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CONNECTICUT'S AFFORDABLE HOUSING APPEALS STATUTE: AFTER TEN YEARS OF HOPE, WHY ONLY MIDDLING RESULTS?

TERRY J. TONDRO*

It is said . . . that the effect of the [zoning] ordinance is to divert this natural development elsewhere . . . . But the village [of Euclid], though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit within the limits of the organic law of its creation and the State and Federal Constitutions.1

Section 8-30g is not part of the traditional land use statutory scheme. Traditional land use policies did not solve Connecticut's affordable housing problem, and the legislature passed § 8-30g to effect a change.2

INTRODUCTION

The Connecticut Affordable Housing Appeals Act, section 8-30g of the Connecticut General Statutes ("Appeals Act"), was adopted ten years ago.3 It has not had an untroubled history. The Act was the primary recommendation of the land use subcommittee of a Blue Ribbon Commission on Housing appointed by Governor O'Neill in 1989. I had the privilege of serving as the co-chair with Anita Baxter, the First Selectwoman of a middle sized town on the

* © 2001 Terry J. Tondro, Thomas F. Gallivan, Jr. Professor of Property Law, University of Connecticut School of Law. The author expresses his appreciation for the work of research assistants in the preparation of this article, in particular Gregory Piotrus, Alexis Schuman, Ronald Soccoli, and Robert Grady. The Article as well as my understanding of affordable housing has been greatly enriched by working with attorneys Philip Tegeler and Timothy Hollister. The Article has benefited from their reviews and comments as well as those of Professor Colin Tait. Any errors are, of course, my own.

suburban fringe of Hartford. I was an academic specializing in land use controls, and lived in the City of Hartford itself. We were a politically balanced team.

The Blue Ribbon Commission ("Commission") was established in response to the increasing cost of housing in Connecticut. One focus of that concern was the increasingly visible and intractable problem of homelessness. Of equal concern were the number of people who had access to a home, but who were paying an excessive portion of their income for that access. At a slightly higher economic level, there was a concern that a continuing housing cost crisis would adversely affect the economy in Fairfield County on the New York border. Many large corporations have offices there, and were finding it difficult to lure executives to their headquarters because of the high-cost of living in the county. Arguments were also made that in the exclusive, high cost communities in the county, teachers, service staff, volunteer firemen, etc. were unable to afford to live in the communities in which they worked, and had to commute long distances from an affordable town to their jobs in Fairfield County. A third general argument was that those children growing up in one of these towns could not afford to live there after they left their parents' homes. While no other area of the state had such high housing costs as the towns in Fairfield County, the general level of housing prices in the 1980s was very high prior to the significant and long recession in 1989, and for several years thereafter.

The legislation proposed by the Commission in response to the problem of high housing costs was premised on the idea that zoning regulation of affordable housing should be simplified to reduce the number of generalized or indeterminate reasons that could be used to defeat a proposal to build affordable housing, reasons such as that the development would adversely affect community character, or that it was unsuitable at the location proposed, or that it was incompatible with the neighborhood. We did not go as far as many commentators have in the 30 years since "exclusionary zoning" was first attacked for its racial and class biases and argue for the elimination of zoning altogether; we were simply trying to pare it back

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5. Id. at 19.
6. Id. at 8.
to its core ideas of separating basic land uses to prevent nuisances, but only if the countervailing interest was the provision of affordable housing.

The Act that our subcommittee proposed was so controversial, however, that the life of the entire Commission was extended by a year, in large part to gather support for the Act. The Act passed the second time around, but with some necessary compromises despite the very strong support of Governor O'Neill and the legislative leadership. In its first 10 years, the Appeals Act was interpreted in some 50 reported decisions by Connecticut trial courts, plus three appellate court and two Supreme Court decisions, which upheld its basic provisions.

In 1999, more or less on the tenth anniversary of the introduction of the Appeals Act, the Connecticut Supreme Court dealt it a crippling blow in Christian Activities Council, Congregational v. Town Council. Some might say it was fortunate that a month earlier the Connecticut legislature had authorized the creation of a new Commission to study the affordable housing problem in Connecticut, including an examination of how section 8-30g had worked. The 1999-2000 Blue Ribbon Commission ("BRC II") submitted 36 recommendations to the Connecticut Legislature dealing

8. BRC I, supra note 4, at 2.
9. Kaufman v. Zoning Comm'n, 653 A.2d 798, 820-21 (Conn. 1995) (finding that the commission failed to prove that denying "the plaintiff's affordable housing application was necessary to protect substantial public interest"); W. Hartford Interfaith Coalition, Inc. v. Town Council, 636 A.2d 1342, 1356 (Conn. 1994) (upholding the plaintiff's right to appeal the rejection of its affordable housing applications without first submitting a modified proposal); Town Close Assocs. v. Planning & Zoning Comm'n, 679 A.2d 378, 384-85 (Conn. App. Ct. 1996) (stating that the planning and zoning commission bears the burden of proof on appeal); Nat'l Associated Props. v. Planning & Zoning Comm'n, 658 A.2d 114, 121 (Conn. App. Ct. 1995) (finding that section 8-30g does not require an affordable housing applicant to obtain approval from all relevant municipal agencies prior to requesting a zone change); Wisniowski v. Planning Comm'n, 655 A.2d 1146, 1154-55 (Conn. App. Ct. 1995) (stating that section 8-30g(c) limits a local commission's discretion, and allows a trial court to grant a zone change if the commission fails to meet the burden of proof).
10. 735 A.2d 231, 254-55 (Conn. 1999) (finding that the protection of open space may be a reasonable cause for denying a permit to build affordable housing). See infra Part V for a detailed discussion of this decision.
I will begin this Article by exploring briefly the design of section 8-30g as initially enacted, and comparing it with the already existing legislative and judicial efforts to promote affordable housing in Massachusetts and New Jersey. Massachusetts' so-called "anti-snob zoning" act, and New Jersey's program deeply rooted in the Mount Laurel cases, were well known to us, and were part of the backdrop against which we developed our own proposal. Also important were the particular aspects of Connecticut's zoning law. Then I will discuss the Appeals Act's reception by Connecticut's towns, its planning community, and its courts, followed by a review of the evidence of the effect of the Appeals Act on the creation of affordable housing opportunities during the initial 10 years after adoption. The third topic I will discuss is the Supreme Court's decision in Christian Activities Council, Congregational, the response of the second Blue Ribbon Commission to that decision in its report of February 2000, and the legislature's subsequent amendments to the statute. Finally, the Article concludes with some reflections on the failure of our "free-market" approach to break down the barriers to affordable housing, why the towns failed to respond to our invitation to negotiate over the details of affordable housing proposals, and the now lessened prospects for resolving the affordable housing problem in Connecticut.

I. THE DESIGN OF SECTION 8-30G

The structure of section 8-30g is relatively simple. It establishes an appeals procedure with few (albeit very important) differences from the standard administrative appeal process available when a land use commission denies a garden-variety land use permit. The section 8-30g procedure is only available to applicants who submit an affordable housing application that requires a permit or other approval from any municipal agency that exercises

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11. BLUE RIBBON COMM'N, STATE OF CONN., FINAL REPORT 9-15 (Feb. 1, 2000) (on file with author) [hereinafter BRC II].
14. 735 A.2d at 254-55.
15. CONN. GEN. STAT. § 8-30g (1999).
16. Compare the appeals procedure in section 8-30g with the procedures for regular land use permits in sections 8-8 through 8-10.
zoning or planning authority.\textsuperscript{17} But if any part of the work involves an inland wetlands, an inland wetlands permit is required for the project in addition to zoning and planning approvals, and the wetlands permit would be issued by a Connecticut Inland Wetlands Agency, rather than by a zoning and planning commission.\textsuperscript{18} An Inland Wetlands Agency has an effective veto over a project, but the decisions of an Inland Wetlands Agency are not subject to the special Appeals Act procedure.\textsuperscript{19} The Commission recognized this limitation on the scope of section 8-30g, but also recognized that because the proposal would be strongly opposed by the municipalities in the legislature, the proposal should not alienate the environmental community as well.

An affordable housing application is statutorily defined as referring either to a governmentally assisted housing development for low- or moderate-income people, or a housing development in which at least 25\% of the dwelling units would be conveyed by deeds with covenants.\textsuperscript{20} The covenants ensured that the units would be rented or sold at prices deemed to be affordable, defined as prices not more than 80\% of the median sale or rental price in the “area” or in the state, whichever was less, for at least 30 years after the initial occupation of the proposed development.\textsuperscript{21} In 1995, the definition of an affordable housing development was modified so that 25\% (up from 20\%) of the units had to be affordable in projects without governmental assistance for at least 30 years (up from 20 years).\textsuperscript{22}

The force of the special section 8-30g procedure lies in its shifting of the burden of proof from the applicant to the planning and zoning commission. Instead of the applicant having to establish that the commission acted irregularly and in abuse of its discretion when it rejected an application for an affordable housing development, the commission must “prove, based upon the evidence in the record” that four tests have been satisfied: (1) the decision and the reasons cited for it must be supported by sufficient evidence in the record; (2) commission rejection of an affordable housing applica-

\textsuperscript{17} § 8-30g(a), (b).
\textsuperscript{18} §§ 8-26, 22a-32, 22a-33, 22a-34.
\textsuperscript{19} § 22a-34.
\textsuperscript{20} § 8-30g(a)(1)(B).
\textsuperscript{21} §§ 8-30g(a)(1)(B), 8-39a.
tion must be "necessary to protect substantial public interests in health, safety or other matters which the commission may legally consider; [(3)] such public interests clearly outweigh the need for affordable housing; and [(4)] such public interests cannot be adequately protected by reasonable changes to the affordable housing development."23 This reverses the normal zoning (and general administrative law) rule that the public agency goes into litigation armed with a presumption that it acted rationally and properly, and the applicant has the burden of establishing otherwise.24 It was this shifting of the risk of non-persuasion that drew the ire of many municipalities and legislators.25

23. § 8-30g(c). After 1995, projects not receiving governmental monetary support could not take advantage of the burden-shifting rule if the project was located in an area zoned exclusively for industrial uses. 1995 Conn. Acts 280 (Reg. Sess.).

24. A modern statement of the presumption is found in United States v. Carolene Products, Co., 304 U.S. 144, 152 n.4 (1938). For a discussion of implications of the presumption in land use law and of its corrective, a shifting of the burden of proof, see, e.g., Daniel R. Mandelker & A. Dan Tarlock, Shifting the Presumption of Constitutionality in Land-Use Law, 24 URB. LAW. 1, 7-18 (1992); see also Dolan v. City of Tigard, 512 U.S. 374, 405 (1994) (Stevens, J., dissenting) (presumption of constitutionality of a municipal action). Carol Rose suggests that imposing the burden of proof on a local legislative body, such as section 8-30g does, treats local legislative bodies as inferior legislatures. Carol M. Rose, Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy, 71 CAL. L. REV. 837, 852 (1983) (discussing the significance of burden shifting, as suggested by the decision in Fasano v. Bd. of County Comm’rs, 507 P.2d 23, 29-30 (Or. 1973) (en banc)). She implies that such a view would be undesirable, id., and I agree. But the Commission was not taking the view that municipal legislative bodies are inferior to state agencies; rather, we were simply limiting a municipality’s ability to ignore affected groups that are not part of its constituency but which are affected by its decision — out-of-towners, future residents, and the poor. We were attempting to control despotic behavior by zoning boards in those contexts, behavior that victimizes people who cannot have a vote in electing the despots.

