

City of Keene
New Hampshire

PLANNING BOARD
MEETING MINUTES

Monday, February 28, 2022

6:30 PM

**Council Chambers,
City Hall**

Members Present:

Pamela Russell Slack, Chair
David Orgaz, Vice Chair
Mayor George S. Hansel
Harold Farrington
Armando Rangel, Alternate

Staff Present:

John Rogers, Acting Community
Development Director
Mari Brunner, Senior Planner

Members Not Present:

Councilor Michael Remy
Emily Lavigne-Bernier
Roberta Mastrogiovanni
Gail Somers
Tammy Adams, Alternate

I) Call to Order – Roll Call

Chair Russell Slack called the meeting to order at 6:30 PM and a roll call was taken.

II) Minutes of Previous Meeting – January 24, 2022

A motion was made by Mayor George Hansel that the Planning Board approve the January 24, 2022 meeting minutes. The motion was seconded by Harold Farrington and was unanimously approved.

III) Capital Improvement Program FY 2023-2029 – Presentation by Merri Howe, City of Keene Finance Director and Kurt Blomquist, Public Works Director/Assistant City Manager

Finance Director Merri Howe and Public Works Director/Assistant City Manager Kurt Blomquist addressed the Board. Ms. Howe indicated the CIP document can be found on the City's website. Ms. Howe stated the Capital Improvement Program (CIP) is a comprehensive program that covers a seven-year period. It covers projects and equipment that are estimated at \$35,000 or more with a useful life of over five years. The CIP is presented bi-annually and reviewed annually during operating budget process.

Ms. Howe stated the CIP is a tool for planning the City's future that is guided by fiscal policy for which goals are set by the City Council and are outlined in the City's Comprehensive Master Plan. The City's master plan is the planning tool that guides the City's vision and the CIP projects presented in this book. Each project presented in this book, if applicable, is tied to a master plan focus area. For example, the Transportation Heritage Trail Program focuses on a healthy community, one of the vision focus areas. The Parking Structure Maintenance Program is tied to a vision of a vibrant downtown. There is a lot of thought and planning that goes into these projects. With that she turned the presentation over to Senior Planner Mari Brunner.

Ms. Brunner stated the Master Plan update is scheduled for fiscal years 24 and 25. This would be a two-phase project. The first phase would be updating the community vision and updating data and trends in the plan. There will also be a housing analysis done as part of the first phase. The second phase would take the information received and input it into the document.

Ms. Brunner added the Planning Board does have a significant role in the Master Plan update and historically the City has looked to the Board to contribute heavily in the process.

The Chair asked for clarification on what Ms. Brunner had stated about housing analysis. Ms. Brunner explained housing has been identified as significant item not only for Keene, the County and the State but for the entire country. Hence, the plan is to do an in-depth housing analysis; what is available and what is needed. Chair Russell Slack asked whether there is conversation being undertaken for instance if a large housing project is being planned, a certain percentage has to be dedicated to workforce housing. Ms. Brunner felt there was mention of that in the last master plan but there has not been anything put in place. The Chair felt the price of housing these days is something that would need to be looked at very closely.

Public Works Director/Assistant City Manager Kürt Blomquist addressed the Board next. He indicated this coming Thursday the City Council will be conducting a public hearing on the CIP. He noted the theme of the CIP this year is "Strategic Governance: the Path to Our Future." This is important because as the departments started reviewing projects it was determined that there are two levels of projects: one-time projects and maintenance projects.

One time projects means that something new is being built. The next level of projects are capital maintenance projects to provide the various services for the community. He added one of the items that has been emphasized over the past few years is the development of asset management plans. He explained an asset management plan is how the City would take care of what it already owns. The first component of developing an asset management plan is to conduct an inventory to see what the City owns, the second step is to determine what condition these assets are in, and the third step is to answer the question – what does the City want for services out of those assets?

Mr. Blomquist stated one of the new programs this year is sidewalks. In the past, sidewalks were grouped with larger projects and completed at that time. He noted the City's asphalt sidewalks are the ones in the worst shape and those would be focused on first.

Mr. Blomquist then referred to the large "one and done" projects and gave a few examples:

The downtown infrastructure project which starts in fiscal year (FY) 23 which would be a complete rework of all infrastructure in the downtown area. The present infrastructure ranges from the 1890's to 1930's. This is a 7.4 million project spread out over three years.

