TOWN OF SOUTH WINDSOR

PLANNING & ZONING COMMISSION

MEMBERS PRESENT: Gary Bazzano, Bart Pacekonis, Stephanie Dexter, Elizabeth Kuehnel, Frank Bonzani, Kevin Greer

ALTERNATES PRESENT: Bill Flagg, Teri Parrott, Mike LeBlanc

STAFF PRESENT: Michele Lipe, Director of Planning; Lauren Zarambo, Recording Secretary

SPECIAL MEETING / MADDEN ROOM

CALL TO ORDER: Chairman Bazzano called the Special Meeting to order at 5:30 p.m.

1. PZC Commissioner Training Part II with Attorney Kari Olson, Murtha Cullina LLP – continued from April 5, 2016

Attorney Kari Olson with Murtha Cullina LLP gave a power point presentation continuing the commissioner training which began on April 5, 2016.

The attorney began with the subject of sign regulations. A recent Supreme Court decision ruled that the content of a sign cannot be controlled, based on principles of free speech, unless there is very significant interest in doing so. Regulations for signs in South Windsor appear to be sufficient to satisfy the Supreme Court's decision if they are applied uniformly.

Director of Planning Lipe brought up political signs which are exempt from regulations while all other signs are regulated. Attorney Olson stated political signs would have to be defined as a type of sign to regulate like municipal and directional signs and noted in other communities there are regulations regarding how long political signs can be left up. Director Lipe noted there are regulations for size and where signs can be located and that off-premises signs are not allowed and neither are signs on vacant property.

Alternate Commissioner Flagg bought up a question regarding the seating of alternate commissioners. It was suggested by a land use attorney at a recent Clear Land Use Training that an alternate appointed to be seated for a public hearing, where the hearing is continued to the next meeting, should still be appointed to be seated even if the regular member is at the next meeting.

Attorney Olson stated it will depend on the nature of the application and how far along the public hearing has gone. Any commissioner who renders a decision on the application has to certify on the record that they have been at all the hearings or listened to the tapes and familiarized themselves with everything. If an alternate has been appointed and sat through one or two hearings and is familiar first hand, it might be the right thing for that alternate to remain seated. It would require the regular member, whose place the alternate took, to recuse his or her self from the rest of the application. However, the regular member is entitled to listen to the tapes and be seated if he or she is present at a meeting.

Alternate Commissioner Parrott asked when an alternate has been present throughout a public hearing and at the time of a vote a regular member is absent, could the alternate be appointed to vote. Attorney Olson replied that alternate could absolutely be seated but should state on the record that they were present at every public hearing or listened to the tapes, reviewed the material, and are familiar with it.

The subject of affordable housing was discussed. The State requires every town to provide affordable housing. Attorney Olson clarified low income, Section 8 developments are not affordable housing. Affordable housing is a certain percentage of the housing that is going to be developed has to be slated for persons at or below the median income for the area. It is especially critical in towns where it is impossible

for those who serve the community (like teachers, fire fighters, police) to be able to afford to live in it. From all appearances affordable units must appear to be the same as market rate units.

Every town has a certain percentage of affordable housing that is required of them and once that percentage is reached the town does not need to accept any other 8-30G applications. Until that happens developers can bring a new zoning text amendment to the commission to create their own set aside development and then bring forward the site plan consistent with those created regulations. The courts have said that towns have to agree to that unless there is a compelling reason that will outweigh the need for affordable housing. There is a presumption for the need for affordable housing if a town is below the percentage required by the State.

Whatever the reason for saying no to an 8-30G, or even putting conditions on it, have to be supportable by some really significant general health, safety, welfare concern of the community. It allows the developer the right of appeal if the 8-30G application is denied and it completely shifts the burden of proof from the applicant to the Town to prove to the court that it was denied for a compelling reason that outweighs the need for affordable housing.

An affordability plan is required from an applicant of an 8-30G application. State law requires that plan to include all calculations and statistics to prove the units will be affordable and the basis for marketing the plan.

