LAW DEPARTMENT

CITY OF STAMFORD, CONNECTICUT

INTER-OFFICE CORRESPONDENCE

Memo

From:	James Minor, Special Counsel, Law Department
To:	Ralph Blessing, Land Use Bureau Chief Valerie Rosenson, Legislative Officer, Board of Representatives
Re:	C6-40-9 legal questions on petition to Board of Representatives for App. 217-01, Lifetime Fitness
Date:	June 27, 2018

You have asked the following questions on the petition to the Board of Representatives for ZB App. #217-01 (amended text change for definition #45 for gymnasium or physical culture establishment; and the text for a C-D commercial district to allow a gym), filed by Lifetime Fitness.

The questions are as follows:

1. How many signatures are required for the petition to give the Board of Representatives jurisdiction?

2. Who is a landowner? For example in case of a coop or condo, would the coop or condo be the landowner, or would all the individual shareholders be considered landowners? If the property is jointly owned, must both property owners sign?

3. Are the owners of more than one property given more than one vote?

4. What are the consequences of a member of the Board of Representatives participating in a vote or deliberation of the petition after having made a presentation to the Zoning Board?

5. Miscellaneous issues as to how a parcel of land owned by a trust or an estate is counted.

Answer:

1) App. #217--1 is an application to change the text for the definition of a gym (definition #45), which is allowed in seven zones (CD, CN, CG, CI, CCF, ML, and MG). Since the text amendment applies to "two or more zones" (C6-40-9), 300 signatures of landowners are required.

2) If the landowner owns property jointly with a spouse or other person, all persons must sign. If the signature is of an owner of a condominium or co-op, only the condominium or co-op can count as a landowner, and not the signature of the owner of an individual unit.

3) If the owner of multiple properties signs multiple times, each signature is counted. So if John Smith owns two parcels in his own name, he has two votes.

4) If a member of the Board of Representatives made a presentation to the Zoning Board and then participates in any of the proceedings on the petition by the Board of Representatives, the Board's actions will be invalidated.

5) As to how the signatures of a trust or estate are counted, see below.

Discussion:

300 signatures required

App. #217—1, text change application, changed the definition of a gym (definition #45) which is allowed in seven zones (CD, CN, CG, CI, CCF, ML, and MG).

Sec. C6-40-9 is the Charter section that applies to any referral to the Board of Representatives by opponents of an amendment to the Zoning Regulations, other than the zoning Map, after the effective date of the master plan.

C6-40-9 states in pertinent part: "If any such amendment applies to two or more zones, or the entire City, the signatures of at least three hundred landowners shall be required, and such signers may be landowners anywhere in the City."

Who has to sign as the "landowner"

The courts have interpreted Stamford Charter C-60-9 to require all the signatures of land owned by joint tenants or tenants in common to count as one vote, "since those owning the entire interest in property must join to make a valid protest". Woldan v. City of Stamford 22 Conn.Supp. 164 (1960) (change of zone for property located at Elm Street and Shippan Avenue; the court ruled that a signature of only one co-owner, or signatures of some but not all of the life tenants, could not be counted since not all of the property owners signed).

Woldan was cited with approval by the Connecticut Supreme Court in Stamford Ridgeway Associates v. Bd. of Representatives of City of Stamford, 214 Conn. 407, 414 (1990) ("It is also clear from Woldan v. City of Stamford, 22 Conn.Sup. 164, which interpreted section 552.2 of the Charter [*the predecessor to Sec. 6-40-9*], that **all of the**

property owners of a specific piece of property must sign the petition for their land to be counted in determining whether either twenty percent requirement is met").

There are many decisions that construe Sec. 8-3(b), CGS, which allows protest petitions to be filed against a zone change, if the requisite number of signatures are signed. If the protest is effective, then a requirement that a supermajority of the land use board is triggered to pass the zone change.

These decisions require that **all owners of land sign a petition in order for the protest to be counted**. Warren v. Borawski, 130 Conn 676, 681 (1944) ("[A] cotenant is not an 'owner' ..., those owning the entire interest in the property must join in order to make a valid protest"); Civitello v. Milford Planning and Zoning Board 1990 WL 289549 ("it is settled law that, to be counted, a protest must be signed by all of the owners or tenants in common"); Colby Associates v. East Haven Planning and Zoning Commission 1993 WL 224989 (since husband signed but wife did not, his signature could not be counted on protest petition).