The next is the Transportation Heritage Trail which is a four million dollar project to reconstruct three bridges over the multi-use trail.

The third project is the lower Winchester Street project, which had the last work done in the 70's – this work would include adding pedestrian and bicycle facilities and bringing the corridor up to date.

The West Street corridor is scheduled just outside the CIP starting at the bike path at Route 9/10/12 and moving east into the City.

In the Parking Fund, the City is looking at electric vehicle infrastructure for City operations and the general public along with the construction of parking structure scheduled for FY27.

Marlboro Street reconstruction to include complete streets improvements for Marlboro Street to encourage redevelopment in the area.

Chair Russell Slack asked for clarification on the sidewalk project. Mr. Blomquist referred to page 89-90: Approximately 17 miles of sidewalks have been deemed to be in substandard condition. Sidewalks are part of the general fund and one of the Council goals is to minimize the impact on the Keene tax rate. The City Engineer has been able to identify about \$270,000 in sidewalk work over the next five years. Most of the work would be on the asphalt sidewalks located in the southeastern section of the City.

In FY23 work will start at lower Main Street near the Route 101 corridor through the cemetery, also some sidewalks on School Street and North Lincoln Street.

FY24 will be Belmont Avenue, Jennison Street and River Street. Mr. Blomquist stated this is a focus on sidewalks not part of a larger project.

Chair Russell Slack noted there is a lot of federal monies available for different projects and asked for Mr. Blomquist's opinion on it. Mr. Blomquist agreed and added the monies at the present time are going to be funneled through existing programs and staff is definitely looking into those programs. However, most programs have not published their guidelines yet but as soon as the Appropriation Bill passes through Congress, staff will start focusing on those funds.

Mr. Farrington commended the Plan and how it was presented. Mr. Farrington asked about triggers – changes in population and how that would affect the plan and items included in the plan. Mr. Blomquist stated in his department a review is done annually of their equipment. For instance in the transfer station if an equipment comes up for replacement but it is still in working condition and can be pushed out for another year, that is what will be done. However, there could be items like the Drummer Hill water tank that failed earlier than it was planned for replacement.

A motion was made by Mayor George Hansel that the Capital Improvement Program for 2023 – 2029 is consistent with the Comprehensive Master Plan. The motion was seconded by David Orgaz and was unanimously approved.

- IV) **NHMA Presentation – Steve Buckley, Legal Counsel for the New Hampshire Municipal Association (NHMA), will provide a virtual presentation titled “Planning Board Role and Responsibilities.” This presentation is offered as part of the NHMA on-demand training series**

Ms. Brunner introduced Steve Buckley, Legal Counsel for NH Municipal Association (NHMA). Mr. Buckley addressed the Board and noted that he joined NHMA in 2014 and stated he is a member of the Planning Board and Zoning Board of Adjustment in his home town.

Mr. Buckley began with the Statutory Duties of the Planning Board – he addressed the role of the Board in its current role with updating the Master Plan. He indicated with the City’s current process he would recommend developing future land use opportunities. He felt master planning is an important role of the Board followed by what was discussed tonight, the Capital Improvement Program (CIP) – he said the CIP is part of the Master Plan process.

Zoning Amendment Process: In Keene, zoning amendments are proposed by the Planning Board which are ultimately considered by the City Council after a public hearing. The fundamental duties of the Planning Board related to the zoning ordinance is approval of subdivisions and site plans. The Planning Board also has the authority to regulate excavations and driveways.

Subdivision and Site Plan Approval: Mr. Buckley stated the Board can always require that all projects have preliminary review which benefits the City and the developer to help shape the final plan. Under the subdivision process the Board will approve plats, streets and will also approve layout of any utilities.

The Board not only has the ability to approve new development, but also has the ability to regulate changes to an existing use. Mr. Buckley stated it has always been his opinion if a development has a certain number of elements that need to be modified, as long as those changes don’t exceed a certain number of building square feet or impervious surface (significant change) those would be considered permissible but not required to come before the Board.

Mr. Buckley then addressed site plan review as it pertains to co-location of personal wireless facilities. RSA 12-K exempts from site plan review any time a project is planning to co-locate another antennae or telecommunication device on an existing tower.

