City of Keene
New Hampshire

MUNICIPAL SERVICES, FACILITIES & INFRASTRUCTURE COMMITTEE MEETING MINUTES

Wednesday, September 21, 2022	**6:00 PM**	**Council Chambers, City Hall**

Members Present:
Mitchell H. Greenwald, Chair
Randy L. Filiault, Vice Chair
Robert C. Williams
Kris E. Roberts

Staff Present:
Rebecca Landry, Assistant City Manager
Thomas P. Mullins, City Attorney

Members Not Present:
Catherine I. Workman

Chair Greenwald called the meeting to order at 6:30 PM and explained the procedures of the meeting.

1) **Continued Discussion – Requesting the City Resume Maintenance of Blain(e) Street – Private Way**

Chair Greenwald asked to hear from Attorney Michael Bentley, representing Agatha Fifield.

Mr. Bentley stated that at the last meeting, City Attorney Tom Mullins talked to the Committee about what happened in 1968, in that in order for the City to consider the road having been laid out as a public way by 20 years of public use up to 1968. He continued that he looked around and could not find anyone who could come in and testify to that, because such a person would have to be about 100 years old, because the house was built in 1945. For example, if someone was 10 years old at the time and might be able to remember from age 10 forward, that person would be about 100 today. He checked with John Dibernardo, thinking he would be a historical person in that section of the city; he could not help at all. Tim Carbone was also unable to shed any light on the subject matter.

Mr. Bentley continued that his and Ms. Fifield's position is not that they have to prove this is a public way; it is their position that by the City's maintenance of the road for as long as it has maintained it, the City has, by its actions, accepted the road as a public way. There is no question about that. The City does not dispute the fact that it has maintained the road up until the last couple of years. Whether he and Ms. Fifield can find anything in the bowels of the Public Works Department about records going back that far, he does not know, but certainly for the past 15 or 20 years there is no question that the City has been down there. Had Ms. Fifield not called

about the trees being in the road, they would not be here tonight, because the issue would not have been brought to anyone's attention and the City would have continued to do what it had been doing. Ms. Fifield as a property owner, having seen what the City had done to maintain the road while she was there, called the City for assistance when the trees came down during a winter storm, and this is what she got for her trouble. He and Ms. Fifield think the record is clear that the City had been undertaking the maintenance of the road, both summer and winter, for a very long time, and by that action, the City should be obligated to continue.

Chair Greenwald asked if the Committee had questions for Mr. Bentley. Hearing none, he asked to hear from the City Attorney.

The City Attorney stated that he spoke with Mr. Bentley before the meeting, to give him a heads up about where he was going to be coming from with respect to talking to the Committee and perhaps later to the City Council. He continued that this is one of those times when the position he holds is unfortunate. It is unfortunate that he has to say what he is about to say, with an individual who clearly believed when she purchased the property that this was on a public way. Whatever happened with respect to the transfer of the property at the time, he was not a party to it, but he suspects that it was not entirely made clear. He understands why that is the case. There is no dispute, as far as he can tell, that the City did plow the road on a regular basis over time. It is less clear how much maintenance was done on the road during this period. Staff has done a fair amount of digging and cannot find specific records with respect to any maintenance. From his perspective, neither of those two things matter. What really matters, back to the 1840s when this started becoming an issue around the state, is whether the purported road was used generally by the public, and that the public expected to be able to use the road, and that because of that public expectation, there was maintenance performed on whatever the road was during that time. It is the theme throughout all of the cases that there has to be some sort of public activity with respect to it.

The City Attorney continued that two particular questions arise in this instance. Mr. Bentley touched on one of them, the question of implied acceptance. As discussed at the last meeting when this was on the agenda, there are four ways to create a public way. Two of them are an issue in this particular matter. One way is a dedication and acceptance, which is when a property owner comes through the planning process or directly to the Town (or City) and dedicates a particular area for a road for public use and the Town or City affirmatively, accepts it. Another way is by prescription, which was referenced by "20 years before 1968." Prior to 1968, a public way could be laid out because the public just kept using it and the property owner never objected. In 1968, the legislature said you cannot do that anymore. Those are the two questions that are at issue now.

