DOCKET NO. LND-CV-18-6091466-S	:	SUPERIOR COURT
HOUSING AUTHORITY OF THE TOWN OF BRANFORD, ET AL.	:	LAND USE LITIGATION DOCKET
V.	:	AT HARTFORD
PLANNING AND ZONING COMMISSION OF THE TOWN OF BRANFORD	:	OCTOBER 24, 2018

MEMORANDUM OF DECISION

I

The plaintiffs, the housing authority of the town of Branford (housing authority),[1] as owner, and Beacon Communities, Inc. (Beacon), a real estate development and property management company, as developer, appeal denials by the defendant, the town of Branford planning and zoning commission (commission), of applications to develop an affordable housing complex pursuant to General Statutes § 8-30g on a 5.02 acre parcel at 115 South Montowese Street in a residential zone (R-3) in Branford.[2] The proposed development, a sixty-seven unit

[1] The housing authority is the agency established by the town of Branford to exercise the powers of a housing authority as set forth in General Statutes § 8-38 et seq.

[2] According to a stipulation of facts and exhibits filed by the parties on April 30, 2018 (pleading # 111.00), the present development was built prior to the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq., and would require substantial renovations and repairs. (Stipulation [Stip.], ¶¶ 10-11.) Additionally, "[t]he redevelopment of Parkside Village was proposed to be funded primarily by the federal Low Income Housing Tax Credit ('LIHTC') Program, which consists of tax credits allocated annually by the Connecticut Housing Finance Authority to development proposals. . . . If granted, the proposed funding would allow the Parkside Village redevelopment to qualify as 'assisted housing' under General Statutes § 8-30g (a) (3)." (Stip., ¶¶ 19-20.)

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apartment complex in one building, would replace an existing fifty unit, age restricted housing complex, known as Parkside Village I, in four buildings.[3]

On September 25, 2017, the plaintiffs filed applications for a text amendment to create a new zone, to change the parcel to the new zone and for a site plan and coastal site plan.[4] A public hearing was held on October 19, 2017, November 2, 2017, November 16, 2017 and December 7, 2017, when it was closed. The commission then deliberated on January 8, 2018, January 18, 2018, and January 25, 2018, when it approved the three applications by a three to two vote, finding that the regulation amendment and rezoning were consistent with the town's comprehensive plan and its plan of conservation and development.

Nevertheless, during the public hearing process, a protest petition[5] was filed under General

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[3] While the proposed units would no longer be age restricted, "90 percent of the units would be preserved for moderate and low income individuals and households, and the disabled, as described in the Affordability Plan." Moreover, the plaintiffs agreed as a condition for approval that they would "relocate existing Parkside Village residents to the new building, on a priority basis." (Stip., ¶¶ 28-30.)

[4] Parkside Village I lies within a coastal area and a coastal site plan is required under General Statutes § 22a-90, et seq.

[5] "While landowners have an interest in the stability of zoning requirements, especially where a rezoning of neighboring parcels may have an impact on the enjoyment or value of their property, courts generally have ruled that public opposition to a zoning change, in and of itself, is not sufficient to support an arbitrary zoning decision. However, by the procedural hurdles of protest and consent provisions, the law may confer upon those most affected by unwanted zoning a measure of protection beyond that afforded by public hearings.

"Protest provisions permit qualified neighboring owners to formally protest the enactment of a proposed zoning enactment. Valid protest petitions generally require that an extraordinary majority of the legislative body approve the proposal." 3 A. Rathkopf & D. Rathkopf, Law of Zoning and Planning (2017) § 43:1, pp. 43-2 through 43-3.

Statutes § 8-3 (b).[6] Section 8-3 (b) provides: "Such regulations and boundaries shall be established, changed or repealed only by a majority vote of all the members of the zoning commission, except as otherwise provided in this chapter. In making its decision the commission shall take into consideration the plan of conservation and development, prepared pursuant to section 8-23, and shall state on the record its findings on consistency of the proposed establishment, change or repeal of such regulations and boundaries with such plan. *If a protest against a proposed change is filed at or before a hearing with the zoning commission, signed by the owners of twenty per cent or more of the area of the lots included in such proposed change or of the lots within five hundred feet in all directions of the property included in the proposed change, such change shall not be adopted except by a vote of two-thirds of all the members of the commission.*" (Emphasis added.) In applying the statute, the commission deemed the three to two vote to be a denial of the applications because a "vote of two-thirds of all the members of the commission"–or, in this case, approval by a four to one vote–was required. The commission's denial was published in The Sound newspaper on February 8, 2018.

