

**SPECIAL MEETING
BOARD OF MAYOR AND ALDERMEN
(PUBLIC HEARING – ZONING AMENDMENTS)
February 6, 2024 at 6:30 PM**

Mayor Ruais called the meeting to order.

Mayor Ruais called for the Pledge of Allegiance, this function being led by Alderman Long.

A moment of silence was observed.

The Clerk called the roll.

Present: Aldermen Morgan, Goonan, Long, Fajardo, T. Sapienza, Kantor, O'Neil, Levasseur, Terrio, E. Sapienza, Burkush, Barry, Vincent, Thomas

The Clerk presented the proposed Zoning Ordinance change:

“An Ordinance amending the Zoning Ordinance, Chapter 155 of the City of Manchester Code of Ordinances, to provide reasonable accommodations to disabled persons by defining “disability” and adopting RSA 674:33, V.”

Mayor Ruais requested that the Director of Planning and Community Development make a presentation.

Jeff Belanger, Planning & Community Development Department, stated as Mike said, this is a public hearing regarding proposed amendments to the Manchester zoning ordinance. In your packet this evening you have the exact language of that proposal. You also have a letter that goes into some detail about what the amendments would do and their significance. I am not going to go into all the detail but I will give you a quick summary. The purpose of this amendment is to amend the zoning ordinance to enable the Zoning Board of Adjustment grant what are called reasonable accommodations for people with disabilities. The federal laws at issue here that are being incorporated into this zoning ordinance are the Fair Housing Act and the Americans With Disabilities Act. Those laws require that all municipalities grant what are called reasonable

accommodations from their zoning ordinances. When doing so, it would enable disabled individuals to have an equal opportunity to use and enjoy their property. That is the federal mandate but the federal laws do not describe an exact process for how that reasonable accommodation needs to be provided and that process is detailed in state law. That is the state law adoption that is part of this amendment process. The way that the state law works is that a person who is disabled can apply to the Zoning Board of Adjustment and can request a variance as part of the reasonable accommodation process. That variance needs to only meet four of the usual five variance criteria. Normally anyone applying for a variance has to meet five criteria but the reasonable accommodation process established by the state allows a disabled person to meet four rather than five; so it is an easier path to a variance. That is the reasonable accommodation process set out in state law. I think it is important to note that these laws that we are talking about, federal and state laws, already apply. The City of Manchester already follows these and all municipalities in the state of NH follow these and are bound to follow them as they are already existing state and federal law. The adoption of these proposed amendments doesn't really have a practical or legal affect. The Zoning Board of Adjustment today already uses this process. They have in the past and they would do it again whether this was adopted or not because that is the law. So, the purpose really of adopting these amendments are first it enables people in the City of Manchester and members of the Zoning Board Adjustment and applicants to the Zoning Board of Adjustment to have a clear understanding of what the law is. It is printed in black and white in the zoning ordinance. We do this in a number of other instances in the zoning ordinance where we take existing state law and put it in our ordinance because it is easy to find. The other reason is that it brings the zoning ordinance up to the current state law. As I said, this practice is already going on and these laws already exist and we want the zoning ordinance to reflect that. That is the purpose behind these proposed amendments and that is why the Planning Department, Solicitor's Office and our outside counsel are all recommending that you adopt these proposed amendments. That is a brief presentation and I would be happy to answer any questions.

Alderman Terrio stated we heard this in committee and maybe I was confused but you are saying we are adopting federal and state law correct.

Mr. Belanger responded I am saying that we are talking language from federal and state law and putting it into the Manchester zoning ordinance.

Alderman Terrio replied yes and maybe I misunderstood so let me just read this. We are now adding individuals that are in recovery from chemical dependency.

Mr. Belanger answered yes.

Alderman Terrio asked so you are saying that federal law and state law have already defined a disability as somebody...so that is codified in federal and state law that somebody who is in recovery from chemical dependency...so we are taking the exact words and verbiage.

