



**TOWN OF OAK RIDGE BOARD OF ADJUSTMENT MEETING
DECEMBER 13, 2012 – 7:00 P.M.
OAK RIDGE TOWN HALL**

MINUTES

Members Present

Jim Kinneman, Chair
Beth Walker, Vice Chair
Wendell Ott
Nancy Stoudemire
Alex Papp
Dede Cunningham, Alternate (Not Sitting)

Staff Present

Sandra Smith, Town Clerk
Bruce Oakley, Town Manager
J. Michael Thomas, Town Attorney

Members Absent

Jay Cumbus, Alternate

1. CALL MEETING TO ORDER

Jim Kinneman called the meeting to order at 6:59 p.m.

2. ROLL CALL

The roll was called by Kinneman. Board members Wendell Ott, Beth Walker, Alex Papp, Nancy Stoudemire, Jim Kinneman and alternate Dede Cunningham were present. Alternate Jay Cumbus was absent.

3. APPROVE AGENDA

Alex Papp made a **motion** to approve the amended meeting agenda after including the swearing in of Cunningham. **Nancy Stoudemire** seconded the motion, and it was passed unanimously (5-0).

4. APPROVE MINUTES OF JUNE 14, 2012, MEETING

Beth Walker made a **motion** to approve the minutes of the June 14, 2012, meeting. **Alex Papp** seconded the motion, and it was passed unanimously (5-0).

5. SWEARING IN

Dede Cunningham was sworn in as a Board of Adjustment alternate by Sandra Smith, Town Clerk.

6. PUBLIC HEARINGS

- **Case No. 12-11-ORPL-04853:** Mike Stone appeals the issuance by the Town Zoning Enforcement Officer of a sign permit for the property located at 8309 Linville Road, Tax Parcel 0165098, Oak Ridge Township, and is zoned CU-LB, Scenic Corridor Overlay, Historic District Overlay.

Kinneman stated that the case had been withdrawn and would not be heard by the Board.

- **Case No. 12-11-ORPL004854:** CMT Commons, LLC, appeals the conditions of a Certificate of Appropriateness as issued by the Town of Oak Ridge Historic Preservation Commission. The property is located at 8309 Linville Road, Tax Parcel 0165098, Oak Ridge Township, and is zoned CU-LB, Scenic Corridor Overlay, Historic District Overlay.

Kinneman disclosed that he is an alternate on the Historic Preservation Commission, but that the only COA he has participated in regarding the appellant was the landscaping review. The only material relevant to the appeal he has heard was as a member of the HPC meeting audience, he said.

Randy James, an attorney from Winston-Salem representing CMT Commons/CrossFit, expressed concern regarding the standard laid out in NCGS 160A-388(e1). If Kinneman is familiar with the provision, feels he can hear the case impartially, and nothing in the landscaping proceeding would affect the appeal, James said he had no issue with Kinneman sitting on the Board. Kinneman responded that he felt he could hear the case impartially; he said he had been chairman of the Planning & Zoning Board for several years and felt he had heard cases fairly and impartially. Kinneman said he felt he could uphold the standard set forth in the statute to which James had referred.

Beth Walker asked if Kinneman had attended the HPC proceedings involved in the appeal, and Kinneman said only as a member of the audience and reiterated that he had not sat on the Board. No other Commission members expressed concern, and Town Attorney Michael Thomas said the Town had no concerns.

Wendell Ott inquired about a court reporter; Thomas said that a court reporter had not been arranged for because the proceedings were certiorari, not an evidentiary hearing, so there was no need to record evidence. Thomas said that certiorari is simply a review of the record by the Board. James said because the statute provides for an appeal to Superior Court, one of the difficulties of any court is knowing what is in the record, what was discussed and how it was discussed. While he didn't disagree with Thomas's analysis, he felt the matter could be remedied by the motion he intended to make. Thomas responded that the appeal of a Historic Preservation Commission decision is not to Superior Court, but to the Board of Adjustment in the nature of certiorari, and if either side is dissatisfied with the ruling, it can be appealed to Superior Court.

James said at the risk of there being "at least one jaded member of the Board of Adjustment," the first thing he had done was try to review the file, but said he was having difficulty ascertaining exactly what is in the record. He said there were references to documents, including the "infamous schematic drawing," that need to be

included in the record. In addition, James also said he understood the Town had adopted several forms from Guilford County and when his client filled out the appeal form, he saw there were several boxes to check and checked the box for "variance." James said this appeal was not a variance, but an appeal of an HPC ruling. James moved to continue the hearing to a later date.

Thomas said while the form was "inherited" from Guilford County and that the applicant had checked the "variance" box, the Town accepted it as an appeal to BOA. Thomas said the Town's motion is to dismiss the appeal because the appealing party failed to specify grounds. Although the applicant could initiate a blanket appeal of the most recent actions of the HPC in granting a COA or modified COA, there are no specific grounds on which to adjudicate the matter, he added. Thomas said the Town is not in a position to defend the actions of HPC because it did not know what supposedly was wrong. The statute regarding BOA, NCGS 160A-388, says the grounds for appeal to BOAs must be specified, a requirement that is repeated in the Town ordinance, Thomas said. He repeated the Town's motion to dismiss, but said if James's motion to "rectify the record" and continue the hearing is allowed, he hoped the appealing party would be required to specify their grounds in accordance with the statute and Town ordinance.

James said he would consent to specifying the grounds for the appeal, but said it is difficult for a "pro se litigant" to meet all the statutes put in place; he added that HPC could and should set forth a procedure for "non-lawyers" to follow in order to pursue an appeal. He said he felt the appropriate remedy would be to continue the hearing to the next meeting with a court reporter present. If the appellant's motion is granted, James said that within 15 days, he would notify the Town of the specific grounds for appeal as well as make sure the record is complete with the Town's agreement.