The City Attorney continued that regarding case law, there are two principle cases outstanding with respect to these. The one from 2007 deals with the implied acceptance of a road based upon maintenance or snowplowing, but that case says the same thing as another case he will talk about, which is, "That is not enough." The public has to have been using the road, not just the

titleholder to the property or their invitees. He reminded everyone that this Blaine entity basically only services this house, even though it would be a long driveway. It does not connect to any other roads in the city other than the one you can get to it on, and it is not used for basically any other purpose. It is essentially just a driveway. It does not have any public activity, as far as he can tell, and unfortunately, Mr. Bentley has not been able to present any evidence with respect to that.

The City Attorney continued that what is also very clear in case law is, as he just said, that plowing is not enough. If plowing were enough to create a public way, every driveway in the town of Temple would be a public way, because for many years, the Town of Temple's Highway Department, as a benefit to the town's residents, plowed the driveways. Finally that had to end, because the underlying problem is you cannot use taxpayer money for a private purpose. That is essentially what would be asked in this kind of context. It is the same thing with prescription, because there is no evidence of public use.

The City Attorney continued that staff tried to look at other options that may be available in this instance. There were two other statutory possibilities with respect to it. One is called Winter Road Maintenance, under RSA 231:24, where the Town or City can assume just the snowplowing aspects of it. However, it has the same requirement where it has to be for the public generally, and not just to serve a private property owner. The other possibility was Emergency Lanes, RSA 231:59-A, which would have been a better option because unlike Winter Road Maintenance, which places lots of liability on the community if you adopt it, the Emergency Lanes statute specifically excludes any liability to the Town or City. However, again the statute requires that *"The public need for keeping such a lane passable by emergency vehicles is supported by an identified public welfare or safety interest, which surpasses or differs from any private benefits to land owners abutting the lane."* There are no other landowners; there is only one landowner with respect to this property, so this statute would not apply in that context. He wants the Committee to know that staff did not just summarily look at this and say "no." They looked for other possibilities. At this point, his advice to the Committee and City Council is that there are none. He recommends accepting the communication as informational.

Chair Greenwald asked for questions from the Committee. Hearing none, he asked for questions from the public. Hearing none, he asked for comments from the Committee.

Councilor Filiault stated that this item has been on more time, and his opinion has not changed since the last time they spoke about this. He continued that he does not completely agree or disagree with anyone. He is looking at the information that has been presented to the Committee. When they talk about a public way versus a private way, and whether the public expected it to be used like a private way, he sees that it has been used as a public road since its conception. No one alive back then (in the 20 years before 1968) is alive and available to tell them, but it appears to have been a public way. Perhaps it has been a *limited* public way, but the public did use it. The road's history also shows that the City's Maintenance Department has always considered it a public way, because they have always treated it as such, plowing it and

maintaining it as a public way. That is the second form of history that has shown it might be a public way. Third is the history shown from MLS listings, because it has always been advertised as a public way. Going back as far as he could, he saw that every time this was listed for sale, every owner that bought it did so with the thought that it was a public way, because that is how it has always been advertised.

Councilor Filiault continued that in all the research he has done, he has not found a single instance that shows it as a private way. The City treated it as a public way, the owners treated it as a public way, and the MLS treated it as a public way. He has not found any [record] or any person saying this address was a private way, until a couple years ago when the City decided it was a private way. They have to look at the original intent. In his opinion, the original intent is that is has always been a public way. It may have been limited, regarding how many people used it, but it looks like it was created as a public way because he sees nothing in the history of this address that has ever shown that it was supposed to be private. If someone can show him that at any point in history this address was going to be a private way, he will listen, but otherwise, he is not changing his mind.

Chair Greenwald stated that he went out to look at this location. He continued that as he was driving there, he felt like he was going up Ms. Fifield's driveway. He is concerned that this sets a precedence for others in the city. He is concerned that it potentially implies not just plowing, but also maintenance. Would that maintenance include paving? Where would it end? There is no question about the fact that it serves one residence. He kept an open mind while driving there, trying to determine where the "public way" ends and the "private driveway" begins. Does it go all the way up to the house? Shoveling the walkway? Where do you draw the line? Ultimately, putting all of that together, he would call it a driveway. Regarding the MLS listings, he himself is a real estate agent. [The MLS listings saying it is a public way] comes from the owner sometime telling the agent a story, believing it, and perpetuating it. It is not a legal justification for anything. This clearly was poorly recorded somewhere.

