

Memo to: John Burt, Town Manager  
From: SSWBGG  
Re: Town Owned Property Re-Use Evaluation Policy & Process  
Date: September 5, 2023

John:

You asked us to provide further, and more detailed, review and comment on the updated version of the proposed Town Owned Property Re-Use Evaluation Policy & Process (the “Policy”). Compared with the earlier version, the most significant change to the eye is that the Policy no longer contains an appendix. It is nevertheless still a substantial document, consisting of a web of detailed requirements and procedures. For reasons that follow, it remains inconsistent with the Town Charter for reasons we set out in our earlier communication, particularly in respect of its heavy delegation of work directly to “staff.” It also continues to have numerous inconsistent and irreconcilable textual provisions.

Because the Policy remains inconsistent with the Town Charter and applicable law, the Council is not required to send this Policy to a referendum under Town Charter Section 4.5 if the RTM passes it and the Council rejects it.

We do not yet address fundamental legal issues arising from the Policy as they may relate to the Charter’s division of legislative power between the RTM and the Town Council. The reason is that the Policy is too vague to examine carefully in this regard. But, and for example, it is possible that the requirement that the TOPE Committee contain two active members of the RTM who, given the quorum requirements as proposed, may control an antecedent process constricting a matter within the Council’s sole discretion, may be seen to invade the authority of the Council and be inconsistent with the Charter’s division of legislative authority. An attempt, by ordinance, to exercise a function authorized by the charter in a manner inconsistent with the provisions of the charter is ineffective and invalid.” *Connelly v. Bridgeport*, 104 Conn. 238, 253 (1926); *Bredice v. Norwalk*, 152 Conn. 287, 292-93 (1964). Where the municipal charter prescribes a particular procedure by which a specific act is to be done or a power is to be performed, that procedure must be followed for the act to be lawful. *Miller v. Eighth Utilities District*, 179 Conn. 589, 594 (1980); *Food, Beverage & Express Drivers Local Union v. Shelton*, 147 Conn. 401, 405 (1960).

#### **I. Inconsistent and Vague Language**

Laws, and ordinances, must be written to “give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. *Grayned v. Rockford*, 408 U.S.

104, 108 (1972). The Policy is replete with textual inconsistencies and unclear language, some of which we address briefly in this section.

#### A. Town “Staff”

We pointed out in our earlier comments about the prior version of the Policy that the provisions that govern “staff,” and require “staff” to perform various tasks and jobs, invades the authority of the Town Manager to oversee employees and likely creates contractual problems with the employees under collective bargaining agreements. These problems remain in the current version.

Throughout the Policy, there still are many references to “town staff.” This includes having three potential members of the committee be appointed to office as ex-officio members (See “Decision on Disposition of Town-owned Property Procedure,” Section 2). While it appears that the term applies to employees, it also appears to apply to the Town Attorney, who is not an employee or municipal “staff” and who has separate duties under the Charter. Without specifying as to who or what qualifies as “town staff,” it is impossible to determine from the panoply of municipal employees who should be appointed to such a position.

The requirements upon “Staff” appears in a variety of places. The following are examples:

- Section 3, titled “Decision on Disposition of Town-owned Property Procedure,” Section 3 refers to town staff “whose responsibilities include marketing the town-owned property and soliciting developers,” who will “provide feedback on communications, interests, and status on specific parcels of property on a regular basis.”
- Section 5, titled “Decision on Disposition of Town-owned Property Procedure,” states that town staff, or TOPE Advisory Committee Members, “shall conduct pro-active outreach actions” for any area likely to be impacted by a potential development. Such “pro-active outreach actions” are given no scope. For example, it may or may not be sufficient to send a letter by mail; to post on the town’s website; to personally knock on every door.
- Section 7, titled “Decision on Disposition of Town-owned Property Procedure,” begins with a sentence fragment that refers to town staff. Such an unidentified individual, entity, or committee is to “consult with Town Staff concerning any preliminary title constraints or any other possible legal reasons the property cannot be sold as detailed in the database maintained by staff.” Section 7 goes on to state that “Town Staff shall produce a written statement for the public record within 45 days of request addressing all concerns.” Should this be meant to apply to the Town Attorney, the communication would be privileged and public disclosure may harm the Town’s legal interests.

