



**TOWN OF OAK RIDGE BOARD OF ADJUSTMENT MEETING  
FEBRUARY 21, 2103 - 7:00 P.M.  
OAK RIDGE TOWN HALL**

**MINUTES**

**Members Present**

Jim Kinneman, Chair  
Beth Walker, Vice Chair  
Nancy Stoudemire  
Jay Cumbus, Alternate (Sitting)  
Dede Cunningham, Alternate (Sitting)

**Staff Present**

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

**Members Absent**

Wendell Ott  
Alex Papp

**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 Beth Walker, Nancy Stoudemire, Jim Kinneman and alternates Jay Cumbus and Dede Cunningham were present. Wendell Ott and Alex Papp were absent.

**3. APPROVE AGENDA**

**Nancy Stoudemire** made a **motion** to approve the amended meeting agenda after changing the meeting date from February 14 to February 21, 2013 (the February 14 meeting was continued to February 21 due to illness). **Jay Cumbus** seconded the motion, and it was passed unanimously (5-0).

**4. APPROVE MINUTES OF DECEMBER 13, 2012, AND JANUARY 10, 2013, MEETINGS**

**Dede Cunningham** made a **motion** to approve the minutes of the December 13, 2012, meeting. **Nancy Stoudemire** seconded the motion, and it was passed unanimously (5-0).

**Beth Walker** made a **motion** to approve the minutes of the January 10, 2013, meeting. **Jay Cumbus** seconded the motion, and it was passed unanimously (5-0).

**5. PUBLIC HEARINGS**

- **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.

Cunningham disclosed that Mark Smith, one of the parties in CMT Commons/Mustang Fitness, is a client through her real estate business. Kinneman explained that a conflict of interest would have to do with a financial interest, impartiality, or if ex parte communications had taken place, and said the Board would need to decide if any of those applied significantly enough to warrant disqualification from hearing the case.

Town Attorney Michael Thomas asked if any of the conflict criteria apply, and Cunningham said she felt she could make an impartial decision. Thomas asked if there had been ex parte communication regarding this matter, and Cunningham said she and Smith had not discussed it. Thomas asked if there was any financial interest regarding the matter or the facility before the Board or any way that the Certificate of Appropriateness (COA) would affect Cunningham; she said she would not be affected by the COA and the only issue which might come into play would be whether Smith decided to continue to do business with her as a result of the outcome of the case. She again stated that she could be impartial. Thomas expressed no concern with Cunningham serving, nor did any member of the Board.

Kinneman disclosed that he was an alternate on the Historic Preservation Commission and that he had sat for one hearing which had to do with the landscaping plan; at that hearing, he had voted in favor of approving the COA on the applicants' landscaping plan. He said he had no financial interest, there had been no ex parte communications other than what was available at public meetings, and he didn't feel there was an issue regarding impartiality. Thomas said the Town had no objection to Kinneman hearing the case before the Board of Adjustment.

\* \* \*

Michael Thomas took the podium and stated the matter was not ready for the Board to hear because the record was not yet ready. He gave the circumstances behind the case as follows:

- In December, the Board agreed to continue the hearing regarding the appeal of the COA issued in October by HPC. The basis for the continuance, in large measure, was due to desire by the Board to have a fuller record. The Town formed an opinion of what the Board wanted based on a series of COAs issued to CMT Commons over a period of about 1½ years. In responding, the Town proposed putting everything before the Board in order to put the entire issue into context.
- In the process of reviewing the record, the Town also considered communications between the involved parties that took place outside of meetings.
- After the continuance at the December 14, 2012, HPC meeting, Thomas said he emailed Randy James, attorney for the appellant, four days after the meeting (on December 17); he sent James a list of COAs relating to the case, and asked again for the grounds for the appeal. Despite that attempt, he and James did not communicate on what constituted the record until mid-January. The Town had everything together except for the emails between the parties, which were voluminous, Thomas said.

