

**TOWN OF WASHINGTON CONSERVATION COMMISSION
BRYAN TOWN HALL
WASHINGTON DEPOT, CT 06794**

**STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL**

In Re:

APPLICATION OF SBA TOWERS II, LLC ("SBA") 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 IN
WARREN, CONNECTICUT

DOCKET: 378

June 9, 2009

**BRIEF IN RESPONSE TO THE SITING COUNCIL'S INVITATION
TO FURTHER BRIEF, DUE JUNE 11, 2009, AND IN SUPPORT OF THE
MOTION TO DISMISS AND FOR COSTS OF THE CONSERVATION
COMMISSION OF THE TOWN OF WASHINGTON**

In further support of its Motion to Dismiss and Request for Costs filed on May 26, 2009, the Town of Washington Conservation Commission reaffirms and reasserts its Motion to to Dismiss the Application, and on the grounds given in the Department of Agriculture's Motion to Dismiss of May 14 2009 for lack of subject matter jurisdiction. We offer documentary evidence here of SBA's early knowledge that its application was without merit.

SBA Filed, Knowing That The Filing Was Without Merit

The Town of Washington Conservation Commission further asserts that SBA knew in early September, 2008 of the Department of Agriculture's objections to the siting proposed in SBA's application, and that this assertion is based on SBA's meeting with the First Selectman of the Town of Washington along with the undersigned, Diane Dupuis, Chair of the Cell Tower Committee, a subcommittee of the Conservation Commission.

At that meeting, we presented to SBA (in the persons of Carrie Larson and Charles Regalbuto), an email from Joseph Dippel on behalf of Commissioner Philip Prelli, stating that a structure and outbuildings was deemed a prohibited commercial, non-agricultural use on this restricted property. A copy of that email is attached as Exhibit A.

SBA Filed, Knowing That the Filing Was in Defiance of Legal Restrictions

In further support of its Motion to Dismiss, the Town of Washington Conservation Commission asserts that an email sent on September 13, 2008 detailing our objections to the application for construction of a cell tower on 422a restricted farmland was sent to: Carrie Larson, Charles Regalbuto; Joseph Dippel; Anthony Jannotta (of the State Attorney General's Office); and Robert Marconi; and cc.'d to Town of Washington Conservation Commission Chairman Susan Payne and Town of Washington First Selectman Mark Lyon. This email, a copy of which is attached as Exhibit B, also documents the early notice, in contrast with its assertions under oath, that SBA had of the prohibited use and our objections to the proposal on that basis.

Despite this early notice and our objections, SBA proceeded in bad faith with its application, and the Council proceeded to full hearing on the application, despite our protests and the Council's own lack of jurisdiction.

Applicant SBA Towers II, LLC has acted with knowledge and in bad faith, disrupting the lives of public servants and private citizens, wrongfully invoking the jurisdiction of this Council, which acted outside its jurisdiction in opening this docket. This has resulted in costs in terms of time and precious resources of a small rural town, manned and womanned by volunteers who have expended personal resources to defend against a frivolous and knowingly wrongful application.

We hereby reassert our Motion to Dismiss in further support of which we adopt the Department of Agriculture's argument regarding lack of Subject Matter Jurisdiction, and that the application should never have been entertained by this Council, or the hearing opened. We present to the Council the attached documents, and ask the Council to admit these into evidence on the record for the purpose of exposing the very bad faith in which this applicant proceeded at all times, before the application was presented to the Council, during the hearing process, at one point insisting that the hearing proceed, and at another insisting that the hearing be postponed, and now attempting to flee the inevitable questions about the motivation and knowledge behind these acts.

SBA Filed, Knowing That the Filing Was in Defiance of An Existing Restriction

The Town of Washington Conservation Commission submits the attached affidavit of its Chairman Susan Payne along with the transcript of a Commission meeting at which legal counsel for SBA admitted an application to build a tower on restricted farmland was to be a "test case," full knowing that there was a legally binding restriction on the property. The transcript and affidavit are attached as Exhibit C. Of course, as a public meeting the full audio of the meeting is available to all parties and to the Siting Council for their review. The bad faith of this applicant has been blatant and wrongful, and must be sanctioned by bearing the significant costs in time and resources of all concerned in defending their rights here.

