

This set of minutes was approved at the Town Council meeting on December 1, 2008

**DURHAM TOWN COUNCIL
MONDAY, OCTOBER 20, 2008
DURHAM TOWN HALL – COUNCIL CHAMBERS
7:00 PM**

MEMBERS PRESENT: Chair Neil Niman; Councilor Jerry Needell; Councilor Julian Smith; Councilor Peter Stanhope (arrived at 7:18 PM); Councilor Henry Smith; Councilor Cathy Leach; Councilor Mike Sievert (arrived at 7:04 PM); Councilor Doug Clark; Councilor Karl Van Asselt (arrived at 7:35 PM)

MEMBERS ABSENT: None

OTHERS PRESENT: Town Administrator Todd Selig; Director of Public Works Mike Lynch; Assessor Robb Dix; Town Engineer David Cedarholm

I. Call to Order

Chair Niman called the meeting to order at 7:01 PM.

II. Approval of Agenda

Councilor Clark MOVED to approve the Agenda as submitted. Councilor Henry Smith SECONDED the motion, and it PASSED unanimously 6-0 (Councilors Sievert, Stanhope, and Van Asselt had not yet arrived).

III. Special Announcements

- A. Employee service recognition (20 years) – Daniel Driscoll, Wastewater Treatment Plant
- B. Incentive Award – Steve Goodwin, Wastewater Treatment Plant, to encourage creativity

Administrator Selig presented a plaque of recognition to Mr. Driscoll. He also presented an award to Steve Goodwin, and noted that his design of a sludge handling system had resulted in a significant cost savings for rate payers.

IV. Approval of Minutes

Councilor Sievert arrived at the meeting.

September 15, 2008 (Work Session on Budget)

Councilor Leach MOVED to approve the September 15, 2008 Work Session Minutes as presented. Councilor Julian Smith SECONDED the motion, and it PASSED unanimously 7-0 (Councilors Stanhope and Van Asselt had not yet arrived).

V. Councilor and Town Administrator Roundtable

Councilor Leach made note of the fact that the Churchill Rink was open for the season. Administrator Selig said he had been busy that week putting the final touches on the Budget. He said voting on November 4th would take place at the Oyster River High School from 7 am to 7 pm, and said a major turnout was expected, so a number of volunteers were needed to help with registering new voters and other logistics. He said that Councilors were election officials, and some were needed to open and close the polls, as well as during the day. He also noted that Councilors would be asked to approve the Election warrant at the meeting.

He said there would be a workshop on October 23rd to look at whether it made sense to propose the Oyster River for inclusion in the State's River Management Protection Program. He also said there would be a special session on the Right to Know Law in October, and said this would be recorded by DCAT. He said the Town's boards and commissions were encouraged to attend this session.

Councilor Henry Smith told Councilors that UNH had recently held a ceremony where UNH faculty and students had tossed flowers into the Oyster River in memory of the people, some known and some unknown, who had been slaves in NH. He said this had been a celebration of the abolition of the slave trade in the 1800's, and he held up a flower as a symbol of the ceremony.

Councilor Julian Smith said he had gone downtown to Libby's to watch the last few innings of the pennant playoff game, and afterwards had seen that there were at least two dozen officers, etc., in the area. He said there had not been a lot of interest in the game, and said he thought Durham's police department had a tendency to overreact to the possibility of a disturbance.

He said the only person downtown who was disturbed was himself, as he watched the police stopping students on Main Street. He said there must be a better way to handle this than telling people they couldn't walk along Main Street when there was no crowd or mob. He said the Police Department could be a little more mindful of the Constitution.

Chair Niman asked those people who were there to speak regarding the Agenda items that included public hearings to please wait until those hearings to make their comments.

VI. Public Comments (NLT 7:30 PM)

Roger Speidel, Nobel K. Peterson Drive, said he had returned in order to keep the Council informed about the discussions at School Board meetings. He said at the meeting the previous Wednesday, the School Board proposed that the 2009-2010 Budget should be held to a 3% increase or lower, and said this passed with only one dissenting vote. He said he felt that the Budget motion should be rescinded, and replaced with a proposed 5% reduction.

He said the sins of past budget increases had driven the tax rate to 28.24 per thousand, which was higher than any other jurisdiction in the area. He said the pain of this tax burden was now coming home to roost, and he named a number of stores that had left Durham. He said the School System did not exist in a vacuum, and was part of the entire economy of the Town. He said the School Budget represented 68% of the Town's tax burden, and said now was the time for the School Board to be intelligent, creative and empathetic, and to go forward with a 5% reduction. He told

Councilors the taxpayers needed the Council's help with this situation.

Mr. Speidel also spoke fondly of the UNH football team, stating that they were a great bunch of kids with a fine coaching staff, and that residents of the State should be proud of them and support them.

Councilor Stanhope arrived at the table at this point.

Bill Hall, Smith Park Lane, disputed in some detail the Town's approach to the Mill Pond Road water infrastructure piping that was proposed. He also spoke in further detail on the waste oil burner idea he had spoken about at the previous meeting. Mr. Hall also noted that the CIP included a sizable expenditure for a test well at the Spruce Hole aquifer, and said with that cost, it was not a test well; it was a real well. He spoke in further detail on this as well as the Lamprey River water supply, and said he had no idea why the Town was talking about developing the aquifer.

