

April 17, 2002

John G. Rowland  
Governor  
State of Connecticut  
Hartford, CT 06106

Dear Governor Rowland:

You have asked for my opinion regarding the constitutionality of House Bill No. 5346, which would impose a one year moratorium on the construction of any electric power line or gas pipeline across Long Island Sound. The stated purpose of the moratorium is to permit the State to conduct a comprehensive environmental assessment and prepare a plan that evaluates the environmental impacts of such projects. You correctly note in your letter that the moratorium would apply to cross Sound construction projects that were approved by regulatory agencies prior to the proposed effective date of the bill. Specifically, you ask “whether this bill is constitutional as applied to projects that have received approvals prior to the effective date of the bill.” I conclude that House Bill No. 5346 is constitutional as applied to projects receiving regulatory approval prior to the bill’s effective date.

An analysis of the constitutionality of House Bill No. 5346 must begin with the appropriate standard of review. A court reviewing the constitutionality of a statute must “indulge every presumption in favor of the statute’s constitutionality.” *State v. Floyd*, 217 Conn. 73, 79 (1991). A party attacking the constitutionality of a validly enacted statute bears the heavy burden of proving its unconstitutionality beyond a reasonable doubt. *Id.*

Presumably, the principal constitutional challenge to the moratorium would come in the form of a takings claim from the entity (Cross-Sound Cable Company, LLC) holding one or more regulatory permits<sup>1/</sup> that authorize the construction of the cross Sound cable. The test for analyzing a takings claim is well-established:

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As the United States Supreme Court has observed, whether a claim that a particular governmental regulation or action taken thereon has deprived a claimant of his property without just compensation is an 'essentially ad hoc factual inquir[y].' *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646 [2659], 57 L.Ed.2d 631 (1977), *reh. denied*, 439 U.S. 883, 99 S.Ct. 226, 58 L.Ed.2d 198 (1978); *see also Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 473-74, 107 S.Ct. 1232 [1236], 94 L.Ed.2d 472 (1987); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 43 S.Ct. 158 [159], 67 L.Ed. 322 (1922). Our review of the plaintiff's takings claim is no less fact-dependent. *Gil v. Inland Wetlands & Watercourses Agency*, 219 Conn. 404, 406, 593 A.2d 1368 (1991).

*Bauer v. Waste Management of Conn. Inc.*, 234 Conn. 221, 250, 662 A.2d 1179 (1995).

As an analytic matter, before a court can review a landowner's claim that he has been deprived of his property without just compensation, the court must first define the property interest that has allegedly been taken. *Keystone Bituminous Coal Assn. v. DeBenedictis*, [480 U.S. at] 497 [107 S.Ct. at 1248]; F. Michelman, 'Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law,' 80 Harv.L.Rev. 1165, 1192 (1967). *Gil v. Inland Wetlands & Watercourses Agency*, 219 Conn. at 410, 593 A.2d 1368.

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construct the cable. Because Cross-Sound cannot construct the cable in the absence of **any** of these permits, this opinion focuses on the permit issued by the Connecticut Siting Council, entitled "Certificate of Environment Compatibility and Public Need." For ease of discussion, we will refer throughout to the Siting Council's approval as a permit.

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*Id.* at 253.

In the present case, however, and unlike the typical takings case, the entity likely to assert the takings claim cannot assert a regulatory taking of land owned by the entity itself. In other words, Cross Sound Cable Company, LLC does not own all or most of the submerged lands under Long Island Sound that it hopes to develop by constructing an electric power line.<sup>2/</sup>

Instead, the State of Connecticut is the owner in fee of the submerged lands under Long Island Sound: “In Connecticut, it is now settled that the public, representing the former title of the king, is the owner in fee of such flats up to the high water-mark . . . .” *Simons v. French*, 25 Conn. 346, 352 (1856); *Lane v. Board of Harbor Commissioners*, 70 Conn. 685, 694 (1898)(State has title to the soil itself below high-water mark in trust for the public use and benefit); *see also State v. Knowles-Lombard Co.*, 122 Conn. 263 (1936). As the owner in fee, the State of Connecticut holds title to the land “in trust for all of the people of the state.” As the Supreme Court noted:

“[T]he title to the shore of the sea, and of the arms of the sea, and in the soils under tidewaters . . . in this country, in the State. Any erection thereon without license is, therefore, deemed an encroachment upon the property of the sovereign . . . which he may remove at pleasure, **whether it tends to obstruct navigation or otherwise.**”

*Hartford Electric Light Company v. Water Resources Commission*, 162 Conn. 89, 101 (1971) (quoting *Weber v. Board of State Harbor Comm’rs*, 85 U.S. 57, 65 (1873))(emphasis added). Although the State **may** grant to individuals limited privileges or rights in such lands, the State as the fee owner otherwise retains its proprietary and regulatory powers over the land. *United States v. Locke*, 471 U.S. 84, 104-105 (1985).

