DEVELOPMENTS UNDER CONNECTICUT'S AFFORDABLE HOUSING LAND USE APPEALS ACT

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I. Public Act 00-206

In Christian Activities Council v. Town Council, 249 Conn. 566 (1999), the Connecticut Supreme Court held that the sufficiency of the evidence standard applied to all four parts of a zoning commission's burden of proof under the affordable housing statute, General Statutes § 8-30g(c). This decision contrasted with the view of affordable housing advocates and others who maintained that the legislature intended that a reviewing court would undertake a de novo review of whether the decision was necessary to protect substantial public interests in health or safety, those public interests clearly outweighed the need for affordable housing, and the public interests could not be protected by reasonable changes to the affordable housing development.

In response to Christian Activities Council, the Connecticut General Assembly in Special Act 99-16 created a new Blue Ribbon Commission to study affordable housing. Many of the recommendations contained in the Commission's final report, dated February 1, 2000, were adopted by the legislature in Public Act 00-206.

Public Act 00-206 (which became effective October 1, 2000) made several important changes to § 8-30g, including:

- Increased from 25% to 30% the required proportion of affordable housing units in a set-aside development, at least half of which must be

available to people with incomes at or below 60% of the area median or statewide median income.

- Decreased the maximum monthly payments for affordable rental units by limiting them to 120% of the Fair Market Rent levels established by HUD under the federal Section 8 program.

- Increased from 30 to 40 years the time period for which the units in a set-aside development must remain affordable.

- Permitted P&Z commissions to require conceptual site plans.

- Required developers to submit an affordability plan and a fair housing affirmative marketing plan.

- Clarified that the "sufficient evidence" standard applies only to the first prong of what is now subsection (g) and that the court's review is plenary as to the last three prongs.

- Clarified the statutory resubmission procedure by providing that the commission has 65 days from receipt of a modified proposal in which to act on it and that the commission must hold a public hearing on the modified proposal if it held a public hearing on the original application.

- Clarified municipal enforcement authority pursuant to Conn. Gen. Stat. § 8-12.

- Adopted a 3-year moratorium on § 8-30g applications for municipalities that have produced substantial levels of affordable housing since 1990.

For additional analysis of the second Blue Ribbon Commission's work, Public Act 00-206, court decisions under § 8-30g, and development experience under the Act during its first seven years, see Professor Terry J. Tondro's excellent article, "Connecticut's Affordable Housing Appeals Statute: After Ten Years of Hope, Why Only Middling Results?" in 23 Western New England Law Review 115 (2001).

II. **Quarry Knoll**

In Quarry Knoll II Corp. v. Planning and Zoning Commission, 256 Conn. 674 (2001), the Supreme Court acknowledged that Public Act 00-206 was intended to address Christian Activities Council and clarify the original intent of § 8-30g(c). The court confirmed that an affordable housing appeal entails a two-step review process in which the court first determines whether the commission has shown that its decision is supported by sufficient evidence in the record, then conducts a plenary review of the record in order to make an independent determination as to whether the commission has sustained its burden of proof for the remaining three prongs. As a clarifying amendment, the court held that P.A. 00-206 was to be applied retroactively.

III. **Public Act 02-87**

The legislature in the 2002 session adopted relatively minor amendments to § 8-30g, which amendments became effective October 1, 2002. Public Act 02-87 amended subsection (l)(1) of § 8-30g to increase the potential moratorium to four years instead of three and to extend by one year any moratorium in effect on October 1, 2002. It also added mobile manufactured homes to the types of units that are counted toward the 10 percent exemption in subsection (k), and added a new subsection (m) requiring DECD to promulgate model deed restrictions satisfying the requirements of § 8-30g.

IV. **Current Local Activity Under § 8-30g**

The overall goal of the 2000 Blue Ribbon Commission report and Public Act 00-206 was to reform § 8-30g to provide greater local control and greater affordability among units produced under the statute. It was also hoped by the Commission that, by making it clear that § 8-30g as amended would remain a part of the State's legal landscape, this would promote more negotiation and settlement of affordable housing proposals at the local level. Many in the development community, however, feared that lowering the maximum allowable rents would make the production of affordable housing less financially feasible, particularly in Fairfield County with its high land costs.

