

**MINUTES**  
**BOARD OF ADJUSTMENT**  
**Wednesday, August 12, 2009, 7:00 PM**

**MEMBERS:** Chair Al Hartkopf, Carla Lunsford, Eric Oliver, Dave Remington, Eddie Sain, and Tommy Sikes.

**ABSENT:** Bradley Curelop, absence excused.

**STAFF:** Senior Planner Tom King.

**PUBLIC:** Warren Faircloth, Michael Neal, Ben Lennon, Angela Wilcox, Robert Pratt, Roland Intrator, and Hervey McIver.

**ITEM #1:** **Call meeting to order and confirm the presence of a quorum.**  
Chair Al Hartkopf called the meeting to order at 7:00 p.m. and confirmed the presence of a quorum.

**ITEM #2:** **Consideration of additions to the agenda.**  
There were no additions or adjustments to the agenda. Mr. King stated that at each Board member's place were review comments and/or approvals of each case before them tonight that had come in since the staff report was distributed.

**ITEM #3:** **Approval of the July 8, 2009 minutes.**  
Mr. Oliver said he believed he had been the one to ask about the stimulus package rather than Mr. Hartkopf. Mr. Hartkopf agreed.

**MOTION:** **Mr. Oliver** moved to adopt the minutes of the July 8, 2009 meeting as amended.  
**Mr. Sain** seconded.

**VOTE:** Unanimous.

**ITEM #4:** **Continued Item - Case #BA-06-2009- Modification of Conditional Use Permit request from Chapel Hill-Training Outreach Project, Inc./Orange County Head Start to construct 2 additional buildings totaling 5,168 square feet in area as part of the expansion of an existing daycare center. Additional on-site parking is also proposed. The property is located at 125 Lawndale Avenue (Orange County Tax Map Reference #4.9.C.18) and is currently zoned R-10 (Medium Intensity Residential).**

Mr. King explained that the applicant had come to the Board in July to ask for a modification of their existing Conditional Use Permit and some information had been provided at that time. He said the Board had referred the matter to a public hearing which was why they were here tonight. Mr. King said the applicant had submitted two options, one involving closure of an unopened street right-of-way on the north side of the property, and an option if the Town Board did not approve that closure. He suggested that at this point those persons who desired to speak on this issue be sworn in.

Mr. Hartkopf asked had the applicant gotten that right-of-way closure on the Town Board's agenda. Mr. King said yes, that it was on the agenda for the September meeting. Mr. King then swore in himself, Angela Wilcox and Robert Pratt.

Mr. King described the application, noting the proposal was to construct 2 additional buildings totaling 5,168 square feet as part of the expansion of an existing daycare center with additional on-site parking. He said as mentioned earlier, there were two options with one option being without the street right-of-way closure and the second option being that the street right-of-way would be closed. Mr. King said there were some outstanding agency review comments on the options, one of which was that the Fire Marshal had indicated that it would be preferable for one of the driveways to be one-way in and one-way out rather than both being two-way drives. He said that the Town Engineer had commented on the option without the right-of-way closure, and had approved it as noted. Mr. King said the Town Stormwater Engineer had seen the original plans but not the follow-up plans, so he did not believe the review had been completed. He said that Orange County Solid Waste had provided its approval, noting that the facility would be using roll-out carts for recycling.

Mr. King said that staff had gone through the Zoning Ordinance findings as it related to the site plan approval. He said one of the items that needed to be addressed was the note on sheet C-2 (Site Plan) that stated that additional outdoor lighting would be provided by wall packs and mounted on the building corners and manually operated when needed. Mr. King said there had been no lighting information provided on those that the Board could review. He said the applicant's engineer, for the storm drainage plan, had noted that there would be no grade changes in excess of one foot from the existing grade, so they had not prepared or submitted a grading plan. Mr. King said that Orange County Erosion Control had had an opportunity to review the plan and had indicated that no erosion control plan or land disturbance permit would be required because less than 20,000 square feet of land was proposed for disturbance. He said they did advise that suitable erosion control measures be installed.

Mr. King said in relation to the site plan, there were still some technical errors that needed to be corrected and some minor adjustments that need to be made to correct typos.

Mr. Oliver said one of his problems with both sets of plans was that whenever you had a sidewalk cross a driveway you needed to have pedestrian markings, and there were none shown. Mr. King stated that the driveways and parking areas were to remain paved with gravel, so he did not know how that could be done. Mr. Oliver said the sidewalk would be concrete. Mr. King said the sidewalk would stop at the driveway entrances. Mr. Oliver said in that case he did not know how to address it. Mr. King suggested it could be addressed using signage.

Mr. Oliver said that item #15 (related to State outdoor recreation requirements for daycares) in the site plan notes said that “X” number of square feet for a total of required square footage of 4,725, but the plan showed an area of more than 7,000 square feet of fenced-in recreation space. He said there was a decided difference in the amount of fenced-in recreation space between the two drawings, so how did that same note apply to both options. Michael Neal, the applicant’s Engineer, said the easy answer was that obviously there was a mistake. He said in any case the amount far exceeded the minimum required amount. Mr. Oliver said then they really only needed to indicate that both exceeded 4,725. Mr. Neal agreed.

Mr. Neal said as far as how to address crosswalks across driveway entrances, he did not believe there was a good way, and if you did something different you would set a precedent that others would want to use around Town. He said he was unaware of any standardized sign that could be used in such instances.

Mr. Oliver said he understood the point, but everyone was required to stripe their driveway where it crossed a sidewalk.

Mr. Remington said he had seen cases where sidewalks had been extended across driveways so it made it obvious it was a pedestrian crossing. Robert Pratt, the applicant’s contractor, said he had not seen that except in cases where the sidewalk actually abutted the curbing mold.

Mr. Oliver said his concern was safety, and in that location there would be pedestrian traffic.

Mr. Remington said the only concern he had left was regarding the permitting. Mr. Sikes said that was his concern as well, in that approval would have to be conditional based on what the Town Board did at its next meeting regarding the proposed street closure.

