

KEHOE & MERZIG, PC

ATTORNEYS AND COUNSELORS AT LAW

SUITE 202 - 8-12 DIETZ STREET

ONEONTA, NEW YORK 13820-1849



DAVID S. MERZIG

JOSEPH F. KEHOE
(of Counsel)

(607) 432-4242

info@kehoemerziglaw.com

January 27, 2020

Town of Richfield
Nick Palevsky, Supervisor
Town of Richfield
P.O. Box 786
Richfield Springs, NY 13439

RE: Analysis of Zone Change Protest Petitions

Dear Mr. Palevsky,

I have been asked to provide you and the Town Board with an independent analysis of the zoning protest petitions submitted with regard to the proposed zone change in the Town from "Residential, Agricultural and Commercial, (RAC)" to "Agricultural, Residential (AR). I will be reviewing them as to the numerical calculations used and, of necessity, whether the methodology was consistent with the provisions of both the statutes and the case law of the State of New York. I am making this analysis and legal opinion based both upon my qualifications as an attorney admitted to practice law in the State of New York continuously for more than forty (40) years, and as a municipal attorney for more than thirty (30) years.

DOCUMENTS.

I have been provided copies of: Protest Petitions which were submitted to the Town Clerk; the Richfield Draft Zoning Map; "Withdrawal" Petitions; Minutes of the Richfield Town Board Special Meeting dated September 30, 2019; and what appears to be an "Excel" type spreadsheet, apparently obtained from the Town Clerk, initialed "MY", and dated "12-23-18" with the notation, "Given to Nick Palevsky". I am analyzing the petitions and information related thereto using those data.

The spreadsheet will be used as the basis for comparison in my analysis, on the presumption (as reflected in the Town Board Minutes), that it was used by the prior Board to determine that there were insufficient Petitions signed to require a "supermajority" vote to implement the new zoning law. NOTE: The spreadsheet does not state who prepared it, when it was prepared, the source of the information, nor who performed the calculations set forth on it. It is not signed, nor does it appear to ever have been filed, stamped and received by the Town Clerk

prior to its use at the Town Board meeting where the data was used and relied upon by the Board in their action on the zoning law revision. Any or all of these issues, depending upon the answers to the questions raised by the absence of information on the record, could have a direct impact upon the validity of those data, or upon their legality as a legal basis for the vote that was taken by the Town Board on September 30, 2019. All that being said, my analysis of the petitions will proceed using the documents provided.

Unfortunately, there can be no analysis of the petitions or their sufficiency in a void. They can only be evaluated within a context of the requirements of New York State statutes and how they have been interpreted by the Courts of the State of New York.

“WITHDRAWN” PETITIONS.

It appears that at no time was there any dispute by the Town, (or any other person, for that matter), as to the form of the Petitions themselves. There is a question, however, regarding the validity of documents entitled “Zoning Change Protest Petition Withdrawal”, which purport to “withdraw” some 609.03 acres of land from earlier signed and filed Protest Petitions. If the withdrawals were submitted and received by the Town Clerk and accepted by her prior to the vote of the Board, then such acreage should not be included in the calculations. While it has been determined that the withdrawal of a protest can be accomplished by a petitioner, the withdrawal must be submitted and filed with the Town Clerk prior to the vote by the Town Board (see, *Maione v. Town of Clarkstown* 94 A.D.2d716,1983). There is nothing in the documents submitted to me to indicate when the purported withdrawals were submitted to the Clerk, or by whom. The minutes of the Special Meeting, simply state that they were “withdrawn.” This is a point that, regardless of my opinion, should be raised, if this matter is ultimately contested in Court.

THE PROTEST PETITIONS.

Again, based upon the Minutes and the Spreadsheet submitted by the Town Attorney, there does not seem to be any dispute or objection as to the accuracy or sufficiency of the form of the Protest Petitions, the names of the owners of the land, or of the acreage reflected in those petitions. As such, my analysis will also presume that those items are correct. The Town Clerk has calculated the acreage addressed in the Petitions as including a total of 5,619.70 acres. This number would then be reduced upon the elimination of acreage based either upon the invalidity of signatures, the location of the property, or upon the prior filing a valid withdrawal.

