

CCM 2011 CCM Annual Convention
October 5, 2011

CAMA Municipal Law Update

Public Act 11-79- Site Plan and Subdivision Bonds
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Public Act 11-79 effective October 1, 2011 revises Conn. Gen. Stat. § 8-3(g) (site plans) and Conn. Gen. Stat. § 8-25 (subdivisions) with respect to bonding requirements. (Copy of the law is found at <http://www.cga.ct.gov/2011/ACT/Pa/pdf/2011PA-00079-R00SB-00860-PA.pdf>.)

A. Section 1/ Site Plans/ Conn. Gen. Stat. § 8-3(g):

1. Overview of prior law.

a. Conn. Gen. Stat. § 8-3g regarding site plans, provides an option (but not a requirement) to bond amenities associated with any “modified site plan”¹ as a condition of approval. (i.e., soil erosion and sediment control measures, drainage provisions, landscaping, and lighting). Bonding for site plans is not limited to public improvements and thus a failure to complete improvements such as landscaping and lighting typically impacts the public image of the project, although failure to complete drainage improvements may have an impact on public improvements. Most zoning regulations include provisions setting out the bonding policy for site plans, although the bonding mechanisms vary greatly from town to town.

b. Under the prior law there were no limits on the bond amount or the types of “surety” to be accepted, there was no restraint on conditioning extension on a determination of the adequacy of the bonding, no provision regarding timing or phasing of bonding, no provision regarding the timing of releases/partial releases, and no prohibition on bonding for maintenance of roads, streets and other improvements. The statute simply permitted a “bond in an amount and with surety and conditions satisfactory to it” with a right to a second look at the adequacy of the bond amount at the time of extensions.

c. Commission practices:

1). Maintenance Bonds. Most towns required road construction bonding (although more common with subdivisions than site plans) with the amount reduced at the time of town engineer signoff to a maintenance amount (typically to 10%) that remained posted until the road wintered over or for a set period such as one year. However there were towns that came to require long-term or permanent bonds to secure improvements- which appear to be part of the incentive for the HBA to push this amendment.

¹ The term “modified site plan” is typically assumed to mean a plan showing the modification of a site rather than an amended site plan. Most towns do not interpret “modified site plan” to be limited to public improvements as in the subdivision statute, but rather apply the term to cover amenities on the site.

2). **Forms of Security.** Many towns prohibited all surety bonds from bond provider companies based on historical problems with collection. Some towns only permitted cash bonds or pledged accounts and others only took letters of credit, although the use of letters of credit was not spelled out in the prior statute. Other towns used combinations of letters of credit, using a cash bond for the maintenance bonding period, soil erosion and site stabilization, or monuments and pins with the remainder of the work secured by a letter of credit. Some towns put actual covenants on the lands records to prohibit a C/O until the bond was posted or improvements completed.

2. The amendment to § 8-3g.

a. Background to the Act. The apparent purpose of the legislation is to provide relief to developers with financial problems affected in part by bonding and surety requirements imposed by some land use commissions. The revisions are aimed at providing more flexibility in the process to enable developers facing financial difficulty to complete their approved developments. This legislation was sponsored by the Home Builder's Association and opposed by CCM and CAPA.

b. The amendment **provides for different types of bonding** that the "Zoning commissions **shall** accept":

- Surety bonds (A surety bond provider guaranties performance)
- Cash bonds (Posted directly by developer/owner)
- Passbook or statement savings accounts (Posted directly by developer/owner)
- And other surety including letters of credit (bank issues to town)

"Provided any 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."

There are no definitions of the words "surety" or "bond." Surety bonds are typically a three-party contract among a principal (property owner/developer) who purchases the bond to guarantee the quality of work to be done in the future, the obligee (Commission/town) that requires the principal post the bond to secure performance, and the surety who is a surety bond company that issues the bond and financially guarantees the principal's capacity to perform a specific task. Generally a "bond" is posted directly by the person performing or responsible for performing the work as opposed to the surety posted by a third party guarantying the person responsible for performing the work will satisfactorily perform. A letter of credit by a bank is listed in the statute as a form of surety although it simply provides the funds that the Town may unconditionally draw upon to apply to the failed performance-- there is no actual guaranty by the bank that the work will be performed. In the case of a letter of credit, a pre-ordained statement is provided by the appropriate town officer, and the funds are drawn. This is why many towns favor letters of credit over surety bonds.

