MEMORANDUM

FROM: OFFICE OF THE CITY ATTORNEY
MIDDLETOWN, CONNECTICUT 06457

TO:
Sebastian J. Garafalo, Mayor

DATE:
January 23, 1986

RE:
Reconstitution of Redevelopment Agency

As you are aware, it is my opinion that the Redevelopment Agency must be reconstituted to carry out the final approval requirements of the Carabetta Enterprises Development and any and all other business that still remains outstanding including two litigation matters. This conclusion is based upon the following analysis.

FACTS

By resolution passed on December 15, 1953, the Common Council resolved that there be established for the City of Middletown a Redevelopment Agency in accordance with the provisions of the state statute. At that time, it provided that there would be five members. That same night, however, an amendment to the resolution was approved that provided for six members and that the Mayor would act as an ex-officio member to vote only in case of a tie. Sometime thereafter, the Redevelopment Agency membership was increased to ten members with the Mayor remaining as an ex-officio member.

On May 7, 1984, the Common Council resolved that the Redevelopment Agency, established by Resolution adopted December 15, 1953, as amended, from time to time thereafter, then consisting of eleven members, shall terminate as of June 1, 1984. At the same time it ordained that Section 26-14 be added to the Middletown Code of Ordinances which established a Redevelopment Agency which was to consist of six regular members plus the Mayor as an ex-officio member. It stated further that the term of the Mayor on the Agency shall run concurrently with his term as Mayor and that he should vote only in the event of a tie. The Ordinance was to take effect as of June 1, 1984.

Thereafter, the Common Council, on September 13, 1984, ordained that effective September 30, 1984, Section 26-14 of the Code of Ordinances was repealed. It then passed a new Section 26-14 entitled "Redevelopment" which stated that: "The Common Council, effective September 30, 1984, shall exercise on behalf of the City, any and all powers, duties, functions and authority previously vested in or the responsibility of the Middletown Redevelopment Agency." At the same time it repealed Section 2-7 of the Code of Ordinances, and enacted a new section 2-7 establishing a Municipal Development Committee.

The Common Council then carried on as if it was the Redevelopment Agency and allowed the Municipal Development Committee to undertake functions that previously had been carried out by the Redevelopment Agency. For the following reasons, it is my legal opinion that the termination of the Redevelopment Agency is quite suspect and probably invalid. Furthermore, the attempted transfer of the powers of the Redevelopment Agency to the Common Council was of no force and effect. Lastly, the exercise of duties by the Municipal Development Committee that were previously carried out by the Redevelopment Agency also was improper. On the other hand, it is my further legal opinion that any actions taken by the Common Council and the Municipal Development Committee under what they believe was their authority to act as a Redevelopment Agency are valid as a matter of public policy and cannot be overturned. But, any further activities must be undertaken by the Redevelopment Agency. These conclusions are supported by the following discussion.

ISSUES PRESENTED

(1) After a municipality has established a Redevelopment Agency pursuant to expressed state legislative grant, may it thereafter terminate the Redevelopment Agency where there is no expressed state statutory authority to do so and such a termination would thwart the enunciated public policy of the state regarding the social welfare of its citizens?

(2) May the legislative body of a municipality, in our case the Common Council, transfer to itself the powers of a Redevlopment Agency which are specifically granted only to a Redevelopment Agency by the state legislature?

(3) Where a legislative body exercises powers granted to it under an ordinance, later determined to be legally invalid, are the actions of that legislative body under that invalid ordinance subject to collateral attack and being overturned or are those actions taken binding upon the legislative body itself and all others based upon sound principles of policy and justice including the principle that third parties who have relied upon and transacted business with their government should be protected where the defects in the powers of that government are not open and obvious?