25. E.g., Rep. (now Judge) Radcliffe: "[T]his, [then] would be a new rule of law not applicable to any other state or municipal agency and certainly not consistent with the Administrative Procedure Act . . . ." Rep. Tulisano responded, "[A]bsolutely true . . . ." 32 H.R. Proc., pt. 30, at 10,586 (Conn. May 30, 1989). Rep. Rogg asserted that in this bill, "we are reversing the whole [zoning] process." Christian Activities Council, Congregational v. Town Council, 735 A.2d 231, 257 (Conn. 1999) (Berdon, J., dissenting) (quoting 32 H.R. Proc., pt. 30, at 10,666-67 (Conn. May 30, 1989)). Shifting the burden of proof is not unknown in American or Connecticut law, however unusual it may be. The burden imposed on the municipality by Dolan v. City of Tigard, 512 U.S. at 394-95, to establish a nexus between the problem and the measure adopted to resolve it amounts to a shifting of the burden of proof to the municipality, for example. Similarly, so does the "change of circumstances" zoning rule prevalent in some states, which prohibits a land use agency from changing the rules unless it can establish that circumstances had changed since the original rule had been adopted. Since 1987, Connecticut’s Inland Wetlands Act has required a wetlands agency to establish that there is no feasible or prudent alternative to the applicant’s proposal. CONN. GEN. STAT. § 22a-41(b) (1999). This must be established before it grants a wetlands permit, after holding a public hearing on the application. TERRY J. TONDRO, CONNECTICUT LAND USE REG-
Towns in which 10% of the housing units qualified as affordable housing were exempted from the burden-shifting rule. This exemption was added for administrative reasons. We felt that towns with that much affordable housing (relatively speaking, of course) should not have to shoulder the burden of proving that they denied applications for proper reasons. In keeping with this desire to minimize administrative demands under the new procedure, affordable housing was defined to include only subsidized housing, or housing with deed restrictions limiting its use to low- and moderate-income persons. We recognized that there is a lot of affordable housing in towns that would not qualify as affordable under this somewhat artificial definition, but the alternatives seemed administratively cumbersome or even impossible. For example, a housing unit that is available at an appropriately low rent level today, or this year, might not be next year. If such units counted as affordable housing for the purposes of meeting the 10% exemption from burden shifting, a new survey of available housing and prices would have to be undertaken each year by each of Connecticut's 169 towns or by an agency of the state. The 10% number is considerably marked down from the percentage of housing that needs to be affordable under the income and housing cost limits established by the legislature. Nevertheless, the 10% exemption concept has turned out to be a major problem in gaining acceptance of the Appeals Act—our concern for simplicity of administration has turned out to be less of a statutory virtue than simplicity of explanation. The Act would have fared better if it had not exempted anyone from the statute under any circumstances.

This is all there is to the affordable housing appeals procedure. The Appeals Act used some key concepts that are not statutorily defined, such as "substantial interest" in "health or safety." These terms are crucial because a commission's rejection must be based on the protection of such interests. By leaving the terms undefined, it became the legislature's, and ultimately the courts', responsibility to identify in particular contexts which interests were substantial public interests and which interests involved health and safety. We
did propose part of a definition for the affected interests by omitting the term "welfare" from the usual trilogy of "health, safety and welfare" because it had become the usual justification for all kinds of decisions; we considered it too malleable a term. Some of the interests the courts have since held to be substantial include protection for housing units located in a flood plain or on steep slopes, and compliance with sedimentation and erosion controls. An applicant's failure to consider the traffic or the environmental impacts of its proposal have been upheld as legitimate reasons for rejecting the application. Other legitimate reasons have included an inadequate water supply or inadequate sewage treatment facilities. Commission arguments that would have been upheld in a normal land use appeal, but which have been rejected in an affordable housing appeal, include a town's argument that approval of an affordable housing application would result in an adverse impact on property values or an increase in local school population. Several reasons given for a denial of an application have been upheld in some instances and overruled in others. Interests the courts have

not considered substantial include the development's illegality under existing zoning regulations (as it would defeat the purpose of the Appeals Act if it could not prevail over existing zoning rules);\(^{36}\) including inconsistency of the proposal with the town's zoning regulations because they required a higher percentage of affordable housing units than the statute did;\(^{37}\) an asserted need of the town to study for a 3 year moratorium period the impact of multi-family units;\(^{38}\) limiting the number of affordable units in the municipality;\(^{39}\) and the need to have affordable housing near community facilities.\(^{40}\) The courts have proven to be quite fair judges of pretextual and legitimate reasons, which is perhaps the key to the gradual acceptance of the initially shocking shift in the burden of proof.

As noted above, the fourth burden the municipality must carry is a finding by the commission that the public interests relied on when it rejected an affordable housing application could not be protected by making reasonable changes in the proposed plan. We had hoped that this requirement would encourage commissions and developers to find a negotiated plan that both could accept. One obstacle is that Connecticut courts have not enforced the requirement of most land use statutes that a commission must state the reasons for its decisions. Instead, Connecticut courts have held that if a commission does not give reasons for its decision or if the reasons it does give are illegal, the trial court on appeal must search the record to determine if a legitimate reason could be supported by the

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\(^{36}\) W. Hartford Interfaith Coalition, Inc. v. Town Council, 636 A.2d 1342, 1347-50 (Conn. 1994).


evidence in the record.41

In a situation where the commission can turn down an application without giving its reasons, or where the only reason given is protecting the “public welfare,” the commission is in a very strong position if it does not like a project for the most unacceptable of reasons. Connecticut commissions, knowing that they would not be penalized for failing to give the reasons for their decision and that their decision was afforded the presumption of regularity if appealed, had no reason to accommodate a developer whose proposal they did not like. By requiring the commission to state the reasons for its decision,42 and by shifting the burden of proof as to the legitimacy of the reasons for the rejection of an affordable housing plan,43 the Appeals Act weakened the position of land use commissions vis-a-vis applicants. The Appeals Act made it possible for the town to lose when a case did come to trial, as opposed to the former near-certainty that it would win an appeal from its decision. The first Commission hoped that this shift in relative bargaining strengths would result in greater cooperation between developers and commissions, if for no other reason than mutual self-interest. Better plans would result, and housing that would meliorate the housing crisis would be completed sooner than if the traditional developer-versus-commission confrontation model continued to be the practice.44

The Huntington Branch, NAACP v. Town of Huntington45 case, at that time recently decided by the Second Circuit, provided a helpful structure for analyzing land use decisions under the fourth criterion of the Act.46 That case divided the reasons for rejecting an

41. See infra notes 93-95 and accompanying text for a discussion of Connecticut cases which have held so.

42. CONN. GEN. STAT. § 8-30g (c)(1)(A) (1999).

43. § 8-30g(c).

44. In Fiscal Year 1987-1988, resolution of the average zoning case took about 450 days, or 15 months, from the time of filing to the announcement of the decision by the trial court. BRC I, supra note 4, at A-5. That significant delay counseled a developer to comply with a commission's decision because the long delay necessary to win an appeal even if the developer was right was often just too costly. Cf. Michael Wheeler, Negotiating NIMBY's: Learning from the Failure of the Massachusetts Siting Law, 11 YALE J. ON REG. 241 (1994) (discussing the Massachusetts siting law involving bargaining by developers, and negotiation requirements, and why the statute failed).

45. 844 F.2d 926, 939 (2d Cir. 1988), aff'd, 488 U.S. 15 (1988) (per curiam) (stating the two prong test from Resident Advisory Board v. Rizzo, 564 F.2d 126, 148-49 (3d Cir. 1977)).

46. § 8-30g(c) (requiring the commission to prove four facts, the fourth of which, in paragraph D, requires proof that the public interests allegedly being protected by a
application into site-specific and plan-specific categories. A site-specific reason would be that the slopes on the site were too steep such that no rearrangement of lot lines could produce buildable lots. A plan-specific reason would be that many of the slopes were too steep, but that rearranging the lot lines could produce buildable lots. Aware of this distinction, the Commission’s objective in the fourth requirement was to prevent the rejection of an application if there were reasonable changes that could be made in the plan.

One effect of the section 8-30g design was the creation of a “builders remedy,” as developed in New Jersey’s Mount Laurel cases. Connecticut’s statute gives any affordable housing applicant an appeal right buttressed by the shift in the burden of proof from that pertaining to normal zoning appeals. We did not create an administrative agency such as the Fair Housing Council that eventually took over the supervision of affordable housing in New Jersey, nor did we explicitly or implicitly incorporate any “fair share” or other measurable obligation on any town. We were certain that establishing an administrative agency to determine the affordable housing obligation of each town would be politically and administratively unfeasible. Instead, we relied on the market sense of the builder as a surrogate for the affordable housing need in a town; if the builder was willing to proceed with an affordable housing project there was probably a market in that town for that product.

A positive side of making the builder the affordable housing “planner” is that we did not need any state agency to make need determinations. We would also not be drawn into the interminable arguments like the ones presented before the New Jersey courts and then before the state agency over which statistics, methodology, etc., were to be used in deciding an appeal. As a student of affordable housing negotiations commented about the Massachusetts commission’s denial of an affordable housing application “cannot be protected by reasonable changes to the affordable housing development”).

47. Mount Laurel II, at 420 (giving builder’s remedies where the plaintiff has acted in good faith and tried to obtain relief without litigation); Mount Laurel I, at 734 (leaving the remedy up to the local municipalities and builders).

approach compared with that of New Jersey, "[t]he Massachusetts approach . . . avoided the difficult question of defining regional boundaries, overall housing needs, and fair share obligations."49 The Massachusetts approach simply established an administrative agency within the State’s Department of Housing which heard all affordable housing appeals from adverse local zoning commission decisions. We tried to emulate the simplicity of the Massachusetts model.

On the other hand, the downside of relying on the developer to do affordable housing planning is that the developer’s decisions about where to build will almost always be based simply on market considerations, such as which land is available, its cost, etc., rather than on planning considerations such as where it is best to provide housing for low- and moderate-income families. Of course, non-profit sponsors or developers (who presumably will take a broader view than a for-profit developer might) can also use the statute, and have done so. Two of the three Connecticut Supreme Court decisions concerning the statute were brought by non-profits.50

It has been suggested many times that the Appeals Act’s special procedures should be limited to non-profits. There are two problems with this proposal. One is that non-profits have built a very small number of affordable housing units during the Appeals Act’s regime. For example, West Hartford Interfaith Coalition, Inc. involved 10 units, and Christian Activities Council, Congregational involved 28 housing units.51 Non-profits usually do not have the capital or the expertise to build more than a few units at a time. Moreover, one has to suspect the self-serving nature of this suggestion, given that towns have fought efforts by non-profits to build affordable housing just as hard as they have fought for-profit developments.

On the other hand, housing of any type is not going to be built no matter how good the planning has been unless a builder steps forward to do the building. That person or entity, profit or non-profit, will not step forward unless the project makes good market


50. Christian Activities Council, Congregational v. Town Council, 735 A.2d 231 (Conn. 1999); W. Hartford Interfaith Coalition, Inc. v. Town Council (West Hartford), 636 A.2d 1342 (Conn. 1994).

51. The four other appeals considered by the appellate and supreme courts were brought by for-profit developers and in comparison they proposed building a total of 225 units. See Rappa, supra note 22, at attachment 3.
sense (including available subsidies such as government grants, market or below market interest rates, tax credits, etc.). The builder initiates the affordable housing project, but the planning and zoning commission can only veto it. By avoiding the establishment of needs and quotas, the Blue Ribbon Commission in effect assumed that the need for affordable housing existed generally throughout the state, and whoever would satisfy any part of that need was serving the reasons for the adoption of the Act in the first place. Conversely, no town was going to be required to provide affordable housing if there was no need for it because a builder would not be asking to build there in the first place.

The statute seemed like an elegant solution in a second or third-best world. The Act permitted towns to continue following their own home rule preferences except in a limited number of situations involving affordable housing. In those cases the Appeals Act substituted free market values and concepts for government regulation—an approach widely in vogue in the eighties and nineties, and one presumably favored by the largely conservative towns that ended up being most opposed to the Appeals Act. We would like to have done more for affordable housing, but the political realities as we saw them precluded this. Unfortunately, time has proven our fears about the strength of the opposition to affordable housing well-founded.

II. Planners' Objections to Section 8-30g

Section 8-30g has been a political lightning rod since its adoption. Every year efforts have been made to repeal or modify it, some of which have succeeded. Potentially the most significant amendment precluded the use of industrially zoned land for affordable housing which was not governmentally assisted.52 Other amendments ratcheted up the number of units that had to be affordable in order for the development to qualify for the protection of section 8-30g from the original 20% to 25%,53 required that a unit qualifying as affordable remain so for 30 years,54 and required that a portion of affordable units be available to persons earning no more than 60% of the lesser of the area’s or state’s median

53. § 8-30g(a)(1)(B).
54. Id. The original legislation did not establish a minimum period of time during which an eligible unit needed to remain affordable.
income.55

Apart from the expected political objections to the Appeals Act that are based on a misunderstanding of the home rule law in Connecticut,56 the primary objection to the Appeals Act is that it gives the applicant an opportunity to force municipalities to accept land use proposals that violate good planning principles because the applicant can win an appeal regardless of the merit of its proposal. Put more trenchantly, an applicant can “blackmail” a town into accepting its development proposal, even if it is not one for affordable housing, by threatening to withdraw the objectionable application and resubmit an affordable housing application. The assumptions behind this allegation are that the affordable housing use of the site would be more offensive to the town than would be the use proposed, and that the town would lose an appeal of its denial of the affordable housing application.

