



**TOWN OF OAK RIDGE BOARD OF ADJUSTMENT MEETING
MARCH 14, 2103 - 6:00 P.M.
OAK RIDGE TOWN HALL**

MINUTES

Members Present

Jim Kinneman, Chair
Beth Walker, Vice Chair
Nancy Stoudemire
Wendell Ott
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 6:00 p.m.

2. ROLL CALL

The roll was called by Kinneman. Board members Kinneman, Beth Walker, Wendell Ott and Alex Papp and alternate Dede Cunningham were present. Because Board member Nancy Stoudemire had indicated she would be present, Kinneman suggested approving the agenda and minutes, but wait to see if Stoudemire was present before hearing the cases. Alternate Jay Cumbus was absent.

3. APPROVE AGENDA

Beth Walker made a **motion** to approve the meeting agenda. **Alex Papp** seconded the motion, and it was passed unanimously (4-0).

4. APPROVE MINUTES OF FEBRUARY 21, 2013, MEETINGS

Alex Papp made a **motion** to approve the minutes of the February 21, 2013, meeting. **Jim Kinneman** seconded the motion, and it was passed unanimously (4-0).

Nancy Stoudemire arrived at the meeting at 6:02 p.m.

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.

- **Case No. 13-01-ORPL-00334:** CMT Commons LLC/ Mustang Fitness LLC, appeal a Notice of Violation for a wall sign. The property is located at 8309 Linville Rd, Tax Parcel 0165098, Oak Ridge Township, and is zoned CU-LB, Scenic Corridor Overlay, Historic District Overlay.

Kinneman announced the purpose of the meeting was to conduct two public hearings that were continued from the last meeting. Although it was a public hearing, the only participants would be attorneys for each side and the Board, and there would be no input from others attending the meeting. Both parties would be allowed to present their side, and the Board would be allowed to ask questions during that time.

Randy James, attorney for CMT Commons/Mustang Fitness, said he had placed before Board members some items. The first was the rendering which was referred to in the record many times.

Wendell Ott asked if James could provide the page number in the record of what he was referring to, and James indicated he would provide that information later. Ott said he didn't want documents referred to that were not in the record. James said he had provided hard copies for the Board because he believed that would be easier for the Board to refer to than flipping through their official copy of the record (which had been provided in electronic format).

James continued that he wanted to discuss what he called the overarching theme, which he said was communication. A screen visible to the Board of Adjustment, parties and counsel had been set up on which portions of the electronic record and other exhibits could be exhibited, and James then provided a video clip of a scene from the movie, "Cool Hand Luke;" in the clip Strother Martin, in the role of the warden, says, "What we've got here is failure to communicate." James said when the record is read, there is a wholesale failure to communicate, which started in part with the initial order granting a Certificate of Appropriateness (COA) for the CrossFit structure located beside Town Hall (he directed Ott to page 22 in the record). He said the document presented from which approval was granted was not a plan and was not to scale, but was what architects refer to as a rendering. From that document, plans and elevations would be drawn, and code approval with the building complying with building code and Historic District Guidelines.

Kinneman asked whether the rendering did not have some specific measurements on it. He said while things may not be to scale, he asked whether they shouldn't be in proportion to each other as shown. James said it would except the rendering is marked "not to scale." James added that Le Corbusier, who designed a cathedral in southern France, drew the schematic outline of it with a piece of charcoal on paper and then gave it to engineers to design. James said Eero Saarinen did the same thing with the TWA Terminal and engineers had to inflate balloons to make the concrete, and the same process was used with the Saint Louis Arch. James said all used an architect's

rendering to show what the building would look like if it were constructed in accordance with plan.

What the Town of Oak Ridge, through the Historic Preservation Commission, had done was to call the rendering a plan, James said, and the approval should have included findings of fact and conclusions of law about what was to be built. He showed a copy of the original COA for the appellant's building on the screen, and read the portion of the COA that said the building would have rock foundation as presented, 7:12-pitch roof, 16-inch overhang, galvanized standing seam roof, setback must be 90 to 110 feet from Linville Road, and T1-11 siding – the latter of which was later changed. Clearly the rendering did not show a 16-inch overhang, James said; he added that it was not acceptable or in accordance with the plan for the Town, through its HPC, to say his clients must build exactly what was shown on the rendering. Instead, the Town should have done what Guilford County does and demand construction drawings of exactly what is going to be constructed, at which time they determine if it meets code.

James said that when the building was constructed, there was a feeling – as shown by various documents in the record – that the HPC felt like somebody “got over on them. ‘You showed us this, and you built that.’” However, his clients thought that they came before HPC and got approval for a schematic, and HPC would indicate if they wanted them to come back for approval with detailed schematics, plans or scaled drawings showing dimensions. Those findings should have been included in the COA issued. James said the *Handbook for Historic Preservation Commissions in North Carolina*, which he had argued in February to be included in the record, was created to help HPCs be sure they have some overarching guidelines that are not law. In order to facilitate communication, it was important that the property owner knows what to build to be in compliance, James said.

Kinneman pointed out that on the rendering, the doors are all sliding doors, there are supports on the front, there is an overhang on the end of the building, there is a faux hay loft door above the main front door, and there is bracing that appears on front of the building above the door. Kinneman asked how the scale issue could be ignored if the appearance of the building is nothing like the rendering. Kinneman asked if one wouldn't expect the architect to incorporate those main features if the rendering were given to him.

James responded that architects always add clouds, trees and grass to renderings as well as building details that the architect may find appealing. The findings of fact do not say the construction must be in accordance with the rendering presented to HPC relating to the COA application of June 13, 2011. James continued that if a member of HPC had wanted those elements included, it would have been appropriate for them to say that so there was discussion before the building was completed. James said there is also a side issue of whose responsibility it was to ensure that those details were spelled out; in reviewing the meeting minutes, he said some HPC members indicated it was the sole responsibility of the applicant, but the applicant felt it was the responsibility of HPC to include details of specifically what was to be complied with.

Kinneman asked if the rendering was not considered part of the application that was approved, and James responded that he would “take that one to the Supreme Court” if it was the rule of an HPC to adopt a rendering that is not to scale and then require the

applicant to make the doors match what was shown in the rendering. Kinneman said he had put the scale question aside, and was asking simply if the rendering was part of the application that was approved. James said that it was approved as a rendering, not a detailed drawing and not what was ultimately constructed. He said Guilford County, however, did have detailed construction drawings, and – even worse – the building was constructed next door to Town Hall. If HPC or Town Manager Bruce Oakley had concerns with what was being constructed, they could have called the applicant and questioned what was being built, James said.

James added that he believed his client had acquired vested rights if he was building something in good faith and, after the fact, the Town questions things like the size of the doors and says they must be the same size as was approved in the rendering and must be removed. Waiting until the building is constructed and then coming back later and saying it doesn't meet what was approved is "unfair, it's unjust, we have vested rights, and it is tantamount to arbitrary and capricious," James said. He added that an uninterested third party would likely say what was built was fairly close to what had been shown.

Kinneman asked if James was able yet to supply the page numbers in the record that he was referring to and that Ott had requested earlier in the meeting; James said he could not do so at this time because he would have to sit down at his computer and he didn't want to take up time doing that then.

James said he had handed the Board a photograph of the building that had been drawn on at one of the HPC meetings. He asked the Board to compare the photo of what had been built to the rendering. He also presented a photo showing the building after the asphalt parking lot had been paved. The drawing showed the elements discussed by HPC with his clients at its September or October meetings, when there was much dialogue about exactly which elements were to be included. James asked whether HPC has veto power; he said there were numerous statements by Commission members that they could not tell his clients what to do, but told them to submit an application and then HPC would decide whether it meets the criteria. James said that is not the way government is supposed to work; what should happen is if HPC was not satisfied with the amount of detail that the original application contained, they should have asked for detailed construction drawings, scaled elevations, lighting information, the relationship of doors to other doors, type and pitch of the roof, and all the details and specifications regarding the other items that later became "controversial." In doing so, the Town would be communicating expectations.

James said there is a concept in law that says you cannot breach an agreement if it was never clear that both parties had the same expectation. He added that one party couldn't know another party's expectation unless it was articulated. James said he believed Kinneman had participated in a meeting in which language in the Historic Guidelines that would facilitate communication with property owners that were attempting to comply was discussed. James said his point was that the Guidelines are so abstract that a property owner cannot simply read the Guidelines and figure out what has to be built to be in compliance. He added that a property owner also cannot stop during construction and go through a 60-day cycle to get approval.

