DOCKET NO. HHD-CV22-6164019-S	:	SUPERIOR COURT
TOWN OF NEW CANAAN	:	J.D. OF HARTFORD
V.	:	LAND USE LITIGATION DOCKET
STATE OF CONNECTICUT DEPARTMENT OF HOUSING	:	FEBRUARY 24, 2023

PLAINTIFF'S OBJECTION TO DEFENDANT'S MOTION TO DISMISS

The Plaintiff, the Town of New Canaan ("Town"), objects to the Motion to Dismiss filed the Defendant, State of Connecticut Department of Housing ("DOH"), dated January 27, 2023 (Entry # 109.00).

As the Town has anticipated may occur, DOH has moved to dismiss this appeal based upon a highly technical argument that misconstrues the wording of the Uniform Administrative Procedures Act (the "UAPA") to a nonsensical result. DOH would ultimately have this Court believe that there is zero allowance under Connecticut law for a direct appeal from a decision of DOH on an affordable housing "moratorium" application filed by a municipality pursuant to C.G.S. § 8-30g. That position flies in the face of the intended purpose of the UAPA – to allow aggrieved parties timely recourse from faulty decisions of state administrative agencies. *See McDermott v. Comm'r of Children & Youth Services*, 168 Conn. 435, 441 (1975). Because here, there are multiple reasons why DOH acted illegally when it denied the Town's moratorium application in October of 2022. A fair and balanced assessment of the law confirms the Court's jurisdiction to consider the present appeal.

What must be acknowledged at the outset is that the moratorium process under C.G.S. § 8-30g indeed results in a decision by a state agency that has years-long ramifications on municipalities and taxpayers. Section 8-30g does not provide any independent cause of action to appeal

that decision to court, so municipalities are left with the UAPA for recourse – an Act first enacted 17 years prior to § 8-30g.

The Town brought this appeal pursuant to Section 4-183 of the UAPA, entitled "Appeal to Superior Court." It provides two grounds for appeal from state agency action, both of which provide the Court with jurisdiction over this appeal. The first is set forth in subsection (a):

> A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision may appeal to the Superior Court as provided in this section. The filing of a petition for reconsideration is not a prerequisite to the filing of such an appeal.

First, neither § 8-30g nor the UAPA obligate the Town to seek any further administrative remedies after the moratorium denial by DOH. On October 18, 2022, DOH issued its decision denying the Town's moratorium application. The Town believed, and still believes, that the basis for denial – that § 8-30g prohibits consideration of affordable units completed prior to when a moratorium has begun – violated the law and past practice of DOH. Attempts by the Town to informally discuss the decision with DOH officials were rejected. Despite the express exclusion in § 4-183(a) as a prerequisite for appeal, the Town nonetheless filed a Petition for Reconsideration with DOH on November 2, 2022, within the period of time allotted under C.G.S. § 4-181a. This was an attempt to avoid litigation. On November 9, 2022, DOH declined to reconsider.[1] (Exhibit A). The first prong of Section 4-183(a) has been satisfied.

Next, although it is true that an appeal under this section is predicated on a party being aggrieved by a "final decision" by the state agency, any distinction between a "final decision" under the UAPA and the decision rendered by DOH here cuts against the legislature's motivation

[1] Consistent with its position in this appeal, the Town filed the Petition with DOH on the belief that the October 2022 moratorium denial was a final decision subject to reconsideration. Consistent with its positions in this appeal, DOH disagreed.

behind the UAPA. DOH's entire argument for dismissal relies on the definition of "final decision" as "the agency determination in a contested case," and in turn the definition of "contested case" as one where a determination is made after a hearing. So, as DOH claims, because a hearing was not held as part of the Town's moratorium review process, there was no contested case, and therefore the denial was not a final decision, and therefore there is no right to appeal under Section 4-183. But that argument misconstrues the law and the facts, and none of the cases cited by DOH address this unique moratorium situation.