Attorney Olson stated one of the few instances that a commission can deny an 8-30G is when it is proposed in an industrial zone because regulations do not allow residential uses in industrial zones. Other reasons upheld by the courts have been inadequate public water or sewer supply or that the property is on the POCD for open space preservation.

Vice Chairman Pacekonis asked about restrictions on the amount of units in a development. The attorney replied there is a 10% requirement to be deed restricted for forty years. The commission cannot require more than 10% of the units to be affordable. Alternate Commissioner Parrot asked about the deed restriction preventing a house sold as affordable being resold at market rate and making improvements to those homes. Attorney Olson stated improvements are made at the home owner's peril if made within the forty years when the house would still be sold at the affordable rate.

The percentage of affordable units in town and throughout the state was discussed.

The burden of proof is on the Commission for any conditions put on an affordable housing approval or if that application is denied. There has to be real data, not conjecture, to support it. If it is about traffic there must be a traffic study or an expert to verify it. If the court doesn't like the condition, they can strike that condition and let it go through. If there is a condition that is so entwined in the approval it may be wise to get a legal opinion as to whether it can withstand scrutiny. Any condition of approval must originate in the regulations.

Incentive Housing was briefly described. Chairman Bazzano asked for the difference between work force housing, incentive housing, and affordable housing. Attorney Olson stated work force housing and affordable housing are supposed to be one in the same where the average person working a full time job in the community can afford to live in that community (at 60% and 80% of the medium income of the community). Recent affordable housing in South Windsor has sold in the range of the $300,000's.

In response to a list of questions provided by Chairman Bazzano, Attorney Olson distributed a document concerning the Code of Ethics and Ethical Standards in South Windsor for elected and appointed town officials.

South Windsor has Ethical Standards while other towns have Ethic Ordinances and some have policies written into their charters. There are also State Statutes, 7-148t, 8-11, and 8-21, regarding a commissioner's ability to represent or be in front of other commissions, boards, committees and subcommittees in their town when they are sitting as a commission member. A commissioner is not allowed to represent someone in front of the body that they are sitting on or any other in town.

It is written in the town charter that no official or employee of the town may in engage in official town capacity in any manner that would create or result in a conflict of interest. A conflict of interest could be financial or personal. A good question to ask in determining whether there is a true conflict of interest is whether your relationship with that individual will affect your ability to render a fair and impartial decision. If there is any bent toward changing your mind or basing your decision you must step away. There is no question.

The appearance of impropriety can arise even if there is not a true conflict of interest. Sometimes there can be the appearance of a conflict that should drive your decision making in terms of whether you should walk away from participation. This is the first issue that can be raised on an appeal and it can cost the Town a great deal financially in appeal costs. Recusing oneself is not to be taken personally but rather for what is in the best interest of the town.

Chairman Bazzano asked at what point in a meeting a commissioner should rescue him or herself. The attorney answered as soon as a commissioner feels there may be a conflict they should rescue themselves and should be aware there may not be a direct conflict but the appearance of impropriety. She also noted an applicant has the obligation to raise the issue of a conflict of interest at the beginning of a hearing. If it is not raised at the beginning they will have lost the opportunity in an appeal.

A question was raised about receiving gifts before or after an application has been decided and the size of a gift, from a cup of coffee to a dinner, etc. Attorney Olson replied absolutely no gifts of any size from someone who will be appearing before you should be received before or after an application has been decided. The attorney stressed it is a matter of introspection for commissioners to determine whether an impartial decision can be rendered.

Once an application has been received and the public hearing has been set, commissioners should not speak with anyone regarding the application outside of the public hearing or public meeting purview. Commissioners can discuss it with town staff but not as a quorum. There should be no discussion with anyone from the public or between commissioners. This is in order that everyone involved is treated equally and fairly and nothing is going on behind the scene. Any communication emailed to a commissioner or staff should be printed out and put into the public record so that the applicant has the ability to respond.

