29

Testimony Before the Planning and Development Committee

Submitted by:
Roger Reynolds, Senior Attorney, CT Fund for the Environment
Terry Backer, Soundkeeper
Russell Brenneman, Attorney at Law
Marjorie Shansky, Attorney at Law
Paulann Sheets, Attorney at Law
Peter B. Cooper, Attorney at Law
Kurt Strasser, Attorney at Law
Elizabeth Gilson, Attorney at Law
Denise Savageau, Conservation Director, Town of Greenwich
The Ridgefield Conservation Commission, Kitsey Snow, Chair
The Ridgefield Garden Club, Kitsey Snow, Conservation Chair
Richard Sherman, Architect and Designer

March 9, 2012

Regarding:

S. B. No. 343: AN ACT CONCERNING INTERVENTION IN PERMIT PROCEEDINGS PURSUANT TO THE ENVIRONMENTAL PROTECTION ACT OF 1971.

Senator Cassano, Representative Gentile and Members of the Committee,

The attorneys, professionals and organizations above respectfully oppose S.B. 343. The proposed amendments specifically and unduly target environmental intervenors and threaten to undermine and weaken one of Connecticut's key environmental protection laws.

The proposed bill would roll back provisions of Section 22a-19 of the General Statutes ("Section 22a-19"), the part of the Connecticut Environmental Protection Act (CEPA) that gives citizens the standing to challenge administrative actions that would unreasonably pollute, impair or destroy Connecticut's land, air or water. It is this citizen suit provision that, along with the Clean Water Act and Clean Air Act, has been responsible for the great progress on environmental issues we have seen in the last 40 years.

The fact that we are in difficult economic times should not be used as an opportunity to roll back our most basic environmental protections and rights of public participation. In the long term, clean water, nearby open space and clean air enhance property values, add to quality of life and protect our health. More importantly, CEPA and our environmental laws work to preserve and protect these finite and precious resources for us, our children and future generations. While we have supported legitimate streamlining measures that do not seek to weaken environmental standards or cut back rights of public participation, this measure would do both and should be rejected.

There are few if any documented abuses of this statute by environmental intervenors. The coalition of developers and retailers that support this bill have put forth as their primary purpose to defend developers against bad-faith, illegitimate intervenors such as economic competitors who use CEPA as a backdoor means of delaying or preventing development.

However, Connecticut law already provides effective means for pursuing bad-faith intervenors. Section 52-568 of the Connecticut General Statutes bars bringing civil action without probable cause, particularly when done simply to disrupt the other side, and awards double or even treble damages as punishment.[1] This law works; it has been used successfully in the past to target intervenors who misuse the legal system to kill development.[2] When Westfarms Mall sought to inhibit the development of competitor Blue Back Square by funding and supporting citizen groups, a superior court allowed the vexatious litigation, Connecticut Unfair Trade Practice Act ("CUTPA"), and abuse of process charges to proceed against the Mall. The case eventually settled for over $30,000,000. The proposed amendments would not improve upon the existing and effective regime for deterring unfair business competition. They would merely dissuade those with sincere environmental concerns from stepping forward.

Most environmental intervenors are non-professional concerned citizens and non-profit organizations who will be easily intimidated by the prospect of paying the attorneys' fees of large developers if they are unsuccessful. Developers have not hesitated to file harassment suits to intimidate legitimate environmental organizations and citizens in the past and this will only accelerate that abusive process. This plainly frustrates the remedial nature of the statute.

Unsupported claims that there is rampant abuse of Section 22a-19 for non-environmental purposes have not held up to scrutiny. Indeed, in a recent report required by the Public Act 10-158, the Department of Environmental Protection was asked to examine the impact of Section 22a-19 suits on the permitting process. The conclusion of the final Permitting Assessment Report was that CEPA intervention in the permitting process was actually very "rare" and only occurred in two out of every 1,000 permits. The report also noted the essential role that CEPA played in providing members of the public with an opportunity to have input on environmental decisions.[3]

Below are comments on specific requirements:

- **Requiring pleading to "demonstrate" rather than "assert"** - This changes the purpose of a pleading which is to state a claim. Demonstrating the claim is a burden reserved for an actual hearing.
- **That the pleading state with specificity the nature of the alleged pollution** – Stating an environmental claim with specificity is already required under current law. *See, Nizzardo v. State Traffic Comm'n,* 259 Conn. 131 (Conn. 2002). This amendment, therefore, is unnecessary.

---

[1] "Any person who commences and prosecutes any civil action or complaint against another . . . (1) without probable cause, shall pay such other person double damages, or (2) without probable cause, and with a malicious intent unjustly to vex and trouble such other person, shall pay him treble damages." Conn. Gen. Stat. § 52-568 (2011).

[2] *Raymond Rd. Associates, LLC v. Taubman Centers, Inc.*, No. X02UWYCV075007877S, 2009 WL 939848 (Conn. Super. Ct. Mar. 5, 2009).

[3] *See,* http://www.ct.gov/dep/lib/dep/permits_and_licenses/assessment/permit_assessment_report.pdf

- **That all persons involved and funding the intervention be identified** –This goes well beyond any pleading requirements that are known to us and would allow defendants to harass non-profits and citizens groups seeking to assert their rights. Disclosing member and funder rolls would infringe on the free speech rights of members of organizations, subjecting them to retaliation and harassment for their personal affiliations. To the extent that disclosure of funders is required it should be applied equally to all litigants, and those with environmental claims should not be singled out based upon the content of their claims. Finally, there has been little difficulty in discerning when competitors are behind challenges and, as set forth above, when such challenges have been baseless, large penalties have been awarded.
- **30 Day deadline and mini-hearing requirement** – The bill sets up a temporary-injunction-style mini-hearing that any intervenor would have to go through during any intervention. Such hearing is unnecessary and a waste of resources as the regular hearing will have to proceed regardless of the result of the mini-hearing. Moreover, the applicant has the burden of proof in a land use proceeding. A claim under Section 22a-19 can be based upon the failure of the applicant to meet that burden or the failure of the agency to have substantial evidence to support its decision. *See, Finley v. Inland Wetlands Comm'n*, 289 Conn. 12, 40-41 (Conn. 2008). Thus, in most instances an agency will not be able to fully rule upon an intervenor's Section 22a-19 claim until after it has heard the applicant's evidence.
- **Attorneys' fees for vexatious litigation** – As discussed above, double or treble damages are already available to parties subjected to bad faith litigation under pursuant to Conn. Gen. Stat. §52-568. To the extent that damages are not available under that statute, they should not otherwise be available. There should not be inconsistent or more stringent requirements enforced against intervenors based upon the environmental subject nature of their intervention. To the extent that the unfair competition laws are not sufficiently strong to deter anti-competitive conduct (although the Blue Back Square case mentioned above shows they are quite strong if the suit is truly baseless), they should be strengthened. This provision would subject legitimate environmental intervenors to harassment and would do nothing do address the real issue of unfair competition.
- **Limitation of appeal rights** – These provisions are inconsistent with bedrock principles of our legal system and basic notions of justice and fair play. Cutting off rights in this instance is unnecessary and improper. Moreover, limiting rights of appeal against only environmental intervenors but not against applicants unfairly tips the scales in an applicant's advantage. There is no legitimate public policy reason to have one set of standards for environmental intervenors and a separate, more lenient one, for applicants. If frivolous appeals are to be discouraged, frivolous appeals of applicants should be as well.

(The above testimony was prepared with the assistance of Chelsea Krombel and James Ringold from the University of Connecticut Environmental Law Clinic)