- Another reference to “town staff” is contained in “Decision on Disposition of Town-owned Property Procedure,” Section 12, which states: “The Town Council will then have the opportunity to make a decision on the disposition of the property and direct Town Staff, through the Town Manager, to develop an RFP” (Request for Proposal). Section 13, “Decision on Disposition of Town-owned Property Procedure,” directs the Town Staff to submit the RFP for review to a subset of the TOPE Advisory Committee, consisting of the elected officials appointed to the Committee.
- Section 14, titled “Decision on Disposition of Town-owned Property Procedure,” requires the Town Council to advise “Town Staff, through” the Town Manager, of its disposition on the document, whether it be acceptance, rejection, or direction for modification. Given the vagueness of who is included under the “town staff” umbrella, this provision requires the Town Council to inform the entirety of the municipal employees of its decision.

Without specification as to the exact individuals responsible for providing these services, the Policy is unworkable and overly vague as written. “Staff” can refer to any employee of the town, which brings under the term’s purview an immense amount of personnel, without standards. Importantly, the directives are inconsistent with the Charter’s scheme.

#### B. Social Media Platforms

Throughout the Policy, reference is made to the use of social media platforms to keep the public aware of the committee’s actions. “Decision on Disposition of Town-owned Property Procedure,” Section 5d requires notice of the TOPE Advisory Committee meeting to be posted as required “under FOIA and on the Town website and social media platforms.” Section 9, “Decision on Disposition of Town-owned Property Procedure,” requires notice of the public forum to be held by the Town Council to be posted as required by FOIA and on social media platforms. Section 10, “Decision on Disposition of Town-owned Property Procedure,” requires potential additional “public information meeting[s] and/or public hearing[s]” to be held by the Town Council on social media platforms. Section 11 requires public information meetings and/or public hearings related to the sale, lease, or improvement of town-owned property to “be promoted on social media platforms.”

The platforms the Town is required to use to promote the relevant meetings, in order to be in compliance with the policy, is unclear. The Town and its citizens use a variety of social media platforms, and the use of the plural in this context implies that the Town must utilize more than one of them. Further specification is necessary to ensure that adequate notice is given pursuant to the Policy, for without specificity it is impossible for a person to know how to comply with it, as written.

#### C. Meetings, Hearings, and Forums

Throughout the Policy, reference is made to various meetings, hearings, and forums. The terms are used both separately and interchangeably, to such a wide extent that the Policy is vague as to the number of meetings, forums, and hearings that must be held by the TOPE committee, the Town Council, or by the subset of the TOPE Committee. It is also not clear when they are to be held within the process prescribed.

For example, Section 6, titled “Decision on Disposition of Town-owned Property Procedure,” provides: “The TOPE Advisory Committee shall generate a draft report within 45 days of the initial meeting for each property to be reviewed.” Nowhere does the Policy identify where in the process the “initial meeting” occurs. The first reference to any kind of gathering of persons relating to a specific property is found in Section 5, “Decision on Disposition of Town-owned Property Procedure,” which requires a “Public Hearing or Forum” for residents from adjacent parcels, the surrounding area, and the Town at large. If the “initial meeting” referenced in Section 6 is that anticipated in Section 5, it must be identified as such. Worse, what difference is meant between a hearing and a forum is vague, and the text does not make clear whether or not the “initial meeting” is a public hearing, a forum, or an ordinary meeting of the Committee. Without a fixed point in time, these time clock requirements are illusory.