DISCUSSION

PART I

(1) AFTER A MUNICIPALITY HAS ESTABLISHED A REDEVELOPMENT AGENCY PURSUANT TO EXPRESSED STATE LEGISLATIVE GRANT, MAY IT THEREAFTER TERMINATE THE REDEVELOPMENT AGENCY WHERE THERE IS NO EXPRESSED STATE STATUTORY AUTHORITY TO DO SO AND SUCH A TERMINATION WOULD THWART THE ENUNCIATED PUBLIC POLICY OF THE STATE REGARDING THE SOCIAL WELFARE OF ITS CITIZENS?

Ordinarily, the grant of power to enact an ordinance implies the power to

amend, change or repeal it. Beyer v. Township Committee of Mount Holly T P., 6 N. J. Super 409, 69 A2d 42, 43 (1949). This rule applies generally "to ordinances passed pursuant to a general grant of discretionary or regulatory authority when the power to legislate on the subject imports the power to pass more than one ordinance respecting it." Beyer, supra at 43. In Madison v. Kimberly, 118 Conn. 6, 11 (1934), our State Supreme Court, relying on a long line of case support, reaffirmed a portion of this general rule by stating "the familiar principle that the grant of power to enact ordinances ordinarily implies the power to repeal them." (underlining added). But, this general rule is subject to an exception. Although no Connecticut case could be found where this exception has been discussed, it has been explained and discussed in several other states.

In Beyer vs. Township Committee of Mount Holly T P., supra at 43, the court explained the exception to the general rule stated previously and cited several other state decisions supporting it.

"But the general rule admits of an exception where the amending or repealing ordinance relates to an ordinance enacted under a narrow, limited grant of authority to do a single designated thing in the manner and at the time prescribed by the legislature. In such case the implication is excluded that the municipal legislative body was given any further jurisdiction over the subject than to do the one act. Loudenslager v. Atlantic City, 83 N.J.L. 30, 83 A. 898 (Sup. Ct. 1912) (power to establish a sinking fund was exhausted upon its creation and its later attempted rescission was nugatory), Simpson v. State, 179 Ind. 196, 99 N. E. 980, 982 (Indiana Sup. Ct. 1912) (power to increase a certain fee provided city acted within stipulated time was exhausted once the city took action); Thompson v. City of Marion, 134 Ohio St. 122, 16 N. E.2d 208 (Ohio Sup. Ct.1938) (exercise of statutory power to determine necessity for pension fund did not imply power later to suspend, modify or repeal the fund); Brown v. Arkansas City, 135 Kan. 453, 11 P.2d 607 (Kansas Sup. Ct. 1932) (power to determine need to establish a court did not imply power to discontinue the court after it was established.)"

In Beyer, the Township Committee of the Township of Mount Holly amended the ordinance creating the Mount Holly Sewerage Authority and effected a repeal of a provision of the original ordinance which governed the annual compensation of Authority members. In declaring the amending ordinance null and void, the court held that the statutory grant was exhausted when the original ordinance, incorporating the salary provision of the authority members, was passed. The court stated that the only expressed powers reserved to the municipality, after the creation of the authority, were that of the appointment of the original and successor members and the power to dissolve the authority, which the legislature had by statute limited to only where the authority consented to dissolution, and it had no debts or obligations outstanding. Beyer, supra at 44.

In Ringwood Solid Waste Management Authority v. Borough of Ringwood, 131 N. J. Super, 61, 328 A2d 258, the court had before it the issue of the validity of an ordinance by which the borough had abolished the local solid waste management

authority which it had previously created by ordinance. Concluding that this case was one of first impression in New Jersey, the court conducted a legal construction of the statute and those statutes in pari materia with it. The court stated that "the sense of a law is gathered from its object, nature of the subject matter, the whole of the context and acts in pari materia." supra at 261. The court noted further that the state legislature had provided no provision, "procedurally or otherwise," by which the municipality could dissolve the legal entity which it had created.