Where there is more than one owner of a lot, such as a husband and wife jointly owning a lot, those owning the entire interest in the property must jointly object to the change. Fuller, 9 Conn. Prac., Land Use Law & Prac. § 4:2."Vote required; protest petitions" (4th ed.).

The requirement that all of the owners sign a petition in order for the protest to count has been stated in past opinions of the Stamford Law Department.[1]

Attorney Robert Fuller in his opinion dated April 25, 1985, on issues arising out of petitions filed after the 1985 comprehensive re-zoning, stated at p. 2:

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[1] The opinions of the Law Department (and for three letters, outside counsel Attorney Robert Fuller) that I could find on petitions from a zone text or master plan change that were the subject of a referral to the Board of Reps:

1) Opinion dated 4.14.14 on the Murphy petition, Saddle Rock Road, with Exhibits A-E (PDF 1-6 with Exhibits A-E)
2) Opinion dated 1.19.00 on the validity of a signature of the treasurer of a corporation is valid, AJM #24
3) Opinion dated 5.18.90 on issues about "privately-owned land" and signatures of Greenwich residents for a zone map petition, MES-#176
4) Outside counsel attorney Fuller opinion dated April 26, 1985 on issues arising out of petitions filed after the 1985 comprehensive re-zoning
5) Attorney Fuller opinion dated April 25, 1985 on issues arising out of petitions filed after the 1985 comprehensive re-zoning (PDF 34-35, missing last page)
6) Attorney Fuller opinion dated April 22, 1985 on issues arising out of petitions filed after the 1985 comprehensive re-zoning
7) Opinion dated Feb 26, 1985 on petitions for Master Plan change, JHS-#52
8) Opinion dated March 15, 1992 on petition on zone change, LEC-#195
9) Opinion dated December 2, 1974 on petition on zone change, JEF-#85

"This leads to the further question of whether all the owners of a particular parcel within the zone change must sign the petition in order to be included in computing the 20%...it is my opinion that the better position is that all of the owners of each separate parcel, no matter what its size, must sign the petition in order to count as an "owner". In other words, owners of only a fractional interest in a parcel do not get a separate vote. Woldan vs. City of Stamford, 22 Conn. Supp. 164, 166, citing Warren vs. Borawski, 130 Conn. 676, 681."

(Fuller, opinion dated April 25, 1985, p.2)

Attorney Fuller states the same in his earlier opinion dated April 22, 1985:

"It is also clear from Woldan v. City of Stamford, 22 Conn. Supp. 164, which interpreted section 552.2 of the Charter [*the predecessor to C6-40-9*], that all of the property owners of a specific piece of property must sign the petition for their land to be counted in determining whether either twenty percent requirement is met."

(Fuller, opinion dated April 22, 1985, p.5)

This principle was also stated in the opinion dated March 15, 1982 from the Law Department to the Planning & Zoning Committee of the Board of Representatives:

"It is our opinion that the analysis of the terminology "owner" as used in the case of Warren v. Borawski, 130 Conn. 676 (1944) and the rationale employed therein requiring those owning the entire interest in the property in question to sign a petition in order to support a valid protest are equally applicable to the present referral pending before your Committee. Moreover, the Court in the case of Woldan v. Stamford, 22 Conn. Sup. 164 (1960) addressed an analogous situation when dealing with the referral process under Section 552.2 of the Charter of the City of Stamford as follows:

> "within the meaning of the ordinance involved in this case, those owning the entire interest in the property must join to make a valid protest. With the exclusion of those properties jointly owned and owned by tenants in common, the petition did not contain the signatures of owners of 20 per cent of the land within 500 feet... For the purpose of this case, all owners of land held in life tenancy must also join. Therefore, the matter was not properly before the board of representatives." 22 Conn. Sup. at 166-167. (emphasis in the original)"

(Opinion dated March 15, 1992 on petition on zone change, LEC-#195, p.1)

In sum, as held in two Connecticut decisions, and stated in the three opinions mentioned above, and Fuller's zoning treatise, **all owners of a parcel of land must sign for that protest to be valid**.

