

This set of minutes was approved at the March 20, 2006 Town Council meeting.

DURHAM TOWN COUNCIL
Monday, February 20, 2006
DURHAM TOWN HALL -- COUNCIL CHAMBERS
7:00 PM

MEMBERS PRESENT: Chair Malcolm Sandberg; Councilor Niman; Councilor Peter Smith; Councilor Kraus (arrived at 7:05 PM); Councilor Morong; Councilor Needell; Councilor Van Asselt Councilor Julian Smith; Councilor Carroll

MEMBERS ABSENT: None

OTHERS PRESENT: Town Administrator Todd Selig; Jim Campbell, Planner; Michael Lynch, Director of Public Works

I. Call to Order

II. Approval of Agenda

Councilor Needell MOVED to approve the Agenda as submitted. The motion was SECONDED by Councilor Carroll, and PASSED unanimously 8-0.

III. Special Announcements

Chair Sandberg said the Council appreciated the hard work of the Public Works Department crew and Red Cross volunteers over the weekend during the wind storm, and also thanked PSNH for its ongoing work in helping the Town recover from the power outages.

IV. Approval of Minutes

January 23, 2006

Councilor Julian Smith MOVED to approve the January 23, 2006 Minutes as submitted. Councilor Carroll SECONDED the motion.

Page 7, 3rd paragraph, last sentence, insert "up to" before "25%".

Page 14, 2nd full paragraph, should read "He said the Merrick conservation easement..."

Page 18, 1st paragraph after motion at top of the page, remove the words "that the Stephens design would take so long"

Page 19, 5th paragraph, insert a comma after the words "water users" in the second sentence and add the words "given the choices".

Page 21, 3rd paragraph from bottom, should read "didn't think this section met the standard of".

Councilor Julian Smith MOVED to approve the amendments to the January 23, 2006 Minutes. Councilor Carroll SECONDED the motion, and it PASSED unanimously 9-0.

The January 23, 2006 Minutes as amended PASSED unanimously 9-0. Report of Administrator

Administrator Selig provided the following updates:

- “NH Chronicle” on Channel 9, will have a feature on February 23rd on sledding at Wagon Hill Farm.
- The Candidates Forum for Town Council and Library Board of Trustees candidates will be held on February 27th. Administrator Selig said the forum would be sponsored by the Seacoast region chapter of the League of Women Voters.
- The annual Town Reports are in the mail, so residents should be receiving them shortly. They will also be available on the Town web site soon.
- On February 28th the Jackson’s Landing Study group will be hosting a charette in the Council chambers, as part of developing a master plan for the site. Administrator Selig said residents interested in this topic should plan on attending.
- Administrator Selig spoke in detail about the harsh weather and resultant power outages the past weekend. He noted that weather advisories on Friday had indicated there would be winds that reached 70 mph, and said this in fact had occurred. He said there were portions of Town that lost power, and he provided details on this. He said by Saturday morning, the Durham dispatch center had received approximately 300 calls from residents requesting assistance.

He said he had contacted the Durham Chapter of the Red Cross early on Friday evening for possible shelter alternatives for residents. He said at around 8:00 AM on Saturday he made the decision that the multiple purpose room of the Oyster River High School should be available for residents. He said it was opened by 10 am, and stayed open until 11 am on Sunday. He said lunch and dinner were provided, and one person spent the night at the shelter.

Administrator Selig expressed gratitude to the Durham Police Department and Fire Department, and also thanked the Public Works Department for their efforts in dealing with a water main break and maintaining roads after a brief snow squall. He also thanked PSNH, noting the company was very responsive to the Town’s calls, and also thanked the Oyster River High School, the Red Cross, Town residents, and the University for assisting citizens who had to leave their homes during the storm.

He said there was a significant amount of debris as a result of the storm, and said the Public Works Department would be picking much of it up the following week. He also said the transfer station would be open every day that week so residents could bring in wood-type debris, and said a permit would not be required for this.

Administrator Selig said the Town had tried to use all the means available to communicate with the public during the storm, and said some worked better than others. He noted that DCAT had broadcast the availability of services for residents from the Red Cross, and also said a broadcast was sent out on the Town’s list-serve, but unfortunately there were power outages at the Town Office, so this was not sent out until the following Monday. He said a number of areas for improvement of emergency services had been identified, but said that generally, things had gone quite well.

Chair Sandberg asked if there had been a debriefing as to how the response had been, regionally.

Administrator Selig said the State's Office of Emergency Management was the most responsive he had ever seen it, explaining that the agency had called him at home, and he had called it several times during the weekend. He said they got the word out on Channel 9 that the shelter was open, and also made the regional Red Cross aware that Red Cross services were available in Durham.

Chair Sandberg again thanked all those who had been involved in this effort.

V. Reports and Comments of Councilors

Councilor Carroll provided details on the Seacoast region chapter of League of Women Voters, which would be sponsoring the upcoming Candidate's Forum. She said the organization had been inactive during the last decade, but had been a very useful organization before this time. She said it did not sponsor any particular candidate or party, but did get involved in issues, both locally and nationally. She said because the organization was starting up again, there would be an organizational meeting of the League at the police station on March 1st, and she encouraged residents of Durham and the region to attend it, to find out more about the organization.

Councilor Needell said the applicant for the next phase of the Spruce Woods development had asked that the discussion on the application be deferred for the time being, so this would not be on the Planning Board's Wednesday agenda. He also said the public hearing and possible deliberation on Scorpion's was scheduled for Wednesday's meeting. He noted that the Board would also be discussing possible implementation strategies for the Master Plan at its March 22nd quarterly planning meeting.

