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Via Email/PDF to Mr. Santoro, with two hard copies hand-delivered

August 30, 2022

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
Department of Housing
505 Hudson Street
Hartford, CT 06106-7106

Laura Watson, Agent
Department of Housing
505 Hudson Street
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Re: Comment On Application Of The Town Of New Canaan For Certificate Of Affordable Housing Completion and § 8-30g Moratorium

Dear Commissioner Mosquera-Bruno, Mr. Santoro, and Ms. Watson:

We are writing to provide comments on the Town of New Canaan's application for a § 8-30g moratorium, based on the Town's publication of notice in the *Connecticut Law Journal* on August 2, 2022, and submission to the Department of Housing. We represent several entities that currently have § 8-30g applications pending before the New Canaan Planning and Zoning Commission, and thus have a substantial and immediate interest in the Department's review of New Canaan's application.

In summary, the application is incomplete and unapproveable, for several reasons. First, the Town has filed with the Department after making (by its own admission) substantial changes to the draft application that was circulated locally for comment in April 2022. However, the changes are so significant that the Town plainly was required to re-start the local process. By bypassing local review this time around, the Town has circumvented the requirement of the § 8-30g Regulations that an application be vetted locally before being submitted to the Department.

Second, at this time, neither of the Canaan Parish buildings, for which 16 units and 34 HUE points are claimed, has obtained a permanent certificate of occupancy, which is required for moratorium points.

Third, the application does not contain evidence of annual, ongoing compliance with maximum household income and rent requirements, as required by § 8-30g and its Regulations, and by General Statutes § 8-30h.

Fourth, the application addresses the deduction of points for affordable units that were demolished, as required by General Statutes § 8-30g(l)(b)(8), by asserting, without any statutory or regulatory basis, that New Canaan is exempt from the deduction process because the units demolished at Canaan Parish in 2020 were "less affordable" than the units now being built. This is an absurd position.

Fifth, the application does not provide a justification for using "holdover" points from the Millport development.

The application now also contains two letters from New Canaan housing officials that, though not relevant to point calculations, inaccurately recount the process by which zoning approval of units at Millport and Canaan Parish were obtained, with my involvement as legal counsel.

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. *See* General Statutes § 8-30g(l)(1). Both Millport and Canaan Parish are submitted as "assisted housing."

Section 8-30g includes a number of requirements for an application for a Certificate of Affordable Housing Completion. *See* General Statutes § 8-30g(l)(4)(B). These requirements include: (a) a complete application that allows town residents, and then 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 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 of compliance when certificates of occupancy are issued, but also evidence of on-going, annual compliance during residential occupancy with maximum household income and maximum rent or sales prices, continuing to the time of the application to the DOH.

The Connecticut § 8-30g 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," Conn. Agencies Regulation § 8-30g-6(c)(2); proof 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, State Regulations § 8-30g-6(c)(7); and a

§ 8-30h compliance report if a development is less than one year old, see Regulations § 8-30g-6(f)(3).

Section 8-30g is a remedial statute, adopted to assist property owners is overcoming exclusionary zoning regulations and onerous application processing requirements that result in denials of affordable housing proposals based on insubstantial, unproven, and/or pretextual reasons. As such, requirements for any exemption from § 8-30g, such as a moratorium application, must be strictly construed. *See, e.g., Kaufman v. Zoning Comm'n*, 232 Conn. 122, 139-40 (1995).

The Town Has Improperly Bypassed Local Consideration Of Major Changes Made To Its April 2022 Application

The Town published notice of its intent to apply for a moratorium on April 5, 2022, thereby starting the local 20 day comment period, and opportunity for local public hearing, required by Conn. State Agency Regulations § 8-30g-6(j)(1). Our office filed an extensive set of comments (several of which are repeated here, and a copy of which is included in the Town's application) on April 29, 2022.

In response to our comments, New Canaan First Selectman Moynihan announced publicly in May 2022 that the Town had concluded that it could not apply at that time for the moratorium, and could do so only when "the Canaan Parish project was complete." *See* Exhibit A. Completion was – and remains – projected for November 2022. In addition, Mr. Moynihan explained to the Town Council in May, as to why the Town could not proceed, that the Department of Housing had recently changed the rules with respect to "deducting [points for] units that were formerly affordable." Exhibit A. (Our April comment corrected this claim; the rules are unchanged since 2000.)

Our office, and the general public, then heard nothing until early August, when the Town suddenly notified the Department that it was now submitting its application to the Department, which published notice in the *Connecticut Law Journal* on August 2, 2022.

The Town's now-pending application included the following substantive changes to the April 2022 local draft (the list below is a paraphrase of the list of changes in the application itself, *see* Exhibit B):[1]

- A new opinion letter from the Town Attorney, Exhibit C to this comment;
- A new "Certificate of No Deductions" of HUE points (Exhibit D), asserting – inaccurately — that neither the Housing Authority nor the Town nor any Town agency had taken action "to disqualify any unit" from being counted as affordable;[2]

[1] A major problem in preparing this comment has been that the pages of the Town's current application are not consecutively numbered, even though it is about 600 pages. For this reason, we have attached as an Exhibit all key pages referred to here.

- A new explanation of the Town's use of a "temporary certificate of occupancy" for Building 1 of Canaan Parish (Exhibit E), and copy of the temporary CO issued (Exhibit F); and

- Two new "certifications," asserting ongoing regulatory compliance with § 8-30g income and rent limits, signed by Ann Werner of Westmount Management, a third-party administrator, for Millport (Exhibit G) and Canaan Parish (Exhibit H).

Thus, in comparison to the April 2022 application, what the Town has now submitted to the Department is based on a completely new theory regarding deductions of points for demolished units; a complete reversal of the Town's May 2022 announcement that it could not proceed with the application until permanent certificate of occupancy had been issued for Canaan Parish; and a new assertion that an affidavit from a third-party compliance manager is a legally sufficient substitute for the annual, ongoing compliance reports that are required § 8-30g and its regulations and § 8-30h.

None of these major changes were circulated for public comment or potential public hearing in the Town of New Canaan. In addition, these changes were made in secret. Through May, June, and July 2022, to our knowledge, not a single public discussion occurred of any of these intended changes, or reversal of the Town's May 2022 position. In contrast to the public process, steps, and disclosures that preceded the April 2022 local application, none of these changes was discussed or reviewed at the New Canaan Planning and Zoning Commission, the Town Council, the Board of Selectman, the Housing Authority, or any other town agency. (Notably, during this period, our office had pending several Freedom of Information Act requests for information about the pending application and the moratorium, but received no documents or disclosures.) This process and the reversals, violate the moratorium requirement of public disclosure by filing the intended application with the Town Clerk for comment before submitting to the Department, see Regulations § 8-30g-6(j)(1). Whether the Town violated the Freedom of Information Act remains to be seen.

The likely reason for the abrupt reversal and precipitous filing — local political pressure — does not justify short-circuiting the required process. The residents of New Canaan, the Town agencies, and the applicant were entitled to review the August 2022 wholesale changes during a local comment period. This violation warrants a Department finding of procedural non-compliance, and direction to the Town to start over.

At This Time, None Of The Units At Canaan Parish Has Received A Permanent Certificate Of Occupancy

The Town claims 34 points for 16 units of Canaan Parish. As of the date of this comment, that development is still under construction, *see* Exhibit I. In contrast to the units at Millport, for which permanent certificates of occupancy are shown in the application, the Canaan

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[2] See pp. 11-12 of this letter.

Parish points are based on a temporary certificate of occupancy dated April 29, 2022, signed by the Building Inspector, the Fire Chief, and the Town Planner.[3] *See* Exhibit E and F.

The Connecticut State Building Code differentiates between temporary certificates of occupancy, partial certificates of occupancy, and permanent certificates of occupancy. *See* Exhibit J. Under the Building Code, a building official:

> may issue a temporary certificate of occupancy before the completion of the entire work covered by the [building] permit, provided such portion or portions shall be occupied safety prior to full completion of the building or structure without endangering life or public welfare. Any occupancy permitted to continue during completion of the work shall be discontinued within 30 days after completion of the work unless a certificate of occupancy is issued by the Building Official.

Thus, a temporary CO may be issued for units (for example, in a phased development) if occupancy will be safe, but a permanent CO may be issued only upon completion of the development. That a permanent CO may only be issued at the completion of a development is also reflected in General Statutes § 8-3(f), which states: "No . . . certificate of occupancy shall be issued for a building, use or structure that is subject to the zoning regulations of a municipality without certification in writing by the official charged with enforcement of such regulations that such building, use or structure is in conformity with such regulations . . . ." Obviously, Canaan Parish cannot be certified as being in compliance with its zoning approval, since it is still under construction. In fact, those residing there at this time live at an active construction site, with limited emergency access, and according to the building's management, are coping with dust, noise, and vibration. *See* Exhibit J, which are photos taken in *mid-August 2022*. Although the individual interior of several units may be occupiable, the development is plainly not nearly complete.

Moratorium points require a completed development with permanent certificate of occupancy. The Town's claim of points without a permanent certificate of occupancy violates (1) the § 8-30g statute; (2) the § 8-30g regulations; (3) the Affordability Plan; (4) an opinion of the Connecticut Attorney General; (5) New Canaan regulations; and (6) case law regarding certificates of occupancy.

1. Statute And Regulations.

A town applies to the Department of Housing for a certificate of "affordable housing *project completion.*" *See* General Statutes § 8-30g(l)(1) (emphasis added). A moratorium may be issued only based on a Department of Housing finding that "there has been *completed* within the municipality one or more affordable housing *developments* . . . ." *See* § 8-30g(l)(4)(A) (emphasis added). Section 8-30g developments, whether 30 percent set-aside or assisted

[3] The April 2022 application was based on Building Official Platz stating that "the units" in Building 1 (60 units) have been inspected and deemed "in substantial compliance with the Connecticut State Building Code. (*See* Exhibit F).

housing, comply with § 8-30g based on a percentage of the total units being offered for rental or purchase; this requirement cannot be met until the overall development is finished. Moreover, as a matter of common sense, the General Assembly could not have intended to allow moratorium points – *in support of a four-year exemption from a remedial statute* – to be based on incomplete construction or a Building Official's letter that is temporary, of unknown duration, (for example, supply chain issue), and without a guarantee that a permanent CO will be issued. In other words, what would happen if the Town were granted a moratorium and then the development, for whatever reason, did not obtain a permanent CO?

2. Financing And Affordability Documents.

The financing, financing commitment, and affordability agreement documents speak consistently to a completed development constituting the development that qualifies for financing. For example, the Extended Low-Income Housing Commitment, contained in the application (New Canaan Land Records, Book 1022, Page 224), says: "During the Extended Use Period; (1) not less than 100% of the [100 intended] Units in the Development shall be occupied (or will be available for occupancy) by Qualified Persons." Likewise, the Regulatory Agreement and Declaration of Restrictive Covenants between the New Canaan Housing Authority and the Canaan Parish Redevelopment Limited Partnership, August 2020 (Land Records, Book 1022, Pages 196-220) defines the "Project" as "the 100 unit multi-family residential rental housing project."

General Statutes 8-30g(l)(9) states: "A newly-constructed unit shall be counted toward a moratorium *when it receives a certificate of occupancy* (emphasis added)." See also subsection (7) ("for which a certificate of occupancy was issued after July 1, 1990"). State Regulations § 8-30g – 6(c)(6) requires that a moratorium application shall include "Certification by the applicant municipality that for each unit for which housing unit – equivalent points are claimed, *a valid certificate of occupancy* has been issued by the building official of such municipality and is currently in effect . . . ." Exhibits E and F to this comment make it clear that this requirement has not been met. The three Town officials conceded "site work is part and parcel of a phased project that includes two buildings and building two is incomplete. I cannot issue a final Certificate of Occupancy until the entire scope of this project has been completed, inspected, and approved by all land use departments," (their letter is dated May 10), that Canaan Parish does not have a final certificate of occupancy even for Building 1 because that requires completion of the development in accordance with the zoning approval."

3. Attorney General's 2006 Opinion.

This requirement of a permanent CO for moratorium points has been reviewed by the Connecticut Attorney General's Office, Exhibit K. In 2006, the Attorney General Blumenthal advised Commissioner Abromaitis of the Department of Economic and Community Development (which at that time was in charge of the State's housing programs, later transferred to the Department of Housing) that while incomplete construction did not disqualify a development from being called a "set-aside affordable housing development," only "fully-

constructed units issued a certificate of occupancy can qualify to receive points toward a moratorium."

In other words, to obtain a permanent certificate of occupancy[4], a development must comply with the overall site plan, which means not only the interior of individual units, but completion of the overall site: paving, lighting, driveways, drainage, emergency access, fencing, landscaping, etc.

4. Town Ordinances.

At least two New Canaan regulations show that a permanent CO requires a completed development, not just units. New Canaan Ordinances § 54-20(c)(4) (Exhibit L) states: "[w]hen a driveway permit is issued in conjunction with a building permit, no certificate of occupancy shall be issued until the construction of such driveway shall comply with all the requirements for the permit." In addition, New Canaan's Drainage Certification Policy Prior to Approval of Permit (Exhibit M) states that final certificates of occupancy can only be issued when "all site work and grading indicated on the approved site plan shall be complete." Thus, the Town's own regulations do not allow a permanent CO to be issued to Canaan Parish at this time. It is obvious from the Exhibit J photos that Canaan Parish is not done with driveways, site work, grading, or drainage, and certainly was not in October 2021.

5. Case Law.

In New York, case law makes clear that final certificates of occupancy require not only that units be habitable, but the development must match the site plans under which the work is being performed. *Braunview Assoc. v. Unmack*, 643 N.Y.S. 2d 253 (1996) (construction was only complete and final certificate of occupancy available when construction met the specifications in the site plans submitted to the town). Exhibit N.

This requirement is further exemplified in the New York cases regarding the Loft Law, which regulates the transition of former industrial or commercial spaces into residential units. "The purpose of requiring a final certificate of occupancy under [the New York law] is to insure that residential tenants … will have the benefit of health and safety regulations applicable to other multiple dwelling." *300 Bowery Inc. v. Bass & Bass, Inc.*, 471 N.Y.S. 2d 997, 999 (Civ. Ct. 1984). Exhibit O. "Only buildings which have obtained final certificates of occupancy under [New York law] are exempt from [the statute] because only those buildings have achieved compliance with the Multiple Dwelling Law, the goal the new Loft Law seeks to accomplish." *Id.* Specifically, the Loft Law "exempts buildings with a 'certificate of compliance or occupancy pursuant to section three hundred one of this chapter,' not buildings with a 'temporary certificate

[4] This comment letter does not challenge the authority of the Building Official to issue a temporary or partial certificate of occupancy; the problem here is that a four-year moratorium from § 8-30g cannot be based on an incomplete development and a temporary certificate of occupancy.

of compliance or occupancy.'" *See also Ass'n of Com. Prop. Owners, Inc. v. New York City Loft Bd.*, 505 N.Y.S.2d 110, 113 (1986), *aff'd*, 71 N.Y.2d 915 (1988). Exhibit P.

Another New York case that addresses directly this difference is *Kaplan v. Synergy, Inc.*, 886 N.Y.S. 2d 67 (Civ. Ct. 2009) (Exhibit Q) ("[t]he Administrative Code defines both a 'certificate of occupancy' and a 'temporary certificate of occupancy' so that use of the term 'certificate of occupancy' in the lease refers to what is commonly called a 'final' or 'permanent' certificate of occupancy and not a 'temporary certificate of occupancy'").

Indeed, there have been cases of buildings or structures that received temporary certificates of occupancy during construction but were unable to obtain a final certificate of occupancy when construction was complete. *See Assurance Company of America v. Yakemore*, Superior Court, District of Waterbury (May 9, 2005) (Exhibit R) (temporary certificates of occupancy issued twice, but no final certificate of occupancy issued due to structural defects in construction); *Commonweatlh v. Marcus*, 690 A.2d 842, 843 (Pa. Commw. Ct. 1997) (Exhibit S) (site developer failed to comply with approved site plan after receipt of temporary certificate of occupancy, so township's proceeding against developer to enforce approved site plan before issuing permanent certificate of occupancy was justified); *see also* Seth Press, *Buyer Beware: Temporary Certificates of Occupancy & the Need for Consumer Protection in the New York City Real Estate Market*, 2 BROOK. J. CORP. FIN. & COM. L. 511, 511 (2008) (Exhibit T) (buyers of luxury apartments based on temporary certificates of occupancy, where builder did not follow building code and made misrepresentations to city and buyers were unable to obtain final certificates, leaving them without the ability to either sell or occupy the apartments). Failure to receive a final certificate of occupancy, but allowing occupancy, is a violation of law. *See Howard v. Berkman, Henoch, Peterson & Peddy, P.C.*, 799 N.Y.S. 2d 160 (Civ. Ct. 2004) (Exhibit U) ("[i]n the event the final certificate of occupancy is not obtained within the time set forth in the initial temporary certificate of occupancy … the occupancy then becomes illegal and therefore all of the [] parties are technically assisting in violation of [city law] by permitting the purchaser to continue occupancy after that date").

In addition, § 8-30g case law holds that strict compliance with the state building code is necessary for units constructed under § 8-30g. *See, e.g., 500 North Avenue, LLC v. Town of Stratford Zoning Comm'n*, Superior Court, District of Hartford, (Aug. 17, 2021) (Exhibit V) ("When the plaintiff reaches the building permit phase and seeks a permit … [plaintiff must] work with an engineer . . . to ensure that all applicable provisions of the building code are followed").

Put another way, the new tenants of Canaan Parish were promised, and are entitled to, a completed development, with finishes and amenities shown in the approved site plan. The financing documents in the moratorium application require nothing less. If a private developer were to apply for a permanent certificate of occupancy for the Canaan Parish development as it existed in October 2021, or April 2022, that application would certainly be denied. There is no basis to make an exception so that New Canaan may expedite its application for an affordable housing moratorium.

The Town Has Not Submitted Evidence
Of On-Going Affordability Compliance Required To Receive Moratorium Points

The issue of evidence of annual, continuing compliance with the maximum income and rent requirements of an approved affordability plan should not be a surprise, as the Town's Attorneys were directly involved in the litigation of this issue in the Town of Westport during 2019-2021.

The documentation for both Millport and Canaan Parish contains numerous, detailed requirements for the development's administrator to collect, evaluate, and report compliance with maximum household income and maximum rent requirements. For example, the Canaan Parish Regulatory Agreement, contains a list of data collection, analysis, and reporting requirements.

General Statutes § 8-30h, and the Affordability Plan for each development, require the administrator to file with the town, by January 31 each year, an annual compliance report. For an "assisted housing" development, and in the documents here, this is generally called an Owner's Compliance Report. *For Millport, for 2017-2021, the application contains no such documentation.* All that is included in the application are letters (Exhibits G and H) dated September 2018 and 2020, from a company called Spectrum, which letters appear to be reports in connection with the federal Low Income Housing Tax Credit program and IRS requirements to ensure that the development is compliant with federal financing rules. New in the pending application (not part of the April 2022 local application) is an affidavit signed by Ann Warner of Westmount Management, in Branford, (Exhibits G and H) apparently a third-party compliance manager. Her affidavit asserts (emphasis added):

> I hereby certify that the seventy-three (73) total units in the 100% affordable set-aside development[5] known as Millport Apartments are restricted under a Housing Affordability Plan…and the units are restricted in compliance with that Plan for a period of 40 years from the date of the issuance of a Certificate of Occupancy for each of the units. *I have ascertained to the best of my knowledge and belief that the income limits for tenants required under the Plan and Connecticut General Statue § 8-30g have been satisfied at all times since the issuance of the Certificate of Occupancy for each of the units. The occupants have provided appropriate supporting documentation from which I verified their income.*
>
> *Therefore, the development continues to be in compliance with the restriction required under Connection General Statute § 8-30g.*

Exhibit H is an identical claim to Canaan Parish. But the Town's application contains no documents — not even a summary from Ms. Warner — to support this claim. *From the affidavit, we do not know Ms. Warner's qualifications; whether she calculated the maximum*

[5] Millport is an "assisted housing" development under 58-30g, not a "set-aside" development.

income limit correctly; whether she or her company set the rent correctly; for what years she conducted the review; and whether she followed § 8-30g requirements or the Millport financing, program, or both, or something else.

It is important to note that what is missing from the current application is the documentation *required* by General Statutes § 8-30h and the Affordability Plan *to be filed annually with the Town*! The application states no justification for this omission.[6] Moreover, the letters for Millport do not address compliance with the Affordability Plan for Millport, and they do not at all cover 2020 or 2021 (the September 2020 letter covers 2018 and 2019). The letters refer to "Owner Compliance" reports, but do not attach them, leaving unknown and unexplained what was reviewed and whether there has been compliance with the Affordability Plan. The Spectrum letters and affidavit are not evidence of compliance with § 8-30g or the Affordability Plan for Millport. Providing copies of annual, statutorily-required compliance reports should be a simple matter of inserting documents, already received by the Town, into the application, making their omission both inexplicable and begging the question of why they have not been provided.

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 the commission 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 development out of compliance with § 8-30g. Section 8-30h provides the municipality with the right to "inspect the income statements of the tenants of the restricted units" so as to verify the development's continuing compliance. This statute also includes a mandatory corrective requirement if a development is out of compliance – rental of the next available unit to an income-eligible household "until the development is in compliance." Section 8-30h thereby assures that the municipality has the capacity both to identify continuing compliance and to confirm that "the development is in compliance." The municipality, therefore, has an oversight obligation. More importantly, *the failure of the development to comply with 8-30h would put the development out of compliance with the requirements for an "affordable housing development," and would necessarily preclude the municipality from counting that development in an application for a moratorium.* To obtain a moratorium, the burden is on the municipality to prove that developments are and continuously have been compliant. This is a burden which can be easily met by assuring that annual certifications are filed and, if necessary, verifying their accuracy. *Thus, the failure to include proof of continuing eligibility precludes the counting of such units to establish eligibility for a moratorium.*

State 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 as of the application date, § 8-30h annual reports have been filed and verified. Second, Regulations § 8-30g-6(c)(6) requires certification that

[6] If the concern is public disclosure of tenant income, please note that § 8-30h provides for exempting such data from FOIA disclosure.

certificates of occupancy for claimed units are "currently in effect," which also requires evidence of on-going compliance since occupancy, not just at a past 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.

The affidavits from Westmont are plainly incomplete. They absolutely beg the question of why the supporting data that Westmount purports to have reviewed has not been disclosed. Confidentiality of income data is not claimed, or relevant under General Statutes § 8-30h, which exempts the data from FOI disclosure but not from a confidential compliance review.

The application, therefore, is incomplete for failure to provide proof of ongoing compliance with income and rent limits.

The Application Makes A Baseless Claim Regarding Exemption From Deduction Of Points For Demolished Units

General Statutes § 8-30g(l)(B)(8) states that HUE points shall be "[subtracted] applying the formula in subdivision (6) of this subsection [the points awarded for various units] for any affordable dwelling unit which, on or after July 1, 1990, was affected by any action taken by a municipality which caused such dwelling unit to cease being counted as an affordable dwelling unit." It should be noted that this provision contains exactly two requirements: (1) units in existence and treated as affordable units after July 1, 1990; and (2) affected by any action taken by a municipality ("that cause the unit to cease being counted"). The Town Planner's statement regarding no deductions (Exhibit D) is erroneous in asserting that the town has taken no action resulting in cessation of counting affordable units — it plainly has — and in asserting a legal conclusion that she is not qualified to assert.

Town Attorney Bamonte states in his opinion letter, Exhibit C, that this provision is not applicable to the current application because the units that were demolished at Canaan Parish "were not 'affordable dwelling units' in 2022 as contemplated by § 8-30g" because their maximum household incomes and maximum rents were based on area median income, not the lesser of the statewide or area median income as required by § 8-30g for "set-aside developments." Attorney Bamonte goes on to concede that the Town of New Canaan, for many years before the demolition, claimed these units as part of the Department's § 8-30g Ten Percent List, yet asserts that this has no relevance at this time.

Attorney Bamonte's letter is mistaken in several respects. First and foremost, the statute makes no exception based on the level of affordability of the demolished units, and under no principle of statutory interpretation can such an exception be added or implied. Second, area median income is in fact recognized by §8-30g as an affordability metric, such as if the units are

"assisted housing" as opposed to "set-aside housing." The statutory definition of "set-aside" development in § 8-30g refers to "median income" as defined in subsection (a)(7), but the definition of "assisted housing" contains no such definition or reference. If units are built with any form of governmental financial assistance, then the units are counted as affordable even if the relevant regulatory/financing program dictates use of area median. Indeed, here, all of the federal-level financing documents refer to area median.[7] In addition, in the Low Income Housing Tax Credit program developments, 60 percent or less of area median is a common income limit. In fact, the Canaan Parish 2018 Affordability Plan, § IX, Maximum Rental Price, refers use of the affordability level specified by the federal Low Income Housing Tax Credit Program, which is generally 60 percent of area median, with other units not covered by the LIHTC restriction being calculated based on the statewide median income. So Attorney Bamonte's reasoning for no deduction is based on the incorrect assumption that area median income is never part of § 8-30g affordability.

It should be noted that § 8-30g used over median income as its calculation stating point when it was adopted in 1990, and this continued until 1995, when the lesser of State or area median was adopted. Since then, in its Ten Percent Lists and moratorium reviews, the Department has consistently, legally, and logically grandfathered all affordable developments that were approved based on the rules in place at this time of approval. The Town Attorney's position here seems to be that the Department should abandon this practice and judge all affordable housing by whether it meets today's § 8-30g statute and regulations.

Moreover, as the Bamonte letter concedes, the Town has counted the 60 units it demolished in 2020 as "assisted housing" units since the first Ten Percent List in 1992, and every list since. So the Town took credit for the units in the past, but now disavows them?

More importantly, it seems to not have occurred to Town officials that when the Town determined that Canaan Parish should be maintained as a location for affordable units, *the Town had a choice as to whether to demolish units and rebuild on the same site, which would require deduction of the demolished units; or to rehabilitate the Canaan Parish and create more affordable units on other sites. The latter approach would have avoided deduction, as well as added points. The Town chose the former.* Thus, the Town was required to deduct the demolished units from its point total. The Town improperly wants to have its moratorium cake and eat it too.

The Application Does Not Explain The Justification For Using "Holdover" Points

General Statutes § 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

[7] It is also important to recognize that use of area vs. state median is only part of the affordability equation. A restriction of a unit to "60% or less of AMI" in most cases will be lower than 80% of SMI, and will be counted. The Department has recognized this in evaluating prior moratorium applications.

unnecessary if units completed before a moratorium has begun could count toward a subsequent moratorium – the phrase would be redundant. The evident statutory direction is that sufficient points for a next moratorium must be created while one moratorium is in effect, without holding back units and points.

The pending application proposes to use units whose CO's were issued in 2016 for a moratorium to take effect in 2022, and to use units completed in 2022 for a moratorium that would begin in 2026, or even 2030.

We raise this issue in part because in April 2022, New Canaan's own website spotlighted it. *See* Exhibit W, page 2 of the attachment, where the Town said, "[To] qualify for subsequent moratorium, a municipality must demonstrate that *since the last moratorium,* it has added enough affordable housing units to meeting [sic] the HUE point requirement." The memo continues that once a prior moratorium is effective, "[additional] new affordable dwelling units needed to be constructed to be counted toward a second moratorium."

The Town, based on the statutory language and the chronology of the issuance of permanent COs for Millport and Canaan Parish relative to the 2017-2021 moratorium and the current application, should be required to explain the justification for its use of holdover points.

The Town Attorney's Incomplete Opinion Letter

The application (Exhibit C) includes a letter from the Town Attorney, stating that the application complies with the moratorium statutes and regulations. But the letter says absolutely nothing about compliance documentation, holdover points, or temporary certificates of occupancy, even those we filed extensive comments about each issue in April 2022.[8]

A Town Attorney's certification letter that fails to address substantial legal issues raised in the local comment period does not comply with the Regulation § 8-30g6(c)(2).

Response To Letters Of Christine Hussey And Scott Hobbs

The application contains a letter from New Canaan Housing Authority Chair Scott Hobbs that restates Attorney Bamonte's erroneous claim that New Canaan is not required to deduct points for the units it demolished at Canaan Parish before beginning the new construction presently underway. Like Attorney Bamonte's letter, Mr. Hobbs' is in error. The statutory provision about deductions provides no basis for an exception if the demolished units were based on area instead of state median income. Mr. Hobbs is also incorrect in asserting that all §8-30g calculations are based exclusively on the state median. Mr. Hobbs also takes issue with my June 2022 remarks to the New Canaan Planning and Zoning Commission that during the past 20

[8] Candidly, the Town's submission of the current application to the Department without addressing these legal issues creates the unfortunate implication that the Town, since April 2022, has received oral assurances that none of these omissions will affect its application.

years, New Canaan has made "little progress" on affordable housing. He asserts, that during this period — and counting the Canaan Parish units that are not yet completed — the Town has added 109 assisted or deed-restricted units, "or 86% of its affordable housing stock." But this calculation ignores the 78 demolished units, and even at 109 over 20 years, that is only 5.5 units per year. The Town might review its definition of "progress."

The application's final entry is a letter from Christine Hussey of New Canaan Neighborhoods. In 2015 and 2018, I assisted the New Canaan Housing Authority as land use/zoning counsel in obtaining site plan approval for Millport and Canaan Parish. My job was to obtain approval of units that would be eligible for moratorium points. We calculated this potential. However, I then had no role in determining when or how the Town might turn its eligible points into a moratorium. There was no discussion then of deductions, temporary vs. permanent certificate of occupancy, or holdover points because those topics were years down the road.

The Town and the Housing Authority have been advised on all of these current issues by Attorney Bamonte and the firm of Berchem & Moses, whose exclusive responsibility it has been to explain the moratorium requirements to the Town. Ms. Hussey's letter is unjustified in attempting to attribute to me legal advice regarding topics that were not remotely part of my charge in 2015 and 2018; asserting that I gave advice clearly contrary to state law; and attributing to me questionable advice provided exclusively by the Town Attorney.

Mr. Hobbs claims that requiring compliance documentation, or prohibiting holdover points, would create a disincentive for Town to approve units and seek moratoria. But this claim is misplaced. In essence, to qualify for a moratorium, a town must approve, assist with building, and issue permanent CO's every four years to earn enough points to qualify for another moratorium and taking into account deductions. This takes planning, and may result in a town approving more affordable units than it needs to exactly qualify for a second or third moratorium. *But following the moratorium rules is not difficult, or a disincentive.*

Conclusion

Please note the Department's statutory obligation to state reasons for its actions (as outlined in my recent letter to the Department regarding Brookfield). That obligation includes responding to the comments in the letter in addition to the application itself.

Thank you for your consideration of these comments. Every town that qualifies for a moratorium under the rules and regulations should be granted one, but this application, at this time, does not qualify.

Finally, we are constrained to note that if this application is granted, our clients will likely be forced to seek an injunction in Superior Court.

Very truly yours,

Timothy S. Hollister

TSH:kcs

cc: Lynn Brooks Avni, New Canaan Town Planner (via email)
Attorney Nicholas Bamonte (via email)
751 Weed Street, LLC

EXHIBITS

A. Moynihan: "Town Cannot Apply for Affordable Housing Moratorium as Planned." The *New Canaanite* Newspaper, May, 2022

B. Excerpt from application: List of changes to April 2022 local application

C. Letter, Attorney Nicholas Bamonte to Commissioner Mosquera-Bruno, July 20, 2022

D. "Certificate of No Deductions," signed by Lynn Brooks Avni, Town Planner, dated 4/29/2022

E. Letter, May 10, 2022, from New Canaan officials re: temporary certificate of occupancy

F. Temporary CO for Canaan Parish with prior documents from April, 2022

G. Compliance Affidavit for Millport

H. Compliance Affidavit for Canaan Parish

I. 2018 Connecticut State Building Code, excerpt

J. Photos of Canaan Parish taken mid-August, 2022

K. Connecticut Attorney General Opinion dated March 22, 2006

L. New Canaan, Zoning Regulations § 54-20(c)(4)

M. Drainage Certification Policy of the Town of New Canaan Prior to Approval of Permit

N. *Braunview Assoc. v. Unmack*, 643 N.Y.S. 2d 253 (1996)

O. *300 Bowery Inc. v. Bass & Bass, Inc.*, 471 N.Y.S. 2d 997, 999 (Civ. Ct. 1984)

P. *Ass'n of Com. Prop. Owners, Inc. v. New York City Loft Bd.*, 505 N.Y.S.2d 110, 113 (1986)

Q. *Kaplan v. Synergy, Inc.*, 886 N.Y.S. 2d 67 (Civ. Ct. 2009)

R. *Assurance Company of America v. Yakemore*, Superior Court, District of Waterbury, Docket No. X01 CV044001224S (May 9, 2005)

S. *Commonweatlh v. Marcus*, 690 A.2d 842, 843 (Pa. Commw. Ct. 1997)

T. *Buyer Beware: Temporary Certificates of Occupancy & the Need for Consumer Protection in the New York City Real Estate Market*, 2 BROOK. J. CORP. FIN. & COM. L. 511, 511 (2008)

U. *Howard v. Berkman, Henoch, Peterson & Peddy, P.C.*, 799 N.Y.S. 2d 160 (Civ. Ct. 2004)

V. *500 North Avenue, LLC v. Town of Stratford Zoning Comm'n*, Superior Court, District of Hartford, Docket No. HHDLNDCV186097370S (Aug. 17, 2021)

W. New Canaan website information re: Moratorium, April 2022

X. Letters from New Canaan Housing Authority Chair Scott Hobbs, and Christine Hussey, June 2022

EXHIBIT A

New Canaanite

NewCanaanite.com | (https://newcanaanite.com/moynihan-town-cannot-apply-for-affordable-housing-moratorium-as-planned-6086198)

Moynihan: Town Cannot Apply for Affordable Housing Moratorium As Planned

By **Michael Dinan** | 13 hours ago

After asserting (https://newcanaanite.com/town-application-for-affordable-housing-moratorium-to-be-filed-next-week-5849412) for several weeks that the town was close to filing, New Canaan's highest elected official said Tuesday that the municipality cannot apply at this time for four years of relief from a widely discussed affordable housing statute.

The town did prepare its application for a four-year "moratorium" from a state law known by its statute number, 8-30g. In towns where less than 10% of all housing stock qualifies as "affordable," under the state's definition, the law effectively allows developers to skirt local planning decisions in projects that set aside a certain percentage of units at below-market rates.

The town had qualified for one such moratorium in 2017, with the denser redevelopment (https://newcanaanite.com/a-real-good-moment-for-new-canaan-officials-break-ground-on-new-affordable-housing-on-millport-avenue-39462) of New Canaan Housing Authority-owned apartments (https://www.propertyrecordcards.com/PropertyResults.aspx?towncode=090&uniqueid=N%20%20%2080%20%20644) Millport Avenue, and hoped to qualify for another through the redevelopment of the Canaan Parish complex at Lakeview Avenue and Route 123, which was partially completed (https://newcanaanite.com/we-feel-really-good-officials-cut-ribbon-on-rebuild-canaan-parish-housing-complex-5013157) last October.

Yet during a required public comment period on the new moratorium application, a prominent land use attorney—Tim Hollister, from a firm representing a local developer in two 8-30g applications, at Weed and Elm (https://newcanaanite.com/weed-and-elm-affordable-housing-application-filed-with-pz-5496761) Streets, and on Main Street (https://newcanaanite.com/20-unit-residential-development-proposed-at-former-red-cross-building-6019028) —said (https://newcanaanite.com/land-use-attorney-new-canaans-moratorium-application-is-incomplete-and-non-approvable-5906346) the town's application was incomplete and would not be approved.

Part of the problem with the application, Hollister said, was that the town has not obtained the "housing unit equivalent" or "HUE" points needed for the moratorium. It also failed to address the demolition of units at Millport and Canaan Paris, and failed to explain how it was using "holdover" HUE points in its calculation.

First Selectman Kevin Moynihan said (https://newcanaanite.com/moynihan-town-to-file-moratorium-application-very-soon-5947871) at first that Hollister's comments had delayed the town's filing. Yet during this week's regular Board of Selectmen meeting, Moynihan said that, in fact, the town would not be able to apply for its next moratorium until the Canaan Parish project was complete. The phase that remains undone—building a 40-unit structure and obtaining a Certificate of Occupancy for it—won't be finished until at least November, Moynihan said.

After consulting with the state, town officials have "determined that the Town does not qualify for a moratorium at this time," Moynihan said during the meeting, reading out from a statement (printed in full below).

"The Town does not currently have enough affordable housing 'points' to qualify for a moratorium," Moynihan said.

He provided two reasons for that. First, Moynihan said, there have been COVID-related delays such as Eversouce gas getting hooked up to the complex at Canaan Parish. And second, the town had been unclear on just how the state Department of Housing—the agency that receives and reviews the moratorium application—was calculating the HUE points.

Moynihan failed to mention that the Housing Authority had run into financing difficulties (https://newcanaanite.com/with-change-at-state-level-officials-now-scrambling-to-figure-out-funding-for-planned-redevelopment-of-canaan-parish-1048394) with the project in April 2019, nearly a full year prior to the pandemic.

Asked about the newly opened 8-30g window at the time the first phase of Canaan Parish project as finished, Housing Authority Chair Scott Hobbs told *NewCanaanite.com* (https://newcanaanite.com), "It's really a shame on the part of Connecticut, where the project was initially delayed for, I believe, around six months because of Connecticut budget issues and the need to get allocations from the affordable housing tax credits, and then a additional roughly four to six months due to COVID."

During the selectmen meeting, Moynihan focused, in part, on Hollister himself and the state's process for moratoriums application.

"It's kind of unusual the way the process works," he said. "You file an application and then an attorney has to write an opinion certifying that you comply. That's kind of unusual in our experience. Usually an applicant applies and the body, whether state or federal has to decide whether, on the facts, whether you comply."

Since the town last secured its own moratorium in 2017, litigation about a similar effort in Westport (in 2019) that involved Hollister also led a change in how the statute is interpreted, Moynihan said.

"It appears that the rules changed with respect to deducting units that were formerly affordable," he said. "In our case, our strategy was to demolish units that had become obsolete and replace [them]. So there has been a bit of disagreement over this whole thing. Obviously the people who put the strategy in place do not agree. But at the end of the day, the rules are the rules that the state decides to follow, and if they change the rules, we have to follow the rules."

He later added that, in light of Hollister's comments on the town's application, there has been "little agreement" even among lawyers in the town attorney's office, which "came as a great surprise" to Moynihan.

Still in the end it didn't matter whether those lawyers agreed with each other, Moynihan said, because "the fact of the matter is we now have definitive confirmation from the Department Housing as to what they're going to apply when they receive our application."

"The town attorney has to write an opinion/certification that we comply," Moynihan said. "If they cannot do that we can't file."

The comments came as the selectmen prepared to approve a state-required affordable housing plan developed by a committee of the town. Moynihan and Selectmen Kathleen Corbet and Nick Williams voted 3-0 in favor it.

Corbet did raise several questions about the plan prior to the vote, though Moynihan noted that the public comment period on it had ended. At one point Corbet pointed to part of the plan that calls for revision of the New Canaan Zoning Regulations "to incentivize the creation of senior, special needs and workforce housing" and "evaluating the efficacy of eliminating or modifying square footage minimums."

"Is this underway?" Corbet asked.

Town Planner Lynn Brooks Avni responded, "No, this was one of the recommendations that the town or subsequent committee should consider considering."

Williams took aim at the state law itself and indicated that Gov. Ned Lamont could have granted New Canaan relief from 830-g moratorium delays associated with the COVID-19 pandemic.

When Moynihan said that "Ned Lamont's Greenwich" has 11 affordable housing applications, Brooks Avni said the number in the governor's hometown is up to 14 or 15.

"So you're going to see the 'urbanization' of downtown Greenwich like no other," Moynihan said. "Seven-story buildings in Greenwich."

Even if New Canaan does successfully secure another four-year moratorium, it's unclear how the town will achieve its next one, Moynihan said.

"We have a lot of work to do to make another project that will qualify for another moratorium in four year's time," he said. "You know, I searched in vain to find 2.5 acres for a Police Department, and if you cannot find 2.5 acres for an essential building it's equally hard to find property in town for affordable housing."

The town had spent $7,074 in legal fees on the moratorium application through April of this fiscal year, according to a legal bill approved by the selectmen at their May 17 meeting. The town also hired (https://newcanaanite.com/town-hires-consultant-to-help-with-application-for-affordable-housing-relief-52144[illegible]) a consultant in December at $120 per hour, plus some expenses, to help draft the moratorium application, for between 50 hours ($6,000 total) and 150 hours ($18,000). It wasn't immediately clear how much money that consultant has been paid. Town CFO Anne Kelly-Lenz did not respond to a message seeking comment.

***

Full text of Moynihan's statement "Regarding New Canaan's Section 8-30g Moratorium Application":

> "The Town Attorney's office, Berchem Moses PC, has been working with Town Planner Lynn Brooks Avni for the past several weeks preparing to file an application with the State Department of Housing (CT-DOH) for an affordable housing moratorium under Section 8-30g.
>
> "In the course of this review, including receipt of public comments from Attorney Tim Hollister and consultation with CT-DOH, Town Attorney Nick Bamonte and Town Planner Avni determined that the Town does not qualify for a moratorium at this time. However, the Town will qualify and will file an application for a moratorium once the additional 40 units of the Canaan Parish affordable housing expansion project are completed and occupied, which is estimated to occur in November.
>
> "The Town does not currently have enough affordable housing "points" to qualify for a moratorium because of: 1) delays completing all of the units at Canaan Parish as a result of COVID pandemic and supply chain disruptions—"that refers to Eversource's gas delays and getting gas hooked up", and 2) deductions for pre-existing government assisted affordable housing that were demolished because they were obsolete. The Town did not fully account for these deductions in its initial calculations for the moratorium application due to a lack of clarity in CT-DOH's affordable housing points calculation methodology, which CT-DOH has now clarified."

EXHIBIT B

Description of Modifications

The Town of New Canaan's Certificate of Housing Completion application was available in the New Canaan Town Clerk's office for review by the public from April 7, 2022 through the date of submission to DOH. During that time New Canaan received a comment from Timothy Hollister of Hinckley Allen. On June 30, 2022 the Town received a letter from the Housing Authority of New Canaan. On July 14, 2022 the Town received correspondence from Canaan Parish Redevelopment GP, LLC.

Subsequent to when the Certificate of Housing Completion application was first available for review in the Town Clerk's office, the Town has modified the application as follows:

1) Compliance Certification Affidavit for Millport Apartments dated 5/19/2022 was added;
2) Compliance Certification Affidavit for Canaan Parish dated 5/19/2022 was added;
3) A table inadvertently included within Tab 3 listing certain Certificates of Occupancy was removed. It pertained to units claimed as part of the 2017 Certificate of Housing Completion that are not claimed in this Application;
4) 2022 Income Limits were added to Tab 2 since they became effective on April 18, 2022;
5) Certification of the Certificates of Occupancy for Millport was executed by the Building Official on April 29, 2022;
6) Certification of Certificate of Occupancy for Canaan Parish was executed by the Building Official on April 29, 2022;
7) Certification of No Deductions was executed by the Town Planner on April 29, 2022;
8) The date has been changed on the letter from the First Selectman;
9) The Attorney Certification Letter has been revised to include further explanation of the HUE points claimed in the application;
10) Correspondence received from Timothy Hollister, Hinckley Allen dated April 29, 2022 has been added;
11) Correspondence from the Housing Authority of New Canaan, dated June 29, 2022 has been added;
12) Correspondence received from Canaan Parish Redevelopment GP, LLC, dated July 14, 2022 has been added;
13) Minor editorial changes to the text of the document to add detail and clarity.

EXHIBIT C

BERCHEM MOSES PC

75 Broad Street
Milford, CT 06460
T: 203.783.1200
F: 203.878-2235

1221 Post Road East
Westport, CT 06880
T: 203.227.9545
F: 203.226.1641

BERCHEMMOSES.COM

July 20, 2022

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

Application for Certificate of Affordable Housing Completion/Moratorium – Town of New Canaan, Connecticut

Dear Commissioner Mosquera-Bruno:

This letter will constitute the certification required by §8-30g-6(c)(2) of the Regulations of Connecticut State Agencies regarding the accompanying Application for State Certification of Affordable Housing Completion (hereafter "Application") which is being submitted by the Town of New Canaan (hereafter "Town").

