

**This set of minutes was approved at the March 1, 2004 Town Council meeting.**

**DURHAM TOWN COUNCIL MINUTES  
MONDAY, FEBRUARY 2, 2004  
DURHAM TOWN HALL – COUNCIL CHAMBERS  
7:00 P.M.**

**MEMBERS PRESENT:** Chair Malcolm Sandberg; Arthur Grant; John Kraus;  
Patricia Samuels Mark Morong; Neil Niman; Katie Paine;  
Peter Smith; Annmarie Harris

**MEMBERS ABSENT:** None

**OTHERS PRESENT:** Town Administrator Todd Selig; other interested members  
of the public

**I. Call to Order**

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

**II. Approval of Agenda**

*Councilor Kraus MOVED to approve the Agenda. The motion was SECONDED by Councilor Paine and PASSED unanimously.*

**III. Special Announcements**

**IV. Approval of Minutes**

January 5, 2004

*Councilor Paine MOVED to approve the minute of January 5, 2004, as presented. The motion was SECONDED by Councilor Morong.*

The following amendments were made:

Page 2, 2<sup>nd</sup> full paragraph, should read “..with Attorney McKitrick...”

Page 4, 2<sup>nd</sup> The motions at the bottom of the page should both read “.....PASSED 6-0-2...”

Also, last paragraph on page should read “..regarding this land, which is located..”

Page 14, 1<sup>st</sup> full paragraph, should read “...to raise bridges all over New England, on old railroad beds...”

Page 20, paragraph at top of page should read “She said there was no mention of this on the motion on that date.” Sentence before that should also read “... June 5<sup>th</sup>, 2000.”

Page 22, 9<sup>th</sup> paragraph, should read “...if this was appropriate.”

Page 23, 3<sup>rd</sup> paragraph from bottom, starting “Chair Sandberg” should read “...and could discuss it at the January 12, 2004 meeting...”

Councilor Smith also provided additional non-substantive changes.

***Councilor Kraus MOVED to approve the minutes of January 5, 2004, as amended. The motion was SECONDED by Councilor, Paine and PASSED 8-0-1, with Councilor Niman abstaining due to his absence from the meeting.***

***The motion to approve the minutes, as amended, PASSED 8-0-1, with Councilor Niman abstaining due to his absence from the meeting.***

January 12, 2004

***Councilor Grant MOVED to approve the minutes of January 12, 2004, as presented. The motion was SECONDED by Councilor Paine.***

The following amendments were made:

Page 3, 2<sup>nd</sup> paragraph, should read “Councilor Morong said he had looked at the floor plan of Heidelberg Harris and saw it had adequate facilities...”  
Page 10, 6<sup>th</sup> paragraph, should read “Bill Cote, 21 Littlehale Road,....”

Councilor Smith also provided additional non-substantive changes

***Councilor Kraus MOVED to approve the minutes of January 12, 2004, as amended. The motion was SECONDED by Councilor Paine, and PASSED 8-0-1, with Councilor Samuels abstaining due to her absence from the meeting.***

***The motion to approve the minutes, as amended, PASSED 8-0-1, with Councilor Samuels abstaining due to her absence from the meeting.***

## **V. Report of Administrator**

1. Administrator Selig said the Planning Board would be holding a Public Hearing on February 4<sup>th</sup> concerning the latest draft of the revised Zoning Ordinance. He said that if no additional changes were made, the Planning Board would be voting to pass the ordinance along to the Council for final consideration.
2. Administrator Selig said Town representatives had recently attended a meeting on the Wiswall Dam, noting there had been discussion over the last 3 years about possibly removing the dam or simply installing a fish ladder on the dam. He said there was an interesting presentation from the working group, which represented Fish and Game, NHDES, a number of fed agencies and various organizations interested in keeping waterways open for fish. The presentation indicated that if the working group could have everything it wanted, and money was not an issue, it would like to remove the dam and allow fish to migrate upstream in an unhindered way.

Administrator Selig said the Town's position was that it would not administratively support removing the dam unless it could be guaranteed that the water supply would be preserved. He said if and when that threshold was met, other issues revolving around moving the dam (impact on homes upstream, as well as recreational aspects of this location) would then have to be considered. He said it appeared the working group had concluded it would be very challenging to remove the dam and that it had two fall back positions – building a fish ladder along the side of the current dam and have a type of canal coming from the downstream side of the dam around the side of the dam and then head upstream. He said there would be another presentation on this within the next few months, which would be targeted to specific questions for the Council on the various options.

3. Administrator Selig said that Senator Judd Gregg's representative would be available to meet with constituents that week, noting he came to Town 1-2 times per year.
4. Administrator Selig said the Town and School elections on March 9<sup>th</sup> would be held at the Durham Evangelical Church, per the Council's vote at its last meeting. He explained that Heidelberg Harris had unfortunately been unable to commit to that date, so arrangements were made with the Church. He noted the Church had been gracious in allowing the Church to be used, and the Town was looking forward to another successful election at the Church. Administrator Selig said the election in September and November of this year would be held at the Oyster River High School.

He thanked Heidelberg Harris for the use of its facility in the most recent election, and said the effort went very well. He also thanked the many election workers who helped make the election process such a success, and also thanked Megan McPherson and other UNH representatives for their success in encouraging students to vote absentee and register ahead of time. He said students were much more prepared than they had been in the past when they came to vote, and the effort was very successful all the way around. He said he appreciated the cooperation shown by Town officials, Councilors and residents to make the election successful.

5. Administrator Selig said the filing period for local elections closed the previous Friday, and outlined the positions that were open and those who had filed to run for them:

Town Council (3 year term) 3 openings – 5 people filing: Peter Smith, Gerald Needell, Charles "Mac" McLean, Karl Van Asselt, and Richard Kelly

Library Trustees (3 year term) 3 openings - 3 people filing: Judith Moyer, Lucy Gardner, and Julian Smith

Library Trustees (1 year term) 1 opening to finish out term of person leaving the Board - 1 person filing: Cynthia Coty

Moderator (2 year term) 1 opening – 1 person filing: Anne Valenza

Supervisor of the Checklist (6 year term) 1 opening – 1 person filing: Ann Lemmon

Town Clerk/Tax Collector - 1 opening - final year of Linda Ekdahl's 3 year term, present deputy Town Clerk Lorrie Pitt filing.

