

City of Keene
New Hampshire

PLANNING, LICENSES AND DEVELOPMENT COMMITTEE
MEETING MINUTES

Wednesday, April 22, 2020

7:00 PM

Remote via Zoom

Members Present:

Kate M. Bosley, Chair
Mitchell H. Greenwald, Vice-Chair
Philip M. Jones
Gladys Johnsen
Catherine Workman

Members Not Present:

Mayor George Hansel

Staff Present:

Elizabeth A. Dragon, City Manager
Thomas P. Mullins, City Attorney
Terri Hood, Assistant City Clerk
William Dow, Deputy City Clerk
Rhett Lamb, Community Development
Director
Mari Brunner, Planner
Kürt Blomquist, Public Works Director
John Rogers, Zoning Administrator
Mark Howard, Fire Chief

Chair Bosley called the meeting to order at 7:06 PM. She read a prepared statement explaining how the Emergency Order #12, pursuant to Executive Order #2020-04 issued by the Governor of New Hampshire, waives certain provisions of RSA 91-A (which regulates the operation of public body meetings) during the declared COVID-19 State of Emergency. She explained the procedures of the meeting and how the public can participate.

Roll call was conducted.

1) Cheshire Housing Trust - Application for a Lodging House License

Chair Bosley stated that they do not have a petitioner present. She asked staff to speak.

Rhett Lamb, Community Development Director/Assistant City Manager stated that he will give a quick background, with the intent of making sure everyone knows where this property is. He continued that it has been a lodging house for several years and it has now come to light that they need a license. It is the Hampshire House property owned and operated by Cheshire Housing Trust. It is at the corner of Winter and School Streets and has been a lodging house for a number of years, and that has only recently come to light as a function of the work the City has been doing on the Social Services and Congregate Care ordinance. The City did a comprehensive look at all lodging houses and other uses under the larger category of congregate care to see what existed in the community. What was

revealed is that the Hampshire House falls under the definition of a lodging house, even under the current Chapter 46 standards. Staff let the Hampshire House know that they need to come forward to the City Council for a lodging house license. That is why the Council are seeing this now.

Chair Bosley asked if they have been operating unlicensed. Mr. Lamb replied yes, because no one in the City had placed them in the category of "lodging house." He continued that they had not been aware that they needed a license. They are trying to correct that through this process today.

Chair Bosley stated that they heard that Hampshire House had all their inspections. Mr. Lamb replied that Fire Chief Mark Howard or Zoning Administrator John Rogers can speak to that.

Chair Bosley asked for Mr. Rogers to speak.

Mr. Rogers stated that he and John Bates from the Fire Department conducted an inspection. They have no concerns and recommend granting the license.

Chair Bosley asked if Chief Howard had comments to add.

Chief Howard stated that what Mr. Rogers reported is accurate. He continued that both departments have completed inspections of the location and they are active. That location, from a Fire standpoint, has been active under prior inspections and services. Even though this is new coming to the City Council, from a Fire Code point of view it is not new to get them up to Code.

Chair Bosley asked if the committee had questions or comments.

Councilor Workman stated that her personal experience with Cheshire Housing Trust is that she is not surprised they are in compliance with codes and ordinances now. She continued that she used them when she was a case manager, placing clients there as tenants. The Cheshire Housing Trust is diligent and take precautions on who they rent to and follow all necessary guidelines.

Councilor Johnsen stated that she would like to know: is this in relationship to the meeting the City Council had with folks who did not want to have 20 people in this area? If so, how many people are in this dwelling?

Chair Bosley stated that people who did the inspections could speak up with corrections if needed, but the application is for 18 rooms and 20 people. She continued that this dwelling has been active for years. She, through Comfort Keepers, has served tenants who have been there for years. She asked if anyone knows how long it has been operating.

Mr. Lamb stated that it has been at least 25 years in that location, with the same activity and the same use.

Chair Bosley stated that regarding Councilor Johnsen's question, she thinks that may give them grounds for having a grandfathered situation, when it comes to the stipulations they are discussing at the Joint Planning Board/Planning, Licenses, and Development Committee level for the new ordinance.

