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Raised Bill 343
Public Hearing 3-9-12

TO: MEMBERS OF THE PLANNING AND DEVELOPMENT COMMITTEE
FROM: CONNECTICUT TRIAL LAWYERS ASSOCIATION
DATE: MARCH 9, 2012

RE: OPPOSITION OF RAISED BILL 343
AAC INTERVENTION IN PERMIT PROCEEDINGS PURSUANT TO THE
ENVIRONMENTAL PROTECTION ACT OF 1971

My name is Keith R. Ainsworth, Esq. I am a resident of 31 Green Springs Drive, Madison, Connecticut and a partner at Evans, Feldman & Ainsworth, LLC of New Haven. I have been in private practice for 21 years and I have been a member of the Executive Committee of the Environmental Law section of the CT Bar Association since 1994. I represent a mixed clientele, but often represent individuals and businesses and organizations asserting claims to protect and conserve natural resources and I frequently lecture to CT law school classes on the Connecticut Environmental Protection Act. I am testifying in my capacity as member of the Connecticut Trial Lawyers Association knowledgeable in environmental law and I do not represent any interested party on a paid basis. I often review legislation which supports a healthy environment which benefits all Connecticut citizens.

CTLA OPPOSES the bill now before your Committee which purports to encourage responsible interventions but which in reality attempts to tear the heart from a statute which has allowed CT citizens to advocate for natural resources when developments have been proposed threatened to irresponsibly (intentionally and unintentionally) over-utilize or impair natural resources. Simply stated, this bill will severely inhibit public participation in environmental permitting and legal actions affecting Connecticut's environment.

This bill is being promoted by a coalition of shopping malls, builders and other developers who see their own members as unfairly utilizing a statute to compete with each other. The CT Post Road mall case and the West Hartford Blue Back Square mall case are two prime examples of abuses of the court system by the business community. What this coalition cannot do is point to cases where environmental organizations have abused CEPA. There is not a single reported case of a vexatious lawsuit claim being brought to address a frivolous intervention. There is already a statute – Conn. Gen. Stat. §52-568 – which allows a person to make a claim against someone who abuses the court system or legal process. That statute allows for recovery of treble damages and attorneys' fees. Further, the tort of abuse of process may be coupled powerfully with CUTPA, the CT Unfair Trade Practices Act, to deter unfair methods of business competition¹.

The bill has a particularly venomous and sinister chilling effect by requiring a bond for damages which have not yet been caused. The only other litigation statute requiring a bond is the injunction statute CGS section 52-471 which is very different. That statute allows a party to seek affirmative action in the form of an injunction. This requirement is ONLY for temporary injunctions which have ex parte or abbreviated proceedings. CEPA interventions never have the ability to seek affirmative relief but only allow a person to raise environmental issues.

The bonding provision tells an intervenor that they may be liable for damages even though they will not have caused any, and after having had to identify all their supporters, their funding sources may be afraid to

¹ This was accomplished with some success after the Blue Back Square debacle.

participate for fear of a frivolous SLAPP suit. This creates a chilling effect on public participation in environmental matters before administrative agencies and the courts. It is a myth that environmental intervenors raise baseless claims. Unlike developers, they gain no money from their efforts. Most environmental intervenors do not have the money or financial incentives of applicants and are taking time from other productive careers to help the public interest.

The bill before you attempts to undermine a law which is remedial in nature² and which is designed to give all citizens a voice in protecting natural resources which have no voice, but which provide the high quality of life that makes Connecticut an attractive place to live and to conduct business.

It is also a myth that the reason for CEPA no longer exists. While many laws were passed in the early 1970's when CEPA was created, over time these laws have become amended with loopholes and weakened by exemptions for special interests.

