

* * * COMMUNICATION RESULT REPORT (OCT. 7. 2015 1:04PM) * * *

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| <input type="checkbox"/> Small Claims Area at: _____ | <input type="checkbox"/> Child Protection Session at Middletown |

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| Fax number of above Court <u>860 567 4779</u> |
| Docket number <u>LL1 CV 77 00164046</u> |
| Title of document faxed <u>Motion to Strike of Lime Rock Citizens Council LLC</u> |
| Number of pages <u>3</u> |

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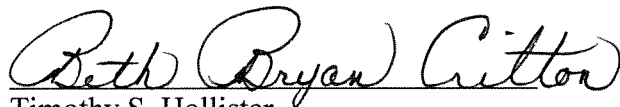
DOCKET NO. LLI-CV-77-0016404-6 : SUPERIOR COURT
: :
LIME ROCK FOUNDATION, INC. : JUDICIAL DISTRICT
: OF LITCHFIELD
v. :
: :
ZONING BOARD OF APPEALS OF THE :
TOWN OF SALISBURY : OCTOBER 7, 2015

MOTION TO STRIKE OF LIME ROCK CITIZENS COUNCIL, LLC

Pursuant to Connecticut Practice Book § 10-39(a)(3), Lime Rock Citizens Council, LLC, moves to strike in its entirety the Motion to Modify Injunction and Judgment filed by Lime Rock Park, LLC on or about September 4, 2015 because of the failure of Lime Rock Park, LLC to take reasonable steps to identify, notify and join necessary and indispensable parties to this action.

In accordance with Practice Book § 10-39(c), a Memorandum of Law accompanies this Motion.

INTERVENOR,
LIME ROCK CITIZENS COUNCIL, LLC



Timothy S. Hollister
Beth Bryan Critton
Shipman & Goodwin LLP
One Constitution Plaza
Hartford, CT 06103
Telephone: 860-251-5000
Facsimile: 860-251-5318
bcritton@goodwin.com
Juris No. 057385
Their Attorneys

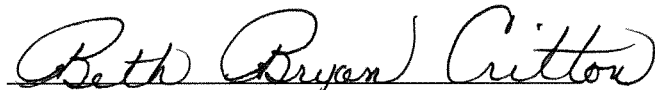
CERTIFICATION

I hereby certify that a copy of the foregoing was transmitted by e-mail and first-class mail, postage prepaid, on this 7th day of October 2015, to:

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Farmington, CT 06032
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Beth Bryan Critton
Commissioner of the Court

* * * COMMUNICATION RESULT REPORT (OCT. 7. 2015 1:12PM) * * *

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| LIME ROCK FOUNDATION, INC. | : | JUDICIAL DISTRICT |
| | : | OF LITCHFIELD |
| | : | |
| v. | : | |
| | : | |
| ZONING BOARD OF APPEALS OF THE | : | |
| TOWN OF SALISBURY | : | OCTOBER 7, 2015 |

**MEMORANDUM OF LAW IN SUPPORT OF
LIME ROCK CITIZENS COUNCIL, LLC'S MOTION TO STRIKE**

Pursuant to Connecticut Practice Book § 10-39(c), the intervening plaintiff, Lime Rock Citizens Council, LLC, (“Council”), submits this Memorandum of Law in support of its Motion to Strike Lime Rock Park, LLC’s Motion to Modify Injunction and Judgment (Motion to Modify) filed with the Court on or about September 4, 2015. The basis for this Motion to Strike is that the Lime Rock Park, LLC has failed to identify, notify and join necessary and indispensable parties, as required by law. Further, a question exists whether Lime Rock Park, LLC, which was not a party to this action, and, on knowledge and belief, has filed no Motion to Intervene, has standing to file a Motion to Modify without first taking steps and obtaining Court approval to become a party.

I. FACTUAL AND LEGAL BACKGROUND

In its current Motion to Modify, Lime Rock Park, LLC seeks to reopen and substantially modify Judgments entered on September 19, 1979 in three interrelated appeals (collectively, the “ZBA Appeals”). The specific modifications requested would significantly extend the geographic area and the hours permitted for racetrack-related camping, camp vehicles and parking and would exponentially increase traffic on White Hollow Road, which

leads to one racetrack entrance, to the detriment of neighboring and other property owners and the community as a whole.

Documents filed with this Court in connection with the Motion to Modify make clear the scant efforts made by Lime Rock Park, LLC to locate those directly impacted by its proposed changes. Lime Rock Park, LLC recites in its Motion for Order of Notice that it has been “unable to locate any of the [named] parties [to the original action] with the exception of the Zoning Board of Appeals. . . .” Its proposed Legal Notice, attached hereto as Exhibit A, includes the names of the original parties but not their addresses and provides no information whatsoever from which a member of the public would glean any understanding about the nature of the proposed modifications in order to determine whether his or her property would be affected.

