

These minutes were approved at the January 21, 2001 meeting.

**DURHAM TOWN COUNCIL
MONDAY, JANUARY 7, 2002 – 7:00 PM
DURHAM TOWN HALL – COUNCIL CHAMBERS**

MEMBERS PRESENT: Mal Sandberg, Chair; Annmarie Harris; Peter Smith; Pete Chinburg Bill Woodward; Jerry Dee; Katie Paine

MEMBERS ABSENT: Mike Pazdon; Eileen Fitzpatrick

OTHERS PRESENT: Todd Selig, Town Administrator; Paul Beaudoin, Business Manager; Ron O'Keefe, Fire Chief; James Campbell, Planner; Interested Members of the Public

I. Call to Order

Chair Sandberg called the meeting to order at 7:25 PM.

II. Approval of Agenda

Jerry Dee MOVED to approve the agenda. Katie Paine SECONDED the motion and it PASSED unanimously.

III. Special Announcements

Introduction of Scott Campbell, Firefighter

Ron O'Keefe introduced Scott Campbell and gave a brief overview of his background.

The Town Council welcomed Mr. Campbell to the Town of Durham.

IV. Approval of Minutes

December 17, 2001

Jerry Dee MOVED to approve the minutes of December 17, 2001. Katie Paine SECONDED the motion.

The following corrections were made:

Page 12, paragraph 6, should read **Peter Smith stated his understanding that if the Council votes to leave the Crommetts Creek Bridge project in the CIP, the Council is voting only to correct any structural deficiencies in the bridge, not to realign or widen it.**

Page 15, paragraph 4, the motion did not have a date certain

The Town Council discussed Page 9, paragraph 5 and whether or not to add the word **resident** between *4,000 students*. This was a statement made by Eileen Fitzpatrick at the December 17th meeting and she was not in attendance tonight to clarify what she said.

Annmarie Harris MOVED to postpone action on the December 17, 2001 minutes to the January 21, 2002 meeting. Jerry Dee SECONDED the motion and it PASSED unanimously.

V. Report of Administrator

Administrator Selig reported on the following:

- The filing period for the 2002 election is from January 23, 2002 through February 1, 2002. The following positions are open:
 - Three (3) Town Council Members
 - Two (2) Library Trustees
 - Town Moderator
 - One (1) Supervisor of the Checklist
 - Town Clerk-Tax Collector
 - Treasurer
 - One (1) Trustee of the Trust Fund
- The Conservation Commission has set up a Land Protection Sub-Committee and is looking for a Town Council Representative. This will be talked about under Other Business at tonight's meeting.
- President Bush will be speaking at the University Tuesday afternoon.
- He reminded the Town Council of the Town/Gown Forum that will be held in the Council Chambers on Wednesday, January 9, 2002, from 8:00 AM to 12:00 noon.

VI. Reports and Comments of Councilors

Pete Chinburg stated that the Water/Wastewater/Solid Waste Committee would be meeting on January 16, 2002 at the Public Works building at 4:00 PM.

Katie Paine stated that the DCAT meeting would be held on Tuesday, January 8, 2002 in the Council Chambers at 4:00 PM.

Annmarie Harris reported that the Planning Board had hired a consultant to work with the Zoning Re-Write Committee. She also reported that the Planning Board had a couple of large projects before it including the Durham Crossing Planned Unit Development.

VII. Public Comments

Beth Olshansky, Packers Falls Rd, stated that she was glad to see that the Planning Board meetings were being taped and shown on Channel 22. She

expressed concern that the re-broadcast of the December 19th meeting left out approximately 15 minutes of the actual meeting.

Katie Paine explained that there was a 15-minutes gap when one tape ran out and before another tape was started.

Dick Lord, Bennett Rd, stated that a second video recorder would solve the problem of having to depend on someone changing tapes.

Katie Paine stated that a second video recorder was on order.

Administrator Selig clarified that the changing of the tapes was problematic partly because it has been difficult to find volunteers to run the equipment, putting reliance upon staff that must change the tapes and be present at the meetings.

