

MINUTES
BOARD OF ADJUSTMENT
Wednesday, October 14, 2009, 7:00 PM

MEMBERS: Chair Al Hartkopf, Bradley Curelop, Carla Lunsford, Eddie Sain, and Tommy Sikes.

ABSENT: Dave Remington, absence excused.

STAFF: Senior Planner Tom King and Town Attorney Bob Hornik.

PUBLIC: Ben Lennon, Warren Faircloth, Arthur Ruzensky, Nannie Richmond, Joe Gattis, Carl Cuthertson, Steve Yuhasz, L. W. Walker, and Annie Whitted.

ITEM #1: **Call meeting to order and confirm the presence of a quorum.**
Chair Al Hartkopf called the meeting to order at 7:02 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 noted that additional information on Items 4 and 5 had been received and provided to the Board at their places, as well as worksheets to assist the Board in making decisions on those items.

Mr. Harkkopf allowed the Board a few minutes to familiarize itself with the new material, noting that the email included appeared to answer one of the concerns the Board had had with the Skimmerland item.

Swearing in of Speakers:

Mr. Hartkopf asked that all persons present to speak on Items 4, 5, and 6 come forward to be sworn. The following persons were sworn in: Tom King, Ben Lennon, Warren Faircloth, Arthur Ruzensky, Nannie Richmond, Joe Gattis, Carl Cuthertson, Steve Yuhasz, and Annie Whitted.

ITEM #3: **Approval of the August 12, 2009 and September 9, 2009 minutes.**
Mr. Sikes called attention to a typo on page 14 of the September 9 minutes in the third paragraph. He noted the second sentence was attributed to Mr. Yuhasz, but he had made the statement.

MOTION: **Mr. Sikes** moved to adopt the minutes of the August 12 and September 9, 2009 meetings as amended. **Mr. Sain** seconded.

VOTE: Unanimous.

ITEM #4: Continued Item - 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. King noted that this was an item continued from the August 12 and September 9 meetings and the public hearing had been left open. He provided a brief update, noting that there were three deficiencies that staff had identified in the application, with the first being that the NCDOT driveway permit had not been submitted. Mr. King stated that the District Engineer's Office had informed him that NCDOT did not normally issue the driveway permits before approval was given, and he had confirmed that this was the case. He said in response to that information, he had added a condition of approval that the driveway permit would have to be submitted before a Zoning Compliance Permit would be issued.

Mr. King said the second issue was that NCDOT had concerns about the storm drainage and entrance driveway. He said the email provided tonight from Chuck Edwards, NCDOT District 7 Engineer, stated they had worked through those issues with the applicant and were giving their approval on that issue. Mr. King said those issues related directly to the third issue regarding the General Standards and Findings of Fact of Section 4.3, so with those two items addressed staff believed that Findings A and Finding D could be made by the Board.

Mr. King noted that Ben Lennon, an Engineer with Michael Neal & Associates, was present tonight to respond to questions, as well as Warren Faircloth, the property owner.

MOTION: Mr. Sikes moved to close the hearing on Case #BA-07-2009 - Conditional Use-2 Permit request from Skimmerland, LLC c/o Warren Faircloth. Mr. Sain seconded.

VOTE: Unanimous.

Discussion:

Mr. Hartkopf went through each of the issues, asking if any members of the Board believed the application did not contain all information required if approved with all noted conditions. Mr. King reminded the Board that a Conditional Use Permit worksheet had been provided to be used in making the determination on this issue. He said as mentioned earlier, NCDOT had an issue with the storm drainage and the entrance drive, and since that had been addressed it could be removed from the list. Mr. King said unfortunately the plans NCDOT had reviewed were not available tonight, but the issue had to do mainly with the placement of the junction box as shown on the grading and stormwater plan. He said he would request a swap sheet be submitted to reflect that change on the plans. Mr.

Hartkopf said then recommended Condition a. could be removed. Mr. King said that was correct.

Mr. Hartkopf asked about Condition b. requiring a sidewalk easement. Mr. King explained that the easement was necessary because the sidewalk went outside the NCDOT right-of-way, and that the Town would be maintaining the sidewalk and therefore would need the easement for maintenance and for public access since portions of the sidewalk would not be in the public right-of-way.

Mr. Hartkopf asked Warren Faircloth, the property owner, if he was in agreement with that condition. Mr. Faircloth responded yes.

Mr. Hartkopf said in regards to Condition c., did they have the sidewalk encroachment agreement. Mr. King said that would come later but prior to the issuance of a Certificate of Occupancy. He said the applicant would have to have that agreement for the portions of the sidewalk that were located within the NCDOT right-of-way.

Mr. Hartkopf said Condition d., Screening, had been discussed at length. Mr. King said once all the leaves had fallen, they would inspect the site to see how well the existing vegetation screened the site from the street. He said the idea was that if the Zoning Officer believed that additional plant material would be needed to accomplish the Type 1 screen along Dimmocks Mill Road, then they would work with the applicant to get that done. Mr. King said if there was disagreement, the applicant would come back to the Board to appeal.

Mr. King said regarding Condition e., the Stormwater Control Plan, Orange County Erosion Control had reviewed those plans and given preliminary approval, and a formal approval would be forthcoming when the applicant paid the fee and went through that process. He stated that approval would have to be obtained before a Zoning Compliance Permit would be issued. Mr. King stated that Orange County Erosion Control had indicated they saw no problems with the plan that had been submitted and reviewed. Regarding Condition f., Stormwater BMP (Best Management Practice) Construction Certification, Mr. King said that was assurance from the Engineer that designed the stormwater BMP that it was built as proposed and would function as it was designed to. He said Condition g., the Stormwater BMP Operation and Maintenance Plan, was to provide a guarantee that the stormwater BMP would be maintained in the future. Mr. King said Condition h., the Stormwater As-built Plan, was the as-constructed drawing for the BMP.

Mr. King said Condition i., the Utilities Encroachment Agreement, was another NCDOT encroachment agreement that would come after the fact. He said that the Solid Waste Management Plan, Condition j., would have to be approved by Orange County Solid Waste prior to issuance of a Zoning Compliance Permit.

Mr. Hartkopt asked if Condition k., Recycling, had been addressed. Mr. King said that was correct. He added that the last condition, Condition l., required that an as-built survey showing all above ground structures, stormwater facilities, and impervious surfaces was required to be submitted to the Zoning Officer prior to issuance of a Certificate of Occupancy.

Mr. Sikes asked if some of those conditions, such as those relating to BMPs, were required because of where the project was located. Mr. King stated that the Town's zoning ordinance did not cover many of those things at the present time, and in discussions with Orange County Erosion Control they had recommended that the Town begin requiring them, especially the construction certification and operation and maintenance plans. Mr. Sikes asked if those requirements would be included in the ongoing rewrite. Mr. King responded they would.

Town Attorney Bob Hornik stated that the State's stormwater regulations were slowly being phased in with more stringent regulations, so those conditions were designed to make sure that as they moved into the future that Hillsborough would be in compliance with the Phase 2 regulations.

Mr. Hartkopf read through the Findings of Fact, asking if any Board member believed that the proposed use did not meet the standards of evaluation imposed by Article 4.10. There were no objections or comments from the Board.

MOTION: **Ms. Lunsford** moved to approve Case #BA-07-2009 – Conditional Use-2 Permit request from Skimmerland, LLC c/o Warren Faircloth with the following conditions:

- a. Driveway Permit: An approved NCDOT (North Carolina Department of Transportation) Driveway Permit shall be submitted prior to the issuance of a Zoning Compliance Permit for the project.
- b. Sidewalk Easement: A public pedestrian/sidewalk easement granting access for maintenance by the Town of Hillsborough for the portion of the required sidewalk located along Dimmocks Mill Road and on the property subject to the Conditional Use-2 Permit, prepared in a format acceptable to the Town of Hillsborough Town Attorney, shall be recorded in the Orange County Register of Deeds Office prior to the issuance of a Certificate of Occupancy for the project.
- c. Sidewalk Encroachment Agreement: A fully executed NCDOT 3-party Encroachment Agreement will be provided for the sidewalk located along Dimmocks Mill Road. This agreement must be provided to the Zoning Officer prior to the issuance of a Certificate of Occupancy for the project.
- d. Screening: Prior to the issuance of a Certificate of Occupancy for the project, or the release of any financial surety guaranteeing the installation of required

landscaping and screening, the applicant shall schedule a landscaping inspection with the Zoning Officer. The purpose of this inspection will be to verify that the proposed landscaping and screening meets the intent of the Zoning Ordinance. Should the Zoning Officer make a determination that the intent of the landscaping and/or specific screens are not being met, he/she shall provide the Permit recipient with a written determination to that affect with suggestions as to how the screening and landscaping may be enhanced for compliance. Should the applicant disagree with the Zoning Officer's written findings, the Permit recipient may forward an appeal of the Zoning Officer's determination to the Board of Adjustment for a determination regarding the landscaping and/or screening.

- e. Stormwater Control Plan: The applicant shall submit a Stormwater Control Plan for review and approval by the Erosion Control Division of the Orange County Planning and Inspections Department. Written evidence of plan approval shall be submitted to the Zoning Officer prior to the issuance of the Zoning Compliance Permit for the project.
- f. Stormwater Best Management Practice (BMP) Construction Certification: A certification letter signed and sealed by the designing engineer stating that the on-site stormwater control BMPs, as constructed, will function properly shall be submitted to the Zoning Officer prior to the issuance of a Certificate of Occupancy for the project.
- g. Stormwater BMP Operation and Maintenance Plan: A Stormwater BMP Operation and Maintenance Plan prepared by the designing engineer and executed by the property owner shall be recorded with the Orange County Register of Deeds Office. The plan shall include the owner's financial responsibility and include the maintenance schedule of the facilities to ensure that it continues to function as originally intended. Evidence of the recordation of the Operation and Maintenance Plan shall be provided to the Zoning Officer prior to the issuance of a Certificate of Occupancy for the project.
- h. Stormwater As-built Plan: An "as-built" plan for all stormwater management facilities shall be submitted to the Zoning Officer after final construction is completed and before a Certificate of Occupancy is issued for the project.
- i. Utilities Encroachment Agreement: A fully executed NCDOT Encroachment Agreement for the water line tap to be installed in the right-of-way of Dimmocks Mill Road will be provided to the Zoning Officer prior to the issuance of a Certificate of Occupancy for the project.
- j. Solid Waste Management Plan: A Solid Waste Management Plan meeting the requirements of the Orange County Solid Waste Department shall be developed and approved for the project prior to issuance of a Zoning Compliance Permit for the project.

