

*This set of minutes was approved at the Town Council meeting on August 15, 2005.*

**DURHAM TOWN COUNCIL MINUTES  
MONDAY, JULY 18, 2005  
DURHAM TOWN HALL -- COUNCIL CHAMBERS**

**MEMBERS PRESENT:** Chair Malcolm Sandberg; John Kraus; Neil Niman; Peter Smith; Karl Van Asselt; Mark Morong; ; Diana Carroll; Julian Smith

**MEMBERS ABSENT:** Gerald Needell

**OTHERS PRESENT:** Town Planner Jim Campbell, Zoning Administrator Tom Johnson; Planning consultant Mark Eyerman

**I. Call to Order**

**II. Approval of Agenda**

**III. Special Announcements**

**IV. Approval of Minutes**

*Councilor Kraus MOVED to postpone approval of the June 20<sup>th</sup> minutes until August 1st. The motion was SECONDED by Julian Smith, and PASSED unanimously 8-0.*

**V. Report of Administrator**  
None

**VI. Reports and Comments of Councilors**  
None

**VII. Public Comments**

**Jim Jelmberg, Park Court**, thanked the members of the Zoning Rewrite committee for the tremendous amount of work they had put in concerning the revisions to the Zoning Ordinance, and said it was quite an accomplishment

**Bill Hall, Smith Park Lane**, noted he had spoken the previous week about parking at the Wiswall park. He said the point he was trying to make at that time was that people should be able to go there, and that it was not up to the neighborhood to not allow them to do that. He said the Town had gotten into this kind of situation elsewhere, and said it's reputation was awful.

He said he had watched this summer as 50 people received parking tickets, and said this was awful. He said swimming like this happened all over the state, and said if swimming was going to be allowed there, he hoped that proper parking would be provided, including access for canoes and kayaks.

**Dick Lord, Bennett Road,** said he was present to speak about the Bennett Road/ Route 108 situation. He said he had lived on this road for more than 40 years, and said he was concerned the grade of the intersection would become steeper if it was changed to a perpendicular intersection. He said if this happened, it would make access to both Bennett Road and Route 108 more difficult. He questioned whether NHDOT had considered this, and asked whether the Council planned to endorse this proposal.

Chair Sandberg said the New Hampshire Department of Transportation was holding a public hearing on Thursday evening, July 21<sup>st</sup> on this issue at the High School, and noted that NHDOT's drawings did have elevations on them. He said it was his understanding that because of a dip in the road, the proposal was to make the intersection more askew in order to raise the level of the intersection, which would improve the sight line. He said the drawings on this would be available at the hearing.

Administrator Selig said the Council had opted to not take action on this because it wanted to hear feedback from the public.

Concerning Mr. Lord's question as to whether the Council planned to endorse the proposal, he said his sense was that the Council was not prepared to do so at the meeting, and instead would continue to consider the issue, and would listen with great interest to public comments at the hearing.

**Beth Olshansky, Packers Falls Road,** said she was concerned about the proposed change to the intersection at Bennett Road. She said what was being suggested would cause more problems, because NHDOT was proposing more of an angle for the intersection. She said it was important that the exit to Bennett Road be more graceful than this, so that it would be less likely that cars would ride up on someone making the turn.

Bill Hall said the State had proposed to put shoulders on this part of Route 108 some time ago, but because of a miscommunication with NHDOT concerning the Council's intent to do this, this had never happened. He said this was the only part of Route 108 that didn't have shoulders, and said he hoped the Town got them, regardless of what else happened.

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

Shall the Town Council approve a special event permit application submitted by the Red Tower Association to close Burnham Avenue from 4:00 to 6:00 PM on Saturday, July 23, 2005, for its annual block party?

***Councilor Julian Smith MOVED to approve the Unanimous Consent Agenda Item. The motion was SECONDED by Councilor Kraus, and PASSED unanimously 8-0.***

#### **IX. Presentation Item**

Annual report from the Integrated Waste Management Advisory Committee - Tracy Wood, Chair

Ms. Wood spoke about the mission of the Committee, and said it was important to say

this again because the Committee sometimes moved out of the familiar, traditional recycling territory. She noted that the previous time she was before the Council, she had spoken about broadening the goals of the committee concerning the concept of sustainability, and to look at wastes as part of the cycle of life, rather than as something to simply be thrown away.

She spoke about the continuing work at the swap shop, which was thriving, and said the hard work of the volunteers who ran the shop was greatly appreciated. She noted an enjoyable luncheon had been held for the volunteers earlier in the year, and said there was always a need for more volunteers.

