In the Region/Connecticut

Court Rulings Trouble Housing Advocates

Affordable-unit rejections are upheld despite state law.

By ELEANOR CHARLES

THREE recent court decisions upholding rejections of moderate-income housing projects have rattled supporters of Connecticut's Affordable Housing Law.

They fear that the 10-year-old law, which has prevailed in the majority of court challenges until now, is vulnerable in cases based on concerns for potable water sources, open space and septic systems, which were not as intense a decade ago.

Now towns where resistance to moderate-income housing is pervasive have a new catalogue of reasons to oppose the law.

Decisions handed down by the Connecticut Supreme Court in July, and by the Superior Courts of New Britain and Bridgeport in March and June, ruled in favor of Glastonbury, Newtown and Bridgewater, respectively. The decisions involved three projects with a total of 159 single-family homes and apartments, 37 of which were to be offered at below-market rates.

Under the affordable-housing law, developers of market-rate projects receive negotiable density bonuses if 25 percent of their units are priced for tenants or purchasers whose incomes do not exceed 80 percent of the area or state median income, whichever is lower. The state's goal is to raise the proportion of housing for lower income tenants or owners to 10 percent in each of its 169 municipalities.

Last month only Justice Robert I. Berdon dissented when the Connecticut Supreme Court ruled 6 to 1 against the Christian Activities Council of Hartford, a century-old inner-city mission society with about 30 member churches. It wanted to build a total of 29 affordable single-family homes on 33 acres of unused water company land in Glastonbury. The watershed tract of forests, brooks and ravines — for sale by the Metropolitan District Commission, a Hartford-based public water agency — once served several towns in the area.

The court made its decision on the issue of open space. Justice David M. Borden wrote in his opinion that the public interest in the protection of open space, conservation and recreation clearly outweighed the need for affordable housing in the town.

Justice Berdon wrote in his dissenting opinion: "This case calls upon us to resolve the issue that lies at the heart of affordable housing in this state: What burden is a municipality required to satisfy before it may reject an affordable housing proposal? According to the majority, this burden is extremely deferential to the local zoning authorities whom the law was designed to keep in check."

Janet Durrans for The New York Times

John F. Carr Jr. on his Bridgewater property. The court upheld the town's contention that there was no potable water for a subdivision.

Glastonbury's lawyer, William S. Rogers, said: "I think the Supreme Court was correct in saying that you can reject simply by saying you are preserving open space. The town set policy 20 or 30 years ago for a 600-acre tract to be to be preserved," including the parcel in question. And, he added, "the local real estate people counted at least 100 units in the affordable range around town when this application was heard."

ACCORDING to the state's Department of Economic and Community Development, 7.13 percent of the housing for the 29,000 residents of the 52-square-mile Town of Glastonbury is affordable. "We feel we have been quite successful," said Ken Leslie, Glastonbury's community development director. "We've had an affordable-housing program for 20 years."

Douglas Wootten, president of the Christian Activities Council, said that he was "extremely disappointed in the Supreme Court ruling."

"It undermines the statute," he said, "and opens the way for towns to be even less responsive to affordable housing using this decision as a precedent."

His council was supported by the Connecticut Civil Liberties Union and the Connecticut branch of the National Association for the Advancement of Colored People, both of which filed friend of the court briefs.

"Connecticut has one of the most restrictive zoning systems in the country, one that we believe has resulted in a pattern of housing discrimination in town after town," said Joseph Grabarz, director of the Civil Liberties Union's Connecticut office. He called local zoning "a political fiefdom."

The Civil Liberties Union's legal director, Philip Tegeler, added that the affordable-housing appeals procedure, which allows a developer to take a town to court when it believes that its project has been unfairly treated, is fundamentally a civil rights statute. "This decision," he said, "weakens all our other efforts to open up housing for people all over the state."

