



City of Middletown

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DEKOVEN DRIVE, MIDDLETOWN, CONNECTICUT 06457

September 9, 1987

Councilman Vincent J. Loffredo
Municipal Building
DeKoven Drive
Middletown, Connecticut 06457

Dear Councilman:

You inquired as to the propriety of Council members who also sit on the Planning and Zoning Commission to act as Council members on the proposal to approve a lease between the City of Middletown and Kogut Enterprises for the construction of a golf course and amenities.

The lease contemplates an initial term of fifty (50) years with an additional fifty-year renewal term at an annual rental of \$1.00.

The developer's obligations to construct a golf course are expressly contingent upon obtaining all necessary zoning approvals for a golf course, adjoining banquet facility and condominium project.

It is reported that the entire project will entail an expenditure of one hundred twenty million dollars.

The lease was first presented to the Common Council at a special meeting on August 31, 1987 wherein the developer, his staff and legal counsel made an extensive presentation and engaged in a spirited dialogue with members of the public and the Common Council.

At that special meeting all members of the Council who also serve as members and alternates to the Planning and Zoning Commission abstained from discussion and vote and Councilwoman McMillan abstained for other reasons. The remaining council members voted to table the resolution.

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CITY ATTORNEY
MIDDLETOWN, CT.

Under the Middletown Charter, the Planning and Zoning Commission consists of seven members and four alternates. The seven regular members include three members of the Council and the four alternates include two members of the Council. Council representatives on the Commission are selected by the Council from among its membership. The remaining Commissioners are appointed by the Mayor with the consent of the Council. A quorum consists of six Commissioners and decisions require an affirmative vote of five Commissioners. Middletown Charter, Section 3a.

Questions of conflict of interest before the Planning and Zoning Commission have been codified in two sections of Connecticut General Statutes which provide in relevant part:

No member of any planning (or zoning) commission...shall participate in the hearing or decision of the...commission of which he is a member upon any matter in which he is directly or indirectly interested in a personal or financial sense...Conn. Gen. Stat. Section 8-11 and 8-21.

The failure to disqualify renders any action by a planning and zoning commission invalid. Lake Garda Improvement Ass'n v. Farmington Planning and Zoning Commission, 151 Conn. 476 (1964). Moreover, a planning and zoning commission is prohibited from predisposing and predetermining pending zoning matters. If a commission acts with predisposition or predetermination, the commission's actions are invalid. Marmah, Inc. v. Greenwich, 176 Conn. 116 (1978).

Most Connecticut cases construing the conflict of interest provisions of the Connecticut General Statutes as they apply to planning and zoning commissions have dealt with cases of financial interest or cases of personal interest where the Commissioner's interest in the outcome is based on purely personal considerations. However, in several cases, the Connecticut Supreme Court has considered cases where there is a conflict of an official and political duty or of two official duties.

In RK Development Corporation v. Norwalk, 156 Conn. 369 (1968), the Connecticut Supreme Court held that it was improper for a member of a town council to appear before the town planning commission to oppose a pending application even where he abstained from a later council vote on the application. In that case, a councilman openly opposed the developer's application before the planning commission, worked actively with his political constituents in the ward which he represented in the council, and had a financial interest through his

wife in the real estate adjoining that of the developer. The councilman attended the council meeting at which the disapproval was voted but did not take part in the vote on the matter in question, removed himself from the council table but was present in the gallery, and did not discuss the developer's application with any member of his political group in the council. Nonetheless, the court found that his participation in the commission proceedings was improper. The trial court found that he put himself on record before the planning commission with full knowledge that his stated opposition would later be transmitted by the commission to the council. As stated by the court:

...The evil lies not in the influence improperly exercised but rather in the creation of a situation tending to weaken public confidence and to undermine the sense of security of individual rights which the property owner must feel assured will always exist in the exercise of zoning power. Id. at page 374.

In Bossert Corporation v. Norwalk, 157 Conn. 279 (1968) the Connecticut Supreme Court held that it was improper for a council member to have represented opponents of an applicant before the planning commission even where he abstained from related proceedings before the Common Council. In that case a member of the Common Council was also a member of the law firm which represented opponents of the pending application. A member of his law firm appeared both before the planning commission and the common council in opposition to the application. On three occasions when the application was before the council, the councilman was acting as majority leader. On the two other occasions when the application was before the council, the councilman was president of the council. On all occasions, however, when the application was being considered by the council, the councilman disqualified himself and abstained from voting. The court noted that the councilman did not cease to be a member of the council by disqualifying himself from the proceedings relating to the application and that the only way the councilman's law firm could represent the opponents of the plaintiff's application and at the same time comply with the statutes was for the councilman was to resign from the Common Council.