Under the UAPA, a contested case "means a proceeding… in which the legal rights, duties or privileges of a party are required by state statute or regulation to be determined by an agency after an opportunity for hearing or in which a hearing is in fact held." As pointed out by DOH in its brief, the 8-30g regulations do in fact obligate the town to participate in a hearing when a petition has been received with only 25 signatures Although this would not be a hearing physically held before DOH, all comments and any changes to the Town's moratorium application as a result of the hearing would be provided to DOH for consideration as part of the application. Regs, Conn. State Agencies § 8-30g-6(j). The Town has opportunity during this hearing to support why it believes it is eligible for a moratorium and to respond to any opposition. The right of the public to call for this hearing should create a contested case under the UAPA.

But even further, the § 8-30g regulations provide for ongoing interaction between the Town and DOH during the pendency of a moratorium application. Regs, Conn. State Agencies § 8-30g-6(j). DOH will ask questions and request additional information, and the Town will provide answers and details. If DOH raises a legal concern, the Town has an opportunity to respond. Similarly, once DOH verifies that it has all the information it needs to process an application, it will publish notice of receipt, make the entire application available to the public, and

accept public comments for 30 days. Nothing precludes the Town from submitting further public comment during this period of time. So again, this is an interactive hearing scenario that the Town is party to. Under the UAPA, the moratorium decision-making process should be considered a contested case and the October denial a final decision.

Even if this Court finds that the underlying facts did not constitute a contested case and that there was no final decision giving rise to the Court's jurisdiction under Section 4-183(a), the Court still retains jurisdiction under subsection (b). The section provides that:

> A person may appeal a preliminary, procedural or intermediate agency action or ruling to the Superior Court if (1) it appears likely that the person will otherwise qualify under this chapter to appeal from the final agency action or ruling and (2) postponement of the appeal would result in an inadequate remedy.

Here, if the October 2022 denial by DOH is not a final decision, it can only be "a preliminary, procedural or intermediate agency action or ruling," which satisfies the first prong of the Section 4-183(b). Next, the Town has utilized Section 4-181a of the UAPA to file a Petition for Declaratory Ruling with DOH challenging the moratorium decision, and DOH has agreed to respond. (Exhibit B). That response will undisputedly constitute a final decision subject to direct appeal under § 4-183 independent of this one, as final decisions are expressly defined to include declaratory rulings issued by DOH. C.G.S. § 4-166(5). This fulfills the second prong of § 4-183(b) because that future DOH ruling constitutes a final decision clearly subject to appeal that results directly from the moratorium decision-making process employed here.

Most importantly, postponement of this appeal until DOH issues a declaratory ruling is wholly inadequate – as of October of 2022, the Town should have been granted a benefit that the legislature established long ago, for good reason. Yet time continues to pass, the Town has no

moratorium, and there is no indication whatsoever that DOH will issue a Declaratory Ruling favorable to the Town. In fact, DOH has advised that it will render its ruling by May 19, 2023 – just two weeks shy of the maximum six-month statutory deadline. The Court retains jurisdiction under § 4-183(b) as well.

While the specific language of the moratorium decision-making process under § 8-30g may not align precisely with the structure for appeal outlined by the UAPA, here, the underlying facts are analogous to those intended to give rise to judicial review of a state agency decision under § 4-183. It is nonsensical and wasteful that the legislature would preclude the Court's direct review of a DOH decision on a moratorium, as DOH argues, and instead provide the aggrieved municipality with a convoluted opportunity for the same relief by (1) filing a petition for a declaratory ruling with DOH contesting the legal basis for its decision, (2) awaiting a response that will take six months, and then (3) directly appealing that response to Court. For these reasons, the Court retains jurisdiction over this appeal and the Motion to Dismiss should be denied.

