

MINUTES
BOARD OF ADJUSTMENT
Wednesday, August 11, 2010, 7:00 PM

MEMBERS: Chair Al Hartkopf, Carla Lunsford Eddie Sain, Doug Stevenson, and Bill Whitmore.

ABSENT: Tommy Sikes and Rod Jones, absences excused.

STAFF: Senior Planner Tom King, Planning Director Margaret Hauth, and Town Attorney Bob Hornik.

PUBLIC: John Roberts, Susan Mellott, Judge Joseph Buckner, George Horton, Joe Phelps, and Frank Clifton.

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

ITEM #2: **Consideration of additions or changes to the agenda.**
Mr. King indicated one item to be included after the Closed Session. Mr. Hartkopf suggested that be added as item #5b. There were no other additions or changes to the agenda.

ITEM #3: **Approve the June 9, 2010 regular meeting minutes and closed session minutes.**

MOTION: **Mr. Sain** moved to adopt the minutes of the June 9, 2010 meeting as submitted. **Ms. Lunsford** seconded.

VOTE: Unanimous.

MOTION: **Ms. Lunsford** moved to adopt the minutes of the Closed Session of June 9, 2010 meeting as submitted. **Mr. Whitmore** seconded.

VOTE: Unanimous.

ITEM #4: **Case #BA-08-2010 – Appeal from an action of the Zoning Officer submitted by Orange County. The appeal relates to a Notice of Zoning Violation issued May 26, 2010 regarding illegal re-occupancy of the newly renovated Orange County Justice Facility. The property subject to the appeal is located at 106 East Margaret Lane (Orange County Tax Map Reference #4.36.D.1) and is zoned OI (Office Institutional)/HD (Historic District) Overlay.**
Mr. King swore in Tom King, Margaret Hauth, Susan Mellott and John Roberts. Mr. Hartkopf noted that officers of the Court did not need to be sworn.

Senior Planner Tom King provided a brief staff report and case history of the issue, noting that this was an appeal to a Notice of Zoning Violation regarding the illegal re-occupancy of the newly renovated Orange County Justice Facility. He said in November of 2006 the BOA (Board of Adjustment) approved a site plan for the Justice Facility expansion which created the need for additional off-street parking. Mr. King said one of the conditions of approval offered by the County, and based on representations made by the County to the BOA, resulted in a condition being attached to the approval that the County would submit a specific parking plan detailing off-site parking arrangements and policies to be enacted to meet the off-street parking requirements of Section 6 of the Zoning Ordinance.

Mr. King said at the public hearing when the case was heard, the BOA had accepted as a condition of site plan approval offered by the County a County policy to encourage or if necessary require County employees to park off-site and be shuttled to the Courthouse site as meeting the requirements of Article 6.6 of the Zoning Ordinance and that the BOA would review the details of that plan and policy at a later date.

Mr. King said in January and February of 2010 County staff began to prepare for completion of the project and the request of a CO (Certificate of Occupancy) for the building. He said one of the requirements for issuance of the CO was for the Town to sign off on a Zoning Compliance Permit indicating that the project complied with all zoning requirements. At that time, Mr. King said, the County was reminded of the parking plan and other additional items related to Historic District Commission approval including landscaping. He said in response, the County had put forth several alternative parking plans, beginning at a meeting in March 2010 and continuing to two meetings in April, with a final meeting in May 2010. Mr. King said on May 12, 2010 the BOA ultimately refused to accept any of the County's alternative parking plans.

Mr. King said on May 14, 2010 Chief District Court Judge Joseph Buckner issued an Administrative Order to allow the courts to occupy a portion of the Justice Facility building, and that was included as Attachment 1, Exhibit B in the Board's packet. He said in response, on May 26, 2010 the Town Planning Director and Zoning Officer Margaret Hauth issued a Notice of Violation addressed to the County Manager. The Notice was identified as Attachment 2 in the packet. Mr. King said that Notice of Violation alleged that the renovated courthouse was being occupied without a valid CO and in violation of the conditionally approved Site Plan that was approved in November of 2006. He said that letter also advised the County Manager that the Town would be assessing a civil penalty in the amount of \$100 a day unless the County either complied with the Conditional Site Plan approval or with the parking requirements required for the Justice Center.

Mr. King said the County was also informed that other enforcement avenues might be pursued if the violation was not remedied, and they were also advised that they could appeal to the BOA, which was what was before the Board tonight.

Mr. Hartkopf asked the Town Attorney who he was representing at tonight's meeting. Town Attorney Bob Hornik replied he was representing the Board of Adjustment as its attorney. Mr. Hartkopf asked were there any factors impacting his representation of the BOA. Mr. Hornik replied he knew of none.

Mr. Hartkopf asked if Orange County had any objections to Mr. Hornik representing the BOA. John Roberts, the County Attorney and representing Orange County, replied they had no objection.

MOTION: Mr. Sain moved to open the Public Hearing. Mr. Stevenson seconded.

VOTE: Unanimous.

Mr. Hartkopf said the Board had received a new document this evening, and asked the appellant if any of the information submitted was materially different than what was in the agenda packet. Mr. Roberts responded there was a memorandum of law in support of what was included in the original packet, which included three exhibits that should be included in the record. He said the material also included several case law citings.

Mr. Roberts noted that Exhibits 1 and 2 were exhibits that were a part of the appeal packet and not new information. He said the Memorandum of Law was 3 pages, and Exhibit 3 was new information.

Mr. Roberts said that Exhibit 3 was an affidavit of the County Manager that was for the BOA's benefit to show that a certain County employee made representations to the BOA that were unauthorized, meaning that she did not have the authority to make those representations.

Mr. Roberts said he did not substantially differ with Mr. King's presentation of the facts. He said the only thing he would add to the rendition of those facts was that there was a Conditional Certificate of Occupancy in place, which was not intended to be permanent and not presented as permanent. Mr. Roberts said a permanent CO required Hillsborough's sign-off as a matter of policy between the Town and the County. He said the Conditional CO was entirely under the discretion of the County Inspections Department.

Mr. Roberts said in addition to the Conditional CO that was in place, there was an Administrative Order allowing occupancy of the Courthouse Justice Facility, and he believed that Orange County's Conditional CO was completely in agreement with that order.

Mr. Roberts asked Judge Joseph Buckner to come forward for questions. Mr. Roberts asked Judge Buckner to provide a basic background of his duties as District Court Judge, which he provided. Judge Buckner said those duties were stated in N.C.G.S. 7A-146, which included the duty to schedule all district court including magistrate or small claims court throughout the district.

Mr. Roberts asked as a part of those duties, did he issue an Administrative Order for occupancy of the Orange County Justice Facility building. Judge Buckner stated he did. Mr. Roberts asked if that was Exhibit 2. Judge Buckner said if Exhibit 2 was the Administrative Order with his signature, then that was correct. Mr. Roberts asked Judge Buckner to describe what was in the Administrative Order and to state for the record what his authority was to have entered that order. Judge Buckner said he had pulled the State Constitution, he had pulled the Duties and Responsibilities of the Chief District Court Judge under the General Statutes, he had pulled the affirmative duties from the Code of Judicial Conduct, and he had pulled a textbook used during his days at the National Judicial College on the inherent powers of the courts. He said in summary, the inherent powers were powers that were not articulated by statute but were implied in a position that an official held.

Judge Buckner said the open court section in the Constitution required that the courts remain open and that they be administered without favor, denial, or delay. He said the Separation of Powers section articulated in the order determined between the three branches of government, and in this instance, it was his view and belief that was the legislative and judicial branches. Judge Buckner said in addition, there were affirmative duties that were articulated in the Code of Judicial Conduct which included but were not limited to the fact that a Judge should maintain order and decorum in proceedings before him or her, that a Judge should accord every person who was legally interested in the proceedings or that person's attorney full right to be heard according to law, and that a Judge should dispose promptly of the business of the court.

Judge Buckner said also included in his thought process but not articulated in the Order, because he did not believe it was needed, was G.S. 7A-302 which required the counties or supporting municipalities to provide physical facilities to the courts. He said in G.S. 7A-130, it said specifically that the district court shall sit in the county seat of each county, and such additional places as the General Assembly may authorize. Judge Buckner said those statutes fell into his decision to issue the Administrative Order.

Judge Buckner said one other rule of court, which was promulgated by the Supreme Court and was the rules of general practice for Superior and District Court which was how they moved their cases, was that the rules of practice shall at all times be construed and enforced in such a manner to avoid technical delay and permit just and prompt consideration and determination of all issues before the court. He said the last section in the Administrative Order was a report from Judge Vernon of their initial attempts to make do with the facilities, and it expressed safety concerns about what had occurred when they had attempted to hold court in the old courthouse. Judge Buckner said that, combined with the open discussion held about him not having any real knowledge of the dispute between the County and the Town before, he would have had to make significant changes in the location of where literally thousands of cases and people were going to be told to go.

