

MINUTES
BOARD OF ADJUSTMENT
Wednesday, December 9, 2009, 7:00 PM

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

ABSENT: Bradley Curelop, absence excused.

STAFF: Senior Planner Tom King.

PUBLIC: Cliff Credle, Rev. Tom Tully, Michelle Kempinski, Lori Taft, Mike Hammersley, and Marabeth Carr.

ITEM #1: **Call meeting to order and confirm the presence of a quorum.**
Chair Al Hartkopf called the meeting to order at 7:03 p.m. and confirmed the presence of a quorum.

ITEM #2: **Consideration of additions to the agenda.**
No additions or adjustments were made to the agenda.

ITEM #3: **Approval of the October 14, 2009 minutes.**

MOTION: **Mr. Sikes** moved to adopt the minutes of the October 14, 2009 meeting as submitted. **Mr. Sain** seconded.

VOTE: Unanimous.

Mr. King noted that Terry Hackett, the Orange County Erosion Control Officer, was present this evening with his Boy Scout Troop who were required to attend Town meetings from time to time to learn how local government operated.

Mr. Hartkopf welcomed the Scouts, noting that there was an interesting case up first that should provide them insight on the Board's processes.

ITEM #4: **Case #BA-11-2009 - Conditional Use-2 Permit request from Holy Family Catholic Church to place a 27 X 70, 1,913 square foot modular office building for use as an education building on the site of the Church. The property is located at 216 Governor Burke Road (Orange County Tax Map Reference #4.5C.B.1) and is zoned R-10 (Medium Intensity Residential).**

Mr. Hartkopf swore in Tom King, Cliff Credle and Rev. Tom Tully. Mr. King stated that the property owner was the Roman Catholic Diocese of Raleigh, and the request was to allow the placement of a 27 X 70, 1,913 square foot modular office building for use as an education building on the site of the Church. He said there would also be the construction of a garden patio and associated walkways, adding the property was about 8 acres in size and zoned R-10. Mr. King said

property surrounding the church was farmland, single-family dwellings, and some vacant lots. He said the church was already a Conditional Use in the R-10 zoning district, so any additions did require a Conditional Use-2 Permit.

Mr. King said staff had gone through the standards of evaluation and found some issues, some of which had been corrected or further information submitted. He said on page 3 of the staff report, one of the conditions was that a fire protection plan had to be reviewed and approved by the Fire Marshal, but on the date of the staff report that was not available. Mr. King said that was made available on Monday, December 7, 2009 and there was an email from the Fire Marshal to that effect provided this evening.

Mr. King said on page 4 of the staff report, there was a condition regarding proposed utility plans. He said he had provided a statement that the Orange County Environmental Health Department had not commented on whether or not the location of the modular unit would interfere with the existing septic system, but the plans were to abandoned that septic system and connect to Town sewer for both the church and the modular unit. Mr. King said the Town Engineer had received the plans and given approval as noted with some minor changes.

Mr. King said on page 4, Standards of Evaluation #5, there was a condition that a proposed landscape plan meet the requirements of the Zoning Ordinance. He said the Zoning Ordinance required a 3-foot high evergreen screen around the parking areas when adjacent to residential areas or street rights-of-way, and also required a Type 2 intermittent screen along the boundaries of parking lots. Mr. King said the eastern parking lot on the north side did not have that Type 2 screening and there were areas that did not have the 3-foot opaque screen as required.

Mr. King said Standard of Evaluation #8 was in regards to stormwater runoff, and the applicant had not submitted a stormwater plan as required under the Ordinance. But, he said, in Attachment #1 the applicant had submitted a statement that the impervious surface being added to the site was fairly negligible and did not see the necessity of submitting a stormwater plan with calculations.

Mr. King said on page 5, regarding Standard of Evaluation #10, he had received no response from Orange County Solid Waste regarding the existing trash recycling containers or Solid Waste Permit, although they had been given the plans and the opportunity to respond.

Mr. King said based on those comments and the required general finding of facts, it was staff's determination that at this point they could not say that the use met the provisions of Section 5, Development Standards and Site Plan approval. However, he said, if the Board made the determination that the application was complete and in its opinion did meet the intent and standards of the Ordinance, the permit could be approved. Mr. King noted that staff was suggesting the following conditions be added to the permit:

1. The modular unit must be skirted with ABS plastic color skirting with interlocking edges around the perimeter of the unit before a Certificate of Occupancy is issued.
2. Any transportation lighting and towing apparatus be removed or covered before a Certificate of Occupancy is issued.
3. The existing septic tank must be properly abandoned. Evidence of the abandonment must be received prior to the issuance of a Certificate of Occupancy for the unit. This evidence must come from the Orange County Environmental Health Department.

Mr. Hartkopf said then staff was proposing that the transition from the septic system to the Town's sewer be accomplished prior to the issuance of a Certificate of Occupancy. Mr. King replied yes, but it could be done prior to issuance of the Zoning Permit, although he did not believe that would make a difference in the end because an inspection would have to be made to make sure all conditions were met.

Cliff Credle with Credle Engineering, the applicant's engineer, said in this particular case there was an existing septic system and existing piping to that system, and since that system was put in there was now a Town sewer system located nearby. He said as part of the project they wanted to connect to that sewer system and abandoned the septic, which would require a simple connection to divert from the existing septic system over to the existing sewer system. Mr. Credle said it was a simple matter to send the out pipe from the modular unit to the same "Y" connection, which could be done all at the same time.

Mr. Hartkopf asked Mr. Credle to comment on where the unit was to be placed and where the existing septic field was located. Mr. Credle said the unit would be placed beside and at the rear of the existing building as it faced NC 57. He said the septic tank was on the other side of the drive about 30 feet south.

Mr. Hartkopf said what he was hearing was that there was not really a chronology issue, in that the abandonment of the septic tank and the connection to the sewer line could be made simultaneously and there was not really a potential settling issue. Mr. King said there was no issue that he was aware of.