THE TOTAL ACREAGE OF THE ZONE CHANGE.

In my opinion, it was impossible for the Town Board to have accurately determined the total number acres involved in the zone change, as required by statute, prior to their vote, by relying upon the documents as they are preserved in the Town records. The number of acres affected by the zone change had to be accurately calculated before the Board could even determine whether or not owners of more than 20% of the property within the impact zone of the

new law had filed protest petitions. The new Agricultural Residential District did not cover the entire Town. In determining the affected acreage from the total acreage of the Town, not only did the acreage of the Village of Richfield Springs have to be removed, but the total acreage of every other Zoning District within the Town should have been removed from the calculations, in order to determine the correct denominator of the fraction necessary to determine what a total of 20% of that acreage was. This was not done. If the notation on the spreadsheet is accurate, the calculations were made by simply deducting the Village acreage from the Town's entire acreage. That is in direct violation of the requirements of Town Law §265. In the absence of that correct number to begin with, determining whether there were sufficient protest petitions is impossible and was certainly not accurate as shown on the record of the Town.

AUTHORIZED SIGNATURES OF PROTEST PETITIONS.

The Town Law does not set forth a narrow set of criteria for who may sign a protest petition for the purpose of requiring a super majority vote on a zone change. It simply states that "owners" must sign. Both the Courts and the New York State Attorney General have determined that one "joint" owner, may sign for all joint owners, and further that no resolution or any other supporting documentation is needed for the president of a corporation to sign a protest petition for this purpose [1989 N.Y. Op. Atty. Gen. (Inf.80)]. The Attorney General states in that opinion, "...in determining 'owners' of property for the purpose of section 265, the town board should consider fee owners to the exclusion of owners of leasehold or remainder interests." A copy of that opinion is attached to this letter for your review.

Here the Town Board excluded every signature of every parcel owned by a Limited Liability Company, (LLC), petitions signed by co-owners, duly appointed Executors of estates, and any other parcel where more than one owner was on the tax assessment rolls but not all of those persons signed. It is my opinion that many of the rejected petitions were, in fact, valid, as having been signed by the "owners" of real property within the affected area, and were improperly excluded from the calculations to determine the validity of the protest petition.

CONCLUSIONS.

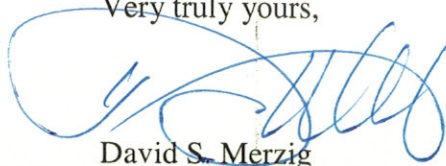
Based upon the analysis and report above, I have concluded the following:

1. The documents in the records of the Town regarding the petitions and their analysis are limited, and as prepared, submitted and retained, make it virtually impossible to independently evaluate the timeline or the process used by the Town Board in evaluating the sufficiency of the Protest Petitions. It is unclear how the documents used by the Board in their vote were prepared, when they were prepared, and at whose direction. It is clear however, that they are inaccurate on their face, and were never provided to the public for review prior to their use by the Town Board at the September 30th meeting.

2. The initial determination of the total number of acres of land affected by the proposed zone change was incorrect, and larger than the actual acreage which should have been used by the Town Board in their review of the Protest Petitions. A reduction of the acreage by all of the other Zoning Districts in the Town would have had to be made prior to any calculation. In the absence of this number, any other calculation thereafter was inaccurate, placing the entire issue in doubt.
3. Many of the signed protest petitions, which, in my opinion, were valid, were not accepted by the Board. The Town Law does not exclude LLC's, Limited Partnerships or tenants in common from protesting zoning changes under the statute.
4. Some Petitioners may have validly withdrawn their protest petitions, but in the absence of some record showing that the withdrawals were filed with the Clerk prior to the action of the Town Board, those records should not have been deducted from the calculation used.

In summary there were significant and substantial procedural and factual errors in the process and in the determination by the Town Board as to whether or not there were sufficient protest petitions to require a super majority vote to change the Zoning Law in the Town of Richfield. In my opinion, such errors, if reviewed by an appropriate court, would likely result in that court either voiding the entire statute as adopted, or requiring a more complete and accurate evaluation of the entire process underlying the Town Board's determinations related to the protest petitions filed and their determination that there were insufficient petitions filed to require a super majority vote by the Town Board in order to pass the new zoning law.