Judge Buckner said when Judge Vernon and other court officials as well as his assistant had enumerated their alarm about safety, enumerated their concern about accessibility, and discussed the issue specifically that Judge Vernon had had to ask every person who was not a party defendant in a criminal session of court to leave the courtroom because they were far in excess of the capacity of the old courtroom, he had felt compelled under his duty to take steps to meet his duty as Chief District Court Judge. He said he had called Jeff Thompson and Pam Jones as County officials and voiced his concern, saying that he wanted to know what the health and safety status permits were via the Department of Insurance, or anything that would prohibit people from occupying that space in a safe and lawful manner. Judge Buckner said it was his belief that had he been told the rooms themselves had not been signed off on by the appropriate health and safety officials, and that that would not have been appropriate or lawful on his part.

Judge Buckner said he was told by those two County officials and then confirmed with Mr. Roberts as County Attorney that all the permits with the exception of the CO between Hillsborough and Orange County, which concerned the allocation of parking which he knew nothing about, had been received. He said at that point he felt compelled to order that the courtrooms be opened, and entered the Administrative Order as a result of observing his duty under the various legal instruments as well as his inherent responsibility to keep the public safe and make sure their cases were heard in a timely manner.

Judge Buckner said he wanted to assure them personally and professionally that it was not an affront directed at this Board which he respected or the Town of Hillsborough. With that being said, Judge Buckner said he did view his responsibility as a separate duty that he had to meet and did not have the ability to relieve his duty or relieve himself of his duty under those circumstances.

Mr. Roberts said Judge Buckner had said he had consulted Jeff Thompson and Pam Jones as well as him about permits, and asked if he had consulted him or anyone in his office about his authority to enter the Order and whether he had that authority. Judge Buckner responded no, that he had consulted with the Chief Justice's office and the Senior Resident Superior Court Judge just to make sure he had not exceeded his authority.

Mr. Roberts asked if he knew or had an opinion about whether Orange County had the power or authority to countermand his Order or remove the courts from that building. Judge Buckner responded he knew of no legal authority that would allow the County to remove the operations of the court unless the buildings became unsafe or uninhabitable. He said he did acknowledge the responsibility that the County had to provide the courts adequate facilities. Mr. Roberts said if he had discovered in talking with Mr. Thompson or Ms. Jones that the health and safety permits had not been issued, would he have entered the Order. Judge Buckner said he would not have done that.

Ms. Lunsford said to clarify, that he was referring to the health and safety of the courtroom and the building itself. Mr. Roberts said just as it applied to the expanded portion of the Justice Facility.

Judge Buckner stated it was his understanding that the permit for the new section had actually been entered for the Clerk's Office, the Sheriff's Department, and Courtrooms 3 and 4, but he stood to be corrected by Mr. Roberts. Mr. Roberts said he had no representation to make regarding that.

Mr. Whitmore asked had he felt an obligation as an official of the court to expand that adequate facility explanation to the general safety of the public as it pertained to parking. Judge Buckner said if he was made aware of any health and safety issue as a result of the parking or lack thereof for emergency access. He said he had contacted Hillsborough's Acting Police Chief Davis Trimmer and asked him to notify him directly if there were ever any concerns about court programming affecting that, as well as Major Blackwood and Sheriff Pendergrass. Judge Buckner said as he understood it from Acting Chief Trimmer, Major Blackwood, and Sheriff Pendergrass of the County were policing the interior lots, and the Hillsborough Police Department were policing the streets around the facility in terms of any kind of parking issues. Judge Buckner said that Acting Chief Trimmer had assured him that if issues arose he would let him know, but he had not heard from Acting Chief Trimmer to that effect. He said he had instructed Major Blackwood, who was head of Court Operations Services, to do everything he could to keep the activities around the courthouse safe, including but not limited to parking and emergency access. He said that Major Blackwood was within his control and was responsible for doing what the court needed him to do for all of those issues. He said to his knowledge, he had not been told of any expanded safety concerns to date. But, Judge Buckner said, if he were made aware of any issues he would take the operational steps necessary to change the scheduling pattern so if it was a numeric issue, or the number of people coming in, that they did not have that problem or at least reduced it significantly.

Mr. Stevenson said to clarify, he had indicated that he had taken advice from both County officials and fellow judges on the conditions of the court operations prior to the Administrative Order, and that based on that consultation and advice he had felt they had reached a point where they were not conducting safe operations in the old courthouse. Judge Buckner said to clarify, he did not believe he had asked County officials for any advice; he had asked Mr. Thompson and Ms. Jones if all the health and safety permits that would permit the use of the courtrooms in that building were in place, and the response was yes. Judge Buckner said he had asked what remained, and the response was the permanent CO which involved a dispute regarding the parking plan between the Town and the County. He said he had then called Mr. Roberts because he had wanted to make sure that that was in fact the case before he issued the Order. He said if he had been told that the interior of the buildings were not safe to occupy, he would not have entered the Order. Judge Buckner said the consultation he had sought with Judge Fox, the

Senior Resident Superior Court Judge who had some administrative scheduling authority that was parallel to his, and the Chief Justice's Office was that he was contemplating that action and was there a problem they knew of. He said the instruction he had received was to do his duty.

Mr. Stevenson asked did the court feel opening that room was absolutely necessary for court functions. Judge Buckner said in his role as Chief District Court Judge and on behalf of the other four District Court judges, the concern he had had was that he could not explain to someone who might be hurt or injured using those slippery stairs, or might not be able to hear their child's case or support some other witness, why he had not taken action. He said the answer to the question was yes, he thought it was absolutely necessary both for safety and for the administration of justice. Judge Buckner said he believed he would have been in a very tenuous situation to meet his duty to say why he had not taken action that would have prevented some tragedy or the delay in hearing cases.

Mr. Hornik said, to be clear for the record, the court system did not own the building. Judge Buckner replied they did not; they were tenants. Mr. Hornik said tenants of Orange County. Judge Buckner replied yes, but statutory tenants of Orange County.

Mr. Hornik asked had he checked to make sure that Ms. Jones and Mr. Thompson had authority to make the representations that they had made to him. Judge Buckner said during his term as Chief District Court Judge, Ms. Jones was the designated person for all court facilities and communication. He said for instance, the County was required to provide the court periodically with furniture that needed to be replaced. Judge Buckner said that he and Ms. Jones had had a professional relationship in that regard for the last 14 years, and Ms. Jones had told him that Mr. Thompson was the specific person who was working through the new construction issues. He said he had confirmed the substance with the County's attorney, but had not gone any further up the line than that.

Mr. Hornik asked had he ever had any experiences in that 14 years of working with Ms. Jones to learn after the fact that she did not have authority to make representations to him. Judge Buckner replied never. Mr. Hornik said the Town had now been told that Ms. Jones did not have the authority to make representations to the Town, so he had wanted to make sure that they were clear about whether she had authority or did not. Judge Buckner said to be clear he had not asked Ms. Jones' permission to enter the courthouse.

Mr. Hornik asked would he agree that the Town's Zoning Ordinance had the force of law in Town. Judge Bucker replied "absolutely." Mr. Hornik said in Section 1.4 of the Zoning Ordinance, it said that "no land or structures or any part thereof shall be constructed, erected, altered, renovated, or moved, except in compliance with the provisions of the Zoning Ordinance. He asked had he been aware of that

section of the Zoning Ordinance when he had made his decision to occupy the building. Judge Buckner replied no.

Mr. Hornik asked was he aware of Section 19.6 of the Zoning Ordinance which said that “no building or structure shall be used or occupied until the Building Inspector has after final inspection issued a Certificate of Occupancy.” Judge Buckner replied no. Mr. Hornik asked was he now aware that the Conditional CO that Orange County now relied on was not issued until about a month after he had issued his Order. Judge Buckner said if Mr. Hornik and Mr. Roberts agreed that was the case, then he trusted their word on that. Mr. Hornik said that was one of the exhibits that the County had submitted for the record that showed that the Conditional CO was signed by Susan Mellott on June 16, 2010, and the court had occupied the rooms on May 17, 2010. Judge Buckner said he may have seen that in an email.

Mr. Hornik said that Judge Buckner had indicated that there was a particular section of the law that required that court was to be conducted in the County seat. Judge Buckner said that was correct, noting it was G.S. 7A-130. Mr. Hornik said for the record the County seat was Hillsborough.

Mr. Hornik said he wanted to explore the scope of the court’s authority to enter an order such as this Administrative Order directing that the court be held at a particular location. He said if there was, for example, space at Dickerson’s Chapel Church around the corner, did he have the authority to say he would conduct court there. Judge Buckner said the statute said that the County must provide him adequate facilities, and there were also various provisions that said an officer, which was deemed to be the director or his designee, had to also say that the facilities were adequate. Judge Buckner said the County had an un-releasable responsibility, and the parallel example would be that if Chapel Hill wanted to stop having district court there were probably some hoops that they could go through to achieve that. He said as he understood it was the County’s responsibility, unless the statute was changed, to meet that.