Mr. Belanger replied yes and let me be clear. There have been a couple of amendments to the definition section, well one to the definition section and one to the process section, that are slightly different. One is different from the state and one from the federal law. There have been a few changes and that provision that you just identified is the one change on the federal side. That is not a legally significant change in that federal courts have all recognized and the Fair Housing Act and the Americans With Disabilities Act recognizes that mental impairments and mental disabilities are treated as a disability under the definition in federal law just as physical disabilities are and an addiction to a controlled substance or addiction to alcohol is considered a disability under the case law. So, the federal law does recognize chemical dependency as a disability.

Alderman Terrio stated just to clarify, it sounds to me like you are saying it is not necessarily federal law but it is in the case law.

Mr. Belanger responded federal cases.

Alderman Terrio asked but has the federal law codified this language. I am not talking about case law, I understand that. Has federal law codified this language?

Mr. Belanger answered there is not a direct reference to chemical dependency in the ADA or FHA but it is absolutely clear in the case law as our outside counsel has advised us in the non-public session we had. I believe they mentioned that.

Alderman Terrio asked so because there are different federal jurisdictions and some of them we don't have to follow because it is not mandatory, do you know which federal jurisdiction.

Mr. Belanger replied I know that there have been a number of them that have but I don't know if it is this one. What I can tell you is that I have been advised that whether that language is there or not, the addiction to a controlled substance is protected as a disability. So, if this Board were interested in striking that language, it would not have any practicable effect on this ordinance.

Alderman Terrio asked has the City of Manchester been sued because we don't have this language currently in our ordinances.

Mr. Belanger responded as you are aware, the City of Manchester is involved in multiple federal cases regarding sober houses. Whether it is about that particular provision, I don't think we should get into and off the top of my head I don't know. If we are going to get into particular litigation, I would recommend recessing to meet with legal counsel.

Alderman Levasseur stated this is a big leap because you already said that everything is codified and we have to follow it anyway yet you are here before this Board asking for a vote and I don't understand why we have to take the vote if it is codified and the rule of the land. Boise is a federal case and probably 90% of this country doesn't follow that and they don't have an ordinance in there...of course only Manchester decided to put it in but not another town or city in this state has codified it or put it in their ordinances.

You say it is case law and they are asking us to...the state hasn't codified it. You say it is part of the federal and state law but I don't know if it is codified in an RSA as far as the particular issue of chemical dependency being a disability.

Mr. Belanger replied to be clear, if you look at your packet and the ordinance, there is the top language that is bolded with the definition of disability. That comes from federal law. The bottom language that is bolded, which is the process side of it, comes from state law.

Alderman Levasseur asked right and we are adding that in as a city and I don't know why that doesn't violate the Tenth Amendment rights unless all of the sudden the federal government decided that they were going to overtake every single housing issue and ZBA issue and Planning Board issue from towns and cities and states. I don't know if this has been challenged anywhere. Boise hasn't been challenged for how many years? It was at least a decade or maybe more and now it is finally being challenged. You are asking us to, and again I don't know this to be a fact but I am assuming the reason you want this extra language added in is for the sober homes to protect us from lawsuits but I don't know want to jump the shark...I don't know where the AMA studies are and I don't know which doctors made a decision that chemical dependency is enough to be able to say I have a...just one person has to have a chemical dependency to be considered disabled to be able to turn three-family buildings or at least cut it from five down to four criteria to get a variance. To me, I understand the disability issue of it. We all know what the ADA has done and how it has changed buildings and streets, etc. but this particular addition on a chemical dependency is really just a bridge too far and I don't know why we...well I know why we are the ones that are getting pushed to do it because we are the dumping ground and we are the place that everybody has to come to with every single social issue because supposedly we have hospitals and we have buses here so they keep dumping all of this stuff in our city and our city is sick of it. So, you are telling us that we have to do this but I don't think we have to add the extra language in on the chemical dependency issue. Maybe I am wrong but I don't want to, that's for sure.

Mr. Belanger responded I am not telling you that you have to add that. If you want to strike that language, I don't think that is going to have much of an effect. That is something we would want to talk to our outside counsel about. As you know, they came and talked to us and walked through the issues in litigation which I don't want to get into detail about here in public session. They are the ones who are litigating these and they are the ones who are very much into the details of this so we could have them back again if you would like. We could table this and continue. My understanding is that language and the amendment regarding the change to the state law language that is in the bottom section were both made to put the city in a better position should future litigation occur. It is putting us in a better position if something else happens. That is why that language was changed. I can explain the amendment to the state language if you would like but that is the intent. If you want to hit pause and...

