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 14, 2009

MEMORANDUM OF LAW BY DEPARTMENT OF AGRICULTURE IN SUPPORT OF MOTION TO DISMISS

The State of Connecticut Department of Agriculture ("DOAg") moves to dismiss Connecticut Siting Council Docket Number 378 on grounds that the applicant, SBA Towers II, LLC failed to comply with Section 47-42d of the General Statutes. The DOAg represents as follows.

BACKGROUND FACTS:

On February 27, 2009, SBA Towers II, LLC[1] ("SBA"), filed in the Connecticut Siting Council an "Application for Certificate of Environmental Compatibility and Public Need" (hereinafter "Application") for the proposed construction of a telecommunication facility to be located on Rabbit Hill Road, Town of Warren, Connecticut.[2] In the Application, SBA proposed

[1] According to the Executive Summary prefacing its application, SBA is a Delaware limited liability company and a subsidiary of SBA Communications Corporation. *See* n. 2.

[2] SBA's documentation filed with the February 27, 2009 application also contains materials prepared for an entity known as Optasite Towers, LLC. As the Application's Executive

two alternative sites on Rabbit Hill Road. Both sites are located on property owned by Lewis A. and Truda A. Tanner. Site "A" is identified in Exhibit A of the Application as proposed for the southwestern corner of the Tanner property. Alternate Site "B" is identified in Exhibit B of the Application as northwest of the Site "A" proposed location. Rabbit Hill Road is the nearest access point for both proposed facility locations.

In 1996, the Tanners conveyed all of the development rights to a approximately 182 acres of their farm on Rabbit Hill Road to the State of Connecticut Department of Agriculture. Pursuant to Conn. Gen. Stat. 22-26cc the State of Connecticut Department of Agriculture. Affidavit of Joseph J. Dippel, *see attached*; *see also Conveyance of Development Rights*, February 26, 1996, recorded April 3, 1996, Town of Warren land records, Vol. 46, Pages 984-990. **Exhibit 1**.[3] The State of Connecticut paid $727,152.00 for the development rights. At the time of conveyance, a survey was prepared to delineate the property on which the State had acquired development rights. The survey was duly recorded on the Warren land records. Affidavit of Joseph J. Dippel. It is entitled *"181.788 +/- Acres, Survey Plan Prepared For State of Connecticut, Department of Agriculture, Farmland Preservation Program, Property of Lewis A. Tanner, Truda A. Tanner, Rabbit Hill Road, Jack Corner Road, Warren, Connecticut, January 1996, Scale 1" = 200', T. Michael Alex, L.L.S. #15462, Washington, Connecticut"* and is recorded in the Town of Warren land records as map #634, Received April 3, 1996. **Exhibit**

Summary clarifies, *see Executive Summary* at 2 and n. 1, Optasite was purchased by SBA and Optasite Towers, LLC's name was thereupon changed to SBA Towers II, LLC.

[3] A certified copy of the Tanner *Conveyance of Development Rights* has been filed with the CSC along with the pre-filed testimony of Joseph J. Dippel, Director, State of Connecticut Department of Agriculture Farmland Preservation Program.

2.[4] Finally, the then Commissioner of Agriculture, Shirley Ferris, caused a "Notice of Acquisition of Development Rights" to be filed on the Warren land records, Vol. 46, Pages 991-994, reflecting the State's prior acquisition of the development rights to the Tanner property, and describing the land upon which the development rights had been acquired. Affidavit of Joseph J. Dippel; *see* **Exhibit 3.**[5]

In September, 2005, without any prior notice to the DOAg, the Tanners executed a lease with Optasite, Inc., the term to commence "on the first (1st) day of the month in which Tenant is granted all federal, state and local permits required for the building and construction of its Communications Facility by the governmental agency charged with issuing such permits . . .." *See "Notice of Lease,"* recorded in Town of Warren land records, Vol. 69, Pages 316-324.[6]

On February 27, 2009, SBA submitted the Application to the CSC for the development of Sites "A" and "B." *See* **Exhibit 4**, Cover letter, February 27, 2009, from Carrie L. Larson, Pullman & Comley, LLC, to S. Derek Phelps, Executive Director, Connecticut Siting Council "Re: Certificate Application for Proposed Telecommunications Facility at Rabbit Hill Road, Warren, Connecticut." SBA sent copies of the application no earlier than February 27, 2009 to

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[4] A certified copy of the survey plan of the Tanner development rights acquisition by the State of Connecticut has been filed with the CSC along with the pre-filed testimony of Joseph J. Dippel, Director, State of Connecticut Department of Agriculture Farmland Preservation Program.

[5] A certified copy of the Notice of Acquisition filed by the Commissioner of Agriculture has been filed with the CSC along with the pre-filed testimony of Joseph J. Dippel, Director, State of Connecticut Department of Agriculture Farmland Preservation Program.