Very truly yours,



David S. Merzig

DSM/csp

1989 N.Y. Op. Atty. Gen. (Inf.) 80 (N.Y.A.G.), 1989 WL 435003

Office of the Attorney General

State of New York
Informal Opinion No.

89

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April 7, 1989

BUSINESS CORPORATION LAW, § 715(g); TOWN LAW, §§ 191, 265; VILLAGE LAW, § 7-708.

*1 A single joint tenant's signature is sufficient to constitute a vote on behalf of the jointly owned property for purposes of a protest petition under section 265 of the Town Law; a town board may accept a corporation president's signature on behalf of corporate-owned property for purposes of section 265, when there is no indication that the president's powers are limited; and in determining "owners" of property for purposes of section 265, the town board should consider fee owners, to the exclusion of owners of leasehold or remainder interests.

Kevin B. Dwyer, Esq.
Town Attorney
Town of North Salem
Town Hall
North Salem, New York 10560

Dear Mr. Dwyer:

I am writing in response to your request for an Attorney General's opinion as to the validity of particular signatures on a petition pursuant to section 265 of the Town Law protesting a change in the town zoning regulations.

The Town Law provides that the town board may amend, supplement, change, modify or repeal its zoning regulations by enacting ordinances, passage of which requires a simple majority vote (Town Law, § 265). If a protest against the change is made by at least twenty percent of the landowners affected by the change,^{al} the amendment will not become effective unless approved by a three-fourths majority of the town board (*ibid.*).

The materials submitted with your letter indicate that a developer had petitioned the town for a change in its zoning regulations to allow a particular type of development which was not permitted. Prior to the vote on the rezoning, a protest petition, purportedly containing the requisite number of signatures to require a supermajority vote, was submitted to the town board. The petition for rezoning was not passed, inasmuch as it failed to receive a supermajority. The developer has now challenged the validity of certain signatures on the protest petition.

Your initial question arises out of a parcel of land, included among those affected by the rezoning, which is owned jointly by a married couple. The wife signed the protest petition in her own name and also signed her husband's name. You have asked whether the wife's signature on behalf of her husband is good and valid for purposes of the protest petition.

Inasmuch as the wife's signature of her own name is sufficient to constitute a vote on behalf of the parcel, the issue of the validity of her signing on behalf of her husband need not be addressed. Joint tenants hold "per my et per tout", or by the half and the whole (*Moskowitz v Marrow*, 251 NY 380 [1929]). This means that each joint tenant is entitled to full use and enjoyment of the entire property and may act and transact business as if he or she

were the sole owner (24 NYJur2d, Cotenancy and Partition, § 21; Matter of Lorch, 33 NYS2d 157 [Queens Co, Surrogate Ct, 1941]). With regard to alienation or forfeiture of the property, however, the joint tenant has only the appropriate fractional interest (ibid.). Because a joint tenant has a full, undivided interest in the property, a vote for a challenge under section 265 would count for the entire parcel of land and not some fraction based on the number of joint tenants (see Matter of Reister v Town Board, 18 NY2d 92, 95 [1966] [effect of joint tenant's vote in special district election]; 1987 OpAttyGen [Inf] 170 [effect of joint tenant's vote in rezoning protest petition pursuant to Village Law, § 7-708]).

*2 You have also asked whether the signature of the president of a corporation is sufficient for purposes of the petition when there is no recitation within the petition as to the president's authority to bind the corporation. The powers and duties of corporate officers are determined by the corporation's by-laws (Business Corporation Law, § 715[g]). In order definitively to establish whether the president has authority to bind the corporation under section 265, it would be necessary to review those by-laws. We conclude, however, that it is not necessary for the town board definitively to establish the source of authority for corporation presidents who sign protest petitions under section 265. It is well established that a party entering a transaction with a corporate officer has a right to rely on the apparent authority of that officer to act on behalf of the corporation (Goldenberg v Bartell Broadcasting Corp., 47 Misc2d 105, 112 [SupCt, NY Co, 1965]). Corporate officers, by necessity, are given broad powers to transact business on behalf of the corporation (McDuffie v Financier Co., 135 AppDiv 307, 310 [1st Dept, 1909]; Powers v Schlicht Heat Co., 23 AppDiv 380, 382 [1st Dept, 1987], affd 165 NY 59 [1901]). With these broad powers in mind and in the absence of any indication that the president lacked such authority, it was not unreasonable for the town board to accept the president's signature on behalf of the corporation.