Trustees of the Trust Fund (3 year term) 1 opening – Craig Seymour filing

6. Administrator Selig said there would be a public hearing on Feb. 5<sup>th</sup> at 7:00 pm at the Oyster River High School regarding the Town's application to the State for reclassification of the Spruce Hole Aquifer and the Lee Five Corners Wellhead Protection area, to Class GA1 and GAA respectively. He explained that this reclassification would give the Town authority to implement a groundwater protection program on these areas, and noted that former Council member Eileen Fitzpatrick had been instrumental in this process.
7. He said on Feb. 3<sup>rd</sup>, 7:00 pm the School district deliberative session would take place at Oyster River High School, and said for those residents who were concerned about their tax rate and tax dollars being spent, it was an important meeting to attend. He noted that the majority of tax dollars were spent on the school side of equation, and it was therefore imperative that residents take an interest in this.
8. Administrator Selig said he was pleased that there had been no issues downtown the previous evening after the Super Bowl, and thanked Town officials for their outstanding preparation. He said he attended a briefing at the Evangelical Church earlier in the evening, and it was filled with over 100 police officers from around the area. He said that students encountered cruisers throughout the downtown area after the game. He also thanked the University who, for the first time, set the tone that disruptive behavior would not be acceptable, and said this appeared to have made a tremendous difference.
9. Administrator Selig noted that on Feb 16<sup>th</sup>, the Council would be holding a public hearing on the Fall Line Properties hotel Conditional Use Permit.
10. He said that Councilor Smith would present information to Councilors on the utility pole exemption bill currently before the Legislature.
11. Concerning on-going contract negotiations between the Town and the Durham Firefighters Association, Administrator Selig said he wanted citizens to know that the Council was very concerned over the status of the negotiations, noting that at the last Council meeting, Council members remained silent while members of the community voiced their concerns. He said he had developed a press release on behalf of the Council to address the ongoing situation, but was hopeful he would not have to release it and that an agreement would be reached.

He said the previous week, the Town sent a very generous proposal to the leadership of the Association, and were hopeful to have a contract soon. He said the proposal addressed a co-pay on insurance, insured firefighters were paid competitively, and also addressed the issue of probationary firefighters. He noted there was a great deal of background to this issue, involving 2 \_ years of on-going negotiations, and both sides had to make some concessions. He said residents who were concerned about this must look not only to the Town and Council, but also to the Firefighters Association to also be reasonable in the negotiations.

12. Administrator Selig provided an update on the Packers Falls bridge issue. He first spoke about the safety issues that had been raised because of redesign of the bridge and the impact of this on the Bennett Road intersection. He said some sight lines were recently shot to see if the distances were accurate, and it was found they were accurate. He read a letter from Hoyle Tanner saying they determined that the intersection sight distance for a vehicle sitting at Bennett Road stop sign, looking to the south of Bennett Road toward Newmarket, was the same in pre and post construction conditions, and was approximately 170 feet. He said this was also the sight distance available from the north of the bridge toward Durham in pre and post construction conditions. He said these distances were within the minimum standards (170 feet) set by the American Association of Highway Transportation Officials to meet a design of 15 miles per hour. He said the sight distance was therefore not a safety hazard, and there was therefore not a liability issue for the Town concerning this, although he said there was no doubt the visibility was not what it had been before.

He said another issue had to do with the redesign of the Bridge, and noted he had begun to get some estimates about using a saw technique to lower the railings or cut them down altogether. He said they were also beginning to get design suggestions on what could be done in the future to modify what was there now.

Administrator Selig said the third issue had to do with what went wrong, and he asked the Council in which of the following ways it would like him to address this matter:

- a. He said his choice would be to have the Public Works Department analyze from its perspective what went wrong and give him a recommendation of how to prevent this from happening in the future, which he would formulate into a formal presentation.
- b. He said he was concerned that some of the comments raised by Council members and community wanted more than that – a thorough analysis of what went wrong, and to cast blame as part of this. He said if this was the way chosen, it would be important that this be done by an outside party, an engineering firm. He did not think this would be productive, it would be very costly and the end result would indicate there was quite a bit of confusion in what people had been looking for.
- c. He said a middle-of-the-road alternative was to have a panel of residents (noting Annmarie Harris and Julian Smith had already volunteered) which would also include citizens not living in the area, as well as someone with engineering expertise and familiarity with the project. He noted Skip Grady was instrumental in the beginning stages of the project, and perhaps could be on this panel.

Chair Sandberg suggested that during the following “Reports and Comments of Councilors” section, Councilors could make their comments on how to proceed.

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

Chair Sandberg endorsed Administrator Selig's comments concerning the handling of the elections, and also the aftermath of the football game. He said the good news was that everyone celebrated in an appropriate manner and they were all very appreciative of this. He said this was perhaps the beginning of a trend that could be of national significance, noting the problems the Town had had were not unique to Durham. He said what was unique was that the Town had turned a corner the previous day, and it should be very proud of the citizens who did celebrate responsibly.

He thanked the University for their extensive involvement in trying to turn this issue of celebratory behavior around. He said the Town would continue to be vigilant on the issue, and it was hoped that UNH would be steadfast in insuring that students behave appropriately. He noted there had been several serious events dating back to 1997, and the current administration at UNH had played a leading role in turning things around. He said the Town would continue to support the University in this effort.

Councilor Smith said a common theme of the two items he wanted to speak on was the relationship between the University and the Town, and noted the past week had been a great example of progress that could be made, acknowledging there was more work to be done in many other areas. He said it was important that when this cooperation happened, it should be recognized.. He said the election was a wonderful example of cooperation, noting he was at the election location all day and was able to observe this cooperation.

