STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL

IN RE:	:	
	:	
APPLICATION OF NTE CONNECTICUT, LLC	:	DOCKET NO. 470
FOR A CERTIFICATE OF ENVIRONMENTAL	:	
COMPATIBILITY AND PUBLIC NEED FOR	:	
THE CONSTRUCTION, MAINTENANCE AND	:	
OPERATION OF AN ELECTRIC POWER	:	
GENERATING FACILITY OFF LAKE ROAD,	:	
KILLINGLY, CONNECTICUT	:	April 24, 2017

BRIEF OF CONNECTICUT FUND FOR THE ENVIRONMENT

I. PROPOSED FINDINGS OF FACT

1. NTE Connecticut, LLC ("NTE" or "Applicant") filed an Application for a Certificate of Environmental Compatibility and Need on August 17, 2016 seeking approval of the construction of an electric power generating facility in Killingly, Connecticut (Record ("R"), Applicant's Exhibit ("Ex.") 1, Application and attachments).

2. NTE proposes to construct and operate an approximately 500-MW combined cycle, electric generating facility and associated electrical interconnection switchyard to be known as the Killingly Electric Center ("KEC") to be located on approximately 73 acres along Lake Road in Killingly (R, Applicant's Ex. 1, Vol. 1, Part 1, p. 22).

3. The approximately 73 acre site consists of two separate parcels located at 180 and 189 Lake Road. Approximately 63 acres north and west of Lake Road will be the location developed for the proposed electric generating facility and approximately 10 acres south and east of Lake Road is the location for the proposed Utility Switchyard (R, Applicant's Ex. 1, Vol. 1, Part 1, p. 22).

4. Adjacent to and northwest of the proposed generating facility is the 32 acre Dunn Preserve owned and maintained by the Wyndham Land Trust (R, Applicant's Ex.1. Vol. 1, Part 2, p. 118).

5. The entire proposed site and surrounding area is located in the Quinebaug and Shetucket Valley National Heritage Corridor, also called the Last Green Valley (R, Applicant's Ex.1. Vol. 1, Part 2, p. 118).

6. There are four interconnections associated with the proposed KEC that are anticipated

to be permitted, constructed, owned and operated by others. These consist of a natural gas pipeline interconnection, an electric transmission interconnection, water piping, and wastewater piping (R, Applicant's Ex.1. Vol. 1, Part 2, p. 166). The four interconnections are not included as part of this Application.

7. The proposed KEC facility will be serviced by an upgraded natural gas pipeline lateral to be constructed and owned by Eversource (R, Applicant's Ex.1. Vol. 1, Part 2, p. 166).

8. The existing Eversource pipeline extends from the Algonquin Gas Transmission mainline, approximately 2 miles northwest of the proposed KEC site in Pomfret, to Lake Road in Killingly where the pipeline turns eastward along Lake Road, continuing past the proposed KEC site (R, Applicant's Ex.1. Vol. 1, Part 2, p. 166).

9. From the point of intersection with the Algonquin Gas Transmission mainline, Eversource's existing pipeline heads southeast beneath a wetland area for approximately 2,000 feet, then continues southeast for approximately 600 feet abutting an open field before crossing Holmes Road and the Airline North Star Park Trail. The pipeline continues southeast for approximately 3,000 feet through forested and protected open space, then heads south, paralleling Durkee Brook for approximately 3,000 feet. The pipeline continues southeast for approximately 2,500 feet, passing west of Bruce Pond and crossing River Road. The pipeline continues in a southeasterly direction, crossing the Quinebaug River into the Town of Killingly. South of the Quinebaug River, the pipeline continues approximately 2,400 feet through forested lands until it enters the southern edge of Lake Road. At Lake Road, the pipeline travels northeast to the KEC site for approximately 1,200 feet (R, Applicant's Ex.1. Vol. 1, Part 2, pp. 166- 167).

10. The approximate length of the existing Eversource pipeline that would need to be replaced is 2.8 miles (R, Applicant's Ex.1. Vol. 1, Part 2, p. 167).

11. It is anticipated that the replacement pipeline will cross the same resource areas crossed by the existing pipeline (R, Applicants Ex.1 Vol.1, Part 2, p. 169). In the replacement of the existing pipeline and in order to provide the required natural gas to the KEC facility, Eversource will need to perform the following work: (a) remove acres of vegetation; (b) excavate, remove the existing pipeline and replace it with an upgraded 14-inch natural gas pipeline (replacement pipeline) rated for 700 psi through wetlands, protected open space, woodlands, and a public multi-use trail; and (c) cross the expanse of the Quinebaug River (*Id.* pp. 166-170).

12. It is undisputed that the proposed KEC facility cannot operate and generate electricity without a source of natural gas (R, Transcript (Tr.) Hearing, November 15, 2016, Testimony of Mirabito, p. 561, lines (ln.) 3-7; Applicant's Ex. 16, NTE's Redacted Responses to NAAP's Interrogatories dated, October 27, 2016, Response to Question No. 13).

13. Although the construction of a new 2.8 mile pipeline lateral through the existing Eversource right of way is the Applicant's preferred route to supply natural gas to the KEC facility, should Eversource be denied a permit to install the pipeline lateral through its existing right of way as proposed by the Applicant, possible alternative routes for the pipeline not currently discussed in the Application will be explored (R, Transcript (Tr.) Hearing, January 10, 2017, Testimony of Mirabito, p. 895, ln.24- p. 897. Ln. 25; Applicant's Ex. 16, NTE's Redacted Responses to NAAP's Interrogatories dated, October 27, 2016, Response to Question No. 13).

14. The Applicant's preferred source of water to operate KEC is a Water Pipe Interconnection with the Connecticut Water Company ("CWC") (Applicant's Ex. 1, Vol. 1, part 2, p. 172).

15. The existing CWC owned water main at the intersection of Lake Road and Louisa Viens Drive will need to be extended 3,100 feet to reach the proposed KEC facility (Applicant's Ex. 1, Vol. 1, part 2, p.172).

16. CWC will be required to install additional piping extensions between the Plainfield and Brooklyn Wellfields to provide water to the KEC facility and to enhance reliability (Applicant's Ex. 1, Vol. 1, part 1, p. 106; part 2, p. 172).

17. Average daily use of water by the KEC is estimated to range from 50,000 gallons per day to 100,000 gallons per day in the summer, with maximum daily use of up to 400,000 gallons per day when Ultra Low Sulfur Diesel fuel is used (Applicant's Ex. 1, Vol. 1, part 1, p. 46).

18. CWC will seek the necessary permits to extend the piping needed to supply an adequate supply of water to the KEC facility (Applicant's Ex. 1, Vol. 2, p. 166).

19. The Drinking Water Section of the Connecticut Department of Public Health raised questions concerning whether the CWC Crystal Division had adequate water supplies available with the appropriate margin of safety to supply the KEC plant (State Agency Comments, item 3, Department of Public Health, Drinking Water Section, dated October 24, 2016).

20. The Siting Council also raised concerns about the impacts of an extended drought on the ability of the KEC to obtain adequate supplies of water to operate (Tr. Hearing, November 15, 2016, questioning by Chairman Stein to Mirabito, p.405, ln. 10 - p. 406, ln.10).

21. It is undisputed that the KEC facility needs an adequate source of water to operate (Applicant's Ex. 1, Vol. 1, p. 46).

22. All four interconnections needed for the operation of the KEC facility, the natural gas pipeline interconnection, the electric transmission interconnection, the water supply piping, and the wastewater piping, will be permitted, constructed, owned, and operated

by others (Applicant's Ex. 1, Vol. 2, p. 166).

II. CONCLUSIONS OF LAW

NTE CONNECTICUT LLC's APPLICATION FOR A CERTIFICATE OF ENVIRONMENTAL COMPATABILITY AND NEED SHOULD BE DENIED

The Essential Components of the Proposed Killingly Energy Center

NTE Connecticut, LLC ("NTE") proposes to construct a 550 MW electric generating plant on a 63-acre parcel off of Lake Road in Killingly. NTE also proposes to install an electric switchyard on a 10-acre parcel adjacent to the electric generating plant. There are four required interconnections associated with the construction of the KEC facilities in order for the facility to operate. They consist of a natural gas pipeline interconnection, electric transmission interconnection, a water pipe interconnection, and a wastewater pipeline interconnection. It is the need for the interconnections with the Eversource natural gas distribution pipeline that runs from the Algonquin mainline to Lake Road in Killingly and the water supply piping to be installed by the Connecticut Water Company Crystal Division in order to supply the KEC facility with an adequate supply of water which are not compatible with the sensitive environment in the area of the proposed site of this electric generating facility. The construction and installation of these components of the proposed KEC facility would unreasonably damage or destroy the natural resources in this area.

NTE's Application for a Certificate of Environmental Compatibility and Public Need ("Application") states that the generation plant and switch yard will require Eversource to replace a 50 year old natural gas distribution pipeline line with a new, larger pipeline capable of providing 3.9 million cubic feet of natural gas per hour at a minimum pressure of 550 pounds per square inch over the course of 2.8 miles. In the replacement of the existing pipeline and in order to provide the required natural gas to the KEC facility, Eversource will need to perform the following work: (a) remove acres of vegetation; (b) excavate, remove the existing pipeline and replace it with an upgraded 14-inch natural gas pipeline (replacement pipeline) rated for 700 psi through wetlands, protected open space, woodlands, and a public multi-use trail; and (c) cross the expanse of the Quinebaug River. The proposed KEC facility would also require the Connecticut Water Company to install piping extensions from its wellfields located in Plainfield and Brooklyn in order to ensure an adequate water supply for the KEC facility and other users in the area of the proposed facility.

Although inextricably essential components for an operational power generation plant, the natural gas pipeline replacement and the water supply piping installation and the environmental impacts associated with their construction and installation are not part of this Application. NTE simply states that these components are associated with KEC but that they are anticipated to be permitted, constructed, owned, and operated by others. These components are defined as "associated equipment" necessary for the operation of an electric generating facility. RCSA § 16-50-2a(1)(B). An application for a certificate of environmental compatibility and need is required to contain a statement in narrative form of

the environmental effects of the proposed facility and associated equipment. RCSA § 16-50j-59(9). In a brief discussion of the community and environmental considerations of these interconnections, NTE simply states that construction of these components will have no significant impact on natural resources and, as for the 2.8 mile replacement pipeline, NTE states only that because the replacement pipeline will be installed in an established Eversource right of way, environmental impacts will be minimized[1] and, the additional water piping extensions between the CWC's Plainfield and Brooklyn Wellfields will be installed within roads, thereby eliminating impacts to natural resources.[2] Details of the construction and installation of these pipelines are simply not contained in the Application and the critical examination of the environmental impacts of the construction and installation of these essential components are left to a later time in future permits to be sought by others.

NTE's Application Improperly Segments Its Proposed Project To Minimize Its Adverse Environmental Impacts

NTE's Application, which seeks to defer action on essential components of its proposed project to a later time in applications to be filed by others, improperly segments its proposed project to lessen the potential environmental impacts of the generating facility, switchyard, natural gas pipeline modifications, and interconnections. Segmentation is defined as "an attempt to circumvent the [environmental protection laws] by breaking up one project into smaller projects and not studying the overall impacts of the single overall project." *Stewart Park and Reserve Coalition, Inc. v. Slater*, 352 F.3d 545, 559 (2d Cir. 2003); *Connecticut Coalition for Environmental Justice v. Development Options, Inc.*, Superior Court, judicial district of Hartford, Docket No. CV-03-0828997-S (January 5, 2005) (copy attached).