Councilor Johnsen stated that she understands that they have been there for a long time. She continued that she remembers saying she was not comfortable with approving that many people in that area because she heard what the people who live in that area said. Wouldn't this slip them in and defeat the whole purpose of not having more than five or six?

Chair Bosley replied that she understands what Councilor Johnsen is saying. She continued that the Joint Committee has had lengthy conversations about this. She thinks that because of the length of time this facility has been in operation, some of the people who came before the Joint Committee with feedback had purchased their homes well after this lodging house was established, moving into the neighborhood knowing that the facility was there already. The ordinance the Joint Committee has been discussing will prevent future buildings being put together in this manner, limiting occupancy at least to 16, which was the initial point they had discussed, and then they talked about lowering that number even more. She continued that Councilor Johnsen needs to look at what her position would be, regarding this particular lodging license. But it has been there for 25 years. Many people who moved in and out of that area were aware that it was already constructed.

Councilor Johnsen asked the City Attorney to address this so she better understands. She continued that she wants to make sure they are not slipping something in that would defeat what they had discussed in the Joint Committee.

Tom Mullins, City Attorney, stated he is not prepared to address the long-term implications. He continued that when the land use development ordinance is in place it will deal with a lot of these uses. This use has been in place for quite some time. When the new ordinance goes into play it will address uses that will be coming into effect after the time that the ordinance is enacted. A better person to answer this question of the interplay between this particular use and the upcoming land use code change would be the Community Development Director or the Zoning Administrator.

Mr. Lamb stated that as it relates to the proposed Social Services and Congregate Care ordinance, the only reason they referenced it tonight is that in doing the preparation for that ordinance they tried to identify all possible lodging houses, group homes, and other categories of land uses that might be affected in the future. He continued that they identified the Hampshire House as a preexisting lodging house, which is why it is coming forward under Chapter 46. In terms of the future ordinance, this is a preexisting use, an allowed use today, and the Hampshire House is there with all the appropriate approvals. The changes associated with the Social Services and Congregate Care ordinance, if it is adopted in the future, would not affect this use, because it is preexisting. The discussion about the ordinance and how they manage congregate care uses in this part of the city is still up for

discussion. It will be coming back in front of the PLD Committee and the full City Council for discussion how to move forward with the issues raised as concerns here tonight.

Councilor Johnsen asked if this is for one year. Mr. Lamb replied yes, it is a one-year license.

Chair Bosley stated that they have an ordinance that will come into play that will level out the dates for all lodging houses to July 1 so this one will be a year and a month.

Councilor Johnsen stated that she remembers people coming and saying, "We don't want this many people in this area." She continued that she is being cognizant of the citizens. If this is grandfathered and that is the consensus of the committee, she will be in support, but she does not want that support to weigh on what will be coming after January 2021.

Chair Bosley asked Chief Howard if he had anything to add.

Chief Howard stated that the proposed number of 20 residents includes two people who reside there, as managers of the property, so there would be 18 lodging house residents.

Councilor Jones stated that something that he keeps bringing up in Joint Committee meetings, regarding the Social Services and Congregate Care ordinance, is that things like what Councilor Johnsen brought up will be taken away from the City Council. For example, the six contingencies they will be making tonight as part of the motion - they would not be able to do that anymore. There is nothing they can do about this tonight, but it is a point he has been making at the Joint Committee meetings. Chair Bosley replied that it is a valid point.

Chair Bosley asked if any attendees or members of the public had comments.

Councilor Clark stated that the Hampshire House has been a resident house for much longer than 25 years, for he remembers it from his youth. He continued that it has always had a reputation of having very strict rules for its residents. He recalls that during a discussion for one of their license renewals maybe 7 or 8 years ago, the Police said they have never had a call there. Maybe that will calm people's fears about there being too many people there. It has never been a problem.

Councilor Workman made the following motion, which was seconded by Councilor Jones.

By a roll call vote of 5-0, the Planning, Licenses, and Development Committee recommends that a lodging license be issued to Cheshire Housing Trust for property located at 86 Winter Street for a period of one year from the date of issuance. Said license is conditional upon the following:

1. No more than 20 persons may reside on the premises.
2. Compliance with all applicable laws, ordinances, codes, and rules and regulations.
3. The continuation of the license is subject to and conditioned upon the successful

passage of an inspection to be conducted by the City.

