

Running an Meeting and Making a Decision

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Land Use Academy



Online Version

- Please note that the answers to the questions in the presentation are highlighted on the next slide in **light blue**.
- This presentation is for educational purposes and not intended to represent legal advice. Consult your town attorney in matters concerning your town.



Attorney Branse's Presentation Outline

You can access a text outline of Attorney Branses's presentation by pasting the following link in your browser:

http://bransewillis.com/PDF/ZONOUTBR_v7.pdf



Pre-Application Conferences

- Valuable procedure but, until recently, no case law or statute allowing it
- Should have a procedure in your regulations
- Be careful of appearing to make a judgment



Pre-application Conferences

- **With the staff**

- * common, informal
- * non-binding and advisory



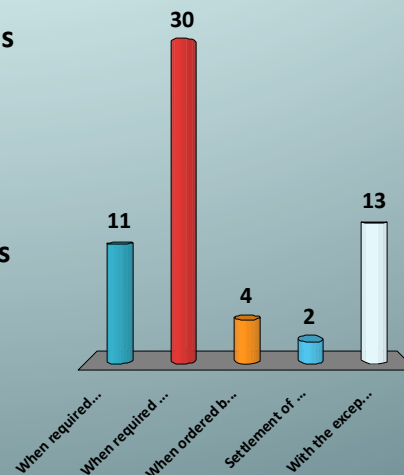
- **With the commission**

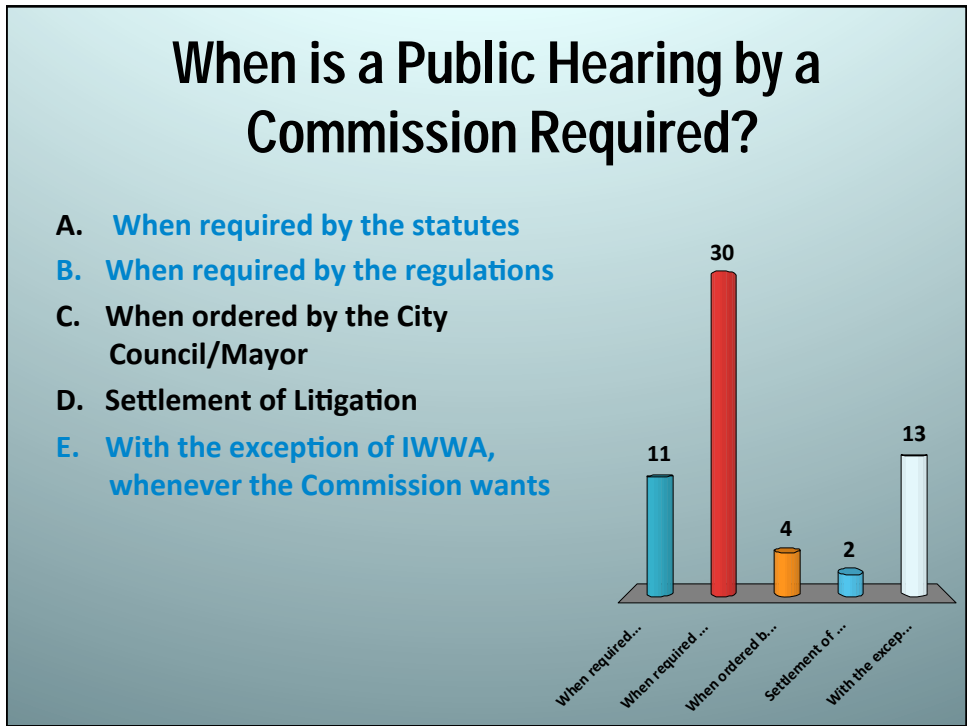
- * permitted by statute (CGS 7-159b)
- * non-binding



When is a Public Hearing by a Commission Required?

