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The 2017 Amendments to the Affordable Housing Land Use Appeals Act, General Statutes § 8-30g (Public Act 17-170)

Every year since 1990, when the Connecticut General Assembly first enacted the Affordable Housing Land Use Appeals Act, General Statutes § 8-30g, legislators have filed bills to repeal it, gut it, or substantially amend it. While changes have been made – longer affordability periods, more units set aside for lower income households, procedures to give towns more control of the § 8-30g process, and a four-year moratorium from applications in towns where a substantial number of affordable units are built – in 27 years, the Act's core provision has remained intact: In towns where less than ten percent of the housing stock is financed by a government program or preserved as affordable by a deed restriction (currently 138 of 169 towns), when a permit applicant appeals a municipal planning and zoning commission's denial to court, the burden of proof is on the commission to prove that the denial was based on a substantial public health and safety concern that "clearly outweighs" the town's need for more lower cost housing.

In July 2017, the General Assembly, overriding Governor Malloy's veto by one vote in the House and one vote in the Senate, amended § 8-30g's moratorium system and tweaked several aspects of the Act. Public Act 17-170 ***does not change*** affordable housing application requirements, processing procedures, the commission's burden of proof in court, or the relief that a court may order to overturn or modify a denial. Rather, the 2017 amendments (1) make it slightly easier for 64 towns with less than 3,750 housing units and six cities with more than 20,000 units to obtain a multi-year moratorium from § 8-30g applications; (2) provide a way for the City of Milford – and it alone – to eventually apply for a moratorium based on a unique formula for counting its existing mobile home units as affordable; (3) mandate that all 169 towns adopt an "affordable housing plan"; and (4) make the definition of "median income" in the state's Incentive Housing Zone (IHZ) program the same as the § 8-30g definition, so that IHZ units, when built, will qualify for moratorium points.

During the 2017 legislative process, the bill that became P.A. 17-170 was roundly criticized as little more than a way to make it easier for some towns to exclude moderate and low income households. The ***Connecticut Law Tribune*** published an editorial entitled, "Shame on Legislature, Rich Towns for Promoting Housing Segregation." Vetoing the bill when it first passed in June, Governor Malloy said:

> Often I hear that town residents fear that the affordable housing appeals law forces them to accept substandard developments built by fly-by-night developers who are sneaking in under the guise of affordable housing. That is the fear, but it is not the reality. . . . Any developer who seeks to use the affordable housing appeal procedure must include affordable units that meet the affordability, quality, and safety standards already in state statute. . . .
>
> This legislation takes affordable housing policy in the wrong direction. . . .

We agree that P.A. 17-170 will do little to promote affordable housing. The Act consists of a set of idiosyncratic exemptions for a minority of towns, Milford in particular. In addition, we

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caution our readers that the 2017 changes are complicated because § 8-30g's moratorium provisions, adopted in 2000, were complex to begin with, and P.A. 17-170 adds exemptions and qualifications. In addition, several of the 2017 amendments are scheduled to expire ("sunset") in 2022. **Our advice** to interested stakeholders is to carefully review what moratorium points a proposed development may generate, and what existing housing units a town may now claim as points toward a moratorium; and bear in mind that this 2017 legislation does not alter § 8-30g's core provisions.

A Primer and Retrospective on § 8-30g

Section 8-30g was adopted in 1989, effective July 1990, after a Governor's Blue Ribbon Commission produced a report documenting that: (1) housing prices and rents in Connecticut skyrocketed during the 1980's; (2) many municipal land use commissions were most often using their authority to approve single-family houses on large lots, but were denying proposals to develop both governmentally assisted and privately financed multi-family development that was affordable to moderate or low income households; (3) under then-existing Connecticut land use law, courts were required to give deference to local decision making; and (4) as a result, lower cost housing denials, even if based on spurious reasons, were being upheld in court, and little lower cost housing was being built.

The legislature's answer, modeled in large part on a successful Massachusetts law adopted in 1969 (known as "40B"), was § 8-30g. The law's key provisions were to (1) define "affordable housing" as units built with government financial help, or privately financed proposals in which a minimum percent (originally 20 percent) of the units would be preserved for the long-term for moderate and low income households; and (2) alter the burden of proof when an affordable housing applicant appealed a denial to court, by eliminating judicial deference to local decisions and requiring commissions to prove that the denial was based on a "substantial health and safety" concern that "clearly outweighed" the town's need for lower cost housing. Recognizing that a relatively small number of municipalities are home to high percentages of lower cost housing units, the legislature exempted from the law all municipalities in which 10 percent or more of the existing housing stock is government subsidized, financed by the Connecticut Housing Finance Authority, or "deed restricted" to guarantee long-term affordability. This permanent exemption, now known as the "Ten Percent List," currently makes § 8-30g inapplicable to 31 of Connecticut's 169 towns.

