

**This set of minutes was approved at the May 3, 2004 Town Council meeting.**

**MONDAY, MARCH 29, 2004**  
**DURHAM TOWN COUNCIL**  
**PRESENTATION OF PROPOSED ZONING ORDINANCE REVISIONS**  
**DURHAM TOWN HALL -- COUNCIL CHAMBERS**  
**7:00 PM**

**MEMBERS PRESENT:** Chair Malcolm Sandberg; Arthur Grant; John Kraus; Neil Niman; Annmarie Harris; Gerald Needell; Carl Van Asselt; Peter Smith

**MEMBERS ABSENT:** Mark Morong

**OTHERS PRESENT:** Town Administrator Todd Selig  
Town Planner Jim Campbell  
Mark Eyerman, planning consultant  
Planning Board members: ZBA members  
other interested members of the public

**I. Call to Order**

Chair Sandberg called the meeting to order at 7:00 PM. He explained this was a special meeting of the Council for the purpose of hearing a presentation from the Town Planner and Planning Board concerning the revised Zoning Ordinance the Board had forwarded to the Council.

**II. Approval of Agenda**

*Councilor Niman MOVED to approve the agenda as submitted. The motion was SECONDED by Councilor Kraus, and PASSED unanimously.*

**III. First Reading on Ordinance #2004-02:** Amending and/or rescinding certain sections of the Zoning Ordinance

Administrator Selig said that Town Planner Jim Campbell and planning consultant Mark Eyerman were there to provide a presentation on the Ordinance. He also noted that Planning Board Chair David Watt, Code Administrator Tom Johnson, as well as other Planning Board and ZBA members were present to participate in the discussion. He said that Mr. Campbell would give a slide presentation on the proposed changes, and Council members would then have the opportunity to ask questions.

Mr. Campbell thanked the Council for devoting a meeting specifically to the proposed Zoning ordinance changes, because this was a very important topic that deserved this special attention. He then went through a series of slides.

He first explained the objectives of the Zoning Ordinance rewrite process:

- implement recommendations of the Master Plan;
- make the ordinance clear and understandable; and

- make it more user-friendly

He explained that the work that had been done represented the first phase of amendments to be undertaken concerning the Zoning Ordinance, and involved:

- changes to the administrative provisions: general provisions; definitions; administration and enforcement; powers and duties of the Planning Board and the ZBA; etc.
- a complete rewrite of the residential districts: Rural, Residential Coastal, Residential A, Residential B
- expansion of the OR (Office Research) District
- “housekeeping” changes

Mr. Campbell said the second set of amendments to the Zoning Ordinance, which would be addressed in a few months, included:

- the nonresidential districts
- the overlay districts
- some performance standards – concerning parking; loading, buffering, screening, etc.

He said that the Master Plan was an important policy guide but had no force of law in itself, and so was implemented by the Zoning Ordinance. He explained that State law required that the Zoning Ordinance must be consistent with the adopted Master Plan, and also must reflect the policies outlined in the plan. Mr. Campbell said that the key principle guiding the Planning Board during the zoning rewrite process was that they should be implementing the recommendations from the Master Plan. He said the Board made the decision to try not to deviate from the Master Plan on these recommendations.

He next provided a brief history of the most recent Master Planning process, undertaken by the Planning Board in July of 1998, with adoption of the plan in September of 2000. He noted that ten subcommittees of citizens were involved in preparing the various sections of the Master Plan, and numerous workshops and public hearings were held as part of this process.

Mr. Campbell listed the key policies that the Master Plan established:

1. Improve the quality of life
2. Strengthen Downtown/commercial core
3. Enhance infrastructure development
4. Manage land development
5. Promote tax stabilization

He said the proposal before the Council specifically addressed policies 1, 4, and 5, and represented almost 3 years of work by the Board and zoning rewrite committee, noting that the committee had started meeting in January of 2001, and had met on a biweekly basis since January of 2002. Mr. Campbell said he had entered the process in August of that year, when there was a contract with the Strafford Regional Planning Commission. He said that contract was terminated in September, but the committee kept meeting, hiring consultant Mark Eyerman to assist them. He explained that the Planning Board held numerous public hearings

during this time, and the Board's proposals were revised to reflect public feedback received at these hearings

He said the first round of public hearings was held in late 2002 and early 2003, when extensive public comments were received on the draft. He said areas of concern that came up at this time, as well as later in the process, were:

- definitions
- conditional use provisions
- standards for conservation subdivisions
- variances and special exceptions
- lot sizes (based on soils)

Mr. Cambell said that the rewrite committee reviewed the comments received and rewrote the first draft based on these comments. He said the second round of hearings (3) was held in late January and February of 2003, when additional comments were received and reviewed by the committee. He said they went on to prepare a third draft of the revised ordinance, and held a third round of public hearings (2) in August of 2003. He said the final draft of the ordinance was prepared based in part on these public comments, and the fourth round of public hearings (2) was held in early 2004.

Mr. Campbell said that the final document was prepared after the hearings, and was then recommended to the Town Council for approval. He also noted that the rewrite committee had prepared amendments to the Subdivision Regulations, which were designed to complement the zoning changes concerning conservation subdivision. He said public hearings were also held on these draft changes, and also noted that the Planning Board was ready to adopt the revised subdivision regulations when the Zoning Ordinance was adopted.

Mr. Campbell said the Board was proposing several significant changes to the Zoning Ordinance, with the two most significant proposals being:

- require subdivisions to be conservation subdivisions
- revise use and approval of Conditional Use Permits

He said the use of conservation subdivisions was one of 10 primary recommendations in the Master Plan, and had been recommended in order to retain small town/rural character, constrain and improve residential development, protect natural resources, and enhance the Town's tax base. He said Master Plan recommended the adoption of conservation-based development, making it the only by-right residential development in Durham. He noted that there were a few exemptions allowed. He also said the Board was proposing to adopt a soils based density standard for residential districts.

