STATE OF CONNECTICUT
DEPARTMENT OF HOUSING

In the Matter of:	)	
	)	
Town of New Canaan	)	
Certificate of Affordable Housing	)	
Completion/Moratorium Application	)	February 8, 2023
Pursuant to C.G.S. § 8-30g	)	
	)	

PETITION FOR PARTY STATUS

Pursuant to General Statutes § 4-176(d) and the Department of Housing's January 31, 2023 Notice and Order, 751 Weed Street, LLC; W.E. Partners, LLC; and 51 Main Street, LLC, hereby petition to be made parties in the above-captioned Petition for Declaratory Ruling (the "Petition").

I. Factual Background and Procedural History.

The moving parties are Connecticut limited liability corporations with offices in New Canaan. As of the date of this petition, each entity has a pending General Statutes § 8-30g affordable housing application in New Canaan, and has filed information with the Department of Housing ("Department") in opposition to the Town of New Canaan's April and July 2022 moratorium applications.

The Town of New Canaan has appealed the decision dated October 18, 2022 denying the issuance of a Certificate of Affordable Housing Project Completion to the Town.

By a Notice and Order dated January 31, 2023, the Department notified potentially interested parties that on December 2, 2022, the Town of New Canaan filed a Petition for a

Declaratory Ruling with the Department, citing § 4-176 of the Connecticut General Statutes, asking for a declaratory ruling limited to the following questions:

1. Does § 8-30g(l)(3) of the Connecticut General Statutes preclude [the Department] from awarding housing unit-equivalent points for dwelling units that were completed before the effective date of a prior moratorium toward establishing eligibility for a subsequent moratorium?
2. Is the Town [of New Canaan] currently eligible for a Certificate of Affordable Housing Project Completion, aka Moratorium?

Pursuant to Paragraph 4 of the Department's Notice and Order, persons or entities seeking party status shall submit a petition for designation to the Department and send copies thereof by mail or electronically to the parties, at least five business days prior to March 1, 2023. Therefore, this Petition is timely.

II. The Moving Parties Legal Rights, Duties or Privileges Will Be Specifically Affected By This Agency Proceeding.

All three entities are necessary and indispensable parties to the Petition. Pursuant to General Statutes § 4-176(d), "If the agency finds that a timely petition to become a party or to intervene has been filed,....the agency: (1) May grant a person status as a party if the agency finds that the petition states facts demonstrating that the petitioner's legal rights, duties or privileges shall be specifically affected by the agency proceeding."

Simply put, even though each petitioner's § 8-30g development proposal is presently "grandfathered" by General Statutes § 8-30g (l)(2)(c) from being impacted by a moratorium that would be granted through this agency proceeding, (1) a denial of any one of the petitioners' pending § 8-30g applications could proceed to Superior Court on appeal, and could result in a remand to the Commission for site plan changes, at which time the Planning and Zoning

Commission could raise a granted moratorium as a defense or obstacle; and (2) in a court appeal under § 8-30g, the Planning and Zoning Commission would undoubtedly raise a granted moratorium as a fact relevant to § 8-30g's requirement that the Commission balance its denial reasons against the town's need for affordable housing. Thus, there are at least two ways that this petition could specifically affect each petitioner's legal rights.

Moreover, as to the second issue submitted for a declaratory ruling, the petitioners submitted in April and August 2022 several other objections to New Canaan's moratorium application in addition to the so-called "carryover points" question raised in the first issue, which objections were not ruled upon by the Department in 2022, such that the petitioners here are necessary and proper parties to ensure that these additional objections are addressed.

In November 2020, the Superior Court (the Hon. Marshall Berger, J.) denied a Department of Housing Motion to Dismiss a § 4-176 declaratory ruling, brought by a § 8-30g developer, addressing several of the same grounds for party status and standing as are raised above, *see Summit Saugatuck, LLC v. Connecticut Department of Housing*, No. LND-CV-20-6127403, Memorandum of Decision, November 19, 2020, copy attached.

The Petitioners also would advise the Department that if they are granted party status, they will seek a modest extension of time within which to file substantive comments on the two petition issues.

III. CONCLUSION.

For the above reasons, this Petition for party status should be granted.

751 WEED STREET, LLC; W.E. PARTNERS, LLC; 51MAIN STREET, LLC

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CERTIFICATION

This is to certify that a copy of the foregoing was mailed or electronically delivered on February 8, 2023 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.

