

FROM: Office of the City Attorney

TO: Mayor Dominique S. Thornton

DATE: March 16, 2000

RE: Planning and Zoning Commission – Minority Representation

Please be advised that I have completed my research of the issue raised by Planning and Zoning Commissioner Holley in his letter dated March 9, 2000 to the Secretary of State, Susan Bysiewicz, as to whether current Commissioner and Chairperson of the Planning and Zoning Commissioner Carl Bolz was incorrectly certified by the Town/City Clerk as having won a seat on the Commission. As the result of that research, I have determined that Commissioner Bolz was incorrectly certified by the Town/City Clerk as having a seat on the Planning and Zoning Commission for the following reasons.

Subsection 2 of Section 1 of Chapter VIII of the Charter of the City of Middletown provides, in pertinent part, that “[t]he Planning and Zoning Commission shall consist of seven regular voting members. . . . There shall be three alternate voting members.” Therefore, the total membership of the Middletown Planning and Zoning Commission is ten members. An opinion from the Office of the Attorney General of the State of Connecticut confirms that minority representation should be based upon the total complement of the Board, regular members as well as alternates. 31 Op. Atty. Gen. 66 (1959). In this opinion, the Attorney General was addressing the issue of minority representation on a Zoning Board of Appeals by construing Section 8-5 of the Connecticut General Statutes, as amended, the enabling statute creating municipal zoning boards of appeals. It follows that, both by the language of the enabling statute creating zoning commissions and combined planning and zoning commissions, Sections 8-1 and 8-1b of the Connecticut General Statutes, as amended, and by the language of the City Charter, Subsection 2 of Section 1 of Chapter VIII, both the State legislature and the City’s populace intended that both the regular and alternate members of the City’s combined planning and zoning commission were to function as one single board.

The United States Court of Appeals for the Second Circuit, of which Circuit the State of Connecticut is a part, stated that Section 9-167a of the Connecticut General Statutes “. . . was meant to cover only . . . zoning commissions, . . . and “similar” bodies whose legislative powers, if any, are strictly circumscribed.” Montano, et al v. Lee, et al, 401 F.2d 214, 218 (1968). Section 9-167a(a)(1) of the Connecticut General Statutes, as amended, provides, in pertinent part, that “. . . the maximum number of members of any board, commission, legislative body, committee or similar body of the State or any political subdivision thereof, whether elective or appointive, who may be members of the same political party, shall be as specified in the following table: . . .”. Under Column I of the Table, the phrase “Total

Membership" appears. Since the total membership of the Planning and Zoning Commission is seven regular members and three alternate members, there are a total of ten members on that Commission. The last entry in the Table indicates that if there are more than nine members on the Commission that the maximum number from any one party that can serve on that Commission is two-thirds of the total membership. Two-thirds of ten is 6.66 so that only six members of one political party may serve on the Commission.

According to my research of the November, 1999 election, there were two republicans and one democrat seated as regular members of the Planning & Zoning Commission and two democrats and one republican seated as alternates to the Commission for a total of six members. There were four seats as regular members of the Commission up for election during the 1999 election. Since three of the Commission seats allowed by statute were already occupied by the democrats, only three additional democratic candidates could occupy three of the seven regular Commission member seats that were the subject of the November, 1999 election pursuant to both the minority requirement of Section 9-167a of the Connecticut General Statutes, as amended, and Section 5 of Chapter II of the Charter of the City of Middletown. That section provides, in pertinent part, that ". . . not more than four (4) members and not more than two (2) alternate members of the Planning and Zoning Commission may be members of the same political party at any time." Therefore, one of the four vacant regular Planning and Zoning Commission members, if all four of the democratic candidates on the ballot proved to get the highest votes, would have to go to the republican who received the highest number of votes pursuant to the same statutory and Charter provisions. Further, since two of the seats of the regular Planning and Zoning Commission member seats were occupied at the time of the election by republicans, in keeping with language of the City Charter, Section 5 of Chapter II, the most that the republicans could win during the November, 1999 election were two of the seats for regular Planning and Zoning Commission members. According to my research, the republicans, therefore, only ran two candidates for those seats. However, the democrats were allowed to run four candidates for only three seats as regular Commission members of the Planning and Zoning Commission.

