

City of Keene
New Hampshire

PLANNING, LICENSES & DEVELOPMENT COMMITTEE
MEETING MINUTES

Wednesday, November 13, 2019

7:00 PM

Council Chambers A

Members Present:

Philip M. Jones, Vice Chair
George S. Hansel
Kate M. Bosley
Robert J. O'Connor

Staff Present:

Thomas P. Mullins, City Attorney
John Rogers, Building & Health
Official/Zoning Administrator
Mari Brunner, Planner

Members Not Present:

David C. Richards, Chair

Chair Richards called the meeting to order at 7:00 PM, he welcomed the public, and explained the rules of procedure.

1) Periodic Update – College City Commission

Chair Richards welcomed his Co-Chair of the College/City Commission and the Director of External Relations in the President's Office at Keene State College (KSC), Steve Fortier. Mr. Fortier began by recognizing Councilor Jones' long-term service to the City and as founding member and leader of the College/City Commission.

Mr. Fortier said that 2019 was a rebuilding year for the Commission, during which time the Mayor and Melinda Treadwell, KSC President, appointed four new members, resulting in seven active members currently and one open active membership. Despite being a rebuilding year, Mr. Fortier shared the Commission's recent accomplishments:

- The joint College/City funded traffic calming medians on Main Street
- Tandem but independent proclamations for Indigenous Peoples Day, for which a student leader will continue working with the Council and the Mayor will work towards a Resolution for the day such as the one passed at KSC.

The Mayor and President Treadwell worked to redefine the Commission's charge during the last year, which Mr. Fortier said has now reenergize the Commission. The Commission is now *charged with facilitating long-range planning and short and long-term recommendations to the college and the City on issues of mutual concern. It is to create a model for how a campus and college collaborate effectively and engage each other in the resolution of their most pressing issues. It will create a framework to deal with emergent issues as well.*

Mr. Fortier continued explaining the Commission's goals for the year ahead:

- Explore the possibility of a social host ordinance with neighborhood organizations
- Maintain the focus on neighborhood relationships between students and citizens
- Building inclusive cultures in the City and College for mutual success and benefit
- Coordinate the ambitious energy goals both the College and City have adopted
- Engage KSC resources to help enhancing the art corridor in Keene
- Work with Mayor-Elect Hansel to envision more next steps
- Continue being a symbol of and body for moving together in shared interests

Chair Richards agreed that 2019 was a rebuilding year, while missing membership and awaiting new direction from the Mayor and President Treadwell. He said the Commission is now in a good place to move forward working toward these goals.

As a KSC graduate, Councilor O'Connor thanked Mr. Fortier for his presentation and for fostering this important connection with the City.

Councilor Jones thanked Mr. Fortier for his kind opening words. The Councilor recalled all the Commission has accomplished in small ways. Such as when the College brings issues of concern to the City, such as no streetlights on Ralston Street, and then the City can work to rectify them quickly. Before this Commission, Councilor Jones said that the College and City worked against each other instead of together. He recalled when Cheshire TV began, KSC marketing students advised on the name and logo, which has clearly endured. With a desire for more art in the City, he said the KSC art department should be involved with promoting both stationary and theatrical art. Councilor Jones said there is still a lot the College and City can do together, for example, College representatives are providing great input for City planning of improvements on Winchester Street between Island Street and RT-101. He said the Commission is working.

Mr. Fortier said he met with President Treadwell's cabinet recently about challenges of his job. A positive outcome of that conversation was realizing that KSC staff is meant to be stewarding resources between City and College, but most job descriptions do not reflect that mission. With downsizing at the College, he admitted the connection has been easy to overlook, but President Treadwell is committed to fostering the College/City relationship moving forward.

Councilor Hansel moved to accept the College/City Commission report as informational, which Councilor O'Connor seconded and the Planning, Licenses & Development Committee carried unanimously.

Mr. Fortier noted that the two most recent reports of Commission efforts & outcomes are available on the Commission webpage: <https://ci.keene.nh.us/college-city-commission>.

The consensus of the committee was to accept the report as informational.

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

John Rogers, the City Building & Health Official and Zoning Administrator, introduced Joshua Gorman, who is a local property owner, former City Housing Inspector, and current Chair of the Zoning Board of Adjustment (ZBA). Mr. Gorman began as an alternate member of the ZBA in 2016 and an acting member in 2017; he was elected as Vice Chair in 2018 and as Chairman in 2019. Mr. Rogers said that the ZBA is lucky to have someone like Mr. Gorman, who efficiently runs their meetings.

Chair Richards welcomed Mr. Gorman who said it has been an honor to serve his community on the ZBA for the past few years. He explained that the ZBA acts in a statutory role to review, most commonly, applications for variances, applications for special exceptions, appeals to administrative decisions, and equitable waivers of dimensional requirements. The ZBA is a quasi-judicial body responsible for interpreting the Zoning Ordinance and determining if an applicant justifies relief from that Ordinance. During the application process, a public meeting is held per RSA 91-A. The Mayor appoints and the Council approves the five members who make-up the ZBA for three-year terms. The Mayor can also appoint up to five alternates, who can serve in the case of an acting member's absence or recusal, which can be due to personal relationship or the opportunity to benefit financially from the application. A minimum of three votes are required to approve an application and while a meeting can be held without five members present, the applicant reserves the right to postpone in such cases. Mr. Gorman said that after being on the Board for four years, the current membership is a strong group with good backgrounds, diverse opinions, and a wealth of legal knowledge to make his job easy.