Mr. Oliver said he believed the Town Board would make a decision on September 14, 2009 and there were still a few things that needed to be tightened up. Mr. King said the majority of those were related to the site plan and that they could be cleaned up given whatever approval was given tonight. Mr. Oliver said they were still lacking two permits. Mr. King said he knew of only one, noting that one of the findings was that the applicant had to bring evidence that the minimum requirements to qualify for a State license had been satisfied, and the Department of Health and Human Services would not grant an opinion or approval or issue a license until the applicant had received local jurisdiction approval. So, he said, that was a “Catch 22” situation, in that they had submitted their current license which was up to date, but according to the staff at the State they actually had to come in and inspect the buildings and the site before they would issue the license itself. Mr. King said that was another item that would need to be corrected in the ordinance rewrite that was getting underway.

Mr. King said where they were now was that the license could not be produced until after the buildings were completed and the State inspection took place, so a condition of approval would be that the license be provided once it was issued by the State and prior to the issuance of a Certificate of Occupancy. Mr. King said another finding was that the site plan must show the methods for screening, parking and the recreation areas with Type 2 screens. He said that parking in excess of 10 spaces had to have Type 2 screening between the use and a street right-of-way and/or adjacent property. He stated that, on the south side of the property, the plans were showing a required evergreen hedge, so staff had suggested that the careful placement of trees in that area would likely satisfy the Type 2 screening. Mr. King said the site plan could easily be amended to reflect that.

Mr. Neal said they were asking that they not be required to put screening in the sewer easement and power line easement on the western property line. He said as far as Plan A with the right-of-way closed and Plan B with the right-of-way not closed, they would hope tonight to reach some resolution on that so that they could go forward.

Mr. Oliver said if they got the right-of-way closed, then they would proceed with Option 1 (plan without street closure), and if not they would proceed with Option 2 (plan with street closure). Mr. Neal said that was correct. Mr. Oliver said then either way they would move forward. Mr. Neal said that was correct, noting they had to inform the State as to which option they were going forward with. He said it would be preferable to receive approval on both options, contingent on whatever conditions were necessary. Mr. Oliver said he was reluctant to approve both.

Mr. Pratt said he thought he had seen language that said both could be approved and then whichever one was not used would then become null. Mr. King said he had added that language as a recommended condition of approval.

Mr. Neal said they would ask that the Board say that approval of Option 1 was contingent upon the Town Board's approval to close the right-of-way, and approval of Option 2 was contingent upon the right-of-way not being closed. He said that would prevent them having two approved site plans once the Town Board made its decision. (Staff Note: Mr. Neal had the options backwards)

Mr. Oliver asked what would be the advantage to the applicant if tonight they were granted approval with some conditions that said if a certain thing happened then they would use one option and if something else happened they would use the other option versus the Board approving a single site plan. Mr. Neal said the advantage was the one month time frame as well as they could go tomorrow to the State and apply to get the permit and get it processed and get back to the Town.

Mr. Pratt said it would also allow them to meet a small window of opportunity to acquire funding.

Mr. Oliver said he believe he remembered that they had until September 1, 2009 to get this project in under the current program they were seeking funding for. Angela Wilcox, the project director, said they had submitted the proposal for the funding and by August 31, 2009 they would get the okay to proceed. She said they had been required to submit a timeline and the expectation was that all of the approvals would be in place so that when they drew down the money that they would be on schedule and ready to go. Ms. Wilcox said they had a large waiting list of children and it was the Federal government's expectation that they would stay on schedule for recruitment, enrollment, as well as construction. She said they needed to be able to hire staff to serve the children that would be coming in, and they would have to be ready to roll as soon as they got the approval.

Mr. Hartkopf said it would be reasonable to him that to actually get the approval for the receipt of the funds on August 31, 2009 that there would be permits and approved plans in hand. Ms. Wilcox said that was correct.

**MOTION:** **Mr. Oliver** moved to close the hearing on Case #BA-06-2009. **Mr. Sain** seconded.

**VOTE:** Unanimous.

**Discussion:**

Mr. King said he assumed the Board had seen the list of suggested conditions, and before the meeting he had given some thought to Condition B regarding one way driveways. He said he had made the suggestion that the southern driveway access point be marked with some signage as "Enter Only," and the northern driveway marked with signage "Exit Only," based on the Fire Marshal's comments. Mr. King asked if the applicant had any thoughts as to whether that should be the proper arrangement or should they be reversed.

Mr. Oliver said they could let the applicant make the decision, noting the condition could read that the driveway would be one way in and one way out with the appropriate signage. The Board briefly discussed the idea of passengers being dropped off in the most convenient way and which drive would need to be "Enter Only".

Mr. Oliver said he saw no recommendation about the screening, and asked if they had to make a recommendation on that. Mr. King said that would fall under Condition A that involved that site plans be submitted in full compliance with the Zoning Ordinance prior to issuance of a Zoning Compliance Permit. He said prior to issuance of the Certificate of Occupancy he would perform a site inspection to confirm that the landscaping was in as shown on the plans, and if not they could post a security with the Town to ensure it was put in at a later date.

Mr. Hartkopf said he would like to address the memo from the Town Engineer and the three bullet points he had made, and asked were they still valid. Mr. King replied yes. Mr. Hartkopf said then they needed to be made a part of the conditions of approval. Mr. King said that would be one of the items caught under Condition A regarding bring the plans into compliance with the Ordinance. He said they would meet with the Town Engineer to make sure the screening was appropriate for the parking and where there might be potential conflict to work around it.

Mr. Hartkopf said given that there was a "Catch 22" situation surrounding that issue, he was willing to give staff latitude to work it out with the Town Engineer.

Mr. Remington said that none of the outstanding issues were specific to one option or the other. Mr. King said he believed that was correct. Mr. Remington said that he did not see a problem with approving Option 2 contingent on the Town Board releasing the right-of-way, and Option 1 contingent on them not releasing the right-of-way.

Mr. Oliver said he would like to craft Condition K (related to the status of the options dependent on the Town Board action on the street closure) to be specific about which option would die after September 14, 2009 in that if the Town Board approved the rescinding of the right-of-way, then Option 1 would become void.

Mr. Hartkopf asked if that would cause the applicant a problem if the Board reworded that condition. Ms. Wilcox said no, that both options were doable.

Mr. King said they had been moving fairly quickly, and believed they had neglected to ask if there were members of the public who wished to speak on this issue, and if so then they would need to reopen the public hearing to receive any comments. Mr. Hartkopf said he had stated in his announcement that if anyone had anything to say that they come forward to be heard. He asked if there was anyone else who wanted to speak on the issue to come forward and be sworn.

