



TOWN OF DURHAM  
8 NEWMARKET ROAD  
DURHAM, NH 03824  
Tel: 603/868-5571  
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August 5, 2020

Mr. Paul Rasmussen  
Chair, Durham Planning Board  
105 Madbury Road  
Durham, NH 03824

Dear Paul:

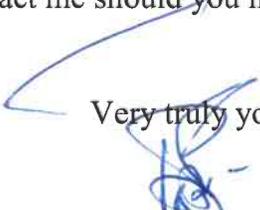
At the Town Council meeting on Monday evening, August 3, 2020, the Council discussed a Council-initiated ordinance (Ordinance #2020-10) amending Chapter 175 "Zoning" of the Durham Town Code regarding height, stories, and uses in the Central Business District; method for determining building height and drive-through facilities.

The Council voted, 8-0, to refer the new Council-initiated zoning changes discussed above to the Durham Planning Board for its review and study in accordance with Section 175-14(8) of the Durham Zoning Ordinance.

Attached for your information is a draft ordinance which incorporates the proposed amendments to the Zoning Ordinance. Also attached is the August 3<sup>rd</sup> Council communication provided to the Town Council explaining the rationale for these proposed changes. The Durham Town Council requests this item be placed on a future Planning Board agenda and that the Planning Board provide its recommendations to the Town Council upon completing its appropriate review and study.

Please do not hesitate to contact me should you have further questions in regard to this matter.

Very truly yours,

  
Todd I. Selig  
Administrator

#### Attachments

c: Lorne Parnell, Vice Chair, Durham Planning Board  
Michael Behrendt, Director of Planning & Community Development



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AGENDA ITEM: **# 11**

DATE: August 3, 2020

## COUNCIL COMMUNICATION

**INITIATED BY:** Downtown Working Group (See below)

**AGENDA ITEM:** DISCUSSION AND POSSIBLE ACTION TO REFER TO THE PLANNING BOARD ORDINANCE #2020-10, A TOWN COUNCIL-INITIATED ZONING AMENDMENT TO:

1. ALLOW AN ADDITIONAL STORY IN THE CENTRAL BUSINESS DISTRICT BY CONDITIONAL USE;
2. CHANGE THE CONFIGURATION OF USES IN A MIXED-USE BUILDING IN THE CENTRAL BUSINESS DISTRICT;
3. CHANGE THE METHOD FOR DETERMINING BUILDING HEIGHT; AND
4. CHANGE PROVISIONS FOR DRIVE-THROUGH FACILITIES

**CC PREPARED BY:** Michael Behrendt

**PRESENTED BY:** Al Howland, Jim Lawson, Ken Rotner, and Sally Tobias

### **AGENDA DESCRIPTION:**

Discussion and possible action to refer to the Planning Board a Town Council-initiated zoning amendment regarding building height, stories, uses, and drive-through facilities.

### **BACKGROUND**

Town Administrator Todd Selig convened an informal working group to explore possible amendments to the Durham Zoning Ordinance to facilitate the creation of high quality development projects in the Central Business District. Members of the working group included Town Council members Al Howland, Jim Lawson, Ken Rotner, and Sally Tobias. Staff members included Town Planner Michael Behrendt, Code Administrator Audrey Cline, Town Assessor Jim Rice, Economic Development Director Christine Soutter, and Mr. Selig. The group met numerous times and developed the amendments that are proposed here.

The working group thought it beneficial to provide for greater flexibility in downtown development while ensuring high-quality design and avoiding adverse

impacts. There are four general components of the proposed amendments as follows.

**Number of stories in CBD.**

The current maximum number of allowed stories in the Central Business District is four except as specified in Sections 175-42. B. 8. and 9. In this area - including all of Madbury Road (The westerly side is zoned CBD) and both sides of Main Street from the Town and Campus/Ciao Italia lot to the east end of the district - the maximum is three stories. This three- story limit on Main Street was adopted in 2013 pursuant to a citizen's petition. The limit on Madbury Road was initiated by the Town Council and adopted later in 2013.

The proposed amendment, in Section 175-42. B.6., would allow one additional story (a fifth or fourth, depending on the area, above) by conditional use provided that it is set back from the street by at least ten feet and that the Planning Board determines that it will not have an adverse impact upon the streetscape. These provisions should ensure the additional story will fit in visually.

