

**City of Keene**  
**New Hampshire**

**PLANNING, LICENSES AND DEVELOPMENT COMMITTEE**  
**MEETING MINUTES**

**Wednesday, October 26, 2016**

**7:00 PM**

**Council Chambers A**

**Members Present:**

David C. Richards, Chair  
Philip M. Jones, Vice-Chair  
George S. Hansel  
Robert B. Sutherland  
Bettina A. Chadbourne

**Staff Present:**

John Rogers, Acting Health Director  
Thomas Mullins, City Attorney  
Rhett Lamb, ACM/Planning Director  
Kurt Blomquist, Public Works Director

**Members Not Present:**

**Other Councilors Present**

Terry Clark

Chair Richards called the meeting to order at 7:00 PM.

**1) Periodic Update – Zoning Board of Adjustment**

John Rogers, Acting Health Director introduced Louise Zerba, Zoning Board of Adjustment Chairperson. Chair Zerba read the following into the record:

*The Zoning Board of Adjustment's principal role, according to state statute, is to review applications for zoning variances, special exceptions, equitable waivers of dimensional requirements and hearing appeals from the decisions made by administrative officials.*

*The Job of the ZBA is to Interpret, not to create, rewrite, implement or enforce the ordinance. ZBA is a quasi-judicial body whose responsibility is to determine whether relief from the ordinance should be granted during a public meeting conducted in accordance with RSA 91-A. Membership consists of 5 members, chosen by the mayor with confirmation by City Council. Members who are Keene residents are appointed to a three-year term and may sit for a consecutive second three-year term. Because all applicants are entitled to be heard by a panel of 5 sitting members, the mayor can appoint up to 5 alternate members to replace a sitting member who is unable to participate in any given application.*

*A minimum of 3 yes votes is required to approve an application. An applicant may, at his or her discretion, choose to postpone a hearing if 5 members are not present.*

*A member may declare that he or she has a conflict of interest. After stating the reason, the Board, at its discretion, can declare that the recusal is appropriate or determine that there is no conflict. A member should recuse him or herself if he/she expects to gain or lose upon disposition of the case, is related to the applicant, has advised or assisted the applicant in any way, has directly or indirectly given an opinion or formed an opinion in the matter, is employed by or employs any party in the case thus if a member has a direct personal or financial interest in the outcome.*

*If a sitting member asks to be recused, or if a board member feels that a conflict may exist with another member, the board will take a position upon which, if approved, an alternate will be seated to replace the recused member.*

*The ZBA has the authority to act in four separate and distinct categories and can be found in the City of Keene handbook, Powers and Duties of the ZBA, Chapter 2, beginning on page II-2.*

- 1. Appeal from an Administrative Decision: Again, the board does not have the authority to enforce the ordinance. It does have the authority to hear and decide administrative appeals if it is alleged that there was an error in any order, requirement, decision or determination made by an administrative official in the enforcement of any ordinance. In exercising those powers it may reverse or affirm, wholly or in part, or may modify the order, requirement, decision, or determination.*
- 2. Approval of Special Exception: The board may make special exceptions to the terms of the ordinance in appropriate cases and subject to appropriate conditions and safeguards. All special exceptions shall be made in harmony with the general purpose and intent of the zoning ordinance and shall be in accordance with the general or specific rules contained in the ordinance. The granting of a special exception does not alter the zoning ordinance but applies only to the particular project under consideration.*
- 3. Granting a Variance: The Zoning Board can grant a variance from the terms of the zoning ordinance if 1. The variance will not be contrary to the public interest (show there will be no harm to the public interest if granted), 2. The spirit of the ordinance is observed, 3. Substantial justice is done, (the guiding rule is that any loss to the individual that is not outweighed by a gain to the general public is an injustice) 4. The values of surrounding properties are not diminished and 5. Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship. (When some characteristic of the particular land in question is different from others can unnecessary hardship be claimed).*
- 4. Equitable waivers of dimensional requirements: When a property or a structure on the property is discovered to be in violation of a physical layout or dimensional requirement imposed by a zoning ordinance, the burden of proof rests on the property owner who is seeking relief from the requirement. The board, in granting the waiver, must make its ruling based on a number of findings which are located in Division 5, Sec. 102-141 in the City of Keene Code.*

*Under Article 3 of the Keene Code, Nonconforming Buildings, Structures and Uses, in Section 102-207, the ZBA may in appropriate circumstances permit a nonconforming use to be changed to another nonconforming use provided that certain criteria are met or that a nonconforming use may be expanded and enlarged provided such enlargement does not violate any of the basic zone dimensional requirements set forth under Section 102-210.*

*To perform its duties, the ZBA collects evidence from written material and testimony presented, finds what are the facts based on evidence with the burden of proof on the applicant and applies the legal tests from the statute to the facts.*

*It conducts the proceedings in accordance with the Right to Know Law, requires opportunity for the applicant, with notice to abutters, to be heard at a public hearing and to speak on his or her own behalf or through counsel or an agent if he or she chooses, requires decision making by board members who are impartial, and, based upon the evidence presented, requires a written decision indicating approval, approval with conditions or denial and appropriate explanations.*

At the conclusion of Chair Zerba's report Chair Richards asked for Committee questions.

