

This set of minutes was approved at the Town Council meeting on May 5, 2008

**DURHAM TOWN COUNCIL
MONDAY, APRIL 7, 2008
DURHAM TOWN HALL – COUNCIL CHAMBERS
7:00 PM**

MEMBERS PRESENT: Chair Neil Niman; Councilor Jerry Needell; Councilor Karl Van Asselt; Councilor Julian Smith; Councilor Henry Smith; Councilor Peter Stanhope (arrived at 7:05 PM); Councilor Cathy Leach; Councilor Doug Clarke; Councilor Mike Sievert

MEMBERS ABSENT: None

OTHERS PRESENT: Town Administrator Todd Selig; Town Planner Jim Campbell, Public Works Director Mike Lynch, Business Manager Gail Jablonski

I. Call to Order

Chair Niman called the meeting to order at 7:02 pm. He welcomed Mike Sievert and Doug Clarke as new members of the Town Council.

II. Approval of Agenda

Councilor Van Asselt MOVED to approve the Agenda as submitted. Councilor Needell SECONDED the motion, and it PASSED unanimously 8-0.

III. Special Announcements

IV. Approval of Minutes

March 3, 2008

Page 6, 1st paragraph, should read “..from 2% to 3% represented...”

Councilor Julian Smith MOVED to approve the March 3, 2008 Minutes as amended. Councilor Leach SECONDED the motion, and it PASSED unanimously 5-0-3, with Councilor Van Asselt abstaining because of his absence from that meeting, and Councilors Sievert and Clarke abstaining because they were not on the Council at that time.

Councilor Stanhope arrived at the meeting at 7:05 pm.

February 18, 2008

Page 2, 3rd paragraph from bottom, should read “Mr. McNitt said that in general, the

citizen users and crews had been willing to make compromises over the use....”

Councilor Van Asselt MOVED to approve the February 18, 2008 Minutes as amended. Councilor Julian Smith SECONDED the motion, and it PASSED unanimously 6-0-3, with Councilor Henry Smith abstaining because of his absence from the meeting, and Councilors Sievert and Clarke abstaining because they were not on the Council at that time.

V. Councilor and Town Administrator Roundtable

Chair Niman noted that Councilor Stanhope would not be able to serve as the alternate Council representative to the Planning Board. He asked that Council members think about who might serve in this position, and said they would discuss this further under Other business.

Councilor Henry Smith reported on the most recent HDC meeting. He said he found some historical material on his house and had presented a report on this to the Committee. He also said the HDC had approved the Henderson plan, conditional on Mr. Henderson coming back with a color scheme that was acceptable for that district.

Councilor Julian Smith reviewed the applications and issues that had come before the Planning Board at its March 27th meeting: the continuation of the Caldarola subdivision; a public hearing on the Stonehouse Farm subdivision; and acceptance consideration of the plan for Jackson’s Landing.

He said the public hearing on the plan would take place at the April 9th Planning Board meeting. He also said there would be a conceptual consultation with JLB Partners concerning a proposed 210 unit multifamily development on a property located north of Spruce Wood, between Mill Road and Mast Road.

Councilor Van Asselt said the EDC’s meeting with the Evangelical Church hadn’t happened yet, but said a meeting with them would occur in April. On another issue, he asked Councilors if there was interest in having Administrator Selig, Mr. Campbell, himself, and a member of the Planning Board speak with Mr. Schuster about what was happening with the Durham Business Park property.

He said this wasn’t something for the EDC to do, but said he thought there might be something the Council should be doing, given that the Town had a purchase and sale agreement with Chinburg Builders for the Business Park.

Chair Niman said he thought this was a good idea.

Councilor Sievert said he could update the Council on the status of the project, but said he wasn’t sure that this would be appropriate.

Chair Niman said what Councilor Van Asselt was wondering was whether there were certain Zoning changes that might be made to make the property more marketable, and whether they could find out from Mr. Schuster whether there were some uses that might be appropriate for the property.

Councilor Van Asselt said it could lead to that, and perhaps other things as well. He said the Town had spent a year on the development of the purchase and sales agreement, and things hadn't gone anywhere yet. He said he was interested to know why.

Councilor Needell called a point of order, and asked Councilor Sievert if he had a professional interest in property, and would be recusing himself in the future concerning it. He said that if he was, his opinion was that he should not comment on the property now.

Administrator Selig agreed that it would be helpful to set up a meeting with Mr. Schuster, and said he would arrange this.

Administrator Selig said Spring Cleanup would begin on April 28th.

He also spoke about a bear research project that UNH had undertaken. He noted that many residents had been spotting bears in Durham, and said the bear population in Town appeared to be thriving. He said a portal would be set up on the Town website so residents could report on bear sightings, and said this would be linked to a University site, where UNH staff and students would then compile this data. He said this information would be provided to the Town, and would also be used to determine locations where bears could be tagged on peoples' properties, so the bear population could continue to be followed.

Administrator Selig reported the good news that EPA had approved a second \$200,000 grant for the Town for the cleanup of the Craig Supply site. He said the funds would go toward the repair and stabilization of the 6 ft culvert under the property, which was cracked and leaking contaminants. He said the ceremony awarding the funds would take place the following day, and suggested that some Councilors could perhaps attend it.

Councilor Needell thanked Public Works Director Mike Lynch for his efforts on behalf of the Town, in obtaining this grant.

Administrator Selig reviewed this history of grants that had been received for this project. He said Mr. Lynch was very persistent, and had done a great job on this.

VI. Public Comments

Roger Speidel, Nobel K. Peterson Drive, said that at the recent meeting of the School Board, Mr. Taylor had said there were conflicting figures on the cost per student per year. Mr. Speidel provided details on figures provided in Mr. Mueller's presentation at the Tri-town meeting, including figures that the Oyster River School District had lost 240 students but had hired 41 additional teachers. He said these figures had been challenged by the School Board, but he said they were in fact correct, and were obtained from the State Board of Education. He said he would bring this data back to the School Board at its next meeting.

Mr. Speidel said it was important to open the lines of communication between the School

Board and citizens, to involve people, and to pledge that there would be a 0 increase in the School Budget next year.