**Configuration of uses in CBD.**

The working group took another look at the respective requirements for commercial and residential uses in mixed-use buildings – Section 175-42.B.7. This is clearly a challenging, but important, issue that the Town has revisited continually over the years. The provisions included in subsections a. through f. are aimed at allowing for greater flexibility while more precisely addressing the specific objectives.

Subsection g. will allow for a developer to count outdoor public use areas toward the commercial area requirements for the site. We want to encourage attractive outdoor public amenities, especially on larger sites, and a developer will not have an interest in doing so unless there is a benefit to the project. We also recognize that in some cases meeting the required amount of commercial square footage can be challenging and this is one way to help meet that standard. Nonetheless, use of these areas depends upon a finding by the Planning Board that the space will be a significant public amenity.

**Building height definition.**

The change is made to Article II – Definitions and Section 175-56 General Dimensional Standards. The current definition is problematic. This issue came to light in the context of the working group's discussions about the number of stories in the Central Business District. A more precise method for measuring building height is needed and accordingly, this method should not be included in the Definitions section of the ordinance so it is relocated to General Dimensional Standards.

Measuring building height is complex when more than a simple box is involved. There may be variation in the underlying grade, the grade may change as part of the project, and there may be different sections of the building with different heights. The biggest shortcoming of the current definition is that the height is measured to the average roof elevation of the overall building. This could be interpreted to allow for measuring different sections (a 30-foot section, a one-story 12-foot section, etc.) with a lower section bringing down the average. It is logical that no section of the building exceed the maximum and this is what the new provision specifies.

In addition, the maximum height allowed in the Central Business District by conditional use would change from 50 feet to 60 feet. This would be allowed in conjunction with the proposal to allow a fifth floor, above, since a four-story building would rarely exceed 50 feet.

**Drive-through facilities.**

Presently a drive-through facility is allowed only for a bank by conditional use (in five zones). The working group thought that allowance for a drive-through facility should be expanded, albeit carefully, to better accommodate residents with disabilities for whom it is easier to purchase from a drive-up window and to enhance social distancing in situations like the current pandemic.

Drive-through windows for food service potentially have a great traffic impact so these would be allowed only in the automobile-oriented Courthouse zone. Any other drive-through window would be allowed in the five zones where bank windows are now allowed by as a permitted rather than a conditional use.

**NOTE:** This was an item on the Council's meeting agenda of July 6, 2020, but due to the lateness of the hour, it was not discussed at that meeting.

**LEGAL AUTHORITY:**

RSA 674:16, RSA 675:2, and 175-14 of the Durham Zoning Ordinance

**LEGAL OPINION:**

As required during review

**FINANCIAL DETAILS:**

N/A

**SUGGESTED ACTION OR RECOMMENDATIONS:**

Discussion and consideration of the motion to refer the proposed zoning changes to the Planning Board.

Re: Ordinance #2020-10 TC-Initiated Zoning Changes for building height, stories, uses, and drive-through facilities

**SUGGESTED MOTION:**

*The Durham Town Council does hereby refer to the Durham Planning Board for its review and study Ordinance #2020-10 amending Chapter 175 "Zoning" of the Durham Town Code, Section 175-7. "Definitions," Section 175-42. B. "Development Standards in the Central Business District," Section 175-53. "Table of Land Uses," Section 15-54. "Table of Dimensions," and Section 175-56. "General Dimensional Standards." (ROLL CALL VOTE REQUIRED)*

*Sally Tobias*            \_\_\_  
*Dinny Waters*        \_\_\_  
*Al Howland*           \_\_\_  
*Katherine Marple*   \_\_\_  
*Kenny Rotner*         \_\_\_

*Wayne Burton*        \_\_\_  
*James Lawson*       \_\_\_  
*Sally Needell*        \_\_\_  
*Andrew Corrow*     \_\_\_