Councilor Needell said he had been a Red Cross volunteer the past weekend, and had observed the exemplary, caring work of Town staff during the storm. He said he had been proud to be a part of this effort. He also noted the extraordinary efforts of Durham Marketplace, which had generously donated food and other requested items, and had put up a big sign about Red Cross facilities available for residents.

Councilor Van Asselt made note of the quick response by the University when a tree on its land fell during the storm in the area of Davis Avenue and Fairchild Avenue. He also noted the issue of the leaking water mains in the vicinity of Main Street and Madbury Road, and asked if this was scheduled for repair.

Administrator Selig said it was scheduled for 2006, as part of a long term plan for such repairs.

Public Works Director Mike Lynch said the engineering for the repairs at this location were scheduled for 2006, and said the actual construction would occur in 2007.

Councilor Van Asselt noted previous Council discussion on the Wiswall Dam, and asked Administrator Selig to put together a summary on the various water supply issues facing the Town. He said these issues and how they fit together were complicated, and said it would help the Council, especially with some new members coming on board, to get a clear picture of who owned what, how much water there was, how much water the Town needed, where the water users fit into this, and what the Town was going to do about these issues. Administrator Selig said he would see that such a paper was developed.

Councilor Morong said it would be good to know what the various options were, with associated ballpark price tags.

VI. Public Comments (began at 7:24 PM)

Bill Hall, Durham, noted previous discussion on the Wiswall dam water supply and the Durham water users. He said it had been decided by Town staff that the Town water users would use water from the Lee well, so therefore the water from the Wiswall dam was just a backup, and was also a backup for the University. He said the only way Town users could use that water was to pay the University to process it at its water treatment plant. He said that therefore, the Town water users shouldn't have to pay more than one third the cost of the water, under any circumstances. Mr. Hall also said the Town shouldn't have paid more than one third the cost of the transfer pipe to the Lamprey River.

He noted that Administrator Selig had said the reason the University didn't participate in maintenance of the Foss Farm water tank was because it didn't own it, but he said the University didn't own the sewer treatment plant either, and it paid 65% of that.

He said the Town could operate well with just the Lee well and the Beech Hill water tank, and said the Town therefore shouldn't be charged for more than 35% of the Foss Farm tank. He said the transfer line was an asset to Durham, and the Town should be paying for a third of it. He said the Wiswall Dam was also an asset to Durham, and the Town should be paying for a third of it as well. Mr. Hall questioned Administrator Selig's reasoning on this, and said his only option was to point these things out to the Council.

Mr. Hall said the water line where the break was should have been replaced nearly 30 years ago. He said the cost for repairs to water line breaks between Woodman Ave. and Madbury Road could have paid for the replacement of the entire pipe system there. He said this was supposed to have been done immediately after Main Street was done, but said he was concerned that it would continue to be put off. He also noted that the connection between Beard's Landing and Route 108 hadn't been done, and he provided details on this.

Mr. Hall said the Council was told during the slide show on the Wiswall Dam that it was unfortunate that the Town had the 401 restriction because that gave the Town the rights to the water in the Lamprey River. He said this was incorrect, and provided details on this, and on the 401 restriction.

Mr. Hall said during the Budget period, Administrator Selig had said the Town was using best practices. Mr. Hall said that wasn't true, and said the only person who could determine this was a licensed water operator at the University. He provided details on this.

VII. Presentation Item

There were no presentation items.

VIII. Committee Appointment

Shall the Town Council move Denny Byrne as an alternate member on the Parks and Recreation Committee to fill the regular member vacancy of Melanie Rose?

Administrator Selig provided details on this proposed committee appointment.

Councilor Van Asselt MOVED to move Denny Byrne from his position as an alternate member on the Parks and Recreation Committee to fill the unexpired term of regular member Melanie Rose, said term to expire on April 30, 2007. The motion was SECONDED by Councilor Kraus, and PASSED unanimously 9-0.

Councilor Needell noted correspondence from Parks and Recreation Committee Chair John Parry endorsing this appointment, and also pointed out that the letter spoke about the idea of an ORYA board member becoming a member of the Parks and Recreation Committee. Councilor Needell said he believed this would require an amendment to the Charter, and asked if the Council should ask the Committee to make a formal request for this. There was discussion about this.

IX. Unanimous Consent Agenda

Councilor Kraus asked that Item B be removed from the Unanimous Consent Agenda. Councilor Peter Smith asked that Item C be removed.

- A. **RESOLUTION #2006-02** authorizing the acceptance of private donations and unanticipated revenues received by the Town of Durham between January 1, 2005 and December 31, 2005

Chair Sandberg read through the list of private donations and unanticipated revenues.

Councilor Kraus MOVED to adopt RESOLUTION #2006-02 authorizing the acceptance of private donations and unanticipated revenues received by the Town of Durham between January 1, 2005 and December 31, 2005. The motion was SECONDED by Councilor Van Asselt, and PASSED unanimously 9-0.

Chair Sandberg thanked members of the community for their contributions to the Town.

- B. Shall the Town Council award the bid for the 2006 road program?

Councilor Kraus MOVED that the Town Council award the bid for the 2006 road program. Councilor Van Asselt SECONDED the motion.

Councilor Kraus said he thought the Town's road surfacing program was behind, and provided details on this. He said citizens should think again as they watched \$150,000 go into work on a perfectly fine bridge, and should consider what that money could do to improve the Town's roads.

Asked by Councilor Van Asselt whether a particular firm had received a packet, Public Works Director Mike Lynch said it didn't because it typically didn't have the manpower or equipment to do this scope of work. But he said because this was a public bidding process, this company was free to bid on the project.