In my opinion, the Application complies with the provisions of Conn. Gen. Stat. §8-30g and with §8-30g-6 of the Regulations of Connecticut State Agencies in effect on the day that the Application is being submitted.

By way of background, I have reviewed the statistical information, calculations, and historical information provided to me regarding the two (2) housing projects submitted as part of this Application, focusing on dates of certificates of occupancy and income requirements as set forth in the governing laws.

The following summarizes the two (2) referenced projects:

1. Millport Apartments – 33, 35, 59 and 61 Millport Avenue
   (71 of 73 total units claimed = 118.5 HUE Points)

This 73-unit § 8-30g development was originally approved by the Planning and Zoning Commission in 2015 and is comprised of 100% affordable units. Because two of the units had been claimed towards New Canaan's last Certification of Affordable Housing Completion in 2017, 71 of the 73 units are claimed in the present application. The property is owned and operated by the New Canaan Housing Authority. Certificates of Occupancy for the units were issued in 2016 and 2018.

2. Canaan Parish – 186 Lakeview Avenue
(16 of 100 total units claims = 34 HUE Points)

This 100-unit § 8-30g development was originally approved by the Planning and Zoning Commission in 2018 and is comprised of 100% affordable units. Because the majority of the HUE points required for the issuance of a new Certification of Affordable Housing Completion result from the Millport Apartments development described above, only 16 units in Canaan Parish are claimed in the present application. The property is owned by the Town of New Canaan and operated by the New Canaan Housing Authority and Canaan Parish Redevelopment LP. Certificates of Occupancy for the units were issued in 2021.

Although this Application claims HUE points for new dwelling units from both Canaan Parish and Millport Apartments that were constructed after pre-existing dwelling units had been demolished, no deductions in HUE points are necessary pursuant to C.G.S. § 8-30g(l)(8), which provides:

> Points shall be subtracted, applying the formula in subdivision (6) of this subsection, for any affordable dwelling unit which, on or after July 1, 1990, was affected by any action taken by a municipality which caused such dwelling unit to cease being counted as an affordable dwelling unit.

Section 8-30g(l)(8) is not applicable to the Town's Application because the prior dwelling units were not "affordable dwelling units" as contemplated by Section 8-30g. Although the prior units were included on the 1990 Affordable Housing Appeals List maintained by DOH, a critical factor is that those prior units had been restricted to 80% *Area* Median Income ("AMI") – which in New Canaan, is not the applicable metric for determining affordability under Section 8-30g.

Section 8-30g applies to "set-aside developments" with at least 30% of the total dwelling units restricted to persons whose income is less than 80% of the "median income." Median income is defined as "*the lesser of* the state median income or the area median income for the area in which the municipality containing the affordable housing development is located...." In New Canaan, the AMI is much higher than State Median Income ("SMI"). For example, the 2022 AMI for a family of four in the Stamford-Norwalk Metro Area is $180,900 (see figures in Tab 2). The 2022 SMI for a family of four is $112,600 (see Tab 2). Therefore, to benefit from the broader protections of Section 8-30g, a set aside development in New Canaan must be restricted to 80% SMI, not AMI.

As discussed above, the prior dwelling units at Canaan Parish and Millport Apartments had been restricted to 80% AMI, not SMI, and therefore do not constitute "affordable dwelling units" subject to deductions under Section 8-30g(l)(8). Moreover, the units claimed for HUE points in this Application are not only brand new and fully updated, but they are also drastically more affordable than the pre-existing units and cannot be considered comparable replacements to the deteriorated pre-existing units formerly at Canaan Parish and Millport Apartments. The New Canaan Housing Authority and Canaan Parish Redevelopment LP have provided public comments (attached at Tab 5) further detailing the new units and fully supporting the HUE points claimed in the Town's Application.

In conclusion, the new units claimed in this Application validly contribute HUE points towards another Certificate of Affordable Housing Completion and no point deductions are required. This is consistent with the methodology employed by DOH when approving the Town's Certification of Affordable Housing Completion in 2017, which awarded HUE points for similar new units but applied no deductions.
If you or any of the DOH staff have any questions, please contact me at (203) 571-1713 or nbamonte@berchemmoses.com. Thank you for your attention and consideration.

Sincerely,

Nicholas R. Bamonte

EXHIBIT D

To: Department of Housing, State of Connecticut

Re: Application for Certificate of Affordable Housing Completion
Town of New Canaan, CT

CERTIFICATION OF NO DEDUCTIONS

I, Lynn Brooks Avni, Town Planner for the Town of New Canaan, Connecticut, hereby depose and say, to the best of my knowledge and belief, and as supported by the review of our consultant's extensive research and gathering of documentation for the Application for State Certificate of Affordable Housing Completion, that there has been no action by the municipality, the Housing Authority of New Canaan or any other Town agency, to disqualify any unit claimed as providing housing unit-equivalency points, and no points have been deducted or otherwise excluded from the total housing unit-equivalency points claimed, as of the date of the submission of the Application.

State of Connecticut
ss: New Canaan
County of Fairfield

Lynn Brooks Avni, AICP Town Planner

Personally appeared Lynn Brooks Avni, signer and sealer of the foregoing instrument and acknowledged the same to be his/her free act and deed before me.

SHAWN KELLEY SOLJOUR
NOTARY PUBLIC
My Commission Expires March 31, 2027

Notary Public

Dated: 4/29/2022

EXHIBIT E

Town of New Canaan

Building Department
Town Hall, 77 Main Street
New Canaan, CT 06840

Brian W. Platz
Chief Building Official
Director of Land Use
Blight Officer

Tel: (203) 594-3013
Fax: (203) 594-3121
brian.platz@newcanaanct.gov

May 10, 2022

Mr. Scott Hobbs
New Canaan Housing Authority

Re: 186 Lakeview Ave, New Canaan, CT 06840

Dear Mr. Hobbs,

Please be advised that that the residential dwellings units known as "Building One" located at 186 Lakeview Ave in New Canaan CT, consisting of 60 dwelling units constructed under Building Permit #20-495, have been inspected and are deemed to be in substantial compliance with The Connecticut State Building Code (CSBC) and are approved for occupancy. This is a Temporary Certificate of Occupancy issued in accordance with section 111.3 of The International Building Code portion of the CSBC. I am issuing this as a Temporary Certificate of Occupancy given that although the building is complete the site work is part and parcel of a phased project that includes two buildings and building two is incomplete. I cannot issue the full and final C of O until the entire scope of this project has been completed, inspected and approved by all land use departments.

Best regards,

Brian W. Platz
Chief Building Official
Director of Land Use

Paul Payne
Fire Marshal

Lynn Avni Brooks
Town Planner
Senior Enforcement Officer

EXHIBIT F

11) ISSUED CERTIFICATES OF OCCUPANCY:

CERTIFICATION OF CERTIFICATE OF OCCUPANCY
New Canaan Application for
State Certificate of Affordable Housing Completion

I hereby certify that a valid Temporary Certificate of Occupancy has been issued and is currently in effect for the following residential development which contains affordable housing units within the Town of New Canaan as per the dates indicated and as shown on the copies of the certificate attached.

	Date Issued
186 Lakeview Avenue (Building 1) 60 affordable units (16 being counted for this application)	10/23/2021

State of Connecticut

ss: New Canaan

County of Fairfield

Brian Platz, Chief Building Official

Personally appeared Brian W. Platz, signer and sealer of the foregoing instrument and acknowledged the same to be his/her free act and deed before me.

Notary Public

Dated: 2/29/2022

Town of New Canaan

Building Department
Town Hall, 77 Main Street
New Canaan, CT 06840

Brian W. Platz
Chief Building Official
Director of Land Use
Blight Officer

Tel: (203) 594-3013
Fax: (203) 594-3121

October 23, 2021

Mr. Ryan Sullivan
AP Construction
707 Summer Street, 5th Floor
Stamford, CT 06901

Re: Canaan Paris, 186 Lakeview Ave, New Canaan, CT 06840

Dear Mr. Sullivan,

The residential dwelling units know as Building One located at 186 Lakeview Ave, New Canaan CT. consisting of 60 dwelling units constructed under permit #20-495 have been inspected, and deemed to be in substantial compliance with the CT. State Building Code. Please be advised that this building in its entirety is approved for immediate use and occupancy.

Best regards,

Brian W. Platz
Chief Building Official
Director of Land Use

Cc; Tiger Mann, Director of Public Works
Maria Coplit, Town Engineer
Paul Payne. Fire Marshal
Lynn Brooks Avni, Town Planner
Kathleen Holland, Director of Inland Wetlands
Jennifer Eielson, Director of Environmental Health

11) ISSUED CERTIFICATES OF OCCUPANCY:

CERTIFICATION OF CERTIFICATES OF OCCUPANCY
New Canaan Application for
State Certificate of Affordable Housing Completion

I hereby certify that valid Certificates of Occupancy have been issued and are currently in effect for the following residential developments which contain affordable housing units within the Town of New Canaan as per the dates indicated and as shown on the copies of the certificates attached.

	Date Issued
186 Lakeview Avenue (Building 1) 60 affordable units	10/23/2021

60 TOTAL AFFORDABLE UNITS

State of Connecticut
ss: New Canaan
County of Fairfield

_____
Brian Platz, Chief Building Official

Personally appeared _____, signer and sealer of the foregoing instrument and acknowledged the same to be his/her free act and deed before me.

_____
Notary Public

Dated:_____

EXHIBIT G

COMPLIANCE CERTIFICATION AFFIDAVIT
Pursuant to Section 8-30h of the Connecticut General Statutes

Connecticut General Statutes § 8-30h. Annual certification of continuing compliance with affordability requirements. Noncompliance.

On and after January 1, 1996, the developer, owner or manager of an affordable housing development, developed pursuant to subparagraph (B) of subdivision (1) of subsection (a) of section 8-30g, that includes rental units shall provide annual certification to the commission that the development continues to be in compliance with the covenants and deed restrictions required under said section.

If the development does not comply with such covenants and deed restrictions, the developer, owner or manager shall rent the next available units to persons and families whose incomes satisfy the requirements of the covenants and deed restrictions until the development is in compliance.

The commission may inspect the income statements of the tenants of the restricted units upon which the developer, owner or manager bases the certification. Such tenant statements shall be confidential and shall not be deemed public records for the purposes of the Freedom of Information Act, as defined in section 1-200.

To: New Canaan Planning and Zoning Department, 77 Main Street, New Canaan, CT 06840

From: ANN WERNER, Compliance Manager
Westmount Management, 36 Park Place, Branford, CT 06405

Development Name/Address: Millport Apartments – 33, 35, 59 and 61 Millport Avenue

I hereby certify that the seventy-three (73) total units in the 100% affordable set-aside development known as Millport Apartments are restricted under a Housing Affordability Plan filed in the office of the Planning and Zoning Department of the Town of New Canaan, and that the units are restricted in compliance with that Plan for a period of 40 years from the date of the issuance of the Certificate of Occupancy for each of the units. I have ascertained to the best of my knowledge and belief that the income limits for tenants required under the Plan and under Connecticut General Statutes § 8-30g have been satisfied at all times since the issuance of the Certificate of Occupancy for each of the units. The occupants have provided the appropriate supporting documentation from which I verified their income.

Therefore, the development continues to be in compliance with the restrictions required under Connecticut General Statutes § 8-30g.

Compliance Manager

State of Connecticut

ss: Branford

County of Fairfield

Personally appeared Ann Werner, signer and sealer of the foregoing instrument and acknowledged the same to be his/her free act and deed before me.

Date: 5/19/2022

Name
Commissioner of the Superior Court or
Notary Public

AMY HERNANDEZ
NOTARY PUBLIC
State of Connecticut
My Commission Expires
August 31, 2023

{01620880.DOCX Ver. 2}

SPECTRUM SEMINARS, INC.
www.spectrumseminars.com
admin@spectrumseminars.com

SPECTRUM COMPANIES

SPECTRUM ENTERPRISES, INC.
www.spectrumlihtc.com
info@spectrumlihtc.com

545 Shore Road
Cape Elizabeth, ME 04107
207-767-8000

October 5, 2018

Mr. Scott Hobbs
Millport Phase I LP
33-35 Millport Ave.
New Canaan, CT 06840

RE: Monitoring for Low Income Housing Tax Credit (LIHTC) Compliance in Connecticut: **Final Summary Report Letter**

Property: **Millport Phase I – CT - 15063**

Dear Mr. Hobbs:

Enclosed please find a summary of our monitoring and findings of your property for this monitoring period covering the areas of review as noted in the Owner's Report Letter. We are required to report any findings we discover to the Internal Revenue Service. In instances where revisions have been requested and not received by the execution date of this letter, additional findings may be cited upon their reception and review. **As stated in the Code, Section 1.42-5(g) Liability: Compliance with requirements of Section 42 is the responsibility of the owner of the building for which the credit is allowable. The Agency's obligation to monitor for compliance with the requirements of Section 42 does not make the Agency liable for an owner's non-compliance.**

The results of our monitoring of **Millport Phase I** are as follows:

1. **Owner's Certifications:** The Owner's Certification of Continuing Project Compliance received for **2017** was reviewed. The results of that review are as follows:

   No issues.

2. **Original Qualifying Basis and Minimum Set-Aside:** As determined by reviewing the first year Status Report database or previously submitted QBTS. The results of that review are as follows:

   No issues.

3. **Status Reports:** The SPECTRUM Status Report database received was reviewed for compliance in **2017** using **Stamford-Norwalk MSA** income limits. The results of that review are as follows:

   No issues.

4. **Physical Inspection:** The physical inspection was conducted on 7/9/2018. Two (2) buildings (BINs CT-15063-01 through CT-15063-02), all common areas, and 20% of the LIHTC units were inspected. All CHFA Inspection Standards and Guidelines were adhered to with the following repairs noted/required:

   CT-15063-02

   Unit 233
   The kitchen countertop was not installed correctly and is loose. Management clarified that the contractor has been alerted and a plan of action is being developed. Due to the fact that this is not a life/safety issue it will be marked as cleared as a plan of action is being taken. **Issue cleared.**

5. **Tenant/Administrative File Review:** The file review was conducted on 7/9/2018. 20% of the LIHTC files were selected for review. Leases, move-in verifications, certifications, and rents were reviewed. The results of that review are as follows:

   No issues.

FINDINGS:

None.

COMMENTS:

This concludes the monitoring for this compliance period.

If you have any questions, please do not hesitate to contact us at (207) 805-0035.

Sincerely,

Harold Tucker, Compliance Analyst
Spectrum Enterprises

cc: Andrew Bowden, Spectrum Enterprises
Joe Voccio, Connecticut Housing Finance Authority
James Welter II, Connecticut Housing Finance Authority

Enclosures

SPECTRUM SEMINARS, INC.
www.spectrumseminars.com
steve.rosenblatt@spectrumseminars.com

SPECTRUM COMPANIES

SPECTRUM ENTERPRISES, INC.
www.spectrumllc.com
info@spectrumllc.com

75 John Roberts Road
Suite 2C
South Portland, ME 04106
207-767-8000

September 25, 2020

Mr. Scott Hobbs
Millport Phase II LP
57 Millport Ave.
New Canaan, CT 06840

RE: Monitoring for Low Income Housing Tax Credit (LIHTC) Compliance in Connecticut: **Final Summary Report**

Property: **Millport Phase II – CT-16408**

Dear Mr. Hobbs:

Enclosed please find a summary of our monitoring and findings of your property for this monitoring period covering the areas of review as noted in the Owner's Report Letter. We are required to report any findings we discover to the Internal Revenue Service. In instances where revisions have been requested and not received by the execution date of this letter, additional findings may be cited upon their reception and review. **As stated in the Code, Section 1.42-5(g) Liability: Compliance with requirements of Section 42 is the responsibility of the owner of the building for which the credit is allowable. The Agency's obligation to monitor for compliance with the requirements of Section 42 does not make the Agency liable for an owner's non-compliance.**

The results of our monitoring of **Millport Phase II** are as follows:

1. **Owners Certifications:** The Owner's Certifications of Continuing Project Compliance received for **2018 and 2019** were reviewed. The results of that review are as follows:

   No issues.

2. **Original Qualifying Basis and Minimum Set-Aside:** As determined by reviewing the first year Status Report database or previously submitted QBTS. The results of that review are as follows:

The 8609s with part II completed by the owner were provided. In addition, the Extended Low-Income Housing Commitment was provided. The applicable fraction of 40/40 or 100% is confirmed. **Issue cleared.**

3. **Status Reports:** The SPECTRUM Status Report database received was reviewed for compliance in **2018 and 2019** using **Stamford-Norwalk MSA** income limits. The results of that review are as follows:

Unit 434 has been vacant since August 2019. Management explained this vacancy is due to applicants failing background screenings and applicants not being income qualified. They were also experiencing some staffing issues. A qualified household moved into this unit on 2/1/2020. **Issue cleared.**

Unit 436 has been vacant since April 2019. Management explained this vacancy is due to applicants failing background screenings and applicants not being income qualified. They were also experiencing some staffing issues. A qualified household moved into this unit on 4/1/2020. **Issue cleared.**

4. **Physical Inspection:** The physical inspection was conducted on TBD. Two buildings (BINs CT-16408-01 to CT-16408-02), all common areas, and sixteen of the LIHTC units were inspected. All CHFA Inspection Standards and Guidelines were adhered to with the following repairs noted/required:

ATTENTION:
Due to the ongoing health crises, CHFA has suspended all physical inspections of LIHTC properties.

5. **Tenant/Administrative File Review:** The file review was conducted on 6/19/2020. Sixteen of the LIHTC files were selected for review. Leases, move-in verifications, certifications, and rents were reviewed. The results of that review are as follows:

Part VII regarding student status is blank on most Tenant Income Certifications. Management reported that this was a software issue and they have manually corrected Part VII on TICs regarding Student Status. **Issue cleared.**

CT-16408-01

Unit 313/Musilli
In accordance with IRS notice 2020-53, the 4/1/2020 annual certification is not required. The 4/1/2019 annual recertification was reviewed during the audit and there were no issues. **Issue cleared.**

Unit 323/Plaza
We requested pay stubs in place of the tax returns for the 6/1/2020 annual certification. Management explained that due to COVID-19, they were unable to obtain the pay stubs. Tenant is well below the income limit. **Issue cleared.**

Unit 325/Moroch
The 2018 initial certification and the 2/1/2020 annual certification were provided as requested. The move-in date was corrected to 2/20/2018. **Issues cleared.**

Unit 332/Lowman
The move-in date was corrected to 2/22/2018 as requested. A Certificate of Zero Income was provided for Hunter. **Issues cleared.**

Unit 335/Vecchini
Signed TICS for 2018 and 2019 were provided as requested. Be sure to add "true and correct" as of the certification date and have tenant initial. In accordance with IRS notice 2020-53, the 4/1/2020 annual certification is not required. **Issues cleared.**

Unit 337/Platt
The 3/1/2020 annual recertification was provided as requested. **Issue cleared.**

CT-16408-02

Unit 421/Brown
The signed 12/1/2019 annual certification was provided as requested, as well as the completed 12/31/2018 move-in certification. **Issues cleared.**

Unit438/Tatarintesva
A signed 3/1/2020 TIC has been provided as requested. Be sure the tenants add, "True and correct as of 3/1/2020." **Issue cleared.**

FINDINGS:

None.

COMMENTS:

This concludes our LIHTC compliance monitoring for this period. Thank you for your cooperation with our monitoring and special thanks to the management staff for their cordiality and assistance.

If you have any questions, please do not hesitate to contact us at (207) 805-0039.

Sincerely,

Wil Whalen

Wil Whalen, C15P
Compliance Analyst

cc: Andrew Bowden, Spectrum Enterprises
Joe Voccio, Connecticut Housing Finance Authority
Colette Slover, Connecticut Housing Finance Authority

EXHIBIT H

COMPLIANCE CERTIFICATION AFFIDAVIT
Pursuant to Section 8-30h of the Connecticut General Statutes

Connecticut General Statutes § 8-30h. Annual certification of continuing compliance with affordability requirements. Noncompliance.

On and after January 1, 1996, the developer, owner or manager of an affordable housing development, developed pursuant to subparagraph (B) of subdivision (1) of subsection (a) of section 8-30g, that includes rental units shall provide annual certification to the commission that the development continues to be in compliance with the covenants and deed restrictions required under said section.

If the development does not comply with such covenants and deed restrictions, the developer, owner or manager shall rent the next available units to persons and families whose incomes satisfy the requirements of the covenants and deed restrictions until the development is in compliance.

The commission may inspect the income statements of the tenants of the restricted units upon which the developer, owner or manager bases the certification. Such tenant statements shall be confidential and shall not be deemed public records for the purposes of the Freedom of Information Act, as defined in section 1-200.

To: New Canaan Planning and Zoning Department, 77 Main Street, New Canaan, CT 06840

From: ANN WERNER, Compliance Manager
Westmount Management, 36 Park Place, Branford, CT 06405

Development Name/Address: Canaan Parish – 186 Lakeview Avenue (Building 1)

I hereby certify that the sixty (60) total units in the 100% affordable set-aside development known as Canaan Parish (Building 1) are restricted under a Housing Affordability Plan filed in the office of the Planning and Zoning Department of the Town of New Canaan, and that the units are restricted in compliance with that Plan for a period of 40 years from the date of the issuance of the Certificate of Occupancy for each of the units. I have ascertained to the best of my knowledge and belief that the income limits for tenants required under the Plan and under Connecticut General Statutes § 8-30g have been satisfied at all times since the issuance of the Certificate of Occupancy for each of the units. The occupants have provided the appropriate supporting documentation from which I verified their income.

Therefore, the development continues to be in compliance with the restrictions required under Connecticut General Statutes § 8-30g.

State of Connecticut

ss: Branford

Compliance Manager

County of Fairfield

Personally appeared Ann Werner, signer and sealer of the foregoing instrument and acknowledged the same to be his/her free act and deed before me.

Date: 5/19/2022

Name
Commissioner of the Superior Court or
Notary Public

AMY HERNANDEZ
NOTARY PUBLIC
State of Connecticut
My Commission Expires
August 31, 2023

EXHIBIT I

EXHIBIT J

DEPARTMENT OF ADMINISTRATIVE SERVICES

2018 Connecticut State Building Code

DIVISION OF CONSTRUCTION SERVICES
Office of the State Building Inspector
450 Columbus Boulevard
Hartford, CT 06103

MELODY A. CURREY
Commissioner

JOSEPH V. CASSIDY, P.E.
State Building Inspector

Effective

October 1, 2018

AMENDMENTS TO THE 2015 INTERNATIONAL BUILDING CODE

(Amd) **111.1 Use and occupancy.** Pursuant to subsection (a) of section 29-265 of the Connecticut General Statutes, no *building* or structure erected or altered in any municipality after October 1, 1970, shall be occupied or used, in whole or in part, until a certificate of occupancy has been issued by the *building official*, certifying that such *building* or structure or work performed pursuant to the building *permit* substantially complies with the provisions of this code. Nothing in the code shall require the removal, *alteration* or abandonment of, or prevent the continuance of the use and occupancy of, any single-family *dwelling* but within six years of the date of occupancy of such *dwelling* after substantial completion of construction of, *alteration* to or *addition* to such *dwelling*, or of a *building* lawfully existing on October 1, 1945, except as may be necessary for the safety of life or property. The use of a *building* or premises shall not be deemed to have changed because of a temporary vacancy or change of ownership or tenancy.

Exceptions:

1. Work for which a certificate of approval is issued in accordance with Section 111.6.
2. A certificate of occupancy is not required for work exempt from *permit* requirements under Section 105.2.

(Amd) **111.3 Temporary occupancy.** The *building official* may issue a temporary certificate of occupancy before the completion of the entire work covered by the *permit*, provided such portion or portions shall be occupied safely prior to full completion of the *building* or structure without endangering life or public welfare. Any occupancy permitted to continue during completion of the work shall be discontinued within 30 days after completion of the work unless a certificate of occupancy is issued by the *building official*.

(Add) **111.5 Partial occupancy.** The *building official* may issue a partial certificate of occupancy for a portion of the *building* or structure when, in the *building official*'s opinion, the portion of the *building* to be occupied is in substantial compliance with the requirements of this code and no unsafe conditions exist in the portion of the *building* not covered by the partial certificate of occupancy.

AMENDMENTS TO THE 2015 INTERNATIONAL RESIDENTIAL CODE

(Amd) **R110.1 Use and occupancy.** Pursuant to subsection (a) of section 29-265 of the Connecticut General Statutes, no building or structure erected or altered in any municipality after October 1, 1970, *shall* be occupied or used, in whole or in part, until a certificate of occupancy has been issued by the *building official*, certifying that such *building*, structure or work performed pursuant to the building *permit* substantially complies with the provisions of this code. Nothing in the code *shall* require the removal, *alteration* or abandonment of, or prevent the continuance of the use and occupancy of, any single-family *dwelling* but within six years of the date of occupancy of such *dwelling* after substantial completion of construction of, *alteration* to or *addition* to such *dwelling*, or of a *building* lawfully existing on October 1, 1945, except as may be necessary for the safety of life or property. The use of a *building* or premises *shall* not be deemed to have changed because of a temporary vacancy or change of ownership or tenancy.

Exceptions:

1. Work for which a certificate of approval is issued in accordance with Section R110.9.
2. A certificate of occupancy is not required for work exempt from *permit* requirements under Section R105.2.

(Amd) **R110.4 Temporary occupancy.** The *building official* may issue a temporary certificate of occupancy before the completion of the entire work covered by the *permit*, provided such portion or portions *shall* be occupied safely prior to full completion of the *building* or structure without endangering life or public welfare. Any occupancy permitted to continue during completion of the work *shall* be discontinued within 30 days after completion of the work unless the *building official* issues a certificate of occupancy.

(Add) **R110.6 Partial occupancy.** The *building official* may issue a partial certificate of occupancy for a portion of the *building* or structure when, in the *building official*'s opinion, the portion of the *building* to be occupied is in substantial compliance with the requirements of this code and no unsafe conditions exist in portions of the *building* not covered by the partial certificate of occupancy that are accessible from the occupied portion.

EXHIBIT K

2006 WL 1280869 (Conn.A.G.)

Office of the Attorney General

State of Connecticut
Opinion No. 2006-008
March 22, 2006

*1 The Honorable James F. Abromaitis
Department of Economic and Community Development
505 Hudson Street
Hartford, CT 06106

Dear Commissioner Abromaitis:
You have requested our opinion with respect to an application by the Town of Trumbull for a temporary moratorium from the affordable housing land use appeals procedure under the provisions of Conn. Gen. Stat. § 8-30g*(l)*.

Conn. Gen. Stat. § 8-30g*(l)*(1) provides that the affordable housing appeals procedure established under the statute shall not apply to an affordable housing application filed with a local land use commission during the period of a moratorium. Conn. Gen. Stat. 8-30g*(l)*(7) governs the awarding of points toward a moratorium for "newly-constructed units in an affordable housing development, as that term was defined at the time of the affordable housing application." Conn. Gen. Stat. § 8-30g(a)(1) defines an "affordable housing development" as a proposed housing development which is, among other things, "a set-aside development."

According to your letter, Trumbull is seeking points for three developments as "affordable housing developments," although you do not believe the information provided in their application clearly demonstrates that they meet the definition of "affordable housing development." This is because all of the units at the three developments have not been completed; therefore the percentage of affordable units at each of the three falls below the percentage necessary to qualify as a "set-aside development."

You indicate that it is your intention to deny the application on that basis, and request our confirmation of your decision.

Our review of the relevant statutes leads us to the conclusion that for a development to qualify as an "affordable housing development," all of the units do not have to be completed, as the definition of an affordable housing development appears to contemplate proposed construction. Conn. Gen. Stat. § 8-30g(a)(1) defines an "affordable housing development" as a *proposed* housing development which is (A) assisted housing, or (B) a set-aside development; § 8-30g(a)(3) defines "assisted housing" as "housing which is receiving, or *will receive*, financial assistance under any government program..."; § 8-30g(a)(6) defines a "set-aside development" as a development in which not less than thirty percent of the dwelling units *will be conveyed* by deeds containing covenants or restrictions..." (Emphasis added.) Therefore, a literal reading indicates that developments appear to qualify as affordable housing developments based upon the development as it is proposed to be fully built out.

On the other hand, only fully constructed units issued a certificate of occupancy can qualify to receive points towards a moratorium. According to Conn. Gen. Stat. § 8-30g*(l)* (7) "points shall be awarded only for dwelling units which were (A) newly-constructed units in an affordable housing development, as that term was defined at the time of the affordable housing application, for which a certificate of occupancy was issued after July 1, 1990..." Conn. Gen. Stat. § 8-30g*(l)*(9) provides that "a newly-constructed unit shall be counted toward a moratorium when it receives a certificate of occupancy."

*2 As a final note, a detailed determination must be made in awarding points for units in housing developments. Such a determination requires a detailed factual review of building plans, certificates of occupancy, etc. upon which we cannot opine. Since it involves a factual determination, any ultimate decision must be made by your agency.

Very truly yours,

Richard Blumenthal
Attorney General

2006 WL 1280869 (Conn.A.G.)

End of Document

EXHIBIT L

Chapter 54. Streets and Sidewalks

Article I. General

§ 54-20. Construction and maintenance of private driveways entering highways.

[Amended 3-24-959, effective 3-28-59; 9-17-68, effective 10-19-68; 2-9-83, effective 2-25-83]

A. Permit required; application and fee for permit; information to be shown in application. Before any driveway which opens on or into any highway or highway right-of-way, whether public or private, shall be constructed and before the location or grade of any existing driveway which opens on or into any such highway or highway right-of-way, whether public or private, is altered, a permit therefor shall be obtained from the Town Engineer. An application for such permit shall be made to the Town Engineer upon a form provided for that purpose, and a fee, in an amount fixed by the Board of Selectmen from time to time, shall be paid to the Town Engineer for the use of the Town with the filing of any such application. Such application form shall make provision for the furnishing of the following information:

(1) The name of the owner of record of the premises being served or to be served by such driveway and the location of the premises.

(2) A plot plan showing:

(a) The location of the driveway in respect to the property lines of the premises on which the driveway is located or is to be located and to the highway lines within 100 feet of either side thereof, together with the location of such driveway within the highway right-of-way.

(b) The proposed grades of the driveway at its intersection with the traveled portion of the highway and at a point 20 feet therefrom.

(c) The actual dimensions of the opening of the driveway which is being constructed or reconstructed onto the highway right-of-way.

(3) The proposed disposition of stormwater from the driveway and of stormwater accumulations on the traveled portion of the highway within the highway right-of-way or in any of the gutters thereof as the same may relate to such driveway.

B. Minimum construction and reconstruction requirements. No permit for the construction or reconstruction of any driveway shall be issued unless the following minimum requirements are complied with:

(1) It shall not interfere with the proper drainage of the highway, it being understood that, if the grade of the highway shall make it necessary, it may be required that the owner of the premises to be served by such driveway shall install culverts of approved design at his own cost and expense at approved locations.

(2) The location and alignment of the driveway shall not create a traffic hazard, danger or nuisance, and the view of the highway at the point where such driveway opens onto the highway shall be unobstructed.

(3) The grade of the driveway from its intersection with the traveled portion of the highway and for a distance of 20 feet therefrom shall not exceed 5%.
[Amended 9-16-1998, effective 9-24-1998]

(4) If necessary to prevent road drainage from entering the driveway, a berm shall be constructed and maintained at the approved location by the owner of the premises served by such driveway.

(5) All new driveways shall be paved with a minimum of two inches of blacktop or equivalent in the area of the highway right-of-way between the highway pavement and the property line.

C. Conditions of permit. Any driveway permit issued under the provisions of this section or any driveway permit issued under any prior bylaw or ordinance of the Town is subject at all times to the following conditions:

(1) The Town or the owner of the right-of-way in which the highway is located shall have the right, at any time, to extend the width of the traveled way or to change the grade of any portion thereof, to change the manner of disposal of stormwater or to make any other improvements in the highway and, if a driveway is affected thereby, there shall be no obligation on the part of the Town or of the owner of the right-of-way to reimburse the owner of the premises served by such driveway, and such owner shall be liable for the cost of any reconstruction work on such driveway made necessary by reason thereof.

(2) Such driveway or driveway opening shall not disturb or interfere with the pavement or finish of the traveled portion of the highway.

(3) Such driveway permit may be revoked by the Town Engineer at any time if the requirements of the permit are not met.

(4) When a driveway permit is issued in conjunction with a building permit, no certificate of occupancy shall be issued until the construction of such driveway shall comply with all of the requirements of the permit.

(5) Any violation of this section, in addition to penalties provided herein, shall be subject to injunctive procedures and to prosecution in accordance with the provisions of § **4-8** of this Code.

D. Variances. The Board of Building Appeals may vary the strict application of this section if there shall be difficulty or unreasonable hardship in carrying out the same, provided that the spirit thereof shall be observed and the public safety and welfare are secured.

EXHIBIT M

TOWN OF NEW CANAAN
TOWN HALL, 77 MAIN STREET
NEW CANAAN, CT 06840

TEL. (203) 594-3054
FAX: (203) 594-3129

Adopted: 7/22/99
Last Revised: 11/9/15
Revised: 12/06/19
Effective: 01/01/20

Drainage Certification Policy of the Town of New Canaan Prior to Approval of Permit (Pre-Development)

1. Prior to obtaining permits for the development of any lot or any construction which increases the impervious surfaces, including gravel, by 500 square feet or more in the 1/2 Acre Zone or smaller or by 1,000 square feet or more in the One Acre Zone or larger, any excavation or other activity that could affect drainage, as determined by the reviewing department, the applicant is required to submit the following:

   A. Complete drainage information and/or calculations for pre-activity (pre-development) and post-activity (post-development) stormwater runoff from a site, **as prepared by a registered professional engineer licensed in the State of Connecticut.**

   B. Documentation that the drainage design will result in a zero increase in the rate or volume of runoff in the post-activity condition, **as determined by a registered professional engineer licensed in the State of Connecticut.**

   C. Provide tabulated Directly Connected Impervious Area (DCIA) under pre-development and post-development conditions.

   Peak flow rates and runoff volumes shall be determined by using the Rational Method, the Time of Concentration Method, the Tabular Method or the Unit Hydrograph Method and a minimum 25-year 24-hour design storm. Rainfall depth shall be defined by the interactive web-tool Extreme Precipitation in New York and New England (http://precip.eas.cornell.edu/), prepared as a joint collaboration between the Northeast Regional Climate Center (NRCC) and the Natural Resources Conservation Service (NRCS).

2. The requested information shall be in a form and contain content acceptable to the Town Engineer for the specific application in question, and shall include the following:
   a) Pre-Development Conditions Drainage Map (*Topography, DP(s), Tc, CN, USDA Soils*)
   b) Post-Development Conditions Drainage Map (*Topography, DP(s), Tc, CN, USDA Soils*)
   c) Existing Flooding Concerns, if any, at property, adjacent off-site properties or off-site drainage infrastructure
   d) Pre-Development & Post-Development Drainage Summary Tables (*by Subwatershed*)
   e) Water Quality Analysis (*WQV, WQF, GRV*)
   f) Water Quantity Analysis (*Peak Flow Control*)
   g) Stormwater Management Operation & Maintenance Plan

3. All site work must also comply with the standards contained in Sections 6.4, 6.5.B, 6.6 and 6.7 of the New Canaan Zoning Regulations, the Connecticut Department of Energy and Environmental Protection (CTDEEP) Stormwater Quality Manual, as amended, and the Connecticut Department of Transportation (CTDOT) Drainage Manual, as amended.

While not required within the zoning regulations or this policy, the Town of New Canaan encourages the use of Low Impact Development (LID) techniques.

It is to be noted and understood that the Town's review and approval of this submittal is expressly limited to determining compliance and conformance of the completed project as a functioning whole. The Town Engineer reserves the right to review multiple permit applications for a parcel within a five-year time period to evaluate the cumulative effects to stormwater on and off-site. Approval does not relieve the applicant or contributing professionals of their responsibility for all matters relating to design, construction, code compliance, safety aspects of performing the work and for general coordination of the work.

Prior to CO of Final Sign-Off (Post-Development)

1. Prior to final signoff for any subdivision, or final signoff for a certificate of occupancy of any lot or lots or any construction or development which increases the impervious surface by 500 square feet or more in the 1/2 Acre Zone or smaller or by 1,000 square feet or more in the One Acre Zone or larger, excavation or other activity as determined by the reviewing department, the applicant may be required to submit the following:

   A. Certification/confirmation from **a registered professional engineer, licensed in the State of Connecticut,** that there is a zero increase in the rate or volume of runoff in the post-activity condition.
   B. Certification/confirmation from **a registered professional engineer, licensed in the State of Connecticut,** that any proposed change in the direction of surface water flow shall not adversely affect any down-gradient or nearby property(s).
   C. Certification/confirmation **from a registered professional engineer, licensed in the State of Connecticut,** that the final grading is consistent with the approved Site Plan and in conformance with Section 6.4.I.7 and 8 of the New Canaan Zoning Regulations.
   D. Certification/confirmation from a Connecticut licensed Land Surveyor that any retaining walls constructed as part of site development do not exceed the standards outlined in Section 6.5.B of the New Canaan Zoning Regulations.
   E. The requested information shall be in a form and contain content acceptable to the Town Engineer for the specific application in question.

2. Prior to final signoff for a certificate of occupancy or confirmation of completion that is required, all site work and grading indicated on the approved site plan shall be complete. There shall be no exposed surfaces. All driveway locations shall be improved with asphalt or other approved medium, proposed hardscapes such as patios shall be complete and lawn and landscaped areas must have established root systems to the satisfaction to the Zoning Inspector. In addition, all sloped areas shall also be stabilized to the satisfaction to the Zoning Inspector. Should the weather at a particular time of year, such as winter or summer heat prevent the establishment of lawns or other plantings required for final sign-off, the applicant can either seek a temporary Certificate of Occupancy (CO) from the Building Department or post a bond in accordance with Section 8.1.K of the zoning regulations.

3. At the discretion of the Zoning Inspector, Chief Sanitarian or Town Engineer, the certification itself may be required to be placed on an "as-built" plan of the site, parcel or lot showing all development, septic system, grading, wetlands and drainage features, and is to be an original signature and live seal.

   It is to be noted and understood that the Town's review and approval of this submittal is expressly limited to determining compliance and conformance of the completed project as a functioning whole. Approval does not relieve the applicant or contributing professionals of their responsibility for all matters relating to design, construction,code-compliance, safety aspects of performing the work and for general coordination of the work.

   Any questions regarding this policy should be referred to the Zoning Inspector and/or Town Engineer. It should be noted that while certification might not be required at the beginning of a project or activity, it might well be required prior to final signoff as a result of activity or experience during the construction process.

EXHIBIT N

227 A.D.2d 937
Supreme Court, Appellate Division, Fourth Department, New York.

Matter of BRAUNVIEW ASSOCIATES, a Limited Partnership, Respondent,
v.
David M. UNMACK, IAO, Assessor of Town of Tonawanda, Appellant.

May 31, 1996.

Synopsis
Taxpayer brought Article 78 proceeding for review of assessor's decision denying request for partial exemption from real property tax, for increase in assessed valuation of property that was constructed, altered, installed, or improved for purpose of commercial business or industrial activity. The Supreme Court, Erie County, Joslin, J., denied assessor's motion to dismiss, and assessor appealed. The Supreme Court, Appellate Division, held that: (1) dismissal of prior petition for review did not have res judicata effect; (2) taxpayer was not restricted to single application; (3) requirement that application be filed before appropriate taxable status date did not establish limitations period, but merely determined initial year for which taxpayer was eligible for exemption; and (4) issuance of temporary certificate of occupancy did not establish date of completion of construction.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss.

West Headnotes (6)

[1] Res Judicata ⇐ Taxation
Dismissal of prior request for judicial review of initial request for partial exemption from real property tax did not have res judicata effect with respect to subsequent petition challenging denial of second application, where dismissal was not on the merits. McKinney's RPTL § 485–b.

[2] Res Judicata ⇐ Res Judicata
Doctrine of res judicata is grounded on premise that once person has been afforded full and fair opportunity to litigate particular issue, that person may not be permitted to do so again.

[3] Res Judicata ⇐ Taxation
Provision of real property tax law providing partial, declining ten-year exemption from increase in assessed valuation of real property that is constructed, altered, installed, or improved for purpose of commercial business or industrial activity did not prohibit taxpayer from filing second application for partial exemption, when dismissal of first application was not on merits. McKinney's RPTL § 485–b.

[4] Taxation — Time

Requirement of real property tax law that application for partial exemption, for commercial business or industrial improvements, be filed before appropriate taxable status date did not establish limitations period, but merely determined initial year for which taxpayer was eligible for exemption. McKinney's RPTL § 485–b, subd. 3.

1 Cases that cite this headnote

[5] Taxation — Improvements on land

Issuance of temporary certificate of occupancy to taxpayer did not establish date of completion of construction of improvements, for purposes of determining initial year for which taxpayer was eligible for partial exemption for commercial business or industrial improvements; structure had to be finished not only to extent that it could be occupied but also to extent that it met specifications in site plans submitted to municipality, and issuance of temporary certificate of occupancy indicated that construction was not yet completed. McKinney's RPTL § 485–b, subd. 3.

2 Cases that cite this headnote

[6] Taxation — Admissibility

Consideration of taxpayer's submissions opposing assessor's motion to dismiss petition for review of denial of partial property tax exemption was not abuse of discretion, though submissions were served after expiration of deadline to which parties had agreed, where they were served within time originally demanded in assessor's notice of motion and assessor was not prejudiced by delay.

Attorneys and Law Firms

**254 Brown and Kelly, L.L.P. by Lisa Sofferin, Buffalo, for appellant.

Goodman, Costa, Getman and Biryla by Mark Wallins, Buffalo, for respondent.

Before DENMAN, P.J., and PINE, FALLON, BALIO and BOEHM, JJ.

Opinion

*937 MEMORANDUM:

[1] [2] Supreme Court properly denied the motion of respondent, Assessor of the Town of Tonawanda, to dismiss the petition and granted the relief sought therein, directing respondent to accept petitioner's application for a partial tax exemption pursuant to RPTL 485–b and to make a determination thereon. The relief sought by petitioner is not barred by res judicata. The doctrine of res judicata "is grounded on the premise that once a person has been afforded a full and fair opportunity to litigate a particular issue, that person may not be permitted to do so again" (*Matter of Gramatan Home Investors Corp. v. Lopez*, 46 N.Y.2d 481, 485, 414 N.Y.S.2d 308, 386 N.E.2d 1328; *see*, *Watts v. Swiss Bank Corp.*, 27 N.Y.2d 270, 277, 317 N.Y.S.2d 315, 265 N.E.2d 739). Here, respondent denied petitioner's first application in a letter to petitioner, and petitioner sought judicial review of that denial by commencing a CPLR article 78 proceeding. Although that petition was dismissed, the dismissal was not on the merits. Therefore, the present CPLR article 78 proceeding, commenced to challenge respondent's rejection of petitioner's second application, is not barred (*see*, *Miller Mfg. Co. v. Zeiler*, 45 N.Y.2d 956, 958, 411 N.Y.S.2d 558, 383 N.E.2d 1152).

[3] The contention of respondent that RPTL 485–b restricts a taxpayer to a single application is without merit. RPTL 485–b (1) gives a taxpayer a partial, declining 10–year exemption from an increase in the assessed valuation of real property that is "constructed, altered, installed or improved * * * for *938 the purpose of commercial, business or industrial activity."

There is nothing in the language of RPTL 485–b that prohibits a taxpayer from filing a second application. Further, such a prohibition may not be inferred where, as here, the dismissal of the first application was not on the merits (*cf.*, **255 *Schulman Master Ltd. Partnership I v. Town/Village of Harrison*, 162 A.D.2d 674, 674–675, 558 N.Y.S.2d 78).

