

**STATE OF CONNECTICUT  
CONNECTICUT SITING COUNCIL**

IN RE:

APPLICATION OF SBA TOWERS II, LLC	:	DOCKET NO. 378
FOR A CERTIFICATE OF ENVIRONMENTAL	:	(withdrawn)
COMPATIBILITY AND PUBLIC NEED FOR	:	
THE CONSTRUCTION, MAINTENANCE AND	:	
OPERATION OF A TELECOMMUNICATIONS	:	
FACILITY LOCATED AT ONE OF TWO	:	
SITES AT RABBIT HILL ROAD, WARREN,	:	
CONNECTICUT (WITHDRAWN)	:	June 24, 2009

**FORMER APPLICANT SBA’S RESPONSES TO BRIEFS REGARDING  
WITHDRAWAL OF DOCKET 378**

Former applicant SBA Towers II LLC (“SBA”) files this brief in response to the following: brief submitted by Ray and Mary Ellen Furse dated June 9, 2009, brief submitted by the Washington Conservation Commission dated June 9, 2009 and June 23, 2009 and briefs submitted by the Concerned Residents of Warren and Washington (“CROWW”) dated June 9, 2009, June 10, 2009 and June 23, 2009. All of these briefs object to SBA’s withdrawal of the application in former Docket 378. As the Council is aware, SBA withdrew Docket 378 by letter dated June 10, 2009. None of the parties has or can dispute the fact that SBA has the absolute right to withdraw an application before the Council and that, once withdrawn, the Council is without jurisdiction to consider any issues related to that withdrawn application. For these reasons, as discussed more fully below, all issues raised in these briefs are moot and therefore should not be considered by the Council.

**I. BACKGROUND**

On February 27, 2009, SBA filed the Docket 378 application for a certificate of environmental compatibility and public need in connection with the proposed construction and

operation of a telecommunications facility located at one of two sites on Rabbit Hill Road in the Town of Warren (the "Property"). The Furses, the Washington Conservation Commission and CROWW (the "Former Parties") all became parties to the Docket 378 proceeding. On June 10, 2009, SBA withdrew Docket 378.

On June 9, 2009, the Furses filed a motion to dismiss Docket 378. On that same date, the Washington Conservation Commission and CROWW filed similar briefs. CROWW filed additional briefs on June 10 and 23, 2009. The Washington Conservation Commission filed an additional brief on June 23, 2009 along with a motion for the Council to render an advisory opinion regarding the siting of telecommunications facilities on land restricted pursuant to Chapter 422a of the Connecticut General Statutes.

All of these Former Parties request that Docket 378 be dismissed, adopt the motion to dismiss filed by the Department of Agriculture (also a party to the withdrawn Docket 378 proceeding) and, without any statutory or regulatory basis, request that they be awarded costs. In response to SBA's withdrawal of this docket, the Former Parties erroneously claim that SBA requires permission of the Council to withdraw its application. The Former Parties suggest that such permission be denied in favor of dismissal by the Council with prejudice. In addition, the Former Parties argue that the Council is somehow a court of general jurisdiction and therefore has the ability to "redress of grievances" by citizens. Finally, the Former Parties claim, again with no statutory or regulatory basis, that they are entitled to their costs associated with their opposition of the withdrawn Docket 378 proceeding.

## II. ARGUMENT

### A. **The Council Has No Jurisdiction To Consider Any Of The Issues Raised By The Former Parties.**

#### 1. **The Council is an Administrative Agency of Limited Jurisdiction.**

The Council's enabling statutes are contained in Conn. Gen. Stat. Chapter 277a (§ 16-50g *et seq.*), the Public Utility Environmental Standards Act ("PUESA"). Under PUESA, the Council has exclusive jurisdiction over, *inter alia*, telecommunications towers. See Conn. Gen. Stat. §§ 16-50g, 16-50i, 16-50k; see also Town of Westport v. Connecticut Siting Council, 260 Conn. 266, 272 (2002). As the Department of Agriculture pointed out and as the parties have adopted in their motions, "[a]dministrative agencies are tribunals of limited jurisdiction and their jurisdiction is dependent entirely up on the validity of the statutes vesting them with power and they cannot confer jurisdiction upon themselves." Castro v. Viera, 207 Conn. 420, 428 (1988). "An administrative agency, as a tribunal of limited jurisdiction, must act strictly within its statutory authority." Nizzardo v. State Traffic Comm'n, 259 Conn. 131, 157 (2002). Therefore, the Council is without jurisdiction to consider issues raised outside of its statutorily defined jurisdiction. All references by the Former Parties to precedent before federal courts and the powers of federal courts have no relevance to a matter before an administrative agency with limited jurisdiction.

