

This set of minutes was approved at the November 21, 2005 Town Council meeting.

**DURHAM TOWN COUNCIL MINUTES
THURSDAY, OCTOBER 20, 2005
(CONTINUED MEETING OF OCTOBER 17, 2005)
TOWN HALL – COUNCIL CHAMBERS
7:00 PM**

MEMBERS PRESENT: Chair Malcolm Sandberg; Peter Smith; Neil Niman; Gerald Needell; Karl Van Asselt; Diana Carroll; Julian Smith
MEMBERS ABSENT: John Kraus; Mark Morong
OTHERS PRESENT: Planning Consultant Mark Eyerman; Planning Board Chair Richard Kelley

Chair Sandberg explained that this meeting was a continuation of the October 17th Council meeting, at which the Council had deliberated on Section B of the Zoning Ordinance. He noted that the Council had almost completed reviewing the definitions in Section B.

There was detailed discussion on the definition for Surface Parking Facility on page 4.

Councilor Julian Smith asked if the wording in the definition meant that a single level parking facility could not be located below a building. He asked what the logic was that the parking facility would have to be uncovered, and could not be located within a structure.

Mr. Eyerman said there were two types of parking in the Ordinance, one of which was when it was accessory to a particular use. He said if there was library parking located under a library, it was considered part of the use of the facility. He said the only time the two definitions on page 4 came into play was if they were the principal use.

Councilor Julian Smith said it was therefore his understanding that if one wanted to have a building on top of a surface parking facility, this would fall under the definition of Structural Parking Facility.

Mr. Eyerman said that was correct.

Chair Sandberg said his problem with the second sentence of this definition appeared to be regulatory, rather than a definition.

Councilor Julian Smith suggested the following wording “A parking lot or similar single level parking facility that provides at-grade parking, and is not covered or located within a structure.”

Chair Sandberg said these suggestions were available to the Planning Board if this item was remanded.

Councilor Peter Smith asked if there were any words defined in this section that did not appear elsewhere in the Zoning Ordinance.

Mr. Eyerman said to the best of his knowledge, there were not, and Councilor Smith asked that this be confirmed.

Chair Sandberg asked a general question concerning Section 175-53, the Table of Uses. He asked whether it was redundant to have included in this list a use that was not permitted completely X'd out in the Table rather than not listed at all.

Mr. Eyerman said although redundant, this was done intentionally to make sure it was clear those uses were prohibited. He said that personally, he was not certain this was good practice, and he provided details on this.

Chair Sandberg said the Council would revisit this issue when it got to the Table of Uses.

Councilor Peter Smith said he strongly urged that the Ordinance not take this approach. He said State statute suggested that it was not good practice, under the legal process of permissive zoning, where silence meant something was not permitted. He provided details on this, and said the only exception he would make to this was if as a result of State statute, a prohibited use had to be listed in the Zoning Ordinance.

Councilor Needell said he agreed it was a good idea to take these prohibited uses out of the Table of Uses. But he noted that one of the criteria in considering a variance was whether the request met the spirit of the Ordinance, and said silence concerning a use gave no direction on this.

Councilor Niman asked if the same kind of problem occurred in the Table of Dimensional Requirements when a minimum lot size was listed for a use that was not permitted in a particular zone.

Mr. Eyerman noted that in a zone where new residential development was not now allowed, existing residential uses with larger lots could still be subdivided. He said in that case, the question would be how big the homestead lot would have to be, so the minimum lot size would apply.

Councilor Julian Smith asked if it was necessary to repeat the name of each district so frequently in the sections on each of the districts, and there was discussion on this.

Mr. Eyerman said an earlier version of the Ordinance didn't have this. He said this change reflected concern about how things would be interpreted by various entities, and the Planning Board erred on the side of redundancy to make things more clear.

Mr. Eyerman described the structure of the information provided on each of the districts. He noted there was a question at Monday's Council meeting about whether all of the different districts were really needed. He said this was a fundamental question to be asked, and explained that the reason for the districts was that this was what the Master Plan proposed, in fairly great detail.

It was clarified that there was no written description in the Ordinance of the land area in a district, and the Ordinance simply referred to the Zoning Map.