Alderman Levasseur interjected we are always the first place in the whole state to add that extra language in. Has Nashua codified chemical dependency as a disability?

Mr. Belanger answered I would need to look at their language. I don't have that in front of me.

Alderman Levasseur asked is this something that has to be done right away as far as a vote. There is no rush to get this done tonight?

Mr. Belanger replied I don't want to get into too much of the litigation part of this but I think it would be advantageous but again we can certainly pause and have our outside counsel back again to talk more about litigation strategy beyond what we have already discussed.

Alderman Levasseur stated we did hear from counsel and they gave us a very good explanation of it but it doesn't mean that we have to agree with it. Is there an actual case that you could point to or send us a link for the actual position that chemical dependency is a disability? Is there an actual case on that particular issue or just...we already know the disability language is something that the feds would probably have

power over the states and municipalities on but the particular issue of now reducing the criteria down to four because of this add-on, is there case law on that particular point?

Mr. Belanger responded the reduction of five down to four is a NH specific issue because that is from state law. I don't know that there is a First Circuit or NH District Court case directly on that issue.

Alderman Levasseur asked or even a state case.

Mr. Belanger answered this would generally be moved to federal court, I think, because it is a federal law issue. I doubt there is a state case on it but again I am not the lawyer doing the litigation so I wouldn't be the one to ask quite frankly.

Alderman Vincent stated if I may, one of the statements in here that we are adding in the first part says "including being in recovery from chemical dependency." Just for clarity, what would constitute recovery in that case?

Mr. Belanger replied it would be not currently using a controlled substance but currently addicted to a controlled substance. That is in recovery.

Alderman Vincent asked so it could be one day.

Mr. Belanger answered yes.

Alderman Vincent asked do you see why I am asking this. I think it just opens a book and is not clear. I get it but it follows that by saying "a record of such impairment." What constitutes a record? Is it something from an institution or some kind of documentation from a hospital or something like that? I don't know if it is going to get that deep or maybe I am getting too deep but it raises a question because we are adding these words to something and I just want to make sure when people look at it, because we are trying to bring clarity...maybe you can help me understand that.

Mr. Belanger responded as far as “be a record of such impairment”, that is verbatim from the Fair Housing Act and the Americans With Disabilities Act. That is not anything that was added. I think it would mean any record like any record from a court or a prior place where someone was receiving treatment or any record that would indicate that that person is in recovery. That cannot be used against that person to prevent that person from doing something like renting an apartment or applying for a job or having access to a piece of property that they would otherwise be able to get but they can’t because of a certain zoning restriction.

Alderman Vincent asked so tonight we are voting on this verbiage so if we said no and we push this back, just to be clear, we are still following under the federal statute correct.

Mr. Belanger answered yes. Whether you adopt this ordinance or not, it does not change the process that the Zoning Board of Adjustment has to follow.

Alderman Barry asked Jeff just to be clear, you are in favor of this right.

Mr. Belanger replied yes. I am as is the Solicitor's Office and our outside counsel. We all believe that this is an appropriate measure for you to pass.

Alderman Barry asked do you think that if we delay this and have them come back, we are going to hear something different than what we have already heard.

Mr. Belanger asked ask the outside counsel to come back.

Alderman Barry answered right.

Mr. Belanger stated I don’t want to speak for them but I highly doubt it.

Alderman Levasseur stated you brought up something interesting and I am not sure if I misheard this but you said when renting an apartment. This is a zoning ordinance that

you are talking about, not a landlord/tenant ordinance. I can't discriminate based on disability, right?

Mr. Belanger replied right.

Alderman Levasseur asked so if we add this extra language in creating a disability that hasn't been codified but chemical dependency is...so if somebody rents an apartment from me and I see track marks all up and down their arm and assume that they are an addict or whatever and I am not saying me personally but a landlord looks at that and then they cannot now discriminate on the fact that the person is probably a drug addict using needles. If we add that language in, does that change the definition? Currently, a landlord can discriminate based on whether somebody is a drug addict or they can't? You brought that up with the landlord thing and that is why it is raising a flag for me.

