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Via Email and U.S. Mail

March 28, 2023

Attorney Randi Pincus
Connecticut Department of Housing
505 Hudson Street
Hartford, CT 06106-7106

Re: Town of New Canaan Declaratory Ruling Petition Regarding § 8-30g Moratorium Application

Dear Attorney Pincus:

As you know, we represent 751 Weed Street LLC; W.E. Partners, LLC; and 51 Main Street LLC, each of which has a General Statutes § 8-30g affordable housing application pending at the New Canaan Planning and Zoning Commission, and has been granted intervenor status with respect to New Canaan's pending declaratory ruling petition.[1] The Department's February 24, 2023 and March 15, 2023 Notices and Orders request written submissions about New Canaan's petition by March 31, 2023.

As the Department is also aware, our clients filed extensive comments and objections on April 29, 2022, in response to New Canaan's April 5, 2022 application for a second moratorium; and on August 30, 2022, in response to the Town's July 2022 revised application. Because those documents are both voluminous and already on-file with the Department, we have not attached them to this letter, but ask that they be incorporated by reference, as they are part and parcel of the comments in this letter.

[1] Our clients' February 7, 2023 petition for party status was denied by the Department on February 24. The petitioners reserve their right to be parties to this matter. Our clients' petition for intervenor status was granted on March 15, 2023.

In our August 30, 2022 comments, we stated the following concerns and objections about New Canaan's July 2022 § 8-30g moratorium application:[2]

- After making substantial, substantive changes to its April 2022 application in July 2022, the town then filed its reapplication directly with the Department of Housing, without following the statutorily-required procedures for notice and an opportunity for a local hearing regarding the revised application;

- As of July 2022, none of the units at Canaan Parish for which HUE points had been claimed had received a permanent certificate of occupancy;

- In its application, the Town did not submit evidence of annual, ongoing compliance with affordability requirements, most notably the annual reports required by General Statutes § 8-30h;

- The Town did not properly deduct points for demolished units, and made a baseless claim that it is "exempt" from that statutory requirement;

- The Town did not explain its basis for claiming "carryover" points; and

- The Town Attorney's opinion letter, in support of the application, though stating a legal opinion that the moratorium application as a whole complied with all § 8-30g requirements, was incomplete on its face as it was a boilerplate letter that did not address any of the legal issues raised by our clients' objections.

In its October 2022 denial of New Canaan's application, the Department did not accept the Town's claim of carryover points, but did not expressly address the other objections and concerns we raised.

In response to New Canaan's December 2022 declaratory ruling petition, we have the following comments and concerns:

The Department Has Not Issued Statewide Notice As Required by State Law for This Declaratory Ruling Petition Regarding A § 8-30g Moratorium

General Statutes § 4-176(c) states that within 30 days of receiving a petition for a declaratory ruling, the agency "[shall] give notice of the petition to all persons to whom the notice is required *by any provision of law* and to all persons who have requested notice of any

[2] The Town's declaratory ruling petition at p.3 contains what is probably a typographical error. New Canaan's 2017 moratorium expired in June 2021, not 2022.

declaratory ruling petition on the subject matter of the petition" (emphasis added).

To the knowledge of the undersigned, the Department has not published notice other than posting it on the Department website. However, General Statutes § 8-30g(l)(4)(8) is explicit that moratorium applications must be noticed statewide by the Department through publication in the *Connecticut Law Journal*. Respectfully, we submit that New Canaan's declaratory ruling petition must be noticed statewide in the same manner as a moratorium application, both because "carryover" points is an issue of statewide interest and concern, and because the petition asks the Department, if it recognizes carryover points, to grant New Canaan another moratorium. The declaratory ruling notice provision refers to notice required by "any provision of law." Therefore, this petition's processing should not be completed until adequate statewide notice is provided as required by law, and adequate opportunity for comment in response to the statewide notice is provided.

The undersigned counsel submitted an email on February 27, 2023, advising the Department that additional notice must be provided, but the Department declined that request in a February 28, 2023 email response.