He said the days of hostility to students with lawful rights to vote in Durham had come to an end, and the days of students not having an appropriate understanding of what it meant to be a resident of the Town had also come to an end, noting that the staff at the University did a wonderful job engaging students in the election process. He also agreed with Administrator Selig's comments concerning the Heidelberg Harris facility and said it turned out to be the best physical facility the Town had ever had.

Councilor Smith seconded the comments made by Town Administrator Selig and Chair Sandberg about the previous evening, and explicitly thanked President Hart for her leadership on this issue from almost the time she arrived in Durham. He said her focus on this issue had massively altered the situation. He thanked her and her staff, as well as the many students who had contributed to this effort. He noted it was important not to forget the lessons of the past few years and that ongoing concern and effort was still necessary.

Councilor Smith also spoke about a bill presently before the State Legislature concerning the continued exemption for poles and conduits from real property taxation. He said the exemption expired on July 1, 2004, and this legislation would renew it. He said he hoped the Council would support the position that the exemption should not be renewed because this was a real opportunity for local communities to have a further tax base. He explained that the NH Municipal Association, at the strong urging of its members, had made this issue a high priority and noted he had sent around a compelling memo from State Senator Dick Green discussing the issues involved. He noted the legislative committee looking at the bill was due to report on its recommendations that week.

Chair Sandberg suggested that Councilors could take a look at the bill during the break that evening, and perhaps bring it up for a vote under “Other Business”.

Councilor Smith said that concerning the Packers Falls bridge, he didn't think the choices were either casting blame or doing nothing. He said he was not interested in casting blame but was interested in seeing that apparent miscommunications, if possible, should not occur again, or at least not to the degree that had happened. He said those miscommunications involved citizens, staff, Town Council, and third parties hired by the Town. Councilor Smith said he was sympathetic that Administrator Selig had a minimal amount of time available to look into this, but said if a way was not found to spend some time to look backwards, the Town was bound to repeat mistakes and in the end would lose money, time good will and good government.

Councilor Kraus said he had been present downtown the previous night after the game and also in October and agreed an excellent job had been done. He said the noble experiment in October did not work and said he had no doubt that if there had not been a significant police presence the previous evening, there would have been problems again. He said the Town should think about what this cost, noting that approximately 100 police officers had to be present and said this was a blanket of enforcement that was required to keep a lid on the situation. He said the cost of providing this blanket of protection was costly and all efforts that could be made in education and other matters to reduce the necessity for this presence would be important.

Councilor Kraus said the Packers Falls Bridge problem appeared to be a failure of imagination in a variety of ways and said he believed the Council should vote on the manner in which it would be looked into, rather than having a back and forth discussion where it would be unclear what the will of the Council was.

Chair Sandberg said the Council could perhaps address this under “Other Business”.

Councilor Morong said he also was concerned about the cost of enforcement at the post game celebration and said he hoped in the future police presence would not be needed to insure things went well. He also noted the excellent leadership shown by Administrator Selig concerning the touchy election issue and the after game celebration. Concerning the Bridge issue, he said he agreed that a panel of townspeople that included Skip Grady sounded like a reasonable solution.

Councilor Paine congratulated Town Administrator Selig and President Hart on doing a great job. Concerning the Bridge, she said it was not simply acceptable to turn over the investigation to the Public Works Department to investigate itself. She said there should be a committee of independent citizens, including engineers in Towns, as well as representatives of the DPW.

Councilor Grant suggested that a citizens' commission was the best way to go in looking at the Packers Falls Bridge issue.

Chair Sandberg said he agreed with this as well. He also noted that the significant number of police, fire and other emergency personnel had not been able to watch the game the previous evening, and they deserved a lot of credit for their support.

Councilor Harris said she was in favor of having a citizens panel look at the Bridge issue, and noted she had brought old tapes which she would be willing to look at with some other people.

Councilor Samuels said that Heidelberg Harris had been an excellent selection, and thanked Administrator Selig and the Supervisors of the Checklist for the success of the election there. She also agreed with comments made concerning UNH, and suggested a nice thank you to University students who did not riot.

She also commented that the Packers Falls Bridge issue appeared to have been a process breakdown. She said she liked the panel idea, but said someone with good insight was needed to look at the process and suggested that if only residents would be involved, they still needed to look at the whole process and the details of the connection between the Planning Board and Town Council in order to figure out where the breakdown occurred.

Councilor Niman said that with respect to the Packers Falls Bridge issue, it was not clear why an investigation was needed. He said he believed he knew what the problem was, noting there was a public hearing on June 5<sup>th</sup> in front of the Council where people expressed their views about the bridge and came to an understanding of what it was going to be, but the Hoyle Tanner person in the audience was not listening carefully. He said this person wrote a letter on June 7<sup>th</sup> that contained, among other things, a comment that said it was their understanding that the rail height requirement was 54 inches. He said no one at the Town caught this mistake and responded that the rail height requirement should be 42 inches. He said this appeared to be a management failure, and was the cause of the problems. He said the Town should move forward in designing better communications systems and management processes rather than living in the past. He said he would like to concentrate on fixing the bridge.

Concerning fixing the bridge railing, Councilor Samuels said if half of it was kept, there would still be a very narrow aperture that one could not see through. She said if there was a way, the railing should be cut down and a wider divide should be built.

## **VII. Public Comments**

Chair Sandberg said there were a number of presentations coming up that evening, and suggested that members of the public keep their comments as succinct as possible.

