

Legislative History for Connecticut Act

Public Act: 01-47	
Bill Number: 1037	
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Transcripts from the Joint Standing Committee Public Hearing(s) and/or Senate and House of Representatives Proceedings

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CONNECTICUT
GEN. ASSEMBLY
SENATE

PROCEEDINGS
2001

VOL. 44
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1510-1798

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Page 11, Calendar 365, File 528, Substitute for
S.B. 1037 An Act Concerning Mediation of Appeals of
Decisions of Planning and Zoning Commissions. Favorable
Report of the Committee on Planning and Development and
Judiciary. The Clerk is in possession of amendments.

THE CHAIR:

Senator Daily.

SEN. DAILY:

Thank you, Madam President. I move acceptance of
the Joint Committee's Favorable Report and passage of
the bill.

THE CHAIR:

The question is on passage. Will you remark?

SEN. DAILY:

Yes. I would like to ask the Clerk to call
LCO6180.

THE CLERK:

LCO6180 which will be designated Senate Amendment
Schedule "A". It is offered by Senator Daily of the
33rd District.

THE CHAIR:

Senator Daily.

SEN. DAILY:

Thank you, Madam President. I move acceptance of
the amendment and I seek leave to explain the amendment

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and the bill.

THE CHAIR:

The question is on adoption. Will you remark?

SEN. DAILY:

Thank you, Madam President. The underlying bill gives local zoning and people aggrieved by zoning decisions the ability to go to mediation to resolve those disputes. Currently, the only option available to them is the courts.

The amendment is really basically technical clarifications for what's contained in the bill.

THE CHAIR:

The question is on adoption of Senate Amendment "A". Will you remark further? Will you remark further?

If not, I will try your minds. All those in favor indicate by saying "aye".

ASSEMBLY:

Aye.

THE CHAIR:

Opposed, "nay"? The ayes have it. Senate "A" is adopted. Will you remark further on the bill as amended? Senator Smith.

SEN. SMITH:

Thank you, Madam President. I rise for the purposes of calling an amendment. Will the Clerk please

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call LCO6024.

THE CLERK:

LCO6024 which will be designated Senate Amendment
Schedule "B". It is offered by Senator Smith of the
14th District et al.

THE CHAIR:

Senator Smith.

SEN. SMITH:

Thank you, Madam President. I would move adoption
of the amendment and seek leave to summarize.

THE CHAIR:

The question is on adoption. Will you remark?

SEN. SMITH:

Yes, Madam President. This amendment is designed
to repeal Connecticut General Statutes Section 8-30g and
h, and those sections do something unique to the
Connecticut General Statutes that has had a very bizarre
operation in the State of Connecticut.

What that section does is, it takes the normal rule
in the State of Connecticut, the normal rule says that
when a municipality turns down a zoning application that
the developer then upon appeal must prove that the
municipality did something wrong. They acted
unreasonably or arbitrarily.

What this section does, it says that if a developer

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can show that if a certain number, 25% of its units are affordable as defined by the statute, then that presumption on appeal is reversed and the developer is assumed to be correct and the municipality is assumed to be wrong unless they can show certain things.

The bizarre result here has been that developers are able to punch selective holes in the zoning laws of certain communities reaping enormous profits for themselves while providing little or no housing, in fact in most cases, no housing that is affordable by any reasonable definition of that term.

Moreover, these developers after making all this money simply walk away and leave the municipality now with a changed community. And interestingly enough, I've heard some people say that there was a design here to get an exclusionary zoning rules.

The bizarre result is, only in those municipalities that have sewer systems can this section operate profitably for developers. So in those very communities with the most "exclusionary zoning" the rule doesn't operate and all you get are suburbs with sewers that are subjected to developers making a lot of money who in turn provide no affordable housing.

This amendment would repeal that section, repeal this one aberration in Connecticut law and return the

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general rule to its general application. I would urge its adoption, Madam President.

THE CHAIR:

The question is on adoption of Senate Amendment "B". Will you remark further? Will you remark further? Senator Daily.

SEN. DAILY:

Thank you very much. I would respectfully speak against the amendment. I don't think the underlying bill is really the proper subject matter for undoing what's in our housing codes to start with.

THE CHAIR:

Will you remark further? Senator Coleman.

SEN. COLEMAN:

Thank you, Madam President. Madam President, I would join in the urging to reject this particular amendment for the simple reason that while this issue and this subject has been controversial over the last couple of years.

While I had the privilege of serving as the Chairman of the Select Committee on Housing, last year we had a blue ribbon commission and a lot of people on a bipartisan basis put in a lot of time and effort to, I think, scrutinize the affordable housing appeals procedure and in fact made some very meaningful and

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significant modifications to that procedure.

It's only fair, I think to that Commission and the people who admirably served on that Commission to give their recommendations, many of which have been enacted into law an opportunity to at least see how they work.

I happen to believe and have every confidence that what was thoroughly considered and what was enacted into law will be beneficial to the communities as well as to those who are seeking affordable housing opportunities in the State of Connecticut. I think what we did was good work and is a good thing and I'm hopeful that this General Assembly including this Senate, will give those initiatives an opportunity to work, hopefully to everyone's satisfaction or nearly everyone's satisfaction.

I urge rejection of this amendment, Madam President.

THE CHAIR:

Thank you, Sir. Will you remark further on the amendment? Will you remark further? Senator Daily.

SEN. DAILY:

Thank you, Madam President. I would ask that when the vote be taken it be by roll call.

THE CHAIR:

A roll call vote will be ordered. Senator

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McKinney.

SEN. MCKINNEY:

Thank you, Madam President. I rise in support of the amendment and just briefly to echo the comments made by Senator Smith. And just to give an example of what's happening out there in many of our towns.

In the Town of Monroe which I represent, several developers came in with housing projects. Because of what was deemed by the zoning board to be a project that was not right for the town, they were seeking to, you put too many homes, quite frankly, on a piece of property, that when the application was rejected the developer rather than scaling back the project, instead of wanting 20 houses maybe get 15, simply said, well, you know what? We're going to show them. And they came in with an affordable housing project.

And the reason why they did that was retribution against a zoning board which had turned down their project and because they know that state law is on their side. State law says you can come in with an affordable housing project and we're going to get it because the zoning board is powerless and that's what's wrong with the law.

Senator Coleman is correct. The blue ribbon commission recommended some very positive changes. We

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enacted those changes and I applaud him for all his efforts and this is not an amendment designed to say that we don't want affordable housing in our towns. We must have more affordable housing in our towns.

In the Town of Newtown which I represent, there was an affordable housing project that was completed two years ago. That was a project that was done at the inspiration of the town leaders and done in cooperation with everyone.

In Trumbull, they're going through affordable housing projects which the town is going forward and doing. We're not talking about trying to keep out affordable housing. I know some towns have and that's not right and I would not advocate for that.

But what we're simply saying is that our towns and our zoning boards should have the final decision. They should have the rights with an affordable housing application that they do with the subdivision application and the current status of Connecticut law is just the opposite.

The rights that the zoning board has with respect to every application are not the rights that they have in the affordable housing application and I think we need to correct that. Thank you, Madam President.

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Thank you, Sir. Will you remark further? Senator Nickerson.

SEN. NICKERSON:

Thank you, Madam President. In addition to the flaws of the underlying statute to which this amendment has been addressed that have already been pointed out, let me point out another one that hasn't been pointed out that I think is as fundamental as any of the other flaws.

The law to which this amendment is directed divides the state into two lists of so-called good towns and so-called bad towns and it creates that division by drawing a line which separates those two lists of towns in accordance with those which do and do not have 10% of their housing in public housing.

The problem with that is, that in the B list, the so-called bad towns, you will find lumped, towns which I concede have not only no affordable housing but no multi-family housing. You will also find towns who have spend millions of dollars of constructing public housing and who every housing authority in the state has said can never reach the 10% threshold in order to find themselves removed from the bad town list to the good town list and thus the intent of the law which was to create an incentive to certain towns to create

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additional housing in most cases doesn't work.

There are, and I could name them all, dozens of towns which as I said have built a great deal of public housing but can never get to 10% either because their town is already largely developed, the price of land, or simply the size of the town or other reasons.

Thus I submit, this fundamental structure of the underlying law, namely good towns and bad towns is unworkable, does not work, has not worked to create incentives for additional public housing and thus while I would prefer a more targeted fashion of dealing with that law that is in this amendment, we don't have such an opportunity before us.

While I recognize Senator Coleman says correctly that there were some reforms, they were to be charitable, modest, and do not deal with this fundamental flaw. Good towns. Bad towns. It doesn't work. Thank you, Madam President.

THE CHAIR:

Thank you, Sir. Will you remark further? Senator Finch.

SEN. FINCH:

Thank you, Madam President. I am not a supporter of the affordable housing laws that currently exist. However, I would urge the circle great caution because

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as a new person involved with housing on the Housing Committee, I can tell you that both proponents of the housing bill and the detractors of the affordable housing bill have made considerable compromise. They have worked out their differences. It's resulted in new laws and it's more importantly resulted in a process by which any of our towns can go forward and seek a moratorium from the affordable housing law.

I think that to act after the compromises have been made may appear to be in bad faith and may jeopardize the moratorium itself. Thank you.

THE CHAIR:

Thank you, Sir. Senator Handley.

SEN. HANDLEY:

Thank you, Madam President. As, along with Senator Coleman, a former Co-Chair of the Housing Committee and one who worked on the issues of affordable housing for four years, once again I urge my colleagues to vote against this amendment.

We worked very hard in the last four years to devise a compromise between many of the parties and this amendment in effect would destroy the compromise which was well thought out and worked on very diligently for a long period of time.

So I do encourage the members of the Senate to

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reject this amendment and to support the work of the blue ribbon commission which we approved last session.

THE CHAIR:

Senator LeBeau.

SEN. LEBEAU:

Thank you, Madam President. Through you a question to the former Chair of the Committee, Senator Coleman.

THE CHAIR:

Senator Coleman, prepare yourself. Senator LeBeau, please proceed.

SEN. LEBEAU:

Are you prepared? I'd just like to, not serving on the Housing Committee and having the kind of background that you and Senator Handley and others in the circle have, I'd like to get some background as to how Senator Smith is referring to kind of a kick in mechanism.

When does that mechanism kick in that there would be the use of this affordable housing provision? Is it to all towns at all times?

THE CHAIR:

Senator Coleman.

SEN. COLEMAN:

Through you, Madam President. Senator LeBeau, as Senator Nickerson had indicated, and I would not be as judgmental as Senator Nickerson has indicated, I would

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simply say that there are towns that have reached the threshold of having 10% of the units within its municipal boundaries affordable and towns that have not reached the threshold of having 10% of the units within its boundaries as affordable.

Senator Nickerson refers to them as good towns and bad towns. I would not use that judgment and I'm not sure which group is good or which group is bad, even under Senator Nickerson's analysis.

But the fact of the matter is, the threshold that would exempt a municipality from the affordable housing appeals procedure process requirements would be having 10% of those units being considered affordable. And that is either 10% of those units can be a combination of public housing units or deed restricted units and still meet the definition of affordable.

Additionally, in the work that was referred to, Senator LeBeau, the work by the blue ribbon commission, there were incentives that were put into law that would entitle moratorium, even a municipality that has not reached the threshold of 10% of those units being affordable would be able to earn a moratorium if it just on its own, for example, took some initiative and built some affordable housing.

If they didn't like the proposals that developers

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were submitting, if they had problems either traffic considerations or size of the development, they could do it on their own and thereby earn points toward a moratorium that could last. The effect of the moratorium would be that no further applications for affordable housing under this particular procedure could be submitted for a period of up to two years.

Through you, Madam President.

THE CHAIR:

Senator LeBeau.

SEN. LEBEAU:

Thank you, Senator Coleman. Having heard that response, I would agree with Senator Coleman that it's neither, what we're talking about here good towns or bad towns. It seems that this is quite a reasonable provision in the last and I think that having heard that explanation I would find that this amendment is not called for and would oppose it. Thank you.

THE CHAIR:

Thank you, Sir. Will you remark further on Senate Amendment "B"? Senator Herlihy.

SEN. HERLIHY:

Thank you, Madam President. Affordable housing is a very good thing and every community needs it. We need starter homes for our young. We need ender homes for

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our seniors. We need homes for first year employees, public employees, everyone in the community. We need a diverse community. So affordable housing is a very good thing.

It is the abuse and it is the manipulation of this statute by profit driven developers that is what's at heart here. And I want to say that I believe a 10% threshold is very reasonable. I agree with Senator Coleman and Senator LeBeau in terms of that being a reasonable and responsible minimum threshold.

The problem with the statute is that developers are able to manipulate this statute in a fashion that keeps the homes that they build through the use of this law unaffordable. I have a complex that if built in my district will have rental prices and new home purchase prices that no first year or even a fifth year teacher could afford, no police officer could afford, no person from a lower socio-economic status could afford.

There are some flaws in terms of how that 10% threshold is defined. It's defined by statute. It's not defined by market. All of the apartments in your particular town or your particular district that on a market price basis that would be considered affordable are not going to meet this definition unless they're CHFA financing, unless they're Section 8 public housing

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or unless there's deed restrictions.

You can have a 700 foot condominium or a small home. There's homes in my home town that were built for employees of a particular manufacturing company that are extremely small and extremely affordable. None of those units count because they don't meet the statutory definition.

It is for those reason that the statute is basically flawed. Now, I served on the blue ribbon commission and I'm going to go out and I'm going to comment the work of Senator Coleman and Representative Flaherty who chaired that commission and I'm going to say that they worked hard, extremely hard to make what I consider a bad law better.

But just because we all dug in, rolled up our sleeves and made a bad law better, it does not diminish our right to come back and try to repeal that bad law. I believe that this amendment is offered in good faith, although I am a member of the blue ribbon and completely support the work of Senator Coleman, Representative Flaherty and that commission, I feel it is well within our purview, in fact it's our responsibility, raise issues, debate issues, vote issues.

I'll be supporting this amendment.

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Thank you, Sir. Will you remark further on the amendment? Will you remark further? If not -- excuse me, Senator Smith.

SEN. SMITH:

Thank you, Madam President. I just couldn't let a couple of comments go by and Senator LeBeau, the 10% threshold that you felt was reasonable as you were having a dialogue there with Senator Coleman. It operates exactly as Senator Herlihy was describing. In my home town we have far more than 10% of our units affordable but because they're not within the statutory definition our town gets chopped up. There's nothing fair about that.

And I also heard that the moratorium was a compromise. For those of us under the hammer of this statute, it was no compromise and there were people on that blue ribbon commission who did not agree with its work and in fact issued a minority report and it's not because of any bad faith dealing, it's because some of us simply disagree with the operation of that law.

And the great compromise that seemed to come out of that commission was a moratorium. A moratorium is not a solution. A moratorium merely calls a hiatus for some here only a couple of years and then the operation begins again, so it doesn't solve the underlying problem

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in any way.

So I think of the work of the blue ribbon commission where people of good will worked hard and were unable to come up with a resolution to this problem, this issue, has not the solution and that's why this bill and the amendments to follow are here today. Thank you, Madam President.

THE CHAIR:

Thank you, Sir. Will you remark further? If not, would the Clerk please announce a roll call vote. The machine will be opened.

THE CLERK:

An immediate roll call has been ordered in the Senate. Will all Senators please return to the Chamber.

An immediate roll call has been ordered in the Senate. Will all Senators please return to the Chamber.

THE CHAIR:

Have all members voted? If all members have voted, the machine will be locked. The Clerk please announce the tally.

THE CLERK:

Motion is on adoption of Senate Amendment Schedule "B".