In the Newtown case, a proposal by D & H Homes was rejected by Judge William A. Mottolese because the property and septic system were in an aquifer protection zone, creating a substantial impact on public health. John Horton, a principal in D & H Homes, and his partners own 31 acres on which they planned to build 96 single-family homes using the 25 percent below-market component. "We believe that the issues Judge Mottolese ruled on are correctable," said Mr. Horton, "and we plan to proceed with some kind of development. We believe there is a need for affordable housing in Newtown." Affordable dwellings amount to 2.01 percent of all housing in Newtown, according to the state's Department of Economic and Community Development.

Judge Sidney Axelrod, in Superior Court, turned down John F. Carr Jr.'s proposal in Bridgewater, saying that there was no potable water supply for the subdivision, nor had the required municipal or State Department of Utility Control approvals been obtained. The proposal had called for a mix of 35 single-family homes and apartments on 24 acres, with an affordable component.

Over the summer Mr. Carr said he would attempt to meet the town's and Judge Axelrod's requirements by drilling a well and performing tests to determine whether he has sufficient volume of potable water, plus providing engineering drawings of the septic system. He said he would then apply for the required approvals and, upon receiving them, submit a new application to the town.

"It's an expensive procedure," said Neil R. Marcus, his lawyer. "The town is upping the cost to discourage affordable housing by holding it to a higher standard than market-rate housing." A market-rate condominium complex nearby with the same density of one unit per half-acre was not required to perform such tests in advance, he said.

Bridgewater has a population of 1,800 in 20 square miles, with homes priced from $250,000 up, including summer and weekend retreats owned by Mia Farrow and other celebrities. Its affordable-housing figure is .25 percent, state figures show.

"I think it's fair to say" said Michael A. Ziska, Bridgewater's attorney, "that although the town is not averse to affordable housing, the density proposed for this site was three to seven times higher than the current two-acre zone." He was referring to varying calculations for the single-family homes and apartments in the Carr proposal.

Timothy Hollister, a Hartford lawyer who represents many developers in dozens of such cases around the state, said he was discouraged by the recent turn of events. But, he said, "these three cases are coincidental in timing. Applicants have prevailed in two-thirds of the cases this year, but that's down from three-quarters a year or so ago." He has compiled informal statistics on the development of more than 1,500 affordable units built since the law went into effect, predominantly single family, but with a large rental contingent.

Shrinking amounts of available land and public concern for basic infrastructure issues, he said, "have made developers more aggressive, proposing affordable housing in areas where water and sewer are not readily available. To get the density for affordable housing you need those two things."

As the lawyer for Avalon Bay Communities, he has been involved in the company's seemingly endless string of lawsuits against towns that initially reject its proposals for luxury rental apartment complexes with the 25 percent affordable component.

But Avalon Bay has so far managed to prevail in court, using the law to its advantage in shoehorning its way into Wilton, Trumbull, New Canaan and other upscale towns that routinely resist affordable housing, albeit at the cost of lengthy legal battles.

While the suburban and rural towns resist affordable housing, Connecticut's major cities of Stamford, Bridgeport, New Haven and Hartford exceed the prescribed 10 percent but need more, officials of those cities say.

The Stamford Zoning Board is considering a measure that would bring the state's affordable-housing law onto the city level New housing developments in certain zones would be required to rent or sell 20 percent of their units below market rate. Because of the area's high income level, earnings of no more than 80 percent of the state's median income of around $54,000 would be the criterion for eligibility.

That would please Eileen Buchheit, a Bridgewater resident.

"The intent of the legislation was not for small villages like Bridgewater," she said at a public hearing on the Carr project, "but rather for large cities like Bridgeport."

Affordable Housing Loses Ground

Advocates for diversity see high court's decision as major setback

BY PAUL FRISMAN

Justice Robert I. Berdon may be retiring, but he's not shy.

Berdon, whose term as an active justice ends in December, does not mince words in his frequent dissents. He holds true to form in *Christian Activities Council v. Glastonbury*, in which the high court upholds Glastonbury's rejection of a zone change that would have permitted construction of housing for low- and moderate-income families.

"Today," Berdon begins his dissent, "the majority rips the soul out of affordable housing in the state of Connecticut."

Berdon's was the only opposing voice in *Christian Activities Council*, a July 20 *en banc* decision that took the justices a record 21 months to decide.

