

**THE BOARD OF COUNTY COMMISSIONERS
DURHAM, NORTH CAROLINA**

Monday, March 24, 2003

AGENDA

4:00 P.M. - 5:30 P.M.

Review of the Local Business Plan for Mental Health

5:30 P.M. - 6:00 P.M.

Review of the CIP Requests for the NC Museum of Life and Science

6:00 P.M. - 7:00 P.M.

Closed Session

The Board is requested to adjourn to closed session to give directions to staff concerning the price and other material terms of a proposed contract for the acquisition of real property, and to hear a report concerning the investigation of alleged criminal misconduct pursuant to G.S. § 143-318.11(a)(5) & (7).

7:00 P.M. Regular Session

1. **Opening of Regular Session**-Pledge of Allegiance

2. **Agenda Adjustments**

3. **Minutes**
 - a. November 4, 2003 Worksession Minutes
 - b. November 25, 2002 Regular Session Minutes
 - c. January 13, 2003 Regular Session Minutes

The minutes were approved as submitted.

4. **4. Consent Agenda**
 - a. Street Annexation Petition-Tyndrum Drive (Tyndrum Subdivision) (adopt the resolution to approve the addition of Tyndrum Drive to the state's road maintenance system subject to the certification of eligibility by the appropriate officials of the NC Department of Transportation);
 - b. Property Tax Releases and Refunds for Fiscal Year 02-03 (accept the property tax release and refund report as presented and authorize the Tax Assessor to adjust the tax records as outlined by the report. These are normal recurring releases and refunds that are presented for your consent agenda);
 - c. Budget Ordinance Amendment No. 03BCC000047-Social Services-To Accept Crisis Intervention Prevention (CIP) Revenue (approve Budget Ordinance Amendment No. 03BCC000047 recognizing additional energy administration funding in the amount of \$165,939);
 - d. Joint City-County Appointment-Triangle Transit Authority (reappoint Mayor William V. Bell to the Triangle Transit Authority); and
 - e. Raleigh-Durham Airport Authority-Federal Aviation Administration (FAA) Grant Approval (approve the \$3,564,848 FAA grant offer to the Raleigh-Durham Airport Authority).

***Commissioner Jacobs moved, seconded by Commissioner Heron,
to approve items 4(a) through 4(e) of the Consent Agenda.***

The motion carried unanimously.

5. **Public Hearing-Centex Homes, Applicant (Rezoning Case P02-25)**

Centex Homes will present to the Board of County Commissioners a request to rezone 133.3 acres located on the west side of Grandale Drive and north of the Sedwick Road intersection. PIN 0727-01-36-7805 (TM 531-1-6) Request: RD (Rural District) to PDR 1.93; F/J-B (Planned Density Residential-1.93 units/acre) F/J-B. The proposal is in general conformance with the small area plan. Staff recommends approval citing general adopted plan conformance. The Zoning Committee of the Durham Planning Commission conducted a public hearing on July 9, 2002 and voted 5-2 to recommend denial, citing school enrollment and stormwater concerns.

The Board of County Commissioners held a public hearing on the rezoning request on September 23, 2002. The Board continued the hearing, but a date was not specified.

The public hearing for this request was advertised on September 6 and 13, 2002 in the Durham Herald-Sun.

The public hearing for this request was re-advertised on March 7 and 14, 2003 in the Durham Herald-Sun.

Resource Person(s): Frank Duke, Planning Director

County Manager's Recommendation: The Manager's recommendation is that the Board hold the public hearing and approve the rezoning, if appropriate, based on public comment.

Chairman Reckhow opened the public hearing, which was properly advertised.

The speakers signed for this item follow:

Allan Ward-Spoke in favor of the development. The proposal is in place with current area development. He called for a rezoning that would protect the environment and still allow the development.

The following persons spoke against the development.

Lloyd Redick-Runoff has brought stormwater flooding to within 30 feet of his house. The lot sizes are too small and have been extended into the floodplain.

Roger Fortman-Infrastructure cannot handle current runoff. Who will pay to elevate the road and build a new bridge. Runoff-sediment, pesticides, and fertilizer-are a great concern. As stewards of

the land, we should be looking for ways to protect the land.

Floyd Diaz-Infrastructure cannot handle more development.

David Monahan-Public services are already over capacity. A large portion of the land is unusable, lots will be subject to stormwater runoff.

Jim Tepperberg-His apathetic neighbors have given up. Lot sizes are too small; traffic is too heavy. He requested that the County purchase the Lowe's Grove school and transform it into a play park for the neighborhood.

