

**MINUTES
BOARD OF ADJUSTMENT
SEPTEMBER 10, 2013
REGULAR MEETING**

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

MEMBER ABSENT: Samantha Cabe, Alternate Member

STAFF PRESENT: Michael Harvey, Current Planning Supervisor
Debra Graham, Board Secretary

OTHERS: Geoffrey Gledhill, Attorney Representing Orange County
David Rooks, Attorney Representing Board of Adjustment

AGENDA ITEM 1: CALL TO ORDER AND ROLL CALL

Larry Wright called the meeting to order at 7:30 p.m.

AGENDA ITEM 2: CONSIDERATION OF ADDITIONS TO AGENDA

There were no additions to the agenda.

AGENDA ITEM 3: APPROVAL OF MINUTES

a. July 8, 2013

Larry Wright: On page 4, line 26 should read, "Larry Wright: We are supposed...". On page 13, line 38 should read, "Michael Harvey: Mr. Chairman that is stipulated in the application. If Ms. Kemerait, is finished...".

Motion made by Karen Barrows to approve the minutes with said corrections. Seconded by Mark Micol.

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.

1
2 David Rooks: I have been asked by the County to sit with you and represent the board tonight.
3

4 Michael Buck: I have been sworn. I am a resident of Churton Grove. I should be technical and
5 say I am a resident of the Churton Grove Planned Development Special Use. Six years ago, I
6 began discussions with Churton Grove developers and Orange County officials regarding what I
7 believe to be numerous violations of Orange County Ordinances and Special Use Permit
8 conditions occurring during the construction of the project. I attempted to work with developers
9 and zoning officers to resolve or prevent the issues about what you are going to hear tonight.
10 The failure to resolve these issues culminated in my filing of an appeal on March 13, 2008. The
11 approximate cause of the appeal filing was the zoning officer's decision to approve on February
12 12, 2008, a subdivision plat for Churton Grove Phase IV. The zoning officer's approval was given
13 despite evidence provided to developers and county officials that the plans represented in those
14 plats violated Orange County ordinances and special use permit conditions.
15

16 Geof Gledhill: I am not sure whether what Mr. Buck is doing is an opening statement or giving
17 testimony. If it is opening statement, I am not going to object, if it is testimony, I am going to
18 object.
19

20 Michael Buck: It is an opening statement if you don't want to count it as evidence, I am fine with
21 that. The zoning officer's approval was given despite evidence provided to developers and
22 county officials that the plans represented in those plats violated Orange County ordinances and
23 special use permit conditions. Furthermore, I think the record will show that the plat was
24 approved despite the County's own misgivings about the validity of the claims in those plats. I
25 intend to demonstrate that the developer's active recreation and acreage plans are invalid and
26 inadequate. I will demonstrate that the planning department has been aware of these
27 deficiencies for years. The record will show that the planning department informed the
28 developers of the inadequacy and inaccuracy of their claims and the developers and county
29 officials shared a common understanding of the developers' claims. Nevertheless, the
30 developers did proceed with construction and did so despite the knowledge that their claims were
31 inaccurate and subject to challenge by appeal. The developers were aware of this appeal when
32 they proceeded with construction activities in Phase IV and in the multifamily phase. You will
33 hear a lot of detail, evidence and history this evening but the bottom line is rather simple. The
34 developers made some claims, they filed paperwork to certify those claims, the zoning officer
35 approved those claims but those claims ignore the facts on the ground. They violate various
36 Orange County ordinances, they do not fulfill the conditions of the controlling special use permit
37 and they cause unauthorized modifications of the special use permit. As members of the Board
38 of Adjustment, you are tasked with "findings of fact and achieving the intent of Orange County
39 Ordinance". You are directed to act "in a prudent manner" so the purposes of Orange County
40 Ordinances shall be served. To aid you in your fact finding, I have evidence to submit.
41

42 Larry Wright: This should be submitted in evidence as a matter of record and copies should be
43 given to the county and the attorney.
44

45 Michael Buck: I have given a copy to the zoning officer earlier.
46

47 Larry Wright: I would like to have a copy for the board's attorney as well.
48

49 Geof Gledhill: Mr. Chairman, I don't have a clue what is in this book so I am going to object to
50 this being offered into evidence.
51

1 David Rooks: I think the witness needs to lay a foundation for each exhibit before presentation.

2
3 Michael Buck: I would be happy to do so.

4
5 Larry Wright: Can I hold your objection?

6
7 Geof Gledhill: I don't want to disrupt this hearing but I think I am going to have to object.

8
9 Larry Wright: Can we proceed and then I will rule on that.

10
11 Geof Gledhill: Yes.

12
13 Michael Buck: I have provided five exhibits and I will walk through them. Exhibits 1 and 2 are
14 historical documents which should already be in the record because they were included as
15 references within the original appeal. I have provided a copy to the clerk. With Exhibits 1 and 2,
16 they should already be part of the record. I don't intend to refer to them tonight but they were
17 documents included within the original appeal. Exhibit 3 is a notice of revised appeal which you
18 should have in front of you which collect in a single document the relevant evidence and detail I
19 intent to refer to this evening.

20
21 Geof Gledhill: Where are these?

22
23 Michael Buck: If you will look in Exhibit 3 on page 20.

24
25 Larry Wright: Revised from what?

26
27 Michael Buck: The appeal I am showing you that begins on page 18, 19 and 20 of Exhibit 3.
28 Your Exhibit 3 has the colored tabs.

29
30 Larry Wright: Is this revised from Exhibit 1 or 2?

31
32 Michael Buck: I did not include a copy of the appeal because the zoning officer provided that as
33 attachment A which was the original appeal filing. In the original appeal filing, there were
34 additional documents that were referenced. Those copies were not provided by the zoning
35 officer, those are Exhibits 1 and 2. I don't intend to refer to those, I have attempted to carry
36 forward the evidence in those documents into Exhibit 3 to create a single document of record but
37 as they are part of the appeal and they were referenced in the original appeal filing of 2008, I did
38 want to make sure there was a complete record of these proceedings.

39
40 Larry Wright: Does the board have any questions?

41
42 Jeff Schmitt: There was an appeal in 2008 and then we have a revised April 25, 2013?

43
44 Michael Buck: Yes.

45
46 Jeff Schmitt: Where is the Notice of Appeal Revised?

47
48 Michael Buck: Exhibit 3, your bound copy.

49
50 Jeff Schmitt: This document has been presented to the planning department?

51

1 Michael Buck: I sent a fax on

2

3 Michael Harvey: No, I have seen a fax and as Mr. Buck was told, by the way for the record I am
4 Michael Harvey, Orange County Planning Department, as Mr. Buck was told on the phone, the
5 appeal was based on his 2008 application which is the only legitimate application we have and
6 was paid a fee for. We received a faxed copy of a 20 page letter but there were no attachments
7 or exhibits. We received two copies via fax. I told Mr. Buck in a telephone conversation, the
8 appeal would be based on what he originally submitted in 2008 which was the only valid appeal I
9 had on record.

10

11 Michael Buck: And I am happy to proceed under that assumption. Everything I am going to
12 present tonight is contained in Exhibits 1 and 2 carried forward to Exhibit 3 to make it more
13 complete and Exhibits 1 and 2 were part of the original appeal filing in 2008.

14

15 Jeff Schmitt: An appeal was filed in 2008, five years ago and this is the first time the Board of
16 Adjustment or any agency has had the opportunity to hear that appeal in its original or revised
17 form?

18

19 Michael Buck: Unfortunately, that is the case.

20

21 Geof Gledhill: Mr. Chairman, I object to Exhibit 3 coming into evidence.

22

23 David Rooks: Mr. Chairman, there are time limits for filing an appeal so the only appeal would be
24 that which was originally filed in February 2008. That appeal is what would be before the board
25 tonight, not a subsequent revision of that appeal.

26

27 Michael Buck: I am happy to withdraw Exhibit 3. The purpose of that was to combine in a single
28 document the evidence of the claims in the appeal. What I am attempting to do is provide
29 evidence. If you prefer, as I refer to specific items in that document, we can say that is in Exhibit
30 presented to the board.

31

32 Geof Gledhill: I don't know what those documents are. I understand what he is planning to do as
33 he presents whatever these documents are; I may or may not have an objection. Is there a ruling
34 on Exhibit 3 as an Exhibit not coming into evidence?

35

36 Larry Wright: I would like to rule that we take a look and use it as a reference or take Mr. Buck
37 for his word. He uses it as reference, just like he would use the constitution. You use it as a
38 reference and it's best as a reference.

39

40 Michael Buck: I am happy to proceed with that. I would look to the board for guidance as to
41 whether or not a particular reference needs to be presented as evidence.

42

43 David Rooks: Mr. Chairman, you have to understand that you may only make your decision
44 based on evidence that is actually presented to you so I think you do have to rule on Mr. Gledhill's
45 objection either up or down. It is either an item in the record or not. If I may, I think I understand
46 the applicant to say that rather than tendering it in mass that he will take the individual
47 components as he makes his presentation and as he gets to that point, he will tender that
48 individual component and that would be an acceptable result subject to the county's right to
49 object.

50

51 Larry Wright: I would like to have you state that objection.

1
2 Geof Gledhill: My objection is to the introduction into evidence of Exhibit 3 in totality. I reserve
3 the right to object to individual documents as he tenders them for your consideration.
4
5 Larry Wright: Any comments from the board?
6
7 Jeff Schmitt: I think that is fine not to put that as Exhibit 3 and then take components of it.
8
9 Larry Wright: I'm not sure that is what Mr. Gledhill wanted.
10
11 Geof Gledhill: I don't want the whole exhibit coming in as evidence.
12
13 Larry Wright: To the board, we are ruling on Exhibit 3 that parts to can be referred to, specifically
14 J, K, L and M and otherwise Exhibit 3 is

15
16 Jeff Schmitt: You sustained his objection allowing Exhibit 3?
17
18 Larry Wright: Yes.
19
20 Jeff Schmitt: It seems to me if you sustain the objection and all of this is thrown out that Mr. Buck
21 has indicated to begin with, that there will be a lot of technical issues that are attendant with his
22 presentation here tonight and if we don't have those or understand what they are, he will have to
23 verbally tell us what they are for us to appreciate what they were at some point. I would rip the
24 first part of this thing off and let him submit J, K, L and M as he wants to utilize those at some
25 point in time as specific pieces of evidence.
26
27 Larry Wright: We will sustain Mr. Gledhill's objection and Exhibit 3 with the exception of him
28 referring to Sections J, K, L and M to support your presentation.
29
30 Jeff Schmitt: The first part of this we toss?
31
32 Larry Wright: That is correct:
33
34 Geof Gledhill: What did everybody toss out cause I can't follow?
35
36 Jeff Schmitt: To page 56.
37
38 Larry Wright: Could you, when you give your presentation, site the page number for the record
39 and Mr. Gledhill so what you are citing in here and the page number of the span.
40
41 Michael Buck: I will do my best to do that.
42
43 Larry Wright: And make sure what is cited is within the ruling that was just made.
44
45 Michael Buck: Exhibit 4 is a copy of the presentation I am about to use. I don't know if that
46 creates another set of conversation but my intent was to give you a hard copy of the presentation
47 I am walking through. The bound book was intended to be just number 3, so what was just
48 presented to you is number 4.
49
50 Geof Gledhill: J, K L and M; although they may be referred to and introduced, are not in
51 evidence, is that correct? None of this book is in evidence now.