Mr. Hall said he continued to hope that the Town would get the forestry program started. He said they could start with cutting trees around the transfer station, which would cut the risk of fire there, and would also provide the Town with \$25,000-40,000, depending on how aggressive the cut was. He also said that if the Town had started an ongoing forestry program after he had done the Doe Farm, it would be getting about \$100,000 to help pay off conservation initiatives. He said there was some work to do regarding this issue, and said the Council needed to get smarter in terms of how it functioned.

Robin Mower, Faculty Road, noted that the Council would be speaking with Conservation Commission member Duane Hyde regarding a possible conservation easement for Misty Meadows. She urged the Council to consider applying for the various grant possibilities to fund this, stating that Councilors had a very detailed summary of the reasons why the Town should consider this. She said she thought it would be useful to have someone read some of those reasons, including the fact that there would be public access and the potential for a new farming area in Town.

Beth Olshansky, Packers Falls Road, urged the Council to go forward with the Misty Meadows application for funding. She noted that the Council's #1 goal was to find a balance between economic development and conservation, and said here was an opportunity where there was appropriate funding available. She said this project was important to the Town's water supply, and she spoke about the fact that the Town of Lee had already protected its portion of the area.

Administrator Selig said he would like to respond concerning some of the public comments that had been made. Regarding Mr. Speidel's comments on the School Budget, he assured residents that the Town was very aware of the current economic conditions, and was taking a minimalist approach as part of the Town Budget process this year.

Regarding Mr. Hall's comments, he said the Public Works Department had evaluated whether to do the Mill Pond Road piping work in-house, but said there was not enough staff to do this. He also said that regarding burning waste oil at the Public Works garage, there wasn't enough oil from the various vehicles to fuel the furnace over the course of the winter. He said there was also the issue of storing the oil on site, and said the permit prohibited this. He said the Town was using synthetic oil for police cruisers and was finding it didn't have to replace the oil as often. He noted that the Town used natural gas at the garage, and was mindful concerning the costs.

Administrator Selig also said that regarding Mr. Hall's comments on a Town forestry program, there were some spots in Town where selective cutting on forested Town land would be appropriate. He said a member of the Conservation Commission was working on this issue, and said the Commission would like to get proposals from a number of foresters.

Regarding the information on the Misty Meadows conservation easement proposal, he said it had only been provided to him and the Council that day, and they hadn't had much chance to review it.

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

- A. Shall the Town Council sign the Warrant for the General Election to be held on Tuesday, November 4, 2008?
- B. Shall the Town Council approve the Special Events Permit application to close a portion of Main Street for the annual "Light Up Durham" celebration on December 5, 2008 from 4:00-9:00 PM as requested by the Durham Business Association?
- C. Shall the Town Council adopt a schedule of supplemental meeting dates for the purpose of deliberating the proposed FY 2009 Operating Budgets, and schedule a public hearing for the proposed FY 2009 Operating Budgets, Capital Budget, and 2009-2018 Capital Improvement Plan for Monday, November 17, 2008?

Councilor Julian Smith MOVED to approve Unanimous Consent Agenda Items A, B and C. Councilor Sievert SECONDED the motion, and it PASSED unanimously 8-0 (Councilor Van Asselt was not yet at the table).

VIII. Committee Appointments

None

IX. Presentation Item

Receive update relative to the ongoing revaluation (statistical update) process – David Hynes, Department of Revenue Administration and Robb Dix, Assessor

Administrator Selig explained that at the last Council meeting, there had been questions on the revaluation process that the Town was presently undergoing. He said he had subsequently asked Mr. Hynes to provide an update on what he has seen so far as part of the revaluation process.

He said Mr. Hynes had met with Assessor Rob Dix, had inspected some properties to look at the accuracy of the assessments, and had talked with some property owners. He said the goal was to get a measure of confidence concerning the way the revaluation was being done. He also said he had shared with Mr. Hynes the scattergram graph that had been provided at the last meeting.

Councilor Van Asselt came to the table at this point.

Mr. Hynes provided background on the role that the State's Department of Revenue played in a Town's revaluation process. He explained that the Department had its own programs that it used to analyze local assessment information, and was involved in the revaluation process from the onset in an unbiased way.

He spoke in detail on the process he followed, which included doing a random sampling of properties that were being revaluated. He said he hadn't found anything significant so far that would indicate that there had been problems with the revaluation process. He said he would be providing final details on whether the assessment values were okay within the next few weeks.

Mr. Hynes said he had looked at the scatter-graph that had been done, and said these results didn't faze him, noting that there tended to be more variation in the NE states, where local entities were in charge of determining assessment values rather than the county. He described a number of changing variables concerning properties, and said the ratio had to hit between 90-110% for him to say it was okay. He said the graph fell within IWA standards. He spoke in detail about the statistical analyses he had been doing, and also said he would be out in the field looking at more properties over the next few weeks.

Councilor Clark asked what happened if Mr. Hynes came back at the end of the assessment process and found that the assessments for the Town weren't in the acceptable range.

Mr. Hynes said that so far, he hadn't seen any glaring problems with the assessments. He said if there were glaring problems, there would still be time to address them, and said the tax rate wouldn't be set until things were right. He noted that the Town Council was Durham's Board of Assessors, and said hopefully the Council would have faith in the assessment process that had been carried out, after reading his report.

He said if the Council decided it didn't want to accept the values, there was no choice but to set them and then have property owners go to the Board of Land and Tax Appeals. He said if that Board saw no glaring problems with an assessment, it would order the Town to use the new assessment values. He noted that there were currently some NH towns where this kind of thing was happening.