Director Lipe described letters received by staff and commission members after the close of a public hearing before deliberation. The letters were collected and placed in the application file with the label that they were received after the close of the public hearing and not entered into the record. Attorney Olson added the label should include, "…and not considered by the commission". She also advised that it be mentioned on the record that the letters were received, sealed, not considered, and not read, if that is the case.

Alternate Commission Flagg left the meeting at 6:30 p.m.

It was asked if three or less members can talk at a social gathering about an application. The attorney replied absolutely not if it is about a pending application. Three members would be considered less than a quorum which means there is the right to speak together without creating an illegal public meeting. However business, especially pending applications, should not be discussed because the applicant would not be permitted to respond to the information being discussed. Vice Chairman Pacekonis interjected the term "exparte communication".

Casual discussions can be held about regulations but not about specific applications. If four or more members are speaking together that creates a quorum and no business at all can be discussed. Commissioners have the right to meet socially but are not allowed to talk about business if there is a quorum. If a commissioner is at a gathering or in public and people start talking about an application it is best to walk away. Pending applications cannot be discussed.

After an application has been received a commissioner can speak to the Town Planner or any town staff but not as a quorum of four or more members which would constitute a public meeting.

Being on a commission and avoiding bias and pre-judgement does not mean a commissioner cannot have an opinion but the law requires commissioners to give an application fair process. The true test of a good commissioner is being able to put aside knee jerk reaction and opinion and wait to take in all the information before rendering a decision.

If a commissioner is going to rely on any particular expertise of their own in coming to a conclusion or opinion then their resume should be entered into the record or their qualifications stated specifically on the record to disclose their expertise. The applicant then has the right to question that commissioner's expertise.

The attorney cautioned against making professional opinions during deliberation after a public hearing has closed. If there is a question about information given at a public hearing it should be raised during the public hearing where it is fair opportunity to be heard on every issue. To bring in information as an expert after the public hearing has closed based on the commissioner's expertise does not give the applicant opportunity to respond.

The attorney counseled commissioners not to state publically or in a hearing, "I would not support another ___ in town." or "I would never ___". A judge will not believe that a commissioner is willing to put their opinion aside to listen to all the evidence and make an informed decision because pre-determination was proven using the word "never" or "will not support another ___".

Alternate Commissioner Parrott asked about protocol for talking to the press recalling her previous time served as a Planning & Zoning commissioner and being called by a reporter for information. Attorney Olson stated commissioners should not talk to the press about pending applications. If the press wants a statement after a decision has been made a commissioner can say 'I listened to everything and took all the information in, and we thought long and hard and came to our decision based on the evidence presented to us.' That is all the court is expecting of a commissioner.

A decision can be appealed for 15 days after the date of the published notice of decision.

The attorney answered a question from Chairman Bazzano concerning whether a commissioner can bring up a decision for reconsideration at the next meeting. She stated the biggest problem on reconsidering a decision is the notion of fair notice to the public. An agenda is published for all meetings so the public knows what the commission is discussing. It is a huge risk to do something after the fact especially for major decisions. Director Lipe stated a decision does not have to be made the evening of the close of the public hearing. The attorney confirmed the commission has 65 days, over two months, after a public hearing is closed to render a decision. The commission should not feel pressure to immediately come to a decision when an important application is before them especially when materials have been submitted right before the public hearing closes.

Alternate Commissioner Parrott asked if during a meeting it was bought up that commissioners wanted to reconsider a decision could it be placed on the next agenda to be published? The attorney stated it would not be possible because the decision would have already been published and the applicant would have received their official notice of the decision and have a vested interest in that decision. Once an application goes forward there are strict statutory guidelines as to when decisions have to be rendered. Once a public hearing is closed it cannot be reopened. If a commissioner moves to close a public hearing and others do not agree it should be stated that the public hearing should be held open. Once a public hearing is closed the only new information that can be added to the record is information provided to the commission by staff concerning what has been previously discussed.