- A. When required by the statutes
- B. When required by the regulations
- C. When ordered by the City Council/Mayor
- D. Settlement of Litigation
- E. With the exception of IWWA, whenever the Commission wants







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Zoning Board of Appeals

- Must Hold a Public Hearing on Everything
- Can deny if a previously denied application is resubmitted as a new application with no changes

November 20, 2008
Board of Zoning Appeals

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Planning and Zoning Commissions

Public Hearings Required for:

- Zone and Regulation Changes
- Adoption/amendment to Plan of Development
- Special Permit/Exception
- Resubdivision
- May be required for site plan review but won't extend your time limits for action



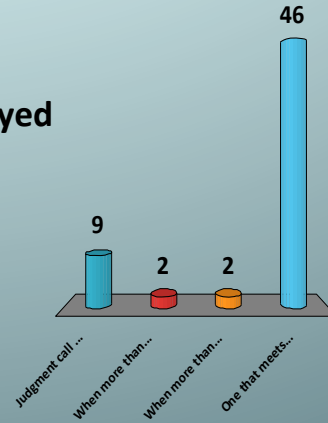
Inland Wetlands and Watercourses Agency

- For “Significant Activity” a public hearing is required.
- For other activities a hearing may be held at the discretion of the agency
- Upon petition of 25 residents the town (within 14 days of the date of receipt)



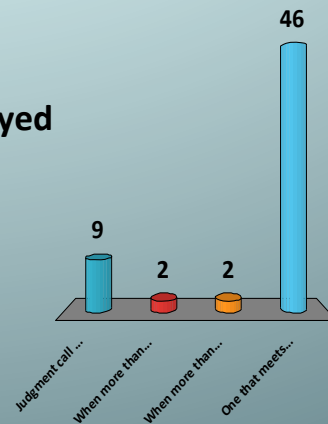
How is a “significant activity” defined?

- A. Judgment call of the IWWA
- B. When more than 5% of a watercourse or wetland is destroyed
- C. When more than 20% of a watercourse or wetland is destroyed
- D. One that meets the definition contained in your wetlands regulations.



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Application Fees

Failure to pay application fees is NOT grounds for not acting on an application. Treat the application as a live bomb and act on it to avoid automatic approval.



Conducting the hearing-what does the law require?

- **Procedural Due Process vs. Substantive Due Process**
- **Review the application against the regulations as they are written**
- **Conduct hearings so that no one is intimidated, harassed or disadvantaged, regardless of their position**

Crowd Control-How important is it?

- Decisions are subject to appeal if an “atmosphere of hostility” is allowed to pervade the proceedings
- Even jokes can be viewed as hostile toward an applicant
- Potential for a civil lawsuit



Rules for running a meeting

- All comments are directed to the commission
- Never allow *anyone* to interrupt a member of the commission, especially the chairman
- No one speaks—including commission members—unless and until they are recognized by the chair.



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Rules for running a meeting

- Keep people on the point
- Don't run too late at night
- If it's likely to be bad, have your attorney there to assist you.



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Let Everyone Know the Rules

Set out the rules of the game before the applicant ever stands up:

- We will hear from the applicant
- Then questions from the Commission and staff
- Then those in favor
- Then those opposed
- Then those who don't wish to be categorized as in favor or opposed



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Let Everyone Know the Rules

Set out the rules of the game before the applicant ever stands up:

- There will be no shouting, applause, booing, heckling, or other disturbance
- Those who break these rules will be ejected from the meeting.
- There will be no exceptions



Rules for running a meeting

- Keep the applicant in line- don't let the applicant incite the crowd or goad the commission into saying something stupid
- Keep your own troops in line- your fellow commission members may be your worst enemy