Councilor Van Asselt asked if in addition to advertising concerning the road work, bid packets went out to companies on a vendors list.

Mr. Lynch said yes.

Councilor Carroll asked if the Town was required to give a contract to the firm with the lowest bid, and Mr. Lynch said it was not. Councilor Carroll also asked if the Town could award a contract to the firm that made the highest bid, if it was the best firm.

Administrator Selig said the Town determined if a company could do the work, and had the equipment necessary. He said if it was felt the low bidder didn't meet these qualifications, the Town had no obligation to go with that firm.

The motion PASSED unanimously 9-0.

- C. Shall the Town Council approve the Town Administrator's annual evaluation for FY 2005?

Councilor Kraus MOVED to approve the Town Administrator's annual evaluation for FY 2005. Councilor Van Asselt SECONDED the motion.

Councilor Peter Smith asked if Administrator Selig would like the annual evaluation to remain a confidential document.

Administrator Selig said he would like it to be made a public document.

The motion PASSED 8-0-1, with Councilor Niman abstaining because he was not at the meeting where the annual evaluation was discussed.

Administrator Selig said the letter developed by Chair Sandberg pulled together the evaluation documents submitted by individual Councilors. He said it would be inappropriate to disclose these, so would keep them confidential, but said he would be happy to provide copies of the summary document for interested residents.

X. Unfinished Business

- A. **PUBLIC HEARING ON ORDINANCE #2005-06** relative to the additional amendments made by the Durham Planning Board to Chapter 175 "Zoning" of the Durham Town Charter: Ordinance #2005-06, Section (B) - to Implement the Master Plan Recommendations Dealing with the Non-Residential Zones.

Councilor Needell MOVED to open the PUBLIC HEARING ON ORDINANCE #2005-06 relative to the additional amendments made by the Durham Planning Board to Chapter 175 "Zoning" of the Durham Town Charter: Ordinance #2005-06, Section (B) - to Implement the Master Plan Recommendations Dealing with the Non-Residential Zones. The motion was SECONDED by Councilor Kraus.

Mr. Campbell provided an overview of the process the Planning Board and Town Council had gone through concerning Section B over the past few months. He said the Planning Board had completed its revisions of Section B, in response to the fact that this section had been remanded back to the Board by the Council. He said there had been a public hearing on Section B at the February 1st Board meeting.

There were no comments on Section B by members of the public.

Councilor Kraus MOVED to close the public hearing. The motion was SECONDED by Councilor Julian Smith, and PASSED unanimously 9-0.

After some discussion, it was agreed that the Council would deliberate on Section B before moving on to the other public hearings.

Councilor Needell MOVED to adopt #2005-06 relative to the additional amendments made by the Durham Planning to Chapter 175 "Zoning" of the Durham Town Charter: Ordinance #2005-06, Section (B) - to Implement the Master Plan Recommendations Dealing with the Non-Residential Zones. The motion was SECONDED by Councilor Kraus. The motion PASSED unanimously 9-0.

B. Ordinance #2005-06, Section (C) - Shoreland Protection Overlay District.

Councilor Kraus MOVED to open the public hearing on Ordinance #2005-06, Section (C) - Shoreland Protection Overlay District. The motion was SECONDED by Councilor Van Asselt, and PASSED unanimously 9-0.

Rob Keefe, 59 Piscataqua Road, said he wished to speak on behalf of his parents, who lived at this address, and were in the process of developing a long term forest management plan for their property involving low impact, sustainable timber harvesting, and which included commercial thinning with draft horses infrequently over a period of several decades. He noted that the proposed Wetland Overlay District recommendations contained a clause that in no case shall any harvesting or clearing, except for the removal of dead or diseased trees, occur within the wetland or within twenty-five feet of the reference line of the wetland. He also noted that the proposed Shoreland Overlay District recommendations said no timber harvesting or clearing could occur within fifty feet of the tidal reference line.

Mr. Keefe said he had a background in forestry, and had been working on the management plan. He said the state of New Hampshire had wise forestry laws concerning timber harvesting in these kinds of sensitive areas, and provided details on this. He noted that both overlay provisions cited two documents developed by the Department of Resources and Economic Development that

should guide timber harvesting. He said neither recommended no harvest zones in sensitive areas, and instead wisely recommended light thinning of trees in these areas.

Mr. Keefe asked that he and his parents be allowed to do a small amount of timber harvesting in these zones, even if it meant this would be over a long period of time. He said Johnson's Creek ran through the center of his parents' property, but there was a 50 ft. area of valuable oak trees nearby. He said for residents like this owning large areas with tidal wetlands, being able to harvest even a small amount of timber over a 20 year period could produce some revenue to offset property taxes.

It was clarified that Mr. Keefe was referring to Section 175-75.1 C of the Shoreland Overlay District Ordinance, and to Section 175-65 D of the Wetlands Overlay District Ordinance.

Councilor Peter Smith noted Mr. Keefe's comment on Johnson's Creek.

Mr. Keefe explained that his parents' land was bisected by the creek, and said the regulations pertained to land on either side of the creek.

Councilor Morong asked Mr. Keefe, as a forester, what the benefits were from the tree thinning process, other than production of revenue, and also asked what the detriments were.

Mr. Keefe said there were a large number of invasive species, such as buckthorn and Japanese barberry, which could be removed in this way, and also said managed forests were often less susceptible to disease.

Councilor Morong asked if the invasive species were generally bushes, noting this type of vegetation could be cut down to the water, because they were under a certain size.

