

DRAFT
MONDAY, APRIL 26, 2004
(Continued Meeting of April 12, 2004)
DURHAM TOWN HALL -- COUNCIL CHAMBERS
TOWN COUNCIL MINUTES
7:00 PM

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

MEMBERS ABSENT: None

OTHERS PRESENT: Paul Beaudoin, Business Manager
Mark Eyerman, planning consultant

Chair Sandberg brought the meeting to order, and explained that this was a continuation of a public hearing on proposed changes to the Zoning Ordinance.

I Approval of Agenda

Councilor Needell MOVED to approve the Agenda - a continuation of the public hearing on the proposed amendments to the Zoning Ordinance, #2004-02. The motion was SECONDED by Councilor Kraus, and PASSED unanimously, 9-0.

Business Manager Paul Beaudoin noted that he would be filling in for Town Administrator Selig, who was in Europe.

Chair Sandberg explained that the public hearing had been opened two weeks prior, and had been continued so that additional members of the public could speak.

Dave Langley, 50 Langley Road said he was a wildlife biologist with expertise in wetlands delineation and a conservationist. He noted he had attended a seminar on conservation development, and had been pleased that Durham wished to move forward with this approach. He said however, that after speaking with the Town Planner and looking at the impact of the ordinance, as proposed, he was very troubled at what appeared to be a taking under the guise of conservation. Mr. Langley said he appreciated the conservation development concept, but said the methods and procedures, as well as specific requirements in the Ordinance, were in some ways draconian, arbitrary and capricious.

He provided details on the characteristics of the most common soil classification in Durham, the Hollis Charlton Buxton Scantic soil association. He then listed the types of land areas that the revised Ordinance listed as unsuitable for development, and explained

how this information was used to determine the final number of lots allowed in the R and RC zones.

Mr. Langley said that using a 25 acre parcel in the R or RC zone as a hypothetical example, this parcel would yield about 7 lots under the old Zoning Ordinance. He said the new Ordinance would be far more restrictive, so that about 17.5 acres would be considered unusable, leaving 7.5 acres as usable, and yielding 2 lots, based on the minimum lot size of 150,000 sq. ft. He also noted it was now possible on a 25 acre parcel to have no buildable lots, because of the stipulation in the Ordinance that there needed to be 10,000 contiguous acreage of usable area.

Mr. Langley described a color-coded map he had developed which delineated the soils in Durham, and showed the impacts the Ordinance might have. He provided details on the soils on the map. He also described a second map which showed undeveloped parcels greater than 15 acres within the R and RC zones which were developable, and noted that most of these parcels occurred over the red areas – the shallow soil areas. He also noted most of that development that had already taken place in Durham had occurred over these types of soils. He said the maps indicated there were approximately 65 individual property owners being impacted by this Ordinance.

Mr. Langley said that 50-80% of soils in Durham would be eliminated from consideration for development, and this was before subtracting out additional areas based on the following criteria: usable area of 10,000 sq. ft surrounded by unsuitable areas; 100 year floodplain restrictions; 50% of moderate depth soils; areas with 25% or greater slope; or areas with 15-24% slope.

He said that as applied, the conservation subdivision approach went well beyond what was reasonable. He said the Council had a duty to protect the welfare, health and safety of the public, but also had the duty to defend the duties and rights of individual citizens. Mr. Langley quoted from the State Supreme Court concerning the need for zoning ordinances to be reasonable, and said he believed this Ordinance would be considered to be unreasonable and unconstitutional. He said the Town might find itself in Court if the proposed Ordinance wasn't modified, because it was clearly designed to eliminate future development in Durham, rather than to provide more open space, as described.

Councilor Kraus asked what the source was of the soils information Mr. Langley had provided in his maps.

Mr. Langley said it was the Strafford County Soil Survey, which was completed in 1973, and was notoriously accurate or inaccurate to within 3 acres, depending on one's perspective. He said that digging the number of test pits required under the revised ordinance would involve a major expense, only to find out one couldn't develop a property. He also suggested that the excessive amount of digging that would be required could lead to fudging of data.

Councilor Kraus said that based on the County Soil Survey information, on any one of the particular parcels on Mr. Langley's map, the information was somewhat extrapolated.

Mr. Langley said it was considered to be a reasonable approximation of the soils, and was used by many people.

