

AGENDA

ORANGE COUNTY BOARD OF ADJUSTMENT

RICHARD E. WHITTED BUILDING

**2nd FLOOR MEETING ROOM
300 WEST TRYON STREET
HILLSBOROUGH, NORTH CAROLINA**

JUNE 8, 2015

7:30 p.m.

No.	Page(s)	Agenda Item
1.		CALL TO ORDER
2.		CONSIDERATION OF ADDITIONS TO AGENDA
3.	3-51	APPROVAL OF MINUTES a. December 8, 2014
4.		<p>PUBLIC CHARGE</p> <p><i>The Board of Adjustment pledges to the citizens of Orange County its respect. The Board asks its citizens to conduct themselves in a respectful, courteous manner, both with the Board and with fellow citizens. At any time should any member of the Board or any citizen fail to observe this public charge, the Chair will ask the offending person to leave the meeting until that individual regains personal control. Should decorum fail to be restored, the Chair will recess the meeting until such time that a genuine commitment to this public charge is observed. All electronic devices such as cell phones, pagers, and computers should please be turned off or set to silent/vibrate.</i></p> <p><i>The Board of Adjustment is a quasi-judicial administrative body established in accordance with the provisions of local regulations and State law to perform specified functions essential to the County's planning program. Action(s) taken by the board are based solely on competent, substantial, and material evidence presented during a previously scheduled and advertised public hearing on a specific item. As detailed within Section 2.12.2 of the UDO the Board chair reserves the right to exclude evidence and testimony that is deemed: 'incompetent, irrelevant, immaterial, or unduly repetitious' and therefore fails to reasonably address the issues before the Board of Adjustment. While it should be noted there is no time limit on the presentation of evidence, the Chair asks that the presentation of evidence be consistent with established policies, rules of procedure, and acceptable levels of decorum to ensure a fair and equitable hearing for all parties.</i></p>

<u>No.</u>	<u>Page(s)</u>	<u>Agenda Item</u>
5.	52-143	A-1-15 – Class B Special Use Permit application proposing to erect a telecommunication facility at 5022 Kerley Road

In accordance with Section(s) 2.7 *Special Uses*, 5.2.2 *Table of Permitted Uses*, 5.3.2 *Application of Use Standards – Special Uses*, and 5.10 *Standards for Telecommunication Facilities* of the UDO Skyway Towers LLC and T-Mobile have submitted a Class B Special Use Permit application seeking a permit to erect a 129 ft. tall (125 ft. tall tower with a 4 ft. lighting pole at the top for a combined total height of 129 ft.) monopole telecommunication facility (i.e. a telecommunication tower) on a parcel of property located at 5022 Kerley Road, further identified utilizing Orange County Parcel Identification Number (PIN) 0801-15-4533.

The parcel, owned by Leah Bergman, is zoned Rural Buffer (RB), is approximately 5.8 acres in area, and is located at the intersection of Mt. Sinai Road (SR 1718) and Kerley Road (SR 1717) near the border with Durham County (hereafter 'the property').

As detailed within the application, the applicant wishes to erect a telecommunication tower within a 100 foot by 100 foot leased area on the aforementioned parcel. There will be an equipment cabinet at the base of the tower to house equipment for the various communication providers utilizing the tower within a 60 foot by 60 foot fenced compound. Access to the facility shall be through a proposed 20 ft. wide access drive off of Mt. Sinai Road.

6. ADJOURNMENT

IF UNABLE TO ATTEND THIS MEETING, PLEASE CALL THE PLANNING DEPARTMENT (NUMBERS LISTED BELOW – PRESS 1 PLUS EXTENSION 2575 OR 2585). STAFF CAN THEN DETERMINE IF A QUORUM WILL BE PRESENT FOR THE MEETING.

**HILLSBOROUGH - 732-8181
CHAPEL HILL - 967-9251**

**MEBANE - 227-2031
DURHAM - 688-7331**

**MINUTES
BOARD OF ADJUSTMENT
DECEMBER 8, 2014
REGULAR MEETING**

MEMBERS PRESENT: Larry Wright, Full Member (Chair)
David Blankfard, Full Member (Vice Chair)
Karen Barrows, Full Member
Mark Micol, Alternate Member
Jeffrey Schmitt, Full Member

MEMBER ABSENT: Samantha Cabe, Alternate Member

STAFF PRESENT: Michael Harvey, Current Planning Supervisor
Debra Graham, Board Secretary
James Bryan, Staff Attorney
Patrick Mallett, Planner II

AGENDA ITEM 1: CALL TO ORDER

Larry Wright called the meeting to order.

AGENDA ITEM 2: CONSIDERATION OF ADDITIONS TO AGENDA

There were no additions to the agenda.

AGENDA ITEM 3: APPROVAL OF MINUTES

A. OCTOBER 13, 2014

MOTION made by Karen Barrows to approve minutes. David Blankfard seconded.

VOTE: Unanimous

AGENDA ITEM 4: PUBLIC CHARGE

The Board of Adjustment pledges to the citizens of Orange County its respect. The Board asks its citizens to conduct themselves in a respectful, courteous manner, both with the Board and with fellow citizens. At any time should any member of the Board or any citizen fail to observe this public charge, the Chair will ask the offending person to leave the meeting until that individual regains personal control. Should decorum fail to be restored, the Chair will recess the meeting until such time that a genuine commitment to this public charge is observed. All electronic devices such as cell phones, pagers, and computers should please be turned off or set to silent/vibrate.

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1
2 Larry Wright: I would like to ask for a point of order. I think I would like to clarify for the record at this time if this is a
3 formal public hearing or a hearing open to the public and on page 20, item B, it states "the hearing, while open to the
4 public is not a public hearing where non-applicants are allowed to address the board for present arguments and
5 testimony, etc." Our attorney is Mr. Bryan and I am going to refer to him.

6
7 James Bryan: This is a public hearing that is open to the public. They can come and observe but only those that are
8 parties of standing can offer testimony.

9
10 Larry Wright: Parties of standing would be those which we have...page 27 through page 36...

11
12 James Bryan: They would have to prove standing. Normally, you would either have special damages or the property
13 owner so any special use permit that the property owner that owns the property has standing and anybody who has a
14 loss in value or other special advantages.

15
16 Larry Wright: So maybe they could introduce that...the reason they have standing when they come up and state they
17 have been duly sworn. That is how we handle that?

18
19 James Bryan: That will be good.

20
21 Larry Wright: Is the board amenable to that?

22
23 Anthony Taibi: I am Anthony Taibi, counsel for the landowner at the pointed issue and simply if the board is going to
24 hear witness testimony later, I would like to be permitted to cross examine any witness.

25
26 Larry Wright: Okay.

27
28 James Bryan: Since I have been here, I don't think we have done an appeal like this. We have done mostly SUPs
29 and maybe a variance but this is an appeal of the zoning administrator and also particular to this case is that we have
30 had a request for a subpoena. How a subpoena works is that there is statutory authorization that the Board of
31 Adjustment may issue a subpoena. You first go to the chair and have a written request and that was given to the
32 chair. The chair denied that request so now it goes to the entire board and the board has to make a decision on that.
33 That is the overall framework. I would suggest proceeding through four different parts to go step by step particularly
34 because I haven't had a lot of these. The first one is to make a determination about jurisdiction. There is a recent
35 case in Warren County where the staff, which is who you make the appeal to... you fill out a form and pay money to
36 make an appeal and it goes to staff. Staff is not allowed to make a determination beyond that. Whatever is filed and
37 whatever is paid for gets sent to the board. So the board has to make that determination who has standing and who
38 has jurisdiction. The first question is, is this a question we can answer, jurisdiction. The next one is standing. Is the
39 right person asking this question? As we mentioned before, the property owner decision affecting standing. We can
40 get into details later. Usually it is financial loss if it has a financial impact on your property that would stand. The third
41 one would be the subpoena. Get to that before you get to the final step... the case on the merits. The case on the
42 merits can be done a number of different ways. I get the inclination that you are going to ask the zoning administrator
43 for a brief synopsis on what is going on and then usually allow the appellant to make their case. Then it is the same
44 having both sides put on their evidence allowing cross examination and so forth.

45
46 T.C. Morphis: T.C. Morphis, I am here for the appellants. We would like the opportunity to make an opening
47 statement at the pleasure of the board.

48
49 Larry Wright: First we are going to be looking at jurisdiction. I would like to ask the question of the subpoena, how is
50 that relevant to this meeting? Is that for another meeting?

1
2 James Bryan: Are you talking about how the subpoena is relevant to any of this case? I would recommend that you
3 let the moving party make their case and it is best for me not to speculate. I have had discussions with them but
4 allow them make their case. If you wanted to do the subpoena first, I guess that is the board's prerogative but you
5 might ask the appellant if they want to hear it first.

6
7 Larry Wright: I would like to go through as it is presented and organized as the packet has been designed and then
8 we will deal with the board's final decision of the jurisdictions and if it is final and binding and we can hear the
9 testimony of those if they are called on pages 27 through 36 if they want to call them and then present their case and
10 respond to Michael's situation and then we can go back. We can always deal with subpoena and standing last. We
11 don't have to do standing up front, do we?

12
13 James Bryan: My recommendation is to handle jurisdiction and standing first. The subpoena, however you want to
14 handle that but it has to be before they put on their case is my recommendation.

15
16 Larry Wright: I would like to, if this is what we are doing today, I have and I will send it to both attorney and you and
17 Mr. Harvey and to the board members. I want to give the board members ample opportunities as State Statute 160A-
18 388 Board of Adjustment and how subpoena relates to us. Let's read this information now.

19
20 David Blankfard: Read the Public Charge.

21
22
23 **AGENDA ITEM 5: A-5-14 – Appeal of a Revised Determination made by the Zoning Officer submitted by**
24 **Adrian Carter, Robert Nicholas, John Gallagher, Kathleen Erickson, Heron Pond**
25 **Subdivision homeowners, ETAL:**

26 In accordance with the provisions of the Orange County UDO, the applicant(s) have appealed a decision of the
27 Zoning Officer related to the rescinding of a Notice of Violation associated with the purported operation of a shooting
28 range.

29 The County issued a Notice of Violation (NOV) on April 29, 2013 over the discharge of firearms on a 34 acre
30 undeveloped parcel of property identified utilizing Orange County Parcel Identification Number (PIN) 9747-86-5920
31 owned by Mr. William Klein.

32 The Notice of Violation was rescinded in February 2014 due to lack of credible evidence as well as a review of recent
33 court cases. The letter rescinding the NOV informed Mr. Klein staff would continue to investigate the matter and
34 reserved the right to re-initiate the enforcement effort.

35 The applicant(s) allege staff erred when rescinding the NOV citing seven specific determinations as follows:

- 36 1) There is no 'firing range' operating from Bingham Woods Mobile Home Park property.
- 37 2) Discharging firearms by [the] property owner and family was a customary accessory use.
- 38 3) There is currently no 'principal use' on the undeveloped 34 acre parcel.
- 39 4) The [April 29, 2013] NOV is hereby rescinded.
- 40 5) The NOV was ambiguous in that it made mention only of [proposed] operations but failed to give clear and
41 complete allegation of the violation.
- 42 6) The NOV made no conclusion on whether a non-profit recreational use existed at this location, which is
43 required for such a determination to be made.
- 44 7) Other than the discharge of firearms by residents and guests, the NOV alleged no facts on which to base a
45 conclusion that a non-profit recreation use existed.

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Larry Wright: I would like to hear about the section on the subpoena right now.

T.C. Morphis: We did request a subpoena. May I ask a preliminary question? Would you all like any background information? I understand this may be the first time this matter has come before you.

Anthony Taibi: I would object to that coming from a bias witness. If anybody is to describe the facts, it should be the staff because the only question before you is whether the staff's decision is warranted or not. It is not to weigh every underlying fact that could possibly be dragged out.

Larry Wright: Mr. Bryan?

James Bryan: This is probably going to be one of the trickiest decisions you will have to make on the subpoena because one of the...you may issue a subpoena when you will decide if it is relevant, reasonable in nature and scope and not oppressive. In order to know whether it is relevant or not, you are going to have some sort of basis for what this case is about. This is a little bit of a tricky case. I don't think it really matters too much who gives it. You can allow T.C. to start and if he becomes argumentative or too long winded, you can shut him down and say never mind, this is irrelevant but I think it would be good to have some sort of basis and I would probably let T.C. give it the first shot and allow Mr. Taibi to issue another objection if it becomes too far-fetched.

T.C. Morphis: Alternatively, I have no objection to Mr. Harvey presenting the basic information if that would be more amenable.

James Bryan: And that might solve a lot of problems too.

Jeff Schmitt: Pardon my lack of understanding the statutes or the law or this case but who are looking at subpoenaing for what sets of reasons?

Larry Wright: That is good question. Let's start by stating that.

T.C. Morphis: We have requested that the landowner, Mr. William Klein be subpoenaed. We would like the opportunity to cross examine him on some of the information that he and his attorney have presented to county staff. I could provide more detail. I am happy to provide arguments but I don't want to get ahead of Mr. Harvey who I think will explain all the basics of the case.

Anthony Taibi: I would like to note that Mr. Morphis has made a particular representation to Mr. Harvey as to the facts that he wants my client, the witness, to explicate. None of which are at all relevant to the matters before this body. He said the board needs to understand what, if any, safety measures have been taken to contain projectiles on the property, the caliber and type of weapons being fired, the frequency with which weapons have historically been fired and Mr. Klein's future plans for the property. No representation by Mr. Klein is at issue in this matter, simply the staff has determined upon their review that there was not a basis for a prosecution. They may in the future decide, based on future facts... but the question before the body today is simply as to whether the staff had a reasonable basis for their decision not to allow opponents to go on a fishing expedition...

Larry Wright: I understand. Your name again and who do you represent?

Anthony Taibi: Anthony Taibi, Taibi, Kornbluth Law Group, for Mr. William Klein, the property owner.

1 Larry Wright: This was my initial concern... the subpoena is for a future meeting and this is in the past. This whole
2 agenda is in the past. How does that relate to this meeting and Mr. Taibi addressed my concerns because I didn't
3 see how it was in order here.

4
5 James Bryan: That is a question that you must allow the mover to make his case.

6
7 T.C. Morphis: If Mr. Taibi is going to cut off Mr. Harvey, I will do the same. You are jumping to jurisdictional issues
8 Mr. Taibi. That is one of the core problems here tonight is there is a fundamental misunderstanding. We are getting
9 right to jurisdiction now. The key issue we are asking you to decide is whether there is an illegal shooting range on
10 property owned by Mr. Klein. Let me finish Mr. Taibi.

11
12 Larry Wright: Please address the Board. I will tell him.

13
14 T.C. Morphis: I apologize. Mr. Taibi in a letter to Mr. Harvey dated May 17.....

15
16 Larry Wright: You address the board sir.

17
18 T.C. Morphis: If I may, I have evidence notebooks. May I hand those out to the board or is that premature Mr.
19 Chairman?

20
21 Jeff Schmitt: Is this gentleman going to give us a synopsis or is Mr. Harvey going to do it?

22
23 Larry Wright: We have been advised to start with the subpoena and so this is what we are doing. I want you to
24 understand, if you are passing out notebooks, we are not going to be here until three in the morning going through
25 these notebooks. We will leave at 10:30. I want you to understand what is realistic for this board to handle and you
26 have a box of notebooks.

27
28 T.C. Morphis: That is one copy for each of you.

29
30 Larry Wright: I understand that.

31
32 T.C. Morphis: I merely wanted you to be able to follow along.

33
34 Larry Wright: Be succinct.

35
36 T.C. Morphis: It will help if I am not interrupted.

37
38 Larry Wright: You realize we can't go through all this tonight.

39
40 T.C. Morphis: I don't intend to have you do that. Most of it is for our case. I wanted the board to be able to follow
41 along. The question before you is this is a shooting range. Mr. Taibi, in tab 9...

42
43 Larry Wright: Is this directly related to the subpoena?

44
45 T.C. Morphis: Yes. Mr. Klein has made representations that we believe are misguided or more likely untruthful. We
46 believe we have a constitutional right and due process to cross examine him and challenge the evidence he has
47 presented. Mr. Harvey's decision was based solely on testimony and information provided by Mr. Klein. We have
48 not had an opportunity to challenge that. I quite honestly think there would be people without his presence on site
49 and that is an issue. I believe there are structures on site. Both of which lead to questions about his creditability and

1 go directly to the issue of whether there is a shooting range on site. I believe Mr. Klein's testimony is very important
2 for this board. We should have a right to challenge what he and his attorney have represented to the staff.

3
4 Larry Wright: Thank you. Any discussion from the board? Mr. Bryan.

5
6 James Bryan: The board has some discretion. There is statutory authorization for a subpoena and straight from the
7 statute whether it is relevant, reasonable in nature and scope and not oppressive. I believe you might, it looks like
8 Mr. Taibi wants to speak and I think it would be prudent to allow him to make his arguments but then it is a question
9 about reasonableness and whether you believe it is relevant.

10
11 Larry Wright: We have whether it is reasonable, nature in scope, not oppressive and relevant. So say we do
12 approve that they pursue issuing a subpoena and Mr. Klein does not. What happens if he comes anyway? If he is
13 sitting in the room, can they ask him to testify? Why a subpoena? That is number one. Number two, if he does not
14 appear after formally being issued a subpoena, isn't he subject to incarceration?

15
16 James Bryan: The first one. The subpoena is because he is not in the room. The board would issue a subpoena.
17 What that looks like nobody knows. I don't know of a board issuing one in the past but it does not preclude it from
18 being an option. If he fails to show up the recourse is it goes to the General Court of Justice, the courthouse and
19 they get jurisdiction to say you need to show up and if you don't show up it is contempt of court. In theory, it could be
20 incarceration but it is a legitimate exercise of power.

21
22 Mark Micol: Is there any precedence?

23
24 James Bryan: Not that I am aware of. Just because a procedure is rare or awkward doesn't make it any less viable
25 but in my experience I haven't seen this done.

26
27 Larry Wright: As I was reading through this, I think there are a couple of cases in North Carolina where Boards of
28 Adjustment did issue subpoenas and I don't know how long ago it was.

29
30 James Bryan: I think reasonable in scope and nature and not oppressive, you might be thinking of a property owner
31 that lives in Asheville or lives out of state coming in, something like that. Those are the nature and scope that you
32 think about. I think the key one that you will be thinking about is relevancy.

33
34 Larry Wright: Okay Mr. Taibi.

35
36 Anthony Taibi: Certainly relevancy is a key issue but it is burdensome and oppressive. They are costing my client
37 lots of money. If he is subpoenaed, he will seek to have it quashed in Superior Court. This will cause satellite
38 litigation that is going on and on. Basically what Mr. Morphis wants is a free shot at putting my client under oath and
39 having an opportunity to interrogate him. What is not before the board is a legislative determination.

40
41 Larry Wright: We have heard that. Thank you. It is time for the board to discuss this.

42
43 Karen Barrows: I frankly don't see why we would pursue a subpoena. It doesn't really have anything to do with what
44 we are being asked to look at tonight.

45
46 Jeff Schmitt: Is the contention here that unless Mr. Klein comes that he is the only one who can address the seven
47 issues that have been put forward by the applicant since he is the property owner, is that part of the basis for this
48 thing. That he is the only person who can really do that?

49
50

1 T.C. Morphis: We believe he is the only person who can testify to what he and his attorney have already said. We
2 believe some of it to be untruthful. However, I will candidly say to the board in the absence of Mr. Klein appearing,
3 we are fully prepared to present evidence on the issues.

4
5 Anthony Taibi: Nothing I have said constitutes testimony. Mr. Harvey and I engaged in discussions about these
6 issues but nothing that I said to him constitutes any kind of any formal representation or fact and I am sure the board
7 did its own investigation as to all discussed matters and of course most of what we talked about is interpretation so
8 there really are not any facts that are at issue.

9
10 Larry Wright: Thank you.

11
12 T.C. Morphis: I just wanted to point out that in fact, the February 10, 2014 letter we are appealing is replete with facts
13 that they accept the ...

14
15 Larry Wright: We will deal with that when it comes. Do I have a motion?

16
17 **MOTION** made by Jeff Schmitt: that given the information that has been provided by staff and under the context of
18 the UDO which sets the bounds of limitation that this board has that the information we need to make a decision
19 relative to the dismissal or the pulling of notice of violation is sufficient for us to do in the material that we have been
20 provided and no subpoena is necessary. Seconded by Karen Barrows.

21 **VOTE:** Unanimously

22
23 Larry Wright: Now we move to standing.

24
25 James Bryan: Jurisdiction I would do first. I made a little chart that would help. It is basically that you will note in the
26 appeal; the applicant has seven issues that have contentions with. Then for each one of those, I have listed and
27 have two columns where the jurisdiction, whether it is an order requirement or determination and then whether it is
28 final and binding. If you have got both of those, you have got jurisdiction to hear it. It can be order, requirement or
29 determination so it could be ordering something; you have to take the shed off your property. It could be requiring
30 something; you need to have a 50 foot buffer or it could make a determination; that box out there is a chicken coop
31 and not a shed. It is my determination and then it has to be final and binding. There are a lot of times you can ask
32 staff or an advisory opinion and it could be very informal; a phone call. The county could formalize it and say you
33 have to pay \$50 for this advisory opinion but it is still advisory. It is just what I think and then you have a separate
34 process for a determination and that would be things like permits, a sign permit, a zoning compliance permit,
35 something like that, that actually vests rights in the applicant that says once this person gets this letter from the staff,
36 they have a right years later. It doesn't matter if Michael is fired, if James is fired, if anybody is fired, they will have
37 that letter and say, yes I can do this on my property or I have to do this.

38
39 Jeff Schmitt: We are going to be asked to make a determination of jurisdiction and its sundry definitions here. On
40 each of the items that has been appealed by the applicant?

41
42 James Bryan: You can do it as one lump haul. I think it would be easier to go item by item.

43
44 Jeff Schmitt: We need to do this because?

45
46 James Bryan: All you have right not is somebody saying I want to appeal; here is the money for an application.
47 Michael has to bring that so if I wrote down that Michael has a messy office, here is \$300 I want to appeal it, he would
48 have to bring that in front of this board. I could be saying let me bring witnesses for his office, you guys would be
49 wasting your time, so you would need to set off; is this something this board is granted the authority to decide.

50

1 Larry Wright: This would be the order of our agenda coming up, these items one through seven and how would you
2 suggest we proceed?

3
4 James Bryan: It is a little tricky because it is the applicant's burden and opportunity to present their case. I surmise
5 this from their application because they did ...it is a blessing and curse but in this instance, a blessing they have an
6 attorney representing them because he did a really good job of outlining his case and this literally involves and it's
7 literally verbatim from Michael's letter what he is pointing out that he is objecting to...

8
9 Larry Wright: But it is an interpretation.

10
11 James Bryan: Yes. So another way you could do this is to say applicants, why do you have jurisdiction? What are
12 you asking us to do? And then make a determination on whatever they say and say alright. Is that something that
13 staff ordered or determined that was final and binding?

14
15 Larry Wright: I think that is the way to proceed. So how we will proceed is, just to let everybody know, and that is
16 Michael and Mr. Taibi and Mr. Morphis. We will go through items one through seven individually so your argument
17 will be for the applicant. There is no firing range operating from the Bingham Wood Mobile Home Property and
18 everything will be restricted to that.

19
20 T.C. Morphis: I do have to offer one qualification. Mr. Bryan has omitted two important legal points. One is [North
21 Carolina General Statutes] 168 S 388 makes it clear that issues that were not raised in an appeal can be challenged.
22 I was just looking for that. I will be happy to give you the citation in a moment. Second, let's not lose the forest for
23 the trees. What we are appealing is the planning staff's determination that there was an illegal shooting range and
24 they rescinded that. End of the day, we believe there is an illegal shooting range and that is on my second page of
25 my appeal. I then challenged and objected to specific determinations made by Mr. Harvey in support of his key
26 determination which is there is no shooting range. That is what Mr. Harvey said. Mr. Bryan is correct, these are
27 seven things we have raised and you can decide if you have jurisdiction or not but at the end of the day, the question
28 you are being asked and it is right here in the middle of page two, the appellants believe that a non-profit shooting
29 range is being illegally operated on the subject property and then direct you to Mr. Harvey's February 10, 2014 paper,
30 it says, "in consultation with the county attorney's office, the NOV is hereby rescinded so we have taken objection
31 and issue with the NOV rescinded and there being a determination there is no shooting range. I want to be crystal
32 clear about that. Now, if the Chair will indulge me I am happy to go through these points.

33
34 Larry Wright: What I would like to do then is to clarify through Mr. Harvey what he... can I do this? I don't see any
35 evidence; there are no hours or anything. They say they have the evidence and the shooting range is running and
36 nobody has evidence, he hasn't submitted it. How do we get down to the nuts and bolts at this meeting? We need
37 evidence to hear.

38
39 James Bryan: First, you need to figure out what the question is because you have the applicant's arguing something
40 but I think Mr. Taibi would disagree and I know that staff disagrees with.

41
42 Larry Wright: Right. How do we do this one through seven?

43
44 James Bryan: You can disregard the one through seven. I think he made a good summary of what his case is and I
45 don't want to put it in my own words and maybe I can't wrap my head around it either but maybe it is best to have
46 Michael say his piece or Mr. Taibi say his piece but what is the question that y'all are going to answer. Make sure it
47 is crystal clear for you guys and that you understand it. Can somebody appeal a rescission of an NOV? It is a very
48 confusing question and I think it is something you need to figure out. What was it that Michael determined in a final
49 and binding manner that can be appealed?

50

1 Larry Wright: I want to ask the board, how would you like to proceed? Would you like to proceed the way it's
2 presented in our packet? I think that is the best way to really make sense of it. I don't know. What do you think Jeff?

3
4 Jeff Schmitt: I wasn't quite sure why we needed to do one through seven but given the last sets of comments, I sort
5 of think we need to because there might be some place where the board thinks that, I'm just picking one here, that
6 item five is really not relevant so when we hear the case of the applicant, I don't want to hear anything about item five
7 because we don't have jurisdiction.

8
9 Larry Wright: Okay. So how do we hear from the intent of the zoning officer if this was an order or a requirement or
10 a determination from the zoning officer because that is jurisdiction if the zoning officer says, this is it, this is a violation
11 and you are going to be fined and I'm not studying it any further, this is it, this is the order. That is jurisdiction isn't it?

12
13 Karen Barrows: I think, Larry, until we hear what folks have to say including Mr. Harvey, we might be able to go
14 through.

15
16 Larry Wright: Go through the one through the seven or go through the way it is in the packet or what?

17
18 Karen Barrows: Probably the way it is in the packet.

19
20 Larry Wright: Jeff?

21
22 Jeff Schmitt: Unless going through the packet presents some issue relative to the appeal of this as opposed to doing
23 something else first, let's just get started and go through the packet.

24
25 Larry Wright: I will start with Mr. Harvey.

26
27 Michael Harvey: Mr. Chairman, if I could make a recommendation. All individuals intending to offer testimony this
28 evening need be sworn before I say one word other than what I have just said.

29
30 Larry Wright: Yes. Thank you. Anybody giving testimony tonight, if you are an attorney and giving testimony, you
31 have to be duly sworn. If you are an attorney not giving testimony, you do not have to be duly sworn.

32
33 James Bryan: Or you may affirm.

34
35 Individuals sworn in by Ms. Graham:

36 T.C. Morphis, Jr.

37 Adrian Carter

38 Michael Joerling

39 Robert Nicholas

40 John Gallagher

41 Richard Kirkland

42
43 T.C. Morphis: Mr. Chairman, I gather I am not going to be able to make opening comments.

44
45 Larry Wright: You will be given your time.

46
47 Michael Harvey: Mr. Chairman, beginning on page 19, you have staff's abstract detailing the nature of this item. You
48 also have several attachments specifically on page 22, you have a map of the subject properties. Beginning on page
49 23, Attachment 2, you actually have the physical appeal application. Attachment 3, which begins on page 43, is
50 staff's response to the appeal. Page 53 is the actual notice of violation issued on April 29. Page 85 is the letter

1 revising the determination rescinding that notice of violation. Page 89 is Attachment 3C which is Land v. Village of
2 Wesley Chapel, a North Carolina Court of Appeals decision. Page 101 is Attachment 3D which is a staff
3 memorandum that was given to the Orange County Board of Commissioners and Attachment 4 which begins on
4 page 109 is various forms that have been prepared and provided by the County Attorney's office dealing with
5 evidence, findings and common objections.

6
7 In summary, and I am looking at pages 43 through 47, as you will note, we issued a Notice of Violation to Mr. Klein
8 indicating that we believed there was an establishment of a land use on the property. Either a 77 acre parcel
9 developed as the Bingham Woods Mobile Home Park or an undeveloped 34 acre parcel of property south of this
10 mobile home park. This Notice of Violation informed Mr. Klein that the discharge of fire arms on these properties
11 either, (a) constituted an illegal expansion of the mobile home park if said shooting activities were a recreational
12 amenity provided for the mobile home park residents and would require the review and action on a Class A Special
13 Use Permit application through the Orange County Board of Commissioners or (b) the establishment of a recreational
14 facility non-profit on the 34 acre parcel of property, as defined within our Unified Development Ordinance requiring a
15 Class B Special Use that is reviewed and acted upon by this board. Mr. Klein subsequently appealed that
16 determination arguing [he had] not developed a recreational facility of any kind. He had not expanded the mobile
17 home park to include a shooting range facility for the benefit of the residents. He argued that there was no direct
18 evidence establishing the determination by the county that an illegal land use had been instituted. And he argued
19 that the county's action was inconsistent with the established case law. After consultation with the county attorney's
20 office in February 2014, staff determined there was insufficient evidence to sustain the Notice of Violation as written.
21 Specifically, we had no direct evidence of who was engaged in the activity. We did not physically catch anybody.
22 The sheriff's report didn't provide us any documentation on who was doing the shooting activity. We found no
23 evidence of actual facilities, building, parking, structures, etc. There was no direct evidence of a recreational facility
24 non-profit as defined in the Unified Development Ordinance being established and as I indicated earlier, in
25 consultation with the county attorney's office, we made the determination that existing case law, specifically Land v.
26 Village of Wesley Chapel, a North Carolina Court of Appeal's decision did not support the NOV as was issued by
27 staff. We rescinded the NOV due to a lack of evidence and then obviously we are here because the adjoining
28 property owners appealed that determination. Mr. Chairman, at this point in time, I would like to enter my abstract
29 including Attachments 1, 2, 3 and 4 inclusive into the record. I would also like to enter into the record a copy of the
30 Orange County Unified Development Ordinance.

31
32 Larry Wright: What date did you say was the first NOV?

33
34 Michael Harvey: April 29, there is only one NOV on April 29, 2013 and that is on Page 53 of your packet.

35
36 Larry Wright: Okay. We would be looking at the UDO relative to that date?

37
38 Michael Harvey: Correct.

39
40 Larry Wright: On what basis did you issue that initial NOV?

41
42 Michael Harvey: I had meetings with several concerned property owners related to the discharge of fire arms.

43
44 Larry Wright: What was the evidence?

45
46 Michael Harvey: The evidence at that point in time was audio evidence denoting the shooting activity. Various visits
47 to the site by the Orange County Sheriff's office. I will call your attention to the actual NOV itself. The NOV was
48 written from the standpoint that it was not the purpose of our order, and I'm on page 54 and 55 now, it was not [the]
49 purpose of our order or letter; excuse me, to require Mr. Klein to cease engaging in what could be construed as a
50 lawful activity from his property. It was to inform that if he wished to allow non-family members, members of the

1 general public, to use either the 34 acre parcel of property or to allow [as] recreation on the Bingham Woods Mobile
2 Home Park site, both of those activities were regulated by the UDO requiring permit. And you will note on page 54,
3 he was advised to apply for a Class A Special Use Permit to modify the mobile home park to allow the new recreation
4 [land use] or he was advised to apply for the Class B Special Use Permit indicating that he was operating the
5 recreation facility non-profit because that is the only land use category that we found in Section 5.2.2 table permitted
6 uses of the UDO that would accommodate that activity. Mr. Klein was given until May 29 to do one of three things. If
7 it was his intent and I'm quoting, "to allow for the activity at the Bingham Woods Mobile Home Park, submit a
8 complete copy of the enclosed conditional zoning application with all required accompanying documentation in order
9 to request it" or if it was his intent to allow the activity on the undeveloped property, again, this is the 34 acre property,
10 "submit a completed copy of the enclosed Class B Special Use Permit application with all the required accompanying
11 documentation" or to provide documentation that only you or your immediate family members will be engaging in the
12 activity. And that is what Mr. Klein was advised to do in this notice.

13
14 Larry Wright: When you issued that NOV, that really wasn't a final and binding or was that a final and binding?

15
16 Michael Harvey: We made the determination that if the activities were being carried on by non-family members, then
17 he had to get a permit. That was our determination and that determination was subject to appeal and Mr. Klein, as I
18 articulated in our abstract and response, appealed that determination.

19
20 Jeff Schmitt: Mr. Harvey, you referenced that you had some audio recordings that were presented to you by the
21 residents in the mobile home park.

22
23 Michael Harvey: Adjacent property owners most of which are subject to the appeal.

24
25 Jeff Schmitt: Did you deem that to be credible evidence?

26
27 Michael Harvey: I deemed it to be credible evidence that shooting activities were being conducted. I deemed it to be
28 credible evidence that there was a lot of shooting activity and as a result, not only based on the comments made by
29 the adjacent property owners but on that tape, I issued the NOV indicating that if Mr. Klein was engaging in this
30 activity allowing third party non-family members or either residents of the Bingham Woods Mobile Home Park that
31 both of those activities required permitting before he could continue.

32
33 Jeff Schmitt: In the presentation, do you have this evidence, the recording, was there any basis for you to make a
34 determination as to the level of the noise that was being generated by this (i.e., 100 decibels, 120 decibels).

35
36 Michael Harvey: No sir.

37
38 Jeff Schmitt: None.

39
40 Michael Harvey: And I should point out that is moot. Orange County Unified Development Ordinance does not have
41 noise regulations. That is a separate ordinance enforced by the Sheriff's Department.

42
43 Mark Micol: Typically when you get a complaint, you would refer them to the Sheriff's Department and then the
44 Sheriff would go out and take noise levels or readings and what not?

45
46 Michael Harvey: If it is a noise complaint, that is a correct statement.

47
48 Larry Wright: And then what is the recourse then?

49
50 Michael Harvey: As I'm not an expert on the enforcement of a noise ordinance, I am not going to comment.