Total number voting 36; necessary for passage, 19. Those voting "yea", 16; those voting "nay", 20. Those

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absent and not voting, 0.

THE CHAIR:

The amendment fails. Will you remark further on the bill as amended? Senator Daily.

SEN. DAILY:

Thank you, Madam President. Without objection, I would move the underlying bill to the Consent Calendar.

THE CHAIR:

Motion is to refer this item to the Consent Calendar. Without objection, so ordered.

THE CLERK:

Calendar Page 12, Calendar 373, File 546, S.B. 89
An Act Concerning the DNA Data Bank of Convicted Offenders. Favorable Report of the Committee on Judiciary. The Clerk is in possession of amendments.

THE CHAIR:

Senator Coleman.

SEN. COLEMAN:

Thank you, Madam President. Madam President, I move acceptance of the Joint Committee's Favorable Report and passage of the bill.

THE CHAIR:

The question is on passage. Will you remark?

SEN. COLEMAN:

Madam President, current law requires those

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Senate on the Consent Calendar. Will all Senators please return to the Chamber.

Madam President, the Second Consent Calendar begins on Calendar Page 2, Calendar 106, S.B. 998.

Calendar Page 11, Calendar 365, Substitute for S.B. 1037.

Calendar Page 29, Calendar 218, Substitute for S.B. 1247.

And Calendar Page 35, Calendar 260, S.B. 1026.

Madam President, that completes the Second Consent Calendar.

THE CHAIR:

Thank you, Sir. Would you once again announce a roll call vote. The machine will be opened.

THE CLERK:

The Senate is now voting by roll call on the Consent Calendar. Will all Senators please return to the Chamber.

The Senate is now voting by roll call on the Consent Calendar. Will all Senators please return to the Chamber.

THE CHAIR:

Have all members voted? Have all members voted? If all members have voted, the machine will be locked. The Clerk please announce the tally.

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THE CLERK:

Motion is on adoption of Consent Calendar No. 2.

Total number voting 36; necessary for passage, 19.

Those voting "yea", 36; those voting "nay", 0.

Those absent and not voting, 0.

THE CHAIR:

The Consent Calendar is adopted.

At this time we'll entertain points of personal privilege or announcements. Are there any announcements? Seeing none, Senator Jepsen.

SEN. JEPSEN:

Madam President, this concludes our business for the day. We'll be back in session tomorrow. For Democrats that's a 12:00 o'clock caucus, the session to follow.

THE CHAIR:

Thank you, Sir. Senator DeLuca.

SEN. DELUCA:

Thank you, Madam President. There will also be a Republican caucus at 12:00 noon tomorrow.

THE CHAIR:

Thank you, Sir. Senator Jepsen.

SEN. JEPSEN:

Madam President, there being no further business, I move we adjourn subject to the Call of the Chair.

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Those voting Yea 141

Those voting Nay 3

Those absent and not voting 6

DEP. SPEAKER HYSLOP:

Bill as amended passes. Clerk please call Calendar 495.

CLERK:

On page nineteen, Calendar 495, substitute for SB1037, AN ACT CONCERNING MEDIATION OF APPEALS OF DECISIONS OF PLANNING AND ZONING COMMISSIONS. Favorable report of the Committee on Judiciary.

DEP. SPEAKER HYSLOP:

Representative Chris Stone of the 9th.

REP. STONE: (9th)

Thank you Mr. Speaker. Good afternoon again. I move the Joint Committee's favorable report and passage of the bill in concurrence with the Senate.

DEP. SPEAKER HYSLOP:

Questions on acceptance and passage in concurrence with the Senate. Will you remark?

REP. STONE: (9th)

Yes, thank you Mr. Speaker. This is a bill that amends zoning appeal process set forth in Section 8-8 of our statutes. It provides for a voluntary mediation process that litigants can participate in, in order to

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save some cost of litigation, save time, and hopefully if they take advantage of the participate constructively, can reach resolution and further land development that is consistent with neighborhoods and consistent with the desires of those landowners who want to develop their property.

The bill was passed by the Senate and amended, in that regard Mr. Speaker, I ask that you call LCO 6180 and I be allowed to summarize.

DEP. SPEAKER HYSLOP:

Clerk please call LCO 6180 previously designated Senate amendment "A" and the Representative has asked leave to summarize.

CLERK:

LCO 6180 Senate "A" offered by Senator Daily.

DEP. SPEAKER HYSLOP:

Representative Stone.

REP. STONE: (9th)

Thank you Mr. Speaker. This bill amends Section E of the original bill. It provides that the stay of the litigation, stay of the appeal, which would have automatically taken effect under the original bill is now, it has to be applied for by litigants. If they agree to a stay, the court will issue a stay, if they do not provide for a stay then the court will not impose

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the stay.

It also provides for an additional 180 days for extensions of the mediation process. It's a relatively simple amendment and I move adoption.

DEP. SPEAKER HYSLOP:

Questions on adoption of Senate "A" will you remark on Senate "A?" Representative Blackwell.

REP. BLACKWELL: (12th)

Thank you Mr. Speaker. A question to the opponent of the amendment.

DEP. SPEAKER HYSLOP:

Please proceed.

REP. BLACKWELL: (12th)

Thank you Mr. Speaker. Through you, the amendment states that the stay of any appeal terminates upon termination of the mediation and the question through you Mr. Speaker is, does mediation terminate upon a party's withdrawal from the mediation, that's line 182-183? Or does mediation terminate only after the 180 days has run? Through you Mr. Speaker.

DEP. SPEAKER HYSLOP:

Representative Stone.

REP. STONE: (9th)

Thank you, through you Mr. Speaker. The mediation can terminate in any one of a number of ways. Initially

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the mediation can terminate if only one of the party's decides to withdraw from the mediation, they're entitled to do so as a matter of right for whatever cause. It would terminate if they reach an agreement and the mediation is successful. The State would terminate so that they could then enter orders with the court consistent with the results, the successful results of the mediation and it would also terminate if the mediation time period is not extended. If mediation has not reached a final resolution one way or another, the time period has lapsed, one or more of the parties does not agree to an extension of that period the mediation would terminate in that event as well. So there are several circumstances. The key here is that when it does terminate the stay on that determinates and they will proceed to court either on the merits or to enter judgement in accordance with the mediation process.

DEP. SPEAKER HYSLOP:

Representative Blackwell.

REP. BLACKWELL: (12th)

Thank you Mr. Speaker. And I thank the gentleman for his answer.

DEP. SPEAKER HYSLOP:

Will you remark further on Senate "A?" Will you

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remark further on Senate "A?" If not I'll try your minds. All those in favor signify by saying aye.

REPRESENTATIVES:

Aye.

DEP. SPEAKER HYSLOP:

Those opposed? The ayes have it Senate "A" is adopted. Will you remark further on the bill as amended?

REP. STONE: (9th)

Yes Mr. Speaker if I might.

DEP. SPEAKER HYSLOP:

Proceed.

REP. STONE: (9th)

Thank you Mr. Speaker. Again, I want to emphasize that the process established in this bill is purely voluntary. It provides for notice to parties who might be affected by the mediation process or might be affected by the development of a particular piece of property.

It provides for the ability of those affected or aggrieved under our statutes to participate in the mediation process. It provides that whatever is decided or discussed within the mediation process is not disclosable or cannot be submitted as evidence as part of litigation. It promotes disclosure, it promotes

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candid discussion, frank discussion about the possibility of resolving the parties differences. Originally when this bill was submitted to the Planning and Development I was the lone dissenter opposed to the bill. You can see from the file copy that I carried a lot of votes with me during that committee meeting.

But I objected to the bill for various reasons, most of those, in fact all of those, my concerns have been addressed. Primarily in giving other parties an opportunity to participate, those who might be affected by the mediation process. So as amended and as amended this afternoon, and has amended through the committee process I urge my colleagues to support this bill.

Thank you Mr. Speaker.

DEP. SPEAKER HYSLOP:

Representative Blackwell.

REP. BLACKWELL: (12th)

Thank you Mr. Speaker. I rise in support of this bill. This bill represents an attempt to offer an alternative to litigation that could save time and money for all parties involved in land disputes. Currently more than 300 administrative appeals of land use decisions are filed annually. A single land use appeal can typically cost any municipality about \$20,000. It's a burden on our court system and a burden on our towns.

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This bill allows for mediation as an alternative method to resolving disputes. And partly the method is not mandated and any party may choose not to engage in mediation at any time. In that case the normal course of land use appeal to the courts will take place. The bill also provides a 45 day cooling off period and an opportunity for parties to withdraw at any time. I believe that this new tool will greatly help land use applicants as well as land use commissions and I urge its support. Thank you Mr. Speaker.

DEP. SPEAKER HYSLOP:

Representative Bernhard.

REP. BERNHARD: (136th)

Thank you Mr. Speaker. A question through you to the proponent of the bill.

DEP. SPEAKER HYSLOP:

Proceed.

REP. BERNHARD: (136th)

Representative Stone, as I've heard it articulated and as I've read this proposed piece of legislation I'm certain I understand why we need a law? It looks pretty, on its face it appears to me that everything is voluntary having handled probably hundreds of these kinds of appeals over the last 30 years, I know there's always an opportunity and the parties often engage in

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the instance of sitting down across from one another to see whether they can come to common ground and resolve the issues.

I can't see any objection to this bill. But I'm wondering why we're spending a lot of time in passing a law which appears to me to be basic common sense?

Through you Mr. Speaker.

DEP. SPEAKER HYSLOP:

Representative Stone.

REP. STONE: (9th)

Thank you Mr. Speaker. And I thank Representative Bernhard for that endorsement of the bill as one that's fraught with common sense. I would point out that this does not necessarily replace other informal mediation processes that litigants might go through. What it does is it sets up a formal procedure that those parties on a voluntary basis can engage in. It sets up the framework and the structure for that process and it brings mediation into or part of the litigation process.

It makes the parties at least consider, at least consider mediation as an avenue, a method to resolve their disputes. It may resolve some cases, it may resolve many cases. But by bringing it to the forefront, making it part of the statute in dealing with zoning appeals, it will do what I hope and as

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Representative Blackwell hopes it will accomplish and that is saving of money, saving of time, and development that is consistent with the concerns of neighbors, concerns of abutters and the rights of individuals to develop their property.

I would also point out, if I might Mr. Speaker, that it was supported not only by the theorists or the academics in zoning law, Professor Tundra for example for one, also supported by the Home Builders Association, it's supported by town planners, the Connecticut Planning Association. So it had widespread support on both sides of the land development issue.

DEP. SPEAKER HYSLOP:

Representative Bernhard.

REP. BERNHARD: (136th)

Thank you Mr. Speaker. Just one follow-up question to insure legislative intent. Since time is often an enemy of one side or the other. It is my understanding from your comments here and from what I can read in the bill, that at any time during the process if one of the parties -- that is one of the litigants -- elects not to proceed any further with mediation because it does not appear to that party that anything successful can come from spending any more time to mediate that, that will terminate the mediation process and allow the courts to

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proceed with the resolution of the appeal?

DEP. SPEAKER HYSLOP:

Will you remark further on the bill as amended?

REP. STONE: (9th)

If I can respond Mr. Speaker.

DEP. SPEAKER HYSLOP:

Representative Stone.

REP. STONE: (9th)

Thank you Mr. Speaker. Representative Bernhard is absolutely correct. I think he also makes an interesting distinction between party litigants or litigants as parties and a neighbor who might come in or somebody might come in at the request of the mediator. It's the party litigants upon withdrawal who will terminate mediation. If the mediator decides that he or she would like, or suggests that a neighbor gets involved or a town planner get involved in the mediation process, they don't become party litigants, they become part of the mediation process. If they were to withdraw, that does not necessarily stop the mediation process.

So you can't petition to get in, in an effort to stop the litigation at some later date. I thank you for the comments Representative Bernhard.

DEP. SPEAKER HYSLOP:

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Representative Sharkey.

REP. SHARKEY: (103rd)

Thank you Mr. Speaker. Through you a question to the proponent of the bill.

DEP. SPEAKER HYSLOP:

Please frame your question.

REP. SHARKEY: (103rd)

Mr. Speaker, there's a significant amount of case law that deals with the issue about parties who reach a mediated solution currently and the need for those parties to then go back to the local commission for approval of that standard. Can you just comment on what this bill will do as far as that's concerned.

DEP. SPEAKER HYSLOP:

Representative Stone.

REP. STONE: (9th)

Thank you Mr. Speaker. Through you. What this would provide, let's assume that the mediation process bring about an agreement. That agreement would be subject to the board or commission that either appealed or was appealed from -- the decision was appealed from -- their approval and also the same rules that apply to any zoning case where there's a withdrawal, they'd have to get the approval from a Superior Court at a hearing for that purpose.

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DEP. SPEAKER HYSLOP:

Representative Sharkey.

REP. SHARKEY: (103rd)

Thank you Mr. Speaker. I would rise in support of this bill knowing the amount of litigation that does occur and the amount of time it takes to litigate these matters depending upon which judicial district you happen to be in. This I think would increase the economy of our land use appeals process. So I would support the bill. Thank you.

DEP. SPEAKER HYSLOP:

Will you remark further on the bill as amended?
Will you remark further on the bill as amended?
Representative Heagney.

REP. HEAGNEY: (16th)

Thank you Mr. Speaker. Mr. Speaker if I may a question to the proponent of the bill through you?

DEP. SPEAKER HYSLOP:

Proceed.

REP. HEAGNEY: (16th)

Just for legislative intent could you tell me Representative, by indication of the party, is it indicated there that, that would be the municipal commission whose decision is being appealed or is it the municipality itself.

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DEP. SPEAKER HYSLOP:

Representative Stone.

REP. STONE: (9th)

Thank you Mr. Speaker. As with all zoning appeals, it would be the commission from whose decision was appealed on their decisions or grants or applications are denied. That commission would be the party, not the municipality.

REP. HEAGNEY: (16th)

And so the Commission that is subject to the appeal would also then have to vote to determine whether it wished to participate in mediation?

DEP. SPEAKER HYSLOP:

Representative Stone.

REP. STONE: (9th)

Thank you Mr. Speaker. Yes.

DEP. SPEAKER HYSLOP:

Representative Heagney.

REP. HEAGNEY: (16th)

And similarly, any successful resolution of that mediation would have to be accepted by vote of the commission?

DEP. SPEAKER HYSLOP:

Representative Stone.

REP. STONE: (9th)

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The short answer is yes. I would assume that the commission would appoint a representative to participate in the mediation process and then bring the results of that back to the commission. As you know, some planning and zoning commissions have up to as many seven members and it would be perhaps unwieldy to require all seven members to participate directly in the mediation, they may appoint a representative who would then report back for approval of any agreed upon resolution. Through you Mr. Speaker.

DEP. SPEAKER HYSLOP:

Representative Heagney.

REP. HEAGNEY: (16th)

Thank you Mr. Speaker. To clarify the point, while a subset, maybe a chairman or someone designated would participate in the mediation. The actual acceptance of a resolution would be done by a vote of the commission itself.

DEP. SPEAKER HYSLOP:

Representative Stone.

REP. STONE: (9th)

Through you Mr. Speaker, yes.

DEP. SPEAKER HYSLOP:

Representative Heagney.

REP. HEAGNEY: (16th)

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And similarly if there is a third party that it's agreed that they have some rights in this mediation process?

DEP. SPEAKER HYSLOP:

Representative Stone.

REP. STONE: (9th)

Through you Mr. Speaker, yes, once the mediation process is decided upon and they go forward there's a requirement that notice be published in the newspaper advising all those who might be aggrieved of the mediation process. That individual or those individuals could then petition to the court under the standards of agreement, which are already in place under 8-8 of our statutes, petition the court to be allowed to become a part of that mediation process. Through you Mr. Speaker.