Mr. King asked Mr. Phillip Thompson, a person owning property within 500 feet of the subject property, if he wanted to speak. Mr. Thompson said his only concern was about the screening and the right-of-way, and if there would be any drainage from the property. He said he believed his concerns had been addressed. Mr. King said the proposal was to move the existing drainage ditch out to Lawndale Drive and to the south side of the new building on the south side of the lot, noting it would be the same formation but just further down.

Mr. Hartkopf confirmed that there were no other members of the public who wished to speak on this matter. He indicated that they would need to go through the findings of fact before a motion could be made.

**Findings of Fact:**

Mr. Sikes indicated that perhaps they should discuss Article 4.16.2, which said that proof that all requirements for licenses from the State had been satisfied. He said that obviously was contingent upon the approval being considered now.

Mr. Hartkopf said he believed Article 4.3 was what they were really concerned with at this point.

- MOTION:** **Mr. Sikes** moved to approve the site plan regarding Modification of the Conditional Use Permit for Chapel Hill-Training Outreach Project, Inc./Orange County Head Start being that it met the following Findings of Fact of Article 4.3:
- A. The use will not materially endanger the public health and safety if located as proposed and developed according to the plans as submitted;
  - B. The use which was listed as Conditional Use in the district in which it is proposed to be located complied with all applicable regulations and standards, including the provision of Section 3.5 and Section 5 of the ordinance, unless greater or different regulations are contained in the individual standards for specific conditional use;
  - C. That the use will not substantially injury the value of contiguous property or the uses of public necessity; and
  - D. The use is in compliance with the general plans for the physical development of the Town as embodied in the Zoning Ordinance or in the Comprehensive Plan or portion thereof adopted by the Town Board of Commissioners.

Conditions of approval are as follows:

- a. Revised site plans shall be submitted for staff review that indicates full compliance with the Zoning Ordinance prior to the issuance of a Zoning Compliance Permit for the project.
- b. The southern driveway access point shall be marked with signage as "Enter Only". The northern driveway access point shall be marked with signage as "Exit Only". Interior circulation for child drop-off shall have interior signage that directs traffic to exit at the appropriate exit driveway. Signage location shall be shown on the revised site plans.
- c. The parking area on the north side of the lot shall be marked with interior signage that directs exiting traffic from the parking area to the appropriate exit driveway. Signage location shall be shown on the revised site plans.
- d. Non-security lighting shall be extinguished when the facility is not in operation.
- e. Evidence that the applicant has obtained or can obtain a license from the State to provide care for the number of proposed children shall be submitted prior to the issuance of a Certificate of Occupancy for the project.

- f. A Solid Waste Management Plan meeting the requirements of the Orange County Solid Waste Department shall be developed for the project prior to issuance of a Zoning Compliance Permit for the project.
  - g. Construction and operation of the facility shall comply with the Orange County Regulated Recyclable Materials Ordinance.
  - h. Should the 30-foot wide unopened right-of-way adjacent to the north side of the lot be closed and additional land area added to the property as proposed, a survey plat reflecting the new property boundary shall be recorded with the Orange County Register of Deeds Office. This shall occur before the issuance of a Certificate of Occupancy for the proposed buildings.
  - i. Should the 30-foot wide unopened right-of-way adjacent to the north side of the lot be closed, the existing sewer service line located in the unopened right-of-way and serving the property located at 216 NC 86 North (Deed Book 283, Page 209; Orange County Tax Map Reference #4.9.D.1A) shall be relocated to the new northern property line that will result from the right-of-way closure so as to avoid conflict with the proposed "Building #1" and existing and proposed trees.
  - j. An as-built survey prepared by a professional land surveyor shall be submitted to the Town's Planning Department prior to the issuance of a Certificate of Occupancy for the proposed buildings.
  - k. Whichever plan the applicant decides to implement at the time of application for a Zoning Compliance Permit will then become the approved plan. The plan that the applicant decides to not implement will at that point become null and void.
- Condition K amended as noted previously should now read "Contingent upon the Town Board's decision on September 14, 2009 if the street right-of-way is rescinded, then the Board's approval is for Option 2. If the right-of-way was not rescinded, then the Board's approval is for Option 1.

**Mr. Oliver** seconded.

Mr. Remington offered a friendly amendment that in terms of the Conditional Use Permit criteria, they would be in compliance only with the conditions A through K that were in part meant to deal with things that were still ambiguous in terms of Finding B of Article 4.3. He said the staff analysis stated specifically that the lighting plans were not currently compliant with what needed to be shown, and that the Type 2 screening was an issue. Mr. King said that could be addressed with corrections to the site plan. He said as far as the additional lights, he had not yet heard a response as to how that would be treated. Mr. Pratt said the facility was closed at night and there would be no outdoor lights other than porch-type lights that would be manually operated and security lights that would be set to come on at dusk and go off at dawn.

Mr. Oliver said then Mr. Remington was proposing a friendly amendment with appropriate conditions for the Findings of Fact. Mr. Remington replied yes.

Mr. Sikes noted he would accept that friendly amendment, and Mr. Oliver accepted it as well.

Mr. Hartkopf stated that the motion on the table was that the Board made findings of fact that the applicant met the requirements of Article 4.3 inclusive with the possible exception of B.1, in that clarity needed to be reached with staff in regards to security lighting, and B.2, in that the ambiguity/Catch 22 situation surrounding the screening in the right-of-way was resolved by staff, and that staff recommendations or conditions A – J are attached, and condition K was amended to read that Option 1 was approved if the Town Board failed to close the right-of-way, and that Option 2 was approved if the Town Board approved the closure of the right-of-way. He said also, the final plan was ultimately approved and was contingent upon the Town Board's action.

**VOTE:** Unanimous.

### **Final Approval Conditions**

- a. Revised site plans shall be submitted for staff review that indicates full compliance with the Zoning Ordinance prior to the issuance of a Zoning Compliance Permit for the project.
- b. The southern driveway access point shall be marked with signage as "Enter Only". The northern driveway access point shall be marked with signage as "Exit Only". Interior circulation for child drop-off shall have interior signage that directs traffic to exit at the appropriate exit driveway. Signage location shall be shown on the revised site plans.
- c. The parking area on the north side of the lot shall be marked with interior signage that directs exiting traffic from the parking area to the appropriate exit driveway. Signage location shall be shown on the revised site plans.
- d. Non-security lighting shall be extinguished when the facility is not in operation.
- e. Evidence that the applicant has obtained or can obtain a license from the State to provide care for the number of proposed children shall be submitted prior to the issuance of a Certificate of Occupancy for the project.
- f. A Solid Waste Management Plan meeting the requirements of the Orange County Solid Waste Department shall be developed for the project prior to issuance of a Zoning Compliance Permit for the project.
- g. Construction and operation of the facility shall comply with the Orange County Regulated Recyclable Materials Ordinance.
- h. Should the 30-foot wide unopened right-of-way adjacent to the north side of the lot be closed and additional land area added to the property as proposed, a survey plat reflecting the new property boundary shall be

recorded with the Orange County Register of Deeds Office. This shall occur before the issuance of a Certificate of Occupancy for the proposed buildings.