Mr. Hornik said he was trying to determine the scope of the court’s authority, because they were occupying that building under his Administrative Order, and if the obligation of the County was to provide the court with adequate space then he could have essentially looked at any County building in the Town of Hillsborough and then said that he wanted to conduct court there. Judge Buckner said that called for a hypothetical; he did not do that and he would not do that. Mr. Hornik said there were many County buildings in Hillsborough that had CO’s and were being occupied. Judge Buckner said they would have had to prove adequate for court functions. He said the number of weapons that they seized and the number of people they dealt with that were in very highly violent conflicts required a special space. Judge Buckner said with the volume unrelated to crimes of violence or threats or intimidation and tainting the jury pool and all the technical issues, he was aware of no building that would meet those immediate needs and

then the more long term needs such as where the Judges' offices might be and where the D.A.'s offices might be, and other County responsibilities. Mr. Hornik said then at the time, in May of 2010, there was no other facility that satisfied those needs. Judge Buckner responded not to his knowledge, but said even if that had been offered and knowing what he knew about the health and safety occupancy of the courthouse that had been built and designed to meet those unique needs, he would have still ordered the courtroom to be used.

Mr. Hornik said he had done that as opposed to moving court back to Chapel Hill where it had been for two years prior to May of 2010. Judge Buckner said he had represented to the BOA previously that he could probably do that but it would take at least six months due to the number people and agencies that would have to be notified, and he had the immediate issue of having literally hundred to thousands of people who they had no time to redirect.

Ms. Lunsford said in providing adequate facilities and providing for safety in the courtroom, and in thinking about all of those people trying to park in Hillsborough, it was hard to imagine that parking was not a key concern to make sure a facility was adequate. Judge Buckner said it absolutely was a concern, and he professed no expertise about zoning regulations so do not expect him to have even a layperson's opinion about that.

Ms. Lunsford said she could see chaos. Judge Buckner said operationally, the numbers that the Clerk of Superior Court had represented at the last hearing from cases from 2006 and 2007 when they had moved a lot of operations to Chapel Hill did not grow and were not statistically significant. So, he said, as they were doing all of those types of cases in 2006 and 2007 two new courtrooms were added. Judge Buckner said a good example was a murder trial in Superior Court that had lasted over the last two weeks and at the same time there was a civil case going on. He said he had only one courtroom he could depend on being available, but now they had three courtrooms plus the hearing room available. Judge Buckner said so the way he programmed criminal court, traffic court, special DWI sessions, child support court, DSS abuse and neglect of children court, juvenile delinquency court, family violence court, general civil cases, and general family court was far different. He said the goal was to provide access to the court for all of those different civil, social services, and criminal cases, and through programming they had tried to lessen the numbers of people on any particular day. Judge Buckner said the second strategy was that because they could run multiple judges in two or more courtrooms on heavy days, that the cases that were heard on those days would clear the site more quickly.

Ms. Lunsford said then there was a strategic plan. Judge Buckner replied yes, that they had been planning for that for years. He said he wanted to reiterate that he had not known about the parking issue between the County and the Town, and it was very difficult to get the word out to all the necessary various law enforcement

agencies about where to cite a person to appear without adequate lead time. Judge Buckner said that was what he had been confronted with.

Mr. Hornik asked had Judge Buckner received any notice from the Town that they were trying to evict him from the courthouse. Judge Buckner responded no, although he had received a communication from Ms. Hauth that the civil penalty would be assessed. Mr. Hornik said that was the Notice of Violation. Judge Buckner said he believed that was correct. Mr. Hornik said he would represent to him that unless something had happened today he had not received any notice that the Town was trying to evict him from the courthouse. Judge Buckner said he accepted that representation. Mr. Hornik asked would he agree that compliance with the law was important. Judge Buckner replied absolutely, that he had taken an oath to uphold the law and to meet his duty.

Mr. Hartkopf said the Board appreciated the administrative and operational ethics that Judge Buckner had put forward to serve the people of Orange County and the district. He said when he had received the Administrative Order, the second paragraph said that the legislative executives and supreme judicial powers of State government shall be forever separate and distinct from each other. Mr. Hartkopf said he believed that was really the crux of this. He said not only were there legislative issues on the table but there were judicial operations that had to be pursued. Judge Buckner said he did not think the dispute between the two legislative bodies negated his duty and the separation of powers issue was not a power play, and he wanted to assure the Board and the Town of that. He said this Board had done its duty very diligently by his observation as a novice in zoning and land use issues, and he believed that the Town and the County had legitimate issues of concern and hoped that would be worked out. Judge Buckner said at the end of the day, his duty was affirmed for him and he in no way meant to intrude in his official capacity on the legislative responsibilities and authorities.

Mr. Hartkopf said it was in that vein that he had read that passage to him, noting he, too, did not see it as a power play but as a framework for the government. He said as he had read through the Administrative Order what he had read was a gentleman taking his duty to the citizens seriously and respected due process and their rights. Mr. Hartkopf said the other fulcrum of this was the County requirement versus the court responsibility. He said there was a requirement that court be held in the county seat, that Judge Buckner had the responsibility to uphold due process, and the County had the responsibility of hosting court which was clear and understood by this Board. Mr. Hartkopf said the Board also understood that Judge Buckner had the added responsibility to keep things as safe as possible in the parking and in the facilities. He said having been a recent visitor to the court it appeared to be working rather well.

Mr. Hartkopf said there had been a statement made that the County did not have the authority to remove him, and naturally the Town did not have that right. He asked Mr. Roberts if that was implicit in anything written or that he had said that

if they could they would make the court leave so the parking problem would be resolved. Mr. Roberts said he did not believe that was implicit, and did not believe the County had the authority or the willingness to try to expel Judge Buckner from the courtroom. Mr. Hartkopf asked if the County had that desire. Mr. Roberts said he could not speak for the County in that regards, but personally he certainly had no desire to do that. He said he did not know if the Town had the standing to do that, but he and Judge Buckner had talked about whether there was a method to challenge that. Mr. Roberts said Judge Buckner did not believe there was except possibly through the Chief Justice. He said he respectfully disagreed with that, noting that any judicial order might be challenged by some special writ, but he did not see the County filing any special writ to do that.

Mr. Hornik said for the record that the Town was not convinced that they did not have an ability to do something about it, but they had chosen not to because they did not want to enter into a constitutional battle with the court. He said they were trying to solve the problem somehow.

Mr. Hartkopf agreed, noting he was just not sure how to do that.

Mr. Hornik said he did not want to give the impression that the Town conceded that there was nothing that could be done about the court's order. He said rather the Town had chosen not to do anything about it.

Mr. Roberts said he believed Mr. Hornik would agree that he had not been involved in this case before April, in that no one had bothered to talk with him or ask his advice about what they should do before they had come to the Town. He said he was not here in 2006, but in his initial conversation with Mr. Hornik and several since then it had involved the statement, "What can the County do to settle this problem and make the Town and the Board of Adjustment happy" other than sending people to park at Durham Tech. Mr. Roberts said he had asked Mr. Hornik what could they do, and if possible they would do it. He said he was not the County Manager and could not make certain representations, but if it involved building more parking then the County could find a way to do that.

Mr. Roberts said they wanted to settle the issue, adding that no one wanted this to play out in the courts. He said he never wanted that and he had asked from day one how to settle it.

Mr. Roberts introduced Susan Mellott, noting she was the County's Chief Building Official and the Town of Hillsborough's building inspector. Mr. Roberts asked how long she had occupied that position. Ms. Mellott replied since 2000. She said prior to that she had worked within the Building Inspections Division beginning in 1994, and prior to that she was in the Erosion Control Division beginning in 1982. Mr. Roberts asked was it fair to say she had quite a bit of experience in inspections. Ms. Mellott replied she did.

Mr. Roberts asked Ms. Mellott to describe her duties. Ms. Mellott said it was her responsibility to see that the office of Building Inspections was conducted appropriately, that they enforced the State building codes and the Administrative Code that contained references to the General Statutes that were applicable to their work in issuing permits, conducting inspections, and issuing Certificates of Completion, of which most of them called Certificates of Occupancy.

Mr. Roberts asked was she familiar with the underlying situation of why they were here tonight. Ms. Mellott replied she was. Mr. Roberts asked had she had the chance to review what was marked as Appellant's Exhibit 1. Ms. Mellott replied yes, noting that was the CCO (Conditional Certificate of Occupancy). Mr. Roberts asked had she personally issued that CCO. Ms. Mellott replied not personally, noting she was not in the office that day but she had authorized the issuance of that CCO via email. She said their process was an electronic process and you could see that the signature was an electronic signature. Ms. Mellott said there were a series of steps that had to be satisfied before the CO would be issued so that they did not make mistakes, and those processes had to be approved before the CO could be generated.

Mr. Roberts said before the CCO was issued, did she or someone in her office verify that all permits had been issued with the exception of the Hillsborough Zoning Compliance Permit. Ms. Mellott replied yes. Mr. Roberts asked if that included all health, life, and safety and related permits for the inside of the building. Ms. Mellott said that was correct, noting the permits were issued at the beginning and they looked at whether the final inspections had been completed and that all conditions had been satisfied before any CO could be issued.

