

These minutes were approved at the February 27, 2004, meeting.

**DURHAM BOARD PLANNING BOARD
ZONING ORDINANCE PUBLIC HEARING
WEDNESDAY, FEBRUARY 4, 2004
TOWN COUNCIL CHAMBERS - DURHAM TOWN HALL
7:00 P.M.**

MEMBERS PRESENT: Stephen Roberts, Nick Isaak, Councilor Arthur Grant, Neil Wylie, Kevin Webb

MEMBERS ABSENT: Chair Watt, Amanda Merrill, Rachel Rouillard

OTHERS PRESENT: Mark Eyerman, Planning Decisions

MINUTES PREPARED BY: Victoria Parmele

I. Call to Order

Planning Board Vice Chair Stephen Robert noted that he was serving in Chair Watt's place for the evening.

*Councilor Grant **MOVED** to approve the agenda. The motion was **SECONDED** by Nick Isaak, and **PASSED** unanimously.*

II. Public Hearing – Zoning Rewrite

Mark Eyerman, of Planning Decisions, explained that following the January 5th public hearing, a punch list of issues was prepared and on January 21st Board members went through this list. He said that after considering each item on the list, the Board made additional revisions to the draft. Mr. Eyerman summarized these revisions.

- Zoning map – a parcel of land which had been changed from RB to OR, based on the Master Plan, was changed back to RB, based on input from residents in this area.
- Language was included that limited the length of consecutive stay at a hotel to 14 days within a 30 day period; the change was made by adding a performance standard which stated this.
- The limitation on occupancy by more than 3 unrelated persons was extended to all residential districts – language in all sections where it occurred was changed
- Minor changes were made in language of the usable area definition.
- The Table of Uses for Residential Districts and the Office Research District was corrected, based on earlier discussion (version posted for public hearing had correct uses in it).
- Language was changed to propose that 5 affirmative votes were required for the Planning Board to grant a conditional use permit.

- Language concerning streetscape buffer was edited to correct typographic errors.
- Language was added concerning minimum size for a single vacant nonconforming lot.
- Dates changes were made to make things consistent.
- Under provisions concerning conservation subdivision, language was added to exempt lots intended for recognized conservation organizations.
- An amendment was made relative to storage of inoperative motor vehicles on lots which limited the number of vehicles to one per year.
- Reference language relative to overlay districts was changed to read, “may be”.
- Wetland Conservation Overlay District language on page 99 was changed to say a “State certified soil scientist”.
- Zoning map date was changed, because of change of a parcel from OR back to RB.

Neil Wylie moved to open the public hearing. The motion was SECONDED by Kevin Webb. The motion PASSED unanimously.

Suzanne Loder, 265 Mast Road, read a letter from Edward (Ted) McNitt, who was unable to attend the public hearing. In the letter, Mr. McNitt asked that the information he was providing be included in the Public Hearing Record.

Mr. McNitt said the Planning Board had done a fine job, pointing especially to the clean-up of the Conditional Use Permit process, and to the adoption of Randall Arendt’s conservation subdivision concept, as milestones in Durham land management.

Mr. McNitt listed several comments, noting one of the themes he was addressing was that with the new provisions, a number of simultaneous options were being taken which would result in a sharp decrease in lot density. He said the conservation objectives could be obtained without doing this, noting that an aggrieved person could consider the combination of all the changes, taken together, as exclusionary zoning. He questioned whether the relatively small incremental slowing of tax increases would be worth the possibility of major legal hassle.

Mr. McNitt said he had serious personal concerns about the decrease in residential density in the Rural and Coastal Residence Districts, which resulted primarily from the increase in the minimum lot size from 120,000 to 150,000 sq. ft.

He listed the following specific items he also had concerns about:

Minimum lot size of conservation lots of 10,000 sq. ft. He said this was unrealistic, noting that lots in the RA district, a high-density residential area that had town water and sewer, required a minimum of 20,000 sq. ft. He said it would be virtually impossible to get a house, well and two proven septic locations with buffers on a 10,000 sq. ft. lot.

Wetland buffers and Shoreland setbacks on Conservation Lots. Mr. McNitt said that while the requirements for individual lot frontages were specified, there should be a clear statement in the ordinance to the effect that shoreland setbacks and wetland buffers for

septic systems and other structures would be enforced on conservation lots, to protect health and safety and also for conservation purposes.

Shore frontage on Conservation Lots. He said there should be a reduction in the 200 square foot per lot shore frontage requirement, noting that if more than one dwelling unit was to be built on a shoreland conservation lot, the required shore frontage should be extended proportionately. He said the Conservation Development was not an excuse for increasing the concentration of dwelling units on the shoreland.

