



September 12, 2011, Number 11-14

New Requirements for Subdivisions and Site Plan Bonds

Differing Perspectives on How Municipalities Should Operate Under Law

Public Act No. PA 11-79, among other things, revises the process whereby development projects proceed in communities, including the types of bonds and sureties that may fulfill bond requirements. The law prohibits certain maintenance bonds for road and other construction after municipalities have accepted improvements. It goes into effect on October 1. A copy of the law may be found at <http://www.cga.ct.gov/2011/ACT/Pa/pdf/2011PA-00079-R00SB-00860-PA.pdf>. For an Office of Legislative Research (OLR) detailed summary of the law, please go to <http://www.cga.ct.gov/2011/SUM/2011SUM00079-R02SB-00860-SUM.htm>

There are differing perspectives on how to interpret the law and what should be done in response to it -- in particular, regarding bond procedures. To assist CCM members in sifting through the law, enclosed please find:

- A **memo from the law firm of Branse, Willis & Knapp**, which recommends that its municipal clients, prior to October 1, prohibit bonds for public improvements, and outlines the rationale for its stance.
- **Notes from a meeting of interested parties** – wherein municipal attorneys, developers, municipal planners and others discussed and interpreted the new law.

CCM urges you to discuss Public Act 11-79 with your legal, planning and economic development staff.

##

If you have any questions, please contact Ron Thomas, Director of Public Policy & Advocacy, at rthomas@ccm-ct.org or 203-498-3000.

This bulletin is not intended as legal advice. Please consult with your municipal attorney regarding Public Act 11-79 and its implications.

Attachments (2)

MEMORANDUM

TO: Parties Interested in Public Act 11-79, Amending Standards and Procedures for Performance Bonding for Site Plans and Subdivision Plans

FROM: Tim Hollister and Chris Smith,
Shipman & Goodwin LLP, Hartford

DATE: September 7, 2011

RE: Summary of August 23, 2011 Discussion

During the summer of 2011, Public Act 11-79 generated considerable discussion among municipal planners, municipal attorneys, and the development community. On August 23, 2011, several stakeholders convened informally in Hartford to discuss the Act, which takes effect October 1, 2011. Attached to this memo is a list of participants in the meeting and the minutes of the discussion, along with a copy of the Public Act.

The group considered preparing a summary of advice about this new legislation, but decided that the better course of action was simply to circulate the attached, detailed minutes, and then allow participants, if they wish, to pass along their own thoughts to interested parties, stakeholders, and constituents.

The consensus was that the meeting was helpful in sorting out the issues. We thank the participants for their time.

DISCUSSION OF PUBLIC ACT 11-79

August 23, 2011
2:00 p.m. to 5:00 p.m.

Participants:

Bill Ethier, HBA of Connecticut
Greg Ugalde, T&M Builders, Torrington
Bob Weidemann, Sunwood Construction, Wallingford
George LaCava, Trilacon Development, Cromwell
Johnny Carrier, By Carrier, Plainville
Bill Ferrigno, Sunlight Development, Avon
Chris Wood, Wood Planning Associates, Woodbury
Eric Barz, Town Planner, Windsor
Mary Savage-Dunham, Town Planner, Southington
Rob Phillips, Town Planner, Ellington
Ron Thomas, Connecticut Conference of Municipalities
Richard Roberts, Attorney, Halloran & Sage, Hartford
Gail McTaggart, Attorney, Secor, Cassidy & McPartland, Waterbury
Eric Knapp, Attorney, Branse, Willis & Knapp, Glastonbury
Tim Hollister, Attorney, Shipman & Goodwin, Hartford
Joe Williams, Attorney, Shipman & Goodwin, Hartford
Chris Smith, Attorney, Shipman & Goodwin, Hartford
Beth Critton, Attorney, Shipman & Goodwin, Hartford

**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 and other performance guarantees; (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-Dunham indicated that Southington prefers to do security agreements. M. Savage-Dunham 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-Dunham 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-Dunham 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 was thought to be 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 or phase.

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 would be 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 noted that "maintenance bonds" is a misnomer, since they are in essence 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 considering improvements and streamlining for all land use regulations and statutes.

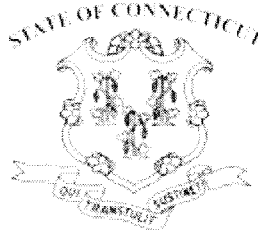
E. Barz suggested that any legislative effort needs to include a review of § 8-25 relative to the distinction between public improvements and private roadways. Homeowners on a private road are no less deserving of protection than buyers on public streets.