Tom Christie, President of Slania Enterprises, said he hoped Councilors had received the letter he had written, and said he was present to announce that his in-fill project was off the table. He described the process he had gone through, obtaining variances, and going through a site plan application before the Planning Board. He said when the project was approved, he was under the impression that he had reached an attainable goal. He said he had spoken at great length with the Planning Board at what was needed for a stormwater management system for the site, and said Mr. Campbell had developed some language concerning this that was a condition of approval.

He noted that he had subsequently written a letter to Administrator Selig, because his of extreme degree of concern about Mr. Cedarholm. He said he was also now concerned about Administrator Selig's letter. He said there appeared to be some misunderstanding.

He said he had contacted Administrator Selig to discuss the Town employee involved with the storm water system. He spoke in detail about the process of dealing with Mr. Cedarholm concerning the storm water management system. He said he had suggested that a reasonable way to resolve the situation would be to get an independent engineer to review the system.

Mr. Christie said he didn't believe that Mr. Cedarholm could fairly make a judgment, and said he was not confident that he could get any system approved. He said he was greatly concerned about Mr. Cedarholm's change in position. He said he was also concerned that Mr. Cedarholm had said it would be impossible to grow and maintain grass on the site. He said his engineers said the grass could be maintained, and also said the State said it could grow there.

Mr. Christie also said that the Stormwater Ordinance draft Mr. Cedarholm had developed said redevelopment projects didn't need stormwater management, and said he would therefore like to know why his project, which was a redevelopment, needed to have stormwater management.

He said he would be moving forward to recover his funds from the Town for the extra expenses he had incurred, and the loss of revenues he wouldn't be getting as a result of the structure not being completed. He provided further details on this.

Mr. Christie said he recommended not doing development in Durham. He asked that Councilors watch the tapes of the Planning Board meetings involving his application, to see if that was the way they wanted Town staff to represent the Town.

VII. Unanimous Consent Agenda (Requires unanimous approval. Individual items may be removed by any councilor for separate discussion and vote)

RESOLUTION #2008-11 authorizing the issuance of one million dollars (\$1,000,000) in a Tax Anticipation Note Line of Credit

Councilor Leach MOVED to adopt RESOLUTION #2008-11 authorizing the issuance of one million dollars (\$1,000,000) in a Tax Anticipation Note Line of Credit. Councilor Leach SECONDED the motion, and it PASSED unanimously 9-0.

VIII. Committee Appointments

Meet with applicants and begin process for making appointments to vacancies on the various Town boards, commissions, and committees

There was discussion that applicants would have the opportunity to introduce themselves at this meeting, and the Council would vote on the appointments at the next meeting.

Councilor Needell said it was his understanding that there was one regular and one alternate ZBA position available, and that it had been determined that Councilor Sievert could continue as a regular member on the ZBA.

Administrator Selig said that was correct.

Councilor Needell said it was also his understanding that if Emily Slama moved up from an alternate to regular membership on the Parks and Recreation Committee, there would be a vacant alternate position. Finally, he received clarification that there was one vacancy on the Churchill Rink at Jackson's Landing Advisory Committee.

Administrator Selig noted that he had forwarded an email to Councilors that Robin Mower wished to be withdrawn as an applicant for the ZBA, but would still like to be considered for the Conservation Commission.

Robin Balducci, 40 Colony Cove Road, said she would like to be appointed an alternate to the Library Board of Trustees. She said had been a student at UNH in the 1980's, and as a professional, had been a resident of Durham for seven years. She said the Library was a part of the community that could be enjoyed by all ages, including young families who were interested in staying in Durham over time. She said it was an important piece that was missing in Durham.

Emily Smith, 17 Orchard Drive, said she would like to be reappointed to the Library Board of Trustees as an alternate. She thanked Councilors for attending the Library events over the past year, which had been an exciting year for the Library. She noted that residents had been surveyed on their opinions about the Library, and said the results would be presented soon. She said the Library had performed splendidly, but said it was time that it had a home.

Ann Windsor, 16 Riverview Road, said she was eager to continue in her role as an alternate on the Board of Trustees, noting that she had previously been an elected member of the Board. She said the Board had never been more confident than it was now, given the feedback and support from the community, including financial support. She said the annual giving campaign this year was devoted to the endowment fund, and said over 200 people had contributed close to \$27,000, which spoke to the hope that residents had for the future.

Jason Lenk, 12 Mathis Terrace, said he would like to be reappointed to the EDC. He said he was a board certified orthodontist, who had opened his practice in Durham the previous year, and was bringing some needed services to the community. Asked by Councilor Needell what he thought about the approval process he had gone through when he came to Town, Mr. Lenk said he hadn't been prepared for it, and noted that the Town was in the middle of the Zoning Rewrite at the time. He said it had been an expensive process for him, and said that hopefully, the Town could do something about that process.

Crawford Mills, 22 Newmarket Road, said he would like to serve an additional term on the HDC. Mr. Mills said one of the problems for the HDC was getting continuity, and making progress concerning projects. He noted that the HDC was now also a Heritage Commission, and said they hadn't really gotten this off the ground yet.

He said the Committee would love to do a survey of properties in Durham from the 18th century or older, and said they would have to raise money in order to do this. He said there was also the question of whether the Historic District wanted to become more proactive, noting that there were a lot of things going on at the fringe of the District.

Councilor Van Asselt suggested that it wouldn't be a bad idea to increase the size of the HDC, especially given its role as a Heritage Commission as well. He said he thought the Council should talk about this.

Mr. Mills said he would support such an idea.

Administrator Selig said that in the meantime, there was a vacancy on the HDC.

Patrick Houle, 22 Edgewood Road, said he would like to be appointed to the Parks and Recreation Committee, and to the Churchill Rink Committee. He said he had been a resident of Durham for 27 years, and in fact had grown up there. He said he had been to all the parks, and worked for the Public Works Department, among other things cutting the grass. He said he wanted his son and others to have the same recreation opportunities in Durham that he had had.