PA 11-79 is reasonably read to prohibit commissions from categorically refusing any particular type of bond, i.e. all surety bonds. This will require a change to a town's bond policy that expressly or effectively prefers some kinds of bonding over others. Although one of the concerns about the legislation is the perceived requirement that the town must now accept surety bonds offered by the person posting, representatives of the HBA who sponsored the bill and developers have remarked that surety bonding is not always preferred by builders as it can be very expensive and onerous to obtain; surety providers calculate a bond's premium based on the specific bond type, its needed amount, and the applicant's credit score. Most surety providers charge a base fee that's a percentage of the total bond amount to be issued (premiums are typically between 1 and 4 percent of the bond amount for an applicant with a good credit history, but can be 5 to 20 percent of the total bond amount for high risk applicants or those new to the business). Surety bonds are more typical for large commercial projects.

There is a question as to the meaning of the phrase "in a form acceptable to the commission" and whether a commission could determine that only certain forms of surety bonds could be acceptable. For example, some town attorneys have discussed that regulations/policies as to the form of the bond might require:

- Set deadlines for payment; i.e. payment in full within 65 days of written demand;
- Town's attorney's fees and costs, including witness, to be paid by the surety company to the town if the town prevails in an action to collect on the surety bond
- Penalties imposed for delays in payment; i.e. Failure to pay within 65 days of demand shall result in an automatic penalty (without further demand) for 1% of the total outstanding bond for each month or part of a month that the payment is delayed
- Institutions must have an office in Connecticut and that interpretation of bond terms and collection shall be governed by Connecticut law
- the surety company shall indemnify and hold harmless the Commission and the Town against any and all claims of damage or injury sustained upon, or as a result of, the incomplete public improvements during the period following the demand for payment on said surety bond, and for restoration of any damage or deterioration (including, but not limited to, erosion and sedimentation damages) resulting from such delay in payment; and
- Provisions reasonably required by the Commission's legal counsel.

Certainly to be acceptable in form, Letters of credit must at minimum be irrevocable and meet international letter of credit standards.

Some concerns with the new law are that the approval of the "financial institution or other entity" may be interpreted to apply only to letters of credit although the financial strength of an insurance bond may be just as important as a bank's safety and soundness. There is no guidance on how to evaluate financial institutions issuing letters of credits. Some towns have previously required that the institution have a high rating by the issuing bank's federal regulator (i.e. FDIC) for safety and soundness or is on the Weiss "A" List or that the insurance company acting as surety have an A.M. Best Company rating of at least A-.

c. **The amendment to § 8-3g provides limits the Amount of the bond:** The new law sets a 10% limit on contingency amounts by limiting the bond amount to the “cost to perform any modifications required by such modified site plan plus an additional amount of up to ten percent of the amount of the bond. Further, the new law deletes the provision for conditioning site plan extensions on adequacy of bonds effectively prohibiting the denial of extensions for failure to update the bond amount or bonding conditions. The word “modifications” provides the same confusion as discussed above. It will be more important than ever to get a very accurate cost of the improvements to be bonded as the cushion is limited.

d. **The amendment to § 8-3g provides for the timing of posting:** “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.” This will be a change for any towns that have required that all bonds be posted up front; it is also a problem where a developer starts construction but does not finish the public improvements (such as fire supply tanks) however bond money is not yet posted and available to complete the work. With the new Act, the bond would not be required to be posted until the end of the project, leaving the town with no security to complete such items.

e. **The amendment to § 8-3g prohibits the town from maintenance bonding.** “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.” This provision was apparently targeted by the HBA to stop the practice of requiring long-term or permanent maintenance bonds, but is written so broadly that it covers the typical one year or winter over periods for roads and similar improvements. The effect of this provision is to delay the public acceptance of streets and to require very careful engineering reviews before determining that construction is complete. Some towns may look at construction standards to include protection for the types of defects that can show during the first winter.

f. **The amendment to § 8-3g provides for release timing and procedures:** The Act provides:

If the person posting a bond or surety 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 a request, (A) release any such bond or surety or portion thereof, provided the commission or its agent is reasonably satisfied that the modification 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.