Rules for running a meeting

- **Avoid the mob mentality. Have the police on hand if necessary**



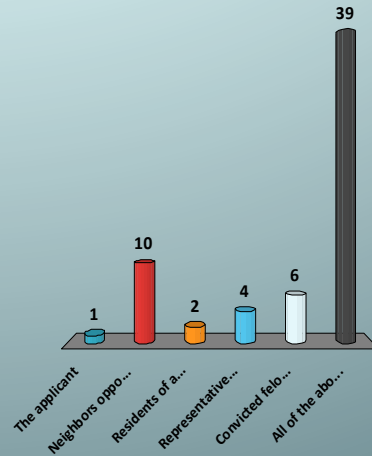
Rules for running a meeting-Logistics

- **Have a large room—oversized, in fact. Packing people together contributes to their anonymity and encourages heckling or shouting out (the “voice from the crowd.”)**
- **Have a board or other way to display plans, etc.**
- **Have an AV system. People will sit in the back row and then shout, “I can’t hear.”**



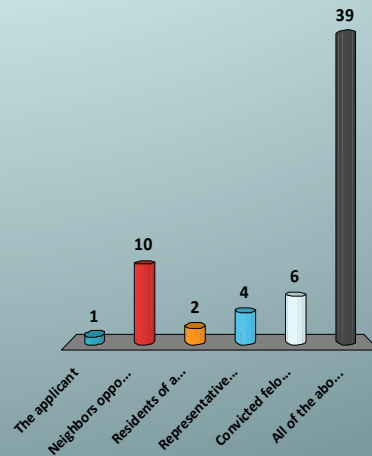
Which of the following individuals may speak at a public hearing?

- A. The applicant
- B. Neighbors opposed to an application
- C. Residents of another town
- D. Representatives of trade associations
- E. Convicted felons
- F. All of the above



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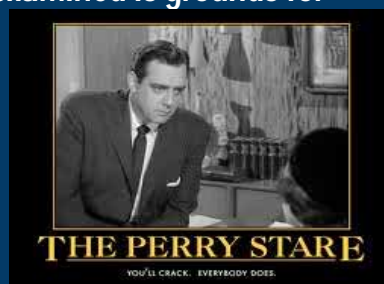


Who gets to speak?

- Typically, applicant speaks first to present application
- Can have proponents, then opponents, or take turns
- Intervenors under CGS 22a-19 can speak even if no public hearing
- Can allow people to speak if no public hearing at the discretion of the chair

Cross examination

- Explain to the public/applicant why cross examination and questions must be permitted, despite formality.
- Refusal of witness to be cross-examined is grounds for “motion to strike”



Site Walks

- Must be noticed
- No comments or questions, take notes
- Public and applicants may attend
- Stay together
- What happens if a commissioner doesn't go on the site walk?



Subpoenas

- Only one case, brand new and only Superior Court, says that an attorney can subpoena parties to appear, with documents (“*duces tecum*”), before a ZBA
- Municipal agencies alone (without an attorney) can't issue or enforce subpoenas

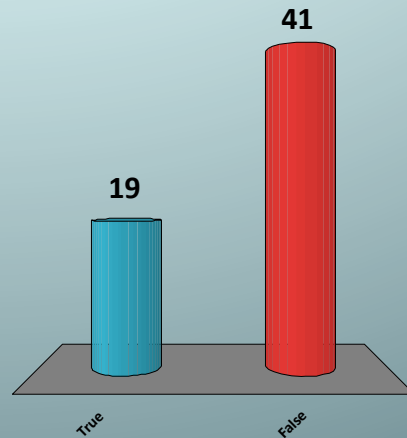
The image shows a 'SUBPOENA CIVIL' form from the State of Connecticut Superior Court. It includes fields for the name of the person being subpoenaed, their address, and the date and time they are to appear. There are checkboxes for 'Judicial District', 'Housing', 'Probation', 'Social Services', and 'Credit Area'. A barcode is also present on the form.