As noted, since 1990, changes to § 8-30g have been infrequent. Twice in the 1990's, the General Assembly increased the percentage of units that must be set aside for low or moderate income households (the current standard being 15 percent of units at 80 percent of the lesser of statewide or area median income, 15 percent at 60 percent of the lesser of area / statewide median income, and restrictions in place for at least 40 years), and exempted from the Act land located in industrial zones that do not permit any residential uses. In 2000, on the recommendation of a second Blue Ribbon Commission, the legislature adopted a package of procedural changes intended to give municipal land use commissions more control over the processing of applications, and established the current system by which municipalities, after issuing certificates of occupancy to affordable units, can obtain from the Department of Housing a multi-year moratorium from § 8-30g applications and the Act's burden-shifting standard of review. The 2000 amendments required applicants to disclose much more information and make binding commitments in their applications, such as the administration of affordability requirements and interspersing affordable units among market-rate units instead of segregating them.

Since 1990, § 8-30g has produced approximately 5,000 units with long-term affordability restrictions, as well as about 10,000 units with below-market rents or sales prices. Approximately 120 application denials have been appealed to court, with applicants prevailing in cases decided on the merits about 75 percent of the time, but with courts upholding denials that are based on documented health, safety, lack of infrastructure, or environmental reasons.

The moratorium system, as adopted in 2000, grants a town "housing unit equivalent" ("HUE") points when it issues certificates of occupancy – ***not simply zoning approval*** – for units that either qualify as "assisted housing" – built with financial help from a government housing program – or "set aside" units, those that will be preserved for 40 years or more for low and moderate income households. The HUE point count is complicated because HUE points reflect incentives to encourage the types of housing that a zoning commission is least likely to approve. Age-restricted (i.e. elderly) units, as a result, receive only half points and are not eligible for extra points. For non-elderly housing with affordability restrictions, the basic HUE point allocation starts with 1.0 point per restricted unit, which is the point award for each ownership unit (e.g. a condominium unit) preserved for the required number of years for households earning 80 percent or less of the median income. An extra half point is added if the housing is rental, if it is restricted to households below 60% of median income, or if it is restricted to households below 40% of median income (these points are cumulative). Market rate units in a "set aside" development meeting the act's 30 percent set aside requirement receive one-quarter point. Thus, a town in which a 100-unit rental complex meeting the minimum § 8-30g affordability requirement is built (15 units at 60%, 15 at 80%, and the rest at market-rate) would receive 70 HUE points. A 100-unit rental complex with all units for households below 60% of median would earn the town 200 HUE points. "Median income" is the lesser of the area median household income in the region where the town is located or the statewide median, as published by the federal government. (In general, the statewide median is much less than the median in Fairfield County, but the two are relatively close elsewhere in the state.) Points are only awarded for units built or newly deed-restricted after July 1, 1990, the effective date of § 8-30g.

To date, Trumbull, Darien (twice), Berlin (twice), Wilton, New Canaan, Farmington, Brookfield, and Ridgefield have achieved moratoria.

In recent General Assembly sessions, a group of housing organizations has filed with committees reviewing proposed § 8-30g amendments a memo called "Reasons to Preserve § 8-30g," listing these points: 15,000 units of deed-restricted units or lower-cost market-rate units produced; successful § 8-30g developments across the state; established standards that are understood by property owners, towns, and judges; local denials upheld when the administrative record documents a health or safety issue; a recent trend of more approvals and settlements, and fewer court cases; a steady stream of towns achieving moratoria; procedural protections for towns working as intended; ongoing affordable housing needs statewide; use of smart growth and sustainability techniques in § 8-30g proposals; positive fiscal impacts and minimal burdens from § 8-30g developments; protection of wetlands and municipal control of infrastructure upheld in court cases; and reduction or elimination of racial and economic barriers and segregation.

Regardless of one's view of § 8-30g, most Connecticut municipalities need more lower-cost housing. Connecticut has the sixth highest monthly housing cost in the nation. About 48 percent of Connecticut renters spend more than 30 percent of their income on rent. Vacancy rates are low and declining, so rents are rising. Meanwhile, many towns continue to maintain zones where, even with infrastructure that would support higher density development, zoning regulations allow only single-family homes on large lots.

