

**MINUTES of the
PLANNING BOARD WORK SESSION
ON DRAFT RULES AND PROCEDURES**

PORTSMOUTH, NEW HAMPSHIRE

**EILEEN DONDERO FOLEY COUNCIL CHAMBERS
CITY HALL, MUNICIPAL COMPLEX, 1 JUNKINS AVENUE**

6:00 PM

September 28, 2023

MEMBERS PRESENT: Rick Chellman, Chair; Corey Clark, Vice-Chair; Beth Moreau, City Councilor; Karen Conard, City Manager; Joseph Almeida, Facilities Manager; Members Greg Mahanna, Peter Harris, James Hewitt, Andrew Samonas, Alternate; William Bowen, Alternate

MEMBERS EXCUSED: Jayne Begala

ALSO PRESENT: Peter Stith, Planning Manager; City Attorney Susan Morrell; Retired City Attorney Bob Sullivan

I. DISCUSSION ON DRAFT RULES AND PROCEDURES

Alternate Andrew Samonas replaced member Jayne Begala, who was excused. The Board discussed the proposed amendments to the Rules and Procedures.

*Relating to **Section B.3, Duties of the Chair**, the following changes were recommended by the **Legal Department**: the Chair does not have to approve the agenda prior to its posting because it adds a layer of review that is cumbersome for the staff as well as additional unnecessary work for the staff. There is no legal requirement for the Chair to sign all Board-approved plans for recording at the Registry of Deeds. The Planning Board does not have any authority to expend City funds and can only be done so with the approval of the City Council. There was also a consensus of the Board to adopt the agenda at the beginning of the meeting.*

Mr. Mahanna said the Chair should approve the agenda, according to Robert's Rules. Chair Chellman said the only reason he proposed that the Chair approve the agenda was because felt that it should be one person, whether it was a Staff member of the Chair, who does have the final say when it comes to the agenda being posted. Mr. Mahanna said he would like the Chair to have the ability to approve the agenda. Mr. Bowen said he had written bylaws for half-dozen organizations that he had been in and had studied the proposed bylaws, and he said he was taken by the State's Municipal Association's recommendations because they had specific recommendations for the role of the Chair and he thought the Board shouldn't depart from those

unless there was specific cause. He said what he thought was missing in the changes was the Chair representing the public body before other boards, commissions, and State agencies and thought that the Board would want the Chair to be the face of the group, in representation with other City or State agencies. Mr. Mahanna agreed and said that was lacking in the Board's current rules. Mr. Harris also agreed and thought it provided precedence for what was happening in other cities and towns and their organizations, based on Robert's Rules. Chair Chellman said the Board didn't have to follow Robert's Rules and that the Board had a lot of discretion, including when it came to signing plans, and that it was something the Board could designate, but it was a statewide custom that the Chair sign plans or that the Vice-Chair signs when the Chair was not available. Attorney Morrell said she thought what Mr. Bowen read from the Municipal Association was consistent with the City's practice that the agenda is developed between Staff and the Chair but there's no special provision for approval. She said as part of generating the agenda, there's consultation with the Staff, and a concern was that sometimes the agenda had additions at the last minute that added an extra burden for the Staff because then they needed to go back to the Chair. She said that was the reason she added the suggestion of the additional requirement that the Chair officially approve the agenda. Mr. Bowen asked if it was an administrative efficiency reason rather than a legal one. Mr. Mahanna said the law should override efficiency and if additional staff was needed to help the Planning Department and meet the Chair's requirements, that's where the money should be spent. He said that, according to the Charter, the Planning Staff works for the Planning Board and the Planning Chair is the head of the Planning Board. Ms. Conard said the Planning Staff worked for the City Manager and that she was part of the agenda review.

Chair Chellman said in the event of a conflict there should be someone, if not the Chair, who can resolve it. He noted that he resolved a conflict a few times within the last year without folks even knowing how it was resolved, and that it shouldn't be necessary. He said there should be a definition that the Chair or the Staff controls the agenda. Mr. Almeida said he didn't understand what was broken because Chair Chellman, as Chair, had multiple opportunities to review the agenda long before it was published. He said when he was the HDC Chair, the last thing he wanted was to be involved in establishing the agenda because it's a massive task. He said if there was a problem with the agenda, the Staff could reach out to the Chair but for the Chair to be responsible for the agenda would be very cumbersome. Chair Chellman said the only thing broken was the instance mentioned, that there was a conflict. He said it was unnecessary because there was a dispute over who had control over the agenda. He had said he had the final say in the agenda and was told that he didn't, so it caused a bit of a hiccup.

