STATE OF CONNECTICUT
DEPARTMENT OF HOUSING

In the Matter of:	)	
	)	
Town of New Canaan	)	
Certificate of Affordable Housing	)	
Completion/Moratorium Application	)	May 19, 2023
Pursuant to C.G.S. § 8-30g	)	
	)	

DECLARATORY RULING

I. Procedural Background

On December 2, 2022, the Town of New Canaan (the "Town" or "Petitioner") filed a Petition for Declaratory Ruling (the "Petition") with the State of Connecticut, Department of Housing ("DOH" or the "Department"), pursuant to Section 4-176 of the Connecticut General Statutes ("CGS"). The Petition requested a declaratory ruling as to the following question:

> Does § 8-30g(l)(3) preclude the consideration of affordable units that were completed prior to a moratorium toward establishing eligibility for a subsequent moratorium?

The Town further requested in its Petition "that DOH issue a ruling as to the applicability of § 8-30g(l)(3) to the specific circumstances in the Town of New Canaan regarding its status of affordable housing completion, as set forth in the Town's 2022 Application to DOH, and whether the Town is in fact currently eligible for a Certificate of Affordable Housing Completion/Moratorium."

On January 31, 2023, DOH issued a Notice and Order[1] stating that DOH would issue a declaratory ruling limited to the following questions:

[1] In comments submitted in connection with this Declaratory Ruling, intervenors 751 Weed Street, LLC, W.E. Partners, LLC and 51 Main Street, LLC suggested that DOH was required to

- Does Section 8-30g(l)(3) of the Connecticut General Statutes preclude DOH from awarding housing unit-equivalent points for dwelling units that were completed before the effective date of a prior moratorium toward establishing eligibility for a subsequent moratorium?

- Is the Town currently eligible for a Certificate of Affordable Housing Project Completion, aka Moratorium?

On February 8, 2023, 751 Weed Street, LLC; W.E. Partners, LLC; and 51 Main Street, LLC filed a Petition for Party Status, petitioning to be made a party to the matter pursuant to Section 4-176(d) of the Connecticut General Statutes. On February 17, 2023, Hill Street-72 LLC filed a Petition for Party Status. On February 24, 2023, DOH denied the Petitions for Party Status. On February 27, 2023, 751 Weed Street, LLC; W.E. Partners, LLC; and 51 Main Street, LLC filed a Petition for Intervenor Status pursuant to CGS Section 4-176(d). On March 3, 2023, Hill Street-72 LLC filed a Petition for Intervenor Status. On March 15, 2023, DOH granted the Petitions for Intervenor Status filed by 751 Weed Street, LLC; W.E. Partners, LLC; 51 Main Street, LLC; and Hill Street-72 LLC and ordered that written submissions of additional evidence and/or legal argument in connection with the questions enumerated in DOH's January 31, 2023 Notice and Order be received by March 31, 2023. On March 28, 2023, counsel for 751 Weed Street, LLC; W.E. Partners, LLC; and 51 Main Street, LLC submitted written comments to DOH.

---

publish statewide notice of the Petition based on CGS § 8-30g(l)(4)(8), which requires that a moratorium application be noticed statewide through publication in the *Connecticut Law Journal*. The Petition is not an application for a moratorium, rather it is a request that DOH opine on the substantive issues raised in the context of the Town's prior application. Accordingly, notice requirements are governed by CGS § 4-176(c), which requires that notice be given to those who have requested notice of declaratory ruling petitions on such matters and those required by any provision of law. Because Section 8-30g(l)(4)(8) is not applicable here and no other provision of law requires statewide notice of the Petition, DOH appropriately published notice of the Petition on its website. As a courtesy that went beyond what was required, DOH also sent copies to intervenors' counsel based on his submission of comments relating to the underlying moratorium application, presuming his interest in these matters.

II. Statement of Facts

1. On March 30, 2017, the Town submitted a request for issuance of a Certificate of Affordable Housing and a Moratorium of Applicability. In its application, the Town stated that it was only claiming two (2) of the thirty-three (33) rental units for which certificates of occupancy had been issued in the Millport Apartments development, located at 33 and 35 Millport Avenue, to be a part of DOH's consideration of its eligibility for a moratorium.

