

Written Testimony

Reasons to Support H.B. No. 5577 and H.B. No. 6129 to Repeal the Affordable Housing Land Use Appeals Act

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I was the Chairman of the Ledyard Zoning Commission in 2011 and 2012 during which time it received two Section 8-30g set-aside affordable housing applications under the provisions of Chapter 126a of the Connecticut General Statutes, which is known as the “Affordable Housing Land Use Appeals Act”.

One of the applications constituted an abuse of the Act that resulted in harm to several senior citizens on limited incomes. The other application constituted an abuse of the Act by proposing a three-story triplex consisting of one-bedroom units to be constructed on an unbuildable mostly underwater undersized non-approved waterfront lot in a subdivision of older expensive custom-built single-family homes, many that are waterfront, where multifamily dwellings are prohibited. In both applications, the applicant achieved or exceeded his objectives, and local homeowners were harmed.

Pages 2 through 5 of my written testimony identify inherent problems of the Act that cannot be corrected by amendment, and justifies why I believe the Act should be repealed. Pages 6 and 7 describe the two 8-30g Affordable Housing Applications, how the Act was abused, and the harm it created.

I urge repeal because of the Act’s history of abuse in Ledyard and the harm it has created, and because of its inherent deficiencies that cannot be corrected by amendment. However, the Act should also be repealed because of its complexity and unenforceability, its unfairness, its financial impact on our Town, its conflicts with the most fundamental statutory purpose of zoning which is to protect public health, safety, convenience and property values, and its failure to produce a significant net increase in “affordable” housing in our Town.

I also urge repeal of the Act because there are better alternatives for increasing the supply of affordable housing that are preferable to providing a statutory loophole to allow a developer to ignore virtually all local land use regulations in return for the development of as few as only one deed-restricted affordable housing unit.

If it is impossible to repeal the Affordable Housing Land Use Appeals Act, adoption of H.B. No. 5055 would constitute an improvement. This is because H.B. No. 5055 allows “affordable” housing that is not deed restricted to be counted towards the percentage threshold that reinstates the burden back to the Applicant, at which point the Act no longer has practical significance.

I will be happy to answer any questions.

Respectfully,

Eric Treaster

Inherent Deficiencies of the Affordable Housing Land Use Appeals Act That Cannot Be Corrected by Amendment

Problem #1

It is impossible for §8-30g to provide a significant increase in the percentage of “affordable housing” because it requires a minimum yield that is less than one new “affordable” deed restricted unit for every two new “market rate” units.

For example, Ledyard has roughly 6,000 dwelling units, but only about 3% (180) are deed restricted as affordable housing. As such, assuming all future dwelling units in Ledyard are developed under §8-30g set-aside affordable housing applications, with 30% of the new units deed restricted as “affordable” for 40 years, and 70% as market rate units, it would require 2,100* new dwelling units to achieve 8-30g’s goal of having 10% of Ledyard’s housing being “deed restricted” as affordable housing.

If it assumed that, on average, fewer than 50 new units are developed per year, it would take 42 years, and the 42 years unrealistically assumes there are no other housing development applications in the interim. And, at the end of only 40 years, the “affordable” deed restrictions start to expire and the percentage of deed restricted affordable housing units will begin to decline and eventually reach zero.

2,100 new units would be 35% of the current number of dwellings in Ledyard. Obviously 2,100 units will never be proposed under §8-30g. But if it were proposed, as demonstrated by the two abusive 8-30g affordable housing applications processed in 2011 and 2012, the construction of 2,100 new housing units that are not subject to local land use regulations would be a disaster.

*[6000 existing units + 2100 new units = 8100 total units
180 existing deed restricted units + (2100 * 30%) new deed restricted units = 810 total deed restricted units = 10% of 8100 total units.]

Problem #2

§8-30g conflicts with the statutory purposes of zoning to protect public health, safety, convenience and property values.

The purposes and the authority of zoning and land use regulations are embedded in Section 8.2 of Chapter 124 of the Connecticut General Statutes. In summary, local zoning regulations are allowed by the state to regulate the height, number of stories and size of buildings and other structures; the percentage of the area of the lot that may be occupied; the size of yards, courts and other open spaces; the density of population and the location and use of buildings, structures and land for trade, industry, residence or other purposes, including water-dependent uses, and the height, size and location of advertising signs and billboards. They are required to be uniform for each class or kind of buildings, structures or use of land throughout each district, but the regulations in one district may differ from those in another district, and may provide that certain classes or kinds of buildings, structures or uses of land are permitted only after obtaining a special permit or special exception, subject to standards set forth in the regulations and to *conditions necessary to protect the public health, safety, convenience and property values.*