Exhibits A, B and C attached hereto, which were prepared by Tim Hollister of Shipman & Goodwin for presentation to the General Assembly's Select Committee on Housing, show that the goals noted above are being achieved and the predictions are also occurring. There has been an upward trend of local approvals and settlements; as of March 2003, at least 462 affordable units were approved, under construction or occupied (Exhibit A). However, since October 2000, there has been a marked slowdown in new 8-30g applications. The number of applications currently pending at the local level statewide is the lowest since the early 1990's (Exhibit B). While there is a relatively large number of appeals currently pending in the courts (Exhibit C), nearly all of the underlying applications were filed prior to the October 1, 2000 effective date of P.A. 00-206.

IV. **Recent Court Decisions Under § 8-30g**

On March 19, 2002, the Connecticut Supreme Court issued its decision in JPI Partners, LLC v. Planning and Zoning Board of the City of Milford, 259 Conn. 675. JPI had proposed a 248-unit assisted living residential complex under § 8-30g. A portion of the site was located in a light industrial zoning district. During its zoning hearings, JPI addressed the exclusive industrial zone exemption in § 8-30g(c) and explained why it did not apply to its application. No member of the Board or its staff took exception to JPI's position. On appeal, however, the Board argued for the first time that its decision was exempt from the burden-shifting provision of § 8-30g because the applications proposed to place affordable housing in an industrial zone that did not permit residential uses. The Supreme Court rejected that argument and held, reiterating prior decisions, that a Board must make a collective statement of its reasons on the record when it denies an affordable housing application. The court remanded to the Superior Court with direction to sustain the plaintiff's appeal.

The Appellate Court has issued two relatively recent decisions under the affordable housing statute. In Mackowski v. Planning and Zoning Commission of the Town of Stratford, 59 Conn. App. 608 (2000),[1] it reversed the Superior Court's decision upholding the denial of the plaintiff's application based on adverse impacts on

traffic and the town sewer system. Applying Christian Activities Council, the court found that the commission failed to meet its burden of proof because it merely made generalized statements concerning adverse impacts on the public health, safety and welfare, and the evidence before the commission disclosed no significant problems with traffic or the sewer system from the development. In Trimar Equities LLC v. Planning and Zoning Board of the City of Milford, 66 Conn. App. 631 (2001), the Appellate Court held that an appeal brought by an applicant under § 8-30g requires that the applicant prove that it is aggrieved pursuant to § 8-8(b). It affirmed the trial court's finding that the plaintiff was not aggrieved because, although the contract for the sale of the property had been properly assigned to the plaintiff, not all of the owners of the property had consented to the assignment as required by the terms of the contract.

There have been some recent Superior Court decisions of note:

- River Bend Associates, Inc. v. Planning Commission of the Town of Simsbury, 2002 Conn. Super. LEXIS 4214 (Dec. 27, 2002): ordering commission to approve plaintiff's subdivision application for 102 homes within a lager proposal for 371 homes on 363 acres subject only to 4 conditions specified by the court. The court found that the "overarching flaw" in the commission's decision was its failure genuinely to weigh Simsbury's undeniable need for affordable housing against the defects it found in the application. It rejected the commission's denial of the subdivision application based on the Zoning Commission's denial of a requested zone change (see below) and vaguely stated concerns with density and traffic. With regard to the denial by other agencies of the plaintiff's septic system and wetlands permit applications, the court found that the commission could not abdicate its responsibility to carry out the weighing process under § 8-30g by simply relying on those other agencies. To allow this would improperly give the WPCA and wetlands agency a "veto power."

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[1] Certification was granted by the Supreme Court in this case but the appeal was withdrawn on September 21, 2000.

Although there was conflicting expert testimony in the record as to the best way to address soil contamination, the commission failed to prove the potential harm that would result from the plaintiff's proposed method of remediation or the probability that such harm would occur. The Court also rejected an intervenor group's request under Conn. Gen. Stat. § 22a-19 "to carve out an environmental exception" to § 8-30g.

