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## S.B. 672 -- Affordable Housing Appeals Procedure (C.G.S. 8-30g)

Judiciary Committee public hearing -- March 24, 2006

Testimony of Raphael L. Podolsky

**Recommended Committee action: NO ACTION**

### Summary

S.B. 672 makes changes to the elements of proof required in an affordable housing appeal. In some instances, S.B. 672 attempts to codify existing case law. Those efforts, however, sometimes oversimplify and sometimes modify what they are trying to codify. In other instances, S.B. 672 attempts to give specificity to particular terms. There, too, the effort is often unsuccessful, producing language that is less rather than more specific, replacing judicial subtlety with rigid rules, and perhaps unintentionally changing the meaning of the statute. The actual effect of adoption of the bill will make the meaning of the Affordable Housing Appeals Procedure less certain, will generate unnecessary litigation, and will weaken the ability of the Act to accomplish its goal of promoting the development of affordable housing in suburban and outlying towns. While the questions raised by this bill may well be worthy of further study, they involve a level of complexity which makes it inappropriate to try to address them thoughtfully so late in this very short session. We therefore urge the Committee to take no action on the bill.

### Background

The Affordable Housing Appeals Procedure (C.G.S. 8-30g) is a critically important affordable housing anti-exclusionary zoning and fair housing law which helps make it possible to build long-term affordable housing in suburban and outlying towns. Its existence is essential to the implementation of municipal obligations under the Zoning Enabling Act (C.G.S. 8-2), which requires that all municipal zoning regulations "encourage the development of housing opportunities, including opportunities for multifamily dwellings" for residents of the town and the region and that such regulations "promote housing choice and economic diversity in housing, including housing for both low and moderate income households." Since its original adoption in 1989 on the recommendation of the first Blue Ribbon Commission on Housing, the Act has undergone many amendments, including a full review and revision in 2000 based upon the report of the second Blue Ribbon Commission. The changes contained in P.A. 00-206 strengthened the affordability requirements of the Act, improved the information available to towns, and rewarded towns in which a substantial amount of new affordable housing was developed with a moratorium under the Act. C.G.S. 8-30g applies only in towns in which less than 10% of the dwelling units are government-subsidized or subject to affordability deed restrictions.

The Affordable Housing Appeals Procedure has proven itself repeatedly as a good, balanced law which helps reduce the negative impact of exclusionary zoning. At the same time, when a zoning or planning commission has good reason for turning down an affordable housing application, the commission's decision will be upheld by the courts. Commissions in fact win about a third of appeals under the Act. In addition, the Act has made zoning commissions more willing to give serious consideration to affordable housing applications and has, in some cases, given formerly resistant towns the incentive necessary to take the initiative and affirmatively seek out ways to promote the development of affordable housing within their communities. There is no need to amend the Act, and we therefore urge that no further action be taken on this bill.

### Specifics of this bill

The primary way in which C.G.S. 8-30g operates is through a shift in the burden of proof. If a developer proposes to build housing which satisfies the Act's affordability requirements (either government-assisted housing or housing in which at least 30% of the units are deed-restricted for affordability for at least 40 years), then a commission which denies the application bears the burden of proof on four issues. First, as a threshold requirement for defending an appeal, the commission must show that its decision is supported by "sufficient evidence in the record." Its decision, in other words, must be based on evidence heard by the commission. If that test is met, then the commission must also prove three additional elements that are designed to give affordable housing more weight in the decision-making process than it might otherwise have received. In particular, the commission must show that (1) its decision is "necessary to protect substantial public interests in health, safety, or other matters which the commission may legally consider," (2) those public interests "clearly outweigh the need for affordable housing," and (3) those public interests "cannot be protected by reasonable changes to the affordable housing development."

S.B. 672 makes changes in these elements of proof. The principal change made by the bill appears to be an attempt to give more specificity to the phrase "other matters which the commission may legally consider." This effort at specificity, however, tends to undercut the Act for a number of reasons. First, it changes the focus of the Act's balancing test. The test is written, quite appropriately, to place the emphasis on the impact of the proposed development on health and safety, since those concerns are the ones which would most obviously justify a denial by the commission. Such health and safety issues as sewage disposal, water supply, and fire equipment access are all matters that have arisen in cases in which a commission's denial of an application has been sustained. At the same time, the existing phrasing makes clear that the commission can also consider any matter within its legal powers. There is no lack of understanding in the courts that non-health and safety matters may sustain a commission's decision. For example, the courts have upheld commission decisions based on such factors as preservation of open space, Christian Activities Council v. Town Council of the Town of Glastonbury, 249 Conn. 566 (1999), and on architectural and historical compatibility, United Progress, Inc. v. Borough of Stonington Planning and Zoning Commission, 1994 WL 76803 (1994). The effort to itemize such matters, however, reverses the focus of the act and suggests that all factors are substantial and as important as public health and safety.

