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## City of Waterbury v. Town of Washington, 800 A.2d 1102 (Conn. 2002)

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evidence that Buccino's predecessors withheld such rights, Ace had, as a matter of law, the right to use Hall's pond for recreational purposes.

*Regan Rozier*

**City of Waterbury v. Town of Washington, 800 A.2d 1102 (Conn. 2002)**  
(holding exhausting administrative remedies is unnecessary to a Connecticut Environmental Protection Act claim and finding unreasonable public trust impairment must be consistent with Connecticut Environmental Protection Act statutory scheme)

City of Waterbury ("Waterbury") appealed the Connecticut Superior Court's declaratory judgment for the Town of Washington ("Washington"), which held that Waterbury's Shepaug dam operation violated the Connecticut Environmental Protection Act ("CEPA") because it polluted the public trust, but not by becoming a public or private nuisance. The trial court found alleged excessive diversions interfered with the Washington's riparian rights, breaching the parties' 1921 contract. On appeal to the Connecticut Supreme Court, the Washington cross-claimed for injunctive relief, alleging the diversions unreasonably impaired the public trust, and that relief granted could not cure Waterbury's breach. The supreme court reversed and held that: (1) exhausting administrative remedies was unnecessary to a CEPA claim; (2) the trial court's unreasonable impairment finding was incorrect because it did not consider minimum flow statutes as within CEPA's mandate; and (3) Waterbury established a prescriptive easement against the Washington's riparian rights. On remand, the court must consider CEPA, public trust and riparian rights claims, as well as a new remedy for the contractual claim.

A 1921 contract permitted Waterbury to divert, out of the Shepaug River, only amounts necessary for consumption and storage. Diversions were unlawful when reservoirs were full. When Waterbury built a treatment plant in 1988, a reservoir, from which it did not draw, frequently overflowed. Waterbury also incurred increased costs pumping water uphill to "high-service areas," allegedly with a greater impact on natural resources than necessary. Over-reliance on Shepaug dam diversions resulted, though other reservoirs overflowed.

Waterbury claimed an 1893 agreement allowed these diversions if in accord with minimum flow statutes, and therefore also in accord with CEPA. It challenged the trial court's unreasonable impairment definition, contending that only administrative agencies have jurisdiction to determine whether minimum flow statutes are within CEPA's scope. CEPA, however, did not require exhausting administrative remedies because the requirement was neither statutorily explicit nor implicit. Its legislative history contemplated administrative relief prior to trial, with judicial discretion over whether to retain the case or refer it to the agency. The trial court therefore

properly had subject matter jurisdiction. Cases requiring exhausting administrative remedies were overruled.

Further, the trial court's unreasonable impairment definition as "something more than de minimus," would force defendants to claim lack of alternatives as a sole affirmative defense. CEPA compliance instead determines the proper standard. Because minimum flow statutes were not designed solely to protect fish and wildlife, they were proper factors in establishing unreasonable impairment, consistent with CEPA's statutory scheme.

Waterbury further established a prescriptive easement against Washington. Waterbury's conduct was sufficiently open and visible for the statutory period to give the Washington notice that flow diminished by diversions adverse to the Washington's rights. The easement's scope however, was for the trial court to determine on remand, with reference to the 1893 and 1921 agreements. The trial court's remedy was inadequate because it was based on a faulty, unreasonable impairment definition and denied relief for Waterbury's contractual breach.

*Robert Lykos*

**Grannis Island Co., Inc. v. City of New Haven, No. CV000445887S, 2002 WL 230912 (Conn. Super. Ct. Jan. 23, 2002)** (affirming a city planning commission's denial of a proposed regrade plan because the petitioner did not support the plan with sufficient evidence and the plan was inconsistent with the Connecticut Coastal Management Act).

Grannis Island Co. ("Grannis") owned property in New Haven, bordered by tidal wetlands and property owned by New Haven Land Trust ("NHLT"). Previously, the New Haven Water Authority ("NHWA") owned the adjacent property where Grannis stored construction materials. Subsequently, NHWA conveyed their property to NHLT. Upon acquiring ownership, NHLT requested Grannis remove the stored materials from their property. Consequently, Grannis decided to "regrade and fill 4.6 acres of upland on [its] property" in order to store their construction materials. To attain permission for the regrade, Grannis applied to the New Haven City Plan Commission ("Commission") for a coastal site plan review and a soil and erosion control permit. After a hearing, the Commission denied Grannis' application. Grannis appealed the application denial to the Superior Court of Connecticut.

At issue before the court was whether the record supported the Commission's decision to deny Grannis' application. The court affirmed the Commission's decision based on the following factors: (1) there was insufficient evidence regarding the spatial relationship between the proposed regrade and the tidal wetlands border; (2) the description of the regrade plan was insufficient; (3) Grannis failed to