Nonconformity of Conservation Lots. Mr. McNitt said the conservation lots were expected to be much smaller than the proposed 150,000 sq. ft. minimum lot size in the Residential Coastal and Rural Districts, so that changes and expansions would be much more subject to neighborhood concern and possibly to increased environmental damage. He recommended that the manner in which changes to those lots was reviewed should be specified in the ordinance.

Exemption from Conservation Subdivision requirement He said an additional exemption should be considered for the case where a preponderance of a lot was being permanently transferred to the Town, the State, or to a recognized conservation management entity for permanent conservation purposes, and where not more than two additional building lots were being created. He noted that encouragement of individual landowners donations to conservation agencies was the fourth of ten Primary Recommendations of the Master Plan.

Mandated Conservation Subdivision. Mr. McNitt said the proposed Randall Arendt Conservation Concept used soils based density standards as well as protection of natural and man made features as the determinants of lot size, setbacks, and frontages. He noted that Durham had little experience with this new and exceedingly complex subdivision decision process, and said it would seem reasonable to offer Conservation Subdivision as a preferred alternative to conventional subdivision until the Planning Board had gained enough experience to be certain that there were no major problems with the concept specific to Durham.

He pointed out that the Allen Farm, a form of conservation subdivision, required more than five years for approval, and asked Board members to imagine what horror the Town would have today if PUDs, Cluster development, Cul de sac development or the Conditional Use process had been made the only choice when the Town enthusiastically adopted them. He said the Master Plan clearly stated that the Conservation Subdivision should be the only type of subdivision permitted by right, but recommended the Town should first spend several years in learning how to do it right.

Utilization of Conservation open space. Mr. McNitt said the greatest deficiency in the existing Zoning Ordinance was the inability to optimize the use of open space scattered over a number of 120,000 square foot lots, and said that Conservation Development offered the opportunity to correct the “open space sprawl”. He recommended that the location, utilization, and protection of conservation open space should require approval by the Conservation Commission before subdivision is granted.

He said this would coordinate and enhance the creation of greenways, habitats, wildlife travel corridors, and scenic vistas, and also noted that if some areas were used for managed forest lands or agriculture, coordination of open space in adjacent subdivisions would permit much more effective care of the land.

High-Intensity Soil Surveys (HISS). He said that the proposed zoning called for a HISS for an entire subdivision parcel in addition to the regular survey showing boundaries, contours, wetlands, easements, setbacks and major ledges. He noted that under the proposed zoning changes, it would be expected that from 50-75%, and possibly more, of an initial subdivision parcel would be designated as open space.

He recommended that the high-density soil survey should therefore be concentrated on the building lots and any other locations where the importance of good soil was critical. He suggested that the regular soil survey would normally be adequate for the recognition of unsuitable land, and for the general areas for open land and building lots,

Decreased lot density. Mr. McNitt said that the increase in the minimum lot area and the deduction of all “unsuitable areas” from the total parcel area before determination of lot yield would reduce the number of available lots, noting the amount of deduction would depend on the percentage of “unsuitable” land on that parcel but ranged upward from about 20%.

He said that without question, this action would gradually slow the growth of Town and School costs, noting that citizens expected town government to minimum tax increases whenever possible, and that decreasing available lots was clearly and frequently called for in the Master Plan.

Mr. McNitt said he felt that the Planning Board should pause to be certain it wanted to go ahead with the decrease in density, because there were other considerations. He said the Town did not need decreased density for conservation reasons, noting that the Randall Arendt model specified that there would be a continuation of the pre-existing lot yield, which was a strong basis for saying that conservation benefits could be obtained without any reduction in the number of lots.

He also said the Master Plan stated that Durham had grown at about the same rate as surrounding communities. He noted that existing minimum lot sizes among these towns were comparable, and that Durham had no unique land-based reason for decreasing lot density.

He said that Durham was considered an elite place to live, and in this privileged situation, the lack of a genuine conservation need, the overall decrease in number of lots, the compulsory use of the conservation subdivision procedure, and the 400,000 square foot minimum for alternative lots, when considered together, looked suspiciously like exclusionary zoning.

Mr. McNitt noted that Durham had almost no affordable housing for families, and said the decreased availability, and perhaps high cost of building lots, appeared to be a clear intention of not meeting Federal and State affordable housing standards.