DEP. SPEAKER HYSLOP:

Representative Heagney.

REP. HEAGNEY: (16th)

Mr. Speaker, I thank you and I thank the proponent for the answers to my questions.

DEP. SPEAKER HYSLOP:

Will you remark further on the bill as amended?

Representative Bernhard.

REP. BERNHARD: (136th)

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Thank you Mr. Speaker for the second time, forgive me. A question through you to the proponent of the bill.

DEP. SPEAKER HYSLOP:

Please frame your question.

REP. BERNHARD: (136th)

Representative Stone I just had an opportunity to dwell on the answer that you gave me to the previous question and I think for legislative intent we ought to have some clarity on this point. In the event that a commission approves an application and an appeal is taken by a neighbor, the litigants then are the commission and the neighbor, not the applicant whose application has been approved. The applicant may have some interest in proceeding with a project that was approved, nevertheless he may find himself unable to control the litigation because the commission and the opponent proceeded to go to this mediation process.

What rights if any at that point does the applicant have to see that the mediation process proceeds expeditiously or terminates for that matter so that they can get the appeal completed. Through you Mr. Speaker.

REP. STONE: (9th)

Thank you Mr. Speaker. Through you, under the existing statute the applicant has a right to petition

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the court to become involved in the lawsuit, to become involved in the litigation stayed but they can still become a party and then that way become part of the mediation process. In your example, the neighbor who claims aggrievement, either classical aggrievement or statutory aggrievement who has brought a lawsuit against a successful applicant but brought that lawsuit against the commission is not compelled, under our statutes, to also name the successful applicant as part of its lawsuit.

However, in my experience and as the statute relates, that successful applicant can become, in most cases the court will allow that applicant to become a party to litigation and in that way become a part to the mediation. Through you Mr. Speaker.

DEP. SPEAKER HYSLOP:

Representative Bernhard.

REP. BERNHARD: (136th)

Thank you very much, I thank the proponent for his answer, I think that will give some clarity for people who are looking for how this bill is going to work.

Thank you Mr. Speaker.

DEP. SPEAKER HYSLOP:

Will you remark further on the bill as amended?
Will you remark further on the bill as amended? If not,

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staff and guests to the well of the House, the machine will be open.

CLERK:

The House of Representatives is voting by roll call members to the Chamber. The House is voting by roll call members to the Chamber, please.

DEP. SPEAKER HYSLOP:

Have all members voted? If all members have voted? Please check the machine to make sure your vote is properly recorded. The machine will be locked and the Clerk will take a tally. The Clerk will announce the tally.

CLERK:

SB1037 as amended by Senate "A" in concurrence with
the Senate.

Total Number Voting	145
Necessary for Passage	73
Those voting Yea	145
Those voting Nay	0
Those absent and not voting	5

DEP. SPEAKER HYSLOP:

Bill as amended passes. Clerk please call Calendar 329.

CLERK:

On page eight, Calendar 329, substitute for HB6572,

JOINT
STANDING
COMMITTEE
HEARINGS

PLANNING
AND
DEVELOPMENT
PART 2
286-601

2001

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February 13, 2001

The Honorable Eric D. Coleman, Chairman
and
The Honorable Jefferson B. Davis, Chairman
Planning and Development Committee
Connecticut General Assembly
Legislative Office Building
Hartford, CT 06106-1591

Re: **Raised Bill No. 1037, An Act Concerning Mediation of Appeals of
Decisions of Planning and Zoning Commissions**

Dear Senator Coleman and Representative Davis:

I am a land use planner and lawyer practicing with a large, Connecticut law firm. I write to you to express my personal opinions, not those of my law firm or any of its clients.

I support fully the concept of the proposed land use litigation mediation legislation.

To put my support in context, I should note that I am a former director of the American Planning Association; past president of the American Institute of Certified Planners, the only organization certifying land use planners; and a soon-to-be-inducted Fellow of the College of the American Institute of Certified Planners. I have a master's degree in planning.

As a lawyer, I have practiced for 23 years in Connecticut, representing land owners and developers, government, environmental and conservation groups and neighborhood organizations—in short, every interest involved in land development and conservation.

Litigating most land use cases is an enormous waste of time and money for the parties and our court system. The outcome of land use litigation is usually uncertain. I have given up trying to predict whether I'll win or lose a case, because more often than I wish, my predictions have been wrong.

The net result of most land use litigation is that the parties merely get to go back and start the whole process over again.

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The Hon. Eric D. Coleman and Jefferson B. Davis
February 13, 2001
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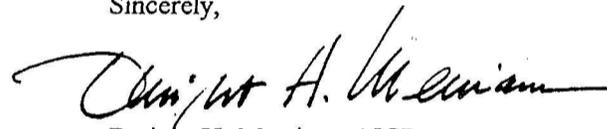
It would be wonderful if people could have a meeting of the minds before an application was even submitted or, during the local process, if they could come together and find a middle ground. Unfortunately, there isn't enough communication and cooperation at the local level, and we wind up with more litigation than we should.

But once a local land use dispute becomes a case in court, we really need to have some time to give everyone at least one more shot at resolving disputes without going through the time, expense and uncertainty of litigation.

Importantly, mediation also allows the participants to expand the scope of a potential settlement. The court has limited jurisdiction, but the parties can deal and barter on a much broader basis. For example, in an appeal of an open space set-aside, the court would have no jurisdiction to mandate more clustering of the development or the payment of money to acquire off-site open space; but the parties—the landowner and the developer, the town and a neighborhood or conservation group—could negotiate this type of resolution, which in the end would serve the interests of all concerned and the environment.

In short, a brief delay in litigation would be far outweighed by the tremendous advantages to everyone. As a planner and lawyer who has represented every interest in land use controversies, I recommend that the General Statutes be amended to provide for some type of structured mediation at the beginning of land use litigation.

Sincerely,



Dwight H. Merriam, AICP

DHM/jki

SEN. DAILY: (Inaudible, mic not on).

BILL VOELKER: Respectfully, we'd like to -- Bill Voelker and Anita Mielert, we'd like to offer our testimony jointly.

SEN. DAILY: (Inaudible, mic not on).

BILL VOELKER: Thank you.

ANITA MIELERT: Good morning. I'm the First Selectman of Simsbury. And Bill is my Director of Planning and Community Development in Simsbury. And we have worked together on this testimony.

As First Selectman of Simsbury, I appear before you today to offer fully support of Raised Bill 1037. This is a bill that, when approved, will enable mediation as an alternative to litigation on land use matters.

Under current legislation, litigation remains the prevailing means of resolving disputes on land use matters. In most cases, the results are far less than satisfactory for all parties. Litigation is inherently hostile and tends to aggravate differences rather than create mutual gains. It is expensive and emotions run high, with little emphasis on the need to build trust and establish long-term working relationships among parties who are likely to live side-by-side for years to come.

The general public is essentially cut out of the process as opponents battle it out in court. A direct consequence is that the average citizen feels detached and cynical about public decision making.

Raised Committee Bill No. 1037 offers an opportunity for collaborative decision making. Because mediators can invite interested parties into the meetings, it is more inclusive than litigation. Therefore, it will allow parties to build trust and enhance long-term relationships.

While litigation pits parties against one another, mediation is based on consensus building. At the end of the day the applicant still owns the land

and it is still in our town. We must encourage a system which is based on communication and amicable accord and not winner take all.

I urge the committee to issue a favorable recommendation on this bill and to shepherd it through the legislative process.

Thank you for your time and your commitment to this important legislation.

BILL VOELKER: Good morning. Thank you very much for this time. And I'd like to thank the committee for giving me the ability to be a resource in your development of this bill.

In my 20 years of public service, I believe that litigation by itself is not a process that has yielded many good results.

We did a legislative -- or pardon me -- a search of the number of cases over the last 14 years of administrative appeals in Connecticut. There are -- and I have the information, which I will give the committee -- but there were 23,488 administrative appeals. Of these, 25 percent were submitted under Section 8-8, the planning and zoning appeals statute. We estimate on -- a conservative estimate in 2001 dollars, that both public and private sectors have spent on average about \$50,000.00 in legal fees alone on these case, not each, but shared among those parties. If we look at that against how many cases were actually served, that's an expenditure of nearly 300 million dollars of public and private money.

What we're asking this committee to do is to give support to a bill that will encourage people to listen to each other and to talk to each other and use another solution rather than litigation to get better results.

It's my experience that the Superior Court doesn't necessarily even want to do these cases, and we will certainly let the Superior Court speak for itself, but I have sat in a few courtrooms in my 20 years of doing this.

And we would ask the committee to issue a joint favorable report on this. And we'd be happy to answer any questions. Thank you.

SEN. DAILY: (Inaudible, mic not on).

SEN. GENUARIO: Thank you very much. I guess I have two concerns with the bill and my concerns do not stem from any doubt that mediation when properly utilized is a better tool for resolution of many disputes than litigation and probably can be properly implemented here.

The first concern I have is that the beginning of the bill states that the proceedings of the court where an appeal shall be stayed until the conclusion of the mediation process established pursuant to Section 2 of the act. I don't see any reason why mediation can't occur concurrently with the process of litigation. And I see several problems. First of all, if you're the developer and you have received an approval from the zoning commission and a competitive business takes an appeal or a neighborhood association takes an appeal, your interested in resolving the matter quickly. The person who took the appeal is not interested in resolving the matter quickly because you can't go forward until the matter is resolved.

BILL VOELKER: Who may also be a developer, yes.

SEN. GENUARIO: Who may also be a developer. Usually the person taking the appeal has less incentive to see that the matter is resolved promptly.

BILL VOELKER: Correct.

SEN. GENUARIO: By giving the person who took the appeal disagrees with the decision of the local officials the ability to delay the proceeding, don't you -- don't you give an incentive against resolution? We all heard the case is settled on the courthouse steps. And the closer you get to somebody else making the decision, the more likely it is that you're going to come to the table and be reasonable.

BILL VOELKER: Let me respond.

SEN. GENUARIO: Um-hmm.

BILL VOELKER: I think the -- the purpose for staying the procedure of due process was to give people an incentive so that they didn't have to continue frankly to pay for preparation of a case that may not have to go that far. Mediation is a far less expensive alternative than litigation. So it's really built in as an incentive. It wasn't there necessarily to give anybody a tool. And clearly the language could be amended if the committee felt in some way -- if the parties themselves wished to continued with preparation of the record.

What we didn't want though was any penalties built into the process for not meeting certain dates. There are things certainly that can be done, but mediation is not something that -- and there are experts who will tell you -- and there is one who is here today -- that take -- that necessarily is fast with litigation. It's certainly less expensive than litigation.

But the only -- the reason that that portion is put into this legislation is to offer an incentive for people to do it, so they don't necessarily have to do it, pay for that portion of litigation if they're not going to go into litigation.

Anybody who's been in this business knows that litigation is often used for the sole purpose of delaying, so it wouldn't be like something new has occurred. The litigation process is flawed. There are -- as I said, and I'm not being completely sarcastic, but I mean developers will sue each other through third-parties because they want to hold somebody up. It happens all the time. So we have already a flawed system there. In the case of --

SEN. GENUARIO: But doesn't the delay --

BILL VOELKER: Well, I'm getting to that, alright.

SEN. GENUARIO: Okay, sorry.

BILL VOELKER: In the case of mediation, bringing in -- first of all, it's voluntary. People don't have to do it if they don't wish to. There's no forced mediation. The only thing you're required to do here is think about it for 45 days, which gives you a time to cool off. In the case where it's legitimate, if people really want to try it, it gives everybody a chance to really think about it. The parties then have to bring in a mediator. The mediator's job is to try to bring about a solution and work to get to that end.

But there's time limits established under the mediation process. We put in there that there's a six-month period -- I thought about that -- you know, here's another way for somebody to delay somebody -- so what we tried to put into the legislation are triggers to try to head that off, to discourage that, and that is the first -- that is there are two 180-day periods built into it. The first one is by right by mutual consent. And the way the legislation reads, and certainly we could make that stronger if you wish, but it says that you have no more than 180 days by right. So in other words, if you and I are on opposite sides of things, if one of us feels that the other one is using it for a delay period, you can opt out and go right to litigation, because remember you have to file an appeal to get to this point. So what we tried to do was put in things to discourage the use of this technique merely for delaying.

And the second 180-day period is again by mutual consent. If at the conclusion the first 180 days if it looks to one of us like the other one is still playing another game here, we can -- we don't have to proceed beyond that point. So what we tried to do was overcome that built in tendency for people to sue each other for the purpose of delaying outcomes.

SEN. GENUARIO: Under the bill as it's written, if the parties agree to mediation after 45 days, is there an automatic 180-day stay or at anytime during that 180 days can a dissatisfied party opt out and move

the litigation along?

BILL VOELKER: It's my interpretation of the bill as written that -- because it says no more than -- that a party can opt out at anytime. And I think, if the committee is interested, then that could be an amendment, because some people have offered me comments on just that point. Instead of like two 180-day periods how about four 90-day periods or how about we just put some language in there that parties may opt out at anytime during the process. And I think that's --

SEN. GENUARIO: There's point having mediation if both parties don't want to do it.

BILL VOELKER: That's absolutely correct. And so -- the bill is not crafted to say to you that once you're in you have to stay in for 180 days like it or not. That's not really the intention here.

The intention is, as I said earlier, to give people who really want to do this, the chance to do it. And if it turns out that somebody's intentions are less than honorable, they should have the option to get out of the proceedings. So --

SEN. GENUARIO: It just seems to me that when you take a zoning appeal, the first step is for the town to file a record. Under the practice book they've got 30 days from the return date to file the record. As a practical matter very few towns file them within 60 days. Nobody files for default or anything like that. But you've got a 60-day window right there in which you can serve -- which can serve as a mediation process --

BILL VOELKER: There's no question --

SEN. GENUARIO: -- instead of allowing one side to wait 45 days -- I mean --

BILL VOELKER: Yeah, I've thought about that, and that's correct. But not many people do that however. Some do.

SEN. GENUARIO: How many people do what?

BILL VOELKER: Use that pretrial period to work things out. It does happen, but not often. Because if you're --

SEN. GENUARIO: Right --

BILL VOELKER: We know that and we're not disagreeing, that can happen today.

I think what you get with this act though -- hopefully an act -- but with this bill is a statement of legislative intent. And if one of the unintended consequences of this is that people will use that period to talk to each other and work it out, then that's a positive unto itself. This is the legislature saying to the community we want you to talk to each other, we want you to use an alternate means other than the Superior Court to resolve your differences, we're providing you a means to do that. And again, if one of the unintended consequences is that more cases are settled in pretrial, then I'm about as happy as I can be. That's positive, because then we haven't taken up the time in Superior Court, we haven't frankly wasted a lot of public and private money for outcomes that may be less than desirable for both parties. But, yes, can it happen, sure. Does it happen much, not in my 20 years.

SEN. GENUARIO: And I like the process --

BILL VOELKER: Yes.

SEN. GENUARIO: -- and I agree that it's an appropriate process. I guess I just see the delay -- I just don't see why they can't occur concurrently and I see the delay as mitigating against the result you want to achieve. It's going to be a disincentive for the successful applicant to the appeal to engage in the mediation if he knows that a month or two down the road if the mediation is not fruitful, he has lost a month or two of time.

BILL VOELKER: And again, I'm sensitive to that, yeah.

SEN. GENUARIO: And the -- I probably shouldn't be

testifying --

SEN. DAILY: Oh, we're enjoying this -- (inaudible, laughter).