**Beth Olshansky, Packers Falls Road**, spoke about some safety issues concerning the Packers Falls Bridge, noting that Hoyle Tanner apparently wasn't addressing them. She said a number of neighbors had had near accidents, including herself. She said she called NHDOT to ask them about sight distances, and said roughly, sight distance was 100 ft per 10 miles per hour. She said the bridge was posted as 15 miles per hour, but no one went that slow, so that while technically a 170 ft sight distance to the edge of the bridge was adequate, in reality it wasn't. She also said that now that the bridge was wider,



people drove over it even faster – 40 miles per hour regularly, so there was a discrepancy between what the standard said and the reality of what people were experiencing. She said there was not just a problem coming from Newmarket, and that sitting at the intersection of Bennett Road, looking south, one could not see the cars coming. She said the headlights were blocked at night, and during the day, the concrete wall was high enough to block the view of oncoming regular sized vehicles. She described a near accident she had recently had in the area.

**Todd Zimac, 41 Emerson Road**, said he had come to support the firefighters and their cause. He said he hadn't been following the issue since its start, but was disappointed because Councilors had spent significant time talking about the Bridge, and UNH, but wondered why there was not discussion about the firefighters.

Councilor Grant said Mr. Zimac's comments were out of order because Council members were not allowed to comment about the contract negotiations, and therefore could not respond to his comment.

Chair Sandberg said he would make a brief comment so the Council's perspective could be better understood, when Mr. Zimac was finished speaking.

Mr. Zimac continued, saying that it was important to support the firefighters. He questioned the patriotism of Council members concerning the contract negotiations.

Chair Sandberg said it was difficult for Council members to be charged with not being patriotic, and said this group of people had worked diligently over a number of years to settle the contract issues. He said there was not a person there who did not respect or honor the Fire Department, and who voted to cut anything from the Fire Department budget. He said it was a complicated issue, and Council members had been elected to make decisions on behalf of all of the people, and to work with all four unions in Town. He said the Council had reached agreement with three of the four unions, and were very anxious to settle on an agreement with the Fire Department. He said the fact that there was not yet such an agreement did not lie strictly at the Council's table, and said there were negotiation teams for both sides. He said Council members were honorable, hard working people who were doing their best to come up with an agreement. He cautioned members of the public to not paint Council members as enemies of the Fire Department or the citizens of Durham.

**Charles McLean, 5 Croghan Lane**, thanked the Town Administrator for handling a "mission impossible" from the Town Council to him. He said he did a great job, with one exception, which was clear from his comments on the 5<sup>th</sup> and 12<sup>th</sup> of January. He also said he supported Councilor Kraus' comments and letter that appeared in *Foster's* on January 8<sup>th</sup> relative to the meeting of the Council on December 15<sup>th</sup>.

He also said he was still somewhat distressed about the firefighters issue and that after two years, comments at the Council meeting seemed to have prompted the Council to do something, but he said something should have been done sooner. He also said he had written a letter congratulating Rodney Collins, Chief of Police of Newmarket for saying the UNH lawyer was out of line trying to place the blame on the Durham Police Chief

regarding previous riots. Mr. McLean said he had sent copies of this letter to various public officials, and may have even triggered the unanimous decision by the University to crack down on the rioters with additional penalties. He said he was mentioning this to encourage citizens to put their thoughts in print.

### **VIII. Unanimous Consent Agenda**

Shall the Town Council approve the Oyster River High School as the voting location for the State Primary on September 14, 2004 and the General Election on November 2, 2004?

Chair Sandberg asked if there was any objection to this Item being considered under the “Unanimous Consent” Agenda.

Councilor Morong said the Item referred only to the March election, and asked for clarification on this.

Administrator Selig said the legal authority as written in the Town Charter was interpreted to mean, whether for the local March election or statewide federal election, that it should be the Council that set the venue.

Councilor Morong said perhaps in the future, the date in Sec. 2.5 A. of the Charter should be made more general.

***Councilor Grant moved that the Durham Town Council hereby approves the Oyster River High School as the voting location for the State Primary election on Tuesday, September 14, 2004 and the General Election on Tuesday, November 2, 2004. The motion was SECONDED by Councilor Kraus.***

Councilor Smith said 2.5. B was somewhat confusing, because it referred to “all town elections”, but said he had always construed this to mean all elections held in the Town of Durham.

Councilor Morong said Sec. 2.5. B referred to hours of operation, but everything referred back to a specific date in Sec.2.5.A so perhaps that was where any confusion was coming from.

***The motion PASSED unanimously.***

### **IX. Committee Appointments**

- A. Shall the Town Council move John Parry from an alternate member to a regular member on the Parks and Recreation Committee to fill the un-expired term of Wesley Merritt, and appoint Melanie Rose, 15 Cutts Road, as a regular member to fill the un-expired term of Samuel Pierce.

***Councilor Samuels MOVED that the Town Council moves John E. Parry, 5 Denbow Road, from his current alternate member position on the Parks and Recreation***

***Committee to fill the un-expired term of regular member Wesley Merritt, said term to expire on March 31, 2006., The motion was SECONDED by Councilor Niman and PASSED unanimously.***

- B. Shall the Town Council appoint Michael Bicks, 279 Durham Point Road, as a regular member of the DCAT Governance Committee to fill the un-expired term of Marjorie Smith, and appoint Thomas Merrick, 7 Canney Road, as an alternate member on the DCAT Governance Committee

Administrator Selig explained that he had received an email from Mr. Bicks saying that as much as he would like to be on the DCAT Committee, he would be unable able to attend many of the meetings because of his work schedule. Mr. Bicks suggested that choosing another applicant would be a safer bet, but said he would be interested in any openings in the future.

Chair Sandberg said it therefore might be more appropriate to appoint Thomas Merrick as a regular member of the DCAT Governance Committee.

Administrator Selig said there was a request to that effect from Peter Brown, Chair of the DCAT Committee.

***Councilor Paine MOVED to appoint Thomas Merrick, 7 Canney Road, as a regular member on the DCAT Governance Committee to fill the un-expired term of Marjorie Smith, said term to expire on March 31, 2005. The motion was SECONDED by Councilor Samuels.***

Councilor Smith asked if there were any alternates on the DCAT board, and Councilor Paine said there were not.

Chair Sandberg asked Mr. Merrick if he wished to speak. Mr. Merrick said he would be glad to answer any questions Councilors had.