Many towns already do this but the 65 days limit is new. The fair interpretation is that the 65 days are timed from the meeting date receiving the request, not upon submission, but the statute does not clarify this. There is no provision to extend the 65 days, so the Town Engineer or Town consulting engineer must be made aware of the time frames and need for a written report with all work to be done. If the work is then done and another request is made, unless there are new issues caused by the additional work that are reasonably cited, the bond will most likely be required to be released within 65 days. This provision coupled with the no maintenance bond provision, means that there will be no bonding for post-completion defects. Although there is no definition of “maintenance” and it is unclear whether defects are truly “maintenance”, the release provisions will not permit bonding of undiscovered defects. Perhaps the performance standards for construction will deal with these issues so that “completion” does not occur until there is assurance of a satisfactory, zero defect product that has wintered over. At least one town is considering a provision that states that upon completion of all public improvements, the Commission may accept the public improvements no earlier than 12 months after the Director of Public Works provides written confirmation of the satisfactory completion. In many cases the Town Ordinances regarding acceptance of roads are implicated and will need to be revisited.

g. **The amendment to § 8-3g provides for bonding in phases to cover approvals with development in phases.** “[T]he surety provision of this section shall apply as if each phase was approved as a separate plan.” Many towns have used this procedure on large projects.

h. The Act prohibits issuing a C/O before the required bond or surety is posted.

B. Section 2 / Subdivision / Conn. Gen. Stat. § 8-25:

1. Overview of Prior Law.

a. **Methods of Assurance of Completion:** The prior law set out three ways² that subdivision regulations may assure completion of improvements in subdivisions (i.e. Completion of improvements before endorsing and filing record subdivision map, filing of map with conditional approval restricting sale of lots until bonding or completion of improvements and utilities, or bonding of improvements or utilities).

b. **The pre-October 1 statute does not address** or restrict maintenance bonding, the amount of a bond, the types of bonds/security, or provide a procedure for the release of bonding.

c. **Selling of lots upon posting of bond.** Where bonding is required, once the record subdivision plan is filed and endorsed, the developer can sell lots based on the assurances to the public that the public improvements will be completed or the town will utilize the bond to complete the incomplete or defective improvements. However, there has never been a guaranty by the Town that if the bond or surety is insufficient that the Town must expend its resources to complete the improvements.

² A fourth way is “for an assessment or other method allowing the municipality to make the improvements and to levy benefit assessments against the subdivision lots.” Fuller, Robert A. Land Use Law and Practice, Connecticut Practice Series, Vol. 9B § 21:14 citing Conn. Gen. Stat. Section 8-25.

2. The Amendment to Conn. Gen. Stat. § 8-3g now provides:

a. If bonding is to be elected to be used, the commission may “in lieu of” the “completion” of “grading and improvement of streets and the providing of public utilities and services”, accept a “**bond in an amount and with surety and conditions satisfactory to it** securing the municipality the actual construction, maintenance and installation of such public improvements and utilities within a period specified in the bond.” With the addition of the word “public” qualifying “improvements and utilities”, this provision makes clear that the scope is more restrictive than the bonding of modifications in site plans. It should be noted that even before the new Act, the subdivision statutes have not been interpreted to permit bonding for improvements on private property as the purpose of the bonding is for the municipality to have funds available to complete public improvements if the subdivider fails. See, Brenton v. Oxford Planning & Zoning Com'n, 1990 WL 265343, 3 Conn. L. Rptr. 41 (Conn.Super.,1990), FN 2.. Avonside Inc. Zoning & Planning Commission, 153 Conn. 232, 236 (1965) (The powers of planning commissions under Section 8-25 are strictly construed). Planning Commissions lack authority for bonding the improvements for private uses on private properties as a condition of a subdivision approval.

b. The following provisions of P.A. 11-79 are the same as site plans discussed above:

- Types of bonds including surety bonds and letters of credit the commission “shall” accept;
- Timing of bonding at discretion of person posting as long as before completion with exception for upfront bonding of S & E;
- Bonding in phases for subdivision approved for development in phases;
- Prohibition on maintenance bonds for roads, streets and other improvements associated with the subdivision after acceptance by the municipality;
- Requirement to release or provide a punch list within 65 days.

c. The act prohibits transferring any “lot to a buyer before any required bond or surety is posted.”

