

MEMORANDUM

FROM: OFFICE OF THE CITY ATTORNEY
MIDDLETOWN, CONNECTICUT 06457

TO: Anthony S. Marino, Mayor
Planning & Zoning Commission

DATE: March 12, 1976

RE: Legal Opinion re Adoption of Current Zoning Regulations

The validity of the adoption of the zoning regulations by the Zoning Commission, including the zoning map, effective April 3, 1970, has been questioned. The matter has arisen in the context of review of an application for a building permit for certain property located on the west side of Highland Avenue. Adjoining property owners have questioned whether the subject property was properly zoned as commercial, B-2, as shown on the current zoning map.

As used herein, "zoning code" and "zoning regulations" are synonymous terms. The map is part of the zoning regulations. Middletown Zoning Regulations, Sec. 11.02. Therefore, reference to the zoning code or regulations includes the map as well as the text, unless otherwise noted.

The current zoning regulations were adopted by the Commission at a meeting held March 31, 1970 effective April 3, 1970.

Prior to 1970 several applications were made to the Commission to change the zone of the subject property. At least one application requested that the property be zoned

Anthony S. Marino, Mayor
Planning & Zoning Commission
March 12, 1976
Page 2

entirely residential while other applications requested that the property be zoned entirely commercial. The fact that prior applications were made to the Commission for changes of zone of the subject property, does not distinguish this property from others. It is common knowledge that from time to time zoning commissions are requested to make changes of zone with respect to various properties within their jurisdiction.

Prior to the current zoning, this property was zoned as to the first 50 or 75 feet adjacent to the highway as commercial, and the remainder as residential.

The events leading up to the adoption of the current regulations in 1970 were as follows. In 1969 the commission had under consideration the adoption of a new zoning code affecting all property in the town. This was to replace the existing code. In February, 1969 the commission held a public hearing concerning a new code. After further consideration, on May 16 and May 23, 1969 the commission caused to be published, in the Middletown Press, in the form of a legal advertisement, a notice of a public hearing to be held on May 28, 1969 to consider the adoption of a new zoning code, including text and map, covering the entire town. A copy of the proposed code was filed in the office of the Town Clerk on May 13, 1969.

Anthony S. Marino, Mayor
Planning & Zoning Commission
March 12, 1976
Page 3

The legal notice stated that a copy of the proposed code was on file in the Town Clerk's Office.

In accordance with the previously published notices, on May 28, 1969 the commission held a public hearing concerning the adoption of a new zoning code. According to the transcript of the hearing, the hearing was attended by approximately 160 members of the public-at-large. All persons were given an opportunity to speak at the hearing concerning the adoption of a new zoning code.

At a meeting held August 27, 1969 the commission voted to adopt the zoning code, with a number of changes, to be effective September 8, 1969. The commission commenced to operate under this code. However, in subsequent litigation, not involving the subject property, a court ruled that the commission had failed to publish notice of its decision as required by Statute and, therefore, that the code had not been properly adopted. As a result, at a meeting held March 31, 1970 the commission voted to adopt the zoning code, including the map referred to therein filed in the Town Clerk's office on September 5, 1969 as the zoning code of the City of Middletown, that the effective date of the zoning code be April 3, 1970 and that notice of the decision be published in the Middletown Press on April 2, 1970.

Anthony S. Marino, Mayor
Planning & Zoning Commission
March 12, 1976
Page 4

A copy of the decision of March 31, 1970 was filed in the Town Clerk's office on April 1, 1970. Notice of the decision was published in the Middletown Press April 2, 1970.

The resolution adopting the code referred to the zoning code originally adopted February 7, 1927. The resolution provided that upon the effective date of the new code, all previously adopted codes and amendments were repealed.

The zoning code adopted in March, 1970 had been on file in the Town Clerk's office for five months from September 5, 1969 to March 31, 1970. It is evident that, in taking this action, the commission intended to adopt as its zoning code, the text and map as they appeared on file on September 5, 1969 in the Town Clerk's office. It is the effectiveness of this action of the commission that is important.