SEN. GENUARIO: And the fact that people have to pay money to move the process along is probably the biggest incentive to forcing them to the table. If you let them have a free six months, three months -- by the way, my experience is that mediation is not always as -- not always so cheap. But -- but if -- if you don't keep the pressure -- any judge will tell you that unless you're putting the pressure on the parties, they're not going to come to the table.

BILL VOELKER: I understand. And given the fact that the person who I work for sits next to me, I didn't want to introduce some legislation that would force her to continue to spend her money. But the intention there was not to provide a delay. The intention was really there to try to provide an incentive.

What I didn't -- what I felt was -- we didn't want to have a penalty necessarily, because -- you know, have a bias that mediation is good. And what we didn't want to do was penalize people who are really sincere about doing it. And that's the reason that it's there. To the extent that the committee is uncomfortable with that, certainly there are some appropriate amendments to that, so.

SEN. DAILY: Thank you. Senator Looney.

SEN. GENUARIO: Thank you. Thank you, Madam Chairman.

SEN. LOONEY: Thank you, Madam Chair. Just one question. On line 184 of the bill in Section 2E thereafter: A mediator may require --

BILL VOELKER: I don't have that -- I'm sorry --

SEN. LOONEY: -- the participation in mediation of any person deemed by the mediator necessary for effective resolution of the issues, including representatives of government agencies, abutting

property owners, intervenors or other persons significantly involved in the decision being appealed. Doesn't that in effect present a potential for pressure almost amounting to harassment if one of the parties to the mediation says that in order to successfully mediate this or have a full picture of what's going on, we need to have all of these people brought in to participate?

And does participation also mean possibly being subpoenaed to attend or participate? So it seems to me that this could become in itself a very adversary kind of proceeding under this section.

BILL VOELKER: If I may. The -- I've obviously spent a little bit of time thinking about this and reading about it and looking at it, and there are certainly people who do this professionally who could probably respond to that better than I, but the -- what was brought to my attention is that a really valid mediation process should include stakeholders who may not have the resources to participate in an appeal. It's a way of perhaps making this decision making process more open and accessible to people who may not have the resources to hire a lawyer and be in a lawsuit.

For instance, the Connecticut Fund for the Environment may offer testimony at a particular public hearing -- who, by the way, we did contact for these proceedings -- they may not elect to participate in a lawsuit. But a mediator may go back into the record and find that their comments were relevant and important at least in terms of the decision that was made. The mediator may feel that it's useful to have the Connecticut Fund for the Environment participate in some way in the mediation. That was the intention of this section of it; that the mediator -- professional mediators upon reviewing -- and they do a process called conflict assessment -- and again, I'll leave that to an expert on that matter who is here -- but they go back into the record and review the proceedings to see what actually took place to make sure that all of the important facts and all the important issues are addressed during the mediation.

We're looking for a way to have the outcome be as

successful as it can be, so --

SEN. LOONEY: It's just that when -- if it says a mediator may require rather than just request the participation of these parties going far beyond the immediate parties in the litigation, that seems to me to be quite an extensive grant of power for the mediator in this case.

BILL VOELKER: If I may just on that point? There was -- and I certainly appreciate your sensitivities -- my thought was that mediators should have the ability to bring some people in if they felt that it was really necessary. And there's got to be a way to do that. And if it's request versus require -- because certainly require under the law is a term of art -- and we weren't certainly trying to assign undue power to the mediator, but we wanted the mediator to have the flexibility to conduct a successful mediation. So, I certainly appreciate your point.

SEN. LOONEY: Okay, thank you.

SEN. DAILY: (Inaudible, mic not on) -- thank you very much for your testimony.

BILL VOELKER: Thank you.

SEN. DAILY: The next speaker is Renee Poirier, followed by Representative Widlitz.

RENEE POIRIER: Good morning. My name is Renee Poirier and I am representing The Metropolitan District Commission.

I am speaking this morning on Raised Bill No. 1127, AN ACT CONCERNING THE IMPOSITION OF SEWER USER FEES BY THE METROPOLITAN DISTRICT COMMISSION; and Raised Bill No. 6721, AN ACT REQUIRING THE METROPOLITAN DISTRICT COMMISSION TO CONDUCT PUBLIC HEARINGS ON ORDINANCES.

The MDC does not oppose Raised Bill 1127, but believes that our current charter provides for imposition of sewer user fees. Section 10-1 of the MDC's Compiled Charter states that in any town or

CHUCK ANDRES: Thank you.

SEN. DAILY: Linda Farmer, followed by Jose Giner.

LINDA FARMER: I'm Linda Farmer. I'm the President of the Connecticut Association of Zoning Enforcement Officers and a Town Planner for the Town of Tolland.

I'm here to express my support for Raised Bill 1037, AN ACT CONCERNING MEDIATION OF APPEALS AND DECISIONS OF PLANNING AND ZONING COMMISSIONS.

We'd like to support this bill. We feel right now when planning and zoning commissions make a decision, a denial and it is appealed to the courts, that it becomes a win or lose all situation and not the best solution for all the parties involved.

Frequently, the concerns of the town, the planning and zoning commission, other interested parties and the needs of the applicant are not mutually exclusive and this isn't really addressed through the court system. Mediation, I believe, would bring about a better product for everyone involved.

If the mediation failed, then the courts would still be an option.

Additionally, the opportunity to involve other persons, government agencies, intervenors, abutting property owners by the mediator picking them where it wouldn't become a free-for-all that some of the public hearings tend to be from time to time, further enhances the chances that the resulting decision would represent the needs and concerns of all the interested parties and improvement of the final product.

And this is really the most important point that I'd like to make. The concern of the planning and zoning commission, planning and zoning officers is the final product for the town. And I think it was expressed well by the woman from Simsbury, whose name I didn't catch, these are your future neighbors. And to solve this in a less contentious way would be certainly a goal I would think.

So we are asking you to support this. Thank you.

SEN. DAILY: Are there questions? Thank you. Jose Giner, followed by Craig Minor.

JOSE GINER: Good morning, Senator Daily, Representative Davis and distinguished members of the committee.

I'm Jose Giner. I'm the Director of Planning and Community Development for the Town of Enfield. I'm also on the Board of Finance in my hometown of East Windsor. And I'm Chairman of the Connecticut Chapter of American Planning Association.

And I'm here primarily to speak in favor of Bill 1037, AN ACT CONCERNING MEDIATION.

I think my colleague, Bill Voelker, who's also had 20 years of experience as I have, pretty well stated the reasons why this bill makes a lot of sense.

I just want to echo my experiences. I've worked in -- I think in Connecticut for the towns of Westport, North Branford, East Windsor, and currently Enfield, and I can certainly tell you there's a lot of instances where I think mediation would have saved a lot of time and grief on the part of both parties, particularly in cases where you know you have a lot of appeals and there's neighbors that go out and actually spend some of their money which is -- you know, can run \$25,000.00 or more for a case only to have a judge send it back on a technicality, so we do the process all over again. What happens to the neighborhood group that has to now make a decision of whether or not they have the financial wherewithal to even go beyond that, to take it even further if the commission just corrected the technicality and goes ahead and approves basically the same project.

So I think mediation would provide some type of a format for these groups to perhaps get together and see if there's some issues they can agree on. If there's a group that's going to just oppose

something just for the sake of opposing it, the developer is going to know that, and I think the developer is not going to agree to mediation and, therefore, just say let's go to court on it.

Unfortunately what happens is people spend a lot of money. And sometimes a judge does not reach a decision on the merits and we do it all over again.

And I don't think that anybody wins in that process. And I've seen cases where the developer, you know, has -- the person who owns the land has a tenant that's interested in the land and they lose the tenant by the time the appeal is done. So, I certainly would like to -- you know, from both my professional perspective and also as a member of the Board of Finance who has to pay attorney's fees for a consulting attorney, we don't have a full-time attorney on-hand, we pay as we go, and I think this would be certainly a good alternative for municipalities to have.

Thank you.

SEN. DAILY: Thank you very much. Are there questions of Mr. Giner? Yes, Representative.

REP. STONE: Thank you, Senator. One of your examples was that a developer can decide that a neighborhood group just doesn't want a particular project in the area and decide you know why mediate, let's just go right to court. Was that the example you --

JOSE GINER: Well, the -- I'm saying that the -- well, certainly if -- both parties have to agree to mediation the way the proposed bill is written. And if somebody thought that -- I heard the concern previously that that may be used by a person appealing is adding another 180-day process and sort of string along and then say, oh, never mind, we'll take it to court anyway. I think if there's a sense from someone that this is happening, they can certainly opt out of that process early on if people are not negotiating in good faith or you know during the mediation session, you know. I'm sure people being reasonable can sense if there's real progress to be made or not.

REP. STONE: And you think this proposal provides the flexibility to make a determination as to whether one is engaging in mediation in good faith or not and therefore to call it off so to speak?

JOSE GINER: It won't be an exact science. Obviously, you know, you're always going to get one side or the other that they may have preconceived notions, but it certainly gives the opportunity for people perhaps to think about well this is going to cost us \$25,000.00 a piece if we go all the way through and --

REP. STONE: Well, they'd have to file an appeal anyway

--

JOSE GINER: Right, they would file the appeal, but --

REP. STONE: -- you've got 15 days to file an appeal from the day of notice --

JOSE GINER: Right.

REP. STONE: -- and then you've got this mediation process, so some financial investment is going to have to be made in any event.

JOSE GINER: There will be, but certainly not as much as it would take -- you know, we have cases now going on in Enfield, you know, from two and a half years ago, that you know neighbors have spent \$25,000.00, and the thing is up and running, and it's been running for two years. And we've got it thrown out on a technicality. Now the -- you know, the appeals are there, it's going to get appealed -- the person who built the project spent a lot of money, granted at his own risk to do so knowing there was an appeal pending, but they're in it for the long haul, they're -- you know, the extra 25 or \$50,000.00 that it's going to cost to appeal this is nothing compared to their investment.

REP. STONE: In terms of the investment, the people who -- the neighborhood groups or whomever who have decided to file an appeal, if this statute were in effect and they decided to file an appeal within the 15 days after the notice and then gone through

the mediation process, do you think it's fair to them to now have a mediator who may require any one of a number of other groups, neighbors, etcetera, who perhaps haven't made that investment to now participate in the mediation process?

JOSE GINER: Well, that's certainly a consideration. I think -- again, I'd refer back to -- I know Bill -- there was some concerns raised in some of our discussions with other groups that we've had about that process of inviting people into the process. But in the spirit of getting everybody's -- I mean a mediator would look at the record and say well look these people had some valid points and maybe we should call them in and get their point of view. And being impartial, I would imagine the mediator would then choose what weight to put on it and perhaps bring out well how about this, you know this party had this concern, would you both be agreeable to this or not.

REP. STONE: I think you're talking about more --

JOSE GINER: It's part of the mix I think that you're trying to get some kind of consensus --

REP. STONE: Right --

JOSE GINER: -- so everybody is happy with the result.

REP. STONE: I think you're referring to, and appropriately so, more substantive aspects of a particular application rather than a procedural efficiency --

JOSE GINER: Right --

REP. STONE: -- in an application. I think it would be difficult for a mediator to mediate a procedural dispute as opposed to a substantive --

JOSE GINER: Correct. But I think a mediation could -- certainly the parties could choose -- if they're using -- I mean procedural aspects are used -- you know, it basically is part of a long list of issues and you know there's always a substantive -- the procedurals are out there hoping that the judge

will latch onto that and toss it back. But nobody wins on that point because you just start the process all over again --

REP. STONE: Well, I think --

JOSE GINER: -- and a lot of times the judge will take that easy out and not rule on the substantive issues. They'll say well you guys -- for some reason, you know, the notice was defective or you didn't consider this particular report fully that is required by your regulations and it may have not been necessary, but you'll go back, have a guy submit the paper, and the commission will rule well we still think it's a good idea and then we're back to court again.

REP. STONE: Well, some might think that procedural due process is as important --

JOSE GINER: Right --

REP. STONE: -- as the substance of the application. But I don't necessarily want to debate that with you today --

JOSE GINER: Well -- and it is. But I'm saying in the cases where there has been, you know, someone truly has not gotten their due process of notice, and I think those issues will not be mediated out if someone didn't feel they had --

REP. STONE: And one would hope that --

JOSE GINER: -- a voice, but --

REP. STONE: One would hope that if there were procedural deficiencies, for example lack of notice, that if there was a re-hearing, that one of the individuals who perhaps didn't get noticed may bring something more to the table and it would be more than just a rubber-stamp by the commission on the second application.

But do you think that the approval process that a commission has to go through now and the public hearings that they have to go through now, and the

interplay between the commission and the public and the applicant that's presently in place, do you think that that provides enough of I'll call it a mediation arena in which issues, substantive issues that are concerns of neighbors or concerns of an applicant can be addressed in that arena and that that's really the mediation or you know the effort there as opposed to adding yet another process to an appeals process, which quite frankly may invite more appeals, may ask -- may invite more appeals? Do you have any thoughts on that?

JOSE GINER: What, the mediation process may -- well --

REP. STONE: Sure. You've got -- remember you're talking about --

JOSE GINER: Making --

REP. STONE: One of the issues --

JOSE GINER: -- lesser investment certainly, but again -

REP. STONE: Less of investment and more of a delay.

JOSE GINER: I think Mr. Voelker eluded to that, that there's some people that may not -- you know, could have legitimate concerns that are not currently in a position to take an appeal for whatever reasons that this would bring into the mix. Yeah, there's public hearings, there's -- commissions can extend them out, you know they can go 30 days, they can go -- well now 35 days --

REP. STONE: Right --

JOSE GINER: -- additional 35 days. And you know, my experience is if there's legitimate concerns, commissions will extend these hearings out and try to give everyone an opportunity to get their people in, their testimony in. What happens when that fails and there's a decision rendered that neither party is not happy with --

REP. STONE: Well, I think for the most part commissions try to do -- or try to gain -- what ultimately may

be the results of mediation, try to gain that result in most cases during the public hearing process --

JOSE GINER: Right.

REP. STONE: -- and that's why they send out the notice and that's why they invite the public to participate and that's why they spend either one, two, or perhaps three or four public hearing sessions hearing different ideas and concerns about an application. So, I guess I'm concerned about doubling up that process and just delaying things -

JOSE GINER: And I think commissions do that --

REP. STONE: -- when it's not -- may not be necessary.

JOSE GINER: Right. In my experience is they try to get the best results, try to -- ask the developer is this acceptable, is this not acceptable. I think this bill addresses when that -- at some point the commission has to make a decision, and somebody may not be happy with it.

REP. STONE: Okay.

JOSE GINER: And maybe the mediation process -- you know, the developer may be less -- or more inclined to give concessions that he wasn't at the hearing when he knows he's facing -- you know -- a lot of times I believe they're gauging whether or not someone is going to appeal, as to whether or not they're going to concede anything. I think once that appeal is pending, I think you know -- like the gentleman said before, the closer you get to a judge making a decision, the more likely you're going to get these people to the table to agree to something. And perhaps that mediation session will be the wake-up call and get everyone at the table saying do we really want to take it all the way through the court system, let's now sit together and see what we can agree on.

REP. STONE: Okay. Well, I want to thank you for taking the time to respond. You're not only an expert in

the field, but also on the front lines on zoning issues.

And I thank the Chair for her indulgence as well. Thank you.

JOSE GINER: Thank you.

SEN. DAILY: (Inaudible, mic not on).

JOSE GINER: Thank you.

SEN. DAILY: (Inaudible, mic not on).

CRAIG MINOR: Good morning, Senator Daily, Representative Davis and members of the committee.

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My name is Craig Minor, spelled M-i-n-o-r, and I'm the Town Planner for the Town of Cromwell.