- k. Recycling: Construction and operation of the facility shall comply with the Orange County Regulated Recyclable Materials Ordinance.
- l. As-built Survey: An as-built survey showing all above ground structures, stormwater facilities and impervious surfaces, prepared by a professional land surveyor shall be submitted to the Zoning Officer prior to the issuance of a Certificate of Occupancy for the project.

Mr. Sikes seconded.

VOTE:

Unanimous.

ITEM #5: **Continued Item - Case #BA-08-2009 – Conditional Use-2 Permit request from ENT Land Surveys, Inc. on behalf of Mt. Bright Baptist Church for the development of a 194 burial space cemetery. The property is located at 210 West Union Street (Orange County Tax Map Reference #4.18.D.5) and is currently zoned R-20 (Medium Intensity Residential)/HD (Historic District) Overlay.**

Mr. Hartkopf said in the interest of full disclosure and transparency in local government, the Chair wanted to inform the Board and the public that the Chair had been supported for public office by citizens and some leaders of Mt. Bright, and had been supported for public office by one of the neighbors who was opposed to the project. He stated the Chair had supported for public office and offered support and consideration to the applicant representing Mt. Bright Church, Steve Yuhasz, in his effort to serve them as a County Commissioner. He said the Chair had also supported the son-in-law of one of the residents of the neighborhood in his bid for election to the Orange County School Board. Mr. Hartkopf said if anyone had an issue with that disclosure he would appreciate hearing that now and it would be addressed appropriately.

Mr. Hornik said with all that being said was there anything that would prevent Mr. Hartkopf from being unbiased and open minded with respect to the application, and not prejudiced one way or the other. Mr. Hartkopf responded no.

Mr. Hartkopf said he would also like to make it known that the Saturday following the September 9 meeting, the Chair had visited the site and apparently that had concerned at least some of those involved in this matter. He stated it was the duty of the members of the Board to review, to the extent they believed necessary to come to a valid conclusion, the cases before it. Mr. Hartkopf said the Chair had made a site visit, and that that was not unusual and happened quite regularly. He said if there was any concern about that, he would like to hear about that as well so that it could be addressed appropriately.

Mr. Hornik asked had the Chair had any discussions with anyone while visiting the site. Mr. Hartkopf replied that there was a gentleman who lived next door to the property by the name of Mr. Terrell, who had joined him during his site visit and had engaged him in “small talk.” He stated that Mr. Terrell did not impede or

facilitate his inspection of the property. Mr. Hornik asked had the Chair learned anything while at the site about the application or about the property that other Board members might not know, or might need to know, in order for them to evaluate the application. Mr. Hartkopf responded he had. He said it had become very clear to him that on the left side which would be the west side of the property, there was an immature bamboo forest and that a lot of water came through there. Mr. Hartkopf said he based that statement on the fact that downed bamboo was washed into a "V" pattern pointing downhill, and he recognized that to be indicative of a great amount of water coming off the back of the hill from Orange Street from the north side.

Mr. Hartkopf said as he moved across the property he began to notice rather large protrusions of solid rock, noting he had been looking for that because of testimony that had been provided at the previous meeting. He said he also observed where some test holes had been dug, which were not very deep with only one going down about 2 to 2½ feet, and they seemed to have hit hard packed earth. Mr. Hartkopf said he had also looked at the east side of the property, where again he found evidence of a lot of water coming off of Orange Street, and that water appeared to go under the ground. He said there was a wash that looked somewhat like a creek in the woods that was hollowed out with trees growing around it, and it appeared to simply stop. Mr. Hartkopf said where it stopped was a good 2 feet below the grade, and the water appeared to go under the ground. He said he also saw places closer to Union Street where there were natural holes in the ground where water appeared to have boiled up. Mr. Hartkopf said he was not positive, but the layman in him told him that the water on the back side of the property was going underground, washing underneath, and coming up in the three or four holes that were about even with the house on the property, and to the east between that house and Ms. Nannie Richmond's house. He said it appeared to be that a fair amount of water would come up and then go down into a very deep bowl where there was a conduit which was shown off-site on the site plan that went underneath Union Street and emptied into the creek and traveled down to the river.

Mr. Hartkopf said that site visits were something all Board members should strive to do and frequently did, although they were not always able to do so. He said in this case, there appeared to be some incongruity so he had made the effort to conduct the site visit. Mr. Hornik said he had wanted to make sure that whatever information came to bear on the makeup of his (the Chair's) decision, that the entire Board was aware of it, and that the public and the applicant had the opportunity to know about it and to try to address any matters that needed to be addressed.

Mr. King noted that the public hearing on this item would need to be reopened in order to receive additional testimony and evidence, as it had been closed at the previous meeting. He stated that he had re-notified all the property owners and republished the ad as required by the zoning ordinance.

Mr. King stated he had visited the site along with Mr. Terry Hackett with Orange County Erosion Control and had observed some of the same conditions as noted by the Chair. He said he had provided at the table tonight the Stormwater Approval Letter from the Town's Stormwater Engineer for the Stormwater Plan, noting the letter indicated that the Stormwater Plan as submitted did comply with the Town's stormwater requirements for sites disturbing less than one acre of land, as provided in the Zoning Ordinance.

Mr. King said that Orange County Erosion Control staff took a general look at the Plan and had indicated that the Plan would likely improve the drainage issue in that area, noting that the Plan included a drainage swale down the eastern side of the property that would handle the water more appropriately than it was being handled now.

MOTION: Mr. Sikes moved to reopen the public hearing on Case #BA-08-2009. Mr. Sain seconded.

VOTE: Unanimous.

Discussion:

Mr. King provided a brief overview of his site visit on September 21. He stated that one issue that had been brought up was whether the well was a spring, and Orange County Erosion Control had noted that it had stone construction around it so they were fairly certain that it was actually an old well. Mr. King stated that they had looked at the two drainageways on the site, and they would not qualify as streams that would require any type of buffering under the Neuse River rules. He said in regards to the two holes located towards West Union Street to the east of the house, Orange County Erosion Control had noted they did not believe those to be springs, and in fact Mr. Archie Terrell had talked with them during their visit and had indicated there used to be a tree there that had been cut down and that over time the stump had disappeared, although he did not know what had happened to it. Mr. King said he had taken a stick and inserted in one of the holes and found it to be perhaps two to three feet deep, but it had angled down. He said if a tree had been there, it could be that the remnants of the roots had rotted and left the holes.

Mr. King said they had found two small holes that appeared to have been dug with a small backhoe that were perhaps two feet deep. He said they had noticed in the upper portion of the property towards West Union Street that there was a small white PVC pipe coming out of the ground at the upper end of the eastern drainageway, and they did not know where that was coming from. Mr. King said they had also observed rock outcroppings there.

Mr. King said it appeared that the lot had been filled at some point in time, and Orange County Erosion Control noted that the proposed grading plan would most likely improve drainage in the area rather than hinder it. He said they would rather that the bamboo grove be removed because it was considered an invasive

plant species, and it was noted that the culvert at West Union Street needed some maintenance to help with the drainage.

Mr. King said some of the issues that had come from the previous public hearing were environmental and health issues related to cemeteries. These issues included surface drainage, subsurface water flow, and subsurface groundwater. He said the applicant had provided a paper entitled "The Impact of Human Decomposition on Groundwater" prepared by Pioneer Natural Burial dating from December 19, 2008. Mr. King added other issues he had noted from the previous meeting were the depth to groundwater, depth to subsurface rock, the presence of a spring on the site, psychological effects of cemeteries on nearby residents, impacts of new proposed cemeteries on existing contiguous residents in established neighborhoods, and traffic concerns related to burials at the site.

Mr. King said related to the depth to groundwater and depth to subsurface rock, he had looked at the Orange County Soil Survey to determine what types of soils were on the property, and that the survey was very general. He said two types of soils had been identified, one of which was an Iredell Urban land complex, and the survey said that about 30% of each mapped area of the Iredell soil had been covered with as much as 18" of fill material or had as much as two thirds of the original soil material removed; and, that use and management of the complex should be based on on-site investigations. Mr. King said the other soil class was Tatum Silt loam, 8% to 15% slopes, and it was noted that depth to bedrock was about 40" to 60"; that the seasonal high water table was at a depth of 48" to 72"; and that slopes, surface, runoff, erosion, and depth to rock were the main limitations to the use and management of that type of soil. He said the survey also contained information on building site development, noting that for dwellings with basements the Tatum series would have moderate limitations, with depth to rock as one of the concerns.

Mr. King stated that the depth to the high water table was 4 to 6 feet and the depth to bedrock was 40" to 60" in the Tatum, and for the Iredell Urban depth to high water table was greater than 6 feet and the depth to bedrock was 40" to 60". He said to clarify, the high water table was generally 4 to 6 feet or greater, so below the actual soil surface it was 4 to 6 feet based on the soil types. Mr. King said depending on the type of soil, the depth to bedrock could be anywhere from 20" to 60" down.

Mr. Hartkopf said since this was a filled lot, what bearing did the soil type have. Mr. King said he could not answer that, but the soil survey did say that 30% of the soils mapped for that Iredell series had been filled, and there had been concerns regarding groundwater and the depth to the surface.

Mr. Hornik said he would assume the interments were intended to be burials on the site, and therefore there would be some excavating down into the ground in order to create the gravesites. He said his point was that it was a relevant

question. Mr. King said that one person who had testified had made the statement that they had worked with a funeral home doing burials and sometimes groundwater would seep into a grave site and they would have to wait for it to seep away before continuing to dig. Mr. Hornik said if you had 10 feet of fill, and if you did not consider that fill, then was the groundwater table 10 feet plus whatever the soil survey said. Mr. King said he did not know. Mr. Hornik said he did not know if the soil survey was based on the fill or based on the native natural conditions. Mr. King said it was general information, having been published in 1977. He said the person who did the burials had said it was 1978 when fill material was deposited on the site.

Ms. Lunsford asked did they know why they had done the fill. Mr. King said from what he remembered from the meeting, it was due to the drainage from West Orange Street in an effort to hinder it in some way.

Steve Yuhasz, representing Mt. Bright Baptist Church, stated that L. W. Walker was present tonight and was the person who had actually dug the holes that had been observed on the site, and wanted him to testify as to how deep the holes were and what he had done subsequently.

