

MEMORANDUM

FROM: OFFICE OF THE CITY ATTORNEY
MIDDLETOWN, CONNECTICUT 06457

TO: Thomas J. Serra, Mayor

DATE: August 30, 1994

RE: Legal Opinion Request

FACTUAL BACKGROUND:

A division of land was recorded on the City land records on August 14, 1928. Subdivision regulations were not adopted in the City until November 27, 1941. A revised map of the proposed subdivision was approved by the Planning and Zoning Commission on September 20, 1960. There are no records of Common Council approval of the street involved nor a deed recorded transferring the street to the City. The majority of the subdivision has been completed.

The applicant desires to construct a portion of the road on which seven of the lots front. There is no road presently existing in the area in which the applicant proposes to commence construction. The seven lots do not conform to present zoning requirements and the road cannot be built to City standards, which require the installation of a cul-de-sac, without changing and reducing lots.

ISSUE:

Whether the lots are "lots of record" pursuant to the Zoning Code.

ANALYSIS:

Connecticut General Statutes §8-2 authorizes municipal zoning commissions to adopt regulations concerning, among other things, lot size. This statute also provides, in pertinent part, that "[s]uch regulations shall not prohibit the continuance of any nonconforming use, building or structure existing at the time of the adoption of such regulations. Such regulations shall not provide for the termination of any nonconforming use solely as a result of nonuse for a specified period of time without regard to the intent of the property owner to maintain that use." C.G.S. §8-2(a), as amended.

Section 13.01 of the Middletown Zoning Code recognizes nonconforming lots as "lots of record". This section provides as

follows:

13.01 LOTS OF RECORD

13.01.01 DWELLING ON ANY LOT OF RECORD

In any Zone where dwellings are permitted a single family detached dwelling may be erected on any lot of official record at the effective date of this Code. The lot must have fifty (50) feet of frontage, provided, however, that if any such lot of official record established prior to Middletown's adoption of Subdivision Regulations (November 1, 1941) has less than 50 feet of frontage but more than 25 feet of frontage it may be approved as a building lot upon application for a special exception if it has availability of city water and sewer services or, if not, is found acceptable by the Middletown Department of Health for on site well and septic system. Other area, yard, and open space requirements must be complied with as nearly as possible required that:

13.01.02 MINIMUM YARDS

In no case shall the width of any side yard be less than ten (10) per cent of the width of the lot, and provided, that on a corner lot, the width of the side yard adjoining the side street lot line shall be not less than eight (8) feet or twenty (20) per cent of the frontage, whichever is the greater. In no case shall the depth of the rear yard be less than ten (10) feet. Front, side or rear yard encroachments as specified in subsection 13.03 shall be prohibited in the case of substandard lots of record.

Zoning Code of the City of Middletown at §§13.01.01 and 13.01.02, as amended.

"Frontage" is defined in Section 16 of the Zoning Code as follows:

16.06.02 FRONTAGE

All the property abutting one side of a street between intersecting or intercepting streets, or between a street and a right-of-way, water-way end of a dead-end street; or city street shall determine only the boundary or the frontage on the side of the street which it intercepts.

16.06.03 FRONTAGE, WHERE MEASURED

The frontage of a lot shall be measured along the front property line, but may be modified in the case of curvilinear streets in accordance with subsection 13.03.02.

Zoning Code of the City of Middletown, at §§16.06.02 and 16.06.03, as amended.

Accordingly, a lot of record pursuant to the Zoning Code must have frontage on a City street. The question arises whether this portion of Nathan Hale Road is an accepted City street.

This office has previously issued a legal opinion concerning "paper streets". This opinion analyzes the elements necessary for a municipality to accept a public highway. A copy of this opinion is attached hereto. The opinion provides, in part, as follows:

The intention of Mr. Dunn in dedicating the land in question was evidenced by the filing of his subdivision map in the Town Clerk's office. The City never expressly accepted Halloran Street as a public street; a fact revealed by the 1940 meeting notes of the Public Works Commission. Since there was never a formal acceptance of the street by the City, inquiry as to an implied acceptance under common law principles must be explored. The present site of the proposed Halloran Street is an open field. Since no actions have been taken by the City in improving the property and proof of the public's actual use of the property is clearly not evident, there has been no implied acceptance of the proposed street. Therefore, the City neither owns the parcel of land designated as Halloran Street on Map 192 nor has it formally accepted this paper street either expressly or by implication.

Legal Opinion, Paper Streets, March 17, 1986.

Accordingly, it does not appear that the unimproved section of Nathan Hale Road is an accepted City street.