James said the Town has benefitted from other property owners who have the benefit of an engineering department, who have or hire architects who participate all the way through the project, and who bring detailed drawings before the HPC. James said he thought the record showed that there was a lack of communication throughout his clients' project. It would cost a significant amount of money to do what the HPC wants at this point – a fact that the HPC says doesn't matter. That fact does matter, James said, otherwise HPC would be fulfilling one of the requirements of "arbitrary and capricious."

Ott asked when a member of HPC had said that didn't matter, and James said it was in the minutes of the September 2012 meeting. Ott asked if it was stated in HPC's decision or an individual on the HPC who had made the statement; James said it was made by an individual who had voted against the amended COA as proposed by his clients. James said the comment was that it doesn't matter what changes cost, because the HPC was concerned with compliance, not cost. While that wasn't in HPC's findings, the reason for the entire record was to provide subcontext, James said.

Ott asked if saying that the issue of cost is not one over which HPC has any authority is different from an allegation that HPC had said that cost doesn't matter. James said he thought it was Ann Schneider who had said, when discussing building cupolas on the roof, that she thought they should be larger because she wasn't satisfied with the size of cupolas the engineer had drawn based on the structure of the roof. He said his clients had said the size was based on the roof structure, and Schneider's response was that the structure could simply be "beefed up." James said a contractor had told him once that he would build anything if James had the money, but the point is that Schneider wanted cupolas relative to the size of those shown on the drawing. One of his clients had responded that it would be cost prohibitive to increase the roof structure, that the cupolas were purely aesthetic and had no function, and that the Varco Pruden building didn't allow larger cupolas because of the placement of the beams on the structure. James said the question was posed repeatedly whether his clients had come back to the HPC; he said they had not because they did not know that was required and it was not in the findings from HPC.

Kinneman asked if it was not specifically stated on the COA that any changes to what had been approved need to come back before the HPC, and James pointed to the original COA and said that wording was not included there. He said one of the grounds for his clients' appeal was that the original COA was inadequate because it did not include the appropriate findings of fact or conclusions of law. In addition, Guilford County had approved the plan and, once the building was completed, had said it was built to code. He added that the Historic District is an overlay district, but it needs to be administered in a fair manner pursuant to Guidelines that reasonable people can understand. James said, in paraphrasing comments by Schneider, that the building didn't have the same rhythm for the doorways and windows, but then asked exactly what that statement means. He said it is intended to allow some wiggle room for property owners, and one of the other intentions of the Guidelines is to allow for some diversity.

James said the original rendering presented to the Town was of a red barn-type structure, but his clients came up with the rendering that had been approved after the Town said it didn't want a big red building. What happened, he said, was that the HPC

created the original COA for the building and his clients had been forced to comply with it. He also said that in earlier COA applications, detailed information and photos showed exactly what was going to be demolished, what trees taken down, etc.; the difference, he said, was that at that time Julie Curry – who had a background in historic preservation – worked as consultant for the Town with the HPC. Curry's contract with the Town was not renewed prior to the time the COA for the building was issued by the HPC and that COA was created without the benefit of a consultant. Much later, disputes arose regarding how the structure fails to comply with the rendering.

James called the Board's attention to the standard, which is in General Statute 160A-400.9(a) and says a structure must not be incongruous with the special character of a landmark or district; he added that is the standard that has been upheld by appellate courts. While the statute allows municipalities to adopt guidelines, those guidelines cannot be inconsistent with the general statute. James said he was not sure whether it was the fault of the Guidelines adopted by the Town or the HPC in attempting to apply the Guidelines, but the result was that his clients had received approval of a COA for the building but were now being required to "double back" and comply with the rendering. James said one issue that needs to be considered is specifically what his clients are being required to correct, and he said the August 29, 2012 letter from his clients to the HPC outlined what his clients believed was a reasonable compromise.

Kinneman pointed out wording in the August 29, 2012 letter where CMT Commons said the rendering was "submitted and approved;" Kinneman said even if the documentation was not perfect, the appellant was operating under the impression that what had been approved was what had been shown on the rendering. Kinneman asked James if that wording implied that his clients had accepted the rendering as what was to be built. James said no, and explained that the bullet points were addressing the specific wording in each of the points brought forward by the HPC. He read from the letter his clients had submitted on August 29, 2012 to HPC, which said the doors on the rendering were shown and described as sliding doors, but that the rendering did not take into account issues such as safety, security and weatherproofing. He said his clients had simply taken each of the points brought forward by HPC and addressed them in the letter.

James said no one had suggested his clients come back before the HPC, and currently there is nothing in the Guidelines or COA that says that should be done. There is also nothing in the original COA for the building, James said, regarding if a change is made because it is required by a building code inspector. For example, he said HPC had questioned that the doors shown on the rendering were sliding doors, which is not what was installed. He said this was yet another case where the artist's rendering showed features somewhat different from what was ultimately constructed for various reasons, and the letter from his clients to HPC went through the reasons for the changes for each of the items addressed by the Town.

James said his clients were not paying him to stand before the BOA and be a "horse's ass" and that they were not saying to the Town or the HPC (at that point, James made the bras d'honneur arm gesture). Instead, what they were doing was asking the Board to look at the record, which was in excess of 2,200 pages, and included attempts to communicate while the structure was being built, James said. In the August 29, 2012 letter, his clients were saying what they could do to the structure and that they could

not do anymore because the structure was built. He added that his clients could not go back and start taking out doors. He said he was not suggesting that they would defy a court order, but said they had a right to talk about issues such as vested rights.

Kinneman asked whether, as an experienced builder and developer, that the issues would not have been anticipated. Kinneman elaborated that issues such as the sliding doors having security or safety issues, that putting cross bracing on the doors would increase the thickness of the door and thus require a thicker knob – one that is readily available on the market – and that faux sliding doors could have been done to make the building visually compare to the artist's rendering. He said he was struggling because construction was done by an experienced builder and developer, not simply a homeowner who wanted to change something on their house, but an experienced developer who claimed to be LEED certified. Kinneman said this was going to be a LEED-qualified building, and that this type of thing should have been taken into account if the builder truly understood what LEED certification was about. Kinneman said in reading the whole record, his impression was that many of the issues were self-created by appellants because the rendering could have been made to look like what they wanted to do. Even a homeowner should have understood that if bracing were going to be added to a door that they needed to plan ahead for a door knob to take into account the extra thickness of the door, he said.

Kinneman said the Board had been told specifically that they were not to take costs or financial damage into account when considering variances, but were to focus on compliance. He said that was what a comment in the record referred to; James asked if Kinneman acknowledged that the comment regarding cost was in the record, and Kinneman said yes. James said he would find the page number to assist Ott.

In addressing what Kinneman said, James said if there was a Guideline that said only qualified builders who are LEED certified can apply for COAs; Kinneman responded, saying that was not what he had said. James emphatically said that was what Kinneman had said and said Kinneman referred to the experience of a man, not his client, CMT Commons. He loudly said Kinneman was projecting, just like HPC did, that Mark Smith has somehow pulled the wool over the HPC, and James banged the podium for emphasis. Kinneman said he never said anyone had pulled the wool over, and James interrupted and said loudly to Kinneman, "The 'he' you are referring to is Mr. Smith, isn't it, sir? Isn't it Mr. Smith?" Kinneman said Smith was the developer, and James said he had tried to stay away from any issues regarding Smith. James said in the record, there were "venomous" emails regarding Smith, which were defamatory.

James then said what he was saying to Kinneman was that it was inappropriate to say that the Town's Guidelines require the certifications that Kinneman had mentioned earlier and that Smith, a part of CMT Commons, should know how to automatically anticipate and comply with a rendering. James said his point was that the rendering was not adequate to construct a building, but is simply meant to show what a structure may look like. If someone wanted to see exactly what the structure was going to look like, they could have gone to Guilford County, or they could have required in the COA that specific details be included.

Kinneman asked how far a builder or developer is allowed to deviate from a rendering or whatever was presented to HPC. He asked if the builder should be allowed to

present a rendering and then build what he wants, but then come back before HPC and say what he has built is not incongruous, so it should be approved. Kinneman said if that were allowed, it would negate the need for any application to come before HPC. James responded that HPC should do the same as Guilford County inspections department does – that is, require a builder who is building a public facility to have a set of engineered or architectural sealed drawings, not just a rendering. He added that there is nothing in the record to indicate that Smith is an experienced builder, although it is alluded to in the emails and communications at various other meetings. James said if conduct is going to be controlled, then specifications need to be required.