4. Continued violation of any parking ordinances by residents of the premises or their guests, may be grounds for suspension or revocation of the license, as determined by the Police or the Community Development Departments.
5. Access to the common areas of the licensed premises shall be granted to the Police, Community Development, and Fire Departments at all reasonable times
6. The owner shall notify City staff of any change in the building operator; failure to do so may be grounds for suspension or revocation of this license.

This license expires on the 17th day of May, 2021, and may be revoked by the City Council in accordance with Sec. 46-590 "Suspension or Revocation."

It was noted that the license term will extend out to July 1, 2021 when Ordinance O-2020-03 becomes effective on July 2, 2020. Ordinance O-2020-03 established a consistent license expiration date for all lodging house licenses to be July 1st of the year subsequent to its issuance date.

2) Anthony and Fanella Levick – Granite Roots Brewing – Request to Serve Alcohol on City Property

Chair Bosley asked if Mr. or Ms. Levick was available to speak. Anthony Levick, majority owner of Granite Roots Brewing in Troy, NH and participating via phone, stated that they are seeking approval to once again sell alcohol at Keene Farmer's Market on Tuesdays and Saturdays.

Chair Bosley asked if they have already spoken with the Farmer's Market to get approval. Mr. Levick replied yes.

Chair Bosley asked if he understands that there are issues with doing samples while there are emergency orders in place. Mr. Levick replied yes, and they agree not to give free samples while these regulations are in place. He continued that when COVID-19 finally goes away they will reapply to give samples. Chair Bosley replied that the way the committee would be looking at this tonight is: the City Manager, once emergency orders are lifted, would have the discretion to say when that would be appropriate.

Kürt Blomquist, Public Works Director, stated that Chair Bosley is correct. He continued that Granite Roots Brewing is requesting their annual permission to sell beer at the Farmer's Market. A requirement of the Liquor Commission is that the legislative body on an annual basis must also grant permission. Currently under the Governor's Executive Order 2020-04 providing samples is not permitted. The recommended motion covers that issue. Granite Roots Brewing would be subject to other conditions the City Council set for the Farmer's Market, involving other restrictions, social distancing, how they sell their wares, and so on and so forth, as a member of the Farmer's Market.

Chair Bosley asked if the committee or public had comments or questions.

Councilor Clark stated that he got a text from Councilor Greenwald that he needs to be unmuted. Chair Bosley noted that Councilor Greenwald is in the list of attendees and asked for staff's assistance in bringing him back as a panelist. She continued that in the meantime, she would entertain a motion.

Councilor Workman made the following motion, which was seconded by Councilor Jones.

By a roll call vote of 5-0, the Planning, Licenses, and Development Committee recommended that Granite Roots Brewing be granted permission to sell alcohol at the 2020 Keene Farmer's Market on City property licensed to the Farmer's Market of Keene. Said permission is contingent on the following: submittal of a signed letter of permission from the Farmer's Market of Keene, obtainment of all necessary permits and licenses and compliance with all laws.

During and following the State of New Hampshire Emergency Declaration due to the Novel Coronavirus (COVID-19) and as amended, Granite Roots Brewing shall be subject to, and shall comply with the licensing conditions applied to all vendors participating in the Farmer's Market of Keene; provided, however, that the City Manager is authorized to allow Granite Roots Brewing to offer individual product samples to patrons in accordance with the requirements of the State Liquor Commission, either at the conclusion of the State of Emergency as declared by the Governor, or at such time thereafter as determined to be appropriate by the City Manager.

3) Ashley Sheehan/Modestman Brewing – Request to Serve Alcohol on City Property

Chair Bosley asked staff to comment. Mr. Blomquist stated that this is Modestman Brewing's request to sell alcohol on City property, in connection with a future license to utilize the sidewalk area for a café. He continued that the license is typically issued administratively, but alcohol permission must be given by the City Council. The permission will be renewed annually unless something changes. Staff recommends this item be placed on more time, due to the COVID-19 executive order. The City is waiting for guidance from the State and the Governor about how the reopening will go. Then they will have guidance for the issuance of the license.

