

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

JUNE 1, 2009

**DEPARTMENT OF AGRICULTURE'S MEMORANDUM IN SUPPORT
OF MOTION TO STAY PROCEEDINGS**

The State of Connecticut Department of Agriculture ("DOAg") hereby files its memorandum of law in support of its motion for stay of the current Connecticut Siting Council's ("CSC") proceedings in connection with the above-captioned docket pending a ruling on the DOAg's motion to dismiss.

BACKGROUND:

1. On May 14, 2009, the DOAg filed a dispositive motion, challenging the CSC's jurisdiction over the receipt and processing of the application of SBA Towers II, LLC ("SBA"). The DOAg's motion to dismiss was docketed by the CSC and placed on the agency's agenda for disposition at the beginning of the first public hearing session held on Docket 378 on May 21, 2009 at the Warren Town Hall.
2. The CSC, through its chairman, placed the motion to dismiss before the CSC, and immediately called for a motion that the matter "be continued." Tr. 5/21/09 (3:10 p.m. session) at 11-13.

3. The CSC then proceeded with its agenda, taking administrative notice of certain documents that it had identified in its draft Hearing Program, in accordance with its rules of practice. The CSC also heard and decided a request by SBA to take administrative notice of certain specific previous dockets of the CSC. *Id.*, Tr. 5/21/09 (3:10 p.m. session) at 14-29. The CSC entertained a motion to receive for identification SBA documents. *Id.* It subsequently entertained a motion to receive them into the record as full exhibits. *Id.* at 43. The CSC swore in four witnesses of SBA: Messrs. Ciarfella, Rieger, Bascom and Wells.

4. The CSC proceeded with its cross-examination of SBA's witnesses. Tr. 5/21/09 (3:10 p.m. session) at 43. The cross-examination, by Mr. Mercier and the members of the CSC, reviewed the merits of SBA's application.

5. During the questioning of SBA by the CSC, SBA stated on the public record that SBA had not complied with the notice requirements of section 47-42d of the General Statutes. *See infra.*

6. At the close of the May 21, 2009 session, the CSC continued the public hearing to June 2, 2009.

7. On May 28, 2009, at an agenda meeting of the CSC, held in Newtown, Connecticut, upon one day's notice to all of the participants in the above-captioned proceedings, the CSC further discussed the DOAg's motion to dismiss and, according to minutes received from S. Derek Phelps, Executive Director, on May 29, 2009, the CSC took the following further action:

In a motion dated May 14, 2009, DOAg moved for dismissal of SBA's application on the grounds that the Council lacks subject matter jurisdiction over the application based on SBA's failure to comply with C.G.S. § 47-42d. In its objection dated May 19, 2009, SBA argued that failure to give DOAg notice is not a jurisdictional defect and that siting the tower on proposed Site A does not violate the terms of the Farmland Preservation restriction.

The Council decided to defer a decision on the DOAg's Motion to Dismiss to allow further development of the evidentiary record. If the applicant, parties and intervenors believe that further evidence may affect the Council's determination on the motion, such participants may file additional briefs on or before June 11, 2009.

ARGUMENT:

THE CSC CANNOT PROCEED WITH FURTHER CONSIDERATION OF SBA'S APPLICATION UNLESS AND UNTIL IT RULES ON THE DOAG'S CHALLENGE TO ITS SUBJECT MATTER JURISDICTION OVER THE SBA APPLICATION, AND FOR THAT REASON IT MUST STAY THESE PROCEEDINGS

A threshold challenge to the subject matter jurisdiction of a court or administrative tribunal such as the CSC with respect to the above-captioned docket No. 378 must be addressed prior to consideration of the merits of the SBA application. The only proper course of action available to the CSC at this juncture is to issue a stay of these proceedings until the CSC has disposed of the DOAg jurisdictional motion by denying or granting it. The power to issue a stay is implicit in the authority granted state agencies such as the CSC. *Cf.* Conn. Gen. Stat. § 4-183(f).

A. The CSC's Action On May 28, 2009 Without An Accompanying Order Staying All Proceedings Is *Ultra Vires*

The CSC's decision to "defer" a ruling on the DOAg's motion to dismiss "to allow further development of the evidentiary record" is utterly without warrant in law. The CSC has been presented with, and it acknowledges that it has before it on its docket, a motion that challenges its subject matter jurisdiction over the application that SBA filed on February 27, 2009. The CSC began to hear the merits of the application even after DOAg took exception to the "motion to continue" consideration of the jurisdictional challenge and explained why the

matter had to be considered before turning to the merits. Tr. 5/21/09 (3:10 p.m. session) at 12-13. The CSC allowed the presentation of the merits to continue to June 2, 2009 after taking public comment at the Warren Town Hall and swearing in the applicant's witnesses for the purposes of cross-examination.

The May 28, 2009 decision of the CSC calling for a further development of the evidentiary record, is, in short, nothing more than a determination to proceed with the routine processing of SBA's application. The CSC legally cannot do this, and there is no legal warrant for the agency's interim ruling that there is a need to "allow further development of the evidentiary record." As demonstrated by the argument that is developed in Part B, *infra*, the necessary and legally sufficient jurisdictional facts already exist for the CSC to address the *only* matter that the law requires it to consider at this juncture, that is, to rule upon the DOAg's motion to dismiss.