Continuation of a public hearing requires an additional published notice stating the time and location of the meeting

A.True

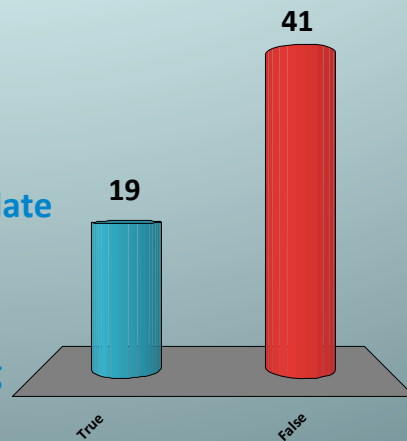
B.False



Continuation of a public hearing requires an additional published notice stating the time and location of the meeting

A.True

B.False-Notice of time, date and location of the continued hearing should be announced before adjourning the hearing



Extensions

- Always get them in writing, even handwritten at the table.
- Specify how many days, not just "extension".
- Make sure the applicant understands: if you don't extend, the Commission will make its decision on what it has in front of it or call special meeting within the time limit



Testimony

- Everyone must identify themselves
- During deliberations-no new evidence and no direct input from applicants or opposition
- Commissioners should take care not to "testify"
- If you start to testify to facts or "special expertise" the applicant or his attorney may be able to question you
- Your job is to listen, question and consider what you hear



Decorum

- Demand to be treated with respect
- Refer to each other and speakers with some formality
- Treat staff with respect



Reports, Exhibits, Letters

- Note at the opening of the hearing exhibits that have been received
- Time to evaluate and examine material
- Reading reports and letters out loud
- What to do with reports from other agencies, experts, staff, etc.
- Electronic presentations

Staff Input

- Normal rule is that your staff and other objective advisors, such as State or other government agencies, can comment even after the public hearing closes but not totally new material
- You are not bound by staff opinion
- Note special case for ZBA appeal of ZEO: contrary to the normal situation, the ZEO cannot speak after the close of the public hearing when his/her decision is subject of the appeal.



Evidence

- Numbering and logging
- Substantial Evidence
- Burden is on the applicant to provide evidence to support approval



Expert Input

- Don't be afraid to challenge an expert
- Get opinions on both sides of technical issue
- Who gets the "last word"?



CEPA/22a-19a Interventions

- Opportunity for intervenor to speak, with or without public hearing
- Can raise environmental issues but also procedural issues
- Intervenors must allege specific adverse impacts of the proposed activity.



CEPA/22a-19a Interventions

- Impacts must be within the commission's jurisdiction.
- Impacts must be proven by substantial evidence.
- If allegations proven, then the commission must deny the application if there are "feasible and prudent alternatives" with no or less adverse impacts



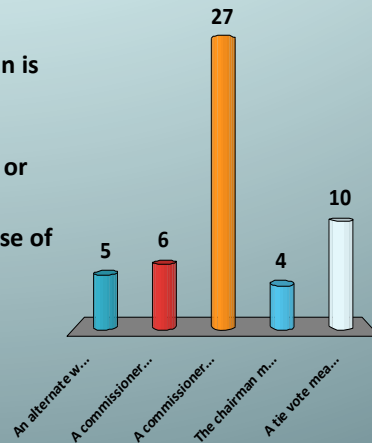
Keeping the record

- Tape everything, even if it is not a formally advertised public hearing
- Lack of a transcript could result in a remand for new hearing or sustaining of the appeal
- Be specific when you speak so it's clear in the transcript
- FOIA allows taping or filming of meeting by others



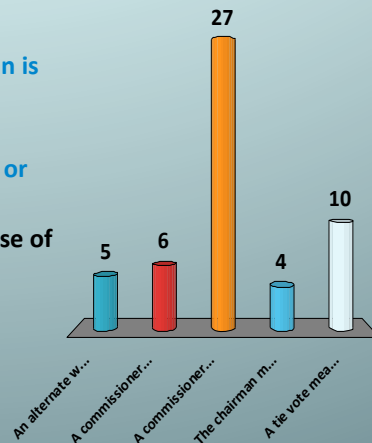
Which of the following statements are generally true?