## **ORDINANCE #2020-10 OF DURHAM, NEW HAMPSHIRE**

**A TOWN COUNCIL-INITIATED ZONING ORDINANCE AMENDING CHAPTER 175 “ZONING” OF THE DURHAM TOWN CODE:**

- A. SECTION 175-7. “DEFINITIONS,” REGARDING ‘BUILDING HEIGHT,’ ‘RESTAURANT,’ RESTAURANT, CARRYOUT,’ AND ‘STORY;’**
- B. SECTION 175-42. B. “DEVELOPMENT STANDARDS IN THE CENTRAL BUSINESS DISTRICT,” REGARDING SUBSECTIONS 6-10;**
- C. SECTION 175-53. “TABLE OF LAND USES,” REGARDING DRIVE-THROUGH FACILITIES;**
- D. SECTION 15-54. “TABLE OF DIMENSIONS,” REGARDING BUILDING HEIGHT AND NOTE 7; AND**
- E. SECTION 175-56. “GENERAL DIMENSIONAL STANDARDS” REGARDING MINIMUM HABITABLE FLOOR AREA FOR APARTMENTS AND BUILDING HEIGHT**

**WHEREAS**, it is important to establish maximum heights for buildings in the Central Business District but it is appropriate to allow for an additional story to enhance economic development where the quality of the design does not adversely impact the streetscape; and

**WHEREAS**, the current definition for Building Height is insufficient, provides inadequate guidance in determining height, and potentially allows for sections of the building to significantly exceed the intended height because the mean for the height is used as the standard ; and

**WHEREAS**, the configuration of commercial and residential uses within a mixed-use building in the Central Business District must be carefully provided for in order to promote economic development, allow for flexibility in the layout of the building, maintain an attractive commercial frontage, and maintain an appropriate balance between uses within the building and in the downtown; and

**WHEREAS**, a developer who provides outdoor areas for use by the public on site should receive credit for those amenities toward the commercial requirement for the building where those areas are deemed to offer a significant public benefit; and

**WHEREAS**, drive-through facilities should be allowed in selective zoning districts to enhance convenience for the public especially for those with disabilities and during times when public health concerns encourage social distancing ; and

**WHEREAS**, an informal working group convened by the Town Administrator met a number of times to develop proposed ordinance amendments to facilitate economic development in the Central Business District while maintaining the high standard of development; and

**WHEREAS**, the Town Council may initiate Zoning Ordinance amendments in accordance with Section 175-14 (B) of the Durham Zoning Ordinance; and

**WHEREAS**, on July 6, 2020 the Durham Town Council voted to refer the proposed Zoning Ordinance amendment to the Durham Planning Board for its review and study; and

**WHEREAS**, on \_\_\_\_\_, 2020 the Planning Board held a duly posted Public Hearing on the proposed ordinance; and

**WHEREAS**, on \_\_\_\_\_, 2020 the Durham Town Council conducted a First Reading on Ordinance #2020-10; and

**WHEREAS**, on \_\_\_\_\_, 2020 the Durham Town Council held a duly posted Public Hearing on Ordinance #2020-10.

**NOW, THEREFORE BE IT RESOLVED** that the Durham Town Council, the governing and legislative body of the Town of Durham, does hereby adopt Ordinance #2020-10, a Council-initiated Ordinance, that amends sections within Chapter 175 “Zoning”, including Section 175-7. “Definitions,” Section 175-42. B. “Development Standards in the Central Business District,” Section 175-53. “Table of Land Uses,” Section 15-54. “Table of Dimensions,” and Section 175-56. “General Dimensional Standards.” as indicated below. Wording to be deleted is annotated with ~~strikeout~~ type. New wording is annotated with underscoring.

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## **ARTICLE II – DEFINITIONS**

- Make the indicated changes.

~~**BUILDING HEIGHT**—The vertical distance from the mean grade elevation (average grade around the perimeter of the building) to the mean roof elevation. For sloped roofs this is equal to one-half (1/2) of the vertical distance from eave to ridge. For flat roofs, including those with parapets, this is measured to the surface of the roof. Approved roof-mounted~~

~~appurtenances such as solar arrays, utilities, and telecommunications structures are not considered part of the “building height.”~~

**BUILDING HEIGHT – See Section 175-56. General Dimensional Standards. for procedure to determine building height.**

RESTAURANT – A commercial establishment open to the general public where food and beverage are prepared, served and consumed primarily within the principal building. Adequate seating shall be provided. ~~Drive-through facilities are prohibited.~~

RESTAURANT, CARRYOUT – A commercial establishment open to the general public which, by design of physical facilities or by service or packaging procedures, permits or encourages the purchase, either within or outside the premises, of prepared ready-to-eat foods intended to be consumed either on or off the premises. ~~Drive-through facilities are prohibited.~~

STORY - The complete horizontal division of a building, situated at or above ground level, comprising the usable space or room(s) on one level. Each such division is considered one full story, except for the top level when it is under a sloped roof, which is considered a half story. For the purpose of determining the total number of permitted stories, a sloped roof that does not contain usable space (other than crawl-type storage space) is not considered a half story. For the purposes of this ordinance, a lower level is considered to be a story if the front exterior wall of the lower floor level rises more than two feet above the finished grade. Cupolas with areas of 100 square feet or less do not count as a story.