- River Bend Associates, Inc. v. Zoning Commission of the Town of Simsbury, 2002 Conn. Super. LEXIS 4212 (Dec. 27, 2002)[2]: overturning commission's denial of plaintiff's proposed "Housing Opportunity Development" zone, zone change request and site plan application in a companion to the decision discussed immediately above. The court reiterated the rule that if a zoning commission can protect its stated public interest while advancing the goal of affordable housing by conditionally granting a zone change or subdivision application, "it is not only authorized but required to do so rather than deny the requested approval." It found that the commission's site-specific concerns with the proposed HOD zone amendment were not a valid basis for denying the zone amendment application and that the commission failed to identify any public interest that would be harmed if the proposed amendment was approved; it rejected the commission's reasons based on "character of the neighborhood," protecting property values and "drafting quibbles." The court further rejected the commission's denial of the zone change request, for which the commission relied on its denial of the zone amendment request, the WPCA denial and vaguely stated traffic concerns. It also rejected the commission's denial of the site plan application based on the denial of the zone amendment and zone change, and held that the commission's denial based on concern for remediation of soil contamination was mere speculation. The court therefore ordered the zoning commission to approve all three applications subject only to conditions to modify the site plan if the decisions of the WPCA and the wetlands agency were upheld, and to complete soil remediation and monitoring in compliance with the Connecticut Remediation Standard Regulations before any construction begins.

- Pathways, Inc. v. Planning and Zoning Commission of the Town of Greenwich, 2002 Conn. Super. LEXIS 2924 (Aug. 30, 2002): in an appeal from the denial of the plaintiff's application for special permit and site plan approval to convert an 8-bedroom house to a convalescent home, the court rejected the commission's denial based on concerns over an increase in

[2] Certification to appeal in this case and the Planning Commission case discussed above was granted by the Appellate Court on March 19, 2003.

parking and driveway areas and expansion of the septic system. The court rejected the commission's argument that the court was bound to approve a stipulation for judgment settling the case that was entered into by the applicant and the commission, because the intervenor did not agree to the stipulation. However, because the applicant was still willing to be bound by the stipulation, exercising its authority under § 8-30g to revise and modify the decision, the court ordered the applicant and commission to comply with the stipulation.

- DelMar Associates, Inc. v. Monroe Planning and Zoning Commission, 2002 Conn. Super. LEXIS 2219 (July 2, 2002): reversing the commission and granting an amendment to the zoning regulations, rezoning of a 24-acre site, and site plan approval for a 31-unit residential development, subject only to 11 revisions and modifications specified by the court. While the court acknowledged that the protection of groundwater, water quality and controlling flooding are valid public interests, there was no reasonable basis in the record to conclude that the denial was necessary to protect those interests, and the proposal had been granted a conditional approval by the inland wetlands agency. As to the commission's concerns with the proposed community septic system, the court was satisfied that the DEP permit requirements and DEP's finding that the site is feasible for the proposed wastewater disposal would protect the public interest. The court also found that the proposed project would not harm the character of the community, there was no credible evidence of a likely adverse impact from blasting, and the plaintiff made sufficient provision for open space.

- Fromson v. Weston Planning and Zoning Commission, 2002 Conn. Super. LEXIS 2215 (July 2, 2002): affirming the denial of an affordable housing application based on plaintiff's failure to file a wetlands application, the only access and ingress being a 3,300 foot long dead-end street, and the need for further testing for septic system adequacy given the presence of difficult topography and lack of appropriate soils.

- Landworks Development, LLC v. Town of Farmington Town Planning and Zoning Commission, 2002 WL 377210 (Feb. 14, 2002): upholding denial of application for 404-unit apartment complex on 67.5 acres based on the lack of a wetlands permit and failure to provide a 400-foot buffer around a vernal pool on the site. The case was settled by stipulated judgment in January 2003.

- Caserta v. Milford Planning and Zoning Board, 2001 WL 1570287 (Nov. 15, 2001): dismissing appeal for lack of aggrievement because plaintiff

failed to show that an approval reducing building from six units to two, all affordable units had a substantial impact on the viability of the development.

- AvalonBay Communities, Inc. v. Wilton Planning and Zoning Commission, 2001 WL 1178638 (Sept. 6, 2001): denial of applications for 113 rental units on 10.6 acres upheld based on traffic and public safety issues.

- Novella v. Bethel Planning and Zoning Commission, 2001 WL 576678 (May 9, 2001): ordering all approvals for a 45-lot subdivision on 27.97 acres granted, subject to specific modifications provided by the court, on grounds that the reasons for denial, pertaining mostly to steep slopes, were insufficient because the commission failed to conduct the required balancing.