2. On May 23, 2017, DOH determined that the Town had met the requirements for receipt of a Certificate of Affordable Housing Project Completion, and a Moratorium of Applicability began on June 6, 2017. In its memo calculating the housing unit equivalent points in connection with the application, DOH noted that the Town had claimed two (2) of the units at Millport Apartments in the application and that the remaining thirty-one (31) units "will be claimed in a future Application."

3. On June 5, 2021 the Town's Moratorium of Applicability that began on June 6, 2017 (the "First Moratorium") expired.

4. On July 21, 2022, the Town submitted a request for the issuance of a new Certificate of Affordable Housing Project Completion (the "Second Moratorium"). The application submitted seventy-one (71) units at Millport Apartments to be counted as part of DOH's consideration of its eligibility for a moratorium. Thirty-one (31) of the Millport Apartments units submitted had certificates of occupancy that had been issued prior to June 6, 2017.

5. On October 18, 2022, DOH notified the Town that its application did not meet the requirements for the issuance of a Certificate of Affordable Housing Project Completion as submitted. In its memo calculating the housing unit equivalent points in connection with the application, DOH stated that "only those units that received a Certificate of Occupancy on or after June 6, 2017, are eligible for consideration."

III. Analysis

A. CGS § 8-30g(l)(3) is Unambiguous and Its Meaning is Based on its Plain Language

Petitioner is correct to note that the fundamental doctrine of statutory construction requires that the plain text of a statute be considered first. Specifically, CGS § 1-2z provides that:

> The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship 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.

See also, Russo v. Waterbury, 304 Conn. 710, 720 (2012); *Stratford v. Jacobelli*, No. CV116013854, 2013 WL 5969127, at *4 (Conn. Super. Ct. Oct. 23, 2013).

CGS § 8-30g(l)(3) states, "[e]ligible units completed after a moratorium has begun may be counted toward establishing eligibility for a subsequent moratorium." One need look no further than the plain meaning of the words in the statute on their face to understand that it means a municipality may count those eligible units completed after a first moratorium is in effect for a subsequent moratorium. It specifically does *not* provide that units completed prior to a first moratorium be counted to establish eligibility for a subsequent moratorium and there is no language to suggest those units should be counted.

Section 1-2z requires that the text of the statute at issue as well as its relationship with other statutes be considered. To that end, Section 8-30g(l)(3) must be considered in light of, and in relation to, the entirety of Section 8-30g. In reviewing Section 8-30g, only subsection (l)(3) addresses the question of when units must be completed in relation to a prior moratorium in order to be considered for purposes of eligibility for a subsequent moratorium. While Section 8-30g(l)(3) specifically allows units completed after the start of a first moratorium to be counted towards a subsequent moratorium, no other provision allows units completed before a first moratorium is in effect to be considered towards eligibility for a subsequent moratorium.

Looking at the rest of Section 8-30g underscores this conclusion. Section 8-30g(l)(4)(B) provides, "[a] municipality may apply for a certificate of affordable housing project completion pursuant to this subsection by applying in writing to the commissioner, and including documentation showing that the municipality has accumulated the required number of points ***within the applicable time period.***" (emphasis added). It is clear from the statute that only points

accumulated during a certain timeframe may be considered. If units completed at any time were able to be considered, then the statute would not include reference to an applicable time period.

In addition, Section 8-30g(l)(10) provides that the affordable housing appeals procedure shall be applicable to affordable housing applications filed after a moratorium expires, except "when sufficient unit-equivalent points have been created within the municipality ***during*** one moratorium to qualify for a subsequent moratorium" (emphasis added). While this section addresses the applicability of the affordable housing appeals procedure and not strictly the granting of a moratorium, it makes it clear that the relevant consideration in the context of Section 8-30g overall is the number of affordable units created during, not prior to, the issuance of the first moratorium. The plain language of Section 8-30g(l)(3) in conjunction with the rest of the statutory scheme governing moratoria makes clear that only units completed after the start of a first moratorium may be counted toward a subsequent moratorium.

Rather than consider the plain meaning of the language as CGS Section 1-2z requires, Petitioner's interpretation requires one to imagine what the statute would mean if the word "only" had been included, and to draw conclusions based on hypothetical consideration of the meaning of such language. Petitioner suggests that anything not specifically prohibited by the statute is necessarily permitted. In fact, the opposite is true. It is well-settled that the legislature "knows how to convey its intent expressly . . . [and] to use broader or limiting terms when it chooses to do so." *State v. Schimanski*, 344 Conn. 435, 449 (2022); *see also, e.g., In re Jusstice W.*, 308 Conn. 652, 673 (2012); *Stitzer v. Rinaldi's Restaurant*, 211 Conn. 116, 119 (1989). It defies logic to believe that the legislature would have included one category of units that are permitted to be considered with no reference to any other categories of units if it intended that all units, regardless of when they were completed, were in fact permitted.