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.



Substitute Senate Bill No. 860

Public Act No. 11-79

AN ACT CONCERNING BONDS AND OTHER SURETY FOR APPROVED SITE PLANS AND SUBDIVISIONS.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. Subsection (g) of section 8-3 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2011*):

(g) (1) The zoning regulations may require that a site plan be filed with the commission or other municipal agency or official to aid in determining the conformity of a proposed building, use or structure with specific provisions of such regulations. If a site plan application involves an activity regulated pursuant to sections 22a-36 to 22a-45, inclusive, the applicant shall submit an application for a permit to the agency responsible for administration of the inland wetlands regulations not later than the day such application is filed with the zoning commission. The commission shall, within the period of time established in section 8-7d, accept the filing of and shall process, pursuant to section 8-7d, any site plan application involving land regulated as an inland wetland or watercourse under chapter 440. The decision of the zoning commission shall not be rendered on the site plan application until the inland wetlands agency has submitted a report with its final decision. In making its decision, the commission shall give due consideration to the report of the inland wetlands agency and if the commission establishes terms and conditions for approval that are not consistent with the final decision of the inland wetlands agency, the commission shall state on the record the reason for such terms and conditions. A site plan may be modified or denied only if it fails to comply with requirements already set forth in the zoning or inland wetlands regulations. Approval of a site plan shall be presumed unless a decision to deny or modify it is rendered within the period specified in section 8-7d. A certificate of approval of any plan for which the period for approval has expired and on which no action has been taken shall be sent to the applicant within fifteen days of the date on which the period for approval has expired. A decision to deny or modify a site plan shall set forth the reasons for such denial or modification. A copy of any decision shall be sent by certified mail to the person who submitted such plan within fifteen days after such decision is rendered. The zoning commission may, as a condition of approval of any modified site plan, require a bond in an amount not to exceed the cost to perform any modifications required by such modified site plan plus an additional amount of up to ten per cent of the amount of the bond and with surety and conditions satisfactory to it, securing that any modifications of such site plan are made or may grant an extension of the time to complete work in connection with such modified site plan. [The commission may condition the approval of such extension on a determination of the adequacy of the amount of the bond or other surety furnished under this section.] The commission shall publish notice of the approval or denial of site plans in a newspaper having a general circulation in the municipality. In any case in which such

notice is not published within the fifteen-day period after a decision has been rendered, the person who submitted such plan may provide for the publication of such notice within ten days thereafter. The provisions of this subsection shall apply to all zoning commissions or other final zoning authority of each municipality whether or not such municipality has adopted the provisions of this chapter or the charter of such municipality or special act establishing zoning in the municipality contains similar provisions.

(2) To satisfy any bond or surety requirement, the commission shall accept surety bonds, cash bonds, passbook or statement savings accounts and other surety including, but not limited to, letters of credit, provided such bond or surety is in a form acceptable to the commission and the financial institution or other entity issuing any letter of credit is acceptable to the commission. Such bond or surety may, at the discretion of the person posting such bond or surety, be posted at any time before all modifications of the site plan are complete, except that the commission may require a bond or surety for erosion control prior to the commencement of any such modifications. No certificate of occupancy shall be issued before a required bond or surety is posted. For any site plan that is approved for development in phases, the surety provisions of this section shall apply as if each phase was approved as a separate site plan. Notwithstanding the provisions of any special act, municipal charter or ordinance, no commission shall require a bond or other surety to securitize the maintenance of roads, streets or other improvements associated with such site plan for maintenance occurring after such improvements have been accepted by the municipality.

(3) If the person posting a bond or surety under this section requests a release of all or a portion of such bond or surety, the commission or its agent shall, not later than sixty-five days after receiving such request, (A) release any such bond or surety or portion thereof, provided the commission or its agent is reasonably satisfied that the modifications for which such bond or surety or portion thereof was posted have been completed, or (B) provide the person posting such bond or surety with a written explanation as to the additional modifications that must be completed before such bond or surety or portion thereof may be released.