On February 20, 2018, the plaintiffs commenced this appeal. The commission filed an answer on April 30, 2018. On the same day, the plaintiffs filed their brief and the parties filed a joint stipulation of facts. On June 21, 2018, the commission filed its brief and the plaintiffs filed a brief in reply on July 5, 2018. The court heard the appeal on July 11, 2018.

In light of the fact that the commission approved the applications–albeit not by a supermajority–the parties agreed during a status conference with the court that the issue of

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[6] The town planner advised that the protest petition met the requirements of § 8-3 (b); the plaintiffs do not challenge that assessment. (Stip , ¶ 44.)

whether § 8-3 (b) applies to affordable housing applications is dispositive of the appeal. In furtherance of that agreement, the parties filed the stipulation of facts and exhibits (stipulation) on April 30, 2018 (pleading # 111.00).

II

As the plaintiffs are the coapplicants and because their applications were denied[7]; (Stipulation [Stip.], ¶ 15); the plaintiffs are aggrieved. General Statutes § 8-30g (f) ("any person whose affordable housing application is denied . . . may appeal such decision pursuant to the procedures of this section."); see also *Moutinho* v. *Planning & Zoning Commission*, 278 Conn. 660, 669, 899 A.2d 26 (2006) ("an agreement between a landowner and a non-owner developer need not be in writing to establish the developer's aggrievement in a zoning appeal"); *Housing Authority of North Haven* v. *North Haven Planning & Zoning Commission*, Superior Court, land use litigation docket at Hartford, Docket No. LND CV-16-6073392-S (August 16, 2018, *Mottolese, J.T.R.*) (construing "person" in § 8-30g (f) to include housing authority).

III

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we 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. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship

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[7] See also affidavit of Dara Kovel attached to plaintiffs' brief which includes the agreement between the plaintiffs (pleading # 110.00, pp. A10-A49).

to other statutes. 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." (Internal quotation marks omitted.) *AvalonBay Communities, Inc.* v. *Zoning Commission*, 280 Conn. 405, 413, 908 A.2d 1033 (2006). "When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *Marchesi* v. *Board of Selectmen*, 328 Conn. 615, 628, 181 A.3d 531 (2018). "Finally, common sense must be used in statutory interpretation, and courts will assume that the legislature intended to accomplish a reasonable and rational result." (Internal quotation marks omitted.) *Cannata* v. *Dept. of Environmental Protection*, 239 Conn. 124, 141, 680 A.2d 1329 (1996).

IV

For a number of reasons, this court holds that § 8-3 (b) does not apply to affordable housing applications under § 8-30g. Initially, the court observes that the plaintiffs were not required to seek a text amendment and zone change. *Wisniowski* v. *Planning Commission*, 37 Conn. App. 303, 315, 655 A.2d 1146 ("[n]o formal zone change application is needed because the [Affordable Housing Act] is designed to allow circumvention of the usual exhaustion of zoning remedies and to provide prompt judicial review of a denial of an application"), cert. denied, 233 Conn. 909, 658 A.2d 981 (1995). Nevertheless, the plaintiffs argue that they are

compelled to seek the zone change because "some applicants, after obtaining zoning approval under § 8-30g, require a legal opinion for a lender or funding source stating that the development 'complies with zoning.' That opinion is more easily provided if the § 8-30g application clearly involves a governing regulation, applied to the subject parcel through the statutory process for rezoning, and with a compliant site plan. In this case, the plaintiffs/applicants will seek Low Income Housing Tax Credit financing, and also possible help from the [CHFA], each of whom will require verification of 'zoning compliance.'"[8]

Chapter 126a of the General Statutes governs affordable housing and does not specifically mention or incorporate by reference § 8-3 (b). The only mention of "a change of zone" is contained in § 8-30g (c), which is not applicable here, but seems to indicate that the legislature contemplated zone changes as part of the affordable housing process. Additionally, the Supreme Court has concluded "that the legislature intended [§ 8-30g's] appeals procedure to apply to the [commission's] legislative decision to grant or deny a zone change. The plain and unambiguous language of § 8-30g supports this conclusion. Section 8-30g (a) (2) defines an '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 in original.) *West Hartford Interfaith Coalition, Inc.* v. *Town Council*, 228 Conn. 498, 508, 636 A.2d 1342 (1994).