Mr. Gorman continued explaining the types of applications the ZBA hears and the criteria the Board must review for each. The ZBA most commonly hears applications for a variance, for which the board weighs in on five criteria when making decisions. The applicant must prove that:

- 1) *Granting the Variance would not be contrary to the public interest.*
- 2) *If the variance were granted, the spirit of the ordinance would be observed.*
- 3) *Granting the variance would do substantial justice.*
- 4) *If the variance were granted, the values of the surrounding properties would not be diminished.*
- 5) *Unnecessary Hardship*
 - A. *Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because:*
 - i. *No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property.*
 - ii. *The proposed use is a reasonable one.*
 - B. *Explain how, if the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the*

ordinance, and a variance is therefore necessary to enable a reasonable use of it.

Next, the ZBA commonly reviews applications for special exceptions, which he thinks are more easily attainable. To receive a special exception from the Zoning Ordinance, an applicant must demonstrate that:

1. The proposed use is similar to one or more of the uses already authorized in that district and is in an appropriate location for such a use.
2. Such approval would not reduce the value of any property within the district, nor otherwise be injurious, obnoxious, or offensive to the neighborhood.
3. There will be no nuisance or serious hazard to vehicles or pedestrians.
4. Adequate and appropriate facilities (i.e., sewer, water, street, parking, etc.) will be provided for the proper operation of the proposed use.

Less often, the ZBA receives applications for equitable waivers of dimensional requirements. Finally, applicants are allowed to appeal administrative decisions and seek the Board's relief from that decision, which are also rare and require the applicant to present facts.

Councilor Jones asked if the criteria listed come from State Statutes and Mr. Gorman replied in the affirmative.

Chair Richards thanked Mr. Gorman for his work, recognizing that the Board often has to make tough - but needed decisions. Mr. Gorman thanked the Council.

Councilor Jones moved to accept the Zoning Board of Adjustment report as informational, which Councilor Hansel seconded.

On a 4-0, the Planning, Licenses & Development Committee recommends accepting the Zoning Board of Adjustment report as informational.

3) Relating to Small Wireless Facility Deployments in the Public Right-of-Way Ordinance O-2019-18

Chair Richards welcomed City Planner, Mari Brunner, to provide a high-level overview of this Ordinance that staff has been working on. He added the Public Works Director and Community Development Director could not be present to answer questions in more detail until the first meeting in December. She shared information similar to what was presented to the Council on November 7. This Ordinance is relating to small wireless facilities, which are often called small cells, and are the newer generation of telecommunications technology that can be fixed to light poles and the sides of buildings, making them more versatile than previous cell towers. This Ordinance deals with the deployment of these facilities within the public right-of-way, like on utility poles or freestanding structures in some instances. The goal of the Ordinance is to establish a license under the purview of the Public Works Director (or their designee) that would establish local standards and design guidelines for these facilities. The overall intent is to

provide an opportunity for these facilities that will eventually supply 5G access in the community, where broadband access is needed. The intent is to ensure these facilities are placed safely, aesthetically compatible with the community, and align with community goals. Staff began this process in part because of a Federal Communications Commission (FCC) Small Cell Order passed on September 18, 2018, which placed restrictions on local authorities to regulate these facilities. Ms. Brunner said the intention of the FCC Order is to 1) speed the transition to 5G; 2) restrict the fees and other compensation state and local governments may receive from applicants, 3) require all aesthetic regulations to be reasonable and no more burdensome than those applied to other infrastructure deployments and published in advance, and 4) mandate that local officials review permit applications within significantly shorter time frames than previously allowed. Chair Richards requested that Council receive copies of the November 7 presentation before the next meeting.

Councilor Jones asked about the public benefit of these facilities. Ms. Brunner said there are many benefits, but the greatest is opportunity for companies that install these facilities on poles within the right-of-way on utilities owned by different companies. She said this is where technology is heading for 5G coverage to improve use of cell phones and smart devices.

Councilor Bosley noted there are areas of Keene, such as Emerald Street, with many telecommunication structures. Through this Ordinance, she asked what the City's ability would be to ensure that new facilities are evenly distributed throughout the community and not be overwhelming. She asked for more information on those guidelines at the next meeting. Ms. Brunner agreed and said a benefit of publishing this Ordinance in advance is to establish these guidelines. Without publishing such guidelines, the City cannot make companies follow them.

