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Via Email/PDF to Ms. Brooks Avni

April 29, 2022

Ms. Lynn Brooks Avni
Town Planner
Town of New Canaan
77 Main Street
New Canaan, CT 06840

Re: Comment On April 2022 Application Of The Town Of New Canaan For Certificate Of Affordable Housing Completion/Moratorium

Dear Ms. Brooks Avni:

We are writing to provide preliminary comments on the Town of New Canaan's application for a § 8-30g moratorium. The application, as of the date of this letter, is pending at the municipal/town level, that is, seeking comment prior to submission to the Connecticut Department of Housing (DOH). Based on a delay in Town offices in making a copy of the application available to us, your office extended the deadline for comment to today, April 29, 2022.

In summary, the application is incomplete and unapproveable, and should not be submitted to the Connecticut Department of Housing, for at least several reasons. First, at this time, Canaan Parish's Building 1, for which 16 (of 100 intended) units and 34 HUE points are claimed, has not obtained a permanent certificate of occupancy, which is required for moratorium points. Second, the application does not contain evidence of annual, ongoing compliance with maximum household income and rent requirements, as required by § 8-30g and its regulations, and § 8-30h. In addition, the application does not address the demolition or termination of affordable units as required by General Statutes § 8-30g(l)(b)(8). The application also does not explain the justification for using "holdover" points. Finally, the application copy provided to us on April 19 contains several other deficiencies that must be corrected before submission to DOH.

The § 8-30g Moratorium Process

In 2000, the General Assembly adopted the moratorium process, which grants a town "housing unit equivalent" ("HUE") points when it issues certificates of occupancy – not simply zoning approval – for units that either qualify as "assisted housing" (built with financial help

from a government housing program) or a "set aside development," in which at least 30 percent of the units will be preserved for 40 years or more for low and moderate income households. *See* General Statutes § 8-30g(l)(4)(A). If a town obtains sufficient HUE points, it may apply to DOH for a Certificate of Affordable Housing Completion. *See* General Statutes § 8-30g(l)(1). Both Millport and Canaan Parish are submitted as "assisted housing."

Section 8-30g includes a number of requirements for an application for a Certificate of Affordable Housing Completion. *See* General Statutes § 8-30g(l)(4)(B). These requirements include: (a) a complete application that allows DOH and the public to understand and verify all point total claims; (b) evidence of compliance with notice requirements; (c) public disclosure of all parts of the town's application, to allow for public comment; and (d) evidence not only of § 8-30g intended compliance at the time the development is granted zoning approval, or of compliance when certificates of occupancy are issued, but also evidence of on-going, annual compliance during residential occupancy with maximum household income and maximum rent or sales prices, continuing to the time of the application to the DOH.

The Connecticut § 8-30g regulations impose additional requirements upon an application, including: a letter from the town attorney opining that the application complies with state law "as in effect on the day the application is submitted," Conn. Agencies Regulation § 8-30g-6(c)(2); certification that certificates of occupancy for claimed units are "currently in effect," § 8-30g-6(c)(6); certification that a town has not claimed HUE points for any developments that no longer meet the necessary affordability requirements, § 8-30g-6(c)(7); and a § 8-30h compliance report if a development is less than one year old, § 8-30g-6(f)(3).

Section 8-30g is a remedial statute, adopted to assist property owners is overcoming exclusionary zoning regulations and onerous application processing requirements that result in denials of affordable housing proposals based on insubstantial, unproven, and/or pretextual reasons. As such, requirements for an exemption from § 8-30g, such as a moratorium application, must be strictly construed. *See, e.g., Kaufman v. Zoning Comm'n*, 232 Conn. 122, 139-40 (1995).

Canaan Parish Has Not Received A Permanent Certificate Of Occupancy

In contrast to the units at Millport, for which permanent certificates of occupancy are shown in the application, the Canaan Parish points are based on an October 23, 2021 *letter* from Building Official Platz stating that "the units" in Building 1 (60 units) have been inspected and deemed "in substantial compliance with the Connecticut State Building Code," and "the building in its entirety is approved for immediate use and occupancy." *See* Exhibit A. The application (in two places) contains an unsigned certificate of occupancy form for Canaan Parish. *See* Exhibit B.

