

**THE BOARD OF COUNTY COMMISSIONERS
DURHAM, NORTH CAROLINA**

Monday, August 9, 2010

7:00 P.M. Regular Session

MINUTES

Place: Commissioners' Room, second floor, Durham County Government Administrative Complex, 200 E. Main Street, Durham, NC

Present: Chairman Michael D. Page, Vice-Chairman Ellen W. Reckhow, and Commissioners Becky M. Heron, Brenda A. Howerton, and Joe Bowser

Absent: None

Presider: Chairman Page

Chairman Page announced that the meeting was officially opened at 5:00 pm.

Closed Session

Commissioner Heron moved, seconded by Commissioner Bowser to adjourn to Closed Session pursuant to G.S. 143-318.11(a)(4) to discuss matters relating to the location or expansion of a business or industry.

The Board gave directives to staff as a result of the Closed Session.

Opening of Regular Session—Pledge of Allegiance

Chairman Page welcomed a visiting delegation from China. The audience welcomed and applauded the group.

Announcements

Commissioner Bowser announced that NCDOT agreed to install a traffic light at the intersection of Riddle Road and Highway 55 by July 31. He indicated that the work had not been done. The County Manager will follow up with NCDOT and report back to the Board.

Agenda Adjustments

The Chair called for Agenda Adjustments. There were no adjustments.

Minutes

Vice Chairman Reckhow moved, seconded by Commissioner Heron, to approve the July 14, 2010 Special Session Minutes.

The motion carried unanimously.

Consent Agenda

Chairman Page asked the Commissioners if they desired to pull any items from the Consent agenda. No items were pulled.

Commissioner Howerton moved, seconded by Commissioner Bowser, to approve the following consent agenda items:

- a. Approve the Durham City-County Planning Department 2010-2011 Proposed Work Program;
- b. Authorize the County Manager to enter into a contract with the Durham Chamber of Commerce in the amount of \$137,934 to provide industrial development services for Durham County;
- c. Receive the Annual Report for the Durham Open Space and Trails Commission;
- d. Approve the Community Transportation Safety System Program Plan for submittal to NCDOT;
- e. *Approve Budget Ordinance Amendment No. 11BCC000001 in the amount of \$50,000 to recognize funding from the NC Department of Health and Human Services;
- f. *Approve Budget Ordinance Amendment 10BCC000088 appropriating \$1,622,101 of FY 2009-10 General Fund fund balance to transfer to the Capital Finance Plan fund to replace FY 2009-10 budgeted revenue from the sale of real property at the Lowe's Grove school site. The General Fund fund balance will be replenished in FY 2010-11 from the actual proceeds (\$1,622,101) from the sale of this real property.

The motion carried unanimously.

*Document(s) related to this item follow:

Consent Agenda Item No. e. Approve Budget Ordinance Amendment No. 11BCC000001 in the amount of \$50,000 to recognize funding from the NC Department of Health and Human Services.

DURHAM COUNTY, NORTH CAROLINA
FY 2010-11 Budget Ordinance
Amendment No. 11BCC000001

BE IT ORDAINED BY THE COMMISSIONERS OF DURHAM COUNTY that the FY 2010-11 Budget Ordinance is hereby amended to reflect budget adjustments.

Revenue:

<u>Category</u>	<u>Current Budget</u>	<u>Increase/Decrease</u>	<u>Revised Budget</u>
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GENERAL FUND

Intergovernmental	\$71,489,095	\$50,000	\$71,539,095
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Expenditures:

Function

GENERAL FUND

Economic and Physical Development	\$5,224,466	\$50,000	\$5,274,466
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All ordinances and portions of ordinances in conflict herewith are hereby repealed.

This the 9th day of August, 2010.

Consent Agenda Item No. f. Approve Budget Ordinance Amendment 10BCC000088 appropriating \$1,622,101 of FY 2009-10 General Fund fund balance to transfer to the Capital Finance Plan fund to replace FY 2009-10 budgeted revenue from the sale of real property at the Lowe's Grove school site. The General Fund fund balance will be replenished in FY 2010-11 from the actual proceeds (\$1,622,101) from the sale of this real property.

