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COMMITTEE ON PLANNING AND DEVELOPMENT
HEARING MARCH 9, 2012 - RAISED BILL 343

STATEMENT OF ATTORNEY HAROLD R. CUMMINGS

My name is Harold R. Cummings. I am a partner in the law firm of Cummings, Lanza and Purnhagen, LLC, South Windsor, Connecticut. I have been actively practicing law in the State of Connecticut for over 40 years with an emphasis in real estate and land use law.

I am very familiar with the provisions of CGS § 22a-19 and more importantly, how that law has been implemented. In my practice I have prepared and filed petitions in land use proceedings on behalf of intervenors. I have also, on numerous occasions, represented land owners, developers and, for the last eight years, the Town of Vernon in applications before inland wetlands and planning and zoning commissions in which intervenors have filed petitions in opposition to applications.

I have no issue with, or objection to, the intent of CGS § 22a-19 which is clearly to provide a mechanism to protect the public trust in the environment. My concern with the statute, as written, is that in my experience I have often seen the law used, not as a shield to protect the environment, but rather as a sword by persons who are opposed to a particular development. Opponents routinely use that law to delay, stall or frustrate a development proposal to the point where the applicant gives up and abandons an otherwise worthwhile project.

The problem is not with the intent of the law, but rather with the process by which the statute has been implemented. I am in favor of proposed Raised Bill No. 343 to reform CGS 22a-19.

CGS 22a-19 provides, in part: ". . . may intervene as a **party** on the filing of a **verified pleading** asserting that the proceeding or action for judicial review involves 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". [emphasis added]

The problem with the statute as written is that all it takes for an intervenor to be granted party status in a proceeding is to file a statement under oath that that person believes that the proposed project will unreasonably pollute or impair the public trust in the environment.

The intervenor does not have to furnish any proof or evidence at that time.

Under Connecticut case law, upon the filing of an intervention petition, the intervenor is a party.¹

"The intervenor has the burden of proving the allegations in the petition."²

"To sustain in that burden of proof, expert evidence must be presented by the intervenor."

"Pollution control is a technically sophisticated and complex subject."³ "A lay commission acts without substantial evidence and arbitrarily, when it relies on its own knowledge and experience concerning technically complex issues . . . "⁴ "Evidence of general environmental impacts, mere speculation or general concerns do not qualify as substantial evidence."⁵

In land use appeals, zoning and wetlands laws speak of "settlement between the parties".⁶ The phrase "settlement between the parties", has been interpreted to require **all parties** to consent to the settlement, **including an intervenor**.⁷

Therefore, while current case law requires that an intervenor's allegations in its petition be supported by substantial evidence supported by expert opinion, there is no practical way to

test the validity of the intervenor's allegations in a petition filed before a land use agency short of a full Superior Court trial.

Unlike other areas of civil court proceedings which allow for a preliminary hearing to test the allegations in a complaint (such as a pre-judgment remedy hearing before placing a lien on property, or a probable cause hearing in a criminal case, or a Motion for Summary Judgment), there is no such equivalent procedure under CGS 22a-19 which allows for a review by a court of the sufficiency of the intervenor's evidence prior to trial.

If an administrative agency approves an application, the intervenor, as a party, may take an appeal. Since a case cannot be settled prior to trial without the consent of all parties, therefore, the intervenor simply has to refuse to agree to any potential settlement of the case to force a case to trial. Following the trial, even if the Superior Court trial judge determines that the intervenor's evidence does not meet the legal standard, the intervenor is still free to appeal that decision to the Appellate Court and, following the Appellate Court's decision, to petition for certification to the Supreme Court. Since such court appeals can take up to (and often exceed) two years to process, the end result is that projects which have been approved by the local land use agency never get built because the developer/property owner simply cannot afford the cost and delay associated with such appeals.

A case which clearly illustrates the procedural problems with CGS 22a-19 is illustrated by the saga of Diamond 67, LLC's application before Town of Vernon agencies for an approval of a "big box" Home Depot building on land that it owns at Exit 67 on I84.

As attorney for the Town of Vernon, I first opened my file on the project in February 2003, when Diamond, LLC applied to the Town of Vernon for inland wetlands approval and for planning and zoning special permit approval.

Based upon a petition filed by intervenors, and the evidence submitted by those intervenors, the Vernon Inland Wetlands Commission initially denied the Wetlands permit and the developers appealed to the Superior Court which sustained the developer's appeal and remanded the application back to the Inland Wetlands Commission for further proceedings. After further review, the Vernon Inland Wetlands Commission again denied the Wetlands permit and upon further appeal, the trial court again sustained the developer's appeal and ordered that the Inland Wetlands Commission issue the Wetlands permit.⁸

What is not revealed in the court record, however, is what went on "behind the scenes" to try to resolve the issues raised by the intervenors in their petition. In order to conserve judicial resources and hopefully resolve cases prior to trial, parties are required to participate in pre-trial settlement conferences. Prior to the trial before Judge Klaczak in 2007, the developer and representatives of the Town of Vernon Inland Wetlands Commission made substantial progress in resolving the issues which concerned the Inland Wetlands Commission. The intervenors however refused to agree to any settlement proposal and demanded that a trial be held. The end result was that, after trial, Judge Klaczak found that the testimony of the intervenors' experts did not meet the legal standard and therefore, the judge sustained the developer's appeal and ordered the Inland Wetlands Commission to issue the necessary permits. As a result of that order, the developer now had a Wetlands permit for a more intensive development of the property without

the concessions and environmental safeguards that had been agreed to during settlement negotiations.