Chair Niman asked if it was reasonable to expect that the scatter-graph could do better, with a reduced amount of variance, than the standard variation Mr. Hynes said it needed to fall within.

There was discussion on this, with Mr. Hynes stating that the Town's revaluation was falling between good and excellent. He provided details on this.

Chair Niman said there had been about 200 meetings with Durham property owners concerning their assessments, and he asked if this was a high number compared to other towns. There was discussion.

Councilor Stanhope said that regarding the scattergram graph, he realized that the mass appraisal method had a high error factor because it was not property-specific. But he said he had a responsibility as a Councilor in a town with a high tax rate when some people were paying more than their fair share. He also said some people were paying less than their fair share. He said he was troubled by the fact that the statistical model could fail when there wasn't a sufficient amount of data, or there wasn't some uniformity in the properties being assessed. He asked Mr. Hynes if he was comfortable with the concept of some people having to pay more than their fair share.

Mr. Hynes said there was a 13.5% range, including above and below the median, and said this

wasn't that bad. He said it would cost about \$500,000 to do a fee-simple appraisal of all the properties in Town, and said the Town simply didn't have enough money to do such an analysis. He stated again that there was process available to question the assessments if people weren't happy with a decision, and that the burden was on the taxpayer to do this.

Councilor Stanhope asked whether, if the Council didn't accept the revaluation and it was referred to the Board of Tax Appeals, testimony could be provided as part of that process.

Mr. Hynes spoke in some detail about the process that would be followed in such a situation. He said the appraisers would come to Durham quickly to review the data, and said chances were very good that if they didn't find anything wrong, he wouldn't find anything wrong either.

Councilor Leach said a concern of some residents whose properties were appraised was that virtually no information was provided as to why the appraisal was what it was. She asked if more details would be provided to property owners.

Mr. Hynes described the reporting he did, and said the report he created would provide this kind of detail. He said specific styles of properties, square footages, etc. would be provided, and said the detail in it mirrored what was happening in the market, in layman's terms.

Councilor Sievert asked if commercial properties would be analyzed in this way, and was told that they would be.

There was discussion with Mr. Hynes about the fact that given the current state of the economy, residents were having a hard time understanding that there had been an increase in assessments relative to 2003. He explained that home prices were still way above what they had been in 2003, noting that they had only started to decline in 2006. He said that between 2003 and 2006, home values had increased about 14% each year in NH, and only started going down when the economy slowed down. He said the Assessor was only a reader of the market, and the market told him what the numbers would be.

Councilor Stanhope noted that all markets didn't perform uniformly, and said that even within a community, there could be stratification, so that appreciation/depreciation could occur at different rates depending on the property. He asked how this could be accounted for in the model.

Mr. Hynes said State averages were used, and said a statistical sheet was developed for a particular town, which was broken out into strata groups. He said the data could be separated further into more strata, depending on the particular town.

Councilor Stanhope noted that foreclosures had increased by 50% or more in the State, and he asked whether when they began to dominate the market, they were considered qualified sales or were excluded.

Mr. Hynes said this would be a point of discussion for the State in 2009, given what was happening in the market, and he spoke in some detail on this.

Administrator Selig noted that the data showed that recent sales of multi-unit properties in Town had driven up the prices of these kinds of properties substantially since 2003. He said student housing was a major industry in Durham, and noted that the Town was trying to expand its tax base, and as part of this was encouraging owners of these properties to expand them. He asked if there was a way to phase in over time the significant increase in the valuation for these properties.

Mr. Hynes said there wasn't such a way to do this, and he discussed the State statute concerning this.

Councilor Stanhope noted that there had been some large portfolios of multi-family properties that were sold to individual buyers, and asked if it would be appropriate to apply the unit values for them to smaller multi-unit properties.

Mr. Hynes said it would not be appropriate to do this.

The Council stood in recess from 8:15 to 8:27 PM.

X. Unfinished Business

PUBLIC HEARING AND ACTION on Ordinance #2008-12 to expand the Office Research & Light Industry (ORLI) district into the Residence B (RB) district to include the remaining land of Sprucewood to the Lee Town line and a draft Conservation Easement Deed encompassing 124 +/- acres of the proposed area to be rezoned

There was discussion that there had previously been a formal motion to table the discussion on this Item, and that it therefore needed to be removed from the table.

Councilor Julian Smith MOVED to remove this item from the table. Councilor Sievert SECONDED the motion, and it PASSED unanimously 9-0.

Councilor Sievert MOVED to open the Public Hearing. Councilor Henry Smith SECONDED the motion, and it PASSED unanimously 9-0.

Administrator Selig noted a letter that had been provided from the EDC on this issue. He read the letter out loud. The letter said EDC felt approval of the ordinance would allow for the kind of development that would serve the interests of the Town.

Derek Sowers, Oyster River Road, said the justification for the rezoning, in terms of how it would actually benefit the Town, hadn't been made clear. He also said it hadn't been made clear why the whole area needed to be rezoned. He said there was no development proposal before the Town, and said there was no guarantee that the property wouldn't be sold in the future. He asked what the protection would be to the Town if this happened, and noted that the easement wouldn't be put in place until a specific development was approved.

He also noted that the current zoning for the RB district required that conservation land be set aside, and said he therefore wasn't sure why this rezoning was needed. He stated again that he wasn't clear on why the whole area needed to be rezoned. He noted that some of the land was owned by the Town, and said it didn't make sense to rezone these areas to allow light industry.

