Attorneys at Law

30 Main Street
Suite 204
Danbury, CT 06810

(203) 744-1234
Fax (203) 730-2500

14 Old Barn Road
Kent, CT 06757

46 West Street
Litchfield, CT 06759

51 Main Street
New Milford, CT 06776

38C Grove Street, 1st Floor
Ridgefield, CT 06877

6 Bee Brook Road
Washington Depot, CT 06794

Daniel E. Casagrande, Esq.
*Also Admitted in New York
dcasagrande@crameranderson.com

January 15, 2019

VIA FEDEX OVERNIGHT DELIVERY

RECEIVED
JAN 16 2019
CT DEPT OF ENERGY & ENVIRONMENTAL PROTECTION COMMISSIONER'S OFFICE

Commissioner Katie Dykes
Department of Environmental and Energy Protection
79 Elm Street
Hartford, CT 06106-5127

RE: Application No.: 201816062
Candlewood Solar, LLC – 20 MW Solar Photovoltaic Project
New Milford Assessor's Map Parcels 26/67.1, 9.6, and 34/31.1
Candlewood Mountain Road, New Milford, Connecticut--
Petition by Town of New Milford for Declaratory Ruling and for Party Status under C.G.S. Section 22a-19

Dear Commissioner Dykes:

Enclosed please find a petition by the Town of New Milford, Connecticut for declaratory ruling and for party status under C.G.S. § 22a-19.

Should you have any questions, please do not hesitate to contact me at (203) 744-1234, Ext. 156.

Very truly yours,

CRAMER & ANDERSON, LLP

By________________________
Daniel E. Casagrande, Esq., Partner

DEC/smc
Enclosures
cc: Town of New Milford
c/o Hon. Peter Bass, Mayor
CT DEEP Central Permit Processing Unit

Exhibit A

STATE OF CONNECTICUT

DEPARTMENT OF ENVIRONMENTAL AND ENERGY PROTECTION

IN THE MATTER OF:	:	**APPLICATION NO: 201816062**
	:	
Candlewood Solar, LLC	:	
20 MW Solar Photovoltaic Project	:	
New Milford Assessor's Map	:	
Parcels 26/67.1, 9.6, and 34/31.1	:	
Candlewood Mountain Road	:	
New Milford, Connecticut	:	
Petition by Town of New Milford for	:	
Declaratory Ruling and for	:	
Party Status under C.G.S. Section 22a-19	:	**JANUARY 15, 2019**

The Town of New Milford ("Town") submits this petition pursuant to C.G.S. §§ 4-176, 22a-430b(c), and 22a-19, and R.C.S.A. § 22a-3a-4. The petition seeks two forms of relief. The first request is for a declaratory ruling pursuant to C.G.S. §§ 4-176, 22a-430b(c) and R.C.S.A. § 22a-3a-4. The declaratory ruling request itself is in two parts. First, the Town requests a declaratory ruling that the above project ("Project") should not proceed under a request for authorization under the General Permit for the Discharge of Stormwater and Dewatering Wastewaters from Construction Activities ("General Permit"). Rather, because of the massive adverse environmental impact of the Project, including the proposed destruction of some 54 acres of core forestland on Candlewood Mountain and the resulting potential for substantial stormwater runoff and erosion during and after construction, the Commissioner should require the developer to apply for an individual permit pursuant to her authority under C.G.S. § 22a-430b(c), because an individual permit will better protect the waters of the state from pollution. The individual permit process will also afford the Town and other stakeholders a meaningful opportunity to review and comment on the developer's proposed stormwater management plan. (<u>See</u> Part I below.)

In the second part of the Town's petition for declaratory ruling, the Town requests that the period for comments by the Town and other interested persons in response to the pending application for registration under the General Permit and accompanying Stormwater Pollution Control Plan ("SWPCP") be extended to 90 days after either 1) the Commissioner rules on the Town's request for a declaratory ruling requiring an individual permit application, or in the alternative, 90 days from the current due date for comments of January 17, 2019. (See Part I below.)

This petition is also brought pursuant to C.G.S. § 22a-19. The Town believes that the proposed project will or may unreasonably destroy or impair the public trust in the natural resources of the state, and thus seeks to be made a party or intervenor to the above-requested declaratory ruling proceeding as well as to the pending application for authorization under the General Permit. (See Part II below.)

I. Petition for Declaratory Ruling.

A. Name and Address of Petitioner and Petitioner's Counsel.

Town of New Milford
c/o Hon. Peter Bass, Mayor
10 Main Street
New Milford, CT 06776
Phone: (860) 355-6010
Fax: (860) 355-6002
Email: Mayor@newmilford.org

Daniel E. Casagrande, Esq.
Cramer & Anderson, LLP
30 Main Street, Suite 204
Danbury, CT 06810
Phone: (203) 744-1234
Fax: (203) 730-2500
Email: dcasagrande@crameranderson.com

B. Facts and Circumstances Giving Rise to the Petition.

On or about January 2, 2019, Candlewood Solar, LLC ("Developer") submitted an application to DEEP for registration under the General Permit. The application was made available on-line on or about January 3, 2019. Accompanying the registration application is a Stormwater Pollution Control Plan ("SWPCP") prepared by Wood Environmental & Infrastructure Solutions, Inc. ("Wood"). The SWPCP was submitted to DEEP as required by the Connecticut Siting Council ("Siting Council") as a condition of its December 21, 2017 issuance of a declaratory ruling in which it approved the Project.

The Town intervened as a party to the Siting Council proceeding to raise numerous concerns about the Project. In addition, Rescue Candlewood Mountain ("RCM"), an association of individuals concerned about the massive destruction of core forest and other environmental impacts to be caused by the Project, intervened in the Siting Council proceeding pursuant to C.G.S. § 22a-19 to oppose the Project due to its significantly adverse effect on the natural resources of the state. RCM and certain other persons adversely affected by the Project timely filed an administrative appeal pursuant to C.G.S. § 4-183 from the Siting Council's approval (the "Appeal"). A copy of RCM's complaint in the Appeal is attached hereto as Exhibit A and incorporated by reference. Trial of the Appeal in the Superior Court for the Judicial District of Hartford/New Britain (Cohn, J.) commenced on December 4, 2018 and is ongoing as of the date of this petition. Also attached hereto as Exhibit B and incorporated by reference herein are RCM's pre-trial briefs (main and reply) in the Appeal. These briefs outline the significant adverse impacts on the natural resources of the state, including its waters and wetlands, that the Town believes the Project will create.

The Town has retained the firm of Milone & MacBroom to review the Developer's plans for the Project. Milone & MacBroom is a professional engineering, landscape architecture, and environmental science firm with offices in Cheshire, Connecticut. To date Milone & MacBroom has reviewed the conceptual plans submitted by the Developer to the Siting Council. Milone & MacBroom has also conducted an initial review of the SWPCP filed by the Developer on January 2, 2019. Based on these reviews, Milone & MacBroom members Edward Hart, P.E., and Ryan McEvoy, P.E., have prepared an affidavit which describes their numerous and significant concerns about the inadequacies in the SWPCP, and also explains why, in their professional judgment, DEEP's review of the SWPCP under the individual permit process will better protect the waters of the state. A copy of the affidavit ("Hart/McEvoy affidavit") is attached hereto as Exhibit C and incorporated herein by reference.

C. Statutes and Regulations at Issue.

C.G.S. §4-176 provides that "[a]ny person" may petition a state agency for a declaratory ruling as to, among other things, "the applicability to specified circumstances of a provision of the general statutes." R.C.S.A. § 22a-3a-4 sets forth the requirements for a petition for declaratory ruling to the Commissioner of DEEP. This petition seeks a determination that the review of the Project under the General Permit otherwise authorized by C.G.S. 22a-430b is inapplicable to and inappropriate for the highly unusual size and scope of the proposed environmental impacts, and that the Commissioner should therefore invoke her right to require an individual permit application under Section 22a-430b(c). Thus the petition properly requests a declaratory ruling under Section 4-176.

C.G.S. § 22a-430b(c) allows the Commissioner to require any person "initiating, creating, originating or maintaining any discharge which is or may be authorized by a general permit to obtain an individual permit pursuant to [C.G.S.] section 22a-430 if the Commissioner determines that an individual permit would better protect the waters of the state from pollution." (For ease of reference the Town attaches a copy of § 22a-430b as Exhibit D.) The statute sets forth a non-exclusive list of the circumstances in which the Commissioner may require an individual permit. One of the listed factors is in subdivision (5), which allows the Commissioner to require an individual permit "when circumstances have changed since the issuance of the general permit so that the discharge is no longer appropriately controlled under the general permit." For the reasons stated in the Hart/McEvoy affidavit, and as discussed further below, the Town submits that the General Permit review process is simply unsuited to review of a project as huge and potentially environmentally disruptive as this; thus the project warrants the Commissioner's decision to require an individual permit application under subdivision (5).

Section 22a-430b(c) also provides that "[a]ny interested person or municipality may petition the Commissioner to take action under this subsection." This provision provides independent authorization for this petition.

D. <u>Bases for Declaratory Ruling Request</u>.

As the Hart/McEvoy affidavit indicates, their initial review of the SWPCP and related plans --made available approximately two weeks ago-- are deficient in numerous respects, and "lack the necessary information to assure that there will not be erosion and sedimentation caused by the [Project's] construction activities that could impact the waters of the state." (Hart/McEvoy affidavit, ¶ 11) Moreover, "disturbing 83 acres of steep woodland is an unusual phenomenon in Connecticut, something that was probably not

contemplated when the SWGP general permit regulations were adopted." (Id.) In Hart's and McEvoy's professional judgment, it would be appropriate and prudent in these unusual circumstances for the Commissioner to determine that an individual permit application is necessary in order to allow for a more extensive review of the plans by the Town and other interested persons.

Accordingly, the Town respectfully submits that an individual permit application will better protect the waters of the state. Moreover, given the scale of environmental disruption to be caused by the Project, the more public review required in an individual permit application is warranted in the interest of fundamental fairness to the Town and other persons who may be adversely affected by the Project.

In any event, and for the same reasons, the Town requests a declaratory ruling to extend the time period for public comment on the Developer's application for registration under the General Permit until either 90 days after the Commissioner rules on whether to require an individual permit as requested above, or in the alternative, until April 2, 2019, which is 90 days from the date the application was filed with DEEP. Should the Commissioner deny both the request for declaratory ruling and the request to extend the comment period, the Town respectfully requests the Commissioner to consider the comments herein and in the Hart/McEvoy affidavit as the Town's comments on the application for General Permit authorization.

Pursuant to R.C.S.A. § 22a-3a-4(c)(4), the Town further requests the Commissioner to hold a hearing on the Town's petition for a declaratory ruling. In a project of this scale and with such critical potential adverse impacts to the waters of the state, a hearing is necessary and appropriate to allow interested persons sufficient

opportunity to participate in this process and to ensure the completeness and transparency of DEEP's review.

Accompanying this petition, as required by R.C.S.A. § 22a-3a-4(a)(3), is an affidavit by undersigned counsel for the Town that the Town has given notice of the substance of the petition, and of the opportunity to file comments and to request intervenor or party status under subdivision (c)(1) of R.C.S.A. § 22a-3a-4, to all persons known by the Town to have an interest in the subject matter of the petition.

II. Request for Party/Intervenor Status Under C.G.S. § 22a-19.

Pursuant to C.G.S. § 22a-19, any political subdivision may intervene as a party in a state administrative proceeding based on facts alleged in a verified pleading that the proposed activity at issue has, or is reasonably likely to have, the effect of unreasonably polluting, impairing, or destroying the public trust in the air, water, or natural resources of the state. The Town seeks party status under § 22a-19 in the proceedings on the declaratory ruling requested in Part I above. In the event that DEEP moves forward with the Developer's application for registration under the General Permit, the Town seeks Section 22a-19 party status in that proceeding. (The verification by Peter Bass, the Town's Mayor, of the facts alleged and referred to herein is appended to this petition.)

The Town has a direct interest in the proceedings because it has a duty to protect the public interests of its residents by preventing unreasonable impacts to the natural resources of the State located in New Milford. Specifically the Town seeks party status to protect the waters of the state which will or may be impacted by the Project.

The Town again incorporates by reference the Hart/McEvoy affidavit as well as the portions of its briefs in the Appeal dealing with the adverse effects of the Project pertaining to erosion and sedimentation from the construction and maintenance of the solar array,

as well as impacts to wetlands, vernal pools and associated critical terrestrial habitats of indicator species dependent on those habitats for survival. (Exhibit C)

As the Hart/McEvoy affidavit demonstrates, the SWPCP and related plans submitted to DEEP are wholly inadequate and do not provide assurance that the Project will not cause erosion and sedimentation. As the affidavit specifically details:

- The plans do not show the limits of clear cutting of the 54 acres of core forest to be destroyed, the grading plans do not show how the topography will be regraded after removal of the trees and stumps and before restoration and implementation of site improvements, the plans lack critical details relating to drainage structures customized for this Project, and the proposed solar panels are too close together to allow for adequate sunlight to promote vegetation, all in contravention of customary engineering practice. (Hart/McEvoy Affidavit, ¶¶ 7-8.4)

- The stormwater drainage analysis is "fundamentally flawed," for numerous reasons, including but not limited to these: 1) the plans are presented based on outdated and improper rainfall data, resulting in a 15-20 percent underestimation of projected rainfall; 2) no on-site soil testing has been performed to determine if surface sand filters are an acceptable stormwater practice; 3) vegetation under the panels will struggle to grow, thus undermining the plan's hydrologic assumptions; post-development peak discharge rates for parts of the site show an increase in runoff from pre-development conditions; 4) the fundamental nature of the discharge from the site will be altered resulting in long-term risk of erosion and sedimentation to downgradient properties; and 5) significant additional design defects and unsupported assumptions further undermine the basis of the SWPCP design. (Id., ¶¶ 9-9.18)

- The phasing plan for construction is "simplistic and does not adequately address the potential erosion and sedimentation that should be anticipated from the clearing of 83.4 acres on a steep hillside." (Id., ¶¶ 10-10.14)

The Town seeks § 22a-19 party status to introduce expert testimony and other evidence as outlined above regarding the inadequacy of the SWPCP in effectively controlling runoff, sediment and erosion from the Project site, thereby jeopardizing the on-site and off-site wetlands, vernal pools, and CTHs, as well as providing inadequate protection to downgradient properties.

The bar is quite low for filing an intervention petition, 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).

CEPA clearly and in broad terms indicates that any legal entity may intervene. This includes a municipality and officials. Avalon Bay Communities v. Zoning Commission, 87 Conn. App. 537 (2005).

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, 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 purposes." 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 (1996). In Red Hill Coalition, Inc. v. Town Planning & Zoning Commission, 212 Conn. 727, 734 (1989) the Supreme Court held that "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." See Polymer Resources, Ltd. v. Keeney, 32 Conn. App. 340 (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 (1984).

The rights conveyed by CEPA are so important and fundamental to matters of public trust that the denial of a 22a-19 intervention itself is 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).

The Town's application for party status should be granted so that it may participate by presenting evidence and otherwise meaningfully assist the Commissioner in reaching a decision which minimizes the impact to the natural resources of the state.

III. Conclusion.

For the foregoing reasons, the Town respectfully requests the Commissioner to issue a declaratory ruling as described in Part I above, and to grant the Town's request for party status under § 22a-19 as discussed in Part II above.

Dated: January 15, 2019
Danbury, Connecticut

TOWN OF NEW MILFORD

By: [signature]

Daniel E. Casagrande, Esq.
Attorney for Petitioner
Cramer & Anderson, LLP
30 Main Street, Suite 204
Danbury, CT 06810
Phone: (203) 744-1234
Fax: (203) 730-2500
dcasagrande@crameranderson.com

VERIFICATION

The undersigned, Peter Bass, duly authorized Mayor of the Town of New Milford, duly sworn, hereby verifies that the above petition is true and accurate to the best of his knowledge and belief.

Peter Bass

Subscribed and sworn to before me this 14th day of January, 2019.

Notary Public
My Commission Expires: 3/31/2022

LINDA D. HOLLINS
NOTARY PUBLIC OF CONNECTICUT
My Commission Expires 3/31/2022

AFFIDAVIT REGARDING NOTICE

Daniel E. Casagrande, being duly sworn, deposes and says:

1. I am over the age of eighteen and believe in the obligations of an oath.

2. I am counsel for the petitioner, Town of New Milford, and am fully familiar with the facts set forth herein.

3. On January 15, 2019, the petitioner, through undersigned counsel, gave notice of the substance of the petition, and of the opportunity to file comments and to request intervenor or party status under R.C.S.A. § 22a-3a-4 (c)(1), to all persons known by the petitioner to have an interest in the subject matter of the petition. Such notice was served, via first-class mail, upon the parties listed on the attached list.

Dated at Danbury, Connecticut, this 15th day of January, 2019.

Daniel E. Casagrande

Subscribed and sworn to before me this 15th day of January, 2019.

Sonia M. Christie
Notary Public
My Commission Expires: 12/31/2021

INTERESTED PARTIES

Candlewood Solar, LLC
111 Speen Street, Suite 410
Framingham, MA 01701

James J. Walker
Vice President
Ameresco, Inc.
111 Speen Street, Suite 410
Framingham, MA 01701

Joel S. Lindsay
Director
Ameresco, Inc.
111 Speen Street, Suite 410
Framingham, MA 01701

Paul R. Michaud, Esq.
Michaud Law Group, LLC
515 Centerpoint Drive, Suite 502
Middletown, CT 06457

Jason Bowsza
Connecticut Department of Agriculture
450 Columbus Blvd.
Hartford, CT 06103

Connecticut Siting Council
10 Franklin Square
New Britain, CT 06776

Rescue Candlewood Mountain
c/o Liba Furhman
P.O. Box 114
Gaylordsville, CT 06755

Carl R. Dunham, Jr.
195 Candlewood Mountain Road
New Milford, CT 06776

Lisa Ostrove
240 East 47th Street, Apt. 30EF
New York, NY 10017-2131

Michael Ostrove
240 East 47th Street, Apt. 30EF
New York, NY 10017-2131

Candlelight Farms Aviation, LLC
c/o Terry McClinch
5 Green Pond Road
New Milford, CT 06776

Weantinoge Heritage Land Trust, Inc.
P.O. Box 821
5 Maple Street
Kent, CT 06757

Rivers Alliance of Connecticut
P.O. Box 1797
7 West Street, 3rd Floor
Litchfield, CT 06759-1797

Housatonic Valley Association
P.O. Box 28
150 Kent Road
Cornwall Bridge, CT 06754

Exhibit B

RETURN DATE: MARCH 6, 2018	:	SUPERIOR COURT
RESCUE CANDLEWOOD MOUNTAIN, LISA K. OSTROVE (F/K/A LISA J. KRELOFF), MICHAEL H. OSTROVE, AND CANDLELIGHT FARMS AVIATION, LLC	:	JUDICIAL DISTRICT OF NEW BRITAIN
v.	:	AT NEW BRITAIN
CONNECTICUT SITING COUNCIL AND CANDLEWOOD SOLAR, LLC	:	FEBRUARY 1, 2018

VERIFIED COMPLAINT

TO THE SUPERIOR COURT IN AND FOR THE JUDICIAL DISTRICT OF NEW BRITAIN AT NEW BRITAIN, on February 1, 2018, come RESCUE CANDLEWOOD MOUNTAIN, an unincorporated association comprised of members as set forth herein, LISA K. OSTROVE (F/K/A LISA J. KRELOFF) AND MICHAEL H. OSTROVE, owners of property at 175 Candlewood Mountain Road, New Milford, Connecticut, and CANDLELIGHT FARMS AVIATION, LLC, a Connecticut limited liability corporation that owns property at 5 Green Pond Road, Sherman, Connecticut, aggrieved by and appealing from a decision by the CONNECTICUT SITING COUNCIL, approving a petition by CANDLEWOOD SOLAR, LLC for a declaratory ruling that no Certificate of Environmental Compatibility and Public Need is Required for the Construction, Operation

LLP
Attorneys at Law
30 Main Street • Suite 204 • Danbury, CT 06810 • (203) 744-1234 • Juris # 101252

and Maintenance of a 20.0 MV AC Solar Photovoltaic Facility in New Milford, Connecticut, and complain and say:

FIRST COUNT (Administrative Appeal Pursuant to C.G.S. § 4-183)

1. Plaintiff Rescue Candlewood Mountain ("Rescue"), is an unincorporated association of residents of New Milford and Sherman who organized to collectively appear before the Connecticut Siting Council to voice their concerns about the severe environmental and other impacts which will or may result from the construction of the project that is the subject of this appeal (as described below). The members of Rescue include the individuals whose names are set forth in Exhibit A attached hereto and incorporated by reference herein. At least several of the members are aggrieved by the Connecticut Siting Council's decision as more fully set forth below.

2. Plaintiffs Lisa K. Ostrove (f/k/a Lisa J. Kreloff) and Michael H. Ostrove reside and own the real property and improvements located at 175 Candlewood Mountain Road, New Milford, Connecticut. Lisa K. Ostrove is also a member of Rescue.

3. Plaintiff Candlelight Farms Aviation, LLC ("Candlelight Farms") is a Connecticut limited liability corporation that owns the real property and improvements located at 5 Green Pond Road, Sherman, Connecticut (the "Candlelight Farms Property"). The sole member of Candlelight Farms is Terry McClinch, who is also a member of

[illegible] LLP
Attorneys at Law
30 Main Street • Suite 204 • Danbury, CT 06810 • (203) 744-1234 • Juris # 101252

Rescue. Candlelight Farms owns and operates a commercial airport and hangar facility on the Candlelight Farms Property known as Candlelight Farms Airport.

4. Defendant Connecticut Siting Council ("Siting Council") is an agency of the State of Connecticut with an address at Ten Franklin Square, New Britain, Connecticut 06051. The Siting Council has jurisdiction over the siting of electricity generating facilities pursuant to the Public Utility Environmental Standards Act, Chapter 277a of the Connecticut General Statutes (C.G.S. §§ 16-50g through 50ll).

5. Defendant Candlewood Solar, LLC ("Candlewood Solar") is a foreign limited liability company authorized to do business in the State of Connecticut with a business address at 111 Speen Street, Suite 410, Framingham, Massachusetts 01701.

6. On or about June 28, 2017, Candlewood Solar, pursuant to C.G.S. §§ 16-50k and 4-176, submitted a petition to the Siting Council for a declaratory ruling that no Certificate of Environmental Compatibility or Public Need ("Certificate") is necessary for the construction, maintenance and operation of a 20 megawatt (MW) alternating current (AC) solar photovoltaic electric facility on a 163 acre parcel at 197 Candlewood Mountain Road in New Milford (the "Property") and associated electrical connection to Eversource Energy's Rocky River Substation on Kent Road in New Milford (the "Project").

[Letterhead, partly cut off] ... LLP Attorneys at Law
30 Main Street • Suite 204 • Danbury, CT 06810 • (203) 744-1234 • Juris # 101252

7. The Project contemplates the clearing of approximately 56.07 acres of currently forested land. Due to the location of the Project, this forest land is part of a much larger block of contiguous, unfragmented forest, which totals 788 acres, mostly lying to the north of the Project site. Such large, unfragmented forest blocks are a valuable and diminishing resource in Connecticut.

8. As depicted in Candlewood Solar's environmental assessment submitted to the Siting Council, approximately 788 acres of contiguous forest is present on and adjacent to the Project area, of which 443 acres are considered "core forest" (as defined by the University of Connecticut's Center for Land and Education and Research's ("CCLEAR") Forest Fragmentation Study). The Project would reduce the area of core forest to 348 acres. The CCLEAR study found that between 1985 and 2006, Connecticut lost 160,960 acres of core forest to development. For this reason, core forest land has been targeted for preservation by the Connecticut Department of Energy and Environmental Protection ("DEEP") as well as the State of Connecticut and its conservation partners including land trusts, municipalities and water agencies.

9. Candlewood Solar submitted the Project in response to the New England Clear Energy Request for Proposals (RFP), a three state solicitation by Connecticut (through DEEP), Massachusetts and Rhode Island. Connecticut solicited and selected

Attorneys at Law
30 Main Street • Suite 204 • Danbury, CT 06810 • (203) 744-1234 • Juris # 101252

renewable energy projects pursuant to Section 1(c) of Connecticut Public Act 15-107, An Act Concerning Affordable and Reliable Energy (P.A. 15-107) and Sections 6 and 7 of Connecticut Public Act 13-303, An Act Concerning Connecticut's Clean Energy Goals (P.A. 13-303). After reviewing all the projects bid into the RFP process, DEEP did not select Candlewood Solar's proposal as one of the projects authorized to enter into a long-term power purchase agreement, although the Commonwealths of Massachusetts and Rhode Island did select the Project. None of the electricity to be generated from the Project would be sold to Connecticut based utilities or electric distribution companies.

10. On or about September 6, 2017, Rescue filed with the Siting Council a verified application to intervene as a party to the proceeding pursuant to C.G.S. §§ 22a-19, 4-177a and 16-50n. A copy of the application to intervene is attached hereto and incorporated by reference herein as Exhibit B. On or about September 14, 2017, the Siting Council granted Rescue's application to become a party on all grounds recited in the application.

11. On or about July 19, 2017, the Town of New Milford, Connecticut (the "Town") moved to intervene as a party. The Council granted the Town party status on or about July 20, 2017.

Attorneys at Law
30 Main Street • Suite 204 • Danbury, CT 06810 • (203) 744-1234 • Juris # 101252

12. On or about August 1, 2017, DEEP filed a notice of intent to intervene as a party to the proceeding and became a party. Although DEEP later withdrew as a party, the Council's Final Decision and Order in this matter continued to refer to DEEP as a party.

13. On or about August 1, 2017 the State's Department of Agriculture ("DOA") filed a notice of intent to intervene as a party and became a party.

14. On or about August 29, 2017, DEEP moved to dismiss the Petition ("Motion to Dismiss") on the following grounds:

> DEEP has not represented, and will not be representing, in writing that the project that is the subject of the declaratory ruling ("the Project") will not materially affect the status of the land on which the Project is to be located as core forest. Accordingly, pursuant to the provisions of Conn. Gen. Stat. § 16-50k(a), as amended by Public Act No. 17-218, the Siting Council may not approve the Project by declaratory ruling. Rather, the Project, if it is to be approved at all, must obtain a certificate of environmental compatibility and public need in accordance with the provisions of the Public Utility Standards Act, Conn. Gen. Stat. §§ 16-50g et seq. and the Siting Council's Rules of Practice, Regulations of Connecticut State Agencies ("R.C.S.A.") §§ 16-50j-1 through 16-50j-91.

15. In the Motion to Dismiss, DEEP noted that P.A. 17-218, amending § 16-50k(a), provides that the Council may approve by declaratory ruling a "solar photovoltaic facility with a capacity of two or more megawatts, to be located on ... forestland" only if, among other things, [DEEP] "represents, in writing, to the council that such project will

[illegible] LLP Attorneys at Law
30 Main Street • Suite 204 • Danbury, CT 06810 • (203) 744-1234 • Juris # 101252

not materially affect the status of such land as core forest." The amended statute's definition of "core forest" makes clear that the Project will be located on and will materially affect core forest. Because DEEP refused to make the required representation, it argued that the Council could not approve the declaratory ruling, and that the Project needed to go through the full statutory process of obtaining a certificate of environmental compatibility and need.

16. On September 19, 2017, DOA submitted a memorandum in support of the Motion to Dismiss.

17. On September 28, 2017, the Siting Council denied the Motion to Dismiss on the ground that P.A. 17-218 became effective on July 1, 2017, and therefore did not apply to this proceeding because the Petition had been filed on June 28, 2017. The Siting Council rejected DEEP's and DOA's arguments that P.A. 17-218 was intended to apply to Council proceedings pending on the effective date, and was enacted to require full environmental review of projects that, as this Project does, will have an adverse impact on core forests and agricultural lands in the State.

18. On September 26, 2017, the Siting Council held a public hearing on the Petition at Roger Sherman Town Hall, 10 Main Street in New Milford. It held continued

[illegible] LLP
Attorneys at Law
30 Main Street • Suite 204 • Danbury, CT 06810 • (203) 744-1234 • Juris #101252

public hearing sessions on October 31, 2017 and November 14, 2017 at the Council's office at 10 Franklin Square in New Britain.

19. On December 8, 2017, the Siting Council issued draft Findings of Fact, and required parties to submit comments on the draft and as well as post-hearing briefs by December 14, 2017.

20. On December 14, 2017, Rescue submitted comments and proposed revisions and additions to the draft Findings of Fact.

21. On December 14, 2017, the Town of New Milford submitted a post-hearing brief in which it requested denial of the Petition and proposed revisions and additions to the draft Findings of Fact.

22. On December 21, 2017, the Siting Council issued a Decision and Order (including Findings of Fact and Opinion), in which it ruled that the Project would not have a substantial adverse environmental effect, and meets all applicable United States Environmental Protection Agency and [DEEP] air and water quality standards, and therefore, pursuant to C.G.S. § 4-176 and § 16-50k, the Siting Council issued a declaratory ruling approving the Project.

23. On December 22, 2017, the Siting Council mailed the Final Decision and Order to all parties and intervenors of record.

LLP
Attorneys at Law
30 Main Street • Suite 204 • Danbury, CT 06810 • (203) 744-1234 • Juris # 101252

24. The evidence in the record before the Siting Council on the Petition demonstrated that:

a) As noted in the letter from Timothy Abbott, Regional Land Protection and Greenprint Director for the Housantonic Valley Association, dated July 26, 2017, clearcutting of 68 acres of forest will devastate a 458 acre area of core forest, and the upland clearcut and industrial development of this size and scale has the potential to negatively impact water quality in the Town of New Milford and region. Some of the area of clearcutting drains into the Housatonic River. Clearcutting will impair the ability of stormwater to absorb and filter groundwater.

b) The Project will have substantial effects on wetlands and watercourses, as shown by the following evidence:

1) A plan to adequately manage stormwater has not been provided.

2) The stormwater management system, as designed, diverts all surface flow, starving portions of the wetland system from existing water flow patterns and surcharging other portions of the wetlands at the outlets.

3) The stormwater calculations and subsequent stormwater management report and plans contain inaccuracies that do not take into account the increases in gravel roadway and installation of solar panels on the Property.

4) The stormwater management plan does not take into account the drip edge erosion and long slope erosion potential.

ANDERSON LLP
Attorneys at Law
30 Main Street • Suite 204 • Danbury, CT 06810 • (203) 744-1234 • Juris # 101252

5) The proposed perimeter stormwater catchment area and infiltration basins may create a cascading effect from one infiltration/detention basin to the next. In a significant rain storm the system may fail.

6) The Project phasing plan is not realistic, especially in view of the fact that Candlewood Solar has very little, if any, experience with large solar projects.

7) Insufficient detail was provided with regard to the sedimentation and erosion control and stormwater management plans.

8) The Project creates the potential for significant negative impacts to wetlands and watercourses, and to the species (and their habitats) that use the wetlands and watercourses for habitat.

c) The Project is incompatible with public policy, including the following:

1) Public Act 17-218 applies to the Project and should be considered due to the Project's impacts to core forest areas.

2) The Project would not be permitted by the Town of New Milford's Zoning Regulations.

3) Candlewood Solar proposes to encumber twenty acres of active farmland as well as several acres of locally important farmland soils, in conflict with the objectives of the DOA and the New Milford Farmland and Forest Preservation Committee.

d) As pointed out by the New Milford Zoning Commission in its letter to the Siting Council of September 11, 2017.

1) Inadequate buffers being provided to neighboring residential properties resulting in negative visual impacts, as well as noise and potentially dust during construction.

COHEN AND WOLF / CRAMER & ANDERSON LLP
Attorneys at Law
30 Main Street • Suite 204 • Danbury, CT 06810 • (203) 744-1234 • Juris # 101252

2) The Project is located within 0.5 miles of the Candlelight Farms Airport and adjacent property which is used in part as a heliport. Glare from the solar panels is a safety concern for the small aircraft using these facilities.

3) Construction traffic, including logging trucks on Candlewood Mountain Road, may cause significant damage to the Town road, requiring the Town to repair road damage, at a potentially significant cost.

4) Construction of the Project may cause significant neighborhood disruption due to increased traffic, noise and parking.

e) Public need for the Project has not been demonstrated.

f) As outlined in the letter to the Siting Council from Starling W. Childs, MFS, dated September 14, 2017: (a) Critical habitat features warrant much more study at the proper times of year in order to fully understand the cycle of seasonal use, and (b) hydrological modelling of the runoff that will be generated given all the additional impervious surfaces has not been provided.

g) Alternate sites, including the Century Brass Brownfield site, were not adequately considered by Candlewood Solar.

h) Historical features such as stone walls, stone bounds, ancient road beds and other archeological resources were not evaluated, recorded or inventoried.

i) A decommissioning plan was not made part of the record. Without such a plan (including adequate bonding in place), the corporate structure and the future

Attorneys at Law
30 Main Street • Suite 204 • Danbury, CT 06810 • (203) 744-1234 • Juris # 101252

unwillingness or inability for Candlewood Solar to properly decommission and restore the site once the Project is no longer viable is unaddressed. This renders the Petition incomplete and creates a threat to the natural resources disrupted by the Project.

j) An adequate, accurate and detailed erosion control plan, including a sequencing and phasing plan, was not provided.

k) Additional surveys of state endangered and threatened species should have been completed prior to moving forward with approval.

l) The alternative use of the Property as a 508 unit planned residential community has not been demonstrated to be feasible. Therefore the likely future use of the Property would be for recreational purposes or low density housing, which probably would be permitted by the New Milford Zoning Regulations should the current or future Property owner request a zone change.

m) None of the vernal pools at the site were examined for obligate vernal pool species during peak breeding season.

n) Candlewood Solar did not propose landscape plantings or buffers around the solar facility.

ANDERSON LLP
Attorneys at Law
30 Main Street • Suite 204 • Danbury, CT 06810 • (203) 744-1234 • Juris # 101252

o) The Natural Diversity Database Preliminary assessment identified nine state-listed species within or near the boundaries of the Project site.

p) The Council on Environmental Quality reviewed the Petition and found the analysis of potential impacts to vegetation and wildlife to be inadequate to enable an informed decision.

q) Rescue was not given the opportunity to review and comment on a revised engineered site plan based on the revised "Photovoltaic Array Layout."

r) The Petition is missing a substantial amount of vital information to determine if it is feasible to construct without causing negative impacts to wetlands, watercourses, and wildlife, including listed species, and wildlife habitat.

s) The Project would primarily benefit Massachusetts ratepayers and electric utility companies based in Massachuesetts and Rhode Island, not Connecticut ratepayers or utilities. Connecticut's DEEP did not vote to select the Project as part of the tri-state selection process.

t) The Council's cross-examination of Candlewood Solar's environmental consultants revealed that the environmental review performed by Candlewood Solar's consultants was performed in a manner that understates the Project's detrimental and long-lasting impact on native species, especially those dependent

Attorneys at Law
30 Main Street • Suite 204 • Danbury, CT 06810 • (203) 744-1234 • Juris # 101252

on the inland wetland systems located in the Project's immediate vicinity. Contrary to Candlewood Solar's representations, the Project will have substantially adverse environmental effects for all the reasons set forth in the record.

u) Candlewood Solar understated and misanalyzed the Project's visual impact, most importantly of the 30-foot-wide interconnection swath to be cut in an easterly and northeasterly direction down Candlewood Mountain – directly within the viewshed of Candlewood Lake ("Lake") and Lynn Deming Park ("Park") – two of the Town's and region's most important recreational resources. Forest thinning will also occur that will further degrade the Park and Lake viewsheds. The Park's beach, picnic areas, play areas, and parking areas all face the Lake in a westerly direction, looking out upon the opposing undeveloped and wooded hillside in a manner that is an important aesthetic and natural resource for Park and Lake users. Candlewood Solar's proposed interconnection corridor would create a permanent visual eyesore for users of the Park and Lake as well as nearby residents. Yet these impacts were not even analyzed within Section 3.10 of the Environmental Assessment prepared for Candlewood Solar by Amec Foster Wheeler.

[illegible] LLP
Attorneys at Law
30 Main Street • Suite 204 • Danbury, CT 06810 • (203) 744-1234 • Juris # 101252

25. For the reasons recited in paragraph 24 above, (a) Candlewood Solar did not show that it meets all applicable federal and state water quality standards, (b) the Project will have a substantial adverse environmental effect, and (c) the Project's impact on contiguous core forest land is inconsistent with the letter and intent of P.A. 17-218.

26. The Final Decision and Order prejudices substantial rights of Rescue as well as its members because: 1) it violates statutory provisions; 2) it exceeds the statutory authority of the Siting Council; 3) it is based upon factual findings which are made upon unlawful procedure and on an inadequate and incomplete record; 4) it is affected by other errors of law; 5) it is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; and 6) it is arbitrary and capricious, and/or is characterized by an abuse of discretion and/or it is a clearly unwarranted exercise of discretion, for one or more of the following reasons:

a) The Siting Council ignored the substantial evidence in the record as set forth in Paragraph 24, and as such, the Final Decision and Order is arbitrary;

b) The Siting Council erred as a matter of law in concluding that P.A. 17-218 does not apply to the Petition;

[Law firm name partially legible] ANDERSON LLP Attorneys at Law
30 Main Street • Suite 204 • Danbury, CT 06810 • (203) 744-1234 • Juris # 101252

c) The Siting Council erred in concluding that the issuance of the Declaratory Ruling will safeguard the environment and the health, safety, and welfare of residents of surrounding neighborhoods, including Rescue's members.

d) The Siting Council erred in concluding that Candlewood Solar had adequately considered feasible and prudent alternatives to the Project site; and

e) The Siting Council erred in concluding that Candlewood Solar had demonstrated a public need for the Project that outweighs the need to protect the ever-diminishing core forest lands of the State, especially given DEEP's rejection of the Project in the RFP process and its refusal to represent to the Siting Council that the Project will not have an adverse impact on core forest land.

27. Rescue has standing to pursue this Appeal because one or more of its members have personal and legal interests in the subject matter, which interests are or may be specifically and adversely affected and threatened by the Final Decision and Order, in ways that would make out a justiciable case had these members themselves brought suit, including but are not limited to the following immediate or threatened injuries:

a) Member Terry McClinch is the owner of Plaintiff Candlelight Farms, which owns property within a quarter mile of the Project Property at 5 Green Pond Road ("Candlewood Farms Property"). Candlelight Farms owns and operates Candlelight

[illegible] LLP
Attorneys at Law
30 Main Street • Suite 204 • Danbury, CT 06810 • (203) 744-1234 • Juris # 101252

Farms Airport ("Airport") at said property. The tens of thousands of solar panels to be installed, which panels are in or near the flight pattern for the Airport, will or may create glare which will be dangerous to the small aircraft that fly into and out of the Airport. This glare may cause pilot disorientation and potential crashes. Local emergency units will have difficulty in fighting a fire caused by a crash in or near the solar array and in rescuing the pilot. Mr. McClinch is a pilot himself who frequently uses the Airport. These safety hazards may cause a reduction in aircraft's use of the Airport with a consequent reduction in value of the property. Also on the Candlelight Farms Property is a large aircraft hangar facility which is sometimes used as a wedding and event center. The solar array will be directly visible to the occupants and visitors to the Candlelight Farms Property, which is prized for its scenic vistas and surrounding unspoiled farm and forestland. The visibility of such a large and unsightly solar array will or may detract from the attractiveness of the property, thus impacting the businesses operated on it and reducing its value.

b) Rescue member Carl M. Dunham, Jr. ("Dunham") owns several parcels of land adjacent to the Project site that will be directly and substantially impacted by the Property, as follows:

a) <u>195 Candlewood Mountain Road</u>. Dunham owns real property and improvements at 195 Candlewood Mountain Road in New Milford, on which his

[illegible] ANDERSON LLP
Attorneys at Law
30 Main Street • Suite 204 • Danbury, CT 0681C • (203) 744-1234 • Juris # 101252

primary residence is located ("195 Candlewood Mountain Road"). The property will be directly and injuriously affected by the Project in one or more of the following ways:

(1) 195 Candlewood Mountain Road abuts the western border of the Project area, and is directly downslope from the area to be clear cut for the solar panels. The panels will be approximately 100 to 150 feet from the property, and will be visible to anyone looking out the back door of the residence.

(2) 195 Candlewood Mountain Road has a large pond in the back (eastern portion of the Property). The potential erosion and sedimentation from the Project area directly uphill (the prevention of which erosion was inadequately documented and planned for by Candlewood Solar) will result in deposits of soil and other sediments onto the property and into the pool.

(3) 195 Candlewood Mountain Road's southern boundary abuts the proposed access road that will be used by heavy trucks and other vehicles to transport the logs from the clear cutting as well as the solar array panels, and thereafter by trucks and other vehicles used to operate and maintain the Project. Dunham will be directly affected by the noise, visibility, dust and other deleterious effects of the creation and use of the access road.

(4) The proposed construction staging area for the Project is on a five-acre parcel that abuts the access road to the south and will be clearly visible from 195 Candlewood Mountain Road. The Final Order and Decision recommends that Candlewood Solar consider placing some of the solar panels in this area in order to reduce the amount of core forestland to be destroyed. If the panels are placed there they will be clearly visible from the property.

(5) All of the above activities and uses will directly and injuriously affect Dunham's use and enjoyment of 195 Candlewood Mountain Road and reduce the property's value.

[illegible] LLP Attorneys at Law 30 Main Street • Suite 204 • Danbury, CT 06810 • (203) 744-1234 • Juris # 101252

b) 214 Candlewood Mountain Road. Dunham owns an approximately 600 acre parcel of land on the east and west side of Candlewood Mountain Road ("214 Candlewood Mountain Road"). This parcel abuts the Project area from the north, south and west, and has several uses which will be negatively impacted by the Project in one or more of the following ways:

(1) Twenty-five acres of this parcel is in the Town's B-3 zone and includes an event and wedding center, a bed and breakfast inn, and a horse farm and stable (for boarding and riding lessons). The solar array will be visible in various parts of the year to users of the facilities, which are prized for their scenic and unspoiled views. The Project will adversely affect the use of the property for weddings and events and as a bed and breakfast, because of the potential visibility to users of the property of the enormous swath of the solar panels to be erected. An adverse impact to these businesses, which depend heavily on the rural and scenic nature of the property, will result in diminution of the property's value. The petition for the Project has already caused a decline in requests for use of these facilities.

(2) The remainder of the 600 acres is mostly zoned for single-family residential uses. It is partially forested with trails that are used year round for hiking, fishing, and horse-back riding. About 55 acres of this remaining part of the property is in the Town's Airport Zone, and contains a heliport. The property also has an easement over the Candlelight Farms Property to the west that allows for use of the Airport by Dunham and his invitees. The glare from the solar panels will or may pose a danger to the small aircraft that use the heliport as well as the Airport, and thus threatens the commercial viability of the use of the portion of the property in the Airport Zone for related airport uses, with a consequent diminution in property value.

LLP
Attorneys at Law
30 Main Street • Suite 204 • Danbury, CT 06810 • (203) 744-1234 • Juris # 101252

c) Plaintiffs Lisa K. Ostrove and Michael H. Ostrove own real property at 175 Candlewood Mountain Road, which is their residence ("Ostrove Property"). The Ostrove Property borders the Project's western boundary, and is located directly downhill from the proposed area of the solar array panels. The panels will or may be located 50 feet or less from the Ostrove Property, and will be visible throughout the year. The Ostrove Property also contains a large pond in the backyard (eastern portion). The potential erosion and sedimentation from the Project, which is very close to and directly uphill from the Ostrove Property (and the prevention of which erosion was inadequately documented by and planned by Candlewood Solar), will or may result in deposits of soil and other sediment directly onto the Ostrove Property and into the pond. The closeness and visibility of the Project from the Ostrove Property and the potential damage to it from erosion will directly and injuriously affect the Ostrove's use and enjoyment of the Ostrove Property and will cause a diminution in its value.

d) Accordingly, Rescue members McClinch, Dunham, and Lisa and Michael Ostrove are aggrieved by the Final Decision and Order and thus would have standing to bring this appeal in their own right. Rescue therefore has standing to bring this appeal on their behalf.

LLP
Attorneys at Law
30 Main Street • Suite 204 • Danbury, CT 06810 • (203) 744-1234 • Juris # 101252

28. The allegations recited above also demonstrate that plaintiffs Candlelight Farms and Lisa and Michael Ostrove are aggrieved by the Final Decision and Order.

<u>SECOND COUNT (C.G.S. § 22a-19)</u>

1. Plaintiffs hereby repeat and reallege paragraphs 1 through 28 of the First Count as if fully set forth herein.

29. For the reasons set forth in paragraphs 24-26, the Project is likely to unreasonably impair the public trust in the natural resources of the state, including but not limited to core forestland, wetlands, watercourses, wildlife, and wildlife habitat, and the visual quality of the environment.

30. Because the Siting Council granted Rescue's application to intervene in the Petition proceeding pursuant to C.G.S. § 22a-19, Rescue has statutory standing to bring this appeal from the Final Decision and Order to pursue the issues of the impact of the Project on the specified natural resources of the state.

31. Plaintiffs Candlelight Farms and Lisa and Michael Ostrove are also aggrieved by the Final Decision and Order and thus have standing to pursue the issues of the impact of the Project on the specified natural resources of the state pursuant to C.G.S. § 22a-19.

Attorneys at Law
30 Main Street • Suite 204 • Danbury, CT 06810 • (203) 744-1234 • Juris # 101252

WHEREFORE, PLAINTIFFS CLAIM:

1. A judgment of the Court reversing the Final Decision and Order of the Siting Council and directing the Siting Council to deny the Petition;

2. Statutory costs;

3. Reasonable attorney's fees as may be authorized by law; and

4. Such other relief as the Court may deem fair and equitable.

PLAINTIFFS,
RESCUE CANDLEWOOD MOUNTAIN,
LISA K. OSTROVE F/K/A LISA J.
OSTOVE, MICHAEL H. OSTROVE,
AND CANDLELIGHT FARMS
AVIATION, LLC

By: ______________________

Daniel E. Casagrande, Esq.
Attorney for Plaintiffs
Cramer & Anderson, LLP
30 Main Street, Suite 204
Danbury, CT 06810
(203) 744-1234
Juris No. 101252

... LLP
Attorneys at Law
30 Main Street • Suite 204 • Danbury, CT 06810 • (203) 744-1234 • Juris # 101252

PLAINTIFF'S VERIFICATION

I, Liba Furhman, a member of Plaintiff Rescue Candlewood Mountain, declare under penalty of perjury under the laws of the State of Connecticut that I have reviewed the attached Appeal of Rescue Candlewood Mountain, Lisa K. Ostrove (f/k/a Lisa J. Kreloff), Michael H. Ostrove, and Candlelight Farms Aviation, LLC versus Connecticut Siting Council and Candlewood Solar, LLC, and the allegations are true to the best of my knowledge, information and belief.

Liba Furhman

Subscribed and sworn to before me this 1st day of February, 2018.

Notary Public
My Commission Expires:

Kelly Simpson
Notary Public-Connecticut
My Commission Expires
May 31, 2021

PLAINTIFF'S VERIFICATION

I, Lisa K. Ostrove, declare under penalty of perjury under the laws of the State of Connecticut that I have reviewed the attached Appeal of Rescue Candlewood Mountain, Lisa K. Ostrove (f/k/a Lisa J. Kreloff), Michael H. Ostrove, and Candlelight Farms Aviation, LLC versus Connecticut Siting Council and Candlewood Solar, LLC, and the allegations are true to the best of my knowledge, information and belief.

Lisa K. Ostrove

Subscribed and sworn to before me this 14 day of February, 2018.

Notary Public
My Commission Expires:

Kelly Simpson
Notary Public-Connecticut
My Commission Expires
May31, 2021

PLAINTIFF'S VERIFICATION

I, Michael H. Ostrove, declare under penalty of perjury under the laws of the State of Connecticut that I have reviewed the attached Appeal of Rescue Candlewood Mountain, Lisa K. Ostrove (f/k/a Lisa J. Kreloff), Michael H. Ostrove, and Candlelight Farms Aviation, LLC versus Connecticut Siting Council and Candlewood Solar, LLC, and the allegations are true to the best of my knowledge, information and belief.

Michael H. Ostrove

Subscribed and sworn to before me this 1st day of February, 2018.

Notary Public
My Commission Expires: 01/17/2020

MICHAEL FRANCIS CREED 2/1/18
Notary Public - State of New York
NO. 01CR6254579
Qualified in New York County
My Commission Expires Jan 17, 2020

PLAINTIFF'S VERIFICATION

I, Terry McClinch, sole member of Plaintiff Candlelight Farms Aviation, LLC, declare under penalty of perjury under the laws of the State of Connecticut that I have reviewed the attached Appeal of Rescue Candlewood Mountain, Lisa K. Ostrove (f/k/a Lisa J. Kreloff), Michael H. Ostrove, and Candlelight Farms Aviation, LLC versus Connecticut Siting Council and Candlewood Solar, LLC, and the allegations are true to the best of my knowledge, information and belief.

CANDLELIGHT FARMS AVIATION, LLC

By:______________________________
Terry McClinch, Its Sole Member

Subscribed and sworn to before me this 31 day of February, 2018.

JASON SCHUMACHER
NOTARY PUBLIC for the
State of Montana
Residing at Dillon, Montana
My Commission Expires
December 02, 2019

NOTARIAL SEAL — JASON SCHUMACHER — STATE OF MONTANA

____
Notary Public
My Commission Expires: December 02, 2019

CRAMER & ANDERSON LLP
Attorneys at Law
30 Main Street • Suite 204 • Danbury, CT 06810 • (203) 744-1234 • Juris # 101252

RETURN DATE: MARCH 6, 2018	:	SUPERIOR COURT
RESCUE CANDLEWOOD MOUNTAIN, LISA K. OSTROVE F/K/A LISA J. OSTROVE, MICHAEL H. OSTROVE, AND CANDLELIGHT FARMS AVIATION, LLC	:	JUDICIAL DISTRICT OF NEW BRITAIN
v.	:	AT NEW BRITAIN
CONNECTICUT SITING COUNCIL AND CANDLEWOOD SOLAR, LLC	:	FEBRUARY 1, 2018

STATEMENT OF AMOUNT IN DEMAND

The Plaintiffs' claim for relief is of a non-monetary nature.

