

**MINUTES OF PUBLIC HEARING
HELD BY THE PLANNING AND ZONING COMMISSION
MAY 18, 2020**

MEETING HELD VIA ZOOM

ROLL CALL:

Members Present: Eric Prause, Chairman
Patrick Kennedy, Vice Chairman
Michael Stebe, Secretary
Jessica Scorso
Jessica Poland

Alternates Present: Julian Stoppelman
Teresa Ike
Bonnie Potocki

Also Present: Gary Anderson, Director of Planning
Megan Pilla, Senior Planner
Nancy Martel, Recording Secretary
Timothy P. O'Neil, Administrative Staff Attorney

The Chairman opened the public hearing at 7:00 P.M. The Secretary read the legal notice when the call was made.

RESOLUTION TO TEMPORARILY AUTHORIZE THE GENERAL MANAGER, IN CONSULTATION WITH THE DIRECTOR OF PLANNING AND ECONOMIC DEVELOPMENT AND THE ZONING ENFORCEMENT OFFICER, TO SUSPEND OR WAIVE THE ENFORCEMENT OR APPLICABILITY OF CERTAIN ZONING REGULATIONS, WHICH IN HIS JUDGMENT WOULD IMPEDE OR PROHIBIT THE OPERATION OF CERTAIN BUSINESSES AND THE REOPENING OF CERTAIN BUSINESSES, INCLUDING, BUT NOT LIMITED TO, THE RESTAURANT INDUSTRY AND OUTDOOR DINING, PURSUANT TO THE STATE GUIDELINES AND RESTRICTIONS.

Mr. Gary Anderson, Director of Planning, introduced himself. Mr. Anderson stated that, at the beginning of May, the governor discussed the proposed reopening of portions of the Connecticut economy in a phased approach starting on May 20th, assuming important health metrics are met.

Phase One is to allow restaurants to have sit-down service outdoors only. The food and beverage industry in Manchester is important to the Town, with more than 200 food and beverage services. He noted that restaurants have been at the forefront of businesses being hit hard by the COVID-19 crisis.

Mr. Anderson reported that outdoor dining may not be allowed in certain towns, though Manchester has allowed outdoor dining for some time. Guidelines have been set up by the Connecticut Department of Economic and Community Development for outdoor dining, retail, offices, etc. He noted that, in the case of outdoor dining, the executive order stated that outdoor dining is allowed in spaces where it would not ordinarily be allowed by zoning, including parking spaces, public or private walks, and other areas that may be available. In addition, the governor limited occupancy of these areas to 50% and required social distancing of 6 ft. to continue.

Planning Department Staff put together a 2-pronged approach, Mr. Anderson said. The first is this public hearing. The second phase is an expedited permitting process, as per the executive order, involving several departments, which allows Staff to review the applications for public safety, public health, and related concerns.

Ms. Pilla reiterated Mr. Anderson's point that Staff worked very closely with several departments to develop the application. She noted that most, if not all, municipalities in Connecticut are taking a similar approach, which she detailed. It is worth noting that Mansfield and West Hartford reached out to Staff directly and requested to use the process Manchester Staff has developed.

Attorney Tim O'Neil stated that Staff knew that there would be some type of waiver of certain zoning regulations, which necessitated the drafting of a broad resolution. He coordinated with the General Manager, Scott Shanley; the Director of Planning, Gary Anderson; and the Zoning Enforcement Officer, Jim Davis in the process. When the executive order was released, the various departments put together the application process and the permitting process.

In reviewing the executive order, reported Attorney O'Neil, it does designate the "local enforcement official," such as a zoning administrator (in Manchester, the ZEO, Jim Davis), or a building code official (in Manchester, the Chief Building Official) as the local zoning official charged with the responsibility of signing off on the requirements that are being suspended. He noted that Ms. Pilla will provide a slightly different version of the resolution, which basically eliminates the reference to the General Manager, the Director of Planning, and the Zoning Enforcement Officer. It recites the exact language in the executive order, saying the local enforcement official will oversee the process and make any modifications, adjustments,

suspension or waiver of any of the zoning regulations that may be necessary to allow what the Town wants to accomplish.