Mr. Buckley then referred to the Master Plan process and indicated the goals and objectives will be an important aspect for the Master Plan update. With respect to adopting a zoning ordinance (which the City already has) vision and land use are two important pre-requisites. There are also many other subject areas that could be deemed important for a master plan update. For Keene, it could be the trail system, also planning for climate change.

Workforce Housing Statute: Mr. Buckley stated this could also be considered a form of statewide zoning and should be taken into consideration for the master plan process and that the zoning ordinance complies with workforce housing statute. As written, the current workforce housing statute requires workforce housing to be allowed in any land area zoned residential and the challenge for any community is whether it has its share of workforce housing, which is typically done through an analysis. Mr. Buckley noted the Regional Planning Commission is working on a statewide housing needs assessment which is required to be completed every five years.

Mr. Buckley reviewed what is considered workforce housing:

- Housing for Sale –affordable to a household with an income of no more than 100% of the median income for a 4 person housing for the county in which the housing is located.
 - Rental Housing - affordable to a household with an income of no more than 160% of the median income for a 3 person housing for the county in which the housing is located.
- Mr. Buckley asked that the community keep this in mind when updating the master plan.

Mr. Farrington asked who comes up with the actual numbers for affordable housing for sale versus rental. Mr. Buckley stated the definition comes from the Workforce Housing Statute but it is also available on the New Hampshire Housing. This table is modified every year based on housing prices.

Mr. Buckley went on to say that the CIP helps a community identify what its priorities are as it relates to capital improvement, what comes first, how are resources allocated and whether the expenditure process fits in with a fair and reasonable impact on local tax rate. He also noted the CIP is not a regulatory document. A subdivision cannot be denied because a CIP does not speak to the needs of a particular project has. However, it is a prerequisite if the Keene Zoning Ordinance has an impact fee requirement as it is necessary for growth management.

Mr. Buckley referred to Keene Charter Section 2-1024 which makes it clear that the Planning Board recommends to the Council amendment to the zoning ordinance that are eventually proposed and recommended to be consistent with the Board recommendations. The City Council then determines if those amendments will be adopted. However, under RSA 675:2 there is a requirement to hold at least one public hearing on those amendments.

Innovative Land Use Controls: Mr. Buckley stated this is another important tool which can involve the Planning Board performing some of the business that is usually reserved for the Zoning Board of Adjustment. If the Zoning Board is not designated regulator, the Planning Board has to be consulted before any amendment is adopted. Mr. Buckley stated his experience has been Innovative Land Use Controls is the most effective way to centralize a land use regulatory process in one Board.

Planning Board and Public Streets – Mr. Buckley stated as previously noted the Planning Board has an important role as it pertains to public streets. The Board has the power to say when it approves a subdivision or site plan there has to be a minimum amount of completion before a Certificate of Occupancy could be issued; this is an important item to include in the Board approval as this provides for an added incentive so that a road or home will be built for appropriate occupancy.

Driveways: The Planning Board is authorized under RSA 236:13 to approve driveway permits on City roads, but most Boards don't carry out the day-to-day process of issuing driveway permits and is usually done by the Public Works Department. The Board or the City has continuing authority over any driveway even if no permit is issued and a property owner can be ordered to fix a driveway that is hazard to the traveling public or threat to a road.

Merged Lots: RSA 674:39-a is a statute that has been in existence for about 15 years. Anyone who has two or more contiguous pre-existing approved or subdivided lots can merge them together without the need for a public hearing. It does not have to come before the Board for

approval and can be approved by its designee. No new survey plan needs to be recorded. The notice has to be endorsed by the Board or its designee and recorded at the Registry of Deeds. Mr. Buckley noted there was a requirement implemented about three years ago, if any of the lots carries a mortgage, the underlying mortgagee has to consent to the merger and this consent has to be recorded with the Registry of Deeds. You cannot merge lots on either side of a public road as they are not considered to be contiguous.

Off Site Excavations: Mr. Buckley stated he was not sure if the City had an impact fee system through its zoning ordinance, even if it didn't have that system as a supplement to the impact fee system - RSA 674:21, V(j), makes it clear when the Planning Board approves a project there is a statutory authority to exact impact fees. However, this is limited to improvement for highways, drainage and sewer and water upgrades pertinent to a development.