In Lurie v. Westport Planning and Zoning Commission, 160 Conn. 295 (1971), the Connecticut Supreme Court held that it was not improper for a town's first selectman to speak in favor of a pending application before a planning and zoning commission. The court

failed to find a violation of the statute where the chief executive officer of a municipality appeared on behalf of the municipality and not to represent an applicant in the proceedings. The court noted that the chief executive officer was an ex officio member of the planning and zoning commission and as such was privileged if he cared to do so to sit with the commission in the hearing and in the deliberative and executive sessions of the commission but was not entitled to vote.

In Holt-Lock, Inc. v. Granby Zoning and Planning Commission, a member of the Granby Conservation Commission was also a member of the Planning and Zoning Commission. He was present at meetings of the Conservation Commission on two occasions to discuss the implication of the pending application and took part in the discussions. As a result of these meetings, the Conservation Commission issued a letter to the Planning and Zoning Commission concerning the zoning application. The same member participated in the Planning and Zoning deliberations concerning the application. It was subsequently argued that the dual participation both as a Conservation Commission member and Planning and Zoning Commission member constituted a "personal interest" in the planning and zoning proceedings in violation of the statute. The court disagreed with this conclusion but stated:

...The decision as to whether a particular interest is sufficient to disqualify is necessarily a factual one and depends on the circumstances of the particular case...while we in no way condoned the course pursued by (the member in question) we cannot say in view of the manner in which this appeal has been presented to us that as a matter of law the court reached an improper conclusion on the issue of...disqualification.

In analyzing the facts of the situation you question, a number of key points need to be emphasized:

1. The lease presently before the Council is inextricably related to several zoning issues; this is apparent on the face of the lease that the Council is now being asked to decide upon.

2. The Council has already heard an extensive presentation by the developer and public comments concerning the developer's overall plan of development which entails in part various zoning considerations.

3. Several Council people have actively participated in negotiating the lease with the developer; it can only be presumed that the special information to which participating council members have become privy as a result of their discussions has or may have been shared with the Council people who serve on the Planning and Zoning Commission.

4. Council members are elected directly by the voters of the City of Middletown whereas the Planning and Zoning Commissioners are appointed; the Council is also the City's legislative body with broad powers whereas the function of the Planning and Zoning Commission is specifically defined by statute.

5. Five of the eleven members and alternates of the Planning and Zoning Commission are either selected from among the Council or appointed by the Mayor with the consent of the Council; the Council thus exerts a dominant influence on the affairs and decisions of the Planning and Zoning Commission.

6. If a Councilor abstains from voting, there is no alternate to take his place, whereas there is provision for the seating of alternates where a planning and zoning commissioner is disqualified.

7. The statutory and judge made rules concerning disqualification of Planning and Zoning Commissioners are much more stringent than those governing actions of Council people.

Based on the foregoing considerations, I conclude the lease issue now before the Common Council could well involve a conflict of interest between the duties of the councilmen who also serve on the planning and zoning commission under Sections 8-11 and 8-21 of the Connecticut General Statutes, and furthermore that the deliberations and decisions of the Common Council could be construed as a predetermination and predisposition to the extent the aspects of the same matter are later considered at the planning and zoning commission wherein council members continue to participate as commissioners. Consequently, any action by the planning and zoning commission which included deliberations by its council members could be subject to later attack and invalidation.

Recognizing that the Council has already actively participated in deliberations concerning this issue and because the primary duty of a councilor is to serve the electors who brought him to office, I advise that it is permissible for those Common Councilors who also serve as Planning and Zoning Commissioners to participate in any and all deliberations and decisions before the Common Council concerning the developer's proposals provided that they disqualify themselves from participation in any related matters before the planning and zoning commission.

With the disqualification of council people from the planning and zoning commission a bare quorum of six - even counting qualified alternates - will remain. This understandably places a difficult burden on the remaining members of the Commission. However, the Council should give some consideration to the statutory procedure for appointing additional alternates set forth in Conn. Gen. Stat. Section 8-11.

This body need not be reminded that the courts are increasingly circumspect about the actions of planning and zoning commissions on issues of conflict of interest and predetermination as most recently indicated in Judge Higgins' decision in Morrow v. Middletown Planning and Zoning Commission. It is suggested as a general matter that the Council, the electorate and future Charter Revision Commissions consider the wisdom of continued participation of Council members on the Planning and Zoning Commission.

Finally, as a caveat, the cases governing conflicts of interest and predetermination among planning and zoning members state clearly that each case must be determined on its own facts and circumstances. This opinion is confined to the facts presented in this specific case. Obviously, other cases will have to be reviewed on their own merits.

Respectfully submitted,

Richard W. Tomc
Corporation Counsel

RWT:kmn

cc: Mayor Sebastian J. Garafalo
Ralph Wilson, City Attorney