Mr. King said one thing he had not mentioned in his staff report was in relation to the required sidewalk, noting that Section 5 of the Ordinance stated that if a street was classified as a subcollector or greater then the applicant was required to put in a sidewalk along the frontage of the street. Mr. King said this lot happened to have an eastern boundary with NC 57 which was an arterial street, resulting in the requirement that a 5-foot wide concrete sidewalk be provided for 489 feet along that boundary. He said he had provided information in the packet regarding development approval "exactions" and had spoken with Rich Ducker at the School of Government in Chapel Hill about this issue. Mr. King said the conclusion was that a sidewalk was a public improvement and when you had a

fairly stringent public improvement requirement it needed to be related to the scale of the development being proposed. So, he said, you had to balance the public benefit based on the applicant's proposal as to whether that standard would apply. Mr. King said the applicant's engineer had proposed to do a cost proportionality which he said had been used in Durham in the past.

Mr. Credle explained that what they were proposing went to the rational nexus of the public improvements being related to the improvement being requested, in that the public improvement being the sidewalk was in relation to the improvement being made. He said the cost proportionality was typically 10%, so in other words you did not have a road improvement that was 80% of the project and therefore doubling the cost of the project. Mr. Credle said when you used the 10% figure, even though the Diocese already owned the unit which was being moved from St. Matthew's Church on Mason Road in Durham and being placed on this site, the cost of moving it and getting it set up was the cost for the structure, and then that 10% was put into the public improvement which they termed as cost proportionality.

Mr. Hartkopf said he had done a fair amount of work in the area of property rights, and tended to err on that side. However, he said, the problem he had at this point was that they had no such proportionality allowance within their ordinance, and asked if Mr. King had spoken to the School of Government about that fact. Mr. King said he had told Mr. Ducker that the Ordinance had no relief valve in the provision, in that it was strict in stating the requirement. He said Mr. Ducker had suggested that they consider it and the Board had the ability to do so, although they had no guidance to do that. Mr. King said hopefully the Ordinance rewrite would provide that guidance. He said Mr. Ducker had indicated it would be up to the Board to make the determination; that is, did the proposed project necessitate meeting the full letter of the ordinance in this case since the sidewalk is considered a public improvement.

Mr. Remington said there were a couple of things that spoke to that provided in the reference materials. He said it seemed clear that the legal cases cited spoke to rough proportionality although setting any specific percentage did not appear in those cases. Mr. Remington said he believed he would need a little more persuasion to assume it was in the Board's jurisdiction to basically declare a Town ordinance unconstitutional, and even if he felt that way he was not sure the material provided made them fit that. He said there was also the precedent of all the other things the Board had done recently as well as the upcoming Fairview Park application where many adjustments had to be made because they were unable to waive the sidewalk requirement even for a government entity. Mr. King said he had spoken to the Town Attorney about this issue, and his first response was that the ordinance required the sidewalk and to stick with the ordinance.

Mr. Sikes said they had talked about the sidewalk ordinance before. He asked in Mr. King's memory, had the Board ever waived that requirement unless there was

a specific environmental impact identified. Mr. King said before he came to Hillsborough he believed there had been a situation on Alison Street with the Hillsborough Business Center where they had worked out a payment for sidewalks or something similar, but that was not in the ordinance, either.

Mr. Sain said putting in a sidewalk in that particular area on Alison Street would have encouraged people to walk where large trucks were coming in and out. Mr. King said the only other situation he was aware of was with Hillsborough Plumbing further up NC 57 where they had a ravine that made placement of a sidewalk difficult and would have required a bridge.

Mr. Hartkopf said he remembered another case with the Taco Bell/KFC remodel, where the terrain made it impossible to install a sidewalk, and the case with the Auto Zone where it was also almost as impossible but they had put in a sort of passageway from their parking lot. He said he remembered the Town had been rather rigid about those, but he was sensitive to the church's situation as well. Mr. Credle said they were not trying to set a precedent or change a policy. He said this was NC 57, and if they were to ask NCDOT if they wanted a sidewalk on that thoroughfare they would likely say no because they would not want to maintain it. Mr. Credle said he understood it was in the ordinance and there was no relief valve, and that was where the proportionality came into play. He said the easier path was to at least apply a proportional portion of the sidewalk, because if they did not put it in but someone came along and did so in the future, that the portion be within reason. Mr. Credle said they were trying to meet the ordinance but to do so within reason, noting that 489 feet of sidewalk would cost more than the entire unit, so that was why they were suggesting proportionality. He reiterated that he did not believe NCDOT would want the sidewalk in its right-of-way which would force them to maintain it.

Mr. Hartkopf said it would hold some sway if they had a letter from NCDOT stating that. Mr. King noted that the Town would have to maintain the sidewalk if it was in NCDOT's right-of-way.

Mr. Sain said the same ravine existed here that caused the issue with Hillsborough Plumbing, so they were looking at an edge of road 30 feet from the end of the right-of-way and down 15 feet. So, he said, he did not know that it was even possible to construct a sidewalk there.

Mr. Sikes said he lived nearby and appreciated the geography there. He asked what language in the ordinance required the sidewalk on NC 57 rather than on Governor Burke Road. Mr. King stated that the ordinance said the street had to be a subcollector or greater, and NC 57 was an arterial street which was the higher designation. Mr. Sikes said he believed a sidewalk would make more sense on Governor Burke Road because there were houses there and places where people would actually walk. Mr. King said the benefit was one of the applicant's arguments.

Rev. Tom Tully of Holy Family Catholic Church, stated that the history of the site and the church's use of it did not include that building. He said they were looking at what was fundamentally a 15-year-old building that they did not want to destroy but to use, but if they were looking at the cost for a sidewalk then that put them outside their very limited cost range. Rev. Tully said the advantage to the Town had to do with the facility being provided through this, not through any long-range site change or an application of an ordinance that they would fully agree with if they were building a million dollar church. He said a \$30,000 sidewalk would actually augment the look of the church making the property more finished, but they were looking at trying to get a permit for a building they did not plan to use long-term, and it had to include allowances based on the actual value of the improvement. Rev. Tully said the building was there, it was available, and it was useful to the Town because his parishioners were residents, and they were not able to afford a project that was significantly larger than what they had proposed.

