

# **D-R-A-F-T**

**DURHAM TOWN COUNCIL  
MONDAY, SEPTEMBER 26, 2005  
(Continued Meeting of September 12, 2005)  
DURHAM TOWN HALL – COUNCIL CHAMBERS  
7:00 PM**

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

**MEMBERS ABSENT:** John Kraus

**OTHERS PRESENT:** Town Administrator Todd Selig; Town Planner Jim Campbell; Planning Consultant Mark Eyerman

Chair Sandberg called the meeting back to order at 7:00 PM and explained that this was a continuation of the Town Council meeting held on Monday, September 12, 2005, and that the Council would be taking up Item #10E of the September 12<sup>th</sup> agenda.

**X. E. DELIBERATION 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 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.

Chair Sandberg outlined the options for the Council concerning the voting on the proposed Zoning amendments: 1) Accept them as is; 2) Make minor substantive changes; 3) Reject them in their entirety; or 4) Go through the individual recommendations in Sections A and B and determine whether there was consensus as to whether the Council accepted or rejected each of the recommendations.

He said if a number of recommendations were rejected, they could be remanded to the Planning Board. He said in order for this approach to be useful, Councilors should explain why they were remanding particular recommendations.

Councilor Peter Smith asked what would happen if the Council remanded several recommendations back to the Planning Board, the Board then responded that it had changed some but not all of these recommendations, and the Council then said the recommendations that hadn’t been changed should be changed. He said he recalled the Town Attorney saying that at this stage, the Council was free to enact its own Zoning provisions.

Chair Sandberg said another alternative was that if the Council decided to reject the Ordinance in its entirety, it could then originate the process of developing its own recommendations.

There followed detailed discussion about these procedural issues.

Chair Sandberg recommended that once the motion was made to adopt Section A, Councilors should address each of the 13 items in it individually, and after discussion, determine if each should be remanded. He noted that Section A would actually be remanded as a package after the Council had completed its deliberation on this section.

Councilor Peter Smith said before the Council got into the debate on specifics, it should contemplate the prospects of creating procedural issues, depending on how it went about this process. He noted there had been some urgency the previous year to pass the Ordinance, and that the list of disagreements with the Planning Board wasn't extensive or substantive. He said his sense was that the type of disagreements this time would probably be more strongly felt, and said people should not feel constrained based on how things proceeded the previous year.

Councilor Needell said he agreed with Councilor Smith's comment. He asked whether it might make sense to deliberate first on Section B, given that there was an item in Section A concerning the table of uses that couldn't be resolved until after Section B was voted on. There was discussion about this.

Councilor Niman said the Council should move on from the procedural discussion to discuss the Ordinance provisions themselves.

***Councilor Niman MOVED to adopt #2005-06 proposing amendments to Chapter 175 "Zoning" of the Durham Town Code Section (A) "to address questions with prior amendments". Councilor Peter Smith SECONDED the motion.***

Councilor Niman said he liked Item #13 regarding accessory sheds.

Councilor Peter Smith suggested going through the Items in the order they were listed. He also pointed out that Councilors Sandberg, Needell, and Carroll had developed their own lists commenting on items 1-13.

1. Councilor Needell said the wording "at large" was new, in the definition of community center, and should be highlighted.

Councilor Peter Smith said he took that to mean the Town of Durham. There was no further discussion on this item.

2. **GOVERNMENT FACILITY** - Councilor Peter Smith suggested this definition should read "A structure or parcel of land, the use of which is governmental..." He also said he had a problem with the wording "...governmental in nature.", and questioned what it meant.

Chair Sandberg said a fundamental question concerning this definition was where the term itself showed up elsewhere in the Ordinance, such as in the Table of Uses for the various districts.

Town Planner Jim Campbell gave the example of the Craig Supply property, which was owned by the Town, and which would be used as a parking structure.