Chair Bosley asked if anyone had comments, or a motion.

Councilor Greenwald made the following motion, which was seconded by Councilor Jones.

By a roll call vote of 5-0, the Planning, Licenses, and Development Committee placed the item on more time.

4) Ordinance O-2019-18-A – Relating to Small Wireless Facility Deployments in the Public Rights-of-Way

Chair Bosley stated that they will be taking additional public comment tonight, limited to

new information or conversation about the amendments to Ordinance O-2019-18 only. She continued that they have already had a public hearing about this topic and talked about it at several meetings.

Councilor Greenwald stated that they are not talking about the merits of 5G tonight, they are just discussing this ordinance which says ‘If and when 5G ever comes to Keene, this is how it will be dealt with.’ That is the only thing the City can control.

Councilor Jones stated that he loves the red line version of the ordinance; he is much happier with this than the other version. He thanked staff. He continued that his question is: there was a part about 5G coming into effect [being possible starting] January 2. What would the process be for that? A new ordinance, or an amendment to this ordinance?

Chair Bosley replied that the PLD Committee had made a motion to hold off on 5G applications, per Councilor Jones’s letter, until January 2, 2021. They could issue 4G licenses under these standards but all 5G licenses would be held until January 2021.

Councilor Jones stated that his question is whether that would be a new license or an amendment to this license. Chair Bosley replied that she thinks it would be the same ordinance that just sunsets. She continued that they will go through the amendments with staff tonight and have further discussion if Councilor Jones thinks it needs to be changed. She asked Mari Brunner to speak.

Mari Brunner, Planner, introduced herself and gave a PowerPoint presentation about the revised ordinance proposal. She stated that the original version was introduced in November and establishes a license that would be issued by the Public Works Director that would include location, siting, and design standards for small wireless facilities (SWFs), and establishes application intake and review procedures. She continued that they have since heard many public comments, mostly concerning potential health impacts of 5G, as well as concerns related to aesthetics and public safety. At the February 26 Planning, Licenses and Development Committee meeting this committee made a motion directing staff to craft a revised ordinance based on those comments, and the motion also included a recommendation to City Council that if this ordinance is adopted staff would be directed to hold off on accepting any 5G applications until January 2, 2021. The reason for that date is that is after the report is due from the State’s commission to study the environmental and health impacts of 5G. That was established by HB 522 last year.

Ms. Brunner continued that there are a few introductory provisions to the ordinance, including purpose and intent, applicability, required licenses and approvals, and exemptions. There were two changes made to these sections. The first, under the “Applicability” section, is a clause that was added, stating that if there are amendments, any such amendments will apply to future applications. Also, under “Required Licenses and Approvals,” they added a “sunset clause,” saying that if the FCC order gets overturned, this license becomes null and void and all licenses issued under this ordinance shall be revoked. It gives a time frame of 90 days for equipment and attachments to be removed, and if they are not, they will be deemed abandoned.

Ms. Brunner continued that the next section, “Location Preferences” establishes where the facilities can be located. A few highlights are: the section gives an ordered hierarchy of preferences, from most to least preferred locations. An applicant is required to demonstrate with clear and convincing evidence that higher preference locations are not technically feasible in order for the director to approve SWFs in a lesser preferred location. There were two changes made to this list: previously they just had the 400-foot spacing requirements, and now they added a 750-foot spacing requirement for residential districts. It will still be 400 feet in non-residential districts. They also added a 750-foot buffer from K-12 schools, preschools, and daycare centers, established as of the enactment of this ordinance.

Ms. Brunner continued that in addition this section lists some prohibited support structures: new wooden poles (with a photo to illustrate), unless they are replacements for existing structures; and existing, City-owned, decorative poles. Highlights from this section: the “Additional Requirements” subsection has a provision that states that SWFs shall be placed as close as possible to the property line between two parcels that abut the public right-of-way. The purpose is to place them between properties as much as possible, instead of right outside someone’s window. There is also a provision geared toward public safety saying that SWFs shall be placed to not obstruct a 200-foot, all-season sight distance at any intersection so they are not a hazard to drivers. Also, it says SWFs shall be placed at least five feet from any driveway and 50 feet from any driveway for police stations, fire stations, or other emergency responder facilities.