1 Michael Buck: None of that book is in evidence until I formally submit, for example when I get to
2 the point, I will say I would like to submit Attachment J, these pages of that book into evidence.
3

4 Geof Gledhill: I get it, so now we are on a different document which is Appellant Exhibit 4
5 (PowerPoint presentation).
6

7 Michael Buck: I was intending and still do so subject to the rules that you have laid out, submit
8 Exhibit 5 which is an attempt, a document of proposed findings that you may wish to make so the
9 outcome of this is that you need to deliberate with the evidence before you and choose to make a
10 set of findings and I want to be able to present a proposal of possible findings you may wish to
11 make. I have not put that before you yet but I am laying out the direction I am going. I want to
12 apologize for the detail you will be exposed to but I understand that you have a duty to create a
13 set of critical findings and those findings must be supported by substantial, competent and
14 material evidence and it is my intention to provide that evidence to you. I will be as respectful as I
15 can of your time and move through this presentation as briskly as possible. We have already
16 taken up some time with housekeeping matters but I will do my best to move things along.
17 Before we get to that mind numbing detail, here is an overview of where I expect to go. I will
18 begin with a discussion of pedestrian bridges and walkways and then I will proceed with what are
19 the relevant dates for our discussion this evening. After we understand the relevant dates and
20 how that drives which ordinances are applicable, I would like to talk about the active recreation
21 area issues with a specific focus on the segmentation of the acreage breaking it up from larger
22 parcels into multiple smaller parcels and how that relates to the invalid and insufficient acreage
23 claims the developers have made. I will then move to a brief response to some of the items
24 raised by the zoning officer and his response to the appeal and brief concluding remarks and
25 present you with, what I believe are post findings you may wish to make. Here is a picture of the
26 planned development and this is coming, this comes from Attachment C?
27

28 Michael Harvey: I believe Mr. Buck is referring to Attachment C which is the approved special
29 use permit.
30

31 Michael Buck: You only provided eight of nine pages and this is actually page 9 which shows the
32 phasing plan. I don't really need to present this as evidence; I just want to provide the board with
33 a context of the phases of the community. This is from the approved special use permit in
34 Attachment C. We have Phase I, single family, Phase 2, also single family, Phase 3 is the multi-
35 family, which you may know as Braddock Park. I said Phase 3 and 4 but the Braddock Park
36 multi-family is also part of Phase 2, the area in blue is the commercial area where the Food Lion
37 is located. This is Phase 3 and then we have Phase 4 here.
38

39 Larry Wright: Jeff, are you visually impaired with color?
40

41 Jeff Schmitt: I am fine.
42

43 Michael Buck: Because it will become important to our discussions, I took the liberty of painting
44 on the creek that runs through the neighborhood dividing Phase 4 from the rest of the
45 development.
46

47 Jeff Schmitt: Down at the right hand corner, we see Scotswood, which is the name, I presume, of
48 what this development was to be called when it was initially filed with the county. Subsequent to
49 that, the name has been changed and/or the developers have changed, is that correct?
50

51 Michael Buck: That is correct.

1
2 Jeff Schmitt: In the midst of any of the oversight management groups being changed, was there
3 any change to the special use permit that was initially approved by the Board of the County? Did
4 we make any changes or it was just subsequent management and they adopted what was there.
5

6 Michael Buck: If you want that on the record, I think Mr. Harvey should answer that.
7

8 Michael Harvey: The special use permit has not been modified since its adoption in 1986. New
9 developers came in and renamed the project from Scotswood to Churton Grove as part of the
10 process to begin and initiate development. The change of name does not constitute a
11 modification which by the ordinance required the County Commissioners to review and approve it.
12

13 Jeff Schmitt: It was approved as a planned development with the special use permit. I am here
14 just citing some of the regulations concerning the planned development ordinance so the
15 ordinance for planned development is intending to provide certain benefits to the public. Among
16 those is a higher level of amenity in all types of development and equivalent or higher degree of
17 zoning regulations.
18

19 Geof Gledhill: Mr. Chair, let me object to this until it is clarified what zoning ordinance you are
20 referring to.
21

22 Michael Buck: Certainly, Orange County Zoning Regulation Section 7.1 and 7.2.
23

24 Geof Gledhill: As they existed on May 20, 1986.
25

26 Michael Buck: Yes sir. The intent of the planned development, as an ordinance to provide higher
27 levels of amenities, to provide certain benefits to the community as well as to the county.
28

29 Geof Gledhill: The document you have in front of you, two versions of the zoning ordinance, both
30 with respect to this is the same, one of those is exhibit.....
31

32 Michael Harvey: Mr. Gledhill is referring to Exhibit H which is a draft zoning ordinance for Orange
33 County North Carolina dated June 17, 1981 and Attachment I which is the Zoning Ordinance for
34 Orange County North Carolina last amended on April 21, 2009 and in full force and effect on
35 February 13, 2008.
36

37 Jeff Schmitt: In a definitional sense, what does "to an equivalent or higher degree mean" and
38 what does an "approved level of amenities mean"?

39
40 Michael Buck: It will be difficult to access.
41

42 Geof Gledhill: For reasons that will become clear later, I am going to object to this testimony.
43 The testimony concerning what this ordinance says, the ordinance is what it says, furthermore,
44 this appeal cannot be of whether or not the special use permit conforms to the ordinance. That is
45 not within the Board of Adjustment's jurisdiction.
46

47 Michael Buck: I would concur; I am not making any such claim.
48

49 Geof Gledhill: You can hear him but my suggestion would be for you to listen to him but rule on
50 the objection to his testimony about what the ordinance contains.
51

1 Larry Wright: Sustained.
2

3 Michael Buck: A discussion of pedestrian bridges and walkways and I guess to ... if we look at
4 the original filing which was brought up earlier in Attachment A, on page 2 of 3 in Attachment F
5 regarding the failure to account for the bridges and now I would like to call your attention to the
6 special use permit which is also Attachment A.
7

8 Michael Harvey: Mr. Buck, technically, the special use permit is in Attachment C. You
9 referenced the SUP in Attachment A but the approved copy is in Attachment C.

10
11 Michael Buck: I would like to highlight, and I can say, it is not my intent to quote anything out of
12 context, it is not my intent to call attention to one area and not another. I certainly encourage and
13 appreciate any objections to make sure you are aware of the complete record so as I quote from
14 particular documents, I am certainly intending you will read the complete context of the
15 documents to best understand what was being communicated.
16

17 Larry Wright: I have been a member of Orange County for a very long time and a lot of that time,
18 there has been a lot of turmoil regarding this development and I sort of remember it and so I went
19 back and searched county documents and a lot of what we are going over I saw in a 2007
20 document, you were the county attorney at the time and John Link was the manager and it was in
21 2007 and it is the same pedestrian walkways and this went before the Commissioners and Ben
22 Lloyd was among them. Why are we starting at 2008 and what happened in 2007? It went
23 before the Commissioners then and I thought why are we getting this now as a Board of
24 Adjustment? I am very confused.
25

26 Michael Buck: I can provide my context on why there was a delay but I can't speak to why the
27 appeal filed in March 2008 is just now coming before you.
28

29 Larry Wright: If the Commissioners at that time, if it was brought before them, the
30 Commissioners at that time, heard a case just like this....
31

32 Michael Buck: I am not aware of that case, do you know any of the details of it.
33

34 Michael Harvey: Mr. Chairman, all I can say is there was no case; the BOCC does not serve as
35 the Board of Adjustment. They did not review an appeal so there was no case, appeal, or any
36 other proceeding.
37

38 Larry Wright; It was brought to them as a development and they approved it as such.
39

40 Mark Micol: What was their last involvement?
41

42 Michael Harvey: Their last involvement in terms of approving this project was in 1986 when it was
43 approved. What Dr. Wright was referring to in 2007 is, I believe in response to neighborhood
44 concerns. Mr. Robert Davis, the former current planning supervisor offered a memorandum to
45 the board but it was not an appeal or case.
46

47 Larry Wright: It seems like this started since the earth cooled and we are picking it up mid-
48 stream. I am really confused.
49

50 Michael Buck: I will do my best to provide some context but I wasn't here in 1986 when the
51 original conditions and permit were approved. There was a delay in the beginning of the

1 construction of the development so it was approved in 1986 and as I am going to get to shortly,
2 construction didn't begin until much later but as Mike Harvey... I am not aware of any other cases
3 that came before the board or any other ruling they made subsequent to their approval of the
4 permit and its conditions in 1986. I would like to call your attention to the special use permit and I
5 was going to read from book 1709, page 103 and then talk about the conditions of the special use
6 permit. "Special terms and conditions of the special use permit. The property subject to this
7 special use permit is described above and shown on the site plan prepared by the John R.
8 McAdams Company, Inc. dated October 1985 and revised January 2, 1986. The terms are
9 binding until such time as the project herein described or the conditions herein are otherwise
10 changed by government action. The change in the zoning of the property and the special use
11 permit effective date are March 31, 1998, the date of recording of this special use permit. The
12 project shall be constructed in accordance with site plan dated October 1985 and revised January
13 2, 1986 and all commitments shall be as contained in the narrative statement of the project. . All
14 of which are incorporated herein and made part of this special use permit. The planned
15 development project is subject to the following conditions". Then there are 44 conditions that
16 follow that help you control the development of the community and that is where I would like to
17 pick up here with Condition 27 subpart D with regard to the pedestrian bridges. Reading again
18 from the special use permit, "Install bridges across the creek at either end or midway in
19 conjunction with public walkways". The requirement for three pedestrian bridges seems clear to
20 me that is obviously a ruling you will have to make but the requirement seems clear to me. I
21 would like to offer into evidence the map on page, Appendix L, from pages 67, 68, 69, 70 and 71
22 and I will show on the screen a large blow-up of that section of the map. This is a map that has
23 been used in multiple contexts by the county and the particular context I have taken it from a
24 letter the county sent to one of the developers in 2002. What I would like to show on this is there
25 are three bridges noted on this map. At either end or midway... It is difficult to see. There is our
26 creek that runs through the neighborhood. The purple line is the vehicle bridges that traverse the
27 creek. This is Phase 4 and here we have Phases 2 and 3 so we have got our creek, the vehicle
28 bridges that runs across, the trails that are built, if you look, there are listed on here that have not
29 been built and we will talk about that. Here are the trails that have been building, here is a trail
30 that has not been built, another one not built, another not built and another not built, and here are
31 bridges at either end or midway. Now, understand this is a difficult map to read and I have
32 requested from the County a non-marked version and have not received one. I do have a partial
33 copy that does not have these dark lines where I think the bridge locations are much more visible
34 so I would like to offer that as well.

35
36 Larry Wright: What are you offering here please? Is this going into evidence?

37
38 Michael Buck: This is a cleaner copy of this map, a partial version of it. I have requested an
39 original version of the map you saw in Appendix L and the county has not been able to provide
40 that to me, however, I did locate this map in county documents, which is a version of that map
41 without all the other lines.

42
43 Larry Wright: I would like the county representatives to look at this.

44
45 Jeff Schmitt: So that I am clear, there are three bridges?