> Segmentation is to be avoided in order to insure that interrelated projects, the overall effect of which is environmentally significant, not be fractionalized into smaller, less significant actions. *Town of Huntington v. Marsh,* 859 F.2d. 1134, 1142 (2d Cir. 1988) (internal quotation marks omitted). A project is properly segmented if it (1) connects logical termini and is of sufficient length to address environmental matters of a broad scope; (2) has independent utility or independent significance; and (3) will not restrict consideration of alternatives .... A project has been improperly segmented, on the other hand, if it has no independent utility, no life of its own, or is simply illogical when viewed in isolation. *Hudson River Sloop Clearwater, Inc. v. Dep't of Navy*, 836 F.2d 760, 763 - 64 (2d Cir. 1988); *In re Village of Westbury v. Dep't of Transp.*, 75 N.Y.2d 62, 69, 550 N.Y.S.2d 604, 549 N.E.2d 1175 (1989).

Stewart Park and Reserve Coalition, Inc. v. Slater, 352 F.3d at 559; *Connecticut Coalition for Environmental Justice v. Development Options, Inc., Id.; Serdechny*

[1] Applicant's Ex. 1, Vol. 1, Part 2, pp. 166,169-170.
[2] Applicant's Ex. 1, Vol. 1, Part 2, p.172.

v. Inland Wetlands, Watercourses & Conservation Commission, Superior Court, judicial district of Hartford, Docket No. LNDCV-12-6038412-S (August 29, 2014) fn. 13 (copy attached).

As noted above, an electric generating facility and switchyard are useless without a source of fuel and other necessary interconnections. An electric generating facility and a switchyard are not stand alone facilities and have no independent utility without all of the component parts that make it operational.

One of the Siting Council's central legislative mandates is to provide environmental quality standards and criteria for the location, design, construction and operation of facilities for the furnishing of public utility services at least as stringent as the federal environmental quality standards and criteria." Conn. Gen. Stat. § 16-50g. In the review of the action of the Federal Energy Regulatory Commission (FERC) approving a Certificate of Public Convenience and Necessity for the construction and operation of the Northeast Upgrade Project by the Tennessee Gas Pipeline Company, LLC, the United States Court of Appeals for the District of Columbia Circuit determined that in applying the National Environmental Policy Act (NEPA), FERC erred in failing to consider the environmental impact of all other upgrade projects planned for the same pipeline. In *Delaware Riverkeeper Network v. FERC,* 753 F.3d 1304 (D.C. Cir. 2014), the Court of Appeals held that in applying NEPA, FERC must consider the cumulative impacts of all related projects. "An agency impermissibly 'segments' NEPA review when it divides connected, cumulative, or similar federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration." *Delaware Riverkeeper,* 753 F.3d 1304, 1313.

The purpose of the Public Utility Environmental Standards Act, Chapter 277a of the Connecticut General Statutes, Conn. Gen. Stats. § 16-50g, et seq., is "[t]o provide for the balancing of the need 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 to minimize damage to scenic, historical, and recreational values; to provide environmental quality standards and criteria for the location, design, construction and operation of facilities for the furnishing of public utility services at least as stringent as the federal environmental quality standards and criteria." Conn. Gen. Stat. § 16-50g. An application for an electric switchyard shall include a justification for the site selected, including comparison with alternative sites which are environmentally, technically and economically practical and a description of the effect of the proposed switchyard on the environment, scenic, historic and recreational values. Conn. Gen. Stat. § 16-50i (4) (definition of electric switchyard "facility"); Conn. Gen. Stat. § 16-50*l*(a)(1)(requirements for application). Because NTE's Application improperly segments its proposed project, it isolates the location of the proposed KEC facility as the sole issue to be considered in this Application and impedes the ability of the Siting Council to perform its statutory obligation to balance the need for the project with the need to protect the environment and ecology of the state.

Conclusion

Because NTE improperly segmented its project to lessen the environmental impacts of the overall impacts of the project including, but not limited to, the environmental harm that will be caused by the construction and installation of the several required interconnections, NTE's Application should be denied.

Respectfully Submitted,

CONNECTICUT FUND FOR THE ENVIRONMENT

By: John M. Looney

John M. Looney
900 Chapel Street, Suite 2202
New Haven, CT 06510
(203) 787-0646
jlooney@ctenvironment.org

ITS ATTORNEY

I HEREBY CERTIFY that a copy of the foregoing document was electronically mailed to all parties set forth on the attached service list.

Dated at New Haven, CT this 24th day of April, 2017.

John M. Looney
900 Chapel Street
New Haven, CT 06510
(203) 787-0646
jlooney@ctenvironment.org

LIST OF PARTIES AND INTERVENORS
SERVICE LIST

Status Granted	Document Service	Status Holder (name, address & phone number)	Representative (name, address & phone number)
Applicant	☒ E-mail	NTE Connecticut LLC	Kenneth C. Baldwin, Esq. Earl W. Phillips, Jr., Esq. Robinson & Cole LLP 280 Trumbull Street Hartford, CT 06103-3597 (860) 275-8200 kbaldwin@rc.com ephillips@rc.com Mark Mirabito, Vice President NTE Connecticut, LLC 24 Cathedral Place, Ste. 300 St. Augustine, FL 32804 mmirabito@nteenergy.com kec.notices@nteenergy.com Chris Rega, Senior Vice President Engineering & Construction NTE Energy, LLC 800 South Street, Ste. 620 Waltham, MA 02453 crega@nteenergy.com
Party & CEPA Intervenor (Approved 9/29/16)	☒ E-mail	Not Another Power Plant	John Bashaw, Esq. Mary Mintel Miller, Esq. Reid and Riege, P.C. One Financial Plaza, 21st Floor Hartford, CT 06103 jbashaw@rrlawpc.com mmiller@rrlawpc.com
Party (Approved 9/29/16)	☒ E-mail	Town of Killingly	Sean Hendricks Town Manager Town of Killingly 172 Main Street Killingly, CT 06239 shendricks@killinglyct.org
Party & CEPA Intervenor r (Approved 11/3/16)	☒ E-mail	Sierra Club	Joshua Berman Staff Attorney Sierra Club 50 F Street NW., 8th Floor Washington, DC 20001 josh.berman@sierraclub.org

Status Granted	Document Service	Status Holder (name, address & phone number)	Representative (name, address & phone number)
Party (Approved 11/3/16)	☒ E-mail	Connecticut Fund for the Environment	John Looney, Esq. Roger Reynolds, Esq. Connecticut Fund for the Environment 900 Chapel Street, Upper Mezzanine New Haven, CT 06510 jlooney@ctenvironment.org rreynolds@ctenvironment.org
Party & CEPA Intervenor (Approved 11/3/16)	☒ E-mail	Wyndham Land Trust, Inc.	John Bashaw, Esq. Mary Mintel Miller, Esq. Reid and Riege, P.C. One Financial Plaza, 21st Floor Hartford, CT 06103 jbashaw@rrlawpc.com mmiller@rrlawpc.com

2005 WL 525631
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.
Connecticut Coalition for Environmental Justice, Inc. v. Development Options, Inc.
Superior Court of Connecticut, Judicial District of Hartford. | January 5, 2005 | Not Reported in A.2d | 2005 WL 525631 (Approx. 11 pages)

Judicial District of Hartford.

CONNECTICUT COALITION FOR ENVIRONMENTAL JUSTICE, et al.
v.
DEVELOPMENT OPTIONS, INC., et al.

No. CV030828997S.
Jan. 5, 2005.

Attorneys and Law Firms

Jacobi & Case PC, Milford, for **Connecticut Coalition** For **Environmental Justice** Inc, **Connecticut** Citizen Action Group, CT Working Families Party, Carolyn Bell, Vivienne C. Bell, Clarke King, Luz Santana, Sherril Coleman, Samuel Goldberger and Leslie M. Simoes.

Updike, Kelly & Spellacy, Hartford, for **Development Options** Inc., CBL & Associates Properties Inc., and Charter Oak Marketplace LLC.

Opinion

BERGER, J.

*1 The plaintiffs, **Connecticut Coalition** for **Environmental Justice**, Inc., **Connecticut** Citizens Action Group, **Connecticut** Working Families Party, Carolyn Bell, Vivienne C. Bell, Clarke King, Luz Santana, Sherril Coleman, Samuel Goldberger, and Leslie M. Simoes, [1] instituted this action by complaint dated September 19, 2003, seeking declaratory and injunctive relief against the defendants, **Development Options**, Inc., CBL & Associates Properties, Inc., and the Charter Oak Marketplace, LLC, in connection with the **development** of the Charter Oak Marketplace. The plaintiffs allege that the **development** will unreasonably pollute, impair or destroy the public trust in the air, water and other natural resources of the state of **Connecticut** as set forth in General Statutes § 22a-16 et seq. [2]

The property in dispute concerns 34.5 acres of a larger sixty-seven acre parcel owned and being developed by the Hartford Housing Authority. It sits on the west bank of the South Branch of the Park River, now channelized as part of a flood control project. The property was formerly the site of the 1000 unit housing community known as Charter Oak Terrace Housing Project that was razed in 1995. After the demolition, portions of the property were seeded and turned into meadow. The subject parcel is now being developed into a retail commercial venture known as "The Marketplace" and will include a Wal-Mart, Marshalls, restaurants and other businesses. Twenty-two acres of the remaining acreage will contain a job training center and the rest will have an office complex owned by the city. [3]

The application process commenced in April 2002 when plans were submitted to the Hartford design review board as part of the zoning process; [4] they were approved on November 12, 2002 with certain conditions. In May 2002, the defendants sought wetlands approval from the Hartford inland wetlands agency to fill five small man-made wetlands on the property and to construct two storm water outfalls to discharge into the river. A public hearing was held on June 24, 2002 and on July 8, 2002, the agency approved the application. In June 2002, the defendants applied to the state traffic commission (STC)

for a certificate of operation which was granted on July 16, 2002. In October 2002, the defendants submitted another application to the Hartford inland wetlands agency for a permit for offsite improvements. After a public hearing on November 25, 2002, the permit was granted on January 27, 2003. In September 2002, the defendants applied to the Army Corps for a federal wetlands permit pursuant to 33 U.S.C. § 1344. After review and a finding of "minor individual or cumulative impact," the federal wetlands permit was issued on December 2002. In February 2003, the state department of **environmental** protection (DEP) issued a water quality certification pursuant to 33 U.S.C. § 1344 and General Statutes § 22a-426.

On March 25, 2003, the design review board approved revised plans for the Marketplace. On April 30, 2003, the Greater Hartford flood control commission approved an amended July 2002 application for the placement of fill in the floodplain in connection with another **development** in the overall parcel and the construction of a recreation field for compensatory flood storage capacity. In July 2003, the defendants sought approval from the city to remove soil and received a permit on July 31, 2003. In August 2003, the defendants sought and received a general commercial construction storm water discharge permit from DEP[5] and an encroachment permit from the state department of transportation (DOT). In November 2003, the defendants entered into an agreement with the Metropolitan District Commission concerning the construction of sewers. That same month the defendants also applied for signal permits from the STC which were approved on December 2003. Also in that same month, the defendants received further approvals from the design review board concerning landscaping.