Ms. Wood noted that both the fall and spring newsletters had addressed sustainability themes, with the fall newsletter covering sustainable homes and buildings, and the spring newsletter covering sustainable gardens and landscapes. She noted the issue of water conservation as one part of sustainability, and said the Committee had hosted speakers who spoke about the proposed regional pipe line. She said one committee member continued to monitor the status of this issue, and kept committee members abreast of it.

She said the Committee was extremely excited about approval of the purchase and use of paper made of 100% recycled content by the Oyster River School District. She thanked committee members who worked on this issue with such diligence, and also thanked the Oyster River School Board for their commitment concerning this. She said

She said the Committee continued to encourage residents to use compost bins, and said 40 bins had been sold this year. She also said a dozen rain barrels had been sold to residents in the first year of this program, noting that these could contribute to water conservation. She said the Committee had had a display at the UNH Solarfest, and talked to people about compost bins, rain barrels, and other issues. She also noted that a member of the Committee had helped recruit volunteers from the community to join with student volunteers to gather up unwanted, usable goods from parting students, and said over a ton of materials were recycled through this effort.

She said there were several issues currently under active discussion, and noted this discussion took place at subcommittee meetings. She said the Committee had been asked for a recommendation concerning spring cleanup, and said it would like to be extremely considerate in attempting to put together that recommendation, and was still in the fact-finding phase. She said another sub-committee had been meeting regularly to gather information and put together recommendations regarding new construction of municipal buildings in Durham. She said the hope was that any plans would consider energy efficiency, health effects, re-use and other sustainable design elements. She said plans for several presentations on Green Buildings were in the works.

She said the issue of household hazardous waste had been on the table for awhile, and said by expanding the collection of this waste, the goal was to lessen the amount that entered the environment and other waste streams not suitable for hazardous waste. She said IWMAC would continue to educate on this important subject through the newsletter, DCAT and occasional listserv announcements.

Ms. Wood noted the Committee had welcomed new members Amy Cunningham and Shelley Mitchell, and had said goodbye to Diana Carroll and Richard Gallant.

Councilor Morong asked Ms. Wood to describe how the rain barrels fit into the grand scheme of conservation.

Ms. Wood explained that by conserving water on site, there was less demand on existing water systems, whether public or private. She noted that she used this water for gardening and landscaping.

Councilor Morong said he found this interesting, and said he wouldn't ordinarily have thought of rain barrels as part of water conservation.

Councilor Kraus noted from his experience as a member of this Committee, that there was no more dedicated group of people in Town. He said they were an example of committees at their best, and said the amount of money they saved the Town was astonishing.

Councilor Julian Smith asked how recycling of roadside litter might be integrated into the work of the Committee. He noted he had recently collected at least 15 gallons of litter on one day, including clothing, bottles, beer cans, etc., which indicated that a lot of litter didn't get picked up. He asked if the Committee had given any thought as to how to get this litter off the road, and also, how it could be prevented from getting there in the first place.

Ms. Wood said if the State had passed a bottle bill, there would be a lot less bottles thrown away. She said some neighborhoods had spoken about wanting to pick up their own roadside trash, but she said nothing on this had been coordinated yet. She noted that the discussion of spring cleanup brought up issues like this.

Councilor Carroll said the Committee was good at developing numbers on the results of recycling efforts, and also noted the Council was interested in seeing numbers. She provided the example that fewer leaves had been picked up the previous fall, which reflected the fact that compost bins appeared to be working. She said that if the Committee had other numbers like these, the Council would like to hear them in order to see how the Committee's various programs were working.

Councilor Carroll also spoke about the importance of developing a regional facility for hazardous waste pickup, and said it would be worthwhile to see if other communities would be interested in a coordinated effort on this, so residents could bring in hazardous materials on a regular basis.

Ms. Wood said this would be a huge project, and said it might even require a Public Works department employee who was dedicated to doing this for a time. She said it was not likely that volunteers would be able to commit that amount of time for such an effort.

Councilor Carroll suggested that anyone watching the meeting who felt called to work on this issue should contact Ms. Woods, or should start by calling the Town Hall.

Chair Sandberg asked how members of the public could find out more about the work being done by the subcommittees of the IWMC Committee.

Ms. Wood said residents could call any of the Committee members to find them out about this, and also said people could check the Minutes of the Committee's meeting, which were available online.

Councilor Julian Smith asked if there was any chance the Committee would reconsider, or readdress Spring and Fall cleanup.

Ms. Wood said there was a wide range of sentiments on this, and said recommendations that the Committee was satisfied with would not be quickly arrived at.

Councilor Smith asked that the Committee's meetings be advertised widely so the public would know about them.

Chair Sandberg said these meetings should be posted officially and said assistance from Town staff was available concerning this. He thanked Ms. Woods and the other committee members for their work for the Town.