46
47 Michael Buck: No sir.

48
49 Jeff Schmitt: There are not three bridges?

1 Michael Buck: There is one bridge that has been built. I have another picture of a Google map I
2 will show you. That bridge has been built but these two have not.

3
4 Geof Gledhill: What is this attachment 2 document?

5
6 Michael Buck: The marked up version with the lines and phases. That was the map provided in
7 a letter from the county, from the planning director to one of the developers. It has lines and
8 markings but if you look closely, you can see the three bridges marked on them so it is hard to
9 read so the second one I sent out is a cleaner version of that map where you can see two of the
10 three bridges but because it is only a partial copy, the third bridge is not shown. To my eye, they
11 are one and the same map. My intent is to show the county's understanding of the requirement
12 for three bridges. The county sent out a map that had three bridges on it....

13
14 Geof Gledhill: I will object to that characterization.

15
16 Michael Buck: I will now move to the developers understanding of the need to deliver three
17 bridges. This is in appendix M beginning on pages 72 and 73 so I would like to offer this into
18 evidence. This is a letter from one of the developers, Churton Grove, LLC, to the county. This
19 letter is from 2002 and in this letter, the developer evidences an understanding and I quote, "walk
20 paths and a 100 foot buffer along the creek with three walk bridges". So what I am attempting to
21 show on these last two slides is the county had an understanding of the need for three bridges
22 and the developer shared that understanding of the need for three bridges.

23
24 Geof Gledhill: Again, I am going to object, not to the introduction of these letters but the way it's
25 characterized is what I object to.

26
27 Larry Wright: Sustained.

28
29 Michael Buck: Before I leave this letter from the developer. I would like to point out the use of
30 the word "requirements" at least three times in the document and all this is in reference to
31 condition 27 and this is important because one of the characterizations the zoning officer has
32 made is that condition 27 is not really a requirement.

33
34 Larry Wright: When a zoning officer uses a term requirement and a developer uses a term
35 requirement, would they necessarily have the same meaning?

36
37 Michael Buck: I would submit to you that in the context of the conditions and I am using the
38 conditions in air quotes, the conditions of the special use permit, I would submit to you that yes
39 they do mean conditions are requirements. I would like to refer to Orange County Zoning
40 Ordinance Section 8.7 and this is the zoning ordinance that was in effect in 1986 and continues to
41 be in effect in the UDO although there have been some modifications to this ordinance. I don't
42 believe the modifications are applicable but I did want to call that to your attention. The ordinance
43 governing the special use has provisions as to how that special use can be modified. We heard
44 earlier testimony that there has been no formal attempt to modify the special use permit using the
45 approve process but I would like to read what the zoning ordinance says as to what constitutes a
46 modification. "The zoning officer is authorized to approve minor changes in the approved
47 plans/special uses as long as they are in harmony of the approved board but shall not have
48 power to approve changes that constitute a modification of the approval. A modification shall
49 require approval of the board having jurisdiction". The ordinance goes on to site what are the
50 criteria that constitutes a modification. There are about 10 criteria listed and a number of them
51 don't apply but I think the following do. These are not quoted, I have shortened slightly but I think

1 the context is the same. First, "Any change in condition imposed during the approval of the
2 special use permit". Any change in condition is a modification. Second, "substantial changes in
3 the amount and/or location of open space or recreation facilities" and the third, "substantial
4 changes in pedestrian access or circulation." I think those three criteria for modification become
5 key in understanding if the process was followed to create a modification or do a modification. If
6 those criteria have been met, the fact a modification has occurred and if it occurred without going
7 through the process, which is an unauthorized modification.

8
9 Jeff Schmitt: Mr. Harvey is this the language that was in the regulations that were applicable at
10 the time that this special use permit was approved?

11
12 Michael Harvey: To the best of my knowledge, the answer is yes.

13
14 Mark Micol: Do we have an understanding of why the developer did not finish the bridges? Is
15 there a reason from the developer's point of view?

16
17 Michael Harvey: I am not going to answer until Mr. Buck has completed with this.

18
19 Larry Wright: You are quoting these out of the Orange County Zoning Regulations in Section 8.7.
20 This is from the UDO?

21
22 Michael Buck: No sir.

23
24 Larry Wright: You have UDO 2.7.14.

25
26 Michael Buck: We have ordinances that have changed multiple times and I am trying to show
27 with the reference to the UDO that this ordinance has persisted over time. There have been
28 some minor language changes but I submit that the intent of the modification language has
29 remained consistent.

30
31 Larry Wright: Thank you for the clarification.

32
33 Geof Gledhill: I would characterize what Mr. Buck is doing now as a final argument as opposed
34 to testimony. The testimony or evidence is what the ordinance contains and I object to him
35 folding into his testimony his argument to you about what is or what is not appropriate under the
36 county's ordinances. It seems we need to move along and let him introduce whatever documents
37 in addition to what is already in the record to you, get the evidence finished and then reserve time
38 for an argument about what this evidence means.

39
40 Larry Wright: In the essence of time, I would like to sustain this and so if you would bring your
41 evidence, one, two, and three and then if you would like to come back and refer to it, we have the
42 documents here.

43
44 Michael Buck: I will do my best. You had a question on my take on the developers, should I
45 answer that?

46
47 Larry Wright: I think that would be in the summary statement.

48
49 Geof Gledhill: I would object to that too.

1 David Rooks: The witness is entitled to testify to things of his own knowledge or public record
2 items, not reject what others may think.

3
4 Michael Buck: May I make factual statements?

5
6 David Rooks: Yes, you may always make a factual statement of something of which you have
7 first-hand knowledge.

8
9 Michael Buck: To the point that you have asked, the development has had a number of different
10 developers involved throughout its history. One of the developers, Churton Grove, LLC, which
11 was operating in the early phases of the development sold their rights to develop Phase 3 and 4
12 and in selling their rights, it is unclear to me so I will not testify to what arrangements they made
13 with regard to developing the bridges and other amenities but there was change in the primary
14 developer.

15
16 Larry Wright: Proceed please.

17
18 Michael Buck: What I am showing here is a Google Earth....

19
20 Geof Gledhill: I am going to object to this slide coming into evidence because of what is clearly
21 an argument. (Walkways and bridges are not connected, logical, convenient or safe.)

22
23 Michael Buck: May I strike the text and speak to the information I am going to show on the slide?

24
25 Larry Wright: Go ahead.

26
27 Michael Buck: This is an image of a satellite view of the area we saw on the earlier map. I put
28 the river or the creek; I am going to take that away because the map will get busy enough. Here
29 are the trails that are in existence and I painted them with different colors and line patterns to
30 show they are not connected but for the existence of the one bridge that has been built. Notice
31 there is no connection at this point and no connection at this point or this point. As the special
32 use permit said...

33
34 Geof Gledhill: I object to that conclusion.

35
36 Larry Wright: On the basis of?

37
38 Geof Gledhill: I don't think it is true, number one. I don't think that shows that they are not
39 connected.

40
41 Michael Buck: Fair enough. Let me add additional context. All the painted areas are five foot
42 wide asphalt paths and there is no five foot wide asphalt path at that location or that location.

43
44 Karen Barrows: There is one to the south, the yellow connects on.

45
46 Michael Buck: We have the creek that goes through the center so this is the asphalt path that
47 goes under the pedestrian bridge, that is true. But for the existence of this bridge, there is no
48 path connection from here to this path in the recreation area and this path in Phase I to the
49 recreation area.

50

1 Karen Barrows: So it looks like very worn places that are connecting the yellow across the road
2 there.

3
4 Michael Buck: Those are dirt paths which pedestrians do use, more difficult for strollers, wheel
5 chairs and obviously the rain season, mud.

6
7 David Blankfard: Are there sidewalks in Phase IV?

8
9 Michael Buck: Yes. The special use permit, condition 10, calls for sidewalks on one side of all
10 streets in the single family portion of the development so there are sidewalks along the interior of
11 this loop, there is a sidewalk along here. If I could reserve that question to the next slide because
12 I will show how the walk pattern is affected by those sidewalks are in relation to these locations
13 where there are no asphalt paths and so the special use permit called for bridges at either end,
14 so there is the one that does exist, this is a location where there is no bridge. From the earlier
15 map, this location very close to the vehicle bridge is where a walking bridge might have been
16 located.

17
18 Geof Gledhill: I object to that characterization.

19
20 Larry Wright: Sustained.

21
22 Michael Buck: I would like to point out at location D that while there is no bridge built at this
23 location, the developers did install a sewer line across the creek so we have no bridge at another
24 location besides A but a sewer line was built across the creek. I would also like to call your
25 attention to this temporary fencing. Much of that fencing is still in the development. I have
26 another slide later that I will point out locations where that continues to exist but there are places
27 throughout the development where silt fencing exists and this was a convenient place to show
28 that to you.

29
30 Geof Gledhill: Object based on relevance.

31
32 Larry Wright: Sustained.

33
34 Michael Buck: I will make a case that there is a condition that will drive the removal of temporary
35 fencing. There are no bridges at those locations and we have already talked about the missing
36 asphalt path here and there.

37
38 Geof Gledhill: I object to both of those characterizations.

39
40 Larry Wright: On what basis?

41
42 Geof Gledhill: Again, Mr. Buck is making his argument; he is not presenting his evidence.

43
44 Larry Wright: Sustained.

45
46 Geof Gledhill: And I object to that slide showing missing bridges. That is a characterization as
47 opposed to evidence.

48
49 Larry Wright: Mr. Buck.

50
51 Michael Buck: I would submit that I could change it to no bridges exist at these locations?

1
2 Geof Gledhill: Or any other location other than where they are. The point is that this Board needs
3 to be looking at evidence at what is there and what isn't there.
4
5 Michael Buck: I am going to stipulate for the record that a bridge exists at location A, a walking
6 bridge, a pedestrian bridge and at no other location.
7
8 Geof Gledhill: And I am not willing to stipulate that one does not exist at any other location. I will
9 stipulate there is a walking bridge at Location A.
10
11 Larry Wright: I think both sides are saying the same thing.
12
13 Geof Gledhill: I doubt it.
14
15 Larry Wright: Proceed and whatever the objection is fine. Please be careful to submit evidence.
16
17 David Blankford: The special use permit says they are supposed to install bridges; they don't
18 necessarily state that they are pedestrian bridges and I see two bridges there. I see one at A and
19 I see the one that happens to be for vehicles.
20
21 Geof Gledhill: There is a vehicle bridge not marked on this map.
22
23 Michael Buck: Regarding walkways, I would like to read from the ordinance in existence in 1986,
24 Zoning Ordinance 7.14 and I am reading from Attachment I, but I could read from the other, page
25 720. This is regard to the ordinance for Planned Development Districts and the internal
26 relationship thereof. "Walkways shall form a logical, safe and convenient system for pedestrian
27 access to all dwelling units, project facilities and principle offsite pedestrian destinations.
28 Walkways to be used by substantial numbers of children shall be so located and safe guarded as
29 to minimize contact with normal automotive traffic. Street crossings shall be held to a minimum
30 on such walkways and shall be located and designed to promote safety". This next slide will get
31 to a question that was asked about the sidewalks. We have shifted a little, this is the same
32 location, Phase IV is up here and as I said, there is a sidewalk here but in order for someone here
33 in Phase I and II or Phase IV, to get to the recreation area shown here, they would walk along this
34 walkway, this is one of three major thoroughfares through the neighborhood, cross this major
35 thoroughfare here where there is no crosswalk to a sidewalk here. There are no sidewalks on this
36 portion of the recreation site so they would cross a major thoroughfare where there is no cross
37 walk, they would walk down to another major thoroughfare where there is a cross walk, cross
38 there, and at that point, they can cross Churton Grove Boulevard and put themselves onto the
39 recreation facility. As opposed to having a path underneath, I'm sorry, may I say that?
40
41 Geof Gledhill: Any characterization of what should be, what is...
42
43 Michael Buck: Sidewalks do exist, they do not have crosswalks to allow access for Phases I, II
44 and IV to get to the recreation facility without multiple crossings of major thoroughfares through
45 the neighborhood. With the exception of the words, missing walkways, everything else here is a
46 quote. There was question about sidewalks. This is Alderberry Court in Phase IV and Alderberry
47 Court has no sidewalk. No sidewalk exist on Alderberry Court. Despite the fact that Alderberry
48 Court has no sidewalk, it does have a walking path. A walking path that is an asphalt walking
49 path built by the developer that essentially goes nowhere.
50
51 Geof Gledhill: Objection. Characterization.

