FICAP # 2009-009

CC: CMH EVT Comm's TAH RMH H. Hammitt

NO. HHB CV 09- 4019954 S

PLANNING AND ZONING COMMISSION OF THE TOWN OF POMFRET	:	SUPERIOR COURT
V.	:	JUDICIAL DISTRICT OF NEW BRITAIN
FREEDOM OF INFORMATION COMMISSION, ET AL.	:	NOVEMBER 10, 2009

MEMORANDUM OF DECISION

Did the Pomfret Planning and Zoning Commission violate the Freedom of Information Act, under the circumstances of this case, when it failed to stop and make copies of records that were being discussed during evening meetings on the request of members of the public in attendance? That is the essential issue in this administrative appeal, and in a related case[1] being decided today. For the following reasons, this court decides that the answer is negative. Accordingly, the plaintiff Zoning Commission's appeal from the contrary decision of the Freedom of Information Commission (FOIC) is sustained, and the matter is remanded to the FOIC for further proceedings consistent with this decision.

[1] This case derives from a Freedom of Information complaint filed by Charles Boster, Lt. Col. Paul Hennen, USA (Ret.) and Ford Fay, members of the public who were in attendance at two evening Zoning Commission meetings, complaining about the Zoning Commission's refusal to stop and give them copies of public records being discussed the meetings. The related case decided today, Planning and Zoning Commission of the Town of Pomfret v. Freedom of Information Commission, et al., No. HHB CV 09- 4019953, derives from an earlier complaint filed by Fay alone, making the same complaint.

I

Appeals from the decisions of the Freedom of Information Commission are available pursuant to the Uniform Administrative Procedure Act (UAPA). General Statutes § 1-206(d). In a UAPA appeal, it is not the function of the court to retry the case. The facts before the court are ordinarily confined to those that were in the record of proceedings before the agency. General Statutes § 4-183(i). The court cannot substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, and it is required to affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced under certain well-defined criteria. General Statutes § 4-183(j). "An agency's factual determination must be sustained if it is reasonably supported by substantial evidence in the record taken as a whole." (Citations omitted; internal quotation marks omitted.) Rocque v. Freedom of Information Commission, 255 Conn. 651, 659, 774 A.2d 957 (2001). Where the main issue turns not so much on the agency's findings of fact, but on its interpretation of the legal requirements under the pertinent statutes and regulations, deference to the agency's interpretation is also merited sometimes. "[C]ourts should accord great deference to the construction given the statute [and regulation] by the agency charged with its enforcement. [W]here the governmental agency's time-tested interpretation is reasonable, it should be accorded great weight by the courts." (Internal quotation marks omitted; citations omitted) Anderson v. Ludgin, 175 Conn. 545, 555-56, 400 A.2d 712 (1978); accord, Longley v. State Employees Retirement Comm., 284 Conn. 149, 162-67, 931 A.2d 890 (2007). However, where

an agency's determination of a question of law has not previously been subject to judicial scrutiny, is not so time-tested, and where the case presents a pure question of law, no deference is due. See, e.g., Autotote Enterprises, Inc. v. State, Div. of Special Revenue, 278 Conn. 150, 154, 898 A.2d 141 (2006); Williams v. Freedom of Information Commission, 108 Conn. App. 471, 478, 948 A.2d 1058 (2008); Plastic Distributors, Inc. v. Burns, 5 Conn. App. 219, 225, 497 A.2d 1005 (1985) citing Wilson v. Freedom of Information Commission, 181 Conn. 324, 342-43, 435 A.2d 353 (1980).

