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 MAY 20, 2009

DEPARTMENT OF AGRICULTURE'S REPLY TO OBJECTION TO MOTION TO DISMISS

The State of Connecticut Department of Agriculture ("DOAg") hereby replies to the objection of SBA Towers II, LLC ("SBA"), filed on May 19, 2009, to the DOAg's pending motion to dismiss.

SBA's objection utterly fails to engage the statutory requirements that apply to its application before the Connecticut Siting Council ("CSC"). In a word, SBA argues matters of subject matter jurisdiction as merely "unnecessary" and "impractical." While conceding it own non-compliance with the requirements of the Easements statute, Connecticut General Statutes, Chapter 822, section 47-42d, it urges the CSC to move on to what it considers the important task of deciding the merits of its application and, thereby, to ignore the clear jurisdictional import of the language of section 47-42d(b). There are several glaring errors in this purported rebuttal, chief of which are the following:

1. SBA questions whether the CSC is a "state land use agency" within the meaning of the statute. For the reasons set forth in the DOAg's opening brief, the CSC issues approvals—certificates of environmental compatibility and public need—which directly affect the ability of

entities such as SBA to site a proposed telecommunications facility on real property. It is obvious that the erection of a tower and associated supporting infrastructure constitutes "construction" and the "improvement" of real estate. SBA has detailed the proposed construction activities. *See* SBA Application, dated February 27, 2009; SBA Notice of Lease; SBA Lease.

The Easement statute applies to an enumeration of municipal commissions, but not exclusively. Significantly, the enumeration includes "state agency." It is beyond dispute that the CSC is a state agency for the purposes of this statute. A "state agency" is defined in the Uniform Administrative Procedure Act as "each state board, commission, department or officer authorized by law to make regulations or to determine contested cases. . .." Conn. Gen. Stat. § 4-166(1). The CSC both makes regulations and determines contested cases that are subject to judicial review. *See, e.g.* Regulations of Connecticut State Agencies, § 16-50j-1 *et seq.* The Easement statute also states that its enumeration of administrative bodies subject to its terms "includes, but is not limited to" "for the purposes of this section." In accordance with this language, the enumeration is deemed inclusive, so there is little to be gained from questioning whether the CSC is an agency that is subject to the requirements of section 47-42d(b).

2. SBA's attempt to distinguish away the binding character of section 47-42d(b) underscores the problem that it has created for itself and for the CSC. SBA has conceded its non-compliance with section 47-42d(b), but asserts that the requirement has *no legal effect*, because, after all, the DOAg received some kind of notice of the filing of its application on February 27, 2009. The Easement statute states what is required without the slightest room for doubt as to its intendment. What in the following language of the statute does SBA believe is optional rather than required? "*No person shall file* a permit application with a state . . . agency

. . . relating to property that is subject to a conservation restriction . . . *unless* the applicant provides proof that the applicant *has provided written notice* of such application, by certified mail, return receipt requested, to the party holding such restriction *not later than sixty days prior to the filing of the permit application.*" Conn. Gen. Stat. § 47-42d(b) (emphasis added).

This requirement speaks to the "essence of the thing to be accomplished," for which the citation to the *Donovan* case was made in order to illustrate the concept of mandatory versus directory statutory requirements. This test is utilized routinely by the courts to measure the legal effect of compliance or non-compliance with the statutory language. For example, the Connecticut Supreme Court has observed:

> In construing a statute, each part should be treated as significant and necessary; every sentence, phrase and clause is presumed to have a purpose. [citations omitted] It should further be presumed that a law was enacted in view of existing relevant statutes and that the legislature intended it to be read with them so as to constitute one consistent body of law. [citations omitted] This latter presumption is relevant to a determination of whether a statutory requirement is mandatory or merely directory. Although it is often difficult to distinguish a provision which is merely directory from one which is mandatory, "'the test most satisfactory and conclusive is, whether the prescribed mode of action is of the essence of the thing to be accomplished, or in other words, whether it relates to matter material or immaterial -- to matter of convenience or substance.' [citation omitted]. . . . In the determination of the question as to whether or not a provision . . . is of the essence of the thing to be accomplished, . . . significance is to be attached to the nature of the act, and also the language and form in which the provision is couched.

Engle v. *Personnel Appeal Board*, 175 Conn. 127, 129-130 (1978).

Nothing could be clearer than the effect of section 47-42d(b)'s language. SBA's preferred understanding turns the easement statute on its head, clearly misreading the express language of the provision. The statute does not merely give the conservation restriction holder an opportunity "to make its position known to the agency making the decision," as SBA states in

its objection. The statute unequivocally and explicitly directs *the applicant not to file* without having complied with the notice requirements of the statute, which includes filing the proof that it has complied with the requirement of notice to the conservation restriction holder. SBA did not do that in this case and, therefore, it should not have filed with the CSC. If it is directed by the statute not to file with the permit or licensure authority unless it complies with the notice required by the statute, then the agency may not obtain jurisdiction over the application so as to commence processing it.