In my 14 years as a town planner in Litchfield and Cromwell, I've been on both sides of land use appeals. I've won some, I've lost some. But I know in all cases somebody loses no matter who wins.

But I'm here today to speak not as a town planner, but as a private citizen who had to organize my neighborhood in my hometown to appeal an improper zoning approval. The details are not important because it could have happened in any town, but my point is that we as a neighborhood had to hire an attorney at considerable expense, as did the developer. We had to spend a lot of time having meetings, as did the developer. And in my opinion, it was unnecessary because the two sides were not all that far apart.

If there had been a way for us to meet in a neutral moderated environment to identify the areas where we had common ground and try to compromise on the areas where we didn't, then everybody would have benefited. Instead the appeals process took so long that the developer ended up losing his client, we still have to raise thousands of dollars to pay for our attorney, the town looks foolish, and the site is still in jeopardy of having some similar,

maybe even worse, use put to it which would be worse than what we could have mediated.

In our case the developer rejected all efforts to meet with him prior to approval. He had no incentive to meet with us during the approval process because he was confident that the Commission was going to approve his project. But if he had worked with us, he would have gotten his site plan approved and he would have gotten a good 90 percent of what he wanted. But again because he had no incentive to meet with us and went forward with his approval, when we won, which we ultimately did, he ended up with nothing.

Again, if mediation had been an option, then he would have had to negotiate with us, not necessarily in good faith, but certainly in his own self-interest. The situation now is it's a winner take all. My group happened to win this time, but again at great expense to everybody and in an unnecessary lengthy time frame. Thank you.

SEN. DAILY: (Inaudible, mic not on).

CRAIG MINOR: Right. Well in this case because we did file the appeal, and if we wanted to be just NIMBYs about it, we could have dragged the appeal process through a year or more, and his incentive would have been to meet with us to help get a negotiated settlement, which would then end up with us -- not withdrawing our appeal, but having a stipulated agreement arrived at within some three or four months instead of the 12 months or more that it would have taken if both sides had said see you in court, we're not going to negotiate. So at that point it would have been to his advantage to negotiate with us.

SEN. DAILY: (Inaudible, mic not on) -- personality you've described?

CRAIG MINOR: Well, personality -- well hopefully his advisors would have said well look the neighbors have a good case here -- in fact, in my case that's what happened; the court counsel basically told the Zoning Commission revoke the approval, I'm not

going to defend this in court because the Zoning Commission erred in a number of ways.

SEN. DAILY: Which is again another story.

CRAIG MINOR: Yes.

SEN. DAILY: Thank you very much. Are there --
(inaudible, mic switched off).

CRAIG MINOR: Thank you.

SEN. DAILY: (Inaudible, mic not on).

REP. FARR: Senator Daily, Representative Davis. I'm Representative Farr from the 19th Assembly District, speaking on behalf of Raised Bill 1127, AN ACT CONCERNING IMPOSITION OF SEWER USE FEES BY THE MDC.

The Clean Water Act established a federal and a national policy in favor of the imposition of user fees for sewer use. The reason they did that was quite obvious, user fees always reduce consumption and reduce use. People control their light bill, they control their gas bill, they control their oil bill by reducing their consumption. If you have a sewer use bill -- if you pay for the use of your sewers through your taxes and whatever you do in terms of your use doesn't impact your bill, you have no incentive to reduce the use of your sewers.

So this national policy was established in order to reduce the consumption of water and reduce the use of the need for additional sewer plants.

Unfortunately, when that policy was established, there was a grandfather clause put in there that allowed the continuation of ad valorem -- so-called ad valorem taxes by local sewer authorities if they were already in place. And the MDC has a provision in its charter under a bizarre billing system under which they do have a sewer use charge for some of the larger users, but their basic charge is determined -- their basic sewer use is charged out based upon the tax collector in each individual municipality. So if your municipal taxes are high, you get a high sewer use bill from the MDC. If

Thank you, Mr. Vincent, for your testimony. A quick question. Could you comment on the concern likely to be raised by some that this bill would negatively impact either current or future collective bargaining agreements?

LEE VINCENT: In our -- we have some pretty strong unions in Groton. And considering how carefully we have to act and how thoroughly, to put it mildly, to even transfer custodians from one building to another or to redesign jobs -- I mean, I could study this -- right now it's hard for me to conceive of any impact on -- negative on any bargaining unit. I mean we would be contracting out. I mean we could contract out our whole fleet management anytime and we'd still have to bargain on the impact with the steel workers' union. The fact is we're so proud of our fleet, we're bringing in other business. We're servicing the City of Groton Police Department, we're servicing the fire departments, and you know we have several independent governments. Mystic actually does have a government, which is its fire district, which of course has its own board, raises its own taxes, writes its own laws, runs a trash hauling business and a park service, but -- that's another story. But I just can't see how any existing -- I mean circumventing would not be anything that would -- any collective bargaining relationship would not be something that would even enter our minds.

REP. FONTANA: Okay, thank you very much. Thank you, Madam Chair.

SEN. DAILY: Thank you -- (inaudible, mic turned off).

LEE VINCENT: Thank you.

SEN. DAILY: (Inaudible, mic not on).

TERRY TONDRO: Senator Daily, Representative Davis and members of the committee, my name is Terry J. Tondro, Professor of Law at the University of Connecticut Law School, where I've been teaching planning and zoning courses for 25, 30 years, or something like that.

SB1037

More importantly for purposes here, I'm testifying in favor of Raised Bill No. 1037, the mediation bill it's called for short.

For 20 years in addition to my teaching, I have consulted on land use issues to towns, the boards and commissions throughout the State, as well as neighborhood organizations and to applicants of various development approvals before those boards and commissions. For the most part my role has been to assist in drafting local planning and zoning and wetlands regulations, but I've also participated in commission hearings on specific applications and advise on strategies for appeals to the courts from commission decisions. I have been deposed as part of ongoing litigation -- and a wonderful experience I might add -- and occasionally testified in court on land use proceedings.

From this perspective, I'm convinced that time, money and resources are being wasted unnecessarily in the too frequent gamesmanship involved that resort to litigation to resolve land use disputes.

Part of the problem is that land use decisions are extremely important to towns, to the neighbors, and of course to the applicant; much is at stake. And as a result, there have been more than 300 land use cases a year since 1988 on the average. That's a huge number of cases. The second largest batch of cases that come before the courts.

It's a heavy load on our court system, on their resources, certainly on budgets of municipalities as has been testified to here this morning, and especially on the funds of neighbors and of organizations who have an interest in the decision who have to raise the money to fight these appeals.

Those costs end up being reflected in higher tax burdens for Connecticut towns or alternatively in the reduction of other services, and in higher cost for housing and other development activities in the State.

I do not know how many of those litigation proceedings could be shortened by making available a mediation process or how much money could be

saved by using mediation instead of litigation to resolve disputes. But if mediations could resolve only five percent of those disputes, we're talking about taking 15 cases a year out of the court system; or 10 percent, we're talking about 30 cases a year out of the court system. And we'd save much time and money as a result, I believe.

Several other states have adopted mediation programs for land use disputes, including Maine, Pennsylvania, California, Utah, Idaho and Oregon. A couple of those places, California and Pennsylvania, of course have extensive development activities, zoning activities, and their experience would be helpful.

I want to emphasize the proposal before you does not require that parties use mediation, but it does require that they consider it before continuing down the usual path of litigation. The bill, in effect, requires a 45-day cooling off period. After which any one party can bail out and close the mediation process. Only then does the 180-day period kick in. And at the end of 180 days, any one party can close the medication process and return all parties to the court.

That's important to understand. There's not a significant delay involved, but only a 45-day delay, and that's the cost of this project. It's a very inexpensive cost for a hope. And we can say it's no more than that, because as someone said it's a matter of personalities. For hope that we may get some cases a more efficient land use regulatory process and a lessening of the idea that the only way to resolve these disputes either from a belief in the process or a desire to play games to win, but it may be another way of thinking about how you proceed down this line.

I'll take your questions if you have any.

SEN. DAILY: (Inaudible, mic not on).

REP. DAVIS: Do you have a sense of how long it takes for a case to be resolved once it enters the judicial process?

TERRY TONDRO: I think we're talking -- from the time of filing the appeal?

REP. DAVIS: Yes.

TERRY TONDRO: We're talking about, I think, in excess of a year for most cases. There's a lot of delays and, you know, fencing back and forth --

REP. DAVIS: Right.

TERRY TONDRO: -- and availability of parties. And it becomes a very complex process.

REP. DAVIS: Thank you.

SEN. DAILY: Representative Blackwell.

REP. BLACKWELL: Thank you, Madam Chair.

Professor, one speaker suggested that there be opt-out language within that 180 days --

TERRY TONDRO: Right.

REP. BLACKWELL: -- would you agree with that?

TERRY TONDRO: I don't -- I think there's -- I think the opt-out -- the fact that under the existing bill any one party can opt 'all the parties out of the mediation process at the end of 45 days, and of course that could be changed to 30 if you're really concerned. That's the real protection I think for parties who are being dragged in.

And it's -- I think it's accurately called a cooling off period, 45 days after the appeal has been -- after the appeal from the commission decision has been filed with the Superior Court. Maybe people don't need 45 days, but maybe to sort of reorient their thinking and do some exploratory ideas about well does this guy really want to mediate and then you go ahead.

And I think you made -- if you make a commitment at that time to spend six months, 180 days, and try

working with a mediator to try and come to some conclusion, I think you've made an investment in that 180 days. Your consideration during the 45 days when you have to decide whether to go along with mediation or not, that makes that investment a serious investment and you'll get more people who are -- less reason to use games.

There's going to be one party, as has been suggested before, who is more interested than the other in delay, to win on that basis. The other party can short circuit that delay and tactic. So the real cost -- the real cost that neither party can avoid is the 45-day delay to consider. I don't think that's a significant cost considering what we may gain by making it possible or encouraging -- not making it possible, but encouraging people to think about this as an alternative.

REP. BLACKWELL: Just one more question. I think it was Representative Samowitz, who's not here right now, I think he suggested sort of a pre-petition period similar to this in which the parties would engage in either a discussion or mediation even before the petition is submitted. It's not part of the bill -

TERRY TONDRO: I think --

REP. BLACKWELL: -- any comment on that?

TERRY TONDRO: Excuse me --

REP. BLACKWELL: Any comment?

TERRY TONDRO: People can certainly negotiate anytime they want to. There's nothing that precludes you from talking to the enemy and seeing if you can dissuade them of their heinous views, so that can go on anytime.

The idea of allowing the Superior Court proceedings to go along simultaneously with the 45-day cooling off period though, I think helps to lock in people to think well, okay, so we've got to put up with this for 45 more days and then we'll get down to the real -- then we'll really start negotiating.

I think it's best to keep it clean. Get your 45 days. Maybe in a few cases you'll get parties considering that this may be worthwhile and they'll step back and think what are our real costs are going to be if we go down the litigation route and our costs this way are going to be different. The psychic frazzle that occurs from being involved in litigation, especially for neighbors and other organizations, I think those kinds of things are best served by having a separation of the due processes.

REP. BLACKWELL: Okay, thank you, Professor. Thank you, Madam Chair.

SEN. DAILY: Thank you. Are there other questions? Representative Spallone.

REP. SPALLONE: Thank you, Senator Daily.

Good morning -- or good afternoon, Professor Tondro.

As a point of information, Professor Tondro was my property professor at the U-Conn School of Law. So the last time you saw me, I probably wasn't wearing a suit. (Laughter). But in any event --

: (Inaudible, mic not on).

REP. SPALLONE: The 5th amendment. One of the questions that arises as people testified on this this morning for me is that when we get to the appeal stage in a land use dispute and a land use matter, the area that the judge can rule on is kind of narrow by that point, whether the board acted illegally, capricious, arbitrarily, or whether there were procedural problems. Do you think that we need to look -- and this is kind of an open-ended question -- a little further forward in the process -- I think Representative Blackwell mentioned the pre-petition period -- so that more of the merits might be on the table by the time we reach mediation? Do you -- if you follow me.

TERRY TONDRO: No, I'm not sure I follow you.

REP. SPALLONE: In an appeal there's -- well, first of all, it's very difficult to overturn a ruling --

TERRY TONDRO: The narrowness of --

REP. SPALLONE: -- or a decision of a commission --

TERRY TONDRO: Right, exactly --

REP. SPALLONE: -- do we agree?

TERRY TONDRO: Right. That's right.

REP. SPALLONE: And so what -- and the court will grant a great deal of deference to that decision --

TERRY TONDRO: Of the commission, yes.

REP. SPALLONE: Right. So what I'm thinking of is by the time we get to that point where we have an appeal, people have really dug in their heels and a lot of times it's not the merits that are in dispute, i.e. whether this is a good idea or whether you, the developer, could make a small change which would make me, the property owner, happy, or whatever the case may be. And I'm wondering if we need to try and get the parties together in a mediation forum earlier? That might be a question for another day, but --

TERRY TONDRO: Well, I think -- this -- if I can take what may be a different direction -- my observation is that maybe 75, 80 percent of the land use decisions the courts render are on procedural grounds rather than substantive grounds, that is they're not talking about what's really separating the parties, they're talking about games. And I've always sort of -- I felt this was missing the point, that we really ought to be finding a way of resolving our disputes and coming to some accommodation with each other. And that's why I'm strongly in favor of mediation as an alternative.

And when -- the advantage of postponing -- and this is where I may differ from what I think you're saying -- the advantage of postponing it until

after the appeals can be and must have been filed by the time that period has ended, is you get people to come forward and say, yes, we want to participate in the process. And so you'll get people who are willing to spend the time and invest some resources because they're paying for it, invest some resources in trying to come to some accommodation rather than going into court where everything is head-on.

Many of the cases I've -- petitions I've participated in as a consultant, I can see the cost being added up by the long list of experts who are added to speak before the planning and zoning commission in the full expectation this is going to court and we're making a record here. And if there -- if it was known there was another option -- but of course you have to know the other party is going to want to exercise the option also, so it's not full proof, but if it's known there is another option, that tendency to think only in that way may be reduced. And I think that's beneficial. I don't know if that gets to what you were saying, but --

REP. SPALLONE: Okay. Well, thank you very much --

TERRY TONDRO: Okay.

REP. SPALLONE: -- I appreciate it.

SEN. DAILY: (Inaudible, mic not on) -- and arbitration, but became concerned when I heard people talking about cases being overturned on a technicality --

TERRY TONDRO: Um-hmm.

SEN. DAILY: -- and that's the 60 to 70 percent that I think you referenced on procedural grounds.

TERRY TONDRO: Um-hmm.

SEN. DAILY: Too often we see boards and commissions not doing things the way the law requires them to do. And then they grouse and say it was a technicality when in fact it was an error or omission on their part. If then they're never -- or if they're held

accountable less often through a negotiation and arbitration process, will they ever do it right?

TERRY TONDRO: People who serve on planning and zoning commissions are not always, but in most cases, lay-people. And some of them become experts by virtue of being on a commission for 20 or 30 years and they become sort of infamous because of that experience and the way they know how to play the game. But most people are not. And it's not surprising that they make mistakes. The law and conflict of interest is not very clear as to when you cross that line.

The law on notice, what has to be noticed -- there was some discussion earlier about amendments to -- whether you could modify a proposal under 8-3(c), I think it was, and the proponent was saying well there is a limitation already built in because if the modification strays too far, you have to have a new public hearing. I was thinking that's exactly right, but what does stray too far mean, how do we know what that is. And --

SEN. DAILY: (Inaudible, mic not on).

TERRY TONDRO: Yeah. And we don't have -- we have some court cases and it's a very interesting problem analytically from my point of view, but not a very interesting problem from the applicant's and the participant's point of view. But there are always those kinds of problems. And that's where commissions get tripped up, I think, more often than not.

