
GENERAL OVERVIEW

**TOWN OF WESTPORT
HISTORIC DISTRICT COMMISSION**

Ira W. Bloom, Esq.
BERCHEM MOSES P.C.
1221 Post Road East
Westport, CT 06880
Direct Line: (203) 571-1715
e-mail: ibloom@berchemmoses.com

Nicholas R. Bamonte, Esq.
BERCHEM MOSES P.C.
1221 Post Road East
Westport, CT 06880
Direct Line: (203) 571-1713
e-mail: nbamonte@berchemmoses.com

February 14, 2023

HDC AND LAND USE REGULATION

A member of the Historic District Commission (HDC) exercises great responsibility in our system of government. Your commission deals directly with the most basic of rights over private property. Your HDC Coordinator, as well as our Town Attorney office, are here to assist you in your deliberations.

PARTICIPATION/ATTENDANCE

It is important for each HDC member to attend all meetings. When it is impossible to attend, members must make contact with the Chairman or HDC Coordinator and see that an alternate is available. If a member misses one session of a particular application, he/she has the option of listening to the tape/video of the earlier session, reviewing the record, and then participating in the deliberations.

It is our recommendation that alternates be seated at the HDC table only on an "as needed" basis. More directly, we do not recommend that all alternates be routinely seated at the HDC table. If an alternate wishes to observe, he/she can certainly attend and sit with the public. Alternates who are "seated" in place of a regular member can sit at the HDC table and vote on an application. Alternates who are not "seated" cannot participate in deliberations or vote.

CONFLICT OF INTEREST

When the HDC reviews an application, each member must determine whether he or she has a conflict of interest which might disqualify them from participating in consideration of the application. Members must not have a personal or financial interest in an application. An HDC member should not appear for or represent any person, corporation or entity (including a neighborhood association of which they are a member) in any matter pending before other land use boards. This applies whether or not the member is paid for the representation. If a member decides to recuse himself or herself, that fact should be noted on the record. A member who has a conflict should leave the hearing room.

There are some cases which are clearly conflicts. If the applicant is one of your business partners, that is an obvious one. If you have an ongoing personal or business relationship with an applicant that would be a conflict on interest. A relative, or your neighbor appearing, would be an easy example. What if it was not you who had the relationship, but your spouse? The prudent approach is to abstain if in doubt. You have highly competent alternates to step in, and you do not want to take a chance of jeopardizing the Commission's action. Don't forget, a conflict of interest can be a ground for an appeal. My informal rule is this: "If you have to think about it for more than 30 seconds, you should probably recuse yourself."

Often it is not the actual conflict, but the appearance of conflict. That appearance can cause a problem also. The cases say that in determining whether there is a conflict of interest, an *appearance* of impropriety is enough to undermine public confidence. It is up to the individual to decide whether he/she has a conflict. It is not up to the Town Attorney or the HDC Coordinator

(although both can give advice). *But remember that the decision you make can impact or jeopardize the Commission decision.* A court finding of prejudice or bias could cause reversal of the Commission's action. Feel free to contact us at any time. It is less embarrassing to work this out in advance than to have the discussion during the meeting.

BIAS AND PREDETERMINATION

Predetermination is not based upon a specific statute, but rather a finding that a member (or the entire commission) has made up its mind and essentially decided the application before the public hearing. A member should not take a public position on a matter which is about to come before the HDC. Similarly, it is prudent to avoid comment on a matter which you reasonably suspect may come before your board. This means avoiding letters to the editor, interviews, and other public comments. This does not mean that you are expected to have no opinions on anything. However, it is important to avoid comments which suggest that you have made up your mind before the conclusion of a particular application. It is also important to keep an open mind on a particular topic. It is understood that you may have familiarity with a particular property or issue, and you may use this information as part of your deliberations, but it is best to first allow the applicant and public a full opportunity to speak and rebut any information gained outside the hearing room.

PUBLIC INSPECTION OF DOCUMENTS

Under the Freedom of Information Act, all records maintained by HDC are public records, and the public has the right to inspect such records promptly during regular office business hours or to receive a copy of such records. Any memos passed on to the staff become part of the public file. Communications to or from the Town Attorney may be privileged. Please note also that emails may be seen by others. You should assume anything you write or submit goes into a public file. While an application is pending, you should not communicate by email with members of the public regarding any aspect of the application. You should also not email your other board members about a pending application.

THE SITE VISIT

Commission members may choose to view the property involved in the application before the hearing, if it is a group effort, these will be arranged by the HDC Coordinator, as they are considered public meetings. Evidence acquired by personal observations can be considered as part of your deliberations. During such site visits, it is best to avoid discussion at the site, saving such discussion for the public hearing.

THE PUBLIC HEARING

It is important that all interested parties and citizens be permitted to participate in the public hearings. Basic fairness and due process applies, although court rules and strict rules of evidence do not apply. This includes inspection of any documents and plans presented at the hearing in connection with the application. Time limits on applicants are not allowed.

THE RECORD

All written reports and comments received by the Commission at or prior to a hearing should be included in the official record. There are no evidentiary rules which apply.

EX PARTE COMMUNICATIONS

Commission members should not discuss a pending application except at a public hearing where all parties have an opportunity to participate. Discussions with interested parties held outside the public hearing are known as *ex parte* communications and are regarded suspiciously by the courts. Caution should be exercised during any “breaks” in hearings. Sometimes an applicant or member of the public will use that opportunity to speak to you. This should be avoided. If you should see an applicant at, for example, the movies, you should avoid conversation except for pleasantries. (This does create the risk that you will be viewed as unfriendly, but that is the price you pay for taking this job!)

POST-HEARING INFORMATION

Information received after the public hearing should not be permitted in the official record. Receiving anything after the public hearing has closed is risky. If further information is needed, the better approach is to keep the hearing open for the further information and then give all parties the opportunity to review the information and comment on it when it is available.

VOTING

In general, in order to vote, a quorum must be present. A majority of the HDC is required to reach a decision.

EXECUTIVE SESSION

Executive sessions may be held with regard to pending litigation, as provided by statute. All other sessions must be in public.

ALTERNATES

It is our recommendation that alternates be seated at the HDC table only on an “as needed” basis. More directly, we do not recommend that all alternates be routinely seated at the HDC table. If an alternate wishes to observe, he/she can certainly attend and sit with the public. Alternates who are “seated” in place of a regular member can sit at the table and vote on an application. Alternates who are not “seated” cannot participate in deliberations or vote.