

*These minutes were approved at the March 4, 2002 meeting.*

**DURHAM TOWN COUNCIL MINUTES  
MONDAY, FEBRUARY 18, 2002 – 7:00 PM  
DURHAM TOWN HALL – COUNCIL CHAMBERS**

**MEMBERS PRESENT:**

Mal Sandberg, Chair; Annmarie Harris;  
Peter Smith; Bill Woodward; Jerry Dee;  
Katie Paine; Pete Chinburg; Eileen  
Fitzpatrick (left the meeting at 8:12 PM);  
Mike Pazdon (left at 10:05 PM)

**MEMBERS ABSENT:**

Peter Smith

**OTHERS PRESENT:**

Todd Selig, Town Administrator; Jim  
Campbell, Town Planner; Interested  
Members of the Public

**I. Call to Order**

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

**II. Approval of Agenda**

*Jerry Dee MOVED to approve the agenda. Katie Paine SECONDED the motion.*

Mike Pazdon MOVED to amend the agenda by reducing the time allocation on item IX. B from 65 minutes to 45 minutes. Pete Chinburg SECONDED the motion.

Chair Sandberg stated that this item was for the Town Council to obtain clarification and guidance with respect to the Conditional Use Permit and Planned Unit Development process. He stated this was a complicated issue that may require more time than 45 minutes. He stated that the Council might find it most useful to allow whatever time is necessary for this discussion.

*The motion was DEFEATED on a vote of 2-5 (Mike Pazdon, Eileen Fitzpatrick were in favor of; Chair Sandberg, Jerry Dee, Annmarie Harris, Pete Chinburg, Katie Paine were opposed).*

*The motion to approve the agenda as written PASSED unanimously.*

**III. Special Announcements**

Chair Sandberg stated that former Durham Selectman Malcolm Chase passed away today. He stated that he was a Selectman in Durham for a total of fourteen years. He offered condolences to the family on behalf of the Town.

#### **IV. Approval of Minutes**

February 4, 2002

There were no corrections to the minutes.

*Annmarie Harris MOVED to approve the minutes. Jerry Dee SECONDED the motion and it PASSED unanimously (Mike Pazdon, Eileen Fitzpatrick abstained as they were absent from the February 4, 2002 meeting).*

#### **V. Report of Administrator**

Administrator Selig reported on the following:

- He stated that the Town election would be Tuesday, March 12, 2002, at the Oyster River High School with the polls opened from 8:00 AM to 7:00 PM.
- He stated that the Informational Town Meeting would be held on Wednesday, March 13, 2002, at the Oyster River High School cafeteria.
- He stated that the 2001 Annual Town Report were in and have been mailed to the residents.
- He stated that it looked like the Candidate Forum would consist only of the citizens running for Town Council as the MainStreet was having difficulty scheduling the citizens running for School Board. He stated that the forum would be held on Tuesday, February 26, 2002, at 7:00 PM in the Council Chambers.
- The Town has received a letter from Harold Schondelmeier resigning from the Trustees of the Trust Funds due to the fact that he was moving out of the Town of Durham.

Chair Sandberg stated that it was the responsibility of the Town Council to appoint a replacement to the Trustees of the Trust at its next meeting.

- He stated that the deadline to get applications for Boards or Committees appointment is 5:00 PM Monday, March 11, 2002.
- He stated that the post Super Bowl bill sent to the University for the illegal student bonfire was for the amount of \$2,776.23.
- The MainStreet Program agreement is not on the agenda as the details to the document are still being worked on.
- He stated that the Parks & Recreation Committee has been working hard in planning a fundraiser to benefit the Oyster River Youth Association and the recreation programs in Durham. They are planning to have a Melanie ????? who is a champion Junior Olympian skater do a benefit skate at the

Whittemore Center. The tentative date for this is Monday, March 25, 2002, in the evening. He stated that more details would be forth coming.

- He had a notice from ORCHY (The Oyster River Community for Healthy Youth) that a forum has been planned called "Let's Talk About It In Durham, Lee and Madbury". He stated that the forum is scheduled for Thursday, February 21, 2002 at 7:00 PM at the Oyster River High School.