1
2 Larry Wright: But there wasn't a noise ordinance you said.

3
4 Michael Harvey: There is a noise ordinance enforced by the county [Sheriff]. What I will testify to because I do have
5 knowledge is that the noise ordinance exempts the discharge of fire arms from being considered a violation.

6
7 Mark Micol: Does your office get involved like during hunting season where people have large parcels and they have
8 people who are not family members going onto their parcel and hunting. Have you had anything like that in the past?

9
10 Michael Harvey: No sir.

11
12 Mark Micol: If that were to occur, would you then refer them to the Sheriff's Department? What action would you
13 take if someone was complaining about a high activity of hunting and traffic and noise and that sort of thing, adjacent
14 to residential areas?

15
16 Michael Harvey: If someone complained to me about hunting, I would unfortunately tell them that is not a regulated
17 activity per the Unified Development Ordinance and there was no land use issue that I could investigate or cite.

18
19 Mark Micol: And that the activity we are talking about today, did that occur on the trailer park parcel or the
20 undeveloped parcel?

21
22 Michael Harvey: The 34 acre undeveloped parcel of property.

23
24 Mark Micol: Okay. So no activity took place in the trailer park itself?

25
26 Michael Harvey: There was conflicting information and I basically, as I indicated, cited Mr. Klein for both parcels.

27
28 Larry Wright: Would you please briefly state how a non-profit enters into this argument.

29
30 Michael Harvey: The land use category as currently defined within the table of permitted uses, there are two types of
31 recreation facilities allowed in Orange County, specially a for profit and a not for profit [operation]. If I can call the
32 board's attention to Attachment 3D which has been entered into the record beginning on page 101, this is the
33 memorandum provided to the County Commissioners. Recreational facilities are broken down into two separate
34 categories as defined in Article 10 of the Unified Development Ordinance specifically recreation use, non-profit and
35 indoor outdoor recreation use owned by non-profit corporation according to the laws of North Carolina and then a
36 recreation use profit, an indoor outdoor recreation use owned by an entity other than a non for profit corporation. A
37 recreation facility nonprofit is allowed within the county subject to the issuance of a Class B Special Use Permit in a
38 myriad of different zoning districts, I will not read them all, but it would be allowed in this subject district to the
39 issuance of a Class B Special Use Permit which is acted upon by this board.

40
41 Larry Wright: How does one document whether it qualifies or does not qualify as a non-profit?

42
43 Michael Harvey: The honest answer to that question is we would look for articles of incorporation establishing a non-
44 profit corporation for the purpose of providing a recreation amenity. We would be looking at the Secretary of State for
45 North Carolina's website for such documentation.

46
47 Mark Micol: Getting back to the jurisdiction question, basically you don't make the determination about what is
48 reasonable or not reasonable as far as traffic, noise level, rapid fire, constant 24/7 shooting, your office doesn't make
49 the determination if that is reasonable or unreasonable, that is for a court of law to decide?

50

1 Michael Harvey: I would say that is a correct statement, I would just point out for the record that the UDO as entered
2 into the record at this proceeding, establishes no regulatory standards governing intensity, i.e. does not establish
3 regulations governing number of shots to be fired in a given hour type of caliber limitations. It does not establish
4 noise limits at property lines that can or cannot be exceeded and that was not the basis for us issuing the original
5 Notice of Violation.

6
7 Mark Micol: Again, getting back to jurisdiction that means this board is not the recourse for the applicant, right?
8 Basically, Mr. Chairman, what we are trying to figure out is jurisdiction?

9
10 Larry Wright: I think the jurisdiction... Mr. Bryan why don't you clarify that because there are various points of
11 jurisdiction.

12
13 James Bryan: You all aren't proceeding exactly how I recommended but the jurisdiction is you have to find a
14 determination. Michael didn't order anything here, and a Notice of Violation is the first one. He made a determination
15 but whatever y'all are doing, is a shooting range and then he thought about it and said, either I don't have enough
16 evidence for it or what I saw wasn't a shooting range, for whatever reason he said rescind it, I wash my hands of it
17 and that rescinding is now being appealed. You have somebody who has argued and is very eager to argue that it is
18 final and binding and creates some sort of rights for Mr. Klein. I think Mr. Klein's attorney is very eager to argue that
19 no; it's like when a cop writes you a ticket and tears up the ticket, he can still write you a new ticket. Just because he
20 tore it up doesn't mean that you weren't speeding, it doesn't do anything, just a wash. Y'all are going to have to
21 make that determination.

22
23 Larry Wright: What we want is a definition of jurisdiction as it applies to this board because we feel jurisdiction is... it
24 should go to somebody else. That is the way, when I read jurisdiction, I thought it should go to somebody else. It
25 should go to the Board of County Commissioners. That is what you are alluding to.

26
27 James Bryan: No. I just think that

28
29 Mark Micol: We are just determining the NOV, right?

30
31 Larry Wright: That is it...

32
33 Mark Micol: It is a lot simpler than we are making it.

34
35 Larry Wright: As it applies to the UDO as of that April date.

36
37 Mark Micol: I have a feeling we are going to hear a lot of testimony about rapid fire

38
39 Larry Wright: Everyone can catch them on relevancy and repetition. Jurisdiction as it relates to...can you summarize
40 that please.

41
42 James Bryan: A final and binding determination by staff and then you will affirm, reverse it or modify it but you have
43 to find out what was the final and binding determination by staff.

44
45 Michael Harvey: Mr. Chairman, before we continue, I feel obligated to make a statement to this board. I already
46 informed Mr. Morphis I was going to do this but I think before we continue I need to make a statement. Mr. Morphis
47 and I have a 10 year association with each other that transcends this hearing date. We are friends; we have been
48 friends for quite a while. It would be fair to say the he and I have had spirited discussions about this issue but we
49 have not discussed the independent merits of this appeal obviously, that is between him, his client and this board. I
50 think it is fair and you all need to know that Mr. Morphis and I have a relationship outside of this hearing and that

1 while we have discussed in broad terms the issues that will be brought up tonight, we obviously have not had a
2 discussion on the merits applicable or any major elements of this case.

3
4 Larry Wright: Mr. Morphis, proceed with your case.

5
6 T.C. Morphis: And this is strictly on the issue of jurisdiction. Is that correct Mr. Chairman?
7

8 Larry Wright: No. Just present your case.

9
10 T.C. Morphis: You want us to present our witnesses? Or proceed with my opening statement?
11

12 Larry Wright: However you want to proceed.
13

14 T.C. Morphis: I know we are halfway into the evening but I do want to thank you all for being here tonight. We very
15 much appreciate your time and your patience. The emphasis I want to place, I cannot state this strongly enough, is
16 the question before you, is there an illegal shooting range on property owned by Mr. William Klein. You have heard
17 all these questions about jurisdiction but I am going to read [North Carolina General Statute] 168 388 v. 1 Section 8
18 and this is your charge for jurisdiction, "the official who made the decision shall be present at the hearing as a
19 witness, the appellant shall not be limited at the hearing to matters stated in the notice of appeal. If any party or the
20 city would be unduly prejudiced about the presentation of matters not presented in the notice of appeal, the board
21 shall continue the hearing". As Mr. Harvey said, the Board of Adjustment may "reverse or affirm wholly or partly
22 modify the appeal from and shall make any order, requirement, decision or determination that ought to be made. The
23 board shall have all the powers of the official who made the decision". I also, and I have a Memorandum of Law I am
24 going to hand out to you a little later and I have some additional motion I need to file but I will hand that out in a
25 moment. I do want to cite to you the County of Lancaster v. Mecklenburg County. It is a 1993 North Carolina
26 Supreme Court case that states unequivocally that appeals to this board from a determination of the zoning official
27 are De Novo and that is an important distinction because you are going to hear arguments from various attorneys
28 that tell you this is limited. This is limited to whether he was right to rescind the determination or not. That is not the
29 issue in front of you. The issue in front of you, what De Novo means is that you get to hear anew. You get to make
30 all the factual determinations that you need to make and you are not bound by the evidence that was in front of Mr.
31 Harvey or presented by Mr. Tabai or suggested by the county attorney. You get to determine anew. What you
32 determine is whether he was correct in 2013 when he determined that this was a shooting range. We additionally, I
33 believe one of you members had asked about this, believe there is evidence to support the idea that it is likely if not
34 definitely on the Bingham Woods Mobile Home Park. County staff has suggested that there is staff response that we
35 can't go on a fishing expedition. Well, we are not but respectively we can use this time to determine the evidence
36 that is available. We can use it to create new evidence so that is what I want to focus on tonight. Is this a shooting
37 range? When I was growing up in Hickory, North Carolina, it seemed like everybody had a gun. It would have been
38 in the 1980s. We had a 12 gauge and a 410 shotgun underneath our bed. Long story short, the world has changed.
39 People used to use guns primarily for hunting and self-defense. Now there are more guns and more people of higher
40 caliber than ever before and what you are going to hear here tonight is testimony that shows this isn't simply nimbus
41 moving from Chapel Hill or wherever out into the woods being upset by traditional uses. You are going to hear that
42 my clients, some of them are gun owners themselves. Some of them use guns on their properties and they have no
43 objection to hunting or a little bit of target practice. The use we are talking about now is qualitatively different. You
44 will hear testimony and I'm going to submit evidence from the sheriff's department that there are structures on the
45 property, structures sufficient to make this determination. One thing I want to emphasize to you, and again, this is in
46 more detail in my memorandum of law; there is not definition for shooting range in the UDO. As one of you
47 suggested, you do not have the authority to say what the standards for regulation ought to be. You can't say there
48 should be a set back or noise limits or things like that but your job and it is uniquely your job is to determine whether
49 the use exists and so what I would ask for you tonight is after you hear all the evidence to determine this is a shooting
50 range and say to the County Commissioner, now you do your job and enact better regulation. We are not asking you

1 to regulate this; we are asking you simply to agree with the 2013 NOV that there is a shooting range on the property.
2 Before I proceed, I do need, we have gone over the subpoena, we have gone over in some detail jurisdiction, and I
3 have two motions. You all can address them at your leisure. The first is a motion to continue to January, we may get
4 there any way but we have additional witnesses that are not available tonight. My hope was that Mr. Klein would be
5 testifying, I think it is going to be relevant but that is neither here nor there. The other thing, I have never done this
6 before but I think it is important in this case and at the board's pleasure, I am prepared to talk about my second
7 motion. I am going to ask that County legal staff be recused from advising you further and you hire outside counsel.
8 This is not some flamboyant move. I respect Mr. Bryan highly, I think he is an excellent attorney but the evidence
9 shows and I am prepared to present it that he is actively involved in working with county staff on their position.
10 Essentially what county staff is they have a dilemma; they can either have Mr. Klein mad at them or have a potential
11 law suit with 2nd Amendment written all over it or they can have us and they have chosen to deal with us instead.
12

13 Larry Wright: I think that is hearsay.
14

15 T.C. Morphis: I have the email right here. You have in front of you. I could show it to you. This is a public record's
16 request. If you flip to Exhibit 10, these are in chronological order. This is a February 4 email to Mr. Bryan, Mr.
17 Harvey, copying Mr. Craig Benedict and John Roberts. They are talking about the rescission. The determination will
18 likely be appealed by neighboring property owners who have already retained attorneys. With that in mind, it may be
19 helpful to focus the letter on those appealable issues. Under tab 10, it is February 4 and I apologize these aren't
20 better divided.
21

22 Larry Wright: They should be paginated.
23

24 T.C. Morphis: The only thing I need to show is "I recommend the following language", and it goes through detail, the
25 following language which appears nearly verbatim in the rescission letter.
26

27 Larry Wright: How does this letter influence his working with us to make an unbiased decision? I want that right now.
28

29 T.C. Morphis: The problem sir is that Mr. Bryan and county legal staff can both represent and advocate for staff or
30 they can be your unbiased impartial

31 Larry Wright: So you can only have one client?
32

33 T.C. Morphis: That is exactly right.
34

35 Larry Wright: You can only have one client and that is it.
36

37 T.C. Morphis: The proper procedure is to hire outside legal counsel.
38

39 Larry Wright: I know they have done it here for this board.
40

41 T.C. Morphis: That actually wasn't the straw that broke the camel's back. I met, on Tuesday of last week, with Mr.
42 Bryan. We had a good conversation about the procedure for this case. There was no discussion on the staff report.
43 The staff's analysis of this, I would have never seen it except it was emailed to me at 3:30 on Friday last week and in
44 that, I am happy go into detail at the pleasure of the board. There is an assertion that this is not a De Novo hearing.
45 It is simply not the law. It is good advocacy but at this point, the county attorney is advocating for the staff's position
46 which is fine but at that point, the county attorney staff needs to step aside, represent their client and you all need
47 outside counsel. You don't have to rule on that now but that is the other motion I wish to make at this time.
48

49 Larry Wright: And your first motion.....
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T.C. Morphis: To continue this matter until January.

Michael Harvey: There will not be a January hearing because I will not be here.

T.C. Morphis: Until your next availability. That is all I have for my opening. If you would like, I am happy to start calling witnesses Mr. Chairman.

Larry Wright: Start calling witnesses.

T.C. Morphis: I would first like to call Mr. Harvey. Mr. Harvey, could you please tell us your position with the county.

Michael Harvey: I am the Current Planning Supervisor.

T.C. Morphis: As you have already stated, you issued the NOV in 2013?

Michael Harvey: That is a correct statement.

T.C. Morphis: And you also issued the rescission in February of this year, is that correct?

Michael Harvey: That is also a correct statement.

T.C. Morphis: Have you ever been on site and seen the alleged shooting range?

Michael Harvey: I have driven down Angel Lane, yes sir. I have not physically gone on the property. That was not the subject of the Notice of Violation we issued.

T.C. Morphis: You haven't looked at the area where the range was allegedly located?

Michael Harvey: I have seen pictures provided by several of the applicants this evening.

T.C. Morphis: May I ask who wrote the February 10, 2014 rescission letter?

Michael Harvey: I did.

T.C. Morphis: And was it with assistance of county staff.

Michael Harvey: It was with their comment, yes sir.

T.C. Morphis: Mr. Harvey, you have one notebook, I want to direct you to Exhibit 9. These are the letters Mr. Taibi wrote to you in 2013 that collectively, I gather, formed the appeal that he lodged challenging your determination that an illegal shooting range existed on Mr. Klein's property. Let me know when you are ready.

Michael Harvey: Okay.

T.C. Morphis: If you look on the first page, it says, 2nd paragraph about halfway down, "Mr. William Klein has not and will not allow any person to shoot on his land without the physical presence and supervision of himself or Eric Klein". Do you see that sentence sir?

Michael Harvey: Yes.

1
2 T.C. Morphis: Is that what was represented to you by Mr. Taibi?
3
4 Michael Harvey: Yes.
5
6 T.C. Morphis: Did you ever attempt to verify that was true?
7
8 Michael Harvey: No.
9
10 T.C. Morphis: Alright. If you would flip three pages, the second page with Mr. Taibi's June 25, 2013 letter. If you
11 look, it says, "no shooting takes place on the undeveloped parcel by anyone other than the land owner and his family
12 or friends". Did you ever seek to verify that was true?
13
14 Michael Harvey: Not beyond Mr. Taibi's argument, no sir.
15
16 T.C. Morphis: And it says, "The landowner says there has never been occasion where more than six persons
17 including himself have been shooting on a given day". Did you ever verify that was true?
18
19 Michael Harvey: Not beyond Mr. Taibi's assertions, no sir.
20
21 T.C. Morphis: No single session of shooting that has lasted more than a couple of hours or so, that that was true?
22
23 Michael Harvey: Staff has never been called when shooting was to start or occur, no sir, we never verified the
24 duration of hours.
25
26 T.C. Morphis: It goes on saying, "any representation of greater numbers of shooters engaged in continuous fire for
27 several hours at a time is simply false". You never had an opportunity to verify that?
28
29 Michael Harvey: No sir.
30
31 T.C. Morphis: I want to direct your and the board's attention to the next page, page 3. At the bottom, Mr. Taibi
32 writes, "that said, the landowner nevertheless is willing to enter into a settlement with the interest of community
33 cooperation, he will agree to undertake...", a long list of things. Would you consider that an attempt to reach a
34 settlement with Mr. Klein over this issue?
35
36 Michael Harvey: Yes sir.
37
38 T.C. Morphis: Did these bullet points that Mr. Taibi outlined form at least a starting point for that settlement proposal?
39
40 Michael Harvey: Yes sir.
41
42 T.C. Morphis: Did it strike you as odd that someone who had no range that would have a range safety and design
43 evaluation performed?
44
45 Michael Harvey: No sir.
46
47 T.C. Morphis: Or they would access environmental issues in conjunction with range safety and design?
48
49 Michael Harvey: No sir.
50

1 T.C. Morphis: Or they would undertake reasonable range safety and environmental litigation that are consistent with
2 the scale and scope of the activity?

3
4 Michael Harvey: No sir.

5
6 T.C. Morphis: My question is why would he seek to do any of these things, it sounds like a regulated shooting range
7 if they don't have one.

8
9 Anthony Taibi: Objection.

10
11 T.C. Morphis: You don't need to answer that, thank you Mr. Harvey. Is it fair to say that all the allegations and
12 assertions that Mr. Klein made, you took at face value and did not further verify?

13
14 Michael Harvey: It was difficult for me to verify considering shooting activities had ceased during the time period that
15 the NOV was issued and the appeal was being processed.

16
17 T.C. Morphis: So you did not?

18
19 Michael Harvey: As I just indicated, sir, it was difficult for me to verify since shooting activities had ceased then there
20 was nothing to verify.

21
22 T.C. Morphis: Okay. Thank you. I have no further questions at this time but I do reserve the right for direct...

23
24 Anthony Taibi: Mr. Harvey, none of those particular matters of fact which I stated in the course of significant
25 argument and discussion with you, none of those facts that Mr. Morphis pulled out, my representations were in no
26 way dispositive to your determination ultimately, were they? In other words, you had independent grounds separate
27 and apart from whether one time he let his buddy go when he was still at home or something like that.

28
29 Michael Harvey: I think the only way I am going to answer that question is as follows; the April 29 notice of violation
30 asked either that Mr. Klein submit a Class A Special Use permit to allow for expanded operations, specifically a
31 recreation amenity at the Bingham Woods Mobile Home Park, or two, he submit a Class B Special Use permit
32 application to allow for a recreation non-profit facility to be operated from the 34 acre parcel or that sufficient
33 documentation be provided to refute the claims that I was The appeal and subsequent letter submitted by your
34 office on Mr. Klein's behalf obviously was an attempt to refute the comments and assertions and determinations that I
35 made in my April 29, 2013 Notice of Violation. As these letters also challenged staff on being able to produce
36 documented evidence proving that a non-profit recreation facility or that the Bingham Woods Mobile Home Park had
37 been expanded, which I did not have any, that led staff to rescind the NOV.

38
39 Anthony Taibi: In fact, any settlement discussion that we might have had and this is very strange to me coming from
40 civil court was in fact never acted upon and there was not settlement. In fact, what happened was that you decided
41 in Mr. Bryan's colorful phrase, it is like the cop deciding to tear up the ticket so there was no settlement entered into
42 of any kind.

43
44 Michael Harvey: No formal settlement agreement was finalized because we chose to rescind the NOV based on the
45 reasons articulated in my letter.

46
47 Anthony Taibi: I'll make argument and close out.

48
49 T.C. Morphis: No further questions for Mr. Harvey. May I call my next witness?

50

1 Mark Micol: When you inspected the property, did you give notice or was it unannounced?
2

3 Michael Harvey: I drove down a common established right of way so I didn't need to give notice.
4

5 Mark Micol: You actually went on the trailer park property?
6

7 Michael Harvey: Yes.
8

9 Mark Micol: Did you look for shells on the ground?
10

11 Michael Harvey: Yes but I didn't see any. For clarification, you ask specifically about the trailer park property.
12

13 Anthony Taibi: At the risk of making a representation, am I correct that everybody now accepts that nothing took
14 place on the trailer park property and we are solely focused on the Angel Way property? That was my understanding
15 that even before the NOV as a whole was rescinded that the staff was satisfied that the complaints had been quite
16 ambiguous as to whether the trailer park property or the 34 acres adjacent to it were involved and accepted that all
17 shooting activity, whatever character you want to call it, in fact was taking place solely on the completely
18 undeveloped 34 acre parcel and not at all on the grounds of the trailer park.
19

20 Larry Wright: I don't think that has been clarified or is it relevant.
21

22 Mark Micol: I think it is very relevant.
23

24 Michael Harvey: The only thing I would say, Mr. Chairman, is obviously we have our rescinding letter.
25

26 T.C. Morphis: I do have one more redirect. Mr. Harvey, when you were driving down that part of the road, could you
27 see anything that looked like a shooting range from the road?
28

29 Michael Harvey: No sir.
30

31 T.C. Morphis: I have no further questions, Mr. Chair.
32

33 Larry Wright: Are you going to bring witnesses?
34

35 T.C. Morphis: I am. I would like to call Mr. John Gallagher.
36

37 John Gallagher: I have been duly sworn. My name is John Gallagher.
38

39 T.C. Morphis: I am going to give you a copy of the Exhibit notebook and it is evident that I should have prepared one
40 additional copy. I would like everyone to turn to Exhibit 1. I represent to you that this is taken from the Orange
41 County GIS system. What you will see on here are numbers that I have added in myself. If you flip to page 2, they
42 correspond with the individual appellants in this case. I have also labeled and outlined in red, properties owned by
43 Mr. Klein. Property that says simply Klein in the center is the undeveloped parcel. The property that says Klein
44 Bingham Woods Mobile Park obviously is the mobile home park. Mr. Gallagher, could you please state your address
45 for the record.
46

47 John Gallagher: 400 Ford Road, Chapel Hill.
48

49 T.C. Morphis: I have your properties numbered 7, is that correct?
50

1 John Gallagher: That is correct.

2

3 T.C. Morphis: Tell me a little bit about yourself. How long have you lived at your property?

4

5 John Gallagher: My wife and I bought this property about 12 years ago, maybe 13 years ago now and we cleared the
6 land for a home site, lived in a mobile home on the home site for about a year and one half while we built our home
7 and we have lived there continuously over those 12 years.

8

9 T.C. Morphis: In those 12 years, what is the only way to get in and out of that property?

10

11 John Gallagher: The only way in and out is the easement. I am sorry to correct this, it is a matter of personal
12 accuracy, and the easement we are talking about off the paved section of Ford Road is all easement through private
13 land. It is not Angel Way. Angel Way is another road that is the end of that easement and it is labelled as Angel way
14 there. The easement that Mr. Harvey referred to is the easement that everyone who lives down on this section of
15 Ford Road passes through so this is in essence the road to our property and it goes through two pieces of property
16 owned by Mr. Klein.

17

18 T.C. Morphis: Just to orient the board, is the easement you are talking about, does it go through the bottom left hand
19 corner, the southwest corner of the Bingham Woods Mobile Home tract.

20

21 John Gallagher: That is the easement we are talking about.

22

23 T.C. Morphis: We will get to the location of the range but for now, do you drive by the range entrance?

24

25 John Gallagher: Yes I do.

26

27 T.C. Morphis: Every day?

28

29 John Gallagher: Every day.

30

31 T.C. Morphis: Okay. Now, are you the only people in your family who live in this area?

32

33 John Gallagher: My wife lives with me on the property that is labelled number seven. I have a daughter, son-in-law
34 and grandchild that live on the property, the land that is directly to the left.

35

36 T.C. Morphis: How long have they lived there?

37

38 John Gallagher: They have lived there 13 years.

39

40 T.C. Morphis: Do any of you, including your daughter and son-in-law own guns?

41

42 John Gallagher: Yes we do.

43

44 T.C. Morphis: Tell me what kind of guns you own?

45

46 Larry Wright: Why is this relevant?

47

48 T.C. Morphis: It is relevant to show the truthfulness and character of the witness. One question the board may have
49 is do these people know anything about firearms and shooting.

50

1 Larry Wright: I don't think that is relevant to this. Just continue with your questioning.
2
3 T.C. Morphis: When you first moved in, did you hear gunfire?
4
5 John Gallagher: Yes.
6
7 T.C. Morphis: Obviously you can't know where it was from, but where did you guess it was from?
8
9 Larry Wright: This is hearsay, let's move on.
10
11 T.C. Morphis: Let's talk about the use. What the Chairman says is that is speculation, it is not relevant and he has
12 overruled that line of questioning so you don't need to answer Mr. Gallagher. Tell me about the specific noises that
13 you have heard coming from the Klein property.
14
15 John Gallagher: It has varied over time; we have been there 12 years. There are times I would say the use of the
16 gunfire that has been going on would fall within the general boundaries of normal use in a rural area. There are other
17 people who live in the area who also discharge firearms. I have discharged firearms so there are times when it is at
18 that level. There are times when the level of use, the number of shooters, the volume and frequency and the duration
19 is quite amazing.
20
21 Anthony Taibi: I want to object that the frequencies, direction, none of these are relevant.
22
23 T.C. Morphis: He can certainly answer those questions. Mr. Chair, we'll let Mr. Gallagher continue speaking and I
24 think he will clarify.
25
26 Larry Wright: Let's get to the point.
27
28 T.C. Morphis: I have taken my witnesses but I have a set of recordings that will be verified by Mr. Adrian Carter that
29 he made. At the pleasure of the board, I would like to let Mr. Gallagher listen to those. We would represent to you
30 they are recording shooting going on at the property. I would like for you to get a sense of what Mr. Gallagher
31 endures on a regular basis.
32
33 Anthony Taibi: I would absolutely object to the introduction. There is no basis. We don't know the kind of
34 equipment, when it was done, so are we going to listen for hours on end to know?
35
36 T.C. Morphis: We have a 10 minute clip of which I was going to play 20 seconds. Mr. Carter can testify to how it was
37 made, when it was made, and all that information. I only brought Mr. Gallagher up first because he can testify to the
38 entrance of the range which is important.
39
40 Larry Wright: Does the board feel this is relevant?
41
42 Mark Micol: I don't think we need to hear it.
43
44 Larry Wright: I don't either. Jeff, please.
45
46 Jeff Schmitt: The gentleman has said this is a De Novo case and that is that we have the opportunity to listen to stuff
47 that is beyond what was in the record. If that is a legal finding and that is correct then maybe we need to expand
48 what we are listening to in regards to this. I don't know that is legally correct that this is De Novo. The applicant's
49 attorney says it is.
50

- 1 Mark Micol: If it was from the Sherriff's department or some other entity I would say let's hear it but I don't know.
2
- 3 Larry Wright: You could hear a tape of an automatic weapon for five seconds. What does that mean in an overall 24
4 hour period, seven day, three month and what are we going to do with that? Where do we go with that?
5
- 6 Jeff Schmitt: I don't know, I would guess and this is not, given the statements in the comments that Mr. Klein,
7 through his attorney, made to Mr. Harvey about him being willing to put up limits on the shooting range, where ever
8 that is here in this letter, number 10, whatever page that was.
9
- 10 Larry Wright: While you are finding it, I wouldn't want to be in any one of these people's shoes but we have to work
11 on something that is tangible. We just can't work on hearsay.
12
- 13 T.C. Morphis: This also goes to the question of standing to show the suffering
- 14
- 15 Jeff Schmitt: Mr. Klein was willing to come to an agreement with Mr. Harvey on having the safety range designed
16 and evaluated access environmental issues and then undertake reasonable range safety things. The implication to
17 me is a very interesting thing and listening to a snippet of this thing may go to some basis by cooperating what is in
18 here and say that in effect the level of what was going on actually substantiates that there was something beyond the
19 family members shooting. How long would we listen to this thing?
20
- 21 T.C. Morphis: Less than 20 seconds and we will have it authenticated by Mr. Carter.
22
- 23 Jeff Schmitt: This thing is not going to end tonight either.
24
- 25 Larry Wright: Go ahead.
26
- 27 Anthony Taibi: Again, settlement discussions are inappropriate for any discussion by a decision making body of this
28 kind. They are, I would defer to Mr. Bryan, completely excludable from any discussion. Secondly, to the extent that
29 my client is attempting to be a good neighbor, that is being used against him so if he and his buddies like to blast
30 away at an old tree stump then that is a perfectly legal use but if in order to accommodate his neighbors, he says
31 okay, I will get the bobcat out here and make some attempts to clean things up in a way y'all would like to make it a
32 little bit more safe. I will put a little quick lime down where the lead might hit, oh, well now he is engaged in an activity
33 so now somehow it has changed its character. The issue is, is there a facility, I'm allowed to play basketball in my
34 backyard, if I put up a hoop, it doesn't suddenly become a basketball facility. If I am shooting on my 34 acres and my
35 neighbors complain and I make some attempt to address any legitimate complaints they might have, I don't expect
36 that to be used against me. There is no facility. We stipulate that there is lots of shooting of loud guns... bad, bad
37 guns.
38
- 39 Larry Wright: Okay. Thank you. So where are we board? Do you want to hear it or not? Play the tape.
40
- 41 T.C. Morphis: I am going to start this at a low volume, I am going to turn it up and you tell me when it sounds like
42 what you heard. Mr. Taibi, we are entitled to let it in.
43
- 44 Anthony Taibi: It is absurd.
45
- 46 Larry Wright: You address the board, please. We will hear it.
47
- 48 *(Played tape).*
49
- 50 John Gallagher: This is what it sounds like outside on my property when I take a walk.

1
2 T.C. Morphis: How many times a week do you hear this?

3
4 John Gallagher: There have been times I hear this two or three times a week and go on for more than three hours.

5
6 T.C. Morphis: For how many years did this go on, sir?

7
8 John Gallagher: On and off for the time we have been there, 10 or 12 years.

9
10 T.C. Morphis: Does the noise bother you?

11
12 John Gallagher: Yes.

13
14 T.C. Morphis: This is relevant to standing Mr. Taibi. How badly does it bother you? Can you do activities outside?

15
16 John Gallagher: It bothers me enough that my wife and I know what are called shooting days and not shooting days.
17 On shooting days, my wife will brave the easement going past the shooting range to get away from the property so
18 she can have activities away from home because she can't stay there. You go inside your house and you turn up
19 your music, you have to turn it up to a very distracting level to drown this out. We can't walk on our property, can't
20 fish in my pond, can't garden, and can't take care of the chickens. You can't be out of the house with that stuff going
21 on hour after hour.

22
23 T.C. Morphis: Do you worry about the safety of your grandchild that lives nearby?

24
25 John Gallagher: Darn right I am. We have an agreement that if there is shooting going on my granddaughter doesn't
26 get transported to and from our house. If there is shooting going on my wife won't take her outside.

27
28 T.C. Morphis: Do you believe this has affected the value of your property?

29
30 John Gallagher: There is no question about it.

31
32 Larry Wright: That is irrelevant. He is not an appraiser.

33
34 T.C. Morphis: We have an appraiser here tonight and we will talk about our appraisal testimony.

35
36 Larry Wright: Mr. Bryan, how does this relate to what we have here today?

37
38 T.C. Morphis: We have been told that we have to prove standing Mr. Chairman.

39
40 Larry Wright: Maybe we already have that.

41
42 T.C. Morphis: If you want to declare we have standing, I can make the testimony short. I am happy to do that.

43
44 Larry Wright: Do you have any other questions of Mr. Gallagher?

45
46 T.C. Morphis: I do. Mr. Gallagher, will you please turn to Exhibit 5. There are three photographs. I will represent to
47 the board, I took these last week and I want Mr. Gallagher to explain to the board what they are looking at.

48

1 John Gallagher: When you drive down the gravel private road from the pavement to our property, part way through
2 that route on the right hand side is access to the undeveloped 34 acres and these photographs are of the place
3 where people pull in, park, open this up and go in to engage in those shooting activities.

4
5 T.C. Morphis: This is the entrance to the shooting range?

6
7 John Gallagher: That's it.

8
9 T.C. Morphis: With barricades and no trespassing signs?

10
11 John Gallagher: That is right.

12
13 T.C. Morphis: Is that, in your estimation, look to be a path suitable for vehicles?

14
15 John Gallagher: Yeah, vehicles do drive through there.

16
17 T.C. Morphis: Like to get to the facilities?

18
19 John Gallagher: There is definitely an entrance and there is definitely a route in.

20
21 David Blankfard: Looks like a running trail.

22
23 T.C. Morphis: I'm not going to try You can certainly ask the witness. Mr. Gallagher, I would like for you to turn to
24 Exhibit 8 please. First page of Exhibit 8, for explanation to the board, is a list, a spreadsheet I have prepared of all
25 the sheriff's departments reports that we received. I made a publics records request and after this spreadsheet are
26 photocopies of all the sheriff's reports we received. There are 13 in total. Mr. Gallagher, did you ever call the
27 sheriff's department about any of these?

28
29 John Gallagher: Yes I have.

30
31 T.C. Morphis: About how many times did you call the sheriff's department?

32
33 John Gallagher: I've only called the sheriff's department twice. My wife has probably called eight or ten times.

34
35 T.C. Morphis: Sounds like almost a dozen times, your family.

36
37 John Gallagher: Something like that.

38
39 T.C. Morphis: Have you called recently or your wife?

40
41 John Gallagher: No.

42
43 T.C. Morphis: Why not?

44
45 John Gallagher: We were told by the sheriff's department that noise violations didn't give the authority to act in these
46 cases and that it is legal to shoot on your property and they really didn't have any basis for bringing it to a stop. They
47 asked us to keep a log of the days and times when we heard shooting and the start and stop duration of those
48 events. We kept those logs for a couple of months and turned them over to them and we never saw any action as a
49 result.