Mr. Campbell explained that page 8 said that within the buffer zone, no trees over 6 inches in dbh could be cut, not more than 50 percent of the basal area of trees could be cut, and no more than 50 percent of the total number of saplings could be removed in any fifteen year period. He also noted that page 9 said that existing vegetation under three feet in height, including ground cover, could not be removed except to provide for a single point of access to the shoreline. He read through additional performance standards for the buffer zone.

Chair Sandberg asked if these regulations meant that the cutting of one tree was considered harvesting or clearing, and that in no case could a tree over 6 inches in diameter be cut in this district.

Mr. Campbell said yes, unless the tree was dead or diseased. He said what he thought Mr. Keefe was talking about was under the Forestry section of the Ordinance, on page 9-10. He said timber harvesting was allowed in the District, but not within 50 ft. of the reference line. He said he believed Mr. Keefe was saying that he would like to be able to remove trees within that 50 ft., for timber harvesting purposes.

Chair Sandberg asked if an aggrieved landowner could apply to the ZBA for special consideration, if there were special circumstances, and Mr. Campbell said yes.

Councilor Needell noted that the language on buffers spoke about a buffer of 150 ft., where no trees over 6 inches in diameter could be cut.

Mr. Campbell explained that under 175-72, Conditional Uses in the Shoreland Protection Overlay District, timber harvesting was a conditional use, so would have to come before the Planning Board. There was discussion that as a conditional use in this district, timber harvesting was subject to Forestry performance standards under 175-75.1.C., which said that no timber harvesting could occur within 50 ft. of the reference line.

Mr. Keefe said it was now his understanding that he could apply for a Conditional Use Permit for timber harvesting within the 150 ft buffer, and potentially could apply for a variance for special circumstances within the 50 ft buffer.

Mr. Campbell said that was correct.

Councilor Kraus received clarification that the reference line referred to in the Shoreland Protection Overlay District Ordinance was the high tide line. Chair Sandberg read the definition of reference line for this district.

Bill Hall, Smith Park Lane, noted some tree harvesting done some years back at the Doe Farm when he was a Trustee of the Trust Funds. He said it was done using best practices, but said a waiver was required from the ZBA, which shouldn't have been necessary, especially since this was a Town with an agricultural and forestry college.

Mr. Hall said he had talked to a resident living along the shoreland, who was working on managing his property. He said this person had two adjacent parcels, and had to deal with these Shoreland regulations, but also had to deal with the fact that there was an additional 150 ft. setback requirement. He provided additional details on how this limited timber harvesting opportunities, and said it was a ridiculous situation. He said people in Town who had put these restrictions in had limited knowledge of forestry, and said it was up to the Council to protect landowners. He said the Council wasn't doing a good job on this, and provided details on this.

Councilor Peter Smith asked if in Mr. Campbell's judgment, there was any inconsistency whatsoever in the Shoreland Overlay Ordinance between the bottom paragraph on page 8, and the one at top of page 10.

Mr. Campbell said no, they were talking about two separate things.

Councilor Smith asked in what respect the paragraph at the bottom of page 8 changed the existing Ordinance, if at all.

Mr. Campbell said he believed it was identical to the current language.

Councilor Needell asked Mr. Campbell to comment on why Section 175-75.1.C, on forestry performance standards, was there, with the last sentence that Mr. Keefe had raised. He noted the document had been under development for a long time, and asked if Mr. Campbell had any sense of the intent of the Planning Board and the Zoning Rewrite committee concerning this sentence.

Mr. Campbell said this had been under review for a number of years, and said the intent was to look at timber that could be harvested, and also to look at the shoreland that needed to be protected. He said that was why the last sentence went in.

There was some discussion about possible additional setback requirements for properties in the Shoreland District

Councilor Kraus MOVED to close the public hearing. The motion was SECONDED by Councilor Julian Smith, and PASSED unanimously 9-0.

It was noted that a member of the public wished to speak again.

Councilor Needell MOVED to reconsider the vote to close the public hearing. The motion was SECONDED by Councilor Kraus, and PASSED unanimously 9-0.

The original motion to close the public hearing FAILED unanimously, 0-9.

Mr. Hall said the 150 ft. setback information he had referred to had been produced recently. He also noted that diseased and dead trees eventually fell into the water, so should be cut. He said he would like to reiterate that the Ordinance said that one couldn't cut within 150 ft. of the property line.

Chair Sandberg asked Mr. Campbell about this, and Mr. Campbell said he didn't know of anything in the Ordinance that said this. There was discussion about this.

Councilor Needell questioned whether there was anything in the Shoreland Protection Overlay Ordinance that reflected on property boundaries. He said if this regulation existed, it would be in a different part of the Zoning Ordinance.

Mr. Keefe noted that in the another part of the Zoning Ordinance, there was an additional restriction that no more than 20% of the basal area could be removed within 100 ft. of a neighboring property, or a right of way.

Councilor Kraus MOVED to close the public hearing. The motion was SECONDED by Councilor Julian Smith, and PASSED unanimously 9-0.

Councilor Needell MOVED to approve Ordinance #2005-06, Section #2005-06 (C) with the additional amendments suggested by the Durham Planning Board relative to the Shoreland Protection Overlay District contained in Chapter 175 "Zoning" of the Durham Town Code. Councilor Kraus SECONDED the motion.

Councilor Van Asselt asked if someone could assure the Council that these provisions were in better condition than the Historic Overlay District Ordinance. He said he had just heard three questions, and there appeared to be some uncertainty as to what the answers were. He said he wasn't sure it all tied together.

Councilor Peter Smith said he personally had gone through the Shoreland Protection Overlay District document line by line several months ago, when the Conservation Commission was asked to review it. He said the Commission had provided dozens of comments and suggestions for changes, which were presented to Planning Board members and were considered.