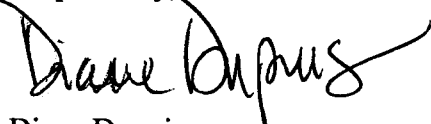
Other than these additions to the record establishing SBA's defiance of state law and the Siting Council's jurisdiction, the Commission would simply add that it has been required to expend countless hours and at least one thousand dollars to defend against this meritless application.

Here, the WCC also re-asserts its objection and basis for dismissal of the application because SBA did not comply with the 60 day municipal consultation rule, again in defiance of state law. The Town of Washington Conservation Commission never waived its right to the full statutory municipal consultation period, and never received a full technical report on Site B, nor had any certain knowledge where site B was located, until we reviewed the formal application made to the Siting Council on February 27. With the application already in process, there was no opportunity, consistent with state law mandates, to properly review the impact of Site B [For greater detail of this WCC objection, see our pre-hearing conference statement dated April 22, 2009.], in addition to which both sites violate our town's zoning regulations.

Conclusion

The Town of Washington Conservation Commission therefore asks the Council to dismiss the SBA application with prejudice, assessing against the applicant the costs and legal expenses of all parties and intervenors for wrongfully wasting everyone's time, including the Council's and two Assistant Attorney Generals, when, despite its protests to the contrary, SBA knew from the outset, and before it invoked the Council's jurisdiction [see Exhibits A, B and C], that it had no rightful claim to the land for which it applied to this State agency for certification, misled this Council about that fact, failed to comply with Connecticut statutory municipal consultation time periods, all the while acting in bad faith to the Council, and all parties and intervenors.

Respectfully,



Diane Dupuis
Conservation Commission

CERTIFICATE OF SERVICE

This is to certify that on this date, an original and 15 copies of the foregoing was mailed by first class mail to the Connecticut Siting Council at 10 Franklin Square, New Britain, CT, and that a copy was mailed by first class mail, postage prepaid, to the following:

Carrie L. Larson, Esq.
Pullman & Comley, LLC
90 State House Square
Hartford, CT 06103-3702

Christopher B. Fisher, Esq.
Cuddy & Feder LLP
445 Hamilton Avenue, 14th Floor
White Plains, NY 10601

Kenneth Baldwin, Esq.
Robinson & Cole LLP
280 Trumbull Street
Hartford, CT 06103-3597

Hon. Mark E. Lyon
First Selectman
Bryan Memorial Town Hall
P.O. Box 383
Washington Depot, CT 06794

Hon. Jack Travers
First Selectman
Warren Town Hall
7 Sackett Hill Road
Warren, CT 06754

Ray and Mary Ellen Furse
26 Jack Corner Road
Warren, CT 06777

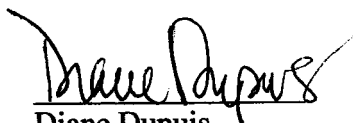
Gabriel North Seymour
200 Route 126
Falls Village, CT 06031

Bruce Coleman, President, CROWW
P. O. Box 2426

New Preston, CT 06777

David H. Wrinn
Assistant Attorney General
55 Elm Street, P.O. Box 120
Hartford, CT 06141-0120

Hon. F. Philip Prelli, Commissioner
Department of Agriculture
165 Capitol Avenue
Hartford, CT 06106


Diane Dupuis
June 10, 2009
gn (AN)

September 11, 2008

Diane Dupuis
Conservation Commissioner
Washington, CT

Dear Ms. Dupuis:

This letter is in response to your email to Commissioner Philip Prelli dated September 5, 2008, in which you ask if a cell tower can be constructed on lands to which the State of Connecticut has acquired the development rights.

Similar requests have previously been reviewed with the Office of the Attorney General.

The construction of the structure and related outbuildings on such development rights restricted farmlands has been deemed to be a prohibited, commercial, non-agricultural use.



