NO. CV 126015308S	:	SUPERIOR COURT
PLANNING AND ZONING COMMISSION OF THE TOWN OF MONROE, ET AL.	:	JUDICIAL DISTRICT OF
v.	:	NEW BRITAIN
FREEDOM OF INFORMATION COMMISSION, ET AL.	:	AUGUST 13, 2013

MEMORANDUM OF DECISION

On December 28, 2012, the court issued a memorandum of decision in this appeal by the planning and zoning commission of the town of Monroe (the commission) from a final decision of the defendant freedom of information commission (FOIC). The final decision favored the defendant Handsome, Inc. (Handsome), the complainant to the FOIC, finding that it had been denied access to a meeting of the commission in violation of General Statutes § 1-225 (a), Freedom of Information Act (FOIA).

In the memorandum of decision, the court remanded the appeal to the FOIC so that certain factual and legal matters would be clarified. See *Commission on Human Rights & Opportunities* v. *Hartford*, 138 Conn. App. 141, 153-54, 50 A.3d 917, cert. denied, 307 Conn. 929, 55 A.3d 570 (2012). The FOIC issued a revised final decision on March 28, 2013 that stated in relevant part as follows:

* * *

6. After a hearing before Judge Owens, the court determined that the [Monroe Planning & Zoning] commission

improperly denied the complainant's [Handsome's] application, because its denial was based on the complainant's alleged failure to comply with the conditions of the original permit, and such failure is not a valid ground on which to deny a request for an extension of a special exception permit. Handsome Inc. v. Monroe Planning and Zoning Commission, Superior Court, Judicial District of New Britain, Docket No. CV 08-4025399 (Sept. 9, 2010, Owens, JTR).

7. It is found that the commission did not appeal the decision, described in paragraph 6, above.

8. It is found that, by letter to the respondents dated October 1, 2010, counsel for the complainant requested that:

> the Commission issue the five-year permit extension, pursuant to the Order of the Superior Court in the above-captioned case. The five-year period should begin to run from the date the extended permit is issued. The Court's order is clear that the extension granted, therefore, no new conditions should attach.

9. It is found that, by letter dated November 2, 2010, counsel for the complainant again contacted the commission stating:

> On October 1, 2010, I wrote to this Commission requesting that it issue the five year permit extension for Handsome, Inc., pursuant to the Order of the Superior Court in the above-captioned case. It has been more than 30 days since my last letter and more than 50 days since the Court's Order. I respectfully request that this matter be placed on the Commission's next agenda for

approval of the permit in compliance with the Court's order.

10. It is found that, on May 5, 2011, the commission held a regular meeting ("May 5th meeting"). It is further found that the agenda for such meeting listed, in relevant part, the following items:

> . . .
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> 3. RECESS REGULAR MEETING and CONVENE TO EXECUTIVE SESSION. Review of enforcement procedure with Town Engineer/Acting Clerk of the Commission, First Selectman, Land Use Attorney and Zoning Enforcement Officer.
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> 4. RECONVENE REGULAR MEETING
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> . . .
>
> 15. OTHER BUSINESS
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> 16. ENFORCEMENT, 125 Garder Road– activity without permits.
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> . . .
>
> 22. LEGAL ISSUES. 125 Garder Road– compliance with extension of approval.

11. It is found that, at its May 5th meeting, the commission voted to convene in executive session to "discuss legal matter[s] on general zoning enforcement" (the "executive session"). It is found that the commission convened in executive session for approximately fifty minutes. It is found that, after the commission reconvened its regular meeting, it voted to move item #22 on the agenda to item

#15. It is further found that the commission, under item #15 on the agenda, without discussion, voted to extend the complainant's permit to March 2013, and also to require that, prior to the commencement of any additional work at the site, the complainant post a bond in the amount of $100,000. It is found that the complainant and the respondents disagree as to whether, at the May 5th meeting, the commission voted to add new terms and conditions to the permit, or whether it voted to simply enforce the conditions that existed on the original permit.