Mr. Campbell outlined additional recommendations of the Master Plan related to conservation based development:

- maintain current lot sizes as maximum density; in other words, - with conservation subdivision, would not get greater density than would get with a conventional subdivision
- reduce density in R and RC where soils are poor
- eliminate "cookie-cutter" zoning requirements

- require buffers along existing roadways, in order to protect the rural, small town character of Durham

Mr. Campbell described a conservation subdivision as a residential development where the majority of the site was set aside as permanent open space; where the size of individual lots was reduced; and which was designed to maintain resource values. He first described a traditional site, where the developer would cut the site into lots, put in the road system, and then think about maintaining some open land with what was left. He then provided a drawing that showed how a conservation subdivision could be designed for a site (taken from Randall Arendt's *Conservation Design for Subdivision*).

He said the first thing done with a conservation subdivision was a site analysis, where primary and secondary conservation areas were set out, before what was developable was considered. He said the roads were then sited, making sure they all had good views of the conservation areas, and the road system and trail system were then put in. He said the lot lines were drawn after everything else was drawn in, and noted that individual lots were not required in a conservation subdivision.

Mr. Campbell went through the process of determining how much open space would be set aside: an area equal to all of the unusable area, plus a percentage of the usable area. He explained that the percent varied by district: 30% in RA, 40% in RB, 50% in RC and R. Mr. Campbell gave an example of open space set-aside: for a 50 acre parcel in the R District: 10 acres unusable; 40 acres usable; open space = 10 ac + 50% of 40 ac. Total open space = 30 acres

Mr. Campbell noted specific amendments that were made to the ordinance dealing with conservation subdivisions:

- District standards for RA, RB, RC, and R were revised
- Definitions were added to Sec 175-7 particular to conservation subdivision
- A specific section containing standards for Conservation Subdivisions was created (175-107)
- A soils based process for calculating "usable area" was added (175-55)

He said that the second major change to the Zoning Ordinance concerned the handling of conditional uses in Durham, noting that there was significant discussion about this at the public hearings. He explained that the Master Plan had advocated removing the Council from the process of issuing conditional use permits, and also recommended adoption of better performance based criteria for evaluating conditional uses, as well as encouragement of appropriate development.

He outlined the specific amendments that were proposed for dealing with conditional uses:

- give the Planning Board authority to grant conditional use permits, therefore removing the Town Council from the process. He said the Board also required that there be 5 votes in favor of granting the conditional use permit in order for it to pass, as a safeguard (2/3 majority).
- revise the standards for the conditional use permit

- specifically provide for conditions of approval, noting a number of Towns already provided those standards in their ordinances, while Durham had not
- limits the number of uses allowed by conditional use; Mr. Campbell noted there was significant discussion about the Table of Uses during the zoning rewrite process

Mr. Campbell said there were other proposed amendments to the Zoning Ordinance, some of which addressed recommendations of the Master Plan, and some of which addressed housekeeping and updating issues. He outlined the following significant changes:

- new and updated definitions (Sec 175-7), with the standards that were currently included with specific definitions moved to a separate performance standards section.
- Providing for administrative appeals (Sec 175-12) – clarified and expanded language on this.
- Resolving of questions involving the interpretation or application of the ordinance
- Mr. Campbell noted he had worked with the Code Administrator on this
- Spelling out responsibilities of the Planning Board (Article V) and the ZBA (Article VI)
- Revising the permitted uses and conditional uses; Mr. Campbell emphasized that only the Residential and OR districts had been addressed during this first phase of the zoning rewrite process. Created a table of uses (Sec 175-53) so this information is more user friendly
- Updating the dimensional requirements; created table for this; breaks out setbacks, lot frontage, impervious surface area, etc. - only for the Residential and OR districts
- Increasing required usable area per dwelling unit to 150,000 sf. in the RC and R District. Mr. Campbell noted that the Master Plan had called for requiring a minimum of 3 acres in this zone, (approx. 132,000) but said the Board had agreed to go a bit beyond this in order to protect fragile lands.
- Creating revised system for maximum residential density (Sec 175-55) - based upon soil suitability; Calculates the usable area; requires that unsuitable areas be deducted; Mr. Campbell explained that this process was based on a High Intensity Soil Survey (HISS)
- Deleted provision allowing planned unit developments
- Creating performance standards for specific uses (Sec 175-109); Mr. Campbell noted that the Board still needed to complete some of these standards, relating to parking, etc., and noted again that some were removed from the definitions section.
- Establishing standards for septic systems (Article XXIV) that the ordinance did not have before; establishes the suitability of the location; before needed 4,000 sq. ft. of area and now need 5,000 sq. ft, and 4 test pits instead of 2 test pits, at 50 ft intervals, to ensure there is actually a suitable septic site. Creates provisions for independent review of test pits by a soil scientist chosen by the Town and paid for by the developer.
- In addition, numerous other amendments - Primarily housekeeping and clarification – checking RSA references, etc., references to other sections to the Ordinance, other codes, etc.
- Mr. Campbell went over the revised Zoning Map, noting proposed changes to it: refinement of Residential District boundaries, and creation of new OR Districts proposed in the Master Plan. He noted that these OR Districts would be further refined in phase two of the zoning rewrite process.

He said there had been a lot of discussion, including comments at the public hearing by the landowner and abutters (including the Town of Madbury) that a specific parcel that had been rezoned as Office Research should be put back as Residential B. He said the Board had not determined there was any particular reason why this parcel should be designated as Office Research, and had decided to change the parcel back to Residential B, based on this discussion. He also noted there had been a request to zone the property as rural, but the Board had decided against this.