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Michael Buck: Ok.

Larry Wright: What is the point of this?

Michael Buck: I am referring to the ordinance and I won't make an argument here but the ordinance has a claim on the way walkways should be developed. The next slide shows... here is the street side location of that walkway, the sidewalk, there is no sidewalk. The path continues for about 100 yards and it terminates at the base of this utility tower. I guess this is an argumentative portion so reserve this for later.

Geof Gledhill: I object to that.

Michael Buck: I would like to ask a procedural question. I am willing to talk about some of these things later in a summary phase. I guess I am worried about the time that will take and coming back to walk through those.

Larry Wright: What you make in a summary statement has to be based on evidence. Everybody is a good guy but we have to make our decision on evidence so you can't just say I see a little bit of sidewalk here. Is it in violation or not, we have to have something in evidence that you submit.

Michael Buck: Is not the pictures evidence?

Larry Wright: I don't know. You make your statement, you show us, we see the pictures, yes, and then we will hear them and go back and forth, okay?

Michael Buck: Moving to a discussion of relevant dates. The conditions were approved, the special use permit conditions, and I read a little earlier, the conditions of the special use permit were approved on May 20, 1986. The SUP was recorded on March 31, 1998. The effective date of the permit also March 31, 1998 and finally the land rezoning dated March 31, 1998.

Jeff Schmitt: Mr. Harvey, what went on in the 12 years? We have an approval on May 20, 1986 and recorded 12 years later.

Michael Harvey: There is a condition in here that the development of the project consistent with the recorded special use permit can only occur when water supply was made adequate and available by the Town of Hillsborough. That did not occur until March 31, 1998. I am looking for the specific condition... condition 44.

Michael Buck: Reading from the special use permit, book 1709, page 109, condition 44 reads, "the effective date of this special use permit and the effective date of the special use zoning of the property described in this special use permit is March 31, 1998, the date of the recording of this special use permit". That is what is listed in the special use permit as the date on which the zoning took place, why is that important? Let's go to ordinance. The ordinance in existence in 1986, also in existence in 1998, but the ordinance in existence Section 7.6 of the Orange County Zoning Regulations reads, "Approval of final plans and reports shall be based on compliance with regulations applying at the time the land was zoned to PD status including such specific modifications that were made by the Board of Commissioners in its amending action. The County Manager shall certify that the conditions imposed by the Board of Commissioners have been met. I would like to offer additional evidence that the plat, these are plats from Book 103, page 63 for Phase IV, contain certifications from the developer signifying their acceptance of the

1 subdivision regulations of Orange County. Furthermore, the plat certified compliance with
2 subdivision regulations and the plats contained no exemption notices per the subdivision
3 ordinance so there is no claim on the....
4

5 Geof Gledhill: I can't see those certifications, do the certifications concern that parenthetical?
6

7 Michael Buck: I am trying not to make an argument.
8

9 Geof Gledhill: Do they contain that parenthetical?
10

11 Michael Buck: These are not quotes at all.
12

13 Geof Gledhill: Let me object to all three of those items, the certifications are

14
15 Larry Wright: Are you talking about the bullets?
16

17 Geof Gledhill: Yes.
18

19 Larry Wright: Are you objecting to the bullets?
20

21 Geof Gledhill: Yes. I object to the bullets.
22

23 Larry Wright: You have a comment on the objection of the bullets?
24

25 Michael Buck: If he wants to object to the bullets, that is fine. The certifications are on a plat with
26 the county as offered into evidence.
27

28 Larry Wright: Okay. Sustained with the evidence.
29

30 Michael Buck: Do I need to call your attention to that for deliberations?
31

32 Larry Wright: Are you talking about the bullets?
33

34 Michael Buck: No. The certifications?
35

36 Larry Wright: No, that is evidence you are submitting.
37

38 Michael Buck: So the certifications are in evidence, they exist on the plat. I would like to offer
39 additional evidence. The zoning officer has claimed in his response to the appeal, the zoning
40 officer has claimed, I am reading now from the staff summary on page 1...
41

42 Geof Gledhill: Before we go any further I want to object to the bullets.
43

44 Larry Wright: Council for the county objects to the bullets.
45

46 Michael Buck: I will do my best to offer evidence without making whatever argument is purported
47 to be made here.
48

49 Larry Wright: Sustained.
50

1 Michael Buck: The zoning officer, Attachment B, the last lines on page one reads: "the
2 development of the planned development special use is governed solely by recorded SUP
3 consistent with the provisions of the ordinance in existence in 1986 when the special use was
4 approved". The evidence I would like to offer is that the zoning officer has enforced ordinances
5 enacted after 1986 and the two cases I would like to show are....

6
7 Geof Gledhill: I object to this. Does it relate to this project?

8
9 Michael Buck: Yes. This is Phase IV. I only have one copy of this letter which I am happy to
10 offer into evidence. This is a letter from Newland Community to the county dated December 15,
11 2006 and in it, reads, "during one of our meetings with Robert Davis, it was explained that current
12 subdivision regulations", current December 15, 2006, "required a 50-foot buffer along both sides
13 of the power line easement. This came as a surprise because it was not mentioned in the SUP
14 and not shown on the approved master site plan".

15
16 Larry Wright: Ms. Graham, did you get this into evidence?

17
18 Michael Buck: I would like to offer it into evidence.

19
20 Larry Wright: You want to see this Mr. Gledhill?

21
22 Geof Gledhill: I think I will object to this because this was a he-said, she-said letter. There are no
23 women involved in this correspondence (that is an expression). It is not evidence, nothing to
24 identify it as a planning document....This letter is hearsay. All letters are hearsay, if it has not
25 been authenticated or identified. The general rules of evidence, it is not admissible.

26
27 Michael Buck: This is a letter received by the county and we supposedly have before us a
28 complete record of the county's documents related to this project and this is a letter from a
29 primary developer, the primary developer of Phase IV to the county. Why is this not in the
30 county's evidence before us?

31
32 Larry Wright: I think that we are going to see what the content of this is. I can write a letter to the
33 county, while they may archive it, it doesn't mean what I write in there is fact.

34
35 David Rook: A report of what a county employee was is actually a third party. What he may have
36 said to somebody else so it is hearsay and it would technically not be admissible.

37
38 Larry Wright: I'm sorry Mr. Buck; I am going to have to sustain the objection.

39
40 Michael Buck: The second certification comes from the County's attachment D, it is Phase IV,
41 Book 103, page 63....

42
43 Michael Harvey: Mr. Buck, I will also stipulate and remind the board that this is the same plat that
44 you submitted with your appeal application.

45
46 Michael Buck: Yes. I am referring to County Attachment D, Book 103, page 63. On that page,
47 there is a certification that reads, "We hereby certify that the lights to be installed on all streets
48 and commonly owned lands depicted on the plat will adhere to the provisions of the outdoor
49 lighting standards as set forth in the Orange County Zoning Ordinance". I would like to point out
50 that the Orange County Lighting Ordinance was not enacted until June of 2003. The SUP was
51 recorded on March 31, 1998, effective date March 31, 1998, and the property zoning change

1 occurred on March 31, 1998. Ordinance requires compliance with regulations at the time the land
2 was zoned PD status.

3
4 Geof Gledhill: I will object to bullets 1, 4 and 5.

5
6 Larry Wright: On what basis?

7
8 Geof Gledhill: They are characterizations not evidence.

9
10 Michael Buck: I don't have a problem with the first and the last. I don't have quotes around it but
11 that is what the ordinance says. The ordinance is already in evidence so that is fine.

12
13 Larry Wright: I am going to rule on 1 and 6 and sustain Mr. Gledhill's objection.

14
15 Geof Gledhill: So you have allowed into evidence 2, 3 4 and 5.

16
17 Larry Wright: Yes, because he has stated for the record that this is a direct quote.

18
19 Michael Buck: This is not a direct quote but the ordinance is, I don't have a problem if you to
20 exclude that bulletin point.

21
22 Larry Wright: I will then.

23
24 Jeff Schmitt: Before you exclude it, Mr. Gledhill, for my edification, number 6, you objecting to
25 because....

26
27 Geof Gledhill: As wiling enforced ordinances enacted after, oh.

28
29 Jeff Schmitt: Willingly because, as Mr. Buck has pointed out, that certification by Robert is on
30 whatever this is, the plat.

31
32 Geof Gledhill: I am not sure what the context of that bullet is. Probably as it is stated without a
33 context, it is a correct statement. It is in context a characterization of ..

34
35 Jeff Schmitt: We have a plat recorded by the county and the developer in the upper right hand
36 corner, Mr. Buck, what does it say?

37
38 Michael Buck: It is evidencing compliance with the ordinance.

39
40 Jeff Schmitt: The county representative has said the lighting that would be impacted in this area
41 has to agree with the county ordinance and I think that is what he is trying to indicate.

42
43 Geof Gledhill: The certificate of compliance with light standards, is that the certification we are
44 talking about. That certification is in evidence, characterizing it is my concern.

45
46 Larry Wright: Please state your opinion on this last thought.

47
48 Jeff Schmitt: Given the observation that counsel makes here, is that because it is in evidence
49 already, this is in effect an argument that is being made by Mr. Buck.

50
51 Larry Wright: Would you sustain or overrule?

