

SPECIAL CITY COUNCIL MEETING

MUNICIPAL COMPLEX
DATE: WEDNESDAY, JANUARY 8, 2020

PORTSMOUTH, NH
TIME: 7:00PM [or thereafter]

At 6:00 p.m., an Anticipated Non-Public Session was held regarding Threat of Litigation Pursuant to RSA 91-A:3 II (e).

I. CALL TO ORDER

Mayor Becksted called the meeting to order at 7:23 p.m.

II. ROLL CALL

Present: Mayor Becksted, Assistant Mayor Splaine, Councilors McEachern, Whelan, Lazenby, Kennedy, Huda, Tabor and Trace

Councilor Kennedy moved to adjourn the Non-Public Session. Seconded by Councilor Trace. On a unanimous roll call 9-0, motion passed.

III. Approve City Council Rules and Orders

Councilor Kennedy moved to accept the Revised Rules and Orders of the Portsmouth City Council as presented with further amendments to Rule 7 – Order of Business Item XI. to remove “single item” and replace it with “items.” Rule 30 – Ordinance Procedure to remove “Staff” to “Administration” and “must” to “may.” Rule 7 – Order of Business Item VIII Public Dialogue Summary to remain. Rule 2 – Special Meetings add at end of first paragraph “the party calling for the special meeting shall make every effort to schedule the meeting at a date no fewer than 7 days from the date the official notice is published to the City website if at all possible.” **Seconded by Assistant Mayor Splaine.**

Councilor Kennedy said Public Comment Session will be done at every City Council meeting. She stated Public Dialogue Session will take place at every other meeting of the month. She said residents will have the ability during work sessions to make public comment. Councilor Kennedy stated presentations by staff will be made during the first reading of an ordinance to allow for the public to provide more input at public hearings.

Councilor Lazenby questioned whether the Council could instruct staff. City Attorney Sullivan said for the Council to instruct staff would be in violation of the City Charter. He stated the City Manager would advise that a presentation will be made by staff.

On unanimous roll call vote 9-0, motion passed.

Ratify City Council Policies

Assistant Mayor Splaine moved to approve the Policies, as submitted. Seconded by Councilor Kennedy.

Councilor Kennedy stated that there are some changes that need to be made, but not this evening. She indicated she would be sitting down with the City Clerk and City Attorney to discuss the recommended changes.

Motion passed.

Ethics Committee Drawing by Lot

City Clerk Barnaby asked City Manager Conard to draw a name from the basket. Councilor Tabor was selected by lot to serve on the Ethics Committee.

IV. MCINTYRE PROJECT – Presentations:

City Attorney Sullivan announced that a Non-Public Session was held at 6:00 p.m. to discuss the threat of litigation regarding RSA 91-A:3 II (e). He stated the City Council had the option to seal the minutes but chose not to. He stated the City Council did vote to make the letter received from Attorney Falby of DLA Piper LLP public and he has copies available for the public and press. He continued to state that the minutes of the Non-Public Session will show all members of the City Council, City Manager Conard, Deputy City Manager Colbert Puff, City Attorney Sullivan and Attorney Stokul were present. City Attorney Sullivan reported that the letter from Attorney Falby stated he represented the developer under the Agreement, which sets forth the terms under which the City will acquire the property and the Developer will develop the McIntyre property. He further went on to say that the Agreement is binding both as a matter of law and by its terms and would follow that contract through completion. He further stated if any action is taken, litigation would be initiated by Attorney Falby. City Attorney Sullivan stated that the threat of litigation was discussed and a broad general discussion took place with no action taken other than releasing the letter.

Councilor Lazenby moved to table items IV – VIII for a later date to provide further input on this matter. Seconded by Assistant Mayor Splaine.

Councilor Lazenby said the project is important and no one wants to delay it. He said he appreciates that Mayor Becksted wanted to have a meeting quickly. He stated there is a lot that is moving very quickly and we need our legal team to review this matter and take it up later this month. Councilor Lazenby said not all Councilors were able to have input on the content. He indicated that most of the public heard about this meeting 2 to 4 days ago and he feels there needs to be more time for the public to be made aware of matters.

