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 19, 2009

OBJECTION TO MOTION TO DISMISS AND RESPONSE TO OPPOSITION

This objection is submitted in response to the following three documents which have been submitted to the Connecticut Siting Council in opposition to the application referenced above:

1. Motion to Dismiss (May 14, 2009) from the State of Connecticut Department of Agriculture ("DOAg");

2. Opposition from the Connecticut Council on Environmental Quality (May 13); and

3. Letter from the Honorable M. Jodi Rell, Governor of the State of Connecticut (April 29, 2009).

SBA Towers II, LLC ("SBA" or "the Applicant") replies in this Objection and Response to all three documents. Further responses to other pleadings will be submitted separately.

I. Absence of Advance Notice to DOAg is not a fatal Jurisdictional Defect.

DOAg argues that Conn. Gen. Stat. §47-42d(b) requires notice to the holder of a conservation or preservation restriction 60 days before application is made to certain agencies for a permit to conduct certain activities on the land subject to the restriction. The statute speaks largely to municipal agencies; it is not clear that it applies to the Connecticut Siting Council ("CSC"). Notice of the application permits the holder of the restriction to provide proof to the agency if granting the application would violate the terms of the restriction.

DOAg argues that notice was not sent to it appropriately and therefore the application cannot go forward because the lack of notice prior to filing the application is a jurisdictional defect, robbing CSC of subject matter jurisdiction. The only authority submitted in support of this interpretation is Donohue v. ZBA of Norwalk, 155 Conn. 550 (1967). But Donohue, decided 38 years before CGS §47-42d(b) was enacted, deals with the failure of an agency to

reach a decision within the statutorily-mandated time for such decisions, it does not deal with notice to the parties. The Court determined that the deadline for such decisions was not "of the essence of the thing to be accomplished." Donohue at 554.

Such is the case before the CSC now. The essence of the requirement in CSC §47-42d(b) is that the holder of the restriction be able to "provide proof to the state or local land use agency..." that the activity for which a permit is sought would violate the terms of the restriction. Thus the "essence of the thing to be accomplished" is the ability of the restriction-holder to make its position known to the agency making the decision.

DOAg has done exactly that. Its position was filed with CSC on May 14th, one week before the hearing scheduled on this application, 75 days after it received notice of this matter. Both DOAg and SBA state that notice was provided to DOAg and others on February 27th. DOAg cannot say, and does not say, that it was prejudiced by the lack of advance notice in this matter.

Further, even if DOAg received no notice until after the application was decided, CGS 47-42d(c) contains the remedy for faulty notice – an appeal to the agency within fifteen days after receipt of the decision. The remedy sought by DOAg – that the application be dismissed and the application refiled – is unnecessary, without precedent and impractical. 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.

II. The Siting of the Tower Proposed in this Application does not violate the terms of the Farmland Preservation Restriction on the Property

Proposed Site A is located in a wooded, steeply sloped area on property owned by Lewis A. and Truda A. Tanner on Rabbit Hill Road in Warren, Connecticut. This area is subject to a farmland preservation restriction in favor of the Connecticut Department of Agriculture put in place in 1996. The land in this area is not farmed. The alternate site B is on the same property but in an area not subject to the restriction. Site A is appropriate for tower-sharing by three carriers and for emergency communication for the town of Warren; Site B will not suit the needs of Verizon.

DOAg, the Council on Environmental Quality ("CEQ") and Governor M. Jodi Rell take the position that it would violate the restriction on the property to permit the tower to be built at Location A.

A. Connecticut Law Permits Tower Construction at Site A.

Connecticut law explicitly provides for the situation at issue in this application and provides guidance for CSC in considering this application. CGS §16-50p(a)(3)(G) states in its entirety:

> (G) In the case of a facility described in subdivision (6) of subsection (a) of section 16-50i that is proposed to be installed on land under agricultural restriction, as provided in section 22-26cc, that the

facility will not result in a material decrease of acreage and productivity of the arable land.

This is one of the factors to be considered by CSC in reaching its decision. CGS 16-50i(a)(6) describes telecommunication towers such as the one under consideration in this application and CGS §22-26cc is the statute that provides for the state's acquisition of development rights to agricultural land. Clearly the legislature has considered whether telecommunication towers may be built on land subject to agricultural preservation restrictions and decided that they may if certain conditions are met. Opposition to this application suggests that the application must be denied, but that is wrong. What must happen is that CSC must consider whether the construction of the facility would "result in a material decrease of acreage and productivity of the arable land."