*2 On January 8, 2004, the city of Hartford issued a building permit for the Wal-Mart building of the Marketplace and on March 13, 2004, the city issued the building permit for the retail portion of the Marketplace. On June 9, 2004, the self **development** building permit was issued.

With the exception of one mandamus action that was dismissed on October 24, 2003,[6] the plaintiffs, three associations and seven individuals, never sought to intervene in any of the above permit processes pursuant to General Statutes § 22a-19 [7] or appeal any of the decisions of the above agencies. The initial complaint was filed on October 7, 2003 and did not seek temporary injunctive relief. As of October 21, 2003, the five wetlands no longer existed and the storm water outfalls had been installed.

II.

A.

The first issue that must be addressed is whether the plaintiffs have standing to bring this action. The **Environmental** Protection Act of 1971 (CEPA) declares that "[i]t is hereby found and declared that there is a public trust in the air, water and other natural resources of the state of **Connecticut** and that each person is entitled to the protection, preservation and enhancement of the same. It is further found and declared that it is in the public interest to provide all persons with an adequate remedy to protect the air, water and other natural resources from unreasonable pollution, impairment or destruction." General Statutes § 22a-15. Section 22a-16 allows any person to seek declaratory or injunctive relief against another person to protect public trust in air, water and other natural resources from unreasonable pollution, impairment or destruction. The **Connecticut** Supreme Court has held that "a plaintiff has standing to bring an independent action under § 22a-16 where an administrative body does not have jurisdiction to consider the **environmental** issues raised by the parties ... Where the alleged conduct involves a permitting claim, however, there is no standing pursuant to § 22a-16 to bring the claim directly in the Superior Court and the claim must be resolved under the provisions of the appropriate licensing statutes." (Citations omitted.) ***Connecticut Coalition*** *Against Millstone v. Rocque*, 267 **Conn**. 116, 147-48, 836 A.2d 414 (2003).

Millstone, supra, relied on *Waterbury v. Washington*, 260 **Conn**. 506, 800 A.2d 506 (2002), in which our Supreme Court discussed the interrelationship between a claim of unreasonable impairment of the public trust under CEPA and activity conducted pursuant to a related **environmental** regulatory permit. The *Waterbury* court held that "when ... the legislature has enacted an **environmental** legislative and regulatory scheme specifically designed to govern the particular conduct that is the target of the action, that scheme gives substantive content to the meaning of the word 'unreasonable' as used in the context of an independent action under CEPA. Put another way, when there is an **environmental** legislative and regulatory scheme in place that specifically governs the

conduct that the plaintiff claims constitutes an unreasonable impairment under CEPA, whether the conduct is unreasonable under CEPA will depend on whether it complies with that scheme." *Waterbury v. Washington, supra*, 260 **Conn**. at 557.[8]

*3 The rulings of *Millstone* and *Waterbury v. Washington* have loomed over this whole trial. The plaintiffs have consistently maintained that the applications as well as the approvals of the applications were invalid or deficient. Of course they have made other claims such as, for instance, that the plans fail to "protect and foster biological diversity and habitat sustainability"; that "the defendants have failed to use reasonable and rational spatial planning considerations ... to develop the property" or that "the **development** will destroy green space for recreational activities and destroy the recreational benefits of the Park River." The plaintiffs additionally claim that the pollutant load from vehicular traffic will cause **environmental** degradation as it finds its way into the soil, surface, groundwater and the Park River. With the exception of the claims dealing specifically with the uplands meadow, which will be discussed hereinafter, all other claims concern permitting issues. Thus, all claims that concern water pollution or degradation, whether surface or ground, to the Park River, or elsewhere, and impairment or filling of on-site inland wetlands, may not be raised in this action as they were covered by the permitting processes of the inland wetlands act, § 22a-36 et. seq. or the federal Army Corps permitting process, 33 U.S .C. § 1344; 3 C.F.R. § 325.7. See *Millstone, supra*, 267 **Conn**. at 134-48.

As noted earlier, the five on-site man-made inland wetlands (resulting from the grading practices during the demolition of the housing project) had been filled and the outfall stations to the Park River had been constructed prior to the filing of this suit. Those previously existing wetlands were described during trial as small, containing sparse vegetation, providing little function from a wildlife habitat standpoint and not supporting any groundwater recharge function. The two new outfall stations (three were already in existence) will allow the discharge of treated run-off through the use of Vortechnic units into the Park River, which is and has been, a concrete channelized river with a riprap embankment. The existing outfalls have allowed the discharge of untreated storm water from Newfield Avenue and Overlook Terrace into the river. As noted by the plaintiffs' experts, the bivalve clam has been observed in the river; it is an alien species whose presence indicates deteriorated water quality. The plaintiffs did not intervene in any applicable permitting proceedings where the issues they now ague could easily have been raised or addressed. See *Millstone, supra*, 267 **Conn**. at 148.

The plaintiffs also claim that a related flood commission application is likewise deficient. The defendants proposed and received approval to create an on-site storage capacity of approximately 11,700 cubic yards through the construction of a recreational field. The flood control commission approved the proposal in July 2002 but in March 2003, concerns were raised by certain individuals, triggering further review. In May 2003, the commission again approved the defendants' proposal and the commission was asked by the plaintiffs' attorney to have the city council review the matter. After the commission refused the request, plaintiffs Carolyn and Vivian Bell filed a mandamus action but the matter was dismissed by the court, Stengel, J.[9] Any claims alleging deficiencies in the flood commission approvals cannot be raised in this action. *Millstone, supra*, 267 **Conn**. at 148.

*4 If *Millstone* and *Waterbury* preclude standing for review of matters related to **environmental** permitting, what then is left of the plaintiffs' claim? The plaintiffs do have standing to seek review of **environmental** claims covered by § 22a-16 (allegations of unreasonable pollution, impairment or destruction to the air, water and other natural resources of the state) that were not included in the permitting process. The plaintiffs thus have standing here to assert that the destruction of the meadow, as a natural resource, or the destruction of related wildlife and plant life, constitute an unreasonable impairment of the **environment** as those and other related issues[10] were not addressed in the **development** applications. *Fort Trumbull Conservancy v. Alves*, 262 **Conn**. 480, 495, 815 A.2d 1188 (2003). The defendants dispute this arguing that the city of Hartford considered the implication to the meadow and the **environment** when it granted the defendants permits for demolition of the meadow. There is nothing in the applicable sections (35-67; 35-68; 35-356 to 371) of the zoning ordinances, however that require the zoning administrator to consider any **environmental** impact when deciding whether to grant a permit.[11] Therefore, the plaintiffs may seek review of permitting claims which do not involve **environmental** review and non-permitting claims which are alleged to cause unreasonable pollution, impairment or destruction to the air, water and other

natural resources of the state. This leads us to a general discussion of the **development** of the property and specifically, the meadow.

B.

We know that the thirty-five acre meadow, as it once existed, was created after the razing of the 1000 housing units of Charter Oak Terrace in 1995. The property is a portion of a larger sixty-seven acre parcel owned by the Hartford Housing Authority and bordered by Flatbush Avenue on the north, Newfield Avenue on the west, Overlook Terrace and then the South Branch of the Park River on the east. After demolition, the land was stabilized by seeding non-native grasses and vegetative cover; the plaintiffs' experts have described it as a "habitat patch" or a "parkland" with ecological and aesthetic value.

It is not unreasonable to argue that an "undeveloped" sixty acre parcel with a significant portion of meadow abutting a river in an urban area and home to a somewhat varied bird population is not a de facto parkland. Nevertheless, that scenario does not exist today nor did it at the time of trial. At that time, it had been fully graded with most of the site alterations and buildings completed. The claim concerning the destruction and **development** of the meadow requires an analyses of (1) the natural resources that are implicated including, whether the meadow itself is a natural resource under the provisions of § 22a-16 and, if so, whether the impairment or destruction of these resources is unreasonable; and (2) whether the claims for relief are precluded due to the doctrine of laches or because they are moot.

1.

*5 As noted, the purpose of CEPA, is to protect the public trust in the air, water and other natural resources of the state of **Connecticut**. While there was an initial claim that the **development** of the parcel would cause air pollution, that claim has been abandoned. Moreover, as mentioned, the claims involving any degradation of water quality or contamination or pollution to ground or surface water, including related inland wetlands or watercourses, are controlled by the rulings in *Millstone* and *Waterbury*. Indeed the plaintiffs admitted this fact in argument before the court. That leaves the question of whether the former meadow falls within the definition of a natural resource.

We know from a review of our case law that prime agricultural land is not a natural resource. *Red Hill* ***Coalition*** *v. Town Plan & Zoning Commission*, 212 **Conn**. 727, 739-40, 563 A.2d 1347 (1989). As explained in *Paige v. Town Plan & Zoning Commission*, 235 **Conn**. 448, 668 A.2d 340 (1995), which did hold that trees and wildlife are natural resources, regardless of whether they have any economic value, "[p]rime agricultural land is different from what is claimed to be a natural resource in this case. Prime agricultural land is a subcategory of land subject to human alteration that is kept barren of plant and animal life that would otherwise eventually live on it through natural succession. Agricultural land is not naturally occurring." *Id*., at 463.

It is hard for this court to conceive that, in a general sense, a thirty-five acre meadow, a habitat for a number of plant and animal species whether native or alien, common or protected, could not be a natural resource within the statutory definition. As noted by the *Paige* court, "[b]ecause § 22a-19 fails to provide a detailed definition of natural resources, we are compelled to produce a definition that reflects legislative intent using traditional tools of statutory construction. In construing a statute, we seek to ascertain and give effect to the apparent intent of the legislature ..." (Internal quotation marks omitted.) *Id*., at 454. The court added, "[i]n promulgating regulations regarding its responsibilities, the department of **environmental** protection (department) has elaborated on what constitutes natural resources. Section 22a-1-1 of the Regulations of **Connecticut** State Agencies provides that [t]he department operates according to powers conferred in various titles of the General Statutes relating to management, protection and preservation of the air, water, land, wildlife and other natural resources of the state ... This regulatory enumeration is consistent with the legislature's express reference to plants and wild animals as natural resources in General Statutes § 22a-6a(a), which provides that [s]uch person shall also be liable to the state for the reasonable costs and expenses of the state in restoring the air, waters, lands and other natural resources of the state, including plant, wild animal and aquatic life to their former condition ... Equally consistent is the use of the term natural resources in General Statutes § 22a-342, which provides that the department, in deciding whether to grant a permit, must consider various factors including the protection and preservation of the natural resources and ecosystems of the state, including but not limited to ground and surface water, animal, plant and aquatic life, nutrient exchange, and energy flow ... Therefore, where the legislature has chosen to specifically articulate what is meant by natural resources, it has included trees and wildlife

and has given no indication that the term as used throughout the act should be afforded different meanings. Moreover, had the legislature intended the illustrative lists in § 22a-6a(a) or § 22a-342 to be limited to those particular statutes, it could have provided a definitional section within the act to control all the other statutes in which the term is used ... The narrow reading of the term natural resources ascribed by the majority of the Appellate Court contradicts the specific illustrations of what the legislature has stated a natural resource includes as found in certain provisions of the act as well as the broad policy language found throughout the act." (Citation omitted; internal quotation marks omitted; footnotes omitted.) *Id.*, at 456-57. See also, *Animal Rights Front v. Rocque*, Superior Court, judicial district of Hartford/New Britain at Hartford, Docket No. PJR CV 97-0575920 (April 16, 1998, O'Neill, S.T.R.) (22 **Conn**. L. Rptr. 26) (standing conferred to seek injunctive action to stop the killing of deer under § 22a-16); *Lewis v. Planning and Zoning Commission*, 49 Conn.App. 684, 692, 717 A.2d 246 (1998) (wetlands constitute a natural resource of the state); *Animal Rights Front v. P. & Z. Commission*, Superior Court, judicial district of Hartford at Hartford, Docket No. CV-057 9968 (March 9, 1999, Wagner, J.T.R.) (24 **Conn**. L. Rptr. 241) (timber rattlesnakes and whippoorwill are natural resources).

