

**MINUTES OF
WORK SESSION**

**PLANNING BOARD
PORTSMOUTH, NEW HAMPSHIRE**

**7:30 P.M. CITY COUNCIL CHAMBERS DECEMBER 7, 2006
CITY HALL, MUNICIPAL COMPLEX, 1 JUNKINS AVENUE**

MEMBERS PRESENT: Jerry Hejtmanek, Vice-Chairman; M. Christine Dwyer, City Council Representative; Cindy Hayden, Deputy City Manager; Raymond Will; Donald Coker; George Savramis; Anthony Coviello; and Paige Roberts, Alternate;

MEMBERS EXCUSED: John Ricci, Chairman; Richard A. Hopley, Building Inspector; and Timothy Fortier, Alternate;

ALSO PRESENT: David M. Holden, Planning Director; and, Lucy E. Tillman, Chief Planner
Rick Taintor, Taintor & Associates

.....
The participants introduced themselves: David Holden, Raymond Will, Donald Coker, Tony Coviello, City Councilor Christine Dwyer, Paige Roberts, George Savramis, Lucy Tillman, Deputy City Manager Cindy Hayden, Rick Taintor and Acting Chairman Jerry Hejtmanek.

Acting Chairman Hejtmanek stated that all work they are doing on the Zoning Ordinance over the next 12 months is following the Master Plan objectives. Tonight they have four items, two of which are City Council referrals. He also noted that the Planning Board will have public meetings at the end of their discussions to improve on their work product.

I. PROPOSED ORDINANCE AMENDMENTS

- A. Table 10 – Dimensional Requirements of the Zoning Ordinance. Change to maximum building height within the Central Business A (CBA) District from a 50 foot maximum to a 40 foot maximum;

Mr. Holden stated that the City Council has worked on two proposals and have sent an additional two proposals to the Board. The Planning Board is taking them up in the order that they were conveyed for a report back. The first is a change in the dimensional table for maximum height from 50’ to 40’ in the CBA. The purpose of this session is to discuss this and become familiar with it and determine how they wish to proceed. The present Zoning Ordinance introduced two CB districts however prior to that there was only one district. 60’ has been the maximum building height since 1960. He opened it up to the Board for discussion.

Councilor Dwyer clarified that she is not representing the City Council on this as they did not discuss it but just remanded it to the Planning Board. She mentioned items that were contradictory. The first is the overall issue of free lance zoning or the idea of taking little bits of things while trying to do the whole zoning code. They all have a concern about that and she would like to discuss that issue and whether they should be thinking of issues like this and enlarging them as they come forward to review

a chunk of the zoning code. Should this be their opportunity to look at CBA rather than just one aspect? This might be used as the beginning of a larger discussion.

Mr. Coker asked what free lance zoning was and whether it was the same as spot zoning? Councilor Dwyer explained she felt it was taking things out of context as they are trying to look at larger pieces of zoning. She would like to see them look at things in their larger context.

Acting Chairman Hejtmanek felt that potentially there may be a lot of activity in the Northern Tier zone and they have three months so they should take an in-depth look. It may be free lance but as their work is future based, if they don't get this done they may not be happy with it. This area should have a priority but they should take an in-depth look at CBA.

Mr. Will confirmed that Acting Chairman Hejtmanek was advocating not taking a look at just height but rather look at CBA as a whole. He didn't think that would put them in jeopardy. That would put developers on notice that they are looking at things.

Mr. Holden added that the City Council has scheduled a second reading for December. Therefore, any building permits being issued in CBA must, in terms of height, meet the requirements of both the existing and proposed ordinance. So, any structure that would be proposed under 40' would be able to go forward. They have until the end of February or March to make a report back so that the City Council can take a timely action.

Mr. Coker asked if what was on the table was a change from 50 to 40 feet. Acting Chairman Hejtmanek suggested rather than just look at that, they should look at the whole. Mr. Coker asked what other changes would they be considering? Councilor Dwyer felt by reviewing the table they start to see some potential things they should consider. 5% minimum open space to a lot should be reviewed. Dimensionality, mass and proportion need to be discussed. Deputy City Manager Hadyen added any type of public benefit that they would like to see that would allow them more height in exchange for the 5% open space, a green building, live/work space or some type of public benefit. Mr. Will asked if that would put their feet to the fire with their form based zoning? Acting Chairman Hejtmanek felt they are not looking at design criteria. Mr. Holden DH confirmed the existing Zoning Ordinance already provides some incentives. They might want to look at incentives for the public. Acting Chairman Hejtmanek felt that sustainability in the City is being discussed.