## **X Unfinished Business**

**A. CONTINUED PUBLIC HEARING on Ordinance #2005-06** proposing amendments to Chapter 175 “Zoning” of the Durham Town Code, Section 2005-06 (A) “to address questions with prior amendments” and Section 2005-06 (B) “to implement the Master Plan recommendations dealing with Non-Residential Zones”. The proposed revisions in 2005-06 (B) pertain to the zoning map, non-residential zoning district provisions, definitions, tables of uses, and table of dimensional requirements.

Chair Sandberg summarized what had happened at the previous meeting concerning the consideration of the Zoning amendments. He said the public hearing on Section A, which had been opened at the previous meeting and then after some comments had been continued, would be re-opened at the current meeting. He said that after additional comments and discussion on this Section, the hearing could either be closed and deliberated on, could be closed and deliberation could be postponed, or could be continued until August 1st. He said following that, the hearing on Section B, which had also been opened at the previous meeting and then continued, would be re-opened.

Councilor Niman asked for clarification concerning the Housekeeping Amendments, noting that some documents Councilor had received on various dates on these amendments mentioned the revised Table of Uses, and some did not. He asked if the Table of Uses had in fact been revised, and if so, if the public had been notified of this.

Mr. Campbell said the Table of Uses was part of Section B, the Zoning District

provisions, and explained that when the first part of the Zoning amendments was passed in 2004, there was some discussion at that time of religious uses, and it was decided to take care of this for the non-residential districts, so these would be found in the Table of Uses. He said this was posted and there were public hearings on this.

Councilor Niman said in other words, the revised uses could be found and would be discussed as part of Section B.

Mr. Campbell said that was correct.

Mr. Eyerman said the only change in the Table of Uses included in the Housekeeping Amendments was the one dealing with sand and gravel excavations, and simply involved narrative to make it a conditional use in the Table of Uses.

Chair Sandberg said when the Council got to discussion on Section B, the Planning Board could explain the logic of this change. He then outlined the Council's options as a legislative body concerning the proposed Zoning Ordinance changes. He described the process the Council had used the previous year to deliberate on the Zoning Ordinance changes that were proposed.

He said what was before the Council now was a package of changes proposed by the Planning Board to additional parts of the Zoning Ordinance, and he noted the Council could not make substantial changes to any of these recommended changes. But he asked what the Council could do, if it found, for example, a problem with one Section out of the entire set of Sections. He suggested that what might be possible would be to initiate a Town Council posting to adopt the Sections it liked, and to hold hearings on this, but to reject the Section(s) it didn't like. He said that conversely, the Council could accept all the Sections, but then could initiate a Town Council action to amend the Ordinance to reject the Section(s) it had just approved but didn't like.

Chair Sandberg said that as the Council proceeded through the process of looking at the proposed changes, Councilors should look through the documents and see what they liked and didn't like, and could start to look at whether the Council might reach consensus on certain areas where it might need to initiate changes of its own to most accurately reflect the will of the legislative body, the Town Council.

Councilor Peter Smith said he didn't disagree with the alternatives Chair Sandberg had set out, but said he was concerned about having opened a public hearing, that was still open. He said it was important not to lose ground from where things were the previous year, and noted the Council did choose to pass the entire body of proposals presented to it, with the understanding that it would develop a list it wanted further action on. He noted this route was chosen the previous year because there were more things the Council approved of than it didn't approve of in the proposed Ordinance changes, and it felt it was important to get the Ordinance passed.

He said at the appropriate time, he would like to hear staff go through, item by item, each of the matters the Council had listed as being of concern the previous year, and to state what was done, not done, and why, and what the subsection was, concerning

each of them. He said he then would like to see, with respect to any items on the Housekeeping amendments list that didn't come from the Council, an explanation from staff as to where the suggested change came from; who made it; what the facts were for it; what legal or policy analysis was presented as to why the person(s) were seeking the change; and exactly what the Planning Board then did concerning this. He said the Council had never discussed these last items at all, and could not discuss them unless it had this kind of information. He also suggested that for all Zoning provisions in question, there should be details on their specific provision numbers.

Councilor Kraus asked for additional clarification on what Councilor Smith was proposing.

Chair Sandberg said the Council had liked approximately 95% of the changes recommended by the Planning Board for the Zoning Ordinance the previous year, and had asked the Board to review and tweak about 5% of it. He said in the midst of this, some questions concerning the provisions came up elsewhere which the Council hadn't talked about, and that were not anticipated.

Councilor Kraus asked if these additional items had been resolved yet, and Chair Sandberg said they were still to be discussed.

Councilor Peter Smith said what the Council had put on the punch list the previous year were not provisions that simply needed to be tweaked. He said it was realized that making changes on them would not be minor, and the Council would get into trouble if it tried to say it had the power to make these changes. He said this was why it was important to understand what had happened concerning these items.

