

These minutes were approved at the Monday, November 18, 2002 meeting
DURHAM TOWN COUNCIL MINUTES
MONDAY, OCTOBER 7, 2002 – 7:00 P.M.
DURHAM TOWN HALL – COUNCIL CHAMBERS

MEMBERS PRESENT: Malcolm Sandberg, Chair; W. Arthur Grant;
Peter Smith; Pete Chinburg; Katie Paine;
Mike Pazdon; Mark Morong; Scott Hovey;
Annmarie Harris

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

I. Call To Order

Chair Sandberg called the meeting to order at 7:00 P.M.

II. Approval of Agenda

*Katie Paine MOVED to approve the agenda as submitted. Annmarie Harris
SECONDED the motion.*

*W. Arthur Grant MOVED to amend item VIIIA, pertaining to the UNH Homecoming
Parade. He MOVED to change the hours to read between 5:00 and 6:00 P.M. and to
add the words “pending final approval by police and fire officials as to the revised
times.” The motion was SECONDED by Annmarie Harris.*

Mike Pazdon stated while the Council could amend the agenda, the permit application
itself would remain the same.

Chair Sandberg suggested the item be removed from the Unanimous Consent Agenda to
be discussed as a separate item and the Council agreed.

*W. Arthur Grant MOVED to amend item VIII.C “Continued discussion on the draft
police Memorandum of Understanding between the Town of Durham and UNH” to
insert the word “postpone” in front of the word “continued.” The motion was
SECONDED by Scott Hovey and it was unanimously APPROVED.*

The agenda was adopted as amended.

III. Special Announcements

Chair Sandberg stated there were no special announcements.

IV. Approval of Minutes

Minutes from September 9, 2002 (which was continued September 16, 2002)

Katie Paine MOVED to approve, as presented, the minutes from September 9, 2002 (which were continued to September 16, 2002.) The motion was SECONDED by Arthur Grant.

The following amendments were made to the minutes:

On page 3, 3rd paragraph in the sentence starting “Mark Morong stated” the line “removal of a computer system” should be replaced with “disposal of a complete computer system.”

On page 5, 7th paragraph in the sentence starting “Katie Paine stated” the word “effect” should be changed to “affect.”

The minutes were APPROVED as amended with a vote of 8-0-1. (AnnMarie Harris abstained as she was not at the meeting.)

Minutes from September 23, 2002

Mark Morong MOVED to accept the September 23, 2002 Minutes as submitted. Pete Chinburg SECONDED the motion.

The following amendments were made to the Minutes:

On page 2, 9th paragraph the sentence starting “Peter Smith stated” the word “effect” was changed to “affect.”

On page 2, 11th paragraph starting “Mike Pazdon stated” the line “the packet that was submitted” was changed to “the budget packet that was submitted.”

The minutes were APPROVED as amended with a vote of 5-0-1, (AnnMarie Harris abstained as she did not attend the meeting.)

V. Report of the Administrator

Administrator Todd Selig reported the following:

Halloween in Durham will be on Wednesday, October 30, 2002 between the hours of 5:00 and 7:30 P.M.

Household Hazardous Waste Day in Durham will be on November 16, 2002 starting at 9:00 a.m. at the Transfer Station.

The weekend of October 11 through October 13 will be UNH Homecoming Weekend.

On Wednesday, October 9, 2002 at 7:00 P.M. Administrator Selig and Business Manager

Paul Beaudoin will be meeting with the Planning Board to discuss the 2003-2013 Capital Improvement Plan.

Last week, Administrator Selig attended the International City County Management Association in Philadelphia, Pennsylvania for its annual conference.

VI. Reports and Comments of Councilors

Katie Paine stated the DCAT Committee will soon have a vacancy. The Committee meets in the Town Hall every Wednesday at 8:00 A.M.

Arthur Grant stated that alternate Planning Board member Tracy Wood will be stepping down from the Board. The Planning Board is seeking a replacement. It meets every

Wednesday at 7:00 P.M. in the Town Hall as the Planning Board or as the Zoning Rewrite Committee.

Mark Morong stated that last week he attended a conference put on by the American Planning Association, and a meeting put on by the Durham Business Association.

Katie Paine stated DCAT will be broadcasting a debate this month organized by Oyster River High School students. The debate will be a candidate's forum of people running for State Representative.

VII. Public Comments

Dawn Gene, 43 N. River Road, Lee, stated she was representing 22 employees who work for the National Resources Conservation Service under the U.S. Department of Agriculture. The business is located on the second floor of the Post Office. She stated that the employees have concerns about the changes being proposed to Cowell Drive and Madbury Road in terms of parking.

Chair Sandberg stated a Public Hearing on the proposed parking changes would be discussed later in the meeting.

Tom Christie, 12 Jenkins Court, and President of Slania Enterprises stated he received a parking ticket in May while his corporate car was parked on his corporate property, and he had received a letter from Police Chief Dave Kurz on August 3, 2002 indicating that the matter was going to the Town attorney and then brought forward to court. He stated it had been two months since he received the letter and he has received no other response.

Mr. Christie stated the size of the Council Chambers was too small to hold meetings, as many times there is no place for the public to sit, and that a new location should be sought.

Mr. Christie stated he would like the Council to adopt a policy that if a member of the public is representing two separate entities they be given five minutes of comment for each entity.

Mr. Christie spoke about the paving of Dame Road. He stated polices should be made first before items are put into the budget.

William Hall, 1 Smith Park Lane, spoke in favor of enlarging the Council Chambers. Chair Sandberg stated enlarging the Council Chambers will be a project given careful consideration during the budget process.

Robin Rousseau, 345 Packers Falls Road, read from a prepared statement which she added to the record. She spoke against a proposed subdivision on Allen Farm, stating she did not see how it would benefit the community or comply with local laws.

Administrator Selig stated the Town has included money in the draft budget to enlarge the Council Chambers.

Administrator Selig stated Public Works has included the paving of Dame Road in its draft budget, but he has not begun reviewing any of the Town Department's budgets except for capital items. It has not been decided if the paving of Dame Road will come to the Council as part of the Administrator's proposed budget.

VIII. Unanimous Consent Agenda

Mike Pazdon MOVED to adopt:

B. Resolution #2002-23: accepting grant funds from the State of New Hampshire Department of Environmental Services for household hazardous waste collection and authorizing the Town Administrator to sign the grant agreement.

C. Postpone continued discussion on the draft police Memorandum of Understanding between the Town of Durham and UNH.

Annmarie Harris SECONDED the motion and it was APPROVED.

Mike Pazdon MOVED to approve a permit application from the UNH Campus Activities Board to close a portion of Main Street and Mill Road between the hours of 6:30 and 7:15 P.M. on Friday, October 11, 2002 for the annual Homecoming Parade. Pete Chinburg SECONDED the motion.

Arthur Grant MOVED to amend the application to change the hours from 6:30 and 7:15 P.M. to 5:00 and 6:00 P.M. and to insert the words "pending final approval by the Town Administrator as to the timing." Annmarie Harris SECONDED the motion and the motion was unanimously APPROVED.

Peter Smith stated each permit application from UNH should be signed by a person who carries the authority of UNH. The permit should be written in such a way to reflect who that person is.

Scott Hovey stated it had been agreed by the Council that event permits would arrive six weeks before the event, but that the Homecoming Parade permit was seen by the Council only one week prior. He stated that if the Council was to turn down the application, the lack of time could create an unnecessary issue.

The permit application was unanimously APPROVED.

IX. Committee Appointments

C. Crawford Mills, Jr., 22 Newmarket Road, spoke to why he wanted to become a member of the Historic District Commission.

Pete Chinburg MOVED to appoint C. Crawford Mills, Jr. to the Historic District Commission until March 31, 2005. The motion was SECONDED by Mike Pazdon and was unanimously APPROVED.

Dale Valena, 313 Durham Point Road, spoke to why she wanted to become a member of the Integrated Waste Management Advisory Committee.

Annmarie Harris MOVED to appoint Dale Valena to the Integrated Waste Management Advisory Committee. The motion was SECONDED by Pete Chinburg and was unanimously APPROVED.

X. Unfinished Business

A. Public Hearing Ordinance #2002-10 amending various sections of Chapter 175 Zoning in the Durham Town Code by deleting references to the sale of alcoholic beverages in various zoning districts of the Town.

Administrator Selig stated it was his professional opinion that the Town ordinance is preempted by State statute and such references should be stricken.

Katie Paine MOVED to open the public hearing on the matter. The motion was SECONDED by Pete Chinburg and was unanimously APPROVED.