Mr. Coviello stated that he is a resident and he doesn't want downtown to be too tall. He does not want to see that happen on Maplewood but as an employee of the construction business, one thing that is nice about the current zoning is for example if the recent hotel had that height restriction, it would not have been able to be built. He thinks they should encourage development in the northern tier so there has to be a discussion with possibly the Economic Development Commission to determine the economic impacts. Mr. Coker agreed. He understands the principal behind the lower height and he agrees wholeheartedly with Mr. Coviello. It is very expensive to do anything today and this would force the developer to charge a higher price for their square footage and the domino effect would start. Acting Chairman Hejtmanek had made notes on that. The top floor is expensive to build compared to the first floor. By cutting out a floor, you change the economics of the building dramatically. Another element is most studies show that commercial businesses pay more in taxes which subsidizes the residents. If you cut a floor, you cut the tax base.

Mr. Will agreed in a simplistic two dimensional way but that will also increase traffic and the infrastructure. It comes down to how they balance the needs of the developer and the residents. He sees the Northern Tier as one large structure and one parking lot that is slated for redevelopment but the surrounding businesses are pretty well established. It is not an empty lot. How they fill it is what they have to ask. He did not feel it was correct to say that it has not been developed. Mr. Coker felt, before he could begin to consider this, he would like to get public input and he would like to have developers talk about their impacts. He would like to know if it is a significant or marginal cost involved in removing one floor. Councilor Dwyer stated the reason given for the top floor condos making the hotel project viable was upfront financing and not price per square foot.

Councilor Dwyer also raised additional issues. She felt Master Plan issues suggest other things. They were about access and sightline and connection to waterfront. That has to do with height but also placement and scale, size, placement of buildings and mixed use. That was part of the impetus behind the height restriction. She would be interested in other people's thoughts about how these issues connect to the Master Plan. Deputy City Manager Hayden felt that was a very good point. They heard a lot about walkability and the Northern Tier being developed. Thing that she heard from the Master Plan were more green space, open space, human scale architecture. Her question is what is the best way to achieve that and the Planning Board role is to determine how to achieve that. She understands the economic issues and developers always want more height. They need to also find out what the community wants. This is the beginning of a process that they will need to find out more about. She doesn't want to ask the Economic Development Commission too soon as they need to determine what they need to know first. Another work session is needed to further discuss their own thoughts about this.

Mr. Will felt there is a lot more they want for that area other than height. How do they open up the whole idea of the CB district. Acting Chairman Hejtmanek felt they might want to set the buildings back further from the street. Mr. Coviello felt you can hide building height from the street and 100 Market Street did it. Mr. Will suggested at some point they might want to have a joint session with the Historic District Commission and the Economic Development Commission to ask them generally what they think.

Deputy City Manager Hayden felt they may want to look at this in smaller pieces. They might want to report back to the City Council that they want to take this in the direction of some public benefit and have the City Council let the Planning Board know if that is what they are looking for. Mr. Taintor's time needs to be used carefully. Ms. Roberts stated it's important to try to expand the discussion and maybe it is time to bring it back to the City Council to get a stamp of approval from them. Councilor Dwyer felt they had plenty of time. Acting Chairman Hejtmanek suggested a 6:00 work session before the next Planning Board meeting? Deputy City Manager Hayden felt they may not want to do this on a regular Planning Board night. Mr. Holden felt this is time sensitive so they should consider picking it up next month.

Deputy City Manager Hayden asked what do they want to try and accomplish between now and the next work session? Mr. Taintor felt there were two approaches. A form based approach which is very detailed and incorporating some form based into the ordinance is being worked on but they haven't gotten to it yet. The opposite approach is to have a set of regulations of public benefits where there

can be a waiver. It doesn't have the specificity and you can look at each case individually. The height and massing can be considered for a particular project. The easiest way would be a simple provision that they might go down to 40' with provisions for public benefit. They will not get the alternative approach done in three months because it is more complicated. Mr. Holden felt that they have had some experience with what Mr. Taintor was suggesting so they could get something back to the Council. And, while they are working on the Ordinance Re-Write, if they come up with something good they can amended it at that time.