The 2017 Amendments: Lower Moratorium Requirements for 64 Towns

The first thing to note about the 2017 amendments is that, while all of the provisions became effective July 24, 2017, the day the General Assembly overrode the Governor's veto, several provisions "sunset" on September 30, 2022, meaning that the pre-July 2017 law will go back in place on October 1, 2022 (unless, of course, the legislature revises this date in the future). These sunset provisions are identified below.

The most significant aspect of P.A. 17-170 is the lower threshold, applicable to municipalities with 3,750 or fewer housing units (based on the 2010 federal census) for achieving a four-year moratorium. There are 64 towns eligible for the lower threshold. Before P.A. 17-170, the requirement was the ***greater*** of two percent of all dwelling units in the municipality, or 75 points. The new threshold is the ***greater of two percent or 50 points***. Mathematically, this change impacts towns with 2,500 or fewer housing units, all of which now only need 50 points for a moratorium; and towns with 2,500 to 3,750 housing units where the reduction from 75 points to the 50 point minimum is 25 points or less. The chart at the end of this Alert highlights in bold and blue which towns have had their point requirements lowered. However, the point total change will sunset in 2022.

The next substantial change is the addition of new sources to achieve HUE points:

- Units that are not age-restricted and contain three or more bedrooms achieve one quarter point, in addition to their points based on median income level;

- If at least 60 percent of units identified in a moratorium application are non-age-restricted, then the age-restricted units qualify for an additional one-half point; and

- Non-age-restricted units in an Incentive Housing Zone Development as defined in § 8-13m (which may already qualify based on being income-restricted), qualify for an added one quarter of a point.

These changes will also sunset in 2022. Again, HUE points are issued for constructed units, not those that have received land use permits.

Affordable Housing Plan

The next change is a requirement that all municipalities – even those currently exempt from § 8-30g – adopt and revise every five years an "affordable housing plan." Each town must explain how it will "increase the number of affordable housing developments within the town." "Affordable housing development" is an existing, defined term under § 8-30g, but this amendment does not specify if these new plans must promote § 8-30g-compliant set-aside developments, or assisted housing, or affordable housing in general. The amendment also does not explain how, if at all, this requirement differs from the (often-ignored) requirement in General Statutes § 8-23, requiring municipal Plan of Conservation and Development to discuss housing affordability. The amendment also does not specify which town body adopts the plan (zoning commission, planning commission, or legislative body?). The plan must be updated every five years, but with no penalty for failure to do so. This change may boost affordable housing planning and development, but we will not be surprised if this plan requirement is widely ignored, except, perhaps, in six municipalities, as explained below. This change does not expire in 2022.

"Median Income" in the IHZ Program

The Act also changes the definition of "median income" in the Incentive Housing Zone, General Statutes § 8-13m. When the legislature adopted this more-friendly-to-towns program in 2007, it set median income as "area" median, which means that affordability calculations take into account differences within regions within Connecticut. The § 8-30g standard is the lesser of the area median or the statewide median. For example, the median income in Stamford-Norwalk is $142,800, but in Norwich-New London, it is $82,100, and the statewide median is currently $91,600. P.A. 17-170 adopts the § 8-30g standard (the lesser of area or statewide) for IHZ developments. Thus, this amendment will most affect IHZ programs in Fairfield County, where median incomes are much higher than the statewide median. This change does not expire in 2022.

This amendment will also require lower rents for affordable units in IHZ developments, which may make the program financially less attractive to developers.

Qualifications for a Second Moratorium

The next change is the qualification standard for a second moratorium: If a municipality has 20,000 or more dwelling units, has adopted an "affordable housing plan," and has previously qualified for a four-year moratorium, the threshold for a second moratorium is the greater of 50 points or 1.5 percent of housing stock, and the second moratorium is five years, not four.

Only six municipalities that are currently subject to § 8-30g have more than 20,000 dwelling units: Milford, Fairfield, Stratford, Hamden, Greenwich, and West Hartford. It should be noted that of these six towns, only Milford's ability to apply for a first moratorium has been changed by the 2017 Act. This change does not expire in 2022.