Mr. Campbell noted that the Limited Business District and the Central Business District were kept the same for the time being, and also said that much of the Rural District and Residential Coastal District had remained basically the same.

He then described the various areas in Durham that had been rezoned as Office Research, some of them as placeholders, and explained that the next phase of the rewrite process would propose several different ones in Durham: Office Research 108; Durham Business Park; Office Research multi-unit; and Office Research light industry.

Chair Sandberg thanked Mr. Campbell, and said the hard work that Planning Board members had put into this work was greatly appreciated. He then opened up the discussion to allow Council members to probe the Board's rationale behind the various proposed changes to the ordinance.

Councilor Kraus asked if some parts of University acreage had been classified as RA on the Zoning Map.

Mr. Campbell said that the University's various individual lots were not indicated on the map, and did not fall into one single zoning district.

Councilor Grant asked Mr. Campbell to explain the reason for this.

Mr. Campbell said some properties currently owned by the University would not necessarily stay in that ownership. He explained that the Master Plan was looking to zone certain areas in certain ways, and if the University disposed of a parcel, the Town wanted to be sure the use of the property would be one that the Town wanted.

Councilor Smith asked what the justification was for giving the University land a zoning designation until such time as the University didn't own the land, and said it would be very helpful if the map could be done to indicate everything that the University owned. He said it was a policy decision as to whether or not the Town should make a contingent decision as to how that land should be classified, if the University wanted to sell some of its land.

Mr. Campbell suggested this would essentially be a University overlay district.

Councilor Smith described it instead as a University owned property with a contingent Town zoning overlay. He said the current Zoning Map did not give citizens a sense of what the Town had no control over.

Councilor Needell asked if the conditional uses clearly marked in the Table of Uses were in some way related to the conditional uses mention in the subheading of the wetlands section of the ordinance. It was clarified that these were not the same thing.

Councilor Kraus suggested hash-marks could be put on the map to designate University property.

Councilor Grant said it was important to keep a zoning designation for all University property, because if it wanted to sell off a piece, the Town did not want the property to appear as an un-zoned property that the owner could do anything with. He noted that there had been initiatives by the University to dispose of some of their outlying properties, some of which were in the Rural zone, and said that in the last decade it had acquired land abutting its own property, in areas where the Town was presuming development. He said hash-marks, etc. were fine, but said it was important to keep the zoning designation to indicate what use could be made of a parcel if the University was not going to use it.

Chair Sandberg said this brought up a procedural question: if the Council started leaning toward certain recommendations, such as using hash-marks. He asked what the Planning Board saw as the appropriate process for providing input.

Mr. Campbell said something like hash-marks was probably not considered a substantial change. He said it was the Board's hope, if a substantive change was proposed by the Council, that the Council would not have to send the whole ordinance back. He said ideally, the rest of the ordinance could move forward, and be adopted, and the Board could make changes to the section in question and then send it back to the Council.

Chair Sandberg said that before they went any further in reviewing the proposed changes to the Zoning Ordinance, it was important to know what the Council could do and could not do, and what the ground rules were. He said this issue had been explored with the Town Attorney, and suggested there should be a motion to open the attorney's letter as a public document so this issue could be discussed with the Planning Board and the public.

***Councilor Grant MOVED that the Town Attorney's letter be opened as a public document. Councilor Smith SECONDED the motion, and it PASSED unanimously.***

Town Administrator Selig provided background on the issue, noting the process outlined in the Zoning Ordinance. He said the Town Attorney had concluded that the Council had authority to deliberate, and to come up with minor substantive changes, - more than editorial, but less than changing the meaning of what was publicly noticed and heard before the Planning Board. He said it would largely be a matter of judgment by Council members as to what this entailed

Administrator Selig explained that the attorney had said that if the recommended changes went beyond minor substantive changes, the ordinance should be sent back to the Planning Board with suggested changes which they would deliberate on, and if they agreed with the suggestions, would hold another public hearing, forward it back to the Town Council, which could then approve it. He noted that the more substantive the changes recommended by the Council were, the more risk there was that the original posting was no longer valid.

He said what made things confusing was that the Council, under the Council initiated process spelled out in the ordinance, had the ability to propose its own changes to the zoning ordinance, and forward them to the Planning Board. He explained that the Board could review these

changes and identify real problems with them, yet the Council could still act on them. He said the Town Attorney had said there was not a clear demarcation between the two processes.

He also noted that the Attorney had said that if the Council decided to tackle substantive changes on its own, and decided to adopt them themselves, if a landowner was somehow harmed as a result of this, the landowner could potentially claim that the new ordinance was not lawfully adopted.

Chair Sandberg summarized that the Council could turn down the proposed changes, after holding the hearings, and then could initiate another document; or it could approve the document as presented, say that was the law of the land in Durham, and then develop Council initiated revisions, which would accomplish, honor and respect what has been done, and then, in the interest of making the document even better, start a new process.

Administrator Selig said this appeared to be consistent with the process the Planning Board would like. He said the Town Attorney said the Council should consider the proposal as a whole, and should not pick and choose. He said they could adopt the proposal, and then zero in on areas they still had problems with through the Council initiated process

Councilor Smith said it was important that the process and interrelationship of the Council and Planning Board not be ambiguous to the public. He said the critical question was how much power the Council should have, and was similar to what the Planning Board struggled with concerning the conditional use permit process – but in this case applied to everything in the zoning code. He said his view was that while he admired very much what the Planning Board had done, there was no question that ultimately the Council must be satisfied with what it was putting into law, and could not put aside that role.