Mr. Coker asked if a developer were to come for a proposal for CBA right now, they would have to meet both regulations and would have to meet the 40' restriction. So, in effect, this is in effect. Mr. Holden confirmed that was correct. Mr. Coviello asked if they were asking for a consensus of the Board to go the route of menu driven items rather than form based zoning? Acting Chairman Hejtmanek confirmed that was correct. Mr. Coviello indicated that was disappointing to him because just because something was hard or difficult it couldn't be done. Mr. Holden did not believe they were saying that it can't be done but they were saying that with the time allotted so they can move forward on this they will not lose site of the form based and they will have a longer time to work with some of the others. Mr. Coviello asked if they can just go with the 40' knowing they will come back to it. Mr. Taintor was going to suggest something along those lines. The longer term goal is to address the long term goal and the 40' could be interim zoning. However, the danger is that someone may build something 40' and they may not end up with what they want.

Councilor Dwyer doesn't want the list to be so short and she also wants more than one list. If they are trying to do the whole thing in 12 months they should be able to do more than a trade off for one aspect. She believes they have to get going on this and they could look at a few things that interact together. Otherwise she feels they are starting a bad precedent of putting off discussions that they need to have about other parts of the City as well. Mr. Taintor cautioned them that the 12 month process is aggressive and they can't chop it up. Councilor Dwyer felt they may want to go through several of their items this evening before they decide how they want to handle it.

Deputy City Manager Hayden agreed these are not small issues and they take a tremendous amount of time. Going from 40' back to 50' with some trade offs is something to consider. Councilor Dwyer was thinking about adding a few other code based ideas, set backs for instance, and the public benefits could all be from the same menu. She understands they are not ready to go to form based zoning but they could step towards it by looking at how different codes interact that relate to the same ideas. Ms. Roberts agreed that they should be creative and not restrict themselves.

Mr. Coker asked how can they pick the brains of developers and other professionals? Mr. Holden assumed, once they have a list, and before going back to the City Council they will have gone through the step of soliciting public comment.

Acting Chairman Hejtmanek confirmed they will have a work session at 6:00 pm before the 12/21 Planning Board meeting and it will be decided whether Rick Taintor will be present.

.....

- B. Nonresidential Planned Unit Development (PUD) which would function as an overlay in the Office Research (OR) and Industrial (I) Districts;

Mr. Taintor stated this was brought forward by Smuttynose Brewery. They went through a review of all Office Research (OR) districts in the City and made a number of recommendations for them. Each OR district is different. Some are buffer districts, there is one long one along the North Mill Pond, there is one on Market Street, and one off of Bartlett Street. At the same time, the owner of Smuttynose approached the Planning Department with a concept for a mixed use development. They looked at combining some parcels to use as a mixed use concept. They were trying to look at this as a transition between an industrial area and the commercial corridor that breaks on Elwyn Road. The proposed ordinance has gone through a number of revisions and has some strict standards. It either has to be in an OR district abutting an Industrial (I) district or in an I district and abutting an OR district. It must abut a business district, it has to be at least 10 acres of land and allows all uses which are allowed in the underlying district along with other uses which are allowed in the supporting district. There are dimensional and intensity regulations. There is a buffer area around the site and a 50' front, side and rear setback. The maximum structure coverage is 50% and minimum open space is 50%. Everything must comply with subdivision regulations regarding circulation and private ways in the development. All sites must be landscaped in the front. Anything abutting a residential district must follow the Site Review process and they describe the Planning Board action by either approving or denying the request. The PUD has a limited number of sites in the City where this can apply to. The North Mill Pond is one possibility but the key one is Lafayette Road. Mr. Holden stated that they have had numerous proposals for this property. The Board rejected Garden Apartments and they also disagreed with changing it to retail. The Master Plan asked that they look into doing a mixed use plan so that is what this is. They have also taken the concept that it won't be a strip development and it would put the parking in the rear and it also takes advantage of existing accessways servicing West Road so there would not be any truck traffic. It appears to be a pretty good model.