Councilor Smith said he was not saying that people couldn't disagree with certain provisions, noting it was a somewhat controversial ordinance. But he said it was not remotely in the same condition as the Historic Overlay District document, in terms of coherence. He said while there were other things that could be done with it, he felt it was a responsible thing to pass it.

Councilor Kraus said that like Councilor Van Asselt, he didn't feel full comfortable. He said it often happened that citizens brought before the Council some things it might want to consider, and said it was important to pay attention to these citizens, especially since there were precious few of them. He said he had seen some uncertainty on this Ordinance, and said it never hurt to take more time to double check something.

Chair Sandberg said if there was some confusion, the Council could address this. He asked for specifics on what the confusion was about.

Councilor Van Asselt said he was not questioning the numbers. He noted that he personally didn't understand the issue, and also said he wished Mr. Campbell had provided a quicker answer as to whether there was a conflict between some of the provisions. He noted the issue was complicated, and said he felt more comfortable that Councilor Peter Smith said the Conservation Commission had deliberated on this. He also noted that the Ordinance could be amended later. He said he would support it, but said he got nervous when there were not quick answers.

Councilor Needell said he had received a quick answer from Mr. Campbell that the last sentence on page 10 was intentionally put in. He said this had been an ongoing process, and said there was certainly room for dialogue on it, but said he was not going to ask for a re-hearing of why that sentence was put in, as long as it was put in intentionally.

Mr. Campbell said the only confusion he had reflected was concerning no cutting within buffer areas outside the Shoreland Zone. He said this didn't have anything to do with the Shoreland district, and said he believed it referred to the conservation subdivision ordinance, which was passed by the Council in 2004.

Councilor Van Asselt reiterated his previous statement about the experience with the Historic District overlay, but said he now felt more comfortable about the situation, and that Mr. Keefe had been told the Ordinance could be amended.

Chair Sandberg said that was correct, and also noted that there was an appeal process. He said to be fair, it could happen during a hearing on a finite section of the Ordinance that someone would start to discuss a different section. He said the Council needed to look specifically at the motion before it, on the Shoreland Ordinance.

Councilor Morong said he appreciated the fact that Mr. Keefe had come in and brought up this issue. He said he felt bad if the Town had created extra hoops for Mr. Keefe to jump through, but said it sounded like he probably had a way to implement what was probably a well thought out plan. Councilor Morong said he would vote for the Ordinance because he wanted to protect the shoreline, and wanted to look at these plans thoroughly, on a case by case basis.

Councilor Needell said he didn't want to be mistaken for endorsing an ordinance that invited people to seek variances. He said the intent of the Ordinance was clear in what it was trying to. He said any of the Town's ordinances had the mechanism for special cases to be handled through the variance process, and said if it was deemed to be a wider spread problem, through the amendment process. He said he did not feel it was the case that the Ordinance would invite wide spread variance requests.

The motion PASSED 8-1, with Councilor Kraus voting against it.

C. Ordinance #2005-06, Section (D) - Wetland Conservation Overlay District.

Councilor Julian Smith MOVED to open the public hearing. Councilor Kraus SECONDED the motion.

Mr. Campbell said Section D had also been taken up by the Council in December, was remanded back to the Planning Board with a few changes, especially the setback for septic systems. He said the Planning Board had held its public hearing on the proposed changes.

Bill Hall, Durham, Smith Park Lane, gave an example of how frustrating it was for citizens to provide information, and then to be contradicted by Town staff or paid consultants.

After some discussion, Chair Sandberg reminded Mr. Hall of the need to be civil.

Rob Keefe, 59 Piscataqua Road, said one thing that made him uneasy was that in a situation where there was disagreement between different sections in the Ordinance, the more restrictive of the two sections would apply.

Councilor Needell said the wording "If there is a conflict among the standards, the most restrictive shall apply" applied only to the paragraph in which it was made, and the standards in the documents listed in that paragraph.

Mr. Campbell said there was also a difference between someone receiving a conditional use permit for timber harvesting, and removal of trees to improve a view.

Councilor Peter Smith asked Mr. Campbell what specifically the Planning Board had changed in the document.

Mr. Campbell said the change was on page 11, 175-65 F Septic Setbacks. He said this whole section had been added to the ordinance. He explained that the new septic regulations adopted the previous year required a 125 ft. from wetlands, but said this only applied to new lots. He said this new paragraph on septic setback covered all existing lots.

Councilor Kraus MOVED to close the public hearing. The motion was SECONDED by Councilor Van Asselt, and PASSED unanimously 9-0.

Councilor Kraus MOVED to adopt Ordinance #2005-06, Section #2005-06 (D) with the additional amendments suggested by the Durham Planning Board relative to the Wetlands Conservation District contained in Chapter 175 “Zoning” of the Durham Town Code. Councilor Julian Smith SECONDED the motion.

Councilor Kraus noted that 175-65.A., Naturally Vegetated Buffer Strip, said that fertilizers were only allowed for agricultural activities. He noted that some people like lawns that went down to the water, and asked if it was clear what “allowed agricultural activities” meant, and said that perhaps a discussion on this would be worthwhile.

Mr. Campbell said agricultural activity was also covered under State statute, and defined what was and was not allowed. He said the Town did allow agricultural activity within the wetland buffer, as long as it was more than just lawn maintenance.

There was discussion about section 175-65, Agricultural Activity, and whether grooming a lawn was considered an agricultural activity.

Mr. Campbell said unless commercial agriculture was being practiced, chemicals couldn’t be used. He said a lawn could be mowed within 25 ft. of the shoreland, and also said natural herbicides and pesticides could be used.