Councilor Peter Smith recommended finding out if the consistent application of “governmental facility” in the Ordinance was as Mr. Campbell described it. He said this made sense, but said if the term carried another meaning that included uses of government property by private persons, he had difficulty with it.

Councilor Peter Smith said he didn’t want this definition to carry a meaning so broad as to countermand the Town’s Telecommunications Ordinance. There was discussion about this with Mr. Campbell.

Councilor Smith said he also assumed this would not be meant to alter a situation where the University carried out a role that did not related to its function as an educational institution, such as making an arrangement with a private company to carry a tower on Route 4.

Chair Sandberg summarized that the Council’s recommendation was that this definition be left unchanged, except for the small wording change Councilor Smith had offered.

Councilor Needell said the definition under Item #2 for somewhat poorly drained soils was not the same as the one in Wetlands Overlay provisions.

Mr. Campbell said this definition was created before the one in the Wetlands Overlay provisions, and said the latter was the preferred definition, and should be adopted. There was discussion as to how to address this.

Councilor Peter Smith noted there would be more discussion on somewhat poorly drained soils, in part concerning what information on them was reliable, which therefore would determine which definition made sense. He said he therefore didn’t think the Council should make a decision on this definition now.

***Councilor Needell MOVED to replace the definition of somewhat poorly drained soils on page 2 of the “Proposed Amendments to Chapter 175 Zoning to Address Questions with Prior Amendments” with the definition proposed in the Wetlands Conservation Overlay District. Councilor Morong SECONDED the motion, and it PASSED 8-0.***

### **3. Amend Section 175-21 A. concerning Conditional Use Permits**

Councilor Niman read the third sentence of this provision, “A Conditional Use may be approved if...”, and asked under what conditions a conditional use that met the criteria would not be approved.

Councilor Peter Smith noted that there was inherently a fair amount of discretion in the Conditional Use concept, but said the phrase should read “...shall be approved...”, - assuming that the conditional use criteria represented the full picture, and were satisfied for a particular conditional use permit application.

Mr. Campbell said he didn't recall the logic that went into including the words "...may be approved...", but said it appeared that the wording should be "...shall be approved..." He said it would either be illogical or highly suspect legally if an application met the criteria and was then denied.

Chair Sandberg asked Mr. Campbell if he thought the Planning Board's intention was to refer to Section 175-23 in its entirety in this same paragraph, and Mr. Campbell said he believed it was.

Councilor Needell pointed out that the wording in this paragraph was part of the Board's attempt to address the vagueness of the wording "of benefit to the Town" by removing it from the Ordinance. He also suggested that the use of the word "may" or "shall" in this introductory section might be problematic.

Chair Sandberg suggested that the Council should not be the wordsmiths concerning this paragraph, and instead should remand Item #3 to the Planning Board so it could work on the wording.

Councilor Julian Smith said he believed the logic of "may be approved" was clarified by the sentence that followed this phrase. He also said he thought the Planning Board did not intend the use of the word "shall" because meeting the criteria in Section 175-23 was not the be all and end all, but was part of the process.

Councilor Peter Smith noted that a conditional use is determined to be "of benefit to the town" if the application is found to be in compliance with the approval criteria in Section 175-23 and that those criteria were an attempt to put parameters around the vague phrase "of benefit to the town". In response to Councilor Julian Smith, he said it therefore came down to whether or not the universe of things to consider was within Section 175-23 or not. He provided a detailed explanation of why there was a substantive difference between using the word "may" or "shall".

Councilor Niman said he agreed this should go back to the Planning Board for redrafting. He also asked if the State statute on this specified how many further conditions could be placed on a conditional use permit application.

Mr. Campbell said the idea behind the revised wording was if a conditional use permit application met the criteria in Section 175-23, it was considered of benefit to the town and shall be approved, with no wiggle room.

He also noted that Section 175-23 D spoke about 11 further conditions that could be placed on a conditional use application. He said the Ordinance was now saying that if an application met the conditional use criteria, as well as any further conditions, it would be approved. He provided details on some of these conditions that could be placed on an application.