*6 Thus starting with the premise that a thirty-five-acre meadow could surely constitute a natural resource, the next focus is on this particular meadow. Of course, it had only been here since the razing of the housing project in 1995 and while it was certainly not in a true natural or pristine state as it contained some construction debris, it was for the most part, a large undeveloped grassed parcel that had evolved since 1995. The focus on its purity or when it was created is a non-starter however. Our national, state, local and even private parks and open spaces contain all types of man-made intrusions, and while parts of them are pristine, some are not. Yet, certainly no one would suggest that they are not natural resources, in terms of their rich diversity of plant and animal life because they have roadwork and hotels and construction material, etc. Additionally, while size is surely a factor, the testimony of plaintiffs' experts credibly and understandably stress that, in an urban area, a parcel of the size such as that in controversy is important.

CEPA, however, not only inquires whether the activity will involve a natural resource but also asks whether that resource is being unreasonably polluted, impaired or destroyed. *Manchester **Environmental Coalition** v. Stockton*, 184 **Conn**. 51, 56-58, 441 A.2d 68 (1981): The *Stockton* court noted that "[u]nder 22a-17, the plaintiff must first come forward and show that the defendant has, or is reasonably likely to unreasonably pollute, impair, or destroy a natural resource. The legislative history shows that the word 'unreasonably' was added as a means of preventing lawsuits directed solely for harassment purposes." *Id.*, at 58. Moreover in *Waterbury*, the court added that "the term 'unreasonable' as used in the context of an independent action under CEPA does not mean something more than de minimis ..." *Waterbury v. Washington, supra*, 260 **Conn**. at 557. The action in the present case was the total destruction of the meadow; that is surely something more than de minimis. But unreasonable? This court believes not. First, we turn back to the discussion of the meadow itself. It was, as mentioned, created after the razing of the 1000 housing units. Portions of the road infrastructure remained notwithstanding the seeded area. In April 2003, the plaintiffs' experts Robert DeSanto and Noble Proctor viewed the property and in July 2003 conducted transects of the property and a portion of the riverine area. The trial testimony was that the plant life was common to that found throughout the state, provided only poor quality habitat, and did not support any rare species. All witnesses testified that plant life diversity was low. The meadow had been home to about twenty species of birds. Other than the migrating Savannah sparrows, a species of special concern while nesting, and swamp sparrows, none of the animal species have been identified as endangered or threatened or of special concern pursuant to General Statutes § 26-310 et seq. [12] Obviously the birds will no longer use the thirty-five acres as it is now developed but there was additional testimony that those species had the whole riverine corridor for feeding and nesting. According to the plaintiffs' experts, by May 2004, various species of the bird population were returning to the river corridor. Moreover, the witnesses testified that the adjoining land is of the same or better quality than the developed piece.

*7 The impact to the existing vegetation from the construction of the outfalls next to the river is both short term and rather negligible since, as acknowledged by the plaintiffs' expert Dr. DeSanto, that which has been removed for the construction will grow back. Additionally, the water discharged to the river from the outfalls is now being treated by the Vortechnic unit-a highly effective hydrodynamic device using swirl technology to capture approximately 80% of the sediment load. [13] The unit is part of the greater storm water collection system along with the fifty-five catch basins in the parking lot and the plunge

pool and riprap at the end of the outfall pipe. The plaintiffs argued that one component of the "treatment tram," namely a detention pond, should have been included. While such additional pollution treatment might be effective, this was a consideration for the permitting process. The installation of the Vortechnic unit, an EPA recognized treatment, is certainly a gigantic step over the untreated outfalls.

Much of the trial was spent discussing the impact of the storm water runoff and especially two metals, zinc and copper, on the river. Using a number of assumptions and a theory derived from a number of prior EPA studies and a mathematical algorithm, Dr. DeSanto testified that, under certain conditions, a hypothetical worst case scenario would result in violations of certain state water quality standards for zinc. [14] The defendants have painstakingly attacked the opinions of Dr. DeSanto and notwithstanding that this court believes the cross-examination was effective in negating many elements of his equation, including: the rate of deposit; the distance of roadway; the number of vehicles; and the number of axles per vehicle, the whole proposition, as it is premised on surface water and, perhaps, ground water impairment, is precluded under the rule of *Millstone*. The outfall construction and their discharges were part of the permitting processes of the federal 404 program and the state's inland wetlands and watercourses regulatory scheme and the specific aspects of that **environmental** permitting are not allowed in this CEPA challenge.

Finally, the parties take a different approach to **environmental** assessment. The plaintiffs segment the thirty-five acres as a singular habitat patch while the defendants portrayed the total riverine area as the wildlife habitat. [15] As a result of the abutting land and river, it is hard, if not impossible, to conclude that the **development** has caused unreasonable impairment of the bird population.

Segmentation arguments, like those put forth by the plaintiffs, are viewed critically however. Usually, "[s]egmentation is an attempt to circumvent **[environmental** regulations] by breaking up one project into small projects and not studying the overall impacts of the single overall project. Segmentation is to be avoided in order to ensure that interrelated projects ... not be fractionalized ... A project is properly segmented if it (1) connects logical termini and is of sufficient length to address **environmental** matters of a broad scope; (2) has independent utility or independent significance; and (3) will not restrict consideration of alternatives for other reasonably foreseeable transportation improvements ... A project has been improperly segmented, on the other hand, if the segmented project has no independent utility, no life of its own, or is simply illogical when viewed in isolation." (Citations omitted; internal quotation marks omitted.) *Stewart Park & Reserve* ***Coalition*** *v. Slater,* 352 F.3d 545, 559 (2nd Cir.2003). Due to the quality and amount of the surrounding land, the plaintiffs' tactical segmentation of only a portion of the overall **development** is unavailing to support their claim of a CEPA violation.

2.

*8 This then leads us to a discussion about whether the doctrines of mootness and laches preclude granting the relief sought by the plaintiffs. "Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [this] court's subject matter jurisdiction ... Indeed, we are required to address this question of justiciability, even in the unusual situation where all of the parties agree that the matter is not moot ... We begin with the four-part test for justiciability established in *State v. Nardini* ... Because courts are established to resolve actual controversies, before a claimed controversy is entitled to a resolution on the merits it must be justiciable. Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute ... (2) that the interests of the parties be adverse ... (3) that the matter in controversy be capable of being adjudicated by judicial power ... and (4) that the determination of the controversy will result in practical relief to the complainant ..." (Citations omitted; internal quotation marks omitted.) *Wallingford v. Dept of Public Health,* 262 **Conn.** 758, 766-67, 817 A.2d 644 (2003). "[A]n actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal ... When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot." (Internal quotation marks omitted.) *Id.*, at 767. In this case, the meadow and the five wetlands are gone, many of the buildings and most of the infrastructure are substantially, if, not by now, totally complete. [16] To return to the prior condition would require a total demolition of the thirty five acres worth of construction not to mention the adjoining construction that was not involved in this suit. As noted in *Millstone*, "**Connecticut** courts have rejected injunctive remedies on the ground of mootness where the issue before the court has been resolved or has lost its significance because of intervening circumstances ...

Connecticut courts also have dismissed cases on the ground of mootness where the court can offer no practical relief because the position of one of the parties has changed." (Citation omitted.) ***Connecticut Coalition*** *Against Millstone v. Rocque, supra,* 267 **Conn**. at 126-27. While the **option** of demolition of the total project is arguably possible or potential, it is surely not practical or warranted.

This, of course, leads directly to the related issue of laches. "Laches consists of two elements. First, there must have been a delay that was inexcusable, and, second, that delay must have prejudiced the defendant." (Internal quotation marks omitted.) *Papcun v. Papcun,* 181 **Conn**. 618, 620-21, 436 A.2d 282 (1980). The defendants maintain that by not participating in the application process and by both waiting to institute suit and not seeking temporary injunctive relief until after construction was well under way, the doctrine of laches bars the plaintiffs' claim for permanent injunctive relief. Indeed, the first request for a temporary injunction came at the end of evidence on July 27, 2004. As noted previously, the defendants started seeking their permits in April 2002 and in April 2003, the plaintiffs' expert Dr. DeSanto viewed the premises returning in July 2003 with Dr. Proctor. The plaintiffs' initial complaint was filed on October 7, 2003; by October 21, 2003, the five wetlands no longer existed, the outfalls had been installed and the defendants had spent in excess of $2,500,000 on site work. By the time of trial total expenses for site work exceeded $6,000,000.

*9 Many of the issues raised herein could surely have been addressed in those specific and proper forums. Our Supreme Court has, of course, rejected the exhaustion of administrative remedies argument, *Waterbury v. Washington, supra,* 260 **Conn**. at 544-45, and thus this court is not finding that failure to participate in the administrative permitting processes deprives this court of jurisdiction. The court did say, however, in ***Connecticut Coalition*** *Against Millstone v. Rocque, supra,* 267 **Conn**. at 148, that "where an administrative body has been granted authority to adjudicate conduct with adverse **environmental** effects ... [and][w]here the alleged conduct involves a permitting claim ... there is no standing pursuant to § 22a-16 to bring the claim directly in the Superior Court and the claim must be resolved under the provisions of the appropriate licensing statutes." (Citations omitted.) The delay in their involvement at the administrative level denies the plaintiffs' standing to raise the permitting issues now. Additionally, whether due to a tactical trial decision or not, the plaintiffs were cognizant that construction would continue while the case was pending.[17]

The problem for this court is that the plaintiffs' decisions to not become involved in the administrative proceedings where the real planning issues concerning the project took place, or to sue only certain parties and not sue those developing the twenty-two acre job corp site or the housing authority portion, or to wait to seek injunctive relief until after the bulldozers had filled the subject wetlands and destroyed the meadow, belie the very nature and purpose of CEPA. No named plaintiff, whether institutional or individual, appeared at the trial to testify about the case or explain why they had not participated in any of the many proceedings below.[18] Yet, the plaintiffs now argue that certain agencies should have considered alternatives. For those matters that this court has jurisdiction over, it is simply too late. This is not to say that to bring a § 22a-16 action, a plaintiff must be involved at the administrative level or must seek immediate injunctive relief as a matter of law. Rather, the party seeking such relief must understand that a court will take all factors into account when deciding whether to issue equitable relief. Our courts take all allegations of **environmental** harm seriously and the failure to seek a cessation of alleged **environmental** harm certainly raises questions. This court finds that the plaintiffs have not only failed to prove that the meadow or any natural resource was unreasonably destroyed but that they waited too long to obtain injunctive relief. ***Connecticut Coalition*** *Against Millstone v. Rocque, supra,* 267 **Conn**. at 126.