The regulations, including the map, as finally adopted in March 1970 were different in a number of respects from those filed prior to the hearing. There were differences in both the text and map. For example, the public land category was entirely deleted from the text and removed from the map. The subject property, as well as a number of other properties, was zoned differently in the code as adopted from that shown in the proposed code. In the proposed code, the subject property

Anthony S. Marino, Mayor
Planning & Zoning Commission
March 12, 1976
Page 5

was shown as R-2, residential. In the code as adopted, the subject property is zoned B-2, commercial.

The zoning of the subject property has remained unchanged, and apparently unquestioned, since 1970, a period of almost six years.

No appeal was taken to Court from the decision of the commission made March 31, 1970, notice of which decision was published April 2, 1970.

The legally required procedures which must be followed as to the giving of any notice, depend on whether the Zoning Commission was governed by a special act or the General Statutes. The General Statutes pertaining to zoning and municipal planning commissions were adopted by the Charter of the City of Middletown adopted effective October 1, 1964. Middletown Charter (1964), Chapter XIV, Sec. 1. On January 4, 1965, the Common Council, by ordinance, pursuant to the authority under the statutes adopted by the Charter, created a planning commission. In 1965 by Special Act No. 231, the General Assembly designated and appointed the planning commission as the zoning commission for the City with the authority granted under the General Statutes pertaining to zoning. 1965 Special Act No. 231. Therefore, it is the General Statutes that must be complied with.

Anthony S. Marino, Mayor
Planning & Zoning Commission
March 12, 1976
Page 6

Section 8-3 of the General Statutes provides for the legal procedures which must be followed by the commission to establish and amend or change zoning regulations. The statute requires a public hearing; that notice of time and place of the hearing shall be published in the form of a legal advertisement in a newspaper having substantial circulation in the City 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, before the hearing; that a copy of proposed regulations be filed in the office of the Town Clerk for public inspection at least ten days before the hearing; and that zoning regulations shall become effective at such time as is fixed by the Zoning Commission, provided a copy of the regulation is filed in the office of the Town Clerk and notice of the decision is published in a newspaper having substantial circulation in the municipality before the effective date.

A review of the record of the actions of the Zoning Commission indicates that all the technical requirements of the Statute have been complied with. However, the question which has now been raised is as to the sufficiency of the contents of the notice of the hearing. Specifically, it has been questioned whether notice was adequate since the proposed

Anthony S. Marino, Mayor
Planning & Zoning Commission
March 12, 1976
Page 7

code showed the subject property and other properties to be zoned differently from that which was finally adopted.

The purpose of the notice requirement in the adoption of zoning regulations is to fairly and sufficiently apprise those who may be affected by the proposed action, so as to enable them to prepare intelligently for a hearing. Edward Balf Co. v Town of East Granby, 152 Conn. 319, 325; Passero v Zoning Commission, 155 Conn. 511, 514. The notice which is required is constructive notice and not actual notice. Jarvis Acres, Inc. v Zoning Commission, 163 Conn. 41, 47; Edward Balf Co. v Town of East Granby, 152 Conn. 319, 325. The Connecticut Supreme Court has specifically held, in a case involving the adoption of a zoning code affecting the legally protected interests of every property owner in the town, that actual notice is not required. Edward Balf Co. v Town of East Granby, 152 Conn. 319, 325.

The statute permits, but does not require, that the proposed regulation be set forth in full in the notice. Passero v Zoning Commission, 155 Conn. 511, 515; Edward Balf Co. v Town of East Granby, 152 Conn. 319, 325-326; Lavitt v Pierre, 152 Conn. 66, 73. The notice of the hearing is not required to contain an accurate forecast of the precise action which will be taken upon the subject matter referred

Anthony S. Marino, Mayor
Planning & Zoning Commission
March 12, 1976
Page 8

to in the notice, *Neuger v Zoning Board*, 145 Conn. 625, 630.

The fact that the code as finally adopted differed somewhat from the code as proposed does not invalidate the action. It is sufficient if the notice is in substantial accord with the final action of the commission. *Dupont v Planning and Zoning Commission*, 156 Conn. 213, 218; *Kleinsmith v Planning and Zoning Commission*, 157 Conn. 303, 312; *Neuger v Zoning Board*, 145 Conn. 625, 631.