The Connecticut State Building Code differentiates between temporary certificates of occupancy, partial certificates of occupancy, and permanent certificates of occupancy. *See* Exhibit C. Under the Building Code, a building official:

> may issue a temporary certificate of occupancy before the completion of the entire work covered by the [building] permit, provided such portion or portions shall be occupied safety prior to full completion of the building or structure without endangering life or public welfare. Any occupancy permitted to continue during completion of the work shall be discontinued within 30 days after completion of the work unless a certificate of occupancy is issued by the Building Official.

Thus, a temporary CO may be issued for units (for example, in a phased development) if occupancy will be safe, but a permanent CO may be issued only upon completion of the development. (Whether the October 23, 2021 letter even qualifies as a temporary certificate of occupancy is unclear; the letter does not state that it constitutes even a temporary certificate.) That a permanent CO may only be issued at the completion of a development is also reflected in General Statutes § 8-3(f), which states: "No . . . certificate of occupancy shall be issued for a building, use or structure that is subject to the zoning regulations of a municipality without certification in writing by the official charged with enforcement of such regulations that such building, use or structure is in conformity with such regulations . . . ." Obviously, Canaan Parish cannot be certified as being in compliance with its zoning approval, since it is still under construction. In fact, those residing there at this time live at an active construction site, with limited emergency access, and according to the building's management, are coping with dust, noise, and vibration. *See* Exhibit D, which are photos which were taken April 20, 2022, six months *after* Mr. Platz's letter. Although the individual units may be occupiable, the development is not nearly complete.

Moratorium points require a completed development with permanent certificate of occupancy. The Town's claim of points without a permanent certificate of occupancy violates (1) the § 8-30g statute; (2) the § 8-30g regulations; (3) the Affordability Plan; (4) an opinion of the Connecticut Attorney General; (5) New Canaan regulations; and (6) case law regarding certificates of occupancy.[1]

1. <u>Statute And Regulations</u>.

The §8-30g statute plainly requires *a completed development for moratorium points.* A town applies to the Department of Housing for a certificate of "affordable housing *project completion.*" *See* General Statutes § 8-30g(l)(1) (emphasis added). A moratorium may be issued only based on a Department of Housing finding that "there has been *completed* within the municipality one or more affordable housing *developments* . . . ." *See* § 8-30g(l)(4)(A). (emphasis added). Section 8-30g developments, whether 30 percent set-aside or assisted housing, comply with § 8-30g based on a percentage of the total units being offered for rental or purchase; this requirement cannot be met until the overall development is finished. Moreover, as a matter of common sense, the General Assembly could not have intended to allow moratorium

[1] All of this raises a substantial question about the Town Attorney's April 5, 2022 opinion letter, contained in the application, which inaccurately states that "Certificates of Occupancy" for the units "were issued in 2021." The letter contains no discussion of whether the Platz October 2021 letter is a proper basis for moratorium points.

points – *in support of a four-year exemption from a remedial statute* – to be based on incomplete construction or a Building Official's letter that is temporary, of unknown duration, and without a guarantee that a permanent CO will ever be issued. In other words, what would happen if the Town were granted a moratorium and then the development, for whatever reason, did not obtain a permanent CO?

2. Financing And Affordability Documents.

The financing, financing commitment, and affordability agreement documents speak to a completed development. For example, the Extended Low-Income Housing Commitment, contained in the application (New Canaan Land Records, Book 1022, Page 224), says: "During the Extended Use Period; (1) not less than 100% of the [100 intended] Units in the Development shall be occupied (or will be available for occupancy) by Qualified Persons." Here, the Town is claiming moratorium points for only 16 units in the first of two buildings. Likewise, the Regulatory Agreement and Declaration of Restrictive Covenants between the New Canaan Housing Authority and the Canaan Parish Redevelopment Limited Partnership, August 2020 (Land Records, Book 1022, Pages 196-220) defines the "Project" as "the 100 unit multi-family residential rental housing project."