Dee Grant, 261 Mast Road, spoke against amending the ordinance. She stated dropping the language from the ordinance without replacing it may increase the use of alcohol consumption in Town.

Ms. Grant stated the State Liquor Commission has proposed new regulations that would include local zoning as a new reason for denial of a liquor license and the current wording in the ordinance may fall under that.

William Hall, 1 Smith Park Lane, spoke against the ordinance.

Bruce Bragdon, 7 Colony Cove Road, stated he did not believe it would be good for the Town to get rid of any rules without replacing them and alternatives should be sought. He stated he believed the current ordinance was in some way against the law in that the State has never allowed any towns to dictate liquor licensure through zoning. Mr. Bragdon stated if the State Liquor Commission adopted new regulations the Town would have a better chance of moving forward with its ordinance.

Beth Olshansky, 122 Packers Falls Road, stated she was concerned about the issues alcohol creates in Durham, not just with college students but with the high school students, as well. She suggested the Council wait until the State Liquor Commission makes a decision on its proposed regulations before making any changes to the current ordinance.

Administrator Selig stated the Town has put together an administrative checklist regarding licensure. People applying for a license must fill out the application indicating where the alcohol would be sold, under what conditions it would be sold, and the nature of the place it was going to be sold. The application would make the rounds to the Fire and Police Departments, Code Enforcement Office, and the Planning Office. These departments would let the Town and State know what concerns, if any, they had with the application.

Mr. Selig stated whatever solution the Town comes up with it must be one that works quickly as the Liquor Commission will not wait long for local governments to provide input. The solution needs to be something administrative that would allow the Town to respond in a timely manner, or it would have to be in the form of an advisory ordinance.

Mr. Selig stated he believed in addition to local zoning, the Town needs backup information to show why it is inappropriate to sell alcohol in certain locations. Chair Sandberg stated the Council would be looking at other language to replace the current ordinance.

Mike Pazdon MOVED to close the public hearing. The motion was SECONDED by Katie Paine and was unanimously APPROVED.

Peter Smith MOVED to table the discussion pending completion of X.E on the agenda. The motion was SECONDED by Mike Pazdon and was unanimously APPROVED.

B. Public Hearing: Ordinance #2002-11 amending certain portions of Chapter 153 Vehicles and Traffic, Section 153-29 Metered Parking Areas of the Durham Town Code by increasing the current parking meter fees from \$1.00 per hour to \$1.50 per hour.

Administrator Selig stated by increasing the metered fees, the Town could gain approximately between \$20,000 and \$25,000 a year in increased revenue. From the parking meters, the Town currently takes in about \$45,000 a year. Mr. Selig stated changing the meter price would increase revenues to between \$60,000 and \$65,000 a year.

Mr. Selig stated the proposed ordinance would change the Pettee Brook Lane parking lot from an all day parking lot to a two-hour maximum time limit parking lot. The rationale is that UNH is currently evaluating its own parking situation as well as its parking fees. Therefore, Pettee Brook lot will become a more desirable lot for students and visitors to UNH. The two-hour time limit would ensure constant turnover.

Mr. Selig stated the ordinance change would eliminate any reference to the business permit system.

Katie Paine MOVED to open the public hearing. The motion was SECONDED by Mark Morong and was unanimously APPROVED.

Dawn Gene, 43 N. River Road, Lee, stated an increase in meter fees makes Durham less attractive to come to and to do business in.

Administrator Selig stated the ordinance change would not eliminate the free parking in the Store 24 lot or along Main Street in front of businesses.

Mr. Selig stated that currently the Town charges \$1.00 an hour and the Town sells parking permits for \$100 a year to business owners and their employees that entitles them to a license to hunt in the Pettee Brook lot for a parking space. He stated the ordinance change would not impact people who have permits as they would still be able to park in the Pettee Brook lot.

Arthur Grant stated that when the ordinance change comes up for Council discussion, he will propose that the Council divide the question of increasing the fees, and setting the maximum parking time in the Pettee Brook lot to two hours, as Mr. Grant believes they are two separate issues.

Peter Smith MOVED to close the public hearing. The motion was SECONDED by Katie Paine and was unanimously APPROVED.

Peter Smith MOVED to table discussion on the matter pending completion of item X.E on the agenda. The motion was seconded by Pete Chinburg and was unanimously APPROVED.

C. Public Hearing: Ordinance #2002-11 amending Chapter 153 Vehicles and Traffic, Article IV Metered Parking of the Durham Town Code by creating Section 153-30 entitled Business Permit Parking Areas and initiating a parking permit system on a portion of Madbury Road, Cowell Drive and Pettee Brook Road parking lots.

Administrator Selig stated the proposed ordinance is part of an overall look the Town has taken at parking with the first part being revenue enhancement and addressing the amount of time people could park in the Pettee Brook lot and the second part being an attempt to free up spaces in the Pettee Brook lot by increasing the number of business parking permit only areas in alternate locations. The change is intended to move people presently parking for free on the right side of Madbury Road heading out of Town.

Mr. Selig stated the proposed ordinance would create an overall parking permit system that would be managed by the Police Department and approved by the Town Administrator. The ordinance would address the east side of Madbury Road from the intersection of Garrison Avenue Extension to Woodman Road. It would create business only parking on the north side of Cowell Drive from the intersection of Madbury Road to the driveway of the St. Thomas Rectory. It includes the east and west sides of the Pettee Brook Road parking lots to include the metered east lot.

Mr. Selig stated the cost of business permit parking would go up from \$100 a year to \$125 for parking in the Pettee Brook parking lot and the Cowell Drive area. The area along Madbury Road would be offered at a reduced rate of \$100 a year to encourage those with business permits to move out of the Pettee Brook lot and park their cars along the right side of Madbury Road. This will move the student population parking on the Madbury Road into the metered area.

Mr. Selig stated the Town has looked at the right side of Madbury Road and at Cowell Drive as a metered area but curbing would need to be installed and the costs of the curbing are prohibitive by the Town at this time.

Katie Paine MOVED to open the public hearing. The motion was SECONDED by Mike Pazdon and it was unanimously APPROVED.

Dawn Gene, 45 N. River Road, Lee, stated the 22 employees of the National Resources Conservation Service that rents space on the second floor of the Post Office have concerns about the proposed changes. Ms. Gene suggested the Town plan for a parking garage in Town.

In response to questions from Ms. Gene, Administrator Selig stated lines will be painted to delineate the spaces, and in the Pettee Brook lot the Town currently sells 100 business parking permits and there are 78 spaces available. The Town plans to oversell the number of spaces available in anticipation not all permit holders would be in the lot at the same time. The permits only grant someone the license to hunt for a parking space. It does not guarantee a space. If someone purchases the more expensive parking permit it would entitle them to park anywhere the permit allows them but the reduced parking permit only allows for parking along Madbury Road.

Brian Linnell, 1 Fellows Lane, is employed by the Natural Resources Conservation Service, and stated handicapped parking at the Post Office does not meet State ADA requirements. He spoke about his concerns with the downtown parking. In response to a question from Dee Grant, 261 Mast Road, Administrator Selig stated the proposed ordinance would increase the number of business parking permits sold by the town to approximately 110. He was unsure as to how many parking spaces it would free up.

In response to a question from Ms. Gene, Administrator Selig stated the Town revenue gained from the parking meters is not limited to the Pettee Brook lot as there are other meters around Town and the business parking permits would only be used in the Pettee Brook parking lot and Madbury Road.

Peter Smith MOVED to close the public hearing. The motion was SECONDED by Katie Paine and it was unanimously APPROVED.

Katie Paine MOVED to table discussion on the matter pending completion of X.E on the agenda. The motion was SECONDED by Mike Pazdon and it was unanimously APPROVED.

B. Public Hearing: Resolution #2002-13 establishing the policy for naming public facilities, trails, forests or trees.

Administrator Selig stated people in Town have made a number of requests to have structures named after their loved ones. He spoke to the requirements for having something named after a person.

Annmarie Harris MOVED to open the public hearing. The motion was SECONDED by Peter Smith and was unanimously APPROVED.

William Hall, 1 Smith Park Lane, spoke against the proposed resolution as it was written. He stated there was no committee to identify the criteria to be named and to take nominations.

Administrator Selig stated the name of a person and designated structure must be submitted to Public Works by a citizen, local organization or Town Department for review. Public Works would make suggestions and forward the proposal to the Council. The names approved would be memorialized by a resolution to be presented to the person or family members.

Mike Pazdon MOVED to close the public hearing. The motion was SECONDED by Katie Paine and was unanimously APPROVED.