The advantage of mediation is if both parties agree, I think you go into the mediation process and you're talking about the real issues. You're not talking about those kinds of things. You're not debating as you do now in a court case well is this sufficiently different from that so you have to have another public or not. Those issues will be raised in the initial appeal from the commission decision.

If the parties then agree to mediate -- I can't imagine they'd mediate over whether this is

sufficient -- they can't do that -- they've in effect abandon that and let's talk about the real issues and see if we can't come to some agreement.

This is not going -- this is not going to solve our problem. It's not going to reduce the courts' load by 50 percent, or 40 percent, or 30 percent, maybe 5 or 10 percent until people have had some experience with it.

But the other gentleman who testified about his unfortunate experience as a neighbor fighting a development proposal, if he'd had a chance to talk with the developer, or if the developer had been less certain he would win, then they might have -- a negotiation might have helped. We -- you know, we don't know that, but we need some experience to find out. And this doesn't impose much of a cost on anybody, I don't think.

SEN. DAILY: (Inaudible, mic not on) -- question Senator Looney raised earlier about requiring that whole list of experts that is in this language. What about that, does that affect costs? And also what about that as presenting information that might never have been considered before anyway?

TERRY TONDRO: As far as the ability of the mediator to require people to come in and speak, I guess I view that as a requirement that in effect the mediator can sum in expert witnesses so to speak, people who know something about the situation, and to provide information for the mediator and help him make a decision. It's a more wide ranging scope of inquiry than courts make or are allowed to make under the rules for what's relevant to their decisions.

I think that's beneficial when you have two parties saying we'll trust the outcome to a mediator and a process which is sort of loose and fluid compared to the court system, the court process, where we can really inquire and find out what's behind the differences of opinion and whether we can't find some common ground.

I understood Representative Looney's concerns to be this is not going to be much different from a

trial. But I think, in fact, it will be because of the ability of the mediator to decide what's going to help him or her make that decision, the final decision in the case. A trial judge doesn't have that power and it's limited therefore by what the attorneys for either side decide are the most important people for them to present, which has all kinds of psychological -- I mean the things I hear being discussed in our clinic for training trial lawyers is very wide ranging, very interesting, but you know they've got control of it and not the person making the decision.

SEN. DAILY: (Inaudible, mic not on).

REP. DAVIS: I think Senator Daily brought up an interesting point in terms of the introduction of new information during the mediation process. Is that an issue? And how might that affect -- if the mediation doesn't work and they've got to go back to the judicial process, that then becomes part of the record of the mediation process, does it, or does it not?

TERRY TONDRO: Well, the -- whether you have to go back to court, to the traditional trial process, that's at the option of the parties. The fact that new information has been introduced -- the record before the commission is going to be there. And I can't imagine that there's going to be any real important significant information that's not been brought before the commission because most people know the commission is the last stop. You know, an appeal is an extraordinary situation anyway. So that they're going to make sure all the information is there, and I would expect it to be.

If additional information is brought out by the mediator's request, I don't know what the legal ramifications of that would be. It doesn't -- it doesn't bother me in the quest for fairness in trying to get a proper decision, let me put it that way. And maybe there's person here who's involved professionally in mediation that maybe can answer that question, but I don't teach those courses, so I don't know. I can't help you, I'm sorry.

SEN. DAILY: (Inaudible, mic not on).

SEN. GENUARIO: Thank you for appearing here, Professor Tondro. I've read much of your book.

The -- off of that point, is there a concern that an agreement can be reached in mediation that contains a change in let's say a site plan that was not presented before the commission?

A simple example; a building is 10 foot from a setback line, a neighbor close to the building takes an appeal. The mediator says, hey, I've got a great idea, let's move the building over to the other side, and an agreement is reached. A stipulated -- the site plan is altered, a judgment is entered. And then the neighbor who happened to have been on the other side of the property who is now impacted by the movement of the building who didn't take an appeal because he thought the original placement of the building was okay, has no remedy. Is that a problem here?

TERRY TONDRO: I can see that as a problem, in that party did not choose to participate because they did not see it coming so to speak. I'm not sure I can offer you on the spot how to remedy that, but it doesn't seem to be an insurmountable problem. We had that same situation -- I think maybe you were making that suggestion earlier with regard to modifications made at public hearings -- or after public hearings --

SEN. GENUARIO: Um-hmm.

TERRY TONDRO: -- and somebody is taken by surprise because the modification involved them where it didn't involve them before.

But we have -- but on the other hand, if you're a neighbor of a parcel whose future is being litigated, taken to the commission and then an appeal taken, maybe you ought to have some knowledge of the fact that you might be affected by what comes out of that. And the courts have -- and the Superior Court has said that in a couple of cases. You know, yes -- the one case I can think

of involved a liquor permit, a liquor permit allowed you to move your facility here and that wasn't in the proposal before the commission, but it was approved, but you should have known that liquor was going to be involved in a hotel, you should have known that liquor was involved and you should have gotten involved earlier and you could have protected yourself by doing that. And I -- and there's a sense there that -- and that's the short 15-day appeal period too. It's the same idea, we want to -- we don't want to have these things drag on forever --

SEN. GENUARIO: Yeah. It seems like charging a lay-person with a fairly extraordinary amount of knowledge and a fairly significant burden for that person to have to hire a lawyer to take an appeal from a site plan that he likes because somebody might change it down the road. I mean a skilled mediator is going to be aware of that and there may be -- maybe one of the appropriate tools could be to provide notice to adjoining property owners.

TERRY TONDRO: Or call the property owner in --

SEN. GENUARIO: Yeah.

TERRY TONDRO: -- on this list of expert people to hear that point of view and -- a mediator is, by definition, fair --

SEN. GENUARIO: Um-hmm.

TERRY TONDRO: -- and to make fair -- to take that factor into account. But moreover, we have that system now under trial court zoning procedures. So do we need to make this any more -- express any more concern for that surprised neighbor than we do now.

SEN. GENUARIO: It's -- that's a legitimate point. You could reach a stipulation without a mediator. There is a provision in the statutes that requires with zoning appeals a hearing before you withdraw an action --

TERRY TONDRO: Right.

SEN. GENUARIO: -- as opposed to other actions --

TERRY TONDRO: Right.

SEN. GENUARIO: -- where you can just withdraw. My experience has been that that's sort of a perfunctory process at best. Maybe something could be done with that process to require maybe a more meaningfully hearing if there's a change --

TERRY TONDRO: Oversight by the Superior Court judge --

SEN. GENUARIO: Yeah --

TERRY TONDRO: -- after the appeal is issued?

SEN. GENUARIO: Yeah, I would think so.

TERRY TONDRO: Perhaps. That might be one way of ensuring that person is heard beyond simply trusting the mediator to ensure that person is heard.

SEN. GENUARIO: Okay.

TERRY TONDRO: But I think a mediator is going to be properly concerned about making a good show for mediation as a process and, therefore, would go out of his or her way to ensure that there was fairness being served by this alternative process. And you know, at a certain point you've got to trust people --

SEN. GENUARIO: Yeah.

TERRY TONDRO: -- and that's the person to trust, I think, under those circumstances. But, yes, you could have the Superior Court review the results.

SEN. GENUARIO: Thank you. Thank you, Madam Chairman.

SEN. DAILY: (Inaudible, mic not on).

TERRY TONDRO: Thank you -- oh.

REP. STONE: Sorry, Senator.

Thank you for coming in, professor. Just a quick question. What do you think about requiring that any stipulation that was reached after mediation or under the present scenario any stipulation that's reached by the parties at an informal mediation be subject to a public hearing and approval by the commission as a whole?

TERRY TONDRO: By the commission?

REP. STONE: Yeah.

TERRY TONDRO: I don't think the commission has had its shot at that application -- we're talking about -- I assume you're talking about a specific application?

REP. STONE: Well had its shot at the original application, but if it's modified --

TERRY TONDRO: Oh, the modification? No, I guess -- here we trust the trial judge to say that's it, and --

REP. STONE: Well --

TERRY TONDRO: -- and I don't see why we don't trust the mediator unless we don't trust the mediation as a process.

REP. STONE: Well only because perhaps -- in the example given, there may be people who are affected differently by a mediated resolution or a mediated stipulation than the way they might have been affected as the result of the original action by the planning and zoning commission --

TERRY TONDRO: But again --

REP. STONE: -- the setback on a side yard for example.

TERRY TONDRO: But again, that -- I mean that case that the Senator -- the situation the Senator eluded to is pretty close to the case, who's name I can't remember, it was about 15 or 20 years ago, by the Connecticut Supreme Court where they held that you

should -- a property owner should have foreseen that an application for a hotel would involve a liquor application. And even though that wasn't in the application before the planning and zoning commission, you should have known that and should have paid attention to what was the result and taken an appeal then or not. You're charged with that. And I think at a certain point you have to in order to keep the system running. If you allow it to go back before the commission again, you're talking about another delay --

REP. STONE: Well, you're also talking perhaps about another appeal. But what about expanding the notice requirements of the mediation session which are now under this proposal open to the public --

TERRY TONDRO: Right.

REP. STONE: -- notice no less than 24 hours prior to the meeting, which is your standard notice for example of a special of the board of selectmen or the board of finance? What about expanding those notice requirements to include more -- a notice more akin to the notices we provide on a regular zoning application, you know no more than 15 days, no less than three notice in the paper, that type of thing?

TERRY TONDRO: We don't require that for the judicial process, do we?

REP. STONE: No.

TERRY TONDRO: So why should we require it for mediation?

REP. STONE: Because you -- again, it --

(Gap in testimony changing from tape 2A to 2B.)

REP. STONE: -- the interest of another property owner may be affected --

TERRY TONDRO: That's true, but the court speaks also of the same thing. I mean that's -- my -- I guess my feeling is this doesn't give -- this bill doesn't

give more rights or lesser rights to the parties than the existing trial system does. It gives more opportunities to get a different basis for a decision. But in terms of a right to participate or get your point of view across, or whatever, I don't think it is any more restrictive than the present practice before the courts.

So we're creating an alternative system to following the litigation route, to follow the mediation route if you wish to. And as many people can be heard maybe under a different rubric, they're now sort of divided participants, or they can -- but certainly they can intervene at the time the appeal is filed as now. The breath of the changes made by the mediator is within -- would probably be held -- we don't know this -- but would probably be held to be within the same kinds of limitations that the courts already impose on commissions making changes anyway. So, I don't see that there's any -- these may be problems, but I think they should be addressed across the board and not just at mediation.

REP. STONE: No, and perhaps -- well, if a commission is a party to an action, under the way it works now without this statute, without this amendment, I would think that if they're going to sign off on a stipulation, that they'd have to have a meeting to do that and they'd have to give notice of the meeting to the public and perhaps that notice is more than what's required under this mediation statute. You don't have to respond to that, professor, it's just an observation --

TERRY TONDRO: A nice point --

REP. STONE: -- more than a question.

TERRY TONDRO: It's a nice point. I don't know how you would deal with the commission's ability to commit itself --

REP. STONE: Right.

TERRY TONDRO: -- without a public hearing or without going through --

REP. STONE: Right. Thank you, professor.

SEN. DAILY: (Inaudible, mic not on).

TERRY TONDRO: Thank you.

SEN. DAILY: (Inaudible, mic not on).

REP. SAMOWITZ: Thank you. Senator Daily, Representative Davis and members of the committee, I'd just like to take a brief opportunity to introduce the Phoenix Academy, which my daughter attends up at Fairfield, at this point in time to have them recognized because I asked them to come over and see what wonderful work we do and what drives her daddy crazy. This is my daughter over here. Brook, if you would just stand. (Laughter, applause) -- and the Phoenix Academy -- and also the rest of the Phoenix Academy, I just wanted to recognize them. If you members would -- would all Phoenix Academy members just stand up. (Applause).
I just wanted to thank them for coming. And now they can see what daddy goes through and why he's so crazy all the time.

SEN. DAILY: (Inaudible, mic not on).

: There's more reason than that -- (laughter, overlap of voices).

SEN. DAILY: (Inaudible, mic not on).

MICHAEL OSIECKI: Good afternoon. My name is Michael Osiecki. I'd like to thank the Planning and Development Committee for allowing me to speak today, Co-chairs Senator Daily, Representative Davis, Vice-Chairs Representative Fontana and Senator Looney.

My name is Michael Osiecki. I'm a career fire fighter for the South Fire District in the City of Middletown.

I'm here today to speak on my opposition to SB 1040. It concerns me for many reasons. The first being my health and safety and how I can perform my

at all. In other words if there's a fire in Middletown, they won't call me to fight the fire, they'll call in surrounding towns to do my job. That's like a shared work bill. And you know shared work bills for me put me out of work and put me on the rolls of welfare. I need to provide for my family. I think this bill could jeopardize me providing for my family. Thank you.

SEN. DAILY: (Inaudible, mic not on) -- Nick Carbone I think has left. Bill Ethier, followed by Pat Field.

BILL ETHIER: Thank you, Senator Daily, Representative Davis and members of the Planning and Development Committee.

My name is Bill Ethier. And for the record, I'm with the Home Builders Association of Connecticut, representing builders, land developers and remodelers.

HB 6601

Today I only have two bills that we're commenting on, unlike the 11 I had two days ago.

First on the mediation of land use appeals. I've filed written testimony on both the bills that we're commenting on. And this one, as you will see, we're strongly supporting this bill. I don't need to repeat all the statements that have been said about the need for mediation and the time and costs that's wasted in land use appeals. I've done some of that myself.

SB 1037

We do have several comments in my written testimony about some language changes that we think will greatly improve the bill and I'd like to touch on those real briefly. There's a provision at lines, excuse me, 160 to 164. This is during that, I believe, 45-day period where the parties need to decide if they're going to go to mediation or not and then they file a statement with the court. If they don't decide on mediation, they're suppose to give reasons why they didn't. We don't believe that should be mandated all the time. That could just generate a whole new round of antagonism and briefing. If the parties decide not to mediate,

they could have very different reasons wh the decided not to mediate. The court could always order an explanation of why they're not mediating, but we don't believe it should be mandated in all cases.

Another provision at lines 191. At the end of the process when a mediator issues his report -- his or her report to the court, we don't believe that a mediator should provide a reason for example of why mediation was unsuccessful or a mediator's opinion.

This is not arbitration. This is a mediation process. Again, the court could always order the mediator to articulate reasons, but we don't believe that should be mandated in all cases. And again if the parties disagree with the mediator's reason why mediation failed, again that just generates a whole new round of perhaps motions to strike, briefing on the issues, not getting to the issues that generated the appeal in the first place.

Listening to all the comments that were made, I've got some hopefully good suggestions to resolve some of the questions that were here and I can get back to those, but I'd like to turn very briefly to 6601, the modification of zoning petitions. As you've heard, zoning commissions right now are restricted to either approve or deny a petition for a zoned map change or a zoning ordinance change, and this would allow them to modify and approve.

We have some concerns about the impact as well on the sufficiency of a public notice. If a zoning commission were to modify a zone change application or petition beyond the scope of the notice, yes, it would be invalid under case law, but we would like to see a provision put into this bill that says you could modify within the scope of the public notice, just to sort of codify the requirement that any modification has to be within the scope of the notice.

And if I could briefly? Modifications also cut both ways. A lot of times you'll file a petition for a zone change and the commission wants to go along with it, but modify it slightly, and the

applicant is fine with that modification, but because of the way the statute is written, there's going to be a month or two or three-month delay because you have to go back and rewrite it and come back. So it cuts against applicants when the commission doesn't have that flexibility to modify a non-controversial thing, what everyone agrees to.

