

MEMORANDUM

Building
Dept.

FROM: OFFICE OF THE CITY ATTORNEY
MIDDLETOWN, CONNECTICUT 06457

TO: Anthony S. Marino, Mayor
Planning & Zoning Commission
Thaddeus Reneson, Chief Building Inspector

DATE: April 20, 1976

RE: Legal Opinion re Application of Ganaros & Fannis
For Building Permit
Premises At South Main Street and Highland Avenue

On March 30, 1976 the owners made application for a building permit to construct a new building on the above premises. The subject property is located in a general business zone, B-2. The applicants completed the application form as well as the "inter-agency application for land use in Middletown, Connecticut". The applicant had made application in December 1975 for the same building permit, which was denied because of doubt as to the status of the zoning of the property. Since the previous application for a building permit had been denied, it was necessary for a new application to be made. New plans were also required to be submitted and were submitted.

The building inspector, upon receipt of the plans, forwarded a site plan to the planning and zoning department for review on March 31, 1976.

The application for the building permit made March 30, 1976 describes the use as "retail store (dairy store)". This application form is not ordinarily presented to the planning

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and zoning department. The inter-agency form, which is submitted to the planning department, referred to "retail store". The site plan, which is also submitted to the planning department, referred to a "retail store building".

By memorandum dated April 13, 1976 the planning and zoning department stated that the site plan was not approved for two reasons: (a) the proposed use was not adequately identified to evaluate whether or not it is an outright use or a special exception use, and (b) there may be a problem with traffic.

By letter dated April 15, 1976 from the attorney for the applicants, addressed to the City Planning Director, a copy of which was filed with the Building Department to become a part of the application, a more definite description of the proposed use was made including a statement that the application is being made under Section 61.01.31 and Section 61.01.34 of the Middletown Zoning Regulations.

In view of an objection made by the applicants, through their attorney, to the rejection of the site plan by the planning department as illegal, the Mayor has requested review of the legal basis for the rejection of the site plan.

No structure may be constructed or altered without obtaining a building permit. General Statutes, §19-398.

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Under the statute, the official who determines whether or not a building permit shall be issued, is the building official. Connecticut has adopted a building code which is applicable to all Connecticut municipalities. General Statutes §19-395e.

The statutes and State Building Code require that application be made to the building official for the building permit. General Statutes, §19-398; Building Code, §113.

The Building Code sets forth information which must be contained as part of the application. See subsections to Section 113 of the Building Code.

Both the General Statutes and the Building Code require the building official to act upon the application within 30 days. The permit must be issued or refused, in whole or in part, within 30 days after the application is filed with the building official. General Statutes, §19-398; Building Code, §114. If it is refused, he must state the reason for refusal in writing. Building Code subsection 114.1.

The application may be amended in accordance with the Building Code. See Building Code subsection 113.8.

Subsection 114.1 of the Building Code provides as follows:

"*114.1 Action on Application: The building official shall examine or cause to be examined

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all applications for permits and amendments thereto within thirty days after filing. If the application or the plans do not conform to the requirements of all pertinent laws, he shall reject such application in writing stating the reasons therefor. If he is satisfied that the proposed work conforms to the requirements of the Basic Code and all laws and ordinances applicable thereto, he shall issue a permit, in whole or in part therefor, within thirty days after filing."

In the first instance, it is the duty and responsibility of the applicant to comply with all pertinent laws and to submit all data necessary for review. It is the duty of the building official, to determine whether all laws and ordinances pertinent to the particular application have been complied with. To do so he may require review and assistance by appropriate officials. The building official is entitled to rely upon the reports he receives from the planning and zoning department and all other departments with regard to compliance of the applicant with the laws and ordinances within their particular fields of knowledge or expertise. In the final analysis, it is the building official who must

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decide whether or not to issue a permit.

In Middletown, an inter-agency application for land use development has been developed which facilitates review by the building official. This provides for review by other agencies and report to the building official, which he may utilize to determine whether all laws and ordinances have been complied with, and if not, in what respects, so that he may properly act upon the application as he is required to do by law within 30 days of the filing of the application with him.