This is a charge more easily made than verified. The most offensive scenario is that just described, where a developer submits a proposal that the town wants to reject for sound planning reasons. However, any expressed objection to the proposal by the commission is met by the developer’s threat to reapply with an affordable housing component as a new part of the original proposal. The town will not be able to deny the “new” proposal because it will lose a developer’s appeal brought under the Appeals Act.

I had student research assistants conduct a survey of town planners for the thirteen towns in the New Haven regional planning area to determine how extensive the blackmail was thought to be. Several planners said this had happened in their town, but only one planner was able to give particulars. In that case, the planner said that although the threat was made, the town denied the objectionable application anyway and the developer then disappeared without following through on its threat. The town planner for Wallingford said that no threats had ever been made in her town because developers always knew they would get a straight deal from the commission. In addition, I examined the reported section 8-30g decisions between 1990 and 1996, and I could discern a potential for “blackmail” in the facts of only four of the fifty or so cases.

55. § 8-30g. Formerly there was no requirement such as this.
litigated throughout the state during those six years. In two of the cases it appears that the developer's threat had been followed through via a resubmitted application that now included an affordable housing component. In a third instance, a bank had been unable to sell industrially zoned land it had foreclosed on and applied for subdivision approval of a project which included an affordable housing element (this was before the 1995 amendments prohibiting the use of industrially zoned land for affordable housing). The town escaped the threat, however, by finding a purchaser who agreed to establish an industrial use on the site. The fourth instance of the use of an affordable housing component to leverage an objectionable project through a commission occurred in Stonington, where an applicant proposed to build, in Stonington's old historic district, a very upscale "dockominium," which included the required minimum number of affordable housing units to qualify for a section 8-30g appeal. The project was widely opposed in town, and the commission rejected it. The developer appealed under section 8-30g but lost the appeal because the court found, among other reasons, that the protection of the town's historic character and valid health and safety issues warranted the commission's denial of the application.

In the first three of these instances, the offensive use of section 8-30g as a threat could have been avoided by prohibiting, within a moderately long period of time such as three years, a reapplication which included a newly added affordable housing component. Such a statutory amendment would not have prevented a developer's use of the Appeals Act as a threat, as was attempted in Stonington, so

57. See generally Peter J. Vodola, Connecticut's Affordable Housing Appeals Procedure Law in Practice, 29 CONN. L. REV. 1235, 1240-45 (1997). Vodola's article provides an enormous amount of data on the first six years of the Act, including a wealth of comments by planners, public officials, and developers on the Act's implementation. Vodola is more sympathetic to the problems of public officials attempting to implement the Act than I am, and he does not share my concern that the zoning system in Connecticut is tilted against the developer. Yet while he quotes many officials' and planners' complaints about developer "blackmail," we do agree that there is little actual evidence of developer abuse of the Act. Id. at 1245-62.


that the Appeals Act still could be used for arguably improper purposes. But is that true? The Appeals Act was designed to produce more affordable housing than was being provided by the free market (defined to include the standard land use controls) but was never designed to produce developments that always included a high percentage of affordable units. The Stonington project would have produced more affordable housing than otherwise would have existed in Stonington. If the proposed dockominium otherwise satisfied the town’s development and zoning plans, the inclusion of unwanted affordable housing should not be the basis for rejecting the proposal.

Another problem with the blackmail scenario is that it seems to be more apparent than real. If blackmail were as common as towns often assert, we should not have the surprising result documented in Hollister’s study—that three-quarters of the affordable housing units built pursuant to section 8-30g litigation were built in projects that were 100% affordable and that these projects constituted one-half of the affordable housing developments approved after litigation. Yet the statute allows a developer to take advantage of section 8-30g if a mere 20% (now 30%) of the units in the project are affordable. Assuming affordable housing units have a lower profit margin than do market rate units, one would think that developers interested in the higher profits assumed by the blackmail argument would keep the number of affordable housing units down to the minimum necessary to gain the protection of the Appeals Act. “Blackmail,” in other words, may not be as common as is usually alleged.

Nevertheless, some town planners have made overwrought comments about the Appeals Act’s destruction of sound town planning. The town planner for Trumbull, for example, proclaimed that when an affordable housing application comes in, the town is obliged to approve it, and “[w]e’ve lost all control over zoning.” Another town planner opined that the law elevated affordable housing over proper land use planning. A third town planner concluded that the Appeals Act “says that if you want to call it affordable housing, you can get away with anything you can.”

61. See Rappa, supra note 22, at attachment 3.
62. Vodola, supra note 57, at 1265 (quoting Joan Gruce, the Planning and Zoning Administrator for the town of Trumbull, Connecticut).
63. Id. (quoting Robert Nerny, the Town Planner in Southington).
64. Id. at 1264 (quoting William Kweder, Planning Consultant for the town of Suffield).
These statements reflect a refusal to look at the facts. As of 1995, the Connecticut courts had upheld municipal rejections of affordable housing applications in 50% of the cases brought under the Appeals Act. More importantly, these planners' criticisms (and other planners shared their views) strongly suggest a willful misreading of the statute as well. The Appeals Act does not prevent a town from continuing to control the uses of land in the town. Rather, it merely requires a town to identify sound planning concerns as the reasons for rejecting an affordable housing application, and it precludes rejections for reasons that have no basis in public health or safety.

Overall, the courts have responsibly sought to separate the specious from real and important municipal interests. By turning the initiative over to the builder, we did not eliminate consideration of planning principles or concerns. We merely sought to force towns to articulate good planning reasons for rejecting an application which, by its nature, involved social issues of great public importance.

III. THE EFFECTIVENESS OF THE ACT

One measure of the impact of section 8-30g is to count the number of affordable housing units that have been added to the housing inventory as a result of the adoption of the Appeals Act. In 1996-1997, Timothy Hollister, an attorney active in affordable housing development and litigation, organized a group of thirteen developers and attorneys familiar with affordable housing in Connecticut. Their objective was to compile a list of affordable housing units that had been given local land use approval between 1990 and 1996, whether through negotiation with a town or pursuant to a court decision after section 8-30g litigation. At a minimum, his

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65. The 50% number includes cases in which one of the parties prevailed on procedural grounds.

66. See Vodola, supra note 57 (providing reports of his extensive interviews with Connecticut municipal planners). Vodola's interviews found very few planners who would openly defend the Appeals Act. I have discussed elsewhere some of the implications of the antipathy to the Appeals Act by many planners. See Terry J. Tondro, Fragments of Regionalism: State and Regional Planning at Century's End, 73 ST. JOHN'S L. REV. 1123, 1140-58 (1999).

67. Rappa, supra note 22, at attachment 3. Hollister has since updated through 1993 the list of decided cases which was part of his 1996 report. Timothy S. Hollister, Connecticut's Affordable Housing Appeals Statute (Jan. 14, 1999) (unpublished presentation to Stamford Regional Bar Association) (on file with author). Hollister was a member of the Second Blue Ribbon Commission discussed infra Part VI. The author of this Article was one of the participants in Hollister's group.
study concluded that 1627 affordable housing units had been built in that period, 1041 without resort to the Appeals Act or by local negotiation and settlement, and 586 as a result of litigation. In comparison, about 57,000 building permits were issued statewide in the same period. In other words, 3% of the housing units authorized for construction in the seven year period were affordable housing units for which section 8-30g was directly responsible.

This does not sound like a lot. By comparison, Massachusetts claims to have influenced the construction of over 20,000 affordable housing units over a 30-year period. That is about 5000 units every 7 years, compared to the 1600 units we have developed in a 7-year period. Connecticut is a smaller state with presumably fewer building permits issued per year than in Massachusetts, which would explain part of the difference between the two states. Moreover, the 7-year period during which the Connecticut Appeals Act has been in place coincided almost precisely with a significant real estate market depression in Connecticut, whereas Massachusetts' statistics include the boom years from 1970-1989. The building downturn began just about the day section 8-30g was enacted and only began to reverse in 1995.

As Hollister himself observed, one problem with the survey is that members of the participating group often had difficulty identifying a townsperson with knowledge of what was happening in the town over the 7-year period covered by the survey. Furthermore, they could not be sure whether a negotiated settlement occurred as a result of the background pressure exerted by the existence of section 8-30g or simply sound land use regulation.

Our primary hope for the Appeals Act was not so much that it would cause homes to be built under court orders, which would be easier to obtain than zoning approvals from town commissions, but that it would persuade towns to more fairly appraise proposals for affordable housing and to negotiate the specifics of the affordable housing proposal. To evaluate whether this happened, the success of the statute needs to be measured by other data, beyond simply tabulating the number of affordable housing units developed as a result of court order. One of those measures is whether commissions in fact dealt more fairly with affordable housing applications after the statute was adopted. This is quite difficult to measure, of course, as it requires reviewing the actual proceedings of commission evaluations of affordable housing applications as well as the

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68. See Hollister, supra note 67.
proceedings involving non-affordable housing applications during the same period. Hollister's study suggested that about two-thirds of the affordable housing built in his six year study period resulted from negotiations rather than litigation.\(^6\) This information has to be considered very "soft," however, since negotiations on such a politically sensitive topic as affordable housing are bound to be kept quiet. Identifying affordable housing units built as a result of the potential threat of section 8-30g litigation will depend on individual recollections and beliefs (and probably the interviewees' political agenda).

In my study of the Act's effects in the New Haven regional planning area during its first 7 years (1990-1996),\(^7\) I attempted to use a more focused methodology, examining the minutes and other records of the decisions on all land use applications in the region's 15 towns. Three student researchers examined the planning and zoning commission regulations and files on proposed market rate and affordable housing developments. Also examined were the minutes of commission meetings and public hearings on these proposals in the 13 towns in the New Haven regional planning region that were not exempted from the reach of the Appeals Act. Based on their information, we found that 89 units of affordable housing had been built or were under construction in the region. However, a much larger number of affordable housing units, 225, may or may not be counted as affordable housing, depending on one's evaluation of the details of those projects. In other words, the information was not particularly helpful. Some of the problems confronted were that the records varied widely from town to town so that meaningful inter-town comparisons were impossible; some towns did not even keep meeting minutes (neither by stenographer nor even on tape, although required by Connecticut law).\(^1\) Therefore, information on what was said was impossible to obtain and ultimately each project, affordable or market-rate, was unique. Those differentiating factors often can persuasively explain whatever difference in treatment one might be able to identify.

Another measure of the Appeals Act's success might be gleaned from an analysis of the amendments made by a town to its zoning regulations to facilitate lower-cost housing opportunities. Hollister's group identified 51 of Connecticut's 169 towns that dur-

\(^6\) See Hollister, supra note 67.
\(^7\) See supra notes 56-57 and accompanying text for a discussion of "blackmail."
\(^1\) CONN. GEN. STAT. § 8-7a (1999).
ing the study period had amended their zoning regulations to improve housing affordability, but his report does not identify the changes made. Seeking more detail, I had a student ask the regional planner at each of the Connecticut Regional Planning Agencies about changes in the regulations of the towns in their regions. He obtained information on 45 towns which had changed their regulations in such a manner that conceivably more affordable housing could be built. Given that more or less 30 towns are exempt from the reach of the affordable housing statute in any particular year, about 139 towns (rather than 169) is the relevant base for this purpose. Therefore, we know that just about one-third of the municipalities subject to section 8-30g appeals did amend their local zoning regulations. The respondents’ information was not always complete however, and in addition, the question of which regulation changes qualify as promoting affordable housing is not clear. Quite a few changes were made, most of them rather minor, and all of them subject to the caveat that while changing the regulations is promising, if no one takes advantage of the change (for whatever reason) the change might just as well have not been made.