[4] [5] We reject the further contention of respondent that petitioner's second application was untimely. Contrary to respondent's contention, the requirement in RPTL 485–b(3) that the application be filed "before the appropriate taxable status date" does not establish a limitations period. It merely determines the initial year for which the taxpayer is eligible for the exemption (*see, Matter of Sitterly Rd. Assocs. v. Board of Assessment Review*, 142 A.D.2d 243, 246, 535 N.Y.S.2d 261). Further, the issuance of a temporary certificate of occupancy to petitioner did not establish "the date of completion" of construction within the meaning of RPTL 485–b(3). To be "complete", a structure must be finished not only to the extent that it may be occupied but also that it meets the specifications in the site plans submitted to the municipality (*see, Matter of Ambald Realty v. Board of Assessors*, 224 A.D.2d 412, 638 N.Y.S.2d 97). The issuance of a temporary certificate of occupancy on November 9, 1993 indicates that, as of that date, construction was not yet completed. This is further borne out by the Town of Tonawanda's zoning law, which provides that, "[u]pon request, the Supervising Building Inspector may issue a temporary certificate of occupancy for a building, structure or premises, or part thereof, before the entire work covered by the building permit shall have been completed" (Tonawanda Town Code § 215–125 [B]). The "date of completion" for purposes of RPTL 485–b(3) is December 21, 1993, when the permanent certificate of occupancy was issued. Thus, petitioner's second application, filed on November 21, 1994, was timely.

[6] Finally, we reject the contention of respondent that the court abused its discretion in considering petitioner's submissions in opposition to the motion to dismiss. Although they were served after expiration of the deadline to which the parties had agreed, they were served within the time originally demanded in respondent's notice of motion and respondent was not prejudiced by the delay (*see, Corbett v. Zedayko*, 151 A.D.2d 941, 545 N.Y.S.2d 216; *see also, Hubbell Elec. v. State of New York*, 153 Misc.2d 810, 813–814, 583 N.Y.S.2d 112).

Judgment unanimously affirmed without costs.

All Citations

227 A.D.2d 937, 643 N.Y.S.2d 253

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EXHIBIT O

122 Misc.2d 985
Civil Court, City of New York.

300 BOWERY INC., Petitioner/Landlord
v.
BASS & BASS, INC., Respondent/Tenant
and
George Grant, Roger Nelson, James Sherry, Sam Tell and Son Inc., Respondents/Undertenants.

Jan. 23, 1984.

Synopsis
Landlord brought holdover proceeding. The Civil Court, City of New York, Helen E. Freedman, J., held that: (1) commercial use requirement of Loft Law was satisfied so as to protect tenants from holdover proceeding, and (2) 1949 certificate of occupancy was not valid, and thus, Loft Law would protect tenants.

Ordered accordingly.

West Headnotes (2)

[1] Landlord and Tenant ~ Business or commercial space

Commercial use requirement of the Loft Law was satisfied so as to protect tenants from holdover proceeding where first floor had always been commercial and second floor was used for storage or warehousing by ground floor tenant and since second, third and fourth floors formerly constituted the hotel, those floors were to be viewed as an entity and the relevant portion, the second floor, was used commercially. McKinney's Multiple Dwelling Law §§ 280 et seq., 281, 281, subds. 1(i-iii), 2, 286, 301.

1 Cases that cite this headnote

[2] Landlord and Tenant ~ Occupancy for dwelling purposes

A 1949 certificate of occupancy was of no force or effect; thus, tenants were protected under Loft Law from holdover proceeding, particularly since there was a violation of record indicating that the certificate had lapsed and a new one was required before occupancy could resume. McKinney's Multiple Dwelling Law §§ 280 et seq., 281, 281, subds. 1(i-iii), 2, 286, 301.

2 Cases that cite this headnote

Attorneys and Law Firms

**997 *985 Nathan Ringel, New York City, for petitioner.

Newman, Aronson & Newman by Steven Raison, New York City, for Bass & Bass Inc., respondent.

Lindenbaum & Young by David Pritchard, Brooklyn, for Sam Tell & Son, Inc., respondent.

Vincent P. Hanley, Jr., New York City, for Grant, Nelson and Sherry, respondents.

Opinion

HELEN E. FREEDMAN, Judge.

Does Article 7–C of the Multiple Dwelling Law ("Loft Law") cover premises having the following history? Until 1970 the top three floors of the premises were a Class B lodging house divided into numerous cubicles. For a period thereafter one of those floors was used for storage purposes while the other two were vacant. Currently each of the three floors is a residential loft. The ground floor has been occupied continuously as commercial space. The only certificate of occupancy on record is a 1949 certificate classifying the premises as a Class B lodging house.

Coverage under the Loft Law has been raised as a defense by the residential tenants, Grant, Nelson and Sherry, in a motion to dismiss this holdover proceeding. They claim that the residential portion of the building is an interim multiple dwelling ("IMD"), and that their tenancies are protected by MDL § 286, *986 which provides that qualified tenants are entitled to continued occupancy. In order to qualify for protection the premises must meet the requirements set forth in MDL § 281. It is not disputed that the three floors in question have been used as the residence of three families living independent of one another at least since April, 1980, as required by MDL § 281(1)(iii), and that the building meets the zoning requirements of MDL § 281(2). The two aspects of coverage which are in dispute are whether the relevant **998 portion has been used for commercial purposes as required by MDL § 281(1)(i), and whether the building lacks a certificate of occupancy pursuant to MDL § 301 as specified in MDL § 281(1)(ii).

In determining whether respondents' lofts constitute an IMD this Court will consider the underlying policy of the loft legislation and the particular facts of this case in light of the statute. The motions by the commercial tenants will be discussed below.

In enacting the Loft Law the legislature found that "a serious public emergency ... has been created by the increasing number of conversions of commercial and manufacturing loft buildings to residential use without compliance with applicable building codes and laws" and that "in order to prevent uncertainty, hardship, and dislocation, the provisions of this article are necessary and designed to protect the public health, safety and general welfare." MDL § 280. The statute establishes the rights and obligations of owners and tenants and sets forth a schedule for achieving compliance with building standards, leading to issuance of a final residential certificate of occupancy pursuant to MDL § 301.

Realizing that the primary objective of the Loft Law is to protect the safety and welfare of the public in general and of tenants of substandard converted residential lofts in particular, the Court will address the two specific requirements of MDL § 281(1) which bear on this case.

*987 The relevant section of the Loft Law provides in pertinent part:

> 281(1) ... the term "interim multiple dwelling" means any building or structure or portion thereof, ... which (i) at any time was occupied for manufacturing, commercial, or warehouse purposes; and (ii) lacks a certificate of compliance or occupancy pursuant to section three hundred one of this chapter ...

[1] The first issue is whether the commercial use requirement of Sec. 281(1)(i) has been satisfied. It appears that the first floor has always been commercial and that for some time the second floor was used for storage or warehousing by the ground floor tenant. Petitioner has not disputed the storage use of the second floor, and this Court finds that it clearly comes within the statutory provision requiring commercial use.

Petitioner argues however that even if the second floor was used commercially, that should not protect the third and fourth floors which, it claims, were never used commercially. Rather, petitioner claims that the second, third and fourth floors together comprised the residential hotel. However, records of the Department of Housing Preservation and Development indicate that at least for a period of time the third and fourth floors were vacant, and that they were then used as studios. The last possible time the building functioned as a hotel was 1970. Thus the use of the third and fourth floors during the intervening period at issue is, at best, unclear. The evidence reveals that at some time those floors were no longer used as a hotel, that the partitions were removed, and that the space remained vacant for a certain period. There was clearly a time gap between the hotel use and the current residential use.

Under these peculiar circumstances the second, third and fourth floors should be viewed as an entity, since those floors together constituted the hotel. The use of one of those floors for commercial purposes qualifies as commercial use of the relevant "portion" and satisfies Sec. 281(1)(i).[1] The fact of prior residential use is of no significance on the issue of whether MDL § 281(1)(i) is ***988** satisfied because that section specifically states that commercial use "at any time" is sufficient.

****999** [2] The second question presented here is whether the 1949 certificate of occupancy is still valid as petitioner claims. If, as petitioner urges, the certificate is considered valid, the Loft Law would not protect the respondents. On the other hand, if the certificate is found insufficient for purposes of MDL § 281(1)(ii) then respondents' lofts would be covered. "Given the choice of two interpretations of the Loft Law, one restricting coverage and one broadening it, the remedial nature of the legislation forcefully argues for the adoption of the latter course." *Ancona v. Metcalf*, 120 Misc.2d 51, 55, 465 N.Y.S.2d 661 (Civ.Ct.NY Cty.1983).

For the following reasons this Court finds that the 1949 certificate of occupancy is of no force or effect. The purpose of requiring a final certificate of occupancy pursuant to MDL § 301 is to insure that residential tenants of converted lofts will have the benefit of health and safety regulations applicable to other multiple dwellings. Such a certificate is an official statement that the premises meet the many standards of light, air, safety etc. mandated by law. Only buildings which have obtained final Certificates of Occupancy under MDL Sec. 301 are exempt from Art. 7–C because only those buildings have "achieved compliance with the Multiple Dwelling Law, the goal the new Loft Law seeks to accomplish."[2] *Ancona, supra*, at 54, 465 N.Y.S.2d 661.[3] To allow the petitioner to rely on and benefit from this outdated certificate of occupancy, and on its own failure to comply with an order to obtain a new certificate, would contravene the intent of Article 7–C.

Moreover, the particular facts of this case warrant the conclusion that the 1949 Certificate of Occupancy is of no use in avoiding MDL § 281(1)(ii). There is a violation of record indicating that the Certificate of Occupancy had lapsed, and that a new one was required before ***989** occupancy could resume. The nature and character of the residential use described in the certificate is totally different from the current use. A hotel with numerous cubicles on each of the three floors differs substantially from a residential loft. After a period of commercial use the three floors are now the residences of three separate families living independent of one another. This is precisely the type of tenancy the Loft Law was designed to protect.

Inasmuch as the requirements of MDL § 281(1)(i) and (ii) have been met, the petition is dismissed as to respondents Grant, Nelson and Sherry.

The commercial tenants have also moved to dismiss the petition. Petitioner brought this holdover proceeding against its prime tenant Bass and Bass Inc. ("Bass") claiming that the lease was properly terminated when, after due notice, Bass failed to correct certain violations. It argues that the subtenancy of Sam Tell and Son Inc. ("Tell") was therefore terminated as a matter of law.

Respondent Tell has moved to dismiss claiming that neither Tell nor Bass ever received notice of the alleged violations because petitioner's principal was the agent of record who received such notices; that Tell was not given an opportunity to cure Bass'

default and assume the obligations of the prime lease; and that the proceeding is brought in bad faith in order to avoid the provisions of the Loft Law.

Respondent Bass joins in the motion adding that the violations are so old that petitioner has waived its right to seek Bass' **1000 eviction for failure to cure violations. Bass claims that petitioner simply wants to regain possession of the building because its value has substantially increased.

The motions of the commercial tenants are denied because there are issues of fact requiring a trial. The nature of the violations, notice of them, and responsibility for cure should be determined at a plenary hearing.

With respect to Tell's motion to quash petitioner's notice to produce, respondent Tell is directed to produce any and all leases between Tell and Bass.

Petitioner's motion to strike Tell's jury demand is granted, inasmuch as the sublease is derived from the main lease which contains a valid jury waiver clause.

*990 In view of the considerable time that has elapsed since submission of this motion, petitioner is hereby permitted to accept and deposit rent, unless and until the trial court orders otherwise. The residential tenants are of course subject to a nonpayment proceeding pursuant to § 285 of the Loft Law should they fail to pay rent.

Matter adjourned as to Bass and Tell to Part 52 for trial on February 2, 1984.

All Citations

122 Misc.2d 985, 471 N.Y.S.2d 997

Footnotes

1 The commercial use of the ground floor does not render the upper three floors an IMD inasmuch as the ground floor always was, and continues to be used exclusively for commercial purposes.

2 Further evidence of the goals of the loft legislation may be found in the Rules and Regulations of the Loft Board, promulgated pursuant to the statute, which in Sec. I(B) provides that only final residential certificates of occupancy qualify for exemption and then only if the certificate of occupancy has not been revoked.

3 Similarly in *Ancona* the Court refused to exempt buildings with temporary certificates of occupancy issued pursuant to Admin.Code D26–50.0.

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EXHIBIT P

118 A.D.2d 312
Supreme Court, Appellate Division, First Department, New York.

Application of ASSOCIATION OF COMMERCIAL PROPERTY OWNERS, INC., Aaron Gelbwacks and Eliahu Lipkis, *Petitioners-Respondents*,
For a judgment under Article 78 of the CPLR
v.
The NEW YORK CITY LOFT BOARD, Carl Weisbrod, Chairman of the Loft Board, Charles Delaney, Thomas Berger, Stewart Litvin, Robert S. Robin, James E. Robinson, Lee Ann Miller, Robert Esnard, and Amalia Petanzos, Members of the Loft Board, and The City of New York, *Respondents-Appellants*.

July 17, 1986.

Synopsis
Commercial property owners brought Article 78 petition challenging loft board regulation exempting certain loft units from Loft Law coverage. Treating petition as declaratory judgment action, the Supreme Court, Special Term, New York County, Maresca, J., declared regulation invalid. Loft board appealed. The Supreme Court, Appellate Division, Sandler, J., held that regulation was consistent with Loft Law and, therefore, valid.

Reversed.

Kassal, J., dissented and filed opinion.

Procedural Posture(s): On Appeal.

West Headnotes (1)

[1] Landlord and Tenant ⇨ Administrative regulations
Loft board regulation exempting from coverage under Loft Law any otherwise eligible loft unit that had been issued temporary residential certificate of occupancy prior to June 21, 1982, unless TCO lapsed for any reason on or after that date, was consistent with language and purposes of Loft Law, and therefore, was valid. McKinney's Multiple Dwelling Law §§ 280, 281, subd. 1, 282, 284, 301, subds. 1, 4.

3 Cases that cite this headnote

Attorneys and Law Firms

**110 *313 Mordechai Lipkis, of counsel (William H. Morris, with him on brief, Morris, Graham, Stephens & McMorrow, Westbury, attys.), for petitioners-respondents.

Kristin M. Helmers, of counsel (Stephen J. McGrath, with her on brief, Frederick A.O. Schwarz, Jr., New York City, atty.), for respondents-appellants.

Before SANDLER, J.P., and ASCH, KASSAL, ELLERIN and WALLACH, JJ.

Opinion

SANDLER, Justice.

The respondent New York City Loft Board appeals from an order and judgment entered October 2, 1984 by Special Term (Orest V. Maresca, J.) which, *inter alia*, declared null and void a regulation which in substance exempted from coverage under the Loft Law (Multiple Dwelling Law §§ 280–287) any otherwise eligible loft unit that had been issued a temporary residential certificate of occupancy (TCO) prior to June 21, 1982, unless the TCO lapsed for any reason on or after that date. We disagree with Special Term's determination because there has been a complete failure to demonstrate that the regulation, adopted after careful and thoughtful consideration by a body with special competence in the area, is inconsistent with either the language or the purposes of the Loft Law.

The regulation here at issue, adopted by the Loft Board on July 20 and filed with **111 the City Clerk on August 2, 1983, reads as follows:

I.B.2. Registration as an IMD [interim multiple dwelling] with the Loft Board shall be required of:

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b. Any building, structure or portion thereof which meets the criteria for an IMD set forth in Section 281 and these regulations, for all residentially-occupied units which obtained a temporary, but not final, residential certificate of occupancy issued pursuant to Section 301 of the Multiple Dwelling Law prior to June 21, 1982. Issuance of a temporary residential certificate of occupancy for such units prior to June 21, 1982, will not be the basis for exemption from Article 7–C coverage *314 if on or after June 21, 1982 a period of time of any length existed for whatever reason whatsoever during which a temporary or final certificate of occupancy issued pursuant to Section 301 of the Multiple Dwelling Law was not in effect for such units.

Petitioner Eliahu Lipkis is the owner of three loft buildings which had been issued TCO's for some or all of their residential units at some time prior to June 21, 1982, but did not have TCO's in effect on or after that date, and so would be deemed interim multiple dwellings under the regulation. The other two petitioners, a not-for-profit corporation whose membership consists of owners of loft buildings in New York City, and that corporation's president, were removed by Special Term as parties, but the papers submitted on their behalf were treated as submissions *amicus curiae*.

Special Term converted the petitioners' article 78 proceeding to a declaratory judgment action and granted all the relief requested in an order and judgment which (1) declared regulation I.B.2(b) null and void; (2) declared that article 7–C of the Multiple Dwelling Law does not apply to any building issued a temporary certificate of occupancy at any time on or prior to June 21, 1982, regardless of any lapses in such TCO, unless the Department of Buildings revoked the TCO *nunc pro tunc* for willful fraud or refused to renew it on the ground that the conditions on which the TCO had been initially issued were not satisfied; (3) prohibited the Loft Board from attempting to exercise jurisdiction over said buildings unless the Department of Buildings revoked or refused to renew the TCO's on the grounds described above; and (4) declared that article 7–C does not apply to any residential units in three buildings owned by petitioner Eliahu Lipkis for which TCO's had been issued before June 21, 1982.

The order and judgment should be reversed to the extent appealed from (one building, not among the three mentioned above, was held subject to article 7–C), the Regulation should be declared valid, and the three loft buildings owned by petitioner Lipkis should be declared subject to article 7–C and the jurisdiction of the Loft Board.

The fundamental test to be applied in such matters is that "where the rules or regulations of an administrative agency are in conflict with the provisions of the statute or inconsistent with its design and purpose, they are to be held invalid." *Connolly v. O'Malley*, 17 A.D.2d 411, 417, 234 N.Y.S.2d 889. In *315 *Ostrer v. Schenck*, 41 N.Y.2d 782, 786, 396 N.Y.S.2d 335, 364

N.E.2d 1107, the Court of Appeals summarized succinctly the standards governing the application of this test by a reviewing court in determining the validity of a challenged regulation:

> The function of a reviewing court is a limited one. The challenger of a regulation must establish that the regulation "is so lacking in reason for its promulgation that it is essentially arbitrary." (*Matter of Marburg v. Cole*, 286 NY 202, 212 [36 N.E.2d 113].) The interpretation given a statute by the administering agency "if not irrational or unreasonable, should be upheld." (*Matter of Howard v. Wyman*, 28 NY2d 434, 438 [322 N.Y.S.2d 683, 271 N.E.2d 528].) As was observed in *Mississippi Val. Barge Co. v. United States* (292 US 282, 286–287 [54 S.Ct. 692, 694, 78 L.Ed. 1260]), "[t]he judicial function is exhausted when there ****112** is found to be a rational basis for the conclusions approved by the administrative body."

Article 7–C of the Multiple Dwelling Law (the Loft Law) was enacted by the New York State Legislature by Chapter 349 of the Laws of 1982. The legislation, entitled "Legalization of Interim Multiple Dwellings," was declared effective June 21, 1982. As here pertinent, MDL § 280 ("Legislative Findings") states that a serious public emergency, "created by the increasing number of conversions of commercial and manufacturing loft buildings to residential use without compliance with applicable building codes and laws and without compliance with local laws regarding minimum housing maintenance standards," necessitated intervention by state and local governments to effectuate legalization.

Article 7–C, by its own terms, applies to "interim multiple dwellings." MDL § 284 requires the owner of each interim multiple dwelling to adhere to a timetable for obtaining a final residential certificate of occupancy. MDL § 281(1) defines an interim multiple dwelling, in pertinent part, as "any building or structure or portion thereof located in a city of more than one million persons which ... (ii) lacks a certificate of compliance or occupancy pursuant to section three hundred one of this chapter."

MDL § 301(1) describes a certificate of compliance or occupancy (CO) as a "certificate by the department [of buildings] that said dwelling conforms in all respects to the requirements of this chapter [the Multiple Dwelling Law], to the building code and rules and to all other applicable law...." MDL § 301(4) permits the department to issue a temporary certificate of compliance or occupancy (TCO) for a period of 90 days or less, renewable for similar periods at the discretion of the department, but not ***316** beyond two years from the date of original issuance. A TCO certifies that the dwelling complies with the requirements of the Multiple Dwelling Law and that temporary occupancy will not jeopardize life, health or property, i.e. the dwelling need not also comply with the building code and rules and all other applicable law, as required for issuance of a CO.

MDL § 282 establishes a special loft unit known as the Loft Board (the primary respondent in this action) consisting of representatives of the public, the real estate industry, loft residential tenants, and commercial or manufacturing loft interests, all appointed by the Mayor. Among its varied and important responsibilities, and particularly pertinent to this appeal, the Loft Board is specifically empowered by MDL § 282 to "[determine] interim multiple dwelling status and other issues of coverage pursuant to this article", and to issue and enforce rules and regulations governing housing maintenance standards and compliance with article 7–C.

In accordance with the statutory duties granted to it, the Loft Board and its staff addressed the issue of whether, and under what circumstances, the existence of a TCO for a loft unit should constitute an exemption from interim multiple dwelling status. The Loft Board and its staff analyzed and debated the issue over a period of months, during which period a draft regulation exempting only buildings possessing a CO (as opposed to a TCO) on or prior to June 21, 1982, was published in the *City Record*, with an invitation to the public to submit written comments. Public testimony on the proposed regulation was also received at a public hearing held on February 28, 1983.

In their written and oral comments, tenants urged that only buildings possessing a final CO on or before June 21, 1982 should be exempt from the Loft Law, since a TCO does not include a certification of conformity with the building code and rules and

to all other applicable law, and buildings lacking such certification are specifically mentioned in MDL § 280 as among those intended to be governed by article 7–C. Landlords urged that any loft building that had been issued a TCO prior to June 21, 1982 was basically "legal," that lapsed TCO's were routinely renewed without reinspection by the Buildings Department, **113 and so the lapsing of a TCO was meaningless unless it had been revoked for cause.

*317 Preliminarily, it should be observed that there are meaningful distinctions between a CO and a TCO, and that article 7–C read as a whole may reasonably be interpreted as contemplating that a loft building shall remain under the jurisdiction of the Loft Board until a final CO is obtained. Moreover, MDL § 281(1)(ii) exempts buildings with a "certificate of compliance or occupancy pursuant to section three hundred one of this chapter," not buildings with a "temporary certificate of compliance or occupancy." Accordingly, a strong argument could be made that as a matter of statutory construction the Loft Board would have been justified in promulgating the draft regulation, which was significantly less favorable to landlords, exempting from article 7–C only buildings that had a CO on June 21, 1982. However, we need not determine that hypothetical issue since regulation I.B.2(b), as promulgated, conditionally exempts from registration any building issued a TCO effective prior to June 21, 1982, the only condition being that the TCO remained in effect on and after that date.

At least with regard to two of petitioner Lipkis' buildings (47 and 49 Walker Street), the TCO's for which lapsed prior to June 21, 1982 and were not in effect on that date, the challenged regulation unquestionably complies with the meaning of MDL § 281(1)(ii) by including those buildings within the jurisdiction of the Loft Board. Certainly there is no authority that permits a court to strike down as null and void a regulation that enforces compliance with the plain meaning of a statute.

The only question that may be deemed even arguable is the regulation's reasonableness and conformity with the statutory purpose insofar as it applies to petitioner Lipkis' building at 71–73 Franklin Street, which had a TCO in effect on June 21, 1982, but not at various times thereafter. We see no basis for concluding that the Loft Board, which pursuant to MDL § 282 is specifically delegated the duty to determine interim multiple dwelling status and other issues of coverage under article 7–C, unreasonably construed the statute as appropriately embracing such buildings within its scope.

The record discloses conflicting opinions as to the significance of the lapsing of a TCO and whether lapsed TCO's are routinely renewed without reinspection. In this regard Irving E. Minkin, Deputy Commissioner of the Department of Buildings of the City of New York and a member of the Loft Board, *318 stated under oath and without contradiction that any applicant for a TCO renewal, whose loft unit would have been exempted from article 7–C but for the lapse in its TCO due to a department backlog or some other factor not in the applicant's control, could apply to the Borough Superintendent and, if denied, appeal to the Commissioner to reinstate the TCO *nunc pro tunc*. There is no basis for presuming that such an application would be arbitrarily denied, and in any event such denial would be reviewable in an article 78 proceeding.

Special Term's order and judgment would effectively require the Department of Buildings to determine on a case by case basis the conditions existing in any building with a lapsed TCO at the time of such lapse, in order to declare whether the building at the time in question satisfied the conditions on which the TCO had originally been issued. We do not believe that the statute or its underlying purpose can fairly be construed to require such a procedure in the face of what appears to be a reasonable determination by the Loft Board that a building that "lacks" a CO or TCO on or after June 21, 1982 is an interim multiple dwelling as defined in MDL § 281(1)(ii) even if it had an effective TCO at some prior time.

Article 7–C, being remedial legislation, should be liberally construed to spread its beneficial effects as widely as possible. "Given the choice of two interpretations of the Loft Law, one restricting coverage and one broadening it, the remedial nature of the legislation forcefully argues for the adoption of the latter course * * * To the extent the Loft Law is restricted in its **114 coverage, the purpose of the law is defeated." *Ancona v. Metcalf*, 120 Misc.2d 51, 55–56, 465 N.Y.S.2d 661; *see, also, 300 Bowery, Inc. v. Bass & Bass*, 122 Misc.2d 985, 988, 471 N.Y.S.2d 997; *Pilgreen v. 91 Fifth Ave. Corp.*, 91 A.D.2d 565, 566, 457 N.Y.S.2d 48.

Since there clearly exists a rational basis for the regulation in light of the statutory language that it effectuates and the canons of statutory construction applicable to remedial legislation, the order and judgment (one paper) of Special Term (Orest V. Maresca, J.), entered October 2, 1984, should be reversed to the extent appealed from, on the law, without costs, the regulation should be declared valid, and the three loft buildings owned by petitioner Lipkis should be declared subject to article 7–C and the jurisdiction of the Loft Board.

All concur except KASSAL, J., who dissents in an opinion.

KASSAL, Justice (dissenting).

The enactment of Article 7–C of the Multiple Dwelling Law, effective June 21, 1982 (the Loft Law), was *319 designed to "bring order to a chaotic and legally vague process of conversion of loft space formerly used for manufacturing, warehousing, and commercial purposes", to foster conversion to residential use, thus ensuring compliance with the Multiple Dwelling Law and applicable building codes (McKinney's Session Laws of N.Y., 1982, *Memorandum of Legislative Representative of City of New York*, p. 2484). Section 281 of the Multiple Dwelling Law created a new category of building to be known as an "interim multiple dwelling" and defined the term as "any building or structure or portion thereof * * * which (i) at any time was occupied for manufacturing, commercial, or warehouse purposes; and (ii) lacks a certificate of compliance or occupancy pursuant to section three hundred one of this chapter; and (iii) on December first, nineteen hundred eighty-one was occupied for residential purposes since April first, nineteen hundred eighty as the residence or home of any three or more families living independently of one another." (Multiple Dwelling Law § 281[1]).

The issue in this proceeding, appropriately converted by Special Term to an action for a declaratory judgment, concerns the construction of subdivision (1)(ii) of Multiple Dwelling Law § 281. Specifically, it relates to the application of the statute to certain buildings or units which had been issued a temporary residential certificate of occupancy (TCO) prior to June 21, 1982, but which TCO had expired either before renewal or issuance of a final certificate of occupancy, under the terms of a regulation adopted by the Loft Board on July 20, 1983. The regulation provided that the issuance of a TCO prior to June 21, 1982, would not be the basis for exemption from coverage under Article 7–C if, on or after that date, there was any period of time during which a temporary or final certificate of occupancy issued under Multiple Dwelling Law § 301 was not in effect, "for any reason whatsoever."

Each of the three buildings involved in this action had been issued a TCO prior to June 21, 1982, pursuant to Multiple Dwelling Law § 301. Since there also had been compliance with the other statutory requirements, these buildings were exempt from the provisions of Article 7–C. At the time this proceeding was commenced on December 2, 1983, each building had been covered by a TCO which had expired during the period in which petitioner's applications for renewal were pending, but had not been acted upon by the Department of Buildings. The record does not disclose the basis for such failure to renew. Applying the 1983 regulation, which is *320 herein challenged, the Loft Board held that the lapse in the TCO rendered the units and the buildings subject to coverage under Article 7–C. Accordingly, petitioner brought this action to annul the regulation and to declare these buildings exempt from coverage under the Loft Law.

We agree with Special Term that the Loft Board exceeded its statutory authority **115 in adopting the regulation. In defining an interim multiple dwelling, the Legislature provided in Multiple Dwelling Law § 281(1), as one of the critical determinants, that the building or unit "lacks a certificate of compliance or occupancy" issued pursuant to Multiple Dwelling Law § 301. While recognizing that there are clear differences between a permanent certificate of occupancy and a temporary certificate, it is significant that both are issued under Multiple Dwelling Law § 301 and the statutory provision, defining an interim multiple dwelling, makes no distinction between the two. Had the Legislature intended coverage to be dependent upon the continued existence of a valid TCO, without any lapse for any period of time and irrespective of the reason, it would have expressly so stated. However, Multiple Dwelling Law § 281(1), couched in the present tense, refers only to the existence of a certificate

of occupancy, not to a subsequent lapse. Although we recognize that deference in interpreting regulations is to be accorded to the Loft Board in its broad administrative power, the Board's authority does not extend to declaring legislative policy but rather, only to applying the statutory standard in an administrative capacity (cf. *Axelrod Co. v. Dixon Studio*, 122 Misc.2d 770, 471 N.Y.S.2d 945).

In enacting the Loft Law, the Legislature expressly recognized the need to alleviate the serious public emergency in housing. There was concern regarding the increase in the conversion of lofts in commercial and manufacturing buildings to residential use without compliance with building codes and rules, but with the further objective of assuring that minimum standards for health, safety and fire protection be maintained. As a result, the statute legalized residential loft tenancies, thereby affording needed safety and housing to tenants who were permitted to reside there, under the aegis of rent stabilization. At the same time, it provided aid to the owners who, without this enactment, could not legally collect rents through the use of summary proceedings in the absence of residential certificates of occupancy.

Special Term, however, found that the challenged regulation failed to promote these legislative purposes in that lapses *321 in TCOs may occur for a variety of administrative reasons, without any bearing upon the health and safety criteria which the Legislature determined to be critical. Furthermore, the record reflects that TCOs have been routinely renewed by the Department of Buildings without reinspection even where the owner inadvertently failed to file for renewal until after expiration of the 90-day period during which a TCO is in effect. Thus, Special Term took into account the real possibility that lapses do result from bureaucratic delay and failure in processing renewal applications which would subject the building to the coverage of the Loft Law under the regulation.

In our view, as held at Special Term, it is necessary to consider the reason for such lapse. Thus, the court limited the imposition of loft regulation to those situations where there was a lapse as a result of a revocation of the TCO on a finding of fraud or where renewal was denied because the owner did not satisfy the conditions upon which the temporary certificate had originally been issued. We agree with that interpretation.

As applied here, absent a showing of fraud or noncompliance with any conditions required at the time of issuance of the temporary certificates, Special Term properly declared that Article 7-C of the Multiple Dwelling Law did not apply to petitioner's three buildings. While mindful of the laudable purpose underlying the Board's adoption of the regulation, we find its promulgation to be legislative in scope and beyond the limited administrative powers which the Legislature has entrusted to the Loft Board. We so conclude, no matter how "careful and thoughtful" the promulgation of this rule may have been, as characterized by the majority. This is especially so when we note that the primary administrative jurisdiction over buildings in **116 terms of lapsed temporary certificates is entrusted to the Department of Buildings, as the agency responsible for enforcing building codes and rules, not the Loft Board.

Accordingly, the order and judgment appealed from (one paper), Supreme Court, New York County (Orest Maresca, J.), entered October 2, 1984, which, *inter alia* (1) declared invalid a July 20, 1983 regulation of the loft board, directing that certain buildings and individual units which had been issued temporary residential certificates of occupancy ("TCO") on or before June 21, 1982, were, nonetheless, subject to the provisions of Article 7-C of the Multiple Dwelling Law, if there existed a period of time of any length, for any reason whatsoever, *322 during which a temporary or final certificate of occupancy issued pursuant to Multiple Dwelling Law § 301 was not in effect; (2) declared that Article 7-C of the Multiple Dwelling Law did not apply to any building or unit issued a TCO on or before said date, regardless of any subsequent lapse in such TCO unless the TCO was revoked, *nunc pro tunc*, by the City Department of Buildings upon a finding of wilful fraud or where the Department refused to renew the TCO on the ground that the conditions on which the temporary certificate of occupancy had been initially issued had not been satisfied; (3) prohibited the Loft Board from exercising jurisdiction over such buildings unless the Department of Buildings had revoked or refused to renew the TCO on said grounds; and (4) declared that Article 7-C did not apply to residential units in three specific buildings owned by petitioner Eliahu Lipkis, located at 47 and 49 Walker Street and 71-3 Franklin Street, should be affirmed.

Order and judgment (one paper), Supreme Court, New York County, entered on October 2, 1984, reversed to the extent appealed from, on the law, without costs and without disbursements, the judgment vacated, the regulation declared valid, and the three loft buildings owned by petitioner Lipkis declared subject to article 7-C and the jurisdiction of the Loft Board.

All Citations

118 A.D.2d 312, 505 N.Y.S.2d 110

End of Document

EXHIBIT Q

23 Misc.3d 1123(A)
Unreported Disposition
NOTE: THIS OPINION WILL NOT BE PUBLISHED IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.
Civil Court, City of New York,
Richmond County.

Steve KAPLAN and Kapwest Corp., Petitioner(s), Plaintiff(s),

v.

SYNERGY, INC. d/b/a Synergy Fitness NYC Ltd. and Synergy Fitness Forest Avenue, Inc., Respondent(s), Defendant(s).

No. L & T 53951/08.
|
April 28, 2009.

Attorneys and Law Firms

Condon & Forsyth LLP, New York, for Petitioner.

Rosenfeld & Kaplan, LLP, New York, for Respondent.

Opinion

PHILIP S. STRANIERE, J.

*1 Petitioners, Steve Kaplan and Kapwest Corp., commenced this commercial summary proceeding against the respondents, Synergy Inc.(Synergy) d/b/a Synergy Fitness NYC Ltd.(Synergy NYC) and Synergy Fitness Forest Avenue, Inc. (Synergy Forest), alleging that the respondents failed to pay rent due and owing. A trial was held on March 11, 2009. Both sides were represented by counsel.

PRIOR LITIGATION:
In October 2006, petitioners commenced a summary proceeding against these respondents in Civil Court, Richmond County (L & T 53241/06), alleging that the respondents had failed to pay rent for the period August through October 2006. Thereafter the respondents commenced an action in Supreme Court, New York County (Index No. 115449/06) seeking damages for petitioners alleged breach of the terms of the lease. On September 5, 2007, the parties entered into a settlement agreement resolving both litigation matters. In that agreement the respondents acknowledged that the petitioners were due rent in the amount of $100,000.00 for the period August 2006 through February 2007. Petitioners agreed to accept $40,000.00 in full settlement of the rent arrearage claim. Respondents were to keep the monthly rent current and to pay the $40,000.00 arrearage in eight monthly payments of $5,000.00. Provided there were no defaults under the terms of the lease and the settlement agreement, the petitioners agreed to reduce the monthly base rent to $14,000.00 and defer an additional $2,000.00 a month in rent beginning September 2007 so that the current rent would be $12,000.00 a month. The abatement was negotiated between the parties because they had anticipated that "mezzanine" space at the premises would be available for the respondents' use. It was agreed that the respondents would undertake to complete the process necessary to legalize the space and obtain all approvals from the appropriate municipal agencies, including filings with the Board of Standards and Appeals (BSA).

Petitioners allege that the respondents' payment of $12,000.00 a month in July 2008 and August 2008 did not comply with the terms of the settlement agreement in that the payment due should have been$17,000.00 with $12,000.00 for the then current abated rent and an additional $5,000.00 to be applied to the monthly arrearage payment. Petitioner applied $5,000.00 of the

$12,000.00 received towards the monthly arrearage and the balance of $7,000.00 against the current rent leaving a shortfall in payments under the terms of the settlement agreement.

The settlement agreement was personally guaranteed by Anthony Reonegro in the event the respondents vacated the premises prior to the term of the Lease or failed to perform the financial obligations under the lease and settlement agreement. The agreement provided that "if the vacatur is caused by the failure to obtain BSA approval, this Agreement Guaranty is null and void."

Thereafter the petitioners agreed to accept surrender of the premises and terminate the respondents' lease obligation. The parties agreed to have the court decide the issue of whether the respondents had diligently pursued obtaining BSA approvals so as to relieve the guarantor of responsibility for the personal monetary obligations. Petitioners claim they are entitled to the money because the respondents never completed the BSA application process. Respondents allege that they did all that could be reasonably done and that the application process was abandoned because it became obvious that the approvals could not reasonably be obtained.

CHRONOLOGY:

*2 Site Plan Prepared by Tamborra Design and Consultants—May 30, 2003

Written Lease Between Steve Kaplan (Landlord) and Synergy, Inc. (Tenant)—July 16, 2003

Synergy Fitness Forest Avenue Inc. incorporated in New York State—July 23, 2003

Kapwest Corp. incorporated in New York State—July 29, 2003

Building Plans Filed by Tamborra Design and Consultants for Medical Group—November 15, 2003

Settlement Agreement between Steve Kaplan as President of Kapwest and Synergy Fitness Forest Avenue, Inc., Brett Holzer as President of Synergy Fitness NYC, Ltd.—September 5, 2007

Personal Guaranty of Anthony Reonegro—September 5, 2007

A search of the New York State Division of Corporations records shows Synergy Fitness NYC, Ltd. having been incorporated on May 9, 2002. The records also show no entity as "Synergy, Inc." being incorporated with a search of that name referring the inquiry to SEVB, Inc. a corporation filed February 1, 1995, but now listed as an "inactive" corporation. There is no evidence of an assignment of the lease to Kapwest or to Synergy NYC or Synergy Forest.

DISCUSSION:

The parties have agreed that the only issue remaining outstanding between them is whether the petitioners may enforce the "personal guaranty" signed by Anthony Reonegro on September 5, 2007 guaranteeing the payment of $40,000.00 to petitioners "if the Tenant: (1) vacates the Premises located at 1268 Forest Avenue, Staten Island, New York prior to the term of the Lease, or (2) fails to perform its financial duties and obligations under the Settlement Agreement and Lease. If vacatur is caused by the failure to obtain BSA approval, this Agreement Guaranty is null and void."

A. Is There a Valid Lease?

On July 16, 2003 there was a written lease that listed Steve Kaplan as the landlord and Synergy, Inc., as tenant, but was signed by Kaplan on behalf of Kapwest, Corp. as the owner and Brett Holzer on behalf of Synergy, Inc. as tenant. The purpose of the lease was for the premises 1268 Forest Avenue, Staten Island, New York, "to be used and occupied by the Tenant as a gym and exercise facility. Not more than twenty percent (20%) of space may be allocated for use as a juice bar and grill-provided tenant obtains necessary permit and Certificate of Occupancy for said usage." After the date of the lease, the petitioners had

filed for a certificate of occupancy for a medical facility, while the lease was for use as gym so in the words of Shakespeare's Hamlet "Ay, there's the rub." [1]

The agreement at paragraph 36 of the Rider to Lease provided for a commencement of the lease term "upon the issuance of a certificate of occupancy for premises known as 1268 Forest Avenue, Staten Island, New York (the Commencement Date)....Tenant's obligation to pay base annual rent and additional rent shall commence on the Commencement Date." The lease also required the petitioner to deliver "approximately ten thousand square (10,000) feet consisting of basement and three (3) floors and access to parking lot."

*3 One of the named petitioners at some point acquired this property. The date of the purchase is not part of the record, nor has a copy of the deed been submitted as an exhibit. On September 10, 2002, Kaplan filed plans with the Buildings Department to do an alteration of the then currently existing structure. Parenthetically, that application for alteration was not officially withdrawn until July 26, 2006 a date sometime after the now existing structure was constructed and began to be used by the respondents as a gym. Thereafter petitioners abandoned these renovation plans and filed for a demolition permit on August 5, 2003. The existing building was demolished. Petitioners then filed plans with the Buildings Department to construct a new building to house medical offices and consisting of a cellar storage area, the first floor designated as medical offices with a second floor designated as for offices only. None of these plans included a third floor or a mezzanine. The total square footage of the building filed with the Buildings Department was less than 6,000 square feet. In addition, the premises was to have eleven parking spaces to be served by "paid parking attendants." Attendant parking was needed so as to maximize the entire parking area, without such a filing, there would be insufficient parking spaces for the size of the building constructed.

The Buildings Department issued its first temporary certificates of occupancy for the period August 1, 2006 through August 10, 2006. There were subsequent temporary certificates of occupancy issued August 9, 2006 through November 7, 2006; November 6, 2006 to February 4, 2007; May 18, 2007 to August 16, 2007 and February 27, 2008 to April 27, 2008. There is no explanation as to why there are gaps in the time periods covered by the temporary certificates of occupancy which leads to the conclusion that the building was being used for periods of time without the existence of even current temporary certificates of occupancy. Each of these temporary certificates authorized the medical use. There was never any indication in the Buildings Department filings that a gym or "physical culture establishment" was being operated at the premises or that the parties even contemplated such a use. These plans were filed on behalf of Kaplan and Kapwest. At no time did the Buildings Department ever issue a final or permanent certificate of occupancy for any use. Taking all of these factors into account, it must be concluded there was never a valid lease between the parties.

First, who are the parties to the lease? The opening paragraph designates Steve Kaplan as the landlord and Synergy, Inc., as the tenant, yet the signature block is signed on the preprinted lease is signed only by Holzer on behalf of Synergy, Inc. There is no signature on behalf of the landlord. There is what is purported to be a twelve page "Rider to Lease" which is dated July 17, 2003, the day after the preprinted lease is dated. The Rider to Lease is also between Kaplan and Synergy, Inc., but this document is signed by Kapwest Corp. as the owner and Synergy, Inc., as the tenant. As stated above, Synergy, Inc., is not recognized as an active registered corporation in New York and there is no evidence of an assignment of the lease to either Synergy Fitness NYC or Synergy Fitness Forest Avenue.

*4 Second, the lease terms required the landlord to deliver a premises of ten thousand square feet of space on a basement and three floors, yet the only approved plans for the premises and the ones which led to the issuance of the temporary certificates of occupancy are for a premises of less than six thousand square feet on two floors and a cellar. It should be pointed out there under the Multiple Dwelling Law there is a difference between a basement-a story partly below the curb level but having at least one-half of its height above curb level (MDL § 4(38)) and cellar-an enclosed area having more than one-half of its height below curb level (MDL § 4(37). A similar definition exists in the NYC Administrative Code § 27–232 where the description of cellar and basement is not limited solely to residential buildings. Based on the initial plans which were filed after the lease

was signed, the petitioners were certifying to the Buildings Department an intent to construct a premises inconsistent with what they had contracted to deliver to the respondents for legal occupancy.

This entire transaction is suspect. The lease, July 16, 2003, predates the initial building department filing of November 15, 2003 by four months. The petitioners already had contracted to deliver a premises capable of being used for "gym and exercise facility" in July 2003 yet petitioners commenced obtaining approvals for a structure designated as a "medical facility." All that can be concluded is that the petitioners deliberately embarked on a plan to circumvent the building code. Based on the testimony at trial and the subpoenaed records, it seems that the intent of the petitioners and by implication, the respondents, was to go into occupancy at the premises and use it as a gym and exercise facility, a "physical culture establishment" under the building code, in complete violation of the approved plans and any applicable building code regulations. The parties sought to operate an illegal health club at the site, which respondents have been doing for a period of time, and then seek either an approval of the changed use from the Buildings Department, or a variance from the Board of Standards and Appeals. This procedure apparently is not that uncommon on Staten Island and may explain why certain buildings seem to exist in unusual locations out of context with the surrounding neighborhood.

Third, the lease required the petitioner to deliver a certificate of occupancy for the gym and exercise use while the tenant was to provide the certificate of occupancy for a juice bar and grill at the premises. In addition, the tenant's obligation to pay rent does not accrue until a certificate of occupancy is issued (Rider paragraph 36). No certificate of occupancy was ever issued for any purpose, let alone the leased use. What was issued were five temporary certificates of occupancy for a medical building, neither the petitioners nor the respondents were ever able to deliver a final certificate of occupancy for a medical facility—the building which was filed, or a temporary certificate of occupancy for the gym and exercise facility. As such, no rent was ever due and owing under the terms of the lease.

