

MEMORANDUM

FROM: OFFICE OF THE CITY ATTORNEY
MIDDLETOWN, CONNECTICUT 06457

TO: Mayor Sebastian J. Garafalo; Chairman Stephen T. Gionfriddo, Planning
and Zoning Commission and Vice-Chairman Ann M. Loffredo, Planning and
Zoning Commission

DATE: July 13, 1988

RE: Request for Legal Opinion - Application of Frank and Josephine Marchese,
87 Clover Street, Middletown - Proposed Special Exception to Permit Two-
Family in RPZ Zone

ISSUE:

Under what conditions, can the Marcheses' second application for a special exception to permit a two-family dwelling in an RPZ zone be considered by the Middletown Planning and Zoning Commission?

FACTS:

By initial application dated March 8, 1988, Frank Marchese and Josephine Marchese applied to convert an existing dwelling located at 87 Clover Street, Middletown from its present use as a single family to a new use as a two-family. A special exception form application, dated March 8, 1988, was also filed by Frank and Josephine Marchese since the Zoning Code required 100' frontage for the requested conversion to a two-family in an RPZ zone.

On April 13, 1988, the Middletown Planning and Zoning Commission held a public hearing on the Marcheses' special exception application. After hearing testimony concerning said application, Commissioner Gionfriddo closed the public hearing on that date and requested of the Commission whether they wished to vote on the application that evening or continue the matter to the next meeting. The Commission voted to continue the matter to the April 27, 1988 agenda.

On April 27, 1988, the Commission voted to disapprove the application. Chairman Gionfriddo stated that the application itself had problems both in the way it was applied for and by virtue of the fact that it fell between two sections of the Zoning Code, namely Sections 44.08.22 and 44.08.28. Section 44.08.22 does not apply to RPZ zones. Chairman Gionfriddo stated further that the applicants had to request another change to the Zoning Code prior to making a new application for a special exception to convert the one family to a two-family dwelling.

By initial application dated May 4, 1988, Frank and Josephine Marchese, through the law firm of Jozus, Tomc & Milardo, applied to add an addition to an existing building while obtaining a special exception allowing a two family dwelling at 87 Clover Street, Middletown, Connecticut. A special exception form application dated May 4, 1988, was also filed by the Marcheses through Attorney Milardo requesting the commission to grant a special exception allowing a two-family use on a lot of record in a zone which allows same, citing as relevant Sections 21.02 (2), 44.08.28, 40.04.16 and 60.02.10 of the Middletown Zoning code, as amended.

By letter dated June 3, 1988, Attorney Robert L. Holzberg requested that the Commission remove from the June 8, 1988 public hearing agenda the Marcheses' second special exception application to convert a one family dwelling to a two-family

dwelling.

Attorney Holzberg based his request on the case of Sipperley v. Board of Appeals on Zoning, 140 Conn. 164 (1953) wherein the Connecticut Supreme Court stated that zoning commissions are barred from considering successive applications containing the same request, previously denied absent a change in conditions since the prior decision or other conditions materially affecting the merits of the subject matter which have intervened and no vested rights have arisen.

By Request for Legal Opinion dated June 10, 1988, Vice Chairman Ann M. Loffredo, Planning and Zoning Commission, requested the Mayor to direct the City Attorney to render a legal opinion on whether there was any law preventing the second application for a special exception from being heard.

Zoning Code Sections

21.02 (2) The commission may approve a two (2) family dwelling on a lot of record as a Special Exception. (See Section 44.08.28).

Off-street parking and off-street loading regulations.

40.04.16 ONE FAMILY AND TWO-FAMILY DWELLINGS. 3 spaces per dwelling effective 7/1/87

44.08.28 Two (2) Family Dwellings on lots of record in an RPZ Zone. A two (2) family dwelling may be constructed on any lot in an RPZ Zone provided that:

- A) The lot has a frontage of at least fifty (50) feet and be established prior to 1986,
- B) The lot has an area of at least 7500 square feet,
- C) The lot is served by City water and sewer.

60.02.10 Two (2) family dwellings on lots of record (44.08.28) zone RPZ

DISCUSSION:

In his letter of June 3, 1988, Attorney Holzberg correctly stated the law with respect to the reconsideration of variances by a Zoning Board of Appeals. The case of Sipperley v. Board of Appeals on Zoning of Town of Westport, 140 Conn. 164, 167 (1953), clearly held that "... every administrative agency is ordinarily impotent to reverse itself unless (1) a change of conditions has occurred since its prior decision or (2) other considerations materially affecting the merits of the subject matter have intervened and no vested rights have arisen."