For example, the most common change was to establish an affordable housing district or overlay zone in which a housing unit bonus was provided if affordable housing units were included in the development. Fifteen of the towns for which we obtained information adopted a new multi-family zone with the affordable housing bonus, and others were considering doing so when this survey was made. This sounds good, but the true value of the change depends on its context. One town’s regulation was subsequently held inapplicable to a proposed affordable housing project because those regulations also mandated a higher percentage of affordable housing units than the 20% then required to qualify under section 8-30g. The court’s concern seemed to have been that by requiring more than 20% of the units to be affordable the town was attempting to increase the amount of cross-subsidies that had to be provided by the lowered number of market rate units, thereby making the development less economically viable.72 The other common change,

72. See Nat’l Associated Props. v. N. Branford Planning & Zoning Comm’n, No. CV92 0518954 S, 1993 WL 489486 (Conn. Super. Ct. Nov. 17, 1993), aff’d, 658 A.2d 114 (1995); Shapiro Farm Ltd. P’ship v. Planning & Zoning Comm’n (N. Branford), No. CV 92-0517281 S, 1993 WL 452234 (Conn. Super. Ct. Oct. 15, 1993). A cross-subsidy occurs where the shortfall between the costs of operating a unit and the rents received from a subsidized (presumably affordable) unit is made up by slightly increasing the rent charged for an unsubsidized unit in the same development to a level above that which
adopted by 9 of the 45 towns, was to allow accessory apartments. While an accessory apartment is undoubtedly more affordable than a single-family home, so that general progress toward reducing housing costs was made by these towns, the rent for an accessory apartment is, nonetheless, not necessarily within the affordable housing price range. Another cautious change in 2 towns was to provide a density bonus for elderly housing units, if the elderly units were affordable.

Many changes authorized a waiver of certain zoning regulations if the proposed development included affordable housing, such as the waiver of a zoning requirement that non-conforming lots must be merged; waiver of front footage rules to permit the creation of flag lots (which allow the owner of a large lot to subdivide off the rear portion of the lot even though sufficient lot frontage for two lots on a street would not then exist; access to the rear lot is provided by a long driveway—the flagpole); waiver of ground floor residential use requirements; waiver of maximum lot coverage standards; and the waiver of minimum floor area requirements to allow building of “starter homes.” One central city negotiated agreements with its suburbs whereby a suburb undertook to “work with” its landlords to gain their acceptance of section 8 certificate holders. Another town created a trust fund to make affordable housing grants to eligible persons and to build affordable housing projects, and yet another town approved owner-occupied duplexes if one of the units was affordable.

IV. THE CAPITOL REGION’S HOUSING COMPACT APPROACH

In the same year as the first Commission was appointed, the Connecticut legislature created an alternate mechanism for encouraging the development of affordable housing. The legislation funded a pilot program in the Hartford Regional Planning area to see if, with the help of a professional negotiator, the participating towns could agree on a strategy for increasing the low-income hous-

would be required to pay for that unit's costs. See generally ALAN MALLACH, INCLUSIONARY HOUSING PROGRAMS: POLICIES AND PRACTICES (1984).

Compare a subsequent superior court holding that a town could not limit the number of affordable housing units to 50% of the development because the need for affordable housing outweighed the commission’s reasons for limiting the number of affordable housing units. Simply from a planning perspective, I would think that limiting the percentage of affordable housing in a development is a good thing to do in order to prevent the creation of affordable housing “ghettoes.” Griswold Hills Newington Ltd. P’ship v. Newington Planning & Zoning Comm’n, 16 Conn. L. Rptr. 45, 48-49 (Conn. Super. Ct. 1996).
A 5 year Capitol Region Fair Housing Compact on Affordable Housing ("Compact") was adopted by 25 of the 29 towns in the region, effective on May 23, 1990.

The Compact established a goal of creating between 4583 and 5637 new affordable housing opportunities in the region over the five years of the plan. Housing opportunities included the construction of new housing units, but also included new initiatives to facilitate the creation of more affordable housing opportunities such as the preparation of an affordable housing strategy. The 5 year summary report for the Compact, for example, gave the town of Glastonbury credit for 3 initiatives; (1) adopting new zoning regulations to allow accessory apartments; (2) establishing a Housing Partnership (a program designed to partner the state with the town to find resources for affordable housing, a recommendation of the first Commission); and (3) establishing an Affordable Housing Land Trust. Glastonbury's strategy for meeting its Compact goal was to permit the production of moderately-priced units through its existing Planned Area Development regulations, "and to pursue other initiatives as appropriate." In terms of new housing unit construction, Glastonbury received credit for adding 45 elderly affordable units and 48 family affordable units, for a total of 93 new units as of September 1995. Glastonbury fell into the group of 5 towns that had achieved between 50% and 74% of minimum Compact goals while 16 towns achieved more than had this group. Five municipalities participating in the Compact achieved less.

At the end of the 5 year Compact, the towns assessed their next step, and voted to replace the Compact's techniques of specific goals with a Regional Housing Policy which was also to remain in effect for a 5 year period. The major difference between the Compact goal-type structure, and the Housing Policy structure, is how non-directive the Policy is. Of 11 strategies for accomplishing its goal of increasing "the range of choice in housing," only 1 discusses a land use policy for each town that will "allow for a diversity of housing types and costs in all communities." The other ten strategies speak about transportation, job creation, use of federal and

73. 1988 Conn. Acts 334 (Reg. Sess.).
75. Id. at app. A-3 to A-5.
76. Id. at 4-5.
state housing subsidies, helping families move from subsidized housing to non-subsidized housing, etc.\textsuperscript{78} Nothing, in other words, looks remotely like a call to towns to drop their existing barriers to newcomers from out of town. This is a Home Rule document.

But the \textit{Christian Activities Council, Congregational} decision, discussed in the next section, found that Glastonbury's participation in the Compact was a positive action indicating that the town was not closed. Glastonbury had nearly met its compact quota for the creation of additional affordable housing units in the town despite its denial of the application at issue in that case.

V. \textbf{THE CHRISTIAN ACTIVITIES DECISION}

The Connecticut Supreme Court upheld section 8-30g in the first two appeals it heard under the Act. In \textit{West Hartford Interfaith Coalition, Inc. v. Town Council (West Hartford)}, the court held the Act applied to \textit{any} affordable housing decision by a zoning authority, despite an ambiguity in the statute about whether a rejection of an application for a zone change (as opposed to a more limited decision on the approval of a particular development project) could be appealed and the burden shifted to the town to justify its decision.\textsuperscript{79} To decide otherwise, the court held, would give a town an easy way of avoiding the statute, by zoning all land so that a zone change would be required before submitting an individual site application. A second important holding was that a zoning commission can impose and enforce conditions on all types of development approvals, clarifying a confused area of Connecticut law.\textsuperscript{80}

In \textit{Kaufman}, decided the next year, the court again sustained an appeal by an applicant because the reason given by the Town of Danbury for rejecting an application (a town water supply might become polluted) was contradicted by evidence produced before the commission by the town's own engineer.\textsuperscript{81} The court held that the "sufficient evidence" standard required by the statute was not as demanding as the usual "substantial evidence" required to support an administrative decision on an application concerning a specific site. Nonetheless, it required more than a "possibility" that the feared result would occur. \textit{Kaufman} relied on legislative history for

\textsuperscript{78} \textit{Id.} at 1-3.
\textsuperscript{79} \textit{W. Hartford Interfaith Coalition, Inc. v. Town Council (West Hartford)}, 636 A.2d 1342, 1354-55 (Conn. 1994).
\textsuperscript{80} \textit{Id.} at 1355.
\textsuperscript{81} \textit{Kaufman v. Zoning Comm'n (Danbury)}, 635 A.2d 798, 819 (Conn. 1995).
this conclusion. The House Manager for the legislation had observed that “sufficient evidence” would require “something on the record that third parties can look at in an objective manner and reach the same conclusion.”

Kaufman also spoke to the conditioning power of zoning commissions when the court dismissed Danbury’s complaint that it had no means of enforcing resale and other restrictions on affordable housing parcels. Kaufman reiterated the rule established in West Hartford Interfaith Coalition, Inc., that commissions can condition zoning approvals and specifically held that a commission can even place enforceable conditions on zone change approvals.

However, in its third Appeals Act decision, in 1999, Christian Activities Council, Congregational v. Town Council (Glastonbury), the Connecticut Supreme Court rejected a developer’s appeal from the denial by the Glastonbury Town Council of a zone change application. The application would allow the construction of 26 single-family affordable houses on a 33-acre parcel owned by the Metropolitan District Commission (“MDC”), a regional water authority in the Hartford area. The MDC also owned 546 acres of land directly across a street from the 33-acre site. All of the MDC’s land was zoned as “reserved land,” meaning that no residential development was allowed. The applicant had applied for a zone change for the smaller site to enable construction of the affordable housing “for low and moderate income minority families.” The Glastonbury Town Council exercises zoning powers in Glastonbury, but only after receiving the recommendation of the Town Planning and Zoning Commission. In Christian Activities Council, Congregational, the Commission had recommended approval of the application.

The Town Council gave several reasons for its denial of the application, including that a dangerous traffic intersection existed on the road bisecting the two MDC parcels; the 1994 Plan of Development had recommended that the town consider purchasing the MDC lands for open space; and its concern that the construction

84. 735 A.2d 231, 236 (Conn. 1999). This author co-authored an amicus brief in this case, urging a reversal of the trial court’s decision.
85. Id. at 236.
86. Id.
87. Id.
would endanger a potential future water supply source.\textsuperscript{88} The trial court held that Glastonbury had carried its burden of proof on the third reason (endangering the public water supply),\textsuperscript{89} but the Connecticut Supreme Court concluded that the town's open space protection defense was stronger.\textsuperscript{90} Neither court discussed the two reasons each court did not consider, following the traditional Connecticut zoning rule that a town's decision must be upheld even if only one of the reasons for the decision is supported by evidence in the record.\textsuperscript{91}

The positive aspect of the decision in \textit{Christian Activities Council, Congregational} is its clear support for the Blue Ribbon Commission's effort to effectively require a zoning commission to provide an affordable housing applicant with the reasons for the commission's rejection. Despite a statutory requirement that most land use regulatory agencies, including planning and zoning commissions, state the reasons for their decisions, the Connecticut courts have consistently refused to penalize a commission for failing to do so.\textsuperscript{92} If a commission fails to provide the reasons for its decision, the trial and appellate courts are obliged to search the record to determine if any basis exists for upholding the commission. Even if every reason the commission gives for its decision is illegal, the courts must still search the record, and if they find a proper reason the decision must be upheld.\textsuperscript{93} This misreading of the statute compounds the difficult task of an applicant (or neighbor) seeking to reverse a municipal decision, since the appellant cannot know the grounds on which the decision might be attacked, and the courts themselves have difficulty in reviewing commission decisions—es-

\textsuperscript{88} Id. at 237.
\textsuperscript{89} Id.
\textsuperscript{90} Id. at 248-53.
\textsuperscript{91} See TONDRO, supra note 25, at 406 n.65.
\textsuperscript{92} See id., at 474-75, n.295 for citations to the statutes requiring a statement of reasons when reviewing zone changes, historic district commission denials, variances, special permits, appeals from decisions by the zoning enforcement officer, waivers of subdivision regulations, applications for approval of subdivisions and re-subdivisions, and of coastal site plans.

\textsuperscript{93} Stankiewicz v. Zoning Bd. of Appeals (Montville), 556 A.2d 1024 (Conn. 1989) (per curiam), aff'd, 546 A.2d 919, 920-21 (Conn. App. Ct. 1988) (establishing the most extreme form of the no-reasons rule); see also, e.g., Protect Hamden/N. Haven From Excessive Traffic and Pollution, Inc. v. Planning & Zoning Comm'n (Hamden), 600 A.2d 757, 766-68 (Conn. 1991); Caserta v. Zoning Bd. of Appeals (Milford), 610 A.2d 713, 715-16 (Conn. App. Ct. 1992), appeal decided on other grounds, 626 A.2d 744 (Conn. 1993). The extent of a court's obligation is a bit muddled, however, after West Hartford Interfaith Coalition, Inc., which reiterated the pre-Stankiewicz rule and provided citations to cases with conflicting holdings. See TONDRO, supra note 25, at 475.
especially in the politically and emotionally charged area of exclusionary zoning. The court in Christian Activities Council, Congregational explicitly found that the Act required the commission “to state its reasons on the record when it denies an affordable housing land use application . . . because it will help guard against possibly pretextual denials of such applications.” But beyond the statement-of-reasons holding, Christian Activities Council, Congregational contains one narrow and cramped decision after another against the purpose of the Appeals Act, even though the Court had held that the Appeals Act was a remedial act to be liberally construed to “facilitate the much needed development of affordable housing throughout the state.”

