FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In The Matter of a Complaint by FINAL DECISION

Felix Charney and Summit
Saugatuck LLC,

Complainants

against Docket #FIC 2016-0571

Chairman, Planning and Zoning
Commission, Town of Westport;
Planning and Zoning Commission,
Town of Westport; and Town of
Westport,

Respondents July 12, 2017

The above-captioned matter was heard as a contested case on April 4, 2017, at which time the complainants and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint.

After consideration of the entire record, the following facts are found and conclusions of law are reached:

1. The respondents are public agencies within the meaning of §1-200(1), G.S.

2. It is found that, by letter dated August 8, 2016, and filed on August 9, 2016, the complainants filed an appeal with this Commission alleging that the respondents violated the Freedom of Information ("FOI") Act by preparing and submitting to the Westport Board of Selectman a "materially inaccurate 'report' in violation of §§1-210(a) and 1-225(a), G.S." The complainants requested that this Commission declare the report null and void.

3. More specifically, the complainants alleged that the respondent commission:

> . . . violated §§1-210(a) and 1-225(a) on July 12, 2016 by preparing and submitting to the Westport Board of Selectmen, acting as the Town's Water Pollution Control Authority ("WPCA"), a materially inaccurate 'report,' required from the PZC by §8-24 ... regarding Summit's April 11, 2016 application to extend a private sanitary

> sewer extension to serve a proposed 155 unit multi-family rental housing development. The PZC's July 12, 2016 report materially misstates and misrepresents what occurred at the PZC's July 7, 2016 meeting.

The complainants contended at the hearing, and in their post hearing brief, that the July 12, 2016, report is "materially and substantially" inaccurate as follows:

> a. [t]he respondent [c]ommission states twice that its findings are based in its report being issued "[after] reviewing all of the material submitted by the applicant," which is not true because the applicant was not allowed to make its presentation;
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> b. [t]he report contains no mention of supplemental materials submitted by Summit at the July 7 proceeding, which the PZC did not review;
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> c. [r]eason C1 states that the necessary upgrades "are only in design state," which is contrary to Public Works Department documents;
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> d. [r]eason C2 states that "funding has not been approved by Town Bodies," which is untrue as to the design and is also irrelevant in that Summit proposed a privately funded project;
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> e. [r]eason C4 states that "there is only a general goal for scheduling actual work … and that work will not likely begin in less than 2 to 4 years," which is directly contrary to facts stated in Public Works Department documents; and finally,
>
> f. . . .the reports fails to state that the PZC refused to allow the . . . applicant's attorney, to make a presentation at the public hearing, which would have provided facts to address the Commission's stated concerns.

4. The respondents contended at the hearing, and in their post hearing brief, that as an initial matter the report is entirely accurate but, and more importantly, that the complainants have failed to allege a violation of the FOI Act and that the complaint should be dismissed.

5. Section 1-210(a), G.S., provides that:

> [e]xcept as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to (1) inspect such records promptly during regular office or business hours, (2) copy such records in accordance with subsection (g) of section 1-212, or (3) receive a copy of such records in accordance with section 1-212. Any agency rule or regulation, or part thereof, that conflicts with the provisions of this subsection or diminishes or curtails in any way the rights granted by this subsection shall be void. Each such agency shall keep and maintain all public records in its custody at its regular office or place of business in an accessible place and, if there is no such office or place of business, the public records pertaining to such agency shall be kept in the office of the clerk of the political subdivision in which such public agency is located or of the Secretary of the State, as the case may be. Any certified record hereunder attested as a true copy by the clerk, chief or deputy of such agency or by such other person designated or empowered by law to so act, shall be competent evidence in any court of this state of the facts contained therein.

6. Section 1-225(a), G.S., provides that:

> [t]he meetings of all public agencies, except executive sessions, as defined in subdivision (6) of section 1-200, shall be open to the public. The votes of each member of any such public agency upon any issue before such public agency shall be reduced to writing and made available for public inspection within forty-eight hours and shall also be recorded in the minutes of the session at which taken, which minutes shall be available for public inspection within seven days of the session to which they refer.