In other words, Lime Rock Park's approach is apparently to give notice only to successors and to living descendants of original individual parties to 1977 and 1978 ZBA Appeals. Given the nature of the changes proposed in its Motion to Modify – vastly extended camping, parking, and use of White Hollow Road with concomitant noise, traffic, and diminution of property values – Lime Rock Park, LLC's approach is patently disingenuous.

II. THE LAW REGARDING MOTIONS TO STRIKE AND NECESSARY AND INDISPENSABLE PARTIES.

“The purpose of a motion to strike is to contest ... the legal sufficiency of the allegations of any complaint ... to state a claim upon which relief can be granted.” (Citations omitted; internal quotation marks omitted). *Fort Trumbull Conservancy, LLC v. Alves*, 262 Conn. 480, 498 (2003). “It is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily

implied from the allegations are taken as admitted.” (Citations omitted; internal quotation marks omitted .) *Asylum Hill Problem Solving Revitalization Ass'n v. King*, 277 Conn. 238, 246 (2006).

The exclusive vehicle for challenging the nonjoinder of necessary and indispensable parties is by a motion to strike. *George v. St. Ann's Church*, 182 Conn. 322, 325 (1980); see also Practice Book §§ 10-39(a)(3) and 11-3. “Necessary parties ... are those [p]ersons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it ... [B]ut if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties.” *In Re Devon B.*, 264 Conn. 572, 579-580 (2003). A party is necessary if its presence is absolutely required in order to assure a fair and equitable trial.” *Id.*;

“[A] court may refuse to proceed with litigation if a claim cannot properly be adjudicated without the presence of those indispensable persons whose substantive rights and interests will be necessarily and materially affected by its outcome ... Parties have been termed indispensable when their interest in the controversy is such that a final decree cannot be made without either affecting that interest or leaving the controversy in such condition that its final disposition may be inconsistent with equity and good conscience ... due process principles make it essential that [such parties] be given notice and opportunity to protect [their] interests

by making [them] a party to the [action].” *Hilton v. City of New Haven*, 233 Conn. 701, 722 (1995).

III. BECAUSE LIME ROCK PARK, LLC HAS MADE NO REASONABLE EFFORT TO IDENTIFY, NOTIFY AND JOIN NECESSARY AND INDISPENSABLE PARTIES, THIS COURT SHOULD STRIKE ITS MOTION TO MODIFY.

“[A]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity [to be heard].” (Internal quotation marks omitted.) *Worsham v. Greifenberger*, 242 Conn. 432, 440 (1997), quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). “Adequate notice will enable parties having an interest to know what is projected and, thus, to have an opportunity to protest.... [N]otice ... is not required to contain an accurate forecast of the precise action which will be taken on the subject matter referred to in the notice. It is adequate if it fairly and sufficiently apprises those who may be affected of the nature and character of the action proposed, ...” (Citations omitted; internal quotation marks omitted.) *Hartford Electric Light Co. v. Water Resources Commission*, 162 Conn. 89, 110 (1971)..

Notice that requires “the general public [to] employ the skills of a research librarian” does not constitute reasonable notice. See *Lauver v. Planning and Zoning Commission*, 60 Conn. App. 504, 511 (2000) (regarding notice required under General Statutes § 8-3(a) relating to a proposed zone change). “[T]he purpose of the notice requirement [in § 8-3] is to

provide *all* interested parties with *full* notice of *all* aspects of the proposed modification.” *City of Bridgeport v. Plan and Zoning Commission*, 277 Conn. 268, 279 (2006).

Among the circumstances this Court should consider in evaluating both sufficiency of notice and the inclusion of necessary and indispensable parties is the specific nature of the underlying actions. The 1979 Judgments in the ZBA Appeals, which expressly recognized that the racetrack was a nonconforming use, established with specificity the baseline geographic and temporal extent of the racetrack’s accessory use of property for camping, camp vehicles and parking and for ingress and egress on White Hollow Road. Consequently, the effect of the Judgments in the ZBA Appeals was not simply to enter orders specific to the immediate parties or their descendants, but to proscribe and limit racetrack-related activities beyond the lifetimes of the original parties, based on careful consideration of the racetrack as a nonconforming use.

Further, as discussed in the Council’s Motion for Stay,¹ the modifications being sought by Lime Rock Park, LLC are essentially judicially imposed zoning regulations, rezoning the property to permit the racetrack to engage in activities not presently permitted by either the Judgments in the ZBA Appeals or by existing and proposed zoning regulations. Under Salisbury Zoning Regulation § 911.4, any rezoning requires the applicant, in addition to publishing notice meeting the standards of *City of Bridgeport, supra*, to identify and mail notice to “all property owners of record on the current Grand List, within 500 feet in all directions including property across a public street.”

¹ The Council has, simultaneously with the filing of its Motion to Strike, filed a Motion to Stay this proceeding based on zoning regulation amendments currently being considered by the Town of Salisbury Planning and Zoning Commission and affecting the operation of the racetrack.

