

**THE TOWN OF HILTON HEAD ISLAND**  
**Board of Zoning Appeals**  
**Minutes of the Monday, October 25, 2010 Meeting**  
**2:30pm – Benjamin M. Racusin Council Chambers**

**APPROVED**

Board Members Present: Chairman Roger DeCaigny, Vice Chairman Peter Kristian, Alan Brenner, Stephen Murphy and Bob Sharp

Board Members Absent: Michael Lawrence and Jack Qualey

Council Members Present: Bill Ferguson, George Williams and Bill Harkins

Town Staff Present: Nicole Dixon, Senior Planner & Board Coordinator  
Anne Cyran, Senior Planner; Teri Lewis, LMO Administrator  
Gregg Alford, Town Attorney; Brian Hulbert, Board Attorney  
Jayme Lopko, Senior Planner, Comprehensive Planning Division  
Kathleen Carlin, Board Secretary

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**1. CALL TO ORDER**

Chairman DeCaigny called the meeting to order at 2:30pm.

**2. ROLL CALL**

**3. INTRODUCTION TO BOARD PROCEDURES**

Chairman DeCaigny stated the Board's procedures for conducting today's meeting.

**4. APPROVAL OF THE AGENDA**

Vice Chairman Kristian made a **motion** to **revise** the agenda as follows: (1) move Item # 10, Board Procedures, to the top of the agenda; (2) move Item # 9, public hearing, APL100010, to be heard before APL100007, because it is a jurisdictional issue and will decide whether or not the Board will hear APL100007. At this point, Chairman Kristian requested legal advice from Brian Hulbert, Board Attorney, regarding the Board's receipt of a separate jurisdictional issue (a separate appeal). Mr. Hulbert and Vice Chairman Kristian discussed the issue and Mr. Hulbert stated that he believed that the jurisdictional issues (with regard to the appeal) were properly received; and (3) change the hearing for all three appeals from a Public Hearing to a Public Meeting. Mr. Murphy **seconded** the motion and the motion **passed** with a vote of 5-0-0.

**5. APPROVAL OF THE MINUTES**

Vice Chairman Kristian made a **motion** to **approve** the minutes of the September 27, 2010 meeting as presented. Mr. Sharp **seconded** the motion and the motion **passed** with a vote of 4-0-1. Mr. Brenner abstained from the vote due to his absence from the meeting.

## 6. BOARD BUSINESS

Ms. Nicole Dixon reported that the Board reviewed the proposed revisions to the Rules of Procedure on September 27, 2010. Chairman DeCaigny requested additional comments from the Board today and none were received. Chairman DeCaigny requested that a motion for adoption of the revised Rules of Procedure be made.

Vice Chairman Kristian made a **motion** to adopt the revised Rules of Procedures as presented by the staff. Mr. Sharp **seconded** the motion. Before the vote was taken, Chester C. Williams, Esq., requested the Board's permission to present public comments on this issue. Chairman DeCaigny asked that a motion be made regarding this request. Mr. Sharp made a **motion** to allow Mr. Williams to present comments. Mr. Brenner **seconded** the motion and the motion **passed** with a vote of 5-0-0.

Mr. Williams stated his opposition to the Board's adoption of the revised Rules of Procedure, particularly as the revisions related to the issue of requiring four affirmative votes to pass a motion on an appeal. Mr. Williams stated that this rule is unfair to the appellant. The Board discussed the issue with Mr. Williams. Vice Chairman Kristian stated that he would like to receive a response from Brian Hulbert, Board Attorney.

Mr. Hulbert responded that Robert's Rules of Procedure state that the Board's voting requirements are entirely up to the Board's discretion. The motion **passed** with a vote of 4-1-0. Mr. Sharp was against the motion.

## 7. NEW BUSINESS PUBLIC HEARING

**APL100010**: Request for Appeal from Chester C. Williams on behalf of Ephesian Ventures, LLC. The Community Development Department issued a letter stating that an appeal application filed by the appellant should not be heard by the Planning Commission since the subject of the appeal was an administrative determination. The appellant contends that the Community Development Department erred in its decision and is requesting that town staff be directed to accept the previously submitted appeal to the Planning Commission.

Before Ms. Nicole Dixon could begin her presentation on behalf of the staff, Chester C. Williams, Esq., requested permission from the Board to allow statements to be heard from Michael Mogil, Attorney, for the Edgewater Homeowner's Association. The Board discussed the issue and granted this request.