***Councilor Carroll MOVED to re-open the public hearing on Section A. The motion was SECONDED by Councilor Kraus, and PASSED unanimously 8-0.***

**Beth Olshansky, Packers Falls Road,** said she wanted to respond to comments made by Planning Board member Kevin Webb in response to her comments. She noted he had said that although the Hollis ordinance was sometimes used as a model ordinance for Durham, that town had very different soils than Durham, so didn't really apply. Ms. Olshansky said she had many conversations with Virginia Mills, the Hollis Town planner, and said Ms. Mills had told her that the only land left for development in Hollis was either wet or rocky, which sounded very similar to Durham. Ms. Olshansky said saying the circumstances were different in Hollis was not the case.

She also said she was interested to hear the Planning Board's concerns that if somewhat poorly drained soils were excluded from the calculation of usable area, this could be considered a taking. She said she was puzzled by this, because in the old cookie cutter ordinance, people didn't build on these soils, so in fact the Board's initial proposal, before the amendment was proposed, was actually in keeping with what had previously been in existence prior. She said that now, with the suggested amendments, to give credit to this soil, gave additional density credit where it did not exist under the cookie cutter approach.

Ms. Olshansky said she thought Mr. Webb raised an important policy issue for the Town to consider, that much of Durham's remaining land was marginal soils, and thus the Planning Board felt it needed to loosen restrictions. She said this was a very critical issue, and said she hoped the Council would spend some time seriously discussing the repercussions of this. She asked whether this meant that as the Town experienced more development pressures, it should loosen restrictions in order to continue to allow development.

Ms. Olshansky noted that the change to the provision on calculation of usable area was one of the items not on the original punch list.

Councilor Morong said that with the old cookie cutter approach, this land wasn't built on, but was still counted in the lot size, and said he was therefore having a problem seeing what was now proposed was a big change.

Ms. Olshansky said that under the conservation subdivision approach, houses were clustered, so this was an issue of calculating density, not how many 2 acre lots were going to be carved out. She said this approach looked at what the productive land was, and if building credit was being given to land formerly not productive, density was being added.

Councilor Morong said he still got the feeling that if somewhat poorly drained soils were excluded from a given lot, one would end up with a lot fewer residences than if the land was cut up into cookie cutter lots.

There was additional discussion on this matter.

Chair Sandberg said Ms. Olshansky's sense was that the proposal to include somewhat poorly drained soils in the calculation of usable area would cause an increase in density as compared to what was approved in May of last year. He said a question the Council might have of the planners was what the consequence of this was, and how it was computed.

Ms. Olshansky said she had checked with Mr. Eyerman on this, and had been told that if somewhat poorly drained soils were included in the calculation of usable area, this would increase the density as compared to what was approved the previous year by the Council.

There was discussion about using the term "cookie cutter" in terms of subdivision, and Chair Sandberg suggested that it probably shouldn't be used.

Councilor Julian Smith noted Ms. Olshansky had spoken about somewhat poorly drained soils as being less productive, and asked if she meant less easily developed.

Ms. Olshansky said she meant this in terms of putting up a building, noting they resulted in wet basements, and could not be used for septic systems.



Councilor Smith asked what the objection was to wet basements, noting he had a spring in his cellar. He said he as well as some other people happened to like them.

Chair Sandberg said this had to do with the number of residences that would be built on the lot.

Councilor Peter Smith said he was at somewhat of a loss to understand what the underlying facts were concerning this issue. He said he was confused as to whether or not there existed either data, or science to get the data, at reasonable cost, in order to know whether land was very poorly drained, poorly drained, or somewhat poorly drained. He said he needed someone to address the facts, and then it could be determined how they fit in making these policy judgments.

He also noted that Mr. Webb had said that the proposed change concerning somewhat poorly drained soils was driven by major concerns that if the change was not made, there would be a substantial takings issue. He said he didn't know, as a policy matter, what he thought about this, but said that as a legal matter, if the Town adopted a zoning provision that carried the concept of zoning to the point where it was too massively in conflict with private property rights, absent paying people, it would be in legal trouble.

But he said he didn't know if there was such a problem. He provided some history on various attacks on zoning, and said the most recent cases had made it clear that there could be takings of various kinds, restricting the use of land, which did not require compensation. He said he would like to know if the reason the Board made the change concerning somewhat poorly drained soil was because of the concern about the takings issue, and not for policy reasons. He said he would like to see more in depth discussion on this.

Chair Sandberg said perhaps the technical issue was something that staff could speak about with the Council.

Ms. Olshansky noted she had spoken with Dale Abbott of Strafford Regional Planning Commission, who had used the County Soil Survey Data as part of the buildout analysis. She said he had said that according to these maps, which were not particularly accurate, there were no somewhat poorly drained soils in Durham, and that in order to get a real sense of the extent of these soils, HISS mapping would need to be done.