PLAINTIFFS,
RESCUE CANDLEWOOD MOUNTAIN,
LISA K. OSTROVE F/K/A LISA J.
OSTOVE, MICHAEL H. OSTROVE,
AND CANDLELIGHT FARMS
AVIATION, LLC

By: ______________________

Daniel E. Casagrande, Esq.
Attorney for Plaintiffs
Cramer & Anderson, LLP
30 Main Street, Suite 204
Danbury, CT 06810
(203) 744-1234
Juris No. 101252

EXHIBIT A

RCM Membership List

Kathleen Roberts Ford Joachim, Doug Joachim, Pam Morgan, Pat Welch, Russ
Posthauer, Jr. , Page Carter , Sue Carter ,Carl Dunham ,Nancy Saggese, Helen
Applebaum , Debra Schueler , Jamie Diaferia, Susan Diaferia, Dom Diaferia, Melissa
Pezzola ,Michael Merrill , Donald Pezzola , Gregory Maroun , Stecks Nursery and
Landscaping , Albert Watson, Elizabeth Watson, Sue Randolph, Steve Randolph
Alice Miller , Ilana Laurence, Patricia Laurence, Stuart Laurence, Jonathan Laurence
Donny Pezzolo Jr , Katie Pezzolo , Kyle Kovacs , Kelly Kovacs, David Kellogg
Devon Dobson, Kelsey Dobson, Phil Dobson, Tom Dobson, Lisa Moisan, Kat Benzova
Michael Patzig, Liba Furhman, Ari Rosenberg, Lisa Ostrove , Michael Ostrove, Sophie
Ostrove, Daniel Ostrove, John Macklin ,Tamar Macklin, Jennifer Shelov, Josh Shelov
Sarah Dillon, Andrew Havill , John Havill, Janet Levy , Ross Levy, Nancy Macklin
Robert Macklin, Michael Scofield, Jay Umbarger , Lynn Umbarger, Naomi Goldstein
Paula Goldstein, Marty Fridson, Elaine Sisman, Nili Baider, Alberto Baider
Daniella Baider, Allegra Baider, Larry Thaler, Sherry Thaler, Julie Bailey
~~Bob Bailey, Norma Hart, Troy Hart, Barbara Stasiak, Jim Stasiak, Karin Shelov~~
Beth Shelov, Mark McCloskey , Jacquie McCloskey, Chris McCloskey, Brian Tivnan
Candlelight Farms Aviation LLC , Terry McClinch , Sven Olsen, Mary Olsen
Kirsten Torraco, Michael Torraco, Gary Hida, Lisa Hida, Eileen F Barber, John Barber
Lawrence Lombardo, Kathryn Joleen Lombardo, Robert Carrozzo, Cheryl S Gould
Tom Castagnetta, San Castagnetta, Dan Castagnetta, Ron Sypher, Barbara Sypher
Nancy Walsh, Tima Winkley, Kenneth Winkley, Eli Noam, Nadine Strossen

EXHIBIT B

STATE OF CONNECTICUT
SITING COUNCIL

PETITION NO. 1312 - Candlewood Solar LLC petition for a declaratory ruling that no Certificate of Environmental Compatibility and Public Need is required for the proposed construction, maintenance and operation of a 20 megawatt AC (26.5 megawatt DC) solar photovoltaic electric generating facility located on a 163 acre parcel at 197 Candlewood Mountain Road and associated electrical interconnection to Eversource Energy's Rocky River Substation on Kent Road in New Milford, Connecticut.

SEPTEMBER 6, 2017

APPLICATION TO INTERVENE UNDER CEPA, §22a-19, §4-177a AND §16-50n

Rescue Candlewood Mountain ("RCM"), a voluntary association, is a coalition of Greater New Milford and Sherman residents that hereby move and petition the CSC to become a party intervenor in the above application by Candlewood Solar LLC petitioning the Council for a declaratory ruling that no certificate of environmental compatibility and public need is required for a 20 megawatt solar photovoltaic power generating facility on Kent Road in New Milford, Connecticut. The purpose of the intervention is to participate in these proceedings to prevent unreasonable impact to the natural resources of the State including scenic vistas, economic loss to neighboring property interests, loss and/or fragmentation of habitat, the unreasonable loss of farm/ ~~forest land and the use of inadequately narrow vegetated buffers along the project boundaries.~~

Pursuant to Conn.Gen.Stat. §22a-19 ("CEPA"), §16-50n and §4-177a, the RCM seeks party status as an entity which has a direct interest in the proceedings which will be specifically and substantially affected as it is a voluntary association consisting of taxpayers and citizens of the host town of New Milford and the neighboring town of Sherman including Lisa Ostrove whose property abuts the project site. The members of *the group are likely to suffer property value loss different from and greater than that of* the public in general due to the proximity of the facility to their homes. In addition, the group seeks to protect the scenic vistas in New Milford and Sherman generally on behalf of the general public. Intervenor seeks party status in the above proceedings for the purpose of submitting testimony, briefs and other evidence relevant to the consideration of the application under consideration; specifically the mitigation of environmental impact to scenic vistas by relocation, increased site buffers, alternative *siting configurations and other best management practices for the conservation of* natural resources.

Intervenor's participation will be in the interests of justice and is proper under CEPA in that the evidence and testimony to be given will tend 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 and the naturally occurring core forests in and about Candlewood Mountain and surrounding area; and is reasonably likely to cause viewshed and habitat *deterioration that is unreasonable because alternatives to the petitioner's proposal exist* which would result in lesser impact.

In support of this application, the movant states the following:

- Rescue Candlewood Mountain is a duly constituted Connecticut voluntary association with members who enjoy the scenic views in and about the area of the proposed facility on Candlewood Mountain.
- *The proposed power generation facility will have a negative impact* on the scenic vistas and natural resources in New Milford and Sherman by clear-cutting 72 acres of core forest in addition to 16 acres of which is farmland, a loss of approximately fifteen thousand trees.
- RCM intends to submit evidence to the record which has not been previously considered in the form of expert testimony which will substantiate the feasibility of available alternatives to the proposed facility of lesser visual impact which will assist the Council in complying with its mandate to minimize impact as required by C.G.S §16-50g and 16-50p(3)(G)(b)(1).
- The design does not incorporate the best available technology for reducing the visual impacts (glare and the view of the facility itself) of the facility in that it fails to fully consider impacts to scenic views, natural habitats and neighboring property uses, including nearby scenic trails and nearby homes.

DISCUSSION 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).

CEPA clearly and in the broadest terms indicates that any legal entity may intervene. This includes municipal officials, *Avalon Bay Communities v. Zoning Commission*, 87 Conn. App. 537, 867 A.2d 37 (2005).

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 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).

The Intervenor is 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."

The rights conveyed by CEPA are so important and fundamental to matters of public trust that the denial of a 22a-19 intervention itself is 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).

Intervenors' application for intervenor status should be granted so that it may participate by presenting evidence for the record and meaningfully assist the Siting Council in reaching a decision which minimizes impact to natural resources of the state while balancing the public need for responsible renewable energy sources..

VERIFICATION

The undersigned, Lisa Ostrove, duly authorized Director of Rescue Candlewood Mountain, duly sworn, hereby verifies that the above application is true and accurate to the best of her knowledge and belief.

Lisa K Ashbore

Sworn and subscribed before me this 5th th day of September, 2017

Geena M Battalini

Notary Public; My Commission Expires August 7 2021

GEENA M BATTALINI
Notary Public – State of New York
NO. 01BA6362596
Qualified in New York County
My Commission Expires Aug 7, 2021

Respectfully Submitted,
Rescue Candlewood Mountain,

By________________

Keith R. Ainsworth, Esq.
Law Offices of Keith R. Ainsworth, Esq., L.L.C. #403269
51 Elm Street, Suite 201
New Haven, CT 06510-2049
(203) 435-2014/(203)865-1021 fax
keithrainsworth@live.com

The intervenor requests copies of all filings made in the course of this docket to date and from this date forward and requests service by electronic mail.

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 6th day of September, 2017 and addressed to:

Ms. Melanie Bachman, Executive Director, Connecticut Siting Council, 10 Franklin Square, New Britain, CT 06051 (1 orig, 15 copies, plus 1 electronic) (US Mail/ electronic).

And electronic copies to:

Candlewood Solar LLC

111 Speen Street, Suite 410
Framingham, MA 01701
Phone: (508) 598-3030
Fax: (508) 598-3330
jawalker@ameresco.com

Joel S. Lindsay
Director
Ameresco, Inc.
111 Speen Street, Suite 410
Framingham, MA 01701
Phone: (508) 661-2265
Fax: (508) 598-3330
jlindsay@ameresco.com

Town of New Milford

John D. Tower, Esq.
New Milford Town Attorney
Cramer & Anderson LLP
51 Main Street
New Milford, CT 06776
Phone: (860) 355-2631
Fax: (860) 355-9460
jtower@crameranderson.com

Department of Energy and Environmental Protection

Kirsten S. P. Rigney
Bureau of Energy Technology Policy
Department of Energy and Environmental Protection
10 Franklin Square
New Britain, CT 06051
(860) 827-2984 (phone)
(860) 827-2806 (fax)
Kirsten.Rigney@ct.gov

Connecticut Department of Agriculture
Jason Bowsza450 Columbus Boulevard
Hartford, CT
Tel.: (860) 713-2526
Fax: (860) 713-2514
Jason.Bowsza@ct.gov

(all by e-mail)

Keith R. Ainsworth, Esq.

DOCKET NO: HHB-CV-18-6042335-S	:	SUPERIOR COURT
RESCUE CANDLEWOOD MOUNTAIN, LISA K. OSTROVE (F/K/A LISA J. KRELOFF), MICHAEL H. OSTROVE, AND CANDLELIGHT FARMS AVIATION, LLC	:	JUDICIAL DISTRICT OF NEW BRITAIN
v.	:	AT NEW BRITAIN
CONNECTICUT SITING COUNCIL AND CANDLEWOOD SOLAR, LLC	:	AUGUST 9, 2018

BRIEF OF PLAINTIFFS/APPELLANTS

Daniel E. Casagrande, Esq.
Attorney for Plaintiffs/Appellants
Cramer & Anderson, LLP
30 Main Street, Suite 204
Danbury, CT 06810
Telephone: (203) 744-1234
Facsimile: (203) 730-2500
dcasagrande@crameranderson.com
Juris No. 101252

TABLE OF CONTENTS

I. INTRODUCTION..1

II. PROJECT NATURE AND PROCEDURAL HISTORY BEFORE COUNCIL..............3

III. AGGRIVEMENT...8

IV. STANDARD OF REVIEW..12

V. ARGUMENT..13

A. The Council acted illegally and in excess of its statutory authority in denying the motions by DEEP and DOA to deny the petition..................13

1. The plain language of P.A. 17-28 makes clear that a solar project rejected by DEEP prior to July 1, 2017 in the statutory solicitation process established by C.G.S. § 16a-3f, 16a-3g or 16a-3j does not qualify for declaratory ruling treatment under C.G.S. § 16-k(a) unless DEEP represents to the Council that the project will not materially adversely affect core forest, regardless of the filing of the petition before July 1, 2017..16

2. The language and structure of § 16-50k(a) (as amended by P.A. 17-218) make evident that it should apply as of the date of the Council's decision on a petition for declaratory ruling..18

3. P.A. 17-218 is procedural and thus should be applied retroactively..............19

B. The Council acted arbitrarily and with no substantial evidence in approving the Project despite wholly inadequate and incomplete data on its effect on several vernal pools and the critical terrestrial habitat surrounding these pools to be destroyed with the proposed razing of core forest..23

C. The Council acted arbitrarily and without substantial evidence in conditioning approval on an undefined decommissioning plan that Petitioner had no power to procure or fund..33

D. The Commission acted illegally, arbitrarily and without substantial evidence in approving the Petition on the basis of a potential undefined conservation easement that Petitioner has no power to procure..................35

E. The record contains no substantial evidence that Petitioner had adequately considered potential alternative sites with less environmental impact..40

F. The Council lacked substantial evidence on which to base its approval given the incompleteness and inadequacy of Petitioner's stormwater management plan..41

G. The Council acted clearly erroneously and without substantial evidence in approving the Petition despite its wholesale inadequacy and incompleteness..43

CONCLUSION..46

I. **INTRODUCTION.**

This case involves an administrative appeal under C.G.S. § 4-183 and a verified complaint under C.G.S. § 22a-19 ("Complaint") brought by plaintiffs challenging a Final Decision and Order (the "Decision") by the Connecticut Siting Council ("Council"). The Decision, dated December 21, 2017, granted a petition by defendant Candlewood Solar, LLC ("Petitioner" or "CS") for a declaratory ruling, pursuant to C.G.S. §§ 16-50k(a) and 4-176, that no Certificate of Environmental Compatibility and Public Need ("Certificate") is necessary for the construction, maintenance and operation of a 20 megawatt (MW) alternating current (AC) solar photovoltaic electricity generation facility on a 163 acre parcel at 197 Candlewood Mountain Road in New Milford (the "Property"), and the associated electrical connection of the facility to Eversource Energy's Rocky River Substation on Kent Road in New Milford (the "Project"). The Decision consists of Findings of Fact (48 pages), an Opinion (9 pages), and a Decision and Order (2 pages). (R. 2470 et seq.) [1]

Plaintiff Rescue Candlewood Mountain ("Rescue"), is an unincorporated association of residents of New Milford and Sherman who organized to appear before the Council to voice their concerns about the severe environmental and other impacts which will result from the construction of the Project. (Complaint, ¶ 27)

Plaintiffs Lisa K. Ostrove (f/k/a Lisa J. Kreloff) and Michael H. Ostrove reside and own the real property and improvements located at 175 Candlewood Mountain Road, New Milford, Connecticut ("Ostrove Property"). The Ostrove Property abuts the Project

---

[1] The record pages electronically filed with the Court are numbered as CSC-1312-001 through -2535. For convenience Plaintiffs will refer to the page numbers without the "CSC-1312" prefix or to the designation of the document in the April 6, 2018 Certified Administrative Record.

property. Lisa K. Ostrove is a member of Rescue. Plaintiff Candlelight Farms Aviation, LLC ("Candlelight Farms") is a Connecticut limited liability corporation that owns the real property and improvements located at 5 Green Pond Road, Sherman, Connecticut (the "Candlelight Farms Property"), which is within a quarter mile of the Project site. The sole member of Candlelight Farms is Terry McClinch, who is also a member of Rescue. Candlelight Farms owns and operates a commercial airport and hangar facility on the Candlelight Farms Property known as Candlelight Farms Airport. (Id., ¶27(a) and (c))

Plaintiffs Ostrove and Candlelight Farms have alleged and will prove at trial that they are aggrieved by the Decision because of the proximity of their properties to the Project site and because of the adverse impacts which the Project will or may cause to their properties and, as to Candlelight Farms, the business which it operates on its property.[2] (Id.) And because Mr. and Mrs. Ostrove and Mr. McClinch are aggrieved, Rescue Candlewood Mountain is also aggrieved. (Id.) See pages 8-11 below.

The Council is an agency of the State of Connecticut with an address at Ten Franklin Square, New Britain, Connecticut 06051. The Council has jurisdiction over the siting of electricity generating facilities pursuant to the Public Utility Environmental Standards Act ("PUESA"), Chapter 277a of the Connecticut General Statutes (C.G.S. §§ 16-50g through 50ll).

Defendant CS is a foreign limited liability company authorized to do business in the State of Connecticut, with a business address at 111 Speen Street, Suite 410, Framingham, Massachusetts 01701. (Complaint, ¶5)

---

[2] Rescue member Carl M. Dunham, Jr. owns properties at 195 and 214 Candlewood Mountain Road in New Milford. The Complaint alleges, and Plaintiffs intend to prove, that Dunham is also aggrieved by the Decision. (Id., ¶27(b)) Dunham has filed a separate appeal from the Decision (Dkt. No. HHB-CV18-5021642-S), and is filing a separate brief. Plaintiffs hereby incorporate by reference all arguments raised by Dunham in his brief.

II. PROJECT NATURE AND PROCEDURAL HISTORY BEFORE COUNCIL.

CS filed its petition for declaratory ruling (the "Petition") on June 28, 2017. (R. 003, 2474) As originally proposed, the Project contemplated the installation of approximately 75,000 solar photovoltaic panels and associated ground equipment on the 163 acre Property. The Property is currently owned by Wells Fargo Bank NA. The proposed purchaser of the Property is New Milford Clean Power, LLC ("NMCP"). Petitioner has an option to lease the Property from NMCP for twenty years to utilize the Property for the Project. Two adjacent parcels to be used for electrical connection of the Project to the grid are owned by First Light Hydropower. (Opinion, p. 2 (R. 2523))

The Property is undeveloped, with hay fields and pastures located in what will be the southern part of the array panel, and with a large area of forest in the northern portion. The land to the north, east and south of the proposed array is forest. To the west are single family residences located on Candlewood Mountain Road. (Id.)

On September 26, 2017, the day that the public hearing on the Petition began, Petitioner's representatives and Council members located two previously unidentified and valuable vernal pools on the Property (in addition to one vernal pool already shown on the plans). As a result, the Petitioner submitted a revised plan for the array on October 24, 2017. The new array avoided direct disturbance to the three vernal pools (but not to the critical terrestrial habitats surrounding those pools, as discussed below). By reducing the angle of the panels from 15 degrees to 12 degrees, the number of panels was reduced to 60,000, and the proposed solar array area was reduced to approximately 57 acres. (Opinion, p. 2; R. 2523; R. 2462 (revised site plan))

The forest land to be cleared for the array is part of a much larger block of contiguous, unfragmented forest, which totals 788 acres, mostly lying to the north of the Project site. (R. 225, 262) As depicted in the environmental assessment submitted to the Council by Amec Foster Wheeler ("AFW") on Petitioner's behalf, approximately 788 acres of contiguous forest is present on and adjacent to the Project area, of which 443 acres are considered "core forest" (as defined by the University of Connecticut's Center for Land Education and Research's Forest Fragmentation Study ("CLEAR Study")). (R. 225) The revised Project would reduce the area of core forest to 359 acres--a loss of 84 acres. (Opinion, p. 6; R. 2527)

The CLEAR Study indicates that a minimum of 250 acres of upland forest is needed to support sensitive edge-tolerant forest bird species (and recommends a minimum of 500 acres). The study defined core forest areas as those greater than 300 feet away from non-forested areas. (R. 2295) The CLEAR Study found that between 1985 and 2006, Connecticut lost 160,960 acres of core forest to development. For this reason, core forest land has been targeted for preservation by the Connecticut Department of Energy and Environmental Protection ("DEEP") as well as the State of Connecticut and its conservation partners including land trusts, municipalities and water agencies. (DEEP Comments, Sept. 21, 2017, pp. 3-4 (R. 2295-96))

Petitioner submitted the Project in response to a request for proposals from the New England Clean Energy Request for Proposals (RFP), a three state solicitation by Connecticut (through DEEP), Massachusetts and Rhode Island. Through this process, Connecticut solicited and selected several renewable energy projects pursuant to Section 1(c) of Connecticut Public Act 15-107, An Act Concerning Affordable and Reliable Energy

(P.A. 15-107) and Sections 6 and 7 of Connecticut Public Act 13-303, An Act Concerning Connecticut's Clean Energy Goals (P.A. 13-303). (Findings of Fact, p. 15; R. 2488-89) After reviewing all the projects bid into the RFP process, DEEP did not select Petitioner's proposal as one of the projects authorized to enter into a long-term power purchase agreement, although Massachusetts and Rhode Island did select the Project. (Findings of Fact, pp. 15-17; R. 2488-90) None of the electricity to be generated from the Project would be sold to Connecticut based utilities or electric distribution companies. (Id., p. 16 (¶ 88; R. 2489)[3]

On September 6, 2017, Rescue filed with the Council a verified application to intervene as a party to the proceeding pursuant to C.G.S. §§ 22a-19, 4-177a and 16-50n. (R. 2353-57) On September 14, 2017, the Council granted Rescue's application to become a party on all grounds recited in the application. (R. § V.A. 6)

On July 19, 2017, the Town of New Milford, Connecticut (the "Town") moved to intervene as a party. The Council granted the Town party status on or about July 21, 2017. (R. 2141-43)

On August 1, 2017, DEEP filed a notice of intent to intervene as a party to the proceeding and became a party. (R. 2274)

On August 1, 2017 the State's Department of Agriculture ("DOA") filed a notice of intent to intervene as a party and became a party. (R. 2215)

---

[3] Petitioner has a 20-year power purchase agreement ("PPA") with Massachusetts under which the electricity generated by the Project would be sold to several Massachusetts utilities. (Findings of Fact, p. 16 (¶ 88); R. 2489) Because DEEP did not select the Project, the State's Public Utilities Regulatory Agency ("PURA") has not reviewed the PPA, and thus there is no rebuttable presumption that the Project will be a public benefit. (Id., p. 17 (¶ 90-92); R. 2490)

On August 29, 2017, DEEP moved to deny the Petition ("Motion to Deny") on the following ground:

> DEEP has not represented, and will not be representing, in writing that the project that is the subject of the declaratory ruling will not materially affect the status of the land on which the project is to be located as core forest. Accordingly, pursuant to the provisions of Conn. Gen. Stat. § 16-50k(a), as amended by Public Act No. 17-218, the Siting Council may not approve the project by declaratory ruling. Rather, the project, if it is to be approved at all, must obtain a certificate of environmental compatibility and public need in accordance with the provisions of the Public Utility Standards Act, Conn. Gen. Stat. §§ 16-50g et seq. and the Siting Council's Rules of Practice, Regulations of Connecticut State Agencies §§ 16-50j-1 through 16-50j-91.

(R. 2327)

In its Memorandum in Support of the Motion to Deny, DEEP noted that P.A. 17-218, amending § 16-50k(a), provides that the Council may approve by declaratory ruling a "solar photovoltaic facility with a capacity of two or more megawatts, to be located on ... forestland" only "as long as", among other things, [DEEP] "represents, in writing, to the council that such project will not materially affect the status of such land as core forest." (R. 2331) The amended statute's definition of "core forest" makes clear that the Project will be located on and will materially affect core forest. Because DEEP refused to make the required representation, it argued that the Council could not approve the declaratory ruling, and that the Project needed to go through the full statutory process of obtaining a Certificate. (Id.) DEEP also argued that even though P.A. 17-218's effective date was three days after the Petition was filed, the amendment should apply to the Petition because it operates on the Council as of the date of its decision (as opposed to the date of filing), and because the amendment is procedural in nature. (R. 2332-34)

On September 19, 2017, DOA submitted a statement in support of the Motion to Deny. (R. 2271) Also, on September 19, 2017, Petitioner submitted a memorandum in

opposition to the Motion to Deny. (R. 2105-11) On September 22, 2017, DEEP submitted a reply memorandum in support of the Motion to Deny. (R. 2341-47)

On September 28, 2017, the Council denied the Motion to Deny, apparently in reliance on a staff report advising that P.A. 17-218 became effective on July 1, 2017, makes substantive changes to the law, and therefore does not apply to this proceeding because the Petition had been filed on June 28, 2017. (R. 905-13) (See discussion at pages 13-22 below.)

On September 26, 2017, the Council opened a public hearing on the Petition at Roger Sherman Town Hall, 10 Main Street in New Milford, with one session at 3 p.m. (R. 1008 et seq.) and another at 6:30 p.m. (R. 1113 et seq.) The Council held continued public hearing sessions on October 31, 2017 (R. 1201 et seq.) and November 14, 2017 (R. 1407 et seq.) at the Council's office at 10 Franklin Square in New Britain.

On December 7, 2017, without waiting for the parties to submit post-hearing comments or briefs, the Council took a straw vote approving the Petition.[4] The next day, the Council issued draft Findings of Fact, and required parties to submit comments on the draft and as well as post-hearing briefs within six days. (R. 2422-69)

On December 14, 2017, Rescue submitted comments and proposed revisions and additions to the draft Findings of Fact. (R. 2417-21)

On December 14, 2017, the Town submitted proposed revisions and additions to the draft Findings of Fact and a post-hearing brief in which it requested denial of the Petition. (R. 2470-535)

[4] The minutes of the December 7, 2017 meeting are attached at Tab A. The Certified Administrative Record does not refer to this meeting.

On December 21, 2017, the Council issued its Decision approving a declaratory ruling for the Project. (R. 2470-535) It ruled that the Project would not have a substantial adverse environmental effect, and "would" meet all applicable United States Environmental Protection Agency and DEEP air and water quality standards. Because it had ruled that P.A. 17-218 does not apply to the Petition, the Council disregarded DEEP's warning that the Project will have a material adverse effect on core forest. (Opinion, p. 9 (R. 2530))

III. AGGRIEVEMENT.

The Complaint (¶¶ 27-28) contains detailed factual allegations as to how each of the Plaintiffs is aggrieved. Plaintiffs intend to prove aggrievement as follows:

1. Rescue. Rescue has standing to pursue this appeal because one or more of its members have personal and legal interests in the subject matter, which interests are or may be specifically and adversely affected and threatened by the Decision, in ways that would make out a justiciable case had these members themselves brought suit.

Specifically members McClinch, Dunham, and Lisa and Michael Ostrove are aggrieved by the Decision by virtue of the following immediate or threatened injuries to their respective interests:

a) McClinch. McClinch is the owner of Plaintiff Candlelight Farms, which owns the Candlelight Farms Property located a quarter mile from the Project Property. Candlelight Farms owns and operates Candlelight Farms Airport ("Airport") on that property. The tens of thousands of solar panels to be installed, which panels are in or near the flight pattern for the Airport, will or may create glare which will be dangerous to the small aircraft that fly into and out of the Airport. This glare may cause pilot

disorientation and potential crashes. Local emergency units will have difficulty in fighting a fire caused by a crash in or near the solar array and in rescuing the pilot. McClinch is a pilot himself and frequently uses the Airport. These safety hazards may cause a reduction in aircraft's use of the Airport, with a consequent reduction in value of the property. The solar array will be directly visible to the occupants and visitors to the Candlelight Farms Property, which is prized for its scenic vistas and surrounding unspoiled farm and forestland. The visibility of such a large and unsightly solar array will or may detract from the attractiveness of the property, thus impacting the businesses operated on it and reducing its value. (Complaint, ¶ 27)

b) Dunham. Dunham owns two parcels of land adjacent to the Project site that will be directly and substantially impacted by the Property, as follows:

i) 195 Candlewood Mountain Road. Dunham owns real property and improvements at 195 Candlewood Mountain Road in New Milford, on which his primary residence is located ("195 Candlewood Mountain Road"). The property will be directly and injuriously affected by the Project in one or more of the following ways:

> (1) 195 Candlewood Mountain Road abuts the western border of the Project area, and is directly downslope from the area to be clear cut for the solar panels. The panels will be approximately 100 to 150 feet from the property, and will be visible to anyone looking out the back door of the residence.
>
> (2) 195 Candlewood Mountain Road has a large pond in the back (eastern portion of the Property). The potential erosion and sedimentation from the Project area directly uphill (the prevention of which erosion was inadequately documented and planned for by Petitioner) will or may result in deposits of soil and other sediments onto the property and into the pond.
>
> (3) 195 Candlewood Mountain Road's southern boundary abuts the proposed access road that will be used by heavy trucks and other vehicles to transport the logs from the clear cutting as well as the solar array panels, and thereafter by trucks and other vehicles used to operate and maintain

the Project. Dunham will be directly affected by the noise, visibility, dust and other deleterious effects of the creation and use of the access road.

(4) The proposed construction staging area for the Project is on a five-acre parcel that abuts the access road to the south and will be clearly visible from 195 Candlewood Mountain Road. The Decision recommends that Petitioner consider placing some of the solar panels in this area in order to reduce the amount of core forestland to be destroyed. If the panels are placed there they will be clearly visible from the property.

(5) All of the above activities and uses will directly and injuriously affect Dunham's use and enjoyment of 195 Candlewood Mountain Road and reduce the property's value.

(Complaint, ¶ 27)

ii) 214 Candlewood Mountain Road. Dunham owns an approximately 600 acre parcel of land on the east and west side of Candlewood Mountain Road ("214 Candlewood Mountain Road"). This parcel abuts the Project area from the north, south and west, and has several uses which will be negatively impacted by the Project in one or more of the following ways:

(1) Twenty-five acres of this parcel is in the Town's B-3 zone and includes an event and wedding center, a bed and breakfast inn, and a horse farm and stable (for boarding and riding lessons). The solar array will be visible in various parts of the year to users of these facilities, which are prized for their scenic and unspoiled views. The Project will adversely affect the use of the property for weddings and events and as a bed and breakfast, because of the potential visibility to users of the property of the enormous swath of the solar panels to be erected. An adverse impact to these businesses, which depend heavily on the rural and scenic nature of the property, will result in diminution of the property's value. The petition for the Project has already caused a decline in requests for use of these facilities.

(2) The remainder of the 600 acres is mostly zoned for single-family residential uses. It is partially forested with trails that are used year round for hiking, fishing, and horse-back riding. About 55 acres of this remaining part of the property is in the Town's Airport Zone, and contains a heliport. The property also has an easement over the Candlelight Farms Property to the west that allows for use of the Airport by Dunham and his invitees. The glare from the solar panels will or may pose a danger to the small aircraft that use the heliport as well as the Airport, and thus threatens

> the commercial viability of the use of the portion of the property in the Airport Zone for related airport uses, with a consequent diminution in property value.

(Id., ¶ 27)

c) Ostroves. Plaintiffs Lisa K. Ostrove and Michael H. Ostrove own real property at 175 Candlewood Mountain Road, which is their residence ("Ostrove Property"). The Project will or may affect the use of their property as follows:

> The Ostrove Property borders the Project's western boundary, and is located directly downhill from the proposed area of the solar array panels. The panels will or may be located 50 feet or less from the Ostrove Property, and will be visible throughout the year. The Ostrove Property also contains a large pond in the backyard (eastern portion). The potential erosion and sedimentation from the Project, which is very close to and directly uphill from the Ostrove Property (and the prevention of which erosion was inadequately documented by and planned by Candlewood Solar), will or may result in deposits of soil and other sediment directly onto the Ostrove Property and into the pond. The closeness and visibility of the Project from the Ostrove Property and the potential damage to it from erosion will directly and injuriously affect the Ostrove's use and enjoyment of the Ostrove Property and will cause a diminution in its value.

(Id., ¶ 27)

Accordingly, Rescue members McClinch, Dunham, and Lisa and Michael Ostrove have alleged and will prove that they are aggrieved by the Final Decision and Order and thus would have standing to bring this appeal in their own right. (Id.) Rescue therefore has associational standing to appeal under this state's three-pronged test for such standing: 1) at least several members of Rescue have standing to appeal; 2) the interests Rescue seeks to protect are pertinent to its organizational purposes (see pages 1-2 above); and 3) the declaratory, prospective relief requested does not require the participation of individual members. See Connecticut Association of Health Care Facilities v. Worrell, 199 Conn. 609, 616 (1986).

IV. STANDARD OF REVIEW.

Judicial review of state administrative agency decisions is governed by C.G.S. §4-183(j).[5] Our Supreme Court recently summarized the differing standards that apply to a trial court's review in appeals from Council decisions involving interpretations of statutes and those regarding determinations of factual issues. See Fairwindct, Inc. v. Connecticut Siting Council, 313 Conn. 669, 678-79, 689-90 (2014). As to statutory interpretations:

> Although the interpretation of statutes is ultimately a question of law... it is the well established practice of this court to accord great deference to the construction given [a] statutes by the agency charged with its enforcement.... Conclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts.... It is also well established that courts should accord deference to an agency's formally articulated interpretation of a statute when that interpretation is both time-tested and reasonable.... This court also has held, however, that when a state agency's determination of a question of law has not previously been subject to judicial scrutiny...the agency is not entitled to special deference.... [T]he factual and discretionary determinations of administrative agencies are to be given considerable weight by the courts...[but] it is for the courts, and not for administrative agencies, to expound and apply governing principles of law....

(Citations and internal quotation marks omitted.) Id. at 678-79.

The trial court's standard of review of factual determinations is more deferential:

> Judicial review of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable.... This so-called substantial evidence rule is similar to the sufficiency of the evidence standard applied in judicial review of jury verdicts, and evidence is sufficient to sustain an agency finding if it affords a substantial basis of fact from which the fact in issue can be reasonably inferred.... [I]t imposes an important limitation on the power of the courts to overturn a decision of an

---

[5] Section 4-183(j) provides: The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

> administrative agency...and [provides] a more restrictive standard of review than standards embodying review of weight of the evidence or clearly erroneous action.... The United States Supreme Court, in defining substantial evidence...has said that it is something less than the weight of the evidence, and [that] the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. [T]he credibility of witnesses and the determination of factual issues are matters within the province of the administrative agency.... As with any administrative appeal, our role is not to reexamine the evidence presented to the council or to substitute our judgment for the agency's expertise, but, rather, to determine whether there was substantial evidence to support its conclusions.

(Citations and internal quotation marks omitted.) Id. at 689-90.

V. ARGUMENT.

A. The Council acted illegally and in excess of its statutory authority in denying the motions by DEEP and DOA to deny the petition.

As discussed above, the basis for DEEP's Motion to Deny (joined in by DOA) was that "DEEP has not represented in writing, and will not be representing that the [P]roject will not materially affect the status of the [Property] as core forest." Accordingly, DEEP argued, pursuant to the provisions of Conn. Gen. Stat. § 16-50k(a), as amended by Public Act No. 17-218, the Council may not approve the Project by declaratory ruling. Rather, the Project, "if it is to be approved at all, must obtain a certificate of environmental compatibility and public need in accordance with the provisions of [PUESA], Conn. Gen. Stat. §§ 16-50g et seq., and the Siting Council's Rules of Practice, R.C.S.A. §§ 16-50j-1 through 16-50j-91." (DEEP Memorandum in Support of Motion to Deny ("DEEP Memorandum", p. 1; R. 2330)

As DEEP pointed out, "the solar array will be located on approximately 80 acres of [the Property] of which 68 acres is wooded and will be cleared to accommodate the Project.... The Project's Environmental Assessment documents that under The University of Connecticut Center for Land Use Education and Research's ('CLEAR')

Forest Fragmentation Study, core forest will be diminished. The Assessment concludes that the Project will reduce the total amount of core forest in the area by 95 acres." (DEEP Memorandum, p. 2; R. 2331) As discussed, the revised plan submitted after the Motion to Deny was filed proposed the destruction of 84 acres of core forest.

Based on the massive proposed reduction in core forest, DEEP argued that denial of the declaratory ruling was required as a matter of law:

> Pursuant to the provisions of Conn. Gen. Stat. § 16-50k(a), as amended by Public Act 17- 218, the Project, which is "a solar photovoltaic facility with a capacity of two or more megawatts, to be located on . . . forestland," is one that the Council may approve by declaratory ruling "as long as," among other things, "the Department of Energy & Environmental Protection represents, in writing, to the council that such project will not materially affect the status of such land as core forest." Pursuant to the amended statute, "'core forest'" means unfragmented forest land that is three hundred feet or greater from the boundary between forest land and nonforest land, as determined by the Commissioner of Energy and Environmental Protection.
>
> Thus, it is clear that the Project is to be located on core forest. Without the written representation from DEEP that the Project will not materially affect the status of core forest, the Council may not approve the Project through a declaratory ruling. Rather, the Project must go through the full process of obtaining a certificate of environmental compatibility and public need pursuant to the provisions of [PUESA] and the Siting Council's Rules of Practice.

(DEEP Memorandum, p. 2; R. 2331)

DEEP emphasized that it "has not, and will not, be making such a representation because the Project <u>will</u> materially affect the status of core forest land." (<u>Id</u>. (emphasis in original))

As discussed, the Council denied the Motion to Deny in reliance on a staff memo advising that P.A. 17-218 does not apply to the Petition because the amendment became

effective July 1, 2017, and the Petition was filed three days earlier, on June 28, 2017. [6] (R. 905-13) The Council erred as a matter of law for several reasons.

We note at the outset that the Council's ruling on the Motion to Deny was the Council's first attempt to interpret P.A. 17-218. Its interpretation therefore is entitled to no deference, and this Court's review of this question of law is plenary.

In State v. Nathaniel S., 323 Conn. 290 (2016), the Supreme Court re-affirmed the standards to be applied in determining whether a statute applies prospectively or retroactively:

> Whether a new statute is to be applied retroactively or only prospectively presents a question of statutory interpretation over which we exercise plenary review.... The question is one of legislative intent and is governed by well-established rules of statutory construction....
>
> Several rules of presumed legislative intent govern our retroactivity analysis. Pursuant to those rules, our first task is to determine whether a statute is substantive or procedural in nature.... [Although] there is no precise definition of either [substantive or procedural law], it is generally agreed that a substantive law creates, defines and regulates rights while a procedural law prescribes the methods of enforcing such rights or obtaining redress....
>
> If a statute is substantive, then our analysis is controlled by *General Statutes § 55-3*, which provides: "No provision of the general statutes, not previously contained in the statutes of the state, which imposes any new obligation on any person or corporation, shall be construed to have retrospective effect." [W]e have uniformly interpreted *§ 55-3* as a rule of presumed legislative intent that statutes affecting substantive rights shall apply prospectively only. . . . [I]n the absence of any clear expression of legislative intent to the contrary [changes to statutes that create or impose substantive new obligations are therefore] presumptively prospective.
>
> By contrast, [p]rocedural statutes have been traditionally viewed as affecting remedies, not substantive rights, and therefore leave the preexisting scheme intact. . . . [Accordingly] we have presumed that procedural . . . statutes are intended to apply retroactively absent a clear expression of legislative intent to the

[6] A June 22, 2017 email by Council staff advised a prospective petitioner that if the petition were filed before July 1, 2017, "the new legislation would not apply to the project." (R. 2332)

contrary.... We have noted, however, that a procedural statute will not be applied retroactively if considerations of good sense and justice dictate that it not be so applied. Because, in the absence of clear statutory guidance, these default rules provide a conclusive expression of the presumed intent of the legislature, it rarely will be necessary to consult legislative history or other extratextual sources to ascertain the legislative intent with respect to retroactivity.

(Citations, some internal quotation marks and footnotes omitted.) Id. at 294-96.

1. **The plain language of P.A. 17-218 makes clear that a solar project rejected by DEEP prior to July 1, 2017 in the statutory solicitation process established by C.G.S. §§ 16a-3f, 16a-3g or 16a-3j does not qualify for declaratory ruling treatment under C.G.S. § 16-50k(a) unless DEEP represents to the Council that the project will not materially adversely affect core forest, regardless of the filing of the petition before July 1, 2017.**

As amended by P.A. 17-218, Section 16-50k(a) provides in pertinent part:

Except as provided in subsection (b) of section 16-50z, no person shall exercise any right of eminent domain in contemplation of, commence the preparation of the site for, commence the construction or supplying of a facility, or commence any modification of a facility, that may, as determined by the council, have a substantial adverse environmental effect in the state without having first obtained a certificate of environmental compatibility and public need, hereinafter referred to as a "certificate", issued with respect to such facility or modification by the council.... Notwithstanding the provisions of this chapter or title 16a, the council shall, in the exercise of its jurisdiction over the siting of generating facilities, approve by declaratory ruling...any customer-side distributed resources project or facility or grid-side distributed resources project or facility with a capacity of not more than sixty-five megawatts, as long as: (i) Such project meets air and water quality standards of the Department of Energy and Environmental Protection, (ii) the council does not find a substantial adverse environmental effect, and (iii) for a solar photovoltaic facility with a capacity of two or more megawatts, to be located on prime farmland or forestland, excluding any such facility that was selected by the Department of Energy and Environmental Protection in any solicitation issued prior to July 1, 2017, pursuant to section 16a-3f, 16a-3g or 16a-3j, the Department of Agriculture represents, in writing, to the council that such project will not materially affect the status of such land as prime farmland or the Department of Energy and Environmental Protection represents, in writing, to the council that such project will not materially affect the status of such land as core forest.

(Emphasis added.)[7]

Thus, § 16-50k(a) (as amended by P.A. 17-218) requires a person seeking Council approval of a solar photovoltaic energy project of two or more megawatts to apply for a Certificate if the project will affect core forest, unless the project satisfies three prerequisites to qualify for a declaratory ruling: 1) the Project meets DEEP air and water quality standards, 2) the Council does not find a substantial adverse environmental effect, and 3) DEEP makes a written representation to the Council that the project "will not materially affect the status of such land as core forest." The third requirement to qualify for the declaratory ruling process--DEEP's written representation of no material adverse effect on core forest--is excused for any project selected by DEEP before July 1, 2017 pursuant to the solicitation process set forth in C.G.S. §§ 16a-38, 16a-3g, or 16a-3j. The question thus becomes whether the Project is entitled to declaratory ruling treatment--regardless of the undisputed facts that it was not so selected by DEEP, and DEEP did not make the required representation--solely because the Petition was filed three days before P.A. 17-218's effective date.

In excluding from the requirement of DEEP's representation of no material adverse impact on core forestland any solar facility which DEEP "selected ... prior to July 1, 2017" pursuant to C.G.S. §§ 16a-3f, 16a-3g or 16a-3j, the legislature explicitly signaled its intention that the declaratory ruling procedure is not available to any such facility not so selected by DEEP prior to July 1, 2017. The language excluding from the DEEP representation requirement projects selected by DEEP in that process before July 1, 2017 is plain and unambiguous. See C.G.S. § 1-2(z). The exclusion from the DEEP

[7] The amended statute defines "core forest" as "unfragmented forest land that is three hundred feet or greater from the boundary between forest land and nonforest land, as determined by the Commissioner of [DEEP]."

representation requirement of such selected projects creates the inescapable inference that a facility not so selected is subject to the prerequisite of DEEP's representation of no material adverse impact in order to qualify for the declaratory ruling procedure. The obvious key date for the legislature in enacting P.A. 17-218 was whether DEEP had selected or rejected a project before July 1, 2017, not whether the petition was filed with the Council a few days before or after July 1, 2017.

2. **The language and structure of § 16-50k(a) (as amended by P.A. 17-218) make evident that it should apply as of the date of the Council's decision on a petition for declaratory ruling.**

The structure and language of P.A. 17-218 demonstrate that the statute applies to decisions made by the Council after July 1, 2017. The general rule under § 16a-50k(a) is that no one can build a project like this unless he or she first applies for and obtains a Certificate from the Council. Conn. Gen. Stat. § 16-50k(a). As amended by P.A. 17-218, the statute goes on to provide that, notwithstanding the general requirement to obtain a Certificate, the Council "shall ... approve by declaratory ruling" certain projects provided that certain prerequisites are met. The declaratory ruling portion of § 16-50k(a) provides an alternative, shortened procedure that the Council uses to approve certain projects that the Council would otherwise have to vet under the Certificate process.

As DEEP made clear in the Motion to Deny, the actual language of the statute is that "the council shall ... approve by declaratory ruling ... as long as.... " (Emphasis added.) In other words, if the specified prerequisites are not met, the Council lacks power to approve the project by declaratory ruling. For decisions by the Council made prior to July 1, 2017, the only necessary element was that the project meet DEEP's air and water quality standards. For decisions after July 1, [2017], two additional elements must be

present: 1) the Council must find there is no substantial adverse environmental impact, and 2) for projects on core forest, DEEP must supply the written representation of no material adverse effect.[8] As DEEP succinctly argued, "[b]ecause the statute's language applies to what the Council may or may not do, it operates on the Siting Council at the point the Siting Council makes its decision." (DEEP Memorandum, p. 4; R. 2333)

DEEP went on to note: "[T]he conclusion that the law that applies to this project is the law in effect at the time of the decision – rather than the law in effect at the time of the filing of the petition – is consistent with the case law and statutes that govern what law applies to municipal zoning and wetlands applications. The current rule is that a zoning application or a wetlands application is governed by the zoning or wetlands regulations in effect on the date of the application. But this is so only because statutes had to be enacted to change the common law rule that these applications are governed by the law in effect at the time of the local agency's decision." (Id.) See C.G.S. § 8-2h (zoning applications); McNally v. Zoning Comm'n, 225 Conn. 1, 9 (1993) (zoning applications); C.G.S. § 22a-42e (wetlands applications); Paupack Dev. Corp. v. Conservation Comm'n, 229 Conn. 247, 249 n.2 (1994) (wetlands applications). There is no statute for Council decisions that changes the common law rule. Accordingly, the law that applies to the Project is the law in effect at the time the Council made its decision, which was after July 1, 2017.

3. **P.A. 17-218 is procedural and thus should be applied retroactively.**

[8] For a project proposed to be located on "prime farmland," DOA must represent in writing that the project will not materially affect the status of such land as prime farmland. Id. DOA representatives testified at the October 31 hearing session that with appropriate testing the Property may well qualify as prime farmland. (R. 1320-21) Petitioner never offered to perform such on-site testing, however, and the Council declined to require it, even suggesting that DOA was to blame for not performing the testing. (Findings of Fact, ¶ 288-93; R. 2510-11)

Retroactive application of P.A. 17-218 so that it applies to the Petition is appropriate because the statute is procedural. As discussed, Conn. Gen. Stat. § 55-3 provides that no statute that "imposes any new obligations" shall be retroactive. The obligations referred to in this statute are those of substantive law. Procedural statutes, on the other hand, apply retrospectively. The provisions of C.G.S. § 16-50k(a), as amended by P.A. 17-218, are procedural: they allow certain projects to proceed under the declaratory ruling procedure, as opposed to going through a full Certificate process. Thus the amended statute applies to the Project, even though the application for the Project was filed before July 1, 2017.

A recent decision by the U.S. District Court for the District of Connecticut is instructive. In Morrison v. Ocean State Jobbers, Inc., 180 F. Supp. 3d 190 (D. Conn. 2016), plaintiffs brought claims for, among other things, unpaid overtime wages under the Connecticut Minimum Wage, C.G.S. § 31-58 et seq. An amendment to § 31-72, effective October 1, 2015, shifted the burden of proving the requisite good faith belief, for purposes of whether the employer can avoid otherwise mandatory double damages, from the plaintiff employee to the defendant employer. The question was whether the amended version of § 31-72 applied to the action, in which the plaintiffs' dates of injuries occurred before October 1, 2015.

The District Court held that the amendment to § 31-72 did not affect substantive rights. In reaching this conclusion the court reviewed C.G.S. § 55-3 as well as Connecticut court decisions applying its terms:

> The obligations referred to in the statute are those of substantive law; and [l]egislation which limits or increases statutory liability has generally been held to be substantive in nature. [W]e have uniformly interpreted § 55-3 as a rule of presumed legislative intent that statutes affecting substantive rights shall apply

> prospectively only. The legislature only rebuts this presumption when it clearly and unequivocally expresses its intent that the legislation shall apply retrospectively.

(Citations and internal quotation marks omitted.) Id. at 196-97.

The District Court held that both before and after the effective date of the amendment to § 31-72, a plaintiff could recover attorney's fees and costs under the statute. All that had changed, the court found, was "that the burden of proof was shifted from the employees to the employer. This is a matter of procedure and does not impose new obligations or affect the substantive rights of the parties." (Citations and internal quotation marks omitted.) Id. at 197. "While there is no precise definition of either [substantive or procedural law], it is generally agreed that a substantive law creates, defines and regulates rights while a procedural law prescribes the methods of enforcing such rights or obtaining redress." (Citations and internal quotation marks omitted.) Id. The court concluded that a rule governing the burden of proof is a rule prescribing the "method of enforcing rights or obtaining redress and thus is procedural law." Id.

Like the burden shifting amendment in Morrison, P.A. 17-218's amendment to § 16-50k(a) brought about only procedural changes. Prior to P.A. 17-218, a person wishing to build a solar energy facility was required to apply for and obtain a Certificate, except that a declaratory ruling was available if the Council determined that the project met DEEP's air and water quality standards. P.A. 17-218 changed the procedure for getting declaratory ruling approval of such a project by adding two conditions--a finding by the Council of no adverse environmental effect and DEEP's representation of no material adverse effect on core forestland. If the conditions are not met, the applicant's approval process is the same as prior to P.A. 17-218--obtaining a Certificate. While the Certificate process is more cumbersome than the declaratory ruling process, it is no more onerous

than what was required before P.A. 17-218. Thus the amendment neither creates nor limits any substantive rights in project applicants. See Investment Assocs. v. Summit Assocs., Inc., 309 Conn. at 866-70 (statute extending period for revising a judgment is procedural, as "it bears the hallmarks of a procedural statute, leaving the preexisting scheme intact and prescribing a method of enforcing rights or obtaining redress").

Moreover, "considerations of good sense and justice" do not dictate against the presumption that P.A. 17-218, as a procedural statute, will be applied retroactively. See id. at 867-68. To the contrary, good sense and justice support the application of the amendment to this proceeding. The manifest underlying purpose of P.A. 17-218's requirement that DEEP represent the absence of any material adverse impact of a solar project on core forestland in order to trigger the declaratory ruling process is to ensure the more intensive environmental inquiry, through the Certificate process, of a project which, as DEEP has determined here, will have such an adverse impact. Indeed, it would undermine the purpose of P.A. 17-218 to rule that a project which DEEP has determined will have such serious adverse effects on a key natural resource of our state may escape review under the Certificate process simply because the Petitioner files its proposal with the Council three days before the statute's effective date.[9] See Investment Assocs. v. Summit Assocs., 309 Conn. at 867 (normal effective date of October 1 for legislation is "never" significant to determination of whether statute applies prospectively or retroactively).

[9] See DEEP Comments, Sept, 21, 2017, pp. 3-4 (R. 2295-96) (purpose of P.A. 17-218 is to "discourage fragmentation of forest blocks larger than 250 acres. The larger the core forest, the greater value and function of the many attributes of a core forest. Reducing the size of core forest blocks greater than 250 acres has a material affect on that core forest.").

B. <u>The Council acted arbitrarily and with no substantial evidence in approving the Project despite wholly inadequate and incomplete data on its effect on several vernal pools and the critical terrestrial habitat surrounding these pools to be destroyed with the proposed razing of core forest</u>.

From the beginning of the public hearing on September 26, 2017, it was clear that Petitioner had inadequately studied or planned to address the serious impacts to wetlands, wildlife, and other natural resources from the clearing of the 84 acres of core forest proposed in the Petition (as revised). A glaring example of the Petition's deficiencies is its failure to adequately address the Project's impact to vernal pools on the Property and the numerous rare species dependent on the pools for their survival.

The initial environmental assessment report ("EA") filed on behalf of Petitioner by Amec Foster Wheeler ("AFW") (R. 204 et seq.) stated that AFW had found one vernal pool on the Property in Wetland Five, to the north of the proposed array. (R. 211) The EA acknowledged, and Connecticut courts and environmental agencies have long recognized, the importance of protecting vernal pools and their surrounding upland areas as sensitive natural resources. See, e.g., Post Road Ironworks, Inc. v. Inland Wetlands & Watercourses Agency, 2018 Conn. Super. LEXIS 351, *21-27 (copy attached). The EA quoted from a definition of a vernal pool in an authoritative article by Drs. Michael Klemens and Aram Calhoun in 2002 (hereafter "Calhoun & Klemens"):

> Vernal pools are seasonal bodies of water that attain maximum depths in spring or fall, and lack permanent surface water connections with other wetlands or water bodies. Pools fill with snowmelt or runoff in the spring, although some may be fed primarily by groundwater sources. The duration of surface flooding, known as hydroperiod, varies depending upon the pool and the year; vernal pool hydroperiods range along a continuum from less than 30 days to more than one year (Semlitsch 2000). Pools are generally small in size (< 2 acres), with the extent of vegetation varying widely. They lack established fish populations, usually as a result of periodic drying, and support communities dominated by animals adapted to living in temporary, fishless pools. In the [New York/New England] Region, they

provide essential breeding habitat for one or more wildlife species including Ambystomatid salamanders (Ambystoma spp., called "mole salamanders" because they live in burrows), wood frogs (Rana sylvatica), and fairy shrimp (Eubranchipus spp.).[10]

Vernal pool-breeding amphibians "depend upon both aquatic and terrestrial habitats for survival; the rest of their annual cycle is spent in adjacent uplands and wetlands .... The surrounding forest provides critical terrestrial habitat for adult amphibians and newly emerged juveniles throughout the year .... " (Calhoun & Klemens, p. 2) Therefore "[p]rotection of critical terrestrial habitat must also be a priority." (Citation omitted.) Id.