Mr. Belanger responded I brought that up along with like applying for a job and a few other examples I gave. The Fair Housing Act and the Americans With Disabilities Act cover a broad range of topics including FHA applies to rental of property. That is not what the zoning ordinance does. I was saying that in response to the alderman's question about what the record of such impairment is. If someone is in a situation like renting an apartment and their landlord is looking at their history or whatever and they see something they that makes them thing that person may have been addicted to a controlled substance, the Fair Housing Act is set-up to prevent that sort of a decision from happening. That is not what we are talking about here. What we are talking about is zoning. It is really our definition of family in the zoning ordinance. That is what most of the sober homes apply for a variance from. It is that cap of four people unrelated in our definition of family.

Alderman Levasseur asked so you are saying that we can vote for this but we can also cut out the part of the definition of a person who has an addiction issue.

Mr. Belanger answered I am saying that I believe that doesn't have much effect. I believe that was inserted in there to put the city in a better position in the future should

litigation be brought against the city. It creates an awareness that the city is not attempting to discriminate based on one of the protected categories under the ADA and FHA, which are an addiction to a controlled substance. It is flagging that and saying we are not engaging in such discrimination and, therefore, puts us in a better defensive position going forward.

Alderman Levasseur stated the Zoning Board, when they are actually voting on a sober home, already know that the people going into the sober home have an addiction issue.

Mr. Belanger responded correct.

Alderman Levasseur asked is there an assumption that if the Zoning Board doesn't want to vote for a sober home it is because the people that are going in there are addicted. I think most of these places are actually being approved because people have an addiction.

Mr. Belanger answered well some have not been.

Alderman Levasseur asked did somebody on the Zoning Board use language that said I am not voting for this because I don't want addicts living in a house next to mine.

Mr. Belanger replied the litigation that is brought was brought alleging discrimination based on people in that protected class. Whether that is accurate or not is an open question but that is the allegation that litigants bring against the city.

Alderman Levasseur asked where is the determining factor that they are a protected class.

Mr. Belanger responded that is the Fair Housing Act and the Americans With Disabilities Act.

Alderman Levasseur stated okay so that is under an act and hasn't been case law yet. That has actually been codified.

Mr. Belanger stated there is case law. I would need to refer back to the language to see for sure whether or not it says addiction to a controlled substance. It is in there somewhere. I don't know that it is part of the definition but case law has been clear on that is my understanding. Again, I believe that our outside counsel said that directly and I know that they have said that to me. That is absolutely true.

Alderman T. Sapienza asked are we removing any barriers to creating a sober home by voting for this.

Mr. Belanger answered no in that these laws already exist and the City of Manchester adopting this language and just sticking it in the ordinance doesn't change the state of the law in NH.

Alderman T. Sapienza asked will we have to approve any sober homes after we pass this that we would not have had to approve prior to passing this.

Mr. Belanger replied I believe the answer to your question is no because again the state of the law isn't changing as a result of the city adopting this language.

Alderman T. Sapienza stated thank you. You are making it pretty clear to me. This language is supported by outside counsel who is actually working on court cases for us right now?

Mr. Belanger responded correct.

Alderman T. Sapienza asked and we are not making it easier to create sober homes.

Mr. Belanger answered nothing is practically changing as a result of this.

Alderman Long asked has the state codified chemical dependency in recovery as a disability.

Mr. Belanger replied I don't know the answer to that. I know that it is not stated in the reasonable accommodation statute that we are bringing into our ordinance here. It may be out there somewhere in state law but I am not familiar with any.

Alderman Long stated I wonder does this increase disability exemptions.

Mr. Belanger replied that would be an assessing question.

Alderman Long stated I don't see him here. Somebody with one day recovery, that is a good day.

Alderman Goonan stated I think the outside counsel we heard from was pretty clear. I know that I spoke to you and you were in favor of it and our Solicitor's Office is in favor of it. To me, it doesn't make sense to bat this around this Board when we have the experts here telling us that we are in a lot better position for some lawsuits that we are going through right now. I think we should support this and stop kicking it around. I am not going to speak for the mayor but we have talked about this in the past and my guess is that he is in favor of this also. I don't think we would be sitting here if he wasn't.