50

1 T.C. Morphis: You testimony is that this is at least once a week for several hours at a time.
2
3 John Gallagher: Yes.
4
5 T.C. Morphis: Okay. I have no further questions at this time.
6
7 Anthony Taibi: So in the last 52 weeks, how many times has there been any shooting activity? On how many
8 occasions?
9
10 John Gallagher: I personally couldn't give you a firm number but there will be weeks when there will be two or three
11 days and there will be two or three weeks when there won't be any.
12
13 Anthony Taibi: There will be months, like in the winter when there is not any.
14
15 John Gallagher: No I wouldn't say that, there was shooting tonight.
16
17 Anthony Taibi: Tonight? In don't think so.
18
19 T.C. Morphis: Mr. Taibi,

20
21 Larry Wright: You address the board, you don't address each other.
22
23 Anthony Taibi: Withdrawn. In fact, most occasions, overwhelmingly are a sunny, Saturday afternoon, aren't they?
24
25 John Gallagher: No. I don't think that is true.
26
27 Anthony Taibi: Okay. And in point of fact, typically, it is less than two hours in duration.
28
29 John Gallagher: I think it just as likely to be three or four.
30
31 Anthony Taibi: Okay. Do you have any evidence there is a club of some kind?
32
33 John Gallagher: No.
34
35 Anthony Taibi: Do you have any evidence there are memberships offered of some kind?
36
37 John Gallagher: No.
38
39 Anthony Taibi: Do you have any evidence the right shoot on Angel Way is an amenity of living in the trailer park?
40
41 John Gallagher: I do know there are people who are residents of the trailer park, who regularly shoot there.
42
43 Anthony Taibi: That was not my question. Would you answer my question?
44
45 John Gallagher: No. I don't have any evidence.
46
47 Anthony Taibi: You don't have any evidence there is a club, memberships, regular activities, competitions?
48
49 John Gallagher: No.
50

1 Anthony Taibi: Scheduled events?

2

3 John Gallagher: Nope.

4

5 Anthony Taibi: Okay. So your testimony is that simply because this man's family and friends shoot with a greater
6 intensity and volume than you like, suddenly, activity which you agree is perfectly legal has somehow taken on a
7 different character, is that correct?

8

9 John Gallagher: Yes.

10

11 Anthony Taibi: No further questions.

12

13 T.C. Morphis: I do have one or two redirect questions. Let's make sure there is full disclosure. Mr. Harvey issued
14 his original Notice of Violation in 2013 that is known at this time. Did the amount of shooting die off after the Notice of
15 Violation was issued?

16

17 John Gallagher: Yes it did.

18

19 T.C. Morphis: Okay. No further questions. May I call my next witness, Mr. Chairman?

20

21 David Blankford: Has the shooting increased since the Notice of Violation was rescinded?

22

23 John Gallagher: It has resumed. There was a period after the Notice of Violation and please don't get the
24 impression I am tracking this on a minute to minute basis. I am one of many people in the neighborhood and I heard
25 the Notice of Violation, I heard that it was rescinded but I don't know when and I wasn't following it closely but we all
26 noticed that when the Notice of Violation was issued that there was a definite reduction in the amount of activity in
27 that area that I call a shooting range. Now, I noticed that activity has picked back up again but it has not picked up at
28 the level that it did before the Notice of Violation was originally issued. That is my subject interpretation but it is also
29 other people that I have spoken who have similar feelings.

30

31 Mark Micol: You said you discharge your weapon occasionally?

32

33 John Gallagher: Yes.

34

35 Mark Micol: What type of weapon do you discharge?

36

37 John Gallagher: I have three different weapons. I have a .22 rifle that I purchased when I bought the property to deal
38 with snakes and possums in my hen house. I have a .20 gauge shotgun that I bought about three years ago to deal
39 with possums because a .22 is a little inadequate and I bought a .22 pistol about six months ago because I was
40 having problems with snakes in the henhouse and I didn't want to blow the walls off with the .20 gauge so those are
41 the weapons I have. My use of the weapons on my property has been to become familiar with them, to sight them in.
42 I learned to shoot as a boy. I hunted as a boy. People hunt on our property. I know how to handle weapons but I
43 wanted to become familiar with those for safety purposes. I probably have fired over 10 years 100 rounds of
44 ammunition at one time or another on my property.

45

46 Mark Micol: At one sitting, how many times have you discharged?

47

48 John Gallagher: I have never discharged more than 15 or 20 rounds at a time just sighting a gun.

49

1 Larry Wright: Mr. Bryan, on this De Novo issue, this agenda could just be washed away and could go on forever,
2 how do we define? He could take this and spend the next eight board sessions on it. What do we do here?
3

4 James Bryan: So you have to give him full and fair consideration and whatever that may take, that will take. At a
5 point, the constraints to it are relevancy and repetition. Those are your two major restraints but beyond that you have
6 to allow them to have their case. It really matters as to what is the determination you are working on but regardless
7 of that, you are not bound by any record on appeal. You guys can issue your own subpoenas apart from them so
8 they can ask for subpoenas. You can, on your own volition say look I need more information about what happened,
9 when it happened, I subpoena somebody. He is trying to prove standing and we routinely, in this board, approve
10 standing or I've never known us to disagree with standing, of course I've been here for 20 years but a professional
11 coming and showing standing and proving ... why can't we just do that and move on rather than go through countless
12 witnesses?
13

14 James Bryan: It was my recommendation that [unintelligible] there is number of different ways to do it. You can
15 argue special damages. That is not what they are arguing here this evening. They have already submitted the
16 appraiser's report in here. I believe they have got the appraiser here tonight.
17

18 Larry Wright: So we could move on to that and he could move on to something else?
19

20 T.C. Morphis: Yes. That is Exhibit 6. We have an appraiser's report. I have Mr. Kirkland here, I would happy to call
21 as my next witness and if it is some comfort, I don't have an endless parade of witnesses. I am very cognitive of
22 competitive testimony. We have witnesses that are going to talk a little bit more along the lines of what you have
23 heard, talk about what they have actually seen on the site so we are going to actually keep this as limited as possible
24 on preserving our rights.
25

26 Anthony Taibi: I would suggest there is a more limited matter in front of you all that will not require a whole lot of
27 factual explanation that is whether Mr. Harvey's determination that a facility means something other than discharging
28 firearms at some arbitrary level of intensity. I mentioned that both procedurally and because there is a constitutional
29 issue which is if you have the right to do something on your property, the original violation says it only has to be
30 members of your family, you can't have other significant others, you can't have a domestic partner; you can't have
31 your friends. They have made it very plain what they object to and it is really a matter of interpretation rather than a
32 question of fact. Is there some level of intensity of an individual and his folks engaging in ordinary shooting activity
33 on vacant land that at some point that is just ordinary okay activity and as Mr. Gallagher has articulately said, no, at
34 some level it becomes more than that slimily with the number of people. If it is your family and friends so that will
35 limit the factual questions before you.
36

37 Larry Wright: Okay. Thank you. Your appraiser?
38

39 T.C. Morphis: We have no further questions Mr. Gallagher. Mr. Kirkland. You have heard our board would like to
40 keep this as short as possible so ... just tell me if I am doing too much lawyer mumbo jumbo.
41

42 Richard Kirkland: My name is Rich Kirkland I have been sworn in. I am a commercial appraiser certified general in
43 the State of North Carolina. I am MAI. I have been working in the Triangle area and surrounding areas for about 19
44 years. I regularly appraise land, rural land and subdivisions as part of my professional practice. I was hired to
45 address the questions about whether this would have an impact, of whether a shooting range can have an impact on
46 land value. This has come up in my regular course of business. I have appraised land next to shooting ranges in two
47 other situations and the Specifically, I have looked at shooting ranges, I have looked at one that was proposed to
48 go into Harnett County where the property was situated in such a way where they were using buffering and there was
49 some safety issues with that because I had already appraised a proposed subdivision that was going in right there so
50 we went through that and that set me onto a process of going through the appraiser. With all the research that has

1 been done across the country and across North Carolina I found a lot of documentation across the country where
2 proximity to a shooting range can have an impact on value. There are plenty of examples where they do not when
3 they are safe and regulated and follow modern techniques. You have outdoor facilities where there is really no
4 potential for projectiles escaping the site and those areas are considered safe and fine. The other side of that is
5 where you have areas that are not as well regulated or their safety concerns that have come up specifically in Harnett
6 County. Drake's Landing was in the papers because they actually had projectiles escaping from their facility and I've
7 done research out and around Harnett County. The county assessor actually dropped values on all the properties
8 around Drake's Landing. If you were within ½ mile, they dropped you by 12 percent and they had a sliding scale
9 going out to a mile, so yes, where there is a concern for safety and there was issues where things were not handled
10 to a set level of safety, there is an impact on value and that is recognized by the public and clearly recognized by the
11 county assessor in that regard. As that pertains to this project, if there is a shooting range type activity going on in an
12 area where it is unlicensed, unregulated and unsupervised, I would say it would be reasonable for the public to be
13 concerned because that would be an impact on property value.

14
15 T.C. Morphis: Mr. Kirkland, don't mean to interrupt your train of thought but if you flip to page 5 of your appraisal
16 document, could you read that first sentence under conclusion.

17
18 Richard Kirkland: The unlicensed and unregulated shooting range, if allowed to continue would substantially injure
19 value of adjoining and nearby property.

20
21 T.C. Morphis: And that is your professional opinion?

22
23 Richard Kirkland: That is my professional opinion.

24
25 T.C. Morphis: We are all talking about, is it a range, isn't a range. Suppose the board decides this is not a shooting
26 range, does that matter or is it an issue of perception?

27
28 Richard Kirkland: All market value is a matter of perception... what a willing buyer and seller is going to work out at.
29 If you go out on a Saturday and you are looking at property to buy a house and there is that level of shooting activity
30 going on out there, you are not going to be asking whether that is licensed, whether that is actually a shooting range
31 or just sort of like a shooting range.

32
33 T.C. Morphis: So all the noise you heard and all that, that could affect the property values even if it is not called a
34 shooting range.

35
36 Larry Wright: You say you work in the triangle?

37
38 Richard Kirkland: Yes sir.

39
40 Larry Wright: Are you familiar with the area of Hopson Road and Alexander Drive in the Research Triangle Park?

41
42 Richard Kirkland: Yes.

43
44 Larry Wright: Are you familiar where the Environmental Protection Agency is and the National Institutes of Health?
45 Alexander Drive and go over to Hopson Road?

46
47 Richard Kirkland: I have a vague recollection of the EPA building but not sure I can tell you anything specific.

48
49 Larry Wright: When have you been there?

50

1 Richard Kirkland: It has been a few years.
2
3 Larry Wright: What time of day?
4
5 Richard Kirkland: Again, I do not recall.
6
7 Larry Wright: Did you hear gunfire?
8
9 Richard Kirkland: No.
10
11 Larry Wright: There is a hunting club. I worked there for 25 years and it goes on all day long. I have just seen a lot
12 of multi-use development and I just don't know how
13
14 T.C. Morphis: May I add one other question that my help with the Chairman's line of question. The range he is
15 talking about down in the Research Triangle Park, to your recollection, is that primarily a commercial or residential
16 area?
17
18 Richard Kirkland: I would call that a commercial area but again, I did not look at that gun range as part of this project.
19
20 T.C. Morphis: Understood but this particular use, primarily commercial or residential?
21
22 Richard Kirkland: This is residential.
23
24 T.C. Morphis: Thank you Mr. Kirkland.
25
26 Anthony Taibi: You haven't observed any of the shooting on Angel Way?
27
28 Richard Kirkland: No sir.
29
30 Anthony Taibi: So whether it is a lot or a little, you don't know, that is what you have been told.
31
32 Richard Kirkland: I am not making any assertions about that.
33
34 Anthony Taibi: Garbage in, garbage out.
35
36 Richard Kirkland: I would classify it as that.
37
38 T.C. Morphis: I have other witnesses that are prepared. We have evidence that is relevant to the use. We also have
39 evidence that is relevant to the standing issue. I am not trying to rush this board, I want to make a full record but I am
40 also sensitive to your time constraints. Would you all like me to continue presenting evidence regarding standing?
41 Without a clear ruling on that, that is what I am going to continue doing.
42
43 Mark Micol: I think we can say they have standing so we can eliminate part of this.
44
45 Larry Wright: Do we all agree there is standing?
46
47 T.C. Morphis: Thank you Mr. Chairman, we will do our best to keep this short. My next witness is Mr. Adrian Carter.
48
49 Adrian Carter: My name is Adrian Carter and I have been sworn in.
50

1 T.C. Morphis: Mr. Carter, if you will open the Exhibit notebook please. Go back to Exhibit 1. If you will look at
2 number 4. Is that the location of your property?

3
4 Adrian Carter: That is my property.

5
6 T.C. Morphis: How long have you lived there Mr. Carter?

7
8 Adrian Carter: We purchased in 1996 and the next couple of years, my wife and I cleared the lot and built our home
9 together. We moved in September 1998. We have been there a while.

10
11 T.C. Morphis: Since you moved in, have you heard shooting in the area?

12
13 Adrian Carter: Of course. As we worked there, we heard shooting, hunting, whatever, seasonality of it, expected in a
14 rural area, hunting and the sound of hunting is expected.

15
16 T.C. Morphis: What changed? What made this use objectionable?

17
18 Adrian Carter: Starting probably in the fall of 2010, we had been there 12 years at this point, significant change in the
19 frequency and intensity of just the cacophony of multiple caliber weapons, multiple shooters. All coming from the
20 same general direction which on the map would be east/southeast from our property and so we would have
21 conversation with our neighbors, what the heck is going on, what's happened, who is just lighting up the sky with
22 weapons? I think around the start of 2011, we had a homeowners meeting and the nearest email I could find to
23 where we started to look into this more deeply was around March of 2011 so almost four years ago.

24
25 T.C. Morphis: I'm going to spare the board and not play the clip again. Tell me about that clip, where did that clip
26 come from?

27
28 Adrian Carter: I recorded that clip with a smartphone from my kitchen window facing the property in question.

29
30 T.C. Morphis: Best guess, how far is your property? And we are going to get, in a moment, to the location of the
31 range but your best guess, how far is it from the range?

32
33 Adrian Carter: It is 1,000 feet.

34
35 T.C. Morphis: That noise that Mr. Gallagher had to talk over, is that an accurate representation of what you hear
36 from your property?

37
38 Adrian Carter: I would differ from what John Gallagher said that noise level you played it at was the sound level we
39 experienced in our home with the windows closed. I think the difference, not to impugn Mr. Gallagher's testimony,
40 but Mr. Gallagher lives opposite the mussel direction of the gun so we were catching the shock wave of the blast of
41 the weapon because as we were to later find out, the gun range points towards our house.

42
43 T.C. Morphis: We will talk in a moment about how you know that. I would like to direct you to Exhibit 8 which are the
44 police reports again. I apologize, it was sheriff's department. Did you or your wife ever call the sheriff's department?

45
46 Adrian Carter: Yes.

47
48 T.C. Morphis: I am looking, there are 13 reports, I don't see your name on any of these but you made those calls, is
49 that correct?

50

1 Adrian Carter: I would say a half dozen times maybe more when these episodes would escalate, we would call our
2 neighbors, as were instructed by Michael Harvey to document the shooting episodes to inform the sheriff's
3 department of the episode and have the sheriff's department come out. I can't explain why our record is not here.

4

5 T.C. Morphis: It would appear there were phone calls made for which there were no record generated?

6

7 Adrian Carter: Absolutely.

8

9 T.C. Morphis: We made a public records request for all sheriff's reports, is that correct?

10

11 Adrian Carter: Absolutely.

12

13 T.C. Morphis: Would you please turn to the last four pages of Exhibit 8. If you look in the top right corner, there is a
14 date, June 21, 2014, is that correct?

15

16 Adrian Carter: Yes.

17

18 T.C. Morphis: This is the date of the police report. Did you hear the shooting on that date?

19

20 Adrian Carter: Yes I did.

21

22 T.C. Morphis: The reason I ask is did you have any discussions with your neighbors about this shooting, specifically
23 with your neighbor, Mrs. Molly James?

24

25 Adrian Carter: I didn't have a discussion with Molly James, however, her husband Johnathan, called the police
26 department, the sheriff's department and I believe Mr. James emailed both you and I and possibly Mr. Harvey about
27 this escalation and reversion to the way it had been before.

28

29 T.C. Morphis: We have a sworn affidavit from Ms. James, I would like you to read it out loud and tell me if it
30 accurately reflects the conversation you had. It is relevant because it talks about non-family members on the
31 property.

32

33 Anthony Taibi: Relevance... hearsay.

34

35 T.C. Morphis: It is a sworn affidavit.

36

37 Larry Wright: Sir, you talk to the board.

38

39 T.C. Morphis: I apologize. The last three pages of Exhibit 7 Mr. Carter.

40

41 David Blankford: Do we really need to listen to him read this affidavit.

42

43 T.C. Morphis: I am happy to read two relevant paragraphs.

44

45 Larry Wright: Two paragraphs you are going to read?

46

47 T.C. Morphis: Yes sir. We will skip right to paragraph 6. After an unusually loud and ongoing shooting session on
48 June 21, 2014, my husband called the Orange County Sheriff Department to see if they could check on the shooting.
49 I drove down to the shooting range. As I walked toward the activity a man turned to face me and pointed a semi-
50 automatic weapon in my direction. I directed him to lower his fire arm as even I know the basics of gun safety. There

1 were also three other men present as well as a very young child approximately four to five years old. I asked if Mr.
2 Klein was present among them as my understanding was that while the shooting range that is being disputed that Mr.
3 Klein needed to be present for any shooting activity. One man said which Klein was at home and had given them
4 permission to shoot their guns there. I asked them to stop shooting until I talked to Mr. Klein and was told then

5
6 Anthony Taibi: I want to object.

7
8 David Blankfard: ...is not here.

9
10 Anthony Taibi: Is not here exactly.

11
12 Larry Wright: I understand that.

13
14 Anthony Taibi: They are trying to get it in through another witness who wasn't there.

15
16 Larry Wright: Sustained.

17
18 T.C. Morphis: Mr. Klein is free to rebut this testimony.

19
20 Anthony Taibi: He wasn't there either.

21
22 Larry Wright: Address the board.

23
24 T.C. Morphis: Mr. Carter, let's go back. I would like to direct you to Exhibit 3 and Exhibit 4. I apologize; it is a little
25 hard to read. Please take a look at these two and tell me what you are looking at sir. If you need any help, we can
26 walk through that.

27
28 Adrian Carter: They look like topos of Bingham Mobile Home Park, Ford Road. Top of the page is north.

29
30 T.C. Morphis: If you will flip to Exhibit 3. Also take a look at Exhibit 4 and tell the board what that is.

31
32 Adrian Carter: That's a satellite view of the same topo.

33
34 T.C. Morphis: I represent to the board that Exhibit 3 and Exhibit 4 are Orange County GIS data that I pulled to
35 prepare these exhibits. Mr. Carter, start on Exhibit 4, there is a little word in the top center that says Ford Road. I
36 want you to follow Ford Road and I want you to stop at the approximate entrance to the shooting range and tell me
37 how you know it is a shooting range and please describe for the board.

38
39 Adrian Carter: I have driven down this road so whether it is called Angel Way or Ford Road, it is not my business but
40 I have driven down this road and so I know the blue line that traverses Ford Road is a creek bottom, probably a
41 seasonal creek, I am imagining. There is some sort of culvert across the road and if you continue down southeast
42 from traveling down Ford Road, past the horizontal yellow lot boundary, there is an entrance into the shooting range
43 on the right side that Mr. Gallagher to in the photographs that showed the entrance to that.

44
45 T.C. Morphis: I am looking at the bottom right of Exhibit 4, a little orange smear. Is that the dirt road entrance?

46
47 Adrian Carter: I am not seeing that.

48
49 T.C. Morphis: That is not a good Exhibit.

50

1 Adrian Carter: Yes. That looks reasonable.
2
3 Anthony Taibi: Can I object to this? What is the basis?
4
5 T.C. Morphis: We are getting to the basis. Just for your information, Mr. Taibi, to show the physical structures as
6 part of your client's shooting range.
7
8 Jeff Schmitt: Maybe the board would like to know where the smear is.
9
10 T.C. Morphis: May the witness approach? Mr. Carter will talk about physical structure. Mr. Carter, have you ever
11 been on site at the range?
12
13 Adrian Carter: Yes I have.
14
15 T.C. Morphis: When you entered the property, did you intend to enter Mr. Klein's property?
16
17 Adrian Carter: No.
18
19 T.C. Morphis: You would not want to trespass, is that correct?
20
21 Adrian Carter: Correct.
22
23 T.C. Morphis: Please explain to me what happened.
24
25 Adrian Carter: My neighbors and I were concerned for our safety and went to see if we could find the source of the
26 gunfire so we went on the property.
27
28 T.C. Morphis: If you would stop Mr. Carter and orient the board. Go to Exhibit 1 for me and I want to generally
29 describe where Ms. Boysen's property is.
30
31 Adrian Carter: Ms. Boysen's property is in the gap between the numbered properties and the mobile home park
32 properties. The two entitled lots that separate two and four. The two lots adjoining north and south.
33
34 T.C. Morphis: You thought you were going on Ms. Boysen's property, correct?
35
36 Adrian Carter: Yes.
37
38 T.C. Morphis: Continue sir. So you found the range, what did you see?
39
40 Adrian Carter: There was a shooting station set up near that creek, dry creek on the high side of the dry creek. On
41 the opposite of the creek were some targets set up. There were some trees that had been cut down.
42
43 T.C. Morphis: We are talking like finger saplings or substantial trees?
44
45 Adrian Carter: Six, eight, twelve inch trees riddled with bullets.
46
47 T.C. Morphis: Why were the trees cut down? You obviously weren't there but what did it appear was the reason?
48
49 Adrian Carter: There was targets set up on the opposite side of the creek bed at approximately level site line across
50 the creeks if you can imagine a depth firing station on one side, target set up on the other and any trees that

1 encroached on your site line had been cut down to facilitate the shooting or the direction of fire. There was also an
2 earthen berm had been built up on the opposite side into the Bingham Mobile Home Park property.

3
4 T.C. Morphis: That appeared to be a man-made berm?

5
6 Adrian Carter: It was a man-made berm. I am a building contractor I would know what a man-made berm looks like.

7
8 T.C. Morphis: Were there any other physical facilities on the site, sir?

9
10 Adrian Carter: There were some structures, catwalks across the creek so you could access the targets, I assume in
11 a number of places they had some bridges and stuff made.

12
13 T.C. Morphis: Did you see any shells on the ground?

14
15 Adrian Carter: There were thousands of shells on the ground.

16
17 T.C. Morphis: Not five or ten?

18
19 Adrian Carter: No.

20
21 T.C. Morphis: There were thousands?

22
23 Adrian Carter: Easily. There were clay target remnants, shotgun shells, pistol cartridges, rifle cartridges of various
24 calibers.

25
26 T.C. Morphis: I want you to go back to Exhibit 4. Maybe easier to use Exhibit 3 which is the top of the exact same
27 area. I want you to verbally explain to the board where this range is located. Kind of walk them through what you
28 saw and I want you to explain to them how you know where you saw it.

29
30 Adrian Carter: The kind of creek bottom determines the center point of the shooting range since they are up at a
31 firing station on one side and shoot across the creek, perpendicular to the creek and the elevated targets are on the
32 other side, so the only place these conditions exist are into the triangular of the mobile home park property which is
33 just to the southwest of Ford Road in that little triangle that traverses Ford Road. The direction of fire with a very
34 small margin of error from this shooting station across that creek fires on a reasonable direct line to my property
35 which is, you'll see from this topography, you will see my house located near the crown of the hill, that is ...

36
37 T.C. Morphis: Let me interrupt you, you are looking at Exhibit 2?

38
39 Adrian Carter: I am on Exhibit 2 which is the clearest one.

40
41 T.C. Morphis: Approximately in the northwest direction?

42
43 Adrian Carter: Approximately west northwest direction. You will see the elevation adjacent to my house is 530 feet
44 above sea level. The elevation around my neighbor, Michael Joerling's house is 555 and the elevation at the creek
45 bottom is 480 so my house is 50 feet higher than the shooting station which is critical if a line of site misses the top of
46 this man-made berm and it wouldn't take a lot of elevation height from the shooter for its projectile to traverse berm
47 and hit my house or my neighbor's house.

48
49 T.C. Morphis: To avoid repetition, you generally agree Mr. Gallagher about frequency and in terms duration and
50 number of times per week.

1
2 Adrian Carter: There was significant escalation from when I mentioned in the fall of 2010, significant escalation, and
3 words cannot describe it was nothing like we had lived with before. It escalated for the 18 months or two years that
4 we were engaged with Michael Harvey trying to document this and trying to get a resolution to it until he issued the
5 NOV and then as Mr. Gallagher testified, everything, actually before the NOV was issued, the shooting died down
6 and it was assumed that Mr. Klein's legal counsel advised him to keep his head low. I don't know this.

7
8 T.C. Morphis: I have no further questions. Anything else you would like to add to the board.

9
10 Adrian Carter: I can't stress enough, how I am not a gun owner, however we respect people's right to shoot on their
11 property but this is just not landowners exercising his right to shoot his weapon on his property. There are police
12 reports showing that tenants from the mobile home park and these seem to be tenants that are being ID'd by the
13 sheriff's department seemed to be the escalation incidents.

14
15 Anthony Taibi: Objection. This is hearsay.

16
17 Larry Wright: Sustained.

18
19 Anthony Taibi: You have a smart phone?

20
21 Adrian Carter: Yes.

22
23 Anthony Taibi: You usually carry it with you?

24
25 Adrian Carter: Yes.

26
27 Anthony Taibi: It has GPS in it?

28
29 Adrian Carter: Yes.

30
31 Anthony Taibi: But you didn't bother to take a GPS coordinate of this place.

32
33 Adrian Carter: I don't know how.

34
35 Anthony Taibi: You don't know how but you do know how to read one of these maps and tell us exactly where the
36 thing is?

37
38 Adrian Carter: I can show you the outline of the county's property here on my smart phone right now without any
39 technical ability at all.

40
41 Anthony Taibi: This area around the area where folks shoot, whatever we care to call that, it's a heavily wooded
42 area, isn't it?

43
44 Adrian Carter: Which area are you talking about?

45
46 Anthony Taibi: There is an area around where people who are shooting tend to do their shooting, right, that you just
47 described where you saw lots of spent shell casings.

48
49 Adrian Carter: Yes.

50

1 Anthony Taibi: The surroundings of that are heavily wooded, correct?
2
3 Adrian Carter: Yes.
4
5 Anthony Taibi: There is no way you can see from that spot to your home however high it is, correct?
6
7 Adrian Carter: Correct.
8
9 Anthony Taibi: And to the extent someone is engaging in legal sport shooting activity on their property, would you
10 prefer that they make attempts to mitigate any trouble to their neighbors or
11
12 T.C. Morphis: Objection.
13
14 Larry Wright: Sustained.
15
16 T.C. Morphis: I know you are not a gun owner but how far do you think a high caliber hunting rifle can shoot?
17
18 Adrian Carter: With this incidence going on at our property, I decided I would educate myself and some high caliber
19 weapons can travel several miles. I believe a .22 can travel over a mile.
20
21 T.C. Morphis: I only have two short other witnesses and I can truncate their testimony I promise.
22
23 Larry Wright: I would appreciate that because I really don't know how this relates to what we have to do, what our
24 business is tonight, do you understand?
25
26 T.C. Morphis: I do sir.
27
28 Larry Wright: And I am going to ask our attorney, how does this relate to what we are supposed to be doing, what we
29 are charged with tonight?
30
31 James Bryan: That is not a question I could answer. The board has determined that there is jurisdiction. It is a
32 question for the appellant, what is he asking you to do, how does it relate? I don't see how I can offer anything.
33
34 Larry Wright: I am going to ask the board. Do you have any comments or questions right now relative to what this
35 has to do with where we are to go tonight?
36
37 David Blankford: I don't think we have heard anything here tonight that says this is a firing range operating on this
38 property. What is the definition of a firing range? We have heard there are people shooting, okay, they can do that.
39 There is no person from NRA that says this is a legal shooting range.
40
41 Mark Micol: We haven't heard all the testimony and I am assuming we are going to hear more of the same but that is
42 the question I have, is the next witnesses, is it going to be more of the same?
43
44 Jeff Schmitt: Mr. Harvey, did you notice this plethora of shells covering the ground and all that was described here?
45
46 Michael Harvey: I have seen pictures provided by the property owners.
47
48 Jeff Schmitt: Physically, you have never walked any of this property to see it?
49
50 Michael Harvey: No sir.

1
2 Mark Micol: Is there a reason why you didn't?

3
4 Michael Harvey: Yes sir. I didn't have permission from the property owner to go on the property but I felt that I had
5 sufficient evidence to issue the NOV as I did in 2013.

6
7 Jeff Schmitt: There have been comments made that I have sort of read in here that before a determination can be
8 made for a profit or not for profit, there has to be some level of physical facility on the property, that is the implication I
9 am getting, is that correct or not? Some structure, something that would indicate...

10
11 Michael Harvey: Let me go back very quickly to make the following statement. I am going to get the board to redirect
12 their attention to Attachment 3A beginning on page 53. That is my Notice of Violation. On page 54, staff had initiated
13 the dialogue with Mr. Klein in 2012 concerning shooting activities from his property and told him at that point in time
14 that if it was just him and his family shooting on his 34 acre property from our standpoint, that was not a violation [of
15 the UDO]. If he allowed the general public to come on the property, then that to us constituted the creation of a
16 [regulated] land use. We cited Mr. Klein because we felt we had antidotal evidence supporting the fact that non-
17 family members were engaging in shooting activity on the property.

18
19 Jeff Schmitt: How many members are in Mr. Klein's family?

20
21 Michael Harvey: At this point, I don't know sir. Within our Notice of Violation we did request documentation from Mr.
22 Klein as to how many family members were engaged in shooting activities for the property and was determined, after
23 consultation with the county attorney, that I had overstepped my authority in asking for said information since it wasn't
24 germane to any regulation of the UDO. With respect to the [operation of a shooting] facility, I will point you to my staff
25 response to the appeal and I will pick on Mr. Carter, only because he is convenient. If Mr. Carter was doing research
26 at his residence on a project or he was writing a paper, that work doesn't constitute a research facility as defined by
27 the UDO. It is the development of amenities, structures, support structures that then morph the use of property into
28 something that would be regulated.

29
30 Jeff Schmitt: In other words, there does need to be some physical presence of something at some place for it to be
31 considered non-profit or profitable from the UDO perspective?

32
33 Michael Harvey: From the standpoint of the UDO, the definition of [recreation] facility, there has to be structural
34 elements creating this facility. There also needs to be, as we have articulated in our letter of rescinding the Notice of
35 Violation, there has to be evidence there is a non-profit operation going on on the property. I am going to call your
36 attention to page 50 of our staff response. No evidence of an established formal or defined recreation facility was
37 found to be evidence. Some of this evidence might include installation of structural elements (i.e. parking for patrons,
38 berms, booth, etc.)

39
40 Jeff Schmitt: You don't know that Mr. Harvey since you never went down there.

41
42 Michael Harvey: Correct statement. Since we didn't have that evidence, we were advised by the County Attorney's
43 office that our original Notice of Violation lacked sufficiency. If we had sufficient evidence, we would not have
44 rescinded the NOV.

45
46 Larry Wright: I noticed in our packet that both the applicant and the county, it is opened looking or evidence, right?
47 Is the county still pursuing, is this an open case?

48

1 Michael Harvey: We have rescinded the Notice of Violation. If we find evidence or if evidence comes to light proving
2 that there is a facility being operated or a land use that has been established, a new Notice of Violation would be
3 issued, yes sir.

4
5 Larry Wright: How would you, if the plaintiff, if Mr. Klein doesn't permit you to go on the property, how would you fulfill
6 the applicant's request?

7
8 Michael Harvey: I would pursue an administrative search warrant as allowed by the UDO in order to determine if
9 there is a violation on the property.

10
11 David Blankfard: Why hasn't that been completed?

12
13 Michael Harvey: I don't believe I have sufficient evidence to show cause to obtain an administrative search warrant.
14 The simple act of discharging a fire arm is not sufficient.

15
16 Larry Wright: And the shells?

17
18 Michael Harvey: The shells in and of themselves are proof of nothing except that guns are being discharged.

19
20 Larry Wright: What do you need?

21
22 Michael Harvey: As shooting activities are occurring, the county planning department needs to conduct an inspection
23 as to who is out there shooting and what is going on.

24
25 Jeff Schmitt: That has to occur simultaneously?

26
27 Michael Harvey: Yes.

28
29 Jeff Schmitt: I don't know how that would ever happen.

30
31 Larry Wright: Karen, where are you on this?

32
33 Karen Barrows: I am very interested in what the folks have to say and yet we have Michael's comments.

34
35 Larry Wright: Mr. Morphis?

36
37 T.C. Morphis: At this time, the only contradicted evidence are those sheriff's reports. The evidence is that they do
38 not reflect anywhere near the number of times that calls have been made much less shooting. The sheriff's reports
39 show that on multiple occasions residents of the mobile home park on the property. We also have uncontroverted
40 evidence that people have been there. They are not likely related to Mr. Klein without Mr. Klein on the property. I
41 would like the board to be mindful of that.

42
43 Jeff Schmitt: How do we know that?

44
45 T.C. Morphis: We have the list from the sheriff's department.

46
47 David Blankfard: You said there were people on site that weren't related to Mr. Klein.

48
49 T.C. Morphis: We have sheriff's reports that show the residents and name of these individuals and if you will at Mr.
50 Taibi's report or letter. He talks about people who will be using the property so I direct you back to Exhibit 9, his May

1 17, 2013 letter, he said "to be sure Mr. Williams Klein and his adult children, Mr. Eric Klein, Ms. Heidi enjoy hunting
2 and shooting". Mr. Klein's name is not on any of these sheriff's reports, Ms. Heidi Klein, Mr. Eric Klein. We have
3 Carlton Williams, Nathan Barnhart, and Christopher Wright twice. Christopher Wright is a resident of the mobile
4 home park. We also have evidence although I can only test it with Mr. Klein testifying that Mr. McCloud Derek who
5 we believe is also a non-relative and resident. We also have Stephen Johnson, Samuel Kelly, owner of the property
6 Butch Klein so the sheriff's department knows the people, I don't know because I can't question Mr. Klein but appear
7 to be non-family members, residents of the mobile home park repeatedly using the property. We have two incidents,
8 November 2, 2010, Christopher Wright who lives at 149 Ford Road, Lot 12 showed up in the report. Same Mr.
9 Christopher Wright, June

10
11 David Blankford: I understand there are people that are on the property but that is not against the law or against the
12 rules. That is allowed. I can have people at my house.

13
14 Mark Micol: Do we have any of those members say they are members of a club?

15
16 T.C. Morphis: We can subpoena them and find out. At the end of the day, I am not arguing with you, this is certainly
17 your purview. My point is that we are presenting evidence that there is a physical structure that is used repeatedly by
18 people more than what Mr. Klein alleged. It points in a specific direction and the shells shoot straight at my client's
19 houses and but for their man-made berm and a little topography change, you could go from having thousands of
20 rounds with no injury to shells entering people's property and that at the end of the day is the evidence we are
21 presenting.

22
23 Jeff Schmitt: The physical structure you are referring to is this berm that has been created?

24
25 T.C. Morphis: There is the berm, the use of the natural topographic drainage, there is a catwalk, there are targets,
26 there are six or seven inch trees that have been cleared, there is a firing range, there is an entrance suitable for an
27 ATV.