Chair Greenwald stated that one potential motion would be to totally deny the request, but maybe that puts prejudice there, if that is the correct legal phrase. He continued that if they accept it as informational and the Petitioner wants to pursue this elsewhere, such as taking it to court to discuss it, it leaves it more neutral. He is inclined to deny the request, but by calling it informational.

Councilor Roberts stated that to him, it comes down to the plain and simple issue of what the law is. He continued that last time, the City Attorney talked about some Supreme Court cases on this matter, and it was plain and simple that agreeing to [say that this is a public way] would mean agreeing to violate State law.

The City Attorney stated that his perspective is that in the absence of some other authority telling the City Council what to do, that would be the case. He continued that from his perspective, case law is clear on this. Part of the problem with respect to this whole issue as well is that there are

cross easements for this property. Chair Greenwald's question is good. The property ownership is not all the way down to the house, as far as he understands. The various property owners out there have cross easements over this. Thus, the City would essentially be taking property interests with respect to this. He would be very reluctant to have any action by the Council other than through some other authority, Superior Court or otherwise. With respect to Chair Greenwald's question, accepting it as informational does not prejudice Attorney Bentley and his client with respect to whatever other steps they wish to try to take.

Councilor Williams stated that he went to see the location and concurs with Chair Greenwald's view that it seems like a driveway. He continued that when the City accepts a road, there is a process that needs to happen, and that process has never happened (here). He would possibly be open to accepting it in the future, but that would require things such as the road being brought up to City standards. He would be reluctant to accept a road that has one unit on it. If there were more units there, or if someone wanted to build there, maybe they could bring the road into the City system, but as it is, he does not think it is a good idea for the City.

Councilor Filiault stated that he is in disagreement with the majority of the Committee. He continued that regarding the law, he has to look at what the interpretation of the law was when this road was created. Clearly, it was made into a public way, and someone had to interpret it as such. Even if it was a limited public way, it was still addressed as a public way, because the City maintained it since then, until a couple years ago. There is not one article or case law anywhere that shows that someone interpreted this to be a private way. Until someone can show him anything in the history of this road that shows it was intended as a private way, he will be in disagreement with the rest of the Committee. The City saying, "Oh, it looks like we made a mistake" is not enough, because there is no proof. Unless he gets that proof, he agrees with the Petitioner.

Agatha Fifield of 22 Blaine St. stated that she is the property owner. She continued that she has heard a couple people call this her "driveway," but people usually own their driveways, and she does not own this road. She needs permission from the three property owners who do own it to drive across to get to her house. She does not own one speck of dirt on this road, and yet, the City is trying to make her legally responsible for other people's property, financially responsible for other people's property, and physically responsible. The Post Office complains about the road, asking her to cut back tree branches, on property that she does not own. She knows that Barbara Breckwoldt, one of the owners, is willing to take care of her own property. Obviously, her (Ms. Fifield's) documents for her mortgage say that it is a public, gravel road. She does not know how five years after owning her home this gets dropped into her lap. She bought this home for retirement. It was something she could afford in her retirement, and that does not include maintenance of a road. This has become a giant mess and a great deal of stress for her. She does not own the road and does not know how she gets saddled with something like that. At one point, there was another home (on the road) that burned down. She does not know how long ago that was. She talked with Mrs. Forcier, whom she bought the house from. She said, "Aggie, in 45 years, I never called the City once to plow the road, because they always just did it." The

road was used while the apartments across from her were getting built. The road was [all] they used, to the point where at times, she could not even get home because the trucks were there from the apartments they were building. The poles are still on the road. Four are fiber-optic cable, and whatever else those apartments use, the trucks get access by Blaine St. The trucks do not come in the other way off Lee St. for the apartments. Mr. Tasoulas is using the road for his apartments.