DURHAM COUNTY, NORTH CAROLINA
 FY 2009-10 Budget Ordinance
 Amendment No. 10BCC000071

BE IT ORDAINED BY THE COMMISSIONERS OF DURHAM COUNTY that the FY 2009-10 Budget Ordinance is hereby amended to reflect budget adjustments.

Revenue:

<u>Category</u>	<u>Current Budget</u>	<u>Increase/Decrease</u>	<u>Revised Budget</u>
<u>GENERAL FUND</u>			
Other Financing Sources	\$16,000,613	\$1,622,101	\$17,622,714

Expenditures:

Function

GENERAL FUND

General Government	\$66,926,482	\$150,000	\$67,076,482
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All ordinances and portions of ordinances in conflict herewith are hereby repealed.

This the 9th day of August, 2010.

Public Hearing on Coordinated Transportation: FY 2010-2011 Rural Operating Assistance Program (ROAP) Grant – Application Approval

The Chair recognized staff from Cooperative Extension. Meg Scully, Mobility Manager, announced that this request is for the annual application that Coop Extension must submit to

NCDOT for transportation for the elderly and disabled. The application requires a public hearing.

Chairman Page opened the public hearing. There was no one signed up to speak. The public hearing was closed.

Commissioner Heron moved, seconded by Vice Chair Reckhow to approve the ROAP application for submittal to NCDOT.

The motion carried unanimously.

Public Hearing – Text Amendment to the Unified Development Ordinance (UDO) – Bicycle Parking Requirements and Alternative Pedestrian Plans (TC1000001)

Chairman Page recognized Steve Medlin, City-County Planning Director. The Board was requested to receive public comments on Text Change – Bicycle Parking Requirements and Alternative Pedestrian Plans (TC1000001) and adopt an ordinance the Unified Development Ordinance, incorporating revisions to Article 3, Application and Permits; Article 6, District Intensity Standards; Article 8, Environmental Protection; Article 10, Off-Street Parking and Loading; Article 12, Infrastructure and Public Improvements; Article 13, Additional Requirements for Subdivisions.

The Chair opened the public hearing. Mr. Daniel Clever, Chair of the Durham Bicycle and Pedestrian Advisory Committee thanked the Planning Department for their support and urged the Commissioners to approve the request.

Chairman Page closed the public hearing.

Commissioner Bowser moved, seconded by Commissioner Heron to approve the text amendment to the Unified Development Ordinance – Bicycle Parking Requirements and Alternative Pedestrian Plans (TC1000001).

The motion carried unanimously.

Public Hearing – Text Amendment to the Unified Development Ordinance (UDO) – Nonconforming Off-Premise Signs (Billboards) (TC1000002)

Chairman Page announced that he received a request from the applicant to defer this item. Lewis Cheek, representing the applicant, Fairways, formally requested that the public hearing be continued to September 13.

Commissioner Bowser moved, seconded by Commissioner Howerton to open the public hearing and continue the public hearing until September 13.

Vice Chair Reckhow requested that the Board not grant the request. She stated that the issue had been before the community for approximately 2 ½ years, and it was a disservice to postpone action.

Commissioner Howerton recommended that if the item was to be heard, it would be moved behind the 751 public hearing.

Commissioner Heron concurred that deferring the case would be a disservice to the public.

After further discussion, the motion carried with the following vote:

AYES: Bowser, Howerton, Page
NOES: Heron, Reckhow

Chairman Page opened the public hearing and continued the hearing until the September 13, 2010 meeting. The public hearing was closed.

Public Hearing – Zoning Map Change – 751 Assemblage (Z0800003) - Continuation

Chairman Page announced that the public hearing was still open; however, anyone who spoke at the July 26 public hearing would not be allowed to speak again.

Vice Chair Reckhow expressed concern that the information regarding the validity of the protest petition would not be presented before the continuation of the hearing. She added that the Board was using double standards, and that the practice has always been to announce findings on protest petitions at the beginning of the meeting.

Attorney Siler responded that the new bill (Senate Bill 1399) is applicable to protest petitions. The wording of the bill suggests that all kinds of actions can take place up until the time of the vote. He stated that it is preferable and better to change the practice to make announcements regarding the protest petition just prior to the vote.

Commissioner Heron remarked that the Board should hear from the County Attorney if the information will help make a better decision.

Chairman Page noted that this case had been a very controversial one, but he requested that the community be respectful and respect the staff. He asked the audience to hold all applause.