Mr. Sowers reviewed various provisions in the easement that he had concerns about, including the fact that stormwater management facilities would be allowed in the conservation area, and that ball fields would be allowed in the conservation area. He said with all of the infringements proposed on the conservation land, his question was where the conservation part was. He said there were too many loopholes in this agreement, and said he didn't think it was a good deal.

Concerning the proposed agreement between the developer and the town, Mr. Sowers noted that it said "all uses", and he also said there could be 37 acres of impervious surfaces. He said the agreement spoke about the Town having to reserve specific water and sewer capacity for the development, and also said that it said the property would be exempted from changes to impact fees, water and sewer permit fees, etc., after September 15, 2008, and said he didn't think this was a reasonable provision. He also noted that the agreement said that roadway access "shall be in a manner acceptable to the developer".

He said this approach turned the usual development paradigm around 180 degrees, and said he found this approach unbelievable. He said the Town was doing the developer a favor, and said he didn't think what was proposed was protective of the town's interests. Mr. Sowers said it wasn't certain that the Town would get the protections the easement was crafted to provide, and said the approach outlined would set up the situation of a quid pro quo for approval of the development by the Planning Board. He said this set a bad precedent.

Hillary Scott, 20 Davis Ave, said she appreciated Mr. Sowers words, and said they echoed her own concerns. She said the rezoning effort had gotten intertwined with a potential application that the Town would benefit from, and said there was a danger in this. She said there were some things that needed careful consideration before the Council acted on this issue.

She asked what the vision was, beyond spot zoning, and said she felt this was a dangerous way to go. She said she would like to hear a conversation specifically about the zoning implications, including the uses that would be allowed, and said they just didn't know what would happen if the land were sold.

Ms. Scott said that with this change, there would be no buffer for properties in the Rural District. She asked that there be a clause that if the application for development of the rezoned property was denied, that its zoning go back to the RB district, and not stay as part of the ORLI district

James Houle, 95 Mill Road, said he didn't believe that this was necessarily a growth or no growth issue, and said it was a question of how Durham grew responsibly. He said a development was proposed to go in an area of current and future drinking water supplies, and said that with development in New Hampshire increasing over time, it was plausible that upstream towns would draw increasingly on surface waters, which would mean that Durham would become more and more reliant on the aquifer for its water supply.

Mr. Houle said the easement document should be more comprehensive in terms of stormwater management strategies, and he spoke in great detail concerning the components that were currently not found in the document.

Chair Niman asked if the UNH Stormwater Center had some boilerplate language that could be used for this kind of easement, and Mr. Houle said language from NHDES would cover the issues he had mentioned, and said he could provide the Internet link for this to Chair Niman. There was discussion between them regarding appropriate requirements for minimizing the total annual volume of stormwater runoff.

Councilor Sievert said it looked like there wouldn't be any construction in the easement area, so he was confused about what Mr. Houle was saying. He said he assumed Mr. Houle was talking about the whole Ordinance being upgraded concerning the stormwater management requirements.

Mr. Houle said he was talking specifically about the easement language. He said it addressed stormwater, but said he felt the language was inadequate to protect overland flow to the river, and stormwater discharge to the aquifer.

There was detailed discussion about this. There was also discussion about the fact that the Town was developing a stormwater ordinance, and that any development would have to abide by the requirements in such an ordinance.

Councilor Leach said that given this, a question was whether the stormwater management detail needed to be in the conservation easement document, or if it instead could be addressed as part of an application process.

Chair Niman said an issue was whether the public wanted to see it all in writing now, in the easement document.

Mr. Houle said he had not seen the draft stormwater ordinance, and he asked whether every development in Town would fall under the jurisdiction of that ordinance. There was discussion about this issue.

Councilor Leach said she didn't think the detailed stormwater information should be in the easement document if it wasn't yet known what the stormwater ordinance would say.

Duane Hyde, 47 Emerson Road, said he was present as the Vice Chair of the Conservation Commission. He said the Council might want to be sure that the easement didn't exclude the Town from being able to regulate development on the property under a new stormwater ordinance. He also said the Commission had experience in doing conservation easements, and would be happy to fine-tune this easement document in order to make it more workable.

He said it would be beneficial to have the Conservation Commission involved with this, and said the issues with the document could be resolved, although he said it was hard to assess it without seeing where the easement would be. He noted that the Commission was a signatory of the document in the current draft.

Robin Mower, Faculty Road, urged the Council not to focus just on stormwater management, and to consider other issues that Mr. Sowers had talked about, noting that he worked for the NH Estuaries Project. She then made reference to the letter that had been read from the EDC. She said

she had attended the meeting of the EDC where the conservation easement was discussed, and said she was not aware that there had been a review of the easement proposal by the EDC. She suggested that there were some elements in it such as the language on impact fees and delivery of water and sewer that should be of concern to the EDC, and said perhaps they would want to review it.

Malcolm McNeill, 44 Colony Cove Road, said he represented Amber Acres, LLC, which was directly contiguous to the parcel that was proposed for re-zoning,. He said it was in the ORLI zone, and was one of the very few parcels of land in Durham capable of large scale development, but for the absence of water and sewer.

He said the ORLI zone did not have a reservation for water and sewer capacity, and said it had no protection against zoning changes, or other changes that might occur during a development process that might impact the project. He said it also had no provision with regard to the impact of density, based on making a conservation donation. He said in other words, the property on his side of the river was being treated differently than the one on other side, even though they would be in the same zone.