1
2 Jeff Schmitt: I would sustain.
3
4 Michael Buck: Active recreation area. I have indicated there are two sections here, the
5 segmented acreage and the invalid....
6
7 Geof Gledhill: I object to that characterization.
8
9 Michael Buck: There is the actual amount of acreage available.
10
11 Larry Wright: Mr. Gledhill, you object to what?
12
13 Geof Gledhill: Whatever segmented acreage means? Is that in the ordinance for a special use
14 permit term?
15
16 Michael Buck: No sir. It is

17
18 Geof Gledhill: Again, it is an argument; characterization.
19
20 Michael Buck: That is fine.
21
22 Larry Wright: I am sustaining this.
23
24 Michael Buck: Reading from Condition 27b, "a minimum of 7 acres are to be developed for active
25 recreational purposes". I will call your attention to the use of active recreation as it relates to the
26 ordinance calls for active recreation.
27
28 David Rooks: Mr. Buck, you have made an appeal made on certain assertions that the staff
29 failed to correctly apply the terms of the special use permit in approving the plat. At this stage of
30 the hearing, all we should be doing is presenting evidence, facts, that ultimately you would then
31 use to make the argument.
32
33 Michael Buck: I understand that now, I did not recognize that particular order.
34
35 David Rooks: And then the county will have the opportunity to put on evidence that it will use for
36 factual basis to make its argument.
37
38 Michael Buck: With that understanding in order to move things along, I would like to see if I can
39 look through my argumentation summary and pull out those pieces that are facts that I need to
40 refer to and offer those into evidence and then come back to the presentation.
41
42 David Rooks: Facts are not conclusions but items of evidence that support a proposition.
43
44 Michael Buck: I will look through my copy to pull out the pieces. I want to refer to the minutes of
45 the approval meetings of 1985 and 1986 which are already in evidence by the county which is
46 Attachment E. I have pictures I would like to submit, can I submit those?
47
48 David Rooks: If they are relevant.
49
50 Michael Buck: I have one additional piece of evidence that is not in the county's evidence. I have
51 some pictures that I would like to submit as evidence, submit my other pieces of evidence then I

1 will stop the presentation and we can pick up here when I get to my summary and argumentation.
2 With the exception of the words, I would like to submit slide 42 which is a picture of the parcel
3 showing on the plat for Phase IV that is designated active resignation. This is in Attachment 4.
4 Page 42 has two pictures on it. Actually, I am going to forward through because I just realized
5 there are some other key pieces I need to show as well. I would like to try to offer evidence is
6 acreage calculations that I have used an online tool to overlay on a Google map to show how
7 much of a parcel, what its size is.

8
9 Larry Wright: What is the online tool?

10
11 Michael Buck: It is referenced on page 41 called freemaptools.com and it is a planimeter tool and
12 you can key in the points of a square or a polygon and it will state for the area you have
13 highlighted, here is the acreage for that location.

14
15 David Blankfard: Are you a registered surveyor?

16
17 Michael Buck: I am not.

18
19 Geof Gledhill: I don't happen to have an objection to this slide because it agrees with something
20 else I have but I am going to object to Mr. Buck introducing these Google map calculations, I
21 don't have a clue whether they are accurate or not.

22
23 Michael Buck: With respect, I want to attempt to show there is a reasonable accuracy here. I
24 don't wish to claim these are 100% accurate but I will attempt to do a control which will show you
25 what area is being shown by this matches plats because the county has not provided surveys that
26 indicate the acreage area of that have slopes, utility easements, other areas that ordinance does
27 not allow.

28
29 Geof Gledhill: And I object to each one of those because I don't think it pertains to this appeal.

30
31 Larry Wright: Sustained.

32
33 Michael Buck: I would say that is argumentative based on the dates that have been shown to be
34 relevant dates that are a conclusion that has not been proven in this case yet.

35
36 David Rooks: It's your call Mr. Chairman. It seems we have wandered a bit from what the
37 charge is tonight.

38
39 Larry Wright: I am going to have to sustain this.

40
41 Geof Gledhill: Just his last comments.

42
43 Jeff Schmitt: I think it is fair for him to make a representation which may or may not be from a
44 surveyors' perspective aromatically absolute but characterize it as being somewhat generally
45 close or an estimate.

46
47 Larry Wright: I want to know where this evidence and how it relates to the overall, where are you
48 going with this so I can rule on this.

49
50 Michael Buck: The zoning officer has made claims that acreage shown on plats is eligible for
51 active recreation purposes. The ordinance that applies in my opinion, and that is a point of

1 debate we have, the ordinance that applies has exclusions as to what character of the land, and
2 slope, easements, etc. can apply or cannot apply. I wish to show we have these acreage
3 calculations using this map tool that the area shown on the plat is invalid and in order to show that
4 I need to use the Google map and its Plano meter capability to show you here is the acreage that
5 was clean and here is the acreage that has certain characteristics that do not comply with the
6 ordinance.

7
8 David Rooks: Are you contending that the surveyor is incorrect in what he states as the acreage
9 on the plat?

10
11 Michael Buck: No. I am contending that the claim on the plat, that it is active recreation is
12 incorrect.

13
14 David Rooks: That is a characterization that the surveyor put on the plat and your claim is that
15 the zoning administrator should not have accepted that characterization.

16
17 Michael Buck: I guess so but I don't think that it is a, I would be surprised if the county objects to
18 that because the county has in its own records indicating the claims in the plat are incorrect.

19
20 David Rooks: It is characterized as it is characterized on the plat. If he wishes to put on evidence
21 that it is wrong then I think ...

22
23 Larry Wright: Then I will overrule, but we the board, if I am reading Mr. Schmitt correctly, and I
24 agree with him that these are estimates, they are not survey....

25
26 Michael Buck: Yes. They are estimates. I am going to use the Phase IV tot lot as a control to
27 demonstrate that it is an estimate but a reasonable estimate so the Plano meter shows .292
28 acres of this location. The plat itself also shows .292 acres. This particular location the developer
29 has put on play equipment and other amenities, I will not at this point argue that it cannot be used
30 for the acreage claim in my argumentation phase, I will revisit this.

31
32 Geof Gledhill: Let me be clear. On this document, what are you trying to introduce because it is
33 loaded with characterization.

34
35 Michael Buck: On all the slides I will show you similar to this, I am happy to limit it to the Plano
36 meter calculations, the area shown in green and the acreage that the Plano meter is saying are
37 shown. If we want to ignore the words for the time being, I am happy to do that. The evidence is
38 that the Plano meter tool is saying here is how much acreage is highlighted.

39
40 David Rooks: Which is also what the plat says.

41
42 Michael Buck: in this case yes, but in other cases, that will not be the case. The control will
43 always match the plat but as I said the plat is making claims that are untrue.

44
45 David Blankfard: How did you get your reference point on this Google, how did you select those
46 corners?

47
48 Michael Buck: I am showing this in satellite view with the visual pictures but in this tool, you can
49 turn satellite view off and you can actually see parcel data. I don't know that source of their GIS
50 data, I presume in some sense it is coming from the county or somewhere else.

1 David Blankfard: That would normally match. The county data and the plat will match.

2
3 Michael Buck: This particular parcel, they put play equipment and so forth, there is no character
4 of the land, no slope, no transmission line or other things that would exclude it from being
5 counted but that is not the case on other parcels.

6
7 Geof Gledhill: I am going to object to this and subsequent ones of these. This board has no
8 evidence of Mr. Buck's qualifications to make these calculations to use Google in this matter. I
9 see he has a control to prove to you it works but that doesn't mean he has the ability to create
10 these. It seems you need expert testimony as to how this Google maps system can prove what it
11 is.

12
13 David Rooks: I don't want to get hung up here because we keep getting hung up time after time.
14 The point is a good one to the extent that Google relies on GIS if you superimpose GIS we know
15 it is not a one to one match a true match and so to the extent that you are actually relying on that
16 to locate things strikes me and makes that evidence somewhat unreliable.

17
18 Michael Buck: The County has in its own documentation relied on estimates. They are using
19 those exact words when they talk about active recreational area. Mr. Gledhill was effusive a few
20 moments of my technology skills and I would submit to you that all that is required to operate this
21 Plano meter tool is the clicking of a mouse to locate a parcel location. I am not trying to claim
22 that this board should use the calculations used by the Plano meter tools to make specific
23 recreation acreage plans but I submit to you that when we add up all the acreage calculations we
24 will not be off by a few feet but we will be off by substantial acreage and being off by substantial
25 acreage is significant enough....

26
27 David Rooks: It is 9:30 pm and we are stuck on something. I think Mr. Buck has a point he wants
28 to get to.

29
30 Larry Wright: Could you get to your point please.

31
32 Michael Buck: I am trying to get to it without being argumentative.

33
34 Larry Wright: I want to see what you are going to say.

35
36 Michael Buck: These pictures as evidence, these are within the active recreation area and here
37 is an overlay of the plat so if you look at the plat for Phase IV. That is the tot lot we just looked at.
38 Here is what is being claimed as active recreation in Phase IV on the plat. There is a utility
39 transmission easement that goes through here and a stream buffer there. The next one I want to
40 show you is on this portion of this parcel how much acreage can be used as a field.

41
42 Geof Gledhill: I object to that.

43
44 Larry Wright: What grounds?

45
46 Geof Gledhill: It doesn't matter. [How much acreage can be used as a field?]

47
48 Michael Buck: The County is doing the exact same thing in their estimate. They have an
49 estimate of how much acreage on this parcel can be used as active recreation. Their claim is
50 1.07 acres because they include the parking lot and portions of the transmission utility so if we
51 are going to exclude my ability then we must exclude the county's ability to include their estimate.

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Larry Wright: Your opinion is what then?

Michael Buck: There is a significant portion of this parcel that are, I am trying not to make that argument now, that are ineligible for being counted as active recreation because of these exclusion points.

Larry Wright: So you are submitting these figures as evidence that this disagrees with the county, right?

Michael Buck: Yes. This says .6633; all I want to do is contrast .6633 which we call $\frac{3}{4}$ of an acre.

Larry Wright: Does this show in topography or anything else that the county does not have?

Michael Buck: The satellite image does not and that is where I will have pictures to show slopes....

Larry Wright: Is that part of your argument?

Geof Gledhill: I object to everything except the photographs because the characterization of unsuitability is a point.

Larry Wright: We as a board understand that.

Michael Buck: That is part of the argument I will come back to. I will come back to those pictures. I would like to submit into evidence Appendix K, Appellant Exhibit 3, pages 61 through 66. I have copies of a letter in that appendix. This is a letter written by the Orange County Planning Director to Newland Corporation, the developer of Phase IV written on November 1, 2006 and in this letter, the planning director describes the requirements that Newland must meet in order to gain approval for Phase IV.

Geof Gledhill: For the record, I would like to object to the introduction of this.

Larry Wright: Why?

Geof Gledhill: For one thing I can't read it and digest it in two minutes. That is on objection. Second is it apparent to me it is some kind of contemporaneous negotiation going on with the planning department and this developer.

Larry Wright: Why would that be objectionable?

Geof Gledhill: I don't think it bears on the special use permit whether or not this development as platted satisfies the special use permit requirements.

Larry Wright: It discusses special use permit in paragraph 3, the multi-family parcel will include As part of the special use permit and paragraph 5 talks about special use permit.

Geof Gledhill: I agree with what it says, I am arguing whether or not it is relevant evidence to this proceeding.

David Rooks: I think it can come in.