Ott said he wanted to get to one of the issues he thought Kinneman was trying to get to. He asked James if there were several applications for COAs throughout the process, and James responded no. James said there was “this one” (the one he had been referring to for the initial building construction), a certificate for demolition, one for landscaping, and there was some discussion about lighting and some kind of certificate issued for that. Ott said as a general rule, three or more constitutes several. Ott asked whether the engineered drawings and detailed plans existed when the initial building COA was submitted, and James said no. Ott then asked whether it was apparent that the building would differ somewhat from the rendering when the engineered drawings were obtained, and James said yes. Ott asked if the applicant at any point called the differences to the attention of the HPC, and James answered no.

Regarding the vested rights argument, Ott asked James if he thought the applicants had vested rights to construct a building with changes of the magnitude of a flat roof and no doors on the front. James said Ott’s question was an interesting hypothetical and said he could give 20 more such scenarios. James said the answer was absolutely not, because that was not what had happened. James continued that there were nonfunctional aesthetic details as well as functional details that had to be included, such as vents added to the side of the building because of building code; the Guidelines acknowledge that building code safety issues trump the Historic District Overlay. Because of that, Ott’s hypothetical situation doesn’t fit, James said.

James said it would have been nice if there were something in the Guidelines or ordinance that says once plans are approved, if you vary from them, you must come back to the Town. He continued that the situation was particularly curious because the structure was going up right beside Town Hall and the person that feeds back to HPC on behalf of the Town was Oakley. James said there was definitely miscommunication, but that it couldn’t all be imposed on either CMT Commons or the Town. He said the rules being applied to his clients were never spelled out, and now the Town wanted his clients to build what it thought they were building. A third party comparing the rendering to what was built would not see material differences such that they would require compliance with subjective issues such as the color of the downspouts, James said. He added that his client had agreed to make some of the changes in order to satisfy the HPC.

Ott asked whether the HPC hadn’t waived a number of the items addressed in the August 29, 2012 letter from CMT Commons, and James said he thought HPC had done so on the advice of the Town counsel. He said there had been discussion by HPC members of which details on the rendering they would like to see and wanted included as part of a new COA, and that some of the issues might not be as reasonable

to require now that the structure had been built and Guilford County had said it met code. James gave an example of if a standard had been applied that was onerous and violates the rights of a property owner and then half of those standards were removed, did that make the rest OK; he said the answer was no, but said there had been some give and take in an effort to avoid coming before the BOA.

James then asked if he should move to the issue of the sign (Case No. 13-01-ORPL-00334: CMT Commons LLC/ Mustang Fitness LLC, appeal a Notice of Violation for a wall sign.); Board members and Thomas indicated it was OK. James said he had given the Board a rendering and a photo. James said he had asked Thomas to include the sign issue with the other issues because he felt it was exactly the same dilemma – that his clients came before the HPC and asked for approval of a sign. That process included submitting the drawing at the bottom of the rendering and also included two horse's heads – one near the words "Mustang Fitness" and another near "CrossFit." James said HPC said it did not approve the upper horse's head, and it was removed. The drawing submitted to HPC included the words "101 square feet" underneath what the sign was to look like.

James said the problem was that from the initial design phase until the sign was painted, the slope of the front gable changed from 4:12 to 7:12, which created more wall space, which resulted in a larger sign. The sign was approved by Guilford County, is in compliance with signs allowed, but it is larger than 101 square feet. One of the other issues with the sign was very bright white and red colors were shown on the original rendering, and members of the HPC wanted those colors muted; James added that there was also some discussion over who had used the term "weathered" first. In painting the sign, David McRae of McRae Signs had done so with more subtle colors. James said after the permit for the sign had been issued from Guilford County, indicating a vested right, HPC members realized the sign was larger than 101 square feet. James said during discussions and meetings, CMT Commons' perspective was that they did not mean that the sign would be the exact size of 101 square feet, that they were still in compliance with the Town and County's size requirements, and they should not have to remove the sign.

James said in the record, Thomas had advised HPC and he intended to argue that CMT Commons had vested rights by virtue of a permit. There is no evidence that anyone did anything untoward; in fact, James said, McRae had started painting the sign before the permit was actually in hand, a fact he said was not really relevant.

James said the sign issue dovetails into the building issue because the rendering shows faux hay loft doors. Those doors were never intended to be functional, but would be located in the same area of the building as the sign. James pointed out that the slope of the front gable on the rendering was not 7:12, but was 4:12; HPC then insisted the roof slope on the front gable be 7:12. In doing so, a larger wall face was created, and so the sign was made larger proportionately.

The same dispute arose, James said, in that HPC said CMT Commons should have come back and sought HPC's approval. He added that was not a requirement.

Kinneman asked how James could reconcile the page in the record labeled CMT Commons 00007, which said any deviation or change in an approved COA is a violation of Sec. 8-5.1 of the Oak Ridge Development Ordinance and is subject to civil penalty. He asked if that would not have served as notice – since that COA was issued early in the process – that any changes to a COA needed to come back before the HPC. James asked if Kinneman was talking about the sign or the building, and Kinneman said he was just asking in general if they understood how COAs work. James responded that how COAs were supposed to work was not what had happened here, and it was not a “gotcha game.”

Kinneman said he was talking about any deviation or change from this approved COA is a violation of the development ordinance; he asked if that didn't put on the record that if changes are made, you have to get them approved. James said no, and you have to have communication about what has been submitted. Kinneman said in this instance, there was specific guidance that the sign was supposed to be 101 square feet, and James said no; Kinneman said the rendering submitted showed the sign being 101 square feet and that is what James' clients had accepted. James responded that Kinneman should rule that way then, and added that if that happened he would “take it up, because that's not what the rules require.” He said McRae had testified before the Town Council that the 101 square feet was a number put on the rendering by McRae and was based on an earlier CAD drawing and was in error. James said his clients had relied upon McRae, because he is the sign expert; he added that the sign was in compliance with the Town and Guilford County, and that his clients had a permit. He asked if the sign was incongruous with the Historic District and said whether something is incongruous is the standard. He cited cases in Cary, Beaufort and Raleigh, saying the courts had said repeatedly that having a Historic District is not a license to dictate.

James said he apologized for being so confrontational, but said that was not the law; he added that if the Board makes it the law with its ruling, then he would “do what I have to do,” but that was not the law of the land. To say otherwise, James said, was arbitrary and capricious.

Board questions:

Beth Walker asked what the size of the sign is now, and James said the record indicated it was 193 square feet, and that proportionately, it was in compliance based on the size of the wall.

Wendell Ott made a **motion** for a 5-minute recess at 7:13 p.m. **Nancy Stoudemire** seconded the motion, and it was passed unanimously (5-0).

Nancy Stoudemire made a **motion** to reconvene at 7:18 p.m. **Beth Walker** seconded the motion, and it was passed unanimously (5-0).

Michael Thomas, attorney for the Town of Oak Ridge and the Town's position of upholding the decision of the HPC, noted that the purpose of the meeting was the appeal of the COA issued on October 23, 2012, and that other COAs that had been

issued were not being appealed. He said the Town Council correctly said that the authorizing statute and ordinance creating the HPC does not give HPC a license to dictate. He said that was somewhat ironic because the owners of the CrossFit building oppose items which were largely agreed to, except in the case of two items in which HPC required either installation or change based on the original rendering – also referred to as an elevation. Thomas said the sign issue mainly is involved because of the Notice of Violation (NOV) being issued.

Thomas said the issue deals with the Historic District Guidelines, which state statute and the Town's ordinance require the HPC to adopt and empower HPC to use them to guide its authority of the overlay district. The Guidelines are inherently advisory in nature, and rule out certain types of construction, rule in others, and leave it to the owner to make the detailed decisions. The Guidelines are loose, because they have to be, Thomas said. HPC is required to have a certain number of members with background or interest or experience in areas which relate to historic preservation. Thomas said he believed the legislature intended that to help guide the HPCs across the state in using the loose advisory guidelines and helping property owners understand what is required to meet the "not incongruous" standard. Regarding a concept that is approved, Thomas said there was a good faith and trust element that owners will carry through on their end.

The CMT Commons appeal appears to be based on decisions being made arbitrarily with some violation of CMT Commons' due process rights for a full and fair hearing by an impartial board, Thomas said. He added that he was prepared to go through the relevant minutes from the October 17, 2012 meeting, from which the appeal arises, to show that the statutory standards for upholding HPC's actions were there and their decision was based on facts that were in the record; if there are overt or implied conclusions based on those facts then HPC's actions, as long as they are within the Guidelines, should be upheld.