Councilor Kraus said what that said was that one couldn’t have a lawn 25 ft. up from the high tide line

Councilor Peter Smith said the word “allowed” appearing immediately before agricultural activity was the most important word, conceptually, and said in case there was any confusion, it would never be construed to mean what a resident wanted to do. He said it would be construed to mean as authorized by law, either State or local.

Councilor Kraus said in other words, it was not allowed unless it was allowed under 175-65.C. - Agricultural Activity.

Councilor Van Asselt asked why timber harvesting couldn’t occur within 50 ft. of the shoreline, but for wetlands, the setback was 25 ft.

Mr. Campbell said this issue hadn't come back during the public hearing process. He provided details on the fact that the Planning Board felt the shoreland buffer needed be larger.

Councilor Van Asselt said the truth was that there were more wetlands than shoreland in Durham, so if one was concerned about timber harvesting, why wasn't a 50 ft. buffer required for both.

Councilor Needell noted that the wetland buffer zone was 75 ft. wide, but said the reference on page 10 was for existing lawns in the upland buffer.

Mr. Campbell said the wetland setback was 75 ft. in all of the zones except for the Rural and Residential Coastal zones, where it was 100 ft. He said no soil disturbance could occur within 50 ft. of the reference line, and existing lawn in the upland buffer could remain, as long as there was a 25 ft. wide strip adjacent to the reference line of the wetland that wasn't mowed, and was allowed to reestablish naturally occurring vegetation.

Councilor Van Asselt said what he wanted to know was why on page 11, it said no timber harvesting could occur within 25 ft. of the wetland, but for the shoreland, the distance was 50 ft.

Councilor Peter Smith said he would think the shoreland zone protection would be greater. He said there were issues for both zones dealing with things like erosion and pollution, but also said there was the issue of aesthetics, which was a legally recognized issue but was not based on the natural sciences. He said one could easily see why a different judgment would be made when dealing with an ordinance that was based in part on aesthetics. Councilor Smith said he couldn't say that this was someone's reasoning, but said it was a reasonable way of thinking.

Councilor Carroll asked if the Conservation Commission had reviewed this, and Mr. Campbell said it had. She said there were essentially two different ecosystems involved, when considering shorelands and wetlands, and said the Council was depending on the technical abilities of the people who sat on the local boards to know what the setbacks should be.

Mr. Campbell said the Planning Board had relied on the Conservation Commission for this. He also said what Councilor Peter Smith had discussed had been discussed by the Planning Board.

The motion PASSED unanimously 9-0.

D. Ordinance #2005-06, Section (G) - Personal Wireless Service Facilities Overlay District.

Councilor Kraus MOVED to open the public hearing. The motion was SECONDED by Councilor Julian Smith, and PASSED unanimously 9-0.

Mr. Campbell said there had been some suggestions by the Council concerning Section G in November, which had been taken into consideration by the Planning Board. He noted that section 175-101 on page 2 had previously contained language on installations that would "adversely impact residential neighborhoods". He said Councilor Kraus had questioned this wording at the Council meeting in November, and said the Planning Board had decided to use

different wording in this section: "...shall place antennas and towers at locations which will minimize the impact on residential neighborhoods."

Mr. Campbell said another change that was made at the request of the Council was on page 3, section 175-101.F, so that it now read "If no alternative technologies exist to accommodate the applicant's proposed PWSF, then the applicant shall submit evidence to demonstrate that no alternative technologies can accommodate the applicants proposed PWSF....."

Mr. Campbell also said that there were some additional editing changes, as recommended by Councilor Julian Smith, for such things as the definitions of "alternative tower structure" and "concealment".

There were no members of the public who spoke about Section G.

Councilor Peter Smith said he wanted to ask Mr. Campbell some questions, and also noted that he intended to recommend some amendments to Section G. He said he didn't consider any of these recommendations to be substantive changes.

Councilor Kraus MOVED to close the public hearing. The motion was SECONDED by Councilor Julian Smith, and PASSED unanimously 9-0.

Councilor Kraus MOVED to adopt Ordinance #2005-06, Section 2005-06 (G) with the additional amendments suggested by the Durham Planning Board relative to the Personal Wireless Service Facilities Overlay District contained in Chapter 175 "Zoning" of the Durham Town Code. Councilor Julian Smith SECONDED the motion.

Councilor Peter Smith MOVED to amend the motion, with the following:

Page 1, the last words of the definition of "Disguise" should read "appear to be something it is not."

Page 3, section 175-101.D., the third line from the end, should read "...applicant shall provide evidence.."

Page 4, section 175-103 A. 1., the next to last line should read "..The applicant shall demonstrate..."

Councilor Van Asselt SECONDED the motion, and it PASSED unanimously 9-0.

Councilor Smith said 175-101. F page 3 represented a new provision for the Overlay district. He said this was a matter of some significance, and introduced into the overlay a concept that was analogous to the original overlay, which stated that if a company wanted to locate a facility for transmission, it must eliminate the alternatives of existing buildings or structures on which to mount the array.

He said this new provision took the same approach, in requiring that a company consider alternative technologies for transmitters/receivers, noting that the Town hadn't realized how fast the technology had been changing in this area, and that there were now methods for transmitting that were much less obtrusive.

Councilor Smith said he wanted to be clear that the purpose of this provision was to make certain that not only existing physical structures, but also existing technologies that would allow transmission in a less obnoxious way, had to be considered in proposing a personal wireless service facility.

The motion PASSED unanimously 9-0.

The Chair called a recess at 9:03 PM; the meeting reconvened at 9:08 PM.