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DOCKET NO. LND CV-20-6127403-S	:	SUPERIOR COURT
SUMMIT SAUGATUCK LLC	:	LAND USE LITIGATION DOCKET
V.	:	
CONNECTICUT DEPARTMENT OF HOUSING	: :	AT HARTFORD NOVEMBER 19, 2020

MEMORANDUM OF DECISION

I

In this declaratory action challenging an affordable housing moratorium granted by the defendant, the Connecticut department of housing (department), to the codefendant, the town of Westport, the defendants move to dismiss the action based upon a lack of subject matter jurisdiction. In Westport's motion to dismiss, it argues that the court is without jurisdiction because the plaintiffs, Summit Saugatuck LLC and Garden Homes Management Corporation, failed to file a declaratory judgment petition with the department that conformed to General Statutes § 4-176 and, therefore, they cannot invoke judicial review. In the department's motion to dismiss, it argues that the plaintiffs do not have standing to challenge the department's refusal to issue a declaratory ruling regarding the issuance of an affordable housing moratorium to Westport.

The plaintiffs counter that their § 4-176 petition to the department properly sought review of the moratorium and that they do have standing and are aggrieved by the department's decision. In the department's memorandum in reply, it asserts that the plaintiffs lack statutory authority to bring this action because the department's decision to refuse to consider the plaintiffs' petition

was not an appealable decision. Further, the department argues that the plaintiffs are not aggrieved as they filed applications under General Statutes § 8-30g before the moratorium was issued.

II

"A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction." (Internal quotation marks omitted.) *R.C. Equity Group, LLC* v. *Zoning Commission*, 285 Conn. 240, 248, 939 A.2d 1122 (2008).

"When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone. . . . In undertaking this review, we are mindful of the well established notion that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Internal quotation marks omitted.) *Cuozzo* v. *Orange*, 315 Conn. 606, 614, 109 A.3d 903 (2015).

III

In *West Hartford Interfaith Coalition, Inc.* v. *Town Council*, 228 Conn. 498, 511, 636 A.2d 1342 (1994), our Supreme Court stated that "the key purpose of § 8-30g is to

encourage and facilitate the much needed development of affordable housing throughout the state." It discussed the report of the Blue Ribbon Commission on Housing that proposed the unique affordable housing appeals procedure and "the need to increase density allowances and to circumvent prohibitively costly zoning and subdivision requirements: Expanding the basis for an appeal gives would-be developers of affordable housing an opportunity *to contrast specific zoning and low-density regulations or anti-growth practices*, when encountered, with a community's need for affordable housing." (Emphasis in original; internal quotation marks omitted.) Id., 509-10. Section 8-30g applies to all Connecticut municipalities if less than 10 percent of the town's dwelling units do not meet the requirements of § 8-30g (k).[1] It is undisputed that Westport's affordable housing stock is less than 10 percent. As such, § 8-30g applied to any affordable housing appeal involving property in Westport before the department granted the moratorium to Westport, which is the subject of this appeal.

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[1] Section 8-30g (k), in relevant part, provides: "The affordable housing appeals procedure established under this section shall not be available if the real property which is the subject of the application is located in a municipality in which at least ten per cent of all dwelling units in the municipality are (1) assisted housing, (2) currently financed by Connecticut Housing Finance Authority mortgages, (3) subject to binding recorded deeds containing covenants or restrictions which require that such dwelling units be sold or rented at, or below, prices which will preserve the units as housing for which persons and families pay thirty per cent or less of income, where such income is less than or equal to eighty per cent of the median income, (4) mobile manufactured homes located in mobile manufactured home parks or legally approved accessory apartments, which homes or apartments are subject to binding recorded deeds containing covenants or restrictions which require that such dwelling units be sold or rented at, or below, prices which will preserve the units as housing for which, for a period of not less than ten years, persons and families pay thirty per cent or less of income, where such income is less than or equal to eighty per cent of the median income, or (5) mobile manufactured homes located in resident-owned mobile manufactured home parks. The municipalities meeting the criteria set forth in this subsection shall be listed in the report submitted under section 8-37qqq. . . ."

Under § 8-30g (l),[2] towns may apply to the department for a moratorium which stays the

[2] Section 8-30g (l) (1) provides: "Except as provided in subdivision (2) of this subsection, the affordable housing appeals procedure established under this section shall not be applicable to an affordable housing application filed with a commission during a moratorium, which shall commence after (A) a certification of affordable housing project completion issued by the commissioner is published in the Connecticut Law Journal, or (B) notice of a provisional approval is published pursuant to subdivision (4) of this subsection. Any such moratorium shall be for a period of four years, except that for any municipality that has (i) twenty thousand or more dwelling units, as reported in the most recent United States decennial census, and (ii) previously qualified for a moratorium in accordance with this section, any subsequent moratorium shall be for a period of five years. Any moratorium that is in effect on October 1, 2002, is extended by one year."

