

**STATE OF CONNECTICUT
SITING COUNCIL**

RE: APPLICATION BY T-MOBILE
NORTHEAST LLC FOR A
CERTIFICATE OF ENVIRONMENTAL
COMPATIBILITY AND PUBLIC NEED
FOR A TELECOMMUNICATIONS FACILITY
AT 61-1 BUTTONBALL ROAD IN THE
TOWN OF OLD LYME, CONNECTICUT

DOCKET NO. 393

Date: April 1, 2010

T-MOBILE'S BRIEF IN OPPOSITION TO PETITION TO INTERVENE

The Applicant, T-Mobile Northeast LLC ("T-Mobile"), respectfully submits this Brief in Opposition to the Petition to Intervene ("Petition") by the Black Hall Club, INC ("Black Hall"). T-Mobile objects to the Petition only to the extent Black Hall seeks intervention under General Statutes § 22a-19. Black Hall's Petition is insufficient because it does not articulate environmental claims under § 22a-19 and fails to set forth specific facts in support of its purported environmental claims. Because Black Hall's Petition does not satisfy the statutory requirement for a verified pleading under § 22a-19, the Connecticut Siting Council ("Council") should not afford Black Hall intervenor status under § 22a-19.

I. BACKGROUND

On or about October 15, 2009, T-Mobile filed its application for a Certificate of Environmental Compatibility and Public Need for the construction, operation and maintenance of a telecommunications facility at 61-1 Buttonball Road, Old Lyme ("Facility"). On or about December 18, 2010, notice of T-Mobile's filing and a proposed schedule was posted for public viewing on to the Council's website. The schedule, *inter alia*, set a deadline to request party/intervenor status on or before January 28, 2010.

On February 04, 2010, the Council held a public field review and hearing. The Council continued the evidentiary portion of the hearing until March 2, 2010. The Council also extended all pre-filing deadlines to February 23, 2010. Black Hall filed its Petition on February 22, 2010, a day before the deadline seeking to intervene under § 22a-19 and General Statutes § 16-50n. At the hearing on March 2, 2010, T-Mobile objected to Black Hall's Petition only as it related to § 22a-19.¹

II. LEGAL STANDARD FOR INTERVENTION UNDER § 22a-19

Section 22a-19 (a) provides in relevant part: "In any administrative, licensing or other proceeding, and in any judicial review thereof made available by law . . . 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." The standing conferred by § 22a-19 is limited strictly "to challenging only environmental issues covered by the statute and only those environmental concerns that are within the jurisdiction of the particular administrative agency conducting the proceeding into which the party seeks to intervene." (Internal quotation marks omitted.) *Pond View, LLC v. Planning & Zoning Commission*, 288 Conn. 143, 157, 953 A.2d 1 (2008).

¹ T-Mobile's opposition to Black Hall's Petition to Intervene implicates Black Hall's standing to intervene in this matter under § 22a-19. *Pond View, LLC v. Planning & Zoning Commission*, 288 Conn. 143, 156-57, 953 A.2d 1 (2008). Because standing relates to subject matter jurisdiction, such issues may be raised at any time and in any form. *Wucik v. Planning & Zoning Commission*, 113 Conn. App. 502, 504 n.2, 967 A.2d 572 (2009). Regardless, Black Hall has conceded that T-Mobile's voiced objection on March 2, 2010, did not prejudice Black Hall. (*Black Hall Br.*, pp. 5-6.) Black Hall has also conceded that it was a "late comer" to the proceedings and could not meet the earlier pre-filing deadlines. (*March 2, 2010 Tr.*, p. 260.)

A would-be intervenor must submit a “verified pleading” containing “specific facts.” *Nizzardo v. State Traffic Commission*, 259 Conn. 131, 164, 788 A.2d 1158 (2002). The specific factual allegations must set forth the environmental issues that the intervenor intends to raise. *Id.*, 164-65. “A [verified pleading] does not sufficiently allege standing [however] by merely reciting the provisions of § [22a-19], but must set forth facts to support an inference that unreasonable pollution, impairment or destruction of a natural resource will probably result from the challenged activities unless remedial measures are taken.” (Internal quotation marks omitted.) *Finley v. Inland Wetlands Commission*, 289 Conn. 12, 35, 959 A.2d 569 (2008).

The requirement to allege a sufficient factual predicate comports with the pleading standards of the Practice Book, which requires a pleading to contain the material facts upon which the pleader relies. *Nizzardo v. State Traffic Commission*, *supra*, 259 Conn. 163; Practice Book § 10-1. Ultimately, the would-be intervenor must articulate a colorable claim of unreasonable pollution, impairment or destruction of the environment. *Finley v. Inland Wetlands Commission*, *supra*, 289 Conn. 35.

III. ARGUMENT

Black Hall’s Petition does not comport with the pleading requirements established by General Statutes § 22a-19 and Practice Book § 10-1. It is skeletal at best. Most of the allegations do not relate to environmental issues within the purview of § 22a-19. The five allegations that arguably touch upon § 22a-19 are addressed in turn.

1. [T]he Black Hall Club . . . is . . . a corporation owning abutting land to the proposed facility and within the line of sight . . . of Applicant's proposed facility.

This allegation states only that members of Black Hall might see the proposed telecommunication. A neighbor's potential visibility of a proposed telecommunications facility, without more, does not constitute unreasonable pollution, impairment or destruction of the State's natural resources. It does not allow for a reasonable inference of such an impact. If this were the case, then most, if not all, towers or tall structures would unreasonably impact the State's natural resources.