[6] A certified copy of the Tanner-Optasite, Inc. Notice of Lease has been filed with the CSC along with the pre-filed testimony of Joseph J. Dippel, Director, State of Connecticut Department of Agriculture Farmland Preservation Program. *See also* Applicant's Application, Exhibit C. (DOAg notes that, contrary to SBA's representation in its Executive Summary, Exhibit C to the Application contains only the notice of lease for so-called "Site A.")

"municipal, regional, State, and Federal officials," reciting its compliance with the CSC's statutes, in particular section 16-50*l*(b). Application, February 27, 2009, Executive Summary at 5 and Exhibit E; Affidavit of Joseph J. Dippel.

ARGUMENT

I. SBA FAILED TO COMPLY WITH A JURISDICTIONAL PREREQUISTE FOR THE FILING OF ITS APPLICATION IN THE CSC FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED

SBA's application ("Application") before the CSC is liable to dismissal prior to the CSC's consideration of the merits of the filing, because SBA has failed properly to invoke the CSC's jurisdiction. Although the Application purports to comply with the filing requirements of section 16-50*l* of the CSC's statutes, as detailed in the Executive Summary and Exhibits appended thereto, it failed to comply with Chapter 822 of the General Statutes respecting easements, and the requirements of that chapter of the General Statutes bears directly upon the filings in CSC Docket No. 378. Chapter 822 applies to this proceeding, because the proposed location of Site "A" on the Tanner farm lies within the boundaries of that land upon which lies the State of Connecticut's development rights easement, and because there is a proposal to construct on or improve the restricted land. Proof of notice to the easement holder is required not 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.

A. For The Purposes Of Section 47-42d, The CSC Is A Land Use Agency

Chapter 822 of the General Statutes, and, specifically, section 47-42d(a) states, in relevant part, "(a) For purposes of this section, 'state or local land use agency' includes, *but is*

not limited to, [enumerating various municipal boards and commissions] and *any state agency that issues permits for the construction or improvement of real property.*" The CSC qualifies as such an agency, since the issuance of its certificate is a necessary prerequisite for the development of SBA's proposed Sites "A" and "B." Among the CSC's enumerated charges, as set forth in the General Assembly's legislative finding in Chapter 277a pertaining to the CSC, are the following: "telecommunications towers have had a significant impact on the environment and ecology of the state of Connecticut," and "that continued operation and development of such . . . towers, if not properly planned and controlled, could adversely affect the quality of the environment and the ecological, scenic, historic and recreational values of the state." Conn. Gen. Stat. § 16-50g. The legislative purpose animating the work of the CSC is further described in the legislative finding as that, inter alia, "to provide environmental quality standards and criteria for the *location, design, construction and operation* of facilities . . . to assure the welfare and protection of the people of the state. . .." *Id.* (Emphasis added.)

Pursuant to section 16-50k, no person shall, inter alia, "commence the preparation of the site for, commence the construction or supplying of a facility . . . that may, as determined by the council, have a substantial adverse environmental effect in the state without having first obtained a certificate of environmental compatibility and public need, hereinafter referred to as a 'certificate', issued with respect to such facility . . . by the council. Conn. Gen. Stat. § 16-50k(a). Because the SBA's proposed telecommunications tower falls within the jurisdiction of the CSC, *see* Conn. Gen. Stat. § 16-50i(a)(6) [definition of "facility" as including telecommunications towers], it filed the present Application for a certificate of environmental compatibility and

public need in accordance with the requirements of Chapter 277a of the General Statutes, of which section 16-50k is a part. *See* Application, February 27, 2009, Executive Summary at 1.

Based upon the legislative finding of the General Assembly, and the powers delegated to the CSC by the legislature to determine whether telecommunications facilities and the other facilities enumerated in Chapter 277a may be located where proposed based upon a balancing of factors involving impacts upon the environment and the need for the facilities, all prior to any construction commencing upon such proposals, the CSC is thereby acting as a "state agency that issues permits for the construction or improvement of real property" as described in section 47-42d(a).

B. The State Of Connecticut Holds A "Conservation Restriction" On The Tanner Farm

For the purposes of section 47-42a, a "conservation restriction" means:

> a limitation, whether or not stated in the form of a restriction, easement, covenant or condition, in any deed, will or other instrument executed by or on behalf of the owner of the land described therein, including, but not limited to, the state or any political subdivision of the state, or in any order of taking such land whose purpose is to retain land or water areas predominantly in their natural, scenic or open condition or in agricultural, farming, forest or open space use.

Conn. Gen. Stat. § 47-42a(a). The 1996 deed of "Conveyance of Development Rights" executed by the Tanners in favor of the State of Connecticut in exchange for payment of $727,152 and other good and valuable consideration, granted to the State a conservation restriction as defined in section 47-42a(a), because the conveyance of development rights, by deed, with its associated covenants, has as its goal the retention of the land "predominantly in [its] natural, scenic or open condition *or in agricultural, farming*, forest or open space use." *Id.* (Emphasis added.)