Section 8-30g (l) (4) provides: "(A) The commissioner shall issue a certificate of affordable housing project completion for the purposes of this subsection upon finding that there has been completed within the municipality one or more affordable housing developments which create housing unit-equivalent points equal to (i) the greater of two per cent of all dwelling units in the municipality, as reported in the most recent United States decennial census, or fifty housing unit-equivalent points, or (ii) for any municipality that has (I) adopted an affordable housing plan in accordance with section 8-30j, (II) twenty thousand or more dwelling units, as reported in the most recent United States decennial census, and (III) previously qualified for a moratorium in accordance with this section, one and one-half per cent of all dwelling units in the municipality, as reported in the most recent United States decennial census.

"(B) A municipality may apply for a certificate of affordable housing project completion pursuant to this subsection by applying in writing to the commissioner, and including documentation showing that the municipality has accumulated the required number of points within the applicable time period. Such documentation shall include the location of each dwelling unit being counted, the number of points each dwelling unit has been assigned, and the reason, pursuant to this subsection, for assigning such points to such dwelling unit. Upon receipt of such application, the commissioner shall promptly cause a notice of the filing of the application to be published in the Connecticut Law Journal, stating that public comment on such application shall be accepted by the commissioner for a period of thirty days after the publication of such notice. Not later than ninety days after the receipt of such application, the commissioner shall either approve or reject such application. Such approval or rejection shall be accompanied by a written statement of the reasons for approval or rejection, pursuant to the provisions of this subsection. If the application is approved, the commissioner shall promptly cause a certificate of affordable housing project completion to be published in the Connecticut Law Journal. If the commissioner fails to either approve or reject the application within such ninety-day period, such application shall be deemed provisionally approved, and the municipality may cause notice of such provisional approval to be published in a conspicuous manner in a daily newspaper having

specific appeal procedure to qualifying towns for four years. On December 5, 2018, Westport filed an application for a moratorium from the affordable housing statute with the department. Several entities contested the town's application. On January 24, 2019, the town filed two letters with the department. The plaintiffs allege that these letters were not disclosed or made available for public comment and that they have material bearing on the calculation of the housing unit-equivalent (HUE) points; see General Statutes § 8-30g (l) (4); which the department used to grant the moratorium. On February 25, 2019, the department issued a certificate granting the town a moratorium. The decision was published in the Connecticut Law Journal on March 6, 2019, which commenced the moratorium exempting the town from the mandates of § 8-30g for a four year period.[3] The town's January 24, 2019 letters were allegedly provided to the plaintiffs on March 6, 2019.

On June 4, 2019, the plaintiffs filed a declaratory ruling petition under General Statutes

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general circulation in the municipality, in which case, such moratorium shall take effect upon such publication. The municipality shall send a copy of such notice to the commissioner. Such provisional approval shall remain in effect unless the commissioner subsequently acts upon and rejects the application, in which case the moratorium shall terminate upon notice to the municipality by the commissioner."

[3] As will be addressed, the issue before the court in these motions to dismiss is narrow, i.e., whether the plaintiffs have standing to bring this declaratory action. The question of the validity of the moratorium is not before the court at this time. As noted by the plaintiffs, with only 3.63 percent of the town's housing stock deemed affordable, the moratorium does not mean that the town has met the state's goal of 10 percent affordable housing stock; it only means that the application of the burden switching process of § 8-30g is held in abeyance for the moratorium period.

§ 4-176 (a)[4] with the department seeking a hearing and a revocation of the moratorium. On July 29, 2019, with a certified mailing of August 2, 2019, the department declined to rule on the petition.[5]

On October 1, 2019, the plaintiffs commenced an appeal from the department's action in *Summit Saugatuck LLC* v. *Connecticut Department of Housing*, Superior Court, land use litigation docket at Hartford, Docket No. LND CV-19-6119143-S (prior action), under General Statutes §§ 4-176 (h)[6] and 4-183 (c).[7] On December 4, 2019, the defendants moved to dismiss

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[4] Section 4-176 (a) provides that "[a]ny person may petition an agency, or an agency may on its own motion initiate a proceeding, for a declaratory ruling as to the validity of any regulation, or the applicability to specified circumstances of a provision of the general statutes, a regulation, or a final decision on a matter within the jurisdiction of the agency."

[5] General Statutes § 4-176 (e) provides: "Within sixty days after receipt of a petition for a declaratory ruling, an agency in writing shall: (1) Issue a ruling declaring the validity of a regulation or the applicability of the provision of the general statutes, the regulation, or the final decision in question to the specified circumstances, (2) order the matter set for specified proceedings, (3) agree to issue a declaratory ruling by a specified date, (4) decide not to issue a declaratory ruling and initiate regulation-making proceedings, under section 4-168, on the subject, or (5) decide not to issue a declaratory ruling, stating the reasons for its action."