Councilor Sutherland asked Chair Zerba to re-read the comments on conflict-of-interest specifically those not related to financial interest. Chair Zerba re-read the comments requested by Councilor Sutherland. He then commented he has been curious because the Mayor appointed everyone on the Zoning Board of Adjustment, with approval of City Council, and appointed everybody on the Planning Board; the Mayor has a project going through the works with changes that require approval from both the Zoning Board of Adjustment and the Planning Board, and he appointed all those people. Councilor Sutherland continued he is just curious as to whether or not this is a conflict-of-interest. He added the Mayor has administrative power to appoint friends and acquaintances. Councilor Jones commented he believes all of the guidelines are in accordance with state statute and we could not change them; every town has the same guidelines.

There being no further Committee comments or questions, Chair Richards asked for public comments.

Mr. Rogers reported Chair Zerba's term is up in December; he expressed gratitude to Chair Zerba for her many years of service. Chair Richards concurred noting it is hard work; he also thanked Chair Zerba for educating the Committee and doing her job so well.

There being no questions or comments from the Committee or public, Chair Richards asked for a motion.

Councilor Hansel made the following motion which was seconded by Councilor Jones.

On a vote of 5-0, the Planning, Licenses and Development Committee recommends the periodic report from the Zoning Board of Adjustment be accepted as informational.

- 2) **Relating to the Establishment of the Main Street Historic Overlay District**
- **Ordinance O-2016-13**

- **Ordinance O-2016-14-A**
- **Ordinance O-2016-15**

Chair Richards noted a letter was written by the Historic District Commission to have this request withdrawn. He continued as this has gone through the whole City process we should not be doing that; we should vote on the ordinances themselves. Attorney Mullins recommended doing that the process is followed through. Attorney Mullins noted there is no specific process within the Zoning Amendment process to allow withdrawal of the request. He suggested this is something you may want to add to the amendment process. Attorney Mullins noted the other problem is the City Council's rules require an up or down vote on ordinances that are presented to it. He also explained this would require a suspension to City Council rules. Chair Richards also pointed out this part of the discussion is not open to public comment because a public hearing has been held, which is part of the standard operating procedure. Attorney Mullins concurred.

Chair Richards asked for Committee thoughts.

Councilor Hansel commented we have heard a lot about this proposed Overlay District including the fact that the homeowners there are unanimously opposed to it. He noted he feels preserving the historic nature of our downtown is important, but he is conflicted over this being a regulated Overlay District. Councilor Hansel suggested some of the points/initiatives are good things to look at with the Land Use Code update that is in process. Councilor Hansel noted one of the goals of the update is to simplify the Code across the board. He also commented his personal comments on this are that he sees the Overlay District as being redundant in our efforts, and it was not well received. He agrees it should be sent to City Council for an up or down vote; he also feels comfortable making a vote on it.

Councilor Jones said he feels we should honor the request from the Historic District Commission to deny this ordinance. He agreed with Councilor Hansel there are other things we can do. Continuing Councilor Jones noted at the Joint Committee meeting he asked if there were other ways to deal with this. Councilor Jones reported the Planning Department will be coming back to the Joint Committee with suggestions on how to achieve the goals here. Councilor Jones feels the ordinance should not be passed.

Councilor Sutherland commented we do have a free market here; if any group would like to pool their funds and acquire any of the properties and preserve them to their desire, they do have the ability to do that. Councilor Sutherland's biggest concern is that any more regulation on those homeowners will increase the costs of maintaining their homes. He continued as it is we have the highest tax rate in this area of New Hampshire; any dollar that is an increased burden on that property owner is going to cause them to save that dollar and maybe not make improvements or do the upkeep. Councilor Sutherland indicated this could cause the property owners to turn their residences into multi-units which is something the City also does not want to see happen.

