

**Testimony of Jonathan B. Orleans in Support of HB 7297**

**Wednesday, March 22, 2017**

Initially, I want to express my thanks to the Chairs and the members of the Committee for allowing me to submit this testimony.

My name is Jonathan Orleans. I live in Fairfield. I have been a practicing lawyer in Connecticut for over 30 years. I also hold a number of “public service” positions, including Legal Advisor to the American Civil Liberties Union of Connecticut, Chair of the Local Civil Rules Advisory Committee of the U.S. District Court for the District of Connecticut, Member of the Civil Commission of the Connecticut Judicial Branch, and Co-Chair of the Federal Practice Section of the Connecticut Bar Association. Although I provide this information for purposes of identification, I must emphasize that the views I offer in this testimony are purely my own, and not those of any firm, client, or organization with which I am affiliated.

I have been involved – sometimes on behalf of plaintiffs, and sometimes on behalf of defendants – in many lawsuits involving challenges to discrimination, including several involving discrimination in housing. One lesson we surely should learn from the history of discrimination litigation since the enactment of the Civil Rights Act of 1964 is that the existence of a private right of action is crucial to the enforcement of antidiscrimination laws. Although federal and state governments have powers to enforce our civil rights laws and have used those powers, many, if not most, of the landmark cases that have contributed to reducing the impact of discrimination in various aspects of American life have been brought by citizens or citizen organizations under the provisions of our antidiscrimination laws that authorize private suits. This is as true in the area of housing discrimination as in any other area of the law. I know from my experience as a lawyer in discrimination cases that the ability of private citizens and advocacy organizations to bring lawsuits is an important and effective tool to move us toward a society in which people have genuinely equal opportunities across race, socioeconomic status, and location.

House Bill 7297 would move us in the right direction by making it clear that Connecticut's law requiring municipalities to affirmatively further fair housing, C.G.S. § 8-37cc(b), carries a right of private enforcement. There are good reasons to think that the Legislature intended this to be the case when the statute was originally passed in 1991, as part of Public Act 91-362, a comprehensive fair housing statute. In March 1988, not long before the passage of C.G.S. § 8-37cc(b), the State of Connecticut Blue Ribbon Commission on Housing issued its Report to the Governor and the General Assembly, finding that, *inter alia*, "The state's 169 municipalities should be encouraged to continue or to begin to forge locally appropriate solutions to regional housing problems." Report of the Blue Ribbon Commission on Housing, (March 1, 1988). In the same year, the Connecticut Supreme Court issued its first major ruling on exclusionary zoning in *Builders Service Corp., Inc. v. Planning & Zoning Com'n of Town of East Hampton*, 208 Conn. 267 (1988), and the *Sheff v. O'Neill* school desegregation case was filed in early 1989. The Affordable Housing Land Use Appeals Act, C.G.S. § 8-30g et seq., which encourages the development of affordable housing outside of urban areas, was also passed in 1989, and became effective in 1990. Each of these developments reflects Connecticut's search for solutions to the segregation of low-income minority families in blighted, disinvested urban areas.

The legislative history of C.G.S. § 8-37cc(b) shows that legislators and advocates viewed Public Act 91-362 as part of this comprehensive effort to combat segregation in Connecticut. In the hearing on P.A. 91-362, the *Sheff* litigation or the link between housing and school segregation is mentioned at least eight times. *See* Hearings on H.B. 5523 (P.A. 91-362) before the Select Comm. on Housing, 1991 Leg. at 267, 270, 271-272, 274, 300, 312, 372, and 457 (1991)(App. 10) ("Hearings"). The need for low-income persons to have choice in the location of their housing is discussed at least nine times. *See* Hearings at 278, 287, 288, 293, 299, 305, 309, and 315. Likewise, concerns about the concentration of impoverished persons of color in urban areas and attendant problems with education, employment, etc., are discussed at least eleven times. *See* Hearings at 267, 276, 293, 296, 301, 317, and 391-392 (1991). Additionally, implicit throughout the legislative history is the perceived need for regional solutions to the problem of housing segregation. *See, e.g.*, Hearings at 268, 294, 297, 312, 315, 333, 354, 357, 363, 366, and 372. The testimony before the legislators who passed C.G.S. § 8-37cc(b) was sophisticated and comprehensive, revealing a deep understanding of the problems of urban segregation and the

concentration of poor persons of color in urban areas, as well as the necessity of a strong public policy response.

