

December 3, 2021

*Via Email commoncouncil@kingston-ny.gov*

Andrea Shaut  
Alderwoman-at-Large  
City of Kingston Common Council  
420 Broadway  
Kingston, New York 12534

Re: Need for Rescheduling of Common Council Public Hearing  
9-17 & 21 N. Front Street and Fair Street Extension

Dear Alderwoman Shaut and Members of the Common Council:

As you are aware, this firm represents a real estate company that owns multiple properties in Uptown Kingston that have serious concerns about the project proposed at 9-17 & 21 N. Front Street and Fair Street Extension, commonly referred to as the Kingstonian (the “Project”). The Project is proposed to be built on and include the Fair Street Extension (the “Street”), a city street, and the City now seeks to abandon the Street in order to accommodate the Project. Pursuant to General City Law § 29 and City of Kingston Code § 355-62, such an abandonment requires that a public hearing be held by the Common Council Laws and Rules Committee. On December 2, 2021, the City attempted to hold such a public hearing (the “Hearing”), which took place at a hybrid remote/in-person meeting pursuant to the modifications to the Open Meetings Law (the “OML”) by NYS Chapter 417 of the Laws of 2021 (the “Chapter 417”). However, due to various issues, including but not limited to technical issues, the purported Hearing violated the Open Meetings Law, did not afford the public an adequate opportunity to meaningfully participate, and cannot form any basis for a Common Council vote on the discontinuance of the Street. For these reasons, the Common Council must schedule a new public hearing during a proper meeting conducted in accordance with all applicable laws and regulations.

From the outset, we note that the public Hearing in question was to be held by the Common Council Laws and Rules Committee. Kingston Code § 355-62. Though the Hearing was set and apparently held by the Common Council, we note that both a quorum of the Laws and Rules Committee and the entire Common Council was present in person and via Zoom. Accordingly, the Hearing constituted a public meeting pursuant to the Open Meetings Law. See Committee on Open Government (“COOG”) Advisory Opinion 5641, stating that “any gathering of a quorum of a public body for the purpose of conducting public business constitutes a ‘meeting’ subject to the OML, regardless of whether there is an intent to take action or the characterization of the gathering.” See also *Clark v Lyon*, 537 NY.2d 934, 935 (3d Dept 1989) (describing the mandate in the OML that “meetings and hearings” be held in accordance with its provisions). The Hearing, however, failed to comply with the current requirements of the OML, as amended by Chapter 417.

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Part E, Section 1 of Chapter 417 provides, in relevant part:

Notwithstanding the provisions of article 7 of the public officers law to the contrary, any... political subdivisions as defined in section 100 of the general municipal law, or a committee or subcommittee or other similar body of such entity, shall be authorized to meet and take such action authorized by law without permitting in public in-person access to meetings and authorize such meetings to be held remotely by conference call or similar service, provided that the public has the ability to view or listen to such proceeding and that such meetings are recorded and later transcribed.

This language essentially mirrors that of Executive Order 202.1 issued in March of 2020. COOG has issued several opinions regarding compliance with Executive Order 202.1 and has since confirmed that these opinions are applicable to Chapter 417 as well. Memorandum of the Committee on Open Government, November 9, 2021. Relevant here is OML AO 5631A, which concerns how agencies must conduct meetings via Zoom or other conferencing software. In the opinion, COOG discusses whether remote meetings that are not webcast, but are recorded and later posted, comply with the OML. COOG determined that they do not. The amendments to the OML, “appear[] to be expressly contingent upon the Board affording the public the ability contemporaneously to view or listen to such proceeding – i.e., livestreaming the audio or video to the public” (emphasis added).

The Hearing did not comply with this requirement. Throughout the meeting, the audio broadcast over both Zoom and YouTube dropped repeatedly, and often during public comments. Entire speakers provided comments in person that were never broadcast over Zoom or online. As a result, the many members of the public that chose to attend the Hearing remotely were deprived of the opportunity to contemporaneously listen to what occurred at the meetings in direct violation of the OML. Despite having been promised that those online would be called intermittently with those testifying in person, the Common Council instead chose to remedy their technical issues by calling all commenters present in the Council Chambers first. Those physically present in the Common Council Chambers disproportionately consisted of the developers spearheading the project, their close associates, and union members in the region who stand to gain from the Project being constructed. The overwhelming testimony in favor of the closure of Fair Street Extension and in support of the project likely had a chilling effect on the many speakers who testified via Zoom against the proposal who were mostly relegated to the last hour of public testimony as a result and had a disparate impact on their ability to participate as a result. This deprivation materially affects the legitimacy of the public hearing because the public was unable to meaningfully participate. Participants of a public hearing do not make their comments in a vacuum. They need to be able to listen to others and potentially alter their own comments in response. That is why it is vital that remote meetings be streamed live. See COOG Opinions AO-5093, AO- 5078, and AO-2243, discussing the need for the public to be “fully aware of” and able to “listen to” the deliberative process at meetings and that a failure to abide by this requirement violates the OML. The remote participants at the Hearing were therefore denied the opportunity to participate that is