- A. An alternate who has not been seated should not participate in deliberations
- B. A commissioner who was elected or appointed after the public hearing began is not eligible to vote
- C. A commissioner should not vote on an application in which he has a pecuniary or other personal interest
- D. The chairman may not vote except in case of a tie
- E. A tie vote means that a motion carries



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Making the Decision-Who Votes?

- If you were not a member of the agency when the public hearing opened, you can't vote
- If you were absent, must listen to the tapes, review all of the documents submitted



Making the Decision-Who Votes?

- Alternates can participate during the public hearing phase of proceeding, but once deliberations begin, alternate not seated cannot vote or participate in deliberations.
- Once deliberations begin, voting alternate remains so, even if full member returns mid-process



FOIA

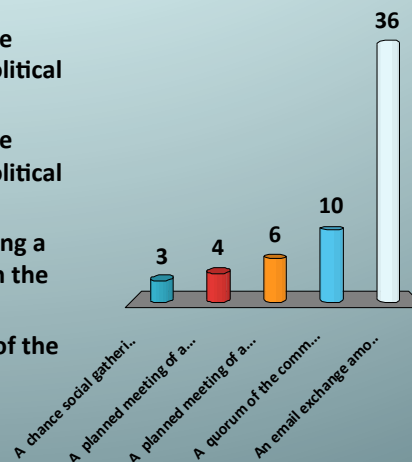
- “Public Meetings”
 - * definition in statute
- “Public Documents”
 - * definition in statute
 - * includes correspondence
 - * email chain warning



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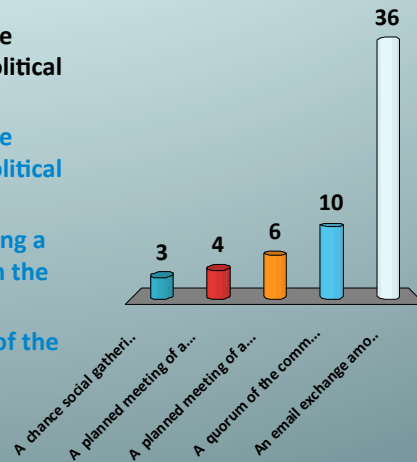
If not noticed as a public meeting under FOI, which of the following may constitute an illegal meeting of a commission?

- A. A chance social gathering of a quorum of the members
- B. A planned meeting of a quorum of the commission members all from one political party
- C. A planned meeting of a quorum of the commission members all from one political party and the mayor/first selectman
- D. A quorum of the commission discussing a pending application while standing in the parking lot after a meeting
- E. An email exchange among a quorum of the commission discussing a pending application



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Making the Decision-Counting the votes

- What constitutes a quorum
- ZBA is always four out of five
- Tie vote=defeat of the motion
- Abstentions
- Extraordinary Majority
- Ex Officio Members



Decision on the record

- Must make your decision based on *what you heard at the public hearing*
- You cannot ignore uncontradicted expert testimony if you do not question it. If you have doubts, question the expert on the record
- If you have special expertise upon which you will rely, say so on the record (while hearing is open).

”Commissioner” Expertise

May rely on own knowledge and expertise

- * OK for general subjects such as traffic
- * otherwise, need to establish expertise
- * may be subject to cross-examination
- State the information for the record during hearing
 - * don’t introduce new facts or opinions later
 - * due process/”surprise” concerns

Decision Based on Regulations

- **Must make your decision based on the criteria in your regulations; or, if variance, what is stated in the case law. be sure to use regulatory standards to focus your discussion.**
- **Interpretation of regulations**



Three questions to ask

- 1) **What evidence did we hear about this criteria?**
- 2) **What do we conclude based on that evidence?**
- 3) **Were the criteria met?**

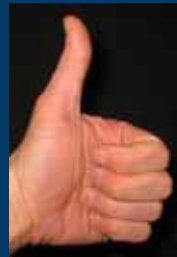


HAVE SOME DISCUSSION to demonstrate that you thought about it



The Decision

- Denial "Without Prejudice"
- Statement of reasons for the decision
- Reconsideration
- Precedent
- Post decision notice