But Berdon's views were echoed albeit somewhat more prudently, by several attorneys familiar with affordable housing issues.

They contend that the 6-1 decision seriously weakens the state's 10-year-old affordable housing appeals process by conceding too much power to indi-

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Advocates say ruling gives towns too much power

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vidual towns. The General Assembly enacted the affordable housing appeals process in 1989 largely to curb that authority, they say.

Legislature adopted the appeals procedure after a state Blue Ribbon Commission on Housing found that towns too often rejected affordable housing proposals on pretextual grounds, says Timothy S. Hollister, a land use expert with Hartford's Shipman & Goodwin.

But William S. Rogers, who represented Glastonbury, calls Justice David M. Borden's majority opinion in *Christian Activities Council* a well-reasoned ruling that balances the need to preserve open space with the need for affordable housing.

The plaintiff, a nonprofit organization of 35 Hartford-area churches, proposed building the affordable housing development on 33 acres it planned to buy from the Metropolitan District Commission near Glastonbury's Hebron Avenue, a main thoroughfare in that prosperous Hartford suburb.

Plan Rejected in '94

The Town Council rejected the plan in 1994 because of concerns over traffic flow, the preservation of open space and the possibility of endangering a potential future water supply.

Under the affordable housing appeals process, a town must satisfy a four-pronged test when rejecting an affordable housing plan. The town must show that its decision is supported by sufficient evidence; that it is necessary to protect a substantial public interest; that the public interest clearly outweighs the need for affordable housing; and that the public interest could not have been protected by making reasonable changes to the proposal.

The plaintiffs, represented by David F. Sherwood, of Glastonbury's Alter & Sherwood, and Wesley W. Horton, of Hartford's Horton, Shields & Cormier, argued that Glastonbury had not satisfied all four prongs. They also contended that the standard of evidence required for the last three prongs is stricter than the sufficient evidence test called for in the first prong.

Borden reject those arguments.

He upholds the town's decision and its affirmance by the lower court, stating that the sufficient evidence standard—less than a preponderance, but more than a mere possibility of evidence—applies to each of the four prongs, not just the first.

The Supreme Court's role, he said, is not to weigh the evidence that was presented to the town, but to determine whether the town had sufficient evidence on which to base its decision. To conclude otherwise, he says, would "require a review that would be virtually identical to a trial de novo."

Borden, applying the same standard that applies to ordinary zoning decisions, also says the high court would sustain the town's decision if there was sufficient evidence to support any one of the reasons the town gave for rejecting the proposal. The plaintiff had argued that Glastonbury's decision should be remanded if any one of the reasons could not be supported.

Superior Court Judge Joseph Q. Koletsky had upheld Glastonbury's decision based on the threat posed to the potential water supply. Borden choose instead to examine the proposal's impact on open space preservation.

After reviewing the history of the MDC parcel, the justice concludes there was sufficient evidence that the housing development would harm the town's plans to preserve the land as open space.

Open Space Paramount

Borden also finds sufficient evidence in the record to show that the public interest in preserving open space clearly outweighs the need for affordable housing in Glastonbury.

The justice notes that Glastonbury, sued in 1980 by the U.S. Justice Department for resisting the development of integrated low- and moderate-income housing, had achieved 55 percent of its five-year affordable housing goal by 1993, and that other sites in town were available for affordable housing development. (The Justice Department suit was settled by a consent decree in 1982).

Ora Nadler

GLASTONBURY'S ATTORNEY, WILLIAM S. ROGERS, SEES THE RULING BALANCING THE NEED FOR OPEN SPACE AND AFFORDABLE HOUSING.

The high court decision also for the first time tackles the question of whether affordable housing needs are to be determined on a regional or local basis—an issue of significant concern to the housing community. Borden finds that the law's legislative history requires that such decisions be made on a local basis.

Joining Borden are Chief Justice Robert J. Callahan and Justices Flemming L. Norcott Jr., Joette Katz and Richard N. Palmer. Justice Francis M. McDonald Jr. concurs separately.

Berdon charges in his dissent that the majority has "effectively unraveled the tapestry of shelter provided by affordable housing."

