LAND USE AGENCIES OVERVIEW

TOWN OF WILTON

Ira W. Bloom, Esq.
Peter V. Gelderman, Esq.

BERCHEM MOSES, P.C.
1221 Post Road East
Westport, CT 06880
Ira: (203) 571-1715
Pete: (203) 571-1720

e-mail: ibloom@berchemmoses.com
e-mail: pgelderman@berchemmoses.com

www.berchemmoses.com

January 24, 2024

LAND USE REGULATION

A member of the Planning and Zoning Commissions (PZC) and a member of the Zoning Board of Appeals (ZBA) exercises extraordinary responsibility in our system of government. Your commission or board deals directly with the most basic of rights over private property. Your Planning and Zoning Department staff, as well as our Town Counsel office, are here to assist you in your deliberations. Other resources are available in the Planning and Zoning office, including the well-regarded treatise on land use by Robert Fuller and Michael A. Zizka's ″What′s Legally Required?″

Land use law balances the rights of property owners versus the powers of the state in order to protect the health, safety and welfare of our citizens. Your authority comes directly from the state statutes, along with a body of case law which has interpreted the statutes. Your actions are further governed by the U.S. Constitution, by federal laws, and, of course, our own Zoning Regulations. Please keep the Regulations handy, as it will become the most well-read book in your household!

NOTICE

Proper legal notice is a prerequisite for P&Z and ZBA hearings. Legal notice must be published in one of the local newspapers have sufficient circulation in Wilton. Failure to publish the notice is a jurisdictional defect. Our Regulations also require in most applications that notice of the hearing be mailed to property owners.

PARTICIPATION/ATTENDANCE

It is important for each Board or Commission member to attend all meetings. When it is impossible to attend, members must make contact with the Chairman or staff and see that an alternate is available. If a member misses one session of a particular application, he/she has the option of listening to the tape/video of the earlier session, reviewing the record, and then participating in the deliberations.

TIME REQUIREMENTS

A site plan application must be decided within sixty-five days after receipt. If the Commission fails to do so, the site plan is automatically approved. The P&Z must also decide a subdivision application within sixty-five days after receipt. Special permit applications to the P&Z, as well as variance applications to the ZBA, require decisions within sixty-five days. If a public hearing is held on an inland wetlands application for a regulated activities permit, it must be decided within thirty-five (35) days after the completion of the public hearing per Conn. Gen. Stat. §22a-42a(c).

The board must determine if an application is complete and if it should go forward with the hearing. Because of the time restrictions above, sometimes a board must either assist the applicant

in completing the application or deny it without prejudice.

Public hearings on applications to zoning commissions, ZBAs and inland wetland agencies must be completed within thirty-five days after the hearing commences.

CONFLICT OF INTEREST

When a commission or board reviews an application, each member must determine whether he or she has a conflict of interest which might disqualify them from participating in consideration of the application. There are statutes which prohibit participation if a member has a personal or financial interest in the issue (Conn. Gen. Stat. §8-11 and §8-21; for Conservation, §22a-42(c)). Beyond these statutes, many conflict issues result in individual judgments. A Board member should not appear for or represent any person, corporation or entity (including a neighborhood association of which they are a member) in any matter pending before the ZBA or PZC. This applies whether or not the member is paid for the representation. If a member decides to recuse himself or herself, that fact should be noted on the record.

Section 7-148t bars any member of a commission or board exercising any power over any municipal land use decision from appearing for or representing anyone before that agency or participating in any decision of it in which the agency member knowingly has pecuniary interest.

There are some cases which are clearly conflicts. If the applicant is one of your business partners, that is an obvious one. If you have an ongoing personal or business relationship – for instance, suppose you do regular, ongoing business with a catering company, which now appears before you – that would be a conflict on interest. A relative, or your neighbor appearing would be an easy example. But many examples are not that clear: The mere fact that you have dined in a restaurant once or twice a year would not normally be a reason to abstain if the restaurant owner appears before you. What if it was not you who had the relationship, but your spouse? The prudent approach is to abstain if in doubt. You have highly competent alternates to step in, and you do not want to take a chance of jeopardizing the Commission′s action. Don′t forget, a conflict of interest can be a ground for an appeal. My informal rule is this: ″If you have to think about it for more than 30 seconds, you should probably recuse yourself.″

Often it is not the actual conflict, but the appearance of conflict. That appearance can cause a problem also. The cases say that in determining whether there is a conflict of interest, an *appearance* of impropriety is enough to undermine public confidence. It is up to the individual to decide what he/she has a conflict. It is not up to the Town Counsel, the Town Planner or the Commission. *But remember that the decision you make can impact or jeopardize the Commission decision.* A court finding of prejudice or bias could cause reversal of the Commission's action. Feel free to contact us at any time. It is less embarrassing to work this out in advance than to have the discussion during the meeting.