The general procedure for zone changes is mainly provided for in § 8-3 of Chapter 124. Section 8-3 does not reference § 8-30g. Thus, the commission's argument that it is bound by

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[8] The plaintiffs give a number of other reasons in footnote 3 of their brief as to why a zone change might be necessary in an affordable housing context.

§ 8-3 (b) is not entirely unfounded.[9]

Nevertheless, "[§] 8-30g is not part of the traditional land use statutory scheme. Traditional land use policies did not solve Connecticut's affordable housing problem, and the legislature passed § 8-30g to effect a change. The commission makes the mistake of looking at § 8-30g applications as though they were traditional zoning applications." *Wisniowski* v. *Planning Commission*, supra, 37 Conn. App. 317.

In our Supreme Court's first decision concerning § 8-30g in 1994, the court rejected a town's argument that the Affordable Housing Act (act) did not apply to a legislative zone change.

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[9] The commission's assertion that the "supermajority" provision of § 8-3 (b) takes precedence over § 8-30g because the housing authority must comply with General Statutes §§ 8-51 and 8-265a is, however, not persuasive. Section 8-51 provides: "Each housing project of an authority shall be subject to the planning, zoning, sanitary and building laws, ordinances and regulations applicable to the locality in which such project is situated." Thus, this statute simply "renders each housing project subject to the planning, zoning, sanitary and building laws, ordinances and regulations applicable to the locality in which each project is situated." *Connelly* v. *Housing Authority*, 213 Conn. 354, 363 n.8, 567 A.2d 1212 (1990).

Section 8-265a provides: "All land and improvements owned by the authority or in which the authority has an interest through a mortgage held or insured by it shall be subject to the planning, zoning, health and building laws, ordinances and regulations applicable to the town in which such land and improvements are situated, provided, as to land owned by the authority, the authority shall have the same rights of appeal and review from an adverse decision or order based on such laws, ordinances and regulations as are granted by such laws, ordinances and regulations to other owners." This section clearly does not apply as "authority" is defined under General Statutes § 8-243 (b) to be the Connecticut Housing Finance Authority (CHFA), not a municipal housing authority. Additionally, § 8-265a, like § 8-51, simply renders all land and improvements that CHFA has an interest in subject to local zoning regulations, ordinances and laws.

Finally, § 8-51 was enacted in 1936; *Housing Authority of North Haven* v. *North Haven Planning & Zoning Commission*, supra, Superior Court, Docket No. LND CV-16-6073392-S; and § 8-265a was enacted in 1972. Neither statute appears to have been amended. Section 8-30g was enacted in 1988 and has been amended several times–most recently this year. As the later and more specific statute as to affordable housing, § 8-30g prevails. See *Wisniowski* v. *Planning Commission*, supra, 37 Conn. App. 313-14 ("To the extent possible, statutes should be reconciled. . . . When two statutes conflict, however, as in the present case, the more specific legislation governs over the general legislation . . . and the latest expression of the legislature prevails over a conflicting prior enactment.") [Citations omitted.]).

West Hartford Interfaith Coalition, Inc. v. *Town Council*, supra, 228 Conn. 498. In determining that the act applied to zone changes, the court discussed the purpose of the legislation noting the conclusion of a study of the blue ribbon commission on housing that "[e]xpanding 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.) Id., 509-10. The court held that "the statute contains no exceptions or qualifications limiting the definition of an affordable housing application to certain types of applications to zoning commissions." Id., 509. Further, the court warned, "Under the defendant's proposed interpretation, a town could utilize zoning to impede a developer from appealing under the statute. That is, a town could remove itself entirely from § 8-30g by eliminating any zones appropriate for the development of affordable housing. Conceivably, towns in which no land is zoned for multifamily housing would be wholly exempt from the statute. We refuse to construe § 8-30g to include an implied limitation that would be so antithetical to the intent of the legislature." (Footnote omitted.) Id., 511.

