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 OF CONCERNED RESIDENTS OF WARREN AND WASHINGTON IN FURTHER SUPPORT OF ITS MOTION TO DISMISS THE APPLICATION

By memorandum dated May 29, 2009, the Connecticut Siting Council invited further briefing on issues raised in the May 14, 2009 Department of Agriculture's Motion to Dismiss the Application, and on issues raised in CROWW's May 19, 2009 Motion to Dismiss the Application and for Costs. This brief addresses these issues:

FACTUAL BACKGROUND

Applicant SBA has caused the residents of Rabbit Hill and environs to incur substantial expenditures of time, effort and money to oppose SBA's land speculating activities. According to SBA's website (www.sba.com), Applicant is the nation's third largest publicly-traded cell tower company. Its primary goal is to earn profits for its investors by enticing farmers and other property owners to lease or sell sites to SBA for addition to its "portfolio." SBA then leases spaces on these towers to telecom companies.

SBA is currently seeking strategic growth opportunities through the acquisition of existing tower portfolios.

Since it was founded in 1989, SBA has participated in the development of over 35,000 antenna sites in the United States -- an average of 1,750 sites per year, or more than 6 new sites for every working day for twenty years. In the last quarter of 2008, while the country was facing its worst financial crisis in recent history, SBA earned total revenues of $ 134.4 million, an increase of 23.4% over the same quarter the year before.

SBA is big business, able to crush opposition from most individual property owners and town and city zoning boards that stand in its way. SBA accomplishes this through an array of formidable attorneys and consultants. Local opponents of SBA tower sites must incur heavy legal costs to effectively challenge SBA, and usually do not have sufficient lead time or financial resources to overcome SBA's huge advantage of professional and monetary resources.

According to SBA's own website,

> SBA Communications is a leading independent owner and operator of wireless communications infrastructure in the United States. SBA generates revenue from two primary businesses - Site Leasing and Site Development Services.
> In our Site Leasing business, we lease antenna space on towers and other structures that SBA owns or manages. The towers we own have either been built by us at the request of a wireless carrier or built or acquired based on our own initiative.
>
> Our Site Development Services division provides all site acquisition and zoning/permitting services necessary to identify and construct multi-tenant wireless facilities. We also specialize in the construction and installation of communication infrastructure for Cellular, PCS, CLEC and fixed/mobile broadband based networks. SBA also provides a broad range of cell site equipment installation, optimization and integration services.
>
> (http://www.sbasite.com/)

Also according to its "Corporation Reports 1st Quarter Results; Provides 2nd Quarter and Full Year 2009 Outlook" Press Release posted on its website, SBA reports:

Investing Activities

As of March 31, 2009 SBA owned 7,884 towers. During the first quarter of 2009, SBA purchased seven towers for approximately 274,000 shares of SBA common stock and built 25 towers. Total cash capital expenditures for the first quarter of 2009 were $11.7 million, consisting of $1.6 million of non-discretionary cash capital expenditures (tower maintenance and general corporate) and $10.1 million of discretionary cash capital expenditures (new tower builds, tower augmentations, tower acquisitions and related earn-outs, and ground lease buyouts). During the first quarter, the Company spent $4.9 million, in cash and stock, purchasing land and easements and extending lease terms with respect to land underlying its towers.

Since March 31, 2009, SBA has acquired six towers for approximately 231,000 shares of SBA common stock. The Company has agreed to purchase an additional 42 towers for an aggregate amount of $15.9 million, which the Company has the option to pay with cash or through the issuance of shares of SBA common stock. The Company anticipates that these acquisitions will be consummated by the end of the third quarter of 2009.

(http://ir.sbasite.com/releasedetail.cfm?ReleaseID=381546)

The press release and company statements make it clear that SBA/Optasite is an aggressive growth company seizing every opportunity to obtain leases and sites in company lease growth that is forecast at 300 to 400% (three to four times) its current June 2009 level.

In a recession economy, such growth is staggeringly aggressive, and reflects the motivation behind reckless and poorly researched certification applications. Such poorly researched claims asserted as the basis for obtaining a certification under state administrative proceeding constitutes pure speculation largely at public expense.