BIAS AND PREDETERMINATION

Predetermination is not based upon a specific statute, but rather a finding that a member (or the entire commission) has made up its mind and essentially decided the application before the public hearing. A member should not take a public position on a matter which is about to come before the Board. Similarly, it is prudent to avoid comment on a matter which you reasonably suspect may come before your board. This means avoiding letters to the editor and other public comments. This does not mean that you are expected to have no opinions on anything. However, it is important to avoid comments which suggest that you have made up your mind before the conclusion of a particular application. It is also important to keep an open mind on a particular topic. It is understood that you may have familiarity with a particular property or issue, and you may use this information as part of your deliberations, but it is best to allow the applicant and public a full opportunity to speak and rebut any information gained outside the hearing room. In one case a finding of predetermination was found where the actions of the chair of the commission ″imperiled the open-mindedness and sense of fairness which a zoning official in our state is required to possess in order to participate″ in the decision-making process. Johnson v. Stafford Planning & Zoning Commission, Super. Ct. No. CV 91-47170S, J.D. of Tolland (1993) (Booth, J.).

REHEARING

Sometimes an applicant will return again after a denial. The PZC is not required to hear a petition relating to a proposed change in a zoning regulation or zoning map if it has heard a petition relating to the same within the previous year. The PZC is not required to consider a subdivision application if another application for subdivision of the same or substantially the same parcel is pending before the Commission. This does not mean that the Zoning Commission cannot hear the application; it means that it is not required to do so.

The ZBA is not required to hear any application for a variance if an application for the same or substantially the same variance was decided within the previous six months.

Ordinarily, a commission or board considering an application substantially similar to the previous one should not reverse its earlier decision unless there has been some material change in conditions or circumstances.

PUBLIC INSPECTION OF DOCUMENTS

Under the Freedom of Information Act, all records maintained by Zoning Boards of Appeals and Planning & Zoning Commissions are public records, and the public has the right to inspect such records promptly during regular office business hours or to receive a copy of such records. Any memos passed on to the staff become part of the public file. Communications to or from the Town Counsel may be privileged. Please note also that emails may be seen by others. You should assume anything you write or submit goes into a public file. While an application is pending, you should not communicate by email with members of the public regarding any aspect of the application. You should also not email your other board members about a pending application.

THE SITE VISIT

Often the Board or Commission members will view the property involved in the application before the hearing. These are usually arranged by the P&Z staff. Evidence acquired by personal observations can be considered as part of your deliberations. During such site visits, it is best to avoid discussion at the site, saving such discussion for the public hearing. It is usually best to be accompanied by a member of the P&Z staff. It is often best to discourage attendance by the applicant or the applicant's representative.

THE PUBLIC HEARING

It is important that all interested parties and citizens be permitted to participate in the public hearings. Basic fairness and due process applies, although court rules and strict rules of evidence do not apply. This includes inspection of any documents and plans presented at the hearing in connection with the application.

THE RECORD

All written reports and comments received by the Commission at or prior to a hearing should be included in the official record. There are no evidentiary rules which apply. In addition to the official reports or comments solicited from other commissions, municipalities or regional planning agencies, the record should contain all correspondence and testimony from municipal personnel and officials. Usually the Town Planner will submit a long list of materials. For example, information from health departments, engineers, police and fire officials and any technical or scientific experts and any other information presented to the Commission in connection with the application should be included in the record.

When a commission member intends to use his or her own expertise or personal knowledge of a site as basis for a decision, he or she should disclose that expertise or knowledge at the public hearing. The disclosure helps protect the record and apprises those concerned with the application of the factual basis for the decision. Interested parties therefore have a chance to respond or rebut or provide their own expert.

EX PARTE COMMUNICATIONS

Board and Commission members should not discuss a pending application except at a public hearing where all parties have an opportunity to participate. Discussions with interested parties held outside the public hearing are known as *ex parte* communications and are regarded suspiciously by the courts. Caution should be exercised during any "breaks" in hearings. Sometimes an applicant or member of the public will use that opportunity to speak to you. This should be avoided. If you should see an applicant at, for example, the movies, you should avoid conversation except for pleasantries. (This does create the risk that you will be viewed as unfriendly, but that is the price you pay for taking this job!)

TAPE RECORDING/VIDEO

Boards and commissions are required to have an audio recording made of each hearing in which the right of appeal lies to the superior court. Video is often used today. Work sessions will also now be recorded. It is important that all members speak into the microphone and identify themselves before they speak. All applicants and citizens should also be requested to speak into the microphone.

POST-HEARING INFORMATION

Information received after the public hearing should not be permitted in the official record. Receiving anything after the public hearing has closed is risky. If further information is needed, the better approach is to keep the hearing open for the further information and then give all parties the opportunity to review the information and comment on it when it is available.

VOTING

In general, in order to vote, a quorum must be present. In general, a majority of the quorum is required to reach a decision. There are certain special voting requirements. Zoning regulations and boundaries may only be adopted or amended by a majority vote of the total authorized number of members even if there are currently vacancies on a board. If residents lodge a "protest" with the commission protesting a proposed zone or regulation change, the change requires a two-thirds vote of all the total authorized number of commission members. A "protest" is a petition signed by property owners of 20 percent or more of the area of lots included in the proposed change or of lots within 500 feet in all directions of the area in question.

A vote of three-quarters of the authorized members of the PZC is required to waive certain requirements under the subdivision regulations. To grant a variance or to reverse the order of a zoning enforcement officer requires the concurring vote of four members of the ZBA. A tie vote results in a denial.