On the other hand, an even more important holding of the case limited the area for the determination of the need (or demand) for affordable housing to the town in which the site is located. The court relied on the legislative history of the statute and the floor debates to reach this conclusion. The Blue Ribbon Commission had suggested that affordable housing needs be measured by the housing need of the region as determined by the state’s regional planning agencies, or by such other method as established by the Office of Policy and Management. Statutory precedent for a regional approach to calculating housing needs already required towns, when adopting zoning regulations, to “encourage the development of housing opportunities . . . for all residents of the municipality and the planning region in which the municipality is located.” Furthermore, Connecticut General Statutes section 8-

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95. Christian Activities Council, Congregational v. Town Council (Glastonbury), 735 A.2d 231, 239 (Conn. 1999).

96. Id. at 239 (quoting Kaufman v. Zoning Comm’n (Danbury), 653 A.2d 798, 809 (Conn. 1995)); W. Hartford Interfaith Coalition, Inc. v. Town Council (West Hartford), 636 A.2d 1342, 1349 (Conn. 1994).

97. See CONN. GEN. STAT. §§ 8-31a to 8-37b (1999) (establishing the procedure through which local regional planning agencies are formed). The State’s Office of Policy and Management has established fifteen municipal planning regions. Towns may elect to participate in the activities of the Regional Planning Agencies and nearly all have done so.

98. BRC I, supra note 4, at A-7.

99. § 8-2 (emphasis added) (Connecticut’s zoning delegation statute).
39a already defined affordable housing as housing for people whose income is equal to or less than the “area median income for the municipality in which such housing is located.” Hence the Blue Ribbon Commission’s bill as submitted to the legislature had required a consideration of “the need for affordable housing in the region.” However, the legislature omitted the italicized language from the bill in the process of adopting the legislation. The court noted that in an exchange between one of the bill’s sponsors and one of its opponents, the sponsor was asked if dropping the regional language was the same as substituting a reference to “the town in question,” to which he responded “I think that is generally the intent.”

Both West Hartford Interfaith Coalition, Inc. and Kaufman had put off deciding the town/regional issue. In Kaufman the court avoided the issue by pointing out that its decision—that the town’s reasons for rejecting the application were not supported by the evidence—meant that the town’s rejection could not be upheld regardless of whether need was measured in the town or in the region. In West Hartford Interfaith Coalition, Inc., the court avoided the issue by observing that much less than 10% of West Hartford’s housing supply was affordable, so that defining the need for affordable housing by looking only at West Hartford’s housing supply would not help the defendant town in any event. Moreover, the court held that “a local focus could severely undermine the development of low income housing because wealthy towns could claim that they have few low income residents, and consequently have little or no local need for low income housing.” This would be a particularly effective method for avoiding the application of section 8-30g, given the intensity of the economic segregation of housing patterns in Connecticut.

This holding in West Hartford Interfaith Coalition, Inc. had im-

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100. Christian Activities Council, Congregational, 735 A.2d at 249.
101. Id. at 249-50 (citing Substitute House Bill 7270).
103. W. Hartford Interfaith Coalition, Inc. v. Town Council (West Hartford), 636 A.2d 1342, 1354 n.23 (Conn. 1994). West Hartford’s percentage of affordable housing stock was 6% of its total housing stock, a little more than Glastonbury’s at the time the Christian Activities Council Congregational filed the application.
104. Id.
105. See RUSK, CITIES WITHOUT SUBURBS 114 (1995) (concluding that Connecticut is the most economically segregated state in the United States, and the ninth most racially segregated state; Hartford, New Haven and Bridgeport, Connecticut’s largest cities, are among the 21 poorest cities in the country).
plicitly set the court on the path of viewing any shortfall from the 10% rule as establishing a need for affordable housing in that town. Since Glastonbury’s number of affordable housing units fell substantially below the 10% level, it was no more necessary for the court to decide the town-regional issue in Christian Activities Council, Congregational than it had been in the prior two cases. Nonetheless the court did decide the regional-local issue “because in the present case the defendant specifically phrased its reasons for denying the plaintiff’s application in terms of ‘the availability of other parcels in town suitable for affordable housing.’”106 But no evidence was presented that such sites even existed in Glastonbury. The record showed that the members of the Town Council “had relied on their knowledge that there were other sites in town that were suitable for affordable housing,” yet there is no indication in either the trial court or Supreme Court opinions that the courts knew where these phantom sites were or whether they were in fact available for sale to an affordable housing developer.107 This uncritical acceptance of the Town Council’s unsupported assertion that other sites existed is contrary to holdings in and outside Connecticut in affordable housing cases that reject such unsupported claims.

A variation on the “other available sites” claim was made by the township in Mount Laurel II108 for example. In that case the New Jersey Supreme Court rejected the township’s claim that other newly re-zoned land was available for affordable housing, noting that the township knew that the owners of the three parcels of land involved did not want to sell, that the sites were surrounded by industrial uses, and that parts or all of the three sites were described as swampy land.109 The Second Circuit in Huntington Branch,

106. Christian Activities Council, Congregational, 735 A.2d at 249.
107. Id. at 254. In Huntington Branch, NAACP v. Town of Huntington, the Second Circuit emphasized that the town’s identical defense (“other sites are available”) was flawed because 63 of the 64 alleged sites were in fact unavailable because they were under-developed properties – i.e., they required clearing of the site in order to build the proposed housing project – and the 64th site had been declared unsuitable by HUD. 844 F.2d 926, 941 (2d Cir. 1988). In other words, the proposed alternate sites were identified and their zoning, development status, and appropriateness for affordable housing could be and were evaluated by the reviewing federal court. Id. That was not possible in Glastonbury, because the sites were never identified. Christian Activities Council, Congregational, 735 A.2d at 236-37.
109. Id. at 460-62. After its loss in Mount Laurel I, 336 A.2d 713, the township had zoned three areas for higher density housing, Id. at 460. The plaintiffs in Mount Laurel II successfully contested the town’s responses on several grounds, including the
NAACP v. Town of Huntington also refused to accept the town's argument that two alternate sites were available for the applicant's project because the town could not establish that the sites were in fact available to the affordable housing applicant.\textsuperscript{110} The lack of control over the sites meant that the town had not satisfied its obligation to refute the prima facie case of discrimination that the applicant had made.\textsuperscript{111} The Connecticut Supreme Court itself had declined to accept the town's claim in West Hartford Interfaith Coalition, Inc. that other sites existed in town, in the absence of evidence that those "other sites" met the statutory criteria of affordable housing.\textsuperscript{112} By now accepting the "other available sites" claim, particularly without requiring proof that such sites exist and are available, the court has presented towns with the perfect means for avoiding the force of section 8-30g: commission members simply have to assert that other (unspecified) sites are available, and that is the end of the appeal.

The explanation for this odd result might be the Connecticut rule in land use cases that commission members are entitled to rely on their personal knowledge of the town and its situation when making a decision, unless the matter is one for which expert knowledge is necessary (a pollution question, for instance) and in which expert testimony has been presented to support one side and not the other.\textsuperscript{113} After noting the Commission members' assertions about other sites, the court adds: "[m]oreover, the plaintiff makes no claim that there [were] no other sites in the town that are suitable for affordable housing development."\textsuperscript{114} The court thus subtly shifts back to the applicant the burden of proof (to support the "no other sites" claim that is now required) on the flimsiest of showings by the municipality: unsupported and unsworn claims by the defendant about the need for affordable housing in the town. In other words, the court has held that these phantom claims are sufficient to carry the town's burden of proof, or, the burden of proof has never really shifted despite the statute. Connecticut's judge-made rule allowing commissioners to rely on

\textsuperscript{110} 844 F.2d at 941.
\textsuperscript{111} Id. at 938.
\textsuperscript{112} W. Hartford Interfaith Coalition, Inc. v. Town Council (West Hartford), 636 A.2d 1342, 1352-53.
\textsuperscript{113} Id. at 1352.
\textsuperscript{114} Christian Activities Council, Congregational v. Town Council (Glastonbury), 735 A.2d, 231, 254.
their own knowledge unless an expert testifies to the contrary on a subject requiring expert opinion is good common sense ordinarily. But when its result, as here, is to severely weaken if not actually nullify the primary technique adopted in a remedial statute, it seems the court should prefer the legislature’s remedial course rather than blindly following the judge-made rule. The court had done just that in *West Hartford Interfaith Coalition, Inc.*, when it rejected the argument based on traditional zoning analysis that a zone change denial was not covered by the Act.115 *West Hartford Interfaith Coalition, Inc.* held that such a holding would destroy the remedial purpose of the statute by making it very easy to avoid, and accordingly declined to adopt that reasoning.116 *Christian Activities Council, Congregational* has now ensured that no affordable housing will be built in town unless the town wants it. That was the law in 1988 before section 8-30g was adopted as remedial legislation.

*Christian Activities Council, Congregational* further undermined the court’s earlier decisions on affordable housing need when it failed to explain why Glastonbury’s less than 6% affordable housing stock percentage did not bear on that problem.117 Glastonbury has not had a stellar record of concern for providing affordable housing. In 1994, at the time the application was filed in *Christian Activities Council, Congregational*, only 5.48% of Glastonbury’s housing stock was reported to be affordable.118 Glastonbury was making progress toward the so-called 10% goal and continued to do so down to the release of the *Christian Activities Council, Congregational* decision, but the point under the *West Hartford Interfaith Coalition, Inc.* and *Kaufman* cases was not whether Glastonbury was making progress, but, rather, whether it had reached the goal.119 It had not.

115. 636 A.2d at 1348-49.


118. *State of Conn., Dep’t of Hous., Affordable Housing Appeals Procedure* (unpublished, Apr. 12, 1994). At the time the Connecticut Supreme Court released its opinion in *Christian Activities Council, Congregational*, Glastonbury’s affordable housing stock was still only 6.79% of its total housing stock. *State of Conn., Dep’t of Econ. and Cmty. Dev.*, Affordable Housing Appeals Procedure (1998 files), at http://www.state.ct.us/ecd/Housing/appeals.htm (last updated Oct. 30, 2000). The first Department of Housing Report, July 9, 1990, reported that 5.3% of Glastonbury’s housing stock was affordable.

119. At the time of its losing appeal, for example, Danbury’s percentage of affordable housing stock was 9.8%. The trial court rejected Danbury’s argument that it
Instead of focusing on Glastonbury's shortfall from the 10% established in the Act, the court focused on Glastonbury's satisfaction of its obligations under the Capitol Region Housing Compact. It concluded that in 1993, a year before the plaintiffs applied for the zone change, Glastonbury had "met" 55% of its goal, "or 122 of its Compact goal of 220 affordable housing units."\textsuperscript{120} It is not clear where the court found these figures. The 1995 Annual Report of the Capitol Region's Fair Housing Compact stated that as of 1995 Glastonbury had completed only 93 affordable housing units\textsuperscript{121}—but this was as of two years after the larger 1993 figures cited in \textit{Christian Activities Council, Congregational}. The 93 units credited by the Compact's 1995 report are roughly consistent with the numbers cited in the Department of Housing's "10% list." Glastonbury's affordable housing supply in 1989 constituted 5.3% of its total housing supply and by 1994, that percentage had increased only to 5.48%, or, in absolute numbers, from 588 affordable housing units in 1989 to 650 affordable housing units at the end of 1994. There is a lot of uncertainty in the numbers, though, and the "discrepancy," if there is one, would be unimportant but for the emphasis that the court places on Glastonbury's record of achievement under the terms of the Compact.

By giving credit to Glastonbury's "good efforts" under the Compact, the court rewrote the statute to include a newly discovered incentive for towns that are trying. Towns have correctly complained that the only incentive (and a useless one at that) for towns to provide affordable housing was that even if a town made good faith efforts to satisfy a Compact objective it was protected from further section 8-30g appeals only for one year. Nonetheless, the statute \textit{does} recognize that Housing Compacts existed but gave them only a limited ability to insulate the town from section 8-30g. Why does the court "correct" that statutory omission?

As viewed by the court, then, the supply of affordable housing in Glastonbury is adequate, regardless of whether the statute's definitions are met. Instead, \textit{Christian Activities Council, Congregational} relied on Glastonbury's activity under the Capitol Region Affordable Housing Compact as a measure of Glastonbury's efforts was only .2% short of having 10% of its housing stock credited as affordable and therefore should be considered exempt from the special appeals procedure for section 8-30g cases. Kaufman v. Zoning Comm'n, No. CV92 0507929S, 1993 Conn. Super. LEXIS 2039, at *25-29 (Aug. 13, 1993).