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<sup>2/</sup> Your opinion request does not provide any detail regarding the various properties over which the cable is proposed to pass. Because at least some of the land at issue is owned by the State in fee, and this project undoubtedly cannot proceed unless Cross Sound can conduct the required activities on all of the properties involved, for the purposes of this opinion only, we discuss only the land owned by the State.

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As a result of the State's fee ownership of much of the land that the cable will need to cross, Cross-Sound may argue that the moratorium deprives it of a constitutionally protected property interest in the various permits it has obtained to construct the cable across Long Island Sound. Consequently, the critical question is whether Cross-Sound would have a constitutionally protected property interest in the permits at the time the moratorium becomes effective.

Given the inherent complexities of both the legal and factual issues involved in analyzing a takings claim of such novel nature, no one can predict with precision or certainty how a court would rule on this question after the development of a complete factual record. But my clear, unqualified conclusion-- a position I am prepared to advocate vigorously-- is that Cross-Sound does not have a constitutionally protected property interest in the permits. First, numerous courts have held that a permit issued by a State for a permittee to engage in activities on public trust land is merely a license or a privilege that does not give rise to a constitutionally protected property interest. *See, e.g., Marine One, Inc. v. Manatee County*, 898 F.2d 1490, 1492 (11th Cir. 1990) ("permits to perform activities on public lands--whether the activity be building, grazing, prospecting, mining or traversing--are mere licenses whose revocation cannot rise to the level of a Fifth Amendment taking"), *cert. denied*, 393 U.S. 1121 (1969); *Acton v. United States*, 401 F.2d 896, 899 (9th Cir. 1968) (holder of uranium prospecting permit for public lands had no property right in permit and government could revoke permit without paying compensation).

The Ninth Circuit's decision in *Acton* is particularly instructive:

Many permits issued by the United States have value as between private persons, but they may be revoked without payment of compensation. We refer particularly to the language of this court in *Osborne*:

"Numerous instances are to be found where permits issued by a sovereign are highly valuable as between private persons but which may be revoked by the sovereign without the payment of compensation: e.g. bridge franchises, *Louisville Bridge Co. v. United States*, 1917, 242 U.S. 409, 37 S.Ct. 158, 61 L.Ed. 395; *United States v. Wauna Toll Bridge Co.*, 1942, 9 Cir., 130 F.2d 855; licenses to erect

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As the United States Supreme Court held in *United States v. Locke*:

The United States, as owner of the underlying fee title to the public domain, maintains broad powers over the terms and conditions upon which the public lands can be used, leased and acquired. . . . Claimants thus take their mineral interests with the knowledge that the Government retains substantial regulatory power over those interests.

*United States v. Locke*, 471 U.S. 84, 104-105 (1985); see also *United States v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 312 U.S. 592, 596 (1941); *Foster & Kleiser v. City of Chicago*, 497 N.E.2d 459, 464 (1986);<sup>3/</sup> *State Highway*

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<sup>3/</sup> The *Foster* case makes clear that a taking has not occurred even if the plaintiff has expended substantial funds in reliance on the permit. 497 N.E. 2d at 464. In *Foster*, the court held that no compensable taking occurred when the city revoked a permit to erect two electric signs on public property, despite the fact that the signs had already been put in place, because “the privilege of erecting a sign projecting over a public way is permissive only and may be withdrawn at any time. . . . No condemnation damages may be awarded when a revocable permit is revoked.” *Id.*

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By enacting House Bill No. 5346, the legislature is seeking to exercise the State's proprietary and regulatory powers over its public trust land by ensuring that the full environmental impacts of cross-Sound projects are understood before the projects proceed. Consequently, even though one or more entities may have received permits to construct a power line cable on Connecticut's public trust lands in Long Island Sound, those permits are mere licenses that may be revoked without creating a taking for which compensation must be paid.

In sum, according to these principles, even if House Bill No. 5346 revoked any existing permits, which it does not, the bill would still be constitutional. Far from revoking any permits, however, the bill simply imposes a temporary moratorium on the construction of any electrical power lines across Long Island Sound for a period of one year. In the absence of other judicial, legislative or regulatory developments during that period, the existing permits would permit Cross Sound to construct the cable at the end of that year.