Councilor Smith asked Mr. Langley for clarification as to whether the 1973 Strafford County Soil Survey was the most up to date soils information available.

Mr. Langley said it was, and was based on aerial photos with some ground truthing to make general determinations of soils types. He said his position was that the Ordinance was going too far, not knowing the soils to any greater degree of accuracy than the Soil Survey provided.

Councilor Smith said assuming the data was accurate, Mr. Langley appeared to be saying the intent of adoption of the soils based provision was to prevent further development in Durham. He asked Mr. Langley for more specific clarification on what he thought the intent of the Planning Board was.

Mr. Langley said he was not suggesting that anyone had actually planned to eliminate development in Durham, but said it didn't appear that anyone sat down with this data, and made any kind of determination as to what the impacts of the Ordinance would be.

Councilor Smith asked Mr. Langley if he had described these conclusions to Jim Campbell, the Town Planner.

Mr. Langley said he had not yet developed these conclusions at the time he spoke with Mr. Campbell.

Councilor Smith noted that Mr. Langley theoretically supported the soils based concept, and asked him how he would alter, or remove the arbitrary, draconian features of the present version of this concept.

Mr. Langley said the following should be considered:

- Was there a need to increase the minimum lot size to 150,000 sq. ft. if landowners were already being asked to give up development of about 50% of their parcel. He also it didn't make sense that while a decrease in the lot size and lot frontage was being offered to fit lots into a site, the minimum parcel size had increased.
- Did the number of house lots have to be determined after unsuitable areas had been determined, and
- Were those unsuitable areas, as written in the Ordinance, based on valid criteria.

Mr. Smith asked which criteria Mr. Langley would dispense with or alter in order to make the Ordinance appropriate.

Mr. Langley said he would dispense with determining that 10,000 sq. ft. of suitable area surrounded with unsuitable area was no longer considered suitable. He also said he would bring the depth of soil characteristics up to something more reasonable, describing the

criterion of 40 inches to bedrock as being way out of line. He said if the soils criterion was 20 inches depth to bedrock, 50% of the red area on the map would disappear, and also said that a 15 inch soil depth, based on State standards, was reasonable.

Councilor Van Asselt asked for clarification of soils details on the map, and also received agreement from Mr. Langley that the red, green and blue areas indicated soils that probably hadn't changed much in 30 years.

Chair Sandberg asked if anyone from the Planning Board could provide some response to Mr. Langley's comments.

Planning Board Vice Chair Steve Roberts said the Board was not trying to deprive the Town of Durham of development. He said the purpose of the Ordinance was to model after other conservation ordinances that had been successful, and noted the Board had used Hollis as a model. He said the Planning Board would have welcomed input from Mr. Langley during the numerous public hearings they had held, noting it would have been more useful to have the soils discussion at that time. He also said the old soils map was probably not valid.

Mr. Roberts said that the 150,000 sq. ft. minimum lot size was chosen because it had been calculated that it would result in the same number of lots as 120,000 sq. ft. He explained that this was because the size of actual house lots was being reduced under the conservation subdivision concept, which meant that more houses could be fit into an irregularly shaped lot. He noted that many lots in Durham were irregularly shaped.

He suggested it was important to look at what the actual soils were on a property, and also to get acquainted with the Hollis ordinance that had performed successfully for almost a decade. He said the intent was not to reduce the amount of developable acreage in the Town.

Mark Eyerman said the intent of the Planning Board in putting forth its proposals was to reflect the policies expressed in the Master Plan. He said these policies made it pretty clear what the objectives of the community were for the R and RC zones, that in terms of density, in both zones, the densest situation should be one unit per 3 acres, and said that 150,000 sq. ft. represented approximately 3 acres. He explained that the Master Plan went on to say that those 3 acres per lot should be on the most suitable areas. He said the system was set up to determine that as the soils got less suitable for development, the density should decrease accordingly.

He said the issue of how the criteria applied to individual parcels was open to discussion, and noted testimony before the Planning Board at its public hearings that said in some cases, using these criteria would reduce significantly the amount of development that could occur on a parcel. He said there was also testimony at the hearings that the usable area provision could in some cases allow more development than could presently occur, based on the conservation subdivision approach.

He said the question of whether the criteria were reasonable was a fair question, and said it was important to think about this. But he repeated that the system, as set out, reflected the policies of the Master Plan.