Rev. Tully said from the point of view of what could be done now to allow them to put that building into use without any prejudice to the site plan or to the ordinance in the future, was the real question being presented. He asked could that building for the use right now be allowed without any prejudice to the application to the ordinance, or to a future site plan and construction of a permanent facility in addition to the facility that was there. Rev. Tully said they were talking about a building that was barely visible from the street, as it was down lower and behind the current building, and was not even near NC 57.

Mr. Sikes said he believed the Board members might agree from a common sense standpoint, but unfortunately they were a quasi-judicial board and at this point there was not a lot of leeway as far as some subjective determination. Rev. Tully asked could the application be changed in some way in order to include a special use without invoking the requirement for a sidewalk. He said he believed that if in fact an exception had already been made for development on that same ravine, such as with Hillsborough Plumbing, then the church should be able to ask for the same consideration.

Mr. Remington said with Hillsborough Plumbing the issue was not with the ravine along NC 57, it was where the creek actually crossed the property, and it was an extension of the creek that was along the west end of the church's property. He said he had driven by the property today and did not recall that there was really a ravine or drainage ditch along the road.

Mr. Remington said there was a case that related to a Special Use Permit where the Town Board had a lot more latitude, but some of the questions may be the same as with the Leland Little Auction House project, where there was a question as to whether the sidewalk would go on the NC 86 right-of-way or on private property for some of the same reasons mentioned here. He said the requirement was to have it a little farther onto private ground to get it away from highway

right-of-way issues and possible widening. Mr. Remington said another issue was one that had come up with the discussion of the Fairview Park project, in that there were two places mentioned for a sidewalk, one in the Subdivision Ordinance and one in the Zoning Ordinance, which held slightly different requirements. He said in one place there were some provisions to allow something other than a concrete sidewalk, such as a walkway with some alternate surface. Mr. King stated that the Subdivision regulations allowed for a provision for sidewalks and for a walkway in certain situations, but the Zoning Ordinance did not contain that language.

Mr. Hartkopf said he believed the Board had approved something like that for a building material recycling area on Orange Grove Road because there was a creek and a guardrail, so an alternative walkway had been approved. He said they did have some latitude, and what they were trying to do was rationalize the ordinance with the reality of the topology of the site.

Mr. Sikes said in the changing of some of the permits over the past couple of years where staff handled some of the smaller items, he remembered that they had set a square footage threshold. He asked was there a dollar threshold along with that or was it just square footage. Mr. King responded it was based only on the size. Mr. Sikes said this was clearly over the threshold in size, but if you look at the map and the size of the use on that property this would be a huge sidewalk. He suggested that might be one of the things to look at changing in the rewrite. Mr. King said they could discuss that as a possibility in the ordinance rewrite; that is, was it worth the effort and the Board's time for something that was a small addition or a unit of this size that was more of an accessory or an adjunct use, and if that necessitated having to go all the way back through a Conditional Use Permit process. However, he said, they would still need to address the sidewalk and other types of issues because even at the staff level they would say a sidewalk was required.

Mr. Hartkopf asked about the timing of getting the work completed for this application. Rev. Tully said the availability of the building was occasioned by St. Matthew's Church in Durham who was already constructing their 6,000 square foot replacement building. He said they were nearing completion and did not want the modular unit on the site when they put in their landscaping. Rev. Tully said if nothing else they needed a place to store it, noting they had not moved it here because they needed to complete this process first. He said because that unit was now in storage, they needed to do something quickly in order to take advantage of its availability.

Mr. Credle said he understood they were required to put a sidewalk there, but asked what it would ever connect to.

Mr. Hartkopf said that was a valid question that had been asked in the past, and the response was that the Town Board had made it very clear that many sidewalks

to nowhere would eventually end up and consummate to a sidewalk to everywhere. He said that was the Town Board's philosophy and their goal. Mr. Hartkopf said historically this Board had not considered non-connectivity to another sidewalk as a valid argument to not require a sidewalk.

Mr. Sain said that if memory served, on one end the Biggs property was up on a hill so there was no way to install a sidewalk, and on the other end at the Wilkerson property there was a steep gully. So, he said, there was little or no possibility of a connecting sidewalk ever being installed to connect to this one.

Mr. Hartkopf said one alternative was that the Board could find that the topology was not such that installing a sidewalk was a sufficient utility. He said he believed they had the latitude that if it was not possible to put a sidewalk in they would work around that, and they could also require that they put in an amount of sidewalk where it was possible.

Mr. Remington said he would like to look over the provisions of the ordinance that allowed for exceptions in constructing a sidewalk where there were issues such as the creek at Hillsborough Plumbing. Mr. King said there was nothing in the ordinance that allowed for that exception; it was more an appeal to the Board that there was an extreme topography issue that would not allow the construction of a sidewalk. In other words, he said, what was on the ground would not permit the construction of a sidewalk without extreme measures such as building a bridge.

Mr. Remington asked was there a ditch in that location at the church.

Mr. Sikes said it was not so much a ditch, but it did drop down from NC 57. He said the whole church site was at a lower grade than the highway, so when you got within 15 feet of the highway the terrain went up to the level of the highway. Mr. Credle said NCDOT called that a fall away, and would mean that if a sidewalk was placed there that all the runoff during rain events would come over the sidewalk. He said if NC 57 was ever expanded or widened, and the sidewalk was not at that elevation, the sidewalk would have to be torn out as part of the expansion.

Mr. Remington said that was the issue along NC 86 for the Leland Little application, and the solution was to place it further onto the private property. He said in that instance the case could be made that a sidewalk or walkway would help connect places that people were more likely to walk to. Mr. Remington said he was sympathetic to this situation, and thought that if people living nearby wanted to walk to the church it would make more sense to have the sidewalk on Governor Burke Road, if anything. Mr. King said Governor Burke Road would have to be a subcollector or greater, but he did not know offhand what its designation was. He said it was a State road and did not show up on their road

classification system map, so he would assume it was a through road that connected NC 86 North to NC 57.

Mr. Hartkopf asked if the Board had latitude to say that in lieu of putting in a sidewalk that a certain amount of money be set aside for sidewalks at some future time. Mr. King said there was no provision for a payment-in-lieu of providing a sidewalk. He added that the applicant was proposing putting in 100 feet of sidewalk.