L. W. Walker, after having been sworn, stated that he was one of the Mt. Bright Trustees working on this project. He said the Trustees had dug four holes at each corner six to seven feet deep with a bat machine. Mr. Walker said when the holes were dug they were trying to determine if rock was present, and because no major rock was found they had covered the holes back up for safety. He said they had found some soil that had been hauled in up on the west side in the back, as well as on the east side in the front, but the rest was natural soil.

Mr. Walker said before they had begun the project he had talked with as many neighbors as possible, and all had wished them well with the project. He said he knew there were some that had some doubts about the project, but he wanted the Board to understand they had not tried to do that overnight.

Mr. Hornik asked when they had excavated the holes, had they hit water. Mr. Walker replied no, they were dry holes. He added he believed that the engineer, Michael Neal, had provided the Board with the drainage plan that should solve any problems.

Mr. Sikes said the Chair had indicated he had observed rocks protruding from the ground. Mr. Walker said there was rock behind the house close to a tree, and that was not part of the planned gravesites.

Mr. Hornik asked, if approved, would one of the requirements be that interments had to be at least 30 feet from the boundary lines so that on the east side of the property where the drainage swale was planned it would be in that buffered area. Mr. King replied that was correct.

Mr. Hornik asked about drainage on the west side, noting the Chair had indicated he had observed drainage coming from the bamboo grove. Mr. Walker said there would be a drainage swale on both sides, noting they had discussed that in detail with Mr. Neal.

Mr. Hornik said Orange County Erosion Control had indicated that the drainage plan would not make conditions in the area worse, and may actually make it better. Mr. King said they had felt that the plan would improve the drainage, and the Town's contracted stormwater engineer had indicated the plan met the Town's zoning requirements for sites disturbing one acre or less of land.

Mr. Curelop said Mr. Walker indicated he had talked with the neighbors. Mr. Walker said he had provided a list of those contacted at the last meeting, so they should have that. Mr. King said the Board had received the cemetery petition at the September 9 public hearing, and had also received a second petition to keep the cemetery out of historic Hillsborough.

Mr. Hornik reminded the Board that what the public thought about the cemetery proposal was really of no consequence, because the Board had to apply the standards in the Zoning Ordinance and there was no public referendum or vote on it. He said it was the Board's vote based on the factual evidence presented.

Mr. Yuhasz distributed a copy of a letter for the record from Tom Konsler, the Director of Orange County Environmental Health. He said on November 24 he had met with Mr. Konsler at the site to examine the old well. He said the letter clearly identified it as a well, and further clarified that it was 11 feet deep and was dry, which suggested that at least at that location they had at least 11 feet from the surface to what was reasonable to dig by hand. And, he said, at that 11 foot level it was dry. Mr. Yuhasz said the letter also suggested that the Church would have to go through the official well abandonment program to plug the bottom of the well with concrete to ensure there was no infiltration of surface water into the subsurface water. He said the deadline suggested by Mr. Konsler to do that was November 7. Mr. Yuhasz stated Mr. Konsler's letter talked about needing that different process, noting normally you would fill the top with concrete, but because they would be grading the top down they should put the concrete in the bottom so that it covered the area that would be present after grading was completed.

Mr. Sikes asked had the well been covered. Mr. Yuhasz said they were asked to do that and Mr. Walker had indicated they had covered it with plywood.

Mr. Yuhasz said in regard to the information Mr. King had provided about the soil survey and the two soil types, he distributed a handout to be entered into the record that showed the property and identified three separate soil types, one of which was present only at the very bottom of the lot. He said the paper he had provided to Mr. King to provide to the Board regarding the impact of human

decomposition on groundwater specifically spoke to the type of soil that you should or should not place a cemetery on. Mr. Yuhasz said it warned against putting cemeteries in sandy soils and suggested that the best place to put cemeteries was in clay-type soils. He said his handout was color-coded for each of the three soils identified on the site, and noted that each of those soil descriptions identified them as clay-type soils. Mr. Yuhasz said that was important, noting that the paper talked about concerns in particular for product decomposition, which was identified generally as the same products of decomposition seen in soils everywhere. He added that humans were after all organic, and when they decomposed they became the same kinds of products that any other organic matter would decompose into.

Mr. Yuhasz said the specific concerns were for pathogens, bacteria and viruses, and the paper talked about how clay soils were much better at taking up those kinds of things and preventing their transmission into water or for long distances through the soil. He said the point was that a cemetery was best placed in that kind of location, noting the site was not in a bottom so it would not be in an area where there was a lot of water, that it was on a side slope, and it was in clay soil.

Mr. Yuhasz stated they had heard previous testimony that people did not want to have a cemetery or have a cemetery in a residential area, and that was really not a question for this Board. He said that question had already been answered by the Town Board by designating a cemetery as an appropriate use in a residential area through the Conditional Use Permit process. Mr. Yuhasz said while he understood that people would have concerns, this was not the venue for those concerns to be addressed but should be brought before the Town Board. He said until such time as the Town Board amended the Zoning regulations, the Board of Adjustment was to look at the application as presented and determine if it met the requirements for issuance of a Conditional Use Permit.

Mr. Yuhasz said, as they had looked at the evidence previously presented by Mr. King, all the specific requirements for the Conditional Use Permit had been met. He said the only thing they had not done, and reasonably so, was provide a traffic impact analysis because they had asked for a waiver. Mr. Yuhasz said the ordinance allowed for the request of a waiver when certain conditions were met, and those conditions had been met. He explained that in this specific case, because it was a cemetery that would serve the church members and the church already had adequate parking for all of its functions including funerals, the traffic impact would be negligible. Mr. Yuhasz said the only traffic impact that might occur would be people walking across the street from the church to the cemetery, and the Police Chief had already indicated he did not believe that to be a problem. He said from that standpoint it appeared reasonable to request a waiver from the requirement for a traffic impact statement, and it also seemed reasonable that that waiver be granted. Mr. Yuhasz reiterated that they had met every specific requirement for the granting of a Conditional Use Permit.

Mr. Yuhasz said the other two items that the Board was uncomfortable with in looking at granting the permit were the issue of the safety of cemeteries in general and the value of adjoining properties. He stated with respect to safety of cemeteries in general, one of the big advances in public health was when people began burying decaying organic matter in the ground, which had been done for thousands of years. Mr. Yuhasz said while there was always the potential for some unintended or undesirable effect from a cemetery, there had not been over the course of recent history epidemics that were related or could be attributed to the existence of a nearby cemetery. He stated there were five cemeteries in Town at present, and if you read through the report it did not say there were absolutely no dangers but it did talk about how those potential dangers could be minimized. Mr. Yuhasz said the three minimizing actions were placing cemeteries in clay soils, not creating large cemeteries, and limiting the number of burials each year, all of which they were doing.

Mr. Yuhasz stated that at least with respect to the information they could identify, which they had been directed to by the Orange County Health Department as the best information that they had available, the Town in adopting the ordinance to allow cemeteries had recognized, he believed for safety and health reasons, that the interments needed to be further away from the property line than a building. He said if there was a specific identified safety concern, that would be something that would be reflected in a requirement in the Zoning Ordinance, and the fact that the only thing present was the required setback at least suggested that when the Town adopted the ordinance to allow cemeteries in residential areas there was not a specific concern. Mr. Yuhasz noted that said to him and should say to the Board that if there was a health concern about cemeteries there had to be something specific to that site that was different from other sites that would suggest that it was a dangerous place to put a cemetery. He stated he frankly did not believe the Board had heard any evidence to that effect.

Mr. Yuhasz said the Board had heard some speculation that there was not enough depth to rock, and there may not be in every place. He said that Mr. Walker had dug holes and there was sufficient depth. Mr. Yuhasz said they also had a well that at least in one place showed there was sufficient depth. He said there was no good evidence that there were any springs on the property or that there was any greater lack of depth to water table on this property than on any other property where a cemetery might be sited.

Mr. Yuhasz said from the evidence presented, there really was no evidence that suggested that there was a specific problem with that site that was not applicable to any other site that they might find within the Town, and clearly the Town Board had said that cemeteries were appropriate within the Town limits in residential areas. He said that he did not know that there was any other way to answer the question as to the health and safety of a cemetery. Mr. Yuhasz said there had been some concern expressed regarding chemicals used in embalming,

but that had been a greater concern when the chemicals that were used were different from the chemicals used today.

Mr. Yuhasz stated the other issue dealt with the value of surrounding properties and the effect the cemetery would have on that. He recognized that was a tough issue, but noted the Board had been presented with a report by a North Carolina licensed residential real estate appraiser, an expert in the field, and his conclusion was that the development of a cemetery in that location would have no negative effect on the value of surrounding properties. Mr. Yuhasz said they had heard testimony from neighbors who said they believed it would have an effect, and had also heard testimony from some members of the Board who said they felt personally that it would effect their thinking about the value of property if they had a cemetery going in next to them. But in fact, he said, that was not competent evidence. Mr. Yuhasz said it was clear under the law and it was clear specifically with a codification of the general rule that had been followed, that lay evidence or evidence by the general public that the effect on value that a specific project might have on surrounding properties was not competent for a Board of Adjustment to make a decision that a project did not meet that general criteria of maintaining or enhancing or not seriously affecting the value of surrounding property. Mr. Yuhasz said the question was not whether or not to a specific individual the value might be affected, it was whether in the market place the specific use in the location would have a negative effect on the value of surrounding properties. He said the only competent evidence they had was that from Vic Knight and his conclusion that it would have no negative effect. Mr. Yuhasz said respective to those criteria, feelings by the neighbors could not be given weight.

Mr. Yuhasz distributed a copy of the State Sessions Law 2009-421 with highlighted sections which codified the usefulness of lay testimony with respect to property values and also with respect to traffic impact. He said he had provided that as a reminder for the Board. Mr. Yuhasz said he would also like to reserve some time after any members of the public had spoken to either ask them questions or respond to their questions or comments.

Mr. Hornik noted that the State statute that Mr. Yuhasz had just distributed was adopted this past legislative session and had just gone into effect. He said it did not change the law, but codified what the existing bodies of law were on those issues. Mr. Hornik called attention to the first paragraph that was highlighted that talked about testimony regarding the impact of any particular project on property values. Mr. King noted that statute actually would go into effect on January 1, 2010.

Joseph Gattis stated they had had mountain rock filled in just behind the parking lot around 1976. He said rock had been located on the hill all the years he had lived there, and knew that rock was still in the ground. Mr. Gattis said where the hole was dug out on the side was where the fill dirt was added because it stayed

moist all the time, noting he was a Church Trustee at that time. He said he knew for a fact that there was rock on that hill.