*5 The Administrative Code defines both a "certificate of occupancy" and a "temporary of certificate" so that use of the term "certificate of occupancy" in the lease refers to what is commonly called a "final" or "permanent" certificate of occupancy and not a "temporary certificate of occupancy." If the parties wanted the rent obligation to be triggered upon the occupancy by the respondents, the lease should have said so.

Giving the parties the benefit of the doubt that they were acting in good faith, then there never was a valid lease due to "mutual mistake of fact," that is, the belief the gym could legally be operated at the site. Analyzing the situation from a more cynical and perhaps more realistic viewpoint, the parties were engaged in an illegal bargain to construct a building that could neither legally be built on the site at all, nor legalized by amending the plans which were filed. They knowingly signed a lease for a physical culture establishment (PCE) and then embarked on a program of filings with the Buildings Department for a structure which could not accommodate the purpose of the lease. Their actions, if not illegal, are at best in defiance of public policy and should not be tolerated by this or any other court. By operating a gym in a building not constructed for that purpose they placed the safety of the general public at risk.

The parties entered into a written agreement to lease the premises as a gym and fitness center, a use inconsistent with the current zoning. The premises is in a C2–1/R3–2 zoning district. Under this zoning classification, a physical culture establishment cannot be legally occupied or operated as of right. An application must be made to the BSA to for a variance. With this zoning and the lease in place, the petitioner commenced construction of medical offices which could be built as of right. They received approvals for such a building and then several temporary certificates of occupancy. Petitioners did this rather than seeking approval from the BSA prior to construction, apparently hoping to construct the medical offices and then apply for and obtain a variance.

The New York City Administrative Code (N.Y.CAC) treats building safety as a priority and has criminalized many activities. NYCAC § 26–125 in regard to the Building Code provides: "every person who shall violate any of the provisions of any laws, rules or regulations enforceable by the department or who shall knowingly take part or assist in any such violation shall be guilty of an offense...."

In addition, NYCAC § 26–126 states: "The owner, lessee, or occupant of any building in which a violation of the zoning resolution has been committed or shall exist, or the agent, architect, builder, contractor, or any other person who commits, takes part or assists in any such violation or who maintains any building in which any such violation shall exist, shall be guilty of a misdemeanor, ..."

While NYCAC § 27–147 provides: "No building construction or alteration work ... shall be commenced, ... until a permit therefor shall have been issued by the commissioner."

*6 The requirement of a certificate of occupancy is set forth in NYCAC § 26–222. This statute states:

> It shall by unlawful to occupy or use any building erected or altered ... unless and until a certificate of occupancy shall have been issued by the commissioner, certifying that such building conforms substantially to the approved plans and the provisions of the building code and other applicable laws and regulations. Nothing herein contained, however, shall be deemed to prohibit the commissioner from permitting the temporary occupancy and use of a building on accordance with and subject to the provisions of the building code....

It is abundantly clear that the parties to this lease agreement are in violation of the NYCAC and are subject to punishment by the appropriate authorities. The occupancy during the entire period of this agreement has been contrary to law.

The Rider to the Lease at paragraph 37 sets forth as "Owner's Work...."

4. In the basement, the men's room shall include, three (3) showers, three (3) stalls, and three (3) urinals, three (3) under mount sinks (including fixtures) 5. In the women's lockers, three (3) showers, five (5) toilets (up to code) and three (3) under mount sinks (including fixtures) ... 7. In both locker rooms the Landlord is allotting ... 9. Locker room bathroom shall be handicapped accessible

These are not alterations typical for a medical facility. All of this work is specialized renovations so that the premises may be used as a PCE. Petitioners contracted in the lease to make renovations which were wholly inconsistent with the plans subsequently filed with the Buildings Department. Petitioners' unclean hands extend not only beyond their wrists but are past their elbows approaching their shoulders.

The Rider to the Lease at paragraph 56(J) provides:

> Tenant covenants that Tenant will not use ... the Premises for any unlawful purpose....Tenant further covenants to comply with all applicable laws, resolutions, codes, rules and regulations of any department, bureau, agency or any governmental authority having jurisdiction over the operation occupancy, maintenance and use of the Premises *for* (emphasis in original) the purposes set forth herein.

How did the parties contemplate that the Tenant was going to be able to comply with the law when the occupancy from its inception was in violation of the law?

Added to the court's skepticism as to the "good faith" of the parties is the fact that the copies of the lease submitted to the court contains a major discrepancy. Paragraph 53 of the Rider to Lease is labeled "53. Changes in Building Facilities:" but contains

no such language. It is followed by a paragraph dealing with the rights of the parties to arbitrate "any matter in dispute wherein arbitration is expressly provided in this Lease...." This is followed by paragraph "55. No Broker." There is no paragraph 54 and there certainly is no language in regard to "Changes in Building Facilities:" anywhere in the copies of the lease submitted to the court.

*7 Based on the foregoing it must be concluded that there never was a legally enforceable lease.

B. Is There a Valid Settlement Agreement?

> The settlement agreement dated September 5, 2007 contains the following language: "Whereas, Synergy Forest Avenue understands that, pursuant to the terms of the Lease, the Tenant is responsible and obligated to obtain the necessary documentation with the appropriate governmental agencies of the City of New York to obtain proper authority to operate a gym facility at the Premises and, because of the failure to do so, a notice of default dated January 11, 2007 was served; ..."

As pointed out above, the written lease agreement does not make it clear that this was the responsibility of the tenant, especially considering that the language of the Rider indicated rent was not due and owing until a certificate of occupancy was issued. If the tenant is responsible for obtaining the certificate of occupancy, then the tenant could operate the facility without a final certificate of occupancy and have no obligation to pay rent. Something that does not make any sense.

Synergy Forest is not a party to the lease, yet it is undertaking to perform the tasks of the tenant under that agreement. There is no assignment of the lease obligations to the Synergy Forest in evidence. In spite of this, Synergy Forest at some point went into possession of the premises, began operating its "gym" business and began paying rent. All of this was clearly in violation of the law because there was never any final certificate of occupancy issued for any purpose nor was there a temporary certificate of occupancy which permitted the PCE use. The only permitted use was as a medical facility, yet the parties knowingly went into an unlawful operation and entered into a lease for a PCE prior to embarking on the Buildings Department application process.

The issue remains can the "settlement agreement" cure this. The answer is no. Merely substituting one tenant for another does not correct the fundamental problem with the lease. The lease purpose was in violation of the building code. The parties knew it and continued to flaunt the law until it became apparent that obtaining the necessary approvals was going to be more costly than envisioned.

The "settlement agreement" provides:

> Synergy Forest Avenue and Tenant and their agents and representatives shall diligently and in good faith pursue completion of the BSA application process, including all commercially reasonable efforts to obtain approval from the BSA for a cultural establishment at the Premises. Any violations for use and occupancy of the Premises without appropriate BSA and any other requirements of government authority applicable shall be borne by Synergy Forest Avenue and Tenant.

There are a few problems with this clause. First is the reference to "Synergy Forest Avenue and Tenant." The "tenant" on the lease is Synergy, Inc., a non-existent corporation. So who is to perform along with Synergy Forest? Second, the clause requires Synergy Forest to obtain "approval" as a "cultural establishment." This is obviously an error because the application should be for a "physical culture establishment" and not a museum, art gallery or concert hall. The zoning regulations permit the BSA to approve this PCE use only in certain circumstances. Third, Synergy Forest is in "good faith" is to "pursue completion of the BSA application process" which is to include "all commercially reasonable efforts to obtain approval from the BSA." Synergy Forest contends that they have met this criterion and petitioner alleges that they did not do so. The requirement of a "good faith"

clause in any agreement between these parties is ludicrous in light of the fact they were perfectly willing for several years to flaunt the building code and operate without a viable certificate of occupancy.

*8 This court has previously extended the prohibitions in regard to illegal residential occupancies (MDL 302) to commercial settings and held that no rent or use and occupancy can be collected while the premises lacks a valid certificate of occupancy (*995 Manor Road LLC v. Island Realty Holdings, LLC* 15 misc32d 1147(A) (2007)). Because the logic for this monetary penalty is to insure that the building is safe for occupancy for its intended use, why would a court permit the public to frequent an illegal commercial establishment where the potential is for injury to a greater number of persons than in a residential situation? The Building Code establishes safety standards and it must be complied with in all situations. There was no valid certificate of occupancy for this location. The use is illegal and no rent or use and occupancy may be obtained.

The above being the case, Synergy Forest could still contract to obtain the BSA approvals. It is just that no rent may be collected during the period if the gym is being operated without a valid certificate of occupancy. Synergy Forest and the tenant could agree to pay rent and not use the premises, but that would not make any business sense.

C. Is There a Valid Guarantee?
On September 5, 2007, Anthony Reonegro signed a document entitled "Agreement of Guaranty" ... between Steven Kaplan and Kapwest Corp. ("Landlord") and Synergy Forest Avenue Inc. and Synergy Fitness NYC Limited. It should be pointed out that neither Synergy Forest nor Synergy NYC is designated as "Tenant" in this agreement. There is no record of any assignment of the lease to either of these entities. The only "tenant" is Synergy, Inc., an inactive corporation, so whose performance is being guaranteed? The personal guarantee is only effective "if the Tenant: (1) vacates the Premises located at 1268 Forest Avenue, Staten Island, New York prior to the term of the Lease, or (2) fails to perform its financial duties and obligations under the Settlement Agreement and Lease. If vacatur is caused by the failure to obtain BSA approval, this Agreement Guaranty is null and void."

Having the guaranty triggered by the tenant vacating the premises prior to the term of the lease, by which it must be concluded is meant, prior to the termination date of the lease, under these facts at a minimum violates public policy. As pointed out above, the occupancy is illegal and in violation of the certificate of occupancy. Had the court been asked to decide only this issue, it would have determined that the lease was illegal and unenforceable and ordered that the tenant vacate the premises because of that fact. Therefore it must be concluded that if whatever entity is occupying the premises for use other than that permitted in the temporary certificate of occupancy vacates the premises, there can be no breach of the agreement. The "tenant" had no legal right to occupy the premises and must vacate. Vacating under these circumstances cannot trigger liability for rent. It should be pointed out that the petitioners have agreed to accept surrender of the premises and only litigate the issue of the personal guarantee.

*9 As to the other ground for enforcing the guaranty, the failure to perform financial duties and obligations under the Settlement Agreement, the court likewise finds there is no legal basis for this. There is no valid lease, the premises cannot be legally occupied, the landlord cannot collect rent or use and occupancy so long as the premises is being occupied in violation of the certificate of occupancy. The illegal purpose of the lease makes it null and void. Likewise the tenant or any other occupant who has paid money to the landlord cannot recover such payments. The court will not resolve the disputes arising from the illegal agreement.

The guaranty is unenforceable. Neither party may use the court to seek redress of any claims in regard to the terms of the lease.

CONCLUSION:
The lease agreement is null and void. The occupancy is illegal. Neither party may use the court to enforce any claims under the terms of that agreement. The settlement agreement is null and void as is the guarantee. In addition, as a matter of public policy, neither party may enforce any claims under these agreements.

All claims and counterclaims between the parties are dismissed. Neither party may recover any monies from the other. A warrant of eviction is issued forthwith. There is no stay of execution.

All Citations

23 Misc.3d 1123(A), 886 N.Y.S.2d 67 (Table), 2009 WL 1309790, 2009 N.Y. Slip Op. 50902(U)

Footnotes

1 Hamlet, Act III, Scene 1.

EXHIBIT R

50 Conn.Supp. 28
Superior Court of Connecticut,
Complex Litigation Docket at Waterbury.

ASSURANCE COMPANY OF AMERICA et al.
v.
Andrew M. YAKEMORE et al.

No. X01 CV–04 4001224S.
|
May 9, 2005.

Synopsis

Background: Commercial tenant and tenant's insurer brought suit against landlord, town, fire district, fire officials, and others, alleging negligence, reckless conduct, and violation of Connecticut Unfair Trade Practices Act (CUTPA) in connection with fire that damaged building in which tenant leased space. Defendants moved to strike various counts.

Holdings: The Superior Court, Sheedy, J., held that:

[1] landlord's actions amounted to a continuous course of conduct, so as to toll negligence statute of limitations;

[2] tenant did not sufficiently allege claim against landlord for "willful, wanton and reckless" conduct;

[3] tenant's allegations did not state CUTPA claim;

[4] fire chief's and fire marshal's decisions were discretionary decisions for which they were immune from liability; and

[5] tenant's allegations were sufficient to state claim against town for reckless disregard of public safety.

Motion granted in part and denied in part.

West Headnotes (29)

[1] **Pleading** ⇐ Application and proceedings thereon

A motion to strike challenges the legal sufficiency of a pleading, and, consequently, requires no factual findings by the trial court. Practice Book 1998, § 10–39(a).

[2] **Pleading** ⇐ Insufficient allegations or denials

A motion to strike tests whether the complaint states a claim upon which relief can be granted. Practice Book 1998, § 10–39(a).

failing to install sprinkler system, obtain a permanent certificate of occupancy from the town, and correct construction deficiencies so as to comply with applicable building codes was "willful, wanton and reckless conduct;" assertions in complaint were stated "upon information and belief," allegations were subject to verification, and some remedial construction in building had occurred.

[11] **Negligence** ⇐ Reckless conduct

In order for a person's conduct to rise to the level of "recklessness," there must be a realization by that person that his conduct involves a risk so substantial that his conduct goes beyond negligence.

[12] **Negligence** ⇐ Heightened degrees of negligence

While it is so that a reckless state of mind, for purposes of proving "willful, wanton and reckless conduct," can be inferred from a person's conduct, for the inference to be drawn, there must be something more than a failure to exercise a reasonable degree of watchfulness to avoid danger to others or to take reasonable precautions to avoid injury to them.

[13] **Negligence** ⇐ Heightened degrees of negligence

Simply using the word reckless or recklessness is not enough to allege cause of action for "willful, wanton and reckless conduct."

[14] **Limitation of Actions** ⇐ Consumer protection; unfair trade practices

Commercial landlord's continuous course of conduct, in failing to design, construct, operate, or maintain property in accord with basic building and fire codes, and permitting premises to be occupied without valid certificate of occupancy, tolled statute of limitations for tenant's Connecticut Unfair Trade Practices Act (CUTPA) claim against landlord for damages resulting from fire in building; above facts supported tolling of negligence statute of limitations, and there was no reason to assume the same did not apply to CUTPA statute of limitations. C.G.S.A. §§ 42–110g(f), 52–584.

2 Cases that cite this headnote

[15] **Antitrust and Trade Regulation** ⇐ Particular cases

Commercial tenant's allegations, in suit against landlord for damages resulting from fire in tenant's building, that landlord violated fire safety and building codes did not state Connecticut Unfair Trade Practices Act (CUTPA) claim, in the absence of allegations indicating that violations were "immoral," "unethical," "oppressive," "unscrupulous," or inimical to public policy. C.G.S.A. § 42–110a et seq.

2 Cases that cite this headnote

[16] **Antitrust and Trade Regulation** ⇐ Real property in general

Duties of commercial landlord to tenant were irrelevant to tenant's Connecticut Unfair Trade Practices Act (CUTPA) claim against landlord for damages resulting from fire in tenant's building; existence of a duty was not a prerequisite for the finding of a CUTPA violation, and declining to do what one was not required to do did not violate public policy. C.G.S.A. § 42–110a et seq.

Fire chief's decisions as to whether to increase water supply or pressure in fire hydrant adjacent to commercial building, whether to require that a fire hydrant be installed on the subject property, and whether to advise tenant in building of the absence of required hydrant on the premises were discretionary decisions for which he was immune from liability under Connecticut Tort Reform Act (CTRA), in tenant's negligence suit arising from fire on the premises, absent showing that his acts were willful or wanton; there was no statute or regulation that created duties to perform such actions. C.G.S.A. §§ 29–298(b), 52–557n(a)(2)(B).

[25] **Municipal Corporations** ⇐ Failure to protect private property against fire

Fire marshal's decisions as to whether to inspect commercial building for code compliance, to increase water supply or pressure in fire hydrant adjacent to building, or to take enforcement action against landlord that operated building, were discretionary decisions for which he was immune from liability under Connecticut Tort Reform Act(CTRA), in tenant's negligence suit arising from fire on the premises, absent showing that his acts were willful or wanton; there was no statute or regulation that created duties to perform such actions. C.G.S.A. §§ 29–298(b), 52–557n(a)(2)(B).

[26] **Municipal Corporations** ⇐ Failure to protect private property against fire

Statute governing liability of political subdivisions for damages to person or property permitted commercial tenant to bring direct cause of action against fire department and fire district for their alleged negligence in connection with fire in tenant's building without specifically referencing agents or employees, regardless of fact that agents or employees had immunity for their discretionary acts. C.G.S.A. § 52–557n.

[27] **Municipal Corporations** ⇐ Actions

Municipal Corporations ⇐ Application of principle of agency to municipalities

Causes of action under statute permitting direct cause of action against municipality, and under statutes requiring municipality to indemnify municipal employees under certain circumstances, are independent and are not mutually exclusive. C.G.S.A. §§ 7–308, 7–465, 52–557n.

[28] **Municipal Corporations** ⇐ Failure to protect private property against fire

Commercial tenant failed, in its complaint against fire department and fire district for damages resulting from fire in tenant's building, to provide notice to department and district of statutory basis of tenant's claim that department and district were not immune from suit; complaint did not reference statute abrogating governmental immunity, but instead referred to statutes providing for the indemnification of municipal employees, and the indemnification statutes were inapplicable because the sued fire officials were immune from liability for their discretionary decisions. C.G.S.A. §§ 7–308, 7–465, 52–557n.

[29] **Municipal Corporations** ⇐ Failure to protect private property against fire

Commercial tenant's allegations that town failed to enforce code provisions, permitted occupancy of building without permanent certificate of occupancy, and permitted fire hydrant to be without an adequate water supply, were sufficient to state claim against town for reckless disregard of public safety, in tenant's suit for damages resulting from fire in the building, where town's building department retained engineer who discovered code violations, issued stop work order on basis of violations, and issued temporary certificate of occupancy without violations having been cured.

Yakemore revocable trust, Richard Paquette as building official for the town, the town itself for indemnification of its employees as well as for its own recklessness, Michael Juda as fire chief of the Simsbury fire department, the Simsbury fire department, Kevin Kowalski as fire marshal for the Simsbury fire district, and the Simsbury fire district. All the defendants have moved to strike certain of the counts to which the plaintiffs have objected. The parties have fully briefed the issues and have waived oral argument in consenting to the court's adjudication of each of the three motions on the papers.

APPLICABLE LAW

[1] [2] [3] [4] [5] [6] [7] [8] "A motion to strike challenges the legal sufficiency of a pleading, and, **782 consequently, requires no factual findings by the trial court." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC v. Alves*, 262 Conn. 480, 498, 815 A.2d 1188 (2003). It tests whether the complaint states a claim upon which relief can be granted. Practice Book § 10–39(a); *Vacco v. Microsoft Corp.*, 260 Conn. 59, 65, 793 A.2d 1048 (2002). The trial court's role is to examine the complaint and construe it in favor of the pleader. *Suffield Development Associates Ltd. Partnership v. National Loan Investors, L.P.*, 260 Conn. 766, 772, 802 A.2d 44 (2002). Specifically, the court must "assume the truth of both the specific factual allegations and any facts fairly provable *32 thereunder" and "read the allegations broadly, rather than narrowly." *Craig v. Driscoll*, 262 Conn. 312, 321, 813 A.2d 1003 (2003). The requirement of favorable construction does not extend, however, to legal opinions or conclusions stated in the complaint but only to factual allegations and the facts "necessarily implied and fairly provable under the allegations." (Internal quotation marks omitted.) *Forbes v. Ballaro*, 31 Conn.App. 235, 239, 624 A.2d 389 (1993). The motion is to be tested by the allegations of the pleading, which cannot be enlarged by the assumption of any facts not alleged therein. *Alarm Applications Co. v. Simsbury Volunteer Fire Co.*, 179 Conn. 541, 549–50, 427 A.2d 822 (1980). "If any facts provable under the express and implied allegations [of the] complaint support a cause of action ... the complaint is not vulnerable to a motion to strike." *Bouchard v. People's Bank*, 219 Conn. 465, 471, 594 A.2d 1 (1991). "A motion to strike is properly granted if the complaint alleges mere conclusions of law that are unsupported by the facts alleged." *Fidelity Bank v. Krenisky*, 72 Conn.App. 700, 720, 807 A.2d 968, cert. denied, 262 Conn. 915, 811 A.2d 1291 (2002); *Donar v. King Associates, Inc.*, 67 Conn.App. 346, 349, 786 A.2d 1256 (2001).

FIRST, SECOND, FOURTH, TWENTIETH, TWENTY–SECOND, TWENTY–THIRD, TWENTY–FIFTH AND TWENTY–EIGHTH COUNTS (MOTION TO STRIKE FILED BY DEFENDANTS ANDREW AND EDITH YAKEMORE)

[9] Counts one and twenty-two assert causes of action in negligence[1] against the named defendant by his failure to design, construct, operate or maintain the property in accord with basic building and fire codes and by permitting the premises to be occupied without a *33 valid certificate of occupancy. The named defendant and his wife claim that the allegations are legally insufficient because they are beyond General Statutes § 52–584, the applicable statute of limitations. Section 52–584, applicable to both the negligence and recklessness claims, provides in pertinent part that an action must be brought "within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of ...." The defendants argue that, because the negligent acts complained of occurred between the years 1983 and 1986 and because the present action was not brought until May 25, 2004, the negligence causes of action are time barred. The plaintiffs object, claiming that the named defendant engaged in a continuous course of conduct and that, **783 therefore, the statute was tolled under *Johnson v. North Branford*, 64 Conn.App. 643, 781 A.2d 346, cert. denied, 258 Conn. 926, 783 A.2d 1028 (2001). Our Supreme Court, in *Witt v. St. Vincent's Medical Center*, 252 Conn. 363, 370, 746 A.2d 753 (2000), enunciated a three-prong

twenty-nine of the first count and paragraph twenty-seven of the twenty-second count (incorporated in counts two and twenty-three) make clear that noncombustible fire walls *were* constructed, although they may, in fact, have been inadequate. Counts two and twenty-three do not assert conduct sufficiently different in degree from the negligent conduct elsewhere asserted to support a conclusion that the named defendant made a conscious choice to do as he did either with knowledge of the serious danger that conduct posed to others or with knowledge of such facts that would disclose to any reasonable person the serious danger to others. The motion to strike counts two and twenty-three is, therefore, granted.

[14] The defendants next argue that the Connecticut Unfair Trade Practices Act (CUTPA) claims asserted in counts four, twenty, twenty-five, and twenty-eight should be stricken because first, they are time barred by the three year ***37** statute of limitations of General Statutes § 42–110g(f), and, second, the third prong of the "cigarette rule" is not met here. As to the first argument, the defendants correctly cite language in *Fichera v. Mine Hill Corp.*, 207 Conn. 204, 541 A.2d 472 (1988), to the effect that the language of this statute "precludes any construction thereof delaying the start of the limitation period until the cause of action has accrued or the injury has occurred." ****785** Id., at 212, 541 A.2d 472.[3] The problem for this court is that *Fichera* was decided on the basis of that court's analysis in 1988 of the legislative intent in enacting the personal injury statute of limitations contained in § 52–584. Citing *Kennedy v. Johns–Manville Sales Corp.*, 135 Conn. 176, 62 A.2d 771 (1948), the *Fichera* court noted our Supreme Court had previously held that "even where the wrongful act could not reasonably have been discovered until after the statute had run, any action seeking damages for such an 'act or omission' was barred." *Fichera v. Mine Hill Corp.*, supra, at 213, 541 A.2d 472. The court concluded any difference in language in the textual context of § 52–584 and § 42–110g(f) was of no consequence there and found that there was no tolling of the statute under the circumstances presented there. Id. That ignores, however, our Supreme Court's holding in *Witt*, that, under certain conditions, the statute of limitations in § 52–584 may be tolled. Moreover, since this court has concluded earlier that the facts asserted permit a finding of a continuous course of conduct with regard to the negligence claims and since no reason exists to conclude that the same is not applicable to a ***38** CUTPA claim, the court rejects the defendants' first argument.

[15] **[16]** **[17]** **[18]** **[19]** **[20]** **[21]** **[22]** **[23]** Under this state's "cigarette rule," recognized by the Federal Trade Commission in enforcing the federal statute on which CUTPA is modeled, courts must consider: "(1) [W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise-whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; [and] (3) whether it causes substantial injury to consumers [competitors or other businessmen]." (Internal quotation marks omitted.) *Jacobs v. Healey Ford–Subaru, Inc.*, 231 Conn. 707, 725, 652 A.2d 496 (1995). The defendants focus on the third strand of this test for "unfairness" in arguing that, to satisfy this third prong of the inquiry, the injury must not only be substantial but "also must not be outweighed by any countervailing benefits to consumers or competition that the practice produces ...." (Internal quotation marks omitted.) *Williams Ford, Inc. v. Hartford Courant Co.*, 232 Conn. 559, 592, 657 A.2d 212 (1995). The argument fails to recognize that "[a]ll three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three." (Internal quotation marks omitted.) *Fink v. Golenbock*, 238 Conn. 183, 215, 680 A.2d 1243 (1996). They alternatively claim, however, that no determination with regard to these CUTPA counts can be made here because, in no one of these counts do the plaintiffs set forth how or in what respect the alleged activities are "immoral" or "unethical" or "oppressive" or "unscrupulous" nor do any of these counts assert in what way(s) the defendants' actions ***39** are inimical to this state's ****786** public policy. The purpose of a pleading is to put the defendant on notice of the specific claims to be argued at trial. The pattern established in the revised complaint is the assertion, in the negligence counts, of various violations of this state's Fire Safety and Basic Building Codes and then to assert, in subsequent counts, the same violations-without more-as both recklessness and CUTPA violations. Allegations of negligence alone are insufficient to support a CUTPA claim. See *A–G Foods, Inc. v. Pepperidge Farm, Inc.*, 216 Conn. 200, 214–17, 579 A.2d 69 (1990); *Thames River Recycling, Inc. v. Gallo*, 50 Conn.App. 767, 784–86, 720 A.2d

be held personally liable for any damage to persons or property that may result from any action that is required or permitted in the *42 discharge of his official duties while acting for a municipality or fire district.... No such fire marshal, deputy fire marshal, fire inspector or other inspector or investigator may be held responsible for or charged with the costs of any such legal proceeding. Any officer of a local fire marshal's office, if acting without malice and in good faith, shall be free from all liability for any action or omission in the performance of his official duties."

Section 7–308(b) provides in pertinent part: "Each municipality of this state ... shall pay on behalf of any paid or volunteer fireman ... of such municipality all sums which such fireman ... becomes obligated to pay by reason of liability imposed upon such fireman ... by law for damages to person or property, if the fireman ... at the time of the occurrence ... was performing fire ... duties and if such occurrence ... was not the result of any wilful or wanton act of such fireman ... in the discharge of such duties ...."

Section 7–308(b) further provides that "[n]o action for personal injuries or damages ... shall be maintained against such municipality and fireman unless ... commenced within one year after the cause of action therefor arose and notice of the intention to commence such action ... has been filed ... [with the] municipality and with the fireman within six months after [the] cause of action has accrued.... Governmental immunity shall not be a defense in any action brought under this section...."

At common law, a municipality was generally immune from liability for its tortious acts. **788 *Conway v. Wilton*, 238 Conn. 653, 672, 680 A.2d 242 (1996). General Statutes § 52–557n both codified and modified the common law of municipal and municipal employee liability and immunity as part of the original Connecticut Tort *43 Reform Act. Section 52–557n(a)(2)(B) provides in relevant part that, except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by "negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law." See also *Elliott v. Waterbury*, 245 Conn. 385, 411, 715 A.2d 27 (1998). The traditionally employed distinction is as between "governmental" acts, which are performed wholly for the direct benefit of the public and are supervisory or discretionary in nature, and "ministerial" acts, which are performed in a prescribed manner without the exercise of judgment or discretion as to the propriety of the action. *Hannon v. Waterbury*, 106 Conn. 13, 17, 136 A. 876 (1927); *Kolaniak v. Board of Education*, 28 Conn.App. 277, 280, 610 A.2d 193 (1992).

[24] Negligence in failing to enforce properly applicable statutes, regulations, and/or codes, to make reasonable and proper inspections of a multi-family rental unit for fire safety hazards, and to prescribe remedial action to be taken by owners were "acts ... [that] required in some measure the exercise of judgment by a municipal employee" and "were not ministerial." *Evon v. Andrews*, 211 Conn. 501, 507, 559 A.2d 1131 (1989). While it is so that statutes, regulations, and policies *can* create ministerial duties, when they relate to fire, police, or other public safety services, they are most often held to create discretionary duties. See, e.g., *Evon v. Andrews*, supra, at 505, 559 A.2d 1131; *Gordon v. Bridgeport Housing Authority*, 208 Conn. 161, 169–70, 544 A.2d 1185 (1988); *Shore v. Stonington*, 187 Conn. 147, 153, 444 A.2d 1379 (1982); *Sestito v. Groton*, 178 Conn. 520, 527, 423 A.2d 165 (1979); *Stiebitz v. Mahoney*, 144 Conn. 443, 446, 134 A.2d 71 (1957); *Alexander v. Vernon*, Superior Court, Complex Litigation Docket at Tolland, Docket No. X07 CV–02 0078935S, 2004 WL 1098773 (May 3, 2004) (*Sferrazza, J.*). Thus, governmental *44 immunity attaches absent an applicable exception to the qualified immunity of municipal agents engaged in discretionary acts. While the plaintiffs here do not claim an exception, they argue the acts at issue are ministerial under *Kolaniak v. Board of Education*, supra, 28 Conn.App. at 277, 610 A.2d 193. The court concluded there that the determination as to when to clear a sidewalk was ministerial—not discretionary—based upon a bulletin previously issued to school custodians and maintenance persons that school walkways were to be inspected and kept clean on a daily basis and, further, that while on duty, it was the duty of those maintenance personnel and custodians to keep the walkways clear of ice and snow. There was no evidence that the subject walkway had been shoveled, salted or sanded prior to the student's fall. The court rejected the

immunity because that is a defense available only to the municipal employee in the exercise of his or her governmental duties. Id., at 37, 818 A.2d 37.

[28] There is here, however, an anomaly. The plaintiff in *Spears* (as these plaintiffs) failed to cite in her complaint a statute which abrogated governmental immunity; in her memorandum in opposition to the motion for summary judgment, however, she argued on the basis of § 52–577n. Although only in passing, the plaintiffs here reference § 52–557n in their memorandum —but they do so only as a statement of the court's holding in *Spears*. No analysis or argument that § 52–577n is applicable here is advanced. Were these facts the only facts available, it would be a closer call regarding whether counts fifteen and seventeen should survive a motion to strike. Yet, not only does the complaint not reference § 52–577n, but it specifically references §§ 7–308 and 7–465; statutes providing for the indemnification of municipal employees. The inclusion of those statutory references, together with the plaintiffs' failure to argue on the basis of § 52–577n, require the conclusion that there is not any notice to the defendants that the plaintiffs intended to rely on § 52–577n here. Further, the inclusion of those references support the defendants' ***48** argument that, because a municipality or political subdivision can act only through its agents or employees, and because this court has determined that the specific conduct asserted as to Juda and Kowalski constitute discretionary acts, these counts are legally insufficient. Counts fifteen and seventeen are, therefore, stricken.

Count sixteen asserts that the Simsbury fire department was reckless in the ways alleged in count fifteen and discussed previously; count eighteen alleges that the Simsbury fire district was reckless in the ways asserted in count seventeen and discussed previously. For the reasons stated herein with regard to counts fifteen and seventeen and for the reasons herein advanced with regard to counts two and twenty-three directed to codefendant Yakemore, counts sixteen and eighteen are stricken. In order to infer recklessness, ****791** "there must be something more than a failure to exercise a reasonable degree of watchfulness to avoid danger to others or to take reasonable precautions to avoid injury to them.... [S]uch ... conduct tends to take on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent." (Internal quotation marks omitted.) *Elliott v. Waterbury*, 245 Conn. 385, 415, 715 A.2d 27(1998). These defendants' motion to strike is, therefore, granted in its entirety.

COUNTS SIX, SEVEN, EIGHT, AND TWENTY–ONE (MOTION TO STRIKE FILED BY DEFENDANTS PAQUETTE AND THE TOWN)

Paquette is identified only as a "building official" employed by the town of Simsbury. Count six of the revised complaint alleges his negligence in failing to: enforce certain provisions of this state's Building and Fire Safety Codes; failing to require the named defendant to install a fire hydrant on the premises so as to ensure an adequate flow of water from the street fire hydrant ***49** to this property; failing to inspect (or inadequately inspecting) the property at issue when he had notice of violations of the referenced codes; and, failing to cure those violations. The complaint further alleges his negligence in permitting the named defendant to operate and lease the premises that Paquette knew were in violation of the codes and without a permanent certificate of occupancy, in permitting work to continue on the property when a stop work order had issued, and in creating a high risk of harm to these plaintiffs by failing to enforce the referenced codes. Count seven alleges that the town of Simsbury is liable to indemnify Paquette for his alleged negligent acts under § 7–465.

The defendants have moved to strike these counts as beyond the statute of limitations and/or repose of § 52–584. The plaintiffs have objected and claim that the statute is tolled because a continuous course of conduct is pleaded. An examination of the allegations of negligence in paragraph thirty-five of count six makes clear that the allegations of negligence relate back to at least as early as 1985 and continued until April 23, 2003, when the fire occurred. Incorporated herein is this court's analysis provided with regard to adjudication of counts one and twenty-two as directed to the named defendant. Assuming as it must the truth of the factual allegations of paragraph thirty-five of count six and construing them broadly for the purpose of this motion, the court must deny the defendants' motion to strike counts six and seven. [6]

4 Neither party has raised the issue of the internal statute of limitations imposed by General Statutes § 7–308(b) and the court finds it unnecessary to address that issue given the adjudication regarding these counts.

5 Our Supreme Court, in *Spears v. Garcia*, 263 Conn. 22, 32, 818 A.2d 37 (2003), in recognizing a direct action against a municipality, concluded a cause of action under § 52–557n and a cause of action (for indemnity) under §§ 7–308 or 7–465 were independent causes of action and not mutually exclusive.

6 These defendants have also chosen not to file a reply to the plaintiffs' memorandum in opposition despite the governing case management order permitting them to do so.

EXHIBIT S

690 A.2d 842
Commonwealth Court of Pennsylvania.

COMMONWEALTH of Pennsylvania
v.
Norman and Susan MARCUS, Appellants.

Argued June 13, 1996.
Decided March 10, 1997.

Synopsis

Landowners appealed from order of the Court of Common Pleas, Montgomery County, No. 07085-92, Tressler, J., imposing fine for their failure to comply with terms and conditions of approved building permit and site plan. The Commonwealth Court, No. 2467 C.D. 1995, Mirarchi, Jr., Senior Judge, held that: (1) trial court had authority to take judicial notice of relevant provisions of Building Official and Code Administrators (BOCA) Building Code; (2) township was authorized to enforce terms and conditions of properly approved permitted site plan before issuing permanent certificate of occupancy; (3) grading and erosion control measures required under site plan could be enforced after completion of construction; and (4) zoning ordinance requiring all work to conform to building permit and site plan was not constitutionally vague as applied.

Affirmed.

Procedural Posture(s): On Appeal.

West Headnotes (13)

[1] **Zoning and Planning** ⇨ Review

Commonwealth Court's scope of review of trial court's decision in zoning enforcement proceeding is limited to determining whether trial committed abuse of discretion or error of law.

2 Cases that cite this headnote

[2] **Evidence** ⇨ Local laws and ordinances

Trial court had authority in zoning enforcement proceeding to take judicial notice of relevant provisions of Building Official and Code Administrators (BOCA) Building Code that had been adopted by township ordinance, where counsel for Commonwealth submitted trial memorandum to trial court at beginning of hearing setting forth sections of BOCA Code adopted by township. 42 Pa.C.S.A. § 6107(a).

3 Cases that cite this headnote

[3] **Evidence** ⇨ Local laws and ordinances

Statute permitting municipal ordinances to be judicially noticed is intended to remove any discretion of court in determining whether to take judicial notice for ordinance and provide court with authority to take whatever steps it deems necessary to apply ordinance. 42 Pa.C.S.A. § 6107(a).

[4] **Municipal Corporations** ⇨ Evidence

To prove violation of ordinance, municipality need only offer evidence of facts establishing that violation occurred.

1 Cases that cite this headnote

[5] **Evidence** ⇨ Proceedings for Taking Judicial Notice

Counsel has obligation under statute governing notice of municipal ordinances to take initiative in requesting judicial notice of ordinance by making ordinance available to court. 42 Pa.C.S.A. § 6107(a).

1 Cases that cite this headnote

[6] **Criminal Law** ⇨ Trial de novo

Rules of Criminal Procedure governing omnibus pretrial motions are inapplicable to de novo summary appeal. Rules Crim.Proc., Rule 306, 42 Pa.C.S.A.

2 Cases that cite this headnote

[7] **Zoning and Planning** ⇨ Power and duty to enforce

Township was authorized to enforce terms and conditions of properly approved permitted site plan before issuing permanent certificate of occupancy under standards set forth in ordinance adopted after building permit and site plan were approved, where landowners failed to comply with permit and site plan even after they were directed to do so by township in temporary certificate of occupancy and subsequent enforcement notice. 53 P.S. § 10617.

[8] **Zoning and Planning** ⇨ Mode of enforcement and proceedings in general

Defendants in zoning enforcement proceeding are afforded same protection as criminal defendants under Pennsylvania Rules of Criminal Procedure. 53 P.S. § 10617.2.

2 Cases that cite this headnote

[9] **Zoning and Planning** ⇨ Power and duty to enforce

Grading and erosion control measures required under site plan could be enforced after completion of construction, where landowners' failure to seed or sod exposed areas resulted in erosion and sedimentation; landowners' duty under site plan did not disappear, but continued until they complete required measures.

[10] **Zoning and Planning** ⇨ Validity of regulations in general

When constitutionality of zoning ordinance is challenged, there is presumption that ordinance is valid.

1 Cases that cite this headnote

[11] **Zoning and Planning** ~ Regulations in general

Party challenging validity of zoning ordinance has heavy burden of proving that ordinance is unconstitutional.

1 Cases that cite this headnote

[12] **Constitutional Law** ~ Zoning, planning, and land use

Zoning ordinance is unconstitutionally vague when persons of common intelligence must guess its meaning.

1 Cases that cite this headnote

[13] **Constitutional Law** ~ Zoning, planning, and land use

Zoning and Planning ~ Maps, plats, and plans; subdivisions

Zoning ordinance requiring all work to conform to building permit and site plan was not unconstitutionally vague as applied to landowners who failed to pave driveway and stabilize all exposed areas with sod, seeding and soil supplements, as required by site plan. Abington Township (PA) Ordinance 113.3.

Attorneys and Law Firms

*843 Michael J. McCaney, Jr., Blue Bell, for appellants.

R. Rex Herder, Jr., Willow Grove, for appellee.

Before PELLEGRINI and FRIEDMAN, JJ., and MIRARCHI, Jr., Senior Judge.

Opinion

MIRARCHI, Jr., Senior Judge.

Norman and Susan Marcus (Marcuses) appeal from an order of the Court of Common Pleas of Montgomery County imposing a fine for their failure to comply with the terms and conditions of the approved building permit and site plan.

The Marcuses are the owners of the property located at 1696 Stocton Road, Abington Township (Township), Montgomery County. On July 28, 1987, the Marcuses submitted an application for a building permit to construct a single-family dwelling on their property. In the site plan attached to the application, the Marcuses set forth fourteen items of grading and erosion measures. Item No. 12 of those measures stated:

> Paved [sic] proposed driveway and stabilize all exposed areas with sod and/or seeding and soil supplements, PennDOT Formula B. Protect seeded areas with hay or mulch covering. Slopes greater than 3 to 1 shall be peg sodded, hydroseeded and/or seeded and protected with Erosion Control Netting.

On July 31, 1987, the Township approved the application and the site plan, subject to conditions that "soil erosion devices" must be used during construction and that "Contractor's Notes" attached to the permit must be carefully followed. Paragraph 4 of the Contractor's Notes stated: "At the completion of construction, the pervious areas of the property must be planted with

grass seed, sod or a suitable vegetative cover to prevent erosion and sedimentation.... The contractor is responsible to provide erosion control devices."

The Marcuses began the construction in the summer of 1989. On October 19, 1990, the Township issued a temporary certificate of occupancy, setting forth four items to be completed before a permanent certificate of occupancy can be issued: (1) driveway paving; (2) removal of all dead trees and wood; (3) patching of fireplaces with cement; and (4) grading and landscaping. On June 13, 1991, the Township Code enforcement officer sent the Marcuses an enforcement notice by certified mail, stating that they must complete the items noted in the temporary certificate of occupancy by June 30, 1991, and that upon their failure to do so, the Township would issue a citation for violating the various provisions of the Township Code. The ***844** Marcuses did not respond to the enforcement notice. Nor did they appeal the notice to the Township Zoning Hearing Board, as advised in the notice.

On October 3, 1991, the Code enforcement officer issued a second enforcement notice, directing the Marcuses to complete the items noted in the temporary certificate of occupancy by October 31, 1991. The notice stated that they must pave the driveway and seed or sod the property pursuant to the approved site plan. In a letter dated October 18, 1991, the Marcuses responded that they were not required to seed or sod because the grading and erosion control measures under the site plan are the items to be done only during construction.

When the Marcuses failed to complete the work as directed despite one more extension of the deadline, the Township on May 15, 1992 issued a citation for their failure to grade and seed or sod the property as required by the permit and the site plan in violation of Sections 111.6, 113.3, 113.4, 113.5 and 119.1 of the BOCA Basic/National Building Code/1984, Ninth Edition (BOCA Code) adopted by the Township Ordinance 1629 (Ordinance). [1]

Under Section 111.6, an applicant for a building permit must submit a site plan showing to scale the size and location of a new construction and all existing structures, street grades and proposed finished grades. Further, "[a]ll work shall conform to the approved application and plans for which the permit has been issued and any approved amendments thereto." Section 113.3. Finally, a certificate must be obtained from the Township before using or occupying a new building or structure. Section 119.1.

[1] On July 2, 1992, the Township filed with the district justice the citation issued on May 15, 1992. [2] Following a hearing, the district justice found that the Marcuses violated the Ordinance as charged and imposed a fine in the amount of $1000 and costs. On appeal, the trial court found, after a de novo trial, that the Marcuses failed to seed or sod the exposed areas as required by the permit and the site plan in violation of Section 113.3 of the Ordinance and imposed a fine in the amount of $3900: $1000 for the first day of violation, plus $100 for each additional day of violation for twenty-nine days. The Marcuses' appeal to this Court followed. [3]

[2] The Marcuses first contend that the trial court did not have authority to take judicial notice of the relevant provisions of the BOCA Code because the Commonwealth failed to submit a copy of the provisions of the Ordinance and authenticate it at the hearing.

[3] Section 6107(a) of the Judicial Code, 42 Pa.C.S. § 6107(a), provides that "[t]he ordinances of municipal corporation of this Commonwealth *shall* be judicially noticed." (Emphasis added.) Further, "[t]he tribunal may inform itself of such ordinances in such manner as it may deem proper and the tribunal may call upon counsel to aid it in obtaining such information." 42 Pa.C.S. § 6107(b). Section 6107 of the Judicial Code is intended to remove any discretion of the court in determining whether to take judicial notice of an ordinance and provide the court with the authority to take whatever steps it deems necessary to apply an ordinance. *Dream Mile Club, Inc. v. Tobyhanna Township* ***845** *Board of Supervisors*, 150 Pa.Cmwlth. 309, 615 A.2d 931 (1992).

[4] [5] To prove a violation of an ordinance, the municipality need only offer evidence of facts establishing that the violation occurred. *Providence Builders, Inc. v. Commonwealth*, 89 Pa.Cmwlth. 316, 492 A.2d 488 (1985). However, counsel has an obligation under Section 6107 to take the initiative in requesting judicial notice of an ordinance by making the ordinance available to the court. *Dream Mile.*

In *Providence,* this Court noted that the ordinance was brought to the trial court's attention when the counsel had it marked as an exhibit and authenticated it by the zoning officer. However, the method used in *Providence* is not the only way of aiding the court in obtaining the relevant ordinance under Section 6107, as the Marcuses seem to suggest.

