

MEMORANDUM

FROM: OFFICE OF THE CITY ATTORNEY
MIDDLETOWN, CONNECTICUT 06457

TO: Councilman Stephen T. Gionfriddo, Chairman, Middletown Planning and Zoning Commission

DATE: October 28, 1987

RE: Legal Issues Raised by the Legal Opinion of Attorney Howard dated October 8, 1987, and by the letter dated October 15, 1987, from Anne C. Bickford, Chairman of Westfield Residents for the Rational Development of Middletown Strategic Action Committee regarding the K & F Subdivision Application.

FACTS:

K & F submitted its application for subdivision approval to the Planning and Zoning office on August 26, 1987. The Planning Director caused a legal notice of a public hearing to be held on the K & F application to be published in The Middletown Press on August 28, 1987, and again on September 4, 1987.

A public hearing was conducted by the Planning and Zoning Commission, hereinafter referred to as the Commission, on the K & F application on September 9, 1987. At that time the applicant presented evidence and testimony in support of its application, and members of the public were afforded an opportunity to speak on the proposal.

At the conclusion of the testimony presented at the September 9th, 1987 hearing, the Commission voted to continue the public hearing to its next meeting to be held on September 23, 1987. Notice of the continuation of the public hearing was published in The Middletown Press on September 11, 1987, and on September 18, 1987.

At the continued public hearing held on September 23, 1987, the applicant and members of the public were once again given the opportunity to present evidence and testimony to the Commission. At the conclusion of the testimony, the Chairman of the Commission asked the attorney for the applicant if the applicant would consent to an extension, until October 14, 1987, of the statutory time period within which a public hearing must be concluded. The applicant consented to the extension.

Notice of the continuation of the public hearing was published on October 2, 1987, and October 9, 1987, in The Middletown Press. At the continued public hearing held on October 14, 1987, once again the applicant and members of the public were given the opportunity to address the Commission. At the conclusion of the testimony, the Chairman of the Commission again asked the applicant's counsel if the applicant would consent to a further continuation of the public hearing. The applicant agreed to a further extension of the public hearing until October 28, 1987.

Notice of the continuation of the public hearing to October 28, 1987, was published in The Middletown Press on October 17, 1987, and October 23, 1987.

At the public hearing held on October 14, 1987, a member of the Westfield Residents for Rational Development, Inc. read into the record an opinion from Attorney Howard which held that the public hearing held on the K & F application was invalid because the Commission itself never made a determination that a public hearing would be necessary on K & F's subdivision application, as required by Section 8-26 of the Connecticut General Statutes, as amended.

Subsequent to the October 14th hearing, the City Attorney received a letter dated October 15, 1987, from Anne C. Bickford raising the further issue of whether the public hearing on the K & F application was invalid on the basis that the initial legal advertisement for the September 9th, 1987 public hearing was published prior to the official receipt date of the application.

ISSUES:

Whether the public hearings conducted on the K & F application were validly held?

If not, what is the effect of any invalidity?

LAW:

Section 8-26 of the Connecticut General Statutes, as amended, provides that:

"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 to be 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. Such regulations may contain provisions whereby the commission may waive certain requirements under the regulations by a three-quarters vote of all the members of the commission in cases where conditions exist which affect the subject land and are not generally applicable to other land in the area, provided that the regulations shall specify the conditions under which a waiver may be considered and shall provide that no waiver shall be granted that would have a significant adverse effect on adjacent property or on public health and safety. The commission shall state upon its records the reasons for which a waiver is granted in each case. The commission may charge fees for the processing of subdivision applications and inspection of subdivision improvements, the minimum fee to be fifty dollars for each application and the maximum to be twenty-five dollars for each lot within the planned subdivision. The commission may hold a public hearing regarding any subdivision proposal if, in its judgment, the specific circumstances require such action. No plan of resubdivision shall be acted upon by the commission without a public hearing. Notice of the public hearing shall be given by publication in a newspaper of general circulation in the municipality at least twice at intervals of not less than two days, the first not more than fifteen days, nor less than ten days, and the last not less than two days prior to the date of such hearing, and by sending a copy thereof by registered or certified mail to the applicant. The commission shall approve, modify and approve, or disapprove any subdivision or resubdivision application or maps and plans submitted therewith, including existing subdivisions or resubdivisions made in violation of this section, within the period of time permitted under section 8-26d. Notice of the decision of the commission shall be published in a newspaper having a substantial circulation in the municipality and addressed