He said he had thought a good deal about the best way to exercise that authority while taking advantage of Planning Board expertise, and also completing the process as soon as possible, consistent with careful deliberation. He suggested that the following should be done:

1. The Council should exercise, in a very conservative way, what it considered was a technical or minor substantive change. He said this would reduce as much as possible the chance of any claim lay on the Town in the future that the ordinance was adopted illegally because the Council overstepped its bounds.
2. The Council should proceed, within that criteria, to make those changes, and unless it believed this was a fundamentally flawed project, the Council should adopt the proposed changes to the ordinance
3. As the Council went through the document, page-by-page, it should very carefully make a list of technical or minor substantive changes it wished to make, and another list of more than minor substantive changes. He said the Council should then discuss these changes it wished to make, noting that if this were not done, it could lose track of the thought process

He said that upon passage of the ordinance, the Council would immediately refer this list to the Town Administrator, and ask that appropriate provisions be drafted and forwarded to the Planning Board.



Councilor Smith noted with some amusement that the Planning Board had not proposed any changes to how the zoning ordinance was to be amended. He also said that under RSA 175- 5:D, when the proposal was referred back to the Planning Board, the Board was obliged to send it back to the Council within 60 days. He also noted that when the Board noticed the public hearing, that constituted posting. Councilor Smith said he hoped the Council would be willing to proceed with this process, and said he was interested to know how Council and Planning Board members felt about his suggestions. He said he hoped the Council could leave the meeting that night in agreement about these procedures.

Councilor Grant said he differed somewhat from Councilor Smith's suggestion that the Council do a page-by- page review of the Zoning ordinance. He noted it had been a difficult exercise for the Planning Board to come to agreement about the meaning of words, and had taken a long time. He said he was concerned that if the Council focused too closely on the words, they would be there a long time, and would lose focus. Councilor Grant encouraged Council members to look at the broad concepts, noting that this was a revolutionary document for the Town, which recommended some ways of doing things that were vastly different from what the Town had been doing.

Councilor Kraus said he agreed with Councilor Smith that there should be Council agreement on the process, but said he agreed with Councilor Grant that they should not dissect the document. He said he wanted to believe the Planning Board had done a good job on the zoning rewrite, and that the Council could move it forward.

Planning Board Chair David Watt said the Board acknowledged there were many ways to amend the ordinance. He explained that the Board had recently discussed the idea of holding quarterly meetings that allowed input from other Town Boards, etc. on a regular basis regarding problems with the ordinance, in order to make it work better. He noted a glitch in the ordinance that had caused problems for the ZBA, but which was never communicated to the Board formally, and was therefore not fixed. He said the Board was not averse to accepting input, identifying problems and continuing to work with the ordinance, noting that Board members were trying to build this into the culture and practice of the Planning Board. He said that the Council's input would be considered in a systematic way.

Chair Sandberg asked if the Board would prefer to have the Council send back the ordinance for minor adjustments, or adopt it - raising the plateau, as compared to the earlier ordinance.

Chair Watt said they would prefer to raise the plateau as soon as possible.

Planning Board member Neil Wylie said the Council needed to be careful not to become a de facto super Planning Board, noting that if they did that, they would have to spend as much time on the ordinance as the Planning Board had. He also said it was very important to see the forest for the trees, - the concepts involved here, the changes, and the impacts they might have, without going into every nuance. He suggested the Council should try to stay at the appropriate level of detail, see this work as a process, and satisfy itself that the ordinance, although not perfect, was good enough.

Jay Gooze said he was speaking for himself as a resident, and as a member of the ZBA. He said he would like to see the Council come to a conclusion as soon as they could. He noted that he had attended a number of the public hearings, and there had already been a significant amount of input from the public. He said he would like to see the overall document adopted, and there could then be suggestions about specific revisions that might still be needed.

Chair Sandberg asked Council members how they wanted to proceed.

Councilor Van Asselt asked if the Town Attorney's opinion was what they worked with.

Councilor Smith said he had read the Town Attorney's opinion very carefully, noting he did not agree with everything in the opinion, and said he thought that perhaps a different analysis could be made of how the Council made changes. But he said one thing that had been clarified at the Council meeting, that was not clear in the opinion, was that if they referred a suggested amendment back to the Planning Board, 60 days later it had to be back to the Council, and at that point, there was no question that the Council had plenary power to make any changes it wished to.

He said he thought the Council was somewhat stuck by the amendment provisions adopted in 1990, but said if the Council kept track of what concerned them, then it would be feasible to make alterations it wanted in a prompt period of time.

Councilor Van Asselt said that if they adopted the Zoning Ordinance provisions, and then worked on substantive changes, this process could take some time. He noted that developers could move fairly quickly, and said the window of time, working with a document they were not sure about, could cause some problems.

Chair Sandberg said that if, as the Council went through the public hearing process and deliberation, it took time to address issues specifically, and worked deliberately to load the next meeting's agenda, in theory it could approve the document and then quickly move to revisions to the document, so that the window of time would not be very large.

Councilor Needell said if the Council saw something in the ordinance it could not live with, they could reject that. He asked for clarification of how this process would work.

Chair Sandberg said if the Council voted the ordinance down, the 1990 ordinance would then still be in effect. He also explained that at times when the Council was not prepared to make a decision, it had the option of postponing action. He said that in the present circumstance, the motion could be made to adopt the ordinance as submitted after the public hearing, and then the Council could deliberate on proposed amendments. He said at that point, they could say they were not ready to vote on this, and could send ideas back to the Planning Board and let them deliberate and provide more input back to the Council. Chair Sandberg said it was a choice the Council would have to make – to postpone action, and ask the Board to negotiate with it, or if more efficient, to adopt the ordinance, and then immediately initiate a Council version of it.

