

# THE LAW OF FISCAL ZONING

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## WHAT DOES THE LAW HAVE TO SAY ABOUT "FISCAL ZONING"?

### I. The statutes do not authorize fiscal zoning.

⇒ Conn. General Statutes sections 8-2 and 8-25, the general enabling acts for municipal zoning and planning commissions and the sole source of their authority, say nothing about basing decisions on fiscal impacts.

⇒ Conn. General Statutes section 8-30g, the affordable housing statute, requires that the decision be necessary to protect a substantial public interest in health, safety, or other matters which the commission may legally consider.

### II. The courts forbid fiscal zoning.

⇒ In General:

"There is nothing in § [8-25] which authorizes regulations prohibiting the subdivision of land because it would place additional financial burdens upon the town." *Beach v. Planning and Zoning Commission of Town of Milford* (Conn. Supreme Court, 1954).

In prior cases, courts have "discussed our long standing disapproval of fiscal zoning. ... **Fiscal zoning per se is irrelevant to the statutory purposes of zoning.**" *Shapiro Farm Ltd. Partnership v. Planning and Zoning Commission of Town of North Branford* (Conn. Superior Court, 1993).

"It has long been clear that zoning policy may not be based on fiscal considerations such as whether a particular residential development will result in added costs to the town." *TCR New Canaan, Inc. v. Planning and Zoning Commission of Trumbull* (Conn. Superior Court, 1992).

**"A zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic and otherwise, upon the administration of public services and facilities cannot be held valid."** *Rinaldi v. Zoning and Planning Commission of Suffield* (Conn. Superior Court, 1990).

⇒ Especially where the property is zoned for the proposed use:

**"The designation of a particular use of property as a permitted use establishes a conclusive presumption that such use does not adversely affect the district and precludes further inquiry into its effect on traffic, municipal services, property values, or the general harmony of the district."** *TLC Development, Inc. v. Planning and Zoning Commission of Town of Branford* (Conn. Supreme Court, 1990).

"Because the plaintiff's land is located in a residential zone and its plan was to use the property for residential purposes, the commission could not weigh offsite traffic concerns, municipal services required by the development, property values, or the general harmony of the district when deciding whether to approve the plaintiff's subdivision application." *Sowin Associates v. Planning and Zoning Com'n of Town of South Windsor* (Conn. Appellate Court, 1990).

"Because residential developments were permitted under the PRD regulations at the time of the application, the court cannot uphold the commission's rationale that the proposed development will damage the town infrastructure." *AvalonBay Communities, Inc. v. Orange Town Plan & Zoning Commission* (Conn. Superior Court, 1999).

⇒ In the affordable housing context:

"Fiscal zoning is an inappropriate goal and it cannot outweigh the need for affordable housing." *AvalonBay Communities, Inc. v. Orange Town Plan & Zoning Commission* (Conn. Superior Court, 1999).

⇒ As translated into "no growth" policies:

**"Zoning may not be used to avoid the increased responsibilities and economic burdens which time and natural growth invariably bring. ... Communities must deal with the problems of population growth. They may not refuse to confront the future by adopting zoning regulations that effectively restrict population to near present levels."** *Rinaldi v. Zoning and Planning Commission of Suffield* (Conn. Superior Court, 1990).

III. Focusing on the presence of children and impacts to schools is unlawful in several ways.

⇒ General incompatibility:

"To argue that an increased number of children in the neighborhood would tend to drive out existing businesses and alter the character of the neighborhood unfairly makes families with children unwanted citizens in busy neighborhoods and imputes to business owners an unwillingness to act responsibly in a dense mixed residential-commercial environment. Such a finding not only has no basis in the record but it is unrealistic in today's society." *Old Farm Crossing Associates Ltd. Partnership v. Planning and Zoning Commission of Town of Avon* (Conn. Superior Court, 1996).

A letter submitted by the Superintendent of Schools that expressed general concerns over large affordable housing developments, but did not address the particular characteristics of the proposed project, "**does nothing more than to reflect the fact that the town's no growth policy has permeated the Board of Education. It has limited if any value.**" *National Associated Properties v. North Branford Planning and Zoning Commission* (Conn. Superior Court, 1993).

⇒ Education costs -- fiscal zoning:

"At the core of such concerns as class size, sufficiency of school space and infrastructure are fiscal considerations: whether the town will be able to provide equal or better education with an increased number of students without an increase in the Board of Education budget. Neither sections 8-2 or 8-30g expressly or impliedly permit a rejection of an affordable housing application premised on the impact of additional students on the school system." *Barberino Realty & Development Corp. v. Town Plan and Zoning Commission of Town of Farmington* (Conn. Superior Court, 1994).

⇒ Possible Fair Housing Act violations:

Both the federal and state Fair Housing Acts provide that it is unlawful to "make unavailable or deny" a dwelling to any person on the basis of "familial status." 42 U.S.C. § 3604; Conn. Gen. Stat. § 46a-64c(a).

"In the Fair Housing Amendments Act of 1988, Congress extended fair housing coverage to prohibit 'familial status' discrimination -- that is, discrimination against parents and other custodians living with children under the age of eighteen." *United States v. Branella* (D.N.J. 1997).

“Many courts have applied [the FHA’s anti-discrimination provisions] to a number of parties and practices not mentioned [in the Act, including] . . . imposition of building height limitations . . . issuance of zoning permits . . . [and] rezoning property plaintiff picked for a low-income housing project and denying sewer hook-ups . . .” *Nationwide Mutual Insurance Co. v. Cisneros* (6th Cir. 1995).

## HOW SHOULD YOU DEAL WITH FISCAL ZONING?

### I. Do's

- ⇒ Propose a use permitted as of right in the applicable zone, and make every possible effort to comply with the regulations.
- ⇒ When designing your development, minimize impacts to natural environment and town services as much as possible.
- ⇒ Build a record.
- ⇒ Research the adoption of the relevant regulations and other approvals or actions in similar situations.
- ⇒ Refute conjecture or blanket statements concerning fiscal impacts with factual testimony and reports by qualified experts, and show what actual experience has been in comparable circumstances.

### II. Don'ts

- ⇒ Raise the fiscal impact issue yourself.
- ⇒ Ignore the issue, fail to prepare for it, or be cavalier about it.
- ⇒ Be dragged into a debate under the "cost per capita" approach.
- ⇒ Overlook the importance of the big picture as to the positive contributions to the economy made by new housing.