Commissioner Greer asked after a decision is rendered can the town engineer decide something else has to be done on the property. Director Lipe stated a standard condition of approval is that drainage on the site is subject to the town engineer. Written comments are issued to the applicant before approval and the commission typically incorporates those changes as part of their approval. Changes beyond that are submitted as change orders by the applicant. Some change orders are handled administratively by town staff and more significant changes come back to the commission for approval. Attorney Olson described site plans, site plan modifications, special exceptions and expirations.

Vice Chairman Pacekonis asked if an applicant misrepresented information which was used for a decision and a problem ensued afterward would they be required to correct that problem based on the incorrect information originally submitted. Attorney Olson replied most applications require the signature of the applicant stating what is submitted is true and accurate. If after the fact the applicant wants to do something different they would come back in for a site plan modification or they would have to comport with what was approved.

Alternate Commissioner Parrott asked about a drawing being approved and when the project is built it does not match. Attorney Olson counseled to make sure that the record is clear with all details of the approval with the architectural plan and have applicants state on the record what materials are to be used. Regulations dictate site plan approval but special exceptions give much more control to the commission about how buildings are built. Landscaping bonds were discussed. Only what is on an approved plan is what can be required.

Concerning the Freedom of Information Act (FOIA), Attorney Olson encouraged commissioners to have a separate email account for town business or to have a separate file on their computer where all email and correspondence related to business with the town goes automatically. Commissioners are subject to FOIA and their personal computer is at risk if there is ever a request for that information and there is a question whether everything has been submitted. If everything is in one file and that file is produced it can be sworn

under oath that it is complete. The Attorney encouraged commissioners to keep all correspondence because it is considered public record and needs to comply with the State Library retention schedule. Commissioner Greer asked how long records had to be kept. Attorney Olson thought it was a one year retention period. The correspondences can also be downloaded onto a disk which will get it off the computer. Texting during a public hearing will put a commissioner at risk for a FOIA request for information on that cell phone.

The attorney indicated application plans and submittals can be marked on by commissioners as long as on record any reference made to a plan or submittal is fully described with the location with a sheet number if possible.

Attorney Olsen indicated commissioners can speak with an applicant before an application is officially received but with care and following regulations. There are pre-application procedures for some applications. The law recognizes the right to have a nonbinding pre-application meeting protected by the shelter of the regulations but an informal meeting should not take place at a kitchen table. Director Lipe noted the disclaimer and waiver agreement that anyone having a preliminary discussion has to sign. The attorney counseled the commissioners to take care in giving informal opinions because of the potential of those opinions coming back and being labeled as predetermination. She gave examples of different circumstances complicated by opinions given and encouraged avoiding absolutes like never or always.

Vice Chairman Pacekonis asked about questions between commissioners during a public hearing. Attorney Olson stated opinions cannot be shared and to avoid making a decision or appearing to make a decision until all information has been put before you. The attorney indicated it is bad form for commissioners to be speaking with each other during the course of a public hearing and to be careful what is put down in writing.

Alternate Commissioner Parrott asked how much weight should be given to input from the public during a public hearing when many are speaking in opposition to an application. Attorney Olson replied the commission is driven by regulations and is sitting in an administrative capacity on a site plan or subdivision application. If all regulations have been met the commission must approve the application. Conditions of approval can sometimes be placed on an application to appease neighborhood concern. With special exception applications there is more flexibility. Director Lipe stated neighborhood acceptance is part of the criteria for special exceptions and asked if it can be reason enough to deny an application. Attorney Olson replied it is not reason enough unless there was some other well grounded reason such as general health, safety, and welfare or when within a village zone that the character of the neighborhood is negatively impacted. Property owners have the right to develop their property if they meet regulations.

ADJOURNMENT:

Motion to adjourn the Special Meeting at 7:33 p.m. was made by Commissioner Bonzani
Seconded by Vice Chairman Pacekonis
The motion carried and the vote was unanimous.

Respectfully Submitted,

Lauren L Zarambo
Recording Secretary