This would not apply to any such area that may have been excluded from the development rights deed covenant. Farm specific A-2 surveys are recorded in the local land records.

I hope this answers you question on the matter.

Sincerely,

Joseph Dippel
for Commissioner Prelli

EXHIBIT A

From: diane dupuis <DD9ART@SBCGLOBAL.NET>
Subject: **optasite's proposed tower location on 422a property, the tanner farm in warren**
Date: September 13, 2008 11:55:13 AM EDT
To: clarson@pullman.com, cregulbuto@optasite.com, joseph.dippel@ct.gov, anthony.jannotta@po.state.ct.us, robert.marconi@po.state.ct.us
Cc: Susan Payne <sbfpayne@charter.net>, Mark Lyon <mark.lyon@washingtonct.org>, diane dupuis <dd9art@sbcglobal.net>
 1 Attachment, 203 KB 

Ms. Larson and Mr Regulbuto,

Per our meeting and conversations on Thursday September 11, 2008, attached is our letter detailing our objections to this application and its proposed siting on 422a restricted farmland.



[tannertower.docx \(203 KB\)](#)

Mark Lyon, First Selectman Town of Washington
Diane Dupuis, Chair Cell Tower Committee

EXHIBIT B

Ms. Carrie L Larson, Pullman & Comley LLC
Mr. Charles S Regulbuto,
Director of Northeast Development Optasite
Via email
9.13.08

Re: Tanner Farm Tower Site Proposal
Rabbit Hill Road Warren Ct

Dear Ms. Larson and Mr. Regulbuto,

As we discussed at our meeting on Thursday afternoon, we do not consider the siting of a tower on the Tanner Farm to be a legal siting. This is a commercial venture on restricted farmland previously sold to the state for development rights. Only noncommercial, agricultural ventures are allowed on this type of property. A copy of the email received from the Commissioner of the Connecticut Department of Agriculture confirming our understanding was presented to you at that meeting:

"Similar requests have previously been reviewed with the Office of the Attorney General. The construction of the structure and related outbuildings on such development rights restricted farmlands has been deemed to be a prohibited, commercial, non-agricultural use."

We also advised that we considered Optasite's application insufficient and discussed with you the many areas of inaccuracy and incompleteness contained in your initial report to the town (propagation maps, sight lines, scenic roads and other environmental and technical aspects to name a few). We asked that you resubmit a full and proper application should you feel you wish to continue with this application.

In addition, we advised you that the town of Washington is on record as being opposed to a site in this residential area.

An application was made in November of 2002 by ATT for a tower approximately 400 feet away and at an elevation 110 feet lower than this application site. That site was strongly objected to by the people of town of Washington, its Selectmen, its land use boards, the Steep Rock Land Trust, and other town environmental agencies.

EXHIBIT B

Since 2003 the town of Washington has worked diligently to protect its natural resources in this area, adding protections at the local and state level. This proposed tower would sit in an environmentally sensitive area above our largest aquifer and effect multiple scenic view sheds, including property bought by the Town of Washington, the State of Connecticut and Steep Rock Land Trust, the 238 acre Macrocostas Preserve. In addition to being situated among historic housing, scenic roads, critical habitats and key areas for recreation, this proposed tower would be in an area of moderate to high archaeological importance.

All letters of our original objections were submitted to the Siting Council in 2003 and are on record there. That 2003 application was made by ATT, who you represent in this application. At our town meeting in 2003, and recorded for the record, when queried about the viability of the Tanner Farm, ATT's representative, Ms. Gaudet, replied "the Tanner property was protected farmland and so was unavailable under the terms of the state protection program."

Since that time, nothing has changed in either the state or Siting Council regulations.

We ask that you take into consideration the town of Washington's objections and the legalities of siting on protected farmland and withdraw your application for a site on Rabbit Hill Road.

