

**MINUTES**  
**BOARD OF ADJUSTMENT**  
**DECEMBER 10, 2012**  
**REGULAR MEETING**

- MEMBERS PRESENT:** Larry Wright, Full Member (Chair)  
Dawn Brezina, Full Member (Vice Chair)  
David Blankfard, Full Member  
James Carter, Full Member  
Mark Micol, Alternate Member
- STAFF PRESENT:** Michael Harvey, Current Planning Supervisor  
Debra Graham, Board Secretary  
Sahana Ayer, Staff Attorney
- OTHERS PRESENT:** Brian Ferrell, Counsel for Board of Adjustment  
Steve Keadey, Counsel for UNC, Office of the University Counsel

**AGENDA ITEM 1: CALL TO ORDER AND ROLL CALL**

Larry Wright called the meeting to order at 7:31 p.m.

**AGENDA ITEM 2: CONSIDERATION OF ADDITIONS TO AGENDA**

There were no additions to the agenda.

**AGENDA ITEM 3: APPROVAL OF MINUTES**

A. NOVEMBER 12, 2012

Brian Ferrell: On page 3, line 125 should read, "Planning staff erred with the issuance of the November 16, 2010 letter to UNC indicating it did not required a Class A Special Use Permit".

Sahana Ayer: On page 3, line 135 should read, "The County objects to the appearance of Preserve...". On page 3, line 144 should read, "Mr. Leath also lacks standing to appeal Mr. Harvey's decision".

Steve Keadey: On page 3, line 146 should read, "Mr. Chairman, to the extent it is necessary, the University, who I don't believe is a party to this, but obviously interested in the outcome..."

Brian Ferrell: On page 5, line 257 should read, "...made out of this hearing that aren't subject to cross..."

Larry Wright: On page 5, insert a new line after 251, "Take your time".

1 Brian Ferrell: On page 6, line 315 should read, "...to prosecute an appeal." On page 7, line  
2 368 should read, "...alternatively because he is a member of the association. If he is, and  
3 maybe we will hear from him, or Preserve Rural Orange. If he is a member of the  
4 association..." Line 380 should read, "...of the approval at issue, that they have some ...".  
5 On page 8, line 410 should read, "...should have the opportunity to rebut the testimony that  
6 is offered. The limits..."

7  
8 Sahana Ayer: On page 8, line 439 should read, "...represents the interests of the Orange  
9 County Residents..."

10  
11 Brian Ferrell: On page 9, line 484 should read, "...the arguments directly on standing and  
12 decide not to move forward. But should you want..."

13  
14 Sahana Ayer: On page 9, line 442 should read, "...objection was that since Mr. Leath was  
15 not the original applicant and he is only appearing now, therefore, his application is not  
16 timely. If Mr. Leath is a member of Preserve Rural Orange, he wasn't on the application..."

17  
18 Mark Micol: On page 10, line 518 should read, "...testimony or not consider her testimony, if  
19 we find she is not in proper standing. Is that correct?"

20  
21 Dawn Brezina: On page 10, line 504 should read, "...I am changing my mind on how the  
22 board should address this. Perhaps we should hear..."

23  
24 Sahana Ayer: Correct spelling of last name from Ayers to Ayer on all lines.

25  
26 Brian Ferrell: On page 11, line 578 should read, "The objection would be the appropriate  
27 evidence is the report itself..." On page 14, line 719 should read, "...rather than a factual  
28 determination. I think ultimately..." On page 16, line 843 should read, "Again, it is important  
29 to clarify what is before this board tonight. From what the applicant..." On page 17, line 926  
30 should read, "...but I don't know if that decision and determination..." Line 927 should read,  
31 "...plan application at issue. The board will have to..." Line 929 should read, "...are they  
32 relevant to the determination of whether the application was approved correctly?"

33  
34 Larry Wright: On page 17, line 931 should read, "...in our discussions we can discuss  
35 whether we feel..."

36  
37 Sahana Ayer: On page 16, line 838 should read, "...the progress of construction, I don't see  
38 the relevance ..."

39  
40 Steve Keadey: On page 17 line 886 should read, "The university would object on relevance  
41 grounds, and that would include an objection to the board considering any part of Exhibit Two  
42 starting on page 10, for which is the page that says, "Active Construction Projects: Bingham  
43 Facility" and continuing." On page 17, line 898 should read, "Page 9, is the page that says  
44 "Existing Photos-UNC Site Plan" and under that, "from agenda packet, page 134. The next  
45 page, page 10 is entitled, "Active Construction Projects: Bingham Facility."

1  
2 Sahana Ayer: On page 19, line 1012 should read, "...on the property. So it is". Line 1016  
3 should read, "...has to comply with DENR..."

4  
5 Brian Ferrell: On page 19, line 1003 should read, "...are hearing is a legal argument and she  
6 has one view and the county has one view of a legal interpretation." Line 1004 should read,  
7 "Obviously, if there is a contrary view..."