[6] Section 4-176 (h) provides: "A declaratory ruling shall be effective when personally delivered or mailed or on such later date specified by the agency in the ruling, shall have the same status and binding effect as an order issued in a contested case and shall be a final decision for purposes of appeal in accordance with the provisions of section 4-183. A declaratory ruling shall contain the names of all parties to the proceeding, the particular facts on which it is based and the reasons for its conclusion."

[7] Section 4-183 (c) provides: "(1) Within forty-five days after mailing of the final decision under section 4-180 or, if there is no mailing, within forty-five days after personal delivery of the final decision under said section, or (2) within forty-five days after the agency denies a petition for reconsideration of the final decision pursuant to subdivision (1) of subsection (a) of section 4-181a, or (3) within forty-five days after mailing of the final decision made after reconsideration pursuant to subdivisions (3) and (4) of subsection (a) of section 4-181a or, if there is no mailing, within forty-five days after personal delivery of the final

this prior action based upon a lack of subject matter jurisdiction asserting that the plaintiffs were not authorized to appeal under § 4-176 (h). Instead, they asserted that the statutory remedy for the denial of a request for a declaratory ruling is found under General Statutes § 4-175 (a).[8] On March 5, 2020, this court granted the motion to dismiss and the appeal was dismissed.

On April 13, 2020, the plaintiffs commenced the instant declaratory judgment action

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decision made after reconsideration pursuant to said subdivisions, or (4) within forty-five days after the expiration of the ninety-day period required under subdivision (3) of subsection (a) of section 4-181a if the agency decides to reconsider the final decision and fails to render a decision made after reconsideration within such period, whichever is applicable and is later, a person appealing as provided in this section shall serve a copy of the appeal on the agency that rendered the final decision at its office or at the office of the Attorney General in Hartford and file the appeal with the clerk of the superior court for the judicial district of New Britain or for the judicial district wherein the person appealing resides or, if that person is not a resident of this state, with the clerk of the court for the judicial district of New Britain. Within that time, the person appealing shall also serve a copy of the appeal on each party listed in the final decision at the address shown in the decision, provided failure to make such service within forty-five days on parties other than the agency that rendered the final decision shall not deprive the court of jurisdiction over the appeal. Service of the appeal shall be made by United States mail, certified or registered, postage prepaid, return receipt requested, without the use of a state marshal or other officer, or by personal service by a proper officer or indifferent person making service in the same manner as complaints are served in ordinary civil actions. If service of the appeal is made by mail, service shall be effective upon deposit of the appeal in the mail."

[8] Section 4-175 (a) provides: "If a provision of the general statutes, a regulation or a final decision, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff and if an agency (1) does not take an action required by subdivision (1), (2) or (3) of subsection (e) of section 4-176, within sixty days of the filing of a petition for a declaratory ruling, (2) decides not to issue a declaratory ruling under subdivision (4) or (5) of subsection (e) of said section 4-176, or (3) is deemed to have decided not to issue a declaratory ruling under subsection (i) of said section 4-176, the petitioner may seek in the Superior Court a declaratory judgment as to the validity of the regulation in question or the applicability of the provision of the general statutes, the regulation or the final decision in question to specified circumstances. The agency shall be made a party to the action."

under § 4-175 challenging the department's decision.[9] On May 29, 2020, the town filed its motion to dismiss and the department filed its motion to dismiss on June 11, 2020. The plaintiffs filed their memorandum of law in opposition to the motions to dismiss on June 29, 2020. The parties waived oral argument and an evidentiary hearing on the motions.[10]

IV

A

In the town's motion to dismiss, it argues that the declaratory judgment provisions of § 4-175 do not apply to this case as the plaintiffs are really attempting to appeal the department's

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[9] At the hearing on February 18, 2020, the court and the parties discussed whether the prior matter could be, by agreement, converted into the current declaratory action. See *Anderson* v. *Carleton*, Superior Court, judicial district of New Britain, Docket No. CV-17-5020045-S (April 13, 2018, *Huddleston, J.*). The parties failed to agree.