Councilor Needell said Section 175-23 D was not totally open-ended in terms of what could be asked of the applicant. He provided details on this.

Councilor Peter Smith suggested the Planning Board might want to give consideration to the wording of the 4<sup>th</sup> sentence in the paragraph, starting with “Further Conditions may be placed, to make it less subject to legal challenge.

Chair Sandberg noted that in that sentence, the word “Permit” should be removed.

Councilor Julian Smith said he agreed with Councilor Peter Smith that “shall be approved” was the appropriate language to use. He also said that sentence should say “the Conditional Use is or is not in compliance with the approval criteria.”

Councilor Peter Smith said he had no objection to the substance of this suggestion, but said the wording should be “...findings of fact respecting whether” the Conditional Use is in compliance.

Councilors agreed Item #3 should be remanded to the Planning Board for further work.

**4. Amend Section 175-23 D “Conditions of Approval so that the introduction reads as follows:”**

Councilors had no objections to the previous amendments that were made.

**5. Amend Section 175-53. Table of Land Uses by changing “Excavation and/or mining” from a prohibited use to a conditional use in the Rural District.**

Councilor Peter Smith said he had raised this issue in the past, because he was aware of the state law, RSA 155-E, concerning this land use issue. He said he had since that time read through the statute in more detail, and said he was not convinced that because of it, the Zoning Ordinance was required to say what was now here. He asked if the Planning Board had included this provision because it had decided it was a good idea to allow excavation and/or mining in the Rural District, or instead, had reached the conclusion that it was pre-empted by the State from saying anything else.

Mr. Campbell explained that there had been an extensive discussion by the Board on this issue, and also said it had sought the opinion of the Town Attorney, who said it was illegal for this activity to be prohibited in all zones in Town. Mr. Campbell provided details on the Board’s discussion on this issue, noting among other things that at one point, it was suggested that excavation be permitted in the Central Business District, knowing it probably wouldn’t happen there.

Councilor Peter Smith said he was not sure mining was viewed as excavation, and noted the complexity of the statute. He said the Planning Board needed to know in much finer detail what types of excavations, in what circumstances, could be totally prohibited or not. He provided details on this, and said at present, these things had not been adequately defined in the Ordinance. He said once it was clear what the Town had to do concerning this land use, the decision on what to put in the Ordinance could be made.

Chair Sandberg noted the reference to conditional use permit in the provision, and said

presumably when the Board made this recommendation, it imagined that the various possible kinds of excavation would be considered under Section 175-23. He asked if there was in-depth discussion on this.

Mr. Campbell said he didn't think the Board's discussion on this issue was as in-depth as the current discussion. He said the Board felt its hands were bound, in part because RSA 155-E was a very confusing statute. He said allowing excavation and/or mining as a conditional use was an attempt to put further restrictions on the land use if it was going to happen.

Chair Sandberg asked if it had been anticipated that the Ordinance could have a separate section to provide more detail on this issue. He also said that if the Town was going to allow this land use, it had to be regulated according to RSA 155-E, but could also possibly be handled differently than through the Conditional Use process.

Councilor Needell said he understood why the Board had responded the way it had, based on the Town Attorney's opinion. But he said it was not clear from this opinion exactly where the illegality could be. He also said he didn't understand why the Rural Zone had been singled out to allow excavation and/or mining.

Councilor Needell also asked why this land use needed to be included at all in the Ordinance, since there was a State statute that covered it in detail.

There was discussion about this, and also about whether using the conditional use approach was sufficient to address this land use. Councilor Peter Smith said he thought a distinction should be made between what the illegality was, and what the policy should be.

Chair Sandberg suggested this Item should be sent back to the Planning Board for further work.

Stephen Roberts said he was Chair when the Planning Board had discussed this issue. He provided details of the discussion, and said it became obvious at the time that the more words that were put in the Ordinance, the more contradictions would come up. He said the Rural District was eventually chosen, and he noted that if the conditional use approach was properly applied, it gave the Board a great deal of latitude in terms of considering how an excavation site could potentially damage the land. He provided additional details on this.