Amy Cunningham said she was interested in serving on the Parks and Recreation Committee. She said had found that as her two children had gotten older, they had outgrown ORYA programs, and said the recreational opportunities were more limited if kids weren't seriously engaged in school sports teams. She said she would like the Town to look at alternative programs for sports, and noted that she was committed to the idea of a skate park.

It was noted that Ms. Cunningham's application was the sixth that the Council had received, and that there were 5 positions available.

Administrator Selig said DCAT continued to have three citizen vacancies. He spoke about the opportunity, for those interested in serving on DCAT, to realize the vision of doing locally produced programming. He said this was a great opportunity for residents to express their creativity.

Pam Appleton, 92 Bucks Hill Road, said she would like to serve on the Churchill Rink Committee. She said it was an amazing resource, noting that she had two children involved with ORYA programs, and said the rink was a great facility for families. She said she was also interested in the redevelopment planned for Jackson's Landing, and said she wished to support the work the Town was doing there.

Councilor Van Asselt suggested that it might be a good idea to have some additional people on the Churchill Rink Committee.

Beryl Harper, 7 Davis Ave., said she enjoyed being on the Conservation Commission, and would like to serve again. She spoke in detail about partnerships the Commission had had with various local entities in recent years to accomplish a number of goals, including funding conservation easements, helping to fund the plan for Jackson's Landing, trails development, working with the Planning Board to implement the Town's conservation subdivision provisions, managing Town properties in a more proactive way, etc.

Neal Ferris, 24 Woodbridge Road, said he would like to be a member of the Conservation Commission. He said he had lived in Durham for 15 years, and had been a member of the Integrated Waste Management Advisory Committee and the Lamprey River Watershed Association. He said he had a life-long interest in conservation, preservation, and stewardship.

Robin Mower, Faculty Road, said this was her first opportunity to serve on a committee, although noting that she had spoken on many conservation issues, and had attended many Conservation Commission meetings. She said she had also attended Mill Plaza Study Committee meetings, and as part of this had done some research on the idea of protecting College Brook. She said she was especially interested in the process of trying to strike a balance between development and conservation, an issue that Durham was facing.

Councilor Sievert asked Ms. Mower if she believed the Conservation Commission was not against development.

Ms. Mower said absolutely, and said most people were trying to find a way they could all work together.

Councilor Leach referred to some wording in Ms. Mower's application "...what is good for the environment is good for business and society, It's just that this is a new concept.", and "...we're struggling with preconceived notions on all sides".

Ms. Mower said these words referred to the conservation subdivision approach, which was new for the Town. She said developers, abutters, and planning boards were struggling with it, as they all adjusted to the concept of constraints on natural resources, for various reasons.

Councilor Stanhope asked Ms. Mower if she had an opinion on the idea of the transfer of development rights to preserve land, and the idea of allowing an increase in density on a

property in exchange for protecting gateways on that property.

Ms. Mower said the transfer of development rights approach could be used as a tool to help achieve conservation and development goals, but said she didn't know enough about how the concept actually played out. She said she assumed that if the Town established it as an option, it would apply equally across the board in the Town. She said it was something to consider carefully before going forward with it.

Regarding the idea of density in exchange for protecting gateways, Ms. Mower said this was one way to protect priority lands and viewsheds as well as help the developer. She said it was something that worked for everyone.

Councilor Leach asked Ms. Mower what she thought about the pace of how projects occurred or didn't occur in Durham, and Ms. Mower said she thought the question was too broad to answer. Councilor Leach said her concern was that she had personally felt that often, some of the issues brought up by Ms. Mower at meetings slowed the process down, and were tangentially related to the issue at hand. She said she was concerned as to whether Ms. Mower would have a balanced approach.

Ms. Mower said she had also spoken out numerous times about the need for balance, and said perhaps Councilor Leach hadn't heard some of those statements. She said she had heard people say it was difficult to get projects through in Durham, but said this depended on the situation, and said she thought it was a gross generalization.

Susan Fuller, 68 Bennett Road, and said if reappointed to the Planning Board, this would be her third year. She said she started as an alternate, and had moved up to a regular one year position. She said she served as the Secretary of the Board, and was the liaison to the EDC and the Housing Task force. She said her interest was in helping to find a balance on the Planning Board, and to keep the application review process moving along.

She said she had knowledge of many towns in the Seacoast area, and was aware that Durham had a reputation of being a difficult town to work with. She said they were trying to change that perception, and said it was important to find the right balance between development and open space.

Mr. Clarke asked Ms. Fuller if she thought Durham was harder to work with than other towns.

Ms. Fuller said this was sometimes true. She said the process could be more streamlined, but she said thought the Planning Board was trying to improve this.

Kevin Gardner, Stevens Way, said he was a civil engineer, and had worked at UNH for nine years. He said although he was engineer, he had a multidisciplinary focus in much of his work. He said his interest in serving on the Planning Board stemmed from being the father of two young daughters, and said he felt he had the moral obligation to contribute to the Town. He noted that he presently served on the Energy Committee.

Councilor Needell received clarification that Mr. Gardner would be happy to serve as an alternate on the Planning Board.

In answer to a question from Councilor Leach, Mr. Gardner explained that some of his engineering students did engineering designs for hypothetical projects at local places like the Crommet Creek Bridge, Mill Plaza, and Jackson's Landing.

Councilor Van Asselt said what Ms. Fuller said was true, and was not just true in terms of the Planning Board. He asked if there was a way to get around the fact that the Planning Board looked at an application in such detail.

Mr. Gardner said in order for the process to be effective there had to be the general discussion on a project as well a detailed discussion. He said he wasn't sure as to whether the place for the detailed discussion was at the Planning Board table.

Chair Niman said there were three vacancies on the IWAC, and two vacancies on the Strafford Regional Planning Commission.

Councilor Van Asselt noted the idea that had been discussed regarding integrating the IWAC and the Energy Committee.

Administrator Selig said this was worth discussing with both of the committees, to see if there was interest in possibly merging them. He said perhaps if the Energy Committee's charge was expanded somewhat, it could encompass both of the committees.