Mr. McNeill said he was a strong proponent of economic development for the purpose of reducing the tax burden. But he said he had concerns about the form and the substance of this re-zoning proposal. He said he had seen the map that day and had also quickly ready the agreement. He said it was this agreement that he found most objectionable, and said what was described in it was contract zoning, which was of questionable legal validity.

He asked if the EDC was aware that this agreement would only apply to a project that had not been approved, and would treat the developer differently than it would other developers in the same zone. He also asked about what the Planning Board's position could be concerning an agreement like this, including the fact that water and sewer would be reserved, under some undefined process, something that to his knowledge had never existed in Town before.

Mr. McNeill said that this part of Town needed to be developed, but said there needed to be a level playing field, and he spoke in further detail on this. He said he expected to be in front of the Planning Board with a project, but said when a project for the property in question right now went to the Planning Board, some of the matters concerning it would already have been decided. He said this would not just be an enabling, it would be a reservation of rights and protections.

There was brief discussion that the issue of contract zoning would need to be addressed before this proposal could go any further.

Mr. McNeill said that given the Town's desire to see development in this area of Town, it was important not to set one possible developer against others by setting up two different sets of rules, especially in the same zone.

Councilor Needell thanked Mr. McNeill for raising some important questions. He also noted that the wording in the easement document should say that there would be a voluntary decrease in the impervious area to 30% . He then asked what Mr. McNeill had been referring to concerning a density bonus.

Mr. McNeill said in one sense, an indirect density bonus was the reservation of capacity, and said that perhaps it should be called a development benefit instead.

Councilor Van Asselt said if one were interested in seeing development of 163 acres that were currently zoned RB, and would like to see them under the ORLI provisions, how could he overcome the effort made to date to try to make that acceptable in this community, if all he did was change the district from RB to ORLI .

Mr. McNeill said he didn't think it should be done this way. He said it was the form and substance of the deal that he found offensive, stating that it appeared to be a special deal for a special project. He also said that regarding many of the concerns of members of the public who had spoken, he felt that many layers of protection existed under the current Ordinance. He said if the Council didn't feel these protections existed, it should change the Zoning Ordinance in the customary way, not this way. He then spoke of how his own property was developable, as long as there was water and sewer available.

Councilor Julian Smith said Mr. McNeill had spoken about the rights the Town was giving to this developer. He asked if these were really rights, or if the developer was saying he would provide an easement on half of the property under certain conditions. He said the Town at any point could say no to certain things, and said he didn't see that the agreement gave the developer any rights that other property owners or potential developers didn't have already.

Regarding protection against Zoning changes, Councilor Smith said that if the Town decided to change back to RB, or to Rural, the developer would say he wouldn't provide the conservation easement, and said this would put a tremendous economic burden on him.

Mr. McNeill said that to him, the zoning protection and the capacity protection were analogous to making a contract deal. He also said there would be conservation restrictions on the development of the property, regardless of whether the easement document existed. He stated again that he was just asking for a level playing field.

Councilor Julian Smith asked whether, if the Council backed away from the agreement, Mr. McNeill would support the rezoning of the property without it.

Mr. McNeill said he was in general agreement with the rezoning. But he said if there was going to be a conservation easement, there shouldn't be special, protective help provided to the developer as part of this. He also said the water and sewer capacity shouldn't be guaranteed. There was further discussion on this with Councilor Smith.

Chair Niman said he had found Mr. McNeill's comments very educational.

Developer Jack Farrell spoke before the Council, and said he didn't know if the conservation easement was the way to go or not. He agreed that the way to go was to just change the zone. He said it had been shown that there were some conservation benefits that could be gained by moving the ORLI district boundary and said this had therefore been proposed to the Conservation

Commission and the Town Council. He said a Council-initiated zoning proposal then had come forward, and noted that the reason the proposed zoning change included more than one area was that otherwise it would be spot zoning.

He said the recommendations from Mr. Houle and Mr. Sowers were perfectly sensible, and could be worked into the proposed easement. He noted that some of them were already in it, and said the items in the easement relating to stormwater had been recommended by Town staff. He said he wasn't trying to leave anything out. He also said he didn't believe that the stormwater management details belonged in the easement document.

Mr. Farrell said he understood why Mr. McNeill felt the way he did, but said the fact was that there was no deal. He said he had been told that this would be a more attractive zoning change if he agreed to do what he had already said he wanted to do, and said the idea had developed to put this into writing, with regard to putting land in open space, etc. He said they were offering about 50% of the land, if the Town wanted to do it that way.

He said if the town didn't want to do it, the property was subject to the same provisions as Mr. McNeill's property. He explained why the agreement said he would be happy to do what he said he would do with the easement, assuming the development could be done. He said there was no reservation of sewer and water. He said this approach wasn't his idea, but said Attorney Mitchell had said it was workable.

He said what he thought the Town should do was to change the property to ORLI, so he could do the project and do the open space the way he had said; and to make the ORLI requirements more stringent for everyone so there would be a level playing field and so all the land around the river would be protected, not just the land owned by people who had agreed to do this voluntarily.

Ms. Olshansky said she thought the whole process had been well intentioned, and said it appeared that the Council and the public would prefer that there would be some conservation land preserved as part of this process. But she said the process had gotten very complex and convoluted, in part because there was no development plan. She said she appreciated the concerns expressed about water resource protection issues, and the expertise of UNH staff on these matters. She also said she had heard the legal concerns about landowners not being treated equally.