Councilor Roberts stated that the City Attorney stated that the Council has to be careful if they try to do something because they would be taking property from other owners. He continued that the owner right here stated that she did not own any of that property and that she had to get a right-of-way on the other three property owners just to get to her property. His question is, legally, would not the other three owners be responsible for their sections of the road?

The City Attorney replied that he needs to be careful and cannot give others legal advice. He continued that his concern is the City. That is precisely his point. The road passes over property that is actually owned by other people. In regards to Councilor Filiault's questions, and regarding the reason this was placed on more time, there has to be evidence presented to the Council and to the court, ultimately, if it goes there, that the public generally had the right to use the road. That does not mean just going to the house, nor does it mean just the mail carrier. It has to be part of the connection of roads within the community, for lack of a better way to put it. Even if there was a petition for layout, he would have to tell the Council that it does not meet the occasion standards. To lay out a road, there has to be an occasion to do so. There has to be a greater public benefit, such as transportation of school children, transportation network generally, emergency use, numbers of houses on the road, and so on and so forth. From his perspective, it does not even fit that requirement at this point. That is his concern. Whatever is out there passes over other properties, and that is clear. Last time this was on the agenda, the Public Works Director went over this in detail. There are references in the deeds to the various properties on Blaine St., so called, that there were easements granted back and forth. That is part of the problem, from his perspective – there just is not any evidence to establish that there was any public road there. If there was, then the takings issue would not so much be an issue for him. That issue is clearly at play right now.

Councilor Filiault stated that this convinces him more than ever that they should find in favor of the Petitioner. He continued that they have argued here, and he has heard the arguments before, "We drove here and it looks like a private driveway," but they just found out it is not a private driveway. The fact that it is a private driveway is probably why the City has been maintaining it all these years. Other property owners were involved with this particular layout. Therefore, his opinion is more strengthened than ever that this was never intended to be a private driveway, and always a public drive. Somewhere over the last 100 years, something got messed up.

Chair Greenwald stated that he assumes there is no survey. The City Attorney replied that he cannot represent to the Committee that he has seen a survey of any of the property out there, but that does not mean that there is not a survey somewhere. Chair Greenwald replied that he

assumes that if one existed, they would have seen it. He continued that that would justify whether it is a driveway. The City Attorney replied that the title record has some ambiguity, but it does indicate that when they were preparing these deeds, whoever was preparing the deeds did not always think it was a public way, because they did not refer to it as a "street" or a "public way" or "city road," or that sort of thing. That would all become part of what a court would consider, but he has not seen it.

Chair Greenwald asked if there were any further questions or comments from the Committee. Hearing none, he asked for a motion.

Councilor Williams made the following motion, which was seconded by Councilor Roberts.

On a vote of 3-1, the Municipal Services, Facilities, and Infrastructure Committee accepted the communication regarding the maintenance of Blaine St. as informational. Councilor Filiault was opposed.

2) <u>Continued Discussion – Designating City Parks – Drug-Free and Smoke-Free Zones</u>

Chair Greenwald asked to hear from staff.

The City Attorney stated that at the last Committee meeting this was discussed at, they discussed that they would be looking at Chapter 58 generally, and specifically, the question of tobacco use in the parks. He, along with Assistant City Attorney Amanda Palmeira and Parks, Recreation, and Facilities Director Andy Bohannon had an extensive meeting about a week ago with respect to the work that Mr. Bohannon and Ms. Palmeira have been doing regarding Chapter 58. They have done some great work, but it was clear after they all talked that Chapter 58 "is not ready for prime time yet" for them to submit a draft Ordinance on it. They discovered that unfortunately Chapter 58, like some of the other portions of City Code, became sort of a "dumping ground" for things that no one knew where else to put. It does not deal just with parks; it deals with other City properties, woodlands, wetlands, and so on and so forth. That needs to be separated out, in order to make the chapter more coherent and cohesive. It is a work in progress, although they hope to complete it rather quickly. They are designating specific parks with respect to those and the proposed Ordinance will include a list of those. They will also prepare a GIS map for the public, so it clear when the Parks, Recreation, and Facilities Director adopts rules that regulate activities in the parks just what those boundaries are.

