MINUTES OF MEETING
OF AUGUST 23, 2011
REGARDING PUBLIC ACT 11-79

Prepared by Chris Smith and Tim Hollister

Meeting commenced at approximately 2:00 p.m. A list of the participants is attached hereto as Exhibit A.

Tim Hollister of Shipman & Goodwin, commenced the meeting with an overview of the purpose of the meeting and its goals. The first goal is to identify points of consensus, disagreement, and possible future legislative work concerning Public Act 11-79 ("Act"). T. Hollister noted that the meeting's participants comprise representatives of most groups affected by the Act, including municipal officials, municipal planners, municipal attorneys, homebuilders and developers. He stated that the ultimate goal is, if possible, to produce and circulate a statewide guidance document for use by the aforementioned groups in implementing the provisions of the Act.

Bill Ethier of the Homebuilders Association of Connecticut, provided an overview of the Act from the HBA's perspective. B. Ethier discussed the fact that the HBA was the initial "sponsor" of the Act, which was prompted by what the HBA perceives as a historic problem with the municipal land use bonding process. Specifically, B. Ethier indicated that until the current legislature and economic environment, the HBA did not have a favorable climate to initiate statutory change concerning land use bonding requirements. The HBA's primary concerns include: (a) creating the ability for a builder or developer to offer alternative forms of bonding or other performance guarantee; (b) providing for the ability to build-down the amount of a bond as construction is completed pre-issuance of a certificate of occupancy; (c) having a designated time for a municipality to release a bond once construction is completed and the bond release is requested (B. Ethier noted that the 65 day time period as provided by the Act was initially proposed to be 30 days); and (d) eliminating lifetime maintenance bonds for public improvements (as used by Ellington and Burlington). B. Ethier concluded by noting that the legislative process is comparable to creating a sausage and that the Act, as passed, is not exactly what was proposed by HBA.

Ron Thomas of the Connecticut Conference of Municipalities ("CCM"), indicated that he has had numerous discussions with representatives of the Connecticut Chapter of the American Planning Association ("CCAPA") in an effort to determine the best approach to address issues raised by the Act. R. Thomas also indicated that he is working with, and reporting to, the Board of Directors of the Connecticut Association of Municipal Attorneys ("CAMA") concerning the Act.

Chris Wood of the Connecticut Chapter of the American Planning Association and as a private planning consultant, indicated that the "buy-in" with the municipal planners and municipalities concerning legislative efforts with the Act came late in the process. C. Wood noted the need to

promote development in the state, and to address problems associated with the municipal bonding process.

Eric Knapp of Branse, Willis & Knapp, referred to a Memo, prepared for his firm's municipal clients, outlining concerns with the Act. E. Knapp indicated that some of the towns that his firm represents are considering modifying their regulations to address the Act. Specifically, E. Knapp mentioned Willington is considering eliminating bonding, and Westbrook is considering modifying its subdivision regulations. E. Knapp noted that surety bonds are a real problem, especially when smaller amounts are involved where a company may refuse to pay out and "play the litigation card" with a town knowing that the town may not pursue the bond in an effort to avoid generating additional legal costs. E. Knapp indicated that some towns are considering how best to delay acceptance of improvements to see if problems with the associated improvements manifest themselves to permit time for the town to call the bond monies for repairs. E. Knapp noted that most smaller towns don't have on-staff engineers, and that the 65 day rule for releasing bonds needs more flexibility – at least for the smaller towns. Finally, E. Knapp stated that the best approach for all participants at this juncture is to agree on new legislation going forward, as opposed to addressing what was passed.

T. Hollister stated that performance bonding is not required by statute – it is optional. Also, there is a statutory distinction between "bonds" and "surety". Finally, the statutory language distinguishes between "surety" and "surety bond," the latter being a third-party's obligation when the party posting the bond does not perform. T. Hollister inquired as to whether the Act's new release provisions (65 day time frame, written statement of reasons) are straightforward.

C. Wood responded that the Act's release provisions is pretty much what the towns do now – they provide a punch list.

B. Ethier stated that some towns provide multiple punch lists.

T. Hollister noted that the crux of the concern about Public Act 11-79 appears to be whether municipalities, going forward, may categorically refuse to accept certain types of bonds, or must evaluate each on a case-by-case basis. He noted that the Act provides that a municipality cannot categorically deny a bond, and that any review of a bond by a municipality must be performed on a case by case basis.

Mary Savage-Dunham, Town Planner, Southington, stated that passbooks present problems because they expire often without the knowledge of, or notice to, the town. There are problems with collecting on surety bonds, especially those involving smaller amounts. M. Savage indicated that Southington prefers to do security agreements. M. Savage further commented that there are problems associated with partially reducing bond amounts when using passbooks.