- Counsel for both sides met on January 31 in an attempt to reach a stipulation as to the contents of the record.
- On behalf of the Town, Thomas asked the Board of Adjustment to settle the record.
- While all this was going on, the Town received a letter from one of the principals of CMT Commons asking for public records. Although it was a Freedom of Information Act request, which does not apply to state or local government agencies, the Town has honored the request anyway by going through the appellant's attorney. In doing so, correspondence came into play, including 1,109 emails.

In terms of the record, the Town proposed including the full sequence of COA, correspondence pertaining to the COA process, minutes of informal meetings between CMT Commons/CrossFit and the Town, building permits of the project, emails pertaining to the COAs or other issues regarding CMT Commons, the sign permit, minutes of HPC meetings, building permit construction drawings submitted to the county inspections office, color elevations, and the Oak Ridge Design Guidelines of the HPC. Other documents have been provided to counsel via the records request. Thomas said the Town believes supplying these documents will give the Board the complete background it desires.

Once the record was settled, the Town also proposed that the record be finalized and served to members of the Board and counsel of CMT Commons in electronic format. The final version of the record, once determined, would be processed as a single PDF and Bates stamped – which would sequentially number the pages. A table of contents would also be included.

Thomas told the Board the hearing was in the nature of certiorari, which means the record is certified and reviewed by the Board prior to the hearing, so that the Board is prepared to ask questions at the hearing. Counsel would be prepared to make legal arguments and answer questions from the Board. As with appellate proceedings, both sides are able to submit written arguments, known as briefs. Thomas said the Town's opinion is that both sides should have the right to submit written arguments.

Thomas asked the Board to:

- Decide what the record should be.
- Decide if it is permissible to certify and serve the record in electronic format.
- Decide if written arguments could be submitted prior to the hearing and give the deadline for such arguments.
- Provide deadlines for when the Board wants the record served.

Thomas also requested the opportunity to respond to the statement by CMT Commons' counsel on what should be included in the record.

After receiving the Board's permission and speaking with the appellant's counsel for a moment, Thomas said the sign appeal, while a separate matter, is a Notice of Violation (NOV). After the December Town Council meeting, the NOV was issued by the Town regarding the sign based on the dimensions approved on the COA. While that would typically receive an evidentiary hearing with sworn testimony, establishment of facts, and a decision on whether to uphold an enforcement decision, counsel for both sides

appeared to have agreed that an evidentiary hearing is not needed; documentation regarding the sign establishes the relevant facts, and that is part of the record in the HPC appeal case. The Town is not opposed to hearing both matters together and deciding them together, Thomas said.

Randy James, counsel for CMT Commons, took the podium. In terms of e-filing versus a paper copy of the record, he said he had printed every document and filled seven binders. He had also printed one document CMT Commons wanted included and to which the Town objects. Although he sometimes prefers paper as opposed to looking at a computer screen, he understands why electronic format is preferred: it saves trees, and many courts now require it.

James said he and Thomas had discussed a proposed schedule once the record is settled. He suggested the grounds for the appeal would be submitted to the Board. He said he had difficulty in formulating the appeal due to his "late arrival in this controversy" and he needed to know what was in the record before he could know what issues he had.

James proposed submitting his grounds by the following Monday (Feb. 25), so that by the following day (Feb. 26), the final record could be served to the Board. He and Thomas had also discussed submitting briefs by March 7, which would give Board members time to read those arguments prior to the March 14 meeting. James said the point of submitting briefs is to sharpen the focus of the voluminous record on the items counsel believes needs to be considered. He agreed with Thomas that there was no need for an evidentiary hearing on the sign issue and that it could be rolled in with the other appeal.