Thomas referred to the minutes of the October 17, 2012 meeting and annotations that point out the various facts and where they can be found, the Guidelines, how HPC deals with the congruence mandate, and how the ultimate motion adopted was based on that. He called attention to a photo of CMT Commons' building as it was built and said HPC is only dealing with aesthetic and cosmetic exterior elements because that is all it is allowed to address. What has been characterized as a rendering was presented to the HPC as the basic image of how the building was going to look, and it was approved by HPC. He also showed the Board the drawing/rendering/elevation that was approved in July 2011, which shows the major architectural details that were approved by HPC and which predates any building plans or technical drawings. He referred the Board to the section in the record labeled Construction Drawings where Board members could see the exhibits. He mentioned that the front elevation drawing does not show the changed pitch of the front gable, a change that was approved by HPC. He added that the roof was not an issue, because HPC agreed after the fact to approve it. The drawing also shows the framing of the large main entrance door, which is at the same height level as the smaller doors on either side of it. Windows are also in the doors on the drawing, he said. In the minutes from the October HPC meeting, while HPC said there is a problem with the size of the doors and that they believed the doors included windows, Thomas speculated that HPC might have approved the doors, because they would have been conceptually close enough to the rendering.

Thomas also said that, as stated in his memo and as specified by statute, HPC cases are appealed to the BOA, with both Boards making quasi-judicial decisions. In making their decisions, findings of fact are formally made and conclusions are made, all of which is included in the record – the same as judges do. However, sometimes citizen boards neglect to specify findings of fact, Thomas said; the legislature says findings of fact are not necessary when the record sufficiently reveals the basis for the decision, or when the material facts are undisputed.

Thomas said the huge record included the minutes of the October meetings because the Town had included everything that might be relevant as it tries to practice transparency. He added that the record included a lot of emails, but what the Town felt was really relevant was the minutes from the HPC's October 17, 2012 meeting; Thomas said the Town agreed that the June 13, 2011 COA was relevant because it included the rendering of the building that is part of the record, and that the HPC has always gone back to that rendering in deciding whether what was built is the same as what was approved. He added that the Historic Guidelines are also relevant. He said he also included in his exhibit on the screen excerpts from the minutes regarding the entrance door, the omitted faux hay loft doors, and – because of the NOV – the sign.

Regarding the large, front entrance door, Thomas said there is no dispute that the door is oversized and different from what was shown on the rendering. There is also no dispute that the faux hay loft doors were omitted. There is no dispute that the sign, for which an NOV was issued because of the size, is painted but is not weathered or muted colors used – things proposed and agreed to by the applicant and included in the COA, Thomas said. Those facts are admitted, but underlie the HPC's need to either approve the changes after the building was constructed or not. Thomas said the Board needed to determine if there are other facts that are relevant and how application of the Guidelines was discussed.

Thomas said he would start with the admitted fact that the oversize door varies from the original rendering. The appellants said there was nothing that could be done with the door, but perhaps it could be treated.

Kinneman then banged the gavel and asked some young ladies in the audience to either stop having conversations or step outside.

Thomas continued that what was coming into question was the rendering/elevation of the building, which was not mandated but came from the applicant and was approved in July 2011; he called the rendering a “touchstone” of the HPC's authority in the matter. The doors and windows deviated from the elevations; the first overt reference could be found on page 41 of the Guidelines. Thomas said sometimes HPC referred to the Guidelines specifically and sometimes generally, but that it was clear that the Commission was struggling to apply the Guidelines to the after-the-fact changes brought to them by the applicant in the August 29, 2012 application. Thomas said there was an admission there that what had been built deviated from what was approved.

Kinneman asked Thomas to address the claim by James that the original COA was defective and that the rendering, by implication, wasn't part of the COA. Thomas

responded that the original COA was all there was to go on and if it was defective, then the building might be illegal. He added that the Town was not interested in going that direction, but that the building could be illegal without a proper COA because the property was subject to the underlying zoning, and conditional use zoning would have been required when the property was rezoned. In addition, the property falls within the Scenic Corridor overlay and the Historic District zoning; Thomas said you cannot have legal permits if the underlying zoning is not complied with.

Kinneman said he thought the implication was that the rendering was not part of the original COA, because the original COA only included two paragraphs (that were added to the form document). Thomas said that is addressed in his earlier point that, per statute, if you can find something referenced in the minutes or if it is in a formal order, then it is included. He said the rendering was in the minutes of the July 11, 2011 meeting, it was in the application submitted, and it has been consistently referred to throughout the process. No one has said that another rendering or conceptual drawing or elevation applies to the project, so there is no other basis to which HPC could apply its Guidelines, Thomas said.

Kinneman asked Thomas if he felt the applicants were aware that they needed to come back and get approval for changes; Thomas said if the applicants were not aware, they would not have come back before the Town repeatedly.

In connection with the August 29, 2012 application where the Town noted the deviations through the informal meeting process and through all communications between CMT Commons' principals and Town staff, Thomas said deviations were noted not before the building was built or during the building process, but when they were in place and were pointed out; CMT Commons came forward after the fact to seek approval. Thomas said he commended them for that, saying that they were seeking to prove the need for changes and to show that they fit in with the Guidelines, but they came repeatedly so the knowledge that they needed approval for the deviations made was there.

Continuing with the review of the record, Thomas said, discussion of the overhead doors by the Commission indicates that they took a very specific stand in regard to the Guidelines. In regard to the fenestration of the door and window openings, Thomas said it is clear that HPC is talking about congruence with the Historic District as a whole; in addition, the Commission also discussed whether the doors could still be approved. That is part of giving the applicant a full hearing, Thomas said. HPC also discussed whether most of the as-built deviations could be approved and, after a full discussion and based on the admitted facts, the Commission cited other options available for doors that would appear to look like the original approved concept. The Commission reached a consensus on the issue and implicitly concluded that the door does not meet the Guidelines, that it is a deviation from the approved COA, and that it cannot be approved after the fact because it does not meet the Guidelines.

Thomas said HPC had followed a full and open process of trying to approve, despite the deviations. The major design concepts of scale and proportionality, which are mentioned in the minutes and can be extrapolated from the rendering fairly easily what is proportionate and human scale. He added that, per the Guidelines, essentially human scale means a traditional-size door tall enough for a person to go through, and

they should be the kind of doors historically found in the district; this door, Thomas said, is not congruent with those aspects of the district, and that is the basis for the decision. Under the codified standard of review, Thomas said the BOA could uphold that decision.

Thomas said the same applies to the faux hay loft doors, which CMT Commons admitted were omitted and said they would like to have that aspect approved as built. The fact of the omission of this "extremely visible design element" is admitted, and HPC was again faced with what to do about it, Thomas said. The feasibility of installing trim to make it appear like a faux door was discussed, and there was no request by HPC to install an actual door frame. There was a full discussion of that issue by the Board in which colors were discussed, but the main issue was that the "door" be compatible with the other colors that the applicant was using. Thomas said again it was an application of the design concepts that had been submitted by the property owner as a part of the plan.

According to Thomas, the problem with the earlier argument that the doors were simply an architectural flourish was that the HPC deals strictly with what is seen; it applies aesthetic overlay zoning to achieve a certain image of preservation of a Historic District, based on historic buildings or achieving a certain feel, tradition or character of that district. If those types of details are omitted on what was agreed to be a barn-like building that reflects the district's historic agricultural background, it defeats the purpose of having a COA and the COA process in a Historic District, Thomas said, because if that detail can be omitted, any detail can be omitted.

The change of the roof pitch does not significantly change the area underneath the front gable, something that can be seen from the photos, said Thomas. The size of the sign appeared to be an arbitrary omission and the sign was painted. Thomas said the main thrust of the discussion on the faux doors was that the element was proposed by the owner and was not a major burden on the owner, but it is a significant design feature, which is what HPC is entrusted to ensure when approving a COA in the Historic District. Thomas said because it was approved, it should be required, and is something that was reflected in the minutes.

Thomas said the last issue he had deals with the sign. There has been an admission that the sign is larger than the 101-square-foot size approved in the sign COA and that it lacks a weathered look, which is in the COA. Thomas said the sign was between 174 and 193 square feet – either way, it is significantly larger than 101 square feet. Signage is dealt with at length in the Guidelines and is an important aspect of district regulation, as noted in HPC's discussion, Thomas said. For example, one member quoted from the Guidelines, saying signs should be unobtrusive, compatible in scale, size, color, material and character, and have a restrained quality of contributing architecture in the Historic District. In addition, logos and graphics should be subtle and secondary to the message. Although the applicant received approval for what is probably not a "subtle" sign, that makes the area more important. Thomas said painting of the sign was done before a sign permit was obtained, which is a basic development ordinance requirement, but the COA still applied.

Thomas said when that came up in the October meeting, as indicated in the minutes and which Thomas attended, the HPC began to discuss at length the size issue, not just

the weathered-appearance issue. Thomas said he did indicate that he felt the sign size was not something HPC should be discussing because that was not part of the application, which dealt only with whether the sign needed to be weathered or not. Thomas said he indicated that a sign permit had been issued, but said he was not aware of the effect of it at the time. Thomas said he had indicated that the applicants may have some rights in that, and suggested HPC focus simply on the colors and weathering – which it did.