A review of the legal notice published on May 16 and May 23, 1969 shows that it fairly gave notice that the matter to be considered at the hearing of May 28, 1969, was the adoption of a code affecting all properties in the entire town. The public was properly put on notice that the commission had under consideration the adoption of a new zoning code. The notice set forth a list of all sections of the proposed code and advised that a copy of the proposed code, including the map, was on file in the Town Clerk's office. A copy had been properly filed in the Town Clerk's office.

Based on the Connecticut Supreme Court cases cited above, it appears that the notice given in this case, with a copy of the code including the map having been properly filed in the Town Clerk's office, complied with statutory requirements of notice.

Anthony S. Marino, Mayor
Planning & Zoning Commission
March 12, 1976
Page 9

Sections 8-8 and 8-9 of the General Statutes govern the procedure for an appeal of a decision of a zoning commission to the Court of Common Pleas, including decisions adopting regulations. *Schwartz v Planning and Zoning Commission*, 36 Conn. L.J. No. 41 p 11, 12. Section 8-9 provides that appeals from decisions of planning and zoning commissions shall be taken to the Court of Common Pleas in the manner provided in §8-8. Section 8-8 provides that any person aggrieved by any decision of a planning and zoning commission may, within 15 days from the date when notice of the decision is published in a newspaper pursuant to §8-3, take an appeal to the Court of Common Pleas. Connecticut General Statutes, §§8-9, 8-8 and 8-3.

Apparently no appeal was taken to the Court of Common Pleas within 15 days of the publication of the notice of decision on April 2, 1970.

In 1975, the Connecticut Legislature enacted, and the Governor approved, Special Act No. 75-16. Section 20 provides as follows:

Sec. 20. MAPS, PLANNING AND ZONING. Any and all actions taken by any planning commission, zoning commission, planning and zoning commission, zoning board of appeals or any other commission, board, agency or municipal official exercising the powers of any such commissions, otherwise valid except that said planning commission, zoning commission, planning and zoning commission, zoning board or other commission, board or municipal official

Anthony S. Marino, Mayor
Planning & Zoning Commission
March 12, 1976
Page 10

failed to comply with the requirement or requirements of any general or special law, ordinance or regulation governing contents, the giving, mailing, publishing, filing or recording of any notice, either of the hearing or of the action taken, is validated, provided no such action shall be validated if an appeal from such action is pending in any court on the effective date of this act.

This section specifically validates any and all actions taken by the commission which are otherwise valid, except that the commission failed to comply with any notice requirements provided no action is validated if an appeal is pending in court on the effective date of the Act. Since no appeal was taken from the decision of March 31, 1970, this Act is effective to validate that action of the commission so far as notice is concerned, even if the contents of the notice were found to be deficient. *Town of West Hartford v Thomas A. Falkner Co.*, 126 Conn. 206, 212-213; 56 AmJur 2d, Municipal Corporations, §373.

The conclusions reached herein are that the content of the notice of hearing of May 28, 1969 was sufficient for the action taken by the commission by its decision of March 31, 1970, and further, if such notice was deficient in any way, it was cured by the validating act. This relates to the question raised as to the sufficiency of the contents of the notice. The validating act cures only deficiencies in the notice where the action was "otherwise valid". If the questioned action were not valid for some other reason, this statute would not validate it.

Anthony S. Marino, Mayor
Planning & Zoning Commission
March 12, 1976
Page 11

The validity of action of the commission has been the subject of at least one previous legal opinion by other counsel. While the commission should adhere to the opinion of its counsel, such opinions are not binding upon those who desire to challenge action of the commission, nor on the courts which would ultimately decide the issue. There have been more than 35 amendments to the zoning code since its adoption in 1970. In view of the adoption of these amendments and the lingering doubt concerning the original action, it is my recommendation that in order to dispel any such doubt as to the validity of the enactment procedure as to any part of the code, that the commission readopt the entire zoning code as it now exists, with strict adherence to procedural requirements of the statute. This procedure has been found helpful in a number of cases which have been litigated and on at least several occasions the actions of the zoning commissions could not have been sustained by the court without such a readoption which cured oversights as to various technicalities.

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Francis O'Neill
City Attorney

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