STATE OF CONNECTICUT
DEPARTMENT OF HOUSING

In the Matter of:	)	
	)	
Town of New Canaan	)	
Certificate of Affordable Housing	)	
Completion/Moratorium Application	)	December 23, 2024
Pursuant to C.G.S. § 8-30g	)	

OPEN COMMUNITIES ALLIANCE'S INTERVENOR BRIEF IN SUPPORT OF PETITION FOR DECLARATORY RULING

I. INTRODUCTION

Open Communities Alliance ("OCA"), an intervenor in this matter, submits the following brief in support of the petition for declaratory ruling.

The two questions at issue are (1) whether applying for an § 8-30g moratorium requires a town to provide evidence of annual compliance with applicable affordability requirements, for residential units claimed for Housing Unit Equivalent ("HUE") points; and (2) whether a town may be exempt from deducting HUE points for affordable units that it demolished in order to construct new units now claimed for a moratorium, if those units that were demolished would not qualify as affordable dwelling units under the current § 8-30g affordability standard.

The language of 8-30g and case law give the Department clear answers to these questions. As to the first question, annual compliance evidence is required both in explicit statutory language and in the legislative purpose of the law. As to the second question, towns must deduct points for affordable units that they demolish, and the statute does not provide any exception based on updated affordability standards. If New Canaan is allowed to obtain a moratorium without including necessary evidence in support, any town could follow its lead and make unsubstantiated claims, rendering the statute effectively toothless. Likewise, allowing New

Canaan to avoid deducting points for the demolition of affordable housing units contravenes the very purpose of the law.

II. PROCEDURAL HISTORY

At issue in the present matter is New Canaan's June 2024 application for a four-year moratorium from § 8-30g requirements and the Department of Housing's ("the Department") August 2024 approval of the application.

New Canaan claimed HUE points for two developments, Millport and Canaan Parish. After New Canaan submitted its application, the petitioners—entities whose § 8-30g applications were denied by the Town's Planning and Zoning Commission in 2023—filed a detailed comment on the two questions now before the Department. As to the first question, the comment pointed to errors, omissions, and inconsistencies in New Canaan's application and asked that the Department compel the Town, Housing Authority, and management company to provide evidence of past and current compliance with affordability requirements. *See* Brief of 751 Weed Street et al. in Support of Petition for Ruling Regarding Conn. Gen. Stat. § 8-30g Moratorium Procedure and Requirements ("Petitioners' Brief") at 2-3. No such evidence was provided. *Id.*

Regarding the second question, on the deduction of points for demolished units, the petitioners explained why the Town's interpretation of the statutory requirement is incorrect and illogical. *Id.* The units at issue, more than eighty in total between the two developments, were restricted to 80% percent of area median income, which was the statutory affordability standard at the time they were built. The current affordability standard is the lesser of area or statewide median income. Prior to demolishing them, New Canaan counted those units for the Affordable Appeals 10% Exempt List ("Ten Percent List") because they were grandfathered in under the affordability rules which were in effect at the time the units were completed. Petitioners' Br. at

18 (citing an email from the Department confirming that the units were, prior to demolition, counted on the Ten Percent List). Yet after demolition, New Canaan claimed that HUE points need not be deducted because the units, if built today and restricted to 80% of AMI, would not qualify as "affordable dwelling units." The town offered no legal authority or other evidence for this interpretation, probably because none exists.

On August 19, 2024, the Department nevertheless approved New Canaan's application. Following this approval, the petitioners moved for a declaratory ruling, and on November 12, 2024, the Department issued an Order agreeing to issue a declaratory ruling on the two questions. Pursuant to General Statutes § 4-176(d) and the Department of Housing's November 12, 2024 Notice and Order, OCA petitioned on December 16, 2024 to be made an intervenor in the above-captioned Petition for Declaratory Ruling (the "Petition").

III. ARGUMENT

A. 8-30g is a remedial statute which must be construed in light of its purpose to facilitate much-needed affordable housing development.

"[T]he key purpose of § 8–30g is to encourage and facilitate the much needed development of affordable housing throughout the state." *W. Hartford Interfaith Coal., Inc. v. Town Council of Town of W. Hartford*, 228 Conn. 498, 511 (1994). In *Kaufman v. Zoning Commission of City of Danbury*, the Supreme Court held that "[a]s a remedial statute, § 8–30g "must be liberally construed in favor of those whom the legislature intended to benefit." 232 Conn. 122, 140 (1995) (internal citation and quotation marks omitted). In interpreting § 8-30g, the decision maker's "fundamental objective [is] ascertaining and giving effect to the apparent intent of the legislature," and in discerning that intent, the decision maker must start with "the words of the statute itself" as well as "the legislative policy it was designed to implement." *Kaufman v. Zoning Comm'n of City of Danbury*, 232 Conn. 122, 133 (1995). When it comes to

exemptions from § 8-30g, such as for a moratorium, "exceptions to statutes are to be strictly construed with doubts resolved in favor of the general rule rather than the exception." *Ensign-Bickford Realty Corp. v. Zoning Comm'n Town of Simsbury*, 245 Conn. 257, 268 (1998).