In the matter *sub judice,* the counsel for the Commonwealth submitted a trial memorandum to the trial court at the beginning of the hearing, setting forth Sections 111.6, 113.3, 113.4, 113.5, and 119.1 of the BOCA Code adopted by the Township and Section 117.4 of the Ordinance. Thus, the counsel fulfilled his obligation to aid the trial court in obtaining the relevant provisions of the Ordinance. Hence, the trial court properly took judicial notice of the Ordinance with the aid of the counsel, pursuant to Section 6107 of the Judicial Code.

[6] The Marcuses next contend that the imposition of the fine should be vacated because the BOCA Code was adopted on May 14, 1989 after they obtained the Township's approval of the building permit and site plan on July 31, 1987. The Commonwealth contends, on the other hand, that the Marcuses waived the issue because they failed to raise it before the trial court. Although the issue was not raised by the Marcuses in their trial memorandum and during the trial, we will address the issue because the trial court in its opinion disposed of the issue. [4]

[7] The Marcuses argue that the Commonwealth failed to establish the *standards* applicable when the Township approved their application for the building permit and the site plan. In so arguing, however, the Marcuses do not dispute that they were required to obtain the Township's approval of the permit and the site plan under the specific standards set forth in the Ordinance then in effect. Further, they do not challenge the terms and conditions of the approved permit and site plan or their obligation to comply with them. Thus, the relevant issue is not whether the Township may impose new *standards* under the ordinance enacted after the issuance of the permit, but whether the Township was authorized to enforce the terms and conditions of the properly approved permit and site plan before issuing a permanent certificate of occupancy under the applicable ordinance.

[8] Under Section 617 of the Pennsylvania Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, *as amended,* 53 P.S. § 10617, the municipality may institute *any* appropriate action or proceeding to prevent, correct or abate a building constructed in violation of any ordinance. *Township of Little Britain v. Lancaster County Turf Products, Inc.*, 146 Pa.Cmwlth. 211, 604 A.2d 1225 (1992). [5] Under Section 117.4 of the Ordinance, which was last amended on November *846 10, 1988 before the Marcuses began the construction, any person who constructs a building in violation of an approved permit or plan is liable for fines and penalties not exceeding $1000 for each day of the violation.

It is undisputed that the Marcuses failed to comply with the permit and the site plan even after they were directed to do so by the Township in the temporary certificate of occupancy issued in October 1990 and the subsequent enforcement notices. The Township was therefore authorized to commence a proceeding to enforce the terms and conditions of the approved permit and site plan before issuing a permanent certificate of occupancy.

[9] The Marcuses nonetheless argue, based on their own interpretation of the site plan, that the grading and erosion control measures were only temporary measures to be taken during the construction, and that the Township therefore may not enforce them after completion of the construction. The purpose of the measures set forth in Item No. 12 of the site plan was to "stabilize all exposed areas." The trial court found that their failure to seed or sod the exposed areas resulted in the erosion and sedimentation. As the trial court aptly stated, the Marcuses' duty under the site plan "does not disappear, but continues" until they complete those measures. Trial Court's Opinion, p. 5.

[10] [11] [12] The Marcuses further contend that the relevant provisions of the Ordinance are unconstitutionally vague. When the constitutionality of a zoning ordinance is challenged, there is a presumption that the ordinance is valid. *St. Margaret Memorial Hospital v. Borough Council of Borough of Aspinwall*, 163 Pa.Cmwlth. 595, 641 A.2d 1270 (1994). The party challenging the validity of the ordinance has a heavy burden of proving that the ordinance is unconstitutional. *Id.* An ordinance is unconstitutionally vague when persons of common intelligence must guess its meaning. *Farley v. Zoning Hearing Board of Lower Merion Township*, 161 Pa.Cmwlth. 229, 636 A.2d 1232 (1994), *appeal denied*, 539 Pa. 658, 651 A.2d 544 (1994).

[13] The trial court found that the Marcuses violated Section 113.3 of the Ordinance requiring that all work must conform to the approved building permit and site plan. It is undisputed that the Marcuses were aware that the site plan specifically required them to pave the driveway and stabilize all exposed areas with sod, seeding and soil supplements, PennDOT Formula B. Therefore, we reject the Marcuses' contention that the requirements set forth in the Ordinance are unconstitutionally vague.

Finally, the Marcuses contend that the evidence in the record does not establish any erosion and sedimentation occurred on their property. However, the question of whether any erosion or sedimentation has actually occurred is not determinative of the issue of the Marcuses' failure to comply with the permit and the site plan. Moreover, the trial court accepted as credible the testimony of the Marcuses' neighbor and the photographs presented by the Commonwealth and found that the erosion and sedimentation actually took place on their property.

Accordingly, the order of the trial court is affirmed.

ORDER

AND NOW, this *10th* day of *March*, 1997, the order of the Court of Common Pleas of Montgomery County in the above-captioned matter is affirmed.

All Citations

690 A.2d 842

Footnotes

1 The BOCA Code is published by the Building Officials and Code Administrators International, Inc. Most part of the 1984 version of the BOCA Code was adopted by Ordinance 1629 on May 14, 1989, replacing the 1978 version of the BOCA Code from the Township Code. Section 2 of Ordinance 1629 lists the deletion, addition and other changes made to the Township Code. Sections 111.6, 113.3, 113.4, 113.5 and 119.1 are not among the changes made to the Township Code.

2 After the issuance of the citation, the Township and the Marcuses reached an agreement, under which the Marcuses agreed to complete ground covering and landscaping by June 30, 1992. When the Marcuses failed to complete the work by the deadline, the Township filed the citation with the district justice.

3 This Court's scope of review of the trial court's decision in a zoning enforcement proceeding is limited to determining whether the trial court committed an abuse of discretion or an error of law. *Baker v. Commonwealth*, 135 Pa.Cmwlth. 597, 581 A.2d 1019 (1990).

4 The trial court held that the Marcuses waived the issue due to their failure to raise it in an omnibus pretrial motion. In a criminal case, a claim that an indictment or an information is defective is waived, if not raised in an omnibus pretrial motion filed pursuant to Pa. R.Crim.P. 306. *Commonwealth v. Gemelli*, 326 Pa. Superior Ct. 388, 474 A.2d 294 (1984). However, the Pennsylvania Rules of Criminal Procedure governing omnibus pretrial motions are inapplicable to a de

novo summary appeal. *Department of Environmental Resources v. Blosenski Disposal Services*, 110 Pa.Cmwlth. 194, 532 A.2d 497 (1987), *aff'd*, 523 Pa. 274, 566 A.2d 845 (1989).

5 Under Section 617.2 of the MPC, added by Section 62 of the Act of December 21, 1988, P.L. 1329, 53 P.S. § 10617.2, a zoning enforcement proceeding is now civil rather than criminal. However, the defendants in such proceeding are afforded the same protection as the criminal defendants under the Pennsylvania Rules of Criminal Procedure. *Commonwealth v. Harchelroad*, 154 Pa.Cmwlth. 259, 623 A.2d 878 (1993), *appeal denied*, 535 Pa. 649, 633 A.2d 153 (1993).

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EXHIBIT T

2 Brook. J. Corp. Fin. & Com. L. 511

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Note

Seth Pruss [a1]

*511 BUYER BEWARE: TEMPORARY CERTIFICATES OF OCCUPANCY & THE NEED FOR CONSUMER PROTECTION IN THE NEW YORK CITY REAL ESTATE MARKET

INTRODUCTION

Seventy-two people thought that they were buying a piece of the American dream in Brooklyn, New York. [1] They had found brand new luxury apartments at prices low enough to make homeownership a reality. [2] But their American dream soon turned upside-down. Due to building code violations and certain misrepresentations to the New York City Department of Buildings (the Department of Buildings), the developer who sold the units with temporary Certificates of Occupancy (TCOs) was unable to acquire the necessary final Certificates of Occupancy for any of the buildings. [3] The new homeowners found themselves unable to sell or refinance their units, but staying in the building meant violating New York law and being subject to a vacate order from the City. [4]

Most of these homebuyers had probably never heard of a Certificate of Occupancy, which is a document issued by the local building department that declares a building is habitable and complies with all local and state building codes. [5] Many municipalities, including New York City, issue TCOs so that homebuyers can move into their new homes while the developer completes the cosmetic details of construction. [6] However, TCOs are only valid for a short period of time, and if the developer does not obtain the final Certificate of Occupancy or extend the TCO before it expires, occupying the building becomes a violation of the New York City Administrative Code (NYCAC) and any occupants are subject to a vacate order. [7] If these homebuyers were like most people, when and if their attorneys explained to them the possible repercussions of buying real estate with a TCO, their eyes probably glazed over as they thought, "that is the developer's responsibility, not mine." Even if they understood the possible consequences of purchasing a home with a TCO, it is likely that there was *512 still very little they could do about it, other than walk away from their dream apartments.

This note proposes the need for consumer protection to guarantee that real estate developers secure final Certificates of Occupancy for homebuyers. The Department of Buildings must ensure that developers who breach their contracts with homebuyers by allowing TCOs to lapse are restricted from receiving new building permits without first obtaining any outstanding final Certificates of Occupancy.

Part I of this note provides a brief overview and history of final Certificates of Occupancy and TCOs in New York City. Part II explores how and why homebuyers can be stranded without a final Certificate of Occupancy. Part III looks at the current liabilities of the mortgage lender, the homebuyer's attorney, and the developer and also examines the appropriateness and repercussions of increasing those liabilities. Finally, Part IV analyzes some possible solutions to the problem and proposes the suspension of the issuance of permits to offending developers.

I. CERTIFICATES OF OCCUPANCY AND TEMPORARY CERTIFICATES OF OCCUPANCY

Many states and municipalities, including New York City, require building owners to keep a Certificate of Occupancy on file with the local buildings department.[8] A Certificate of Occupancy is a document that states that the property is habitable and complies with all local and state building codes.[9] The Department of Buildings defines a Certificate of Occupancy as "[t]he key document used to certify the legal use and occupancy of a building [that] describes how a building may be occupied, for example, a two-family home, a parking lot, a 40-unit multiple dwelling, or a store."[10] According to a spokesperson for the Department of Buildings, the City enacted the Certificate of Occupancy requirement in 1938, and buildings built before then may not have one.[11] However, even buildings built before 1938 need a Certificate of Occupancy if there has been any post-1938 construction that resulted in a "change of use, egress, or occupancy."[12]

Under the New York City Administrative Code, a building can not be legally occupied without a Certificate of Occupancy, and the City does not issue final Certificates of Occupancy until a building "conforms substantially to the approved plans and the provisions of [the] code and *513 other applicable laws and regulations."[13] Because of these regulations, a lag time developed between when a residential building or house was safe for occupancy and when the sale could close and the building be legally occupied.[14] Some of the requirements for obtaining a Certificate of Occupancy were deemed "cosmetic" rather than safety related and could be delayed by things as trivial as the weather.[15] In many cases, "[t]he only items that remained to be completed might be things like sodding of the lawn or pavement of the street to the curb in front of the house."[16] In 1985 the New York City Council decided that it was "not fair to postpone the closing owing to items beyond control of the parties."[17] To solve the problem, the City Council amended the Administrative Code to permit the issuance of TCOs when occupancy would "not endanger public safety, health, or welfare."[18]

According to the Department of Buildings, a TCO "means that while the Buildings Department has determined that the house or apartment building is safe to occupy, the approval is only temporary and is subject to expiration."[19] TCOs are issued for an initial period of either 90 or 180 days.[20] The Department of Buildings will renew a TCO three times before inquiring into why the required "open" items have not yet been resolved.[21] An expired TCO makes it very difficult, if not impossible, for buyers to renew homeowner's insurance, sell, or refinance their homes.[22] Additionally, occupancy of a building without a final certificate of occupancy or a TCO is illegal, leaving the new owner subject to a vacate order from the Department of Buildings.[23]

At the inception of New York City Administrative Code (NYCAC) § 27-218, the problem of expiring TCOs was not accorded much weight by the New York City Council, as it was "predicated on the belief that the builder would act in good faith and a timely manner to secure the final certificate of occupancy" and the section was only expected to be used sporadically.[24] However, since the Department of Buildings began issuing *514 TCOs, it has become common practice in New York real estate deals to close on a property before the final Certificate of Occupancy has been issued.[25] According to Judge Straniere of the New York Civil Court, "it is more likely that you will see a yeti crossing the West Shore Expressway wearing a Mets Hat than a final certificate of occupancy at a closing."[26] In fact, many New York real estate sale contracts contain a provision that states that while the seller agrees to deliver a final Certificate of Occupancy, the contract will not be voidable because of a failure to do so.[27] These provisions have relieved developers of any contractual pressure to obtain final Certificates of Occupancy prior to closing. Some developers thus simply move on to new projects without completing the necessary work to obtain the final Certificates of Occupancy for their buyers.

For this reason, the Department of Buildings "strongly recommends" that homebuyers negotiate their closings "based on a final [Certificate of Occupancy], not a TCO."[28] It warns that the buyer bears the legal obligation of obtaining the final Certificate of Occupancy and a failure to do so could result in the issuance of a vacate order.[29] In order to create an incentive for the developer of property to obtain the final Certificate of Occupancy after the sale, the Department of Buildings suggests buyers obtain "written assurance and sufficient escrow"[30] to ensure any outstanding work is completed and the final Certificate of Occupancy is obtained.[31] The amount held in escrow for this purpose in a "standard real estate contract" is $2,500.[32] But this amount is typically arbitrary and has nothing to do with the cost of completing the items listed as "open" on the TCO, and is very rarely negotiated by the parties for reasons that are discussed below.[33]

II. REASONS FOR THE CURRENT PROBLEM WITH THE TCO SYSTEM

This section looks at some of the reasons for the failings of the TCO system. Part A discusses the buyer's lack of bargaining power in insisting on a final Certificate of Occupancy at the closing. Part B looks at the insufficiency of the standard Certificate of Occupancy escrow. Part C *515 explores how building code and zoning violations can lead to the city withholding final Certificates of Occupancy. Finally, Part D examines the Department of Building's self-certification process, which allows developers to issue TCOs to themselves, and how this process can lead to buildings that do not satisfy the building or zoning code receiving TCOs.

A. BUYER'S LACK OF BARGAINING POWER IN NEGOTIATING TO CLOSE WITH A FINAL CERTIFICATE OF OCCUPANCY

If the real estate market is strong, the buyer typically has very little bargaining power compared to the seller and the mortgage lender. In fact, a strong real estate market is often referred to as a "seller's market." [34] The buyer has less bargaining power than the seller because there could be multiple potential buyers trying to purchase a single property. [35] In addition, the buyer has less bargaining power than the mortgage lender because the lender typically brings a greater amount of money to the table. [36]

When there are multiple offers on a property, the seller can easily replace a "difficult" buyer with one who is more cooperative. [37] This forces potential homebuyers to accept the contract terms as presented by the seller, with little opportunity to negotiate. [38] Therefore, there is little incentive for sellers to negotiate with a potential buyer who insists on waiting for the final Certificate of Occupancy if there are many other buyers who are willing to close with a TCO. [39] Likewise, a potential buyer will be less likely to insist on (and even less likely to receive) a higher escrow from the seller when there are multiple potential buyers, many of which will not make the same demand. [40]

Buyers have less bargaining power than mortgage lenders in real estate transactions because the lenders typically have more money at stake in the *516 transaction than the buyers. [41] According to Judge Straniere, "there is said to be a 'golden rule' in real estate; that is, 'he who has the gold, makes the rules.'" [42] In a typical residential real estate purchase, the homebuyer makes a down payment, which is traditionally about 20% of the purchase price. [43] The mortgage lender provides the difference between that amount and the price of the property. [44] Since the mortgage lender provides the majority of the purchase money, they have greater bargaining power and the buyer is unlikely to be able to negotiate out of contract terms that are beneficial to the lender. [45]

B. INSUFFICIENCY OF THE CERTIFICATE OF OCCUPANCY ESCROW

The escrow amount of $2,500 used in the standard real estate agreement, [46] which is intended to ensure that the developer obtains the final Certificate of Occupancy, is so low that in many instances it is more profitable for the developer to not complete the work. [47] In these instances, homebuyers are left with the responsibility of completing the necessary work and obtaining the Certificate of Occupancy themselves. [48] The New York Civil Courts have had at least one case where the homebuyer completed the work and obtained the Certificate of Occupancy himself. [49] However, when the buyer tried to have the escrow released to cover the cost, the developer brought an action because the escrow agreement was silent as to whether the buyer was entitled to the money if the developer failed to obtain the Certificate of Occupancy. [50]

If the buyer has closed on the property with a TCO, and the open items left to complete will cost more than the $2,500 escrow amount, the *517 developer will actually lose money by completing the work and releasing the escrow. [51] Also, even if the work to be completed will cost the developer less than the $2,500, the amount he would receive in the end is negligible compared to the money he could make by using his resources to start new projects. [52] Therefore, the standard escrow amount of $2,500 is too low to serve its intended purpose, which is to ensure that the developer/seller obtains the final Certificate of Occupancy for the buyer.

C. BUILDING CODE AND ZONING VIOLATIONS

Another scenario that has led to homebuyers being stranded without final Certificates of Occupancy occurs when a developer receives a TCO from the Department of Buildings, even though the building does not meet the building or zoning codes. [53] Buyers then get mortgages and purchase the property, only to find that the City will not issue a final Certificate of Occupancy due to those building code or zoning violations. [54]

An example of this occurred in late 2002 and early 2003, when a group of developers submitted plans to the City for four adjoined buildings and a fifth down the block on Spencer Street in Bedford Stuyvesant, Brooklyn. [55] The plans called for constructing these buildings to more than twice the height that the zoning in that area would typically allow. [56] The developers took advantage of a zoning "provision that permits bigger structures for certain community-friendly uses." [57] They claimed that the buildings would be faculty housing for the Beth Chana School for Girls in Williamsburg. [58] However, when the developers filed their application at the Department of Buildings for faculty housing, they simultaneously submitted papers to the New York State Attorney General's office stating that the apartments were to be sold as condominiums on the open market. [59]

The units, priced from $280,000 to $445,000, quickly sold out. [60] In the summer of 2004, while the buildings had a TCO, buyers began to obtain financing, close on their units, and move into the first four buildings. [61] However, extensive delays in the completion of the fifth building eventually *518 caught the attention of the Department of Buildings and the Attorney General's office. [62] Officials from the Department of Buildings looked into the development and realized that the oversized buildings were not being used as faculty housing. [63] "After discovering the zoning violations," the Department of Buildings conducted a more thorough inspection of the buildings and discovered other design flaws that would have to be corrected before occupancy of the buildings could be legal. [64] As a result, the Department of Buildings said that the buildings did not qualify for final Certificates of Occupancy and that the City would not renew the buildings' TCOs. [65] The City has kept that promise, and the Spencer Street condos' most recent TCO expired in May 2005. [66]

The negative effects of the situation have fallen mainly on the buyers. Although the City has not issued vacate orders to the buyers of the units even though occupancy without a Certificate of Occupancy is technically illegal, the buyers could not sell their units or refinance without Certificates of Occupancy. [67] To make matters worse, many of them had adjustable-rate mortgages [68] with rising rates. [69] The Department of Buildings recognized that the buyers should not have to suffer for the developer's mistakes, but they also wanted to send a message to developers who think they can violate the code and escape unscathed. [70] However, that is exactly what seems to have happened, since while the violations at Spencer Street were still outstanding, [71] the city granted the developers permits to begin other projects throughout the city. [72]

*519 D. SELF-CERTIFICATION

Considering the building code and zoning violations in the Spencer Street condominiums, one would find it surprising that the developers received TCOs in the first place. However, the Department of Buildings issues tens of thousands of building permits each year, though the city employs relatively few inspectors. [73] In order to expedite the building process and lessen the burden on the inspectors, the Department of Buildings revised its certification procedure in order to allow "licensed architects and engineers hired by builders to self-certify that their plans and documents ... comply with all zoning and building code requirements." [74] Under this procedure, the Department of Buildings checks self-certified applications for completeness, but does not subject them to a rigorous examination. [75]

While the self-certification process has served the purpose of expediting the development process, it has also raised many questions of accountability. For example, during a 1997 investigation of one developer in Staten Island, former Richmond County District Attorney William L. Murphy stated:

> It's certainly the case that [the developer] was self-certifying his plans and the department wasn't checking. If you look at the process, accountability doesn't seem to be one of its high points .... The builder is saying, "I'm told by these people--the licensed electrician, the plumber--that the work has been done, so I'm applying for the temporary certificate." It allows development to take place without the protections of a permanent certificate, and the homeowner is left holding the bag. There are hundreds, probably thousands, of temporary C. of O.'s issued. [76]

As Mr. Murphy alluded, when the problem of a dubious self-certification arises, the process allows each party involved to shift the blame to someone else; the Department of Buildings blames the developer for not giving proper information in the application, and the developer blames the contractors who supposedly assured him that the work has been properly completed. [77]

The self-certification process has been subject to numerous challenges, [78] and the Department of Buildings itself has admitted that it is *520 not yet 100% satisfied with the current process. [79] Due to building code violations that the Department of Buildings did not catch because the parties self-certified, the self-certification process has been blamed as the "cause of collapsed buildings, cascading facades, chronic corruption and homeowners left stranded with slipshod construction and no permanent certificates of occupancy." [80] However, the process is unlikely to be changed. [81] Supporters of self-certification argue that the time-saving process has greatly helped New York City complete much needed additional construction. [82] The process also saves tax dollars and helps the Department of Buildings perform more efficiently. [83] Additionally, the Department of Buildings is currently drafting "Rule 21" which would enable the Department to

> revoke self certification privileges of architects who show ignorance of the building laws, submit plans that were not prepared under their own supervision, demonstrate incompetence, knowingly make false or misleading statements, falsify any application or form, are convicted of a criminal offense which arose out of their professional occupation, or show poor moral character. [84]

While Rule 21 may not eliminate all self-certification abuses, it gives the Department of Buildings the authority to respond to those abuses. [85]

Despite the myriad reasons for and scenarios in which homebuyers end up stranded without final Certificates of Occupancy, there remain few proposed solutions to mitigate these problems. A major issue in this respect is that there is a real debate as to who should be liable for failure to obtain a final Certificate of Occupancy. The following section examines this and concludes that when a final Certificate of Occupancy is not obtained, the developer should bear the liability.

III. LIABILITY OF THE MORTGAGE LENDER, THE HOMEBUYER'S ATTORNEY, AND THE DEVELOPER

Currently, when homebuyers are left without final Certificates of Occupancy, they are subject to vacate orders and are unable to sell, *521 refinance, or even renew homeowner's insurance. [86] When this occurs, there are three parties that could face possible liability: the mortgage lender, the homebuyer's attorney, and the developer. By exploring these parties' current liabilities, this section demonstrates that it is inappropriate to hold the mortgage lender or homebuyer's attorney liable for the developer's failure to obtain a final Certificate of Occupancy. This section also shows that the current liabilities faced by the developer are not enough and too difficult to prosecute to be an effective remedy.

A. LIABILITY OF THE MORTGAGE LENDER

Some courts have discussed placing liability for a homebuyer being stranded without a final Certificate of Occupancy on the mortgage lender. [87] However, the New York Supreme Court, Appellate Division's decision in *Myers v. L & M Developers* [88] held that lenders have no duty to ensure that a Certificate of Occupancy is issued to the buyer, even when there is a provision in

the lender's commitment stating that they would not close without a final Certificate of Occupancy. [89] The court found that the provision in the commitment was solely for the protection of the lender, and did not provide the buyer with a cause of action. [90]

But the issue of mortgage lender liability was recently resurrected by the New York City Civil Court's opinion in *Howard v. Berkman, Henoch, Peterson & Peddy, P.C.* [91] According to *Howard*, a mortgage lender can face liability if it closes on property without a Certificate of Occupancy, knowing that the buyer intends to occupy the premises. [92] Most lenders *522 know of the borrower's intention because borrowers are required to complete a form stating whether they intend to use the premises as a primary residence within thirty days of the closing. [93] *Howard* posited that if the lender closes on a property without a Certificate of Occupancy, it cannot plead ignorance and demand payments from a borrower who cannot occupy the premises. [94]

Howard attaches liability to mortgage lenders by looking beyond the NYCAC to the New York Banking Law (the Banking Law). [95] Section 589 of the Banking Law requires all mortgage lenders to be licensed in order to protect consumers and "ensure that the mortgage lending industry is operating fairly, honestly and efficiently, free from deceptive and anti-competitive practice." [96] The Banking Law also provides that a lender's license can be revoked for violating any provision of the Banking Law or "any other law, rule or regulation of this state or the federal government." [97] *Howard* found that "any other law, rule or regulation" includes NYCAC § 27-214 (which creates the Certificate of Occupancy requirement). [98] Considering the legislative purpose behind the lender license requirements, and that the Banking Law permits licenses to be revoked upon any violation, *Howard* concluded that "lenders in the State of New York have the obligation to insure that a final certificate of occupancy is delivered on any building purchases they finance." [99]

Under the *Howard* analysis, when closing with a TCO, the lender is not in violation unless the developer fails to obtain the final Certificate of Occupancy. [100] Therefore, according to *Howard*, if a lender closes with a *523 TCO and the developer breaches the contract and fails to obtain the final Certificate of Occupancy, then the lender has violated § 589 of the Banking Law [101] despite entering the deal in good faith.

The *Howard* court justifies placing this affirmative duty on lenders by stating that, as the wealthiest party in real estate purchases, the lender

> has the ability, if not the best opportunity to insure that no closing takes place in the absence of a final certificate of occupancy or if a temporary certificate of occupancy is produced, that sufficient money is withheld at the closing and placed in escrow to insure that there is a fund available to remedy any violations that would prevent the issuance of a certificate of occupancy. [102]

The problem with this rationale is that even if lenders have the necessary leverage to require higher escrows, it seems inequitable to hold them liable for the actions of an independent third party.

Despite the *Howard* court's recent challenge to the *Myers* notion that lenders are not liable for a developer's failure to obtain a final Certificate of Occupancy, it is highly unlikely that lenders will go out of their way to increase pressure on developers to ensure final Certificates of Occupancy are obtained. [103] This is not only because there have not been any appeals confirming the Civil Court's opinion, but also because lenders could actually benefit from homebuyers being stranded without Certificates of Occupancy. A brief explication of the basics of refinancing helps explain this latter point.

Mortgage lenders loan money to purchasers of real estate, and in return, the borrower repays the principal of the loan plus interest over a set period of time, or the "term" of the loan. [104] When interest rates drop, many borrowers look to replace their existing high-interest debt by paying off their existing loans with new loans at the lower interest rate; this is called "refinancing." [105] However, when a borrower pays off a loan before the date of maturity, [106] the lender does not get the full amount of interest that it was *524 expecting at the outset of the loan. [107] For this reason, many mortgage loans either prohibit prepayment or impose charges when a borrower wants to prepay. [108]

One way that mortgage loans restrict prepayment is by having a "lock-in" period, which prohibits prepayment for a certain period of time. [109] When homebuyers' TCOs expire and they have not received final Certificates of Occupancy, they are not able to sell or refinance. [110] Therefore, no matter how lenient the prepayment clause in the mortgage note is, borrowers will not be able to refinance to take advantage of any declines in the interest rate until they obtain final Certificates of Occupancy. [111] Therefore, the lack of a Certificate of Occupancy creates an artificial lock-in period with real effects, preventing the borrower from prepaying the loans and assuring the lender that it will receive the rate of return anticipated upon entering the mortgage contract (at least until the homebuyer gets a final Certificate of Occupancy). Despite these incentives for the mortgage lender to not put pressure on the developer to raise the escrow or actually acquire the final Certificate of Occupancy, the lender is not necessarily acting in bad faith. Therefore, absent an agency relationship, when the contractual responsibility to obtain the final Certificate of Occupancy is the developer's, and he fails to do so, it is inappropriate to place liability on the lender for that developer's negligence or malevolence. [112]

B. LIABILITY OF THE HOMEBUYER'S ATTORNEY

Another party who could face possible liability when a homebuyer is left without a final Certificate of Occupancy is the homebuyer's attorney who represented the buyer in the closing. [113] In Judge Straniere's opinion in *Howard*, he stated, "[i]t is malpractice [for an attorney] to permit a client to purchase a premises without a valid certificate of occupancy or under the current questionable system without a valid temporary certificate of occupancy." [114] *Howard* also raised the possibility that an attorney could *525 face malpractice liability even if there was a valid TCO at the time of closing. [115] Since a TCO is issued for only a limited time, [116] if that time expires without a final Certificate of Occupancy being acquired or without the TCO being extended, the homebuyer's attorney may face liability for "assisting" in the violation of the NYCAC. [117]

Under this interpretation, whenever an attorney's client closes with a TCO, that attorney has the ongoing responsibilities of monitoring whether or not the buyer obtains a final Certificate of Occupancy and advising the client of the certificate's current status. [118] If no final Certificate of Occupancy is obtained before the TCO expires, the attorney must alert the client to the possibility of receiving a vacate order and facing potential civil or criminal penalties. [119] Whether not upholding those duties constitutes malpractice depends on if the attorney did not "render professional services with the skill, prudence, and diligence that an ordinary and reasonable lawyer would use under similar circumstances." [120] Typically, real estate lawyers' responsibilities include things such as helping the client understand the contract, clarifying mortgage terms, and ensuring valid title transfer. [121]

It is not typically the responsibility of the real estate lawyer to ensure that the parties uphold their future obligations under the contract. [122] Since ongoing monitoring of the real estate contract is not typically the responsibility of the real estate attorney, the attorney should not be subject to malpractice litigation for failing to do so. Additionally, attorneys are already legally obligated to act in their clients' best interests, [123] and homebuyers' attorneys are obligated to inform their clients of the possible *526 consequences of buying a home with a TCO. [124] Imposing additional responsibilities and liabilities on the attorney because the developer failed to satisfy his contractual obligations seems illogical.

C. LIABILITY OF THE DEVELOPER

Similar to the lenders and attorneys discussed above, a developer who fails to obtain a final Certificate of Occupancy for a homebuyer could be subject to liability under NYCAC §§ 26-125 and 26-248. [125] However, if the developer was the party contractually obligated to obtain the final Certificate of Occupancy, it is logical that he should be the party held accountable for the failure to do so.

In *Washington v. Culotta*, [126] the plaintiff/homebuyers had each contracted with the defendant/developer for the purchase of homes. [127] The plaintiffs' contracts with the developer each contained a fairly common Certificate of Occupancy clause stating

> Seller agrees to deliver a permanent Certificate of Occupancy for the dwelling but title shall not be adjourned for lack of same. It being understood and agreed that a sum not to exceed $2,500.00 from the Seller's money will be held in escrow by the lending institution or the Seller's Attorney pending production and delivery of such permanent certificate. No closing will occur, however, without Seller first obtaining a temporary Certificate of Occupancy. [128]

Seven years after signing the contract, the developer still had not obtained the final Certificate of Occupancy for the homebuyers. [129] However, the court held that "[n]either the above cited 'Certificate of Occupancy' escrow paragraph[] nor any other clause of the agreement creates a cause of action in favor of the plaintiffs in the event there is a failure of the seller to procure the final Certificate of Occupancy." [130] A further complication exists because the injury caused by "the failure to deliver a final Certificate of Occupancy is ... nebulous," [131] and was therefore deemed too speculative for a court to award damages. [132]

*527 The court in *Culotta* stated that the homebuyers would have to complete the work and obtain the final Certificates of Occupancy themselves before the court would be able to determine the proper damages. [133] The court proposed one "remedy":

> Perhaps the proper remedy is for the plaintiffs to elect to declare that a forfeiture has occurred which would make the contract a nullity and entitle them to a refund of all the monies expended for the purchase and for occupying the premises since the date of the closing and all foreseeable expenses arising from that occupancy. [134]

However, requiring homebuyers to give up their homes in order for developers to feel the backlash of their actions could be viewed as more of a punishment for the homebuyer than for the developer.

One ray of light from the homebuyers' perspective was the *Culotta* court's statement that when a developer ignores a contractual obligation and makes no effort to procure the final Certificate of Occupancy, the developer's actions might be "so egregious" that they could warrant punitive damages. [135] But it is not enough that a homebuyer stranded without a final Certificate of Occupancy can only recover from a breaching developer if the developer's actions were so egregious as to warrant punitive damages. Though the measure of damages may be debatable, the liability should still rest on the developer since the developer is the party who breaches the contractual duty to obtain a final Certificate of Occupancy for the buyer. Unfortunately, the current system of liabilities makes it very difficult for homebuyers to recover damages from a developer without giving up their homes. [136]

IV. SOLUTIONS

This section discusses three possible ways to prevent homebuyers from being stranded without final Certificates of Occupancy: elimination of the TCO system in its entirety, statutory enforcement of higher escrows, and restriction of the issuance of permits to offending developers. The section concludes that the option that would most effectively solve the problem presented is restriction of the issuance of permits to offending developers.

A. ELIMINATION OF TEMPORARY CERTIFICATES OF OCCUPANCY

One solution, presented by Judge Straniere of the New York City Civil Court, is to eliminate the TCO system in its entirety. [137] This solution is *528 overbroad. While it is true there have been protracted legal issues due to misuse of the system, possible legal and contractual problems caused by the TCO system do not outweigh the benefits that the system creates.

The New York City Council created the TCO system because it determined that it was unfair to postpone closings when the items left for completion were not dangerous and the building could be safely occupied. [138] The fact that the City Council found

it was not "fair" to postpone closings implies that it believed that there are benefits to expediting the process. [139] Indeed, there are possible benefits of closing earlier for all of the parties involved. The homebuyer is able to secure their newly acquired asset and begin benefiting from the advantages of homeownership earlier. [140] The lender is able to collect mortgage payments and interest sooner. [141] And, the developer is able to get a return on his investment earlier and have the opportunity to reinvest in future projects. The problems that arise from the TCO system are mainly due to bad faith actions on the part of a small number of actors. Eliminating the entire system by retracting NYCAC § 27-218 is far too overbroad, and would punish countless potential homebuyers, lenders, and developers for the actions of a few.

B. ENFORCEMENT OF HIGHER ESCROWS

Another possible solution is the introduction of legislation mandating that higher escrows be put aside to ensure that the developer fulfills its contractual obligation and obtains the final Certificate of Occupancy. One method of achieving this would be amending NYCAC §27-218 to require that upon the issuance of a TCO the developer create an escrow equal to twice the projected cost of completing the open items, as determined by an independent appraiser. [142] The *Howard* court suggested an even more substantial escrow requirement, making the developer put aside 10% of the sale price or the amount that represents the entire profit margin on the *529 sale. [143] While this solution appears logical, it interferes with the parties' freedom of contract, and might not be effective in all situations or might be unduly restrictive on developers.

Freedom of contract is important to retain in mortgages because the needs of every homebuyer are different. While homebuyers are required by law to have Certificates of Occupancy in order to occupy their homes, some may prefer to contract for different terms than the ones set out above. Perhaps it is beneficial for some homebuyers and developers to have the homebuyers complete the open items on the TCO themselves in exchange for something else, such as a lower base price or upgraded appliances. Though there are often imbalances of power in real estate negotiations, it is imperative that the parties are not restricted to government-mandated contract terms, and are allowed to create a contract that is as beneficial as possible to all parties.

Another issue with a possible escrow amendment is that the "twice-the-cost escrow" would not always be effective and the "profit-margin escrow" could be too detrimental to developers. If the developer is one who would abandon his contractual duties in order to pursue a new development with greater income potential, it might not matter to him whether he loses $2,500 or $5,000. The amendment would cause such developers to lose more money than they otherwise would have, but it is not a sufficient deterrent to stop developers who are willing to act in bad faith in order to make the most money possible in the shortest period of time. However, the escrow requirement suggested by the *Howard* court could be destructive to the livelihood of many developers. Many developers survive financially by being able to work on multiple projects simultaneously, using the income from one as the capital for another. [144] That means, if developers were required to obtain a final Certificate of Occupancy before receiving any profit from a project, it could make it difficult for them to begin new projects before completing previous ones. [145] Withholding developers' entire profit margins, or even 10%, until their projects are complete could seriously hinder developers' income streams and could slow down the entire development industry. Also, like the elimination of the TCO system altogether, this solution is overbroad, restricting all developers because of the actions of a few.

*530 C. RESTRICTING THE ISSUANCE OF PERMITS TO OFFENDING DEVELOPERS

The best way to deter developers from breaching their obligations to obtain final Certificates of Occupancy is to suspend delinquent developers' ability to obtain any new building permits from the city once they have let a TCO lapse. This is a variation of a solution proposed by the *Howard* court which would preclude developers from receiving any new permits until all of their current projects have received final Certificates of Occupancy and require that permits only be issued to individuals, not corporations. [146]

The problem with the *Howard* proposal is that it is overbroad and the restriction on corporations would put developers at an undue risk of personal liability. Not allowing developers to receive permits until all previous projects have received final Certificates of Occupancy would have the same negative effects on all developers as requiring the escrow to equal the profit margin. [147] It would greatly decrease the profitability of being a developer and could slow the whole development industry. Forcing developers to receive permits as individuals, as opposed to as corporations, would have the desired effect of opening the developer up to personal liability for stranding the homebuyer without a Certificate of Occupancy. However, it would also make

developers personally liable for any of the myriad of issues that could arise during development. Such heavy legal responsibility could be too much of a burden on any individual to make it worthwhile to be a developer.

Simply suspending developers' ability to receive new building permits until they correct any lapses in TCOs for which they are responsible addresses both of those problems. First, this does not affect all developers, but only those that abandon homebuyers without final Certificates of Occupancy. Developers could continue beginning new projects while previous ones still have TCOs. However, if a developer allows a TCO to expire and has not yet obtained the final Certificate of Occupancy, the developer will be restricted from obtaining any future permits until the final Certificate of Occupancy is obtained. This solution would require the homebuyer to remain vigilant as to whether the necessary work is completed and the Certificate of Occupancy is delivered. If it is not, it would be the homebuyer's responsibility to report the developer's indiscretion to the Department of Buildings. [148] The Department of Buildings would then be responsible for placing an alert on the offending *531 developer's name, disallowing any permits from being issued to that developer by self-certification or any other means.

Second, instead of disallowing the issuance of permits to any corporations, the principal officers of the corporations need to be held responsible for the corporation's actions. Under NYCAC §27-151, if a corporation applies for a building permit, all of the principal officers' names must be listed on the application. [149] Therefore, if a homebuyer reports the expiration of a TCO where the developer was a corporation, the restriction on permits would apply not only to that corporation, but to all of the principal officers as individuals, and to any other corporations in which those principle officers are members.

This solution is optimal not only because it only punishes the offenders and does not interfere with freedom of contract, but also because it justly distributes different responsibilities to the parties that are most likely to fulfill them. Developers are responsible for obtaining the final Certificate of Occupancy (unless they contract out of that duty) and their livelihood is put on hold if they do not fulfill that responsibility. Homebuyers are responsible for monitoring whether the work is completed, as they are in the best position to observe the progress (or lack thereof), and are subject to a possible vacate order if it is not. The Department of Buildings is responsible for checking the records when a complaint is reported by a homebuyer and placing the developer/corporation's officers on a "no-permit" list until the final Certificate of Occupancy is recorded. It is in the best position to do so since it maintains the files and is responsible for the issuance of permits. It would also be the responsibility of the Department of Buildings to maintain records of offending developers and report repeat offenders to the Attorney General for possible revocation of their license.

CONCLUSION

TCOs are beneficial to everyone involved in a real estate transaction. They allow people to take advantage of the benefits of homeownership earlier, and they help put money into the continued development of land by providing for earlier returns for developers and for lenders. But, despite all of the benefits brought by the issuance of TCOs, they also open the door for some bad actors to leave homebuyers stranded in desperate situations, unable to sell, refinance, or insure their homes. To quell this problem, the New York City Department of Buildings should effectuate a restriction on all offending developers, preventing them from receiving new building permits, as individuals or as corporations, until they have rectified their actions and received the final Certificates of Occupancy that they are contractually obligated to obtain.

Footnotes

a1 The George Washington University, B.A.; Brooklyn Law School, J.D. (expected 2008). I would like to thank my parents and my in-laws for all of their love, support, and guidance. I would also like to thank my wonderful wife, who truly is lovely and stubborn and brave.

1 *See* William Neuman, *Caught in the Twilight Zone*, N.Y. TIMES, Aug. 28, 2005, § 11, at 1.

2 *See id.*; *see also* The Developer's Group, Developments: The Spencer, http://www.thedevelopersgroup.com/buildings/building.aspx? buildingid=1005& (last visited Apr. 7, 2008).

3 Neuman, *supra* note 1.

4 N.Y. City Dep't of Bldgs., Certificates of Occupancy: Temporary and Final -- Fact Sheet (Jan. 10, 2006), *available at* http:// www.nyc.gov/html/dob/downloads/pdf/co_factsheet.pdf; *see* N.Y. CITY ADMINISTRATIVE CODE § 27-214 (2007); Washington v. Culotta, No. 034230/02, 2005 WL 2171189, at *4 (N.Y. Civ. Ct. July 21, 2005).

5 New York City Real Estate Glossary, Certificate of Occupancy, http:// www.new-york-new-york-real-estate.com/c2.html (last visited Apr. 7, 2008).

6 N.Y. CITY ADMINISTRATIVE CODE § 27-218 (2007); *see* Howard v. Berkman, Henoch, Peterson & Peddy, P.C., No. 034411/04, 2004 WL 2732245, at *11 (N.Y. Civ. Ct. Nov. 5, 2004).

7 N.Y. CITY ADMINISTRATIVE CODE §§ 27-218, -214 (2007); N.Y. City Dep't of Bldgs., *supra* note 4.

8 *See, e.g.*, N.Y. CITY ADMINISTRATIVE CODE § 27-214.

9 New York City Real Estate Glossary, *supra* note 5.

10 N.Y. City Dep't of Bldgs., Certificates of Occupancy, http:// www.nyc.gov/html/dob/html/certificates/certificates.shtml (last visited Apr. 7, 2008).

11 *Q & A; When a Building Must Install Ramps*, N.Y. TIMES, Sept. 29, 2002, §11, at 8; *see* N.Y. City Dep't of Bldgs., *supra* note 4.

12 N.Y. City Dep't of Bldgs., *supra* note 4.

13 N.Y. CITY ADMINISTRATIVE CODE § 27-214.

14 Howard v. Berkman, Henoch, Peterson & Peddy, P.C., No. 034411/04, 2004 WL 2732245, at *11 (N.Y. Civ. Ct. Nov. 5, 2004).

15 *Id.*

16 *Id.*

17 *Id.*

18 N.Y. CITY ADMINISTRATIVE CODE § 27-218 (2007).

19 N.Y. City Dep't of Bldgs., *supra* note 4.

20 N.Y. CITY ADMINISTRATIVE CODE § 27-218.

21 Sebastian M. D'Alessandro, *The ABC's of the 'C. of O.'*, GOTHAM CITY INSPECTOR, Spring 2005, at 3, *available at* http:// www.accuratebuilding.com/publications/inspector/gotham_inspector_spring_ 2005.pdf.

22 N.Y. City Dep't of Bldgs., *supra* note 4.

23 *See, e.g.*, Washington v. Culotta, No. 034230/02, 2005 WL 2171189, at *4 (N.Y. Civ. Ct. July 21, 2005).

24 Howard v. Berkman, Henoch, Peterson & Peddy, P.C., No. 034411/04, 2004 WL 2732245, at *11-12 (N.Y. Civ. Ct. Nov. 5, 2004).

25 *Id.* at *12.

26 *Id.*

27 *See, e.g.*, *Culotta*, 2005 WL 2171189, at *1 (Real estate sale agreement stated, "Seller agrees to deliver a permanent Certificate of Occupancy for the dwelling but title shall not be adjourned for lack of same .... No closing will occur,

however, without Seller first obtaining a temporary certificate of occupancy."); Divita v. Decker & Decker, P'ship, No. SCR1192/04, 2004 WL 3178287, at *1 (N.Y. Civ. Ct. Nov. 24, 2004); *Howard*, 2004 WL 2732245, at *1.

28 N.Y. City Dep't of Bldgs., *supra* note 4.

29 *Id.*; *see* *Culotta*, 2005 WL 2171189, at *4.