Councilor Van Asselt noted the arbitrary lines where district boundaries had been drawn, and asked if these were based on the Master Plan. He said there were four districts drawn in from Main Street to Packers Falls Road, and said he was curious as to why the lines were drawn where they were.

Mr. Eyerman said that for the Limited Business District, there had been a fairly detailed map, but he said for the OR, MUDOR and ORLI districts, the direction from the Master Plan was less specific. He said the Planning Board and the Zoning Rewrite Committee spent many hours trying to determine where the appropriate boundaries were for these districts, given the direction in the Master Plan, land ownership, and what seemed to make sense.

Councilor Van Asselt said the reason he asked the question was because of a substantive issue. He said that the permitted uses and standards for each district were significantly different, and provided examples concerning this.

Chair Sandberg described the process the Council was going through, and said if it was important for a Councilor to understand why a line was drawn the way it was in order to vote on the Ordinance, this was a fair question.

Councilor Van Asselt said his concern was not so much where the line was drawn, but whether enough space was being allowed in the community as a result of how these district lines were drawn, to have something like multi-unit dwellings.

Mr. Eyerman said the Planning Board struggled greatly with this, and he noted that the Master Plan said the community should do two different things with essentially the same area of the community. He said the sections on economics talked about fostering growth of nonresidential taxable properties and businesses, and also talked about multi-family housing. He said the decision as to where to draw the line to divide a limited amount of land area on the west side of campus was difficult, and said he said he thought that what had been proposed in the Ordinance was an attempt to balance these two things.

Councilor Niman said given that, he didn't understand why multi-unit elderly housing was a Conditional Use in the ORLI district.

Mr. Eyerman said the Master Plan talked about elderly housing being profitable for the community, and provided details on this.

Councilor Niman noted he could say this about one and two bedroom apartments as well. Chair Sandberg said if there were specific objections to this section and it was remanded to the Planning Board, the Council ought to do this with some guidance to the Planning Board. He asked Councilors to be specific about what they liked and did not like about the section, and then a consensus could be developed as to whether the group agreed.

Chair Sandberg noted that Arthur Grant, a member of the Planning Board, was present and wished to speak on this issue, as its representative.

Mr. Grant said that one of the Board's aims, given that there so such a small amount of land for the ORLI district, was to preserve that, and to not put in permitted uses that would compete for the value of that land. He said it seemed multi-unit development would be the prime use of that land, and then there would be nothing for industry or research uses.

Councilor Van Asselt said he had a problem with requiring that 50% of the limited amount of land in ORLI had to remain as open space, He said it was hard to understand how the Town would meet the objective of getting more office, research, and light industry, given that. He noted he also had a problem with this 50% open space requirement for the Durham Business Park, etc., and said this requirement seemed contrary to what the Master Plan called for, in these districts.

Chair Sandberg noted that it wasn't known how much acreage was in the ORLI district, so 50% of what wasn't clear.

Councilor Van Asselt said it was important to know this, noting it was hard to be able to determine how good the various standards were when it wasn't known how much land was actually available.

Councilor Peter Smith said the Zoning Map should be checked to make sure it was absolutely accurate. He spoke about the extent of University land on the map, and said he wondered to what extent the Planning Board had considered this as it had determined the various district locations and boundaries.

Mr. Eyerman said the reason UNH ownership was shown on the Zoning map was to enable people to make judgments with reasonable ease on how much of a district was owned by the University. He said the way the Ordinance was written concerning UNH, it was not covered by the Zoning Ordinance for University uses, but if it leased its land for non-University use, that other use was generally covered by the Ordinance.

He noted there had been discussion of the idea of private developers developing apartments on University land, which presumably would be occupied by students, although there was no requirement concerning this. He said a question was whether that would be a University use that was exempt from the Ordinance.

Councilor Peter Smith said he understood the usefulness of saying this was a stakeholder for regulatory exercise at some future point. But he asked, realizing the reality of the situation, if the Planning Board had said that the small amount of land for the MUDOR district was as much as the Town wanted for the district.

Mr. Eyerman said he thought the Planning Board felt that within the MUDOR district, the University was already moving forward with various kinds of multi-unit housing, so the need for this identified in the Master Plan could be met in part by the University on its own land.