Regarding what he wanted included in the record, James asked permission to hand the Board copies of the *Handbook for Historic Preservation Commissions in North Carolina*, a joint publication of Preservation North Carolina and the State Historic Preservation Office/Division of Archives and History/N.C. Department of Cultural Resources. The handbook's preface says it is "intended as a guide and reference for commission members and staff and for communities that may be interested in establishing commissions. It also provides anyone interested in preservation with an introduction to North Carolina's mechanism for historic preservation at the local level." He pointed out that on its website, the Town of Oak Ridge references the Handbook. He presented a copy of a document obtained from the Town's website, and said that by referencing the Handbook, the Town was saying to the public and to CMT Commons that the main functions of the HPC are set forth in the *Handbook for Historic Preservation Commissions*. James said the handbook is also referenced in two places — pg. 15 of the Guidelines, which say the main functions for the HPC are set forth in the state Handbook. The Handbook is also referenced in the bibliography section of the Town's Guidelines. James said he believed Wendell Ott (a BOA member who was present at the December meeting but was not present at that night's meeting) was referencing the state Handbook when he referred to an expanded record.

James said part of CMT Commons' appeal is the way the various COA applications work their way through the HPC and said, procedurally, it had been a "rough course" for CMT Commons because the Town had gotten away from the state Handbook,

which was part its own referenced guidelines. Because the Handbook was referenced in meetings before the HPC, he asked that the Handbook – which he called “highly relevant” – be included in the record. James said he understood that the Handbook was the only document being contested.

Thomas responded that the reason the Town objects to the inclusion of the state Handbook is because it is referenced but not made part of the Guidelines, therefore it is not part of the law in this matter. If the Handbook is going to be included in the record, why not also include the 30+ other selected materials cited as resources in an appendix to the Guidelines, Thomas asked. Doing so makes no sense and would be irrelevant, he added. In the Guidelines where the Handbook is referenced, it simply sets out the four functions of the HPC so that anyone reading the Guidelines knows what the functions of the Commission are. Thomas added also added that the reference to the Handbook on the Town’s website is meaningless. He said he was unsure why imposing another body of law was desired, but the Town’s position was that the only references to the Handbook during any hearings were by or on behalf of CMT Commons. Had CMT Commons referred to any other “exotic or foreign materials,” that would still not make them relevant, Thomas said, adding that the record proposed was quite sufficient. Including the Handbook could lead to arguments on the “extraneous” material that could affect the hearing in a way that might later lead to further appeals and reversals, he said.

Thomas said generally the appealing party submits its brief and then the other side responds. If the BOA does allow briefs and the grounds for appeal specified, Thomas said he thought that staggered method could be dispensed with and both sides submit their arguments by the same deadline.

James said the flip side of Thomas’s argument was why the Town would not want to include the Handbook in the record. He said the reason is because the Town’s Guidelines are “woefully inadequate.” One of the reasons the state created the Handbook in 1994 was so towns wouldn’t each have to create their own set of Guidelines, he said. Adhering to the Handbook would create some uniformity for builders and developers who do business in various parts of the state where historic districts are located. The Town could have elected not to reference the state Handbook, James said.

Regarding legal briefs, James said he thought he and Thomas had reached an agreement for both sides to submit their arguments at the same time and that submitting staggered briefs was not required. The briefs will direct the Board to what counsel thinks is relevant in the record, without requiring Board members to “wade through” the entire record.

*Board questions/comments:*

Beth Walker inquired about the four functions of the HPC which had been referenced. Thomas said the functions as stated in the Guidelines came straight from the Handbook, but the ones on the document on the Town’s website had been

rephrased, although he thought they were intended to reflect the functions stated in the Handbook.

Kinneman said he struggled somewhat with the context of the Handbook since his experience on Town Council and Planning & Zoning Board taught him that there is exclusive wording to make one document a part of another. He added that the only thing the Town was required to adhere to was its ordinance. He said he had no problem with allowing the Handbook to be part of the record, but wanted to be clear whether or not the Handbook is part of the Town's ordinance.