Mr. Eyerman said the 15 inches vs. 20 inches to bedrock was an attempt to reflect the County Soil Survey.

Mr. Eyerman also explained the provision in the Ordinance that said in order to be counted toward usable area, there needed to be a minimum of 10,000 of contiguous area. He said this reflected concern that there might otherwise be isolated areas of usable area on a parcel that could be put together for purposes of calculation.

Councilor Kraus asked Mr. Langley which pages were of particular concern to him. Mr. Langley said page 99 where the usable area calculation was made.

Mr. Langley said it didn't make sense that any increase in the minimum lot size could yield more lots, and asked to see the math on this. He also said in doing the calculations, one could completely eliminate the possibility of development on a property.

Mr. Eyerman explained that when subdivisions were done in the past, while 120,000 sq. ft. was the minimum lot size, the actual size of a lot generally turned out to be larger, because of the odd shape of parcels, the lay of the land, and how roads could be put in to get the required frontage. He said clustering of houses, with smaller lots and decreased frontage requirements, allowed the permitted density to be aggregated on the usable area more efficiently, making it possible to come up with same number or more of buildable lots.

Councilor Smith asked Mr. Eyerman whether the Planning Board had considered the 1973 soils data, in its deliberations about the Zoning Ordinance, as the most up to date soils data.

Mr. Eyerman said he believed the County Soil Survey was the most up to date off the shelf data for the entire community, and said the Board had worked with soil scientists, and had discussed the pros and cons of looking at soils in various ways, including with the County Soil Survey.

Councilor Smith noted that Mr. Langley suggested that for many properties, this would lead to an unconstitutional taking, and asked for Mr. Eyerman's reaction to this statement.

Mr. Eyerman said he did not agree.

Councilor Needell said at the first public hearing, he had asked about the basis/validity of the soils criteria and was assured they were not arbitrary, and had been developed based on discussions with soils scientists about standard practices.

Mr. Eyerman said there had been considerable discussion by the Planning Board on the criteria on page 93. He said that after considering each of the soils factors carefully, these criteria were agreed upon, and each was based on the direction the Board was given from the Master Plan.

John deCampi, Durham Point Road, thanked the Council for continuing the public hearing, since he had been unable to attend the previous meeting on the Zoning Ordinance. He said his concerns were similar to those of Mr. Langley. He said he was troubled by the following provisions: the increase in the minimum lot size to 150,000 sq. ft in the R and RC districts; the subtraction from usable area of the various unsuitable areas listed on page 93; and the provisions on septic systems. He said this combination of provisions would make substantial numbers of properties in Durham unbuildable.

Mr. deCampi noted he had tried to subdivide his property on Adams Point Road, a project he had now had to abandon, but this had caused him to look at the Ordinance in some detail. He said he was not sure his case was typical, but said the Ordinance appeared to look confiscatory. He also noted that the septic system requirements were substantially more severe than previously, including an increase from a 50 ft. required wetlands setback to a 75 ft. setback.

Tom Christie, Dame Road, said Mr. Roberts appeared to have said the Strafford County Soils Survey was not an accurate document, while Mr. Eyerman said there was some usefulness to the map. He said it seemed strange that the Planning Board would develop an Ordinance, based on the Master Plan, without knowing what they were dealing with. He asked how, without having real knowledge about the soils in Durham, there could be a valid basis for decision-making. Mr. Christie asked whether the 1973 soils information was used, and if so, was any consideration given to what the results would be.

Mr. Roberts said in general he agreed with Mr. Eyerman that the soils map was relevant. He also explained that the Master Plan contained a residential build-out analysis, using the 1973 soils map, other more recent wetland soils information, and other data, which showed a build-out of 1,508 lots could be squeezed into the Town unless some changes were made to provide more rationale development. He said the build-out showed that future development would threaten fragile areas and properties that were already developed.

He also noted there was a proposed conservation subdivision development currently before the Planning Board for up to a 100 lots, which showed that the intent of the Ordinance was not to stop development, but rather to respond to what the logical consequence would have been of a traditional build-out of a parcel of land.

Chair Sandberg asked what the build-out potential was for the Town, based on the criteria in the revised Ordinance.

Mr. Roberts said the difficulty was that the current generalized soils map information, applied throughout the Town, made this difficult to estimate. But he said that on a

project by project basis, they could get a better idea of what the build-out potential was because of the availability of more detailed soils information.