ENFORCEMENT

PZC is empowered by statute to specify how the regulations will be enforced. The Zoning Enforcement Officer (ZEO) may issue a cease and desist order or file a civil action to attempt to correct a violation. A ZEO may initially issue a less formal letter request to a violator prior to issuing a cease and desist order or filing a civil action. Any order of a ZEO may be appealed to the ZBA. The Town Counsel can be instructed to bring a legal action.

EXECUTIVE SESSION

Executive sessions may be held with regard to pending litigation, personnel matters, security and several others matters as provided by statute. All other sessions must be in public.

MUNICIPAL IMPROVEMENTS: CONN. GEN. STAT. SECTION 8-24

You will often hear Town officials refer to the need for an "8-24" report, and you will likely wonder the first time you hear it if this is a new interstate highway, the time of day, or what. Actually, the reference is to Section 8-24 of the Connecticut General Statutes, which states that the planning commission is entitled to review certain specified municipal improvements, including, among others, acquisition of land, sale or lease of municipal property, location of extension of public utilities, and location, acceptance, abandonment, widening, narrowing or extension of any streets. The Town cannot carry out such a project until it receives a favorable report consistent with planning considerations from the commission. The commission has 35 days to make the report. If an unfavorable report is received, the Town can only proceed if an annual or special town meeting approves the project by a majority vote.

ZONING BOARD OF APPEALS

Appeals from a decision of the zoning enforcement officer

State law empowers the ZBA to hear and decide appeals where it is alleged that there is error in any order or decision made by the zoning enforcement officer. A zoning enforcement officer may issue a cease and desist order (or fail to issue one) or may approve or deny zoning permits. In deciding whether a use of property violates the zoning regulations, the zoning enforcement officer interprets the zoning regulations and makes a factual determination whether the use of the property complies with the regulations. The ZBA reviews that decision and has the authority to interpret the regulations and to decide whether it applies to the situation before it. The ZBA can affirm, reverse or modify the decision appealed from, and it must state the reasons for its decision.

Variances

The ZBA is empowered to hear and decide applications for variances of the zoning regulations. A variance is authorization from the ZBA to use property in a manner otherwise forbidden by the zoning regulations. For a variance to be granted two conditions must be met: 1) the variance must be shown not to substantially affect the comprehensive zoning plan, and 2) adherence to the regulations must be shown to cause unusual hardship. Such hardship must be unique, which means that the property has physical characteristics different from other properties in the area, such as unusual soil, drainage or topography conditions.

Recent cases, Verrillo v. ZBA of Branford, 155 Conn. App. 657 (2015) and E & F Assocs., LLC v. ZBA, 320 Conn. 9 (2015), have limited the scope of variances.

The applicant has the burden of proving hardship peculiarly affecting his land. There are very few true hardships, and the hardship requirement is difficult to prove. For example, there is no unique hardship where all houses in the applicant's neighborhood were built on small lots and were subject to the same setback requirements. Financial loss does not constitute hardship (except in rare cases where the regulations destroy a parcel's value). Self-created hardship is not a proper basis for a variance; these cases often concern location of structures or lot division lines. The statute does not allow a variance to be granted where it would adversely affect public health, safety and welfare, or property values. The test for obtaining a variance is very strict, so the ZBA's authority to grant a variance is limited. The fact that the board granted a variance to another lot on the same street in a virtually identical situation is not a valid basis for granting a variance.

When a variance is granted, the ZBA must state the reasons for its action and must describe the hardship. The ZBA must also state its reasons when it denies a variance. The ZBA may attach reasonable conditions to the granting of a variance, provided the conditions are not impossible to satisfy.

PLANNING AND ZONING COMMISSION (PZC)

Site Plans

A site plan is a plan showing the layout and design of a proposed use which is filed with the commission to determine the conformity of the proposed building or use with the zoning regulations. The commission has no discretion beyond determining whether the plan complies with the regulations and a plan may be modified or denied only if it fails to comply with the regulations.

Subdivisions

A subdivision application requests the commission's approval to allow the division of a parcel of land into three or more lots. The commission must approve, modify and approve or disapprove a subdivision application. The commission cannot disapprove a subdivision application based upon standards not contained in the subdivision regulations. The commission acts in an administrative capacity when it considers subdivision applications, and its authority is limited to

determining whether or not the application conforms to the regulations. Where a subdivision application meets the regulations, the commission must approve the application. If the non-compliance is minor, the commission can modify and approve the application. The general rule is that the commission cannot attach conditions to an approval. However, the commission does have the authority to "modify" an application. The commission cannot consider offsite traffic conditions, municipal services required by the development or the effect of the subdivision on property values or the character of the neighborhood.

Special Permits

A special permit is a use which the regulations expressly permit under conditions specified in the regulations. The commission's function when considering special permit applications is to determine whether 1) the applicant's proposed use of the property is expressly permitted under the regulations, 2) whether the standards and regulations are satisfied, and 3) whether conditions necessary to protect public health, safety and welfare can be established. A special permit allows a use which is generally compatible with the zoning district but requires special attention as to its location and method of operation in order to keep it consistent with uses permitted as of right in the district. A special permit application which conforms with the regulations must be approved. However, recent case law has affirmed that the commission has reasonable discretion in deciding whether the proposed use meets the standards in the regulations and certain conditions attached to a special permit application consistent with the regulations may be upheld.