8  
9 Steve Keadey: On page 20, line 1079 should read, "We agree with the decision that was  
10 made and that has been approved."

11  
12 Sahana Ayer: On page 20, line 1067 should read, "...septic system. The Board of  
13 Adjustment has no authority to comment on the compliance..." Line 1071 should read,  
14 "...does not have the authority to regulate it and that is the situation here. We are talking..."

15  
16 Michael Harvey: On page 20, line 1076 should read, "I have been advised by counsel to only  
17 respond to questions from the board or cross examination."

18  
19 Brian Ferrell: On page 22, line 1201 should read, "...heard some about tonight that deal with  
20 what does the statute mean...". On page 23, line 1208 should read, "Essentially, the issue of  
21 the Davidson County versus High Point case was whether or not a sewage treatment plant  
22 was subject to the zoning authority...". Line 1213 should read, "...counties are allowed to put  
23 together for public good. Examples of public enterprises are sewage...". Line 1221 should  
24 read, "...the Rocky Mount Board of Adjustment decision. In that case you had a school that  
25 had a building...". Line 1242 should read, "...those previous iterations, it appears from the  
26 record, they were subject to the zoning jurisdiction..."

27  
28 David Blankfard: On page 24, lines 1269 and 1270 should read, "The one about the building,  
29 a sewage treatment plant is not considered a building; I have issue with the fact that if it has  
30 four walls and a roof. It is a building structure."

31  
32 Brian Ferrell: On page 24, line 1283 should read, "...have here that zoning is not applicable  
33 at all. The County's argument is we don't have the authority to regulate this if we wanted...".  
34 Line 1306 should read, "...determinations, nobody attempted to appeal them. Whether or  
35 not they could be appealed is another...". Line 1309 should read, "...determinations was  
36 made prior to the UDO. In my view, what is before you, is the appeal you see on this case".  
37 Line 1317 should read, "...have an appeal from those actions. Your question is, do four fifths  
38 of you believe, in order to...". Line 1308 should read, "required pursuant to your UDO or the  
39 then in effect zoning ordinance assuming that one of those..."

40  
41 David Blankfard: On page 24, line 1289 should read, "...treatment plant then or was that just  
42 a proposed modification or was it already done?"

43  
44 Michael Harvey: On page 25, line 1338 and line 1339 should read, "I would call the board's  
45 attention to the November 2010 letter that articulates the county staff's opinion..."

1  
2 Steve Keadey: On page 25, line 1349 should read, "I think I said what I can say, which is  
3 that I agree with the staff's determination in the November 10 letter." Line 1351 should read,  
4 "...State Statutes 153A-347 limits the County's zoning authority for state land in ways that it's  
5 not limited...". Line 1352 should read, "That statute gives this entity a different set of  
6 authority, which is slightly smaller than it is for land that is not owned by the state. I think this  
7 waste water system falls into that category." Line 1355 through line 1359 should read,  
8 "...Davidson County Court of Appeals decision but I think the Nash County decision is  
9 directly on point. In that case, as Mr. Ferrell has described, there is an existing building with  
10 a use that is not a building. And the conclusion was clear, by a unanimous panel of the Court  
11 of Appeals; Zoning authority did not exist for that, no special use permit for that. I would  
12 submit to you that this is the same case. That is my legal argument." On page 26, line 1374  
13 should read, "This waste water system is subject to a permit, but it is not a special use  
14 permit. It is regulated by DENR (Department of Environment and Natural Resources).  
15  
16 Mark Micol: Page 26, line 1414 should read, "I am saying that there is a possible impact to  
17 property value."  
18  
19 Brian Ferrell: On page 27, line 1467 should read, "I think it is important to have facts to  
20 support your decision."  
21  
22 Dawn Brezina: On page 27, line 1455 should read, "I agree. In my interpretation of the  
23 statute and with the...". Line 1464 should read, "We could list different findings of fact."  
24  
25 Michael Harvey: On page 27, line 1453 "water treatment system due to the wording in North  
26 Carolina Statute 153A-347".  
27  
28 Brian Ferrell: Please confirm line 1457 "Department of Environment and Natural Resources".  
29  
30 Michael Harvey: On page 28, line 1488 should read, "water treatment system due to the  
31 wording in North Carolina Statute 153A-347 and based on case law that was presented...".  
32  
33 Mark Micol: On page 26, line 1409, should it read, Mr. Leath is the aggrieved party, should it  
34 read Mr. Leath is potentially the aggrieved party? My intent was to say potentially.  
35  
36 Brian Ferrell: It is potentially the aggrieved party.  
37  
38 Mark Micol: We need to correct that in any further motions. It is again on page 27, line 1430  
39 should read, "...based on the fact that Mr. Leath is potentially the aggrieved party".  
40  
41 Mark Micol: My intention was not to make a decision on whether he was aggrieved or not.  
42  
43 Brian Ferrell: Keep in mind, the standing requirements require someone to be grieved.  
44  
45 Debra Graham: Do we leave it in?  
46  
47 Mark Micol: I think we leave it out because I say "possible impact on property value".  
48

1 Brian Ferrell: If you are saying you heard his testimony and going by what he said, if you  
2 say, "Mr. Leath was the aggrieved party with respect to possible impact of property value and  
3 possible well contamination"?

