

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

May 19, 2009

**MEMORANDUM OF CONCERNED RESIDENTS OF WARREN
AND WASHINGTON IN SUPPORT OF THEIR MOTION TO
DISMISS THE APPLICATION**

Concerned Residents of Warren and Washington ["CROWW"], party to the above-entitled Connecticut Siting Council Docket, hereby respectfully submit this memorandum in support of their motion to dismiss the Application with prejudice.

ARGUMENT

POINT I

**THE SALE OF DEVELOPMENT RIGHTS TO THE STATE
PREVENTS THE PROPERTY OWNER FROM GRANTING A LEASE OF THAT
SAME PROPERTY FOR COMMERCIAL USE**

In 1996, Lewis and Truda Tanner (the "Tanners"), who are the owners of the 106 acre parcel (the "Subject Parcel") on which Site A is located, sold to the State of Connecticut, pursuant to Chapter 422a of the Connecticut General Statutes and Section 22-26cc thereof, for the sum of \$727,152, all "Developmental Rights" in and to a total of approximately 182 acres of agricultural land, which includes Site A. In the Conveyance of Development Rights executed by the Tanners in connection with that sale, the Tanners

acknowledged their intent, and the intent of the State of Connecticut, “to prohibit development of the [approximately 182 acres of agricultural land] for residential, commercial and/or industrial purposes.”

Given this prior sale of Development Rights, the Tanners no longer own the right to lease to the Applicant any portion of a Subject Parcel for a commercial and/or industrial purpose, which clearly includes constructing, maintaining and operating a telecommunications facility.

Applicant’s reliance (at page 18 of the Application) on Section 16-50p (a)(3)(G) of the Public Utility Environmental Standards Act (PUESA) is totally misplaced. That section of PUESA does not restore to the owners of the property a right previously sold to the State of Connecticut. If anyone has the right to approve a commercial use of the Subject Parcel, it is the State of Connecticut, the purchaser of the Development Rights covering the Subject Parcel. However, the Governor and the Secretary of Agriculture of the State of Connecticut each oppose the construction of a telecommunications facility on Site A.

Misapplication and Misconstruction of the Statute

Moreover, the section of PUESA relied upon by the Applicant was not intended to have a broad application. In a letter dated May 13, 2009 from Karl Wagener, Executive Director of the Connecticut Council on Environmental Quality, to S. Derek Phelps, Executive Director of the Connecticut Siting Council, Mr. Wagner, citing the House Session Transcripts, May 30, 2003, points out that the intent of the General Assembly in 2003 was to allow the construction of a telecommunications antenna on a particular farm

in Lyme, Connecticut (which was subsequently constructed in an existing silo without Siting Council approval). Mr. Wagner adds that

“it is ironic and regrettable that P.A. 03-221 and P.A. 03-278 were adopted without public hearing or public input or agency advice, as they were not needed and have led to the potentially damaging application before you.”

In short, Section 16-50p (a)(3)(G) of the Public Utility Environmental Standards Act has no bearing on the Application being considered in this proceeding and the lease between the owner of the Subject Parcel and the Applicant is a legal nullity.

POINT II

A "MATERIAL DECREASE OF ACREAGE AND PRODUCTIVITY OF THE ARABLE LAND" IS NOT REMEDIED BY FELLING TREES TO REPLACE ARABLE ACREAGE

Tanner Farm, traditionally known locally as "Nutmeg Farm," is one of the oldest continuing working farms in the country. The Tanners were among the founders of Warren in the 1700's. For more than 240 years the Tanner Farm has been operated primarily as a dairy farm. Dairy farms produce milk.

Even if Section 16-50p (a)(3)(G) of the Public Utility Environmental Standards Act were to be determined to have restored the Tanners' right to lease a portion of their property for which they previously sold the development rights to the State of Connecticut and is applicable to the pending Application, the Applicant has not satisfied the requirement of that section that the proposed use not “result in a material decrease of ... the productivity of the arable land.”

In the case of the Tanner Farm, which for more than 240 years has been operated primarily as a dairy farm, any decrease in the productivity of the Tanner Farm depends on an evaluation of the effect of the operation of proposed telecommunications facility on

milk production and general well-being of the cows kept on the farm. A comprehensive study reported in “Conspicuous Behavior Abnormalities in a Dairy Cow Herd Near a TV and Radio Transmitting Antenna,” a copy of which is included in CROWW’s Pre-Filed Exhibits, researchers have reported a significant reduction in the milk production and other adverse behavioral effects on the well-being of cows within a close distance to telecommunications transmitters. The proposed SBA tower will significantly decrease the productivity of the Tanner Farm.

SBA has offered no scientific evidence whatsoever on this subject. As a result, the Siting Council cannot determine on the basis of the record in this proceeding that the construction and operation of a telecommunications facility on Site A will not decrease the productivity of the Tanner Farm. Therefore, this requirement of Section 16-50p (a)(3)(G) of the Public Utility Environmental Standards Act has not been satisfied in the pending Application.

POINT III

FAILURE OF THE APPLICANT TO MEET THE MANDATORY 60-DAY REVIEW PERIOD FOR SITE B REQUIRES DISMISSAL OF THE APPLICATION

The Towns of Warren and Washington have been denied a proper statutory 60-day time period to consider the harmful impact of Site B on the environment, thereby violating the statutory municipal consultation requirements.

POINT IV

BOTH PROPOSED TOWER SITES VIOLATE THE TOWN OF WARREN'S ZONING REGULATION REQUIRING A 1500 FOOT SETBACK

The Town of Warren's Zoning Regulations provide that no cell tower may be placed within 1500 feet of any residence. The SBA Application clearly violates this local

law. There are five residences located within 1500 feet of both tower sites. Disregard of local zoning regulations that have been adopted by a duly constituted town legislature and implemented by a duly constituted town board is a violation of citizens' rights to substantive and procedural due process and Tenth Amendment sovereignty. The Application is therefore void ab initio and must be dismissed.

CONCLUSION

1. Having previously sold the Development Rights to the State of Connecticut, the owners of the property on which Site A is located do not have the right to grant a lease to the Applicant for a commercial use of that property.
2. Applicant has failed to meet the requirements of Section 16-50p (a)(3)(G) of the Public Utility Environmental Standards Act, by demonstrating that the construction and operation of a telecommunications facility on Site A will not reduce the productivity of the Tanner Farm.
3. The Applicant's failure to comply with the 60-day statutory municipal review period for Site B constitutes a violation of Fifth and Fourteenth Amendment Due Process rights of the citizens of both the Towns of Warren and Washington, as well as the town's Tenth Amendment sovereignty.
4. The proposed tower sites violate express provisions of the Town of Warren's Zoning Regulations and therefore the Application is void.

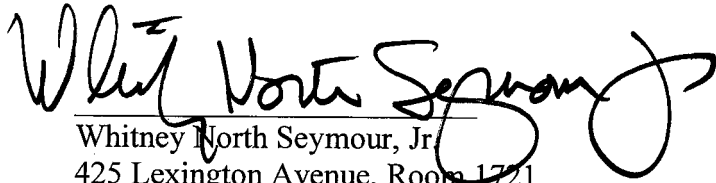
For all of the foregoing reasons, the Application must be dismissed and the Applicant should be directed to reimburse parties' out-of-pocket costs for defending against this unlawful and frivolous application.

Respectfully submitted,



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

A handwritten signature in black ink that reads "Whitney North Seymour, Jr." with a large, stylized flourish at the end.

Whitney North Seymour, Jr.
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 Memorandum of Concerned Residents of Warren and Washington in 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



Gabriel North Seymour
May 19, 2009