NO. HHB CV14-6024209S	:	STATE OF CONNECTICUT
BOARD OF ESTIMATE AND TAXATION FOR THE TOWN OF GREENWICH, ET AL.	:	SUPERIOR COURT
v.	:	JUDICIAL DISTRICT OF NEW BRITAIN
FREEDOM OF INFORMATION COMMISSION, ET AL.	:	OCTOBER 30, 2014

Memorandum of Decision

The plaintiffs, the board of estimate and taxation for the town of Greenwich, the board of selectman for the town of Greenwich, and the board of education for the Greenwich Public Schools, have filed this administrative appeal challenging a ruling by the defendant state freedom of information commission (commission) holding that the plaintiffs violated the open meetings provision of the state freedom of information act (act) when they met in executive session concerning what the plaintiffs maintain was a "pending claim." Defendant Greenwich Time newspaper (the Time) filed the original complaint with the commission. As explained below, the court affirms the commission's decision and dismisses the appeal.

I

The record reveals the following facts.[1] In 2011, the plaintiff board of education proposed to expand the auditorium and related music facilities at Greenwich High School. Shortly after the project commenced in 2011, the town realized that the soil surrounding the high school, particularly in the area of the project, was contaminated and would have to be remediated

[1]These facts are found in the commission decision (Return of Record (ROR), pp. 458-64) unless otherwise noted.

in order for the project to proceed. In response, William and Steven Effros, brothers and joint owners of residential property abutting the school grounds, contacted various local, state, and federal agencies in writing to express their concerns about the nature, cost, and legality of the proposed remediation work.

On or about February 25, 2013, the plaintiff board of estimate and taxation, which is the equivalent of a board of finance,[2] issued an agenda indicating that it planned to hold a special public meeting the next day. Its agenda stated that the board planned to convene in executive session to discuss the following issue: "a Pending Claim related to elimination of contamination in the Greenwich High School site." The board met in executive session on February 26 along with members of the board of education and board of selectman, the town attorney, outside legal counsel, two environmental remediation consultants, and the commissioner and deputy commissioner of the town's department of public works.

The Time filed an appeal with the commission in April, 2013, claiming that the board's decision to convene in executive session on February 26 was improper because there was no "pending claim" within the meaning of the act. See General Statutes § 1-200 (8).[3] After a hearing, the full commission rendered a final decision on June 11, 2014 in favor of the Time.

The commission made the following findings in support of its conclusion that there was no pending claim at the time of the meeting: "While the [plaintiff boards] submitted into

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[2]The court will refer to the board of estimate and taxation as the board.

[3]Section 1-200 (8) provides: "'Pending claim' means a written notice to an agency which sets forth a demand for legal relief or which asserts a legal right stating the intention to institute an action in an appropriate forum if such relief or right is not granted."

evidence several emails and letters written by the Effros brothers concerning the MISA [school] project and related work, it is found that none of these documents establishes a 'pending claim,' within the meaning of [General Statutes] §§ 1-200 (8) or 1-200 (6) (B) . . . . It is found that such evidence only establishes that the Effros brothers were seeking to have an outside agency, particularly the U.S. Army Corps of Engineers, get involved with and oversee the MISA project and the related remediation. It is further found that, as they sought to secure such oversight, the Effros brothers *complained* about the process that they believed the town was following and/or not following. While it is true that the [plaintiffs] submitted evidence which establishes that the Effros brothers asked the town to halt certain activities, made requests of the town, and informed the town they believed it was in violation of certain regulations, this is evidence of their criticism and discontent, and falls short of proving that there was a pending claim against the [board] at the time of the executive session in question.

"While the [plaintiffs] submitted an email into evidence which was sent by the Effros brothers to the Town of Greenwich's Zoning Enforcement Officer and which was entitled, 'Complaint and Request for Enforcement,' the email was undated and it was never established when this correspondence was sent and received. Moreover, similar to the other correspondence submitted into evidence, this email only establishes that the Effros brothers requested that the Zoning Enforcement Officer get involved with the town's remediation efforts in order to correct mistakes which they believed that the town was making. It did not establish that there was a 'pending claim' against the [board] at the time of the executive session in question.