In *Wisniowski* v. *Planning Commission*, supra, 37 Conn. App. 312, in 1995, the Appellate Court concluded "that the plain and unambiguous language of § 8-30g does not contemplate a denial of an affordable housing subdivision application on the ground that it does not comply with the underlying zoning of an area." In so concluding, the court held, "To the extent possible, statutes should be reconciled. . . . When two statutes conflict, however, as in the present case, the more specific legislation governs over the general legislation . . . and the latest expression of the legislature prevails over a conflicting prior enactment. . . . The affordable housing land use appeals act was enacted to deal with the particular problem of the lack of affordable housing in

Connecticut. . . . It was not enacted as an amendment to the general zoning law. Section 8-30g is the later expression of the legislature and it prevails in the event of any conflict with §§ 8-26 or 8-2." (Citations omitted.) Id., 313-14.

Similarly in the present case, § 8-30g was enacted in 1988 while § 8-3 (b)[10] was promulgated more than sixty years earlier with the adoption of Connecticut's first zoning laws in 1925. *Muller* v. *Town Plan & Zoning Commission*, 145 Conn. 325, 329, 142 A.2d 524 (1958) ("The original enactment authorizing zoning generally in this state was chapter 242 of the Public Acts of 1925. Section 5 of that chapter contained a provision, commonly found in zoning acts, that when a protest against a change of zone was filed by the owners of 20 per cent or more of the area of the lots included in the proposed change, or of those immediately adjacent in the rear thereof extending 100 feet therefrom, or of those directly opposite thereto extending 100 feet, a vote by more than a majority of the zoning authority was required for the adoption of the

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[10] Citing to Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (2017), the plaintiffs challenge the very concept of the protest petition because they have been used historically to discriminate on the basis of race. They also assert that a more stringent requirement on a commission should be imposed where the petitioners are not required to give stated reasons for their position. See *Parisi* v. *City of Gloucester*, 3 Mass. App. Ct. 680, 683-84, 338 N.E.2d 847, 849-50 (1975) ("The explicit requirement for written reasons in its present form has been in the statute since 1933. . . . The effect of such a provision is, it seems to us, to place on one who wishes to invoke this exception the burden of identifying and articulating his reasons (or subscribing and signing his name to reasons articulated by others) with somewhat greater care and reflection than may be involved in merely 'wish(ing) to be recorded in opposition' and leaving it to others to give the city council, orally, reasons which may or may not be those which gave rise to his opposition." [Citation omitted; footnote omitted.]) Otherwise, this may be more subterfuge for discrimination or, in a more benign form, allows "landowners' personal and subjective concerns to dominate" zoning decisions. In the extreme, conceivably just one person who owns all the lots within 500 feet could create an anomalous situation, i.e., one person would be able to impose a supermajority under § 8-3 (b). The plaintiffs point out that protest petitions can cause "extreme results. The exclusionary implications of permitting a small group of local owners to block a zoning amendment are obvious." 3 A. Rathkopf & D. Rathkopf, supra, § 43:1, p. 43-3. These concerns are valid.

change."). "[T]he legislature is presumed to have knowledge of all existing statutes and the effect which its actions may have upon them." *Quarry Knoll II Corp.* v. *Planning & Zoning Commission*, 256 Conn. 674, 737, 780 A.2d 1 (2001). As the later and more specific expression of the legislature's intent regarding affordable housing, § 8-30g prevails. See *Wisniowski* v. *Planning Commission*, supra, 37 Conn. App. 313-14.

Furthermore, in *Quarry Knoll II Corp.* v. *Planning & Zoning Commission*, supra, 256 Conn. 735-38, in 2001, the court reviewed the interrelationship of § 8-30g and General Statutes § 22a-19 (b) concerning environmental intervention. In that appeal, the commission and the individual defendants argued "that the trial court, in concluding that under § 8-30g (c) (1) (D), the commission, rather than the plaintiffs, had the burden of proving that 'no feasible and prudent alternative' to the proposed development existed, improperly determined that § 22a-19 (b) was repealed by implication." Id., 699. The court held that "the trial court properly determined that under § 8-30g (c) (1) (D), the commission, rather than the plaintiffs, had the burden of proving that 'no feasible and prudent alternative' to the proposed development existed." Id., 701. In reconciling the statutes and discussing the different burdens of proof, the court stated, "Our reading of the two statutes promotes the legislative policy that the affordable housing statute was designed to implement. In contrast, the defendants' proposed reading of the statutes would 'thwart its purpose.'. . . Our review of the legislative history reveals that the aim of § 8-30g is to encourage and facilitate the development of affordable housing throughout the state. . . . The defendant's proposed interpretation of the interrelationship between § 22a-19 and § 8-30g would undermine this objective. Indeed, it would render § 8-30g (c) worthless." (Citations omitted.) Id., 737.