II

The record in this case reveals the following: By complaint filed with the FOIC on February 6, 2008, Charles Boster, Lt. Col. Paul Hennen, USA (Ret.) and Ford Fay complained that the Pomfret Planning and Zoning Commission (Zoning Commission) reviewed and debated draft proposed amendments to the zoning regulations concerning home occupation uses at evening meetings on January 9 and January 15, 2008, but that the Zoning Commission refused to make copies for members of the public in attendance. They further complained that a letter from the Zoning Commission's counsel, Attorney Michael Zizka, concerning the proposed amendments, was also reviewed and discussed at the January 9 meeting and that the Zoning Commission also refused to make copies of that item for members of the public in attendance. A similar, earlier complaint was filed by Fay, on January 28, 2008. The complainants were told they could get copies during the day. They did return during the day, a few days later, and received all copies on request. The complainants argued, in essence, that getting copies after the

meeting did them no good because they needed the material to follow what was happening, and, moreover, it violated the Freedom of Information Act requirement that they receive copies "promptly." Both complaints were consolidated and heard by a FOIC hearing officer at a hearing held on June 4, 2008. Following that hearing, a proposed final decision was drafted and considered by the FOIC at a meeting on January 14, 2009. The FOIC adopted the proposed final decision, with some minor changes, and issued its final decision dated January 14, 2009. That decision, which is the subject of this appeal, made the following essential factual findings:

> 3. It is found that the respondent Planning and Zoning Commission, with the respondent First Selectman in attendance, held meetings on January 9 and January 15, 2008, at which time it discussed a four-page draft memorandum from the town planner entitled "Home Occupations Retail Sales." The respondents discussed a January 8, 2008 draft at the January 9 meeting, and a January 15, 2008 draft at the January 15 meeting. Additionally, the respondents discussed a letter dated January 9, 2008 from town counsel to the town planner, regarding the proposed zoning amendments.
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> 4. It is found that both draft memoranda discussed proposed changes to the town's zoning regulations.
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> 5. It is found that the complainant Fay asked for a copy of the draft memorandum discussed at each meeting, so that he could follow the discussion, as well as the January 9, 2008 letter from town counsel; and the complainant Boster asked for a copy of any records distributed to the members of the respondent Planning and Zoning Commission at the January 25, 2008 meeting.
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> 6. It is found that, at the January 9, 2008 meeting, extra copies of the draft memorandum were available on the table around which the respondents were conducting their discussion.
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> 7. It is also found that, at both meetings, the respondents had available to them a running copying machine in the building in which the meeting was being conducted, and that a copy of the requested records readily could have been made.

8. It is found that the respondents nonetheless declined to provide a copy of any of the requested records to the complainants during the meeting, on various ground asserted at the time of that request. First, the respondents asserted that they had three or four days to provide copies of public records, pursuant to their own rules and pursuant to the Freedom of Information Act. Second, the respondents asserted that copies were only available from the town clerk during regular office or business hours. Finally, the respondents asserted that the draft memoranda were subject to change, and therefore could be misused or misunderstood by the public.

9. It is found that the requested records were provided to the complainants when they appeared several days later at the office of the town clerk and requested them again.

Final Decision, Agency Record pp. 209-10.

The FOIC concluded that, under these facts, the Zoning Commission could have easily provided the copies when requested, that the Zoning Commission's excuses for not complying were not legally valid, and, therefore, the Zoning Commission violated the "promptness" requirements of the Act. The promptness rules appear in Sections 1-210(a) and 1-212(a) of the Act. Section 1-210(a) provides, in pertinent part, as follows:

> (a) .... every person shall have a 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.

General Statutes § 1-210(a) (emphasis added).

Section 1-212(a) provides, in pertinent part, as follows:

> (a) Any person applying in writing shall receive, promptly upon request, a plain or certified copy of any public record.

General Statutes § 1-212(a) (emphasis added).

This appeal followed.

III

A preliminary matter to be decided is whether the Zoning Commission is aggrieved by the decision of the FOIC. Aggrievement is a jurisdictional prerequisite to any administrative appeal, and the court must find whether a plaintiff is aggrieved before it can proceed to the merits of the case. See General Statutes § 4-183(a). With respect to FOIC appeals, it has been held that when the FOIC finds that a governmental agency violated the Freedom of Information Act, the agency is aggrieved for purposes of appeal because failure to comply with the FOIC order can result in criminal and civil sanctions. See State Library v. Freedom of Information Commission, 240 Conn. 824, 834, 694 A.2d 1235 (1997); Davis v. Freedom of Information Commission, 47 Conn.Sup. 309, 312 790 A.2d 1188 (2001), aff'd., 259 Conn. 45, 787 A.2d 530 (2002).