28
29 Larry Wright: So let's just say that we declare all this, what can we do? We are just a Board of Adjustment.

30
31 T.C. Morphis: You are the only people in the county who can do anything about it. The Board of Commissioners can
32 issue new regulations to regulate these uses but until they do and who knows when they will....

33
34 Larry Wright: But we are independent of them. A member of the BOCC can sit right and we can rule against them
35 and they have no recourse.

36
37 T.C. Morphis: That is exactly my point. Since staff has said they agree with Mr. Klein, staff has said there is no
38 shooting range here. We are not telling you that you need to find the standards and say here is what the setbacks
39 are but you need to determine and we actually have some arguments about what the legal definition of a shooting
40 range is and at the appropriate time I will be happy to present that to the board but we believe this constitutes a
41 shooting range. I can go into that or wait for my closing arguments.

42
43 Michael Harvey: I would like to respectfully disagree with Mr. Morphis' point. We have said there is no non-profit
44 recreational facility as defined by the UDO. That is the only point in the UDO where the term shooting range is
45 referenced.

46
47 T.C. Morphis: Could you say that again Mr. Harvey?

48
49 Michael Harvey: The only component the UDO references a shooting range is under a non-profit recreational facility
50 or for profit recreation facility.

1
2 T.C. Morphis: I am happy to explain that further but I don't want to speak out of turn so it is at the pleasure of the
3 board.
4
5 Larry Wright: Call your next witness please.
6
7 T.C. Morphis: Could I get Mr. Michael Joerling.
8
9 Michael Joerling: I have been sworn in.
10
11 T.C. Morphis: Would you please turn to Exhibit 1 in the notebook. I have your property number 2, is that correct?
12
13 Michael Joerling: That is correct.
14
15 T.C. Morphis: How long have you lived on your property?
16
17 Michael Joerling: We have live there almost 30 years.
18
19 T.C. Morphis: Do you own a gun sir?
20
21 Michael Joerling: I do.
22
23 T.C. Morphis: About how far away from the range do you think your property is?
24
25 Michael Joerling: I think we are just under 1,000 feet from the shooting range.
26
27 T.C. Morphis: Have you been on site?
28
29 Michael Joerling: I have.
30
31 T.C. Morphis: Did you intend to trespass?
32
33 Michael Joerling: No I didn't.
34
35 T.C. Morphis: When you went on the property did you think you were on Ms. Boysen's property?
36
37 Michael Joerling: I suspected it was coming from Ms. Boysen's property so I walked back there to take a look.
38
39 T.C. Morphis: And physical structures you saw, was it the same thing that Mr. Carter saw?
40
41 Michael Joerling: They are. There was a berm. There was some sort of platform they were shooting from, targets,
42 trees cut down, and thousands of shells on the ground.
43
44 T.C. Morphis: You have heard testimony about the frequency, duration, volume, you heard audio, was that
45 consistent?
46
47 Michael Joerling: It is consistent. It can get much worse than what you heard on the tapes but....
48
49 T.C. Morphis: We were talking the other day and you called that a warm up, was that accurate?
50

- 1 Michael Joerling: Yeah. They get cranked up and then they start out seemingly like people are target shooting, there
2 is no space between shots.
3
- 4 T.C. Morphis: Are you worried about safety on your property?
5
- 6 Michael Joerling: My biggest issue is the direction they are shooting in.
7
- 8 T.C. Morphis: Do they fire directly at your house?
9
- 10 Michael Joerling: The way the range is set up, it is firing directly in my property which I spend a lot of time outside
11 both myself and my wife work from home and it wouldn't take much and I respectfully disagree with how wooded it is
12 around the range. The least wooded area is behind the berm and if it gets past the berm it is coming in my property.
13
- 14 T.C. Morphis: Is it correct, that past the berm, there is no field that backs to woods?
15
- 16 Michael Joerling: Exactly right.
17
- 18 T.C. Morphis: Mostly saplings?
19
- 20 Michael Joerling: Saplings and past that is open field. The next thing they are going to hit is my house or my
21 property.
22
- 23 T.C. Morphis: Do you have grandchildren that come visit you?
24
- 25 Michael Joerling: I have got kids, I have got grandkids, I have got pets. We spend a lot of time outside, that is why
26 we live there.
27
- 28 T.C. Morphis: I have no further questions.
29
- 30 Larry Wright: Mr. Taibi?
31
- 32 Anthony Taibi: Sir, do you have any evidence there are any memberships being given away, sold, advertised? Do
33 you ever see any advertisements for activities to take place?
34
- 35 Michael Joerling: I wouldn't know where to see advertisements but no I have not.
36
- 37 Anthony Taibi: No flyers or anything of that nature?
38
- 39 Michael Joerling: It's not a flyer kind of place.
40
- 41 Anthony Taibi: You would agree if somebody has their family and friends and would like to shoot a few rounds up in
42 a rural area, that is perfectly acceptable. One should be a good neighbor but it is not a question for the land use
43 authority.
44
- 45 Michael Joerling: If that is what they were doing, I would have no objection. We are not here because they are
46 shooting a couple of rounds off.
47
- 48 Anthony Taibi: How many rounds is your distinction between a private and acceptable activity and private activity?
49
- 50 T.C. Morphis: I object.

1
2 Larry Wright: Sustained.
3
4 Michael Joerling: My concern is safety. Somebody is going to get shot.
5
6 Larry Wright: He has no idea of rounds, I don't either.
7
8 T.C. Morphis: I have no further questions.
9
10 Robert Nicholas: I have been sworn in.
11
12 T.C. Morphis: If you will turn to Exhibit 1, is your house located at number 1.
13
14 Robert Nicholas: That is correct.
15
16 T.C. Morphis: How long have you lived at the property?
17
18 Robert Nicholas: Since 2003.
19
20 T.C. Morphis: Have you ever visited the site?
21
22 Robert Nicholas: No.
23
24 T.C. Morphis: Tell me about the intensity, the volume, the timeframe, you have already heard testimony, is that
25 consistent with what you understand.
26
27 Robert Nicholas: It is definitely consistent.
28
29 T.C. Morphis: What you heard is accurate and truthful?
30
31 Robert Nicholas: That is correct.
32
33 Anthony Taibi: Like the other witnesses, you have no evidence to suggest there is a club, there is an organization,
34 any kind of organized or formal facility or activity going on, just you hear a lot of shooting?
35
36 Robert Nicholas: A lot of shooting, very loud.
37
38 T.C. Morphis: Thank you Mr. Nicholas, you are done.
39
40 Larry Wright: Mr. Taibi, do you have any witnesses?
41
42 Anthony Taibi: I do not, I believe the questions before the board are purely questions of law and interpretation that
43 are solely for your determination and are not matters of fact.
44
45 Larry Wright: Do you have any questions? Your closing arguments please.
46
47 T.C. Morphis: I will make them as quickly as I can sir. I want to thank you all again, it has been a long night. We
48 very much appreciate you giving us the opportunity to speak our mind. I want to emphasize again, this is a De Novo
49 hearing, there are all these issues, we have identified specific issues in the rescinding. At the end of the day, Mr.
50 Harvey made two determinations in his 2013 NOV. One, he said he thought the range was on the Bingham Woods

1 Mobile Home property. Tonight is the first night we have had sworn testimony about the location. It is consistent with
2 that finding. Two, he determined that either on the Bingham Woods Mobile Home property and/or on the
3 undeveloped property, there was a shooting range. The evidence you have heard tonight in addition to the legal
4 arguments I am going to make, demonstrate conclusively there is a shooting range, you have the right to make a De
5 Novo review of those issues. The reason we appealed Mr. Harvey's 2014 decision is because he, in essence, said
6 there is no shooting range, we have no evidence that is, on the Bingham Woods Mobile Home Park property. The
7 issue tonight, is there a shooting range and we have talked about where this is defined in the UDO. The answer is,
8 there is no specific definition of shooting range in the UDO. All you have is the term recreation facility for profit and
9 this is under UDO section 10.1. I have concluded that in tab 12 in your notebook but it is not necessary at this time.
10 In fact, I have included all the UDO provisions that I am citing to, also relevant statute about Land vs. Wesley Chapel
11 since my colleague appears to be fixated on that. Shooting range ... I want to digress for just a moment on what
12 Land vs. Wesley Chapel says. So county staff has attempted to argue that this court of appeals case says you
13 cannot regulate something, what essentially, they don't ever specifically state in staff response why they think Land
14 vs. Wesley Chapel is relevant so I will tell you what the holding of that case was. It says, "unless an ordinance clearly
15 prohibits a specific use, that land use is allowed". That is all Land vs. Wesley Chapel stands for. In that case, the
16 Village of Wesley Chapel tried to require a special use permit for an existing shooting range and the court of appeals
17 said no, you can't do that you have no reference to shooting range, therefore it is not regulated by your ordinance
18 and is allowed. Here, Orange County clearly regulates shooting ranges. At this point, it is not an appeal or argument
19 issue because Mr. Taibi and his client, Mr. Klein, never challenged that determination. They have conceded from day
20 one that Orange County regulates shooting ranges so Land vs. Wesley Chapel is irrelevant. So what is a shooting
21 range? It is not defined in the UDO. Mr. Harvey correctly pointed out, or maybe he didn't, but states this but I think
22 he would agree. There are some standards for "for profit" shooting ranges. Non-profit do not have standards,
23 additionally, the term non-profit recreational facility does not include shooting ranges so you have some ambiguities
24 and mix-ups in the ordinance. What is clear is the ordinance regulates shooting ranges. There is a lot of talk about
25 non-profit corporations and things like that. Respectfully, that is the staff confusing an illegal use with an unregulated
26 use. It is... at best to say if you don't meet all the requirements in our ordinance, you don't exist and you are not
27 illegal. That would be saying if I had an asphalt batch plant in a residential area, as long as it is not...on the other
28 requirements in the definition, it doesn't exist. Clearly that is not the case but county staff does, as they say do we
29 regulate this, and then they say does the use exist. Our UDO clearly regulates shooting ranges and says they are
30 allowed in some places and not others and then the question of whether Mr. Klein's range is lawful and complies to
31 the ordinance, completely different question because as Mr. Harvey indicated at the beginning of the hearing tonight.
32 There is a way Mr. Klein could have a lawful shooting range and if he had a special use permit issued for that range
33 on his property, I will tell you now, and my clients would not be here tonight. There is however one good definition
34 that I will point to you for shooting ranges. In the absence of a shooting range definition, the UDO, I am going to cite
35 you to the North Carolina Shooting Range Protection Act, we are not required to follow this but I do think it is
36 instructive. If you will look on page 6 of my Memorandum of Law, the definition is there. It is the last paragraph. This
37 is the separate sheet of paper I handed out. I am going to read the statute. This is GS 14-409.45 from the North
38 Carolina Shooting Range Protection Act of 1997. A sport shooting range or range is defined as "an area
39 designed and operated for the use of rifles, shotguns, pistols, skeet, black powder or any other similar shooting".
40 Respectfully, there is no physical structure requirement. It says an area. If any of y'all have ever been to a wildlife
41 club or been out to a relative with a lot of land, you know sometimes that area is just an open field. This act was
42 designed to protect existing shooting ranges that have been around from 1994 and earlier, not including Mr. Klein's
43 range as the testimony shows it appears to have been established around 2010. This is designed to protect all sorts
44 of range uses. I would respectfully submit that in the absence of additional definition in the ordinance that is the best
45 definition you have. What evidence do we have tonight that this is an area for sports shooting? We have audio that
46 has been verified, of the volume, of the frequency, of the intensity, of the direction of the range. You have evidence
47 that multiple shooters shoot on multiple occasions on the same location with regularity. Seems like every week if not
48 more often. The only controverted evidence in the record is that non-family members are using the range. We don't
49 know how many but we know that residents of the mobile home park are using the range. There are also emails in
50 Exhibit 10 from Sheriff Lindy Pendergrass to Mr. Harvey talking about the berm because the sheriff's department has

1 been on the site and they have seen the berm. The only contradicted evidence we have about what the site looks
2 like are from my witnesses and they talk about a physical structure. There is a man made at the top of a natural rise.
3 They have cleverly used a natural drainage to help make them shoot into the ground. That is one of the things the
4 sheriff's department talked about in their emails. We don't know what we can do, they are shooting downhill so it
5 appears it is safe shooting. That is not the question in front of you. We also have a shooting platform area. We have
6 evidence that massive, not massive, large trees have been cleared; there are targets that have been put up. There is
7 nothing in the ordinance that says you have to have a certain kind of shooting building, a certain number of targets or
8 other protections. You have a situation where there is a structure and there is evidence of use and we are fortunate
9 that nobody has been shot by a stray bullet tonight. I thank you very much for your time and I appreciation your
10 consideration of this matter.

11
12 Anthony Taibi: Even under Mr. Morphis' definition from that act, it has to be something that is operating, having some
13 land, you got 34 acres of land, you take your bobcat and knock some things over and make yourself, that is a
14 shooting range. That is a place where you shoot. If I go in my back yard and put something up, paper targets taped
15 up, that makes a facility? There is no membership, no club, are we going to get focused on who is a family member
16 or start defining who is a family member and have lists of family members to answer this question? There are really
17 two different questions here. One question is the one that is not before you and that is how ought shooting ranges ...
18 how should shooting activities be regulated in the county. The county is changing its character, its going from being
19 rural to being more urban and there have been some issues made that maybe my client has not always been a good
20 neighbor. But that is not the question here. This is about zoning and it doesn't have to be a profit making business
21 but there has to be an operation. It has to be a facility. This is about do you have a facility. This is 34 acres of
22 undeveloped land. People are going to shoot, you knock down a few trees, you put up some paper towers. There is
23 a couple of boards over some wet spots does not make it a facility. There is no operation, there is no club, there is
24 no organized activity of any kind. There are just some people shooting. Should that be regulated? We have heard
25 testimony that the sheriff has told people that this is not something he can intervene but they call him 10 times but he
26 says it is not his business. The EPA is interested in intervening. I believe in the idea that laws about not just we want
27 something how can we make it happen but that there is a right procedure and a right place to go for the remedy.
28 There is the law of nuisance. They can go and get regulations changed about how the county regulates the
29 discharge of firearms. We even offered to voluntarily take some steps that would make them a better neighbor but
30 what it isn't is a land use decision. Certainly, the staff in coming to that decision was supported by reason and
31 evidence. It's not in their brief to be a roving commission to right every wrong and take up everybody who maybe
32 wasn't always the best neighbor. Their job is, do I have evidence, is there something that is clearly a violation of the
33 land use rule. Not to see if they can twist the land use rule into being an instrument for people to highjack the zoning
34 process for their political end. Let's do that in a political arena. Thank you.

35
36 Larry Wright: Do you have any questions for the counsel? Have we declared jurisdiction on the points...

37
38 Michael Harvey: Mr. Chairman, if it's not your intent to have any additional testimony, you need to close the public
39 hearing. I'd ask Mr. Bryan about that.

40
41 James Bryan: You close the public hearing, you don't have closed session.

42
43 Larry Wright: I'm sorry. We are not closing the public hearing for board discussion on the process. Any questions
44 before we do this? On the initial point of order that I made, I didn't know we really had to close the public hearing.
45 Mr. Bryan, will you summarize how we are to proceed on this.

46
47 James Bryan: I think you, as a board, have ruled on standing on the subpoena and jurisdiction. You heard all the
48 testimony the parties intended to give. I would rule on whether there is a shooting range or not, whether you believe
49 there is enough evidence to support the Notice of Violation. There was an opportunity to say the NOV doesn't exist
50 because the rescission eliminated it. I think you have already granted jurisdiction so the question is do we have

1 enough evidence for issuing an NOV based on the evidence you have heard tonight, not necessarily what Michael
2 had at the time. You will have to decide what the shooting range is. It is not defined in the ordinance so you have an
3 understanding on what it is or you can use a definition. You can use it from a dictionary, a statute or whatever you
4 want then apply the evidence to it.

5
6 Larry Wright: Is there any way we can make recommendation to, for example, the commissioners to clarify in the
7 UDO? There seems to be a discrepancy when I was on the planning board, that is what we were doing and still
8 working on....

9
10 Jeff Schmitt: That is a separate issue.

11
12 Larry Wright: My question is can we make a recommendation that they clean this up in the UDO.

13
14 James Bryan: As a whole, your decision is to affirm the determination, reverse the determination or modify it. Those
15 are generally the three categories. You can also make any other orders you think are appropriate. I don't think that
16 you can order the BOCC to do anything. You can't determine them; you can't require them to do anything. After you
17 have made you decision tonight for this, you can add something for the next agenda or modify the agenda for tonight
18 and as separate item, discuss anything you want to do. You can say hey board; this is what we would like.

19
20 Larry Wright: Let's start with the shooting range. What are your feelings on... it's not in the UDO, that we have had
21 several definitions of a shooting range. Is there a shooting range going on there? Do we deem it and can we define,
22 and can we say there is a shooting range going on?

23
24 Jeff Schmitt: Is the Range Protection Act of 1997 effectively a statute?

25
26 James Bryan: It is a statute. I think, don't worry about it other than does it sound good.

27
28 Jeff Schmitt: It has standing in law then.

29
30 James Bryan: It is totally not binding on you all. I would give it the same weight as the Webster's dictionary for a
31 shooting range, the Oxford English dictionary. Those two dictionaries might have differences and this statute might
32 have a difference. The attorney would reopen the hearing if you want to subpoena a dictionary.

33
34 Mark Micol: I think we are all sympathetic to people that live next to noises whether it is fire or motorcycles or chain
35 saws. I think we open a Pandora's box when we try to limit lawful activity. We used several scenarios earlier but I
36 am reading here that recreational facilities, tennis clubs, swim clubs, skating rinks, billiard pool halls. So if freeze my
37 pond over and invite friends over and we are skating does that make me an owner of a skating rink. I don't think that
38 does or if I put three greens on my 10 acres does that make me have a golf course. I think we are going down a path
39 here when we start saying we are a shooting range because we have friends over, firing firearms. I don't want to go
40 down that path, I think it is really something for the county commissioners to decide but I am sympathetic to what they
41 are saying.

42
43 Larry Wright: There was a reference here that the emails from the Orange County Sheriff, I don't believe it was Mr.
44 Pendergrass, but he saw berm in his report and then there is the one definition of a shooting range that berms was
45 among the list and I guess my line of thinking is, is this report, this email sufficient to have staff look in to this and get
46 some sort of order to find out, if indeed, there is a shooting range going on. If there is an organized, and to clarify
47 this, obviously that neighborhood is polarized by this and I don't think we can do anything to mitigate that but is this
48 email enough to provoke staff to investigate this further, would they still do it.

49

1 Mark Micol: If you take the firearms piece, safety is the biggest thing so when you take the safety away and you can
2 think of many other uses for 34 acres that would be annoying. I am thinking as I was listening riding motorcycles on
3 Saturday. You could have 30 acres with 10 kids riding motorcycles hours and hours a day and that would be just as
4 annoying as firearms. The only difference is the safety and we don't have the authority to solve that problem.

5
6 David Blankfard: The police said it was hidden and they would have shut them down if they said they were shooting
7 down into the ground.

8
9 Larry Wright: There is a case of a woman who lives next door to a go kart track and she has tried and tried but there
10 is nothing that can be done about it. That noise is as bad if not worse than this. She has been to everybody.

11
12 Mark Micol: The evidence that I have heard supports the property owner over the appellant. When you listen to the
13 audio, I heard rapid fire but that could have been one person making those shots. The ground level topography, you
14 mentioned it could be a trail. That wasn't very supportive of their argument. The aerial shot didn't show ... when he
15 said structure, I am thinking it was going to be a 1,200 square foot building. Instead we hear it is a board over a
16 creek and an earthen berm. I think the evidence they put on was as supportive to the owners as it was to them. The
17 sheriff's report supported the owner in many ways. I am not convinced.

18
19 Larry Wright: Karen?

20
21 Karen Barrows: I think I have to agree with Mark and I am very sympathetic. We live down the street from a hunt
22 club so we hear but not to the level these people are exposed to. I don't know what the recourse is but I don't think it
23 is us.

24
25 Larry Wright: Even though it is out of order, there is a hunt club at RTP. Nobel prize winners are going by there and
26 bullets and mixed use development is going in, single family homes. They are trying to find a place to move to.
27 Anyway, I digressed. I don't know. How do you think we should proceed on this?

28
29 Karen Barrows: The only question I have is whether we should have independent counsel. How does the rest of the
30 board feel about that?

31
32 Larry Wright: After he made his motion, he moved on before there was chance for us to even

33
34 James Bryan: I think this board knows and I will say it again. I work for the county, I represent this board. It is
35 always best to have your own independent counsel. I am directed to and fully prepared to represent you all but it is
36 fully within your discretion to do so.

37
38 Jeff Schmitt: Karen, I agree with you but I'm not sure a different counsel would have provided counsel which would
39 change the opinion. Larry, a couple of years ago when I was on this group before, we had a case in Northern
40 Orange where we had a church that had put up lights to play softball defacto for the membership and I think all of us
41 knew as we listened to it that it was being run as a for profit institution by the church. Couldn't prove it and never had
42 the right definitions in point to say when lights should be put up and when they shouldn't be put up. This has
43 somewhat of the same flavor to it. Unfortunately, I find myself in the same position. I have a lot of empathy for this. I
44 live in the country, I have guns, I shoot but if I were at a place where it was just significant, that is a big problem. I
45 can't vote to overturn what has gone on here but I think there needs to be something we say after this I would like to
46 have Michael do. I think there needs to be further investigation to look at the property, look at the land, and make a
47 comment relative to the structure which is far too vague here.

48
49 Larry Wright: On both sides. The burden of proof is on both sides, the applicant's as well. I agree.

50

1 Jeff Schmitt: That is my piece. Unfortunately, I have read the state statute. I know where you can and can't do, you
2 can discharge your fire arms and there is nothing that talks about the volume or velocity or the issues of noise,
3 unfortunately.

4
5 Larry Wright: And there is nothing that speaks to it with a gun, with an ordinance because guns are not included in
6 the noise ordinance. I think we are coming to some sort of consensus here with respect to staff's decision. Is
7 anybody willing to make a motion?

8
9 **MOTION** made by Karen Barrows to uphold the 2014 rescinding order made by planning staff. Seconded by Mark
10 Micol.

11 **VOTE:** Unanimous

12
13 Jeff Schmitt: I don't know whether you phrase this as a motion but I think there needs to be. I don't know what the
14 basis by which you would be able to do this. I don't know whether this board has the ability to decide to do that or
15 not. I think there needs to be further investigation by the staff of the area contained by the witnesses is the shooting
16 range. Physical presence on it, look at it, understand whether or not there are structures definitely on this thing to
17 see whether or not, given that, there would be a notice that would be reissued for whatever set of reasons.

18
19 Larry Wright: Mr. Bryan, can we put this in the form of a recommendation?

20
21 Jeff Schmitt: Does anybody else agree?

22
23 Larry Wright: I am trying to talk about the feasibility of moving forward.

24
25 David Blankfard: Staff needs to do their administrative search of the "shooting area".

26
27 Mark Micol: What did Mr. Harvey say about a warrant? What was the term? An administrative search warrant. That
28 sounds like a step.

29
30 David Blankfard: He said he didn't have enough evidence.

31
32 Mark Micol: Well, if he didn't have enough evidence then, he is probably not going to have any going forward.

33
34 David Blankfard: Sworn testimony...

35
36 Jeff Schmitt: We have all this stuff here.

37
38 Mark Micol: What we have heard here tonight, he has already heard and he made the determination it wasn't
39 warranted then so the question is do we have the power to compel him to do that? That is what he is asking. How
40 do we compel him to go out there and search the property and determine if what we heard tonight is factual.

41
42 James Bryan: If I may suggest, you all are affirming the rescinding letter.

43
44 Jeff Schmitt: The discussion we had since this is closed... the comment that Mark makes is, are we contradicting
45 ourselves. Well maybe we are but maybe there needs to be some catalyst or something that occurs that would allow
46 this to be re-investigated.

47
48 Mark Micol: They already said that up until the NOV was not warranted, right? So it is really going forward that if
49 they call Mr. Harvey's office tomorrow ...

50

1 Larry Wright: I think the motion is that we support the rescission of the NOV and it could be for lack of evidence and
2 this is what we are discussing because it was a lack of evidence and now we are ...

3
4 James Bryan: If I keep my mouth shut, the board will come to it on their own. That is exactly right. You affirmed
5 rescinding the NOV. You didn't say there is not a shooting range there. You said we don't have enough proof that
6 there is or we don't have enough of a definition right now. Something is not right. This board does not want to send
7 it up to Superior Court with what we have right now. We want to build a better case. If that is what you believe his
8 NOV was, that is fine. If you think his rescinding NOV letter, if you think that was ambiguous, wasn't clear, modify it
9 and say we affirm but we modify it to be clear that we are continuing an investigation pursuant to more information.

10
11 Jeff Schmitt: That is a procedural statement from my perspective, whatever is correct, I don't know.

12
13 Larry Wright: You understand. I think there should be a continuing investigation, the question is how is that done
14 and

15
16 Jeff Schmitt: Do we do it by modifying this or is there a separate issue?

17
18 Larry Wright: That could be the work of a lifetime.

19
20 James Bryan: I don't believe this board can have continued jurisdiction, I think it is a one shot deal.

21
22 Larry Wright: I agree.

23
24 James Bryan: But Michael, that staff position does continue authority, every day is a new one until there is a final
25 and binding determination. I think if you just make it clear that you affirm the recession, modify it if you like.

26
27 Larry Wright: Are we happy with the decision and just leave it that way or is there some way we would like to modify
28 that. Think we leave it the way it is.

29
30 Jeff Schmitt: I have spoken my peace about those issues. I understand both sides. I am continuing in a way here to
31 express my empathy for the residents of this community, that I have guns, I shoot guns, I understand all that stuff but
32 I understand the issue that has been brought here. That is, my statements said may be inappropriately.

33
34 Mark Micol: It could also, in the future, be something as simple as amending the noise ordinance as well. Its sounds
35 like our nuisance ordinance is not adequate to protect our citizens but again, that is up the county commissioners. It
36 sounds like there needs to be some type of, like you said earlier, send a letter of recommendation to the county
37 commissioners. That is all we can do right?

38
39 Larry Wright: Can we do that?

40
41 James Bryan: Yeah. Once you have determined this matter is over. The next item on the agenda is how can we
42 prevent this from happening again and make a motion to tell the BOCC we need better regulations, tell staff to keep
43 investigating. It is just recommendations that are separate and apart from this.

44
45 Larry Wright: I am really in favor of that because they are going through the UDO now and cleaning it up and I think
46 we should be make some recommendations.

47
48 David Blankfard: Like Mark said, we need to have something about the sound level, nuisance law.

49
50 Jeff Schmitt: If you do something with the sound, you will have [the NRA} on the top of your head.

1
2 Mark Micol: It may be distance from residential.

3
4 Larry Wright: I think distance in our area. Distance is taking care of itself. Does somebody want to craft a motion for
5 recommendations.

6
7 Mark Micol: I think we could make a general ... again, we are not going to be able to iron it out tonight. It has to be
8 done by the BOCC but we need to send them a message...

9
10 Larry Wright: We could draft that into a motion and have it go to them and ask staff to convey our vote or motion and
11 opinions to them.

12
13 David Blankfard: Will we do that tonight or at the next meeting?

14
15 Jeff Schmitt: That could be a separate issue.

16
17 Larry Wright: I don't think we should lose sight of this.

18
19 Karen Barrows: We could ask to make it an item on the next agenda so we don't forget.

20
21 Unidentified female: I would like to say when one of my six granddaughters gets shot; it is on you people, every one
22 of you.

23

24

25 **AGENDA ITEM 6: ADJOURNMENT**

26

27 **MOTION** made by David Blankfard to adjourn. Seconded by Jeff Schmitt.

28 **VOTE:** Unanimous

29

**ORANGE COUNTY
BOARD OF ADJUSTMENT
PUBLIC HEARING
AGENDA ITEM ABSTRACT CASE A-1-14
Meeting Date: June 8, 2015**

**Agenda
Item No. 5**

SUBJECT: CASE A-1-15: Class B Special Use Permit Proposing Development of Telecommunication Facilities at 5022 Kerley Road (PIN 0801-15-4533)

DEPARTMENT: Planning and Inspections

PUBLIC HEARING: (Y/N)

Yes

ATTACHMENTS:

1. Property Map
2. Notification Materials and Certification
3. Special Use Permit Findings of Fact
4. Staff Comments

INFORMATION CONTACT:

Michael D. Harvey, Planner III (919) 245-2597
Craig Benedict, Director (919) 245-2575

UNDER SEPARATE COVER

Skyway Towers LLC and T-Mobile Class B Special Use Permit Application Booklet complied by the applicant's attorney Mr. Thomas Johnson from the Nexsen / Pruet Law Firm

11 x 17 copy of site plan included as well.

PURPOSE: To hold a quasi-judicial public hearing, receive sworn testimony and evidence, and take action on a Class B Special Use Permit (hereafter 'SUP') application proposing the development of telecommunication facilities, including a 129 foot tall monopole cell tower (125 ft. tall tower with a 4 ft. lighting pole at the top for a combined total height of 129 ft.), in accordance with the provisions of the Unified Development Ordinance (hereafter 'UDO').

BACKGROUND: The basic facts concerning the current application are as follows:

Applicant(s): Skyway Towers LLC and T-Mobile
20525 Amberfield Drive
Suite 102
Land O' Lakes FL 34639

Leah Marie Bergman (property owner)
5022 Kerley Road
Durham, NC 27705

Agent(s): Thomas H. Johnson, Jr. (Attorney) Tower Engineering
Member Professionals (Surveyor)
Nexsen Pruet, PLLC 326 Tryon Road

4141 Parklake Avenue
Suite 200
Raleigh, NC 27612

Raleigh, NC 27603

Location:

5022 Kerley Road (SR 1717) near the border with Durham County. Please refer to Attachment 1 for a map of the parcel.

Parcel Information:

- a. **PIN:** 0801-15-4533.
- b. **Size of parcel:** 5.8 acres.
- c. **Zoning of parcel:** The property is zoned Rural Buffer (RB).
- d. **Township:** Chapel Hill.
- e. **Future Land Use Map Designation:** Rural Buffer.
- f. **Growth Management System Designation:** Rural.
- g. **Existing Conditions/Physical Features:** The property has some existing vegetation, primarily clustered along existing property lines. The majority of the parcel has been cleared for use as horse pasture.

The property has relatively flat topography throughout. There are no streams and/or other waterbodies located on the property.

The development of the proposed telecommunications facility shall not impact the existing single-family residential land use or the ability of the property owner to continue to have horses. An existing shed/barn will have to be moved from the tower fall zone area as detailed on the submitted site plan.
- h. **Roads:** The proposed telecommunication facility shall be access via a proposed driveway off of Mt. Sinai Road (SR 1718).
- i. **Water and Sewer Service:** The property is not located within a primary utility service area. The location of a telecommunication facility on the property will not require the development of utility infrastructure (i.e. well and/or septic).

Surrounding Land Uses:

- a. **NORTH:** Single-family residences on lots ranging in size from 1.5 to 8.9 acres in area all zoned RB;
- b. **SOUTH:** A nursing home facility located within Durham County's Planning Jurisdiction, undeveloped property approximately 5 acres in area zoned RB;
- c. **EAST:** Kerley Road (SR 1717); property used to support a farm operation and a school located within Durham County's Planning Jurisdiction;
- d. **WEST:** Single-family residences on lots ranging in size from 1 to 2 acres in area all zoned RB;

Proposal: In accordance with:

- Section(s) 2.7 *Special Uses*,

- 5.2.2 *Table of Permitted Uses*,
- 5.3.2 *Application of Use Standards – Special Uses*, and
- 5.10.8 *Wireless Telecommunication Support Structures – Submittal and Review Requirements*

of the UDO Skyway Towers LLC and T-Mobile have submitted a SUP application seeking a permit to erect a 129 ft. tall (125 ft. tall tower with a 4 ft. lighting pole at the top for a combined total height of 129 ft.) monopole telecommunication facility (i.e. a telecommunication tower) on a parcel of property located at 5022 Kerley, further identified utilizing Orange County Parcel Identification Number (PIN) 0801-15-4533.

As detailed within the application, the applicant wishes to erect a telecommunication tower within a 100 foot by 100 foot leased area on the aforementioned parcel. There will be an equipment cabinet at the base of the tower to house equipment for the various communication providers utilizing the tower within a 60 foot by 60 foot fenced compound. Access to the facility shall be through a proposed 20 ft. wide access drive off of Mt. Sinai Road.

A copy of the site plan is contained within the applicant's SUP application packet. A narrative outlining the specifics of the project is contained in **Tab 3** of the application booklet.

ORDINANCE REQUIREMENTS: Telecommunication Facilities are defined within Article 10 *Definitions* of the UDO as:

A structure, facility or location designed, or intended to be used as, or used to support antennas or other transmitting or receiving devices. This includes without limit wireless support structures of all types, kinds and structures, including, but not limited to buildings, church steeples, silos, water towers, signs or other structures that can be used as a support structure for antennas or the functional equivalent of such. It further includes all related facilities and equipment such as cabling, equipment shelters and other structures associated with the facility. It is a structure and facility intended for transmitting and/or receiving radio, television, cellular, SMR, paging, 911, personal communications services (PCS), commercial satellite services, microwave services, and any commercial wireless telecommunication service not licensed by the FCC.

As previously indicated the standards governing the submittal and review of telecommunication facilities are detailed within:

- Section 2.7 *Special Use Permits*;
- Section 5.3.2 *Special Uses*;
- Section 5.10.8 (A) and (B) *Wireless Telecommunication Support Structures – Submittal and Review Requirements*

of the UDO. Attachment 3 contains staff's evaluation of the proposals compliance with the various standards detailed within these sections. Staff will review these findings in detail during the public hearing.

STAFF COMMENT(S):

1. There are no County owned/leased facilities in the general area of the subject property allowing for the development of telecommunication facilities.

There is an existing County park on Erwin Road, approximately 0.75 to 1 mile south, of the Kerley Road parcel.

The applicant has indicated the park property elevation is too low to support a tower and will not address their service needs in the identified area. Please refer to **Tab(s) 10, 19, 26, and 33** of the application packet for more information.

2. There is an existing telecommunication tower located approximately 1,300 ft. south of the proposed site. This tower is located on property within the planning jurisdiction of the City/County of Durham.

The applicant has indicated this existing tower is too low to accommodate their request and serve their needs.