V. **When § 8-30g Is Not Enough**

Two recent cases involving a proposal by AvalonBay Communities, Inc. to develop a 168-unit rental apartment development with a 25 percent affordable component in the Town of Orange illustrate that an affordable housing proposal may not end with the decision in an 8-30g appeal. During the zoning hearings on AvalonBay's application, town leaders devised a strategy to take AvalonBay's land for an industrial park pursuant to Chapter 132 of the General Statutes. The town, however, had never expressed a desire to place an industrial park on this property until AvalonBay filed its affordable housing application, and its Board of Selectmen voted on two occasions to take the property before its plan for an industrial park was completed. In their efforts to bolster public support for their strategy, town leaders openly declared that the use of eminent domain was a way to "regain control" of property that the affordable housing statute takes away from municipalities, and warned that if AvalonBay were successful, residents of Orange would hear a "giant sucking sound" of

their tax dollars being diverted to pay for additional schools and other municipal services.

AvalonBay sued and obtained a permanent injunction against the town, with the trial court finding that the industrial park plan was nothing but a pretext adopted in bad faith to thwart affordable housing. Supporting the trial court's decision were its findings that the plan itself was deficient in numerous areas, evasive and vague, and that town officials had made public representations about the costs to the town from the AvalonBay application which were "gross exaggerations and misleading." Relying on these findings, the Supreme Court affirmed the permanent injunction. AvalonBay Communities, Inc. v. Town of Orange, 256 Conn. 557 (2001).

Meanwhile, AvalonBay prevailed in its zoning appeal under § 8-30g, AvalonBay Communities, Inc. v. Orange Town Plan and Zoning Commission, 1999 WL 1289060 (Aug. 12, 1999); and in its simultaneous wetlands appeal. AvalonBay Communities, Inc. v. Orange Inland Wetlands and Watercourses Commission, 1999 WL 1315021 (Aug. 12, 1999). In the 8-30g appeal, the court (Munro, J.) remanded to the TPZC and ordered it to approve AvalonBay's applications subject only to conditions that were reasonable, necessary and consistent with the court's decision. On remand, the TPZC approved the applications but imposed a long list of conditions, including several substantial off-site road improvements.

AvalonBay moved for contempt, arguing that several of the conditions violated the trial court's remand order. The court declined to find the TPZC in contempt as it

did not find that the TPZC willfully disobeyed its order. However, the court found that some of the challenged conditions were invalid under general principles of zoning law or were otherwise unreasonable, and therefore ordered the TPZC to strike those conditions under the inherent power of the Superior Court to effect compliance with its orders. AvalonBay Communities, Inc. v. Orange Town Plan and Zoning Commission, 2000 WL 1872087 (Dec. 6, 2000). The Commission appealed, arguing that once the Superior Court declined to hold it in contempt, it had no authority to order the TPZC to strike conditions. The Supreme Court affirmed the Superior Court's decision on May 21, 2002, 260 Conn. 232.

VI. Current Legislative Activity

As has become the norm, a flurry of bills addressing the affordable housing statute were introduced during the 2003 legislative session. As of early May 2003 (past the Joint Favorable deadline), no bills seeking to amend § 8-30g made it out of committee. However, several amendments designed to repeal or severely limit § 8-30g have been offered.

VII. Websites for Affordable Housing Information

http://www.state.ct.us/ecd

- -- Connecticut Department of Economic and Community Development
- -- Ten percent list
- -- Proposed regulations implementing P.A. 00-206
- -- FY 2001 area median income limits