Councilor Chadbourne acknowledged the work and effort over many years by the Commission, staff, and lots of other individuals. Noting things change, Councilor Chadbourne suggested maybe what we wanted three years ago does not fit our mission now or how we accomplish that mission. She reiterated comments regarding the residents there not wanting an unfunded mandate. Councilor Chadbourne also thinks the area can be preserved through other means and she is confident staff will come through.

Chair Richards asked if any other Councilor's in the room wished to make comments. As there were no other comments Chair Richards asked Councilor Jones to explain how the motion would work as it is a little different than usual. Councilor Jones explained there are two ways to do this 1) we can make the motion in the positive for approval of the ordinances and then vote them down, or 2) or we can go directly to a motion to deny the passage of the ordinances. Chair Richards clarified this would be a reverse motion not endorse the ordinances to which Councilor Jones agreed. Attorney Mullins added it could be done in one motion as long as each one of the ordinances is referenced.

There being no questions from the Committee Chair Richards asked for a motion.

Councilor Jones made the following motion which was seconded by Councilor Chadbourne.

On a vote of 5-0, the Planning, Licenses and Development Committee recommends to City Council the denial of the passage of- O-2016-13, O-2016-14A, and O-2016-15.

### **3) Council Policy – Political Advertising on City Property and Rights-of-Way**

- **Resolution R-2016-31**

Attorney Mullins noted he was here for the City Clerk as she had a conflict in her schedule. Attorney Mullins said he wanted to remind everyone, especially the public of where this came from. He noted there were one or more complaints to the City Clerk's office regarding political signs at polling places and City property. Attorney Mullins noted the actions taken by the Clerk and the conflicts between the Attorney General's Office and the Secretary of State's Office about what the underlying statutes require. Attorney Mullins reiterated testimony provided at the previous meeting regarding the Attorney General's Office. He reported the City Clerk's office was inclined to bring this back before the City Council and to have a Resolution with respect to putting signs up on the property which was presented to you. A question arose as to whether or not the public had enough input on this issue. Attorney Mullins also reported being contacted by the ACLU. Attorney Mullins noted this is an issue still working its way through our country; he cited the underlying Reed versus the Town of Gilbert, Arizona case. Continuing his comments Attorney Mullins noted the underlying problem with this particular resolution is if it makes a distinction based upon content of the sign, technically under the Reed versus the Town of Gilbert case, it is not constitutional. The fundamental question now is whether the statutes underlying this particular resolution, underlie the placement of political signs anywhere is constitutional. Noting the election laws speak more to the placement of electioneering materials at polling places on Election Day, which is what the City Clerk is mostly concerned about, our recommendation at this time is that you vote this down until such time as all the other questions can be answered. Attorney Mullins noted he suspects there will be more discussion at the state level after the elections. Chair Richards also commented on the fact the position changes every two years which can bring a change in opinion.

Chair Richards asked for Committee questions from the Committee. There being no questions or comments from the Committee Chair Richards asked for questions or comments from the public.

John F. DiBernardo, of Cobb Street noted he has seen a lot of campaigns come and go. He has seen a lot of signs come and go; he has also put out signs himself. As he travels through Keene and the outlying towns, seeing hundreds of signs he genuinely thinks what a country compared to others. Mr. DiBernardo continued he thinks this is wonderful, we are Americans and we are invested in things wholeheartedly or we do not do them at all. We want to express our opinions and publically declare what we think where those opinions can be seen by the public on City property. Mr. DiBernardo indicated he and every other resident of Keene owns this property, and the City government administers it. Although the placement of signs every couple of years can be seen by some as a terrible thing, to Mr. DiBernardo it is a perfect example of how we have taken to heart the system we have. For this reason Mr. DiBernardo hopes the Committee votes not to support this ordinance; he sees this as an infringement on free speech.

John Therriault, of 76 Bradford Road commented he is here today as both a citizen of Keene and the Chairman of the Republican Committee. Mr. Therriault noted he has two points, one being putting up signs is political speech. Mr. Therriault noted comments by the City Attorney and Mr. DiBernardo regarding the Constitution and free speech; he quoted from Article XXII of the New Hampshire Constitution. Mr. Therriault continued the City Council would be challenged in court should it infringe on free speech in Keene. Mr. Therriault noted his second point, which is New Hampshire having the first in the nation primary every four years. He commented on the amount of exposure and economic benefit this brings to New Hampshire. If New Hampshire starts being negative or hinders political speech it makes our job to preserve that first in the nation primary harder. Mr. Therriault continued he thinks this is a bad idea because it hinders freedom of speech and it would hurt us in defending our first in the nation primary status. Mr. Therriault urged the Committee to vote down this resolution.

