

STATE OF CONNECTICUT
SITING COUNCIL

IN RE: T-MOBILE NORTHEAST, LLC : DOCKET #393
APPLICATION FOR CERTIFICATE FOR :
TELECOMMUNICATIONS FACILITY AT :
BUTTONBALL ROAD, OLD LYME : March 18, 2010

**BLACK HALL GOLF CLUB'S BRIEF IN REPLY TO T-MOBILE'S OBJECTION TO
BLACK HALL'S MOTION TO INTERVENE UNDER CONN.GEN.STAT §22-a19**

The Intervenor, the Black Hall Club, hereby objects to the motion to dismiss this intervention raised by T-Mobile on the grounds that it has raised environmental issues related to the impacts to a natural resource – impacts to scenic vistas in the coastal zone.

Since Black Hall clearly may participate in the proceedings as an Intervenor under the Council's procedures and the UAPA, Black Hall is baffled by just what right T-mobile seeks to protect by pressing its motion, unless it believes that it will deprive Black Hall of appellate reliance upon CEPA case law.

As will be argued below, T-Mobile has invited the Council to improperly deny a CEPA intervention which will serve no purpose but to create the kind of appellate issues it seems to want to avoid.

STANDARD OF LAW

The Council must be mindful of the statutory requirements which apply to interventions under CEPA. The bar is quite low for filing an intervention and thus §22a-19 applications should not be lightly rejected. Finley v. Town of Orange, 289 Conn. 12

(2008) (an application need only allege a colorable claim to survive a motion to dismiss) citing Windels v. Environmental Protection Commission, 284 Conn. 268 (2007).

An allegation of facts that the proposed activity at issue in the proceeding is likely to unreasonably impair the public trust in natural resources of the State is sufficient.

See, Cannata v. Dept. Of Environmental Protection, et al, 239 Conn. 124 (1996)(alleging harm to floodplain forest resources).

The Connecticut Appellate Court has noted that statutes "such as the EPA are remedial in nature and should be liberally construed to accomplish their purpose." Avalon Bay Communities, Inc. v. Zoning Commission of the Town of Stratford, 87 Conn.App.537 (2005); Keeney v. Fairfield Resources, Inc., 41 Conn.App. 120, 132-33, 674 A.2d1349 (1996). In Red Hill Coalition, Inc. V. Town Planning & Zoning Commission, 212 Conn. 7272, 734, 563 A.2d 1347 (1989) ("section 22a-19[a]makes intervention a matter of right once a verified pleading is filed complying with the statute, whether or not those allegations ultimately prove to be unfounded"); Polymer Resources, Ltd. v. Keeney, 32 Conn. App. 340, 348-49, 629 A.2d 447 (1993) ("*[Section] 22a-19[a] compels a trial court to permit intervention in an administrative proceeding or judicial review of such a proceeding by a party seeking to raise environmental issues upon the filing of a verified complaint. The statute is therefore not discretionary.*") See Also, Connecticut Fund for the Environment, Inc. v. Stamford, 192 Conn. 247, 248 n.2, 470 A.2d 1214 (1984).

In Mystic Marinelife Aquarium v. Gill, 175 Conn. 483, 490, 400 A.2d 726 (1978), the Supreme Court concluded that one who filed a verified pleading under § 22a-19 (a) became a party to an administrative proceeding upon doing so and had "statutory standing to appeal for the limited purpose of raising environmental issues." "It is clear that

one basic purpose of the act is to give persons standing to bring actions to protect the environment." Belford v. New Haven, 170 Conn. 46, 53-54, 364 A.2d 194 (1975).

In order to decide a motion to dismiss, an evidentiary hearing may be required. "It is well established that in ruling upon whether a complaint survives a motion to dismiss, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader." (Internal quotation marks omitted.) Lawrence Brunoli, Inc. v. Branford, 247 Conn.407,410-11, 722 A.2d 271 (1999).

"When issues of fact are necessary to the determination of a court's jurisdiction, due process requires that a trial-like hearing be held, in which an opportunity is provided to present evidence and to cross-examine adverse witnesses." Unisys Corp. v. Department of Labor, 220 Conn. 689, 695-96, 600 A.2d 1019 (1991).

"A motion to dismiss may . . . raise issues of fact and would, therefore, require a . . . hearing [to determine the facts] . . . Affidavits are insufficient to determine the facts unless, like the summary judgment, they disclose that no genuine issue as to a material fact exists . . . When issues of fact are disputed, due process requires that an evidentiary hearing be held with the opportunity to present evidence and to cross-examine adverse witnesses . . . Moreover, a court cannot make a critical factual finding based on memoranda and documents submitted by the parties." Coughlin v. Waterbury, 61 Conn. App. 310, 315-16, 763 A.2d 1058(2001).

DISCUSSION OF FACT AND LAW

Plaintiff's argues that the intervention petition does not allege any harm to a natural

resource. This is simply untrue. Scenic vistas are specifically recognized as natural resources protected under the statutory scheme of the Coastal Area Management Act §22a-91(5) (referencing aesthetic resources), §22a-91(15)(F) (“degrading visual quality through significant alteration of the natural features of vistas and viewpoints”), and the enabling legislation for the Connecticut Siting Council, §16-50g and 16-50p(3)(B) which state:

Sec. 16-50g. Legislative finding and purpose.