In support of this testimony, I offer the following regarding the requirements for intervention:

1. That the reasons for the intervention be stated with specificity. This requirement already exists as a concept in CT case law. *Nizzardo v. Traffic Commission*, 259 Conn. 131 (2002) already requires that an intervenor not simply track the language of 22a-19 but state with specificity the grounds for the intervention. This requirement is therefore unnecessary.
2. That the identity of all persons involved in the intervention and the names of all persons funding the intervention be identified. First, this provision is one-sided. No permit process or court proceeding requires that an applicant, developer or litigant disclose "all persons involved in the pleadings" and their funding sources. Second, our courts and the legislature both have found that CEPA's purpose is so important that the identity and intent of the person is of no consequence, so long as the environmental concern being raised is legitimate.³ Further, this provision seems only directed at intimidating citizens who desire to support an intervention by indicating that they will be marked for retaliation. If a truly abusive citizen intervention is filed, the person or entity verifying the intervention can be held accountable under 52-568.
3. 30 Day deadline to file an intervention pleading. Many intervenors are unaware of the filing of an agency appeal or court action within 30 days since the date for the filing of an appearance is 30 days following the return day. This arbitrarily short deadline is meant to decrease the opportunity to intervene and serves no other purpose. A late filed intervention under DEEP administrative rules, the CT Siting Council rules and in most court actions are given increasingly limited consideration depending on how far into the process they are filed. This proposed limitation is unnecessary and unfairly limits agency and court discretion to handle an intervention which may raise important public issues.
4. Evidence of the environmental harm must be presented within 30 days. This provision is particularly pernicious. Intervenors often provide an advocacy role during the intervention, responding to an applicant's modifications and information provided during the hearing. By making an intervenor present

² 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).

³ See footnote 2. 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". Ironically, this case was cited in the CT Post Road mall case in which one mall owner tried to stop another mall using an intervention.

its case in the first 30 days denies the intervenor the opportunity for discovery and forces an intervenor to spend money it may not have analyzing an application before all the information has been presented. In addition, it creates a second class litigant/participant standard with a duplicative mini-hearing on the intervention which allows the developer to hold its cards close to its vest, waiting until the intervenor is gone to provide full technical details on its actions.

5. A Surety Bond must be put up for future damages before any intervention may be had. First, no proponent of this bill can cite to an instance where such damages were proven in court by an environmental intervention, except in the Blue Back Square matter in which one business unfairly abused the statute and was held accountable in court for that frivolous use of CEPA. The bonding requirement would not have changed anything in that matter.

This section is pernicious in that it unfairly would discourage low income or financially limited intervenors as the bonding requirement (which itself is vague as to amount) would be out of many ordinary citizen's reach. In the only stated example of the proponents of this bill- abuse of CEPA by competitors – the bonding requirement would do nothing to deter another wealthy developer from abusing the statute (see Blue Back Square example above).

This provision is meant to create fear such that interventions will not be filed at all. If a citizen knows that an applicant can press a judge to tax them with tens of thousands of dollars in costs, legitimate citizen interventions will not be filed while business competitors who are seeking to abuse the process (e.g.: Blue Back Square) would not be deterred by the cost of harassing a competitor. The vexatious lawsuit statute and abuse of process statutes already exist to address abusive legal filings. This provision removes the burden of pleading and proving such claims and reduces the right to discovery and defense to such a potentially damaging claim and in conjunction with provision #7, denies a citizen the right of due process provided by the right of appeal. This provision is a serious violation of the principles of fairness and due process of law.

It is significant that applicants are not required to put up a bond for filing frivolously damaging proposals which require many public and private resources to oppose. The bill is one-sided in a way that suggests developers are above reproach and all intervenors are suspect.

6. Intervenors have no right of appeal from an unfair denial of the intervention. The proponents of this provision provide no reason for this restriction. The provision allows an agency the unfettered discretion to deny an intervention without reason leaving an intervenor no right of redress to the courts. Again, coupled with restriction #7, this provision leaves legitimate intervenors at the mercy of an agency without due process and without the right of review. It is telling that no similar restriction is placed upon an unsuccessful applicant. There can be no justification for this request to deny the fundamental right of due process and legal review to intervenors. It appears to be raw in its expedient and punitive nature.

CTLA RESPECTFULLY URGES THIS COMMITTEE TO DEFEAT RAISE BILL 343

