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In the matter of)
)
Town of New Canaan August 19, 2024) December 20, 2024
Certificate of Affordable Housing Project)
Completion/Moratorium Application)
Pursuant to C.G.S. §8-30g)

MEMORANDUM REGARDING DECLARATORY RULING ON 8-30g MORATORIUM APPLICATION OF THE TOWN OF NEW CANAAN

This memorandum is in response to the Department's request for comment on the counting of moratorium points under C.G.S. 8-30g. In summary, we believe that (a) moratorium points must be deducted for assisted and deed-restricted units which are demolished, even if those units would not have met the standard for housing equivalent point if built today and (b) rental units that otherwise comply with moratorium standards cannot be counted for HUE points without proof that their affordability has been maintained on an on-going basis. This memo addresses the demolition question first, followed by the question on documentation of continuing affordability compliance.

Issue #1 - Demolition of units

We assume this question asks for the legal basis for the petitioner's claim that the units demolished at the Millport Apartments and Canaan Parish must be deducted from the HUE count in the New Canaan application before points for replacement units can be counted. It is our belief that it is contrary to law for the Department to have awarded new construction points to New Canaan without also deducting points for the units that were demolished in order to build them. The Department's decision is contrary both to the language of the statute itself and to the purpose and policy behind the statute. Indeed, it turns the incentivization structure of the moratorium on its head and produces the bizarre result that a town can get a four-year moratorium from new affordable housing development under 8-30g by reducing the number of government-assisted or deed-restricted units in the town. This is a shocking interpretation from an agency responsible for promoting the development of affordable housing in Connecticut and is utterly inconsistent with the purpose of 8-30g. That is because it holds that, in regard to towns not exempt from 8-30g, by reducing the number of affordable housing units in the town, that town can free itself from the availability of 8-30g to generate more affordable housing units for four years and possibly more. Such an interpretation of 8-30g(*L*)(8) is incompatible with 8-30g and cannot be a correct interpretation of the statute. It is simply not a reasonable reading of the law.

The Department's interpretation results from a serious misreading of the demolition portion of the statute and a confusion between the construction of new affordable[1] housing, which requires meeting current 8-30g affordability standards to be moratorium-eligible, and the demolition of older affordable housing, which is based on eligibility for inclusion in the 10% list. The moratorium requires that a significant amount of additional affordable housing, meeting current 8-30g affordability standards and serving households below 80% of median income, have been added to the town's housing stock. For that, it "rewards" the town with greater discretion to direct new affordable housing by limiting developer use of 8-30g during a moratorium. It does not, however, "reward" the town for the opposite – allowing the town to block new affordable housing for an additional four years by reducing the number of affordable units in the town. This does not prevent the upgrading of older affordable housing, but it does mean that an 8-30g moratorium is about expanding the number of affordable units.

The failure to subtract for the demolition of existing government-assisted or deed-restricted housing is contrary to both the letter of 8-30g and its purpose. The starting point is the wording of the statute itself. C.G.S. 8-30g(*L*)(8) requires subtraction for units that "cease being counted as an affordable housing unit." The phrase "cease being counted" is the key language. The "count" referred to in the statute is necessarily the 10% count of C.G.S. 8-30g(k), not the HUE count of C.G.S. 8-30g(*L*), because it refers to units that are already "being counted." Moratorium points, in contrast, are for new units. Demolished (or otherwise discontinued) units are existing units, some of which will have been built to lower affordability standards. The test for counting them as a deduction from moratorium points is whether they were eligible for "being counted" on the 10% list, not whether they would qualify for moratorium points if they were built today. If they were eligible for the 10% count, then there must be a subtraction under the statute.

The Department does not remove units from the 10% list because of changes in the requirements that developers must meet in order to make applications today under 8-30g, nor should it and nor would towns want to lose credit on the 10% list for such units. For example, a building constructed in 1998 with a 25% affordability set-aside and a 30-year deed restriction would not have been deleted from the 10% exemption list when the 30%/40-year requirement for new affordable housing construction was adopted in 2000. Similarly, pre-1996 housing priced at the AMI level when it was opened did not lose its eligibility on the 10% list in 1995 when SMI was added to 8-30g. Moreover, the 10% list has always intentionally been broader than the new-construction requirements for moratorium points, which must meet a more significant affordability standard. That is to assure that developers that use 8-30g will provide real affordability in the town. In contrast, the 10% list performs a very different function. It is a point-in-time measure of the number of units of government-assisted and deed-restricted housing at that moment in time. It is not limited to construction and includes many subsidized units (e.g., Section 8 and RAP) that do not involve construction at all. It is also not limited to new construction or even construction that occurred after 1990. As long as the restricted units

[1] In the context of 8-30g, the term "affordable" is a technical word meaning "government-assisted or subject to long-term affordability restrictions."

are still in existence as government-assisted or deed-restricted units, they are counted on the 10% list.