Preliminary Review Conceptual Consultation – Design Review: Mr. Buckley advised if the Board hasn't already, it would be a good idea to request the City Council to adopt under RSA 674:35, I - to require preliminary review of all projects coming to the Board. He indicated preliminary consultation is non-binding, no abutter notification is required – it is a general discussion of the type of development and the relationship of that development to the master plan and the issues that will arise under local regulations. Mr. Buckley felt this was a good communication to have with a developer prior to when drawings are formulated.

There is then the halfway step prior to the formal application process, which is Design Review. This is still non-binding but additional items such as abutter notification and other studies would need to be provided.

Mr. Buckley then went over Formal Application for the Planning Board:

- Submit a completed application – regulations specify what is required – costs, internal review and external review.
- Application is voted on at a public hearing where abutters are notified and are present.

Timeline for Decision Making: Defined under RSA 674:4, I.

- Preliminary consultation has no time limit
- Application needs to be submitted 21 days before acceptance to meeting.
- Notice to abutters and public needs to happen 10 days before a meeting for plan acceptance.
- There needs to be at least one public hearing conducted and a decision needs to be made within 65 days of plan acceptance.
- A written decision from the Planning Board needs to be issued within five business days.

Mr. Buckley then went over some Alternative Site Plan Approval and Review Procedures: The City or Council can authorize the Board to delegate its site review powers for minor site plans to a committee of technically qualified administrators.

The Board can also establish a Technical Review Group to provide advice to applicants.

The Board or Council can establish thresholds based on the size of a project where a site plan review would not be required.

Acceptance of Vesting: This is an important aspect of decision making. At times there are projects that linger before a Planning Board for a long time and Acceptance of Vesting can be important for those instances. RSA 676:12, VI is clear when an application is deemed complete, the rules in existence at that time is what the application has to comply with; it vests the Board from changes to the regulatory structure.

Mr. Buckley stated there is a new statute that gives the Board time for plan approval for Developments of Regional Impact (DRI). This was designed for a project the Board might consider could have a regional impact – Statute Amended – RSA 676:4,I (c) (1). This will give the affected community along with the Regional Planning Commission a chance to be heard.

There is also another new Statute which addresses rules for 3rd party inspectors for better inspection process prepared by the Board. It also allows a municipality to have a certification process instead of having supervision of construction by a third party. SB 86 also has a new requirement prohibiting a municipality from adopting any regulation or practice that prohibits a person from installing a safe and commercially available heating or other energy system of that person's choice. Mr. Buckley stated he was not sure what this requirement is aiming at but something Keene should keep in mind when updating its master plan or zoning ordinance.

Public Hearing Process: It is very clear in RSA 676:4,1 - that there are a certain population of people who are required to be heard from; abutters, public, anyone who has a direct interest, and others permitted by the Planning Board. Mr. Buckley stressed the importance of following the proper public input process and impartially following that process. He added the importance of site visits which are also considered to be public meetings. He added there could be an instance where an applicant might not want the public to attend a site visit, this is not an experience Mr. Buckley has had to deal with. Mr. Buckley referred to Riggins Rules which gives advice on how to be a good Planning Board member.

Deliberation and Weighing the Evidence: Obtaining all the necessary information prior to closing the public hearing; Make sure the Board members receive documentation it needs to review well in advance of a meeting; Board can deliberate and vote at a later meeting but avoid ex parte contacts with parties or deliberation among members outside meeting; Board is permitted to reply on personal knowledge of the area and are not bound to accept conclusions of experts, but when rejecting expert conclusions, the Board member needs to have sound reason for doing so; Board cannot ignore contradicted expert testimony unless Board can adequately explain in written decision – *Condos East Corp v. Conway 132 NH 431 (1989)*.

Mr. Buckley referred to the *Dartmouth V. Hanover, Supreme Court Case (2018)* – where a Board always has to keep in mind what it can and cannot do. This case is in reference to whether or not a very large athletic complex being constructed by Dartmouth College in the City of Hanover was going to impact adjacent property owners. It was indicated by the Board that this large structure was going to cast a shadow depriving the neighbors of sunshine, especially during the winter. It was proven that this very large structure met all the regulations and Dartmouth College produced a professional Light and Casting Study demonstrating that there would not be an impact to sunshine on abutting properties. The Board nonetheless denied approval but the

Supreme Court concluded the Board made a decision based on their feelings and personal judgment.