Chairman Page opened the public hearing and read the names of speakers who signed up. The following speakers: James Stivers, Lois Murphy, Christy Moore, Jack Steer, Steve Toler, and John White spoke in favor of the rezoning. They felt the project would increase the tax base, bring jobs, improve overcrowded school situation, and make the city desirable with a quality development that would make it viable for people to live where they work.

The following citizens spoke in opposition to the rezoning: Tina Motley-Pearson, Donna Randolph, Will Wilson, and Ray Eurquhart. They shared concerns about the water quality of

Jordan Lake, density, traffic, and the location of the project. Mr. Eurquhart read a Resolution from the Soil and Water Board of Supervisors.

The Chair read the names of others who spoke at the July 26 hearing and closed the public hearing.

Chairman Page asked the County Attorney to render his decision regarding the NCDOT Declaration of Revocation of Easement. The Attorney read the following analysis:

As you know, on July 13, 2010, Southern Durham Development, Inc. offered an unconditional, perpetual deed of easement for highway right of way to the North Carolina Department of Transportation (NCDOT) along NC Hwy 751 and Southern Durham Development's property (the "Easement"). On the same date, NCDOT, by its authorized Area Negotiator on behalf of the Division Highway Agent, accepted the Easement. The Easement was immediately recorded in the Durham County Register of Deeds Office. Thirteen days later, on July 26, 2010, NCDOT filed a "Declaration of Revocation, Rejection and Termination of Easement To Dedicate Right of Way" (the "Revocation")

Since the Easement directly impacts whether or not the protest petition in this matter is valid or not, I was requested to research whether the Revocation effectively divested NCDOT from ownership of the Easement. As a part of doing my research, I sought and received legal opinions from W. Richard Moore, Deputy Attorney General and Charles Szypszak, with the School of Government. I also received and reviewed legal opinions from several other attorneys representing both the opponents and proponents. Per the request of Commissioner Reckhow, I forwarded all of these opinions to you and the Commissioners on Friday, July 6.

My analysis begins with the authority of NCDOT to accept the Easement, which is also spelled out in Deputy Attorney General Moore's opinion (attached). N.C.G.S. 136-19 provides the authority for NCDOT to "acquire" by easement or fee simple such rights of way and title as it may deem necessary and suitable for transportation infrastructure. N.C.G.S. 136-4 provides for a State Highway Administrator, who shall be appointed by the Secretary of Transportation and shall be the administrative officer for all highway matters. The duties and responsibilities of the State Highway Administrator are set forth in the NC Administrative Code, Chapter 19A. Throughout the Chapter 19A of the Code, the Highway Administrator is authorized to acquire real property by gift, purchase or otherwise. Further, 19A NCAC 02A.0102(4) allows the Highway Administrator to delegate certain duties and powers concerning highway right of way acquisitions to the right of way branch.

NCDOT has not disputed the fact that the Easement was accepted, and in fact published a press release which stated, "The N.C. Department of Transportation learned last weekend that by accepting the donation of right of way along N.C. 751 in Durham, the Department had inadvertently interfered in an active public participation process. In order to rectify this and restore the public voice in a local zoning issue, NCDOT has issued an immediate "Revocation of Acceptance ... NCDOT accepted the Right of Way in good faith..."

Further, in an email, dated July 29, 2010, from Transportation Secretary Conti to Steve Bocchino, Conti writes, 'Although unusual for a developer to donate right of way in

advance of receiving rezoning approval, NCDOT had no reason to deny the voluntary donation of the right of way. In fact, if the rezoning was not approved, the property would be beneficial to D.O.T. for a future TIP project to widen N.C. 751. Although this project is not in the current TIP, there is a project in the long range transportation plan which was approved by the Durham, Chapel Hill and Carrboro Metropolitan Planning Organization to widen 751 to a 4 lane divided highway.” Secretary Conti did go on to state, “NCDOT was not aware of the impact on the petition process at the time of the conveyance of this right of way from the developer. The developer expressed a desire to expedite the dedication of the right of way to show a good faith effort prior to the next public meeting.”

There is no reason for the County to believe that the Easement did not validly convey an interest in the strip of property conveyed in the instrument, as it clearly defines the property to be conveyed, is properly signed by the Grantor’s, accepted by an authorized representative of the Grantee, and recorded in the Register of Deeds Office.