#### 2. **An Applicant Has An Absolute Right To Withdraw An Application From Consideration and Does Not Require Permission From the Council To Do So.**

An applicant to the Council has an absolute right to withdraw an application from consideration and does not require permission from the Council to do so. The Former Parties argue, in their motions, that an applicant must seek permission from the Council to withdraw an

application from consideration and that an application cannot be withdrawn until such permission is granted. Contrary to the unsupported contentions made by the Former Parties, an applicant before an administrative agency has the right to withdraw a part or all of an application pending before that agency. See M & L Homes, Inc. v. Zoning and Planning Commission of Town of Montville, 187 Conn. 232, 240-241 (1982), see also Middlefield Citizens Action, Inc. v. Middlefield Inland Wetlands, 1999 WL 195882 (Conn. Super. 1999) (holding that “the withdrawal from the Agency’s consideration by the applicant of all of the applications but the road activity removed the withdrawn provisions from the purview of the Agency. It was no longer before it for consideration.”). Indeed, the Council’s own past precedent confirms that it is in an applicant’s full control to withdraw an application at any time during a proceeding and that no permission from the Council is required to do so. See e.g. Dockets 372, 357, 350, 328.

The Former Parties argument suggesting that permission is required is irrelevant to administrative proceedings. CROWW argues that “[t]he general rule in *judicial* proceedings is that a party may not voluntarily withdraw a complaint or similar initiating document after the opposing party has appeared.” CROWW Brief dated June 23, 2009 at 1 (emphasis added). The contention that this is the general rule in litigation is irrelevant because CROWW fails to recognize that former Docket 378 was *not* a judicial proceeding but an *administrative* proceeding.

**3. Once an Application is Withdrawn, the Council is Without Jurisdiction to Consider Issues Relating to that Former Application.**

The Council only has jurisdiction over applications that are filed with it. Once an application is withdrawn, the Council is without jurisdiction to consider issues relating to the former application. There are many occasions where a telecommunications company has filed a technical report, pursuant to Conn. Gen. Stat. § 16-501 (2)(e) with a municipality and then, for a

variety of reasons, may choose to not pursue the site further. Just as the Council has no jurisdiction over those sites unless and until they are filed as applications with the Council, once an application is withdrawn, the Council has no jurisdiction over a withdrawn application, its parties and intervenors.

This precise issue was raised in Bornemann v. Connecticut Siting Council, 287 Conn. 177 (2008). In that case, the plaintiffs had filed a petition for declaratory ruling with the Council seeking to void an approval issued to Nextel Communications, Inc (“Nextel”). In the interim, at Nextel’s request, the Council re-opened Nextel’s petition so that Nextel could withdraw its petition. The Council then dismissed the declaratory ruling filed by the plaintiffs as moot. The plaintiffs appealed to the superior court, which dismissed the appeal as moot since there was no practical relief that could be granted. The Connecticut Supreme Court, *per curiam*, agreed and dismissed the plaintiffs’ appeal as moot. Id. at 183. Here, the Council is being asked to do the very thing it was asked to do in the Bornemann case: enter a ruling on an application that is no longer before the Council for consideration. Just as in Bornemann, the issues raised by the Former Parties are moot and therefore should not be ruled on by the Council.

The Former Parties argue that even if the docket has been withdrawn, citizens have the right to have their grievances adjudicated by the Council. Again, the Former Parties do not cite a single, relevant authority to support this conclusion because no such authority exists.

The cases cited by CROWW in support of this contention discuss whether a court of general jurisdiction can maintain jurisdiction over issues that are “capable of repetition but evading review” and deal with challenges to municipal regulations that were changed or revoked after the filing of the lawsuit challenging them. The cases cited are not only completely

irrelevant to the withdrawal of an administrative application but also deal with courts of general jurisdiction, not administrative agencies of limited jurisdiction.