\textsuperscript{120} \textit{Christian Activities Council, Congregational}, 735 A.2d at 254.

\textsuperscript{121} Capitol Report, \textit{supra} note 74, at app. A-5.
to provide affordable housing rather than on its record as required under the Act. 122 The court also observed that the town adopted a regulation allowing a density bonus for affordable housing within planned area development zones, although the court does not say whether that provision had ever been used, 123 and noted that Glastonbury had recently approved ten additional units of affordable housing. 124 But the court failed to notice that Glastonbury on at least one occasion had gone out of its way to stop the building of affordable housing. In that instance, Glastonbury cited numerous reasons why it denied the application, including an over-concentration of affordable housing in the town center and loss of productive farm land. Nonetheless, the town lost. So serious was the town's intent to prevent affordable housing, that it responded by buying the land itself.

That the town has an adequate supply of affordable housing is only one defense to a claim that it has violated the requirements of Section 8-30g. A second defense is that even though the demand for affordable housing is great, satisfaction of that need does not require the town to sacrifice other substantial public interests. The statute requires that the need for affordable housing be measured against any substantial public interest that would be threatened if the affordable housing proposal were approved. Protecting open space is clearly a substantial public interest, but the court does not clearly identify the open space it believed must be preserved. In Christian Activities Council, Congregational, out of a total MDC acreage of 579 contiguous acres, the affordable housing development in question would use only 20 acres, leaving 559 acres of open space after development of the site. 125 That this is inadequate open space is a bit preposterous, of course, but the court concludes that it is inadequate because the court chose to focus on the 33-acre portion of the MDC site on one side of the road bisecting the MDC lands and ignored the contiguous 500+ acres on the other side of the road. 126 The final sentence of the majority opinion insisted on viewing the 33-acre site as an island unto itself: "There was suffi-

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122. Christian Activities Council, Congregational, 735 A.2d at 254.
123. Id.
124. Id.
125. 735 A.2d 231. The specific site was 33 acres; the balance of the MDC-owned land, across the road from the site, was 546 acres, for a total of 579 acres of adjacent open space. The development would have used a cluster form, requiring only 20 acres of the 33 acres on the site, with the balance of 13 acres being dedicated as open space. Id. at 255.
126. Id.
cient evidence in the record for the defendant to have concluded that a 33.42 acre, twenty-eight unit residential subdivision, bisected by thirteen acres of open space, simply is not the same thing as 33.42 acres of open space.”127 Yet three pages earlier in the opinion, the court held that all the MDC lands had to be considered as one entity “for purposes of open space and conservation.”128

The relationship between the need for affordable housing and the protection of substantial public interests is the key to section 8-30g and to providing for affordable housing in general. As noted above, the planners primarily objected to what they viewed as section 8-30g’s unwarranted authority to override what they considered to be proper planning decisions in favor of affordable housing objectives. But such a conflict is inevitable when the pursuit of desirable policy objectives produces conflicting results in specific contexts. A specific piece of land such as that in Glastonbury cannot be used for both passive and active recreation, or for preserving historic structures in an historic district and the opening up of a new road. Nor can a 33-acre piece of land in Glastonbury be used both as open space and as a site for housing (for any income level). One of planning’s objectives is to work out the conflicts between competing choices for the allocation of scarce resources such as land. The choice made will be the product of criteria and priorities established by statute and regulations, and by the decision-maker’s judgment about the application of those criteria and priorities in the particular context. But when the planning exercise is not thought to take adequate account of one of the competing policies, its proponents have the option of looking for a political solution, as happened in 1969 in Connecticut when the legislature authorized the creation of inland wetlands agencies to protect wetlands from destruction.129 Environmentalists were concerned that local planning and zoning commissions were not adequately protecting wetlands from over-development although they had the authority to do so. As with section 8-30g, the legislature responded by taking the power to balance the competing policy interests out of the hands of planning and zoning commissions and gave it to the new inland wetlands agencies.130

Section 8-30g does provide some criteria for deciding between

127. Id.
128. Id. at 253.
130. §§ 22a-42 to -45d.
using a parcel for affordable housing, and using it to preserve a conflict­ing policy objective.131 A denial of an affordable housing application must be “necessary” in order to protect a substantial public interest;132 even so, the need to protect that substantial public interest must “clearly outweigh” the “need” for affordable housing if the denial is to be upheld.133 In order to sustain a town denial of an affordable housing application, then, this formula requires first, that the public interest be “substantial;”134 second, that it cannot be protected if the affordable housing application is granted;135 and third, that the affordable housing “need” is “clearly outweighed” by the necessity of protecting the identified public interest.136

Protecting open space is clearly a substantial public interest, but the other two legs of the test do not seem satisfied in the Glastonbury situation, contrary to the court’s conclusion. While implicitly a balance is to be struck between the town’s need for affordable housing and the protection of open space, that balance has been heavily weighted by the legislature in favor of affordable housing. The Appeals Act does not require a simple balancing of the need for affordable housing against the protection of sound planning concerns affecting public health and safety. Rather, it requires satisfaction of the affordable housing need unless the necessity for protecting open space clearly outweighs137 the need for the affordable housing. A simple balancing of equal interests was not established by the Appeals Act; rather, the legislation places a heavy thumb on the scale in favor of affordable housing. The public interest is insufficient even if it outweighs the need for affordable housing; open space must “clearly outweigh” the affordable housing need. An affordable housing application may be rejected only if “necessary”—not simply reasonably necessary—to protect the public interest. But unlike the court’s close reading of the statutory language on other issues,138 the court chose not to emphasize these

132. § 8-30g(c)(1)(B).
133. § 8-30g(c)(1)(C).
134. § 8-30g(c)(1)(B).
135. § 8-30g(c)(1)(D).
136. § 8-30g(c)(1)(C).
137. Id.
138. For example, the court placed great emphasis on the fact that the legislature had dropped the word “regional” as a qualifier when it described the “need” for affordable housing. See supra notes 97-101 and accompanying text for a discussion of the legislative history of the word “region” in the statute.
very high demands imposed on the town by the statute.139

Applying the statutory balancing criteria, the question is did the preservation of 20 acres of land out of a total of 579 acres of open space clearly outweigh the affordable housing need in a contiguous suburb of the second poorest city in the state, a suburb which has barely satisfied half of the legislative "goal" for affordable housing units? The court responded by characterizing the lost open space as the public interest that is threatened by transferring 100% of the 33 acres to the plaintiff. This ignores, however, the more than 500 acres that were part of the original parcel, and which will continue to be preserved as open space. It also ignores the fact that even if the 33-acre parcel is viewed as an island unto itself more than 50% of that parcel would remain as open space because of the proposed cluster pattern of development. Open space at this site is thus mischaracterized as a highly threatened resource.

On the other side of the balance, the court's opinion eliminates any need for affordable housing in Glastonbury. It ignores (by implicitly overruling) its earlier decisions in West Hartford Interfaith Coalition, Inc. and Kaufman on the circumstances when town or regional need is important and must be considered. It ignores its own conclusions in those cases and in Christian Activities Council, Congregational that the statute is to be interpreted to give it remedial effect. It ignores Glastonbury's failure to comply with the 10% "goal" of section 8-30g. And finally, it "amends" the Appeals Act to protect a town from an affordable housing lawsuit because the town is complying with Compact requirements which section 8-30g itself rejects as irrelevant.

Early in its opinion the court extensively discussed the meaning of the "sufficient evidence" required by section 8-30g(c)(1)(A) if the town is to carry its newly imposed burden of proof. But this discussion seems of little consequence for the outcome of the case, as is evident upon examination of the evidence relied on by the court. The court accepted as sufficient evidence testimony that the town had been considering for over 25 years the purchase of the site in question but had never gotten around to doing so.140 Yet as stated in the court's opinion, it was only after the town

139. Christian Activities Council, Congregational v. Town Council (Glastonbury), 735 A.2d 231, 244, 254 n.29.
140. In 1971, the town unsuccessfully offered to purchase from MDC the 33-acre site in question. A year later, a town committee recommended that the town buy either the entire MDC land, or at least the 33-acre site. Nothing happened, evidently, as the Town Manager recommended in 1977 that the town purchase the 33 acre site, and again
received the affordable housing application of the developer to develop 20 acres of the MDC land for affordable housing that the defendant Town Council ordered the commencement of the contingency planning called for in the 10 year old 1984 Plan of Development.141

The court examined this strangely coincidental timing of the town finally deciding to do something about the 25 year old unsatisfied recommendations of town officials, and the submission of the plaintiff's plans to build affordable housing on a small part of the tract. The Court concluded that:

the defendant [Town Council] had before it a record replete with evidence that, consistently for nearly twenty-five years, beginning at the latest in April, 1971, and continuing to March, 1994, just a few months before the defendant's hearing in this case, the town had viewed the parcel in question, along with the rest of Metropolitan [MDC] land, as particularly appropriate for open space . . . [and] that this was much more than an idle or passing thought for the town, which had planned for and on several occasions attempted to purchase the particular parcel in question for these purposes, or encouraged the state to do so as part of a regional plan.142

The "several occasions" in fact total one instance of an offer to purchase, and one other instance when the town sought to persuade the state to purchase the land.

Municipal decisions to purchase land are not lightly made, of course, so the town's delay in getting around to even studying how to acquire all or part of the MDC land is not surprising. What is bothersome, however, is that the town finally decided to act imme-

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141. The application by the Christian Activities Council, Congregational was submitted to the town on February 3, 1994; the Town Council finally ordered the long called for contingency planning "early in March 1994." Id. at 251. The Court summarizes the efforts of the town to designate the land as public open space, or to acquire it. Id. at 251-53. Compare the Massachusetts Supreme Court's rejection of a town's attempt to condemn land on which a developer had proposed to build affordable housing—the town claimed that the purpose of the condemnation was to provide parks and recreation facilities. Pheasant Ridge Assocs. Ltd. P'ship v. Burlington, 506 N.E.2d 1152, 1156-58 (Mass. 1987).

142. Christian Activities Council, Congregational, 735 A.2d at 253 (emphasis added).
Immediately after it discovered the plaintiff was proposing to build affordable housing on the small 33-acre parcel across the road from the 500+ acres that comprised the vast majority of MDC land. Lest some towns get the wrong idea about what seems to be another easy way to avoid the impact of section 8-30g, the court did emphasize the "long history" of the town's interest in the 33-acre site for open space, which "precludes any possible inference of pretext on the part of the town." Perhaps. The voters in North Haven might be struck by the ease with which Glastonbury was able to gain control over open space without paying a penny. North Haven, like Glastonbury, had also long marked a particular parcel to be used for open space and recreational purposes. The town board of selectmen voted to acquire or condemn the land only after a developer had applied for approval of an affordable housing project for the site. Interestingly, North Haven had to pay just compensation for its condemnation of privately owned land to create public open space. Glastonbury got its open space for free.

Finally, *Christian Activities Council, Congregational* ignores the provision in Connecticut's zoning enabling statute which provides that:

Such [zoning] regulations *shall* also encourage the development of housing opportunities, including opportunities for multifamily dwellings, consistent with soil types, terrain and infrastructure capacity, for all residents of the municipality and the planning region in which the municipality is located . . . . Such regulations shall also 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 housing plan prepared pursuant to section 8-37t and in the housing component and the other components of the state plan of conservation and

143. See *supra* notes 111-12 and *infra* notes 182-85 and accompanying text for a discussion of ways of avoiding the force of section 8-30g.

144. *Christian Activities Council, Congregational*, 735 A.2d at 253.


146. *Id.*

147. *Id.* at 348. The Connecticut Supreme Court has recently accepted certiorari in another case where the town condemned land that was the subject of an affordable housing appeal. This case is *Avalonbay Communities, Inc. v. Town of Orange*, No. 99065826, 2000 WL 226374 (Conn. Super. Ct. Feb. 9, 2000), and the Supreme Court docket number is 16352.
development prepared pursuant to section 16a-26.148

The Court's decision in *Christian Activities Council, Congregational* ignored, if it did not actually nullify, that legislative mandate as well.