Attorney O'Neil noted that, in general, the Planning and Zoning Commission should be made part of the process, being able to hear what is being done and take in any comments from the public, so the Planning and Zoning Commission could buy into the process. That was the purpose of presenting the resolution to the Commission for approval. He explained that there is a provision in the executive order that, if an application is denied or issued with conditions and the applicant is upset about either the denial or conditions, they can make an appeal to the Planning and Zoning Commission.

Mr. Stebe requested clarification that, the way the resolution is written, the decision power on any adaptations, waivers or exceptions is going to be held by the ZEO, Jim Davis. Attorney O'Neil confirmed that was correct. He further stated that Mr. Davis is going to take in whatever information he needs from the various departments, but the bottom line is that it will be his decision.

Mr. Anderson agreed with Attorney O'Neil. On the application and through the process, the Health, Fire, and Police departments are also included. According to Mr. Anderson, the ZEO's signature is legally required; the various departments have the opportunity to review and comment.

Mr. Stebe noted that, in the Commission's proceedings, public health, fire, and safety are not discussed as they have their own review process. He questioned Attorney O'Neil about the termination clause at the end of the resolution, explaining that his interpretation is that the authorizations contained in the resolution are speaking to the ability of the ZEO to make the decisions. He inquired whether there is anything in the resolution which would also terminate the decision at any specific time. For example, if a restaurant applies for and receives a waiver, is there anything in the resolution stating that the ZEO can make the decisions up until October 31st but any decisions the ZEO makes also expire at that time?

Attorney O'Neil responded that the last sentence is intended to do just that. The authorization expires automatically on October 31, 2020; it is a sunset clause. In Attorney O'Neil's opinion, there will be subsequent executive orders that may either extend that date or shorten that date. The resolution has been worded so that it can also be extended or terminated on an earlier date by an action of the Planning and Zoning Commission.

Mr. Stebe noted that the resolution is not referring to an application; it is solely talking about the power of the ZEO to make a decision.

Attorney O’Neil stated that, when the application is acted upon and the approval is given, it is his understanding that there will be some language referring to the expiration date.

Ms. Pilla explained that the approval given out with the ZEO’s signature, as well as the other authorizing signatures, specifically states that it expires on October 31st.

Mr. Stebe concluded that the actual application process lays out the duration of the waiver and includes the same language as in the resolution.

Ms. Potocki offered her opinion that the resolution is very broad in the first three paragraphs and then goes into the process. She surmised that this resolution has to do with one executive order and can subsequently be terminated or revoked. Ms. Potocki questioned whether there is a way to include that language, making it dependent on the governor’s executive order. Additionally, she questioned why the Zoning Board of Appeals would not hear appeals of the ZEO’s decision.

Attorney O’Neil responded that the Zoning Board of Appeals will not be part of the appeals process because that is what the executive order states; such appeals would go before the Planning and Zoning Commission.

Ms. Potocki asked Attorney O’Neil whether the resolution’s format was provided by General Counsel for OPM or the governor’s office. Attorney O’Neil stated that he has done many resolutions over his years with the Town and that the “whereas” clauses are just introductory to describe the situation. The details are in the “therefore” paragraph, which he crafted.

Ms. Potocki inquired whether the Town has other resolutions in response to executive orders from the governor’s office. Attorney O’Neil informed her that there are other resolutions. One of the earlier executive orders regarded assisting taxpayers with the payment of the upcoming July 1 tax bills. The order requires towns to choose either to delay the payment of the bills by 90 days without interest or to make the bills due on time with interest rates for delinquent bills much lower than the existing 18% interest. He drafted a resolution for the Board of Directors, which made the choice to defer the payment of tax bills for 90 days without interest.

Ms. Potocki referred to the last paragraph stating “enforcement official.” Attorney O’Neil responded that he is unaware why the language is “local enforcement official,” though he surmises that not every town has a zoning enforcement officer. There may be municipalities where the power of enforcing zoning regulation lies with another official. He stated that the executive order specifically mentions a building official as opposed to a zoning official and he surmises that the intent is that the individual who would make the decision pursuant to the executive order is a local enforcement official, whomever that may be. Attorney O’Neil

commented that, in Manchester's case, there is a Zoning Enforcement Officer, a zoning administrator, who will be making the decisions.