THE PLAINTIFF
TOWN OF NEW CANAAN

By:_____

Nicholas R. Bamonte, Esq.
Berchem Moses, P.C.
1221 Post Road East
Westport, CT 06880
Juris No.: 065850
Tel. 203-227-9545
nbamonte@berchemmoses.com

CERTIFICATION

I hereby certify that a copy of the above was mailed or electronically delivered on the above date, to all counsel and self-represented partied of record and that written consent for electronic delivery was received from all counsel and self-represented parties of record who were electronically served, to wit:

Anthony C. Famiglietti
Assistant Attorney General
165 Capitol Avenue
Hartford, CT 06141-0120
Anthony.Famiglietti@ct.gov

Timothy Hollister
Hinckley Allen & Snyder, LLP
20 Church Street,
18th Floor Hartford, CT 06103
thollister@hinckleyallen.com

Christopher Smith
Alter & Pearson, LLC
701 Hebron Avenue
P.O. Box 1530
Glastonbury, CT 06033
csmith@alterpeason.com

Nicholas R. Bamonte
Commissioner of the Superior Court

EXHIBIT A

Ned Lamont
Governor

STATE OF CONNECTICUT
DEPARTMENT OF HOUSING

Seila Mosquera-Bruno
Commissioner

November 9, 2022

Nicolas R. Bamonte, Esq.
Berchem Moses, P.C.
1221 Post Road East
Westport, CT 06880

Dear Attorney Bamonte:

The Department of Housing (DOH) is in receipt of your November 2, 2022 e-mail to Michael Santoro seeking a reconsideration of DOH's October 18, 2022 letter stating that the Town of New Canaan's application for a Certificate of Affordable Housing Completion does not meet the requirements for the issuance of a Certificate as submitted.

Because DOH's letter and accompanying memo do not constitute a contested case under the Uniform Administrative Procedure Act (UAPA) as defined in Section 4-166 of the Connecticut General Statutes, Connecticut General Statutes Section 4-181a is not applicable here and does not provide for reconsideration of the letter under the UAPA.

Sincerely,

Amy Filotto
Legal Counsel

EXHIBIT B

STATE OF CONNECTICUT
DEPARTMENT OF HOUSING

In the Matter of:	)	
	)	
Town of New Canaan	)	
Certificate of Affordable Housing	)	
Completion/Moratorium Application	)	January 31, 2023
Pursuant to C.G.S. § 8-30g	)	
	)	

NOTICE AND ORDER

On December 2, 2022, the Town of New Canaan (the "Town") filed a Petition for Declaratory Ruling (the "Petition") with the State of Connecticut, Department of Housing ("DOH"), pursuant to Section 4-176 of the Connecticut General Statutes.

Upon review of the Petition, it is ordered that:

1) The Department of Housing will issue a declaratory ruling limited to the following question(s):

    - Does Section 8-30g(l)(3) of the Connecticut General Statutes preclude DOH from awarding housing unit-equivalent points for dwelling units that were completed before the effective date of a prior moratorium toward establishing eligibility for a subsequent moratorium?
    - Is the Town currently eligible for a Certificate of Affordable Housing Project Completion, aka Moratorium?

2) Written submissions of additional evidence and/or written legal argument in connection with the questions enumerated in Item 1 of this order may be submitted to DOH by March 1, 2023.

3) Written submissions should be sent by e-mail to randi.pincus@ct.gov or by mail to:

    Randi Pincus
    Staff Attorney
    Department of Housing
    505 Hudson Street
    Hartford, CT 06106

4) The Town of New Canaan is designated as a party in this proceeding. Any other persons or entities seeking party or intervenor status shall submit a petition for designation to

DOH and send copies thereof by mail or electronically to the parties, at least five business days prior to March 1, 2023.

5) DOH shall post notice of the petition and this order on its website at www.ct.gov/doh.

6) DOH shall issue the declaratory ruling referenced in Item 1 of this order no later than May 19, 2023.

7) DOH may make such orders, including modifications to this order, as are necessary for the proper conduct of these proceedings.

Seila Mosquera-Bruno
Commissioner