

**TOWN OF HILTON HEAD ISLAND**  
**Board of Zoning Appeals**  
**Minutes of the Monday, December 13, 2010 Special Meeting**  
**11:00am – Benjamin M. Racusin Council Chambers**

**APPROVED**

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

Board Members Absent: Michael Lawrence

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

Town Staff Present: Nicole Dixon, Senior Planner & Board Coordinator  
Anne Cyran, Senior Planner; Gregg Alford, Town Attorney;  
Brian Hulbert, Board Attorney  
Kathleen Carlin, Board Secretary

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**1. CALL TO ORDER**

Chairman DeCaigny called today's special meeting to order at 11:00am.

**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 the public meeting for APL100010 to be heard before APL100007 because it is a jurisdictional issue and will decide whether or not the Board will hear APL100007. Mr. Sharp **seconded** the motion and the motion **passed** with a vote of 7-0-0.

**5. APPROVAL OF THE MINUTES**

Vice Chairman Kristian made a **motion** to **approve** the minutes of the October 25, 2010 meeting as presented. Mr. Sharp **seconded** the motion and the motion **passed** with a vote of 5-0-1. Mr. Qualey abstained from the vote due to his absence from the meeting.

**6. UNFINISHED BUSINESS**

**\* APL100007:** Request for Appeal from Chester C. Williams on behalf of Ephesian Ventures, LLC. The Community Development Department issued a letter stating revocation proceedings will not be pursued for a notice of action, approving a tabby walkway and brick areas at Edgewater on Broad Creek. The appellant contends that the Community Development Department erred in its decision and is requesting that Town staff be directed to institute proceedings to revoke the notice of action.

\* **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.

\* Ms. Nicole Dixon reported that the applicant has requested that the review of the above two applications (APL100007 and APL100010) be postponed to the January 24, 2011 meeting. Ms. Dixon stated that the Board needs to approve the applicant's request for postponement.

The Board discussed the request for postponement. Following their discussion, Vice Chairman Kristian made a **motion to approve** the applicant's request to postpone the review of APL100007 and APL100010 to the January 24, 2011 meeting. Mr. Brenner **seconded** the motion and the motion **passed** with a vote of 6-0-0.

## 7. NEW BUSINESS

### Public Meeting

**APL100013**: Request for Appeal from Chester C. Williams on behalf of St. James Baptist Church. The Community Development Department issued a Tree Approval to Beaufort County allowing tree pruning and removal in the approach slopes on the north end of airport property. The appellant contends that the Tree Approval letter was issued improperly and is requesting that the letter be declared void.

Ms. Annie Cyran, case manager, presented opening comments and then introduced Gregg Alford, Town Attorney. Mr. Alford made the presentation on behalf of the Town. Mr. Alford began his presentation with background details related to the jurisdictional issue. The question is whether or not the Board of Zoning Appeals *or* the Planning Commission has the authority and ability to hear the case. The second issue concerns the validity of the Town's Ordinance.

Mr. Alford stated that it is the duty of the Board of Zoning Appeals to interpret and analyze how the staff has dealt with an applicant in light of the existing Ordinance. The State Enabling Legislation does not permit the Board of Zoning Appeals to go back and question whether or not an Ordinance is valid.

Mr. Alford stated that the primary premise of the appeal is that the Town's Ordinance is defective, and that proper notice was not followed. The applicant would like the Board to ignore the amendment that was made by Town Council to the Overlay District, which the Board is not permitted to do. Mr. Alford stated that he believes the LMO Administrator properly interpreted the Town's Ordinance.

The Board and Mr. Alford discussed several issues including the applicant's remedy (Circuit Court), adequate notice requirements, and proper notification to the Catawba Indian Nation. Mr. Alford stated that the Ordinance has nothing to do with the permit being issued. The applicant's notice questions are attempts to invalidate Town Council's amendment to the

Ordinance. Mr. Alford stated that the applicant (St. James Baptist Church) has had ample opportunity to review the file since the application was submitted in September 2010.

Following this presentation, Mr. Alford introduced Ms. Mary Lohr, a representative of Beaufort County. Mr. Alford requested that the Board allow statements from Ms. Lohr to be heard. Chairman DeCaigny and the Board agreed to the request. Chairman DeCaigny stated that a motion on the request is not required.

Ms. Lohr stated that Beaufort County is the applicant for the tree permit. Ms. Lohr discussed several issues including the approval of the Catawba Indian Tribe. Ms. Lohr stated that she agrees with the arguments presented by Mr. Alford concerning the validity of the Ordinance.

Ms. Lohr stated that these types of arguments are non-issues because legislative questions need to be addressed by the Circuit Court. Ms. Lohr discussed the time limit imposed upon Beaufort County and the urgency to move forward with the application. Today's appeal is the only item holding up this process.