The vernal pool envelope is the area within 100 feet of the pool's edge. The critical terrestrial habitat ("CTH") extends 750 feet beyond the edge of the pool. (Id., p. 16; see EA, p. 6 (R. 211-152)) As the EA noted, the envelope and CTH of the vernal pool initially identified in Wetland V consist almost entirely of undisturbed core forest areas. Id.

An inspection on April 14, 2017 indicated that the vernal pool in Wetland V is a breeding ground for spotted salamanders and wood frogs. (R. 212) Both of these amphibians are "vernal pool indicator species" (Calhoun & Klemens, p. 5) The total area of this vernal pool's CTH is 48.5 acres, 23.3 percent of which would be lost as a result of the forest clearing and other Project activities. (EA, p. 18; R. 224) The EA concluded nevertheless that the Project would not have an adverse effect on this vernal pool because no impacts would occur in the vernal pool depression or envelope and the total Project impact was less than 25 percent of the CTH, which Calhoun & Klemens

[10] This definition is contained in A. Calhoun & M. Klemens, Best Development Practices: Conserving Pool-Breeding Amphibians in Residential and Commercial Developments in the Northeastern United States; pp. 1-2 (2002). The Council took administrative notice of this article and relied on it in inquiring into the effects of the Project on the vernal pools. (See Certified Record, p. 20, No. 1X.E.111)

recommends as the maximum percentage disturbance of the CTH. (Id.; see Calhoun & Klemens, p. 18)[11]

On July 10, 2017, DEEP sent a letter to AFW in response to AFW's request that DEEP review Natural Diversity Data Base ("NDDB") maps regarding the Project site. (R. 1612-16) The letter listed several populations of several "State listed species" that are within or close to the Property's boundaries, including the golden-winged warbler (State endangered) and the slimy salamander (State threatened). DEEP requested that Petitioner conduct surveys of the site by qualified ornithologists and herpetologists to determine the presence of the warbler and salamander species. Id.

In response to DEEP's request, Petitioner retained Oxbow Associates, Inc. Brian Butler, Oxbow's president, conducted the field work during the week of September 11, 2017. (Butler Prefiled Written Testimony, September 19, 2017, pp. 8-9; R. 1312-13) As to the golden-winged warbler, although Butler himself found no evidence of the presence of the species during that week, he did not conduct the requested survey "because its breeding season is from May through July and we are outside of the breeding season." (CS Responses to Council Interrogatories, Set One, No. 49; R. 1563) Butler found areas of potential habitat for the slimy salamander in the Project area but did not locate any slimy salamanders in his inspection. (Prefiled Testimony, 9/19/17, pp. 8-9; R. 1312-13)

The wholesale inadequacy of Petitioner's efforts to document protected species became apparent when the public hearing opened on September 26, 2017. Butler

---

[11] Calhoun & Klemens notes that the travel distances from breeding pools of wood frogs are approximately 1,550 feet, and can be as far as 3,835 feet. (Id., p. 4) Yet nowhere in the EA or in subsequent testimony regarding the other, more valuable wood frog breeding pools later found on the Property (in Wetland I) (see pages 26-32 below) did the Petitioner or its consultants address the need to protect the wood frog's CTH beyond 750 feet. See Post Road Ironworks, Inc., 2018 Conn. Super. LEXIS 351, *21-27 (addressing importance of survival of wood frogs to viability of vernal pools).

admitted that, during the inspection of the Property attended by Council members earlier that day, "a couple more amphibian species" were identified on the site than first reported. (Public Hearing ("PH"), 9/26 at 11; R. 1019) Under vigorous questioning by Council member Dr. Michael Klemens (the co-author of Calhoun & Klemens), Butler conceded that the inspection that day revealed at least one additional vernal pool on the site, located within "Wetland I" as identified in the EA. (R. 1057-61) Wetland I is a large wetland (c. 6 acres) that borders the Project work area's eastern edge. (See Findings of Fact, p. 47 (Figure 7) (R. 2520); EA, Fig. 12; R. 260) Wetland I is a "cryptic vernal pool,"[12] as evidenced by the discovery on September 26, 2017 of several threatened species of salamander, 20 wood frogs, and other indicator species in and around this pool. (R. 1055-58, 1063-65) Butler agreed with Dr. Klemens that these species heavily depend on the forested areas to the west and north of the pool that are to be cleared. (Id.; see EA, Fig. 15; R. 263, 1061) Butler also conceded that Wetland I's CTH may be much more critical (i.e. biologically diverse) than the CTH surrounding the vernal pool in Wetland V. (R. 1064-65) Butler admitted that salamanders are not "good" at relocating after dependent upland forest land has been cleared, and that it would be unlikely that the species could re-populate in the area after the proposed decommissioning of the project twenty years later. (R. 1311-14)

It was evident from this exchange between Dr. Klemens and Mr. Butler–and Butler himself agreed--that, at least as of September 26, 2017, the Council had before it insufficient data to make an informed decision on the impact of the Project on the CTHs of the several indicator species that depend on the site's vernal pools for their existence.

[12] A "cryptic vernal pool" is an area within a larger wetland that has vernal pool functions as defined by the presence of indicator species. (R. 1057-58)

(R. 1050-51) As Dr. Klemens pointedly asked: "How can one effectively consider [how to protect] these threatened species when you have as of yet not been able to locate them on the site....?" (R. 1077-78)

As the credibility of the initial EA crumbled during the September 26, 2017 hearing, Petitioner's representatives acknowledged that the reason its consultants had not located either salamanders or golden-winged warblers was that Butler's inspection was done in early September (the end of the summer dry season), whereas the optimal time in Connecticut to detect these species is in May or June. (R. 1051-54, 1070-71)[13]

When Dr. Klemens suggested that Petitioner conduct its surveys of wildlife populations next year and then re-submit the Petition, Petitioner's representatives responded bluntly that the timeline of the Petition and environmental testing was dictated by Petitioner's contractual deadline with its proposed landlord (NMCP, the Property's contract purchaser). (R. 1053-54) (Lindsay); R. 1081-82 (Walker) (contract documents require Petitioner to complete construction of the project by end of 2018; this deadline prevents Petitioner from doing the more extensive studies suggested by Dr. Klemens)).

Dr. Klemens nevertheless requested Petitioner to submit, before the October 31, 2017 hearing session, mapping of the two vernal pools and CTHs as well as pre-and post-construction vernal pool water budgets. (R. 1079-81, 1101)[14]

At the October 31, 2017 hearing session, Petitioner submitted a revised plan. The revised plan (E-101) reduced the size of the solar panel array (to 60,000 panels from 75,000 panels) (R. 1359-60) and shifted the array to the west "to provide more buffer for

[13] Butler admitted he spent no time in his September inspection searching Wetland One for marbled salamanders. (R. 1059)

[14] Dr. Klemens recused himself before the October 31, 2017 hearing, and did not participate further in the deliberations or decision on the Petition. (Council Memorandum, Oct. 30, 2017 (R. § V.A.10)

vernal pools and to stay out of [slimy salamander] habitat areas." (R. 1245-47) Even with these changes, however, the proposed impacts on the CTHs for the vernal pools remained substantial.

The revised plan showed that there are actually two cryptic vernal pools in Wetland I. (R. 2067-68; 10/27/17 AFW to DEEP pp. 1-2; R. 1899-1900 (vernal pool maps)) As to the two vernal pools in Wetland I, clear cutting of the forest area and other development activity would result in a loss of <u>41.4 percent of the CTH of these pools</u> (26.14 acres destroyed v. total CTH of 63.08 acres). This destruction of CTH is much greater than the 25 percent maximum alteration of CTH recommended by Calhoun & Klemens. (10/27/17 AFW to DEEP, p. 2 (R. 2068); <u>see</u> Petitioner's Response to Council Interrogatories (Set Two); Nos. 90-91 (R. 1883-84))

As to the vernal pool previously identified in Wetland V, the revised plan would result in a loss of 7.5 acres of the total 43.45 acres of the CTH, or 17.3 percent. Butler then determined, without any explanation or any analysis of the migration habits of the indicator species in the two separate vernal pool systems in Wetlands I and V, that the CTHs for the two vernal pools overlap and should be assessed together as a "single, mutually supportive system." (R. 2068) As a single system, Butler concluded that the "aggregate" CTH for the pools is 94.57 acres and the total "aggregate" loss of CTH would be 29.91 acres (31.6 percent), a percentage still much greater than Calhoun & Klemens' maximum. (R. 2003) Butler also admitted that because he did not examine the pools during the spring breeding season, he could not determine which pool had greater or fewer indicator species, and conceded again that the larger Wetland I may be more biologically diverse than Wetland V. These concessions reduced his conclusion that the

two vernal pools share the same aggregate CTH to sheer speculation. (R. 1233-35) Butler also agreed that a loss of even five percent of forested cover is statistically significant, but stated that in his view the loss of cover would not be quite as significant as "conventional development." (Id.)

At the final hearing session on November 14, 2017, Petitioner did nothing to ease concerns about the effect of the Project on the vernal pools' CTHs. In cross-examination by counsel for Rescue, Petitioner's representative clarified that the deadline for completion of construction was the end of 2019, not the end of 2018 as previously represented. (R. 1480) When counsel then asked whether this extra year would allow Petitioner time to do the environmental assessments in the next spring breeding season as requested by Dr. Klemens, Petitioner's representative answered: "We'll leave that to the full panel." (Id.; at 1480-81) This was nonresponsive, and showed again that the Petitioner was driven more by contract deadlines than by any meaningful desire to study the Project's effect on these important natural resources. Butler acknowledged that, notwithstanding the revised plan, removal of over 26 acres of core forest to the west of Wetland I will remove a substantial portion of the 750 feet of CTH surrounding this wetland. (R. 1501-02)

This sequence of events plainly reveals that the Petition was, as Dr. Klemens put it on September 26, a "hasty compilation to meet administrative deadlines rather than well-planned studies of the site that maximizes seasonal opportunities for the detection of significant species." (R. 1053) The Petition obviously was filed to come in under the wire of P.A. 17-218 and to get around the need for the more comprehensive review required under a Certificate process. The Petition was filed with no meaningful analysis

of the core forest land to be destroyed, and with totally inadequate data on the identity or functions of the vernal pools on the site and the importance of the core forest areas to the CTHs of the diverse species dependent on these pools. DEEP's and Dr. Klemen's requests to conduct the requisite surveys during the appropriate times of year were rejected by Petitioner due to its alleged need to meet contractual or construction deadlines. Surely a contract contingency cannot justify the Petitioner's failure to conduct these critical assessments in a timely manner. See C.G.S. § 16-50p(g).

Moreover, the size and scope of the array and its effect on critical environmental resources changed from the beginning of the hearing until literally days before it closed. To allow the destruction of core forest on the scale proposed on the basis of an ever-shifting Project description, the absence of the requested environmental surveys, and a rush to sign contracts, would make a mockery of UConn's CLEAR findings of the need to prevent the fragmentation of core forest habitats.

The inadequacy and untimeliness of the data presented by Petitioner was succinctly summarized by Starling Childs, Rescue's environmental consultant. Mr. Childs, a Connecticut Certified Forester, testified:

> Along with [Petitioner's] admitted "non-existent breeding bird survey" and [the absence of] any serious consideration of the interior forest sites to be demolished, these and other critical habitat features warrant much more study at the proper times of year in order to fully understand the cycle of seasonal use by, obligatory utility to, and relative abundance and diversity of wildlife ....

(R. 2367)

Timothy B. Abbott, Housatonic Valley Association's Regional Conservation & Greenprint Director, underscored the importance of the core forest area at issue and the

inadequacy of the data presented to the Council on the impact on CTHs of the clear cutting envisioned by the Project:

> The Connecticut Department of Energy and Environmental Protection Natural Diversity Database (NDDB), most recently updated in June, 2017, identifies nearly the entire core forest and all but a small area of cleared field near Candlewood Mountain Road within the 163 acre parcel as important rare species habitat. This data layer may be viewed either at Connecticut Environmental Conditions Online or through HVA's online map viewer. These areas support one or more rare species or habitat types, in part, because the area of core forest that envelopes them provides a buffer from a range of environmental stressors which could affect their viability. Any vernal pool habitat which may occur on the property would be affected by forest clearing as well, since obligate species like wood frogs and mole salamanders that breed in vernal pools spend much of their life cycle in the leafy substrate of associated upland forests, sometimes at a considerable distance from the pools themselves. DEEP should have the opportunity to review this project in detail and consider how these habitat areas may be impacted by the scale and scope of forest clearing envisioned by this project.

(R. 2372)

The August 30, 2017 report from the Connecticut Council on Environmental Quality ("CEQ") echoed these concerns, and urged the Council to deny the Petition due to the inadequacy of essential information on the Project's effect on upland habitats of numerous species. (R. 803-05)

Under these circumstances, the Council acted arbitrarily and without substantial evidence in approving the Petition in the face of the wholly inadequate data on the adverse effect of the Project on the CTH areas to be destroyed. The Council's Findings of Fact and Opinion themselves demonstrate the paucity of the data:

- The Council acknowledged that post-development conditions of the CTH for vernal pools exceeded Calhoun & Klemens' maximum percentage developed area recommendation. (Findings of Fact, ¶ 212; R. 2503)
- The Council found that the construction area would be as close as 145 feet from the Wetland I cryptic vernal pools. (Id., ¶ 214; R. 2503) The Council stressed that the facility would "completely avoid" the vernal pools in Wetlands I and V as well as their 100 feet envelopes. (Id., ¶¶ 212, 215) That finding, however, is immaterial

as it ignores the permanent loss of CTH surrounding these pools. It is this larger area that is essential to "support upland populations of amphibians that breed in vernal pools." (Calhoun & Klemens, p. 16)

- The Council admitted that none of the vernal pools was examined for indicator species during the spring breeding season. (Id., ¶ 217; R. 2503)

- The Council accepted without question Petitioner's conclusion that there is no suitable breeding habitat on the site for the endangered golden-winged warbler, and ignored the undisputed testimony that the optimum time to inspect for this endangered species is the spring. (Id., ¶ 247, R. 2506)

- The Council acknowledged the diverse amphibian species observed in Wetland I during the September 26, 2017 site inspection. While one dark salamander observed at this time could not be conclusively identified as a lead-back salamander or slimy salamander, the Council conceded that the "field survey time of year was not ideal as the optimal time of year to capture slimy salamanders in Connecticut is between May and June."[15] (Opinion, p. 7; R. 2528)

- The Council's determination that an "exclusion barrier from the fenced solar array" would protect salamanders (R. 2508) finds no support in the record. To the contrary, the erection of a barrier to the west of Wetland I will prevent salamanders from migrating in that direction from this vernal pool into what is left of the CTH after construction.

- The Council's conclusory finding that the proposed 100 acre "conservation parcel" to the north and east of Wetland I will "allow for preservation of slimy salamander habitats" is pure conjecture, especially given the absence of any meaningful study of whether these creatures would be able to migrate from Wetland I. (Opinion, p. 7; R. 2528; see pages 35-39 below)

In sum, the Council's willingness to overlook the absence of reliable and timely data on the effects of the contemplated massive destruction of core forest on the viability of the CTHs and their indicator species is arbitrary and an abuse of discretion.

[15] Although 20 wood frogs were observed in Wetland I's vernal pool in September 26, 2017, the Council's conclusion that obligate species would not be affected by the Project ignored Calhoun & Klemen's finding that the CTH for wood frogs can extend as far as 3,835 feet from the pool. See page 25 n. 11 above.

C. The Council acted arbitrarily and without substantial evidence in conditioning approval on an undefined decommissioning plan that Petitioner had no power to procure or fund.

The Council conditioned its approval of the Petition on a purported "[d]ecommissioning plan" that would require removal of the panel array after the 20-year life of the Project. (Decision, ¶1.k; R. 2531; Findings of Fact ¶ 164; R. 2498) Petitioner failed to provide, and the Council failed to require, even bare-bones details of the plan, despite numerous requests from Rescue representatives and other members of the public. (R. 1160-62, 1182, 1474-77, 1507-09) There was no evidence submitted as to the effectiveness of the decommissioning plan in restoring the destroyed core forest areas.[16] There was no evidence that NMCP, the owner of the Property who would lease it to Petitioner for 20 years, had been consulted or was even willing to agree to the plan. Petitioner submitted no proof that it had commitments or agreements from sureties to secure the plan financially--a particularly glaring omission given the fact that Petitioner is a single-purpose entity created solely to lease the Property and operate the Project for its expected 20-year life.[17] (R. 1241-42, 1378-80) Petitioner's representative (Walker)

---

[16] Indeed the overwhelming evidence was that the threatened species that would be eliminated by the removal of CTH would be unable to repopulate the area after 20 years. (CEQ Comments, R. 1313; see page 26 above)

[17] To the extent that the Council took any comfort from the PILOT agreement between Petitioner, NMCP and the Town (R. 367-81) that the decommissioning plan would be adequately funded, that reliance was unjustified. The PILOT agreement-- which the Council has no authority to enforce in any event--states that a surety bond for the decommissioning plan will be provided to the Town six months before the decommissioning date, i.e. at the end of the Project's proposed 20-year life. (R. 380) Whether Petitioner would be able or willing to procure such a bond 19.5 years after the commencement of the Project is pure speculation. Without any presently-in-place financial security and no future revenue stream to fund any such security at the end of the Project, Petitioner easily could avoid funding any plan by declaring bankruptcy. The Council's apparent willingness, through its conditional approval, to let the nature and scope of the decommissioning plan be worked out between Petitioner and the Town is an impermissible delegation of the Council's statutory responsibility to protect the environment, and is in any event illegal as there is no record proof that the plan (in whatever final form Petitioner chooses to adopt) will ever be adequately funded. (See pages 37-39 below.)

bluntly stated that Ameresco, its parent, would not agree to commit to fund such a plan. (R. 1379-80)

In the final hearing session on November 14, 2017, Petitioner's representatives admitted that: 1) a specific decommissioning plan had not been developed; 2) the Property will be restored in accordance with an as-yet undeveloped plan and the "desires of the owner of the property"; 3) it was undetermined whether the plan would include restoration of trees; 4) as proposed lessee of the property from NMCP, Petitioner has no power to agree or object to planting trees as part of the plan; and 5) NMCP, the proposed Property owner, is not a party to the proceeding. (R. 1474-78, 1507-09)

The Council acted arbitrarily and without substantial evidence in approving the Petition with a condition for an undefined and undrafted decommissioning plan that Petitioner admitted it had no power to agree to, and in the absence of any evidence that the proposed Property owner would agree to such a plan or that the plan would be secured by someone with the financial wherewithal to ensure it would be carried out 20 years from now. An Agreement to decommission years in the future is meaningless without solid proof that is properly funded now. Quite simply, the Council's approval of what was no more than a chimerical promise of a decommissioning plan was an abdication of its responsibility to preserve the long-term environmental viability of this sensitive forested area. Indeed, the Council violated its own regulations, and thus erred as a matter of law, by not requiring a detailed decommissioning plan with financial assurances as part of the Petition. <u>See</u> R.C.S.A. 16-50j-93, incorporating the requirements of R.C.S.A. § 16-50i-94(i) for filing a decommissioning plan with applications

for wind turbine facilities into the requirements for declaratory ruling petitions for solar projects under C.G.S. § 16-50k(a).

D. The Commission acted illegally, arbitrarily and without substantial evidence in approving the Petition on the basis of a potential undefined conservation easement that Petitioner has no power to procure.

In the Opinion portion of the Decision, the Council noted:

> Along with the proposed revised project, the developer of the parcel hosting the project, New Milford Clean Power, LLC, would deed approximately 100 acres (located on the project parcel as well as on adjacent parcels also controlled by the developer) to a local land conservation trust as permanently conserved land. This area to be set aside would encompass the area of three vernal pools and associated prime slimy salamander habitat immediately to the north and east of the area to be used for the project.... The Council encourages CS to work with entities such as, the Town of New Milford, DEEP, Weantinoge Heritage Land Trust and/or other local conservation groups to prepare and finalize the conservation easement.

(R. 2523 (emphasis added); see also R. 2509 (Findings of Fact, ¶ 272 (referring to "potential agreement" to work with conservation groups to establish conservation easement))[18]

The Commission acted illegally and/or without substantial evidence in approving the Petition on the assumption that the proposed conservation easement would be procured, for two reasons. First, although the Opinion states that the Council "encourages" Petitioner to work with the Town, DEEP, and conservation groups to "prepare and finalize" an easement, the record is clear that Petitioner has no power to grant such an easement, and Petitioner offered no evidence to show that the Property owner would agree to impose such a perpetual restriction on the use of the Property. Second, although the record is replete with Petitioner's bromides that imposing a

[18] Note that Finding of Fact 301 (R. 2512) incorrectly states that Petitioner "established a 100-acre conservation restriction."

conservation easement in the northern portion of the Property would address the numerous environmental ills the Project would inflict on the southern portion, the record contains no proof of any studies showing the actual efficacy of the easement on the northern portion in mitigating the destruction of CTHs and other adverse effects in the southern portion.

Section 47-42a of the Connecticut General Statutes authorizes a "conservation restriction" to be placed "by or on behalf of the owner of the land described in" a deed or other instrument conveying the restriction. The restriction may be conveyed to "any governmental body" or "a charitable corporation or trust whose purposes include conservation of land or water areas." C.G.S. § 47-42b. Throughout the public hearing, however, Petitioner's representatives admitted that, as the proposed lessee of the Property from NMCP, Petitioner has no power to transfer any conservation easement or any other interest in the Property.

At the initial September 26, 2017 hearing session, Council members Murphy and Hannon questioned whether Petitioner had any ability to procure a permanent easement. (R. 1031-35) Petitioner's counsel responded that what happens after the 20-year Project period expires had not been "finalized" with the "landlord." (Id.) At the session later that night, Paul Elconin, Director of Land Conservation for the Weantinoge Heritage Land Trust, testified that Petitioner had taken none of the required steps to negotiate an acceptable conservation easement with any land trust, and that there was no proof in any event that the restrictions actually would mitigate the effects of the destruction of core forest. (R. 1128-30)

At the October 31, 2017 session, Petitioner's representative stated that it had submitted a "plan" for a conservation easement to several "conservation organizations," but Petitioner never produced such a plan or any other evidence of discussions with any land trust. (R. 1255-56)

At the November 14, 2017 closing session, Petitioner's representative (Lindsay), admitted that Ameresco, Petitioner's parent, had not received permission from either the current or prospective owner to place a conservation restriction on the Property. (R. 1478-79) Lindsay stated that "discussions" between NMCP and land trusts were being held, but repeated that there was no contract in place, and that Petitioner could offer no details on the negotiations or the scope of the restriction. (R. 1483-86, 1506) Just before closing the hearing, Council Chair Stein remarked on the lack of details provided by Petitioner on the proposed conservation easement. He asked if Petitioner would be willing to provide "more assurance" about the easement in the development and management plan that would be submitted if the Petition were approved. (R. 1533-34) As the Chair put it: "[W]e're going to want to see more than just a pledge by an entity that may not even be able to deliver." (R. 1534) Yet despite those purported concerns, the Council inexplicably failed to condition the approval on the procurement of the easement.

The Council erred as a matter of law in approving the Petition in the absence of any evidence that the Property owner would agree to the conservation easement. Connecticut law is clear that an administrative agency acts illegally when it approves an application and the approval depends for its proper functioning on action by another agency or entity over which the applicant has no control, unless the record shows that the necessary action is probable. See Gerlt v. Planning and Zoning Comm'n, 290 Conn. 313,

323-28 (2009). The policy underpinning this rule is that where, as here, the agency's action is not conditioned on the approval or action of a third party over which the agency has no control, there is a risk of public harm unless the record at the time of approval contains substantial evidence that the required action is reasonably probable. Id. at 325-26 (citing cases).

The record before the Council is devoid of any evidence showing the reasonable probability that the Property owner would agree to establish---or indeed that a land trust would agree to host--the proposed conservation easement. Moreover, it is undisputed that, without the proposed conservation easement, the Project would create added risks to the public health and safety. See id. Indeed, it was Petitioner itself that proposed the conservation easement in the northern portion of the Property as a way to offset the substantial environmental impacts that the forest clearing would impose on the southern portion. Council members clearly viewed the easement as an important component of the Project. (R. 2528)

Because of the undisputed risk of adverse environmental effects to the Property if the Project were to go forward without the easement, the Council erred as a matter of law in failing to impose the easement as a condition of approval, due to the absence of any evidence that the Property owner would agree to the easement. Compare Gerlt, 290 Conn. at 323-28 (upholding unconditional approval of site plan which depended on town's approval of easements over the subject properties because town submitted letters into record that expressly stated its intent to grant the easements, and there was no evidence

that the development would cause harm to the neighborhood if easements were not granted). [19]

The Council also acted without substantial evidence and on the basis of incomplete and inadequate data by failing to require Petitioner to submit any evidence on the nature and scope of the conservation easement or any meaningful environmental study of whether and to what extent the easement would mitigate the environmental havoc the clear cutting of 57 acres of core forest would wreak on the rest of the Property. As Mr. Elconin of the Weantinoge Heritage Land Trust pointed out, the proposed conservation easement area would be in the northern portion of the Property with much steeper slopes than the core forest to be destroyed in the southern portion, and a comprehensive environmental assessment is necessary to determine how the proposed conserved land would offset the environmental impacts caused by the loss of the core forest. (R. 1128-30) Petitioner never offered to undertake such a study.

In sum, it is obvious from the record that Petitioner's promises to attempt to procure a conservation easement were illusory and beyond its control, and the Council erred in approving the Petition on the basis of no more than a hope that the easement would ever be obtained or have any salutary effect.

---

[19] The public harm that the Gerlt rule seeks to prevent would not be lessened by allowing Petitioner to submit evidence to the Council regarding the conservation easement as part of its development and management plan ("DMP"). See R.C.S.A. § 16-50j-60 et seq. Plaintiff Rescue and other parties to the Petition proceeding would have little opportunity to contest the nature or limits of the easement at this stage, and if the DMP does not propose an easement or the proposed easement does not have the mitigative environmental effects represented by Petitioner, the only recourse would be to file a declaratory ruling petition or bring another round of expensive litigation. See Fairwindct, 313 Conn. at 694-95.

E. The record contains no substantial evidence that Petitioner had adequately considered potential alternative sites with less environmental impact.

The Council found that Petitioner had investigated four alternative sites in New Milford, but rejected them for reasons including inadequate space, visibility to abutters, wetlands issues, and steep grades. (Opinion, p. 3 (R. 2524)) The Council concluded that "[t]he proposed site is the only site [in New Milford] CS was able to secure that had willing landowners, adequate acreage and proximity to electrical infrastructure." (Id.) The Council's determination that Petitioner had adequately investigated alternative sites is not based on substantial evidence. To the contrary, the evidence showed that Petitioner intentionally did not look at any site outside of New Milford due to its time constraints in responding to the RFP (see pages 27-30 above). The proof on alternatives was as follows:

- At the October 31, 2017 hearing session, Petitioner's representative admitted that it had not explored any alternative sites outside of New Milford, because it had only a short time to respond to the RFP after the "land developers" approached it. (R. 1391-92)
- Petitioner considered a brownfield site located near the Property and known as the "Century Brass Site," but rejected it because of insufficient size and wetlands issues. (Opinion, p. 3 (R. 2524); see R. 1392. However, Petitioner admitted that it had not explored a site adjacent to the Century Brass Site, and offered no explanation for this. (Id.)
- Petitioner admitted that it did not evaluate the closed New Milford Landfill as a site, and the record does not reveal who owns the site or whether it is available for use as a solar facility. (R. 2524, 1527-28) The New Milford Landfill is located on Route 7 south of the Property. Although Petitioner suggested that the Property has an advantage because the Project would not have to run long transmission lines over roads to get to the Rocky River interconnect (id), there was no evidence that transmission lines along Route 7 from the landfill to the Property would not be available.

- At the closing session on November 14, 2017, Petitioner's representative summed up why it did not look at the landfill or any sites outside of New Milford: "This is the site we were presented with, and this is what we went with." (R. 1528)

This evidence reveals that Petitioner's search for alternatives was strikingly inadequate and, as with its incomplete and unsupported investigations on other salient issues, was driven by its own internal constraints rather than any meaningful environmental analysis. The Council acted arbitrarily and without substantial evidence in failing to require Petitioner to explore other potential alternatives, especially given the critical environmental importance of the Project site.

F. The Council lacked substantial evidence on which to base its approval given the incompleteness and inadequacy of Petitioner's stormwater management plan.

In its initial Environmental Assessment, AFW represented that the Project's stormwater management plan ("SWMP") would comply with DEEP's 2004 Connecticut Stormwater Quality Management ("SWQM") guidelines as well as DEEP's 2002 guidelines for erosion and sedimentation control. (R. 226-27) From the outset of the hearing, however, it was clear that Petitioner's study of the effect of the Project on management of stormwater runoff from the site was a constantly moving target that remained incomplete and undocumented at the hearing's close.

Petitioner's representatives admitted at the September 26, 2017 opening session of the hearing that its SWMP was not ready, and that it had not yet even configured the location of the interior access roads. (R. 1029-30, 1897-98)) After that initial session, Petitioner substantially redesigned the solar array field in an attempt to reduce impacts to the vernal pools discovered during the site inspection that day. (See pages 26-28 above) Yet as of the October 31, 2017 session, Petitioner had not completed a revised SWMP reflecting the redesign, and had no specific plan or data on pre and post-construction

water discharge rates. (R. 1225-26) In response to questions from Council members, Petitioner's representatives stated that it needed "additional meetings" with DEEP to redesign the plan, and had no plan addressing the impact of the access roads (which will face downhill perpendicular to the slope directly toward the Ostrove and Dunham properties) on wetlands. (Id.; see R. 1350-53) Despite questions and comments by Council members and Town representatives in both the October 31 and November 14 sessions as to whether a "deluge" storm (causing several inches of rain in a short period as had recently happened in New Milford) would cause rutting and erosion off-site, Petitioner's representatives could answer only that it had not seen this in Ameresco's other solar projects. (R. 1362-63, 1458-59)[20]

At the November 14 session, Russell Posthauer, Rescue's civil engineering consultant, testified that the plans for containing erosion and stormwater runoff were still incomplete and lacked necessary detail. (R. 1426-27) Town officials also complained that the Town had not even seen any drawings on the reconfiguration. (R. 1453-54) In response, Council Chair Stein announced without explanation[21] that the hearing needed to be closed that night and there would be no more opportunity for follow-up. (Id. at 1454-55) As the hearing drew to a close, Petitioner's representatives stated again that the final design of the SWMP was still under negotiation with DEEP, and repeated the assurance that the final plans "would" comply with the applicable standards. (R. 1517-21)

[20] The properties of plaintiffs Lisa and Michael Ostrove and of Carl M. Dunham, Jr. on Candlewood Mountain Road abut the western boundary of the Project site and are directly downgradient from the area of disturbance, and any drainage from the Project will flow onto their properties. (R. 1431-33)

[21] The Chair never even suggested that the Council could ask the parties to agree to an extension of its deadline for deciding the Petition to allow an opportunity for meaningful review of the revisions. See C.G.S. § 4-176(i).

In these circumstances the Council acted arbitrarily and without substantial evidence in accepting Petitioner's representations that it "would modify" its SWMP to comply with DEEP's 2002 erosion and sediment control guidelines and the 2004 SWQM. (Opinion, p. 9; R. 2530; see also Findings of Fact ¶¶ 196-98; R. 2501) Critically, the Council did not find that an existing SWMP plan in the record satisfied water quality standards. Compare Fairwindct, 313 Conn. at 694-95 (Council properly had approved petition based on existing plan in record showing compliance with stormwater quality standards), with Finley v. Inland Wetlands Comm'n, 289 Conn. 12, 41-43 (2008) (commission improperly approved permit on condition that petitioner submit "revised and updated" erosion control plan that implements state regulations, in the absence of any existing plan in the record when commission rendered its decision showing compliance with state regulations).

G. The Council acted clearly erroneously and without substantial evidence in approving the Petition despite its wholesale inadequacy and incompleteness.

For the reasons discussed above, the Petition lacked essential data and information from the moment it was filed, and this critical information failed to materialize at any point during the hearing. First, it became obvious at the opening of the public hearing that Petitioner had missed the critical window of opportunity for conducting the necessary studies and assessments of the Property to determine the number and extent of vernal pools and the effect that the destruction of core forestland would have on the rare species who depend on the forest for their survival. The Petitioner's sole excuse for not performing such studies was that it had contract deadlines to meet. (See Part B above.)

Second, the decommissioning plan proposed by the Petitioner was simply an illusory promise backed by no proof that such a plan would be put in place, let alone that funds or security in place today would be adequate to pay for it. (See Part C above)

Third, the Council approved the Petition on the basis of a "potential" conservation easement to preserve 100 acres of land on and adjacent to the Property in the absence of evidence that the Property owner would agree to impose the restriction or that the easement would mitigate the devastating harm to the 87 acres of core forest to be destroyed. (See Part D above)

Fourth, it is undisputed that Petitioner failed to explore any prudent or feasible alternative site outside the geographical limits of New Milford, and only conclusorily explored alternatives within New Milford. Here again, contractual limitations prevailed over environmental due diligence. The notion that this record shows an adequate or complete investigation of alternatives is baseless. (See Part E above)

Fifth, the SWMP – an obviously critical means of protecting against the potentially severe runoff of drainage and sediment to properties directly downhill from the Project – was another continuously moving target that remained incomplete when the Council closed the public hearing. Petitioner's promise that it would "modify" the SWMP to comply with applicable DEEP guidelines is not an acceptable substitute for the Council's determination that an existing plan on the record met these standards. (See Part F above)

Quite simply, the Council acted on the basis of a petition that was substantially incomplete and that lacked essential required information. An administrative agency abuses its discretion when it approves an application that is not in substantial compliance with the essential requirements of the governing statutes or regulations sufficient to

assure adherence to their objectives. See e.g., Montigny et al. v. Vernon Inland Wetlands Comm'n, 2004 Conn. Super. LEXIS 2839, *14-15 (J.D. Rockville) (citing cases) (copy attached). When an agency acts without essential required information, or defers such consideration to a date after approval, it not only acts without substantial evidence but violates the fundamental due process rights of the parties involved. See Gustafson v. East Haven Inland Wetlands & Watercourses Comm'n, 2004 Conn. Super. LEXIS 1416, *6-9 (J.D. New Haven) (copy attached) (commission's deferral of resolution of the contested issue of existence of vernal pools on site until after application was approved and without opportunity for plaintiffs to be heard violated fundamental due process).

Any one of the above deficiencies would warrant the Court's reversal of the Council's decision. But when viewed together, the inadequacy and absence of critical data and information regarding the environmental impacts of this massive project on a vital natural resource of the State make clear that the hearing and decision process was made subservient to the overriding goal of starting the clearcutting and installing the solar panels within Petitioner's contractual deadlines. This manifest rush to judgment – especially in a matter that never should have proceeded as a declaratory ruling – stands on its head the Council's statutory mandate to balance the State's energy needs with the preservation and protection of our ever-diminishing natural resources.

Certainly twenty megawatts of electricity to be sold to other states do not justify the destruction of 87 acres of core forest, especially when the state's environmental protection agency opposes the Petition and the record is devoid of the information necessary for the Council to intelligently strike the statutory balance. The Council acted illegally, arbitrarily, without substantial evidence, and in violation of Plaintiffs' fundamental

due process rights in stamping its imprimatur on a project with such serious and irreversible environmental consequences in the face of the wholesale deficiencies in the Petition described above.

CONCLUSION

For the reasons discussed above, Plaintiffs respectfully request the Court to reverse the Council's Decision.

PLAINTIFFS,
RESCUE CANDLEWOOD MOUNTAIN,
LISA K. OSTROVE F/K/A LISA J.
KRELOFF, MICHAEL H. OSTROVE,
AND CANDLELIGHT FARMS
AVIATION, LLC

By: ______________________

Daniel E. Casagrande, Esq.
Attorney for Plaintiffs
Cramer & Anderson, LLP
30 Main Street, Suite 204
Danbury, CT 06810
(203) 744-1234
Juris No. 101252

CERTIFICATION OF SERVICE

I certify that a copy of the above was or will immediately be mailed or delivered electronically or non-electronically on August 9, 2018, to all attorneys and self-represented parties of record and that written consent for electronic delivery was received from all attorneys and self-represented parties of record who received or will immediately be receiving electronic delivery.

AGG Robert L. Marconi
General Finance
10 Franklin Square
New Britain, CT 06051

AGG Clare E. Kindall
AG-Energy
10 Franklin Square
New Britain, CT 06051

Paul R. Michaud, Esq.
515 Centerpoint Drive, Suite 502
Middletown, CT 06457

Daniel E. Casagrande

TAB A

Meeting Minutes

Meeting of December 7, 2017

A meeting of the Connecticut Siting Council (energy/telecommunications) was held on Thursday, December 7, 2017, in Hearing Room Two, Ten Franklin Square, New Britain, Connecticut. The meeting was called to order with a quorum present by Chairman Stein at 1:00 p.m.

Council Members Present:

Robert Stein
Chairman
James J. Murphy, Jr.
Vice Chairman
Edward Edelson (arrived at 1:35 p.m.)
Robert Silvestri

Robert Hannon
(designee for Commissioner Klee)
Larry Levesque
(designee for Chairman Dykes)
Michael W. Klemens

Council Members Absent:

Michael Harder

Daniel P. Lynch, Jr.

Staff Members Present:

Melanie Bachman
Executive Director/Staff Attorney
Christina Walsh
Supervising Siting Analyst
Fred Cunliffe
Supervising Siting Analyst

Robert Mercier
Siting Analyst
Michael Perrone
Siting Analyst

Recording Secretary:

Lisa Fontaine

1. **Minutes of November 9, 2017**

Dr. Klemens moved to approve the minutes of November 9, 2017; seconded by Mr. Murphy. The motion passed with Chairman Stein abstaining.

2. **PETITION NO. 1221 - Windham Solar LLC petition for a declaratory ruling that no Certificate of Environmental Compatibility and Public Need is required for the proposed construction, maintenance and operation of two 1.0 Megawatt and one 1.5 Megawatt Solar Photovoltaic Electric Generating facilities located at 91 Plainfield Pike Road, Plainfield, Connecticut. Motion to Reopen.**

Dr. Klemens moved to deny the Motion to Reopen pursuant to Connecticut General Statutes §4-181a(b); seconded by Mr. Hannon. The motion passed with Mr. Silvestri abstaining.

3. **PETITION NO. 1310 - Quinebaug Solar, LLC petition for a declaratory ruling that no Certificate of Environmental Compatibility and Public Need is required for the proposed construction, maintenance and operation of a 50 megawatt AC solar photovoltaic electric generating facility on approximately 561 acres comprised of 29 separate and abutting privately-owned parcels located generally north of Wauregan Road in Canterbury, Connecticut and south of Rukstela Road and Allen Hill Road in Brooklyn, Connecticut. Draft Findings of Fact, Opinion, and Decision and Order.**

Dr. Klemens moved to approve the Draft Findings of Fact, Opinion, and Decision and Order denying the proposed project without prejudice; seconded by Mr. Silvestri. The motion passed unanimously.

4. **PETITION NO. 1312 - Candlewood Solar LLC petition for a declaratory ruling that no Certificate of Environmental Compatibility and Public Need is required for the proposed construction, maintenance and operation of a 20 megawatt AC (26.5 megawatt DC) solar photovoltaic electric generating facility located on a 163 acre parcel at 197 Candlewood Mountain Road and associated electrical interconnection to Eversource Energy's Rocky River Substation on Kent Road in New Milford, Connecticut. Draft Findings of Fact.**

Mr. Levesque stated for the record that he read the transcripts of the proceeding.

Mr. Edelson arrived at 1:35 p.m.

After reviewing the Draft Findings of Fact, Chairman Stein conducted a non-binding straw poll of the Council Members with Mr. Murphy, Mr. Silvestri, Mr. Levesque, Mr. Hannon, and Chairman Stein in favor of the proposed project, Mr. Edelson abstaining, and Dr. Klemens recusing.

Chairman Stein directed staff to draft a favorable Opinion and Decision and Order to be reviewed at the next meeting.

5. **PETITION NO. 1313 - DWW Solar II, LLC petition for a declaratory ruling that no Certificate of Environmental Compatibility and Public Need is required for the proposed construction, maintenance and operation of a 26.4 megawatt AC solar photovoltaic electric generating facility on approximately 289 acres comprised of 5 separate and abutting privately-owned parcels located generally west of Hopmeadow Street (US 202/CT 10), north and south of Hoskins Road, and north and east of County Road and associated electrical interconnection to Eversource Energy's North Simsbury Substation west of Hopmeadow Street in Simsbury, Connecticut. Draft Findings of Fact.**

Mr. Hannon moved to deny Flammini, et al's December 1, 2017 Request for Administrative Notice on the basis that it was submitted 30 days after the close of the evidentiary record and requests administrative notice of items that are either already in the record or that are irrelevant to the record; seconded by Mr. Levesque. The motion passed with Mr. Edelson abstaining.

Dr. Klemens moved to reject Flammini, et al's December 1, 2017 Memorandum in Opposition to DWW's Petition for Declaratory Ruling on the basis that it was submitted 30 days after the close of the evidentiary record and presents new information and argument in contravention of the Council's hearing procedure; seconded by Mr. Murphy. The motion passed with Mr. Edelson abstaining.

After reviewing the Draft Findings of Fact, Chairman Stein conducted a non-binding straw poll of the Council Members with Mr. Murphy, Dr. Klemens, Mr. Levesque, Mr. Hannon, and Mr. Stein in favor of approving the proposed project with concerns/conditions that would be addressed at the Development and Management Plan stage of the project; Mr. Silvestri undecided; and Mr. Edelson abstaining

Chairman Stein directed staff to draft a favorable Opinion and Decision and Order to be reviewed at the next meeting.

6. **PETITION NO. 1330 - MCM Communications, LLC petition for a declaratory ruling, pursuant to Connecticut General Statutes §4-176 and §16-50k, for the proposed installation of a temporary tower facility and associated equipment to be located on Connecticut Water Company property at 1542 Boston Post Road, Westbrook, Connecticut. Decision.**

Mr. Murphy moved to approve the petition with the condition noted in the staff report; seconded by Mr. Silvestri. The motion passed unanimously.

7. **PETITION NO. 1331 - Cellco Partnership d/b/a Verizon Wireless petition for a declaratory ruling, pursuant to Connecticut General Statutes §4-176 and §16-50k, for the proposed installation of two small cell telecommunications facilities at Lime Rock Park, 497 Lime Rock Road, Lakeville, Connecticut. Decision.**

Mr. Murphy moved to approve the petition with the conditions noted in the staff report; seconded by Mr. Hannon. The motion passed with Dr. Klemens recusing.

8. **PETITION NO. 1332 - Bloom Energy Corporation petition for a declaratory ruling, pursuant to Connecticut General Statutes §4-176 and §16-50k, for the proposed construction, maintenance and operation of a customer-side one-megawatt fuel cell facility to be located at the FedEx Ground building, Middle Street, Middletown, Connecticut. Decision.**

Dr. Klemens moved to approve the petition with the condition noted in the staff report; seconded by Mr. Murphy. The motion passed unanimously.

9. **Connecticut Siting Council Revised Fiscal Year 2019 Proposed Budget.**

Mr. Levesque moved to approve the revised Fiscal Year 2019 budget and send it to the General Assembly Appropriations Committee, seconded by Mr. Silvestri. The motion passed with Mr. Edelson abstaining.

10. **Administrative Matters.**

The following calendar events were discussed:

- Docket No. 477 Tuesday, December 12, 2017, **public hearing** beginning with a **2:00 p.m. public field review, a 3:00 p.m. evidentiary hearing session, and a 6:30 p.m. public comment session** at the Canterbury Community Center, 1 Municipal Drive, Canterbury, Connecticut,.
- Energy/Telecommunications meeting, Thursday, December 21, 2017, beginning at **1:00 p.m.** in Hearing Room Two, Ten Franklin Square, New Britain, Connecticut.

Adjournment.

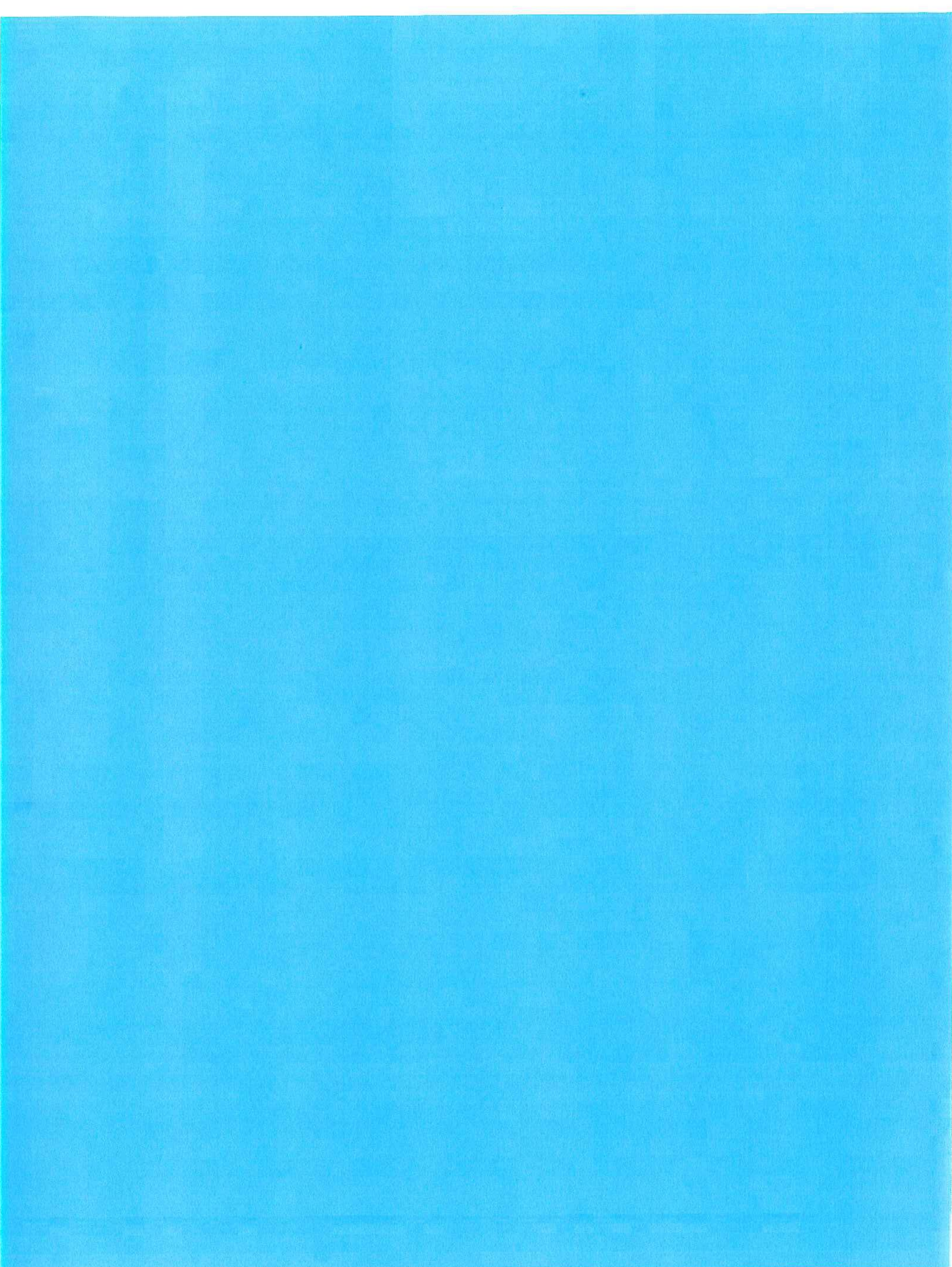
Mr. Murphy moved to adjourn the meeting, seconded by Mr. Hannon. The motion passed unanimously.

Chairman Stein adjourned the meeting at 2:42 p.m.

Respectfully submitted,

Robin Stein
Chairman

RS/laf



No *Shepard's* Signal™
As of: August 8, 2018 6:50 PM Z

Post Rd. Iron Works, Inc. v. Inland Wetlands & Watercourses Agency

Superior Court of Connecticut, Judicial District of Hartford, Land Use Litigation Docket At Hartford

February 20, 2018, Decided; February 20, 2018, Filed

LNDCV166071537S

Reporter

2018 Conn. Super. LEXIS 351 *; 2018 WL 1459953

Post Road Iron Works, Inc. et al. v. Inland Wetlands and Watercourses Agency of the Town of Greenwich

Notice: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

Core Terms

wetlands, watercourses, inland, feasible, prudent, alternatives, frogs, site, regulations, habitat, regulated activity, proposed activity, impacts, pools, off-site, provides, proposed development, plaintiffs', activities, resources, sewer, substantial evidence, adverse impact, public hearing, incomplete, stormwater, agency's, percent, physical characteristics, Applicant's

Judges: [*1] Marshall K. Berger, Judge Trial Referee.

Opinion by: Marshall K. Berger

Opinion

MEMORANDUM OF DECISION

I

The plaintiffs, Post Road Iron Works, Inc. (PRIW), the Carriero Family Limited Partnership (CFLP) and Janice S. Gasparrini, individually and as executrix of the Estate of William S. Gasparrini, appeal the denial of an application for an inland wetlands permit in connection with a proposed affordable housing development by the inland wetlands and watercourses agency of the town of Greenwich (agency).[1] The plaintiffs collectively own several parcels of property consisting of 5.011 acres at 37 Oak Street, 26 Hemlock Drive, 0 West Putnam Avenue and 345 West Putnam Avenue (the site) in Greenwich. (Exhibit 1; Return of Record [ROR], Item 3.A.13.)[2] A single-family home sits on 37 Oak Street currently and continuously since the 1930s. (ROR, Item 2.T1, p. 18.) Since approximately 1927, the remaining land on

---

[1] In a companion appeal, the plaintiffs appeal the denial of their site plan and special permit application for an affordable housing development by the planning and zoning commission of the town of Greenwich. *Post Road Iron Works, Inc. v. Planning & Zoning Commission of the Town of Greenwich*, Superior Court, land use litigation docket at Hartford, Docket No. LND CV-16-6072715-S. After demolishing the existing buildings, the plaintiffs plan to build 355 units with 559 parking spaces. (ROR, item 3.A.51.) *General Statutes §22a-42a(c)(1)* directs the plaintiffs to obtain approval by the agency in connection with an activity that impacts the inland wetlands. See also *General Statutes §8-3c(b)* ("The commission shall render a decision on the [special permit or special exception] application until the inland wetlands agency has submitted a report with its final decision to such commission. In making its decision the zoning commission shall give due consideration to the report of the inland wetlands agency . . .") This court's holding in the present appeal does not necessarily reflect what its position might be in the companion affordable housing matter.

[2] The agency labeled the return of record (Pleadings ##142.00-146.00) as folders one through four. Most items are referred to by the folder number and then the item number, e.g., Item 1.2, refers to folder 1, item 2. Folder three was further broken down alphabetically, e.g., Item 3.A.13 refers to folder 3, folder A, item 13.

Hemlock Drive and West Putnam Avenue has been used by PRIW for commercial and industrial purposes including a steel fabrication operation currently. (ROR, Item 2.T1, p. 18.) The site is primarily located in a residential zone (RA-1) with a small portion in a general business zone (GB). (ROR, Item 1.2, p. 3; Item [*2] 2.T1, p. 18) Approximately eighty-seven square feet of the site is located in the wetlands and portions of the site are in the upland review area. (ROR, Item 3.A.13.)