VIII. Unanimous Consent Agenda (*Requires unanimous approval. Individual items may be removed by any councilor for separate discussion and vote*)

- A. Shall the Town Council vote to place a referendum item on the March 12, 2002 election ballot to raise and appropriate the sum of \$2,407,000.00 for long-term debt, such sum to be raised in part through the State of New Hampshire State Revolving Loan Fund, for the construction phase project costs to improve equipment deficiencies and other operational problems to the Town's existing Wastewater Treatment Facility?
- B. Shall the Town Council sign the election warrant for the March 12, 2002 Town election?

The above two consent items PASSED unanimously on a roll call vote as follows:

<i>Peter Smith</i>	<i>YES</i>	<i>Bill Woodward</i>	<i>YES</i>
<i>Katie Paine</i>	<i>YES</i>	<i>Annmarie Harris</i>	<i>YES</i>
<i>Jerry Dee</i>	<i>YES</i>	<i>Chair Sandberg</i>	<i>YES</i>
<i>Pete Chinburg</i>	<i>YES</i>		

IX. Unfinished Business (*Beginning NLT 8:30*)

There was no unfinished business.

X. New Business (*Beginning NLT 9:30*)

- A. **Public Hearing: Conditional Use Permit** application submitted by Jones & Beach Engineers, Inc. on behalf of J.R. Collier Corporation for a Planned Unit Development in the Rural District for property located on Packers Falls Road

Pete Chinburg recused himself from this discussion.

Chair Sandberg stated that the proposed motion is for the Town Council to vote for a Conditional Use Permit under Town Code 175-10, but it also includes a Planned Unit Development, which is regulated by Chapter 175-32 of the Town Code.

Administrator Selig stated that the Town Planner was also in attendance to clarify any concerns the Town Council may have. He stated that the Town Council had two tasks before it concerning this issue. He stated that the major task, in his opinion, is for the Council to go through the Conditional Use Permit process to ensure that there is an availability of public services and facilities (a range of services from water to schools) and that these services are adequate to serve the needs of the use as designed and proposed. It is also the task of the Council to ensure that, in terms of the impact on property values, the proposed use will not cause or contribute to the decline in property values of the adjacent properties.

Administrator Selig stated that the issue is somewhat complicated under Section 175-32 of the Zoning Ordinance, which deals with Planned Unit Development. He stated that under this portion of the Ordinance, it speaks to the role that the Town Council should take in reviewing the application. He stated that under Section G it states that if all the conditions of the Durham Zoning Ordinance are met, the Town Council shall approve a Planned Unit Development by ordinance or resolution, which shall incorporate by reference all documents included in the site plan.

Administrator Selig stated that Section 175-32 F-3(c) stated that the applicant shall provide the proposed time schedule for completion of the development and the phasing, a copy of all proposed covenants, restrictions, and easements, a copy of the proposed articles of incorporation and by-laws of any corporation and/or homeowners association, and any other information the Planning Board or the Town Council may deem necessary.

Administrator Selig stated that there are two issues before the Town Council; one being the Planned Unit Development portion of the ordinance and the second is the Conditional Use Permit portion of the ordinance. He stated that he had received some clarification in regard to what the Council's role should be in terms of the Planned Unit Development portion of the ordinance. He stated that, in his opinion, it is the Planning Board's responsibility to review subdivision and site plan regulations. He stated that there was some confusion raised with respect to Section 175-32 because at first glance it places some burden of the subdivision/site plan review process on the Town Council.

Administrator Selig stated that the Council should assure itself that the Planning Board has reviewed the application thoroughly and that the application is in compliance with the Zoning Ordinance. He stated that the Council should also assure itself that the various documents that are required are in order. He stated that once the Town Council is confident that the Planning Board has done its work with the Planned Unit Development portion of the ordinance under Section 175-32; the Council then reverts back to Section 175-10, the Conditional Use Permit process. He stated that what the applicant is seeking approval for from the Council is a Conditional Use Permit for a Planned Unit Development.