The Act as thus interpreted is hardly the revolutionary dragon feared by some legislators when the statute was adopted 10 years ago, nor the statute that since its enactment has annually been the focus of major struggles for repeal or amendment. Nor is it a statute that was still so controversial in the spring of 1999 that the forces of repeal forced the supporters of the Appeals Act to agree to establish a new commission to examine its workings and to recommend necessary changes.149

VI. THE SECOND BLUE RIBBON COMMISSION REPORT AND THE LEGISLATURE'S RESPONSE

Supporters of affordable housing development in Connecticut put the best face on the Report of BRC II and the legislation that resulted,150 but it is clear that the *Christian Activities Council, Congregational* decision has severely crippled the affordable housing effort in Connecticut, and that the year 2000 affordable housing amendments have redirected its course. The legislation increases the percentage of units that must be affordable in order for a development to qualify as an affordable housing development protected by section 8-30g. In what the legislation now formally terms "set-aside affordable housing developments" (those not receiving governmental assistance), 30% of the units must be affordable, and they must remain affordable for 40 years.151


149. Senator Eric Coleman, a supporter of section 8-30g and co-chair of the second Blue Ribbon Commission, said later that every year so much legislative time had to be devoted to debating the numerous proposed amendments to section 8-30g that not enough time remained to properly consider other housing legislation; normal legislative business was being "held hostage" to the revision or repeal of section 8-30g. Eric D. Coleman, Introductory Remarks at Understanding the Amendments to Connecticut's Affordable Housing Statute Conference, New Britain, Conn. (Sept. 8, 2000).

150. See Connecticut Housing Coalition, Housing Highlights of the 2000 Legislative Session (n.d.) (on file with author). "The compromise forged by the Blue Ribbon Commission experienced some further compromise during the legislative process, but the final version was supported by the Coalition and other advocates, and adopted the final night of the session. . . . The House defeated an amendment to totally repeal the Affordable Housing Appeals Procedure by an encouragingly strong vote of 92-48." *Id.*

While assisted housing—housing which does receive governmental financial assistance—can continue to use the section 8-30g procedure as before, under the new legislation private developers must rent or sell a higher percentage of their units at below market prices, meaning that the prices of the market rate units will have to go up to cover the increased internal subsidy required.\textsuperscript{152} The rhetoric of the proponents of this change is that it will increase the amount of truly affordable housing that is built. The contrary is more likely to be true, as for-profit developers—the key\textsuperscript{153} to providing affordable housing other than in a form akin to the much detested public housing—are less likely to participate. The 40-year requirement compounds the problem for the for-profit developer without a government subsidy; for example, planners assume the average life of a residential house is only 20 years.

Two new forms are now required to take advantage of section 8-30g. The affordable housing developer must submit an “Affordability Plan” and a “Conceptual Site Plan.” The Affordability Plan is a new idea, and appears to be part of the new and broader view that the purpose of section 8-30g is to facilitate the provision of more very low-cost publicly supported housing. The Commissioner of Economic and Community Development is to issue regulations on Affordability Plans, which will include a formula on how to determine rent levels and sale prices, how to equate family size and maximum rental and sale prices for affordable housing, etc. The Affordability Plan must also include the designation of the person or entity that will be responsible for ensuring that the income limits set by the statute are complied with over the 40 year period (if they are enforced by covenants in the deeds) as well as any other restrictions required by section 8-30g; the sequence in which the affordable and market rate units will be built in the case of a set-aside project; and draft zoning regulations, covenants, deeds, and other documents intended to impose the income restrictions required by the Appeals Act.\textsuperscript{154}

\textsuperscript{152} See \textit{supra} note 72 for a discussion of the cross-subsidy mechanism.

\textsuperscript{153} See \textit{supra} notes 50-51 and accompanying text for a discussion of the relative importance of for-profit and non-profit developers in building affordable housing.

\textsuperscript{154} See 2000 Conn. Acts at 963 (providing the definition of an “Affordability Plan,” under new section 8-30g(b)(1)(E), which requires submission of “draft zoning regulations, conditions of approvals, deeds, restrictive covenants or lease provisions that will govern affordable dwelling units”).
It is hard to evaluate the significance of the new statutory permission for towns to require the submission of a Conceptual Site Plan as part of an application to change a zone to allow construction of affordable housing on a site. Since 1977, section 8-30(g) of the Connecticut Statutes has authorized towns to require the submission of conceptual site plans to aid the commission in determining the conformity of any proposed building with the zoning regulations, so long as that requirement was stated in the town’s regulations. Five years ago *Kaufman v. Zoning Commission of Danbury* specifically held that section 8-30(g) applies to zone change requests as well as to other zoning permit applications, if the requirement is in the town’s regulations. Danbury’s regulations did not require such a submission so it could not rely on the applicant’s failure to submit a site plan as a justification for rejection of the developer’s proposal. In any event, the section 8-30g amendment adds explicit permission to require submission of a Conceptual Site Plan as part of a zoning amendment request if that application would permit the construction of affordable housing. The amendment is a recognition that for some time we in fact have used zone changes to regulate individual parcels contrary to fundamental zoning assumptions such as the uniformity rule.

The new amendment to section 8-30g on site plans is confusing, however, because it does not at first glance appear to change the law at all. Both *Kaufman* and the amendment permit a zoning commission to require a site plan in connection with a request for a zone change, and both *Kaufman* and the amendment permit a commission to impose that requirement only if that requirement is in the town’s regulations. What is new is that the section 8-30g amendment limits what may be required in the site plan submitted with a zone change application to allow the building of an affordable housing project, whereas *Kaufman* did not place any restrictions on the information that could be required to be submitted as part of a site plan.

The new amendment limits the information to be collected to “the proposed development’s total number of residential units and

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155. New section 8-30g(c) authorizes commissions, if they wish, to require submission of Conceptual Site Plans of applicants for a zone change that would allow construction of an affordable housing development.

156. 653 A.2d 798, 805 (“[Z]oning commissions may require the submission of site plans for all zone change applications . . . .”) (emphasis added).

157. See id. (stating that the Commission conceded that the plaintiff’s application was sufficient without site plans).
their arrangement on the property and the proposed development’s roads and traffic circulation, sewage disposal and water supply.”158 These may be the core of a conceptual site plan, but site plans as used in Connecticut, and as authorized in Kaufman, have required much more.159 The new amendment in effect prohibits requiring such additional information when applying for a zone change to construct affordable housing. This provides significant protection for an affordable housing application being heard by an unsympathetic commission endlessly demanding more information—a procedure which significantly increases the start up costs that must be incurred before the developer knows whether an approval is even possible.

On the other hand, two of the members of the Second Blue Ribbon Commission, speaking at a Connecticut Bar Association sponsored conference discussing the amendments to section 8-30g, managed to expand the definition of what might “logically” be required in the Conceptual Site Plan. According to them, such plans should include, for example, improvements to off-site traffic patterns; “[t]opographical information on existing and final grades . . . and estimated amount of blasting;” location of wetlands, streams, and proposed utility lines; location of pedestrian walks; floor plans of all units proposed; report on existing and proposed storm water distribution, including the capability of off-site drainage facilities; an analysis that assures that remaining sewer line capacity after development would be sufficient to accommodate a reasonable build out under the town’s plan of development, etc.160 One superior court decision provides the justification for much of this imposing list.161 All of this information and more is justifiably required before the commission approves an application, of course. But the statute simply requires a “Conceptual” Site Plan. To transform this into the expensive generation of information suggested when the initial ap-

158. 2000 Conn. Acts at 964 (new § 8-30g(c)).
159. For an example of a conceptual site plan regulation requiring more, see the site plan regulation for Fairfield, Connecticut, quoted in SSM Associates Ltd. Partnership v. Plan & Zoning Commission, 545 A.2d 602, 604 n.4 (Conn. App. Ct. 1988), aff’d, 559 A.2d 196 (Conn. 1989) (stating that the site plan required information on the proposal’s impact on, inter alia, the “appearance and beauty of the community”).
160. Richard Redness & Diane Fox, Conceptual Site Plans under the Amended Statute, in Understanding the Amendments of the Connecticut Affordable Housing Statute (Sept. 8, 2000) (unpublished manuscript at 94-95) (on file with author).
plication for a zone change is made—unless that zone change is the only approval the developer needs in order to commence construction—is to impose a significant burden on an affordable housing developer before there is any indication as to whether the idea is remotely acceptable. The requirement is even more suspect when it is not imposed on market rate construction.

The other major change adopted by the Second Blue Ribbon Commission was the creation of a limited moratorium procedure to shield towns from section 8-30g lawsuits if they are in fact approving affordable housing projects, even though the percentage of affordable housing units in the town is less than 10% of the town’s housing stock. The original version of section 8-30g included a 1-year moratorium for towns participating in an affordable housing compact, but this provided no incentive to a town that was attempting to increase its amount of affordable housing.\textsuperscript{162} For example, using the old moratorium’s formula and applying it to Glastonbury’s housing stock numbers for the year 2000, 125 units of affordable housing would have to be added to its housing stock for it to gain a 1 year exemption, after which it would become subject to section 8-30g lawsuits again. That is a very large number of new units to be added to the housing stock of a town the size of Glastonbury in 1 year.

The new moratorium provision increases the length of the moratorium on section 8-30g lawsuits to 3 years, a more realistic period of time in which to demand a significant increase in affordable housing stock if the moratorium is to continue.\textsuperscript{163} To be entitled to the moratorium, the Commissioner of Economic and Community Development must issue a certification of completion for a certain number of affordable housing units.\textsuperscript{164} The number is arrived at by a complicated point formula that provides differing point levels based on whether the unit is owned or rented, whether the rent or payment levels are appropriate for persons earning 80\% or 60\% of the area’s median income, or whether the unit is a market rate unit in an affordable housing development.\textsuperscript{165} Units of housing built since the effective date of section 8-30g are counted in the point accumulations, providing a sort of \textit{ex post facto} reward for those towns that did allow the construction of affordable housing during

\textsuperscript{162} \textit{Conn. Gen. Stat.} § 8-30g(g) (1999).
\textsuperscript{163} 2000 \textit{Conn. Acts} at 967.
\textsuperscript{164} \textit{Id.}
\textsuperscript{165} \textit{Id.} at 967-68.
the last 10 years even though no effective reward then existed for doing so.\textsuperscript{166} The town is not shielded from section 8-30g lawsuits, however, if the rejected application is for an affordable housing development in which the affordable units are government-assisted, and either there are 40 or fewer dwelling units (market rate or assisted), or 95\% of the units are restricted to persons whose income is 60\% or less of the area's median income.\textsuperscript{167}

The Commission was successful in reversing the unfortunate holding in \textit{Christian Activities Council, Congregational} that the "sufficient evidence" standard required specifically in section 8-30g(c)(1)(A), also applies by implication to subsections (B), (C), and (D) which do not specify any evidentiary standard.\textsuperscript{168} A sufficient evidence standard requires less from the commission, which carries the burden of supporting its decision, than would the more usual preponderance of the evidence standard. The plaintiff in \textit{Christian Activities Council, Congregational} argued that subsections (B), (C), and (D) require the town to carry its burden by a preponderance of the evidence, since that is the traditional standard.\textsuperscript{169} The court disagreed, finding that by close textual analysis it could be seen that all four sections were interrelated and hence the lesser "sufficient evidence" standard applied in all four instances.\textsuperscript{170} The \textit{Christian Activities Council, Congregational} interpretation leads to the anomalous situation in which a remedial statute designed to increase the amount of affordable housing ends up requiring a less demanding standard of judicial review of a commission's adverse decision than is presently required for similar land use decisions \textit{not} involving affordable housing.\textsuperscript{171} The Blue Ribbon Commission recommended the reversal of that interpretation, and the legislature agreed; a period was placed at the end of section 8-30g(c)(1)(A) replacing the semicolon in the original legislation, to emphasize that the sufficient evidence standard does not apply to subsections

\begin{itemize}
\item \textsuperscript{166} \textit{Id.}
\item \textsuperscript{167} \textit{Id.} For a clear example of how the point calculations are to be made see Raphael Podolsky & Brian Miller, Moratorium Eligibility Under P.A. 00-206, \textit{in} Understanding the Amendments of Connecticut's Affordable Housing Statute, \textit{supra} note 162 (manuscript at 175).
\item \textsuperscript{168} \textit{Christian Activities Council, Congregational v. Town Council}, 735 A.2d 231, 239-46 (Conn. 1999).
\item \textsuperscript{169} \textit{Id.} at 239-40.
\item \textsuperscript{170} \textit{Id.}
\item \textsuperscript{171} \textit{BRC II, supra} note 11, at 12, 29 (recommending a clarification of the judicial review standard and discussing the significance of this recommendation by the proposing subcommittee).
\end{itemize}
A potential problem remains, however, since the legislature refused to adopt the second Blue Ribbon Commission Report’s recommendation number 7, which would have modified “need” in section 8-30g(c)(1)(C) of the Connecticut General Statutes so that the need would be determined regionally rather than locally or statewide. The Commission’s change would have reversed the holding in Christian Activities Council, Congregational that the undefined word “need” meant local or municipal need. Members of the second Blue Ribbon Commission decided not to press for the addition of the word “regional,” however, since the Connecticut zoning statutes already required a regional focus for land use decisions. Section 8-2 requires zoning regulations to “encourage the development of housing opportunities . . . for all residents of the municipality and the planning region in which the municipality is located.” Identical language is in section 8-23, concerning the town’s plan of conservation and development which section 8-2 in turn requires a zoning commission to consider when it adopts zoning regulations. Thus, satisfaction of the region’s housing needs is already required of Connecticut towns, contrary to the narrow interpretation of “need” in Christian Activities Council, Congregational.