4  
5 Mark Micol: Right. That is actually what I say on page 27.

6  
7 Sahana Ayer: On page 19, line 1008 should read, "...defined what a building is. It clearly  
8 states in the decision that it is not intended by the legislature...".

9  
10 Steve Keadey: I have a question about listening to the tape again. On page 5, line 241  
11 reads, "Preserve Rural Orange is a citizen non-profit founded 40 years ago". That may be the  
12 case but my understanding is that it may be a shorter time than that.

13  
14 Brian Ferrell: Secretary of State Records do reflect a shorter duration so I think it would be  
15 appropriate for the board to direct the secretary to listen to the tape. If she said 40, it should  
16 be 40 but I understand counsel's questions because the entity was not formed 40 years ago.

17  
18 **MOTION** to approve minutes with corrections by Dawn Brezina. Seconded by Mark Micol.

19 **Vote:** Unanimous

20  
21 **AGENDA ITEM 4: PUBLIC CHARGE**

22  
23 *The Board of Adjustment pledges to the citizens of Orange County its respect.*  
24 *The Board asks its citizens to conduct themselves in a respectful, courteous*  
25 *manner, both with the Board and with fellow citizens. At any time should any*  
26 *member of the Board or any citizen fail to observe this public charge, the Chair*  
27 *will ask the offending person to leave the meeting until that individual regains*  
28 *personal control. Should decorum fail to be restored, the Chair will recess the*  
29 *meeting until such time that a genuine commitment to this public charge is*  
30 *observed. All electronic devices such as cell phones, pagers, and computers*  
31 *should please be turned off or set to silent/vibrate.*

32  
33 *The Board of Adjustment is a quasi-judicial administrative body established in*  
34 *accordance with the provisions of local regulations and State law to perform specified*  
35 *functions essential to the County's planning program. Action(s) taken by the board are*  
36 *based solely on competent, substantial, and material evidence presented during a*  
37 *previously scheduled and advertised public hearing on a specific item. As detailed*  
38 *within Section 2.12.2 of the UDO the Board chair reserves the right to exclude*  
39 *evidence and testimony that is deemed: 'incompetent, irrelevant, immaterial, or unduly*  
40 *repetitious' and therefore fails to reasonably address the issues before the Board of*  
41 *Adjustment. While it should be noted there is no time limit on the presentation of*  
42 *evidence, the Chair asks that the presentation of evidence be consistent with*  
43 *established policies, rules of procedure, and acceptable levels of decorum to ensure a*  
44 *fair and equitable hearing for all parties.*

1  
2 **AGENDA ITEM 5: REVIEW AND CERTIFICATION OF RECORD –**  
3 **CASE NUMBER A-3-12 Appeal of a decision made by the**  
4 **Zoning Officer submitted by Clifford Leath**  
5

6 The purpose of this item is to allow for the Board members to certify the record and order  
7 concerning the disposition of this case. The PUBLIC HEARING on this item was closed on  
8 November 12, 2012 and no additional public comment on the proposal shall be heard.  
9

10 Brian Ferrell: This is a written decision in accordance with the board rules. You must  
11 provide a written decision to the applicant and this is that document I have prepared for your  
12 consideration tonight in this draft form. I am happy to discuss it and answer any questions.  
13 Before we begin that process, I need to make two slight changes. On page 30, Roman  
14 Numeral II, I would like the board to consider adding the words, "Findings and Conclusion of  
15 Law Regarding Standings". Then on Roman Numeral III, "Findings and Conclusions of Law  
16 Regarding the Appeal".  
17

18 **MOTION** made by David Blankfard to approve the decision as amended by Mr. Ferrell.  
19 **Seconded** by Mark Micol.

20 **Vote:** Unanimous  
21

22 Brian Ferrell: Your rules of procedure contain a method for distribution of the decision so I  
23 ask the secretary to take note of that.  
24

25 Michael Harvey: We send it out certified mail to listed parties. In this case, it would be  
26 Clifford Leath and Preserve Rural Orange. We will also copy the County Attorney's office  
27 and Mr. Ferrell as the Board of Adjustment Attorney. The applicants would have 30 days to  
28 appeal.  
29

30 **AGENDA ITEM 6: ADJOURNMENT**  
31

32 **MOTION** made by Mark Micol to adjourn. **Seconded** by Dawn Brezina.

33 **Vote:** Unanimous  
34

35 Meeting was adjourned at approximately 8:30 p.m.  
36