by certified mail to any person applying to the commission under this section, by its secretary or clerk, under his signature in any written, printed, typewritten or stamped form, within fifteen days after such decision has been rendered. Such notice shall be a simple statement that such application was approved, modified and approved or disapproved, together with the date of such action. The failure of the commission to act thereon shall be considered as an approval, and a certificate to that effect shall be issued by the commission on demand. The grounds for its action shall be stated in the records of the commission. No planning commission shall be required to consider an application for approval of a subdivision plan while another application for subdivision of the same or substantially the same parcel is pending before the commission. If an application involves land regulated as an inland wetland or watercourse under the provisions of Chapter 440. The applicant shall submit an application to the agency responsible for administration of the inland wetlands regulations no later than the day the application is filed for the subdivision or resubdivision. The Commission shall not render a decision until the inland wetlands agency has submitted a report with its final decision to such commission. In making its decision the commission shall give due consideration to the report of the inland wetlands agency. The provisions of this section shall apply to any municipality which exercises planning power pursuant to any special act."

Section 8-26d of the Connecticut General Statutes, as amended, provides that:

"(a) In all matters wherein a formal application, request or appeal is submitted to a planning commission under this chapter and a hearing is held on such application, request or appeal, such hearing shall commence within sixty-five days after receipt of such application, request or appeal and shall be completed within thirty days after such hearing commences. All decisions on such matters shall be rendered within sixty-five days after completion of such hearing. The applicant may consent to one or more extensions of any period specified in this subsection, provided the total extension of any such period shall not be for longer than the original period as specified in this subsection, or may withdraw such application, request or appeal.

(b) A decision on an application for subdivision approval, on which no hearing is held, shall be rendered within sixty-five days after receipt of such application. The applicant may consent to one or more extensions of such period, provided the total period of any such extension or extensions shall not exceed sixty-five days.

(c) For purposes of subsection (a) or (b) of this section, the receipt of an application, request or appeal shall be the day of the next regularly scheduled meeting of such commission or board, immediately following the day of submission to such board or commission or its agent of such application, request or appeal or thirty-five days after such submission, whichever is sooner. If the commission or board does not maintain an office with regular office hours, the office of the clerk of the municipality shall act as the agent of such commission or board for the receipt of any application, request or appeal.

(d) Notwithstanding the provisions of this section, if an application involves an activity regulated pursuant to sections 22a-36 to 22a-45, inclusive, as amended by this act, and sections 12 and 13 of this act, and the time for a decision by a

planning commission established pursuant to this section would elapse prior to the thirty-fifth day after a decision by the inland wetlands, the time period for a decision shall be extended to thirty-five days after the decision of such agency. The provisions of this subsection shall not be construed to apply to any extension consented to by an applicant."

DISCUSSION:

The K & F application was first submitted to the Planning and Zoning office on August 26, 1987, which was also the date of a regularly scheduled meeting of the Commission. According to Section 8-26d(c) of the Connecticut General Statutes, the day of receipt of the K & F application would have been the day of the next regularly scheduled meeting of the Commission "following the day of submission" of the application. It would seem clear from this language that the Commission could not have officially received the K & F application prior to the next regularly scheduled meeting after the August 26th meeting, which date was September 9th.

The requirement that legal notice of a public hearing be published is statutory (Section 8-26, C.G.S., as amended.) The failure to follow the requirements for legal notice is a jurisdictional defect which renders any action taken by the Commission ineffective. Neuger v. Zoning Board, 145 Conn. 625 (1958).