In the instant case, the FOIC found that the Zoning Commission violated the Freedom of Information Act. Therefore, the court finds that the Zoning Commission is aggrieved.

IV

As to the merits, the first issue raised by the Zoning Commission is whether the FOIC erred in ruling in favor of the complainants because they never made their request for copies in writing. The Zoning Commission argues that the Act requires that such requests be made in

writing. Since the complainants never made written requests, they had no grounds to file a complaint, and the FOIC lack statutory authority to rule in their favor, it argues. It is true that the statute requires that requests for copies be in writing. See General Statutes § 1-212(a) ("Any person applying in writing shall receive, promptly upon request, a plain or certified copy of any public record.") (emphasis added). The point raises issues as to whether a written request is a jurisdictional prerequisite for an FOI complaint. It also raises issues as to whether the written request requirement is directory or mandatory. Assuming, arguendo, that it is a mandatory requirement, there is also an issue as to whether the requirement was waived by the Zoning Commission due to its failure to object in writing. See General Statutes § 1-206(a) ("Any denial of the right to inspect or copy records .... shall be made .... in writing ...."). The dispositive factor in this case is the fact that the Zoning Commission did not deny the requests for copies on the grounds that the requests were not in writing. In fact, the Zoning Commission did not deny the requests for copies at all. To the contrary it provided all copies requested. By honoring the requests for copies, any issue as to whether the requests must be in writing was rendered moot. It would serve no practical purpose to revive that controversy now. "[W]hen events have occurred that preclude a court from granting practical relief to a party through a disposition on the merits, the case is moot." (Citation omitted; internal quotation marks omitted.) Dept. of Public Safety v. Freedom of Information, 103 Conn.App. 571, 587, 930 A.2 739, cert. denied, 284 Conn. 930, 934 A.2d 245 (2007). Accordingly, the Zoning Commission's challenge to the FOIC decision on this point fails.

V

The second issue raised by plaintiff is whether the FOIC erred in finding that the Zoning Commission violated the promptness requirements of the Act[2]. In other words, as framed in the opening sentence of this decision, the central issue is: Did the Pomfret Planning and Zoning Commission violate the Freedom of Information Act, under the circumstances of this case, when it failed to stop and make copies of records that were being discussed during evening meetings on the request of members of the public in attendance? The court agrees with the Zoning Commission on this point, and answers the question in the negative.

The promptness rule appears twice in the Act. It first appears in General Statutes § 1-210(a), in pertinent part, as follows: ".... every person shall have a 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." (emphasis added). It appears a second time in General Statutes § 1-212(a), in pertinent part, as follows: "Any person applying in writing shall receive, promptly upon request, a plain or certified copy of any public record." (emphasis added). It is immediately apparent that the first appearance, in § 1-210(a), concerning, inter alia, inspection, affords rights only during regular office or business hours. The second appearance, in § 1-212(a), concerning

[2] As opposed to the first issue, raising the question of whether a request must be in writing after the request was honored, the issue of promptness is not rendered moot even though the request was honored. Dept. of Public Safety v. Freedom of Information Commission, supra, 103 Conn.App. 586 citing Domestic Violence Services of Greater New Haven, Inc. v. Freedom of Information Commission, 240 Conn. 1, 7, 688 A.2d 314 (1997).

copies, does not repeat that condition. The FOIC argues that absence of the phrase "during regular office or business hours" in the second statute concerning copies means that there is no such restriction when copies are requested. The Zoning Commission, on the other hand, argues that both sections should be read together to include the requirement that requests for copies should be honored, if at all, only during "regular office or business hours." This would avoid the logically absurd result that requests for inspection of records at evening meetings can be deferred to regular office or business hours, but not requests for copies of those same records. Furthermore, as a practical matter, it also avoids the inconvenience of stopping meetings while staff goes to the photocopy machine. Anyone who has ever served on or attended a local government citizens board, like a zoning commission, knows that any general immediate right to get copies during evening meetings most likely would be frustrating for everyone else. It would also inflict a fiscal toll to keep staff and facilities on standby after hours – raising the specter of a judicially created unfunded mandate. However, the FOIC found that the Zoning Commission could have easily honored the complainants' requests in this case without inconvenience or extra expense, and, as the FOIC notes, open government is part of the Zoning Commission's mission, not a fiscally impractical interference.