-- FY 2001 median family incomes for state

http://www.huduser.org

-- U.S. Department of Housing and Urban Development

-- FY 2002 median family incomes, income limits and fair market rents

http://www.cga.state.ct.us/hsg/830gConference.htm

-- Model affordability plan

-- Guide to calculation of maximum sale price and rents

-- Moratorium procedural requirements

-- Affirmative fair housing marking plan

EXHIBIT A

DEVELOPMENTS APPROVED/UNDER CONSTRUCTION/OCCUPIED, SINCE JANUARY 1, 2000, AS OF MARCH 2003

APPLICANT/OWNER	TOWN	NO. OF UNITS	PERCENTAGE AFFORDABLE	RENTAL OR SALE	STATUS/COMMENTS
Mutual Housing Association of Southwestern Connecticut	Trumbull	43	100 percent (43 units)	Sale	Occupancy completed January 2003
AvalonBay Communities	New Canaan	102	20 percent (21 units)	Rental	Occupancy began spring 2002
Carriers LLC	Canton	83	25 percent (21 units)	Sale	Single-family homes, common interest ownership; partially occupied
Novello	Bethel	45	25 percent (12 units)	Sale	Under construction
Smith-Groh	Greenwich	36	25 percent (9 units)	Sale	Under construction
Metro Realty	Canton	98	79 units (80 percent) to be sold at 60 percent of median or less	Sale	Age-restricted – under construction; occupancy December 2003
Meadowbrook Circle	Brookfield	36	25 percent (9 units)	Sale	Single-family cluster; under construction
Baker Residential/Lexington Meadows	Bethel	115	25 percent (29 units)	Sale	Under construction
Baker Residential	Middlebury	126	8 units	Sale	Under construction
Mackowski	Stratford	32	100 percent (32 units)	Rental	Age-restricted

APPLICANT/OWNER	TOWN	NO. OF UNITS	PERCENTAGE AFFORDABLE	RENTAL OR SALE	STATUS/COMMENTS
Thompson	Stratford	25	25 percent (7 units)	Sale	Under construction
Knowlton Street	Stratford	36	25 percent (9 units)	Sale	Under construction
Verna Home Builders, Inc. (Olde Oak Village)	Wallingford	80	30 percent (24 units)	Sale	Under construction; initial occupancy December 15, 2002
AvalonBay Communities	Darien	189	25 percent (47 units)	Rental	Under construction – occupancy summer 2003
JPI/Avalon Bay Communities (purchaser)	Milford	246	25 percent (62 units)	Rental	Construction to start spring 2003
Del Mar Associates	Monroe	31	25 percent (8 units)	Sale	Under construction
AvalonBay Communities	Orange	168	25 percent (42 units)	Rental	Construction to begin 2003
TOTAL AFFORDABLE UNITS			**462 units**		

Prepared by Shipman & Goodwin LLP
Revised: 3/4/03

EXHIBIT B

APPLICATIONS PENDING AT LOCAL LEVEL, AS OF MARCH 2003

APPLICANT/OWNER	TOWN	NO. OF UNITS	PERCENTAGE AFFORDABLE	RENTAL OR SALE	STATUS/COMMENTS
Valeri	Ridgefield	16	30 percent (5 units)	Rental	Settlement under discussion
Quaranta Brothers	Monroe	30	30 percent (10 units)	Sale	Subdivision approved; conforming wetlands permit being sought
AvalonBay Communities	Wilton	100	30 percent	Rental	Local agency hearings March-April 2003

Prepared by Shipman & Goodwin LLP
Revised: 3/4/03

EXHIBIT C
CASES PENDING IN SUPERIOR OR APPELLATE COURT, AS OF MARCH 2003

APPLICANT/OWNER	TOWN	NO. OF UNITS	PERCENTAGE AFFORDABLE	RENTAL OR SALE	STATUS/COMMENTS
Jordan Properties, LLC	Old Saybrook	216	25 percent	Sale	Approved for 168 units; applicant appealing conditions and reduction of units
AvalonBay Communities	Stratford	146	25 percent	Rental	In Superior Court
AvalonBay Communities	Milford	284	25 percent	Rental	In Superior Court
Griffin Land	Simsbury	371	25 percent	Sale	In Superior Court
Carr	Bridgewater	35	25 percent	Sale	In Superior Court
Acorn Homes	Brookfield	108	25 percent	Sale	In Superior Court
DiNatale	Wallingford	36	30 percent	Sale	In Superior Court
LePage Homes	Southington	61	30 percent	Sale	In Superior Court
Townbrook	Brookfield	102	25 percent	Rental	Granted with conditions
Herman	Redding	3	1 unit	Rental	In Superior Court
Forest Walk	Middlebury	286	30 percent	Rental or Sale	In Superior Court

Prepared by Shipman & Goodwin LLP
Revised: 3/4/03