In addition, Lime Rock Park, LLC is asking the Court to reopen and modify Judgments in a way that will authorize an expansion of a nonconforming use, which is contrary to Connecticut case law and to the Salisbury zoning regulations. Pursuant to Regulation § 501.1, the sole responsibility for evaluating proposed changes to a nonconforming use is vested in the Planning and Zoning Commission, which is prohibited from approving any change in a nonconforming use that will “have an adverse effect on the zone, the neighborhood or surrounding properties greater than the effect of the current non-conforming use,” giving consideration to “traffic, noise, lighting and other external factors affecting the zone, neighboring, or surrounding properties.”

Finally, notwithstanding the present Judgments and current and proposed zoning regulations, Lime Rock Park, LLC is asking this Court to declare certain uses of land, otherwise prohibited or limited, to be permitted and unlimited. In this respect, the Motion to Modify is a *de facto* request for a declaratory judgment and, arguably, the notice requirements of Practice Book § 17-56(b) are suitable.

In view of the nature of the underlying ZBA Appeals, the attempted rezoning and illegal expansion of a nonconforming use proposed by the Motion to Modify, and the declaration being sought from the Court regarding permitted uses by the racetrack, the following people should have been notified and provided an opportunity to participate:

1. Current owners, as shown by the assessment records of the Town, of the properties in Salisbury that were owned by the original parties;
2. All property owners of record on the current Grand List of the Town, within 500 feet in all directions from the property proposed to be used by the racetrack, including property across a public street;

3. All property owners who live close enough to the racetrack to be potentially affected by the noise nuisance, and who live along access roads to the racetrack and may be affected by increased traffic;
4. Because the Appalachian National Scenic Trail, part of the National Park system, overlooks the racetrack and is subject to the noise and other negative effects of racetrack activity:

Wendy K. Janssen
Superintendent
Appalachian National Scenic Trail
P.O. Box 50
Harpers Ferry, WV 25425
wendy_janssen@nps.gov

Ron Tipton
Executive Director / CEO
Appalachian Trail Conservancy
799 Washington Street | P.O Box 807
Harpers Ferry, WV 25425-0807
rtipton@appalachiantrail.org

5. Because noise from the track is easily audible and is particularly likely to cause irreparable harm to Sunday chamber music performances at Music Mountain, America's Oldest Continuous Chamber Music Summer Festival:

Music Mountain
225 Music Mountain Road
Falls Village, CT 06031

In addition, the required notice should be sufficiently detailed to provide recipients of the notice with an understanding of the modifications being proposed by Lime Rock Park, LLC, including a comparison of activities presently permitted and those that would be permitted if the Motion to Modify were granted.

IV. CONCLUSION AND RELIEF REQUESTED.

For all the reasons discussed above, Lime Rock Citizens Council, LLC respectfully requests that this Court grant its Motion to Strike the Motion to Modify filed by Lime Rock Park, LLC for failure to identify, notify and join all necessary and indispensable parties.

INTERVENING PLAINTIFF
LIME ROCK CITIZENS COUNCIL, LLP



Beth Bryan Critton
Shipman & Goodwin LLP
One Constitution Plaza
Hartford, CT 06103
Telephone: 860-251-5000
Facsimile: 860-251-5318
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Juris No. 057385
Their Attorneys

CERTIFICATION

I hereby certify that a copy of the foregoing was transmitted by e-mail and first-class mail, postage prepaid, on this 7th day of October 2015, to:

John L. Cordani, Jr., Esq.
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Farmington, CT 06032
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Beth Bryan Critton
Commissioner of the Court

EXHIBIT A

LEGAL NOTICE

**NOTICE OF MOTION TO MODIFY INJUNCTION
AND STIPULATION BY LIME ROCK PARK, LLC**

By order of the Superior Court for the Judicial District of Litchfield at Litchfield, notice is hereby given that Lime Rock Park, LLC has filed a Motion to Modify Stipulation and Judgment in Lime Rock Foundation, Inc. v. Zoning Board of Appeals of the Town of Salisbury, Docket No. 16, 404 6 and Lime Rock Protection Committee v. Lime Rock Foundation Inc., Docket No. 16,416 D.

The Motion to Modify seeks to modify the terms of a permanent injunction entered into concerning Lime Rock Park in Salisbury, Connecticut. The injunction was entered into by judgment in 1979. The Parties to the action are: Zoning Board of Appeals of the Town of Salisbury, Herbert O. Bergdahl, Joan C. Bergdahl and The Lime Rock Protection Committee, Inc. The defendant seeking to modify the injunction is Lime Rock Park, LLC.

Any persons who may claim to be a party to such action may appear and be heard at a hearing to be held at the Superior Court for the Judicial District of Litchfield at Litchfield, 15 West Street, Litchfield, Connecticut 06759 on October 24, 2015 at 9:30 A.m. The purpose of said hearing will be to consider and act upon Lime Rock Park LLC's Motion to Modify Stipulation and Judgment. The Motion is on file at the clerk's office for the Superior Court for the Judicial District of Litchfield at Litchfield under Docket Number 16,404 6.

LIME ROCK PARK, LLC

By _____