30 N.Y. City Dep't of Bldgs., *supra* note 4.

31 *Id.*

32 *Howard*, 2004 WL 2732245, at *12.

33 *Id.*

34 A "seller's market" is defined as a "[a] market which has more buyers than sellers. High prices result from this excess of demand over supply." InvestorWords.com, Seller's Market Definition, http:// www.investorwords.com/4470/sellers_market.html (last visited Apr. 8, 2008).

35 *See* Tracie Rozhon, *Housing Market Heats Up Again in New York City*, N.Y. TIMES, Feb. 19, 2007, at A1 (looking at an increased number of bidding wars on condos, co-ops, and townhouses as an indication of a strengthening real estate market).

36 Homebuyers often provide 20% or less of the purchase price of a home, with the lender providing the remaining money to the seller. *See* Yahoo! Finance, The Down Payment Hurdle, http://loan.yahoo.com/m/finance8.html (last visited Apr. 7, 2008).

37 *See* Blanche Evans, *Multiple Offers: How Can You Compete?*, REALTY TIMES, Mar. 31, 1999, http://realtytimes.com/rtcpages/19990331_ multipleoffers.htm ("In a hot market, there are more buyers than homes for sale" and "[m]ultiple offers mean that the seller has his/her pick of offers ....").

38 *See* Marty Latz, *Buyers Must Strategize in Today's Seller's Market*, NEGOTIATIONS.COM, http://www.negotiations.com/articles/real-estate/ (stating that "[i]t's not easy" to "negotiate the best possible deals as a buyer in a seller's market") (last visited Apr. 8, 2008).

39 *See* Evans, *supra* note 37 (stating that in a strong real estate market "[t]he seller will only accept terms which meet his/her own needs, so [prospective buyers should] keep contingencies to a minimum").

40 *Id.*; *see also* discussion *infra* Part II.B.

41 *See* Yahoo! Finance, *supra* note 36.

42 Divita v. Decker & Decker, P'ship, No. SCR1192/04, 2004 WL 3178287, at *7 (N.Y. Civ. Ct. Nov. 24, 2004).

43 Mortgage lenders have typically required borrowers to provide a down payment of 20% of the property's purchase price. However, there are now mortgage companies that will lend to borrowers who put down as little as zero to three percent, as long as the buyer takes out private mortgage insurance. Yahoo! Finance, *supra* note 36; *see also* Jay Romano, *Ending Mortgage Insurance*, N.Y. TIMES, Mar. 9, 1997, § 9, at 3.

44 *See generally* NexTag, Mortgage Basics, http://www.nextag.com/home-mortgage/0/Mortgage-Basics.html ("A larger down payment on a property will result in a smaller loan ....") (last visited Apr. 7, 2008).

45 *See* RESTATEMENT (THIRD) OF PROPERTY: MORTGAGES, § Introduction (1997) ("Protection [of borrowers] is amply justified because it serves to restrain the often oppressive bargaining power lenders exercise over borrowers.").

46 *See* Howard v. Berkman, Henoch, Peterson & Peddy, P.C., No. 034411/04, 2004 WL 2732245, at *12 (N.Y. Civ. Ct. Nov. 5, 2004).

47 *Id.* ("This escrow number is so artificially low that on many occasions the seller never completes the work, forfeits the $2,500.00 and leaves the homeowner the task of obtaining the certificate of occupancy.").

48 Irardy v. Decker & Decker, SCR 1279/04, 2005 N.Y. Misc. LEXIS 3268 (N.Y. Civ. Ct. Mar. 2, 2005); *Howard*, 2004 WL 2732245, at *12.

49 *Howard*, 2004 WL 2732245, at *12.

50 *Id.*

51 For example, if the cost of completion is $3,000 and the escrow is $2,500, then it will cost the developer $3,000 to receive the $2,500, leaving him with $500 less than he would have if he did not complete the work.

52 *See* Christine Haughney, *Manhattan Apartment Prices Hit Record High Despite Slump*, N.Y. TIMES, Apr. 2, 2008, at B1 ("The average price of a Manhattan apartment in the first three months of [2008] was $1.7 million ....").

53 Neuman, *supra* note 1.

54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.*

58 *Id.* Faculty housing is now no longer one of the permitted uses.

59 Neuman, *supra* note 1.

60 *Id.*

61 *Id.*

62 *Id.*

63 *Id.*

64 William Neuman, *At Spencer Street, A Solution Meets Skepticism*, N.Y. TIMES, July 9, 2006, § 11, at 2. These flaws included "a failure to meet standards for access by people with disabilities and a fire-safety problem: the apartment doors open directly onto the buildings stairwells."

65 Neuman, *supra* note 1.

66 N.Y. City Dep't of Bldgs., Temporary Certificate of Occupancy, 191 Spencer Street, *available at* http://a810-cofo.nyc.gov/cofo/B/301/399000/B301399840T2.PDF.

67 N.Y. City Dep't of Bldgs., *supra* note 4.

68 Black's Law Dictionary defines "adjustable-rate mortgage" as: "A mortgage in which the lender can periodically adjust the mortgage's interest rate in accordance with fluctuations in some external market index." BLACK'S LAW DICTIONARY (8th ed. 2004).

69 Neuman, *supra* note 1.

70 *Id.*

71 After much negotiation, a settlement was reached between the developers, the city, and the homebuyers, but the contents of that settlement are not available to the public. Interview with a Spencer Street buyer's attorney, in New York, N.Y. (Oct. 15, 2006). However, as of the publication of this note, a search of the Department of Buildings' Buildings Information

System indicates that the final Certificate of Occupancy has yet to be issued to the Spencer Street Condominiums. *See* N.Y. City Dep't of Bldgs., Building Information Search, http://a810-bisweb.nyc.gov/bisweb/bispi00.jsp (select borough "Brooklyn," enter House No. "191" and Street "Spencer Street") (last visited Apr. 7, 2008).

72 William Neuman, *Under the Radar in Brooklyn*, N.Y. TIMES, Sept. 4, 2005, § 11, at 2.

73 *See* Dennis Hevesi, *When Builders Are Inspectors*, N.Y. TIMES, Dec. 3, 2000, § 11, at 1.

74 *Id.*

75 *Id.*

76 *Id.*

77 *See id.*

78 Most recently, Mayor Bloomberg has proposed two bills that would require the Department of Buildings to conduct more complete examinations of plans and applications and enforce the suspension or revocation of self-certification privileges of architects or engineers who "knowingly or negligently certify false or non-compliant building permit applications or plans." Press Release, N.Y. City Office of the Mayor, Mayor Bloomberg Signs Two Bills Targeting Abuse of City's Self-Certification System for Engineers and Architects (Feb. 15, 2007), *available at* http:// www.ci.nyc.ny.us/portal/site/nycgov/menuitem.c0935b9a57bb4ef3daf2f1c701c789a/index.jsp? pageID=mayor_press_release&catID=1194&doc_name=http%3A%CCC2F%CCC2Fwww.ci.nyc.ny.us%CCC2Fhtml%CCC2Fom%CCC2Fhtml%CCC2F2007a%%%®pr054-07.html&cc=unused1978&rc=1194&ndi=1.

79 Hevesi, *supra* note 73.

80 *Id.*

81 *Id.*

82 David Mandl, *Professional Certification Program a Great Success*, REAL EST. WKLY., May 24, 2006, at 3C(1).

83 *See id.*

84 *Id.*; *see also* Press Release, N.Y. City Dep't of Bldgs., Buildings Commissioner Launches Safety Outreach Campaign (Oct. 18, 2006), *available at* http://home2.nyc.gov/html/dob//html/news/pr_construction_safety_101806.shtml.

85 *See* Press Release, N.Y. City Dep't of Bldgs., *supra* note 84.

86 N.Y. City Dep't of Bldgs., *supra* note 4.

87 *See* Myers v. L & M Developers, 569 N.Y.S.2d 301 (N.Y. App. Div. 1991); Divita v. Decker & Decker, P'ship, No. SCR1192/04, 2004 WL 3178287 (N.Y. Civ. Ct. Nov. 24, 2004); Howard v. Berkman, Henoch, Peterson & Peddy, P.C., No. 034411/04, 2004 WL 2732245 (N.Y. Civ. Ct. Nov. 5, 2004).

88 *Myers*, 569 N.Y.S.2d 301.

89 *Id.*

90 *Id.*

91 *Howard*, 2004 WL 2732245, at *10.

92 *Id.* ("A [lender] who loans money knowing that the mortgagor intends to occupy the premises as a primary residence cannot close the loan knowing full well that legal occupancy is prohibited."). New York City Administrative Code § 26-125(a)New York City Administrative Code § 26-125(a) states:
[E]very person who shall violate any of the provisions of any laws, rules or regulations enforceable by the department *or who shall knowingly take part or assist in any such violation* shall be guilty of an offense and upon conviction thereof shall be punishable by a fine of not more than five thousand dollars. Such person shall also be subject to the payment

of a penalty of not more than five thousand dollars to be recovered in a civil action brought in the name of the city in any court of record in the city.
N.Y. CITY ADMINISTRATIVE CODE § 26-125(a) (2007) (emphasis added). Additionally, New York City Administrative Code § 26-248(a)New York City Administrative Code § 26-248(a) reiterates:
[T]he owner of any structure, or part thereof, or land, where any violation of this subchapter or chapter one of title twenty-seven of the code shall be placed, or shall exist, and any person who may be employed *or assist in the commission of any such violation*, and any and all persons who shall violate any of the provisions of this subchapter or chapter one of title twenty-seven of the code or fail to comply therewith, or any such requirement thereof, ... shall severally, for each and every such violation or non-compliance, respectively, be punished by a fine of not more than five thousand dollars.
N.Y. CITY ADMINISTRATIVE CODE § 26-248(a) (2007) (emphasis added).

93 *Howard*, 2004 WL 2732245, at *10.

94 *Id.* ("If the lender wants to close, ignoring the law in regard to occupancy status, then it should be precluded from collecting the mortgage payments due it during that period of time.").

95 *Id.* at *10-11.

96 N.Y. BANKING LAW § 589 (McKinney 2007).

97 N.Y. BANKING LAW § 595(1)(a).

98 Judge Straniere points out that the New York State Constitution Article IX and the Municipal Home Rule Law (10)(1) both grant local governments the power to regulate the use of property within their own locality. Since these local regulations are authorized by the state constitution and statute, they must be treated as state laws within their own locality. *Howard*, 2004 WL 2732245, at *11.

99 *Id.*

100 *Id.* The court stated:
[O]nce the lender is aware that there is an escrow being held until a final certificate of occupancy is issued by the municipality, the lender has an obligation to insure that the final certificate of occupancy is issued or, in the City of New York, that the temporary certificate of occupancy is extended until the final certificate of occupancy is issued.
Id.

101 *See supra* note 96 and accompanying text.

102 *Howard*, 2004 WL 2732245, at *11.

103 Likewise, until there is further support from the higher courts in New York, *Howard* is unlikely to deter mortgage lenders from continuing to collect payments from borrowers, whether or not they have final Certificates of Occupancy.

104 *See* Mortgage for Beginners, Mortgage Basics, http:// www.forbeginners.info/mortgage/mortgage-basics.htm (last visited Apr. 8, 2008).

105 STEVEN W. BENDER ET AL., MODERN REAL ESTATE FINANCE AND LAND TRANSFER: A TRANSACTIONAL APPROACH 241 (3d ed. 2004).

106 Black's Law Dictionary defines "date of maturity" as "[t]he date when a debt falls due, such as a debt on a promissory note or bond." BLACK'S LAW DICTIONARY (8th ed. 2004).

107 BENDER ET AL., *supra* note 105, at 241.

108 *Id.*

109 *Id.*

110 *See* N.Y. City Dep't of Bldgs., *supra* note 4.

111 *See, e.g.*, Washington v. Culotta, No. 034230/02, 2005 WL 2171189, at *4 (N.Y. Civ. Ct. July 21, 2005).

112 An agency relationship "exists only if there has been a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent so to act." RESTATEMENT (SECOND) OF AGENCY § 15 (1958). In other words, unless the mortgage lender has given permission to the developer to act on the lender's behalf, and the developer consents, there is no agency between the parties.

113 *See* Divita v. Decker & Decker, P'ship, No. SCR1192/04, 2004 WL 3178287, at *7 (N.Y. Civ. Ct. Nov. 24, 2004); Howard v. Berkman, Henoch, Peterson & Peddy, P.C., No. 034411/04, 2004 WL 2732245, at *3 (N.Y. Civ. Ct. Nov. 5, 2004).

114 *Howard*, 2004 WL 2732245, at *3.

115 *Id.* at *6.

116 N.Y. CITY ADMINISTRATIVE CODE § 27-218 states:
[T]he temporary certificate of occupancy shall be issued initially for a period between ninety and one hundred eighty days, in the case of all buildings classified in occupancy group J-3 or three-family homes, and ninety days for all other buildings, subject to renewal for additional ninety-day periods at the discretion of the commissioner.
N.Y. CITY ADMINISTRATIVE CODE § 27-218 (2007). Occupancy group J-3 includes "buildings occupied as one-family or two-family dwellings, or as convents or rectories." N.Y. CITY ADMINISTRATIVE CODE § 27-266 (2007).

117 *Howard*, 2004 WL 2732245, at *6.

118 *Id.*

119 *Id.*

120 BLACK'S LAW DICTIONARY (8th ed. 2004) (defining "legal malpractice").

121 Lending Tree, The Role of Real Estate Lawyers, http:// www.lendingtree.com/smartborrower/Finding-a-listing-agent/The-role-of-real-estate-lawyers.aspx (last visited Apr. 7, 2008).

122 *See id.* Real estate lawyers' responsibilities typically include aiding clients up to and through closing, but do not typically include post-closing, ongoing tasks.

123 NEW YORK CODE OF PROF'L RESPONSIBILITY EC 7-9 (2002).

124 NEW YORK CODE OF PROF'L RESPONSIBILITY EC 7-8 (2002) ("A lawyer should exert best efforts to ensure that decisions of the client are made only after the client has been informed of relevant considerations.").

125 Howard v. Berkman, Henoch, Peterson & Peddy, P.C., No. 034411/04, 2004 WL 2732245, at *5-6 (N.Y. Civ. Ct. Nov. 5, 2004).

126 Washington v. Culotta, No. 034230/02, 2005 WL 2171189, at *1 (N.Y. Civ. Ct. July 21, 2005).

127 *Id.*

128 *Id.* at *1-2.

129 *Id.* at *2.

130 *Id.*

131 *Id.* at *3.

132 *Culotta*, 2005 WL 2171189, at *4.

133 *Id.* at *5.

134 *Id.* at *4.

135 *Id.*

136 *See id.*

137 *See* Divita v. Decker & Decker, P'ship, No. SCR1192/04, 2004 WL 3178287, at *8 (N.Y. Civ. Ct. Nov. 24, 2004) (suggesting that "[p]erhaps the solution is to eliminate [the TCO] system"); Howard v. Berkman, Henoch, Peterson & Peddy, P.C., No. 034411/04, 2004 WL 2732245, at *3 (N.Y. Civ. Ct. Nov. 5, 2004) (referring to the TCO system as "questionable, if not absurd").

138 *See Howard*, 2004 WL 2732245, at *11; *see also* N.Y. CITY ADMINISTRATIVE CODE § 27-218 (2007).

139 *See Howard*, 2004 WL 2732245, at *11.

140 *See* Habitat for Humanity, Benefits of Homeownership, *available at* http://www.habitatnyc.org/pdf/Toolkit/homewonership.pdf (last visited Apr. 7, 2008).

141 Mortgage Professor, Mortgage Closing Date: Does it Matter? http:// www.mtgprofessor.com/A%20-%20Options/closing_date.htm ("The interest clock on your loan starts ticking on the closing date, because the lender expects to be paid beginning the day the funds are disbursed.") (last visited Apr. 7, 2008).

142 Therefore, if it would cost the developer an additional $2,500 to complete a project and obtain the final Certificate of Occupancy, the developer would be required to create an escrow of $5,000 that can only be released upon obtaining the final Certificate of Occupancy.

143 *Howard*, 2004 WL 2732245, at *12.

144 Answers.com, Real Estate Developer: The Economics of Real Estate Development, http://www.answers.com/topic/real-estate-developer-1 (one common form of real estate development financing is equity financing, the "use of cash flows from other projects owned by the developer") (last visited Apr. 7, 2008).

145 *See id.*

146 *Howard*, 2004 WL 2732245, at *12.

147 *See* discussion *supra* Part IV.B.

148 This would also require the homebuyer's attorney to make the homebuyer aware of these responsibilities when purchasing a home with a TCO. The homebuyer could also contract for the attorney to monitor whether the filing of the Certificate of Occupancy occurs and report any failure to the Department of Buildings.

149 N.Y. CITY ADMINISTRATIVE CODE § 27-151 (2007).

2 BKNJCFCL 511

End of Document

EXHIBIT U

5 Misc.3d 1020(A)
Unreported Disposition
(The decision of the Court is referenced in a table in the New York Supplement.)
Civil Court, City of New York,
Richmond County.

Michael HOWARD, Plaintiff,
v.
BERKMAN, HENOCH, PETERSON & PEDDY, P.C., Defendant.

No. 034411/04.
|
Nov. 5, 2004.

Attorneys and Law Firms

Munzer & Saunders, LLP, New York, attorney for plaintiff.

Joseph E. Macy, Esq., Berkman, Henoch, Peterson & Peddy, P.C., Garden City, attorney for defendant.

Opinion

PHILIP S. STRANIERE, J.

*1 Plaintiff, Michael Howard, commenced this action against the defendant, Berkman, Henoch, Peterson & Peddy, P.C. alleging that owing to the defendant's legal malpractice the plaintiff has suffered damages. Currently before the Court is a motion for partial summary judgment only on the issue of liability. Defendant opposes the motion. Both sides are represented by counsel, although the defendant is representing itself.

Certain facts are not in dispute. Plaintiff retained defendant law firm to represent him in regard to the purchase of the premises 40 Union Court, Staten Island, New York. Plaintiff apparently selected the defendant as his counsel since defendant was part of a referral list maintained by the labor union of which the plaintiff was a member. A written contract was entered into between plaintiff and the seller TPZ Corporation on July 26, 2001. The contract had an anticipated closing date of September 15, 2001. Paragraph 13 of the rider to the contract provided: "The seller agrees to deliver a final Certificate of Occupancy for the premises. However, the purchaser agrees to close with a Temporary Certificate of Occupancy or without any Certificate of Occupancy if Seller has not yet obtained same by the scheduled closing date." This paragraph was amended in writing at the time of contract to say: "The seller agrees to deliver a final certificate of occupancy for the premises and any improvements as they exist. However, the purchaser agrees to close with a Temporary Certificate of Occupancy by the scheduled closing date." The paragraph went on to provide that the sum of $2,500.00 would be deposited by the seller in escrow to guarantee the delivery of a final certificate of occupancy. It should be pointed out that the paragraph does not specify who would be the escrow agent under this agreement.

A review of the contract submitted as an exhibit by the plaintiff reveals that the first few pages of the rider are not included, as the rider starts at the middle of paragraph 11. Also the contract does not contain a legal description. There is no metes and bounds description attached and the spot for the block and lot number contains a block but no lot. The rider to contract at paragraph 12 and part of paragraph 11 points out in detail that the property being sold is a foreclosure property acquired by the seller and that there may be title and certificate of occupancy problems that are not resolvable. Paragraph 12 gives the purchaser the right to cancel the contract and receive a refund of any down payment in those situations.

In September 2001 the purchaser's attorney asserts that he was orally notified by the seller's attorney that they had a temporary certificate of occupancy and that a closing could be scheduled. Defendant admits that it never received a copy by facsimile

transmission, regular mail or overnight mail. Defendant states that based on this representation a closing was set. It should be pointed out that neither party has produced an affirmation from the seller's attorney to confirm this fact. In any case, the closing took place on September 26, 2001 at seller's attorney's office. It is unclear whether the closing took place at the Staten Island, New York office or the Sparta, New Jersey office of the seller's attorney since no RESPA statement (HUD –1) is attached as an exhibit.

*2 No temporary or final certificate of occupancy was produced at the closing, yet the matter closed. Seller's attorney agreed to hold $2,500.00 in escrow as provided by the contract. The purchaser apparently waived any right to cancel the transaction that existed under the terms of the contract when he agreed to accept title without either a temporary or final certificate of occupancy. It should be pointed out that the failure to have a certificate of occupancy is not an objection to title and does not affect the marketability or insurability of title. The issue of whether a premises can be legally occupied is not a title issue. Although this status is provided in most title reports, it is provided for "information purposes only."

On July 31, 2002 an inspection of the premises by the New York City Department of Buildings led to the issuance of a notice of violation against Michael Howard and Jean Howard. The violation was described as follows: "Building occupied without a valid certificate of occupancy. Noted: Department of Buildings records shows that this building have (sic) no C of O. Remedy: Obtain valid certificate of occupancy." The notice of violation alleged that the premises was in violation of New York City Administrative Code section 27–214. The section states: "New buildings: sidewalk requirements. a. Except as permitted under the provisions of section 27–218 of this article, no building hereafter constructed shall be occupied or used, in whole or in part, unless and until a certificate of occupancy shall have been issued certifying that such building conforms substantially to the approved plans and the provisions of this code and other applicable laws and regulations." Paragraph "c" of that section provides: "No certificate of occupancy or temporary certificate of occupancy (excluding amendments to previously issued certificates of occupancy) shall be issued on or after April First, Nineteen Hundred Eighty–Seven for any existing building which has not fully complied with all requirements of this code applicable to such existing building." Since neither side presented any information as to when the premises was originally constructed, when it was foreclosed and its status when it was foreclosed, it is impossible to determine if on the date the plaintiff purchased the premises it even qualified for a temporary certificate of occupancy; the age of the building may have made issuance of a final certificate of occupancy as the only option upon compliance with all of the requirements of the building code for an existing premises.

On the return date of the violation at the Environmental Control Board, the notice of violation was dismissed because Michael Howard produced gas, electric and water bills for several months prior to the date of the notice of violation which showed that no one was living in the building since the usage was billed at a minimum rate.

On March 6, 2003, the Building Department issued a final certificate of occupancy for the premises.

*3 Plaintiff commenced this action for damages incurred alleging that because he had not received a temporary or final certificate of occupancy he could not occupy this premises and rent his then current home. He alleges that he had to make payments for mortgage principal and interest, taxes and insurance and utility bills at the premises in question but could not occupy it. He is seeking these items as damages directly flowing from the defendant's legal malpractice.

This is just another example of the problems created for homeowners, attorneys, lenders and ultimately the Court system because of the questionable, if not absurd system, of allowing temporary rather than final certificates of occupancy to be issued in the City of New York and especially on Staten Island. An analysis of the system leads to the conclusion that if a rational basis existed for its initial imposition, that reasoning has long ago disappeared into a morass of problems that would have never existed had the City of New York devoted sufficient resources to the Department of Buildings so that final certificates of occupancy issued at the closing of title would be the rule and not the exception. It is incomprehensible that an industry such as the building industry which generates so much revenue for the City should be treated as if it were a victim of a natural disaster in need of eleemosynary relief. If more personnel is needed and the current system does not generate enough income to hire sufficient staff, then the Buildings Department should raise the fees; a cost that would ultimately be passed along to the home buyer. The real

"malpractice" in this and other similar actions is the failure of the City of New York to abide by its statutory obligation to protect the consumer, attorneys, lenders and the building industry by issuing timely certificates of occupancy. It is incomprehensible that practically every other municipality in this state and perhaps the United States has figured this out, yet the greatest city in the world cannot do so. In fact, some places even have the ability to inspect premises on resale and issue certificates of continuing occupancy.

LEGAL ISSUES PRESENTED:

A. Is It Malpractice To Close Without A Certificate of Occupancy?

There can only be one answer to this question. It is malpractice to permit a client to purchase a premises without a valid certificate of occupancy or under the current questionable system without a valid temporary certificate of occupancy. To represent a client in the purchase of residential real property to be occupied by that person as a dwelling place and to permit that client to enter into title without a certificate of occupancy is a clear breach of an attorney's obligation to that client. Blanche DuBois in Tennessee Williams' "Streetcar Named Desire" may be able to depend on the "kindness of strangers;" however, such a standard does not apply to our adversarial system, especially when it comes to representing clients in the purchase and sale of real property, the biggest investment most persons ever make in their lives. The failure to have a certificate of occupancy makes occupancy of the premises illegal. Whether it is a final certificate of occupancy or a temporary one, if such a standard is permitted under local building codes, the failure to have that document means that any subsequent occupancy violates the law and attorneys cannot be engaged in practices that lead to the violation of statutes.

*4 Certificates of occupancy are not issued as items to be framed for wall decoration; they are issued to insure that the wall is sturdy enough to support the hanging of such an ornamentation. Without the issuance of a certificate of occupancy, it is impossible to determine if a structure is built to code and safe for human habitation. As stated above, it is designed to insure that "such building conforms substantially to the approved plans and the provisions of this code and other applicable laws and regulations" (N.Y.CAC 27-214(a)). The lack of a certificate of occupancy leads to the presumption that the premises is not constructed in conformity with the applicable code. A Court faced with this issue only knows that the certificate has not been issued. It is impossible to determine if the reason for that is the failure of the builder to pay the architect, a ministerial error, or that the premises is about to collapse faster than the Yankees in the 2004 American League Championship Series.

Although the state legislature has never specifically addressed the necessity of certificates of occupancy in the construction of one and two family homes, it has found that they are required for multiple dwellings (Multiple Dwelling Law Article 8), that is, residential dwellings of three or more units (MDL 4(7)). The certificate of occupancy rules under the NYCAC cover all dwellings from one family to multiple dwellings and because, under the Municipal Home Rule Law, the legislature has given the authority to local government to set these standards, these local regulations have the same weight as a state statute. The MDL states that: "It shall be unlawful to commence the construction or alteration of a multiple dwelling ... until the issuance of a permit by the department upon compliance with all of the following requirements: ..." (MDL 300). It also provides: "No multiple dwelling shall be occupied in whole or in part until the issuance of a certificate by the department that said dwelling conforms in all respects to the requirements of this chapter, to the building code and rules and to all other applicable law, ..." (MDL 301). The clear thrust of these statutes is that certificates of occupancy are designed to insure the safety of the inhabitants of dwellings in this state and to protect them from unsafe structures.

There is one instance where it would not be malpractice to close in this situation and that is if the client or anyone else was not going to occupy the premises because the premises was either going to be demolished or renovated. However, that is not the situation in this case. The facts establish that the plaintiff was purchasing either for his own personal use or for use as a rental property. The fact that there was neither a temporary nor permanent certificate of occupancy makes the actions of the defendant in allowing the closing to take place, negligence. The defendant cannot deny it had this knowledge since it asserts that the plaintiff only qualified for representation under the union legal services plan if the purchase was for personal residential use. It should be pointed out that neither side has submitted a copy of this agreement as an exhibit.

*5 If, in fact, the plaintiff-client insisted that the closing take place, then, in order that it not be malpractice the defendant would have to have had the plaintiff execute a detailed release informing the plaintiff of the law, the legal implications of closing without a certificate of occupancy, that the closing was going forward against the advice of counsel, and advising the client to consult another attorney. In this case such a course would seem to have been almost mandatory by the defendant since paragraph 12 of the contract of sale served as notice to the plaintiff-purchaser that the seller could convey title without a certificate of occupancy and that in such case the plaintiff could either accept or reject title. The contract provided that if the purchaser rejected title, damages would be limited to a refund of the deposit; but if the purchaser, as he did in this situation, accepted title, the purchaser would be taking title "as is" without any further remedies against the seller. Acceptance of title with these restrictions is of such import that in order to not commit legal malpractice, defendant would have to produce some documentation that the plaintiff was fully aware of the implications of closing with this cloud on his right to occupancy. No such documentation has been produced. In fact the defendant has not produced any documentation to indicate whether a temporary certificate of occupancy was ever issued to this premises or if one were issued and expired, what were the open items that prevented the issuance of the permanent certificate of occupancy.

B. Does The NYCAC Address The Issue Of Closing Without A Certificate of Occupancy?
A review of the NYCAC reveals that the plaintiff, defendant, seller, counsel to the seller, the lender and counsel to the lender all face potential liability under the law.

NYCAC 26–125(a) provides:

> every person who shall violate any provisions of any laws, rules, or regulations enforceable by the department or who shall knowingly take part or assist in any such violation shall be guilty of an offense and upon conviction thereof shall be punishable by a fine of not more than five thousand dollars. Such person shall also be subject to the payment of a penalty of not more than five thousand dollars to be recovered in a civil action brought in the name of the city in any court of record in the city.

In addition, NYCAC 26–248(a) provides:

> the owner of any structure, or part thereof, or land, where any violation of this subchapter or chapter one of title twenty-seven of the code shall be placed, or shall exist, and any person who may be employed or assist in the commission of such violation, and any and all persons who shall violate any of the provisions of this subchapter or chapter one of title twenty-seven of the code or fail to comply there with, or any such requirement thereof, ... shall severally, for each and every such violation of non-compliance, respectively, be punished by a fine of not more than five thousand dollars.

*6 Occupying a premises without a certificate of occupancy is a violation of NYCAC 27–214 which is a section included in Chapter One of Title Twenty–Seven. This means that not only is the plaintiff-owner subject to liability, but defendant as counsel to the purchaser has "assisted" in committing the violation by permitting the plaintiff to close title with an intent to occupy the premises in violation of the administrative code. Applying these statutes to the practice of real estate law, can only lead to the conclusion that when an attorney permits a client to close title and enter into possession of a premises that lacks a valid certificate of occupancy reflecting the actual use of the premises, that attorney is assisting in violating the NYCAC. Likewise, a lender or lender's counsel that closes knowing that the premises either lacks a valid certificate of occupancy or has an actual use, not in conformity with the valid certificate of occupancy, is also in violation of the statute.

The existence of the temporary certificate of occupancy not only complicates the process but also exposes sellers, purchasers, attorneys and lenders to liability. This is because the NYCAC 27–218 states that in regard to the J–3 occupancy group a temporary certificate is issued for a period between 90 and 180 days and it may be renewed for additional 90 day periods. In the event the final certificate of occupancy is not obtained within the time set forth in the initial temporary certificate of occupancy or any extension thereof, the occupancy then becomes illegal and therefore all of the above parties are technically assisting in violation of the NYCAC by permitting the purchaser to continue occupancy after that date. What is the obligation of each party to continue to check the Buildings Department records? An argument can be made that a purchaser's attorney who permits the closing to go forward with a temporary certificate of occupancy has a continuing obligation to monitor the situation; advise the client that no final certificate of occupancy has been obtained; and that the client is not only subject to being evicted by the Buildings Department but also potentially to civil and criminal penalties. Although this obligation is not spelled out in the statute and perhaps the necessary follow through is not done by many attorneys in actual practice, the current system of issuing temporary certificates of occupancy is a trap for the unwary and a potential source of liability for malpractice if strictly interpreted.

It should however, be pointed out that there will be no additional liability attaching to the defendant since the plaintiff was successful in getting the violation dismissed at the Environmental Control Board hearing on September 18, 2002 by establishing that although plaintiff intended to occupy the premises, he had not in fact done so. If the plaintiff-owner is not liable, then the defendant cannot also be liable.

C. Is It A Violation Of The Code Of Professional Responsibility To Close With A Temporary Certificate Of Occupancy?

*7 Since this action involves an allegation of legal malpractice, it is important to examine the Code of Professional Responsibility to see if the system of issuing temporary certificates of occupancy in general, or the facts of this case specifically, lead to a violation of the Code.

Ethical Consideration 6–4 provides:

> Having undertaken representation, a lawyer should use proper care to safeguard the interests of the client. If a lawyer has accepted employment in a matter beyond the lawyer's competence but in which the lawyer expected to become competent, the lawyer should diligently undertake the work and study necessary to be qualified. In addition to being qualified to handle a particular matter, the lawyer's obligation to the client requires adequate preparation for and appropriate attention to the legal work, as well as promptly responding to inquires from the client.

Disciplinary Rule 6–101 provides:

> A. A lawyer shall not: 1. Handle a legal matter which the lawyer knows or should have known that he or she is not competent to handle without associating with a lawyer who is competent to handle it. 2. Handle a legal matter without preparation adequate in the circumstances. 3. Neglect a legal matter entrusted to the lawyer."

Ethical Consideration 7–8 states:

> A lawyer should exert best efforts to insure that decisions of the client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer ought not be confined to purely legal considerations. A lawyer should advise the client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his or her experience as well as the lawyer's objective viewpoint. In assisting the client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. The lawyer may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions. In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not the lawyer. In the event that the client, in a non-adjudicatory matter, insists upon a course of conduct that is contrary to the judgment and advice of the lawyer, but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment.

Ethical Consideration 7–9 states:

> In the exercise of the lawyer's professional judgment on those decisions which are for the lawyer's determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interest of the client. However, when an action in the best interest of a client seems to the lawyer to be unjust, the lawyer may ask the client for permission to forego such action.

*8 Disciplinary Rule 7–101 states: "A. A lawyer shall not intentionally: ... 3. Prejudice or damage the client during the course of the professional relationship...."

Although enforcement of the Code of Professional Responsibility is beyond the jurisdiction of this Court, it is obvious that in addition to all the other problems caused by the system of issuing temporary certificates of occupancy, exposure to a grievance is one of the possible results. In this case, the problem of course is: did the defendant give proper advice to the plaintiff so that the plaintiff could make his own decision in regard to closing without the existence of the temporary or final certificate of occupancy? At a minimum, the defendant was required to inform the plaintiff of all the potential problems that could occur by closing in this situation beyond monetary concerns, including being prohibited from occupying the premises, and facing civil and criminal penalties. By closing without even a temporary certificate of occupancy, the plaintiff, if going into occupancy, would be violating the applicable law. How does an attorney give such advice without being able to document that all disclosures were given to the client and that the client elected to close in spite of and against the advice of counsel? If never having received a temporary certificate of occupancy, how can the attorney advise the client as to whether or not a final certificate of occupancy will ever be issued since a temporary certificate of occupancy would list all items considered incomplete by the Buildings Department?

What is troubling about Ethical Consideration 7–8 is the sentence "advice of a lawyer to the client need not be confined to purely legal considerations." Does this mean the client can expect the lawyer to give financial advice, serve as a structural engineer, accountant, physician, spiritual advisor, home improvement contractor and auto mechanic? I am sure that the attorney's malpractice insurance carrier would be happy to cover an attorney who was sued for giving improper non-legal advice (please note the sarcasm). For instance, when a seller when faced with having to complete the Property Disclosure Act Statement(Real Property Law Article 14) notifies the attorney that he or she has no idea how to answer the questions, the attorney not only can advise the client how to complete the questions but might be expected or even required to do so under this ethical consideration.

Would this not make the attorney a defendant in any suits that arose concerning defects in the premises arising after closing?

Or, if the attorney advises the client not to complete the form but to give the $500.00 credit (RPL 465) and the seller later gets sued, would the attorney also be a proper party? I would think that bar associations around this state may want to re-word this Ethical Consideration so that it does not have this potential for mischief.

D. Is The Plaintiff Entitled To Damages?

*9 Plaintiff is only seeking partial summary judgment on the issue of liability, however, a summary judgment motion permits the Court to search the record and examine the sufficiency of the complaint (CPLR 3212). One problem is that the plaintiff has not produced a copy of the deed which would establish that the plaintiff is the owner of the premises. This may be an issue since the notice of violation is issued in the name of "Michael and Jean A. Howard." The contract and the pleadings are only in the name of Michael Howard. Although not admitted in the answer, defendant apparently is not challenging that the closing took place and that the plaintiff is the only proper party.

Although the issue of damages is not specifically raised in this motion, there are certain aspects of that portion of the case that require analysis and comment. Defendant asserts that initially the plaintiff stated that he intended to rent 40 Union Court and that because it could not be occupied he lost rental income. Defendant claims that when the plaintiff realized this, he changed his allegation to the fact that he attempted to move into the premises but could not do so because there was no certificate of occupancy and that if that was his intention defendant would not have represented him under the legal service plan agreement. Plaintiff later was successful in defeating the violation that was issued at the ECB hearing by establishing that no one was occupying the premises. If no one was in the premises one must question why a notice of violation was issued in the first place. According to the contract, this was a foreclosure property. If it was empty, why a violation? The mere fact that title changed would not have caused a violation to be issued. The history of the property would lead to the conclusion that no certificate of occupancy was in effect and the premises was unoccupied since the building was first constructed, so why was a notice of violation issued? Interestingly, nowhere in the summons and complaint is the address of the plaintiff listed. On the summons the plaintiff's address is "care of" his attorney's office. When this is taken into account with a letter to defendant from plaintiff's prior attorney claiming lost "rent" of $1,300.00 a month along with other charges incurred at the premises, one must question what was the plaintiff's true intent concerning the premises. If his claim is for rent lost at the premises, then he cannot collect it as a matter of law. A landlord cannot collect rent from a premises being rented in violation of a certificate of occupancy (MDL 302). Although this statute applies only to multiple dwellings, this Court has consistently held it applies to all illegal occupancies. The Court will not permit a landlord to benefit financially from the rental of a premises being occupied in violation of the law. The law will not enforce an illegal contract.

Plaintiff is claiming that the assertion that he intended to rent the premises is not correct. He is claiming that he intended to rent his current home and occupy 40 Union Court. This claim is questionable. Plaintiff's address in the contract of purchase is listed as 40 Union Court; the premises to be purchased. There is no proof of ownership of any other premises, nor is there an explanation of why he has not revealed any other address, although the checks he submitted as an exhibit have 10 Union Court as his address. This is possibly an adjacent property making the defendant's contention that the plaintiff knew he was closing without a certificate of occupancy and knowingly waived any objection to that fact more believable. This, of course, would not relieve the defendant of its malpractice and its failure to take any steps to reduce this understanding and waiver to a writing, but it might be relevant to the issue of damages if it can be established that the plaintiff was aware of the risk.

*10 If plaintiff is claiming that he lost income from the premises he currently lives in and could not rent because he could not move out, he is going to have to prove ownership, a valid certificate of occupancy, either a lease to a tenant which he could not honor, or expert testimony as to the fair market rental value of the premises.

It should also be pointed out that an argument can be made that the mortgagee for 40 Union Court, ABN AMRO Mortgage Group, Inc., should be precluded from collecting principal and interest payments during the period there was no certificate of occupancy. A mortgagee who loans money knowing that the mortgagor intends to occupy the premises as a primary residence

cannot close the loan knowing full well that legal occupancy is prohibited. The lender would know the borrower's intent from the application submitted and would have the borrower execute a document at closing indicating that the borrower intended to occupy the premises as his primary residence within thirty days of closing, and if that does not occur the lender can call the loan. Such a form, if not a federally required one, is standard for almost all lenders. The lender should have known the occupancy status from the title search where a municipal search in this regard would have been provided for "information only." If this lender is "out of state" and not familiar with local practices, it should either hire local counsel to protect its position or not lend money in New York City. The lender cannot plead ignorance and place a borrower in a situation where they owe the money and cannot live in the premises. If the lender wants to close, ignoring the law in regard to occupancy status, then it should be precluded from collecting the mortgage payments due it during that period of time.

The State of New York has found it necessary to license lenders including mortgage bankers (Banking Law Article 12-D). Banking Law 589 sets forth the legislative purpose for licensing, It states:

> The activities of lenders and their agents offering financing for residential real property have a direct and immediate impact upon the housing industry, the neighborhoods and communities of this state, its homeowners and potential homeowners. The legislature finds that it is essential for the protection of the citizens of this state and the stability of the state's economy that reasonable standards governing the business practices of mortgage lenders and their agents be imposed. The legislature further finds that the obligations of lenders and their agents to consumers in connection with making, soliciting, processing, placing or negotiating of mortgage loans are such as to warrant the uniform regulation of the residential mortgage lending process, including the application, solicitation, making and servicing of mortgage loans. Consistent with the purposes of promoting mortgage lending for the benefit of our citizens by responsible providers of mortgage loans and services and avoiding requirements is consistent with legitimate and responsible business practices in the mortgage lending industry, the purpose of this article is to protect New York consumers seeking a residential mortgage loan and to ensure that the mortgage lending industry is operating fairly, honestly and efficiently, free from deceptive and anti-competitive practices.

*11 In light of this legislative purpose and the fact that Banking Law 595(1)(a) permits the superintendent of banking to revoke a license if a licensee violates "any other law, rule or regulation of this state or the federal government" it can only be concluded that lenders in the State of New York have the obligation to insure that a final certificate of occupancy is delivered on any building purchases they finance. The New York State Constitution Article IX grants to local governments certain powers including the power to regulate the use of property within that local subdivision. The Municipal Home Rule Law (10)(1) permits local governments, like the City of New York, to enact local laws concerning property. Since these local laws are authorized by the state constitution and statute, these local regulations become a "law, rule or regulation of the state" to which the licensed lender must adhere. The failure of a lender to insure that a mortgagor borrowing money so as to purchase a residential property for human occupancy, becomes an act that may lead the superintendent of banking to revoke that lender's license. Likewise, once the lender is aware that there is an escrow being held until a final certificate of occupancy is issued by the municipality, the lender has an obligation to insure that the final certificate of occupancy is issued or, in the City of New York, that the temporary certificate of occupancy is extended until the final certificate of occupancy is issued. As a licensee, a lender cannot advance the money for purchase and then stick its head in the sand and ignore the strong public purpose of the State of New York to provide safe housing and consumer protection.

There is said to be a "golden rule" in real estate, that is, "he who has the gold, makes the rules." As the mortgagee is the entity that is providing the most "gold" when it comes to the purchase of residential, or for that matter, any improved real estate, it has the ability, if not the best opportunity to insure that no closing takes place in the absence of a final certificate of occupancy

or if a temporary certificate of occupancy is produced, that sufficient money is withheld at the closing and placed in escrow to insure that there is a fund available to remedy any violations that would prevent the issuance of the certificate of occupancy.

It must be concluded that lenders issuing mortgage loans in New York have a legal obligation not to close the loan unless there is a final certificate of occupancy or, if a temporary certificate of occupancy is in effect, that enough money is held in escrow to insure the outstanding work can be completed and paid for within the time set forth in the temporary certificate of occupancy.

If the plaintiff intends to seek damages, the plaintiff must deal with the issues set forth above.

E. What Is The Function Of A Temporary Certificate Of Occupancy?
In 1985 the New York City Council amended the NYCAC to add section 27-218 which provides for the issuing of a "temporary certificate of occupancy." Initially, it was enacted to end the crisis that had occurred in the construction of residential housing because of the Department of Buildings' inability to issue timely final certificates of occupancy. In many cases it was argued that the premises had been constructed in accordance with all regulations and was safe for human occupancy. The only items that remained to be completed might be things like sodding of the lawn or pavement of the street to the curb in front of the house. It was felt that since such items were more "cosmetic" than safety related and completion of them might be delayed because of adverse weather conditions, especially in the winter, it was not fair to postpone the closing owing to items beyond the control of the parties. The temporary certificate of occupancy was advocated, developed and subsequently enacted to permit occupancy when only "cosmetic" items remained to be completed. It was predicated on the belief that the builder would act in good faith and a timely manner to secure the final certificate of occupancy.

*12 What was anticipated to be a sporadically used procedure has become the rule rather than the exception. In new construction cases, real estate attorneys and lenders in Richmond County can probably count on their hand the number of times they have closed title with a final certificate of occupancy. In fact, it is more likely that you will see a yeti crossing the West Shore Expressway wearing a Mets Hat than a final certificate of occupancy at a closing. This has resulted in an aggregate of "agita" for attorneys who represent these parties, primarily purchasers, at the closing of title. The standard real estate contract calls for the sum of $2,500.00 to be held in escrow at closing to insure the seller produce a final certificate of occupancy. On Staten Island this is the "accepted" amount to be held; it often is totally unrelated to the actual cost of completing the items the Buildings Department lists as open on the temporary certificate of occupancy and is almost never negotiated by the purchaser or lender. As a result of this practice hundreds of attorneys are holding millions of dollars in escrow accounts awaiting the seller or someone else to produce a final certificate of occupancy.