Connecticut courts have therefore rejected attempts to interpret the statute in a way that "would undermine this very important objective" of facilitating affordable housing development in Connecticut. *W. Hartford Interfaith Coal., Inc.*, 228 Conn. at 511 (holding that, contrary to town's contention, § 8-30g applies to legislative zone changes). *See also, e.g.*, *Brenmor Props. v. Plan. & Zoning Comm'n of Town of Lisbon*, 162 Conn. App. 678, 697 (2016), *aff'd, 326 Conn. 55* (2017) (rejecting planning commission's claim that "'any deviation' from the requirements set forth in the road ordinance entitles it to deny an affordable housing application"); *Wisniowski v. Plan. Comm'n of Town of Berlin*, 37 Conn. App. 303, 317 (1995) (rejecting planning commission's claim that underlying zoning nonconformity was a basis to block an affordable housing subdivision application).

Here, if the Department agrees with New Canaan's illogical interpretations—that supporting evidence of compliance is not required, and that points need not be deducted for demolished units—those readings would contravene the very purpose of § 8-30g.

B. The statutes require moratorium applications to include evidence of compliance, including annual certifications.

Under § 8-30h, the owner of an affordable housing development that contains rental units must "provide annual certification to the commission that the development continues to be in compliance with the covenants and deed restrictions required under" § 8-30g. Section 8-30h further provides that a municipality has the right to "inspect the income statements of the tenants of the restricted units," making explicit that the municipality has oversight authority to verify a development's compliance. *Id.* If a development is not in compliance, "the developer, owner or

manager shall rent the next available units to persons and families whose incomes satisfy the requirements" until the development is back in compliance. *Id.* These requirements help ensure, *inter alia*, that the development is following mandatory income and rent limits and that formerly affordable units are not counted towards HUE points if they are no longer affordable.

New Canaan's claimed compliance was woefully inadequate and unsupported by evidence. Despite the statutory obligation that affordable housing developments must submit annual certifications of compliance, New Canaan Town Planner Sarah Carey stated that the New Canaan Planning and Zoning Commission "has *never* received annual [8-30h] compliance reports from the Housing Authority relating to Millport or Canaan Parish." Petitioners' Br. at 6 (emphasis added). Although the New Canaan Housing Authority and Westmount Management company asserted via email to the petitioners that both developments are compliant with affordability requirements, they failed to provide any evidence of said compliance. *Id.*

As the petitioners explained in their comment on the moratorium application, in addition to failing to comply with the annual reporting requirement, the Town and Housing Authority also refused to provide actual calculations of maximum income and rent, submitted "compliance affidavits" that were incorrect and incomplete, and submitted conflicting information on income limits and rents being charged at Millport and Canaan Parish, among other issues. For more details on the many errors, omissions, and discrepancies in New Canaan's moratorium application materials, see Petitioners' Br. at 5-13.

The burden is on a municipality to demonstrate that it has earned a moratorium. This must include proving annual, ongoing compliance with affordability requirements. If, as New Canaan claims, both developments are in fact in compliance, then it should not be unduly burdensome to provide evidence of that compliance.

On the other hand, if a town can obtain a moratorium based on unsupported claims of compliance, then there is no incentive for municipalities and developments to maintain accurate, up-to-date records, which would mean it could claim points for units that are no longer (or have never been) affordable. That interpretation would contravene the remedial purpose of § 8-30g by allowing a municipality to disregard its compliance requirements and nevertheless be rewarded with a moratorium. Instead, the Department should clarify in its declaratory ruling that a municipality's application for moratorium is not complete without evidence of annual, ongoing compliance with affordability requirements. In the absence of that evidence, the Department should either reject or decline to review a moratorium application.

C. The statutes require that points be deducted for the demolition of affordable housing units; there is no exception for units that would not qualify as "affordable" under current standards.

In calculating HUE points for a moratorium application, "[p]oints shall be subtracted . . . for any affordable dwelling unit which . . . was affected by any action taken by a municipality which caused such dwelling unit to cease being counted as an affordable dwelling unit." Conn. Gen. Stat. Ann. § 8-30g(l)(B)(8). The accompanying regulation requires that a moratorium application include a certification that the municipality has "identified and deducted, or otherwise excluded from the total housing-unit equivalent points claimed, all units that as a result of action by the municipality . . . no longer qualify, as of the date of submission of the application, as providing housing unit-equivalent points, without regard to whether the units were originally constructed before or after July 1, 1990." Conn. Agencies Regs. 8-30g-6(c)(7).

New Canaan argued, and the Department agreed, that it does not need to deduct points for the demolition of more than eighty affordable housing units at Millport and Canaan Parish. The town claims that because those units were restricted to 80 percent of area median income,

rather than the current standard of the lesser of area or statewide median, the demolished units would not qualify today as "affordable dwelling units." In its letter of decision, the Department explained that no deduction was required because "if the units had been rebuilt subject to the original affordability restriction, 80% of Area Median Income, they would not have received any housing equivalent points under the formula." Letter from the Department to New Canaan First Selectman, Aug. 19, 2024, at 7-8. This interpretation is at odds with both the text of the law and its purpose: it creates a statutory exception where none exists and undermines 8-30g's objective of facilitating the development of affordable housing in the state.