Mr. Roberts asked had all of those inspections been completed and successfully passed on the Justice Center. Ms. Mellott replied yes, except for the Zoning Compliance Permit from Hillsborough. Mr. Roberts asked if that Zoning Compliance Permit applied only to the parking outside of the Justice Facility. Ms. Mellott said she had a list from Senior Planner Tom King that was generated June 17, 2010 and there were several items of which parking was a part. She paraphrased the items listed by Mr. King as:

- that the site plan had to have presentation of acceptable remote parking facilities or the correct number of parking
- that they needed an as-built landscape plan
- that the north side of the parking area adjacent to East Margaret Lane had to meet screening requirements
- that the gravel driveway and parking area off South Churton Street had to be removed
- that there were some cosmetic things to be done to the aluminum security fence door to meet the Hillsborough appearance committee
- handrails leading into River Park must be replaced with picket style handrails.

Mr. Roberts said then there was nothing related to health, life or safety. Ms. Mellott responded no. Mr. Roberts asked was it uncommon to issue CCO's. Ms. Mellott replied no, stating that was allowed under the General Statutes and was up to the discretion of the inspector. She said it was something they did quite often to help people out if their building was not quite finished. Ms. Mellott said they had issued 123 Conditional or partial CO's within the last three years, with 46 of those commercial and 39 within Hillsborough. She said four of those were still CCO's with two of those for the Justice Facility. She said those four that were still CCO's were all relative to Hillsborough's zoning conditions.

Mr. Roberts said then it was a discretionary power of the Inspections Department to issue CCO's. Ms. Mellott responded yes, noting that power was given through G.S. 153A-363 in the language regarding Certificates of Completion. She said to remember that Certificates of Completion and Certificates of Occupancy were interchangeable terms, noting the Administrative Codes referred to both in the same sections. Ms. Mellott said that the CO was relative to all State and local codes and both had to be checked before they issued the permit to ensure that all other local jurisdictions had approved the issuance of the permit and again at the end of the project. However, she said, the last sentence in that section said that a partial or temporary CO could be issued at the discretion of the inspector.

Mr. Roberts asked to what building did the CCO apply and where was that building located. Ms. Mellott said it applied to the building located at 106 East Margaret Lane which was the Justice Facility.

Ms. Lunsford asked when you issued a CO for someone to occupy a commercial building, was parking considered. Ms. Mellott said parking was considered specifically in relation to ADA (Americans with Disabilities Act) requirements, which related to accessibility. She said accessibility was determined based on how many parking spaces were required through other agencies, and not the Building Code. Ms. Mellott said if there was no parking there would be no ADA requirement or accessibility requirement. She said based on the number of parking spaces required by typical zoning, you then applied that number to the Building Code or the accessibility code to determine how many parking spaces had to be accessible. Ms. Mellott said before they issued a CO or a CCO those spaces had to be approved by her department. She said they also considered fire lanes and other emergency items related to transportation for access to the building, such as handicap ramps and driveways, which were a part of the Building Code. Ms. Lunsford said then that was reviewed and approved. Ms. Mellott responded yes.

Mr. Stevenson asked what the duration was of a CCO. Ms. Mellott replied it did not have a date or duration because it was based on satisfaction of the conditions. She said typically they listed at the bottom of the form the outstanding conditions that had to be met before issuance of a permanent CO. Ms. Mellott said this CCO

did not have those conditions because they had not received them until the next day after the CCO had been issued.

Mr. Stevenson asked who's responsibility was it to make the coordination between the Town and the County; that is, to get conditions from the Town. He said he would think that if he was going to issue such a permit that he would make sure that all the relevant agencies those conditions would come from had been contacted. Ms. Mellott said they had a process within their electronic permitting system that sent out an email notice to all the agencies that gave approvals on the front end of the project, which Hillsborough was a part of the day that the final inspection was requested. She said on the front end people entered conditions that had to be approved at the end, and when the final CO was requested all of those people received an email alerting them that the project was coming to an end and any conditions not satisfied needed to be brought forward.

Mr. Stevenson asked what the time period was between when the email went out and the time the CCO was issued. Ms. Mellott responded she could not tell him the exact date because she did not have the electronic information with her, but she could tell him that she had checked after they received the Judge's Order and Mr. Roberts had asked for the CO. She said she had gone back and checked and all finals were in place prior to the Judge's Order. Mr. Stevenson said he specifically was looking for the Zoning Compliance Permit which should have been listed as a condition. Ms. Mellott said that condition was holding up the CO and that was why they had not issued it. She said the day the final inspection was done, if all the conditions had been satisfied they automatically generated the CO that day. Ms. Mellott said this particular one was held up because the Zoning Compliance Permit from Hillsborough had not been approved; therefore they had not issued the CO the day of the final inspection. She said they would not issue a final CO if any building code issues were outstanding. (**Staff Note:** The Zoning Compliance Permit had been issued. The Town could not sign off on a CO because all zoning requirements had not been met.)

Mr. Whitmore said but they could and did issue CCO's without all the conditions being satisfied. Ms. Mellott said they could, noting they assessed each situation based on its merits.

Mr. Sain asked what their calculation was for parking for such a building as the Justice Facility. Ms. Mellott said the Building Code did not address parking except for handicap accessibility, noting the numbers were generated through zoning and they took that number and applied the Building Code prescriptive formula to determine how many of those had to be accessible, where they had to be located, access aisles, and things of that nature.

Mr. Hartkopf asked were there other Conditional COs in force where parking was the reason. Ms. Mellott replied there were currently four, with two for the Justice

Facility facility, one was for the Orange County Sportsplex with the issue being the sidewalk, and one was for the Farm Bureau having to do with stormwater.

Mr. Hartkopf said the final CO was not issued because parking remained a condition attached to issuance of that final CO. He said for the case before them now they were hearing that because a CCO existed then the parking requirements were somehow unenforceable. He said from a process perspective he was trying to understand that. Ms. Mellott stated she could only say that her job stopped at determining whether the building was safe, and then she had the judgment call of whether or not she issued a CCO and they had decided to do that in this case.

Mr. Hornik said it was the County that issued the final CO for any buildings in Hillsborough, that the Town did not actually issue the CO. Ms. Mellott said that was correct. Mr. Hartkopf said the Town was the signatory to the County's CO. Ms. Mellott said that was correct.

Mr. Hornik said essentially Ms. Mellott's office performed building inspections for the Town of Hillsborough through a long term arrangement. Ms. Mellott replied that was correct. Mr. Hornik said the Town could hire its own Building Inspector and perform its own building inspections and issue its own CO's. Ms. Mellott said that was correct. Mr. Hornik said then she essentially acted as the Town's Building Inspector when she was issuing CO's for the Town of Hillsborough. Mr. Hornik said that was why she would want to have or seek to have a Zoning Compliance Permit from the Town of Hillsborough before she issued a CO for a project in the Town. Ms. Mellott replied that was correct. Mr. Hornik said she would not need that when she was out in the County because that had to come from the County's zoning people. Ms. Mellott said that was correct.

Mr. Hornik said he understood Ms. Mellott to say that Mr. Roberts had asked her to issue the CCO. Ms. Mellott responded Mr. Roberts had come to her office on June 16, 2010 but she was not in that day. Mr. Hornik said then on June 16, 2010 Mr. Roberts had come to her office when she was not there and asked for the issuance of a CCO. Ms. Mellott said Mr. Roberts had come to the office but she was not sure he had asked that the CCO be issued. Mr. Hornik said that was the date that the CCO was issued. Ms. Mellott said that was correct and she would assume he had asked for it but she had not personally heard him say that. She said she had been contacted through email about releasing the CCO based on the Judge's Order and she had responded yes and emailed approval.

Mr. Hornik said Ms. Mellott had cited G.S. 153A-363, which was the authority that counties had to do building inspections in the county jurisdictions. Ms. Mellott said that was correct, and there was a corresponding one for cities. Mr. Hornik said then G.S. 153A-363 really had nothing to do with what she did in Hillsborough, because she would be operating under the companion statute for cities when acting as the Building Inspector for Hillsborough and issuing permits

for the Town. Ms. Mellott replied he was the legal expert and she would have to take his word on that.

Mr. Hornik asked was she aware that the Hillsborough Zoning Ordinance, Section 19.6, provided that no building or structure could be occupied and no CO could be issued until after the Zoning Compliance Permit had been issued. Ms. Mellott replied no. Mr. Hornik said she was only concerned with parking as far as building codes were concerned in two regards, in that the zoning people would tell her how many parking spaces were required for the use, and then based on that number she would calculate to make sure there was ADA compliance. Ms. Mellott said they did not verify the number of parking spaces after the parking lot was built. She said they only took the number that they were told was required and then applied the accessibility formula to that to determine the number of accessible spaces, and they then verified that that number of spaces were built and built to code. Mr. Hornik said then they really only cared about making sure there was ADA compliance so far as parking was concerned and not zoning compliance. Ms. Mellott said that was correct. Mr. Hornik said then she had no idea whether there was compliance as far as parking. Ms. Mellott said she had no idea because she did not enforce zoning.

Mr. Hornik said Ms. Mellott had also talked about there being 39 conditional CO's in Hillsborough. Ms. Mellott replied yes, that 39 CCO's had been issued over the last 3 years. Mr. Hornik asked how many of those 39 CCO's were issued without the Town's or the Planning Director's or Zoning Officer's authorization. Ms. Mellott replied none of those. Mr. Hornik said with the exception of this one. Ms. Mellott said that was correct.