The same reasoning applies here. The commission's interpretation that the protest provisions of § 8-3 (b) overrides § 8-30g would thwart the purpose of the act. "As a remedial statute, § 8-30g must be liberally construed in favor of those whom the legislature intended to benefit." (Internal quotation marks omitted.) *Kaufman* v. *Zoning Commission*, 232 Conn. 122, 140, 653 A.2d 798 (1995). "[T]he key purpose of § 8-30g is to encourage and facilitate the much needed development of affordable housing throughout the state." (Internal quotation marks omitted.) *Christian Activities Council, Congregational* v. *Town Council*, 249 Conn. 566, 577, 735 A.2d 231 (1999). "Section 8-30g does not allow a commission to use its traditional zoning regulations to justify a denial of an affordable housing application." *Wisniowski* v. *Planning Commission*, supra, 37 Conn. App. 317. Further, it would not be reasonable or rational to conclude that a small but vocal minority could block development of affordable housing and thwart the purpose of § 8-30g simply by signing a petition. See *Cannata* v. *Dept. of Environmental Protection*, supra, 239 Conn. 141.

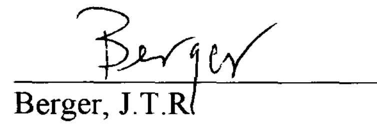
In determining that the applications were deemed denied as a result of the protest petition under § 8-3 (b), the commission did not comply with the provisions of § 8-30g (g). Section 8-30g (g), in relevant part, provides: "Upon an appeal taken under subsection (f) of this section, the burden shall be on the commission to prove, based upon the evidence in the record compiled before such commission, that the decision from which such appeal is taken and the reasons cited for such decision are supported by sufficient evidence in the record. The commission shall also have the burden to prove, based upon the evidence in the record compiled before such commission, that (1) (A) the decision is necessary to protect substantial public interests in health, safety or other matters which the commission may legally consider; (B) such public interests

clearly outweigh the need for affordable housing; and (c) such public interests cannot be protected by reasonable changes to the affordable housing development . . . ."

"The burden of proof in § 8-30g dictates the only effective reasons for a commission to deny an affordable housing application. That burden necessarily establishes the standards of the underlying proceeding. Section 8-30g, therefore, affects the administrative proceedings concerning affordable housing subdivision applications, as well as the appeal proceedings. The narrow rigorous standard of § 8-30g dictates that the commission cannot deny an application on broad grounds such as noncompliance with zoning. Section 8-30g anticipates that there will be many different types of applications that may be brought to many different types of agencies. . . . Whichever zoning authority is asked to deal with the application, a zone change will necessarily be embodied in the application, either as to use, or as to bulk, as is the case here. If no zone change were involved, there would be no need for an application for affordable housing. An application may not be rejected just because it involves a zone change." (Citations omitted.) *Wisniowski* v. *Planning Commission*, supra, 37 Conn. App. 314-15.

In short, the protest petition provision of § 8-3 (b) is not a proper ground for the denial of the applications. In improperly relying on § 8-3 (b) to deny the applications, the commission failed to comply with § 8-30g and has not sustained its burden of proof. The commission's inclusion of a condition requiring approval of the zone change for the site plan to be approved was unequivocally illegal. Accordingly, inasmuch as the plaintiffs acknowledge and agree to the

conditions imposed by the commission on January 25, 2018, the denials of the commission based upon the "supermajority" provision of § 8-3 (b) are reversed. The applications are remanded to the commission for approval with the conditions as previously imposed excluding the condition requiring a zone change for approval of the site plan as alleged in paragraph forty-eight of the complaint and paragraph forty-nine of the stipulation.[11]



Berger, J.T.R.

[11] See also exhibits eleven through thirteen attached to the parties' stipulation of facts. The condition to be excluded is paragraph one at the bottom of page four and top of page five of exhibit thirteen.