Recently, the Connecticut Supreme Court in Putala v. DePaolo, et al, 225 Conn. 378 (1993), ruled that the Southington Town Clerk and the election moderator were correct in certifying two republican candidates to the two vacant seats on the Board of Finance, even though the second republican candidate had received fewer votes than the democratic candidate. The democratic candidate then brought this action to determine whether the Town Clerk and the election moderator were correct in certifying the republican candidate, who had received less votes than he had, to the second vacant position on the Board of Finance for the Town of Southington, but, as noted above was unsuccessful in his challenge.

It is clear that the City Charter provision found in Section 5 of Chapter II is consistent with the minority representation provisions of Section 9-167a of the Connecticut General Statutes, as amended, which provision allows for a total of six members of one political party to serve on a Commission whose total membership is ten as is the total membership of the City's Planning and Zoning Commission. Since the General Statutes are silent as to how many of the total

membership of the Planning and Zoning Commission must be regular members and alternate members, the City Charter, consistent with Section 9-167a of the Connecticut General Statutes allows for four members of any one political party to serve as regular Commission members and not more than two of any political party to serve as alternate members for a total of six. The certification of the election of Mr. Bolz to the Planning and Zoning Commission by the Town/City Clerk, therefore, violated not only the City Charter but Section 9-167a of the Connecticut General Statutes since a total of seven democrats have served on the Commission when only six members of the same political party are authorized to serve on the Commission under both Section 9-167a of the Connecticut General Statutes and Section 5 of Chapter II of the City Charter.

Insofar as the actions of the Planning and Zoning Commission to date, since the problem with the certification of Chairperson Bolz by the Town/City Clerk to a seat as a regular member of the Planning and Zoning Commission was brought to light by Commissioner Holley, the Connecticut Supreme Court has stated that there are four circumstances under which an officer not legally qualified to hold the office which he/she is performing will be found to be an officer de facto, i.e. an officer in fact, whose actions will be valid until title to his/her office has been adjudged insufficient. Furtney, et al v. Simsbury Zoning Commission, et al, 159 Conn. 585, 595 (1970). "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, but where the officer 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." (Cite omitted). Id. at pages 595-596. Because Commissioner and Chairperson Bolz has acted under the color of a known election and was certified as the winner of a seat on the Planning and Zoning Commission by the Town/City Clerk due to the fact that he received the fourth highest amount of votes even though the action of the Town/City Clerk in so certifying him was a violation of both the City Charter and Section 9-167a of the Connecticut General Statutes, this violation was unknown to the public and his certification was not challenged by the public as being contrary to law until the challenge of the Town/City Clerk's action in so certifying him was made by Commissioner Holley. Therefore, it appears that this set of circumstances would fall within the third category of circumstances under which Chairperson and Commissioner Bolz will be found to have acted as an officer de facto of the Planning and Zoning Commission. "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." (Cite omitted). Id. at pages 596-597.

In conclusion, the certification by the Town/City Clerk, after the November, 1999 election, of

Mr. Bolz to the fourth vacant regular Commission member's seat on the Planning and Zoning Commission was both a violation of the City Charter, Section 5 of Chapter II, and Section 9-167a of the Connecticut General Statutes, as amended. The current state of the law in Connecticut recognizes that the acts of a de facto officer are valid so long as the public and third persons are unaware that the officer did not have the authority to act because his certification to that office was a violation of both the organic law of the municipality and the statutes of the State of Connecticut. Therefore, any actions that have been taken by the Planning and Zoning Commission to date that involved Mr. Bolz are valid and not subject to collateral attack.

A handwritten signature in cursive script, reading "Trina A. Solecki", written over a horizontal line.

Trina A. Solecki
City Attorney

Cc: Debra A. Moore, Administrative Assistant to the Mayor