The agency received the plaintiffs' application on January 12, 2016. (ROR, Item 3.A.13.) On March 7, 2016, Nick Cataldo, a member of the Greenwich Neighborhood Preservation Association (GNPA),[3] filed a notice of intervention pursuant to *General Statutes §22a-19*.[4] (ROR, Item 3.A.78; Item 2.T1, p. 8.) A public hearing was held on March 7, 2016, March 28, 2016, May 9, 2016, May 23, 2016, and concluded on June 13, 2016. (ROR, Items 2.T1-T5.) The public hearing focused on off-site wetlands known as wetland 3, wetland 4 and the Ramsey Pool Reserve (collectively also referred to as the "vernal pool complex"), wetland 6 (also referred to as the "Copp Pool") and wetland 8 (also referred to as the "Cotswold Pond"). The agency deliberated on the application on June 27, 2016, and voted unanimously to deny it; (ROR, Item 2.T6, pp. 5-9); for the reasons stated in a letter dated July 6, 2016. (ROR, Item 4.25.) The decision was published on July 7, 2016, in the Greenwich Times. [*3] (ROR, Item 4.26.)

The plaintiffs commenced this appeal on July 20, 2016. On March 24, 2017, the agency electronically filed the return of record which was supplemented thereafter.[5] The agency [*4] refiled the return of record on October 27, 2017, in an abbreviated format. On July 31, 2017, the plaintiffs filed their brief, the agency filed its brief on September 29, 2017, and the plaintiffs filed their brief in reply on October 13, 2017. The court heard the appeal on November 2, 2017.

II

General Statutes §22a-43(a), in relevant part, provides that "any person aggrieved by any . . . decision or action made pursuant to *sections 22a-36 to 22a-45*, inclusive, by the . . . municipality or any person owning or occupying land which abuts any portion of land within, or is within a radius of ninety feet of, the wetland or watercourse involved in any . . . decision or action made pursuant to said sections may, within the time specified in *subsection (b) of section 8-8*, from the publication of such . . . decision or action, appeal to the superior court for the judicial district where the land affected is located . . ." In the present case, it is undisputed that the plaintiffs have been the applicants and the owners of the site throughout the administrative process and during this appeal. Exhibit 1. Thus, the court finds that the plaintiffs are aggrieved. *General Statutes §22a-43(a)*; see also *General Statutes §45a-234(25)(M)* (giving power to estate executors "to deal with any such property and every part thereof in all other [*5] ways and for such other purposes or considerations as would be lawful for any person owning the same").

III

[3] Cataldo and GNPA are not parties to the present appeal.

[4] *Section 22a-19*, in relevant part, provides:

> (a)(1) In any administrative, licensing or other proceeding . . . any person, partnership, corporation, association, organization or other legal entity 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.
>
> * * *
>
> (b) In any administrative, licensing or other proceeding, the agency shall consider the alleged unreasonable pollution, impairment or destruction of the public trust in the air, water or other natural resources of the state and no conduct shall be authorized or approved which does, or is reasonably likely to, have such effect as long as, considering all relevant surrounding circumstances and factors, there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety and welfare.

[5] Some maps were filed in paper format.

"[I]n an appeal from a decision of an inland wetlands commission, a trial court must search the record of the hearings before that commission to determine if there is an adequate basis for its decision." Gagnon v. Inland Wetlands & Watercourses Commission, 213 Conn. 604, 611, 569 A.2d 1094 (1990). "In challenging an administrative agency action, the plaintiff has the burden of proof . . . The plaintiff must do more than simply show that another decision maker, such as the trial court, might have reached a different conclusion. Rather than asking the reviewing court to retry the case de novo . . . the plaintiff must establish that substantial evidence does not exist in the record as a whole to support the agency's decision . . .

"In reviewing an inland wetlands agency decision made pursuant to the act, the reviewing court must sustain the agency's determination if an examination of the record discloses evidence that supports any one of the reasons given . . . The evidence, however, to support any such reason must be substantial; [t]he credibility of witnesses and the determination of factual issues are matters within the province of the administrative agency . . . This so-called **[*6]** substantial evidence rule is similar to the sufficiency of the evidence standard applied in judicial review of jury verdicts, and evidence is sufficient to sustain an agency finding if it affords a substantial basis of fact from which the fact in issue can be reasonably inferred . . . The reviewing court must take into account [that there is] contradictory evidence in the record . . . but the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." (Citations omitted; internal quotation marks omitted.) Samperi v. Inland Wetlands Agency, 226 Conn. 579, 587-88, 628 A.2d 1286 (1993).

IV

The agency articulated several reasons in denying the plaintiff's applications. (ROR, Item 2.T6; Item 4.25.) In its brief, it summarizes these into five categories: the plaintiffs failed to provide critical information to allow adequate review of their application, the plaintiffs' development is likely to have adverse impacts on off-site wetlands, the agency had jurisdiction to address the plaintiffs' proposal to repair the town's sewer system, the plaintiffs did not demonstrate that no feasible and prudent alternatives existed and the application was otherwise incomplete. **[*7]**

The plaintiffs argue that their proposed development will have no direct or indirect adverse impacts on inland wetland or watercourses because of their "robust soil and erosion control measures, a detailed construction phasing plan and on-going soil management during construction." They maintain that no work is to be conducted in the wetlands. Additionally, they argue that only minor grading, paving and the construction of stormwater discharge structures would take place in the upland review area, i.e., within 100 feet of the wetlands under §2.1 of the inland wetlands and watercourses regulations of the town of Greenwich (regulations). (ROR, Item 2.7, p. 8.)

A

The reasons the agency gave for its denial, particularly the failure to provide information to allow adequate review of the application and the incompleteness of the application, are interrelated. Specifically, the agency articulated that the information or the application was incomplete in the following ways:

> a. The criteria for soil remediation are based on residential thresholds as opposed to ecological thresholds.[6] The applicant did not present information to refute the applicability of the more stringent ecological threshold to protecting **[*8]** the down gradient wetland, nor

---

[6] The agency determined that the Residential Direct Exposure Criteria used by the applicant to determine the lead contamination was inappropriate because its actionable levels of lead contamination focused on human health and not on ecological resources. (ROR, Item 4.25.) This particular finding is not determinative of the court's decision here.

did they submit a remediation plan to more fully address aquatic concerns.

b. In the May 27, 2016 letter requesting additional information, the results of a closed captioned TV investigation of the existing drain pipe was requested.[7] Poor quality video was submitted immediately prior to the final public hearing on June 13, 2016 with no professional interpretation of the results.

c. In the May 27, 2016 letter, the applicant was asked to present information that verifies their legal right to discharge collected storm water directly onto the neighboring property. While Attorney Studer orally stated it was his client's right as an upgradient neighbor to drain to a lower elevation property, he did not substantiate his statement with statutory or case law reference. His assertion alone does not enable the agency to determine what qualifications the law may include, which may or may not be relevant to this development.

d. In the May 11, 2016 letter requesting information, the applicant was asked to provide a risk assessment regarding the contaminated pond at 24 Hemlock Drive. While this parcel is not included in the proposed development, it is under the same ownership [*9] and the contamination is a result of historic pollution originating from the subject parcel. The risk assessment was not provided.

e. A hydrologic assessment of the impact to the wetlands was requested by [agency member Elliott Benton] at the May 9, 2016 public hearing session. The assessment subsequently provided by the application spoke to the overall annual hydrologic budget without detailing this budget on a monthly or seasonal basis.

f. Section 7.11.e requires measures designed to mitigate the impact of the proposed activity that avoid destruction or diminution of the wetland and/or watercourse functions, degradation of water quality, and safeguard water resources to preserve and protect adjacent wetland and watercourse areas and natural buffers. No such mitigation was submitted.

g. The applicant was asked to submit an alternative which would be consistent with the sewer capacity of the Horseneck Brook sewer. No alternatives were submitted.

h. In the May 27, 2016 letter to the applicant, the applicant was requested to submit their plans for the sewer line repair. This plan was not submitted.

i. Authorization from the Town of Greenwich Department of Public Works for a sewer repair to sustain the [*10] proposed development was requested and not received.

j. Section 7.10.e requires sketches or plans for alternatives considered but rejected by the applicant. In a letter to the applicant dated May 27, 2016 the applicant was specifically asked to submit an alternative which would preserve the on-site forested area. This alternative was not provided, nor were other alternatives aside from the "Tollgate" site plan discussed above.[8] (ROR, Item 4.25.)

"*General Statutes §22a-41(a)* sets forth specific criteria that must be considered by a wetlands

[7] Stormwater discharge from the industrial portion of the site is carried to the east in a twelve inch pipe, which was installed prior to the enactment of the inland wetlands act in 1972. The pipe discharges into wetlands 6 and 8 pursuant to an industrial stormwater general permit issued by the department of energy and environmental protection which regulates the activity pursuant to *§22a-39-4.3.a(5) of the Regulations of Connecticut State Agencies.* (ROR, Item 3.B.44.) With the construction anticipated in the inland wetlands permit, the discharge permit would presumably not be applicable as the activity would no longer exist. Regardless, the agency maintains—and this court agrees—that the agency may review the historical discharge as part of its evaluation as to the impact on the wetlands.

[8] On April 9, 2012, the agency denied a different application for a development to be known as Tollgate on the grounds that feasible and prudent alternatives existed. (ROR, Item 3.C. 62.) The site would have included other parcels for a total of 15.29 acres. (ROR, Item 3.C. 62.) The Tollgate application was revisited as part of the administrative process for the present application. In reducing the size of the project from fifteen to five acres, it was suggested that certain wetlands were no longer "on site" and thus presumably no longer subject to review.

commission in determining whether an application for a wetlands permit should be granted. Specifically, a commission is directed to consider: '(1) The environmental impact of the proposed regulated activity on wetlands or watercourses; (2) The applicant's purpose for, and any feasible and prudent alternatives to, the proposed regulated activity which alternatives would cause less or no environmental impact to wetlands or watercourses; (3) The relationship between the short-term and long-term impacts of the proposed regulated activity on wetlands or watercourses and the maintenance and enhancement of long-term productivity of such wetlands or watercourses; (4) Irreversible and irretrievable [*11] loss of wetland or watercourse resources which would be caused by the proposed regulated activity . . . and any mitigation measures which may be considered as a condition of issuing a permit for such activity including, but not limited to, measures to (A) prevent or minimize pollution or other environmental damage, [or] (B) maintain or enhance existing environmental quality . . . (5) The character and degree of injury to, or interference with, safety, health or the reasonable use of property which is caused or threatened by the proposed regulated activity; and (6) *Impacts of the proposed regulated activity on wetlands or watercourses outside the area for which the activity is proposed and future activities associated with, or reasonably related to, the proposed regulated activity which are made inevitable by the proposed regulated activity and which may have an impact on wetlands or watercourses.*' . . . General Statutes §22a-41(a) . . .

"[T]he authority for a commission to regulate outside of [wetlands and watercourses] is governed by [General Statutes] §22a-42a(f) . . . Section 22a-42a(f) provides: 'If a municipal inland wetlands agency regulates activities within areas around wetlands or watercourses, such regulation shall (1) be in accordance with the [*12] provisions of the inland wetlands regulations adopted by such agency related to application for, and approval of, activities to be conducted in wetlands or watercourses, and (2) apply only to those activities which are likely to impact or affect wetlands or watercourses.' The statute reflects that one of [the act's] major considerations is the environmental impact of proposed activity on wetlands and water courses, which may, in some instances, come from outside the physical boundaries of a wetland or water course For that reason, [o]ur courts consistently have recognized the authority of an inland wetlands commission to regulate activities in areas adjacent to wetlands and watercourses that would affect or impact such wetlands or watercourses." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Three Levels Corp. v. Conservation Commission, 148 Conn.App. 91, 131-33, 89 A.3d 3 (2014).*

"[The wetlands resources that a commission is charged with preserving and protecting . . . are not limited simply to the wetlands and watercourses as containers of soil and water but encompass the aquatic, plant or animal life and habitats that exist therein. Consequently, when a commission evaluates an application for a wetlands permit, it is proper for a commission [*13] to consider the factors set forth in *[General Statutes] §22a-41(a)* with respect not only to the wetlands and watercourses in relation to their physical characteristics, but also in relation to the aquatic, plant and animal life and habitats that are part of those wetlands and watercourses. As part of that evaluation, a commission necessarily must be able to request, and is entitled to, information on the aquatic, plant or animal life and habitats that are part of the wetlands and watercourses, pursuant to *§22a-41(c)*, as well as an assessment of impacts to those resources, along with information on any impact to plant or animal life outside the wetlands that might, in turn, impact the wetlands." (Citations omitted, footnote omitted.) *Unistar Properties, LLC v. Conservation & Inland Wetlands Commission, 293 Conn. 93, 109-10, 977 A.2d 127 (2009).*

"Nothing in *§22a-41(d)* prohibits a commission from requesting information on wildlife in order to determine *whether* the proposed activity either will

'affect the physical characteristics of such wetlands' or will impact wildlife outside the wetlands that in turn will 'affect the physical characteristics of such wetlands.' Whether the physical characteristics of the wetlands are impacted is a factual determination that only the commission is empowered to make and which cannot be reached in the absence [*14] of such information." (Emphasis in original.) Id., 111.

In the present case, the regulations contain specific requirements for the agency to make a determination. Specifically, §7.1, in relevant part, provides: "The application shall contain the information described in this section and any other information the Agency may reasonably require . . ." (ROR, Item 2.7, p. 14.) Section 7.5, in relevant part, provides: "Applications shall contain such information as is necessary for a fair and informed determination therein by the Agency or its duly authorized Agent . . ." (ROR, Item 2.7, p. 14.) Additionally, §7.11, in relevant part, provides: "Applications to conduct regulated activities subject to review by the Agency that may include significant impact activity shall include, at a minimum, the following information in addition to the requirements of sections 7.7, 7.8, 7.9 and 7.10:

* * *

d. Biological evaluation based upon a methodology acceptable to the Agency, prepared by a wetland scientist, ecologist, or other qualified professional that provides a description of the ecological communities, functions, and values of the wetlands, watercourses, and Upland Review Area involved with the application. The report should also describe the extent [*15] of the presence of plant species commonly associated with wetlands and watercourses. Description of how the proposed activities will change, diminish, or enhance the ecological communities and functions of the wetlands, watercourses, and/or upland review area involved in the application and each alternative. Narrative detailing why each alternative was deemed neither feasible nor prudent shall be included: The report shall be signed by the professional responsible for its preparation;

e. Management practices and other measures designed to mitigate the impact of the proposed activity. Such measures could include, but need not be limited to, plans or actions that avoid destruction or diminution of the wetland and/or watercourse functions, recreational uses, and natural habitats; that prevent flooding, degradation of water quality; erosion and sedimentation, obstruction of drainage; safeguard water resources; provide for wetland/watercourse habitat and functions and other legal measures designed to preserve and protect adjacent wetland and watercourse areas and natural buffers; and

f. Watercourse characteristics and impacts—if the Agency has reason to believe the proposed activities may [*16] potentially affect a watercourse, the applicant shall submit quantitative information of water quality and quantity relative to the present character both upstream and downstream of the watercourse on the subject property, including the comparison of existing and anticipated discharges where downstream flooding is a consideration, and the projected impact, including storm water impacts, of the Proposed activity upon the watercourse." (ROR, Item 2.7, pp. 18-19.) Finally, §8.6 provides that the application will be denied if it is deemed incomplete. (ROR, Item 2.7, p. 22.)

The record contains evidence that supports the agency's determination that it lacked adequate information to determine the impact of the proposed activities and that the application was otherwise incomplete. Stormwater from the site currently runs off into wetlands 6 and 8 and would continue to do so. (ROR, Item 2.T3, pp. 162-63.) The plaintiffs' environmental experts performed no testing on wetland 8. (ROR, Item 3.C.4, p. 2; Item 2.T3, p. 33.) The plaintiffs' licensed environmental

professional (LEP), J. Carver Glezen of Triton Environmental, Inc., Conceded that failure to test "the outflow of the pipe on the downstream **[*17]** side" is a "data gap that remains to be addressed and can be." (ROR, Item 2.T3, p. 33.)

Other experts also spoke of the need to investigate the off-site wetlands. At the May 9, 2016 public hearing, the town's senior wetlands analyst, Robert Clausi, expressed concern that potential impacts to off-site wetlands had not been addressed and pointed out that no samples were taken from wetland 8. (ROR; item 2.T3, pp. 11-13.) In his opinion, not even the revised phasing plan was sufficient to ensure that the site work can be done without impacts to off-site wetlands. (ROR, Item 2.T3, pp. 14-15.) The agency's expert, Michael Doherty a senior manager at AECOM, stated that additional evaluation of off-site wetlands would be appropriate since "a good majority of the storm water exits the . . . areas that are most highly contaminated so we feel it's an area that should probably be looked at in some additional detail"; (ROR, Item 2.T3, p. 111) and made written recommendations for further evaluation. (ROR, Item 3.B.77, pp. 3-4; Item 4.4, p. 4.) GNPA's LEP, Michael Manolakas, agreed. (ROR, Item 2.T2, pp. 87-88.) Additionally, GNPA's expert, Michael Klemens, stated, "it is essential to assess the condition **[*18]** of [wetland 8] as part of this application as it lies directly in the drainage pathway of pollutants that have, for some time, been flowing out of the proposed development site into the Horseneck Brook watershed." (ROR, Item 4.11, p. 3.) Klemens further explained that bioaccumulation requires an ecological risk assessment of wetland 8.[9] (ROR, 2.T4, pp. 170-71.)

In *Unistar Properties, LLC v. Conservation & Inland Wetlands Commission, supra, 293 Conn. 115*, the court noted that an expert opined that the development "had the potential to impact the wetlands adversely but . . . the application lacked certain data necessary to determine the extent of that impact." The court held that the agency was not required to make findings on adverse impacts in order to request the information. See *id., 123* ("[i]t is clear that the commission was acting pursuant to its regulations when it requested a wildlife inventory and an alternatives analysis, and those regulations do not condition receipt of such information on a finding of an adverse impact to the wetlands"); see also *Newtown v. Keeney, 234 Conn. 312, 324, 661 A.2d 589 (1995)* (holding that failure to submit "comprehensive hydrogeological study as a prerequisite for the granting of a permit . . . serves as substantial evidence in support of the commissioner's decision to deny the town's permit application"). **[*19]**

The same is the case here. The regulations authorized and required the agency to obtain additional information in order to make its findings. The burden of proof in challenging the agency's decision is on the plaintiffs and not the agency. *Samperi v. Inland Wetlands Agency, supra, 226 Conn. 587*. The plaintiffs have not sustained their burden and the agency was entitled to deny the application based. on incompleteness.[10] See *Three*

[9] Klemens stated, "We have animals in that wetland, particularly things such as snapping turtles, which are well known to be very, very good accumulators of heavy metals, lead, cadmium, zinc. Now if you take that one step further those turtles are not staying there, they could be moving out beyond that Cotswold pond down into other parts of the watershed. So potentially—until you do this risk assessment and understand what the fauna [is] there, what species are, you don't even know where these potential pollutants are bioaccumulating and where they are going into the watershed far beyond here right down in this. So I think that's a very important point. It's not the human health levels, it's the health levels for a wetland and it is the bioaccumulation." (ROR, Item 2.T4, pp. 170-71.)

[10] One of the other reasons for denial. was the plaintiffs' failure to provide requested information, about possible sewer repair. (ROR, Item 4.1; Item 4.25, pp. 14-15.) The agency argues that it needed to know if the related sewer activities would involve a regulated activity. The plaintiffs maintain that the agency lacked jurisdiction to request the information citing *CMB Capital Appreciation, LLC v. Planning & Zoning Commission, 124 Conn.App. 379, 4 A.3d 1256 (2010)*, cert. granted in part, *299 Conn. 925, 11 A.3d 150 (2011)* (appeal withdrawn on September 15, 2011). In *CMB Capital*, the court concluded that the commission improperly denied an affordable housing application on the basis that the sewer connection would probably be denied and that the commission was required to grant the application on the condition that the plaintiff obtain

Levels Corp. v. Conservation Commission, supra, 148 Conn.App. 114 ("[a] commission is entitled to deny an application before it due to incompleteness").

B

"In reviewing an inland wetlands agency decision made pursuant to the act, the reviewing court must sustain the agency's determination if an examination of the record discloses evidence that supports any one of the reasons given." (Internal quotation marks omitted.) Samperi v. Inland Wetlands Agency, supra, 226 Conn. 587-88. Nevertheless, the court addresses the agency's denial based upon its finding that the development would have adverse impacts on the off-site wetlands.

The plaintiffs argue that the stormwater system would not impact the wetlands. On page four of their brief, they assert, "The proposed stormwater management system has been designed to reduce and control both runoff volumes and peak flow rates. (ROR 2, p. 11-14.) Accordingly, there is no likelihood of downstream [*20] flooding. The total area of impervious surface on Site will actually be reduced by forty percent (40 [percent]) from 1.86 acres to 1.12 acres. (ROR C55, item 7.) The stormwater management system will also maintain the current hydraulic regimes of the wetlands, while improving water quality through the addition of Low Impact Development ('LID') techniques and Best Management. Practices ('BMPs'); i.e., hydrodynamic separators, a vegetated green roof, (approximately eighty-five percent (85%) of the roof surface) pervious pavement (porous asphalt, permeable pavers or grass pavers) and catch-basins with deep sumps. The porous pavement has been designed with a deeper than normal stone base (18" minimum) to provide a stormwater reservoir. (ROR C59.) In addition, the proposed system will also reduce thermal impacts and remove between 80 [percent] and 98 [percent] of total suspended solids. (ROR C33.) Stormwater quality will further improve due to cessation of PRIW's industrial use and the remediation of on-site soils."

In the agency's decision, it specifically found the following: "2. Section 10.2.f requires assessment of impacts to wetlands or watercourses outside the area for which the activity is proposed. [*21] The applicant consistently referenced the limited area of wetlands, [eighty-seven square feet], actually on-site, The applicant did not adequately evaluate the off-site wetlands, some of which are immediately adjacent to the property and under the same ownership as the subject parcel. In consideration of documents incorporated from [the Tollgate application] (Michael Klemens, LLC[11] environmental report dated November 10, 2011 and Natural Resource Evaluation and Wetland/Watercourse impact Assessment Reports, prepared by Land-Tech, dated August 22, 2011 and January 26, 2012) and testimony received from Klemens] the proposed development is likely to have adverse impacts to these off-site wetlands and watercourses. Further, unanswered requests for detailed hydrologic cycle information from applicant did not allow the agency to properly assess the seasonal changes and impacts to the off-site wetlands and watercourses.

---

approval from the sewer authority. Id., 394.

While this holding would presumably apply in a wetlands case, the issue here is wholly different. Section 10.21 of the regulations requires the agency to consider "[i]mpacts of the proposed regulated activity on wetlands or watercourses outside the area for which the activity is proposed and future activities associated with or reasonably related to, the proposed regulated activity which are made inevitable by the proposed regulated activity and which may have an impact on wetlands or watercourses." (ROR, Item 2.7, p. 25.) If repairing the sewer would impact the wetlands, the agency would need to consider it. With the lack of such information, the application could be deemed incomplete. See Three Levels Corp. v. Conservation Commission, supra, 148 Conn.App. 114 ("[a] commission is entitled to deny an application before it due to incompleteness").

[11] Klemens had "been involved with this project since 2011 and . . . had, through a cooperative arrangement with the Applicant in 2012, the ability to look at all the wetlands that are discussed in various reports, wetlands that are now physically not part of this proposed development footprint, yet are very much part of the ecological footprint." (ROR, Item 3.C.4, p. 1.)

"3. As directed by sections 10.2.c. of the [regulations], the agency considered the short and long-term impacts of the proposed activity. The loss of the residential forest on the subject property will cause long-term adverse impacts to the vernal pool on 6 and Lot 4-2 Hemlock drive through [*22] the loss of critical terrestrial habitat of the wood frog on the subject property and will foreclose opportunity for enhancement of the long-term productivity of the vernal pools.

* * *

"4. As described above, the consumption of over 90 [percent] of the subject parcel, including the portions within the critical terrestrial habitat of the off-site vernal pools will cause irreversible and irretrievable loss of wetland resources and would foreclose a future ability to protect, enhance and restore such resources. Section 10.2.d directs the agency to consider these factors. As described above, further depletion of the wood frog's forested habitat will jeopardize the recovery of the population to the detriment of the vernal pools." (ROR, Item. 4.25.)

During the public hearing, the agency received conflicting opinions from the plaintiffs' wetland expert, Michael Klein of Environmental Planning Services, and Klemens concerning the functional value and the health of the wetlands. At issue primarily are wetlands 3 and 4 which are off-site and contain vernal pools. Klein opined that the wetlands had little functional value. (ROR, Item 3.B.94.) Klemens disagreed and focused, in part, on the wood frog population [*23] as reflecting the health of the wetlands. He emphasized, "Survival of wood frogs is important because of their ability to cycle nutrients effectively in small wetlands during the tadpole stage, countering eutrophication.[12] Loss of wood frog populations results in impairment to wetlands by altering the quality of the water chemistry, and thereby ultimately the quality of the wetlands. Enhancement of wood frog populations, such as is occurring in Wetland 3, can ultimately begin to reverse some of the eutrophic conditions that have been noted in this pool." (ROR, Item 3.C.4, p. 4.) He continued, "Given that the wood frog population in Wetland 3 is in the early stages of recovery from a catastrophic environmental impact in 2012, I would consider the footprint of the proposed development reasonably likely to impact the physical and functional characteristics of Wetlands 3, 4 and the Ramsey Preserve pool." (ROR, Item 3.C.4, p. 6.) Later, he stated, "The population is fragile, and there is a reasonable likelihood that development within the critical terrestrial habitat of Wetland 3, even at the margins of that zone, will have an adverse effect upon the recovering population of wood frogs. The [*24] Applicant's proposal, by Mr. Klein's own calculations, will remove at least 2 [percent] more of the critical terrestrial habitat zone of Wetland 3. The alternatives that I introduced still allows a building of considerable size, and conserves and restores another 3 [percent] of critical terrestrial habitat. That 5 [percent] difference, between the Applicant's proposal and my alternative is likely to impact and reverse the wood frog population recovery that is underway.

"I repeat my assertion that loss of this upland habitat will cause a negative impact to the vitality and function of the three vernal pools that occur adjacent to this development." (ROR, Item 4.11, p. 6.)

Klemens testimony involving wood frogs is very similar to that in _River Sound Development, LLC v. Inland Wetlands & Watercourses Commission, 122 Conn.App. 644, 2 A.3d 928_, cert. denied, *298 Conn. 920, 4 A.3d 1228 (2010)*. In *River Sound*, the court held, "In _AvalonBay Communities, Inc. v. Inland Wetlands Commission, [266 Conn. 150 163, 832 A.2d 1 (2003)]_, our Supreme Court stated that it is apparent that the commission may regulate activities outside of wetlands, watercourses and

---

[12] In reference to lakes, _§22a-339d-1 of the Regulations of Connecticut State Agencies_ defines "eutrophication" as "nutrient enrichment or sedimentation causing excessive phytoplankton, macrophyton, or dissolved oxygen depletion which impairs recreation."

upland review areas only if those activities are likely to affect the land which comprises a wetland, the body of water that comprises a watercourse or the channel and bank of an intermittent watercourse . . . Our Supreme Court concluded in AvalonBay Communities, supra, 163, that [*25] the act protects the physical characteristics of wetlands and watercourses and not the wildlife . . . The court, nevertheless, pointed out that [t]here may be an extreme case where a loss of or negative impact on a wildlife species might have a negative consequential effect on the physical characteristics of a wetland or watercourse . . . Later, in 2004, the act was amended by Public Acts 2004, No. 04-209, to include subsection (c), now codified in General Statutes §22a-41(c), which provides that '[f]or purposes of this section, (1) "wetlands or watercourses" includes aquatic, plant or animal life and habitats in wetlands or watercourses, and (2) "habitats" means areas or environments in which an organism or biological population normally lives or occurs.' Also included in the amended act was subsection (d), now codified in §22a-41(d), which provides that '[a] municipal inland wetlands agency shall not deny or condition an application for a regulated activity in an area outside wetlands or watercourses on the basis of an impact or effect on aquatic, plant; or animal life *unless such activity will likely impact or affect the physical characteristics of such wetlands or watercourses'* . . . In the present case, substantial [*26] evidence was presented to show that the amphibian life contributed to the life cycle of the wetlands themselves.

"The commission found that the development of the golf course would cause unacceptable fragmentation and isolation of the area, which would result in a substantial reduction in the capacity of the wetlands to maintain animal life, especially amphibians, and that it greatly would reduce the capacity for survivorship of amphibians and that the clearing of forests adversely would affect amphibian populations and *nutrient and energy recycling* within the wetlands. The plaintiff's expert, Michael Klemens, testified that '[t]he wood frogs remove a lot of the detritus in the pools. The leaves' energy is transported through the wood tadpoles. They're one of the few species which you can say there's direct nexus biologically. And also, the actual quality of the water, physical parameters of the water, are affected by wood frog tadpoles, which is an important thing to take note of Klemens also testified regarding the effect of wood frogs on the physical quality of water within the vernal pools and concluded that he 'would actually call [wood frogs] a keystone species in terms of the [*27] wetlands cycles.'

"We conclude that there was substantial evidence in the record that the loss of wood frogs would have a negative consequential effect on the physical characteristics of the wetlands, which falls squarely within the commission's jurisdiction." (Citations omitted; emphases in original; internal quotation marks omitted.) *River Sound Development, LLC v. Inland Wetlands & Watercourses Commission, supra, 122 Conn.App. 653-55.*

Similarly, Klemens' testimony in the present case constitutes substantial evidence that loss of habitat for wood frogs and subsequent loss of wood frogs would have an adverse impact on the wetlands. See id., 655. Insofar as the various experts may have disagreed, the contradictory evidence and the credibility of witnesses were matters for the agency. See Samperi v. Inland Wetlands Agency; supra, 226 Conn. 588 ("[T]he credibility of witnesses and the determination of factual issues are matters within the province of the administrative agency . . . The reviewing court must take into account [that there is] contradictory evidence in the record . . . but the possibility of drawing two. inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." [Internal quotation marks omitted.]); id., 597 ("an administrative agency is not required to believe [*28] any witness, even an expert, nor is it required to use in any particular fashion any of the materials presented to it so long as the conduct of the hearing is fundamentally fair"

[internal quotation marks omitted]).

C

The agency also denied the application based upon the plaintiffs' failure to demonstrate that there were no feasible and prudent alternatives to the proposed development. Specifically, the agency found that the only alternative submitted by the plaintiffs was the Tollgate site plan; see footnote 8 of this memorandum of decision; which it determined was irrelevant because it included parcels of property not involved here. (ROR, Item 4.25.) It also found that Klemens proposed an alternative that the agency asked the plaintiffs to address which they did not do. (ROR, Item 4.25.)

The plaintiffs argue that an analysis of feasible and prudent alternatives was unnecessary as there was no substantial evidence of adverse impacts. They assert that this proposal was the feasible and prudent alternative to the Tollgate application. They also maintain that Klemens' proposal is not feasible as to their development because the number of dwellings could not be accommodated on the site. [*29] The agency counters that it made findings regarding significant impacts and therefore it could not approve the application without determining that there were no feasible and prudent alternatives. It also asserts that the Tollgate application was irrelevant and that the plaintiffs could build a smaller development in accordance with Klemens' proposal.

General Statutes §22a-41(b)(1) provides: "In the case of an application which received a public hearing pursuant to (A) subsection (k) of section 22a-39, or (B) a finding by the inland wetlands agency that the proposed activity may have a significant impact on wetlands or watercourses, a permit shall not be issued unless the commissioner finds on the basis of the record that a feasible and prudent alternative does not exist. In making his finding, the commissioner shall consider the facts and circumstances set forth in subsection (a) of this section. The finding and the reasons therefore shall be stated on the record in writing." Similarly, §10.3 of the regulations, in relevant part, provides: "In the case of an application which received a public hearing pursuant to a finding by the Agency that the proposed activity may have a significant impact on wetlands or watercourses, a permit shall not be issued unless the [*30] Agency finds on the basis of the record that a feasible and prudent alternative does not exist . . ." (ROR, Item 2.7, p. 25.)

"The legislature, in effect, has placed the initial and principal responsibility for striking the balance between economic activities and preservation of wetlands in the hands of the local authorities. In striking that balance, the local inland wetlands agency is required only to manifest in some verifiable fashion that it has made a finding of no feasible and prudent alternative." (Footnote omitted.) *Samperi v. Inland Wetlands Agency, supra, 226 Conn. 592-93*. "[A]n applicant for an inland wetlands permit has the burden of proving that it has met the statutory prerequisites for a permit . . . The applicant, accordingly, must demonstrate to the local inland wetlands agency that its proposed development plan, insofar as it intrudes upon the wetlands, is the only alternative that is both feasible and prudent." (Citations omitted.) *Id., 593*.

As to the plaintiffs' argument that its proposal would have no adverse affects on the wetlands and therefore no feasible and prudent alternatives were necessary, this court has held otherwise as discussed previously. Additionally, our Supreme Court has expressly rejected this argument in *Unistar [*31] Properties*. Specifically, the court held, "With respect to whether the application lacked an analysis of alternatives to the proposed subdivision, it is undisputed that the plaintiff consistently failed to provide an analysis of alternatives, maintaining that, because there would be no adverse affect on the wetlands, no alternatives analysis was necessary. It is well established, however, that a commission is authorized to request information concerning alternatives to the proposed activity and, significantly, such information permits the

commission 'to determine the likelihood that the proposed activity may or may not impact or affect the resource, and whether an alternative exists to lessen such impact.'" Unistar Properties, LLC v. Conservation & Inland Wetlands Commission, supra, 293 Conn. 123.

Furthermore, the comparison to Tollgate was criticized by Klemens as Tollgate was a much larger site—approximately three times as large; it is not comparable. (ROR, Item 2.T4, pp. 164-66.) While this proposal might have been an alternative to Tollgate, if offered at that time, an attempt to point to this application as an alternative to Tollgate now is Simply inappropriate.[13] More importantly, it does not demonstrate that the proposed development plan is the only alternative that [*32] is both feasible and prudent. See Samperi v. Inland Wetlands Agency, supra, 226 Conn. 593.

Finally, the plaintiffs rejected Klemens' alternative of a smaller project with less impact. (ROR, Item 3.C.60; Item 3.C.72.) "Feasible and prudent alternative" as used in the act means "sound from an engineering standpoint" and "economically reasonable in light of the social benefits derived from the activity." Id., 595. The plaintiffs have not proven that a smaller development would not be sound or economically reasonable.

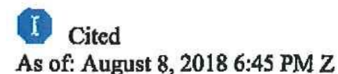
In sum, the application was subject to an extensive public hearing and it was incumbent upon the plaintiffs to proffer a feasible and prudent alternative to the current proposal pursuant to §10.3 of the regulations. See id., 593. ("The evidentiary burden imposed on the applicant to demonstrate that its proposal is the only feasible and prudent alternative will ordinarily require an affirmative presentation to that effect. If only one alternative is presented, the inland Wetlands agency can approve the application for a permit only if no other feasible and prudent alternatives exist. In practical terms, this will usually require that the applicant present evidence of more than one alternative to the local agency.") Having failed to present a feasible [*33] and prudent alternative, the plaintiffs have not sustained, its burden of proof.

Having searched the record, it is clear there was an adequate basis for the agency's decision. See Gagnon v. Inland Wetlands & Watercourses Commission, supra, 213 Conn. 611. Moreover, the plaintiffs have not established that substantial evidence does not exist in the record as a whole to support the agency's decision. See Samperi v. Inland Wetlands Agency, supra, 226 Conn. 588. Therefore, the plaintiffs' appeal is dismissed.

Berger, Judge Trial Referee

End of Document

[13] Moreover, there is still the question of what happens when others attempt to develop the remaining portion of the original Tollgate land. (ROR, Item 3.C.62.)



Cited
As of: August 8, 2018 6:45 PM Z

Montigny v. Vernon

Superior Court of Connecticut, Judicial District of Tolland, At Rockville

September 30, 2004, Decided ; September 30, 2004, Filed

CV030081630S

Reporter

2004 Conn. Super. LEXIS 2839 *; 2004 WL 2440078

Glenn J. Montigny et al. v. Vernon, Town of, Inland Wetlands Commission

Notice: [*1] THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

Core Terms

wetlands, Inland, regulations, plaintiffs', applicant's, redesignation, Watercourses, Map, boundaries, incomplete, superior court, commission's, requirements, substantial evidence, judicial district, public hearing, approve, notice, internal quotation marks, commission's decision, intervene, scientist, requests, reasons, soil, substantial compliance, proceedings, properties, provides

Case Summary

Procedural Posture

Plaintiff intervenors appealed from a decision of defendant inland wetlands commission (Connecticut), which granted an application for the amendment of wetland boundaries filed by defendant applicant.

Overview

The intervenors argued that they had standing to bring the appeal. The reviewing court held that the intervenors were statutorily aggrieved, had standing pursuant to *Conn. Gen. Stat. § 22a-19*, and timely filed and served the appeal. The application at least substantially complied with the Vernon, Conn., Inland Wetlands and Watercourses Regulations. The commission acted within its discretion in failing to obtain an outside reviewer. The commission could reject the testimony of the intervenors' expert as he relied on applications that were not relevant to the issue before the commission. Further, the commission was not required to credit any evidence before it as long as the hearing was fundamentally fair. The commission provided reasons for its decision, which were supported by substantial evidence. Finally, the hearing was fundamentally fair even though the intervenors were denied access to the property. The land owner had a right to deny the intervenors access to his property. The commission did not act illegally, arbitrarily, or in abuse of discretion when it approved the applicant's wetlands request.

Outcome

The appeal was dismissed.

LexisNexis® Headnotes

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

Environmental Law > Natural Resources & Public Lands > Wetlands Management

HN1[] **Administrative Proceedings & Litigation, Judicial Review**

Conn. Gen. Stat. § 22a-43 governs an appeal from a decision of an inland wetlands agency.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

HN2[] **Reviewability, Jurisdiction & Venue**

It is fundamental that appellate jurisdiction in administrative appeals is created only by statute and can be acquired and exercised only in the manner prescribed by statute.

Administrative Law > Judicial Review > Reviewability > Standing

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

Environmental Law > Natural Resources & Public Lands > Wetlands Management

HN3[] **Reviewability, Standing**

Pleading and proof that the plaintiffs are aggrieved within the meaning of the statute is a prerequisite to the trial court's jurisdiction over the subject matter of an appeal of a decision on a wetlands boundary application.

Administrative Law > Judicial Review > General Overview

Civil Procedure > Parties > Intervention > General Overview

Environmental Law > Administrative Proceedings & Litigation > Jurisdiction

HN4[] **Administrative Law, Judicial Review**

See *Conn. Gen. Stat. § 22a-19(a)*.

Environmental Law > Administrative Proceedings & Litigation > Jurisdiction

HN5[] **Administrative Proceedings & Litigation, Jurisdiction**

Conn. Gen. Stat. § 22a-19 authorizes any person to intervene in any administrative proceeding and to raise therein environmental issues. An intervening party under *§ 22a-19(a)*, however, may raise only environmental issues.

Administrative Law > Judicial Review > Reviewability > Standing

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Adverse Determinations

Environmental Law > Natural Resources & Public Lands > Wetlands Management

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

HN6[] **Reviewability, Standing**

Individuals who file notices of intervention at the underlying agency hearing pursuant to *Conn. Gen. Stat. § 22a-19* have standing to appeal from an inland wetlands commission's decision for that limited purpose.

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

HN7[] **Administrative Proceedings & Litigation, Judicial Review**

Conn. Gen. Stat. § 22a-43(a) provides that an

appeal of an inland wetlands commission's decision may be commenced within the time specified in Conn. Gen. Stat. § 8-8(b) from the publication of such regulation, order, decision or action.

Environmental Law > Administrative Proceedings & Litigation > Jurisdiction

Governments > Legislation > Statute of Limitations > Time Limitations

HN8[] Administrative Proceedings & Litigation, Jurisdiction

See Conn. Gen. Stat. § 8-8(b).

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

Environmental Law > Natural Resources & Public Lands > Wetlands Management

HN9[] Administrative Proceedings & Litigation, Judicial Review

In reviewing an inland wetlands agency decision made pursuant to the Connecticut Inland Wetlands and Watercourses Act, Conn. Gen. Stat. § 22a-36, the reviewing court must sustain the agency's determination if an examination of the record discloses evidence that supports any one of the reasons given. The evidence, however, to support any such reason must be substantial; the credibility of witnesses and the determination of factual issues are matters within the province of the administrative agency.

Administrative Law > Judicial Review > General Overview

Civil Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

Evidence > Weight & Sufficiency

Administrative Law > Judicial Review > Reviewability > Factual Determinations

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

Environmental Law > Natural Resources & Public Lands > Wetlands Management

HN10[] Administrative Law, Judicial Review

The so-called substantial evidence rule for the review of inland wetlands agency decisions is similar to the sufficiency of the evidence standard applied in judicial review of jury verdicts, and evidence is sufficient to sustain an agency finding if it affords a substantial basis of fact from which the fact in issue can be reasonably inferred.

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

Environmental Law > Natural Resources & Public Lands > Wetlands Management

HN11[] Administrative Proceedings & Litigation, Judicial Review

A court reviewing an inland wetlands agency's decision must take into account that there is contradictory evidence in the record but the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

Environmental Law > Natural Resources & Public Lands > Wetlands Management

HN12[] Administrative Proceedings & Litigation, Judicial Review

When challenging the decision of an inland wetlands agency, the plaintiffs bear the burden of proof in establishing that substantial evidence does not exist in the record as a whole to support the agency's decision. If the trial court finds that the decision of the agency is arbitrary, illegal or not reasonably supported by the evidence, the court may sustain the plaintiffs' appeal.

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

Environmental Law > Natural Resources & Public Lands > Wetlands Management

HN13[] Administrative Proceedings & Litigation, Judicial Review

A court reviewing an inland wetlands commission's decision cannot substitute its judgment for that of the commission where the record contains substantial evidence to support the commission's decision and where appropriate procedures were followed.

Environmental Law > Natural Resources & Public Lands > Wetlands Management

Governments > State & Territorial Governments > Licenses

Governments > Local Governments > Licenses

HN14[] Natural Resources & Public Lands, Wetlands Management

Vernon, Conn., Inland Wetlands and Watercourses Regulations § 4.3.4 sets forth the information that must be included in a permit application to undertake an activity that is likely to impact or affect a wetland or watercourse.

Environmental Law > Natural Resources & Public Lands > Wetlands Management

HN15[] Natural Resources & Public Lands, Wetlands Management

See Vernon, Conn., Inland Wetlands and Watercourses Regulations § 4.3.5.2.

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

Environmental Law > Natural Resources & Public Lands > Wetlands Management

HN16[] Administrative Proceedings & Litigation, Judicial Review

Connecticut courts are not obligated to overturn an inland wetlands commission's decision even if it is found that the application was incomplete. An allegation that the application is incomplete is not a valid basis for appeal.

Environmental Law > Natural Resources & Public Lands > Wetlands Management

HN17[] Natural Resources & Public Lands, Wetlands Management

While an inland wetlands commission has the discretion to deny an incomplete application, the rule is that an application must be in substantial compliance with the applicable regulations.

Environmental Law > Natural Resources & Public Lands > Wetlands Management

HN18[] Natural Resources & Public Lands, Wetlands Management

An application for an inland wetlands permit need only be in substantial compliance with the applicable regulations. Substantial compliance with a statute or regulation is such compliance with the essential requirements of the statute or regulation as is sufficient to assure its objectives. What constitutes a substantial compliance is a matter depending on the facts of each particular case.

Administrative Law > Judicial Review > Standards of Review > General Overview

Governments > Local Governments > Administrative Boards

HN19[] Judicial Review, Standards of Review

Courts must be scrupulous not to hamper the legitimate activities of civic administrative boards by indulging in a microscopic search for technical infirmities in their actions. This cautionary advice is especially apt whenever a court is reviewing a decision of a local commission composed of lay persons.

Environmental Law > Administrative Proceedings & Litigation > Jurisdiction

Environmental Law > Natural Resources & Public Lands > Wetlands Management

HN20[] Administrative Proceedings & Litigation, Jurisdiction

Inland wetland commissions have complete discretion over whether an outside reviewer should be involved with an application. There are a number of cases which have approved the consideration of information by a local administrative agency supplied to it by its own technical or professional experts outside the confines of the administrative hearing.

Environmental Law > Natural Resources & Public Lands > Wetlands Management

HN21[] Natural Resources & Public Lands, Wetlands Management

An inland wetlands commission shall not be deemed to have ignored expert testimony when it has simply accepted the testimony of certain experts over the testimony of opposing experts.

Environmental Law > Administrative Proceedings & Litigation > Jurisdiction

Environmental Law > Natural Resources & Public Lands > Wetlands Management

HN22[] Administrative Proceedings & Litigation, Jurisdiction

An administrative agency is not required to believe any witness, even an expert, nor is it required to use in any particular fashion any of the materials presented to it so long as the conduct of the hearing is fundamentally fair.

Administrative Law > Agency Adjudication > Hearings > General Overview

Environmental Law > Natural Resources & Public Lands > Wetlands Management

Trademark Law > US Trademark Trial & Appeal Board Proceedings > Oppositions > General Overview

HN23[] Agency Adjudication, Hearings

The credibility of witnesses and the determination of factual issues are matters within the province of the administrative agency.

Environmental Law > Administrative Proceedings & Litigation > Jurisdiction

Environmental Law > Natural Resources & Public Lands > Wetlands Management

HN24[] **Administrative Proceedings & Litigation, Jurisdiction**

A challenge to fairness of the hearing process in a zoning or planning appeal and an inland wetlands appeal are the same, and similar considerations apply to wetlands appeals under subsection (4) or *Conn. Gen. Stat. § 4-183(j)* as with land use appeals under *Conn. Gen. Stat. § 8-8*. While hearings do not have to follow strict rules of evidence, they must be conducted so as not to violate fundamental rules of natural justice.

Administrative Law > ... > Hearings > Right to Hearing > Due Process

Environmental Law > Natural Resources & Public Lands > Wetlands Management

Administrative Law > ... > Hearings > Evidence > General Overview

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN25[] **Right to Hearing, Due Process**

Fundamentals of natural justice require that there must be due notice of an inland wetlands commission hearing, and at the hearing no one may be deprived of the right to produce relevant evidence or to cross-examine witnesses produced by his adversary. Put differently, due process of law requires that the parties involved have an opportunity to know the facts on which the commission is asked to act and to offer rebuttal evidence.

Environmental Law > Administrative Proceedings & Litigation > Jurisdiction

Environmental Law > Natural Resources & Public Lands > Wetlands Management

HN26[] **Administrative Proceedings & Litigation, Jurisdiction**

A site visit is not an integral part of an evidentiary hearing and is merely an investigative measure.

Banking Law > Types of Banks & Financial Institutions > Bank Holding Companies > General Overview

Real Property Law > Estates > General Overview

HN27[] **Types of Banks & Financial Institutions, Bank Holding Companies**

A property owner has a long-standing right to deny access to his or her property.

Judges: Klaczak, J.T.R.

Opinion by: Klaczak

Opinion

MEMORANDUM OF DECISION

This is an appeal from the decision of the defendant, the Vernon inland wetlands commission (commission), granting in part and denying in part, an application for the amendment of wetland boundaries filed by the defendant, W/S Development Associates, LLC (applicant), relating to properties at 65 and 75 Reservoir Road in Vernon, Connecticut. The plaintiffs, Glenn J. Montigny, Norma J. Marchesani, Karen A. Lynch and Michael B. Lynch, (plaintiffs) appeal pursuant to *General Statutes § 22a-19*.

On January 19, 2003, the applicant filed an application with the commission requesting redesignation of three specific wetland boundaries

at the subject properties, two abutting parcels of land, known as 65 and 75 Reservoir Road in the town of Vernon, Connecticut. (Return of Record [ROR), Exhibit A.) The applicant requested that the commission take the following action: (1) establish formal boundaries for "wetlands B" by including recently created wetlands [*2] that were previously approved by the commission ("wetlands B request"); (2) remove the watercourse designation from an area known as the Swale ("Swale request"); and (3) reduce the boundaries for "wetlands E" ("wetlands E request"). (ROR, Exhibit HHH, pp. 32-34.)

On January 28, 2003, the applicant submitted the application at the commission's regular meeting. (ROR, Exhibit GGG.) The commission held a public hearing commencing on February 25, 2003; (ROR, Exhibit HHH); and continued on March 25, 2003 and April 15, 2003. (ROR, Exhibits III, JJJ.) At the April 15, 2003 meeting, the commission closed the public hearing and approved the wetlands B and Swale requests, but denied the wetlands E request. (ROR, Exhibit JJJ.) The plaintiffs now appeal the commission's decision in regard to the approval of the wetlands B request.

HN1[] *General Statutes § 22a-43* governs an appeal from a decision of an inland wetlands agency. HN2[] "It is fundamental that appellate jurisdiction in administrative appeals is created only by statute and can be acquired and exercised only in the manner prescribed by statute." *Munhall v. Inland Wetlands Commission, 221 Conn. 46, 50, 602 A.2d 566 (1992).* [*3]

Aggrievement

HN3[] "Pleading and proof that the plaintiffs are aggrieved within the meaning of the statute is a prerequisite to the trial court's jurisdiction over the subject matter of the appeal." *Munhall v. Inland Wetlands Commission, supra, 221 Conn. 50.* All of the plaintiffs assert standing as intervenors pursuant to *General Statutes § 22a-19.* [1] (Amended Complaint, PP13, 14.)

HN5[] "*Section 22a-19* . [*4] . . authorizes any person to intervene in any administrative proceeding and to raise therein environmental issues." (Internal quotation marks omitted.) *Connecticut Coalition Against Millstone v. Rocque, 267 Conn. 116, 131, 836 A.2d 414 (2003).* "An intervening party under *§ 22a-19(a)*, however, may raise only environmental issues." *Red Hill Coalition, Inc. v. Conservation Commission, 212 Conn. 710, 715, 563 A.2d 1339 (1989).* HN6[] Individuals, such as the plaintiffs here, who file notices of intervention at the underlying agency hearing pursuant to *§ 22a-19* have standing to appeal from the commission's decision for that limited purpose. *Id.*; *Branhaven Plaza, LLC v. Inland Wetlands Commission, 251 Conn. 269, 276 n.9, 740 A.2d 847 (1999).*

In the present case, plaintiffs Glenn Montigny, Karen Lynch and Michael Lynch filed verified petitions to intervene that were approved by the commission at the February 25, 2003 public hearing. (ROR, Exhibit HHH, pp. 5-26.) The remaining plaintiff, Norma Marchesani, filed a verified petition to intervene that was denied at the March 25, 2003 public hearing; (ROR, Exhibit III, pp. 39-41); but was subsequently [*5] approved at the April 15, 2003 public hearing. (ROR, Exhibit JJJ, pp. 4-10.) In filing such petitions, all of the plaintiffs allege the likelihood of unreasonable pollution or destruction of the public trust in natural resources of the state as a result of the applicant's proposal. The plaintiffs are found to be statutorily aggrieved pursuant to *§ 22a-19(a)*, and have standing to bring this appeal.