Local Impact of SBA's Land Speculation

First Selectman Jack Travers of Warren and First Selectman Mark Lyon of Washington, together with the Town of Washington Conservation Commission, have been required to appear in this forum to defend their towns' sovereign rights against the

state itself, in the form of the Siting Council, requiring the Towns to mount full defenses of their rights to statutorily-mandated municipal consultation periods, and enforcement of local zoning laws.

Private citizen-taxpayers Ray and Maryellen Furse, property owners in Warren, Connecticut, and members of Concerned Residents of Warren and Washington, have appeared in this proceeding in order to defend their own and their neighbors' property rights -- in addition to those they have in the State farmland restrictions as taxpayers -- or waive those rights.

Since industry fees and assessments -- and not state tax money -- fund the Council, it plainly lacks the impartiality that is required to meet constitutional due process criteria. The impact on individual citizens is staggering. They must share in the costs for:

- the Assistant Attorney General who advises and defends the Siting Council;
- the Assistant Attorney General who represents a separate state agency (The Department of Agriculture) to defend state taxpayer's property rights;
- state payment to the farmer for development restrictions on his land;
- municipal officials who must defend town interests, rights and ordinances;
- and on top of all this, for the defense of their own private property interests.

The taxpayers must bear the expense not once, not twice, or even three times -- but five times at five different levels in a proceeding that never should have been opened.

POINT I

THE THRESHOLD QUESTION TO BE DETERMINED IN EVERY CERTIFICATION PROCEEDING IS WHETHER THE APPLICANT HAS A LEGAL RIGHT TO ERECT A TOWER ON THE PROPOSED SITE; THIS QUESTION MUST BE DECIDED BEFORE SCHEDULING ANY PUBLIC HEARING ON THE ENVIRONMENTAL IMPACT OF THE TOWER PROPOSAL

CROWW repeats and reiterates their full support for the jurisdictional challenge raised by the Department of Agriculture upholding the restriction on development of the Tanner farm. But the matter does not rest there.

Forcing adjoining property owners, local municipalities and prospective parties and intervenors to expend time, money and effort in preparing for a hearing on the environmental impact of a certification application that is based on a non-existent or defective site agreement is a violation of constitutional rights under the Fourteenth Amendment.

The absence of subject matter jurisdiction, where jurisdiction is exercised ultra vires, improperly creates the need for local property owners to defend their homes and property rights, denying such owners of their right to due process, and effecting a deprivation of federal constitutional rights under color of state law.

CSC Has the Duty to Determine the Validity of Every Agreement Covering A Proposed Tower Site Submitted on Certification Applications

SBA's claim that the Connecticut Siting Council ("CSC") does not have the authority to decide the parameter of the Tanners' conveyance is wrong.

A valid lease or title to the property on which a proposed tower is to be located is an essential preliminary requirement for Siting Council consideration of every application.

Conn. Gen. Stat. Section 16-50o(c) provides

> (c) The applicant shall submit into the record the full text of the terms of any agreement, and a statement of any consideration therefor, if not contained in such agreement, entered into by the applicant and any party to the certification proceeding, or any third party, in connection with the construction or operation of the facility. This provision shall not require the public disclosure of proprietary information or trade secrets.

In examining any application, the CSC must determine if there is a valid agreement before proceeding further. SBA, as party to the lease and Applicant, has the burden of establishing that its Application is valid and complete before any further proceeding takes place. At the time the Application was filed, did SBA have a valid lease to the property on which SBA proposes to construct a tower? If not, the Application may not be considered by the Council.

As demonstrated by the Department of Agriculture's motion and brief, the purported lease was void when it was signed, and it was void when the SBA's Application was filed. SBA has invoked the jurisdiction of this Council in bad faith, resulting in the involvement of all those to whom formal notice of these proceedings is required under state law. This violates all principles of due process under the State and Federal Constitutions, and the Siting Council's own obligation to protect the citizens and residents of the State for whose protection it was created. The defective Application should not have been entertained, the docket should never have been opened, and SBA is responsible for initiating and engaging a process that violates the rights of the many parties and intervenors herein, as well as for its abuse of the Council's jurisdiction by acting in bad faith, which it now seeks to compound with a retrospective effort to patch up justification for its actions.