By imposing the sufficient evidence standard on the last three prongs of the affordable housing appeals law, Berdon says, the majority had undone the Legislature's attempt to make towns meet a much more rigorous standard when rejecting affordable housing plans.

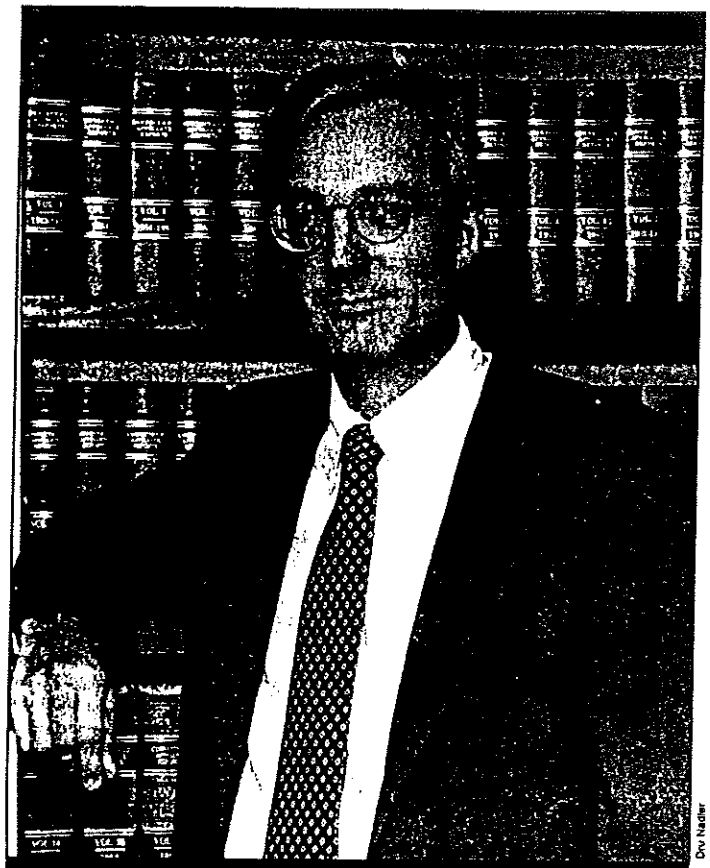
Berdon also finds the majority's reliance on open space preservation in justifying the denial of affordable housing "pitifully inadequate."

"It could not be more obvious to me that the desirability of ample open space—which implicates interests that are purely aesthetic and recreational—cannot possibly clearly outweigh (1) the basic human need for shelter and (2) the fundamental importance of racial and ethnic diversity," he writes.

A Matter of Justice

"Affordable housing," he fumes, "is not just about providing shelter for the economically disadvantaged. It is also about cultivating racial and ethnic diversity in residential communities. My colleagues in the majority seem to have set their sights on frustrating these equitable aspirations."

Berdon's concerns are shared by several attorneys who have worked on affordable housing over the years. They each disagree with the court's imposition of



Dov Nadler

DAVID F. SHERWOOD WAS ONE OF THE LAWYERS REPRESENTING THE PLAINTIFFS.

the sufficient evidence standard on all portions of the affordable housing law; its decision to determine housing needs on a local basis; and the apparent elevation of the importance of open space preservation vis-á-vis affordable housing.

Raphael Podolsky, an attorney and housing advocate for the Legal Assistance Resource Center of Connecticut, says the "whole point" of the affordable housing appeals process is to require towns that don't have enough affordable housing to

The town was not against affordable housing. It was for the preservation of this particular tract of land,' says William S. Rogers, who represented Glastonbury.

make a "compelling case why housing shouldn't be built."

"The court's interpretation makes all these cases only slightly different from ordinary zoning cases," he says. Supporters of the affordable housing appeals law would not have fought as hard to enact it, nor its opponents fought so hard against it, he claims, if they thought the change they were debating was that slight.

Hollister calls the case "a very troubling decision," that is apparently at odds with previous appellate rulings on the issue.