Section 8-26, C.G.S., as amended, requires that all plans for subdivision or resubdivision be "submitted" to the Commission and that with respect to subdivision applicants, the Commission may hold a public hearing "if, in its judgment, the specific circumstances require such action." The problem here, however, is whether the Commission "in its judgment" determined the need for a public hearing prior to September 9th. If it did not validly do so, it could not, under any circumstances, have advertised for a public hearing before September 9, 1987. As was the practice, when the K & F application was submitted on August 26, 1987, the Planning Director scheduled the application for a public hearing without scheduling a preliminary hearing on the application before the Commission.

The specific language of Section 8-26 is that the Commission may hold a public hearing if in its judgment the specific circumstances require such action. Ordinarily, an administrative body, such as a planning commission, when it hears a subdivision application, cannot delegate powers and functions which are discretionary. 73 Corpus Juris Secundum, Public Administrative Law and Procedure, Section 56. See also, Forest Construction Co. v. Planning & Zoning Commission, 155 Conn. 669 (1967).

Clearly, the decision as to whether a subdivision application requires a public hearing is a discretionary matter to be decided by the Commission based on the facts of each case. Therefore, the Commission has no authority to delegate this discretionary authority to the Planning Director.

For this reason, a public hearing could not have been advertised prior to the time the Commission first heard any evidence on the K & F application, which was September 9, 1987. On September 9, 1987, the Commission was in a position, for the first time, to exercise its discretionary power to require a public hearing after it heard the specific circumstances affecting the K & F application.

It is clear that the Commission deemed it necessary for a public hearing to be held on the K & F application. This conclusion is evidenced by the facts that: (a) the Commission

conducted what it believed to be a valid public hearing on September 9, 1987 and (b) it continued this purported hearing for three (3) separate additional hearing dates.

It is possible to argue that if the public hearing on September 9, 1987, was invalid, perhaps the continuations to September 26, 1987, October 14, 1987, and October 28, 1987, were each, themselves, a valid public hearing. Certainly, newspaper publication was given each time, as required by Section 8-26, C.G.S., as amended, and certainly, both the applicant and members of the public have been given more than an ample opportunity to present their views and evidence to the Commission.

However, the Connecticut Supreme Court has stated many times that the purpose of a public hearing is to afford interested parties the opportunity to be heard and to present evidence. See, State ex rel Spiros v. Payne, 131 Conn. 647 (1944). Here the subsequent legal notices all referred to the "continuation" of a public hearing, which itself was invalid. Accordingly, it is possible that interested parties who were present at the initial public hearing on September 9, 1987, might not have returned to testify at subsequent continuations. While the legal notice to be valid need not state with precision the action to be taken at the public hearing, it must at least fairly apprise interested parties of the purpose of the hearing and should not be misleading. See, Dupont v. Planning and Zoning Commission, 156 Conn. 213 (1968). For this reason, I conclude that subsequent legal notices could be deemed misleading if it were to be argued that they constituted notice of a new public hearing. Accordingly, the subsequent continuations could not cure the invalidity of the initial public hearing on September 9, 1987, and, in and of themselves, they could not constitute new hearings.

Based on the foregoing, no valid public hearing was conducted by the Commission on the K & F application. Furthermore, it is clear that the Commission has determined that a public hearing is required.

Once it is determined that a public hearing is to be held on a subdivision application, pursuant to Section 8-26d(a) C.G.S., as amended, a public hearing must be conducted within sixty-five (65) days after the date of the Commission's receipt of the K & F application. The application was received on September 9, 1987. Therefore, a valid public hearing must be conducted on or before November 13, 1987.

Because 1987 is an election year, the next regularly scheduled meeting of the Commission, after its October 28th, 1987 meeting, for which a valid public hearing could be advertised, is December 9, 1987. This date is beyond the sixty-fifth (65th) day from the date of receipt of the application. Section 8-26, C.G.S., as amended, states that the failure of a commission to act on an application within the established timetable results in an approval by operation of law. Caldrello v. Planning Board, 193 Conn. 387 (1984).

Section 8-26d(a) C.G.S., as amended, provides in pertinent part that the "applicant may consent to one or more extensions of any period ...provided the total extension of any period shall not be for longer than the original period" Unless the applicant is willing to grant an extension of the time in which the Commission may commence a valid public hearing, the K & F application may be approved by operation of law.