Eileen Fitzpatrick asked if Administrator Selig had an update on the USA Springs and the water bottling plant.

Administrator Selig stated that he did not have an update to report at this time. He stated that he would look into it.

Eileen Fitzpatrick stated that she would like to see the Town of Durham have a larger presence in this matter.

Eileen Fitzpatrick asked if it would be possible to get the attachments from the University Board of Trustees' meeting minutes. She stated that she would to know what piece of property the University recently sold.

Eileen Fitzpatrick asked what the status of the elderly housing issue that had been raised with respect to revenue enhancement was.

Administrator Selig stated that this would be brought forward at the March 4, 2002, meeting. He stated that it may not offer precise solutions to all of the various ideas that have been broached, but it will address the tried and true issues that can be addressed.

## **VI. Reports and Comments of Councilors**

Eileen Fitzpatrick stated that there would be an Art Show and Dessert at Moharimet School put on by Growing Places on Wednesday, February 20, 2002 from 6:30 to 8:00 PM.

Eileen Fitzpatrick stated that she would like to see the issue of affordable housing put on the agenda for a presentation from staff.

Katie Paine stated that there would be a debate in the House on Tuesday, February 19, 2002, at 2:00 PM relative to the state wide property tax.

Katie Paine stated that the DCAT Committee needs volunteers. She stated that if citizens have questions or concerns about the DCAT they should contact the DCAT Committee and not Town Staff.

Chair Sandberg asked for an update on the AT&T Broadband cable issue.

As stated that the cable company has provided its estimates in providing build-out to the areas in Town that don't currently have build-out. He stated that he would like to get a second opinion for those estimates as they seem high. He stated that he has asked White Mountain Cable to provide a second cost estimate.

Annmarie Harris reported on the Zoning Re-Write Committee.

Mike Pazdon spoke about the Parks & Recreation Committee working on the fundraiser with ORYA.

Pete Chinburg stated that the Durham Rental Housing Commission would not be meeting until April and the Water/Wastewater Committee would be meeting in March.

## **VII. Public Comments**

Betsy Horskin, Smith Park Ln, asked a question about Planning Board meetings. She stated that she was concerned that no one mentioned the public forum held about the Wiswall Dam. She expressed concern with this meeting that was held.

Administrator Selig gave brief update of the Wiswall Dam issue. He explained that the initiative to remove the dam has come from a federal level and not from the Town.

***Katie Paine MOVED to extend Public Comments for 15 minutes. Jerry Dee SECONDED the motion and it PASSED unanimously.***

Bill Hall, Smith Park Ln, spoke on the Wiswall Dam issue and the water issue. He also spoke on the cable issue and the cost of cable in the Town of Durham.

Malcolm McNeill, 44 Colony Rd, urged the Town Council to discuss the Conditional Use Permit/Planned Unit Development issues in public session.

Dick Lord, Bennett Rd, passed out brochures about the Lamprey River.

## **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 appoint Jessie McKone as a member to the Integrated Waste Management Advisory Committee?

- B. Shall the Town Council authorize the Town Administrator to sign a Memorandum of Agreement with the New Hampshire Department of Environmental Services relating to the Brownfields Cleanup Revolving Loan Fund?
- C. **Adopt Ordinance #2002-01** amending Section 153-49 of Chapter 153 "Vehicles and Traffic" of the Durham Town Code by prohibiting parking to certain hours on Nobel K. Peterson Drive

*Katie Paine MOVED that the Durham Town Council approve the above three items by unanimous consent. Annmarie Harris SECONDED the motion and it PASSED unanimously.*

**IX. Unfinished Business (Beginning NLT 8:00)**

- A. **Public Hearing: Ordinance #2002-02** amending Sections 160-1 and 160-2 of Chapter 160 "Water and Sewer Rates" of the Durham Town Code by Adjusting the Water and Sewer Rates for FY 2002

Administrator Selig gave a brief overview of this ordinance.

*Katie Paine MOVED that the Durham Town Council open the Public Hearing on Ordinance #2002-02, amending Sections 160-1 and 160-2 of Chapter 160 "Water and Sewer Rates" of the Durham Town Code by adjusting the Water and Sewer Rates for FY 2002. Jerry Dee SECONDED the motion and it PASSED unanimously.*

Betsy Horskin, Smith Park Ln, urged the Council to continue its review of the Agreement with UNH on how the cost is split up.