Administrator Selig stated that from the conclusion of the Public Hearing, the Town Council has 45 days to take action on the Conditional Use Permit. He stated that if the Council felt it needed more information, it should hold off on the Public Hearing until the Council is prepared with the information it needs.

Peter Smith stated that, in his opinion, it was important for any confusion to be cleared up before the Public Hearing is opened. He stated that it looked like the Planned Unit Development section and the Conditional Use Permit section to some extent gets the Town Council involved in land use planning. He stated that he would like the Council's role in land use planning clarified.

Chair Sandberg asked if there was something in State law that provides for the Council to be involved in land use planning decisions with respect to a Conditional Use Permit as opposed to a Planned Unit Development.

Administrator Selig stated that, under state statute, in regard to Conditional Use Permit, it confers the authority to Planning Boards or other local boards to be involved in the Conditional Use Permit process. He stated that the state law was very clear that the subdivision and site plan portion of local land use planning is a function of the Planning Board and not any other Board. He stated that there was no provision that gives the Council the ability to intercede with regard to site plan and subdivision review.

Administrator Selig stated that, in his opinion, the portion of Section 175-32 that brings the Town Council into play with regard to reviewing the Planned Unit Development is an inappropriate function and role of the Town Council. He stated that his concern was that if the Town Council went too far down the slope of reviewing ground that the Planning Board

has appropriately gone over as part of the site plan subdivision process, the Council would be acting inappropriately under state law.

Administrator Selig stated that, in his opinion, the Council should look closely to assure itself that the Planning Board has done its job in acting on the site plan/subdivision and that it meets all of the requirements in the Zoning Ordinance, and then move on to the Conditional Use Permit process and review the fiscal impact of the proposed development.

In response to a question from Chair Sandberg, James Campbell, Town Planner, stated that the time frame for completion is on the site plan. He stated that the Planning Office was waiting for the language of the easements as well as the amendments to the covenants. He stated that some of the required documents were submitted with the application but due to the negotiations with the abutters in order to settle a lawsuit, some of those documents need to be amended. He stated that he plans on receiving the final documents within the next two weeks.

Peter Smith stated that he had read the correspondence from the Town's attorney. He stated that the letter had no content to it, just a conclusion. He stated that the conclusion was not adequate for him to pass the threshold of overcoming the legitimacy of the Town's ordinance. He stated that he would need more detail from the attorney as to why the conclusion was reached.

Katie Paine stated that she did have quite a few questions and felt a need for additional information. She stated that she was as confused as Peter Smith, as to what extent could the Council ask for additional information. She stated that she would like to see more of the data behind the conclusions reached by the Planning Board.

Administrator Selig stated that given the way Section 175-32 was written, the Town Council could get involved in this application with great detail. He stated that his way of trying to work through the issue is to recognize that a portion of the Zoning Ordinance, in his opinion, is flawed because it assigns a role to the Council that the Council should not have.

In response to a question raised by Chair Sandberg, Administrator Selig stated that the Town Council should not be in the business of re-reviewing the entire subdivision/site plan application in great detail. He stated that, in his opinion, that would be inappropriate for the Town Council to do. He stated that if there are facets to the application that the Council thinks the Planning Board should have addressed and didn't, the Council could send the application back to the Planning Board to address those issues.

Jerry Dee MOVED that the Durham Town Council postpone discussion/action pending additional input from legal counsel on the Planned Unit Development issue. Katie Paine SECONDED the motion.

Peter Smith stated that he would also like to review any other matters that may need to be clarified by legal counsel.

Peter Smith MOVED to amend the motion to include in the Council's inquiry with legal counsel a series of questions that pertain to the Conditional Use Permit application. Katie Paine SECONDED the motion and it PASSED unanimously.