Assistant Mayor Splaine stated he will be opposing the motion, but congratulated Mayor Becksted for calling this meeting. He said that this is not creating a problem and the Council needs to listen, with discussion continuing beyond this evening.

Councilor Kennedy said it is right to get everything out on the table.

Mayor Becksted passed the gavel to Assistant Mayor Splaine.

Mayor Becksted said it is necessary to listen. He said the Council needs to listen to the residents to and allow the public to be heard. He stated he had the right to hold a meeting within 24 hours.

Assistant Mayor Splaine returned the gavel to Mayor Becksted.

Councilor Lazenby said he agrees with hearing from the public this evening as we need to hear all viewpoints.

On a roll call vote 2-7, motion failed to pass. Councilor Lazenby and Tabor voted in favor. Assistant Mayor Splaine, Councilors McEachern, Whelan, Kennedy, Huda, Trace and Mayor Becksted voted opposed.

- **Historic Preservation: Senator Martha Fuller Clark**

Senator Martha Fuller Clark spoke on her experiences on historic preservation. She spoke to the character of the downtown and said it is equal and important. She stated that very few cities have such historic buildings and homes in their downtowns. She said we are thriving because of the historic district. Senator Clark said the building mass and scale will destroy our downtown. She spoke to the large massive buildings being constructed around Maplewood Avenue. She stated any new construction must be compatible and this proposal is not compatible with the surroundings. Senator Clark said it should be clear the new buildings will alter the downtown. She stated that we need lower story buildings that will enhance the downtown. She asked all the City Council to review the Redgate/Kane proposal, as it does not seem to be the best outcome for the City. Senator Clark said the Redgate/Kane proposal should be withdrawn to develop a new proposal and bring the post office back to the downtown.

- **Finances: Michael Simchik, Developer**

Mr. Simchik said none of his comments should be taken despairingly and he is not a disgruntled developer. He wanted to see the building to be used for its maximum benefits. He said due diligence has not been followed for this process. He stated the previous two City Councils could not make good decisions because of the former City Manager and why only one option was reviewed. He addressed the financial aspects of the project. He stated the City would not receive anything until after the project return. Mr. Simchik spoke to the developer having a distribution deficient clause. He said there is a short fall of \$2.7 million in the first year. He stated the \$2.7 million short fall are less rates that are unattainable and said the City will never receive income. He said the calculations should be provided refinancing proceeds and sales proceeds that the City will share in the refinance and are fully at the discretion of the developer. He indicated if the developer does not refinance there is no funds coming to the City. He said that this project is a massive give away and what are the net results. He reported that the City gets \$100,000.00 per year, taxes, no distributed income, no refinance share, all you have is an over developed site. He said you will have a canyon effect and the City should stop the project. He suggested giving Mr. Binnie's proposal a chance and solicit other proposals. He recommended giving the project 6 months. He stated put the City Hall back in the downtown and let the Police Department expand into the current City Hall. He also stated would there be a better spot for senior and affordable housing, here at this current site. He asked if the City looked into these things. Mr. Simchik said the City Council needs to fix the process and the project.

- **Legal: Attorney Paul McEachern, Past Assistant Mayor, City of Portsmouth**

Attorney McEachern said he comes as a citizen. He stated that the Development Agreement defines the relationship for the City and Redgate/Kane. He indicated that Redgate/Kane is able to walk away from the agreement. He said the terms established grounds for each party to walk away. Attorney McEachern referred to Section 2.1.6., page 6 of the Development Agreement and Agreement to Lease reads as follows:

2.1.6. National Park Service Application: *Developer shall cooperate with the City in preparing the National Park Service “Application to Obtain Real Property for Historical Monument Purposes.” It is expected that such Application will be submitted to the National Park Service on or about July 2019, but no later than September 30, 2019 (the period ending on such later date, as it may be extended by mutual agreement of the parties, is hereby referred to as the “application Period. Subject to further refinement as provided in the Agreement and comments received from the National Park Service, it is expected that the Application will be generally consistent with the City’s August 22, 2017 RFP and the Developer’s November 6, 2017 Response thereto. The parties also expect to submit the proposed form of Ground Lease as part of the Application. The Ground Lease must be approved by the National Park Service. The Application shall, at a minimum, include a detailed description of the Project, and a “Program of Preservation and Utilization” which includes a preservation plan, a use plan and a financial plan all as required under the Federal Historic Surplus Property Program. If the Application is initially rejected by the Park Service for technical reasons or correctible issues then the City agrees that it will work with the Developer to submit a corrected application. If the parties, after good faith negotiations, fail to reach agreement on a mutually acceptable form of Application during the Application Period then either party may terminate this agreement in which event the Deposit (and all interest earned thereon) shall be promptly returned to the Developer and neither party shall have any further rights or obligations hereunder except those expressly stated to survive.*

If the City submits the Application, the Developer shall automatically and immediately become fully responsible for all requirements, obligations, duties, and commitments related to the Application and the acceptance and approval of the Application including, without limitation, all “constructive possession” responsibilities (if any) described in the general terms and conditions of the Application even if constructive possession were to occur prior to satisfaction of the conditions precedent to Developer’s obligation to consummate the Closing and to execute the Ground Lease (the “Closing Contingencies”). The parties shall work cooperatively to ensure that neither possession nor constructive possession of the Property occurs until satisfaction of the Closing Contingencies and the execution of the Ground Lease. In the event that the General Services Administration (GSA) send a notice requesting or demanding that the City take possession of the Property within fifteen (15) days before all Closing Contingencies have been fully satisfied, then the City will accept the deed to the Property and the City and the Developer will execute the Ground Lease with an Addendum to be negotiated reasonably by the City and the Developer, which Addendum will cover the interim period between executive of the Ground Lease and the date on which all Closing Contingencies have been satisfied. During that interim period: (i) the Developer will be responsible for all obligations owed to the National Park Service pursuant to the Application or the Deed and for securing, maintaining and insuring the Property, (ii) subject to the terms of the Ground Lease, the Developer will be allowed to enter leases, including without limitation, any space in the existing building on the Property in compliance with any required environmental remediation and/or asbestos removal, and to operate or lease the

parking areas on the Property, all in accordance with all applicable laws, regulations, and building and health and life safety codes, (iii) except as may be required by the National Park Service, no improvements to the Property shall be made other than improvements to the existing building and other appropriate repairs and maintenance, environmental remediation and/or asbestos remove, and (iv) the Developer will be required to pay real estate taxes on the Property, but not base rent. Once all Closing Contingencies have been satisfied, the Addendum will terminate and the Ground Lease will commence within a 75 year term, etc. If the interim period lasts for more than 12 months then (i) Developer shall provide an accounting of operating expenses, taxes, insurance expenses, debt service payments, other expenses and income and (ii) twenty five percent (25%) of Developer's actual income in excess of such expenses incurred (but in no event more than \$49,650 annually) will be paid by Developer to the City.

Attorney McEachern stated the definition of application defines the period of when the Ground Lease should be approved by the City Council and the form of Ground Lease has never been reviewed or approved by the City Council or was in review or approved with the 573 page Application to the National Park Service. He spoke to the interoffice memorandum from Deputy City Manager Colbert Puff to City Manager Bohenko. He said one exhibit to the application is a draft Ground Lease and its partner Redgate/Kane the document should be considered draft. He spoke to the City Council packet of December 2019 had a form of the Ground Lease but it was never voted on by the City Council. He stated the Development Agreement states that the developer recognized agreement application is subject to review and approval by the City Council. He further stated the ground lease of December 3, 2019 does not prohibit a hotel to be approved. Attorney McEachern said under the documents the lease control of the Development Agreement to prohibit a hotel was never put into the lease. He said the Development Agreement goes away after the Ground Lease is approved. He said if parties are unable to reach agreement over the Ground Lease then either party can terminate the agreement and money is returned to the developer. Attorney McEachern spoke to the interference clause of the City Charter Section 5.5 – which states:

Neither the City Council nor any of its member's shall direct or request the appointment or removal of any person to office or employment by the City Manager or any of the administrative officers. Neither the Council nor any member shall give orders to any of the administrative officers, either publicly or privately. This section shall not be construed; however, to prohibit the City Council or Council members from conducting inquiries of the City Attorney or the principal financial officer of the City as to legal or financial matters, respectively, involving the City.