Section 8-26a of the Connecticut General Statutes provides as follows:

(a) Notwithstanding the provisions of any general or special act or local ordinance, when a change in the subdivision regulations is adopted by the planning commission of any town, city or borough, or other body exercising the powers of such commission, no subdivision plan which has been approved, prior to the effective date

of such change, by such planning commission or other body, and filed or recorded with the town clerk, shall be required to conform to such change.

(b) Notwithstanding the provision of any general or special act or local ordinance, when a change is adopted in the zoning regulations or boundaries of zoning districts of any town, city or borough, no lot or lots shown on a subdivision plan for residential property which has been approved, prior to the effective date of such change, by the planning commission of such town, city or borough, or other body exercising the powers of such commission and filed or recorded with the town clerk shall be required to conform to such change.

C.G.S. § 8-26a, as amended.

However, the Connecticut Supreme Court has held that "[t]he mere filing of maps for the subdivision of a parcel of real estate does not necessarily immunize the subject property from the operative effect of subsequent subdivision regulations." Sherman-Colonial Realty Corporation v. Goldsmith, 155 Conn. 175, 183 (1967).

The Sherman-Colonial Court held as follows:

The mere filing of maps for the subdivision of a parcel of real estate does not necessarily immunize the subject property from the operative effect of subsequent subdivision regulations. Otherwise, "a property owner, by the process of map filing, could completely foreclose a zoning authority from ever taking any action with respect to the land included in the map, regardless of how urgent the need for regulation might be." Corsino v. Grover, supra. The court found that the plaintiffs "demonstrated no use of a lot or lots owned by them in the subdivisions which established a vested right to continue a use non-conforming to the subdivision regulations effective July 13, 1963." . . .

There is nothing in the record to indicate that the plaintiffs actually used the property or expended any money in physically changing the nature of the undeveloped land or that they cannot recoup in a conforming use of the land the engineering expenses they have incurred. "To be a nonconforming use the use must be actual. It is not enough that it be a contemplated use nor that the property was bought for the particular use. The property must be so utilized as to be 'irrevocably committed' to that use. Fairlawns Cemetery Assn., Inc. v. Zoning Commission, 138 Conn. 434, 443-445, 86 A.2d 74; Town of Wallingford v. Roberts, 145 Conn.

682, 684, 146 A.2d 588." Town of Lebanon v. Woods, supra, 153 Conn. 197, 215 A.2d 120. Since the plaintiffs' land was not "irrevocably committed" to development in lots of a size smaller than that permitted by the 1963 regulations, there was no nonconforming use as to lots of that size when the subdivision regulations were adopted, and the court properly so concluded.

Sherman-Colonial, supra, at 183-84 (emphasis added).

Recently, a Judge of the Superior Court applied the Supreme Court's holding in Sherman-Colonial to a situation involving development of lots in a pre-zoning subdivision.

This Court held as follows:

The claim of the plaintiff in this case that Sherman-Colonial confers legal nonconforming status on an undeveloped lot where other lots in a pre-regulatory defacto subdivision are improved is refuted by the Sherman-Colonial Court's conclusion that there was no nonconforming use "[s]ince the plaintiff's land was not 'irrevocably committed' to development" of undersized lots. . . . That a parcel of land is depicted on a map which has been filed on the land records prior to the advent of zoning regulations or subdivision regulations does not render that parcel a legal, nonconforming lot, automatically exempt from the subsequent enactment of those laws. Sherman Colonial Realty Corporation v. Goldsmith, supra 183; Lebanon v. Woods, supra, Corsino v. Grover, supra. Where land is "irrevocably committed" to a particular use, General Statutes 8-2 will protect that use from the subsequent enactment of zoning laws. General Statutes 8-2 provides in pertinent part that zoning "regulations shall not prohibit the continuance of any nonconforming use, building or structure existing at the time of the adoption of such regulations." However, this statute does not protect preexisting nonconforming lots, although a local regulation may provide such protection. Archambault v. Wadlow, 25 Conn. App. 375, 379-80, 594 A.2d 1015 (1991).

Siciliano v. Zoning Board of Appeals, 8 CSCR 544, 1993 CT Casebase 3373, 3379-3380 (April 7, 1993 (Levin, J.)).

In the present situation, our local regulation protects pre-existing nonconforming lots if they have frontage on a City street. Zoning Code §13.01, supra. However, as discussed above, these lots do not come within the Code's protection.

On September 20, 1960 the Planning and Zoning Commission approved revisions to the previously filed subdivision map.

