1. New Business

Due to time constraints of Attorney McLaughlin and Mr. Michel, upon motion by Ms. Fassuliotis, seconded by Ms. Krumeich, the Committee voted 2-0-0 to adjust the Agenda and consider the State Department of Transportation (DOT) Encroachment Permit first. At issue are the following provisions in the permit:

(34) As a condition for issuance of this Permit, in addition to the insurance required above, Permittee agrees to:

(a) obtain, at its sole cost and expense, Commercial General Liability and Excess Insurance for the Permit and Project, naming the State of Connecticut as an additional insured and providing for contractual liability for indemnification of the State for personal injury or property damage to third parties in lieu of the Town’s present $1,500,000 Self Insured Retention (“SIR”). The Permittee shall maintain said insurance coverage until the Permittee and State enter into a Maintenance Agreement (“Encroachment Agreement”) for the Project.

(b) obtain, at the time of completion of the work authorized under this Permit, at its sole cost and expense, Commercial General Liability and Excess Insurance for the Project, which for the purposes of this section and section (35) of this Permit, includes the sewer infrastructure installed under Encroachment Permit No. 301568, naming the State of Connecticut as an additional insured and providing for contractual liability for indemnification of the State for personal injury or property damage to third parties in lieu of the Town’s present $1,500,000 Self Insured Retention (“SIR”). The Permittee shall maintain said insurance coverage until the Permittee and State enter into a Maintenance Agreement (“Encroachment Agreement”).

(35) As a further condition for the issuance of this Permit, Permittee agrees that by no later than September 20, 2018 (unless that date is extended by the Department’s Commissioner), it shall enter into a Maintenance Agreement (aka Encroachment Agreement) with the Department. The Permittee agrees that it will, in addition to other contractual provisions (including indemnification and insurance):
Attorney McLaughlin reviewed with the Committee the history of negotiations with the State DOT and reported that the State accepted all of the changes requested by Greenwich DPW with the exception of the insurance and indemnification provision. The permit and corresponding Encroachment Agreement covers the Old Greenwich Common Force Main (OGCFM) and projects that will fall under the Master Municipal Agreement (MMA). The Town is currently negotiating the terms of the MMA. There is a requirement by the State in the MMA that the Town Charter be changed to provide for indemnification of the State in perpetuity on projects to which the State is a party. Until the MMA is in place the State is requiring the language found in the OGCFM permit and the Encroachment Agreement relating to this project which requires the project be covered under a separate insurance policy.

The DOT is requiring that the Town purchase insurance to cover the State as an additional insured and to indemnify the State for personal injury or property damage to third parties. The State is requiring the Town to maintain the insurance coverage until the Town enters into a Maintenance Agreement (also known as an Encroachment Agreement) for the project. The State is also requiring that the Town maintain this insurance coverage in perpetuity.

Mr. Michel estimated that the insurance would cost $25,000 for the first year. His understanding is that cost should decrease after construction and after the insurance is rolled into the Town’s general insurance costs. Once the construction work is completed, the coverage limits for the completed work would be the same as that for the indemnification liability. The indemnification over and above the $1.5 million self-insured retention (SIR) would be covered under the existing general liability coverage for the Town.

The State has indicated that they would not accept any further changes to the permit. A question was raised as to whether by agreeing to the permit conditions whether it would bind the Town to a permanent agreement and agreeing to the indemnification of the State in perpetuity. Attorney McLaughlin stated that, in his opinion, it would be permanent, which is the reason he will be seeking Selectmen and RTM approval prior to DPW signing the permit this June. He also indicated that the Town Charter states that no official can enter into an agreement that they don’t have an appropriation for which is another reason Attorney McLaughlin will be seeking Selectman and RTM approval.