Attorney McEachern read the first paragraph of Section 2.2.2. – Development Approval and Permits:

This Agreement is contingent upon Developer, at its sole cost and expense, obtaining any and all required Development Permits and Approvals from applicable governmental agencies (including without limitation the full building permit necessary for construction of the Project), upon such terms and conditions as are satisfactory to Developer in its reasonable discretion, for the Project. A preliminary list of anticipated permits and approvals is attached hereto as Exhibit D.

Attorney McEachern went on to say that the Development Agreement violates the Charter.

Mayor Becksted thanked Senator Clark, Mr. Simchik and Attorney McEachern for their presentations, which were to be used as a listening tool.

Councilor Lazenby spoke on the matter of a hotel not being allowed in the former Ground Lease. He said it was being pursued and for presentation in the form of the Ground Lease and has not been given back to the City.

City Attorney Sullivan said that is correct.

V. Public Comment McIntyre Project

Mayor Becksted said residents will speak first followed by those individuals from outside the City.

Josh Denton, Portsmouth resident, spoke to the transparent process held over the last two years regarding the McIntyre. He said Mr. Simchik chose not to go through the process.

Trevor Bartlett, Portsmouth resident, said after many public hearing and forums he can't believe we are opening this matter up. He said the City's time and money can be better spent moving forward rather than vetting an issue that has been voted on.

Bernard Mulligan, Portsmouth resident would like to see the post office separated out from the McIntyre project. He said there should be two leases, one for the McIntyre and one for the post office. He said we need to get the post office back in place.

Lee Roberts, Portsmouth resident, said we care about this project and we listened to three wonderful presentations this evening. She expressed concerns regarding the project and said she learned more about the finances this evening than she had from the beginning of the process. She stated she is in favor of having an opportunity for the public to have more input on what will go into the federal building.

Byron Matto, Portsmouth resident, said we need to project our vision for the downtown. He stated that the McIntyre project should include workforce and affordable housing because we need to increase supply. He spoke to Redgate/Kane adding 80 unit's downtown with the McIntyre project, and the point is, we need more and demand better.

Ted Jankowski, Portsmouth resident, said the funding for this projected started at an \$11 million dollar fund from Congressman Sununu. He stated the post office was required by the bill to remain. He stated in 2016 the City went in a different direction. He urged the City Council to hire outside legal counsel to look into the bill.

Patricia Bagley, Portsmouth resident, thanked the presenters for the information on this very complex process. She stated that this has been a divisive process and would like to see the City move forward. She said that the residents are relying on the City Council to make this right.

Mark Brighton, Portsmouth resident, said Deputy City Manager Colbert Puff should no longer have anything to do with the project.

Dick Bagley, Portsmouth resident, endorsed the comments of his wife and said this is an important piece of property in our downtown. He stated we need to move collectively forward with a process and come up with something that serves the City best.

Gerald Duffy, Portsmouth resident, said the McIntyre project created division in the City. He said the City needs to find a way forward and heal the mistakes. He said the residents will hold the City Council to high standards. He indicated it was not right to have all three presentations from the opponents. He said we may need to withdraw from this process and revisit the entire project. Mr. Duffy said maybe all previous proposals need to go and a new proposal come forward.

Stephen Barndollar, Portsmouth resident, said he heard how important the McIntyre project was during the election process. He said revisit was the word and to bring back the post office. He said the threat of legal action against us should not stop us. He urged the City Council to vote on the issue and not the Ground Lease. He likes the idea of rezoning the property to Municipal use and trying to move quickly and bring the post office back.