The Board and Ms. Lohr discussed the issue of safety with regard to the need to remove trees rather than just trim or prune the trees. Ms. Lohr stated that Beaufort County is adopting the Town's submittal with regard to positions taken in the application for appeal. Following Ms. Lohr's presentation and discussion by the Board, Chairman DeCaigny requested that the applicant make their presentation.

Chester C. Williams, Esq., attorney for St. James Baptist Church, made the presentation on behalf of his client. Mr. Williams stated that St. James Baptist Church is the applicant in the appeal. Beaufort County is the applicant under the tree permit. However, Beaufort County is a necessary party to the appeal. Mr. Williams presented statements with regard to the notice issue and the rezoning issue.

Mr. Williams read from State Code Section 629-760 (D) regarding the procedure for the enactment or the amendment of a zoning regulation or map. Mr. Williams claimed that the Town did not comply with the required notice requirements. Therefore, the 60-day period has not yet started running, and the validity of Ordinance No. 2010-03 is open for discussion.

Mr. Williams claimed that it is improper for the Town staff to enforce an invalid Ordinance, and the BZA should not be expected to follow it. Mr. Williams stated that the BZA, under the State Enabling Act, has the authority to make Findings of Fact and Conclusions of Law. Mr. Williams claimed that the Town did not comply with the notice requirements in enacting Ordinance No. 2010-03. Mr. Williams presented statements regarding the issue of safety and the County's desire to remove trees instead of pruning them. Mr. Williams also presented statements regarding the jurisdictional issue. The question is whether this is a Board of Zoning Appeals zoning decision or a Planning Commission land development decision.

The Board stated that the jurisdictional issue should be addressed first and then the substantive issue should be addressed. The Board and Mr. Williams discussed the issue of jurisdiction to determine whether or not the permit was properly issued by the Town. The Board and Mr. Williams discussed the issue of the completeness of today's application.

Vice Chairman Kristian stated that the Board must first determine if they have jurisdiction before moving forward. Chairman DeCaigny requested that a motion on jurisdiction be made.

Mr. Brenner made a **motion** that the Board of Zoning Appeals **has jurisdiction** to determine the completeness of the County's application for a permit to cut and remove trees from the airport runway areas. Vice Chairman Kristian **seconded** the motion. Mr. Gregg Alford requested clarification on the motion. Mr. Alford stated that the jurisdictional question before the Board today does not relate to the completeness issue. The issue before the Board is whether or not the BZA has jurisdiction to hear this appeal (which relates to the propriety of the issuance of the permit). Brian Hulbert, Esq., Board Attorney, stated his agreement with these comments and requested that the motion be amended.

Mr. Brenner **amended** his motion to state that the Board of Zoning Appeals **has subject matter jurisdiction** to hear the appeal presented before the Board today by St. James Baptist Church. Vice Chairman Kristian **seconded** the motion. To clarify the motion, Vice Chairman Kristian recommended that Mr. Brenner withdraw his original motion. Vice Chairman Kristian stated that he will then withdraw his second to the original motion. This way there will be only one motion to vote on.

Mr. Brenner agreed and **withdrew** his **original motion** with respect to **jurisdiction**. Vice Chairman Kristian **withdrew** his **second** to the original motion. Chairman DeCaigny stated that no vote on the motion is necessary. Chairman DeCaigny requested that Mr. Brenner restate his new motion for the record.

Mr. Brenner made a **motion** that the BZA is the proper body, and **has jurisdiction**, to hear the appeal by St. James Baptist Church related to the approval given to Beaufort County, South Carolina, to remove and prune trees on the property of the Hilton Head Island Airport. Vice Chairman Kristian **seconded** the motion.

Chairman DeCaigny stated that the Board will take a brief recess to allow Mr. Brenner time to meet with Ms. Kathleen Carlin, Board Secretary, to prepare the motion for overhead review and discussion. Following this break, the Board reviewed the prepared motion. The Chairman then called for a vote on the motion, and the motion **passed** with a vote of 6-0-0.

For the record, Chester C. Williams, Esq., stated his opposition to the form of the motion. Mr. Williams claimed that the motion is improper because it did not contain the required Findings of Fact and Conclusions of Law.

Vice Chairman Kristian stated that the Board should discuss the issue of whether or not the Board has the authority to judge whether an Ordinance adopted by the Town of Hilton Head Island is valid or not.

Mr. Williams claimed that the Town's response to his original application does not meet the required rules with respect to required Findings of Fact and Conclusions of Law. The Board discussed the issue of case law with Mr. Williams. Vice Chairman Kristian stated that the Board of Zoning Appeals is not the proper place for this discussion because it is the Board of Zoning Appeals' duty to interpret the Ordinances and not render judgments over whether or not they are validity adopted.

Mr. Brenner stated that he has researched this issue and he has not been able to find anything in State or local law that gives the Board of Zoning Appeals the express right to determine the constitutionality of an Ordinance or if an Ordinance is valid or not.

