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October 8, 1987

Westfield Residential Rational Development
c/o Ms. Ann Bickford
1409 Country Club Road
Middletown, Connecticut 06457

RE: PHASE II - WESTFIELD HILLS - SUBDIVISION APPLICATION
OUR FILE NO. 482-002

Dear Sirs/Madams:

You have requested our opinion on certain procedural questions concerning the recent subdivision application for Westfield Hills Phase II. The facts as you have related them to us are as follows.

On August 26, 1987, the subdivision application was submitted to the Planning and Zoning Office in Middletown, but did not include the application fee at that time. A Planning and Zoning Commission meeting was held that night but the submission of this application was not brought up at that meeting. Notice of a public hearing to be held on September 9, 1987 with respect to the application was published on August 28 and on September 4, 1987. A public hearing on the application was held on September 9, 1987. The public hearing of September 9 was the first occasion in which the Planning and Zoning Commission dealt with the application. Presently, the matter has been continued and is before the Inland Wetlands Commission. The applicant has filed a letter with the Planning and Zoning Commission extending the time within which the Commission can consider the matter until November 8, 1987. Your representative found nothing in the application file in the Planning and Zoning Office indicating whether or not a sign giving notice of the public hearing was, in fact, posted on the property in question. I have not personally examined the file in this matter, but have relied on your description of the facts.

The first question raised by you centers on the manner in which the application was scheduled for public hearing and the legal results stemming from that. It would appear that the application was scheduled for public hearing by the Planning and Zoning Commission's staff and not by the act of the Commission itself. Section 8-26, of the Connecticut General Statutes, provides "the Commission may hold a

public hearing regarding any subdivision proposal if, in its judgment, the specific circumstances require such action." The choice of whether to hold a public hearing on a subdivision application is within the discretion of the Commission. Daviau v. Planning Commission, 174 Conn. 354, 357 (1978); Forest Construction Co. v. Planning and Zoning Commission, 155 Conn. 669, 674 (1967) The clear implication of the statutory language and the cases is that the discretion or judgment as to whether to hold a public hearing is to be exercised by the Commission itself. Accordingly, in this instance, there is justification for concluding that the Commission has not, itself, set a public hearing for the application within the meaning of Section 8-26, even though something purporting to be a public hearing may have been held.

There are serious implications to this. Section 8-26d of the statutes provides time limits within which the Commission is to act on applications. If the Commission does not act on an application within the prescribed time limitations, this failure to act is considered an approval of the application. If a public hearing is held, the time limitations within which to act are different than if a public hearing is not held. In a case where a public hearing is held, the hearing must commence within sixty-five days after the receipt of the application, the hearing is to be completed within thirty days after the hearing commences. The decision on the application must be rendered within sixty-five days after the completion of the hearing. In contrast, where no public hearing is held, a decision on the application must be rendered within sixty-five days after the receipt of the application. The statute provides that the time of receipt for an application is the "day of the next regularly scheduled meeting... following the day of submission....".

Since here the Commission itself did not call a public hearing, the argument can be made that the time limitation for considering the application in question runs from the first regular meeting after submission, which would be September 9, 1987. The decision, accordingly, would have to be made within sixty-five days thereafter, i.e., November 13, 1987. Strong support for this conclusion is found in the case of Viking Construction Co. v. Planning Commission, 181 Conn. 243 (1980). This would not make a difference if the public hearing had been completed on the evening of the ninth, because then, a decision would have to be rendered within sixty-five days in any event. However, here the hearing was continued or the period for completion extended. This begins to stretch the possible period of action beyond the sixty-five day limit. The fact that the applicant has filed a letter consenting to an extension, may be regarded as effective even though it is an extension of the wrong time limitation. See, Metropolitan Homes, Inc. v. Town Planning and Zoning Commission, 152 Conn. 7 (1964). However, extensions granted by an applicant, where no public meeting is held, can extend no longer than a cumulative additional sixty-five days. Whereas, extensions where a public hearing

was held can cumulate to ninety five days. Thus, automatic approval might occur while everyone is operating under a mistaken assumption that more time is available.

The second question raised by your inquiry concerns the validity of the posted sign notice of the public hearing. Section 05.05 of the Middletown Zoning Regulations requires that a sign be posted on the premises in question seven days prior to the date of the public hearing, or eight days if a holiday intervenes. The regulation further requires that "the Zoning Enforcement Officer shall file a report with the Commmission that the sign was observed in place in accordance with the regulation." You have informed me that when you examined the file you found no report of an official inspection showing the presence of a sign in this case.

The regulatory requirement in Middletown that a sign be posted, is in addition to the notice requirements imposed by the State statutes. Where a jurisidiction adds notice requirements beyond the statutory essentials, such requirements must be strictly complied with. Wight v. Zoning Board of Appeals, 174 Conn. 488, 491 (1978) A failure to strictly follow additional requirements imposed by local regulations brings into question the sufficiency of notice and, therefore, the validity of the public meeting which was the subject of that notice. A failure to follow the requirement that the posting of the sign be examined officially and a report made thereon would raise the possibility of there being a procedural infirmity with respect to the public hearing on this application.

The procedural irregularities concerning this application produce a dilemma. In the first instance, the apparent public hearing may have no legal status as such because the Commission did not make the decision to call it. In that case, the statutory time limits for decision are proceeding at a faster pace than anticipated. On the other hand, if the public meeting was properly called within the meaning of Section 8-26, then there remains a question as to its validity if there is a failure of compliance with the sign notice provisions of the regulations. Clearly, these are matters which should be clarified prior to further action or a decision on the application in question.

Yours truly,

William Howard

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Ans by 28th