

**TOWN COUNCIL MINUTES
ORDINANCE COMMITTEE
Town Hall Council Chambers
September 22, 2020, Tuesday
Zoom # 863 7156 3045**

Present: Kenneth DiFazio, Chairman
Brian Dwyer, Vice Chairman
Rebecca Haugh, Councilor
Christopher Heffernan, Councilor
Arthur Mathews, Councilor

Also Present: Kathleen Deree, Town Clerk
Joseph Callanan, Town Solicitor
Robert Luongo, Planning Director
Eric Schneider, Principal Planner
Greg Agnew, Planning Board

Recording Secretary: Mary Barker

Chairman DiFazio called the Ordinance Committee meeting to order at 6:02 PM. Clerk Kathy Deree called the roll with all members present.

**20 100- Citizen Petition-Request to Change Zoning Ordinance Section 120-64.7.1-
Billboard Relocation Overlay District**

This measure was referred to the Ordinance Committee on September 8, 2020. The chair deferred to Solicitor Callanan to explain the memo he sent that the members received just prior to the meeting. The solicitor responded that he forwarded a memo to the chair of the Ordinance Committee; copied to the town council president, members of the Ordinance Committee and the Weymouth Planning Board.

Solicitor Callanan read the memo's contents; that the petition is legally invalid and his opinion is that the committee should not take it up:

"I wish to bring to the attention of the Ordinance Committee and the Planning Board legal infirmities of the proposed zoning measure, 20-100, Citizen Petition-Request to Change Zoning Ordinance Section 120-64.7.1 - Billboard Relocation Overlay District. I wish to share only my legal opinion, and I have no position of the merits of the proposal.

"State law prohibits a municipal legislative body from considering for two years a similar proposed zoning ordinance after a previous unsuccessful effort to change that same zoning provision. G. L. c. 40A, § 5, sixth paragraph. The statute reads as follows:

"No proposed zoning ordinance or by-law which has been unfavorably acted upon by a city council or town meeting shall be considered by the city council or town

meeting within two years after the date of such unfavorable action unless the adoption of such proposed ordinance or by-law is recommended in the final report of the planning board.

“Last year, a similar citizen petition, Amendment to Zoning Ordinance-Billboard Relocation Overlay District-Citizen Petition. On November 19, 2019, the Planning Board unanimously recommended to reject this measure. On December 2, 2019, the Town Council failed to recommend passage by two-thirds vote.

“On September 2, 2020, more than ten registered voters filed with the town another citizen initiated zoning amendment, measure 20-100. This measure sought (i) to repeal subsection (c) of section 120-64.7.1; and (ii) to require a special permit for an electronic billboard.

“In my opinion, G.L. c. 40A, § 5, sixth paragraph, bars the Town Council from considering measure 20-100. Recently, the Massachusetts Appeals Court concluded that ‘proposed ordinances or bylaws are the same for purposes of G. L. c. 40A, § 5, sixth par., if they share the same fundamental or essential character, with little substantive difference.’ *Penn vs. Barnstable*, 96 Mass. App. Ct. 205, 211, (2019), *review denied*, 483 Mass. 1108 (2019) (copy is attached).

“In that case the court also found that the statute seeks ‘to prevent the constant forcing of ...questions which have been rejected.’ *Penn*, 96 Mass. App. Ct. at 211. Both measure 19-109, completely, and measure 20-100, partially, sought to ‘negate, [] essentially the same provisions [as a previous measure].’ *Id.* Therefore, if the town were to enact this measure, any reviewing court would almost certainly annul any adoption of the amendment.”

Attached to the memo was the case he cited.

Chair DiFazio asked if from the solicitor’s perspective, they should have no discussion of the measure currently before the committee? Solicitor Callanan responded affirmatively; and said ultimately, if the Council was to adopt the measure, a reviewing court, relying on *Penn*, would see that the previous measure sought to appeal the entire section of the billboard overlay district, and this measure seeks to repeal some of it. He reviewed the aspects of the *Penn* case. The similarity between fully repealing it first and partially repealing it second correlates. Applying *Penn*, they are substantively the same.