First, rules of statutory construction caution against New Canaan's position. The plain meaning rule provides that "[t]he meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If . . . the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." Conn. Gen. Stat. § 1-2z. Moreover, "adding [] language where none exists would violate a cardinal rule of statutory construction." *Marchesi v. Bd. of Selectmen of Town of Lyme*, 328 Conn. 615, 630 (2018).

The decision maker cannot "read language into a statute" and is "bound to interpret legislative intent by referring to what the legislative text contains, not by what it might have contained." *Id.* This is especially true when an interpretation would lead to a result that contradicts the statute's purpose; a court "cannot accomplish a result that is contrary to the intent of the legislature as expressed in the [statute's] plain language*." McCullough v. Swan Engraving, Inc.*, 320 Conn. 299, 309 (2016). "It is axiomatic that we will not read into a [statute] words or limitations that are not there." *Randolph v. Mambrino*, 216 Conn. App. 126 (2022) (internal citation and quotation marks omitted). *See also Vessel RE Holdings, LLC v. Town Plan & Zoning*

Comm'n of the Town of Glastonbury, k, at *11 (Conn. Super. Ct. July 12, 2024) (rejecting town plan and zoning commission's interpretation of a zoning regulation where commission failed to provide "any legal authority or legislative history" supporting its interpretation and noting that "[t]he court cannot import language where it does not exist").

Here, § 8-30g requires that points be deducted for units that have ceased to be affordable dwelling units due to a municipality's action such as through demolition. It is mandatory—points "shall" be deducted—and unambiguous. It includes no exceptions. If the legislature had intended this provision to apply only to units that meet the current definition of affordability, it could have defined "affordable dwelling unit" to exclude formerly-compliant units; the legislature has not done so. Neither New Canaan nor the Department is at liberty to import its own definition into the statute.

Second, prior to demolition, all of the now-demolished units were listed on the state's Ten Percent List, compiled pursuant to § 8-30g(k), making clear that the state considered them to be affordable dwelling units. When the legislature redefined "median income" in § 8-30g—such that the units at issue would no longer meet the statutory requirement—the Department did not remove these units from the list. Nor has the Department *ever* taken the position that previously-compliant units should be subject to retroactive review on the basis of updated legislation. Instead, the Department's practice has been to count units as affordable based on the applicable laws in effect at the time the units were built.

Conn. Agencies Regs § 8-30g-6(c)(7) supports this interpretation of the requirement. The concluding clause in the regulation – "without regard to whether the units were originally constructed before or after July 1, 1990" – reflects the reality of the Department's practice of counting units based upon the laws in effect at the time of the units' creation and the requirement

that those units be subtracted if demolished. This phrase indicates that there was an understanding that 1) affordable units in existence prior to 1990 would be reflected on the Ten Percent List and 2) such units predated the adoption of the § 8-30g framework (as well as the change to the lesser of area or state median income in 1995). Practically speaking, many units that the Department itself includes on the Ten Percent List would not qualify for housing equivalent points under current § 8-30g rules because of the affordability rules in effect at the time they were built. The requirement that these units be deducted if demolished creates an equitable framework – credit for actual affordable units, but a deduction when they disappear.

Third, allowing a municipality to continue claiming points for demolished units contravenes the very purpose of § 8-30g. The Supreme Court has consistently rejected interpretations of the statute that would "thwart its purpose," and has "refuse[d] to construe § 8–30g to include an implied limitation that would be so antithetical to the intent of the legislature." *W. Hartford Interfaith Coal., Inc.*, 228 Conn. at 511. As in that case, here, New Canaan's interpretation of the deduction provision would lead to a result completely at odds with the legislative intent. Given the choice to demolish and then rebuild unsafe or outdated units or simply to demolish them, a town would have no incentive under the moratorium requirements to rebuild. This would create a perverse incentive where a municipality can take advantage of the moratorium provision while actually *lowering* the total number of affordable housing units in its jurisdiction through demolition. Since the very purpose of the law is to "encourage and facilitate the much needed development of affordable housing throughout the state," *W. Hartford Interfaith Coal., Inc.*, 228 Conn. at 511, public policy cautions against sanctioning this reading of the statute.

Therefore, the Department should clarify that a municipality must deduct points for any demolished units that had been counted as affordable on the state's Ten Percent list, regardless of whether those units were subject to a prior affordability standard.

IV. CONCLUSION

For the reasons stated above, OCA asks that the Department answer the first question presented in the affirmative and the second question in the negative.

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CERTIFICATION

This is to certify that a copy of the foregoing was sent via electronic delivery on December 23, 2024 to all parties listed below, and written consent for electronic delivery has been received from all parties.

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