12. By letter of complaint, dated May 31, 2011 and filed June 2, 2011, the complainant appealed to this Commission alleging that the respondents violated the Freedom of Information ("FOI") Act by convening in executive session during the commission's May 5th meeting for purposes not permitted under the Act. . . .

* * *

15. In a sworn affidavit, the chairman testified, that during the executive session, discussion of the following matters occurred:

(a) how to react to Judge Owens' decision;

(b) how to respond to . . . [the] demand that the respondent hold a hearing and grant the complainant a permit extension;

(c) how to respond to [the] demand that no new conditions be imposed on the complainant's permit . . . and

(d) how to address the complainant's non-compliance with its original permit; and

(e) what zoning enforcement options were available to the respondent in light of the permit violations.

* * *

23. [T]he respondents contend that the commission convened in executive session to discuss strategy with respect to a pending claim or pending litigation, pursuant to § 1-200(6)(B), G.S.

* * *

26. The respondents argue that the discussion , described in paragraph 15(a), above, of Judge Owens' decision, was permitted because such discussion constituted strategy and negotiation with respect to pending litigation, pursuant to §§ 1-200(6)(B) and 1-200(9)(B), G.S. Although the respondents assert that the parties' legal rights were "not finally adjudicated," it is found that the parties' rights insofar as they were at issue before Judge Owens were finally adjudicated, and it is undisputed that the respondent commission did not appeal Judge Owens' decision. See Ansonia Library Board of Directors v. Freedom of Information Commission, et al., 42 Conn. Supp. 84, 89 (1991). Moreover, it is found that the record contains no evidence of "the service of a complaint" against the respondents, a required element in § 1-200(9)(B), G.S. Accordingly, it is found that the discussion of Judge Owens' decision was not permitted in executive session pursuant to §§ 1-200(6)(B) and 1-200(9)(B), G.S.

27. Based upon the foregoing, it is concluded that the respondents violated § 1-225(a), G.S., when the commission discussed, in executive session, the matter described in paragraph 15(a) above.

28. Next, the respondents argue that the discussion, described in paragraphs 15(b) and 15 (c)), above, of the letters described in paragraphs 8 and 9, above, was permitted because the letters constitute both a "pending claim," and "pending litigation," within the meaning of §§ 1-200(8) and 1-200(9)(A), G.S. The respondents characterize the letters as "threatening" and "demanding," and, in their brief, they

attach great significance to the inclusion, in the October 1st letter, of the statement that "no new conditions should attach [to the permit]." However, it is found that, although such letters contain a request for action from the respondents, they do not contain a "demand for legal relief . . . stating the intention to institute an action in an appropriate forum, or before a court, if such legal relief is not granted," as required by §§ 1-200(8) and 1-200(9)(A), G.S. . . .

29. Based upon the cases cited in paragraph 28, above, it is concluded that the phrase "the intention to institute an action" modified both the phrase "demand for legal relief" and "asserts a legal right," in §§ 1-200(8) and 1-200(9), G.S. Thus, it is concluded that the respondents violated § 1-225(a), G.S., when the commission discussed, in executive session, the matters described in paragraphs 15(b) and 15(c), above.

30. Next, the respondents argue that the discussions, described in paragraphs 15(d) and 15(e), above, were permissible because they constituted strategy and negotiation with respect to pending litigation, pursuant to §§ 1-200(6)(B) and 1-200(9) (c), G.S.