Mr. Qualey and Mr. Williams discussed the issue of the required Findings of Fact and Conclusions of Law and the power by the BZA to render a decision on a Town Ordinance. The Board and Mr. Williams also discussed notice requirements. At the completion of the discussion, Chairman DeCaigny requested that a motion be made.

Mr. Qualey made a **motion** that the Board of Zoning Appeals **does not** have the power or the authority to pass on the constitutionality or validity of the Town's Ordinance in question in this appeal based on South Carolina Code Sec. 6-29-800 (A) which contains a list of the powers of a Board of Zoning Appeal and based on Town Code Sec. 16-2-305 which also contains a list of the limited powers of the Board of Zoning Appeal. Vice Chairman Kristian **seconded** the motion.

Chairman DeCaigny stated that the Board will take a brief recess to allow Mr. Qualey time to meet with Ms. Kathleen Carlin, Board Secretary, to prepare the motion for overhead review and discussion. Following this break, the Board reviewed and discussed the motion. Chairman DeCaigny then called for a vote and the motion **passed** with a vote of 6-0-0.

As a point of clarification, Mr. Qualey stated that the Findings of Fact leading to his motion is that there are express limitations on the powers of Boards of the Zoning Appeals in State and local ordinances; and that it is based upon those facts that (I) made the motion that we conclude as a matter of law that this body (the Board of Zoning Appeals) does not have the power or the authority to make a decision as to the constitutionality or the validity of the Ordinances that is of issue in this appeal. Following these comments, Chairman DeCaigny stated that the Board will now proceed with the next order of business. Chairman DeCaigny requested that Mr. Williams make his presentation.

Mr. Williams requested that the Board refer back to his original appeal submission and the supplemental brief submitted on December 10, 2010. Based on the ruling that was just made, Mr. Williams stated that he will forgo any further discussion on the issue concerning the validity of the Ordinance. With respect to completeness of the application, however, Mr. Williams claimed that the Town's LMO Administrator did not follow proper procedures with regard to obtaining required permits and approval. Permits were received from the Army Corps of Engineers and DHEC.

The Board and Mr. Williams discussed the approval of the Catawba Indian Nation. The Board and Mr. Williams also discussed LMO requirements for the tree permit application. Mr. Williams claimed that the application does not comply with the provisions of the LMO as enacted by Ordinance 2010-03 (regarding Base Zoning District vs. Overlay Zoning District). The Board and Mr. Williams discussed the distinction between the Base Zoning District and the Overlay District, particularly with regard to the Airport Overlay Zoning District.

Regarding the adoption of the Ordinance itself, Mr. Qualey stated that the Board of Zoning Appeals is not here to deal with the intent of the Ordinance. Mr. Williams stated that the issue is whether or not the permit was valid when issued.

Gregg Alford, Esq., presented statements regarding the legal and the factual basis necessary for the BZA to deal with these issues. Mr. Alford stated that other than the validity of the Ordinance, and the jurisdictional question, there isn't much left to consider.

Mr. Alford stated that the Town's response (submitted by Curtis Coltrane, Esq.) addresses the applicant's issues. The issues are clear with respect to the arguments that deal with both jurisdiction and the Code. Mr. Alford stated that this is not a rezoning issue.

Following final discussion, Chairman DeCaigny requested that a motion be made. Mr. Qualey made a **motion** that the Board of Zoning Appeals **affirm the action** of the Administrator in issuing the Tree Approval Letter and **deny** the **appeal** based upon the Board's determination that the appellant has not met the burden of proving that the issuance of the Tree Approval Letter was improper, based on the application of Town Code Sec. 16-4-403(C), and based upon the application of Town Ordinance 2010-03. Vice Chairman Kristian **seconded** the motion.

Chairman DeCaigny stated that the Board will take a brief break to enable Mr. Qualey time to meet with Ms. Kathleen Carlin, Board Secretary, to prepare the motion for overhead review and discussion. Following this break, the Board reviewed and discussed the motion. Chairman DeCaigny then called for a vote and the motion **passed** with a vote of 6-0-0.

## **8. BOARD BUSINESS**

None

## **9. STAFF REPORT**

- 1) Ms. Dixon stated that there are no Waivers to report.
- 2) Ms. Dixon distributed copies of the adopted Rules of Procedures.
- 3) Ms. Dixon distributed a memo from Brian Hulbert, Esq., regarding ex-parte communications. Mr. Hulbert presented statements in support of the memo.

Prior to the adjournment of today's business meeting, Brian Hulbert, Staff Attorney, and Gregg Alford, Town Attorney, presented statements to the Board regarding the Town's official Notice of Action resulting from the Board's determination on today's appeal. The Board stated that the usual procedure for a Notice of Action should be followed.

## **10. ADJOURNMENT**

The meeting was adjourned at 1:00pm.

Submitted By:

Approved By:

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Kathleen Carlin  
Board Secretary

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Roger DeCaigny  
Chairman