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McNee v. Town of Newton Conservation Comm'n, No. CV000338817S, 2000 Conn. Super. LEXIS 3178 (Conn. Super. Ct. Nov. 27, 2000)

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threshold requirements. First, the court determined Consumer Cause's notice addressed a health issue that constituted a matter of indisputable public interest and significance because the Safe Drinking Water and Toxic Enforcement Act concerned the quality and safety of the state's drinking water supply. Second, the court found the notice was part of a proceeding, as authorized by law, because the mandated sixty-day notice was generated in connection with the proposed lawsuit, which constituted an official proceeding.

The court held Consumer Cause satisfied the second requirement to secure a dismissal under the special motion to strike. The court determined Equilon had not established a probability that it would prevail on its claim. Equilon claimed Consumer Cause did not serve notice on the proper parties and the notice did not provide sufficient specific information for each gas station regarding the nature of the alleged discharge and the identification of the alleged drinking water sources. The court, however, concluded declaratory and injunctive relief were not proper remedies for a party who received a Proposition 65 notice of intent to sue. The court found Equilon could have raised a deficient notice defense to an enforcement action, and the Proposition 65 notice was absolutely privileged. The court asserted that allowing Proposition 65 private enforcers to be sued before they, themselves, decide to bring suit would seriously undermine the goals of the state initiative. The court noted that such "chilling effect" would thwart the goal of public participation and prevent some citizen and environmental groups from alerting government officials of water pollution violations.

The court affirmed the lower court's decision because (1) Consumer Cause established a prima facie case that it was sued by Equilon after exercising its First Amendment right to petition the government in connection with a public issue—conduct protected by both California law and the SLAPP statute; and (2) the oil companies were unlikely to prevail on their claims. Additionally, the court stated that Consumer Cause could bring a motion in the trial court to recover the attorney fees and costs incurred while appealing this case.

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McNee v. Town of Newton Conservation Comm'n, No. CV000338817S, 2000 Conn. Super. LEXIS 3178 (Conn. Super. Ct. Nov. 27, 2000) (holding an inland wetlands agency has discretion to determine whether to conduct a public hearing before issuing a permit, and a decision to issue a permit is not rendered void by the agency's failure to provide notice to nearby landowners nor by applicant's failure to obtain a discharge permit prior to the agency's decision).

In November 1999, Excelsior, Inc. ("Excelsior") filed an application with the Newton Conservation Commission ("Commission") to conduct regulated activities. The activities included building a new residential road across a watercourse and modifying the channel of an intermittent watercourse. After the town engineer, health director, fire marshal, and the Commission's conservation officer reviewed Excelsior's plan, the Commission unanimously approved the application in February 2000. Mary McNee, the abutting property owner, appealed the Commission's decision to the Connecticut Superior Court.

McNee first asserted the decision was contrary to law because the Commission failed to abide by its own regulations. Specifically, she contended the proposed activity met the regulatory definition of a "significant impact activity," and, therefore, state law required the Commission to conduct a public hearing before making its decision. The relevant statute states the agency "shall not hold a public hearing" unless: (1) the proposed activity will have a significant impact on wetlands or watercourses; (2) a petition signed by at least twenty-five persons requesting a hearing is filed with the agency; or (3) the agency finds a hearing would be in the public interest. Because a petition was not submitted, the court held the Commission had total discretion to determine whether to hold a hearing. Furthermore, the court found the record contained more than substantial evidence to support the Commission's decisions to grant the application, and to do so without a public hearing.

McNee claimed the Commission had the responsibility to regulate the subdivision's water supply prior to granting the application. The court ruled McNee failed to provide authority to support her claim.

McNee contended the Commission failed to provide required notice to Olmstead Water Supply Co. ("Olmstead"), which owned property within 200 feet of the proposed project. The court found McNee failed to provide any law or facts to support this claim. The court stated, even if personal notice was required, only Olmstead, not McNee, had standing to raise this issue. The court also held any failure to give such notice did not create a jurisdictional defect that would render the Commission's decision void.

Finally, the court rejected McNee's claim that the Commission should have required Excelsior to obtain a discharge permit. The court held state law contains no provision that would have required Excelsior to obtain a permit before application to or decision by the Commission. Moreover, the Commissioner of Environmental Protection, not the wetlands agency, has jurisdiction over whether and when a discharge permit is required.

Because the court concluded that McNee failed to prove the decision was illegal, arbitrary, or an abuse of discretion, the court dismissed the appeal.

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