Marilyn Link-Environmental issues should halt this development.

Bernt Hienike-Stormwater protection costs will be excessive. Who will pay, the developer or the homeowner, when yards must be protected by building walls or grading with more dirt?

Tracy Stark-Land is environmentally sensitive; lot sizes are too small.

Liz Pullman-Stormwater runoff is sure to increase in this area of the county. The street culverts cannot handle increased capacity.

Carol W. Young-7.5% change isn't enough. The environmental concerns are too great for this development. Larger lots with more tree-saving is needed.

Brett Hiemenz-Local elementary schools are over capacity.

Christine Davies, Parkwood community-no more development until roads are improved and schools are no longer crowded.

Denise Dawson-gave her time to Carol W. Young

Tad Dawson-Withdrew his name.

Ginny Dadek-New ordinances need to be enacted to protect from stormwater damage. This is an increasing problem. She called for a moratorium on development in this area until new FEMA maps are made. She spoke of existing flooding in the area.

Jack Markham Jr.-Asked the Commissioners for a deferment until the neighbors can be consulted and perhaps an agreement be reached. He noted that open space would be provided that doesn't exist in neighboring subdivisions. Drainage swells do exist. Only two lots go into the floodplain. None have been purposefully extended into the floodplain to increase lot size.

Chairman Reckhow acknowledged Mr. Markham's request to defer the rezoning request. She asked that the deferral be a short one. She suggested that the request exceed the requirements of the ordinance, given the sensitivity of this land.

Chairman Reckhow asked Mr. Roger Fortman and Ms. Carol Young, to make comments for the neighbors. Mr. Fortman and Ms. Young asked that the Commissioners not delay this much longer. April calendars are full for them, the meeting of May 27 would work better.

Commissioner Heron spoke negatively about massive grading to move earth to build on the steep slopes and around the streams. Mr. Markham assured there would be no massive grading.

Commissioner Bowser stated he could not vote on a project with homes in a floodplain. Problems

in later years will mean expensive fixes by homeowners.

Chairman Reckhow suggested that lots 134-138 should not be built on. Lots 190-212 are on very fragile territory. For Commissioner approval, this must be addressed.

Commissioner Cousin stated his concern that area schools are over capacity and could not tolerate another neighborhood.

Commissioner Bowser moved, seconded by Commissioner Cousin, to defer the item until such time the alterations can be made and the developer can meet with the neighbors to eliminate the concerns presented. The caveats addressed would be translated to committed elements.

The motion carried unanimously.

6. **Time Warner Cable's Request to Increase the Rate for Basic Cable Television, Service Installation, and Equipment Rental**

In September 1995, the Federal Communications Commission (FCC) adopted the 13th Report and Order, which, among other things, allowed cable operators to adjust their rates on an annual basis using FCC1240, taking into consideration past and anticipated future external costs. On October 1, 2002, Time Warner Cable submitted FCC1240-Basic Cable Service Tier and FCC1205-Equipment and Installation Charges documents, seeking a rate increase for basic cable television service, installation, and equipment rental for the 2002 calendar year. Through the Triangle J Cable Regulatory Consortium, Durham County has been working with Consultant Robert Sepe of Action Audits. Mr. Sepe reviewed these filings, evaluated the information with respect to conformance to FCC rules, regulations, and publications, and reviewed documents gathered by the County.

The Consultant performed independent calculations to verify the proposed rate structure sought. Supplied data was reviewed to determine whether the cable operator calculated "updated" rates consistent with the procedures prescribed by the FCC in accordance with the FCC's 13th Report and the Telecommunications Act of 1996.

Durham County is composed of two federally identified cable television districts, NC-343 and NC-0650 representing 10,074 cable households.

- a. 10,039 NC-343 Time Warner Cable subscribers will be charged a "selected" monthly rate of \$14.95 for the Basic Service Tier (BST) in 2003, which is slightly below the Maximum Permitted Rate. The Maximum Permitted Rate includes the BST charge of \$13.19 plus the "Add-On" Cost of Service Network Upgrade, a charge of \$2.11. The "Selected" Monthly Combined Rate of \$14.95 is \$.35 less than the Maximum Permitted Combined Rate of \$15.30.
- b. 35 NC-0650 Time Warner Cable subscribers will be charged a "selected" monthly rate of \$12.15 for the Basic Service Tier (BST) in 2003, which is slightly below the Maximum Permitted Rate. The Maximum Permitted Rate includes the BST charge of \$13.04 plus the "Add-On" Cost of

Service Network Upgrade, a charge of \$1.81. The "Selected" Monthly Combined Rate of \$12.15 is \$.89 less than the Maximum Permitted Combined Rate of \$13.04.