The regulations shall be designed to lessen congestion in the streets; to secure safety from fire, panic, flood and other dangers; to promote health and the general welfare; to provide adequate light and air;

to prevent the overcrowding of land; to avoid undue concentration of population and to facilitate the adequate provision for transportation, water, sewerage, schools, parks and other public requirements. The regulations shall be made with reasonable consideration as to the character of the district and its peculiar suitability for particular uses and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality. The regulations shall encourage the development of housing opportunities, including opportunities for multifamily dwellings, for all residents of the municipality. The regulations shall promote housing choice and economic diversity in housing, including housing for both low and moderate income households, and shall encourage the development of housing which will meet the housing needs identified in the state's consolidated plan for housing and community development. Zoning regulations shall be made with reasonable consideration for their impact on agriculture. Zoning regulations may be made with reasonable consideration for the protection of historic factors and shall be made with reasonable consideration for the protection of existing and potential public surface and ground drinking water supplies. The regulations may also encourage energy-efficient patterns of development, the use of solar and other renewable forms of energy, and energy conservation.

The key inherent and unfixable *“deficiency”* of the Affordable Housing Land Use Appeals Act is that if a community does not have at least 10% of its housing units “deed restricted” as affordable, its land use regulations, for practical purposes, *cease to exist* for an §8-30g set-aside affordable housing development application.

The result is that, in the real world, because of the Act's transfer of burden to the Commission, the developer can propose anything he wishes, in any location he wishes (except in an industrial district or too near mapped wetlands), and to any intensity and height and design he wishes, even if on a non-approved non-compliant lot, provided 30% or more of the housing units he constructs are “deed restricted” as “affordable” for forty years, and provided water and sewerage are available for the development. If the Commission denies the application for virtually any reason other than for lack of water or sewer, such as failing to conform to the regulations, the Court will almost certainly overturn its denial. Historic districts, village districts, cemetery districts, multi-use commercial districts, architectural standards, housing types, setbacks, height limits, design constraints, traffic impact, parking requirements, signage requirements – there is almost no denial decision or condition of approval a zoning commission can make that would not be overturned by the Court upon appeal because statutorily, there is almost *nothing* that is more important than *“the need for affordable housing”*.

The most egregious attribute of Affordable Housing Land Use Appeals Act is that a proposed development is able to lawfully ignore its impact on neighboring property values and the quality of life of nearby residents. This is especially unsettling because the protection of property values is one of the specific statutory purposes for land use regulation.

Proponents may argue that §8-30g-(g) provides that a zoning commission can deny a set-aside affordable housing application if (A) the denial 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, or (2) (A) the application which was the subject of the decision from which such appeal was taken would locate affordable housing in an area which is zoned for industrial use and which does not permit residential uses; and (B) the development is not assisted housing, as defined in subsection (a) of this section.

However, in the real world, because §8-30g places the burden on the Commission, and because the words *“substantial”*, *“other matters”*, *“clearly outweigh”*, *“public interests”*, and *“need”* are not defined in the statute, it is virtually impossible to demonstrate to the court that there are *substantial public interests in*

health, safety or other matters (such as the destructive impact on neighboring property values, a neighbors “quality of life”, noise, glare, lack of parking, traffic, aesthetics, oversized or missing signage, no sidewalks, refuse management (lack dumpsters), limited sight lines, etc.) *sufficient to clearly outweigh* the “*need*” for affordable housing. For practical purposes, the court, by establishing precedent, has determined that there is *virtually nothing that outweighs the need for affordable housing* except lack of water, sewer, and construction on or near wetlands.

For example, if a developer wants to build a 100 unit mobile home park for single-wide trailers in a downtown village historic district adjacent to the town green directly across from Town Hall and abutting large historic homes, with the trailers only a few inches from each other, and with no on-site parking - if there is water and sewer - he will be able to do so under §8-30g. This is true even when the market rate housing costs of owning or renting mobile homes is less than the thirty per cent of eighty per cent of the Town’s median area income as specified by the Act, and the Town’s zoning regulations provide specific districts reserved for new mobile home parks. Such a development would be a disaster for the Town and especially for the residents of the nearby historic homes. And the promised 30 new mobile homes that would be “*deed restricted as affordable housing for 40 years*” would make barely a dent in satisfying the “official need” for 630 new units of deed restricted affordable housing.

Problem #3

Deed restrictions are too difficult to enforce.

Even with the required deed restrictions, it is almost impossible for a Town to enforce all of the provisions of the §8-30g required affordability plan, especially the annual compliance with the income limits and sales prices or rental restrictions, and conformance with the required affirmative fair housing marketing plan governing the sale or rental of the dwelling units.