Sec. 2. Section 8-25 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2011*):

(a) No subdivision of land shall be made until a plan for such subdivision has been approved by the commission. Any person, firm or corporation making any subdivision of land without the approval of the commission shall be fined not more than five hundred dollars for each lot sold or offered for sale or so subdivided. Any plan for subdivision shall, upon approval, or when taken as approved by reason of the failure of the commission to act, be filed or recorded by the applicant in the office of the town clerk not later than ninety days after the expiration of the appeal period under section 8-8, or in the case of an appeal, not later than ninety days after the termination of such appeal by dismissal, withdrawal or judgment in favor of the applicant but, if it is a plan for subdivision wholly or partially within a district, it shall be filed in the offices of both the district clerk and the town clerk, and any plan not so filed or recorded within the prescribed time shall become null and void, except that the commission may extend the time for such filing for two additional periods of ninety days and the plan shall remain valid until the expiration of such extended time. All such plans shall be delivered to the applicant for filing or recording not more than thirty days after the time for taking an appeal from the action of the commission has elapsed or not more than thirty days after the date that plans modified in accordance with the commission's approval and that comply with section 7-31 are delivered to the commission, whichever is later, and in the event of an appeal, not more than thirty days after the termination of such appeal by dismissal, withdrawal or judgment in favor of the applicant or not more than thirty days after the date that plans modified in accordance with the commission's approval and that comply with section 7-31 are

delivered to the commission, whichever is later. No such plan shall be recorded or filed by the town clerk or district clerk or other officer authorized to record or file plans until its approval has been endorsed thereon by the chairman or secretary of the commission, and the filing or recording of a subdivision plan without such approval shall be void. Before exercising the powers granted in this section, the commission shall adopt regulations covering the subdivision of land. No such regulations shall become effective until after a public hearing held in accordance with the provisions of section 8-7d. Such regulations shall provide that the land to be subdivided shall be of such character that it can be used for building purposes without danger to health or the public safety, that proper provision shall be made for water, sewerage and drainage, including the upgrading of any downstream ditch, culvert or other drainage structure which, through the introduction of additional drainage due to such subdivision, becomes undersized and creates the potential for flooding on a state highway, and, in areas contiguous to brooks, rivers or other bodies of water subject to flooding, including tidal flooding, that proper provision shall be made for protective flood control measures and that the proposed streets are in harmony with existing or proposed principal thoroughfares shown in the plan of conservation and development as described in section 8-23, especially in regard to safe intersections with such thoroughfares, and so arranged and of such width, as to provide an adequate and convenient system for present and prospective traffic needs. Such regulations shall also provide that the commission may require the provision of open spaces, parks and playgrounds when, and in places, deemed proper by the planning commission, which open spaces, parks and playgrounds shall be shown on the subdivision plan. Such regulations may, with the approval of the commission, authorize the applicant to pay a fee to the municipality or pay a fee to the municipality and transfer land to the municipality in lieu of any requirement to provide open spaces. Such payment or combination of payment and the fair market value of land transferred shall be equal to not more than ten per cent of the fair market value of the land to be subdivided prior to the approval of the subdivision. The fair market value shall be determined by an appraiser jointly selected by the commission and the applicant. A fraction of such payment the numerator of which is one and the denominator of which is the number of approved parcels in the subdivision shall be made at the time of the sale of each approved parcel of land in the subdivision and placed in a fund in accordance with the provisions of section 8-25b. The open space requirements of this section shall not apply if the transfer of all land in a subdivision of less than five parcels is to a parent, child, brother, sister, grandparent, grandchild, aunt, uncle or first cousin for no consideration, or if the subdivision is to contain affordable housing, as defined in section 8-39a, equal to twenty per cent or more of the total housing to be constructed in such subdivision. Such regulations, on and after July 1, 1985, shall provide that proper provision be made for soil erosion and sediment control pursuant to section 22a-329. Such regulations shall not impose conditions and requirements on manufactured homes having as their narrowest dimension twenty-two feet or more and built in accordance with federal manufactured home construction and safety standards or on lots containing such manufactured homes which are substantially different from conditions and requirements imposed on single-family dwellings and lots containing single-family dwellings. Such regulations shall not impose conditions and requirements on developments to be occupied by manufactured homes having as their narrowest dimension twenty-two feet or more and built in accordance with federal manufactured home construction and safety standards which are substantially different from conditions and requirements imposed on multifamily dwellings, lots containing multifamily dwellings, cluster developments or planned unit developments. The commission may also prescribe the extent to which and the manner in which streets shall be graded and improved and public utilities and services provided and, in lieu of the completion of such work and installations previous to the final approval of a plan, the commission may accept a bond in an amount and with surety and conditions satisfactory to it securing to the municipality the actual construction, maintenance and installation of such public improvements and utilities within a period specified in the bond. Such regulations may provide, in lieu of the completion of the work and installations above referred to, previous to the final approval of a plan, for an assessment or other method whereby the municipality is