Councilor Julian Smith asked whether Doug Greene would still be interested in serving as an alternate on the Planning Board if he was not moved up to be a regular member.

Councilor Needell said Mr. Greene's term as an alternate would not be up yet. It was clarified that there would still be one opening on the Planning Board for an alternate.

IX. Presentation Item - None

X. Unfinished Business

- A. PUBLIC HEARING ON ORDINANCE #2008-04** amending Chapter 175 "Zoning", Section 175-7.A. "Definitions" of the Durham Town Code by amending the definition of "Wholesale Sales" and refer proposed ordinance to the Durham Planning Board for its review and study in accordance with Section 175-14 (B) of the Zoning Ordinance

Chair Niman noted that the appropriate protocol had not been to advertise that the Council would have a public hearing on the proposed Ordinance, and said instead, it should have been referred first to the Planning Board.

Councilor Van Asselt MOVED to open the public hearing. Councilor Needell SECONDED the motion and it PASSED unanimously 9-0.

Beth Olshansky, Packers Falls Road, said she appreciated seeing this item on the

Agenda, and noted that she was one of the members of the public who had expressed concerns about this issue. She thanked the Council for taking these concerns seriously. But she said she wasn't sure the amendment would alleviate the concerns. She provided details on this, and said she wasn't sure what the word "exclusively" accomplished. Councilor Needell said the point of this change was that it would eliminate a point of sale to individual consumers from this district, thus prohibiting something like a BJ's. Ms. Olshansky said in that case, she supported the concept. She also said there was still the issue of retail on Route 108, and noted that it was still in the Table of Uses.

There was discussion that mixed use parking with retail would still be allowed as a conditional use in the Route 108 District. Councilor Needell said it had been recommended that this be removed, but the Council had chosen not to do this.

Ms. Olshansky asked the Council to look carefully at this, as it set its goals and considered EDC initiatives, and to think about what it would allow in terms of retail stretching along the Town's gateways. She said she knew that Councilors agreed that they didn't want sprawl, and she also noted that Durham was losing its downtown businesses, including Houghton's Hardware and the Copy Center.

Councilor Julian Smith MOVED to close the public hearing. Councilor Clarke SECONDED the motion, and it PASSED unanimously 9-0.

Councilor Henry Smith MOVED to send Ordinance #2008-04 on to the Planning Board. Councilor Julian Smith SECONDED the motion, and it PASSED unanimously 9-0.

Councilor Needell clarified that the Council would have an additional public hearing on this proposed change before voting on it.

The motion PASSED unanimously 9-0.

- B. Take action to correct a procedural oversight made at the March 17, 2008 Town Council meeting pertaining to Resolution #2008-07

Councilor Julian Smith MOVED to approve Resolution #2008-07 memorializing the results of the Administrator's Annual Performance Evaluation and approving an amendment to the employment agreement dated February 19, 2007 between the Town of Durham and Administrator Todd I. Selig to reflect a Cost of Living Adjustment, a performance bonus, and authorizing the Council Chairman to sign said agreement on behalf of the Town Council. Councilor Needell SECONDED the motion.

Chair Niman provided clarification that this motion simply memorialized something that the Council had already discussed.

Councilor Julian Smith asked if the two new Council members should be voting on this, and Administrator Selig said it was up to them.

The motion PASSED 5-3-1, with Councilor Stanhope, Councilor Leach, and Councilor

Van Asselt voting against it, and Councilor Clarke abstaining because he was not part of the discussion on this matter.

The Council stood in recess from 8:34 - 8:43 pm.

- C. Review proposed Council-initiated ordinance to amend Section 175-9 (A) 13, the “Most Conservative or Restrictive” provision, of the Durham Zoning Ordinance and refer proposed ordinance to the Durham Planning Board for its review and study in accordance with Section 175-14 (B) of the Zoning Ordinance

Administrator Selig summarized the discussion at the previous meeting on this issue, and noted there were some members who wished to keep the language as it was, and a number of Councilors who wished to take “a conservative approach”, and a number who wished to strike Section 175-9 (A) (13) altogether. He said he had been asked to bring something forward for the Council to formally get its hands around.

Councilor Julian Smith asked if the phrase “take a conservative approach” meant that the code officer didn’t need to take a conservative approach the rest of the time, when there was no ambiguity.

Administrator Selig said if there was no ambiguity, the approach would be mandated specifically by the words in the Ordinance.

Councilor Smith asked if that would be what would be called a restrictive interpretation.

Administrator Selig said Durham’s Ordinance was a fairly restrictive ordinance. He said if they were truly interested in moving away from the most restrictive approach, they would need to not only address this, but would also need to go through the entire Ordinance, figure out the things the Council believed were too burdensome, and then eliminate them. But he said there were many places where the Ordinance gave clear direction and there was no ambiguity, and said that would be the direction the Code officer would take.

He said his recommendation addressed those areas where there was room for ambiguity and human judgment, and he provided further details on this. He also said that if the whole paragraph was eliminated, this would provide even more flexibility.

Councilor Henry Smith said if there was room for ambiguity, the code officer would take “a conservative” approach. He said if the situation was clear, then there was a lack of ambiguity, and it would be interpreted according to the Ordinance.

Councilor Julian Smith said the tradeoff was that they were getting rid of restrictive and keeping conservative, and adding to conservative the notion of ambiguity, only when there was ambiguity.

Councilor Leach asked how this really changed anything.

Administrator Selig said it provided some modest additional flexibility in the outlier

situations. He said there were often situations where it was clear what a conservative approach would be, but he said there were some situations where there were choices to be made. He provided some details on some recent examples of this.

He noted that the current language was extremely friendly to the people who lived around a project, who might want to be involved in discussing it. He said if the language was changed, it would give more credence to what the property owner wanted to do.

Councilor Stanhope said they heard frequently that it was hard to do business in Durham, that applicants for a development were often forced to go to the ZBA, and to spend money on legal fees. He said when this issue was last discussed by the Council, it seemed that there was a balance between wanting to amend the provision and striking the paragraph altogether.