Ms. Brunner continued that the ordinance also lists a number of design standards. This is a pretty large section. It includes standards for many items, such as height, colors and finishes, lights, trees and landscaping, signs and advertisements, and so on and so forth. There were no changes made to this section.

Ms. Brunner continued that what is new in the “Application Requirements and Review Procedures” is as follows: staff removed language, which stated that separate radio frequency (RF) reports are not required for batched applications when the same small cell wireless facility equipment is proposed for each location. This change was made in response to a comment they received from the public, asking why separate reports would not be required. It was a valid point so they decided to remove that language. Now, an RF report *will* be required for each facility, even if it is a batched application.

Ms. Brunner continued that the next section is “Decisions.” This outlines the process for issuing a decision on a license application, including the deadlines by which decisions need to be made. It is an important section, because the City has very short timeframes, which have been set for the City at the State and Federal level to act on these applications. In particular, for applications to locate SWFs on an existing structure. From the date someone applies, the City has to issue a decision within 45 days. That is a quick turn-around time, and it has driven some of the ways that this ordinance is set up. The “Decisions” section also includes required findings for approval. The Public Works Director has to be able to go through the list and make a finding on each item in order to issue a license.

Ms. Brunner continued that the “Conditions of Approval” section includes a list of 16 standard conditions that would apply to all licenses issued under this ordinance. It also includes a provision called “Modified Conditions,” which authorizes the Director to modify, add to, or remove any of those 16 standard conditions for any SWF license as may be necessary to ensure compliance with the City of Keene Code of Ordinances, this Article, or other applicable law.

Ms. Brunner continued that lastly, this ordinance creates the opportunity for the Public Works Director to establish Preapproved Designs. If someone submits a design to the Director and he is able to find that that design meets or exceeds the design standards in this Article, he can adopt it as a pre-approved design and make it publically available. The purpose of that is to streamline the review and reduce the burden on staff in reviewing these applications. If someone is going to propose several facilities and they use a pre-approved design, then when the Director is making those findings of approval, if the applicant is using a pre-approved design he can presume that the design standards are satisfied and he will only have to go through and make a finding on the other items.

Chair Bosley thanked Ms. Brunner and asked if other staff members wanted to speak to this.

Mr. Lamb stated that staff is in support of the ordinance and Ms. Brunner’s presentation and did not have specific comments but are available to answer questions.

Councilor Jones stated that he understands why the decision would come from the Public Works Director, because it would not make it through the City Council with the 45-day deadline, but he would like to know what the process is if an applicant wants to appeal the Public Works Director’s decision. Ms. Brunner replied that the appeal would go to “a court of competent jurisdiction.”

The City Attorney stated that there are two potential courts of competent jurisdiction, depending on which part of the ordinance is appealed, keeping in mind that the ordinance melds the FCC Order and State law. If there was an issue with regard to the FCC Order it would go to the Federal District Court, but if it was something that arose under State law only it would probably go to the Superior Court. There is a possibility that the Federal Court would take jurisdiction of it but if it were strictly a State law question under RSA 12-K it would probably go to the Superior Court.

Councilor Jones stated that he is happy with the change to 750 feet in residential areas. He continued that the 400-foot requirement was one of the things he did not like about the ordinance, and he appreciates that change being made.

Chair Bosley stated that she agrees. She continued that she thinks staff has done a great job listening to public and committee comments. She likes the way this has shaped up.

Chair Bosley asked for comments from the public.

Beth Cooley, Assistant Vice President of State Legislative Affairs at CTIA, stated that CTIA

is the trade association for the wireless communications industry. She continued that she has been asked to express concerns about the City of Keene's proposed ordinance, on behalf of the wireless industry. As drafted, the ordinance violates both State and Federal law. CTIA also has concerns that the proposed ordinance "will deprive the residents of Keene of enhanced wireless services." Connectivity as we can see today is imperative for the world that we live in, from work to school to play, and the provisions of this ordinance will hinder wireless providers' ability to deploy and upgrade their networks.