In addition to the reasons set forth above, I conclude that the moratorium would pass constitutional muster for at least two other reasons. First, legislative temporary moratoria on the further development of land are subject to a less rigorous standard of constitutional review. *See, e.g., Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 216 F.3d 764, 777 (9th Cir. 2000), *cert. granted*, 538 U.S. 978 (2001). The Ninth Circuit has clearly articulated the importance to state and local governments of a planning moratorium like the one proposed in House Bill No. 5346, and the need for courts to be extremely reluctant to invalidate them:

[T]he widespread invalidation of temporary planning moratoria would deprive state and local governments of an important land-use planning tool with a well-established tradition. Land-use planning is necessarily a complex, time consuming undertaking for a community, especially in a situation as unique as this. In several ways, temporary development moratoria promote effective planning. First, by

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preserving the status quo during the planning process, temporary moratoria ensure that a community's problems are not exacerbated during the time it takes to formulate a regulatory scheme. Relatedly, temporary development moratoria prevent developers and landowners from racing to carry out development that is destructive of the community's interests before a new plan goes into effect. Such a race-to-development would permit property owners to evade the land-use plan and undermine its goals. Finally, the breathing room provided by temporary moratoria helps ensure that the planning process is responsive to the property owners and citizens who will be affected by the resulting land-use regulations. Absent the pressure of trying to out-speed developers who are attempting to circumvent the planning goals, the "planning and implementation process may be permitted to run its full and natural course with widespread citizen input and involvement, public debate, and full consideration of all issues and points of view." Given the importance and long-standing use of temporary moratoria, courts should be exceedingly reluctant to adopt rulings that would threaten the survival of this crucial planning mechanism.

*Id.* at 777 (citations omitted); *see also Bridgeport Hydraulic Co. v. Council on Water Company Lands of the State of Connecticut*, 453 F. Supp. 942 (D. Conn. 1977) (upholding Connecticut's Moratorium Act, which imposed four year moratorium on development or sale of certain real properties owned by water companies), *aff'd*, 439 U.S. 999 (1978). The Connecticut Supreme Court has also upheld moratoria that prevent development projects provided that the restrictions do not remain in effect for an unreasonable period of time. *See, e.g., Arnold Bernhard and Company, Inc. v. Planning and Zoning Commission of the Town of Westport*, 194 Conn. 152 (1984)(nine month moratorium).

Second, even if the proposed moratorium revoked existing permits, which it does not, it is highly significant that the Siting Council's approval of the Cross Sound cable project is still subject to judicial review. "It is well established that a party cannot maintain a takings claim unless it owned the property at the time of the taking." *United States v. Dow*, 357 U.S. 17, 22 (1958). Thus, a court reviewing the moratorium must examine the status of the alleged property interest

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at the time the legislation becomes effective. *Id.*; *Herndon v. United States*, 36 Cl. Ct. 198, 201-02 (1996).

Assuming that the moratorium is enacted and becomes effective in the next few weeks, the permit issued by the Siting Council will still be subject to the administrative appeals filed by the Attorney General and the City of New Haven presently pending in the Superior Court. Even if an immediate stay is denied by the Supreme Court, judicial consideration of our legal action challenging the Siting Council approval as unlawful will continue, with a hearing scheduled on June 7, 2002. Thus, the approval of the Cross Sound project is subject to a significant contingency: If a reviewing court concludes that the Siting Council improperly granted the Cross Sound permit for any reason, the approval could be reversed or vacated. *See* Conn. Gen. Stat. § 4-183(k). If Cross Sound elects to proceed with construction of the project “before it can be certain of the outcome of the case, it must be prepared to accept the risk of an unfavorable outcome. Any loss or other hardship it may suffer will be the result of its own business judgment if [the appellants] should prevail.” *Connecticut Resources Recovery Auth. v. Keeney*, 1993 WL 229749 (Conn. Super. 1993)(Shea, J.); *see also Waste Management*, 234 Conn. at 258 (capital investment “does not transform speculation into a property interest.”). Under such circumstances, Cross Sound’s rights in the certificate granted by the Siting Council are not sufficiently final and definitive to be deemed vested and therefore the imposition of the moratorium cannot constitute a taking. Such a nonfinal and indefinite interest does not constitute a clear and legitimate claim of entitlement sufficient to invoke constitutional protection. *See Board of Regents of State College v. Roth*, 408 U.S. 564, 577 (1972); *DLC Management Corp. v. Town of Hyde Park*, 163 F.3d 124, 130-31 (2d Cir. 1998); *RRI Realty v. Incorporated Village of Southampton*, 870 F.2d 911, 915 (2d Cir. 1989), *cert. denied*, 493 U.S. 893 (1989).

Finally, Connecticut law is well-settled that the mere issuance of a final permit does not create a vested right. *Marmah, Inc. v. Town of Greenwich*, 176 Conn. 116, 121, 405 A.2d 63 (1978). Rather, for the right under a permit (such as the one issued by the Siting Council) to become vested, the permit holder must have undertaken substantial construction and incurred substantial expenses in reliance on the permit. *Id.* (holding that “[e]ven the issuance of a building permit does not necessarily create a vested right unless the building is substantially under construction. . . .”); *Graham Corp. v. Board of Zoning Appeals*, 140 Conn. 1, 4-6, 97 A.2d 564 (1953). This is the rule in other states as well. *E.g.*, *DLC*

at the time the legislation becomes effective. *Id.*; *Herndon v. United States*, 36 Cl. Ct. 198, 201-02 (1996).

