

STATE OF CONNECTICUT
DEPARTMENT OF HOUSING

OFFICE OF THE COMMISSIONER

JUNE 14, 2019

STATEMENT OF OPPOSITION TO PETITION FOR DECLARATORY RULING

This office represents the Town of Westport and the Westport Planning and Zoning Commission (hereafter “Westport”). We are in receipt of a document dated June 4, 2019 and entitled “Petition For Declaratory Ruling Pursuant to General Statutes § 4-176 Regarding Legality of Moratorium from General Statutes § 8-30g, as Issued to the Town of Westport by the Connecticut Department of Housing, March 6, 2019” (hereafter “petition”). That document was filed with your office apparently seeking a declaratory ruling stating that the Certificate of Affordable Housing Completion, granting a moratorium¹ to Westport published by the Department of Housing on March 5, 2019, (hereafter “Certificate”) was not “legal.” The petition was expressly brought under C.G.S. § 4-176.

This memorandum is intended to set forth the reasons why the petition is not authorized by law and is an inappropriate attempt to create an appellate right with respect to the Connecticut Department of Housing’s determination that Westport has met the requirements for the moratorium. However, this memorandum will not address the “merits”² of the petition unless and until such may be required, depending on your decision.

¹ Pursuant to C.G.S. § 8-30g of the Connecticut General Statutes.

² The merits of the petition relate to the petitioners’ claim that the Department of Housing erroneously calculated the number of points earned by the Town of Westport. In fact, Westport strongly rejects the claim that any error was made, as undoubtedly a careful review was undertaken by the Department after consideration of comments from Yale Law School, Hoopes Margenthaler Raush & Scaramozza and Shipman & Goodwin opposing the issuance of the Certificate. Unlike the comments from Hoopes Margenthaler Raush & Scaramozza, which had been provided to the Town as a courtesy and to which the Town had an opportunity to respond, the petitioners did not provide the Town with a copy of their December 2018 and January 2019 objections that “challenged the factual, statistical and legal basis of several of Westport’s moratorium point claims.” Westport expressly reserves its right to address these claimed substantive issues if the petition is not rejected.

I. The petition is invalid as there is no subject matter jurisdiction to raise these issues pursuant to the statute.

The first defect in the petition relates to subject matter jurisdiction. C.G.S. § 7-176 provides for two circumstances under which a person may petition an agency for a declaratory ruling, neither of which are present here. First, a person may seek a declaratory ruling as to the validity of a regulation. Second, a person may seek a declaratory ruling as to the applicability “to specified circumstances” of a statute, regulation or final decision of the agency. The petition does not claim that any regulation of the Department of Housing is invalid, so the first authorized purpose for filing a petition is clearly not present. In addition, the petition does not claim that § 8-30g or any other statute, regulation or prior final decisions of the Department are not applicable to the circumstances and facts related to Westport’s application or the Department’s decision. In fact, the petition expressly cites the same statutory provisions that were applied by the Department. The petition concedes that the statutes and regulations cited by the Department were and are applicable to the Town’s application and the Department’s decision. Instead, the petition is really an appeal of the *factual findings and computations* of the Department, an action that is not authorized in C.G.S. § 4-176.

Indeed, the petitioners admit that in December 2018 and January 2019 they already filed “written procedural and substantive objections challenging the “factual, statistical, and legal basis of several of Westport’s moratorium point claims.” Those objections were obviously rejected by the Commissioner. In effect, the petition is an attempt by the petitioners to have a second bite of the apple. That is simply not the purpose of C.G.S. § 4-176.

The petitioners cite *Stefanoni v. Department of Economic & Community Development*, 142 Conn. App. 300 (2013) apparently as purported support for the proposition that a petition may in fact be filed under C.G.S. § 4-176 to challenge the issuance of a Certificate of Affordable Housing Completion. However, neither the Appellate nor the trial courts reached that issue and there is no further legal authority supporting the petitioner’s position.