For example, what happens if a resident in a deed restricted affordable unit sells his unit at a fair market price to someone who earns too much money to qualify under 8-30g, or he fails to market the unit to potential minority purchasers? What happens if the owner of rental units fails to provide the required annual certification that the development continues to be in compliance with the covenants and §8-30g deed restrictions? Does the ZEO issue a Cease and Desist Order? To whom does he issue the Order – the buyer of the affordable unit who paid a fair price for his unit, or the Seller who is long gone? These are challenging §8-30g obligations that are almost impossible for a small town or a volunteer zoning commission to properly enforce.

Problem #4

Unfair benefit after 40 years

The owner of a deed-restricted property, or the owner of an apartment complex with deed restricted rental units, is entitled to receive the fair market value of his property upon its sale after its 40 year affordable housing deed restrictions have expired. This is an unfair benefit for the resident-owner or landlord who happens to be the owner of the property at that future date.

Problem #5

Undue benefit for owners and long-term leaseholders with increasing incomes.

The owner-resident of a deed restricted unit, or a tenant with a long-term lease of a deed restricted unit, if his income increases and he is no longer qualified for an “affordable housing” unit, has no legal obligation to sell or vacate or to relocate to a market rate unit.

Problem #6

Unless housing is government owned or subsidized, it is inherently unfair for a citizen to be denied a scarce housing unit because of slightly too much income (i.e. 80.1% of area median), and it is equally unfair for a citizen to be approved for a scarce housing unit because of slightly less income (i.e. 79.9% of area median income).

“Market rate” units and “deed restricted affordable” units are required to be “comparable” and are, by definition, equally desirable and equally valuable. In the event a “deed restricted” affordable unit is for sale or resale in a desirable and otherwise fully occupied highly sought after complex, it seems unfair that the law should prohibit new medical doctors or new scientists (higher income people) from purchasing and residing in the unit, but allow only taxi drivers, barbers, painters, clerks, and others with less income to purchase and reside in the unit. It is especially perplexing because new medical doctors or scientists may have student debt, larger loan payments, less disposable income, and less net worth than do taxi drivers, barbers, painters, clerks, and other lower paid workers who have no debt. This type of discrimination by a state or by a local zoning commission or a local zoning enforcement official seems unfair and un-American.

Problem #7

There is a significant risk that an Owner-resident of a deed-restricted affordable housing unit may have to “pay” to sell his home, even when the market value of his home has increased.

Because of the 8-30g deed restriction, the resident/owner of a deed restricted housing unit is limited to selling his home for an amount which is affordable for persons and families who pay thirty per cent or less of their annual income for the cost of housing, and such income must be less than or equal to eighty per cent of the area median income. Under §8-30g deed restrictions, the sales price of the resident/owner’s home is tied to the area median income* and is not based on the home’s condition, size, convenience, market value, colors, quality, extras, features, and location.

Even if the home’s market value increases, if the median annual area income *decreases*, which is likely if the casinos hire large numbers of new entry level employees, or a company terminates or transfers a large number of its highly paid professional employees out of the area, the amount that the owner would be allowed to sell his home would be reduced to less than what he paid for the home. In such an event, the home owner (seller) would be required to pay the difference in the amount he owes on his mortgage and the sales price - even though the true market value for his home is higher than what it was when he purchased his home. Unless the 40-year deed restriction has expired, §8-30g could compel a homeowner to take a substantial loss at the time he sells his home even though the market value of his home has increased.

*(Along with changes in the area median income, changes in utility costs, taxes, interest rates, and other housing costs would also influence the maximum allowed sales price for a deed restricted unit.)

Problem #8

It is likely that §8-30g will create societal discord between residents who paid market rates for their units, and their adjacent neighbors who paid the §8-30g discounted “affordable” rate for comparable units.

This is because, unless area medium income increases, under the §8-30g deed restrictions, there is no opportunity for lower income residents residing in a deed restricted unit to profit upon the sale of their home, and without the opportunity of an economic gain, there is less incentive for these residents to care for and maintain their property. Because there is no profit incentive to maintain deed restricted units, §8-30g indirectly makes it more likely that it will be difficult to sell, resell, lease, or re-lease adjacent “market rate” units, which will harm their owners by reducing the market value of their homes and which will reduce overall property tax revenues to the Town.

Abuse Example #1

How to use §8-30g to build a residence on an unbuildable non-approved substandard lot.