---

[1] *General Statutes § 22a-19* provides in relevant part: HN4[] "In any administrative, licensing or other proceeding, and in any judicial review thereof . . . any person . . . 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." *General Statutes § 22a-19(a).*

Timeliness and Service of Process

HN7[] *Section 22a-43(a)* provides, in pertinent part, that an appeal may be commenced "within the time specified in subsection (b) of *section 8-8* from the publication of such regulation, order, decision or action . . ." *General Statutes § 8-8(b)* provides, in part, that an *HN8*[] "appeal shall be commenced by service of process . . . within fifteen days from the date that notice of the decision was published . . ." *Section 22a-43(a)* provides that "notice of such appeal shall be served upon the inland wetlands agency and the commissioner . . ."

The plaintiffs allege that legal notice of the commission's decision approving in part, and denying in part, the applicant's redesignation application was duly published in the *Journal Inquirer* on April 21, 2003 (Amended [*6] Complaint, PP17, 18); and the commission admits the same in its answer. (Commission's Answer, PP11, 18.) [2] Subsequently, on May 5, 2003, this appeal was commenced by service of process on (1) the applicant's agent for service of process; (2) Arthur J. Rocque, the commissioner of environmental protection; (3) the town clerk of Vernon; and (4) Ralph B. Zahner, the chairman of the commission. [3] (Marshal's Return.) Accordingly, the appeal was commenced timely by service on the proper parties.

SCOPE OF REVIEW

"The [*Inland Wetlands and Watercourses Act*] was [*7] designed to protect and preserve the 'indispensable and irreplaceable but fragile natural resource' of inland wetlands 'by providing an orderly process to balance the need for the economic growth of the state and the use of its land with the need to protect its environment and ecology . . .' *General Statutes § 22a-36*. Instead of banning all economic activities on wetlands, the legislature realized that a balance had to be struck between economic activities and preservation of the wetlands." *Samperi v. Inland Wetlands Agency, 226 Conn. 579, 591, 628 A.2d 1286 (1993)*.

HN9[] "In reviewing an inland wetlands agency decision made pursuant to the act, the reviewing court must sustain the agency's determination if an examination of the record discloses evidence that supports any one of the reasons given . . . The evidence, however, to support any such reason must be substantial; the credibility of witnesses and the determination of factual issues are matters within the province of the administrative agency . . . *HN10*[] This so-called substantial evidence rule is similar to the sufficiency of the evidence standard applied in judicial review of jury verdicts, [*8] and evidence is sufficient to sustain an agency finding if it affords a substantial basis of fact from which the fact in issue can be reasonably inferred . . . *HN11*[] The reviewing court must take into account [that there is] contradictory evidence in the record . . . but the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence . . ." (Internal quotation marks omitted.) *Tarullo v. Inland Wetlands & Watercourses Commission, 263 Conn. 572, 584, 821 A.2d 734 (2003)*.

HN12[] When challenging the decision of an inland wetlands agency, the plaintiffs bear the burden of proof in establishing "that substantial evidence does not exist in the record as a whole to support the agency's decision." *Samperi v. Inland Wetlands Agency, supra, 226 Conn. 587*. If the trial court finds that the decision of the agency is "arbitrary, illegal or not reasonably supported by the evidence," the court may sustain the plaintiffs' appeal. (Internal quotation marks omitted.) *Red Hill Coalition, Inc. v. Conservation Commission, supra,*

---

[2] The record does not contain an affidavit of publication, however, it should be noted that in the April 21, 2003 legal notice the commission requested that the affidavit of publication be sent to the town planner. (ROR, Exhibit TT.)

[3] John J. Muirhead, Jr., the agent of service for co-defendant MJDR Real Estate LLC, and Amanda D. Upchurch, the agent of service for co-defendant Lee & Lamont Realty, were also served on May 5, 2003. (Marshal's Return.)

212 Conn. 718. As indicated [*9] above, however, HN13[] this court cannot substitute its judgment for that of the commission where the record contains substantial evidence to support the commission's decision and where appropriate procedures were followed.

DISCUSSION

The plaintiffs appeal on the ground that the commission acted illegally, arbitrarily and in abuse of its discretion when it approved the applicant's wetlands B request. Specifically, the plaintiffs allege that (1) the commission failed to follow its own regulations in that it approved the wetlands B request even though the application was incomplete; (2) the decision to approve the wetlands B request is not supported by substantial evidence; and (3) the proceedings as a whole failed to accord fundamental fairness to the plaintiffs as § 22a-19 intervenors.

As indicated, the plaintiffs only oppose the commission's approval of the wetlands B request. The commission unanimously approved the wetlands B request on the basis that: "1. the application is complete per the Town of Vernon Inland Wetlands Regulations Section 4.3.4; 2. the re-designation approved amends the Town of Vernon Wetlands Map per Regulations Sections 3.7; [and] 3. the Commission considers [*10] the amendment of the Town of Wetlands Map not to cause an unreasonable pollution, impairment or destruction of the public trust in the watercourses and wetlands per Connecticut General Statutes, Section 22a-19." (ROR, Exhibit NN.)

A.

Whether the Commission Failed to Follow Its Own Regulations by Accepting and Approving, in Part, an Allegedly Incomplete Application.

The plaintiffs assert that it was improper, and in violation of relevant regulations, for the commission to accept and approve, in part, an allegedly incomplete application. HN14[] Section 4.3.4 of the Inland Wetlands and Watercourses Regulations of the town of Vernon, Connecticut sets forth the information that must be included in a permit application to undertake an activity that is likely to impact or affect a wetland or watercourse. (ROR, Exhibit FFF.) Section 4.3.5.2 of Vernon's regulations provides that: HN15[] "Petitions requesting changes or amendments to the Inland Wetlands and Watercourses Map, Vernon, Connecticut shall contain the information outlined in Section 4.3.4." (ROR, Exhibit FFF.)

The plaintiffs argue that the applicant "failed to comply with application requirements in several material [*11] ways. Specifically, [the plaintiffs assert that] (i) [the applicant] failed to provide all of the information enumerated in Section 4.3.4 as required by Section 4.3.5.2. of [Vernon's] Regulations; (ii) [the applicant] failed to request redesignation of the entire wetland boundary on the Properties notwithstanding more changes to the 2000 plan than were reflected in [the applicant's] three-part request in the 2003 Application; and (iii) [the applicant] failed to identify the wetlands limits and buffer associated with the watercourse (a brook), showing only its centerline (Record Exhibits A, CCC)." (Plaintiffs' Brief, p. 19.)

The applicant, as well the commission, [4] directly counters the plaintiffs' assertions. The applicant contends that when applying for a wetlands boundary designation an applicant is (1) not required to supply all the information that is necessary when applying for a grant of a regulated activity permit; (2) not required to redesignate the boundaries of its entire parcel; and (3) not required to show detailed limits and buffers for watercourses that are not the subject of the redesignation application. (Applicant's Brief, pp. 8-20.)

[*12] Although Vernon's regulations enumerate

---

[4] The commission, instead of submitting its own brief, adopted the applicant's brief and the commissioner of environmental protection's brief. See "Notice of Adoption of Briefs by Defendant, Town of Vernon Inland Wetlands Commission" dated April 22, 2004.

the application requirements for both wetland boundary delineation and wetland activity requests in § 4.3.4, the applicant argues that a close reading of this section reveals that some of the requirements listed do not apply to applications for wetland boundary delineation requests. The applicant asserts that the express language of several requirements in § 4.3.3 makes such requirements inapplicable to redesignation of wetlands. For example, the applicant argues that the requirement of "[a] detailed description of the activity or use for which a permit is required," pursuant to Vernon's Regulations § 4.3.4.5, applies only to an "activity or use" permit and not to a wetland boundary delineation request. [5]

[*13] Unfortunately, the plaintiffs do not specify in their brief which of the § 4.3.4 requirements are missing from the application in question. The plaintiffs also fail to provide any legal basis for their other two arguments in regard to the application; namely, their arguments that the application is incomplete because the applicant (1) did not request redesignation of the entire wetland boundary and (2) only identified a brook by its centerline. This court could not find any support in Connecticut case law, Connecticut General Statutes or Vernon's regulations for either argument.

Moreover, HN16[] Connecticut courts are not obligated to overturn an inland wetlands commission's decision even if it is found that the application was incomplete. See *Oppenheimer v. Redding Conservation Commission*, Superior Court, judicial district of Danbury, Docket No. CV 01 0343722S (December 16, 2003, Moraghan, J.T.R.) ("Assuming, without deciding, for the sake of argument, that [the inland wetlands] application was, in fact, incomplete, this does not necessitate that the court find that the commission abused its discretion when it approved the application"); *Brander v. Inland-Wetlands Commission* **[*14]** , Superior Court, judicial district of Litchfield, Docket No. CV 98 00763565 (September, 11, 1998, Pickett, J.) (holding that an allegation that the application is incomplete is not a valid basis for appeal); *Santini v. Inland Wetlands Commission*, Superior Court, judicial district of Tolland at Rockville, Docket No. CV 96 61840S, 19 Conn. L. Rptr. 180 (February 7, 1997, Rittenband, J.) ("The court finds that the allegations of an incomplete application is not an intervening consideration which materially affects the merits of the matter decided"); *DeAngelis v. Inland Wetlands & Watercourses Commission*, Superior Court, judicial district of Waterbury, Docket No. CV 96 132755 (May 16, 1997, Pellegrino, J.) HN17[] ("While the IWC has the discretion to deny an incomplete application . . . the rule is that [an application] must be in substantial compliance with the applicable regulations").

HN18[] An application for an inland wetlands permit need only be in substantial compliance with the applicable regulations. See, e.g., *Michel v. Planning & Zoning Commission, 28 Conn.App. 314, 324, 612 A.2d 778*, cert. denied, *223 Conn. 923, 614 A.2d 824 (1992)*; T. Tondro, Connecticut **[*15]** Land Use Regulation (2d Ed. 1992) pp. 431-33. "Substantial compliance with a statute or regulation is such compliance with the essential requirements of the statute or regulation as is sufficient to assure its objectives. What constitutes a substantial compliance is a matter depending on the facts of each particular case." *DeAngelis v. Waterbury Inlands Wetlands & Watercourses Commission*, Superior Court, judicial district of Waterbury, Docket No. CV 96 132755 (May 16, 1997, Pellegrino, J.). See also *Sorrow v Zacchera*, Superior Court, judicial district of Hartford, Docket No. CV 98 580072, 24 Conn. L. Rptr. 19 (December 23, 1998, Teller, J.).

The present application contains an application form, a check for required fees, a statewide inland wetlands activity reporting form, the applicant's letter of interest, the owner's letter of authorization, deed descriptions of the properties, a list of

[5] See also the following sections of Vernon's regulations: 4.3.4.6 ("A map of the proposed use or activity . . ."); 4.3.4.7 ("If the extent of the proposed regulated activity . . ."); and 4.3.4.10 ("measures which would mitigate the impacts of the regulated activity . . .").

abutters, a boundary and topographic survey, a supplemental wetlands report, a soils report, routine wetland determination data forms, a letter from an independent professional soil scientist, mailing labels for the abutters, a boundary and topographic survey plan, a general location and [*16] wetland re-designation plan, a wetlands mitigation plan, a project narrative, and a re-designation proposal. (ROR, Exhibit A.) This record reflects that the application is, at least, in substantial compliance with Vernon's regulations.

Furthermore, HN19[] "courts must be scrupulous not to hamper the legitimate activities of civic administrative boards by indulging in a microscopic search for technical infirmities in their actions . . . This cautionary advice is especially apt whenever the Court is reviewing a decision of a local commission composed of lay persons." (Citation omitted; internal quotation marks omitted.) *Samperi v. Inland Wetlands Agency, supra, 226 Conn. 596*. The record indicates that the plaintiffs raised the issue of whether the application was complete several times during the public hearing and that the commission examined this issue extensively. (ROR, Exhibits HHH, pp. 15-19, 21-24, 48-50; III, pp. 43-45.) In fact, both the town engineer and the town planner reported to the commission that the application was complete. (ROR, Exhibit HHH, pp. 22, 49.)

For the foregoing reasons, the plaintiffs' appeal cannot be sustained on this ground.

B.

Whether [*17] the Decision to Approve the Wetlands B Request Is Supported by Substantial Evidence

The plaintiffs also appeal on the ground that the commission's decision to approve the wetlands B request is not supported by substantial evidence. The plaintiffs argue that the commission (1) improperly failed to employ the participation of an outside reviewer despite conflicting information; (2) improperly ignored the plaintiffs' experts; and (3) failed to provide a reason for its wetlands B decision.

Connecticut case law is clear on the plaintiffs' first two contentions on this matter. In regard to the plaintiffs' first argument, HN20[] inland wetland commissions have complete discretion over whether an outside reviewer should be involved with an application. *Tarullo v. Inland Wetlands & Watercourses Commission, supra, 263 Conn. 587.* See also *Norooz v. Inland Wetlands Agency, 26 Conn.App. 564, 570, 602 A.2d 613 (1992)* ("There are a number of cases which have approved the consideration of information by a local administrative agency supplied to it by its own technical or professional experts outside the confines of the administrative hearing"). Thomas Joyce, Vernon's [*18] town planner, specifically addressed this issue at the public hearing. "In regard to this issue of second opinions or independent opinions we rely upon the judgment of licensed certified professionals who with their seals attest to the [veracity] of their testimony and that is true whether they are civil engineer, a traffic engineer or a soil scientist or an architect or structural engineer and the fact that people may challenge their opinions does not mean that you . . . then would automatically go saying well because someone disagrees with someone else we go hiring our own party." (ROR, Exhibit HHH, pp. 49-50.) The fact that the commission did not seek the assistance of an outside reviewer/expert in considering the wetlands B request is irrelevant as to whether there is substantial evidence supporting the commission's approval of such request.

The plaintiffs' second argument on this matter also has been addressed by case law. HN21[] A commission shall not be deemed to have ignored expert testimony when it has simply accepted the testimony of certain experts over the testimony of opposing experts. *Samperi v. Inland Wetlands Agency, supra, 226 Conn. 597-98*. As in [*19] *Samperi*, "the evidence before the agency in this case did not involve uncontroverted expert testimony. Unlike the situation in *Feinson v.*

Conservation Commission, 180 Conn. 421, 429 A.2d 910 (1980), in which the agency disregarded testimony on a technically complex matter by the only expert who appeared at the hearing, without affording the expert an opportunity to rebut the agency's concerns, the present case included testimony by a myriad of experts." Samperi v. Inland Wetlands Agency, supra, 226 Conn. 597.

Here, the applicant provided testimony from three experts, soil scientist Philip London (ROR, Exhibit HHH, pp. 37-46); professional engineer and licensed land surveyor Rohan Freeman (ROR, Exhibits HHH, pp. 34-37, 46-49; JJJ, pp. 15-19); and professional wetland scientist/biologist Bud Titlow (ROR, Exhibit JJJ, pp. 20-22); while the plaintiffs presented testimony from two experts: professional engineer Marc Goodin (ROR, Exhibit III, pp. 41-50); and soil scientist Martin Brogie (ROR, exhibit III, pp. 50-57). The experts disagreed over whether wetland boundaries were improperly changed by the applicant.

While the plaintiffs' experts mostly **[*20]** focused on an on-site brook and on wetlands E when making their argument that the applicant improperly changed wetland boundaries (ROR, Exhibit III, pp. 43-47, 50-51); Goodin, the plaintiffs' professional engineer, also applied this argument to the wetlands B request (ROR, Exhibit III, pp. 48-50). For example, Goodin argued: "It's difficult to see but here's wetlands B and wetlands D. As you can see, there's two different colors there. And what they represent is the January 2003 wetlands in one color and that's the wetlands that they're asking for right now; but the other flag numbers and flag locations represent their previous October and September wetlands. In other words, the wetlands has changed from October and September to the January 6 application." (ROR, Exhibit III, p. 48.) As explained by the plaintiffs' other expert, soil scientist Martin Brogie, Goodin "took the maps from the earlier applications and the January 2003 application and digitized the wetland flag locations to scale and he came up with these colorized maps that he's generated that demonstrates that the wetland boundaries that were initially to represent the accepted inland/wetland boundary, the boundary that **[*21]** was not the subject of this redesignation and it demonstrated that they'd actually changed." (ROR, Exhibit III, pp. 50-51.)

The main flaw in the plaintiffs' argument is that despite numerous entreaties by the commission's chairman, Ralph Zahner, [6] the plaintiffs' experts continued to rely heavily on applications that, although related to the same property, were irrelevant to the redesignation request. Roland Freeman, one of the applicant's experts, exposed this flaw and convincingly challenged the credibility of Goodin's argument by pointing out that Goodin never discussed the accuracy of the maps he created, nor the methodology he used. (ROR, Exhibit JJJ, p. 16.) Freeman also explained that Goodin likely digitized and blew up irrelevant maps and thus distorted the boundary lines. (ROR, Exhibit JJJ, pp. 16-17.)

[*22] That the commissioners assessed these various expert opinions with care, and did not ignore the plaintiffs' arguments, is demonstrated by the denial of the wetlands E request. "Furthermore . . . HN22[] an administrative agency is not required to believe any witness, even an expert, nor is it required to use in any particular fashion any of the materials presented to it so long as the conduct of the hearing is fundamentally fair." Samperi v. Inland Wetlands Agency, supra, 226 Conn. 597. The argument that the commission ignored the plaintiff's experts is unpersuasive.

The plaintiffs' last argument, asserting that the commission failed to provide reasons for its wetlands B decision, is also without merit. As indicated above, the commission did provide

[6] Chairman Zahner continuously explained: "We're not discussing a new application. We're discussing strictly this information that has been presented to us . . . We are not referring to [other applications]. We are referring to this application . . . We're talking about a redesignation. Stick to the subject please." (ROR, Exhibit III, pp. 45-46.)

reasons for such decision. The commission stated the following reasons for approving the applicant's wetlands B request: "1. the application is complete per the Town of Vernon Inland Wetlands Regulations Section 4.3.4; 2. the re-designation approved amends the Town of Vernon Wetlands Map per Regulations Sections 3.7; [and] 3. the Commission considers the amendment of the Town of Wetlands Map not to cause an unreasonable **[*23]** pollution, impairment or destruction of the public trust in the watercourses and wetlands per Connecticut General Statutes, Section 22a-19." (ROR, Exhibit NN.) Thus, the plaintiffs' assertion that the commission did not provide a reason for its wetlands B decision is unfounded.

The plaintiffs generally assert that the commission's approval of the wetlands B request is not supported by substantial evidence in the record. Despite such argument, however, the record contains (1) expert testimony in support of the wetlands B request; (ROR, Exhibits HHH, pp. 34-49; JJJ, pp. 15-22); (2) the application which contains various expert reports and surveys supporting the wetlands B request; (ROR, Exhibit A); and (3) several detailed maps that support the wetlands B request. (ROR, Exhibits CCC, DDD, EEE.) HN23[↑] "The credibility of witnesses and the determination of factual issues are matters within the province of the administrative agency." (Internal quotation marks omitted.) River Bend Association v. Conservation and Inland Wetlands, 269 Conn. 57, 70, 848 A.2d 395 (2004). While the plaintiffs have submitted some evidence in opposition to the applicant's experts' **[*24]** analyses (ROR, Exhibit III, pp. 48-50); it was within the commission's discretion to determine how much weight to accord such evidence and, more importantly, whether it amounted to substantial evidence. Therefore, because the record supports a determination that the applicant presented sufficient evidence with respect to the wetlands B request, the plaintiffs' appeal cannot be sustained on this ground.

C.

Whether the Proceedings Were Fundamentally Fair

Finally, the plaintiffs appeal on the ground that they did not receive the "fundamentally fair" treatment that they deserved as environmental intervenors. Specifically, the plaintiffs argue that "they were denied access to the Properties to confront the evidence upon which the Commission was being asked to make a decision, and under the circumstances, their inability to view the site was a denial of fundamental fairness in the proceedings." (Plaintiffs' Brief, p. 28.) The plaintiffs assert that because "no public meeting attended by a quorum of the Commissioners afforded the Plaintiffs access to the site and . . . the Applicant staunchly rejected all of Plaintiffs' requests" the validity of the proceedings were undermined. (Plaintiffs' **[*25]** Brief, p. 30.)

HN24[↑] "A challenge to fairness of the hearing process in a zoning or planning appeal and an inland wetlands appeal would be the same, and similar considerations would apply to wetlands appeals under subsection (4) or section 4-183(j) as with land use appeals under section 8-8. While hearings do not have to follow strict rules of evidence, they must be conducted so as not to violate fundamental rules of natural justice." R. Fuller, 9A Connecticut Practice Series: Land Use Law and Practice (2d. Ed. 1999), § 33.9, p. 180, citing Huck v. Inland Wetlands & Watercourses Agency, 203 Conn. 525, 536, 525 A.2d 940 (1987). HN25[↑] "Fundamentals of natural justice require that there must be due notice of the hearing, and at the hearing no one may be deprived of the right to produce relevant evidence or to cross-examine witnesses produced by his adversary . . . Put differently, due process of law requires that the parties involved have an opportunity to know the facts on which the commission is asked to act and . . . to offer rebuttal evidence." (Citations omitted; internal quotation marks omitted.) Grimes v. Conservation Commission, 243 Conn. 266, 274, 703 A.2d 101 (1997). **[*26]**

The plaintiffs rely heavily on Grimes v.

Conservation Commission, supra, especially for their contention that "[a] site visit is an appropriate investigative tool" (Plaintiffs' Brief, p. 29); the Connecticut Supreme Court in *Grimes*, however, also held that HN26[] a site visit is not "an integral part of an evidentiary hearing" and is "merely an investigative measure." Grimes v. Conservation Commission, supra, 243 Conn. 271, 277-78. The plaintiffs contend that "while the *Grimes* court expressly refrained from exploring the boundaries of the common-law right to due process in administrative proceedings, it plainly suggests that the boundaries of fundamental fairness have not yet been defined [Id., 274 n.11] . . . [and the plaintiffs allege] that the facts in the case at bar warrant that examination." (Plaintiffs' Brief, p. 27.) Essentially, the plaintiffs ask this court to create new law that establishes that environmental intervenors under § 22a-19(a) shall always have the express right to enter the subject property in question without the land owner's consent. This court declines to do so.

The superior court, Tobin, J., in response **[*27]** to a similar claim, stated that: "The plaintiffs claim that they were denied due process in that the Commission should have assisted plaintiffs and their experts in obtaining limited access to the property is without merit. The property owner (BHC) exercised its rights in denying access to its property." *Mulvey v. Environmental Commission*, Superior Court, judicial district of Stamford, Docket No. CV 97 0156976 S, 22 Conn. L. Rptr. 665 (August 26, 1998, Tobin, J.). Like the *Mulvey* court, this court upholds the long-standing right of HN27[] a property owner to deny access to his or her property. Accordingly, the plaintiffs' appeal cannot be sustained on this ground

CONCLUSION

Based on the foregoing reasons, the court finds that the commission did not act illegally, arbitrarily or in abuse of discretion when it approved the applicant's wetlands B request. The appeal is dismissed.

Klaczak, J.T.R.

End of Document

Cited
As of: August 8, 2018 6:46 PM Z

Gustafson v. E. Haven Inland Wetlands & Watercourses Comm'n

Superior Court of Connecticut, Judicial District of New Haven, At New Haven

June 1, 2004, Decided ; June 2, 2004, Filed

CV030476072S

Reporter

2004 Conn. Super. LEXIS 1416 *

Gary Gustafson et al. v. East Haven Inland Wetlands and Watercourses Commission et al.

Notice: [*1] THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

Core Terms

wetlands, pools, vernal, Inland, Statutes, subject property, intervenors, watercourse, aggrieved, regulated

Case Summary

Procedural Posture

Plaintiffs, an intervenor and a wetlands neighbor, appealed the decision of defendant East Haven, Connecticut, Inland Wetlands and Watercourses Commission approving the application of defendant applicant to construct an eight-lot residential development in a protected area.

Overview

The applicant sought permission to fill a portion of the wetlands. At a hearing, several people spoke in opposition to the application out of concern that the proposed construction was to impact vernal pools, which were shallow bodies of water that appeared in springtime and that were used by wildlife species. The Commission granted the application subject to the condition that the applicant submit a supplemental wetland investigation that dealt with vernal pools. The report stated that there were no sightings of any vernal pool obligate species within or around the shallow pool areas on the site. The application was incomplete. The Commission was required under *Conn. Gen. Stat. § 22a-41(a)(1)* to consider the impact upon vernal pools. When the Commission approved the application, the existence of vernal pools was in dispute and not all of the information required under *§ 22a-41(a)(1)* had been provided. Furthermore, allowing the contested issue of the existence of vernal pools to be resolved by the preparation of a report to be done after the application was approved and without an opportunity for the intervenor and neighbor to be heard was not consistent with due process.

Outcome

The appeal was sustained. The matter was referred back to the Commission for a further hearing to consider whether vernal pools existed on the subject property and, if they did, what impact the proposed activity was to have on them. The intervenor and neighbor were to be given a fair opportunity to be heard.

LexisNexis® Headnotes

Civil Procedure > ... > Justiciability > Standing > Ge

neral Overview

Environmental Law > Administrative Proceedings & Litigation > Jurisdiction

Civil Procedure > Parties > Intervention > General Overview

HN1[] **Justiciability, Standing**

See *Conn. Gen. Stat. § 22a-19.*

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

Environmental Law > Natural Resources & Public Lands > Wetlands Management

Environmental Law > Land Use & Zoning > Judicial Review

HN2[] **Administrative Proceedings & Litigation, Judicial Review**

The duty of a reviewing court in a wetlands appeal is to uphold an agency's decision unless the action was arbitrary, illegal, or not reasonably supported by the evidence. A plaintiff must establish that substantial evidence does not exist in the record as a whole to support the agency's decision.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Administrative Procedure

Environmental Law > Land Use & Zoning > Constitutional Limits

Administrative Law > Agency Adjudication > Hearings > General Overview

Constitutional Law > Substantive Due Process > Scope

Business & Corporate Compliance > ... > Real Property Law > Zoning > Constitutional Limits

HN3[] **Zoning, Administrative Procedure**

Although proceedings before an administrative board are informal and not subject to the strict rules of evidence, it is required that hearings provide to the parties involved fundamental due process.

Administrative Law > ... > Hearings > Right to Hearing > Due Process

Constitutional Law > Substantive Due Process > Scope

Administrative Law > Agency Adjudication > Hearings > General Overview

Administrative Law > ... > Hearings > Right to Hearing > General Overview

HN4[] **Right to Hearing, Due Process**

In the administrative context, due process of law requires not only that there be due notice of the hearing but also that at the hearing the parties involved have the right to: produce relevant evidence, an opportunity to know the facts on which the agency is asked to act, to cross-examine witnesses, and to offer rebuttal evidence. Moreover, a municipal agency may not use information supplied on an ex parte basis.

Environmental Law > Natural Resources & Public Lands > Wetlands Management

HN5[] **Natural Resources & Public Lands, Wetlands Management**

Under *Conn. Gen. Stat. § 22a-41(a)(1)*, a local inland wetland agency must take into account the

environmental impact of a proposed activity on a regulated area.

Environmental Law > Land Use & Zoning > General Overview

Environmental Law > Natural Resources & Public Lands > Wetlands Management

HN6[] **Environmental Law, Land Use & Zoning**

In the context of an application to conduct a regulated activity within an inland wetland or watercourse area, an application is not deemed complete until all information required by statutes or regulations has been submitted in proper form.

Environmental Law > Natural Resources & Public Lands > Wetlands Management

HN7[] **Natural Resources & Public Lands, Wetlands Management**

The Connecticut Inland Wetlands Act protects the wetlands and not the wildlife.

Judges: Devlin, J.

Opinion by: Devlin

Opinion

MEMORANDUM OF DECISION

This is an administrative appeal from a decision of the East Haven Inland Wetlands and Watercourses Commission (Commission) approving the application of Clemente Estates LLC to conduct a regulated activity within an inland wetland or watercourse area. The activity concerned the proposed construction of the Wheaton Road Subdivision--an eight-lot residential development. Trial of this appeal took place on May 17, 2004. Prior to that date, all parties including the Commissioner of the Department of Environmental Protection (DEP Commissioner) filed briefs setting forth their respective positions.

For the reasons set forth below, the court finds that the Commission acted on an incomplete application regarding the existence of regulated resources, i.e. vernal pools, on the subject property. Accordingly, the appeal is ordered sustained and the matter is remanded to the Commission for further proceedings.

FACTS

On October 28, 2002, Clemente Estates filed Application [*2] No. 02-13 Wheaton Road Subdivision. The Commission accepted the application at its meeting on November 13, 2002 and set the matter down for a public hearing on January 8, 2003. On January 8, 2003, prior to the hearing, both plaintiffs intervened in the proceedings pursuant to General Statutes § 22a-19. [1]

At the January 8, 2003 hearing, Clemente Estates made a presentation in support of the application. The subject parcel of land consists of 6.68 acres of which 1.2 acres are wetlands. The proposal was for an eight-lot subdivision serviced by a proposed road--Victoria Drive. The applicant through a civil engineer, [*3] Victor Benni, described the details of the proposal that included an open-space lot, a twenty-foot buffer area adjacent to the existing wetlands and storm water drainage system. Although the alternative of a bridge was mentioned, the applicant sought permission to fill a portion of the wetlands in order to construct Victoria Drive.

[1] In relevant part, § 22a-19 provides: HN1[] "In any administrative . . . proceeding . . . any person . . . may intervene as a party . . . asserting that the proceeding . . . 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."

At the January 8th hearing, several persons spoke in opposition to the application out of concern that the proposed construction would impact vernal pools. [2] The plaintiff, Ms. Whitehead, commented on the application and introduced some documentation in support of her objections. Ms. Whitehead requested that the Commission keep the record open so that she could produce additional reports/documentation regarding vernal pools. The applicant objected to this on the ground that its civil engineer and soil scientist were available for questioning by Ms. Whitehead. After discussion, the Commission implemented the following schedule (1) intervenors must submit questions to applicant by January 15, 2003; (2) applicant must respond to the questions by January 22, 2003; (3) intervenor must submit comments by January 29, 2003; and (4) applicant must submit comments/rebuttal [*4] by February 5, 2003. The hearing was recessed to February 13, 2003.

On February 13, 2003, the Commission accepted the correspondence exchanged between the applicant and intervenors but took no further action. Thereafter, on March 12, 2003, the Commission granted the application subject to a condition. The Commission required the applicant to produce a "Supplemental Wetland Investigation" within sixty days to deal with vernal pools. [3] At its meeting on July 9, 2003, the Commission accepted the report submitted by the applicant from David Lord, a soil scientist. Mr. Lord's report was dated July 5, 2003 and noted his observation that there were "no sightings of any vernal pool obligate species within or around the shallow pool areas on this site."

[*5] *DISCUSSION*

The plaintiffs claim that they are aggrieved by the Commission's decision and appeal asserting (1) the Commission's procedures violated their right to due process; and (2) the decision to grant the application prior to a full investigation regarding the existence of vernal pools violated *General Statutes § 22a-41*.

A.

Aggrievement

The plaintiffs claim statutory aggrievement on two grounds. Both plaintiffs assert that as intervenors in the administrative proceeding pursuant to *General Statutes § 22a-19*, they have statutory standing to appeal. *Red Hill Coalition, Inc. v. Town Plan & Zoning Commission, 212 Conn. 727, 734, 563 A.2d 1347 (1989)*. In addition, Gary Gustafson asserts that as a person owning land that is within 90 feet of the watercourse involved in a regulation, he is aggrieved pursuant to *General Statutes § 22a-43*.

In the present case, both plaintiffs intervened in these proceedings prior to the Commission's January 8, 2003 hearing. Through that intervention, they both became parties to the administrative proceeding with standing to appeal for the limited [*6] purpose of raising environmental issues. *Red Hill Coalition, Inc. v. Town Plan & Zoning Commission, supra,212 Conn. 734*. Moreover, this court credits the testimony of both Gary Gustafson and George Logan, a wetlands expert, that a watercourse runs from the subject property to and through Gustafson's property.

Accordingly, the court finds that both plaintiffs are statutorily aggrieved. Ms. Whitehead pursuant to *§ 22a-19* and Mr. Gustafson pursuant to *§ 22a-19* and *§ 22a-43*.

---

[2] Vernal pools are shallow bodies of water that appear in springtime. They are used by wildlife species--particularly salamanders, for breeding.

[3] The condition stated:

A "Supplemental Wetland Investigation" is to be supplied to the Commission within a maximum period of sixty (60) days of the March 2003 Meeting Date. The report will deal with Vernal Pools (if any) on the site, their quality in terms of ability to support amphibians, wildlife, flora and fauna, etc. Based on these findings the Commission may impose additional measures that it deems appropriate to protect said wetlands shown on this "Supplemental Report and Map" or modify its decision if appropriate.

B.

Due Process/Conditional Approval

The Commission correctly points out that HN2[] the duty of a reviewing court in a wetlands appeal is to uphold the agency's decision unless the action was arbitrary, illegal or not reasonably supported by the evidence. *Bain v. Inland Wetlands Commission, 78 Conn.App. 808, 813, 829 A.2d 18 (2003).* The plaintiff must establish that substantial evidence does not exist in the record as a whole to support the agency's decision. *Samperi v. West Haven Inland Wetlands Agency, 226 Conn. 579, 587, 628 A.2d 1286 (1993).*

On the other hand, the plaintiffs correctly assert that HN3[] although proceedings before an administrative board are **[*7]** informal and not subject to the strict rules of evidence, it is required that hearings provide to the parties involved fundamental due process. *Parsons v. Board of Zoning Appeals, 140 Conn. 290, 293, 99 A.2d 149 (1953)*, overruled on other grounds; *Ward v. Zoning Board of Appeals, 153 Conn. 141, 146-47, 215 A.2d 104 (1965).* HN4[] In the administrative context, due process of law requires not only that there be due notice of the hearing but also that at the hearing the parties involved have the right to: produce relevant evidence, an opportunity to know the facts on which the agency is asked to act, to cross-examine witnesses and to offer rebuttal evidence. *Connecticut Fund for the Environment, Inc. v. City of Stamford, 192 Conn. 247, 249, 470 A.2d 1214 (1984)*; *Huck v. Inland Wetlands and Watercourses Agency, 203 Conn. 525, 536, 525 A.2d 940 (1987)*; *Pizzola v. Planning & Zoning Commission, 167 Conn. 202, 207, 355 A.2d 21 (1974).* Moreover, a municipal agency may not use information supplied on an ex parte basis. *Norooz v. Inland Wetlands Agency, 26 Conn.App. 564, 569, 602 A.2d 613 (1992).* **[*8]**

In the present case, whether vernal pools existed on the subject property and whether they would be affected by the proposed activity were matters that the applicant was required to address in its application, and that the Commission was required to consider in its decision. See *General Statutes § 22a-41(a)(1)* HN5[] (local inland wetland agency must take into account environmental impact of proposed activity on the regulated area); see also *Connecticut Fund for the Environment v. Stamford, supra, 192 Conn. 250* (same). When the Commission rendered its decision on March 12, 1999, the existence of vernal pools on the property was in dispute. Because vernal pools are only present during springtime, it was not possible to resolve the issue in either January when the hearing was conducted or early March when the decision was announced. The Commission handled this issue by making the approval conditional on a future determination of the existence of vernal pools. As the DEP Commissioner points out, this approach amounted to acting on an incomplete application and deferring consideration of essential required information. Memorandum of Defendant Commissioner **[*9]** of Environmental Protection, p. 3. HN6[] An application is not deemed complete until all information required by statutes or regulations has been submitted in proper form. *Newtown v. Keeney, 234 Conn. 312, 322, 661 A.2d 589 (1995).*

The Commission's reliance on *AvalonBay Communities, Inc. v. Inland Wetlands Commission, 266 Conn. 150, 163, 171, 832 A.2d 1 (2003)*, is unpersuasive. It is true that our Supreme Court in *AvalonBay* made clear that HN7[] Connecticut's inland wetlands act protects the wetlands and not the wildlife. *Id.* Unlike *AvalonBay*, however, the present application involved proposed activity that affected the wetlands. Whether the filling of wetlands as approved by the Commission impacts vernal pools is in doubt, but such filling clearly involves a physical impact not present in *AvalonBay.*

The procedure adopted by the Commission also affected the plaintiff's due process rights. Allowing a contested issue at the hearing--the existence of

vernal pools--to be resolved by the preparation of a report to be done after the application was approved and without an opportunity for the plaintiffs to be heard, is not consistent with the due process **[*10]** principles described above. Moreover, the report submitted by the applicant is ambiguous with respect to the issue of vernal pools on the property. David Lord's report notes no observation of relevant species, but also confirms the existence of "shallow pool areas" on the site. The plaintiffs, as intervenors, should have an opportunity to respond to this report.

The court's decision is not intended to substitute its judgment for that of the Commission. To the contrary, this court makes no finding as to whether vernal pools do or do not exist on the subject property, or whether, even if they do exist, the proposed filling is permissible. This court does find, however, that the applicant did not submit a complete application to the Commission prior to its decision.

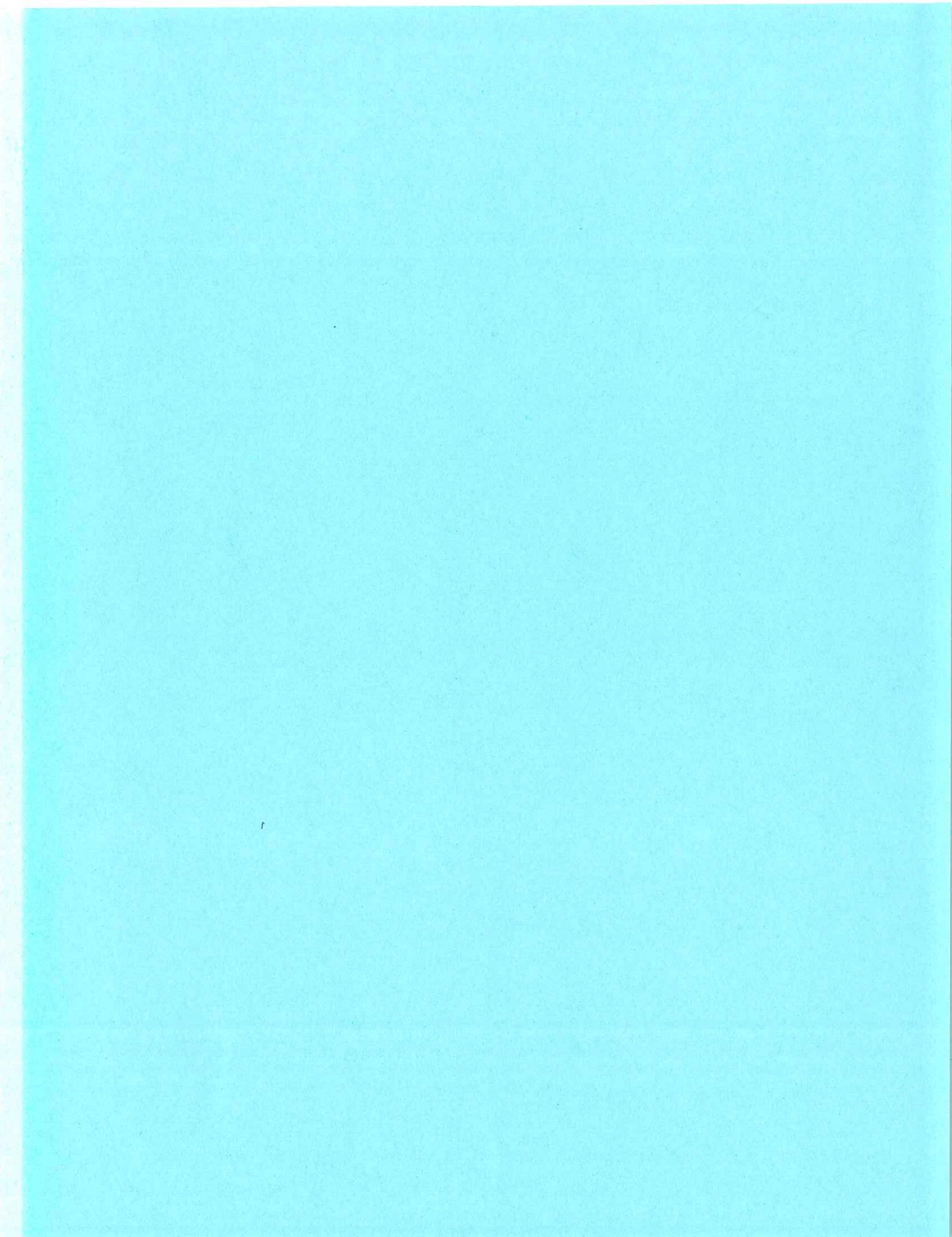
CONCLUSION

The appeal is sustained. The matter is referred back to the Commission for a further hearing to consider whether vernal pools exist on the subject property and, if they do, what (if any) impact the proposed activity will have on them. At such hearing, the plaintiffs should be given a fair opportunity to be heard.

So Ordered at New Haven, Connecticut this 1st day of June 2004.

By Devlin, J.

End of Document



DOCKET NO: HHB-CV-18-6042335-S	:	SUPERIOR COURT
RESCUE CANDLEWOOD MOUNTAIN, LISA K. OSTROVE (F/K/A LISA J. KRELOFF), MICHAEL H. OSTROVE, AND CANDLELIGHT FARMS AVIATION, LLC	:	JUDICIAL DISTRICT OF NEW BRITAIN
V.	:	AT NEW BRITAIN
CONNECTICUT SITING COUNCIL AND CANDLEWOOD SOLAR, LLC	:	OCTOBER 26, 2018

REPLY BRIEF OF PLAINTIFFS/APPELLANTS

I. The Council erred as a matter of law in denying the motions by DEEP and DOA to deny the Petition.

The Council and Petitioner[1] argue that P.A. 17-218 affects "substantive requirements" because it adds an additional "element" that a person seeking a declaratory ruling under C.G.S. § 16-50k(a) (as amended by P.A. 17-218) must satisfy in order to qualify for declaratory ruling review. Without DEEP's representation that a project will not have a material adverse effect on core forest (a new "element" added by P.A. 17-218), a person seeking approval for a solar project under the statute must seek approval under the provisions for obtaining a Certificate. This change in procedure, the Council argues, is really a change in substantive law. (Council's Br., pp. 7-22) This ipse dixit contention fails to pass muster. (Plaintiffs' Br., pp. 13-22)

[1] Petitioner CS's brief adopts all of the Council's arguments and adds only a few additional claims which the Plaintiffs will identify and discuss separately below. Otherwise Plaintiffs will refer only to the relevant pages of the Council's brief and will identify the Defendants' points collectively as the Council's argument. Plaintiffs incorporate the arguments of Co-Plaintiff Carl M. Dunham, Jr. in his reply brief in Dkt. No. HHB-CV-18-5021642-S.

Nowhere in its brief does the Council address the point that the plain language of P.A. 17-218 demonstrates that a solar project rejected by DEEP prior to July 1, 2017 in the statutory solicitation process cited in that act does not qualify to proceed under the declaratory ruling process unless DEEP makes the representation of no material adverse effect on core forest. (Plaintiffs' Br., pp. 16-18) It is undisputed that the Project was not selected by DEEP in that solicitation process, and that DEEP did not make the required representation. As Plaintiffs have discussed, the language of P.A. 17-218 plainly excludes from the DEEP representation requirement a project selected by DEEP before July 1, 2017, and creates the inescapable inference that a project not so selected is subject to the DEEP representation requirement in order to qualify for the declaratory ruling procedure. The key date for the legislature was whether DEEP had selected or rejected a project before July 1, 2017, not whether the petition to approve the project was filed with the Council a few days before or after July 1, 2017. (Id.) In short, the express language of P.A. 17-218 leaves no doubt that its added conditions apply to petitions filed before the July 1, 2017 effective date unless DEEP had selected the proposed project before July 1, 2017.

The Council's attempt to cast P.A. 17-218 as a change in "substantive law" misses the mark, because the determinative question in the analysis is whether the statute affects substantive rights. State v. Nathaniel, 323 Conn. 290, 294-96 (2010), quoted in Plaintiffs' Br., pp. 15-16; see Doe v. Norwich Roman Catholic Diocesan Corp. 270 Conn. 207, 218-19 (2006). As Plaintiffs have shown, a person seeking approval from the Council for a solar project had no right to such approval even before the enactment of P.A. 17-218. P.A. 17-218 merely changed the procedural process for obtaining a declaratory ruling for

such projects by adding two conditions--requiring a finding by the Council of no adverse environmental effect and DEEP's representation of no material adverse effect on core forestland. If the conditions are not met, the applicant must apply for a Certificate. While the Certificate process is more cumbersome than the declaratory ruling process, an applicant's expectancy or hope for declaratory ruling approval of its Project was not a substantive right prior to P.A. 17-218. Thus the act cannot be viewed as creating or limiting any substantive rights in project applicants. Indeed, the Council is constrained to admit that P.A. 17-218 adds additional elements to be reviewed by the Council "by shifting the procedure from a petition process to a certificate process" for solar projects affecting core forest areas. (Council's Br., p.21 (emphasis added))

Quite simply, a change in the procedural requirements for the Council's approval of an energy project does not affect substantive rights of the applicant. As the Council itself recognizes, in considering such projects it has a "broad mandate" to balance the state's energy demands against the need to protect the environment. (Council's Br., pp. 19-20) Courts in this country regularly have held that an applicant's mere expectation of approval does not constitute a substantive, or "vested" right that is protected from legislative interference. See N. Singer & J.D. Singer, Statutes and Statutory Construction § 41:6, pp. 460-63 (7th ed. 2009) (copy attached). As a leading treatise on statutory construction notes, "There is no vested right in a mere expectancy ... [and] [t]here is no vested right in a particular remedy or procedure .... " (Id., p.460)

For these reasons, the Council's efforts to distinguish Morrison and Investment Associates, cited at pages 20-22 of Plaintiffs' Brief, are unpersuasive. As the district court held in Morrison, a statute that, as here, increases a party's burden of proof--i.e., makes

it more difficult to sustain its case--is a change in the method for obtaining redress and is thus procedural. And as the Supreme Court explained in Investment Associates, a statute extending the period for revising a judgment bears the "hallmarks" of a procedural statute, because it "leaves the preexisting scheme intact and prescribes a method of enforcing rights or obtaining redress." (Id.) Moreover, the Council nowhere disagrees that "good sense and justice" support the application of P.A. 17-218 to this proceeding. (Plaintiffs' Br., p.22)

The Council attempts to dismiss Plaintiffs' and DEEP's point that, unlike in land use cases where applicable statutes dictate that an application is to be decided at the time the application is filed, there is no similar statute governing Council decisions that changes the common law rule that administrative applications are governed by the law in effect at the time of the agency's decision. (Plaintiffs' Br., p. 19) The Council's sole response is the unremarkable observation that it is not a local agency but a state agency with its own statutory scheme to balance the state's energy demands against environmental concerns. (Council's Br., pp. 18-20) The Council fails to explain how this statutory scheme operates to distinguish the common law precedents discussed by DEEP and Plaintiffs.

Petitioner argues that McNally v. Zoning Comm'n of City of Norwalk, 225 Conn. 1, 8-9 (1993) stands for the proposition that a statutory amendment that takes effect after a land use application has been filed does not apply to the pending application. (CS's Brief, p.11) McNally involved the legislature's enactment of C.G.S. § 8-2h(a), which provides that zoning applications are to be decided under the regulations in effect at the time the application is filed. As discussed, § 8-2h(a) changed the common law rule that

applications are controlled by the regulations in effect when the court renders its decision on the application. Defendant had filed its zoning applications before § 8-2h(a) took effect, and it was undisputed that the applications did not comply with an amendment to the regulations that was adopted after it filed the applications. The Supreme Court held that the trial court properly applied the amended version of the regulations (requiring denial of the applications). The Court reasoned that, because § 8-2h(a) did not indicate by its language that it should be applied to pending applications, it should apply prospectively only. McNally, 225 Conn. at 8-9.

Contrary to Petitioner's suggestion, McNally supports the application of P.A. 17-218 to the Petition here. To begin with, there is no statute similar to § 8-2h(a) providing that an application to the Siting Council is governed by the law in effect as of the date of filing of the application; thus the common law rule articulated in McNally should apply here and the Petition should be governed by P.A. 17-218. (See Plaintiffs' Br., p.19) Second, unlike § 8-2h(a), the plain language of P.A. 17-218 indicates that it applies to the Petition. (See id., pp. 16-18) Third, the parties did not argue in McNally whether the statutory amendment at issue was substantive or procedural. Later Supreme Court decisions emphasize the importance of this distinction, and have consistently held that only if a statutory amendment affects "substantive rights" is it to be applied prospectively. See Doe, 270 Conn. at 218. A procedural amendment, by contrast, will apply to pending actions as long as the amendment does not abrogate vested rights. Bhinder v. Sun Co., Inc., 263 Conn. 358, 375-76 (2003) ("[A] claimant does not have a vested right to have his appeal adjudicated in accordance with the statute that was in place at the time of his trial when the legislature has amended the statute in the interim."). Petitioner had no

vested right in the approval of the Petition. Indeed, the Council's broad discretionary power over proposed energy facilities demonstrates that applicants have no substantive right to receive such approvals. See pages 2-4 above.

II. The Council's erroneous failure to apply P.A. 17-218 constituted harmful error.

Relying primarily on TeleTech of Connecticut Corp. v. Department of Public Utility Control, 270 Conn. 778, 780-88 (2004), and FairwindCT, Inv. v. Connecticut Siting Council, 313 Conn. 669, 735 (2014), the Council argues that if it improperly refused to deny the Petition for declaratory ruling as mandated by P.A. 17-218, the error was harmless because it did not prejudice Plaintiffs' "substantial rights." (Council's Br., pp. 22-27) The Council concedes that this question is one of law and that the Court's review therefore is de novo. (Id., pp. 22-23) The harmless error doctrine should not be applied to rescue the Council from its error in failing to apply P.A. 17-218 and deny the Petition.

As discussed in TeleTech and FairwindCT, the harmless error doctrine applies when there is an improper evidentiary or procedural ruling on an issue that does not address the threshold issue of whether the application or petition was properly filed. See FairwindCT, 313 Conn. at 709 (alleged error in precluding expert testimony regarding noise levels was harmless because the expert's testimony, if accepted by Council, would not have required denial of the "petition altogether"); id., quoting Hicks v. State, 287 Conn. 421, 439 (2008) ("harmful] error standard in a civil case is whether the improper ruling would likely affect the result" [internal quotation marks omitted]).

In this case, by contrast, DEEP's motion to deny the Petition, if granted, would of course have required the termination of the entire declaratory ruling proceeding before the hearing began. Accordingly, if the Court concludes that the Council erred in failing to

follow the mandate of P.A. 17-218, the remedy would be denial of the "petition altogether." FairwindCT, 313 Conn. at 709. It is difficult to conceive of error more harmful than that.