Chair DiFazio asked where it leaves the committee with regards to amending this particular ordinance, in sections, so they’re not very similar? One section could be within the 2019 measure; one could also be in the 2020 measure. What if they eventually want to deliberate a proposed change that isn’t exactly the same and is potentially done piecemeal? Will they be permitted to do that?

The solicitor responded that the difficulty with that would be what type of change is proposed, unlike what was rejected? For example, one of the more recent zoning changes

that the Council faces were those that included technical amendments to the commercial corridor overlay district, which was passed. In that case you could change something within the two years. If rejected, essentially there would be a two year freeze on changes to similar matters related to that.

The chair asked if for an example, what if a proposal comes before the Council within the near future, and the only issue proposed is an elimination of section C, to be replaced with a new section C, would they be able to deliberate it?

The solicitor responded that the biggest problem with that is the repealing before and the repealing after. If the action is to replace something, it is a better argument, but he would have to see what the replacement is. Here, it's clear. They were proposing to repeal all and now they are repealing some of them. It's pretty clear that it's problematic. He would need to see what is being amended to compare it to the repeal. It was noted that for two years they would be prohibited from repealing or amending any part of something that's been passed.

Chair DiFazio responded that they should have the capability; as times change, and if there was something happening in the community, as it appears to be now, that really warrants some changes to this particular ordinance- just because of the research cited here, they can't address it; you can't change one part of it until the two years is up. If they can't do anything for two years on this particular ordinance, the citizens will not be satisfied. He would like some clarity so they are hearing the same thing he is.

The solicitor responded that he is not saying there is no chance; the area of law that was cited are the best cases to look at what are the permissible attempts to amend after it has been rejected. It involves initiative petitions that the attorney general would certify. This is a process every two years with the AG's office; they review questions to go to ballot to see if they fit within the initiative petition limits. Some things can be amended even if they were previously rejected. There are those cases that arise and were litigated by the SJC. He will research what was litigated by the SJC. Could there be further amendments to that section within the next year and a half? Yes, but that contours those cases involving litigation every two years in the municipal initiative questions. He hasn't researched those completely to determine the contours of what is and what isn't, but he knows there are a handful of cases which were litigated that further explain it.

The chair opened it to questions from the committee members.

Councilor Haugh noted she received the memo at 5:35 PM, as she was setting up the meeting and can't simply process M.G.L. Ch. 40 § 5 to compare to this situation. One concern is that these residents appeared before the Council on August 18th, and were referred to M.G.L. Ch. 40 § 5 for guidance. She is concerned they weren't told at that time, when they were doing the legwork, about this particular issue. If anything, she suggested it should be tabled until the members have had a chance to digest this new development. She is not comfortable dismissing this here and now, because of this memo they just received.

Councilor Heffernan agreed; he does not think they should completely dismiss this issue. He has spoken with several constituents, including Ms. Swain, and her neighbors. They need to focus on exploring all of their options – it may mean reaching out to the Attorney General’s Office for them to issue an opinion as to what they can and cannot do going forward. They need to do right by these neighborhoods and make sure they cover all their bases; and all parameters that they can to reach the best solution for the constituents. He is not in favor of dismissing this from this committee. They will need to come back to it. He thinks they will need more than one meeting to deal with this issue and they need a diversity of opinions as to their parameters. He is willing to look at every avenue available to them.