James responded that the Handbook is a standard that has been articulated statewide that intended to help avoid a Town from going off on a "tangent." He also referred to the Handbook as a "map." More importantly, he said, it is on the Town's website and the Town is telling others to go look at the Handbook. If the Town didn't want people referring to the Handbook, it should take the reference to it off the Town website and say that the only thing that is applicable is the Town's Guidelines. He argued that the Handbook is a "North Star" for a Town to follow, and the reason the parties involved were at this point is because the HPC had "sort of got off track" in terms of the original COA for the building. Where there is a process or procedure that the Town has not adopted, the BOA has to decide if there was a process that was followed, what the process was, and what it should have been.

James said it was his understanding that the Town of Oak Ridge ultimately wants to revoke the Certificate of Occupancy (CO) and forbid CMT Commons from using the facility until "we come into line with whatever the HPC has said..." in issuing COAs. Kinneman said he thought personal opinion was being interjected. James apologized, but said that was what he understood from his conversations with counsel. Thomas said he never said such a thing and took issue with conversations with him being characterized in such a way. James said he thought the appeal came from the violation of finding that CMT Commons was out of compliance, and the result is that the temporary CO will be revoked by the Town.

Thomas read from the minutes of the December BOA meeting where Ott discussed what items might be included in the record, "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." He added that there was no reference to the state Handbook, and that the Handbook is not the law, but that the Guidelines are. There was nothing to keep counsel from referring to the Handbook or any other document in its brief, but it should not be part of the record upon which the BOA would render its decision, Thomas said.

Kinneman said he had questioned whether the Handbook could be used in any way other than in terms of the legal arguments. Thomas said you can refer to practically anything in a legal argument, but in terms of what is the record on which the Board decides what the HPC was rendering its decision on, Thomas said he didn't think so.

Kinneman asked James how not including the Handbook would put him at a disadvantage if he could still reference it in his legal arguments. Because he did anticipate referring to it, James said he felt it should be included in the record. He said

he was not asking that it be included as law, but that it be included in discussing procedure. However, if he could attach it to his brief, he was satisfied.

Walker asked if the Oak Ridge Historic District Guidelines were part of the Handbook, and James said no. She asked what would be the difference in relying on the Town Guidelines versus the state Handbook. James held up copies of each of the documents and stated that the Oak Ridge Guidelines were a "fraction" of the size of the state Handbook and not the same in terms of process or procedure. While the Town's Guidelines are law, the Handbook serves to fill in gaps in interpretation of the law. He compared the state Handbook to a dictionary, saying it served as a dictionary for HPCs in terms of process and procedure.

Walker said it seemed as if the Board needed to look at the Town's Guidelines, which are law, when determining findings of fact versus making an assessment of whether the Guidelines are appropriate or not. She said she felt the Board's job was not to determine whether the Town's Guidelines are adequate, but to look at the Guidelines and how they have been applied in this case. James responded that the question is whether the Guidelines were applied as the Handbook suggested they be. He gave the example of when the original COA for construction of the building was issued, and asked if the Town followed the suggestion that a certificate with sufficient detail that was suitable for framing be issued or was it a "loosey-goosey arrangement" resulting in the reason why CMT Commons ended up in this "miscommunication" between them and the various bodies involved. Walker asked whether towns have the right to create their own Guidelines; James responded yes. Walker said it sounded as if James was talking about a hearing regarding the HPC – something she didn't want to be involved in – as opposed to a hearing regarding the CMT Commons's issues.

James said he intended to argue when it is appropriate for an HPC to demand something be done a particular way and when it is not appropriate. That doesn't put the HPC on trial, he said. In establishing whether something is applied properly or is unfair, he said he was suggesting that someone (at the State level) spent a lot of time and effort putting together a Handbook because they had experience with those issues. He said there was considerable friction between a desire to preserve and adhere to the Guidelines, as administered by the town manager, versus developers who are trying to improve the community by building this structure. The "clash occurs," James said, "because someone didn't communicate with someone else."