Attorney McLaughlin was asked whether the Town should pursue a Charter change to incorporate the conditions requested by the State. Attorney McLaughlin indicated that because the provision in the Charter is due to a Special Act it would not be easy to change, although it could be changed using Home Rule, which would then require a referendum. Attorney McLaughlin felt that as long as we have an ongoing agreement and insurance to cover the State and we agree to indemnify the State through the permit, the Town could continue to negotiate the MMA with the State.

The Committee was also informed that the contractor for this project has filed a claim with the DOT Commission against Greenwich on the basis of a lack of an agreement over the indemnification and a failure to obtain a permit which has resulted in a delay to the start of the project. Penalties can be substantial, as much as $2,000/day, which runs from May 2017.

The Committee was also informed that the MMA will be a ten-year agreement with dollar one on insurance and allow a waiver of any insurance provisions only at the discretion of the DOT. Attorney McLaughlin indicated that it is likely that the Town will have to cover the self-insurance retention amount for the ten-year period.
Upon a motion by Ms. Krumeich, seconded by Ms. Fassuliotis, the Committee voted 2-0-0 to approve the encroachment permit as presented by the State DOT without further changes.

2. Sound Beach Bridge/Road Improvement Municipal Improvement

Town Attorney Fox was asked whether the approval by the BET of the Sound Beach Bridge/Road Improvement budget item constituted an action and thus requiring Municipal Improvement (MI) prior to the BET's vote. Town Attorney Fox agreed that there appears to be differing interpretations of what Planning & Zoning Commission (P&Z) is requiring on an MI. In Town Attorney Fox's opinion, the action occurs not when the BET votes on a budget that is presented to the RTM; rather, the action occurs when the RTM votes on the final budget. Therefore, a MI should be in place prior to the RTM voting on the full appropriation for the Sound Beach Bridge/Road Improvement that is in the FY 2018-19 budget that will be before the RTM on May 14, 2018. It is for this reason that the MI will be before P&Z prior to that RTM meeting.

3. Discussion in Executive Session of Pending Cases in Litigation

The Committee voted 2-0-0 to go into Executive Session at 1:47 PM to discuss pending cases in litigation. After some discussion the Committee voted 2-0-0 to come out of Executive Session at 1:57 PM.

4. Discussion of deed restrictions for the property at 70 Parsonage Road

The Committee received an update from Counsel Wetmore who stated that he searched the Court archives and found that there were never any stipulated agreements between the neighbors of The Nathaniel Witherell, Inland Wetlands and Watercourses Agency, the Zoning Board of Appeals and P&Z. They had been discussed but never acted on. Town Attorney Fox told the Committee that the archives will be searched to find documentation on the grantor legatees identified in 1995 to the real property at 70 Parsonage Road which had deed restrictions placed on the use of the land to continue the Nathaniel Witherell as a licensed home for the aged.

5. Additional Appropriation Requested by the Law Department

Town Attorney Fox updated the Committee on the costs being incurred by the law department in the Collins case and Eversource case. Because outside counsel fees in the Collins case falls outside of the $1 million Self Insured Retention, there will be a shortfall in the budget and he will be requesting an interim appropriation of $250,000.00 from the BET.

Upon a motion made by Ms. Fassuliotis and seconded by Ms. Krumeich, the Committee voted 2-0-0 to approve the Town Attorney's request for an interim appropriation of $250,000.00 for the Law Department's FY17-18 budget.

6. Law Department Request to Transfer Monies from Object Code A 140 51450, Other Professional Fees to Object Code A 140 52150, Office Supplies
Town Attorney Fox explained that he was seeking a transfer of $15,000 from object code A 140 51450, Other Professional Fees, to object code A 140 52150, Office Supplies, to cover a short fall due to increased costs of Westlaw, copies and iPad expenses.

Upon a motion by Ms. Fassuliotis, seconded by Ms. Krumeich, the Committee voted 2-0-0 to approve the Town Attorney’s request for the transfer of $15,000 from object code A 140 51450, Other Professional Fees to object code A 140 52150, office supplies in the FY17-18 budget for the Law Department.