Councilor Paine endorsed Mr. Merrick, noting he had been diligent in coming to meetings as a visitor and had contributed to these meetings, and said she was pleased to welcome him as an official member.

***The motion PASSED unanimously.***

Councilor Morong asked if it would be appropriate to suggest that Michael Bicks could be an alternate, noting he had a lot of experience in the television field, and had expressed interest in DCAT, although his time was limited.

Councilor Paine said she was not sure there was currently an option for alternates in the DCAT guidelines.

Administrator Selig said this would be something new, but he would look into this.

## **X. Unfinished Business**

None

## **XI. New Business**

Chair Sandberg explained there were two items on the agenda which both dealt with the same parcel and his intention was to have Council members listen to the first item, and then the second, before deliberating on the issue, unless he was overruled by Council members. He noted the Council might decide not to make any decision on this issue that evening.

Councilor Niman asked if there was any time limit in mind for both presentations so they would not be there until midnight.

Both parties said their presentations would each take about 15 minutes.

Chair Sandberg asked Administrator Selig to provide introductory comments on the issue.

Administrator Selig said the Town was contacted by both parties with respect to the “stub” of land. He thought that logistically speaking, it made sense to handle both on the same night, so the Council could have the full picture and everyone would have an equal presentation.

- A. Presentation by the law firm of Griffin, Pudloski & Jenkins, P.L.L.C. on behalf of property owners on Fairchild Drive, Madbury Lane and Davis Avenue requesting that the Town release and discharge the “stub” of land located at the end of Fairchild Drive from public servitude.

Attorney Charles Griffin explained that he represented the Fairchild Drive Concerned Citizens Committee, in requesting that the Town release and discharge a “stub” of land located at the end of Fairchild Drive from public servitude, as well as to speak in opposition to Stonemark Management’s request to authorize the use of the “stub” as a Class V highway.

He provided background on the issue, explaining his clients comprised part of the 30-lot Chase subdivision approved by the Planning Board in 1980, and noted that all of the streets in the subdivision ended in cul-de-sacs. He said that in March of 2003, the Planning Board had unanimously denied an application by Stonemark Management to create a 12-lot subdivision with access through the “stub” of land in question, located off of Fairchild Drive. He said Stonemark appealed that decision to the Strafford County Superior Court, and in November of 2003, the Court upheld the Planning Board’s decision, but did not specifically address the issue of the “stub”. He said Stonemark filed a Motion for Reconsideration, asking the Court to address the “stub” issue, and this motion was denied the previous week.

He explained that the Town owned the fee to the “stub” and the developer had no present right to build a roadway to it unless it obtained that right with the Town’s permission. He

said this finding was based on an opinion by the Planning Board's attorney, Walter Mitchell.

Mr. Griffin spoke about the Findings of Fact the Planning Board gave as reasons for denying the subdivision. He said that to decide whether to grant permission to Stonemark in the present situation, the Council needed to consider several other reasons the Planning Board had given for denying Stonemark's request. Mr. Griffin provided detail on the Findings of Fact, noting a key concern of the Chase subdivision residents was that their neighborhood had been approved as a cluster subdivision with a quiet residential street, and the approval of the proposed development would change that dramatically.

Rubin Hull, of Civil Design Engineering Consultants, provided detail on his conclusions that the roadways in the Chase subdivision were not designed to accommodate traffic from a new subdivision. He said Durham had a hierarchical system of streets that provided vehicle traffic appropriately, and said Davis Ave. and Fairchild Drive were, without question, access streets. He said whether it was part of a cul-de-sac, as originally proposed, or worse, extended as a through road to Madbury Road, making it a collector street and short cut from Madbury Road to Edgewood Road. Using the tube would add additional traffic, and would be inappropriate.

Attorney Griffin noted that the Chase subdivision was a cluster subdivision, and at the time it was approved in 1980, lot dimensions that normally applied were waived to allow greater than normal density. He noted 15 of the 21 lots in the subdivision had less than 20,000 sq. ft. He said to allow traffic from a conventional subdivision to pass through this cluster subdivision would violate the purpose and intent of the ordinance that allowed it, so what was at stake was much more than simply allowing a "stub" to connect to a new subdivision. He said what was at stake was possibly overturning a Planning Board decision that had remained in place for 23 years, and said the Town Council should not do this, because the residents of the Chase subdivision would suffer.

Attorney Griffin also noted possible health and safety issues that would result from this, as well as reductions in property values. He also referred to the Durham Master Plan's discussion of housing objectives, including the importance of preserving existing residential neighborhoods by, among other things, designing traffic circulation systems that reduced speeding and eliminated cut through traffic. Mr. Griffin said his intent was to prove why using the "stub" as part of the highway system in connection with development of adjoining properties would violate both the Zoning Ordinance and the Subdivision Regulations and urged them to deny Stonemark's request.

Attorney Griffin said he wanted more than for the Council to deny Stonemark's request, explaining he also wanted it to grant his clients' request to release the "stub" from public servitude. He quoted State statute RSA 231:51 concerning this, providing history on the "stub" to demonstrate it qualified for release under this statute. Attorney Griffin noted that Attorney Ryan had indicated that Stonemark had purchased additional land that would allow access to Madbury Road from Craig Meadows, so granting his clients' request would not deprive Stonemark of access to its land.

Councilor Smith got clarification from Attorney Griffin that if 20 years had not passed, the Town would not have this discretion to release the “stub”. He then asked if 20 years had passed, what degree of discretion the Town had in taking an action under this provision. Attorney Griffin said the statute used to say “shall”, but now said “may”, but the various factors would have to be weighed.

Councilor Smith asked whether, understanding that the word “may” is used in the statute, did the Council have certain parameters it must follow in exercising discretion, or was it fully entitled to exercise its discretion for any reason that was not otherwise explicitly unlawful. Attorney Griffin said the purpose of the Statute should be considered – whether a street “on paper” should remain as such.