There are no minutes of the Commission's meeting but it does not appear that the Commission did anything more than approve measurement refinements on certain lots. It does not appear that the Commission granted either subdivision or resubdivision approval as there is no evidence that a public hearing was held. Consequently, this approval would not appear to meet the approval contemplated by C.G.S. §8-26a(b), as amended.

Further, the legislative history of C.G.S. §8-26a discloses that subsection (a) originally contained the phrase "until a period of three years has elapsed from the effective date of such change" at the end of the subsection following the phrase "shall be required to conform to such change." This language was also included in subsection (b). 1959 P.A. 58; 1959 P.A. 59.

In 1969 the statute was amended to change "three years to five years" and in 1984 this language was deleted altogether. 1969 P. A. 396; 1984 P.A. 84-147 §2.

Therefore, assuming arguendo, that the 1960 map approval was the type of Commission approval contemplated by the statute, C.G.S. §8-26a still required that plan and lots conform to subsequent changes in zoning regulations within three years.

CONCLUSION:

Connecticut General Statutes §8-26 provides, in pertinent part, as follows:

All plans for subdivisions and resubdivisions, including subdivisions and resubdivisions in existence but which were not submitted to the commission for required approval, whether or not shown on an existing map or plan or whether or not conveyances have been made of any of the property included in such subdivisions or resubdivisions, shall be submitted to the commission with an application in the form prescribed by it. The commission shall have the authority to determine whether the existing division of any land constitutes a subdivision or resubdivision under the provisions of this chapter, provided nothing in this section shall be deemed to authorize the commission to approve any such subdivision or resubdivision which conflicts with applicable zoning regulations.

C.G.S. §8-26, as amended.

The lots in question do not appear to be lots of record because they do not have frontage on an accepted City street.

Pursuant to this statutory provision, an application to

the Planning & Zoning Commission is required for the Commission to determine whether the plan constitutes a subdivision or resubdivision of land.



Timothy P. Lynch
Deputy City Attorney

TPL/es

cc: William Warner, AICP,
 Planning & Zoning Director
 Linda Bowers, Environmental Planner
 Dean Thomasson, Esq.

MEMORANDUM

FROM: OFFICE OF THE CITY ATTORNEY
MIDDLETOWN, CONNECTICUT 06457

TO: Sebastian J. Garafalo, Mayor

DATE: March 17, 1986

RE: Paper Streets: Specifically, the status of Halloran Street, a Paper Street
found on a Map - Washington Villa dated May, 1912

ISSUES:

- I. Was "Halloran Street" ever deeded to the City of Middletown by the owner of the parcel of land, James F. Dunn?
- II. Has Halloran Street been expressly or impliedly dedicated and accepted by the City as a public street?

LAW:

I. After searching the land records of the Washington Villa Subdivision platted for James F. Dunn, May, 1912, it is my conclusion that the parcel of land proposed as "Halloran Street" was never formally deeded to the City by Mr. Dunn. After reviewing the descriptions of the four properties which were deeded to the City of Middletown by Mr. Dunn, none of the descriptions fit that of the proposed Halloran Street.

Referring to the map prepared for James F. Dunn dated May, 1912, hereinafter referred to as Map 192, the proposed Halloran Street is 49.5 feet in width and about 469.60 feet in length and is not directly accessible to Washington Street except by way of Butternut Street or the proposed Dunn and Thomas Streets as indicated on Map 192. The total acreage of the area is about 1 1/4 acres.

The first parcel, deeded by Mr. Dunn to the City of Middletown on June 24, 1914 which contained 3/4 of an acre along with a right to pass and repass to Washington Street being a twenty (20) foot right of way, can be found at Volume 149, Page 303 of the Land Records in the Town Clerk's office. The deed to the second parcel, which can be found at Volume 171, Page 198 of the Middletown Land Records, involved a portion of what is presently known as the City Yard. The third deed, which can be found at Volume 193, Page 54 of the Middletown Land Records, conveyed to the City another portion of what is presently known as the City Yard. On November 30, 1935, Mr. Dunn deeded to the City of Middletown the parcel designated as Thomas Street on Map 192, which deed can be found at Volume 194, Page 68. Said street is presently known as the road to the City Yard. The deed specifically states that Mr. Dunn was formally conveying Thomas Street to the City of Middletown.

Based on the foregoing, the proposed Halloran Street, as designated on Map 192, was never formally deeded to the City of Middletown by Mr. Dunn.