There was discussion on what the definition of excavation should be.

Chair Sandberg asked for consensus on how to proceed.

Councilor Morong said he would like the Council to accept the currently recommended wording, and make the policy decision later. He said it seemed that the Council had the option at any time to consider adding more words to the Ordinance on this land use. Councilor Needell asked what the legal reason was as to why excavation and/or mining

couldn't be prohibited everywhere in Durham.

Chair Kelley read from Attorney Mitchell's letter concerning this.

Chair Sandberg asked Councilor what the consensus was on this recommendation. Councilors Peter Smith and Carroll said it should be sent back to the Planning Board, but the other Councilors said this was not needed. So the item was not remanded.

## **6. 175-54 Table of Dimensional Requirements**

Councilor Niman asked what "impervious surface ratio" meant, in this table, and Mr. Campbell provided details on this, noting it was the ratio of the area of a property with impervious surfaces to the total area of the property.

Councilor Niman asked where the ratios themselves for the various districts had come from, and Mr. Eyerman provided details on this.

Councilor Niman spoke about a particular property located in the Coe's Corner District, a district which required a 30% impervious surface ratio, and said that because of this requirement, property owners were going to want to build as many stories as they could on a building. He suggested this would create a situation where tall buildings would be put where the Town didn't want to see them.

Mr. Eyerman said his personal observation was that an objective of the Planning Board had been to translate the policies of the Master Plan in the Zoning Ordinance. He said the directives in the Master Plan concerning Coe's Corner were probably the least specific, the least clear, and the most contradictory of any areas in the Master Plan. He said the Plan spoke of maintaining rural character, but also talked about business park development, and said the wording here was an attempt to work with this.

Councilor Niman said he would be happy to discuss this in more detail when there was deliberation on Section B, and noted he didn't like the impervious surface ratios for any of the districts.

Councilor Needell said a problem was that this table was intended as an amendment to the one in Section B, which had not been adopted yet, and said this made things confusing.

Chair Sandberg suggested holding off the discussion on this Item until the Council got to Section B.

Mr. Eyerman said this was one of the problems that came from breaking up the Zoning Ordinance into pieces. He said the intention in this table was specifically to deal with lines 2 and 3 concerning usable area, and where it did and did not apply.

Councilor Needell noted there was very little change to the lot size numbers in those two rows, and it was just the language in them that changed. He also said he agreed with

Chair Sandberg's suggestion about postponing further discussion on Item #6 until the Council discussed Section B.

Councilor Niman said he didn't understand why there was a minimum usable (lot) area in the Courthouse District, Office Research District and other nonresidential districts, when residential housing wasn't allowed there. There was discussion about this.

***Councilor Needell MOVED to postpone further deliberation on Item #6 -until the Town Council got to Section B "Proposed Amendments to Chapter 175 Zoning to Implement the Master Plan Recommendations Dealing with the Non-Residential Zones". Councilor Peter Smith SECONDED the motion, and it PASSED unanimously 8-0.***

*Chair Sandberg called for a 5-minute recess at 8:40 PM.*

*The meeting resumed at 8:45 PM.*

Chair Sandberg noted that Councilors Van Asselt and Councilor Morong had left the meeting, but there was still a quorum.

**7. Amend Section 175-55 E. Minimum contiguous usable area by deleting the section in its entirety**

Councilor Julian Smith said he didn't see a problem with leaving the wording in.

Chair Sandberg noted that the discussion in May of 2004 had to do with the fact that this wording required a rectangle of usable area, and the question had been what happened if a property didn't happen to be a rectangle.