Councilor Smith asked whether, if a developer was able to establish that there was no other means to enter the property other than the “stub”, this would limit the Town’s discretion to the point of having to deny the request. Attorney Griffin noted the developer was not making this claim, and was looking at the “stub” as an alternate means of access.

Councilor Grant asked in Attorney Griffin’s judgment, what happened to the property if it was released from public servitude. Attorney Griffin said the property would be divided from the centerline, between the adjacent property owners.

Councilor Grant asked if this was automatic, or did a fee exchange hands for the exchange of the property. Attorney Griffin said that in other towns where he had seen this release from public servitude, they hadn’t charged a fee, but said he was not aware of anything that said towns could not charge a fee. He noted this was a question that should be directed to the Town attorney.

Councilor Kraus asked whether the traffic in the Chase subdivision accessed through Davis Avenue, and also asked if the “stub” of land was opened and connected to Madbury Road, whether B Street would have two-way traffic on it. Attorney Griffin said that was correct.

Administrator Selig said there was also an abutting property on a third side of the “stub” property and questioned how the “stub” property would be affected by this. Attorney Griffin said he had not seen a situation like that.

Councilor Smith asked whether, if the Town released the property, it would be owned in fee simple by the abutters. Attorney Griffin said that was correct.

Chair Sandberg said the request presented by Attorney Griffin had been noted, and suggested there would be further discussion on the issue later in the meeting.

- B. Presentation by Stonemark Management Company, Inc. regarding a request for the Town to authorize use of a “stub” road located at the end of Fairchild drive as part of a Class V highway system to be extended from Fairchild Drive to Madbury Road.

Attorney Ryan represented Stonemark Management, and said he was there to ask that the “stub” be allowed to be used as part of the roadway system for the Fairchild Drive as well as the proposed subdivision. He clarified that the reason his client was there had nothing to do with the so-called 12 lot subdivision that had been the subject of a long Planning Board process and court action. He said the previous subdivision application had proposed 2 dead-end cul-de-sacs, but the new proposal, because his client could now acquire additional land that would exit onto Madbury Road, now proposed a different development that conformed to the new conservation ordinance. He said they were anxious to submit a plan that conformed to this set of regulations, but said that without the authority to connect to the “stub”, the Planning Board would not take jurisdiction of the plan.

Attorney Ryan provided a sketch plan of where the road would begin and end, and provided background on the “stub” property. He said the purpose of its existence was to provide future access to adjoining properties, which was not an uncommon designation. He said their plans for the “stub” would not violate the 1980 Chase subdivision approval, and in any event was something for the Planning Board to consider, noting that the Council’s concern was whether the “stub” should be available for development. He said reserve strips to adjoining pieces of property were part of the Durham’s, and many towns’ subdivision regulations, and were a preferred way to design roadway systems, as opposed to having a series of cul-de-sac developments and nothing connecting them, especially when there were existing public roads on either end.

Attorney Ryan said his client was willing to do what the Town wanted in terms of physical improvements, and said no improvements would be required on Fairchild Drive or any of the other interior roads. He said the reason to deny the relief requested by Attorney Griffin and to grant the relief his client was looking for was that the public purpose would be served by allowing the “stub” road to be used. He said it came down to whether this was good land use planning, and there was no question that good land use planning preferred through roads to a series of cul-de-sacs. He also said the development was in keeping with the Master Plan and the revised Zoning Ordinance and subdivision regulations.

He said the question of the traffic impact on the Fairchild Drive area could be looked at by the Planning Board, and he thought it would be found that the majority of traffic would not go through the Chase Subdivision but rather would come from, and exit out of Madbury Road. He said the “stub” road should be allowed to complete its original purpose as part of a connector to a through road system.

Councilor Morong received clarification that the client did not own the property in 1980 going out to Madbury Road, and noted that the land was landlocked then, but wasn’t now.

Attorney Ryan said the point the Planning Board was trying to get to was that its preference was that there not be a second set of cul-de-sacs.

Councilor Smith asked if Attorney Ryan's statement "It simply makes no sense to deny that use where the development of the adjoining property will comply with the current Zoning Ordinance and Subdivision Regulations" constituted a legal argument.

Attorney Ryan said it constituted a stipulation that his client would be bound to comply with these regulations once they were finally adopted. There was additional discussion about the meaning of this sentence, and whether it was a legal argument or something else.

Councilor Smith noted Attorney Ryan's previous statement that said good land use planning preferred through roads to cul-de-sacs, and asked what empirical support he had for this statement, and also whether he was stating it as a legal requirement. Attorney Ryan said his empirical support was 34 years of land use planning law and experience concerning through roads and cul-de-sacs.

Councilor Smith asked him to point to specific provisions of Durham's ordinances that indicated that good land use planning preferred through roads to cul-de-sacs. Attorney Ryan read from the Section 3.06 of the Town's the Road Regulations.

Councilor Smith asked if there was any other legal authority that said it was the practice of planning boards to look very carefully at subdivisions that were intended not to have access through to other undeveloped land.

Councilor Smith noted it had been 24 years since the Chase project was developed, and asked to what extent the Council should take into account the fact that there was an established neighborhood and customs and life within this area. Attorney Ryan said time should not make any difference.

Councilor Grant noted he sat on the Planning Board as the Council's representative on October 22<sup>nd</sup>, 2003 when Attorney Ryan was present for a conceptual consultation. Councilor Grant said he realized this discussion was non-binding, but noted that the minutes from the meeting stated on page 11 that "Attorney Ryan noted that no access would be needed over the so-called "stub" off Fairchild Avenue", so the traffic issue there was no longer a problem. Attorney Ryan noted that was true at that time, but said the ordinance had changed thereafter, so the proposal he spoke about that evening would not be in conformance now.

Councilor Niman asked if using the "stub" was the only way a conservation subdivision could be designed for the property, and Attorney Ryan said he did not know. He said the current design was the best way to do it, and to have to do it in cul-de-sac form without access through the "stub" might mean the property could not be developed at all.