Most subscribers receiving only BST service will experience an overall combined monthly rate increase of about \$.55 over last year. Time Warner estimates a total of 10,095 BST subscribers at the end of 2003, an increase of 16 households.

Resource Person(s): Robert Sepe, President, Action Audits, LLC

County Manager's Recommendation: Find the FCC1240/1235/1205 rate-making forms and proposed rates compliant with the FCC's interpretation of its rate regulation rules and subject the conditions set forth herein and approve the rate adjustment.

7. Request from the Little River Community Complex

At the March 3, 2003 Board of County Commissioners Worksession, Mr. William Ross, President of the Little River Community Complex, asked the Board to assist in funding the \$25,000 roof replacement needed for the Little River Community Complex Senior Center. County staff was directed to gather additional information on this request.

Durham County currently funds nonprofit agencies through a competitive application process, which begins in January. The application requires agency information; program descriptions; program performance data; a proposed program plan for the upcoming fiscal year; a community care plan; community partnerships; information on program participants; program budget and management details; program budget narrative; a schedule of positions in the agency; and a list of the current board of directors. In addition to an application, we require nonprofit agencies to submit:

1. IRS tax-exempt letter confirming their 501 (c) (3) nonprofit status;
2. Most recent solicitation license or exemption letter;
3. Certificate of Liability Insurance; and
4. Most recent 990.

Though the Little River Community Complex did not apply for nonprofit funding with Durham County, it was asked to submit the above materials and a quote for the roof replacement.

Resource Person(s): Mr. William Ross, President, Little River Community Complex

County Manager's Recommendation: The Manager recommends that the Board authorize an appropriation of \$12,500 from its contingency account.

Commissioner Bowser expressed the opinion that this request should have been made during the regular FY 2002-2003 budget cycle. This would open the door to other nonprofit organizations requesting funding mid-cycle. It should wait until the next budget cycle.

Chairman Reckhow stated that the County has a relationship to this building, as it would be returned to the County if its use as a community center discontinues. This building must be protected long-term.

Commissioner Heron moved, seconded by Chairman Reckhow, to approve the appropriation of \$12,500 from the Contingency fund to replace the roof over the senior center portion of the Little River Community Complex.

***The motion carried with the following 4 to 1 vote:
Ayes: Cousin, Heron, Jacobs, and Reckhow
Noes: Bowser***

8. Left Blank Intentionally
9. **Proposed Stormwater Regulations**

The Department of Environment and Natural Resources has proposed new stormwater regulations which will have a direct impact on Durham County if adopted. The regulations are proposed under State law for counties in urbanized areas that do not fall under the Federal law requirements for stormwater management. The Federal Phase II stormwater requirements apply to counties and smaller towns which own and operate stormwater systems and do not currently apply to the part of Durham County outside the municipal limits. There are 33 counties in urbanized areas which would be covered by the new regulations; including Alamance, Durham, Orange, and Wake.

These new proposed regulations present a significant unfunded mandate for counties in North Carolina. The State in its fiscal note has estimated that the cost of these regulations to be \$17,420,644.00 for counties and municipalities across the State. However, since they opine that regulations they have already made cost the counties \$7,087,753.00, the net cost of the new regulations is \$10,332,891.00. The State has further stated that it cannot separate the Federal mandated costs from the new State program, and therefore include both in these figures. The State's cost estimate for the portion of the County outside the city limits for the cities is \$131,411.00 per year. However, since some of the required programs are countywide, e.g. sedimentation and erosion control, Health Department mandates, the cost will probably be higher. The cost for the entire County, including the municipalities, is estimated to be \$831,229.00 per year. It should be noted that the State is apparently using a low-end number. A representative of the Association of County Commissioners has cautioned that the cost may be as much as \$243,885 per year. This figure was determined using Federal cost estimates for compliance. Much of this cost will probably be in mapping of stormwater systems which is a new requirement for the County.

The State has attempted to justify these new regulations by stating that the Federal government's intent was to regulate counties when it enacted the Federal stormwater regulations. However, this has been contradicted by the Regional Administrator for the Environmental Protection Agency and by the EPA's guidance on Federal and State-Operated MS4s.