General Statutes 8-30g(l)(9) states: "A newly-constructed unit shall be counted toward a moratorium *when it receives a certificate of occupancy* (emphasis added)." See also subsection (7) ("for which a certificate of occupancy was issued after July 1, 1990"). State Regulations § 8-30g – 6(c)(6) requires that a moratorium application shall include "Certification by the applicant municipality that for each unit for which housing unit – equivalent points are claimed, *a valid certificate of occupancy* has been issued by the building official of such municipality and is currently in effect . . . ." Exhibits A and B to this letter attached make it clear that this requirement has not been met. Mr. Platz's letter states that *the units* substantially comply with the state building code, but Canaan Parish does not have a certificate of occupancy even for Building 1 because that requires completion of the development in accordance with the zoning approval.

3. Attorney General Opinion.

This requirement of a permanent CO for moratorium points has been reviewed by the Connecticut Attorney General's Office, Exhibit E. In 2006, the Attorney General Blumenthal advised Commissioner Abromaitis of the Department of Economic and Community Development (which at that time was in charge of the State's housing programs, later transferred to the Department of Housing) that while incomplete construction did not disqualify a development from being called a "set-aside affordable housing development," only "fully-constructed units issued a certificate of occupancy can qualify to receive points toward a moratorium."

In other words, to obtain a permanent certificate of occupancy[2], a development must comply with the overall site plan, which means not only the interior of individual units, but completion of the overall site: paving, lighting, driveways, drainage, emergency access, fencing, landscaping, etc..

4. Town Ordinances.

At least two New Canaan regulations show that a permanent CO requires a completed development, not just units. New Canaan Ordinances § 54-20(c)(4) (Exhibit F) states: "[w]hen a driveway permit is issued in conjunction with a building permit, no certificate of occupancy shall be issued until the construction of such driveway shall comply with all the requirements for the permit." In addition, New Canaan's Drainage Certification Policy Prior to Approval of Permit (Exhibit G) states that final certificates of occupancy can only be issued when "all site work and grading indicated on the approved site plan shall be complete." Thus, the Town's own regulations do not allow a permanent CO to be issued to Canaan Parish at this time. It is obvious from the Exhibit D photos that Canaan Parish is not done with driveways, site work, grading, or drainage, and certainly was not in October 2021.

5. Case Law.

In New York, case law makes clear that final certificates of occupancy require not only that units be habitable, but the development must match the site plans under which the work is being performed. *Braunview Assoc. v. Unmack*, 643 N.Y.S. 2d 253 (1996) (construction was only complete and final certificate of occupancy available when construction met the specifications in the site plans submitted to the town). Exhibit H.

This requirement is further exemplified in the New York cases regarding the Loft Law, which regulates the transition of former industrial or commercial spaces into residential units. "The purpose of requiring a final certificate of occupancy under [the New York law] is to insure that residential tenants ... will have the benefit of health and safety regulations applicable to other multiple dwelling." *300 Bowery Inc. v. Bass & Bass, Inc.*, 471 N.Y.S. 2d 997, 999 (Civ. Ct. 1984). Exhibit I. "Only buildings which have obtained final certificates of occupancy under [New York law] are exempt from [the statute] because only those buildings have achieved compliance with the Multiple Dwelling Law, the goal the new Loft Law seeks to accomplish." *Id.* Specifically, the Loft Law "exempts buildings with a 'certificate of compliance or occupancy pursuant to section three hundred one of this chapter,' not buildings with a 'temporary certificate of compliance or occupancy.'" *See also Ass'n of Com. Prop. Owners, Inc. v. New York City Loft Bd.*, 505 N.Y.S.2d 110, 113 (1986), *aff'd*, 71 N.Y.2d 915 (1988). Exhibit J.

