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MEMORANDUM

FROM: OFFICE OF THE CITY ATTORNEY
MIDDLETOWN, CONNECTICUT 06457

TO: Anthony S. Marino, Mayor
Edward J. Kalita, Chairman, Planning & Zoning Commission

DATE: February 23, 1977

RE: George Holmes, Jr. vs The Planning & Zoning Commission
of The City of Middletown

Gentlemen:

The above lawsuit, brought on February 15, 1977, challenges the legality of Chapter V Sec. 3A of the Charter which establishes the Planning & Zoning Commission. It is claimed that this section of the Charter is in conflict with and contrary to the General Statutes. In view of this pending suit, you have asked whether the Commission should continue to conduct its business in the usual manner, or whether business should be suspended until a final judgment has been made by a court in this lawsuit. It is my recommendation that the Middletown Planning & Zoning Commission continue to transact its business in the usual manner, unless and until such time as there is a court order ordering otherwise.

My recommendation is based upon my conclusion that, even if a court rules that the Charter provision is invalid, under Connecticut law the members of the Planning & Zoning Commission would then have the status of de facto officers and all of their

Anthony S. Marino, Mayor
Edward J. Kalita, Chairman, Planning & Zoning Commission
February 23, 1977
Page 2

official acts would be valid and effective to the same degree as if the commission had been validly constituted between the time of their appointment and the determination by the court.

Generally, a de facto officer is one who has failed to qualify for an office because of an invalid appointment or election, a failure to take the proper oath or other defect in taking office, the failure of a successor to qualify for the office, or appointment or election to an office created by a statute or ordinance later declared invalid. Many years ago, the Connecticut Supreme Court adopted a very broad rule detailing the circumstances under which an officer not legally qualified will be found to be an officer de facto, and these include situations where the officer acts under the authority of an election or appointment pursuant to a law later declared to be invalid. *Furtney v Zoning Commission*, 159 Conn. 585, 595-6 (1970); *State v Carroll*, 38 Conn. 449, 471 (1871). Based on these cases, and the general common law, if the law under which the Planning & Zoning Commission members were appointed is determined to be invalid, ^{they} ~~it~~ would be de facto officers.

The general rule as to the validity of acts of de facto

Anthony S. Marino, Mayor
Edward J. Kalita, Chairman, Planning & Zoning Commission
February 23, 1977
Page 3

officers when dealing with third persons and the public is
as follows:

§518. Acts involving third persons or public.

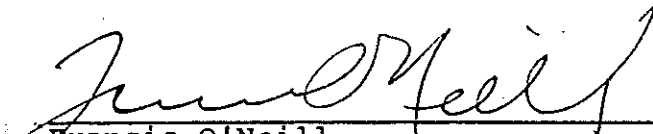
The general rule is that the acts of a de facto officer are valid as to third persons and the public until his title to office is adjudged insufficient, and such officer's authority may not be collaterally attacked or inquired into by third persons affected. The practical effect of the rule is that there is no difference between the acts of de facto and de jure officers so far as the public and third persons are concerned. The principle is placed on the high ground of public policy, and for the protection of those having official business to transact, and to prevent a failure of public justice. Third persons, from the nature of the case, cannot always investigate the right of one assuming to hold an important office. They have a right to assume that officials apparently qualified and in office are legally such, even though a contest is pending. Furthermore, the de facto officer is estopped from taking advantage of his own want of title. 63 AmJur 2d, PUBLIC OFFICERS AND EMPLOYEES §518.

This rule was specifically approved by the Connecticut
the
Supreme Court in / case of Furtney v Zoning Commission, Supra,
pp. 596-597. In addition to the Furtney case, the Connecticut
Supreme Court has held the actions of de facto officers to be
valid in other cases. State v Carroll, 38 Conn. 449; Trinity
College v Hartford, 32 Conn. 452. This rule appears to have
been adopted in the majority, if not all of the states which
have considered the question. 3 McQuillin, Municipal Corpora-
tions, §12.106.

Anthony S. Marino, Mayor
Edward J. Kalita, Chairman, Planning & Zoning Commission
February 23, 1977
Page 4

"The official acts of de facto officers are validated only from motives of public policy to preserve the rights of third persons and the organization of society. The rule is generally recognized that the public and third parties may deal with a de facto public officer without inquiring into the validity of his title to the office he assumes to fill, and that in so doing they will be as fully protected as though such officer had been both a de facto and a de jure officer as to all acts within the scope and apparent authority of such officer. The rule, it has been said, is based on sound policy and is designed to protect the public."
3 McQuillin, Municipal Corporations, §12.106.

Based on the foregoing, it is my conclusion that all acts of the Middletown Planning & Zoning Commission from the time it was formed to such time as a final court judgment/^{if any,}determines the commission is illegally constituted, are and will be as valid as though the commission had been validly constituted. The commission not only may, but has a duty to discharge its duties under the law as a Planning & Zoning Commission.


Francis O'Neill
City Attorney

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