He said there should be concern about how landowners were being treated, noting that most of the land that would become available for subdivision existed today only because the landowners kept it open and resisted the temptations of developers. He said that even though the decrease in the number of potential lots might not be a “taking”, these landowners could expect a decrease in land value proportional to the reduction in the number of lots.

Mr. McNitt also provided a table that calculated densities under the conservation subdivision provisions.

Dork Sahagian, 32 Sumac Lane, read a letter from Stewart Smith, president of the Canney Farm Association, which recommended that the Gangwer parcel should be rezoned to Rural instead of back to RB. He said most of the land had a rural character, and RB uses would be inconsistent with this. He provided specifics on this, among other things noting that the parcel was cut off from the rest of town by Canney Farms green space and Route 4. He also said that the local schools were already stressed; the Town didn’t need development here, from a tax perspective; and also said there was no way to get basic services to this area except through Madbury. Mr. Sahagian said OR would be less invasive than RB, but Rural was the most appropriate zoning.

Mr. Roberts asked if the Canney Farms Association would prefer the parcel be OR than RB, and Mr. Sahagian said he could not say, noting that the formal request simply asked that the parcel be zoned as Rural.

Jim Jelmburg, 29 Park Court, thanked the Planning Board members again for their work. He said it appeared that the phrase “within a 30 day period” had not been included in the definition limiting the length of consecutive stay at a hotel to 14 days, as previously decided.

Jim Cambell explained that the language was included on page 138 as a performance standard.

Beth Olshansky, 122 Packers Falls Road, said the document the Planning Board had created was forward-thinking and progressive, and noted it was hard to make changes like this.

Regarding the soils based regulations, she said the whole purpose was to allow the land to support what it could naturally support. She said that in terms of decreasing density, the soils based in some areas would decrease the density, but not all areas.

Ms. Olshansky said she supported the following items suggested by Mr. McNitt:

- The concern about the minimum lot size of 10,000 sq. ft.
- Adequate buffers for wetlands and shorelands
- Protecting the shoreline against overpopulation
- Involving the Conservation Commission in reviewing proposals, along with the Planning Board.

Concerning the affordable housing issue, Ms. Olshansky said it could be said that the soils basis would cause a decrease in density, but asked where the affordable houses were being built now, without these provisions. She said didn't think, realistically speaking, that there would be much affordable housing in Durham, noting that student housing was a significant deterrent, and fact that. She said she didn't believe these provisions were in themselves reducing opportunities for affordable housing.

Ms. Olshansky also said that the reason the Allen Farm subdivision project took so long was that these proposed regulations were not in place. She said she supported what had been created, noting that it was not out of line with what other New Hampshire communities had done, and recommended forwarding them to the Town Council.

Mr. Wylie suggested that the reference to Allen Farm as a conservation subdivision was probably not a good idea.

Suzanne Loder, 265 Mast Road, said that Mr. McNitt's recommendation that the location, utilization, and protection of conservation open space should require approval by the Conservation Commission before subdivision is granted was critical, and should be looked at not just for Durham, but also regionally. She said the Town should be cooperating to put conservation land pieces together regionally, to make certain they were not isolated pockets.

Mr. Roberts asked if was Planning Board policy to have the Conservation Commission review subdivision applications.

Mr. Campbell said the Conservation Commission would review these applications, and also said the Planning Board was behind the idea of connecting open space, and required that as part of a submission, a map would have to show areas within a 500 ft foot radius of the proposed subdivision.

Ms. Loder said they needed an even bigger picture, and said she hoped they would be looking beyond that radius, and beyond Durham's borders.

Mr. Eyerman spoke about Mr. McNitt's comments. He said that some of his concerns had been addressed in the draft of the revised subdivision regulations that the Board had held a public hearing on, for example - consideration of natural resource systems extending beyond the development site.

Mr. Eyerman also spoke about the issue of using high-intensity soil surveys. He said that realistically speaking, from a land planning perspective, this level of detail was only needed for 25-35% of a site to be developed. But he said that because of the decision to use soil based lot sizing, it was needed to figure out how much of the whole parcel had to be deducted.

There was discussion on Mr. McNitt's comment about shoreland frontage in the Rural Coastal zone. Mr. Roberts asked what the logic was of allowing a smaller lot in the shoreland zone, and Mr. Eyerman said with the connection between the zoning and subdivision processes, shoreland area would be identified as a secondary conservation

area, where development should not be located, and this would be considered on a case-by-case basis. He said it was important to trust the process and method behind the ordinance.

No other members of the public spoke.
There was additional discussion about this.

Neil Wylie MOVED to close the public hearing. The motion was SECONDED by Councilor Grant and PASSED unanimously.