In its May 20, 2009 reply brief to SBA's opposition papers, the DOAg summarized the legal rule that the CSC is constrained to follow. DOAg pointed out that concepts of subject matter jurisdiction are as applicable to the proceedings of administrative agencies as they are to the proceedings of courts. Our Supreme Court has stated the legal point as follows:

Administrative agencies . . . are tribunals of limited jurisdiction and their jurisdiction is dependent entirely upon . . . the statutes vesting them with power and they cannot confer jurisdiction upon themselves. . . [the Court] has recognized that [i]t is clear that an administrative body must act strictly within its statutory authority, within constitutional limitations and in a lawful manner. . . It cannot modify, abridge or otherwise change the statutory provisions . . . under which it acquires authority unless the statutes expressly grant it that power.

Celentano v. Rocque, 282 Conn. 645, 654 (2007), citing *Fullerton v. Administrator*,

Unemployment Compensation Act, 280 Conn. 745, 755 (2006); *Figueroa v. C & S Ball Bearing*,

237 Conn. 1, 4 (1996); *see also* *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.”)

The CSC’s May 28, 2009 ruling, in conjunction with the announced intent to reconvene the public hearing on June 2, 2009, would constitute such an arrogation or conferral of jurisdiction by the CSC upon itself while a dispositive motion is pending. This is so because the CSC’s call for additional filings on the DOAg’s outstanding motion, and intent to take additional evidence on June 2, 2009, constitutes an exercise of subject matter jurisdiction over the SBA application while a challenge to that very jurisdiction is pending. This the CSC cannot do, especially where the “jurisdictional facts” respecting the existence of a conservation restriction and lack of statutorily required proof of notice are clearly before the agency.

B. A Motion To Dismiss Must Be Addressed Before Any (Further) Consideration Of SBA’s Application On The Merits

The law is clear and unequivocal that a pending motion challenging subject matter jurisdiction of a court or agency must be addressed before proceeding with any other aspect of the matters before the court or agency. *E.g. Valley Cable Vision, Inc. v. PUC*, 175 Conn. 30, 32 (1978); *Castro*, 207 Conn. at 430 and cases cited (“the determination of jurisdiction is the first order of business”). This is so, because side-stepping the dispositive motion is itself an exercise subject matter jurisdiction, the very issue raised by the jurisdictional challenge. The DOAg cites, once again, the legal precedent that compels the CSC not to evade its obligation to address a claim that it lacks jurisdiction to process SBA’s application. *See, e.g., 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.'*") (Emphasis added.)

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 . . ." (Emphasis added.) This language underscores the correctness of the DOAg's jurisdictional claim: the agency processing the application must first be able to find that the applicant has complied with the Easement statute. This is a thoroughly unexceptional instance of the application of the plain meaning of a statute. Conn. Gen. Stat. § 1-2z.

The CSC's cross-examination of the applicant on May 21, 2009 did not, however, confine itself to the resolution of the DOAg's motion to dismiss or the establishment of jurisdictional facts. On the contrary, the CSC took administrative notice of certain documents that it wished to be placed in the record; it resolved a request by SBA respecting the administrative notice of certain CSC dockets; it swore in SBA's witnesses; it questioned them about cellular telecommunications installations and coverage that had nothing to do with the manner and method of SBA's filing of its application; it delved into construction details respecting the proposed access road and pad on Site A, the site within the conservation restriction that belongs to the DOAg. There are over 140 pages of material constituting the CSC's processing of SBA's application while the DOAg is on record asserting that the agency has *no jurisdiction* to hear any of it, because SBA's application should never have been filed.

C. The CSC Has Already Established A Sufficient Set Of Jurisdictional Facts Upon Which To Render A Decision On The Motion To Dismiss

SBA conceded non-compliance with the Easement statute, Conn. Gen. Stat. § 47-42d, in its opposition to the DOAg's motion to dismiss. Moreover, SBA, through counsel, has now conceded on the record SBA's non-compliance with this provision of the General Statutes. SBA stated in its May 19, 2009 opposition papers the following in reference to the Easement statute's prior notification and filing requirement:

While SBA regrets being unaware of the prior notice requirements, the facts of this application are such that DOAg has a full opportunity to make its position known and dismissal is neither necessary nor appropriate.

SBA's concession constitutes a "jurisdictional fact" that is now of record. A second jurisdictional fact exists in the affidavit of J. Joseph Dippel. The Chair made reference to this document in cross-examination of the applicant. Mr. Dippel's affidavit states that the DOAg never received any notice of SBA's application prior to February 27, 2009, the date of SBA's filing of its application with the CSC. Affidavit of Dippel, ¶ 7. (Therefore, DOAg received no notice in compliance with the Easement statute's provisions.)