The other components of Public Act 91-362 also provide important context for understanding what the Legislature intended in enacting C.G.S. §8-37cc(b). The bills which eventually became P.A. 91-362 addressed a range of housing segregation issues including the administration of housing subsidies, regional housing obligations, and housing choice and mobility. The overall package was designed to address both the racial and economic segregation of affordable housing in Connecticut. The obligation imposed on state housing agencies to “affirmatively promote fair housing choice and racial and economic integration” was a not inconsequential part of that effort.

The sponsors of P.A. 91-362 were very familiar with 42 U.S.C. § 3608 (the section of the Fair Housing Act upon which § 8-37cc(b) is based), and with the manner in which § 3608 had been construed by the courts at the time P.A. 91-362 was passed. At that time, the most well-known Second Circuit case, *Otero v. New York City Housing Auth.*, 484 F.2d 1122 (2nd Cir. 1973), stood for the proposition that a private right of action to enforce the government obligation to affirmatively further fair housing was implicit in § 3608 and available to a range of potential plaintiffs. At the same time, the Fair Housing Act was being vigorously enforced in high profile cases on Long Island (*Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926 (2nd Cir. 1988)) (an action brought by a citizen organization) and in Yonkers, N.Y. (*U.S. v. Yonkers Bd. Of Education*, 837 F.2d 1181 (2nd Cir. 1987)). In view of this broad contextual backdrop for the statute's passage, it is fair to assume that the Legislature expected its anti-segregation mandates to be more than mere exhortations; it expected them to be enforceable in the courts.

Unfortunately, in *Asylum Hill Problem Solving Revitalization Association v. King*, 277 Conn. 238 (2006), our Supreme Court concluded that the Legislature did not intend to create – or at least had not effectively created – a private right of action in enacting § 8-37cc(b). In the interest of transparency, members of the Committee should know that I was one of the lawyers for the losing plaintiffs in that case. The Court based its decision on several factors, and while I think it was mistaken, it is not my purpose in this testimony to re-argue those issues. Instead, I ask this Committee to recognize now that without the ability of private citizens to enforce its command

through the courts, the statutory requirement that housing agencies “affirmatively promote fair housing choice and racial and economic integration” will too often be an empty promise, words on paper without real-world impact.

The principal objection I have heard to the proposal to re-establish a private right of action to enforce C.G.S. Sec. 8-37cc(b) is that it will open the floodgates of litigation. I don’t think that is true. In the 15 years the statute was on the books before the *Asylum Hill* case was decided, I am aware of no other cases brought under that section. And in any event, the proposed legislation ties the private right of action to an existing statute which includes a relatively low cap on punitive damages, thus reducing the financial exposure to the public fisc. But the possibility of litigation that may result not only in a damages award, but also in injunctive relief, will force the state housing agencies to take the “affirmatively furthering” obligation more seriously, and will provide advocates with negotiating leverage, even without filing actual suits.

Other witnesses have, or will, describe for you in detail the problems we in Connecticut still face in integrating our towns and neighborhoods racially and economically, and the sad consequences of our continuing struggle to address those problems adequately. In the 33 years I have lived here, we have become more segregated both racially and economically. Those trends will certainly continue if we do not take action. I submit to you that if we are serious about making strides toward achieving fair housing goals, providing a private right of action to enforce this statute is an essential step. It is time to do more than just “talk the talk;” we have to “walk the walk” as well.

Thank you for considering my views on this important matter.