On the other hand, it could also -- a zoning commission could also modify a petition in a way the applicant doesn't want or can't use. So we would like to see a provision in this modification authority to say that -- something like without objection of the applicant or other parties.

So codify that modification has to be within the scope of the public notice and without objection of the parties that are involved in the case.

My time is up, so with that, I'd be happy to answer any questions.

SEN. DAILY: (Inaudible, mic not on).

REP. FONTANA: Thank you, Madam Chairman.

Bill, I have just one question. In your testimony on 1037, your second point regarding sessions open to the public --

BILL ETHIER: Yes.

REP. FONTANA: -- I just want to be clear I understand. It would seem to me that having mediation sessions open to the public might actually hinder the mediation process. Are you advocating mediation sessions be open to the public or --

BILL ETHIER: Well, I think the bill already says that -

REP. FONTANA: Right --

BILL ETHIER: -- that it's open to the public under certain conditions. And it says mediation sessions between all parties shall be open to the public. And then that same provision of the bill goes on to

say that when mediators are meeting individually with parties or other interested persons, those would not be open to the public. In fact, there's a provision in there that exempts that.

All I was trying to do was clarify between all parties by saying mediation sessions in which all parties to the action are present. So it's a minor change. But just to clarify; when all the parties are around, those sessions would be open to the public.

And I think it's difficult to exclude the public. The public has been involved throughout the whole process. Certainly in court it's open to the public. You don't want to hide the process. You know, if you exclude the public, you know there's going to be visions of, you know, back room dealings that's going on, that the public always thinks goes on anyway, but -- so, I think you want to avoid that notion in holding that out.

So, I think the public does need to be involved in some part of the mediation process. And the appropriate time that should happen is when all the parties to the appeal are present, the mediator is sort of brokering that, and the public can be there.

REP. FONTANA: I guess -- and I appreciate the fact that your testimony brought this to my attention because I think this is an important issue. And the reason I guess I'm asking it is because it seems to me that one way or another the substantive work is going to happen behind closed doors anyway.

To the extent that you, I, and say Representative Davis are in the same room and we're in front of the public, neither you nor I want to look like the bad guy. So if Jeff is mediating between us, he may make a proposal to you or to me and we'll go well thank you very much, that's interesting, I'll have to think about it and get back to you. But the work won't actually go on in that case.

The true nuts and bolts of the substantive discussion only can essentially happen in private

without sort of a sense of the public characterizing it or trying to use the process in a general environment to sway the process. It seems to me -- it seems to me we would facilitate the mediation if we -- as much as the public would like to see that go on, recognize that a lot of those negotiations can really not happen in public any more than a lot of discussions and negotiations in other areas of life do not hap.

BILL ETHIER: Right.

REP. FONTANA: So, I guess I'm just questioning, and I'd be happy to hear your thoughts down the road, as to whether or not in fact it's helpful for the mediation process to have it happen in public at all.

BILL ETHIER: I would -- I would answer that in most cases, in most discussions it would not be beneficial to have it open to the public. Because I agree, most of the dealing and really frank discussions that can happen between parties --

REP. FONTANA: Right.

BILL ETHIER: -- you're going to get better discussions without the public sort of watching over your shoulder. But it was in the proposal and --

REP. FONTANA: No, no, I --

BILL ETHIER: -- we're trying to clarify. And I think that is -- the danger I expressed is going to be out there if you do exclude the public throughout the whole process. And I think this is a very limited piece of the whole mediation process where the public is exposed to the process. And it might be necessary just to avoid those other things.

REP. FONTANA: Okay.

BILL ETHIER: I do have one quick comment. There was a question that Senator Looney had about the mediator requiring participation by non-appellants, by other parties. And I believe there was some -- there was also some other concern as well. And it says the

mediator may require the participation of these folks. A simple change saying the mediator shall request the participation, first of all, that doesn't give the mediator sort of subpoena power. But it also goes to the issue I think, Senator Genuario, you raised about the neighbor who's disenfranchised if you will, the mediator is there if -- if it's a mandate that the mediator shall request the participation of interested parties, well then it's sort of a built-in safeguard, if you will, that he's got to bring in that other neighbor if you're going to move the building to the other side. So it sort of satisfies both points just by changing two words.

REP. FONTANA: Thank you.

BILL ETHIER: Thank you.

SEN. DAILY: (Inaudible, mic not on).

BILL ETHIER: Thank you.

SEN. DAILY: Pat Field, followed by Brian Miller.

PATRICK FIELD: Good afternoon. I'd like to have said good morning, but good afternoon. Thank you for your patience today and for listening to my testimony.

My name is Patrick Field. I'll try to actually make my comments brief and then if people have questions about some of the issues raised, I'd be happy to try to answer them.

I'm Vice-President at the Consensus Building Institute, located in Cambridge, Massachusetts. We are a not-for-profit facilitation mediation organization. I'm also a member of The Society of Professionals in Dispute Resolution, on the rosters of the U.S. Environmental Protection Agency roster and the U.S. Institute for Environmental Conflict Resolution roster for mediators and Associate Director of the MIT-Harvard Public Disputes Program.

Regarding the question raised I think by Bill No.

1037, the question in a sense is quite simple, is can land use disputes be mediated successfully. And it is my organization's experience that the answer is yes. Mediation can help parties save money, save time and many of the other benefits that people highlighted earlier.

The one thing I want to refer to in my shortened statement is simply a study that we actually conducted starting in 1997 where we wanted to actually research many of the claims made in regards to mediation and facilitation, what we call assisted negotiation in land use disputes. So with money from the Lincoln Institute for Land Policy, we conducted a study that included over 400 confidential interviews with various parties and individuals involved in about a hundred land use cases across the United States. And let me just cite a few of the findings from that study.

Almost 85 percent of those interviewed developed a positive view of mediation facilitation after participating. Eighty-one percent of those interviewed believed that the assisted negotiation process as compared to their status quo alternatives saved them both time and money. Sixty-nine percent of those interviewed believed that the agreement they reached in mediation was more stable and longer lasting than one that might have been reached through traditional processes. And almost 90 percent of the interviewees stated that their settlement was more creative than an agreement that might have been reached through traditional processes.

So, I think our study suggests strongly, and with the limitation that this is a qualitative study and we're sort of depending on the accurate reporting of those folks we talked to, but that mediation in fact does work quite successfully in, not all, but in many land use disputes.

So, I commend this committee for putting forward this bill. I think it's very progressive and unusual for states to be able to do this. And I think it will not only help the citizens of Connecticut, but set a good precedent for states

across the country.

And I'd be happy to answer any questions that you might have.

SEN. DAILY: (Inaudible, mic not on).

REP. FONTANA: Thank you, Madam Chairman.

Pat, I'd just like to ask you the same question, what is your comment on the provision in the bill currently to require mediation sessions with all parties be open to the public?

PATRICK FIELD: The challenge of mediation in the public sector context is to balance both sort of the success of what I would call settlement discussions with the larger public interests. And it's -- I don't think there's an easy answer.

Typically, in sort of private sector mediation where two businesses are about to go to litigation and decide -- the public interest isn't at stake, so they can have their private sessions. They often sometimes exclude their lawyers with high level managers in the discussions to try to facilitate them. They can essentially do what they like and it works fine. And it, in fact, I think can be said that when there's not sort of the media eye or the public eye watching, people can be more frank, get their issues out more on the table, get to maybe the real interest at stake that are never said publicly.

On the other hand, and I think people have brought up concerns about this as well, there is a real public interest at stake. If there are abutters who are concerned about, you know, being affected by a decision in the mediation, and also the long-term stability of the agreement -- I know of one case in Massachusetts, and I won't refer to it specifically, but essentially the town entered into a mediated agreement or negotiation and reached a settlement in closed door session and later on the town citizens were so infuriated by the decision it led to a series of town actions and the like that essentially made the decision moot and it was sort

of revisited in its entirety because of people in part being excluded. Whether it was the substantive of the decision people really disagreed with or not, you know, I can't speak to.

So, I think there has to be a balance between making sure that the public interest is met and being conducive to actually reaching agreement. I think the way that this is structured allows the mediator to do a lot of work in what we would call shuttle diplomacy, the sort of meat of the matter that you had talked to in working with the parties. Also ensuring that there's sort of public conversation about the discussion so that anyone can at least sort of watch the sausage being made, if I can use that metaphor.

It's possible you could modify this to suggest that there maybe needs to be a final mediation discussion in public and that there can be pre-mediation discussions not in public. I mean there are probably ways to do this. But I think it's important to balance the public interest and the sort of the constructiveness of settlement discussions.

REP. FONTANA: Well, I guess that's the reason why I'm asking -- if I could, Madam Chairman -- because if you've got a dispute over a planning and zoning issue, you may have more private parties, you know a business and a next door neighbor. And I'm also thinking that in other instances when we require mediation say over collective bargaining issues, I don't know, and I'm going to look forward to actually asking somebody later on, but I don't believe those are public. So, I guess that's why I'm concerned about doing this when we're not doing other mediation issues in public. But maybe that's a good compromise, the final versus the working --

PATRICK FIELD: And to be -- I think to be fair to the field, almost all the work we do is in the public eye and so we tend to advocate for more public processes of mediation, but there are certainly many mediators who say you're crazy, you really ought to have private sessions and have some kind of input from the public or a chance for them to

look at it, but maybe later.

REP. FONTANA: Thank you. Thank you, Madam Chairman.

SEN. DAILY: (Inaudible, mic not on) -- public hearing, were you not?

BILL ETHIER: What's that?

SEN. DAILY: You've been here for the entire public hearing?

BILL ETHIER: Yes.

SEN. DAILY: Questions that other people have raised about different parts of the bill, without going back over those, are any of them things which are not usually part of negotiated settlements?

BILL ETHIER: The -- let me speak to maybe two, beginning and end. The 45-day period as I was listening to the comments, one of the thoughts I had is that if mediation was widely accepted and practiced in land use cases currently, people know how to get a hold of mediators, towns knew how to budget for paying for mediators, which by the way they often don't, I think maybe the 45-day period would not necessarily be necessary or maybe it could be shorter. But given that this is relatively new to many towns and cities, I think that 45-day periods give say the town planner who's really behind it or someone else a chance to advocate for it, help the parties find ways to pay for it, find a mediator who people may not know. And I think particularly in the first years of trying to sort of really sanction this by the State Legislature, that 45-day period is really important for that kind of pragmatic reason of ramping up experience with mediation more thoroughly with towns and cities in Connecticut.

The -- at the end of the process -- I would agree with the last speaker, that I think if you put the mediator in the role of reporting to the judge on the discussions, you no longer have a mediator. What you actually have is some kind of what we'd call a med-arb, a mediator up to a point in which

you can't reach agreement and then they become kind of an arbitrator, sort of analyzing and reporting on the facts and essentially weighing in in the decision making process to the judge. So we would certainly say if the parties have narrowed the issues that they want to bring into the appeal, you know narrower than the original appeal, if the parties want to make some joint statement to the court about everyone participated in good faith, whatever it might be, if the parties jointly agree to it, it's certainly appropriate for the mediator to speak on behalf of them, but to offer their own analysis, I think turns it into something else, which we would discourage.

SEN. DAILY: Thank you very much. And did you provide written copies --

BILL ETHIER: Yes. I have two documents --

SEN. DAILY: Okay.

BILL ETHIER: -- the study and -- where should I hand those?

SEN. DAILY: Brad -- Brad is not there -- the desk right here.

BILL ETHIER: Great. Thank you very much.

SEN. DAILY: Thank you very much. Brian Miller, followed by Paul -- Rapan --

PAUL RAPANAULT: Rapanault.

SEN. DAILY: Rapanault. Thank you.

BRIAN MILLER: Good afternoon. My name is Brian Miller. I have been an urban planner for 23 years now, the last 12 of them in Connecticut. I'm currently the Director of Development Services for the Town of Berlin, and I'm here to testify in support of HB 1037.

There's been quite a bit of testimony and very detailed testimony, experts have been here, as well as my colleagues, so I don't want to repeat too

much of what was said. But just a couple of observations I think from somebody who's sort of -- I think my position is a little bit in the vortex of all these land use disputes.

As I said, I've been an urban planner for -- actually, I did admit to 23 years, I don't admit that all the time -- but over the past -- not just the past 23 years, but the past 12 years I've been in Connecticut, I've detected a much stronger orientation of land use decisions towards litigation, where it used to be kind of the commission might act as somewhat of a mediator and that would generally be accepted by many parties, that's not the case. And I think more insidious perhaps is that many commissions are now making decisions more on the basis of who's going to sue us and who's going to appeal us rather than what the actual basis is, whether it's good planning, good law, or just a good decision for the town. And I've become increasingly concerned about this.

I think Professor Tondro stated that this certainly won't solve all the problems, but it might help a little bit on the margins. I certainly agree with that. I generally think if the system is not -- it ain't broke, don't fix it, but I contend that it is broke.

Representative Davis, I believe, asked a question before of how long does an appeal normally take. Well, I'm appalled to report here in Berlin we have an appeal that's going to be hitting its fifth birthday pretty soon, where the original -- the actual dispute -- I believe if it wasn't -- if it was subject to this, could have been resolved amicably for all concerned four and a half years ago.

I think one of the benefits here, the cooling off period, which was -- it was pointed out we do have a de facto cooling off period now. But this would provide the mechanism really that -- not just let -- maybe we could talk, but there would actually be a recognized mechanism to bring the parties together.

There's many hidden costs in litigation aside from attorneys, it's staff involvement and everything else. It detracts from the real mission of what we're all trying to do here. It's interesting that you have a proposal together that's being strongly supported by the Home Builders and by the Planning Association, and I think it's based on the recognition that this system really right now isn't doing anybody any good and it's not leading to fairness or good planning or really good decision making.

And on that, I'll end my testimony. And if there's any questions, I'm happy to answer it.

SEN. DAILY: Thank you very much. Are there any questions? Thank you again, thank you for your patience. Paul Rapanault.

PAUL RAPANAULT: Good afternoon, Senator.

SEN. DAILY: How are you.

PAUL RAPANAULT: Thank you. My name is Paul Rapanault and I am the Legislative Representative for the Uniformed Professional Fire Fighters of Connecticut.

I'm here today to voice my opposition in its present form to Bill No. 1040, AN ACT AUTHORIZING MUNICIPALITIES TO JOINTLY PERFORM MUNICIPAL FUNCTIONS.

Professional fire fighters have spent many years convincing the citizens of Connecticut and municipal leaders that when it comes to fire fighting, emergency medical responses and hazardous condition responses, it is fire fighters that make the difference, not equipment, not fire engines, ladder trucks or fire stations.

We're concerned that the above mentioned bill and those like it will jeopardize the fire fighters' ability to perform their jobs in a timely and safe manner. We believe that municipalities will opt for economy instead of safety if given the opportunity and proper economic conditions exist.



Town of Simsbury

933 HOPMEADOW STREET

P.O. BOX 495

SIMSBURY, CONNECTICUT 06070

Anita L. Mielert, First Selectman

0-563

February 15, 2001

The Honorable Eileen Daily, Chairman
The Honorable Jefferson B. Davis, Chairman
Planning and Development Committee
Connecticut General Assembly
Legislative Office Building
Hartford, CT 06106-1591

Re: Raised Bill No. 1037, An Act Concerning Mediation of Appeals of Decisions of Planning and Zoning Commissions

Dear Senator Daily and Representative Davis:

As First Selectman of Simsbury, I appear before you today to offer full support of Raised Bill No. 1037. This is a bill that, when approved, will enable mediation as an alternative to litigation on land use matters.