Thomas said HPC ended up telling the applicants to do what they proposed, which was to weather the sign. In fulfilling his job to the Town, Thomas said he produced a memo, the gist of which is included in the memorandum of law to BOA, as to why he concluded the sign permit was erroneously issued, was invalid, and did not give rise to vested rights because it was erroneously issued; the COA should have alerted the permitting officer – in this case Bill Bruce, the town planner – of the 101-square-foot limitation.

Kinneman asked Thomas whose responsibility it was to make the COA available to the permitting officer, and Thomas said it was the owners' responsibility. Kinneman asked if the Town had any obligation to communicate that information, and Thomas said for purposes of his argument, the answer was no. It was unfortunate that the COA form had been changed, but the original form did say when obtaining building permits that the COA should be taken along. Thomas added that he could not excuse the fact that subsequent COAs did not have that wording, but it was on the first COA obtained by CMT Commons. Thomas said he felt it was the owners' responsibility because if they want the benefit of the permit, they need to show all applicable limitations to that permitting.

Thomas continued that he had noted in his memo that the Town has requested the County revoke the sign permit because the sign is oversized based on the sign COA; as such, it has been treated as a violation under the civil enforcement proceedings of the development ordinance, and that has been cited and is what is being appealed to the Board. Thomas said there is the normal matter of a code enforcement appeal before the Board – is the Town right or wrong that there is a violation of a standard under the development ordinance, which includes the Historic District regulations and the COA, such that the NOV should be upheld? Thomas added that the appeal from the COA is whether the sign should be weathered. He said apparently it should, because CMT Commons proposed that it be weathered.

Thomas said the actual appeal is to the oversized front and side doors – the Town does not contest the right to have the back doors oversized because they are not visible from the public right of way. The Town contends that those three doors are oversized. Kinneman asked whether Thomas thought the Town would have any issue with facades and faux treatment to appear to make the size of the doors smaller, and Thomas said he did not know, but if the doors were as originally proposed – that is, with a solid, element for most of the door and windows in the top half as shown on the rendering – perhaps HPC might have felt differently, even though the framing is bigger than what was shown on the rendering. Thomas said the history shows the HPC communicating very well with the property owners, but disagreeing from time to time. Despite those disagreements, the HPC gave the owners most of what was wanted in terms of as-built, after-the-fact construction elements, and tried hard to work within

the Historic District to avoid unnecessary costs and delays. In a perfect world, would the Town have asked this owner to go to the expense of bringing in building plans before they were issued a COA, Thomas asked? Maybe, he said, but the Town's approach has been based on an element of trying to work with owners and trusting if they said something will look a certain way that it will – proportionately and rhythmically in terms of scale.

Thomas said the HPC has bent over backwards trying to accommodate CMT Commons' after-the-fact changes. Perhaps that is part of the problem, Thomas said – that the HPC should have simply refused to allow the building to proceed, but instead it worked with the owner and largely agreed with the owner's position on most issues. Thomas said the record backs up what HPC did, and HPC's discussion constantly comes back to the facts and to the Guidelines. The HPC struggled, but always based decisions on the Guidelines, which is what it has to work through. The owners' good faith in presenting a rendering and then not building it is what the appeal is about, Thomas said, with HPC basically giving them all they wanted, with these limited exceptions.

Thomas said the Town was asking the Board to deny the appeal because HPC based its decision on a discussion based on facts and concluded, based on those facts, that the Guidelines had not been met, that the elements of the omitted faux hay loft door and the oversize entrance doors were not congruent with the Historic District. They were requiring that the doors be changed out to appear as originally shown on the rendering and that the omitted faux door be installed.

Ott asked Thomas how he responded to the argument by James on behalf of CMT Commons that the appellant, having been granted the initial COA on July 13, 2011, had some kind of vested right to construct a building that was reasonably comparable to the rendering that had been submitted. Thomas responded that he had argued in his memorandum of law that there were two basic sources of vested rights in North Carolina. One of those was common law – if you, in good faith, obtain a permit or other clearance to build or use your property, the administering county could not change the applicable zoning to prevent you from doing so after the fact if you had, in good faith, expended time and money on pursuing the development – the law would not let you cut someone off in that circumstance. He said that in 1989, the Legislature codified a rule regarding certain development issues to create vested rights in those instances, but as noted in the memorandum of law, those do not apply to COAs.

Thomas said he did not follow the vested rights argument where HPC is told that the building will follow the rendering/conceptual drawing with the design elements they have been asked to approve, and then money is spent afterwards for building permits, which deviate from what was approved. Then, knowing that the building is not compliant with the COA, the appellants apparently were hoping that the Town would not do anything about it – which Thomas said has largely been the case – or would go along with the change. Thomas said he did not see the vested rights arising or the vested rights argument being valid before the BOA based on the appeal of the HPC's decision.

In response to Ott's request for page numbers, James stated that he was referring to page 0082, 00111 and 00112, and that the rendering appears multiple times, and that there are also other versions of it.

James said he was thankful that Thomas's presentation ended the way it did, because, from their perspective, there was no mention of the failure to comply with the rendering until the certified letter dated August 15, 2012; he added that the letter also talks about the parking lot and other issues. James said the letter started off by saying the Town noticed the building was nearly completed. In July 2011, the applicant was told to go build the building, and on August 15, 2012, when construction was nearly complete, it was noted that certain elements were not in compliance with the drawing/rendering. James said that was where the vested rights common law argument comes from. He said it appeared the Town has something going on in its "collective heads" and his clients had something in their "collective heads" and the two were not communicating.

Kinneman asked Thomas if there were communications prior to the August 15, 2012 letter, which he recalled seeing in the record and which addressed some of the issues. Thomas said he believed so, but he could not give specific page numbers at that time. The August 15, 2012 letter reflected accumulated understandings as well as what was then apparent outside, Thomas said, adding that it wasn't as if Oakley looked out the window of Town Hall on August 14 and generated the letter the following day. The letter refers to a letter dated November 30, 2011, explaining what items needed to be completed, and also a meeting on April 19, 2012; in that meeting, Town staff met at length with the property owners – the minutes of which are included in the Informal Minutes section of the record – to discuss all issues of noncompliance and any other issues the owners had to work with the owners to effectuate all levels of zoning that applied to this property, including historic preservation. The August 15, 2012 letter was after months of communicating, Thomas said.

James responded that what the consolidated record does not include are the appeal notices, which were somehow unintentionally not included. He asked to include those two single-page forms in the record.

Wendell Ott made a motion to amend the record to include the two notices of appeal as referenced by James. **Jim Kinneman** seconded the motion, and it was passed unanimously (5-0).

Ott commended Thomas for the section of his brief providing the Board with guidance on the nature of review, which was on page 3, and continuing on page 4 with the standard and scope of review and including to the top of page 8; Ott asked James if he had any objections, reservations or disagreements with the guidance Thomas had provided. James said he did respectfully disagree, and that his grounds for appeal were broader. He continued that Thomas would like for the Board to put blinders on, like one would do on a horse. James said one of the reasons he wanted to include the appeal notices is that the appeal is not limited to the narrow issue of one COA, but was a very broad appeal; what happened chronologically was that CMT Commons had submitted a proposed revised COA of essentially the structure as built and acknowledged that they would make some corrections, and that was refused so that became part of the appeal. James referred the Board to the *Beaufort* case. He said he

thought the Guidelines are a part of this case, although Thomas had said they were not, as well as the way the Guidelines were applied is a part of this case. Because of the process, James said he had to include all grounds here in order to raise them later.

Ott said it seemed James was addressing the arguments that Thomas puts forth on the bottom of page 8 of the record regarding actual matters for review. However, Ott said he was talking about the guidance Thomas has provided for the Board about the nature and the scope of the Board's review of the matter. Ott said, for example, Thomas had said, with citations, that one of the things the Board reviews the record for is errors in law; Ott agreed with that and that the Board should agree that procedures in both the law and the ordinance were followed, and that the due process rights of the petitioner were protected, including the right to offer evidence, cross examine witnesses, and inspect documents; James agreed. Ott said he was trying to determine whether James disagreed with any of Thomas's guidance provided in his brief about the nature and scope of review. James said he thought the scope was broader than what Thomas contends.

Board discussion

Kinneman said the Board was now free to discuss the cases and ask questions as needed. He reminded Board members that to overturn both cases and move in the appellant's favor would require a four-fifths majority vote.

