

REQUEST FOR OPINION, ADVICE OR OTHER LEGAL SERVICE
(Submit to Mayor in Duplicate)

TO: MAYOR'S OFFICE

FROM: William Warner, Planning Director

SUBJECT:

FACTS: (In brief Statement tell WHO, WHAT, WHEN, WHERE, WHY, & HOW.) A parcel of land is proposed for subdivision within the Wesleyan Hills Planned Residential Development. The plan conforms to City of Middletown Zoning and Subdivision Regulations. The Wesleyan Hills Association asserts that the Commission is bound to adhere to the private deed restrictions established by the Association. The developer is not the original developer.

LAW: (Cite appropriate ORDINANCE, REGULATION, STATUTE, OR CASE LAW that you think applies to this question.)

Section 45 of Zoning Code
Subdivision Regulations
Wesleyan Hills covenants and restrictions

QUESTION: What, in your own words is the precise question you wish to have answered?) In rendering a decision on a proposed subdivision within the Wesleyan Hills Planned Residential Development, is the City of Middletown Planning and Zoning Commission required to adhere to and/or enforce the private covenants and restrictions of the Association?

ESTIMATE OF PRIORITY:

Check One.

EMERGENCY by 3/23/94 **STANDBY FOR FUTURE ACTION**

URGENT **APPLICANT SHOULD KNOW FOR FUTURE ACTION**

Date:

3-10-94

Signed:

approved Thomas J. Serra 3/17/94

sent to City Atty. on 3-17-94

MEMORANDUM

RECEIVED
MAY 12 AM 8:45
CITY OF MIDDLETOWN
MAYOR'S OFFICE

FROM : OFFICE OF THE CITY ATTORNEY
MIDDLETOWN, CONNECTICUT 06457

TO : Thomas J. Serra, Mayor

DATE : May 11, 1994

RE : Legal Opinion Request

FACTUAL BACKGROUND PRESENTED WITH THE REQUEST:

A parcel of land is proposed for subdivision within the Wesleyan Hills Planned Residential Development. The plan conforms to City of Middletown Zoning and Subdivision Regulations. The Wesleyan Hills Association asserts that the Commission is bound to adhere to the private deed restrictions established by the Association. The developer is not the original developer.

QUESTION PRESENTED:

In rendering a decision on a proposed subdivision within the Wesleyan Hills Planned Residential Development, is the City of Middletown Planning and Zoning Commission required to adhere to and/or enforce the private covenants and restrictions of the Association?

ANSWER:

The Planning & Zoning Commission is only required, and in fact restricted, to carry out those duties imposed on it by appropriate legislation.

ANALYSIS:

Connecticut General Statutes §8-25 provides the authority for the Planning & Zoning Commission's regulation of the subdivision of land. This section provides, in pertinent part, as follows:

No subdivision of land shall be made until a plan for such subdivision has been approved by the commission.
... Before exercising the powers granted in this section, the commission shall adopt regulations covering the subdivision of land. ... Such regulations shall provide

that the land to be subdivided shall be of such character that it can be used for building purposes without danger to health or the public safety, that proper provision shall be made for water, drainage and sewerage and, in areas contiguous to brooks, rivers or other bodies of water subject to flooding, including tidal flooding, that proper provision shall be made for protective flood control measures and that the proposed streets are in harmony with existing or proposed principal thoroughfares shown in the plan of development as described in section 8-23, especially in regard to safe intersections with such thoroughfares, and so arranged and of such width, as to provide an adequate and convenient system for present and prospective traffic needs. Such regulations shall also provide that the commission may require the provision of open spaces, parks and playgrounds when, and in places, deemed proper by the planning commission, which open spaces, parks and playgrounds shall be shown on the subdivision plan.

C.G.S. §8-25(a), as amended.

Pursuant to this enabling legislation the Planning and Zoning Commission has adopted subdivision regulations. Subdivision Rules and Regulations of the City of Middletown, at §1.02.

It is well settled law that a planning and zoning commission acts in an administrative capacity when it reviews subdivision applications. Sowin Associates v. Planning & Zoning Commission, 23 Conn. App. 370, 374 (1990) (citations omitted). Consequently, the commission "has no discretion or choice but to approve a subdivision if it conforms to the regulations adopted for its guidance". Id.

