

These minutes were approved at the April 15, 2002 meeting.

DURHAM TOWN COUNCIL –MEETING MINUTES
MONDAY, MARCH 25, 2002 – 7:00 PM
(Continuation of the March 18, 2002 Town Council Meeting)
DURHAM TOWN HALL – COUNCIL CHAMBERS

MEMBERS PRESENT:

Mal Sandberg, Chair; Art Grant; Katie Paine; Annmarie Harris; Peter Smith; Mark Morong; Pete Chinburg

MEMBERS ABSENT:

Mike Pazdon, Eileen Fitzpatrick

OTHERS PRESENT:

Todd Selig, Town Administrator;
Interested Members of the Public

The meeting was called to order at 7:00 pm

Councilor Grant suggested adding a discussion period regarding the school rates formula and the false alarm fees to the agenda of an upcoming meeting. Councilor Grant will present an argument at the May 6, 2002 meeting, at which there will be further discussion about the school formula.

Councilor Morong felt that there should be a base number of false alarms for which the district is not charged. He will put together an argument to that end to be presented at the May 6, 2002 meeting. Currently the first 5 alarms are “forgiven.”

Councilor Grant requested clarification regarding the distinction between the numbers of alarms which were burglar alarms versus fire/burglar alarms, and whether the Fire Department responded to all alarms or only fire alarms. Councilor Smith said that it was dependant upon the sophistication level of the alarm system, as to whether or not it displays an alarm message that is specific or just a general alarm call.

Councilor Grant MOVED to move Item XIII G to be discussed early. Annmarie Harris SECONDED the motion. The Motion PASSED unanimously.

XIII. New Business (Continued Discussion New Business From Previous Regularly Scheduled Council Meeting)

- G. Shall the Council consider initiating an amendment to the Durham Zoning Ordinance pursuant to Chapter 175-5 (B) of The Town Code relative to liquor licensing as recommended by the Administrator and refer this item to the Durham Planning Board?**

Town Administrator Selig recapped the issue as to whether or not the ordinance was enforceable as written. He included in the Council packets his non-legal opinion and

recommendation on the matter that it would be unenforceable should the ordinance be challenged in court. He felt that the Town's ordinance conflicted with the states comprehensive regulatory scheme. He also questioned the reference to churches in the restrictions on where such licensing is granted, and its appropriateness or inappropriateness under the division of church and state.

Town Administrator Selig said that the Durham Cumberland Farms was in the process of applying for licensing to sell alcohol. Other businesses in Durham are also going through that process with the state. In a short period of time, these and similar cases would be requiring attention by the Council and the Town. The Cumberland Farms application was discussed as an indicator case in terms of liquor sales licensing in Durham. Town Administrator Selig said that the liquor licensing commission welcomed input from the Town regarding organizations seeking liquor licensing. Town Administrator Selig outlined the general grounds by which the Liquor Commission might be inclined to reconsider or reject a venue's application for a liquor license, including public safety.

Councilor Smith discussed the relevance of this to a town's ability to be wet or dry if it wishes. The authority is chapter 663:5 of the revised statutes. If a town wishes to pursue those provisions, it can seek to become partially or fully dry. It may also vote to preclude the state from having liquor stores within The Town. The argument that Town Administrator Selig elaborated on was characterized by Councilor Smith as state pre-emption. Councilor Smith indicated he is addressing legal issues, not policy issues. He went on to state that there is a uniquely huge problem in Durham due to the large volume of students and their age range, with alcohol. He characterized this question as being flooded with substantial policy questions. Under legal pre-emption, in a state that does not generally provide home rule for a locality, such as the State of New Hampshire, the doctrine of pre-emption means that if the state adopts a general regulatory scheme with respect to a particular subject matter area, and if it is construed as occupying the field, the consequence is that the Town has no power to pass laws or to act in any regulatory fashion that is inconsistent with a state's regulatory scheme. Councilor Smith said that whether or not a state chooses to do that is a policy question. In the case that Town Administrator Selig had referred to in the city of Manchester, the difference is that our statute is different than theirs. The State Supreme Court had overruled the complainant, apparently, in that case, supporting that a local community could not overrule the state law decision. Councilor Smith further clarified that one issue that the liquor commission considers in deciding whether or not to grant a license is the location of the premises, based on a series of criteria. If The Town interferes, through its ordinance, with any piece of the regulation being of general application that occupies the field, that is not allowed. Councilor Smith felt that if The Town's ordinance were challenged the Town would lose. In terms of attorney fees and of any entity against which the Town might have to defend its decision, he felt the Town would "lose large."