VII. CRITIQUE OF SECTION 8-30g

Several shortcomings in the Appeals Act became apparent during the decade after its initial enactment. None were successfully addressed by the second Blue Ribbon Commission, because it is not easy to determine how to resolve these difficulties.

First, we did not consider how to limit a town’s ability to block affordable housing proposals by refusing to supply the necessary infrastructure for an affordable housing development. Without public sewers, for example, at least an acre of land is required for each dwelling unit; with public sewers, the density limitation becomes unimportant and the cost of housing units drops. The Appeals Act does not apply to appeals from local water and sewer

173. CONN. GEN. STAT. § 8-30g(c)(1)(C) (1999) (providing that “such public interests clearly outweigh the need for affordable housing”).
174. BRC II, supra note 11, at 10.
175. CONN. GEN. STAT. § 8-2(a) (1999).
176. § 8-23(a).
commissions. In fact, it is well established that decisions of water and sewer commissions are virtually unappealable. Moreover, Connecticut passed a "sewer avoidance law" in the 1970s, which encourages towns to avoid building sewers because of the increased population densities and concomitant environmental problems that seemed likely to follow.

Second, we did not figure out how to deal with neighbors. They have intervened in several of the court cases, in at least one of which the town and developer had already agreed to a much-negotiated plan only to have the neighbors object. Neighbors can often win simply by delaying a project.

Third, eminent domain has turned out to be an unassailable technique for defeating an affordable housing development. At least 5 towns have now used eminent domain to condemn a site that is the subject of an affordable housing application. This is a costly defense of a town's "right" to exclude the poor, but it does work and until recently has been judicially approved.

Fourth, expert testimony (i.e., the development would pollute groundwater at the proposed location) will be the primary means by which a town can carry its burden of proving that its rejection of an application was not pretextual. It is quite surprising, therefore, to see how casually towns have defended their decisions on points that they probably could have carried if they had brought in an expert on their side. The Connecticut rule provides that the commission can believe or disbelieve an expert if it wishes, but it can only reject an application that is supported by expert testimony by relying on experts who support an opposing view. For a relatively small expenditure, a town could hire an expert to appear before the

177. See Archambault v. Water Pollution Control Auth., 523 A.2d 931, 933-34 (Conn. App. Ct. 1987) (applying a legislative standard for review of WPCA decisions on the extension of sewers, and holding that the municipality has discretion to decide where sewers will and will not go, subject to judicial review only for "fraud, oppression, or arbitrary action"). See generally Lord, Sewers and Growth Control (1996) (unpublished paper) (on file with author).

178. CONN. GEN. STAT. § 7-245 to 7-250 (1999).


181. E.g., Huck v. Inland Wetlands & Watercourses Agency (Greenwich), 525 A.2d 940, 948-49 (Conn. 1987).
commission to provide support for its view and would have an excellent chance of winning any appeal if one is taken.

Fifth, the FHA will not insure any mortgage for a property that is subject to resale restrictions, such as a limitation on a unit’s resale price. Yet, without being able to impose a resale restriction on the developer and its tenants or buyers, a town probably cannot ensure that any density bonus it gives the affordable housing developer will not make its way into the developer’s pocket (as it might if the developer were free to rent or sell the affordable housing units at full market price). HUD has, in effect, given towns a very simple means of stopping affordable housing proposals; the town simply requires a resale restriction, and the developer cannot get insurance from HUD. Some developers have persuaded banks to forego HUD insurance by observing that funding for affordable housing will look good on Community Reinvestment Act reports. There may be other strategies, but, when pressed, HUD reportedly insists that its policy must prevail.

Finally, some “carrots” were provided in the first Blue Ribbon Commission Report—primarily economic incentives. These were all underfunded or not funded at all. In addition, however, we should have added other rewards for encouraging affordable housing—most obviously exempting towns from the reach of the Appeals Act if they are actively complying with an acceptable affordable housing development plan like the first Capitol Region Housing Compact. The exemption should be finely tuned to take into account the number of units approved, for example, and the degree to which that approval increased the town’s supply of affordable housing.

**Conclusion**

Connecticut seems to have accepted the Appeals Act’s creation of an enforceable obligation on towns to consider affordable housing applications as a separate class of applications which cannot be rejected for the usual reasons. This is a sea-change from 10 years ago, when nearly half the legislators voted against the adoption of section 8-30g even when it was part of a package with exten-

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182. See 24 C.F.R. § 203.41(b) (2000) for the U.S. Department of Housing and Urban Development policy against restrictions on the use of properties that the federal government insures through the FHA.

183. See 12 U.S.C. § 2906(a) (1994) (requiring banks to file reports on the amount of loans they have made to the communities in which their branches are located).
sive (though, as it turned out, never fulfilled) commitments to provide funding and bonuses to towns that approved affordable housing projects. Moreover, the legislature did not attempt to override the part of the Supreme Court's decision in *Christian Activities Council, Congregational* that changed the entrenched rule that commissions did not have to give reasons for their decisions (as long as a court reviewing the case could find evidence to support the decision). That will go a long way toward leveling the field on which the applicant and commission are playing.

At the same time, the Appeals Act has been transformed. When adopted 10 years ago, the primary thrust of the Appeals Act was to reduce housing costs at the lower end of the income scale. We attempted to reduce the delays in municipal approval procedures that increased housing costs; we added a technique—the builder's remedy—that allowed a pecuniarily interested party to challenge a dilatory commission or a commission that was otherwise hostile to the building of affordable housing in its town; we provided a procedure whereby towns and developers could negotiate to accommodate each other's interests; and we did not demand much from the town—an affordable housing project could be turned down for *any* sound planning reason that rested on facts established in the decisional record. We did not establish any new governmental agency as both Massachusetts and New Jersey had done, nor did we increase the paperwork required to process an affordable housing application as New Jersey had done.

The Appeals Act as amended in 2000 changes the focus from reducing housing costs to increasing the number of the truly poor who will benefit from the Appeals Act's appeals procedure. The old Appeals Act could be satisfied with a minimum number of low-income housing units, and these were usually only affordable to the very upper end of lower-income people. No unit needed to be designed to sell or rent to persons with incomes below 80% of the area median income. Now at least 15% of the residents of a set-aside affordable housing development (a development built without governmental financial assistance) must have incomes not exceeding 60% of the area's median income.184 This downward shift in the income level of the population benefiting from the Appeals Act is good, of course, but the Appeals Act now encourages development of housing that is more like that built under the nearly defunct pub-

lic housing program, rather than a mechanism for reducing housing costs at the lower (not lowest) end of the income spectrum.

A major consequence of the increased subsidy that becomes necessary to provide housing for the very poor is that the subsidy can no longer be provided very easily by cross-subsidies from the market rate units in an affordable housing development. Builders seeking to use the Act will be much more dependent on securing governmental subsidies to make up the difference between what the tenants can pay and what the housing actually costs. With that greater dependency comes more forms and paperwork—and in fact, the forms and paperwork and calculations necessary to qualify a project as affordable have been built into the Act itself, even if governmental subsidies are not sought. The new paperwork requirements include a Conceptual Site Plan,185 which must be submitted with the initial application for a zone change; an Affordability Plan;186 a calculation of points a municipality has earned toward a moratorium on the ability of developers to invoke the section 8-30g procedure (certain applications are excepted);187 and an Affirmative Fair Housing Marketing Plan.188

Some of these additional requirements are designed to establish greater protection for interests intended to be protected by the original Appeals Act. That act did implicitly have a goal of racially and economically integrating the suburbs.189 That goal is explicit in the new Fair Housing Marketing Plan requirement, in the lowering of the income of the targeted population and the accompanying income certifications required to ensure that the lowered income levels are met, as well as in the requirement for the preparation of the Affordability Plan.190 Nonetheless, the increased paperwork will increase housing costs and will discourage private initiatives for affordable housing development. The Second Blue Ribbon Commission recognized that the increased number of units that must be provided to persons earning only 60% of the area income, and the increased percentage of units that had to be set-aside as affordable (from 25% to 30%), might actually reduce the number of low-in-

185. Id. at 964.
186. Id. at 963.
187. Id. at 967.
188. Id. at 963.
189. Phillip Tegeler, The Affirmative Fair Housing Marketing Plan, in Understanding the Amendments of the Connecticut Affordable Housing Statute, supra note 162 (manuscript at 131-36).
come units produced: "[i]t is possible that the cumulative changes proposed to make even more of the housing proposed under the statute affordable, may prove to be a disincentive to private developers." Nonetheless, the Commission adopted these heightened requirements because "the benefits of providing additional units for lower income households was determined to outweigh the risk."192

Some of the members of the first Blue Ribbon Commission had hoped that section 8-30g would provide a framework within which developers and commissions could find a way to work out their differences over affordable housing applications without resorting to the expense and delay of litigation.193 We expected that if we constrained the town’s ability to stonewall an affordable housing application, an affordable housing developer could be enticed into making compromises of its own to respond to the town’s stated problems with the application. All we did was to require the town to give good planning reasons for its decision, so that the developer could respond to those reasons (if possible to do so). We emphasized the importance of negotiations, by entitling the developer to resubmit a disapproved application with changes, and have that resubmitted application placed on a fast track to approval, or disapproval followed by judicial review. We thought that simply requiring the town to state a good planning reason would reduce the volatility and knee-jerk reactions toward affordable housing proposals.

We were naïve. When Danbury’s application rejection was reversed by the Supreme Court because the town’s reasons were disputed by the uncontradicted testimony of the town engineer (testifying for the town), Danbury’s Planning Director complained that section 8-30g was “written by people who don’t understand zoning.”194 Was he saying that zoning is understood as doing whatever the town wants regardless of the law or of rules of evidence? Moreover, one would think that a statute that reinforced the need for town commissions to produce decisions anchored in good planning practices would cheer anyone interested in strengthening planning as a fundamental part of zoning. Instead, more than a few planners complained that requiring the town to give good

191. BRC II, supra note 11, at 23-24.
192. Id.
193. BRC I, supra note 4, at 11-12.
planning reasons for its decisions forced the town to give up all control over how town land was used.

Section 8-30g began as an effort to simplify the zoning procedures governing affordable housing development applications and to encourage developers and commissions to negotiate more and litigate less. The biggest breakthrough has been the adoption by the Connecticut Supreme Court of the rule that land use commissions must state the reasons for their decisions. This requirement will not simplify the application process for affordable housing developments, but it will remove a significant part of a town's ability to turn down affordable housing developments for improper reasons. This should encourage commissions to negotiate more with developers, which should shorten the time necessary to produce affordable housing projects. This should in turn reduce the cost of producing affordable housing.

On the other hand, the Supreme Court has sanctioned the use of unsupported assertions as "reasons" for rejecting affordable housing projects. The second Blue Ribbon Commission has increased the complexity of the reviews required for affordable housing projects, so that instead of simplifying these applications we have burdened them even more than before. The statute's attempt to reduce the level of government intrusion into property law claims has gone in the other direction. Even though the 1980s was in general a period of increasing interest in reducing the level of government intrusion in our lives, that greater acceptance of free market solutions did not extend to zoning and planning law. That law evidently strikes too close to home for us to want to take the risks of less regulation. We want assurance that the regulators will be our friends and neighbors.