The Tanner deed duly recites that it conveys "development rights" as the term is defined in section 22-26bb(d) of the General Statutes, and that the owners/grantors of the property agree to be and are held to a set of enumerated restrictions set forth, in part, in the deed of conveyance, among them "(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 . . .." Exhibit A, *supra.* "Development rights" as defined in Chapter 422a mean, 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. § 22-26bb(d).

Moreover, Chapter 422a, pursuant to which the DOAg acquired the development rights to the 181.79 acres of the Tanner farm, defines "restricted agricultural land," for the purposes of the state program for the preservation of agricultural land, as "land and improvements thereon for which development rights are held by the state of Connecticut." The chapter further defines "restriction" as "the encumbrance on development uses placed on restricted lands as a result of the acquisition of development rights by the state of Connecticut. Conn. Gen. Stat. § 22-26bb(h); § 22-26bb(i).

Accordingly, there is no dispute that the conveyance by the Tanners in 1996 of development rights to the State of Connecticut resulted in the imposition on the land of a "conservation restriction" as defined in section 47-42a(a). The development rights conveyance is a "limitation" in the form of a "restriction, easement, covenant or condition" in a deed executed by "the owner of the land described therein" whose purpose is to "retain land predominantly in their natural, scenic or open condition or in agricultural, farming, forest or open

space use." Since the State of Connecticut and its DOAg-administered farmland preservation program hold a "restriction" on the land conveyed by the Tanners, for the purposes of Chapter 822 the State obviously holds a "conservation restriction" on the Tanner farm. SBA itself knew or should have known that a conservation restriction existed on that portion of the Tanner farm upon which it proposed Site "A." SBA was on notice as a result of the recordation of the 1996 Tanner deed of conveyance and the DOAg's recordation of its notice of acquisition of development rights. Exhibits A, C, *supra.* Moreover, SBA's Application acknowledges that "Site A is located on a section of the Property subject to an agricultural restriction under CGS 22-26cc . . .." Application, Executive Summary at 11.

C. Section 47-42d Required SBA To Serve Notice On The Holder Of A Conservation Restriction Prior To Filing An Application In the CSC

Once a "conservation restriction" is identified, section 47-42d mandates that "*no person shall file* a permit application with a state or local land use 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). SBA has failed to provide such proof, because it provided no notice to DOAg in compliance with the requirements of section 47-42d(b). No written notice of the Application was provided to the DOAg by certified mail, return receipt requested, not later than sixty days prior to SBA's filing in the CSC on February 27, 2009. Affidavit of Joseph J. Dippel. It is obvious from an examination of the Application that it

did not address compliance with the easement statutes, nor provided notice to the DOAg in compliance with the requirements of those statutes.

Because the easement statute directs that "no person shall file" an application involving a property subject to a conservation restriction, the SBA Application constitutes a defective filing that cannot be remedied except for a refiling in compliance with the statute. First, the language of this statute is mandatory and directory in character: the use of the term "shall" is indicative of the legislature's insistence that applicants for permits and other approvals to construct on or improve land subject to conservation restrictions provide proof of prior "written notice" to the owner of the restriction. Such language was meant to be explicit and consequential. "As we have often stated, [d]efinitive words, such as must or shall, ordinarily express legislative mandates of a nondirectory nature." *See, e.g. Lostritto v. Community Action Agency of New Haven,* 269 Conn. 10, 20 (2004).

Second, the time limitation in section 47-42d(b) is substantive and not merely procedural. Compliance with this notice provision is "of the essence of the thing to be accomplished," which is control over development proposals that potentially or actually interfere with the rights the owners of conservation restrictions. Compliance with the provision is *explicitly* a *condition precedent.* Therefore, it is also "of the essence of the thing to be accomplished" and is a substantive provision of the statutes that cannot be waived, and with respect to which its non-observance would render the agency's decision *void. See, e.g. Donohue v. Zoning Bd. of Appeals,* 155 Conn. 550, 554 (1967) The failure to provide written notice not later than sixty days prior to a filing with the CSC is subject to a negative consequence—*no person shall file*—and that consequence is jurisdictional, because the CSC cannot begin to process that which under

statutory directive must *not* have been filed. The negative consequence is not susceptible to interpretation: it is the plain and unambiguous meaning of section 47-42d(b). Section 1-2z of the General Statutes provides the standard for the interpretation of the words of the legislature: "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes." This observation applies with equal force to the application of section 47-42d(a) to the activities of the CSC. The CSC is in the business of issuing approval for the "construction or improvement of real property."

Finally, DOAg's notice of intent to participate as a party in these proceedings on Docket No. 378 does not constitute any waiver of its jurisdictional claim against SBA's Application, because subject matter jurisdiction cannot be waived nor conferred by consent. *See, e.g., Demar v. Open Space and Conservation Commission,* 211 Conn. 416, 424 (1989).

Respectfully submitted,

F. PHILIP PRELLI,
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