31. It is found that the respondents offered no testimony, at the hearing in this matter, regarding how, or whether, the nature of the discussions described in paragraph 15(d), above, were different from the nature of the discussions described in paragraph 15(e), above. In addition, it is not clear, on the face of the affidavit, described in paragraph 15, above, whether the discussions, described in paragraphs 15(d) and 15(e), above, pertained to how the commission, within its own authority and under its own zoning regulations, might address the complainant's non-compliance, or whether such discussions pertained to consideration of bringing an action against the complainant in court or in another forum. However, it is found that,

based upon the testimony of the chairman of the commission, at the hearing in this matter, that the commission members did not discuss, in the executive session, a "zoning enforcement action" against the complainant. Based upon the facts of this case, it is found that such statement by the chairman may be fairly interpreted to mean that the commission did not discuss, in the executive session, bringing an action in court or in another forum, against the complainant. To the extent that this testimony by the chairman contradicts the statement he made in his affidavit, described in paragraph 15(e), above, it is found that the testimony at the hearing is more credible.

32. Accordingly, it is found that the respondents cannot rely on § 1-200(6)(B), G.S., as the basis for their discussions in executive session of the matters described in paragraph 15(e), above.

33. Moreover, even if such discussions, described in paragraph 31, above, pertained to how the commission, within its own authority and under its own zoning regulations, might address the complainant's non-compliance with the permit, it is found that the provision in 1-200(6)(B), G.S., for discussion of strategy and negotiations with respect to pending litigation also would not apply to such discussions, as the commission, in that instance, would be acting in its capacity as a regulatory body, and thus would not be a party to any pending litigation, as that term is used in the statute.

34. Therefore, based upon the foregoing, it is found that the respondents' discussions, described in paragraphs 15(d) or 15(e), above, do not constitute strategy and negotiation with respect to pending litigation, pursuant to §§ 1-200(6)(B) and 1-200(9)(c), G.S.

35. Based upon the foregoing, it is concluded that the respondents violated § 1-225(a), G.S., when the

commission discussed, in executive session, the matters described in paragraphs 15(d) and 15(e), above.

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 provisions of §§ 1-225(a) and 1-231(a), G.S.

2. Forthwith, the respondents shall create minutes of the May 5 executive session, to include a detailed account of the discussions that took place, and a description of who was in attendance, and further, shall forthwith post such minutes with the town clerk and provide a copy, free of charge, to the complainant.[1]

The Appellate Court has recently stated the standard of review of an FOIC decision as follows: "We begin by setting forth our well established standard of review of agency decisions. Ordinarily, this court affords deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's

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[1] The commission argues that the FOIC, in issuing this revised final decision, improperly exceeded the court's directive in its December 28, 2012 opinion by making new findings of fact not based on the evidence at the hearing before the FOIC. The court disagrees. In its opinion, the court asked the FOIC to resolve a discrepancy between finding of fact # 15 stating that the commission had discussed "zoning enforcement options" in executive session, while in finding of fact # 31 concluded that enforcement options were not discussed. The clarified findings state that the chairman of the commission submitted an affidavit regarding the discussion while he responded to a question that an enforcement action as such was not discussed. Rather options in lieu of court action were discussed. This clarification does not exceed the court's order. Also the revised final decision's citation of (d) and (e) in finding of fact # 31 is not a major change to the original final decision.

purposes. . . . [A]n agency's factual and discretionary determinations are to be accorded considerable weight by the courts. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of discretion. . . . Furthermore, when a state agency's determination of a question of law has not previously been subject to judicial scrutiny . . . the agency is not entitled to special deference.[2] . . . [I]t is for the courts, and not administrative agencies, to expound and apply governing principles of law." (Citations omitted; internal quotation marks omitted.) *Commissioner of Public Safety* v. *Freedom of Information Commission*, 137 Conn. App. 307, 311-12, 48 A.3d 694, cert. granted, 307 Conn. 918, 54 A.3d 562 (2012). See also *Tompkins* v. *Freedom of Information Commission*, 136 Conn. App. 496, 507, 46 A.3d 291 (2012): "The appropriate standard of judicial review . . . is whether the commission's factual determinations are reasonably supported by substantial evidence in the record taken as a whole." (Citation omitted.)