Addressing redevelopment and other legislative concerns, the court stated that it was "quite clear that the Legislature intended the creation of various independent authorities as a means by which these entities would provide essential services in certain quasi-governmental areas, i. e., parking, water, sewerage, disposal, incinerator plants, housing, REDEVELOPMENT and solid waste disposal." (Capitals added for emphasis).

In declaring the repealing ordinance null and void, the court held that once the borough had created the authority by ordinance, its powers were limited solely to appointing members. Ringwood supra at 263.

CONNECTICUT REDEVELOPMENT ACT

In enacting the Connecticut Redevelopment Act, the state legislature made clear the broad scope of its concern in its declaration of policy contained in Section 8-124.

"Sec. 8-124 Declaration of public policy

It is found and declared that there have existed and will continue to exist in the future in municipalities of the state substandard, insanitary, deteriorated, deteriorating slum, or blighted areas which constitute a serious and growing menace, injurious and inimical to the public health, safety, morals and welfare of the residents of the state; that the existence of such areas contributes substantially and increasingly to the spread of disease and crime, necessitating excessive and disproportionate expenditures of public funds for the preservation of the public health and safety, for crime prevention, correction, prosecution, punishment and the treatment of juvenile delinquency and for the maintenance of adequate police, fire and accident protection and other public services and facilities and the existence of such areas constitutes an economic and social liability, substantially impairs or arrests the sound growth of municipalities, and retards the provision of housing accommodation; that this menace is beyond remedy and control solely by regulatory process in the exercise of the police power and cannot be dealt with effectively by the ordinary operations of private enterprise without the aids herein provided; that the acquisition of property for the purpose of eliminating substandard, insanitary, deteriorated, deteriorating, slum or blighted conditions thereon or

preventing recurrence of such conditions in the area, the removal of structures and improvement of sites, the disposition of the property for redevelopment incidental to the foregoing, the exercise of powers by municipalities acting through agencies known as redevelopment agencies as herein provided, and any assistance which may be given by any public body in connection therewith, are public uses and purposes for which public money may be expended and the power of eminent domain exercised; and that the necessity in the public interest for the provisions of this chapter is hereby declared as a matter of legislative determination." (underlining added for emphasis)

This declaration of policy was present and forward looking. It was a public policy recognizing that the conditions sought to be remedied needed constant oversight. In fact, during comment on a later amendment to the Redevelopment Act, establishing the Urban Renewal Section, Sen. Armentano of Hartford stated on the senate floor in 1955 that: "We are living in an age of redevelopment. You and I will never see the end of redevelopment in our lifetime. It's a continuous process and I think it's a good thing because it tears down the old and creates the new." In declaring the Redevelopment Act constitutional, the State Supreme Court recognized the need for the continued existence of Redevelopment Agencies when it stated: "The purpose of the act is not only to remove slums and blighted areas but also to prevent the redeveloped areas from reverting to their former status." Gohld Realty Co. v. Hartford, 141 Conn. 135, 143 (1954).

These statements clearly foresaw an unending job for redevelopment agencies.

In Section 8-126, the state legislature provided the mechanism for establishing a redevelopment agency. That section presently states:

"Sec. 8-126. Redevelopment agency

The legislative body of any municipality may designate as a redevelopment agency the housing authority of the municipality or the state commissioner of housing or other electors resident therein. The members of any redevelopment agency so created shall be appointed by the chief executive of a city or borough or by the board of selectmen of a town with the approval of the legislative body. Those first appointed shall be designated to serve for one, two, three, four and five years, respectively, and thereafter members shall be apointed annually to serve for five years. Each member shall serve until his successor is appointed and has qualified and any vacancy shall be filled for the unexpired term. Action by any redevelopment agency shall be taken only on the majority vote of all the members. A redevelopment agency shall select from among its members a chairman and a vice-chairman, and may employ a secretary and such other officers, agents, technical consultants, legal counsel and employees as it requires. The members shall serve without compenstion but may be reimbursed for necessary expenses."