SBA is a land and tower speculator. SBA's meritless application in Docket 378 has underscored the need to protect municipalities and municipal officials, private property owners and taxpayers of the state who underwrite the Attorneys General whose time has been wasted here, from the reckless and irresponsible invoking of the Siting Council's jurisdiction based on the desire for more and more profits.

SBA has embroiled every Party and Intervenor to these proceedings -- as well as the Council itself -- in a vortex of activity, all for its own self-interest and shareholder benefits. This must never be allowed to happen again.

POINT II

THE CONNECTICUT SITING COUNCIL LACKED -- AND STILL LACKS -- SUBJECT MATTER JURISDICTION TO PROCEED TO HEARING IN DOCKET 378

In its motion to dismiss filed on May 14, 2009, the Department of Agriculture pointed out that the applicant failed to comply with CGS Chapter 822 respecting easements, requiring proof of notice to the easement holder [in this case, the state of Connecticut, which purchased the development rights to the Tanner Property in 1996] no later than sixty days prior to the filing of the application for a permit to conduct an activity that relates to the land burdened by the easement. The Department of Agriculture asserts that no such notice was ever received.

CROWW wholly endorses the Department of Agriculture analysis and argument on this point, and incorporates them here by reference.

Under this analysis, the Connecticut Siting Council never should have proceeded with opening any proceedings on this docket, but having opened proceedings, should never have proceeded to full hearing.

Without Jurisdiction the Agency Cannot Proceed

The issue of jurisdiction is a threshold analysis that must be performed before any agency, body or court may start the wheels of formal proceedings in motion, in order to protect fundamental procedural and substantive due process rights of all concerned. Expediency in considering merits where a jurisdictional defect exists is no excuse for seizing jurisdiction and acting ultra vires. The Supreme Court has said:

> Jurisdiction to resolve cases on the merits requires both authority over the category of claim in suit (subject-matter jurisdiction) and authority over the parties (personal jurisdiction), so that the court's decision will bind them. In Steel Co. v. Citizens for Better Environment, 523 U.S. 83 (1998), this Court adhered to the rule that a federal court may not hypothesize subject-matter jurisdiction for the purpose of deciding the merits. Steel Co. rejected a doctrine, once approved by several Courts of Appeals, that allowed federal tribunals to pretermit jurisdictional objections "where (1) the merits question is more readily resolved, and (2) the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied." Id., at 93. Recalling "a long and venerable line of our cases," id., at 94, Steel Co. reiterated: "The requirement that jurisdiction be established as a threshold matter … is 'inflexible and without exception,' " *id.*, at 94—95 (quoting Mansfield, C. & L. M. R. Co. v. Swan, 111 U.S. 379, 382 (1884)); for "[j]urisdiction is power to declare the law," and " '[w]ithout jurisdiction the court cannot proceed at all in any cause,' " 523 U.S., at 94 (quoting Ex parte McCardle, 7 Wall. 506, 514 (1869)).
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> Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 577 (1999)
> (Emphasis added.)

In its analysis of the harm that comes from a court acting without subject matter jurisdiction, the Supreme Court said:

> Steel Co. held that Article III generally requires a federal court to satisfy itself of its jurisdiction over the subject matter before it considers the merits of a case. "For a court to pronounce upon [the merits] when it has no jurisdiction to do so," Steel Co. declared, "is … for a court to act ultra vires." 523 U.S., at 101—102.
>
> (Id. at 583) (Emphasis added.)

No single element of the application in Docket 378 should have been addressed by the Council once the jurisdictional defect was brought to the Council's attention. Indeed, even without being notified of the defect, the burden to prevent the agency from acting ultra vires fell upon the Council itself. While personal jurisdiction is waivable, subject matter jurisdiction is non-waivable, and serves to keep the adjudicative body "within the bounds the Consitution."