[10] A remote status conference was held on July 20, 2020, after which all counsel agreed that the parties would waive oral argument and a hearing. Notwithstanding the parties' waiver, this court also reviewed the matter to determine whether an evidentiary hearing was in fact required. See *Cuozzo* v. *Orange*, supra, 315 Conn. 616-17 ("where a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts. . . . Likewise, if the question of jurisdiction is intertwined with the merits of the case, a court cannot resolve the jurisdictional question without a hearing to evaluate those merits. . . . When the jurisdictional facts are intertwined with the merits of the case, the court may in its discretion choose to postpone resolution of the jurisdictional question until the parties complete further discovery or, if necessary, a full trial on the merits has occurred. . . . In that situation, [a]n evidentiary hearing is necessary because a court cannot make a critical factual [jurisdictional] finding based on memoranda and documents submitted by the parties." [Citations omitted; internal quotation marks omitted.]). Having determined that an evidentiary hearing was not required as there are no factual disputes, this court issued an order on August 4, 2020, taking the matter on the papers.

decision and, therefore, the plaintiffs should have appealed under § 4-183.[11] The town cites *Young* v. *Chase*, 18 Conn. App. 85, 91, 557 A.2d 134 (1989), for the general proposition that "[d]eclaratory judgment proceedings are appropriate for determining the validity of the regulations of an administrative agency. . . . [D]eclaratory judgment proceedings are appropriate for determining jurisdictional issues or questions concerning the validity of the regulations of an administrative agency, while questions concerning the correctness of an agency's decision in a particular case or of the sufficiency of the evidence can properly be resolved only by appeal."[12] (Citation omitted; internal quotation marks omitted.) The town maintains that the plaintiffs are in fact challenging the decision by the department rather than the validity or applicability of the moratorium provisions. Further, the town argues that since this should have been filed as an administrative appeal the plaintiffs failed to file within the statutory period.

The plaintiffs counter these arguments maintaining that the appeal procedures of § 4-183 do not apply where, as in this case, the department did not hold a hearing. First, they note that § 4-183 only applies to final decisions. General Statutes § 4-166 (5)[13] defines a "final decision"

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[11] In the prior action, the town argued that the plaintiffs should not have appealed under § 4-183, but should have filed a declaratory judgment action pursuant to § 4-175.

[12] While generally applicable to a municipal land use appeal, the statement of law set forth in *Young* v. *Chase*, is not controlling as land use appeals procedures do not involve the Uniform Administrative Procedure Act.

[13] Section 4-166 (5) provides: "'Final decision' means (A) the agency determination in a contested case, (B) a declaratory ruling issued by an agency pursuant to section 4-176, or (C) an agency decision made after reconsideration. The term does not include a preliminary or intermediate ruling or order of an agency, or a ruling of an agency granting or denying a petition for reconsideration."

as an "agency determination in a contested case" and a "contested case" is one in which there is the opportunity for a hearing or in which a hearing is held under § 4-166 (4).[14]

In *Summit Hydropower Partnership* v. *Commissioner of Environmental Protection*, 226 Conn. 792, 811, 629 A.2d 367 (1993), our court interpreted "§ 4-166 (2) as manifesting a legislative intention to limit contested case status to proceedings in which an agency is *required by statute* to provide an opportunity for a hearing to determine a party's legal rights or privileges." (Emphasis in original.) In the present case, the department was not required by statute to hold a hearing and, as previously stated, declined to rule on the petition for a declaratory ruling. It was not a final decision in a contested case as those terms are defined by § 4-166 (4) and (5). Indeed, proceedings on a petition for a declaratory ruling under § 4-176 are specifically excluded from § 4-166 (4). Thus, the plaintiffs could not properly appeal under § 4-183. Consequently, the town's arguments that an appeal should have been filed and that such an appeal was not timely filed are not persuasive.

"[W]here a hearing was conducted and the petition was then dismissed, an aggrieved party has a right of appeal under § 4-183. Where, however, no hearing was conducted . . . the statute requires that the plaintiff bring an action for a declaratory judgment, rather than an administrative appeal, which is limited by § 4-183 to agency decisions or orders in contested

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[14] Section 4-166 (4), in relevant part, provides: "'Contested case' means a proceeding, including but not restricted to rate-making, price fixing and licensing, in which the legal rights, duties or privileges of a party are required by state statute or regulation to be determined by an agency after an opportunity for hearing or in which a hearing is in fact held, but does not include proceedings on a petition for a declaratory ruling under section 4-176 . . . ."

cases." *Shearson American Express, Inc.* v. *Banking Commissioner*, 39 Conn. Supp. 462, 466, 466 A.2d 800 (1983). "[I]f an agency declines to issue a declaratory ruling, the person who requested the ruling may bring a declaratory judgment action [in the Superior Court] pursuant to General Statutes § 4-175 (a)." (Internal quotation marks omitted.) *Metropolitan District* v. *Commission on Human Rights & Opportunities*, 180 Conn. App. 478, 489, 184 A.3d 287, cert. denied, 328 Conn. 937, 184 A.3d 267 (2018).