The creation of a redevelopment agency had wide ramifications. The state

legislature granted this body the right to employ a secretary and such other officers, agents, technical consultants, legal counsel and employees as it required. Furthermore, the structure of the terms to be served by its members guaranteed perpetual existence.

The state legislature granted these newly created Redevelopment Agencies broad powers to effectuate its public policy. But in doing so, it attempted to strike a balance between that enunciated public policy and local interests. Consequently, a close working relationship was statutorily created between these two interests. For example, the Redevelopment Agency, although given the power to acquire land by purchase, lease, exchange or gift, could not exercise its powers of eminent domain without approval of the legislative body of the municipality. (Sec. 8-128), Nor could it give final approval of a contract for sale, lease or other transfer until approved by the legislative body. (Sec. 8-137), Furthermore, Section 8-136 provides that any proposed modification by the Redevelopment Agency of the development plan, must be approved by the legislative body, if the proposed modification would substantially change the redevelopment plan as previously approved by that legislative body.

It is also quite evident that this delicate framework established by the state legislature, envisioned a continued two party relationship between the municipality and the redevelopment agency, i.e. 8-134, 134a, 136, 137, etc. The two are, in fact, separate and distinct entities whose interrelationship is defined by statute.

Nowhere in this statutory framework is there expressed authority for a municipality to terminate a redevelopment agency. Additionally, the delicate framework of the Redevelopment Act clearly shows that the general implication that the power to create implies the power to repeal is excluded. The enunciated public policy, as stated by the state legislature, and the clear differentiation it has made in its statutory framework between the local legislative bodies and redevelopment agencies created by them, clearly supports the proposition that the state legislature intended to and did preempt the local municipalities in the redevelopment area. Redevelopment shall take place only pursuant to the state legislative mandate. Redevelopment Agencies are clearly administrative agencies of the state and can only be terminated by it. See Gohld, supra at 148.

Having enacted an ordinance creating a Redevelopment Agency, the City of Middletown carried out the enabling grant of the state legislature in this area. Once created, the municipality became bound to the statutory framework of the state legislature. Its only remaining power in Section 8-126 was to confirm the mayoral appointments of the initial and later members of the Redevelopment Agency. Enlarging the membership of the agency was not excluded by failure of the state legislature to mention it, but the lack of expressed statutory power to terminate the agency clearly forbad such an action. This is so because enlarging the membership does not destroy the existence of the agency while its termination would thwart the purpose for which the state legislature wanted it created.

CONCLUSION PART I

Having carefully reviewed the first issue presented, it is my legal opinion that once a municipality has established a Redevelopment Agency under the Connecticut Redevelopment statutory framework, it cannot thereafter terminate that agency since there is no expressed statutory provision for doing so and the effectuation of such a termination would thwart the enunciated public policy of the state legislature regarding the social welfare of its citizens. Consequently, if challenged in court, there is an extremely good chance that the ordinances passed by the City of Middletown terminating its Redevelopment Agency on two occasions, would be found to be null and void because an ordinance enacted without constitutional or statutory authority is not valid. New Haven Commission on Equal Opportunities v. Yale University, 183 Conn. 495 (1981), see Canavan v. Messina, 31 Conn. Sup. 447 (1973).

On the other hand, courts are unpredictable and there is a slim chance that a court could find the ordinances which terminated the Redevelopment Agency as valid.

Accordingly, for this reason, it was recommended that the Redevelopment Agency be recreated by ordinance. This has been done.

PART II

(2) MAY THE LEGISLATIVE BODY OF A MUNICIPALITY, IN OUR CASE THE COMMON COUNCIL, TRANSFER TO ITSELF THE POWERS OF A REDEVELOPMENT AGENCY WHICH ARE SPECIFICALLY GRANTED ONLY TO A REDEVELOPMENT AGENCY BY THE STATE LEGISLATURE?

Not even a court would argue with the proposition that what the state legislature specifically states, it intends.