For the above reasons, judgment enters for the defendants.

All Citations

Not Reported in A.2d, 2005 WL 525631

Footnotes

1 While certainly not required, it is interesting to note that no plaintiff testified or attended any hearing, the trial, or closing argument.

2 General Statutes § 22a-16 **states**:

The Attorney General, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity may maintain an action in the superior court for the judicial district wherein the defendant is located, resides or conducts business, except that where the state is the defendant, such action shall be brought in the judicial district of Hartford, for declaratory and equitable relief against the state, any political subdivision thereof, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity, acting alone, or in combination with others, for the protection of the public trust in the air, water and other natural resources of the state from unreasonable pollution, impairment or destruction provided no such action shall be maintained against the state for pollution of real property acquired by the state under subsection (e) of section 22a-133m, where the spill or discharge which caused the pollution occurred prior to the acquisition of the property by the state.

3 Neither the housing authority nor the city as the owners and developers of the subject parcel and the other adjoining parcels were named as defendants.

4 Section 35-371 of the municipal code (zoning) states in part, "[i]n the B-3 zoning district, the zoning administrator shall refer all applications for zoning or building permits ... to the design review board."

5 A storm water management plan must be approved by DEP prior to commencing operation.

6 *Carolyn Bell v. Court of Common Council,* Superior Court, judicial district of Hartford, Docket No. HHD CV 03-0827370 (October 24, 2003, Stengel, J.).

7 General Statutes § 22a-19 states:

(a) In any administrative, licensing or other proceeding, and in any judicial review thereof made available by law, the Attorney General, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, 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 so 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.

8 In reviewing the history of standing in CEPA cases, the *Millstone* court explained "[w]e now clarify our decision in *Waterbury* to recognize *Middletown,* [192 **Conn**. 591, 473 A.2d 787 (1984),] and *Fish II,* [254 **Conn**. 21, 755 A.2d 860 (2000),] involved claims that the plaintiffs lacked standing because the court did not have jurisdiction to litigate **environmental** issues that are governed by § 22a-430, and which clearly have been placed within the exclusive domain of the department ... We also note, however, that *Waterbury* properly characterized our ruling in *Fish I,* [254 **Conn**. 1, 756 A.2d 262 (2000),] as based on the exhaustion doctrine. In *Fish I,* we concluded that the trial court should have dismissed the case for lack of standing under § 22a-16 and remanded the matter to the department for an initial determination before bringing their action to the court, because the department had authority to grant the requested injunctive relief during the permit renewal proceeding in which Fish Unlimited had intervened ... Although this clarification does not affect our holding in *Waterbury* that the

exhaustion doctrine does not apply where the legislature determines that a court may exercise jurisdiction pursuant to § 22a-16, despite the availability of administrative procedures, there must be no possible confusion as to our reasoning in *Middletown* and *Fish II*, because we rely on those two cases as precedent in the current matter. With each new case, we have continued to refine the law on standing under § 22a-16. We have determined that a plaintiff has standing to bring an independent action under § 22a-16 where an administrative body does not have jurisdiction to consider the **environmental** issues raised by the parties ... We also have concluded that where an administrative body has been granted authority to adjudicate conduct with adverse **environmental** effects, the exhaustion doctrine does not apply ... In cases such as *Waterbury*, an independent action may be brought directly in the Superior Court, but the court has discretion to retain jurisdiction and remand the matter for administrative proceedings ... Where the alleged conduct involves a permitting claim, however, there is no standing pursuant to § 22a-16 to bring the claim directly in the Superior Court and the claim must be resolved under the provisions of the appropriate licensing statutes ... The present claim falls within this last category." (Citations omitted; internal quotation marks omitted.) *Millstone, supra*, 267 **Conn**. at 146-48.

9 See footnote 6.

10 The plaintiffs claim that an April 2002 application submitted to the design review board of the city of Hartford and approved with certain conditions on November 12, 2002 was also improper. They claim that the board failed to consider any feasible and prudent alternatives to the plan. The board's regulations do not require such a determination and its review does not include, under § 35-371, **environmental** review as, discussed above.

11 In *Nizzardo v. State Traffic Commission*, 259 **Conn**. 131, 788 A.2d 1158 (2002), the court, in the context of a § 22a-19 intervention dispute, discussed the ability of an administrative agency "to address **environmental** concerns regardless of whether that agency has jurisdictional authority over the **environmental** concerns [sought to be] raise[d]." *Id.*, at 148-49. After discussing *Middletown v. Hartford Electric Light Co.*, 192 **Conn**. 590, 596-97 which did concern a similar issue in the context of a § 22a-16 action ("The city's alternate claim of standing rests on its statutory claim under the **Environmental** Protection Act, General Statutes § 22a-16. This statute permits any private party, including a municipality, to seek injunctive relief for the protection of the public trust in the air, water and other natural resources of the state from unreasonable pollution, impairment or destruction. We have recently concluded, however ... that invocation of the EPA is not an open sesame for standing to raise **environmental** claims with regard to any and all **environmental** legislation."), the court noted its decision in ***Connecticut*** *Water Co. v Beausoleil*, 204 **Conn**. 38, 46, 526 A.2d 1329 (1987) in which it reaffirmed the prior mentioned decisions and added that "22a-19 does not expand the jurisdictional authority of an administrative body acting pursuant to a separate act of title 22a to hear any and all **environmental** matters, but rather, *limits an intervenor to the raising of those **environmental** matters which impact on the particular subject of the act pursuant to which the commissioner is acting.*" (Emphasis supplied.) *Nizzardo, supra*, 259 **Conn**. at 153. The *Nizzardo* court rejected the plaintiff's argument that § 22a-19 intervention required consideration of any and all **environmental** issues regardless of whether the agency had jurisdictional authority leaving those issues outside the scope for an independent action under § 22a-16. It further noted that the state traffic commission had no jurisdictional authority to consider any **environmental** issues. *Nizzardo v. State Traffic Commission, supra*, 259 **Conn**. at 167. In *Fort Trumbull Conservancy, LLC v. Alves*, 262 **Conn**. 480, 509, 815 A.2d 1188, (2003), the court then added, "[n]othing in this decision is contrary to our dicta in *Nizzardo v. State Traffic Commission, supra*, 259 **Conn**. at 159, that, [i]f a party wants to raise **environmental** concerns that are beyond the scope of authority of a particular agency, [§ 22a-16] provides a means for doing so ..."

Unlike the state traffic commission, land use (zoning, planning, and inland wetlands) agencies have different concerns. While the zoning regulations herein did not require review that could be deemed **environmental**, it is surely plausible that a land use agency could have such review encompassed in its regulations. Examples come to mind for specific areas such as, for instance, aquifer protection (General Statutes § 8-2(a)), open space (§ 8-2(a)) and ridge line protection regulations (§ 8-2(c)). Nevertheless, the **development** of a parcel of land-for whatever use-has some **environmental** impact, whether large or small. The approval by the land use agency, if **environmental** considerations are included within the scope of its review, implicate the *Millstone* and *Waterbury* rulings.

12 General Statutes § 26-310 states in relevant part:

(a) Each state agency, in consultation with the commissioner, shall conserve endangered and threatened species and their essential habitats, and shall ensure that any action authorized, funded or performed by such agency does not threaten the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat designated as essential to such species, unless such agency has been granted an exemption as provided in subsection (c) of this section.

In fulfilling the requirements of this section, each agency shall use the best scientific data available.

13 The sediment must, of course, be removed during normal maintenance; if this does occur, the device will not work as designed.

14 Pursuant to General Statutes § 22a-426, the DEP has promulgated the **Connecticut** Water Quality Standards to "set an overall policy for the management of water quality." Testimony at trial focused on Appendix D, numerical water quality criteria for chemical constituents, specifically copper and zinc of the toxic metal section and the accompanying table notes (2); (3); (6) and (7).

15 As noted previously, the plaintiffs' review and, indeed this litigation, only focused on the "marketplace property," and not the other parcels undergoing **development**. Plaintiffs' argument that this activity, on this portion of the total parcel, constitutes a violation of CEPA while the remaining construction and related impact apparently does not is perplexing to this court. Unlike the defendants' experts, the plaintiffs' experts did not study the adjacent land.

16 Counsel for the parties and this court conducted a view of the premises on July 20, 2004.

17 Of course, the same could be said of the defendants: that despite the institution of this action, they continued construction knowing the type of relief the plaintiffs were seeking.

18 This court is not referring to the plaintiffs' two experts-both reputable, knowledgeable and highly qualified witnesses.

End of Document

2014 WL 5288249

Superior Court of Connecticut.
Serdechny v. Griswold Inland Wetlands, Watercourses & Conservation Com'n
Superior Court of Connecticut, Judicial District of Hartford. | August 29, 2014 | Not Reported in A.3d | 2014 WL 5288249 | 59 Conn. L. Rptr. 35 (Approx. 11 pages)

Gary SERDECHNY et al.

v.

GRISWOLD INLAND WETLANDS, WATERCOURSES & CONSERVATION COMMISSION et al.

No. LNDCV126038412S.
Aug. 29, 2014.

Attorneys and Law Firms

Janet P. Brooks, East Berlin, CT, for Gary Serdechny et al.

Suisman Shapiro Wool Brennan Gray, New London, CT, Heller Heller & McCoy, Uncasville, CT, for Griswold Inland Wetlands, Watercourses & Conservation Commission et al.

BERGER, J.

I

*1 On October 18, 2012, the defendant, the Griswold inland wetlands, watercourses and conservation commission (commission), granted the application of the codefendant, Kreative Property Development of CT, LLC (Kreative), to conduct excavation and regrading activities on approximately 5.1 acres of eleven acres at 688 Hopeville Road and 700 Hopeville Road [1] (the property) in the C–1 commercial district in Griswold. The plaintiffs, Gary Serdechny, the owner of 56 Bishop Crossing Road and 66 Bishop Crossing Road in Griswold, and Dillon Serdechny, a resident of 66 Bishop Crossing Road, appeal the commission's decision alleging that it violated General Statutes § 22a–41(a)(2) and (6) by not considering reasonable and prudent alternatives to the proposed activity and impacts of future activities on the property.[2]

The property is approximately 50 percent wetlands; (Return of Record [ROR], Pleading # 125.00,[3] p. 4); and a significant portion falls within the 150–foot upland review area set by § 6.12 of the Inland Wetlands & Watercourses Conservation Commission Regulations of the town of Griswold (regulations). (ROR, # 120.00, pp. 8–9.) Kreative's plan is to regrade the property and to construct two gravel pads for development with a driveway connecting the southerly portion to the northerly portion. (ROR, # 110.00, Item 6, # 117.00, pp. 6–7.) It filed its application on April 30, 2012, seeking to excavate 46,980 cubic yards of sand and gravel from the southerly portion of its site of which 8,660 cubic yards would be used on the northerly portion to create a 14,000 square foot gravel development pad. (ROR, # 110.00, Items 1 and 2; # 117.00, pp. 2–3, 15 .) The rest of the sand and gravel would be disposed. (ROR, # 110.00, Item 1.)