Mr. Christie said there appeared to be enough empirical data to develop a build-out analysis based on the revised Ordinance.

Chair Sandberg said the Council would try to get the answer to the question of what the build-out would be.

Mr. Christie said he heard people speak about the importance of the relationship between the Master Plan and Zoning Ordinance, and noted he had worked on the Master Plan some years back. He said he did not believe that the revised Ordinance followed the Master Plan in terms of trying to preserve rural character, because many formerly allowed agricultural land uses had been struck out, so that the only land use now allowed in the Rural district was residential housing. Mr. Christie also said that the current draft did not reflect what the Master Plan had envisioned for development of the Business District.

Councilor Grant noted he was the Council's representative on the Planning Board, and said that the agricultural land uses Mr. Christie had referred to for the Rural Zone had not been taken out of the Ordinance. He also said that only the residential provisions of the Zoning Ordinance had been updated, while zoning changes for the other districts were in process. He said the Master Plan would be represented in zoning drafts of those chapters when the Board got to them.

Chair Sandberg said that perhaps the Zoning Ordinance Draft Mr. Christie was working with was not the most recent version.

Barry Ryan 321 Dame Road, said he knew the soils on his land, although he was not an expert, and said it seemed that based on the revised Ordinance, most of his 50 acres of land would be unsuitable to build on, which would greatly reduce the value of that land. Mr. Ryan also said he had seen on page 61, under Permitted Uses in the Rural District, that all the rural uses were taken out.

Chair Sandberg explained that the information on this page had been incorporated into the Table of Uses, p. 86-90.

Mr. Ryan asked if animal husbandry was allowed if it was not for commercial purposes, and Mr. Eyerman said it was permitted as accessory to residential uses in all residential zones.

Mr. Ryan noted his land would be suited to being a horse farm, and asked if someone wanted to build a riding rink, if this would be considered an indoor recreational use.

Chair Sandberg said it was allowed, as a conditional use, outdoors, in the R and RC zones. Councilor Harris said that stables were permitted uses in the R and RC districts.

Mr. Ryan said the Ordinance seemed like a knee jerk reaction to deal with overbuilding. He said that perhaps 3-5 acre subdivided lots should be exempt from the conservation subdivision provisions, just as pre-existing lots were exempted. He said these large lots would have the same effect as the conservation subdivision concept, and would allow the value of these properties to be maintained.

Maggie Moore, Lee Road, said she wanted to express her appreciation for all the work that had been done on the Zoning Ordinance and thanked the various town officials for their commitment to this work. She noted she had done some work on the Master Plan but had not been active recently.

Richard Kelley, Stagecoach Road, pointed out that there was no definition for somewhat poorly drained soils in the proposed Zoning Ordinance. Mr. Kelley also noted that as a civil engineer, he had seen many zoning bylaws, and felt strongly that soils based lot sizing worked well in locations that didn't have sanitary sewers. He suggested that buffer zones should be incorporated into the Ordinance, noting that if the goal was to protect resources areas, the edge areas between wetlands and uplands were very important, providing biodiversity and a buffer from the pollutants of development. He said he would support a buffer zone around resource areas, where no activity would be allowed.

Mr. Kelley said regarding the Ordinance as a whole, if the intent were not to eliminate development but to control it, the Town would now have a tool to do so. He said he did have some concerns regarding the calculation of usable area, noting this would extremely limit areas that could be developed on any given site. But he said the concept as a whole was good, if they were trying to maintain open space and limit, but not prevent development.

He said he had a lot of experience with the Strafford County SCS soils maps, and unfortunately, new maps were long overdue, and there was no sense of when they would be available. He also said in his experience, for areas where the SCS maps would lead one to believe no development could occur, the HISS maps would indicate there could be some development.

Beth Olshansky, Packers Falls Road, said she supported Susanne Loder's letter regarding the importance of creating an ordinance that would protect Durham's farmlands. She said this was important if the Town was going to respect the Master Plan and preserve the Durham's rural character.

She also asked if the Council would consider passing a timing of development ordinance in order to be able to manage development more effectively, noting such an ordinance had already been developed, reviewed, by the Town Attorney and by Ben Frost of the NH Office of Energy and Planning, and was ready to post. She said the Town had a lot of development pending, so this ordinance would be timely.