Mr. Will stated that he can see how the developer proposing this would see this as a wonderful way to develop the property. How could this be done with other industrial and office type businesses? Usually they have reasons to separate industrial from other districts. They have to do what they did with the other PUD and how can they make this less for a brewery and more for other types of businesses. Ms. Roberts agreed with Mr. Will. Why are they using this mechanism when they are focused on this one particular area and she would like to somehow try to make this feel more appropriate for other parcels in the City. Mr. Will asked what other uses other than a brewery could this be used for? Why should they separate this out?

Mr. Taintor indicated that they talked about things that were similar to this relationship between the brewery and the restaurant, such as specialty food production. Part of the issue is the struggle of how to make this OR district work without making it a commercial strip. Mr. Holden confirmed it is allowing all the uses that are allowed in Industrial and Office Research so it isn't tailored to one use. A lot of tabled uses preclude a heavy retail-type mall development, which is what they don't want. This is an area that the Board has struggled with for two years and they are now following through on the Master Plan to see how this area can be developed. Mr. Will could see that however he had concerns of how to tailor it to the terms they are proposing and how do they craft the ordinance to help someone in 2026.

Mr. Taintor added that they are taking the same approach they took with the residential density proposal. If it works, they might want to expand it. Even though it is proposed for OR and I, it may

work in other districts. It may be an opportunity for them to create new models to expand on later on. Mr. Coviello asked why not a conditional use permit? Mr. Holden indicated that the requirements are fairly specific. To assemble 10 acres of land there are a fair number of restrictions on it. Mr. Taintor confirmed it was a conditional use. Mr. Coviello asked about frontage where it says no parking between the front of the lot and the building. What if they have a building bordering West Road and Route One – what is the front? Mr. Holden confirmed the principal street is the front. Mr. Coviello asked if the Board will have orientation to determine where the front will go and what the surrounding residents will be looking at.

Councilor Dwyer asked why they are requiring the 10 acres and would this apply to smaller parcels in other places? This could be an idea of a model for other areas and they should think about what areas this might apply to as this is potentially a redevelopment of a strip. This gives us potentially a way to think that sometime in the future when they have an opportunity to get out of the strip mall situations to what those could become. From a corridor standpoint, it gives them a new vision of what the corridors should be. She did feel that maybe the 10 acres is too high of a bar.

Mr. Coker didn't see anything that leaps out at him to be opposed to except the outdoor entertainment really sends up a red flag to him. The outdoor entertainment is a quality of life issue. The downtown has tall buildings to help block the noise but there would not be anything to break the noise in this area. He is adamantly opposed to that item. Deputy City Manager Hayden felt one thing that would be helpful is if the Department prepared a map to show where this would apply in the City. Mr. Will stated he would have a better vision for this with a 5 acre parcel. Uses in the Industrial District would make him prefer a smaller lot. He would also like to see a maximum acreage.

Mr. Savramis felt that right now it offers too many options for someone to develop the piece of property across from Elwyn Park. He could not support this and they should try to limit as much as possible so that people can understand exactly what can go in. This offers a large range of options. Mr. Coviello reminded the Board that it is conditional and not permitted. Councilor Dwyer felt that the exterior design issue is interesting. Regarding outdoor entertainment, she would suggest an ordinance deleting outdoor entertainment in the business district. That might take away the concern. Mr. Holden disagreed as when they get to that, it is for a principal use and this one is for an accessory use. He felt the Board had a great deal of control of it.

Deputy City Manager Hayden Cindy indicated that she likes the purpose and intent items in this ordinance. It is a conditional use permit and it creates that kind of creativity and flexibility so that they avoid bad developments. It is a way to break up the retail strip. She doesn't think they are giving it a blank slate to any developer. The next developer that comes along could also find something to fit in. Mr. Coviello felt that land owners should have a right to develop their property some way. He thinks this is a good step to give them that ability.

Attorney Pelech addressed the Board and first indicated that Mr. Taintor had said all that he would say except they have worked months with the Planning Department. Smuttynose is in the position that they are growing and need to find a new location. There is no zone in the City where they can go. They had numerous meetings with Mr. Taintor, Mr. Holden, Ms. Tillman and Ms. Hayden and various City staff. Mr. Taintor came up with this idea and they felt it was workable. It is a chance to give small industry a place to go that is in keeping with the Master Plan. Someone questioned what other

uses could use this and he suggested that Stonewall Kitchen, the Lollipop Tree, Baileyworks or a small furniture maker could all go there. Smuttynose is a microbrew. The second dilemma is that the rezoning process will take 12 months and they don't have that much time. This deals with a very small specific item and it is not just for this zone but other areas of the City. He would like to see it move forward as rapidly and as quickly as possible. It gives this Board a lot of flexibility and it is a good process.