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## ARTICLE XII - BASE ZONING DISTRICTS

### 175-42. Central Business District (CB)

- Make the indicated changes.

#### B. *Development Standards in the Central Business District*

In addition to the dimensional standards, development in the Central Business District shall conform to the following additional requirements:

6. Maximum number of stories – The maximum number of permitted stories is four except as restricted in sections 8 and 9, 9 and 10, below.

However, the maximum number of permitted stories may be increased by one story subject to all of the following provisions:

- a. Adding a story is permitted by conditional use.

- b. In the case of buildings limited to three stories in sections 8 and 9, below, this provision allows for a fourth story. In other cases, this provision allows for a fifth story.*
  - c. The provisions regarding percentage of office/retail use apply.*
  - d. The additional top story must be set back from the first floor by at least ten feet on all sides that front a public street.*
  - e. The Planning Board must determine that the additional story will not have an adverse impact upon the streetscape, giving particular consideration to scale and mass (See Architectural Regulations for guidance).*
  - f. Building height. When an additional story is incorporated under this section the maximum building height is 60 feet.*
7. *Configuration of Required office/retail uses for a mixed-use with residential building*  
~~*—Where the building fronts on a public road, the portion of the building facing the road must be office/retail to a depth of at least 50 feet. In addition, the minimum percentage of gross floor area that is office/retail is based on the number of building stories as follows:*~~
  - a. One-story building: 100% of the gross floor area must be office/retail. A mixed-use with residential use is not allowed in a one-story building.*
  - b. Two-story building stories: A minimum of 50% of the gross floor area. The entire first floor must be office/retail.*
  - c. ~~Three stories:~~ Frontage - three-, four-, or five-story building: Where the building fronts on a public road, the first floor of the portion of the building facing the road must be office/retail to a depth of at least 50 feet. ~~A minimum of 33-1/3% of the gross floor area must be office/retail.~~*
  - d. Three- or four story building: The entire first floor must be office/retail. Alternatively, office/retail uses may be located anywhere on the first, second, third, and fourth floors provided the amount of office/retail equals or exceeds the square footage of the first floor and the requirement regarding frontage in c, above, is met.*
  - e. Five-story building: The entire first floor must be office/retail. Also, one additional floor (any floor) or an area equal to the square footage of the fifth story must be office/retail.*

~~f. **Three Stories – Increased Nonresidential Option:** For a three-story building where a minimum of 66-2/3% of the gross floor area is used for office/retail, the habitable square footage per occupant for unrelated households is established as specified in Section 175-56 – General Dimensional Standards.~~

~~g. **Four stories:** A minimum of 50% of the gross floor area of the building must be office/retail. Alternatively, the entire first floor plus one other entire floor must be office/retail.~~

f. For a building where there are distinct sections with a different number of stories and for sites where there are multiple buildings, the required minimum overall office/retail gross square footage is determined by the sum of the minimum office/retail area required by each distinct section, or by each separate building, using the required office retail space specified above. For these sites ~~where there are multiple buildings~~, the disposition of office/retail and residential space on the site is flexible provided ~~this minimum percentage of office/retail area is met~~ the minimum overall amount of office/retail required is included and the Planning Board determines that the configuration of the building and its uses meets the intent of this subsection 7.

g. Outdoor public use areas. Outdoor space on the subject property that is dedicated in perpetuity to public use may be used to meet the office/retail square footage requirement on a one-to-one basis provided that: a) the Planning Board determines that the design, location, management, and other aspects of the space will add a significant public amenity to the project; and b) the outdoor space may be used to meet a maximum of 50% of the overall required office/retail square footage.