Councilor Smith he did not think the process would be to have immediate negotiations between the Council and Board, explaining that he did not think the amending process authorized this,

although it would be great. He said the choices were to send the whole thing back, even if the Council had only slight changes to suggest; or, instead to do what he had outlined earlier. He said he preferred the latter, especially if they could keep the window of time as short as possible.

Councilor Kraus noted there were nine public hearings, and said he would like to think most of the problems with the ordinance had already been smoked out. He said he was uneasy that somehow the Council would now find significant flaws in the document, and take a huge amount of time with this.

Councilor Harris said the Zoning Rewrite committee, was charged with following the Master Plan as much as possible, but noted that the Master Plan was not always crystal clear, sometimes being in conflict with itself, which required the Board to make some choices about what it intended. She said these were the kinds of issues that might come up.

Councilor Grant noted that the revised ordinance was now in effect, and said the problem was that they couldn't keep the ordinance in the process of review and approval for too long. He noted again that there were some important policy and philosophical issues involved with the ordinance changes, the most significant being the conservation subdivision approach. Councilor Grant said this was a dramatic change for the community, and suggested that Mark Eyerman speak to the Council about it.

Mr. Eyerman said there were two important aspects of the conservation subdivision process:

1) the process of developing a subdivision proposal. He explained that the subdivision regulation changes would require applicants to look at their land in terms of its conservation value as well as its development potential, noting that historically, this had not been the case. He said the conservation subdivision process balanced the two, with ties going to the natural resource side. He said this required a change in perspective, and one that could only be seen tangentially in the Zoning Ordinance, but was institutionalized in the subdivision regulations.

2) He said there would be some issues with the approach because conservation subdivision meant that the lots would be smaller, and some people would question whether such developments would look rural. He said this would be a trial for the community to rethink how a piece of land got used. But he said the approach did create opportunities for the community to protect rural road corridors, the really significant pieces of property, and provide continuity of open space between properties.

Mr. Eyerman also said if the approach were applied as the community continued to develop, it would assure that a significant percentage of undeveloped land remained in common open space. He noted that creation of individual lots could compromise the resource value of open land over time, as there were spillover effects, and said having common open space provided the opportunity to protect this land.

Chair Sandberg asked what the chief complaints were in other communities that adopted this approach.

Mr. Eyerman said the biggest concerns expressed by the development community were that people who wanted to live in a rural area wanted a 3 acre or 5 acre lot, and not a smaller lot with

common open space as their back yard. He noted that developers could provide such big lots to landowners, but would have to give away most of their density in order to do this.

Councilor Niman asked if one could still have large acre lots, with subdivisions of three lots or less.

Mr. Eyerman said that was correct. He said the Zoning Rewrite committee thought there needed to be an exemption from the conservation subdivision approach for smaller subdivisions.

Councilor Smith asked Mr. Eyerman to explain HISS maps, and how they fit with the conservation subdivision concept. He also asked Mr. Eyerman to explain what it was in the ordinance or Subdivision Regulations that put hard limits on what a developer could do, in order to ensure that what the Planning Board had in mind came to pass.

Mr. Eyerman said the HISS (High Intensity Soil Survey) mapping was needed to determine what the land could support. He explained that density was determined by taking the gross area and subtracting deductions, many of which were based on soil factors, in order to determine the usable area. He said the HISS was needed in order to determine the various soils on the parcel, and noted that the various HISS deductions were cumulative, but not overlapping. He pointed out that some of the deductions were already in the existing ordinance. Mr. Eyerman explained that the density factor was then expressed in terms of how much area of usable land was needed for each dwelling unit.

He also explained that the Subdivision Regulations required that an applicant submit, either in the pre-submission phase or as part of a formal application, a site inventory and analysis documenting the resources on a site, and identify the primary, and secondary conservation areas on the site. He noted that the Conservation Commission and abutters could also participate in this process. He said this information was reviewed before the subdivision lots, roads, etc. were laid out.

Mr. Eyerman also noted that the regulations had a provision that the developer had to go through a four-step design process, including identifying open space, and described this process in some detail. He also said there was a provision that required the applicant to include the primary conservation areas and the highest-ranking secondary conservation areas in the common open space.

Councilor Kraus asked if there was anything inherent in this approach that meant that developers would not be able to make as much money with new houses in Durham.

Mr. Eyerman said the answer was probably no.

Councilor Kraus clarified that the discussion pertained only to subdivisions, and not to individual pieces of land. He also said that in a conservation subdivision, houses of traditional size would be on smaller lots.

Mr. Eyerman said this was correct, but noted that the number of houses that could be built within the subdivision would not be different.

Councilor Kraus said Mr. Eyerman had seemed to imply that some developers were not so keen on this approach, and asked if this was because they thought they wouldn't be able to sell the properties as easily.

Mr. Eyerman said that whenever a property was encumbered with additional restrictions, - common open space, a land trust, there were some people who would suggest that some buyers would go away. He said the experience had been that in a community like Durham there were sophisticated buyers who understood these kinds of restrictions, as compared to a really rural community where people wanted their five acres and didn't want anyone to bother them.

Councilor Niman asked whether, if two different soil scientists calculated usable area, they would come up with significantly different numbers.

Mr. Eyerman said soil scientists would probably say there was a relatively small margin of error. He said there would still be likely to be some disagreement over soil boundaries, as had already been the case, but he noted that the process allowed for independent peer review, which if done would eliminate most of the problems. He noted there were many communities that had used HISS mapping for years, and it was an approach that was well studied.

Councilor Needell said HISS mapping should improve upon the process that was presently used. He asked what guidance the Zoning Rewrite committee had in determining the specific soils and other site criteria that were to be used, for example, 0-20 inches to bedrock. He also asked if there were limitations as to what constraints the community could place on property owners.