Mr. Yuhasz asked if the entire property was filled with rock. Mr. Gattis replied that he did not know, but knew that rock did not melt and there was rock on the hill. He said where the holes were dug was where the fill dirt had been placed. Mr. Yuhasz said but the whole site did not contain rock. Mr. Gattis replied you would never find rock everywhere, but knew there was rock on the hill.

Nannie Richmond stated that Mr. Walker had stated that before that project had started that he had informed the neighbors. She said she had never been informed by even one person other than her sister. Ms. Richmond said her neighbors had told her that Mr. Walker had visited them and asked them to sign a paper stating that they were not within 500 feet of the cemetery area. She said when she was asked to sign it she had refused. Ms. Richmond said that no one at Mt. Bright had talked with her except for McKinley Jones, who came by to visit her daughter and had brought up the subject during that visit, and she had talked with the pastor for just a few minutes by telephone, but that was the only contact she had had.

Ms. Richmond said two weeks ago, Town workers had installed a new water meter right in front of the parsonage and she had gone over to speak to them. She said they were having a difficult time digging the drainage ditch to put the pipe in to run the new meter, and they had told her that they had hit a lot of rock. Ms. Richmond said they had told her that there was a lot of rock on the back side of the house, and they had even laid some of it on the side of the street while they were working which had stayed there for a week. She said one of the workers had asked her that if she saw any of the Mt. Bright members to please tell them that there was a 12-foot hole on the site that was dangerous and it was uncovered. Ms. Richmond said the worker expressed concern about children falling into it, noting the hole had a lot of rock along the sides of it. She said she assumed that was the well Mr. Yuhasz had spoken of.

Ms. Richmond said Mr. Yuhasz had spoken at length about the issue of safety, and she wanted to address the issue of health, specifically her health. She related an incident to the Board which she said she had taken very seriously and was even seeing a doctor because of the effect it had had on her health. She spoke of a dream she had experienced the night of the last BOA meeting that involved the presence of a cemetery beside her home and a small child walking towards her home from the cemetery. Ms. Richmond said when she awoke at 2 a.m. she was shaking so badly that she had checked her blood pressure and found it to be high. She said she had then sat down and written out the dream while it was still fresh in her mind.

Ms. Richmond said at 2:45 a.m. she woke again and heard mumbling noises coming from outside. She said she opened her bedroom window and in the church yard were people talking. Ms. Richmond said she dialed 911 and told the

operator that there were people at the church who should not be there, and the 911 operator said she would send an officer by. Ms. Richmond said 15 minutes passed and no one came, so she had called and woke Ms. Whitted to tell her something was going on at the church. She said she had asked Ms. Whitted if she thought perhaps someone was trying to bother her because of the meeting that she had attended that night, and then related to her the dream she had had about the little girl and the cemetery. Ms. Richmond said she called 911 again and was told that the Police had been conducting a traffic check at the end of Hassel and West Union Streets and they had arrested a person that was a passenger in a car. She said the family in the car had then gone to the church to retrieve their car where it was parked, and that was the mumbling she had heard.

Ms. Richmond said her blood pressure had remained elevated for a day and a half, and she had visited her doctor and told him what had happened. She said she was not afraid of the dead, but she did not want to walk out on her deck and look over a four foot wall at graves. Ms. Richmond said with the water standing in her basement during a hard rain and with the potential that water would seep in that contained chemicals from decomposing bodies, she would be forced to inhale those chemicals. Ms. Richmond said a real estate appraiser she had spoken to had told her that the value of her home would be negatively impacted by a cemetery. She said if she tried to sell her home with a cemetery next door, she could assure them that no one would purchase it. Ms. Richmond said she could guarantee that none of the Board members lived by a cemetery.

Mr. Sikes asked what real estate agent she had talked with, and did she have documentation of that. Ms. Richmond said she had provided that documentation at the previous meeting. Mr. King said Ms. Richmond had submitted a letter dated September 5 where she stated that Tate-Moser Appraisal Group of Chapel Hill had informed her that building a cemetery where homes already existed would decrease the homes' values, but should a cemetery exist in a neighborhood where an individual decided to build a home, then the home's value would not decrease.

Mr. Hornik said Ms. Richmond's letter related the information she said she had received from Tate-Moser. Ms. Richmond said that was correct.

Mr. Yuhasz noted an objection to considering that information without any documentation.

Annie Whitted, after having been sworn, said she wanted to address the information provided regarding the soil survey. She said she had talked with the Soil Conservation Office herself and was told that the dimensions noted of bedrock at 20 to 40 feet (Staff Note: Staff thinks Ms. Whitted meant inches) below the ground may or may not be accurate if the soil had already been altered, and it appeared that the soil had already been altered on that lot. Ms. Whitted said regarding the Town putting in a new water line, the meter had been on Orange

Street and it had been moved to West Union Street. She said she had talked to one of the work crews and had been told that blue rock was present all over that lot, and she had seen the evidence of the large boulders that had been dug up. Ms. Whitted said she had knew you did not have to go that far underground to put in a water line, and the crew had hit rock very soon after digging. She said it had been indicated that no blasting would be permitted if the cemetery was approved, but there was no way of knowing at what depth the rock was present.

Ms. Whitted said she was separated from this site by one street and one house, and had been approached by Mr. Walker to sign a petition just a couple of days before receiving a notice about the first hearing. She said that was the first she had heard of the proposal other than a rumor just the day before.

Mr. Yuhasz asked where the Town's crew had been digging for the water line. Ms. Whitted said it was on Union Street on the back side of the house on that property. She said a member of the crew had told her there was blue rock present throughout that lot.

Mr. Yuhasz said there was obviously rock on some parts of the property, and it may very well be that the rock increased as you moved towards Union Street from that point. He said they would not be doing any digging on Union Street, but would be halfway up the lot before that even started so he did not believe that was relevant. Mr. Yuhasz said even though their application was for 194 plots they may not necessarily be able to put that many plots on the site because there may be places where rock made that impossible. He said with the condition suggested that blasting would not be allowed, then if rock was present there certainly would be no plots placed in that area. But, Mr. Yuhasz said, he did believe the lot would allow a significant portion to be developed as a cemetery, and they would like to have that opportunity since they had met all the requirements of the ordinance and had shown that there was no concern with the three general provisions they were required to meet.

Mr. Sikes asked if the analysis and conclusion that had been provided regarding property values was comparing the value beforehand and afterwards or was it just comparing property that already surrounded an existing completed cemetery. Mr. Yuhasz said he was not an appraiser, but his impression of what appraisers did was that there were very few situations where you could value a specific house. He said you looked for comparables; that is, property situated in a similar way and then try to make a valuation determination based on that. Mr. Yuhasz said the question could be analyzed as if he was going to build a \$400,000 house next to an existing house, would that increase the value of the adjoining lot or not. He said there would be a number of factors, one of which would be what if the house was not finished and only a foundation was put in, which would have a different affect than if the house was completed. Mr. Yuhasz said he believed what was being suggested was if the cemetery was built as proposed then it would not have any negative effect on surrounding properties.

Mr. Sikes said he was looking at it from the point of view that it had been mentioned that there were several cemeteries in Hillsborough, and to him there was a difference between analyzing what the property values were of houses around an existing cemetery and houses where there was no cemetery. Mr. Yuhasz said there really was no way to answer that question because there were too many variables. Mr. Sikes said the analysis was done assuming the cemetery was 100% complete, so that was not a before and after, it was pretending that the cemetery was already there and 100% complete. He said the "as if" assumption was used a lot. Mr. Yuhasz said he did not believe it was intended as a disclaimer, but there was no way to compare that direct effect. He said you would have to find an area where there was a cemetery being built next to a house, and you would have to know the value of the adjoining property beforehand and then know what the property value was afterwards. But, he said, that kind of data was just not available. Mr. Yuhasz said the only way to make any kind of analysis was to look at similar houses situated next to cemeteries and compare the prices they brought to similar houses that were not situated next to cemeteries. He said the analysis showed that the presence of a cemetery did not affect the value of the adjoining property in regards to cemeteries in Hillsborough. Mr. Yuhasz said there was a national study that indicated the same thing, in that there really was no difference in the value of property adjoining cemeteries to similar properties that did not adjoin cemeteries.

Mr. Sikes said he wanted to make sure that any assumptions the Board made based on the analysis was understood to not be a specific before and after snapshot. Mr. Yuhasz said he did not believe that was a reasonable thing to ask for because the kind of information he was looking for just was not available.

Mr. Hartkopf said then absent that kind of information, weren't they left then to apply a certain amount of a layperson's intuition. Mr. Yuhasz said he did not believe so, in that he believed it was the Board's job to apply common sense to the facts that were brought forward, and the Board's thoughtfulness was in evaluating the evidence and not in producing evidence where there was none.

Mr. Sain said in regards to the health issue, he saw nothing in the material that said the cemetery would not be a health hazard. Mr. Yuhasz said there was nothing that specifically said it was not going to be a health hazard, but he believed the burden was not on him to prove that. He said the fact that the Town Board had said that cemeteries were appropriate facilities to be placed in residential areas was a statement by the Town Board that cemeteries generally were safe within residential areas. Mr. Yuhasz said if there were things that suggested that a cemetery in that particular location would not be healthy, then that was something that could be taken into account, but there had been no evidence of that. He said it was critical to remember that all of the soil types identified on the lot were all clay-based soil types, and whether or not the lines were exactly right on the soil map made no difference because clay-based soils were exactly what was recommended for cemeteries.

Mr. Sain said it was hard to determine if decaying bodies would cause a health hazard, and the Board could not prove there would be and Mr. Yuhasz could not prove there would not be. But, he said, there was that concern based on common sense. Mr. Yuhasz said as had been pointed out there were places where water traveled underground that had to surface at some point, and he suspected some of it was what Ms. Richmond had coming into her basement. But, he said, as a part of the development of the cemetery they would eliminate some of those drainage holes and when they put in a drainage swale it should improve her situation.

Mr. Hartkopf said in regards to the soil elevation map, if they were not going to disturb the soil around the Pecan tree what did that make the topology of that lot look like. He said as they got close to where the proposed driveway was, it was his understanding that the grade would be raised. Mr. Yuhasz said at that point the retaining wall would be a 1½ to 2 feet. Mr. Hartkopf said then the earth would be higher behind it. Mr. Yuhasz said that was correct, noting they were doing that in order to maintain the 5% slope that would comply with ADA (Americans With Disabilities Act) requirements.