Mr. Mahanna said that, under Robert's Rules, the agenda is written up by the secretary and approved by the presiding officer or chairperson, but the adoption of the agenda for each meeting should be voted on by the majority of the assembly at the beginning of the meeting and only at the point is binding. He said therefore, it wasn't 100 percent the Chair. Chair Chellman said the Board would adopt the agenda at the beginning of the meeting and that it was practical on a day-to-day basis to just ask the Staff to prepare the agenda, and if they have a question, they would ask the Chair. He said it was just in the event of a disagreement about who gets to make that decision and it stops at the City Manager's desk. Mr. Almeida asked if the Board would officially accept or change the agenda at the beginning of the meeting, noting that the agenda was advertised. Chair Chellman said it was advertised but it was known that it might change. Mr.

Mahanna said the motion to suspend the rules for the benefit of people who didn't want to be at the meeting at 11:00 p.m. provided a level of flexibility to extend or put items at the front of the meeting and move on. Mr. Almeida said that could be abused as well, and it was further discussed. Councilor Moreau gave an example of the Planning Board never having to approve for site plan or subdivision completeness and it was not part of the agenda ten years ago when she was on the Board, but it changed when the Board members had questions as a Board, so now the Board votes on that so that the Planning Director doesn't get blamed. She said she didn't have a problem with keeping the rules the way they were but thought it would be a good thing to add to the agenda that there can be a discussion of the Board in the public forum and it would have to be the majority of everyone who wanted to make that change. She said in the past the Board had moved everything up that was postponed on the agenda at the beginning of the meeting and she thought there was no reason why that couldn't be done.

Chair Chellman concluded that the Board would adopt the agenda at the beginning of the meeting and that, as Chair, would make suggestions about moving agenda items around. The Board members agreed. Attorney Morrell said nothing in her suggestion prevented the Board from making a final approval and that, even without some formal approval at the beginning of the meeting, the Board was free to suspend its rules and adjust the agenda as needed. She said her only concern was the potential conflict with Staff and timing of getting the notices out to be published in time and then having to find someone to get a final approval. She said in the process of developing the agenda, there would not be a need for any additional approval because the Board would have agreed to the agenda. She said the process had gone smoothly in the last months without any formal rule that said the Chair had to give final approval, and she was just trying to avoid any additional burden. Chair Chellman said it would be a matter for formally adopting the agenda at the beginning of the meeting and would not suspend anything and would be just a part of the regular proceedings. Mr. Almeida asked if the Board had to reconsider the agenda at every meeting. Mr. Stith cited Section D, General Order of Proceedings, that said at each regular meeting, the agenda format shall be followed unless otherwise followed by the Board. He said he thought the Board already did that. Mr. Almeida said it used to be the order the agenda was in when the application was received. Mr. Stith said the new applications were time stamped. Chair Chellman noted the exception of when there were a few things that the Board might want to move up if there was a problem, which they did now.

Referring to Number 2, the Board discussed the Statute that said the Planning Board could say that it was customary in the State that the Chair signs the plan and the Vice-Chair signs it in his or her absence. Councilor Moreau said they always looked for the authoritative head of the Board to sign off on any plan that she did when she was doing a title search, otherwise it might be difficult. Attorney Morrell asked if the Board wanted to allow for the Chair or a designee to sign, noting that some other member of the Board could sign the plan in the Chair's absence. Chair Chellman said he thought it should be either the Chair or the Vice Chair.

Referring to Number 3, Chair Chellman said there was no desire for him or any Chair to spend City funds without Council approval and what he read required going back to the City Council afterward. Attorney Morrell said it was just a difference in language. She said right now it required City Council approval, which is what the City Code said, and she thought it was clearer to leave it the way it was. Chair Chellman said the only thing he could think that the Planning

Board had statutory approval over that the City Council didn't was the Master Plan, but the Council had to appropriate the money. Attorney Morrell said she was just suggesting that the language in that rule be specific, as opposed to more general where the term "applicable City Code" replaced "the approval of the City Council".