Per Section 5.10.8 (B) (4) (b) (vi) of the UDO wireless support structures shall not be located within ½ mile of any existing monopole, lattice, or guyed wireless tower unless the applicant can sufficiently demonstrate that:

- i. Appropriate space on the existing telecommunication wireless support structure is not available; or*
- ii. The applicant has made good faith effort to negotiate an agreement with the owner of the existing wireless telecommunication support structure and has been unsuccessful, which must be documented in writing; or*
- iii. The telecommunication equipment on the existing wireless telecommunication support structure is not compatible with the proposed telecommunication equipment of the applicant; or*
- iv. Adequate coverage by the applicant cannot be met at the location of the existing wireless telecommunication support structure; or*
- v. The existing wireless telecommunication support structure cannot be reasonably modified to accommodate additional collocation by the applicant.*

The applicant has provided information in **Tab(s) 3, 10, 19, 26, and 33** of the application packet detailing their argument(s) why this existing facility is not viable for locating T-Mobile's proposed antenna.

3. Per Section 5.10.8 (B) (4) (b) (i) of the UDO there are no commercial and/or industrial zoned properties (i.e. Orange County's planning jurisdiction) within the applicant's identified search area allowing for the location/development of a telecommunication facility.
4. Per Section 5.10.8 (B) (4) (b) (i) of the UDO there are no Agricultural Residential (AR) zoned properties within the applicant's identified search area allowing for the erection of a tower.
5. As detailed within Attachment 3 staff has determined the application is consistent with established submittal requirements (i.e. application form, submittal of site plan, payment of fee, etc.). The applicant has provided documentation arguing the project is compliant with established development standards as detailed in Section 5.10.8 of the UDO.

As with all applications the Board will have to base their final recommendation on this evidence as well as the sworn testimony offered during the public hearing.

6. As you are aware staff does not make a formal recommendation on the approval of the application or on the applicant's compliance with the general standards detailed within Section 5.3.2 (a) (2), specifically:
- (1) *The use will maintain or promote the public health, safety and general welfare, if located where proposed and developed and operated according to the plan as submitted;*
 - (2) *The use will maintain or enhance the value of contiguous property (unless the use is a public necessity, in which case the use need not maintain or enhance the value of contiguous property); and*
 - (3) *The location and character of the use, if developed according to the plan submitted, will be in harmony with the area in which it is to be located and the use is in compliance with the plan for the physical development of the County as embodied in these regulations or in the Comprehensive Plan, or portion thereof, adopted by the Board of County Commissioners;*
7. There are several goals/policies detailed within the adopted 2030 Comprehensive Plan addressing the development of telecommunication facilities in the County including:
- a. Land Use Goal 1: Fiscally and environmentally responsible, sustainable growth, consistent with the provision of adequate services and facilities and a high quality of life.
 - b. Services and Community Facilities Goal 7: Efficient and effective public safety including, police, fire, telecommunications, emergency services, and animal services.
 - c. Objective PS-T-6: Develop a mechanism for cooperation with telecommunication facilities stakeholders regarding the siting and design of towers.
 - d. Objective PS-T-7: Manage the number of future wireless telecommunication facilities by identifying preferred locations capable of accommodating service Countywide.
 - e. Objective PS-T-8: Encourage the expansion of affordable, high-speed internet access, fiber optic lines, and other high-speed communication networks to rural and underserved areas.
 - f. Objective PS-9: Maintain a radio communication system that ensures reliable notification and oversight of emergency assets, such as personnel, vehicles, and response equipment, throughout Orange County and inter-operability of communication among jurisdictions.
8. Staff held 2 neighborhood information meetings (NIM) on this project, specifically on March 28th and April 11th of 2015. During these meetings staff received numerous comments from local property owners/interested parties, most of whom were against the proposal.

Comments made at these meetings are summarized as follows:

- a. Concerns were expressed that the tower would negatively impact adjacent property values.

- b. Several comments were made indicating this was a 'bad site' for a telecommunication facility.
- c. Several individuals indicated they believed the tower ought to be located in Durham County as it would appear the primary beneficiaries of increased cell service would be Durham County residents.
- d. Numerous individuals indicated they were worried about the impacts electromagnetic radiation emitted from the proposed tower would have on their health/safety.

STAFF COMMENT: The Federal government has found there is no conclusive evidence demonstrating telecommunication towers generate harmful radiation or have an impact on an individual's overall health.

As a result Federal law prohibits the denial/restriction of telecommunication facility applications based on same.

- e. Comments were made that as T-Mobile was not a major telecommunication carrier (i.e. not a lot of people used T-Mobile services) erection of a tower was unnecessary.

STAFF COMMENT: This is not a rationale that can be used in acting on this request.

- f. Objections were made to the proposed location of the tower, specifically the facility would create a 'visual blight' for local property owners and motorists.

STAFF COMMENT: Section 5.10.8 (B) (3) of the UDO requires the applicant complete a balloon test demonstrating the location and height of the proposed tower.

As part of this test the applicant completed a visual impact assessment demonstrating, through renderings, how the tower would look on the property. This information is contained in **Tab(s) 21 and 22** of the application package.

- g. It was suggested the applicant ought to be forced to erect a 'stealth' tower on this site.

The example used by many individuals was the disguising of the tower as a 'pine tree' or other similar construction to assist in 'hiding' the structure from view.

STAFF COMMENT: A stealth tower is defined within Article 10 *Definitions* of the UDO as:

A design or treatment that minimizes adverse aesthetic and visual impacts on the land, property, buildings, and other facilities adjacent to, surrounding, and in generally the same area as the requested location of such wireless support structures, which shall mean building the least visually and physically intrusive facility that is not technologically or commercially impracticable under the facts and circumstances. Stealth technology includes such technology as Distributed Antenna System (DAS) or its functional equivalent or camouflage where the structure is disguised to make it less

visually obtrusive and not recognized to the average person as a wireless support structure.

There is an existing 'stealth' tower approximately 1,300 ft. south of this site within the City/County of Durham's planning jurisdiction.

While staff is supportive of the use of stealth technology, and the UDO encourages same, we cannot compel and/or mandate this proposed telecommunication facility be designed as a stealth tower.

Having said that the applicant is responsible for demonstrating the tower will not have a significant visual impact in the area (Section 5.10.8 (A) (3) (k)). In order to meet this requirement, the applicant may have to employ stealth technology.

- h. Local residents indicated they believe there is existing/sufficient cellular coverage in the area negating the need for the proposed facility.

STAFF COMMENT: The applicant has the burden of proving the need for the tower as required within the UDO. They have provided information in **Tab(s) 10 and 19** of the application package in an attempt to address this concern.

Conversely those in opposition to the tower have a responsibility to submit evidence refuting same.

Hearsay or unsubstantiated opinions related to existing cellular service are not sufficient testimony.

- i. Concerns were expressed that telecommunication towers are not appropriate for development within the Rural Buffer (RB) zoning district due to its intent/purpose of only allowing low intensity development in an effort to maintain the rural aesthetic of the area.

STAFF COMMENT: Per Section 5.2.1 *Table of Permitted Uses* of the UDO telecommunication facilities are a permitted use of property within the RB zoning district subject to the issuance of a SUP.

There are existing telecommunication facilities within the RB zoning district, the majority of these reviewed and acted upon through this very process.

- j. An individual stated as the County has never denied a telecommunication tower application, local property owners opposed to the project will not receive a fair hearing.
- k. Several individuals suggested it was unfair local residents assume the financial burden for fighting the project and that the County ought to pay/reimburse them for any incurred costs associated with the hiring of an attorney and/or experts to 'fight' the application.

9. Attachment 4 of this abstract contains comments from various County departments, including staff's initial zoning review of the application and the County's telecommunication consultant recommendation(s) on the proposal.

10. Review of SUP applications are carried out in a *quasi-judicial* format meaning that decisions relating to the approval or denial of an application are based solely on the sworn testimony of all parties involved with the case, both those for and against an application, as well as the review of the competent material and substantial evidence submitted into evidence during the public hearing.

11. The applicant has the burden of establishing, by the submission of competent material and substantial evidence, the existence of facts and conditions that demonstrate the projects compliance with the various requirements and standards detailed within the UDO.

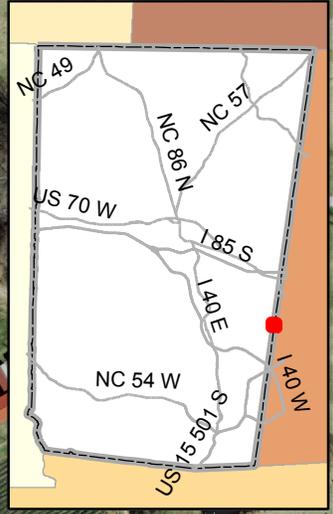
Those opposing approval of the application shall have the burden of establishing, also through the submission of competent material and substantial evidence, the specific manner in which the proposal does not satisfy the requirements for approval of the application.

12. As previously indicated the Board of Adjustment shall render a decision only on the sworn testimony of all parties and on the competent material and substantial evidence submitted during the hearing relating to the approval or denial of the application.
13. Per Section 2.25.4 of the UDO every decision of the Board of Adjustment shall be subject to review at the request of any aggrieved party by the Superior Court by proceedings in the nature of certiorari. Appeals have to be submitted with the Superior Court within 30 days of the availability of notice of decision as detailed within 2.12.5 of the UDO.
14. If approved, staff is recommending the imposition of several conditions as detailed within Attachment 3.

Property Vicinity Map 5022 Kerley Road

5022 Kerley Road
PIN 0801-15-4533

Subject property
Anticipated location of tower



Durham/Orange County Line

Property in Durham City Limits

WILKINS DR

MT SINAI RD

KERLEY RD

PIN#: 0801154533
LEAH MARIE BERGMAN

5022 KERLEY RD
DURHAM, NC 27705

1 inch = 200 feet

Orange County Planning and Inspections Department
03/13/2015

PLANNING & INSPECTIONS DEPARTMENT
Craig N. Benedict, AICP, Director

Current Planning
(919) 245-2575
(919) 644-3002 (FAX)
www.orangecountync.gov



131 W. Margaret Lane
Suite 201
P. O. Box 8181
Hillsborough, NC 27278



March 13, 2015

RE: **NOTIFICATION of Balloon Test and Skyway Towers LLC plans to construct a telecommunication facility (i.e. a telecommunication tower) on a parcel of property located at 5022 Kerley Road**

To Whom It May Concern:

The Orange County Planning Department has been informed by representatives of Skyway Towers LLC, through their attorney's with the Nexsen Pruet law firm, (hereafter 'the applicant') they will be submitting an application for a Class B Special Use Permit seeking authorization to construct a 129 ft. tall (125 ft. tall tower with a 4 ft. lighting pole at the top for a combined total height of 129 ft.) monopole telecommunication facility (i.e. a telecommunication tower) on a parcel of property located at 5022 Kerley Road.

The parcel, further identified utilizing Orange County Parcel Identification Number (PIN) 0801-15-4533, is zoned Rural Buffer (RB), is approximately 5.8 acres in area and is located at the intersection of Mt. Sinai Road (SR 1718) and Kerley Road (SR 1717) near the border with Durham County (hereafter 'the property'). Please refer to the attached vicinity map for additional information on the location of the property.

According to the applicant the tower location is optimal for the provision of wireless services in the area and will provide additional co-location space for other wireless service providers' antennas thereby helping to reduce the need for additional telecommunication facilities within the area. The applicant intends to lease a portion of the property to allow for the construction of the telecommunication facility, which shall be enclosed within a fenced compound that will have a vegetative screen/buffer installed along its perimeter. A portion of the submitted site plan denoting the location of the tower has been included to provide additional detail on the location of the aforementioned facility.

In accordance with Section 5.10.8 *Wireless Telecommunication Support Structures – Submittal and Review Requirements* of the Orange County Unified Development Ordinance (UDO) the applicant is scheduling a balloon test in order to provide an opportunity for local residents and property owners to have a visual representation of the height and location of the proposed facility. The test shall involve the applicant floating a large balloon at the height of the proposed tower in an effort to simulate its constructed height.

This balloon test shall occur on **Saturday March 28, 2015** between the hours of **10:00 a.m. to 2:00 p.m.**, weather permitting. In the event of inclement weather, or if windy or otherwise poor weather conditions prevent the balloon test on that day, it will be held during the same hours on the first weekday thereafter that weather permits. As required under Section 5.10.8 of the UDO, this letter is being sent to inform you of the test and invite you come out to the property between the aforementioned hours to meet with the applicant and members of the Orange County Planning staff.

This meeting date/time shall serve as the Neighborhood Information Meeting (NIM) required for all special use permit applications. The applicant shall be on-site to answer questions related to the project. County staff shall be present to answer questions related to the review process. Staff has taken the liberty of providing an information fact sheet on the special use permit review process for educational purposes.

Please bear in mind this is the **first** required step in the application submittal and review process. A public hearing, slated to occur on May 11, 2015, shall be held by the Orange County Board of Adjustment to review and act on the actual application. You will be notified through separate correspondence of this meeting time and location.

Relevant section(s) associated with the review of this project can be found within:

- Section 2.7 *Special Use Permits* (review procedures)
- Section 5.2.1 *Table of Permitted Uses – General Use Zoning Districts*
- Section 5.3.2 *Application of Use Standards – Special Uses*
- Section 5.10.8 *Standards for Telecommunication Facilities*

of the UDO, which can be viewed on the Orange County website at: <http://orangecountync.gov/planning/Ordinances.asp>.

If you have any questions of the applicant please feel free to contact Mr. Thomas Johnson Jr. of the Nexsen Pruet law firm at (919) 786-2764 or tjohnson@nexsenpruet.com.

If you have questions related to the special use permit review process, or the application, please contact County staff at (919) 245-2575 and ask for either Messer's Michael D. Harvey or Patrick Mallett. Staff looks forward to assisting you and meeting you at the balloon test.

Sincerely,



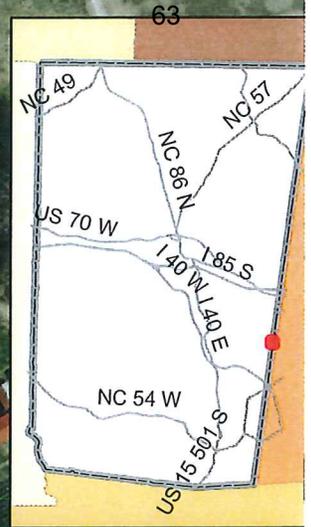
Michael D. Harvey AICP, CZO, CFO
Current Planning Supervisor
Orange County

Enclosures

Property Vicinity Map
5022 Kerley Road

5022 Kerley Road
PIN 0801-15-4533

Subject property
Anticipated locaiton of tower



KERLEY RD

Durham/Orange County
Line

MTSINAIR RD

Property in
Durham City Limits

WILKINS DR

KERLEY RD

PIN#: 0801154533
LEAH MARIE BERGMAN

5022 KERLEY RD
DURHAM, NC 27705

RGB

- Red: Band_1
- Green: Band_2
- Blue: Band_3



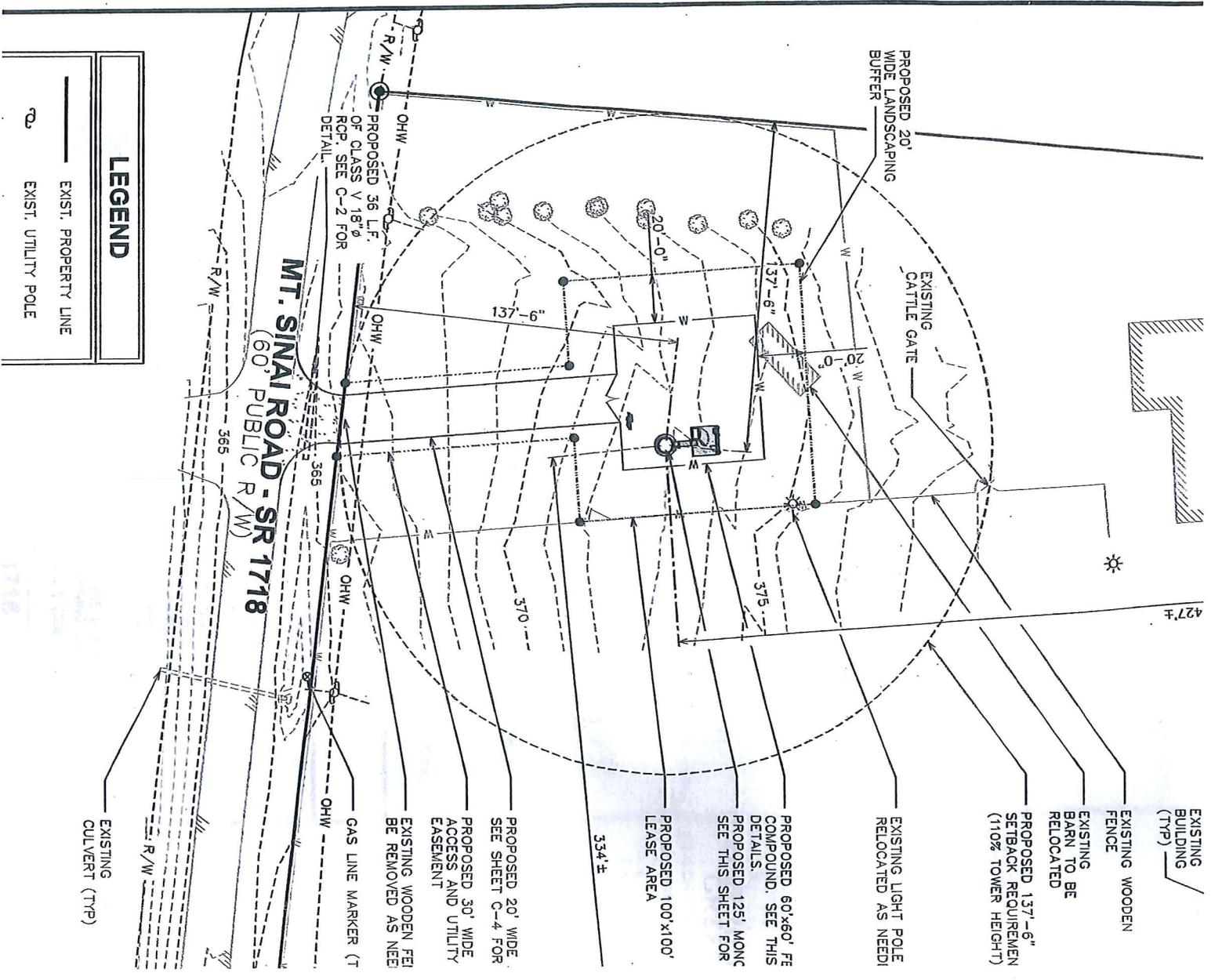
1 inch = 200 feet



LEGEND

— EXIST. PROPERTY LINE

— EXIST. UTILITY POLE



Copy of site plan showing proposed location of the tower

The tower shall be set back 137 feet from Mt. Sinai Rd and from the Western property line.



SPECIAL USE PERMIT FACT SHEET

The purpose of this fact sheet is to provide a breakdown of Orange County's Special Use Permit submittal and review process.

The information contained herein provides an explanation on the nature of the permit proceedings, the presentation of evidence, burden of proof, what constitutes testimony and who can present evidence, and your rights with respect to challenging a decision to either approve or reject a SUP application.

1. *What is a Special Use Permit?*

A Special Use Permit (SUP) is a permit allowing for the establishment of certain uses, in certain districts, that are considered worthy of additional scrutiny in their proposed location. Such uses typically require special review for design, location, and impact on surrounding properties.

Orange County has 2 different categories of SUP, specifically:

- i. **Class A** reviewed and acted upon by the Board of County Commissioners (BOCC), with a recommendation from the Planning Board, and
- ii. **Class B** reviewed and acted upon by the Orange County Board of Adjustment.

2. *What is considered a 'Special Use'?*

A SUP is required for those specific land uses identified within the Orange County Unified Development Ordinance (UDO) Table of Permitted Uses contained within Section 5.2.

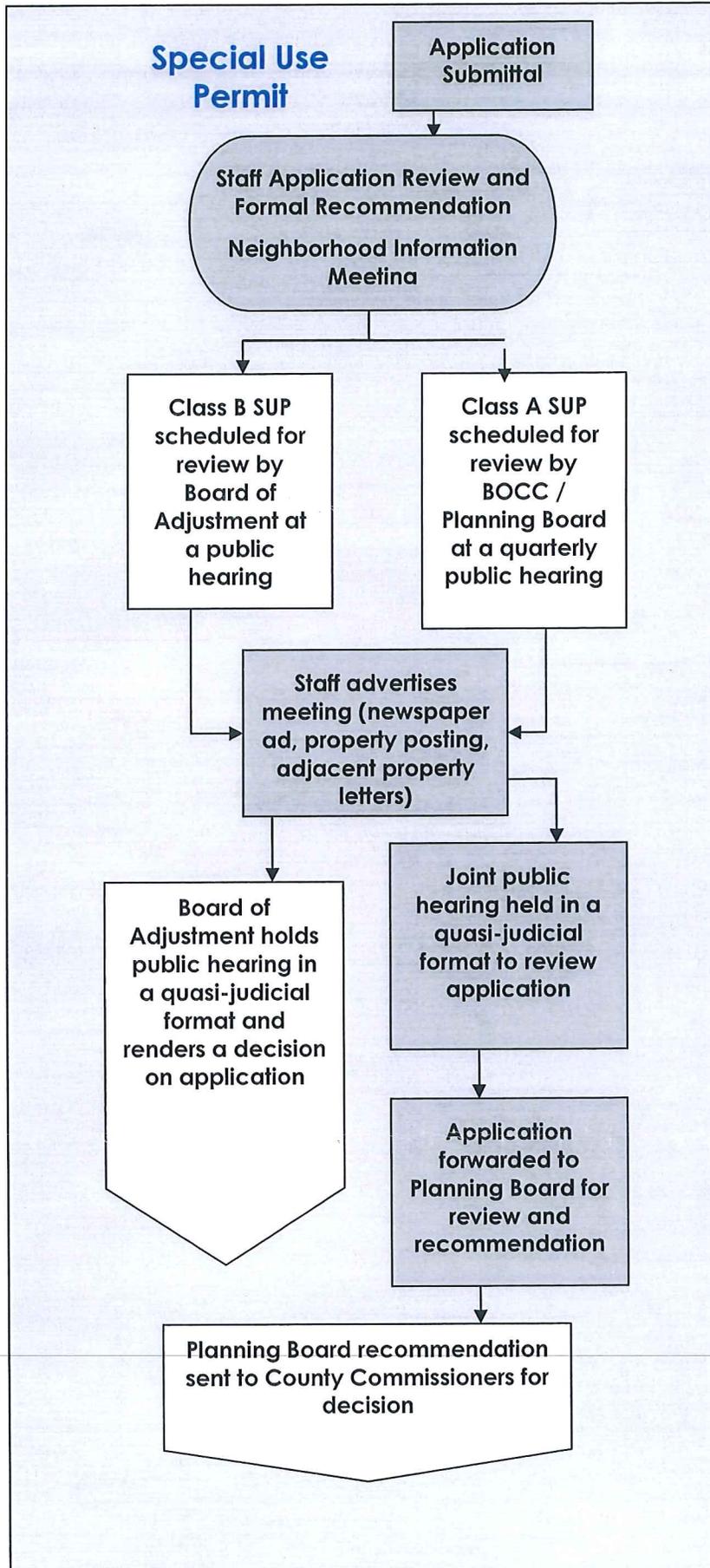
These uses are identified in the UDO's Table of Permitted Uses with an 'A' for Class A SUP and a 'B' for a Class B SUP. Some uses may be permissible in certain districts without restriction (referred to as "uses by right"), but require the SUP in districts where their impact calls for special consideration. Applicants are entitled to be granted a SUP if they can show that specific standards would be met.

3. *When are such applications reviewed?*

Review of a SUP application occurs during a previously scheduled and advertised public hearings held by either the BOCC or the Board of Adjustment.

The review of an application is carried out in a quasi-judicial process.

The typical cadence associated with the review of a SUP is broken down in Section 2.7 of the UDO and can be summarized using the following flow chart:



4. *What does quasi-judicial process mean?*

Quasi-judicial decisions arise in a variety of local government settings.

During a quasi-judicial hearing, the Board (i.e. BOCC or Board of Adjustment) responsible for rendering a decision acts much like a panel of judges. The Board hears factual evidence and sworn testimony presented at the public hearing and then makes a determination on whether the permit can be issued based on the competent, substantial, and material evidence presented.

Put differently a quasi-judicial decision is one that requires the board hearing the matter to find facts and make decisions by applying those facts to the standards in the Unified Development Ordinance.

5. *Who may speak or present evidence at the public hearing?*

Both individual applicants and those individuals supporting, or opposed to, the application are encouraged to attend. Individuals may represent themselves or be represented by an attorney and they may have expert witnesses testify for them.

The cost for attorneys or expert witnesses is borne by the individual seeking counsel or expert testimony, not the County. The County will not pay for, or reimburse, expenses incurred by an individual in their quest to support or oppose a SUP application.

While not required by State or County regulations, all parties with an interest in a SUP application are strongly advised to have an attorney represent them.

Engineers, architects, real estate agents, planners and other non-attorneys may only appear as expert witnesses; they may not represent an applicant or those opposed to an application.

Only those with standing may speak or present evidence.

6. *What are the responsibilities of the applicant?*

The applicant bears the ultimate responsibility for producing and submitting competent, substantial, and material evidence for the body reviewing the application to conclude the proposal complies with applicable County regulations.

If they fail to submit evidence demonstrating compliance, the request is denied.

If, however, the applicant proves they comply, and there is insufficient evidence submitted to the board hearing the case demonstrating they do not comply, the applicant is entitled to have the application approved.

7. *What standards must be met by the applicant?*

All applicants must show compliance with the General Standards for all SUPs, as detailed within Section 5.3.2 of the UDO, and any specific development standards associated within the proposed use.

The General Standards, as contained in Section 5.3.2, read as follows:

(a) *The use will maintain or promote the public health, safety and general welfare, if located where proposed and developed and operated according to the plan as submitted;*

(b) *The use will maintain or enhance the value of contiguous property (unless the use is a public necessity, in which case the use need not maintain or enhance the value of contiguous property); and*

(c) *The location and character of the use, if developed according to the plan submitted, will be in harmony with the area in which it is to be located and the use is in compliance with the plan for the*

physical development of the County as embodied in these regulations or in the Comprehensive Plan or portion thereof, adopted by the Board of County Commissioners

8. ***How are decisions made?***

Members of the board rendering the decision must make their decision solely on the competent, material and substantial evidence presented at the hearing, both for and against an application.

Members cannot consider information obtained through independent research or undisclosed *ex parte* communications, meaning members cannot have private discussions with individuals who support or object to a specific application.

9. ***What exactly is ex-parte communication and why is it not allowed?***

Persons affected by a decision have the legal right to hear all of the information presented to members of a board who will be rendering a decision on an SUP application, specifically they have a right to know all of the “facts” being considered.

Therefore members of the decision-making body are not allowed to discuss the case or gather evidence outside of the hearing (what the courts term *ex parte* communication). Only facts presented to the full board at the hearing may be considered.

This is an important point to remember when such applications are being reviewed. Members of the board rendering the decision are prohibited from discussing the matter or receiving comment on a proposal.

These members are not trying to be rude or unsympathetic to your concerns. They are prohibited from engaging in the conversation in the first place as they are required to guarantee an impartial hearing where the ‘facts’ are weighed as they are presented as to whether or not an application should be granted.

10. ***You previously indicated decisions are based on evidence. Does this mean those presenting evidence at a SUP hearing have to be under oath?***

In a word, yes. All testimony, including from County staff, offered during the public hearing where a SUP is reviewed must be under oath.

All persons wishing to speak will be given a reasonable time in which to be heard, however groups are encouraged to select a spokesperson to speak for the group in order to avoid repetitive testimony.

11. ***Can people just speak to offer their opinion on the application?***

Inflammatory, irrelevant, repetitive and incompetent testimony and hearsay is not permitted and the chairman of the board hearing the matter has the right to limit and restrict such comments during the public hearing.

For more information please refer to Section 2.7.7 (D) of the UDO.

12. ***What constitutes ‘competent, substantial, and material evidence’ allowing for the approval or a denial of a SUP?***

Breaking down what constitutes evidence can best be summarized as follows:

- i. **Competent evidence:** legally admissible under the rules of evidence unless admitted without objection, or appears to be sufficiently trustworthy and is admitted under such circumstances that it is reasonable for the decision-making body to rely upon it. Evidence that can be subjected to cross-examination, inspection, explanation and rebuttal (i.e. expert testimony).

For example a realtor who has professional experience and accreditation can offer an opinion if a specific project will or will not impact the value of adjacent property. An individual with no background in the field cannot offer a ‘competent’ opinion on the

subject. In this case it would not be considered as ‘competent’ evidence and would be inadmissible.

- ii. Substantial evidence: evidence that which a ‘reasonable mind’ would regard as sufficiently supporting a specific result.

Would this persuade the average person to make a certain conclusion? Does it do more than speculate?

- iii. Material evidence: evidence that is relevant to the issue being considered.

For example if a board is reviewing an application for a kennel (i.e. a place where dogs/cats are housed and cared for a period of time) an individual who is opposed may submit documentation denoting noise complaints from other kennels throughout Orange County. This could be construed as ‘material evidence’.

Documentation denoting animals have died in kennels throughout the county and, as a result, this specific application should be denied is not relevant to the case at hand as it has no specific relationship to what is being proposed. This would be deemed immaterial evidence and would not be admissible.

As a general rule, anyone with knowledgeable information (i.e. relevant) to the case may provide factual information, but only experts may provide opinion testimony.

Even expert testimony must be competent (i.e. the expert has qualifications relevant to the issue) and material before the decision-making board can rely on it.

Hearsay evidence is testimony that the witness does not know of his or her own personal knowledge, including that which someone else told the witness and the use or introduction of signed petitions and letters.

The board may only hear testimony that focuses on the applicable standards and criteria established in the UDO. Unless they are a qualified expert, witnesses are not competent to testify about the impact of a proposed land use on the value of nearby property, the danger to public safety resulting from increases in traffic or other matters that require special training or expertise like the level of noise that will be generated.

13. *Can conditions be imposed on a SUP?*

Generally, the board hearing the application may attach conditions to the approval of an SUP as it relates to compliance with applicable standards. For example, a condition may require the applicant to increase the size of a required setback or land use buffer in order to ensure the project complies with that specific standard as detailed within the UDO. The Board cannot impose conditions addressing an issue not related to an existing standard such as establishing hours of operation, color of buildings, etc.

Conditions cannot require the applicant to take action with regard to a piece of property that is not a part of the application being considered, and conditions cannot require the alteration of a special use permit previously issued to a third party.

14. *Is there a record of the proceedings?*

Complete records must be kept of the hearings. Detailed minutes must be kept noting the identity of witnesses and giving a complete summary of their testimony. Any exhibits presented are retained by the board and become a part of the file on that case. An audio recording of the hearing is also made.

15. *How are parties notified of the decision?*

The board rendering a decision on the application is required to make a formal decision on the application (i.e. approve or deny) in writing and shall be based on the determination of facts and their application to the specific standards for the particular use and the general standards contained in the

UDO. This includes providing specific details on the board's conclusions on each applicable standard for a given SUP. Even if the application is denied, there is an obligation to make a detailed finding identifying the evidence utilized to deny the application.

The written decision must be signed and becomes effective upon filing with the Planning Department. A copy of the written decision must be delivered to the applicant, property owner, and others as required by State law.

16. Are decisions on SUP applications subject to further review?

Yes. Decisions of the BOCC or Board of Adjustment on a SUP application are subject to by the Superior Court. Appeal applications must be filed within 30 days with the court from the date the decision is made available. Please refer to NCGS 160A-393 and Section 2.12.5 (A) of the UDO for additional information.