Councilor Grant said that Mr. McNitt's concerns about reduced density issues, and the impacts of this on land values, gave rise to philosophical issues, because the Board had for the most part followed what the Master Plan had recommended. He recommended that when the document was forwarded to the Town Council, the Board should point out the density concern, as a matter of philosophy, which the Council might want to consider. He suggested that Mr. Eyerman should make a presentation on this to the Council, with the intent of saying that this was a policy issue at the Council level, which was separate from the fact that the Planning Board had made the commitment to implement the Master Plan.

Mr. Eyerman said Mr. McNitt raised several policy issues, all of which the Master Plan was pretty direct about, and said that whether one agreed with these policies was another issue. But he said the intent of the Zoning rewrite process was to implement policy decisions made with respect to the Master Plan, and if the Board was going to implement them, it needed high intensity soil surveys.

Mr. Eyerman noted that concerning the issue of nonconformity of conservation lots, this was an issue the Town would have to keep an eye on. He suggested that when the Board went back and made a second round of proposals for amendments, they should look at how to handle this. He said that setbacks, height requirements were going to be specific to the particular project, and the conservation subdivision plan would have to be clear on this, so Code Administrator Johnson would know where to find those requirements when someone proposed to do something.

Mr. Isaak asked if this information could perhaps be included as part of the Conditions of Approval.

Mr. Eyerman said it could be part of the subdivision plan, and the Conditions of Approval could simply restate this.

Jim Campbell noted that the Planning Board didn't have to allow setbacks to be smaller, but the option would be there, and if they allowed this, the Board would have to be careful that this was clearly spelled out.

Mr. Roberts asked Mr. Eyerman if he had any ideas on the best way to present the Zoning rewrite package to the Council so the changes to the Ordinance would be clear.

Mr. Eyerman suggested that an executive summary should be developed which laid out the major changes, and said he would work on this with Mr. Campbell.

Mr. Roberts said that would be a good way to deal with issues such as increasing the minimum lot size to 150,000 sq. ft., so it would be clear that this wasn't being done because the Board wanted to make lot sizes bigger, but was being done because density calculations had found that they would be getting more lots rather than the same amount as before, and the Board was simply trying to level the playing field.

Mr. Eyerman noted that four members of the Council had been involved in the Zoning rewrite process, and asked whether the presentation to the Council could be a quick overview of the conservation subdivision concept and how the zoning changes interfaced with the proposed changes to the subdivision regulations.

Councilor Grant said it was important that the presentation take the approach that people were not familiar with this concept. He suggested that Rachel Rouillard should do a presentation on the conservation subdivision, which included background on Randall Arendt, and comments like Beth Olshansky's that Hollis had lived under this approach for 20 years. He stressed that the conservation subdivision concept was the most dramatic change to the Zoning Ordinance, and requires a dramatic presentation.

Mr. Roberts said whatever the Board presented should also be in writing, because of the complexity and detail of this information. He also emphasized that it was important to give Councilors time to read this information.

Councilor Grant said the Board needed to resolve the issue raised by the Canney Farm Association concerning zoning districting. He noted that it had been unanimous among Board members that the OR designation for the Gangwer parcel was inappropriate, and said that if they were to deviate from the Master Plan, he would be more comfortable going back to the RB designation than proposing a Rural designation. But he said he perhaps could be convinced that if they were going to deviate, there were options.

Mr. Wylie said the Board should either follow the Master Plan and zone the parcel as OR, or keep it as RB, noting that going in another direction would require more public hearings. He said the suggestion to change the parcel to Rural came up very late, and he didn't see a strong rationale for changing it. He said ideally Durham's zoning districts would match Madbury's, but this was not the case, and no one had ever urged that the Town do this, also noting that Selectwoman Sundberg from Madbury had asked the Board not to rezone the parcel to OR.

Mr. Webb agreed, saying he didn't see how the Board could consider rezoning the parcel to anything other than what it was (RB), or what was proposed in the Master Plan (OR). He also pointed out that the request for zoning district changes could go on and on with other parcels if the Board changed this parcel in this way.

Nick Isaak said it seemed that RB was appropriate for the parcel in question, and it was simply an anomaly that it had been changed to OR. He said that to change the parcel to Rural would be another anomaly, and wouldn't really help the situation much.

Mr. Webb asked if the existing lots on Pendexter conformed to RB, and there was discussion about this.

Mr. Eyerman said he was not familiar with the property's natural resources, but said this was where the usable area calculation could really make difference. He said that in reality there might have to be a lot of deductions because of site constraints, so that a developer might not get anywhere near the maximum units allowed on that particular parcel. He said it would be interesting to see how the conservation subdivision process applied to parcels like that.