. . . .

"It is found that the purpose of the February 26, 2013 executive session was to discuss the

various approaches to resolving the ground contamination at Greenwich High School. It is further found that the discussion included a review of a remedial investigation that had been performed on the grounds as well as two risk assessments. The executive session also included the presentation of a feasibility study by consulting experts retained by the town. It is found that this presentation focused on three possible remediation options for addressing the ground contamination. It is further found that each of the options presented involved a different financial commitment, with the first option or approach to the cleanup requiring a 5 to 8 million dollar financial commitment, the third option requiring a '100 million dollar plus' financial commitment, and the second option falling somewhere in between. It is further found that, before the executive session was concluded, the [plaintiff] boards reached a consensus on what option was best suited to address the town's situation." (Emphasis in original.) (ROR, pp. 461-63, paras. 17 & n.1, 21.)

On the basis of these findings, the commission concluded that the plaintiffs violated the open meeting provision of General Statutes § 1-225 (a) by convening in executive session for an impermissible purpose.[4] The commission declined to impose a civil penalty or to render the plaintiff boards' consensus null and void. The commission did order that the plaintiffs create minutes for the meeting and provide them to the Time along with copies of all written materials presented or discussed during the meeting. Finally, the commission ordered that henceforth the plaintiffs strictly comply with the open meetings statute.

The plaintiffs have appealed.

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[4]In pertinent part, § 1-225 (a) provides: "The meetings of all public agencies, except executive sessions, as defined in subdivision (6) of section 1-200, shall be open to the public."

II

Under the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq., judicial review of an agency decision is "very restricted." (Internal quotation marks omitted.) *MacDermid, Inc. v. Dept. of Environmental Protection*, 257 Conn. 128, 136-37, 778 A.2d 7 (2001). Section 4-183 (j) of the General Statutes provides as follows: "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Stated differently, "[j]udicial review of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable." (Internal quotation marks omitted.) *Schallenkamp v. DelPonte*, 229 Conn. 31, 40, 639 A.2d 1018 (1994). "It is fundamental that a plaintiff has the burden of proving that the [agency], on the facts before [it], acted contrary to law and in abuse of [its] discretion." (Internal quotation marks omitted.) *Murphy v. Commissioner of Motor Vehicles*, 254 Conn. 333, 343, 757 A.2d 561 (2000).

Our Supreme Court has stated that "[a]n agency's factual and discretionary determinations are to be accorded considerable weight by the courts. . . ." (Internal quotation marks

omitted.) *Longley v. State Employees Retirement Commission*, 284 Conn. 149, 163, 938 A.2d 890 (2007). "Even for conclusions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse if its discretion. . . . [Thus] [c]onclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts. . . . [Similarly], this court affords deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its 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. . . . We have determined, therefore, that the traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's time-tested interpretation. . . . [When the agency's] interpretation has not been subjected to judicial scrutiny or consistently applied by the agency over a long period of time, our review is de novo." (Citation omitted; internal quotation marks omitted.) *Chairperson, Connecticut Medical Examining Board v. Freedom of Information Commission*, 310 Conn. 276, 281-83, 77 A.3d 121 (2013).

III

A

As our Supreme Court has recently stated, "[t]he act requires 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.' General Statutes § 1-225 (a). Section 1-200 (6) defines an executive session as 'a meeting of a public agency at which the public is excluded' for one of five specified purposes.[fn6][5] This court has narrowly construed these purposes because 'the general rule under the . . . [a]ct is disclosure. . . .' *New Haven v. Freedom of Information Commission*, 205 Conn. 767, 775, 535 A.2d 1297 (1988); see also *Stamford v. Freedom of Information Commission*, 241 Conn. 310, 314, 696 A.2d 321 (1997) ('[t]he overarching legislative policy of the [act] is one that favors the open conduct of government and free public access to government records' [internal quotation marks omitted])." *Chairperson, Connecticut Medical Examining Board v. Freedom of Information Commission,* supra, 310 Conn. 283-84.