Papp said he appreciated the expense the appellants had gone to in building their business, and that he could understand what they were trying to do.

Stoudemire asked if the same person did the rendering that later did the detailed drawings; James said no – an architect had done the rendering, and Varco Pruden did the construction drawings. She asked if Varco Pruden had a copy of the rendering when the construction drawings were done, and James explained that Varco Pruden is a company that has engineers working for them; he added that the company manufactures metal buildings of various shapes and sizes that vary depending on the use. He said he did not know, but it was not in the record, who had a copy of what, and that he could not answer that question if it was not contained in the record. He said he had not thought to ask that question.

Walker said that the building is in a historical district and a scenic district, and if she were on HPC and were given the rendering, she would expect, if it had been approved, that what was built would look very close to the rendering. She added that she felt the HPC had tried to compromise a lot – just from reading the minutes, she could see there had been a lot of compromise on both sides. Walker said one of her concerns was one of the first comments that James had made regarding whether the Historic District Guidelines for Oak Ridge are too abstract. There are hundreds of emails included in the record, and Walker said she wondered if – and perhaps the best thing that could come out of the proceedings – HPC needs to develop a checklist or clearer Guidelines, so that should this ever come up again, it would be easier for a builder. She said she went back to the issue of the Commission approving in good faith what was told to them and then looking at what is built, and feeling as something has occurred that needs to be addressed. She said she was working on how to address what we have now with the building, how to address what HPC has done, whether the Board can decide if the changes can be made. She said CMT Commons' business is obviously one that is loved

and used in the community, but there is the issue of good faith with the HPC and with the citizens of Oak Ridge expecting something that looked more like a barn or that they were told it would look like. She said those were the issues she planned to focus on.

Ott said in looking back at the situation, he suspected and hoped that all the participants – staff, HPC, the applicant, and perhaps even the Town Council – learned something about how to improve processes and procedures, and how to get a better result with less turmoil and conflict and expense. But that was for the future, he said. The challenge now was in many ways a difficult decision, Ott said, and added that he thought it might be time for Board members to try to articulate their own thoughts about the proper decision.

Ott said one of the things that occurs to him is that when the rendering was submitted with the initial application and HPC approved that particular COA, the form on which the approval was submitted, which Ott read aloud, says, "Application No. 6/13/2011 is allowed and the applicant is hereby granted a Certificate of Appropriateness for the action requested in the application, said application being incorporated herein by reference." Ott said he thought it was clear beyond dispute that the rendering was a part of the application and was incorporated in HPC's approval. He said he appreciated that the rendering was not to scale and was not a basis for actual construction of the building, but it was the owner who came to HPC asking for initial approval.

Ott added that he thought the record more than adequately supports the fact that the owner and its agents knew, from the various approvals it had to obtain from various parties, that material changes had to be brought to the attention of the Town. Ott said he thought HPC and the Town of Oak Ridge were legally entitled to insist that the material elements of that rendering either be complied with or be modified. He said that when the Town gave notice to the applicant in the August 2012 letter, which itemized the areas of noncompliance, he thought the applicant by subsequent behaviors implicitly acknowledged the fact that the issues itemized in the letter were inconsistent with the rendering. In the two subsequent hearings, he said it seemed that there was a lot of progress made as the HPC waived a fairly lengthy list of the noncompliant items. In its ultimate decision, HPC accepted the owner's proposals to compromise several of the other issues and came down to conditions.

Ott said it seemed unfair for the applicant to go back to the Commission, get waiver on some items, get agreed-upon compromise on some others, and then come before the BOA and say they now want everything – that they wanted the ones they hadn't won on already. Ott said the appellant had choices. When the appellant received the August 2012 letter that included the itemized list of noncompliant items, it could have appealed that and said those items are not noncompliant or that they were items in which compliance was not required. But it did not do that, but instead went back to the HPC. Ott said it seemed to him that was where the matter seemed to end if his view of the facts and applicable law is valid. He added that unless he is persuaded by views and comments of the Board, that was where he thought he would wind up.

Kinneman said he had similar concerns, with the biggest concern being that if the decisions were overturned, the Board would basically be saying that a party can submit a rendering, submit a plan, get a COA, and then pretty much do whatever they

want and come back and ask for forgiveness. He gave an example of someone who, instead of applying for a permit, builds a deck and then asks for forgiveness. He compared that situation to what the Board is dealing with, saying that the Board would basically be saying the HPC is a toothless tiger.

Although Kinneman acknowledged it was frustrating for the applicant, Kinneman said the applicant has to decide what they want to do in a building, and once that is done, that is what HPC is asked to approve. Agreeing with Thomas, he said HPC mainly deals with aesthetics – not structural issues, whether something meets code, whether it is the correct height or size, or whether it meets drainage issues. Kinneman said the applicant had faced some issues regarding rain spouts, and HPC recognized the need for them and compromised with them. Kinneman said he was in the audience at that particular meeting, and saw HPC working with the applicant to find a way to work the downspouts into the aesthetics of the building.

Kinneman said HPC had accepted many renderings on buildings from many applicants – they have submitted technical engineering drawings on what their building was going to look like. Kinneman said that was where he was concerned that the Board of Adjustment would be saying that HPC has no real authority, and if that is the case, why even have an HPC. Kinneman said his main concern was that the Board not say someone can tell HPC something and later come back and say they decided to do something different and ask for HPC's approval.

Regarding the sign issue, Kinneman said he thought that issue should be discussed separately, since he was more conflicted on that issue, but otherwise said he was leaning the same way as Ott – that HPC had acted within its authority, and the long line of emails shows that they tried actively and aggressively to accommodate the applicant. He said those emails are public record, and encouraged everyone to read them, saying they tell the full story of the timeline and everything that went on. He said he found the emails educational, because he had not been privy to all of them prior to the record being produced.

Walker said, in looking through the very large record, that there were several different drawings or renderings that all appear to try to fit the character of the community in terms of the structure looking like a barn. Walker said she thought that took the Board particularly back to the issue of the Historic District overlay and the congruent/incongruent issue. She added that when she looks at the standing building, she has a hard time believing that it is congruent with the Historic District. Walker said she had no problem with the building anywhere other than in the Scenic Corridor or the Historic District, but specifically because it is located in the Historic District, she did not think that it was congruent. If the majority of people in Oak Ridge were asked, they may well come in on her side, Walker said.

Walker said since congruence was a big issue in James's presentation, then she had some problems. She said she had no problem with CMT Commons' having to modify sliding doors, and she understood that modifications had to be made. She added that she thought the as-built structure had lost the Historic District character that the HPC was trying to uphold, and as Kinneman had said, it was strictly an exterior aesthetic issue and has nothing to do with what business operates there or what permits have been obtained – those issues are beyond the Board's purview. Walker said the way the

building looks is important to her and to the HPC in its continued work; she also said she appreciates that CMT Commons worked very hard to address the problems, but there could have been earlier discussion of the aesthetics.

Papp said this is a Historic District, and there are certain Guidelines that have to be followed. Kinneman said he did not dispute that the Guidelines could be "tidied up."

Stoudemire said it seems clear that the rendering is what everyone has an issue with. Although both parties had made concessions, she kept going back to the timeline, but knowing that when the applicant came to apply and it says that changes require resubmittal and going back to the Board – something done after the fact – Stoudemire said she felt the Town and CMT Commons had acted in good faith. Although procedures could be tightened, it is hard to make rules when you don't know what is coming.

Kinneman asked if the Board needed any additional input or had questions for counsel, or if the Board felt it was ready to make a motion on the first case, which was to uphold or overturn the HPC's rulings. Walker asked if it was appropriate to discuss what happens next, based on the Board's decision. Kinneman said there was nothing wrong with discussing that, and said the process is that CMT Commons could appeal the Board's decision to Superior Court, which essentially would repeat the process that was being gone through then. If the Board rules against the appellant, Walker asked if they have the option of making the suggested changes that had come up repeatedly, or their second option would be to appeal to Superior Court. Kinneman asked Thomas for clarification; Thomas said that he thought James would agree that there was a right to appeal. James there is an appeal right to Superior Court, and there is also a Superior Court action that could be filed independently of the appeal right in the cases, one against the Town of Oak Ridge which he attacks in a declaratory judgment the Town ordinances for being what he called "loosey-goosey," which contributed to the entire problem.

James asked to address one aspect, which he said was somewhat of a counsel issue. When the issues are broken apart and the first is voted on and if the HPC decision is upheld, James said he thought the sign issue would be subsumed into that decision because one of the issues was the faux doors and the sign is on the faux doors. James said there had been some debate about how to put the faux doors in without taking the sign down. He said there was even comment in the record about putting the faux doors up and then replacing that portion of the sign on top of the doors. James said if the Board were to affirm the HPC decision, but then say the sign was up and a permit had been obtained so the Board ought not make the appellants take the sign down, that ruling could be in conflict.