Of course, whether the Zoning Commission, as a matter of good public service, could and should have been more courteous to members of the public simply trying to follow a meeting in this case is not the issue for this court's decision. The issue is: What does the Act require?

In deciding what the Act requires, the court follows the plain language of the statute, if that language is unambiguous. "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statues. 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." General Statues § 1-2z. In the instant case, the language is ambiguous. A reader of the pertinent statutes must concede that there is merit to both interpretations advanced by the parties in this case, and both sides have compelling arguments. In such cases, the court must resort to the guiding principles of statutory construction to resolve the controversy. The most common techniques of statutory construction in such cases call for reading the statute as a whole, and examining of the legislative history. See, e.g., State v. Peters, 287 Conn. 82, 88, 94, 946 A.2d 1231 (2008).

Reading the statute as a whole calls on the court read it in context, and to "construct an interpretation that comports with its primary purpose and does not lead to anomalous or unreasonable results." (Citations omitted; internal quotation marks omitted) State v. Peters, supra, 287 Conn. 88. Using this technique, it is observed that the public's right to inspect records is limited to regular office or business hours. General Statutes § 1-210(a)(1). The right to receive copies is of "such records." General Statutes § 1-210(a)(3). Thus, the right to receive copies is linked to the right to inspect records "during regular office or business hours." The right to receive copies is further regulated "in accordance with section 1-212." General

Statutes § 1-210(a)(3). Section 1-212 sets forth rules for fees, and adds the requirement that requests be honored promptly on request of a person applying "in writing." General Statutes § 1-212(a). Reading these statutes as a whole, it is apparent that the rules for receiving copies in 1-212(a) are in addition to the "during regular office or business hours" requirement of §1-210(a), not in substitution thereof. Therefore, the Act only requires agencies to respond to requests for copies promptly during regular office or business hours, not during evening meetings in progress.

The legislative history is in accord. Originally, the statute that is now § 1-210(a) read, in pertinent part, as follows: ".... every resident of the state shall have the right to inspect or copy such records at such reasonable time as may be determined by the custodian thereof." Public Acts 1957, No. 57-428. Under this statute, members of the public were clearly notified that the permitted times for inspection and copying were the same for both. In 1975, the legislature added the section that is now § 1-212(a) providing that requests for copies be honored promptly on request of a person applying "in writing," and it added rules for costs. At the same time, the legislature re-enacted the rule allowing inspection or copy requests "at such reasonable time as may be determined by the custodian thereof," thus signifying no intent to change that rule. See Public Acts 1975, No. 75-342, Secs. 2 and 5. In 1979, the sentence structure of what is now General Statutes § 1-210(a) was changed to add reference to the statute that is now § 1-212(a). See Public Acts 1979, No. 79-119. The change produced the following: ".... every person shall have the right to inspect such records promptly during regular office or business hours or to