Councilor Mathews noted they received this at 4:30 PM today. He wished they had received it sooner. He hasn’t read all seven pages yet. First and foremost, they should have Ms. Hachey provide the document to any constituent that wants it. While he hasn’t read the entire document yet, in reading the first 2 pages and in the solicitor’s opinion, under G. L. c. 40A, § 5, sixth paragraph, it appears to bar the Town Council from considering measure 20 100. If a motion is made to table it, it cannot be discussed. Talking further or obtaining a legal opinion can’t happen if it’s tabled. If the solicitor indicates that they are barred from considering it, he doesn’t know what they can do with it. He wants to start taking testimony from constituents but can’t and he wished they had known about this sooner. It’s not on tonight’s agenda, however, there he noted that there was another topic subject to the matter that Mr. Delaney brought before Council under Resident and Community Comment and asked to have referred to the committee. It was referred and he was surprised that it was not on the agenda. It could have been discussed. That matter was also referred and he doesn’t think they are precluded from discussing that. He is willing to take it up now but wants them to be cautious about proceeding with measure 20 100 at this time to avoid ending up in a legal quagmire. He suggested they include it on an agenda for discussion another night.

Vice Chair Dwyer endorsed what Councilor Mathews said concerning being careful about the legal opinion from the solicitor. The neighbors are very concerned about the issue and it may be wise to discuss at a later date, so they can digest this and obtain advice as needed, all while following the legal advice they have been given.

Councilor Heffernan agreed and said if they switch to the other topic, broadly it would be more appropriate. They need to explore all options to remedy this situation. If this is something that is not legally palatable, they need to determine what they are able to do.

Chair DiFazio said they will not discuss this measure any further. It will remain as an item on their agenda going forward. The second matter relating to the billboard ordinance and billboards in general was inadvertently left off the agenda; because it is not on the agenda, they cannot discuss it at this time. They are precluded from discussing the issue the solicitor brought forward. He will place Mr. Delaney’s issue on an agenda for next week. He suggested meeting at 6 PM next Tuesday (September 29, 2020). He will have both matters on the agenda, in case an update is provided. The committee spent many

months on this issue, and it seems at this point that they have relevance as to whether they have gone forward or backwards since December, 2019. The issue needs to be revisited. Councilor Mathews said it will give the citizens a chance to read it as well.

Councilor Mathews added that it will give the public a chance to read the 7-page memo received at 4:30 PM today from the solicitor, and his opinion. Any constituent who wants it may reach out to the Council Office in the morning. He also suggested the chair reach out to the office to obtain the specific language in Mr. Delaney's address to the Council under "Resident and Community Comment". It could be the general language to include a range of what he brought before Council.

Councilor Haugh asked, because this is such a complex and unique situation, can they discuss the status of the town contract and any amendments at the next meeting if they are not discussing the current state or any changes that might have been? It seems they need to bring the entire issue back; not only Mr. Delaney's comments and this measure 20 100, but the entire thing. It is her suggestion since there are a lot of updates they should be allowed to talk about them at the next meeting.

The chair concurred. Mr. Delaney will have full rein to discuss anything and everything that has taken place since November, 2019. He anticipates it will include what changes have been made; what has taken place, the agreements between the parties and any other information about what has taken place since November 2019 to date. Councilor Haugh suggested they not limit discussions to Finnell Drive, but include input from the Century Road residents.

The chair apologized to the constituents; he expected a long meeting, and will schedule the next only a week away.

ADJOURNMENT

Councilor Mathews made a motion to adjourn, at 6:33 PM. Councilor Mathews withdrew his motion to adjourn.

Solicitor Callanan suggested they include the Citizen Concern item first in order on the agenda. The chair agreed.

At 6:34 PM, there being no further business, a MOTION was made by Councilor Mathews to adjourn and was seconded by Councilor Haugh.

A roll call vote was taken:

Councilor Haugh-Yes, Councilor Heffernan-Yes, Councilor Mathews-Yes, Vice Chair Dwyer- Yes, Chair DiFazio- Yes. UNANIMOUSLY VOTED.

Respectfully Submitted by Mary Barker as Recording Secretary

Approved by Kenneth DiFazio as Ordinance Committee Chairman
Voted unanimously on 5 October 2020