"By applying the sufficient evidence standard to the other parts of the statute," he says, "the court has injected into affordable housing the same degree of judicial deference to local decision-making that was the whole reason the statute was adopted in the first place."

"The unanswered question is how much discretion commissions now have," he adds.

Hollister also says defining affordable housing needs on a local basis is an "overly parochial view of how the housing market works."

It's not enough that residents are able to afford housing within the town in which they live, he says. The suburbs must be accessible to people from other towns and cities as well.

Hollister also expresses dismay at the court's failure to consider a state subdivision statute that exempts parcels containing affordable housing from its open space requirements.

Finally, Hollister says, he believes the last three prongs of the affordable housing appeals statute present legal questions subject to plenary review.

Plaintiffs Disappointed

Plaintiff's counsel Sherwood says his client is disappointed in the ruling. The decision, he says, will "make it more difficult for developers to rely on the statute."

The Connecticut Civil Liberties Union and the state chapter of the NAACP filed an amicus brief on behalf of the plaintiff. The CCLU's Philip D. Tegeler and University of Connecticut Law School professors Terry J. Tondro and John C. Brittain were co-counsel on the brief.

Tegeler says he believes *Christian Activities Council* "has done some damage to a strong civil rights statute that was starting to have some positive effects on segregated housing patterns in the state."

The decision, he says, "could potentially undercut our ability to challenge exclusionary zoning in Connecticut."

Tegeler, like Hollister and Podolsky, is concerned about the deference the high court showed local zoning commissions, as well as the decision's evaluation of housing on a local, rather than regional, basis.

"Suburban towns share the responsibility of low-income housing in a region," Tegeler says. Defining housing needs on a town-by-town basis "does nothing to address segregated housing patterns and open up new housing to people in the central city."

Tegeler also sees a danger in pitting the preservation of open space against the development of low-income housing. "I think everyone's committed to preserving open space," he says, "but it shouldn't be at the expense of low-income housing."

"The threat to open space is large, single-family homes, not low-income housing," he adds, noting that "local zoning boards don't object as strongly to encroachment on open space by high-end luxury housing."

Tegeler says he hopes *Christian Activities Council* will prove to be fact-specific, and that "the lower courts will continue to enforce affordable housing appeals procedure in a strong way."

In the near term, he says, the decision "will lead to less negotiation and more litigation. You may see a greater use of federal race discrimination statutes to litigate affordable housing."

Tegeler says a new Blue Ribbon Commission on Housing, created by the Legislature this session, must "put this case at the top of its agenda."

Plaintiff's co-counsel Horton also says the next move is up to the General Assembly. "The legislature's got to write a stronger statute to make their intent clear," he says.

But Rogers, of Tyler, Cooper & Alcorn, says Borden's decision is the correct one.

The decision, he says, "doesn't restrict the development of affordable housing,

The decision 'could potentially undercut our ability to challenge exclusionary zoning in Connecticut,' says the CCLU's Philip D. Tegeler.

doesn't detract from the existing statute. All it does say is that the preservation of open space is a reason, a legitimate, acceptable reason, for the denial of an application for affordable housing."

"The town was not against affordable housing," Rogers says. "It was for the preservation of this particular tract of land."

And Borden makes clear, Rogers adds, that a town can't raise open space preservation as a last-minute, pretextual defense.

"You can't just say you're doing it to preserve open space," Rogers says. "The decision goes to great pains to say there must be proof this is the consistent policy of a town as to a particular parcel."

Long Wait for Decision

Rogers also notes that at the time the plan was proposed there were a number of single-family homes and condominiums for sale in Glastonbury that were in the price range for affordable housing.

Christian Activities Council was argued before a five-justice panel on Oct. 30, 1997. The Supreme Court released the decision as an *en banc* ruling 21 months later. Horton, the de facto high court historian, says it is the longest the court has taken to decide a case in this century, and possibly ever.

It is a particularly long time for a case in which there is only one dissent.

Several attorneys involved in the case attributed the long gestation period to the court's decision to have all seven justices decide the case after it was initially heard by only five, and to the court's request for supplemental briefing on the appropriate scope of review. ■