Mr. Sain said it seemed that everything was coming back to non-compliance.

Mr. Roberts said he would like to make a two-minute final statement at the appropriate time.

Mr. Hornik asked if Planning Director Margaret Hauth had anything to add to the public record. Ms. Hauth replied she was present only to address questions.

Mr. Roberts stated he felt and had sensed some anger from the Board and he understood that. He said the Town was made a promise by a County employee that Orange County would take certain actions, and two years later Orange County did not follow through with that action. Mr. Roberts said they had an affidavit from the County Manager indicating that that employee did not have the authority to make that promise; she did not have the power to enforce the terms of that promise and make that promise happen. He said she at a later time presented that to the County Commissioners, and he saw nowhere in the minutes where it said that was a requirement for getting the facility built. Mr. Roberts said he could not say that the County Commissioners ever knew that she had made that promise to this Board.

Mr. Roberts said as the County's attorney he had to look at that and say that Orange County, the Town of Hillsborough, or the State of North Carolina as government entities were not legally bound by unauthorized acts of their employees. He said as the County's attorney he had to apply that law to his analysis of this situation. Mr. Roberts said there was ample case law that prohibited cities, counties, and states from being bound by unauthorized acts of any employee with the sole exception of a county manager or town manager or someone in State government with apparent authority to make such representations. He said he understood why this Board was upset and why the Town Board was upset; promises were made and not kept, but it was an unauthorized promise.

Mr. Roberts said there were two reasons why they should reverse the Zoning Officer's action. He said first, it was the wrong party. Mr. Roberts said if the Zoning Officer wanted to cite someone it should be the judge or the courts, in that Orange County did not have the legal authority or the power to countermand the Judge's order to occupy the building. Mr. Roberts said that as well, Orange County did not have the inclination to countermand that order. He said that there was case law cited in the brief that demonstrated that counties were immune from any sort of civil liability from following a court order or taking actions in compliance with a court order. Mr. Roberts said that was what they had done in issuing the Conditional Certificate of Occupancy and it was rightly issued. He said that CCO was the second reason why the Zoning Officer's action should be reserved. Mr. Roberts said the CCO was in place but was not what they wanted; they wanted the permanent and final CO.

Mr. Roberts said if a court told them that they had to comply with that zoning requirement for parking, the CCO would change to comply with zoning responsibilities for parking. He said they were willing to add parking in Town and would find a way to do that. Mr. Roberts said if owners of land were citable in this situation then citations would go out in every town and every county across the State pretty much every time a CCO was issued. He said this CCO was legal and valid, and the only legally justifiable action the BOA could take tonight would be to reverse the Zoning Officer's action.

Mr. Roberts asked that the Board accept into the record the memorandum and exhibits marked 1, 2 and 3. He said exhibits 1 and 2 were in the record, which were the Conditional Certificate of Occupancy and the Administrative Order, and exhibit 3 was only for information and review.

Mr. Whitmore observed that they had heard Judge Buckner talk about Pam Jones being a County official and that he had trusted Ms. Jones as the designated person for the past 14 years. And yet, he said, Judge Buckner had also said they had wanted to avoid technical delays. Mr. Whitmore said that just did not line up; Judge Buckner trusted her and the BOA had trusted her. He said now they were hearing that she was not authorized. He asked how they would know that Mr.

Roberts or anyone else was authorized. Mr. Roberts said he understood and it was wise to make that observation. He said from a legal perspective there was no case law that said the County's attorney was an authorized person to make representations like he had made. Generally, he said, an attorney with the client's permission was authorized to make certain statements. Mr. Roberts said the County Manager was present and could contradict him if he believed anything had been said that was not authorized by the County Board or by the County Manager. Mr. Whitmore said you can understand the frustration when they heard the Judge and the County talk about a trusted employee as an official, and that was taken at face value. Mr. Roberts said that was why he understood the anger that he had seen.

Mr. Hartkopf said the Board, he believed, was not angry but rather frustrated. He said the Board was not promised, as a promise was a representation of something that would come. Rather, he said, they were assured that the process for the shuttle was in place, and it was represented as a "done deal." Mr. Roberts said he believed he had read something similar to that. Mr. Hartkopf said having said that, the BOA had in the past taken promises and turned them into conditions of approval, and if they could not do that then the ramifications for the next people to come before this Board were great. He said he understood Mr. Roberts' assertion that a County could not be bound by the promises of persons not in a position to fulfill those promises. Mr. Hartkopf said but again, this was not a promise but a representation of something that had already come. And, he said, it became part and parcel of this contract between the Town and the County about the Justice Facility.

Mr. Hartkopf said in paragraph 18 it used the phrase "ultra vires" and asked what that meant. Mr. Roberts said it was Latin and was a legal term that meant "beyond powers" and was used to indicate that an employee or subordinate did not have the authority to take certain actions.

Ms. Lunsford asked why Ms. Jones had come and presented before the Board if she did not have the authority.

Mr. Hartkopf said that Ms. Jones had presented to the Board that she had the authority and presented to the Board that it was a "done deal" that a shuttle bus had been secured as well as a process under which employees would be transported. Mr. Hornik said in looking at the minutes of that meeting, Ms. Jones' title was noted as Director of Purchasing and Administration, or something similar to that. He said in any case, she was the person who had appeared.

Mr. Stevenson asked why any organization would send someone to secure a permit that did not have legal authority to make the agreement in the first place. He said that was "insane" to him. Mr. Roberts said the Board of County Commissioners was not aware of what had gone on in this room. He said he had talked with Geoff Gledhill, former orange County Attorney, about this issue and

he had not been consulted about anyone coming before the Board. Mr. Roberts said he did not know that anyone else knew what was being said at the time, so he could not say why anything was said or that anyone else knew what Ms. Jones was saying. He said as far as he knew that was the only thing she had said that was not authorized. Mr. Roberts said he believed the grant for the shuttle bus had been awarded but the State had then withdrawn it, so the County no longer had the ability to fund a shuttle bus.

Mr. Hornik said they would hate to have to have a quorum of the County Commissioners present to testify every time the County made an application. He said based on this experience, it seemed they would have to have that authority in order to believe what they were told. Mr. Hornik said he understood that was not the way government worked, and he hoped they would all come out of this somehow better off in the end. But, he said, right now the Town was left with not even knowing if the County Manager had the authority to speak for the County if he were to testify in front of the Board. Mr. Hornik said they would have to have a quorum of the County Board in front of them saying that they agreed to whatever was being proposed, and that just could not be the way things worked.

Mr. Whitmore said that could easily be satisfied in the future by having the people with the authority to produce written authority, basically a Power of Attorney, that delegated authority to a person for a particular issue. He said then whoever appeared would have that delegation of authority letter. Mr. Whitmore said he did not believe anyone wanted to deal with a bunch of litigation, noting the whole idea was that they have a safe method for the court to conduct its business while allowing the rest of the downtown community to function. He said that was what the Board was bound to do with the zoning laws.

Mr. Roberts said as far as litigation, he could tell them that the County Commissioners would authorize him to dismiss every bit of it in a week if they could reach some settlement position where the County did something that would satisfy this Board and the Town, and have people at the meetings who were authorized to tell the Town what the County would do.

Mr. Hartkopf said in the attachments, at the bottom of page 204, part 2, with regards to sovereign immunity, he had read the case law included in the packet but he had not heard Mr. Roberts talk about that particular topic tonight. Mr. Roberts said this and one other section were included to preserve the record. He said he was presenting that information but would not make further argument on it, reiterating it was included to preserve the record on appeal.

Mr. Whitmore asked in that same attachment, it asked the question did the County have superior jurisdiction over the Town in making determinations of whether something was “occupiable” or not. Mr. Roberts responded that the Town had jurisdiction and control in the Town, but his opinion and Mr. Hornik’s opinion differed but his opinion was that there was a particular statute that described

exactly what a town could control as far as State or county property, and that was G.S. 160A-392. He said in effect, that statute said the Town could regulate the erection, construction, or use of buildings. Mr. Roberts said his and Mr. Hornik's interpretation of that language were at variance. He said as far as the erection, construction, and use of a building, if the County wanted to put a dog kennel in a residential section of the Town in a County-owned building, the Town could absolutely veto that because the Town controlled the use of that building. Mr. Roberts said there was case law that a town or a county could not control a town or a county in anything other than the erection, construction, and use of buildings. He said his viewpoint was shaped by the definitions of the words erection, construction, use, and buildings, and Mr. Hornik had a differing opinion.

Mr. Hornik said the Town's opinion was that there would never have been a building there if the County had not made representations about how they would satisfy the parking requirements. He said in regards to the sovereign immunity question, there was law that said that unless a local government either by statute or by contract was deemed to be subject to waive its sovereign immunity then there was no immunity. Mr. Hornik said that G.S. 160A-392 said that all the provisions of that part, which was part 3 of Chapter 160A, or Article 19 of Chapter 160A, were hereby made applicable to the erection, construction, and use of buildings by the State and its political subdivisions. He said G.S. 160A-389 was part of that same part and said that "a building or structure is erected, constructed, reconstructed, altered, repaired, converted, or maintained, or any building, structure or land is used in violation of this part or of any ordinance or other regulation made under authority conferred thereby, the city, in addition to other remedies, may institute any appropriate action or proceedings to prevent the unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance or use, to restrain, correct or abate the violation, to prevent occupancy of the building, structure or land, or to prevent any illegal act, conduct, business or use in or about the premises."