The Decision

- Time limits
- Effective date
- Conditions and modifications
- Stating the motion
- Restate complicated motions



The Decision

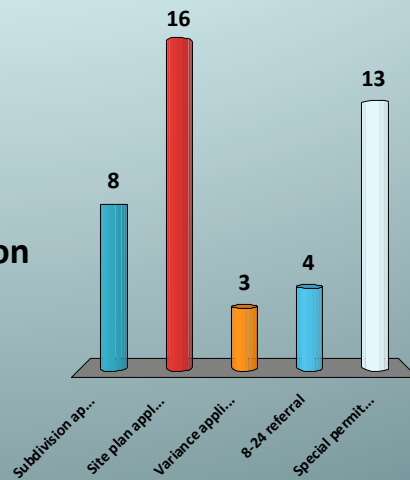
- Be specific with stipulations and comments
- Integral conditions
- Approval of the application, not the applicant
- Defeating motion to approve does not automatically equal denial



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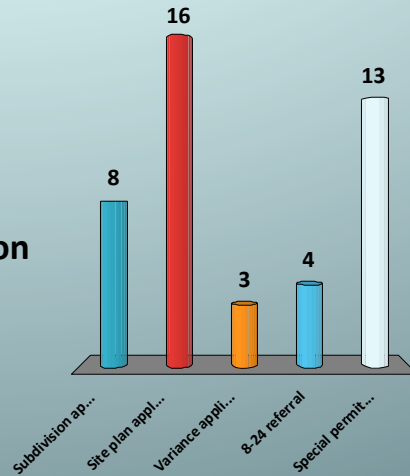
Which applications are automatically deemed to have been approved if the agency does not act on them with the statutory time periods?

- A. Subdivision application
- B. Site plan application
- C. Variance application
- D. 8-24 referral
- E. Special permit application



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Interagency Overlapping Jurisdiction

- Local Overlaps in General
- Zoning/Wetlands/Subdivision
- Zoning/Subdivision Regulations
- Planning and Zoning Commission/Zoning Board of Appeals
- State/Federal Overlaps
- Agency/Administrative
- Inland Wetlands and Watercourses Jurisdiction



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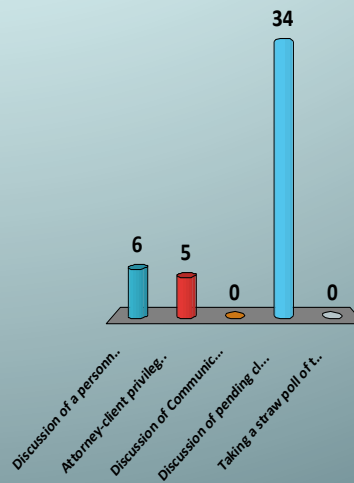
Jurisdiction to hear/decide the application

Agency must have jurisdiction to hear the application and/or to impose its regulations, and jurisdiction must be established before the merits of the issue will be reached



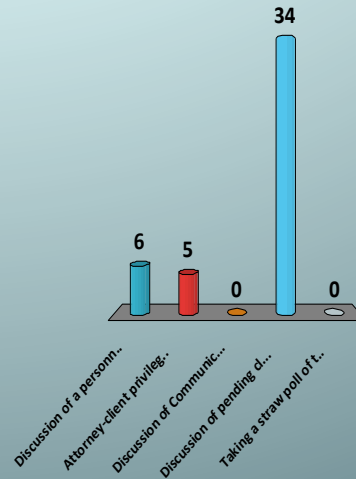
Which of the following is a legally permissible reason to go into executive session?