Changes of zone and changes to the zoning regulations

The commission has the authority to adopt and amend zoning regulations and to change the zone of any zoning district. These actions can only be taken after a public hearing. Zoning amendments and zone changes can be initiated by either the commission itself or by any interested party. The commission acts in a legislative capacity when it undertakes these matters, and has broad discretion as to the content of regulations and the boundary of zones. A regulation or zone change which has some relationship to promoting public health, safety, welfare or property values will almost always be found to be a valid exercise of the commission's power.

AFFORDABLE HOUSING

Although Wilton is in the middle of a moratorium, it is important to understand theses laws. In general, the burden is on the plaintiff to prove that the Commission or the Board acted illegally, arbitrarily or in abuse of its discretion. In view of recent decisions, along with amendments to the law in 2000 (Public Act 00-206), the standard for review has been clarified. In affordable housing actions that are appealed by a developer, the burden shifts to the Commission or Board to justify their decision. The court will then engage in a two-part process. (1) First, the court must determine that the decision and the reasons cited for the decision are supported by sufficient evidence in the

record. (2) If this is satisfied, the reviewing court then examines the record to determine whether there is sufficient evidence for the commission to sustain its burden of proof that (A) the decision is necessary to protect substantial public interests in health, safety, or other matters which the commission may legally consider; (B) such public interests clearly outweigh the need for affordable housing; and (C) such public interests cannot be protected by reasonable changes to the affordable housing development. It is important, therefore, to build a proper record in order to defend against a challenge to an affordable housing appeal. In the majority of cases since the law was passed, municipalities which have denied an application have lost in court.

INLAND WETLANDS COMMISSION (IWC)

The IWC's jurisdiction is under the state Inlands Wetlands laws. Under the Connecticut General Statutes, the IWC may regulate inland wetlands and watercourses by regulating activity which might have an adverse environmental impact on such natural resources. The Commission has set boundaries of inland wetlands and watercourse areas within its jurisdiction. Once such boundaries are established pursuant to the procedure in Conn. Gen. Stat. §22a-42a, no regulated activity can be conducted within the boundaries without a permit approved by the Commission. In addition to the designated wetlands areas, the IWC may regulate activities "outside the wetlands boundaries and upland review areas if such activities are likely to have an impact or effect on the wetlands themselves." See Aaron v. Conservation Commission, 183 Conn. 532 (1981) and Queach Corp. V. Inlands Wetlands Commission, 258 Conn. 178 (2001). However, in the case of Avalonbay Communities Inc. v. Inland Wetlands Commission of Wilton, 266 Conn.150 (2003), the Supreme Court noted that the IWC may regulate activities outside of wetlands, watercourses and upland review areas "only if those activities are likely to affect the land which comprises a wetland, the body of water that comprises a watercourse or the channel and bank of an intermittent watercourse. The legislature did not adopt broad definitions of wetlands and watercourses that would protect aspects of the wetlands apart from their physical characteristics, such as, for example, the biodiversity of the wetlands or wildlife species that might be wetland dependent."

The cases also say that local inland wetland agencies such as the IWC "are not little environmental protection agencies." Rather, the IWC jurisdiction is limited to the wetland and watercourse area that is subject to their jurisdiction.

CONSERVATION COMMISSION

The Conservation Commission's powers are set forth in Chapter 10 of the Wilton Code. The purposes of this Commission are set forth in that section, including "to guide the development and conservation of the natural resources within the Town of Wilton." Other purposes include proposing, managing, and maintaining open space lands, to be an advisory and consulting body on issues involved with the environment, conservation and land use, and to develop and sponsor educational programs, promoting sound environmental practices. In many other respects, the Conservation Commission offers technical assistance and guidance to the Planning & Zoning Commission and other boards.

SECTION 22a-19: ENVIRONMENTAL INTERVENTION

Conn. Gen. Stat. §22a-19 states that in "any administrative, licensing or other proceeding, and in any judicial review thereof," a person, corporation, association or other legal entity may intervene as a party upon the filing of a verified pleading asserting that the proceeding involves conduct which has, or which is reasonably likely to have, the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state.

It has been established that interventions may occur before the Conservation Commission and Planning and Zoning Commission for most of their functions (special permit, site plan, subdivisions, and change of zone). Intervention may also occur before the ZBA for a variance. However, the Supreme Court has recently held that "...an individual′s right to intervene in an administrative agency proceeding under §22a-19 must be limited by the jurisdictional authority of the administrative agency conducting the proceeding into which the party seeks to intervene." Nizzardo v. State Traffic Commission, 259 Conn. 131 (2002). Intervenors are limited to raising environmental issues. Most courts have held that an intervenor may raise environmental issues limited to the scope of the particular agency's underlying jurisdiction. As one Court noted, "[t]he planning commission did not become the wetland agency simply as a result of the §22a-19 petition." Edelson v. Planning Commission, 1994 WL 551183 Super. Ct. (Berger, J.).