Councilor Jones noted that the City already has standards for light and phone poles and thought some of Councilor Bosley's questions could be answered in the Telecommunications Ordinance. He asked the City Attorney if the Telecommunications Act of 1996, which changed how municipalities could charge for use of the right-of-way, would carry over into this Small Cell Order. The City Attorney said no, not under the current order from the FCC. The City Attorney continued making a few points. He thought the need for more expansive broadband within the City was agreed upon. He said the FCC ruling is being appealed however, likely to the Supreme Court, by many municipalities claiming it is an overreach by one Federal agency into the public right-of-way of every municipality nationally. The 1996 Act was specific to private and municipal properties whereas this current one is for the public right-of-way, and it makes some presumptive decisions about fee structures and stipulates that all companies must be treated equally. He said this is a fundamentally different ruling than 1996. He said that regardless of what the ruling might be on appeals to this Order, staff is trying to be proactive because if City standards do not allow a competitor to be able to operate, then they can go to the Federal District Court saying those standards inhibit their competition rights. He said the reality is that in this country we have allowed all of these companies to install their own telecommunications facilities as opposed to colocation efforts. However,

Keene is a small town and will not likely have many providers coming in compared to Boston, for example. The City Attorney added that there is a law firm in the state that the City has worked with before, which is working on a draft Ordinance, so the Council should anticipate further iterations of this Ordinance.

Chair Richards recognized Councilor Terry Clark, who said that electromagnetic frequencies come in many sizes and styles. He formerly worked in power generation and said that electromagnetic waves depend on frequency and wavelength. He said that short electromagnetic frequencies like microwaves are relatively harmless, but said that 5G is a high frequency wave with shorter bandwidth. He said the military found such waves to have effects on human skin. He urged more research on the effects of 5G.

Chair Richards recognized Bobby Williams (of 66 N. Lincoln Street, Keene), who is Councilor-elect in Ward 2. He began providing comments on the statute. Mr. Williams said that broadband is good and the City should encourage it, but he listed concerns. He said he was frustrated by FCC overreach in this regard but said FCC turnover in 2020 could change this ruling and that any Ordinance should be viewed as likely to have many iterations over next few years. He hopes the City will get fair compensation versus giving away something valuable to very wealthy companies. He does not think the public is being adequately compensated. While the Ordinance cited a maximum 35' tall for towers, he suggested that taller towers could mean fewer towers, and wanted the Council to consider how collocation by multiple companies could minimize the quantity of poles. Regarding disaster resilience, Mr. Williams said he saw no requirement for battery backup. He said the national standard is six hours and that would be important in a real storm; he suggested battery life of 12-24 hours, but said that would not need to be required on each pole. Mr. Williams said this Ordinance calls for big aluminum boxes next to each facility and suggests placing them underground, which he said will not work in flood zones and will then be aesthetically displeasing aboveground in some of those disproportionately poorer neighborhoods. He echoed Councilor Clark's comments about health concerns but said there is not yet enough science. Councilor Jones said that tower height and collocation are addressed in the Telecommunication Ordinance and that batteries were just installed on the bike path that last 36 hours.

Chair Richards asked if these facilities can be placed on top of buildings and Ms. Brunner said yes, but this Ordinance is specifically for the public right-of-way to be compliant with the FCC Small Cell Order. If private property owners want to allow facilities on their rooftops, they would need a Conditional Use Permit from the City.

Councilor Hansel asked if the FCC ruling is to incentivize placing these facilities in the public right-of-way versus on private property. The City Attorney said that is the intent. Councilor Hansel asked if there is a creative way to incentivize putting these on private property. The City Attorney said there is little municipal authority on how to avoid taxes on private property under state law compared to other states. Other incentives could include collocation, among others. Regarding health issues, the City Attorney said that all the City can do at this time is comply with Federal Standards.

Councilor Hansel suggested providing a free application for installations on private property versus an application fee for those in the right-of-way.

Councilor Bosley asked if there is a fee the FCC is limiting. The City Attorney said no they are not limiting a fee but creating a safe harbor and if you do not exceed that, then the fees will be presumptively reasonable, and if you exceed it then you must provide specific reasons in the cost analysis for why. Ms. Brunner said the fee is \$500 per facility for the first five facilities and \$100 per facility after, in addition to a \$250 annual fee per facility. These are just the safe harbor numbers; if a City can justify a higher cost, they can. Councilor Bosley said the way to incentivize using private property is by giving a dollar amount that excites private landowners to give up space on their roof for extra income. The City Attorney said that money would flow to the entity, which would negotiate with private landowner.

Councilor Hansel said there could be a way to incentivize the few companies applying to develop a whole plan versus piecemeal per facility, which in aggregate could add up to something; to bring a City-wide plan for certain incentives. The City Attorney said these were all good ideas for the first iteration of this Ordinance, but encouraged the Council to keep moving it along.

Councilor Bosley moved to recommend that Ordinance O-2019-18 be placed on more time, which Councilor Hansel seconded.

On a vote of 4-0, the Planning, Licenses & Development Committee recommend Ordinance O-2019-18 to be placed on more time.

4) Adjournment

Hearing no further business, Chair Richards adjourned the meeting at 8:00 PM.

Respectfully submitted by,
Katriona Kibler, Minute Taker
November 17, 2019