On May 17, 2012, the commission voted to hold a public hearing finding that it would be in the public interest to do so, at least in part, because Anthony was a selectman and because Gary Serdechny was a member of the commission, albeit recused. (ROR, # 125.00, pp. 20–25.) The public hearing was held on June 21, 2012, July 19, 2012, August 16, 2012, and September 13, 2012.

Prior to the public hearing on June 15, 2012, Dillon Serdechny filed a petition to intervene pursuant to General Statutes § 22a–19,[4] which was revised on July 9, 2012; he was recognized by the commission as an intervenor and participated in the hearings. (ROR, # 110.00, Items 8 and 14.) During the public hearings, Kreative maintained that the

application was an "excavation permit"; (ROR, # 113.00, p. 15); in preparation for work to come later. Kreative, through counsel, emphasized that the proposed work would not occur within a wetland boundary, that proper siltation and erosion controls would be installed, and that the hydrology of the wetlands would not be impacted. (ROR, # 111.00, Item 57, pp. 2–5.) Among other things, Dillon Serdechny testified that information on impacts of future development, such as septic systems and parking, was lacking. (ROR, # 116.00, pp. 11, 49–51.) The commission conditionally approved the application on October 18, 2012. (ROR, # 111.00, Items 61 and 62.) The decision was published on October 23, 2012 in the *Norwich Bulletin*. (ROR, # 124.00, Item 69.)

*2 The plaintiffs commenced this appeal by service of process on the defendants[5] on November 2, 2012. On April 5, 2013, the record was returned and amendments to the record were filed on May 8, 2013. After briefs and supplemental briefs were filed, the court heard the appeal on April 28, 2014. The parties submitted further briefs on the issue of standing on May 16, 2014 and May 19, 2014.

II

"[P]leading and proof of aggrievement are prerequisites to the trial court's jurisdiction over the subject matter of a plaintiff's appeal ... [I]n order to have standing to bring an administrative appeal, a person must be aggrieved ... Statutory aggrievement exists by legislative fiat, not by judicial analysis of the particular facts of the case. In other words, in cases of statutory aggrievement, particular legislation grants standing to those who claim injury to an interest protected by that legislation." (Citations omitted; internal quotation marks omitted .) *Moutinho v. Planning & Zoning Commission*, 278 Conn. 660, 664–65, 899 A.2d 26 (2006). The defendants argue that the plaintiffs lack standing based upon the word "within" in General Statutes § 22a–43(a). Section 22a–43(a), in relevant part, provides: "[A]ny person aggrieved by any regulation, order, decision or action made pursuant to sections 22a–36 to 22a–45, inclusive, by ... a district or 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 regulation, order, 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 regulation, order, decision or action, appeal to the superior court for the judicial district where the land affected is located ..." (Emphasis added.) The defendants argue that "within" should be interpreted to mean that the owner's or occupier's land is required to abut, or be within ninety feet of, the wetland or watercourse involved in the decision, not abutting or within ninety feet of the property involved in the commission's decision. This court disagrees that § 22a–43(a) should be so construed.[6] See *Calabiano v. Planning & Zoning Commission*, 211 Conn. 662, 560 A.2d 975 (1989); *Civitano v. Conservation Commission*, Superior Court, judicial district of Fairfield, Docket No. CV–11–6019729–S (September 29, 2011, Radcliffe, J.) (52 Conn. L. Rptr. 676, 677–78) and cases cited therein. Consequently, Gary Serdechny, as the owner of 56 Bishop Crossing Road and 66 Bishop Crossing Road, and Dillon Serdechny, as an occupant of 66 Bishop Crossing Road, which properties undisputedly abut the subject property at 688 Hopeville Road and 700 Hopeville Road; (ROR, # 110.00, Item 1, p. 19, and Item 2); are statutorily aggrieved. See General Statutes § 22a–43(a). Additionally, as Dillon Serdechny intervened in the administrative proceeding pursuant to § 22a–19, he has standing to raise environmental issues. See *Finley v. Inland Wetlands Commission*, 289 Conn. 12, 25–26, 959 A.2d 569 (2008) ("[t]his court repeatedly has held that a person who intervenes in an administrative proceeding pursuant to § 22a–19, and who is aggrieved by the agency's decision, is entitled to appeal from that decision pursuant to the statutory provisions governing appeals from the decisions of that particular agency").

III

*3 "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 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 ... It imposes an important limitation on the power of the courts to overturn a decision of an administrative agency ... and to provide 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 in the directed verdict formulation, has said that it is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence ... 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).

"This court also has held that a claim that an application for a regulated activities permit does not comply with substantive wetlands regulations is cognizable under the Connecticut Environmental Protection Act ... It is clear, therefore, that if the wetlands agency has not made a determination, supported by substantial evidence, that the applicant's proposal complied with applicable statutes and regulations, a decision approving the permit cannot be sustained on appeal, regardless of whether the plaintiff has affirmatively established that the proposal will cause harm to the wetlands. We conclude, therefore, that an intervenor pursuant to § 22a–19 can prevail on appeal not only by proving that the proposed development likely would cause harm to the wetlands, but also by proving that the commission's decision was not based on a determination, supported by substantial evidence, that the development complied with governing statutes and regulations and would not cause such harm." (Citation omitted.) *Finley v. Inland Wetlands Commission, supra*, 289 Conn. at 40.

IV

*4 In paragraph twelve of the plaintiffs' complaint, they allege that the commission's decision in granting Kreative's application was illegal, arbitrary, and an abuse of discretion in that the commission did not consider all of the factors in § 22a–41(a). Section 22a–41(a) provides: "In carrying out the purposes and policies of sections 22a–36 to 22a–45a, inclusive, including matters relating to regulating, licensing and enforcing of the provisions thereof, the commissioner shall take into consideration all relevant facts and circumstances, including but not limited to: (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 loss of wetland or watercourse resources which would be caused by the proposed regulated activity, including the extent to which such activity would foreclose a future ability to protect, enhance or restore such resources, 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, (B) maintain or enhance existing environmental quality, or (C) in the following order of priority: Restore, enhance and create productive wetland or watercourse resources; (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." Section 10.2 of the regulations conforms to General Statutes § 22a–41 as required by General Statutes § 22a–42(f).[7] (ROR, # 120.00, pp. 16–17.) General Statutes § 22a–42a(d)(1), in relevant part, provides: "In granting, denying or limiting any permit for a regulated activity the inland wetlands agency, or its agent, shall consider the factors set forth in section 22a–41, and such agency, or its agent, shall state upon the record the reason for its decision ... The plaintiffs allege that the commission did not require Kreative to submit, and failed to consider, feasible and prudent alternatives to its proposal under § 22a–41(a)(2) and details of future development related to its proposal under § 22a–41(a)(6). In the plaintiffs' brief, they argue that commission failed to consider septic systems and well installations which will need to be constructed for future development and failed

to consider alternatives to the regrading and excavation and to future activities not yet proposed. Kreative counters that the commission is not required to consider feasible and prudent alternatives where the proposed activities will have no impact on the wetlands and that, even if the commission was required to do so, it made such a finding. Additionally, Kreative argues that nothing has been made inevitable by the commission's granting of the permit for regrading and excavation and that any future development will require further authorization by the commission.

*5 The commission also asserts that the appeal should be dismissed because it "fully complied with all procedural and substantive requirements consequent to a determination by a wetlands agency to conduct a hearing because of a potential significant impact on wetlands resources." It notes that it considered the alternatives presented by the intervenor; that it expressly found in its decision that there were no feasible and prudent alternatives to the proposed activities which would cause less or no environmental impact and that this finding is supported by substantial evidence on the record.

A

The plaintiffs posit that the commission failed to consider feasible and prudent alternatives to the proposed regulated activities. Kreative argues that the commission was not required to consider alternatives because substantial evidence in the record indicated no impact on wetlands, and, even if the commission was required to do so, it made such a finding.

In the present case, the commission limited its review to the specific application and made the following relevant, specific findings: "3. The Commission finds that the Application involves and calls for no activity in regulated areas, and that all proposed activities will occur in upland review areas. The Commission also finds, based on substantial evidence in the Record, including but not limited to the expert evidence submitted by the Applicant, that the activities proposed by the Applicant will have no direct or indirect adverse impact on regulated resources; will not disturb any regulated area; will not alter or adversely impact the physical characteristics of the regulated wetlands and watercourses, and will not change the physical characteristics of the wetlands or watercourses or reduce the populations of the various amphibians and animals observed by the Applicant's experts at the site.

"4. The Commission finds that the Application, as conditioned and modified by this Motion, is in compliance with the applicable criteria of its Regulations and of the Act.

"5. The Commission finds that there are no feasible and prudent alternatives to the proposed regulated activity which would cause less or no environmental impact to wetlands or watercourses. In making this finding, the Commission considered, *inter alia*, 'alternatives' suggested by the Intervener.

"6. With respect to the claims by the intervener pursuant to C.G .S. § 22a–19, the Commission finds that the Intervener is not an expert in any field relevant to the Application, and presented no expert evidence as to the likely impacts on the activities proposed by the Application. The Commission further finds that the expert evidence submitted by the Applicant, none of which was controverted by expert evidence relevant to the Application, as modified and conditioned by this Motion, and based on the substantial evidence in the Record including the Application, will not adversely impact the physical characteristics of the regulated wetlands and watercourses, and will not or is not 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, including the regulated wetlands and watercourses." (ROR, # 111.00, Item 62, p. 2.)

*6 In deciding whether to hold the public hearing on the application, the commission found the application to be a matter of public interest; (ROR, # 111.00, Item 62, p. 1); but the commission admits in its brief that it is somewhat unclear whether the public hearing was also held based upon a finding that the proposed activity may have a significant impact on the wetlands. (See ROR, # 125.00, pp. 20–25.) Sections 22a–19(b),[8] 22a–41(a)(2) and (b)(1)[9] require the commission to consider alternatives. See *Gardiner v. Conservation Commission*, 222 Conn. 98, 110, 608 A 2d 672 (1992) (agreeing that an inland wetlands commission must consider "alternatives to the same extent that § 22a–41 requires the commissioner of environmental protection to do so in determining whether any degree of pollution likely to be generated by a proposed wetlands activity is unreasonable"). When a public hearing is held on an application based upon a finding that the proposed activity may have a significant impact on wetlands or watercourses, a

commission shall not issue a permit unless it finds on the basis of the record that a feasible and prudent alternative does not exist. General Statutes § 22a–41(b)(1).