"Carryover Points" Are Not Permitted by the Moratorium Statutes or Regulations[3]

At the outset, it will be helpful to define precisely the issue presented by New Canaan's declaratory ruling petition regarding carryover points. The question is whether a municipality may apply for a four-year moratorium from § 8-30g by counting some, but not all, of the Housing Unit Equivalent ("HUE") points generated by one or more that have been completed as of the time of a moratorium application; obtain a moratorium; and then, at some time in the future, apply for another moratorium, using points that were not claimed in the first/prior application. Specifically, New Canaan's July 2022 moratorium application (and its April 2022 predecessor) proposed to use HUE points from units that received their certificate of occupancy in 2016 (at the Millport development), but were not claimed in the Town's 2017 moratorium application; and to use some but not all of the points from the Canaan Parish development, which first became partially occupied in 2022, for the Town's second moratorium, and saving unused Canaan Parish points for a possible third moratorium, to be sought in 2026 or after.

General Statutes § 8-30g(l)(3) states that "Eligible units completed after a moratorium has begun may be counted toward eligibility for a subsequent moratorium."[4] "Eligible units" are those that qualify to generate HUE points. *See* General Statutes § 8-30g (l)(6). "Completed" means issued a permanent certificate of occupancy. *See* General Statutes § 8-30g(l)(9). "After a moratorium has begun" means at a date after the Commissioner of Housing has granted a

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[3] In the balance of this letter we will use the term "carryover" points instead of "holdover," though the words have equivalent meaning.

[4] The undersigned was a member of the 1999 Blue Ribbon Commission that recommended to the legislature adoption of the moratorium program and this subsection.

Certificate of Affordable Housing Completion in compliance with General Statutes § 8-30g(l). *See* General Statutes § 8-30g(l)(4)(B). "Counted" means recognized and accepted as providing HUE points as of the date of a moratorium application. *See* General Statutes § 8-30g(l)(6).

Under General Statutes § 1-2(z), known as the "plain meaning rule," the meaning of a statute "[shall], in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes." *See Bysiewicz v. Dinardo,* 298 Conn. 748, 765 (2010), ("[W]e seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. Under the rules of statutory interpretation, where the text of a statute is clear, no further analysis is necessary or warranted. *See Id.* ("If, after examining such text and considering such relationship, 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").

Here, § 8-30g(l)(3) states an unequivocal requirement and a clear timeframe: units that are eligible for points by virtue of being subject to maximum rent or sale price restrictions for the minimum 40-year time frame required by § 8-30g; and that are completed (certificate of occupancy issued) *after* a moratorium has begun; "may" be considered for HUE points toward a subsequent moratorium. This means that units that are completed – issued a certificate of occupancy – *before* a moratorium begins cannot be counted toward a subsequent moratorium.

In its petition, the Town offers an absurd statutory interpretation of subsection (l)(3), asserting that it *allows* units completed after one moratorium has begun to be counted, but does not *prohibit* counting units completed before a moratorium begins. This interpretation entirely eliminates the express statutory limitation and makes subsection (l)(3) superfluous. It reduces a statutory requirement to a mere suggestion. The phrase "after a moratorium has begun" is a limiting phrase that would be entirely unnecessary if units completed before a moratorium has begun could count toward a subsequent moratorium; the phrase would be entirely redundant. The plain meaning of the statute is that the Department "may," but is not required to, attribute points to a unit completed after a moratorium begins, but not that the Department may count units completed before a moratorium begins. The Town submits (Petition at 5) that anything other than its interpretation leads to disincentives to the ongoing creation of affordable housing and situations where towns will "lose credit" for already-built affordable units. The Town's interpretation violates the rule that where the plain text is clear, the analysis need go no further.

In its petition, the Town further complains about unfairness, disincentives, being misled, and being exposed to § 8-30g applications, but the Town has failed to consider the following:

- A moratorium is a four-year exemption from a remedial statute, *see Kaufman v. Zoning Commission,* 232 Conn., 122, 164-66 (1995); and thus relief from § 8-30g should not be granted unless there is strict compliance with moratorium requirements;

- Affordable units that are built and occupied, but for whatever reason do not generate HUE points, are not a detriment or hardship to the town, or a waste of its money;

- Subsection (l)(3) contemplates that once a moratorium is in place, the Town will issue certificates of occupancy *during* the four-year moratorium period for enough units to generate enough HUE points for a subsequent moratorium; and

- A later moratorium need not necessarily be granted immediately on expiration of a first or prior moratorium.