Councilor Needell said his focus at the time in questioning this wording was strictly that rectangular was an arbitrary shape, and said when the wording went back to the Planning Board, a much broader discussion ensued. He said the proposed language in January of 2005 to replace it was incomprehensible, and said that rather than deal with this, it seemed simpler to remove the language from the Ordinance, in light of the fact that it applied only to conservation subdivisions, which already contained stringent requirements. He said he had concurred that the wording should be removed.

Councilor Peter Smith said he was not ready to think the concept should be dismissed, and said he would first like to get more guidance on this issue.

Councilor Niman noted Item #10 concerning exempt subdivisions, and asked how the Ordinance could exempt someone from something that had then been deleted in the Ordinance.

Mr. Eyerman said with the current Ordinance, virtually all subdivisions were required to be conservation subdivision, with exemptions from this allowed in a few cases. He said the housekeeping amendments were an attempt to say the Town had essentially one set of



standards for lots in conservation subdivision, and another set of standards for lots that were exempt.

He said in terms of conservation subdivisions, the language under 175-55. E was almost a moot requirement, because the basic requirement for conservation subdivisions was that unusable area had to be placed in common open space, and 50% of usable area had to be put in common open space. He provided additional details on the process, and said what E was intended to deal with essentially couldn't happen in a conservation subdivision.

Mr. Eyerman said the intent of Item #7 was to address concern that there could be Swiss cheese lots, where islands of good land could be added up to reach the minimum lot area requirement. He said the process of conservation subdivision essentially mandated going through a process to identify the best site for houses based on natural conditions.

Councilor Peter Smith said he had two concerns. He said Mr. Eyerman had said the wording was essentially not necessary in a conservation subdivision because of a series of steps that had to be undertaken, which provided the Planning Board with adequate power to negate inappropriate designs. He asked if Mr. Eyerman agreed that this went beyond "essentially", and actually eliminated inappropriate designs.

Mr. Eyerman said the only recourse for an applicant would be the ZBA.

Councilor Smith said his second concern was about conventional subdivisions. He said he was not convinced at this point that the Town didn't need to worry about them anymore since it was stressing conservation subdivisions. He asked why the concept of minimum contiguous area should be dispensed with, with respect to conventional subdivisions.

Mr. Eyerman said this was a good observation, and said the minimum contiguous usable area requirement to him was more of a concern with respect to conventional subdivisions. He provided some detail of the Planning Board's discussion about this issue, and said it had decided that on balance, taking out the wording wasn't a big risk, or likely to result in substantial harm to the community

Councilor Peter Smith said it would take time to see how this all worked out. He asked why he shouldn't take the view that this requirement should perhaps be dispensed with at a later date, once there was enough experience to indicate that non-conservation subdivision issues would be minor.

Mr. Eyerman said the reason was because of concern about the burden this put on individuals trying to create a lot through the Ordinance provisions on exempt subdivisions.

Councilor Julian Smith asked if Mr. Eyerman said this issue was moot because there weren't many areas where it applied.

Mr. Eyerman said the existence of the requirements concerning doing a conservation subdivision made concern about this issue moot.

Chair Sandberg asked what the objection would be to simply taking out the conservation subdivision part of this wording.

Mr. Eyerman said the information required to determine what was usable area, based on a HISS map, was not required for exempt subdivisions, so it wouldn't make sense to leave conventional subdivisions in the sentence but take out conservation subdivisions.

Planning Board Chair Richard Kelley said this was not a slam-dunk issue, and noted there had been opposition to removing it, but the vote in favor of removing it had carried. He said he had supported amending the language, as an additional measure to prevent the Swiss cheese option discussed earlier.

Councilor Peter Smith said he accepted the argument for removal of this language with respect to conservation subdivisions, but said the language should be worked on concerning conventional subdivisions. He said with respect to this, not requiring HISS mapping did not eliminate the need to have some kind of restriction to avoid very inappropriate land uses.

He said he was in favor of sending this Item back to the Planning Board so it could examine some appropriate language just for the conventional subdivisions, not focusing on crafting a HISS burden, but a more minimal burden that the shape of a lot not get too weird. He said had been done in other communities, and said there would be a hole in the Ordinance if nothing were done concerning this.