Kinneman responded that he thought in that case CMT Commons would have to install the faux doors, but would be allowed to paint the sign back over the doors as it exists. James said he had not thought of it that way, but agreed that Kinneman was correct. Kinneman asked Thomas for his thoughts, and Thomas said he agreed with Kinneman as well.

Kinneman then asked if counsel had strong feelings about whether the issues should be voted on jointly or independently, and said because they were separate causes, his

interpretation was that they should be voted on separately. Thomas said one case is an appeal from HPC, and the other is a Town issue. Ott proposed the cases be treated separately, and if the Board reaches a decision on the review of HPC's proceedings, while there may be some elements that apply, they should be dealt with when the Board deals with the sign issue.

Kinneman asked if there was additional discussion before asking for a motion; seeing none, he said he saw the options as a motion to uphold the decision of the HPC, a motion to overturn HPC's ruling, or a motion to defer the case back to the HPC because of a procedural issue. Thomas said the latter would effectively be vacating HPC's decision and require HPC to hold further hearings, if necessary, to comply.

Wendell Ott made a **motion** that having reviewed the record and considered arguments of counsel and their written submissions, to uphold the Oak Ridge Historic Preservation Commission's Certificate of Appropriateness issued to the appellant in this case on October 23, 2012; Ott said he concluded that the decision does not in any way violate the rights of the petitioners because he believes that the findings, conclusions and decisions were not in violation of the Constitutional provisions, adequately provided for the petitioners' due process, complied with statutory authority conferred upon the City and Commission by state law and Oak Ridge ordinance, and were consistent with applicable procedure specified by statute and ordinance and not otherwise affected by error of the law. Ott also said that he concluded that the decisions of HPC were fully supported by substantial competent evidence in the entire record, and were neither arbitrary nor capricious. **Alex Papp** seconded the motion.

Discussion on the motion

Walker agreed with Ott that the record clearly supports the basis for HPC's decisions, and said she felt the Board was bound by that regardless of how long the procedure had gone on or the compromises made by both sides. Walker said she thought the Board was required to base its decision on what was before them in the record.

Kinneman called for a vote, and the motion was passed unanimously (5-0).

* * *

Regarding discussion of the sign NOV, Walker said the Board had dealt with some of the issues previously and it seemed as though the issue is either based on a percentage or what was agreed to. She added that unfortunately it seemed to her that the Board's decision should be based on what was agreed to, not on percentages.

Kinneman said he hinged on the question he had asked Thomas regarding whose obligation it was to make matters known, and Thomas had said it was the applicants' responsibility.

Ott said since the Board's decision on the COA was to uphold HPC's decision, the applicant would have the COA that authorizes it to proceed with signage with the option or weathering or painting the background area to match the building, and the applicant was encouraged to propose a sign more consistent with the size approved in the COA. Ott said he understood that the applicant would then have to go back and get a sign permit showing the changes to the sign, since the previous permit had been

vacated. He said the applicant and the Town's agent planners would have to see what they could figure out about issuing that permit, or the Board may end up in the same position again. Ott said he hoped that point could be reached, either without the additional time and expense of appellant review or with it, and that he thought there may be some options available.

Walker thanked Ott for reminding the Board that there is a COA and there has been a request to revoke it. She asked whether that had happened yet, and Thomas said it had not.

Papp asked whether the Board was deciding to uphold what the HPC says; Kinneman said this issue was not so much about the HPC, but about the Town's ordinance. Kinneman said the HPC approved a sign at 101 square feet, and that the sign permit that was issued allowed a much larger sign, so the decision still could have implications for the HPC.

James said for the record he wanted it known that he did not acquiesce just because he had been sitting there silently. He said the sign submission had the figure of 101 square feet in it, which was put in by Mr. McRae of the sign company. The ratios for the sign are correct – otherwise Guilford County would not have issued a sign permit – the sign is correct, and it is correct as far as the Historic District Guidelines, James said. The only question is that the submission to HPC said the sign would be 101 square feet, but it is not. That is why CMT Commons had requested a variance and a Notice of Violation was issued, although the sign permit has not been revoked. He said he simply brought up the other issue because if the Board elected to reverse the Notice of Violation and the permit were upheld, he guessed CMT Commons could paint the same size sign later.

Thomas responded that James might say the sign was compliant with normal zoning under sign provisions of the development ordinance, which is what the County looked at; it didn't look at the COA, because the permitting officer did not have it in front of him, which was why Thomas had characterized it as erroneous issuance of the sign permit. It was not prepared as what the HPC had approved, which was proposed by the applicant as 101 square feet; the 193 square feet was on the sign permit application which was submitted after the painting of the sign had already begun, and the Town notified CMT Commons that a permit had not been applied for yet. Thomas said that was where the disconnect had occurred, and the Town's position was that the permit should not have been issued. The Guidelines do not have an area for calculating the size of a sign like the general sign ordinance does – it simply has Guidelines about how a sign should appear.

Papp said (comment inaudible).

Ott said it does seem that the Notice of Violation is correct in the sense that the applicant applied for a weathered sign, and the fact has been established that it is not weathered. James asked permission to address that statement; Ott proposed both counsel be allowed to respond, and Kinneman asked James to wait. Ott continued that the Board had just upheld the COA requiring that modifications be made regarding the weathering. He said his personal view was that because the application clearly specified the size of 101 square feet, HPC would be within its authority to require that

the sign comply with that dimension. Ott said he would be inclined to uphold the NOV and hope that parties can work it out. He said he would be glad to consider any additional responses counsel has.

James responded that there is no real definition for the term "weathered." He said his clients asked, and were told that because they said they could make the sign weathered, they had to do it. James said his clients responded that they didn't say they could make the sign look weathered, but they said they could make it not as bright, so they put in the gray background instead of white. He said the sign was being held to a standard, although he admitted the size of 101 square feet versus 193 square feet was a different issue.

Kinneman asked Thomas to clarify what the language was; he said he was conflicted because he thought the size of the sign was the main issue, not the weathering or coloring. Thomas responded that the NOV was based on signage area, not the weathering issue. He added that the April 11, 2012 COA says that colors will be muted and the sign "weathered" so that it appears like a sign that would be seen on a much older barn, but that is not the issue the Board is dealing with. Kinneman agreed, saying the Board is not considering that issue, but rather that the sign exceeded the size that the HPC said it should be. Thomas said he responded because that was the applicants' wording.

Walker asked Thomas what would happen if the sign permit is revoked. Thomas responded that if the permit is revoked by the contract agency, which is the County, that would make the sign illegal and subject to court order to get rid of it. That would mean painting over it, since the sign is painted on the building and is not a structure.

Kinneman said because the Board is dealing with the size issue, he continued to return to the issue of whose responsibility it was to make the permitting office aware of the size the sign was supposed to be, and that the applicant had agreed to that size. He asked James if he felt the Town had some obligation to notify the permitting office of the COA or, as Thomas had pointed out, COAs typically say that you should bring the COA with you when you apply for a permit. James said, at the risk of sounding like a broken record, that he thought the Town had some obligation to communicate with its contracting agency to establish guidelines or standards by which they review permitting requests. He said, at a minimum, the sign permit said 193 square feet and the picture said 101 square feet, and there had been explanations as to why there was a difference between the two - and now the Town wants to hold his clients to a size of 101 square feet.

Kinneman asked James whether he thought his client had some obligation to acknowledge that HPC had said the sign could be only 101 square feet, but the permitting officer said it could be 193 square feet. Kinneman said if you are given the wrong change, do you not have an obligation to say you got the wrong amount of change. James said he would agree with that analogy, but that it is not applicable in this case. He said his clients were trying to run a business and get their sign approved, which is a custom-painted sign. They had muted it in response to HPC's concerns, and he didn't think they had gone down and pointed out to the County that the sign would be 193 square feet, but that HPC had said it could only be 101 square feet so they needed to go correct it. James asked how many signs were being painted, and said this

was not downtown Greensboro. He said there was a sign being painted and someone could have said something. The Town had certainly noticed that the sign was being painted before they had a permit in hand, James said. He added that in North Carolina, if both parties are at fault, then there is no recovery in terms of negligence. Here, he said, the Town was saying after-the-fact to remove the sign and repaint it. He said he thought that was mooted by the other affirmation.