**Eileen Fitzpatrick, Packers Falls Road**, said she had listened to the previous Council meeting at home and had heard a member of the Planning Board express concern that excluding somewhat poorly drained soils from the calculation of usable area would be too restrictive, and might constitute a taking. She said a taking occurred if the ordinance was not rationally related to a legitimate Town interest, and said the rules on this were clear cut, but the application of them got very interesting.

Ms. Fitzpatrick discussed case law concerning the takings issue, noting two cases where the courts ultimately ruled that a taking had not occurred. She said one related

to a buffer for a scenic view, and said that because the Town had had a big discussion on the goal of preserving a scenic view, which was a legitimate purpose, and because having a setback was considered rationally related to preserving scenic beauty, it was not considered a taking. She provided details on a second case, decided this year, which had also determined that a taking had not occurred. She said these cases had come down on the side of Towns, and on the side of zoning.

She said that regarding the somewhat poorly drained provision, it would be appropriate for the Council to identify a goal as to why it would want to exclude somewhat poorly drained soils, and said this had to be for a legitimate town purpose. She said she believed it would be illegitimate to say it was because the town wanted lower density, and she noted there was a timing and phasing ordinance provision in State statute which was a permissible way to address density in a town. She also said if it were doing this because it wanted to be able to buy land for conservation easements more cheaply, this would also not be appropriate.

Ms. Fitzpatrick said the Zoning Ordinance actually spoke about ensuring that development was commensurate with the character and physical limitations of the land. She said there was a reason to take out somewhat poorly drained soils, and said the Council should consider Durham's unique location on the edge of Great Bay, with two huge river tributary systems coming into Great Bay in Durham. She said if stressing these soils could permanently impact the quality of Great Bay, it was perfectly appropriate to have the goal that building would only occur in Durham to the extent that the soils could handle this. She said that restricting for density purposes land that that was somewhat poorly drained certainly furthered that goal.

Councilor Kraus said in the end, it was a kind of subterfuge anyway. He said if explicit statements about density were made, the Town was in trouble, but said if these ethereal kinds of statements were made, then it was all right.

Ms. Fitzpatrick said if one believed that soils protection and ecological protection were ethereal, then there should be less restrictive soils standards. She said there was nothing ethereal about water quality, and said this related to how much soils were stressed. She said this was perfectly legitimate, and said the best reason to restrict development was for ecological reasons.

Chair Sandberg noted the Council had previously approved a change to the Ordinance which said that very poorly drained, poorly drained, and somewhat poorly drained soils would be excluded from the calculation of usable area, and said the Council was now being asked to not exclude somewhat poorly drained soils. He asked Ms. Fitzpatrick if in her professional opinion the Ordinance as it stood today, excluding somewhat poorly drained soils, was defensible, and was not a taking because the preamble to the Zoning Ordinance justified this. He asked if her recommendation was that the Council not adopt the Planning Board's recommendations with respect to this particular item.

Ms. Fitzpatrick said if there was a parcel of land where applying this meant that all use was taken away from it, this would be an issue, and would constitute a taking.

She said if some of the use was left, it would not be, and said there was a huge grey area in the middle of this. She also noted the Ordinance had an escape clause, in that if a person found himself without usable land, he could go before the ZBA.

Councilor Peter Smith said one issue was shaping the Ordinance to say the Town didn't want building on certain kinds of soils because there would be physical and potentially aesthetic consequences. He said the second issue would be shaping the Ordinance to say that not only could one not put a house on that type of land, but that one could not count the land toward the minimum lot size. He asked how excluding somewhat poorly drained soils furthered the goal of ensuring that development only occurred on the soils that could support it.

Ms. Fitzpatrick gave as an example a 20 acre parcel, where the non-usable soils were subtracted out but somewhat poorly drained soils were not subtracted out as part of this. She said with those soils included in the usable area, 20 buildings could be built, while without them only 12 buildings could be built. She said the question was, was there a difference, ecologically, between building 20 buildings as compared to 12, and she said yes, there was, because the volume of use, and wastes created inevitably engulfed the site. She said because the soils would be saturated, there would be more runoff and more ecological impact.

Councilor Smith said to the extent that this was tied to an ecological impact, it was based on believing the science would demonstrate in that instance that there would be an unacceptable impact on the somewhat poorly drained soils, even though the soils were somewhat removed from where the house was. He said the rationale went back to the science of the effect on the land.

Ms. Fitzpatrick said that was correct. She noted that with wetlands law, it wasn't until the science showed the impacts on water supplies that these laws were developed.