Upon the filing of the petition, the commission or board must first find that the intervenor's specific claims as set forth in their verified pleading are within the scope of the commission's or board′s statutory jurisdiction. If the allegations are within the jurisdiction, a two-part test must be performed. First, the commission or board must review the claims to determine whether the proposed conduct "does, or is reasonably likely to, ...[cause the] pollution, impairment or destruction of the public trust in the air, water or other natural resources of the state…." Second, if the commission or board determines that the proposed conduct will cause unreasonably pollution, then the commission or board must address whether "there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety and welfare." §22a-19(b).

The intervenor must allege specific factual claims in their verified pleading. The intervenor also has the burden of establishing these claims. The burden then arguably shifts to the applicant as to whether the conduct results in unreasonable pollution, and whether feasible and prudent alternatives exist.

FREEDOM OF INFORMATION ACT OVERVIEW

TOWN OF WILTON

Ira W. Bloom, Esq.
Peter V. Gelderman, Esq.

BERCHEM MOSES, P.C.
1221 Post Road East
Westport, CT 06880
Ira: (203) 571-1715
Pete: (203) 571-1720

e-mail: ibloom@berchemmoses.com
e-mail: pgelderman@berchemmoses.com

www.berchemmoses.com

January 24, 2024

INTRODUCTION

The Freedom of Information Act (the "FOIA"), Conn. Gen. Stat. §§1-200 through 1-241, inclusive, represents Connecticut's commitment to open government and a strong policy in favor of public access to meetings and records. The laws concerning access to public meetings are strict and it is suggested that the Town take a very conservative approach in the interpretation and implementation of those laws. Subject to narrow exceptions, the FOIA mandates that the public has access to the meetings of public agencies.

The FOIA also provides rules regarding the public's access to records maintained by the Town and its departments and elected and appointed officials.

The following is an overview of the FOIA to the extent it relates to the public's access to the meetings of boards, commissions, committees and subcommittees, and to the public's right to obtain copies of public records. Part One addresses public meetings, and Part Two addresses public records.

PART ONE: PUBLIC MEETINGS

I. PUBLIC AGENCIES

What is a public agency?

Conn. Gen. Stat. § 1-200 defines a public agency as any executive, administrative or legislative office of the state or any political subdivision of the state and any state or town agency, any department, institution, bureau, board, commission, authority or official of the state or of any city, town, borough, municipal corporation, school district, regional district or other district or other political subdivision of the state*, including any committee of, or created by, any such office, subdivision, agency, department, institution, bureau, board, commission, authority or official,* and also includes any judicial office, official, or body or committee thereof, but only in respect to its or their administrative functions.

Note that the definition of public agency includes any "committee" created by the public agency (i.e., a board or commission). Committees and subcommittees are subject to the same requirements of the FOIA. This includes any subcommittee, task force, and working group created by any board or commission.

II. MEETINGS

A. What is a meeting?

1. A "meeting" means a hearing or other proceeding of a public agency, any convening or assembly of a quorum of a multimember public agency, and any communication by or to a quorum of a multimember public agency, whether in person or by means of electronic equipment, to discuss or act upon a matter over which the public agency has supervision, control, jurisdiction or advisory power. (Conn. Gen. Stat. § 1-200(2))

2. Note that a meeting does not include "an administrative or staff meeting of a single-member public agency." For example, a staff meeting of the First Selectwoman is not a meeting.

3. Also note that a quorum of one public agency who are present at any event which has been noticed and conducted as a meeting of another public agency under the FOIA shall not be deemed to be holding a meeting.

4. A conference call, email discussion, or other communication by means of electronic equipment may constitute a meeting.

5. In general, there is a meeting anytime a quorum of a public agency convenes in person or electronically to discuss or act upon a matter for which it has responsibility. The definition actually describes three kinds of gatherings that can constitute a meeting: regular, special, and emergency special meetings. The Connecticut Supreme Court has determined that "hearings or other proceedings" of less than a quorum may also trigger FOIA requirements. This is discussed in more detail in Section II.D. below.

B. What isn't a meeting?

There are several statutory exclusions in the definition of "meeting." They are:

1. Meetings of a personnel search committee for executive level employment candidates.

2. Chance or social meetings not for the purpose of discussing official business.

3. Strategy or negotiations with respect to collective bargaining.

4. Political caucuses.

5. An administrative or staff meeting of a single-member public agency (e.g., the First Selectwoman).

6. Communication limited to notice of meetings of any public agency or the agendas thereof.

C. Do e-mail communications constitute a meeting under the FOIA?

Yes. If a quorum of the body communicates by email about a matter over which the body has supervision, jurisdiction, control or advisory power, a meeting is being conducted. It is important for each member of the public agency to remind other members of this rule and to stop any discussion of such matters over email. Discussions about purely administrative matters (e.g., scheduling the date or time of a meeting) are not considered "meetings" under FOIA.

Question: Could you ever properly conduct a meeting by email communications? The Commission has stated that it is unlikely that email communications among agency members would be able to be conducted in a manner that comports with the open meeting requirements of the FOIA because those persons interested in attending the meeting would not have the opportunity to hear or see the discussion and actions as they transpired at the meeting.