She suggested that the conservation subdivision process should be applied to both sides of the river, and said this process was already set up in Durham as a way to address these matters. She said it sounded like the Council and the public would like to see conservation land preserved as part of development proposals, and she asked why the Town wasn't doing what seemed to be a more straightforward approach, which was less likely to be challenged legally. She also said it seemed odd that the Conservation Commission was asked to sign the easement document, but wasn't invite to provide input on it.

Mr. McNeill said the reasons conservation subdivision wasn't done for commercial properties was that doing so would mean there wouldn't be any commercial development in Durham. He said if the Council wanted to proceed in the manner Ms. Olshansky had described, the entire Town should be zoned residential, and it should forget about commercial development.

He said if the Council looked at the regulations, it would find a property that could comply with the ORLI requirements, as long as there was the commitment to provide the infrastructure.

Ms. Olshansky noted that she had sent letter a month ago, suggesting the idea of rezoning all of ORLI into a possible zone that did adopt conservation subdivision. She said Mr. Farrell had created the idea of doing conservation subdivision on his piece of land, and she said there should be a simple way to support that.

Councilor Van Asselt MOVED to close the public hearing. Councilor Stanhope SECONDED the motion, and it PASSED unanimously 9-0.

Councilor Stanhope said he believed it would be better to change the Zoning, and then, if a plan came forward, the negotiation of a conservation easement could be looked at as a separate matter. He said he would be very uncomfortable if that agreement excluded zoning changes, or reserved water and sewer rights. But he said those aspects would be relevant if there was a development project before the Planning Board. He also said the Council should have received feedback from the Town attorney on the risk involved with the contract zoning aspect of this issue. He said he thought the Council should vote on the ordinance change.

Councilor Sievert said he wasn't comfortable with the easement aspect of this process. He said the shoreland, stormwater, and aquifer overlay provisions of the Ordinance would cover most of the protections the Council would want to see, and said this was a better idea than putting an easement on the land. He also asked if residents would be there raising their concerns if a residential development had been planned for this area, rather than a commercial development.

Councilor Henry Smith noted that the question had been raised as to what happened if the property was changed to ORLI and then the project didn't go through, and the Town was left holding the bag. He said he didn't know how this would work, and there was discussion.

Councilor Leach asked whether the Town's regulations provided enough protections. She said she had thought that the reason this process had gotten so convoluted was that some members of the Council and members of the public had said that more protections were needed than what the current regulations allowed.

Councilor Needell said he had been consistent that he was not willing to rezone this specific parcel to ORLI. He said he had said that if there was a need to change the zoning to make the rules more stringent, this should be done before the rezoning occurred. He said it needed to be decided how to do this: by requiring conservation subdivision, creating a planned unit development ordinance, etc. He said there had been very few objections to the proposal as put forward. But he said his concern was what happened if it was rezoned, and for any reason Mr. Farrell wasn't the developer who brought a development forward.

Councilor Van Asselt said residents had made sure that the other parcels in Town labeled ORLI had gone nowhere in terms of development. He said here was a parcel zoned RB, where there was the opportunity to make it ORLI. He said he didn't understand why it worked in other places but not

here. He asked Councilor Needell if he was saying ORLI didn't fit this piece of land, and Councilor Needell said he was in fact saying that. He was not interested in moving ORLI unaltered to this parcel.

Councilor Clark said he was frustrated because all the Council was trying to do was the right thing. He said he would hate to see the Council abandon the conversation on the zoning change. But he said there were questions as to what happened if the land were sold, why the whole piece was being rezoned, and the legality of the agreement. He said there seemed to be a lot of support for the project and finding some kind of balance between economic development and environmental protection. He recommended trying to find the right solution.

Councilor Henry Smith agreed that there was still the question about whether this was an appropriate place for the ORLI district, and whether greater protections were needed there. He said he was inclined to feel these greater protections were needed.

Councilor Julian Smith asked Councilor Needell if he would feel better about this proposed zoning change if this land was a new district, such as the Spruce Hole district, with protections relative to the aquifer, etc.

Councilor Needell said he would be comfortable with any suggestion on how to accommodate the property, but said he was not willing to simply accept changing it from RB to ORLI.

Councilor Leach asked Councilor Needell why he didn't feel this was appropriate.

Councilor Needell said the reason was the closeness to the Spruce Hole aquifer, and said there was also the fact that this area was a buffer between ORLI and the residential zones. He said the ORLI designation didn't require that any conservation land be set aside, but said that with the current RB designation, residential development was subject to the conservation subdivision process. He said ORLI had no rules regarding placement of the development.

He said he had been supportive of the easement approach to the extent that its intent was to say that was proposed for development of the property would actually happen there. But he said Mr. McNeill had raised some questions that he had not considered, and said these things did need to be considered. He also said the Council should take advantage of the expertise of the Conservation Commission to help in the crafting of the easement document.

Councilor Leach said the Conservation Commission had been sent the easement document and had been asked to provide input.

Councilor Needell said this most recent draft of the document had not been provided to the Commission, and there was further discussion.

There was discussion between Councilor Julian Smith and Administrator Selig as to why the Conservation Commission Chair was expected to sign the easement, and whether the agreement would go forward if the Commission did not wish to sign it.

Councilor Sievert said he was troubled by the fact that people were complaining about surface water issues for this small area. He said the Oyster River was surrounded on both sides by commercial districts, and asked why the discussion wasn't focused on the entire acreage of MUDOR and ORLI and its influence on the river.

Chair Niman said he thought people would in fact like to broaden the discussion.