How many points should be subtracted when demolition has occurred? C.G.S. 8-30g(*L*)(8) refers us to 8-30g(*L*)(6), which provides for different point totals based on rental vs. ownership and degree of affordability. The reference to "median" refers to "median" when the unit was built (or 1990 for pre-1990 construction), even though the lower of SMI or AMI has applied to new construction since 1996. For example, demolition of an 80% rental unit would require a 1.5 point reduction. Given the mandatory requirement for deduction, that is the most reasonable application of the statute.

The Department's interpretation in the New Canaan application is also directly contrary to the purpose of the 8-30g moratorium and severely undermines it. The goal of the moratorium is to reward towns in which a substantial number of affordable units have been added to the town's housing stock. C.G.S. 8-30g(*L*)(8) is designed to prevent the award of a moratorium when affordable units are demolished. Replacement units can be counted for a moratorium, but they add to the number of units available to town residents only to the extent that existing units remain. The moratorium is not intended to reward a town for demolition of affordable housing, and it is certainly not meant to incentivize demolitions. For example, what if a 50-unit set-aside development built to 8-30g requirements in 1994 were replaced with a 25-unit set-aside development built to 8-30g requirements in 2024? On the Department's theory, there would be no reduction in moratorium points for the demolition, so that the town would receive full moratorium credit for cutting the number of affordable units in half. This would be contrary to the purpose and letter of both the moratorium and 8-30g itself.

An interpretation of 8-30g that allows towns to obtain the right to block new affordable housing by demolishing old affordable housing and reducing its affordable housing stock would seriously undercut 8-30g. Such a reading is <u>not</u> required by the statute – it is, indeed, contrary to the statute – and is in conflict with the purpose of the stataute. It actually incentivizes the demolition of affordable housing. The Department should not read the statute in such an incongruous way.

<u>Issue #2 -- Continuing compliance of countable units</u>

We support the brief of the petitioners as to the requirement of proof of continuous compliance, but we want to add further comment based on the history of that requirement. The failure of the Department to require actual monitoring of developer compliance with 8-30g undermines the enforcement plan implicit in 8-30g and 8-30h. This has the effect of eliminating the General Assembly's key mechanism for making sure that owners of 8-30g-constructed buildings do not use the turnover of rental tenancies as a way to avoid compliance with the durational requirements imposed in the original income restrictions to assure long-term affordability. To see the intended operation of this enforcement mechanism, it is necessary to go back to the original 1989 act (P.A. 89-311), the 1995 amendments (P.A. 95-280), and the 2000 amendments (P.A. 00-206).

The core of 8-30g is a legislative balancing between developers and municipalities for the purpose of forcing municipalities with little government-assisted or deed-restricted housing to accept greater density and, with it, more long-term affordable housing units. The ultimate beneficiaries are the low-income residents who will have a greater opportunity to find housing they can afford in high-opportunity communities. By creating a "builder's remedy," the system assures a high likelihood that units approved through 8-30g will actually get built and that the units for the targeted population will actually be occupied. In order to include private development and not just government- and non-profit-built housing, the act from its inception included developers of mixed-income private development.

As originally adopted, however, 8-30g included no formal enforcement provisions to assure that developments would remain affordable for the full duration of any restriction period. For ownership developments, it was assumed that a self-enforcement mechanism existed. In practice, banks and title companies will enforce continuation of the restrictions when units are re-sold, since banks are unlikely to finance such purchases without a title search that would reveal the income restrictions.[2] For rental units, however, there was no enforcement structure, so it had to be assumed that the developer or subsequent owners would comply with deed restrictions or with assisted program rules.