Mr. Will indicated that Attorney Pelech used the user phrase small industry, which he is a big proponent on, and he asked how does he see it working if it had a maximum acreage? Attorney Pelech stated that Mr. Eggleston, owner of Smuttynose, did not want to restrict any site to just his operation but he was looking for other similar businesses to share the 10 acres. Given the fact that land is so valuable and so scarce he doesn't think a campus type concept should be any bigger than 15 or 20 acres maximum. Mr. Will stated he can see this as a very good tool, especially on Lafayette Road, on a small scale but trying to put it on 10-15 acres might cause problems.

Deputy City Manager Hayden clarified for the record that she was not in on the meetings with Attorney Pelech and Peter Eggleston and she believes it was probably Nancy Carmer.

Mr. Coviello asked if it would be appropriate to recommend a public meeting at the next meeting? Mr. Holden suggested doing it as a public meeting and they will notify abutters. Deputy City Manager Hayden asked it that would give the department time to do the re-zoning matrix? Mr. Holden felt they could probably prepare it as to their purposes this is forwarding the Master Plan. If they had a public meeting, they would take public comment and try to reflect them in the report. Mr. Coker felt it would be good to have the rezoning matrix before the public hearing or at least concurrent with the Public Hearing.

Acting Chairman Hejtmanek confirmed they will schedule a public meeting at the next regular Planning Board Meeting next meeting and Mr. Holden confirmed he would prepare a legal notice tomorrow.

.....

C. Non-Agenda Item: An Ordinance regulating Formula Businesses within the Historic District

Mr. Taintor indicated that this came from the City Council, trying to implement one of the recommendations in the Master Plan, trying to control the growth of franchises in downtown. They did research of what other cities have done around the Country. Ogunquit and York have done it and they looked at Bristol, RI which has been commented on nationally. Nantucket has also done it. The Bristol, RI model appears to fit this area very well. And, incidentally, two weeks ago Portland Maine adopted a formula business restriction which was more restrictive than this proposal in some ways and then less restrictive in other way.

Mr. Taintor reviewed the handout which included a list of findings about studies that have been done regarding the impacts of chains on changing the character of downtowns and the importance of preserving the historic character and they have defined what a formula business is. This model is similar to the Bristol model and it says that the use is some type of business that is required that some type of contractual arrangement reviews all of the standardized items and it it pretty much identical to

at least five other businesses. Some ordinances say 5 businesses outside of New Hampshire. They have to always be balancing and not discriminating favor any chain. I.e., when does Moe's become different from McDonalds? Portland uses 30 as how many other establishments determine a formula business. They then describe the new regulations in the Historic District, including the size of the business shall not exceed 2500 s.f. of gross floor area, the street frontage of any individual formula business shall not exceed 65', no drive through windows shall be permitted, no signs shall be internally illuminated, corporate logos and color schemes shall not be used on exterior facades or signs, or on any interior features that are visible to passers by through any window, opening or open door, provisions for rubbish removal shall prevent any substantial impacts to abutting properties, there shall be no substantial impact to the public safety from increased traffic and at the discretion of the Zoning Board of Adjustment the applicant may be required to submit a traffic study, and there shall be no impacts to the roadway or abutting properties from the loading area. They then discuss the standards that need to be met, including compatibility with surrounding businesses, and the process for review. Sometimes banks are excluded and most cities center in on restaurants. The Board can look at this to determine how broad they want to be. Bristol has chains which you cannot identify until you walk inside.

Councilor Dwyer stated that she just realized that she works for a formula business, but they are not in the historic district. She wanted to discuss the larger point of Master Plan connection before getting in to the details. Her understanding of the Master Plan as it relates to this issue is the desire to retain small businesses and the goal is to retain diversity, making sure that we have small businesses that are unique. This ordinance proposal does not do anything towards that. She talked to a number of small businesses and she did not find anyone that was in favor of it. Incentivizing small businesses is different than what they had in front of them. If they were to make this something viable, they should look more at aesthetics. Acting Chairman Hejtmanke believed there was a lot of concern about franchises moving into downtown Portsmouth. Mr. Will added that formula chains are able to afford rents that small businesses cannot afford. His biggest concern is the number and type of formula businesses and how do they enforce this. He agrees with the intent of the proposal as it protects the small business and the aesthetic issue downtown.