"The sine qua non of review of inland wetlands applications is a determination whether the proposed activity will cause an *adverse impact* to a wetland or watercourse." (Emphasis in original.) *River Bend Associates, Inc. v. Conservation & Inland Wetlands Commission*, 269 Conn. 57, 74, 848 A.2d 395 (2004). In the present case, the commission reviewed Kreative's proposal to determine whether there would be an impact on the wetlands. The commission based its decision, at least in part, on the expert testimony received at the public hearing. (ROR, # 111.00, Item 62, p. 2.) "Determining what constitutes an adverse impact on a wetland is a technically complex issue ... Inland wetlands agencies commonly rely on expert testimony in making such a finding." (Citation omitted.) *Id.*, at 78. One of Kreative's experts was George Logan, a wetlands scientist, a biologist, and a soils scientist, who stated, "Based on this, I can tell you confidently that there will not be an adverse impact or unreasonable impairment, pollution, or destruction of the natural resources including critters and vernal pool-potential vernal pool habitats and wetlands on the site." (ROR, # 117.00, pp. 48–49.) Based upon substantial evidence in the record, the commission found that there would be no direct or indirect impact on the wetlands. (ROR, # 111.00, Item 62, p. 2.) With a finding of no impact on the wetlands, the commission was arguably not required to consider feasible and prudent alternatives. See *Paige v. Town Plan & Zoning Commission*, 235 Conn. 448, 462–63, 668 A.2d 340 (1995) ("General Statutes § 22a–19(b) requires the consideration of alternative plans *only* where the commission first determines that it is *reasonably likely* that the project would cause *unreasonable pollution, impairment or destruction* of the *public trust* in the natural resource at issue" [emphasis in original; internal quotation marks]); see also *Nason Group, LLC v. Haddam Inland Wetlands Commission*, Superior Court, judicial district of Middlesex, Docket No. CV–08–4009643–S (February 9, 2011, Abrams, J.) (51 Conn. L. Rptr. 440, 442) ("[the plaintiff's] obligation to provide alternatives to the proposed use [under § 22a–41(a)(2)] is obviated by the court's conclusion that the [commission's] finding of adverse impact was not supported by substantial evidence and was not a proper basis for denying [the plaintiff's] application"). [10]

"7 Regardless of whether the commission was required to consider feasible and prudent alternatives, it specifically made such a finding. (ROR, # 111.00, Item 62, p. 2.) The plaintiffs argue and Kreative admits that it did not submit any alternatives to its proposal. [11] The intervenor did present, however, other options, including a larger non-disturbance buffer, eliminating the access road connecting the northern and southern portions, and eliminating the northern pad. (ROR, # 116.00, pp. 43–48.)

In *Red Hill Coalition, Inc. v. Conservation Commission*, 212 Conn. 710, 726, 563 A.2d 1339 (1989), the court held, "[A]lthough the applicable statutes and regulations mandate that the commission consider alternatives to the applicants' proposed action, nowhere is it mandated that the alternatives emanate from the applicants. We conclude, as did the trial court in its memorandum of decision, that '[t]he record is replete with alternatives proposed for consideration by the Commission whether submitted by the applicants with their reasons why such alternatives were not feasible or by interested parties.' Neither the General Statutes nor the local regulations compel the applicants, sua sponte, to submit formal plans or drawings for all possible alternatives. Absent such a direction by the legislature, we will not read such a requirement into the wetlands act." (Footnote omitted.)

In *Samperi v. Inland Wetlands Agency, supra*, 226 Conn. at 589, "The plaintiffs and the cross appellant argue ... that the statutory mandates of [§ 22a–41(b)] require the agency to create a record concerning each and every separate incursion or regulated activity in a wetland and to make an express finding that no feasible and prudent alternative exists before it can issue a permit ." The court agreed "that the statute does not permit an agency to grant a permit if the agency finds that a feasible and prudent alternative exists with regard to any of the incursions or regulated activities," but disagreed "that the agency's decision-making process in this regard requires explicit consideration of each proposed alternative and an explicit finding that all other alternatives are not feasible and prudent." *Id.*, at 589–90. The court continued, "Section 22a–41(b) requires only that the commissioner make a singular 'finding' that a feasible and prudent alternative does not exist. The use of the singular word 'finding' is unambiguous. The statute does not require that multiple findings be made." *Id.*, at 590. "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.) *Id.*, at 592–93.

In the present case, the commission specifically found "that there are no feasible and prudent alternatives to the proposed regulated activity which would cause less or no environmental impact to the wetlands or watercourses." (ROR, # 111.00, Item 62, p. 2.) In making its finding, "the Commission considered, *inter alia*, 'alternatives' suggested by the intervener." (ROR, # 111.00, Item 62, p. 2.) The alternatives were not required to emanate from Kreative. See *Red Hill Coalition, Inc. v. Conservation Commission, supra*, 212 Conn. at 726. The commission was entitled to consider and apparently did view Dillon Serdechny's non-expert testimony with skepticism. See *Manor Development Corporation v. Conservation Commission*, 180 Conn. 692, 697, 433 A.2d 999 (1980) ("[a]n administrative agency is not required to believe any witness, even an expert"). A review of the commission's meeting of October 18, 2012 during which it granted Kreative's application reveals no specific discussion or mention of alternatives other than the commission's counsel reading of the specific finding. (ROR, # 119.00.) The commission members clearly reviewed, however, the proposed decision, discussed particular paragraphs, and then voted to approve it. (ROR, # 119.00.) The commission was not required to make an explicit finding that all other alternatives were not feasible and prudent. See *Samperi v. Inland Wetlands Agency, supra*, 226 Conn. at 590. The commission simply needed to manifest a finding of no feasible and prudent alternative in some verifiable fashion, which it did. See *id.*, at 592–93. Therefore, this court does not agree that substantial evidence in the record indicates that the commission failed to consider feasible and prudent alternatives under § 22a–41(a)(2).

B

*8 The plaintiffs also argue that the commission did not consider impacts of future activities made inevitable by the proposed regulated activity which may have an impact on the wetlands under § 22a–41(a)(6). Specifically, the plaintiffs assert that future development will require wells and septic systems that should have been considered by the commission. Kreative counters that the commission did not have authority to consider unknown, future development on the property and that any further development on the property will require additional authorization by the commission.

Section 22a–41(a)(6) and § 10.2.d of the regulations; (ROR, # 120.00, p. 17); require the commission to consider "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." "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature ... In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply ... In seeking to determine that meaning, General Statutes § 1–2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered ... When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter." *A. Gallo & Co. v. Commissioner of Environmental Protection*, 309 Conn. 810, 821, 73 A.3d 693 (2013), cert. denied, 134 S.Ct. 1540, 188 L.Ed.2d 581 (2014).

The plain language supports the plaintiffs' argument that the legislature understood and mandated that in reviewing an application a commission should be looking at the whole impact of the proposed development on the regulated area.[12] See *Connecticut Fund for the Environment, Inc. v. Stamford*, 192 Conn. 247, 250, 470 A.2d 1214 (1984) ("[a]lthough in considering an application for a permit to engage in any regulated activity a local inland wetland agency *must, under § 22a–41, take into account the environmental impact of the proposed project*, it is the impact on the regulated area that is pertinent, not the environmental impact in general" [emphasis added]). "Inevitable" is defined as "incapable of being avoided or evaded" or "certain to occur or confront one." Webster's Third New International Dictionary (1961). Kreative's argument with respect to inevitable future development is somewhat disingenuous,[13] but the transcript of the public hearing on May 17, 2012, indicates that Kreative planned to sell the property and did not necessarily know what further development may occur. (ROR, # 125.00, pp. 13–14.) Indeed, a professional office park was theorized as the use for the back portion of the

property with possibilities of restaurant or retail uses on the front portion. (ROR, # 125.00, pp. 13–14.) Therefore, the court cannot determine from the record that any particular future development would be certain to occur.

*9 Additionally, commissions cannot speculate as to what the impacts may be from nonspecific, future development. See *River Bend Associates, Inc. v. Conservation & Inland Wetlands Commission, supra*, 269 Conn. at 71 ("[e]vidence of general environmental impacts, mere speculation, or general concerns do not qualify as substantial evidence"). Consequently, the plaintiffs have not sustained their burden to prove that the proposed development would likely cause harm to the wetlands and that "the commission's decision was not based on a determination, supported by substantial evidence, that the development complied with governing statutes and regulations and would not cause such harm." See *Finley v. Inland Wetlands Commission, supra*, 289 Conn. at 40.

For the foregoing reasons, the appeal is dismissed.

All Citations

Not Reported in A.3d, 2014 WL 5288249, 59 Conn. L. Rptr. 35

Footnotes

1 Kreative owns 688 Hopeville Road, and Philip Anthony, a codefendant, owns 700 Hopeville Road. (Return of Record [ROR], Pleading # 125.00, p. 23; # 113.00, p. 22.) Anthony apparently gave Kreative permission to extend grading and to eliminate a berm on his property. (ROR, # 125.00, p. 23.)

2 In the plaintiffs' complaint, they also allege that they were denied the right to cross examine one of Kreative's experts. As they have not briefed that issue, the court considers that claim abandoned. See *Turner v. American Car Rental, Inc.*, 92 Conn.App. 123, 130–31, 884 A.2d 7 (2005).

3 For ease of reference, the return of record items are referred to by the number assigned to each pleading as they were entered on the docket and are further broken down to include the item numbers only where more than one item was included in the pleading.

4 Section 22a–19, in relevant part, provides: "(a)(1) In any administrative, licensing or other proceeding, and in any judicial review thereof made available by law, the Attorney General, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, 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 Pursuant to General Statutes § 22a–43(a), service of process was also made on the commissioner of the department of energy and environmental protection who has not filed an appearance in this matter.

6 The parties agree that the addition of "within" was simply part of a reviser bill, No. 01–195 of the 2001 Public Acts (P.A. 01–195), § 173. Reviser bills are passed only to make technical and not substantive changes the public acts. See *Kravitz v. McCarthy*, 14 Conn.Sup. 368, 372 (1946) ("It is not, however, the purpose of a revision of the General Statutes to amend or

otherwise alter the public acts but only to rearrange and codify them. No intent on the part of the legislature in adopting such a revision to change the statutory law as it was at the time the revision was made will be attributed to it"); see also Connecticut General Assembly, "Legislative Terms and Definitions," available at http:// www.cga.ct.gov/asp/content/Terms.asp (last visited August 27, 2014) (defining "technical reviser's bill" as "an annual bill to correct grammatical or typographical errors in the statutes"). Indeed, Representative Michael Lawlor testified as to P.A. 01–195: "The file copy contains 100 sections, each one of which is actually technical and does not make any substantive changes in the General Statutes ... It is my understanding from the bill drafters and all the persons who have reviewed this that nothing in this file copy in any way changes anyone's substantive rights or obligations or privileges or anything else under the statute." 44 H.R. Proc., Pt. 22, 2001 Sess., p. 7382–83.