- A. Discussion of a personnel matter
- B. Attorney-client privileged communications
- C. Discussion of Communications from attorneys representing interested parties
- D. Discussion of pending claims or litigation
- E. Taking a straw poll of the members on a pending application



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Most Important

Be prepared

- review the materials before the meeting starts
- have access to the regulations
- view the subject property



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Legal and Procedural Considerations-Special Mention

When in doubt, call the town attorney



Group exercise

- **Town of NIMBY Planning Commission**
- **Answers at the end of the presentation**



Town of NIMBY Planning Commission

Commissioners: Chairman, Patriot, Lost, Neighbor, Jerko, Bewildered

Alternates: Found, Leftout, Dogood

The Commission is holding a public hearing on an application for a special permit to allow a home for persons recovering from the effects of Traumatic Brain Injury (TBI) and similar nervous system handicaps. There are 6 full members and 3 alternates. Everyone knows that one of Commissioner Patriot's sons, who returned from service in Iraq with TBI, may be a resident of the facility, and is vocally in support of it. Commissioner Neighbor resides on the same street as the proposed facility about 3 doors down. There is a full panel of alternates. During the hearing, things get very nasty, and several residents start to chant, "No zombies in our neighborhood!" The applicant's representative is drowned out by the noise and she has to suspend her presentation. The Chairman shrugs and says, "What can I do? That's democracy." Commissioner Jerko says, "Well, that's what happens some outside agency tries to bust into one of our single family neighborhoods. The applicant should have known that we just don't allow these tax exempt group homes for drunks and welfare cases in our town." At that point, Alternate Dogood said he was disgusted with what was being said and left the meeting.

The first night of hearing is about to adjourn and the Chairman announces, "This hearing will be continued to our next regular meeting." The hearing reconvenes at the next meeting, but regular Commissioner Lost is absent. Alternate Found is seated for him, but Alternates Leftout and Dogood are not seated for anyone. The hearing closes that night, and the Commission begins deliberations but doesn't finish. At the next meeting, Commissioner Lost returns and claims his seat as a full member, displacing Alternate Found. Alternate Found and Alternate Leftout participate in the discussions along with the other full members and alternates. Alternate Leftout is adamant that this kind of facility is not suitable for a single family neighborhood and persuades Commissioner Lost, who is "on the fence," to agree with him.

Commissioner Jerko says he did some research on the internet yesterday, and he found a study from the Center for the Protection of American Neighborhoods at the Community College of Southern North Dakota at Deacon Falls which concludes that TBI victims are capable of sudden and violent outbursts against children, puppies, and ministers. Town Planner Noodnick tries to help out by providing a brand new study published by the Veterans Administration which establishes conclusively that group homes for TBI victims have no adverse impacts on property values or neighborhoods, and are actually a community asset.

A motion is made to deny the application, and it fails on a vote of 3 to 3, with Commissioner Neighbor, Commissioner Jerko, and Commissioner Lost voting for the motion to deny; and Commissioner Patriot, Commissioner Chairman and Commissioner Bewildered voting against the motion (i.e., against denial.) The Chairman declares that the application has been approved, and he states the collective reason as being that we need a suitable place in Town for Commissioner Patriot's son to live after his heroic service to our country in Iraq.

There are 11 (maybe more) issues or problems with this meeting. What are they?

Answer on the following slide.

Town of NIMBY Planning Commission Issues and Problems

1. ADA/FHA- disabled persons and a reasonable accommodation
2. Fair hearing: atmosphere of hostility, failure of Neighbor and Patriot to disqualify for conflict of interest and Jerko for predetermination.
3. Improper announcement of continuation (no time, date, place)
4. Displacement of Found for Lost after deliberations have started
5. Participation of unseated alternates in deliberations that influence the outcome.
6. Introduction of new information after close of PH by the Town Planner.
7. Introduction of new evidence after close of PH by Jerko.
8. Neither of the studies presented specific to Connecticut (new and bad case law)
9. Failure to vote on a motion for approval. Failure of the denial motion to carry is not an approval.
10. Chairman could not state the collective reasons for the commission members; it had to be in the motion or otherwise reflect consensus.
11. The reason is not a zoning reason, but a personal reason.