The Washington Conservation Commission argues that “[a] docket does not belong to the applicant. The docket belongs to the citizens of the state that the Council serves. . .” See Washington Conservation Commission Brief dated June 22, 2009 at 6. Contrary to this unsupported assertion, while citizens certainly have rights to participate in a proceeding, as the Former Parties chose to do in the former Docket 378, if anyone is the “owner” of a docket, it is surely an applicant. The Council does not have jurisdiction over a proposed telecommunications facility until an *applicant* files an application. If the Council requires additional time to render a decision on a docket, it is only the *applicant* that can grant such an extension of time. Finally, only an *applicant* has the ability to withdraw an application and has the absolute right to do so.

In order for the Council to have authority to hear general grievances of the public with no application pending before, the authority to do so must be found in the Council’s statutes or regulations. No such authority has been cited, none exists and therefore the Council does not have jurisdiction to consider them.

**B. The Council Has No Authority to Award Costs to the Former Parties.**

Equally unavailing is the Former Parties’ arguments that they should be awarded costs associated with their opposition to the former Docket 378. Even if the Council had jurisdiction to adjudicate the briefs filed by the Former Parties to the withdrawn docket, which it does not, the Council has no statutory or regulatory authority to award costs to a party in a telecommunications docket.

CROWW cites to several federal and state statutory provisions to support its argument that it is entitled to costs in the former Docket 378. The statutes cited are not applicable. 28

U.S.C. § 1927 permits the awarding of costs after multiple judicial proceedings. Conn. Gen. Stat. § 4-184(b) permits a court, in its discretion, to award reasonable costs to a prevailing party in an administrative appeal. Finally, Conn. Gen. Stat. § 52-245 permits the awarding of costs in a judicial proceeding if false affidavits have been filed. Former Docket 378 is neither a judicial proceeding nor an administrative appeal.

**C. The Council Has No Authority to Render Advisory Opinions.**

In a motion filed under the withdrawn Docket 378, the Washington Conservation Commission essentially requests that the Council render an advisory opinion regarding the siting of telecommunications facilities on land subject to restrictions pursuant to Chapter 422a of the Connecticut General Statutes. Yet again, this motion is filed with no statutory or regulatory support cited by which the Council can render such a decision. The Council cannot render such an advisory opinion because it has no jurisdiction to do so.<sup>1</sup>

**D. The Remaining Issues Raised in the Former Parties Briefs are Moot.**

The Former Parties raised several other substantive arguments in their motions to dismiss including: (1) the legality of siting a telecommunications facility on property subject to an agricultural restriction under Conn. Gen. Stat. § 22-26bb; (2) the validity of SBA's lease with the Tanners as it relates to the former Docket 378; (3) the substance of the municipal consultation, which has previously been considered and ruled on by the Council prior to the withdrawal of Docket 378; and (4) the supposed bad faith of SBA in filing the former Docket 378 application. Since the docket has been withdrawn and is no longer pending before the Council, any substantive arguments concerning the merits of the application are moot.

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<sup>1</sup> Even if the Council did have the jurisdiction to render advisory opinions, it is clear that Conn. Gen. Stat. § 16-50p (2)(G) permits the Council to cite a telecommunications facility on such property.

### III. CONCLUSION

SBA has the absolute right to withdraw its application, as it has done with former Docket 378. None of the Former Parties have cited any legal authority to dispute that fact. Once the former Docket 378 was withdrawn, the Council is simply without jurisdiction to render any decisions regarding that docket, including the requests contained in the Former Parties' briefs for dismissal and for an award of costs. Even if the Council did have jurisdiction to consider them, the Council has no statutory or regulatory basis to award the Former Parties' costs associated with former Docket 378. Finally, the Council has no authority to render advisory opinions. Therefore, all of the motions filed by the Former Parties are moot and no action should be taken on them.

Respectfully Submitted,

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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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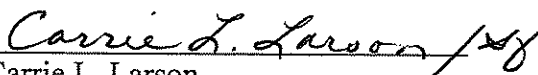
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