Second, the list results in less, not more, specificity. By citing unlimited categories --

any other provision of the general statutes, any state or federal regulation, any municipal charter or ordinance -- it gives the courts no guidance at all as to what factors are actually relevant or substantial. Even if there were uncertainty, this listing does not help.

Third, the listing described above seems to expand rather than codify what a zoning or planning commission can legally consider. Although planning and zoning commissions are appointed locally, the case law is very clear that they are creations of the state and exercise only those powers which have been delegated to them by the state. What the commissions covered by the Affordable Housing Appeals Procedure "may legally consider" is controlled by their applicable enabling acts -- C.G.S. 8-2 (zoning), C.G.S. 8-25 (planning), and C.G.S. 8-6 (zoning boards of appeal). A municipal ordinance, for example, cannot expand the areas of consideration of a zoning commission; but the language of the bill seems to imply that it can. Similarly, state and federal laws enunciating various public policies are relevant to the considerations of a zoning commission only to the extent that they fall within the parameters of a zoning commission's authority under C.G.S. 8-2. The open-ended list of sources of law in I. 52-58, however, does not seem to be tied to the existing scope of planning and zoning commissions.

Fourth, the bill in I. 59-65 apparently attempts to codify two recent Supreme Court cases involving C.G.S. 8-30g -- River Bend Associates, Inc. v. Zoning Commission of the Town of Simsbury, 271 Conn. 1 (2004) and Carr v. Planning and Zoning Commission of the Town of Bridgewater, 273 Conn. 573 (2005). The problem is that these very complicated cases are fact-specific and do not lend themselves well to the simplified language proposed in the bill. In effect, the bill attempts to create an absolute rule allowing a zoning commission routinely to reject an affordable housing application, without any consideration of the merits of the application, if a wetlands commission has initially failed to grant a wetlands permit. The practical effect of the bill would be, by precluding simultaneous proceedings, to allow a wetlands commission to block an affordable housing application for years, even if its decision is ultimately overturned on appeal. That would be a result damaging to C.G.S. 8-30g and not a fair codification of those cases.

A separate part of the bill (I. 31-35) attempts to codify the Supreme Court's explanation of "sufficient evidence" in River Bend and Carr. The codification, however, is only approximate rather than exact. Moreover, the very translation of these words from the flexible and case-specific context of judicial interpretation into the rigid words of a statute illustrates the awkwardness of trying to overcodify the judicial task of applying statutes. It is interesting that the bill wisely does not try to codify the meaning of other parallel terms in the Affordable Housing Appeals Procedure, such as "necessary," "substantial," "clearly outweigh," or "reasonable," all of which are similar general standards which the courts must apply to the particular factual settings which come before them.

For all these reasons, this statute should be left alone.

#### Alternate language

While we believe that no bill at all is needed and that any bill is potentially harmful, if the Committee feels that it is essential to explain what is covered by the phrase "other matters which the commission may legally consider," then it should be sufficient to insert a simple cross-reference to the relevant planning and zoning sections in Title 8, rather than to

all the laws of the state and the nation as a whole. **Thus, the phrase "pursuant to sections 8-2, 8-6 and 8-26 of the general statutes" could be inserted into I. 40 after the word "consider."** That would more accurately reflect what the phrase "legally consider" refers to and would avoid the inaccuracies and confusion which will be caused by the language proposed by the bill.

### Conclusion

The Affordable Housing Appeals Procedure is Connecticut's premiere land use law for addressing issues of exclusionary zoning. It is not a magical solution to all of Connecticut's housing problems, but it is important in opening suburban and outlying areas to the diversity of housing which is already required of them by other laws. The statute is complex, because zoning law itself is complex. This bill unnecessarily attempts to codify where codification is not needed. The brevity of the remaining time left in this legislative session leaves no opportunity for the thoughtful analysis which the issues raised by this bill require; and an effort to move the bill forward without greater consideration jeopardizes the effectiveness of the Act. I hope that the Committee will take no further action on the bill this year.