Mr. Hartkopf said if that area was raised 1½ to 2 feet, the low part of that property would then be a funnel between the east retaining wall and the arc of the retaining wall around the driveway. Mr. Yuhasz said that was correct, noting the northwest corner would likely be the highest point and it would then slope gently to the southeast corner. He said that would be where the surface flow could enter the drainageway that crossed Union Street.

Ms. Richmond asked if the tree Mr. Terrell had indicated had been cut down was on his side of the property. Mr. Yuhasz replied yes. Ms. Richmond said she had lived in her home since 1982, and for about 18 years there was a natural spring with a steady flow of water coming off of the hill. She added that she had talked with licensed appraisers, and if needed she would get formal statements from them to be submitted into the record.

Mr. Hartkopf said Mr. Terrell said a tree had been cut down on the property on his side of the property. Mr. King said it was on the east side of the property, which was one of the holes he had observed. Mr. Hartkopf said he had understood Mr. Yuhasz to say it was on Mr. Terrell's side. Mr. Yuhasz said he may have misunderstood Ms. Richmond's question, in that he believed she was asking if the hole was on her property or on the church property. He said the tree had been on the southeast corner of the property. Mr. Hartkopf indicated that the hole then was on the property line near Ms. Richmond's property but it was not on her property.

Mr. Hartkopf drew on the map in blue the area in which he had observed the holes where he believed the tree had stood. He then passed the map around to the Board for their information. Mr. Hartkopf said there were perhaps 3 holes about

8” in diameter in the grassy area. Mr. King stated that was the same location he had alluded to, which was where Mr. Terrell had indicated there used to be a tree.

Ms. Richmond asked if she needed to get further documentation from the appraisers. Mr. Hartkopf responded that would be advantageous only if the public hearing was continued, and he did not believe that would be the case.

MOTION: Mr. Sain moved to close the hearing on Case #BA-08-2009. Mr. Curelop seconded.

VOTE: Unanimous.

Discussion:

Mr. Hartkopf said there was considerable concern at the last meeting and tonight regarding the presence of large igneous rock in the area, and there was an allusion made to when graves were dug they may run into solid rock. He said what he had gathered was that they would need only to get the plots dug deep enough to get the graves adequately covered. Mr. Hartkopf said because the cemetery statutes did not apply to non-profit cemeteries, then he had drawn the implication that there was not some board or person charged with oversight to assure that graves were dug to the appropriate depth. He asked had he made the correct assumption. Mr. King responded that was his understanding as well, and that Mr. Yuhasz had provided some testimony that the North Carolina Cemetery Act was more the rules of maintaining a cemetery. He said it would appear that it was assumed that churches and towns would provide maintenance.

Mr. Hartkopf asked if someone purchased a plot or plots and it was discovered that one or more of the plots were solid rock just a couple of feet down, what would be the process going forward and who would oversee that process. Mr. Hornik responded that was a private process between the church and the owner of the gravesite. He said if the site was not suitable for burial, then some accommodation would need to be made by the church. Mr. Hartkopf said then it would be a civil matter that could be decided by a court. Mr. Hornik said he would suggest that if the Board had a concern about depth of bedrock and suitability for a gravesite that the Board impose a condition that the church would have to satisfy whatever standard was imposed by the State’s for-profit cemetery regulations.

Ms. Lunsford suggested that the Board go through the pertinent sections of the Zoning Ordinance.

Mr. Hornik read from Section 4.4.7 of the Zoning Ordinance to allow the Board to focus on what it was they were supposed to be focusing on, which dealt with burden of proof: “When the applicant presents evidence that the proposed development will conform to all specific provisions applicable to that CU, persons opposed to the granting or members of the Board shall have the burden of

presenting evidence contrary to the applicant's evidence or evidence that the proposed development will violate any of the general standards set forth in Section 4.3. If no such evidence is submitted, the applicant shall be granted the permit. If evidence is submitted, the applicant shall have the burden of overcoming that evidence with further evidence of his/her own." Mr. Hornik said so, the initial burden on the applicant was to show that they complied with all the specific requirements of the Zoning Ordinance or their proposed use. He said if they did that, then the burden shifted either to the Board or to the public to show contrary evidence that the applicant did not meet one or more of those specific standards, or that the general standards of Section 4.3 had not been satisfied.

Mr. Hornik said it was not the applicant's initial burden to show that the use would not materially endanger the public health or safety, and it was not the applicant's initial burden to show that the use would not substantially injure the value of adjoining or abutting properties. He said the applicant's initial burden was to show that all of the specific requirements of Section 4.13, which was the Cemetery-Non-Profit section, had been satisfied or that they otherwise had satisfied the standards of Section 4.9, which was the general requirements for Conditional Use. Mr. Hornik said if the applicant had met that burden, then the Board was to consider what those opposed to the application had submitted. He said if they could show that the applicant had not met one of those specific standards, or could show that the proposal would materially endanger the public health and safety or would substantially injure the value of contiguous property, then the use would not be in compliance with the general plans for development of the Town.

Mr. Hornik said it was important for the Board to understand those burdens of proof and who had the burden, and the burdens had to be satisfied by substantial competent material evidence in the record. He said as the Board deliberated, if they had any questions regarding the competency of any of the evidence then he would be happy to address it at that time.

Mr. Hartkopf noted that Section 4.13 of the Zoning Ordinance contained standards for non-profit cemeteries, and Section 4.12 contained standards for for-profit cemeteries. Mr. Hornik said in respect to the applicant's burden the Board should be looking at Section 4.13 and the general standards noted in Section 4.9.

Mr. King noted that he had included that information beginning on page 4 of the Staff Report, adding that the information in boxes was staff comment.

Mr. Sikes asked, in regards to Section 4.13.2(c), if the screening shown in the plan was at least a Type 2 screen. Mr. King responded yes, noting the landscape plan stated that on the west and northwest sides the applicant would retain an existing bamboo thicket, and there would be some vegetation added to the existing vegetation along the driveway. He said on the northern side, on the east side of the proposed steps the plan showed they would retain the existing

vegetation, and along the majority of the eastern side a Type 2 screen would be planted consisting of small trees and shrubs planted 30 feet on center as available from the suggested planting list in the Zoning Ordinance. Mr. King said the plan also showed Pines and Oaks in the front yard that would be retained.

Mr. Hartkopf asked if the existing woods on the east side of the lot would remain in addition to the plantings. Mr. King said because of the 10 foot drainage easement and the installation of the drainage swale through that area, they would need to clear that entire area to accommodate the drainage swale and the retaining wall, which would be about 4 feet above the existing grade on the outside in that area.

Mr. Hartkopf said then the cemetery proper would be higher than the retaining wall. Mr. King said it would be lower than the retaining wall. He then read the description of a Type 2 screen for the Board's information, noting it was intermittent screening and was not intended to be totally opaque. Mr. King said one of the proposed conditions he had included in the Staff Report would require an on-site inspection of the vegetation to insure that the screening requirements had been met.

Mr. Hartkopf asked if Ms. Lunsford wanted to go through each part of Section 4.13. Ms. Lunsford said she believed it would be helpful to use the worksheet provided by staff as their guide.

Mr. Hartkopf said that the Board had to find that all of the information required by Section 4.9 had been provided with the application. Mr. Curelop said that Section 4.9.x spoke to the requirement of a traffic impact study, which had not been submitted. Mr. King reminded the Board that the applicant had requested a waiver of the requirement for a traffic impact study.

Mr. Hornik said you first had to look at whether the applicant had met their burden, which was to satisfy the specific standards of the Zoning Ordinance. Mr. Curelop said there was some public comment about what had been witnessed in regards to water in Ms. Richmond's basement, and there was some concern that that may be a public health issue which would have put the burden of proof back on the applicant. Mr. Hornik said the Board had to decide if that testimony by the public was sufficient to establish that it was a public health issue.

Ms. Lunsford said she believed it had been established that they just did not know. Mr. Hornik said once the applicant had shown compliance with the specific standards of the Zoning Ordinance, then the burden of proof shifted to either the Board or to the opponents of the proposal. He said their burden was to present evidence to the Board that either the applicant had not satisfied the specific standards of the Zoning Ordinance, or that the Board could not make one or more of the findings found in Section 4.3.

Mr. Hartkopf said if the Board believed that it was a fact that water went into Ms. Richmond's basement, and when they saw that the natural flow of water would be changed to a height that would actually be equivalent to a point that was higher than Ms. Richmond's property, then that would certainly open the possibility that water from this site would find its way to Ms. Richmond's lot. Mr. Hornik said if there was evidence to that fact, then that would be true. Mr. Hartkopf said if the change in grade lowered that particular grade to something lower than Ms. Richmond's lot, then that would indicate that less water would flow to Ms. Richmond's lot. He said the grading at the front of cemetery lot was being raised to 1½ to 2 feet, which took it from around 612 to 614. Mr. Hartkopf said the 612 contour line came into the side of Ms. Richmond's house, and the 614 contour line came into the highest point where her foundation left grade.

Mr. Hornik asked had the Town's engineering consultant reviewed the drainage plan. Mr. King said they had indicated that it met the requirements of Section 5.20 of the Ordinance, which meant it generally met the Town's stormwater requirements. He said he did not believe he understood how the elevations played a part because the applicant would be putting in a swale that would come down, noting that Orange County Erosion Control had recommended a flat-bottom swale. Mr. King said it appeared to him that it would be coming from the existing grade from the east down flat, and then back up to the retaining wall. He said behind the retaining wall the lot would actually be lower. Mr. Hornik said the purpose of the swale was to intercept drainage and bring it down to the street. Mr. King agreed.

Mr. Hartkopf said then any point coming north to south, coming down the east property line, the bottom of that swale would be lower than any point to its east on the same line of latitude. Mr. Hornik said to its immediate east, because there would be part of the Richmond property that might be lower. Mr. Hartkopf said but not on the same line of latitude. Mr. Hornik said because of the swale, the drainage from the church property would be intercepted and would never get to the Richmond property. Mr. Hartkopf agreed that was the case.