E. Knapp stated that all of the seventeen towns represented by his firm do not accept surety bonds.

B. Ethier noted the language of the Act, Section 1 addressing General Statutes § 8-3(g)(2) provides that the commission "shall accept . . ." all of the listed items that follow, provided that

the form of a listed instrument is acceptable to the commission. B. Ethier noted that the intent of the language pertaining to the acceptability of the financial institution applies only to letters of credit ("L/Cs").

Eric Barz, Town Planner, Windsor, stated that he has experienced problems with surety bonds. He noted that L/Cs were the first things thrown into the trash when the FDIC took over banks in the 1980s. E. Barz noted that we need better securitized and generic L/Cs.

T. Hollister stated that that there were recent concerns with Bank of America, with processing its L/Cs at four regional locations, none in Connecticut.

T. Hollister, C. Wood, and Richard Roberts of Halloran & Sage, then discussed how the laws that apply to surety bonds and letters of credit are governed by the international Uniform Commercial Code, and not by individual state law. Therefore, whether an instrument references "Connecticut law" as applying to the instrument is not really relevant since the UCC will be applied.

T. Hollister suggested that the group move on to what form of bonding is practical today.

George LaCava of Trilacon Development, indicated that most developers don't use a surety bond since they usually have to pay 110 percent to 120 percent of the value. He indicated that the towns he does business with prefer cash or a L/C. On one occasion, he pledged "lots" in an approved subdivision. Typically, developers go with L/Cs today. However, some towns are saying "no" to L/Cs. Irrevocable L/Cs are best because they are securitized by the property, and the bank has an interest to get things done.

T. Hollister inquired as to whether the group has recommendations for a standard rider or conditions to be imposed on performance bonds in light of the new Act.

E. Knapp indicated that he would like commissions to prepare a "uniform document" for developers in their respective town.

Joe Williams of Shipman & Goodwin, stated that any requirements should be provided for in the respective commission's or town's regulations or ordinances.

B. Ethier stated that there should be a standard form with criteria. He also noted that the criteria should not be placed in the statutes, and that it may be more appropriate to have such criteria in a municipality's regulations.

E. Knapp said that any criteria should not be in statute, but a more appropriate place would be as a regulatory guideline.

J. Williams reiterated that it may be appropriate to have a statutory amendment to incorporate some of the basic, uniform requirements of performance bonds.

B. Ethier noted that the term "performance guaranty requirement" would be appropriate language for any statutory amendment.

Bill Ferrigno of Sunlight Development, noted that a surety costs 1 percent or 2 percent above the 110 percent value, based upon zero payouts.

T. Hollister and M. Savage discussed how commercial and industrial developments use surety bonds more often than residential developments.

E. Barz questioned the need to have bonds for commercial developments. One only needs to wait until the developer goes to pull a certificate of occupancy, and then outstanding improvement issues can be addressed.

T. Hollister noted the historic confusion with the term "modification to site plan" as used in § 8-3(g), and that this term means "work involved with modifying the land in accordance with the approved plan …," as opposed to modification of a previously approved site plan. B. Ethier and others agreed with this comment, and that remedying this longstanding confusion would be helpful.

C. Wood noted that public improvements include where a roadway is expanded and ties into the town's stormwater system – that the tie in is included. M. Savage agreed.

E. Barz stated that perhaps a workable form of bond would be a hybrid. He suggested, as an example: 75 percent L/C and 25 percent cash where the cash is "on hand" if needed at the completion of the development.

Greg Ugalde of T&M Builders, stated that his company uses different forms. He noted that surety bonding companies have become very competitive and very responsive. G. Ugalde stated that he generally uses L/Cs.

T. Hollister asked for comments on E. Knapp's firm's recommendation that references the Act's 10 percent cap on contingency over and above actual cost of improvements, and the firm's recommendation to "load up" when computing construction cost, especially since approvals may now be extended out to fourteen years. T. Hollister inquired, "Is padding or bumping up the numbers legal?"

E. Knapp responded, "No, but you [the town] really need to do your homework up front."

B. Ethier indicated that the 10 percent cap was a number that simply was arrived at "out of the air," but one that the HBA thought was reasonable in most cases. He recognized that the number may not be practical in some cases. B. Ethier indicated that a potential fix may be to tie any bond increase to future plan modifications, or possibly add reference to the CPI index.

E. Knapp commented that B. Ethier's suggested fixes on this issue would make the towns happier.

C. Wood noted that consideration could be made to provide 10 percent for a contingency plan, and 10 percent for CPI.

M. Savage-Dunham suggested a flat 20 percent for contingency.

B. Ethier asked what is a reasonable number that everyone can agree on. He noted that Public Act 11-5 does provide for "automatic" extensions.

T. Hollister noted the sentence taken out of § 8-3(g) [providing "[t]he commission may condition the approval of such [site plan] extension on a determination of the adequacy of the amount of the bond or other surety furnished under this section."]. This seems to say that permit extensions may not be based on bonding issues.