B. Construction of the Tower Would not Result in a Material Decrease of Acreage and Productivity of the Arable Land

If site A were developed, the construction would disturb 0.23 acres of land. The total amount of land subject to the easement is just under 182 acres. Though "material decrease" is a very imprecise standard, this exceedingly small amount of disturbance could not be found to be a "material decrease" by any measure. Consideration should also be given to the fact that proposed site A may not, in fact, be arable. It is heavily wooded now, contains fairly steep slopes, and contains soil types not well-suited to agricultural production. See Exhibits B, M, N and O to the application for information about topography, soil types, and environmental screening. Even if the conditions were perfect for farming, the amount of disturbance is so minimal that it would have no effect on the productivity of the land. The owners of the land retain a fee interest in the land and retain certain rights to it, including the right to lease portions of the property for less than 25 years and other rights of property owners so long as they do not materially decrease agricultural acreage and give due consideration of the effects of their activities on total farm operation. See Conveyance of Development Rights, Vol. 46, Page 984 at Section B(4)(and (5) (attached to Motion to Dismiss by DOAg).

Thus, there is clear authority for the construction of telecommunication towers on land subject to farmland preservation restrictions and guidance about conditions when such construction may be allowed. SBA has presented evidence that its application has met those conditions.

C. CEQ's Other Points are Not Supported

SBA has offered to add to the land subject to the restriction additional land larger in area than that which will be disturbed, but CEQ states that such substitution is not authorized by Connecticut law. It is equally true that such substitution is not prohibited by Connecticut law. If the ability of the restricted land to really support farming is considered important, the substitution could result in a larger area of land of good quality for farming and should be considered.

CEQ's position that permission of the holder of the restriction must approve the proposed construction does not appear to be supported by either the law nor the documents governing the

owner's use of the land. No authority has been cited for this concept and none has been found. The owners retain certain rights to use their land so long as they do not materially disrupt its agricultural potential.

CEQ also raises the issue of visibility of the proposed tower, as is usual in an application of this sort. SBA has presented evidence about the visual impact of the proposed towers. See pages 14-16 and Exhibit L of the application. For any sparely developed site in Connecticut there will be objections that a tower will be visually unattractive, but these are often the sites where communication coverage is the most problematic. Part of CSC's mission is to site towers so as to minimize their visual impact while providing communication services needed by the community. In this case, three carriers will share the tower and town emergency equipment can also be accommodated. As amply shown in the application, the visual impact will be slight. To suggest that one tower, only minimally visible in a small area, will cause economic harm to tourism in Connecticut is to engage in irresponsible and unsupported speculation.

Similarly, the letter from Governor Rell (April 29, 2009) offers no evidence to support the denial of this application. There are many areas of the state known for their "pristine and natural beauty"; whether communication can be facilitated in such an area without unduly disrupting that beauty is CSC's concern. And, as mentioned above, the law supports the construction of a tower in restricted land if certain conditions are met. Vague language about natural treasures and habitat for several kinds of wildlife is not evidence and it is not helpful. For such a vague, unsupported piece of advocacy to come from the Governor, who appoints many members of CSC, is disquieting.

D. Interpretation of the Conveyance of Development Rights is Outside CSC's Jurisdiction

Much of the opposition to this application is based on the conveyance of development rights to DOAg. As discussed above, Connecticut law explicitly permits the construction of a telecommunications tower on land subject to an agricultural restriction if the disturbance of the agricultural operation is minimal. CSC should certainly take that authority into consideration, and is fully able to determine whether the disturbance proposed by SBA at this property would interfere to too great an extent with the agricultural potential of the property.

What is not within the jurisdiction of CSC is a legal interpretation of the conveyance documents themselves. If opponents of this application wish to raise issues with the interpretation of the conveyance and rights retained by the fee owners of the property, those issues are more properly raised in Superior Court. CSC may make its decision based on the criteria that are within its jurisdiction. The parameters of the restriction of development rights are more appropriately left to other authority.

CONCLUSION

The restrictions on the land where site A is located do not prohibit the construction of a telecommunications tower, they simply impose additional conditions which must be satisfied if

CSC is to approve the application. SBA has met those conditions. The hearing should go forward and the application should be approved.

SBA TOWERS II, LLC

By: [signature]

Carrie L. Larson
clarson@pullcom.com
Diane W. Whitney
dwhitney@pullcom.com
Pullman & Comley, LLC
90 State House Square
Hartford, CT 06103
(860) 424-4330
Its Attorneys

Certificate of Service

I certify that a copy of the preceding response was sent by first class mail, postage prepaid and/or by electronic means to all names on the attached service list on this 19th day of May 2009.

[signature]

Diane W. Whitney

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