Councilor Sievert said he thought the right approach was to rezone the area under discussion to ORLI, and to then update the stormwater regulations.

Chair Niman said he would like the Council to talk about how it wanted to proceed. He first said it was not his intent to set up a system where individuals were treated differently. Regarding whether there were already adequate protections, he said that if a development came forward, he would trust Mr. Cedarholm to be sensitive to the special needs of the property, and to enforce the stormwater regulations until the stormwater ordinance was in place, in a way that would adequately protect the water supply. But he said some people didn't have that same confidence, and wanted to see things in writing. He said the question was whether there were now five Council members who felt there were adequate protections in place.

He said the intent with the easement document had been to create the features of a conservation subdivision without actually having one. But he said perhaps this hadn't been the best way to go about things. He said there were ways to continue the process, and to keep the good will. He asked Councilors whether they wanted to vote on the proposed zoning change, or instead wanted to come up with another approach.

Councilor Stanhope said he had a lot of confidence in Mr. Cedarholm's ability to come up with the stormwater ordinance, and also had confidence in the planning process. He said he thought the proposed agreement would be more appropriate coming out of the planning process instead of being a part of the approval of the zoning change. He said he thought the Council should vote.

Councilor Stanhope MOVED to Adopt Ordinance #2008-12 to expand the Office and Research & Light Industry (ORLI) district into the Residence B (RB) district to include the remaining land of Sprucewood to the Lee Town line. Councilor Van Asselt SECONDED the motion.

Councilor Henry Smith said Mr. Farrell had put forth a good faith effort, and said he also had confidence that Mr. Cedarholm would do the right thing. But he said the question in his mind continued to be what happened if the ownership changed hands. He said he would prefer to improve the document, and said he was not in favor of voting that evening.

Councilor Julian Smith said his preference was to table the motion.

Councilor Clark said before voting on this, he would first like to hear the answers to the questions that had been raised that evening.

Councilor Leach asked those Councilors who would like to table the motion what they would like to see happen in the mean time.

Councilor Julian Smith noted that there had been a two part motion for the public hearing, and that the easement proposal had come forward as part of this. He said there had been some enthusiasm concerning this conservation easement, also noting that Mr. McNeill had pointed out some problems with it. He said the Conservation Commission hadn't met yet to discuss the most recent version, and said there were issues with the easement that needed to be worked on.

He also noted that he had suggested some time back that the permitted uses and the dimensional standards in the ORLI district should be looked at. He said he would like to see more discussion on this.

Mr. Farrell said that given the challenge that Mr. McNeill had presented to the whole concept of the conservation easement and the agreement, he didn't think it would be in the best interests of his company to continue on that path. He said he thought there were other ways to address this situation, and said the ORLI district should be fixed as soon as possible to address the concerns he had been asked to address.

In response to a question from Councilor Julian Smith, he recommended that the Council make the zoning change, so he could go forward with his project and conserve land next to College Woods. He said otherwise, he would have to come forward with a different proposal that wasn't as good. He said there was time to fix whatever issues there were.

Administrator Selig said there were some things for Councilors to keep in mind. He noted the natural tension between those who wanted economic development and those who were very protective of the town's natural resources. He said if they put off making the change, and looked at a very detailed revision to the ORLI district, they would continue to find that tension. He spoke in detail on this.

He said the critical component that made the parcels under discussion different than those across the river was the existence of the Spruce Hole aquifer. He also said it was wrong to assume that there were no protections in place, and noted among other things the fact that there was the aquifer protection district, which had been carefully crafted.

He said there had been discussion that the zoning change shouldn't occur until the pump tests for the aquifer had been done, but he said the engineers involved had said this wouldn't provide a great deal of additional information regarding the aquifer boundaries. He also said these boundaries could always be changed if needed.

Administrator Selig said it was incredibly unlikely that a gas station would be put in this particular area, and he provided details on this. He said Town staff had more concerns about possible single family home development in this area than the type of development permitted in the ORLI district, which would require much more rigorous stormwater management. He spoke in some detail about this.

He also said the total area involved within the watershed was very small, and said part of it was reduced even further because some of the land was already owned by the Town and wouldn't be developed. He said the impacts would be small, and said what impacts there would be needed to be

weighed against the importance of increasing the Town's tax base.

Administrator Selig said there was no sure thing with development, and said Councilors shouldn't vote on this with the thought that the developer would be Mr. Farrell. But he said whoever the developer was, there would be sufficient protections in place.

Councilor Julian Smith MOVED to extend the meeting.

There was discussion as to whether this Agenda item should be the last one for the meeting.

The motion PASSED 7-2, with Councilor Stanhope and Councilor Leach voting against it.

Councilor Julian Smith MOVED to table the motion. Councilor Henry Smith SECONDED the motion.

Councilor Clark asked what could be accomplished in two weeks, and there was discussion.

The motion FAILED 2-7, with Councilor Julian Smith and Councilor Henry Smith voting in favor of it.

Councilor Clark said he had found Administrator Selig's argument compelling. But he said he had been hoping that the Council could take something that was 70% good, and make it 90% good.

Councilor Needell noted that his vote had to do with his objection to prematurely making the zoning change, not his level of trust.

Councilor Sievert said making the zoning change would probably expedite the regulatory changes that needed to be made concerning stormwater and aquifer protection, and he noted that it had been established by everyone that these changes needed to be made. He said in this way, these protections would extend all the way down to the river in both the ORLI and MUDOR districts

There was discussion on this, with Chair Niman suggesting that Councilor Sievert and Councilor Clark could work on these changes.

