HINCKLEY ALLEN

20 Church Street
Hartford, CT 06103-1221

p: 860-725-6200 f: 860-278-3802
hinckleyallen.com

Timothy S. Hollister
(860) 331-2823 (Direct)
(860) 558-1512 (Cell)
thollister@hinckleyallen.com

Via Email and U.S. Mail

June 29, 2021

The Hon. Seila Mosquera-Bruno, Commissioner
Connecticut Department of Housing
505 Hudson Street
Hartford, CT 06106-7106

Michael Santoro, Director
Policy Research and Housing Support
505 Hudson Street
Hartford, CT 06106-7106

Re: Comment on Application of the Town of Brookfield for Certificate of Affordable Housing Completion/Moratorium

Dear Commissioner Mosquera-Bruno and Mr. Santoro:

I am writing to comment on the Town of Brookfield's pending application for a § 8-30g moratorium.

In writing today, I am not representing any client or organization; I have no pending or potential development work in Brookfield; and in general, I support the Department's granting of properly documented moratorium applications. I write today primarily for two reasons: I helped write the moratorium regulations, under contract to the Department, in 2002; and I regularly consult with housing advocates and advocacy organizations that, among other roles, have taken on the responsibility of reviewing 8-30g moratorium applications for regulatory compliance. In preparing this letter, I have consulted with several advocates and organizations, including Attorney Podolsky.

In summary, the Brookfield application consists of points calculations for the Brookfield Village and Carlin's Way developments, plus "holdover" points from the town's 2017 moratorium. Brookfield's application is incorrect in its use of and reliance on holdover points, which § 8-30g does not allow. The application is incomplete in one significant respect, and it is the same issue as has been raised in the past two years in declaratory ruling/declaratory judgment actions involving the 2019 moratorium issued to Westport: A failure to file with the application evidence of annual, ongoing compliance with the Affordability Plans for the developments for which Housing Unit Equivalent points are claimed. As you are aware, the Westport declaratory judgment litigation is in the process of being withdrawn, with a waiver of claims with respect to that moratorium. However, the Brookfield application raises the same issue. There are no § 8-30h annual compliance reports for the set-aside housing points claimed, or equivalent reports for assisted housing, in the application.

The § 8-30g Moratorium Process

In 2000, the General Assembly adopted the moratorium process, which 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 a "set aside development," in which at least 30 percent of the units will be preserved for 40 years or more for low and moderate income households. *See* General Statutes § 8-30g(l)(4)(A). If a town obtains sufficient HUE points, it may apply to DOH for a Certificate of Affordable Housing Completion, which may grant the town a moratorium from § 8-30g's burden-shifting standard for four years. *See* General Statutes § 8-30g(l)(1).

Section 8-30g includes a number of requirements for an application for a Certificate of Affordability. *See* General Statutes § 8-30g(l)(4)(B). These requirements include: (a) a complete application that allows DOH and the public to understand and verify all point total claims; (b) evidence of compliance with notice requirements; (c) public disclosure of all parts of the town's application, to allow for public comment; and (d) evidence not only of § 8-30g intended compliance at the time the development is granted zoning approval or issued certificates of occupancy, but evidence of *on-going compliance during residential occupancy* with maximum household income and maximum rent or sales prices, continuing to the time of the Certificate application to the DOH.

The Connecticut regulations impose additional requirements upon an application, including: a letter from the town attorney opining that the application complies with state law "as in effect on the day the application is submitted," § 8-30g-6(c)(2); certification that certificates of occupancy for claimed units are "currently in effect," § 8-30g-6(c)(6); certification that a town has not claimed HUE points for any developments that no longer meet the necessary affordability requirements, § 8-30g-6(c)(7); and a § 8-30h compliance report if a development is less than one year old, § 8-30g-6(f)(3).

Section 8-30g Does Not Allow "Holdover" Points

Section 8-30g is clear that there is no such thing as "holdover" points from a prior application. They are not allowed by § 8-30g, and they are contrary to the purpose of the moratorium.

C.G.S. § 8-30g(l)(3) states that "Eligible units completed *after a moratorium has begun* may be counted toward establishing eligibility for a subsequent moratorium" (emphasis added). The phrase "after a moratorium has begun" is a limiting phrase that would be entirely unnecessary if units completed before a moratorium has begun could count toward a subsequent moratorium – the phrase would be entirely redundant. The text of § 8-30g makes clear that, except for use of post-1990 points in a first moratorium application, moratorium points for a second or subsequent moratorium must be generated by development or equivalent activity that is completed only *after* the prior moratorium has started.