Ms. Olshansky also urged the Planning Board to pass an impact fee ordinance, and therefore honor the intentions of the community. She said she had a guidance booklet on developing Impact Fee Ordinances that the Council might find useful.

Ms. Olshansky said the purpose of the soils based density calculation was to protect the Town's fragile ecosystems, and noted that the better lands in Durham had already been developed, although there was still some good/usable land left. She also said that the soils based calculations were very site specific. She made reference to the present 100 lot conservation subdivision before the Board that was based on the soils based density calculations, and said this showed that the concept was not intended to prevent development, but was intended to protect areas that were more fragile.

Ms. Olshansky said one of the tests of the reasonableness of the conservation subdivision concept was to ask whether a developer who understood the reality of development could find it to be reasonable. She said the Ordinance had been drafted with the help of a local developer, who had served on the Land Use subcommittee of the Master Plan, and had been instrumental in developing the conservation subdivision concept.

She noted that during the Zoning rewrite process, she had been interested in finding out how the conservation subdivision approach was working in other communities. She said she spoke with Virginia Mills in Hollis and was told the Town had never been challenged on their ordinance. Ms. Olshansky also said the septic provisions were not unreasonable, and brought Durham up to par with other local communities, which had had comparable regulations in place for several years.

Regarding the impact of the conservation subdivision approach on the community, Ms. Olshansky said this would be very site specific, and could not be determined by using a the Strafford County Soil Survey, which was a medium intensity soil survey.

Councilor Van Asselt referred to Ms. Olshansky's comment that the best soils had been built on, so that what was left was likely to be less desirable to build on. He asked whether, if this were the case, using HISS mapping on these so called lesser lands could result in the fact that the land that was left to build on was unbuildable.

Mr. Eyerman said perhaps it could. He said that if the land that was left was not that good, the impact of the soil based density calculation could be significant.

Councilor Van Asselt asked if in that case, there should then be a lesser test, because using the high test precluded the development of much of the land that was left.

Mr. Eyerman said there couldn't be a blanket statement about this, and said this would vary from parcel to parcel.

Councilor Needell said there were different points of view about the different soils criteria, but said he assumed there was a basis for why development should not occur on these soils. He said if it happened that a 50-acre parcel had soil with ledge at less than 20

inches, it was not a suitable place to develop. He also said that if a byproduct of this Ordinance was to severely limit some parcels, it was because they were not suitable for development, just as would be the case if they were comprised mostly of wetlands.

Mr. Eyerman said a fundamental premise of the Master Plan was that the intensity of development that should be allowed on a parcel should be a function of how good the land was for development purposes. He said the development potential was a function of the physical suitability of a parcel.

Nancy Smath, Packers Falls Road, said she appreciated the hard work that had been done on the Ordinance. She said there had been a process where the public had many opportunities to say that there was a problem with the Ordinance, and said the process was now at the point where the Town Council should move forward with it.

Dick Lord, 85 Bennett Road, thanked all those who had worked on the Ordinance. He said his concern was that in his zone, renting of office space in a single-family home was prohibited. He said he believed this should be allowed as a Conditional Use, noting that one could convert extra space to rental space for room rentals in his zone, but not office rentals. He said he could not understand why this distinction had been made.

Mr. Eyerman said the Board had attempted to address the situation Mr. Lord had described, especially for older structures, by allowing low impact nonresidential use as a Conditional Use in older single- family residences in the Rural and RC zones.

Mr. Langley said he was troubled by Councilor Van Asselt's suggestion that the good land in Durham had all been used. He said the revised ordinance made it possible to affect property values so that one owner would benefit while another would not. He said he was not sure how the Town should deal with such an outcome, but said this should be considered.

Mr. Ryan said he also was concerned about the comment that perhaps all the good land had already been used. He said his house had probably been built in its present location because it was near the well, yet there were a number of other places on his property that probably were more suitable. He said he had hoped he would be able to give a lot to each of his daughters, but said the criteria in the revised Ordinance would make much of his property unsuitable for building. He said that passing on land should be a right.

Jay Gooze, 9 Meadow Road, said, as a member of the ZBA, that that the ZBA's job was to balance the public interest against private property rights, and said the revisions to the Zoning Ordinance were also striving to do this. He said the Ordinance did a good job of making the community better off, while some individuals might not be better off for it. Mr. Gooze urged that the Council pass the Ordinance soon, and then send questions back to the Planning Board for possible revisions. He said that overall, the entire Ordinance was a step above what had existed before.