In the present case, the proposed subdivision is located in a planned residential development (PRD). This PRD application was approved by the then Commission on the City Plan and Zoning on October 9, 1968. Commission on the City Plan and Zoning Resolution 68-17.

Connecticut General Statutes §8-2d provides as follows:

Any land use regulations concerning planned unit developments or planned residential developments adopted by a municipal zoning commission, planning and zoning commission or other applicable zoning authority pursuant to sections 8-13b to 8-13k, inclusive, of the general statutes, revision of 1958, revised to January 1, 1985, shall continue to be valid and any planned unit development or planned residential development proposed in accordance with such regulations which has received approval, whether tentative, preliminary or final, from such commission or authority prior to July 1, 1985, shall continue to be governed by the provisions of such

regulations.

C.G.S. §8-2d, as amended.

The regulations governing planned residential developments were set out in section 45 of the 1968 Zoning Code.

The property also appears to be subject to a certain Declaration of Covenants and Restrictions filed by the PRD developer.

The Wesleyan Hills Declaration of Covenants and Restrictions were not adopted by the Planning & Zoning Commission and are not part of either the Zoning Code or the Subdivision Regulations.

However, the Zoning Code does provide as follows:

In their interpretation and application, the provisions of this Code shall be held to be minimum requirements, adopted for the promotion of the public health, safety, moral, or general welfare. Wherever the requirements of this Code are at variance with the requirements of any other lawfully adopted rules, regulations, ordinances, deed restrictions, or covenants, the most restrictive or that imposing the higher standards shall govern.

Zoning Code, §10.05, at 4 (emphasis added).

Similarly, the Subdivision Regulations provide that:

The interpretation and application the provisions of these regulations shall be held to be the minimum requirements. More stringent provisions may be required if it is demonstrated that different standards are necessary for the promotion and protection of the public health, safety, and general welfare.

Subdivision Regulations, §1.06.01, at 11.

These provisions do not empower the Planning & Zoning Commission to consider private covenants or restrictions when considering a subdivision application.

The Connecticut Appellate Court has held that planning and zoning commissions do not have the authority to impose conditions restricting future subdivisions at the time that it approves an initial subdivision. Moscowitz v. Planning and Zoning Commission, 16 Conn. App. 303 (1988).

The Moscowitz Court held that the commission could not empower itself to deny future applications which otherwise complied with applicable zoning regulations and that such a condition was void ab initio. Id. at 307-308.

The Court held that:

It is axiomatic that "[a]s a creature of the state, the ...[town...whether acting itself or through its planning commission,] can exercise only such powers as are expressly granted to it, or such powers as are necessary to enable it to discharge the duties and carry into effect the objects and purposes of its creation." ...In other words, in order to determine whether the [condition] in question was within the authority of the commission to [impose], we do not search for a statutory prohibition against such an [action]; rather, we must search for statutory authority for the [action].'

Moscowitz, supra (citations omitted).

There is no statutory authority for the Planning & Zoning Commission to consider the requirements of the Wesleyan Hills Declaration of Covenants and Restrictions when considering this application.

Recently, the Connecticut Supreme Court has upheld a decision of the Appellate Court holding that a planning and zoning commission may not delegate its authority over subdivision approval to another body. Thoma v. Planning and Zoning Commission, 229 Conn. 325 (April 1994).

In Thoma, the Court found that the Canterbury zoning regulations improperly delegated authority over the approval of a subdivision application to the inland wetlands agency. Id. at 327.

In the present situation, it would be an unlawful delegation of authority for the Planning and Zoning Commission to grant an approval conditioned on compliance with private deed restrictions.

CONCLUSION

The Planning and Zoning Commission is not empowered to adhere to or enforce the private deed restrictions or covenants of the Wesleyan Hills Association when rendering a decision on this application.



Timothy P. Lynch
Deputy City Attorney

TPL/dw
cc: William Warner, AICP
Planning & Zoning Director

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59 MAR 10 PM 4:26

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RECEIVED
CITY OF MIDDLETOWN
MAYOR'S OFFICE
5/11/94
6:19 PM 2:01

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