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March 24, 2006

State Senator Andrew J. McDonald, Co-Chair
State Representative Michael P. Lawlor
and Members of the Judiciary Committee
Connecticut General Assembly
Legislative Office Building
Hartford, CT 06106

Re: Opposition to **Raised Bill No. 672**, An Act Concerning Standards for the Denial
of an Affordable Housing Application

Dear Senator McDonald, Representative Lawlor, and Members of the Judiciary Committee:

I am writing in opposition to Raised Bill No. 672, a proposed amendment to the
Affordable Housing Land Use Appeals Act, Conn. Gen. Stat. § 8-30g.

Qualifications

A resume listing my experience with affordable housing in Connecticut and nationally is attached. In summary, I have been actively involved in affordable housing matters throughout my 23 years as a land use and environmental attorney. I participated in the Blue Ribbon Commission in 1988-89 and was a member of the second Blue Ribbon Commission in 1999-2000. I currently serve as Chair of the Affordable Housing Committee of the Connecticut Bar Association.¹ I wish to emphasize that my 11 lawyer practice group at Shipman & Goodwin serves as Town Attorney to three towns (Glastonbury, Canton, and Colchester) and Special

¹ In this testimony, I am not speaking for that Committee, as there was insufficient time to formulate Committee comments on this specific proposed bill. However, the Affordable Housing Committee, since the mid-1990's, has been opposed to any substantial change to the affordable housing statutes.

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Counsel to approximately 20 others.² I mention this to emphasize that I provide this testimony not as a developer's attorney but as a land use and environmental attorney who regularly represents both private property owners and municipalities and their agencies.

Reasons For Opposition

This bill should be rejected for the following reasons:

1. Alteration Of Second Factor Of Judicial Review. This bill drastically and improvidently alters the second factor of the standard of judicial review of agency denials of affordable housing by injecting into the phrase "other matters which the commission may consider" matters that simply do not belong there.

Section 8-30g requires a municipal land use agency that denies an application to justify its denial by demonstrating to a reviewing court that each of its reasons for denial:

- (1) is supported by sufficient evidence in the record;
- (2) constitutes a "substantial public interest" in "health, safety, or other matters which the commission may legally consider";
- (3) is so substantial as to "clearly outweigh the need for affordable housing" in the town and region; and
- (4) cannot be addressed by reasonable changes to the development plan.

To see whether a reason for denial is a matter that the commission "may legally consider," we look at its enabling statute. For zoning commissions, for example, we examine Conn. Gen. Stat. § 8-2, the Zoning Enabling Act, and court cases interpreting the scope of that statute.

² In addition, I am the only Connecticut attorney and one of only 50 attorneys in the country to have received designation of "Local Government Law Fellow" from the International Municipal Lawyers Association, the association of city and town attorneys.

This "other matters" phrase has not changed since Conn. Gen. Stat. § 8-30g was enacted in 1989, and its meaning has never been in doubt. Raised Bill No. 672, however, would provide that the agency acting on an affordable housing application may consider virtually anything, whether stated in its enabling act or not, whether within its jurisdiction and expertise or not. The bill explodes the agency's statutory jurisdictional parameters, and in doing so substantially rewrites § 8-30g's burden of proof. It is fundamental to our land use system that what a municipal land use agency is "permitted or required" to consider must be stated in the agency's enabling statute; the raised bill contradicts this fundamental aspect. In other words, this amendment expands the second factor of the standard of review from a matter within the commission's statutory jurisdiction to matters contained in any source of law, which would include matters that are clearly not within the jurisdiction of the local municipal agency.

2. Coordinate Agency Permits. The raised bill overrules established practice regarding the relationship between a § 8-30g application and any other permits that may be necessary. It imposes a uniform rule on what are fact-sensitive standards and situations. First and foremost is the long-established and recently-repeated principle that wetlands permit decisions are to be given "due consideration" by land use agencies, but are not a basis for a denial of an application. This is true of all land use applications, and not just affordable housing. Subsection (3)(B) provides that the mere denial of a required application of another agency constitutes a public interest that the commission may legally consider. This overrules several cases holding that denial of a wetlands permit is not a basis for denial of a zoning or subdivision application. The bill also overrules established cases regarding coordinate permits for subdivision and site plan applications. The bill provides that if any coordinate application is denied for any reason, whether legal or not, the agency processing the § 8-30g application is empowered to deny the affordable housing application.

As a result, in any affordable housing application where multiple permits are required – which is usually the case – the § 8-30g process will come to a halt whenever any coordinate permit is denied for any reason. This will make it virtually impossible to pursue the permits simultaneously, and will require affordable housing applicants to wait until all coordinate permits have been obtained before proceeding with a § 8-30g application. This onerous requirement of sequential as opposed to simultaneous permits would be imposed on affordable housing applications but not other land use applications – a result that would be completely contrary to the remedial purposes of the affordable housing statute.

3. "Ongoing Negotiations." In Subsection (3)(C), an agency is authorized to consider whether the applicant is engaged in "ongoing negotiations" regarding another permit with another agency. This is unworkable. If an applicant has an application pending before an

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agency that requires a public hearing, there should be no "negotiations." Such discussions would violate public notice, public meeting, and due process rules. If the permit application has been denied and settlement negotiations are underway, the raised bill apparently requires the public disclosure of what are supposed to be confidential discussions.