put in an assured position to do such work and make such installations at the expense of the owners of the property within the subdivision. Such regulations may provide that in lieu of either the completion of the work or the furnishing of a bond or other surety as provided in this section, the commission may authorize the filing of a plan with a conditional approval endorsed thereon. Such approval shall be conditioned on (1) the actual construction, maintenance and installation of any improvements or utilities prescribed by the commission, or (2) the provision of a bond or other surety as provided in this section. Upon the occurrence of either of such events, the commission shall cause a final approval to be endorsed thereon in the manner provided by this section. Any such conditional approval shall lapse five years from the date it is granted, provided the applicant may apply for and the commission may, in its discretion, grant a renewal of such conditional approval for an additional period of five years at the end of any five-year period, except that the commission may, by regulation, provide for a shorter period of conditional approval or renewal of such approval. Any person who enters into a contract for the purchase of any lot subdivided pursuant to a conditional approval may rescind such contract by delivering a written notice of rescission to the seller not later than three days after receipt of written notice of final approval if such final approval has additional amendments or any conditions that were not included in the conditional approval and are unacceptable to the buyer. Any person, firm or corporation who, prior to such final approval, transfers title to any lot subdivided pursuant to a conditional approval shall be fined not more than one thousand dollars for each lot transferred. Nothing in this subsection shall be construed to authorize the marketing of any lot prior to the granting of conditional approval or renewal of such conditional approval.

(b) The regulations adopted under subsection (a) of this section shall also encourage energy-efficient patterns of development and land use, the use of solar and other renewable forms of energy, and energy conservation. The regulations shall require any person submitting a plan for a subdivision to the commission under subsection (a) of this section to demonstrate to the commission that such person has considered, in developing the plan, using passive solar energy techniques which would not significantly increase the cost of the housing to the buyer, after tax credits, subsidies and exemptions. As used in this subsection and section 8-2, passive solar energy techniques mean site design techniques which maximize solar heat gain, minimize heat loss and provide thermal storage within a building during the heating season and minimize heat gain and provide for natural ventilation during the cooling season. The site design techniques shall include, but not be limited to: (1) House orientation; (2) street and lot layout; (3) vegetation; (4) natural and man-made topographical features; and (5) protection of solar access within the development.

(c) The regulations adopted under subsection (a) of this section, may, to the extent consistent with soil types, terrain, infrastructure capacity and the plan of development for the community, provide for cluster development, and may provide for incentives for cluster development such as density bonuses, or may require cluster development.

(d) (1) To satisfy any bond or surety requirement in this section, the commission shall accept surety bonds, cash bonds, passbook or statement savings accounts and other surety including, but not limited to, letters of credit, provided such bond or surety is in a form acceptable to the commission and the financial institution or other entity issuing any letter of credit is acceptable to the commission. Such bond or surety may, at the discretion of the person posting such bond or surety, be posted at any time before all public improvements and utilities are constructed and installed, except that the commission may require a bond or surety for erosion control prior to the commencement of any such construction or installation. No lot shall be transferred to a buyer before any required bond or surety is posted. For any subdivision that is approved for development in phases, the surety provisions of this section shall apply as if each phase was

approved as a separate subdivision. Notwithstanding the provisions of any special act, municipal charter or ordinance, no commission shall require a bond or surety to securitize the maintenance of roads, streets or other improvements associated with such subdivision for maintenance occurring after such improvements have been accepted by the municipality.

(2) If the person posting a bond or surety under this section requests a release of all or a portion of such bond or surety, the commission shall, not later than sixty-five days after receiving such request, (A) release any such bond or surety or portion thereof, provided the commission or its agent is reasonably satisfied that the modifications for which such bond or surety or portion thereof was posted have been completed, or (B) provide the person posting such bond or surety with a written explanation as to the additional modifications that must be completed before such bond or surety or portion thereof may be released.

Approved July 8, 2011

MEMORANDUM

To: Our Municipal Clients

From: Branse, Willis, & Knapp, LLC

Subject: Public Act 11-70, An Act Concerning Bonds and Other Surety for Approved Site Plans and Subdivisions

Date: July 11, 2011

The General Assembly has passed Public Act 11-79, An Act Concerning Bonds and Other Surety for Approved Site Plans and Subdivisions, and, having not been vetoed by the Governor, it is now law and will become effective October 1, 2011. **Between now and October 1, 2011, we recommend that all of our client municipalities amend their subdivision regulations to eliminate the option for bonding of public improvements; and modify bonding provisions for site plan approvals in the zoning regulations.**

What Does the Act Require?