Councilor Morong said it was one thing to say one didn't want to affect the soils, but asked how one proved that. He said if the state was saying a piece of land supported 10 homes, and by excluding somewhat poorly drained soils the Ordinance was saying only six could be built, wasn't that a taking. He asked what standard one went by, and how one could substantiate that damage wasn't being done.

Ms. Fitzpatrick said these were very important questions. She said if there were no ecological impact, there would be no justifiable reason for excluding somewhat poorly drained soils. She said that perhaps the Council could hold a hearing on this.

Councilor Niman asked if there could be other legitimate purposes, such as building nice neighborhoods. He said he thought the original rationale behind cluster was to bring houses together so there was more of a community, with open space for playing, etc. But he said it seemed like there could be a situation where the houses were clustered on the good land surrounded by poor land where you couldn't do much on them. He asked whether, if a legitimate purpose of zoning was to create nice neighborhoods, if there should also be a certain amount of good land for people to form communities on and recreate on.

Ms. Fitzpatrick said absolutely. She also said aesthetics and community enhancement were considered legitimate purposes.

Councilor Kraus noted it had been said that the Town didn't have an in-depth soil study and that doing one would be very expensive. He said as he listened to this discussion, he was thinking there would be a lot of legal difficulties, and he said having a soil survey would set this to rest. He said he was curious as to what this would cost the Town.

Councilor Morong said concerning Councilor Niman's comments, that there were a lot of even poorly drained soils that were good to recreate on. He noted some clay based fields in Town, and said these soils were usable for other things even if they couldn't be used for septic systems.

Councilor Carroll said she was concerned about the future, noting that if the present zoning changes passed, and somewhat poorly drained soils were included in the calculation of usable area, there would be more buildout of Durham, and then in the future, there might be the choice to go to poorly drained soils, and allow them to be included in calculation of usable area. She asked if that was a possibility for the future, and asked if it was therefore important to take a stand on the soils issue now.

Ms. Fitzpatrick said this was a concern for the future.

Councilor Julian Smith said if someone had a large parcel of land, with a wonderful view shed of land that was well drained, and wanted to build in the poorly drained soil, couldn't that person go to the ZBA and ask for a tradeoff, where the view would remain, but he would have a wet basement. He asked if the ZBA would be the appropriate venue to go to in this case.

Ms. Fitzpatrick said she thought it would be.

Mr. Smith asked what the danger then was of leaving the provisions as they were.

Chair Sandberg said he would like to hear response from staff and Planning Board members to some of the questions that had been raised.

Planning Board member Steve Roberts provided some history on this issue, noting the original recommendations concerning the soils came from a subgroup of the Board. He said at a public hearing on the proposed ordinance changes the previous year, several members of the public then challenged the somewhat poorly drained criteria for calculating usable area, as excessively restricting the use of their land. He said the Board was also challenged that the provisions didn't meet current soil scientist standards. Mr. Roberts said that at that time, he said the Board was not intentionally changing the density of land in the community.

He said it was then determined, in referring to the data provided by the New England Soil Scientists Society, that the resident who had spoken was right. He said this

organization said somewhat poorly drained soils should have a minimum lot size of 132,000 s.f. and a slope of 8-15%. He noted the Town's minimum lot size was 150,000 s.f., but he said this was something the Board didn't get into because of concern about viewscapes, and the historical pattern of development in the Town which made it very difficult to reduce lot sizes down to the 2 acres used by many communities that used soils based lot sizes. He asked to see data that showed the approach used by NESSS was wrong, and that the recommended change would endanger the quality of the lots being approved.

Councilor Niman said that based on this data from the NESSS, why not then change the minimum lot size from 150,000 s.f. to a 135,000 s.f.

Mr. Roberts said they had had 120,000 s.f., but it had been determined that because of the way lots were configured as part of the conservation subdivision process, this would result in a net increase in density as compared to traditional subdivisions. He said the lot size had been increased so this wouldn't happen, and so that conservation subdivision would be density neutral.

Councilor Niman repeated his original question, and there was additional discussion about this. Mr. Roberts said the approach used was to take the soil's minimum lot size and then add a factor beyond soils for a lot development.

Councilor Peter Smith said what was happening here was that there were varying perspectives on primary facts. He said in view of the situation the Council was in, he thought the issue boiled down to whether, as a matter of science, there was the kind of effect Ms. Fitzpatrick described. He said the Planning Board was using another standard. He said he would welcome the person(s) who had raised this case to come before the Council and make the case. But he said the proposed change to include somewhat poorly drained soils in the calculation of usable area had to be based on more than someone coming before the Council and saying it caused him a problem with his property. He said the whole Town needed to be represented concerning this, and said perhaps the Council needed a soil scientist to come in on this.