Councilor Needell said the University master plan called for a substantial amount of MUDOR type development in this area. But he said Councilor Niman's and Van Asselt's real point was that if the intent of the Master Plan was that Town land be used for MUDOR type development,

it was not being provided for here. He said a reasonable request was to increase the amount of Town-owned land in the district. He noted he had asked the question at a Planning Board public hearing if MUDOR was a euphemism for student housing, and was told the answer was yes. Chair Sandberg said if the University could buy the property in the center of the MUDOR district that was in private hands, and then turn it into student housing, this would be land that would go off the Town's tax roll. But he said by allowing private owners to use their land to perhaps build private facilities, they could stay on the tax rolls, and still meet the needs of the University.

Mr. Eyerman said the description of the Planning Board's perception regarding MUDOR was essentially correct, but said he thought the Board's concern was that because of market forces, multifamily housing would be occupied essentially by students.

Councilor Peter Smith requested that on Page 4, the column starting with RA be reversed with the column starting with Residence A.

Councilor Niman asked for clarification on the wording of paragraph 8 on Page 8 concerning the Central Business District, Maximum Height of Mixed-Use Buildings.

Mr. Eyerman said if mixed use was done in this district, the building height could be increased, and he provided details on this. He said the intention of this was that there could be non-elderly residential uses, but only on the upper floors of a mixed-use building. He said the provision also allowed a height increase on the north side of Main Street to accommodate two floors of nonresidential use, and up to two floors of residential use above it.

Councilor Needell noted page 45 of the Table of Uses concerning this.

Councilor Julian Smith suggested the following wording on page 8, paragraph 8: "...shall be as follows: if the building..."

Councilor Julian Smith said the wording on Storage and Service Areas on page 4, paragraph 6, was unclear noting it was something that also occurred with all the other paragraphs in the Ordinance on storage and service areas. He suggested the word "other" should be taken out of the phrase "dumpster and other storage areas".

Councilor Peter Smith asked if page 45 contained the only language in the Ordinance that established the fact that the first floor would be commercial or office use, and the upper floors would be residential. He said if it was, this needed to be cleaned up.

Mr. Eyerman said he believed it was the only place.

Councilor Niman noted that the description of the Church Hill district in the purpose statement referred to adaptive re-use of buildings, including the first floor use for nonresidential use, while the upper floors were residential, so why not mention it for the Central Business District as well.

Councilor Peter Smith provided additional details about why the wording on this needed to be improved.

Mr. Eyerman noted the two definitions on page 3 regarding mixed use. There was additional discussion on this.

Councilor Niman said if this was not clear, and an applicant who appealed to the ZBA, he was not sure that the ZBA would clearly understand the spirit and intent of the Ordinance regarding this.

Chair Sandberg said perhaps there was room on page 5-7, under Development Standards to say that retail and office shall be permitted.

Mr. Eyerman said he could see adding something in the purpose statement. He said Councilor Smith's idea might result in inconsistency, and therefore confusion.

Councilor Needell agreed it would be all right to put a phrase in the purpose statement, to avoid putting too much in the Table of Uses. He noted that everything in the Table was defined in the Ordinance.

Councilor Peter Smith said his objection was that the particular expression was clumsy, but said he agreed, in general, with Mr. Eyerman's comment about the importance of consistency.

Chair Kelley noted the comment about language in the Ordinance that would be awkward for the ZBA and others to work with. But he said the Ordinance as a whole brought Durham more into conformance with other communities, and was an improvement for professionals who would be working with it. He described the way the information for the various districts was laid out, and provided a process.

Councilor Van Asselt asked if the residential use allowed as per page 8, paragraph 8 on maximum height of mixed-use buildings in the Central Business District was limited to non-elderly.

Mr. Eyerman said it could be. He said the Table of Uses said there could be a multi-unit elderly project that had no nonresidential use in it in the CBD, but if non-elderly housing was built, it had to be part of a mixed-use building. He said paragraph 8 would allow either elderly or non-elderly to go higher, if it was mixed use.

Councilor Peter Smith said the language on page 8, paragraph 8, "except as follows," was too vague, and Mr. Eyerman agreed.

Chair Sandberg noted that Councilor Julian Smith had suggested an approach that might or might not change the intent of the Planning Board.