The purpose at issue in the present case is set forth in § 1-200 (6) (B), which allows an executive session for "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

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[5]Footnote 6 quotes § 1-200 (6), which provides: "'Executive sessions' means a meeting of a public agency at which the public is excluded for one or more of the following purposes: (A) 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; (B) 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; (C) matters concerning security strategy or the deployment of security personnel, or devices affecting public security; (D) discussion of the selection of a site or the lease, sale or purchase of real estate by a political subdivision of the state when publicity regarding such site, lease, sale, purchase or construction would cause a likelihood of increased price until such time as all of the property has been acquired or all proceedings or transactions concerning same have been terminated or abandoned; and (E) discussion of any matter which would result in the disclosure of public records or the information contained therein described in subsection (b) of section 1-210."

otherwise settled. . . ." As noted, § 1-200 (8) defines a "pending claim" as "a written notice to an agency which sets forth a demand for legal relief or which asserts a legal right stating the intention to institute an action in an appropriate forum if such relief or right is not granted."

Our Supreme Court has interpreted this definition as follows: "Under § 1-200 (8), a pending claim must set 'forth a demand for legal relief' and 'stat[e] the intention to institute an action. . . .' '[D]emand' means '[t]he assertion of a legal or procedural right.' Black's Law Dictionary (9th Ed. 2009). Similarly, the plain meaning of 'stating the intention' is that the demand actually or expressly states what actions the author intends to take. Although there are no magic words necessary to express demand and intent, the written notice must actually or expressly state that an action is pending or that an action is conditional on relief not being granted. . . . Because § 1-200 (6) (B) and (8) requires actual or express articulation, the proper focus is not on what the board reasonably could have believed but, rather, on what the written notice actually states." (Footnotes omitted.) *Chairperson, Connecticut Medical Examining Board v. Freedom of Information Commission,* supra, 310 Conn. 284-85.[6] See also *Board of Education v. Freedom of Information Commission,* 217 Conn. 153, 585 A.2d 82 (1991) (letter from students and faculty advisor to Board of Education demanding that it rescind an order prohibiting

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[6]As stated, the definition of "pending claim" calls for "a written notice to an agency which sets forth a demand for legal relief or which asserts a legal right stating the intention to institute an action in an appropriate forum if such relief or right is not granted." The phrase "such relief" is a clear reference to the "demand for legal relief," while the phrase "such . . . right" is an obvious reference to a writing "which asserts a legal right." Thus the phrase "stating the intention to institute an action in an appropriate forum if such relief or right is not granted" modifies both "demand for legal relief" and a writing "which asserts a legal right." In other words, as the Supreme Court's discussion suggests, in order for a pending claim to exist, there must be a statement of an "intention to institute an action in an appropriate forum" regardless of whether there is a written "demand for legal relief" or a writing "which asserts a legal right."

publication of high school literary magazine or they would file suit constituted a "pending claim.")[7]

A careful reading of the statute reveals that the pending claim must be against the same agency that seeks to conduct the executive session. Section 1-200 (6) (B) defines "executive session" to mean "a meeting of *a* public agency at which the public is excluded for one or more of the following purposes . . . 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. . . ." (Emphasis added.) The emphasis on the articles in this quotation establishes that, to justify an executive session, the public agency that is conducting the meeting must be the same public agency that is a party to the pending claim or litigation. See also *Chairperson, Connecticut Medical Examining Board v. Freedom of Information Commission,* supra, 310 Conn. 287-88 ("Section 1-200 (6) (B) requires that the 'public agency or . . . member thereof' be 'a party' to the 'pending claims or pending litigation. . . .'"); *Glastonbury Education Assn. v. Freedom of Information Commission,* 234 Conn. 704, 713, 663 A.2d 349 (1995) ("the legislature authorized a public agency to adjourn a meeting into executive session for 'strategy and negotiations with respect to pending claims and litigation' to which the agency itself is a party.") Thus, because the board in this case is "*a* public agency" that conducted the meeting, it must be "*the* public agency [that] . . . is a party" to the pending claim or litigation in order to