receive a copy of such records in accordance with the provisions of [section 1-212]." Although the wide discretion in the records custodian to set the times for disclosure was eliminated and replaced by the requirement to disclose "promptly during regular office or business hours," a plain reading of this language still notified members of the public that agencies were required to respond to both requests for inspection and copies only during regular office or business hours. Nothing in the legislative debates reveals an intent to require custodians to make copies at different times or after hours. To the contrary, the intent was to standardize the time for both during regular office or business hours. See Remarks of Representative Robert J. Carragher, 22 H. Proc., Pt. 8, 1979 Sess., p. 2666; Amendment by Representative Phyllis Kipp at p. 2667-8; Remarks of Senator Wayne A. Baker, 22 S. Proc., Pt. 5, 1979 Sess., p. 1571. Next, in 2001, a Superior Court Judge ruled that the right to receive copies did not include a right of members of the public to use their own personal scanners to copy land records. See Office of the Municipal Clerk, City of Hartford v. Freedom of Information Commission, Superior Court, judicial district of New Britain, No. CV 00-0500645 S (April 3, 2001, Owens, J.). In apparent response to that decision, the legislature passed Public Acts 2002, No. 02-137. That public act rephrased § 1-210(a), creating the current language with three separate rights in three separate subsections: to inspect, to copy oneself, and to receive copies from the agency. A review of the legislative debates, however, reveals no intent to eliminate the "during regular office or business hours" requirement for copies. Rather, the intent was to add a right – the right to copy records oneself. See Remarks of Representative James A. O'Rourke, 45 H. Proc., Pt. 17, 2002 Sess., p. 5414.

Consequently, the legislative history confirms that the requirement that agencies respond promptly during regular office or business hours applies to all three categories of information requests: requests to inspect, copy, and to receive copies.

The evidence in this case established that the requests to receive copies took place during two evening meetings, after 7:30 p.m. The evidence further established that the regular hours of the town were, generally 8:30 a.m. to 4:30 p.m. Monday through Friday. Therefore, the requests were made after regular office or business hours in this case. Consequently, the Zoning Commission did not violate the Freedom of Information Act in this case by requiring the complainants to return during the day to obtain copies, regardless of the Zoning Commission's motives, and the FOIC erred in ruling otherwise.

The FOIC nevertheless argues that it has ruled in the past that requests to receive copies must be complied with promptly, even at evening meetings. The court has reviewed the citations offered, and observes that the issue concerning the language "during regular office or business hours" raised in this case was either not raised or not addressed in those FOIC rulings. Therefore, the decisions cited cannot be considered as being on point, and consequently, they are not eligible for deferential treatment. Moreover, the court observes that it was recently held that a delay in excess of two weeks did not violate the copy promptness rule in General Statutes § 1-212(a). See Lash v. Freedom of Information Commission, 116 Conn.App. 171, 184, 976 A.2d 739, cert. granted, 293 Conn. 931, ___ A.2d ___ (2009). Under this precedent, a delay to a time when the office is open for business would certainly not violate the promptness rule.

VI

The Zoning Commission further advances another issue concerning alleged procedural errors and erroneous evidentiary rulings made during the hearing and meeting before the FOIC. It complains that, cumulatively, these errors amount to a situation whereby it received a fundamentally unfair hearing and meeting. The court has reviewed the Zoning Commission's arguments, and, suffice it to say, the court is not persuaded. Hearings conducted by administrative agencies under the UAPA must be conducted with fundamental fairness. See New England Rehabilitation Hospital, Inc. v. Commission on Hospitals & Health Care, 226 Conn. 105, 164-65, 627 A.2d 1257 (1993); Rivera v. Liquor Control Commission, 53 Conn.App. 165, 174, 728 A.2d 1153 (1999). Fundamental fairness in administrative proceedings requires a fair and impartial hearing officer making decisions based on probative and reliable evidence. However, the proceedings can be informal, and the strict rules of evidence do not apply. See Barry v. Historic District Comm'n of the Borough of Litchfield, 108 Conn.App. 682, 704-06, 950 A.2d 1, cert. denied, 289 Conn. 943, 959 A.2d 1008 (2008). A review of the record in the instant case shows that the Zoning Commission received a fundamentally fair hearing and meeting from the FOIC in this case under this standard. Moreover, the factual findings were based on substantial evidence in the record taken as a whole. The challenge to the FOIC decision on this point fails. However, since the court has found that the FOIC erred in interpreting the statutes concerning the promptness rule, the appeal is sustained on that ground.

VII

For all of the foregoing reasons, the plaintiff Zoning Commission's appeal is sustained, and the matter is remanded to the FOIC for further proceedings consistent with this decision.

Vacchelli, J.

Robert F. Vacchelli
Judge, Superior Court