The property owner/developer still had to receive special permit approval from the Planning and Zoning Commission (the applicant's proposed development was a permitted use within the zone as a special permit).

A new intervention petition however was filed by different persons in the proceedings before the Planning and Zoning Commission.

The new intervenors filed that petition (and several more petitions thereafter) without any new evidence, additional evidence, or in fact, without any legally sufficient evidence whatsoever, to support their allegations.

In the first Appellate Court appeal filed by the new set of intervenors, claiming that they were unfairly denied an opportunity to have a hearing on their petition, the Appellate Court remanded the case back to the Tolland County Superior Court to afford the intervenors an opportunity to have a hearing and present evidence.⁹

Subsequently, on October 21, 2009, Tolland Superior Court Judge Klaczak held that hearing. The intervenors appeared by their attorney but offered no evidence. Judge Klaczak therefore denied the intervenors' petition. The intervenors again appealed to the Appellate Court. The Appellate Court upheld Judge Klaczak's decision denying the intervenors' petition.¹⁰ The intervenors then petitioned the Supreme Court for certification for review of the Appellate Court decision which petition was denied by the Supreme Court.

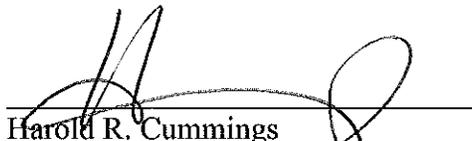
Based upon the Appellate Court's decision sustaining Judge Klaczak's denial of the intervenors' petition, the Tolland County Superior Court (Sferrazza, J) then dismissed another

appeal which had been filed by the intervenors as parties in a companion administrative appeal. The intervenors then took another appeal of Judge Sferrazza's judgment dismissing their petition to the Appellate Court. On January 24, 2012, the Appellate Court sustained Judge Sferrazza's decision dismissing the intervenors' appeal as moot.¹¹ As of this date, the intervenors have a petition pending for certification to the Supreme Court seeking review of the Appellate Court's decision sustaining Judge Sferrazza's decision.

As a result of the delays caused by the intervenors' meritless 2007 petitions, Home Depot withdrew from the project. The intervenors through their attorney have admitted, both off the record and during oral argument before the Appellate Court, that they never had any expert evidence to sustain their allegations. Notwithstanding the absence of any legally sufficient evidence, the intervenors, through the misuse of CGS 22a-19 have managed to forestall a project which was fully approved by the Town of Vernon Planning and Zoning Commission in 2007.

I first opened my file in February 2003. Nine years later, there is still a pending court proceeding. The Town of Vernon may have won the legal battles with regards to its approval of the development of a retail facility at Exit 67, however, it has clearly lost the war.

Respectfully submitted,


Harold R. Cummings
Commissioner of the Superior Court

FOOTNOTES:

1. Red Hill Coalition, Inc. v. Town Plan & Zoning Commission, 212 Conn. 727, 734 (1989). Mystic Marinelife Aquarium, Inc. v. Gill, 175 Conn. 483, 489, 499 (1978).
2. Nikitiuk v. Pishtey, 153 Conn. 545, 552 (1966). Zhang v. Omnipoint Communications Enterprises, Inc., 272 Conn. 627, 645 (2005)
3. Feinson v. Conservation Commission, 180 Conn. 421, 429 (1980).
4. River Bend Associates, Inc. v. Conservation & Inland Wetlands Commission, 269 Conn. 57, 80 (2004).
5. Connecticut Fund for the Environment, Inc. v. Stamford, 192 Conn. 247, 250 (1984). River Bend Associates, Inc. v. Conservation & Wetlands Commission, 269 Conn. 57, 71 (2004).
6. CGS § 8-8 (n) and CGS § 22a-43 (d).
7. Trost v. Conservation Commission, 242 Conn. 335 (1997); Ralto Developers, Inc. v. Environmental Impact Commission, 220 Conn. 54 (1991), Dietzel v. Planning Commission, 60 Conn. App. 153 (2000) [emphasis added].
8. Diamond 67, LLC v. Vernon Inland Wetlands Commission, Superior Court, Tolland J.D., d.n. CV06-4004144 (May 10, 2007).
9. Diamond 67, LLC v. Planning & Zoning Commission, 117 Conn. App. 72, 978 A.2d 122 (2009).
10. Diamond 67, LLC v. Planning and Zoning Commission of the Town of Vernon (AC 31913) Officially released April 5, 2011.
11. James D. Batchelder Et Al. v. Planning and Zoning Commission of the Town of Vernon (AC 32859) Officially released January 24, 2012.