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[7]Contrary to the plaintiff's invitation, there is no occasion to consider the legislative history of the statute. The Supreme Court has described the statute's language as "plain and unambiguous"; *Chairperson, Connecticut Medical Examining Board v. Freedom of Information Commission,* supra, 310 Conn. 285; which means that, by statute, "extratextual evidence of the meaning of the statute shall not be considered." See General Statutes § 1-2z.

invoke the executive session exception to the open meetings rule. (Emphasis added). General Statutes § 1-200 (6) (B).[8]

B

The plaintiffs rely on six letters and emails purportedly written by the Effros brothers to town, state, and federal agencies to establish that there was a "pending claim" that would justify an executive session under § 1-200 (6) (B). Having reviewed these letters and emails, the court agrees with the commission that none of them meets the definition of "pending claim."

The chief shortcoming of these communications is that they do not state an intention to institute an action against any of the plaintiff agencies. Several of them do request that state or federal agencies such as the state department of environmental protection or the U.S. Army Corps of Engineers take enforcement action against the town. (ROR, pp. 280-83, 286-96, 304-12; Exhibits 3, 5, 8.) These requests are insufficient because they do not state an intention by either the Effros brothers or the enforcement agencies to begin an action against any of the plaintiffs. The same is true of what appears to be Stephen Effros's email to the federal environmental protection agency stating: "Can you please tell me the formal process for filing enforcement complaints at both the DEEP and the EPA? Clearly that's the only option we have." (ROR, p. 303; Exhibit 7, p. 5.) This email, while unclear, at most states an intention to file a complaint with the state and federal agencies. It does not state an intention on the agencies' part or on the

[8]The plaintiffs point to the commission's finding that there was no claim pending "against the Board of Estimate and Taxation. . . ." (ROR, p. 461, para. 16.) The court agrees with the plaintiffs that, because the board governs finances for the entire town, it is not necessary, contrary to the commission's suggestion, for a claim to state a planned action against the board itself and that a planned action against any of the plaintiff agencies or even the town as a whole acting on behalf of these agencies would suffice to establish a pending claim in this case. As explained below, however, the plaintiffs do not meet even this expanded standard.

part of the Effros brothers to file an action against the plaintiffs. Even the letter to the town zoning enforcement officer states only a "request" that the officer "notify the Town, the Department of Public Works and the Board of Education that they do not have valid authorization to initiate construction . . . ." (ROR, pp. 284-85; Exhibit 4, pp. 3-4.) Bearing in mind that "the proper focus is not on what the board reasonably could have believed but, rather, on what the written notice actually states"; *Chairperson, Connecticut Medical Examining Board v. Freedom of Information Commission,* supra, 310 Conn. 285; this request simply does not state an intention, either by the Effros brothers or the zoning enforcement officer, to institute an action against any of the plaintiff agencies. As stated by the commission, the Effros communications are "evidence of their criticism and discontent, and [fall] short of proving that there was a pending claim against the [board] at the time of the executive session in question." Applying the rule that the court must narrowly construe the pending claim exception to the open meetings rule; id., 283-84; the commission's conclusion was correct.[9]

C

The plaintiffs also argue that they properly convened an executive session because of "pending litigation." The plaintiffs raised this issue before the commission even though at one point they conceded that "[t]here wasn't any pending litigation." (ROR, p. 119.) The plaintiffs

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[9]In addition, to constitute a pending claim the threat of legal action must be "imminent." *Board of Education v. Freedom of Information Commission*, supra, 217 Conn. 161. In this case, the most recent correspondence took place in September, 2012. Some of the communications occurred in March, 2012. (ROR, Exhibits 5, 6, 7, 8.) One of the emails is dated August, 2011 and the letter to the town zoning enforcement officer is undated. (ROR, Exhibits 3, 4.) These communications do not qualify as "imminent" so as to justify an executive session on February 26, 2013.