Mr. King said the requirements for Section 5.20, Stormwater Control for Sites Disturbing Less than One Acre, said that "The first ½ inch of rain shall be handled on site with either structural or non-structural devices reviewed and approved by the Town Engineer. Stormwater control structures shall be designed to accommodate a 10-year storm event. The rate of runoff from the developed site shall not be greater than that of the undeveloped site based on a 10-year storm event. Water flows shall not be diverted onto neighboring properties beyond preconstruction levels." Mr. King said the Town's engineer had reviewed the stormwater calculations and the plan and had said the plan and calculations were in general compliance with Section 5.20.

Mr. Sikes recommended that they go back to Section 4.9 and make sure that all the findings had been met, noting he believed the traffic impact statement was the

only provision not met. He said a waiver had been requested by the applicant but did not believe the Board had discussed that as yet. Mr. Sikes said he believed that needed to be addressed before any discussion of Section 4.3. He said he would lean towards granting the waiver because it appeared that there would be no more traffic generated by the cemetery and the fact that parking was already available on the church grounds. Mr. Sikes said if all 194 plots were full and everyone visited at the same time that would be a traffic issue, but that was a very remote possibility.

Ms. Lunsford agreed, noting that even when people attended a burial they likely would have attended the church service beforehand and would be parked at the church.

Mr. Hartkopf asked was it the consensus of the Board to grant the waiver of the requirement for the traffic impact statement. Mr. Hornik said in regards to satisfying the requirements of Section 4.9, he believed the Board could weave into the approval that the requirement for a traffic impact statement had been waived.

Mr. Sikes said in regards to Section 4.13.1.a. regarding evidence that the relevant requirements of NCGS (North Carolina General Statute) Chapter 65 could be achieved, he suggested that the Board impose a condition that the operation and maintenance of the project also comply with the statutes for for-profit cemeteries. Mr. Hornik said he believed in particular they were talking about the depth of the gravesites. Mr. Sikes said that was correct. Mr. Sikes said he would want that condition to comply with geographical or topographical requirements and minimums.

Mr. Hornik said he believed the specific context was with respect to the concern that there may be rock on the site and if there were requirements in Chapter 65 regarding minimum depths of gravesites, then the Board would want the Mt. Bright cemetery to comply with those minimum requirements. Mr. Hartkopf said the Board could also include a specific minimum depth as a condition of approval.

Ms. Lunsford asked what was the standard minimum depth required by the State. Mr. Hartkopf said he believed it was 7 feet, 6 inches, because apparently a coffin was 1½ feet thick. Mr. Yuhasz said that standard varied, and in the more modern schemes for cemeteries it was suggested that gravesites be less deep rather than more deep so as to promote the kind of non-toxic decomposition that they wanted to see. He said he believed what they were looking for was to use either the standard that might be contained in NCGS Chapter 65 or some other standard that might be created or adopted by the National Association of Cemetery Management or some other accredited organization.

Mr. Sikes said he would be amenable to that rather than trying to come up with one themselves. Mr. Hornik said he did not believe they had enough information for the Board to try to establish a standard. Mr. King said from an enforcement

standard, how the Board would know that they had complied. Mr. Hornik said he did not believe that was a good enough reason not to set a standard. He suggested that the Board either set a condition that the applicant had to meet the State standard in NCGS Chapter 65 or the standard established by a nationally recognized cemetery accreditation board.

Mr. Hartkopf said in regards to Section 4.13.2., the Standards of Evaluation, (a) the Board had agreed that proof that the relevant requirements of NCGS Chapter 65 can be met would be included in the motion of approval. He said (b) said that there shall be adequate space within the site for parking and maneuvering of the funeral cortege at each proposed burial site, and that had already been discussed. Mr. Hartkopf asked what exactly did that mean, in that it sounded like that was speaking to the apparatus that had to be placed around a grave to lower the casket. Mr. Hornik said he believed it was speaking to the funeral caravan itself.

Mr. Hartkopf asked what the terminology was for the apparatus set around the grave that ultimately lowered the casket into the ground. He said he brought that up because of a concern that the graves were placed fairly close together. Mr. Hornik said the standard was that there had to be adequate space for parking, and for maneuvering of the vehicles at the site, which was basically the driveway.

Ms. Lunsford said she believed it also meant that there should be space to walk between graves without having to walk across graves. Mr. Yuhasz said the layout had been modeled after the Town cemetery as far as the individual spacing.

Mr. Hartkopf said that (c) in regards to landscaping had already been addressed. He said that (d) referred to a minimum lot size of ½ acre, which had been met. Mr. Hartkopf said (e) spoke to frontage on a paved Town or State street, and that was satisfied. He said that (f) required that all interior vehicular access and maneuvering space had to be paved, which would be met, and (g) stated that no interments shall take place within 30 feet of any lot line, and the plan laid that out.

Ms. Lunsford asked how each gravesite would be accessed by the equipment that would be used to dig the graves, asking what the plan was to get into the back of the property. Mr. Yuhasz said the intention was that the area around the edges of the cemetery would be available for backhoes and other equipment to move around, and that when a backhoe was used to dig an individual grave they would put plywood down across the graves that they would drive across so as not to disturb those graves.

Mr. Sain asked when carrying a casket to a gravesite, how the hearse would get close enough. Mr. Yuhasz said there was a carriage that the casket sat on that would be wheeled along the center paved walkway to as close to the actual gravesite as possible, then the casket would be hand carried to the gravesite.

Mr. Hartkopf asked how wide the center walkway was. Mr. Yuhasz said five feet. Mr. Hartkopf asked then how wide was the walkways between the graves. Mr. Yuhasz said either 2 or 2 ½ feet, although he did not recall exactly.

Mr. Hartkopf said it appeared all of those questions had been answered, and suggested moving on to Section 4.3, the General Standards and Findings of Fact. He read each of the four findings and asked if the Board had any issues with any of those findings. The Board agreed by consensus that there were no issues with findings (b) and (d), but discussion was needed on (a) and (c).

In regards to (a), Mr. Hornik said the Board had to make a determination that the use would not materially endanger the public health and safety, or that the opponents of the cemetery had met the burden that it would. He said if the opponents had not met that burden, then the Board's conclusion was that it would not materially endanger the public health and safety.

Mr. Curelop said it was Mr. Yuhasz's assertion that the cemetery would not endanger the public health nor would it decrease the value of adjoining properties. Mr. Hornik said Mr. Yuhasz was exactly right, in that the theory was that when a use was listed as a use permitted in the district with a Conditional Use Permit, then that was tantamount to a finding that the use was permitted if it was built in accordance with the specific standards of the ordinance. He said that was why they went through the exercise of the applicant having to prove that they had satisfied the specific standards, which he believed the Board had shown by the findings just made that they did meet those standards. Mr. Hornik said once the applicant had done that, then they had satisfied the standards as far as the Supreme Court was concerned that this use was permitted in the district. He said the only circumstance under which it would not be permitted in the district was if the Board or project opponents came forward with substantial competent proof for the record that the use would substantially or materially endanger the public health and safety, that the use was not listed as a conditional use in the district, or that the use would substantially injure the value of adjoining or abutting property. Mr. Hornik said if that level of proof was provided, then and only then did the applicant have a burden to show evidence to the contrary.

Mr. Hartkopf said in this case they had a document put forth by the applicant from an appraiser who stated that property values would not be negatively impacted. He said they also had an opponent who said they had spoken to someone who said that property values would be affected, and was willing to get a written document to attest to that. Mr. Hornik said if he was being asked, the opponents had not satisfied the burden of proof. He said presenting a hearsay document was not substantial competent evidence.

Mr. Hartkopf said his concern was that the opponent had said she would provide that evidence. Mr. Hornik said opponents had had two chances to provide that evidence but they had not done so, and the public hearing had been closed. Mr.

Hartkopf said there was also the fact that the Town Board had said that cemeteries were allowed in residential areas. Mr. Hornik said yes, absent evidence to the contrary. He said it appeared that the Board had just said the standards had been satisfied, and if that was the case then the applicant was entitled to the Conditional Use Permit to place the cemetery in the district, unless there was competent evidence to support otherwise.

Mr. Sikes said the way he was reading Section 4.3, it said the Board of Adjustment “shall not” approve any Conditional Use Permit unless it made the following general findings of fact, as opposed to “shall approve” any Conditional Use Permit. Mr. Hornik said that would likely be reworded when the rewrite was accomplished to make it more clear. Mr. Sikes said they did not have anything to establish that as fact that it would not, although there was not evidence to the contrary that it would necessarily. He said they have been under the assumption that it was the burden of the applicant to prove that it would not, but that was not the case. Mr. Hornik said the initial burden was not on the applicant, that it was the initial burden of the applicant to show that they had satisfied the specific standards in Sections 4.9 and 4.13.

Mr. Sikes said the only issue he had, of which a part went to the definition of “materially endanger” which was subjective, was that the document submitted by Mr. Yuhasz indicated that the type of soil on the site was ideal for a cemetery. He said the document said that clay-type soil was the best type of soil, but it also said that it would reduce, not eliminate, the potential for groundwater pollution. Mr. Sikes said looking at the term “materially endanger,” to him that did not meet the level.

Mr. Curelop said if the burden of proof was not on the applicant, it seemed to him that in both cases it would be hard to put fact to them. He said there were too many moving parts to prove that it would materially endanger, and they did not know if the graves would actually make things better.

Mr. Sikes said his comments at the last meeting were purely anecdotal with regard to real estate values, and had said if he was looking at a house and there was no cemetery present but found out during the transaction that a cemetery was planned, it would affect his decision. But, he said, that was not material evidence.

Mr. Curelop said it was hard to get a straightforward appraisal for even a commercial building in Hillsborough, let alone trying to find one where there was a cemetery now when it wasn't there before. He noted his believe that you could likely get a real estate appraiser to say anything you wanted them to say.

Mr. Hartkopf said the Town had existing cemeteries that were hundreds of years old, so they had to allow cemeteries because they already had them. Mr. Hornik said another question would be was there any evidence in the record that showed that around those cemeteries there were pockets of unusual incidents of illness.

He said he had heard nothing about that tonight, but that was one way that you may be able to prove or provide evidence that there was a material endangerment to the public health associated with having a cemetery near a residential area.

Mr. Curelop said for clarification, and as Mr. Hornik had said, the applicant had had two chances at that and the public hearing was now closed, and if that evidence was not in front of the Board right now, what then? Mr. Hornik responded then it was too late. Mr. Curelop said then the Board had to look at what they had, not at what they could have had.

Mr. Hartkopf said if in fact new evidence was discovered, could that evidence be brought forward after the fact. Mr. Hornik replied no, because that could result in an application being carried on indefinitely. He said at some point proceedings had to come to closure.