In petitioning the department for a declaratory ruling, the plaintiffs sought determinations[15] of "the applicability to specified circumstances of . . . provision[s] of the general statutes [and] the regulation[s]" under § 4-176 (a). See, e.g., *Tilcon Connecticut, Inc.* v.

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[15]According to the complaint, the three questions were: "a. Did the [department] violate General Statutes § 8-30g (l) (4) (B) and Regs. Conn. State Agencies § 8-30g-6 (j) (4), which require the [department] to make available for public comment all parts of a Certificate application, by accepting Westport's January 24, 2019 letters, which substantively altered Westport's claimed point totals and conceded that some of its points claims did not meet statutory requirements, but then failing to make those letters available for public comment, and failing to timely disclose them to those who, as of January 24, 2019, had already submitted written comments?
"b. Did the [department] violate General Statutes § 8-30g (l) and Regs. Conn. State Agencies § 8-30g-6 by granting moratorium points for developments for which Westport did not provide any evidence of on-going compliance with affordability restrictions on household income and maximum rent, from the date of initial residential occupancy or newly-imposed affordability restrictions to the date of the Certificate application, such as the annual rental unit § 8-30g compliance reports that each town is required to receive from each affordable housing development administrator pursuant to General Statutes § 8-30h, or periodic compliance reports that are required by all federally or state-subsidized affordable housing programs?
"c. Did the [department] violate General Statutes § 8-30g (l) and Regs. Conn. State Agencies § 8-30g-6, and/or make a material factual or mathematical error, by granting 30 points for the Hidden Brook development, when Westport had only claimed 6.0 points for that development, and where the [department's] calculation was based on unidentified and never publicly-disclosed 'records of the Department' as to the number and affordability characteristics of pre-existing units that were demolished when the Hidden Brook development was constructed in 1999?"

Commissioner of Environmental Protection, 317 Conn. 628, 642, 119 A.3d 1158 (2015) (seeking determinations of department's authority to require environmental impact studies for permit application). Further, the plaintiffs properly availed themselves of § 4-175 (a) (2) in filing this case as the department declined to issue a declaratory ruling pursuant to § 4-176 (e) (5). See *Metropolitan District* v. *Commission on Human Rights & Opportunities*, supra, 180 Conn. App. 489; see also generally *Stefanoni* v. *Dept. of Economic & Community Development*, 142 Conn. App. 300, 315, 70 A.3d 61, cert. denied, 309 Conn. 907, 68 A.3d 661 (2013). Therefore, the town's motion to dismiss is denied.

B

In the department's motion to dismiss, it argues that the plaintiffs lack standing to challenge the issuance of the certificate of moratorium because they are not aggrieved. The department maintains that only entities that have a pending application before a zoning commission when a moratorium becomes effective are aggrieved. There is no dispute that the plaintiffs had affordable housing applications that were pending and subsequently denied by the commission. Summit Saugatuck's application was filed in November, 2018, and denied June 20, 2019; *Summit Saugatuck LLC* v. *Westport Planning & Zoning Commission*, Superior Court, land use litigation docket at Hartford, Docket No. CV-19-6120090-S; Garden Homes' applications, filed in 2017 and 2018, were denied on January 10, 2019.[16] *Garden Homes*

[16] This court notes that the commission denied Summit Saugatuck's application and resubmission based, in part, on the issuance of the certificate of moratorium. *Summit Saugatuck LLC* v. *Westport Planning & Zoning Commission*, supra, Superior Court, Docket No. CV-19-6120090-S. In the Garden Homes appeal before this court, the commission referenced

Management Corp. v. *Westport Planning & Zoning Commission*, Superior Court, land use litigation docket at Hartford, Docket No. CV-19-6107573-S. The department argues that the plaintiffs do not have standing to challenge the moratorium as these applications were filed before the moratorium took effect and, therefore, § 8-30g applies to these appeals.[17] Nevertheless, the department acknowledges that the plaintiffs own additional properties in Westport. Additionally, the plaintiffs have alleged that they may seek to develop such property pursuant to § 8-30g.

"If a party is found to lack standing, the court is without subject matter jurisdiction to determine the cause. . . . Standing is not a technical rule intended to keep aggrieved parties out of court; nor is it a test of substantive rights. 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. . . . These two objectives are ordinarily held to have been met when a complainant makes a colorable claim of direct injury he has suffered or is likely to suffer, in an individual or representative capacity. Such a personal stake in the outcome of the controversy . . . provides the requisite assurance of concrete adverseness and diligent advocacy. .