Overall, the bill substantially revises the burden of proof and standard of judicial review of municipal land use agency denials of affordable housing; overrules several major affordable housing court decisions; and overrules a part of the work of the second Blue Ribbon Commission from 1999-2000. As a result, it throws out the now well-established standards developed by applicants, land use agencies, and courts over the past 16 years as to what is and is not a substantial public interest. As a result of these consequences, it is virtually guaranteed that if this raised bill is adopted into law, municipal agencies intent on opposing affordable housing will dig in their heels and refuse to engage in settlement negotiations or mediation, and wait to see how this new legislation will be interpreted. This will undermine the central purposes of the affordable housing statute, which is to encourage mediations and settlements at the local level.

Raised Bill 672 Is Unnecessary/A Possible Substitute

It appears from the draft bill that its intent is to clarify that the phrase "or other matters which the commission may legally consider" is not strictly limited to matters of public health and public safety. In my opinion and experience, neither local land use agencies nor courts have ever considered the statute to be limited to public health or public safety matters. In fact, the focus of nearly every dispute and court case is whether the agency's reasons for denial constitute substantial public interests, not the scope of the phrase "or other matters which the commission may legally consider."

In preparing this testimony, I have reviewed the reported court cases over the past 16 years. It is clear from this review that neither the municipal land use agencies nor the courts are under the impression or delusion that the phrase "health, safety or other matters which the commission may legally consider" is limited to matters of public health or public safety. Indeed, municipal denials of § 8-30g applications have been sustained by the courts where the denial was based on **open space preservation, historic preservation, preservation of industrially-zoned property, water quality, sedimentation and erosion controls, and upland habitat protection.** Thus, it is unnecessary to clarify this phrase in this regard.

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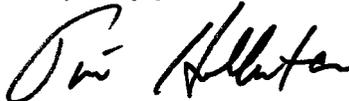
However, if the Committee decides that such a clarification is necessary, in lieu of the proposed Section (3), I would propose the following:

For the purposes of subparagraph (A)(i) of subdivision (2) of this subsection, the phrase "health, safety or other matters which the commission may legally consider" means not only matters of public health and public safety, but also all matters listed or referenced in the agency's enabling statutes and any court decision interpreting the scope of such statutes.

A clarification of this type will make it clear that local agencies are empowered to consider as substantial public interests matters within their statutory or regulatory jurisdiction, and that they are not strictly limited to matters of public health and public safety. This clarification would not impact the burden of proof, would not overrule any existing standards or court cases, and would not be a cause of confusion.

Thank you very much for this opportunity to testify.

Very truly yours,



Timothy S. Hollister

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Attachment
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Timothy S. Hollister
Experience With Affordable Housing

- Partner, Shipman & Goodwin LLP, Hartford Office
- Practice concentration in land use and environmental law
- Member, Blue Ribbon Commission to Study Affordable Housing, August 1999 – February 2000
- Participated in meetings of Governor's Blue Ribbon Commission on Housing, 1988-89
- Participated in drafting of Public Act 89-311 during 1989 legislative session and Public Act 00-206 during 2000 legislative session
- Under contract to the Connecticut Department of Economic and Community Development, provided technical assistance in drafting statewide regulations adopted in June 2002 governing affordable housing applications, see Regs. Conn. State Agencies §§ 8-30g-1 to 8
- Represented Home Builders Association of Connecticut in Builders' Service Corp. v. East Hampton PZC, 208 Conn. 267 (1988)
- Represented Trammell Crow Residential in first case decided under § 8-30g by Superior Court, TCR New Canaan v. Trumbull PZC (March 1992).
- Since 1990, represented applicants/developers in affordable housing applications in Avon, Beacon Falls, Bethany, Bethel, Branford, Canton, Cheshire, Danbury, Darien, Milford, Monroe, New Canaan, New Milford, Newtown, North Branford, North Canaan, Norwalk, Orange, Ridgefield, Simsbury, Stamford, Stratford, Thomaston, Tolland, Trumbull, Wallingford, Westport, and Wilton
- Speaker on § 8-30g to Northeast Council of Governments, Connecticut Bar Association, Connecticut Conference of Municipalities, International Municipal Lawyers Association, Connecticut Housing Coalition, Connecticut Community Development Association, Southwest Regional Planning Commission, Select Committee on Housing, and Planning and Development Committee of Connecticut General Assembly
- Appointed special master in 1995 to assist Connecticut Superior Court judge in settlement of affordable housing litigation
- Author, "Not in My Town," The Hartford Courant, February 27, 1994, p. D1

- Author, "Zoning 'for the Living Welfare': The Status of Affordable Housing Litigation in Connecticut," Conn. Real Estate Law Journal, Vol. 10, No. 1 (1992)
- Author, Brief Amicus Curiae of Connecticut Housing Coalition, et al., Quarry Knoll II Corp., et al. v. Planning and Zoning Commission of the Town of Greenwich, et al., Connecticut Supreme Court decision, July 2001
- Member, West Hartford Housing Partnership, 1992-1994
- Counsel to the Connecticut Coalition to End Homelessness
- Designated a "Local Government Law Fellow" by the International Municipal Lawyers Association, for "demonstrated excellence in the field of local government law," October 2002
- Distinguished Service Award, Home Builders Association of Connecticut, December 2004