Mr. Mahanna brought up a scenario where the Board sometimes asked the applicant to provide a third-party consultant. He said there could be situations where a land use board would be interested in doing that and he didn't think it would be cumbersome to follow what the City Attorney said about having to go to City Council to hire a consultant to clear up a matter under a land use board. Chair Chellman said there was a Statute on that and that the applicant has to pay for a consultant and has to approve the budget and the consultant. He said the issue was about City funds that the City Council has approved and that the Planning Board would be spending, and that the only instance he could think of was the Master Plan. Councilor Moreau said she thought it was fine the way the City Attorney wrote it, and others agreed. Vice-Chair Clark asked how the contractual process worked in the City and if the contract would still have to be bound and signed if the Board wanted to go with a certain consultant to do the Master Plan. Chair Chellman said the contractual requirements of the City would have to be signed but it would add a signature from the Chair. Attorney Sullivan explained that the City had a form for a three-party agreement and that the contractor or engineering consultant would perform work as a client of the City but the developer would pay the bills. Chair Chellman said in this case the Planning Board had a formality in terms of a signature and it has to be signed by the City Council, the Legal Department and so on. He said it was separate but formed the allegiance between the consulting team and the Planning Board, which was important in a Master Plan process. Attorney Morrell said she didn't think there was a disagreement that the City Council has to authorize the expenditure of funds. Chair Chellman said the Master Plan was budgeted and went to the Capital Improvements Plan. He said if the Board had a consultant and went through a process of selection that would involve Staff and were ready to hire a firm and that principal came to the meeting, there could be a signature at the meeting, somewhat of a formality so that the firm knows they had been engaged. He said the legal steps to get the firm paid would then happen. Attorney Morrell agreed and said the Chair would sign the agreement with the consultants after a majority vote of the Planning Board granting such authority and in accordance with the applicable City Code, which was the approval of the City Council. Chair Chellman asked if it hadn't already happened in his example by virtue of it being part of the adopted agenda. Councilor Moreau said it had not because the City Council had to vote. She said even though something was budgeted, the money wasn't spent until the Council voted to spend it. Chair Chellman said the Council had nothing to do with the Master Plan under the Statute except pay the bill, so maybe it could only happen if the Board got authority from the Council before that signature event with the consultants and written that the Board would hire a certain firm for a certain amount and ask for authority to sign. Attorney Morrell agreed and said she added the approval of the City Council so that there wouldn't be confusion.

Chair Chellman suggested changing it to say that he as the Chair would seek approval from the Board and if granted, he would go to the City Council representing the Board to seek authority from the Council, and the Council would give the authority so that the Board would be armed at the meeting to hire the consultant. Everyone agreed that it was a good solution.

Section E – Quorum Requirements, E.2 Remote participation. Where in-person attendance is not reasonably practical for a Board member, remote participation may be allowed in the discretion of the Chair. The Legal Department said there was no provision in the State law for remote participation to be allowed at the discretion of the Chair; the Statute requires a majority vote of the Board members participating in the meeting. The Board cannot add requirements to their rules that are not authorized by State law. The revision limiting the number of members appearing remotely to no more than two members is not one of the provisions to the State statute. There is a provision permitting a meeting when a quorum of the members are not in person, which should be part of the Board's rules. The Legal Department said it would be easier to refer to the State statute.

Section G8 – Procedure for Public Hearings.

Part A - Public hearings of the Board shall follow the following general procedures with the actual times allowed and number and order of rounds of public comment, including remote participation, to be at the discretion of the Chair and announced at the commencement of the public hearing. The Legal Department said the provisions were inconsistent.

Part A.3 - Public comment to, for, or against the application or proposal. The Legal Department said the addition of rules for remote participation for “chat” or similar functions excludes that input from the record, but any comment made during the hearing must be part of the record.

The Board discussed the changes above. Chair Chellman referred to remote participation and said he read what the Municipal Association had strongly suggested in another publication, which was why he added the provisions. Attorney Morrell said she had cited the language of that Statute and that it was safer to stick with that language. Chair Chellman said he understood that but said it came up at a meeting that the Planning Board wanted the Chair to have discretion about it, so he added it for discussion. He said the Board was supposed to make the decision to allow remote participation and folks at that particular meeting weren't happy with that, so he put it the way he did as an addition. He said the clause about “with the discretion” could be removed. Councilor Moreau said it should only be the case if there are no alternates present to sit in the absent member's place. Ms. Conard said there were two alternates available that particular night, which frustrated people because they did not understand why the Board couldn't recognize the voting ability of those two alternates. Mr. Mahanna said he had prepared for that particular meeting that night at his hotel room and that he traveled for a living and had missed meetings before, and he didn't want that to go against his record. He noted that remote participation was allowed and encouraged during the pandemic. Mr. Harris added that the alternates that evening didn't have the background and preparation. Ms. Conard asked Attorney Morrell about emergency provisions during the pandemic that related to remote participation and how those changed. Attorney Morrell said she didn't think the State law anticipated remote participation until the pandemic, and that's where the Statute and the revisions to the Right to Know Statute came in. She said there was nothing to prevent the Board to vote on whether they wanted the absent member to participate remotely or have the alternates participate. She said her only point was that the Board had to carefully follow the language of the Statute that said it was up to the Board by majority vote if they made a finding that it was necessary.

Chair Chellman said that tied into the alternate question. He said there were two issues, 1) if the alternates are present, they would first sit and remote participation would not be allowed, or 2) if a missing regular Board member wanted to participate, it was a Board decision. He said the way he read the current rules, the Board couldn't adopt anything that night but could have a consensus on whether to use alternates instead of remote participation. Councilor Moreau said that at least to begin with, remote participation could be an option when there wasn't an available alternate. Mr. Almeida referred to the case where Mr. Mahanna participated remotely from his trip and said it could be allowed but thought making it a rule that alternates would be passed over would be a mistake. Chair Chellman said a regular member could request a vote of the Board, otherwise an alternate would be used. The Board members agreed, except for Councilor Moreau. Attorney Morrell said the Right to Know law said people present in the public should have face-to-face confrontation, but that only changed because of the pandemic. She said the State law was allowing it to continue but only when reasonably necessary. She said whether the Board stated it specifically or not, their vote would determine whether they thought it was necessary for a member to appear remotely if an alternate was present, and that would be on a case-by-case basis. Councilor Moreau said she would need to see the language.