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the fact that the town had sought the moratorium before it issued its denial. *Garden Homes Management Corp.* v. *Westport Planning & Zoning Commission*, Superior Court, land use litigation docket at Hartford, Docket No. CV-19-6107573-S. This court sustained the appeal in part and remanded the appeal in part on July 27, 2020.

[17] This is consistent with the department's position in the administrative process as indicated in its July 29, 2019 decision refusing to issue a declaratory ruling.

. . The requirement of directness between the injuries claimed by the plaintiff and the conduct of the defendant also is expressed, in our standing jurisprudence, by the focus on whether the plaintiff is the proper party to assert the claim at issue. . . .

"Two broad yet distinct categories of aggrievement exist, classical and statutory. . . . Classical aggrievement requires a two part showing. First, a party must demonstrate a specific, personal and legal interest in the subject matter of the [controversy], as opposed to a general interest that all members of the community share. . . . Second, the party must also show that the [alleged conduct] has specially and injuriously affected that specific personal or legal interest." (Internal quotation marks omitted.) *Andross* v. *West Hartford*, 285 Conn. 309, 321-22, 939 A.2d 1146 (2008). "Because the [Uniform Administrative Procedure Act] does not, by itself, render the plaintiffs statutorily aggrieved for standing purposes, we must determine whether they are classically aggrieved." *Financial Consulting, LLC* v. *Commissioner of Insurance*, 315 Conn. 196, 227, 105 A.3d 210 (2014).

The department maintains that the plaintiffs fail to satisfy the aggrievement requirements because they do not have pending affordable housing applications with the commission. The department relies on *Stefanoni* v. *Dept. of Economic & Community Development*, supra, 142 Conn. App. 300. Specifically, it cites the court's holding that "[i]n order for the plaintiffs to have a specific, personal and legal interest in seeking a declaratory judgment regarding the moratorium, they would need to have an affordable housing application filed with the commission that would not be subject to the appeals procedure due to the moratorium." Id., 307. Additionally, the department asserts that the plaintiffs' claims of ownership of property to be

developed as well as a past history of affordable housing applications does not establish aggrievement.

Stefanoni is inapposite for two important reasons.[18] First, the *Stefanoni* plaintiffs sought approval of a floating zone application with the commission. Id., 307. Second, while the floating zone application sought to allow affordable housing development in town, it was not tied to a specific affordable housing application.[19] Id., 310. Therefore, the *Stefanoni* court held that the floating zone application did not meet the statutory definition of an "affordable housing

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[18] In its reliance on *Stefanoni*, the department seems to suggest that only an applicant that files a new affordable housing application with the town would have standing. It would, however, be a futile act to prepare an application that would undoubtedly be denied. "[T]he law does not require the performance of a futile act." (Internal quotation marks omitted.) *Lane* v. *Cashman*, 179 Conn. App. 394, 419 n.15, 180 A.3d 13 (2018). Additionally, submitting an affordable housing application during the moratorium only to have it denied solely for the purpose of creating "a specific, personal and legal interest" cannot possibly be necessary to satisfy the first prong of the classical aggrievement test. If it is, then no one could satisfy the test.

[19] It should be noted that the trial court in *Stefanoni* was concerned with the restrictive covenant placed on the parcel which precluded it from being developed as anything other than single family housing. *Stefanoni* v. *Department of Economic. & Community Development*, Superior Court, judicial district of New Britain, Docket No. CV-11-5015396-S (June 19, 2012, *Schuman, J.*) ("The difficulty for the plaintiffs is that the deed to their property contains a restrictive covenant that limits the premises to 'single family residential use' . . . . The fact of the matter, however, is that the plaintiffs have not filed an action to determine the validity of the covenant, in which action they might make these arguments. . . .Without such an action–indeed, unless the plaintiffs prevailed in such an action–the plain language of the restrictive covenant creates a contractual bar to using [the property] as a multi-family affordable housing site. . . .The plaintiffs are thus left with a zone change application that was denied and a restrictive covenant on their housing site that they have not challenged. At this point, it is only speculation that they will prevail in either matter. While the plaintiffs unquestionably have a strong interest in developing affordable housing in Darien, such interest, for standing purposes, is little different than the 'concern of all members of the [affordable housing] community as a whole.'" [Citations omitted.]), aff'd, 142 Conn. App. 300, 70 A.3d 61 (2013).

application" under General Statutes § 8-30g (a).[20] Id., 310-12. Such is not the case here as the plaintiffs have undisputedly applied to the commission to develop affordable housing in the past and intend to do so in the future.