E. Barz suggested that a solution could be to have a residual bond to be kept at costs or values determined at the time of reduction.

G. Ugalde stated that this occurs now. However, he noted that it is difficult for the smaller towns to monitor these situations.

C. Wood stated that this is exactly the problem – especially with municipal budget constraints.

M. Savage-Dunham noted that Southington permits one bond reduction per bond per project.

T. Hollister inquired as to whether towns charge for the costs of inspection.

Gail McTaggart of Secor, Cassidy & McPartland, stated that smaller towns often pass the consultants' inspection fees onto the developer.

E. Knapp indicated that nobody really wants to call a bond and that such is done as a last resort. He noted that by that time, bad things have occurred.

B. Ethier noted that the 10 percent cap only applies to site plans, not subdivisions. One possible option is to have a new "performance guarantee statute" similar to § 8-7d that is referenced by both site plan and subdivision statutes.

T. Hollister suggested that the timing of the posting of a bond may determine the bond form.

B. Ferrigno stated that you may have one number for pre-lot conveyance, then when someone approaches to purchase a lot, the numbers may need to change.

M. Savage-Dunham stated that the issue of transferring lots prior to completion of all improvements is the real problem.

B. Ethier noted that the Act requires a bond to be in place, or improvements completed, before the conveyance of a lot can occur.

C. Wood asked do you negotiate a percentage of work vs. percentage of bond prior to posting?

G. Ugalde responded, "Yes. You need to get a knockdown of the bond amount when work is completed." G. Ugalde noted that one can use a restrictive covenant approach when you need to record the mylar and convey, but don't want to post bonds.

E. Knapp indicated that the Act permits you to record the mylar, but you just can't convey a lot, which is something that he is okay with.

Johnny Carrier of By Carrier, indicated that he prefers a L/C that is premised on phasing. Farmington provides for this in its regulations and he believes that this is a good approach. J. Carrier prefers this approach as opposed to having to post cash bonds prior to recording a subdivision mylar.

General quick, out of turn, discussion with a split as to whether L/C or cash bond is preferable prior to recording a subdivision mylar.

B. Ethier noted that it makes sense to standardize this process.

M. Savage-Dunham responded that it may work, but need to consider smaller towns with limited staff.

E. Barz stated that in standardizing the process, it must be based upon the "buyer's protection." The process is necessary for public protection. It is both for fiscal protection and to protect the buyer.

T. Hollister then inquired about the new Act's prohibition on long-term maintenance bonds after public acceptance.

B. Ethier stated that a maintenance bond shouldn't be longer than one year. Some towns have them go "in perpetuity" where you never get your monies back, and that this is a real problem. This needs to be clarified.

G. McTaggart stated that the biggest problem is how to securitize a maintenance bond.

B. Ferrigno stated that the bonding process involves three aspects: construction, performance and maintenance.

T. Hollister inquired as to whether a town may place a moratorium on bonds while working on new regulations to address the Act.

There was a general, out of turn, discussion where the consensus was that you could probably have a moratorium on site plans and subdivisions, but not on bonding.

C. Wood asked whether the Act applies to approved subdivisions where the bond has yet to be posted, and how does the Act apply to a maintenance bond that has yet to be posted?

There was a general consensus that the Act would not apply to an approved subdivision (approved prior to the Act's effective date of October 1, 2011) where the bond has not been posted. However, there was disagreement as to whether the Act would apply to a maintenance bond that has not been posted. B. Ethier indicated that the Act would apply to a maintenance bond not yet posted. C. Smith and G. McTaggart indicated that if the Act does not apply to an approved subdivision where the performance bond has not been posted, then the Act would similarly not apply to a maintenance bond not yet posted for the same approved subdivision.

E. Barz suggested that maintenance bonds were misnamed and that they were more of a warranty against faulty construction.

T. Hollister suggested that the meeting generated great discussion, and that he would arrange to have the minutes prepared and sent to all participants. T. Hollister asked about the advisability of attempting to draft a uniform performance guaranty statute.

C. Wood indicated that CCAPA is reviewing all land use regulation statutes to identify possible improvements and streamlining, but not exclusively or specifically a "performance guaranty statute."

E. Barz suggested that any legislative effort needs to include a review of § 8-25 relative to the distinction between public improvements and private roadways. Private ownership of a road should not make homeowners any less deserving of protection than buyers on public streets.

B. Ethier responded that a town can't require bonding for private roadways because such are not public improvements.

G. McTaggart and R. Roberts noted that the issue of bonding for private roadways would need to be addressed in any proposed new legislation.

B. Ethier responded that he didn't have a problem with the providing for the ability to bond for work that is really "public."

T. Hollister adjourned the meeting at this point, thanking everyone for attending and for their contributions. It was approximately 4:00 p.m.

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