Ms. Potocki questioned whether there is a reason why Manchester's resolution cannot instead refer to the zoning enforcement officer. Attorney O'Neil stated that he made it absolutely consistent with the executive order. He did not anticipate a problem with substituting the phrase "zoning enforcement officer," although going forward, if for some reason Mr. Davis was unable to perform his duties, there is broad enough language in the resolution to have, perhaps, the Chief Building Official sign off.

Ms. Potocki asked if the resolution could state "zoning enforcement officials," because there will be many involved in the sign-off of the permit, including the Fire Marshal and Police.

Attorney O'Neil responded that the bottom line is that, ultimately, there needs to be one individual who signs off on it. He stated, referring to Ms. Potocki's earlier question, at the very end of the last sentence where it states "By the action of the Planning and Zoning Commission..." he would add the following language, "or by an executive order of the Governor of the State of Connecticut."

Mr. Prause questioned Attorney O'Neil as to why the resolution is necessary. He understood that Attorney O'Neil wants some jurisdictional clarification from the Commission, indicating that the Planning and Zoning Commission is agreeing with the executive order.

Attorney O'Neil affirmed Mr. Prause's statement. He commented that if Mr. Prause were asking the question at this meeting, as opposed to two weeks ago, whether the Commission absolutely needs to pass this resolution in order for the Planning Department and the other various departments to proceed with the applications from restaurants, the answer is no. The executive order speaks for itself and gives everyone who needs to act in this regard the necessary authority. Attorney O'Neil stated that he and General Manager Shanley decided that this would be a way for the Planning and Zoning Commission to buy into the process and give public support for the process.

Mr. Prause agreed that, whenever there is a declaration of an emergency, when bodies that are normally vested with power recognize by a resolution that they are acquiescing that power, that is reasonable. He referred to Attorney O'Neil's references to the appeal process, and if someone is denied their plan by the local enforcement officer, that would trigger an appeal process that would go through the Commission. The Commission would not have to hold the normal public hearing. He noted that is not written in the resolution but is in the executive order.

Attorney O'Neil reported that such action will be consistent with the governor's executive orders in general, and executive order 7MM specifically. The intent is to comply with all of the provisions of the executive order.

Mr. Prause assumed that Attorney O'Neil does not intend the resolution to clarify who the local enforcement official is, though that is the language in the resolution, and Attorney O'Neil agreed. Mr. Prause inquired about the paragraph beginning "Now, therefore, be it resolved..." and asked whether Attorney O'Neil interprets any of this to go further than what is in the executive order. Mr. Prause referred to the statement, "the Planning and Zoning Commission of the Town of Manchester hereby authorizes the applicable Local Enforcement Official to suspend or waive the enforcement or applicability of certain zoning regulations, which in his or her judgment would impede or prohibit the operation of certain businesses and the reopening of certain businesses." He questioned whether Attorney O'Neil's intent is to copy the language word for word from the executive order or to vest more power in the local enforcement officer as he sees fit.

Attorney O'Neil responded that he is trying to mirror the executive order, which does lead him to believe that there is a good reason to act on the resolution. The executive order refers not only to outdoor dining and restaurants serving outdoor meals, but also to other businesses as the State reopens. There are other businesses that may need some flexibility in order to reopen with regard to zoning regulations. Attorney O'Neil reiterated that the primary focus of this meeting's action is to assist with the reopening of restaurants for outdoor dining. The executive order does contemplate that there will likely be a need to be flexible with zoning regulations as other businesses reopen in accordance with the governor's executive orders.

Mr. Prause stated that he reread the executive order and the only time it applied to anything other than outdoor dining, in his opinion, is the reference to outdoor dining and retail. He speculated whether that just meant retail as in the process of paying for food. The scope does limit it to outdoor dining, as the title of the executive order talks about permitting expanded outdoor dining. It does not clarify that the scope is beyond that.

Attorney O'Neil stated that, based on his interpretation of the executive order being dealt with at this meeting and other readings of executive orders that are in place or coming soon, he believed that it is not necessarily going to be just outdoor dining that may be cause for having some flexibility in the zoning regulations. He reported that he crafted the resolution to specifically focus on outdoor dining, but also mention the fact that there may be other businesses that are going to require the same flexibility. Any action taken, he noted, must be consistent with the governor's executive orders in general and 7MM specifically. He stated that he tried to write the resolution in a way that will not require the Planning and Zoning Commission to act on a new

resolution every time an executive order is issued that addresses the reopening of other types of businesses over the next few weeks or months.