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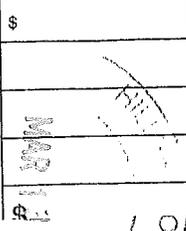
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LESLIE J GILDEMEISTER
5712 MT SINAI RD
DURHAM, NC 27705

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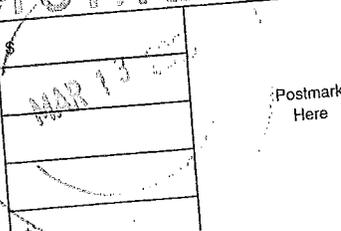
LUIS A HERNANDEZ
IDALIA F MEDINA
6035 WILKINS DR
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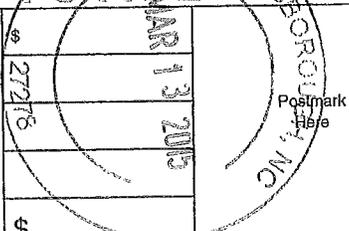
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PROPERTIES INC
211 EAST DOYLE ST
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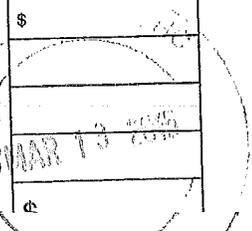
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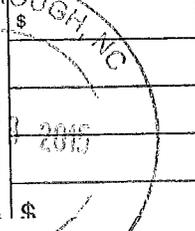
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KATHRYN A OLIVE
5821 MOUNT SINAI RD
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RENEE R SNYDERMAN
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 RHONDA P MISENHEIMER
 123 S CHANNEL HAVEN DR

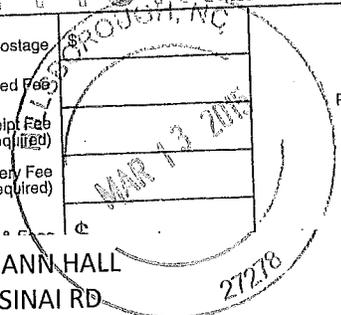
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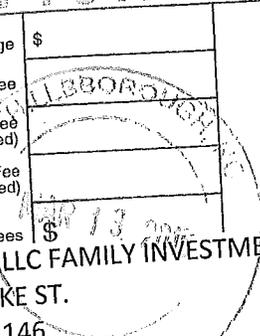
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GROUP #4146
DURHAM, NC 27704-2623

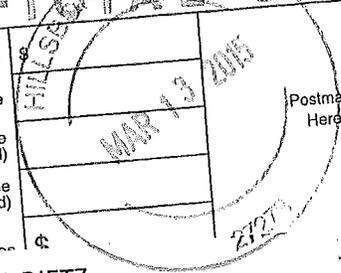
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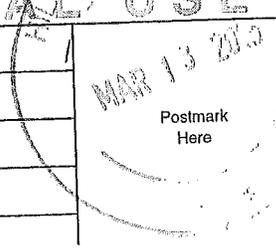
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MARK W WALLER
PAMELA P WALLER
5005 KERLEY RD
Durham, NC 27705

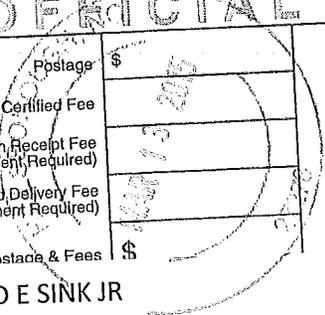
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5816 MT SINAI RD
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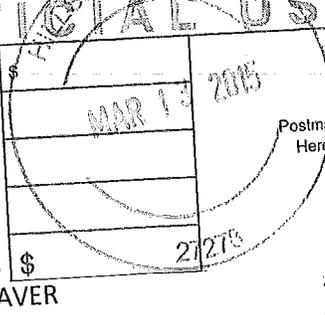
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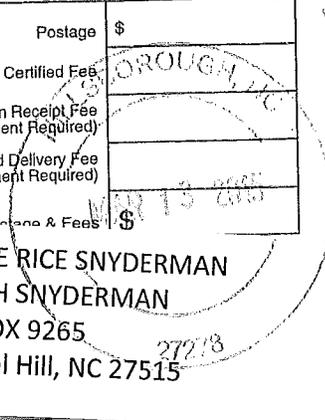
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Chapel Hill, NC 27515

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227 SMITH DR
DURHAM, NC 27712

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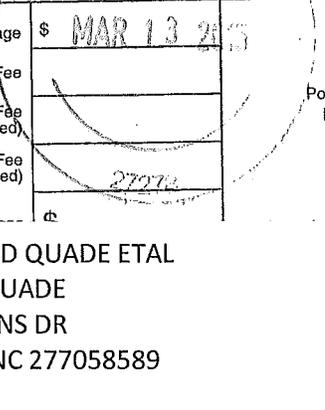
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ALISON V QUADE
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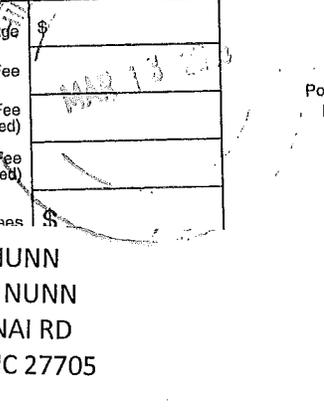
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BARBARA H NUNN
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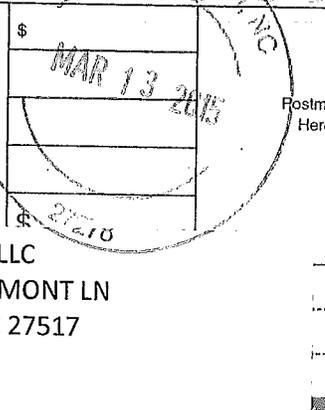
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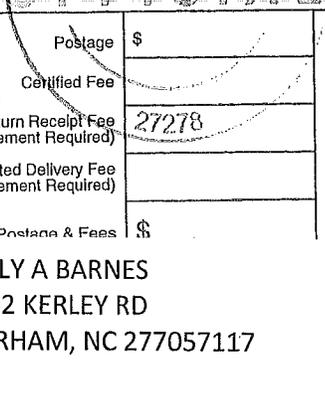
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LEE RAY BERGMAN LLC 27278
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MARILYN B WAGNER
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DURHAM, NC 277055351

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ANNE T TRUESDALE
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DURHAM, NC 277058613

For Instructions

PLANNING & INSPECTIONS DEPARTMENT
Craig N. Benedict, AICP, Director

Current Planning
(919) 245-2575
(919) 644-3002 (FAX)
www.orangecountync.gov



131 W. Margaret Lane
Suite 201
P. O. Box 8181
Hillsborough, NC 27278



April 2, 2015

RE: NOTIFICATION of Balloon Test and Skyway Towers LLC plans to construct a telecommunication facility (i.e. a telecommunication tower) on a parcel of property located at 5022 Kerley Road

RE-SCHEDULING OF BALLOON TEST AND NEIGHBORHOOD MEETING FOR SATURDAY APRIL 11, 2015 FROM 10:00 A.M. TO 2:00 P.M.

To Whom It May Concern:

As you may recall from past correspondence, the Orange County Planning Department was informed by representatives of Skyway Towers LLC, through their attorney's with the Nexsen Pruet law firm, (hereafter 'the applicant') they will be submitting an application for a Class B Special Use Permit seeking authorization to construct a 129 ft. tall (125 ft. tall tower with a 4 ft. lighting pole at the top for a combined total height of 129 ft.) monopole telecommunication facility (i.e. a telecommunication tower) on a parcel of property located at 5022 Kerley Road.

The parcel, further identified utilizing Orange County Parcel Identification Number (PIN) 0801-15-4533, is zoned Rural Buffer (RB), is approximately 5.8 acres in area and is located at the intersection of Mt. Sinai Road (SR 1718) and Kerley Road (SR 1717) near the border with Durham County (hereafter 'the property'). Please refer to the attached vicinity map for additional information on the location of the property.

In accordance with Section 5.10.8 *Wireless Telecommunication Support Structures – Submittal and Review Requirements* of the Orange County Unified Development Ordinance (UDO) the applicant originally scheduled a balloon test for March 28, 2015 in order to provide an opportunity for local residents and property owners to have a visual representation of the height and location of the proposed facility.

This test was, ultimately, cancelled due to inclement weather. Under the provisions of the UDO, the applicant had to legal ability to hold this test during the same hours on the first weekday thereafter that weather permits. They decided, however, to move the test to the first available Saturday in April to ensure interested parties would be able to witness the test and discuss the project.

This notice is being sent to inform you the applicant has re-scheduled the required balloon test for Saturday **April 11, 2015**. The balloon will be flown from 10:00 a.m. to 2:00 p.m. and the applicant will be on-site to provide additional information on the project.

County staff will also be available to conduct a second neighborhood meeting.

As was indicated in our last letter, this is the **first** required step in the application submittal and review process. A public hearing will be held by the Orange County Board of Adjustment to review and act on the actual application in the near future, with the meeting date/time to be determined. You will be notified through separate correspondence of this meeting time and location.

Relevant section(s) associated with the review of this project can be found within:

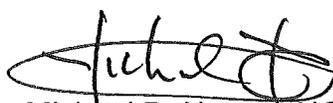
- Section 2.7 *Special Use Permits* (review procedures)
- Section 5.2.1 *Table of Permitted Uses – General Use Zoning Districts*
- Section 5.3.2 *Application of Use Standards – Special Uses*
- Section 5.10.8 *Standards for Telecommunication Facilities*

of the UDO, which can be viewed on the Orange County website at: <http://orangecountync.gov/planning/Ordinances.asp>.

If you have any questions of the applicant please feel free to contact Mr. Thomas Johnson Jr. of the Nexsen Pruet law firm at (919) 786-2764 or tjohnson@nexsenpruet.com.

If you have questions related to the special use permit review process, or the application, please contact County staff at (919) 245-2575 and ask for either Messer's Michael D. Harvey or Patrick Mallett. Staff looks forward to assisting you and meeting you at the balloon test.

Sincerely,



Michael D. Harvey AICP, CZO, CFO
Current Planning Supervisor
Orange County

Property Vicinity Map
5022 Kerley Road

5022 Kerley Road
PIN 0801-15-4533

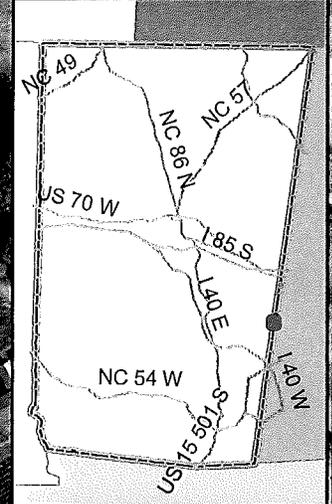
Subject property
Anticipated locaiton of
tower

Durham/Orange County
Line

Property in
Durham City Limits

PIN#: 0801154533
LEAH MARIE BERGMAN

5022 KERLEY RD
DURHAM, NC 27705



WILKINS DR

KERLEY RD

KERLEY RD

RGB

- Red: Band_1
- Green: Band_2
- Blue: Band_3

1 inch = 200 feet

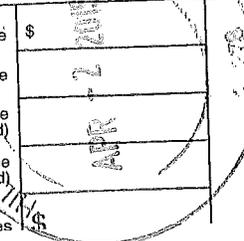
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Orange County Planning and Inspections Department
03/13/2015

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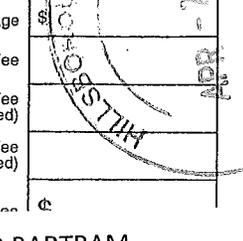
MICHAEL D BEEN
 1904 KERLEY RD
 DURHAM, NC 27705

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 LESLIE J GILDEMEISTER
 5712 MT SINAI RD
 DURHAM, NC 27705

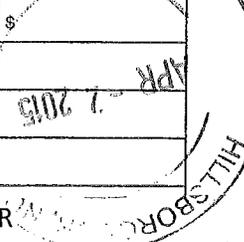
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KAREN WALLER
 MARK WALLER
 505 KERLEY ROAD
 DURHAM, NC 27705

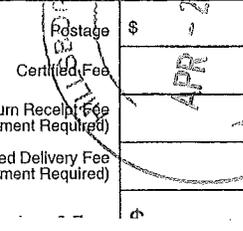
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 IDALIA F MEDINA
 6035 WILKINS DR
 DURHAM, NC 27705

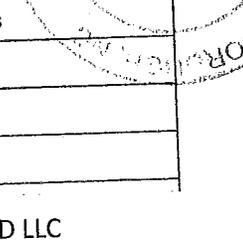
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 313 MEADOWMONT LN
 Chapel Hill, NC 27517

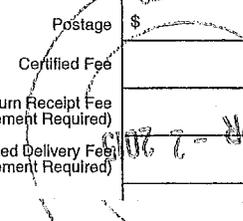
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 MELAINA B HALL
 5905 MT SINAI RD
 DURHAM, NC 27705

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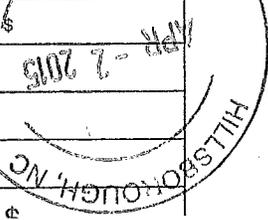
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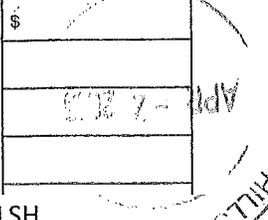
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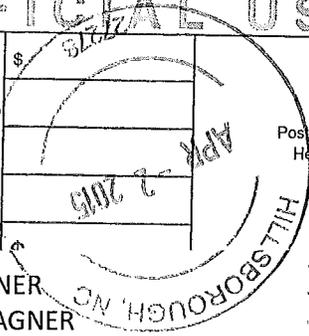
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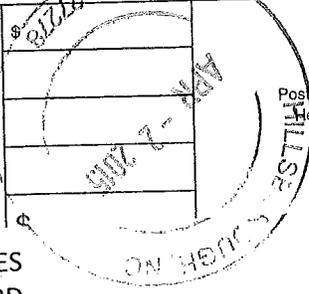
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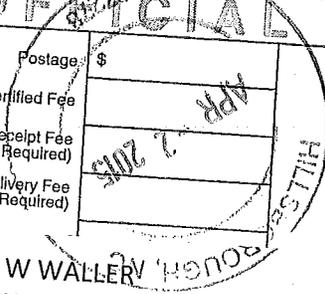
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 MARK WALLER
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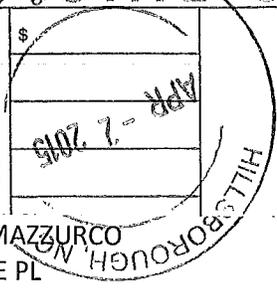
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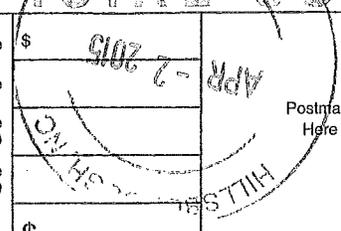
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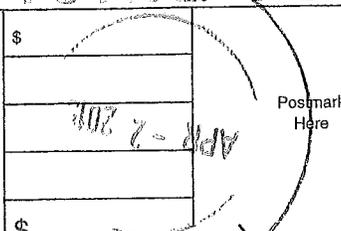
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DURHAM, NC 27705

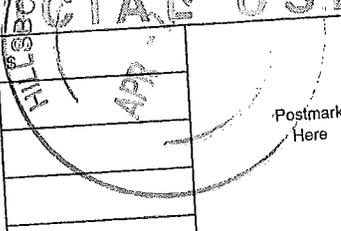
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BARBARA H NUNN
5912 MT SINAI RD
DURHAM, NC 27705

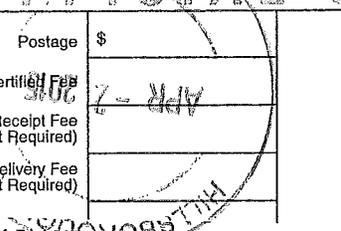
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TAMMY MORSE ETAL
5305 KERLEY RD
DURHAM, NC 27705

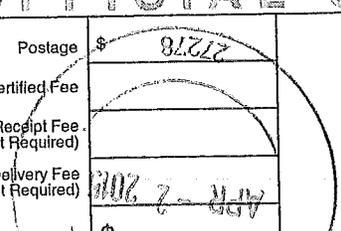
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6021 WILKINS DR
Durham, NC 27705

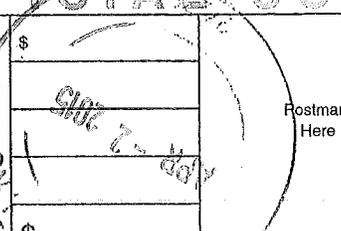
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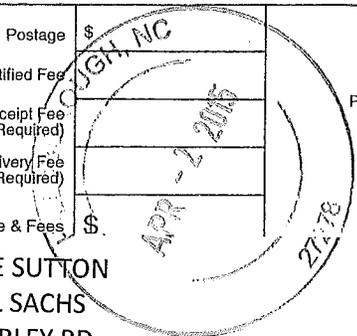
ROBERT G MISENHEIMER
RHONDA P MISENHEIMER
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WILMINGTON, NC 284093509

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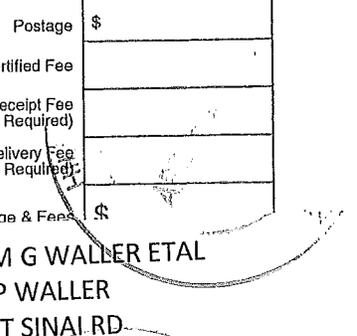
SUSAN E SUTTON
 SUSAN L SACHS
 4912 KERLEY RD
 DURHAM, NC 27705

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 HELEN P WALLER
 3130 MT SINAI RD
 CHAPEL HILL, NC 27514

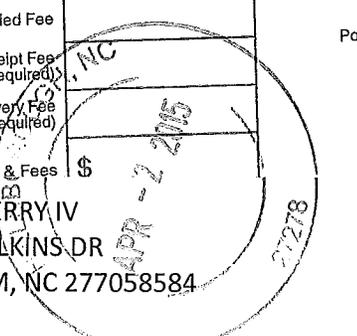
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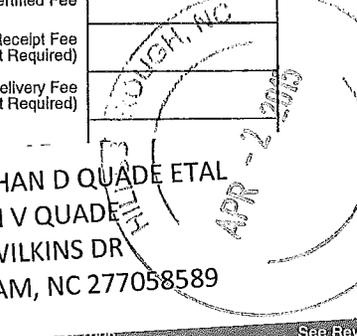
BEN T PERRY IV
 5806 WILKINS DR
 DURHAM, NC 277058584

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 ALISON V QUADE
 6021 WILKINS DR
 DURHAM, NC 277058589

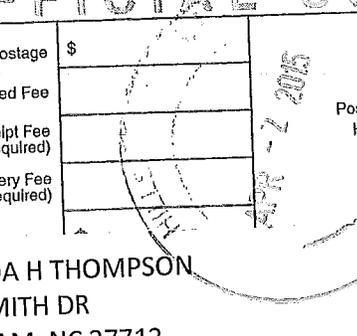
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BRENDA H THOMPSON
 227 SMITH DR
 DURHAM, NC 27712

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 City

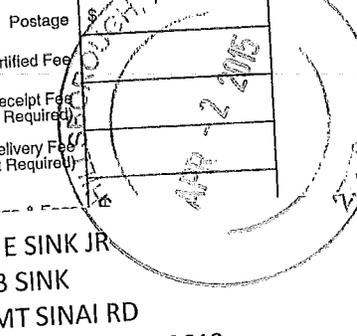
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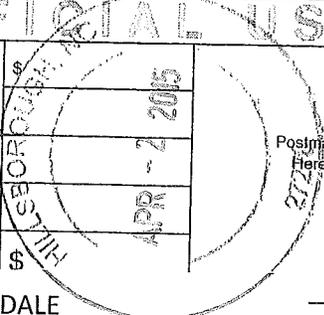
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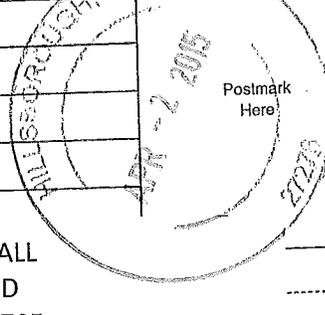
ANNE T TRUESDALE
 5802 MT SINAI RD
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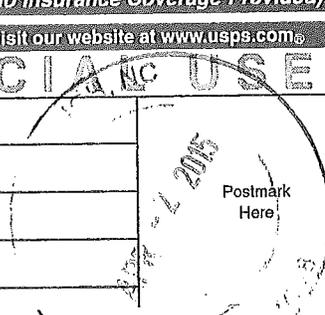
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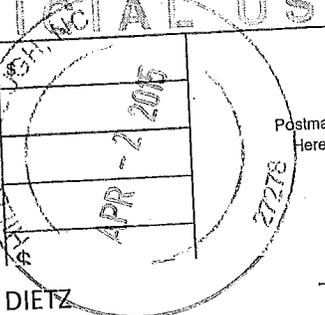
KIMBERLY B GOTWALS
 10 OSBORNE PL
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MARGARET A DIETZ
 4908 KERLEY RD
 DURHAM, NC 277057115

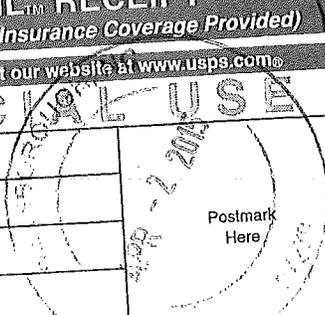
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 2901 N. DUKE ST.
 GROUP #4146
 DURHAM, NC 27704-2623

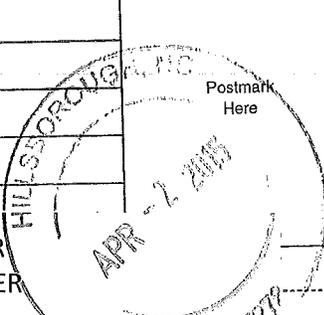
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 PAMELA P WALLER
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 Durham, NC 27705

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RALPH SNYDERMAN
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JOHN WALL
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Durham, NC 27705

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WILLIAM T WILKINS ETAL
YVONNE SWILKINS
9 PEDESTAL ROCK LN
DURHAM, NC 27712

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RENEE R SNYDERMAN
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Durham, NC 27705

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LEE RAY BERGMAN LLC
PO BOX 685
DURHAM, NC 27702

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HELEN E COLIVE
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ORANGE COUNTY HEALTHCARE
PROPERTIES INC
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TOCCOA, GA 30577

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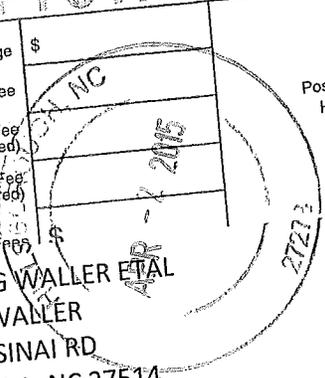
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HELEN P WALLER
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CHAPEL HILL, NC 27514

or Instructions

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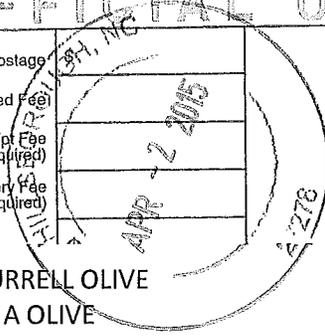
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BRUCE BURRELL OLIVE
KATHRYN A OLIVE
5821 MOUNT SINAI RD
DURHAM, NC 277058614

or Instructions

PLANNING & INSPECTIONS DEPARTMENT
Craig N. Benedict, AICP, Director

Current Planning
(919) 245-2575
(919) 644-3002 (FAX)
www.orangecountync.gov



131 W. Margaret Lane
Suite 201
P. O. Box 8181
Hillsborough, NC 27278



May 20, 2015

RE: NOTIFICATION of PUBLIC HEARING

Review of CLASS B SPECIAL USE PERMIT APPLICATION submitted by Skyway Towers LLC proposing construction of 125 ft. tall telecommunication facility (i.e. a telecommunication tower) on a parcel of property located at 5022 Kerley Road

To Whom It May Concern:

The Orange County Planning Department has received a Class B Special Use Permit (SUP) application from Skyway Towers LLC and T-Mobile, through their attorney's with the Nexsen Pruet law firm, (hereafter 'the applicant') seeking authorization to construct a 129 ft. tall (125 ft. tall tower with a 4 ft. lighting pole at the top for a combined total height of 129 ft.) monopole telecommunication facility (i.e. a telecommunication tower) on a parcel of property located at 5022 Kerley Road.

The application has been submitted in accordance with the provisions of: Section(s) 2.7 *Special Uses*, 5.2.2 *Table of Permitted Uses*, 5.3.2 *Application of Use Standards – Special Uses*, and 5.10 *Standards for Telecommunication Facilities* of the Orange County Unified Development Ordinance (UDO). A copy of the UDO can be viewed on the Orange County website utilizing the following link: <http://orangecountync.gov/planning/Ordinances.asp>.

The parcel, further identified utilizing Orange County Parcel Identification Number (PIN) 0801-15-4533, is zoned Rural Buffer (RB), is approximately 5.8 acres in area and is located at the intersection of Mt. Sinai Road (SR 1718) and Kerley Road (SR 1717) near the border with Durham County (hereafter 'the property'). Please refer to the attached vicinity map for additional information on the location of the property.

As detailed within the request, the applicant wishes to erect a telecommunication tower within a 100 foot by 100 foot leased area on the aforementioned parcel near Mt. Sinai Road. There will be an equipment cabinet at the base of the tower to house equipment for the various communication providers utilizing the tower within a 60 foot by 60 foot fenced compound. Access to the tower is proposed to be through a driveway off of Mt. Sinai Road. Please see attached map(s) for additional detail.

A copy of the application is on file at the Orange County Planning Department and can be viewed during normal business hours. The application package has also been made available on the Orange County website and can be viewed utilizing the following link:

http://www.orangecountync.gov/new_departments/planning_and_inspections/CurrentDevelopmentProjects.php.

As an adjacent property owner you have the right to address the Board concerning this request. The meeting to review this case is scheduled for **Monday June 8, 2015 at 7:30 p.m.** in the 2nd floor meeting room of the Whitted Building located 300 West Tryon Street Hillsborough, North Carolina (please see attached map for additional detail on building and parking location).

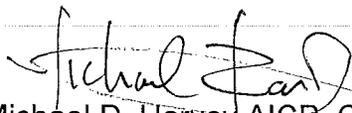
It should be remembered that the review of all special use permit applications are carried out in a *quasi-judicial* format meaning that decisions relating to the approval or denial of an application are based solely on the sworn testimony of all parties involved with the case, both those for and against an application, as well as the review of competent material and substantial evidence submitted during the public hearing. While County regulations and State law do not require that parties be represented by an attorney, it may be in your best interests to secure legal council to represent your interests at the hearing.

Further the applicant has the burden of establishing, by the submission of competent material and substantial evidence, the existence of facts and conditions that demonstrate the projects compliance with the various requirements and standards detailed within the UDO. Those opposing approval of the application shall have the burden of establishing, also through the submission of competent material and substantial evidence, the specific manner in which the proposal does not satisfy the requirements for approval of the application.

As previously indicated, the Board of Adjustment shall render a decision only on the sworn testimony of all parties and on the competent material and substantial evidence submitted during the hearing.

If you have any questions concerning this request, please contact staff at (919) 245-2575.

Sincerely,



Michael D. Harvey AICP, CZO, CFO
Current Planning Supervisor
Orange County

Whitted Building (300 W. Tryon St.)



1 in = 100 feet
0 50 Feet

Orange County Planning and Inspections
Brian Carson (5/8/2015)

Property Vicinity Map

5022 Kerley Road

5022 Kerley Road
PIN 0801-15-4533

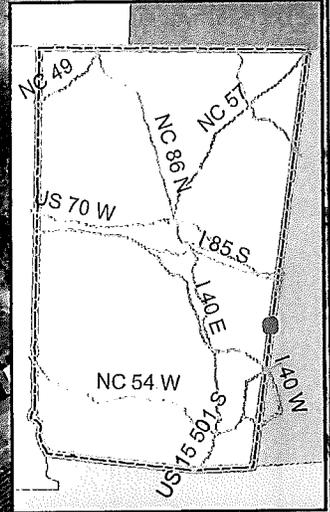
Subject property
Anticipated location of tower

Durham/Orange County Line

Property in Durham City Limits

PIN#: 0801154533
LEAH MARIE BERGMAN

5022 KERLEY RD
DURHAM, NC 27705



WILKINS DR

KERLEY RD

MIT SINAI RD

KERLEY RD

RGB

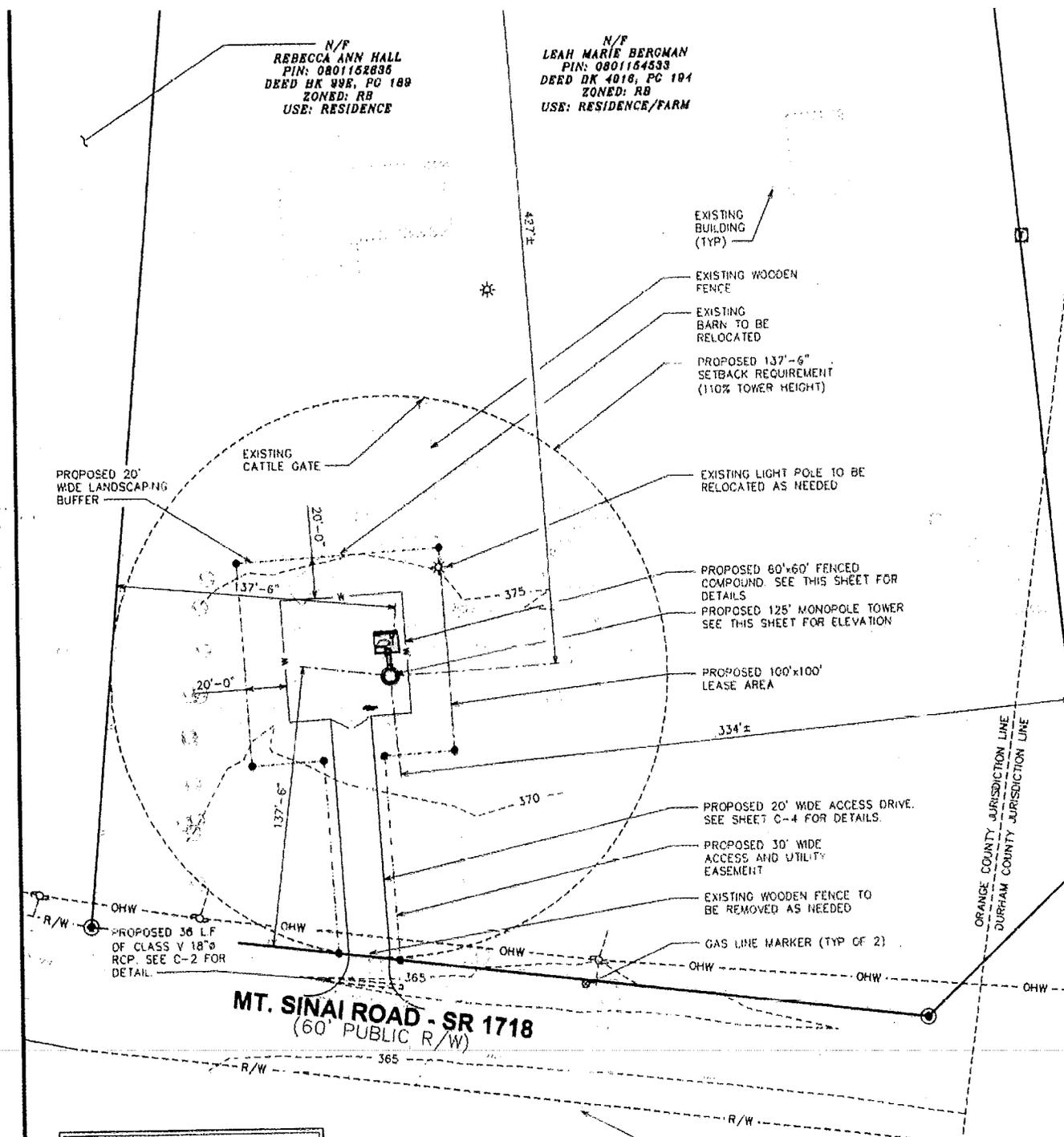
-  Red: Band_1
-  Green: Band_2
-  Blue: Band_3



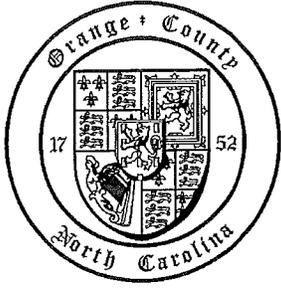
1 inch = 200 feet



COPY of site plan sheet for proposed telecommunication facility showing tower location at 5022 Kerley Road (illustrative purposes only. Image is not to scale)



The application, including the complete site plan, can be viewed at the Orange County Planning Department or through the following link:
http://www.orangecountync.gov/new_departments/planning_and_inspections/CurrentDevelopmentProjects.php.



SPECIAL USE PERMIT FACT SHEET

The purpose of this fact sheet is to provide a breakdown of Orange County's Special Use Permit submittal and review process.

The information contained herein provides an explanation on the nature of the permit proceedings, the presentation of evidence, burden of proof, what constitutes testimony and who can present evidence, and your rights with respect to challenging a decision to either approve or reject a SUP application.

1. *What is a Special Use Permit?*

A Special Use Permit (SUP) is a permit allowing for the establishment of certain uses, in certain districts, that are considered worthy of additional scrutiny in their proposed location. Such uses typically require special review for design, location, and impact on surrounding properties.

Orange County has 2 different categories of SUP, specifically:

- i. **Class A** reviewed and acted upon by the Board of County Commissioners (BOCC), with a recommendation from the Planning Board, and
- ii. **Class B** reviewed and acted upon by the Orange County Board of Adjustment.

2. *What is considered a 'Special Use'?*

A SUP is required for those specific land uses identified within the Orange County Unified Development Ordinance (UDO) Table of Permitted Uses contained within Section 5.2.

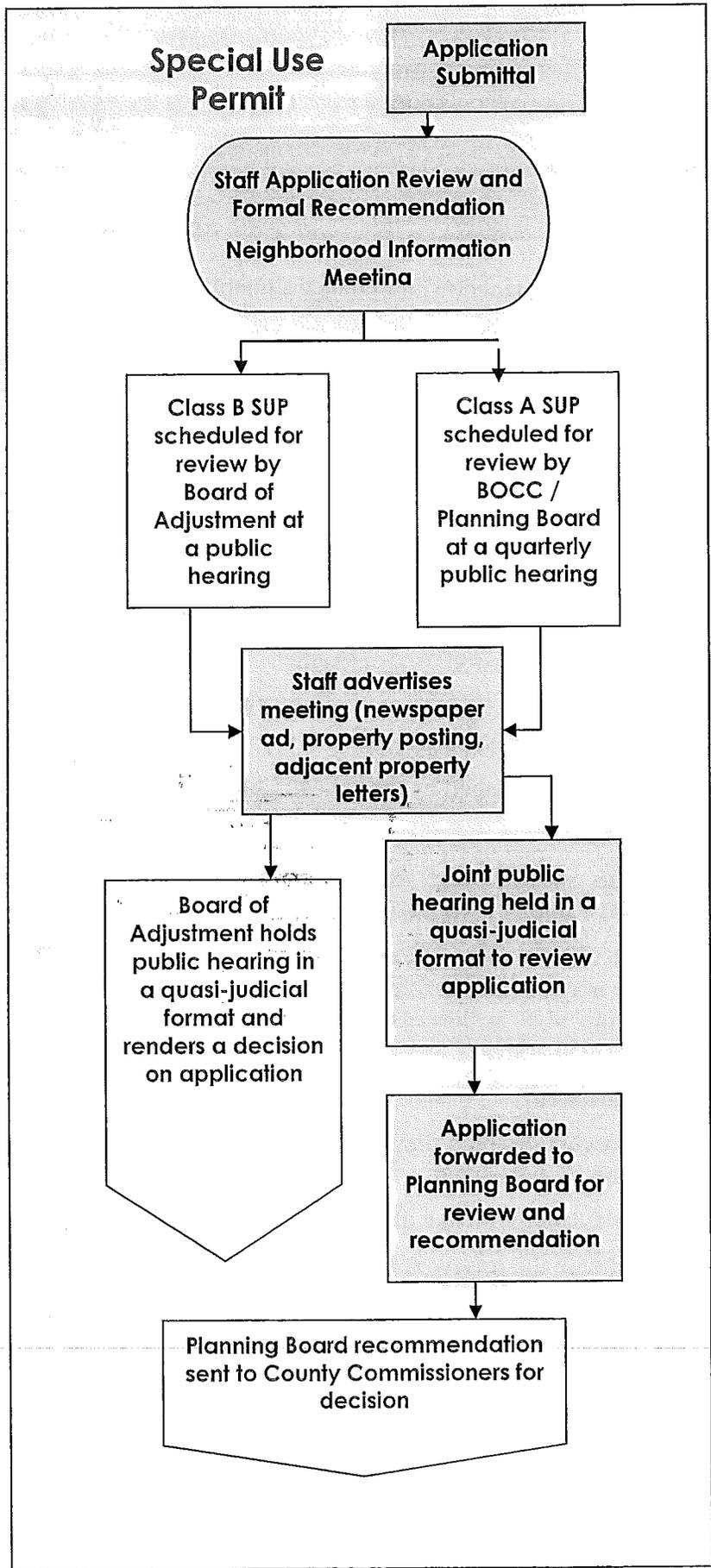
These uses are identified in the UDO's Table of Permitted Uses with an 'A' for Class A SUP and a 'B' for a Class B SUP. Some uses may be permissible in certain districts without restriction (referred to as "uses by right"), but require the SUP in districts where their impact calls for special consideration. Applicants are entitled to be granted a SUP if they can show that specific standards would be met.