Additionally, the defendants' interpretation of the word "within" would completely change the rights of abutters that has continuously been understood by our courts in inland wetland appeals as well as in sister statutes concerning statutory aggrievement in land use appeals. See General Statutes § 8–8(a)(1) (" 'aggrieved person' includes any person owning land ... that abuts or is within a radius of one hundred feet of any portion of the land involved in the decision of the board"). Indeed, in *Caltabiano v. Planning & Zoning Commission*, 211 Conn. 662, 560 A.2d 975 (1989), the court held that "the land involved" in the decision was the complete tract of land rather than just the discreet part contained in the application. In discussing the history of aggrievement, the court noted, "Both forms of statutory aggrievement reveal a significant liberalization of the law of aggrievement concerning those who can appeal to court from a decision of a zoning agency. Before the addition of these statutory appellate rights, a person appealing from such a decision had, then as now, an arduous burden to allege and prove so-called classical aggrievement ... We conclude that the legislature presumed as a matter of common knowledge that persons owning property within close proximity to a projected zoning action would be sufficiently affected by the decision of a zoning agency to be entitled to appeal that decision to court. Giving such a right to the narrow class of abutters and those owning property within 100 feet of the land involved would not unduly enlarge the class of those entitled to appeal such a decision. On the other hand, the delay, difficulty and expense of proving classical aggrievement would be eliminated ... To apply § 8–8(a) in such a narrow fashion would be to nullify its effect of opening up the courts to litigants with a presumptively legitimate right to challenge such zoning decisions." (Citations omitted.) *Id.*, at 668–70.

"[P]lanning and zoning cases ... furnish a very compelling analogy" to inland wetlands and watercourses law. *Gagnon v. Inland Wetlands & Watercourses Commission*, 213 Conn. 604, 611, 569 A.2d 1094 (1990). In discussing the related phrase of "any portion within" in § 22a–43(a), the court, Radcliffe, J., adopted the *Caltabiano* interpretation opining that as inland wetland agencies also regulate upland review areas not within a wetland or watercourse, the argument, similar to the one herein, to interpret the statute as restrictive would make no sense. See *Civitano v. Conservation Commission*, Superior Court, judicial district of Fairfield, Docket No. CV–11–6019729–S (September 29, 2011, Radcliffe, J.) (52 Conn. L. Rptr. 676, 677–78).

Furthermore, as our Supreme Court noted, "[t]his court traditionally eschews construction of statutory language which leads to absurd consequences and bizarre results." (Internal quotation marks omitted.) *Caltabiano v. Planning & Zoning Commission*, *supra*, 211 Conn. at 667. In the present case, the defendants' interpretation would lead to absurd consequences and a bizarre result not only because it would ignore the upland review area, but also because their interpretation of "owning or occupying land which abuts any portion of land *within* the wetland or watercourse" is nonsensical. First, the wetlands are within the land and not vice versa. Second, the phrase "any portion of land" would be made superfluous. See *PJM & Associates, LC v. Bridgeport*, 292 Conn. 125,

138, 971 A.2d 24 (2009) ("It is a basic tenet of statutory construction that the legislature [does] not intend to enact meaningless provisions ... [I]n construing statutes, we presume that there is a purpose behind every sentence, clause, or phrase used in an act and that no part of a statute is superfluous ... Because [e]very word and phrase [of a statute] is presumed to have meaning ... [a statute] must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant." [Internal quotation marks omitted]). Thus, this court concludes that the reviser bill amendment was made in error and refuses to infer that the legislature through a technical amendment intended to narrow the class of those who may appeal inland wetlands decisions.

7 Section § 22a–42(f) provides: "Municipal or district ordinances or regulations may embody any regulations promulgated hereunder, in whole or in part, or may consist of other ordinances or regulations in conformity with regulations promulgated hereunder. Any ordinances or regulations shall be for the purpose of effectuating the purposes of sections 22a–36 to 22a–45, inclusive, and, a municipality or district, in acting upon ordinances and regulations shall incorporate the factors set forth in section 22a–41."

8 See footnote 4 of this memorandum of decision.

9 Section 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 therefor shall be stated on the record in writing."

General Statutes § 22a–39(k) provides for the waiving of a public hearing when the "commissioner determines that the regulated activity for which a permit is sought is not likely to have a significant impact on the wetland or watercourse ..."

10 But see *Gardiner v. Conservation Commission, supra,* 222 Conn. at 109 ("The trial court construed § 22a–19(b) not to require a municipal inland wetlands agency to consider alternatives to an applicant's proposal once the agency has found that 'unreasonable pollution' is unlikely to result from granting the application. This analysis is flawed, however, because the determination of whether a specific degree of contamination or other environmental detriment is unreasonable may often turn on the availability of alternatives. Even minimal environmental harm is to be avoided if, '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.' General Statutes § 22a–19(b)").

11 The plaintiffs argue that Kreative's application was not complete without the presentation of alternatives. "It was within the discretionary power of the commission to proceed on the application with the supporting material as submitted." *Woodburn v. Conservation Commission,* 37 Conn.App. 166, 179, 655 A.2d 764, cert. denied, 233 Conn. 906, 657 A.2d 645 (1995); see also *Abel v. New Canaan Planning & Zoning Commission,* Superior Court, judicial district of Stamford–Norwalk at Stamford, Docket Nos. CV–08–4013132–S and CV–08–4014331–S (January 6, 2012, Mottolese, J.T .R.) ("[i]t is within the discretion of a zoning agency to determine whether sufficient documentation has been provided in order to enable it to proceed with an application"); see also R. Fuller, 9 Connecticut Practice Series: Land Use Law and Practice (3d Ed.2007) § 15.12, p. 485.

12 "In 1996, the legislature amended § 22a–41, adding a requirement that a wetlands and watercourses commission should consider six factors when considering a permit application. See Public Acts 1996, No. 96–157 (P.A. 96–157), § 2." *Tarullo v. Inland Wetlands & Watercourses Commission,* 263 Conn. 572, 580, 821 A.2d 734 (2003). In enacting P.A. 96–157, Senator

Cathy Cook commented that: "The underlying purpose of any of these changes in the wetlands law is to make certain that the function of the wetland is not interfered with by an applicant." 39 S.Proc., Pt. 9, 1996 Sess., p. 2953. This is in accord with the duty to protect Connecticut's wetlands and watercourses as set forth in the enabling legislation. See General Statutes § 22–36; *Red Hill Coalition, Inc. v. Conservation Commission, supra,* 212 Conn. at 718–19.

13 Kreative argues that it is only seeking approval for excavation and regrading and that the commission is "not evaluating what any potential future use will have on this site"; (ROR, # 111.00, Item 57, p. 5); but Kreative also seeks to construct two gravel pads in the hopes of enticing a buyer. (ROR, # 110.00, Item 6 .) Indeed, the application states that the excavation and regrading is to "prepare the site for future development" and that the two gravel building pads are being built "to facilitate access and future development." (ROR, # 110.00, Item 6.) Additionally, it states, "the 150' regulated area for commercial activities encompasses a significant portion of the property. This proposed work within the regulated area is necessary to prepare the site for future development and is essentially unavoidable." (ROR, # 110.00, Item 6.) Furthermore, Kreative acknowledges that a septic system will be needed "eventually" and that a system for a fast-food restaurant would need to be a "large ... a significant septic system." (ROR, # 125.00, pp. 14, 25.)

Kreative's expert, George Logan, a wetlands scientist, a biologist, and a soils scientist testified: "In a future condition if this thing goes through and has to come back with a specific proposal, I will caution you and I will caution the developer and I've cautioned them in the report that certain things need to happen in order for you folks to ensure that there's not going to be a physical impact and the most important part at that time, apart from the continuing vigilance with the erosion and sedimentation control obviously, is to ensure that you use some low impact development processes. I'm sure this gentleman down there knows all about them and, in this particular case because this is a discharge wetlands which has a very stable hydrologic regime, we want to be sure it continues to have a stable hydrologic regime, and you need to infiltrate your runoff into the ground. You need to pretreat it first and infiltrate into the ground. There are systems that in these soils it would be very easy to do. Maybe on the north side a little bit more difficult but certainly on the south side it would be (inaudible) right there.

"And those are really my only caution. My only caution looks to future addition which I don't know and you don't know and you shouldn't really care in the sense that this is the proposal you have before you." (ROR, # 117.00, p. 49.)

This comment that the commission should not care about future addition is not correct. The commission is not constrained to take a limited view of the application with respect to future development under § 22a–41(a)(6).

Logan's testimony and Kreative's application allude to the process of developing by segmentation. *Stewart Park & Reserve Coalition v. Slater,* 352 F.3d 545, 559 (2d Cir.2003) ("Segmentation is an attempt to circumvent [environmental regulations] by breaking up one project into small projects and not studying the overall impacts of the single overall project. Segmentation is to be avoided in order to ensure that interrelated projects ... not be fractionalized ... A project is properly segmented if it (1) connects logical termini and is of sufficient length to address environmental matters of a broad scope; (2) has independent utility or independent significance; and (3) will not restrict consideration of alternatives for other reasonably foreseeable transportation improvements ... A project has been improperly segmented, on the other hand, if the segmented project has no independent utility, no life of its own, or is simply illogical when viewed in isolation" [citations omitted; internal quotation marks omitted]). Segmentation, or splitting a development application into components, each perhaps with minimal or no impact, can simplify the permitting process. See, e.g., *Swain v. Brinegar,* 542 F.2d 364, 368–69 (7th Cir.1976) ("Segmentation of highway

projects, although necessary to make their design and construction more manageable, can limit the usefulness of environmental impact studies in two significant ways. First, the project can be divided into small segments; although the individual environmental impact might be slight, the cumulative consequences could be devastating. Second, the location of the first segment may determine where the continuation of that roadway is to be built. In such a case, preparation of the [Environmental Impact Statement (EIS)] for the extension is no more than a formal task because the decision-maker's ability to choose a different route no longer exists. On the other hand, an EIS need not consider the long-term visions of highway designers and urban engineers when they suggest comprehensive plans which may take years to construct, if they are to be built at all. The information contained in an EIS for such a comprehensive plan is likely to be speculative, irrelevant to the specific question before the decision-maker, and outdated by the time the choice must be made. To require the preparation of such an EIS would surely impose an undue burden on the state and federal agencies"). It can also be an end run around evaluating the whole impact of a project on the subject resource. See, e.g., *Hoosier Environmental Council v. U.S. Army Corps of Engineers*, 722 F.3d 1053, 1059 (7th Cir.2013) ("[t]here is a difference between 'segmentation' in its perjorative sense and—what is within administrative discretion—breaking a complex investigation into manageable bits").

In cases like the present one where the next stage of development is intimated in the application; (ROR, # 125.00, p. 14); the commission is obligated under § 22a–41(a)(6)—to the extent it is able—to scrutinize future activity made inevitable by the proposed activity which may have an impact on wetlands or watercourses. Focusing only on the limited work in the application suffices if the proposed activity stands on its own and has "independent utility." *Thomas v. Peterson*, 753 F.2d 754, 759–60 (9th Cir.1985). A commission should not ignore potential impacts of future development. Under § 22a–41(a)(6), commissions are empowered to ask and should be asking questions, for example, about what the real impact of the inevitable future development on the natural resource will be and what will happen if that next permit cannot be obtained.

In the present case, the commission will likely have another opportunity to consider the § 22a–41(a) factors. Kreative admits in its brief that "any future development for a subsequent use in either the [southern or northern portions] requiring any use of the northerly development node or the northerly third of the southern development node would, by regulation, require a further permit from the [commission]." Given that the property is 50 percent wetlands, query whether the next permit will be able to be obtained.

End of Document