Pete Chinburg MOVED to table discussion on the matter pending completion of X.E on the agenda. The motion was SECONDED by Mike Pazdon and was unanimously APPROVED.

Arthur Grant MOVED to recess for 8 minutes with the Council to reconvene at five minutes before the hour. There was no objection and the Council recessed at 8:48 P.M.

Chair Sandburg called the Council back to order at 9:07 P.M.

The following is a verbatim transcript for this section as requested by the Town Council:

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

Pete Chinburg recused himself from the discussion and left the Council at 8:48 P.M.

Mark Morong and Katie Paine both recused themselves from the discussion at 9:07 P.M.

Chair Sandberg: As you recall, we closed the public hearing on this matter at our last meeting, or two meetings ago, I guess. Now, we have before us the deliberation and at this time the chair would entertain a motion, I don't actually have the language of the proposed PUD motion right here.

Administrator Selig: I have it. It's a resolution.

Chair Sandberg: Now, we had a second motion.

Administrator Selig: Hold on.

Chair Sandberg: The motion was to authorize the issuance of a Planned Unit Development.

Administrator Selig: Right there.

Chair Sandberg: Thank you (laughter) my apologies.

Administrator Selig: Sorry.

Chair Sandberg: The Chair would entertain a motion for the Town Council to approve by express resolution the application for a Planned Unit Development submitted by Jones & Beach Engineers Inc. and recommended by the Planning Board at its December 19, 2001 meeting for the property at Packers Falls Road shown on Tax Map 17, Lots 39-0, 39-1, 39-3 through 39-6 and 39-8 through 39-20. This approval is

to allow for a Planned Unit Development in the Rural Zoning District subject to the conditions outlined in the Findings of Fact and Conditions of Approval and includes by reference all documents included in the site plan. Is there such a motion?

Councilor Pazdon: So moved.

Chair Sandberg: Moved by Councilor Pazdon and seconded by...

Councilor Harris: Second.

Chair Sandberg: .. Councilor Harris. Discussion? Councilor Pazdon?

Councilor Pazdon: I just have a question. This is for the PUD, when does the CUP come along or is it we're trying to do both?

Chair Sandberg: The PUD is addressed under 175-32 and then the CUP is for a Conditional Use Permit as a PIJ7D. Once we approve the PUD then you'd address the question of the CUP as a PUD.

Councilor Pazdon: All the things that went together with the, I didn't bring my stuff, all of the pertaining materials from the Planning Board and the Conditional Use Permit, Planned Unit Development, are all wound into this one resolution?

Chair Sandberg: We all have the package. The checklist we have with respect to 175-10 and 175-32 can all be addressed relative to this information that was presented at the same time. The question with respect to the, our duty under the ordinance would be to look at the checklist under 175-32 and determine to your satisfaction whether or not the applicant has met his burden as required by 175-32.

Councilor Pazdon: Can I see the resolution that was just read?

Chair Sandberg and Administrator Selig: Motion number three.

Chair Sandberg: Is there further discussion on this matter while Councilor Pazdon is... Mr. Selig?

Administrator Selig: Can I try to provide some guidance, that's all?

Chair Sandberg: Sure

Administrator Selig: What the Zoning Ordinance says with regard to the PUD is in 175-32 (G), this is regarding the planning and development portion of this application. It says "approval of the residential planning and development, if all the conditions in 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. When appropriate a final plan shall be submitted and approved by the Town Council and recorded in the Stafford County Registry of Deeds.” In order to assist the Council in ascertaining whether or not all of the conditions of the Durham Zoning Ordinance are met we put together the checklist that the Council has before it. Our Town Planner, at my request, went through the checklist and answered from the perspective essentially of the Planning Board, whether or not this application in fact met all the conditions of the Durham Zoning Ordinance and where applicable, the Planner identified in the document where you can look to find out for yourself whether or not the burden has been met by the applicant. Now, this portion of the application, again this being first the PUD, the second is going to be the CUP. The PUD requires a majority vote by the Council. The CUP requires a 2/3 vote of the Council to overturn or reverse the Planning Board recommendation but again, in the Chairman and my discussions and the Vice Chairman and my discussions in terms of trying to facilitate this discussion tonight, we thought we would utilize this checklist as a way, a vehicle, for the Council to determine whether or not the burden has been met in terms of meeting the requirements of the Zoning Ordinance.

Chair Sandberg: Other comments? Councilor Smith?

Councilor Smith: I have a threshold question for Todd on something you just said which was the issue of the 2/3 vote with respect to the CUP. Could you indicate what your authority is for that?

Administrator Selig: Yes, I hope I spoke correctly. I was thinking it was 2/3 but let me...

Councilor Smith: Let me ask you, to speed this up a little bit, would you regard the referring...

(Undistinguishable background voices)

Chair Sandberg: I’m sorry, one person speaking at a time. The answer to your first question, Councilor Smith, is 175-10 (F7) which reads “a 2/3 vote of Council members present is required to reverse the recommendation of the Planning Board on any conditional use application.

Councilor Smith: Is it your opinion, Mr. Selig, that the 2/3 vote applies to those matters for which the Town Council is given plenary jurisdiction?

Administrator Selig: That question has been a great debate over the last few months. It is my personal opinion and professional opinion that it refers specifically to the fiscal criteria but there has been some disagreement about that interpretation on my part.

Councilor Smith: What was the meaning of the word that in your sentence? I’m sorry;

you said that refers to the fiscal criteria.

Administrator Selig: It's my opinion that the Council should focus on the fiscal issues only that are outlined in 175-10 (KS) and (K6.)

Councilor Smith: I guess my question, on this 2/3 issue, which I think we need to get an agreement on initially, is whether the Planning Board has the power to make recommendations to the Council with respect to fiscal issues as opposed to all the other issues, which it seems to me quite clearly it does have the power to do and if the answer is the Planning Board does not have the power to be making recommendations with respect to the fiscal issues then the issue of 2/3, it would seem to me, wouldn't come into play as the Council would not be reversing the Planning Board with respect to something on which it didn't have power, which would mean that unless there is something otherwise stated it would be a majority of the Town Council that would vote on the issue with respect to the fiscal issues and would require a 2/3 vote of the Town Council to overturn the recommendation of the Planning Board. The critical question, I think becomes: does the fiscal issue come within the boundaries of what the Planning Board has to bring to the Council or is that outside of the boundaries?

Chair Sandberg: It's definitely outside of the boundaries of the motion that's before us, which is with respect to the PUD and the 175-32. The fiscal matter does not come up in this particular question that's before us but it will be coming up pursuant to this.

Councilor Smith: Mr. Chairman, I'm happy to defer this discussion but I wanted to raise it. The way it was presented a few moments ago was as if there were no question about it and I wouldn't want that notion to sit on the table at all until we get to the point of discussing it but I'm happy to not discuss it at this point.

Administrator Selig: The answer to the excellent point that Councilor Smith raises may never, I'm afraid, be known unless we find ourselves in court and it's decided by a judge but we can discuss that later.

Chair Sandberg: The question before us is the, with respect to, and I would suggest we take a look at the checklist that you have before you or in your packet for 175-32, Compliance Checklist for Planned Unit Development. There are X's that are placed, as Mr. Selig pointed out, in various sections of this sheet that were placed there by the

Planner who apparently placed them there from the Planning Board's perspective. The question is now are there any of the points that have been responded to, by the Planner., is there any objection on the part of councilors as to how the checklist has been addressed by the Planner. Councilor Grant?

Councilor Grant: I don't have an objection Mr. Chairman but I do want to verify for the record that my understanding is correct. I guess I'm addressing the Planner through the administrator. My understanding is that this is a 106 acre piece of

property and that the Planning Board did in fact conclude that it contains the required minimum 20% of the total acreage of the site to set aside as open space. I gather that the open space, in this case, amounts to 67 acres approximately. 50% of that, which shall include land with slopes greater, shall exclude land with slopes greater than 25% and wetlands. The Planning Board did verify that is correct, am I right on that?

Planner Campbell: You're referring to question number 10?

Councilor Grant: Question number 10, Jim.

Planner Campbell: Actually, the figures for the 50% and 20% slopes were not on the site plan and the way I tried to frame the answer to that is from looking at the Board's perspective. The Board looked at the site plan, they had 106 acres. They're required to have 21.26 acres of open space. They're providing a lot more than that. Looking at that, if you look at the required open space and what they're providing they would have to have a majority of this parcel in wetlands and steep slopes but again that is a conjecture as the Planning Board never saw those figures on the site plan.

Chair Sandberg: Councilor Grant, follow up?