Ms. Cooley continued that she will not go line by line but she wants to highlight a few things in the ordinance that are problematic in the CTIA's view. First, the ordinance violates State statute, RSA 12-K. That is an overarching problem, to the extent that the ordinance attempts to regulate facilities on utility poles, which violates that State statute. That was Senate Bill 101 in 2013, for reference. Section 82-205 of the proposed ordinance discusses prohibited support structures and this is, in effect, a prohibition. It flatly prohibits SWFs on new, non-replacement wooden poles. There appear to be no similar restrictions on other rights-of-way users, so imposing this restriction only on SWFs is discriminatory and violates Sections 253 and 332 of the Federal Communications Act.

Ms. Cooley continued that also, under 82-206-9, the "accessory equipment volume" definition conflicts with Federal law. The FCC order says that accessory equipment volume is 28 cubic feet for all antenna equipment, whereas this ordinance's language says 9 cubic feet in residential and 17 cubic feet in nonresidential. That is a conflict.

Ms. Cooley continued that finally, she would be remiss not to point out that although it is not in the ordinance, she heard reference to a moratorium on 5G applications being in effect until January 2, 2021. She is familiar with and sits on the NH 5G Commission; however, a moratorium on applications also violates Section 253 of the Federal Communications Act and recent FCC affirmations reaffirming that moratoriums are unlawful. She concluded that the CTIA respectfully requests that the ordinance not pass in its current form.

Chair Bosley thanked Ms. Cooley for her comments. She continued that they have made some decisions as a committee with the understanding that there could be ramifications, based on what they think is right for the citizens of Keene. There were some good points that were made. She asked the Community Development staff and/or the City Attorney if they have information or if those points have been looked into.

The City Attorney replied that the short answer is, yes, they have looked into those points. He continued that they are trying to balance what the City and City Council needs and expects, with the State law and FCC Order. He does not want to get into a debate with Ms. Cooley tonight, but staff believes they have crafted the ordinance in a manner that they are going to proceed on. If there are issues that arise from it, they will deal with the issues if they arise.

Councilor Clark stated that to comment to Ms. Cooley, they are all aware of the ramifications of the City Council's decision but they have decided that the health and safety of the Keene citizenry is more important and they are willing to take due diligence to protect

them from harm. He continued that it is not unreasonable to craft the ordinance around the State commission's work. That commission was unanimously created by the legislature and the Governor so it is a prudent step to take and he thinks what the City Council is doing is right.

Chair Bosley stated that the City Council as a whole has been progressive in the decisions it has made throughout time. She continued that if the City Attorney feels they have crafted an ordinance that does keep them on this side of legal and they understand moratorium issues, they are all definitely aware of the sensitivity around these topics.

Mr. Lamb stated that part of the reason for this ordinance is that there has been interest on the part of developers of SWFs but he also wants to point out, when City staff have spoken to those folks, none of them have spoken about installing 5G. They say it is potentially several years away. So studying 5G, evaluating it, and putting it into the ordinance when they are ready to do that is prudent. No one has made applications for 5G installations in the City of Keene. All applications have been for 4G using the SWF concept in the public right-of-way.

Councilor Jones stated that he thanks the committee and the City Council – he could not be at the February meeting as he was out of state. He thanks them for addressing his letter considering the moratorium until they can hear from the State committee. He thinks that was the right thing to do and he thanks them for their support.

Chair Bosley replied that he is welcome and everyone heard his point. She continued that she believes what Mr. Lamb was saying. They do not see immediate applications so there is no reason to not take the time with this process and have safety be a consideration.

Hearing no additional comments, Chair Bosley stated that she would entertain a motion.

Councilor Greenwald made the following motion, which was seconded by Councilor Jones.

By a roll call vote of 5-0, the Planning, Licenses, and Development Committee recommends that City Council adopt Ordinance O-2019-18-A Relating to Small Wireless Facility Deployments in the Public Rights of Way, with the condition that the City Manager or her designee be directed to accept only applications for antenna and transmission equipment of up to a maximum of 4G until January 2, 2021.

There being no further business, Chair Bosley adjourned the meeting at 8:11 PM.

Respectfully submitted by,
Britta Reida, Minute Taker