The plaintiffs argue that their ownership of property that they intend to develop as affordable housing falls within our historic concept of aggrievement. For example, in *Hayes Family Ltd. Partnership* v. *Planning & Zoning Commission*, 98 Conn. App. 213, 221-22, 907 A.2d 1235 (2006), cert. denied, 281 Conn. 903, 916 A.2d 44 (2007), the court held in the context of an amendment to the regulations that "[a]lthough the amendment by its terms is of general applicability, in practice, it potentially applies only to a limited portion of land in the town, some of which was owned by [the plaintiff]. Although [the plaintiff's] land was not yet designated as within the planned residential development zone, it is in the very nature of a floating zone that it does not apply to a particular area of town until a specific application is approved. . . . [The plaintiff] demonstrated that it owned and wanted to develop a particular parcel of land that would be directly affected by the regulation at issue and, therefore, had a personal interest distinguishable from the community as a whole. The court's factual findings as to the nature of the subject property, and the properties surrounding it, indicate a sufficient likelihood of approval such that the regulation will apply to reduce the property's development potential. That reduction in development potential specially and injuriously affected [the

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[20] Section 8-30g (a) defines "affordable housing application" as "any application made to a commission *in connection with an affordable housing development* by a person who proposes to develop such affordable housing." (Emphasis added.)

plaintiff]." (Citation omitted; footnote omitted.)

In the present case, the plaintiffs own land that is subject to the moratorium. As they point out, if a court rejects their pending appeals, they would then be subject to the moratorium and unable to develop affordable housing. Similarly, the court may order a remedy that would lead to a different or modified application which might then beget a claim that could be subject to the moratorium.

Additionally, unlike the other landowners in Westport, the plaintiffs have sought to construct and are seeking to construct affordable housing in Westport. A review of appeals brought by the plaintiffs indicates challenges to actions of the water pollution control agency in connection with the proposed § 8-30g developments as well as the pending zoning appeals and related pending inland wetland matters.[21] *Garden Homes Management Corp.* v. *Westport Planning & Zoning Commission*, supra, Superior Court, Docket No. CV-19-6107573-S; *Garden Homes Management Corp.* v. *Westport Planning & Zoning Commission*, Superior Court, land use litigation docket at Hartford, Docket No. CV-16-6067291-S; *Summit Saugatuck LLC* v. *Town of Westport Water Pollution Control Authority*, Superior Court, land use litigation docket at Hartford, Docket Nos. LND CV-17-6086949-S, LND CV-16-6071538-S; *Summit Saugatuck LLC* v. *Town of Westport Water Pollution Control Authority*, Superior Court, judicial district of Stamford, Docket Nos. CV-20-6047869-S, CV-17-6031613-S ; *Summit Saugatuck LLC* v.

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[21] Further, Garden Homes is or has been involved in numerous affordable housing appeals and related appeals in several other towns. See, e.g., *Garden Homes Management Corp.* v. *Oxford Conservation Commission & Inland Wetlands Agency*, Superior Court, land use litigation docket at Hartford, Docket No. CV-14-6049470-S.

Conservation Commission/Inland Wetlands Agency for the City of Norwalk, Superior Court, judicial district of Stamford, Docket Nos. CV-20-6047309-S, CV-20-6047311-S ; *Summit Saugatuck LLC* v. *Westport Planning & Zoning Commission*, supra, Superior Court, Docket No. LND CV-19-6120090-S. Thus, these plaintiffs have specific interests that are unlike other landowners in Westport.

Further, they have challenged the moratorium because it may or will deprive them from accomplishing the goal of developing their property as affordable housing. These interests are unquestionably affected by the moratorium on affordable housing. As the plaintiffs point out, if this court remands the matters–as it has done in *Garden Homes Management Corp.* v. *Westport Planning & Zoning Commission*, supra, Superior Court, Docket No. CV-19-6107573-S–then the commission may assert that there is an issue of whether a new application was filed–as it did in *Summit Saugatuck LLC* v. *Westport Planning & Zoning Commission*, supra, Superior Court, Docket No. LND CV-19-6120090-S. See also *Autumn View, LLC* v. *Planning & Zoning Commission*, 193 Conn. App. 18, 31-32, 218 A.3d 1101, cert. denied, 333 Conn. 942, 218 A.3d 1048 (2019) (examining issue of whether site plan submitted with remand application was updated plan consistent with Superior Court's remand order or constituted new plan). In sum, the plaintiffs are differently situated from the public at large with specific interests in developing property as affordable housing that will specially and injuriously impacted by the moratorium. As the plaintiffs are aggrieved, the department's motion to dismiss is denied.

Accordingly, the defendants' motions to dismiss are denied.

/s/ 080096
Berger, J.T.R.