Alderman Kantor asked can you define recovery. I guess I am just really having a hard time with the recovery, dependency...

Mr. Belanger interjected sure. An addiction to a controlled substance like a current medically diagnosed addiction would be synonymous with recovery.

Alderman Kantor asked who decides this.

Mr. Belanger answered the case law has decided that that is a “disability” and I use quotes because that is a defined term in the Americans With Disabilities Act. It falls under disability. That is what that means.

Alderman E. Sapienza stated I am not a lawyer but to put it plainly, it seems like we are adding restrictions to ourselves. We have a lot of restrictions placed upon us by the federal and state government and we are going to go ahead here and add restrictions voluntarily to pre-empt some lawsuit that is possible in the future? I just think we have enough restrictions as is. I hope we don't fall into the habit of adding restrictions and mandates and whatnot ourselves. There are enough out there from the federal and state government.

Alderman Goonan asked these are just parts of the larger changes to our zoning ordinance correct.

Mr. Belanger replied yes. The zoning ordinance is like 170 pages and this is just one part of it.

Mayor Ruais called for those wishing to speak in favor of the proposed Zoning Ordinance Change.

There were none.

Mayor Ruais called for those wishing to speak in opposition to the proposed Zoning Ordinance change.

Richard Girard, 283 Orange Street, stated:

Before I get to my prepared remarks, there is actually a First Circuit Court of Appeals case on this question. The City of Fitchburg actually won and was told that enforcing its codes was not discriminating against people who had disabilities. I will forward it to the Board after the meeting. In the Planning Director's November 13, 2023 letter to the Board of Mayor and Aldermen, Mr. Belanger wrote that the Fair Housing Act and the

Americans With Disabilities Act “require municipalities to make reasonable accommodations to their rules, policies or practices when such accommodations are necessary to afford persons with disabilities an equal opportunity to use and enjoy a dwelling. After asserting that the proposed alternations of the zoning ordinance change nothing because they are prescribed in state and federal law, Belanger writes “one example of a situation in which the adopted provisions would apply would be for a person who uses a wheelchair if the person needed to install a ramp to access their house and the only suitable location for a ramp would be within the setback, the person could apply to the ZBA for the variance and the ZBA would only require the applicant to meet four variance criterion rather than five, thus making it easier to receive the variance and granting a reasonable accommodation from the usual rules.” Well, that makes sense and is certainly “in harmony with the general purpose and intent of the zoning ordinance” which is required by state law. He goes on to equate a person who needs a wheelchair ramp to access their home with sober living facilities. This is like saying because there is a bike lane on a road, a trucking company can open up shop anywhere along that road. It is absurd on its face. The considerations that come with accommodating an individual's ability to live in a residential property are very, very different from those involved with allowing a high-intensity business use in residential zones that don't allow the use. Manchester's zoning ordinance does make accommodations for those businesses that wish to serve those in recovery. It provides for congregate housing which is defined as “multi-family or other dwelling units serving individuals who require on-site services that support independent living including at a minimum, communal dining facilities. Congregate housing may be characterized by on-site personal care services, housekeeping and linen service and the supervision of self-administered medication but excluding 24-hour nursing care.” At its core, a sober living facility is congregate housing and allowed in 8 of the city's 16 zoning districts including the R-3, C-1 and C-2 by right and the B-2, RDV, CBD, AMX and R-SM districts with a conditional use permit from the Planning Board. This makes sense given that the sober living operations are businesses. They accept insurance payments from their clients, experience constant turnover, provide on-site services often including transportation to off-site services, and have shared dining and laundry facilities. In short, the city allows this use in business zones and in residential zones with characteristics to better enable

their operation and disallows these operations in areas where they would be disruptive to surrounding properties, which is how it should be. Please vote no.

Mayor Ruais stated all those wishing to speak having been heard, the testimony presented will be taken under advisement with reports to be made to the Board of Mayor and Aldermen.

*This being a special meeting of the Board, no further business can be presented and on motion of **Alderman O'Neil**, duly seconded by **Alderman T. Sapienza**, it was voted to adjourn.*

A True Record. Attest.

A handwritten signature in black ink, appearing to read "Matthew Normand". The signature is fluid and cursive, with a long horizontal stroke at the end.

City Clerk