In a desperate effort to re-frame the nature of the proceeding below, the Council contends that it examined "every relevant substantive issue" mandated by C.G.S. § 16-50p for consideration of a Certificate application, and that Plaintiffs therefore were not prejudiced by the Council's failure to apply P.A. 17-218. (Council Br., pp. 25-27) This claim is unpersuasive for two reasons. To begin with, at no time after the Council rejected DEEP's motion to deny the Petition and before it issued its Final Decision and Order did the Council advise the parties that it intended to determine any substantive issue beyond whether the Project met DEEP's air and water quality standards (as mandated by C.G.S. § 16-50k for declaratory ruling petitions on such projects prior to its amendment by P.A. 17-218). Without such notice that it intended to examine all issues that it would be required to consider in a Certificate proceeding, the Council violated Plaintiffs' rights to fundamental fairness and due process. (See page 8 n.2 below.)

Moreover, the Decision fails to make several key findings required by C.G.S. § 16-50p for the issuance of a Certificate, thus severely undermining the Council's claim that it treated the Petition as if it were an application for a Certificate. First, § 16-50p(c)(1) requires the Council to make the threshold finding and determination that the facility provides a "public benefit." A public benefit exists "when a facility is necessary for the reliability of the electric power supply of the state or for the development of a competitive market for electricity.... " Id., § 16-50p(c)(3). The Council made no such finding. It noted only that there is a rebuttable presumption of a public benefit for electric generating facilities selected by PURA in a request for proposals. (Finding of Fact ¶ 92) This

statement overlooks the fact that because DEEP did not select the Project in the tri-state RFP process, PURA never reviewed it, and thus that presumption does not apply. (Id., ¶ 90) The absence of any affirmative finding by the Council of public benefit is not at all surprising in view of DEEP's failure to select the Project, its admonition of the material adverse environmental effect, and the fact that none of the electricity generated from the Project will be sold to Connecticut utilities. DEEP's statutory authority under the RFP process was to select only those projects that are in the "interest of ratepayers." See Allco Finance Ltd. v. Klee, 2014 WL 7004024, *1 (D. Conn.) (copy attached), aff'd, 805 F.3d 89 (2015). Thus, even if the Council actually had determined that the Project is "necessary for the reliability" of the state's electric power supply, DEEP's determination that the Project is not in the interest of ratepayers would hardly support such a finding.[2]

Second, as the Council concedes, another fundamental requirement in Certificate proceedings is that the Council must "find and determine ... [t]he nature of the probable environmental impact of the facility...including a specification of every significant adverse effect, including, but not limited to ecological balance, ... public health and safety, ... agriculture, ... forests and parks, ... air and water purity, and ... fish, aquaculture and wildlife .... " C.G.S. § 16-50p(a)(3)(B). The Council also must explain why these adverse effects are "not sufficient reason to deny the application." C.G.S. § 16-50p(a)(3)(C); see FairwindCT, 313 Conn. at 700-01. Nowhere in its Final Decision and Order did the Council make these critical findings, which go to the essence of a Certificate process. It

[2] This point underscores the fundamental unfairness of Council's ex post facto effort to recast the Decision as a ruling on a Certificate application. Had Plaintiffs and the other parties known that the Council intended to decide the Petition as if it were an application for a Certificate, they would have had the opportunity to argue--quite justifiably given DEEP's rejection of the bid and its warning of the Project's material adverse environmental effect--that the Project did not meet the "public benefit" test. The Council's insistence, in denying DEEP's motion, that the proceeding would be adjudicated as an application for a declaratory ruling, deprived the parties of that opportunity.

concluded that a declaratory ruling should issue because the Project would "not have a substantial adverse environmental effect" (in complete disregard of DEEP's contrary conclusion) and that the Project met applicable EPA and DEEP water and air quality standards. (R. 2531) This is nowhere near the analysis and weighing of the adverse environmental effects required by § 16-50p for issuance of a Certificate. Indeed, the Decision does not even mention that DEEP had moved to deny the declaratory ruling on the express ground that the project "will have a materially adverse effect on core forestland." (Plaintiffs' Br., p. 14 (emphasis in DEEP motion))[3]

Had the Council really intended to treat the Petition as if it were a Certificate proceeding under § 16-50p, surely it would have made a finding (rather than rely on an inapplicable presumption) whether the proposed facility is a public benefit. Surely it would have squarely addressed its sister state agency's finding that the Project would have a materially adverse effect on a vital natural resource. See Paige v. Town Plan & Zoning Comm'n, 235 Conn. 448, 454, 465 (1995) (trees and wildlife in wooded area are natural resources of the state for purposes of C.G.S. § 22a-19). Surely it would have articulated how this significant adverse environmental effect was not sufficient reason to deny the Petition. In the absence of these critical findings under § 16-50p, the Council's claim that it treated the Petition as if it were an application for a Certificate is simply not credible.[4]

---

[3] The Council stated in footnote 1 to its Opinion only that P.A. 17-218 "does not apply to the proposed project because the petition was received by the Council on June 28, 2017." (R. 2522)

[4] The Council's suggestion that the Court should view the Decision as a surrogate for a decision on a Certificate application also ignores the fact that the Petition failed to comply in numerous respects with the statutory requirements for Certificate applications. Even a cursory comparison of the Petition (R. 003-203) with the requirements set forth in C.G.S. § 16-50l for contents of Certificate applications for electric generating facilities, as well as the detailed requirements for such applications set forth in the Council's June 2016 guide (Appendix to CS's Brief), reveals the Petition's wholesale noncompliance with these requirements.

III. The Council erred as a matter of law in conditioning approval on an undefined and undrafted decommissioning plan.

The Council argues that PUESA does not authorize it to adopt a regulation requiring decommissioning plans for solar projects. According to the Council, C.G.S. § 16-50k authorizes it to require decommissioning plans only for wind turbine projects. The Council disagrees with Plaintiffs' argument that R.C.S.A. § 16-50j-93, dealing with declaratory ruling petitions in general, expressly incorporates the requirement of R.C.S.A. § 16-50j-94 that declaratory ruling petitions for wind turbine projects include detailed proposed decommissioning plans. (Council's Br., pp. 27-30)

R.C.S.A. § 16-50j-93 provides that, pursuant to C.G.S. § 16-50k, a petition for declaratory ruling shall be filed by "any person seeking to construct, operate and maintain a customer-side distributed resources project or a grid-side distributed resources project with a capacity of not more than 65 megawatts or a wind turbine facility with a capacity of less than one megawatt.... " (Emphasis added.) Section 16-50j-93 requires that any such declaratory ruling petition "shall also include additional information required to be submitted to the Council as part of the petition under [R.C.S.A.] Section 16-50j-94 .... "

Perhaps the most egregious instance of the Petition's noncompliance with the statutory requirements is its failure to include the $25,000 municipal participation fees as required by C.G.S. §§ 16-50l(a) and 16-50bb. The purpose of this fee is to defray the costs incurred by the municipality in which the facility is to be sited in participating as a party in the Certificate proceeding. Id. The Council's position that it actually decided the Petition as if it were one for a Certificate even though the Petition failed to include the municipal participation fee would allow the Council and Petitioner to completely circumvent this requirement, which obviously is intended to encourage municipal participation in Certificate proceedings at reduced taxpayer costs. Had the Town of New Milford and Plaintiffs known that this was to be treated as a Certificate application, they could have insisted on payment of the $25,000 fee, which could well have influenced the level and extent of their participation in the proceeding.

In short, if the Council actually intended to treat the Petition as a Certificate application, the Council should have dismissed it as incomplete for Petitioner's failure to file this fee or to comply with the numerous other requirements of § 16-50l and the Council's guide for such applications.

The Council correctly notes that § 16-50j-94 deals specifically with petitions for declaratory rulings for wind turbine facilities, and includes in subsection (i) a requirement for a comprehensive decommissioning plan including financial assurances. The Council incorrectly contends, however, that § 16-50j-93, which contains general requirements for all declaratory ruling petitions for customer-side distributed resources projects, grid-side distributed resources projects up to 65 megawatts, and wind turbine facilities less than one megawatt, does not incorporate the requirements of § 16-50j-94 into the general requirements of § 16-50j-93 for all such projects. Contrary to the Council's contention, the express language of § 16-50j-93 is that all declaratory ruling petitions it references must contain the additional information required by § 16-50j-94. Indeed, the Council's interpretation of this provision to apply only to wind turbine facilities would render the provision superfluous, because § 16-50j-94 already contains such requirements as to wind turbine facilities. (Citation and internal marks omitted.) Megos v. Ranta, 179 Conn. App. 546, 552 (2018) (statute should not be construed to render provisions superfluous or meaningless).

While the Council correctly states that not all the specific requirements for wind turbine facilities set forth in § 16-50j-94 will apply to solar projects, it offers no logical reason to suggest that decommissioning plans are proper components for declaratory ruling petitions for wind turbine projects but not solar projects. Indeed, the Council's argument that it has no statutory authority to require a decommissioning plan for a solar project is contradicted by its decision here, which conditioned approval upon CS's submission of a decommissioning plan as part of its DMP, and by its insistence in its brief that such a condition of approval is within its regulatory power. (Council's Br., pp. 30-31)

See also August 2016 Council Outline of Requirements for Petitions for Declaratory Rulings on Renewable Energy Facilities, p. 3 (requiring decommissioning plan to be filed as part of petition) (Appendix to CS's Brief) ("Council's Requirements").

Even assuming §§ 16-50j-93 and 16-50j-94 or the Council's Requirements do not mandate a decommissioning plan for solar projects like the one proposed here, the Council acted illegally, arbitrarily and without substantial evidence in conditioning its approval of the Petition on an undefined and undrafted decommissioning plan without any proof that the Property owner, who was not a party, would ever agree to it, let alone provide sufficient current funding[5] to secure its execution some 20 years from now. (Plaintiffs' Br., pp. 34-35)

The Council next argues that Plaintiffs have no standing under C.G.S. § 22a-19 to challenge the conditioning of the approval on submission of a decommissioning plan because the condition imposes no "costs or burdens" on Plaintiffs, and because the condition does not have the "effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state." (Council's Br., pp. 31-32, quoting C.G.S. § 22a-19) The Council misconstrues § 22a-19's requirement of standing. A core component of Plaintiffs' claims that the Council's decision will unreasonably impact or destroy the natural resources of the state is its argument that the

---

[5] CS argues that the PILOT Agreement it executed with the Town provides for an adequately funded decommissioning plan. (CS's Br., pp. 22-23) As Plaintiffs have demonstrated (Plaintiffs' Br., p.33 n.17), the Council has no power to enforce the PILOT Agreement, which in any event contains only the pig-in-a-poke promise that a decommissioning plan to be provided sometime in the future will be funded close to the end of the Project's 20-year life. Moreover, Plaintiffs intend to move to supplement the record with evidence of the current status of the PILOT Agreement. This evidence--of which CS was well aware before it filed its brief--not only renders the Council's purported reliance on the PILOT Agreement even less justified now than when it issued the Decision. The evidence also will undermine CS's credibility in its representation that the PILOT Agreement and its provision for a decommissioning plan will "generate significant revenue for the town and has many other provisions that will benefit the town and the public." (CS's Br., pp. 18, 22-23)

Council's failure to require an articulated, financially secured decommissioning plan raises serious doubt that the 84 acres of core forest to be destroyed will be restored. As Plaintiffs have stated, the Council's approval on the basis of a "chimerical promise of a decommissioning plan was an abdication of its responsibility to preserve the long-term environmental viability of this sensitive forested area." (Plaintiffs' Br., p.34) Plaintiffs maintain that this ruling "did not give adequate consideration to [the] environmental issues" raised by Plaintiffs as part of their allegations pursuant to § 22a-19. FairwindCT, 313 Conn. at 713-14. The Supreme Court in FairwindCT held that this is all that is necessary for § 22a-19 standing. (Id.)

IV. The Council acted arbitrarily, illegally and without substantial evidence in approving the Petition on the speculative assumption that a conservation easement would be imposed on a portion of the Property.

Notwithstanding its recognition in the Decision that the proposed conservation easement would protect several vernal pools and associated critical terrestrial habitats on the Property (R. 2523), the Council concedes that it intentionally did not require the easement as a condition of approval, and instead used "words of encouragement" in the hope that the Property owner would agree to the easement.[6] (Council's Br., p.32) The Council suggests that its failure to require the easement as a condition is justified by the fact that C.G.S. §§ 16-50k and 16-50p do not expressly require conservation easements for solar facilities. (Id.) As the Council certainly would agree, however, this does not mean that the Council is powerless to impose conditions, including conservation easements, which are reasonably related to its statutory mandate to protect the

[6] CS's contention that the Council found the establishment of the easement to be "probable" is patently false. (CS's Br., p.23)

environment and natural resources when considering energy facilities. See C.G.S. § 16-50p; City of Torrington v. Connecticut Siting Council, 1991 WL 188815, *8 (Conn. Super.) (Sullivan, J.) (upholding numerous conditions on approval as authorized by § 16-50p) (copy attached).

Moreover, nowhere in its brief does the Council address the settled Connecticut administrative law establishing that it erred in approving the Petition without such a condition when there was no evidence that the Property owner would ever agree to the easement. (See Plaintiffs' Br., pp. 37-38, citing Gerlt v. Planning & Zoning Commission, 290 Conn. 313, 323-28 (2009)).

Instead, the Council again questions Plaintiffs' standing to assert this claim under § 22a-19, based on the Council's argument that its failure to require the conservation easement does not have the effect of unreasonably impairing or destroying the public trust in the air, water or other natural resources of the state. (Council's Br., p.32) The record conclusively demonstrates otherwise. Petitioner itself repeatedly referred to the proposed easement as a reasonable way to mitigate the loss of core forestland, offset the destruction of vernal pools and CTH that the Project would cause, and protect other vernal pools and CTH on the Property. (Plaintiffs' Br., pp. 35-36) The Council clearly accepted and acknowledged Petitioner's representations on the salutary effect the easement would have on these resources.[7]

---

[7] Finding of Fact ¶ 115 (R. 2492) provides:

> Along with the proposed revised project, the developer of the parcel hosting the project, New Milford Clean Power, LLC, would deed approximately 100 acres (located on the project parcel as well as on adjacent parcels also controlled by the developer) to a local land conservation trust as permanently conserved land. This area to be set aside would encompass the area of three vernal pools and associated prime slimy salamander habitat immediately to the north and east of the area to be used for the project. The area to be placed into conservation would include the location of the summit of Candlewood Mountain which is also the terminus of the "Blue Trail." The 100-acre area includes, but is not limited to, Wetlands I, III and V,

In the face of the record facts showing that Petitioner and the Council agreed on the need for the easement in order to mitigate the substantial environmental harm and the destruction of natural resources that the Project will cause, the Council's suggestion that Plaintiffs do not have § 22a-19 standing to challenge the Council's approval of the Petition without requiring the easement is baseless. See FairwindCT, 313 Conn. at 713-14; Paige, 235 Conn. at 454, 465.

V. **The Council acted without substantial evidence in failing to require Petitioner to consider alternate sites outside of New Milford.**

The Council argues that there is no authority for the proposition that Petitioner was required to consider potential alternative sites outside of the geographic limits of New Milford. All that is required, according to the Council, is that the Council "consider" alternatives. Because the Project was selected by Massachusetts (but not Connecticut) in the tri-state RFP, the Council posits, Petitioner had no obligation to consider sites anywhere else than New Milford. (Council's Br., pp. 33-35)

At the outset, it is noteworthy that the Council does not dispute that it was required to consider alternatives to the proposed facility. No such consideration is required unless the Council has determined that the facility "will cause unreasonable pollution or harm to the environment." See City of Torrington, 1991 WL 188815, *13. Under § 22a-19, "[t]he agency is not allowed to approve a proposal which does or is reasonably likely to

---

the buffers for Wetlands III and V, and the Critical Terrestrial Habitat areas for vernal pools associated with Wetlands I and V that are not located within the solar footprint. See Figure 8. (CS 13a, p.4; CS 15 – Conservation Restriction Area)

See also Findings of Fact ¶ 42(h) (R. 2480) (easement would "preserve much of the forested areas of the site"), ¶72 (R. 2509) (easement "would result in preservation of core and edge forest habitat and would mitigate the impacts of the facility"), and ¶301 (R. 2512) (easement was proposed by Petitioner to address neighborhood concerns about destruction of forest and disturbance to CTHs); Opinion, pp. 2, 5 and 7 (R. 2523, 2526, and 2529).

unreasonably pollute, impair or destroy the public trust in the air, water or natural resources of the state if, considering all relevant surrounding circumstances and factors, there is a feasible and prudent alternative consistent with reasonable requirements of public health, safety, and welfare." R. Fuller, Connecticut Land Use Law & Practice § 32:6, p. 206 (2007 ed.), citing § 22a-19(b). It is undisputed that the Project will result in the destruction of 84 acres of core forestland, which the state has deemed to be a critical natural resource. DEEP has determined that the loss of these acres will materially adversely affect this core forest. Therefore the Council correctly addressed whether there is a feasible and prudent alternative.

Given the substantial evidence demonstrating the likelihood that the Project will unreasonably destroy or impair natural resources, it was not Plaintiffs' burden to show feasible and prudent alternatives. Rather, given the evidence establishing at least a prima facie showing of unreasonable impairment and destruction, Petitioner had the burden of proving that, "considering all relevant surrounding circumstances and factors, there is no feasible and prudent alternative to the ... conduct and that such conduct is consistent with the reasonable requirements of the public health, safety and welfare." C.G.S. § 22a-17; see Waterbury v. Town of Washington, 260 Conn. 506, 549-51 (2002); Fort Trumbull Conservancy, LLC v. City of New London, 135 Conn. App. 167, 179-82 (2012). The Council cites no authority for its contention that because the Project was selected in the tri-state RFP, the Petitioner was not required to present--and the Council was not required to consider–sites outside of New Milford. See also C.G.S. § 16-50(l)(a)(2) (requiring application for Certificate to include comparison with alternative sites). To accept Petitioner's suggestion that the feasible and prudent alternative test is met here simply

because, as Petitioner's representatives put it, "[t]his is the site we were presented with, and this is what we went with" (Plaintiffs' Br., p. 41), would render the standard meaningless, and is clearly contrary to the remedial purposes of the State's environmental protection law and policy.

VI. The Council lacked substantial evidence to approve the Petition because of the incompleteness and inadequacy of the stormwater management plan.

Citing to various iterations of the ever-changing stormwater management plan in the hearing sessions, DEEP's comments on the initial plan, and Petitioner's assurances that it "would" modify the plan to comply with applicable DEEP requirements, the Council argues that it appropriately approved the Petition with the condition that DEEP eventually approve a final plan. (Council's Br., pp. 36-40) The Council also suggests that it properly conditioned approval on Petitioner's submission of a revised plan as part of its DMP, in order to "accommodate the reduction in the project" area made necessary by the discovery during the hearing that the original plan would result in the destruction of much more CTH than Petitioner initially had estimated. (Id., p. 40)

These points ignore the critical fact that the Council failed to find that an existing storm water management plan in the record before the Council showed compliance with the applicable standards. (Plaintiffs' Br., p. 43) As in Finley, 289 Conn. at 12, "[i]t was clear, therefore, that the [Council] had not determined that the existing erosion control plan met state regulations when it rendered its decision." (Internal quotation marks omitted; emphasis added.) FairwindCT, 313 Conn. at 695, quoting Finley.

The Council attempts to align this case with the Supreme Court's decision in FairwindCT, by noting that it did not find the Petitioner's stormwater plans "inadequate." (Council's Br., p. 40) That is not the point. The reality is that, unlike in FairwindCT, the

Council nowhere found that an existing plan in its record met state regulations on water quality. See FairwindCT, 313 Conn. at 695. This case is therefore governed by Finley, not FairwindCT. And as the Council correctly concedes, "The D&M plan cannot provide a substitute for matters not addressed during the application process." (Council's Br., p.28 n.12), quoting Town of Middlebury v. Connecticut Siting Council, 2002 WL442383 at *5 (Conn. Super. 2002) (copy attached).[8]

VII. The Council acted arbitrarily and without substantial evidence in approving the Petition despite the wholesale inadequacy of Petitioner's documentation of protected species and their CTHs.

In response to Plaintiffs' demonstration of the absence of reliable and timely data on the effects of the contemplated massive destruction of core forest on the viability of the site's CTHs and their protected indicator species (Plaintiffs' Br., pp. 23-32), the Council can muster only two arguments. First, the Council contends that it was within its "province" to disregard Calhoun & Klemen's warning that the Project should not impact more than 25 percent of CTH. (Council's Br., p.41) Second, the Council asserts that it was entitled to balance the undisputed substantial disruption to wildlife the Project will cause against "conflicting concerns." (Id., p.42)

To begin with, as discussed, nowhere in the Decision does the Council state how -- let alone explain why -- the need for this 20 megawatt solar project outweighs the State's policy to prevent further fragmentation of core forest or the devastating environmental damage the contemplated destruction of 84 acres of core forest will cause. Moreover, the Council misses the gravamen of Plaintiffs' position in this regard. On a full

---

[8] Plaintiffs have already demonstrated the inadequacy of the DMP procedure as a substitute for the fundamental due process requirement that the Council deny petitions that lack essential required information. (Plaintiffs' Br., pp. 39 n.19 and 44-46)

and complete record the Council (at least in a Certificate proceeding) would have discretion to balance the energy demand met by a particular project against the need to protect environmental resources. The record here, by contrast, was wholly insufficient to enable the Council to make an informed decision on the impact of the Project on the CTHs of several protected species who live on the site. By Petitioner's own admission, its need to meet contractual and statutory deadlines trumped any effort to perform the timely and reliable environmental assessments urged by Plaintiffs, CEQ, HVA, Weantinoge, and by Council member Klemens--a recognized authority on CTHs. Dr. Klemens' assessment of the Petition's deficiency--a "hasty compilation to meet administrative deadlines rather than well-planned studies of the site that maximizes seasonal opportunities for the detection of significant species"--is a compelling summary of how the Commission abused its discretion in joining in Petitioner's rush to judgment despite a record devoid of essential environmental data. (Plaintiffs' Br., pp. 29, 43-46)[9]

CONCLUSION

For the reasons discussed above and in Plaintiffs' Brief, Plaintiffs respectfully request the Court to sustain this appeal and reverse the Council's Final Decision and Order.

[9] The Council's effort to distinguish Gustafson (cited in Plaintiffs' Brief at page 45) is unavailing. In that case the Superior Court sustained an administrative appeal because the wetlands commission approved the application even though it was uncertain of the existence of vernal pools on the subject property. The Council claims that its decision here, by contrast, "dealt extensively with vernal pools." (Council's Br., p.43) The Council misapprehends Plaintiffs' position. The Council abused its discretion here not because it was uncertain of the existence of several vernal pools on the site but because it approved the Petition in the face of the lack of essential and timely information on the environmental impact of the loss of substantial CTH areas surrounding the vernal pools due to the proposed devastation of core forest.

PLAINTIFFS,
RESCUE CANDLEWOOD MOUNTAIN,
LISA K. OSTROVE F/K/A LISA J.
KRELOFF, MICHAEL H. OSTROVE,
AND CANDLELIGHT FARMS
AVIATION, LLC

By: ________________________

Daniel E. Casagrande, Esq.
Attorney for Plaintiffs
Cramer & Anderson, LLP
30 Main Street, Suite 204
Danbury, CT 06810
(203) 744-1234
Juris No. 101252

CERTIFICATION OF SERVICE

I certify that a copy of the above was or will immediately be mailed or delivered electronically or non-electronically on October 26, 2018, to all attorneys and self-represented parties of record and that written consent for electronic delivery was received from all attorneys and self-represented parties of record who received or will immediately be receiving electronic delivery.

AGG Robert L. Marconi
General Finance
10 Franklin Square
New Britain, CT 06051

AGG Clare E. Kindall
AG-Energy
10 Franklin Square
New Britain, CT 06051

Paul R. Michaud, Esq.
515 Centerpoint Drive, Suite 502
Middletown, CT 06457

Jeffrey J. Mirman, Esq.
Hinckley Allen & Snyder, LLP
20 Church Street
Hartford, CT 06103

____
Daniel E. Casagrande

Statutes and Statutory Construction

SEVENTH EDITION

NORMAN J. SINGER

PROFESSOR OF LAW
UNIVERSITY OF ALABAMA

and

J.D. SHAMBIE SINGER

ATTORNEY AT LAW

2009 New Edition

VOLUME 2

CONNECTICUT JUDICIAL BRANCH
DANBURY LAW LIBRARY

MAR - 4 2010

COURTHOUSE - 146 WHITE STREET
DANBURY, CT 06810

WEST®

A Thomson Reuters business

For Customer Assistance Call 1-800-328-4880

Mat #40722993

deed is a vested right.[17] The interest of a donee in a gift that had is fully executed and vested prior to the enactment of a new tax on gifts is exempt from liability for the tax.[18] Some courts recognize as a vested right an accrued but undetermined cause of action at common law,[19] although there is no such right in an unenforced penalty.[20]

Courts have also found an extensive range of claims and interests not to be vested. There is no vested right in a mere expectancy.[21] Where no water is used under an irrigation permit, no vested right accrues thereunder.[22] There is no vested right in a particular remedy[23] or procedure[24] so long as an adequate remedy exists.[25] Vested

---

[17]**Florida.** Cf. Trustees of Tufts College v. Triple R. Ranch, Inc., 275 So. 2d 521 (Fla. 1973).

North Carolina. Booth v. Hairston, 193 N.C. 278, 136 S.E. 879, 57 A.L.R. 1186 (1927).

[18]**United States.** Nichols v. Coolidge, 274 U.S. 531, 47 S. Ct. 710, 71 L. Ed. 1184, 1 U.S. Tax Cas. (CCH) P 239, 6 A.F.T.R. (P-H) P 6758, 52 A.L.R. 1081 (1927); Coolidge v. Long, 282 U.S. 582, 51 S. Ct. 306, 75 L. Ed. 562, 9 A.F.T.R. (P-H) P 1394 (1931).

[19]**Connecticut.** Siller v. Siller, 112 Conn. 145, 151 A. 524 (1930).

Michigan. Absent saving clauses to state otherwise, repeal of a statute to change the mode of procedure by altering or terminating a court's jurisdiction applies to all accrued, pending, and future actions as long as it does not affect vested rights. Brooks v. Mammo, 254 Mich. App. 486, 657 N.W.2d 793 (2002).

[20]**Connecticut.** Massa v. Nastri, 125 Conn. 144, 3 A.2d 839, 120 A.L.R. 939 (1939).

Missouri. State ex rel. Sweezer v. Green, 360 Mo. 1249, 232 S.W.2d 897, 24 A.L.R.2d 340 (1950) (overruled in part on other grounds by, State ex rel. North v. Kirtley, 327 S.W.2d 166 (Mo. 1959)).

[21]**United States.** Cf. de Rodulfa v. U.S., 461 F.2d 1240, 18 A.L.R. Fed. 890 (D.C. Cir. 1972).

Statutory tenure rights were subject to divestment by legislative action. Taliaferro v. Dykstra, 434 F. Supp. 705 (E.D. Va. 1977), judgment vacated on other grounds, 588 F.2d 428 (4th Cir. 1978).

Idaho. The mere initiation of the statutory process for water appropriation does not grant the applicant a vested right in the water. Matter of Hidden Springs Trout Ranch, Inc., 102 Idaho 623, 636 P.2d 745 (1981).

Ohio. In re Millward's Estate, 102 Ohio App. 469, 3 Ohio Op. 2d 22, 136 N.E.2d 649 (8th Dist. Cuyahoga County 1956), judgment aff'd, 166 Ohio St. 243, 2 Ohio Op. 2d 6141 N.E.2d 462 (1957).

[22]**Texas.** Texas Water Rights Commission v. Wright, 464 S.W.2d 642 (Tex. 1971).

[23]**United States.** Wunderlich v. National Sur. Corp., 24 F. Supp. 640 (D. Minn. 1938), judgment rev'd on other grounds, 111 F.2d 622 (C.C.A. 8th Cir. 1940).

Alabama. Barnes v. State, 429 So. 2d 1114 (Ala. Crim. App. 1982).

Arizona. Allen v. Fisher, 118 Ariz. 95, 574 P.2d 1314 (Ct. App. Div. 2 1977).

Colorado. Moore v. Chalmers-Galloway Live Stock Co., 90 Colo. 548, 10 P.2d 950 (1932).

Hawaii. Clark v. Cassidy, 64 Haw. 74, 636 P.2d 1344 (1981).

ee in a gift that had is
ment of a new tax on
ne courts recognize as
ause of action at com-
ht in an unenforced

f claims and interests
a mere expectancy.[21]
ermit, no vested right
in a particular reme-
medy exists.[25] Vested

R. Ranch, Inc., 275 So. 2d

8, 136 S.E. 879, 57 A.L.R.

., 47 S. Ct. 710, 71 L. Ed.
P 6758, 52 A.L.R. 1081
75 L. Ed. 562, 9 A.F.T.R.

A. 524 (1930).
ise, repeal of a statute to
a court's jurisdiction ap-
s it does not affect vested
2d 793 (2002).

A.2d 832, 120 A.L.R. 939

1249, 232 S.W.2d 897, 24
by, State ex rel. North v.

1240, 18 A.L.R. Fed. 890

nt by legislative action.
dgment vacated on other

s for water appropriation
Matter of Hidden Springs

, 3 Ohio Op. 2d 22, 136
aff'd, 166 Ohio St. 243, 2

t, 464 S.W.2d 642 (Tex.

p., 24 F. Supp. 640 (D.
2 (C.C.A. 8th Cir. 1940).
rim. App. 1982).
4 (Ct. App. Div. 2 1977).
k Co., 90 Colo. 548, 10

44 (1981).

Illinois. People v. Dorff, 77 Ill. App. 3d 882, 33 Ill. Dec. 300, 396 N.E.2d 827 (3d Dist. 1979).

But see Schantz v. Hodge-VonDeBur, 113 Ill. App. 3d 950, 69 Ill. Dec. 668, 447 N.E.2d 1355 (4th Dist. 1983).

Maryland. Rawlings v. Rawlings, 362 Md. 535, 766 A.2d 98 (2001).

Michigan. Stott v. Stott Realty Co., 288 Mich. 35, 284 N.W. 635 (1939).

Ohio. State ex rel. Michaels v. Morse, 165 Ohio St. 599, 60 Ohio Op. 531, 138 N.E.2d 660 (1956).

Texas. Kelly v. Republic Building & Loan Ass'n, 34 S.W.2d 924 (Tex. Civ. App. Dallas 1930).

Contra: William H. Beard, Inc. v. State Bd. of Undertakers, 387 Pa. 261, 128 A.2d 49 (1956); Dean v. Gregory, 318 S.W.2d 549 (Ky. 1958).

[24]**United States.** Porter v. Senderowitz, 158 F.2d 435 (C.C.A. 3d Cir. 1946); Fisch v. General Motors Corp., 169 F.2d 266 (C.C.A. 6th Cir. 1948).

Alabama. Barnes v. State, 429 So. 2d 1114 (Ala. Crim. App. 1982).

Arizona. State v. Snyder, 25 Ariz. App. 406, 544 P.2d 230 (Div. 1 1976).

California. San Bernardino County v. State Indus. Acc. Commission, 217 Cal. 618, 20 P.2d 673 (1933); Olson v. Hickman, 25 Cal. App. 3d 920, 102 Cal. Rptr. 248 (3d Dist. 1972).

Colorado. A change in the burden of proof can be applied retroactively. Krumback v. Dow Chemical Co., 676 P.2d 1215 (Colo. App 1983).

Hawaii. Clark v. Cassidy, 64 Haw. 74, 636 P.2d 1344 (1981).

Illinois. People v. Dorff, 77 Ill. App. 3d 882, 33 Ill. Dec. 300, 396 N.E.2d 827 (3d Dist. 1979); Board of Managers of Dominion Plaza One Condominium Ass'n No. 1-A v. Chase Manhattan Bank, N.A., 116 Ill. App. 3d 690, 72 Ill. Dec. 257, 452 N.E.2d 382 (2d Dist. 1983).

Iowa. Matter of Duhm's Estate, 267 N.W.2d 688 (Iowa 1978).

Maryland. Rawlings v. Rawlings, 362 Md. 535, 766 A.2d 98 (2001).

Michigan. In re Certified Questions from U.S. Court of Appeals for the Sixth Circuit, 416 Mich. 558, 331 N.W.2d 456, 35 U.C.C. Rep. Serv. 382 (1982).

Missouri. Darrah v. Foster, 355 S.W.2d 24 (Mo. 1962).

Nebraska. Lindgren v. School Dist. of Bridgeport in Morrill County, 170 Neb. 279, 102 N.W.2d 599 (1960).

New Jersey. Feuchtbaum v. Constantini, 59 N.J. 167, 280 A.2d 161 (1971).

Oklahoma. Phillips v. H. A. Marr Grocery Co., 1956 OK 104, 295 P.2d 765 (Okla. 1956).

Pennsylvania. William H. Beard, Inc. v. State Bd. of Undertakers, 387 Pa. 261, 128 A.2d 49 (1956).

Tennessee. Anderson v. Memphis Housing Authority, 534 S.W.2d 125 (Tenn. Ct. App. 1975).

Texas. Merchants Fast Motor Lines, Inc. v. Railroad Commission of Texas, 573 S.W.2d 502 (Tex. 1978); Commercial Ins. Co. of Newark, N. J. v. Lane, 480 S.W.2d 781 (Tex. Civ. App. Dallas 1972), writ refused n.r.e., (Oct. 4, 1972); Butler v. State Bd. of Ed., 581 S.W.2d 751 (Tex. Civ. App. Corpus Christi 1979), writ refused n.r.e., (Sept. 25, 1979).

Washington. Henry v. McKay, 164 Wash. 526, 3 P.2d 145, 77 A.L.R. 1025 (1931).

[25]**Maryland.** Rawlings v. Rawlings, 362 Md. 535, 766 A.2d 98 (2001).

Texas. It is well settled that there is no vested right in a procedural remedy set out in a procedural statute and that the legislature may make changes applicable at any time and at any stage in the litigation which is affected by a

rights do not accrue in jurisdiction or venue arrangements[26] or rules of evidence[27] in effect when the events involved in a lawsuit transpired. There is no vested right in a term of public office,[28] or in the power to impose liability for loss of public funds.[29] There is no vested right to be protected against consequential injuries arising from a proper exercise of rights by others.[30] A citizen has no vested right in statutory privileges or exemptions[31] or in an omission to

---

procedural statute. Butler v. State Bd. of Ed., 581 S.W.2d 751 (Tex. Civ. App. Corpus Christi 1979), writ refused n.r.e., (Sept. 25, 1979).

Wisconsin. State v. Diehl, 198 Wis. 326, 223 N.W. 852 (1929).

See § 41:16.

[26]**Louisiana.** Payne v. Walmsley, 185 So. 88 (La. Ct. App. 2d Cir. 1938).

Michigan. But see: Absent saving clauses to state otherwise, repeal of a statute to change the mode of procedure by altering or terminating a court's jurisdiction applies to all accrued, pending, and future actions as long as it does not affect vested rights. Brooks v. Mammo, 254 Mich. App. 486, 657 N.W.2d 793 (2002).

Minnesota. Hunt v. Nevada State Bank, 285 Minn. 77, 172 N.W.2d 292 (1969).

[27]**United States.** U.S. v. Papworth, 156 F. Supp. 842 (N.D. Tex. 1957), judgment aff'd, 256 F.2d 125 (5th Cir. 1958).

District of Columbia. United Securities Corp. v. Bruton, 213 A.2d 892, 2 U.C.C. Rep. Serv. 1059 (D.C. 1965).

Maryland. Lucado v. State, 40 Md. App. 25, 389 A.2d 398 (1978) (holding modified on other grounds by, Sband v. State, 103 Md. App. 465, 653 A.2d 1000 (1995)).

South Carolina. Boyd v. Boyd, 182 S.C. 98, 189 S.E. 794 (1937).

Wisconsin. State ex rel. Sowle v. Brittich, 7 Wis. 2d 353, 96 N.W.2d 337 (1959).

Cooley, Constitutional Limitations (8th Ed 1927), p. 766.

[28]**Georgia.** Smith v. Abercrombie, 235 Ga. 741, 221 S.E.2d 802 (1975).

New York. But the right to salary for the period served by an incumbent prior to the abolition of an office is vested. Periconi v. State, 91 Misc. 2d 823, 398 N.Y.S.2d 959 (Ct. Cl. 1977).

Rhode Island. Gorham v. Robinson, 57 R.I. 1, 186 A. 832 (1936).

[29]**Arkansas.** Pearson v. State, 56 Ark. 148, 19 S.W. 499 (1892).

But see Bauer v. North Arkansas Highway Imp. Dist. No. 1, 168 Ark. 220, 270 S.W. 533, 38 A.L.R. 1507 (1925), for an opposite ruling in the case of special assessment funds.

Iowa. McSurely v. McGrew, 140 Iowa 163, 118 N.W. 415 (1908).

Ohio. Board of Ed. v. McLandsborough, 36 Ohio St. 227, 1880 WL 92 (1880).

Oregon. Miller v. Henry, 62 Or. 4, 124 P. 197 (1912).

Texas. Aetna Ins. Co. v. Richardelle, 528 S.W.2d 280 (Tex. Civ. App. Corpus Christi 1975), writ refused n.r.e., (Feb. 4, 1976).

[30]**New Hampshire.** Chasse v. Banas, 119 N.H. 93, 399 A.2d 608 (1979).

Cooley, Constitutional Limitations (8th Ed 1927), p. 795.

[31]**California.** Los Angeles County v. Superior Court of Los Angeles County, 62 Cal. 2d 839, 44 Cal. Rptr. 796, 402 P.2d 868 (1965); American States Water Service Co. of Cal. v. Johnson, 31 Cal. App. 2d 606, 88 P.2d 770 (3d Dist. 1939).

Michigan. Stott v. Stott Realty Co., 288 Mich. 35, 284 N.W. 635 (1939);

legislate.[32] There is no vested right in the confidentiality of records compiled prior to enactment of an open records act.[33] There is no vested right against recognition of new grounds for divorce.[34] There is no vested right in a defense raised upon mere informalities.[35] There is no vested right not to be compelled to disclose information in discovery proceedings.[36] Abolition of the collateral source rule in the law of damages is subject only to prospective application.[37]

Legislation abolishing the defense of contributory negligence and adopting the principle of comparative negligence is susceptible to retroactive application, denying that there is a vested right to the defense of contributory negligence.[38] A state has no vested right to nonliability for injuries caused by public officers before enactment of a statute permitting recovery.[39] There is no vested right in the route of a public highway.[40] Neglect of a taxing officer does not to give rise to a vested right to immunity from taxation.[41] There is no vested right to attorney's fees for services rendered under contract

---

Lahti v. Fosterling, 357 Mich. 578, 99 N.W.2d 490 (1959).

New York. I.L.F.Y. Co. v. Temporary State Housing Rent Commission, 10 N.Y.2d 263, 219 N.Y.S.2d 249, 176 N.E.2d 822 (1961).

Washington. But see Hammack v. Monroe Street Lumber Co., 54 Wash. 2d 224, 339 P.2d 684 (1959), where it is said that a statutory immunity could not be constitutionally abrogated retroactively.

Cooley, Constitutional Limitations (8th Ed 1927), p. 792.

[32]**Michigan.** Stott v. Stott Realty Co., 288 Mich. 35, 284 N.W. 635 (1939).

[33]**Texas.** Texas Indus. Acc. Bd. v. Industrial Foundation of the South, 526 S.W.2d 211 (Tex. Civ. App. Beaumont 1975), writ granted, (Feb. 11, 1976) and judgment aff'd and remanded, 540 S.W.2d 668 (Tex. 1976).

[34]**Alabama.** Fuqua v. Fuqua, 268 Ala. 127, 104 So. 2d 925 (1958).

New York. Yoli v. Yoli, 55 Misc. 2d 416, 285 N.Y.S.2d 470 (Sup 1967).

[35]**West Virginia.** White v. Walter Wickham & Son, 112 W. Va. 576, 165 S.E. 805 (1932).

Cooley, Constitutional Limitations (8th Ed 1927), p. 771.

[36]**Minnesota.** Larson v. Independent School Dist. No. 314, 305 Minn. 358, 233 N.W.2d 744 (1975).

[37]**Arizona.** State v. Sanders, 118 Ariz. 97, 574 P.2d 1316 (Ct. App. Div. 1 1977).

[38]**Maryland.** Rawlings v. Rawlings, 362 Md. 535, 766 A.2d 98 (2001).

Minnesota. Peterson v. City of Minneapolis, 285 Minn. 282, 173 N.W.2d 353, 37 A.L.R.3d 1431 (1969).

Pennsylvania. Contra Costa v. Lair, 241 Pa. Super. 517, 363 A.2d 1313 (1976).

Washington. Godfrey v. State, 84 Wash. 2d 959, 530 P.2d 630 (1975).

[39]**New York.** Evans v. Berry, 262 N.Y. 61, 186 N.E. 203, 89 A.L.R. 387 (1933).

[40]**Alaska.** Brice v. State, Div. of Forest, Land and Water Management, 669 P.2d 1311 (Alaska 1983).

Kentucky. State Highway Com'n v. Mitchell, 241 Ky. 553, 44 S.W.2d 533 (1931).

[41]**Illinois.** People ex rel. County Collector of Ogle County v. Chicago, B. &

arrangements[26] or rules
nvolved in a lawsuit
1 of public office,[28] or in
lic funds.[29] There is no
ential injuries arising
A citizen has no vested
[1] or in an omission to

.W.2d 751 (Tex. Civ. App.
9).
N. 852 (1929).

Ct. App. 2d Cir. 1938).
ate otherwise, repeal of a
terminating a court's juris-
s as long as it does not af-
6, 657 N.W.2d 793 (2002).
Minn. 77, 172 N.W.2d 292

p. 842 (N.D. Tex. 1957),

. Bruton, 213 A.2d 892, 2

A.2d 398 (1978) (holding
App. 465, 653 A.2d 1000

S.E. 794 (1937).
, 2d 303, 96 N.W.2d 337

p. 766.
S.E.2d 802 (1975).
served by an incumbent
ate, 91 Misc. 2d 823, 398

A. 832 (1936).
499 (1892).
Dist. No. 1, 168 Ark. 220,
ing in the case of special

V. 415 (1908).
227, 1880 WL 92 (1880).
2).
0 (Tex. Civ. App. Corpus

99 A.2d 608 (1979).
795.
of Los Angeles County,
American States Water
d 770 (3d Dist. 1939).
, 284 N.W. 635 (1939);

2014 WL 7004024
United States District Court, D. Connecticut.

ALLCO FINANCE LIMITED, Plaintiff,
v.
Robert KLEE, in his Official Capacity as Commissioner of the Connecticut Department of Energy and Environmental Protection, Defendant.

Civil No. 3:13cv1874 (JBA).
|
Signed Dec. 10, 2014.

Attorneys and Law Firms

Matthew E. Price, Jenner & Block LLP, Washington, DC, Michael Melone, Thomas Melone, New York, NY, Scott Roger Chadwick, Chadwick & Stone, LLP, East Hartford, CT, for Plaintiff.

Robert D. Snook, Hartford, CT, for Defendant.

Opinion

JANET BOND ARTERTON, District Judge.

*1 Defendant Robert Klee, in his official capacity as the Commissioner of the Connecticut Department of Energy and Environmental Protection (the "Commissioner" and "DEEP" respectively) moves [Doc. # 31] to dismiss Plaintiff Allco Finance Limited's ("Allco") First Amended Complaint [Doc. # 25] for lack of standing and failure to state a claim. For the reasons that follow, Defendant's motion is granted.

I. Facts Alleged

In 2013, Connecticut enacted Connecticut Public Act 13–303, Section 6 ("Section 6"), which empowers the Commissioner to solicit proposals for renewable energy and compel the Connecticut Power and Light Company and United Illuminating (the "Connecticut Utilities") to enter into wholesale power purchase agreements for a term of up to 20 years serving up to 4% of Connecticut's electricity needs. (Am.Compl.¶ 5.)

Section 6 of Public Act 13–303 states, in pertinent part:

> On or after January 1, 2013, the commissioner ... may ... solicit proposals ... from providers of Class I renewable energy sources ... if the commissioner finds such proposals to be in the interest of ratepayers ... [he or she] may select proposals from such resources to meet up to four per cent of the load distributed by the state's electric distribution companies. The commissioner may direct the electric distribution companies to enter into power purchase agreements for energy, capacity and environmental attributes, or any combination thereof, for periods of not more than twenty years....

In July 2013, the Commissioner solicited proposals for renewable energy resources pursuant to Section 6. (Am. Compl. ¶ 9; Notice of Request for Proposals, Ex. A to Am. Compl.) Allco submitted proposals for five solar projects, but the Commissioner selected two other projects, a 250 megawatt wind project located in Maine (the "Number Nine Wind Project") and a 20 megawatt solar project located in Connecticut (the "Fusion Solar Project") and "ordered the Connecticut Utilities to execute [power purchase agreements] at fixed wholesale prices" with them. (*Id.* ¶ 13; *see also* Commissioner's Order, Ex. B to Am. Compl.; Commissioner's Determination, Ex. C to Am. Compl.)

Allco alleges that the Commissioner violated federal law by doing so, because under the Federal Power Act of 1935 ("FPA"), Congress gave the Federal Energy Regulatory Commission ("FERC") exclusive jurisdiction over all wholesale electricity rates, charges, and terms. (Am.Comp.¶ 7.) The only exception "to the blanket rule prohibiting states from engaging in any type of regulation or setting the wholesale price for energy" (*id.* ¶ 8) is under the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 824a–3, ("PURPA"), which allows states to fix the price of energy under a power purchase agreement if (1) the facility is a "small power production facility," which is defined as no greater than 80 megawatts in size and (2) the rate fixed in the power purchase agreement equals the facilities "avoided costs" (Am.Comp.¶¶ 11, 24).

*2 Thus Allco alleges that in his implementation of Section 6, Defendant has "fixed" wholesale energy prices,

which would only be permissible under the FPA if the proposals were in compliance with PURPA, such as Allco's five projects, which were all for 80 megawatts or smaller, and the price for "one or more of the Plaintiff's projects equaled the Connecticut Utilities avoided costs." (*Id.* ¶¶ 45–46, 50, 53.) Allco does not allege that Section 6 is facially invalid and when it submitted its proposals, "Allco had every reason to believe that the Commissioner would observe the two clear federal requirements that restrict his authority to act under Section 6 in the process of evaluating and selecting projects." [1] (*Id.* ¶ 10.)

II. Discussion

A. Regulation of the Wholesale Energy Market

"For much of the 20th century, the energy market was dominated by vertically integrated firms that produced, transmitted, and delivered power to end-use customers," *PPL EnergyPlus, LLC v. Nazarian,* 753 F.3d 467, 471 (4th Cir.2014), and "the States possessed broad authority to regulate public utilities, but this power was limited by ... the negative impact of the Commerce Clause prohibit[ing] state regulation that directly burdens interstate commerce," *New York v. F.E.R.C.,* 535 U.S. 1, 5 (2002).

This limitation on state authority was first recognized in *Pub. Utils. Comm'n of R.I. v. Attleboro Steam & Elec. Co.,* 273 U.S. 83, 89 (1927), where the Supreme Court invalidated an attempt by Rhode Island to regulate the rates charged by a Rhode Island plant selling electricity to a Massachusetts company, which resold the electricity to the city of Attleboro, Massachusetts, because it imposed a "direct burden upon interstate commerce." Creating what has become known as the "*Attleboro* gap," the Supreme Court held that this interstate transaction was not subject to regulation by either Rhode Island or Massachusetts, but only "by the exercise of the power vested in Congress." *Id.* at 90.

Congress responded with the FPA, which "was designed in part to fill the regulatory gap created by the dormant Commerce Clause and cover the then-nascent field of interstate electricity sales," *Nazarian,* 753 F.3d at 472, "but it also extended federal coverage to some areas that previously had been state regulated," *New York,* 535 U.S. at 6 (footnote omitted). The FPA charged FERC, "to provide effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce." *Id.* (quoting *Gulf States Util. Co. v. FPC,* 411 U.S. 747, 758 (1973)).

Jurisdiction over the sale and delivery of electricity is split between the federal government and the states on the basis of the type of service being provided and the nature of the energy sale. *Niagara Mohawk Power Corp. v. F.E.R.C.,* 452 F.3d 822, 824 (D.C.Cir.2006). Specifically, in § 201(b) of the FPA, Congress recognized FERC's jurisdiction as including "the transmission of electric energy in interstate commerce" and "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1). "FERC's authority includes 'exclusive jurisdiction over the rates to be charged [a utility's] interstate wholesale customers.' " *Entergy Nuclear Vermont Yankee, LLC v. Shumlin,* 733 F.3d 393, 432 (2d Cir.2013) (quoting *Nantahala Power & Light Co. v. Thornburg,* 476 U.S. 953, 966 (1986)) (alterations in original). Furthermore, § 205 of the FPA prohibited, among other things, unreasonable rates and undue discrimination "with respect to any transmission or sale subject to the jurisdiction of the Commission," 16 U.S.C. §§ 824d(a)-(b), and § 206 authorized FERC to correct unlawful practices and gave it jurisdiction over "any rule, regulation, practice, or contract affecting" such rates and charges, *id.* § 824e(a).

*3 But the FPA states that "except as specifically provided in this subchapter and subchapter III of this chapter," FERC has no jurisdiction "over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter." *Id.* § 824(b)(1). Consequently, "[s]tates retain jurisdiction over retail sales of electricity and over local distribution facilities" and while "transmission occurs pursuant to FERC-approved tariffs[,] local distribution occurs under rates set by a state's public service commission." *Niagara Mohawk Power Corp.,* 452 F.3d at 824.

Overall, interstate energy "markets are the product of a finely-wrought scheme that attempts to achieve a variety of different aims. FERC rules encourage the construction of new plants and sustain existing ones. They seek to preclude state distortion of wholesale prices while preserving general state authority over generation sources. They satisfy short-term demand and ensure sufficient

long-term supply. In short, the federal scheme is carefully calibrated to protect a host of competing interests. It represents a comprehensive program of regulation that is quite sensitive to external tampering." *Nazarian,* 753 F.3d at 473.

B. Standing [2]

Defendant and Intervenor Number Nine Wind Farm LLC ("Number Nine") both contend that because "Allco's claim of injury depends on legal rights allegedly conferred by statute, that statute and the rights that it conveys guides the determination of standing" and they look to Connecticut law on the standing for disappointed bidders challenging the award of a state contract. (Number Nine's Mem. Supp. [Doc. # 39] at 4–5; Def.'s Mem. Supp. [Doc. # 31–1] at 9–10.) However, Allco does not allege a violation of Section 6 or the Connecticut competitive bidding statute under which a "disappointed bidder" has standing "where fraud, corruption or acts undermining the objective and integrity of the bidding process." *Ardmare Const. Co. v. Freedman,* 191 Conn. 497, 504–05 (1983). Rather, as Allco clarified at oral argument, its claim is that Section 6 as applied is a violation of the FPA and PURPA, which preempt Section 6 by operation of the Supremacy Clause. (Oral Argument Tr. [Doc. # 53] at 10, 17–18.) Thus, Allco alleges a violation of federal law and the Court must look there to evaluate Plaintiff's standing.

"[T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent,' not 'conjectural' or 'hypothetical.' Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.' " *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61 (1992) (internal citations, alterations and footnotes omitted).

*4 "Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.,* with the manner and degree of evidence required at the successive stages of the litigation. At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.' " *Id.* (quoting *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 889 (1990)).