But a variance is unlike a special exception. "... a variance is authority extended to the owner to use his property in a manner forbidden by the zoning enactment. An exception, on the other hand, allows him to put his property to a use which the enactment expressly permits." Mitchell Land Company v. Planning and Zoning Board of Appeals of the Town of Greenwich, et al, 140 Conn. 527, 532-33 (1953). Because of

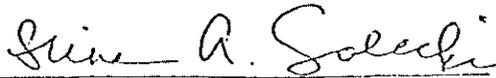
the nature of a special exception, the power of the zoning commission to review a prior decision is not limited to the two situations to which a variance is limited to review. "An additional situation arises when the owner requesting an exception files a subsequent application altering the plan under which he previously sought the exception, in order to meet the reasons for which the board denied the prior one." Ibid, 140 Conn. 527, 534 (1953); Shippee v. Zoning Board of Appeals of the Town of Old Lyme, 39 Conn. Sup. 436 (1983); Rocchi, et al v. Zoning Board of Appeals of the Town of Glastonbury, et al, 157 Conn. 106, 111 (1968).

Both the March 8, 1988 and May 4, 1988 applications for special exception are relatively similar in their request. No change of conditions is indicated to have occurred since the Commission's decision to deny the first application on April 27, 1988 and no other considerations have been indicated by the applicants which materially will affect the merits of the subject matter. The only remaining situation allowing the Board to review its prior decision would be if the applicants requesting the exception have filed an application altering the plan under which the applicants had originally sought the special exception in order to address the reasons for which the commission had originally denied the application. Chairman Gionfriddo's comments as set forth previously are important in this regard.

Finally an issue was raised concerning the definition of the word "construct" in Section 44.08.28 of the Middletown Zoning Code. Construction is defined as the "Creation of something new, as distinguished from the repair or improvement of something already existing." Black's Law Dictionary, Fifth Edition. Cases also have defined the word "construct" as the "physical performance of the work required to bring the thing ordered into existence ..." Thomas J. Donnelly v. The City of New Haven, 95 Conn. 647, 657 (1921); and "To make repairs and alterations in a building already erected, is a different thing from erecting a building." Booth v. The State of Connecticut, 4 Conn. 65, 66 (1821).

CONCLUSION:

The Marcheses' second application for a special exception can be considered by the Commission if there have been changes in conditions since the Commission's denial of the application on April 27, 1988, (e.g. proximity of schools, churches, theaters, or places of public gathering; traffic conditions, width of highways, effects of public travel relating to the property in question); if other considerations, not including newly thought of grounds which could have been presented by the earlier application, materially affecting the merits of the subject matter have been indicated (e.g. changes in the physical conditions of the property such as topography); or if the second application addresses the reasons for the denial of the application by the Commission, i. e. substantial changes to the application to address objections raised by the board in denying the first application. If it is found by the Commission that any of these reasons exist, the second application must be reheard but if none of these conditions exist, the Commission must deny the application for lack of jurisdiction.


Trina A. Solecki
Assistant City Attorney

Stephen T. Glonfriddo, Chairman, Middletown Planning and Zoning
Commission and George Lapadula, Zoning Enforcement Officer

October 20, 1988

Legal Opinion Request - 87 Clover Street

Section 16.04.07 of the Middletown Zoning Code defines a single-family dwelling as "A building designed for or used exclusively for residence purposes by one (1) family or housekeeping unit."

Section 16.04.08 of the Middletown Zoning Code defines a two-family as "A building designed for or used exclusively by two (2) families or housekeeping units."

The interpretation of the Middletown Zoning Code from which Mr. Holzberg and Ms. D'Oench appealed is the Commission's decision that "any dwelling building, no matter what the room layout or apparent number of units which is used by one family is to be considered as a single-family dwelling."

Taking all of these definitions and interpretations into consideration, it must be determined into which definition the construction taking place at 87 Clover Street falls.

Trina A. Solecki
Acting City Attorney

cc: Mayor Sebastian J. Garafalo

MEMORANDUM

TO: Stephen Gionfriddo, Chm. Planning & Zoning
FROM: George Lapadula, Zoning Enforcement Officer
DATE: October 6, 1988
RE: 87 Clover Street

As Zoning Enforcement Office I am requesting you to look into the legal interpretation of the City's single family addition noted as 87 Clover Street.

I feel that I need a legal interpretation on how to handle this problem. Enclosed is a letter from David Brown.

AR

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OCT 7 1988

CITY ATTORNEY
MIDDLETOWN, CT.

10 - 14 - 88 Spoke to the Mayor Re: Request
Told us to do opinion —

October 5, 1988

David M. Brown
35 Clover Street
Middletown, CT 06457

Mr. George Lapadula
Zoning Enforcement Officer
City of Middletown
P.O. Box 1300
City Hall
Middletown, CT 06457

Re: Clover Street Single Family Addition - Marchase Property

Dear Sir;

This letter is a formal request that you fully investigate the single family addition being erected at the Marchase property on Clover Street. It seems apparent that this structure is not a single family building as it has been represented to the community, but is a multifamily dwelling as outlined by our city's zoning codes.

Although a recent ruling by the Planning and Zoning Board has allowed a single family residence to have many kitchens and baths, it does not allow separate units to be constructed in the guise of a single family home. It seems that a mistake has been made in the approval process, and by protesting while this building is still under construction, it is my hope that this situation can be equitably corrected.

Please undertake this investigation as quickly as you can since time is of the essence. I thank you for your assistance in this affair. Please call me if I can help in any way.

Sincerely,



David M. Brown