MEMORANDUM

FROM: OFFICE OF THE CITY ATTORNEY
MIDDLETOWN, CONNECTICUT 06457

TO: William Warner, Planning & Zoning Department

DATE: January 2, 1991

RE: Legal Opinion Request
Return of Money Collected for Sidewalk Fund

FACTUAL BACKGROUND

During 1989, Section 25-45 of the Middletown Code of Ordinances was amended to authorize the Planning & Zoning Commission to collect the cost of sidewalks in lieu of a developer actually installing the walks in a particular subdivision.

During 1990, a developer challenged this requirement in a zoning appeal to the Superior Court. The developer argued that there was no enabling legislation for this concept. This case was eventually settled with the developer. Subsequent to this appeal, the Planning & Zoning Commission amended its sidewalk policy to eliminate any payment-in-lieu of installation option.

Only one developer had actually made a payment into the "Fund for the Orderly Installation of Sidewalks." The Planning & Zoning Commission initially voted to return the developer's money. Subsequently, due to a question of whether they had the jurisdiction to direct the disbursement of funds, the Commission voted to refer the matter to the Common Council. The Finance Committee of the Common Council has requested a legal opinion regarding this issue.

QUESTION PRESENTED:

Should the money collected for the sidewalk fund be returned to the developer?

ANSWER: Yes

ANALYSIS:

In a case extremely similar to the present situation, the court held that a minicipal planning regulation authorizing such payments was unconstitutional. Aunt Hack Ridge Estates, Inc. v. Planning Commission of Danbury, 27 Conn. Sup. 74, 230 A. 2d 45 (1967). In the Aunt Hack Ridge case, a planning regulation authorized the commission to accept a cash contribution from

developers in lieu of an allocation of a portion of the subdivision as a park or playground. The regulation provided that "[a]ny monies so received shall be deposited in a special fund solely for the purpose of acquiring land for parks or playgrounds for use of residents of the Town of Danbury." 27 Conn. Sup. at 75. The court in this case found the regulation amounted to the imposition of a tax and was unconstitutional because the money collected was not "specifically confined and limited to the direct benefit of the regulated subdivision." Id at 77-78.

Similarly, in the present situation, Sec. 25-45(2) of the Middletown Code of Ordinances permits the money to be used to "construct sidewalks at other locations as designated by the Public Works Director and/or his duly authorized designee."

Accordingly, as the money collected is not specifically earmarked for this particular subdivision, it should be returned to the developer.

Timothy P. Lynch
Deputy City Attorney

TPL/dw

cc: Finance Committee:
Thomas J. Serra, Chairman
Robert J. Bourne
Stephen T. Gionfriddo

REQUEST FOR OPINION, ADVICE OR OTHER LEGAL SERVICE

(Submit to Mayor in Duplicate)

TO: MAYOR'S OFFICE

FROM: Planning and Zoning Department

SUBJECT: Return of money accepted for subdivision approval

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

See Attached

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

City Ordinance 25-45
27 CS 74 cited 31 CS 83

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

Should the Finance Committee (Common Council) return the monies to Louise L. Roberts?

ESTIMATE OF PRIORITY:

Check one.

____ EMERGENCY

XXXX URGENT
by December 21, 1990

____ STANDBY FOR FUTURE ACTION

____ APPLICANT SHOULD KNOW FOR FUTURE ACTIC

Date: 12/6/90

Signed:

Background

During 1989, at the request of the Planning and Zoning Commission, the Common Council adopted an amendment to Sec.25-45 of the Middletown Code of Ordinances which authorized the Commission to collect the cost of subdivision sidewalks in lieu of a developer actually installing the walks in their particular subdivision project. Money would be pooled and used to install sidewalks in some place other than the specific subdivision being considered.

The "payment-in-lieu" of installation concept was applied to several subdivisions but actually only one subdivision made payment($19,523.) into what was named the "Fund for the Orderly Installation of Sidewalks."

During 1990 the developer of an industrial lot subdivision in the Westfield area, was given the choice of either installing sidewalks or contributing to the fund. The developer (W. Shea) filed suit against the Commission using several arguments including the fact that there was no State law authorizing the, "payment in lieu" concept. The Shea case was resolved by the Commission requiring the actual sidewalk installation for which there is ample legal authorization in State enabling legislation.

Once the Commission became aware of the State enabling issue they amended their sidewalk policy to eliminate any payment-in-lieu of installation.

The Problem

As noted earlier only one subdivision (Louise Roberts) has paid money. Because of the circumstances the P & Z Commission feels the money ($19,523) should be returned, and voted to do so. Later, do to the lack of jurisdiction they reconsidered and referred the question to the Common Council. The Commissions sidewalk policy previously, and now, is to require the installation of walks along all new streets. The only deviation from that policy was the Shea industrial subdivision which as noted previously has been revised to require walk installation.

The several other subdivisions for which proposed payment was involved either have been or can be adjusted and resolved without involving payment.

The request for a legal opinion arose at a Finance Committee meeting. That Committee questions whether or not any money should be returned to Louise Roberts.