- i. Should the 30-foot wide unopened right-of-way adjacent to the north side of the lot be closed, the existing sewer service line located in the unopened right-of-way and serving the property located at 216 NC 86 North (Deed Book 283, Page 209; Orange County Tax Map Reference #4.9.D.1A) shall be relocated to the new northern property line that will result from the right-of-way closure so as to avoid conflict with the proposed “Building #1” and existing and proposed trees.
- j. An as-built survey prepared by a professional land surveyor shall be submitted to the Town’s Planning Department prior to the issuance of a Certificate of Occupancy for the proposed buildings.
- k. The site plan submitted to and reviewed by the Board of Adjustment noted as “Option #1” entitled “Fairview Child and Family Center without Street Closure” shall be considered the approved option should the Town Board of Commissioners decide not to close the 30-foot wide unopened street right-of-way adjacent to the north side of the subject property. The site plan submitted to and reviewed by the Board of Adjustment noted as “Option #2” entitled “Fairview Child and Family Center with Street Closure” shall be considered the approved option should the Town Board of Commissioners decide to close the 30-foot wide unopened street right-of-way adjacent to the north side of the subject property.

**ITEM #5: Case #BA-07-2009 – Conditional Use-2 Permit request from Skimmerland, LLC c/o Warren Faircloth to construct a 16,429 square foot assembly and distribution building with associated on-site parking and a loading dock. The property is located on the south side of Dimmocks Mill Road (SR #1144) approximately 500 feet west of the intersection of Dimmocks Mill Road and Allison Street (Orange County Tax Map Reference #4.38.B.10R) and is currently zoned GI (General Industrial).**

Mr. Hartkopf asked that anyone present who wished to speak on this matter to come forward and be sworn. Mr. King swore in himself, Michael Neal, Ben Lennon, Warren Faircloth, Roland Intrator and Hervey McIver and asked the speakers to sign in.

Mr. King said the application was for a 16,429 square foot one-story fabrication and assembly plant for the production of the “Faircloth Skimmer,” which is a sediment and erosion control device. He said the application included 19 off-street parking spaces and one off-street loading dock. Mr. King said the Board had been provided with additional materials that came in after the packets were prepared, including the stormwater control plan. He said Ren Ivins, Orange County Erosion Control Supervisor, had provided tentative stormwater plan approval but indicated there were a few numbers that needed to be straightened out. Mr. King said that Orange County Solid Waste and Waste Industries had provided review comments, with Orange County Solid Waste being okay with the

proposal and their only comment was if the Public Works Department was okay with it. He said Public Works had forwarded the matter to Waste Industries, the Town's solid waste contractor, and they had provided some comments on the dumpster location.

Mr. King said that several people were present to speak about the project, and that he had received one phone call from Ms. Lauren Oaks, who owns property within 500 feet of the site. He said that Ms. Oaks said she had no serious objections but she would prefer that the roof not be metal and if it were metal that it be a dull metal or painted with a matte finish. He said Ms. Oaks had also expressed concern about outdoor lighting that might spill over into the night sky and glare into the street. Mr. King said apparently Ms. Oaks had been part of a group that had looked at recreational opportunities for the Oconeechee State Park and they did not want people to be looking down from the mountain trails and getting blinded by light reflecting off a metal roof. Mr. King said he understood that the roof would be metal but did not know if it would be painted or what type of finish it would have.

Mr. Oliver said he did not believe that it was within the Board's purview, in that they did not decide color of roofs. Mr. King said the concern was whether or not the roof would be reflective. Mr. Oliver said he still did not believe that would be within the Board's purview. Mr. King said he believed someone could make an argument that Finding of Fact in Article 4.3(c) could apply, as it spoke to substantially injuring the value of contiguous property. Mr. Oliver said that Ms. Oaks' property was not contiguous to the subject property.

Mr. King said that he had not yet heard back from the North Carolina Department of Transportation (NCDOT) Division 7 office regarding the last comments sent in regarding the driveway entrance, and the driveway permit not being submitted. He said that NCDOT staff had indicated that the driveway permit was not normally a permit that they issued at this stage in the review process, but there was no reason why they could not issue a driveway permit at this time. He said that had not come in and he did not know how the Board would want to treat that, but staff could make sure they had that permit before the Zoning Compliance Permit was issued.

Mr. King said the applicant was requesting an alternate screen due to the topography of the final grade of the site, in that they were requesting that the Type 2 screen for the parking area along the western side property line not be required; that the evergreen hedge along the edge of the parking area not be provided because there would be a grade change of 14 feet between the parking area and the western property line; and, that along the street there would be a Type 1 screen required which was more stringent than the Type 2 screen.

Mr. Remington said along the street the argument was that the amount of Type 1 screening was more stringent. Mr. King said that was correct, noting it would

have to be opaque to the height of 6 feet with intermittent plantings that would reach a height of 20 feet. He said the applicant was proposing to use existing vegetation along the street frontage.

Mr. Oliver said then even with what Mr. King had provided today, the application remained incomplete. Mr. King said there was no driveway permit as yet, which was required under Article 4.9 (General Requirements) of the Ordinance. He said the plans had been reviewed by NCDOT but the driveway permit had not yet been issued. Mr. King said that Orange County Erosion Control had given their tentative approval of the stormwater plans contingent on a few additional numbers which he believed Mr. Neal would be responding to. In addition, he said, there was an \$11,000 fee for off-site stormwater mitigation.

Mr. Sikes said his only comment was that the application was deficient as noted.

Mr. Remington said he had visited the site and in terms of the buffer, there was a dip in Dimmocks Mill Road and he assumed the buffer was close to that. Mr. Neal said it was somewhat on the uphill side of the dip. Mr. Faircloth said the driveway would essentially be where the dip was. Mr. Remington said there was some rather thick vegetation along the highway there, but he had not paid attention to the extent that it was all deciduous and would not look screened in the winter, so that was a concern.