Conn. Gen. Stats. §8-3(g) currently addresses site plans, and allows (but does not require) bonding of the amenities associated with a site plan, such as landscaping, erosion and sedimentation control, lighting, etc. Conn. Gen. Stats. §8-25(a) contains more detailed provisions for bonding of public improvements as one of three (3) possible ways to assure the completion of such improvements. The other two options are that the subdivider completes the public improvements prior to the endorsement and filing of the subdivision; or that the subdivider obtains “conditional approval” (not to be confused with an approval subject to conditions) under which a deed restriction is filed that prohibits the sale of any lots until the public improvements are either constructed or bonded. In both cases, there are no provisions that address the procedure for the release of such bonds.

In the case of site plan approval, failure of the developer to complete amenities can result in an incomplete and unattractive development, but ordinary consumers are not effected. Tenants of a shopping center or office building may not see the landscaping and other improvements that they were promised, but they have the option of suing their landlord or withholding rent. By comparison, once a subdivision is endorsed and filed, the general public can buy lots and are led to believe, by virtue of the subdivision approval, that the Town will assure them of safe access via public roads, control of erosion, walking trails, or whatever other improvements were shown on the subdivision plan. Where the original subdivider is bankrupt or insolvent, those lot owners have no recourse except against the Town. In addition, many towns require maintenance bonds following acceptance of new subdivision roads (typically for one year) in order to

require repair of defects that may not be detectable until the passage of the seasons. Maintenance bonds like this will no longer be possible.

The Act contains five main elements:

1. It mandates that municipalities accept “surety bonds” for site plans and subdivisions, in addition to letters of credit, passbooks, or cash. At the behest of CCM, CCAPA, and other municipal advocacy groups, the Act was revised late in the session to allow commissions to review the “form” of the bond (i.e., it’s text, not the type of bond) and to approve the issuer of the bond.
2. It mandates that bonds not exceed more than 110% of the estimated costs (in other words, the contingency is limited to 10%).
3. It mandates that bonds be released within sixty-five (65) days of request or else provide the developer with a written explanation as to what additional work must be done.
4. It prohibits maintenance bonds following acceptance of public improvements.
5. For phased site plans or subdivisions, it requires that bonding be broken out so that each phase is treated as if it were a separate site plan or subdivision.

What is the Effect of the Act?

The fiscal impact analysis of this Act by the non-partisan Office of Legislative Research concludes:

Enactment of this bill may increase the likelihood that a municipality will not have access to sufficient funds to complete or remediate public improvements in cases of default or inadequate work by developers engaged in site plan modifications or subdivision development. To the extent that a municipality elects to complete or remediate any unfinished or inadequate work, corresponding costs, which may be of significant magnitude, would be incurred.

This is an accurate assessment of the Act’s impact, and it succinctly states why municipal attorneys all over Connecticut will not accept surety bonds for subdivision improvements while they will accept passbook assignments, cash, and letters of credit. The reason for the distinction between surety bonds and letters of credit is the way in which these two instruments are structured:

Letter of Credit: When you go to a bank to borrow money, the bank requires security for that loan. The collateral may be land (a mortgage), a security interest in personal property (usually called a “UCC-1”), assignment of rents or other income flow, cash on deposit with the bank, or any combination thereof. The bank is then willing to give you the money that you borrowed to spend as you wish. In a letter of credit, however, the bank doesn’t give you the money. Instead, it says to a third party, “we have the

proceeds of this loan available upon demand.” If the demand is made, the bank pays over the money without question because they have the security. After all, they would have given *you* the money on the spot so giving it to someone else at your request involves no greater risk.

2

Surety Bonds: A surety bond is an insurance policy, just like your health insurance. Because surety bonds don't involve the same law of averages as health insurance, the premiums are set on a more case-by-case basis, but the fact remains that the insurance premium is a lot less than the amount owed in the event of a default. Therefore, when there *is* a default, the insurance company has a strong incentive to delay (keeping the interest on that money while they stall) or to raise all kinds of defenses to payment in the hope of coercing you into a compromise that involves a lesser payout. Unlike the bank in the letter of credit, when the insurance company pays out more in bonding than it collected in premiums, it won't get more premiums from the same party over time and it usually won't have the collateral. So the insurance company just loses money on that particular transaction and hopes to make it up on others.