D Quorum; Meetings of Less Than a Quorum

1. The minimum number of members of an agency who constitute a quorum is not provided in the FOIA. It is generally a majority, but a different amount may be provided in the Town Charter or other state or local law, or the agency's governing documents.

2. The Freedom of Information Act and the policy behind it seek to avoid "secret meetings" and doing public business in private.

3. A question often arises as to whether a gathering of less than a quorum of a public agency is a "meeting" that requires a notice, agenda, public access, and minutes. The answer depends on whether the group has been authorized by the public agency to take action on behalf of the public agency.

4. Any group of people that is less than a quorum of a public agency, whether or not the group is officially called a committee, subcommittee, working group, or task force of a public agency, that has been asked or authorized (by request by the public agency or by law, rules, regulations, etc.) to research or evaluate an issue, draft a document, conduct a site visit, or otherwise take action on an issue on behalf of the public agency, must hold their meetings in public, with proper notices, agendas, and minutes, even though they do not make up a quorum of the public agency.

5. However, if the group of less than a quorum of the public agency has *not* been asked or authorized to act on behalf of the public agency, then gatherings by the group are not "meetings" under the Freedom of Information Act. This might include co-petitioners working together to coordinate drafting and presenting a new ordinance.

6. A recent Connecticut Supreme Court case, City of Meriden v. Freedom of Information Commission, 338 Conn. 310 (2021), ruled that there is no public meeting if there is a gathering of less than a quorum of the members of a public agency, unless the group has been given express authority to take action on behalf of the whole public agency, by either:

- statute, regulation, ordinance, charter, bylaw, or other legal authority, or
- official resolution of the public agency. The case seems to suggest that *implied* authority (when the public agency is aware that the group exists and is meeting but does not authorize it) is not enough to constitute a public meeting.

7. Remember that any meeting of a quorum of a public agency, which includes committees, subcommittees, etc., is also a meeting and requires a proper notice, agenda, public access, and minutes.

E. Types of Meetings; Notice of Meetings

The FOIA recognizes three types of meetings.

1. Regular Meetings are those for which the public agency must file a schedule with the Town Clerk by January 31 for the ensuing year. These are meetings whose times, dates, and places do not typically change.

- New agenda items may be added at the meeting with a 2/3 vote of the members present and voting. (Note that an abstention is not a vote.)

2. Special Meetings are those not included on the list of regular meetings.

- No new business may be added at the meeting.

3. Emergency Special Meetings may be called in an emergency without advance notice (the term "emergency" will be strictly construed).

- The content of the meeting and any action taken is limited to the matter that required the emergency meeting.

- Minutes setting forth the nature of the emergency and the proceedings occurring must be filed with the Town Clerk within 72 hours.

F. Requirements for In-Person, Remote (Solely Electronic), And Hybrid Meetings

1. Electronic Meetings. Effective July 1, 2021, public meetings may be conducted as in-person, fully remote (e.g., fully Zoom), or hybrid meetings (members of the public may participate in person or by Zoom).

2. Remote participation by members of the public agency:

   Every public agency that is meeting in person must provide any member of the public agency (but not the public) the opportunity to participate remotely, except that the agency is not required to adjourn or postpone the meeting if a member of the agency loses connection to the meeting, unless that member is needed to form a quorum. Any member of the agency who participates remotely must make a good faith effort to state their name and title (if applicable) before speaking.

3. Notices and Agendas:

   a. Meeting Notice Must Identify Type of Meeting. All meeting notices must identify whether the meeting will be in-person, remote, or hybrid.

   b. Notice and Agendas of **All Regular** Meetings:

   - A notice of all regular meetings for the year is posted in January in the Town Clerks' office. If a meeting is not on that list, it is a special meeting.

   - Agendas must be available to the public at least 24 hours in advance:
     - In the agency's regular office; and
     - In the Town Clerk's office; and
     - For remote or hybrid meetings, also on the agency's website (if one exists)

   - Additional 48-Hour Notice Needed for **Remote or Hybrid Regular Meetings**: At least 48 hours prior to an electronic (remote or hybrid) regular meeting, the agency must provide direct notice by mail or email (or other electronic means where the notice can be retained and printed if necessary) to agency members. The agency must also post notice:

- In the agency's regular office;
- In the Town Clerk's office; and
- On the agency website (if one exists).

c. Notice and Agenda of **All Special** Meetings:

- At least 24 hours prior to the meeting, the agency must post the meeting notice and agenda:
  - In the Town Clerk's office; and
  - on the agency's website (if one exists).