Councilor Grant: When you say it's a matter of conjecture, whose conjecture?

Planner Campbell: When they looked at it, they're looking at 106 acres. They're looking at 21 acres required open space. They're looking at what is being provided.

Councilor Grant: What is being provided is approximately 67 acres, is that correct?

Planner Campbell: Yes, if you take out the 2.75 buildable area for their one other lot. I don't remember anything saying that there's this much wetlands 50% and this much steep slope in the open space. What I'm saying is there weren't figures saying that this is 50% and this is 20% of steep slope.

Chair Sandberg: Thank you Mr. Campbell, Councilor Smith?

Councilor Smith: Just a follow up on this issue of trying to get clear what was conjectured here. On this particular point, did anyone testify and specifically give the information that is called for with respect to... we're talking about number 10, am I correct?

Chair Sandberg: Yes.

Councilor Smith: Was there any testimony that was given that spoke specifically to it and if so what was the testimony, who gave it and what did it say?

Planner Campbell: To the best of my knowledge there was no testimony saying that this was the amount of wetland in the open space or this was the amount of steep

slope in the open space.

Councilor Smith: Is there any document in the materials that I can barely lift up here?
(Laughter) Is there any document that contains that information?

Planner Campbell: Not that I can find.

Councilor Smith: Thank you.

Chair Sandberg: Let me just draw this, that the checkmark which, there's an X placed by the "Yes" on item 10 on this checklist and that's there as it reflects the sentiment of the Planning Board but in fact, there is nothing in the record that indicates that 50%, addresses this whole question of 25% slopes and wetlands.

Planner Campbell: Correct. The reason I said yes instead of no was that they didn't deny it saying there wasn't that either.

Chair Sandberg: Thank you. Are there other questions or comments from the Council with respect to the checklist? I would, just following up on that Mr. Campbell, on item 11. In the checklist it makes reference to 175-32 sub (D) sub (3) sub (a), small a, where it asks the question "does the development meet the residential density requirements shown on the chart?" When we look at that particular chart it makes reference to net acreage. What should we have found in the record with respect to the question of net acreage, anywhere in the record where net acreage shall include the required 20% of open space, land with slopes in excess of 25% and wetlands as required in article 5?

Planner Campbell: Again, if you refer to the checklist I gave you on the answer I gave to 11 that this was not shown on the plan and I referred you to question 17 (B) on the checklist in which that density calculation is supposed to be noted on the site plan.

Chair Sandberg: You note in there that it is not.

Planner Campbell: It was not. Again, trying to look at it from the Planning Board's perspective that if you had a half acre per dwelling unit you'd need 2 acres for each lot and if they had proposed 18, which included the one for Jack Farrell which is there, you would need 36 acres for the density. Looking at the total space, separating the open space of what is required of 21.26 you have 85.07 roughly. If they only need 36 acres and again its not listed on the plan but if you were to look at it saying if they had 85 acres after they take out open space, they need 36 for 18 lots that would probably require about 49.07 acres to be wetlands and steep slopes, which seems like a lot but they didn't see the figure of exactly what that was.

Chair Sandberg: Councilor Smith?

Councilor Smith: I don't have the advantage, of course, of having sat at any of the Planning Board meetings. May I address Mr. Campbell?

Chair Sandberg: Please.

Councilor Smith: When the issue set forth in the various subsections of 175-32 were being discussed did there come a time with respect to each of these when the applicant or the applicant's representative presented in some form explicit data with respect to any of these issues? What was the system by which the Planning Board went through each of these numerous criteria; either during the course of using testimony, presentation of materials by the applicant or through its discussion? Was there a system in which a piece of evidence was specifically pointed that said such as we've now met this one? Mr. Jones said two Wednesdays ago the following..., or did somebody hold up a document or something like that and say "we met this one, there's this particular document in our file?" How did this process work?

Planner Campbell: I think it was different for the Conditional Use Development and the Planned Unit Development where, as I think, with the Planned Unit Development the discussion of everything involved in there was scattered. These checklists were created after that went through the Planning Board so the Board didn't have these checklists to go through but with the Conditional Use Permit...

Councilor Smith: Before you, I don't want you to get through that yet.

Planner Campbell: They went through that with the ordinance but they did not go through each of these questions individually. That just didn't occur.

Councilor Smith: Did it occur in terms of when the applicant, before the discussion among the Planning Board members itself but just at the point when the applicant was presenting information, did the applicant, totally aside from what the Planning Board did... did the applicant go through each one of these criteria as the information was being presented? Did it happen at that stage?

Planner Campbell: Point by point? No, they did not.

Chair Sandberg: Other questions or comments with respect to other items on the checklist perhaps? There is a question, if we can move on to number 16, Mr. Campbell. It says "is the architectural design of the buildings aesthetically compatible with surrounding buildings within the PUD" and you check off "not applicable."

Could you explain to us why it's not applicable and why we shouldn't be considering building aesthetics?

Planner Campbell: I think when the Planning Board approved this there were no buildings proposed so they did not look at any architectural designs. When I look back at the previous approval, as they said, a lot of what they were doing was based

on that. Again, I didn't find anything in that. I'm assuming that when the Planning Board made a decision not to say "were not requiring the applicant to show us buildings" that's what their interpretation was, saying that they have covenants that talk about design but since they were proposing no buildings they did not apply that section.

Councilor Smith: On this point, was there any discussion before the Board members or from the applicant as to whether subsection 9... and Mr. Selig, if we ever do this book again it would be wonderful if they had page numbers. (Laughter) On 175-32 (D) (9) we're talking about now, was there ever any discussion about whether the existence of this provision presupposed that in moving ahead with the PUD the planning had to reach the point, before approval, where by there would be data on architectural design so that the judgment contemplated by paragraph (D) (9) could be made or was it the opinion of the Planning Board that this was simply an optional consideration or was the point never discussed at all?

Planner Campbell: It was not discussed as to whether or not it was required at all. I'm trying to actually find out. There was a reference to... I think the December 5 meeting, of building layouts and making them as visibly attractive as possible but I think that was basically the extent of the discussion on that point. I can't remember any of the Planning Board members to my knowledge; maybe Annmarie would recollect differently, that they discussed that point in any great detail.

Councilor Harris: My recollection is that we knew that these were intended to be substantial buildings and the reputation of the builder to build buildings that were compatible with the community rather than in great contrast with the design in the community but we did not address architectural design. We did talk about where buildings would be located on the properties and that landscaping and buffering would be provided.

Chair Sandberg: Councilor Smith?

Councilor Smith: Did the applicant himself discuss anything with respect to what his intentions were with respect to this project architecturally, if no specific building designs were presented?

Chair Sandberg: Mr. Campbell?

Planner Campbell: Outside of Mr. McNeil's I can't remember exactly if anything was said towards it. With the proposed covenants that were provided there was language in there about the design and it being approved by the declarant I think was the language, which would have been Eric. They talked about...

Chair Sandberg: Would have been, I'm sorry, would have been, I didn't hear what you said.

Planner Campbell: It would have been cedar shingle.

Chair Sandberg: It would have been approved; you said would have been approved...

Planner Campbell: By the declarant which would have been Eric.

Chair Sandberg: Mr. Chinburg.

Planner Campbell: Yes, as it was developed.

Councilor Smith: If I could while we're on these points, Mr. Chairman... on 14, why does it say not applicable?

Planner Campbell: I had a tough time answering that one. There was a lot of discussion on it and if you're proposing to provide a buffer between proposed uses or between adjacent zoning districts, it was all, for the most part, in the Rural District except for one front corner on a non-buildable land, was aquifer district. The applicant was providing, when you talk about between proposed uses it was all the same use. They talked about a lot. They provided a 100 foot buffer along Packers Falls Road. They provided another 75 foot buffer. They weren't going to mow the fields but every other year and after a certain time they were going to save Hickory trees. They talked a lot about that but they didn't talk about any proposed landscaping for the lot, individual lot.

Councilor Smith: Was anything required by the Planning Board in connection with this factor?

Planner Campbell: Other than what's listed in the Conditions of Approval?

Councilor Smith: Tell me...

Planner Campbell: I'd have to find them and read them off to you. There's several pages of that.

Councilor Smith: That relates to factor 14...

Planner Campbell: "Conditions to be met subsequent to signature of approval of the subdivision plan: Developer shall provide 100 foot wide no cut buffer zone on Packers Falls Road, which shall utilize the standards of the most current shore land protection district. With respect to cutting of trees, vegetation it shall allow utility

construction only when necessary to serve existing lot and where no other alternative location exist. These restrictions shall apply to the northeastern corner of lot 39-5 as depicted on Map A-2. Number 2. Developer shall provide a 75 foot wide no cut buffer zone along boundary line 17-42 which utilizes standards in the most current shore land protection district with respect to the cutting of trees and vegetation." The next one actually refers to layout of buildings in a manner that reduces visual impact.