Written Notice of Decision: Important points to remember include: Decisions need to be in writing in the event of disapproval; Project cannot be disapproved without a written reason; Decisions and meeting minutes need to be on file within five business days; and, A tie vote is not a decision.

Conditional Approval: Mr. Buckley said that any representations made by an applicant are not binding unless clearly made a condition of approval. In addition, conditions need to relate to the Board regulations. He noted that many communities have standard conditions that are applicable to all projects. Conditions Precedent – conditions that need to be satisfied before the Board signs the plan (eg. obtaining a driveway permit or a wetlands permit); Conditions subsequent – conditions used to control the use of the property (e.g. lights being turned off at a commercial site after a certain time. A compliance hearing could also be requested – this is a public hearing to determine whether certain conditions have been met.

Grandfather Rights: Two elements of a statute that are important to be considered – RSA 674:39,III – Applicants are protected from changes in regulatory structure after final approval as long as the applicant has begun active and substantial development within 24 months – there is a five year exemption under such condition. Once an applicant has completed active and substantial improvement they are completely vested from any future zoning and subdivision changes forever. It is important to be clear to the applicant what amount of work needs to be completed within 24 months.

Housing Appeals Board: Went into effect in July 2020. Consists of three members appointed by the Supreme Court and a venue to appeal a decision by the Planning Board. It is an administrative body, not the Superior Court. This is for decisions regarding housing and housing Development. The hearing is similar to that of the Superior Court. The Board will need to hold a hearing on the merits within 90 days of receipt of appeal. Decision are made within 60 days. Housing Appeals Board decisions ultimately go before the Supreme Court.

Conflict of Interest: RSA 674:14 defines how a land use member or a Planning Board member could have a conflict of interest. A Planning Board member cannot sit on a case if that member has a direct pecuniary (financial or personal) interest in the outcome. A Planning Board member could also be recused if that member would be deemed unable to hear the same kind of case at the Superior Court – are you related to anyone on the case, have you advised anyone, have you formed an opinion, etc.

Mr. Buckley referred to a few examples. *W. Robert Foley, Trustee v. Enfield (2017)* – A ZBA Chair, while the case was pending, made an inquiry through an email listserv referred to as “Plan Link,” which is managed by the NH Office of Planning and Development (a site used often to trade ideas). The chair received some feedback and a day later the ZBA denied the applicant’s motion. The applicant learned of this dialog and felt he could not have a fair hearing because of such sharing of information. The Supreme Court did not agree with the applicant that sufficient information was shared which would impair the fairness of the process.

However, *Z-1 Express v. Manchester (2019)* – Conditional Use Permit Application before the Planning Board for the construction of a gas station in a controversial area in the City of Manchester. After the public hearing, but before voting on the application, two members of the Board voiced opposition to the project on the opposition’s social media site. At the public hearing prior to the vote, one of the individuals who spoke on social media was asked to recuse himself and he refused and voted against this application. The Superior Court remanded the vote after finding that the member’s failure to enter into and participate in deliberations with an open mind threatened the integrity of the deliberative process.

Mr. Buckley advised Planning Board members to avoid social media sites put in place by those supporting or opposing an application. He added if there is a conflict of interest, a member has the right to ask for an advisory vote if he/she has a concern. He also felt the Board may want to have social media rules of procedure. When dealing with such issues they should err on the side of caution and recuse themselves. This concluded Mr. Buckley’s presentation.

The Chair asked if available this presentation be emailed to the Board and to also include Riggins Rules.

V) Staff Updates

Ms. Brunner stated the department has a new planner, Evan Clements, who will be starting next week.

VI) New Business

Chair Russell Slack stated she would like to see the Work Force Housing Statute included as an item for discussion – what NH Housing Finance Authority data is; affordability of housing in this area. She stated this item is of great concern to her.

VII) Upcoming Dates of Interest – March 2022

- Joint Committee of the Planning Board and PLD – March 14, 6:30 PM
- Planning Board Steering Committee – March 15, 11:00 AM
- Planning Board Site Visit – March 23, 8:00 AM – To Be Confirmed
- Planning Board Meeting – March 28, 6:30 PM

There being no further business, Chair Russell Slack adjourned the meeting at 8:19 PM.

Respectfully submitted by,
Krishni Pahl, Minute Taker

Reviewed and edited by,
Mari Brunner, Senior Planner