I have reviewed this matter thoroughly with the applicant's attorney, Philip F. Karpel. He has indicated, after discussion with his client, that this client would be willing to consent to an extension of time in which the Commission may conduct a public hearing to December 9, 1987. Pursuant to statute, the applicant could agree to an extension of the time in which

the Commission must commence the public hearing for up to an additional sixty-five (65) days from November 13, 1987, or until January 18, 1988.

CONCLUSION:

It is recommended that the following procedure be followed:

1. At the meeting of October 28, 1987, the Commission should find or reconfirm that a public hearing is required on the K & F application, if, in the exercise of its discretionary judgment, it believes a hearing is necessary.
2. The Commission should accept, for the record, the applicant's consent to an extension of the date by which the public hearing must be conducted to December 9, 1987.
3. The Commission should also note for the record the applicant's consent and agreement that all prior purported hearings have been of no valid effect.
4. Legal notice of the public hearing to be conducted on December 9, 1987, should not refer to a continuation of a prior hearing. To be on the safe side, the legal notice, after the customary reference to the K & F application should state: "Note: Prior hearings held on this application on September 9, 1987, September 26, 1987, October 14, 1987 and October 28, 1987, have been ruled null and void. The hearing to be held on December 9, 1987 constitutes a new public hearing at which all interested parties should attend. Testimony or evidence produced at the prior voided hearings must be presented on December 9, 1987, in order to be considered by the Commission."


Ralph E. Wilson
City Attorney

REW/sjr

cc: Mayor Sebastian J. Garafalo
Councilman Steven J. Leinwand, Vice Chairman, Planning and Zoning Commission
Stephen Gadowski, Planning and Zoning Commission
Ann Loffredo, Planning and Zoning Commission
Councilman William A. Pillarella, Planning and Zoning Commission
Sebastian Passanesi, Planning and Zoning Commission
John Robinson, Planning and Zoning Commission
Salvatore Fazzino, Director, Public Works
Richard Thompson, Alternate Member, Planning and Zoning Commission
Christine Lindquist, Alternate Member, Planning and Zoning Commission
Councilman Frances T. Patnaude, Alternate Member, Planning and Zoning Commission
Councilman Gerard M. Roccapriore, Alternate Member, Planning and Zoning Commission
George A. Reif, Planning and Zoning Director

W. R. R. D. M., Inc.
P. O. Box 373
Middletown, Ct. 06457

October 15, 1987

Mr. Ralph Wilson
City Attorney
City of Middletown
Municipal Building
Middletown, Ct.

Dear Mr. Wilson:

There is additional information we would like you to take under consideration when you are reviewing the opinion prepared for our organization by Attorney William Howard regarding the Phase II Westfield Hills subdivision application.

The date of receipt of the application, September 9th, is the same day that the public hearing was held. The Subdivision Regulations in Section 05.05 state that "upon receipt of an application . . . the commission may call a public hearing if . . . the specific circumstances require such action." This statement appears to put in question the validity of the legal notices that were published on August 28th and September 4th, prior to the "date of receipt" of the application.

We appreciate the time your are taking to review this matter.

Sincerely,

Anne C. Bickford

Anne C. Bickford
Chairman, WRRDM Strategic
Action Committee

W. R. R. D. M., Inc.
P. O. Box 373
Middletown, Ct. 06457
October 13, 1987

Mr. Stephen T. Gionfriddo, Chairman
Planning and Zoning Commission
Municipal Building
Middletown, Ct, 06457

Dear Commissioner Gionfriddo:

Please find attached the legal opinion, RE: Phase II - Westfield Hills - Subdivision Application, as requested by Westfield Residents for Rational Development of Middletown, Inc. (WRRDM) from Attorney William Howard, dated October 13, 1987. Based on this opinion, WRRDM strongly recommends that the public hearing for this item be voided and the application be denied.

In addition, we recommend the Commission not place this item on a public hearing for the 28th of October because of a potential change in commission members before the hearing can be closed pending a ruling from the Inland Wetlands and Water Courses Agency.

Sincerely,

Anne C. Bickford

Anne C. Bickford
Chairman, WRRDM Strategic
Action Committee