Mr. Roberts said the Board appeared to want to leave the parcel as RB, which was consistent with previous zoning efforts going back over 30 years, but he noted they could always change this later if necessary.

Mr. Webb noted that in the past, he had discussed with the Board the idea of doing a test drive of the conservation subdivision concept. He spoke about two conceptual consultations for conservation subdivisions the Board had recently been involved with which he considered to a certain extent to be test drives. He said one claimed the right to 24 units on an 11 acre lot, when the last time it came before the Board as a traditional subdivision, 16 units were allowed, which got trimmed down to 12 units before the plan was ultimately denied. He acknowledged that each of the two proposals came through without consideration of soils.

He said he realized everyone wanted to move the zoning rewrite process ahead, but said he was very reluctant to send the revised Zoning Ordinance to the Town Council without knowing how it would perform. He said at present it looked like it would make things worse.

Mr. Webb was asked to define "worse", and he said he meant more dwelling units than were currently allowable.

Mr. Campbell explained that one of the recent conceptualizations had been done before changes were made to the definition of usable area, and also noted that the soils on the parcel had not been considered. He also said that the other conceptualization would wind up with fewer units than what Planning Board members had seen, once HISS mapping was done, although probably not as much of a reduction as everyone wanted.

Mr. Webb noted that a substantial portion of the property in the second conceptualization was in the aquifer overlay district, and it was clarified that this area could be used for determining density requirements, but units could not be built in it.

Mr. Roberts said that part of Mr. McNitt's argument was that reducing total density was leading to elitist zoning. But he said the Board was reflecting the fact that even though it had increased the minimum lot size for an application, this would probably not increase density because of the smaller buildable area required for units.

Mr. Webb said he would like to see how the ordinance worked before sending it on, but acknowledged he had not had time to do all the calculations to see exactly how the ordinance worked.

Mr. Isaak said this appeared to be a chicken and egg scenario (how could a developer use the conservation subdivision if it wasn't put into effect).

Mr. Webb said ideally the Board should be able to apply the new regulations to lots available in other towns, so it wouldn't bias itself, or to one of the Town's existing conservation lots.

Mr. Isaak said the first project would be the guinea pig, and if there were problems, the Board could pull back. He expressed concern that if the first project was fictitious, the Board might not discover the true essence of what a lot would yield.

There was additional discussion about this.

Jim Campbell said he had a recent meeting concerning a parcel of land, and after looking at soils and other information about it, it turned out to have 0% buildable area, although he noted this information didn't include HISS Mapping. He said one could also look at another application where this was not at all the case, so it really depended on the particular lot.

Mr. Isaak said the process was likely to be a net benefit for the Town, although in the case of one particular development it might not be a benefit.

Mr. Eyerman said that was essentially the intention of the Master Plan policy (how much development you get should be a function of how good the land is) so a developer who has a good piece of land with good soils, few constraints, irregular shape, can take advantage of the conservation subdivision concept. He said that on the other hand, a developer with a poor piece of land for development, with lots of constraints, could not do this. He said he didn't think they should believe the concept would be neutral in terms of every piece of land, but instead, the system would cut both ways when actually applied to the earth.

Mr. Wylie said Mr. Eyerman had described the process well. He also noted that they were still finding fault with the previous Zoning Ordinance, and said there should be no illusions that they had solved all of the problems with this most recent version, - or with any draft. But he said that at some point, they had to try it, and said they could always fix the revised ordinance if it turned out not to be just right.

He also said he didn't think a test case would tell them much because there was so much variation between properties. He said that on net, this Ordinance would be better for the earth, in terms of what could be served, and where homes could be put, which was a really good thing. He said it would certainly be better than the one being replaced, noting that history would ultimately judge this.

Neil Wylie MOVED to recommend the version of the revised Zoning Ordinance dated Jan 23, 2004 and the associated map, dated Jan 23, 2004 to the Durham Town Council, and to include in the package an Executive Summary, as well as a

recommendation from the Chair of the Planning Board that the Town Council adopt this Ordinance. The motion was SECONDED by Nick Isaak.

Kevin Webb thanked everyone for listening to his concerns.

The motion PASSED unanimously.

Neil Wylie MOVED to adjourn the Planning Board portion of the Zoning Rewrite meeting. The motion was SECONDED by Kevin Webb and passed unanimously.

Meeting adjourned at 8:30 pm

Amanda Merrill, Secretary