Administrator Selig stated that over the last few months there has been some draft modifications to the water and sewer agreements between the Town of Durham and the University. He stated that the agreements were on going.

*Pete Chinburg MOVED that the Durham Town Council close the Public Hearing on Ordinance #2002-02, amending Sections 160-1 and 160-2 of Chapter 160 "Water and Sewer Rates" of the Durham Town Code by adjusting the Water and Sewer Rates for FY 2002. Katie Paine SECONDED the motion and it PASSED unanimously.*

*Katie Paine MOVED that the Durham Town Council adopt Ordinance #2002-02, amending Sections 160-1 and 160-2 of Chapter 160 "Water and Sewer Rates" of the Durham Town Code by adjusting the Water and Sewer Rates for FY 2002. Jerry Dee SECONDED the motion and it PASSED unanimously.*

- B. Meeting with Town Counsel to obtain clarification and guidance with respect to the Conditional Use Permit and Planned Unit Development approval process

Eileen Fitzpatrick recused herself from this discussion.

*Eileen Fitzpatrick left the meeting at 8:12 PM.*

Administrator Selig stated that the discussion was a planned discussion that the Council had planned to hold in public session. He stated that he would like to offer a few cautionary words to the Town Council before starting the discussion. He stated that if the Council chose to have this discussion in public session that, depending upon the results of the discussion, either the abutters or the applicant could allege that the Town Council, if it does not follow the advise of legal counsel, is acting in bad faith.

Pete Chinburg stated that it was his understanding this was going to be a generic discussion and that is why he had not yet recused himself from this discussion. He stated that, although he had no financial interest in the current project before the Council, he was related to the developer. He asked for guidance as to whether he should recuse himself.

Mike Pazdon stated that he did not understand why Eileen Fitzpatrick left if this was suppose to be just a generic discussion on interpretation and advice from the Attorney.

Annmarie Harris stated that she felt Pete Chinburg should recuse himself.

Jerry Dee stated that it was a general discussion and he did not see why either Eileen Fitzpatrick or Pete Chinburg needed to recuse themselves from this discussion.

It was the consensus of the Council that neither Pete Chinburg nor Eileen Fitzpatrick needed to recused themselves. Pete Chinburg stayed at the table and Eileen Fitzpatrick had already left the meeting.

Attorney Walter Mitchell stated that he respected the Council's desire to keep as much as possible in public session. He stated that even though the Council did not plan on discussing the specific application before them, the discussion tonight comes up in the context of the application the is before the Council. He stated that He was going to be discussing the strengths and weaknesses of the Town's Zoning Ordinance. He stated that comments made in a generic discussion could be used against the

Town of Durham at a later time. He strongly advised the Town Council to hold this discussion in a nonpublic session.

***Bill Woodward MOVED to recess to hold a non-meeting with the Town's Attorney. Annmarie Harris SECONDED the motion.***

Chair Sandberg stated that he was opposed to going into a non-meeting for this discussion.

Annmarie Harris stated that she would want to see this discussed in public session and trust the Council's ability to be discreet in its discussion.

***The motion was DEFEATED on a vote of 1-5-1 (Bill Woodward was in favor of; Chair Sandberg, Jerry Dee, Katie Paine, Annmarie Harris, Mike Pazdon were opposed; Pete Chinburg abstained to avoid the appearance of impropriety).***

Chair Sandberg stated that the next issue to address was whether to make the letter from Attorney Mitchell on this subject a public document.

Administrator Selig stated that if the issue was going to be discussed in public, meaning that the letter would be a part of the discussion, he saw no reason not to make the letter public.

It was the consensus of the Town Council to release Attorney Mitchell's letter as a public document.

Mike Pazdon stated that he would like the Town Council to have a sense of direction for this discussion.

Chair Sandberg stated that the goal for this discussion is for the Town Council to establish a Standard Operating Procedure for the staff, Planning Board and Town Council when addressing Conditional Use Permit or Planned Unit Development applications.