The analysis then turns to the Declaration of Revocation, Rejection and Termination of Easement to Dedicate Right of Way. Despite the authority to acquire real property, nowhere in the statutes or the Administrative Code is there authority for the Highway Administrator (or sub delegates) to dispose, revoke, or reject real property that has been accepted by NCDOT. Instead, the authority to dispose of State property is clearly set forth as well as the procedures to do so.

North Carolina law authorizes the State’s divestiture of real property interests by one of two methods: (1) Abandonment, as set forth in N.C.G.S. 136-54 and 55.1. Pursuant to this section, only the North Carolina Board of Transportation is authorized to abandon public right of way, and such abandonment can occur only after sixty (60) days notice to adjacent property owners and a public hearing., or (2) Sale of Surplus Lands, pursuant to 19A NCAC 02B.0143 and .0144. The sale of all surplus lands, including but not limited to surplus right of way requires the approval of the Board of Transportation, Council of State, and the Governor. Although the Deputy Attorney General outlines several actions taken by the Board of Transportation in 1973, the applicable statutes and codes referenced herein and relied upon, were codified after the Board of Transportation’s action, specifically, 19A NCAC 02B.0143 and .0144 (1978, modified last in 1993). Further, reading Moore’s opinion, he cites no authority to dispose of state property without Board of Transportation approval.

A cursory search of the Register of Deeds reflects that NCDOT has filed many instruments entitled, “Declarations of Abandonment and Disclaimer” which recites action taken by the Board of Transportation to dispose of real property. However, I cannot find any other instrument recorded in the Durham County or Wake County Register of Deeds office entitled “Declaration of Revocation, Rejection and Termination of Easement”, which unilaterally, without Board action, serves to dispose of state owned perpetual easements of rights of way.

At the public hearing on July 26, 2010, Joey Hopkins with NCDOT, indicated that in his twenty years the subject Declaration had been used to revoke temporary deeds of easements, but he was not aware that the Declaration had ever been used to revoke a perpetual easement. As you know, there is a difference between a temporary construction easement and a perpetual easement. Temporary easements are a temporary right for DOT to use property, in a parcel of land owned by a third party outside the highway right of

way, during the construction and which reverts to the third party on completion of construction. Perpetual easements on the other hand vest the Grantee with a property right to use or control real property of another, which is perpetual. Since the perpetual easement created a property right in the state, the Easement is now subject to the procedures set forth in the statutes and Code for disposition of real property, to wit, abandoned property or surplus property.

While this was by no means a simple analysis, I have concluded that NCDOT did not follow the prescribed procedures in disposing of the Easement and therefore, the County should deem the Easement a valid conveyance by the Southern Durham Development. I have come to this conclusion based on the statutory authority provided to NCDOT by the General Assembly and the North Carolina Administrative Code provisions which set forth the procedures for NCDOT's acquisition and disposition of real property.

Mr. Medlin stated that, based on the determination that the revocation is not legal; the property on the east side would no longer be valid for the protest petition. The percentage affected would be 2 percent which does not meet the 5 percent requirement. Therefore, he ruled the protest petition invalid.

Vice Chair Reckhow submitted the argument that this case should fall under the old rules. She added it was very unfortunate that the rules changed in mid-stream.

Attorney Siler remarked that he solicited two opinions from Rich Ducker, UNC School of Government, who indicated that the protest petition occurred under the new rules.

Chairman Page and Commissioners Howerton and Bowser expressed their disappointment with the media and other behaviors during this case.

Patrick Young, Assistant Planning Director, discussed the following Committed Elements proposed by the developer along with Planning's responses. He asked that they be entered into the record:

Review of Draft New Commitments:

19. A minimum of 41.0 acres of retained Tree Coverage in the locations shown on the Development Plan sheet DP-2.3. Retained tree coverage areas may be maintained as necessary according to accepted forestry management practices.