Milford

Several provisions of P.A. 17-170 affect only the City of Milford. The Act contains a lengthy definition of "resident-owned mobile home park," and a set of HUE points specifically written for such a park. To our knowledge, the only mobile home park in Connecticut that meets P.A. 17-170's definition of "resident-owned mobile home park" is the Ryder Woods Community in Milford. Thus, P.A. 17-170 allows Milford to count the existing units at Ryder Woods in a moratorium application: 1.5 points for units in such parks "occupied" by persons or families earning 80 percent or less of median income; 2.0 points for 60 percent or less; and .25 points for all other units. (The term "occupied" may imply that the 40 year minimum affordability otherwise applicable to HUE points may not apply to the Ryder Woods point total, and raises an issue of how to count points if a unit is claimed for points but is, or becomes, vacant.) Milford must still apply to the Department of Housing to obtain a moratorium, but the 2017 Act appears to have been written to allow Milford, in the near future, to achieve a moratorium based on its existing housing stock, without having to approve, or assist in, the construction of additional affordable housing.

Our Advice on the Implications of P.A. 17-170

For those seeking to develop affordable housing under § 8-30g, our advice in light of the 2017 amendments is to (1) determine whether the subject property is in a town whose moratorium threshold is now lowered; (2) calculate how many points a proposed development will generate when completed; and (3) calculate how many moratorium points a town needs to obtain a moratorium, and when it may be able to document the necessary point total. If a proposed development will help a town achieve a moratorium, that may be a selling point. (This calculation, of course, may also be a benefit in towns whose moratorium threshold is unchanged by the 2017 amendments.)

This 2017 Public Act will make the moratorium process more important. It will be incumbent on towns to accurately document their point totals, and the Department of Housing will need to be clear and consistent about what level of documentation of HUE points is acceptable, and what types of units qualify for points.

Finally, it warrants mentioning that § 8-30g's baseline for the Ten Percent List is the federal decennial census, so in 2020 (as occurred in 2000 and 2010), the calculations of how many housing units each town has, and therefore what two percent and ten percent of that number is, will reset.

Change in Moratorium Points for Towns Not Exempt From §8-30g

(Towns with lowered points requirement in bold and blue)

TOWN	TOTAL HOUSING UNITS 2010 CENSUS	PRIOR POINTS STANDARD: > OF 2% OR 75 POINTS	NEW POINTS STANDARD: > OF 2% OR 50 POINTS
Andover	**1,317**	**75**	**50**
Ashford	**1,903**	**75**	**50**
Avon	7,389	147.78	147.78
Barkhamsted	**1,589**	**75**	**50**
Beacon Falls	**2,509**	**75**	**50.18**
Berlin	8,140	162.8	162.8
Bethany	**2,044**	**75**	**50**
Bethel	7,310	146.2	146.2
Bethlehem	**1,575**	**75**	**50**
Bolton	**2,015**	**75**	**50**
Bozrah	**1,059**	**75**	**50**
Branford	13,972	279.44	279.44
Bridgewater	**881**	**75**	**50**
Brookfield	6,562	131.24	131.24
Burlington	**3,389**	**75**	**67.78**
Canaan	**779**	**75**	**50**
Canterbury	**2,043**	**75**	**50**
Canton	4,339	86.78	86.78
Chaplin	**988**	**75**	**50**
Cheshire	10,424	208.48	208.48
Chester	**1,923**	**75**	**50**
Clinton	6,065	121.3	121.3
Colchester	6,182	123.64	123.64
Colebrook	**722**	**75**	**50**
Columbia	**2,308**	**75**	**50**
Cornwall	**1,007**	**75**	**50**
Coventry	5,099	101.98	101.98
Cromwell	6,001	120.02	120.02
Darien	7,074	141.48	141.48
Deep River	**2,096**	**75**	**50**
Durham	**2,694**	**75**	**53.88**
East Granby	**2,152**	**75**	**50**
East Haddam	4,508	90.16	90.16
East Hampton	5,485	109.7	109.7
East Haven	12,533	250.66	250.66
East Lyme	8,458	169.16	169.16
Eastford	**793**	**75**	**50**
Easton	**2,715**	**75**	**54.3**
Ellington	6,665	133.3	133.3
Essex	**3,261**	**75**	**65.22**
Fairfield	21,648	432.96	432.96
Farmington	11,106	222.12	222.12
Franklin	**771**	**75**	**50**
Glastonbury	13,656	273.12	273.12
Goshen	**1,664**	**75**	**50**
Granby	4,360	87.2	87.2
Greenwich	25,631	512.62	512.62
Griswold	5,118	102.36	102.36
Guilford	9,596	191.92	191.92