Councilor Carroll suggested that to make the Table of Uses more user friendly, page 32, under "Category of Uses", it could say "See definition of uses, pages _ to __," so someone could look at the definitions to understand the Table better. She also said that under the individual Zone columns, page numbers could be put there in order to link the Table with other pages in the document.

Councilor Peter Smith noted that on Page 9, on the third line, the word “provisions” was not the right word to use.

Chair Sandberg suggested that on page 9 , paragraph 3, the wording should say the “more restrictive regulation”, noting there might not be the most restrictive regulation in the Ordinance. There was discussion about this.

Councilor Van Asselt noted Page 10, the last sentence under Purpose of the Professional District, and asked if this said there could not be parking at the front of the building. He was informed that it did and he then asked if this was realistic.

Mr. Eyerman said this area was commonly called “fraternity row”. He said the purpose of this was that the front lawn areas should be maintained, so there should be no parking lots in front, and parking should be located at the back of the building.

There was discussion about how far up Madbury Road the Professional Office District went, and about this area in general.

Councilor Van Asselt received clarification that the no front parking rule would apply to new development, but existing development was grandfathered.

Councilor Peter Smith asked what else besides the last sentence on page 10 established that there was no parking allowed in front of buildings for this district.

Mr. Eyerman noted that paragraph F. 1. on page 11 addressed this. He said there was also comparable language for the Courthouse District, Coe’s Corner and the Church Hill District, although the explicit requirements for each was differed. He said the reason the requirements varied for each district was to capture the character that the Master Plan set out for each of them.

Councilor Needell noted that Chapter 12 of the Ordinance on parking, etc., currently referenced the OR District, and would have to be made consistent with these proposed changes concerning parking. He noted the Planning Board hadn’t worked on this chapter of the Ordinance yet.

Councilor Niman asked what was meant by “upgraded multi-family housing” in the bottom paragraph on page 10, and also asked what the Planning Board imagined would make this happen.

Mr. Eyerman said the Ordinance would allow those buildings to be turned into multi-family housing, noting the fraternities and sororities were more like boarding facilities, and weren’t individual living units.

Chair Sandberg asked what the consequence would be if the word “upgraded” was removed.

Mr. Eyerman said there would be no consequence because this was in the purpose statement.

Councilor Peter Smith said he was not too sure about that. He said he took this to be a statement that a housing arrangement could be put together on Madbury Road that would be superior to what was there now.

There was detailed discussion by the Council about the wording “upgraded multi-family housing”.

Mr. Eyerman said the Master Plan and the Ordinance said that the vision was that fraternity/sorority uses would disappear from this area, and would be replaced by buildings converted either to multi-family housing apartments or office professional uses.

Councilor Needell noted that just as was the case for the MUDOR district, if multi-family apartment buildings were built in the Professional Office district, they would be occupied mostly by students. He said they wouldn’t be boarding houses, but could be rented by groups of students.

Councilor Van Asselt said that was one option, but said another was that he would be delighted to buy some of them and make them into Section 8 public housing.

Mr. Eyerman said with these buildings, the shell could be converted into apartment buildings, and the occupancy could be whatever people wanted such as affordable housing, elderly housing, student housing or faculty housing.

Councilor Carroll noted the Council had had a similar conversation the other evening, and said the question was how to revamp buildings and create something that could be moderately priced without having them then go to students.

Chair Sandberg asked if the Planning Board had discussed whether, if the University put more housing on campus, and perhaps required more people to live on campus, that there would be perhaps be some vacancies in the housing in the Professional Office district.

Mr. Eyerman said the operating assumption was that absent an outside force to constrain occupancy, the market would be students. He said he thought the Planning Board felt that provision of moderately priced housing would not occur simply through zoning, unless the Town, University, and financing agencies made this possible.

Councilor Julian Smith left the meeting at 8:36 PM.

Councilor Peter Smith when he read the word “upgrade”, he saw it as a value judgment presumably made by the Planning Board. He spoke in detail about his perspective on this, and said he questioned if enough thought had been given to whether the Town was prepared to say that Madbury Road would remain student housing, and if it was, if there was a basis for this.

Councilor Niman said he would like to think in other terms. He said he thought that if the availability of land were extended for apartment buildings that had amenities, some students would say they wanted to live there. He also said if the supply of housing was therefore increased, prices would go down.