1
2 Larry Wright: I overrule.
3
4 Larry Wright: Submit it into evidence and once you make your summary claims I would come
5 back to it.
6
7 Michael Buck: The Phase II plat is already in evidence so I will skip that. I would like to submit
8 into evidence, I only have one copy, there is a picture of it in Exhibit 3 but I will relinquish that
9 copy. The picture I am showing here is a digitized area view created by the county engineer's
10 office provided to me courtesy of the current planning supervisor serving 2007 or 2008. This is
11 what the county has used in order to claim how much active recreation space is used on the
12 recreation parcel on the Phase II plat. If I may, the Phase II plat has this large 16 acre recreation
13 parcel and the plat actually has the words 16 acres of recreation but it further clarifies there is 9
14 acres of passive recreation and the plat says there is 7.06 acres of active recreation. The letter I
15 just provided to you from the planning director says there is actually .4 acres of active recreation
16 on that location so the planning director is saying despite what is on the plat, there is .4 acres of
17 active recreation. The picture I am showing you here from the zoning officer says there is 3.77
18 acres of active recreation. I would like to present this into evidence.
19
20 Debra Graham: Michael has gone to make copies of that. I am labeling the letter Exhibit 7 and
21 that will be Exhibit 8.
22
23 Michael Buck: I guess I should submit this so you are able to see what is actually there. This is a
24 satellite view of the Churton Grove single family recreation parcel showing there are amenities
25 and a parking lot on what is in the general shape of the planner's digitized view so I would like to
26 submit slide 51 into evidence.
27
28 Karen Barrows: What is actually on this?
29
30 Michael Buck: We have a parking lot, clubhouse, swimming pool, one tennis court, basketball
31 court and some gravel paths; small children's play area and a gazebo. In Phase II, back to the
32 Plano meter tool, I highlighted this area which is about 1.346 acres that is within the area of the
33 3.77 the planning supervisor is claiming. I don't really care to get down to 100ths or 10ths of an
34 acre but I am happy to stick to rough numbers. There are 1.3 acres in this vicinity. There is a
35 slope and I am not claiming to be an engineer but this distance is about 20 feet and drops off
36 over 10 feet and this is the location on the parcel where the picture was taken.
37
38 Geof Gledhill: Objection.
39
40 Larry Wright: What grounds?
41
42 Geof Gledhill: The grounds that I don't know what he just said constitute a slope of 15%.
43
44 Larry Wright: He is under oath I think ... I am going to accept what he has to say.
45
46 Michael Buck: If I better understood the sequence I would have left off some of these things.
47 This is a slightly different location and so in terms of keeping track of these as evidence, I want to
48 make sure these are being included. Slightly different location, slope and sewer. Slightly different
49 location, I showed a picture earlier.
50
51 David Rooks: It is clear that you are only looking at photograph not anything written.

1
2 Larry Wright: We are looking at these as part of this recreation area.

3
4 David Rooks: Those photographs are what they are.

5
6 Michael Buck: This is the path we talked about earlier that is not at fault in the sewer easement.
7 This is a picture of the parking lot that exists on the parcel. I have already submitted into
8 evidence the parking lot in Phase IV that was built by a different developer.

9
10 Larry Wright: That is part of this parking lot on the upper left hand.

11
12 Michael Buck: This is Phase IV parking lot and this parking lot is in Phase II. We just finished
13 talking about some of these parameter areas and on the previous slide I said about 1.3 acres
14 were in the areas of the pictures I just showed now I am going to show pictures for this particular
15 location and from a Plano meter standpoint that is about .9 acres in this vicinity. Again, this is
16 slope area, stumps here; this is a grate that was in the center. I will point out that this grate has
17 been removed at homeowner's expense. It was once in the middle of what the developer's called
18 active recreation but since been removed at homeowners expense. More sloping and along
19 Churton Grove Boulevard, sloping. This sloping was once landscaped until the road for the
20 bridge was built and for the last four years has looked like there. Here, what is claimed as the
21 active recreation area, we have cement debris? Here is another view of the landscaping along
22 Churton Grove Boulevard and you can see all the area where this is no grass. In this highlighted
23 yellow area, I am trying to show the temporary silt fencing. Churton Grove Boulevard was built in
24 2008 and here we are in 2013 and still the silt fencing.

25
26 Mark Micol: That wear is not due to pedestrian traffic but erosion?

27
28 Michael Buck: Correct. There is a sidewalk on this side so pedestrians would not typically walk
29 there. This is a blowup not from this location but what that type of fence is and here are locations
30 throughout the neighborhood where this type of fencing exists primarily along this area where the
31 creek is. There is temporary all along in those locations and there are other locations throughout
32 the development where it exists in Phase IV. I do have pictures of all these.

33
34 Geof Gledhill: None of this has anything to do with permitting or anything to do with the special
35 use permit. This is Mr. Buck's walk through about the construction that is going on or has gone
36 on. In my opinion, all the slides in this presentation talking about the condition in this property is
37 irrelevant.

38
39 Larry Wright: Where are you going with this?

40
41 Michael Buck: That the special use permit has a condition, Condition 30...

42
43 Geof Gledhill: Is that part of your appeal?

44
45 Michael Buck: Yes.

46
47 Geof Gledhill: The grounds for your appeal includes Condition 30? I object to that.

48
49 David Rooks: I think he is outside the scope of his appeal. It is not relevant. The only issue here
50 are the things that he says were incorrect at the time the zoning administrator signed off on the plat
51 not subsequent failures on the developers so I would say it is irrelevant.

1
2 Michael Buck: The County has in their appeal response made claims that the special use
3 permits, specifically Condition 27, but other parts of the special use permit have been met and so
4 I am showing evidence that they have not been met.
5
6 David Rooks: That is somebody else's issue.
7
8 Michael Buck: I would like to read from Condition 27, Book 1709, page 107 reads, "Appropriate
9 landscaping", my claim is that the special use permit conditions have not been met that it is
10 specifically stated in my appeal. I am showing that the facts on the ground for Condition 27 are
11 clearly not met.
12
13 David Rooks: The question is what state of play was at the time the zoning administrator signed
14 off on the plat, not subsequent.
15
16 Michael Buck: Some of these pictures are contemporaneous to that time; furthermore, the
17 signing off of the plat for Phase IV must be conditioned on what active recreation use was already
18 in play at the time, what had been put on the ground. You have the planning director's letter
19 which says that portions for this parcel cannot be counted as active recreation and in order for the
20 zoning officer to certify the final phase of the development to ensure that it has the appropriate
21 active recreation required, you have to look at the earlier phases and what active recreation has
22 been put into place.
23
24 David Rooks: It is what the zoning administrator ...
25
26 Larry Wright: You are going to have to have that time limit down to submit that in evidence. I
27 think you need to come back with that.
28
29 Michael Buck: Can you clarify for me?
30
31 David Rooks: The date the zoning administrator signed the plat was February 12, 2008?
32
33 Michael Buck: Correct.
34
35 David Rooks: That is the date and it was what was in existence on February 12, 2008 not
36 subsequent failures of the developer but what was available to the zoning administrator on
37 February 12, 2008 at the time the zoning administrator signed the approval of the plat.
38
39 Michael Buck: That information is contained in the letter from the planning director from 2006
40 because between 2006 and 2008, there is not ...
41
42 David Rooks: That is an argument.
43
44 Michael Buck: From a factual standpoint...
45
46 Larry Wright: You can make your argument after you submit your evidence.
47
48 Michael Buck: These are the claims that the planning director made in the letter that is in
49 evidence. These are the comparisons using the Plano meter tool so the planning director is
50 claiming, in essence, about .7 acres using the Plano meter tool I am showing about 1.3 acres.
51

1 Geof Gledhill: I am going to object to that because it does not include areas that from the
2 county's view of this should be included.
3
4 Michael Buck: I would say that if the county wishes to object to my use of estimate then we must
5 necessarily exclude their use of the digitized view which is an estimate by the county's own
6 admission.
7
8 David Rooks: The county is entitled to put on evidence of how that was made.
9
10 Larry Wright: This is all an estimate, we are not taking anything from the mapping as exact.
11
12 Michael Buck: Here is the county's estimate which is argumentative which we will skip. We
13 looked at Phase IV, there is no active recreation acreage in Phase III, we just looked at Phase II,
14 there is no active recreation in Phase I. Now we will look at the multi-family. Contextually, in
15 order to determine, could you go forward with the plat for Phase IV, you have to know the overall
16 acreage and are we in this final phase when we get to the acreage claim for Braddock Park.
17 Here is the plat already in evidence, the acreage claim is 2.381 acres as shown on the Plano
18 meter tool subtracting out a parking lot and road...
19
20 Geof Gledhill: Object. Same basis, the exclusion that Mr. Buck is doing, the county does not
21 approve. The special use permit does not require those

22
23 Larry Wright: The county is entitled to put out evidence so what do we do with his evidence.
24
25 David Rooks: It is your decision.
26
27 Larry Wright: The county puts on evidence, go ahead, we know these are estimates, proceed
28 and we will listen to the county.
29
30 Michael Buck: There are about 1/3 of an acre taken up by a road and a parking lot. There is
31 about one acre in this portion where...
32
33 Geof Gledhill: Objection, same basis.
34
35 Larry Wright: On what?
36
37 Geof Gledhill: The characterization of the calculation methodology used by Mr. Buck.
38
39 Larry Wright: We have already said this is all estimate and we have seen these slopes.
40
41 Michael Buck: This is a different plat. This is to the multi-family phase so there is a slope with a
42 bit of landscaping missing; the key point is there is no tennis court. I will note there is a swimming
43 pool but no tennis court. This is my last opportunity to submit evidence or can I submit it later?
44
45 Larry Wright: Evidence you have should be submitted at this time.
46
47 Michael Buck: I would like to submit into evidence this site plan provided to me by Newland in
48 2007.
49
50 Geof Gledhill: I will object based on it is not authenticated. Mr. Harvey doesn't know what it is.
51

1 Michael Buck: It is a preliminary plat of the Phase IV provided to me by the developer prior to
2 their submission of the plat for approval.
3
4 Geof Gledhill: Objection same basis.
5
6 David Blankfard: It is a preliminary plat, so what. There are a lot of preliminary plats floating
7 around, is it signed and sealed by anybody. It is not a signed and sealed document.
8
9 Larry Wright: I will have to sustain the objection. Do you have any other evidence?
10
11 Michael Buck: No, I don't think so.
12
13 Larry Wright: We have heard the evidence submitted by the applicant and it is now 10:07 p.m. I
14 would like to ask the county what they have in mind relative to time for their submitting of
15 evidence. We need to take a look at how realistic it is to complete this in one hearing. I would
16 like to hear something from the county on the submission of their evidence and how we could
17 proceed with this among the board members. Mr. Gledhill?
18
19 Geof Gledhill: I have about 15 questions of Mr. Harvey. In preparing for this hearing it took ½
20 hour to go through those and I have a two page, very brief closing argument. Barring any
21 extensive cross examination of Mr. Harvey, I think it would take about 40 minutes.
22
23 Larry Wright: I would like to get the board's opinion on how to proceed.
24
25 David Blankfard: I would like to continue.
26
27 Jeff Schmitt: Practically, this will take an hour to get through what Mr. Harvey says because we
28 will have questions and rebuttal will take, how long?
29
30 Michael Buck: I intended to show all the slides we missed with argumentation. I would say about
31 an hour.
32
33 Jeff Schmitt: I would suggest we are talking about 2 ½ hours. That would be an estimate I would
34 give if we continue.
35
36 Larry Wright: I would like to continue this in an additional meeting; to recess this session until
37 next month at the regular meeting and reconvene and hear the rest of the application.
38
39 David Blankfard: Can we hear from the county and then move the deliberations to the next
40 session or wait for rebuttal. At least get his portion on the record for tonight.
41
42 Larry Wright: That is a reasonable suggestion.
43
44 Geof Gledhill: My only concern is that if you separate the testimony from the argument, it may be
45 difficult to recall what happened.
46
47 Larry Wright: We had that in our last appeal and we were able to deal with that.
48
49 David Blankfard: Or just have a time certain we cut it off.
50
51 Larry Wright: The applicant presented his evidence, I would like to offer balance for the county.

