



BERCHEM, MOSES & DEVLIN, P.C.
ATTORNEYS & COUNSELORS AT LAW

MEMO

To: Members of the Representative Town Meeting (RTM)

From: Ira W. Bloom, Town Attorney *IWB*

Re: RTM review of Zone Text Amendment #714 and Map Amendment #715 regarding property located at 1177 Post Road East

Date: September 15, 2016

Charter §C10-4: The petitioning members of the RTM are exercising their right under Westport Charter §C10-4. This section allows for review by the RTM of any action by the Planning & Zoning Commission (P&Z) “adopting, amending or repealing any zoning regulation or fixing or changing the boundary of any zoning district...” This section provides that by the affirmative vote of two-thirds of the *total number of RTM members*, a resolution may be adopted reversing the action of the P&Z, thus rendering the action void. The RTM’s power is limited to the adoption or rejection of the resolution, but does not include any power to modify or amend the action of the P&Z, nor any power to postpone final action on such resolution to a later date. The RTM meeting must be held within thirty (30) days after the delivery of the request to the moderator or to the Town Clerk. Two-thirds of the total number of RTM members is 24, which means, for example, that if 25 members are in attendance, 24 would be needed to reverse the P&Z action.

This charter provision is a rather unique power. Our research confirms that only one or perhaps two other municipalities in the state have a similar power allowing the legislative body to review these actions of the P&Z. In 2010, when the RTM had been faced with similar petitions pursuant to this section, it became apparent that there was no standard in the Charter clarifying the nature of the “review” the RTM should undertake pursuant to this section. A subcommittee was formed at that time, and Gail Kelly and I worked with the subcommittee members. The attached guidelines were produced and adopted by the RTM and codified as Section 162-25 of the RTM Rules of Procedure. It is worth noting that these standards have never been tested in court or subject to any sort of formal judicial review. The guidelines only represent the RTM’s preferred path for review.

RTM Rules of Procedure Article XI, 162-5: In reviewing Section 162-25, the RTM concluded that it was “not strictly limited to a review of the Planning & Zoning Commission...record.” Additional comments and materials could be received. At the same time, it was also stated that the RTM review “will be guided by land use criteria,” including, but not limited to, the Plan of Conservation and Development and general health, safety and welfare considerations. RTM members were advised that they “should become familiar with the P&Z record” from the application at issue. An effort was made in this document to balance the RTM’s legislative

responsibilities with the desire to focus on “land use criteria.” Nevertheless, *no consideration was given at that time to a review of an application made as part of a Connecticut General Statute §8-30g review.*

The §8-30g application: 1177 PRE Associates, LLC (the Applicant) submitted three related applications to utilize the benefits provided in Connecticut General Statutes §8-30g. C.G.S. §8-30g is a state statute that has been in effect for 25 years. Pursuant to that state statute, if a developer commits to providing 30% “affordable” housing units (along with other requirements), the developer is relieved from the limitations imposed by a particular Town’s zoning regulations. In plain terms, if a developer complies with the affordable “set aside” of 30%, the developer can ignore the local regulations regarding height, setback and all others. Most importantly, in the event of a denial by a local Planning & Zoning Commission of such an application, this statute provides for a “shifting of the burden” to the Commission. In other words, in a typical land use application, a denial appealed to court requires the developer to prove that the Commission acted illegally, arbitrarily or abused its discretion. In sharp contrast, with an 8-30g application, the burden is *completely shifted to the Commission.* The Commission must show and prove, based upon substantial evidence in the record, that: 1) the decision is necessary to protect substantial public interests in health, safety or other matters which the Commission may legally consider; 2) such public interests clearly outweigh the need for affordable housing; and 3) such public interests cannot be protected by reasonable changes to the affordable housing development. Dozens of cases have interpreted these provisions quite strictly. For instance, case law has narrowly construed “substantial public interests in health, safety or other matters which the Commission may legally consider” to be such items as safety issues, environmental factors, or infrastructure issues including sewers/septics, water quality, etc. Statistically, the courts have ruled against Commissions that have denied §8-30g applications in nearly 80% of the cases.

The affordable housing concept has been the law and policy of the State of Connecticut for many years, and multiple attempts to modify the law to give more discretion to Commissions have almost universally failed (except for changes in year 2000). This is clearly the law and policy of the State. Many believe it supports an important cause, while others believe it has been abused. In any event, it remains the law, and the burden imposed on Commissions after a denial remains difficult.