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[2] It should be noted that this comment letter does not challenge the authority of the Building Official to issue a temporary or partial certificate of occupancy; the problem here is that a four-year moratorium from § 8-30g cannot be based on an incomplete development and a temporary certificate of occupancy.

Another New York case that addresses directly this difference is *Kaplan v. Synergy, Inc.*, 886 N.Y.S. 2d 67 (Civ. Ct. 2009) (Exhibit K) ("[t]he Administrative Code defines both a 'certificate of occupancy' and a 'temporary certificate of occupancy' so that use of the term 'certificate of occupancy' in the lease refers to what is commonly called a 'final' or 'permanent' certificate of occupancy and not a 'temporary certificate of occupancy'").

Indeed, there have been cases of buildings or structures that received temporary certificates of occupancy during construction but were unable to obtain a final certificate of occupancy when construction was complete. *See Assurance Company of America v. Yakemore*, Superior Court, District of Waterbury (May 9, 2005) (Exhibit L) (temporary certificates of occupancy issued twice, but no final certificate of occupancy issued due to structural defects in construction); *Commonweatlh v. Marcus*, 690 A.2d 842, 843 (Pa. Commw. Ct. 1997) (Exhibit M) (site developer failed to comply with approved site plan after receipt of temporary certificate of occupancy, so township's proceeding against developer to enforce approved site plan before issuing permanent certificate of occupancy was justified); *see also* Seth Press, *Buyer Beware: Temporary Certificates of Occupancy & the Need for Consumer Protection in the New York City Real Estate Market*, 2 BROOK. J. CORP. FIN. & COM. L. 511, 511 (2008) (Exhibit N) (buyers of luxury apartments based on temporary certificates of occupancy, where builder did not follow building code and made misrepresentations to city and buyers were unable to obtain final certificates, leaving them without the ability to either sell or occupy the apartments). Failure to receive a final certificate of occupancy, but allowing occupancy, is a violation of law. *See Howard v. Berkman, Henoch, Peterson & Peddy, P.C.*, 799 N.Y.S. 2d 160 (Civ. Ct. 2004) (Exhibit O) ("[i]n the event the final certificate of occupancy is not obtained within the time set forth in the initial temporary certificate of occupancy ... the occupancy then becomes illegal and therefore all of the [] parties are technically assisting in violation of [city law] by permitting the purchaser to continue occupancy after that date").

In addition, § 8-30g case law holds that strict compliance with the state building code is necessary for units constructed under § 8-30g. *See, e.g., 500 North Avenue, LLC v. Town of Stratford Zoning Comm'n*, Superior Court, District of Hartford, (Aug. 17, 2021) (Exhibit P) ("When the plaintiff reaches the building permit phase and seeks a permit ... [plaintiff must] work with an engineer . . . to ensure that all applicable provisions of the building code are followed").

Put another way, the new tenants of Canaan Parish were promised, and are entitled to, a completed development, with finishes and amenities shown in the approved site plan. The financing documents in the moratorium application require nothing less. If a private developer were to apply for a permanent certificate of occupancy for the Canaan Parish development as it existed in October 2021, or April 2022, that application would certainly be denied. There is no basis to make an exception so that New Canaan may expedite its application for an affordable housing moratorium.

The Town Has Not Submitted Evidence
Of On-Going Affordability Compliance Required To Receive Moratorium Points

The issue of evidence of annual, continuing compliance with the maximum income and rent requirements of an approved affordability plan should not be a surprise, as the Town's Attorneys were directly involved in the litigation of this issue in the Town of Westport during 2019-2021.

The documentation for both Millport and Canaan Parish contains detailed requirements for the development's administrator to collect, evaluate, and report compliance with maximum household income and maximum rent requirements. For example, the Canaan Parish Regulatory Agreement, at pages 8-9 of 25, contains a list of data collection, analysis, and reporting requirements.