Clare Kittredge, Portsmouth resident, said we need to keep the downtown charming and pretty. She stated we have river views being blocked by the proposed development and we are losing our water views due to the mass of buildings. She said the heart of the downtown is being taken away. Ms. Kittredge said this is our last chance to get things right.

Duncan MacCallum, Portsmouth resident thanked the presenters and said he is resentful of comments made that Mr. Simchik is a developer that does not care. He said Mr. Simchik was never trying to advance his own self interests.

Patrick Ellis, Portsmouth resident, said he hopes to listen to every person in the City and their reviews regarding Redgate/Kane which are not the views of everyone. He said this is an opportunity to make the downtown a place for citizens to go and enjoy outdoor plazas. He said that this has been a public process at no cost to the taxpayers. He further stated that Mr. Simchik chose not to submit a proposal and Mr. Binnie's proposal feels like a parking garage.

Brad Lown, Portsmouth resident, said the City Council signed a binding contract and negotiated in good faith. He said if you break the contract you will be sued, it will cost the City many dollars, and it will cause a delay of the project. He said the alternative is to sit down with Redgate/Kane and tell them what you don't like about the plan.

Bill Downy, Portsmouth resident, said the process followed by the City and staff was horrible. He spoke to the mass density of the project and said we need to get this right. He suggested laying out all the options and moving forward.

Ralph Cox, Redgate/Kane Partner, said he would like the City Council to view some of the projects they have done. He stated he was proud to win the RFP and submitted the project. He said the process was a public process and very thorough. He indicated he will live up to all obligations and would like to continue dialogue and the process.

Attorney Bruce Falby, Boston, MA, representing Redgate/Kane. He said he sent a letter rebuttal to the remarks from Attorney McEachern. He stated the City is bound by the Development Agreement and by the vote the basic terms of the ground lease were approved. He said the City had a complete draft of the Ground Lease and the Development Agreement the City voted to bind itself in good faith and to take all legal actions to continue the project. Attorney Falby said if the City does not honor the contract you will be sued and it is not a threat. He said we would not want to expend our time, however the City will regret not following the contract.

Zelita Morgan said the election was not all about the McIntyre project but the City has lacked framework for public/private partnership and process is not made available. She asked where the public benefits are coming from.

At 9:35 p.m., Mayor Becksted called for a brief recess. At 9:45 p.m., Mayor Becksted called the meeting back to order.

Councilor McEachern moved that the City Council continue in light of the fact that there has been an enormous amount of discussion in the previous 24-48 hours in terms of information. All comments received this evening, all of the thought gone into this, feedback from a legal perspective on all sides that we take a moment and continue to work in good faith, but bring in our own perspective to the answers to the questions we received to be able to negotiate before any return of those responses would go back to the National Park Service Application at a later day. Seconded by Councilor Kennedy.

Councilor McEachern said an enormous amount of information has come forward today and does not know if any interests are served to change the process this evening, while respecting the will of the people.

Councilor Kennedy said what you are asking is to not forward the answers to the National Park Service, to have the current City Council review and discuss the answers with the City Attorney and to have a vote later and to forward the answers at a later date.

Councilor McEachern said we should have a conversation on the application and called out the financial questionnaire.

Councilor Lazenby said he would like to have a Work Session prior to the January 21, 2020 City Council meeting.

Councilor McEachern said he would like to have a Work Session prior to January 21, 2020 in order to be prepared.

City Attorney Sullivan said you can have the Work Session at the call of Mayor Becksted.

Councilor Huda said she wants to make it clear that we will have no further communications with the National Park Service before the Council has held a discussion.

Mayor Becksted passed the gavel to Assistant Mayor Splaine.

Mayor Becksted said the responses are of concern and we are in a holding pattern. He said he would give the new City Council time to review the responses and clarify those without the threat of litigation.

Assistant Mayor Splaine returned the gavel to Mayor Becksted.

Councilor Whelan said there was a Ground Lease submitted that the City Council was not aware of. He learned two hours ago that there is a new Ground Lease dated December 7, 2019. He stated that the City Council needs to act in good faith and represent the people and have that lease included in the Work Session.