Councilor Grant said his practice was to not go looking for trouble. He pointed out that the ordinance had been on the books for at least 10 years, and felt that it had perhaps been challenged unsuccessfully in the past.

Town Administrator Selig clarified that in a case several years ago an application was denied and the applicant challenged the Town's ruling. However, during the time between the complaint and the court date, the case was dropped as the applicant found another tenant, making the application a moot point.

Councilor Grant felt that alcohol was a huge problem with the university, the high school and for the police department. He maintained that The Town should keep the ordinance it has in effect. He felt that it was a local right in terms of zoning. While there may be some weaknesses in the current ordinance, he would prefer to enforce the statute as it now stands and would vote not to send this to first reading.

Councilor Paine asked what impact the zoning ordinance had on the value of a liquor license and on the value of property in Durham, and whether the increased “value” of a piece of property such as that would benefit the Town, in terms of taxation benefits/property taxation.

Town Administrator Selig indicated that the potential revenue stream of a company does have an impact on the assessed value of an enterprise. But historically, Durham has not done a good job in closely ascertaining what the cash flow is of these private enterprises in town. It is voluntary for businesses to provide that information. To a certain degree, he felt that the profit reaped from selling alcohol was muted due to inadequate data in which to generate reliable information upon which to base such calculations.

Councilor Paine asked if there is an economic impact of voting one way or the other on this issue. Town Administrator Selig indicated he did not have adequate information to thoroughly answer that inquiry. But if an ordinance is not enforceable, then the revenue stream is not the issue of concern. The issue is not cash flow, but rather appropriate location of establishments that serve alcohol.

Chair Sandberg indicated that the Council could initiate zoning changes. However, should the Council concur that this is a subject which needs further development; it should not pass an ordinance on first reading, but refer the issue to the Planning Board.

Town Administrator Selig suggested that should the Council refer this matter to the Planning Board, it should include its suggestions regarding buffer zones.

Councilor Morong also asked that there be a differentiation made between establishments that sell alcohol with food as opposed to businesses that sell alcohol without serving food.

Councilor Harris expressed concern that establishments might have food service as an excuse for the right to sell liquor. She noted that the Zoning Board was currently in the process of rewriting the Zoning Ordinance and may be quite busy. Councilor Paine responded that the Zoning Board has great familiarity with the Master Plan, and it seemed more appropriate to refer this issue to the Zoning Board because they are currently in the process of doing the Zoning Ordinance rewrite.

Councilor Grant observed that a referral from the Council might carry more weight and be misinterpreted as a recommendation one way or the other on the part of the Council.

Councilor Chinburg indicated his opinion that the tentative value of a semi-enforceable ordinance is not a desirable reason to keep an ordinance on the books. He suggested that the unintended consequences law might rear up were the Town to go completely dry.

Councilor Harris stated that after Durham had moved from dry to limited alcohol availability, there was concern about students driving to obtain alcohol. In her opinion, the problem has increased as the size of the student population has increased. She also felt that the university had become much more stringent in its alcohol control policies, which increases problems in the Town as opposed to on campus, resulting in more policing costs.

Councilor Morong expressed reluctance to refer the decision to the Planning Board. He asked if the matter of having different rules for restaurants versus convenience stores had been discussed.

Chair Sandberg expressed his understanding of the process that if the Council wanted to initiate a change to the land use ordinances, then it should be sent to the Planning Board. If the Council does not desire to change the ordinance, then it should vote to NOT send it to the Planning Board. Eventually it will come back to the Council, at which point further argument would be entertained.

Councilors Chinburg and Grant debated the question of whether increasing the number of venues that sell alcohol would increase correspondingly the rate of consumption of alcohol sales in town.

Councilor Paine asked if additional supporting data could be provided to the Planning Board to assist in its decision. Town Administrator Selig responded in the affirmative. He voiced his agreement with Councilor Grant that the Council should only refer the ordinance to the Planning Board if it were serious about making the change. The Planning Board is simply too busy with other pressing issues to do otherwise. He also felt that rescinding the ordinance would have a significant impact on a whole host of problems associated with increased alcohol availability. However, he did not feel the ordinance would stand the test of time or dispute.