The legislature finds that ...telecommunication towers have had a significant impact on the environment and ecology of the state of Connecticut; and that continued operation and development of such power plants, lines and 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*. The purposes of this chapter are: *To provide for the balancing of the need for adequate and reliable public utility services ... with the need to protect the environment and ecology of the state and to minimize damage to scenic, historic, and recreational values;*

Sec 16-50p(3) (b) - The council shall not grant a certificate, either as proposed or as modified by the council, unless it shall find and determine... The nature of the probable environmental impact of the facility alone and cumulatively with other existing facilities, including a specification of every significant adverse effect, including, ... on... the natural environment, ecological balance, ... *scenic*, historic and recreational values, forests and parks...

CEPA section 22a-19 provides for an intervention to raise issues regarding “conduct which has, or which is reasonably likely to have, the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state”. Conn. Gen. Stat. § 22a-19.

As a recreational facility, Black Hall Club, falls within the ambit of the Council's own protective jurisdiction and as an organization which utilizes the benefits of the coastal area scenic vistas, Black Hall is well situated to raise issues of protection of

the scenic vistas both on and off its property.

The Intervention application clearly meets the minimum standard set forth in the Nizzardo case; that an application not merely track the language of the statute, but that it state specific facts upon which it relies to establish the type of harm and the nature of the natural resource being protected.

The Application states that Black Hall intends:

to show that the proposed activity for which Applicant seeks a certificate is likely to unreasonably harm the public trust in the air, water or other natural resources of the State of Connecticut in that, if granted, the proposed facility will, inter alia, unreasonably impair the visual quality of the environment in and about Buttonball Road; and is reasonably likely to cause viewshed deterioration.

This is a specific identification of the natural resource, the viewshed in and about Buttonball Road. The Application further specifies that the height of the proposed tower is excessive, something which was proved at the initial hearing at which it was established that the requested height could be reduced from 97 to 87 feet and still provide equivalent coverage. Thus, the application establishes that due to excessive height, the tower is reasonably likely to cause viewshed deterioration.

It is not elaborate, but it is sufficient.

PREJUDICE

The Council requested that Intervenor address any prejudice caused by the lack of timeliness of T-Mobile's motion to dismiss Black Hall's intervention. The prejudice suggested by the undersigned was that Intervenor was unprepared to orally argue a motion to dismiss on the spot with no prior warning. The Council's decision to allow Black Hall to participate in the proceedings pursuant to the Council's procedures for

intervening parties has avoided any prejudice regarding participation.

The Council's decision to allow Intervenor to brief its objection to the Motion to Dismiss has avoided the prejudice occasioned by the lack of notice of the motion.

Black Hall asserts that regardless of the Council's decision to allow Black Hall to participate under the Council's procedures for intervention, it is still entitled to participate as a §22a-19 intervenor which allows for a right of appeal under that statute.

Committee to Save Guilford Shoreline, Inc. v. Guilford Planning & Zoning Commission, 48 Conn.Sup. 594, 853 A.2d 654(2004) once any entity has filed for intervention in an administrative proceeding, it has established the right to appeal from that decision independent of any other party. Mystic Marinelife Aquarium v. Gill, 175 Conn. 483 (1978) stated quite clearly that "one who files a §22a-19 application becomes a party with statutory standing to appeal." Branhaven Plaza, LLC v Inland Wetlands Commission of the Town of Branford, 251 Conn. 269, 276, n.9 (1999) held that a party who intervenes in a municipal land use proceeding pursuant to §22a-19 has standing to appeal the administrative agency's decision to the Superior Court. The Court cited as support for this proposition, Red Hill Coalition, Inc. v. Conservation Commission, 212 Conn. 710, 715, 563 A.2d 1339 (1989)("because the [appellants] filed a notice of intervention at the commission hearing in accordance with §22a-19(a), it doubtless had statutory standing to appeal from the commission's decision for that limited purpose.")

In Keiser v. Zoning Commission, 62 Conn. App. 600, 603-604 (2001) our Appellate Court stated that the Branhaven Plaza case is directly on point and held "the plaintiff in the present case properly filed a notice of intervention at the zoning commission hearing in accordance with §22a-19(a). Accordingly, we conclude that he has standing to appeal

environmental issues related to the zoning commission's decision.”

In conclusion, Black Hall recognizes that it has a right of appeal under the UAPA §4-183 and under the Siting Council's enabling legislation, however, Black Hall is attempting to preserve its rights of appeal specifically under §22a-19 and to be able to utilize the case law available to it under that statute. While the undersigned is aware of no caselaw on this point, Black Hall believes that regardless of the Council's decision it would have an appeal available to it and that the denial of the 22a-19 intervention itself would be appealable. See, CT Post Limited Partnership v. New Haven City Planning Commission, 2000 WL 1161131 Conn. Super. (Hodgson, J. 2000)(§22a-19 intervenors may file an original appeal for improper denial of intervenor status).

Wherefore, the motion to dismiss should be denied and the intervention under CEPA should be allowed.

Respectfully Submitted,

Black Hall Golf Club

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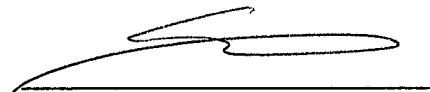
CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing was deposited in the United States mail, first-class, postage pre-paid this 18th day of March, 2010 and addressed to all parties and intervenors on the attached service list and as noted below.

Mr. S. Derek Phelps, Executive Director, Connecticut Siting Council, 10 Franklin Square, New Britain, CT 06051 (1 orig, 15 copies, plus 1 electronic).

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