8. Maximum Height of Mixed-Use Buildings, Section of Main Street – No building in the Central Business District on any lot with frontage along either side of Main Street, from and including Tax Map 2, Lot 14-4 to the easterly boundary of the district, shall exceed three (3) stories. This provision specifically includes the following properties: Tax Map 2, Lot 14-4; Tax Map 4, Lot 7-0; Tax Map 4, Lot 6-0; Tax Map 4, Lot 5-0; Tax Map 4, Lot 4-0; Tax Map 4, Lot 3-0; Tax Map 4, Lot 2-0; Tax Map 4, Lot 1-0; Tax Map 5, Lot 1-0; Tax Map 5, Lot 1-2; Tax Map 5, Lot 1-3; Tax Map 5, Lot 1-17; Tax Map 5, Lot 1-4; Tax Map 5, Lot 1-5; Tax Map 5, Lot 1-6; Tax Map 5, Lot 1-7; and Tax Map 5, Lot 1-8. (See 6. b, above for exception.)

9. Maximum Height of Mixed-Use Buildings, Madbury Road – No building in the Central Business District on any lot with frontage along Madbury Road shall exceed three (3) stories. This provision specifically includes the following properties: Tax Map 2, Lot 12-0; Tax Map 2, Lot 12-2; Tax Map 2, Lot 12-3; Tax Map 2, Lot 12-4; Tax Map 2, Lot 12-5; Tax Map 4, Lot 1-0; Tax Map 4, Lot 11-0; Tax Map 4, Lot 12-0; Tax Map 4, Lot 13-0; and Tax Map 4, Lot 14-0. (See 6. b, above for exception.)



~~50~~ 60.

➤ Change note 7 as follows:

7. No building along the sections of Main Street or Madbury Road delineated in Subsections 175-42(B)(9) and (10) shall exceed thirty five (35) feet in height except by conditional use in Subsection 175-42. B. 6.

### Section 175-56. General Dimensional Standards.

➤ Make the following changes in Table 175-56 B.

Apartment (but not including accessory apartments, and apartments in the ORLI and MUDOR districts, ~~and apartments in the CB-District conforming to the provisions of Section 175-42 B.7.d~~). 400

~~Three-story apartment in the CB-District conforming to the provisions of Section 175-42 B.7.d.~~  
~~—300~~

➤ Add the provision below and reletter the subsections that follow accordingly.

C. Building height. The height of the building may not exceed the maximum permitted height.

1. Measuring height. Building height shall be measured as the vertical distance from the mean elevation of the finish grade, six feet offset from the building foundation (or at the property line if the building is less than six feet from the property line), around the perimeter of the building to the following points for the various roof types shown:

a. gable, hip, and curved roofs: the midpoint between the ridge/high point and the corresponding eave;

b. gambrel and mansard-type roofs and roofs that are fully dormered: the deck or curb line (the top of the lower roof slope) or the eave above the dormer for fully dormered roofs;

c. flat roofs (including those with parapets) and situations where there is no discernible roof (such as the higher wall under a shed roof): the eave, cornice, or fascia at the top of the wall.

2. Appurtenant elements. Cupolas and towers with an area of 100 square feet or less and roof-mounted appurtenances such as solar arrays, utilities, roof decks, and telecommunications structures are not considered part of the building

height. However, these elements may not exceed the maximum permitted building height by more than 15 feet (unless otherwise explicitly permitted).

3. Additions. For new building additions, the mean grade elevation shall be measured around the addition only.

4. Difference in elevation. Where there is more than an eight foot difference in elevation between the highest and lowest points along the finish grade, six feet offset from the building foundation around the perimeter of the building, the mean elevation shall be calculated separately for appropriate sections or sides of the building.

5. Excavations. Where an area is excavated adjacent to the foundation to provide a light well or outdoor use area for a lower level, such that the excavated area would not be prominently visible from any property line, the grade may be measured to the ground surface beyond the excavated area.

6. Spot elevations. Measurements of the elevation of the grade around the foundation may be taken at specific points as directed by the zoning administrator.

**PASSED AND ADOPTED** this \_\_\_\_ day of \_\_, **2020** by a \_\_\_\_ to \_\_\_\_ roll call vote of the Durham Town Council as follows:

Sally Tobias	_____	Wayne Burton	_____
Dinny Waters	_____	James Lawson	_____
Al Howland	_____	Sally Needell	_____
Katherine Marple	_____	Andrew Corrow	_____
Kenny Rotner	_____		

\_\_\_\_\_  
Kitty Marple, Chair  
Durham Town Council

**ATTEST:**

\_\_\_\_\_  
Lorrie Pitt, Town Clerk-Tax Collector