7. The complainants contended at the hearing, and in their post hearing brief, that implicit in the statutory requirements of §§1-210(a) and 1-225(a), G.S., is that public agencies accurately report what occurs at public hearings and that at a minimum, the public must be "adequately apprised" of what transpires at public meetings. In support of their contention, the complainants cite Freundlich v. Pace et al., Freedom of Information Commission, Docket No, FIC 2007-144 (Feb. 27, 2008) which states, in relevant part, the following:

> 41. While the respondents are correct that §1-231(a), G.S., requires disclosure of persons in attendance at executive

> sessions, §1-210(a), G.S., more broadly requires that an agency's minutes in their entirety—not just the minutes of executive sessions—reasonably apprise the public of the business transacted at the meeting. Section 1-210(a), G.S., does not require the agency to disclose precisely what was discussed in executive session, but only to apprise the public in general terms—beyond the phrase "executive session for personnel matters"—of the *subject matter* of the business discussed. In this case, for example, the respondents' minutes could at least have apprised the public that an employment discrimination grievance against the complainant was the subject matter of the executive session. Such a description would put the public—not to mention the complainant—on notice of what business the respondent board discussed, while leaving the respondent board free to keep the details of that discussion confidential.
>
> 42. It is found that the respondent board's minutes, by failing to describe in any way the personnel matter discussed in executive session—such as the person discussed, or the grievance that had been filed, or the conduct at issue, or even the agency (Youth and Family Services) involved, for example—are insufficient to reasonably apprise the public of the business actually transacted at the meeting.
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> 43. It is therefore concluded that the respondent board violated §1-210(a), G.S., by failing to keep and maintain a record of the proceedings of its meetings that reasonably apprises the public of the business actually transacted.

8. The complainants also cited two additional decisions from this Commission, one of which is Jaskiewicz v. Murphy et al., Freedom of Information Commission, Docket No. FIC 2004-482 (Oct. 11, 2005) in which this Commission ordered the respondents, who had never prepared minutes of the meeting in question, to reconstruct minutes of a meeting stating that "such minutes shall, at a minimum, be sufficient to adequately apprise the public of the reappointment issue addressed." The other was Klimasewiski v. Wigg et al., Freedom of Information Commission, Docket No. FIC 2003-001 (Nov. 12, 2003) in which this Commission found that "the agenda (notice) of the respondent commission's December 9, 2002 special meeting listed a number of items, none of which specifically relates to docks and boats, although those subjects were, in fact, discussed at that meeting" and found that the agenda item "Workshop Meeting" failed to fairly apprise the public of the business to be transacted. In that case, this Commission concluded that the respondents had violated §1-225(a), G.S., "by failing to specify the business to be transacted at the December 9, 2002 special meeting, by then

discussing [the] same at the special meeting, and by failing to include such discussion in the minutes of that meeting."

9. Finally, the complainants cited an unreported case from Delaware – Reeder v. Department of Insurance, C.A. No. 1553-N, 2006 WL 510067, at *15(Del. Ch., Feb. 24, 2006). In that case, the minutes of a certain hearing recorded that the plaintiff had raised a certain issue and requested a hearing but the minutes did not record the action that was promised by the commission member to recommend an investigation. The court in that case ruled that once the agency chose to address the issue in the minutes, "it had a duty to do so in a fair and balanced manner that does not misstate or omit what in fact happened . . .[and] cannot describe the topic in a manner that is materially misleading." Id.

10. It is found, however, that each of the cases cited by the complainants addresses an alleged violation of the minutes requirements of the respective disclosure statutes. In that regard, those cases are distinguishable from the present case because the report at issue is not required under the FOI Act, as are the minutes of the meetings of public agencies. Rather the report is required, as the complainants stated in their appeal to this Commission, pursuant to §8-24, G.S., which provides:

> No municipal agency or legislative body shall (1) locate, accept, abandon, widen, narrow or extend any street, bridge, parkway or other public way, (2) locate, relocate, substantially improve, acquire land for, abandon, sell or lease any airport, park, playground, school or other municipally owned property or public building, (3) locate or extend any public housing, development, redevelopment or urban renewal project, or (4) locate or extend public utilities and terminals for water, sewerage, light, power, transit and other purposes, until the proposal to take such action has been referred to the commission for a report. Notwithstanding the provisions of this section, a municipality may take final action approving an appropriation for any proposal prior to the approval of the proposal by the commission pursuant to this section. The failure of the commission to report within thirty-five days after the date of official submission of the proposal to it for a report shall be taken as approval of the proposal. ***In the case of the disapproval of the proposal by the commission the reasons therefor shall be recorded and transmitted to the legislative body of the municipality.*** A proposal disapproved by the commission shall be adopted by the municipality or, in the case of disapproval of a proposal by the commission subsequent to final action by a municipality approving an appropriation for the proposal and the method of financing of such appropriation, such final action shall be effective, only after the subsequent

> approval of the proposal by (A) a two-thirds vote of the town council where one exists, or a majority vote of those present and voting in an annual or special town meeting, or (B) a two-thirds vote of the representative town meeting or city council or the warden and burgesses, as the case may be. The provisions of this section shall not apply to maintenance or repair of existing property, buildings or public ways, including, but not limited to, resurfacing of roads. [Emphasis added]

11. The FOI Commission is entirely a creature of statute. "It operates within the confines of the FOI Act; General Statutes §1-200 et seq.; and the complementary rules of the Uniform Administrative Procedure Act, General Statutes §4-166 et seq. As a creature of statute, the jurisdiction of the Commission necessarily is restricted by the legislation from which it originates. 'Administrative agencies are tribunals of limited jurisdiction and their jurisdiction is dependent entirely upon the validity of the statutes vesting them with power and they cannot confer jurisdiction upon themselves.' Castro v. Viera, 207 Conn. 420, 428, 541 A.2d 1216 (1988); see also State v. State Employees' Review Board, 231 Conn. 391, 406, 650 A.2d 158 (1994) (administrative agency possesses no inherent power; its authority 'is found in a legislative grant, beyond the terms and necessary implications of which it cannot lawfully function')." Dep't of Pub. Safety v. Freedom of Info. Comm'n, 103 Conn. App. 571, 584 (2007).

12. Section 1-206(b)(1), G.S., provides that:

> Any person denied the right to inspect or copy records under section 1-210 or wrongfully denied the right to attend any meeting of a public agency or denied any other right conferred by the Freedom of Information Act may appeal therefrom to the Freedom of Information Commission, by filing a notice of appeal with said commission.

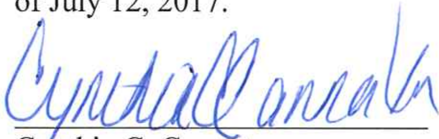
13. It is found that the complainants have not alleged that the report was not made available to inspect or copy under §1-210, G.S., nor that they were denied any other right conferred by the FOI Act, but rather, have taken issue with the substantive content of the report. In so doing, it is concluded that the complainants have not alleged a violation of the FOI Act.

14. Consequently, it is further concluded that the respondents have not violated the FOI Act as alleged by the complainants. As result, there is no basis on which to consider the complainants' request for relief.

The following order by the Commission is hereby recommended on the basis of the record concerning the above-captioned complaint:

1. The complaint is dismissed.

Approved by Order of the Freedom of Information Commission at its regular meeting of July 12, 2017.



Cynthia C. Cannata
Acting Clerk of the Commission

PURSUANT TO SECTION 4-180(c), G.S., THE FOLLOWING ARE THE NAMES OF EACH PARTY AND THE MOST RECENT MAILING ADDRESS, PROVIDED TO THE FREEDOM OF INFORMATION COMMISSION, OF THE PARTIES OR THEIR AUTHORIZED REPRESENTATIVE.

THE PARTIES TO THIS CONTESTED CASE ARE:

FELIX CHARNEY, AND SUMMIT SAUGATUCK LLC; c/o Attorney Timothy S. Hollister, Attorney Amber N. Sarno, Shipman & Goodwin LLP, One Constitution Plaza, Hartford, CT 06103-1919

CHAIRMAN, PLANNING AND ZONING COMMISSION, TOWN OF WESTPORT; PLANNING AND ZONING COMMISSION, TOWN OF WESTPORT; AND TOWN OF WESPORT c/o Attorney Gail I. Kelly, Berchem, Moses & Devlin, 1221 Post Road East, Westport, CT 06880

Cynthia C. Cannata
Acting Clerk of the Commission

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