Mr. Remington said it was his understanding that when the sidewalk ordinance was last revised that the Parks and Recreation Board had urged that a payment-in-lieu not be allowed because it would delay pedestrian amenities being constructed. He asked was there some provision that because this was a temporary building not on a foundation that the ordinance would not apply.

Mr. Hartkopf said he was of the opinion that if they simply held to the ordinance they would in effect be sending it back to the Town Board for them to address the issue of a sidewalk. But, he said, that was not the case, because if they held strictly to the ordinance this project would go away. Mr. Hartkopf said he had asked about the timing of the placement of the unit because there was the possibility of holding this over until January and asking for comment from the Town Board, but they were likely to come back and say the ordinance required it.

Mr. King said there was an ordinance rewrite underway and hopefully by June they would have another Zoning Ordinance in place that addressed such issues as temporary structures and requirements for sidewalks. He said there was the opinion from the School of Government that the Board did have some form of leeway, whether it was written in the ordinance or not, based on some Supreme Court case law.

Mr. Hartkopf said he was not so certain that it made sense to put in even 100 feet of sidewalk, and was not sure what utility would be found in that. He said the fact that this was a temporary building was a reality that entered into the decision. Mr. Hartkopf said they could not accept a payment-in-lieu, but churches were notorious record keepers and it would behoove them to remember that they may be receiving a little give at this time but when any expansion took place at the church they would be required to put in a sidewalk. Mr. King said they did not yet know what the wording would be in the new ordinance so he would not want that to be included in a condition of approval. He said this was a small temporary building, and a permanent addition was a whole other matter.

Mr. Hartkopf said that was the crux of the matter, in that this was a temporary structure. Mr. King said he was not saying it was a temporary structure, only that it could be viewed that way. Mr. Hartkopf said from where he sat it was clearly a temporary structure.

Rev. Tully stated that the unit's half-life had already been exceeded. Mr. Credle added that the unit was deemed a temporary structure in its previous location, and in fact that was proven because they were lifting it up and moving it.

Mr. Hartkopf asked if anyone knew if there was a sidewalk requirement when Orange County Schools placed the Alternative School across the street from the Whitted building. Mr. King said he believed that pre-dated the sidewalk ordinance.

Mr. Remington said going back to the ordinance, what was the language that triggered improvements such as sidewalks. Mr. King said the ordinance did not speak to that; it said only that a sidewalk was required. Mr. Remington said there had to be something that triggered it, because there were things out there that were nonconforming and would remain nonconforming until someone came in to construct or improve something. He asked was it a requirement of any Conditional Use Permit.

Ms. Lunsford said the language just said that it required all developments with frontage to install a sidewalk.

Mr. Hartkopf said then if Orange County Schools were to bring mobile units into Cameron Park School, which he believed was being discussed, then they would come under the same requirement. Mr. King responded yes, they would have to meet the same requirement. He said that Section 5.25 of the Zoning Ordinance said that all development with frontage along streets classified as subcollector or greater shall provide paved sidewalks five feet in width along the parcel's street frontage.

Rev. Tully stated this was not development with frontage, because it was behind the current building on the other side of the property that did not affect anything that was seen either from Governor Burke Road or NC 57.

Mr. Remington said that section referred to the property itself, not a particular section of the property. He wondered if by this being a temporary unit that the Board would look at it in some proportional way, noting it was an inexpensive project and the cost of a sidewalk was very expensive. Mr. Remington said he was sure that if the church ever expanded that they could be sure that they would be required to build a sidewalk along the entire 489 feet of frontage.

Mr. Remington stated, in regards to other issues, he had looked at the screening requirements and it looked like the east side of the parking was visible from the highway. He wondered if the same considerations could be applied to all of the issues since this was a temporary building and not directly tied to construction.

Mr. Credle said their thoughts on landscaping was with this particular unit going in they were not increasing the use or the density of the site because it was already

in use and they were not increasing the number of parishioners coming and going on the site. He said they also were not increasing the number of parking spaces, so they had tried to isolate just what improvements would be required for that unit as opposed to the entire site being brought up to standards.

Mr. Remington said from his site visit it appeared you could not see much from Rocky Lane at all because of the topography and the patch of trees.

Mr. Hartkopf said, from the reading the staff report, it was only the north side of the eastern parking area (which was the side that fronted Rocky Lane) that needed additional screening. Rev. Tully said the land rose just past the Duke Power right-of-way, so from Rocky Lane you could not see across to that parking area.

Mr. Remington asked about the stormwater plan and the erosion control plan. Mr. King replied that Orange County Erosion Control indicated that there was no need for an erosion control plan, although the ordinance did require one. He said the applicant's engineer had provided a stormwater impact analysis that was part of Attachment 1, and the bottom line was that the impact to the drainage area to the site was about 1% so it was statistically insignificant.

Mr. Hartkopf said that the ordinance required a stormwater plan. Mr. King said in this case the Town's contracted stormwater engineer would review the stormwater plan and calculations. Mr. Hartkopf asked would that be done on site. Mr. King responded no, that it was done from the contracted stormwater engineer's offices and based on the data provided. He said he had spoken with the engineer and provided her the site plan, but she indicated she could not make a determination without the proper calculations. Mr. King said what he gathered from that engineer was that at most the applicant may need to put in some type of drainage swale.

Mr. Hartkopf asked would the applicant be amenable to that. Rev. Tully responded not without more information about what might be required. He said there was already a playground there with pebbles under the playground, and the building would be inserted into a place currently in use. So, he said, the change in stormwater impact had to be negligible. Mr. Hartkopf said then it was the applicant's assertion that the existing square footage was impervious. Rev. Tully said there was dirt under the pebbles, and placing the unit there would by and large not change the drainage of the area.

Mr. Credle said where they were draining to, in the bigger picture, was the creek on the west side of the property. He said at the point where that would enter the creek from that area being a rooftop as opposed to negligible infiltration of water into the existing playground area, there was 8 acres of watershed behind that spot; so when they made the small disturbance to install the footings into what was that playground area the characteristics of the runoff would not increase or decrease in regards to that 8 acres behind it and running into the creek.