Commissioner of Public Safety also has relevancy to the interpretation of a statute in the context of the Freedom of Information Act. "Because statutory interpretation is a question of law, our review is de novo. . . . When construing a statute, [o]ur fundamental

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[2] An exception to this rule is where the agency's interpretation has been "time tested." See *Christopher R.* v. *Commissioner of Mental Retardation*, 277 Conn. 594, 603, 893 A.2d 431 (2006). The court does not apply this exception here.

objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to the existing legislation and common law principles governing the same general subject matter." (Citation omitted.) *Commissioner of Public Safety* v. *Freedom of Information Commission,* supra, 137 Conn. App. 313-14.

The commission contends that the FOIC erred in its findings and orders for three reasons.[3] The first commission claim is that it might react to Judge Owens' *Handsome,*

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[3] The commission also argued that the executive session was properly convened because of an attorney-client privilege. Hon. Howard Owens rejected this argument in *Chairperson, Connecticut Medical Examining Board* v. *Freedom of Information Commission*, Superior

Inc. in executive session. See finding of fact # 15 (a). The commission argues that this was an appropriate topic for executive session as it constituted strategy with respect to pending litigation. The court rejects this argument based on *Ansonia Library Board of Directors* v. *Freedom of Information Commission*, 42 Conn. Sup. 84, 89-91, 600 A.2d 1058 (1991), as the commission had not appealed from the *Handsome* decision.

The commission's second argument involves finding of fact # 15 (b) and (c). The claim is that the commission was permitted to conduct an executive session to discuss the two letters sent by Handsome's attorney. The commission argues that these letters fall within the exemption for pending claims and litigation, §§ 1-200 (6), (8) and (9) (A) as a demand for legal relief. These sections require that the agency receive a written notice to the agency which sets forth a demand for legal relief or which asserts a legal right stating the intention to institute an action before an appropriate forum if such relief or right is not granted.[4]

Court, judicial district of New Britain, Docket No. CV 10 6003500 (June 24, 2011). Section 1-231 (b) does not allow for an agency's convening in executive session to receive oral communications that would be otherwise privileged by the attorney-client relationship unless the executive session is for one of the five explicitly permitted purposes found in subdivision (6) of § 1-200. This court agreed with Judge Owens in *State of Connecticut Citizen's Ethics Advisory Board* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV 10-6007661 (July 15, 2011).

[4] The court has integrated the wording of subsections (8) and (9) (A). In addition, the court does not find that the FOIC's other final decisions in employing this language are time-

The commission argues that the sections mean that a pending claim or pending litigation arises when an agency receives a demand for "legal relief" *or* "which asserts a legal right" with the clause requiring the institution of an action only modifying "legal right." The FOIC, to the contrary, argues that the legal relief or legal right facing the agency must be accompanied by an intention to institute an action. The findings of the FOIC show that Handsome never made a threat of litigation.

The court concurs with the FOIC's interpretation. The commission has focused on the wrong "or" in these statutory provisions. The sections require the threat of litigation "if such relief *or* right is not granted." Were the commission's interpretation to be correct, the ending clause should read: "if such right is not granted by the agency." To the contrary, the FOIA requires both the notice to the agency demanding legal relief or asserting a legal right *and* states the intention to commence a legal action. "In construing a statute, common sense must be used and courts must assume that a reasonable and rational result was intended. It is not the function of courts to read into clearly expressed legislation provisions which do not find expression in its words . . . nor is it our function to substitute our own ideas of what might be a wise provision in the place of a clear expression of the legislative will." (Citations omitted; internal quotation marks omitted.)

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tested, nor is this language ambiguous such that extratexual materials are needed to ascertain the sections' meanings. The court thus addresses the meaning of these statutory subsections itself.