Councilor Henry Smith asked what happened if the motion did not pass, and there was discussion.

The motion PASSED 6-2-1, with Councilor Needell and Councilor Henry Smith voting against it, and Councilor Julian Smith abstaining.

Councilor Julian Smith said he hadn't wanted to vote no on this motion, but said he hadn't vote yes on it because of the basic setup of the ORLI district.

- B. Receive update from Town Engineer David Cedarholm relative to the Wiswall Bridge replacement project and authorize the Town Administrator to sign an amendment to the engineering services contract with CLD Engineers for this project

Mr. Cedarholm spoke briefly about what was proposed. He noted that there had been a 13 month process of looking at historic and cultural resource aspects of the project, and said CLD had been effective in reaching a really good compromise. He spoke in some detail on this.

Councilor Leach MOVED to authorize the Town Administrator to sign CLD Consulting Engineers Inc. engineering services contract amendment #3 for the amount of \$33,319. Councilor Julian Smith SECONDED the motion.

Councilor Leach received clarification that the Council was just addressing what was in the motion that evening, and that Mr. Cedarholm would come back to talk with the Council further on the historic mitigation issue.

The motion PASSED unanimously 9-0.

Councilor Henry Smith left the table at this point as ***Councilor Leach MOVED to adjourn the meeting. Councilor Peter Stanhope SECONDED the motion, and it FAILED 4-4, with Councilor Needell, Councilor Julian Smith, Councilor Clark, Councilor Sievert, and Chair Niman voting against it.***

XI. New Business

Discussion relative to a potential conservation easement for the Misty Meadows Farm located on Wednesday Hill Road and potential application for a New Hampshire Department of Environmental Services Water Supply Land grant regarding this property – Duane Hyde, Conservation Commission member and Land Protection Working Group member

Duane Hyde said that before putting much more effort into this project, he wanted to get a sense from the Council of whether it wanted the Land Protection Working Group to pursue it. He then provided details on what was proposed for the 62 acre parcel. He said an abutting parcel in Lee already had funding lined up for a conservation easement, and said the hope had always been that the Durham part would be protected as well.

He said the land was located close to where the water for the Lamprey River was withdrawn as a Town water supply, and said it was also the headwaters of Chesley Brook. He said there was excellent wildlife habitat in the area, and also said the agricultural values there were quite high.. He said a young couple was interested in buying the property and having a more productive agricultural farm there. He said there was also a trail on the property.

Mr. Hyde said NHDES funds and LCHIP funds as well as other outside funds could possibly be obtained, and said between \$44,000-200,000 would have to come from the Town of Durham. He said land use change tax funds could be used for this, and he provided details on this.

Councilor Needell asked if the land use change tax funds would be used if the other funding didn't come through, and Mr. Hyde said no. Councilor Needell said he therefore didn't see any reason not to go ahead with pursuing this, although noting that he would be reluctant to consider any Town funding for this.

Councilor Stanhope asked if there was a certified land planner's analysis underlying the appraisal.

Mr. Hyde said a comparable sales analysis had been done, although a land plan hadn't been done by a surveyor or engineer.

Councilor Henry Smith asked what the downside of pursuing this would be, if it didn't cost the Town anything.

Chair Niman said if it took \$232,000 out of the conservation fund, this meant there would be less money the Conservation Commission had to spend on other projects. He said he therefore didn't think it was right to say that this project wouldn't cost the Town anything.

He spoke about the issue of whether the property could actually be developed, given the soils there, and said if the Town was going to protect land, he would like to protect land that could be developed. He said if it couldn't be developed, it was just going to sit in its wild state anyway.

He also said there some questions regarding whether the Town was going to put land into conservation for the purpose of food production. He said if it was, there needed to be a bigger discussion as to whether the Town was interested in subsidizing this, how much food was produced, where it was sold, and for what price.

Councilor Sievert said he would support the idea of local food production, and Mr. Hyde noted that the easement would allow agriculture.

Councilor Stanhope said he didn't support buying development rights unless he knew what the development potential of the property was. But he said there was no land plan.

Mr. Hyde said the request could be made to have this done, but he said it was still early in the process. But he said if the Council didn't want to pursue the easement, it didn't make sense to do the land plan.

There was discussion that applying for the grant could lead to a slippery slope concerning approval of the easement.

Councilor Julian Smith said he would like to go into nonpublic session.

Councilor Needell said he was comfortable letting the Land Protection Working Group go ahead, and the Council could see where this led. Councilor Henry Smith and Councilor Sievert agreed.

Councilor Stanhope, Councilor Leach, and Councilor Van Asselt said they did not want the LPWG to go ahead with this project.

Councilor Clark said he didn't see how Councilors could say yes or no on this, because there wasn't enough information.

There was discussion as to why Councilor Julian Smith wanted to go into nonpublic session.

Administrator Selig said he appreciated that Mr. Hyde was there, and also appreciated it that the Conservation Commission wanted to come forward to the Council early in the process. He said he thought the challenge here was that it was hard for the Council to make an informed judgment without more time. He suggested that the Council pass on this for this year, and in the mean time, the Council could visit the property and consider it further. He noted that it was important not to build false hopes on this.

After further discussion, Chair Niman said he had heard that five Councilors had said no or that they weren't sure, and four had said to go ahead. He said the Council would talk about this project some more to see what bubbled to the surface.

XIII. Adjourn

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

Adjournment at 14:00 pm.

Victoria Parmele, Minutes taker