Mr. Lord asked if there was a particular reason why 1950 was chosen as the cutoff date for an “older single residence”, and said this seemed arbitrary.

Mr. Eyerman said the year chosen was, in fact, an arbitrary one, and was simply picked as a dividing point. He said the intent of the provision was to allow an organic transition/reuse of an older building, to reflect the Master Plan, which said that older structures were part of the rural character, and should be allowed to be adaptively reused.

Mr. Lord asked if the definition of an older single-family house was one that had been there for 50 years, or one that had been there since 1950.

Chair Sandberg noted that this needed to be addressed, and said that if the definition said 50 years, there would be some hope for Mr. Lord.

Mr. Christie asked if the difference in the soils of Hollis and Durham could affect the impact that the conservation subdivision approach would have in each town. He pointed out that Hollis generally seemed to have better soils, while Durham had poorer soils, for development.

Mr. Roberts said he would be glad to get the answer to this question.

Mr. Christie said the affect of this Ordinance might be for some people to sell their land, because the incentive to keep the land in order to pass it on in the family at a later date would be gone. He also referred to comments about how the conservation subdivision approach would benefit the community as a whole, and said it was easy for people with smaller acreages to say the application of the Ordinance in the Rural and RC zones was not a big deal. He also said he had read on the Citizens Exchange that the Zoning Rewrite had been a long process, so it was important to vote on the Ordinance soon. He said that although it had been suggested that the issues being raised that evening had come in late in the process, they had been raised before. He said the Ordinance should be voted on after these issues had been considered.

Mr. Kelly said he wished to restate that that the usable land criteria, from an engineer’s point of view, would be very challenging in terms of trying to subdivide some of the large parcels in the Rural and RC districts. He said it had been put forward that the Council should understand the ramifications of this, and said the Town had not heard from the Planning Department or Planning Board what a full build-out would be, given these proposed changes. He said he recognized the difficulty of coming up with a solid analysis of this, based on the HISS criteria. But he said there were some assumptions that could be made with the data that was out there, and urged the Council to take this into consideration.

Ms. Olshansky noted there had been discussion at the last Council meeting on the Zoning Ordinance about the process, moving forward. She said the proposal obviously needed some tweaking, but urged the Council to move to adopt the Ordinance and then amend it later. She said she was concerned about pending proposals, and the fact that if the

document as a whole was rejected, the Town would go back to square one. She said it was quite possible to adopt the Ordinance, and then fine-tune it as the Council saw fit.

Mr. Christie said he had seen in the past, that when sections of an ordinance were amended, this could create effects that were never envisioned when the changes were made. He urged the Town to get the Ordinance right first, and then to pass it.

Jim Jelmborg said he supported Ms. Olshansky's suggestion about the process the Council should follow concerning the Zoning Ordinance.

Mr. Ryan said he recognized the hard work that had gone into the Ordinance, saw it as something that was done for the good of the town, and said he supported the protection of Durham's rural character. He said his understanding was that all preexisting lots were exempt from the usable/unusable criteria being put forward, and asked that the 5-7 acre subdivided lots, which didn't have a high impact on the land, should be able to have a septic system sited on them. He said the proposed Ordinance took a 49 acre lot and made it worthy of only two building lots. He said the rural character in the Rural Zone would be preserved by allowing this exemption, noting that some people in these areas had owned their land for over 100 years, and it wasn't right to strip away the value of those citizens and what they have done in the Town. He also said that the new setback regulations should be applied for small lot, high impact subdivisions, noting these were the developments that were putting a burden on the community.

Kevin Webb, a member of the Planning Board, said something that perhaps was being missed was that small subdivisions of 3 lots less were exempt from the conservation subdivision provisions, so the intention was not to impact that sort of development. He said the intention of HISS and conservation subdivisions was to address large developments on large tracts of land.

Mr. Langley said he had read this exemption provision, but said landowners still had to meet all the suitability criteria prior to subdividing out the lots. He said when he did the calculations, unless someone had 50 acres or more, they would be unlikely to get 3 lots.

Chair Sandberg asked if there were any additional members of the public who wished to speak. Hearing none, he described the various ways the Council could proceed at that point. He noted that if they closed the hearing, members of the public would not be allowed to speak, but this did not preclude the possibility of opening the public hearing again at a later date.