To the extent the Petitioner suggests that DOH's application of the plain meaning of Section 8-30g(l)(3) results in absurd or arbitrary results simply because it purportedly differs from prior interpretations and practice, the evolution of DOH's position concerning holdover points is far from arbitrary. Rather, it is reasonable and rational, and in fact necessary, for DOH to decline to allow holdover points in order to ensure adherence to the language of the statute. To the contrary, it would be unreasonable, irrational and contrary to law for DOH to refuse any adjustment to its position regarding holdover points simply for the sake of consistency. To suggest otherwise is to dictate that agencies should never modify or alter their initial policies or practices in order to ensure continuing compliance with the law.[2]

The results of DOH's determination here are far from absurd or unworkable. Section 8-30g is a remedial statute and as such should be liberally construed in favor of those whom the legislature intended to benefit. *See Kaufman v. Zoning Commissioner of the City of Danbury*, 232 Conn. 122, 140 (1995). The inability to utilize holdover points does not create an absurd or unworkable result for municipalities; rather, it supports the policy rationale underlying Section 8-30g that, in order to benefit those in need of affordable housing, a municipality should continually develop affordable housing over time and should not be permitted to use a single development to justify successive moratoria over the course of many years.

Petitioner appears to acknowledge that its interpretation of the statue goes beyond its plain language by relying heavily on a discussion of policy considerations and otherwise which go beyond the text and is irrelevant to the plain meaning of the statute. Because the plain

[2] In support of its assertion that DOH has interpreted Section 8-30g incorrectly, Petitioner cites DOH's 2022 approval of a moratorium to the Town of Brookfield which considered units completed prior to issuance of a prior moratorium towards eligibility for a subsequent moratorium. While DOH is separately addressing this issue to ensure consistency, it is not part of this Petition nor is it relevant to the resolution of the issues here.

meaning of Section 8-30g(l)(3) is clear, especially when considered in relation to the entirety of Section 8-30g, it is not necessary nor in fact permitted to consider extratextual evidence of the meaning of the statute such as Petitioner's references to policy considerations, legislative intent and DOH's past practices.

B. The Town Did Not Detrimentally Rely on DOH's Statements or Practices and Cannot Claim Waiver and Estoppel Against the State

In addition to citing DOH's past practices in support of its interpretation of Section 8-30g(l)(3), Petitioner claims that it relied on DOH's prior statements and determinations to its detriment, giving rise to a possible waiver and estoppel claim against DOH.

A claim of estoppel requires a showing that (1) a party did or said something that "is intended or calculated to induce another to believe in the existence of certain facts and to act upon that belief;" and (2) that "the other party, influenced thereby, must actually change his position or do some act to his injury which he otherwise would not have done." *Russo v. City of Waterbury*, 304 Conn. 710, 735 (2012); *see also, Shanahan v. Dept. of Environmental Protection*, 305 Conn. 681, 708 (2012); *Sookhoo v. Bremby*, No. HHBCV135015796, 2014 WL 818618, at *3 (Conn. Super. Ct. Jan. 29, 2014).

There is no indication that the Town in fact relied on DOH's prior statements concerning holdover points such that it changed its position or did something it would not otherwise have done in regards to the development. *Russo*, 304 Conn at 735. The Petitioner states that it relied upon DOH's representation "when approving and funding the ongoing construction of additional affordable housing." *See* Petition at 6. The Petitioner further refers to the units completed prior to

the First Moratorium as units that "would not have otherwise been constructed due to the high cost of land and the resulting economic disincentive to private developers" (Petition at 1), suggesting that the Town would not have constructed the Millport Apartments as part of a 100% affordable development had it known they could not count the units in subsequent moratorium applications.