The Town also ignores the fact that any town at any time may request a formal ruling or informal advice from the Department as to how and when it should plan, approve, finance, construct, and occupy affordable units so they will be counted for HUE points. New Canaan is now complaining about units already built not being counted, but the Town could have avoided its present dilemma by filing a declaratory ruling petition at any time before or during the construction of Millport and through the construction of Canaan Parish as to how and when to deploy the units for points. But the Town apparently failed to read the statute and to seek timely advice.

The Beneficial Purposes of the Prohibiting Carryover Points

The purposes of the statute's prohibition on carryover points are (1) to require towns that want another moratorium to approve and assert the construction and occupancy one or more developments sufficient to generate sufficient HUE points *during* the four-year moratorium; (2) to avoid towns from using one or more developments to claim a moratorium that effectively exceeds the statutorily-specified four years; (3) to prohibit HUE points, if and when created, from being used many years later for a moratorium, when conditions, markets, and a town's housing stock may have changed significantly; and (4) to prevent the moratorium provisions from being used to undermine the remedial purposes of § 8-30g. In other words, the moratorium provisions are intentionally specific and prescriptive in directing towns when to approve and assist construction and occupancy of units, so moratorium are consistent with the purpose of § 8-30g, which are to overcome exclusionary rules and practices and get affordable units built and occupied.

The moratorium process was never intended to allow a non-exempt town to obtain a moratorium for the purpose of blocking future affordable housing development for many years. The prohibition on carryover points explains why § 8-30g(l)(7) allows towns to count only affordable units built after 1990 under the then-existing § 8-30g standard. This was certainly not so that non-exempt towns could use construction in the 1990s at the 80 percent-20 percent/20-year standard to obtain extended moratoria beyond an initial moratorium. To the contrary, the post-1990 rule was intended to enable a first moratorium only, so that towns that had development in the 1990s, when § 8-30g contained no moratorium provision, would not be left

out. *Once a town achieves a first moratorium, however, a new moratorium requires new affordable development.*

The Town[5] has also failed to consider that if carryover points are allowed without limitation, it would be relatively easy for dozens of towns to approve a § 8-30g compliant development and then be exempt from § 8-30g *for eight and perhaps even 12 years*, which is directly contrary to the statutory limit of moratorium being awarded for four years; contrary to § 8-30g's remedial purposes; and, frankly, an abuse of the system. In other words, the Town has not considered this scenario: the minimum HUE point threshold for a moratorium is two percent of the town's housing stock on the most recent U.S. Census, or 75 points, whichever is more. With this formula, a town with 3,750 housing units or less needs 75 points. *Sixty-five (65) of the 139 towns in Connecticut subject to 8-30g have fewer than 3,750 housing units* on the 2010 U.S. Census, as stated on the Department's 2022 Ten Percent List (released March 1, 2023). Therefore, in each of these towns, the zoning commission could approve, for example, a 100 unit development consisting of "family" (not restricted to elderly) rental units, with one third (33 units) at 80 percent of median income; one third (33 units) at 60 percent of median income, and one third (34 units) at 40 percent of median income. (If the development were on a large enough parcel and consisted of multiple buildings, a community septic system might be able to serve each building, no public sewer required.) Such a development could generate 200 HUE points[6] – *enough for an eight-year moratorium, plus half the points needed for a third moratorium* – all from one modest-sized development. *This is a scenario that the Second Blue Ribbon Commission in 1999 was trying to avoid.* New Canaan's demand to use holdover points presents this scenario as legal[7], but General Statutes § 8-30g(l)(3) wisely prohibits this tactic, and requires every town that receives a moratorium for four years to generate a new batch of HUE points during that moratorium if it wants another one.[8]

No Basis for Estoppel or Waiver

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[5] The Department has already received, in the undersigned's August 30, 2022 comment on the Town's July 2022 moratorium application, Exhibit W, evidence of the fact that in April 2022, the Town posted on its website a set of Frequently Asked Questions ("FAQs") about § 8-30g Moratoria, *and in one of the questions and answers advised New Canaan residents that holdover points are not counted toward a subsequent moratorium.* Another copy of that post is attached here as Exhibit B to this letter.