Councilor Smith said as he had listened, he realized the Council must come to grips with whether the soils based density concept as applied to this Town would represent an unconstitutional taking. He said that zoning of any form was a kind of taking, and noted that when originally established, it was challenged, but then upheld, because the need for community regulation was viewed as a more powerful interest, as long as the taking didn't go beyond a certain point.

Councilor Smith said the Council must have a reasonable degree of confidence that the soils based approach fell within the allowable standards of taking to ensure that this would not be viewed as an unlawful taking. He also said the Council needed an answer as to where to draw the line as to what land parcels should be exempted. He said if they were to take the approach that all property that had not previously gone through the subdivision process should be exempt from any regulations, and so could be grandfathered, this would say they couldn't amend the Ordinance in any substantive way. But he also said they had to determine if the extent of the exemption was adequate.

Concerning the procedural issue, Councilor Smith said he understood those who said the Council should simply pass the Ordinance, but said there needed to be a limit to that approach, because if there were not, the Council would be acting totally beyond its authority. He said he did not believe the Council would be meeting its responsibility if it simply put a stamp on the Ordinance with no thought as to what was before them.

Chair Sandberg said there had been some assurances regarding the Hollis model, and asked if legal counsel had reviewed this aspect of the document before it came to the Council.

Mr. Roberts said he had, but said the review was not in depth, noting the document and all of its ramifications were incredibly complex. He said the Town Attorney's general overview was that the Ordinance was reasonable.

Chair Sandberg said the Council might want to consider if there were specific sections such as this in the Ordinance that were causing particular concern, and should be reviewed by the Town Attorney.

Councilor Smith said there were a basic question that counsel ought to advise the Council about, - whether the soils based approach presented an unlawful takings problem, because there was a conflict between the nature of the land in Durham and using this kind of approach which would degrade to a constitutionally unacceptable point the value of land. He said he was not suggesting this was the case, but noted that the question had been presented.

Councilor Grant asked Mr. Roberts if the current (old) Zoning Ordinance permitted the Planning Board to require a HISS survey whenever it wished.

Mr. Roberts said currently the Board had the right to request this.

Councilor Grant said he was trying to make the point that the Town was already using HISS mapping, but the revised Ordinance extended this to all conservation subdivisions. He asked Council members to keep in mind that there were exemption criteria for large land parcels on page 131. He read through some of the wording of these provisions, and said an effort had been made to address the issue. But he said whether this was an adequate effort was another question.

Councilor Niman MOVED to close the public hearing. The motion was SECONDED by Councilor Kraus.

Councilor Needell asked whether, if they closing the hearing, this would start the clock running so that time constraints might therefore limit the Council's options. There was discussion about this.

Mr. Beaudoin said Administrator Selig had talked with the Town Attorney about how the Council could move the Ordinance forward. He described various options that could be taken.

Councilor Smith said he was not inclined to close the hearing unless they wanted to dispose of the Ordinance that evening. He said while the Council worked this through, it was appropriate for members of the public to continue to provide input. He said he was not inclined to want to cut this off, and said the Council should be as generous as it could be with something as important as this.

Councilor Niman said he was interested in moving the process forward. He said that interesting points had been raised by the public and the Council, and said he would like the Council to begin to discuss them.

Chair Sandberg said by closing the hearing, this would not be the end of the process, but would simply be the beginning of a new process.

Councilor Needell said he didn't see any real benefit in closing the hearing.

Councilor Morong also said he didn't see any advantage to closing the hearing, and suggested they could close the hearing when they were done deliberating on the Ordinance.

Councilor Harris said she would support closing the hearing if the Council could receive written comments from members of the public.

Councilor Grant said the revised Zoning Ordinance was now in effect, and said the Council could continue massaging the Ordinance until a developer took the Town to court, and found it had taken too long to implement the Master Plan. He said it was important to set some real deadlines, and said he didn't object to continuing the hearing if it was to a specific date and for a specific purpose. But he said that to simply hold it open to permit further input on what was not known was unproductive. He said the Council should deliberate for a set number of meetings, and if necessary could then set another public hearing.

Councilor Kraus suggested citizens with concerns about the Ordinance could raise them during the Public Comment period at regular Council meetings, and these comments could be incorporated into Council deliberations.