Condominium owners

As to the owners of a condominium, only the condominium association can sign as a "landowner".

C6-40-9 states that "If any such amendment applies to two or more zones, or the entire City, the signatures of at least three hundred **landowners** shall be required."

A condominium owner does not own the land upon which the condominium is built. The unit owner, in common with all the other condominium owners, owns a fractional interest in the building and land, and has no authority to sell or mortgage the land on which the condominium building stands.

In Jennings v. Borough of Highlands, 418 N.J. Super. 405, 13 A.3d 911 (App. Div. 2011), only the Condominium association, rather than owners of individual condominium units in a building with common areas near a mobile home park, was the "owner of lots or land" near the park, for purposes of determining whether protest petition signed by unit owners triggered the requirement that ordinance be passed by a supermajority of the borough governing body, since unit owners did not own the common areas outright and did not enjoy the full measure of protest.

In Gentry v. Norwalk, 196 Conn 596 (1985) the Supreme Court ruled that condominium owners had no more than a fractional vote on the issue of creation of an historic district involving the Norwalk Green. The statute setting forth the procedure for counting votes is Section 7-147b (g), which states that "[a]ny tenant in common of any freehold interest in any land shall have a vote equal to the fraction of his ownership in said interest. Joint tenants of any freehold interest in any land shall vote as if each joint tenant owned an equal, fractional share of such land. . .."

The Supreme Court held that despite the fact that a condominium owner can sell or mortgage a condominium unit as if it were the equivalent of any piece of property, and each unit is taxed as if the unit is any other parcel of real estate, the unit does not get a more than a factional vote. So in Gentry, each condominium unit owner received a factional vote of 1/67th of a vote, since there were 67 units.

> "The Supreme Court of Connecticut held that for purposes of voting on creation of a historic district, each unit owner within a condominium was entitled to a vote proportionate to his freehold interest in the building and land rather than one vote each. Gentry v. City of Norwalk, 196 Conn. 596 (1985)... Conn. Gen. Stat. Ann. § 7-147b(g), ... refers [to] "freehold interest in any land." Finding that "land" means the parcel and physical improvements thereon, the court ruled that while each unit owner's undivided interest in the common areas of the condominium is freehold in nature, each owner nevertheless possesses less than all the freehold in that property. Therefore, each unit owner is entitled to a vote

proportionate to his freehold interest in the "land," which in this case was 1/67 of a vote." 3 Rathkopf's The Law of Zoning and Planning § 43:11 (4th ed.)

If one person signs as the owner of lot A and again as the owner of lot B

If the owner of two properties signs two times, as the owner of lot A and then as the owner of lot B, each signature is counted.

This is consistent with past practice, and there is no restriction that limits the owner of more than one piece of land to one vote.

Sec. 8-11, CGS disqualification

Sec. 8-11, CGS requires that any member of the Board of Representatives who made a presentation for or against the Lifetime text change at the public hearing before the Zoning Board should not participate in any of the proceedings before the Board of Representatives.

> Sec. 8-11. Disqualification of members of zoning authorities. No member of any zoning commission or board and no member of any zoning board of appeals or of any municipal agency exercising the powers of any zoning commission or board of appeals, whether existing under the general statutes or under any special act, shall appear for or represent any person, firm, corporation or other entity in any matter pending before the planning or zoning commission or board or said board of appeals or any agency exercising the powers of any such commission or board in the same municipality, whether or not he is a member of the board or commission hearing such matter. No member of any zoning commission or board and no member of any zoning board of appeals shall participate in the hearing or decision of the board or commission of which he is a member upon any matter in which he is directly or indirectly interested in a personal or financial sense. In the event of such disqualification, such fact shall be entered on the records of the commission or board and, unless otherwise provided by special act, any municipality may provide by ordinance that an elector may be chosen, in a manner specified in the ordinance, to act as a member of such commission or board in the hearing and determination of such matter, except that replacement shall first be made from alternate members pursuant to the provisions of sections 8-1b and 8-5a.