XI. New Business
Other Business

Administrator Selig provided details on House Bill 1679, as amended, “An Act Relative to Property Tax Exemption for the University System of New Hampshire. He said as currently written, the bill would require payment to a local community equivalent to a property tax. He said the Municipal and County Government Committee had reviewed the Plymouth bill, had amended it, and had then recommended passage by the full House, which had then passed it, and forwarded it to the State Senate. Administrator Selig said he thought it would be appropriate for the Council to propose a resolution concerning House Bill 1679.

Chair Sandberg read House Bill 1679 out loud.

Councilor Niman MOVED to support Resolution #2006-04, a Resolution Endorsing House Bill 1679, as amended, “An Act Relative to Property Tax Exemption for the University System of New Hampshire”. The motion was SECONDED by Councilor Needell.

Councilor Kraus asked if the Bill would mean that a business such as a Taco Bell in Holloway would pay some kind of property tax for its residency there.

Administrator Selig said if there was a lease between that private business and the University to use the tax-exempt space, the Bill would require a payment to the Town by that business.

Chair Sandberg asked if there was another arrangement besides a lease, if the business would still have to pay the tax, and Administrator Selig said they would have to take a look at that. He said the bill specifically addressed leased space.

Councilor Peter Smith said an important point was that it should be clear what this provision, if it passed as it currently was, would not do. He said it did not deal with a multiplicity of arrangements that didn’t use the term lease, but amounted to the same thing for town government.

He said he was not suggesting changing the language of the legislation, but said time would tell whether it had much meaning. He also said it did not begin to deal with the more fundamental issue of certain activities that the University permitted that were not part of its core mission, and which resulted in a substantial burden to the Town, such as Whittemore Center events.

Councilor Smith suggested some wording changes to the resolution that eliminated some duplication.

Councilor Peter Smith MOVED to amend the motion, to include the following changes.

- ***4th Whereas, eliminate “..by the government or..”***
- ***7th Whereas, rephrase to read “Whereas, the University System of New Hampshire is exempt from the provisions of RSA 72:2; and”***
- ***8th Whereas, rephrase to read “Whereas, the State of New Hampshire, itself, is subject to this statute; and”***
- ***The twelfth “Whereas” should be deleted.***
- ***Next to last paragraph, should read “NOW, THEREFORE BE IT RESOLVED that the Durham Town Council, the governing body of the Town of Durham, New Hampshire, hereby endorses House Bill 1679...”***

The motion was SECONDED by Councilor Julian Smith.

Councilor Needell questioned Councilor Smith’s recommendations that the 12th “Whereas” in the Resolution should be deleted. He said he found the statement important in that there was a possible concern it could be interpreted that the bill was trying to extract money from the University. He said he thought the intent of the sentence was to clarify that no money was to be taken from the University’s budget as a result of this bill.

Councilor Peter Smith said this language was confusing, and said what it was saying was covered elsewhere in the Resolution. He said perhaps there were too many “Whereases” in the Resolution, and said he would be surprised if people didn’t already understand what was stated there.

Chair Sandberg said that perhaps members of the Legislature didn’t know the issues as well as the Council did. There was discussion about this.

The motion to amend PASSED unanimously 9-0.

Councilor Van Asselt said he would abstain from voting on the original motion, because there were much larger issues around Town/ University finances that should be looked at. He said he was not opposed to the intent of what was proposed, but said he didn’t agree with a piecemeal approach to this issue.

Councilor Niman said he disagreed with Councilor Van Asselt, and would urge him to change his mind. He said he thought this bill was a very important step forward. He said he thought there had been a certain arrogance by the University system in viewing itself as untouchable, and said this bill did touch it. He said the University system had abused the good nature of host communities and citizens of the State, and said just as it had received the tax exempt status from the General Court, this could be taken away. He said he didn’t view this as a revenue generator, or a problem solver, but as a way to clear the air to allow more productive discussions on the things Durham cared about.

There was discussion about Chancellor Stephen Reno's letter to Representative Betsy Patten of the Municipal and County Government Committee.

Councilor Niman asked if this letter would be copied to the Senate. He said the Chancellor was articulating a policy view of the University system that bore little resemblance to the reality, and said he wondered why this was.

Councilor Niman noted that the letter said the University "shall not use our facilities for purpose that are unrelated to our educational mission." He then spoke about some marketing materials he had seen concerning the University's professional wedding consultant, and said this needed to be brought to the Chancellor's attention. He said if wedding attendees drove on the Town's roads, the Town should get a payment for this. He also noted discounts available for staying at the New England Center's hotel, and said that apparently, things like this occurred on a daily basis.

Councilor Niman also made note of wording in the Chancellor's letter concerning entities occupying USNH facilities for purposes not supporting its mission, and requirement that they pay the municipality in which the facility was located payments in lieu of taxes.

He asked Administrator Selig whether the Town had received money for the cell tower leases the University had, and Administrator Selig said it had.

Councilor Niman said the Council should clarify the commitments the Chancellor was making to the General Court, and should make sure they were accurate, as a basis for discussion.

Councilor Needell said he seconded Councilor Niman's statements. He said this bill would not result in a windfall for the Town, but did set in motion a correction to a statute giving the University a blanket exemption, which was flawed. He said there was also another issue involved, noting that in all agreements with the University, there was a clause that said if the tax laws changed, either party could re-negotiate the agreements. He said whether this bill would trigger that was a matter of discussion, but said this discussion would be welcome, and said people shouldn't be surprised if this happened.

Administrator Selig said that at the hearing before the House Municipal and County Government Committee, the Vice Chancellor had stated that if a change was made to state law, the University System would cancel all the agreements. He said he didn't know if the Vice Chancellor was speaking for the University system, or was simply fearful this change in statute was the thin edge of the wedge, and that if this was changed, the blanket exemption would be lifted, and the Legislature would be taking notice in terms of the business practices of the University system, and the impact it had on local communities.