“Access to lot 10 and 11 shall be from a newly designed road, Stonewall Way.”

Councilor Smith: What number are you on now?

Planner Campbell: Number 4.

Chair Sandberg: On page?

Planner Campbell: On page 3 and that talks about that houses shall be located in a wooded area etc... can't find anything else that refers to that. “The deed to lot 11 shall contain a 50 foot wide no cut buffer zone, extended 50 feet westward from the western edge of Little John Meadow as depicted on map C-2 utilizing standards in the most current shore land protection district with respect to the cutting of trees and vegetation and the same respect for utilities construction. Prior to occupancy of any structure on lot 11, a mature evergreen tree buffer, trees at least three inches in diameter shall be placed along the eastern edge of lot 11 if necessary to minimize the visual impact of a house from Little John Road. No building structures, fences or removal of vegetation shall be allowed within 50 feet of the current western edge of the open meadow area along Little John Road except for utility construction.” Number 8., again, talks about “prior to occupancy of any structure on lot 13, developer shall install a buffer strip of mature of evergreens at least three inches in diameter along the northeastern edge of lot 13.”

Councilor Smith: Now, let me just ask you since I think you've covered the bulk of the items there. Do you consider those that items you just read...

Planner Campbell: Above and beyond. I don't consider that... Councilor Smith: . . .to not bear on item 14 of your checklist?

Planner Campbell: Right, being that the landscaping required by the Planning Board provides a buffer between proposed uses?

Councilor Smith: Look, do you consider those items you just read to not bear on item 14... of item 14 of your checklist?

Planner Campbell: Correct.

Councilor Smith: So item 14 has to do with something other than the items you just read, which is why you checked...

Planner Campbell: I think that's why I went and... the Planning Board didn't answer this question exactly the way we're going through it right now.

Councilor Smith: I'm trying to find out whether it answered it in any way and I gather

your view at least on this by checking “not applicable” is that A. it wasn’t answered or B. if it was it wasn’t applicable.

Planner Campbell: I don’t think they would have applied that to this development but the developer proposed buffering between a lot of different areas on this and the Planning Board went along with that, yes.

Chair Sandberg: With respect then to the question raised at 16, with respect to the architectural buildings being aesthetically compatible, there’s nothing in the record that we have before us with respect to that issue on the architectural design. Is that a fair statement?

Planner Campbell: Yes.

Chair Sandberg: Thank you. Councilor Harris?

Councilor Harris: Doesn’t number 16 say buildings within the PUD and since there are no buildings proposed it’s really not applicable?

Chair Sandberg: Except for the fact that you just said a few minutes ago that they are proposing buildings and that you saw the sites and that you were relying on the reputation of the builder for it being of satisfactory design.

Councilor Harris: Right, but it says within the PUD and within the PUD there’s nothing existing and if you are looking at architectural design aesthetically compatible with surrounding buildings within the PUD they are not yet in existence.

Chair Sandberg: Other questions, comments, observations? With respect to number 17, the question of the site plan, did the site plan include.., and the documents that I was looking at seemed to be referring to a subdivision plan. I was unable to distinguish what is the site plan. Could you help steer us to the site plan, Mr. Campbell?

Planner Campbell: This is actually language right from the ordinance; “the site plan shall include the following.” If you looked at the plans that were given to you, which would have been the roll stamped September 17. There are several plans in there. Some are listed as subdivision plans, there are some listed as site plans, some are erosion and control plans. They all have different names. I think a lot of times when site plan is used it’s used as a generic term. Sometimes people call a subdivision plan a site plan but it’s actually a subdivision plan. Subdivision plans are the ones that get recorded in the Strafford County Register of Deeds. Site plans do not. That language where it asked that question, “did the site plan include the following” is taken right from 175-32.

Chair Sandberg: It seems to beg the question was the site plan presented and I’m looking now at the definition of site plan in the Zoning Ordinance which says “a plan

of a lot, track or parcel of land showing the location of all existing and proposed features, such as buildings or other structures, driveways, parking, landscape, easements, utilities, drainage” etc. It brings raises the question whether or not the Planning Board and therefore the Council, is obliged to look at a site plan to answer the questions that are in paragraphs A through I under question 17. We ended up with item B, which you previously mentioned with respect to the density in dwelling units per developable acre. You said that’s a no. The location, width, surfacing and layouts of all streets, parking areas and pedestrian walks. I was unable to find anything in this package, which we had, which addressed those items. Could you help steer us to that?

Planner Campbell: For?

Chair Sandberg: Item 17 (D)

Planner Campbell: They have shown the roads, layout of the street, the width, the surfacing. There are no parking areas since it’s a residential lot and will park in their garage or driveway.

Chair Sandberg: Which page should I be looking at?

Planner Campbell: Pedestrian walks, there were no proposed pedestrian walks except for the easements.

Chair Sandberg: Which page are we looking at on that for this?

Planner Campbell: You can look at A-2. It shows the roadway layout. There are several planner profiles that I put in. The right of ways, road widths as well as the easements are listed on C-2.

Chair Sandberg: These are the documents with respect to surfacing and width and location that the Planning Board relied on?

Planner Campbell: That the Planning Board reviewed, yes.

Chair Sandberg: Any other questions, councilors? Councilor Smith?

Councilor Smith: Just one question. On this statement sub (F) of the zoning, PUD 175-32 (F,) is it your opinion that the phrase “site plan” in sub F is being used generically to refer to site plan as it’s defined in the zoning code plus a subdivision as defined in the zoning code.

Planner Campbell: Yes.

Councilor Smith: What would be the authority for saying that?

Planner Campbell: If you’re having a Planned Unit Development, which is a subdivision, you’re not going to create a site plan. You are going to create a

subdivision plan. Maybe they should have said subdivision plan, I don't know but on a Planned Unit development when you're subdividing a lot you will create a subdivision plan and that subdivision plan will get recorded.

Councilor Smith: So you're saying in the PUD there is no such thing as a...

Planner Campbell: There could be.

Councilor Smith: I'm sorry.

Planner Campbell: If you are saying there's no such thing as a site plan?

Councilor Smith: There's no such thing as a site plan.

Planner Campbell: I think if it's a commercial venture where there are no residential units per say being developed. The Planning Board had an application before them just like that. They didn't give any subdivision plan they gave a site plan for business.

Councilor Smith: So all of the items listed under the definition of site plan in the zoning code where it describes what they are talking about. The location of various items was a whole series of listings; none of those would exist in a residential Planned Unit Development?

Planner Campbell: None of these? I would say they need to be on the plan and they're on several of these plans. I would still, looking at this checklist and looking at what's supposedly on the site plan for a residential PUD or non-residential PUD, I would look at this and say going through this checklist does your plan show anything? If you are taking that argument that no subdivision plan would be required to have one. If I see that argument that you're making. I don't know if I do.

Councilor Smith: I was trying to understand whether the items listed under the definition of site plan would be expected to be shown on a plan, whether or not it is or is not mislabeled as a subdivision plan.

Planner Campbell: I don't really think we got into that with this PUD.

Chair Sandberg: Are there other questions with respect to these issues? Just one last one on 19, Mr. Campbell, you made reference, is there a proposed timeline for completion of the development of the phasing thereof? You say see the reference to the road on 2 (A) and then looking at that 2 (A) says that the road would be completed on...

Administrator Selig: (A) 2, It's (A) 2

Chair Sandberg: I beg your pardon, (A) 2. The notation said that the roadway is to be substantially complete within 24 months after approval, yet this requirement, is there

evidence of a proposed time schedule for the completion of the development or the phasing thereof? Was there a phasing plan presented?

Planner Campbell: No phasing plan presented?

Chair Sandberg: There's no proposed time schedule for completion of the development either?

Planner Campbell: Only for the road. Not for the development.

Chair Sandberg: Thank you. Are there other questions? The question that is before the Council now is essentially whether or not the applicant has met the burden and, whereas Mr. Selig has pointed out that if all of the conditions of the Durham Zoning Ordinance are met the Town Council shall approve a PUD by ordinance or resolution which shall incorporate by reference of the documents included in the site plan. When appropriate a final plan shall be submitted and approved by the Town Council per 175-32 (G.) The question before us is whether or not that has been accomplished. Mr. Selig?