Mr. Hornik said it was his opinion that the State Legislature had already said that counties must comply with Article 19, Part 3 of Chapter 160A and any ordinances that the Town adopted under that authority. He said that was exactly where they were, in that it was the staff's position that there had been a violation of the Zoning Ordinance and non-compliance with the approved site plan which approved the construction of the building under the Town's ordinance adopted pursuant to that section of State law. Mr. Hornik stated that G.S. 160A-392 said that the Town had some say over the construction of that building, and G.S. 160A-389 said that the Town had enforcement remedies that were available. He said by law the County was subject to that.

Mr. Roberts said he had not made that argument because of the legal technicalities, but he would make that argument to a judge if necessary. He said it was his position that G.S. 160A-392 did not apply to the County for a particular reason and the sovereign immunity was still in place.

Mr. Hartkopf said it was his understanding that it was Ms. Hauth's previous testimony that she had received reports from Town staff and the local police department regarding the movement of traffic and pedestrians in the vicinity of the Justice Facility. Ms. Hauth said as part of an ongoing study the Town was conducting they had staff conducting traffic counts and observing traffic situations in the downtown generally. Mr. Hartkopf asked when the last such reports had been received on those activities. Ms. Hauth said she had some casual observations made today, but the actual counts were last done the second week of July. Mr. Hartkopf said that would be after Judge Buckner moved court back to Hillsborough. Ms. Hauth replied yes. Mr. Hartkopf asked were those observations and counts conducted on actual days that traffic court was in session. Ms. Hauth replied yes. Mr. Hartkopf asked what her opinion was on what those reports showed in regards to the safety and efficacy of foot and mobile traffic in the area of the Justice Facility. Ms. Hauth said without having the reports in front of her she could not quote numbers of illegal parking and the like, but in general a number of situations were noted and photographed of significant illegal parking within the lot next to the Justice Facility and on the street. She said they had coordinated with the Police Department and they had conducted enforcement of the illegal parking on the street, noting that they did not have enforcement powers within the County's parking lot. Ms. Hauth said it was a matter of concern for the Fire Marshal which caused him to conduct his own study of the site and offer some recommendations and requirements of how parking and signs needed to be installed in the parking lot to provide safe fire and emergency access to the building.

Mr. Hartkopf asked was she offered any reports or opinions of the queuing at the intersection of Churton Street and Margaret Lane on the east side and on the west side as well. Ms. Hauth said not that she recalled specifically. She said there had been casual reports of people pulling up and stopping in front of the courthouse to drop people off, which created a slowdown for people trying to turn right onto East Margaret Lane from Churton Street which impacted Churton Street. Ms. Hauth said she had not heard anything since the courtrooms were opened about people trying to leave East Margaret Lane and access Churton Street and queuing at the light from that direction. She said she had heard in the past that it sometimes took three cycles to get through the light. Mr. Hartkopf said he did not want to go in depth about that since there was construction taking place on East Margaret Lane. Ms. Hauth said all of those instances were prior to the construction.

Mr. Hartkopf determined that there were no other speakers or questions for witnesses at this time.

MOTION: **Ms. Lunsford** moved to close the Public Hearing on Case #BA-08-2010. **Mr. Sain** seconded.

VOTE: Unanimous.

Discussion:

Mr. Stevenson stated for clarity a Notice of Violation had been issued for failure to meet the conditions of approval, and he wanted to be specific about those conditions.

Mr. Hartkopf said those conditions could be found in the second paragraph on page 2 of the staff report. He said there was a condition that there be a submittal of the parking plan referred to as process documents in the relevant condition of approval, and it was stated the condition was under the influence of the Zoning Compliance Permit. Mr. Hartkopf said they had discussed the conversation with Pam Jones that County employees would utilize the Durham Tech lot or some other remote lot, and the Board could exercise its discretion in that event. He said, with regard to parking, by putting in a condition, it said if the County actually committed to doing that and, as had been reported the funds and the buses were already there, they would make that a condition of approval and allow the building of the Justice Facility to carry on.

Mr. Hornik said in regards to the Notice of Violation itself, which was Attachment 2 to the staff report, was Ms. Hauth's May 26, 2010 letter. He said that in the second paragraph it was stated: "Please take notice that the Town of Hillsborough has determined that the renovated Orange County Courthouse, located at 106 East Margaret Lane, is currently being occupied without a valid Certificate of Occupancy in violation of the Conditional Site Plan approval granted for the Orange County Justice Center in November 2006. In particular, the Courthouse has been occupied without satisfaction of the condition of approval for the Courthouse Expansion project which required Orange County to submit to the Town of Hillsborough process documents describing how Orange County would use the remote parking spaces at Durham Tech's campus in Waterstone to satisfy Orange County's off-street parking requirement for the expanded and renovated Justice Center. Additionally, the Justice Center has been opened and occupied without a Certificate of Occupancy and despite the fact that it did not satisfy Hillsborough Zoning Ordinance off-street parking requirements found in Section 6.6 of the Hillsborough Zoning Ordinance."

Mr. Stevenson said that Notice of Violation was submitted prior to the CCO. Mr. Hornik replied yes, noting the CCO was issued June 16, 2010. Mr. Stevenson asked how that CCO impacted the Notice of Violation. Mr. Hornik said that was what the Board of Adjustment had to determine.

Mr. Hartkopf said his thinking on that was that there was a statement on the front of the CCO in the box just under the County seal. He said at first reading, it basically said that in this case if the County agreed that the County had fulfilled the requirements then the County ought to be able to inhabit the County's building. Mr. Hartkopf said on its face it looked like that was what is said. He said on reading it several times and listening to the two attorneys this evening, it became clear that when it said in the second sentence "all applicable ordinances,

restrictions, regulations of the County, North Carolina, and statutes of North Carolina...” it was in those statutes where the Town’s ordinances were authorized. Mr. Hartkopf said the Town’s ordinances were permitted and enforced by statute, so it carried the force of law.

Mr. Hartkopf said the next sentence said “if any of the conditions or restrictions so specified (that is, in the statutes) or any part thereof shall be held void or invalid, or if any conditions or restrictions are not complied with (which was a long way of saying the Town’s ordinances) this Certificate shall be void and of no effect.” Mr. Hartkopf said with that having been said and without comment to anything else, it would seem to be that the CCO was void and of no effect.

Mr. Hornik pointed out to the Board Section 19.6 of the Zoning Ordinance, which said that, among other things, that: “No building, structure, or zoning lot for which a Zoning Compliance Permit has been issued shall be used or occupied until the Building Inspector has, after final inspection, issued a Certificate of Occupancy. However, the issuance of a Certificate of Occupancy shall in no case be construed as waiving any provision of the Ordinance.”

Mr. Hartkopf said if they took that section, and they looked at the document they were provided tonight, under “Conclusions,” one of the arguments made in that paragraph was that there was a CCO in place. He said from his perspective that argument failed. Mr. Hartkopf said the next sentence that said that Orange County’s actions were consistent with a facially valid court order thus giving Orange County qualified immunity for its actions. He said he believed that Judge Buckner had made it very clear when asked questions about it that the three branches of government were separate, and that the judiciary had its rules as did the other two branches. Mr. Hartkopf said he believed that if Judge Buckner had been asked to do something he thought was illegal and inconsistent with his oath he would not have done it, and that Judge Buckner believed he was acting within his oath and within his charge. And, he said, Judge Buckner had a court responsibility to carry on court, and he had made it clear to the Board that the County had a responsibility to provide adequate facilities, including chairs, tables, doors and walls. Mr. Hartkopf said those two things did not cross.

Mr. Stevenson said it was his belief that any judge’s order did not relieve the County of the responsibility of meeting the conditions of the Town’s Zoning Ordinance. He said the conditions were still out there and still needed to be complied with.

Mr. Hartkopf said in fact, Judge Buckner said that on the bottom of the first page of Appellant’s Exhibit 2, where it said “I do not believe the courts have any current jurisdiction or responsibility in this disagreement between these two legislative bodies.” He said the Judge was saying he had his responsibilities and the issue was between the County and the Town, and he believed the Judge had

pursued that realizing that he was likely going to create a situation but that he had a duty.

Ms. Lunsford said for clarification, did the CCO mean you could not occupy that building without making sure it met all conditions, or did it mean you could occupy but you still had the conditions and you had to make sure those conditions were satisfied. Ms. Mellott stated that the Conditional CO meant that the CO could not be issued until the conditions were satisfied. She said the conditions were typically stated at the bottom of the CCO, but her office had not received those conditions before they had issued the CCO because Tom King had indicated he had to check with the Town Attorney. Ms. Mellott said they received the conditions the next day via email from Tom King.