Mr. Mogil requested that the Board grant a request for postponement of the review of both APL100007 and APL100010 to a future meeting. Mr. Mogil's request for postponement is for review of both the jurisdictional issues and the substantive issues for both applications. Mr. Mogil stated that the parties involved in these two appeals are trying to work the issues out among themselves.

Vice Chairman Kristian requested a response from Chester C. Williams, Attorney for Ephesian Ventures. Mr. Williams stated that he agreed with Mr. Mogil's request for the postponement of these two appeals. The Board discussed the issue and agreed to the request. Chairman DeCaigny then requested that a motion be made.

Vice Chairman Kristian made a **motion** to **grant** the request for postponement of Applications for Appeal, APL100007 and APL100010 on both the jurisdictional issues and the substantive issues. Both parties have agreed to postpone these applications to the December 20, 2010 meeting. Mr. Murphy **seconded** the motion and the motion **passed** with a vote of 5-0-0.

Gregg Alford, Town Attorney, stated for the record, that the Town is prepared to proceed on the jurisdictional issue. Mr. Brenner stated that he was unable to ascertain an injury to the aggrieved party.

Before proceeding to the next business item, public hearing for APL100011, Chester C. Williams, Esq., requested a postponement of the public hearing of APL100011. Mr. Williams stated that he would like to wait until all of the members of the Board of Zoning Appeals are present to hear the appeal. The Board discussed the issue and requested a response from Gregg Alford, Town Attorney.

Mr. Alford stated that the Town is prepared to move forward on the jurisdictional issues. The Board discussed the issue and at the completion of their discussion, Chairman DeCaigny requested that a motion be made with regard to the request for postponement.

Vice Chairman Kristian made a **motion** that the Board should hear the jurisdictional issue on this matter today. Mr. Sharp **seconded** the motion.

Chester C. Williams, Esq., stated his opposition to the motion because there is not a full complement of the Board present today. There were no further comments from the Board and the motion **passed** with a vote of 5-0-0. The Board then proceeded with the review of appeal, APL100011.

## **PUBLIC HEARING**

**APL100011**: Request for Appeal from Chester C. Williams on behalf of St. James Baptist Church. The Community Development Department issued a letter stating that the Tree Approval Application submitted by Beaufort County for the Hilton Head Island Airport was considered complete. The appellant contends that the Community Development Department erred in its decision and is requesting that tree application be deemed incomplete.

Ms. Anne Cyran, case manager, presented a brief timeline of the appeal including the receipt of Mr. Williams' supplemental brief on Friday, October 22, 2010. Ms. Cyran then introduced Gregg Alford, Esq., Attorney for the Town.

Before Mr. Alford could begin his presentation on behalf of staff, Mr. Williams stated, for the record, that the published notice of this meeting does not meet the Town's LMO requirements. Mr. Williams stated that the Town's public notice for this application is defective and, therefore, invalid.

Mr. Alford responded that Mr. Williams' claim regarding public notification requirements is a procedure issue and should be addressed at a later time. The jurisdictional issue is before

the Board today. The staff believes that the public notice is sufficient for the jurisdictional issue to be heard today.

Mr. Alford then distributed a sheet to each of the Board members on behalf of staff. Mr. Williams stated his objection to this distribution of information as he felt that it is in violation of the Board's Rules of Procedure.

Mr. Alford stated that he would like to move past some of these procedural arguments. The staff believes that all jurisdictional requirements are met. Mr. Alford stated that the applicant has attempted to create a dual-appeal path when the proper path and proper jurisdiction lies with the Board of Zoning Appeals and not the Planning Commission. Mr. Alford discussed this issue at length. This application is properly before the Board of Zoning Appeals because it is a zoning issue and is related to the Airport Overlay District. Mr. Alford stated that a great deal of confusion has been created regarding the distinction about what goes before the Planning Commission and what goes before the Board of Zoning Appeals. The Board of Zoning Appeals has the proper authority to review the applicant's permit to remove trees at the Airport. This is a zoning issue and not a subdivision or land planning issue.

Chairman DeCaigny, Vice Chairman Kristian and Mr. Alford discussed the process for today's review. The Board stated that they would like to rule on the jurisdictional issue first and then the substantive issue.

Mr. Alford then discussed the specific grant of authority in the State Enabling Act and the Land Management Ordinance that places the burden on the Board of Zoning Appeals to decide this issue. Mr. Alford and the Board discussed this issue at length.