Mr. King said that staff had proposed a condition that before the Certificate of Occupancy was issued that an inspection would be performed, and if there was any doubt that the screening requirements would not be met with the existing vegetation then the applicant would be required to supplement it to meet the requirements.

Mr. Remington suggested stipulating that it be inspected when the leaves were off the trees.

Mr. Oliver asked when the construction plans would be ready. Mr. Neal said assuming they received the Board's approval, then they would immediately begin the construction phase of the project. Mr. Oliver asked how long would construction take. Mr. Neal responded it was a 12-month plan. Mr. Faircloth added once they received the Board approval, then they would begin acquiring building permits and the like.

Mr. Remington reiterated that he wanted to make sure the screening was adequate during the winter months. Mr. Faircloth said he believed the leaves would be down when construction was started.

Mr. Oliver said they could add a stipulation that Mr. King conduct the inspection during the winter months, or he could note which trees were evergreen and which were deciduous. Mr. King said he had added a contingency that if he made a

determination that additional plant material needed to be added and the applicant disagreed, then the applicant could appeal to the Board and it could be revisited at that time.

Mr. Remington said he would like see a native forest along that line rather than a line of Leland Cypress as if they were hiding something. Mr. King said it was a screen and not a buffer, so it would be the thickness of vegetation which would help although he did not know how thick the area would be. He said there were sewer easements that cut through there in which plantings would not be placed, or very limited at best.

Mr. Neal said he would like to address the two deficiencies that had been pointed out, the first of which was stormwater. He said that they had met with the County Sedimentation and Erosion Control staff and they had approved their plan but had not had the time to produce the letter indicating that. Mr. Neal said the numbers in question were not numbers that were relevant to the stormwater management report per se but was the amount of money they would have to pay into the Clean Water Trust Fund or Stream Mitigation Fund for their nitrogen buy-down. He said the \$11,000 figure was the calculation that had been estimated and was a minor issue, and had nothing to do with the performance of the stormwater plan. Mr. Neal said they believed they had met the spirit of the requirements and had received the approval, and believed that Mr. King had received an email to that affect.

Mr. Neal said the second issue pertained to the NCDOT driveway permit, noting he believed Mr. King would agree that it was fairly standard for NCDOT to not issue the driveway permit at this point in time. Mr. King said that DeAngelo Jones, Assistant District Engineer with NCDOT's Division 7 office, had indicated it was not their normal, routine practice, but there was no reason why they could not. Mr. Neal said that was the same response they had received, in that it was not usually provided at this stage.

Mr. Sikes asked if that was something that could materially affect the plans. Mr. Neal said possibly, but NCDOT had already looked at the plans and had no issue with where the driveway was located. He said he did not foresee that being an issue at all. Mr. King stated that the NCDOT comments were included as Attachment 2 of the Staff Report, and stated that the driveway access appeared to provide the necessary sight distance, but complicated on-site and off-site drainage which would have to be solved. Mr. Neal said they had explored other alternatives but they proved to have safety issues related to sight distances. Mr. King said there were also responses from Mr. Neal's project manager included.

Mr. Oliver asked where did it stand with NCDOT. He asked would they provide the permit in two weeks or two months or what. Mr. Neal said they had already had at least a month and a half, so he did not know the answer. He requested that

the Board add as a condition of approval that they obtain the NCDOT driveway permit.

Mr. Hartkopf asked if others wished to speak to this case.

Hervey McIver spoke, stating that he had been asked by the Eno River Association to attend this meeting and voice their concerns. He said the Association owned property within 500 feet of the site. He said their position was that it was a good project and a good business, and given the nature of the business they would assume they would have state-of-the-art stormwater controls. Mr. McIver said they were of course concerned about any effect on the river and the watershed, and would hope that those effects would be minimized as much as possible. He said anything that would limit the runoff would be better for the environment, including capturing and treatment the runoff. Mr. McIver said regarding the screening issue, it would be nice to minimize as much as possible the cutting of any vegetation and keeping as much of the forest on the site as possible. He agreed with Mr. Remington that any kind of natural vegetation as a buffer, even if it was non-evergreen, was appropriate.

Mr. McIver said that this lot was a small distance from the overlook at the top of the quarry at the Oconeechee Mountain State park. He said it was the State's intention to build a lookout tower and that current visuals at the south side of Dimmocks Mill Road were an eyesore; so a less bright, less reflective roof would be good, and any kind of lighting that projected downward would be ideal for the aesthetics from the mountain for those visiting it. Mr. McIver said that that should make the view towards the east a little more visible, and if you had something that was very reflective it would stick out. He suggested that a photovoltaic roof would be ideal.

Mr. Faircloth stated that the roof would be galvanized metal, but color had not yet been determined.

Mr. King stated that there could be no work or grading in the floodplain on the property, and a stormwater detention facility was proposed at the rear of the lot but not in the floodplain. Mr. Faircloth said the floodplain was actually where the larger trees were. Mr. Neal agreed, noting there was a significant distance between the floodplain and where the building would be located on top of the hill. Mr. King said Sheet C-2 (Grading, Storm Drainage and Erosion Control Plan) of the plan set showed the areas of vegetation to be retained, noting that the line labeled "TP" was the tree protection fencing.

Roland Intrator said he was an abutting property owner to the east on Allison Street, and his main concern was ending up having his property unintentionally trashed. He said he had seen cases where people would do things they did not consider to be wrong, such as the Town tearing down his fence and stating it was his responsibility to repair it. Mr. Intrator said he had had similar problems with

NCDOT and Duke Energy, and he would like to avoid that. He asked could he meet with the developer when they came in to begin bulldozing and make sure his property was not disturbed and that the trees were protected.

Mr. Intrator said another concern was being close to a place that was generating something he did not know anything about, noting he had only learned of the proposal a week or so ago. He said he had no idea what kind of things would be used on the property, and he would like to discuss that with Mr. Faircloth and perhaps get an agreement. Mr. Intrator said he did not want to start out in an adversarial relationship with his neighbor, but he also did not want to have any damage to his property and have to pay for repairs himself. He said his goal was to have everything go smoothly and to everyone's satisfaction.

Mr. Intrator asked was there some process they could go through to make sure any problems did not become legal problems, such as having the borders of abutting property respected and if something went awry that they be solved without introducing lawyers into the mix.