Such evidence as the CSC received on May 21, 2009 simply underscores the legal effect of these facts with respect to SBA's compliance with the Easement statute. In a colloquy between Mr. Golembiewski, the DEP statutory representative on the CSC, and Mr. Ciarfella, one of SBA's witnesses, the following is of record:

MR. GOLEMBIEWSKI: Okay. So -- I read another exhibit from the Department of Agriculture saying the first time they were aware of the -- well, I shouldn't -- I can't ask that -- did you specifically notify the Department of Agriculture?

MR. CIARFELLA: No.

Tr. 5/21/09 (3:10 p.m. session) at 78. After the CSC reconvened that evening, the following was stated on the record of the proceedings by counsel for SBA:

CHAIRMAN CARUSO: Can you confirm for me whether or not it's true that at no time did SBA confer with the Department of Agriculture regarding the pending application?

MS. LARSON: Pursuant to our notice requirements under the Public Utility Environmental Standards Act, we did provide a copy of the application to the Department of Agriculture when it was filed with the Council.¹ We have a FedEx receipt of the mailing of the application.

CHAIRMAN CARUSO: Okay. And prior to that time were there any communications?

MS. LARSON: No, there were not.

Tr. 5/21/09 (7:10 p.m. session) at 47-48. Accordingly, the record is clear for the purposes of DOAg's pending motion. SBA did not comply with section 47-42d(b) of the General Statutes.²

Our Appellate Court has commented that, in the context of administrative proceedings, "certain jurisdictional facts are essential to establish the statutory jurisdiction of tribunals of limited authority. The existence of these facts is fundamental to the power *to entertain and adjudicate a proceeding on the merits.*" See *Salmon v. Dept. of Public Health and Addiction Services*, 58 Conn. App. 642, 652 (2000) (emphasis added). Put another way, pursuant to section 47-42d(b), proof of written notification of a person or entity that holds a "conservation restriction" is a jurisdictional fact that SBA was required to demonstrate on this docket in order

¹ Notwithstanding this circumlocution, 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 *legally irrelevant* to the jurisdictional issue that is presently pending before the CSC.

² The clearest question for the chairman to ask is: QUESTION: Did SBA, in compliance with the requirement in section 47-42d(b) of the General Statutes, provide written notice of its application, by certified mail, return receipt requested, to the State of Connecticut Department of Agriculture not later than sixty days prior to its filing of its application on February 27, 2009 with the Connecticut Siting Council? Based upon what is of record in this proceeding, the ANSWER is "NO," and it would behoove SBA to be upfront and straightforward about this.

for the CSC to obtain jurisdiction over the application and to process it. This requirement underlies the important statutory requirement that “no person shall file a permit application . . .” without complying with the notice requirement detailed in this statute.³ Conn. Gen. Stat. § 47-42d(b).

Proof of notice to conservation restriction owners as provided by this statute is an issue that must be determined at the *outset* of the proceedings; it affects the validity of all further actions by the CSC. *Cf., e.g., Stern v. Connecticut Medical Examining Bd.*, 208 Conn. 492, 502 (1988) (“The critical jurisdictional fact in the present case was the licensure status of the plaintiff at the commencement of the proceedings.”) *Stern* had pointed to the same principle quoted in *Salmon*, that is, that it is especially important that agency proceedings comply with *all applicable statutory prerequisites* prior to taking up the merits of matters before them, because they are tribunals of limited jurisdiction. Without doubt, the CSC is an agency that has a limited and defined statutory charge. Without doubt, the Easement statute instructs any local or state agency that issues permits or approvals that concern construction or improvement of real property that particularized notice in compliance with the statute’s terms are required *before* a person may file an application that implicates the rights of a conservation restriction owner. Conn. Gen. Stat. § 47-42d(b). Proof of such notification is, in the words of our Supreme Court “fundamental to the power to entertain and adjudicate a proceeding on the merits. In short, such facts condition the power to act.” *Castro v. Viera*, 207 Conn. 420, 434 (1988). Accordingly, notwithstanding

³ As argued in the DOAg’s reply brief, the Easement statute states what an applicant for a permit must do, without the slightest room for doubt, before it can file a permit application to construct upon or improve real property and before the agency can obtain jurisdiction over the application. “*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).

compliance by SBA with the section 16-50/ requirements, the General Assembly has subsequently decreed and required applicants such as SBA to comply with section 57-42d.

CONCLUSION:

Accordingly, for all of the reasons stated, the DOAg respectfully requests that the CSC stay any and all proceedings on the merits of this docket (No. 378) unless and until it has determined and issued a ruling on the merits of the DOAg's motion to dismiss. The only course of action legally available to the CSC is to dismiss SBA's application for want of jurisdiction.

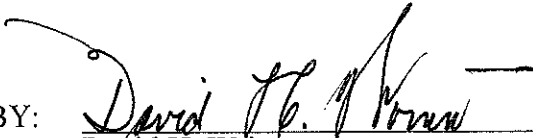
Dated at Hartford, Connecticut, this 1st day of June, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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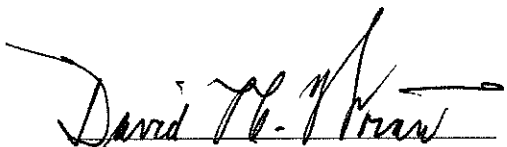
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