Administrator Selig: It is important that if the Council believes this application does not meet the requirements of the Zoning Ordinance that we specify how the application falls short in the resolution.

Chair Sandberg: We could ask then for concurrence with respect to these items that have been discussed, Item 10, 11, 14, 16 and 17 whether or not the Council concurs with the finding of the Planning Board on each of those items. If we take a look at item 10, "Does the PU7D contain the required minimum of 20% of total acreage of the site set aside as open space, 50% of which shall exclude land with slopes greater than 25% and wetlands to find in article 5." Is there any councilor who objects to the "yes" being checked based on what you heard, Councilor Smith?

Councilor Smith: Could you repeat again what you said a moment ago as to what it is the Council is voting on here?

Chair Sandberg: Let's see, can we read the motion again? Let me read the motion specifically. The motion is for the Council to approve by express resolution the application for a Planned Unit Development submitted by Jones & Beach Engineers Inc. and recommended by the Planning Board at its December 19 meeting for the property on Packers Falls Road shown on Tax Map 17, Lots 39 and on as I read earlier. This approval is to allow for a Planned Unit Development in the Rural Zoning District subject to the conditions outlined in the Findings of Fact and Conditions of Approval and includes by reference all documents included in the site plan. That's the motion that's before us.

Councilor Smith: In terms of knowing how to vote, I assume that what governs us here is paragraph G, which Mr. Selig read to us earlier, which says if all of the

conditions of the Durham Zoning Ordinance are met the Town Council shall approve a Planned Unit Development. I assume some of those conditions are the conditions of the Planned Unit Development that we've just been looking at. Am I right so far?

Administrator Selig: The ordinance says all of the provisions and certainly these provisions are included under the broad term all.

Councilor Smith: The provisions in the PUD would be applicable provisions since it's a PUD and so the question is whether all the conditions are met. At the moment, I'm looking at that not in the sense of making a qualitative judgment as to whether I agree or disagree with a particular piece of the evidence before the Planning Board. I'm looking at that in terms of whether there is information that the Planning Board looked and made a judgment, and not whether or not I might reach the same judgment with respect to that information? I think that's the question that's before this us, is it not?

Chair Sandberg: I think the question that's before us is whether or not the requirements of the ordinance have been met and if the requirements of the ordinance have not been met... Our role here as I'm seeing it, and others can speak to this as well if they wish, is that we are sort of the check and balance on this innovative land use. Our role here is to determine that the interest of the public have been protected by way of adherence to the ordinance. When you take a look at the checklist that says the applicant should be doing the following 20 items and they did them all then we grant the permit and if they didn't then you don't but that's just the way I'm sensing it at this point.

Councilor Smith: The issue really is... is there something in the record that shows that if fact directs should be examined by the Planning Board and a finding made with respect to it if some information has been presented. If that has happened then that requirement would be deemed to have been met unless on the face of it there was something absurd going on. If there is a factor respecting, which the Planning Board did not have the evidence before it to allow it to say it considered that factor and that factor has been met then it wouldn't have been met.

Chair Sandberg: There's the question and we've got another 2 minutes before we need to extend this meeting and time is of the essence, as we all know. I guess the Council needs to determine in its own mind whether or not the burden has been met. If you think that the burden has been met you would vote to approve this resolution and if you believe the burden has not been met then you would not vote in favor of this motion. Is there further discussion? There being none the Chair calls for the vote for the Town Council to approve by express resolution the application for a Planned Unit Development submitted by Jones & Beach Engineers Inc. and recommended by the Planning Board at its December 19, 2001 meeting for the property on Packers Falls Road shown on Tax Map 17, Lots 39-0, 39-1, 39-3 through 39-6 and 39-8 through 39-20. This approval is to allow for a Planned Unit Development in the Rural Zoning District subject to the conditions outlined in the Findings of Fact and

Conditions of Approval and includes by reference all documents included in the site plan. All in favor indicate by saying aye.

Councilor Pazdon: Aye.

Councilor Harris: Aye.

Councilor Hovey: Aye.

Councilor Grant: Aye.

Chair Sandberg: We have Pazdon, and Harris and Grant and Hovey in the affirmative. All Opposed?

Councilor Smith: Nay.

Chair Sandberg: ...and the Chair votes nay.

Administrator Selig: While we have now adopted a motion we have not adopted a resolution. Based on the vote of the motion, I'd like to propose the following resolution which would stand behind the motion. In that way we would meet our burden under the 175-32 of the Zoning Ordinance.

Chair Sandberg: Before we do that the Chair would point out Council did approve an agenda calling for adjournment not later than 10:00 P.M. The Chair would entertain a motion to extend the meeting for 30 minutes.

Councilor Smith: So moved.

Chair Sandberg: It's been moved by Councilor Smith seconded by...

Councilor Hovey: Second.

Chair Sandberg: ...Councilor Hovey. Discussion? All in favor indicate by saying aye, requires a 2/3 vote.

Councilors: Aye.

Chair Sandberg: We'll continue with the meeting. Go ahead Mr. Selig.

Administrator Selig: I would like to propose the following resolution which was distributed to the Council on September 9. "Resolution #2002-2 1 of Durham, New Hampshire, approval of an application for a Planned Unit Development submitted by Jones & Beach Engineers Inc., Stratford, New Hampshire, on behalf of J.R. Collier Corporation C/O Sophie Collier, Portsmouth, New Hampshire. The property is located on Packers Falls Road, located on Tax Map 17, Lots 39-0, 39-1, 39-3 through

39-6 and 39-8 through 39-20 and is located in the Rural Zoning District. Whereas Jones & Beach Engineers Inc. has submitted an application, supporting documents and plans to the Planning Board which are on file in the Planning and Zoning Office and whereas the Planning Board has held public hearings on said application and whereas the Planning Board has approved and recommended the Conditional Use Permit for a Planned Unit Development to the Town Council and whereas the Town Council has received and reviewed the copies of materials from the application including the Findings of Fact and Conditions of Approval approved by the Planning Board on December 19, 2001 and whereas the Town Council has held a public hearing and has reviewed input from the public and Town staff and whereas the Town Council has reviewed the proposal in accordance with 175-32 of the Durham Zoning Ordinance and the Council has reviewed the PUD checklist and whereas section 175-32 (G) states if all of 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. Now therefore be it resolved that the Town Council, the governing body of the Town of Durham, New Hampshire hereby approves by express resolution the application for a Planned Unit Development in the Rural Zoning District submitted by Jones & Beach Engineers Inc. and recommended by the Planning Board at its December 19, 2001 meeting subject to the conditions outlined in the Findings of Fact and Conditions of Approval and including by reference all documents included in the site plan for property located on Packers Falls Road shown on Tax Map 17, Lots 39-0, 39-1, 39-3 through 39-6 and 39-8 through 39-20.”

Councilor Pazdon: I’ll make that motion.

Chair Sandberg: Motion is made by Councilor Pazdon seconded by...

Councilor Grant: Second.

Chair Sandberg: ...Councilor Grant. Is there discussion on the motion? There being none the Chair calls for the vote. I guess I’d like to make a comment. I think that our role here as guardians of the Zoning Ordinance and ensuring that the ordinance has been followed requires that the Planned Unit Development be denied. For us to approve it in the presence of an incomplete application, it does not serve well to bolster the citizens or the community’s confidence of the Zoning Ordinance. For that reason I intend to vote in opposition to this. Other comments? Councilor Smith?

Councilor Smith: Briefly, in view of the hour. I substantially agree with the comments of the Chair. We sit in an unusual capacity in this matter. We do not sit as a political body. Therefore, the scope of what I view is the scope of my ability to vote in one direction or another is much more circumscribed. This is not the time for me to express my opinion as to whether I believe that it’s a good idea that there be a Planned Unit Development in that area or some other kind of development. It’s not the time for me to express my view as to whether I think the Planning Board, sorry, the Town Council should be sitting with respect to this matter, that’s been a matter of

some controversy during the years. I am stuck with doing what I am required to do by what the existing ordinance says and I'm not satisfied that I can say that the burden has been met by an application where there is the kind of incompleteness that there is here. It is on that basis that I will vote no.

Chair Sandberg: Thank you. Are there other comments? Councilor Grant?

Councilor Grant: I respect Councilor Smith's comments on this matter. My problem is that the Planning Director has completed the questionnaire to guide us through this process and has indicated that by interpretation and inference and so on, he believes the Planning Board did in fact address all these issues and these questions. That it did not get the information in precisely the form that the ordinance provides does not make the development itself of no value. Confronting and accepting the Planning Director's contribution to this discussion I have to say that I can't find in here precise things the Planning Board did not do so therefore I am accepting the Planning Director's ability to interpret what the Board meant.