The Commissioner therefore lacks subject matter jurisdiction with respect to the petition, and for that reason, a declaratory ruling should not be issued.

II. The petitioners lack standing to bring the petition.

In *Stefanoni*, the Court affirmed the lower court's determination that the petitioner lacked standing to request declaratory relief.³ *Stefanoni* sets forth the oft-repeated standard that must be used to determine if a party has standing to pursue an action.⁴ Essentially, a party must have a "justiciable right" in the matter. In addition, the justiciable right (i.e. the specific interest – in this case an alleged property interest) sought to be protected must be distinguishable from the general public interest. The justiciable right claimed by the petitioners in this matter must be the right to file an application for affordable housing under § 8-30g, since that is the only "right" affected by the moratorium. No applications by the petitioners for affordable housing under § 8-30g have been rejected, in whole or in part, by the Town because of the moratorium.

The fact that the petitioner Summit Saugatuck has a pending application before the Westport Planning and Zoning Commission is irrelevant since that application is unaffected by the moratorium. Garden Homes is equally unaffected. Garden Homes has filed two applications with the Town under § 8-30g. The first was denied. The Superior Court (Berger, J.) denied the administrative appeal taken by Garden Homes and upheld the Commission's denial. The second Garden Homes application was also denied and the administrative appeal is pending. Neither petitioner has sought to file an application since the moratorium was established.

Nevertheless, the petitioners claim standing to file the petition because, in their words, "...each is an owner of real property that is, as of the date of this petition, utilizing, or eligible to use, § 8-30g to pursue an affordable housing development in Westport." The "utilizing" argument is discussed above. In addition, the petitioners cite the *possibility* that in each such pending application, they may have to "reapply or refile" the applications that were filed prior to the issuance of the Certificate. Obviously, since the

³ Standing also involves subject matter jurisdiction.

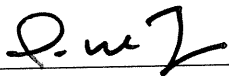
⁴ In addition to having no standing, if the petitioners bring a subsequent action regarding this challenge in Superior Court, they will be unable to establish that they are aggrieved.

petition seeks a ruling that the Certificate is invalid, a ruling could have no effect on pending or “grandfathered” applications filed prior to the effective date of the Certificate.⁵ If the petitioners wish to reapply or refile, they are entitled to do that *in the same way any other property owner or developer in Westport is so entitled*. The pending applications, however, are completely unaffected by the Certificate and do not in any conceivable way confer standing on the petitioners.

Alternatively, at least in the case of the petitioner Summit Saugatuck, LLC⁶, an argument is offered that it owns 60 Charles Street in Westport which the petitioner claims “could be developed under § 8-30g.” Putting aside the fact that virtually any of the 10,586 lots in the Town of Westport *could* be subject to a § 8-30g application, Summit Saugatuck, LLC in fact *does not own* 60 Charles Street. According to Town of Westport tax and land records, 60 Charles Street is owned by 60 Charles Street, LLC, a fact that must be well-known to the petitioners. This patent misrepresentation of ownership of a parcel of land in Westport is surprising since the *Stefanoni* decision made it clear that mere ownership of real estate is not enough to confer standing on a person challenging the issuance of a Certificate. It is therefore unclear what motivated the petitioners to make this erroneous claim.

For these reasons, both petitioners lack standing to request a declaratory ruling from the Department, and therefore the petition should be rejected.

TOWN OF WESTPORT AND TOWN OF WESTPORT
PLANNING AND ZONING COMMISSION

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⁵ See CGS § 8-30g(1)(2)(C).

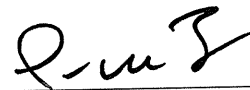
⁶ The petitioner Garden Homes Management Corporation does not claim to own any property in Westport that is not the subject of a current 8-30g application, filed prior to the effective date of the Certificate.

CERTIFICATION

I hereby certify that a copy of the above was mailed or electronically delivered on June 14, 2019, to all counsel and self-represented parties of record and that written consent for electronic delivery was received from all counsel and self-represented parties of record who were electronically served, to wit:

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