He said the language under discussion had been used to hold up and discourage development in Durham, and said his feeling was that if the Town had a competent Town Administrator and Code Officer, there was already sufficient language in the code without this paragraph. He also said there were adequate checks and balances provided by the ZBA and the Planning Board, and said he would therefore like to see the language struck entirely.

Councilor Clarke asked whether there were times when the most conservative interpretation would be the most restrictive interpretation, and asked for an example concerning this.

Chair Niman noted the next item on the Agenda, concerning fitness centers, which were listed in the Zoning Ordinance as an example of an indoor recreational facility, but as a general definition were considered to be a personal service. He said the Code Officer felt this proposed use in Mill Plaza needed to be turned down, although a reasonable person would say that a fitness center was a personal service.

Councilor Needell said he felt that the Zoning Ordinance should be fixed when there were flaws. He said the Ordinance clearly said that fitness centers were not permitted in the Central Business District, and also said that in the Planning Board's discussion on this issue, the Board was clear that there was an error.

He said in general, the provision in question intended that the Code Officer was not to interpret the Ordinance, and instead was supposed to follow the Ordinance as written. He said this harkened back to the concept that when there were two provisions involved, the most restrictive must be followed. He said the phrase now under discussion was an amplification of that. He said the only thing that changing this phrase did was to send a message, and he said he wasn't sure he liked what that message was.

Mr. Sievert said he thought the paragraph should be stricken, because it went against the citizen of Durham more than anyone else. He provided details on this, and said there was no project today that got approved without abutters knowing about it. He said none of the regulations in his files from other towns in NH had this kind of provision. He also said the RSA Councilor Needell had spoken of concerning "most restrictive" applying had

nothing to do with the statement under discussion, and he provided details on this.

Councilor Needell said at any time there was a conflicts between provisions, the most restrictive applied, not just when it was a town provision versus a State provision.

Councilor Henry Smith said with the next Agenda item, concerning fitness centers, it was clear that this was currently not permitted, and was something that needed to be corrected. He said he disagreed with Councilor Stanhope that the phrase in question was used to slow down or stop development. He said it might be used to guard carefully against development that might not be good, or projects that might be harmful, but said it was there for a reason, to allow reflection, and care in terms of how to proceed. He said he didn't mind striking the word "restrictive", but said he felt that "conservative" should be retained.

Councilor Van Asselt questioned that Mr. Johnson's job was to determine what might be good.

Councilor Van Asselt MOVED to strike the paragraph (Section 175-9 (A) 13) altogether. Councilor Stanhope SECONDED the motion.

Councilor Leach asked what the impact would be, as a result of striking this paragraph.

Administrator Selig said when the Ordinance was ambiguous, a judgment would need to be made, and said eliminating this paragraph would provide additional flexibility in making this judgment. He said the Code Officer would look back on past decisions by the ZBA, and at past decisions he or previous Code Officers had made. He noted that landlords sometimes had letters from prior Code Officers, and he said striking the paragraph would allow the Town some flexibility to honor those old letters.

He said Town staff had checked with NH OEP's Planlink to see what other towns did, as compared to the language Durham currently had. He said Durham's language was found to be unique, and said while some towns had the "conservative" approach, some towns went completely the other way.

He said striking this paragraph would give Mr. Johnson some legislative authority, and also said that if the Town didn't like a decision, it could decide where the Ordinance needed to be tightened up. Regarding the Stonemark case, he said he wondered what the ZBA's decision would have been if the paragraph in question was not in the Ordinance.

Chair Niman explained that if the Council passed the motion, this matter would then be sent on to the Planning Board, and there would be a public hearing. He said in the meantime there would be discussion with Mr. Johnson, and the Council would make its final decision at the end of this process.

Councilor Needell said that at the last meeting, he had said his preference, between amending the provision and striking it altogether, was to strike it. But he said he would not support the motion that had been made, because he didn't think taking it out would grant anyone more flexibility. He said it would allow someone to use more flexibility

where necessary, and said he was not sure this was a direction he wanted the Town to take. He said he felt that this would be opening the door to interpret the Ordinance as one saw fit.

Councilor Stanhope said he disagreed, and said it would allow for some common sense. He said it seemed that the Town Administrator and the Code Officer could exercise this common sense, in looking at the various documents in an applicant's file. He noted that Mr. Johnson worked with people on projects, and had the skills that were needed to see what could be worked out. But he said he didn't take the common sense approach at present because of this existing language. He said if the paragraph was removed, he did not expect to see Mr. Johnson have a holiday in terms of administering the code, and said he felt he could do a good job without it.

Chair Niman said the last time the Council had discussed this issue, he had thought an incremental approach made more sense. But he said he couldn't disagree with what Councilor Stanhope had said. He said he would therefore vote to pass this along, and would see what happened.

The motion PASSED 7-2, with Councilor Needell and Councilor Henry Smith voting against it.

XI. New Business

A. FIRST READING ON ORDINANCE #2008-05 amending Chapter 175 "Zoning", Section 175-7 "Definitions" of the Durham Town Code to allow fitness centers within the Central Business District (CBD)

Mr. Campbell provided some history on how this proposed change had come about. He noted that the former Zyla's was no longer in business, and that a business person wanted to lease the building as a health club. He explained that "fitness center" was currently included under the definition of indoor recreation facility, which was not an allowed use in the Central Business District. He explained that after detailed discussion, the Board had agreed that it was more appropriate to list "fitness center" under "Personal Services" than under "Recreational Facility - Indoor".

He requested an amendment to the motion that was to be made, that fitness centers would be allowed in all of the districts where personal services businesses were allowed: the Central Business District, the Coes Corner District, the Church Hill District, and the Courthouse District.

Councilor Van Asselt MOVED to approve on first reading ORDINANCE #2008-05 amending Chapter 175 "Zoning", Section 175-7 "Definitions" of the Durham Town Code to allow "fitness centers" within Zoning Districts where "Personal Services" are allowed: the Central Business District (CBD), the Church Hill District, the Coes Corner District, and the Court House District. Councilor Needell SECONDED the motion.