General Statutes § 8-30h, and the Affordability Plan for each development, require the administrator to file with the town, by January 31 each year, an annual compliance report. For an "assisted housing" development, and in the documents here, this is generally called an Owner's Compliance Report. For Millport, for 2017-2021, the application contains no such documentation. All that is included in the application are letters dated September 2018 and 2020 from a company called Spectrum, which letters (Exhibit Q) appear to be reports in connection with the federal Low Income Housing Tax Credit program and IRS requirements to ensure that the development is compliant with federal financing rules. However, the letters do not address compliance with the Affordability Plan for Millport, and they do not at all cover 2020 or 2021 (the September 2020 letter covers 2018 and 2019). The letters refer to "Owner Compliance" reports, but do not attach them, leaving unknown and unexplained what was reviewed and whether there has been compliance with the Affordability Plan. The Spectrum letters are not evidence of compliance with § 8-30g or the Affordability Plan for Millport. Providing copies of annual, statutorily required compliance reports should be a simple matter of inserting documents, already received by the Town, into the application, making their omission both inexplicable and dubious.

Numerous statutory and regulatory provisions demand continuing compliance with affordability plan oversight, administration, and enforcement obligations. Most important, General Statutes § 8-30h mandates that owners of affordable housing developments containing rental units "provide *annual* certification to the commission that the development *continues to be in compliance* with the covenants and deed restrictions required under" § 8-30g. The requirement is mandatory, and failure to certify would put the development out of compliance with § 8-30g. Section 8-30h provides the municipality with the right to "inspect the income statements of the tenants of the restricted units" so as to verify the development's continuing compliance. This statute also includes a mandatory corrective requirement if a development is out of compliance – rental of the next available unit to an income-eligible household "until the development is in compliance." Section 8-30h thereby assures that the municipality has the capacity both to identify continuing compliance and to confirm that "the development is in compliance." The municipality, therefore, has an oversight obligation. More importantly, *the failure of the development to comply with 8-30h would put the development out of compliance*

with the requirements for an "affordable housing development," and would necessarily preclude the municipality from counting that development in an application for a moratorium. To obtain a moratorium, the burden is on the municipality to prove that developments are and continuously have been compliant. This is a burden which can be easily met by assuring that annual certifications are filed and, if necessary, verifying their accuracy. *Thus, the failure to include proof of continuing eligibility precludes the counting of such units to establish eligibility for a moratorium.*

State Regulations § 8-30g-6(c)(2) requires a letter from the town attorney opining that the application complies with state law "as in effect on the day the application is submitted." This provision clearly requires evidence that as of the application date, § 8-30h annual reports have been filed and verified. Second, Regulations § 8-30g-6(c)(6) requires certification that certificates of occupancy for claimed units are "currently in effect," which also requires evidence of on-going compliance since occupancy, not just at a past point in time. Third, Regulations § 8-30g-6(c)(7) instructs that a municipality, when applying for an § 8-30g moratorium, must certify that it "has identified and deducted, or otherwise excluded from the total [HUE] points claimed, all units that as a result of action by the municipality, municipal housing authority, or municipal agency, no longer qualify, as of the date of submission of the application, as providing [HUE] points." This too implies a look back and enforcement. Fourth, Regulations § 8-30g-6(f)(3) requires, as one way to provide evidence of currently enforceable affordability obligations, a § 8-30h compliance report if developments are less than one year old.

The application, therefore, is incomplete for failure to provide proof of ongoing compliance with income and rent limits.

The Application Does Not Address Demolition Or Termination Of Affordable Units

General Statutes § 8-30g(l)(B)(8) states that HUE points shall be "[subtracted] applying the formula in subdivision (6) of this subsection [the points awarded for various units] for any affordable dwelling unit which, on or after July 1, 1990, was affected by any action taken by a municipality which caused such dwelling unit to cease being counted as an affordable dwelling unit." The application discusses demolition of affordable units at Millport and Canaan Parish, yet there is no discussion of this statutory provision. There is also no mention of the 2021 end of the affordability period at Avalon New Canaan. The Department of Housing has enforced this provision in prior moratorium application reviews, such as Westport in 2019.