Following Mr. Alford's presentation, Chairman DeCaigny requested that the applicant make his presentation. Mr. Williams stated that he represents St. James Church. His client is arguing, not the issuance of a permit, but the determination as to whether or not the County's application was complete when accepted. Mr. Williams stated that the issue is whether this is a zoning issue or a land development issue. Mr. Williams stated that he believes that this is a land development issue and the Planning Commission has jurisdiction over land development issues. Mr. Williams and the Board discussed the issue at length.

Mr. Williams read from several articles of the State Enabling Act. He also presented comments regarding the Land Use Element of the Comprehensive Plan. Following Mr. Williams' presentation, Chairman DeCaigny requested that the Town's attorney provide a response.

Mr. Alford stated that Ladson Howell, Esq., Attorney for Beaufort County, has requested an opportunity to present statements to the Board. Mr. Alford agreed to this request on behalf of the Town. The Board discussed the issue and agreed to receive comments from Mr. Howell.

Mr. Howell presented statements with regard to the jurisdictional issues being faced by the Board. Mr. Howell discussed the distinction between zoning ordinances and land development issues. Mr. Howell stated that this issue is correctly before the Board of Zoning Appeals as it is a zoning issue (Overlay District of the Hilton Head Island Airport). The trees need to be removed or trimmed for reasons of safety. Following these statements, Chairman

DeCaigny requested a response from Mr. Alford. Mr. Alford stated that he agreed with Mr. Howell's statements. Mr. Alford stated that this land has already been developed and zoned. Mr. Alford recommended that common sense be used in making a determination on these jurisdictional issues. The staff believes that the Town's interpretation is a reasonable interpretation.

Next Mr. Alford read from LMO, Sec. 16-3-403, Approval Letter for the Proposed Removal of Trees. The Board discussed this section of the LMO with Mr. Alford. Following these comments, Chairman DeCaigny granted a request from Mr. Williams to respond.

Mr. Williams stated that the issue of the determination of jurisdiction is a legal decision. Mr. Williams suggested that the Board receive legal advice from Brian Hulbert, Board Attorney, in an executive session. At the end of these comments, Chairman DeCaigny thanked Mr. Williams and stated that the public portion of the presentation is closed.

Following final discussion, Chairman DeCaigny requested that a motion be made on this appeal's jurisdictional issue.

Mr. Brenner made a **motion** that the Board of Zoning Appeals has jurisdiction to hear this application for appeal based on the arguments of Town Counsel and the counsel for Beaufort County, as well as Land Management Ordinance Sections 16-3-401 through 409. Vice Chairman Kristian **seconded** the motion. Prior to taking a vote on this motion, Chairman DeCaigny called a five-minute recess to allow time for Ms. Kathleen Carlin, Board Secretary, to type the motion for review by the Board.

Following this brief recess, the staff placed the typed motion on overhead for review by the Board. Chairman DeCaigny requested that Brian Hulbert, Board Attorney, present any comments that he may have on the motion. Mr. Hulbert stated that the motion is correct as stated by Mr. Brenner. It is a proper motion. The motion **passed** with a vote of 5-0-0.

Next, the Board discussed the substantive portion of this appeal. Chairman DeCaigny requested that the staff make their presentation. Mr. Alford stated that this is where the Administrator's determination that the application was complete enough for her to review has been appealed. Mr. Alford stated that there is no standing for this appeal because there is no aggrieved party. The St. James Baptist Church did not suffer an injury by the Administrator's decision to find that this application was complete enough to be reviewed. The law requires that an injury in fact occur, and there is no aggrieved party in this decision. The issue is whether or not the application was complete when it was accepted by the Administrator. Mr. Alford stated that he believes this particular appeal has been brought forward in an effort to delay the process. The appeal is inappropriate because an injury in fact, as required by law, is not a part of this issue.

Mr. Alford stated that the merits of the issuance of the permit will be addressed at a later time. That is not a part of this discussion. Mr. Alford discussed the staff's position on this appeal at length. Following Mr. Alford's presentation, Chairman DeCaigny invited Mr. Williams to respond.

Mr. Williams presented statements on behalf of his client, St. James Baptist Church. Mr. Williams stated his opposition to Mr. Alford's statements as related to issuance of a permit. Vice Chairman Kristian stated that the only issue before the Board today is the completeness of the application.

