

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

Monday, June 9, 2003

7:00 P.M. Regular Session

MINUTES

Place: Commissioners' Room, second floor, Durham County Government Administrative Complex, 200 E. Main Street, Durham, NC

Present: Chairman Ellen W. Reckhow, Vice-Chairman Joe W. Bowser, and Commissioners Philip R. Cousin Jr., Becky M. Heron, and Mary D. Jacobs

Absent: None

Presider: Chairman Reckhow

Opening of Regular Session

Chairman Reckhow called the meeting to order with the Pledge of Allegiance.

Agenda Adjustments

Chairman Reckhow asked for adjustments to the agenda.

Commissioner Heron commented on a bill in the legislature sponsored by Representative Luebke that would sanction counties to impose a cigarette tax. She requested that the Board authorize support of this bill.

Chairman Reckhow stated that the Board has already taken a position to support a cigarette tax. Durham County should convey to Representative Luebke that the tax could help counties defray their Medicaid costs.

Commissioner Heron wanted the Board to move forward on this.

Chairman Reckhow directed County Manager Ruffin to relay this message to Representative Luebke.

County Manager Ruffin added item No. 13 to the agenda—"FY 2003-2004 Funding for Holloway Street Neighborhood Achievement School."

Minutes

Commissioner Heron moved, seconded by Commissioner Jacobs, to approve the March 24, 2003 BOCC/Area Mental Health Board Minutes as corrected and the May 12 and May 27, 2003 Regular Session Minutes of the Board as submitted.

The motion carried unanimously.

Consent Agenda

Commissioner Heron moved, seconded by Commissioner Jacobs, to approve the following consent agenda items:

- * (a) Budget Ordinance Amendment No. 03BCC000067—Family to Family Funding Through Social Services (approve the budget ordinance amendment for \$30,000 in Family to Family funding);
- * (b) Budget Amendment No. 03BCC000068—Social Services—Recognizing Additional Smart Start and Subsidy Child Care Revenue (approve the budget ordinance amendment to recognize additional intergovernmental revenue in the amount of \$25,922 for Child Care Subsidy payments and Smart Start funds); and
- (c) One-Year Extension of Contract Agreement between the State of NC and Regional Response Team (RRT) (approve of this one-year extension of the contract agreement between the State of NC, Durham County, and Parkwood Fire Department).

Commissioner Heron asked whether the County receives additional funding from the state to respond to hazardous spill emergencies across the state.

Jeff Batten, Fire Marshal, replied that the County reimburses Parkwood 100 percent of the cost so there is no out-of-pocket money.

The motion carried unanimously.

*Documents related to these items follow:

Consent Agenda 4(a). Budget Ordinance Amendment No. 03BCC000067—Family to Family Funding Through Social Services (approve the budget ordinance amendment for \$30,000 in Family to Family funding).

The budget ordinance amendment follows:

DURHAM COUNTY, NORTH CAROLINA
FY 2002-03 Budget Ordinance
Amendment No. 03BCC000067

BE IT ORDAINED BY THE COMMISSIONERS OF DURHAM COUNTY that the FY 2002-03 Budget Ordinance is hereby amended to reflect budget adjustments.

Revenue:

<u>Category</u>	<u>Current Budget</u>	<u>Increase/Decrease</u>	<u>Revised Budget</u>
<u>GENERAL FUND</u>			
Intergovernmental	\$262,585,109	\$30,000	\$262,615,109

Expenditures:

<u>Activity</u>			
<u>GENERAL FUND</u>			
Human Services	\$325,669,252	\$30,000	\$325,699,252

All ordinances and portions of ordinances in conflict herewith are hereby repealed.

This the 9th day of June, 2003.

(Budget Ordinance Amendment recorded in Ordinance Book _____, page _____.)

Consent Agenda 4(b). Budget Amendment No. 03BCC000068—Social Services—Recognizing Additional Smart Start and Subsidy Child Care Revenue (approve the budget ordinance amendment to recognize additional intergovernmental revenue in the amount of \$25,922 for Child Care Subsidy payments and Smart Start funds).

The budget ordinance amendment follows:

DURHAM COUNTY, NORTH CAROLINA
FY 2002-03 Budget Ordinance
Amendment No. 03BCC000068

BE IT ORDAINED BY THE COMMISSIONERS OF DURHAM COUNTY that the FY 2002-03 Budget Ordinance is hereby amended to reflect budget adjustments.