Mr. Coviello agreed with Councilor Dwyer but he felt it was a broader issue. This does not help small business but rather just changes the way franchises look. He didn't see it as a means of helping small business but that doesn't make it bad. He felt they should include restaurants and also real estate offices. He added that the Coldwell Banker sign shouldn't have been allowed and that is a sore spot with him. He would like to see the number increased from 5 to 10.

Mr. Coker stated that he has been on the Planning Board for 9 years and, with all due respect to the City Council, he believes this is the most bizarre proposal he has ever seen. It comes from their basic view of the world and business and the free market and this is the most exclusionary proposal he has ever seen and he was adamantly opposed to it. He indicated that Moe's sells franchises and they may have 10 - 15. He believes the City already regulates the location and operation of businesses in the historic district through zoning. The HDC is their watchdog downtown and some may argue that they are going too far. He felt the size of any formula business is irrelevant and he feels that almost all features are already regulated. He does not see what harm Starbucks or the Gap has done to downtown. He feels this is anti-competitive and that the free market will take care of itself.

Acting Chairman Hejtmanek felt that diversity of shops and those looks are important for a tourist town.

Deputy City Manager Hayden felt this proposal is trying to head off a problem that may be created and it is a big issue in the zoning world. Mr. Coker asked if the HDC would have any say in controlling a Dunkin Donuts coming into downtown? Mr. Holden felt they would have very limited control over it.

Acting Chairman Hejtmanek asked if the Board is ready for a public hearing? Mr. Holden suggested that they move this to the January meeting which will give the Planning Department time to do the rezoning matrix. The Board was in agreement with this.

.....

D. Outdoor entertainment

Mr. Holden advised the Board that the City Council has referred a proposal to the Board to review which aims to regulate any future outdoor entertainment, or specifically remove outdoor entertainment and outdoor recreation as an allowed use in all the business and industrial districts. Any businesses out there at the present time that are existing would be conforming and would be allowed to continue but it would attempt to regulate any future outdoor entertainment. One reason for doing this is wondering what the impact of outdoor impacts are in terms of traffic in residential neighborhoods and whether this is appropriate. He recommended scheduling this for a public meeting but they cannot do abutter notices.

Councilor Dwyer asked what was the larger piece that this would fit within. Deputy City Manager Hayden indicated that they have very limited industrial land and business land and outdoor recreational uses tends to generate a lot of traffic. Examples of outdoor recreation would be Water Country or a concert venue. Mr. Holden indicated that this Board rejected the proposal to increase the size of Water Country. Mr. Coviello asked if this would cover Central Business? Mr. Will stated it would grandfather the rest of the districts. Mr. Holden clarified that this addresses outdoor entertainment which is a primary use but not as a secondary use. Ms. Tillman added that if somebody wanted to put in a deck outside and wanted outdoor entertainment they would need a Special Exception.

Councilor Dwyer noted that special exception is crossed out on the handout. Mr. Holden stated that, for example, a restaurant including accessory uses of bars, taverns, etc., are affected by this. So they can have their entertainment indoor and also outdoor because it is an allowed use. There was some discussion on the interpretation of the definitions of principal use and it was felt that they should probably look at this more closely and consider the questions they have raised tonight.

Acting Chairman Hejtmanek suggested scheduling a follow up work session in January and the Board was in agreement.

Deputy City Manager Hayden felt, as they have a lot of work to do, she would like them to consider meeting the first Thursday of each month for work sessions with a 7:00 starting time. After discussion, the Board was in agreement.

.....

E. Other Business.

Mr. Holden advised the Board members that the Department of Public Works would like to do an EPA presentation in January regarding the new stormwater regulations. It was the consensus of the Board to schedule this at the January meeting.

.....

II. ADJOURNMENT

A motion to adjourn at 8:50 pm was made and seconded and passed unanimously.

.....

Respectfully submitted,

Jane M. Shouse
Acting Secretary for the Planning Board

These minutes were approved by the Planning Board on January 18, 2007