Peter Smith presented the following questions concerning the Conditional Use Permit application that he would like to have legal counsel clarify:

1. What role should any evidence presented before the Planning Board have in the Town Council making its decision?
2. What additional information, by way of evidence, does anybody who is a party to this matter have the right to present to the Town Council? Can the Town Council request such information?
3. Does the Town Council apply a different standard of review of evidence presented to it that the standard that the Council would apply to evidence that was presented to the Planning Board.
4. Needs clarification between Section 175-10 (F-6) and 175:10 (M)?
5. Needs clarification of Section 175-10 (M), the third sentence.
6. To what extent are any of the possible actions that the Town Council supposedly has the right to take under its conditional use ordinance permitted by provisions of state statute and if they are not permitted by state statute, what is the state statute that permits such action under the conditional use ordinance but does not permit Council action under the Planned Unit Development ordinance.

Chair Sandberg suggested that the Town Council continue deliberations on this issue with the Town's attorney on January 21, 2002 in public session.

Jerry Dee expressed concern with delaying the Public Hearing.

Peter Smith stated that he would appreciate it if the applicant's attorney would also submit views on behalf of the applicant with respect to these questions. He stated that he would also welcome input from members of the public.

Attorney Malcolm McNeill, representing the applicant, asked what the rules of procedure are relative to the processing of this application. He would like to request that any documents related to this issue be made public. He stated that he would like to know what his rights are in representing the applicant in the processing of this application. He asked if at the next public meeting when town counsel is present, would the counsel for the applicant be able to speak.

Chair Sandberg stated that the reason the Town Council is seeking legal advice is because the rules of procedure are not clear to the Council either.

The motion as amended PASSED unanimously.

It was the consensus of the Town Council to release the letter received from the Town's attorney, Walter Mitchell dated January 7, 2002, as a public document.

Peter Smith asked that the Town Council receive any material from the public and the applicant well in advance of the next meeting.

Pete Chinburg returned to the table

- B. What action shall the Town Council take in preparing for the March 13, 2002 Informational Town Meeting Agenda?

The Town Council discussed what format the Informational Town Meeting should follow. The Town Council agreed that it was important to broadcast the meeting on Channel 22.

Katie Paine stated that her concern was that the Informational Town Meeting was never promoted and people were never encouraged to come.

Peter Smith stated that this should be a time of audience participation in which the public has a chance to discuss issues with the Town Administer, the Town Council, the Department Heads and Committee Members.

The following is the agenda format the Town Council discussed:

- I. Introductions of Public Officials by Town Moderator
 - Members of the 2001 Town Council
 - Newly elected members to the Town Council 2002
 - Election results of other Town Officials
- II. Remarks:
 - Town Council Chairman, Malcolm Sandberg
 - Town Administrator, Todd Selig
- III. Open discussion between Town Council and Durham Residents on issues of interest.
- IV. Town Moderator shall summon the voters of the town to hear reports and ask questions and/or provide comments on the previous year's activities and on proposals for the current year by the following:
 - Business Department
 - Fire Department
 - Planning and Community Development
 - Police Department
 - Public Works Department

- Library Board of Trustees
- Town Clerk/Tax Collector
- Town Treasurer
- Trustees of Trust Funds/Cemetery Committee
- Planning Board
- Zoning Board of Adjustment
- Conservation Commission
- Historic District Commission
- Rental Housing Commission
- Integrated Solid Waste Management Advisory Committee
- Lamprey River Management Advisory Committee
- Parks and Recreation Committee
- UNH Outdoor Swimming Pool Study Committee
- DCAT Governance Committee

V. Other Business

VI. Adjournment

At the end of the meeting, the public would have a chance to have refreshments and visit various information sites.

Katie Paine MOVED to approve the above agenda format. Jerry Dee SECONDED the motion and it PASSED unanimously.

C. Other Business

Chair Sandberg stated that the Conservation Commission had asked that a Town Council representative be appointed to the new Land protection Sub-Committee. It was the consensus of the Council to offer the position to Eileen Fitzpatrick. Bill Woodward stated that he would consider it if Eileen was not able to do it.

XI. Nonpublic Session (if required)

There was no nonpublic session required.

XII. Adjourn (NLT 11:00 PM)

Pete Chinburg MOVED to adjourn. Jerry Dee SECONDED the motion and it PASSED unanimously.

The meeting adjourned at 10:19 PM.

Sharon Elliott, Secretary