Mr. Prause pointed out the phrase “but not limited to,” in the third “Whereas,” clause referring to businesses, and the language stating, “but not limited to the restaurant industry and outdoor dining,” in the “Therefore, be it resolved” clause. He speculated that is a consideration for the Commission after the public hearing, as he is worried about the scope of leaving that wording in the resolution when the Commission is discussing this one executive order.

Attorney O’Neil responded that the safeguard against Mr. Prause’s concern would be the fact that any actions the local enforcement official takes must be consistent with the executive orders issued by the governor. Hypothetically, if in two weeks there are subsequent executive orders regarding hair salons and barber shops that call for waiver or suspension of a zoning regulation, the local enforcement official, by virtue of this resolution and the executive order itself, would have the power to comply with the executive order. Attorney O’Neil was confident that the Zoning Enforcement Officer, Jim Davis, will not do anything other than comply with the governor’s executive orders, this specific one or any earlier or subsequent orders, when it comes to relaxing zoning regulations. The bottom line is that the local enforcement official can only do what the executive order permits.

Attorney O’Neil reported that, when the executive order was released, there were comments by one or two attorneys on the Connecticut Association of Municipal Attorneys listserv that the local enforcement official always has “prosecutorial discretion to either enforce or not enforce the zoning regulations as he sees fit.” The response to that was overwhelming that that would not be the path in any instance.

Mr. Prause concurred that the resolution would not trump any state statutes.

Mr. Anderson referred to Section 2 of the executive order, particularly 2a, which specifically mentions display of goods, which assumes retail. In his opinion, there is some inclusion of sale of retail outdoors and not just outdoor dining.

Mr. Stebe commented that the important “Whereas” statement is the very last of the executive order in the Commission members’ packet stating that there will be a subsequent order providing for increased economic and recreational activity. The phrasing of this resolution has to include that open-ended statement to cover the need without having to return for future waivers; it allows that flexibility. Mr. Stebe praised the resolution, stating that there is a very professional set of individuals working at all levels on Town Staff who would not simply drop regulations in an attempt to reopen businesses.

Ms. Potocki questioned Attorney O’Neil whether, “or by present and preceding executive orders from the Governor of the State of Connecticut,” should be added at the very end of the resolution.

Attorney O’Neil responded that, before it is acted upon, the resolution should be amended at the very end of the last sentence, to read “...upon an earlier date by the action of the Planning and Zoning Commission or by an executive order of the Governor of the State of Connecticut.”

Mr. Kennedy stated that the Commission should not deliberate over the title of the governor’s executive order because the actual text of the order trumps what is in the title. Additionally, the Commission cannot exceed the governor’s orders. Except for the addition to the end of the resolution concerning further gubernatorial orders, his opinion is that the language should be kept as is because he agrees with Attorney O’Neil that the Commission should track the language of the executive order as closely as possible and avoid any inadvertent variances with that.

Mr. Stoppelman commented that the executive order covers more than restaurants and the language should remain as written.

Mr. Prause opened the public hearing to public comments.

Mr. Adam Delaura, an owner of Labyrinth Brewing Company, voiced support of the resolution, stating that this should assist the Town in reopening according to the governor’s regulations.

Mr. Keith Beaulieu, owner of Main Pub Restaurant, 306 Main Street, introduced himself. He also supports the resolution for the success of all the restaurants in town. The impact of the closure on the restaurant business has been tremendous, he reported. His hope is that the resolution will make it easier for the restaurants in town to reopen, and he noted the owners will incur costs in doing so. Mr. Beaulieu pointed out that this resolution would be a great starting point, and hopefully the next step will include indoor dining as outdoor dining is weather-dependent.

Mr. Stoppelman asked Mr. Anderson how many applications have been received. Ms. Pilla stated that there have been 18.

MOTION: Mr. Stebe moved to close the public hearing. Ms. Scorso seconded the motion and all members voted in favor.

The public hearing was closed at 8:00 P.M.

I certify these minutes were adopted on the following date:

June 1, 2020

Date

Eric Prause, Chairman

**NOTICE: A DIGITAL RECORDING OF THIS PUBLIC HEARING CAN BE HEARD
IN THE PLANNING DEPARTMENT.**