4. For Meetings Where the Public Can Attend Remotely (i.e., remote or hybrid meetings):

a. Notice Must Include Instructions for Public Participation. The notice and agenda (if different) must each include instructions for the public to attend the meeting and to provide comment or otherwise participate in the meeting, by means of electronic equipment or in person, as applicable.

b. Speakers State Name and Title, if any. Agency members and members of the public who participate remotely must make a good faith effort to state their name and title (if applicable) before speaking.

c. Interruption. Whenever a remote or hybrid meeting is interrupted by the failure, disconnection, or, in the chairperson's determination, unacceptable degradation of the electronic connection, or if a member necessary to form a quorum is unable to participate due to such connectivity issues:

- The agency may, between 30 and 120 minutes after the lost connection, resume the meeting:
  - In person, if a quorum is present in person, or
  - Remotely, if a remote quorum exists or has been restored.
- The agency may adjourn or postpone the meeting to a new date.
- The agency must, if possible, post a notification on its website to inform any remote attendees of the expected time that the meeting will resume or of the adjournment or postponement of the meeting. The agency may also announce at the beginning of the meeting what procedure to follow for resumption if any connectivity issues arise.

d. Disruption. The chair of the meeting may remove a remote participant who causes disorder, until the offender conforms to order or, if necessary, until the close of the meeting.

e. Additional Rules for **Regular** Electronic Meetings (But Not Executive Sessions or Special Meetings):

- Upon written request submitted at least 24 hours prior to a meeting, the agency must provide any member of the public:
  - A physical location; and
  - Any "electronic equipment," (which includes but is not limited to "telephonic, video or other conferencing platforms") necessary to attend the meeting in real-time.

- The public must have the same opportunity to provide comment or testimony and otherwise participate in the meeting as if the meeting were in-person, except that the agency is not required to adjourn or postpone if a member of the public loses connection to the meeting.

- If a quorum of the agency members attends the meeting from the same physical location, members of the public must also be allowed to attend the meeting in-person at that location.

- The agency must record or transcribe the meeting.

- Within 7 days of the meeting and for at least 45 days after the meeting, the agency must post the recording or transcription of the meeting on the agency website and make it available in the agency's office for the public to view, listen to, and copy.

5. For ALL meetings, whether in-person, remote, or hybrid:

a. Roll Call Vote. If any member of the agency participates remotely in any meeting, votes must be taken by roll call unless the vote is unanimous.

b. Minutes Identify Any Remote Participation. If any member of the agency participates remotely in any meeting, meeting minutes must identify which agency members attended in person and which members attended remotely.

c. Adjournments Posted on Website. Adjournment notices must also be posted on the agency website.

d. Failure to follow proper procedures can result in voiding a public agency's action.

III. EXECUTIVE SESSIONS

A. Only agency members may attend, except for persons invited to testify or to give opinion (attendance is limited to the time during which persons are providing testimony or opinion).

B. 2/3 of those members of the public agency present and voting must vote at a public meeting to go into executive session. (Note that an abstention is not a vote.) ***Must always convene in public to go into executive session, even if the meeting is only for an executive session.***

C. Allowed for:

1. Discussion concerning the appointment, employment, performance, evaluation, health, or dismissal of a public officer or employee, provided that such individual may require that discussion be held at an open meeting;

2. Strategy and negotiations with respect to pending claims or pending litigation to which the public agency or a member thereof, because of the member's conduct as a member of such agency, is a party until such litigation or claim has been finally adjudicated or otherwise settled;

3. Security issues;

4. Discussion of the selection of a site or the lease, sale or purchase of real estate when publicity would adversely impact the price; and

5. Discussion of any matter which would result in the disclosure of certain other public records or the information contained therein that are otherwise exempt from disclosure under Section 1-210 (e.g., certain police records).

D. Meeting Notice and Agenda:

1. The meeting notice must state a permissible reason for the executive session. It is not enough to simply recite the executive session exemption of the FOIA on which the public agency is relying. For example, if the executive session is to discuss litigation, it is not sufficient to simply state, "it is anticipated that the Board will go into executive session to discuss litigation." Instead, the Chairman should state the following: "It is anticipated that the Board of Finance will go into executive session to discuss the case of Bloom v. Town of Weston." Adding the name of the case will more consistently follow the Act and the Commission's rulings.

2. For electronic meetings expected to go into executive session, is important to remember to schedule two electronic sessions (e.g., Zoom links or conference call numbers) for executive sessions: One for the public portion of the meeting, and one for the executive session. Only the Zoom link (or conference call number) for the public portion of the meeting is published in the meeting notice and agenda. The agency meets in the public meeting to vote to go into executive session, and then exits the public meeting and uses the unpublished Zoom link (or conference call number) to enter the executive session. Since no votes are taken in executive sessions, the public agency must go back into the public Zoom meeting (or conference call) to take any votes resulting from the executive session.

E. Conduct of the Meeting. There are specific requirements for conducting business in executive session:

1. No votes are taken in executive session. Only discussion is permitted. Any votes are taken in open session.

2. No minutes are taken during executive session. Minutes are taken only during the public portion of the meeting. The minutes of the public meeting must include the vote to go into executive session; the reason for the executive session; and the names of the persons in attendance at the executive session. The minutes should also include what time the public agency convened to go into executive session and the time it adjourned and resumed the meeting in public.

IV. MISCELLANEOUS MEETING REQUIREMENTS

A. Contents of Agendas

1. The FOIA doesn't provide any clear guidance as to the level of detail that is required in an agenda. However, the agenda should adequately identify the business to be transacted and the date, time, and place.

2. For regular meetings, try to avoid "Other business" or "new business" without specific items listed beneath those headings.