Mr. Sikes said he believed there were State statutes that dealt with that type of thing. Mr. Intrator said he had assumed that. Mr. Sikes encouraged him to research those statutes, and to look at the contour plans for the project in that it might ease his mind somewhat. Mr. Intrator said he had looked them over today, and although he did not particularly feel at ease he was sure they could work something out.

Mr. Neal said that Mr. Faircloth owned two lots, one of which was the lot to the east which was not going to be developed at this time. He said they would have to come to the Town at such time that plans to develop it were proposed. Mr. Neal said the County Lock Up's property was directly behind that lot, and he would take all care and diligence at pre-construction to indicate to the contractor where the fence protection line was and make him aware of Mr. Intrator's concerns. He said they would establish physical boundaries through the use of tree protection fencing and others that were visual boundaries to the construction workers that that was as far as they could go.

Mr. Oliver asked had they done a survey that marked the property line so they would know how close the fence was to the property line. Mr. Neal said a survey was conducted, and the fence was a substantial distance from the construction that would take place on the site.

Mr. Intrator said part of the problem was that the chain link fence was not on the property line, so he would appreciate being invited to the meeting with the contractor so that he could personally make him aware of his concerns. Mr. Neal said they would be happy to have Mr. Intrator attend the meeting.

Mr. Oliver stated that Mr. Intrator could take a set of plans with him this evening if he wanted to study them in detail. Mr. Intrator said he would like to do so.

Mr. Oliver said he would not vote to approve unless all permits were in place, noting that was the way the ordinance read and that was what the Board had required in the past. Mr. Hartkopf agreed that was true.

Responding to a comment that trucks would have a difficult time accessing the site to pick up waste, Mr. King stated the issue was the diameter of the interior landscaping island and it needed to be addressed. Mr. Neal said initially they had designed the solid waste disposal area and when Orange County Solid Waste reviewed it they had said it needed to be turned. He said that had been done and they resubmitted it, and Waste Industries said that it would not work and wanted it turned back the same way as it was originally submitted to the County. Mr. King said that Public Works had looked at the original plan and had no comments; Orange County looked at the plans and made changes with the provision that the Town's Public Works staff would need to approve it; Public Works had sent it to Waste Industries; and, Waste Industries sent it back with the comment that there needed to be some minor adjustments because the trucks would be backing into the landscape island. Mr. King said since Waste Industries would be picking up their waste, they should be the ones that were happy with the plans. He said that Orange County Solid Waste would require a solid waste management plan to be submitted.

Mr. Sikes asked about the email from DeAngelo Jones with NCDOT and the questions he had posed. Mr. Neal responded that they had responded to all of those questions a month or more ago. Mr. Sikes asked if that included the issue regarding the driveway permit. Mr. King stated that when he had received the email he had contacted Mr. Jones and he had indicated that it was something that could be received prior to issuance of this permit, but it was not the usual case to do so with other jurisdictions they worked with. He said it was more normal for NCDOT to review the permit application and the design specifications for the throat of the driveway as to how it connected to the State road to make sure it met all their safety and other requirements.

Mr. Neal said he understood the requirement to have all permits in place, but asked was there some leeway in the language to cover situations such as this when it was not practical to have a permit in hand at this stage. Mr. King said under Article 4.9, the language in item (e) said that "all State permits or reviews required for operation that can be secured in advance of opening" are required for submittal. Mr. Neal said the word "can" did indicate some flexibility, noting they had been diligent in attempting to obtain the driveway permit and asked that the Board take that into consideration.

**MOTION:** Mr. Oliver moved to continue the public hearing on the Conditional Use-2 Permit request from Skimmerland, LLC, case #BA-07-2009, to the September 9,

2009 meeting to allow the applicant time to obtain all required permits. **Mr. Sain** seconded.

**VOTE:** The vote was 4-1, with Mr. Oliver, Mr. Sain, Mr. Hartkopf, and Mr. Remington voting Aye, and Mr. Sikes voting Nay. Mrs. Lunsford did no vote in the matter as she was sitting as the ETJ alternate member.

Mr. Hartkopf asked the Board members to relate to Mr. King those issues they found to be deficient in the application. Mr. King stated that he would generate a list based on the discussion, and a decision letter would go out in the next day or so where he would enunciate those things that were lacking or needed to be clarified. He said he believed those issues were the NCDOT driveway permit and the revised plan with the dumpster location addressed.

Mr. Oliver said that any other issues could be conditions to approval, but the driveway permit had to be obtained before approval could be considered.

Mr. Hartkopf said it was the practice of the Board that when an item was continued that they advise the applicant specifically of those items they would expect to see at the next meeting so that there would be no misunderstanding. He advised the applicant that it was also the practice of the Board that having been so advised of those things required for approval at the next meeting, should those things not be presented at that next meeting then the application would be denied. Mr. Hartkopf said they wanted to be very forthright and very straightforward with all applicants.

Mr. Sikes added that that the applicant or his representatives should meet with Mr. King if there was any foreseen delay so that the application could be pushed back should an additional meeting be necessary.

Mr. Oliver said if it was NCDOT that was holding things up, then the applicant would not be held accountable.

**ITEM #6: Continued discussion on proposed amendments to the Board's Rules of Procedure.**

Mr. King said he had made the changes suggested at last month's meeting. He said one thing he had identified earlier this week was a discrepancy in the ordinance regarding appeals, in that with a zoning notice violation you had 30 days to appeal, but anything else it was 14 days. Mr. King said that would be corrected in the ordinance rewrite. He said the draft before the Board dated July 9, 2009 addressed all suggested revisions noted at that July meeting.

Mr. King asked if the Board wanted to take action on this tonight, or did they require additional time to review the draft.

The Board agreed by consensus to consider action on the Rules of Procedure at its September 9, 2009 meeting.

**ITEM #7: Committee and Staff reports.**

Mr. Remington announced that he would be away during the next two Board meetings.

**Planning Board**

Mr. Remington said that the Planning Board had participated in the quarterly public hearing with the Town Board, and one of the big issues was the UNC Hospital application to amend the Master Plan for Waterstone. He said that public hearing would be continued at the Planning Board's meeting next week. Mr. Remington said the other big issue was a proposal from the Planning Board to enact a development moratorium to allow staff time to conduct the rewrite of the Zoning Ordinance. He said there was much discussion about that although no decision had been made, but there was a unanimous feeling to find ways to accomplish the rewrite without a moratorium. Mr. Remington said they may be looking at obtaining some temporary contract workers for the Planning Department to free up some of the staff's time, and perhaps accepting the fact that there would be less staff time to provide detailed help to the public.