Westport’s history of affordable housing/the four-year moratorium: Westport has a history of many initiatives in the affordable housing area. The details of Westport’s progress in this area will be provided by the Planning & Zoning Department. If a municipality reaches ten percent of its housing as affordable, it is exempt from the §8-30g law. Westport, like most suburban communities, has not achieved that level. However, pursuant to State law and regulations, Westport is close to achieving a four-year moratorium on §8-30g applications by accumulating sufficient “points” according to a complicated regulation based upon actual housing in town. The project at 1177 Post Road East (once constructed along with other pending approvals) will allow the Town to achieve the moratorium on new applications, an important goal for the P&Z and Town. Other municipalities in Fairfield County have recently achieved the moratorium level, and some towns are working towards a second four-year moratorium.

The proposal at 1177 Post Road East/the three-part application: The Applicant filed three applications as part of the §8-30g submittal. The first application was a site plan application calling for 94 housing units including 30% “affordable,” as defined under the law. The building was proposed to be four stories. This site plan is not appealable to the RTM. A second application was for a text amendment that would allow construction of such a building at 1177 Post Road East (the statute itself provides that draft zoning regulations must also be submitted, and this requirement

results in most developers submitting a zone text change as well as a zone map change). The text amendment is very narrowly tailored to this site only and has a "sunset provision" (i.e. it expires) in sixty days. The third application was an amendment to the zoning map to reflect the zone text amendment. Of course, pursuant to our Charter §C10-4, only the text amendment and zoning map amendment change can be appealed to the RTM, thus leaving the approved site plan intact. All three applications were filed by the developer as part of a §8-30g project.

The details regarding the actual project will be provided by the Planning & Zoning staff or the RTM P&Z subcommittee.

It should also be noted that during the public hearing conducted by the P&Z, members of the P&Z asked the Applicant whether a three story building with a different facade was possible. After studying this request, the Applicant submitted for consideration a three story building with a different facade. However, citing financial constraints imposed by this revised proposal, the Applicant could not initially propose 30% affordable units, nor could the Applicant comply with other requirements of the §8-30g statute. As a result, this so-called "alternate plan" had a lower height, but was not in strict compliance with §8-30g and provided fewer moratorium points for the Town. The P&Z carefully and thoughtfully reviewed these two proposals and voted (5-1) to approve the original §8-30g application.

Standard for RTM review: An important issue for the RTM to consider is the standard of review to be undertaken in this §8-30g context. After all, the state statute itself imposes a strict and significant burden on the Commission if it denies a §8-30g application. Again, this has been the policy of the state for 25 years, and it has been upheld in countless court decisions. In simple terms, the reasons to deny a §8-30g application are very limited, and even if one such reason is found, it must "clearly outweigh the need for affordable housing," and it must be backed by substantial evidence in the record.

It is my firm belief that a court would impose these same strict statutory conditions on the RTM to overturn the two applications currently before it. The court will ask if there is substantial evidence in the record supporting a significant public interest that clearly outweighs the need for affordable housing. If the RTM is allowed any lesser standard, then Westport would have an easier path to deny an §8-30g application than virtually any other municipality in the state.

I have been asked whether the standard of review set forth in Article XI, §162-25, would govern. I would note that this RTM standard itself does say that the RTM "will be guided by land use criteria." The land use criteria are set forth in Connecticut General Statute §8-30g. I believe they must be followed. The RTM standard of review passed in 2010 would not allow the body to ignore the state statute and its requirements.

- **ARTICLE XI. - REVIEW OF ZONING ACTIONS**

- **Sec. A162-25. - Standard of review.**

The RTM review of a Planning and Zoning Action pursuant to Section C10-4 of the Town Charter shall not be strictly limited to a review of the Planning & Zoning Commission ("P&Z") record. Rather, the RTM shall be permitted to receive additional comments and materials outside of the original record.

The RTM review, in its legislative capacity, will be guided by land use criteria. These criteria include, but are not limited to, the Town of Westport's Plan of Conservation and Development and general health, safety and welfare considerations.

RTM members participating in the review of a P & Z action should become familiar with the P & Z record prior to the RTM meeting.

(Res. of 10-5-2010)

- **Sec. A162-26. - Discussion and debate.**

Petitioners, P & Z Commission, applicant/property owner and statutory intervenors shall be granted a reasonable opportunity to speak to the RTM.

(Res. of 10-5-2010)

- **Sec. A162-27. - Additional information received.**

Written materials relevant to the review should be shared with the entire body by providing a copy to the Town Clerk.

(Res. of 10-5-2010)