Attorney Mitchell stated that in an earlier letter to the Council he had mentioned that there was no statutory authority for delegating Planned Unit Development administration to a Board such as the Planning Board. He stated that statement was not accurate, that in RSA 674:21 does contain that authority as well as authority for delegating administration of Conditional Use Permits.

In response to a question from Chair Sandberg, Attorney Mitchell stated that if there is a delegation, then the Planning Board's role is to make a recommendation prior to the Council's review.

Chair Sandberg stated that he wanted to go through the letters from Attorney Mitchell for clarification. He stated that in his digging back through the records, he found correspondence from the former Town Attorney, Peter Loughlin, who in 1989 was helping the Town Council and Planning Board develop the current ordinance. He talked about some of the objections Attorney Loughlin had with the draft ordinance. He asked for Attorney Mitchell's comments on that.

Attorney Mitchell stated that he was not asked to interpret what Peter Loughlin might have thought. He stated that he was asked to provide insight on the language of the current ordinance. He stated that he tried to address his answers in the letter to the Council as a Court would look at the Zoning Ordinance. He stated that a Court would look at the language of the current ordinance. He stated that a Court would never look at the document Chair Sandberg was reading from. He stated that while there were inconsistencies in the Conditional Use Permit ordinance, it does not arise to a condition where a Court would find ambiguity. He stated that, in his opinion, the Court would rely on how the Town had previously made decisions based on the ordinance.

Attorney Mitchell stated that of the cases that he saw that have come before the Town Council in the past, the Council clearly focused on fiscal impact factors only. He stated that none of the past cases he was shown showed contained documentation or suggestion that the Council focused on anything except fiscal impact issues.

Jerry Dee stated that he feels the ordinance limits the Town Council's ability to make decisions on a Conditional Use Permit to just fiscal impact.

Chair Sandberg stated that just because the Council has been doing the Conditional Use Permit process wrong for twelve years it does not make sense to continue doing it wrong. He stated that this Council might want to consider changing the ordinance so it won't be done wrong.

Mike Pazdon stated that this issue is a Planning Board issue. He stated that the Council only has two criteria to decide on. He stated that the Planning Board should do the planning and not the Town Council. He stated that the Council should not be changing ordinances just because it feels like changing the ordinances.

Attorney Mitchell stated that, in his opinion, the effect of the present ordinance is that the Planning Board makes a decision on all issues that is final on everything except the fiscal impact matters that go to the Town



Council. He stated that the Planning Board could make recommendations concerning the fiscal impact.

***Jerry Dee MOVED to extend this discussion for an additional 15 minutes. Katie Paine SECONDED the motion and it PASSED unanimously.***

Attorney Mitchell stated that there was a stronger argument for the Planned Unit Development ordinance and the Council's role than there was for the Conditional Use Permit ordinance. He stated that all he could see were two cases where a Planned Unit Development came before the Council and in both cases the Town Council did nothing about approving a Planned Unit Development. He stated that if the Council chose to follow his recommendation concerning the Conditional Use Permit, and chose to act in a broader way under the Planned Unit Development, it would need to be careful to make sure that under this part of the ordinance that all it is looking at is the Planned Unit Development issue and not stepping over the line into Conditional Use Permit.

Chair Sandberg passed out a draft for a Standard Operating Procedure (SOP) for the Town Council to look at. He stated that he would like to see the Council adopt some form of SOP.

Mike Pazdon stated that he did not think Chair Sandberg was proposing the Standard Operating Procedure in good faith, that it was being proposed just to stall the applications before the Council. He stated that every Council that is elected is supposed to follow the same rules.

Administrator Selig stated that he did not feel comfortable scheduling a Public Hearing for the Council to hear the application until the Council knows what it is going to be hearing. He stated that he would like to come to some resolution with Attorney Mitchell as to what the role of the Council is going to be in this issue. He stated that he understood the benefit of having a Standard Operating Procedure but was concerned that it would take a number of meetings to work out. He stated that the Council needed to be fair to the applicant as well as to the residents/abutters.

Administrator Selig stated that, in his opinion, the role of the Council, based on practice and the way he interprets the Conditional Use portion of the ordinance, is for the Council to focus on fiscal matters. He stated that he still had questions and concerns about the Planned Unit Development portion of the application.