Revenue:

<u>Category</u>	<u>Current Budget</u>	<u>Increase/Decrease</u>	<u>Revised Budget</u>
<u>GENERAL FUND</u>			
Intergovernmental	\$262,615,109	\$25,922	\$262,641,031

Expenditures:
Activity

GENERAL FUND

Human Services	\$325,699,252	\$25,922	\$325,725,174
----------------	---------------	----------	---------------

All ordinances and portions of ordinances in conflict herewith are hereby repealed.

This the 9th day of June, 2003.

(Budget Ordinance Amendment recorded in Ordinance Book _____, page _____.)

Public Hearing on Revised 2003-2013 Ten-Year Comprehensive Solid Waste Management Plan (SWMP)

The Department of General Services requested that the Board of County Commissioners conduct a public hearing to receive comments from interested parties on the revised 2003-2013 Ten-Year Comprehensive Solid Waste Management Plan.

North Carolina General Statute 130A-309.09A(b) requires each unit of local government, either individually or in cooperation with other local governments, to develop a Ten-Year Comprehensive Solid Waste Management Plan and submit the plan to the North Carolina Department of Environment & Natural Resources (NC-DENR) for approval. In addition, each local government is required to submit a three-year revision to the SWMP following a public hearing and adoption by resolution by the Board of County Commissioners.

On June 23, 1997, the Board adopted the County's first Ten-Year Comprehensive SWMP for 1997-2006. On June 26, 2000, the original plan was revised and adopted by the Board for 2000-2010. The next revision is due to DENR by June 30, 2003 for the period 2003-2013.

The revised plan includes: new population estimates; residential, commercial, and construction/demolition tonnage estimates; and a listing of current programs and intended actions.

At the Board's May 12, 2003 Regular Session, the Commissioners set a public hearing for June 9, 2003 to receive public comment on the revised plan. The appropriate public notices were advertised in the Durham Herald-Sun and the Carolina Times newspapers. Copies of the draft SWMP were made available for public review beginning May 16, 2003 at the Clerk of Court's office, main branch of the Durham County Public Library, Office of the Clerk to the Board, and the Department of General Services. In addition, copies were mailed on May 16, 2003 to all waste collectors serving Durham County.

Resource Person(s): Michael Turner, Director of General Services; Larry Dixon, Solid Waste Supervisor; and Thomas Bryant, Litter Control Officer

County Manager's Recommendation: The County Manager recommended that the Board receive public comment on the revised 2003-2013 Ten-Year Comprehensive SWMP, adopt a resolution as required by NCGS 130A-309.09A(b) to approve the plan subject to the inclusion of public comment, and authorize the County Manager to implement the plan effective July 1, 2003.

After reviewing this agenda item, Mr. Turner thanked Mr. Dixon and Mr. Bryant for their work on this revision. He then introduced Mr. Bryant and asked him to briefly summarize plan revisions.

Mr. Bryant stated that changes in Durham County over the last three years were considered prior to making the necessary plan revisions. The population in Durham County and Durham City increased by 23,223 residents—5,818 in the county alone (16 percent of the overall growth). A large majority of the growth occurred in the northwest portion near Orange County and in the southeastern portion near Wake County. The population growth generates an increased amount of waste. The total waste comprises 30 percent residential, 27 percent commercial, 33 percent industrial, and 10 percent construction and demolition. Opportunities exist to capture and recycle a portion of this waste. Waste reduction goals for the unincorporated areas of Durham County are an additional 5 percent for FY 2007-2008 and 10 percent for FY 2012-2013. Four solid waste convenience centers are strategically located throughout Durham County. In Year 2002, Durham County, Durham City, and out-of-county residents possessing solid waste stickers made 266,380 trips to the centers. Out-of-county residents are charged a higher fee to utilize these centers, because they add no tax base to the County. City residents are charged a fee, also, and County residents are charged for solid waste decals in order to access the centers. The total budget for operating the County solid waste program for 2001-2002 was \$1,560,701 and included staff salaries, solid waste disposal, recycling services, etc.

Commissioner Heron asked about the recycling at Research Triangle Park and if the Park's waste is accounted for.

Mr. Bryant responded that most companies in the Park have their own recycling managers on staff; however, all waste haulers, including those in the Park, must report to the state of North Carolina the amount of waste collected.

Commissioner Heron questioned why all businesses do not have recycling programs.

Mr. Turner responded that the law does not require businesses to recycle materials other than those banned from the City landfill.