2. Black Hall's participation will tend to show that the proposed activity is likely to unreasonably harm the public trust in the air, water, or other natural resources of the State of Connecticut in that, if granted, the proposed facility will, inter alia, unreasonably impair the visual quality of the environment in and about Buttonball Road; and is reasonably likely to cause viewshed deterioration.

This allegation parrots some of the language in § 22a-19, which, according to Supreme Court precedent, is an insufficient basis to intervene under § 22a-19. This allegation alleges no facts at all – it is just a prediction of what Black Hall thinks it can prove by the close of the record.

3. Black Hall Club, Inc. is a Connecticut corporation consisting of, inter alia, of Old Lyme-area residents and members who enjoy the scenic values of the Buttonball area while attending recreational opportunities provided at the Black Hall Club which abuts the proposed facility to the south.

This allegation is similar to the first allegation above in that it avers only that the members of Black Hall might see the proposed Facility. Although the statement refers to "scenic values," there are no facts in the Petition to support the proposition that the Black Hall Club, a private golf course, is a "natural resource" of the State protected under § 22a-19.

4. Black Hall's members will have a direct line-of-sight view of the proposed tower

This allegation repeats those in statements one and three above. It states only that members of Black Hall might see the proposed Facility. A neighbor's potential visibility of a proposed telecommunications facility, without more, does not constitute unreasonable pollution, impairment or destruction of the State's natural resources. It does not allow for a reasonable inference of such an impact. If this were the case, then most, if not all, towers or taller structures would unreasonably impact the State's natural resources.

5. The design does not incorporate the best available technology for reducing the visual impacts of the facility.

This statement refers to "visual impacts" without any specificity. The reader can only assume this statement rests on statements one and four above. Accordingly, this statement suffers from the same flaws as statements one and four.

Accordingly, the five cursory allegations do not set forth facts to support an inference that unreasonable pollution, impairment or destruction of a natural resource will probably result from the challenged activities unless remedial measures are taken. *Finley v. Inland Wetlands Commission, supra*, 289 Conn. 35. They do not, therefore provide a colorable basis for standing under § 22a-19.

In its reply brief, Black Hall refers to various legal authorities in support of its intervention under § 22a-19. Those authorities state that one may intervene in proceedings under § 22a-19 by submitting a "verified pleading" setting forth sufficient facts in support of an environmental claim within the purview of § 22a-19 (and within the purview of the presiding agency's jurisdiction). The case law cited by Black Hall

presupposes the filing of the requisite “verified pleading” and does not address the present situation, when the purported “verified pleading” fails to set forth specific factual allegations and fails to articulate an environmental claim under § 22a-19.

Similarly, in its reply brief, Black Hall argues that it is “an organization which utilizes the benefits of the coastal area scenic vistas” and therefore is “well situated to raise issues of protection of the scenic vistas both on and off its property.” (*Br.*, pp. 4-5.) However, the Petition is devoid of any facts indicating that Black Hall’s private golf course has any coastal vistas on its property or enjoys nearby scenic vistas. Moreover, Black Hall does not allege any facts in its Petition which would suggest an adverse impact to the “visual quality of a natural resource through an alteration of the natural features of the vistas.” General Statutes § 22a-93 (15).

Black Hall’s only complaint is that it would see the Facility from certain areas of its private golf course. This complaint is questionable as Black Hall previously supported the installation of a 190 foot telecommunications facility on property owned by Black Hall across the street from its golf course. Nevertheless, intervention under § 22a-19 pertains to claims of unreasonable pollution, impairment or destruction of “natural resources,” and does not pertain to claims by a private property owner that it would have views of a new structure. Ultimately, such a complaint does not support intervention under § 22a-19 because it is not a claim that the proposed Facility would unreasonably pollute, impair or destroy “natural resources” of the State.

IV. CONCLUSION

For the foregoing reasons, T-Mobile respectfully requests that the Council deny Black Hall's Petition as it relates to § 22a-19.

Respectfully Submitted,

T-MOBILE NORTHEAST LLC

By: 

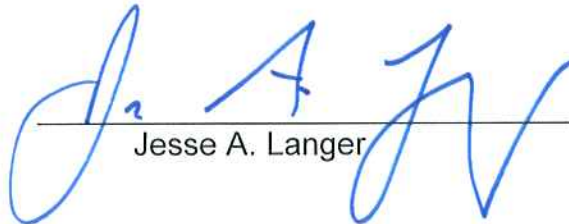
Julie D. Kohler, Esq.
Jesse A. Langer, Esq.
Cohen and Wolf, P.C.
1115 Broad Street
Bridgeport, CT 06604
Tel. (203) 368-0211
Fax (203) 394-9901
jkohler@cohenandwolf.com
jlanger@cohenandwolf.com

CERTIFICATION

I hereby certify that on this day a copy of the foregoing was delivered by Electronic Mail and regular mail, postage prepaid, to all parties and intervenors of record, as follows:

The Honorable Timothy C. Griswold
First Selectman
Town of Old Lyme
Town Office Building
52 Lyme Street
Old Lyme, CT 06371
(Via Email: selectmansoffice@oldlyme-ct.gov)

Keith R. Ainsworth, Esq.
Evans Feldman & Ainsworth, L.L.C.
261 Bradley Street
P.O. Box 1694
New Haven, CT 06507-1694
(Via Email: krainsworth@snet.net)



Jesse A. Langer