Mr. Eyerman said the answer to the second question was that what the community could do had to pass a number of tests: was the Zoning Ordinance consistent with the Master Plan; were the regulations based on a legitimate public purpose; and, did the ordinance pass the reasonableness test.

Planning Board member Rachel Rouillard said a variety of sources were used to develop soils criteria, including several NH towns, private soil scientists, and the Soil Conservation Service. She said the rewrite committee had asked these entities what the standards and desired densities were for various soils, slopes and depth to bedrock in Durham, and then took an average of what communities used and what was recommended. She said the Board looked at what they could defend, and said the criteria were not subjective.

Councilor Grant noted Councilor Kraus's question of whether growth would stop because of the conservation subdivision ordinance. He said the Town of Hollis had such an ordinance for a number of years, and the Town had not stopped growing.

Councilor Kraus said he had wondered whether people would be happy buying property in a conservation subdivision.

Ms Rouillard said they had looked at Hollis because the Town had been successful with the conservation approach over such a long period of time. She explained that Hollis used the ordinance in order to preserve the rural character, and had seen prices go up significantly. She acknowledged that the conservation subdivision approach had the potential to make housing and land prices in Durham higher, but said landowners in Hollis had no problem there in terms of

selling houses in developments where houses were a little bit denser but they had common, shared open space.

Chair Sandberg asked if there was some idea how many acres in Durham which were developable under the existing ordinance would not be developable under the revised ordinance.

Ms. Rouillard said from what had been indicated by soil scientists the Board had spoken to, much of the Town of Durham had Hollis Charlton soils, which were borderline, marginal soils, so really shouldn't be built on anyway. She also noted these soils in some cases could be part of a wetlands complex or upland area, which would be deducted anyway. She said there was potential to take a significant amount of land out of the developable category.

Councilor Smith said there were other important limitations to consider - taking of property without due process, or without just compensation, and asked if the Board was confident that the conservation subdivision approach would not inappropriately bump into them.

Mr. Eyerman said the Board was confident.

Councilor Van Asselt noted Ms. Rouillard had said the approach had the potential to drive prices up, and asked her why.

Ms. Rouillard said if certain soils were taken off the table that meant there was a smaller supply of available land, while demand was expected to continue to grow. She said Hollis had created a community where the landscape had a desired rural feel, and there was a rich community life. She said there was plenty of access to recreational land, and there was not a feeling of too much density, yet people knew their neighbors.

Councilor Van Asselt said he assumed the Planning Board had discussed this, and considered these things to be desirable, even if the price of housing was driven up.

Ms. Rouillard said the concerns of the Board were what the characteristics of Durham were that its residents wanted to protect, - what it was that people loved about Durham. She said one of those things was the rural feel, a community with Great Bay, the Oyster and Lamprey Rivers, open space, and many recreational opportunities, and how to protect them for the people who lived there as well as for those who wanted to come to the community and share in that. She said the conservation subdivision approach was the best one the Board could find to accomplish this.

Chair Watt said the other principle the Board followed was to keep the development value of a particular piece of property neutral, to the extent that they could, while also not providing unintended density bonuses. He said this was why they went from requiring 120,000 sq. ft. of usable area per lot to 150,000 sq. ft.

Mr. Eyerman said the conservation subdivision approach, as outlined, on the one hand said to developers that they had to go through a process of thinking about how the land should be used, but in return for that gave the developer significantly more flexibility in terms of lot size, frontages, etc.. He said it was therefore not necessarily a given that the development had to be higher priced, and noted there were some communities where the conservation subdivision

approach was used to develop affordable housing, because of the ability to avoid some of the infrastructure costs.

Mr. Eyerman said an important potential benefit of conservation subdivisions was that they created the possibility for minimizing conflict with abutters in the long term. He noted situations where the Planning Board was reviewing a development proposal, and neighbors came in because something was happening in their back yard. He said the Board had observed that lots abutting common preserved open space generally were given a higher value by buyers, because they realized the open space meant that land abutting their property would not be developed. He said people appeared to be willing to pay for that kind of protection.

Councilor Kraus said it would be useful if the Council could see photos of Hollis, and Chair Sandberg agreed this would be a good idea.

Councilor Smith said he assumed that if the values Durham held dear were ones that no one else in the country shared, the price of properties would go down. He also said he assumed that in constructing the conservation subdivision approach, the Board recognized that one of the effects of preserving Durham's special qualities was that the price of properties would go up, but were not basing their decision on the desire to see that happen.

Mr. Eyerman said that was a fair statement. He explained that the conservation subdivision approach implemented one of the Master Plan's major policy tenants, and said the Zoning Rewrite and Planning Boards' main discussions evolved around how to make the approach work best for the community. He said the questions Councilor Smith asked were only tangentially discussed.

Chair Sandberg said he would like to see a discussion that evening about the timeline, and also wanted a sense of where and when the public hearing would be needed, and how many meetings would be needed.

Chair Sandberg declared a 5-minute recess 9:00.

The meeting reconvened at 9:05 PM.

Chair Sandberg asked Councilors to consider the best way to proceed.

Councilor Kraus asked how the public hearing fit into the process.

Chair Sandberg provided details on this.

Councilor Kraus said a public hearing at an earlier stage would assist him, because the Council otherwise might overlook parts of the ordinance that members of the public had problems with.

Councilor Smith said he strongly recommended learning more about new developments in the ordinance and the rationale of the Planning Board for these proposed changes; and, holding a public hearing, where they could get everything out on the table. He said after that, the Council would be in a position to discuss the ordinance with each other, and move forward.

Chair Sandberg said if they opened the public hearing that evening, there would still be the opportunity to have give and take with the Council, the planners and the public.

Councilor Smith said it would be helpful to get more input from the Planning Board. He said it would be extraordinarily important to have as many Planning Board members as possible at the special Council meetings on the ordinance.