Section 10 “Decision on Disposition of Town-owned Property Procedure,” refers to a “initial public informational meeting” to be held by the Town Council, but this “initial public informational meeting” could be the “public forum” or hearing to be held by the Town Council as referenced in “Decision on Disposition of Town-owned Property Procedure,” Section 9. Simply, it is impossible to discern the correct procedure.

The relationship between these hearings, meetings, and forums needs to be clarified, for the procedure is legally incoherent. If reference is to be made to a meeting, forum, or hearing that is created in a separate part of the Policy, that needs to be specifically identified. Without that, effort to comply with the Policy will be vain, like searching for the end of the rainbow.

#### D. The involvement of “Adjacent Parcels”

Section 5, titled “Decision on Disposition of Town-owned Property Procedure,” Section 5, refers to “adjacent parcels.” Section 5 states that at least one public hearing or forum for residents from adjacent parcels, the surrounding area, and the town at large must be held in connection with a potential development. The section goes on to describe an area impacted by a potential development as “adjacent parcels and the surrounding area within a 500 ft. radius” (emphasis supplied); town staff or committee members shall conduct “pro-active outreach” actions in connection with said public hearing or forum. It not clear that the term adjacent parcels begins or ends with the 500-foot radius; nor it is clear from where the measurement begins.

An “adjacent” parcel is not an “abutting” one. Specifically, the legal definition of “adjacent” is “lying near or close to,” while “abutting” means that the property “borders or adjoins to another property.” *Adjacent*, Black’s Law Dictionary, 2<sup>nd</sup> Edition, (1910); *Fronting and*

*Abutting*, Black's Law Dictionary, 2<sup>nd</sup> Edition, (1910). Based on this, it is unclear just how close a potential "resident" needs to be to the parcel to be a target of the pro-active outreach actions and be provided notice. Usually these kinds of notice provisions are drafted by saying that notice shall be given to owners of property lying within 500 feet of the boundaries of the subject property.

#### E. Notice Requirements

Section 5, "Decision on Disposition of Town-owned Property Procedure," provides for notice to be provided for a Public Hearing or Forum for the town at large to provide input for potential TOPE Advisory Committee actions. Said notice requirements include posting a "large" notice somewhere on the potential development site, posting on "websites," providing notice in a "locally-distributed print or digital newspaper," and "posting flyers in nearby or frequently trafficked public buildings and businesses." These requirements are utterly vague, leaving to speculation how these requirements are to be satisfied in practice. How "large" the notice on the site must be; what "websites" the notice is to be posted on; what constitutes a "locally-distributed print or digital newspaper;" how close a business need be to be "nearby;" how busy a business must be in order to be "frequently trafficked;" all are not answered and cannot be discerned through the language of the Policy. Further specification is necessary for the Policy to be understandable so that a buyer may be assured that the Town complied with its procedures and is authorized to convey good title.

## II. Process Issues

#### A. Membership, Voting, and Quorum

Section 2, titled "Decision on Disposition of Town-owned Property Procedure," again, leaves unclear as to the makeup and working of the TOPE Advisory Committee. As written, the committee is to include, at minimum, three Town Councilors (one of which will chair the committee), and two representatives of the Representative Town Meeting, for a minimum total of five members. But, the advisory committee *may* include also up to three "town staff" selected by the Town Manager as "ex-officio" members. The advisory committee also *may*, "at the discretion of the chair and with consensus of the body," also include a liaison from the Economic Development Commission, the Groton Housing Authority, the Conservation Commission, the Inland Wetlands Commission, the Planning and Zoning Commission, and the Historic District Commission (as an ex-officio member). Therefore, and stopping at this point for comment, the advisory committee may consist of a minimum of five members, and a maximum of fifteen members. But, the committee makeup is still not done. Section 5c provides that residents within 500 feet "of those areas" must be invited to "attend as *ad hoc*, ex-officio members of the TOPE Advisory Committee." They are voting members because their status is not limited. Therefore, the number of voting Committee members is somewhere between five and tens or hundreds, which will cause obvious functional problems for the Committee. Consider, too, the

difficulties in the makeup of this Committee where the property under consideration is located at the Town's boundary.