Administrator Selig said his own response to this would be that this would be ridiculous, and highly inappropriate. But he said that if the University did this, the Town had recourses of its own. He said the hope was that the Town and the University could work cooperatively to make changes in the statute that were fair, appropriate, and that were a long time in coming.

Chair Sandberg said his reading of the letter was that the Chancellor concurred with the intent of the bill, and said he saw no reason to be fearful that the Town was going into this situation in opposition to the University. He said his sense was that the University was willing and interested in working cooperatively and fairly with the Town, and said he would be surprised if the University wouldn't join with the Town on this. He said he was hopeful that by endorsing this resolution, this would be an invitation that the University would be welcome to join the Town in doing what was right.

Councilor Carroll said she encouraged all Councilors to support the Resolution. She said although there was more to do, this was a beginning, and said if Councilors felt the language was appropriate, they should vote in favor of the motion.

Councilor Peter Smith said he understood what this bill did and did not do, but said they were living in the real world. He said in Durham, there were some State laws which the Town had traditionally wanted to change. He said it was not a sign of weakness for the Council to say it supported this initial step in the right direction. He said it was a very responsible thing to support the motion and that it be a unanimous vote.

There was discussion as to whether or not the University System was a state government organization.

Administrator Selig said he encouraged the Council to support this motion. He said the Town had been a model of fairness in its dealings with the University. He said the legislation might have broad support statewide, and possibly would be supported by the University itself.

Councilor Van Asselt said he would be happy to vote for this, but said that when the Council had its workshop, he would argue that the Town had to put time and money into this issue, in order to get beyond the first step.

Chair Sandberg noted that the Town was interested in pursuing the idea of surcharges and other payments in lieu of taxes. He said this resolution should not upset those negotiations, and said the Town should maintain an air of cooperation, and should continue to be fair and methodical in its approach. He said he felt the Resolution reflected this.

Administrator Selig said this resolution supported local businesses, noting there was currently a very unfair advantage to businesses located on University property. He said this resolution therefore achieved multiple benefits.

The motion, as amended, PASSED unanimously 9-0.

Councilor Carroll said this had been a positive meeting, and said she reluctantly had to bring up something negative. She said that in re-reading the January 23, 2006 Minutes, in the discussion on the conservation easement for the Fogg property, there were comments by Councilors on the process of looking at easements that came before the Council, and on the fact that there had been some difficulty for Councilors in grappling with this process and how it should take place. She said this issue was likely to come up again when other possible easements were considered.

Councilor Carroll asked Administrator Selig if the Council could get an outline on how this process should go, as these easements came up for discussion and vote, so it would be more clear for Councilors. She said this could be a general outline, but one that was customized depending on the easement. She asked if other Councilors had suggestions on this.

Administrator Selig said a policy on this had been developed in 2004, and said they tried to follow this, including trying to keep the Council informed on where things stood on various land deals. He said some concern had been expressed by Bill Hall concerning the Land Protection Working Group, - that because it was acting as a public body, it therefore should be covered by the provisions of the Right to Know law. He provided details on this, and said although there might be some concern in the community about who was actually identifying these pieces of land and who was bringing the proposals forward, in reality, the Town's own policy was that any person or private group could bring something forward.

Administrator Selig said it was challenging to follow the process with particular parcels, because the arrangements were often different for each of them. He said however awkward the discussion at the previous meeting was, his concern had been that everyone be informed, and he noted that at least it was a public discussion. He said they could try to do better, but had been following a policy fairly rigorously.

Councilor Needell said the major problem was that even though there had been public discussion, the Council had to make a nonbinding commitment to something, and was uncomfortable about making that kind of commitment.

Chair Sandberg said what Councilor Carroll had said was a legitimate concern, and one that needed to be reviewed, as to how the process could be refined over time.

Administrator Selig said the Conservation Commission had recommended that the Council fully endorse the Fogg property, but he had said he hadn't felt that was appropriate because the final language on the easement hadn't existed yet. He said in the meantime, the grant deadline loomed, so this had been a precarious situation.

Councilor Kraus said given the legacy of Wagon Hill Farm, he didn't see any problem that the process was a little awkward. He said although it might not be done smoothly, the Council needed to show that it was representing all sides of the community.

Councilor Van Asselt said Councilor Carroll's point was well taken. He said the Council had jumped from a closed door session that discussed the easement, to a room full of people saying let's go do it. He said it would be good if the transition could be made a little smoother.

Councilor Niman agreed that the process was confusing, and provided details on his experience in dealing with the Fogg conservation easement. He said he didn't know how it had happened, or how to fix it.

Administrator Selig said what it showed was that there was a great deal of support in the community for these kinds of initiatives. He provided details on how the process had unfolded.

Councilor Needell said the public's information on the easement was very limited, because the Council's decision to go ahead with it had been in nonpublic session, He said that was why the process hadn't looked quite right.

Councilor Carroll thanked everyone for the discussion on this, and said her point was that one of the Council's tasks for the future was the process.

Councilor Van Asselt said he would like to correct his previous comment at the meeting on UNH's response to the trees on its property that had fallen. He said he had learned that the University had been prompted by the Public Works Department to remove the trees.

XII. Adjournment (NLT 10:00 PM)

Councilor Kraus MOVED to adjourn the meeting. Councilor Van Asselt SECONDED the motion and it PASSED unanimously 9-0.

The meeting ADJOURNED at 10:02 PM.

Victoria Parmele
Minute Taker