Commissioner Heron complimented convenience center staff for their helpfulness.

Chairman Reckhow strongly encouraged staff to provide more education and outreach to citizens. Recovery percentages reflected in the solid waste management plan should be higher, especially for plastics and aluminum cans.

Chairman Reckhow asked about the status of a proposed franchise with private haulers to assure that certain guidelines are followed. An agreement requiring haulers to alert citizens about certain issues would help with communication and education. This has been implemented in several counties across the state.

Mr. Turner replied that this issue was discussed about a year ago. He would review his notes before providing an answer.

Commissioner Jacobs asked whether citizens visiting the convenience centers have access to solid waste handbooks.

Mr. Bryant responded in the affirmative.

Commissioner Jacobs recommended that a pamphlet or brochure be distributed on an ongoing basis.

Commissioner Jacobs asked about fines associated with the illegal disposal of litter.

Mr. Bryant replied that the Solid Waste Ordinance addresses two issues: (1) the illegal dumping of materials; and (2) the illegal storage of solid waste materials. A \$100 fine is in place for dumping materials illegally. Citizens in violation of illegal storage are notified and given a timeframe in which to comply. To date, all violations have been resolved through the administrative process. The District Attorney's office has an Environmental Court in place for cases that cannot be disposed of through this process.

Chairman Reckhow opened the public hearing that was properly advertised.

As no one asked to speak at the public hearing, Chairman Reckhow closed the public hearing and referred the matter back to the Board.

Commissioner Jacobs moved, seconded by Commissioner Cousin, to approve the Ten-Year Comprehensive Solid Waste Management Plan and authorize the County Manager to implement the plan effective July 1, 2003.

The motion carried unanimously.

The resolution follows:

RESOLUTION TO APPROVE THE DURHAM COUNTY
TEN-YEAR (2003-2013) COMPREHENSIVE
SOLID WASTE MANAGEMENT PLAN

WHEREAS, better planning for solid waste will help protect public health and the environment, provide for an improved solid waste management system, better utilize our natural resources, and control the cost of solid waste management; and

WHEREAS, North Carolina General Statute 130A-309.09A(b) requires each unit of local government, either individually or in cooperation with other units of local government, to develop a ten-year comprehensive solid waste management plan and provide three-year revisions; and

WHEREAS, Durham County coordinated with the City of Durham in the preparation of the required three-year revision to the plan:

NOW, THEREFORE, BE IT RESOLVED that the County Commissioners of Durham County hereby approve the Durham County Ten-Year (2003-2013) Comprehensive Solid Waste Management Plan.

Adopted by the Board of County Commissioners during regular session on this 9th day of June, 2003.

/s/ Ellen W. Reckhow
Chairman, County Commissioners

Attest: /s/ Garry Umstead
Clerk to the Board

Public Hearing—Zoning Text Amendment to Make Changes to the Buffer and Tree Preservation Standards [TC03-4]

Chairman Reckhow asked Planning Director Frank Duke to present this item.

Mr. Duke stated that American Village, Greenway, and Lenox neighborhood representatives requested changes to multiple sections of the Zoning Ordinance. Staff provided JCCPC with an analysis of those requested changes and recommended that the request be deferred to the development of the Unified Development Ordinance (UDO) unless it was more narrowly focused to address no more than one or two issues. The JCCPC concurred with the staff recommendation, and the neighborhood issues were refined to focus on increasing the buffer requirements between very low density residential development (no more than two units per acre) and other types of development and requiring preservation of specimen trees within required buffers.

The Zoning Committee of the Planning Commission considered the matter at a public hearing held on March 11, 2003. The Committee raised the issue of applying wider

buffers to rights of way greater than 50 feet. Staff determined that a 50-foot right of way is standard for streets in residential areas. Rights-of-way of greater than 50 feet are used for collector streets or thoroughfares and can accommodate up to four lanes of traffic. In such cases, the right-of-way width of the collector street or thoroughfare would have a greater impact on the existing residences than the new development on the opposite side of the right of way. Planning staff recommended against applying the expanded buffer standard to rights-of-way greater than 50 feet in width. The Zoning Committee recommended in favor of the proposal with a change in the maximum right-of-way width where the buffer would apply from 50 feet wide to 65 feet wide.

City Council considered the matter at a public hearing on April 21, 2003. The Council voted to deny the proposal, directing that this issue be examined in the context of the UDO.

