

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Linda Czaplinski,

Complainant

against

Docket #FIC 2018-0127

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

Respondents

February 13, 2019

The above-captioned matter was heard as a contested case on May 18, 2018, at which time the complainant and the respondents appeared and presented testimony, exhibits and argument on the complaint.

At the request of the hearing officer, the case was reopened and heard on September 27, 2018, at which time the respondents appeared and presented testimony and argument on the complaint. The complainant did not appear.

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

1. It is found that the respondents are public agencies within the meaning of §1-200(1), G.S.

2. By letter dated March 7, 2018, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information (“FOI”) Act when members of the respondent Planning and Zoning Commission (“PZC”) held “workshops”¹ with a project applicant without providing proper notice and for which no minutes were kept.

3. Section 1-225, G.S., provides in relevant part, that “[t]he meetings of all public agencies, except executive sessions... shall be open to the public.”

4. Section 1-200(2), G.S., defines “meeting” as:

any hearing or other proceeding of a public agency, any convening or assembly of a quorum of a multimember public agency, and any

¹ At the hearings, the terms “workshops” and “presentations” were used interchangeably by the parties.

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....

5. It is found that the workshops at issue concerned the “residential phase” of the Oxford Towne Center development project, an ongoing, multi-phase project in the Town of Oxford. It is found that at the time of the workshops, a conceptual plan for the project had already been approved by the PZC, but the project applicant had yet to seek site plan approval for the residential phase.

6. It is found that, prior to submitting a formal site plan application for the residential phase, the project applicant requested the opportunity to present its proposed site plan to the PZC members, among others (e.g., PZC staff members, town public safety personnel).

7. It is found that the project applicant made an initial power point presentation in December 2017. Such workshop was attended by three PZC members, including the PZC Chairman. It is found that after the December 2017 workshop, the PZC Chairman requested that the applicant make the presentation again. It is found that two additional workshops were held in January 2018, which were attended by other PZC members, staff and public safety personnel, respectively.

8. It is found that no workshop was attended by more than three PZC members, and no member attended more than one workshop.

9. It is found that, after the third workshop, the project applicant filed a formal application for site plan approval of the residential phase with the PZC. It is found that such site plan application was considered by the PZC at public meetings, at which times the public was given an opportunity to participate and provide comment. The site plan application for the residential phase of the development project, which differed from the conceptual plan, was approved by the PZC in February 2018.

10. Section 1-206(b)(1), G.S., provides in relevant part:

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. A notice of appeal shall be filed not later than thirty days after such denial, except in the case of an unnoticed or secret meeting, in which case the appeal shall be filed not later than thirty days after the person filing the appeal receives actual or constructive notice that such meeting was held.

11. It is found that the complainant first learned of the workshops by reading an article in the Republican American, which was posted online on March 1, 2018, and attached to the complainant's March 7th complaint. It is found that the complainant received actual or constructive notice within the meaning of §1-206(b)(1), G.S., of the workshops at issue on March 1, 2018. It is concluded that the Commission has jurisdiction to adjudicate the merits of the complaint in this case.

12. With respect to the merits of the complaint, at the May 18th hearing, respondents' counsel represented that it is common practice for a project applicant to seek review prior to filing a site plan application from various town agencies and staff, and for PZC members to participate in that process. According to respondents' counsel, the applicant has an "interest" in getting a "preliminary sense" of what the PZC members think is "important."

13. Subsequently, at the September 27th hearing, the PZC Chair and a PZC member testified, respectively, that the purpose of the workshops was to have the project applicant "give us their vision of what they are planning to do" and for the applicant to get "opinions and feedback" before proceeding with the full design and submission of the formal site plan application. They testified, respectively, that during at least two of the workshops, the PZC members posed "basic questions" to the applicant, and that when asked for feedback, the PZC members' "comments were very vague." The respondents could not recall with certainty whether there was any discussion among the PZC members relating to the substance of the workshops. No votes were taken by the PZC members present at the workshops.

14. The respondents contend that the workshops did not constitute "meetings" within the meaning of §1-200(2), G.S., because a quorum (i.e., four of the seven full members) of the PZC was not present at any of the workshops.