**Staff**

Mr. King asked if the Board was satisfied with the staff reports they were receiving and if there needed to be changes.

Mr. Hartkopf said that Mr. King had spoiled them, in that in the past they were quite accustomed to getting a much less thorough packet of information to review and make decisions on. He said they understood that Mr. King's time may not be as freely given during the rewrite as they would wish. Mr. King introduced Aspen Price who would be working with the Town as a Planner for the next year. He said she had looked at the staff reports and suggested that the Board provide staff with suggestions of things that they really did not need to see in the staff reports and what things they would like to continue to see. Mr. King said an email or phone call would be sufficient to relay that information.

Mr. Hartkopf said having Mr. King step through Article 4.3 was very helpful, but if there was something that needed to go then that could be shortened significantly and a simple statement that there were no issues with the findings of fact would be sufficient. Mr. King suggested then that a statement could be included that staff found the application to be in compliance.

Mr. Hartkopf said the packets were very thorough and was very good work, but the thing he found most beneficial especially during meetings was the section on recommended conditions. He said that was incredibly helpful, explaining that in the past when they had sought to conditionally approve an application they had had to formulate and document those things on the fly, which caused difficulty for the Planning Director in her recordkeeping as well as made for a clumsy looking Board. Mr. Hartkopf said in his opinion the most important thing in the entire

packet was the elucidation of the conditions should they wish to conditionally approve.

Mr. Remington agreed with Mr. Hartkopf, noting the recommendation on conditions was something he would like to see continued. He said as well, a listing of where in the statutes the things they needed to consider were located was helpful, and the members could look those up at their leisure and bring them to the meeting if necessary. Mr. Remington said also a list of issues that appeared to be okay was helpful, or that one thing to consider was did they meet the requirements of whatever because this or that was missing or ambiguous or the like.

Mr. Sikes seconded both Mr. Remington's and Mr. Hartkopf's statements. He said the information on conditions was very helpful, as well as statements such as in order to meet a stipulation you had to adhere to Section 4.3 or whatever. Mr. Sikes said he believed that what this Board was almost supposed to do was to formulate conditions on the fly, noting they discussed those conditions and worded them to fit the specific need.

Mr. King said he and Ms. Price had discussed that some jurisdictions offered recommendations and some did not, and he had worked in both situation.

Mr. Sikes said that Mr. King was very thorough and very impartial, but having such specific language he would wonder on appeal if that would look like staff leading the Board or coloring the decision on findings of fact. Mr. King stated that Town Attorney Bob Hornik had looked over staff reports in the past and had not brought up that issue.

Mr. Remington said he would not object to leaving things the way they were. Mr. King said what he was coping with was trying to give the Board what it needed but to keep it short. He said the cases before the Board took a large amount of time, noting that with the last application he had written two lengthy review letters stating what was needed and if the applicant did not have what was needed then it would likely be continued. Mr. King said he had also had a lot of back and forth conversation with various people about the application; also time consuming.

Ms. Lunsford asked was it appropriate that if the application was considered incomplete that it not even be placed on the Board's agenda. Mr. King said it was possible that if the application was not totally in line and complete at submittal that it could be returned with a note that it was incomplete and listing the things that were needed in order for it to be complete. He said with the decision for no moratorium and with deadlines amended, all Conditional Use Permit and Special Use Permit applications would be going through the Technical Review Committee first before they would be placed on the board's agenda. He said instead of him farming out plans to the Technical Review Committee members

and asking for comments by “X” date, they would be sending out the plans to the Technical Review Committee and anyone else involved in the review process such as Orange County Solid Waste who would have a chance to look at the plans first and generate written comments that could all at one time be sent to the applicant to address. Mr. King said that would now be the first step in the application process, and would likely add a month to the review process, possibly more.

Mr. Oliver said he had always looked at it as taking two meetings to get an application through, because there would always be some wrinkle. Unless, he said, the applicant had come forward for a review before they submitted their application so that any wrinkles would be ironed out in advance. Mr. King said when an application came to the Board, the desire was to have all the technical issues addressed so that the Board could address citizen or other concerns.

Ms. Lunsford said that would save Mr. King from having to produce packets several times. Mr. King agreed, and noted that nine times out of ten when he looked at a site plan it was almost assured that he would have to go through it at least three times before the applicant got everything in order for whatever reason.

Mr. Hartkopf said things were improving, in that in past years the Board would be seeing applicants three and sometimes more times. Mr. Remington agreed.

Mr. Hartkopf said the Board should be reviewing an application no more than twice, in that if issues were outstanding they would schedule it for a second meeting, but if those issues were not addressed then the application would be denied. He said they needed to make sure that applicants were taking staff seriously and responding to review comments regarding deficiencies in the application.

Mr. Hartkopf asked was there anything the Board could do to assist staff beyond what was being done now. He said he would not want to deny an application because it was incomplete on the first review. Mr. King said if something was incomplete then it was reasonable to allow the applicant a chance to make it complete, but technically the Board could deny it on the first review due to incompleteness. He said that one of the findings of fact was that the application was complete, but making that finding would set the application back one year and that was a steep penalty.

### **Webb Grove Appeal**

Mr. King said that last week they had received the Court of Appeals decision on the Webb Grove denial from 2007, which the Town lost. He said Orange County Superior Court had said the Board had done the right thing, but the Court of Appeals had reversed that decision primarily because they had believed it was improper to rely on an intent section found in the Zoning Ordinance as a basis for denial of the density bonus, and that the Vision 2010 Plan was an insufficient

basis upon which to base the decision to deny because that plan was only a policy document. Mr. King said what that was saying was that you could not deny something based on an intent statement, which in this case was the intent with respect to the historic district, or an adopted plan. He said if you were going to deny it had to be based on noncompliance with some standard in the ordinance, or some evidence was submitted that the requirements of Section 4.3 or that one or more of the Standards of Evaluation were not being met.