Under current legislation, litigation remains the prevailing means of resolving disputes on land use matters. In most cases, the results are far less than satisfactory for all parties. Litigation is inherently hostile and tends to aggravate differences rather than create mutual gains. It is expensive, and emotions run high, with little emphasis on the need to build trust and establish long-term working relationships among parties who are likely to live side-by-side for years to come. The general public is essentially cut out of the process, as opponents battle it out in court; a direct consequence is that the average citizen feels detached and cynical about public decision making.

Raised Committee Bill No. 1037 offers an opportunity for collaborative decision making. Because mediators can invite interested parties into the meetings, it is more inclusive than litigation. Therefore, it will allow parties to build trust and enhance long-term relationships.

While litigation pits parties against one another, mediation is based on consensus building. At the end of the day, the applicant still owns the land, and it is still in our Town. We must encourage a system which is based on communication and amicable accord, not "winner take all."

I urge the Committee to issue a favorable recommendation on this bill and to shepherd it through the legislative process. Thank you for your time and your commitment to this important legislation.

Very truly yours,

Anita Mielert, First Selectman

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amielert@simsbury.k12.ct.us

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860/232-1905 • Fax 860/232-3102
<http://www.hbact.com>

February 16, 2001

To: Senator Eileen M. Daily, Co-Chairman
Representative Jefferson Davis, Co-Chairman
Members of the Planning & Development Committee

From: Brett, Executive Vice President & General Counsel

HB 6627

Re: House Bill 1037, AAC The Mediation of Appeals of Decisions of Planning and Zoning Commissions

The HBA of Connecticut is a professional trade association with almost nine hundred (900) member firms statewide, representing approximately 45,000 employees. Our members are residential and commercial builders, land developers, remodelers, general contractors, subcontractors, suppliers and those businesses and professionals that provide services to this diverse industry. We also created and administer the Connecticut Developers Council, a professional forum for the real estate development industry in the state.

We strongly support Raised Bill 1037, AAC The Mediation of Appeals of Decisions of Planning and Zoning Commissions. Every once in a while an idea comes along that makes so much sense that it is surprising it was not adopted long ago. Raised Bill 1037 is one of those proposals.

Tremendous amounts of time and money are spent on land use litigation in this state. Land use appeals are one of the most numerous types of cases clogging our courts. This bill will benefit all parties to these land use appeals by authorizing a needed dispute mediation process. The mediation process in this bill is not mandated on any of the parties. Any party may choose not to engage in this mediation process, in which case the normal course of a land use appeal to the courts will take place. This is as it should be since there may be valid reasons for either the appellant/plaintiff or the appellee/defendant to not want to mediate a legal action. But the vast majority of land use litigants on all sides of a dispute do not want to be in court. Agreements can be reached if the parties can talk with each other in a professionally facilitated format, such as is offered through mediation. This new tool will greatly help land use applicants as well as land use commissions and our communities throughout the state.

We do have three suggested changes. At lines 160 – 164, after a defined period of time a statement is submitted to the court by the parties requesting either that the action be resolved by mediation or that the court proceedings be resumed. However, we are not sure why this statement must include reasons for the selection. The parties at this stage of the process would still be very antagonistic and it could be difficult for them to agree to the reasons for mediating or not. Each party might end up filing contrary reasons that

 The Voice Of The Home Building, Remodeling and Land Development Industries In Connecticut

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could lead to legal briefs to back up their reasons, all of which would add unnecessary expense to the process. At this stage, there is no mediator. To simplify the process, a simple statement, without explanation, should be filed with the court, to tell the court that the parties will attempt to mediate their dispute or that mediation will not be pursued. The court could, of course, always order the parties for an explanation of why mediation will not be pursued, but a statement of reasons should not be mandated in all cases.

At line 174, we suggest that the language read as follows: "(d) Mediation sessions in which all parties to the action are present shall be open to the public." Since mediators need to be able to speak to the parties as well as others, often individually and in private, this change would help clarify the public portions of the mediation process. Also, the language at lines 178 - 183 should be retained in the bill.

Finally, at lines 191-194, the mediator should not provide reasons for failing to resolve issues, particularly since the mediator cannot act as or be summoned as a witness in court if mediation is not successful. Mediators must be able to act independently and they should not be subject to be called as a witness. However, to remain entirely neutral throughout the whole process, they should not offer opinions as to why a particular result was reached. These opinions would lead only to another round of briefing and motions by the litigants. This is not an arbitration process where the arbitrator issues findings of act and renders a decision. As a service to the parties and to the court, mediators should report only the results of the mediation process, i.e., the issues resolved and the issues not resolved.

With the adjustments we suggest above, this bill is a great compliment to Raised Bill 6627, AAC Applications to Planning and Zoning Commissions, which is in the Housing Committee and we hope will be passed favorably by that committee and come to you next for consideration. Raised Bill 6627 would authorize local land use commissions to talk with potential applicants prior to filing land use applications. This pre application review process will help to improve applications and work out difficult issues ahead of time. Raised Bill 1037 before you today will help the parties talk to each other at the end of the process when disputes still remain and an appeal is filed.

This bill, with substitute language as we suggest above, benefits all parties and we strongly urge you to support its favorable passage.

Thank you for considering our views on this important matter.

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Testimony, Bill No. 1037, *An Act Concerning Mediation of Appeals of Decisions of Planning and Zoning Commissions*
Patrick Field, *Vice-President, Consensus Building Institute*
February 16, 2001

Hello, and good morning. My name is Patrick Field. I am Vice-President of the Consensus Building Institute (CBI), a not-for-profit facilitation and mediation organization located in Cambridge, Massachusetts. I am a member of The Society of Professionals in Dispute Resolution (SPIDR), on the rosters of the U.S. Environmental Protection Agency and the U.S. Institute for Environmental Conflict Resolution, and Associate Director of the MIT-Harvard Public Disputes Program. I am co-author of the 1996 Free Press book entitled *Dealing with an Angry Public*. I have a Masters in City Planning from Massachusetts Institute of Technology and have been a mediator since 1992.

The question raised by Bill No. 1037, *An Act Concerning Mediation of Appeals of Decisions of Planning and Zoning Commissions* is quite simple: can land use disputes be mediated successfully? It is my organization's experience that the answer is, simply, YES. Mediation can help parties save money, save time, increase understanding and communication, develop agreements that are more nuanced and tailored to the needs of all parties, increase party satisfaction, and over time, help restore and increase social capital -- that is, trust, relationships, expertise, and good faith -- in local communities.

A reasonable person might ask, "Is this really true?" In 1997, CBI, my organization, initiated a study to evaluate the use of assisted negotiation -- as we called mediation and facilitation -- in land use disputes throughout the U.S. This effort was funded by the Lincoln Institute for Land Policy, also based in Cambridge. In this study, we completed over 400 confidential interviews from individuals involved in 100 land use disputes across the U.S. where mediation or facilitation was attempted.

What did we find? Almost 85% (84.5%) of those interviewed developed a positive view of mediation and facilitation after participating. 81% of those interviewed believed that the assisted negotiation process, as compared to their status quo alternatives, saved them both time and money. 69% of those interviewed believed that the agreement they reached in mediation was more stable than one that might have been reached through traditional processes. And, almost 90% (88%) of the interviewees stated that their settlement was more creative than an agreement developed in a traditional way.

Let me give you a few, concrete examples. In West Chester, Pennsylvania, the County was able to site a homeless shelter and address the many concerns of local businesses, neighborhoods, and city government through the use of mediation. In Santa Fe, New Mexico, mediation and facilitation helped resolve a dispute over development on the city's outskirts and produce Santa Fe's first ever approved comprehensive neighborhood plan. In Rowley, Massachusetts, mediation assisted the Town, its Boards, a developer, and neighbors in successfully resolving an appeal to the State's Housing Board of Appeals regarding a mixed-use development.

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Has mediation been used in Connecticut, and are there trained mediators able to assist? On a case by case basis, mediation has been used in Connecticut. For example, assisted negotiation was used to help relocate Meriden's Veteran's Hospital and to adopt a Fair Share Allocation Plan for Affordable Housing in the Hartford area. And yes, there are skilled, well-trained mediators of complex public disputes available throughout the Northeast. In addition, there are also public and private organizations offering training for mediators who have not previously handled land use disputes so that the supply of trained mediators can be increased to match the demand.

Over the years, the details and intricacies of how best to successfully assess conflicts, convene stakeholders, and resolve differences in the public arena have been detailed in such written works as *Breaking the Impasse* (Larry Susskind and Jeffrey Cruikshank, Basic Books, 1987) and *The Consensus Building Handbook* (Larry Susskind, Sarah McKernan, and Jennifer Thomas-Larmer, Sage Publications, 1999). The fact is mediation works.

Unfortunately, to our knowledge, very few states support the use of mediation in land use disputes through formal statute. We commend the Bill's sponsors and the State of Connecticut for this innovative and progressive act. Passage of this bill will not only be good for Connecticut and its citizens, but will also set an example for other states across the country. We look forward to the use of mediation in successfully resolving land use disputes across Connecticut.

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FARMINGTON RIVER WATERSHED ASSOCIATION, INC.
749 HOPMEADOW STREET • SIMSBURY, CONNECTICUT 06070

February 15, 2001

Rep. Jefferson B. Davis and Sen. Eileen M. Daily
Co-Chairs Planning and Development Committee
Room 2100 Legislative Office Building
Hartford, CT 06106

Re: SB01037 AAC Mediation Of Appeals Of Decisions Of Planning and Zoning Commissions

Dear Rep. Davis, Sen. Daily and members of the Committee:

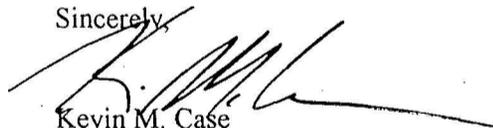
On behalf of the Farmington River Watershed Association (FRWA) I would like to offer our support of SB01037. Providing stronger encouragement and structure for the use of mediation as a resolution process for contested land use decisions will benefit everyone involved.

From the perspective of a small nonprofit river conservation group, the legal appeal process is daunting. Limited time, limited money and the overall limited resources of smaller nonprofits make a legal appeal not a realistic option. Knowing a mediation process was outlined directly in state statute opens up more opportunities for interests, such as ours with fewer resources, to be heard.

As well, the proposed language clearly defines the mediator's freedom to call upon anyone deemed necessary to help resolve the issues. This provides an important additional avenue in which local interest groups may become meaningfully involved in the process while staying within their time and monetary limits.

Again, FRWA supports SB 01037. It is an important step in enhancing access to the complete land use decision making process for all interests involved.

Thank you for your consideration.

Sincerely,

Kevin M. Case
Executive Director

Established in 1953, the Farmington River Watershed Association (FRWA) is a 501 (c)(3) non-profit organization created to encourage the restoration and conservation of the natural resources of the 609 square mile Farmington River Watershed. FRWA works diligently to promote an understanding among its 1,200 members and the citizens of the Watershed of the need for such conservation and exercises leadership in issues including water quality and conservation, wetland and floodplain protection, water allocation, land protection and recreational usage.

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Brian J. Miller, AICP, PP

**24 Brubaker Rd.
Cheshire, CT 06410
(203) 271-2458**

Email BJMillerPlan@msn.com

Memorandum

To: Members of the Planning and Development Committee
From: Brian J. Miller, AICP
Subject: H.B.1037
Date: February 13, 2001

I am writing this to express my full support of H.B. 1037, An Act Concerning Mediation of Appeals of Decisions of Planning and Zoning Commissions. I have been an urban planner for 23 years, and currently serve as the Director of Development Services for the Town of Berlin. I am supporting this bill because I have witnessed a dramatic shift in the land use decision-making process over the past decade, from decisions based upon the impact upon neighborhoods and the environment, to one more strongly oriented towards legalistic considerations such the likelihood of litigation or impact upon pending litigation. While the court system has an important role in the process to safeguard the rights of all, the shift in emphasis has resulted in long and often costly delays that have benefited no one.

Briefly, I believe that the increased use of mediation instead of litigation is needed for the following reasons:

1. The current system often leads to extended periods of project delay. Tales of litigation extending years beyond the original date of action by the local land use board are not uncommon. This delay certainly increases the costs of development, but the delay itself can destroy the project, as financial commitments expire and market conditions change.
2. Neighbors or other people unhappy about what may be a worthwhile project can delay the project with the filing of an appeal. As stated, the delay can effectively kill the project.
3. The current system does not encourage or permit the considerations of any other interests other than those directly involved in the litigation. A process of mediation would allow the interests of all parties to be considered as appropriate.

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4. The mediation process would facilitate a "cooling off" period, often to the benefit of all parties. The mediation process may bring forth a solution that is mutually advantageous.
5. Land use disputes can often be resolved by such measures as mitigation of impacts or altering the scale or composition of a project. Litigation is inherently adversarial, and is not conducive to achieving "common ground."
6. The current orientation towards litigation to resolve land use disputes can discourage participation by neighbors or other potentially effected parties who lack the resources to challenge land use decisions.

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CONNECTICUT CONFERENCE OF MUNICIPALITIES

900 Chapel St., 9th Floor, New Haven, CT 06510-2807 • Phone (203) 498-3000 • FAX (203) 562-6314

Testimony

of the

Connecticut Conference of Municipalities

to the

Planning and Development Committee

February 16, 2001

HB 6718 HB 6720 HB 6597 SB 1037 SB 1133 HB 6601

The Connecticut Conference of Municipalities appreciates the opportunity to testify on the following bills of interest to towns and cities:

R.B. 1040, "An Act Authorizing Municipalities to Jointly Perform Municipal Functions"

CCM strongly supports this bill, a legislative priority of towns and cities.

R.B. 1040 would clarify that towns and cities can do jointly all that they are allowed to do individually.

By eliminating statutory and other barriers to greater cooperation between municipalities and regions, the State can encourage *voluntary* efforts to create greater efficiencies and save taxpayers' money.

R.B. 1040 also provides towns and cities with the opportunity to develop and foster innovative approaches to "grow smart". Such efforts should be supported and rewarded.

CCM is aware that there have been concerns in the past by public employee unions regarding this bill. However, nothing in this bill would allow municipalities to change contracts and other obligations. Indeed, *all statutes governing municipal labor relations would be continued under R.B. 1040.*

CCM urges you to favorably report this important bill.

R.B. 6718, "An Act Concerning State Grants for Regional Efficiency Development"

CCM strongly supports this bill.

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continued compliance with the standards in advance of the next scheduled revaluation, and (4) is specific with regard to the timetable for application and approval or rejection of exemptions.

CCM urges the Committee to JFS R.B. 6597.

R.B. 1037, "An Act Concerning Mediation of Appeals of Decisions of Planning and Zoning Commissions"

CCM supports R.B. 1037, which would allow for third-party mediation between parties after a planning and zoning grievance has been filed in Superior Court.

Mediation would take place with the consent of both parties.

Both parties would pay, in equal amounts, for costs associated with obtaining the services of a mediator.

R.B. 1133, "An Act Concerning Incentives for Municipal Aggregation and Consolidation of Electric Generation"

CCM supports this bill.

R.B. 1133 would require the Secretary of the Office of Policy and Management (OPM) to develop a program of incentives for towns and cities to become electric aggregators.

The bill would also require OPM to report back to the General Assembly with details on financial estimates for each incentive considered by the Secretary, and any recommendations for legislation.

R.B. 6601, "An Act Concerning Modification of Zoning Petitions"

CCM supports this bill.

R.B. 6601 would clarify the ability of zoning commissions to modify, as well as adopt or deny, proposed changes regarding zoning petitions.

Thank you for your time and consideration.

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If you have any questions, please call Ron Thomas, CCM Senior Legislative Associate; or Jim Finley, Associate Director of CCM for Public Policy and Advocacy; at (203) 498-3000.

Attachment