7. Proposed Amendment to the Investment Management Agreement with Neuberger Berman (NB)

The Town Treasurer, Kathleen Murphy, joined the Committee for discussion on the proposed Amendment to the Investment Management Agreement with the Retirement Board’s outside investment advisory manager, Neuberger Berman (NB).

Under the proposed Amendment, NB would retain National Financial Services, LLC (NFS), a subsidiary of Fidelity, to serve as a clearing agent and sub-custodian in order to manage the Retirement Funds of the Town. Attorney McLaughlin explained that, following review of the Charter, the Retirement Board has the authority under Section 208 of the Town Charter to approve of this engagement by NB to retain a sub-custodian rather than continue with State Street Corporation, the current custodian for the Retirement Funds. The Town Charter conveys to the BET the fiscal responsibility for engaging an independent investment custodian for the Retirement Funds. Because the Retirement Board is contemplating the transfer of the custodial function to the corporation trustee, that is NB, both the corporation trustee and the underlying agreement must be approved by the BET and the Law Department. Conversely, had the Retirement Board decided to turn over the Retirement Funds to a bank for safekeeping and employed an independent advisor to invest the funds then there would be no corporation trustee and no approval would be required by the BET and the Law Department. Attorney McLaughlin stated that after a lengthy discussion with outside counsel for the Retirement Board, Attorney Edward ("Ted") Smoot, and Chairman of the Retirement Board, Mr. Joseph Pellegrino, there was general agreement with that interpretation.

Ms. Murphy expressed her concerns over the proposed arrangement, stating that NB’s retention of NFS as a sub-custodian does not follow “best practices” for pension plans. Ms. Murphy explained that the agreement contemplates many sub-custodians with no guarantee of performance. This could end up with an investment portfolio that is so complex that the assets would be scattered and it would be difficult to extract the Town’s retirement funds should the Retirement Board decide to terminate the arrangement. Ms. Murphy also questioned how the request for proposal for a custodian was drafted and stated that she was not surprised that there were no responses. Ms. Murphy was concerned as to how independent the custodial arrangement would be and stated that she would rather see a more rigorous management process and indicated that the arrangement with the current custodian, State Street Corporation, is improving.

Attorney McLaughlin stated that he was waiting for responses to questions posed to NB and also stated that the Amendment relies on regulations for adherence and reporting requirements but does not spell them out. Attorney McLaughlin indicated that it might be prudent to actually enumerate these regulatory requirements in the Amendment.
The Committee deferred action on the Amendment pending further information and research.

8. Board of Assessment Appeals Waiver of Penalties for Commercial Property Owners

The question was raised whether the Board of Assessment Appeals overstepped its legal authority in granting waivers of penalties for some commercial property owners. Attorney McLaughlin explained that there is support for the premise that this board has a legal right to waive a penalty for commercial property owners. He referred Committee members to CONN. GEN. STAT. 12-63c. While this section states that the Board of Assessment Appeals could waive a late penalty if the town has an ordinance stating that it has the authority to do so, Greenwich does not have such an ordinance. Attorney McLaughlin stated, however, that an appellant could state that they have a receipt and they are appealing the entire assessment. In this case, there is room for interpretation to say that the Board has a legal right to waive any penalty for late payment. Attorney McLaughlin indicated that he will be following up with the Board to discuss the matter with them.

9. Approval of Minutes of Meetings

Upon a motion by Ms. Fassuliotis and seconded by Ms. Krumeich, the Committee approved the Minutes of its March 5, 2018, March 13, 2018, and April 17, 2018 meetings by separate votes of 2-0-0.

Adjournment

The meeting was adjourned at 3:32 P.M.

Karen Fassuliotis
Karen Fassuliotis, Recording Secretary

Elizabeth K. Krumeich
Elizabeth K. Krumeich, BET Law Committee, Chair