now seek to justify the executive session on the basis of paragraph (C) of § 1-200 (9), which provides that "pending litigation" means "the agency's consideration of action to enforce or implement legal relief or a legal right." General Statutes § 1-200 (9) (C).[10] The plaintiffs rely on case law stating 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, 434, 703 A.2d 624 (1997). In this case, however, there is no evidence that the board discussed taking any affirmative action to enforce a legal right. Instead, as the commission found, the board discussed several remediation options. Such a discussion hardly equates to "pending litigation." The court rejects this claim.

D

In order to justify an executive session, there must be "strategy and negotiations" with respect to pending claims or pending litigation. General Statutes § 1-200 (6) (B). In addition to an absence of pending claims or pending litigation as defined by the statute, there is no valid basis to conclude that the February 26 meeting involved any claim or litigation strategy or negotiations. The commission heard considerable testimony about the discussion at the February 26 board meeting. (ROR, pp. 174-98, 204-06.) On the basis of this testimony, the commission concluded that "the purpose of the February 26, 2013 executive session was to discuss the

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[10]In full, § 1-200 (9) provides: "'Pending litigation' means (A) a written notice to an agency which sets forth a demand for legal relief or which asserts a legal right stating the intention to institute an action before a court if such relief or right is not granted by the agency; (B) the service of a complaint against an agency returnable to a court which seeks to enforce or implement legal relief or a legal right; or (C) the agency's consideration of action to enforce or implement legal relief or a legal right."

various approaches to resolving the ground contamination at Greenwich High School. It is further found that the discussion included a review of a remedial investigation that had been performed on the grounds as well as two risk assessments. The executive session also included the presentation of a feasibility study by consulting experts retained by the town. It is found that this presentation focused on three possible remediation options for addressing the ground contamination." Thus, the commission's findings reveal that, if there was any discussion about strategy, it was strategy about how best to resolve the contamination, rather than strategy about any possible claims or litigation. As mentioned, there is considerable testimony and thus substantial evidence to support these factual findings. See *Sweetman v. State Elections Enforcement Commission*, 249 Conn. 296, 331, 732 A.2d 144 (1999) (under substantial evidence rule, "evidence is sufficient to sustain an agency finding if it affords a substantial basis of fact from which the fact in issue can be reasonably inferred." [Internal quotation marks omitted.]) Therefore, the plaintiff cannot establish that any portion of the meeting involved litigation strategy or negotiations.

E

The plaintiffs attempt to claim for the first time in this case that an executive session was proper under § 1-200 (6) (E), which permits a closed meeting when discussion would result in the disclosure of certain protected records related to public supply and construction contracts.[11]

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[11]Section 1-200 (6) (E) provides that an agency can conduct an executive session for a "discussion of any matter which would result in the disclosure of public records or the information contained therein described in subsection (b) of section 1-210." Section 1-210 (b) (7), upon which the plaintiffs rely, pertains to "[t]he contents of real estate appraisals, engineering or feasibility estimates and evaluations made for or by an agency relative to the acquisition of property or to prospective public supply and construction contracts, until such time as all of the property has been acquired or all proceedings or transactions have been terminated or

The plaintiffs did not raise this claim before the commission and introduced no evidence to support it. Accordingly, the court will not review it further. See *Solomon v. Connecticut Medical Examining Board,* 85 Conn. App. 854, 862, 859 A.2d 932 (2004), cert. denied, 273 Conn. 906, 868 A.2d 748 (2005) ("If the plaintiff failed to raise issues before the panel or the defendant, he may not do so for the first time on appeal.")

IV

The court affirms the commission's decision and dismisses the appeal.

It is so ordered.

Schuman, J.

Carl J. Schuman
Judge, Superior Court

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abandoned, provided the law of eminent domain shall not be affected by this provision . . . ."