Our first 8-30g application was intended to allow a local developer to live in a waterfront residence. He purchased an unbuildable undersized non-approved waterfront 1-acre lot in a desirable subdivision of older expensive custom built single-family homes. The reason the lot was undersized and unbuildable was because almost 75% of the property was underwater, the dry ground between the road and the pond sloped in excess of 30 degrees, and the pond was too close to the road to satisfy the setback requirement for new construction and on-site parking requirements. Because the lot was unbuildable, he was able to purchase it for next to nothing. The ZBA properly denied his application for a variance to the setback requirements.

The developer then propose a three-unit, each one-bedroom, stacked three-story “affordable housing” apartment building using 8-30g to avoid the setback and parking requirements that are in Ledyard’s land use regulations. Only the second floor apartment was deed restricted. Apartment buildings are not allowed in the district, and the proposed structure was too close to the road, did not satisfy the on-site parking requirements, and exceeded the height limits in our regulations.

The Zoning Commission denied his application based on many reasons including that it was necessary to protect substantial public interests in safety and this interest outweighed the need for only one unit of affordable housing. The applicant appealed, and the court reversed the unanimous denial decision of the Zoning Commission.

As a consequence, the structure (as anticipated and documented in the Commission’s listing of reasons to deny the application) blocks the water view of some of the neighbors which has reduced the desirability and value of their homes, lowered the value of the adjacent waterfront home, created an eyesore and reduced the property values for waterfront homeowners on the other side of the pond, has created a need for on-street parking that makes snow removal dangerous, and is a structure that is incompatible with the residential established neighborhood. Because of the sloped land, there is a risk that parked cars will slide into the pond. Most importantly, the curved road and sloped parking have created sight line difficulties that make exiting the property dangerous, especially when there is on-street parking in front of the property. What makes this example particularly disheartening is that while this horrific structure has harmed the neighbors and has created traffic risks, it created only one new “deed restricted affordable 1-bedroom unit”. And because of an adequate supply of 1-bedroom apartments in

Ledyard, the “market rate” rent for the deed restricted 2nd floor “affordable” unit is less than the “affordable” rent specified in §8-30g.

Abuse Example #2

How to use §8-30g to compel a town to ignore special permit conditions protecting a neighborhood and its senior citizens and not produce any new “deed restricted” affordable” housing units.

The second abuse example is associated with a newer 18-acre 80-site age-restricted senior citizen mobile home park that was approved by special permit in 2002. In 2012, with over half of the rental sites vacant, the new owner of the park decided the reason mobile homes were not longer selling well was because of the age-restriction that was a key condition of the 2002 special permit. He submitted an 8-30g affordable housing application to make 24 (30%) of the 80 sites “deed restricted affordable units” but included provisions in his application that removed the age-restriction and other conditions of the special permit that he considered burdensome, such as the condition that axles and wheels be stored under the mobile homes to assure their future mobility. What was disheartening about this application is that the market rate for the sale or rental of mobile homes in Ledyard is below the “affordability” threshold specified in 8-30g.

The Zoning Commission approved his 8-30g affordable housing application, but imposed, as some of its conditions of approval, that the age restriction is retained and the axles and wheels are stored under the mobile homes. The park owner appealed. To avoid the cost of litigation and to assure retention of the all-important age-restriction, the Commission entered into a stipulation for judgment with the park owner that, in return for allowing 36 of the 80 sites to be used for 2-bedroom duplexes and 1-bedroom triplexes to increase the total number of dwelling units from 80 as allowed by the special permit up to 120, and to allow for on-street parking that is necessary for the duplexes and triplexes, the park owner would agree to retain the age restriction. In my opinion, this was an abuse of §8-30g to compel the town to breach the conditions of the special permit for the development.

The court approved the stipulation, even though it was obvious that on-street parking and the commingling of duplexes and triplexes throughout a professionally engineered well-planned development of single-family doublewide manufactured homes would reduce the desirability and property values of the resident-owned homes in the community. The residents, who are senior citizens, had a reasonable expectation when they purchased their homes and executed their 30-year site leases that the Town would honor and enforce the conditions of the special permit it granted for the property.

Amazingly, one of the provisions in the stipulation and approved by the Court was deletion of the mandatory requirement for “deed restrictions” because the “market rate” for the purchase or rental of mobile homes and 1 and 2 bedroom apartments in Ledyard is less than the “affordable housing” limit specified in §8-30g. This means that the supply of “affordable” non-deed restricted mobile homes, 1-bedroom apartments, and 2-bedroom apartments, is adequate in Ledyard.

The end result is that the property owner received permission from the Town, in the form of a Stipulation for Judgment, that effectively repealed most of the conditions of the original special permit, granted a 50% increase in the allowed number of dwelling units, and created a 50% increase in the value of the park owner’s property, without a public hearing, without public input, and without ZBA approval. There is no question that the Affordable Housing Land Use Appeals Act has harmed the homeowners in the mobile home park.