He said it was important to change the existing economics of apartment housing. He noted the 3 unrelated provision was considered a joke because of the way many students actually lived. He said if this rule and the safety codes were more vigorously enforced, there would be a way to ensure that owners of buildings complied, and he said this would then fundamentally change the economics of student housing. He said he thought many of the landlords would decide to get out of the business.

Councilor Niman said he thought this idea of providing additional land in part for student housing would begin to open up the opportunity to convert existing student rentals to family rentals. He said the most economic use of the buildings might become rental to families, and said if there was a comprehensive set of policies concerning this, they could alter the situation in Town.

Chair Sandberg asked Councilor Niman if he thought the paragraph on 10 was a good idea, and if not, what he would like the Council to direct the Planning Board to do with it.

Councilor Niman said he would like the Planning Board to re-do some of the zones, so there could be more multi-family housing. He said a comprehensive vision was needed in order to move in that direction.

Councilor Peter Smith said the difficulty was what word to put into the code that could be put in, and which would sufficiently increase the chances of that kind of development taking place. He said he thought the assumption in the Ordinance was that this was considered an upgrade. But he said he needed more assurance of what this Ordinance caused.

Mr. Eyerman noted that multi-family residential development was allowed in the Professional Office Development (POD) as a Conditional Use. He said this was done to hopefully provide the kinds of safeguards Councilor Smith was talking about. He said he thought the Master Plan laid out a vision that said it was in the best interest of the community to get fraternities and sororities out of this area; that the character of Madbury Road was an important element of the community, and therefore the community should provide for the re-use of buildings in order to achieve that. He noted that under the Ordinance, a developer couldn't tear down the building and build a multi-unit building.

Regarding Councilor Niman's comment, Mr. Eyerman said the Planning Board had considered what was next in terms of review of the Master Plan. He said he had suggested that an important first step was to go through a systematic evaluation of what the current Master Plan said, and what the community had done to implement this. He said that virtually everything Councilor Niman had said was in there.

Mr. Eyerman also said there were recommendations in the Master Plan concerning other approaches besides zoning to get at this issue. He cautioned the Council to not let the Zoning Ordinance get ahead of the other pieces. He said the Durham Master Plan was one of the best he had seen, and laid out specific proposals.

Councilor Needell said he didn't see making changes to the proposed Ordinance as his goal, and said when he looked at the document, he was looking for consistency with the Master Plan. He said he didn't think this was the time for the Council to be rewriting the Ordinance.

Chair Sandberg said Councilors' observations were all valid, but said at present, the Council should be focusing on what was in the proposed Ordinance that was acceptable. He said Councilors wanting to initiate other changes should schedule this for future Council meetings.

Councilor Peter Smith asked Mr. Eyerman to convince him that if the Council adopted the purpose statement on Page 10, uses other than student housing on Madbury Road would come about. He said at present, he didn't see the likelihood of that upgrade. He said he didn't agree with the premise that if a building went from student housing with the label of fraternity to student housing with the label of apartment, this was an upgrade. He said he would almost rather not change the wording at all until the Council figured out how to make it an upgrade. He asked if the Conditional Use approach stood a chance of resulting in a substantial upgrade of a building.

Chair Sandberg asked if the Council had a specific recommendation regarding paragraph A on page 10.

Councilor Needell said he didn't see how it could be claimed that the CU approach would do anything substantial to change things, and he discussed this in some detail.

Councilor Van Asselt said the discussion seemed to revolve back to the housing issue, and he said the Town might have to get into the housing business if it really wanted to resolve this issue. He also said that until the University was willing to work with the Town on housing, the Zoning Ordinance didn't matter. He said Durham had to find a way to address this issue, or it would continue to lose its residential character.

Mr. Eyerman noted that other communities containing large institutions had similar issues to deal with, and he asked why there wasn't a standing body in Durham to deal with the housing issue.

Chair Sandberg declared a 10-minute recess at 9:00 PM.

The meeting resumed at 9:05 PM.

Councilor Carroll asked for a clearer understanding of Councilor Peter Smith's comment regarding "upgraded".

Councilor Smith said he thought the word posed more of a question than an answer, and said he was not convinced to accept or reject the provision at present. He provided details on his thinking concerning this.