meant to be guaranteed by the City Code and the OML.

Moreover, as a result of, among other issues, the hour-plus of technical difficulties and delays, the Hearing commenced much later than was scheduled to, was paused several times, and ultimately dragged on late into the night with no apparent end in sight. We observed multiple remote participants leave the meeting before they were given an opportunity to participate because the Hearing was being unreasonably delayed and because it was unclear whether they would ever actually be given an opportunity to speak. The Council was directly informed of this development during the Hearing itself, but inexcusably decided not to reschedule or extend the Hearing. While the Council may claim that those who could not participate may instead do so via written comment, that does not cure the legal issue. The law calls for a public hearing, not a public comment period, and the residents of Kingston deserve the opportunity to be heard, live, as a part of a public hearing.

Of particular concern is the fact that at least three members of the Common Council – Rita Worthington, Jeffrey Ventura-Morrell, and Steven Schabot, attended the Hearing via Zoom. There is no reason to believe that they were somehow not affected by the same technical issues that afflicted all of the other remote participants, meaning that for large portions of the Hearing, three councilmembers could not hear what was being said during the Hearing. This problem cannot be cured by providing a post-hearing transcript, as the OML requires the live streaming of audio during the actual meeting. We will never know if, had they been able to listen to all parts of the meeting, those members of the Council participating remotely may have formed different opinions regarding the abandonment of the Hearing itself, perhaps even being persuaded to vote to adjourn, continue, or reschedule the Hearing to a new date. The Hearing therefore simply cannot form a basis for any vote taken by the Council regarding the abandonment of the Street.

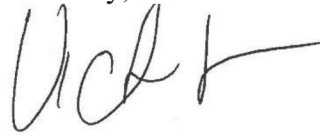
Finally, we appeal to the Council's sense of decency and equity. Its members know that what occurred at the Hearing was a technical disaster and that it directly affected the ability of the public to participate. The Councilmembers are public servants that have an obligation to act for the benefit of the residents of Kingston and that obligation has not yet been fulfilled with respect to the abandonment of the Street. Basic principles of fairness should lead the Council to schedule a new public hearing in order to solve these issues and prevent a tainted meeting from purportedly supporting the decision to give away a public street for private development with minimal, if any, benefit to the public. The Project is months, if not years away from ever receiving final approvals and would not benefit from the Street being closed in the interim. There is absolutely no need for the Council to rush to vote on the abandonment at this time. Any decision to plow ahead with the abandonment despite a patently deficient public hearing raises obvious questions regarding the Council's intent in doing so.

Based on the foregoing, any vote regarding the abandonment of the Street will be arbitrary, capricious, and in direct contravention of the Kingston Code and the OML. If the Council moves ahead with a vote at its next meeting, which is apparently pre-determined as Councilman Scott-Childress stated the Council would do so during the meeting – *before the Hearing was even over* – then concerned parties will have no choice but to pursue their legal remedies by filing an action at 3:00pm on Monday, December 6, 2021, at the Ulster County Supreme Court seeking, *inter alia*,

a temporary restraining order enjoining the City of Kingston Common Council from considering the Resolution to Discontinue Fair Street Extension at their meeting to scheduled to be held on December 7, 2021 or at any time until a new and legally compliant public hearing on the proposed road abandonment is held. We wish to work cooperatively with the City in this respect, and have called Corporation Counsel Graves-Poller and left a message to discuss whether the need for judicial relief may truly be necessary.

We urge the City to rethink this hasty and ill-advised discontinuance and to abide by its obligation to act in the public interest. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'Victoria L. Polidoro', with a long horizontal flourish extending to the right.

Victoria L. Polidoro

CC (all via e-mail): Barbara Graves-Poller, Esq.  
City of Kingston Common Council  
City of Kingston Clerk