[6] 33 units at 80 percent of median = 1.5 = 49.5 points
33 units at 60 percent of median = 2.0 = 66 points
34 units at 40 percent of median = 2.5 = 85 points
Total: 200.5 points

[7] In fact, New Canaan's 2022 Affordable Housing Plan, adopted pursuant to General Statute's § 8-30g, makes a rolling set of four-year moratoria a central strategic goal.

[8] This multiple-year moratorium scenario is even more likely in those towns larger population whose HUE points requirements for a second or subsequent moratorium were reduced by Public Act 17-170 as codified (effective Oct. 1, 2022) in General Statutes § 8-30g(l)(4)(A).

There is no basis for estoppel or waiver, as asserted at p. 6, fn. 2 of the New Canaan petition. The Department in 2017 did not and could not rule on the validity of a future carryover points claim; it merely acknowledged that New Canaan had indicated its intent to claim more points at a future time, which was unspecified. The 2017 letter did not state that the HUE points would be *granted* in a future moratorium; it recognized that the HUE points *might* be *claimed* in a *future application*. As such, in 2017, there was no decision or action in 2017 on which the Town could have relied.

Also, as noted above, completing affordable units but not then obtaining HUE points for them cannot remotely be characterized as "detrimental reliance" that would support an estoppel claim. "There are two essential elements to an estoppel—the party must do or say something that is intended or calculated to induce another to believe in the existence of certain facts and to act upon that belief; and the other party, influenced thereby, must actually change his position or do some act *to his injury* which he otherwise would not have done." *Fadner v. Commissioner of Revenue Services*, 281 Conn. 719, 726 (2007) (emphasis added) (quoting *Pet Car Products, Inc. v. Barnett*, 150 Conn. 42, 53-54 (1962). Neither Department action nor Town reliance, much less detrimental reliance, occurred here.

In addition, estoppel against a public agency is limited and may be invoked: (1) only with great caution; (2) only when the action in question has been induced by an agent having authority in such matters; and (3) only when special circumstances make it highly inequitable or oppressive not to estop the agency. *Id.,* (quoting *Kimberly-Clark Corp v. Dubno,* 204 Conn. 137, 148 (1987)). "Estoppel against a public agency is allowed where the party claiming estoppel would be subjected to substantial loss if the public agency were permitted to negate the acts of its agents." *Id.* at 127 (quoting *Kimberly-Clark Corp v. Dubno*, *supra*, at 147). "A party seeking to justify the application of the estoppel doctrine by establishing that a public agency has induced his actions carries a significant burden of proof." *Id.* New Canaan has not demonstrated a single element of estoppel. As noted earlier, if New Canaan has built units that were not correctly timed for moratorium points, it has only itself to blame.

The Department did apparently accept a carryover points claims of the Town of Brookfield in 2021-2022. It did so over objections filed by the undersigned and Attorney Raphael Podolsky, raising the same arguments as are raised here. The Brookfield approval was incorrect, but it was not challenged in Superior Court because no person or entity with standing came forward to challenge it.

The Department Cannot Grant a Moratorium in Response to this Declaratory Ruling Petition

Finally, there is no basis in the § 8-30g statute or regulations for the Department to grant a moratorium through the Town's pending declaratory ruling petition. Section 8-30g(l) states procedures and time frames for a moratorium. *The Department's own October 2022 decision letter expressly states that New Canaan must start over.* If the Department rules that carryover points will be counted, and that ruling becomes final, then New Canaan must start over with its

application, and give required notices, and the Department must address the other issues and objections listed on p.2 of this letter.

Very truly yours,

Timothy S. Hollister

TSH:afz

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