Thus, the argument that the DOAg is not "prejudiced" because it indirectly received notice of the filing of the application with the CSC is legally immaterial to compliance with this separate statutory requirement. The easement statute specifies that "written notice" by "certified mail, return receipt requested" be the sole and exclusive method by which notice to the easement holder is accomplished under this provision. The statute requires this form of notice to be effected *prior to any filing of an application.* The fact that the DOAg just so happens to be an agency which is entitled to a copy of CSC application filings pursuant to section 16-50*l,* is irrelevant. If a conservation organization held a conservation easement on the Tanners' farm where SBA preferred to site its facility, it would be equally entitled under section 47-42d(b) to receive the particularized notice required by this statute, and that notice would be critical to the protection of its conservation restriction, because the organization would not receive any particularized notice per any requirement of section 16-50*l.*

It is important to note that section 47-42d(b) states that the conservation restriction holder need put on proof of how the application would violate the terms of the restriction only "*[i]f the applicant has provided written notice pursuant to the subsection . . .*" This language underscores the DOAg's jurisdictional claim: the agency processing the application must be able to find that

the applicant has complied with the Easement statute. Here, since SBA has conceded its non-compliance with the terms of 47-42d(b), and the CSC is precluded from making any finding of notice given the conservation restriction holder pursuant to this statute, it should dismiss the application from its docket, because the application is, essentially, not "ripe." SBA's recourse to argument about the "practicality" of the easement statute's mandate is legally meritless and ineffectual.

Equally ineffectual and unpersuasive is SBA's contention that if the CSC ignores section 47-42d(b), the conservation restriction holder can always try to get the permit that may be issued "unissued" under section 47-42d(c). The matter of compliance with 47-42d(b) is out in the open and squarely before the CSC. Subsection (c) may be a further remedy, expressing the legislature's solicitude for the rights of conservation restriction holders, but it is not the applicable statutory provision in this case. SBA would have DOAg take an appeal after decision where the CSC should not process the application to a decision in the first place.

3. Concepts of subject matter jurisdiction are as applicable to the proceedings of administrative agencies as they are of courts. *See, e.g., Castro v. Viera,* 207 Conn. 420, 428 (1988). "Administrative agencies are tribunals of limited jurisdiction and their jurisdiction is dependent entirely upon the validity of the statutes vesting them with power and they cannot confer jurisdiction upon themselves." *Id.* Simply put, SBA invites the CSC to confer jurisdiction upon itself in this filing. This it cannot do, especially where the "jurisdictional facts" respecting the existence of a restriction and lack of notice are clearly before the agency (what DOAg has put before the CSC by way of affidavit and exhibits identifying it as the holder of a conservation restriction) *and* where the applicant before the agency has *admitted the truth of those facts* by conceding non-compliance with the statute.

The bulk of SBA's inadequate response to the DOAg's motion amounts to little more than an attempt to slide past the jurisdictional bar and argue the merits of its application. The CSC must decline the invitation to process the merits of the SBA Application while a jurisdictional motion is pending. Courts routinely state that, once a subject matter jurisdictional motion is pending, it should take no further steps to determine any other matter. *See, e.g., Gurliacci v. Mayer,* 218 Conn. 531, 545 (1991) ("[b]y considering the motion to amend prior to ruling on the challenge to the court's subject matter jurisdiction, the court acted inconsistently with the rule that, as soon as the jurisdiction of the court to decide an issue is called into question, all other action in the case must come to a halt until such a determination is made"); *see also Baldwin Piano & Organ Co. v. Blake,* 186 Conn. 295, 297-99 (1982) ("Whenever the absence of jurisdiction is brought to the notice of the court or tribunal, cognizance of it must be taken and the matter passed upon before it 'can move one further step in the cause; as any movement is necessarily the exercise of jurisdiction.'")

Accordingly, SBA's attempted interpretation of the reach of section 16-50p(a)(3)(G) respecting findings that the CSC may make are meritless, because the findings of the CSC are always predicated upon it having jurisdiction over the merits of the application before it. Citation to this provision of the CSC's statutes does not in any way address the jurisdictional claim that the DOAg is raising at the outset of this proceeding. In short, section 16-50p(a)(3)(G) does not excuse or legalize non-compliance with section 47-42d(b).

To similar effect is SBA's attempt to argue all of the other aspects of the merits of its purported application, such as the interpretation of DOAg's deed of conveyance awarding it exclusively all of the development rights to the acreage on the Tanners' farm upon which SBA

proposes to site its facility, or its argument that the Tanners had the ability to lease any of the restricted land to it, or for the time period stated in the filings on this docket.

CONCLUSION:

For all of the foregoing reasons as expressed herein and in its moving papers, the DOAg respectfully requests that the CSC grant the DOAg's motion and dismiss the SBA Application, Docket No. 378.

Respectfully submitted,

F. PHILIP PRELLI,
COMMISSIONER OF
ENVIRONMENTAL PROTECTION

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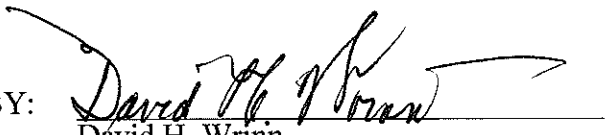
BY: 

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