During the first five years of 8-30g, however, allegations arose that some developers of 8-30g rental housing were not enforcing deed-based income-restrictions, resulting in developers using the statute without providing, in return, the long-term affordability that 8-30g requires. The legislature responded, through the adoption of P.A. 95-280, by explicitly giving municipalities the power to verify continuing affordability in rental developments. The relevant section, codified as C.G.S. 8-30h, mandated that owners of rental developments under 8-30g annually certify to the municipality their continuing compliance with affordability restrictions. It also explicitly gave the municipality itself the power to inspect the income statements of the tenants to verify owner compliance. The underlying purpose was to satisfy municipality concerns that there was no enforcement mechanism for continuing affordability compliance. If a municipality detected non-compliance with the affordability requirements for the development, the owner was required to rent the next available unit to an income-eligible renter until compliance was reestablished. This was an effort to give municipalities tools to make sure it was receiving the affordability promised in return for the ability of 8-30g to challenge restrictive zoning.

This system thus made the municipality the enforcer of 8-30g for rental housing, so that it could protect its own interest in affordable housing. It appears, however, that many municipalities did not take this opportunity. In effect, the 1995 amendment was still not sufficient as an enforcement system. With the 2000 amendments of P.A. 00-206, a two-part solution became possible. First, P.A. 00-206 made explicit what had been implicit in the 1995

[2] For ownership housing, unlike for rental housing, the time for review of continuing eligibility is when the ownership of the unit changes, rather than annually.

amendment by creating a new Subsection (j) in 8-30g. That subsection provides that an owner's failure to comply with the affordability restrictions is a violation of the zoning statutes and can be enforced through C.G.S. 8-12. This removed any doubt that the municipality could impose already-existing zoning penalties for failure to maintain affordability. Second, it created a moratorium system through which a non-exempt town could obtain a three-year moratorium (subsequently changed to a four-year moratorium in 2002 by P.A. 02-87) as an incentive to encourage the town to be more receptive to the development of 8-30g-eligible housing. The moratorium was based on an incentive system of "housing unit equivalent" (HUE) points, giving more points per unit for types of housing that the town was less likely to have or to otherwise approve. In return, it required the municipality to provide "documentation" of the legitimacy of the points. See C.G.S. 8-30g(*L*)(4)(B). The statute thus linked the documentation required for a moratorium – which municipalities would want -- with the enhanced enforcement powers that the legislature had provided to municipalities in the 1995 act and strengthened elsewhere in the 2000 act.

The requirement that municipalities justify the actual eligibility of units is reflected and confirmed in the regulations, which require "certification" by the applying applicant and repeatedly require "documentation" to assure that the "certification" is based on real-life information and not just a pro forma sign-off. Thus RCSA 8-30g-6 requires that the municipality must provide "documentation" of the existence of the required HUE points. See 8-30g-6(c)(4) and 8-30g-6(e). Moreover, "each dwelling unit" – each individual unit -- must be "documented" as an enforceable obligation "with respect to both income qualifications and maximum housing payments" that is "binding at the time of application." See 8-30g-6(f). These requirements can only be met by actual information.

By requiring municipalities to certify that the units submitted as HUE credit meet the long-term requirements for affordability, the moratorium closes the enforcement circle for rental housing developments by giving municipalities an incentive to use the auditing powers in 8-30h and the zoning enforcement powers in 8-30g(j). The annual reviews required by 8-30h would make sure that the owner was complying with the restrictions, which in turn would justify awarding those units HUE points toward a moratorium for the municipality.

The Department's failure to recognize the nature of 8-30h, in conjunction with the moratorium provisions of 8-30g, undercuts this enforcement structure. It allows the property owner to fail to comply with affordability restrictions while allowing the municipality to evade not only the letter but the very purpose of 8-30g by rewarding the municipality for housing that may not meet 8-30g requirements. The municipality, which bears the burden of proof of eligibility for a moratorium, should have detected non-compliance by the owner through the enforcement techniques that the legislature had provided.

Any moratorium application review by the Department that allows a municipality to obtain a moratorium without requiring "documentation" that restricted units are actually in compliance with 8-30g "in respect to both income qualifications and maximum housing payments" is not only in violation of the statute and the regulations but in reality undermines

the 8-30g enforcement system for long-term affordability in rental housing built under 8-30g by rewarding towns for non-enforcement.

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