15. The Connecticut Appellate Court first considered this issue in Emergency Medical Services Commission of the Town of East Hartford v. Freedom of Information Commission ("EMSC"), 19 Conn. App. 352 (1989). In EMSC, less than a quorum of the East Hartford Medical Services Commission gathered in the mayor's office to hear a presentation from two ambulance companies. The FOI Commission found that the gathering was a proceeding, and therefore, a meeting. The Appellate Court recognized that pursuant to the first clause of the definition, a gathering of less than a quorum may, in certain circumstances, constitute a proceeding, and hence a meeting. "The plain language of General Statutes [§1-200(2), G.S.] does not require a quorum as a necessary precondition to 'any hearing or other proceeding of a public agency....' The word 'quorum' does not appear in the clause dealing with 'any hearing or other proceeding of a public agency....' The legislature did not define a meeting as any hearing or proceeding of a quorum of a public agency, as it might have done." Id. at 355.

16. The Court reasoned that to interpret the definition of "meeting" as requiring a quorum as a necessary precondition in every instance "would make the quorum requirement in [1-200(2), G.S.] redundant. No word in a statute should be considered as surplusage...[N]o reason has been cited for reading a quorum requirement into the first clause of [§1-200(2), G.S.] nor are we aware of any." (Citation omitted; internal quotation marks omitted.) EMSC, supra, 19

Conn. App. 356. According to EMSC, whether a gathering of less than a quorum is a meeting turns on whether the gathering is a “hearing or proceeding” of a public agency.

17. Subsequently, in New London Planning and Zoning Commission v. Freedom of Information Commission, CV 94 0531947 S, Judicial District of New London (Maloney, J.) (May 1, 1996), the Superior Court held that a workshop attended by less than a quorum of Planning and Zoning Commission (“commission”) members, along with various city officials, staff and representatives of the applicant, was “a meeting of the staff,” and did not constitute a “meeting” within the meaning of §1-200(2), G.S. The court considered a number of factors: (1) the commission did not organize or convene the workshop, nor was there evidence that the commission specifically or by implication authorized holding the workshop; (2) there was no evidence that the commission officially assigned or selected the members who attended the workshop or even planned that any would attend; (3) the presence of the commission members was not essential to the holding of the workshop; and (4) there was no application pending before the commission or any matter requiring its official attention.

18. The respondents rely on the 1999 decision in Town of Windham v. Freedom of Information Commission, 48 Conn. App. 529, *cert. granted*, 245 Conn. 913 (1998), *appeal dismissed*, 249 Conn. 291 (1999). In Town of Windham, the Supreme Court let stand, by a per curiam opinion, the Appellate Court ruling that a meeting did not occur because there was no quorum. By dismissing the appeal, the Supreme Court declined to clarify the conflict between the EMSC and Windham Appellate Court decisions.

19. In Town of Windham, four selectmen, which was less than a quorum, met for five or ten minutes to discuss whether they would support a proposal to go into executive session to discuss a landfill contract. The *only* issue on appeal at the Superior Court was whether the gathering was not a meeting because it was communication limited to notice of meetings or agendas. The Superior Court concluded that the private discussion among less than a quorum was not limited to notice of an agenda item, and the Court affirmed the Commission’s conclusion that the gathering constituted a “proceeding of a public agency,” and, therefore, a meeting within the meaning of §1-200(2), G.S.

20. The decision of the Appellate Court, however, did not mention that the town had not disputed that the gathering would be a meeting if not excluded from the definition as communication limited to notice of an agenda item. The Appellate Court decision also made no reference to its previous decision in EMSC, and did not address the question of whether the gathering of the four selectmen had any of the indicia of a “proceeding” as set forth in EMSC and its progeny. Instead, the Court apparently relied solely on the second clause of the definition – “convening or assembly of a quorum of a multimember public agency” – and stated without elaboration: “There was no quorum and, therefore, no meeting as defined by [§1-200(2), G.S.]” Town of Windham, *supra*, 48 Conn. App. 531.