Adoption of this proposal by the Board would create a provision in the ordinance where City and County requirements conflict. It would be difficult to apply the differing standards to new developments.

The citizens' request to adjust buffer widths for projects adjacent to low density residential can be coordinated with the development of the UDO.

The Homebuilders Association requested a 30-day delay in consideration of this item by the Commissioners; therefore, the hearing was moved from May 12, 2003 to tonight's meeting.

Resource Person(s): Frank M. Duke, AICP, Durham City-County Planning Director

County Manager's Recommendation: The Manager recommended that the Board conduct a public hearing and if appropriate, not adopt the proposal and direct that these issues be addressed in the development of the Unified Development Ordinance (UDO).

Chairman Reckhow opened the public hearing that was properly advertised.

As no one asked to speak at the public hearing, Chairman Reckhow closed the public hearing and referred the matter back to the Board.

Commissioner Heron moved, seconded by Commissioner Cousin, not to adopt the zoning text amendment to make changes to the buffer and tree preservation standards (TC03-4) but to direct that these issues be addressed in the development of the Unified Development Ordinance (UDO).

The motion carried unanimously.

Public Hearing—Hamlin Road Subdivision (Rezoning Case P02-77)

Chairman Reckhow called on Mr. Frank Duke, Planning Director, to make the presentation.

Mr. Duke spoke to the rezoning request by E. T. Development Corporation for a 65.41-acre site located on the south side of Hamlin Road, more than a half mile east of Old Oxford Road, from RD to PDR 2.08 for 134 single-family lots, with a minimum lot size of 10,000 square feet. (PIN 0843-01-26-0857, 0843-01-17-6277, 0843-01-27-1482). Ellerbee Creek floodplain is on the southeastern boundary of the site. The proposed Northern Durham Parkway passes along the northern boundary of the site; a 120' wide right of way is to be dedicated for this street.

The North Durham Plan called for high-density residential use on the west side of Northern Durham Parkway. A plan amendment to low density residential was submitted in conjunction with this request. Staff recommended approval of the plan amendment. The Planning Commission recommended denial. The Board of County Commissioners approved the amendment at its April 14, 2003 meeting.

Mr. Duke listed the following committed elements associated with the request:

- Maximum lots: 134
- Minimum lot size: 10,000 square feet
- 10 percent open space (twice the amount required by ordinance)
- Tot lot
- Wetlands constructed as a stormwater treatment measure
- 2 trees per lot, in addition to required trees
- Impervious surface limit 24 percent (low density option)
- Dedication of 120' right of way for proposed Northern Durham Parkway
- Construction of left-turn lane for both entrances
- By referencing roadway improvements on the plan, the applicant agrees to construct said improvements prior to issuance of certificate of occupancy in a manner that will allow them to function as noted on the plan and in accordance with NCDOT and City of Durham standards and policies. This includes (where appropriate), but is not limited to: adequate transition tapers, alignment of lanes through intersections, associated signal modifications, pavement markings, associated signage, curb and gutter, coordination with other proposed roadway improvements and bike lanes. The applicant also accepts the financial responsibility for acquisition of any additional right of way necessary to accommodate these improvements and any required sidewalk construction.
- A fee will be paid to the Durham County Commissioners, on behalf of the Durham Public Schools, in the amount of \$1,000 per lot for the number of lots, to be paid on a lot by lot basis with each building permit issued.

The proposal is in conformance with the small area plan. Staff recommended approval citing adopted plan conformance. The Zoning Committee of the Durham Planning Commission conducted public hearings on February 11, March 11, and May 13, 2003 and voted 6-0 to recommend approval, citing the developer's efforts to mitigate school impacts and the use of constructed wetlands as a stormwater control.

The public hearing for this request was advertised on May 23 and May 30, 2003 in the Durham Herald-Sun.

Resource Person(s): Frank M. Duke, AICP, Planning Director

County Manager's Recommendation: The Manager recommended that the Board hold a public hearing on the proposed rezoning and approve it, if appropriate, based on public comments.

County Attorney Chuck Kitchen noted, for the record, that a committed element for payment of cash for schools cannot be considered a condition for zoning approval.

Chairman Reckhow suggested that in the future, Planning staff include in its report whether items of concern have been addressed.

Commissioner Jacobs asked whether any opposition had been expressed.

Mr. Duke responded that significant opposition was voiced during the plan amendment process. Since that time, staff has received phone calls from two persons merely asking questions about the case.