He noted that at the previous meeting, a Planning Board member had said he found some substantial disadvantage placing in the arms of the ZBA a land use function that should instead be before the Planning Board. He said he was trying to figure out if going to the ZBA for a variance was the proper outlet for people with this kind of problem. He asked whether there would be hundreds of applications that would result because people couldn't make any meaningful use of their land under the provision passed the previous year. He said he agreed the ZBA shouldn't be turned into the Planning Board, but said if it could be the proper outlet for those with hardship, that was what it was there for.

Mr. Roberts said it troubled him that the Town was making planning decisions that were not related to guidance from somewhere, and said some of the people challenging these amendments were those who had advocated larger lot sizes as a way to restrict development. He said that wasn't the Planning Board's job, it was to plan correctly.

Councilor Kraus said he remembered much of this from the previous year. He said it would be a good idea to dredge up the minutes from this to see what was actually said previously.

***Councilor Peter Smith MOVED to continue the public hearing on Section A to August 1st. The motion was SECONDED by Councilor Kraus and PASSED unanimously 9-0.***

**Continuation of X A - Section B - continued Public Hearing on Ordinance #2005-06** proposing amendments to Chapter 175 "Zoning" of the Durham Town Code, Section 2005-05 (B) "to implement the Master Plan recommendations dealing with the Non-residential Zones". The proposed revisions in 2005-06 (B) pertain to the zoning map, non-residential zoning district provisions, definitions, tables of uses, and table of dimensional requirements.

Mark Eyerman said this was part II of the process to bring the Zoning ordinance into conformance with the Master Plan. He provided background on what the changes involved (See the June 20th Minutes for details on this)

He said the package did several major things: it created a number of new and revised definitions relating primarily to uses in the revised table of uses; it went through and amended the description of the existing nonresidential districts, including a purpose statement, a tie in with the table of uses and table of dimensional standards, and then added development standards for each district, which was a major recommendation of the Master Plan.

He noted that under the current zoning adopted in May of 2004, there was one omnibus OR district which was now proposed to be divided into four OR districts. He said there were dimensional standards for each of these districts. He also said there were some new performance standards for light industrial uses.

Chair Sandberg asked if amendments were proposed to Article 20, performance standards. Mr. Eyerman said yes, and he provided details on this.

***Councilor Kraus MOVED to open the public hearing on Ordinance #2005-06 proposing amendments to Chapter 175 "Zoning" of the Durham Town Code, Section 2005-05 (B) "to implement the Master Plan recommendations dealing with the Non-residential Zones. Councilor Peter Smith SECONDED the motion, and it PASSED unanimously 8-0.***

**Bill Hall**, said the previous week he had realized the setback requirements in his neighborhood had been dropped. He described what he saw as problems with this. He said he didn't mind if the setbacks were only 10 ft., and said he would like to see a proposal to change them to at least 10 ft.

Mr. Eyerman asked what district Mr. Hall had referred to. Told it was Church Hill, Mr. Eyerman said there were in fact a proposed sideyard setback of 5 ft. and a rear

yard setback of 15 ft. in this district. He said there was no required front yard setback.

Councilor Kraus said this layout was similar to what one would see in Italy.

Mr. Eyerman said the building could be located at the property line, typically at the back line of the sidewalk. He said the Master Plan talked about maintaining that street wall, and maximizing the development potential with the limited amount of space available.

Councilor Kraus said there would be some kind of curbing, so it wouldn't be that someone would be stepping into the street.

Bill Hall said he would be pleased to have a setback of 10 ft., but said to get none would be ludicrous.

**Jim Jelmborg, Park Court**, said keeping conditional use in the Courthouse district would be consistent with past practice, and said now that it was the town gateway, the extra scrutiny would be beneficial.

Chair Sandberg asked Mr. Jelmborg what conditional uses he was referring to, and there was discussion about this.

Ms. Carroll noted hotels and motor vehicle service stations would now be permitted uses in the Courthouse district, and asked how Mr. Jelmborg felt about this.

Mr. Jelmborg said he was fine with this.

Mr. Campbell said for the proposed Courthouse district, the Board had looked at what the Master Plan said. He said there were no recommendations for conditional use, which was generally why the Planning Board went that way.

Councilor Peter Smith noted the significant increase in the number of zones, and asked if Mr. Eyerman was convinced that there were peculiar and differing conditions in these zones that provided sufficient justification for them, so there were no issues with spot zoning.

Mr. Eyerman said they were recommended in the Master Plan, and it was agreed from the outset that the Board's role was to implement the Master Plan, and not second guess the policies in it. He also said that if one looked at the five downtown districts, they had very different characters, and it was easy to see how the Master Plan proposed those five different districts. He said with the four OR districts, it became a little less clear, but said the case could be made that these districts were differentiated, and didn't constitute spot zoning.