Mr. Remington said the change was that water would initially be hitting a roof as opposed to pervious ground, so the fact that it was a modular unit did not change that runoff because it would be somewhat concentrated where it ran off the roof. He said the question was the requirement for a stormwater control plan, and if the impact analysis met the legal requirement for that.

Mr. Hartkopf said apparently from what Mr. King had said, it did not. Mr. King said the ordinance required that a stormwater plan had to be reviewed by the Town's contracted engineer where the site was disturbing less than one acre, and he could not say that that had been done.

Ms. Lunsford asked hadn't Mr. King spoken to someone who had indicated it was not necessary. Mr. King said the applicant's engineer had provided information that stormwater impact would be negligible, and thus a stormwater plan approval would not be required. He stated the Town's contracted engineer had said over the phone that at most the project may need a small drainage swale, but without getting a more solid answer he would advise not accepting that answer until additional data was provided to the contracted engineer so that a more formal determination could be made. Mr. King said there was sufficient wooded area on the west and northwest side of the property should a drainage swale be deemed necessary.

Mr. Credle said that currently from the playground, runoff sheet-flowed across the asphalt drive then through a grassed area, and then through a wooded section before it reached the creek. He said unless the drainage swale would be to retain water and it then became a mobile issue, what you would really be doing would be creating a point discharge for nitrogen loading where there was no discharge now. Mr. Credle said that was why they had not proposed any sort of stormwater device; because it was a negligible impact that was already filtered before it reached the creek.

Mr. Hartkopf said the ordinance stated that you had to have a stormwater plan, and they were changing from an obviously pervious surface to an obviously impervious surface.

Mr. Remington said they were in a situation where they needed someone in a regulatory position to say that was okay.

MOTION: **Mr. Sikes** moved to close the hearing on Case #BA-11-2009 - Conditional Use-2 Permit request from Holy Family Catholic Church. **Mr. Sain** seconded.

VOTE: Unanimous.

Discussion:

Mr. Hartkopf said given that this was a temporary structure he believed they had the latitude to find that the sidewalk was not a requirement. But, he said, in regards to the stormwater issue they were changing from a pervious to an

impervious surface and believed that if an inspection was done that there would be no issues identified, so it would not be a hardship for the applicant.

Ms. Lunsford agreed that if there were no issues found in regards to stormwater then the applicant would have no hardship. She also agreed that a sidewalk should not be required in this instance.

Mr. Hartkopf said the applicant's engineer had already signed off on it so he had no reason to believe that another engineer would do any different.

Mr. Sain agreed a sidewalk would not promote any kind of pedestrian movement in that location.

Mr. Sikes said he could think of at least one case where they had the proverbial "sidewalk to nowhere" but that applicant had been required to provide it, and now that sidewalk was connected on one or both sides. He said he believed the Town Board was adamant about the requirement for sidewalks unless there were safety issues or some other compelling reason.

Ms. Lunsford said the fact that this was a temporary structure and not a permanent one should answer that concern.

Mr. Hartkopf said if the Board did not approve this application based on the sidewalk requirement, chances were the Town Board would not give an opinion. He said if the applicant appealed to Superior Court, the Town Board might then decide to weigh in. Mr. Hartkopf said this case might provide the opportunity to reinforce the language in the ordinance and provide more latitude in such instances. He said if the Board approved this application they would at least accomplish that much with regards to exacting the Town Board's opinion as they would by disapproving it.

Mr. Remington said the fact that this was a temporary building which was a self-limiting issue would justify an exception to the sidewalk requirements in this instance. He said this situation was unique in that the structure was temporary, and if this structure was ever replaced with a permanent structure then all ordinance requirements would come into play.

The Board briefly discussed the need for future sidewalks and the connectivity that would provide. The Board generally agreed by consensus that this case was unique enough not to trigger the sidewalk requirement because the application was for a temporary structure. The Board also discussed the issue of the requirement for a stormwater plan and the fact that the applicant's engineer had determined that this project would not significantly affect the stormwater abatement issue.

Mr. Credle provided the Board with information on how stormwater calculations were performed, noting it used the characteristics of the land, the intensity of rainfall, and the area the project was located in. He said in this instance you would take the pre-development and post-development measurements and compare them, and because the disturbance was so small they had determined that any change was negligible.

Mr. Remington said if the Town Stormwater Engineer accepted that rationale and approved it in writing then he believed that would satisfy the requirement for a stormwater control plan. The Board agreed by consensus.

The Board then discussed the requirement for screening around the parking area of boundaries as well as skirting of the unit, again bringing in the issue that the structure was temporary. The Board read through the Findings of Fact to determine if the proposed use met the standards of evaluation imposed by the ordinance.

- MOTION:** **Mr. Remington** moved to approve Case #BA-11-2009 - Conditional Use-2 Permit request from Holy Family Catholic Church in that it met the requirements of Article 4.14 and 4.3 of the Zoning Ordinance with the following conditions:
- a) The modular unit must be skirted around the perimeter of the unit before a Certificate of Occupancy is issued.
 - b) Any transportation lighting and towing apparatus shall be removed or covered before a Certificate of Occupancy is issued.
 - c) A stormwater control plan must be approved by the Town's contracted stormwater engineer prior to the issuance of a Zoning Compliance Permit for the modular unit.
 - d) The existing septic tank must be properly abandoned and evidence of the abandonment must be received from the Orange County Environmental Health Department prior to the issuance of a Certificate of Occupancy for the modular unit.

Mr. Sikes seconded.

VOTE: Unanimous.

Mr. Credle expressed their gratitude to the Board for its careful attention and for recognizing what they were trying to accomplish, and noted that judiciousness always required common sense even when trying to follow ordinances. He said he believed the Board had faithfully followed the ordinance.

- ITEM #5:** **Case #BA-12-2009 – Special Exception Permit request from Michelle Kempinski of Kempinski Designs, LLC, on behalf of Tom and Marcia Cameron, to allow a wooden deck with associated steps to be constructed on the rear of an existing house. The proposed deck will continue with the line of the house that currently encroaches 13.01 feet into the allowed reduced 16.11-foot east side yard setback. The proposed deck will be no closer than 3.1 feet from the east side property line, once constructed. The property is**

located at 123 West Queen Street (Orange County Tax Map Reference #4.31.A.5) and is zoned R-20 (Medium Intensity Residential)/HD (Historic District) Overlay.