***Jerry Dee MOVED to extend this discussion for an additional 10 minutes. Bill Woodward SECONDED the motion and the motion was DEFEATED***

*on a vote of 3-2-2 (Jerry Dee, Katie Paine, Bill Woodward were in favor of; Chair Sandberg, Annmarie Harris were opposed; Pete Chinburg, Mike Pazdon abstained).*

**X. New Business (Beginning NLT 9:15)**

- A. Shall the Town Council ratify the Collective Bargaining Unit Agreement for the Durham Professional Firefighters Association (DPFFA)?

Administrator Selig gave a brief overview of this issue. He stated that Attorney McKittrick had met earlier in a non-meeting with the Town Council to discuss this issue. He stated that the Council had been given the recommendation from Attorney McKittrick to approve the contract.

*Jerry Dee MOVED that the Durham Town Council ratify the Durham Professional Firefighters Association (DPFFA) Collective Bargaining Unit Agreement from the period January 1, 2002 to December 31, 2004. Pete Chinburg SECONDED the motion.*

Bill Woodward complimented the firefighters and the job they perform. He stated that he had concerns with the contract. He stated that he would be voting against this, as he believes the Town needs to tighten its belts.

Pete Chinburg stated that he was in support of this contract and urged the Council to support it.

Katie Paine stated that the fiscal impact of this contract is more than anticipated. She stated that she certainly appreciated the firefighters and the job they do but could not support the contract.

Jerry Dee stated that he was in support of the contract and urged the Council to support it.

Annmarie Harris stated that she would not support this contract, as the Town could not afford a contract such as this.

*The motion was DEFEATED on a vote of 2-5 (Pete Chinburg, Jerry Dee were in favor of; Chair Sandberg, Annmarie Harris, Katie Paine, Mike Pazdon, Bill Woodward were opposed).*

- B. Shall the Town Council consider the proposal by Carl and Judith Spang offering to purchase approximately one and one-half acres of Town land bounded on the east side by the Lamprey River, the north side by Wiswall bridge and the Spang's land on the south and west

Administrator Selig gave a brief overview of this issue. He stated that he thought the best way to bring this forward was to allow Judith Spang to address the Council on her proposal.

Judith Spang spoke on this issue. She passed out maps to the Town Council showing the property her proposal is referring to. She stated that this land would remain in conservation and the public would be allowed to continue accessing the property. She addressed questions from the Town Council.

*Annmarie Harris MOVED that the Durham Town Council direct the Town Administer to continue working with Judith Spang on this issue and do research on concerns raised by the Town Council. Katie Paine SECONDED the motion.*

Mike Pazdon stated that he would like to make sure the public access is not denied to this land.

Judith Spang stated that public access would certainly be allowed and would be in the conservation easement language.

*Pete Chinburg MOVED to extend the meeting for an additional 15 minutes. Jerry Dee SECONDED the motion and it PASSED on a vote of 6-1 (Mike Pazdon was opposed).*

Pete Chinburg stated that he would like to see the property properly protected if sold.

*The motion PASSED unanimously.*

*Mike Pazdon left the meeting at 10:05 PM.*

C. Town Administrator Evaluation

*Katie Paine MOVED to extend the meeting until 10:45 PM. Jerry Dee SECONDED the motion and it PASSED unanimously.*

The Town Council discussed Administrator Selig's evaluation.

Administrator Selig stated that he felt it was important for the Town Council to set up goals and objectives for itself.

It was the consensus of the Council to schedule a workshop meeting with Win Puffer right after the elections to work on setting goals.

D. Other Business

The Town Council briefly discussed a letter received from a UNH student concerning the mixed messages the Town was sending with respect to the post Super Bowl student bonfire on Madbury Road.

Bill Woodward stated that he believed Town staff did an excellent job at controlling the situation that evening and prevented more serious problems.

**XI. Nonpublic Session (if required)**

There was no nonpublic session required.

**XII. Adjourn (NLT 10:00 PM)**

*Pete Chinburg MOVED to adjourn. Katie Paine SECONDED the motion and it PASSED unanimously.*

The meeting adjourned at 10:45 PM.

Sharon Elliott, Secretary