TOWN	TOTAL HOUSING UNITS 2010 CENSUS	PRIOR POINTS STANDARD: > OF 2% OR 75 POINTS	NEW POINTS STANDARD: > OF 2% OR 50 POINTS
Haddam	**3,504**	**75**	**70.08**
Hamden	25,114	502.28	502.28
Hampton	**793**	**75**	**50**
Hartland	**856**	**75**	**50**
Harwinton	**2,282**	**75**	**50**
Hebron	**3,567**	**75**	**71.34**
Kent	**1,665**	**75**	**50**
Killingworth	**2,598**	**75**	**51.96**
Lebanon	**3,125**	**75**	**62.5**
Ledyard	5,987	119.74	119.74
Lisbon	**1,730**	**75**	**50**
Litchfield	3,975	79.5	79.5
Lyme	**1,223**	**75**	**50**
Madison	8,049	160.98	160.98
Marlborough	**2,389**	**75**	**50**
Middlebury	**2,892**	**75**	**57.84**
Middlefield	**1,863**	**75**	**50**
Milford	23,074	461.48	461.48
Monroe	6,918	138.36	138.36
Montville	7,407	148.14	148.14
Morris	**1,314**	**75**	**50**
Naugatuck	13,061	261.22	261.22
New Canaan	7,551	151.02	151.02
New Fairfield	5,593	111.86	111.86
New Hartford	**2,923**	**75**	**58.46**
New Milford	11,731	234.62	234.62
Newington	13,011	260.22	260.22
Newtown	10,061	201.22	201.22
Norfolk	**967**	**75**	**50**
North Branford	5,629	112.58	112.58
North Canaan	**1,587**	**75**	**50**
North Haven	9,491	189.82	189.82
North Stonington	**2,306**	**75**	**50**
Old Lyme	5,021	100.42	100.42
Old Saybrook	5,602	112.04	112.04
Orange	5,345	106.9	106.9
Oxford	4,746	94.92	94.92
Plainville	8,063	161.26	161.26
Plymouth	5,109	102.18	102.18
Pomfret	**1,684**	**75**	**50**
Portland	4,077	81.54	81.54
Preston	**2,019**	**75**	**50**
Prospect	**3,474**	**75**	**69.48**
Redding	3,811	76.22	76.22
Ridgefield	9,420	188.4	188.4
Rocky Hill	8,843	176.86	176.86
Roxbury	**1,167**	**75**	**50**
Salem	**1,635**	**75**	**50**
Salisbury	**2,593**	**75**	**51.86**
Scotland	**680**	**75**	**50**
Seymour	6,968	139.36	139.36
Sharon	**1,775**	**75**	**50**
Shelton	16,146	322.92	322.92
Sherman	**1,831**	**75**	**50**

TOWN	TOTAL HOUSING UNITS 2010 CENSUS	PRIOR POINTS STANDARD: > OF 2% OR 75 POINTS	NEW POINTS STANDARD: > OF 2% OR 50 POINTS
Simsbury	9,123	182.46	182.46
Somers	**3,479**	**75**	**69.58**
South Windsor	10,243	204.86	204.86
Southbury	9,091	181.82	181.82
Southington	17,447	348.94	348.94
Sprague	**1,248**	**75**	**50**
Stafford	5,124	102.48	102.48
Sterling	**1,511**	**75**	**50**
Stonington	9,467	189.34	189.34
Stratford	21,091	421.82	421.82
Suffield	5,469	109.38	109.38
Thomaston	**3,276**	**75**	**65.52**
Thompson	4,171	83.42	83.42
Tolland	5,451	109.02	109.02
Trumbull	13,157	263.14	263.14
Union	**388**	**75**	**50**
Voluntown	**1,127**	**75**	**50**
Wallingford	18,945	378.9	378.9
Warren	**811**	**75**	**50**
Washington	**2,124**	**75**	**50**
Waterford	8,634	172.68	172.68
Watertown	9,096	181.92	181.92
West Hartford	26,396	527.92	527.92
Westbrook	3,937	78.74	78.74
Weston	**3,674**	**75**	**73.48**
Westport	10,399	207.98	207.98
Wethersfield	11,677	233.54	233.54
Willington	**2,637**	**75**	**52.74**
Wilton	6,475	129.5	129.5
Windsor	11,767	235.34	235.34
Windsor Locks	5,429	108.58	108.58
Wolcott	6,276	125.52	125.52
Woodbridge	**3,478**	**75**	**69.56**
Woodbury	4,564	91.28	91.28
Woodstock	**3,582**	**75**	**71.64**

Questions or Information

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