Mr. Hartkopf said the Board had previously agreed by consensus that there were no issues with findings (b) and (d), but discussion was needed on (a) and (c).

Mr. Curelop said for finding (a) the only factual evidence submitted was that by Vic Knight, even though that was questionable as to how much it really told them. He said there was no evidence brought forward that the cemetery would decrease property values.

Mr. Hornik said for findings (a) and (c), he believed they were still at the burden of proof issue, and the burden of proof at this point was that either the Board or opponents had to have shown by producing substantial competent evidence for the record that the use would materially endanger the public health and safety or that the use would substantially injure the value of adjoining properties. He said the initial question on those two issues was had they satisfied that burden.

Mr. Sikes said he had been on the Board for 3 to 4 years, and he had not been aware that the Board members could actively seek out evidence. Mr. Hornik said he had mentioned it because the language of the ordinance, in Section 4.4.7, specifically mentioned Board members. But, he said, it was not typical practice for boards in North Carolina to do so. Mr. Sikes said it seemed to be opposite of the point that the Board should be impartial. Mr. Hornik said that language was another on the list that would be amended when the ordinance rewrite was accomplished.

Mr. Hartkopf said that a former member of the Board, Eric Oliver, used to visit all project sites that came before the Board as he did many times himself, and wondered if they should not do that. Mr. Hornik said it was not so much that they were not supposed to do that, but if they did they were suppose to state for the record that they had done so and what they had observed. Otherwise, he said, they may be basing their decision on evidence or information that was not in the

record. Mr. Hartkopf said he had disclosed his visit to this site, and Mr. Oliver had consistently done so as well.

Mr. Sikes said he wanted to make sure that the idea was not to come in with preconceived notions and actively seek out evidence to support that preconceived notion. Mr. Hornik said that was correct, because otherwise they would be violating their oath.

The Board agreed by consensus that for findings (a) and (c), the use would not materially endanger the public health or safety and would not substantially injure the value of contiguous property.

The Board briefly discussed the various conditions offered by staff, with slight rewording made to some and explanations offered by staff of others.

MOTION: **Mr. Sikes** moved to approve Case #BA-08-2009 – Conditional Use-2 Permit request from ENT Land Surveys, Inc. on behalf of Mt. Bright Baptist Church for the development of a 194 burial space cemetery with the following conditions:

- a. No Blasting Permitted: No blasting or explosive devices or materials shall be permitted for use on the development site at any time.
- b. Delineation of Outer Edge of On-site Burial Area: The extreme outer edge of the area(s) to be used for burials/interments shall be delineated on-site by markers that will visibly indicate the minimum 30-foot interment setback from adjacent property lines and street rights-of-way.
- c. Stormwater Drainage Swale Design: Storm drainage improvements consisting of grassed swales shall be designed with a flat bottom to reduce possible impacts from impervious surface runoff.
- d. Stormwater Best Management Practice (BMP) Construction Certification: A certification letter signed and sealed by the designing engineer stating that the on-site stormwater control BMPs, as constructed, will function properly shall be submitted to the Zoning Officer prior to the issuance of a Certificate of Zoning Compliance for the project.
- e. Stormwater BMP Operation and Maintenance Plan: A Stormwater BMP Operation and Maintenance Plan prepared by the designing engineer and executed by the property owner shall be recorded with the Orange County Register of Deeds Office. The plan shall include the owner's financial responsibility and include the maintenance schedule of the facilities to ensure that it continues to function as originally intended. Evidence of the recordation of the Operation and Maintenance Plan shall be provided to the Zoning Officer prior to the issuance of a Certificate of Zoning Compliance for the project.

- f. Silt Fencing Requirement: Silt fencing with silt fence outlets shall be installed to contain any sediment on-site during construction. Materials used for compliance with this condition shall be removed after construction is complete and prior to any interments.
- g. Retention of Existing Vegetation: Existing mature trees identified on the landscape plan shall be retained. Tree protection fencing shall be provided around the critical root zone of all trees to be preserved on site. Materials used for compliance with this condition shall be removed after construction is complete and prior to any interments.
- h. Landscaping Inspection: Prior to the issuance of a Certificate of Zoning Compliance for the project, or the release of any financial surety guaranteeing the installation of required landscaping and screening, the applicant shall schedule a landscaping inspection with the Zoning Officer. The purpose of this inspection will be to verify if the intent of the proposed landscaping and screening have been met. Should the Zoning Officer make a determination that the intent of the landscaping and/or specific screens are not being met, he/she shall provide the applicant with a written determination to that affect with suggestions as to how the screening and landscaping may be enhanced for compliance. Should the applicant disagree with the Zoning Officer's written findings, the applicant may forward an appeal of the Zoning Officer's determination to the Board of Adjustment for a determination regarding the landscaping and/or screening.
- i. Existing Well Abandonment: The property owner shall properly abandon the well labeled on the approved site plan as "old shallow well to be abandoned" through the Orange County Health Department, Division of Environmental Health. Written evidence of the completion of the abandonment shall be submitted to the Zoning Officer prior to the issuance of a Certificate of Zoning Compliance for the project.
- j. Property Survey Plat Recordation Required: The property owner shall record a survey plat of the subject property with the Orange County Register of Deeds Office prior to the required recordation of the Conditional Use-2 Permit. This shall occur prior to the issuance of a Zoning Compliance Permit for the project. The survey shall indicate the boundary of the area to be used for burials.
- k. Burial/Interment Requirements: All gravesites shall have a minimum depth (1) as required by North Carolina General Statute Chapter 65 (Cemeteries) or administrative regulations promulgated pursuant thereto, or if none is established by State law, then (2) in accordance with standards established by a nationally recognized cemetery accreditation body for the soil/rock conditions at the site.

1. Certificate of Zoning Compliance: Prior to the final completion of all site work for the project and opening of the cemetery for use, the property owner shall request, in writing, a Certificate of Zoning Compliance from the Zoning Officer. The Zoning Officer, prior to issuing said Certificate, shall perform a final site inspection to verify that the completed project complies with the applicable requirements of the Zoning Ordinance, the site plan approved by the Board of Adjustment, and all required conditions that can be met prior to the opening of the cemetery.

Mr. Curelop seconded.

VOTE:

Unanimous.

Ms. Richmond asked if it was possible for her to appeal the Board's granting of the Conditional Use Permit. Mr. King stated he would provide her with a copy of the Board's decision, and that she would have 30 days to appeal to Orange County Superior Court.

The Board agreed by consensus to take a five minute break.

ITEM #6:

Case #BA-10-2009 – Arthur Ruzensky of AA Graphics, LLC is appealing an adverse decision of the Zoning Officer as it relates to the replacement of a freestanding sign in violation of the required freestanding sign setback requirement of the Zoning Ordinance. The property subject to the appeal is located at 202 Cardinal Drive (Orange County Tax Map Reference #4.42.B.3H) and is currently zoned HIC (High Intensity Commercial).

Mr. King provided some background information regarding this case, stating that on July 31 Orange County Inspections had requested a zoning sign off for the Holiday Inn Express freestanding sign at 202 Cardinal Drive. He said he had taken measurements and found that the sign did not appear to be installed in compliance with the Zoning Ordinance. Mr. King said he had sent a certified letter and a map, included in the Board materials as Attachment 4, to Rainbow Hospitality, who was the property owner, to inform them of his findings. He stated the map showed roughly the measurements that the sign, as installed, was approximately 5 feet from the back of the sidewalk and approximately 11 feet +/- from the back of the curb. Mr. King said the Zoning Ordinance stated that any freestanding sign had to be located at least one-half of the required front setback which in this case would be 10 feet of the required 20-foot setback for the High Intensity Commercial district.

Mr. King said subsequently, Mr. Ruzensky contacted him to discuss the matter and told him that Thomas Cummings, former Town Code Enforcement Officer, who had issued the Zoning Permit for the sign included as Attachment 3, had indicated that there was already a freestanding sign there and that they could install the freestanding sign back in the same location as the old sign but no closer to the right-of-way. Mr. King said apparently the original sign had not been installed where it was supposed to be to begin with, so his argument was that just

because the old non-illuminated sign was put in incorrectly and was not caught did not indicate that the new sign could be installed in violation of the sign setback. He indicated that the old sign had not been installed by Mr. Ruzensky and had been installed in 1997. Mr. King said the permit for that original 1997 was included as Attachment 2.

Mr. King said apparently there was a disagreement as to what was said and what was allowed. He said subsequent to the appeal he had contacted Mr. Cummings to determine if he had any recollections of this matter, noting that Mr. Cummings had left Town employment at the end of June. Mr. King said Mr. Cummings had indicated that he had not said that the sign could go back in the same spot, but had said if the old sign met the requirements of the ordinance then the new sign could go back in that same spot. He said that was consistent with the way the Town had handled those types of situations since he had been employed with the Town.

Mr. King said that both of the permits indicated that the old sign and the new sign, when looking at the setback, said ten feet. He said that Mr. Cummings' permit issued in March of this year referred to Section 8.14 of the Zoning Ordinance which specifically spoke to the sign setback requirement.

Arthur Ruzensky said he had been hanging signs for 12 years and he was a "rules" guy. He said he worked off documents that contained all of his drawings, and that was what he had showed Mr. Cummings. Mr. Ruzensky said he had showed Mr. Cummings where he intended to put the sign, where the old sign was located, and he was told that he could put the sign back in the same spot as long as it was no closer to the road than the old sign was. He said he had never in 12 years placed a sign in a right-of-way, adding this was the first time he had had a situation like this one. Mr. Ruzensky said he was not disputing that the sign was not in the right-of-way, but wanted to know what his options were and what could be done to resolve the matter. He indicated the sign was not impeding sight lines, noting it was a dead-end road and no traffic came from that other direction.

Mr. Ruzensky said to move the sign would put it right behind a piece of the pump house, which would totally impair the vision due to the fact that the ordinance would not allow a sign taller than 7 feet. He said the owners had spent \$15,000 on the sign and if they had known about the issues they never would have purchased it. Mr. Ruzensky said the burden now fell on him and that he may have to buy the sign.

Mr. Ruzensky said the day he had spoken to Mr. Cummings, Mr. Cummings was sick and not in a very good mood, and like he always did he presented his materials and asked his questions. He said he had no recollection of Mr. Cummings saying anything other than he could put the new sign in the same location as the old one as long as it was no closer to the road. Mr. Ruzensky said the purpose of a right-of-way was for future expansion and maintenance work, and he had talked with the owner to determine if he was willing to submit a letter

to the Town that if at some point the sign were to become an obstruction, they would move it at that point. He said he believed the owner would be willing to do that, although they would still not be in full compliance with the Zoning Ordinance.