The City Attorney continued that with respect to tobacco use, staff will be presenting in the Ordinance the prohibition on the use of tobacco products in City parks. The Ordinance will use the definition of "tobacco products" that is already in City Code, which includes vaping, chew, and so on and so forth. Unless the Council decides otherwise, there is no proposal for a designated smoking area. Mr. Bohannon thought that would be problematic and difficult to enforce. Five or eight years ago, he (the City Attorney) would have had a little concern with

regulation of tobacco products, but generally, in the attorney bar, there is an understanding that [municipalities] can do that.

The City Attorney continued that [regulating] drug use is much more problematic, as he alerted the Committee to last time. State law has two specific places where Drug-Free Zones can be established. First, a specific statute gives statutory authority for schools to enact Drug-Free Zones and specific requirements associated with that and enhanced penalties associated with that. The other place that caught his attention was in RSA 47:17, Bylaws and Ordinances. At first, he thought that Drug-Free Zones could be established, but the caveat is that the City has the authority to establish a Drug-Free Zone in *"any area inclusive of public housing authority property and within 1,000 feet of such public housing authority property."* He dug deeper into the statute. This statute does not define "public housing authority property," but there is a statute that creates public housing authorities. The City of Keene created one through Keene Housing. Believing this [part of RSA 47:17] referred to Keene Housing, he contacted Josh Meehan and said, "You own a lot of property in the City; you'd have to draw a thousand feet around each one." Mr. Meehan replied no, they do not. With the way the ownership structure works for these various properties, Keene Housing only owns one, on Webster St. All the other properties are held by 501c3 limited liability companies (LLCs), of which Keene Housing is not just a minority member, but a *very* minority member. That unfortunately did not work. What he did draw from the fact that the State has authorized this in two instances is that that is where the specific authority lies, and the municipal does not have the authority to create Drug-Free Zones with enhanced penalties anywhere else in the city, unfortunately.

The City Attorney continued that the other issue he had to consider in connection with this was Chapter 318, the State law that deals with the regulation of unlawful drugs, unlawful drug activities, fines and penalties, and so on and so forth. He thinks that if the City tried to adopt a Drug-Free Zone it would fall afoul of the "preemption requirement," that the State has probably occupied that whole field at this point, to the exclusion of any regulation from any of its political subdivisions. It is a very comprehensive statute. All that being said, his opinion is that he does not think the City can [establish Drug-Free Zones]. At a minimum, they might be able to put a sign on the property that says "Please don't use unlawful drugs within the confines of the park," but they would not be able to impose any penalties, enhanced penalties, or criminal penalties.

Chair Greenwald stated that drug use is illegal, whether they put up a sign or not. He continued that if they acknowledge that the enhanced penalties are off the table, putting up a sign saying the use or sale of illegal drugs is not permitted, or however they want to phrase it, that is just restating the obvious. He does not see anything wrong with saying that.

The City Attorney replied that he thinks they *can* say that, if they wanted to put up a sign that says that. He continued that [it could say] something along the lines of "the use of unlawful drugs within this area is a violation of RSA 318." They would just be saying what is true.

Chair Greenwald stated that he is of the opinion that most people do the right thing. He continued that when most people see a sign that says "Don't," they do not do it. To think that the Police are going to run around busting people for smoking cigarettes in the park is fantasy, when they have a hard enough time busting drug dealers. Putting up a sign at least sends the right message. He realizes that enhanced penalties would be nice, but people are not likely to be arrested anyway to get the enhanced penalty. He is still staying with this. He had some doubts over the past several weeks, about the certainty of lack of enforcement, and the restriction of personal rights. Years ago, (former) Councilor Dibernardo stood up when they were talking about [prohibiting] smoking in restaurants and said, "What's next? French fries? Large, caffeinated sodas?" At what point does the government step out of people's lives? Nonetheless, he thinks it is important to make a statement regarding drugs and cigarettes in the parks, where there are children, whether it will be enforced by the Police or not.

The City Attorney replied that that is up to the Committee and the Council. He continued that that is a rule/regulation/operation of the park that he thinks the Parks, Recreation, and Facilities Director could do individually; it might not even need to be in the Ordinance. It could be a request to the Parks, Recreation, and Facilities Department, through the City Manager, to develop signage for that purpose. They do want to include the No Smoking provision in the Ordinance for the parks; that is something he thinks they do need.

