

**STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL**

**RE: APPLICATION OF SBA TOWERS II, LLC
FOR A CERTIFICATE OF ENVIRONMENTAL
COMPATIBILITY AND PUBLIC NEED FOR
THE CONSTRUCTION, MAINTENANCE AND
OPERATION OF A TELECOMMUNICATIONS
FACILITY AT ONE OF TWO ALTERNATE SITES AT
RABBIT HILL ROAD, WARREN, CONNECTICUT**

DOCKET NO. 378

Date: May 20, 2009

**OBJECTION BY SBA TO MOTION BY CROWW
TO DISMISS THE APPLICATION AND TO MOTION TO STRIKE SBA'S
REQUEST FOR ADMINISTRATIVE NOTICE**

I. Response to Motion to Dismiss

Applicant SBA Towers II, LLC ("SBA") responds to and objects to the Motion to Dismiss filed by Concerned Residents of Warren and Washington ("CROWW") dated May 19, 2009. To address points raised in the motion briefly:

1. The Conveyance of Development Rights explicitly grants the property owners the right to lease the property or portions of it for a term of less than 25 years (Section B(4));

2. Determination of whether the amount of land disturbed at Site A is a "material decrease in acreage or productivity of arable land" is a determination that must be made by the Connecticut Siting Council ("CSC") in consideration of this Application, if the CSC seeks to approve Site A. Despite any contention to the contrary, CROWW cannot make this determination.

3. SBA complied with the statutorily mandated 60-day review period for municipalities. The 60 day period began with notice provided by the applicant on August 25, 2008. The Council has already rendered a determination that the statutory requirements of C.G.S. § 16-50l have been met.

4. Compliance with local zoning requirements is not required; failing to comply with local zoning does not render the Application void.

DISCUSSION

1. The Tanners Retain the Right to Lease Portions of their Property; CSC lacks Authority to Decide that Issue.

A sale of development rights does not leave a property owner with no rights to his land. The sale conveys only certain rights to the purchaser, leaving the fee owner with ownership rights and the ability to do other things with the land, restricted only by the terms of the conveyancing document. See C.G.S. §22-26bb(d) for what may be considered development rights. In this case, and consistent with both the specific Conveyance of Development Rights executed by the Tanners, who are the Property owners, and with the statute, the Tanners retain the right to lease all or some of their Property.

Contrary to CROWW's position, the Tanners may lease part of their Property and the CSC may permit the siting of a telecommunications tower on the portions of the Property subject to the § 22-26cc conveyance if the conditions in C.G.S. §16-50p(a)(3)(G) are met. There is no contention that §16-50p(a)(3)(G) "restored" to the Tanners the right to lease part of their Property – they never relinquished that right.

Further, C.G.S. §16-50p(a)(3)(G) has not been either misapplied or misconstrued. Nothing in that statute limits its application to any one site. The plain language of the statute makes it applicable to any site. Extrinsic evidence of the meaning of a statute is only appropriately considered if the statute is not clear. See C.G.S. §1-2z. Section 16-50p(a)(3)(G) is perfectly clear on its face and its relevance to this Application is also clear.

More to the point, it is outside of the jurisdiction of the Council to determine the parameters of the conveyance in question. There is nothing in the statutorily defined powers of CSC to suggest that the interpretation of the restrictions on any property can or should be determined by the CSC. If DOAg believes that its rights to the property need to be determined, their proper route would be to take the issue to Superior Court. CSC should appropriately decline to resolve such issues, particularly when one of the two parties to that conveyance, the owners of the Property, are not parties to this Docket. Whether CROWW has standing to seek such a determination remains an open question. However, in any event, the CSC is not the proper venue for such request.

2. Determinations Pursuant to C.G.S. §16-50p(a)(3)(G) Are For CSC To Decide.

In its motion to dismiss, CROWW attempts to supplant the discretion and authority of the CSC by concluding that SBA has failed to establish that the development of Site A will not result in a "material decrease of the acreage and productivity of arable land" on the Property. Despite CROWW's unsupported contention, the CSC is the decision maker for this Docket, not CROWW. It is within the discretion of the CSC alone, in considering this Application, to make those determinations. Unsupported conclusions by CROWW should be given no weight when considering the issues raised by C.G.S. §16-50p(a)(3)(G).

While this issue is for the CSC alone to decide, this conclusion is contrary to the evidence produced thus far in this docket by SBA. In addition, CROWW has produced *no* evidence to contradict SBA regarding this issue. The Property is a dairy farm. The land

where Site A is proposed is wooded and sloped. It is neither tilled nor is it pasture. No reasonable person can find that the installation of this tower would have any effect at all on the acreage or productivity of the farm. The suggested issue of the effect of radio frequency on cows is both speculative, based on no evidence in the record, pre-empted by the Telecommunications Act and subject to a motion to preclude filed by SBA on May 19, 2009.

3. **SBA Provided 60 Days Notice to Warren and Washington and CSC Has Already Ruled that SBA Fulfilled its Requirements Pursuant to Conn. Gen. Stat. § 16-501**

The Town of Washington and the Town of Washington Conservation Commission have claimed that the SBA did not satisfy its requirements under Conn. Gen. Stat. § 16-501. The CSC has already rendered a determination on this precise issue. See Memorandum dated April 28, 2009. The CSC determined that SBA filed its technical report on August 20, 2009 with both Towns, met with the chief-elected officials of both Towns and is in full compliance with its statutory requirements. Therefore, this issue is moot.

4. **CSC's Decisions are Not Bound by Local Zoning Regulations**

Though CSC generally is aware of local zoning regulations, it is not bound to enforce those regulations. Therefore, any suggestion that this Application should be dismissed for failure to comply with local regulations is baseless.

Conclusion regarding Motion to Dismiss

None of the arguments presented by CROWW supports a Motion to Dismiss. The motion should, if entertained, be denied.

II. **Response and Objection to Motion to Strike SBA's Request for Administrative Notice**

SBA requested on May 14th that CSC administratively notice a list of documents. Included in the list were the Conclusions of Law in Docket 360 and the record from Docket 329. CROWW moves to strike the request because it was not a party to those proceedings and cannot therefore be bound by them.

There is no support for the motion. It is within the discretion of any administrative agency or judicial authority to take notice of other proceedings and decisions. CSC is well within its rights to take notice of other proceedings just as SBA is within its rights to make the request. Neither CROWW nor Warren nor CSC nor SBA is bound by these noticed matters, but they may all be considered by CSC. SBA may explain why they are relevant and presumably CROWW may oppose their relevance. If it is a violation of the Fifth and Fourteenth Amendments to the United States Constitution to take previous decisions into consideration, one has to wonder how the common law of this country ever developed at all.


CONCLUSION

SBA asks that the Motion to Strike by CROWW be denied as being totally without support.

GENERAL CONCLUSION

It is troubling that CROWW takes such pains to muffle SBA in this docket while at the same time refusing to provide simple background information, such as the identity of its members. SBA asks that the motions seeking to impede its application be denied and the matter proceeds to a full and fair hearing.

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Certification

This is to certify that a copy of the foregoing has been mailed this date to all parties and intervenors of record.

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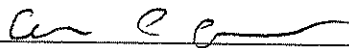
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