The Board and Mr. Williams discussed the criteria of an injury. Mr. Williams stated that the LMO specifically says that an aggrieved person is defined as any property owner located within 350 feet of the property for which a decision and determination has been rendered. His client, St. James Baptist Church, is within 350 feet of the airport. Mr. Williams stated that the Church is an aggrieved party because a permit was issued based upon an incomplete application. Mr. Williams claimed that the application did not contain all of the necessary permits and approvals from all of the other agencies when it was accepted by the Administrator. Mr. Williams stated that the application before the Board is incomplete and invalid.

The Board questioned how St. James Baptist Church is harmed. Chairman DeCaigny stated that today's discussion should be confined to whether or not the application was complete when it was accepted by the Administrator. Chairman DeCaigny asked if the staff would like to respond to Mr. Williams. Mr. Alford stated that Ladson Howell, Attorney for Beaufort County, would like to present statements.

Ladson Howell, Esq., presented statements in opposition to Mr. Williams' comments particularly regarding the staff's acceptance of the application, and subsequent issuance of a permit. Mr. Howell stated that it is the County's position that the issues being raised today by Mr. Williams are not ripe for consideration. They will be addressed and reviewed by the Board at a later date.

Mr. Alford then presented additional statements with regard to the absence of an aggrieved party in this matter. There is no injury involved to the appellant. Mr. Williams' concerns will be appropriately addressed at a later date. Mr. Alford stated that this appeal is inappropriate and improper. Mr. Alford recommended a common sense approach with an interpretation of fairness and balance. Mr. Alford asked that the Board take a stand on this issue.

Mr. Williams responded that as long as the Town and the County are willing to stipulate that his client does not waive any rights with respect to the preservation of the argument, and with respect to the completion of the application, they do not have a problem with consolidating that particular issue with the remaining issues that will be raised in the substantive appeal on the issuance of the permit. Mr. Williams stated that he needed to file today's appeal in this manner or he would have forfeited the right to do so at a later time.

The Board had no additional comments and Chairman DeCaigny stated that the public portion of this presentation is closed. Vice Chairman Kristian stated that the issue before the Board today is whether or not an application was complete; and not whether a permit has been issued. And, in that particular instance, no party has been aggrieved, no injury has occurred, and no action was taken. Following final comments, Chairman DeCaigny requested that a motion be made.

Vice Chairman Kristian made a **motion** to **deny** the appeal based on the fact that no party has been aggrieved, that no action was taken, and no permit had been issued at the time; and therefore, this issue is not ripe for consideration. We uphold the decision of the LMO Administrator. Mr. Brenner **seconded** the motion.

Prior to taking a vote, Chairman DeCaigny called a five-minute recess in order for Ms. Kathleen Carlin to type the motion for review by the Board. Following the five-minute recess, the meeting was reconvened. The Board reviewed the motion. Prior to the vote, Mr. Alford requested an opportunity to comment on the motion. The Board agreed to this request. Mr. Alford stated that the staff would prefer to see the last sentence that reads, “We uphold the decision of the Administrator” be deleted from the motion because there is no decision to be upheld at this point.

Brian Hulbert, Esq., Board Attorney stated that he agrees with the recommendation to delete this sentence from the motion. Mr. Hulbert recommended that the Board amend their motion to delete this sentence. Chairman DeCaigny requested that a motion be made to amend the original motion.

Vice Chairman Peter Kristian stated that he would like to amend his motion to delete the last sentence that reads, “We uphold the decision of the Administrator”. Mr. Brenner **seconded** the amendment and the motion **passed** with a vote of 5-0-0.

Chairman DeCaigny stated that the Board will now vote on the motion itself. For the record, the amended motion reads: Vice Chairman Kristian made a **motion** to **deny** the appeal based on the fact that no party has been aggrieved, that no action was taken, and no permit had been issued at the time; and therefore, the issue is not ripe for consideration. This motion was **seconded** by Mr. Brenner and the amended motion **passed** with a vote of 5-0-0.

## 8. STAFF REPORT

- 1) Ms. Dixon stated that there are no Waivers to report to the Board today.
- 2) Ms. Dixon reviewed State mandated training requirements with the Board. These training requirements must be completed by the end of December.
- 3) Staff will present a webinar on Form Based Codes on Thursday, October 28<sup>th</sup> at 1:00pm in Conference Room # 3.

## 9. ADJOURNMENT

The meeting was adjourned at 4:10p.m.

Submitted By:

Approved By:

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Kathleen Carlin  
Board Secretary

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Roger DeCaigny  
Chairman