II. The Middletown land records located in the Town Clerk's office are replete with descriptions of deeded properties from the Washington Villa Subdivision referencing one or more of their boundaries to Halloran Street and also tax liens and sewer liens on properties which reference at least one of their boundaries on Halloran Street. Even as recently as 1985, the executor's deed, which can be found at Volume 717, Page 11 of the Middletown Land Records of Richard J. Guliani, executor of the Will of Frank E. Foss, to Dean A. Pegolo, Marilena Pegolo and Dino V. Pegolo, references the northerly boundary of the deeded parcel to Halloran Street. On March 7, 1985, an A-2 survey was done of the Pegolo's parcel, Map 182-3 in the Town Clerk's office, referencing the northerly boundary of their land as Halloran Street.

In 1940, the Public Works Commission of the City of Middletown, refused to accept the dedication of Halloran Street as a public street. All of the parcels deeded from the original Washington Villa subdivision Map 192 were referenced to said map and deeded by lot number. Even though Halloran Street was never accepted by the City as a public street, said Map 192 references all lots abutting the non-existent Halloran Street to said street.

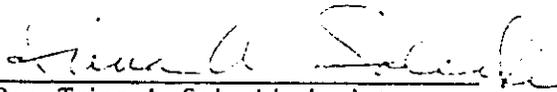
Case law since 1863, which was prior to the date that the statutory acceptance of a public highway under Section 13-3 of the Connecticut General Statutes was enacted by our Legislature, has held that "Public as well as private rights may be lost by unreasonable delay in asserting them." Derby v. Alling, 40 Conn. 410, 436 (1873). (Paper Village laid out on a Map). There must be more than just the act of dedicating this street by the owner of the parcel. Two elements are essential to a valid dedication: 1) a manifested intent by the owner to dedicate the land involved for the use of the public; 2) acceptance by the proper authorities or by the general public. A & H Corporation, et al v. City of Bridgeport, 180 Conn. 435, 439 (1980) (Cites omitted). The City must accept the land binding itself to keep that street in repair or the public must accept that street. An acceptance of a street may be either expressed or implied. An implied acceptance may be established either by the public's use of the property or by the actions of the municipality such as grading and paving a street, maintaining and improving it, removing snow from it, installing storm or sanitary sewers, lighting, curbs or sidewalks. Meshberg v. Bridgeport City Trust Company, 180 Conn. 274, 283 (1980); Katz v. Town of West Hartford, 191 Conn. 594 (1983). Such acceptance can be presumed where "it is shown to be of common convenience and necessity and therefore beneficial to them." The New York, New Haven and Hartford Railroad Company v. The City of New Haven, 46 Conn. 257, 262 (1878). (No exercise of control by City of New Haven over Myrtle Street, a paper street, delineated on a subdivision map in the Town Clerk's office). The courts, usually, will not find implied acceptance where the proposed street is devoid of public use and municipal improvement. "The public's use of the property" must continue over a significant period of time; II McQuillin Municipal Corporations (3d Ed. Rev.) Section 33.50, and be of such a character as to justify a conclusion that the way is 'of common convenience and necessity.' A & H Corporation, et al v. City of Bridgeport, 180 Conn. 435, 441 (1980). Each situation must be judged in relation to its own surroundings and conditions with regard to the number of people who would have the occasion to use the way. Phillips v. The City of Stamford, 81 Conn. 408, 411 (1908).

In 1905, pursuant to Sections 13-271 and 8-25 of the General Statutes, the clerk of the town, city or borough was prohibited from filing a subdivision map of streets and highways until they received a certificate bearing the appropriate municipal approval. The purpose of these statutes is to prevent a landowner from filing a subdivision map and designating highways thereon without improving those highways in a manner acceptable to the proper town authority which imposes an obligation upon the town to construct and maintain them. Thompson v. Town of Portland, 159 Conn. 107 (1970) (subdivision map recorded by landowner which showed three proposed highways. Landowner conveyed parcels of the land by deed, all deeds describing the land conveyed by reference to the lot number on the map).

The intention of Mr. Dunn in dedicating the land in question was evidenced by the filing of his subdivision map in the Town Clerk's office. The City never expressly accepted Halloran Street as a public street; a fact revealed by the 1940 meeting notes of the Public Works Commission. Since there was never a formal acceptance of the street by the City, inquiry as to an implied acceptance under common law principles must be explored. The present site of the proposed Halloran Street is an open field. Since no actions have been taken by the City in improving the property and proof of the public's actual use of the property is clearly not evident, there has been no implied acceptance of the proposed street. Therefore, the City neither owns the parcel of land designated as Halloran Street on Map 192 nor has it formally accepted this paper street either expressly or by implication.

