

GEORGE JEPSEN
ATTORNEY GENERAL



55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120

Office of the Attorney General
State of Connecticut

October 23, 2014

The Honorable James Redeker
Commissioner
Department of Transportation
2800 Berlin Turnpike
Newington, CT 06111

Dear Commissioner Redeker:

In your letter of August 4, 2014, you requested our opinion as to whether municipal zoning requirements and approvals apply to transit-oriented development in the City of Stamford under the factual circumstances outlined in your letter. My opinion, for the reasons set forth below, is that the property owned by the State is not subject to the zoning authority of the City of Stamford.

By way of background your letter provides the following information: The General Assembly of the State of Connecticut enacted what is now codified as Conn. Gen. Stat. § 13b-79kk, authorizing the Department of Transportation (DOT) to participate in Transit-Oriented Developments (TODs). "Transit-oriented development" is defined in subsection (a)(4) as follows:

The development of residential, commercial and employment centers within one-half mile or walking distance of public transportation facilities, including rail and bus rapid transit and services, built environment densities and walkable environments, in order to facilitate and encourage the use of those services.

DOT's authority with regard to TODs is set forth in Subsection (b) and states in relevant part:

Subject to the availability of funds, the commissioner may, with the approval of the secretary, participate in transit-oriented development projects to the extent that such projects result in the development or improvement of public transportation facilities. When the State solicits transit-oriented development proposals, the commissioner shall select the developer or developers through an open, competitive process.

Pursuant to § 13b-79kk, DOT solicited proposals for a TOD at the Stamford Parking Garage. Currently, parking for the Stamford Rail Station is

provided in a 2004-constructed parking garage, which is connected to another parking garage constructed in the 1980s (the Original Garage). In addition to the need to replace the Original Garage, there is a demand for more parking. DOT selected a proposal for a TOD of the Stamford Parking Garage and is currently negotiating with the selected proposer. The proposal includes public parking at three locations with private development on two of those locations and is summarized below:

- (1) The proposer will build a 900-plus space parking garage on land owned by the State on South State Street with a pedestrian bridge connecting the garage to a Station platform. The State will continue to own the land and building after completion of the garage. No private development will be built on this parcel.
- (2) During construction of the garage on South State Street, the proposer will provide a surface lot for temporary parking of 150 spaces on property it currently leases but which it has an option to purchase.
- (3) The proposer will demolish the Original Garage located at State Place and build a parking garage (Station Place Garage), residential units and commercial development. One or more floors in the Station Place Garage will be State-controlled parking. All users of this development, both public and private will be able to access the Station platforms through elevated pedestrian bridges extending between the garage and Station. Therefore this site will contain a combination of public and private development. The State will continue to own the land, but the land will be ground leased to the proposer.

This office has consistently opined that in the absence of specific statutory authority, local zoning authorities have no jurisdiction over the construction of a building on state land, whether that building is owned and used by the State or leased to a private entity.

The issue of whether local zoning applies to state land being used for state agency purposes was first addressed by Attorney General William L. Hadden in 1949. The University of Connecticut was planning to acquire property in the City of Hartford for a School of Social Work and the zone in which the property was located did not permit schools as an authorized use. Citing State v. Shelton, 47 Conn. 400 (1879), the Opinion set forth the general rule that a statute of general applicability does not apply to the State unless there is clear and express language that it was intended to so apply. Since the zoning laws do not contain an express intent to include the State, the Opinion concluded that the property was not subject to the local zoning requirements. See 26 Op. Atty. Gen. 98, 99 (1949).

October 23, 2014
The Honorable James Redeker
Commissioner
Page 3

We are aware of no subsequent legal authority that would cause us to doubt or reconsider that conclusion. As a result, under the first scenario outlined above for the Stamford TOD, the land owned and used for the parking garage is not subject to the City of Stamford's zoning requirements.