Germain v. *Manchester*, 135 Conn. App. 202, 209-10, 41 A.3d 1100 (2012).[5]

The final argument raised by the commission is that it had the right to convene an executive session to discuss strategy and negotiations regarding "the agency's consideration of action to enforce or implement legal relief or a legal right." §§ 1-200 (6) (B), (9) (C) See finding of fact # 15 (d) and (e). The FOIC found that the commission's chairman denied any intention to take such enforcement action in court or in another forum. Finding of fact # 31. The FOIC argues that these provisions mean that the commission's "consideration" involve a possible lawsuit or take part in another agency's litigation.

The court disagrees with the FOIC's position in this instance. "The commission argues that 'action' in the definition of 'pending litigation' should mean 'legal action." We disagree. The definition of 'pending litigation' . . . [in (A) and (B)] refer to litigation in terms of legal action. Subdivision [(C)], however, refers to 'consideration of action to

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[5] The cases relied upon by the commission are inapposite. The FOIC's claim in *Board of Education* v. *Freedom of Information Commission*, 217 Conn. 153, 161, 585 A.2d 82 (1991) was that there was no pending claim because "only claims formally submitted to some adjudicatory forum may be deemed" pending. This claim was rejected by the Supreme Court and in addition the subsequently enacted statutory subsections (8) and (9) (A) merely require a statement of "intention to institute an action." The court in the case of *ECAP Construction Co.* v. *Freedom of Information Commission*, Superior Court, judicial district of Hartford-New Britain, Docket No. CV 97-0574054 (July 30, 1998) did not analyze the final clause as this court does above, but only referred to a demand for "legal relief." This case ultimately found for the FOIC and neither party appealed.

enforce or implement legal relief or a legal right.' Absent from that subdivision are the terms 'legal action' and 'an action.' Words of a statute 'shall be construed according to the commonly approved usage of the language . . . ." General Statutes § 1-1 (a). Such a reading of the statute yields the interpretation that any action, not restricted to legal action, to implement legal relief or enforce a legal right concerns 'pending litigation' under the exception." *Furhman* v. *Freedom of Information Commission*, 243 Conn. 427, 433-434, 703 A.2d 624 (1997). See also *Brodinsky* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV 03-0520584 (December 15, 2004, *Beach, J.*), n.4, where Judge Beach quoted favorably from the Supreme Court's decision in *Furhman*.[6]

The commission has listed on page 22 of its brief matters that it might consider short of the decision to bring suit against Handsome. It lists (1) the issuance of a cease and desist order by the ZEO demanding that Handsome comply with their permit conditions; (2) closer monitoring of Handsome's grading activities by the ZEO and the town engineer; (3) sending letters to Handsome insisting that it comply with permit conditions; and (4) the commission's own order to show cause. Under *Furhman*, these

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[6] The FOIC argues that in *Furhman* that the agency was considering intervening in a DEP proceeding and therefore the agency was not merely considering actions in general. The court does not read *Furhman* to turn on this distinction.

are matters for "agency consideration" under subsection (9) (C).[7]

The court concludes that the FOIC correctly found that the executive session was improperly called to discuss the decision of Judge Owens or to discuss the two Handsome letters. However, the court concludes that the executive session was properly called to discuss the steps, short of litigation, that it might take to enforce its legal rights. Therefore the court remands the matter to the FOIC for further consideration of the appropriate remedy in this matter.[8]

Henry S. Cohn, Judge

[7] Since these are matters that qualify for "pending litigation" under § 1-200 (9), the court disagrees with finding of fact # 33 that finds that the exception does not apply. The FOIC argues that § 1-200 (6) (B) applies to strategy and negotiations in "pending litigation," but as Judge Owens' case has ended, the commission was acting only "in its capacity as regulatory body, and thus would not be a party to any pending litigation . . . ." Since under *Furhman*, an agency may discuss "consideration of action to enforce or implement legal relief or a legal right," the court concludes that its consideration falls under "pending litigation."

[8] Under this ruling, the FOIC should now consider whether the executive session violated § 1-231 (a) by the attendance of Mr. Chapman.