Councilor Needell noted, in terms of what upgrade meant, that there would have to be a significant change to the interior of a fraternity house building to suit a family.

There was detailed discussion concerning the development standards on page 15 for Drive-Through Services. Mr. Eyerman said there had been redundancies and inconsistencies in the treatment of drive-through services in Town. He said the Council should advise the Planning Board on this, and should also provide policy guidance concerning whether drive-throughs should be allowed in Town.

Councilors agreed the language needed to be cleaned up concerning this throughout the Ordinance.

Councilor Needell asked if drive-throughs were forever banned in Durham. There was discussion about this.

Chair Sandberg said this question was not ready to be answered yet, and said the Council needed guidance from the Planning Board before getting into a policy discussion on it.

Chair Kelley said he would need to check with the Planning Board on this.

Councilor Van Asselt noted that on the Table of Uses, manufacturing housing was prohibited in all districts except the Rural District, and asked why this was the case.

Chair Sandberg read the definition of manufactured housing in the Ordinance.

Mr. Eyerman said this language existed in the residential portion of the Ordinance that had been adopted the previous year, so there was no change in community policy. He said that historically, the Town had allowed singlewide trailers only in the rural area, and said this had been continued.

Councilor Van Asselt asked if the definition of manufactured housing did not include modular housing, and Mr. Eyerman said it was correct that it did not include this.

It was noted that Councilor Van Asselt had to leave, so there would no longer be a quorum for the Council meeting.

There was discussion about the importance of having Mr. Eyerman present for the Council's deliberations on the Ordinance.

Councilor Needell asked if it would be possible to schedule a joint session of both the Council and the Planning Board so they could have a dialogue about some of these issues.

Chair Sandberg said there could always be joint meetings. But he said the Planning Board had already had many meetings and hearings on the Ordinance, and Mr. Eyerman was present to help the Council understand the various issues. He said his sense was that the Council should not be involved in re-developing the zones right now.

Councilor Needell said he agreed with this, but said in making his suggestion, he was trying to streamline the process. He said before getting to the brink of accepting or rejecting the Ordinance, he was looking for additional clarity on issues, and thought perhaps a joint meeting would help provide this. He said he didn't expect there would be time to do a major rewrite.

Chair Sandberg said he hoped Chair Kelley and Mr. Eyerman were getting a sense from the discussion of where the Council was.

Councilor Peter Smith said for items like the meaning of “upgrade” on page 10, the Planning Board could introduce some wisdom on this. He said the Council should wait to see how many items like this it collected.

Mr. Eyerman described possible kinds of recommendations the Council could make to the Board:

- Specific recommendations, and clear direction, on parts of the Ordinance it didn’t like;
- indication of aspects of the Ordinance that were unclear (he noted that some of the issues the Council was struggling with had already been grappled by the Board);
- issues like conversion of fraternities, MUDOR, etc., which were critical policy issues, should be put aside for the time being, and at the end of the process, they could all go back to them and consider what should be done with them.

Chair Sandberg said for the controversial issues, perhaps they could be brought back at a later date. He said if the Ordinance was accepted, they all could see how it worked, and if it needed to be adjusted, this could be done later.

Mr. Eyerman said he would do what he could to be available for deliberation on the Ordinance, and said he could be there on October 24th.

Councilor Van Asselt asked if there was a time limit during which the Ordinance had to be adopted.

Chair Sandberg said it was important not to stall, and to make every effort to get through the deliberation process. He said he would like to complete the process, if possible, before the Budget season.

Councilor Smith said there was no explicit answer to this question, but said there had to be a good faith effort to complete the process.

Mr. Kelley thanked Councilors for their comments and insights on the Ordinance. Regarding Councilor Needell’s suggestion, he said it would be good for the two Boards to sit down together regarding those areas where the Council was seeking what the Board’s intent was. He said there had been different opinions on the Board concerning these issues, and said that might shape the Council’s opinion as well to hear those.

Councilor Van Asselt MOVED to adjourn the meeting. The motion was SECONDED by Councilor Niman, and PASSED unanimously 6-0.

The meeting ADJOURNED at 9:48 PM.

Victoria Parmele, Minutes taker