Councilor Leach asked for details on the book that Mr. Campbell had gotten the

definitions from, and he provided details on this. She received clarification that this book did say that personal services included health clubs. He also said the definition of fitness center in the book said “see health club.”

In answer to a question from Councilor Leach on why the Planning Board hadn’t wanted to change the definition of “Recreational Facility, Indoor”, Mr. Campbell said the Planning Board didn’t want to do that, because they felt the districts they were allowed in were appropriate.

Councilor Needell provided additional details on the Planning Board’s thoughts on this.

The motion PASSED unanimously 9-0.

B. Discussion regarding the development of Town Council Goals for 2008/09

Chair Niman said when he was first on the Council, separate meetings were held for goal-setting. He noted that this hadn’t been done in 2007, and instead, the goal-setting was incorporated into regular Council meetings. He said one would think he would advocate doing that again, but he said not this year. He said last year, the Council had done a great job of creating goals that were doable, and said Administrator Selig had done an exceptional job of making sure they all stayed on track. He said at the end of the year, there were some things they could really feel good about.

He said he would like to repeat that, but said that if they tried to slip goal-setting into regular Council meetings, they wouldn’t have adequate time to consider goals, especially the big picture goals, and to then create a specific list. He noted comments made by Councilor Needell that the Council had not set specific goals concerning some issues that had come up.

Councilor Stanhope suggested that individual Councilors could submit issues that were important to them, and these could then be organized and circulated.

There was discussion on possible dates for the goal-setting session.

Councilor Needell agreed that a meeting dedicated to goal-setting was important. He also said it was really important that there was consensus on what the goals were. He said if consensus couldn’t be reached on some goals, the Council needed to figure out how to represent this.

Councilor Clarke said he was in favor of setting big goals, and asked if the goal-setting session should include conversation on goals that would take multiple years.

Chair Niman said yes.

Councilor Stanhope noted the importance of having the goal-setting meeting shown on DCAT.

Chair Niman asked Councilors to send their lists of goals to him by the following

Monday.

C. Shall the Town Council Reconstitute the Durham Apportionment Committee as the Tri Town Education Committee?

Chair Niman said he and Councilor Clarke had discussed this issue, and what they envisioned for this proposed committee. He said a question was whether they could perhaps find some common ground on this issue with other groups, some of them in other towns. He said what they came up with was a committee that would look at whether there were more creative ways to think about restructuring the School District that would save money for everyone, while improving the quality of education for kids in the district.

He said they envisioned a committee with broad participation, which could look for common ground to see if they could rethink the way they were currently doing things. He said he had volunteered to contact the various groups that had been identified, to see if they would be interested, and said he had also volunteered to convene the first meeting. He said someone else could then be voted in as chair of the committee. He said the question was whether the Council was interested in moving in this direction.

Councilor Needell said the Council Communication on this Agenda item had raised some excellent points, and some important issues to be discussed in the community. He said he thought this should be pursued, but said he was troubled about the idea of the Council having a role in this process. He said he felt the committee should be formed by interested citizens of the three towns, and said the Council could have representation on it.

He said the funding formula had been discussed by the Council because it was of direct concern to it, in terms of taxation in Durham. But he said it didn't seem to be within the Council's purview to say it was forming a committee to explore options for restructuring the School District, and said he felt it would be inappropriate to take a unilateral action like that.

Councilor Leach asked Councilor Needell if he would be ok with Councilor Clarke and Chair Niman forming a committee that didn't come through the Council, and with the Council not talking about this issue now or in the future.

Councilor Needell said the Council would talk about it in the future if there was a Council representative on the committee, but he said that person would not speak for the Town Council on that committee.

Councilor Stanhope said he disagreed with Councilor Needell, and said the Council had the responsibility to see that this topic was discussed. He said what had been proposed gave all parties a seat at the table. He noted that he personally would be more aggressive, in terms of looking at the issue of withdrawing from the School District. He noted that all three towns were not comfortable with the School District, for their own reasons, and said this committee would provide the opportunity to address the concerns.

Councilor Henry Smith said when the Council heard comments from the public about the

School District, it was concerning the tax issue. But he said the idea of restructuring the School District was a much larger issue. He said he thought they should approach the groups Chair Niman had referred to before taking action at the Council level.

There was discussion about what had happened with the Apportionment Committee. Councilor Van Asselt said he hadn't given up on the idea of getting a better apportionment formula, and said this seemed to be the place to start. He said if it was again found that this was impossible, they could then look at other options.

Chair Niman said Lee and Madbury were not interested in talking with Durham about the apportionment formula, and said there was no way to force them to do this. He said a question was whether they would be willing to discuss the idea of rethinking how educational services were provided. He said by seeing what they all could agree on, this might lead to changes in the School District, and cost savings for everyone.

Councilor Van Asselt said he didn't have a problem with this, and agreed that the efforts of the Apportionment Committee the previous year didn't get the Town very far. He also said he didn't see the situation as Councilor Needell did, and said the Council had to try something else of the discussion on the apportionment formula wasn't going anywhere.

Administrator Selig said he didn't see a fundamental problem with taking this direction, but he said it was a hard road, with many obstacles in the way. He spoke in detail about this. He also said he felt there was some fundamental inequity in the funding formula, and said he would like the Council not to lose sight of that.

Councilor Clarke said there was no question that from Durham's perspective, the funding formula was problematic, although the other towns didn't agree. But he said the three towns had a lot in common as to what the long-term solutions for the School District needed to be. He said the overall cost was a problem, and said there was also the issue of whether residents were getting what they wanted from the schools. He said people were very anxious to talk about this, and said the committee would evaluate what the options were. He noted that it had been 50 years since this issue had been explored.

Councilor Needell said he didn't disagree with the sentiments that had been expressed, but said he thought the place to change things was at the School Board. He said if people had concerns, the place to have an impact was at the School Board meetings, and also said he felt the Council should send a representative to these meetings, to close the loop. He said this approach should be tried first, and said he didn't think people had made a concerted effort to bring their concerns there.

Councilor Leach said she was not averse to the idea of this committee, and was not hung up on who created it. She also said that even if the Council let this proposal die that evening, Chair Niman and Councilor Clarke could go ahead and create the committee on their own. She said she was somewhat confused about Councilor Needell's position.