Councilor Niman asked if Attorney Ryan would agree there could be a possible decrease in property values and quality of life, for the people on Fairchild Drive if there was access through the "stub". Attorney Ryan said he did not think so, and in any event that was not an issue for the Council. He said it was an issue for the Planning Board, which had significant discretion concerning health, safety, welfare and traffic issues.



Councilor Samuels asked if the Town was requiring two accesses to the development. Attorney Ryan replied that it was not.

There was discussion on which version of the Zoning Ordinance was in effect now, and it was clarified that the draft Zoning Ordinance, since it had been posted, was in effect now.

Councilor Smith asked Attorney Ryan if it was his client's position that the Town Council was legally required, for purposes of making its decision, to act as if a proposed ordinance was currently in effect. Attorney Ryan replied in the affirmative.

Administrator Selig asked Attorney Ryan if the question of discharging the property from public servitude was a discretionary or political action of the Council, or a judicial action. Attorney Ryan said it was an issue that was grounded in the police power, and in the context of land use planning. He said that in 1980 the Town decided it was a good idea to provide the "stub" for future access, and asked if anything had change since that time.

Administrator Selig asked how he would recommend the Council weigh the impact of laying out a roadway across the "stub" upon the established neighborhood, as compared with the rights of the property owner who would like to develop the property in one way or another. Attorney Ryan said he believed the Council should ask if there was any good reason why there should not be through access. He said what the new development would consist of, and potential impacts from it, should be addressed by the Planning Board.

Administrator Selig asked Attorney Ryan whether, if the Council was to grant the request of the neighborhood, he thought that action would be unlawful. Attorney Ryan said he thought it would be, because it would have no basis in the exercise of good public policy.

Administrator Selig asked if the "stub" were discharged, what Attorney Ryan thought would happen to the underlying land, since there were three abutters versus two. Attorney Ryan said the Town would continue to own the piece of ground because the statute referred only to dedication. He said the Town had a deed and would have a piece of land that nobody would be able to do anything with.

Councilor Smith asked Attorney Ryan whether, if the Council decided to have a public hearing concerning this issue, he would say this was legal and appropriate. Attorney Ryan said he would have no problem with this.

Councilor Smith asked that Attorney Ryan imagine that 50 people spoke on this issue, and every one of them said the welfare and safety of the Town was benefited by not permitting this land to be used as a through road, and asked him if he would consider such evidence as being against the law. Attorney Ryan said he had no way to answer this since he had no idea what the comments would be, and said it was up to the Council to hear this evidence and decide the matter on its merits.

Councilor Morong asked if he heard Attorney Ryan correctly to say that he did not know if he could have a conservation subdivision with one entrance. Attorney Ryan said a subdivision with one entrance would have to be a cul-de-sac arrangement, and said he

was not sure what the Planning Board would say about that. He said his client was trying to structure the development in terms of what was the best land use plan to put before the Planning Board.

Chair Sandberg suggested that Council members mull this over for a few weeks and they could then discuss the pros and cons and consider whether a public hearing was appropriate.

Councilor Smith said he thought the two sides would like the matter resolved sooner rather than later, and suggested that the Council should therefore determine if a public hearing should be held.

***Councilor Smith MOVED to schedule a public hearing on this issue. The motion was SECONDED by Councilor Paine.***

Chair Sandberg called for a Recess at 9:20 PM.

Councilor Paine left the meeting at this time.

The meeting reconvened at 9:30 PM.

Councilor Smith said there were factual issues that could influence their decision, and he did not believe that any matters relating to land use, for the purpose of the decisions they had to make, were beyond the Council's jurisdiction. He said it was important to obtain public facts on the issue.

There was discussion about the Council's upcoming schedule, and if it was reasonable to schedule the public hearing for Feb 16<sup>th</sup>.

Councilor Grant suggested that the public hearing should be held as a separate meeting because so many people would want to speak.

Councilor Kraus asked whether the hearing would actually be needed. He said he personally had resolved the matter in his mind and said if there was no overriding reason for the hearing, he didn't believe it was necessary.

Councilor Morong said he basically agreed with Councilor Kraus concerning the hearing. He also said he might like to check with the Town attorney on a few matters, but said he had a pretty good idea how a public hearing on this issue would go.

Administrator Selig asked if it would be possible for interested residents and members of the public to submit written comments, and the Council could then digest this information.

Chair Sandberg said he would prefer that the Council talk about this at the next meeting, after having the chance to digest the information that had just been presented. He said he was not excited about having another public hearing if one was not needed.

Councilor Smith said there were two disparate views of the public interest that had been presented, invoking factual concepts. He said that when the Council took the final vote, he would like to know its vote was as informed as possible by relevant facts provided by persons with disparate views. He said if the Council made a decision, and it was challenged, the Council should have a record of facts that supported its position.

Councilor Niman said he would speak against holding the public hearing, but asked Councilor Smith what facts he thought would spring forth at the hearing that would influence the Council's decision.

Councilor Smith said he did not know, but said he would hope that whatever facts sprang forth would influence the Council's decision. He noted again that he wanted the decision to be legally unassailable.

Councilor Samuels said she was on the Planning Board when the original subdivision was approved and that she would like Council members to see the original Findings of Fact and Conditions of Approval. She said she would be willing to pull up the old discussion on the application if it could be located.

Chair Sandberg said the question before them was whether or not to schedule the public hearing.

***The motion failed, 1-7, with Councilor Smith voting in favor of the motion.***

Chair Sandberg said this issue would be on the agenda at the next meeting, and there would be discussion around the table. He said the issue of whether to hold a public hearing could also be looked at again at that time.

Councilor Samuels explained that she had voted against the motion because it was important to pull up all of the relevant information before the Council went forward.

Councilor Harris restated that the Council should invite public comment in writing so it would have this information to consider.

- C. Discussion on and Adoption of the Town and UNH "Shared Statement of Civic Commitment" dated January 21, 2004.

Chair Sandberg said this was an important document and read it for members of the public.