Section 265 provides that property which is "immediately adjacent" to the area being rezoned is to be used in determining those eligible to sign the protest petition. Your letter indicates that one of the parcels contiguous to the rezoned area has a driveway easement running over that part of it which abuts the rezoned area. The question is whether the driveway easement prevents this parcel from being considered "immediately adjacent" for purposes of section 265.

The presence of a driveway easement over a parcel of property does not alter the ownership of the underlying parcel. We believe that the owner of this underlying parcel is the adjacent owner for purposes of section 265. Section 265 refers only to "owners". It contains no more specific statement as which property interests, such as fee owner, easement owner or remainder interest owner are eligible for participation in the challenge process. The procedure for establishing special districts under article 12 of the Town Law provides a similar standard for voter eligibility and allows for a helpful analogy. Section 191 of the Town Law refers only to "owners of taxable real property" and "resident owners owning taxable real property".^{a2} As in the language of section 265, the statute does not mention any lesser ownership interests such as easements or leaseholds. In a 1981 opinion interpreting this section, we found that section 191 authorizes the fee owners of property to vote in the election, to the exclusion of leaseholders (1981 OpAttyGen [Inf] 89, 91). Following this precedent, and in the absence of any special or limiting language, we believe that use of the word "owner" in section 265 is in its normally understood sense, and would apply to the owner in fee of the property. (See also, 1987 OpAttyGen [Inf] 170 [fee owner considered owner for purposes of rezoning protest petition procedure under section 7-708 of the Village Law].) It is this person who is eligible to vote for a protest petition under section 265.

*3 Finally, you have asked what type of inquiry into the validity of the petitions is appropriate by the town board. The Town Law provides no guidelines in this regard. The question does not lend itself to a generalized answer because the type of inquiry will depend on the type of information being presented, which, as the issues discussed above indicate, differs from case to case. If an irregularity is called to the attention of the board, it should be addressed and resolved.

We conclude that a single joint tenant's signature is sufficient to constitute a vote on behalf of the jointly owned property for purposes of a protest petition under section 265 of the Town Law; a town board may accept a corporation president's signature on behalf of corporate-owned property for purposes of section 265, when there is no indication that the president's powers are limited; and in determining "owners" of property for purposes of section 265, the town board should consider fee owners, to the exclusion of owners of leasehold or remainder interests.

The Attorney General renders formal opinions only to officers and departments of the State government. This perforce is an informal and unofficial expression of views of this office.

Very truly yours,

Patrick Barnett-Mulligan
Assistant Attorney General

Footnotes

- a1 Those eligible to protest any amendment are defined in the following way:
"In case, however, of a protest against such change signed by the owners of twenty per centum or more, either of the area of the land included in such proposed change, or of that immediately adjacent extending one hundred feet therefrom or of that directly opposite thereto, extending one hundred feet, from the street frontage of such opposite land, such amendment shall not become effective except by the favorable vote of at least three-fourths of the members of the town board" (Town Law, § 265).
- a2 The relevant language of the section reads as follows:
"Except as otherwise provided in the case of a water storage and distribution district, water quality treatment district or sewage disposal district, such petition for the establishment or the extension of an improvement district shall be signed by the owners of taxable real property situate in the proposed district or extension thereof, owning in the aggregate at least one-half of the assessed valuation of all the taxable real property of the proposed district or extension thereof, as shown upon the latest completed assessment-roll of said town; provided, however, that if there be any resident owners, the petition shall include the signatures of resident owners owning taxable real property aggregating at least one-half of the assessed valuation of all the taxable real property of the proposed district or extension owned by resident owners, according to the latest completed assessment-roll" (Town Law, § 191).

1989 N.Y. Op. Atty. Gen. (Inf.) 80 (N.Y.A.G.), 1989 WL 435003