Responding to a comment regarding how the measurements were taken, Mr. King stated the measurements for the right-of-way were normally taken from the centerline of the roadway, but there had been no survey to determine if the road was in the center of the right-of-way. He said in this case, Cardinal Drive was a 60-foot-wide public right-of-way, so if the street was in the center then the right-of-way would be 30 feet from the center of the street.

Mr. Hornik stated that often the right-of-way was defined before any road was built and was defined on a survey map. He said the road might be down the middle of the right-of-way or it might be a little off-center, so there was no uniform rule that from the edge of the pavement you had another 6 or 8 or 12 feet from the pavement. Mr. Hornik said it could be 3 feet on one side and 20 feet on the other side.

Mr. King said the sign setback was 10 feet from the edge of the right-of-way, and that was where the building setback was measured from unless there was not a right-of-way that could not be determined.

Mr. Ruzensky asked Mr. King if he would agree that where vehicles would pull out into the street that there was no visual impairment for the sight triangle. Mr. King said it would not now, but if the road was ever extended then there may be an issue. He said that Aspen Price, Intern with the Planning Department, had taken the photos included as Attachment 5 to give the Board an idea of what you would see when you pulled out of the driveway. Mr. King said he had asked Mr. Cummings about that as well, and he had indicated that where you would normally stop behind the sidewalk, and if there was a crosswalk striped there, the sign would obstruct vision to the left. He said a vehicle would have to pull out further past the sidewalk, but not into the street. Mr. King said at this point it was a dead-end street but if the road was ever extended over to Orange Grove Road then at that point there could be sight issues. He said this was not a variance request but an appeal, so the question was whether he was right or wrong.

Mr. Curelop said then if Mr. Ruzensky was asking for a variance the situation would be different, noting that Mr. Ruzensky was not saying that Mr. King was wrong in his determination. Mr. Ruzensky said this was his first step to determine if he should pursue a variance. Mr. King said it would also have to be determined if the situation met the criteria for a variance.

Mr. Curelop said looking at this as an appeal he did not believe there was any real discussion needed. Mr. Ruzensky said the only real discussion was what he had

been told he could do, but there was no way to prove to the Board that what he had said was in fact what he had been told.

Mr. Hartkopf said it could constitute some kind of sight concern to the east, but if the road was extended where one would want to be looking for traffic would be to the west.

Mr. Sikes said initially you would be looking to the east.

Mr. Hartkopf said that was correct, that you would encounter that first. Mr. Ruzensky said he had observed traffic coming out of the site today and not one vehicle had stopped behind the sidewalk but had pulled to the street before exiting. Mr. Hartkopf said based on his experience with the cut through to New NC 86 where the stop line was drawn on the pavement at New 86 at the road that went in front of Durham Tech, that if you stopped there you would not be able to see oncoming traffic. He said that told him that the stop line or stop sign was a strong suggestion and not a statement of fact.

Mr. Hartkopf said from his perspective, the sign was in the right-of-way. But, he said, for a variance one would then consider reality. Mr. Hornik stated that the Board did not have an application for a variance. Mr. Hartkopf said he understood that, but if one was before the Board they would consider reality, service to the traveling public, and other factors. He said one could easily make the case, and he believed that showed in the last photo in the attachment, that the sign posed no greater obstruction of the view eastbound than did the high grass growing on the ditch bank.

Mr. Ruzensky said normally one would request a variance prior to installing a sign, and he was present this evening looking for options or suggestions.

Mr. Hartkopf said they were sending messages about a variance whether the Board intended to or not. But, he said, this issue appeared to be rather clear-cut that the sign was in the right-of-way and that it was likely just as clear that it had been conveyed to Mr. Ruzensky that he could put the new sign in the same location as the old sign.

Mr. Ruzensky asked if it had been known at the time he had talked with Mr. Cummings that the old sign had never been permitted. Mr. King responded that the old sign had been permitted with a 10-foot front setback, but he was not able to find a plot plan for that old sign. He said he had only been able to locate the elevation drawing and the permit.

Mr. Sikes said the photo clearly showed that where the original sign was proposed to be placed was not where it had been put. Mr. King agreed, noting that was from the Holiday Inn site plan approval. He said the plan had shown the sign was in the appropriate place, but when it was installed it had been shifted but it had

never been identified as being in the wrong place until the issue with placement of the new sign came forward.

Mr. Ruzensky said that the sign could go on the other side of the driveway which would move it out of the right-of-way. But, he said, his point was that it was now a question of the expense of doing that and the fact that he had done what he had been told to do by Mr. Cummings. Mr. Ruzensky said he was willing to take a polygraph in regards to what he remembered about that conversation, stating he could assure the Board that he did not put signs where he had been told they could not be put.

Mr. Sikes asked if the new sign was physically on the same supports as the old sign. Mr. Ruzensky replied no, that the new sign had 20,000 lbs. of concrete on it as per the engineered drawing. He said it was actually set back a couple of feet from where the original sign was located. Mr. Ruzensky said another issue that created a problem with that was that you had to go to the Town for a Zoning Permit and you then had to go to the County to get the building permit. He said the building permit required only that someone from the County look to see if the hole dug on the site matched the engineered drawing as far as measurements. Mr. Ruzensky said many times there was no coordination between where something was to go and what that something was.

Mr. Sikes asked what it would take to move the existing sign out of the right-of-way. Mr. Ruzensky said the only place to move it was on the other side, and it would likely cost about \$3,000. He asked if he would have to reapply for a permit to do that. Mr. King stated he could modify the existing permit, but he believed he would have to go back through the County's process. Mr. Ruzensky said at present he did not know if placing the sign on the other side would be possible because he did not know where the utility lines were located. Mr. King said there was a Duke Power easement there of which a part was in the right-of-way.

Mr. Ruzensky said he could file for a variance, if that was worthwhile in the Board's opinion. He said he was basing his present argument on the conversation he had had with Mr. Cummings where he was told what he could do. Mr. Ruzensky said he wondered if it was his negligence not to know where the right-of-way was or was it someone else's, although he did not want to point fingers.

Mr. Hartkopf said he hoped the language in the rewrite of the new UDO (Unified Development Ordinance) would make things much clearer. Mr. Ruzensky agreed that it was open for interpretation at this point.

There was some question as to whether this discussion constituted a public hearing, in that some members believed that for appeals a public hearing was not necessary. Mr. Hornik advised that treating such appeals as a public hearing would never be in error, although he was not sure that the Ordinance required a public hearing.

MOTION: **Mr. Curelop** moved to close the hearing on Case #BA-10-2009, noting it was assumed that the public hearing had been formally opened when discussion began. **Mr. Sikes** seconded.

VOTE: Unanimous.

Discussion:

No additional discussion was forthcoming.

MOTION: **Mr. Curelop** moved to **uphold** the Zoning Officer's determination on Case #BA-10-2009 – Arthur Ruzensky of AA Graphics, LLC regarding an adverse decision of the Zoning Officer as it relates to the replacement of a freestanding sign in violation of the required freestanding sign setback requirement of the Zoning Ordinance. **Mr. Sain** seconded.

VOTE: Unanimous.

ITEM #7: Committee and Staff reports.

New Rules of Procedure

Mr. King stated that he had included the new Rules of Procedure in tonight's packet, noting he had handed out the Judicial Review of Quasi-judicial Decisions for the Board to read over. He asked if the Board had any questions for Mr. Hornik, noting during the discussion of the cemetery Mr. Hartkopf had asked Mr. Hornik to stay for this discussion.

Mr. Hartkopf said his concern was regarding the application for 194 grave sites, and he believed that the church would not be able to achieve that number due to certain circumstances. Mr. Hornik said with the approval the church got the potential to have as many as 194 grave sites, noting that for example if there were 6 plots that could not be placed in a particular area did not mean that they would get to place 6 plots somewhere else. He said it meant only that they could not use those 6 plots. Mr. Hartkopf said then if someone bought a plot and it was determined to be unusable, then it was a civil matter. Mr. Hornik said that was correct.

Potential Conflict of Interest

Mr. Sikes said his sister was a clerk for Judge Robin Hudson on the NC Supreme Court, and she had mentioned to him that she was writing an opinion for Judge Hudson when Hillsborough had come up with regard to the Courtyard condominium case. He said he had commented to her that that was a Planning Board issue and not a Board of Adjustment issue, but wondered with that relationship did he need to disclose that to the Board. Mr. Sikes said there had been a decision regarding Webb Grove the Board had made recently that had gone to Court and then come back to the Board. Mr. Hornik said both of those issues were going to Supreme Court. He added that he did not believe that Mr. Sikes needed to disclose that his sister commonly wrote opinions for a Supreme

Court judge because cases would go to the Supreme Court only after the Board of Adjustment had acted. Mr. Sikes said then in such instances the Court would be reviewing testimony already in the record, so there was no conflict. Mr. Hornik agreed.

Status of Webb Grove and Courtyard Cases

Mr. Hartkopf asked about the status of the Webb Grove Condominium case. Mr. Hornik said they had won in Superior Court, had lost in the Court of Appeals, and the Town had now asked the Supreme Court to take the case under review. Mr. Hornik said regarding the Courtyard Condominiums, they had lost in Superior Court, had won in Court of Appeals, and the Courtyard owner was now asking the Supreme Court to review the case.

Mr. Hartkopf asked when they got Webb Grove back, which he presumed they would, how that would work. Mr. Hornik said he believed the Supreme Court would not take the case, which meant it would go back to the Historic District Commission for review and the HDC would deny it, and it would again be appealed to this Board. Mr. Hartkopf said at that point they likely should have the density bonus broken down into small pieces so that they could all have a good understanding of it, because the grounds on which the appeal had been made was that the BOA had incorrectly applied or failed to apply the density bonus.

Mr. Sikes said if and when the asphalt plant issue came back, they would have to apply the standards that were in place at that time rather than the standards in the new ordinance. Mr. Hornik said that was correct, noting that with that opinion the Court of Appeals had rewritten the law in North Carolina and that was why the Town had asked the Supreme Court to take under review the Webb Grove case.

ITEM #8: Adjourn.

Mr. Sikes moved to adjourn the meeting at 10:51 p.m. **Mr. Sain** seconded. The motion was adopted unanimously.

Approved:

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