Allco maintains that "as a small power producer and participant in energy markets [it] has a legally protected interest to be free from unlawful actions of State officials related to those markets" (Pl.'s Opp'n [Doc. # 34] at 12) and that it has suffered particularized injuries in fact to that legally protected interest because: (1) it incurred costs in developing its five bids; (2) "one or more of the Plaintiff's projects would have been selected if the Number Nine wind project was not;" and (3) it "has made investment and development decisions in reliance on the market signals sent by the federally regulated interstate capacity market" and Defendant has "interfere[d] with those market forces and rights by seeking to foster uneconomic entry into the market, contrary to the Plaintiff's investment expectations based upon the Congressionally mandated framework of the FPA and PURPA." (*Id.* at 12.)

Even assuming that the expense that Allco incurred in connection with its bid constitutes an injury in fact, "[t]he interest [it] asserts must be 'arguably within the zone of interests to be protected or regulated by the statute' that [it] says was violated," *Match–E–Be–Nash–She–Wish Band of Pottawatomi Indians v. Patchak,* 132 S.Ct. 2199, 2210 (2012) (quoting *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150, 153 (1970)), here the FPA and PURPA. For example, in *Gosnell v. Fed. Deposit Ins. Corp.,* 938 F.2d 372, 375 (2d Cir.1991), the plaintiff was a "disappointed bidder" for an art collection that was acquired by the Federal Deposit Insurance Corporation ("FDIC") from a failed bank and alleged that the FDIC exceeded its statutory authority by agreeing to sell the collection to a museum at its appraised value rather than making the collection available on the open market and thereby "failed to administer its affairs fairly and impartially" in violation of the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA"). *Id.* at 373.

The Second Circuit held that even assuming that the plaintiff could demonstrate that he suffered an injury by not winning the bid, "there is no way that he could ever" show that he was within the zone of interest protected by FIRREA, because allowing him "to sue based on his status as a disappointed bidder would be inconsistent with FIRREA's goal of giving the FDIC broad discretion in disposing of the assets under its control" and the standing doctrine "denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.* at 375–76 (internal quotation marks omitted).

*5 The Second Circuit contrasted the statute authorizing the FDIC's actions to defense procurement laws, which grant a disappointed bidder standing because "the statutes alleged to have been violated were quite 'specific in their reference to bidders' " and "contained specific procedural guidelines protecting the bidders' rights." [3] *Id.* at 376 (quoting *B.K. Instrument, Inc. v. United States,* 715 F.2d 713, 719 (2d Cir.1983). Although Allco contends that "Congress has laid down specific rules in the FPA" regarding "what states can and cannot do" and that it "is an intended beneficiary of those rules," it cites no provision of the complex regulatory scheme that evinces a concern for bidders' rights. (Pl.'s Opp'n at 16.) Rather, as discussed *supra,* Congress had quite another purpose in mind with the enactment of the FPA, which was "to provide effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce." *New York,* 535 U.S. at 6 (quoting *Gulf States Util. Co. v. FPC,* 411 U.S. 747, 758 (1973)).

Allco cites no cases in which a court has found that a disappointed bidder has standing to raise a preemption challenge to a state program. Where courts have allowed entities to raise such challenges, they have demonstrated "concrete and particularized injuries," such as in *PPL Energyplus, LLC v. Solomon,* CIV.A. 11–745, 2011 WL 5007972, at *3 (D.N.J. Oct. 20, 2011), where existing electricity generators and utilities alleged that "by artificially depressing wholesale prices for capacity and energy," a state law would "cost [them] millions of dollars." By contrast, here Allco has suffered no such injury and despite not being awarded this particular contract remains free to sell whatever energy it wishes in the open market, underscoring the reality that the true injury alleged is the denial of the contract.

Additionally, Allco has failed to satisfy the third requirement for standing-that it is " 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.' " *Defenders of Wildlife,* 504 U.S. at 560–61. Allco contends that because one of its projects was ranked fourth out of forty-seven bids submitted, these rankings confirm that "it is not only likely, but a near certainty," that if the Number Nine Project had not been selected, "one or more of Plaintiff's projects would have been selected." (Pl.'s Opp'n at 12.) However, nothing in the statute mandates that projects be selected based upon their ranking. Instead, the proposals were ranked "[b]ased on [an] analysis of price and non-price factors" [4] and then provided to the Commissioner to determine if they were " 'in the interest of ratepayers ... and in accordance with the policy goals outlined in the' " statute. (Commissioner's Determination at 10 quoting Section 6.) Although the Commissioner selected the six highest-ranked projects to proceed with contract negotiations with the Connecticut Utilities, only the first- and third-ranked projects were selected and the second-ranked project was not. (*See id.* at App'x 2.) Thus, given the Commissioner's discretion to select projects, it does not necessarily follow that if Number Nine were not selected, Allco's projects would have been.

*6 More fundamentally, however, Section 6 did not mandate that Defendant take any action at all but rather provided that the Commissioner "may" select renewable energy bids if it was determined "to be in the interest of ratepayers." P.A. 13–303, Section 6. Allco contends that if it "receives a favorable decision in this case, it is likely, if not a virtual certainty that Defendant would make a redetermination ... that comports with federal law, in which case, based upon the Rankings, it is likely that one or more of Plaintiff's projects would be selected" and that "[i]n light of the stated goals of the Connecticut Legislature, the Governor, and the Defendant, it is a remote possibility that the Defendant would do nothing if a decision in Plaintiff's favor were issued in this case." (Pl.'s Opp'n at 14.) But Allco provides no support for its prediction and, as Defendant notes, the Commissioner could not simply make a redetermination based on the original rankings cited by Allco, because bidders were only required to keep their bids open for six months and the bids have now expired. (Oral Argument Tr. at 34.)

WESTLAW © 2018 Thomson Reuters. No claim to original U.S. Government Works.

Thus, if the Court were to void the results of the Section 6 procurement, Defendant explains that "the state might very well take no further action because P.A. 13303 is predicated upon a policy of letting the market, not the state, set prices" and even if the state decided to try again, P.A. 13–303 is the Commissioner's only authority "to act with regard to long-term renewable energy contracts" and "a favorable decision for Plaintiff in this case would avail the Plaintiff nothing that it does not already have, i.e ., the opportunity to participate in a future procurement, if any." (Def.'s Reply [Doc. # 40] at 3–4.) Because it is speculative at best whether Allco's claimed injury would be redressed by a favorable decision, the Court concludes that it lacks standing. *See Defenders of Wildlife,* 504 U.S. at 560–61. Although the Court has determined that Plaintiff lacks standing, it also concludes that Plaintiff's claim fails on the merits.

C. Failure to State a Claim [5]

1. Preemption Principles

Preemption can take several forms, but Allco advances only a field preemption argument (Oral Argument Tr. at 32) whereby "the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Arizona v. United States,* 132 S.Ct. 2492, 2501 (2012). "Congress' intent to supersede state law may be found from a scheme of federal regulation ... so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," *Entergy Nuclear Vermont Yankee, LLC,* 733 F.3d at 409 (quoting *Suffolk Cnty. v. Long Island Lighting Co.,* 728 F.2d 52, 57 (2d Cir.1984)) (alterations in original), and "federal law occupies [the] entire field of regulation," *Wachovia Bank, N.A. v. Burke,* 414 F.3d 305, 313 (2d Cir.2005).

*7 Where field preemption is claimed in "areas that have 'been traditionally occupied by the States,' congressional intent to supersede state laws must be 'clear and manifest.' " *English v. Gen. Elec. Co.,* 496 U.S. 72, 79 (1990) (quoting *Jones v. Rath Packing Co.,* 430 U.S. 519, 525 (1977)). "In determining whether preemption exists, we must 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " *Entergy Nuclear Vermont Yankee, LLC,* 733 F.3d at 408 (quoting *Wyeth v. Levine,* 555 U.S. 555, 565 (2009)).

2. Section 6

Plaintiff contends that the Commissioner's selection of bids pursuant to Section 6 is unconstitutional based on field preemption, because it is an unlawful "attempt by a State to compel distributors to purchase energy from generation facilities at a particular price." (Pl.'s Opp'n at 19.) Allco does not dispute that "states have broad powers under state law to direct the planning and resource decisions of utilities under their jurisdiction" and "may, for example, order utilities to build renewable generators themselves, or ... order utilities to purchase renewable generation." *Entergy Nuclear Vermont Yankee, LLC,* 733 F.3d at 417 (quoting *S. Cal. Edison Co. San Diego Gas & Elec. Co.,* 71 FERC ¶ 61,269, at *8 (June 2, 1995) (alterations in original)); (Pl.'s Opp'n at 7–8). But Plaintiff maintains that FERC has exclusive jurisdiction over "wholesale energy and capacity markets and the 'practices' or 'contracts' that affect them" and that Defendant's order under Section 6 "intrudes on FERC's exclusive jurisdiction because it fixes a long-term wholesale energy price and guarantees that State-selected generators will receive that price for their sales of energy for resale" by requiring the Connecticut Utilities "to enter into long-term wholesale purchase contracts with generators chosen by the Defendant" and "[e]ach contract fixes a wholesale energy price." (Pl.'s Opp'n at 8, 34.)

As discussed above, Allco is correct that a "wealth of case law confirms FERC's exclusive power to regulate wholesale sales of energy in interstate commerce, including the justness and reasonableness of the rates charged." *Nazarian,* 753 F.3d at 475. In this area, "if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject." *Miss. Power & Light Co. v. Mississippi ex rel. Moore,* 487 U.S. 354, 377 (1988) (Scalia, J., concurring). However, despite correctly identifying the legal standards applicable to the division of state and federal authority in the energy markets, the flaw in Allco's argument is that it repeatedly contends without support that Defendant has "fixed" wholesale energy prices when this characterization is contradicted by documents attached to the Amended Complaint. [6]

As Defendant notes, Section 6 authorized him to "solicit proposals" and then provided that he "may select proposals" and "may direct the electric distribution companies to enter into power purchase agreements."

 © 2018 Thomson Reuters. No claim to original U.S. Government Works.

P.A. 13–303, Section 6. Defendant and Number Nine maintain that Section 6 "expressly permitted generators to offer whatever price they wished" and that Defendant has not "fixed the price" of the selected projects.[7] (Def.'s Mem. Supp. at 17.) Number Nine contends that it "and presumably other bidders, deliberated internally to determine a bid price that would be viable and competitive. Then, DEEP undertook a process of evaluating bids considering a variety of price and non-price elements, consistent with the traditional authority of states to direct how jurisdictional utilities obtain generation." (Number Nine's Mem. Supp. at 16.)

***8** The power purchase agreements were "signed at the price freely offered by [Number Nine and Fusion Solar] and accepted by the [Connecticut Utilities] and the Commissioner had no ability to change that price." (Def.'s Mem. Supp. at 20.) Rather than "interfering with FERC's control of the interstate market .... the Commissioner was asking the market to offer prices which might, or might not be accepted by buyers," which "is a clear example of a permissible action under the FPA as implemented by FERC." (*Id.; see also* Number Nine's Mem. Supp. at 15–17.) Number Nine notes that the power purchase agreements explicitly require that it apply for market-based rates from FERC, who will "determine whether Number Nine may permissibly make sales to the [Connecticut Utilities] at the negotiated rates set in the" power purchase agreements based on "whether or not Number Nine possesses market power," which would require it "to mitigate that market power or lose the benefit of the DEEP procurement." Consequently, Number Nine maintains, "[f]ar from subverting the federal regulatory regime, Number Nine will comply with it." (Number Nine's Mem. Supp. at 17.)

Defendant's argument is consistent with how Section 6 was implemented. DEEP's Request for Proposals stated that a "proposal must provide fixed prices (in $/MWh) annually for the term of the contract" and nowhere did it indicate that the Commissioner would set or mandate any particular price. (Request for Proposals § 2.2.12(a).) Proposals were to be evaluated on the basis of a number of price and non-price evaluation criteria (*see id.* § 2.3) and DEEP was to "notify Applicants whether they have been selected to finalize a" power purchase agreement with the Connecticut Utilities (*id.* § 2.4). Applicants could then decide whether "they intend to proceed with their proposals" and if so, would "enter into separate [agreements] with each [Connecticut Utility]" and DEEP could "coordinate the finalization of [the agreements] between the Applicants and the [Connecticut Utilities], where changes to the form [agreements] are necessary to conform to the contracting practices of each" Connecticut Utility. (*Id.*)

The Commissioner's Determination of how he selected the winning bids confirms that he "analyzed proposals received" and on August 20, 2013, "selected the highest-ranked Applicants to proceed with initial negotiations with the [Connecticut Utilities]," who "also initiated the ... negotiation process with Applicants." (Commissioner's Determination at 3.) On September 18, 2013, "the Commissioner formally directed the [Connecticut Utilities] to enter into contracts with two projects that had successfully completed negotiations for [power purchase agreements] with the [Connecticut Utilities]" and final agreements were signed and executed the following day. (*Id.*)

Allco counters that "by requiring the Connecticut Utilities to purchase power at a fixed price from the State's favored generator, pursuant to criteria developed by the State," the utilities were prevented "from freely negotiating for a different contractual price." (Pl.'s Opp'n at 20.) It notes that in proceedings before the Public Utilities Regulatory Authority, the United Illuminating Company ("UI") confirmed that it "did not perform an independent cost-benefit analysis for the proposed contracts," because Section 6 "provides the basis for UI entering into the two contracts" and "specifically charged the Authority, and not the [Connecticut Utilities], with performing the analysis of customer costs and benefits, and determining which projects to direct the [Connecticut Utilities] to contract with." (UR–022, Ex. E to Am. Compl.; *see also* Am. Compl. ¶ 55.) It thus contends that Defendant's argument that the bidders set the price "ignores the very act at issue in this case—that it was only through the Defendant's Order that the wholesale price was, in fact, fixed," which amounts to an impermissible state encroachment upon FERC's authority. (Pl.'s Opp'n at 2.)

***9** Plaintiff offers no authority in support of this conclusion, and contrary to Allco's argument, the mechanism by which the final price of the contracts was "fixed" is in fact dispositive. Absent any non-conclusory allegations that Defendant in fact "fixed" the contract prices, Section 6 is consistent with the "broad powers" of

 © 2018 Thomson Reuters. No claim to original U.S. Government Works

the states "to direct the planning and resource decisions of utilities under their jurisdiction." *Entergy Nuclear Vermont Yankee, LLC,* 733 F.3d at 417. While these state efforts may have some "indirect effect" on wholesale rates, not all such state action is preempted because " 'there can be little if any regulation of production that might not have at least an incremental effect on the costs of purchasers in some market.' " *Nazarian,* 753 F.3d at 478 (quoting *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas,* 489 U.S. 493, 514 (1989)); *see also Connecticut Dep't of Pub. Util. Control v. F.E.R.C.,* 569 F.3d 477, 481 (D.C.Cir.2009) (noting that indirect effect on energy markets is a "natural" consequence of state regulation).

Section 6 stands in contrast to state efforts that have been held to be preempted, such as in *Nazarian* where Maryland attempted to incentivize the construction of a new power plant by offering a fixed, twenty-year revenue stream secured by "contracts for differences," which required the state's utility companies to make payments "amounting to the difference between [the plant operator's] revenue requirements per unit of energy and capacity sold (set forth in its winning bid) and its actual sales receipts." 753 F.3d at 473–74. The Fourth Circuit held that the program was "field preempted because it functionally sets the rate that [the plant operator] receives for its sales" and "the contract price guaranteed by the [program] supersedes the ... rates that [the plant operator] would otherwise earn —rates established through a FERC-approved market mechanism .... regardless of the market price." *Id.* at 476–77. Thus, the state "impinge[d] on FERC's exclusive power to specify wholesale rates." *Id.* at 477.

The Fourth Circuit emphasized "the limited scope" of its holding, confined to "the specific program at issue" and did "not express an opinion on other state efforts to encourage new generation, such as direct subsidies or tax rebates, that may or may not differ in important ways from the Maryland initiative." *Id.* at 478. The Maryland program failed, however, because its "effect ... on matters within FERC's exclusive jurisdiction is neither indirect nor incidental," but rather "strikes at the heart of the agency's statutory power to establish rates for the sale of electric energy in interstate commerce by adopting terms and prices set by Maryland, not those sanctioned by FERC." *Id.* (internal citation omitted). Likewise in *PPL Energyplus, LLC v. Solomon,* 766 F.3d 241, 253–54 (3d Cir.2014), a similar New Jersey law was invalidated on preemption grounds because it "essentially set[ ] a price for wholesale energy sales" and was not within the state's power to regulate utilities even when doing so "would indirectly affect interstate rates." [8]

***10** Notably, Section 6 is devoid of any such market-distorting features that encroach FERC's exclusive jurisdiction over setting wholesale rates. Defendant plays no role in determining the price offered by bidders. Although the Connecticut Utilities are compelled to accept the prices in the bidders' offers, which are selected by Defendant, there is no market distortion and to the extent that Section 6 has an indirect effect on the market, it is incidental and within the State's authority to regulate utilities under its jurisdiction. Accordingly, Defendant's motion to dismiss is granted as to Count One.

D. Section 1983 Claim

Under 42 U.S.C. § 1983, "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." Allco contends that "Defendant impermissibly discriminated against" its projects and in doing so violated its rights, which are "derived from the FPA and PURPA" and that by violating these acts, "Defendant has injured Plaintiff" and it "has suffered harm and damages." (Pl.'s Opp'n at 24.)

"Section 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred." *Albright v. Oliver,* 510 U.S. 266, 271 (1994) (internal citations omitted). Thus, a 1983 action can be based only on a constitutional claim or a claim of a violation of a federal right. *Blessing v. Freestone,* 520 U.S. 329, 340 (1997) ("In order to seek redress through section 1983, ... a plaintiff must assert the violation of a federal right, not merely a violation of a federal law."). "The first step in any such claim is to identify the specific ... right allegedly infringed." *Albright,* 510 U.S. at 271. Plaintiff cites no authority for the proposition that even if Section 6, as implemented, were found to be preempted by the FPA, that a disappointed bidder could maintain an action against state officials under § 1983. As the FPA does not create any individual federal rights that can be

enforced under § 1983, Defendant's motion to dismiss Count Two is granted.

III. Conclusion

Because Allco has not suffered a legally protected injury within the zone of interests protected by the Federal Power Act nor shown that it is likely that any such injury would be redressed by a favorable decision by the Court, it lacks standing in this case. Plaintiff's claim also fails on the merits, because Defendant's implementation of Section 6 does not seek to regulate wholesale energy sales but rather is a permissible regulation of utilities under the State's jurisdiction. Therefore, Defendant's Motion [Doc. # 31] to dismiss is GRANTED. The Clerk is directed to close this case.

*11 IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2014 WL 7004024, Util. L. Rep. P 14,918

Footnotes

1 Plaintiff asserts a violation of the Federal Power Act and that Defendant's implementation of Section 6 is preempted under the Supremacy Clause and seeks a declaratory judgment and injunctive relief, declaring that the power purchase agreement for the Number Nine Wind Project void *ab initio* and enjoining "the Commissioner from enforcing or otherwise putting into effect any part of the Order and ... from issuing further orders and decisions that are inconsistent with the FPA and PURPA" (Count One). Plaintiff also claims that Defendant "impermissibly discriminated" against its bid in violation of 42 U.S.C. § 1983 (Count Two).

2 "A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States,* 201 F.3d 110, 113 (2d Cir.2000). "A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Id.* In resolving a motion to dismiss for lack of subject matter jurisdiction, the court may refer to evidence outside the pleadings. *Id.*

3 Likewise, in the Equal Protection Clause context a disappointed bidder is recognized as having standing even without "alleg[ing] that he would have obtained the benefit but for the barrier" because the " 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Ne. Florida Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.,* 508 U.S. 656, 666 (1993).

4 For example, the Commissioner considered project size, evidence of site control, the developer's experience in the New England organized power market, the project's likelihood of meeting the proposed commercial operation date, and contribution to reliability in six specific ways. (Commissioner's Determination at 4–6, 8–9.).

5 To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). Detailed allegations are not required but a claim will be found facially plausible only if "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* However, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly,* 550 U.S. at 555 (alterations in original).

6 The Court can consider documents attached to the complaint on a motion to dismiss under Rule 12(b)(6), *see Chambers v. Time Warner, Inc.,* 282 F.3d 147, 152 (2d Cir.2002) ("For purposes of this rule, the complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference." (internal quotation marks omitted)); *see also* Fed.R.Civ.P. 10(c) ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes."), and when "considering a motion to dismiss may begin by identifying allegations that, because they are mere conclusions, are not entitled to the assumption of truth," *Iqbal,* 556 U.S. at 664.

7 Defendant maintains that the procurement was not conducted pursuant to PURPA under which he would be entitled to "fix" energy prices for a "small power production facility," which is no greater than 80 megawatts in size, and there is no dispute that the Number Nine Project would not qualify under PURPA because it is larger than 80 megawatts. (Def.'s Mem. Supp. at 14; Number Nine's Mem. Supp. at 5 n. 1.) At oral argument, Plaintiff clarified that it was not seeking to invalidate the Fusion Solar contract, because it is a PURPA generator. (Oral Argument Tr. at 26.).

 © 2018 Thomson Reuters. No claim to original U.S. Government Works.

8 FERC argued that the New Jersey law was preempted because it undermined FERC's effort to "ensure that subsidized entry supported at the state level does not have the effect of disrupting the competitive price signals that ... wholesale capacity market protocols are designed to produce." Br. for DOJ and FERC at 16, *PPL EnergyPlus, LLC v. Solomon*, No. 13–4330 (3d Cir. Mar. 20, 2014) (quoting *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 at P54 (2013)). FERC acknowledged that states "have numerous ways to incentivize construction of new generation facilities that do not directly affect the setting of FERC-jurisdictional wholesale rates" even if they "result in indirect effects on a capacity market." *Id.* at 18–20.

End of Document

© 2018 Thomson Reuters. No claim to original U.S. Government Works.

1991 WL 188815
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Hartford.

CITY OF TORRINGTON, et al.,
v.
CONNECTICUT SITING COUNCIL, et al.

No. CV 90 0371550 S.
|
Sept. 12, 1991.

MEMORANDUM OF DECISION

SULLIVAN, Judge.

*1 On December 5, 1988, Bio–Gen Torrington Partnership ("Bio–Gen") applied to the Connecticut Siting Council ("Council") for a Certificate of Environmental Compatibility and Public Need ("Certificate") to build and operate an electricity generating facility in the Town of Torrington. Bio–Gen proposes to burn wood chips as fuel and sell the electricity generated by the facility to the Connecticut Light and Power Company ("CL & P").

This is an administrative appeal filed by the City of Torrington, the Torrington Planning and Zoning Commission, and the Torrington Inland Wetlands Commission ("plaintiffs") from a decision of the Council of November 22, 1989 granting a Certificate to Bio–Gen for the construction and operation of the proposed facility, pursuant to sections 16–50k and 16–50p of the Connecticut General Statutes.

The Council is a state agency charged with the responsibility of balancing the need for public utility services with the environmental consequences associated with the location, construction and operation of facilities which produce and supply said services. Conn.Gen.Stat. sect. 16–50g.

Subsequent to giving notice, the Council conducted public hearings on the application filed by Bio–Gen on February 6, 7, 8, 9, 10, and 28, March 29, 30 and 31, April 11 and 13, and May 17 and 18, 1989. In addition to volumes of exhibits submitted to and considered by the Council, at least 17 sworn witnesses testified during the 13 days of hearings.

The plaintiff's complaint is a broad scale attack upon the procedures, findings, opinion and decision of the Council. However, as briefed, [1] the complaint is composed of six major allegations: (1) The Council lacked jurisdiction; (2) The Council improperly revoked orders of the City of Torrington Planning and Zoning Commission; (3) The Council violated the Public Utility Environmental Standards Act; (4) The Council failed to comply with the Connecticut Environmental Protection Act; (5) The Council violated the plaintiff's right to due process; (6) The Council abused its discretion.

AGGRIEVEMENT

The court's jurisdiction over the subject matter of an administrative appeal rests upon proof that the plaintiff has been aggrieved by the decision of the agency. *Lewin v. United States Surgical Corp.,* 21 Conn.App. 629, 631 (1990). The mere fact that a plaintiff has been a participant or a party at a hearing before the agency does not constitute proof of aggrievement. *Hartford Distributors, Inc. v. Liquor Control Commission,* 177 Conn. 616, 62 (1979). "Aggrievement, when not based upon a specific statute, is determined by way of a well settled twofold test. First, the plaintiffs must successfully demonstrate a specific, personal and legal interest in the subject matter of a decision. Second they must successfully establish that this interest has been specifically and injuriously affected by the decision. Further, an aggrieved party must have a claim that is distinguishable from the concerns of the community at large." (Citations omitted) *Lewin v. United States Surgical Corp.,* supra at 631. Aggrievement is established if there is a possibility as distinguished from a certainty that some legally protected interest has been adversely effected, *Hall v. Planning Commission,* 181 Conn. 442, 445 (1985).

*2 In the instant case, the court takes judicial notice of the fact that the Torrington Planning and Zoning Commission is a municipal agency charged

 © 2018 Thomson Reuters. No claim to original U.S. Government Works.

with administering Torrington's zoning regulations, and that the Torrington Inland Wetlands Commission is a municipal agency charged with the responsibility of administering Torrington's inland wetlands regulations.

The plaintiffs have alleged that the Siting Council engaged in procedural irregularities which deprived them of their right to fully participate in the proceedings before the Council. In addition, the Inland Wetlands Commission alleges that the Council did not adequately consider the impact of water use by the proposed facility and that this may result in harm to the surrounding wetlands, the protection of which is within the purview of the commission. Also, the zoning commission alleges that the Council improperly pre-empted their statutory authority with respect to Bio–Gen's application to that commission, that it did not adequately take into consideration the effect of truck traffic in the area which had been the subject of two recent fatal accidents, and that it did not adequately consider the noise pollution which would result from the operation of the facility. The court finds that the record is sufficient to prove by a fair preponderance of the evidence that these are among several legally protected interests of the plaintiffs that have possibly been specifically and injuriously effected by the actions and decisions of the Siting Council. Consequently, the court finds that the plaintiffs are sufficiently aggrieved to bring this appeal.

JURISDICTION

While it is undisputed that notice of the public hearings was properly published, and that the plaintiffs were properly served with the application as required under Section 16–501(b) of the General Statutes, the plaintiffs claim that the Siting Council lacked jurisdiction in this case because Bio–Gen failed to serve the Torrington Conservation Commission and the State Office of Policy and Management with copies of the application.

A defect in personal notice does not deprive an agency of subject matter jurisdiction. The only notice of constitutional dimension is notice of the hearing, not a notice of the filing of an application for a Certificate. *Mobley v. Metro Mobile CTS of Fairfield, County, Inc.* 216 Conn. 1 (1990). The Court notes that neither the Conservation Commission nor the Office of Policy and Management are parties to this appeal and neither agency has complained to the Council, or to this court, about lack of notice. In addition, both agencies must have had de facto notice of the hearings conducted by the Council regarding the application as each participated in the proceedings. The Office of Policy and Management filed written comments with the Council and Mr. Ray Wilcox of the Torrington Conservation Commission presented oral comments to the Council on February 6, 1989, the first day of hearings. By participating in the proceedings the agencies in question effectively waived notice.

*3 The Court finds that the plaintiffs have not shown how they were prejudiced by lack of notice to any other agency. Having been properly served themselves they do not have standing to raise a lack of notice to any other party. *Intervale Homeowners Ass'n. v. Environmental Protection Board,* 19 Conn.App. 334 (1989). The court finds that the Council did have jurisdiction in the instant case.

TORRINGTON PLANNING AND ZONING COMMISSION ORDERS

On December 5, 1988, Bio–Gen filed an application for a Certificate of Environmental Compatibility with the Siting Counsel. Pursuant to Section 16–501(b)(A) of the General Statutes, Bio–Gen filed a copy of that application with the Torrington Planning and Zoning Commission on that same date.

On December 30, 1988 the zoning commission notified Bio–Gen that it would require additional information before it could act upon the application and, on the same date, the zoning commission notified both Bio–Gen and the Council that the Torrington Zoning Regulations would not permit a facility of the type proposed by Bio–Gen to operate within the City of Torrington. (Record–Letter of 12–30–88).

On January 27, 1989, Bio–Gen filed a timely appeal of the decision and order of the zoning commission with the Council and sought a de novo review pursuant to Section 16–50x(d).

On February 6, 1989 the City of Torrington notified Bio–Gen that the city had denied its application for a site plan pursuant to Section 8–7d(b) of the General Statutes, and on March 8, 1989, Bio Gen appealed that order to the

Council and again sought a de novo review. (See Findings 252 through 257).

On November 22, 1989, following completion of the record, the Council voted 7 to 2 to revoke the orders of the zoning commission and issued its own Decision and Order of the same date in substitution thereof. (Decision and Order). The plaintiffs argue that the Council's decision to revoke the zoning commission's orders was not supported by the record nor the findings of the Council. They also argue that the zoning commission was never given an opportunity to rule upon the merits of Bio–Gen's application because it wasn't provided with the information it required. The court disagrees.

The leading case directly on point concerning this subject is *Town of Preston v. Connecticut Sitting Council,* 20 Conn.App. 474 (1990), in which the Appellate Court held that the Siting Council has exclusive jurisdiction over the location and type of public utility facilities within this state. " "With respect to the separate and distinct application process before the zoning commission, under General Statutes 16–50x(d), the decision of the zoning commission may be appealed to the council, "which shall have jurisdiction, in the course of any proceeding on an application for a certificate or otherwise, to affirm, modify or revoke such order [of the local agency] or make any order in substitution thereof ..." ". *Id at 483.*

*4 A zoning commission does not have jurisdiction to review an application to the Council for a certificate, nor is the Council encumbered in its de novo review of decisions from zoning commissions to those narrow issues which concern only the municipality. It may approve of a site for a proposed facility even if the facility fails to meet local zoning requirements. The mandates of the Council under the General Statutes "go far beyond local zoning concerns". The court in *Preston* also stated that "It is clear that, under PUESA framework, the role of the council in its review of local zoning decisions was meant to be comprehensive and plenary." *supra at 485.*

In the instant case, the transcripts of the hearings reflect that on the first day of hearings the Council Chairperson indicated that the Council would be conducting a de novo hearing and that the Council would make whatever time was necessary to develop facts relevant to the wetlands or other protection concerns of the community. She invited input from anybody who was interested. (Transcript 2–6–90).

Testimony was received by the Council from Dana McGinnis, Torrington City Planner; George Simoncelli, Torrington Corporation Counsel; James Rokos, Torrington Director of Health; Matthew Dominy, Torrington Director of Public Works; and Susan Strand, former member of the Torrington Planning and Zoning Commission, among others, all of whom testified regarding zoning and wetlands matters. The court finds that the record contains substantial evidence which was presented to the Council regarding local concerns of both zoning and wetlands issues from which the Council could and did make appropriate findings and issue orders regarding zoning and wetlands matters. (See Findings 32 through 58 as well as Opinion and Decision and Order).

The court finds that the plaintiffs had ample opportunity prior to and during the four months of hearings to obtain and present to the Council whatever information and material it felt was important to their position regarding zoning and wetlands concerns. Indeed, the court finds from the record that the plaintiffs fully participated and were meaningfully involved in the de novo hearings before the Council.

Finally, once the plaintiff zoning commission notified both Bio–Gen and the Council that the facility proposed by Bio–Gen would not be permitted under the Torrington zoning regulations it became questionable, at best, as to whether the submission of the additional information requested of Bio–Gen by the zoning commission would be meaningful. While such information might have been useful with respect to a possible change in the zoning regulations, or perhaps an appeal to the zoning board of appeals, neither was a subject then under consideration. The application before the zoning commission had effectively been denied on the same date the additional information was requested. Consequently, the resulting appeal to the Council was both proper and appropriate.

*5 The court finds that the Council properly revoked the orders of the Torrington Planning and Zoning Commission within its authority under Section 16–50x(d), and that such action did not substantially prejudice the rights of the plaintiffs as they were given ample opportunity to address local concerns during the de novo hearings before the Council.

PUBLIC UTILITY ENVIRONMENTAL STANDARDS ACT (PUESA)

The plaintiffs have launched a wide scale attack upon the Council's findings and decision to issue a Certificate alleging numerous procedural and factual irregularities in violation of General Statutes Sections 16–59g through 16–50z as well as Section 4–183. The court finds these claims to be without merit.

In reviewing agency decisions the court can not substitute its judgement for that of the agency with respect to the weight of the evidence, credibility of witnesses, or questions of fact that are supported by the record. *State Medical Society v. Board of Examiners in Podiatry,* 208 Conn. 709, 717 (1988); *Huck v. Inland Wetlands & Watercourses Agency,* 203 Conn. 525, 539–41 (1987). The agency findings of fact must be accorded considerable weight by the reviewing courts. *Connecticut Hospital Assn., Inc. v. Commission on Hospitals & Health Care,* 200 Con. 133, 140 (1986).

The court has conducted a careful review of each briefed issues, as discussed infra, and finds that the plaintiffs have not sustained their burden as to these allegations.

A. *Adequacy of Notice.*

The plaintiffs contend that they were not fairly or sufficiently appraised of the Bio–Gen proposal being considered and acted upon by the Council. Specifically, they claim that they did not receive sufficient notice because the applicant refused to submit a local application and they allege that they were not given fair notice because the applicant substantially modified the application during the hearing process. The issue concerning the requirement that an applicant seek local permission for the proposed facility has been addressed by the court, supra, and need not be repeated.

It is undisputed that the plaintiffs were properly served with a copy of the application and that public notice of the Council hearings was properly published. In addition, the record clearly reflects that the plaintiffs fully participated in pre and post hearing proceedings as well as the thirteen days of hearings before the Council. Nevertheless, the plaintiffs argue that because Bio–Gen did not comply with the request of the planning and zoning and wetlands commissions for additional information relating to local approval of the proposed facility, and because several changes to the facility were permitted in the application before the Council during the hearings, they were effectively denied the opportunity to prepare for or meaningfully and fully participate in the proceedings. The court finds these assertions to be without merit.

There is substantial evidence in the record that the notice given to the plaintiffs satisfied the provisions of the Uniform Administrative Procedures Act (UAPA), C.G.S. section 4–177(b), as well as the Public Utilities Environmental Standards Act (PUESA), C.G.S. section 16–50. The UAPA "exceed [s] the minimal procedural safeguards mandated by the due process clause." *Adamchek v. Board of Education,* 174 Conn. 366, 369 (1978); *Fleischman v. Board of Examiners in Podiatry,* 22 Conn.App. 181, 191 (1990).

*6 The purpose of notice is to give all affected parties an "opportunity to be heard and to be apprised of the relief sought". *Mobley v. Metro Mobile CTS of Fairfield County,* Inc., 211 Conn. 1, 9 (1990); *Schartz v. Hamden,* 168 Conn. 8, 14 (1975). Included in the notices given in this case was information which adequately informed the plaintiffs of the nature, use and location of the proposed facility, as well as a statement of the time, place, and nature of the hearing before the Council. (See application and notice). The record is clear and the court finds that the plaintiffs had ample time and opportunity to obtain, and were not precluded from developing and presenting to the Council, whatever information they felt was relevant and important to their positions through the use of pre-hearing interrogatories (City exhibit 2), the submission of documentary evidence, cross-examination of witnesses and the presentation of witnesses and other evidence throughout the four months of hearings.

The plaintiffs also claim that the applicant was permitted to change the application during the hearing process without being required to submit a new application. Specifically, in their brief, the plaintiffs cite six such changes or amendments which they claim effectively changed the nature of the facility. (plaintiff's brief p. 17–18). They argue that under section 16–501 and 16–50m the applicant should have been required to submit a new application and that the plaintiffs were entitled to a 30

day notice and a delay in the hearings with respect to the amendments.

The plaintiffs reliance on Section 16–501 and 16–50m, suggesting that said statutes require that a new application be filed and that public hearings be scheduled not less than 30 days thereafter whenever substantial amendments to an application for a Certificate are filed, is inappropriate to this case.

The statutes referred to by the plaintiffs are concerned with two separate procedures: an application for an original certificate and an application to modify an existing certificate. [See Section 16–501(a) and (d), and 16–50m(a) and (b)]. The statutes do not require new notice or the scheduling of new public hearings with respect to amendments or modifications of an application for a certificate. In the case of an application to modify an existing certificate the statute provides that a hearing is to be held and notice to be given if in the opinion of the Council the amendment would result in any substantial changes to the authorized facility or result in a material effect upon the environment. [Section 16050(b)(1)]

Since the amendments to the application in the instant case were submitted to the Council within the framework of an ongoing hearing in connection with an original application for a certificate, and are not concerned with amendments to an existing certificate, the issue of new notice and new or additional public hearings is inapplicable.

Additionally, the court rejects the plaintiffs contention that the changes and modifications proposed by Bio–Gen and acted upon by the Council fundamentally changed the nature of the facility in question. This facility was proposed as a wood burning 13 (net) megawatt electricity generating facility on a specific parcel of land and that is exactly the facility which was approved and authorized by the Council. The modifications addressed and mandated by the Council merely reflected its concerns over possible environmental issues, and that is exactly the purpose of the hearings and function of the Council.

*7 With respect to the plaintiff's claim that they were not given sufficient time to study the proposed changes to the facility, the court notes that five of the six changes complained of in plaintiff's brief were presented to the Council, and the plaintiffs, during the February, 1989 hearings. The hearings did not conclude until May, some three months later. The remaining change concerning the dry cooling system was made at the clear suggestion of the chairperson of the Council during remarks made by her to counsel for the applicant and was submitted to the Council and the other parties on March 29, 1989. (Transcript) The court finds clear and substantial evidence in the record that plaintiffs had sufficient time to both study and to respond to these proposals during the several months of hearings during which evidence concerning these and other proposals were being considered by the Council.

B. *Extra record evidence.*

In October, 1989 the Council issued proposed findings and requested that the parties submit briefs, comments and exceptions with respect to those findings. In addition to submitting its brief, which included suggested changes to the findings of the Council, Bio–Gen also requested that the Council take administrative notice of several matters which occurred subsequent to the close of the public hearings: (1) a zone change near the site of the proposed facility; (2) a FAA decision regarding the smoke stack for the facility; and, (3) the City of Torrington's decision concerning closing of a nearby road and repairing a nearby bridge.

The plaintiffs suggest that the submission of the request to take administrative notice of these matters constituted an improper ex parte communication with the Council. They also argue that they were denied their right to examine and rebut this "extra record evidence" and that the Council may have been improperly influenced by this material in making its findings and decision to issue the Certificate. The court disagrees and finds that the plaintiffs have not met their burden of proof as to these allegations.

This was not an *ex parte* communication. The request by Bio–Gen that the Council take administrative notice of the information in question was presented by means of legal argument made by counsel for the applicant and served upon all parties. Not only did the plaintiffs have an opportunity to respond to Bio–Gen's brief and request for administrative notice, they in fact did respond and object by means of a letter to the Council of October 19, 1989 and a brief of November 3, 1989.

The fact of the matter is that the Council denied Bio–Gen's request that it take administrative notice of the information in question. In addition, the record shows

that the Council did not adopt Bio–Gen's proposed findings or conditions. Indeed, the Council does not appear to have made any changes at all as the result of Bio–Gen's proposals and arguments. There is no significant difference between the draft findings of the Council, which were prepared before the material in question was submitted by Bio–Gen, and the final findings of the Council. There is nothing of substance contained within the entire record which would suggest that the Council was influenced by or in any way used the information in question.

*8 The court finds that there is insufficient evidence to support plaintiffs contention that the information and argument submitted by Bio–Gen may have "tipped the balance" in the Council's decision making process.

C. *Conditions imposed upon the granting of the Certificate.*

The plaintiffs further allege that by issuing a Certificate subject to the requirement that Bio–Gen satisfy a number of specific conditions precedent and subsequent to the construction and operation of the facility the Council abused its discretion and acted improperly. They argue that "by postponing the discussion of certain issues until after the decision, the Siting Council effectively cut off plaintiff's rights to be heard ...". (plaintiff's brief p. 23). The court disagrees and notes that once again the leading case on this subject is *Town of Preston v. Connecticut Siting Council,* supra.

Section 16–50p of the General Statutes clearly authorizes the Council to grant a Certificate on "*such terms, conditions, limitations or modifications of the construction or operation of the facility as the council may deem appropriate.*" (emphasis added). In compliance with its mandate to protect the environment, the Council carefully pointed out what steps it had taken, and what it proposed to do, to prevent any adverse impact upon the environment with respect to the issues of water use and discharge, air pollution, the source and type of fuel to be used, waste products, noise, traffic, zoning and wetlands concerns, the aquifer and Still River, and the aesthetic qualities of the facility. (See: Opinion and Decision and Order). The majority of the concerns addressed by the Council were raised during the hearings in which the plaintiffs played an active and constructive role.

The Decision and Order contains a significant number of specific conditions and requirements related to environmental issues which must be met and satisfied by Bio–Gen before it can begin construction of the facility. There are additional conditions which Bio–Gen must meet and satisfy before it can begin operation, and even further conditions which it must continue to meet in order to continue operations.

The preamble to the Decision and Order of the Council clearly states that "[f]ailure to comply with the following conditions may subject the applicant to temporary and permanent injunctive action, and/or civil penalties ... pursuant to CGS 16–50u." Thus, it is clear that the Council's oversight of the Bio–Gen operation is a continuing function and that satisfaction of the conditions imposed by the Council will be required if the facility is to begin and/or continue operation.

The Appellate Court has ruled that the Council has a statutory duty to seek input from and the expertise of other state agencies. See: CGS 16–50j(g). "The legislature clearly contemplated the involvement of other state agencies to supply information to the council in order to render its decision on the granting or denying of a certificate." *Town of Preston v. Connecticut Siting Council,* supra at 491. It is clearly within the statutory authority of the Council to grant a certificate subject to specific conditions, including subsequent compliance with DEP standards and regulations. The court will not and can not "substitute [its] judgement for that of the council regarding the adequacy and reasonableness of the condition[s]". Id., at 492.

*9 The plaintiffs also suggest that the Council should not postpone the establishment of certain environmentally related procedures until after the issuance of a Certificate because it will deprive the plaintiffs of the opportunity to participate in and contribute to that decision making process which affects many local concerns. In point of fact, the Council has not excluded the parties from participating in many of the procedures designed to satisfy its conditions. Quite the contrary is true.

The parties are to be given the opportunity to comment upon and make recommendations concerning the testing procedures to be developed and approved by the Council with respect to the demolition/recycled wood to be burned (Decision and Order). In addition, the Council ordered

the applicant to submit a detailed Development and Management Plan to and secure the approval of the Council for dealing with a number of concerns raised by the plaintiffs. Among other items the plan must include a detailed final site plan, taking into account setbacks for the wetlands and the Still River. It must include plans and details for dealing with landscaping, soil erosion, sedimentation, litter, noise, odors, aquifer protection and traffic. Contrary to the assertions of the plaintiffs, these are conditions which the plaintiffs will have an opportunity to review and on which they will have a right to be heard. "The proposed D & M plan shall be provided to parties and intervenors, if service is requested, who may submit comments to the Council within 20 days." (Decision and Orders).

The court finds that the conditions imposed by the Council were proper and appropriate.

D. *Adequacy of the Record.*

Prior to granting a Certificate, the Council is required, pursuant to Section 16–50p(a) of the General Statutes, to find and determine the nature and *probable* environmental impact of the proposed facility. (emphasis added). Within the context of that environmental impact analysis and evaluation, the Council must specify every significant adverse effect and conflict with state policies which it finds, if any, and then indicate why said significant adverse environmental effect is not sufficient to deny the issuance of the Certificate.

The plaintiffs claim that the record before the Council was inadequate and deficient in a number of areas (plaintiff's brief p–28–29) and because of these alleged inadequacies in the record they allege that the Council did not and/or could not find and determine the nature of the probable environmental impact, including a determination of any significant adverse effects, of the proposed facility. The court disagrees and finds that the plaintiffs have not met their burden of proof as to this issue.

The court finds that the Council did consider each of the areas of environmental concern mandated by statute [2] and indeed made findings concerning those issues. The court further finds that the citations of the Council at the end of each of its findings refers to substantial evidence in the record which if believed and accepted by the Council fully support those findings. Specifically, the Council considered the natural environment (Findings 32–36 and 51–58); ecological balance (Findings 37–40, 51–58 and 116–128); public health and safety (Findings 50, 70–73, 131–143, 146–150 and 198–237); scenic, historic and recreational matters (Findings 238 and 244); forests and parks (Findings 116 and 119–125); air and water purity (Findings 103–109 and 151–197); fish and wildlife (Findings 242–243).

***10** Additionally, the Council adequately considered the availability, use and discharge of water at the facility and the resulting effect upon the wetlands and Still River. For example, the Council found that the facility would need up to 52,000 gallons of water per day during times of peak usage. (Findings 87 and 91). It found that Bio–Gen could obtain the water it needs from the city water supply and from on site wells. (Findings 92–96). It made findings concerning the impact of the facility upon the wetlands (Findings 51–58) as well as water usage (Findings 87–91), water supply (Findings 92–101) and water discharge (Findings 106–109 and 204).

While no hydrogeologic study was conducted of the proposed site, the Council did consider the possible effect of using on site wells (Findings 99–101), and it found that there *would* be an impact upon the Still River during seasonal low flow periods, and that the use of on site wells *could* cause conflict with existing ground water allocations. (emphasis added) (Finding 101). Thus, while there were findings of possible adverse environmental effects, there were no findings of *significant* adverse effects resulting from the construction and operation of the facility. (emphasis added).

It is of significance and importance that as an expression of its awareness of the possible impact of water usage upon the surrounding environment, and as a means of balancing the protection of the environment with the need for the facility, the Council ordered in its Decision and Order that "[t]he Still River, adjacent wetlands, and the site aquifer are not to be substantially affected by the operation of the facility." This is not a finding, it is a condition of operation, a violation of which would subject Bio–Gen to the sanctions cited in the preamble to the Decision and Order of the Siting Council.

Additional concerns raised by the plaintiffs which the court finds were adequately considered by the Council and supported by substantial evidence in the record

involve the burning of demolition wood (Findings 116–118, 126–128, and 131–143), air quality (Findings 151–197), noise (Findings 223–235), and the effect upon the forests (Findings 14–19, 23–24, 119–128, and 132). The fact that testimony concerning noise resulting from the facility was not presented by an acoustical engineer is of no evidentiary significance.

The record is clear that the Council did not find any *significant* adverse environmental effects that would result from the construction or operation of the facility, as that facility was ultimately authorized by the Council. Had it found such a significant adverse effect it would have been required to specify and address that finding. Indeed, the Council would not have been permitted to issue a Certificate had it found any such significant adverse environmental effect, unless it was able to state and justify why any such effect was not sufficient to deny the certificate. C.G.S. Section 16–50p.

*11 There is no requirement within the statute that the Council make an affirmative finding of no significant adverse environmental effect. It is only upon finding that such effect exists that the Council is required to further address the issue. Since administrative agencies are presumed to have acted legally and properly, *Murach v. Planning & Zoning Commission,* 196 Conn. 192, 205 (1985); *Breccioroli v. Commissioner of Environmental Protection,* 168, 349, 356 (1975), the burden is upon the plaintiffs to prove that the Council acted illegally in this instance. The court finds that the plaintiffs have not met this burden.

The plaintiffs also complain that no consideration of alternate sites was undertaken by Bio–Gen or the Council. Actually, the Council did make findings concerning site selection and the record contains substantial evidence concerning the consideration and selection of sites by Bio–Gen for the proposed facility. (Findings 29–31; Bio–Gen application). However, since the Council did not find a significant adverse environmental impact resulting from the construction or operation of the facility at the proposed site, there was no need to consider additional sites.

In administrative appeals, the court cannot substitute its judgement for that legally vested in the agency. The court's function is to determine on the record whether there is a logical and rational basis for the decision or whether, in the light of the evidence, the agency has acted illegally or in abuse of its discretion. This is a fundamental limitation on the court. *Buckley v. Muzio,* 200 Conn. 1, 3 (1986); See, Conn.Gen.Statutes section 4–183(g). The burden of proving illegality or an abuse of discretion is on the party asserting it. *Woodbury Water Co. v. Public Utilities Commission,* 174 Conn. 258, 260 (1978).

The court is limited to determining whether the record reflecting the evidence which was before the Council supports the conclusions of the Council. The weight and credibility to be given to testimony and evidence presented before the agency is for the agency to evaluate. The court cannot substitute its judgement for that of the agency in the area of the credibility or the weight to be given to the evidence. *Huck v. Inland Wetlands & Watercourse Agency,* supra at 539–41; *C & H Enterprises, Inc. v. Commissioner of Motor Vehicles,* 176 Conn. 11, 12 (1978). The agency is entitled to accept that which it reasonably finds persuasive and reject that which it finds unpersuasive in reaching its decision. *Briggs v. State Employee's Retirement Commission,* 210 Conn. 214, 217 (1989).

After reviewing and considering the Council's more than two hundred findings, together with its Opinion and the stringent conditions and requirements in its Decision and Order, the court finds that the Council gave careful consideration to each of the possible effects upon the environment as required by statute and as raised by the plaintiffs. The findings of fact with respect to these environmental concerns are substantially supported by the record as referenced by the Council after each finding.

E. *Public need.*

*12 The plaintiffs claim that the facts do not support the finding by the Council that building and operating the proposed facility will meet a public need as provided under Section 16–50g of the General Statutes. They argue that it has not been shown that there is a need for the electricity to be generated and that said electricity would not be produced at the lowest reasonable cost to consumers. This narrow construction of the term "public need" was recently rejected by the Appellate Court in *Town of Preston v. Connecticut Siting Council,* 20 Conn.App. 474, 485 (1990), cert. denied 214 Conn. 803 (1990).

Section 16–50g of the General Statutes states that the legislative purpose in enacting the Public Utility

 © 2018 Thomson Reuters. No claim to original U.S. Government Works.

Environmental Standards Act ("PUESA") under which the Council was created is to "... provide for the balancing of the needs for adequate and reliable public utility services at the lowest reasonable cost to consumers with the need to protect the environment and ecology of the state ... [and] encourage research to develop new and improved methods of generating, storage and transmitting electricity and fuel". A review of the Findings, Opinion, and Decision and Order of the Council clearly reveals that the Council considered not only the future need for generating additional electricity, but also gave carefully consideration to the "broad mandate of PUESA to protect the environment, ... [to restrict] the number and size of electric facilities to be built in this state ... [and employ] resource recovery facilities to eliminate solid waste.". *Town of Preston v. Connecticut Siting Council,* supra at 489.

In the instant case the Council determined that "[t]he project would help to diversify the State's energy mix, and reduce Connecticut's dependence on imported oil by over 9.7 million gallons a year, consistent with the Council's charge in 16–50g to foster new and improved energy resources." (Opinion). Additionally, the Council concluded that the use of wood chips from recycled wood would reduce the need to deposit such materials in over-burdened landfills throughout the state.

While it is true that the cost to the taxpayers may be greater than the cost of producing electricity by other means (Finding 15), the Council was entitled to accept the determination of the DPUC that it is reasonably likely that the taxpayers would not be adversely affected over the term of the contract with Bio–Gen (Finding 19). The Council found that the facility had been approved by the DPUC as part of a 450 MW block of private power projects (Block One) which it was originally estimated would be needed to meet electricity generation shortfall in the mid-1990's. It was subsequently determined that the Block One electricity would not be needed until the year 2001. (Findings 14 and 27).