Mr. Hornik said what had happened was the Town had been told that the CO was going to be issued that day, and Mr. King had called him to ask what to do about that. Ms. Mellott said that was because her office had requested the conditions, because Mr. King had checked “no” on the form that he had not approved the Zoning. She said her office was diligent about getting all necessary approvals before issuing a final CO. Ms. Mellott said they had contacted Mr. King and asked what else was needed, and his response was he would get back with them. She said then, he had sent the email the next day and attached the conditions. Ms. Mellott said her staff had issued the CCO prior to getting the details from Mr. King, so they had added that clause at the bottom of the CCO.

Ms. Lunsford said then you could occupy a building with a CCO. Ms. Mellott stated that was correct, with conditions. Ms. Lunsford said and there were no timelines to meet those conditions. Ms. Mellott said you could include a timeline, but they had not done so.

Mr. Hornik said he believed the idea was that hopefully and eventually the conditions would be satisfied and an unconditional CO could be issued. Ms. Mellott said that was correct and that was the example she had given, in that of the 123 issued in the last three years there were only four outstanding with three of those for the County.

Mr. Hartkopf said he could see the need for a CCO given the nature of the facility, but the question he had was were all the blocks checked. Ms. Mellott replied “absolutely.” She said they were all checked, but one was checked “No” which was the Town of Hillsborough Zoning. Mr. Hartkopf said that begged the question as to what had prompted her office to go ahead and issue the CCO when they knew that Hillsborough’s Zoning had not been signed off on? Ms. Mellott said at the time the Administrative Order was issued by the Judge they did not have a copy of the Order and did not know anything about it. She said when the Administrative Order was brought to their attention in June they issued the CCO. Ms. Mellott added that to her a Judge’s order was very serious so she had approved the issuance of the CCO.

Mr. Hartkopf said for clarification, with regards to the work being done on the old part of the Justice Facility, was there at some point in time a conversation that said that this issue only applied to the Mural Courtroom or to the whole building. Mr. Hornik said the Administrative Order said in the last paragraph, "Under my duty as Chief District Judge, for all of our resident and visiting judges, to meet and the above Constitutional, statutory, Code of judicial conduct and Inherent responsibilities and mandates, I have decided that court will be held in the Mural Courtroom beginning Monday, May 17, 2010."

Mr. Hartkopf asked then was the CCO just for the Mural Courtroom or did it deal with the Gordon Battle Courtroom and the offices on the same floor as the Gordon Battle Courtroom. Mr. Hornik said the Order said 13,098 total square feet, and he did not know if that was the entire building. Ms. Mellot said that was the whole original building, and it was their intent that the CCO be for the entire renovation. She said the addition was one permit and the renovation was a separate permit which was why there were two CCO's still outstanding for the entire complex.

Mr. Stevenson said then there were two CCO's, one for the old part and one for the new, and the one they were concerned with here was the one for the old part. Ms. Hauth stated that the one for the new part was issued many months ago so that they could move out of the old part and into the new part and then begin renovating the old part.

Ms. Mellott said the one in front of them was for the renovation and not the addition. She said the additional CCO had ties to the covered area out front at the passenger drop-off zone.

Mr. Stevenson asked what the County's recourse was at this point.

Mr. Hartkopf said they were bound by the Town's ordinances, and the ordinance required X parking spaces but they did not have X spaces identified. He said the Town was currently looking at modifying its ordinances, so using round numbers it could be that the new regulation would require only half of X. But, Mr. Hartkopf said, they did not yet know how that would turn out, but there were understandings on the line right now that said they required X spaces.

Mr. Hartkopf said there was also the option that other parking could be erected elsewhere or even some perhaps erected on that very site. Or, he said, other solutions might be identified that had not yet been considered. Mr. Hartkopf said the County could elect to wait and see whatever the modified ordinance might require, and the County would then have to petition the Town to have this case evaluated under the new parking requirements, and they had agreed that could happen. He said if the requirement was half what it was now, the County would be very close to meeting its requirement so that may well be a solution.

Mr. Stevenson said he wondered if the County could apply for a new Conditional Use Permit, because apparently the original agreement was not going to happen.

Mr. Hartkopf asked could the County do that. Mr. King said not under a Conditional Use Permit because this was a site plan approval. Mr. Hartkopf said the Board's point was that they had approved the site plan on a particular set of ordinances and those ordinances existed today. Mr. King said the County would have to show they were complying with the ordinances even if they filed for whatever permit it would have to fall under now.

Mr. Stevenson said he understood that that really did not affect the Board's decision, or it shouldn't. Mr. Hornik said what they were asked to do tonight was to either affirm or modify or reverse the determination of the Zoning Officer. He said there were all kinds of ways they could do that. Mr. Hornik said they could just say it was confirmed, or they could just say it was reversed. He said they could say it was affirmed but the penalty would only be for a certain period of time, or that they would suspend the penalty for some period of time. Mr. Hornik said the Board had the authority to do whatever the Zoning Officer could have done under the ordinance on this appeal.

Mr. Hartkopf said the Board could simply affirm the Zoning Officer's ruling tonight and then at some later point in time the County could file for relief on the appeal, which he believed would come before the BOA. Mr. Hornik replied no, that the appeal would be to Superior Court. Mr. Hartkopf said if the BOA were to uphold the ruling and the County was to come into compliance then it would come back to the BOA at some point in time with the County saying they had been out of compliance for X number of days and ask for forgiveness of the assessed penalties. Mr. Hornik said he had not thought about that. He said there was some mechanism under which that could be done but he did not know exactly how.

Ms. Lunsford said she was getting hung up on the fact that the CCO was issued saying it was okay to occupy the building so long as the conditions were addressed at some point.

Mr. Hornik said there was no timeframe, and further he believed they had had the conversation that at least in his mind satisfied that the CCO was without course.

Mr. Stevenson said it appeared that the CCO was prematurely issued.

Mr. Sain said it was prematurely issued after the Notice of Violation, and had it been issued prior to that there may have never been a Notice of Violation. He said he understood that was all speculation.

Mr. Hartkopf went over the timeline, noting that the permit to construct was issued May 22, 2007. He said the CCO date of June 16, 2010 was the date that the document was created, and the print date was when Ms. Mellott actually printed it.

Ms. Lunsford asked about the date of the Notice of Violation. Mr. Hornik responded that was issued on May 26, 2010.

Mr. Hartkopf said while the building permit was issued significantly prior to the Notice of Violation, the CCO was issued after the Notice of Violation.

Ms. Lunsford asked why the County had not addressed the Notice of Violation prior to issuing the CCO. She said someone had to have known that it was already in the record that there was a Notice of Violation, so why would they issue a CCO before addressing that.

Mr. Stevenson said they were obviously ignoring the Notice of Violation.

Ms. Lunsford asked would Susan Mellott have gotten a copy of the Notice of Violation, or would have been informed of it.

Mr. Hartkopf asked why that mattered.

Ms. Lunsford said because if Ms. Mellott knew about the Notice of Violation, she still issued the CCO.

Mr. Sain said she had issued it because she had been informed of the Judge's Administrative Order.

Ms. Lunsford said she saw it as being very irresponsible that the Zoning had not been addressed, yet those actions had been taken. She said they had heard several meetings ago that the Town merchants were extremely upset because this issue was affecting their business. Ms. Lunsford asked what would happen when the downtown shut down because people could not get to the restaurants and shops.

Mr. Sain asked when the new parking regulations would be effective and enforced by the Police. Ms. Hauth said the restriping was almost complete and the new signs would be erected shortly. She said probably by the time of the September Board meeting the Board would be able to judge how effective the changes were. Ms. Hauth said the Police were handling extreme cases now, such as when someone parked in the wrong direction or did something considered odd or dangerous. But, she said, they were not conducting constant enforcement. Mr. Sain said once that came into play that would take a lot of the on-street parking away, noting that the merchants had been very concerned about court visitors and employees taking up all the available downtown on-street parking.

Ms. Lunsford said from her observations the parking in the downtown appeared to be very chaotic.

Mr. Hartkopf said that was why he had questioned Ms. Hauth about what was happening on Churton Street. He said when the BOA had approved the site plan

they had an expectation that the traffic now hitting Margaret Lane would not be hitting Margaret Lane, and that was understood at that time. Mr. Hartkopf said had they known otherwise, they would have added a condition to the approval with regards to the signal timing at Churton and Margaret. He said there had been a traffic study of the area done some time ago, but that would have been based on a different number.

Ms. Lunsford said it was her understanding that even though conditionally the County could occupy the Justice Center, a civil penalty of \$100 a day was being charged.

Mr. Hartkopf said he thought what the CCO was trying to say was that because the parking condition had not been met they really could not use that. He said the Judge had a different opinion, and that was another issue. Mr. Hartkopf said in essence, because certain ordinances were not met then the CCO was null and void.

Mr. Sain said it all came down to the ordinances that were in place now and when the County had received the approval.

Mr. Hornik reminded the Board that if they upheld the Zoning Officer's ruling then the motion would need to state at least one point to support that.

Ms. Lunsford said that Ms. Mellott had said the County could occupy the building yet there were conditions outstanding.