Required Change: Please change the word "retained" to "preserved" to ensure consistency with the text on sheet DP-2.3 of the Development Plan

20. A maximum of 81.1 acres of Impervious Surface in the MU(D) zoning district.

Suggested Change: add "as shown on sheet DP-2.0"

Required Change: add "(55.0% of proposed MU(D) zoning district)"

21. A minimum of 49.92 acres of total project open space.

Accepted

22. Project will meet the proposed Jordan Lake Water Supply Nutrient Strategy Watershed Nutrient Reduction Goals as stipulated in 15A NCAC 02B.0262 for the Upper New Hope Arm by committing to not exceed limits of 2.2 lbs of nitrogen and 0.5 lbs of phosphorous per acre per year

Required Change: The citation and title highlighted in GREEN above appears to be incorrect. Please either a) use the correct title and citation (according to Chris Roberts of County Stormwater) of “15A NCAC 02B .0265 Jordan Water Supply Nutrient Strategy: Stormwater Management for New Development” or b) clarify the standard to which you are referring to if it is a standard that differs from 15A NCAC 02B .0265.

Required Change: Clarify whether you mean “...not to exceed limits of 2.2 lbs/acre/year of nitrogen and 0.5 lbs/acre/year of phosphorus” as indicated in the proposed committed element or “...not to exceed limits of 2.2 lbs/acre/year of nitrogen and 0.82 lbs/acre/year of phosphorus” as 15A NCAC 02B .0265 requires.

Required Change: Per the attached guidelines the committed element must be state “This committed element is enforceable by the County Engineering if in the County or City Stormwater Services if annexed”

Suggested Change: Please add the qualifier “If there is a conflict between the phosphorous and nitrogen export standards between that required by a) the standard adopted by the City and/or County (whichever jurisdiction this project is developed in), b) the standard required by 15A NCAC 02B .0265, or c) 2.2 lbs of nitrogen and 0.5 lbs of phosphorous per acre per year, the most stringent standard shall apply.”

23. Construction of a neighborhood amenities center with clubhouse, pool and playground prior to issuance of a certificate of occupancy for the 650th residential unit.

Accepted

24. Street layout as shown on the Development Plan sheet DP-2.0, along with sidewalks on both sides of all streets (except for alleys) and where adjacent to natural storm water infiltration areas and tree save areas as shown on Development plan sheet DP-2.3, all subject to adoption of the NCDOT TND Street Guidelines from August 2000 or similar street design standards by the City of Durham.

Required Change: On sheet DP-2.3, please modify the text “sidewalk on one side only on this street” to make it clear on which side of the street will **not** be provided with a sidewalk.

Note: per guidelines this may automatically require that the item be continued for

Required Change: Please make the following grammatical changes (in **YELLOW**) for clarity: “Street layout as shown on the Development Plan sheet DP-2.0, along with sidewalks on both sides of all streets, ~~(except for alleys)~~ and where adjacent to natural storm water infiltration areas and tree save areas as shown on Development plan sheet DP-2.3, all subject to **acceptance adoption** of the NCDOT TND Street Guidelines from August 2000 or similar street design standards by the City of Durham.”

25. No single retail tenant shall occupy a space larger than 75,000 square feet

Suggested Change: Change “retail” to “commercial”

26. 100 vegetated landscape area along NC 751 opposite the Chancellors Ridge Townhome area as shown on Development Plan sheet DP-2.3

Required Change: Add “foot-wide” after “100”

Required Change: A timing mechanism must be provided. We recommend “...to be provided prior to the first certificate of occupancy for the corresponding Block Elements that this area is adjacent to as shown on DP-2.1”.

27. 2 Transit/bus shelters with roof, seating, wi-fi, real time arrival display and solar lighting within 60 days of a public transit route serving the property becoming operational

Required Change: A timing mechanism must be provided, other than the date of operability of transit service. We recommend “...”or prior to the last certificate of occupancy of the MU(D) district, whichever is first”

Required Change: Add “The location of transit/bus shelters shall be approved, in writing, by the transit provider(s)”

28. A least 10% of the residential units will be affordable based on HUD Low Income housing standards.

Required Change: A reference to a specific “HUD Low Income housing standard” is required. HUD has various standards of “low-income”. We suggest you review these standards at <http://www.huduser.org/portal/datasets/il.html> and specify the applicable standard.

Required Change: Please add “Prior to annexation, the applicant will record restrictive covenants enforcing the above provision. Such restrictive covenant will be reviewed and accepted as sufficient by the County Attorney and a certified copy will be provided to the Planning Department prior to the issuance of the first residential building permit.”