Councilor Harris asked what sorts of alternative mechanisms The Town could have that might make it possible to restrict the licensing availability. Town Administrator Selig stated that a process could be established where a public hearing could be held for concerned people to air their concerns. However, in order for the Town to have meaningful input, it must be timely. The state process works quickly and the turnaround would need to be perhaps a week. He feared that subjectivity would also be a problem.

Councilor Smith left the meeting at 8:45pm.

Councilor Paine MOVED that the Council initiate an amendment to Durham's Zoning Ordinance relative to liquor licensing and refer that ordinance to the Planning Board for review and study. Councilor Chinburg SECONDED the Motion, which PASSED with one negative vote from Councilor Grant.

- C. Shall The Town Council accept the resignation of Ruth Schondelmeier as Library Trustee and appoint Roni Pekins to fill Ms. Schondelmeier's unexpired term as recommended by the Library Board of Trustees?**

Councilor Harris mentioned that there was another person interested in applying for the position who was told it was too late to put his name on the ballot. She felt that this vacancy should have been a separate ballot vote and advertised separately. She was also displeased that there was not supporting information provided with the recommendations received by the Council.

Councilor Grant MOVED to accept the resignation of Ruth Schondelmeier as a Library Board of Trustee and expressed the Council's appreciation for her dedication and service to the community. He further MOVED to appoint Roni Pekins to fill Ms. Schondelmeier's vacancy with a term expiration of March 2002. Councilor Chinburg SECONDED the Motion.

Chair Sandberg acknowledged some problems with the process. He felt that there was adequate time to have the vacancy appear on The Town warrant, which is where it should be. However, a vacancy now exists and it is the Town Council's responsibility to fill any such vacancies. He asked if Council members were satisfied that adequate notice had been given to the public to know that there is an open appointment. If the Council wanted to postpone action on this question and give the general public a greater opportunity to submit their names in interest of this appointment, then action could be postponed until a later date.

Councilor Harris felt that the position should be re-advertised to better allow other interested parties to present their applications.

Town Administrator Selig commented that in terms of public notice, the vacancies were posted, including the alternate positions as well as the regular member position, because his office had not yet received Mrs. Schondelmeier's resignation letter by the opening of the filing period for elected positions. Therefore, posting was done and potential candidates were given adequate time and notice. He also referenced that each of the candidates had in fact filled out the standard application form, attached to the information packet of the Council.

Councilor Chinburg stated his satisfaction with the candidate, as did Councilor Grant.

The Motion PASSED unanimously.

D. Shall The Town Council appoint Cynthia Cote and Norma Segal as alternate Library Trustees as recommended by the Library Board of Trustees?

Councilor Chinburg MOVED in favor of the appointments, and Councilor Morong SECONDED the Motion. Councilor Paine asked that future applications be more informative. Councilor Harris expressed her hope that the vacancy would be filled with candidates experienced in fundraising and grantwriting. ***The Motion PASSED unanimously.***

E. First Reading Ordinance #2002-04: Rescinding Chapter 96 "Permanently Disabled Exemptions", rescinding Chapter 52 "Elderly Exemptions" of the Durham Town Code and renaming Chapter 52 "Exemptions", codifying all existing adopted property tax exemptions, adopting and codifying the optional standard veteran tax credit and surviving spouse veteran tax credit and

codifying and modifying the income amounts and asset limits for the disabled and elderly exemptions?

Town Administrator Selig suggested that all of the exemptions and tax credits be consolidated into one section so that they could be easily located and explained. The proposal abolishes Chapter 52 and Chapter 96, and creates a new chapter simply called "Exemptions." It further codifies all of the exemptions previously adopted in Durham, in one location. His proposal is that it be treated as one Motion, in which The Town would essentially be adopting a new ordinance asking all of the above questions, to which an affirmative yes is implied.

Councilor Harris MOVED that the Durham Town Council hereby passes on First Reading, Ordinance #2002-04 rescinding Chapter 96 "Permanently Disabled Exemptions", rescinding Chapter 52 "Elderly Exemptions" and renaming Chapter 52 "Exemptions", codifying all existing adopted property tax exemptions, adopting and codifying the optional Standard Veteran Tax Credit and Surviving Spouse Veteran Tax Credit and codifying and modifying the income amounts and asset limits for the Disabled and Elderly Exemptions. The Town Council further schedules a public hearing to be held on Monday, April 15, 2002. Councilor Paine SECONDED the Motion.