3. *When are such applications reviewed?*

Review of a SUP application occurs during a previously scheduled and advertised public hearings held by either the BOCC or the Board of Adjustment.

The review of an application is carried out in a quasi-judicial process.

The typical cadence associated with the review of a SUP is broken down in Section 2.7 of the UDO and can be summarized using the following flow chart:



4. *What does quasi-judicial process mean?*

Quasi-judicial decisions arise in a variety of local government settings.

During a quasi-judicial hearing, the Board (i.e. BOCC or Board of Adjustment) responsible for rendering a decision acts much like a panel of judges. The Board hears factual evidence and sworn testimony presented at the public hearing and then makes a determination on whether the permit can be issued based on the competent, substantial, and material evidence presented.

Put differently a quasi-judicial decision is one that requires the board hearing the matter to find facts and make decisions by applying those facts to the standards in the Unified Development Ordinance.

5. *Who may speak or present evidence at the public hearing?*

Both individual applicants and those individuals supporting, or opposed to, the application are encouraged to attend. Individuals may represent themselves or be represented by an attorney and they may have expert witnesses testify for them.

The cost for attorneys or expert witnesses is borne by the individual seeking counsel or expert testimony, not the County. The County will not pay for, or reimburse, expenses incurred by an individual in their quest to support or oppose a SUP application.

While not required by State or County regulations, all parties with an interest in a SUP application are strongly advised to have an attorney represent them.

Engineers, architects, real estate agents, planners and other non-attorneys may only appear as expert witnesses; they may not represent an applicant or those opposed to an application.

Only those with standing may speak or present evidence.

6. *What are the responsibilities of the applicant?*

The applicant bears the ultimate responsibility for producing and submitting competent, substantial, and material evidence for the body reviewing the application to conclude the proposal complies with applicable County regulations.

If they fail to submit evidence demonstrating compliance, the request is denied.

If, however, the applicant proves they comply, and there is insufficient evidence submitted to the board hearing the case demonstrating they do not comply, the applicant is entitled to have the application approved.

7. *What standards must be met by the applicant?*

All applicants must show compliance with the General Standards for all SUPs, as detailed within Section 5.3.2 of the UDO, and any specific development standards associated within the proposed use.

The General Standards, as contained in Section 5.3.2, read as follows:

(a) *The use will maintain or promote the public health, safety and general welfare, if located where proposed and developed and operated according to the plan as submitted;*

(b) *The use will maintain or enhance the value of contiguous property (unless the use is a public necessity, in which case the use need not maintain or enhance the value of contiguous property); and*

(c) *The location and character of the use, if developed according to the plan submitted, will be in harmony with the area in which it is to be located and the use is in compliance with the plan for the*

physical development of the County as embodied in these regulations or in the Comprehensive Plan or portion thereof, adopted by the Board of County Commissioners

8. *How are decisions made?*

Members of the board rendering the decision must make their decision solely on the competent, material and substantial evidence presented at the hearing, both for and against an application.

Members cannot consider information obtained through independent research or undisclosed *ex parte* communications, meaning members cannot have private discussions with individuals who support or object to a specific application.

9. *What exactly is ex-parte communication and why is it not allowed?*

Persons affected by a decision have the legal right to hear all of the information presented to members of a board who will be rendering a decision on an SUP application, specifically they have a right to know all of the "facts" being considered.

Therefore members of the decision-making body are not allowed to discuss the case or gather evidence outside of the hearing (what the courts term *ex parte* communication). Only facts presented to the full board at the hearing may be considered.

This is an important point to remember when such applications are being reviewed. Members of the board rendering the decision are prohibited from discussing the matter or receiving comment on a proposal.

These members are not trying to be rude or unsympathetic to your concerns. They are prohibited from engaging in the conversation in the first place as they are required to guarantee an impartial hearing where the 'facts' are weighed as they are presented as to whether or not an application should be granted.

10. *You previously indicated decisions are based on evidence. Does this mean those presenting evidence at a SUP hearing have to be under oath?*

In a word, yes. All testimony, including from County staff, offered during the public hearing where a SUP is reviewed must be under oath.

All persons wishing to speak will be given a reasonable time in which to be heard, however groups are encouraged to select a spokesperson to speak for the group in order to avoid repetitive testimony.

11. *Can people just speak to offer their opinion on the application?*

Inflammatory, irrelevant, repetitive and incompetent testimony and hearsay is not permitted and the chairman of the board hearing the matter has the right to limit and restrict such comments during the public hearing.

For more information please refer to Section 2.7.7 (D) of the UDO.

12. *What constitutes 'competent, substantial, and material evidence' allowing for the approval or a denial of a SUP?*

Breaking down what constitutes evidence can best be summarized as follows:

- i. Competent evidence: legally admissible under the rules of evidence unless admitted without objection, or appears to be sufficiently trustworthy and is admitted under such circumstances that it is reasonable for the decision-making body to rely upon it. Evidence that can be subjected to cross-examination, inspection, explanation and rebuttal (i.e. expert testimony).

For example a realtor who has professional experience and accreditation can offer an opinion if a specific project will or will not impact the value of adjacent property. An individual with no background in the field cannot offer a 'competent' opinion on the

subject. In this case it would not be considered as 'competent' evidence and would be inadmissible.

- ii. Substantial evidence: evidence that which a 'reasonable mind' would regard as sufficiently supporting a specific result.

Would this persuade the average person to make a certain conclusion? Does it do more than speculate?

- iii. Material evidence: evidence that is relevant to the issue being considered.

For example if a board is reviewing an application for a kennel (i.e. a place where dogs/cats are housed and cared for a period of time) an individual who is opposed may submit documentation denoting noise complaints from other kennels throughout Orange County. This could be construed as 'material evidence'.

Documentation denoting animals have died in kennels throughout the county and, as a result, this specific application should be denied is not relevant to the case at hand as it has no specific relationship to what is being proposed. This would be deemed immaterial evidence and would not be admissible.

As a general rule, anyone with knowledgeable information (i.e. relevant) to the case may provide factual information, but only experts may provide opinion testimony.

Even expert testimony must be competent (i.e. the expert has qualifications relevant to the issue) and material before the decision-making board can rely on it.

Hearsay evidence is testimony that the witness does not know of his or her own personal knowledge, including that which someone else told the witness and the use or introduction of signed petitions and letters.

The board may only hear testimony that focuses on the applicable standards and criteria established in the UDO. Unless they are a qualified expert, witnesses are not competent to testify about the impact of a proposed land use on the value of nearby property, the danger to public safety resulting from increases in traffic or other matters that require special training or expertise like the level of noise that will be generated.

13. *Can conditions be imposed on a SUP?*

Generally, the board hearing the application may attach conditions to the approval of an SUP as it relates to compliance with applicable standards. For example, a condition may require the applicant to increase the size of a required setback or land use buffer in order to ensure the project complies with that specific standard as detailed within the UDO. The Board cannot impose conditions addressing an issue not related to an existing standard such as establishing hours of operation, color of buildings, etc.

Conditions cannot require the applicant to take action with regard to a piece of property that is not a part of the application being considered, and conditions cannot require the alteration of a special use permit previously issued to a third party.

14. *Is there a record of the proceedings?*

Complete records must be kept of the hearings. Detailed minutes must be kept noting the identity of witnesses and giving a complete summary of their testimony. Any exhibits presented are retained by the board and become a part of the file on that case. An audio recording of the hearing is also made.

15. *How are parties notified of the decision?*

The board rendering a decision on the application is required to make a formal decision on the application (i.e. approve or deny) in writing and shall be based on the determination of facts and their application to the specific standards for the particular use and the general standards contained in the

UDO. This includes providing specific details on the board's conclusions on each applicable standard for a given SUP. Even if the application is denied, there is an obligation to make a detailed finding identifying the evidence utilized to deny the application.

The written decision must be signed and becomes effective upon filing with the Planning Department. A copy of the written decision must be delivered to the applicant, property owner, and others as required by State law.

16. Are decisions on SUP applications subject to further review?

Yes. Decisions of the BOCC or Board of Adjustment on a SUP application are subject to by the Superior Court. Appeal applications must be filed within 30 days with the court from the date the decision is made available. Please refer to NCGS 160A-393 and Section 2.12.5 (A) of the UDO for additional information.

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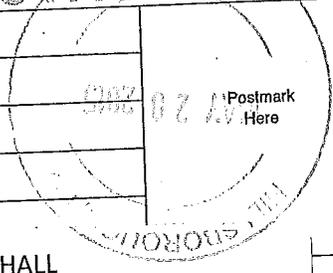
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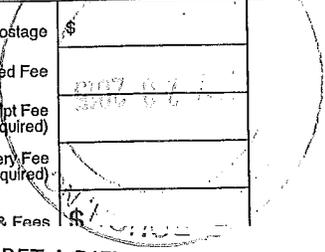
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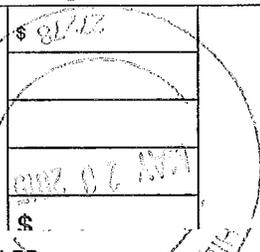
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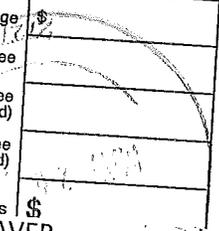
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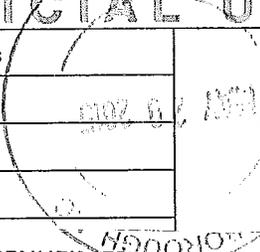
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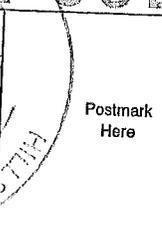
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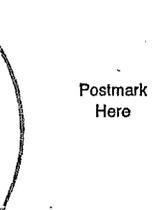
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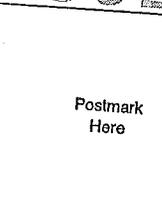
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Durham, NC 27705

sup Kerley

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SYBIL B SINK
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DURHAM, NC 277058613

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**NOTICE OF MEETING
BOARD OF ADJUSTMENT
OF
ORANGE COUNTY, NORTH CAROLINA**

Pursuant to the requirements of the General Statutes of North Carolina, Chapter 153A, Sections 340 and 345.1, Chapter 160A Section 388, and Section 2.11 of the Orange County Unified Development Ordinance (UDO), notice is hereby given that the Board of Adjustment will hold a public hearing in the 2nd flood meeting room of the Whitted Building located at 300 West Tryon Street, Hillsborough, North Carolina on **Monday June 8, 2015 at 7:30 p.m.** for the purpose taking specific action on the following item(s):

1. A-1-15 – Class B Special Use Permit application proposing to erect a telecommunication facility at 5022 Kerley Road:

In accordance with Section(s) 2.7 *Special Uses*, 5.2.2 *Table of Permitted Uses*, 5.3.2 *Application of Use Standards – Special Uses*, and 5.10 *Standards for Telecommunication Facilities* of the UDO Skyway Towers LLC and T-Mobile have submitted a Class B Special Use Permit application seeking a permit to erect a 129 ft. tall (125 ft. tall tower with a 4 ft. lighting pole at the top for a combined total height of 129 ft.) monopole telecommunication facility (i.e. a telecommunication tower) on a parcel of property located at 5022 Kerley, further identified utilizing Orange County Parcel Identification Number (PIN) 0801-15-4533.

The parcel, owned by Leah Bergman, is zoned Rural Buffer (RB), is approximately 5.8 acres in area, and is located at the intersection of Mt. Sinai Road (SR 1718) and Kerley Road (SR 1717) near the border with Durham County (hereafter ‘the property’).

As detailed within the application, the applicant wishes to erect a telecommunication tower within a 100 foot by 100 foot leased area on the aforementioned parcel. There will be an equipment cabinet at the base of the tower to house equipment for the various communication providers utilizing the tower within a 60 foot by 60 foot fenced compound. Access to the facility shall be through a proposed 20 ft. wide access drive off of Mt. Sinai Road.

The application can be viewed utilizing the following link:

http://www.orangecountync.gov/new_departments/planning_and_inspections/CurrentDevelopmentProjects.php

All interested citizens are invited to attend this hearing. This is a quasi-judicial hearing requiring a fair trial standard including accepting only competent material, and substantial evidence presented by parties with standing. Following the close of the public hearing, only evidence presented at the public hearing will be examined by the Board of Adjustment for decision.

Changes may be made in the advertised proposal, which reflect debate, objections, and discussion at the hearing.

Questions regarding the proposal may be directed to the Orange County Planning and Inspections Department located on the second floor of the West Campus Office building at 131 West Margaret Lane, Hillsborough, North Carolina, 27278. Office hours are from 8:00 a.m. to 5:00 p.m., Monday through Friday. You may also call 732-8181 (Hillsborough), 688-7331

(Durham) or 967-9251 (Chapel Hill-Carrboro). Please ask for Extension 2575 or 2585. You will be directed to a staff member who will answer your questions.

Craig Benedict, AICP
Planning Director

Attachment 3

**FINDINGS OF THE ORANGE COUNTY BOARD OF ADJUSTMENT
PERTAINING TO A REQUEST SUBMITTED BY
SKYWAY TOWERS LLC / T-MOBILE
REQUESTING A CLASS B SPECIAL USE PERMIT APPROVAL
FOR A TELECOMMUNICATION TOWER AT
5022 Kerley Road (PIN 0801-15-4533)**

As required under Section 5.2 *Table of Permitted Uses* of the Orange County Unified Development Ordinance (UDO), a Class B Special Use Permit is required for the erection of a telecommunication tower, over 75 feet but under 200 feet in height, reviewed and acted upon in accordance with the provisions of Section 2.7 of the UDO. Such permits shall comply with general and specific standards as set forth in Section(s) 5.3.2 and 5.10.8 of the UDO.

Section 5.3.2 (A) (2) of the UDO requires written findings certifying compliance with the following:

- (1) The use will maintain or promote the public health, safety and general welfare, if located where proposed and developed and operated according to the plan as submitted;
- (2) The use will maintain or enhance the value of contiguous property (unless the use is a public necessity, in which case the use need not maintain or enhance the value of contiguous property); and
- (3) The location and character of the use, if developed according to the plan submitted, will be in harmony with the area in which it is to be located and the use is in compliance with the plan for the physical development of the County as embodied in these regulations or in the Comprehensive Plan, or portion thereof, adopted by the Board of County Commissioners;

In addition, the Board shall make findings certifying that the application is compliant with the following specific standards:

- (1) Specific standards for the submission of Special Use Permit applications as outlined within Section(s) 2.2 and 2.7 of the UDO,
- (2) Specific regulations governing the development of telecommunication tower as set forth in Section 5.10.8 (A) through (B) of the UDO,
- (3) Section 5.3.2 (B) relating to the method and adequacy of the provision of:
 - a. Sewage disposal facilities,
 - b. The adequacy of police, fire, and rescue squad protection, and
 - c. The adequacy of vehicular access to the site and traffic conditions around the site
- (4) The general findings outlined within Section 5.3.2 (A) (2).

Listed below are the findings of the Orange Planning staff regarding the application in question. The findings have been presented by Article and requirement to assist the Board of Adjustment in its deliberations.

REQUIREMENT	UDO	SUPPORTING EVIDENCE	Staff	BOA
APPLICATION COMPONENTS				
Proper forms	2.2	Application (TAB 1 of binder)	Yes	
Fees paid	2.2.4(D)	Staff Testimony/Application (TAB 2 of binder)	Yes	
Full description of use <ul style="list-style-type: none"> • Location • Appearance • Operational characteristics 	2.7.3(B)(1)	Application (Application Binder and Site plan)	Yes	
Owner Information	2.7.3(B)(2)	Application (TAB 3 of binder and Site plan)	Yes	
Information needed for Use Standards	2.7.3(B)(3)	Application (TAB(s) 3, 4,5 of binder and Site Plan)	Yes	
Site Plans (10 copies for Class B; 26 for Class A)	2.7.3(B)(4)	Application/Staff Testimony (Site plan)	Yes	
Preliminary Subdivision Plat (if necessary)	2.7.3(B)(5)	[No subdivision proposed.]	N/A	
List of parcels within 1,000 feet	2.7.3(B)(6)	Application (TAB 5 of binder)	Yes	
Elevations of all structures	2.7.3(B)(7)	Application (Site plan)	Yes	
Environmental Assessment (or EIS) <ul style="list-style-type: none"> • Topography • Drainage issues • Natural or Cultural resources • Mining • Hazardous Wastes • Wastewater treatment • Water usage 	2.7.3(B)(8)	Project exempt per Section(s) 6.16.2 and 6.16.3 of UDO Proposed level of land disturbance for project does not meet established thresholds for an environmental assessment to be completed.	N/A	
Method of Debris Disposal	2.7.3(B)(9)	Application (Site plan)	Yes	
Development Schedule	2.7.3(B)(10)	Application (Site plan)	Yes	
Extended Vesting Request	2.7.3(B)(11)	Not requested	N/A	

REQUIREMENT	UDO	SUPPORTING EVIDENCE	Staff	BOA
NOTIFICATION REQUIREMENTS				
Public Notice <ul style="list-style-type: none"> • Date • Time • Place 	2.7.5(a)	Abstract (Attachment 2)	Yes	
Published in Newspaper <ul style="list-style-type: none"> • Two successive weeks • First notice at least ten days prior but no more than twenty-five days prior 	2.7.5(b)	Abstract (Attachment 2) and Staff Testimony	Yes	
Sign Posting on Property (at least 10 days prior)	2.7.5(c)	Staff Testimony posted sign on <i>May 28, 2015</i>	Yes	
Mailed Notice <ul style="list-style-type: none"> • Certified mail • All adjacent property owners (within 1000 ft.) • Not less than fifteen days prior 	2.7.5(d)	Abstract (Attachment 2)	Yes	

REQUIREMENT	UDO	SUPPORTING EVIDENCE	Staff	BOA
SPECIFIC STANDARDS				
Waste Disposal Method and adequacy of provision for sewage disposal facilities, solid waste and water service.	5.3.2(B)(1)	Abstract (Attachment 4) Both Environmental Health and Solid Waste have indicated they have no concerns. Conditions are recommended to require Solid Waste Permit as part of development process.	Yes	
Safety Method and adequacy of police, fire and rescue squad protection.	5.3.2(B)(2)	Abstract and Staff Testimony Orange County Emergency Service staff and the Sheriff's office have indicated the project can be served.	Yes	
Vehicle Access Method and adequacy of vehicle access to the site and traffic conditions around the site.	5.3.2(B)(3)	Application and Site plan There will not be an appreciable traffic increase in the area associated with the development of the telecommunication facility.	Yes	

REQUIREMENT	UDO	SUPPORTING EVIDENCE	Staff	BOA
STANDARDS for Telecommunication Facilities				
Site Plan A site plan prepared in accordance with Section 2.5 of UDO	5.10.8 (A) (1) (a)	Application, Applicant Testimony, Staff Testimony, and Site plan	Yes	
A detailed description of the proposed telecommunication support structure (i.e. monopole, self-supporting lattice, etc.) including a detailed narrative description and explanation of the specific objective(s) for the new facility including a description as to the coverage and/or capacity, technical requirements, and the identified boundaries of the specific geographic area of intended coverage for the proposed telecommunication support structure.	5.10.8 (A) (1) (b)	Application (TAB(s) 3, 5, 6, 7, 10 through 20), Site plan, and Applicant Testimony	Yes	
Elevation drawings and color renderings of the proposed tower.	5.10.8 (A) (1) (c)	Application (TAB(s) 9 and 12), Applicant Testimony, and Site plan	Yes	
A signed statement from the applicant certifying that the proposed telecommunication support structure: <ul style="list-style-type: none"> (i) Shall be maintained in a safe manner, (ii) Is in compliance with all conditions of all applicable permits and authorizations without exception, and (iii) Is in compliance with all applicable and permissible local, State, and Federal rules and regulations. 	5.10.8 (A) (1) (d)	Application (TAB 6), Applicant Testimony, and Site plan		

REQUIREMENT	UDO	SUPPORTING EVIDENCE	Staff	BOA
STANDARDS for Telecommunication Facilities (continued)				
A statement, prepared by a professional engineer certifying the tower's compliance with applicable standards as set forth in the State of North Carolina Building Code, any associated regulations; and describing the tower's capacity.	5.10.8 (A) (1) (e)	Application (TAB(s) 7 and 9), Applicant Testimony, and Site plan	Yes	
A statement indicating how the proposed tower will minimize visual intrusiveness to surrounding properties in the area.	5.10.8 (A) (1) (f)	Application (TAB(s) 21 and 22), Applicant Testimony		
A copy of the installed foundation design including a geotechnical sub-surface soils investigation, evaluation report, and foundation recommendation for the proposed wireless support structure.	5.10.8 (A) (1) (g)	Application (TAB(s) 8 and 9), Applicant Testimony, and Site plan	Yes	
The existing cell sites (latitude, longitude, power levels) to which this proposed site will be a handoff candidate.	5.10.8 (A) (1) (h)			
Propagation studies of the proposed site and showing all adjoining planned, proposed, in-service or existing sites.	5.10.8 (A) (1) (i)	Application (TAB(s) 10 and 26), Applicant Testimony, and Site plan	Yes	
The search ring utilized in finding the proposed site.	5.10.8 (A) (1) (j)	Application (TAB(s) 10 and 26), Applicant Testimony		
The number, type, height, and model of the proposed antennas along with a copy of the applicable specification sheet(s).	5.10.8 (A) (1) (k)	Application (TAB 11), Applicant Testimony	Yes	

REQUIREMENT	UDO	SUPPORTING EVIDENCE	Staff	BOA
STANDARDS for Telecommunication Facilities (continued)				
The make, model and manufacturer of the tower and antenna(s), antenna heights and power levels of proposed site.	5.10.8 (A) (1) (l)	Application (TAB 12), Applicant Testimony	Yes	
The frequency, modulation and class of service of radio or other transmitting equipment.	5.10.8 (A) (1) (m)	Application (TAB 13), Applicant Testimony	Yes	
The maximum transmission power capability of all radios, as designed, if the applicant is a cellular facility.	5.10.8 (A) (1) (n)	Application (TAB 14), Applicant Testimony	Yes	
The actual intended transmission and the maximum effective radiated power of the antenna(s).	5.10.8 (A) (1) (o)	Application (TAB 15), Applicant Testimony	Yes	
The direction(s) of maximum lobes and associated radiation of the antenna(s).	5.10.8 (A) (1) (p)	Application (TAB 16), Applicant Testimony	Yes	
Certification that the NIER levels at the proposed site are within the threshold levels adopted by the FCC.	5.10.8 (A) (1) (q)	Application (TAB 17), Applicant Testimony	Yes	
Certification that the proposed antenna(s) will not cause interference with other telecommunications devices.	5.10.8 (A) (1) (r)	Application (TAB 18), Applicant Testimony	Yes	
A written affidavit stating why "the proposed site is necessary for their communications service".	5.10.8 (A) (1) (s)	Application (TAB(s) 19 and 26), Applicant Testimony	Yes	
A copy of the FCC license applicable for the intended use of the facility as well as a copy of the 5 and 10 year building out plan required by the FCC.	5.10.8 (A) (1) (t)	Application (TAB 20), Applicant Testimony	Yes	

REQUIREMENT	UDO	SUPPORTING EVIDENCE	Staff	BOA
STANDARDS for Telecommunication Facilities (continued)				
Applications for the co-location of antennas	5.8.10 (A) (2)	The proposal is for a new tower, not for the co-location of equipment. The application is not proposing any co-locations at this time.	N/A	
Overall Policy and Desired Goals Alternatives to constructing new wireless support structures, placement to minimize adverse aesthetic impacts, etc.	5.8.10 (B) (1) (a) and (b)	Application (TAB(s) 21 and 22), Applicant Testimony		
Balloon Test	5.8.10 (B) (2)	Application (TAB(s) 21 and 22), Applicant Testimony, Abstract (Attachment 4), Staff testimony.	Yes	
Submittal of site plan	5.8.10 (B) (3) (a)	Application, Site plan, Applicant Testimony, Staff testimony	Yes	
Plans and elevations for all proposed structures and descriptions of the color and nature of all exterior material, along with the make, model, and manufacturer of the proposed structure, maximum antenna heights, and power levels.	5.8.10 (B) (3) (b)	Application (TAB(s) 11, 12, 15), Applicant Testimony, Site plan.	Yes	
A Landscape and Tree Preservation Plan	5.8.10 (B) (3) (c)	Application, Site plan, Applicant Testimony	Yes	
Evidence that the applicant has investigated the possibilities of placing the proposed equipment on an existing wireless support structure.	5.8.10 (B) (3) (d)	Application (TAB(s) 3, 10, 26), Applicant Testimony	Yes	
Documentation from applicable state or federal agencies indicating requirements, which affect the appearance of the proposed wireless support structure, such as lighting and coloring.	5.8.10 (B) (3) (e)	Application (TAB 27), Applicant Testimony	Yes	

REQUIREMENT	UDO	SUPPORTING EVIDENCE	Staff	BOA
STANDARDS for Telecommunication Facilities (continued)				
Draft bond guaranteeing removal of the wireless support structure in the event that it is abandoned or unused for a period of 12 months.	5.8.10 (B) (3) (f)	Application (TAB 28), Applicant Testimony.	Yes	
A listing of, and current tax map identifying, all property owners within 1,000 feet of the parcel	5.8.10 (B) (3) (g)	Application (TAB 5)	Yes	
A report containing any comments received by the applicant in response to the balloon test along with color photographs from various locations around the balloon.	5.8.10 (B) (3) (h)	Application (TAB(s) 22 and 29), Applicant Testimony, Abstract.	Yes	
Evidence that the balloon test requirement has been met.	5.8.10 (B) (3) (i)	Application (TAB 22), Abstract (Attachment 2)	Yes	
A notarized statement that the sign posting requirement has been met.	5.8.10 (B) (3) (j)	Staff testimony	Yes	
Photographs of a clearly visible balloon floated at the proposed tower location as well as photographs with the proposed tower and associated antennas superimposed upon them showing what the proposed tower will look like.	5.8.10 (B) (3) (k)	Application (TAB 22)	Yes	
The Special Use Permit application shall include a statement that the facility and its equipment will comply with all federal, state and local emission requirements.	5.8.10 (B) (3) (l)	Application (TAB 6) and Applicant Testimony	Yes	
Environmental Assessment Analysis and a Visual addendum.	5.8.10 (B) (3) (m)	Environmental Assessment is not required. Application (TAB 22).		

REQUIREMENT	UDO	SUPPORTING EVIDENCE	Staff	BOA
STANDARDS for Telecommunication Facilities (continued)				
Visual Impact Assessment requirements	5.8.10 (B) (3) (n)	Application (TAB 22), Applicant Testimony.		
Demonstration that the wireless support structure is sited so as to have the least visually intrusive effect reasonably possible and have the least adverse visual effect on the environment and its character, on existing vegetation, and on the residences in the area of the telecommunications tower.	5.8.10 (B) (3) (o)	Application (TAB(s) 19, 21, and 22), Applicant testimony		
A statement, prepared by a professional engineer licensed in the State of North Carolina certifying the tower's compliance with applicable standards as set forth in the State of North Carolina Building Code, and any associated regulations.	5.8.10 (B) (3) (p)	Application (TAB 7), Applicant Testimony	Yes	
Proposed telecommunications equipment planned cannot be accommodated on an existing wireless support structures	5.10.8 (B) (4) (a)	Application (TAB 7), Applicant Testimony	Yes	
Location of Wireless Support Structures	5.10.8 (B) (4) (b)	Application inclusive with a specific statement contained in TAB(s) 25 and 33, Applicant Testimony, Abstract. The applicant is not by-passing a 'higher priority' site with the proposal to erect a tower on this property. There are no higher priority sites in the area where a tower can be located.	Yes	
Fall zone setbacks of 110% of tower height (not including lighting rod)	5.10.8 (B) (4) (c)	Site plan	Yes	
Access	5.10.8 (B) (4) (d)	Site plan. Access shall be off of Mt. Sinai Road.	Yes	

REQUIREMENT	UDO	SUPPORTING EVIDENCE	Staff	BOA
STANDARDS for Telecommunication Facilities (continued)				
Landscape and Buffers – Type C land use buffer	5.10.8 (B) (4) (e)	Application, Site plan, Applicant Testimony.	Yes	
Visibility of balloon shall not constitute sole justification of denial but shall serve as an indication of what location on the site may be less visually intrusive.	5.10.8 (B) (4) (f)	Applicant testimony (acknowledgement of condition) Application (TAB 22)		
The applicant shall demonstrate and provide a description in writing and by drawing how it shall effectively screen from view the base and all related equipment and structures of the proposed facility.	5.10.8 (B) (4) (g)	Site plan, Applicant Testimony	Yes	
The site plan shall indicate a location for at least two equipment buildings in addition to that proposed for use by the applicant.	5.10.8 (B) (4) (h)	Site plan	Yes	
All utilities at a facility site shall be installed underground and in compliance with all Laws, ordinances, rules and regulations of the County.	5.10.8 (B) (4) (i)	Site plan, Applicant Testimony	Yes	
All wireless support structures shall satisfy all applicable public safety, land use, or zoning issues required in this Ordinance.	5.10.8 (B) (4) (j)	Application inclusive, Site plan	Yes	
Fences and Walls	5.10.8 (B) (4) (k)	Site plan.	Yes	
Tower is structurally designed to support additional users.	5.10.8 (B) (4) (l)	Application inclusive	Yes	
To minimize the number of antenna arrays the County may require the use of dual mode antennas.	5.10.8 (B) (4) (m)	Not applicable for this project	N/A	

REQUIREMENT	UDO	SUPPORTING EVIDENCE	Staff	BOA
STANDARDS for Telecommunication Facilities (continued)				
Structures shall be galvanized and/or painted with a rust-preventive paint of an appropriate color to harmonize with the surroundings.	5.10.8 (B) (4) (n)	Site plan, Application inclusive	Yes	
Both the wireless telecommunications support structure and any and all accessory or associated telecommunication equipment and related facilities shall maximize the use of building materials, colors and textures designed to blend with the structure to which it may be affixed and/or to harmonize with the natural surroundings, this shall include the utilization of stealth technology as may be required by the County.	5.10.8 (B) (4) (o)	Applicant testimony (acknowledgement of condition) Language within application indicates proposed monopole will be constructed of galvanized steel, grey in color.		
Antennas shall be flush mounted	5.10.8 (B) (4) (p)	Site plan, Applicant Testimony	Yes	
Lighting	5.10.8 (B) (4) (q)	Not applicable. Tower is not required to be illuminated.	N/A	
The tower and antenna will not result in a significant adverse impact on the view of or from any historic site, scenic road, or major view corridor.	5.10.8 (B) (4) (r)	Not applicable. Area does not contain historic sites (i.e. officially designated), designated scenic roads (NC DOT), and is not located in a major view corridor	N/A	
Facilities, including antennas, towers and other supporting structures, shall be made inaccessible to individuals and constructed or shielded in such a manner that they cannot be climbed or collided with	5.10.8 (B) (4) (s)	Applicant acknowledges condition via testimony	Yes	
Abandoned structures shall be removed with 12 months.	5.10.8 (B) (4) (t)	Applicant acknowledges condition via testimony	Yes	

REQUIREMENT	UDO	SUPPORTING EVIDENCE	Staff	BOA
STANDARDS for Telecommunication Facilities (continued)				
A determination shall be made that the facility and its equipment will comply with all federal, state and local emission requirements, and the Special Use Permit shall include a statement that the facility and its equipment will comply with all federal, state and local emission requirements.	5.10.8 (B) (4) (u)	Condition of approval	Yes	
The Special Use Permit shall include a condition that the electromagnetic radiation levels maintain compliance with requirements of the FCC, regarding emission of electromagnetic radiation.	5.10.8 (B) (4) (v)	Applicant acknowledges condition via testimony and information in TAB 41. Condition of approval	Yes	
Warning signage on compound fence	5.10.8 (B) (4) (w)	Site plan, Applicant Testimony	Yes	
Bond Security. Applicant/owner shall file a bond with the County to assure faithful performance of terms and conditions of Special Use Permit.	5.10.8 (B) (5)	Condition of approval	Yes	
Liability Insurance	5.10.8 (B) (6)	Application (TAB 43)	N/A	

REQUIREMENT	UDO	SUPPORTING EVIDENCE	Staff	BOA
SPECIFIC STANDARDS				
In accordance with Section 5.3.2 (A) (2), the Board of Adjustment shall also consider the following general conditions before the application for a Special Use can be approved.				
NOTE: Planning Staff does not provide a recommendation on these items as the Board is expected to act based on the sworn testimony provided at the hearing. Staff is providing a brief synopsis of the information contained within the submittal the applicant argues demonstrates compliance for reference purposes only.				
The use (will / will not) maintain or promote the public health, safety and general welfare, if located where proposed and developed and operated according to the plan as submitted.	Section 5.3.2 (A) (2) (a)	Application package inclusive <ul style="list-style-type: none"> • Narrative (TAB 3) • Impact Analysis (TAB 21) • Balloon Test (TAB 22) • Site Plan 	N/A	
The use (will / will not) maintain or enhance the value of contiguous property (unless the use is a public necessity, in which case the use need not maintain or enhance the value of contiguous property).	Section 5.3.2 (A) (2) (b)	Application package inclusive <ul style="list-style-type: none"> • Impact Analysis (TAB 21) • Site Plan 	Yes	
The location and character of the use, if developed according to the plan submitted, (will / will not) be in harmony with the area in which it is to be located and the use is in compliance with the plan for the physical development of the County as embodied in these regulations or in the Comprehensive Plan, or portion thereof, adopted by the Board of County Commissioners.	Section 5.3.2 (A) (2) (c)	Application package inclusive <ul style="list-style-type: none"> • Narrative (TAB 3) • Impact Analysis (TAB 21) • Balloon Test (TAB 22) • Site Plan 	Yes	

RECOMMENDATION:

While staff has received numerous comments from local residents and property owners indicating they do not believe the proposed facility complies with the provisions of Section 5.3.2 (A) (2) inclusive, no specific evidence has been submitted for review establishing the grounds for making a negative finding on the general standards as detailed herein. These standards include maintaining or promoting the public health, safety, and general welfare, maintaining or enhancing the value of contiguous property, the use is in harmony with the area in which it is to be located, and the use being in compliance with the general plan for the physical development of the County.