Suggested Change: Please specify “per site plan” or other unit / increment of development after “10%”. If you do not do so, we will be required to note that this commitment can be deferred until the last phase(s) of development and may never take effect.

29. A minimum of 75,000 of the retail space will be in vertically integrated buildings containing upper level residential and/or office uses

Required Change: Please add “square feet” after “75,000”

Suggested Change: Change “retail” to “commercial”

Vice Chair Reckhow expressed concern about being inconsistent with the guidelines adopted in September, 2006. The comments should have been received five (5) days in advance of the public hearing. She recommended a one cycle deferral in keeping with the guidelines to make sure the commitments are workable.

Commissioner Heron stated that it would be good for Board members to disclose any type of compensation received from developers.

The Board held a lengthy discussion about ethics. All Board members refuted any allegations of receiving any type of compensation from developers.

Patrick Byker, representing Southern Durham Development, read the Committed Elements and was present to answer any questions regarding same.

Vice Chair Reckhow remarked that Committed Element #19 conflicts with #13 and Element #24 conflicts with #15. Mr. Byker responded that #19 and #24 replaced #13 and #15 since #19 and #24 were more stringent.

Vice Chair Reckhow addressed the affordable housing units. She questioned whether the units would be for sale or rent, the period of affordability, and the size of units. She asked for a commitment of 15 years for affordability. She also expressed a desire not to see all the affordable housing units be efficiencies. A range in the size of the units would be desirable. He agreed to the 15-year request. Regarding the size of the units, Mr. Byker responded that the all the affordable units would not be efficiencies. Although Mr. Byker agreed to commit to not having all efficiencies, he reminded the Board that the developers would follow HUD guidelines. Mr. Young, Assistant Planning Director, remarked that the HUD income guidelines are tied to family size, but there is not embedded in the guidelines a number of bedrooms and size of units.

Mr. Byker agreed to pass on Vice Chair Reckhow's comments to the developers. The size of the units would ultimately be at the discretion of the developers.

Commissioner Heron asked the Planning Director for clarification about the effect of the rezoning if the property was sold. Mr. Medlin attested that zoning and the committed elements run with the land so the rezoning would remain in effect. Any change would have to come back for a new rezoning.

Commissioner Howerton asked about the process to monitor the committed elements. Mr. Medlin replied that if the rezoning is approved, any committed element must be shown on the site plan submittal. Once constructed, any commitments that require long term monitoring would be enforced by the zoning enforcement staff.

Vice Chair Reckhow questioned the phases of the proposed development. She expressed concern with the terminology "platted." She asked for consideration to change the word to "constructed." She asked for a commitment that the first phase would contain both residential and nonresidential construction. Mr. Byker responded that the building of residential and nonresidential was a requirement.

Vice Chair Reckhow asked for more details about the transportation issue. Mr. Lyle Overcash, Traffic Engineer, responded. He indicated that the developers would improve 18 of the 22 intersections that were studied. This will be carried out in line with the phases of the development. There will be \$6.5 million spent in road improvements.

Commissioner Bowser moved, seconded by Commissioner Howerton to grant the rezoning request 751 Assemblage (Z0800003) including committed elements 19-29 as stated above.

Vice Chair Reckhow thanked the developers for inviting her to meet with them. She was pleased to see the additional committed elements. She did express an overarching concern about the size of the development at that location. She reiterated that the intense development was inappropriate at this location.

Commissioner Heron emphasized that there was no way she could support the 751 rezoning. She added that it is important to do all we can to protect the drinking water supplies.

Commissioner Howerton stated that she was not happy with how the developers handled this case. She expressed concern about the money spent by the Planning staff on this case.

Commissioner Bowser remarked that there were a lot of organizations in support of this project. He pledged his support because of the job potential in this community and to help address the needs of this community, including education. He stated that the project falls within the State guidelines for protecting Jordan Lake.

Chairman Page echoed Commissioner Bower's comments and stated that the project falls within the guidelines of smart growth. He acknowledged that the developers invited the Board to Charlotte to see a similar project and to show what the project would look like in Durham.

The motion carried with the following vote:

AYES: Bowser, Howerton, Page

NOES: Heron, Reckhow

Adjournment

There being no further business, Chairman Page adjourned the meeting at 9:20 p.m.

Respectfully submitted,

V. Michelle Parker-Evans
Clerk to the Board