Councilor Needell said if members of the Council wanted to do this, that was fine, but said he was unwilling to vote for the Council to endorse a committee on what the structure of the School District should be.

Councilor Clarke asked what body it had been that had decided to enter into the School District in the first place.

Councilor Needell said he was not questioning the Council's authority, but said he didn't think it should be doing this.

Chair Niman said he and Councilor Needell had gone around on this issue before. He said he felt it was the Town's responsibility to educate students, and to determine how they were educated. He said the Selectmen, through the voters, had voted 50 years ago to delegate this responsibility to the School Board, but said he had suggested since he had been on the Council that he didn't view this as an irrevocable decision.

He said he believed it was the responsibility of the Council to determine what it believed was in the best interest of its citizens, including how kids were educated, even though this responsibility had been delegated to the School District. But he said he wouldn't have a problem with pulling together a committee with Councilor Clarke, and then coming back to the Council to create an official Council representative on it.

Councilor Van Asselt said he didn't think the Council was endorsing anything by encouraging a few member of the Council to start this committee. He noted other committees that had been started, and also said he wasn't sure there was anything wrong with showing some leadership on this issue, and said he felt these kinds of discussions needed to take place.

Councilor Stanhope MOVED to reconstitute the Durham Apportionment Committee as the Tri-Town Education Committee. Councilor Van Asselt SECONDED the motion.

Councilor Needell said taking this action was a statement of a lack of confidence in the School Board to solve its problems, and said he was not prepared to take that position.

Administrator Selig said it was his own preference to have the School Board establish this committee, and said he thought the effort would be more effective if the Board sponsored it.

Councilor Henry Smith said this was not the Town's responsibility, but was the School Board's responsibility. He said he would rather see Chair Niman and Councilor Clarke discuss the idea of forming a committee to evaluate the 50 year old structure of the School District. He said that otherwise, this would seem like a unilateral approach.

Administrator Selig noted that generally in New Hampshire, there was a separation of powers between the school board and the governing body of the town. He said he didn't want the School Board to be offended or surprised by this proposed action, and suggested this could be alleviated by asking them to create the committee first.

Chair Niman asked if the Council would like to delay the vote, and to check with the School Board first.

Councilor Sievert asked what would happen if the School Board said no, and

Administrator Selig said if the Council felt it was appropriate, it could proceed with creating the committee, and the School Board wouldn't be able to claim that the Council acted without consulting it.

Councilor Sievert said he agreed that the School Board should be given the opportunity to create the committee.

Councilor Stanhope said in towns where there was a school board and a board of selectmen, both entities answered to the budget committee. He said Durham had a budget committee, but said the School Board had actively opposed that check and balance. He said the question now was how to resolve the issues in a civil manner.

Councilor Van Asselt said Administrator Selig's idea was a good one. He said he should determine if there was interest on the part of the School Board, and should bring that information back to the Council.

Councilor Stanhope said he was willing to see the motion tabled, assuming that the Council would get a reply concerning this by the next Council meeting.

Councilor Van Asselt MOVED to table the motion. Councilor Julian Smith SECONDED the motion.

Chair Niman said Administrator Selig would contact the School Board to see if it was interested in creating such a committee. He said if it was, the Council would send a representative to it. He said if it wasn't, the Council would come back and vote on this motion. He said this process would be done in an expeditious manner.

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

D. Discussion regarding the design process for addressing future capital improvement projects

Councilor Leach spoke about her discomfort with the Wiswall Bridge process, and also said she hadn't been aware that the guidelines concerning the design process for capital improvement projects existed. She said the Council had been fairly clear on what it wanted the cost for the bridge project to be, in October, but said what was then recommended in February was the most costly bridge option. She noted that residents of the neighborhood had attended the meetings on the bridge, and asked why it seemed that more credence was given to them than to what the Council had said.

She noted that she wasn't on the Council during the Packers Falls bridge process, and said her concern was that these guidelines that had been recommended had come out of that particular project, which was a difficult project. She asked whether this was an approach the Council wanted to be used for all capital improvement projects.

Councilor Henry Smith noted that at the Council meeting on October 1st when the cost of the Wiswall Bridge was discussed, there were six Councilors. He said although there was discussion, no consensus was reached, and nothing was clearly recommended.

Councilor Van Asselt said it had been said, concerning the Packers Falls bridge process, that if citizens had been involved earlier in the process, the issues would have been resolved. But he said he wasn't sure that when the Council voted on these guidelines, it had considered how they would apply to all projects.

He said if they were taken literally, the idea of a group of citizens helping out concerning design ideas involving safety was not a good idea, just as it wasn't a good idea to have the Council involved in these kinds of decisions. He said involving the citizens could get in the way of certain activities that Town staff should be taking care of.

He said he wasn't sure it mattered whether these rules were on the books, and said Administrator Selig could use his judgment concerning the degree of citizen involvement that was appropriate for capital improvement projects.

Councilor Julian Smith said a meeting concerning the Wiswall Bridge that Councilor Leach had referred to, which citizens had attended, had come about as part of a requirement by the NH Division of Historic Resources. He said the fact that some members of the public who were there wanted to see a sidewalk, etc., was outside the scope of that meeting.

Councilor Leach said she understood that, but said her concern was that the neighbors were disappointed that they were not getting what they wanted. She said the communication with these people needed to be better, noting that the Minutes reflected the fact that the Council had said there wouldn't be all the bells and whistles for the bridge. She said she had nothing against public input, but said the Council had to make its decisions based on the overall good of the community.

Councilor Julian Smith noted that the second bullet in the guidelines hadn't taken place in the Wiswall Bridge process.

Administrator Selig provided details on the fact that a neighborhood group had not been formed for the Wiswall Bridge process.

Councilor Needell said there was nothing wrong with these guidelines, and said they had been developed because of a process with the Packers Falls bridge that had been extremely flawed and confused. He said the guidelines were an attempt to say that this shouldn't happen again, and that there shouldn't be any surprises. He said he didn't think there was a problem with them, and he provided further details on this. He also said it was a legitimate issue concerning whether the expectations of residents had been raised with the Wiswall Bridge process, and whether there had been enough communication.