Mr. Oliver asked what the next step was. Mr. King said the option was that the Town had the right to petition the Supreme Court to hear the appeal, or it would be remanded back to this Board and the Board would have to approve the permit. He said if the Town did not pursue the appeal the Board would need to grant the Conditional Use Permit and consider appropriate conditions on the application. Mr. Oliver asked what the Town's intent was. Mr. King said he had not gotten the word on that as of yet. He said if the Town was going to appeal then the petition for discretionary review had to be filed within 35 days, which would be September 8, 2009. Mr. King said the Town Attorney believed there were legitimate legal questions to raise to the Supreme Court.

Mr. Remington agreed, noting the Town had an option to allow a density increase which would seem to suggest that there were criteria they could use to decide whether or not to allow that. Mr. King said that because the decision of the Court of Appeals was unanimous, the Town did not have the automatic right to appeal, which was why they had to file a petition for discretionary review. He said that process could result in either the denial of the petition, in which case the Town had no further appeal, or that the petition would be granted in which case they would be allowed to fully brief the issues and argue the case before the Supreme Court. Mr. King said it would take anywhere from one to six months for the Supreme Court to decide whether to grant the petition for discretionary review, and if granted it would take several more months for the Supreme Court to make a decision on the merits of the appeal.

Mr. Oliver said if the Town did not appeal or the Court decided not to grant review, then it would come back to the Board and they would have no choice but to grant the permit. But, he said, the Board would have the opportunity to add reasonable conditions to the approval. Mr. King said that was correct.

### **Proposed Sign Regulation Changes**

Mr. Oliver said at the Joint Public Hearing changes to the sign regulations had been discussed, and asked what the outcome had been. Mr. Remington said that the Planning Board would be making a recommendation to the Town Board at its next meeting.

Mr. Remington said that part of the next Planning Board meeting, which would be next Thursday, would be a continuation of the public hearing on the UNC Hospital application.

Mr. Sikes asked if the Rencher Street development was coming before the Planning Board. Mr. King said not yet, but there were plans in his office if anyone cared to look through them. He said the plan was for eight lots, but there were still issues that needed to be resolved before it went before the Planning Board.

#### **Gateway Center Portico Issue**

Mr. King said he had talked with a representative of ENT Land Surveys, Inc. regarding the Gateway Center portico matter, and had asked had he noticed if deliveries were occurring between 3:30 and 6 p.m., and the response was generally no, in that most deliveries especially by large trucks, were in the morning with smaller trucks coming in the early afternoon. He said their building had been hit a few times, and the problems were being caused by drivers who entered the drive too fast and could not safely make the turn. Mr. King said that it had been indicated that another potential problem was that pedestrians used that drive to get to the Orange County offices in the rear.

Ms. Price commented that a fence was being built to prevent that, so that should no longer be an issue.

#### **Phillip Thompson Matter**

Mr. King said lastly, he had been working with Mr. Thompson and wanted to get the Board's feedback. He said what he had was basically a one-story unheated, unpowered garage, and his letter to Mr. Thompson was that it had to be removed from the stream buffer. Mr. King said he wanted to clarify what the Board was expecting to see as a result of the denied appeal. Mr. King said that Mr. Thompson may be coming back with a variance request.

Mr. Sikes said the original plan approved was a single story structure. Mr. King said that was correct, and it was to be a garage, but Mr. Thompson had then added a second story. Mr. Sikes said it was his recollection that the Board had said that the plan approved was what should be there, and whatever needed to be done should be. He said there was also the issue of the setbacks with the two stories. Mr. King said there was still the issue of the setback even with one story, in that he was within just a few inches of that setback. Mr. Sikes said given that there was a physical structure there already, his memory was that the Board had said that what was there had not been approved, and what should be there was what had been approved.

Mr. Remington said he recalled it almost came down to reducing the pitch of the roof.

Mr. Oliver said he did not know if they had the leeway to do a variance in that case. Mr. King said that Mr. Thompson could ask for a variance from the requirement, or he could move the structure.

Mr. Sain said Mr. Thompson had an approval and changed the plans on his own. Mr. King said that Mr. Thompson realized his error, and was trying to exhaust all means of fixing the situation.

Mr. Sikes said the Board did not want to set a precedent by looking the other way, and did not know if there was some method by which they could approve it.

Ms. Lunsford asked could Mr. Thompson submit a revised plan and seek approval that way.

Mr. Sikes said even a revised plan would not be acceptable because the height would immediately violate the setback requirements. Mr. King said that was correct, noting Mr. Thompson was already in violation of the rear setback even with the one-story. Mr. Sikes asked what the Town's recourse was on that. Mr. King said the Town could start an enforcement action and work through that process which included civil penalties, and compel Mr. Thompson to move it because it violated the setback and it was in the stream buffer.

Mr. Remington said he believed the decision the Board had made hinged on the stream buffer because the question was whether it was a lapse in his building permit. He said even if the rest of the Board had agreed with him that it was not a lapse, there was still the issue that what Mr. Thompson had changed the plan to was not in compliance with the permit, in that he had made it taller and it was too close to the property line.

Mr. Hartkopf said he had agreed with Mr. Remington that it was not a lapse and Mr. Thompson still had the ability to construct that which he had received a permit for. However, he said, Mr. Thompson had dug himself a hole when he had changed the pitch of the roof because from that point in time on any other application was going to fall under the new stream buffer requirements. And, he added, there was still the issue of the setback.

Mr. King said one issue was that the Town did not have its own inspections department but relied on the County, and even though the County was getting better at notifying the Town of issues they see, there were still issues with multiple calls, expired permits, and the like. He said if the Town had its own inspections staff they could coordinate more closely and catch changes before they were completed.

#### **Eric Oliver's Resignation Announcement**

Mr. Oliver said that Mr. Remington had announced that he would miss the next two meetings, and wondered if any other Board members would be unable to attend those meetings. No members indicated a conflict.

Mr. Oliver noted that tonight was his last appearance on the Board, noting that he was sending a letter of resignation shortly. He said he was in the process of

building a home in Florida which would take up much of his time, and as soon as the house was completed he would be moving, likely sometime in the spring. Mr. Oliver thanked the Board for its respectful and thoughtful considerations of applications, noting he had very much enjoyed serving on the Board of Adjustment.

The Board offered its congratulations and noted what a pleasure it had been to serve with him.

**ITEM #8: Adjourn.**

**Mr. Oliver** moved to adjourn the meeting at 9:37 p.m. **Mr. Sain** seconded. The motion was adopted unanimously.

Approved:

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Tom King, AICP, CZO  
Senior Planner  
Secretary to the Board