Councilor Niman said he could think of only one property that might meet all the conditions for the MUDOR district, so that a multi-unit apartment complex could be built there.

Mr. Eyerman said that was right, and said the Board wrestled long and hard with this issue. He said the potential for the University to do some kind of public/private development on what was University land was why the Board had created MUDOR.

Chair Sandberg asked for background on where elderly housing was allowed in each of the zones. He noted there had been discussion about encouraging elderly housing within the shopping district, to make it more of a walking community, and not out in the wilderness, and asked for more detail on this discussion .

Mr. Campbell said he thought the majority of discussion was to encourage more of this housing, and to move away from single family non-elderly duplex housing, and said he didn't recall any discussion that there should be elderly housing in the downtown area. He said there had been discussion on the importance of having transportation available as part of these projects.

Councilor Peter Smith asked if the Board had given consideration of mandatory requirements that would decrease the likelihood of the disadvantages raised by Chair Sandberg.

Mr. Eyerman said it was important to realize elderly housing was currently defined in town as 55 and older. He said the reality was that much of the housing that was called elderly housing was not really targeted at the aging population.

Chair Sandberg noted there were several categories in this section, nursing homes, elder care facilities, elderly housing, and said he was having trouble understanding the logic applied in determining where these different uses were permitted, etc. in the various districts. He said it seemed to be an odd layout.

Mr. Eyerman said one of the strong policy directions of the Master Plan was to consider activities that would contribute to the property tax base without increasing the demand for services. He said elderly housing fell in this area, so it was felt it should be allowed wherever this made reasonable sense. He also said some of these facilities took a certain amount of land, so it was felt that in the downtown, that land should be utilized for retail services, and housing for non-elderly people. He said it was felt that in the other districts, this kind of development could be easily accommodated in well designed, serviceable projects.

Councilor Kraus said this was a good example of why some people thought Durham suffered with an image of conceit. He noted earlier discussion about viewscales and lot sizes, and said the Town didn't necessarily want industry anywhere, and didn't want student housing. He said in a certain sense he had just heard that elderly housing shouldn't be mucking up viewscales, and should instead be in town so elderly people could walk places. He said he had a friend who lived at Spruce Woods and was not isolated, and he said to intimate that this was even a problem was offensive to people in this category. He said however it was intended, it came across that one wouldn't want elderly housing out by Great Bay. He said he found it very problematic that citizens were being categorized, and all of this was done in a very subtle way. He said this was why people thought Durham was elitist.



Chair Sandberg said there was nothing to suggest he thought this was a bad idea, but said he was simply asking for the line of logic as to why the facilities were permitted where they were. He provided details on the kinds of questions he had, and said asking these kinds of questions was the job of the Council. He said he welcomed anyone to not be intimidated by remarks made by certain members of the Council.

Planning Board member Arthur Grant provided details on what was permitted and where concerning elderly housing. He noted there were some different criteria for the nursing homes, and explained the Board felt these facilities needed to be located centrally in order to be closer to services.

Councilor Niman said he appreciated that the Chair had brought this issue up. He said his understanding was that the reason elderly housing was a conditional use in ORLI was that this was a way to expand the tax base and not put kids in the schools. He said based on that logic, he wondered why multi unit residences for people 18-23 would not also have the same tax benefit, and should therefore be a conditional use in the ORLI district.

Mr. Eyerman said the Board struggled mightily with what should be included in ORLI, and provided details on this.

Chair Sandberg asked how the Council wanted to proceed concerning further discussion on Section B.

***Councilor Kraus MOVED to continue the public hearing on Section B until August 1<sup>st</sup>. The motion was SECONDED by Councilor Carroll, and PASSED unanimously.***

- B. Shall the Town Council endorse the modification proposed by the NHDOT on Option 1 previously endorsed by the town of Durham relative to the Route 108 bicycle shoulder project at the Bennett Road intersection.

Chair Sandberg described the options before the Council on this.

***Councilor Kraus MOVED to postpone discussion on Item X B indefinitely. Councilor Morong SECONDED the motion.***

Councilor Niman said he would vote against this motion. He said anything that made an intersection safer was a good idea. He said he didn't find the current configuration safer, and didn't see any harm in the Council discussing the issue.

Councilor Kraus said with presentation on Thursday and discussion to follow, those issues would be adequately covered. He said there was no purpose to thrash the issue at present, especially because they might get more information at the hearing.

***The motion PASSED 6-2, with Councilors Niman and Carroll voting against it.***

**XI. Adjournment**

***Councilor Morong MOVED to adjourn the meeting. The motion was SECONDED by Councilor Kraus, and PASSED unanimously 8-0.***

Adjournment at 9:35 pm

Victoria Parmele, Minutes taker