The state legislature clearly intended that the municipalities would act by and through redevelopment agencies. Throughout the statutory framework of the Redevelopment Act, there is a clear delineation between the Redevelopment Agency, an administrative agency of the state, and the municipality. They are separate and distinct entities whose interrelationship was skillfully woven to take into account local redevelopment concerns while at the same time carrying out the enunciated public policy of the state legislature in its concerns for the social welfare of its citizens.

This interrelationship between the municipality and Redevelopment Agency is evident in several sections of the Redevelopment Act. For example, Section 8-136 provides that any proposed modification by the Redevelopment Agency of the redevelopment plan, must be approved by the legislative body (the Common Council), if the proposed modification will substantially change the redevelopment plan, as previously approved by the legislative body. To this same end, Section 8-

137 provides that any contract for sale, lease or other transfer shall be approved by the legislative body before its final approval by the Redevelopment Agency.

In finding the Redevelopment Act constitutional in Gohld Realty Co. v. Hartford, 141 Conn. 135, (1954) the State Supreme Court addressed the state legislative delegation of powers to a Redevelopment Agency. In its interpretation of the Redevelopment Act statutory framework, it found that: "The legislature has delegated to each redevelopment agency the power to determine, within certain limits, what property it is necessary to take in order to effectuate a complete redevelopment plan which the agency has adopted." supra at 146. Furthermore it stated that "under the constitution all legislative powers in the state rests in the General Assembly. That body, however, may delegate to an administrative agency the power to carry its enactment into effect by prescribing rules and regulations, provided adequate standards are set forth to guide the agency in so doing." supra at 148.

Under the Redevelopment Act, the state legislature granted certain powers to the municipalities and certain powers to the Redevelopment Agencies. It created a delicate separation of powers between these two entities. Those powers which are delegated by the General Assembly to one specific entity cannot be exercised by the other entity not so endowed. The Common Council gained nothing by the passage of the ordinance on September 13, 1984 which stated: "The Common Council, effective September 30, 1984, shall exercise on behalf of the City, any and all powers, duties, functions and authority previously vested in or the responsibility of the Middletown Redevelopment Agency." Those powers delegated exclusively by the General Assembly to a Redevelopment Agency cannot by ordinance be taken away or transferred by a local legislative body to itself. Those powers could only be transferred to the Common Council by a redelegation of powers by the General Assembly. As stated in Part I, an ordinance enacted without constitutional or statutory authority is not valid. New Haven Commission on Equal Opportunities v. Yale University, 183 Conn. 495, (1981), see Canavan v. Messina, 31 Conn. Sup. 447 (1973).

In an analogous case, the State Supreme Court, in Gregory v. City of Bridgeport, 52 Conn. 40 (1884), stated that where a city charter directs the appointment of a committee to lay out a street, the council could not act in place of the committee. Therefore, by analogy, without question, those powers which have been specifically delegated by the General Assembly to Redevelopment Agencies cannot be exercised in their stead by the legislative bodies of the municipalities. To hold otherwise destroys the delicate separation of powers established between the municipalities and Redevelopment Agencies.

CONCLUSION PART II

The legislative body of a municipality cannot transfer to itself the powers of a Redevelopment Agency which have been specifically delegated by the General Assembly to a Redevelopment Agency.

PART III

(3) WHERE A LEGISLATIVE BODY EXERCISES POWERS GRANTED TO IT UNDER AN ORDINANCE, LATER DETERMINED TO BE LEGALLY INVALID, ARE THE ACTIONS OF THAT LEGISLATIVE BODY UNDER THAT INVALID ORDINANCE SUBJECT TO COLLATERAL ATTACK AND BEING OVERTURNED OR ARE THOSE ACTIONS TAKEN BINDING UPON THE LEGISLATIVE BODY ITSELF AND ALL OTHERS BASED UPON SOUND PRINCIPLES OF POLICY AND JUSTICE INCLUDING THE PRINCIPLE THAT THIRD PARTIES WHO HAVE RELIED UPON AND TRANSACTED BUSINESS WITH THEIR GOVERNMENT SHOULD BE PROTECTED WHERE THE DEFECTS IN THE POWERS OF THAT GOVERNMENT ARE NOT OPEN AND OBVIOUS?