Chair Chellman brought up the chat function through Zoom and thought that the Board should let people on Zoom know that their chat would not be part of the record and that they would have to speak to be part of that record. Mr. Stith said the chat function was disabled at public meetings. Chair Chellman said it was a good idea to tell people to not even try. He said texting by the Board members during meetings was also not permitted regarding deliberations. Councilor Moreau said it was disturbing to the public to see Board members texting and to not know what the members were texting, and that it was also distracting to other Board members.

Section H.5 - General Practice and Guidelines, Motions for Rehearing

*The Legal Department said State law does not expressly permit the Planning Board to entertain Motions for Rehearing. The law provides for a 30-day appeal period to the Superior Court or within a reasonable time period to the Board of Adjustment, however. The Legal Department recommended that the proposed Rule H.5 be deleted and replaced with: **H.5 Motions for Reconsideration.***

Attorney Morrell said they changed the language to "reconsideration" instead of "a rehearing" by looking at the law that's developing. She said the Board had the authority to reconsider their own decision as long as it was within the 30-day appeal period, but the Statute didn't provide having a formal rehearing. She said some of it was case law and that the Board had an inherent authority to reconsider their decisions because they wanted to fix them before there was litigation. Chair Chellman said he liked what was done with it and thought it would be helpful to the applicants. Mr. Samonas asked what the window of notice was for a rehearing or public notice. Mr. Stith said it would be called a special meeting because it had to be within 30 days. Chair Chellman said the way it was worded, it would be filed within 30 days but it would be on the agenda for the next regular meeting and it would be noticed that way. Attorney Morrell said the Board might have to work out practical problems depending on when the next regular meeting was and that the meeting might not always be within 30 days. She suggested changing it to say "earliest convenience." Chair Chellman said the language could be "upon receipt of a motion and file it

with the Staff for reconsideration, and if it's filed within 30 days, the Planning Board would take it up at the next regular meeting." Attorney Morrell said Legal could make that language clearer and the Board would consider any motion of request for consideration within a 30-day period, but that had to occur with or without a vote. Chair Chellman asked if would be a special meeting if two Planning Board meetings were 34 days apart and someone filed a motion for rehearing the day after a decision that they didn't like. Attorney Morrell agreed. Councilor Moreau asked when the 30 days would start tolling. Attorney Morrell said it would start the night of the vote.

The Board discussed the three rounds of comment. Attorney Morrell said it looked like the Board's edits for the time and order of rounds for public comment was at the discretion of the Chair but that it seemed in conflict with the rule that sets for the specific three minutes, ten minutes, and unlimited. Chair Chellman said the Board hadn't been doing that and that he was trying to write what they had been doing. Councilor Moreau said a person had to come up for the first round to speak at the second and third rounds. She said she thought by law that the Board could not restrict the time at the end, which was why the term "unlimited" was there. It was further discussed. Attorney Morrell pointed out that Legal's concern was due process and fairness, so it shouldn't change from meeting to meeting. She said anyone who came to any Planning Board meeting know how long they can speak. She said only those who speak in the first round would then have a second round and would have to speak to the issue. Chair Chellman said the first round should be a maximum of three minutes, the second round five minutes, and the third round five minutes with an extension if the speaker requested it.

Mr. Hewitt referred to 3H about the Chair being responsible to review, receive, and refer appropriate questions from the Planning Board staff and asked if it was consistent with other land boards. Mr. Stith said the BOA didn't do it. Attorney Morrell said for most boards, the request for Staff was to go through the City Manager and then to the City Council. She said the other requests went through the Board's Chair to the Staff so that the Staff wasn't inundated. Mr. Hewitt asked how that worked if he couldn't talk to Mr. Stith in the hallway or via phone about a Planning issue. Mr. Mahanna said it would overburden and that Mr. Stith had all the answers in the City's documentation. Chair Chellman said he thought it was part of the job.

Mr. Hewitt asked if the Board could get edits seven days before the meeting or some other reasonable time instead of seven minutes. Mr. Bowen asked if there was a difference between content questions and process questions and if it was appropriate to ask Mr. Stith process questions. Chair Chellman said the questions had to go through him.

II. ADJOURNMENT

The meeting adjourned at 7:25 p.m.

Respectfully submitted,

Joann Breault,
Secretary for the Planning Board