3. Amendments to zoning and subdivision regulations in response to P.A. 11-79:

a. Curative legislation is being considered particularly to allow for a one-year or short-term post-acceptance maintenance bond or surety, to provide for criteria to determine an “acceptable” bond or surety, including a letter of credit, and to provide a formula for increasing bond or surety amounts to track increased development costs during completion periods that can be up to 14 years.

b. The Public Act imposes a mandatory State Law that will pre-empt local regulations; local regulations and policies that conflict should be revised accordingly.

c. Local regulations have some room to set policies on the forms of bonds and financial requirements for letters of credit.

d. As bonding covers the cost of the improvements, it is questionable that other fees can be increased to cover the loss of inflation contingency in bond amounts. For example, Section 8-26 of the General Statutes allows a planning commission to establish a fee schedule and charge fees sufficient to cover the cost of processing subdivision applications; including cost of mailings, publication of notices and the costs of inspecting subdivision improvements, except that any schedule of fees is superseded by fees established by an ordinance based on section 8-1c a town ordinance covering schedule of reasonable fees for the processing of land use applications, including costs of professional consultants hired by the town agency. Section 8-3(a) allows the zoning commission to require a filing fee to cover the cost of publication of legal notices for a zone change or change in regulations.

e. Because bonding is discretionary, some towns, in response to the Act, are considering eliminating bonding and requiring conditional approvals for subdivisions as permitted by Section 8-25. This should be considered carefully, as bonding is an important tool to ensure that improvements are not left half built when a developer fails to complete. The timing of such a change in this economic environment should also be considered. Some towns already have or are considering provisions that give the developer the option of constructing public improvements without posting a complete performance providing the developer elects this option in writing, all work shall be subject to the required inspection procedures, and the developer files on the land records a security agreement with the Commission in a form approved by the Town Attorney covenanting that the developer transfer the title to any lots or obtain building or zoning permits until the public improvements are fully completed to the Town Engineer's satisfaction or until a proper bond has been posted.

f. It should be remembered that inland wetland bonding is not covered by this Act.

g. At least one Connecticut community, the P&Z Commission in Salem, is considering imposing a moratorium on all subdivision projects until the town can change its regulations in order to comply with the new law. This could mean a delay for developers who are eager to start building projects.

h. Weston has passed a new subdivision regulation that: Requires all public improvements to be completed before the endorsement and filing of the subdivision approval; allows the P & Z to require the developer to file a restriction on the land records for each lot in the subdivision so potential buyers are aware that the lot cannot be sold until all public improvements are complete; allows the P&Z to impose an assessment to ensure the completion of public improvements at the expense of the property owners within the subdivision; allows the P&Z to approve a subdivision for development in phases, in which case the bond or surety required would pertain to just the phase that is in development, and would be released once the phase is completed.

Credits: In preparing this outline, I have had the benefit of several fine reviews and discussions of this new Act, including the input of Eric Knapp, Esq. of Branse, Willis & Knapp, LLC who has been reporting on this legislation for the CBA Planning & Zoning Section both before and after passage and has provided outlines and memos for the municipal audience; Timothy S. Hollister of Shipman & Goodwin LLP who hosted a meeting of Stakeholders, including lawyers, builders/developers, town planners, and municipal officials to discuss the new Act; the minutes of this meeting provided by Tim Hollister and Chris Smith of Shipman & Goodwin LLP (www.shipmangoodwin.com/files/upload/Minutes082311.pdf) and a fine article by Chris Smith published in this week's edition of the Law Tribune and a pre-release copy of same (www.ctlawtribune.com/printarticle.aspx?ID=41815) and the Shipman & Goodwin Real Estate Alert also authored by Hollister and Smith, (http://www.martindale.com/members/Article_Atachment.aspx?od=273684&id=1347878&filename=asr-1347880.Our.pdf).