Mr. King swore in Michelle Kempinski and himself. Mr. King provided some brief information regarding the application, noting the property was about .29 acres, was zoned R-20, and was in the historic district overlay. He said the applicant was proposing to construct an unenclosed wooden deck with associated steps to be constructed on the rear of an existing house that was nonconforming as to the required and reduced east side yard setbacks. Mr. King noted the staff report explained that the current house was 13.1 feet from the east side property line, and the deck would continue in line with that eastern line of the existing house, with the deck estimated to be 3.3 feet from the existing property line. He stated that Attachment 2 was the site plan, and that staff found that the application meet all requirements for the issuance of a Special Exception Permit, with the condition that an as-built survey showing that the deck and steps complied with the terms of the ordinance be submitted before issuance of a Certificate of Occupancy.

Mr. Whitmore, after having been sworn, stated that he was a neighbor of this property and he was in agreement with the proposed plan.

Mr. Remington said it appeared that the existing structure was angling slightly away from the property line, and it did not appear that constructing a deck with steps would be an issue on this lot. Ms. Kempinski said the deck would be squared with the house and following the side of the house, which would take it further away from the property line as it continued to the south.

Mr. King noted that the Historic District Commission had already approved the project from its purview.

MOTION: **Ms. Lunsford** moved to close the hearing on Case #BA-12-2009 – Special Exception Permit request from Michelle Kempinski of Kempinski Designs, LLC on behalf of Tom and Marcia Cameron. **Mr. Sain** seconded.

VOTE: Unanimous.

Discussion:

Mr. Hartkopf stated the Board appreciated the thoroughness and the clarity of the documents provided by the applicant and that all adjoining parcel owners were clearly listed.

MOTION: **Mr. Sikes** moved to approve Case #BA-12-2009 – Special Exception Permit request from Michelle Kempinski of Kempinski Designs, LLC on behalf of Tom and Marcia Cameron in that it met the requirements of Article 3.6.4 of the Zoning Ordinance with the following condition: that an as-built survey, prepared by a professional land surveyor, showing that the deck and steps comply with the

terms of the Ordinance and Special Exemption Permit shall be submitted to the Zoning Officer prior to the issuance of a Certificate of Occupancy for the project.

Mr. Remington seconded.

VOTE: Unanimous.

ITEM #6: **Case #BA-13-2009 – Special Exception Permit request from Ellen L. Steinberg to allow a wooden deck with outdoor shower to be constructed on the rear of an existing house. The proposed deck will continue with the line of the house that currently encroaches 12 feet into the allowed reduced 15-foot south side yard setback. The proposed deck will be no closer than 3.0 feet from the south side property line, once constructed. The property is located at 313 North Hassel Street (Orange County Tax Map Reference #4.18.G.8) and is zoned R-20 (Medium Intensity Residential)/HD (Historic District) Overlay.**

After swearing himself in, Mr. King stated that Ms. Steinberg was not present but that she had been noticed and advised in person that she should appear. He said Ms. Steinberg had indicated it was likely she would be out of Town tonight, and the Board could either consider the application in her absence based on the application submitted, or the Board could hold open and continue the public hearing.

Mr. Hartkopf noted that the Historic District Commission had given its approval of the proposal and the application appeared to be in good order. Mr. King stated that the proposal was to construct an unenclosed rear deck with the possibility of an outdoor shower stall onto a nonconforming structure. He said that this was a .28 acre tract and was zoned R-20. Mr. King indicated that Attachment 1 was an aerial view of where the proposed deck and outdoor shower would be installed, that Attachment 2 was the plot plan which indicated that the deck would run with the line of the south side of the house, and that this application would carry the same as-built condition as the previous application required.

Mr. Remington said it appeared that the deck would tail away from the property line as it went back, as the previous application. Mr. King said that was correct, noting that on the south side the front corner of the house was 3 feet from the property line and was 3.6 feet from the back corner.

Mr. Sain said then the deck was free-standing and not attached to the house. Mr. King said that was correct, that it was attached by what looked like a gangplank. Mr. Sain asked what the Code required for such a deck with no railing. Mr. King said there was only two steps up to the deck and believed the deck was only about 18 inches high, but did not know what the Building Code would require in that regards. He added that this would require a Building Permit as well as an inspection so it would have to meet State Building Code.

Mr. Hartkopf asked if the addition of the outside shower triggered any kind of water use regulations or approval. Mr. King said he was not aware of any. Mr.

Hartkopf said it was not indicated that the shower was tied into the drainage or plumbing of the house, and asked were they to assume that it would be. Mr. King said he was unsure if the amount of water that might drain from an outdoor shower would be an issue, and did not know if that was even in this Board's purview. He said if the Board believed it was an issue then it could possibly be tied to the Findings of Fact. Mr. King said the outdoor shower would be approximately 6 to 7 feet from the property line.

Mr. Sikes said Mr. Hartkopf had asked about how the water would drain. He said if this was an area where someone would be washing off grease as opposed to children washing off sand from a sandbox, then that would be of some interest.

Mr. Remington said the last time the area had experienced a drought there had been some articles in the newspaper about people being encouraged to collect shower water for use elsewhere, and there were some issues about what was really legal in that regards because such water was supposed to go into the sanitary sewer system and not out on the ground or into the storm sewer. He said he would hope that whatever Building Permit was required would address that issue. Mr. King stated that a plumbing permit would be required so those issues should be addressed if the shower indeed became a reality.

Mr. Remington said he was somewhat concerned that Ms. Steinberg was not present for questioning, and if the Board had concerns about the outdoor shower in regards to the public health and safety then he believed they should hold the public hearing open to the January 13, 2010 meeting and request that Ms. Steinberg be present at that time.

MOTION: **Mr. Sikes** moved to hold open and continue the public hearing on Case #BA-13-2009 – Special Exception Permit request from Ellen L. Steinberg, to the January 13, 2010 meeting, and that the applicant or an agent of the applicant be present at that time to respond to questions about the proposed project. **Ms. Lunsford** seconded.