The Town has not demonstrated that its affordable housing development scheme or the construction of the Millport Apartments was the result of a belief, based on DOH's prior actions, that a moratorium would be granted using the Millport Apartment points. There are many reasons for a municipality to develop affordable housing, not the least of which is to provide decent, safe and sanitary affordable housing that enables a variety of individuals to reside in the town. In fact, the Millport Apartments units were constructed and completed *before* DOH's statement in its 2017 determination memo and *before* the granting of Brookfield's second moratorium, making it impossible for the Town to have relied on such statements or prior practice in its construction of the Millport Apartments. Moreover, "Moratorium FAQ's" posted on the Town's website in connection with the 751 Weed Street application reflect that the Town understood that it needed to build *new* units to count toward a second moratorium, and could not use those already constructed. *See* https://www.newcanaan.info/news_detail_T8_R311.php and https://cms3.revize.com/revize/newcanaanct/New%20Stories/Moratorium%20FAQs%20-%20CLEAN%20(NRB%203.11.22)%20(01599821xADB93).pdf.[3] In order to demonstrate that it

[3] Specifically, the Town's FAQ's included the following:
Once a municipality attains a moratorium, is the municipality guaranteed another moratorium? No, in order to qualify for subsequent moratoria, a municipality must demonstrate that since the last moratorium, it has added enough affordable housing units to meet the HUE point requirement. Affordable dwelling units previously counted towards a moratorium may not be used for subsequent moratoria.

relied on DOH's statements and determinations, the Town must set forth how its plan of development was created based specifically on the assumption that the Millport Apartments units would be counted in a subsequent moratorium.

Even if the Town had relied on DOH's prior statements and determinations, Petitioner has failed to demonstrate how, such purported reliance was to its detriment, as required for a claim of estoppel. The Petition states that DOH's position on holdover points "prejudice[s] the Town after years of effort." *See* Petition at 7. As set forth above, however, the development of affordable housing has many benefits other than achieving a moratorium. If anything, a reliance on the assumption that previously built units could be used for a subsequent moratorium would only result in the Town's decision to build *fewer* units, not additional units, to its detriment. The Town has not articulated how its alleged reliance was to its detriment in the context of its overall affordable housing development plan and actions.

Even if Petitioner were able to demonstrate some form of detrimental reliance, a claim of waiver and estoppel may be brought against the State only in very limited circumstances. Specifically, estoppel against a public agency "may be invoked (1) only with great caution; (2) only when the action in question has been induced by an agent having authority in such matters; and (3) only when special circumstances make it highly inequitable or oppressive not to estop the agency . . . this exception applies where the party claiming estoppel would be subjected to substantial loss if the public agency were permitted to negate the acts of its agents." *Shanahan v.*

Was New Canaan eligible to apply for a new moratorium on June 5, 2021 when the moratorium expired? No. At that time, New Canaan did not have enough HUE points to submit an application for a second moratorium. Once the first moratorium became effective on June 5, 2017, additional new affordable dwelling units needed to be constructed to be counted towards a second moratorium.

Dept. of Environmental Protection, 305 Conn. 681, 708 (2012); *see also, Fadner v. Commissioner of Revenue Services*, 281 Conn. 719, 726 (2007); *Sookhoo v. Bremby*, No. HHBCV135015796, 2014 WL 818618, at *3 (Conn. Super. Ct. Jan. 29, 2014); *Town of Stratford v. Jacobelli*, No. CV116013854, 2013 WL 5969127, at *5 (Conn. Super. Ct. Oct. 23, 2013). In order to claim estoppel against a public agency, Petitioner has a "significant burden of proof." *Fadner*, 281 Conn. at 727. Petitioner has not satisfied this burden. In addition to the shortcomings of Petitioner's claims of reliance set forth above, the Town has not demonstrated how the denial of its moratorium was inequitable or oppressive nor that it suffered a "substantial loss." Absent such showing, estoppel cannot be claimed against DOH.

C. **Conclusion**

In light of the foregoing, C.G.S. § 8-30g(l)(3) precludes DOH from awarding housing unit-equivalent points for dwelling units that were completed before the effective date of a prior moratorium toward establishing eligibility for a subsequent moratorium. The Town therefore is not eligible for a Certificate of Affordable Housing Project Completion.[4]

Seila Mosquera-Bruno
Commissioner

[4] To the extent that the intervenors who submitted comments in connection with this Declaratory Ruling raise issues other than whether holdover points may be counted, such issues are outside the scope of the questions DOH agreed to consider and in any event are not necessary to consider given the conclusion in this Declaratory Ruling. They therefore are not considered herein.