3. Do not use "other business" or "new business" for special meetings since agenda items cannot be added at the meeting.

4. When convening in an executive session is a possibility, the agenda should say "it is anticipated that the Board/Commission will go

into executive session" and list the potential exceptions for executive session as specifically as possible as described above.

5. Meeting Chairs are responsible for stopping any discussion about a non-agenda item and re-orienting the meeting back to the agenda.

B. Minutes; Filing of Minutes

1. Generally, minutes must be available for public inspection with seven (7) days of the meeting to which they refer (Conn. Gen. Stat. § 1-225 (a)). Minutes should include, at a minimum, the following:

   a. When the meeting was convened and adjourned.

   b. Time and place of the meeting.

   c. Which member of the public agency were present and how they voted.

   d. Statement of each issue discussed or acted on.

   e. Purpose of any executive session and who attended.

   f. If any agency members participated remotely, which members participated remotely and which were in person.

2. Hard copies of the minutes must be maintained and filed with the designated person in the department which oversees the particular board, commission, committee, or subcommittee.

3. For those boards, commissions, and committees for whom the Town Clerk is not the custodian of the minutes, it is nevertheless recommended that a paper copy also be sent to the Town Clerk's office to be preserved in the Town's archives.

C. Record of Votes

The record of the votes (as distinguished from the meeting minutes) of all members of the public agency must be reduced to writing and be available for public inspection within forty-eight (48) hours of the meeting. The votes shall be recorded in the minutes of the session at which taken.

V. PUBLIC PARTICIPATION AND CONDUCT OF PUBLIC MEETINGS

A. Members of the public have the right to attend the public portion of all meetings (but not executive sessions). Members of the public have the right

to attend anonymously and may not be required to register, sign in, or identify themselves as a condition of attendance, whether the meeting is in-person, remote or hybrid.

B. The FOIA does not, by itself, give the public the right to speak or otherwise participate in meetings.

C. Members of the public and the media have the right to record or broadcast meetings. However, the agency may, in advance, establish procedures for broadcasting.

D. If a member of the public creates a disturbance, the agency may remove him or her. If the disturbance persists, the public agency may order the room cleared and continue in session. (The media, except any members participating in the disturbance, must be allowed to remain in attendance.) The procedures for removing members of the public from remote or hybrid meetings is described above.

E. Meetings may be adjourned to a specified time and place. Written notice of the time and place of any adjourned meeting must be posted near the door of the place of the adjourned meeting and on the public agency's website, if applicable, within 24 hours after the time of adjournment.

PART TWO: PUBLIC RECORDS

INTRODUCTION:

Town departments, boards, and commissions, routinely receive requests for public records, documents and other information in accordance with FOIA. FOIA requires that a public agency respond to a records request "promptly" and notify the requestor of any denial of a record request within 4 days. Generally speaking, each public agency is expected to respond to a FOIA records request immediately and no later than four business days of the receipt of such requests**.** Every public agency has the responsibility to promptly search for and otherwise locate and make available all documents that are responsive to each FOIA request. The role of the Town Attorney's Office is to provide advice and counsel to public agencies, and to assist and otherwise facilitate the disclosure of documents requested under FOIA.

A. DEFINITION OF PUBLIC RECORDS:

A public record or file is defined as any recorded data or information relating to the conduct of the public's business prepared, owned, used, received or retained by a public agency, whether the information is handwritten, typed, tape-recorded, printed, photocopied, photographed or recorded by any other method.

B. EMAILS, TEXTS, AND OTHER ELECTRONIC RECORDS:

Emails, texts, audio and video recordings, and computer-stored or generated documents also fall within this definition. Even emails and texts using personal email addresses and personal cell phone numbers are public records if a member of a public agency is conducting Town or agency business using those addresses or numbers. The member of the public agency must maintain those records under state record retention rules, and the public has a right to obtain copies of them.

C. EXEMPTIONS FROM DISCLOSURE:

The FOIA contains many exemptions from disclosure, including attorney-client privileged communications, personal notes and drafts, certain law enforcement records, and certain personal information. Please contact the Town Attorney's Office if you have any questions about what may be withheld.

D. RECORD RETENTION GUIDELINES:

The Connecticut State Library promulgates Retention Schedules for municipal records here: https://ctstatelibrary.org/publicrecords/general-schedules-municipal/. Depending on the type of records, they may need to be maintained for several years, or permanently. For example, routine correspondence, including FOIA requests, must be maintained for 2 years. Emails that are "transitory messages – (i.e., non-record material such as junk mail, publications, notices, reviews, announcements, employee activities, routine business activities, casual and routine communications similar to telephone conversations" can be deleted "at will." Email messages that are less than

permanent may be erased after the retention period for the equivalent hard copy has passed, and then may be destroyed. Email messages that are permanent "(i.e., documenting state policy or policy process, protection of vital public information)" may be deleted after transferred to paper or microfilm. Meeting agendas may be destroyed after one year, but meeting minutes must be permanently retained by the municipality. Voice mail messages may be deleted at will absent special circumstances.

QUESTIONS? Please contact Ira or Pete with any questions. (Contact information is on the cover sheet.)