To add to the difficulty, Section 2 goes on to state that "Quorum shall be determined by a simple majority of elected representatives, who are the voting members, being present." The "elected representatives" seemingly refer to the three Town Councilors and the two representatives of the Representative Town Meeting, meaning that only three of the potential innumerable members of the Committee need to be present for action to be taken. This suggests that two members (a quorum being 3) can act for the entirety of the Committee, despite the possibility of having numerous members. This scheme cannot be employed in such a way that it will provide a sound, legal decision.

#### B. Town Staff

As we had pointed out in our earlier correspondence and referred to above, under Section 7 of the Charter the general management of Town Staff is granted to the Town Manager. The Town Council is expressly limited in its role in the day-to-day management of such employees. Yet, in several places (outlined above), the Policy requires "town staff" to participate in the process outlined in the Policy to be enforced through entities other than the Town Manager. These provisions are inconsistent with the employee management structure set out in Section 7 of the Charter, and therefore unauthorized.

Further, were the Town Manager to consider assigning to one or more employees such duties, it is likely these will be bargained for by contract, including with the Town's collective bargaining units.

#### C. Limited Executive Sessions

Section 3, "Decision on Disposition of Town-owned Property Procedure," states "TOPE Advisory Committee meetings may allow for limited Executive Sessions, as necessary and is agreed to by a majority vote of the TOPE Advisory Committee Members in attendance." (Emphasis supplied). Section 1-200 of the General Statutes authorizes a public agency to hold an executive session when it is considering "the sale or purchase of land and where the price for the same may be affected by holding discussions in open session." Nowhere in the General Statutes is there authorization for something called a "limited executive session." Further, a majority vote of the TOPE Advisory Committee Members in attendance is not sufficient under the General Statutes to hold an executive session. General Statutes Section 1-225 states "A public agency may hold an executive session...upon an affirmative vote of two-thirds of the members of such body present and voting, taken at a public meeting and stating the reasons for such executive session." (Emphasis Added.) This provision of the Policy patently violates Connecticut's open meeting laws.

Further, given that the number of members of the TOPE Committee is wholly uncertain, it will be impossible to determine whether or not a 2/3 vote will occur.

#### D. Use of Town Commissions

As we pointed out earlier in our prior, informal comment on this proposal, the Policy improperly authorizes several Town commissions to review land sale proposals and requires each of these commissions to provide a report on the proposed action. Namely, the Policy requires a report from the Planning and Zoning Commission, Inland Wetlands Commission, Conservation Commission, Groton Housing Authority, Economic Development Commission, and Historic District Commission.

E. Conflict with Authority of Planning and Zoning Commission

Also, we pointed out in our earlier comments that one of the stated “goals” of the Policy is to “ensure” that the sale of Town-owned property “aligns with the long-term strategic plans, including but not limited to the Plan of Conservation and Development, Zoning Regulations, etc., of the Town.” We wrote that the Policy is inconsistent with the statutory scheme created by the General Assembly as it encroaches on the Planning and Zoning Commission’s authority over the POCD under CGS Section 8-24. When construing a statute concerning municipal authority, the governing principle is that a municipality, “being a creature of the State, can exercise no powers except those which are expressly granted to it or are necessary to enable it to discharge the duties and carry into effect the objects and purposes of its creation.” *Bredice v. City of Norwalk*, 152 Conn. 287, 292 (1964).

In sum, the fundamental legal issues with the Policy, stemming from inconsistent language and process issues that contradict with the Town’s Charter, render it unenforceable. Because the Policy is inconsistent with the Town Charter and applicable law, the Council is not required to send this Policy to a referendum under Town Charter Section 4.5 if the RTM passes it and the Council rejects it.

Please let us know if you have any questions or comments.