The Application Does Not Explain The Justification For Using "Holdover" Points

General Statutes § 8-30g(l)(3) states that "Eligible units completed *after a moratorium has begun* may be counted toward establishing eligibility for a subsequent moratorium" (emphasis added). The phrase "after a moratorium has begun" is a limiting phrase that would be unnecessary if units completed before a moratorium has begun could count toward a subsequent moratorium – the phrase would be redundant. The evident statutory direction is that sufficient points for a next moratorium must be created while one moratorium is in effect, without holding back units and points.

The pending application proposes to use units whose CO's were issued in 2016 for a moratorium to take effect in 2022, and to use units completed in 2022 for a moratorium that would begin in 2026, or even 2030.

We raise this issue because New Canaan's own website spotlights it. *See* Exhibit R, page 2 of the attachment, which says, "[To] qualify for subsequent moratorium, a municipality must demonstrate that *since the last moratorium,* it has added enough affordable housing units to meeting [sic] the HUE point requirement." The memo continues that once a prior moratorium is effective, "[additional] new affordable dwelling units needed to be constructed to be counted toward a second moratorium."

At this time, we take no position on this issue, but the Town, based on the statutory language and the chronology of the issuance of permanent COs for Millport and Canaan Parish relative to the 2017-2021 moratorium and the current application, should explain the justification for its use of holdover points.

Other Application Defects

In addition to addressing the deficiencies explained above (no permanent CO, no affordability compliance evidence, no accounting for deductions, question about use of holdover points), the Town should address the following before submitting to DOH:

- Remove unsigned documents or provide signed copies;
- Remove post-it notes and handwriting on several pages; and
- Number the pages and provide subject matter tabs.

Conclusion

Thank you for your consideration of these comments. Every town that qualifies for a moratorium under the rules and regulations should be granted one, but this application, at this time, does not qualify.

Very truly yours,

Timothy S. Hollister

TSH:kcs

cc: Attorney Bamonte
751 Weed Street, LLC

EXHIBITS

A. Building Official Platz letter dated October 23, 2021

B. Unsigned Certification of Certificates of Occupancy form for Canaan Parish

C. 2018 Connecticut State Building Code, excerpt

D. Photos of Canaan Parish taken April 20, 2022

E. Connecticut Attorney General Opinion dated March 22, 2006

F. New Canaan, Zoning Regulations § 54-20(c)(4)

G. Drainage Certification Policy of the Town of New Canaan Prior to Approval of Permit

H. *Braunview Assoc. v. Unmack*, 643 N.Y.S. 2d 253 (1996)

I. *300 Bowery Inc. v. Bass & Bass, Inc.*, 471 N.Y.S. 2d 997, 999 (Civ. Ct. 1984)

J. *Ass'n of Com. Prop. Owners, Inc. v. New York City Loft Bd.*, 505 N.Y.S.2d 110, 113 (1986)

K. *Kaplan v. Synergy, Inc.*, 886 N.Y.S. 2d 67 (Civ. Ct. 2009)

L. *Assurance Company of America v. Yakemore*, Superior Court, District of Waterbury, Docket No. X01 CV044001224S (May 9, 2005)

M. *Commonweatlh v. Marcus*, 690 A.2d 842, 843 (Pa. Commw. Ct. 1997)

N. *Buyer Beware: Temporary Certificates of Occupancy & the Need for Consumer Protection in the New York City Real Estate Market*, 2 BROOK. J. CORP. FIN. & COM. L. 511, 511 (2008)

O. *Howard v. Berkman, Henoch, Peterson & Peddy, P.C.*, 799 N.Y.S. 2d 160 (Civ. Ct. 2004)

P. *500 North Avenue, LLC v. Town of Stratford Zoning Comm'n*, Superior Court, District of Hartford, Docket No. HHDLNDCV186097370S (Aug. 17, 2021)

Q. Letters dated September 2018 and 2020 from Spectrum

R. Information about § 8-30g moratoria, from New Canaan's website