VOTE: Unanimous.

ITEM #7: **Case #BA-14-2009 – Conditional Use-2 Modification request from Mike Hammersley of Corley Redfoot Zack, Inc. on behalf of Orange County to allow the addition of 3 tennis courts, associated court fencing and lighting, and 6 additional parking spaces at Fairview Park. The properties involved are located at 195 Torain Street (Orange County Tax Map Reference #s 4.5.A.15 and 15 B) and are zoned OI (Office/Institutional).**

Mr. King stated this was not a public hearing item but was a modification request. He stated the Board had the ability to review this modification and approve it as submitted, or if the Board believed that public input was needed it could forward it to a public hearing. Mr. King said the request was to add 3 tennis courts, associated court fencing and lighting, and 6 additional parking spaces at Fairview

Park to the plan previously approved in December of 2008. He said that staff recommended approval of the modification with no conditions.

Mr. King said that the tennis courts were close to the Orange County Public Works Facility and met the required 50-foot setback from the property lines. He said it would require the Type 2 screening that was shown on the landscape plan. Mr. King stated that the 6 additional parking spaces had been incorporated into the existing parking area, noting it had been approved with 38 spaces and they would now be providing 44 spaces. He indicated that the need for additional spaces was generated by the tennis courts.

Mr. Hartkopf said after reviewing the plans he was largely in agreement with Mr. King that the application be approved, although he had one question regarding lighting. He said the Town had a requirement that all lights be turned off at 10 p.m., and asked would the facility comply with that. Mr. King responded yes, that the condition still stood. Mr. Hartkopf asked would there be a timed switch to do that or was there some process in place to have the lights shut off manually.

Mike Hammersley with Corley Redfoot Zack, Inc. noted that there would be timers on the lights, and the lights would only operate when the courts were in use after daylight hours.

Mr. Hartkopf said then the user would turn them on and they would stay on for a specified period of time. Mr. Hammersley said that was correct, noting that they would shut off automatically at 10 p.m. regardless.

Mr. Remington said that he had remembered seeing some plans for the park showing the tennis courts. Mr. King said that was correct, but that the plans approved by the Board in 2008 did not show the courts. King went on to state that the walking trail had been moved somewhat to accommodate the 50-foot setback from the property line, and the parking lot area had increased slightly to include the additional 6 spaces. He said that Orange County Erosion Control had reviewed the plans and there was an attachment in the packet that indicated the project met stormwater requirements and was essentially approved. Mr. King said the project did have an Erosion Control Permit through NC DENR (North Carolina Department of Environment and Natural Resources).

Mr. Hammersley stated that NC DENR had issued them another approved permit for the additional project, dated November 16, 2009, and indicated he would provide a copy of that permit to Mr. King for his files.

Lori Taft, with Orange County Parks and Recreation, indicated that the tennis courts and additional parking spaces would be constructed only if there were remaining funds from the PARTF (Parks and Recreation Trust Fund) grant. She said if they did not hit rock or have some other unforeseen issue, then they would be moving forward quickly.

MOTION: Mr. Sain moved to approve Case #BA-14-2009 - Conditional Use-2 Permit Modification request from Mike Hammersley of Corley Redfoot Zack, Inc., on behalf of Orange County for Fairview Park. Mr. Remington seconded.

VOTE: Unanimous.

ITEM #8: Committee and Staff reports.

Mt. Bright Cemetery Appeal:

Mr. King stated that a neighbor had served notice of appeal just prior to Thanksgiving, and it would be going to Orange County Superior Court. He said the Town Attorney would likely make a motion to dismiss it because it was filed incorrectly, and had indicated there would be some procedural nuances due to the fact that the neighbor was representing herself. Mr. King said it had been reviewed by the HDC (Historic District Commission) last week but was tabled to their January meeting. He said the HDC had discussed the retaining wall on the north side of the property which they believed was too high and was suggesting a staggered retaining wall and that more trees be saved. Mr. King said he did not know if that would trigger the application coming back to the Board of Adjustment, noting it could be considered a minor change to the plan.

Mr. Sikes asked how much input the Town Board would have on the actual appeal in court. Mr. King said if there was a valid appeal he assumed the Town would have to engage it, and the Town Board may have input at that time in the Town's defense. He said if the Town were to lose in Superior Court, it would be the Town Board's decision whether or not to appeal that decision to a higher court.

Webb Grove Conditional Use Permit:

Mr. King stated that the Webb Grove density bonus case would be coming back to this Board, noting the Town Attorney had indicated that he expected the judgment from Superior Court sometime in January 2010. He said the Board would have to make a decision to grant the Conditional Use Permit in either February or March of 2010, and the Town Attorney had asked that the Board put on its agenda for February 2010 a review of the record, discussion, deliberation, and potential issuance of the Conditional Use Permit.

Mr. King said the Board would perhaps want to discuss appropriate conditions to attach to the Permit, noting the court decision did not address the issue of conditions the Board might want to consider and it was within the Board's authority to attach appropriate conditions to the permit. He said those conditions would be to make it comply with the Zoning Ordinance. Mr. King said the Town Attorney had suggested that the Board discuss potential conditions, one of which would be a requirement for obtaining a Certificate of Appropriateness from the Historic District Commission. He said this was a court direction, in that the Board was being directed to issue the Conditional Use Permit but was also being

given the latitude to attach appropriate conditions to bring it more into conformance with the Zoning Ordinance.

Mr. Remington said then once that was accomplished it would go back to the Historic District Commission. Mr. King said that was correct, noting this had been ongoing since September of 2007. He said once this Board approved the Conditional Use Permit with whatever conditions it attached, it would go back to the Historic District Commission for a COA (Certificate of Appropriateness). Mr. King said if the HDC denied the COA, it would likely be appealed back to this Board to review the record of the HDC decision to confirm that it had performed its duty and made its findings correctly.