Mr. Campbell suggested the wording could be "minimum contiguous lot area" as a way to avoid the Swiss cheese effect.

Chair Sandberg said perhaps the Board could also deal with "rectangle" wording as well, which needed to be more precise.

The consensus of the Council was to send Item #7 back for further work.

## **8. Amend Section 175-55. F. Calculation of usable area**

Councilor Niman said different points of view had been presented concerning the proposed removal of somewhat poorly drained soils from the list of unsuitable areas. He provided some detail on these points of view, and said the issue was still unclear, and confusing. He said he hadn't heard a convincing argument as to why these soils should be removed from the list and therefore included in the calculation of usable area.

Councilor Carroll noted she had sent Councilors a memo outlining her concerns on this Item. She said she had done her homework on this issue, and did not feel that somewhat poorly drained soils should be struck from the list of unsuitable areas.

Councilor Julian Smith said he agreed somewhat poorly drained soils should be left on the list, and said he felt the same way concerning #6 - areas with slope between 15-24% as identified on a HISS map.

Councilor Carroll said she felt #4 and #6 under Item #8 should stay in the Ordinance.

Councilor Niman said he preferred to keep Section 175-55. F. as it was until there was greater clarification on what the issues were.

Councilor Peter Smith said he agreed with Councilor Niman that there was some burden that had to be met in order to change the existing Ordinance. He said he didn't think it had been met, although noting he was not saying it couldn't be met. He said that regarding #4 and #6, he was in even less of a position to say anything.

He noted that the definition of somewhat poorly drained soils the Board had most recently been working with, and said he remained confused as to what the correct definition should be. He said the next question was whether to treat somewhat poorly drained soils the same way as poorly drained soils.

He recommended asking the Planning Board to send the Council back a draft that did not remove somewhat poorly drained soils. He also encouraged the Board to engage in further education of the Council on this issue, to the extent the Board felt strongly that this was needed.

Councilor Needell said he didn't necessarily disagree with this. He reviewed the events that had led to the review of the wording, and said a question was whether there was broader concern in the community about the existing wording.

Chair Sandberg noted that five Councilors had indicated at the present meeting that they would not support deletion of the language, and said he also agreed with this. He said he agreed there might be more evidence that would be persuasive, but said at present he was not persuaded that the wording should be changed.

Councilor Needell said in fairness to the Planning Board, it had tried to address a Council concern in coming back with this recommendation to remove the wording. He asked how the Council's current position would get communicated back to the Board. Chair Sandberg said procedurally, he would think the Board would take from the discussion that these remanded items would be taken out. He provided additional details on the process.

Councilor Niman said it was not clear to him what was driving this proposed change. He said from what he had heard at the meeting, it sounded like what had driven this had been landowners saying they wanted more houses on their land. He said more clarity was needed on what requirements were needed in order to be good stewards of the land.

Councilor Peter Smith said he was not taking his position because he saw it as a clever, backdoor way to diminish the amount of land to be developed in Durham, noting this would not be legally proper. He said he was taking this position because he was not convinced that the absence of this language gave the appropriate amount of regulation to promote the interests that zoning was supposed to promote.

Councilor Carroll said she had taken her position based on looking at the realities of land as it existed in nature, and the pollution implications of certain soils.

Chair Sandberg said the Council was remanding to the Planning Board #'s 1, 4 and 6 of Section 175-55. F

Councilor Needell said he didn't disagree with what Councilor Niman had said, and provided details on this. He also asked if any Councilors were unhappy with the wording of #10 under this same Section.

Councilor Peter Smith asked what the purpose of the proposed change was.

Chair Kelley said this resulted from the general consensus of the Board that it had gone too far, and said it was felt that 5,000 sq. ft. was a more reasonable amount of land.

Mr. Campbell said the Board would be happy to review that again.

#### **9. Amend Section 175-56. A. Lot area**

Councilor Niman asked what the objective was for this proposed change.