One must question whether or not such an amount ($2,500.00) is enough to compel a seller to complete the work, especially when fully attached houses in 2004 are selling for close to $300,000.00. This escrow number is so artificially low that on many occasions the seller never completes the work, forfeits the $2,500.00 and leaves the homeowner the task of obtaining the certificate of occupancy. This Court has even had cases when the purchaser having obtained the final certificate of occupancy seeks to have the escrow released to him or her and the seller opposes that because the escrow agreement does not clarify that the purchaser is entitled to the money if the seller fails to obtain the document. Usually, the seller completes the house or the housing development; does not deliver the final certificates of occupancy and moves on to another project. Since the seller is probably a corporation that ceases to exist after the last home is sold, buyers are often left to fend for themselves in obtaining the final certificate of occupancy, and may find themselves without a real legal remedy. This apparently is the situation in this case. The buyer might even face a vacate order from the Buildings Department because the temporary certificate of occupancy has not been issued. In order to correct the situation the buyer will have to expend time and money: money to complete the work, money for architects, money for lawyers, money for expediters to process the papers through the appropriate City agencies, etc.

There are several remedies to this situation. First, if there is going to be a system of temporary certificates of occupancy, then require an amount be held in escrow that will compel the seller to obtain the document, such as ten percent of the sale price, or a number that represents the profit margin on the sale. The amount being held has to be enough to force the seller to live up to its contractual obligation. Second, do not permit corporations to receive building permits. Have the permits issued to

individuals and preclude that individual from obtaining any new permits until all of the houses in previously approved projects have received a final certificate of occupancy. The actual construction could be done by a corporation so that the individuals would not have unlimited personal liability.

*13 Another problem with this system is the amount of litigation that is produced. These actions can be a purchaser suing the seller for the costs incurred in obtaining the final certificate of occupancy, in which the attorney holding the money is named as a stakeholder; or they can be an attorney bringing a stakeholder action asking the Court to decide who should be paid the escrow; or it can be the seller seeking to have the funds released having produced the final certificate of occupancy albeit a substantial time after the date set forth in the escrow agreement, the release of which is opposed by the purchaser. All of this litigation would be unnecessary if the City of New York would do its job and protect its residents with a rational policy.

There is an additional reason for abandoning this system of temporary certificates of occupancy; that is, that the language of the statute does not create a standard that is readily determinable by reading the statute and provides no guidance from which it can be determined whether or not the commissioner has abused his or her discretion.

NYCAC 27–222 "Issuance of certificates of occupancy" has been part of the NYCAC since 1968. It provides:

> (a) All applications for certificates of occupancy and accompanying papers shall be examined promptly after their submission. If the building is entitled to a certificate of occupancy applied for, the application shall be approved and the certificate of occupancy issued by the commissioner within ten calendar days after submission of the application. Otherwise, the application shall be rejected and written notice of rejection, stating the grounds of rejection, shall be given to the applicant within ten calendar days of the submission of the application....

NYCAC 27–214 "New buildings; sidewalk requirements" provides:

> no building hereafter constructed shall be occupied or used, in whole or in part, unless and until a certificate of occupancy shall have been issued certifying that such building conforms substantially to the approved plans and the provisions of this code and other applicable laws and regulations.

NYCAC 27–218 "Temporary occupancy" states::

> The commissioner may, upon request, issue a temporary certificate of occupancy for a part or parts of a building before the entire work covered by the permit shall have been completed, provided that such part or parts may be occupied safely prior to completion of the building and will not endanger public safety, health, or welfare, ...

A comparison of these sections leads to the conclusion that a standard is in existence for the issuance of a final certificate of occupancy, that is, substantial conformity to the approved plans and the provisions of the code, law and regulations (N.Y.CAC 27214(a)) whereas there is no such requirement for a temporary certificate of occupancy since one can be issued if the commissioner determines that occupancy will not be unsafe or endanger the public. The statute provides no standard for the commissioner to follow and no minimum requirements are set forth to govern his determination. The wording of the statute

means that the commissioner has the sole discretion as to whether or not a final certificate can be issued. The commissioner alone determines what is meant by a safe building. There is no requirement to certify compliance with the plans or the law before requesting a temporary certificate of occupancy equivalent to those that exist for a final one. There is no definition of what constitutes a "safe" building. This difference in requirements is also set forth in NYCAC 26–645(d) and (f). It should also be pointed out that the term "conform substantially to the approved plans" used for issuance of a final certificate of occupancy is nebulous at best. Since Judge Cardozo created the doctrine of "substantial performance" in *Jacobs & Youngs v. Kent*, 230 N.Y. 239, the real estate construction industry has never been the same. It too is problematical, but it is more guidance than exists for issuance of temporary certificates of occupancy.

*14 All of these issues lead to the conclusion that the continued practice of issuance of temporary certificates of occupancy must be ended.

CONCLUSION:
The plaintiff has established that it is entitled to a judgment in its favor on the issue of liability. Defendant has committed legal malpractice in closing without the benefit of either a temporary or final certificate of occupancy.

Judgment for plaintiff on the issue of liability. Upon the payment of the appropriate fees and the filing of the necessary papers, the matter will go forward on the issue of damages only.

Pursuant to the grant of jurisdiction in regard to the enforcement of provisions of the multiple dwelling law, housing maintenance code, building code and the health code given to the Civil Court in the Civil Court Act 110(c) and 203(k)through 203(o), the Department of Buildings, the Building Industry Association of NYC, Inc., and the Richmond County Bar Association will appear before this Court in Part 56 on Monday November 29, 2004 at 9:30 AM at the Courthouse, 927 Castleton Avenue, Staten Island, New York and show cause why an order should not be issued permanently enjoining the Department of Buildings from issuing temporary certificates of occupancy; directing the Department of Buildings to hire enough personnel to issue only permanent certificates of occupancy for new construction; requiring that a system be put into place which prohibits the issuance of new building permits to any individual or entity which has not obtained final certificates of occupancy on prior permits.

The foregoing constitutes the decision and order of this Court.

Court attorney to notify all parties and added parties.

All Citations

5 Misc.3d 1020(A), 799 N.Y.S.2d 160 (Table), 2004 WL 2732245, 2004 N.Y. Slip Op. 51470(U)

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EXHIBIT V

2021 WL 4895248
Only the Westlaw citation is currently available.

Superior Court of Connecticut,
Judicial District of Hartford at Hartford.

500 NORTH AVENUE, LLC

v.

TOWN OF STRATFORD ZONING COMMISSION et al.

HHDLNDCV186097370S

I

August 17, 2021

Opinion

Hon. Rupal Shah, J.

*1 The plaintiff commenced this appeal on May 30, 2018, pursuant to General Statutes § 830g, regarding the denial of its affordable housing application (application) by the Town of Stratford Zoning Commission (commission) for the development of 795 James Farm Road in Stratford. The court allowed the plaintiff to be substituted by the new owner of 795 James Farm Road, JRB Holding Company LLC, and to continue this appeal. After a hearing on November 21, 2019, the court issued its decision remanding the matter back to the commission. In its memorandum of decision, dated January 29, 2020, the court found that the commission failed to meet the requirement that it issue a collective statement on the record and engage in the four-part test required under § 8-30g(g). The commission reconsidered the application and provided notice to the court. The court heard argument on October 16, 2020, regarding the commission's denial of the application on remand. A supplemental record was filed on November 9, 2020. On May 17, 2021, the court heard supplemental argument concerning the plaintiff's appeal. [1] After consideration, the court reverses the commission's decision, and approves the plaintiff's application with modifications and conditions.

I

STATEMENT OF FACTS

The plaintiff's first application in 2015 concerned the construction of a seventy-two unit affordable housing development pursuant to § 8-30g on a 4.6 acre portion of 795 James Farm Road. To accomplish this, the plaintiff filed three separate submissions with the commission. The proposal, in part, called for a 700 feet by 20 plus feet high retaining wall to be built at the base of a steep hill to retain 35,000 cubic yards of fill. The first application was denied by the commission causing the plaintiff to file a modified application. The modified application was also denied, causing the plaintiff to appeal to the Superior Court, which was dismissed on July 16, 2018. See *500 North Avenue, LLC v. Zoning Commission,* Superior Court, judicial district of Fairfield, Docket No. CV-16-6061118-S (July 16, 2018, Radcliffe, J.) *(500 North I),* cert. denied, Appellate Court, Docket No. PAC-18-0004 (October 31, 2018). The court, Radcliffe, J., found that in addition to other reasons, there could be no reasonable modification to the retaining wall, which required a "recommended distance, twice the height of the wall or forty (40) feet, contained in the manufacturer's specifications and recommendations (ROR 110)." *Id.*

*2 In November 2017, the plaintiff filed a new application with the commission, seeking approval of a § 8-30g project on the same land located at 795 James Farm Road. The plaintiff submitted an application for an affordable housing development, which included the following: (1) a proposal to amend the zoning regulations to add a new section 28 for an affordable housing development known as Julia Ridge Apartment Zone (JRAZ) at 795 James Farm Road, consisting of fifteen acres, which complied with § 8-30g; (2) a petition to change the zone from RS-1 to JRAZ; and (3) an affordability plan for Julia Ridge for a set aside development consisting of 116 units. This application was similar to the earlier applications filed by the plaintiff and included a 700 feet long by 28 to 30 feet tall gravity block retaining wall, requiring approximately 35,000 cubic yards of fill.

The commission conducted a public hearing on the application on February 27, March 28, and April 25, 2018. (Return of Record [ROR], Exhibit [Exh.] 57.a, 57.b and 57.c, pp. 591-713.) The sessions consisted of a presentation by the plaintiff and its experts; a presentation by the defendants [2] and their experts; and, finally, a rebuttal by the plaintiff. Expert testimony and documentary evidence were introduced in support of and in opposition to the application, which consisted of at least four engineers, three soil scientists, an architect, and police and fire experts. After concluding the public hearing, on May 9, 2018, the individual members of the commission discussed the application and denied it, without providing a collective statement on the record for the denial. (ROR, Exh. 57d, pp. 714-30.)

On remand, the commission held a special meeting to reconsider the plaintiff's application for the development of 795 James Farm Road. (Second Supplemental Return of Record, Docket Entry No. 166 [November 9, 2020].) The commission's members voted to affirm its May 9, 2018 denial of the application for a special case approval to construct a 116-unit affordable housing project, pursuant to § 8-30g, on a property located in a RS-1 zone. The denial letter, dated September 24, 2020, [3] provided the following reasons, which include a specific citation to the record for each reason and the names of commissioners who ascribed to the particular reasons, as follows:

1. The applicant has not submitted a completed Special Case application, per § 5.4 of the Zoning Regulation, for a complete review to be conducted by the Zoning Commission. The applicant has chosen to ignore this provision that outlines the affordable housing application process in the Town of Stratford.

Evidence:

ROR page 97-101. Zoning Commission Planning Staff Review by J. Habansky

In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick

2. The application is incomplete, as the petitioner has not submitted the application for a Special Case application.

Evidence:

ROR pages 97-101. Zoning Commission Planning Staff Review by Jay Habansky

In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick

3. The proposed development is inconsistent with the Town of Stratford's 2013 Plan of Conservation and Development.

Evidence:

ROR pages 97-101. Zoning Commission Planning Staff Review by Jay Habansky

ROR pages 108. Planning Commission Unfavorable Recommendation Letter

In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick

4. The proposed development is inconsistent with the Forest Management Plan for the Town of Stratford's Roosevelt Forest.

Evidence:

ROR page 329. Written testimony of Steven Danzer, Ph.D, Soil Scientist/Professional Wetland Scientist

*3 *In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick*

5. The proposed development would be detrimental to the public health and safety for residents and the surrounding ecosystem/wetlands. Evidence: ROR pages 656-60. Testimony of Sigrun Gadwa, Soil Scientist/Professional Westland Scientist, Rema Ecological Services

In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick

6. The proposed development would do irreversible damage to the surrounding wetlands and the flora and fauna within that ecosystem.

Evidence:

ROR pages 577-81. Written testimony of George T. Logan, MW, PWS, CSE and Sigrun N. Gadwa, Rema Ecological Services

In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick

7. The applicant has not submitted an application to the Inland Wetlands and Watercourses Commission (IWWC) for a review of potential impacts on surrounding wetlands.

Evidence:

ROR pages 682-83. Remarks by Attorney / Senator Kevin C. Kelly citing legal opinion by Assistant Town Attorney John Florek and *Green v. Ridgefield Planning and Zoning Commission.*

In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick

8. The proposed development would create irreversible, long-term degradation of the Roosevelt Forest, Cemetery Brook and the surrounding wetlands.

Evidence:

ROR pages 577-581. Written testimony of George T. Logan, MW, PWS, CSE and Sigrun N. Gadwa, MS, PWS of Rema Ecological Services

ROR pages 656-61. Testimony of Sigrun Gadwa, Soil Scientist/Professional Wetland Scientist, Rema Ecological Services

In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick

9. The magnitude of the proposed development would create traffic issues, which would impede emergency response times, impede access to local properties, and disrupt local traffic flows. This would pose as a risk to public health and safety.

Evidence:

ROR page 621. Testimony of Robert Smith.

ROR page 631-37. Testimony of Lieutenant David Gugliotti, Stratford Police Department Traffic Division

In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick

10. The applicant has failed to satisfy the Special Case criteria identified in § 20 of the Zoning Regulations.

Evidence:

ROR 97-101. Zoning Commission Planning Staff Review by Jay Habansky

In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick

11. The proposed development, more specifically the 30' tall retaining wall, would present a clear public danger to residents, children and emergency first responders. This danger would be increased in the event of inclement weather.

Evidence:

ROR page 297-301. Engineering Review by STY Incorporated

*4 *In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick*

12. It is questionable whether the proposed retaining wall would support any large equipment, including fire apparatus responding to emergencies on site.

Evidence:

ROR page 284-90. Engineer's Report by Rene Basulto, PE of Robson Forensic

In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick

13. There is concern regarding the availability of sufficient water to fight fires in the event there is a fire on site.

Evidence:

ROR page 291. Map of Fire Hydrants

ROR page 615. Testimony of Brian Lampart, Fire Marshal

ROR page 684. Testimony of Thomas Velky

In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick

14. The stormwater retention system is located too close to the structural components of the proposed retaining wall, compromising the structure integrity of the entire site. Evidence: ROR page 650. Testimony of Tim Casey, PE of STV Incorporated. *In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick*

15. The applicant has provided insufficient information regarding the entire stormwater control system, which will create unsafe conditions that will compromise the structural integrity of the entire site.

Evidence:

ROR page 653. Testimony of Tim Casey, PE of STY Incorporated.

In reviewing the decision of May 9, 2020, Commissioners added additional reasons for denial enumerated below:

16. The site lacks adequate sidewalks, there is no access to public transportation, and there are no current plans by transportation providers to serve the site. The Commission felt that the traffic study was unreasonable in its assumptions and projected volume of traffic.

Evidence:

ROR pages 505-07. Letter to Attorney Joseph Kubic from Greater Bridgeport Transit Authority (GBTA) *In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick*

17. There are no easements in the plan that would allow access or apparatus to the foot of the retaining wall for purposes of maintenance, repair or rescue.

Evidence:

ROR page 563. Map denoting Eversource easement

ROR page 681. Discussion between Attorney Joseph Kubic and Commissioner Silhavey

In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick

18. In order to provide enough fill and material to build up the site, a multi-month long process of constantly trucking in material would be required creating massive traffic and potentially damaging James Farm Road. Estimate was 36,000 cubic yards of fill requiring 7,200 dump truck arrivals and departures from the site.

Evidence:

ROR page 678-80. Testimony of Richard Ezyk, Professional Engineer

In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick

19. The dangerous grade of 10% that exceeds the International Building Code maximum of 5%.

Evidence:

ROR page 188. Transcript of *500 North Avenue, LLC v. Gary Lorenston*, Planning and Zoning Administration, et al before Hon. Dale Radcliffe, Judge. ROR page 284-90. Engineer's Report by Rene Basulto, PE of Robson Forensic

*5 *In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick*

20. If approved, the development would only add a small number of affordable units to Stratford's housing stock while actually decreasing the total percentage in town. Stratford has a significant amount of "naturally affordable" housing, although it may not meet the statutory definition for various reasons.

Evidence:

ROR pages 662-64. Statement of Attorney/Senator Kevin C. Kelly.

In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick

21. This application if approved would constitute spot zoning.

Evidence:

ROR page 717. Discussion by Commissioner Henrick.

In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick

22. Punctures in the geosynthetic fabric would compromise the structural integrity and allow water to seep through. Evidence: ROR 652-55. Testimony of Tim Casey PE STV Incorporated.

ROR 297-301. Engineering Review by STV incorporated

In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick

23. Hydrostatic pressure (build up of water behind the wall) could compromise the wall's structural integrity.

Evidence:

ROR 642-55. Testimony of Tim Casey PE STV Incorporated

ROR 297-301. Engineering Review by STV Incorporated

In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick

24. Evidence in the record from 2018 is sufficient to support the above findings.

Evidence:

ROR Entire Record.

In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick

25. The potential risks to public health and safety outweigh the need for affordable housing in Stratford.

Evidence:

ROR Entire Record. ROR pages 662-64. Statement of Attorney/ Senator Kevin C. Kelly.

In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick

26. Emergency access to the site could be impeded should firetrucks need to be rerouted. Response time was estimated to grow from 1:47 to 4:23.

Evidence:

ROR Pages 523-31

In Concurrence: Commissioners Fredette, Manos, Voccola, Silhavey, and Henrick

27. The project had been given an unfavorable recommendation by the Stratford Planning Commission.

Evidence:

ROR pages 97-101. Zoning Commission Planning Staff Review by Jay Habansky

ROR page 108. Planning Commission finds Text Amendment inconsistent with POCD

In Concurrence: Commissioners Fredette, Manos, Voccola, Whavey, and Henrick

The text amendment denial letter incorporated six of the reasons provided above. The denial letter for the petition for a zone change incorporated all twenty-seven reasons provided above and also indicated: "The proposed [t]ext [a]mendment and [s]pecial [c]ase applications have been denied, thus [JRAZ] does not exist in the [zoning regulations] of the Town of Stratford, and the application is thereby rendered moot." The denial letter concerning sediment and erosion control plans provided the following: "The proposed [t]ext [a]mendment, [z]one [c]hange and [s]pecial [c]ase applications have been denied, thus no application for a [r]eview of [e]rosion and [s]ediment [c]ontrol shall be considered at this time."

*6 In this appeal, the town of Stratford (town), Judith Kurmay, Cathleen Martinez, and Concerned Citizens Group of Stratford, Inc. (CCGS) (collectively, intervening defendants), have all appeared as intervening defendants pursuant to General Statutes § 22a-19. Kurmay, Martinez, and CCGS raise the additional defense of collateral estoppel, which shall be considered after all the overlapping reasons for the denial are considered by the court.

II

LEGAL STANDARD

Section 8-30g(f) provides, in relevant part: "[A]ny person whose affordable housing application is denied, or is approved with restrictions which have a substantial adverse impact on the viability of the affordable housing development or the degree of affordability of the affordable dwelling units in a set-aside development, may appeal such decision pursuant to the procedures of this section ..." Additionally, § 8-30g(g) provides, in relevant part: "Upon an appeal taken under subsection (f) of this section, the burden shall be on the commission to prove, based upon the evidence in the record compiled before such commission, that the decision from which such appeal is taken and the reasons cited for such decision are supported by sufficient evidence in the record. The commission shall also have the burden to prove, based upon the evidence in the record compiled before such commission, that (1)(A) the decision is necessary to protect substantial public interests in health, safety, or other matters which the commission may legally consider; (B) such public interests clearly outweigh the need for affordable housing; and (C) such public interests cannot be protected by reasonable changes to the affordable housing development ... If the commission does not satisfy its burden of proof under this subsection, the court shall wholly or partly revise, modify, remand or reverse the decision from which the appeal was taken in a manner consistent with the evidence in the record before it."

In an application made under § 8-30g, the traditional burden of proof is shifted to the land use board to show that its determination is supported by sufficient evidence in the record. In denying an affordable housing application, the board must show that its decision was (1) based upon the protection of one or more substantial public interests; (2) that the cited public interest clearly outweighs the need for affordable housing in the municipality; and (3) that there are no reasonable modifications that could be made to the proposal that would permit the application to be granted. *Quarry Knoll II Corp. v. Planning & Zoning Commission*, 256 Conn. 674, 727, 780 A.2d 1 (2001) *(Quarry Knoll)*. The zoning commission cannot rely on general concerns, but must point to evidence showing a quantifiable probability that a specific harm would result if the application is granted. *AvalonBay Communities, Inc. v. Zoning Commission*, 130 Conn.App. 36, 58, 21 A.3d 926, cert. denied, 303 Conn. 909, 32 A.3d 962 (2011).

"[S]ufficient evidence standard is not a burden of persuasion, which ordinarily requires the finder of fact to have a specific level of certainty, but, instead, is a standard of judicial review, the function of which is to allocate decisionmaking authority between the decision maker and the reviewing court ... [T]he zoning commission remains the factfinder, as in a traditional zoning case ... Thus ... the burden of proving facts is not imposed on a finder of fact ... [A]lso ... the sufficient evidence standard of judicial review applie[s] to all four prongs of [§ 8-30g(g)]." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *River Bend Associates, Inc. v. Zoning Commission*, 271 Conn. 1, 23-24, 856 A.2d 973 (2004).

*7 Our Supreme Court "has defined 'sufficient evidence' in this context to mean less than a preponderance of the evidence, but more than a mere possibility ... [T]he zoning commission need not establish that the effects it sought to avoid by denying the application are definite or more likely than not to occur, but that such evidence must establish more than a mere possibility of such occurrence ... Thus, the commission [i]s required to show a reasonable basis in the record for concluding [as it did]. The record, therefore, must contain evidence concerning the potential harm that would result if the [application was granted] ... and concerning the probability that such harm in fact would occur." (Citation omitted; internal quotation marks omitted.)

Christian Activities Council, Congregational v. Town Council, 249 Conn. 566, 585, 735 A.2d 231 (1999) *(Christian Activities Council)*. "Notably, [the court in *Christian Activities Council*] also has indicated that the sufficient evidence standard imposes a lesser burden than the substantial evidence standard." (Internal quotation marks omitted.) *Brenmor Properties, LLC v. Planning & Zoning Commission*, 162 Conn.App. 678, 696, 136 A.3d 24 (2016), *(Brenmor)*, aff'd, 326 Conn. 55, 161 A.3d 545 (2017).

"The substantial evidence standard has been described as one that is highly deferential and permits less judicial scrutiny than a clearly erroneous or weight of the evidence standard of review ... Because the sufficient evidence standard applicable to affordable housing appeals impose a *lesser* burden than substantial evidence, that burden is minimal. A land use agency simply must establish that something more than a mere theoretical possibility of harm to the public interest exists." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Id.*

"[T]he trial court must conduct a plenary review of the court ... and make an independent determination that denial of the affordable housing application (A) ... is necessary to protect substantial public interests in health, safety, or other matters which the commission may legally consider; (B) such public interests clearly outweigh the need for affordable housing; and (C) such public interests cannot be protected by reasonable changes to the affordable housing development ... Thus ... these are not factual determinations, but mixed factual and legal determinations, the legal components of which are subject to plenary review ... In other words ... the commission remains the finder of fact and any facts found are subject to the sufficient evidence standard of judicial review ... [A]pplication of the legal standards set forth in § 8-30g(g)(1)(A), (B) and (C) to those facts is a mixed question of law and fact subject to plenary review." (Citations omitted; internal quotation marks omitted.) *River Bend Associates, Inc. v. Zoning Commission, supra*, 271 Conn. 24-25.

"Where a zoning [commission] has stated its reasons for its actions, the court should determine only whether the assigned grounds are reasonably supported by the record and whether they are pertinent to the considerations which the authority was required to apply under the zoning regulations ... The zone change must be sustained if even one of the stated reasons is sufficient to support it." (Internal quotation marks omitted.) *West Hartford Interfaith Coalition, Inc. v. Town Council*, 228 Conn. 498, 513, 636 A.2d 1342 (1994) *(Interfaith)*; see also *Mackowski v. Planning & Zoning Commission*, 59 Conn.App. 608, 618, 757 A.2d 1162 (Lavery, C. J., dissenting), cert. granted, 254 Conn. 949, 762 A.2d 902 (2000). "[O]ur Supreme Court has cautioned against exalting form over substance in contemplating the adequacy of such decisions ... Rather, we must recognize that the commission is composed of laymen whose procedural expertise may not always comply with the multitudinous statutory mandates under which they operate ... We must be scrupulous not to hamper the legitimate activities of civic administrative boards by indulging in a microscopic search for *technical infirmities* in their actions ... Affording a degree of latitude is particularly appropriate in the context of affordable housing appeals, where—unlike traditional zoning appeals—the reviewing court is not empowered to scour the record in search of a proper basis for the agency's decision." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Brenmor, supra*, 162 Conn.App. 692.

*8 "In summary ... in conducting its review in an affordable housing appeal, the trial court must first determine whether the decision from which such appeal is taken and the reasons cited for such decision are supported by sufficient evidence in the record ... Specifically, the court must determine whether the record establishes that there is more than a mere theoretical possibility, but not necessarily a likelihood, of a specific harm to the public interest if the application is granted. If the court finds that such sufficient evidence exists, then it must conduct a plenary review of the record and determine independently whether the commission's decision was necessary to protect substantial interests in health, safety or other matters that the commission legally may consider, whether the risk of such harm to such public interests clearly outweighs the need for affordable housing, and whether the public interest can be protected by reasonable changes to the affordable housing development." (Citation omitted; internal quotation marks omitted.) *River Bend Associates, Inc. v. Zoning Commission, supra*, 271 Conn. 26.

In short, "the court first determines whether the [c]ommission has met its burden of proof that the decision is supported by sufficient evidence in the record. Having done this, the court not the [c]ommission, then weighs whether the [c]ommission has met its burden of proof, that the decision is necessary to protect substantial public interests which clearly outweigh the need

for affordable housing and which cannot be protected by reasonable changes to the affordable housing development." (Internal quotation marks omitted.) *Quarry Knoll, supra*, 256 Conn. 723-24.

III

DISCUSSION

A

AGGRIEVEMENT

"Standing is established by showing that the party claiming it is authorized by statute to bring an action, in other words, statutorily aggrieved, or is classically aggrieved ... [Statutory] [s]tanding concerns the question [of] whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." (Internal quotation marks omitted.) *Handsome, Inc. v. Planning & Zoning Commission*, 317 Conn. 515, 525, 119 A.3d 541 (2015). "Standing is not a technical rule intended to keep aggrieved parties out of court ... Rather it is a practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented." (Internal quotation marks omitted.) *R&R Pool & Rome, Inc. v. Zoning Board of Appeals*, 43 Conn.App. 563, 569-70, 684 A.2d 1207 (1996).

"[T]he fundamental test for determining [classical] aggrievement encompasses a well-settled twofold determination: first, the party claiming aggrievement must successfully demonstrate a specific personal and legal interest in the subject matter of the decision, as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the decision ..." (Internal quotation marks omitted.) *New England Cable Television Assn., Inc. v. Dept. of Public Utility Control*, 247 Conn. 95, 103, 717 A.2d 1276 (1998).

The court finds that JRB Holding is an aggrieved party as the current property owner. See *Quarry Knoll, supra*, 256 Conn. 705. None of the parties dispute that JRB Holding is the current property owner, although the defendants argue that the manner in which it became the owner (by foreclosure) should have some significance. The court has found no distinction between an owner through foreclosure or any other means and finds that JRB Holding is both statutorily and classically aggrieved as the owner of the property at issue.

B

PROCEDURAL DISPUTE AND IMPROPER REASONS FOR DENIAL

1. Failure to Comply with Zoning Regulations and Special Case Regulation

*9 On remand, the letter from the commission provided its collective reasons with citations to the record, including the plaintiff's failure to submit a completed special case application for a complete review by the commission. The plaintiff contends a special case application is not required and specifically indicated to the commission that it was not submitting a final site plan

under the town's special case regulations. The commission argues that the plaintiff must comply with all its regulations for a special case application. This stated reason by the commission is misplaced.

As a § 8-30g affordable housing application, the standards for approval or denial are clearly provided and governed by the statute. "Section 8-30g does not allow a commission to use its traditional zoning regulations to justify a denial of an affordable housing application, but rather forces the commission to satisfy the statutory burden of proof ... Instead of simply questioning whether the application complies with [the affordable housing subdivision] regulations ... the commission considers the rationale behind the regulations to determine whether the regulations are necessary to protect *substantial* public interests in health, safety or other matters." (Emphasis in original.) *Wisniowski v. Planning Commission*, 37 Conn.App. 303, 317-18, 655 A.2d 1146 (1995). In other words, "[e]ssentially, every subdivision application must be approved unless there is a justifiable reason to deny the application. The commission must look at the rationale behind its regulations to determine if there is a substantial interest, outweighing the need for affordable housing, that must be protected by the denial of an application." *Id.*, 318.

"Failing to comply with a zoning regulation that is directed to protect public health and safety may satisfy the sufficient evidence requirement under § 8-30g(g) ... The commission, however, must still demonstrate that denying an application on the basis of a failure to comply with a certain zoning ordinance is necessary under § 8-30g(g) ... Noncompliance with a zoning regulation alone is not enough to support a commission's denial of an affordable housing development application under § 8-30g(g)." (Citations omitted; emphasis omitted.) *Autumn View LLC v. Planning & Zoning Commission*, 193 Conn.App. 18, 39, 218 A.3d 1101, cert. denied, 333 Conn. 942, 218 A.3d 1048 (2019).

In the present case, the commission had affordable housing regulations and special case regulations in effect at the time of the plaintiff's application. It maintains that failure to comply with those regulations requires denial of the plaintiff's affordable housing application. The court holds that the plaintiff's failure to comply with the town's regulations is still insufficient to meet the commission's burden under § 8-30g(g). Specifically, the record is devoid of any evidence that a specific harm to the public interest would occur if the commission granted the plaintiff's application despite the plaintiff's noncompliance with the town's zoning regulations. Moreover, even if the commission was able to show that compliance with its special case regulations was necessary, the record does not establish how compliance was necessary to protect an identified public interest and that such public interest outweighed the need for affordable housing, or that the public interest could not be protected by reasonable changes. Accordingly, those reasons pertaining to the plaintiff's noncompliance with the town's special case regulations[4] are inadequate bases to support the commission's denial of the plaintiff's application.

2. Naturally Affordable Housing and the Town's Lack of Need of Affordable Housing

***10** The commission stated the following as a reason to deny the plaintiff's application: "If approved, the development would only add a small number of affordable units to [the town's] housing stock while actually decreasing the total percentage in town. [The town] has a significant amount of 'naturally affordable' housing, although it may not meet the statutory definition for various reasons." The plaintiff argues that the town provided the same reason in *Thompson v. Zoning Commission*, Superior Court, judicial district of Fairfield, Docket No. CV-99-0494184-S (January 11, 2000, Mottolese, J.) (26 Conn. L. Rptr. 318), which was rejected by the court.

The defendant in *Interfaith, supra*, 228 Conn. 498, proffered similar argument as the commission in the present case. "The defendant [in *Interfaith*] argue[d] that under [§ 8-30g(g)][5] when weighing the need for affordable housing in [the municipality] against the substantial public interests advanced by the defendant as reasons for denying the plaintiff's application, the trial court should have considered evidence of existing housing that did not meet the statutory definition of 'affordable housing' but was, nevertheless, 'affordable.' " (Footnote added.) *Id.*, 520. Rejecting the defendant's argument, the court reasoned: "[There is no support in the [affordable housing] statute or its legislative history for the defendant's position. Section 8-30g *(a)* explicitly limits

the definition of 'affordable housing [development]' to 'assisted housing' or ['a set-aside development']. Further, [§ 8-30g(k) and (l)] provide specific exemptions from the statute's appeals procedure. Because the 'evidence' proffered by the defendant does not comport with the statutory definition of 'affordable housing,' it satisfies neither statutory exemption. Consequently, when weighing the need for affordable housing, the trial court correctly refused to consider the defendant's evidence of low cost housing ..."] *Id.*, 520-21.

Similarly, the reason provided by the commission in the present case regarding "naturally affordable" housing in denying the plaintiff's application does not exempt the town from the requirements of § 8-30g. "Section 8-30g applies if less than 10 percent of the dwelling units in the municipality meet the statutory criteria for affordable housing." *Garden Homes Management Corp. v. Planning & Zoning Board;* Superior Court, judicial district of Hartford, Land Use Docket, Docket No. CV-15-6059519-S (April 8, 2016, Berger, J.); see General Statutes § 8-30g(k). Here, the 2017 Affordable Housing Appeals List has the town listed under its nonexempt municipalities category with only 6.21 percent of the town's housing stock qualified as affordable housing. (ROR, Exh. 56.b.4, pp. 134-37.) Therefore, the town fails to meet the 10 percent threshold and is subject to the provisions of § 8-30g.[6] Because the evidence proferred [commission] does not comport with the statutory definition of 'affordable housing' (internal quotation marks omitted); *Interfaith, supra*, 228 Conn. 521; the town is not eligible for an exemption under either § 8-30g(k) or (l). Accordingly, the commission has failed to prove that its decision is supported by sufficient evidence in the record.

3. Inconsistencies with the POCD and FMP

*11 The commission pointed to the proposed affordable housing development's inconsistencies with the town's Plan of Conservation and Development (POCD) and with the Forest Management Plan for the town's Roosevelt Forest (FMP), as reasons to deny the plaintiff's application. The plaintiff contends that the court can require multifamily use irrespective of the POCD and that the proposed development does not have to be consistent with the surrounding area. A town plan of development, sometimes referred to as a master plan, is adopted pursuant to General Statutes § 8-23. *AvalonBay Communities, Inc. v. Orange*, 256 Conn. 557, 573, 775 A.2d 284 (2001). Our Supreme Court "repeatedly has recognized that a town plan is merely advisory ... The purpose of the [town] plan is to set forth the most desirable use of land and an overall plan for the town ... The development plan is the planning commission's recommendation on the most desirable uses of all land within the community, including all public and private uses from street layouts to industrial sites ... Because the overall objectives contained in the town plan must be implemented by the enactment of specific regulations, the plan itself can operate only as an interpretive tool." (Citations omitted; internal quotation marks omitted.) *Id.*, 574-76.

"Enjoying such status, the plan constitutes a public interest which deserves to be protected and promoted ... However, § 8-30g is a remedial statute which must be liberally construed in favor of those whom the legislature intended to benefit ... Moreover, if an affordable housing application may not be denied because it does not comply with the underlying zoning of the area [as held in *Wisniowski v. Planning Commission, supra*, 37 Conn.App. 312], a fortiori, the application cannot be denied because it is not consistent with a plan of development and conservation ..." (Citations omitted; emphasis omitted.) *Dakota Partners, Inc. v. Plan & Zoning Commission*, Superior Court, judicial district of Hartford, Docket No. CV-18-6103767-S (August 28, 2019, Mottolese, J.T.R.) [70 Conn. L. Rptr. 480]. In the present case, the court relied on the planning and zoning office staff comments, dated January 10, 2018. (ROR, Exh. 32, pp. 97-101.)[7]

The FMP is similar to the POCD, and it appears to be merely advisory. The defendants do not offer any basis to find otherwise. Because the record does not contain a copy of the FMP, the court is precluded from properly reviewing this reason for denial. Therefore, insufficient evidence supports the commission's decision to deny on the basis of inconsistencies with the FMP.

4. Unfavorable Recommendation from the Stratford Planning Commission

The commission cites to an unfavorable recommendation from the Stratford Planning Commission (planning commission) as a reason to deny the plaintiff's application. The record contains a copy of the planning and zoning office staff comments, dated January 10, 2018 and a copy of the February 21, 2018 recommendation letter from the planning commission to the zoning commission. The commission, however, fails to prove how the planning commission's unfavorable recommendation requires the commission to deny the plaintiff's application "to protect substantial public interests in health, safety or other matters which the commission may legally consider." General Statutes § 8-30g(g)(1)(A). The court cannot find any provision in the town's zoning regulations or anywhere else in the record that precludes the commission from approving an affordable housing land use application without a favorable recommendation from the planning commission. Moreover, the record does not establish that "there is more than a mere theoretical possibility ... of a specific harm to the public interest if the application is granted." *River Bend Associates, Inc. v. Zoning Commission, supra*, 271 Conn. 26.

5. Spot Zoning

*12 The commission asserts that the plaintiff's application, if approved, would constitute spot zoning. The plaintiff again points to *Thompson v. Zoning Commission, supra*, 26 Conn. L. Rptr. 318, to maintain that the defendant's argument on such basis was unsuccessful in that case. The court first notes the purpose of zoning, including in the affordable housing context. "The purpose of zoning is to serve the interests of the community as a whole, and one of those interests is to provide adequate housing. A change of zone predicated on such an interest, if otherwise consistent with the accepted principles of zoning, is a reasonable exercise of the board's discretionary powers." *Malafronte v. Planning & Zoning Board*, 155 Conn. 205, 212, 230 A.2d 606 (1967). "The zoning power of a municipality may properly be exercised to achieve the goal of access to affordable housing in order to meet present and prospective needs." *Brennick v. Planning & Zoning Commission*, 41 Conn.Sup. 593, 598, 597 A.2d 346 (1991).

Our appellate courts have spoken on the applicability of the general rule on uniformity in the affordable housing context. "A general rule requiring uniform regulations serves the interests of providing fair notice to applicants and of ensuring their equal treatment ... It is not necessary to apply such a rule [when] the interests served by the rule would not be adversely implicated by granting the zone change on the condition that the new zone be used only for affordable housing." (Citations omitted.)

Kaufman v. Zoning Commission, 232 Conn. 122, 147, 653 A.2d 798 (1995). "The requirement of uniformity of § 8-2 does not militate against the grant of a specific exception to a general zoning requirement so long as the exception is reasonable and for the general community benefit rather than for the benefit of a single landowner ... Clearly, affordable housing legislation is for the benefit of the entire community, as well as for that of the state." (Citation omitted; footnote added; internal quotation marks omitted.) *Wisniowski v. Planning Commission, supra*, 37 Conn.App. 315.

"The very *same* reasoning applies to the principle of spot zoning." *Thompson v. Zoning Commission, supra*, 26 Conn. L. Rptr. 320*Thompson v. Zoning Commission, supra*, 26 Conn. L. Rptr. 320. "[S]pot zoning is the reclassification of a small area of land in such a manner as to disturb the tenor of the surrounding neighborhood ... Two elements must be satisfied to constitute spot zoning ... First, the zone change must concern a small area of land. Second, the change must be out of harmony with the comprehensive plan for zoning adopted to serve the needs of the community as a whole." (Citation omitted; internal quotation marks omitted.) *Konigsberg v. Board of Aldermen*, 283 Conn. 553, 591-92, 930 A.2d 1 (2007).

In the present case, even if the fifteen-acre parcel in question meets the first element, the plaintiff's proposed development cannot be deemed to constitute spot zoning as a matter of law. Not only is the proposed development in an area where approximately 123 developed properties exist, albeit producing a substantially greater density than that found in the area; (ROR, Exh. 26, 5614, pp. 337, 582); but "providing affordable housing does not just benefit an applicant, it benefits a town, a region, a state." *TCR*

New Canaan, Inc. v. Planning & Zoning Commission, Superior Court, judicial district of Hartford, Docket No. CV-384353 (March 5, 1992, Berger, J.) (6 Conn. L. Rptr. 91, 102) *(TCR)*. The court is further persuaded by the following proposition from *TCR*: "Zoning changes affording special treatment to encourage the construction of multifamily residences in cities with housing shortages promote the public welfare and do not constitute spot zoning." (Internal quotation marks omitted.) *Id.* The commission has failed to prove sufficiency of evidence that a specific harm to a substantial public interest would occur if it approved the application. Even if the court could determine that sufficient evidence exists—which it cannot—the commission has yet to prove that denying the plaintiff's application is necessary to protect substantial public interests in health and safety that clearly outweigh the need for affordable housing and that cannot be protected by reasonable modifications to the proposed development.

6. Inadequate Sidewalks and Lack of Access to Public Transportation

*13 The commission provides the following as bases to deny the plaintiff's application: inadequate sidewalks and public transportation accessibility issues. "A commission is not entitled to reject an application on the basis of the mere possibility of harm or generalized concerns." *Garden Homes Management Corp. v. Town Plan & Zoning Commission*, 191 Conn.App. 736, 755, 216 A.3d 680, cert. denied, 333 Conn. 933, 218 A.3d 594 (2019). Moreover, "[s]uch generalized concerns cannot support a determination that the commission's decision was necessary to protect the public interest or that the harm outweighed the town's documented need for affordable housing." *Brenmor, supra*, 162 Conn.App. 706. Here, the record is devoid of any evidence as to the specificity, severity, and probability of harm that would result if no public sidewalks were constructed or if no public transportation were to serve the area. Even if sufficient evidence supported the commission's decision, the commission has yet to satisfy its burden on the other three prongs of § 8-30g(g).

7. Sufficient Evidence to Support Findings; Potential Risks Outweigh Need for Affordable Housing

The court briefly notes that reasons 24[8] and 25[9] in the commission's September 24, 2020 letter are improper. Reason 24 merely paraphrases the first prong of § 8-30g(g), which provides: "[T]he burden shall be on the commission to prove, based upon the evidence in the record compiled before such commission, that the decision from which such appeal is taken and the reasons cited for such decision are supported by sufficient evidence in the record." Likewise, reason 25 merely paraphrases § 8-30g(g)(1)(B), which provides in relevant part: "The commission shall ... have the burden to prove, based upon the evidence in the record compiled before such commission, that [substantial public interests in health, safety or other matters which the commission may legally consider] clearly outweigh the need for affordable housing ..." It is inadequate for the commission to merely state its burden of proof; the commission must satisfy its burden. Furthermore, reasons 24 and 25 are legally insufficient because they merely recite legal conclusions. Cf. *Office of Chief Disciplinary Counsel v. Miller*, 335 Conn. 474, 509, 239 A.3d 288 (2020) (legal conclusions unsupported by factual allegations are insufficient to plead proper special defense). Accordingly, reasons 24 and 25 are improper grounds for denial.

C

FAILURE TO WEIGH IDENTIFIED PUBLIC INTERESTS AGAINST NEED FOR AFFORDABLE HOUSING AND WHETHER REASONABLE CHANGES COULD NOT BE MADE

The decision of the commission and the various reasons provided shows no indication that the commission engaged in the kind of contemplation required in the last two critical steps under § 8-30g(g). In reviewing the commission's decision on

remand, there is an absence of evidence of consideration of how any of the identified public interests outweigh the need for affordable housing or whether the identified public interest could be protected by reasonable changes. In the September 24, 2020 denial letter, the commission adds as a reason that "[t]he potential risks to public health and safety outweigh the need for affordable housing in [the town]." In support, the commission cites to the entire record. The municipal planning and zoning commission, rather than the affordable housing land use applicant bears the burden of proving that no reasonable modifications to a proposed development exist. *Quarry Knoll, supra*, 256 Conn. 733. The plain language of § 8-30g(g) requires that the municipal planning and zoning commission consider reasonable changes: "The *commission* shall ... have the burden to prove, based upon the evidence in the record compiled before such commission, that ... *such public interests cannot be protected by reasonable changes to the affordable housing development* ..." (Emphasis added.) General Statutes § 8-30g(g). "To fulfill its burdens under [§ 8-30g(g)(1)(C)] ... the commission was required to show only that, on the basis of evidence in the record, it reasonably could have concluded that the public interests could not be protected by reasonable changes to the size of the zone, the density of the zone or the specific designs presented." (Internal quotation marks omitted.) *Kaufman v. Zoning Commission, supra*, 232 Conn. 137 n.11.