Having acted under an invalid ordinance, members of the Common Council were not officers de jure but officers de facto. An officer de jure is one who is in all respects legally appointed and qualified to exercise the office. An officer de facto is one who performs his duties under color of right without being technically qualified in all points of law to act. While an officer de jure's authority is based on right, that of an officer de facto rests only on reputation.

In State v. Carroll, 38 Conn. 449, 471 (1871), the court adopted a broad rule detailing the circumstances under which an officer not legally qualified will be found to be an officer de facto.

The court stated that: "An officer de facto is one whose acts, though not those of a lawful officer, the law, upon principals of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised,

> First, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be.
>
> Second, under color of a known and valid appointment or election, a worthy officer had failed to conform to some precedent requirement or condition as to take an oath, give a bond, or the like.
>
> Third, under color of a known election or appointment void because the officer was not eligible, or because there was a want of power in the electing or appointing body or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public.
>
> Fourth, under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such."

The general rule is contained in Am Jur 2d.

"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." 63A Am Jur 2d PUBLIC OFFICERS AND EMPLOYEES Sec. 605.

"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." 3 McQuillin, Municipal Corporations, 3d Ed., Sec. 12.106.

Under the facts of our case, there is no question that the actions carried out by the Common Council, and the Municipal Development Committee on its behalf, are valid as to the public and third parties. These actions cannot be successfully collaterally attacked and the Common Council is estopped from taking advantage of its own want of title to reverse itself.

Specifically, the Common Council did not have the legal authority to transfer the powers of the Redevelopment Agency to itself. It had no authority to in effect, appoint itself as the Redevelopment Agency. The Common Council members were not properly appointed to fill these seats under the provisions of 8-126 of the Redevelopment Act. Accordingly, the Common Council members, although acting under an ordinance they felt was valid, actually had no power to do what they did; however, no one was aware of the legal impediment to the activities undertaken.

Naturally, the public and third parties assumed the Common Council, and the Municipal Development Committee acting on its behalf, had the legal authority to do what they did. Business was transacted under this belief.

In view of the foregoing, it is quite evident that based upon principles of policy and justice, including the principle that third parties who have relied upon and transacted business with their government should be protected where the defects in the powers of that government are not open and obvious, the actions taken by the members of the Common Council, and the members of the Municipal Development Committee acting on its behalf, are valid as to the public and third

parties and are not subject to a successful collateral attack by anyone, or reversal.

CONCLUSION PART III

Because of motives of public policy and the rights of third persons and the organization of society, the actions taken by members of the Common Council and the members of the Municipal Development Committee acting on its behalf, under the invalid ordinance are not subject to a successful collateral attack or reversal.

SUMMARY

In my legal opinion, once a municipality establishes a Redevelopment Agency, under the present statutory framework of the Redevelopment Act, it thereafter has no legal authority to terminate it by ordinance or otherwise. Second, the powers granted to a Redevelopment Agency by the General Assembly cannot by ordinance be legally transferred by a Common Council of a municipality to itself. Lastly, the actions taken by the Common Council, acting as a Redevelopment Agency, and the Municipal Development Committee acting on behalf of the Common Council, are binding on everyone "from motives of public policy to preserve the rights of third persons and the organization of society." 3 McQuillin, supra at Sec. 12.106.

Lastly, it is noted that Senator Kenneth Hampton has had additional research done at the State Capital on issues number one and two addressed in this opinion. That research, has confirmed my findings. In addition, Senator Hampton has advised me that he intends to seek an amendment to the Redevelopment Act that will allow municipalities to terminate their Redevelopment Agencies.

Ralph E. Wilson
City Attorney

REW/es