Councilor Lazenby said the Ground Lease should be part of the Work Session and he would like that to be on the City's website. He agrees with Mayor Becksted that the Council deserves some time to get through this. He said the Council should not have the matter come back for the January 21st meeting to consider a Work Session and provide us with the time this deserves.

Councilor Kennedy said in way is there a time to send the answers to the National Park Service. She said we need to make a decision on what will happen with the budget. She stated we need some answers for the public and we may pull the project back. Councilor Kennedy said we have some big ticket items in the budget with the threat of a law suit and the need for an appraisal.

Councilor Trace said the Ground Lease is a form of the Ground Lease and does not become a Ground Lease until it is signed. She stated the City Council needs to receive a copy of the December 7, 2019 form of the Ground Lease before we meet in a Work Session. She said we need time to review and be fully aware of both sides of the picture to benefit the residents of the City. She asked the City Manager to provide a copy of the Ground Lease.

Assistant Mayor Splaine said he agrees with Councilor Trace's remarks and Councilor Kennedy's that we need to deal with this without haste but deal with it correctly. He said Mayor Becksted needs to set up a Work Session before January 21, 2020 and the Council needs to find ways to make things work in a win win scenario. He said if representatives of Redgate/Kane wants to continue the process and dialogue we need to continue the dialogue. He stated we need to find a win win and do the right thing moving it ahead.

Councilor McEachern said to be able to resolved the conflict of the City Charter and the Development Agreement would we not have staff speak on the development and have an opinion that the Development Agreement is not against the City.

Councilor Lazenby said the Council has substantial important work for the Work Session. He said the City staff will need time to prepare for the session and for the public to be aware of issues. He said it is not slowing anything down, we need to give people time.

Councilor Tabor said he sees this as a longer process and asked how do we develop and process how we work with staff, we need to be careful.

Councilor Lazenby moved to amend the motion and schedule a Work Session at the discretion of Mayor Becksted. Seconded by Assistant Mayor Splaine.

Assistant Mayor Splaine said the motion allows for Mayor Becksted to set a meeting or Work Session or Special meeting.

Mayor Becksted said he can set the meeting and make it a special meeting.

Councilor Lazenby said he would discourage having a special meeting because the schedule has been made and put out to the public. He said he feels having a Special City Council meeting after the Work Session is not what he feels to be transparent.

Councilor McEachern withdrew his motion and Councilor Kennedy withdrew her second to the motion.

Motion passed.

Assistant Mayor Splaine moved to postpone Items VII. – Ask City Manager to arrange for Public Presentations from National Park Service and General Services Administration on all possibilities for acquisition of The Thomas J. McIntyre Federal Building and VIII. – Establish Transparent Process addressing the acquisition and development of The Thomas. J. McIntyre Federal Building that would provide greatest benefit to the citizens of the City of Portsmouth until after the Work Session. Seconded by Councilor Kennedy and voted.

The City Council agreed to review the answers to the National Park Services Application and not forward those answers to the National Park Service. Further the City Council will review and discuss those answers with a vote at a later date of when to forward the answers. The City Council agreed there will be no further communications sent to the National Park Service until after a Work Session is held on this matter. Further, the City Council agreed to have the Ground Lease of December 7, 2019, forwarded to the City Council for discussion during the Work Session to be held at the call of Mayor Becksted.

Councilor Kennedy said Portsmouth Listens will have a public dialogue on the McIntyre project. She also announced that she will have a discussion at Café Vonsolln at 2:00 p.m. Saturday regarding ideas for better public input on the McIntyre project.

Councilor McEachern said he heard many comments this evening, some were positive and some less positive. He wants people to understand we can disagree but it does not mean we need to be disagreeable. He spoke regarding a comment directed at a member of the staff that is working here on her Birthday and is working in the capacity of moving forward. He has seen nothing but effort from the staff and that we all work together.

At 10:20 p.m., Councilor Kennedy moved to adjourn. Seconded by Assistant Mayor Splaine and voted.



KELLI L. BARNABY, MMC/CNHMC
CITY CLERK