CONCLUSION

The City of Middletown has no legal interest in or to the parcel of land designated as Halloran Street.


By: Trina A. Solecki, Assistant
City Attorney, as approved by Ralph
E. Wilson, City Attorney

TAS/es

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

RECEIVED
CITY OF MIDDLETON
MAYOR'S OFFICE
MAY 25 PM 2:30

TO: MAYOR'S OFFICE
FROM: William Warner, Planning Director
SUBJECT: Division of Land (Second Request)

FACTS: (In brief Statement tell WHO, WHAT, WHEN, WHERE, WHY, & HOW.)

Division of land filed on August 14, 1928 Map No. 428A. See attached history of land. Subdivision regulations first adopted November 27, 1941. No records of council approval of street or transfer of deed to City. Majority of subdivision completed.

Applicant would like to complete portion of road upon which 7 lots front. Lots do not conform to zoning requirements, road cannot be built to City standards with regard to cul-de-sac without changing and reducing lots. Thereby eliminating lot of record status and requiring conformance to current zoning.

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

QUESTION: What, in your own words is the precise question you wish to have answered?)

Is this a subdivision or resubdivision, if not either one, does Planning and Zoning have any jurisdiction? Does CGS 8-26a apply in this case? Does CGS 8-26c apply in this case? In the interest of public health and safety can the City require that a cul-de-sac be installed? By virtue of being filed on the land records is this an accepted City street?

ESTIMATE OF PRIORITY: Check One.

 EMERGENCY STANDBY FOR FUTURE ACTION

 X URGENT APPLICANT SHOULD KNOW FOR FUTURE ACTION

Date: 5-24-94

[Signature]
Signed:
approved Thomas J. Serra
5/31/94

RECEIVED
MAYOR'S OFFICE
MAY 25 11:53 AM '94
8:55

Proposed Subdivision of Joseph Mazzotta

- 1.) Original subdivision "Newfield Heights," filed August 14, 1928, which included this proposed subdivision as a section. Map No. 428A
- 2.) Revised map of this proposed subdivision on above map 428A was approved by the Planning and Zoning Commission on September 20, 1960. Map No. 2288

Revisions made to refine measurements of the following:

- a. Frontage on Lot 22
- b. Rear Line on Lot 21
- c. Side Line on Lot 24
- d. Front Line on Lot 18
- e. Rear Line on Lot 18
- f. Side lines of Lots 18 through 22

- 3.) Tax Assessor's Map No. 12 shows that lots numbered 18, 19, and 20 have been combined to form two new lots 18B (Lot 18 plus half of Lot 19) and 20B (Lot 20 plus other half of Lot 19). (See Number 5)
- 4.) Mattebasset Associates sold Lots 18 through 22 to Angelo De'bro. Volume 309/224 - August 30, 1960.
- 5.) Angelo De'bro sold Lots 18 through 20 to Vincent J. Scamporino (Volume 390/ Page 186 - December 20, 1972). Vincent J. Scamporino transferred Lot 20 and part of 19 to Vincent P. Scamporino (Volume 390/Page 188 - December 22, 1972). Mazzotta purchased V.P. Scamporino's property January 27, 1984 (Volume 674/Page 170; and J.A. Scamporino's property on January 27, 1984 (Volume 674/181).
- 6.) De'bro Estate transferred Lots 21 and 22 to Lucille F. Marino. (Volume 622/Page 150 - May 26, 1982, later sold to Mazzotta (Volume 672/Page 119 - December 29, 1983).
- 7.) Mazzotta purchased Lots 21-24 south east side of Nathan Hale Road from Marian Tobin December 29, 1983 (Volume 672/Page 119).
- 8.) Volume 293/Page 87 and Volume 296/Page 77 carry a list of covenants imposed on these properties.
One covenant is that no buildings be erected on Lots 4, 10, and 19 of Section 6 of Lots on Map 428A.
- 9.) At time of approval date in 1960 State Statutes required subdivisions to conform to changed zoning regulations within three years of approval. In 1969 changed to "five years" (Section 8-26A).
- 10.) No minutes of Planning & Zoning meetings which describe who is to improve Nathan Hale Road were found.
- 11.) Is Nathan Hale Road, south of Phedon Parkway, an accepted street?
It appears that this portion of the road is a paper street only and not accepted by the City. It is not an existing street to qualify this as a subdivision under Section 21.07 of the Zoning Regulations.
- 12.) The different changes in lot sizes after 1960 were never approved by the Planning & Zoning Commission or documented as being approved.