***Councilor Kraus MOVED that the Town Council approve the final draft (1/21/04) of the Town of Durham and University of New Hampshire "Statement of Shared Civic Commitment", which was endorsed by the UNH President Ann Weaver Hart and her cabinet. The motion was SECONDED by Councilor Grant.***

Councilor Niman said he could not support the document in its current form because it seemed unbalanced. He suggested there should be a shared commitment, where there was also a commitment from the University to the Town of Durham where its community

members should respect private property and its judicial system should be used to insure that students are good community members. He also noted that if Durham had a commitment to provide access to municipal resources, the University should perhaps have a commitment with respect to funding or contributing to some of these resources. He also asked whether, like the Town, the University should also be committed to the resolution of mutual problems. He said he could only vote to adopt the document if paragraph three was removed, or if there was a paragraph four that talked about the University's commitment to the Town.

Councilor Kraus said he appreciated Councilor Niman's concerns, but didn't see quite the same issues with the document, noting he had worked on the document at an earlier time. He said he was surprised Councilor Niman was suggesting this now.

Councilor Niman said the earlier version didn't look anything like the present document.

Chair Sandberg said the document had in fact changed over time, having been whittled down considerably. He noted that he and others had been working on it since the previous spring, but he realized Councilor Niman had a valid point. He said he would have no problem taking out paragraphs two and three and said making the document shorter, sharper and more to the point had merit. Chair Sandberg said the goal was to demonstrate and verbalize the fact that the University and the Town had their shoulders to the same wheel in establishing and maintaining law and order and proper civic behavior in the community. He suggested the Council could postpone the vote on this and come up with a slightly modified version of the document.

Councilor Samuels agreed the Council should come back to this at a later meeting. She said she remembered that the original purpose of the statement was for students to see it when they opened their handbooks, so they would understand their responsibility to be good citizens of the Town. She said Councilor Niman's comments were to the point, and also suggested a shorter document would be better.

Chair Sandberg said that it had not been fully explored how this document would be used.

Councilor Smith said he agreed with Councilor Niman's view, and said this could easily be dealt with, suggesting wording could be added to the third paragraph to make it a joint commitment.

Councilor Smith referred to page 2, paragraph III entitled "Respect for Law and University Policy". He felt that subparagraph a. which reads: "The sale and/or use of illicit drugs" did not make sense and suggested that it could be reworked.

Councilor Kraus said that although a considerable amount of work had already been done on the document, he realized a bit more work on it was needed.

Councilor Grant said the statement was excellent, and should be endorsed that evening

There was additional discussion on the document and what it should include, and Chair Sandberg suggested the Council could continue to work on it.

Councilor Morong suggested that wording should not be deleted that evening, and that they should speak with the University first about the wording changes.

Councilor Smith said paragraph two was all right as it was, and suggested that a few changes to paragraph three, and slight rewording on page three would make the document fine.

***Councilor Smith MOVED to postpone adoption of the Statement of Shared Civic Commitment. The motion was SECONDED by Councilor Morong, and PASSED 7- 1, with Councilor Grant voting against the motion.***

D. Discussion on budget goals and objectives – Neil Niman

***Councilor Smith MOVED to extend the agenda for 15 minutes to 10:15 pm. The motion was SECONDED by Councilor Kraus, and PASSED unanimously.***

Councilor Niman outlined two serious budget issues the Town was facing. He said the first reflected budget projections that showed that in order to keep tax rate increases in the 4% range, the Town must reduce its fund balance to levels that were not financially responsible. He explained that the second reflected an overall level of spending that make it difficult to maintain the tax rate at a level that was affordable for many current residents. Councilor Niman provided additional thoughts on this in a memo to Council members, which included specific recommendations for steps the Council should take to address the problems.

He said he was frustrated that during the budget process, the Council never had the chance to address these policy issues, and suggested there should be an ongoing conversation on them, starting early in the year.

Councilor Kraus explained why he had abstained in voting approval of the budget. He said the most important thing the Council did was the budget, but the process was crammed into a short period of time, and problems resulting from this sometimes came back to roost. He said it would be good to have a budget discussion of some kind every month.

Chair Sandberg said that to the extent this could be done, it would be useful. He said he would have no objection to scheduling workshops.

Councilor Harris said it would be useful to do this sooner rather than later, before they lost the input of present Council members. She said there was somewhat of a lull at present, so it might be a good time to do this.

Administrator Selig suggested the workshops could include new as well as previous Council members.

Other Council members agreed that the workshop approach had merit, and there was discussion about when to hold the first session.

Administrator Selig suggested that this item could be placed on the February 16, 2004 agenda under “Unfinished Business” where the Council would be more likely to get to it, and then Councilors could also look at their calendars in the interim to determine a workshop date sometime after the February 16 meeting.

E. Update on the Work of the Economic Development Committee

Councilor Niman provided brief comments on the work of the Town’s Economic Development Committee, and invited others to join them in the work they were doing. He said he would provide a more detailed progress report to Council members at a later date.

F. Other Business

**Support behind effort to defeat exemption from taxation of utility poles**

Chair Sandberg asked Councilor Smith whether, if towns across the land were to start taxing these poles, whether consumers would pay for this.

Councilor Smith said yes, but no different than when we tax corporations...how much ...

***Councilor Smith MOVED that the Durham Town Council urges the defeat of House Bill 1416-FN because it believes that local communities should have the legal right to impose real property taxes on the poles and conduit of land based telecommunication companies. The Town Administrator is directed to convey to Durham’s representatives in the General Court, and to the appropriate committees of the General Court, copies of this Resolution. The motion was SECONDED by Councilor Harris. The motion PASSED 5-0-2, with Chair Sandberg and Councilor Morong abstaining.***

**XII. Nonpublic Session**

None

**XIII. Adjourn**

***Councilor Grant MOVED to adjourn the meeting. The motion was SECONDED by Councilor Kraus, and PASSED unanimously.***

The meeting ADJOURNED at 10:30 PM.

Victoria Parmele, Minute Taker