Councilor Chinburg questioned the absence of a solar energy tax credit being included in the motion.

Councilor Chinburg MOVED to amend the Motion to include the solar energy tax credit. Councilor Paine seconded the Motion.

Councilor Grant abstained from the vote due to his current veteran status, on the basis of a conflict of interest, a status possibly being claimed also by Councilor Chinburg. Town Administrator Selig stated that any such conflict of interest precludes the Councilors from voting, but it might prevent a quorum from being obtained.

Town Administrator Selig also indicated that he planned to bring forward another separate proposed first reading on the taxation chapter to eliminate solar, blind, and elderly exemptions to consolidate such exemptions.

Councilor Morong asked if this would prompt another public hearing. Town Administrator Selig that would all be addressed at the April 15 public hearing.

The Motion was to amend the original motion, and to move the solar item to the end of the list and then move the standard veteran tax and surviving spouse credits up.

The Motion to amend the original motion PASSED unanimously. The Motion itself PASSED unanimously, with Grant and Chinburg abstaining.

- F. Shall The Town Council rescind its vote of March 4, 2002, to schedule a public hearing for April 1, 2002, on Ordinance #2002-03 amending Chapter 52 "Elderly Exemptions, Section 52-3 "Administration" of the Durham Town Code by increasing amounts and asset limits?**

Councilor Paine MOVED that the Town Council rescind its vote of March 4, 2002 scheduling a public hearing on Ordinance #2002-03 for April 1, 2002. Councilor Chinburg SECONDED the Motion. The Motion PASSED unanimously.

H. Shall The Town Council discuss appointments to remaining boards, commissions and committees?

Town Administrator addressed two open appointments: Traffic Safety Committee and Water, Wastewater, Solid Waste Committee. He welcomed any Councilor interested in attending the Traffic Safety Committee, and suggested that this committee be moved to the category of "administrative committee." Town Administrator Selig clarified that the purpose of the Water, Wastewater, Solid Waste Committee was to review applications submitted for hookups, look at long-range planning for water and wastewater systems in Durham, and it provide a forum for the Town and the University to collaboratively discuss these issues. He noted that water and wastewater issues tend to be technical and costly. Having Councilors attend meetings on those issues would be beneficial and of value to the Council as a whole. However, at the same time, he felt those committees are an administrative function, and that the staff should be putting together the plans to be presented to the Council as a whole. The Council was comfortable with the change in classifications to an administrative committee.

Chair Sandberg asked that the Council continue to be notified of these meetings.

On the topic of Town/Gown partnership and community building, Chair Sandberg felt there was a useful purpose for having the Town/Gown meetings. However, the current setup is restrictive due to the University representatives' desire to meet no more than two times a year. Though it is still a good forum for sharing global ideas, it may not be a "get things done" group format. The Council will need to direct the Administrator to move forward on particular issues with the University.

A. Other Business

There was no other business.

XIV. Nonpublic Session

Grant made a MOTION to enter into Nonpublic Session for the purpose of discussing personnel matters pursuant to RSA 91-A:3 II (a) and (c) respectively. The motion was SECONDED by Harris and PASSED on a roll call vote of 6-0 as follows:

Fitzpatrick	<u>Absent</u>	Sandberg	<u>Aye</u>
Morong	<u>Aye</u>	Harris	<u>Aye</u>
Smith	<u>Absent</u>	Pazdon	<u>Absent</u>
Paine	<u>Aye</u>	Chinburg	<u>Aye</u>
Grant	<u>Aye</u>		

The Town Council entered into Nonpublic Session at 9:00 PM.

The Town Council entered into public session at 9:25 PM.

Councilor Grant MOVED to seal the nonpublic session minutes of March 25, 2002. The motion was SECONDED by Harris and PASSED unanimously.

Councilor Grant remarked that the Police Department had done a very nice job with its visioning session on Saturday, March 23rd.

XV. Adjourn

Chinburg MOVED to adjourn the meeting. The motion was SECONDED by Harris and PASSED unanimously. The meeting adjourned at 9:27 PM.

Marie MacDonald, Minute Taker