Councilor Filiault stated that regarding RSA 47:17, if they wanted a change to that they would have to request that someone in the State legislature introduce a bill and get it passed. The City Attorney replied that that is exactly right. Councilor Filiault replied that that will be his intent.

Chair Greenwald asked if there were any more questions or comments from the Committee. Hearing none, he asked for public comment.

Charles Redfern of 9 Colby St. stated that for starters, he thanks the City Attorney for the effort he put into this. He continued that he appreciates the research City Attorney did with the statutes. He likes the tack that Councilor Greenwald has taken, which is that there is nothing to prohibit the posting. It may be obvious [to say drug use is illegal in parks], but it is sort of like the No Smoking signs, which will refer to an Ordinance, he assumes. Perhaps instead of attempting to throw this into an Ordinance, which may be challenged as not having statutory authority, they could do a Resolution. The City has used Resolutions for advisement. Although Resolutions do not carry any legal consequence, in and of themselves, [they are still useful]. For example, State law prohibits ATVs from being on the City's trail system, because the trails were paid for with Federal funding from the Highway Department. Nonetheless, the City passed a Resolution saying that ATVs would not be allowed on the trail system. Thus, there is a stated, public position on that matter that was passed by a governing body, that being the City Council. Until he became a City Councilor back in the day, he did not know the difference between an Ordinance and a Resolution, which both sounded like legalese to him, and he thinks that is how many Keene citizens may regard it as well. At least, [with a Resolution] they will know the position their governing body has taken on this.

Mr. Redfern continued that he agrees with and appreciates what Councilor Filiault said as well, that this needs to go to the State level. This is, to him, a no brainer. He is not thinking so much about the enhanced penalties against the user, but against the [dealers]; they are the ones who definitely need to be targeted.

Councilor Roberts stated that he agrees with the [idea of] signs, because many people see a sign and will obey it, due to group pressure. He continued that for example, if many other people are not littering, people will pick up and put their trash in the right place. He also agrees with Chair Greenwald that the Police are not going to be running around and issuing citations to everyone who is smoking in a park. There are plenty of parks and green spaces and they do not have enough police to do that. [Staff] cleaned out a lot of the Russell Park area, and the area by the basketball court, and when they did that, many drug users [had to leave] the area. On the other side of the bike path, along the fence where they are building a new Hundred Nights shelter, there are people [using drugs] and someone overdosed there recently. It seems like the most effective way to cut down on drug use is to clean up the area. In that area, in particular, signs would help, because many people do not understand that that parking lot belongs to the City. To go to the City Attorney's point, the Parks, Recreation, and Facilities Director can have a lot more control and be much more effective than [the strategy of] sending the Police at people to get them to stop smoking or drinking. The big softball tournaments at Wheelock Park have signs saying "No drinking past this point." He went to a softball tournament there, and people did what they were told and did not bring their drinks past that sign. There are many ways this can be done, and ways this can be done by the Parks, Recreation, and Facilities Department.

Councilor Filiault stated that there are not going to be any quick answers here tonight, but he thinks they are making headway.

Councilor Filiault made the following motion, which was seconded by Councilor Williams.

On a vote of 4-0, the Municipal Services, Facilities, and Infrastructure Committee placed this item on more time until the next meeting.

Assistant City Manager Rebecca Landry stated that she wanted to make sure everyone was aware that she does not think the Committee needs to do anything specific in order for staff to go to the Parks, Recreation, and Facilities Director and suggest they do some signage, if it is the will of the Council. Staff can just take that and run with it.

3) Discussion – Chapter 58 – Parks, Recreation, and Public Facilities

Councilor Williams made the following motion, which was seconded by Councilor Filiault.

On a vote of 4-0, the Municipal Services, Facilities, and Infrastructure Committee placed the discussion of Chapter 58 on more time.

4) Adjournment

There being no further business, Chair Greenwald adjourned the meeting at 6:49 PM.

Respectfully submitted by,
Britta Reida, Minute Taker

Edits submitted by,
Terri M. Hood, Assistant City Clerk