For these reasons, surety bonds end up being very difficult to collect, especially for small sums. In a typical site plan or nearly-complete subdivision, the cost of suing the bonding company can exceed the amount of possible recovery and the insurance companies know it. For them, legal fees are a deductible cost of doing business; for you, it's tax dollars.

What Should the Town Do?

We recommend the following:

- § Amend your subdivision regulation to eliminate any provision for bonding of subdivision improvements and use conditional approval, or completion of improvements prior to subdivision endorsement, exclusively. While the amended Statute would mandate the forms of bonds that you must accept, it continues to make bonding itself merely an option. Conditional approval still allows a subdivision to be approved and filed without bonds, but prohibits the sale of lots until public improvements are completed. This way, no innocent lot owner will be exposed to incomplete public improvements and will have no need to sue the town to complete them; **or**

- § While we think the safest route is to eliminate subdivision bonding, if you decide to retain the bonding option, amend your regulations to incorporate the language that the *form* of the bond and the *issuer* of the bond must be acceptable to the commission. As to the form, we would suggest that the bond form mandate a deadline by which funds must be paid following a calling of the bond, with a

penalty for delay; and the payment of attorney's fees and costs to the town in the event that litigation is required to collect on the bond. You should also require that all bonds be governed by the law of the State of Connecticut (not the law of the surety's home offices). As to the issuer, a good start would be to require that any surety maintain offices in Connecticut, so you don't have to chase an out-of-state insurance company.

§ Amend your subdivision and zoning regulations to provide that any bonds must be based on the cost of the work *if performed by the town*, including the cost of advertising for bid, bid evaluation, and oversight by a town inspector. Be sure your town's engineer is aware of this important distinction.

§ Amend your subdivision and zoning regulations to provide that no extensions of approvals may be granted until updated cost estimates for improvements are provided and approved by your town staff, and until new bonds are submitted in the new amounts. This will help to protect you against the 10% cap on contingency bonding.

§ Increase your zoning application fees to allow a factor for legal fees to collect on surety bonds that are unpaid for site plan approvals.

§ Increase your zoning and subdivision application fees to incorporate the cost of expanded inspections. With a 10% cap on contingency bonding, no provision for post-acceptance maintenance bonds, the required 65-day period within which to respond to bond releases, and the elimination of maintenance bonding, you will need to be vigilant in monitoring all work for which bonds are posted; and your inspectors will have to be ready to produce "punch lists" on short notice.

§ Impress upon your improvements inspectors the importance of identifying *any and all* defects and keeping accurate and complete records of them. This will make it easier to respond at the time that the bond release is requested.

§ With maintenance bonds, you may have been able to take a "wait and see" approach to defective work and see if it held up during the maintenance period, secure in the knowledge that any failures would be bonded. Now, that won't be the case. Therefore, require that *all* work be performed in *strict compliance* with the applicable standards, and that any defective work be corrected at once. You will not be able to accept excuses or delays anymore.

§ When accepting new subdivision streets, take your time. Since there is no maintenance bonding, you will have no recourse for defective work that shows up later on. While the Act requires bond releases within sixty-five days of request, it does not require road acceptance on any timetable. Even without bonding, your

liability is greater once you accept the road as a public road.

- § The Act *does* allow your town to reject bonds (including surety bonds) from particular companies. The language is that you must accept the bond “provided the financial institution or other entity issuing any letter of credit is acceptable to the commission.” Perhaps in cooperation with the Connecticut Conference of Municipalities, you should compile, maintain, and share a list of financial institutions that have failed to promptly honor their bond obligations and refuse to accept bonds from such institutions in the future.
- § Warn and educate the engineers and other professionals who review the improvements covered by this act that when a developer requests the return of a bond you must have their detailed analysis of whether the work covered by the bond has been done completely and to the engineer’s satisfaction sufficiently in advance that the town is not at risk of violating the sixty-five day limit set forth in this legislation. Failure to respond within the new statutory limit may result in towns being obligated to hand back bonds even where the work has not been done. Do not let this happen to you.
- § If your zoning regulations provide for bonding of site plans, those provisions should be amended to incorporate the requirements for surety bonds that are discussed above.

Public Act 11-79 is a bad idea that will make life more difficult for towns, developers, and consumers, but we have to deal with it. A copy of the Act is attached.

This Memorandum is part of our continuing effort to alert our client towns to important new developments in the law, and we hope you find it helpful. You have not been charged for the cost of preparing this Memorandum.

M:\TOWN1\Public Act 11-79 Memo.wpd