Mr. Campbell explained that previously the language was somewhat confusing, and provided details on this. He said the Board felt it needed to clarify what the Town was doing concerning density for elderly housing, and said if it was encouraging this kind of housing, this would be a way to give a bonus for doing that.

Councilor Peter Smith said as revised here, the developer would only have the option to go for a variance.

Mr. Campbell said that was correct.

Councilor Niman asked where the numbers for this came from.

Mr. Campbell said Mr. Eyerman had provided these numbers, and said the Board then talked about them.

Mr. Eyerman explained that the Master Plan had a recommendation regarding considering bedroom density as opposed to unit density in order to determine the intensity of development. He said in terms of single family units, this didn't have much meaning, but said the attempt here was to say, using a single family unit as the standard, how an elderly unit of various configurations translated in terms of impact, on parking, traffic, etc. He provided details on the numbers themselves, based on this approach.

He noted there was concern that there was more elderly development in Town, but no real standards as to what an acceptable density level was.

#### **10. Amend Subsection C. of 175-107.**

There was additional discussion as to what the Council had decided to do concerning Item #7.

Mr. Eyerman said the direction was that the Planning Board go back and look at some kind of requirement for lots in conventional subdivisions, using language other than usable area. He said Item #10 could still stand as proposed based on this, and would not be affected.

In answer to a question from Councilor Peter Smith, Mr. Eyerman said if Item # 10 was adopted, and Item #7 was not, leaving the current language for 175-55. E on the books, he didn't think any rights were being created. He said this situation would clearly be more restrictive than what was envisioned as an alternative.

Councilor Peter Smith asked whether in the mean time, if more confusion would be created by the new appearance in the Ordinance of the underlined sentence in Item #10, prior to future resolution of this matter. He said he didn't want this sentence to act in some way to confuse the waters, and he provided additional details on this.

Mr. Eyerman said it would be good to have agreement on what the Council's intention was in terms of moving forward. He provided details on why the Council probably shouldn't adopt the amendment to Item #10 until related changes were made to the Table of Dimensional Requirements. He said the Council needed to think carefully about how to do this.

Chair Sandberg discussed the procedure that should be followed, so that the things that still needed work would be put aside for the time being, and the Board could then send the Council back everything that hadn't been remanded, and the Council could then vote to adopt those changes. He noted the Board would then have to make sure there was consistency between these adopted provisions and other parts of the Ordinance.

He said this process would allow things to move forward, and also would allow the Planning Board to be more focused on the things that needed more work.

Councilor Peter Smith said he suspected the sentence to be added should not be added until this other matter was resolved. He said he was not quite sure what effect it would have, but said it was too closely related to everything else.

Mr. Eyerman said he agreed with this.

It was the unanimous consensus of the Council to send this Item back to the Planning Board.

## **11. Amend Section 175-109. C. Accessory Apartments and Dwelling Units**

Councilor Peter Smith said he was having trouble figuring out what this language meant, and provided details on the possible punctuation that was needed to make the language clearer.

There was detailed discussion about this, and also about what the intention of the proposed changes was.

Councilor Peter Smith said commas should be put in, and said if that created enough meaning for everyone, the rest of the wording was fine.

It was the consensus of the Council to delete the words “for the entire occupancy”, as proposed.

## **12. Amend Section 175-109 G. Hotels and Motels**

Councilor Peter Smith said the word “guest” was a very vague term as used here, and suggested it should be clarified to mean someone paying for a room. He said another issue he had with this wording was regarding the length of stay allowed. He provided details on this, and said he found it difficult to understand how the Hotel NH could be required to have a 10-day limitation, and to now create a different rule for other establishments.

Councilor Needell said the 10-day limit was established in a separate negotiation offered by the developer, and he also noted there was no ordinance in place concerning this at the time. He said he therefore didn’t think what Councilor Smith had pointed out was relevant.