The issue of whether local zoning would apply to land owned by the State but leased to private entities – the issue now presented in the third scenario outlined above -- was first addressed in a 1959 Opinion by Attorney General Albert L. Coles. The question there was the applicability of local zoning to a hotel operated by a lessee on land owned by the State at Bradley Field Airport. The Hotel sought a liquor permit, which was prohibited by local zoning. The analysis centered on several New Jersey opinions that held that the lessees who operated ancillary uses on state owned property were exempt from local zoning requirements. Attorney General Coles concluded that:

Therefore, it is my opinion that the airport operation constitutes a governmental function serving the public need and by virtue of its nature is immune to the zoning power of the Town of Windsor Locks. The hotel with a liquor permit would be in furtherance of, rather than a deviation from, the essential airport use and, therefore, exempt from the zoning regulations of the Town of Windsor Locks.

31 Op. Atty. Gen. 102, 104 (1959). This conclusion – that state owned property leased to a private entity in furtherance of a governmental function serving a public need -- has been reaffirmed in two subsequent formal opinions. See 33 Op. Atty. Gen. 38 (1963)(The town of Cornwall's zoning regulations did not apply to state-owned park property that was subject to a potential lease); 86 Op. Atty. Gen. 251 (1986) (commercial property owned by the University of Connecticut and leased to private businesses not subject to the zoning requirements of the Town of Mansfield).¹

Since the opinions addressed both the governmental function involved and whether the private use contributed to that function, it is important to review here exactly how the planned garage in Stamford will serve a public function. Pursuant to Conn. Gen. Stat. §13b-3, DOT is "responsible for all aspects of the planning, development, maintenance and improvement of transportation in the

¹ When the General Assembly has intended that lessees of the State comply with local zoning, it has done so explicitly. See Conn. Gen. Stat. § 13a-80d ("The use of any space on, over or below any state highway right-of-way leased by the Commissioner of Transportation to a lessee shall conform with zoning regulations and ordinances of the local government in which the land is located or as modified by a variance pursuant to legal process.").

October 23, 2014
The Honorable James Redeker
Commissioner
Page 4

state." In addition the Commissioner's powers include the ability to coordinate the efficient use of current modes of transportation, coordinate and assist in the development and operation of mass transit and to "participate, subject to the availability of funds, in transit-oriented development projects at or near transit facilities." Conn. Gen. Stat. §13b-4. Finally, as noted previously, Conn. Gen. Stat. § 13b-79kk provides that the Commissioner can participate in TOD projects to the extent those projects "result in the development or improvement of public transportation facilities."

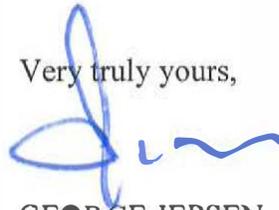
Under the third scenario outlined in your letter, the Station Place Garage will contain a mix of state uses as well as commercial development and retail uses by the proposer. The garage will serve an important governmental function in providing parking to the public who will be using the Stamford rail station. The public will also receive the benefit of up to date replacement garages, additional parking, direct access to the station platforms from the garage, and improvements to the existing roadway. Finally, we understand from your agency and from the text and purpose of the legislation itself that the planned commercial development and retail uses will also support and advance the project's public functions. The legislative purpose in creating TODs is to "facilitate and encourage the use of" rail and bus rapid transit and services. Conn. Gen. Stat. § 13b-79kk. The legislature concluded that, in addition to upgrading existing facilities and services, private development in and around TODs would result in increased employment and commerce, around these centers, thereby facilitating and encouraging increased use of these new public transportation services, with the intent of making them economically viable. We credit your conclusion that the private and commercial development aspects of the Stamford project are intended to advance the important public purposes served by the TOD legislation.

The TOD in Stamford, as you have described it, has been undertaken pursuant to an explicit legislative mandate. In that regard, it demonstrates a clear government purpose with neither explicit nor implicit authority vested in local zoning authorities. Thus, based upon our review of the relevant statutes and related information, it is the opinion of this Office that the property owned by the State and leased to the proposer under the third scenario is not subject to the local zoning requirements.

The Honorable James Redeker
Commissioner
Page 5

In sum, we conclude that local zoning requirements do not apply to the first and third scenarios you have described – where the State owns the land, including when the State leases the land. Local zoning requirement would apply to the second scenario, where the proposer leases the land from a non-state entity or owns the property itself. We trust that this answers your questions.

Very truly yours,



GEORGE JEPSEN
ATTORNEY GENERAL