Chair Sandberg: Other questions or comments? There being none the Chair calls for the vote all in favor of the, I won't read the whole resolution but the resolution as presented and presented by Mr. Selig and moved by Councilor Pazdon. All in favor indicate by saying aye.

Councilor Grant: Aye.

Councilor Harris: Aye.

Councilor Pazdon: Aye.

Councilor Hovey: Aye.

Chair Sandberg: All opposed vote nay.

Councilor Smith: Nay.

Chair Sandberg: ...and the Chair votes nay.

Chair Sandberg: The motion carries on a 4-2 vote. Now that we have an approved PUD the next question is with respect to the CUP as a PUD and you have a checklist before you. The motion would be to approve the application for a Conditional Use Permit submitted by Jones and Beach Engineers Inc. for the property located on Packers Falls Road shown on Tax Map 17, Lots 39-0, 39-1, 39-3 through 39-6 and 39-8 through 39-20 as recommended by the Planning Board.

Councilor Pazdon: So moved.

Chair Sandberg: It's moved by Councilor Pazdon seconded by...

Councilor Grant: Second.

Chair Sandberg: ... Councilor Grant. Discussion, with respect to the Conditional Use Permit request which is covered by chapter 175-10 of the Zoning Ordinance?
Councilor Pazdon?

Councilor Pazdon: Going back to something Councilor Grant said, the Planning Board has done its due diligence on this matter, passed along to us and the Planner, has passed along to us the information we need for this and I'm ready to vote.

Chair Sandberg: Any other comments? Councilor Grant?

Councilor Grant: If the responsibility or burden upon the Council at this time with regard to a Conditional Use Permit is exclusively fiscal than I am troubled that there is no, or virtually no, residential development project that could be propose that would meet the fiscal criteria under the tax rates that we have in this community. A house would have to be assessed at \$450,000 plus. There are few houses in a PUD development that are going to have that kind of assessment, I'm certain. I see many good things in this project, the conservation efforts, the buffers, the no cut zones, and a lot of open space. These are things which the abutters have invested considerable time and personal investment of money to negotiate with the developer and the developer has certainly incurred cost to that extent. I'm inclined to say when a neighborhood or a majority of a neighborhood is comfortable with what is presented to it that I am inclined to support that effort though I recognize professor Niman's astute analyst that this is not a fiscally profitable proposition for the Town. Professor Niman spoke about social capital and I think that's part of what we have in this matter. There are social aspects to this proposal that at least equal if not outweigh the fiscal implications but it's a difficult decision.

Chair Sandberg: Other comments? Councilor Smith?

Councilor Smith: I find the Conditional Use to be somewhat less close than I did the Planned Unit Development. Again, my starting point is that I can't vote on this project based on the fact that a majority or unanimous group of abutters to the project thinks it's a good idea or, for that matter, thinks it's a bad idea. I have to utilize the data presented in testimony by abutters or anybody else for that matter as a means of making a determination whether or not various criteria have been met. Whether the applicant has carried the burden of those criteria. I witnessed abutters testify passionately against this proposal and many of those abutters subsequently then testifying I'd have to say in most cases passionately in favor of it but not for the reasons stated by the applicant but rather for reasons of practicality due to concerns they had as to what they thought the alternative was going to be. If I were sitting in my normal capacity making political judgments in the broad sense of that phrase then what abutters say in terms of their general likes and dislikes, fears and lack of fears are going to have substantial influence on me. When I sit in the capacity I am right

now as a judge having to look at whether or not an applicant has carried the burden with respect to a series of factors then I have to be restrained in how I can interpret the comments of the public that are of a more general type as opposed to keying in to whether explicit factors in the CUP ordinance have been met and confining myself only to the issue of the fiscal matter, an area in which I think the Town Council was given plenary powers of consideration. I do not think that the applicant, in fact, has presented the evidence to demonstrate the burden of benefit has been met, whether that could have been done by other information and.... I do agree that looking at the fiscal analysis is not the exclusive way of determining benefit. I do not think that when I compare the evidence presented before this Board which I think has the power to decide this issue. I don't think the issue is close. For that reason I can't find as our conditional use statute is now written, again I pass no judgment as to whether it's good, bad or indifferent, but as it is now written I do not think the burden has been carried.

Chair Sandberg: Other comments? Councilor Hovey?

Councilor Hovey: I too do not think it has been met. I think when we opened up conditional use and PUD's we were opening up a can of worms. I've said that from the get go. I think that has brought us to this stage. I'm sorry, I can't vote in favor of this as I don't think they meet that burden. I have tried to be as open as I possibly can in this but as far as I'm concerned it's going to cost the Town and it's going to cost the Town dearly. I can't vote for it.

Chair Sandberg: Councilor Pazdon?

Councilor Pazdon: There's been a lot of testimony on both sides about fiscal impact on our school systems but in fact there's never a residential homeowner with two school children that is a benefit to the Town. There isn't one house in this Town like that and Towns are not designed to be like that. They never are. The burden of the problem with education funding in this Town doesn't lie with this particular development or with the houses going in here. It comes with our taxing system. You can't blame this developer for bringing in houses with children and costing this Town money. Every house in this Town with children cost money. The way our taxing system is set up, the only way to offset that is to bring in non-residential development as these things don't have children that impact the tax system, that's called business. In this Town our business to residential ratio is not what it should be. There are two places where the fiscal problem for this lie and it's not with this developer. It's with the State tax system and the fact we can't do our homework enough to get some non-residential uses in here to pay for these things.

Chair Sandberg: Others who haven't spoken to the issue? Councilor Hovey?

Councilor Hovey: There is no argument with a thing you said but that's not the decision that we're supposed to be making. We're supposed to making a decision on the fiscal impact as it pertains to our charter and ordinances as written. I don't have

an argument with a thing you said. Everything you said is correct but that is not the decision we're supposed to be making.

Chair Sandberg: Councilor Grant?

Councilor Grant: I have to say I am troubled and confused by the wording of the ordinance with regard to the Council decision based on findings. "The Town Council's decision shall be based upon the fiscal impact analysis of the project on the Town. This review will focus on subsection K-S and 6 above." It's odd that it says shall be based upon **the** fiscal and not **a** fiscal. It sounds the way this is written that we either were to commission a fiscal impact analysis or that one was supposed to be provided. I don't know how we're supposed to get that but I think the problem here is as Scott has said. The Conditional Use Permit itself is a serious problem for the community and this is only a minor example of the problem.

Chair Sandberg: Councilor Smith?

Councilor Smith: I want to make mention of what is probably in the front part of the mind of many people watching right now, which is isn't it true that if this is not approved under conditional use there will then be a development that comes in which is not a conditional use at all rather its under a use as of right, at least if the terms of the zone are met. This is again one of those times I think we can lose sight of what may be the most enduring consideration. I can understand somebody saying how could you vote not to approve a project which let's say has 12 houses and 65 acres of land set aside in conservation and instead acknowledge that you won't have the opportunity to vote in favor or against the project of 25 houses that may only have 15 acres in conservation. The answer, my friends, is the law. For all the many years that I sat on the Planning Board the issue of if there should be a concept of a conditional use system was debated. It has remained. I have reached the political judgment, after thinking about it for many years that it probably shouldn't remain. I may have the opportunity as a councilor to have something to say about that in my political capacity when this comes before the Town Council. I do not have that opportunity now. For me, the worst thing that I can do in the capacity that I now sit is to say that I am not bounded by what the law says. While it may make me vote in a way that may displease me at this moment it at least restrains me and everybody else to vote in ways that would be improper in many other situations that we can't conceive of. I simply can't be bounded by the fact that there is a Conditional Use Permit and like it or not it has requirements and I can't overlook those requirements. I can't overlook where the burden is placed and I can't overlook what the testimony was that was presented to this Council.

Chair Sandberg: Councilor Grant?

Councilor Grant: Mr. Chairman, I would read further on this 175-10 (M) I don't know how I got there but here it is, same place I was reading from before. The next sentence says "every decision of the Town Council pertaining to the granting, denial

or amendment of a request for a Conditional Use Permit shall be based on Findings of Fact and Conditions of Approval and every Findings of Fact and Conditions of Approval shall be supported in the records of its proceedings.” We don’t have any Findings of Fact or Conditions of Approval before us relating to the fiscal analysis or a fiscal analysis.