He said he had wanted to know that these numbers were not arbitrary and where they came from, but said he didn’t care about the specific numbers themselves.

Mr. Campbell said that probably any number was arbitrary, noting most hotel owners would want guests to stay as long as possible. He said with the Burton application, the concern was that there could turn out to be students living there, and said the ten-day limit within a 30 day period was an attempt to address that. He said after this, the Board had tried to find a number that was a good amount of time for a length of stay, while still trying to allay fears that there could be students staying at a hotel or motel.

Chair Sandberg asked if the Planning Board had considered that any hotel or motel in the future could revert to student housing

Mr. Campbell noted that if it did, there would be a whole new process to evaluate the property.

Councilor Peter Smith said the concept was not arbitrary at all. He said this was Durham, which had a special problem everyone recognized, and said it made sense to have a rule that took account of this problem. He said this was an appropriate provision to avoid a problem the Town had a legitimate interest in seeing did not happen. He said it was important to pick a number that created the right balance for the community and the hotel owners. He also noted that the negotiation of the length of stay for the Hotel NH occurred before this wording came about.

Councilor Niman said he thought the Council was operating under the principal that unless it had good information on a recommendation to change the Ordinance, it wouldn't consider agreeing with this recommendation. He suggested keeping the wording in 175-109 .G. for the time being, but said he said he was willing to listen to further information on this.

Councilor Needell said although he too would like additional information on this, he would accept the proposal.

Councilor Peter Smith said he was in-between on this recommendation. He said he would like to accept it, but would like to see the reasoning behind the numbers.

Councilor Julian Smith said he would like to see the Council remand this, and have the Board consider changing the language so it was clear that no person could stay in any hotel in Durham than more than a certain amount of days for a certain period of time, in order to prevent people from going back and forth from hotel to hotel, and meeting the letter of the law.

It was agreed the Planning Board should come back with information requested by Councilors Peter Smith, Julian Smith, and Needell.

### **13. Amend Section 175-109 by adding a new sub-section M. Accessory Sheds**

Councilor Peter Smith said he had three problems with these provisions as proposed. He said 100 sq. ft. was too small; he questioned why the accessory shed had to be located on either the side or to the rear of a building; and he said he didn't see why electricity shouldn't be allowed. He also noted that the wording "...supplied with sewerage..." was not correct, and should be changed.

In answer to a question from Chair Sandberg as to the reason for this addition of Section 175-109 M to the Ordinance, Mr. Campbell said this had stemmed from a ZBA decision that allowed an 8 ft. x 10 ft accessory shed. He said Mr. Johnson thought that if these sheds were going to be allowed, and among other things, could intrude partially into the setbacks, they should meet at least some performance standards.

There was detailed discussion on the definition of accessory shed as compared to shed. There was then consensus reached by the Council that the recommended wording in Item #13 was all right as it was.

Councilor Julian Smith noted the fire agreement would be discussed at the Council meeting on October 17<sup>th</sup>, and asked whether it might be appropriate to have a public hearing on that topic before beginning deliberations on the agreement.

Chair Sandberg said he didn't know if it would be wise to do this, but said Councilor Smith could make a motion on this if he wished to do so.

***Councilor Julian Smith MOVED to have a public hearing on the contract between the***

***Town and the University for fire services at the October 17<sup>th</sup> Town Council meeting. The motion FAILED for lack of a SECOND.***

***Councilor Niman MOVED to continue deliberations on Section B to October 17<sup>th</sup>, 2005 . The motion was SECONDED by Councilor Julian Smith, and PASSED unanimously 6-0.***

**XI. New Business**

There was no new business to come before the Council.

**XII. Nonpublic Session (if required)**

**XIII. Adjourn (NLT 10:00 PM)**

***Councilor Peter Smith MOVED to adjourn the meeting. Councilor Carroll SECONDED the motion, and it PASSED unanimously 6-0.***

The meeting ADJOURNED at 10:15 PM.

Victoria Parmele, Minutes taker