Thomas said he wanted to point out a fact had been admitted in the presentation on behalf of CMT Commons before the Town Council in December – that the sign was already painted before a permit was applied for. James said he had not said that. Thomas said it was started where the extra horse's head was, which is a matter of record, and the sign's area was already set. Thomas said the contractor may have been an innocent party. He said he did not remember if that was in the COA, but it was in the minutes of the December meeting. Thomas said that was the sequence of events, and to apply for 101 square feet doesn't sound like it would be covered here.

Papp asked if what the Board was voting on was whether CMT Commons got a sign approved for 101 square feet but then made it 193 square feet. Kinneman said he believed it was that they were approved for a 101-square-foot sign, and Papp said that CMT Commons knew that but they went ahead and made it bigger, knowing that it should only be 101 square feet.

James said the issue is that the submission by the sign painter said 101 square feet, but the sign, following all applicable guidelines and information, wound up being 193 square feet. The sign painter had said he made a mistake, and testified in front of the Town Council that he had made a mistake in terms of the 101 square feet, but that the ratios regarding height and width of the sign are all proper. Papp asked if CMT Commons should not have gone to the proper authorities and asked if they could make the sign 193 square feet instead of 101 because it would still be complying with all the ratios. James said that was the issue, and what had happened was that when they requested a permit, the sign painter realized that it was larger than 101 square feet, so he put 193 square feet on the permit when it was recalculated. James said the issue was the same as what Kinneman had pointed out: Whose responsibility was it to point out that the actual sign was bigger. James said their contention was that they had a permit, it was sized, and that fact was not hidden. They didn't tell the sign permitting office that they would make the sign 101 square feet, received approval for 101 square feet, and then the sign wound up being 193 square feet. They realized that it was larger during the process, but James questioned whether it was their responsibility to go back to somebody and point out that the sign was not 101 square feet. He said he didn't think so, and suggested that it was subsumed by the other ruling.

Papp said he had a problem with the authority on the issue when there is a permit for a sign that says "x" amount of square footage and then the sign is almost double that. Somebody should have gone back to the people who issued the permit and said they wanted to make the sign 193 square feet – not painting the sign and they saying, "By the way, we made the sign twice the size you approved." James said that was not what had happened. His clients had gone to HPC and asked if they liked the sign and the colors; HPC had said it was too bright and asked if the sign could be weathered or, in other words, mute the colors. James said there was no discussion about the size of the sign except that on the rendering, which showed the colors, it said 101 square feet.

When his clients went to get the sign permit from the County – which is who the Town delegates, since it does not have an agency here to handle it – the calculations on the permit turned out to be 193 square feet. In the record, the sign painter said he had made a mathematical error. The ratios of the sign size are the same, James said. He added that it should have said on the initial presentation 193 instead of 101 square feet, but it didn't. James said he was suggesting that nobody lied to a County permitting agent. Papp said it looked like there was an oversight that nobody caught, and James said that was correct.

Ott said he thought technically what the Board has to decide is whether or not to uphold, reverse or otherwise modify the Notice of Violation issued by the Town to the appellant by letter dated December 19, 2012, which was on page 2,193 of the record. He thanked counsel for pointing out that the NOV is based exclusively on the fact that the sign exceeds the 101-square-foot size approved by HPC. Ott said he would propose a series of findings of fact and then a recommendation based on those findings. He said if the Board agreed on the findings of fact, he thought that would lead them to an ultimate decision about whether to uphold or reverse the NOV.

Kinneman said, back to Ott's earlier point about the application including all documents, and when it was approved, the application was also approved by reference. With that interpretation, Kinneman said HPC did approve a 101-square-foot sign. He said he would propose that as a fact and note that the HPC was under the assumption that it was approving a 101-square-foot sign, and that if there was a mistake, the applicant should have come back and said they made a mistake.

Kinneman asked if it was a fact that the permit was issued in error. Ott said if the Board found as a fact that the applicant repressed it and obtained a COA for a sign that was 101 square feet – although Ott said he knew James disagreed with the validity of that conclusion – and if it was found as a fact that the sign constructed materially deviated from that by covering an area between 170 and 190 square feet, something he said he thought there was ample evidence in the record to prove, and if the Board finds as a fact that the applicant was obligated to but did not call that deviation to the attention to the HPC and obtain its approval for a modification of the permit, then on the basis of those, he would conclude that the NOV is valid and should be approved.

Walker said since the Board had spent a lot of time talking about the rendering and that the original drawing of the sign was on a smaller scale of the rendering, she didn't think CrossFit/CMT Commons could have known that the sign was going to be that much bigger. As James had said, when you look at what actually exists and what was on the original rendering, they appear to take up the same amount of space on the façade, Walker said. She said she didn't think whether the appellants knew was that much of an issue as the sign was being painted. While she said she thought the sign was too large, she added that in terms of proportion, it does fit with the drawing so she was undecided about it.

Ott said he was not accusing anyone of bad faith, but said he personally did not think the question was when they knew or didn't know that the sign would be larger. It was, he said, the simple fact that they applied for a 101-square-foot sign and it was approved, and 173 to 194 is, in his view, materially larger. He said he saw no

requirement that the sign occupy all the space that is available; if that were the case, you could see a sign that occupied the whole side of the building, Ott said.

Kinneman asked if the Board might be creating some kind of situation where it might be getting into a situation in the future, or if they are basically free and clear, because the impact on the applicant sounds relatively moot whether the Board votes his way; if the NOV is upheld, the HPC will have to remedy that anyway. Ott said he thought it was important that fundamentally, if the Board upholds the Town's NOV on the sign issue, that the Board is taking the same position that it took on the initial issue; that is, when an applicant submits an application, materials submitted with the application become part of the application and are incorporated, and the approval of that application incorporates the application. For any material changes from that application, it is the obligation of the applicant to call to the attention of the HPC any material changes, Ott said. He said he thought if the Board upholds the NOV, they are saying that they are taking the same position in both cases.

Walker asked if the record does not say that the applicant didn't know and that it was the sign painter who came to the HPC to say he had made a mistake. Kinneman said he believed the testimony was before the Town Council with the sign painter explaining the errors, and Thomas agreed. Kinneman said that the HPC was always under the impression that the sign was going to be 101 square feet; Walker added that they were under that impression until the sign was finished.

James responded that the size of the sign was based on 7.5 percent of the wall size, and the wall had not been constructed when the original sign was drawn. The wall was a different size because of the 7:12-pitch gable on the front of the building, so when the wall was constructed, the same ratios were kept but it increased the size of the sign. To Walker's point, James said the sign looked like it did on the rendering because his clients kept the same size ratio as what was shown on the rendering. James said his clients did not realize, and to have a finding of fact that said they did realize was, he thought, a clear error. If their agent had a responsibility, that should be stated in the Guidelines, he said.

In response, Ott said he was comfortable with the notion that whoever went to the County for the sign permit, acting as agent for the appellant, had knowledge of the size based on the approval for it. James disagreed, saying it was a ratio. Ott asked James whether the result of the calculation changed as the ratio changed. James said yes, but added that Ott's finding was material and this is not material. Ott said the two could argue about that, and James said he could argue about that with someone else later.

Kinneman asked if there was a motion, and Ott asked whether there might be a motion to adopt the findings of fact that he had articulated earlier.

Jim Kinneman made a **motion** to adopt the findings of fact that Ott had presented. **Nancy Stoudemire** seconded the motion.

Discussion on the motion

Walker asked for clarification on what Kinneman's motion would mean. Ott said in a hearing of this nature, unlike the hearing earlier in the meeting where the Board was reviewing the HPC's action in the nature of certiorari, here the Board is reviewing the

validity of the NOV issued by the Town to the same appellant. Ott said his view was that it was appropriate in that instance to make note of findings of fact so that if the case is appealed, the reviewing court will see how the Board looked at evidence and whether they thought the evidence supported those findings, determine whether they think those findings are relevant, and decide whether they think those findings support whatever ultimate action the Board takes. Ott said that was why he had articulated the proposed findings of fact, and that it was appropriate to do that to support whatever ultimate decision the Board makes. Ott added that he believed if the Board proved those findings of fact, that it is tantamount to and becomes a mere formality to make the further decision to uphold the NOV. Ott said if a Board member disagreed with upholding the NOV, then they should probably not agree with the findings of fact.

Kinneman called for a vote on the motion, and it was passed unanimously (5-0).

Jim Kinneman made a **motion** to uphold the Notice of Violation. **Alex Papp** seconded the motion, and it was passed 4-1 (Walker voting in opposition). Kinneman stated that a supermajority had been needed to overturn.

6. ADJOURNMENT

Alex Papp made a **motion** to adjourn the meeting at 9:19 p.m. **Beth Walker** seconded the motion, and it was passed unanimously (5-0).

Respectfully Submitted:


Sandra B. Smith, Town Clerk


Jim Kinneman, Chair