Chair Sandberg asked Councilor Smith if he wanted to continue the first reading before scheduling the public hearing for April 12<sup>th</sup>.

Councilor Smith said he would like to schedule the hearing after the Council received the necessary input from the Planning Board.

Councilor Niman said in the best of all possible worlds, he agreed with Councilor Smith, but said he was concerned that the process could drag on too long. He said he would be in favor of opening the hearing on April 12<sup>th</sup> to get a sense of how involved the public wanted to be in the process, and noted they could schedule separate meetings with the Planning Board. He also said he would prefer looking at general issues, and said he didn't think that looking at the ordinance word by word and rewriting the document was a good use of the Council's time, or added to the process.

Councilor Grant said he would like to move to schedule the public hearing, which could be continued if needed. He said this would enable the Council to sort out the issues involved, without trying to hand pick them.

Councilor Van Asselt and Councilor Kraus said they agreed with Councilor Grant and Councilor Niman.

Councilor Harris agreed that the Council should move to schedule the public hearing for April 12<sup>th</sup>.

Councilor Needell said he agreed with this as long as Council members could receive input from the Planning Board at the hearing.

Chair Sandberg said Councilors could ask questions during the public hearing process. He said that based on Councilors' comments, they would be moving to schedule the public hearing for April 12<sup>th</sup>.

Councilor Van Asselt said he wanted to know the thought process the Planning Board went through concerning the conditional use permit process.

Mr. Eyerman said the Master Plan provided specific guidance in the tax stabilization section about making the kinds of development the community wanted easier to bring to the Town. He said one of the obstacles was that the conditional use process was not viewed as being conducive to this. He said the Master Plan specifically recommended some ideas concerning this, and noted one was that the Council should not be involved in the process.



He said the Master Plan also talked about including more specific standards concerning conditional uses in the Zoning Ordinance. He explained that an extension of this issue in the Zoning rewrite discussions was, that if a particular land use was one that the Master Plan said the Town wanted in the community, the ordinance should say it was a permitted use, and shouldn't put people through a second process. He summarized that the judgment process used by the Board in going through the Table of Uses was to say - make it permitted, or prohibited, unless there was something about a particular use that made it a call the Board couldn't make.

Mr. Eyerman introduced Planning Board member Stephen Roberts, who had chaired the subcommittee looking at the conditional use process.

Mr. Roberts said he had started working with the conditional use process 20 years back, when the term used more frequently to handle certain uses was special exceptions. He said he had looked at Tables of Uses in zoning ordinances around the state, and noticed that those municipalities with the highest amount of commercial development land issues used the conditional use permit process.

Mr. Roberts said that in studying other ordinances, he had learned that the conditional use process provided Towns with two tools: it provided some idea of financial impact, and some of the general impacts that were not allowed by general zoning regulations. He noted that RSA 674 provided additional powers for protecting neighborhoods and other businesses from negative impacts, and said the conditional use tool kit was larger than site review, and provided the opportunity to do better planning. Mr. Roberts said the toughest uses were the ones that the tool kit was needed for. He said if the use was not controversial, it should be a permitted use, but as the use got more difficult, the conditional use process was needed.

Chair Sandberg asked, if the use was potentially serious, why not simply prohibit it. He asked if this was because they wanted to be able to broaden the tax base.

Mr. Roberts said the Manchester ordinance was excellent, and was not used to encourage business, but was used to regulate things that would not be covered by site review. He said it was not a tool for development, but was a tool to referee uses.

Chair Sandberg asked if Mr. Roberts could explain what the down sides were.

Mr. Roberts noted an email to the Planning Board that said it had no business having this much power.

Councilor Smith noted testimony on the conditional use permit at the public hearings, which considered the downsides, and said he would like to know the thought process the Board used to determine that the upsides outweighed the downsides.

Mr. Roberts said people who took a very strict constructionist view were against it, but noted that towns and cities in the State had been beaten up by bad commercial and residential development. He said he saw this as a broader, more creative process for evaluating development in places like Manchester and Portsmouth to blend different land uses more effectively.

Councilor Grant noted he was the only member of the Planning board who had voted against taking the Council out of the conditional use process, and said he wanted to explain how he had come to accept what the Board had agreed to. He said he believed that the Zoning Ordinance should say explicitly what was possible, when someone was looking to buy a property, and had always believed that conditional use was a way to get around the ordinance, and do something that otherwise would not be allowed.

Councilor Grant explained that having said this, Board members asked him what would happen if the conditional use provision was taken out. He said use of special exception was considered, but didn't seem to be the way to go because it went through the ZBA and didn't involve the Planning Board. He said it was also brought up that if there was a use the Town didn't permit, and this went to court, the planning factor was taken away again if the court decided the use should be allowed. Councilor Grant said he had reluctantly come to the conclusion that the Town needed the conditional use process, and noted the Board was recommending fewer conditional uses than the Master Plan recommended. He said it was not as few as he would like. He said there were potentially heavy impacts of conditional uses - financial, public safety factors, water supply, etc. which lead some to think the Council should be involved in the process. He said he was not sure how he felt about this, but had tempered his original attitude because of guidance from the Town Attorney concerning some recent conditional use processes, as to the limited role of the Council in the process (only considering financial impact). He said this role could conceivably be played by the Planning Board if it was made very clear that they had to do a thorough job. He said he believed the present Planning Board would be responsible concerning this, and also noted that more specific standards had been proposed concerning conditional uses in the revised ordinance.

Chair Watt explained how the new conditional use provisions were better than old ones. He noted that the PUD provisions had been eliminated, and said all of the things allowed by conditional use were for uses that were useful in the community, but could have a negative impact on the community if not well managed. He said there weren't that many conditional uses in the Table, and the process was considerably narrower than it had been before.