21. Subsequent to Town of Windham, the issue of whether a gathering of less than a quorum could be a meeting, as a “proceeding of a public agency,” was again before the Superior Court in Meriden Board of Education v. Freedom of Information Commission, CV 99 0496508 S, Judicial District of New Britain (Cohn, J.) (June 6, 2000) (27 Conn. L. Rptr. 298). In Meriden

Board of Education, less than a quorum met privately during a recess of a Board of Education meeting to discuss whether the Board could rescind a prior vote of the Board, what a contract meant, and whether the underlying issue being addressed by the Board should be tabled. The FOI Commission concluded that the private discussion was a “proceeding” of the Board.

22. In affirming the Commission’s decision, the Superior Court recognized the apparent conflict presented by Town of Windham, but did not conclude that Town of Windham overruled EMSC. After a review of the case law, the Court concluded as a matter of law that even without a quorum, “under General Statutes §1-200(2) an agency may in some circumstances hold a ‘proceeding’ and that this will constitute a ‘meeting.’ The proceeding ... must be authorized by the agency itself or constitute a step in the process of agency-member activity.” Meriden Board of Education, supra, *2. The Court concluded that the evidentiary record indicated that the private discussion was an integral part of the board meeting, and was authorized by the agency as a means to resolve a contentious issue.

23. The court continues to adhere to the statutory interpretation set forth in Meriden Board of Education. See City of Meriden v. Freedom of Information Commission, CV 17 6035943 S, Judicial District of New Britain (Cohn, J.) (January 29, 2018), *currently on appeal in the Appellate Court*. In City of Meriden, the Superior Court held that there was a sufficient factual and legal basis for the FOI Commission to determine that a gathering of four members of the Meriden City Council constituted a “proceeding” of the council and thus a “meeting,” within the meaning of §1-200(2), G.S. The court concluded that “the *Windham* holding is not completely determinative and therefore not binding on the issue. Rather, there are times, factually, where certain agency members are merely ‘convening’ and there is a requirement of a quorum under §1-200(2); and there are times, factually, where agency members...are gathering with the implicit authorization of the city council as a whole and this gathering ‘constituted a step in the process of agency-member activity.’”

24. It is found that the members of the respondent PZC present at the workshops used the workshops as an opportunity to provide the project applicant with their preliminary opinions regarding the proposed site plan for one of the multiple phases associated with the ongoing Towne Center development project. Based on the facts in this case, it is found that the workshops were at least implicitly authorized by the PZC as a whole.

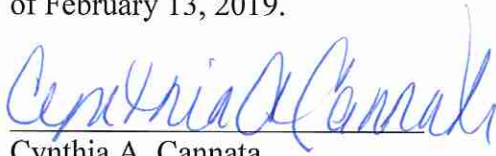
25. It is concluded therefore that the workshops at issue were “proceedings” within the meaning of §1-200(2), G.S., and that such proceedings constituted “meetings” within the meaning of §1-200(2), G.S.

26. It is concluded that the respondents violated §1-225(a), G.S., by failing to properly notice and create minutes for such meetings.

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

1. Henceforth, the respondents shall strictly comply with the open meeting requirements of §1-225(a), G.S.

Approved by Order of the Freedom of Information Commission at its regular meeting of February 13, 2019.



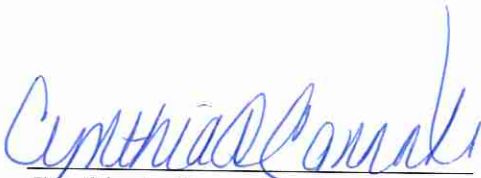
Cynthia A. Cannata
Acting Clerk of the Commission

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:

LINDA CZAPLINSKI, 30 Freeman Road, Oxford, CT 06478

**CHAIRMAN, PLANNING AND ZONING COMMISSION, TOWN OF OXFORD;
PLANNING AND ZONING COMMISSION, TOWN OF OXFORD; AND TOWN OF
OXFORD**, c/o Attorney Peter Olson, Land Use & Conservation Counsel, 275 Greenwood Avenue, Bethel, CT 06801



Cynthia A. Cannata
Acting Clerk of the Commission