Kurt Blomquist, Public Works Director explained the City is responsible for safety within our public ways. He explained within the resolution there was a listing of spaces within the public ways that is currently regulated and signs are removed from. He cited examples such as the medians on Winchester Street and the middle of the roundabouts as they technically were designed not to have people go out into them (safety issue). Mr. Blomquist explained situations that are a safety concern are evaluated. Mr. Blomquist again referred to the list of spaces in the resolution noting we do not want people to go out into these spaces because they are putting themselves and the motoring public at risk. Mr. Blomquist added until directed otherwise he would continue to monitor these areas with safety concerns so people are not put at risk. Mr. Blomquist recommends the monitoring of these safety areas continues.

Councilor Sutherland asked Mr. Therriault if he ran for City Council in the last election; Mr. Therriault replied in the affirmative. He then asked if Mr. Therriault knew all the people who voted for him; Mr. Therriault replied in the negative. Mr. Therriault also responded acknowledging he did have signs and did place them in the areas addressed by Mr. Blomquist. Mr. Therriault also noted having signs at the polling locations in addition to people holding signs there as well. In response to additional questions Mr. Therriault responded to he agreed the signs did increase his name recognition even though he did not win.

There being no further public comment Chair Richards asked for additional comments from the Committee.

Councilor Chadbourne commented as she was looking the material over she noted through State Statute something already existed for polling stations. Noting she wants to be clear in her understanding Councilor Chadbourne said it sounds like there is a limited area where signs can be held and only on Election Day. Attorney Mullins commented it is a narrower discussion than just that. To answer Councilor Chadbourne's specific question Attorney Mullins said on Election Day at polling locations State Statute does have restrictions regarding what is otherwise known as electioneering. He also noted there is a 10-foot wide corridor that must be maintained from the parking area and the Moderator has the right to determine where people can be. Referring to earlier discussion Attorney Mullins commented he does not want this Committee or the City Council or the public at-large to think that he is suggesting that what was suggested that there are no limits on the First Amendment issues either under state or federal law; that is very clear. It is not an absolute right and the courts have made that pretty clear. The problem with this particular resolution and to the Public Works Director's comments, it is also very clear as to the City rights with respect to public health, safety, and welfare. The problem with this resolution and the statutes that pin it are the result of this particular area called political advertising; and this is now problematic under the Supreme Court's interpretation of the First Amendment. Even with voting to not proceed with approving this resolution you are not changing some of the underlying responsibilities municipalities have in protecting public health, safety, and welfare which includes the right to remove signs from roundabouts and other unsafe places. Attorney Mullins also added none of this changes anything with respect to electioneering at the polling places on Election Day.

Chair Richards asked for additional Committee comments.

Councilor Hansel clarified we do not need any further resolutions to remove signs for the public safety element of this; as it is already in place. Attorney Mullins replied in the affirmative, adding under the existing statute that is correct. Councilor Hansel thanked the public for coming to speak noting their opinions and the points they made were well taken. After additional comments Councilor Hansel said he supports not recommending this resolution be adopted.

Attorney Mullins commented this is a classic example of a municipality being placed between a rock and a hard place. We have to be responsible to the state agencies that supervise us including the Attorney General's Office. This whole thing resulted from a conversation with the Attorney General's Office. Attorney Mullins commented at this point he is more comfortable letting those agencies fight this battle.

Councilor Sutherland asked other than the change at the Attorney General's Office what was the problem that we could not deal with before. After additional comments he also suggested we do not need an additional ordinance when everything seemed to be working before. Attorney Mullins addressed what changed by noting there was a statute and the first sentence is subject to interpretation. The interpretation is whether or not any municipality in the State of New Hampshire is the owner of property with respect to the obligation to either permit or deny the use of political signs. Previously the interpretation of that was that owner did not apply to the municipality. Attorney Mullins noted he took exception to this and explained why; he added this

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took place back in 2008 and reiterated testimony previously given regarding the change in the Attorney General's Office.

Councilor Chadbourne commented she is glad this issue came back around and is sorry she missed it first time around. She also commented the public felt they were left out of the loop and that she is happy some showed up this evening to address it. After additional comments Councilor Chadbourne noted she is also in favor of voting this resolution down.

Councilor made the following motion which was seconded by Councilor Hansel.

On a vote of 3-1, the Planning, Licenses and Development Committee recommends to the City Council not to adopt Resolution R-2016-31.

Councilor Sutherland asked if it was still possible this could still get passed at City Council. Chair Richard replied in the affirmative.

**4) Adjournment** - There being no further business before the Committee Chair Richards adjourned the meeting at 7:48 PM.

Respectfully submitted by,  
Mary Lou Sheats Hall  
October 27, 2016