Thomas responded that he was hearing criticism of the Guidelines, but that was what the Town has adopted and is "stuck with." After hearing all the arguments and reviewing the record, Thomas said his opinion was that the BOA's function is to determine whether due process and the applications process had been properly adhered to by the HPC.

Jay Cumbus said if the Handbook is included in the record, the Board will still be making the decision later on whether it is relevant. Kinneman responded that he was inclined to say it was OK to include the Handbook in some context as long as it was clear that it was not a part of the Town's ordinance. James could reference it, but it would carry no more weight than, say, an article in that day's newspaper, he said. Kinneman said he didn't feel whether the Town's ordinance is good or bad was what the Board should consider, but rather whether it was applied properly.

Nancy Stoudemire said, much like the land use plan, the Town has a right to make its own Historic Preservation ordinance. While the state Handbook might be interesting reading, it would be irrelevant because it was not the Town's law unless it could be proven otherwise.

Dede Cunningham said the Handbook was referenced in the Town's documents and it had been referenced in previous HPC meetings. She added that the BOA's "fiduciary responsibility" is to learn all the facts, and if there is a chance due process is not served, then they are doing an injustice by not including the Handbook in the record. While the Handbook is not law, she said the Board was capable of understanding that; because it has been referenced in Town documents and referenced in HPC meetings, it would be unfair not to allow its inclusion in the record.

Beth Walker asked whether the Oak Ridge HPC Guidelines would be included in the record; Kinneman said he understood the Town's entire ordinance would be included by reference, and Thomas said the ordinance was an overarching part of any Town record. Walker asked if a supermajority was needed to decide the record; both attorneys agreed it was not necessary. Kinneman clarified that a four-fifths majority would be needed to decide CMT Commons's appeal.

**Dede Cunningham** made a **motion** to include the *Handbook for Historic Preservation Commissions in North Carolina* as a portion of the record. **Jay Cumbus** seconded the motion. **Jim Kinneman** offered a friendly amendment to the motion that it be stipulated that the Handbook is not a part of the Town's ordinance, and Cunningham agreed to the amendment; the motion was passed 4-1 (Beth Walker voting in opposition).

**Jim Kinneman** made a **motion** to include the following items in the record: The complete sequence of COAs issued regarding the project, correspondence between CMT Commons and the Town, informal meeting minutes, building permits issued, complete emails, the sign permit and related documents including the NOV, HPC meeting minutes, building permit construction drawings, color elevations, Oak Ridge Design Guidelines, and per motion just adopted, the *Handbook for Historic Preservation Commissions in North Carolina*, which would be attached to the record but stipulated that it was not part of the Oak Ridge ordinance. **Beth Walker** seconded the motion, and it was passed unanimously (5-0).

Thomas asked for the deadline of when he needed to serve the record to the Board. James suggested it be done by the following Tuesday (February 26) so that his grounds for the appeal could be included in the package. Kinneman said it should be done within seven days, and that both sides should have their briefs submitted by March 7. Kinneman said the Board will hear the case on March 14, regardless of any other circumstances which may arise; he added that five months were more than sufficient to prepare, regardless of when James became involved in the case, because his clients would have had five months since the October HPC meeting. Although he initially directed his comments to CMT Commons, Kinneman said the Town should also have had time to be adequately prepared.

**Jim Kinneman** made a **motion** to agree to the timeline: that the record would be completed and sent to the Board within the next week, that the briefs be submitted by March 7, and that the BOA meeting be continued until March 14. **Jay Cumbus** seconded the motion, and it was passed unanimously (5-0).

6. **ADJOURNMENT**

**Beth Walker** made a **motion** to adjourn the meeting at 8:16 p.m. **Nancy Stoudemire** seconded the motion, and it was passed unanimously (5-0).

Respectfully Submitted:



Sandra B. Smith, Town Clerk



Jim Kinneman, Chair