> The Court of Appeals accorded priority to the requirement of subject-matter jurisdiction because it is nonwaivable and delimits federal-court power, while restrictions on a court's jurisdiction over the person are waivable and protect individual rights. See id., at 217—218. The character of the two jurisdictional bedrocks unquestionably differs. Subject-matter limitations on federal jurisdiction serve institutional interests. They keep the federal courts within the bounds the Constitution and Congress have prescribed. Accordingly, subject-matter delineations must be policed by the courts on their own initiative even at the highest level. See Steel Co., 523 U.S., at 94—95; Fed. Rule Civ. Proc. 12(h)(3) ("Whenever it appears … that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."); 28 U.S.C. § 1447(c) (1994 ed., Supp. III) ("If at any time before final judgment [in a removed case] it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."). * * *
>
> (Ibid.) (Emphasis added.)

The Siting Council's determination of subject matter jurisdiction affects substantive due process rights of every person affected by the matter.

Where a defect in subject matter jurisdiction exists, an agency must exercise forbearance and police itself, halting the proceeding immediately. If it proceeds to act ultra vires, where the facts and law relating to the subject matter jurisdiction issue are before it, the body must show restraint before it treads onto unconstitutional ground.

Here the Council has failed to act upon two express requests to examine its jurisdiction. The Council has acted ultra vires in defiance of state and federal law, and

has violated the substantive and procedural due process rights of the parties appearing before it on this docket, inflicting actual injury and depriving federal constitutional rights under color of state law, in violation of equal protection of the law as embodied in the Fourteenth Amendment to the United States Constitution.

POINT III

THE TANNERS HAVE NO RIGHT TO LEASE PROPERTY FOR WHICH THEY SOLD THE DEVELOPMENT RIGHTS TO THE STATE OF CONNECTICUT

None of the following is in dispute:

1. In 1996, Lewis and Truda Tanner (the "Tanners") sold to the State of Connecticut the "Development Rights" to approximately 182 acres of agricultural land pursuant to Chapter 422a of the Connecticut General Statutes and Section 22-26bb (d) thereof;

2. "Development Rights" as defined in Chapter 422a means, inter alia, "the rights of the fee simple owner of agricultural land to develop, construct on, sell, lease or otherwise improve the agricultural land for uses that result in rendering such land no longer agricultural land…." Conn. Gen. Stat. Section 22-26bb (d); and

3. Site A is located on a portion of the property for which the Tanners sold the Development Rights to the State of Connecticut.

Notwithstanding the foregoing undisputed facts, SBA claims the Tanners currently have, and indeed never relinquished, their right to lease for commercial, non-agricultural use a portion of the property for which they sold the development rights to the State of Connecticut.

SBA relies upon paragraphs B(4) and (5) of the Conveyance of Development Rights ("Conveyance") executed by the Tanners and the State of Connecticut at the time of the 1996 sale.

More precisely, to support their position, SBA cites only select portions of these paragraphs. The result is an incomplete and misleading statement of what the cited paragraphs of the Conveyance actually provide.

Specifically, in the Objection By SBA To Motion By CROWW To Dismiss The Application and To Motion To Strike SBA's Request For Administrative Notice dated May 20, 2009, at page 2, SBA defends the Tanners' lease of the portion of their property on which Site A is located by referring to the "right to lease portions of the property for less than 25 years" granted in paragraph B(4) of the Conveyance.

However, the right to lease portions of the restricted property granted by paragraph B(4) of the Conveyance is, by its express terms, subject to the provisions of paragraph A of the Conveyance, which provides, in pertinent part:

> "A. The Grantors [the Tanners] covenant for themselves, their legal representatives, heirs, successors and assigns, that the Premises will, at all times, be held and conveyed, in their entirety and subject to the following restrictions and such further restrictions as set forth in Paragraph B below:
>
> (1) No building, residential dwelling, structure, parking lot, driveway, road or other temporary or permanent structure or improvement requiring construction shall be placed upon the premises except as provided for in Paragraph B below;
>
> (2) The fee simple owner of the above described land shall not divide, subdivide, develop, construct on, sell, lease or otherwise improve the Premises for uses that result in rendering the Premises no longer agricultural land;
>
> (3) No use shall be made of the Premises, and no activity shall be permitted or conducted thereon which is or may be inconsistent with the perpetual protection and preservation of the land as agricultural land, and no activity shall be carried on which is detrimental to the actual or potential agricultural use of the Premises, or detrimental to soil conservation, or to good agricultural management practices;
>
> (4) Said development rights are considered and deemed wholly and exclusively dedicated to the State of Connecticut in perpetuity in accordance with Chapter 422a of the Connecticut General Statutes…."
>
> (Emphasis added.)

SBA's attempts to further support the Tanners' right to lease a portion of their property on which Site A is located by relying on other rights of the fee owners reserved in paragraph B of the Conveyance "so long as they do not materially decrease the agricultural acreage and give due consideration of the effects of their activities on total farm operation" are undermined by rights of the fee owners referred to in subparagraph (c) of paragraph B.

This is the very same portion of paragraph B paraphrased by SBA in the language quoted in the preceding sentence, and specifically limits the activities to "improvements, activities and uses thereon as may be directly or incidentally related to the operation of the agricultural enterprise…." (Emphasis added.)

SBA's selective textual support is exposed by a full reading, which shows that as a result of their sale of development rights, the Tanners conveyed to the State of Connecticut and no longer owned the right to lease any portion of their agriculturally restricted property for commercial, non-agricultural use.

As a result, at the very moment the Tanners executed the lease with SBA covering Site A, the Tanners did not own the development rights to the property they purported to lease. The lease was therefore void at the time it was executed, and it remains void to this day.

SBA's Material Misrepresentation About the Bona Fides of its Lease

At the Siting Council hearing on this docket held on June 2, 2009, SBA disclosed that the purported lease with the Tanners was amended on April 7, 2009 to include Site B. However, SBA's Application was filed on February 27, 2009.

By SBA's own admission, on the date the Application was filed, SBA did not have a valid lease in effect covering either Site A or Site B. SBA also admits that the statement on page 3 of the Application that the Notice of Lease included in the Application as Exhibit C covers "either Site" is not accurate, constituting an additional misrepresentation to this Council.

SBA's claimed subsequent amendment to the lease with the Tanners to include Site B cannot retroactively validate an Application that was invalid at the time it was filed. The Applicant's lack of candor in the Application itself and in SBA's feeble attempts to restore validity to a defective Application during the hearing should be subject to sanctions for frivolous invocation of this agency's jurisdiction.

CONCLUSION

For all of the foregoing reasons, the Application must be dismissed with prejudice and the Applicant directed to reimburse all parties' out-of-pocket costs for defending against this unlawful and frivolous application.

Respectfully submitted,

_____/s/_____
Gabriel North Seymour
Juris No. 424367
200 Route 126
Falls Village, CT 06031
Tel: 860-824-1412
Fax: 860-824-1210
Email: certiorari@earthlink.net

_____/s/_____
Whitney North Seymour, Jr.
Counsel *pro hac vice*
425 Lexington Avenue, Room 1721
New York, NY 10017
Tel: 212-455-7640
Fax: 212-455-2502
Email: wseymour@stblaw.com

Counsel to CROWW

CERTIFICATE OF SERVICE

I hereby certify that on this day, an original and fifteen copies of the foregoing Brief of Concerned Residents of Warren and Washington in Further Support of their Motion to Dismiss The Application was served on the Connecticut Siting Council by first class mail and copy of same was sent postage prepaid to:

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

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

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

Susan Payne, Chairperson, Conservation Commission
Town of Washington, Bryan Memorial Town Hall
P. O. Box 383, Washington Depot, CT 06794

Diane Dupuis, Chair, Cell Tower Committee
Conservation Commission, Bryan Town Hall
P. O. Box 383, Washington Depot, CT 06794-0383

_____/s/_____
Gabriel North Seymour
June 9, 2009