The North Carolina Association of County Commissioners has held several meetings with representatives of the Department of Environment and Natural Resources (DENR) in an attempt to work jointly on mutually agreed upon regulations whereby the counties and the State could work in partnership. Those discussions have ended with the State taking a position which is adversarial to the counties in the State.

The County Attorney believes that there are serious legal issues with the proposed draft regulations. The regulations require counties to adopt certain specified ordinances which require the approval of DENR. This presents a serious separation of powers issue under the North Carolina Constitution. Here an appointed administrative body is requiring an elected legislative body to enact certain laws over which it holds a veto. One of these ordinances includes a requirement to enact an ordinance to regulate the application of fertilizer. This apparently would regulate both farmers and homeowners. The legislature has previously indicated that the policy of the legislature is to prevent counties from regulating farming. This has been done explicitly in preventing county zoning ordinances from regulating farm activities.

A second ordinance, which is required of certain coastal counties, would mandate the implementation of a pet waste ordinance. This raises serious questions regarding a Constitutional prohibition on local acts of the legislature on health questions. If the legislature does not have the authority to impose this requirement, it is difficult to envision that the legislature could delegate this non-existent power to an administrative agency.

There is also an issue as to whether DENR has authority to enact regulations requiring mandatory stormwater regulations of counties which are not regulated by the Federal government. G.S. § 143-214.7 provides for a voluntary program of stormwater control based on a model program developed by the State. Instead of a voluntary program, DENR is trying to mandate its program. This appears to be contrary to the express provisions of the statute.

Two final issues exist in the regulations. The first is a requirement that the county require deed restrictions and easements for all new construction. Such a restriction raises takings issues and issues related to the legislative authority of counties to require these property rights be given.

The second is the apparent requirement that a county get a permit from DENR to exist. The permitting requirement is not based on ownership of stormwater systems as is the Federal rules. The permitting requirement is solely based on the fact that a county exists in North Carolina. This appears to exceed the delegated authority given to DENR and intrudes on the power of the Legislature to create counties.

These proposed rules are currently in the public hearing process. It is requested that the County Attorney be allowed to present comments in opposition to these rules in conjunction with the North Carolina Association of County Commissioners. Additionally, the Association has indicated that legislation may be introduced to prevent DENR from adopting these rules. If the rules are enacted as presented, it is further requested that the County Attorney be authorized to file an action contesting the authority of DENR to regulate Durham County.

Resource Person(s): Chuck Kitchen, County Attorney

County Manager's Recommendation: Authorize the County Attorney to prepare comments in opposition to the adoption of the proposed stormwater rules. Direct that a letter be written to the County's Legislative Delegation requesting its support for legislation which would prevent DENR from adopting the rules. Finally, authorize a suit to challenge the rules if they are passed and DENR attempts to regulate Durham County.

Commissioner Cousin moved, seconded by Commissioner Jacobs, to follow the advice of the County Attorney to authorize the County Attorney to prepare comments in opposition to the adoption of the proposed stormwater rules, to direct that a letter be written to the County's Legislative Delegation requesting its support for legislation which would prevent DENR from adopting the rules, and finally, to authorize a suit to challenge the rules if they are passed and DENR attempts to regulate Durham County.

The motion carried unanimously.

Item added by Commissioner Heron-payment of taxes by board appointees
After discussion, the following motion was made.

Commissioner Heron moved, seconded by Commissioner Bowser, that initial appointees to citizen boards and commissions must have all current taxes paid, and that ongoing appointed members must keep their tax payments current. An allowance would be made for a 90-day payment plan for persons with a hardship.

The motion carried unanimously.

Item added by Chairman Reckhow-change of time given to citizen comments area
Because there are 24 persons signed to speak under the citizen comments area on the April 27 meeting, a suggestion was made and agreed to, to reduce the time given per person from five minutes to three minutes for that particular meeting.

10. **Board and Commission Appointments**

Garry E. Umstead, CMC, Clerk to the Board, will distribute ballots to make appointments to the following boards and commissions:

- Adult Care Home Community Advisory Committee
- City-County Appearance Commission
- Durham Technical Community College
- Environmental Affairs Board
- Nursing Home Community Advisory Committee
- Open Space and Trails Commission
- Planning Commission
- Public Health Board
- Transportation Multi-Jurisdictional Advisory Board
- Women's Commission

Resource Person(s): Garry E. Umstead, CMC, Clerk to the Board

The Commissioners made the appointments by ballot.

THERE BEING NO FURTHER BUSINESS, THE MEETING WAS ADJOURNED AT 10:15 P.M.



Last updated: May 3, 2006

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