The Council also determined that the lead time for the construction of base-load electrical generating plants is between six and ten years. (Finding 27). It would neither be prudent nor in the public interest to wait until the actual need for additional electricity is at hand to begin construction of new generating facilities. Consequently, as has been stated by the Appellate Court, this court will not substitute its judgement for that of the Council regarding the timing of making a facility operational when the council's decision is supported by substantial evidence in the record. *Tanner v. Conservation Commission,* 15 Conn.App. 336, 339 (1988). See *Preston,* supra at 490.

*13 The court finds that the decision of the Council as to need is supported by substantial evidence contained in the record, specifically as cited by the Council in support of its own findings.

CONNECTICUT ENVIRONMENTAL PROTECTION ACT

The plaintiffs further allege that the Council failed to fulfill the requirements of the Connecticut Environmental Protection Act ("CEPA") pursuant to Section 22a–19(b) of the General Statutes in that if did not make a determination of whether there would be any unreasonable harm to the environment, and whether there is a feasible and prudent alternative available to prevent such harm from occurring.

Section 22a–19(b) imposes a duty upon an agency "to consider whether the proposed project does or is reasonably likely to cause unreasonable pollution ... [or destroy] the public trust in the air, water or other natural resources of the state, and, if so, to reject the project so long as, considering all the relevant circumstances there is a reasonable and prudent alternative." *Mystic Marinelife Aquarium v. Gill,* 175 Conn. 483, 499 (1978).

The legislative act creating the Connecticut Siting Council is the Public Utility Environmental Standards Act. One of the fundamental functions of the Council under this Act is to protect the environment to the extent possible while satisfying the public need for adequate electrical power. That is why the applicant, Bio–Gen, was required to obtain from the Council a Certificate of Environmental Compatibility and Public Need before building and/or operating the proposed facility. In issuing the Certificate the Council necessarily concluded that building and operating the facility, in accordance with the modifications and subject to the conditions imposed by the Council will be compatible with, and will not unreasonably harm, the environment.

There is no requirement that the Council make an affirmative statement of no environmental impact or that it consider alternatives to the proposed facility unless it finds that the facility will cause unreasonable pollution or harm to the environment. The only requirement is that the Council consider these matters. *Mystic Marinelife Aquarium v. Gill,* supra.

The court finds that the Council did carefully consider and make findings concerning the effect of the facility upon the environment, including its effect upon the air and water, as required under the CEPA. Each of the areas of environmental concern has been addressed by the court, supra. Because the record reflecting the concern and findings of the Council with respect to each of these environmental issues is substantial, and because they fully support the decision of the Council to issue a Certificate, this court will not and can not second guess that decision.

DUE PROCESS

The plaintiffs allege that their due process rights have been violated because they were denied the right to cross-examine witnesses, present evidence, secure information necessary to be able to meaningfully participate in the hearings before the agency, rebut "extra record evidence", and be informed of the reasons why the zoning commission orders were revoked. (Plaintiff's brief p. 42). The court disagrees.

***14** Each of these allegations has been addressed by the court elsewhere in this decision and each has been found to be without merit. For the reasons stated, supra, and after a review of the entire record, the court finds that the plaintiffs have not satisfied their burden of proof concerning their claims of being denied due process by the Siting Council.

CUMULATIVE EFFECT OF THE DECISIONS OF THE SITING COUNCIL

During oral argument before this court on June 7, 1991 counsel for the plaintiffs acknowledged that the Connecticut Appellate Court in *Town of Preston v. Connecticut Siting Council,* supra, addressed and resolved many of the individual issues being raised in this appeal. Nevertheless, the plaintiffs urge this court to look beyond the resolution of those individual issues and focus upon the cumulative effect of the procedures and decisions of the Council. In other words, the plaintiffs argue that even if the court should find for the defendants on the individual issues raised in the appeal, the court can and should find that the totality of the decisions and procedures used by the Council in the instant case constituted an abuse of discretion requiring reversal. The plaintiffs cite no authority to illuminate of this somewhat unorthodox approach and consequently the court declines to travel down this dimly lit path. The decisions and procedures of the Council are supported by the record and are in conformity with the holdings of *Preston* and other cited decisions of our Appellate and Supreme Courts.

The court finds insufficient evidence to conclude that the Siting Council acted improperly or abused its discretion in this matter.

The appeal is dismissed.

All Citations

Not Reported in A.2d, 1991 WL 188815

End of Document

© 2018 Thomson Reuters. No claim to original U.S. Government Works.

2002 WL 442383
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut.

TOWN OF MIDDLEBURY et al.,
v.
The CONNECTICUT SITING COUNCIL et al.

No. CV010508047S.
|
Feb. 27, 2002.

Synopsis
Town, citizens group, and environmental organization appealed declaratory ruling by the Siting Council concerning electric generating facility in adjacent town. The Superior Court, Judicial District of New Britain, Cohn, J., held that: (1) limited liability company could hold certificate of environmental compatibility and public need and was not required to apply for transfer to its parent corporation; (2) Council was not required to hold a hearing when approving the development and management plan to decide whether the plant should have been moved; (3) the Council could approve the use of additional water trucks when the supply of natural gas to electric generating facility was suspended.

Appeal dismissed.

West Headnotes (5)

[1] **Declaratory Judgment**
Appeal and Error

Town contiguous to town in which Siting Council permitted an electric generating facility was aggrieved by and, therefore, entitled to appeal Council's declaratory ruling against the town; the town represented the public interests of its inhabitants and suffered an injury due to its issues with the Council's views on who was the proper certificate holder, with the procedure leading to the location of the facility, and with the increased truck traffic.

Cases that cite this headnote

[2] **Electricity**
Generating Facilities in General
Electricity
Environmental Considerations in General

Limited liability company could hold certificate of environmental compatibility and public need for the construction, maintenance and operation of an electric generating facility and was not required to apply for transfer of the certificate to its parent corporation. C.G.S.A. §§ 16-50i(c), 16-50k(a), 16-50k(b).

1 Cases that cite this headnote

[3] **Electricity**
Generating Facilities in General

Siting Council was not required to hold a hearing when approving the development and management plan to decide whether the electric generating facility should have been moved southerly from its initial location; the Council did not provide such a condition in final decision that had been affirmed by the Superior Court and did not condition the permit on relocation.

Cases that cite this headnote

[4] **Electricity**
Environmental Considerations in General

Siting Council's final decision that the Superior Court had affirmed in connection with development and management plan for electric generating facility could not be challenged in connection with Council's decision not to make a move to the south a condition of the certificate of environmental compatibility and public need.

2 Cases that cite this headnote

[5] Electricity
Generating Facilities in General

Siting Council did not abuse its discretion in approving in the development and management plan the use of additional water trucks when the supply of natural gas to electric generating facility was suspended and it burned oil.

Cases that cite this headnote

MEMORANDUM OF DECISION

HENRY S. COHN, Judge.

*1 The plaintiffs[1] appeal from a March 1, 2001 declaratory ruling issued by the defendant, Connecticut Siting Council ("the siting council"), relating to a power plant proposed to be built in the town of Oxford by the defendant, Towantic Energy LLC ("Towantic"). This appeal is authorized by General Statutes §§ 4-176(h) and 4-183 of the Uniform Administrative Procedure Act ("UAPA").[2]

The administrative record provides the following relevant facts. On December 7, 1998, Towantic filed an application with the siting council for a certificate of environmental compatibility and public need ("certificate") for the construction, maintenance and operation of an electric generating facility primarily fueled by natural gas and to be located in Oxford, Connecticut. In the course of the proceedings, a predecessor of Citizens and Trout became parties and Middlebury became an intervenor. On June 23, 1999, the siting council issued its findings of fact, opinion, and decision and order granting a certificate to Towantic for the facility. (Return of Record ("ROR"), Item 1.)

The siting council found that the proposed project "can be developed in a manner to provide a clean and reliable source of electric generation, minimize community and environmental impacts, and provide economic benefits to the Town of Oxford and the State of Connecticut." (ROR, Item 1, Opinion, Docket No. 192, p. 5.) The opinion continued, "the Council will issue a Certificate for this facility, accompanied by orders including a detailed Development and Management Plan (D & M Plan) with elements designed to protect resources on site and mitigate impacts off site." (ROR, Item 1, Opinion, Docket No. 192, p. 5.)

The siting council in its decision and order approved, pursuant to General Statutes § 16-50p, Towantic's application to construct, operate, and maintain "a 512 MW natural gas-fired combined cycle facility." (ROR, Item 1, Decision and Order, Docket No 192, p. 1.) A certificate, as required by General Statutes § 16-50k, was issued to Towantic, subject to several conditions, including but not limited to: (1.) that the facility be constructed and operated by Towantic; (2.) that the project operate on natural gas, except during curtailment of natural gas when the project may operate on low sulfur fuel oil; and, (3) that Towantic shall develop an emergency response plan drafted in cooperation with local and state public safety officials. (ROR, Item 1, Decision and Order, Docket No. 192, p. 1.)

In addition, one of the elements of the D & M plan in the decision and order required Towantic to set forth:

> A final site plan showing all roads, structures and other improvements on the site. The final site plan shall, to the greatest extent possible, reduce the height of facility in conjunction with the shifting the proposed site, up to 500 feet south, to maximize placement of facility components within the existing field; preserve the existing natural vegetation on the site; and minimize impacts on inland wetlands.

*2 (ROR, Item 1, Decision and Order, Docket 192, p. 1.)

Another element in the D & M plan required Towantic to make:

> Provisions for adequate water supply while operating on oil and for adequate oil storage, unloading, and pumping facilities including tanker queuing and turn-around areas sufficient to allow for the arrival of four trucks per hour, to

 © 2018 Thomson Reuters. No claim to original U.S. Government Works.

> ensure continuous burn on oil for up to 720 hours per year during natural gas curtailment.

(ROR, Item 1, Decision and Order, Docket 192, p. 2.)

Citizens appealed from this decision and after a hearing, the Superior Court dismissed the plaintiff's appeal on November 14, 2000, concluding that substantial evidence supported the decision of the siting council. *Citizens for the Defense of Oxford v. Connecticut Siting Council,* Superior Court, judicial district of New Britain, Docket No. 497075 (November 14, 2000) (Satter, J.T.R.). Citizens then appealed to the Appellate Court but on May 19, 2001, the appeal was withdrawn. (ROR, Item 4.)

On or about October 20, 2000, Towantic filed its proposed D & M plan. (ROR Item 6.) On November 2, 2000, the plaintiffs petitioned for a declaratory ruling, requesting the siting council to determine, in relevant part: (1.) Whether Towantic was still effectively the certificate holder, or whether Calpine Eastern Corporation ("Calpine") improperly submitted the D & M plan; (2.) Whether the terms of the siting council's final decision were violated in the submitted D & M plan by the failure of the plant to be moved "up to 500 feet south" or whether the certificate was improperly amended; (3.) Whether the water supply plan in the D & M plan was unworkable and improperly submitted. (ROR, Item 8, pp. 1-2, 6-8.)

On March 1, 2001, the siting council approved the D & M plan and made the following relevant conclusions to the plaintiff's requests. First, the siting council rejected the claim that Towantic is not the certificate holder. The siting council determined that Towantic was a valid business entity, its business relationship with Calpine was not illegal and would not hinder enforcement, and Calpine was forthright in documenting its purchase of Towantic with plans to operate the facility under Towantic's name. Second, as to the 500 foot provision in the decision, the exact language was "to the greatest extent possible ... shifting the proposed site, up to 500 feet south, to maximize placement of facility components within the existing field ..." While it was claimed that in the proposed D & M plan the site was not moved to the south by 500 feet, the siting council believed the site compaction and reorientation of facility components in the D & M plan were in compliance with its decision. Third, the decision noted that accommodation had to be made for four trucks per hour delivering oil, if the natural gas supply was interrupted as well as adequate water supply. In the proposed D & M plan, Towantic added an additional four trucks per hour to bring in additional water supplies, due to the inability of the Heritage Water Company to meet Towantic's demand entirely. The additional truck traffic would not be excessive and would only occur infrequently when natural gas is not available.

*3 The plaintiffs again have appealed to this court from the siting council's decision and order on their request for declaratory ruling.[3] The court must first address the issue of aggrievement.[4] The standard for aggrievement has been stated by our Supreme Court as follows: "The fundamental test for determining aggrievement encompasses a well-settled twofold determination: first, the party claiming aggrievement must successfully demonstrate a specific personal and legal interest in the subject matter of the decision, as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the decision ... Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest ... has been adversely affected ..." (Brackets omitted; citations omitted; internal quotation marks omitted.) *New England Cable Television Assn., Inc. v. DPUC,* 247 Conn. at 95, 103, 717 A.2d 1276 (1998); see also *Bethlehem Christian Fellowship, Inc. v. Planning & Zoning Commission,* 58 Conn.App. at 441, 447, 755 A.2d 249 (2000) ("[s]tanding is not a technical rule intended to keep aggrieved parties out of court; nor is it a test of substantive rights ...") (citations omitted; internal quotation marks omitted).

[1] With respect to the town of Middlebury, the ten-term First Selectman of Middlebury and Director of Public Works, Edward B. St. John, testified at the hearing before this court that his town borders on Oxford and that the proposed power plant is just over the border. Middlebury as a contiguous town has issues with the siting council's views on who is the proper certificate holder, with the procedure leading to the location of the facility and with the increased truck traffic allowed under the D & M plan.

Based on his testimony, aggrievement is found for Middlebury. First, it has a specific personal and legal interest as "representative of the public interests of all

its inhabitants ..." *Milford v. Commissioner of Motor Vehicles,* 139 Conn. at 677, 681, 96 A.2d 806 (1953); *Guilford v. Landon,* 146 Conn. at 178, 179, 148 A.2d 551 (1959); see also *Cromwell v. Inland Wetlands & Watercourses Agency,* Superior Court, judicial district of Middlesex at Middletown, Docket No. 065192 (September 15, 1993) (Gaffney, J.) (10 Conn. L. Rptr. 92) (standing for two towns that border the regulated activities in question). As to the "injury in fact" requirement, there exists a possibility that Middlebury's interests, as stated by the First Selectman, may be affected due to the siting council's replies to the declaratory ruling, and this is sufficient injury under aggrievement law. [5]

Having resolved the issue of aggrievement, the court will next proceed to consider the merits of the case as raised by the plaintiffs. The court uses the following standard in evaluating the claims: "Judicial review of [an administrative agency's] action is governed by the Uniform Administrative Procedure Act [General Statutes § 4-166 et seq. (UAPA)] ... and the scope of that review is very restricted ... With regard to questions of fact, it is [not] the function of the trial court ... to retry the case or to substitute its judgment for that of the administrative agency ..." (Citations omitted; internal quotation marks omitted.) *MacDermid, Inc. v. Dept. of Environmental Protection,* 257 Conn. at 128, 136, 778 A.2d 7 (2001). "This substantial evidence standard is highly deferential and permits less judicial scrutiny than a clearly erroneous or weight of the evidence standard of review ... The burden is on the [plaintiff] to demonstrate that the [agency's] factual conclusions were not supported by the weight of substantial evidence on the whole record ..." (Citations omitted; internal quotation marks omitted.) *Id.,* at 136-37, 778 A.2d 7. "Even as to questions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion ..." (Internal quotation marks omitted.) *Id.,* at 137, 778 A.2d 7; see also *Assn. of Not for Profit Providers for the Aging v. Dept. of Social Services,* 244 Conn. at 378, 389, 709 A.2d 1116 (1998) (stating the rule in the context of review of a declaratory ruling).

*4 [2] The plaintiffs' first contention is that the siting council erred in not requiring Towantic to petition the siting council for a transfer of its certificate to Calpine. This argument is based upon an interpretation of General Statutes § 16-50k(a) providing that "no person" may develop a facility without a certificate from the siting council. Under General Statutes § 16-50k(b), a certificate may be transferred, subject to the approval of the siting council, to "a person who agrees to comply with the terms, limitations and conditions contained therein." The word "person" includes "any ... corporation, limited liability company, joint venture ... and any other entity, public or private, however organized." General Statutes § 16-50i(c).

The plaintiffs argue that Calpine's name should be on the certificate and Towantic should seek the approval of the siting council to transfer the certificate to Calpine. The plaintiffs allege that Towantic is merely a shell entity for the real party in interest, Calpine, which prepared the D & M plan. The court rejects this attempt to hold the siting council at fault for not analyzing the structure of a limited liability company after it has received a certificate through the application process. This would vary the explicit language of the statutes quoted above that allow a limited liability company to hold a certificate without limitation as a "person." It has been repeatedly held that the primary rule of statutory construction is that "[i]f the language of the statute is clear, it is assumed that the words themselves express the intent of the legislature; ... and thus there is no need to construe the statute." *Anderson v. Ludgin,* 175 Conn. at 545, 552, 400 A.2d 712 (1978); *Wrinn v. State,* 234 Conn. at 401, 405, 661 A.2d 1034 (1995); *Ferrato v. Webster Bank,* 67 Conn.App. at 588, 592, 789 A.2d 472 (2002). By statute, any limited liability company may become a certificate holder and is not automatically forced to apply for a transfer of the certificate to the parent entity.

The only reason given by the plaintiffs to require Towantic to transfer its certificate to Calpine, is the plaintiffs' concern that enforcement would become more difficult if the subservient entity is left as the operator, and not the ultimate owner. The law does not support this conclusion, as the state and local officials or the siting council may take any action they deem appropriate if Towantic violates its certificate. Enforcement would include seeking to revoke the certificate as well as applying remedies against Calpine. See, e.g., *Baston v. RJM & Associates,* Superior Court, judicial district of Hartford, Docket No. 593189 (June 4, 2001) (Beach, J.) (29 Conn. L. Rptr. at 646) (allowing an action against an individual partner of a limited liability company).

 © 2018 Thomson Reuters. No claim to original U.S. Government Works.

The siting council, based on the record as it existed in Docket Numbers 192 and 492,[6] fully answered the plaintiffs in its March 1, 2001 declaratory ruling: Towantic is a valid business entity, its relationship with Calpine is not illegal, and Calpine fully disclosed its relationship with Towantic to the siting council. Therefore, the court finds that the siting council properly ruled on this issue as raised in the request for a declaratory ruling.

*5 [3] The second issue raised by the plaintiff is that the siting council failed to hold a hearing when approving the D & M plan to decide whether the facility should have been moved southerly from its initial location. They contend that there should have been an amended certification process pursuant to § 16-50*l*(d). However, under General Statutes § 16-50p(d): "If the council determines that the location of all or a part of the proposed facility should be modified, it may condition the certificate upon such modification, provided the municipalities, and persons residing or located in such municipalities, affected by the modification shall have had notice of the application as provided in subsection (b) of section 16-501." This provision is a link to § 16-501(d).

[4] In its final decision (Decision and Order, Docket No. 192), (ROR, Item 1, pp. 1-4), the siting council did not provide such a condition. Instead, the siting council added to its order a directive that the D & M plan contain a final site plan, shifting the proposed site, to the greatest extent possible, up to 500 feet south. (ROR, Item 1, pp. 1-2.) The decision and order of the siting council was affirmed by this court and cannot now be challenged on its decision not to make the move to the south a condition of the certificate. Since the siting council did not condition its permit on relocation, or require further notice or a hearing on location in its order, there was no error in the siting council's merely reviewing the proposed D & M plan for compliance.[7] The siting council logically conclude that the D & M plan sets forth an attempt to contract the facility and to retain existing vegetation as a boundary line, and that this satisfies the requirements of the final decision regarding the D & M plan.

[5] The plaintiffs' final issue is that the D & M plan exceeded its scope by approving Towantic's plan to increase truck traffic to the site. Clearly, the D & M plan functions to "fill up the details" in the siting council's final decision. Cf. *State v. Stoddard,* 126 Conn. 623, 628, 13 A.2d 586 (1940) (legislature may delegate to agency to fill up details). The D & M plan cannot provide a substitute for matters not addressed during the application process. *Westport v. Connecticut Siting Council,* Superior Court, judicial district of New Britain, Docket No. 501129 (June 27, 2001) (Cohn, J.), appeal pending, S.C. Nos. 16600, 16601. Under analogous regulations of the siting council, the purpose of D & M plans for electric transmission lines and communications towers is to help "significantly in balancing the need for adequate and reliable utility services at the lowest reasonable cost to consumers with the need to protect the environment and ecology of the state." Regs., Conn. State Agencies §§ 16-50j-60, 16-50j-75.

Here, the decision and order, ROR, Item 1, p. 2, requires Towantic to set forth the means of bringing an adequate water supply to the site, at such time as the power plant must use oil for fuel. Towantic explains in the D & M plan that it cannot supply all water needs by the Heritage Water Company and must use truck water to complete the siting council's requirements. (ROR, Item 6, Tab D, p. 3.) Since the final decision provided for the transmission of water to the site, the siting council did not abuse its discretion in approving in the D & M plan the use of additional trucks to accomplish this directive. The siting council appropriately gave its approval noting that the use of water trucks would not be a great environmental burden and would only occur where the supply of natural gas was suspended.

*6 The court concludes that the siting council has not acted unreasonable, arbitrarily, illegally or in abuse of its discretion in its response to the request for a declaratory ruling.

Therefore, the plaintiffs' appeal is dismissed.

All Citations

Not Reported in A.2d, 2002 WL 442383

Footnotes

 © 2018 Thomson Reuters. No claim to original U.S. Government Works.

1 The plaintiffs are the town of Middlebury ("Middlebury"), Citizens for the Defense of Oxford ("Citizens"), Trout Unlimited, Inc., Naugautuck Chapter ("Trout"), William Stowell, and Mira Schachne.

2 The plaintiff's appeal is from the siting council's declaratory ruling in Docket Number 492, and not from Docket Number 192, approving Towantic's proposed development and management plan ("D & M plan"). (Second Amended, Verified Petition For Administrative Appeal, p. 2.) Towantic contends that the Siting Council did not respond at all to the plaintiffs' request for a declaratory ruling and therefore this administrative appeal is not allowed. Towantic suggests that the plaintiffs' avenue for review is to § 4-175 only, an action for declaratory judgment. The Siting Council's March 1, 2001 response, however, sufficiently replied to the plaintiffs' requests to be considered appealable. *Cf New Milford v. Commissioner of Environmental Protection,* Superior Court, judicial district of Hartford New Britain, Docket No. 547864 (September 19, 1995) (Maloney, J.) (15 Conn. L. Rptr. 571) (commissioner declined to rule as request for declaratory ruling was moot).

3 The plaintiffs raised issues other than the three fully set forth above in their request for a declaratory ruling and made allegations in their petition and amended petitions for an administrative appeal that involved issues other than these three. The plaintiffs only discussed the three issues in their brief, however, and did not discuss any additional issues; therefore, the court considers all other issues to have been abandoned. *Merchant v. State Ethics Commission,* 53 Conn.App. 808, 818, 733 A.2d 287 (1999).

4 The court only analyzes aggrievement under the classical test, and not under statutory aggrievement. Some of the plaintiffs intervened in Docket No. 192 under General Statutes § 22a-19 (environmental intervention). This appeal is taken, however, from the declaratory ruling issued in Docket No. 492, and not from Docket No. 192. Therefore, statutory aggrievement is irrelevant.

5 Given that one of the plaintiffs is aggrieved, it is unnecessary to make an extensive analysis of the other plaintiffs' aggrievement. *Protect Hamden/North Haven from Excessive Traffic & Pollution, Inc. v. Planning & Zoning Commission,* 220 Conn. 527, 529 n. 3, 600 A.2d 757 (1991); *Concerned Citizens of Sterling, Inc. v. Connecticut Siting Council,* 215 Conn. 474, 479 n. 3, 576 A.2d 510 (1990). The individual plaintiff Stowell lives in Middlebury, just across the border from Oxford and the proposed plant; the court finds him aggrieved because he raises the issue of the location of the plant in the D & M plan; Stowell is a member of Citizens and this gives Citizens organizational standing; Trout's concern involves the flow of the Pomperaug River and does not have specific personal and legal interest for aggrievement; and finally Schachne has only a general interest in the environment and does not satisfy the first requirement of the aggrievement test.

6 There is no requirement in the siting council's regulations or the UAPA that the siting council before approving the D & M plan hold further hearings on the matter of the relationship between Towantic and Calpine. See Regs., Conn. State Agencies § 16-50j-40(b) (discretionary to hold hearing in issuing declaratory ruling).

7 The plaintiffs rely on a transcript from the hearing in Docket Number 192 to argue what the siting council had in mind by its order on location. The court must rely only on the actual order, not what might have arisen during the hearing process. On reaching this conclusion, the court does not believe it necessary to address the defendant Towantic's motion to strike the transcript excerpt from the plaintiffs' brief. (Motion to Strike Evidence Outside the Record or, in the Alternative, to Supplement the Record dated January 30, 2002.)

End of Document

© 2018 Thomson Reuters. No claim to original U.S. Government Works.

Exhibit C

IN THE MATTER OF:

STORMWATER POLLUTION CONTROL PLAN
PROPOSED 20 MW SOLAR PHOTOVOLTAIC PROJECT
CANDLEWOOD MOUNTAIN ROAD
NEW MILFORD, CONNECTICUT
CANDLEWOOD SOLAR LLC – APPLICANT
MMI #1481-57

AFFIDAVIT

STATE OF CONNECTICUT	)	
	)	**ss: Cheshire**
COUNTY OF NEW HAVEN	)	

Ryan McEvoy and Edward A. Hart, being duly sworn, depose and say the following:

1. We are members of Milone & MacBroom, Inc., a professional engineering, landscape architecture, and environmental science firm with its principal office in Cheshire, Connecticut.

2. We are professional engineers licensed to practice in the State of Connecticut and by our experience are qualified to prepare and review applications for Stormwater General Permit (SWGP) for Discharge from Construction Activities.

3. At the request of the Town of New Milford, we have undertaken a preliminary review of the plans and technical documents related to the above-referenced project that have been submitted to the Connecticut Department of Energy & Environmental Protection (CTDEEP) in support of an application for a SWGP for the Discharges from Construction Activities. Our review focuses on the consistency of the plans with the CTDEEP *2002 Connecticut Guidelines for Erosion and Sediment Control* and the *2004 Connecticut Water Quality Manual*. The notice of the application appeared on the CTDEEP website on January 3, 2019. Prior to the filing, we had an opportunity to become somewhat familiar with the proposed development from the plans submitted to the Connecticut Siting Council in 2017.

4. From what we observed in plans submitted to the Siting Council, we fully expected to see an application for an individual permit to discharge since this project is quite unusual for Connecticut and beyond the intent of a SWGP where "... the category of discharges which involve the same or substantially similar types of operations, involve the same type of wastes, require the same effluent limitations, operating conditions or standards, and require the same or similar monitoring" (C.G.S Section 22a-430). The construction of a solar generation facility of this magnitude on steep slopes and where a significant area of core forest will be removed does not meet those criteria, in our opinion. An individual permit would allow for a more comprehensive review of the plans to assure that the waters of Connecticut will not be impaired as a result of uncontrolled erosion and sedimentation.

5. In the following review, we have addressed the practical issues of construction of a solar facility on this site based on our firm's experience in the design of similar projects in other states and our familiarity with the site from prior development applications on this property. The plans and data for our review include the following:

   - *Stormwater Pollution Control Plan, 20 MW (AC) Solar Photovoltaic Project Candlewood Mountain Road, New Milford, Connecticut,* prepared by Wood Environment & Infrastructure Solutions, Inc., dated December 19, 2018

   - *Plans entitled Candlewood Solar, 20 MW (AC) Solar PV Development, Candlewood Mountain Road, New Milford, Connecticut, For Construction,* prepared by Wood Environment & Infrastructure Solutions, Inc., dated December 19, 2018 (26 sheets)

6. The Candlewood Solar project will be constructed on a large site. The site where construction is proposed has steep slopes that average 10% to 15% with some slopes as steep as 25%. The underlying soils are compact upland soil formed over glacial till, typical of what is found on the hillsides elsewhere in New Milford. The soil infiltration rates for these soils are classified by the Natural Resources Conservation Service as being slow to very slow. They are also prone to erosion due to being fine grained. There are several special wetlands on the property including three vernal pools as well as state special concern and threatened amphibians that are sensitive to water quality impacts. There are no construction activities proposed directly in the wetlands, but there are activities in the upland review area that could impact/impair water quality. Except for a small area of hayfields, construction will occur in wooded areas of the property. Overall, approximately 83 acres will be disturbed, and approximately 54 acres of core forest land will be clear cut to allow for the installation of the solar array and the transmission line connecting to the Rocky River substation east of the site.

7. Our observations are divided into three broad categories: the adequacy of the plans and specifications to allow a contractor to implement the site improvements without causing erosion and sedimentation and having impacts on the sensitive natural resource systems located on and downgradient of the site; the adequacy of the stormwater management measures including the underlying assumptions that serve as the basis of the design; and the construction phasing plan.

8. The plans submitted to CTDEEP are represented as being "For Construction." The plans are not suitable for construction, in our opinion, because they lack detail specific to the conditions on this subject site. Note the following:

   8.1 Based on our experience with the design of similar facilities, it is customary engineering practice to provide site layout plans with appropriate dimensions showing the precise limits of clearing and the location of all improvements, grading plans having 2-foot contour intervals showing existing and proposed finished grades including what will be beneath the solar arrays, and detailed drainage plans showing the precise slope sizes and inverts of pipes and other structures. This information is in addition to the required erosion and sedimentation control plans. Without having refined plans, the impacts of the proposed development cannot be adequately assessed.

8.2 The project calls for the clearing and grubbing of the site in order to install the solar arrays, access drives, and other related facilities. However, except for some drainage swales and other drainage improvements located on the perimeter of the disturbed site (83.4 acres), there are no grading plans that show how the topography will be regraded once the existing vegetation and stumps have been removed and prior to restoration and the implementation of site improvements.

8.3 The site construction details included in the plans are generic, accompanied by standard tables. The critical details related to drainage structures have not been customized to be applied to this site and rely on field interpretation during construction.

8.4 In reviewing other solar installations and based on our experience, the ratio between the panels and the space between arrays is approximately 50/50 to allow for adequate maintenance and provide for sunlight for the vegetation to grow beneath the panels. The plans show that the solar arrays are separated by aisles having a width as narrow as 5 feet, which is too narrow to allow maintenance and promote a healthy vegetative community. Moreover, it will cause the vegetation in the aisles and beneath the panels to be shaded, thus affecting the long-term sustainability and quality of the vegetation.

9. The stormwater analysis presented by the applicant is fundamentally flawed as noted below:

9.1 The plans are based on outdated rainfall data. Both CTDEEP and the Connecticut Department of Transportation (CTDOT) require the use of rainfall precipitation data from National Oceanic and Atmospheric Administration (NOAA) Atlas 14, not TP-40. The NOAA Atlas 14 rainfall data is 15% to 20% higher than the old data in TP-40 and would have a significant impact on the outcome of the modeling and the actual design.

9.2 The *HydroCAD* model output provided in the Stormwater Pollution Control Plan indicates the use of infiltration in the design of the proposed sand filters. However, it does not appear that in-situ soil testing has been performed to determine if surface sand filters are an acceptable stormwater practice for the site.

9.3 The CTDEEP *Stormwater Quality Manual* provides guidelines for stormwater filtering practices that have not been followed in the proposed design. The manual states that filtering practices are designed as offline systems to treat the water quality volume and bypass larger flows. Also, the manual recommends the Water Quality Volume should be diverted into a pretreatment sediment forebay or settling chamber to reduce the amount of sediment that reaches the filter. The proposed design directs all of the runoff to the surface sand filter with no pretreatment. The manual contains a list of the limitations of stormwater filters that pertain to the proposed design: 1) Pretreatment is required to prevent filter media from clogging; 2) Frequent maintenance is required; 3) Surface sand filters are not feasible in areas of high groundwater; 4) Surface sand filters should not be used in areas of heavy sediment loads; 5) Surface sand filters provide little or no stormwater quantity control; and 6) Surface and perimeter filters may be susceptible to freezing. The design of the proposed stormwater management needs to be designed with greater attention to site conditions.

9.4 It is appropriate to assume a meadow coverage condition for the proposed conditions *HydroCAD* model only if continuous vegetation is permanently established and maintained under the solar panels. However, it is expected that the new vegetation will struggle to grow under the panels due to the density, size, and short height of the panels in relation to the ground. The only possible portion of the site where the arrays are proposed that could have a continuous meadow coverage would be the open space in between the panel rows that are illustrated to be as narrow as 5 feet. The hydrologic computations need to be revised to assume a poorer ground coverage under the proposed solar panels. This is likely to result in the need for stormwater detention that is not part of the plans as now presented.

9.5 The postdevelopment peak discharge rates for Points of Analysis 5 and 6 show an increase from the predevelopment conditions. A technical explanation as to why these increases will not cause negative impacts downstream should be provided.

9.6 At present, much of the runoff from the western portion of that site that drains to abutting properties to the east does so in an even, shallow, concentrated flow. The introduction of the spillway outlets will result in runoff being consolidated and concentrated in a few distinct locations. This will fundamentally change the nature of the discharge from the subject parcels downgradient and could result in long-term risk of erosion and damage to downgradient parcels. This condition also exists on the eastern side of the parcel where runoff is concentrated and not spread out in a manner more consistent with existing conditions.

9.7 Design computations for the drainage swales and culverts have not been provided to demonstrate that they are adequately sized to convey the contributing stormwater runoff.

9.8 There are no supporting calculations demonstrating the velocity of runoff that is expected at the outlets of the basins.

9.9 The use of sheet flow in the time of concentration calculations where solar panels are proposed may not be a reasonable expectation given the concentrated nature of the runoff from the panels themselves. The runoff generated from the drip line of the panels will travel downgradient in a manner more consistent with shallow concentrated flow.

9.10 The grading of the driveway from Candlewood Mountain includes riprap swales along both sides of the road, with runoff directed to sand filter 7C. The uphill swale appears to simply discharge across the driveway to the sand filter. The uphill swale in particular is likely to convey significant flows that will cause erosion across the driveway in an unprotected manner. Also, there does not appear to be any supporting calculations on the design of the roadside or other swales on site.

9.11 The roadway swales ultimately discharge into two 18-inch culverts beneath the driveway that will channelize the flow and result in point discharges that currently occur on site. Also, the 18-inch culvert along the road is shown within the town right-of-way requiring approval from the New Milford Public Works Department. Calculations for the 18-inch culverts have not been provided.

9.12 The riprap spillway depth is not specified for the sand filter details. Assuming that the outflow from the spillway is calculated to begin at the crest and not the bottom of the riprap, the basins will begin to drain at the interface between the earth embankment and the bottom of the riprap, significantly reducing the effective storage within the basins.

9.13 The berms of the sand filters are shown at a 2:1 slope. Recommended slopes on constructed berms generally require an average slope of 2.5 between the inside and outside slope of the berm.

9.14 Sand filter 7C does not include a berm as shown in the calculations and merely drains from elevation 726 to 724.

9.15 The plans call for a narrow sand filter strip within the bottom of some sand filter basins. The soil media should be placed within the entire bottom of the sand filters.

9.16 Water Quality Basins 2A, 2B, 4A, and 4B are proposed on existing grades approaching 25% in grade, resulting in significant grading along the property line. These basins need to be relocated upgradient to flatter existing slopes that are more suitable for construction of stormwater control features.

9.17 Portions of the site grading, drainage, and site improvements are shown directly against property lines and the town right-of-way. The submitted documents indicate that the property lines are based on tax maps and not based on surveyed property lines. Assessor's mapping is approximate and should not be used as a basis for design of construction plans particularly when activity is proposed right up to a property line. An A-2 boundary survey should have been completed prior to submission of the SWGP application.

9.18 The grading plan for basin 1A requires the installation of a constructed berm that will impound stormwater up to a couple feet in depth beneath portions of the solar panels. Based on the limited area of sand filter that is shown only in a small portion of the area impounded by the basin nearest to the eastern berm, extended periods of standing water may exist beneath panels after a rain storm.

10. The phasing plan described in the Stormwater Pollution Control Plan is simplistic and does not adequately address the potential erosion and sedimentation that should be anticipated from the clearing of 83.4 acres on a steep hillside. Note the following:

10.1 The plans do not clearly show how no more than 5 acres will be disturbed before stabilization and prior to the installation of the panels.

10.2 The plan states that the solar array will be installed after vegetative cover is "initiated," but there is no metric for determining when the soil has been stabilized.

10.3 The plans call for the clear cutting of trees as one continuous operation leaving the stumps in place. Such forest operations can cause soil erosion, but the applicant is not proposing to install erosion control measures until after the clearing operation is finished.

10.4 The second phase of the operation calls for the grubbing (removal of stumps) to be done in 5-acre increments, but the location of those "plots" have not been clearly defined; this will be left to field survey at the time of construction. Furthermore, the method of grubbing has not been presented. If not performed with appropriate equipment, there is likely to be a loss of topsoil and an increase in the potential for erosion on the steep slopes. It is the applicant's intention to perform the operations in a continuum in discrete and separate disturbance plots.

10.5 Temporary seeding is proposed in areas that will be disturbed by subsequent construction activity with permanent seeding occurring at a later time. It is not clear how, when, and where permanent seeding will occur.

10.6 It is not appropriate to assume that once germination occurs that the land is stabilized and the 5-acre phase is ready for the installation of foundations. It is our experience on sites where grass needs to be established prior to having activity on the site that it takes a substantial period of time before sod becomes adequately established. Permanent seed, which should include drought and shade-tolerant species, takes 3 weeks or so to germinate and takes months, not weeks, to develop a root system that can withstand traffic. The actual time for turf establishment depends on the time of year that seed is placed, temperature, and moisture. The turf needs to be mowed to promote density. In this instance, we would expect a full growing season for the grass to become fully established.

10.7 As described in the plan, the foundations for the solar arrays will be ground screws that, in our experience, are installed using a skid-steer vehicle (a Bobcat). The movement of such equipment will tear apart the grass, likely resulting in erosion unless the grass is fully established.

10.8 The phasing plan attempts to break up the stabilization and construction of the site based on contributing watersheds. This does not seem to be a practical means to construct the site, particularly given the potential of subwatersheds being changed or modified as a result of ongoing construction activities. Sediment control measures including sediment traps and diversion swales should be installed and in place in phases immediately adjacent to phases that are under active construction to ensure that downgradient protections are in place should the topography not precisely match what is shown on the plans or if construction activities divert runoff across the estimated watershed limits.

10.9 The temporary sediment traps (TST) are shown on the plans in the identical manner that that sand filter/water quality basins are shown. The supporting calculations shown on the details sheets includes bottom elevations of the TSTs that are up to 3 feet below the *bottom* of the sand filter, well below the finished grade. The sediment and erosion control plans should reflect the grading of the TSTs shown in the supporting calculations.

10.10 Long slopes several hundred feet in length (as much as 700 feet) with average slopes exceeding 10% of disturbed exposed soil are proposed prior to any sediment control measures. Unprotected long and steep slopes represent a significantly higher risk of erosion. Long steep slopes are required to be broken up by benching, terracing, or diversions to avoid erosion problems (pages 3 through 7 of the *2002 Connecticut Guidelines for Erosion and Sediment Control*). Detailed site grading plans should be provided to show these site modifications.

10.11 The sediment barrier shown on the perimeter of the site will channelize and direct runoff to the low points along the slope, concentrating runoff from sediment trap outlets. The sediment barrier/silt fence locations need to be placed in a manner that will not result in channelizing the discharge from the basins.

10.12 Soil stockpile locations are not shown.

10.13 Much of the clearing and installation of overhead wires occur on a slope that exceeds 25% in grade. While the activities proposed in that area are intended to be minor in nature, disturbed soil on a slope this steep will require temporary diversions and at least temporary erosion control matting to allow for vegetation to become established.

10.14 There are no long-term stabilization measures shown along the drip line of the panels. Particularly in areas exceeding 10% in grade, there exists the potential for erosion of the soil, which over time will result in increased sediment loads to downgradient areas.

11. In summary, the plans submitted to CTDEEP are inadequate and lack the necessary information to assure that there will not be erosion and sedimentation caused by the construction activities that could impact the waters of the state. More importantly, disturbing 83 acres of steep woodland is an unusual phenomenon in Connecticut, something that was probably not contemplated when the SWGP regulations were adopted. Due to the brief time available for public comment, the focus of our preliminary review on behalf of the Town of New Milford has been limited. We believe that it would be appropriate, prudent, and necessary for the CTDEEP to determine that this proposal does not meet the criteria for a general permit and instead require an individual permit in order to allow for a more extensive review of these plans and any subsequent revisions thereto.

STATE OF CONNECTICUT RYAN J MCEVOY No. PEN.0025786 LICENSED PROFESSIONAL ENGINEER

Ryan McEvoy, PE
Lead Project Engineer, Civil

Dated: 1/14/19 Cheshire, CT

STATE OF CONNECTICUT EDWARD A. HART No. 15502 LICENSED PROFESSIONAL ENGINEER

Edward A. Hart, PE, Vice President
Director of Civil Engineering

Dated: 1-14-19 Cheshire, CT

1481-57-j1419-ltr

Exhibit D

22a-00--0430--bK.Doc
Showing 1 of 1 CGA document(s) retrieved

Sec. 22a-430b. General permits. Certifications by qualified professionals. Regulations. (a)(1) The Commissioner of Energy and Environmental Protection may issue a general permit for a category or categories of discharges regulated pursuant to section 22a-430, except for a discharge covered by an individual permit. The general permit may regulate, within a geographical area: (A) A category of discharges which involve the same or substantially similar types of operations, involve the same type of wastes, require the same effluent limitations, operating conditions or standards, and require the same or similar monitoring and which in the opinion of the commissioner are more appropriately controlled under a general permit; (B) stormwater discharges; or (C) a category of discharges not requiring a permit under the federal Water Pollution Control Act. Any person or municipality conducting an activity covered by a general permit shall not be required to apply for or obtain an individual permit pursuant to section 22a-430, except as provided in subsection (c) of this section. The general permit may require that any person or municipality initiating, creating, originating or maintaining any discharge into the waters of the state under the general permit shall register such discharge with the commissioner before the general permit becomes effective as to such discharge. Registration shall be on a form prescribed by the commissioner.

(2) When issuing a general permit pursuant to this section, the commissioner may require the submission of a certification made by a qualified professional. Any general permit requiring such certification shall specify: (A) The qualifications

necessary to define a qualified professional. Such qualifications may include education, training, experience or the attainment of a credential or license that such qualified professional must have obtained. If such qualifications do not require a license, the commissioner shall describe the rationale for such qualifications in a publicly available fact sheet or similar document when proposing the issuance of the applicable general permit pursuant to subsection (b) of this section; (B) the criteria to ensure that a qualified professional is independent and does not have a conflict of interest in making a certification, provided reasonable compensation for services rendered in making a certification shall not be deemed a conflict of interest; (C) the information to be reviewed or inspections to be conducted by such qualified professional as a basis for making a certification; (D) documents that shall be retained in connection with a certification; (E) the standards or requirements for an activity or project that a qualified professional must affirmatively determine have been met; (F) the terms of a statement to be signed by such qualified professional, including any conditions necessary for providing such statement; (G) any other information or condition deemed necessary by the commissioner regarding a certification; and (H) whether the submission of a certification shall be required when the person seeking coverage under the general permit is a governmental entity, including a federal, state or municipal entity. Nothing in this section shall authorize a qualified professional to engage in any profession or occupation requiring a license under any other provision of the general statutes without such license. The commissioner shall not require such certification if such certification would violate the federal Water Pollution Control Act or the federal Safe Drinking Water Act.

(b) Notwithstanding the provisions of chapter 54, a general permit shall be issued, renewed, modified, revoked or suspended in accordance with the standards and procedures specified for an individual permit, in accordance with section 22a-430 and any regulations adopted thereunder, except that (1) summary suspension may be ordered in accordance with subsection (c) of

section 4-182; (2) any proposed or final general permit and notice thereof may address persons or municipalities which are or may be covered by the general permit as a group, describe the facilities which are or may be covered by the general permit in general terms; and (3) upon issuance of a proposed or final general permit, the commissioner shall publish notice thereof in a newspaper of substantial circulation in the affected area. General permits shall be issued for a term specified by the permit and such terms shall be consistent with the federal Water Pollution Control Act and shall be subject to the provisions of section 22a-431. Such permits shall: (A) Describe the category of discharge regulated by the general permit; (B) specify the manner, nature and volume of discharge; (C) require proper operation and maintenance of any pollution abatement facility required by such permit; and (D) be subject to such other requirements and restriction as the commissioner deems necessary to fully comply with the purposes of this chapter, the federal Water Pollution Control Act and the federal Safe Drinking Water Act. Any construction or modification of a pollution abatement facility or disposal system which is undertaken pursuant to and in accordance with a general permit shall not require submission of plans and specifications to or approval by the commissioner, unless required pursuant to the terms of the general permit.

(c) Subsequent to the issuance of a general permit, the commissioner may require a person or municipality initiating, creating, originating or maintaining any discharge which is or may be authorized by a general permit to obtain an individual permit pursuant to section 22a-430 if the commissioner determines that an individual permit would better protect the waters of the state from pollution. The commissioner may require an individual permit under this subsection in cases that include but are not limited to the following: (1) When the discharger is not in compliance with the conditions in the general permit; (2) when a change has occurred in the availability of a demonstrated technology or practice for the control or abatement of pollution applicable to the discharge; (3) when effluent limitations and conditions are promulgated by the United States Environmental Protection Agency or established by the commissioner under

section 22a-430 for discharges covered by the general permit; (4) when a water quality management plan containing requirements applicable to such discharges is approved by the United States Environmental Protection Agency; (5) when circumstances have changed since the issuance of the general permit so that the discharger is no longer appropriately controlled under the general permit, or a temporary or permanent reduction or elimination of the authorized discharge is necessary; (6) when the discharge is a significant contributor of pollution, provided the commissioner, in making this determination, may consider the location of the discharge with respect to waters of the state, the size of the discharge, the quantity and nature of the pollution discharged to waters of the state, cumulative impacts of discharges covered by the general permit and other relevant factors; or (7) when the requirements of subsection (a) of this section are not met. The commissioner may require an individual permit under this subsection only if the affected person or municipality has been notified in writing that a permit application is required. The notice shall include a brief statement of the reasons for the commissioner's decision, an application form, a statement setting forth a time for the person or municipality to file the application, and a statement that on the effective date of the individual permit the general permit as it applies to the individual permittee shall automatically terminate. The commissioner may grant additional time upon the request of the applicant. If the affected person or municipality does not submit a complete application for an individual permit within the time frame set forth in the commissioner's notice or as extended by the commissioner in writing, then the general permit as it applies to the affected person or municipality shall automatically terminate. Any interested person or municipality may petition the commissioner to take action under this subsection.

(d) (1) A qualified professional shall ensure that any certification submitted pursuant to this section complies with the general permit that requires such certification. Compliance with a general permit shall include any matter specified in such permit pursuant to subdivision (2) of subsection (a) of this

section. The commissioner shall accept a certification when submitted with a registration for a general permit, unless (A) the certification is the subject of an audit pursuant to subsection (e) of this subsection; or (B) the commissioner has reason to believe that the certification does not comply with the requirements of the general permit, including any matter specified in the general permit pursuant to subdivision (2) of subsection (a) of this section.

(2) Any qualified professional who makes a certification pursuant to this section shall promptly notify, in writing, the commissioner and the person who would obtain or has obtained coverage under the general permit based upon such certification if, during the normal course of a qualified professional's practice, such professional learns, or should have learned, of information that would significantly affect or prevent such professional's decision to have made such certification. Such notification shall be made not later than fifteen days after a qualified professional learns of such information and shall identify the certification and the reasons such qualified professional is submitting notice pursuant to this subdivision.

(e) The commissioner may audit any certification made by a qualified professional pursuant to this section. As part of such audit, the commissioner may request any information the commissioner deems necessary to conduct such audit from either the person who would obtain or has obtained coverage under the general permit based upon such certification or the qualified professional making the certification. In addition, the commissioner may require independent verification of all or any part of a certification made by a qualified professional. Such independent verification shall be performed by a different qualified professional who: (1) Meets the requirements for a qualified professional specified in the general permit; (2) does not have a conflict of interest, provided reasonable compensation for providing independent verification shall not constitute a conflict of interest; (3) did not engage in any activities associated with the development, preparation or

review of any information on which the certification is based; and (4) is not under the same employ of the person who developed, prepared or reviewed any of the information on which the certification is based. Such independent verification shall be at the expense of the person who seeks or has obtained coverage under a general permit. If an audit undertaken by the commissioner pursuant to this subsection reveals that a certification was made in violation of any requirement of the general permit, including any matter specified in the general permit pursuant to subdivision (2) of subsection (a) of this section, the commissioner may charge, and the person who would obtain or has obtained coverage under the general permit based upon such certification shall pay, for the reasonable costs of conducting such audit.

(f) The commissioner shall have a goal of auditing ten per cent of the certifications submitted with a general permit pursuant to this section. The commissioner shall, not later than January 1, 2014, submit a report, in accordance with the provisions of section 11-4a, to the joint standing committees of the General Assembly having cognizance of matters relating to commerce and the environment. Such report shall include (1) the total number of certifications submitted; (2) the number of certifications subject to partial or full audit; (3) the number of certifications found not to be in compliance with the general permit; (4) where necessary, the actions taken to bring about or maintain compliance with the general permit; (5) whether any conclusions can be drawn from the audits regarding levels of compliance of the certification with applicable requirements and, if so, any such conclusions; and (6) any additional recommendations regarding the use of certifications in general permits. Such report may be submitted electronically.

(g) Notwithstanding the acceptance of a certification pursuant to the provisions of subdivision (1) of subsection (e) of this section, if, after acceptance, the commissioner finds that a certification does not comply with the requirements of the general permit, including any matter specified in the general permit pursuant to subdivision (2) of subsection (a) of

this section, or if the qualified professional that made a certification fails to cooperate or provide information requested by the commissioner pursuant to subsection (e) of this section, the commissioner may (1) deny a registration seeking coverage under a general permit, (2) revoke, suspend or modify any approval issued by the commissioner under a general permit, including the approval of any registration for coverage under a general permit, or (3) require the person who would obtain or has obtained coverage under the general permit based upon such certification to obtain an individual permit, pursuant to subsection (c) of this section. The commissioner may take such action even if the person who would obtain or has obtained coverage under the general permit based upon such certification had no involvement in the development, preparation or review of the certification submitted pursuant to this section, or any of the information on which a certification was based, or was unaware that the certification was not in compliance with the requirements of the general permit, including any matter specified in the general permit pursuant to subdivision (2) of subsection (a) of this section. In addition to any other penalty or sanction provided for by law, disciplinary action may be taken against a qualified professional for a certification that does not comply with the requirements of a general permit, including any matter specified in the general permit pursuant to subdivision (2) of subsection (a) of this section. For any qualified professional required to maintain in effect a license or credential under any provision of law, the commissioner may (A) make a referral for disciplinary action against such qualified professional to any board, commission or department overseeing such professional; (B) issue a reprimand or warning to such qualified professional; or (C) prohibit, either temporarily or permanently, such professional from making a certification submitted pursuant to this section.

(h) The commissioner may adopt regulations in accordance with the provisions of chapter 54 to carry out the purposes of this section.