Chair Sandberg: The motion before us is to approve the application for a Conditional Use Permit submitted by Jones & Beach Engineers Inc. for the property located on Packers Falls Road shown on the Tax Map as listed. Based on what Councilor Grant has just said, let’s take the various scenarios. If we approve this application then it would be incumbent upon us to follow that approval with Findings of Fact, it would seem to me. That could be entertained as a different motion. Conversely, if the motion to approve were to fail, which would require a 2/3 vote. It leaves us in an awkward position. A motion to approve would essentially fail on a 3-3 vote. Yet, by failing on a 3-3 vote, by default, it would, by default, constitute approval of the CUP as a PUD. The vote would have to then be 2 in favor of the motion and 4 opposed to the motion in order to reverse the recommendation of the Planning Board. In case it would seem that the Council is then going to have to address specific Findings of Fact, either which could be addressed at the next meeting.

Administrator Selig: We actually have attached to the communication we sent to the Council on September 9 was a draft Findings of Fact statement. This had been forwarded months ago to the Council. So we do have a template to work off of and what it does is it refers to the checklist that the Planner has prepared for us.

Councilor Grant: Could I see that?

Administrator Selig: The checklist?

Councilor Grant: No, the resolution.

Council at Once: It’s the Findings of Fact

Councilor Grant: I’m sorry.

Chair Sandberg: This would be the template.

Councilor Grant: I had a different interpretation as to what the facts would be. I thought we would have a document which said that either this was fiscally beneficially for the Town or it wasn’t fiscally beneficially for these reasons.

Chair Sandberg: Councilor Smith?

Councilor Smith: I know the time is getting late here but let’s keep in mind while this statute is not clear in a number of respects at least we can say that it puts to the Council explicitly with respect to fiscal matters. I do not believe that first of all, the

Planning Board with respect to the CUP does not make final decisions with respect to anything fiscal or non-fiscal. I think that is clear in the statute. Secondly, I think that with respect to the non-fiscal matters that it is our obligation to vote to support the recommendation of the Planning Board to the extent that it inspected each of the factors and discovered some information and has some information that supports it, that's not irrational. We can't overturn that recommendation, or we can't, it's not a question of overturning, we can't refuse to agree with that recommendation unless 2/3 of the membership voting does so. It is not my view that the same voting requirement pertains with respect to the fiscal matters for the reasons that I said earlier when I was out of line describing them at that moment as it wasn't pertinent but now it is pertinent. While I agree that this ordinance is a certain amount of mystery in that regard and that our Town Administrator is probably correct, the only time the ink will be written on this when it will stay dry and never change is if it's done by a court. I have gone through in detail the legislative history of this ordinance and I believe there were major compromises made between the powers of the Planning Board and the Town Council by the time this went through but that a certain piece of power was reserved to the Council itself and that had to do with the fiscal issues. So I do not accept that with respect to that item the limit of our obligation or power to simply determine whether we disagree with the recommendation of the Planning Board, which I don't think the Planning Board has the power to make. I do agree with Councilor Grant's view on the need for findings and that it goes in either direction. That we vote for or against. It has to be supported by specific Findings of Fact and I believe those specific Findings of Fact have to relate with respect to the fiscal matters at least to the facts that were presented to the Council including the facts presented to the Council after a proposed template was developed. Otherwise we wouldn't be considering the facts presented to the Council.

Chair Sandberg: I should call for the order of the day that it is now half past the hour and the Chair would entertain a motion to continue the meeting for another 30 minutes.

Councilor Pazdon: I'll point out; you will not have a quorum to discuss this.

Chair Sandberg: How much time can you stay?

Councilor Pazdon: I'm beyond half an hour what I was going to stay. Thank you. I have a life, you know, I have things to do.

Chair Sandberg: Are you saying you can't stay another 5 minutes or 10 minutes?

Councilor Pazdon: I'll do 5.

Chair Sandberg: The Chair would entertain a motion to extend the meeting for 5 minutes?

Councilor Hovey: Second.

Chair Sandberg: It's seconded. Discussion? There being none the Chair calls for the vote, all in favor indicate by saying aye.

Councilors: Aye.

Chair Sandberg: Opposed? It passes so we'll continue for five minutes. The question before us is if we vote on the motion before us in its present form, it does beg the question I believe for what we would establish for Findings of Fact. This motion could be amended I would suspect to add on the tag line to direct the Administrator to formulate Findings of Fact that are consistent with the discussion here tonight and to prepare those for the next meeting.

Administrator Selig: There won't be a quorum to discuss them at the next meeting. Councilor Smith will be away. We'd have to set that for a time when all six of us are here.

Chair Sandberg: Suggestions? Councilor Pazdon? I know that we will lose a quorum in 3 days.

Councilor Smith: For purposes of this week you lose a quorum at the end of tonight.

Chair Sandberg: We can carry on with Findings of Fact and we could simply adopt, I'm not sure where we go, or say in the Finding of Fact that the burden wasn't met if that's the case or the burden was met if that's the case. With that in mind, is it appropriate to call for the vote? Any objections? Councilor Harris?

Councilor Harris: I would just have to make one comment and that is in looking at the form for Conditional Use Permit that was prepared by Jim that in fact the section 10-175, 10 (K) (5) "the following services and facilities are available and adequate to serve the needs of the use as designated and proposed," includes schools at the bottom of the list. I believe that was a split vote on the Planning Board. That was not a strong yes.

Councilor Smith: Where are you looking at on the sheet? What number?

Councilor Harris: Page 2, Conditional Use Permit, the bottom of the page.

Chair Sandberg: This is item 10 on the checklist, item 10 on the CUP checklist.

Councilor Hovey: Are we going to vote?

Chair Sandberg: Is there more discussion? There being... do you want to comment? We have 60 seconds here. Councilor Pazdon is going to bolt on us.

Administrator Selig: I do have comments but we need to vote.

Councilor Smith: My only suggestion is that I don't think it would be inappropriate for us to vote with instructions to the Town Administrator to prepare findings which could be voted on at a subsequent time.

Chair Sandberg: Would you like to make that as a motion?

Councilor Smith: What I just said I make as a motion.

Chair Sandberg: The motion is to attach the statement the Council hereby directs the Town Administrator to prepare Findings of Fact consistent with the outcome of the vote. Second?

Councilor Pazdon: Second.

Chair Sandberg: It's second by Councilor Pazdon. Discussion? All in favor indicate by saying aye.

Councilors: Aye.

Chair Sandberg: We have that tag on there now. Do I need to read the motion again? All in favor indicate by saying aye.

Councilor Smith: I think you better read the motion again.

Chair Sandberg: The motion...

(A brief murmur as the document containing the motion is found.)

Chair Sandberg: The motion is to approve the application for a Conditional Use Permit submitted by Jones & Beach Engineers Inc. for the property on Packers Falls Road shown on Tax Map 17, Lots 39-0, 39-1, 39-3 through 39-6 and 39-8 through 39-20 as recommended by the Planning Board and further directs the Town Administrator to prepare Findings of Fact for future deliberation consistent with the outcome of the vote. All in favor indicate by saying aye.

Councilor Grant: Aye.

Councilor Harris: Aye.

Councilor Pazdon: Aye.

Chair Sandberg: All opposed say nay.

Councilor Hovey: Nay.

Councilor Smith: Nay.

Chair Sandberg: Nay from Councilor Smith, nay from Councilor Hovey and your vote Councilor Harris?

Councilor Harris: I said yes.

Chair Sandberg: You said yes and yes... and the Chair says nay. The vote is 3-3. The motion fails but the recommendation of the Planning Board is not reversed.

Councilor Smith: Mr. Chairman I wish to note my objection to that last ruling of the Chair.

Chair Sandberg: The objection is heard. Would you speak to it?

Councilor Smith: Simply, I do not believe a tie vote results in that conclusion with respect to the matter of fiscal issues and therefore I think that the outcome of this is exactly the opposite of what the Chair said.

Chair Sandberg: Your correction is noted.

Mark Morong and Katie Paine returned to the meeting at 10:40 P.M.

Scott Hovey MOVED to reschedule tabled items X.A through X.D on the agenda. The motion was SECONDED by Arthur Grant.

Peter Smith MOVED to amend the motion by rescheduling item X.A to the first meeting in November. The motion was SECONDED by Annmarie Harris and was APPROVED.

The motion as amended was APPROVED.

XI. New Business

There was no new business.

XII. Nonpublic Session

There was no nonpublic session required.

XIII. Adjournment

Arthur Grant MOVED to adjourn the meeting. The motion was SECONDED by Scott Hovey and was unanimously APPROVED.

The meeting was ADJOURNED at 10:42 P.M.

Michael Bornstein, Minute Taker