This requirement is consistent with the purpose of a second moratorium, which is to give relief to non-exempt towns that have continued to promote affordable housing construction *during and after a moratorium*, and to give relief from a high level of on-going active affordable housing development. Indeed, the idea is that, during the moratorium, non-exempt towns will have an opportunity and incentive to generate affordable housing in their own way so as to achieve to a second moratorium. The moratorium process was never intended to allow a non-exempt town to obtain a moratorium for the purpose of blocking future affordable housing development. Indeed, if "holdover" points were permitted, a one-time single large development could be used by a non-exempt town to prevent any additional affordable housing development for years, beyond the four-year moratorium period. The prohibition on "holdover" points also explains why § 8-30g(l)(7) allows towns to count affordable units built after 1990 under the then-existing § 8-30g standard. It was certainly not so that non-exempt towns could use construction in the 1990s at the 80 percent-20 percent/20-year standard to obtain extended moratoria beyond an initial moratorium. To the contrary, that was always intended to be for a first moratorium only, so that towns that had development in the 1990s, when § 8-30g had no moratorium provision, would not be left out. Once a town achieves a first moratorium, however, new moratoria require new affordable development.

The application's holdover points should not be credited.

DOH Cannot Grant The Moratorium Because Brookfield Has Not Submitted Evidence Of On-Going Affordability Compliance Required To Receive Moratorium Points

Section 8-30g(l)(4)(A) provides that DOH shall issue a Certificate of Affordability "upon finding that there has been completed within the municipality one or more affordable housing developments which create [HUE] points equal to" the requisite statutory standard. Section 8-30g(a)(1) then defines "'Affordable housing development'" as "a proposed housing development which is (A) assisted housing, or (B) a set-aside development."

By definition, a "set-aside development" is a housing development in which (a) at least 15 percent of the dwelling units must are sold or rented at or below prices at or below 30 percent of the 80th percentile of the lesser of the state or area median income and (b) at least 15 percent of the dwelling units are sold or rented at or below prices at or below 30 per cent of the 60th percentile of the lesser of the state or area median income. General Statutes § 8-30g(a)(6). Critically, *set-aside developments must maintain these restrictions "for at least forty years after the initial occupation of the proposed development" to be compliant with the statute* (emphasis added).[1]

[1] We recognize that developments approved before 2000 may have affordability terms of less than 40 years, although several of such terms have now expired.

Numerous statutory and regulatory provisions demand continuing compliance with affordability plan oversight, administration, and enforcement obligations. Most important, General Statutes § 8-30h mandates that owners of affordable housing developments containing rental units "provide annual certification to [DOH] that the development *continues to be in compliance* with the covenants and deed restrictions required under" § 8-30g. The requirement is mandatory, and failure to certify would put the town out of compliance with § 8-30g. A town that does not receive and review these annual reports, and take enforcement action as necessary, is violating the statute. Moreover, if in fact the required set-aside percentages are not annually being met, then § 8-30h mandates corrective action. The failure to take such action would also place the town out of compliance with § 8-30g. Units that are not in compliance with the mandatory requirements of § 8-30g or § 8-30h cannot be used to establish eligibility for a moratorium.

Numerous other provisions of § 8-30g and the related regulations confirm that continued compliance is required and must be documented. First, Regulations § 8-30g-6(c)(2) requires a letter from the town attorney opining that the application complies with state law "as in effect on the day the application is submitted." This provision clearly requires evidence that § 8-30h annual reports have been filed and verified. Second, Regulations § 8-30g-6(c)(6) requires certification that certificates of occupancy for claimed units are "currently in effect," which also requires evidence of on-going compliance since occupancy, not just at a point in time. Third, Regulations § 8-30g-6(c)(7) instructs that a municipality, when applying for an § 8-30g moratorium, must certify that it "has identified and deducted, or otherwise excluded from the total [HUE] points claimed, all units that as a result of action by the municipality, municipal housing authority, or municipal agency, no longer qualify, as of the date of submission of the application, as providing [HUE] points." This too implies a look back and enforcement. Fourth, Regulations § 8-30g-6(f)(3) requires, as one way to provide evidence of currently enforceable affordability obligations, a § 8-30h compliance report if developments are less than one year old."

In this case, Brookfield has provided no evidence of on-going compliance with affordability restrictions for the developments for which it claims points. The necessary documentation should be on file with the Town, readily available, and filed as part of the application. Until that occurs, the application is incomplete. We recognize that the Department may have been inconsistent at times in the past in requiring this documentation, but the statutory obligation is clear and, going forward, applications should be required to comply before certificates are issued.

Thank you for your consideration.

Very truly yours,

Timothy S. Hollister

TSH:kcs

cc: Patricia Sullivan, Esq.
Rafael Podolsky, Esq.