

John Wayne Fox
Town Attorney

Eugene F. McLaughlin, Jr.
Fernando F. de Arango
Valerie Maze Keeney
Aamina Ahmad
Abby R. Wadler



John K. Wetmore
Special Counsel

LAW DEPARTMENT

Town Hall • 101 Field Point Road • P.O. Box 2540 • Greenwich, CT 06836-2540
Tel: (203) 622-7876 Fax: (203) 622-3816

June 7, 2011

Ellen B. Simon, Assistant District Counsel
U.S. Army Corps of Engineers, New York District
26 Federal Plaza
Jacob K. Javits Federal Building
New York, NY 10278-0090

Re: Town of Greenwich Feasibility Study Agreement – Byram River

Dear Ellen:

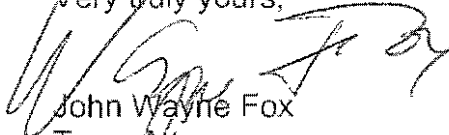
Thank you for your letter of May 31, 2011 which is informative, especially the excerpts from the Flood Control Act.

Please convey to your colleagues that the Town of Greenwich Department of Public Works appreciates the Corps' consideration of the Department's request to revise the Certification of Financial Capability consistent with Article XIII of the Agreement so that it no longer conflicts with the Town of Greenwich Charter. On behalf of the Department, I can assure you that the Commissioner of Public Works and the professional staff who have responsibility for contracting for and managing Army Corps projects understand the implications of Article XIII, as amended. I trust that confirming our understanding through this letter from me will ensure that the Feasibility Study Agreement may now move forward.

You and I also talked about future agreements between the Corps and the Department. Please confirm that the Corps will allow the Department to revise all certifications for future projects to include the language discussed in this letter exchange ("consistent with Article XIII of the Agreement").

Thank you and we look forward to reviewing the final version of the Feasibility Study Agreement.

Very truly yours,



John Wayne Fox
Town Attorney

JWF:sh
Encl.

An Affirmative Action/Equal Opportunity Employer, M/F/H



DEPARTMENT OF THE ARMY
NEW YORK DISTRICT, CORPS OF ENGINEERS
JACOB K. JAVITS FEDERAL BUILDING
NEW YORK, N.Y. 10278-0090

REPLY TO
ATTENTION OF
CENAN-OC

Town of Greenwich
John Wayne Fox, Esq.
Town Attorney
101 Field Point Road,
Greenwich, CT 06830

May 31, 2011

Dear Mr. Fox,

On behalf of your client, the Town of Greenwich, you have requested that the Corps consider adding to the Non-Federal Sponsor's Self Certification of Financial Capability (Self Certification) the phrase "consistent with Article XIII of the Agreement for the Study." The District will need to seek approval from our Headquarters for the addition of this phrase to the Self Certification.

The Corps wants to ensure that the Town of Greenwich understands the effect of Article XIII of the Feasibility Cost Sharing Agreement. Therefore I have provided the attached information regarding pertinent legislation which I request that you review.

Article XIII is based on section 221(a) of the Flood Control Act of 1970, as amended (42 U.S.C. 1962d-5b). Section 221(a), in relevant part, provides:

"In any partnership agreement . . . entered into by a State, or a body politic of the State which derives its powers from the State constitution, or a governmental entity created by the State legislature, the agreement may reflect that it does not obligate future appropriations for such performance and payment when obligating future appropriations would be inconsistent with constitutional or statutory limitation of the State or a political subdivision of the State."

Section 221(a) provides that the agreement may reflect that it does not obligate future appropriations for the non-Federal sponsor's performance and payment under the agreement. However, section 221(a) does NOT provide that a non-Federal's sponsor obligation under the agreement is contingent on the appropriations of funds. This latter approach was considered in the House version of the Water Resources Development Act of 1986 amendment to section 221(a), which provided that "In any such agreement entered into by a State, such State may make the furnishing of all or any portion of its required cooperation contingent upon the appropriation by the State of necessary funds for that purpose." See section 1167 of H.R. 6, 99th Cong., as passed by the House of Representatives. However, the Senate version did not make the obligation contingent on appropriations but rather provided simply that "the agreement may reflect that it does not obligate future legislative appropriations." As explained by the Senate Committee on Environment and Public Works [S. Rep. No. 126, 99th Cong., 1st Sess. 16 (1985)]:

"In the future, where the State is the non-Federal sponsor of a Corps project, the State would be able to sign binding contracts with the Corps to pay the non-Federal share of project development without obligating in any way future State legislative appropriations.... [A] State . . . is permitted to enter into long-term, legally enforceable, and binding contracts to pay for its share of Corps water resources projects, without obligating future State legislative appropriations or other funds in a manner that would be inconsistent with the state's constitutional limitations."

In other words, although the agreement may reflect that it does not obligate future appropriations, the non-Federal sponsor is signing a "long-term, legally enforceable and binding contract to pay for its share of Corps water resources development projects." To recognize this legislative concept, the Corps has developed an optional Article XIII to the Feasibility Cost Sharing Agreement.

Article XIII provides:

ARTICLE XIII OBLIGATIONS OF FUTURE APPROPRIATIONS

A. Nothing herein shall constitute, nor be deemed to constitute, an obligation of future appropriations by the _____ of the _____ of _____, where creating such an obligation would be inconsistent with _____ of the _____ of _____.

"B. The Non- Federal Sponsor intends to fulfill its obligations under this Agreement. The Non-Federal Sponsor shall include in its budget request or otherwise propose appropriations of funds in amounts sufficient to fulfill these obligations for that year, or biennium, and shall use all reasonable and lawful means to secure those appropriations. The Non- Federal Sponsor reasonably believes that funds in amounts sufficient to fulfill these obligations lawfully can and will be appropriated and made available for this purpose. In the event funds are not appropriated in amounts sufficient to fulfill these obligations, the Non- Federal Sponsor shall use its best efforts to satisfy any requirements for payments or contributions of funds under this Agreement from any other source of funds legally available for this purpose. Further, if the Non-Federal Sponsor is unable to fulfill these obligations, the Government may exercise any legal rights it has to protect the Government's interests related to this Agreement.

The last two sentences in Article XIII reinforce that the Non-Federal sponsor's obligations are not contingent on appropriations. Specifically, Article XIII provides that in the event that there are not sufficient appropriations to fulfill its obligations, the Non-Federal sponsor agrees that it will use its best efforts to satisfy any requirements for payments from "any other sources of funds legally available for this purpose."

Further, this article provides that the "if the Non-Federal Sponsor is unable to fulfill these obligations, the Government may exercise any legal rights it has to protect the Government's interests related to this Agreement."

To ensure that there is a meeting of the minds, it is important that the Town of Greenwich clearly understands the effect of Article XIII. Thus, I am requesting that you please confirm that the Town of Greenwich correctly understands the effect of Article XIII.

Sincerely,

A handwritten signature in cursive script that reads "Ellen B. Simon". The signature is written in black ink and is positioned above the printed name and title.

Ellen B. Simon
Assistant District Counsel