1
2 Geof Gledhill: Mr. Harvey, will you identify yourself and state your position with Orange County
3 and your qualifications for that position.
4

5 Michael Harvey: I am the Current Planning Supervisor for Orange County Planning. I was
6 brought on board in 2005 as the Chief Zoning Enforcement Officer. I was promoted to the Senior
7 Level Planning position in 2010 to assume the duties of the current planning supervisor. I have
8 Bachelor of Science degrees from East Carolina University in both political science and urban
9 planning. I have been a practicing planner for 18 years, a certified planner for the American
10 Planning Association, I am ASC certified. I am also a certified zoning enforcement officer for the
11 Institute of Government and a certified flood plain manager through FEMA.
12

13 Geof Gledhill: I would tender Mr. Harvey as a professional planner certified in all the things he is
14 certified in essentially as an expert witness. In the interest of time, I am going to lead Mr. Harvey,
15 meaning I will flesh out the questions so he can answer as many in a yes or no format as possible
16 to save time.
17

18 Geof Gledhill: Through the recorded SUP including those documents incorporated to it by
19 reference together with recorded plats memorialize this Scotswood Planned Development special
20 use?
21

22 Michael Harvey: Yes.
23

24 Geof Gledhill: Is Attachment C of the record, the recorded SUP of the project including the
25 documents incorporated by reference?
26

27 Michael Harvey: Yes.
28

29 Geof Gledhill: Does Attachment D of the record include all recorded plats constituting approved
30 site plans for this project?
31

32 Michael Harvey: Yes sir.
33

34 Geof Gledhill: Have you analyzed the recreation component shown on the recorded plats and
35 have you determined those components platted as developed conform to Condition 27 of the
36 SUP related to recreation areas and facilities?
37

38 Michael Harvey: Yes sir, they do.
39

40 Geof Gledhill: Have you prepared a chart for the way Scotswood as platted and as developed,
41 Churton Grove, Braddock Park, the commercial area satisfies the complained about recreation
42 recommendations contained in the SUP?
43

44 Michael Harvey: Yes sir.
45

46 Geof Gledhill: Would you refer to that chart which is already in evidence.
47

48 Michael Harvey: Attachment B. Staff essentially took Mr. Buck's argument and indicated the
49 active recreation area and I am quoting from my response includes all necessary lot areas
50 supporting the use of said amenities. This includes parking, property located in required
51 setbacks, undeveloped property available for recreational use, required open space for recreation

1 lots and the appropriate landscaping. We have provided our estimates utilizing Mr. Buck's
2 arguments in terms of what could or could not be classified as active recreation and we have
3 determined that there are 7.48 acres in total of the development that is available for active
4 recreation.

5
6 Geof Gledhill: Excluding those things Mr. Buck would you have exclude, you still come up with
7 that number.

8
9 Michael Harvey: That is not an admission that Mr. Buck's claim is correct.

10
11 Geof Gledhill: Have you also prepared a document that connects the various PINs that you show
12 on the chart that is Exhibit B to the various recorded plats and illustrates those parcels?

13
14 Michael Harvey: Yes sir.

15
16 Geof Gledhill: Do you have that document with you?

17
18 Michael Harvey: Yes I do.

19
20 Geof Gledhill: Will you explain that please.

21
22 Michael Harvey: I am providing the board and the applicant a breakdown of the platted
23 recreational area. I have included the appropriate plats which I am referencing. These plats are
24 all contained in Attachment D which has been entered into the record. Phase I, page 12 deals
25 with the dedication of open space around Strouds Creek which is also referred to as Nancy Hill
26 Creek. These names become synomous depending on which plat you are looking at. This
27 includes the dedication of an open space pedestrian and non-motorized vehicle easement which
28 is required per Condition 27 of the approved recorded special use permit. The plat which is on
29 page 3 includes 5.260 acres of area. Phase IV is referred to on Plat Book 103, page 63 and 64.
30 We have the dedication of open space for the development of trails and pedestrian access points.
31 There are 4.98 acres as denoted on this plat. We also have on Phase IV the dedication of active
32 recreation space between lots 107 and 106. This is the top lot Mr. Buck was referring to earlier.
33 This is .292 acres for the plat and in Phase IV we have the dedication of active recreation space
34 specifically in an open grass play area according to the plat that is on Plat Book 103 page 64,
35 page 5 of this document, it is 5.4 acres. Moving to the Braddock Park multi-family portion of the
36 special use permit, is on pages 6 through 12 which also includes the site plan approved by the
37 planning staff. We have 2.381 acres per the approved plat and on the next page we have the
38 Phase II a recreation area (located in the single-family portion of the project). This is the area
39 including a pool, club house, parking, basketball court, tennis court, playground and gazebo and
40 also includes dedication of open space around Strouds Creek aka Nancy Hill Creek development
41 of a trail system and includes the imposition of an open space pedestrian non-motorized vehicular
42 easement per Condition 27 of the recorded SUP. There is a total according to the plat and we
43 have provided you on pages 13 through the end of the document, three plats that represent this
44 property a total of 16.127 acres of land area reserved for rec purposes. Note that on the plat
45 contained on page 14, we have a note indicating there are 7.06 acres reserved for active
46 recreation and 9.905 acres reserved for passive recreation. Adding all these together there is a
47 total of 15 acres of active recreation and a total of 19 acres of passive recreation of this project.
48 This figure, I should add does not include sidewalks that are not captured in these various
49 recorded documents. There are foot paths and sidewalks throughout the project not referenced
50 here. I would like to remind the board, the regulations in place at the time the special use was
51 approved most notably those establishing the requirements for the provision of rec amenities

1 were detailed in Articles 6 and 7. The document has been entered into record, Attachment I. The
2 required ratios denoting how much recreational area is required is listed on the approved site plan
3 and I am referencing the condition of the approved plat.
4

5 Geof Gledhill: I would offer this document into evidence.
6

7 Michael Buck: Where is the 15 acres of active recreation space?
8

9 Michael Harvey: We have indicated that when you look at what is provided on these plats, there
10 is a total of 15.141 acres. There is 7 acres on Phase IIa as noted on the plat, there is the .292
11 acres, Phase IV in the tot lot, the 5.4 acres reserved for the dedication of active recreation space
12 in Phase IV, this is the grassy field, the 2.381 acres in the Braddock park multi-family portion of
13 this project with the swimming, required parking for the swimming pool and other recreation
14 amenities.
15

16 Michael Buck: Everything in the fifth column, you are counting as active recreation?
17

18 Michael Harvey: Yes.
19

20 Michael Buck: What is the definition of active recreation?
21

22 Geof Gledhill: With all due respect, Mr. Buck is cross examining.
23

24 Geof Gledhill: When Scotswood was considered and approved by Orange County in 1986
25 leading to the May 20, 1986 SUP approval, were County Zoning regulations and subdivision
26 regulations contained in the zoning ordinance and a separate subdivision regulation?
27

28 Michael Harvey: Yes.
29

30 Geof Gledhill: Are those documents in the record?
31

32 Michael Harvey: Yes.
33

34 Geof Gledhill: Explain the reason for the "1981" draft ordinance and the other zoning ordinance
35 for the board so they understand why we have both of these in the record.
36

37 Michael Harvey: In addressing the appeal which first came to my attention in 2012, and in looking
38 at the file for the Scotswood planned development special use, I determined there was no copy of
39 the ordinance that existed on the day this project was approved in the public record or in our files.
40 In order to try to determine what regulations were imposed at the time, we found a draft copy of
41 the 81 ordinance and compared it to a copy of the ordinance that was in force and effect the day
42 Mr. Buck submitted his appeal. We determined the language was consistent, there had not been
43 major modification of Article 7 specifically dealing with the review and approval plan and approval
44 of planned developments. We included both the draft and actual zoning ordinance in the record
45 so this board was able to determine what regulations existed and verify that no major changes
46 had occurred in the planned development regulations that would call what we are about to testify
47 into question.
48

49 Geof Gledhill: Specifically, with respect to the recreation requirements, are they the same?
50

51 Michael Harvey: Yes sir.

1
2 Geof Gledhill: Let me rephrase that to make it clear. The 1981 draft ordinance contains the
3 same recreation requirements as the 2008 ordinance except for amendments that were made
4 and were noted on in the 2008 document?

5
6 Michael Harvey: Yes sir.

7
8 Geof Gledhill: When the board is looking at the 1981 Draft Ordinance, was Mr. Buck's appeal
9 speaks extensively about Section IV.B.7.b of the Orange County Subdivision Regulations, was
10 that first adopted by Orange County on August 4, 1986?

11
12 Michael Harvey: Yes sir. Minutes from of those meetings are contained in Attachment F.

13
14 Geof Gledhill: Prior to the adoption of Section IV.B.7.b of the County's subdivision regulations on
15 August 4, 1986, what were the recreation requirements and essentially when this projects was
16 reviewed and approved by the Board of County Commissioners on May 20, 1986, what were the
17 recreation requirements and refer to the ordinances you have.

18
19 Michael Harvey: Recreational requirements for all planned developments were defined in detail
20 in Section 6.12.2.6 of the Zoning Ordinance requiring a specific recreational space ratio of .019.
21 The process to determine required recreation was to take the gross size of a project and multiply
22 it by the ratio and that would give you the acreage required. In conducting my research it was
23 determined at the at time when they were reviewing the project in 1985 and 1986 that 15 total
24 acres of recreation would be required and then there was an additional breakdown of active and
25 passive recreation that there would be 7 acres minimum required for active. The approve site
26 plan contained in Attachment C provides a breakdown of the required ratios enforced at the time
27 this project was reviewed and approved and provides documentation denoting how compliance
28 would be achieved.

29
30 Geof Gledhill: Were the requirements met in the recorded plats for this project?

31
32 Michael Harvey: Yes.

33
34 Geof Gledhill: The recreation requirements that existed when this special use permit was
35 approved were not detailed and not as specific as the IV.B.7.b and essentially the recreation
36 requirements that Mr. Buck has been talking about, isn't' that correct?

37
38 Michael Harvey: That is correct.

39
40 Geof Gledhill: Condition 27 of the special use permit relating to recreation is couched in what
41 terms.....

42
43 Michael Harvey: Recommendation for the provision of rec amenities are as follows; there is a
44 breakdown in the list of the minimum required recreation that would be desirable or necessary
45 including tennis courts, swimming pool, the appropriate parking, top lot, open grassy field.
46 Condition 27 provides a list of the necessary requirements the developer would have to utilize in
47 order to facility compliance with the SUP.

48
49 Geof Gledhill: All of that is couched in terms of recommendation?

50
51 Michael Harvey: That is correct.

