RECENT 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.

At about the same time as the decision in 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. Current Local Activity Under § 8-30g

The overall goal of the 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 based on a February 2002 telephone survey by Tim Hollister of Shipman & Goodwin® for presentation to the 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; in 2000-2001, over 200 affordable units were approved, under construction or occupied (Exhibit A). 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 them were filed prior to the October 1, 2000 effective date of P.A. 00-206.

In addition to the developments referenced on Exhibit A, other recent affordable housing approvals include an 80-unit common interest ownership development with 30 percent affordable units approved by the Wallingford PZC in April 2002, and a 31-lot subdivision with 10 affordable lots approved by the Monroe PZC, also in April 2002. And as discussed below, the state Supreme Court recently ordered that an assisted living complex be approved in Milford.

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), 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 a few recent Superior Court decisions of note:

- *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.

- *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.

- *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.

- *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.

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. The first case involved the town's attempt to take the property in question by eminent domain; the second applied the law of contempt to a zoning commission's adoption of conditions after the developer prevailed in its 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 obtained a permanent injunction against the town, with the trial court finding that the industrial park plan was but a pretext 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 heard argument in this appeal (No. SC 16619) on January 16, 2002.

VI. Current Legislative Activity

As has become the norm, a flurry of bills addressing the affordable housing statute were introduced during the 2002 legislative session. As of mid-April 2002, only one bill had made it out of committee. Substitute House Bill No. 5434 (File No. 261) received a joint favorable report from the Planning and Development Committee on March 13, 2002. The bill would amend subsection (l)(1) of § 8-30g to increase the potential moratorium to four years instead of three and extend by one year any moratorium in effect on October 1, 2002. It would also remove the exemption for affordable housing from the open space requirements of § 8-25.

VII. Websites for Affordable Housing Information

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

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

APPLICANT/OWNER	TOWN	NO. OF UNITS	PERCENTAGE AFFORDABLE	RENTAL OR SALE	STATUS/COMMENTS
Mutual Housing Association	Trumbull	43	100 percent (43 units)	MHA "sweat equity model"	Court-ordered zoning approvals led to Town-MHA development agreement/site plan modifications; occupancy June 2002
AvalonBay Communities	New Canaan	102	20 percent (21 units)	Rental	Original application 1992; settlement agreement 1999; occupancy spring 2002
Carriers LLC	Canton	83	25 percent sale (21 units)	Sale	Single-family homes, common interest ownership; under construction – partially occupied
Novello	Bethel	45	25 percent (12 units)	Sale	
Smith-Groh	Greenwich	36	25 percent (9 units)	Sale	
?	Milford	2	1 unit		Stipulated settlement for 2 units
Metro Realty	Canton	98	80 percent at 60 percent of median or less		Age-restricted – approved January 2002
N. Marcus, Trustee, for Meadowbrook Circle	Brookfield	36	25 percent (9 units)	Sale	Single-family cluster; under construction
Baker Residential (purchaser)	Bethel	115	25 percent (29 units)	Sale	"Lexington Meadows"
Pine Meadows	New Hartford	8	?		
Mackowski	Stratford	32	32	Rental	Age-restricted; settlement in late 2001 resulted in increase in affordable unit percentage
Thompson	Stratford	25	25 percent (7 units)	Sale	
Knowlton Street	Stratford	36	25 percent (9 units)	Sale	

EXHIBIT B

APPLICATIONS PENDING AT LOCAL LEVEL, AS OF FEBRUARY 2002

APPLICANT/OWNER	TOWN	NO. OF UNITS	PERCENTAGE AFFORDABLE	RENTAL OR SALE	STATUS/COMMENTS
Valeri	Ridgefield	16	30 percent (5 units)	Rental	
Quaranta Brothers	Monroe	33	30 percent (10 units)	Sale	
Verna Developers	Wallingford	80 ±	30 percent	Sale	Single-family cluster; zone change approved Dec. 2001, no appeals.
AvalonBay Communities	Darien	189	25 percent	Rental	Zone change and site plan approved Dec. 1998, no appeals; awaiting sign-off on environmental matter.
?	Middlebury	260	30 percent	Rental	Wetlands permit denied.
Townbrook	Brookfield	102	25 percent	Rental	Wetlands permit denied.

Prepared by Shipman & Goodwin® LLP

EXHIBIT C
CASES PENDING IN SUPERIOR OR APPELLATE COURT, AS OF FEBRUARY 2002

APPLICANT/OWNER	TOWN	NO. OF UNITS	PERCENTAGE AFFORDABLE	RENTAL OR SALE	STATUS/COMMENTS
JPI	Milford	240(?)	25 percent	Rental	State Supreme Court; issue of scope of "industrial land exemption"
DelMar Associates	Monroe	31	25 percent (8 units)	Sale	Superior Court
AvalonBay Communities	Orange	168	25 percent	Rental	State Supreme Court
?	Weston	18	5 units		
Quarry Knoll	Greenwich	92	25 percent		Age-restricted; on remand from Supreme Court
?	Old Saybrook	216	25 percent	Rental	Approved for 168 units; applicant appealed reduction from 216 units
AvalonBay Communities	Stratford	146	25 percent	Rental	
AvalonBay Communities	Milford	284	25 percent	Rental	
Griffin Land	Simsbury	371	25 percent	Sale	371 units is long-term master plan for 363 acre parcel
Trumbull Main Development	Trumbull	50	25 percent	Rental	
Carr	Bridgewater	35	25 percent	Sale	
(?)	Redding	3	1 affordable unit		
Acorn Homes	Brookfield	108	25 percent	Sale	

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