Council Smith said he was not suggesting they should delay Council discussion on the Ordinance, but said he didn't see anything to be gained by closing the hearing.

Chair Sandberg said they would most likely be sending back some kind of punch list for the Planning Board to respond to. He said the Town Attorney's letter had indicated that the Board could then have a public hearing to consider this, and then would come back to the Council with their response, at which point the Council would have another public hearing. He said it would be much more productive if they closed the hearing now, worked to develop a list for the Planning Board to respond to in a timely fashion, and took it from there.

Councilor Kraus called the question. The motion PASSED 6-3, with Councilors Smith, Needell and Morong voting against it. (2/3 majority required)

The motion PASSED 6-3, with Councilors Smith, Needell and Morong voting against it.

Chair Sandberg declared a RECESS from 9:30 to 9:38 PM.

Chair Sandberg noted that during the recess, the question was raised concerning at what point in the process the Council would address the delineation of the various zones on the revised Zoning Map.

Mr. Roberts explained that the land currently zoned as residential as well as the general OR category would be ready for approval.

Chair Sandberg asked if that map was incorporated into the new document, so that the time to speak on this portion of the Zoning Map had passed.

Mr. Roberts said that was correct. He said members of the public had spoken about the map, and it had been voted on by the Planning Board. He said the Zoning Rewrite committee was still working on the portion of the map involving nonresidential uses.

Councilor Needell received clarification that the residential portions of the Zoning Map were part of the new Ordinance.

Chair Sandberg spoke about the punch list idea, and noted he and Councilor Needell had each put one together.

Councilor Niman said it was hard to determine from these lists which Items were substantive and which were non-substantive.

There was discussion about this. Chair Sandberg said that Jim Campbell and members of the Planning Board could determine this. Councilor Needell noted he had not distinguish between the two in his list.

Chair Sandberg said a fifth column on the punch list could be used to indicate the consensus of the Council on a particular Item. He said that from a parliamentary perspective, it might make sense to move adoption, second, and then determine if they were prepared as a group to vote, or if they wished to propose specific substantive and non-substantive amendments.

Councilor Niman said he was concerned about the process for substantive changes, and said he would prefer to deal with non-substantive changes and move them forward. He said they could discuss substantive changes, but said if they wanted to move these forward, he would prefer to move them forward as a Council initiated change.

Chair Sandberg said if the Council took up a substantive issue, such as whether the Council should be involved in the Conditional use process, it could recommend a gradual approach to accomplish this, with a rational explanation to the Planning Board as to why it wanted to stay involved. He said this wouldn't be in opposition to the Master Plan, and Council members could determine whether or not they wanted to move this forward as a Council initiated process. There was additional discussion about the best procedure to follow.

Councilor Needell suggested that giving feedback about the Ordinance to the Planning Board wasn't taking over the process, but was in fact reacting to proposed changes the Board wanted to make. He said it was not unreasonable to have a little give and take on this.

Chair Sandberg described briefly how this give and take might work between the Council and the Planning Board.

Councilor Kraus MOVED to approve #2004-02, as presented. The motion was SECONDED by Councilor Niman.

Councilor Smith said at 9:58 pm, absent a motion to extend the meeting, the Council was moving to adopt a proposed ordinance that had been worked on by the Planning Board for over 2 years, without any debate or discussion.

Chair Sandberg suggested a Council member could move to postpone deliberation on this motion for two weeks.

Councilor Niman MOVED to postpone discussion until May 12th, 2004. The motion was SECONDED by Councilor Grant.

Chair Sandberg said the motion to postpone would allow the opportunity to continue the discussion in detail in two weeks.

Councilor Grant said the reason he seconded this motion to postpone the discussion for two weeks was because he wanted to encourage members of the Council to re-read pertinent land use related chapters of the Master Plan. He said that although this

Ordinance might have things they didn't agree with, it did reflect what the Master Plan was asking for.

Councilor Needell said it was important to lay the groundwork for the approach to deliberating on the Ordinance that was to follow, before postponing discussion and ending the meeting.

It was clarified that Council members should send their lists to Administrator Selig, who would compile the information and circulate it before the next meeting on the Zoning Ordinance.

***The motion to postpone deliberation on adoption of the Ordinance until May 12th
PASSED 8-1, with Councilor Needell voting against it.***

The meeting ADJOURNED at 10:00 PM.

Victoria Parmele, minutes taker.