The applicant should endeavor to see that all legal requirements have been complied with prior to making application for the permit. If, however, some deficiency is discovered in the review process, and it can be remedied and review completed within the 30 days, the applicant may remedy the deficiency, and amend his application accordingly. See Building Code subsection 113.8.

Unless the building official determines that all requirements of all pertinent laws have been complied with, he is required to refuse to issue the building permit. Building Code, §114; State v Building Commission, 135 Conn. 415, 422. If all requirements have been complied with, and the permit fee is paid, (See Building Code subsection 115.1) he must

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issue the permit. Gold v Usher, 138 Conn. 323; Kavenewsky v Zoning Board of Appeals, 160 Conn. 397; Purtil v Planning and Zoning Commission, 146 Conn. 570; 9 McQuillan, Municipal Corporations, §26.206.

Among the pertinent laws to be complied with are valid requirements of planning and zoning. State ex. rel. LaVoie v Building Commission, 135 Conn. 415. The Middletown Planning and Zoning Commission is authorized to enact zoning regulations. Charter, Chapter V, Sec. 3A; General Statutes §8-2. The applicant is required to comply with all valid requirements of the Planning and Zoning Regulations enacted by the Middletown Planning and Zoning Commission. In exercise of its power, the Commission has adopted regulations which include the B-2 zone referred to in Zoning Regulations Section 32, with permitted uses set forth in Section 61. Uses permitted outright are contained in subsection 61.01.01 to 61.01.39. In addition, the regulations contain Section 55 requiring site plan approval. Section 55 contains specifications for information that must be submitted for review of the site plan. The necessity and reasonableness of the required information has not been questioned. The planning office stated that the information submitted did not comply with the requirements to sufficiently

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identify the proposed use. While it is arguable whether or not the information contained on the application for a building permit, inter-agency application and site plan sufficiently identified a permitted use in a B-2 zone under the regulations, it appears that any such defect was cured by the letter of April 15, 1976 made a part of the application further elaborating on the proposed use and specifically referring to subsections 61.01.31 and 61.01.34. Therefore, the permit cannot be refused, at this point in time, based on the first objection raised by the planning department.

The second reason given by the planning office for rejection of the site plan was the following: "(b) the relationship of traffic generated by the unspecified 'retail use' and the awkward intersection of South Main Street and Highland Avenue warrants the attention and advice of qualified traffic engineers." A copy of the memorandum dated April 13, 1976 is attached.

One of the important purposes of zoning is to lessen traffic congestion in the streets. Wayland v Town Planning and Zoning Commission, 146 Conn. 321; Vece v Zoning and Planning Commission, 148 Conn. 500; Gordon v Zoning Board, 145 Conn. 597; General Statutes, §8-2. However, the

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Commission must exercise its power in a legal manner. A generally accepted procedure for controlling traffic congestion in the use and development of land within the town has been to prohibit entirely certain uses in zones wherein development of such uses would create or aggravate traffic congestion, and to permit certain uses within zones only upon a special exception or special permit, subject to conditions set forth in the regulations, in the manner specifically provided for in Section 8-2 of the General Statutes.

Section 55 of the regulations has several other subsections pertaining to the purpose, procedure and scope of review of required site plans. It would appear that the fourth paragraph under subsection 55.03 pertains to this application, and that it has been so treated by the planning department. Subsection 55.05.01, scope of review, parts D and E refer to traffic considerations. Apparently, there are no other sections of the regulations establishing standards which must be met by the applicant with regard to traffic requirements on an application for an outright use. Section 55 does not establish such standards. Neither the Planning & Zoning Commission, the planning director, nor the building official can legally be vested with unregulated discretion.

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Keating v Patterson, 132 Conn. 210. To permit the Commission, the planning director or building inspector to reject the application based on a failure to comply with unspecified standards for alleviating traffic problems would be to vest such illegal discretion. Therefore, I have concluded that the application for the building permit cannot be denied on the basis of a failure to comply with unspecified requirements pertaining to traffic.

As stated above, it is clearly not only within the power, but a duty of the Planning & Zoning Commission to enact regulations with a view to reducing traffic congestion, however, such power must be exercised in a legally permissible way.