*14 Courts that have addressed the requirement of the commission to consider reasonable modifications have set forth guidelines to be followed by the commission. The court in *River Bend Associates, Inc. v. Zoning Commission*, Superior Court, judicial district of New Britain, Docket No. CV-00-505223-S (December 27, 2002, Shortall, J.), rev'd in part by 271 Conn. 1, 856 A.2d 973 (2004), determined that it was not sufficient for the commission to make generalized statements that reasonable changes could not be made to the affordable housing development plan. The court explained that it is necessary for the commission to explain why the public interest cannot be protected by reasonable changes. *Id.* Furthermore, the court in *Hillcrest Orchards, supra*, Superior Court, Docket No. CV-08-4016248-S [47 Conn. L. Rptr. 337], concluded that the commission failed to sustain its burden under § 8-30g with respect to a proposed stormwater management system. The court remanded the plaintiff's modified affordable housing application to the commission because there was never a discussion in the record by the commission as to whether reasonable changes could be made to the grading of the system nor as to why a recommendation by the town engineer to construct an additional berm to contain stormwater runoff could not have been added as a reasonable condition to approval. The court in *Novella v. Planning & Zoning Commission*, Superior Court, judicial district of New Britain, Docket No. CV-00-050146-S (May 9, 2001, Axelrod, J.), stated that "except in the case of a site specific reason for the substantial public interest that would be harmed by the proposed affordable housing development, the commission must also address in writing subsection [(C) of § 8-30g(g)(1)] as to why the public interest cannot be protected by reasonable changes to the affordable housing development." In *T&N Associates v. Planning & Zoning Commission*, Superior Court, judicial district of New Britain, Docket No. CV-98-0492236-S (November 9, 1999, Holzberg, J.), the court remanded the plaintiff's applications to the commission and specifically found that "the commission has failed to demonstrate that there is sufficient evidence in the record to support a finding that the substantial public interests in adequate water, sewer and drainage systems cannot be protected by reasonable changes in the plan." See also *Rinaldi v. Zoning & Planning Commission*, Superior Court, judicial district of Hartford, Docket No. CV-94-533603-S (January 4, 1995, Leheny, J.) (remanding for consideration of reasonable changes under what is now § 8-30g[g][1][C]); see also *Nucera v. Zoning Commission*, Superior Court, judicial district of Hartford, Docket No. CV-97-0568039-S (August 3, 1998, Axelrod, J.) (concluding that public interest can be protected by conditioning approval upon plaintiff receiving approval from city's water pollution control authority to connect into city's sewage and storm drainage system).

"[T]he key purpose of § 8-30g is to encourage and facilitate the much needed development of affordable housing throughout the state." *Interfaith, supra*, 228 Conn. 511. While "[t]he action of the commission should be sustained if even one of the stated reasons is sufficient to support it"; (internal quotation marks omitted) *DeBeradinis v. Zoning Commission*, 228 Conn. 187, 199, 635 A.2d 1220 (1994); the court cannot find that the commission engaged in the full analysis required with respect to each reason provided. Similar to the modified proposal in *Hillcrest Orchards*, the proposal in the present case is for a larger project at the same property and as in *Hillcrest Orchards*, there simply was no discussion of whether reasonable modifications

would address the concerns. Instead, there was a clear indignation expressed that the plaintiff submitted a modified proposal that included more units, and the commission seemed to infer lack of reasonableness of the proposal due to its size. The scale of a project can be an appropriate factor in considering the effects on the other public interests involved. However, that naturally raises the question of whether the commission considered whether a smaller scale development would address the concerns expressed while still allowing the development to proceed. Here, the record is absent of any such discussion or analysis.

1. Traffic Concerns and the Magnitude of the Construction's Effect on Traffic, Including on Emergency Access

The defendants' concerns that the magnitude of the development and the increase in traffic on roads with additional cars on the site could potentially decrease the ability of emergency service providers to provide adequate service to the town residents, "could not support a denial of the plaintiff's application because these concerns established only a theoretical possibility, not necessarily a likelihood, of harm to the public interest." *CMB Capital Appreciation, LLC v. Planning & Zoning*, 124 Conn.App. 379, 399, 4 A.3d 1256 (2010) *(CMB)*, cert. granted, 299 Conn. 925, 11 A.3d 150 (2011). [10] "[C]ourts have rejected town concerns regarding traffic generated by a proposed development where those concerns are based on potential safety issues or concerns." *Landworks Development, LLC v. Planning & Zoning Commission*, Superior Court, judicial district of New Britain, Docket No. CV-00-0505525-S (February 14, 2002, Eveleigh, J.). "Furthermore, while traffic problems and related safety concerns can be a valid reason for a denial ... there must be more than a traffic increase, and either traffic congestion or an unsafe road design at or near the entrances and exits from the site." (Internal quotation marks omitted.) *CMB, supra*, 399. "The mere fact that a proposal will generate increased traffic volume is not, in itself, an indication that such traffic will result in undue hazard ... or congestion; to determine whether the proposal will result in undue hazard ... or congestion, [the court] review[s] the record as to the proposal's projected impact on traffic conditions." (Internal quotation marks omitted.) *American Institute for Neuro-Integrative Development, Inc. v. Town Plan & Zoning Commission*, 189 Conn.App. 332, 343, 207 A.3d 1053 (2019). "[T]he significance of the impact should not be measured merely by the number of additional vehicles but by the effect that the increase in vehicles will have on the existing use of the roads. An increase of 100 vehicles per hour may have a negligible impact at one time or location and a ruinous impact at another time or location." *Cambodian Buddhist Society of Connecticut, Inc. v. Planning & Zoning Commission*, 285 Conn. 381, 434, 941 A.2d 868 (2008).

*15 The record indicates that traffic issues are already a town-wide concern, not specific to the proposed development in question. A traffic operations engineer stated: "I observed long queues and significant traffic delays at some of [the major intersections] during a weekday peak hour of traffic, *which indicate existing traffic deficiencies at the locations*." (Emphasis added.) (ROR, Exh. 56.d.48, pp. 519-20; see also ROR, Exh. 56.d.51, p. 529 [fire department noting its test drives were not performed during rush hour traffic, "which does provide higher density traffic back-ups" at certain intersections].) Some town residents expressed similar concerns regarding traffic delays at various points of intersection. (ROR, Exh. 57.a, pp. 624-25.) In fact, one town resident observed that [t]raffic on James Farm road is already horrific ... (ROR, Exh. 49, p. 117.) Also, a traffic study showed that motor vehicles near the proposed development already far exceed the posted speed limit of 25 miles per hour (MPH). (ROR, Exh. 56.d.18, p. 280.) On the basis of the foregoing evidence, the court "conclude[s] that the commission's denial of the plaintiff's ... application on the basis of traffic and safety concerns is not supported by sufficient evidence." *CMB, supra*, 124 Conn.App. 398.

Our Appellate Court, in an affordable housing case, has held: "[W]ith respect to concerns about emergency response time to the development, the evidence in the record reveals that there is no state standard for emergency response time and that any potential problem with emergency response time is not specific to the development in question, but rather was a town-wide concern ... The length of emergency response time, which was a town-wide concern, was not a valid basis for the commission's denial of the plaintiff's application." *CMB, supra*, 124 Conn.App. 398. In the present case, the record is absent as to any evidence on the state standard for emergency response time. Although the evidence shows that one's chance of survival decreases with every passing minute, such evidence does not establish that the supposed increase in response time violates any law or fails to meet any standard.

Although the evidence shows that one's chance of survival could depend on the emergency response time; (ROR, Exh. 57, p. 555); the fire department's drive test evaluation unnecessarily assumed that emergency vehicles cannot access the direct route because of added vehicles on the road, contributed by the development. (ROR, Exh. 56.d.51, pp. 528-29.) As discussed previously, the evidence shows that interruptions in traffic flows are already an existing concern in the town and that any potential traffic increases caused by the development are speculative. Moreover, the plaintiff has addressed the issue of fire department's access to the development by modifying its plan to provide two driveways, instead of one, including a fire department access road, on James Farm Road. (ROR, Exh. 58.a, p. 732.) While there was evidence regarding the weight limitation for the heaviest fire truck to be supported and possible insufficient turning radius, the commission's concerns can be properly addressed by approving the application on the condition that the plaintiff receives the fire marshal's approval that all fire trucks in the town fire department's possession can be maneuvered freely on any road on the site. (ROR, Exh. 56.f.5, pp. 583, 694.)

2. The Danger and Structural Integrity of the Retaining Wall and Lack of Safety

*16 As to reason 17, [11] the court finds insufficient evidence, as the record is devoid as to why an easement would be necessary. Analyzing a very similar issue, the court in *Nizza v. Planning & Zoning Commission*, Superior Court, judicial district of Hartford, Docket No. CV-93-0526193-S (August 2, 1994, Leheny, J.), held: "There was no evidence provided as to what maintenance of the retaining wall would involve nor of the type of equipment required to maintain the wall. No commission member expressed sufficient knowledge about retaining walls to contribute any expertise ... The commission could have suggested or asked for reasonable changes to the plan under [§ 8-30g(g)(1)(C)]." (Citation omitted.) Moreover, the commission failed to discuss or seek reasonable modifications, according to the record before the court.

As to reasons 11, [12] 12, [13] 22, [14] and 23, [15] sufficient evidence supports the commission's denial of the plaintiff's application. An engineering review of the development displays concerns that settlement and stormwater discharge will weaken and deteriorate the retaining wall (wall). (ROR, Exh. 56.d.23, pp. 299-300.) There is ample evidence of experts predicting a high likelihood of failure of the wall. (See, e.g., ROR, Exh. 56.d.20, pp. 289-90.) The evidence indicates that steep slopes of certain driveways in conjunction with the wall's proximity to the fire department access road led some experts to doubt whether and how the wall will support the weight of fire apparatus. (ROR, Exh. 56.d.20, 56.d.50, pp. 286-90, 524.) Given the discussion surrounding the geosynthetic fabric of the wall; (ROR, Exh. 57.b, 57.d, pp. 650, 671-72, 725); and the height of the wall; (ROR, Exh. 56.d.50, p. 524); the commission's decision is, all in all, supported by sufficient evidence to satisfy the first prong of § 8-30g.

While some experts indicated that the wall, as designed, would fail, there was no consideration of the ability to design it so it would not fail or not cause the issues that were raised. The court in *Novella v. Planning & Zoning Commission, supra*, Superior Court, Docket No. CV-00-050146-S, found that an inadequate design of a retaining wall that lacks supporting calculations or construction sequence, is not a valid reason for denial. Our Supreme Court has held: "To fulfill its burdens under [§ 8-30g(g)(1)(C)] ... the commission was required to show only that, on the basis of evidence in the record, it reasonably could have concluded that the public interests could not be protected by reasonable changes to the size of the zone, the density of the zone or the specific designs presented." (Emphasis added; internal quotation marks omitted.) *Kaufman v. Zoning Commission, supra*, 232 Conn. 137 n.11.

In the present case, the plaintiff's civil engineer explained that certain tasks had not been completed yet because they were typically done during the building permit process. (ROR, Exh. 44, 56.b.11, 56.f.5, 57.c, pp. 111, 239, 585, 696.) Such tasks include conducting borings, testing structural fill, and submitting a final wall design. (ROR, Exh. 56.f.5, 57.c, pp. 585, 696; Plaintiff's Brief, Docket Entry No. 120, pp. 18-19 [February 15, 2019].) When the plaintiff reaches the building permit phase and seeks a permit, borings and the final wall design will be done at that time. (ROR, Exh. 56.f.5, 57.c, pp. 585, 696.) The

plaintiff's retaining wall manufacturer described in detail its plan to work with an engineer to properly install the wall and to ensure that all applicable provisions of the building code are followed. (ROR, Exh. 57.c, pp. 702-04.) Moreover, grade level would have to conform to the requirements under the state building code, as will be discussed subsequently in this memorandum in a section titled "Dangerous Grade Level."

*17 In its brief, the plaintiff admits that the town engineer would have to approve the retaining wall's design before a building permit is issued. (Plaintiff's Brief, Docket Entry No. 160, p. 8 (October 13, 2020)). It further acknowledges that the wall design would have to be designed and certified by a structural engineer. (*Id.*; see also ROR, Exh. 57.c, pp. 700, 705.). The town's engineer, in fact, indicated that certain steps would have to be taken in order to ensure that the retaining wall is properly designed and built to avoid any structural issues. (ROR, Exh. 56.d.23, pp. 298-301.) Accordingly, it is reasonable for the court to order the commission to conditionally approve the application, especially in light of the plaintiff's admissions and suggestions. As suggested in its brief, the plaintiff should perform test borings, and an independent engineer's approval of the structural fill used is required. The plaintiff should obtain approval from the town engineer, a certification from a structural engineer, and any other structurally related and necessary approvals, permits, and certifications in accordance with the state regulations, the town regulations, and applicable codes.

3. Stormwater Retention System and Hydrostatic Pressure Impacting Wall

The defendant indicates that the storm water retention system is inadequate and that it will cause the wall to fail. Yet, the town's own expert provided that some changes could alleviate the concerns. The engineering review by STY indicates that certain studies should be done to ensure the wall is properly built—not that the wall could not be safely built. (ROR, Exh. 56.d.23, pp. 298-301.) The report provides that "[p]reliminary [b]orings should be performed to provide subsurface information to supplement the design of the wall regarding the bearing capacity, settlement estimates, and stability analysis for the foundation of the wall." (ROR, Exh. 56.d.23, p. 299.) The manufacturer of the wall suggested that a way to reduce the effect of water on the wall system was to place any infiltration systems away from the wall by a distance of at least twice the height of the wall. (ROR, Exh. 56.d.31, p. 461.) Although the evidence is sufficient to support the commission's decision as to the first two prongs of § 8-30g(g), the commission does not satisfy its burden of proof under § 8-30g(g)(1)(C) because there was no discussion or consideration of reasonable changes by the commission.

After reviewing the record, the court remands the matter back to the commission to approve the application with the following conditions: (1) approval from the town engineer with regard to the structural walls is required. (Plaintiff's Brief, Docket Entry No. 160 [October 13, 2020].); and (2) an independent engineer shall be hired and paid for by the plaintiff. (ROR, Exh. 57.c, p. 692; Plaintiff's Brief, Docket Entry No. 120, p. 22 [February 15, 2019].) The independent engineer should oversee the construction process to ensure that the plaintiff maintains proper soil and erosion control and that the stormwater management system is adequate to protect Roosevelt Forest. While overseeing the construction process, the engineer should give consideration to all suggestions, recommendations, and concerns expressed in the record, including but not limited to, the environmental concerns caused by a potential release or toxins and other harmful particles into protected lands or waters.

4. Water Sufficiency in the Case of Fires

The deputy chief of the Stratford Fire Department testified about the fire hydrant locations and that the closest hydrant would be one third of a mile away from the site. (ROR, Exh. 57.a, 57.b, pp. 614-15, 643.) In response, the plaintiff's engineering expert testified that additional fire hydrants will be placed on or near the site because the fire marshal's approval is required. (ROR, Exh. 57.c, pp. 694-95.) The expert also discussed how he will work with the water company to determine the fire hydrants' water pressure and that he will put a fire pump if the pressure is inadequate. The fire marshal even agreed with the plaintiff's experts that one-hour fire-rated walls with a full sprinkler system would be sufficient. (ROR, Exh. 57.a, pp. 611-14.) Under such

circumstances as here, conditional approval is reasonable. The commission shall approve the application with the condition that the plaintiff obtains approval from the fire marshal that the development is in compliance with all applicable regulations, ordinances, and codes, including fire codes.

5. Increased Risk of Fire

*18 The commission argues in its March 5, 2019 reply brief that the development will increase the risk of fire to Roosevelt Forest. (Commission's Reply Brief, Docket Entry No. 123, pp. 4-5 [March 5, 20191].) It relies on evidence in the memorandum prepared by CCGS's expert. The comments by CCGS's expert on increased risk of fire due to "the inherent" time lag involved in containing structural fire, and an increase in human activities near the forest (ROR, Exh. 56.d.26, 57.b, pp. 328, 666), are speculative and raise nothing more than a theoretical possibility of harm. See *Brenmor, supra*, 162 Conn.App. 696. Moreover, the fire marshal testified that it would be unlikely that a fire at the development would get out of control and spread to Roosevelt Forest. (ROR, Exh. 57.b, p. 648.) Therefore, the commission has failed to meet the first prong of § 8-30g(g).

6. Dangerous Grade Level

The experts offer conflicting evidence as to the actual proposed grade of the development. The defendants' experts were concerned that the proposed grade exceeds 5 percent, which the record suggests is a standard followed by the town pursuant to the state's building code, at least on parts of the site. (ROR, Exh. 56.d.20, 57.b, pp. 288, 290, 638.) The plaintiff's experts disputed this fact and maintained that the grade does not exceed 5 percent anywhere on the site. (ROR, Exh. 5615, 57.a, 57.c, pp. 583, 611, 694.) The cited reason is supported by sufficient evidence in the record. Also, the commission's concerns are supported by sufficient evidence as to steep grade's potential adverse impact on substantial public interests of health and safety of the community. (ROR, Exh. 57.b, pp. 648, 680, 683.)

After conducting a review of the record, the court, however, determines that the commission has failed to meet its burden of proof that such substantial public interests cannot be protected by reasonable conditions on the development. The record lacks any evidence that the commission considered reasonable changes or conditions to the plan to comply with the building code. Because the plaintiff's experts expressed confidence that the project is feasible without exceeding 5 percent grade throughout the site, it would be reasonable for the court to require approval with a condition that the grade of the slope not exceed a 5 percent maximum. (See Commission's Brief, Docket Entry No. 116, p. 15 [(January 22, 2019)].)

7. Effect on Wetlands, Cemetery Brook and Roosevelt Forest

The commission's collective statement provides the following reasons: (1) The proposed development would be detrimental to the public health and safety for residents and the surrounding ecosystem/wetlands; (2) The proposed development would do irreversible damage to the surrounding wetlands and the flora and fauna within that ecosystem; (3) The applicant has not submitted an application to the Inland Wetlands and Watercourses Commission of the Town of Stratford (IWWC) for a review of potential impacts on surrounding wetlands; and (4) The proposed development would create irreversible, long-term degradation of Roosevelt Forest, Cemetery Brook and the surrounding wetlands.[16] All of the reasons here presume failure of the retaining wall as provided in the plaintiff's proposal, which would cause irreversible damages to the wetlands, Cemetery Brook, Roosevelt Forest and the surrounding area. The issues of the retaining wall were already discussed. With respect to the detrimental effect on the wetlands, considerable evidence in the record is devoted to potential harm to the wetlands to satisfy the first prong of § 8-30g(g).

In discussing the vote on the plaintiff's application, one of the commissioners specifically acknowledged that "[i]t has not gone for review for the inland/wetlands commission, inland/wetlands and watercourses commission ... And without that input it is nearly impossible for the zoning commission to determine what impacts or threats the proposed development may have on the surrounding ecosystem and public interest." (ROR, Exh. 57.d, p. 729.) Such sentiment was shared by CCGS' expert: "The wetland boundary submitted on the survey lacks sufficient detail to be verifiable ... [A]ny conclusions regarding the limits of the [u]pland [r]eview [a]rea are ... premature." (ROR, Exh. 56.d.26, p. 326.)

*19 The plaintiff asserts in its brief that it does not need to submit an application to the IWWC because the site does not contain wetlands and no "regulated activity" within the meaning of General Statutes § 22a-38(13) [17] would occur at the site. (Plaintiff's Brief, Docket Entry No. 160, p. 6 [October 13, 2020].) It argues that the IWWC's jurisdiction is limited to the upland review area. (ROR, Exh. 56.b.5, 57.a, pp. 151-52, 592.) The plaintiff's proposed textual amendment to the zoning regulations even contains a section titled "Wetlands review," which provides: "Zoning Regulation 3.14 [which deals with waterbody, watercourse, wetland and coastal resource protection] shall not be applicable to the [development site] since there is no development within the upland review area." (ROR, Exh. 24, p. 16.)

"[Inland wetlands commissions] may regulate activities outside of wetlands, watercourses and upland review areas only if those activities are likely to affect the land which comprises a wetland, the body of water that comprises a watercourse or the channel and bank of an intermittent watercourse." (Emphasis added; internal quotation marks omitted.) *Unistar Properties, LLC v. Conservation & Inland Wetlands Commission*, 293 Conn. 93, 108 n.13, 977 A.2d 127 (2009). Our Supreme Court held that the municipal conservation and inland wetlands commission in *River Bend Associates, Inc. v. Conservation & Inland Wetlands Commission*, 296 Conn. 57, 74, 848 A.2d 395 (2004), was required to carefully consider "the precise impact that the plaintiffs' proposed activities will have on the wetlands and watercourses on the site and surrounding area." "Determining what constitutes an adverse impact on a wetland is a technically complex issue ... Inland wetlands agencies commonly rely on expert testimony in making such a finding." (Citation omitted.) *Id.*, 78. Section 2.26 of the Stratford Inland Wetlands and Watercourses Regulations (wetlands regulations) provides in relevant part: "[IWWC] may rule that any other activity located within such upland review area or *in any other non-wetland or non-watercourse area* is likely to impact or affect wetlands or watercourses and is a regulated activity." (Emphasis added.) Stratford Inland Wetlands & Watercourses Regs., § 2.26. Because the IWWC has authority to determine what constitutes an adverse impact on wetlands and watercourses—including brooks [18]—outside of upland review areas, the plaintiff's argument is without merit, [19] and the section on wetlands review in the plaintiff's proposed textual amendment to the zoning regulations is invalid.

With respect to Roosevelt Forest, as mentioned in a preceding paragraph, the reasons presumed that the retaining wall would weaken or fail. The court has already discussed the conditions that the commission may add to ensure the wall's safety. As to the reasons that relate to the flora and fauna, specifically Eastern Box Turtles, within the forest, the court finds insufficient evidence in the record to pass muster of the first prong of § 8-30g(g). Particularly notable is CCGS's expert relying on the letter from the state department of environmental protection to support his position that the turtles have been spotted in the area. (ROR, Exh. 56.d.26, 57.b, pp. 329, 666-67.) The letter, however, merely states that a survey could be conducted to see if the turtles are present. (ROR, Exh. 56.d.26, p. 336.)

*20 In sum, the section on wetlands review in the plaintiff's proposed textual amendment shall be deleted in its entirety. The application should be approved on the condition that the plaintiff submit an application to and obtain approval from the IWWC with respect to its proposed activities on the site.

D

COLLATERAL ESTOPPEL CLAIM

The intervening defendants claim that the denial or the plaintiff's prior application warrants the denial of the current application on the basis of the principle of collateral estoppel.[20] It has been firmly established that the denial of one application does not necessarily bar a party from filing a second application regarding the same property. *Vine v. Zoning Board of Appeals*, 102 Conn.App. 863, 869-70, 927 A.2d 958 (2007). Additionally, a zoning board may grant a second application that has been substantially changed to obviate the objections raised in the original application. *Rocchi v. Zoning Board of Appeals*, 157 Conn. 106, 111, 248 A.2d 922 (1968). Moreover, "[d]espite the enhanced level of review that a court undertakes in an affordable housing appeal, as opposed to other administrative appeals, the court's role remains *to assess the evidence in the record*. Collateral estoppel, sometimes referred to as issue preclusion, prevents relitigation of issues or facts actually litigated and necessarily determined in a prior action ... Furthermore, [t]o invoke collateral estoppel the issues sought to be litigated in the new proceeding must be identical to those considered in the prior proceeding ... The facts and issues actually litigated and necessarily determined in the prior judicial appeals were the sufficiency of the records in those cases to sustain the commission's prior decisions. The court here must determine the adequacy of the evidence on a different record." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Landmark Development Group, LLC v. Zoning Commission*, Superior Court, judicial district of New Britain, Docket No. CV-064016813-S (October 31, 2011, Frazzini, J.).

The present application differs from the prior application in that this proposal concerns a fifteen acre parcel with 85 percent open space proposed. This application provides an additional access point into the property and changes the slope of the driveway from 10 percent to 5 percent. While the plaintiff proposes a large retaining wall again, the Versa-Lok Retaining Walls of New England representative testified that there are numerous walls of similar type product as that proposed for the retaining wall here, constructed throughout New England. The design of the building is different, and it allows fire trucks to have a bigger turning radius and flat level ground around the building itself. Overall, this application is sufficiently different from the earlier application, which was denied, and would not bar this appeal on the basis of collateral estoppel or res judicata. See *Landmark Development Group v. Zoning Commission*, Superior Court, judicial district of New Britain, Docket No. CV-05-4002278-S (February 2, 2008, Prescott, J.) (45 Conn. L. Rptr. 63, 68).

Some of the same concerns exist here as there were in *500 North I*, and evidence in the present record supports the defendants' concerns with these enumerated public interests. Nevertheless, the present record is absent of discussion regarding weighing each of these identified interests against the need for affordable housing and determining whether reasonable changes could protect the public interests, yet still allow the development to move forward. In fact, some expert testimonies upon which the commission relied, mentioned changes that could be made to make the development feasible and that further tests were needed, such as preliminary boring tests. Unlike *500 North I*, in which the commission clearly engaged in determining the ability to make reasonable changes to address the specific public interest in the wetlands, the decision and the record here contain no such analysis. See *500 North I, supra*, Superior Court, Docket No. CV-16-6061118-S. The court, therefore, concludes that the plaintiff is not precluded from filing the present application.

IV

CONCLUSION

*21 For the foregoing reasons, the court sustains the plaintiff's appeal and reverses the commission's denial of the plaintiff's application for conditional approval with the following modifications and conditions:

The plaintiff shall seek and obtain the fire marshal's approval that all fire trucks in the town fire department's possession can be maneuvered freely on any road on the site.

The plaintiff shall seek and obtain approval from the fire marshal that the development complies with all applicable regulations, ordinances, and codes, including fire codes.

The plaintiff shall comply with the slope of the site, which shall not exceed the 5 percent grade maximum and compliance with all applicable codes shall be met.

As to the retaining wall, the plaintiff shall seek and obtain approval from the town engineer with regard to the structural walls; a certification from a structural engineer; and any other structurally related and necessary approvals, permits, and certifications in accordance with the state regulations, the town regulations, and applicable codes. An independent engineer, hired and paid for by the plaintiff, shall oversee the construction process to ensure that the plaintiff maintains proper soil and erosion control and that the stormwater management system is adequate to protect Roosevelt Forest. While overseeing the construction process, the engineer shall give consideration to all suggestions, recommendations, and concerns expressed in the record, including but not limited to, the environmental concerns caused by a potential release of toxins and other harmful particles into protected lands or waters. Additionally, an independent engineer's approval of the structural fill used shall be required.

Section 28.16 in the plaintiff's proposed textual amendment to the zoning regulations shall be deleted in its entirety. (ROR, Exh. 24, p. 16.) Inasmuch as the commission has raised the issue of an impact to the neighboring wetlands (even if there is none on-site), a submittal to the IWWC would be appropriate. See General Statutes § 8-3(g).

So ordered.

All Citations

Not Reported in Atl. Rptr., 2021 WL 4895248

Footnotes

1 At the May 17, 2021 hearing, the court asked for the parties to clarify the record. (ROR, Exh. 57.c, p. 712.) Plaintiff's counsel also explained that it had not submitted its application under the defendant's special case regulations and that any reference to special case was meant to refer to meeting agenda items that listed its application as a special case application. Plaintiff's counsel for the first time indicated it was submitting a final site plan, which contradicts the counsel's prior references to the site plan as a "conceptual site plan," including in its e-mail dated November 17, 2017. (ROR, Exh. 26, p. 87.) While there was much discussion of whether the site plan submitted was conceptual or final, the court treats the application as a conceptual site plan given the proposed amendment requires a final site plan to be submitted after a zone change approval. (ROR, Exh. 24, p. 14); cf. *Landmark Development Group, LLC v. Zoning Commission,* Superior Court, judicial district of New Britain, Docket No. CV-06-4016813-S (October 31, 2011, Frazini, J.) (court remanding application to zoning commission to approve conceptual site plan conditioned upon applicant subsequently demonstrating in its preliminary or final site plan under amended regulations that zoning commission's concern regarding public water and sewers can be met).The court has evaluated this application as it was submitted: (1) a petition for a zone change; (2) a proposed textual amendment to the town's zoning regulations; and (3) an affordability plan.

2 All references to the defendants are to the commission and the intervening party defendants, which consists of the town of Stratford (town), Judith Kurmay, Cathleen Martinez, and Concerned Citizens Group of Stratford, Inc. (CCGS).

3 The denial letters as to the proposal for a text amendment, the petition for a zone change from RS-1 to JRAZ, "the special case application," and the application for review of erosion and sediment control plans, all dated September 24, 2020, are contained in a Notice of Compliance filed by the commission on September 29, 2020. (Docket Entry #159.)

4 Specifically, they are numbered as reasons one, two, and ten in the defendant's September 24, 2020 letter to the plaintiff's counsel titled "RE: 795 James Farm Road—Special Case Application." (Commission's Notice of Compliance, Docket Entry No. 159, pp. 7-10 [September 29, 2020].)

5 Throughout this paragraph, because the affordable housing statute contemplated by the court in *Interfaith* is not the current statutory language and the subsection numberings are different, such discrepancies were modified to reflect the current statutory language.

6 The commission does not offer any basis to exempt the town from the definitions under § 830g. In fact, pages 662 through 664 of the return of record, which it cites as support for its assertion, shows that the town concedes that it does not meet the municipality requirement of 10 percent for affordable housing under § 8-30g.

7 The record does not contain a copy of the POCD thereby preventing the court form evaluating whether and how the application is inconsistent with the POCD. See *Hillcrest Orchards, LLC v. Conservation Commission,* Superior Court, judicial district of New Britain, Docket No. CV-084016248-S (March 6, 2009, Prescott, J.) [47 Conn. L. Rptr. 337] *(Hillcrest Orchards).* Even if the record included a copy of the POCD and the evidence was sufficient to meet the first prong of § 8-30g(g), a plenary review of the record shows insufficient evidence to prove that "the decision is necessary to protect substantial public interests which clearly outweigh the need for affordable housing and which cannot be protected by reasonable changes to the affordable housing development." (Internal quotation marks omitted.) *Quarry Knoll, supra,* 256 Corm. 724.

8 Reason 24 provides: "Evidence in the record from 2018 is sufficient to support the [commission's] findings."

9 Reason 25 provides: "The potential risks to public health and safety outweigh the need for affordable housing in [the town]."

10 The appeal was withdrawn after the Supreme Court granted certification.

11 Reason 17 provides: "There are no easements in the plan that would allow access or apparatus to the foot of the retaining wall for purposes of maintenance, repair or rescue."

12 Reason 11 provides: "The proposed development, more specifically the 30 [feet] tall retaining wall, would present a clear public danger to residents, children and emergency first responders. This danger would be increased in the event of inclement weather."

13 Reason 12 provides: "It is questionable whether the proposed retaining wall would support any large equipment, including fire apparatus responding to emergencies on site."

14 Reason 22 provides: "Punctures in the geosynthetic fabric would compromise the structural integrity and allow water to seep through."

15 Reason 23 provides: "Hydrostatic pressure (build up of water behind the wall) could compromise the wall's structural integrity."

16 Because the intervening defendants filed verified pleadings pursuant to § 22a-19, the commission was required to consider environmental issues pursuant to the statute's subsection (b).

17 General Statutes § 22a-38(13) provides: " 'Regulated activity' means any operation within or use of a wetland or watercourse involving removal or deposition of material, or any obstruction, construction, alteration or pollution, of such wetlands or watercourses, but shall not include the specified activities in [General Statutes § 22a-40]."

18 Section 2.35 of the wetlands regulations defines "[w]atercourses" to include brooks. Stratford Inland Wetlands & Watercourses Regs., § 2.35.

19 The court notes that the commission has failed to prove that more than a theoretical possibility exists that there may be a specific harm to substantial public interests in Cemetery Brook. The court, however, recognizes that when the IWWC evaluates the site, it may evaluate the impact that the plaintiff's activities may have on Cemetery Brook, as brooks are within the IWWC's purview.

20 The commission did not take the position that the present application was barred on the basis of the principle of collateral estoppel.

End of Document

EXHIBIT W

INFORMATION ABOUT 751 WEED STREET

Explanation Regarding 8-30g Moratorium Application

Karp Associates has filed applications with the Water Pollution Control Authority (WPCA) and with the Planning & Zoning Commission regarding a proposed multi-family development at 751 Weed Street.

For information about the WPCA application click here.

Sewer Connection Application with the WPCA withdrawn as of March 25,2022.

Revised and Dated April 14, 2022 Application for allocation of sewer capacity and approval to reconnect a multi-family development

Click here for Application with Planning & Zoning and the related legal memo *8-30g Memo*

Moratorium FAQ's

What is 8-30g?

"8-30g" is a reference to Section 8-30g in Chapter 126a of the Connecticut General Statutes. The law, which is sometimes referred to as the "Affordable Housing Land Use Appeals Act," establishes unique standards that must be satisfied for a municipality to deny a proposed affordable housing development. If 10% of a municipality's total housing units are affordable, the municipality is exempt from these standards.

In addition, the law establishes a process for a municipality to apply to the State Department of Housing (DOH) for a "a certification of affordable housing project completion" that would result in a 4-year "moratorium," during which the Town is not required to accept or act upon new applications for proposed affordable housing developments. A municipality becomes eligible to apply for this moratorium once it can prove that a certain number of affordable housing units exist within the municipality.

What dwelling units get counted as affordable housing?

Affordable housing has very specific definitions under Section 8-30g. Generally, affordable housing refers to housing that is occupied by persons and/or families who have an annual income that does not exceed 80% of the median income. These dwelling units also must be deed restricted for a period of 40 years.

How do municipalities obtain a moratorium?

A municipality must demonstrate to the State that it has the requisite number of affordable housing units for a moratorium. The total number of affordable housing units required for a moratorium is calculated using a "Housing Unit Equivalent" (HUE) point system that provides more points for certain types of affordable housing units and less for others. The number of HUE points required to apply for a moratorium (and subsequent moratoria) is 2% of all the dwelling units in the municipality, and so each municipality will have different HUE point requirements based upon the evolving housing stock of each municipality.

How many dwelling units are there in New Canaan?

In the 2010 US Census there were 7,551 dwelling units in New Canaan. In the 2020 US Census there were 7,502 dwelling units in New Canaan.

How many HUE points does New Canaan need to qualify for a moratorium?

It is a simple math problem: 7551 X .02 = 151.02 HUE points. Currently, municipalities must utilize the 2010 US Census numbers because the 2020 US Census has not yet been finalized.

How do you calculate HUE points?

HUE points are calculated by the type of unit (rental or ownership) and by the income demographic of the family/persons for whom the unit is dedicated. The state

regulations that implement Section 8-30g outline what type of units garner the most points. For instance, a family unit which is rented and restricted to households which makes 80% or less of median income garners 1.50 points while the same apartment rented and restricted to households which makes 40% of median income would garner 2.50 points.

What is median income?

State Median Income is $102,600

Area Median Income is $151,800

Do all affordable housing units count towards a moratorium?

Naturally occurring affordable housing (NOAH) is housing found in a community which is unsubsidized and is not deed restricted and is considered affordable to persons/families that earn 80% or less of AMI. NOAH does not count towards HUE points nor a moratorium. Generally, the affordable housing needs to be new construction and deed restricted.

Once a municipality attains a moratorium, is the municipality guaranteed another moratorium?

No, in order to qualify for subsequent moratoria, a municipality must demonstrate that since the last moratorium, it has added enough affordable housing units to meet the HUE point requirement. Affordable dwelling units previously counted towards a moratorium may not be used for subsequent moratoria.

When was the last time New Canaan applied for a moratorium?

New Canaan first applied to the State DOH for a moratorium on March 30, 2017. The DOH approved the moratorium effective June 6, 2017.

How long was the moratorium in effect?

The moratorium was in effect for four years, until June 5, 2021.

Was New Canaan eligible to apply for a new moratorium on June 5, 2021 when the moratorium expired?

No. At that time, New Canaan did not have enough HUE points to submit an application for a second moratorium. Once the first moratorium became effective on June 5, 2017, additional new affordable dwelling units needed to be constructed to be counted towards a second moratorium.

Was Canaan Parish under construction during the first moratorium?

Yes, Canaan Parish was under construction; however, the units need to have received a Certificate of Occupancy before the dwelling units could be used for HUE points. Work anticipated to occur at Canaan Parish had been delayed by approximately 10 months due to difficulties obtaining financial assistance from the State in 2018-2019, and then COVID-19 and resulting supply chain disruptions caused an additional several months of delay.

When did Canaan Parish receive its Certificate of Occupancy?

Canaan Parish received a Temporary Certificate of Occupancy in late October 2021.

Who submits the moratorium application?

Under Section 8-30g, the Chief elected official of any municipality may apply for a state certificate of affordable housing completion once the extensive application and documentation requirements have been satisfied.

If New Canaan had applied for a moratorium immediately upon the completion of Canaan Parish in late October, 2021, would the second moratorium have gone into effect prior to the current application for an affordable housing development at 751 Weed Street?

No. Section 8-30g sets an approximately 4-month timeline between the expiration of a moratorium and the approval of a subsequent moratorium. Specifically, the Town must first publish newspaper notice that it intends to apply for a new moratorium and the application must be made available to the public for 20 days. A public hearing may also be necessary if requested by petition during that time. At that point, the application may be submitted to DOH for review, and DOH has 90 days to decide.

Is New Canaan in the process of applying for a moratorium?

Yes, the Town is and has been actively preparing an application for a second moratorium.

Because the statutory requirements for the moratorium application are complex and involve a substantial number of supporting documents, and due to the ongoing volume of applications and responsibilities pending with the Planning and Zoning Department, the Town has hired a consultant for the preparation of the application. Significant progress has been made and the Town anticipates completion of its application on or before April 1, 2022.

EXHIBIT X

HOUSING AUTHORITY OF NEW CANAAN
57 Millport Ave.
New Canaan, CT 06840

June 29, 2022

State of Connecticut Department of Housing
Attn: Michael Santoro
505 Hudson St
Hartford, CT 06106

RE: New Canaan 8-30g Moratorium

Dear Mr. Santoro,

This letter is to express the Housing Authority of the Town of New Canaan's (HANC) support for the Town of New Canaan's request to the Department of Housing (DOH) for a 4-year moratorium from applications filed under CGS 8-30g.

The HANC has implemented a decade-long project to replace New Canaan's aging and obsolete affordable housing stock with modern, high-quality and more affordable units. This effort has been held up as a model for other towns to simultaneously improve and expand their affordable housing. When we began this initiative in 2009, the HANC only owned and operated 34 obsolete affordable housing units. We have now replaced those units with 113 modern and more affordable units and we are currently replacing the aging 60-unit Canaan Parish property with 100 modern and more affordable units in partnership with a local not-for-profit. The end result is 213 modern and deeply affordable units.

One key aspect of the HANC's program is a dramatic change in the affordability level of the HANC's affordable housing. The existing units at Mill Apartments, Millport Apartments and Canaan Parish were all restricted to 80% of Area Median Income. The Stamford-Norwalk MSA's 2022 area median income for a family of four is $180,900. The HANC's new units have all been restricted to 60% and 80% of State Median Income. The 2022 state median income for a family of four is $112,600. This means that the new units are at least 38% more affordable than the units they replaced.

In his memo to the Town of New Canaan, Attorney Tim Hollister asserted that Section 8-30g(k)(8) means that units listed on the Appeals List as of 1990 that are demolished should be deducted from the moratorium points calculation. Ostensibly, this is to ensure that a town does not simply earn moratorium points by demolishing and rebuilding the same units without increasing the town's affordable housing stock. However, applying this interpretation of Section 8-30g(k)(8) to New Canaan's application falls short in two very important regards:

1. The HANC demolished 78 units that were listed on the 1990 Appeals List since its last moratorium (60 at Canaan Parish and 18 at Millport Apartments). These units were previously restricted to 80% of Area Median Income. The new units that replaced them are restricted to 80% of State Median Income or lower. As described earlier, this is a substantive difference in affordability level and the demolished units were not the equivalent of the new units.

2. The language in Section 8-30g(k)(8) refers specifically to the demolition of "affordable dwelling units" as qualifying for a deduction of moratorium points. This term is used throughout the 8-30g statute exclusively to refer to units that are restricted to 80% of State Median Income or lower.

None of the units that the HANC demolished met this definition at the time they were demolished.

Attorney Hollister has also asserted in a recent public meeting that New Canaan has made "relatively little progress" towards meeting the state's 8-30g goals. We prepared a comparison between the 2021 Appeals List and the 2002 Appeals List and found that, in that time, New Canaan added 109 Government Assisted and Deed Restricted units or 86% of its affordable housing stock*. This ranked New Canaan #15 of the 138 Non-Exempt towns and #4 among municipalities in Fairfield County in terms of new affordable units. The HANC is proud of its accomplishments and objects strongly to Attorney Hollister's factually incorrect statement in the public record.

We believe that the HANC's affordable housing modernization and expansion program over the past decade has succeeded in improving the quality, quantity and affordability of New Canaan's affordable housing. The attendees at our recent groundbreaking and ribbon cutting events celebrating these achievements, including Governor Dan Malloy and DOH Commissioner Evonne Klein, reiterated this message. Attorney Hollister's attempt to convince DOH to apply the provisions of Section 8-30g(k)(8) to dramatically reduce the Town of New Canaan's moratorium points will have the effect of penalizing the Town of New Canaan for this successful approach to developing affordable housing in a suburban community. It will also disincentivize other towns from seeking to redevelop their own aging affordable housing. Finally, this interpretation of 8-30g(k)(8) runs contrary to public policy: it doesn't support towns that are seeking to comply with 8-30g and it fails to improve the affordable housing situation for the very people the program is designed to help.

We appreciate your consideration of our thoughts on this matter and welcome any questions or comments you might have in response to our letter.

Sincerely,

Scott Hobbs, Chairman

* We included the 40 new Canaan Parish units that are under construction and will be completed this year in this analysis.

CANAAN PARISH REDEVELOPMENT GP, LLC
186 Lakeview Ave.
New Canaan, CT 06840

July 14, 2022

State of Connecticut Department of Housing
Attn: Michael Santoro
505 Hudson St
Hartford, CT 06106

RE: New Canaan 8-30g Moratorium

Dear Mr. Santoro,

This letter is to express Canaan Parish Redevelopment GC, LLC's (CPGP) support for the Town of New Canaan's request to the Department of Housing (DOH) for a 4-year moratorium from appeals filed under CGS 8-30g.

CPGP was formed in 2018 as a partnership between the Housing Authority of the Town of New Canaan (HANC) and New Canaan Neighborhoods, Inc. (NCN), a 501(c)3 not-for-profit corporation formed in 1978 to promote affordable housing in New Canaan. The CPGP owns and is redeveloping the Canaan Parish redevelopment project, which is converting 60 small and obsolete affordable housing units built in 1979 into a best-in-class affordable housing community containing 100 units.

In his memo to the Town of New Canaan, Attorney Tim Hollister made several assertions regarding the Canaan Parish project, including stating that the project was not eligible for a certificate of occupancy at the completion of the first building in October, 2021 and that the demolished Canaan Parish units should be deducted from the Town's moratorium calculation according to CGS Section 8-30g(k)(8). This surprised us, considering that in 2018-2019 Attorney Hollister prepared our 8-30g Affordability Plan, prepared the zoning amendments to enable the redevelopment to happen, and represented us in public presentations before the Planning and Zoning Commission.

During his representation of us, Attorney Hollister created an entirely different presentation of our project's contribution to an 8-30g moratorium than what he described in his memo to the Town of New Canaan:

- First, Attorney Hollister developed 8-30g moratorium point calculations and presented them in meetings and hearings with the Planning and Zoning Commission that clearly showed he believed that the demolished Canaan Parish units would **not** be deducted from the moratorium point calculation. Presumably, this is because Attorney Hollister understood that the old Canaan Parish units were restricted to 80% of Area Median Income and that eligibility for moratorium points is limited to units that are restricted to 80% of State Median Income, which is a much stricter definition of affordability in New Canaan.

- Second, Attorney Hollister understood and described a phased development of the Canaan Parish project. He participated in many team meetings where the phasing was planned in detail. He presented an 8-30g moratorium calculation showing that the first building of Canaan Parish would qualify the Town of New Canaan for an 8-30g moratorium. He never once raised a

concern about whether a temporary certificate of occupancy met the requirements for completion in the 8-30g statute.

We ask the DOH to consider Attorney Hollister's assertions about our project with the knowledge that three years ago, when Attorney Hollister represented CPGP, Attorney Hollister apparently believed that the Canaan Parish project should qualify the Town of New Canaan for an 8-30g moratorium.

We appreciate your consideration of our thoughts on this matter and welcome any questions or comments you might have in response to our letter.

Sincerely,

Christine Hussey

Christine Hussey, Chairwoman
New Canaan Neighborhoods, Inc.