Thomas said if the Board were to continue the matter and allow for the specification of grounds, he felt any deadlines should be extended to the first of the new year. The Town could most likely respond fairly quickly as far as additional gathering of records, Thomas said, but added that he would need to discuss the matter with James to determine specifically what was needed and reissue the record. Regarding the court reporter, Thomas expressed concern about the cost to the Town and reiterated that this was not an evidentiary hearing and that he saw no need for a court reporter.

Kinneman asked whether the applicant would have a means of recourse to reapply if the Board acted on the Town's motion to dismiss. Thomas said presumably the applicant would appeal the decision to Superior Court. James said he would file a notice of appeal of certiorari coupled with a lawsuit, which would be a declaratory judgment action that would attack the procedures and processes of HPC and effectively of the BOA. He cited the case of *Mears v. Town of Beaufort*. He added that one of the things he would take issue with was that the record was incomplete.

Kinneman said the next Board of Adjustment meeting was January 10 and asked if all parties would be able to prepare by that date if the continuation motion were entertained. He added that the appellant's application contained no grounds for objection. He asked how strongly the Town felt about dismissing the case or whether it wished to work with the appellant if the continuation was granted, but with the clear direction that the applicant must provide grounds. Thomas said he did not make the

motion to dismiss pro forma, as the Town had asked at least twice for specification of grounds to back up the appeal and those grounds had not been forthcoming. He added that the motion was not improvident, as James had said, as there had been no other opportunity to make such a motion to dismiss. Thomas said he would have a busy week in court the week of January 7, which would make a continuation to February more realistic.

James responded that February would be perfect for him. Thomas said if the Board agreed to that, all issues regarding the record should be resolved and all grounds regarding the appeal should be specified. Thomas said the Town felt it had been very cooperative and had tried to help the applicant, but the decision on whether to grant either motion was up to the Board.

Wendell Ott made a **motion** to deny the Town's motion to dismiss without prejudice for lack of specificity, and to require full elaboration of the basis for the appeal. Walker said, after reading through the materials, that it appears the appellant needs to have someone directly address the issues and to dismiss the case would leave the case in the limbo that it seems to have been in for some time. Stoudemire and Papp agreed. Kinneman said if the Board were going to deny the motion to dismiss, it would need to do so with the proviso that it be done without prejudice so that Town can resubmit if grounds were not properly specified. He added that he thought the continuation motion should be strongly worded so that specific grounds would need to be delineated in the application for appeal to be heard in February, because further delay would be a waste of Town resources should the applicant not be ready in February. James said he had attempted to call Thomas earlier in the day when he was reviewing the case. Kinneman asked how long James had been involved in the case, and James said he became involved within the last 4 to 5 days. Thomas clarified that the efforts at discussion had just occurred earlier that day. **Beth Walker** seconded the motion, and it was approved unanimously (5-0).

Ott disclosed that he would not be in attendance at the January and February meetings, as he would be out of state. Depending on the grounds for appeal, he said the Board might need the original application and all that went with it – particularly the artist's rendering, the original approval, the letter from the Town specifying the 17 alleged deviations of what had been constructed versus what had been approved, and an authenticated copy of the HPC Guidelines. With respect to grounds for appeal, Ott said it would be helpful if the items on the COA issued October 23, 2012, were numbered; he added that the applicant seems to be in compliance on several of the items, and he would like any items not being appealed to be eliminated to make the process more manageable. Ott added that he thought a court reporter should be present, and he requested the Town provide one. He agreed with Thomas on the nature of certiorari and said he did not anticipate accepting testimony or evidence, but said even from tonight's meeting he would have liked to had Kinneman's disclosure on possible conflict and James's response on record. Kinneman said he would make sure to disclose that information at the next meeting.

Walker asked if the motion to continue should specify items the Board wants to see, including decisions from other Boards; Kinneman said the only decisions being appealed were from HPC. Oakley said there had been numerous COAs issued to the applicant dating back to April 2011; Ott said it was difficult to specify what should be

included in the record since the Board didn't know what was being appealed, but that additional documents might be needed based on that information. Kinneman said he agreed with Ott regarding the court reporter to ensure there is no ambiguity; although he said he was sensitive to the fact that there would be a cost to the Town, he said that might possibly prevent the Town from incurring further costs down the road.

Because of Ott's absence in February, James asked if the Board would like to continue the case to the March meeting; Kinneman said he would not be in favor of that and that he felt the applicant and Town would like to get the matter resolved as soon as possible. James asked for the date of the February meeting, and Oakley said it was February 14.

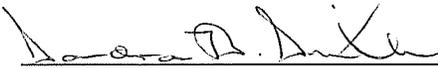
Wendell Ott made a **motion** to accept the appellant's motion for continuance, and that the case be reset for hearing at the regular Board meeting in February with the provision that except for unusual and unforeseen circumstances, the Board would not be responsive to further continuation. **Nancy Stoudemire** seconded the motion, and it was approved unanimously (5-0).

Kinneman asked if the case needed to be readvertised, and Thomas said it did not because it was a continuance. Kinneman said the meeting was advertised as a public hearing, but asked if the public could speak due to the quasi-judicial nature of the hearing. Thomas said the proceeding was not evidentiary but that the public had been noticed and could attend, as with any open meeting. Kinneman said if anyone wished to speak, they would need to do so through one of the two attorneys and that other comments would not be entertained by the Board.

7. ADJOURNMENT

Wendell Ott made a **motion** to adjourn the meeting at 7:44 p.m. **Alex Papp** seconded the motion, and it was passed unanimously (5-0).

Respectfully Submitted:



Sandra B. Smith, Town Clerk



Jim Kinneman, Chair