The planning director has advised that his memorandum of April 13, 1976, with regard to traffic problems, was intended to include a potential problem of a failure to comply with regulations in that the access driveway and/or a portion of the parking area is located in such a way as shown on the site plan as to violate some buffer requirement of the zoning regulations. If this is the case, such violation should have been specifically referred to in the memorandum to the building inspector. Based on the verbal comment from the

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planning director on this point, it would appear that if there is such a potential violation of the zoning regulations, it would be a failure to comply with a buffer requirement and not a failure to comply with standards concerning traffic congestion. At this point, with the application for the building permit amended to make it clear that it pertains to an outright use, it is incumbent upon the planning department to specify in what respects, if any, the application fails to meet the specific requirements of the zoning regulations. The procedure to be followed by the building official has already been outlined above.

In summary, the following conclusions have been reached:

- (1) The application, as amended, is for an outright permitted use.
- (2) The planning department must approve or disapprove the site plan as presented.
- (3) If the plan complies with the zoning regulations, it must be approved.
- (4) If the plan fails to comply with the regulations, it must be disapproved and the planning department must specify in writing, to the building official, each reason why the plan fails to comply.

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The following must be kept in mind to understand this opinion:

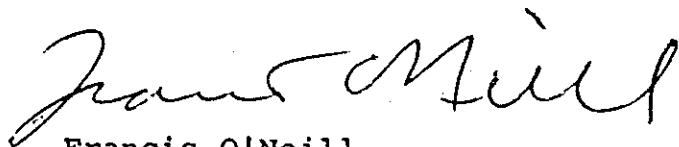
(1) The question presented to the undersigned is not whether traffic problems will or will not be created, or whether the Zoning Commission should or should not have zoned the property B-2, or whether the Zoning Commission should have taken any other action to affect the subject property. The only question the undersigned is authorized to advise upon at this time is whether the reasons given for rejection of the plan by the Planning Department are valid based on the regulations as enacted by the Commission and other applicable law.

(2) The undersigned has no power to change the zoning regulations to impose any requirement on the applicant not already contained in the regulations or the statutes.

(3) The Zoning Commission has the power to change the regulations, if it is warranted. Both the commission and the public may initiate proceedings to change the regulations. The subject property has been shown on the zoning map in the Town Clerk's office and Zoning office as a B-2 zone for almost six years. Notice of adoption of the regulations including the map, was published in a newspaper as required by statute

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in 1970. The status of the zoning of the subject property was questioned and became a matter of common knowledge after the first application for the permit was made in December 1975. Members of the public concerned about the subject property retained an attorney to represent them. The undersigned rendered an opinion on March 12, 1976 concerning this subject property. Apparently, at no time during the six years, neither before or after the opinion of March 12, did anyone take any official action to initiate proceedings to consider a change of the zone boundaries or regulations which would affect the proposed property. None of the members of the public who expressed concern, neither personally nor through their attorney, have taken any such action, although there apparently has been ample time to do so. The point made here is not that a change in the regulations should or should not have been made. The point is that anyone with the benefit of hindsight, who now believes that the proposed use should have been prohibited or further controlled as to the subject property than is possible under the existing regulations has not taken appropriate action to effectuate changes thought desirable.



Francis O'Neill
Francis O'Neill
City Attorney

MEMORANDUM

PLANNING AND ZONING COMMISSION

Office of the Building Inspector

April 13, 1976

RE: Fanis & Ganaros
South Main St. & Highland Ave.
Site Plan Review (received for review 3/31/76)

Sufficient Departmental reports have been received to conclude that: (a) the "retail use" proposed for the site has not been adequately identified to evaluate whether or not it might be an outright use or a special exception and (b) the relationship of traffic generated by the unspecified "retail use" and the awkward intersection of South Main Street and Highland Avenue warrants the attention and advice of qualified traffic engineers.

In the case of the traffic problem the solution shown may indeed be the very best possible but the Police Department reports that they lack necessary information to evaluate and that pertinent information (volume of traffic) sight-line etc.) should be obtained from the State.

Therefore because of the above factors this site plan is NOT approved.

George A. Reif
George A. Reif
Director, P & Z Commission

GAR:acr

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PLANNING AND ZONING COMMISSION
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