Assuming that the moratorium is enacted and becomes effective in the next few weeks, the permit issued by the Siting Council will still be subject to the administrative appeals filed by the Attorney General and the City of New Haven presently pending in the Superior Court. Even if an immediate stay is denied by the Supreme Court, judicial consideration of our legal action challenging the Siting Council approval as unlawful will continue, with a hearing scheduled on June 7, 2002. Thus, the approval of the Cross Sound project is subject to a significant contingency: If a reviewing court concludes that the Siting Council improperly granted the Cross Sound permit for any reason, the approval could be reversed or vacated. *See* Conn. Gen. Stat. § 4-183(k). If Cross Sound elects to proceed with construction of the project “before it can be certain of the outcome of the case, it must be prepared to accept the risk of an unfavorable outcome. Any loss or other hardship it may suffer will be the result of its own business judgment if [the appellants] should prevail.” *Connecticut Resources Recovery Auth. v. Keeney*, 1993 WL 229749 (Conn. Super. 1993)(Shea, J.); *see also Waste Management*, 234 Conn. at 258 (capital investment “does not transform speculation into a property interest.”). Under such circumstances, Cross Sound’s rights in the certificate granted by the Siting Council are not sufficiently final and definitive to be deemed vested and therefore the imposition of the moratorium cannot constitute a taking. Such a nonfinal and indefinite interest does not constitute a clear and legitimate claim of entitlement sufficient to invoke constitutional protection. *See Board of Regents of State College v. Roth*, 408 U.S. 564, 577 (1972); *DLC Management Corp. v. Town of Hyde Park*, 163 F.3d 124, 130-31 (2d Cir. 1998); *RRI Realty v. Incorporated Village of Southampton*, 870 F.2d 911, 915 (2d Cir. 1989), *cert. denied*, 493 U.S. 893 (1989).

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*Management Corp.*, 163 F.3d at 130-31; *Town of Orangetown v. Magee*, 88 N.Y.2d 41, 643 N.Y.S.2d 21, 665 N.E.2d 1061 (1996); *Greenspring Racquet Club, Inc. v. Baltimore County*, 70 F. Supp. 2d 598, 602 n.6 (D. Md. 1999). Thus, in the absence of evidence that the Cross-Sound project is substantially under construction, there is no vested right in the Siting Council approval.

Although our understanding is that some preliminary work has begun on the Cross Sound project, such preliminary work can hardly be described as falling within the category of “substantial construction” for a project of this size and scope. According to documents submitted to the Siting Council, the construction process will be lengthy, and the work conducted to date is but a minimal fraction of what will be required. Because the project is not yet substantially under construction, any rights under the Siting Council permit have not vested.

An exception to the general rule that a permit alone does not create vested rights has been recognized where the primary purpose of the change in law is to preclude the proposed development rather than to engage in a legitimate exercise of the police power for the promotion of the general welfare. *Marmah*, 176 Conn. at 121-23. Clearly, the moratorium on electric and gas transmission facilities that cross Long Island Sound is an important and legitimate legislative enactment to protect health and environmental needs as well as consumer interests, and to promote the general welfare. Its aim is to preserve and enhance the natural resources of the State and develop an appropriate and effective plan for the siting of such facilities. Although the moratorium affects the Cross-Sound proposal, its purpose is not simply to preclude that proposal, but rather to undertake a comprehensive review of all transmission facilities proposals in light of changing needs and the regulatory framework. Under these circumstances, Cross-Sound does not have a vested property right that could be unconstitutionally impaired by the proposed legislative moratorium.<sup>4/</sup>

I trust this answers your inquiry.

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<sup>4/</sup> In light of my conclusion that House Bill No. 5346, if adopted, would pass constitutional muster, the question of damages is moot for the moment. Indeed, the amount of damages cannot be accurately or reliably assessed without a clearly developed factual record. Clearly, the company's threats-- the apparent source of some public statements-- seem to be vastly exaggerated and incredible.

*Management Corp.*, 163 F.3d at 130-31; *Town of Orangetown v. Magee*, 88 N.Y.2d 41, 643 N.Y.S.2d 21, 665 N.E.2d 1061 (1996); *Greenspring Racquet Club, Inc. v. Baltimore County*, 70 F. Supp. 2d 598, 602 n.6 (D. Md. 1999). Thus, in the absence of evidence that the Cross-Sound project is substantially under construction, there is no vested right in the Siting Council approval.

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Very truly yours,

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