Sincerely,

Mark Lyon
First Selectman
Town of Washington

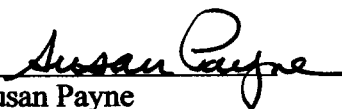
Diane Dupuis
Chair Cell Tower Committee

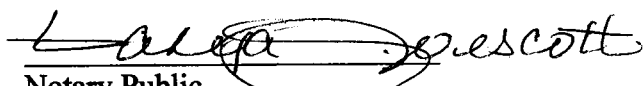
cc Mr. Joseph Dipple, Dept of Agriculture
Mr. Anthony Jannotta, Attorney General's Office
Mr. Robert Marconi, CT Siting Council

9. The Commission submits this transcript in support of its motion to dismiss and asks that the Connecticut Siting Council also accept the attached transcript into evidence for consideration under Docket 378, as it is material evidence of issues under the Council's consideration for the proper disposition of several matters before the Council on this docket.

Sworn to before me

This 9 day of June, 2009


Susan Payne


Notary Public
Com exp 5/31/14



Town of Washington, CT

Conservation Commission Meeting

November 5, 2008

The following information was reproduced from the posted minutes of the meeting.

Members Present: Susan Payne, Linda Frank, Phil Markert, Kelly Boling, Joe Gitterman, Diane Dupuis, Ric Sonders, Phil Dutton

Guests: Chris Charles, Rod Bascom, Engineer, Atty. Carrie Larson, Charles Regulbuto, Representative for Optasite

Staff Present: Shelley White

Susan Payne called the meeting to order at 5:02 p.m. and seated members Kelly Boling, Linda Frank, Phil Markert, Joe Gitterman, and herself.

The following transcription is from a select excerpt approximately two-minutes long of the audio recording completed at the meeting.

Kelly Boling: Is this located in an area where public money was used to purchase development rights?

Carrie Larson: It is. The property, the development rights were purchased by the State of Connecticut and it is located in the area.

Multiple Voices: Inaudible.

Kelly Boling: Why is it not being located in a place where taxpayer money wasn't used to prevent development?

Carrie Larson: The reason that the locate, first of all, under the statutes we are permitted to site a cell tower on property that's subject to the development restriction that this property is subject to.

Multiple Voices: Inaudible.

Diane Dupuis: That's up for dispute. That, that is, um, a first look action. You have not, that has never been put before the Siting Council before. This will be the first case before them. Is that correct?

Carrie Larson: Yeah. Um, but the reason that the, this location was chosen on this property is because we're really taking advantage of the topography there and the existing vegetation to screen and shield the tower from neighboring properties. Um, and Rod has done the visuals on this site so he can talk about that a little bit further. But, in order to, if you, if we pull

EXHIBIT C

it out on, there's six acres of, of a subject parcel that are not subject to the development restriction, but there's no vegetation there. It's further up the hill so you, you're just going to be more visible for people to see.

Diane Dupuis: But it also doesn't work for you, is that not the facts, more correct, that site that we would, we've asked that before and the answer from Optasite and AT&T is that you can't get the signal that you want if you put it up on property that has not been sold to the State?

Carrie Larson: No, that was not our response at all.

Diane Dupuis: Oh, we have that in some paper somewhere. Ok.

Multiple Voices: Inaudible.

Kelly Boling: So is, is that a viable site from, uh, engineering perspective, the, the portion not encumbered by the development rights?

Rod Bascom: Yes.

Kelly Boling: Ok.

Charles Regalbuto: We actually haven't gone out there yet to draft up any plans. That is in the works to take a look at it that way.

Linda Frank: Who does this serve? Where, I mean, what, what's your audience here for this tower?

Male: Inaudible.

Carrie Larson: The proposed tenant is, is AT&T Wireless.

Linda Frank: Yeah, but who, who's picking up ...

End of selected portion.

I, Sheila R. Silvernail, do hereby certify that the foregoing pages are an accurate transcription to the best of my ability of a portion of the Conservation Commission Meeting held on Nov 5, 2008 and that said pages have been verified and proofread by Diane Dupuis, Conservation Commission Member, whose signature below indicates acceptance of said transcription.

Dated at Washington, CT the 9th day of June 2009


Diane Dupuis, Conservation Commission