Planning Board:

Mr. Remington stated that at the last meeting the Planning Board had reviewed the subdivision request on a 10-acre site on the north side of Rencher Street that Alan Knight had been trying to develop for some time but had access problems. He said the Planning Board had recommended to the Town Board that the subdivision not be approved because the cumulative impact of adding more traffic in that area would add to an already bad situation. Mr. Remington said they had suggested several conditions should the Town Board decide to approve it, but did not know what the Town Board might do.

Mr. Remington said the residents of that neighborhood had brought up several issues, including that children had no place to play so they played in the street. He said the neighbors had wanted this development to address that and other issues. Mr. King said that subdivision regulations were generally very technical in nature, so denying a subdivision for a non-technical issue could get tricky in the courts because the Board did not have much discretion.

Mr. Remington said the other issue discussed was the ordinance rewrite process, noting that Roger Waldon with Clarion, the Town's consultant, had provided an update. He said the one thing that stuck in his mind that was somewhat different from the way they had been talking about things was that they had been saying they would deal with things in the rewrite. He said Mr. Waldon's point was that the idea was to basically streamline the Code and make it more user friendly, and that the changes to the provisions were secondary to that. Mr. Remington said they had assumed that the ordinance rewrite was a chance to fix all the things that were frustrating or needed attention, but it appeared it would be up to the advisory boards to make sure that the things they had concerns about were addressed during the process. He said as much as he agreed with why the sidewalk ordinance requirements were necessary, there were situations such as what the Board had faced tonight that needed to be addressed so that there was some basis for making exceptions. Mr. Remington said what they had been forced to do with the initial approval of the Fairview Park project was convoluted, and believed they would all agree that the ordinance needed the teeth that were there but there needed to be more flexibility.

Mr. Sikes said the sign change they had faced with the Dollar General had highlighted that some may argue that taking out one sign and putting in another one would trigger the new sign ordinance, which would require that they tear the whole sign down and move it up the hill to make it compliant. But, he said, it was not that big a thing to trigger such extreme measures, but the ordinance was written as such that there was not an easy out.

Mr. Remington said it was kind of a “gotcha” clause but believed it was necessary.

Mr. Sikes agreed it was necessary, but for that case in particular the sign was working as it was designed.

Mr. Remington said he believed that had now been addressed by the Town Board, in that they had determined that the design of the sign did not determine whether there had been a change in message. He said just because a sign was designed to slip a placard in or out did not constitute that it was not a change in message. Mr. Remington said basically the ambiguities that the Board had been hung up on were now unambiguous, but not in a way that everyone may like. Mr. King said there may have been some unintended ambiguities added with the change, but that was yet to be determined.

Mr. Hartkopf said he found it very comforting in this arena to have ordinances that were written fairly rigidly. He said he found that comforting because the Board of Adjustment was appointed and were not compensated; they were meant to be lay people without any vested interest; and, they were simply to interpret that which had been put before them. Mr. Hartkopf said they were not a legislative body but were more a judicial body, and from a judicial perspective one would like to have rigid guidelines to go by. He said he felt that the Board was not calling out a deficiency in the ordinance by putting up a requirement for an alteration to the ordinance as had been done for the Food Lion sign or the Holy Family Catholic Church applications; just as he did not feel terrible about what was done in regards to the Mt. Bright Cemetery case. Mr. Hartkopf said the Town Board had made its judgment that a cemetery was allowed in a residential district, hence it was fine, but whether or not he believed it was fine did not matter and he liked it that way.

Mr. Hartkopf said it was to the Board’s credit to be able to find a way to allow something to happen that by all rights should be allowed to happen and would harm no one, such as with the sidewalk issue related to the church heard this evening. He said they had been able to allow that to happen within the framework of a fairly rigid ordinance. Mr. King noted that the ordinance did not define the term “development” so that alone gave some flexibility. He said in the church’s case tonight, it would have been helpful to have a determination of what constituted “development.” Mr. Hartkopf said in that instance it was helpful not to have that determination. He said when you had a special case you did not want

“wobble room” codified, because when it was codified it became a slippery slope. Mr. Hartkopf said wobble room discovered on a case-by-case basis was a product of intelligence and diligence. Mr. King agreed that the Board had to have the ability to use some discretion in applying the ordinance and making an interpretation. He said they had to do that on a case-by-case basis and there was the danger of setting a precedent, but when looking at a Conditional Use Permit the Board was applying standards to a unique situation.

Mr. Hartkopf said they were a lay board and were appointed, and therefore had some latitude that Mr. King and other staff did not have because they were compensated employees. He said the staff’s assertion of creativity may cost them their jobs, and the Board’s assertion of creativity may cost them only their positions on the Board. Mr. Hartkopf said if you attempted to codify everything in order to allow things you wanted, you would eventually end up allowing things that you did not want.

Mr. Remington said his take-home message from all of that, as far as where Planning Board discussions would go, would be the comment that whatever they did to fix the sidewalk ordinance that they should be careful about flexibility. He said the Webb Grove incident taught them that the flexibility they had ended up not being flexibility at all, without more concrete standards.

Mr. Hartkopf said Mr. Remington was exactly right, referring to the Vision 2010 document and whether that was or was not an ordinance. Mr. King said such plans were policy documents and not ordinances, but the ordinance did refer back to the Comprehensive Plan which encompassed such policy documents. He said he would talk with the Town Attorney about the issue faced tonight with regard to the sidewalk requirement, and see if he would perhaps offer some legal opinion so that if the situation came up again the Board would have some guidance.

Mr. Remington said requiring the church to build 489 feet of sidewalk because they brought in a modular unit would be just the kind of thing that would trigger the court case that would change the Town’s sidewalk ordinance. He said he believed that applicant was right to bring up the proportionality issue, although the Town’s ordinance did not speak to the cost proportionality that the applicant had brought up.

Mr. Remington said in regards to the rewrite of the ordinance, he did not mean to indicate that no substantive changes would be made, but did understand that that was not the primary focus as stated by the consultant. He said the framework of that rewrite would likely make it easier to make substantive changes in the future, and believed that some substantive changes would be made during the rewrite process but perhaps not as many as first thought.

ITEM #9: Adjourn.

Mr. Sikes moved to adjourn the meeting at 10:14 p.m. **Mr. Remington** seconded. The motion was adopted unanimously.

Approved:

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