In Luery v. Zoning Board of the City of Stamford, 150 Conn. 136, 146 (1962), the AMF property, a 39 acre tract of land, was rezoned from RA 1 to a CD, Designed Commercial District. The appeal was dismissed. One claim of error was whether Robert Trudel, a member of the Stamford ZBA, who testified before the Zoning Board in support of the zone change, as Executive Vice Chairman of the Citizens Action Council for the Improvement of Stamford, violated Sec. 8-11, CGS. The Supreme Court held that Mr. Trudel violated Sec. 8-11, CGS.

In Schlesinger v. Board of Representatives, (2/24/77 Belinkie, J) the Board of Representatives reversed a zone change granted by the Zoning Board, from R 10 to R 5, to allow an apartment house. This decision was reversed by the court, because of the actions of Edith Sherman, a member of the Board of Representatives. Edith Sherman opposed the application before the Zoning Board and the Board of Representatives Committee. She participated in the Board of Representatives decision, not by voting, but by requesting a roll call vote. This action was enough to cause the court to find that Edith Sherman violated Sec. 8-11, CGS, and to reverse the Board of Representatives decision on the petition. This court decision re-instated the zone change by the Zoning Board.

> "Where an agency member has a conflict of interest, it is improper for him to participate in discussion on the application even though he did not vote on the final proposal... While voting on the application would clearly be illegal participation, other actions such as discussing it privately with other agency members or participation at the agency's decision making session is also improper.... In one case, the fact that an ex officio member of the commission only asked questions, at the public hearing, but did not vote on an application in which he had a personal interest still amounted to illegal participation, which invalidated the commission's decision." Fuller, 9B Conn. Prac., Land Use Law & Prac. § 47:3 (4th ed.)

Therefore, any member of the Board of Representatives who testified for or against the application before the Zoning Board should not participate in any proceeding of the Board of Representatives on the petition.

Issues of how the term "landowner" is interpreted for a trust or estate

Question- How is the owner of a trust counted, if the signature does not identify the capacity in which the person is signing, e.g. – Valerie T. Rosenson Revocable Living Trust and the Co-Owner is the Jim Minor Revocable Living Trust, but the signatures are just Valerie Rosenson and Jim Minor

Answer - It counts- if the property is identified on the tax records as being owned by those two individuals as co- trustees, it counts, even if the persons didn't add "as co-trustee". Civitello v. Milford Planning and Zoning Board 1990 WL 289549 ("With respect to the protest of Clarence Smith, who holds title as a trustee... a trustee does have title to the property and has complete right to sell, mortgage or otherwise dispose of the real estate, including the right to protest as owner, whether or not the word "trustee" is used. See Conn.Gen.Stat. § 47-20.")

Q- What of a signature that is a trust with other types of trusts listed as the owner – e.g. Valerie Rosenson signing for a) the Harriet Rosenson Revocable Trust b) the Jim Lunney Descendants' Separate Trust and c) the Valerie Rosenson and Jim Lunney Trust

A- It counts- If the protest is signed by one person, as authorized agent for all of the trustees that own the property, then that vote counts.

Q - I have owners listed as Estates such as Valerie Rosenson signing, with the owner listed as the Estate of Harriet Rosenson

A- Doesn't count- a person who signs his or her name, and doesn't sign as the authorized agent for the Estate, doesn't count. If only some but not all of the representatives and heirs sign, then the vote does not count. To count, the person must sign as the authorized agent for the estate, or all of the representatives and heirs must sign, for the vote to count. **Warren v. Borawski**, 130 Conn. 676, 682 (1944) ("... the weight of authority denies a personal representative the right to sign a petition for improvements on the basic ground that he does not have title and has possession of the real property for the limited purpose of settling the estate... With regard to an executor or administrator, as in the case of a cotenant we conclude that it is more practical and logical to hold that he is not an 'owner' within the meaning of the ordinance. ... of six heirs, two, who were executrices, signed. Nothing is said with reference to their relationship to the estate or the wishes of the four other heirs, who signed neither personally nor by agent. The trial court was not in error in concluding that the executrices were not owners within the meaning of the ordinance.")