Chair Sandberg asked how the Board chose to put conditional uses in some of the zoning districts, but not in others. He also noted that churches were allowed by conditional use in all of the districts, and asked what the logic was of putting them in the Office Research zone and Rural zone.

There was discussion about federal law concerning religious uses. Mr. Roberts said federal law said the Town had to allow the religious uses in all zones, but the Board wanted the conditional use process to guide this kind of development.

Councilor Smith said he questioned whether federal law prohibited Towns from restricting religious zones to certain districts.

Councilor Smith said he agreed with the Planning Board that if the conditional use process remained in the ordinance, the Council should be taken out of the process, explaining that the downsides of Council involvement were too large. But he said he needed to know more about the conditional use process than that the Board had gotten rid of the bad features of the process. He

said to him an especially bad feature was that historically the process had created incredible uncertainty for landowners and developers, so that it became essentially meaningless and unproductive.

He said the one reason he could see the conditional use process would be useful in limited situations was when the Board couldn't make up its mind about a particular use. He asked if the Board had weighed the flexibility the process provided against the downsides involved with the arbitrariness and uncertainty of the process to begin with.

Chair Watt said he had been on both sides of the issues, but said that when the Board came close to eliminating the conditional use process, there was the nagging feeling that the Town might want some of these uses, and the Board was simply not smart enough to know this ahead of time. He said concerning the uncertainty on the part of the developer, the Board concluded that was the risk the developer had to take, and also determined that considering conditional uses was the work the Board had to do. He said that ultimately the Board decided that the flexibility provided by the process was worth the pain.

Planning Board member Neil Wylie said that every time he went through the Table of Uses, there were a few things he had to figure out why were there, and also said there were some that were questionable. But he said that if the ordinance didn't allow any variation, Durham would be a dull town, - and also asked why someone should have to go to another town to go to a kennel. He also noted that the Board had discussed the fact that if the ordinance didn't provide an outlet for unusual land use situations, the courts would become involved in the permitting process.

Mr. Wylie also spoke concerning the issue of Council involvement in the conditional use process. He said Council involvement could be arduous, and became essentially a super planning board, and noted that no other community in NH had this provision. He said the most important issue was how often the legislative body of the Town should assume the role of judiciary, and said this was something the Council would have to decide. Mr. Wylie also noted that he did not think the Council had ever rejected a proposed conditional use that the Planning Board had recommended to it.

Councilor Kraus said nothing was black and white, and flexibility was the key, and was important to have.

Chair Sandberg asked whether, if the Council wanted to change any of these use designations, if that was considered to be a minor substantive change. He said the Council might be able to provide a fresh view of the Table of Uses, and asked how offensive this input would be. There was discussion about this.

Mr. Eyerman said the Board agonized over this process, and provided details of how they had proceeded. He said that following the public hearing that discussed the process, the Board wanted to eliminate the conditional use option, but then people began to say, - what about things like kennels. He said that through excruciating painful discussions, the Board went through the table 4-5 times, and looked at uses that could be a problem, but that might be needed in community and should therefore be accommodated.

Mr. Eyerman said the second piece of the process was to try to include standards and conditions of approval, in order to build in safeguards to ensure that the potential negative impacts of those conditional uses would be addressed. He said the Board liked the idea of being able to have some flexibility, but ultimately decided to use the process for the relatively few land uses that weren't black or white. Concerning the issue of uncertainty, Mr. Eyerman said in many cases, the uncertainty would be for abutters, not for developers.

There was additional discussion about what kind of input on the Table of Uses was appropriate from the Council, and the due process that needed to be followed.

Mr. Campbell stressed that the Planning Board and ZBA had worked on this issue for four months, and had considered carefully what the Table of Uses should look like.

Councilor Smith said this had been an excellent discussion, and said he believed the Council needed this same kind of discussion on other important issues related to the revised ordinance. He said having the discussions at the public hearing was fine with him, but stressed that a few more hours like this would save time in the long run.

***Councilor Grant MOVED to pass on first reading Ordinance 2004-02, an ordinance amending Chapter 175 Zoning, on first reading, and schedule hearing on April 12<sup>th</sup>. The proposed ordinance makes revisions to Part A consisting of the Administrative Provisions, including the new language for conditional use permits; for Part B the Zoning Districts (including the Table of Uses and Dimensional Requirements), and for Part C the Performance Standards.***

***The motion was SECONDED by Councilor Harris.***

***Councilor Smith moved to amend the motion to provide that the first hour of the April 12<sup>th</sup> public hearing be devoted to the continuation of the discussion with the Planning Board on certain major issues. The motion was SECONDED by Councilor Needell.***

Councilor Grant spoke against the amendment, and said the Council should next hear issues raised by the public, which would raise issues they would then want to discuss with the Planning Board. He noted he did not feel comfortable asking the public to come to a hearing and wait for an hour before being allowed to speak, and suggested the next meeting after the public hearing should be held specifically with the Planning Board.

Councilor Kraus said he also opposed the amendment.

Councilor Needell said the agenda could indicate the meeting would begin with a discussion with the Planning Board, so the public would know this. He said he wanted to make sure he had the opportunity to ask questions directly, and questioned whether the Council could get the exchange they had had this evening when the public was present.

Chair Sandberg said Councilors would have this opportunity.

Councilor Smith said he would be pleased to follow the alternative suggested by Councilor Grant.

***The motion to amend the previous motion FAILED.***

***Chair Sandberg called the question, and noted it required a 2/3 vote. It PASSED unanimously.***

***The original motion PASSED unanimously.***

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

Chair Sandberg thanked everyone for the excellent discussion.

Meeting adjourned at 10:00 pm

Victoria Parmele, minutes taker