Chair Niman said he agreed that there shouldn't be surprises, but said this new process outlined in the guidelines was almost as flawed as the old process, because it was based on the view that the neighborhood where a project was proposed would tell the Council what it wanted. He said he had no problem with citizen involvement, but said there was the implicit perception that because the neighbors were involved, they would get what they wanted. He said the Council had to look at the bigger picture, and said the Council

ultimately had the authority to say what happened.

Councilor Stanhope said the Town Council represented the majority, not the minority. He said there should be a mechanism for suggestions to be provided, but he said that ultimately, the Council had a responsibility to the Town as a whole. He said it seemed that this process had been burdened by some misconceptions.

Councilor Clarke said he felt the Council's job was to represent all constituents. He said a flaw he saw in the process outlined in the guidelines was focusing just on the neighbors, as the citizen group. He said he was all in favor of inviting public input at the beginning of the process, but said the Town was asking for problems if it focused just on the small group of neighbors. He said there needed to be a process that got broader involvement of citizens.

Administrator Selig said there had been public notices put up concerning the project, so it wasn't just the abutters who had been notified. He also said a particular challenge was that a message from the Packers Falls bridge project was that Durham would spend what it needed to spend on the bridge, including retrofitting a bridge that had just been renovated, in order to make it look good aesthetically, because this was important to Durham.

He also said he had detected concern by Council members about the cost of repairs to the Wiswall Bridge, and said that was taken into consideration by the Public Works Department. He also said the top price option presented to the Council in October was not the most expensive option Town staff had seen, and said at that point, the project had been honed back to a smaller footprint to get to a lower cost.

He provided additional details on the thinking of the Public Works Department and himself concerning the bridge project. He also said that while the guidelines hadn't been followed precisely for the Wiswall Bridge process, it was used as the game plan.

Councilor Julian Smith said these recommended guidelines were clear, but didn't empower residents to think they controlled the design process, or that they would get everything they wanted. He said this was why he persisted in saying that he could live with a bridge that didn't have a sidewalk, but couldn't live without a bridge.

Councilor Van Asselt said there were five things on the list, and the Town did all of them but #4. He said he didn't see why there should be a special committee to help with the design process.

There was discussion on this, and the thoughts of the Council at the time the guidelines were developed four years ago. Administrator Selig said Town staff remembered being grilled at that time, concerning the Packers Falls Bridge project. He also said he wouldn't mind dropping #4, but said the Council at the time thought it was important to include.

Councilor Needell said he disagreed with the decision the Council had made concerning the Wiswall Bridge, but said he didn't disagree with the process by which it had made this decision.

After further discussion, Administrator Selig suggested that Town staff could put forth what they thought would be an ideal process, in a somewhat different format.

Chair Niman agreed, and suggested that after looking at this, the Council could then decide if it preferred this,

Councilor Henry Smith said there had been public hearings on the Wiswall Bridge, and said the Council had gotten a lot of input on it. He said he therefore didn't think it was appropriate to include #4.

Councilors agreed the document would be brought back.

E. Other business

There was discussion about the degree to which an alternate Council representative to the Planning Board was actually needed.

Councilor Needell said this was a requirement, and noted that only an alternate Council representative could replace the regular Council representative at a meeting.

Councilor Julian Smith said he would not be able to attend two Planning Board meetings this summer.

There was further discussion on the role of the alternate Council representative. Administrator Selig pointed out that without an alternate Council representative at a meeting when the regular Council representative wasn't there, the Town Council had no input at the meeting.

Councilor Needell said alternate Council representative were full participants at Board meetings. He said it was not a passive role, and was not intended to be. He also said that given all the work this Town Council was encouraging the Planning Board to take on, concerning Zoning changes, etc., he thought it was incumbent on the Council to participate fully with the Planning Board at meetings.

Councilor Julian Smith MOVED to extend the meeting beyond the 10:30 pm adjournment time. Councilor Needell SECONDED the motion, and it PASSED 7-2, with Councilor Stanhope and Councilor Henry Smith voting against it.

Councilor Van Asselt suggested that the Council resolve this issue when it decided on committee appointments at the next meeting.

Councilor Leach said she didn't feel that someone should be forced to serve in the alternate Council representative position.

Councilor Needell said he objected to this statement, and said it was the responsibility of the Council, given the difficulty in coming up with volunteers, and given the posturing on the Council about the importance of planning for the future of Durham, and the

importance of development projects, to get two members to participate in the process more fully.

Chair Niman volunteered to be the alternate Council representative, unless another Councilor wanted this position.

He then noted that the Council needed to talk about personnel matters, and should decide whether to do this in public session or not.

The Council decided that it would first have the specific discussion on personnel matters in nonpublic session, and would then have the general discussion on personnel matters, in public session.

Councilor Van Asselt MOVED to go into nonpublic session on Personnel matters in accordance with RSA 91-A:3 II (a) and (c): Councilor Leach SECONDED the motion, and it PASSED 9-0, by roll call vote:

<i>Chair Neil Niman</i>	<i>yes</i>	<i>Councilor Peter Stanhope</i>	<i>yes</i>
<i>Councilor Jerry Needell</i>	<i>yes</i>	<i>Councilor Cathy Leach</i>	<i>yes</i>
<i>Councilor Van Asselt</i>	<i>yes</i>	<i>Councilor Doug Clarke</i>	<i>yes</i>
<i>Councilor Julian Smith</i>	<i>yes</i>	<i>Councilor Mike Sievert</i>	<i>yes</i>
<i>Councilor Henry Smith</i>			

The Council entered Nonpublic Session at 10:41 PM.

The Council returned to public session at 11:08 PM.

Councilor Leach MOVED to seal the Nonpublic Minutes. Councilor Van Asselt SECONDD the motion, and it PASSED unanimously 9-0.

XII. Adjournment

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

Adjournment at 11:10 pm

Victoria Parmele, Minutes taker