Ms. Hauth said Ms. Mellott had talked about the number of CCO's that had been issued over the last three years, and in every case the Town had been consulted and the Town indicated that they were okay with occupancy or were not okay with occupancy. She said by and large the County went along with them on that because it was a zoning matter. Ms. Hauth said in some cases it might be landscaping or some other issue. She said in almost every case, the County had signed off that occupancy was okay with certain conditions, or they had not issued the CCO. Ms. Hauth said this one was different in that it was parking, and if the Town had been asked they would have said occupancy was not okay for this type of condition. She said what made this case different was that a different outcome came from the CCO.

MOTION: Mr. Stevenson moved to uphold the determination by the Zoning Officer in regards to Case #BA-08-2010 for the following reasons:

1. that the conditions of the original approval have not been met; and
2. that the Justice Center building was occupied without a Conditional Certificate of Occupancy (no CCO was in place at the time the Notice of Violation was issued).
3. Further, that the civil fine of \$100 per day be suspended for six months to allow time for the appellant to produce a solution to meet the conditions of the site plan approval.

Mr. Whitmore seconded.

Discussion:

Ms. Lunsford said she believed that was reasonable and it extended a hand to the County.

Mr. Sain said to him suspending the fine for six months was too long. He said if the County really wanted to resolve the issue they could provide a solution in a shorter timeframe.

Mr. Whitmore said another issue was the legality and the basis of G.S. 160A-392, which gave the Town the right and authority to have zoning ordinances apply within the Town.

Mr. Hartkopf said that this issue had been in the public domain for four years, and a plan could have been brought forward by the County at any point in time during those four years. He said he intended to vote “no” on the motion because he wanted to keep the penalties in force because they must have something to drive a resolution to the issue. Mr. Hartkopf said in discussion the Board had said, and he would be amenable, to listening to arguments for reduction or suspension once the building use had come into compliance.

Mr. Whitmore asked what the Board was trying to signal to the County with the time limit.

Mr. Stevenson said nothing happened overnight, and he was trying to give the County reasonable time to identify a solution. But, he said, he was suddenly having a change of heart based on Mr. Hartkopf’s remarks and wanted to amend his motion.

Mr. Hartkopf said they needed to vote the motion down and then make a subsequent motion.

Mr. Hornik said if the Board was of a mind to confirm the Zoning Officer’s decision and wanted to indicate a willingness to work on the civil penalty, they could affirm with a condition that they were willing to revisit the issue of the amount of the civil penalty at such time as the property was brought into compliance with the parking requirements of the Zoning Ordinance.

Mr. Hartkopf said the minutes would reflect that the Board had already indicated that, and an astute observer would realize that the Board was already there. He said his point was that there would have to continue to be some procedure or some movement in the right direction. Mr. Hartkopf said the fact of the matter was that if the County decided to lay them to the side and just carry on for another five

years then he would not be in a very good position to negotiate on that civil penalty.

VOTE: The vote was 0-5. The motion failed.

The Board held a brief discussion regarding the wording to be used in the new motion, including what details should or should not be included to make the motion as straightforward and thorough as possible while reflecting the reasons for their decision.

MOTION: **Mr. Sain** moved to uphold the determination by the Zoning Officer in regards to Case #BA-08-2010 as follows:

1. for the reasons as stated in the Notice of Violation;
2. that the Conditional Certificate of Occupancy was invalid due to the required Zoning Ordinance regulations not having been met; and
3. that validity was provided by General Statute 160A-392 giving authority to the Town's Zoning Ordinance.

The Board would revisit the civil penalties when the conditions of the Zoning Ordinance were met.

Ms. **Lunsford** seconded.

VOTE: Unanimous.

Mr. Roberts asked was this a situation where tonight's decision would be filed with the Zoning Officer after the Board's next meeting. Mr. King said they would have to formulate the order to ensure accuracy, and then at the next meeting they would approve the order. He indicated at times the Board did not meet every month, and if that was the case then it could be the month after.

Mr. Hartkopf asked that staff alert Mr. Roberts in advance of the Board's next meeting so he would know when that would be. Mr. King agreed to do that.

Mr. King suggested not hearing Item #5b but moving directly into Closed Session. The Board agreed by consensus.

ITEM #5: **Closed Session: Status Report from the Town Attorney regarding the Orange County Justice Facility.**

MOTION: **Mr. Hartkopf** moved to enter into a Closed Session as authorized by North Carolina General Statute Section 143-318.11(a) for the purpose of discussing the Orange County Justice Facility pending litigation. **Mr. Stevenson** seconded.

VOTE: Unanimous.

Mr. Hornik gave the Board an update on this legal matter and answered Board questions.

Close the Closed Session: The Board agreed by consensus to close the Closed Session and return to Open Session.

ITEM #6: Committee and Staff reports.

Mr. King said he needed some feedback from the Board regarding the email the Board had received dated August 6, 2010 regarding the Board survey.

Mr. Hartkopf asked was that feedback specifically about the BOA's operation or about a variety of boards. Mr. King said he was looking at it generally for the Board of Adjustment and what its needs were. He said there were only seven comments that he needed feedback on.

1. Need more time to review materials.

Mr. King said that 14+ days was included in the schedule, and it would be extremely difficult to get the materials out 14 days prior to Board meetings because it took time to gather materials and write the staff report, and a longer period would require pushing application deadlines out further.

Mr. Sain said he believed what they were doing now was acceptable. Ms. Lunsford said she had no complaint as well.

Mr. Hartkopf said he had served on another board where the rule was packets were to be received a week in advance, but rarely did they get them until just a few days prior to the meeting. He said Mr. King should be commended for his efforts, and believed if they tried to do anything more than what was being done now it would interrupt other business.

Mr. Stevenson asked if the packets were always as large as what had been received for this meeting. Mr. King said this appeal was complicated and required a lot of materials, where other appeals were not nearly as difficult. But, he said, there were times when the Board would get packets as large, and even larger, than what had been provided tonight.

2. Incomplete applications were coming before the Board.

Mr. King said that had been discussed at the recent training session, and asked in what ways they were incomplete. He asked were there specific items missing or that the site plan did not show compliance with some issue, or something else.

Mr. Sain said some things depended on what direction the Board was trying to point an applicant to in order to get what they wanted. Mr. King said an applicant would come before the Board, there was something they did not have, the Board would give them direction, and they came back and still did not have what they needed to give the Board. He said he remembered one meeting where an

applicant had come back three times, and in that case staff had wrangled with them for a month or more before the Board ever saw the application.

3. More completed applications could make things a little better.

Mr. King said that was somewhat along the same vein as the previous comment and he would continue to work on that.

4. Prefer to receive ordinance reference excerpts with each item.

Mr. King said in his staff reports he had stopped providing ordinance citations and sometimes not even including the title of the ordinance section. One Board member indicated he was not yet familiar with all the ordinances and it would be helpful to get just the key excerpts from the pertinent sections, possible even just one sentence. Mr. King said he had an idea of how to address that and would work on it.

5. Please provide guidance on best practices used to organize all the information the Board would receive and would need to carry with them to meetings and to retain reasonable records of situations – binders, tabs, notes.

Mr. King said for the newer members he had not had binders for their ordinances, but asked if that comment referred to having binders at the table in which the Board could insert pertinent information. The Board discussed whether documents provided to them for matters before the Board should be kept in their possession or recycled, and the fact that some of the documents contained sensitive information. Mr. King stated those materials could be returned to him for recycling. He said that he retained file copies of everything so the Board did not need to retain anything unless they wanted to have particular materials on hand. Mr. King said he had entertained the possibility of sending the staff reports to the Board electronically, but did not know if any of the Board members would prefer that or to get them by mail. He said if the staff reports were sent electronically, then the Board would be able to review it before the meeting and he would provide paper copies at their places the night of the meeting. The Board agreed by consensus to receive the staff reports by mail.

Ms. Hauth commented that once the Board had voted on a matter and then approved the minutes at the next month's meeting, at that point there was no need to retain any of the materials. She said the Town was the official record keeper and the Board members would never be asked to produce any materials related to their work on the Board. Ms. Hauth said if they could not recycle the materials from home they should feel free to return them to Mr. King for recycling.

Mr. King commented that if the Board members would return their mailing envelopes, they would be reused multiple times.

6. Staff highlight shortcomings in submitted materials.

Mr. King asked for something specific, noting that he scored 3 out of 5 in this area on the survey, so that told him there was a lot of room for improvement. The response was that the Board wanted him to identify the most problematic issues in his staff report.

7. Staff identifies potential difficulties, challenges or discussion points for agenda items.

Mr. King noted that he had scored 4 out of 5 in this area on the survey. The Board's consensus was that the packets were complete, that staff provided the information needed, and that Mr. King was doing a good job and should be commended for that. Mr. King said he was attempting to make the staff reports shorter, but would redouble his efforts to give the Board just what they needed to know.

Mr. King said that appeals were somewhat different and he had been advised not to provide any recommendations on those. He said he had even been advised not to offer scenarios based on one outcome or the other.

ITEM #7: Adjourn.

MOTION: Ms, Lunsford moved to adjourn the meeting at 10:23 p.m. Mr. Whitmore seconded.

VOTE: Unanimous.

Approved:

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