Staff has reviewed the application, the site plan, and all supporting documentation and has found that the applicant **complies** with the specific standards and required regulations as outlined within the UDO

Provided the Board of Adjustment finds in the affirmative on the specific and general standards as detailed herein, and no evidence is entered into the record demonstrating the applicant has either:

- a. Failed to meet their burden of proof that the project complies with the specific development standards for a telecommunication facility, or
- b. Fails to comply with the general standards detailed within Section 5.3.2 (A) (2)

of the UDO, the Board could make an affirmative finding on this application.

In the event that the Board makes an affirmative finding, and issues the permit, staff recommends the attachment of the following conditions:

1. The height of the tower shall not exceed a height of 129 feet above pre-construction grade (125 ft. tall tower with a 4 ft. lighting pole at the top for a combined total height of 129 ft.) as detailed within the approved application package as reviewed and acted upon by the Board of Adjustment at their June 8, 2015 meeting.
2. Existing vegetation, as detailed on the approved site plan reviewed and acted upon by the Board of Adjustment at their June 8, 2015 meeting, shall be maintained as indicated in perpetuity.
3. The facility and its equipment shall comply with all federal, state and local emission requirements.
4. The electro-magnetic radiation levels shall be maintained compliance with all federal, state and local requirements, including the requirements of the Federal Communications Commission regarding emission of electromagnetic radiation. Within 30 days of installation of equipment on the tower, and within 30 days of the installation of any additional equipment in the future, the tower owner shall provide documentation of emission levels in relation to FCC standards to the County for review. In addition, the tower owner must provide documentation of emission levels within five working days if so requested by Orange County. Orange County may make such requests at any time, not to exceed 2 times per year.
5. Two ten pound 2-A:20-B:C dry chemical portable fire extinguishers shall be installed at the site at a conspicuous location for use during an emergency event.
6. As required within Section 5.10.8 (A) (1) (g) of the UDO, the applicant shall be required to provide a final copy of the installed foundation design including a geotechnical sub-surface soils investigation, evaluation report, and foundation recommendation for the

proposed wireless support structure prior to the commencement of land disturbing activities associated with the construction of the telecommunication facilities.

7. The applicant shall obtain a driveway permit from the NC Department of Transportation approving the driveway access for the project off of Mt. Sinai Road.
8. Final assignment of a street address shall be completed by Orange County Land Records prior to the issuance of any permit authorizing land disturbing activity on the property.
9. The applicant shall obtain all necessary development permits from the County prior to the initiation of and land disturbing activity associated with the construction of the telecommunication facilities including, but not limited to:
 - a. Building Permit,
 - b. Erosion Control/Stormwater Management Permit,
 - c. Solid Waste Management Permit, and
 - d. Zoning Compliance Permit.

As part of the review of proposed construction drawings, the Orange County Services Department shall review and comment upon final submitted construction drawings to determine compliance with State Fire Code regulations.

10. Any proposed co-location of antenna on this tower shall be reviewed, acted upon, and installed in accordance with the provisions of the UDO.
11. A co-location site shall be offered to the County for the placement of antenna in support of local emergency communication needs.
12. The applicant shall submit all necessary bonding/financial security documents to the County Attorney's office for review and approval guaranteeing the removal of the tower in the event it is abandoned or unused for a period of 12 months. A cost estimate shall be provided by a qualified contractor. The amount of the security shall be 110 percent of the estimate. This must be completed before building permits are issued.
13. Telecommunication tower owners shall submit a report to the County Inspections Division certifying structural and electrical integrity upon completion of the initial construction and at intervals as specified within the UDO.
14. Inspection records shall be kept by the tower owner and made available upon request to the County Inspections Division during regular business hours. Inspections shall be performed as specified within the UDO.
15. In those cases where an inspection is required, which is not performed by Orange County Inspections, the applicant is required to notify the Planning Department and any applicable County telecommunication consultant of the inspection and its results.
16. Nothing associated with the approval, development or use of the property in support of the proposed telecommunication facilities shall be construed as impacting the use of the property for single-family residential or horse/farm activities with the exception of preserving existing foliage as detailed within Condition 2.
Expansion of same shall not constitute a modification of the special use permit as detailed within the UDO requiring a re-review of the project by the Board of Adjustment.
17. The County's telecommunications consultant shall issue a final Certificate of Completion upon the completion of a final inspection of the constructed telecommunication facilities.

Commercial service cannot be provided/initiated until this final Certificate is completed and issued.

- 18.** The Special Use Permit will automatically expire within 12 months from the date of approval if the use has not commenced or construction has not commenced or proceeded unless a timely application for extension of this time limit is approved by the Board of Adjustment.
- 19.** If any condition of this Special Use Permit shall be held invalid or void, then this Special Use Permit shall be void in its entirety and of no effect.

PLANNING & INSPECTIONS DEPARTMENT
Craig N. Benedict, AICP, Director

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March 30, 2015

Thomas Johnson
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 Nexsen Pruet
 4141 Parkland Avenue
 Suite 200
 Raleigh, NC 27612

Skyway Towers LLC
 20525 Amberfield drive
 Suite 102
 Land O' Lakes, FL 34639

RE: STAFF COMMENTS concerning Class B Special Use Permit application proposing a telecommunication facility at 5022 Kerley Road (PIN 0801-15-4533)

NOTICE OF DEFICIENCIES – REJECTION OF APPLICATION

To Whom It May Concern:

Throughout late February/early March 2015 the County Planning Department has been in receipt of various components of a Class B Special Use Permit application (hereafter 'SUP') related to the development of a telecommunications facility (hereafter 'tower') on a parcel of property located at 5022 Kerley Road within the Chapel Hill Township of Orange County.

It should be noted several components of the application were not submitted to staff for review until March 20, 2015, approximately 10 days ago. It should also be understood that this review was done simply to determine the provision or lack thereof of the required information. The accuracy and correctness of the information will be determined upon the formal submittal of a hard copy application containing all the required information.

Given the nature of the submittal thus far we are declaring this qualifies as a pre-application review to assist the Applicant and does not represent the review of a formal application package.

The parcel, further identified utilizing Orange County Parcel Identification Number (PIN) 0801-15-4533) is approximately 5.8 acres in area and is zoned Rural Buffer (RB). The parcel is currently utilized in support of a single-family residence and what appears to be a horse farm. The parcel is surrounded by agricultural, single-family residential

and institutional uses, specifically a nursing home, to the south located within the City of Durham's planning jurisdiction (hereafter 'the property').

The proposal calls for the development of a 129 ft. tall tower (125 ft. in actual tower height with a 4 ft. long lighting rod erected on top) on the property. The tower will be approximately 137 ft. from both the western and southern (along Mt. Sinai Road) property lines, 337 ft. from the eastern (along Kerley Road) property line, and 427 ft. from the northern property line.

In reviewing the provisions of the County Unified Development Ordinance (UDO), most notably Section 5.2.1 *Table of Permitted Uses*, staff has determined a tower can be erected on RB zoned property through the review and issuance of a SUP by the Orange County Board of Adjustment (hereafter 'BOA') as outlined in Section 2.7 of the UDO.

Staff allowed the scheduling of a balloon test for March 28, 2015 as mandatory SUP components are based on results of said test. This test was cancelled due to inclement weather (i.e. high winds).

In reviewing what has been submitted thus far, staff would like to offer the following comment(s):

1. As detailed within Section 5.10.8 (B) (1) of the UDO the overall County policy, with respect to the review/approval of a tower through the SUP process, is the promotion and encouragement when possible of the following:
 - (a) *Alternatives to constructing new wireless support structures, including but not limited to the collocation of wireless telecommunications equipment and mitigating the visual effect of a wireless telecommunication support structure to an extent not commercially impracticable; and*
 - (b) *The placement, height and quantity of wireless telecommunications towers and equipment in such a manner, including but not limited to the use of stealth technology or camouflage techniques, to minimize adverse aesthetic and visual impacts on the land, property, buildings, and other facilities adjacent to, surrounding, and in generally the same area as the requested location of such wireless telecommunications support structure, which shall mean using the least visually and physically intrusive facility that is not technologically or commercially impracticable under the facts and circumstances.*
2. The SUP makes reference to the property as being both 5.8 and 3.8 acres in area (Tab 1 of submitted application).
The property is 5.8 acres in area according to Orange County Land Records data.
3. The information contained in Tab 3 is hard to read as the result of poor photocopying/scanning. As a result it is unclear if required components have been provided or not.

4. The required liability insurance certificate is not included within the submission.
5. Section 5.10.8 (A) of the UDO establishes the general submittal requirements for all towers, specifically:

- a. A site plan denoting the development of the proposed tower (Sec 5.10.8 (A) (1) (a)).

STAFF COMMENT: The required site plan denoting all essential information was submitted.

Please note this statement is not intended to convey there are not issues with the site plan.

Staff is merely indicating same was submitted as required by this aforementioned section.

- b. A detailed description of the proposed tower (Sec 5.10.8 (A) (1) (b)).

STAFF COMMENT: Information was provided on the site plan and SUP application (Tab(s) 1 and 6 of application submittal).

- c. A detailed narrative detailing the specific objective(s) for the new facility including a description as to the coverage, as well as the identified boundaries of the intended coverage, for the proposed tower (Sec 5.10.8 (A) (1) (b)).

STAFF COMMENT: Tab 5 of the application package provides a brief statement addressing this requirement.

This section, however, erroneously references a ½ mile search ring analysis/requirement. Section 5.10.8 (B) (3) (D) (i) of the UDO requires a 2 mile radius search/listing for all existing towers with an explanation on why said cannot meet stated project objectives.

- d. Elevation drawings and color renderings of the proposed tower (Sec 5.10.8 (A) (1) (c)).

STAFF COMMENT: The site plan in Tab 6 contains most of the required information.

Staff understands the required 'color renderings' are best completed once the balloon test is held.

We are requiring an estimate on the date, in writing, on which said drawings are to be submitted as part of the application submittal.

- e. A signed statement by the applicant certifying the tower shall be maintained in a safe manner and will at all times be maintained and operated in compliance with applicable permits and authorizations (i.e. FCC, State, local, etc.) (Sec 5.10.8 (A) (1) (d) inclusive).

STAFF COMMENT: Tab 11 of the application package provides a statement from Justin Jones of Skyway Towers signifying same.

- f. A statement from a professional, State licensed, engineer certifying the tower's compliance with applicable State building code standards (Sec 5.10.8 (A) (1) (e)).

STAFF COMMENT: Tab 7 of the application package provides the required information.

- g. A statement detailing how the proposed tower will minimize visual intrusiveness for surrounding properties (Sec 5.10.8 (A) (1) (f)).

STAFF COMMENT: Completion of this statement requires the results of the pending balloon test.

We are requiring an estimate on the date, in writing, on which said statement shall be submitted as part of the application submittal.

- h. Proposed foundation design including a soils investigation (Sec 5.10.8 (A) (1) (g)).

STAFF COMMENT: This information is still pending.

Staff understands, and is supportive of, your request that a preliminary geotechnical soils/engineering report be submitted as part of the SUP for initial processing and that the final report be submitted as part of the building permit process assuming approval.

As with other similar projects this will become a staff recommended condition of approval.

We are requiring an estimate on the date, in writing, on which said final report will be submitted as part of the application submittal.

- i. Propagation studies of the tower showing all adjoining, planned, proposed, or existing sites including the modeling information used to produce, as well, as an explanation on any assumptions made, said study (Sec 5.10.8 (A) (1) (i)).

STAFF COMMENT: It is noted that the Applicant of its own volition submitted propagation maps in the context of demonstrating proof-of-need for what is requested. Tab(s) 9 and 10 of the application package provide some of the required information.

The following issues, however, have been identified:

1. Tab(s) 9 and 10: both tabs reference a ½ mile search ring. As previously detailed herein the County requires a 2 mile search ring with a description of existing facilities and an analysis of the reason(s) why each said site is not viable.

2. Tab 10 RF Engineering Statement: the statement indicates the tower is to be 120 ft. in height with a 4 ft. lightning rod. This assessment is inconsistent with the application package and submitted site plan.

As a result the validity of the statement is called into question.

3. Tab 10 Search Ring Maps: maps are not at a sufficient scale for staff to review to determine compliance with submittal standards.

Further it does not appear all towers within the search ring area are denoted on the map, most notably the 'stealth' tower down Erwin Road referenced within the memorandum authored by Justin Jones contained in Tab 9.

Maps need to be of sufficient scale, reflect the required 2 mile radius search, and denote all existing facilities.

- j. The number, type, height and model of proposed antennas. The SUP is required to include a copy of the applicable specification sheets, the make, model, and manufacture of the tower and antenna, and documentation on the azimuth, size, and centerline height of proposed antenna on the tower (Sec 5.10.8 (A) (1) (k) and (l) inclusive).

STAFF COMMENT: Tab(s) 3, 6, and 10 contain required information.

- k. Frequency, modulation, and class of service of equipment as well as maximum transmission power capability as designed (Sec 5.10.8 (A) (1) (m), (n), and (o) inclusive).

STAFF COMMENT: Tab(s) 3, 6, and 10 contain required information.

- l. The direction and maximum lobes, and associated radiation, of the proposed antenna (Sec 5.10.8 (A) (1) (p)).

STAFF COMMENT: Tab(s) 6, 10 and 13 contain required information.

- m. Certification that the Non-Ionizing Electromagnetic Radiation (NIER) levels at the proposed site are within FCC standards and that the proposed antenna will not cause interference with other telecommunication devices (Sec 5.10.8 (A) (1) (q) and (r) inclusive).

STAFF COMMENT: Staff was unable to located required information.

- n. A written affidavit stating why the facility is necessary (i.e. coverage, capacity, etc.) and a statement indicating there are no existing alternative sites as well as no alternative technologies available providing services without the tower (Sec 5.10.8 (A) (1) (s)).

STAFF COMMENT: There is no affidavit as required. Tab 5 contains a brief project narrative and Tab 9 contains a memorandum on 'search ring' findings but required statements/language is not detailed within the application in proper format (i.e. the aforementioned affidavit).

- o. A copy of the FCC license applicable for the intended use of the facility as well as the FCC required 5 and 10 year build out plan.

STAFF COMMENT: Staff was unable to locate required information denoting compliance.

6. Section 5.10.8 (B) of the UDO establishes additional submittal requirements for all towers governed by the SUP process, specifically:

- a. In addition to the requirements of the UDO, and the information detailed herein, the site plan shall be required to show the size of all existing structures within 500 ft. of the site, existing and proposed contour levels at a 5 ft. interval, and any identified floodplains and/or alluvial soils (Sec 5.10.8 (B) (3) (a) inclusive).

STAFF COMMENT: Tab 6 contains the required site plan.

Planning staff will stipulate there are no identified floodplains on the property but cannot make any comment on the presence, or lack thereof, of alluvial soils.

Sheet C-2 provides contour information for the proposed tower via a map inset.

The scale of the site plan, specifically Sheet C-1, does not lend itself to denoting all structures within 500 ft.

The plan will have to be modified accordingly.

- b. A landscape/tree preservation plan shall be required (Sec 5.10.8 (B) (3) (c)).

STAFF COMMENT: Tab 6 contains a site plan denoting same, specifically on Sheet(s) C-1, C-2, and C-3.

Staff has not yet completed an assessment of the proposed land use buffer with respect to its compliance with the UDO.

- c. As with Section 5.10.8 (A) (1) (s) of the UDO, Section 5.10.8 (B) (3) (d) requires the SUP to contain evidence that the applicant has investigated the possibilities of placing the proposed equipment on an existing tower or other structure within a 2 mile radius.

STAFF COMMENT: Required information for these aforementioned sections is incomplete and inconsistent with UDO standards as detailed herein.

The SUP will have to be modified.

- d. Documentation from applicable State and/or Federal agencies indicating requirements which affect the appearance of the proposed wireless support structure such as lighting and coloring, are included for review (Sec 5.10.8 (B) (3) (e)).

STAFF COMMENT: Staff was unable to locate required information.

- e. Draft language re a safety and performance bond guaranteeing removal of the tower in the event same is abandoned (Sec 5.10.8 (B) (3) (f)).

STAFF COMMENT: Tab 12 of the application package contains a letter of credit addressing the condition, which is deemed acceptable by staff.

Final approval of the letter of credit by the County Attorney's office shall be required in the event the SUP is approved.

- f. A listing of all property owners within 1,000 ft. of the property including a current tax map denoting all said properties (Sec 5.10.8 (B) (3) (g)).

STAFF COMMENT: Tab 8 of the application package contains the required list. The tax map was not included with the submittal.

- g. A report detailing the balloon test (Sec 5.10.8 (B) (3) (h), (i), (j), (k) inclusive).

STAFF COMMENT: We understand this information is pending the completion of the actual balloon test.

- h. Section 5.10.8 (B) (3) (m) of the UDO indicates an applicant may be required to submit an environmental assessment analysis and a visual addendum providing an analysis of the visual impact of the tower.

STAFF COMMENT: Staff cannot make the determination regarding this requirement until the results of the balloon test are submitted for review.

We encourage you to complete a visual impact map/analysis as part of the balloon test report to avoid unnecessary delay, which will require photo simulations to-scale of the proposed tower superimposed over the existing landscape to scale showing the 'before' and 'after' views of the property.

These 'views' should be taken from adjoining rights-of-way, nearby institutional land uses (i.e. schools, churches, etc.), adjoining properties, and so on.

Please note additional screening may be required to address visibility issues of tower base and supporting equipment.

We are requiring an estimate on the date, in writing, on which said environmental assessment analysis and visual addendum shall be submitted as part of the application submittal.

- i. A statement/description that the tower has been located so as to have the least visually intrusive effect reasonable possible on the: *environment and its character, on existing vegetation, and on the residences in the area of the tower* (Sec 5.10.8 (B) (3) (o)).

STAFF COMMENT: As we understand the situation this will be a component of the balloon test report.

You are required, however, to provide the necessary documentation requesting an extension (i.e. timing relief) on the submittal of this required documentation as well as the anticipated date said information is to be submitted.

7. Section 5.10.8 (B) (4) of the UDO outlines the standards by which the SUP will be evaluated by both staff and the Orange County Board of Adjustment.

Highlights of these standards, and identified deficiencies, are as follows:

- a. The proposed equipment cannot be accommodated on existing towers due to 1 or more of the following:
- (i) *The planned equipment would exceed the structural capacity of existing and approved wireless support structures, considering existing and planned use of those wireless support structures and the wireless support structures cannot be reinforced to accommodate planned or equivalent equipment at a reasonable cost.*
 - (ii) *The planned equipment would cause radio frequency interference with other existing or planned equipment for these wireless support structures, and the interference cannot be prevented at a reasonable cost.*
 - (iii) *Existing or approved wireless support structures do not have space on which the equipment can be placed so it can function effectively and reasonably in parity with similar existing or approved equipment.*
 - (iv) *No tower or other suitable facility exists in an area where the equipment to be placed on the tower will function in its intended manner.*

STAFF COMMENT: Tab 9 provides an explanation on why an existing tower at 5266 Kerley Road cannot accommodate the proposed equipment. There is no additional information on other towers/structures in the required 2 mile search area.

Please provide additional explanation to ensure the required evaluation can be completed by staff and the BOA.

- b. Section 5.10.8 (B) (4) (b) provides a hierarchy of recognized properties where we encourage the erection of telecommunication facilities, namely:
1. Existing County owned facilities,
 2. Existing telecommunication facilities,
 3. County owned property,
 4. On commercial or industrially zoned property,
 5. On property zoned Agricultural Residential (AR), and
 6. Other residentially zoned property including the Rural Buffer.

STAFF COMMENT: There are no County owned telecommunication facilities in the area.

While you provide an assessment of your ability to locate equipment at 5266 Kerley Road, other facilities have not been reviewed and staff does not believe clear and convincing technical information has been provided demonstrating this requirement has been adhered to.

The County owns property approximately 1 mile south along Erwin Road. You will need to provide an assessment of why this parcel cannot serve your needs with respect to the location of the tower.

Please remember Section 5.10.8 (B) (4) (b) (ii) requires the applicant to submit a detailed technical RF analysis report detailing specifically why any alternative site cannot be used.

Without said report/analysis the application shall not be approved (please refer to Section 5.10.8 (B) (4) (b) (iii) of the UDO).

- c. Please be prepared to demonstrate via a map/report the proposed tower is not located within ½ mile of an existing telecommunication tower as required within Section 5.10.8 (B) (4) (b) (vi).

It should be remembered there are exceptions to complying with this standard if you can demonstrate the existing facility:

1. Does not have appropriate space,
2. Negotiations made in good faith have not been successful at securing permission, or
3. Proposed equipment is incompatible with the existing telecommunication facility.

- d. The tower shall comply with a setback from property boundaries of at least 110% of the proposed height (Sect 5.10.8 (B) (4) (c)).

STAFF COMMENT: The required setback for this tower is 137.5 ft. (110% x 125 ft. – lighting rod is not included within the calculated tower height). The site plan in Tab 6 demonstrates compliance with this standard.

- e. A Type C landscape buffer shall be provided between the tower and adjoining properties (Sec 5.10.8 (B) (4) (e)).

STAFF COMMENT: At the writing of this letter staff has not completed its review of the proposed landscape plan.

- f. An 8 ft. fence or wall is required to be erected around the base of the tower (Sec 5.10.8 (B) (4) (k)).

STAFF COMMENT: The site plan in TAB 6 shows the required fence, but staff is unable to find a note indicating the height of same. As a result we cannot make a determination the proposed fence complies with the applicable standard.

- g. A statement is required from a licensed Professional Engineer demonstrating the tower is structurally designed to support additional users (Sec 5.10.8 (B) (4) (l)).

STAFF COMMENT: While you have indicated same in conversations with staff, a formal statement is required as part of our evaluation of the project.

- h. Section 5.10.8 (B) (4) (w) of the UDO requires the installation of specific warning and information signs.

STAFF COMMENT: The site plan in Tab 6 provides an explanation on the erection of some signage but not all as detailed within this aforementioned section.

A note should be added on the site plan indicating same.

Please be aware that to assist the Applicant we have provided a rough synopsis of deficiencies related to Section 5.10.8 (B) (4) based on what has been provided thus far. As we do not have all required information we cannot complete our review on the viability or compliance of said tower request.

Again, please understand that this only represents an informal pre-application submittal review of the information provided to assist in the preparation and submittal of a complete application.

As of the writing of this letter staff has determined we do not have a complete application as required by the UDO. Therefore our review of the proposal has not begun. This letter is merely intended to outline those deficiencies making the application incomplete and, therefore, not legally submitted per applicable local, State, or Federal guidelines.

The 'FCC shot clock' has not started, given that we do not have a formally filed complete application to review.

Please note that as we do not have a single, formally filed application our comments as contained in this letter are not binding, meaning we reserve the right to offer additional comment on any aspect of the proposal once we have received what qualifies as a formally filed application per applicable local, State, and Federal regulations.

The County can no longer accept the 'piecemeal' submittal of application information and is requiring you to submit a single application package containing all required elements. Once this is accomplished staff will review for compliance purposes and make a determination at that time concerning the application's completeness.

Further, given the need for additional information demonstrating the property can support a tower per applicable UDO standards, we believe the required balloon test should be delayed until the issues identified herein are addressed.

If my staff or I can assist you further please feel free to give us a call at (919) 245-2575 or email me at mharvey@orangecountync.gov and we will be happy to assist you further.

Sincerely,



Michael D. Harvey AICP, CEO, CZO
Current Planning Supervisor
Orange County Planning

CC: Craig Benedict, Planning Director
John Roberts, County Attorney
James Bryan, Staff Attorney
Jackie Hicks, County Telecommunications Consultant

PLANNING & INSPECTIONS DEPARTMENT
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May 15, 2015

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Skyway Towers LLC
 20525 Amberfield drive
 Suite 102
 Land O' Lakes, FL 34639

RE: CONTINUED REVIEW - STAFF COMMENTS concerning Class B Special Use Permit application proposing a telecommunication facility at 5022 Kerley Road (PIN 0801-15-4533)

REQUEST FOR CLARIFICATION

To Whom It May Concern:

On April 24, 2015 Orange County and its telecommunication's consultant (hereafter 'staff') received and updated/revised Class B Special Use Permit application (hereafter 'SUP') related to the development of a telecommunications facility (hereafter 'tower') on a parcel of property located at 5022 Kerley Road within the Chapel Hill Township of Orange County.

The parcel, further identified utilizing Orange County Parcel Identification Number (PIN) 0801-15-4533) is approximately 5.8 acres in area and is zoned Rural Buffer (RB). The parcel is currently utilized in support of a single-family residence and what appears to be a horse farm. The parcel is surrounded by agricultural, single-family residential and institutional uses, specifically a nursing home, to the south located within the City of Durham's planning jurisdiction (hereafter 'the property').

The proposal calls for the development of a 129 ft. tall tower (125 ft. in actual tower height with a 4 ft. long lighting rod erected on top) on the property. The tower will be approximately 137 ft. from both the western and southern (along Mt. Sinai Road) property lines, 337 ft. from the eastern (along Kerley Road) property line, and 427 ft. from the northern property line.

Previous correspondence, specifically a letter dated March 30, 2015, identified deficiencies with the SUP application. For the most part these deficiencies have been

corrected. In reviewing the most recent submittal, however, staff is requesting additional information/feedback on the following:

1. As detailed within Section 5.10.8 (B) (1) of the Unified Development Ordinance (UDO) the overall County policy, with respect to the review/approval of a tower through the SUP process, is the promotion and encouragement when possible of the following:
 - (a) *Alternatives to constructing new wireless support structures, including but not limited to the collocation of wireless telecommunications equipment and mitigating the visual effect of a wireless telecommunication support structure to an extent not commercially impracticable; and*
 - (b) *The placement, height and quantity of wireless telecommunications towers and equipment in such a manner, including but not limited to the use of stealth technology or camouflage techniques, to minimize adverse aesthetic and visual impacts on the land, property, buildings, and other facilities adjacent to, surrounding, and in generally the same area as the requested location of such wireless telecommunications support structure, which shall mean using the least visually and physically intrusive facility that is not technologically or commercially impracticable under the facts and circumstances.*

As we have received numerous complaints the proposed facility is not a 'stealth' facility, or will be visually intrusive, it would be advantageous for you to provide additional documentation/explanation beyond what exists in **Tab 21** of the submittal package on how the proposed facility will comply with this policy.

From our standpoint this can be part of your presentation to the Board of Adjustment as part of your 'expert testimony'.

2. A detailed narrative detailing the specific objective(s) for the new facility including a description as to the coverage, as well as the identified boundaries of the intended coverage, for the proposed tower (Sec 5.10.8 (A) (1) (b)).

STAFF COMMENT: A narrative is contained in **Tab 3** and still references a ½ mile search ring analysis/requirement. Section 5.10.8 (B) (3) (D) (i) of the UDO requires a 2 mile radius search/listing for all existing towers with an explanation on why said cannot meet stated project objectives.

While there are no specific standards within the UDO detailing how the narrative ought to be written, staff still believes the narrative is lacking scope with respect to providing a detailed explanation of the project.

3. Propagation studies of the tower showing all adjoining, planned, proposed, or existing sites including the modeling information used to produce, as well, as an explanation on any assumptions made, said study (Sec 5.10.8 (A) (1) (i)).

STAFF COMMENT: It is noted that the Applicant of its own volition submitted propagation maps in the context of demonstrating proof-of-need for what is requested. The following issues, however, have been identified:

1. **Tab 11** provides an unscaled map denoting what we can only assume is the search ring. **Tab 26** provides explanation on co-location options with additional search ring information.

As previously detailed within past correspondence the County requires a listing of all telecommunication support structures and/or other structures in the vicinity of the proposed facility that are 'technically feasible' for the location of an antenna within a 2 mile radius of the subject property. Applicant's are then required to submit an analysis of the reason(s) why each said site is not viable.

Staff does not believe the supplied map is sufficient, especially without a denoted scale, to determine compliance with submittal standards.

With that staff requests additional detail on the following issue: it would appear the search area for the tower is primarily designed to serve property/clients within Durham County.

Why is the tower not being proposed within Durham's jurisdiction as it would appear the majority of those who will benefit are located within said area?

This has been a source of contention for adjoining property owners. Staff believes additional explanation is necessary as to why this site is viable for development and how Orange County's telecommunication's program will benefit.

4. Section 5.10.8 (A) (1) (s) of the UDO requires a: *'written affidavit stating why the facility is necessary (i.e. coverage, capacity, etc.) and a statement indicating there are no existing alternative sites as well as no alternative technologies available providing services without the tower'*.

STAFF COMMENT: There is a statement in **Tab 19** but no affidavit as required by the UDO.

5. Section 5.10.8 (B) (3) (d) requires the SUP to contain evidence that the applicant has investigated the possibilities of placing the proposed equipment on an existing tower or other structure within a 2 mile radius.

STAFF COMMENT: Required information for this aforementioned sections has been modified and is contained in **Tab 26**. Having said that staff would like to note the following:

- a. The UDO requires the listing of all towers in a 2 mile radius. The letter contained in the aforementioned tab indicates there is a tower 1.8 miles away: *'well outside of the search ring'*. This statement is inconsistent with the UDO. The tower is located within the required 2 mile search radius. If it will not support necessary operation then documentation indicating same is required to be submitted.
- b. As with previous comments the provided propagation maps are not of sufficient scale to be properly scrutinized by staff.

6. Sec 5.10.8 (B) (3) (e) of the UDO requires documentation from applicable State and/or Federal agencies indicating requirements which affect the appearance of the proposed wireless support structure such as lighting and coloring, are included for review. While **Tab 27** contains 'requirements' there is no explanation on how you intend to comply.
7. **Tab 33** of the revised application package purports to contain an assessment of the project's compliance with Section 5.10.8 (B) (4) (b) of the UDO. In **Tab 26** you provide an assessment of your ability to locate equipment at 5266 Kerley Road. Please remember Section 5.10.8 (B) (4) (b) (ii) requires the applicant to submit a detailed technical RF analysis report detailing specifically why any alternative site cannot be used. Staff is unsure what has been submitted properly addresses this matter.
8. **Tab 43** provides the required certificate of liability insurance. The included certificate, however, states the following: '*This certificate is issued as a matter of information only and confers no rights upon the certificate holder*'. From staff's perspective the issue here is basic: does this statement indicate you have the required coverage or not? Please provide additional information so staff can make a formal determination as to compliance.

The 'FCC shot clock' for this project began on April 24, 2015 with the submitted of a revised application. Having said that we believe there are still deficiencies that need to be addressed in preparation for the public hearing scheduled for June, 8, 2015.

If my staff or I can assist you further please feel free to give us a call at (919) 245-2575 or email me at mharvey@orangecountync.gov and we will be happy to assist you further.

Sincerely,



Michael D. Harvey AICP, CFO, CZO
Current Planning Supervisor
Orange County Planning

CC: Craig Benedict, Planning Director
John Roberts, County Attorney
James Bryan, Staff Attorney
Jackie Hicks, County Telecommunications Consultant



To:

Michael D. Harvey AICP, CFO, CZO
Current Planning Supervisor – Planner III
Orange County Planning Department

From:

Alan Clapp
Environmental Health Supervisor
Orange County Health Department

RE: Telecommunication Tower Review

1. PIN: 0801-15-4533
5022 Kerley Road

Michael,

Environmental Health has reviewed the proposed tower project.

1. PIN 0801-15-4533 – 5022 Kerley Road

Our records indicate there is a well and septic system on the parcel. If the tract is to be subdivided we would require an application for Improvement Permit to make sure there is a repair area and to ensure the septic system is on the parcel with the residence.

Michael Harvey

From: Peter Sandbeck
Sent: Thursday, May 28, 2015 10:59 AM
To: Michael Harvey
Cc: Rich Shaw
Subject: RE: Reminder - comments needed on Kerley Road Tower

Michael,

Rich and I have discussed this one informally—he is off today. There are no cultural resource issues for that project. I think I can speak for Rich in saying that there were no natural or conservation land issues either.

Thanks. Peter

From: Michael Harvey
Sent: Thursday, May 28, 2015 8:43 AM
To: Peter Sandbeck; Rich Shaw; Jason Shepherd; James Groves; Alan Clapp; Jeff Scouten
Subject: Reminder - comments needed on Kerley Road Tower

Hello gang: just a friendly reminder I need any comments you call may have over the proposed erection of a telcom tower on Kerley Road (information attached).

We have discussed at DAC a few times. I need your comments for the Board of Adjustment meeting. if you could get me something by today at 5:00 p.m. or tomorrow, no later than 10:00 a.m., it would be appreciated.

If you have already sent them, and I have misplaced/lost them, resending them would also be appreciated.

Thanks again and sorry for the multiple e-mails.

Michael D. Harvey AICP, CFO, CZO
Current Planning Supervisor – Planner III
Orange County Planning Department
131 West Margaret Lane
PO Box 8181
(919) 245-2597 (phone)
(919) 644-3002 (fax)

Pursuant to North Carolina General Statute 132, correspondence sent and received from this account is a public record and may be disclosed to third parties.

Michael Harvey

From: Jeff Scouten
Sent: Thursday, May 28, 2015 8:54 AM
To: Michael Harvey
Subject: RE: Reminder - comments needed on Kerley Road Tower

Sorry.... I would have NO objection.

From: Jeff Scouten
Sent: Thursday, May 28, 2015 8:53 AM
To: Michael Harvey
Subject: RE: Reminder - comments needed on Kerley Road Tower

Michael:

Since the tower site will be an unmanned facility, there are no issues or concerns related to solid waste and/or recycling. As such, I would have **no** objection to the recommendation for approval of this application. Thanks and let me know if you have any questions or wish to discuss this matter further.

From: Michael Harvey
Sent: Thursday, May 28, 2015 8:43 AM
To: Peter Sandbeck; Rich Shaw; Jason Shepherd; James Groves; Alan Clapp; Jeff Scouten
Subject: Reminder - comments needed on Kerley Road Tower

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