1
2 Geof Gledhill: That is because none of that is required is specified in the county's zoning
3 ordinance in 1985 or May 20, 1986.
4
5 Michael Harvey: Yes.
6
7 Larry Wright: Can you repeat that again.
8
9 Michael Harvey: The current subdivision regulation, Section IV.B.7.b provides for the specific
10 provision of a certain percentage, certain requirement of the rec area. The ordinance as it
11 currently exists requires certain minimum recreational amenities, swimming pool, tennis court,
12 etc., none of that level of specificity existed in 1985, 1986 when that site plan was submitted or
13 reviewed by the county. The only thing required which is detailed in Article 6 of the ordinance
14 entered into the record was the certain provision of amenities based on total lot area for the
15 projects.
16
17 Geof Gledhill: By provision you mean size, amount of acreage.
18
19 Michael Harvey: What this special use permit did was to flesh out, this is what we recommend
20 you build to satisfy the required rec area that we have determined that is necessary per Section
21 6.12.2.6 of the zoning ordinance.
22
23 Jeff Schmitt: Recommended or have to?
24
25 Michael Harvey: Recommended. The condition specifically states the following
26 recommendations are made with respect to provision of recreation amenities. I will refer you to
27 Condition 27 in the SUP that is contained in Attachment C in that specific language.
28
29 Geof Gledhill: August 4, 1986, is your testimony as to when the recreation components were
30 fleshed out in the adoption of Section IV.B.7.b in the subdivision regulations.
31
32 Larry Wright: Those conditions are those that were considered when this special use permit was
33 granted?
34
35 Geof Gledhill: No they were not. The special use permit was approved 3 or 4 months before.
36
37 Michael Harvey: I would like to call the board's attention to the minutes in Attachment F, there is
38 a specific statement made by Marvin Collins who was the planning director of Orange County,
39 who is now deceased, indicated that Scotswood would not be subject to the regulations as it had
40 already been previously approved.
41
42 Geof Gledhill: The recreation component IV.B.7.b was being discussed while Scotswood was
43 going through the process.
44
45 Michael Harvey: That is correct. Scotswood SUP was issued before those specific recreation
46 requirements were approved.
47
48 Larry Wright: Is that statement that the planning director made to the commissioners at that time,
49 has that been submitted into evidence here?
50
51 Michael Harvey: Yes.

1
2 Geof Gledhill: In my argument I will quibble with the planning director's use of the term exempt.
3 Another term is legally correct and yes that is in your evidence.
4
5 Geof Gledhill: Is it true that at the time the special use permit was approved by the BOCC the
6 recreation requirements, this ratio you have talked about, included recommendations with respect
7 to satisfying its ration, the recreation area could include parking or slopes of any percentage and
8 all the things that would now not be permitted by the revisions?
9
10 Michael Harvey: Yes.
11
12 Michael Buck: Is that in the ordinance somewhere? You have referenced 6.12.
13
14 Geof Gledhill: Please wait until you cross-examine. What was required in terms of recreation for
15 Scotswood beyond the RSR or these ratios you talked about.
16
17 Michael Harvey: That is the recreation space.
18
19 Geof Gledhill: That was negotiated between the developer and the planning staff, correct?
20
21 Michael Harvey: Yes.
22
23 Geof Gledhill: On the basis of the negotiation were the county's negotiating point the
24 recommendations?
25
26 Michael Harvey: Yes.
27
28 Geof Gledhill: Those negotiations continued until the recording of the plats?
29
30 Michael Harvey: Yes sir.
31
32 Geof Gledhill: Ground of appeal F, does it appear to speak to Condition 27d of the special use
33 permit. Ground of Appeal F is one related to the stream crossings. Michael and I are sharing
34 documents. The plat does not indicate locations or easements for SUP mandated pedestrian
35 bridges?
36
37 Michael Harvey: Yes sir.
38
39 Geof Gledhill: Was there anything in the SUP that required that easements be provided?
40
41 Michael Harvey: No sir.
42
43 Geof Gledhill: To find out where these facilities are, you have to look on the ground.
44
45 Michael Harvey: Yes sir.
46
47 Geof Gledhill: What are the, particularly with respect to the bridges, what are the bridges that
48 exist at this project right now?
49
50 Michael Harvey: There are two bridges. Mr. Buck has shown the board a picture he entered into
51 evidence showing a pedestrian bridge on the northwestern portion of the project towards the edge

1 of the project. There is also Berryman Boulevard which has a sidewalk which is counted as a
2 pedestrian bridge and crossing as well. As it has been testified this evening, I will confirm we
3 have a network of trails across including under the bridge affording access around Nancy Hill
4 Creek/Strouds Creek as required by the special use permit.

5
6 Geof Gledhill: Do you have illustrations of your testimony?
7

8 Michael Harvey: Yes. I am handing out document detailing the location....
9

10 Geof Gledhill: Some of this does duplicate what Mr. Buck has done.
11

12 Michael Harvey: On the cover page, Condition 27, this is paraphrased for you referenced the
13 installation of pedestrian access points off Graham Drive, Cameron Circle to allow for access to
14 the walking/hiking paths on the other side of Nancy Hill Creek. One of the concerns that staff had
15 in terms of bringing this appeal forward was for you to understand that Graham Drive and
16 Cameron Circle don't exist. They were on the approved site plan but those names have changed
17 as allowed so we wanted to provide you with documentation showing you where these stream
18 crossing are and these access points are so you will have a better understanding that the
19 requirements of Condition 27 with respect to this issue have been addressed.. Open space
20 passive area access consistent with the requirements of the condition are now located off
21 Churton Grove Boulevard, West Hatterleigh Avenue and Berryman Avenue. Berryman Avenue is
22 the bridge extended over Nancy Hill/Stroud's Creek. Page 2 provides you an approximate detail
23 of ...
24

25 Larry Wright: Berryman Avenue goes over Nancy Hill Creek?
26

27 Michael Harvey: Yes. This is Berryman here with the blue drawn roadway.
28

29 David Rooks: I don't know that he understands that this is Scotswood.
30

31 Michael Harvey: We wanted to provide you with a copy of the approved site plan showing the
32 current street configuration so you can get an idea of what it looks like currently. Page 3 is a
33 clean copy of Churton Grove the special use permit project and page 4 provides a map showing
34 various trails. I will point out that this street, Churton Grove Boulevard, you will see the green
35 denoted trail system leading from Churton Grove Boulevard and Nancy Hill Creek. There is a
36 sidewalk which we have pointed out with a highlight on Berryman Boulevard, bridge with sidewalk
37 allowing crossing of Nancy Hill Creek. There are access points from West Hatterleigh here in
38 Phase IV.
39

40 Larry Wright: You said there is a sidewalk on Berryman Boulevard that pedestrians can cross
41 Nancy Hill Creek?
42

43 Michael Harvey: Yes. There is an access point off West Hatterleigh which allows access to
44 those portions around Nancy hill Creek. The purpose of this document is to provide the board
45 with the assurance we have met the obligation for providing connections from streets that no
46 longer exist at least in the current development of this project but we have required the developer
47 to comply with the nature of the request.
48

49 Jeff Schmitt: There are two bridges?
50

1 Michael Harvey: Technically there are three. You have a foot bridge here, a small foot bridge
2 here which crosses Nancy Hill Creek.

3
4 Jeff Schmitt: So the little corner that crosses the blue from a definitional perspective we are
5 saying is sufficient even though the floodplain exists?

6
7 Michael Harvey: This qualifies as the foot bridge crossing as required by the SUP. This is just
8 crossing a small tributary. It is a convenience. Then we have Berryman Avenue that has a
9 sidewalk which we count as a required bridge and it is our stipulation that only two bridges are
10 required.

11
12 Geof Gledhill: It is your testimony that there are two pedestrian bridges crossing Nancy Hill Creek
13 that area connected to the pedestrian trail system?

14
15 Michael Harvey: Yes sir.

16
17 Geof Gledhill: The specific recreation requirements in the special use permit are
18 recommendations?

19
20 Michael Harvey: Yes.

21
22 Geof Gledhill: That is all I have.

23
24 Michael Buck: About the bridges, it sounded like you were saying there were three bridges and I
25 wanted to flesh that out, were you trying to make a definitional distinction?

26
27 Michael Harvey: My only distinction is there are only two bridges in my mind that satisfy the
28 requirements of the SUP. There was a third bridge, that foot bridge crossing a tributary and does
29 not cross Nancy Hill Creek. There is a small foot bridge here.

30
31 Michael Buck: You are counting the Berryman Bridge as one, the tributary as two and the small
32 foot bridge as three.

33
34 Michael Harvey: I am not counting the foot bridge at all.

35
36 Michael Buck: You were going to show me the section of the code that allows the inclusion of
37 parking and setbacks are part of the recreational area calculation.

38
39 Michael Harvey: In Section 6.12.2 of the zoning ordinance, you have definitions and methods of
40 measurement related to standards for the land use intensity ratio requirements and limitations.
41 Section 6.12.2.1 gets to the definition of gross land area and what that includes, of lots, of
42 residential land area, residential floor area, recreation space which is Section 6.12.2.6, recreation
43 space part of total and livability of open space is exterior area appropriately approved for common
44 recreational use. That includes all applicable necessary infrastructure to support the use of the
45 said facility for that purpose which I claim is parking or any other necessary infrastructure which
46 would include required landscaping, buffering, setbacks, that make the recreation space
47 conforming to the provisions of the SUP.

48
49 Michael Buck: You mentioned the testimony of Marvin Collins in a meeting in 1986 where he said
50 Scotswood would not be included in the new subdivision regulations. Did the BOCC choose to
51 include that exclusion in the code.

1
2 Michael Harvey: There is no need to include any exclusion in the code. They did not challenge
3 him neither did they require Mr. Collins to write an ordinance to require Scotswood to be
4 excluded. We have here the May 27 Quarterly Public Hearing which is where this item was
5 discussed on page 180.

6
7 Michael Buck: Can you explain the active recreation guidelines used in your estimate?
8

9 Michael Harvey: In terms of my response in Attachment B? I used the various acreage
10 breakdowns as denoted on the plat for each designated recreational area.

11
12 Michael Buck: The total acreage of the parcel.

13
14 Michael Harvey: Yes.

15
16 Larry Wright: We are at the point where evidence has been submitted for the applicant and the
17 county and I would like to ask if it would possible to recess and reconvene next month to the
18 regularly scheduled for October 14. Would we have a draft of the minutes prior to that meeting?
19

20 Debra Graham: Yes.

21
22 Larry Wright: I would like to ask the board members who will be available?
23

24 Geof Gledhill: If you recess the meeting until October 14 and it turns out that you can't get a
25 quorum you can recess it again.

26
27 David Rooks: Would you ask the parties if they anticipate any more evidence or can we close the
28 public hearing?
29

30 Jeff Schmitt: Is there a particular reason we need to close it, then we can keep it open.
31

32 David Rooks: Your motion would be to continue the public hearing until the next meeting date. It
33 would be good if we did have a draft of the minutes for the board members to refresh what
34 happened tonight.

35
36 **MOTION:** made by Jeff Schmitt to recess until October 14, 2013 at 7:30pm in this conference
37 room for a continuation of this hearing. Seconded by Karen Barrows.

38 **VOTE:** Unanimous
39

40 Michael Harvey: We do not have to re-advertise the hearing.
41

42
43 **AGENDA ITEM 6: Adjournment**

44
45 Meeting was adjourned at approximately 10:55 p.m.