Chairman Reckhow directed that the County Attorney meet and inform the Zoning Committee of the Planning Commission that it may not consider the cash payment for schools when recommending approval of a rezoning request.

Chairman Reckhow opened the public hearing that was properly advertised.

Larry Thomas, 9 Preakness Drive, Durham 27713, an officer of E. T. Development Corporation, stated that in the last five subdivisions developed by the corporation, over 80 percent of the houses were sold to local residents. Most of the children are already enrolled in the Durham Public Schools system; therefore, the statistics reflect a greater school impact. He worked with the Planning Commission and Zoning Committee from January of this year through May. A few area residents oppose the rezoning. Corporate neighbors are in favor of the development.

Jan T. Beeker, 1518 Hamlin Road, Durham 27704, spoke against the request noting school impact and traffic concerns.

Dr. E. L. Allison, PO Box 428, Durham 27702, opposed the rezoning because of school overcrowding.

Mr. Duane Stewart, engineer for the Hamlin Road Subdivision project, was available to answer questions.

No one had questions for Mr. Stewart.

Chairman Reckhow closed the public hearing and referred to the Commissioners for comment or consideration.

Vice-Chairman Bowser moved, seconded by Commissioner Heron, to approve Hamlin Road Subdivision Rezoning Case P02-77.

The motion carried unanimously.

(Legal description recorded in Ordinance Book 2, page ____.)

Public Hearing—Ravenstone (Rezoning Case P03-02)

Chairman Reckhow noted that the Commissioners had received a memorandum from County Attorney Lowell Siler informing them that a valid protest petition had been filed in this case.

Planning Director Frank Duke stated that Sherron Road Ventures presented a request to rezone 130.15 acres southeast of the intersection of NC 98 and Sherron Road, between Sherron Road and Baddock Drive, including all 150 lots and parts of three previously recorded lots within Shaw Hills. The specific request was to rezone the subject acreage from RD, R-20 and R-10(D) to R-10(D) for a residential development with 306 single-family homes. The applicant proposes a cluster development, which allows for single-family lots with smaller dimensions than normally permitted within a zoning district in exchange for the provision of permanent open space within the same development. The development plan has a committed minimum lot size of 10,000 square feet but would use cluster development provisions to reduce lot widths and setbacks.

The project would combine property in the undeveloped Shaw Hills subdivision with property off Sherron Road rezoned to R-10(D) in 2001. Access is proposed from Sherron Road, Hillview Drive, and Rondelay Drive. Tributaries of Lick Creek run through and adjacent to the site, and stream buffers account for much of the required tree preservation and open space. A 100-foot greenway trail easement along Lick Creek is provided, consistent with the Durham Urban Trails and Greenway Master Plan. The project is required to construct several roadway improvements including: dedicating additional right of way on Sherron Road, left-turn lanes at the intersection of NC 98 and Hillview Drive and the project entrance on Sherron Road, and a connection to the existing improved portion of Rondelay Drive. A pump station is required for sewer service.

A development plan is included with this request. This indicates that the general physical layout of the property shown on the development plan is committed as part of the adopted rezoning. Any significant change in the plan will require a new zoning petition for the property. The development plan submitted with this rezoning includes the following committed elements:

- Maximum of 306 single-family lots.
- Minimum lot size of 10,000 square feet.
- No lots will be extended into stream buffers.
- A Recreation Swim Club facility will be provided.
- Two tot lots—one at the Swim Club area and the other in the southern portion of the development.
- Construct a left-turn lane on NC 98 at Hillview Drive. Extend turn-lane eastward past Olive Branch Road.
- Construct the connection to Rondelay Drive.
- Construct a left-turn lane on Sherron Road at Ravenstone Lane.
- Dedicate an additional 25 feet of right of way on Sherron Road for the frontage of site.
- Provide 9.6 acres of open space.
- A 100' Greenway Easement will be provided along the property frontage of Lick Creek with a neighborhood connection to the trail.
- Mass grading shall be performed in sequential phases as shown on the development plan. The infrastructure and lot preparation will be completed within a phase before starting a sequential phase.

The proposal is in conformance with the small area plan. Staff recommended approval, citing adopted plan conformance. The Zoning Committee of the Durham Planning Commission conducted a public hearing on April 8, 2003 and voted 5-1 to recommend denial, citing school overcrowding and traffic concerns.

The public hearing for this request was advertised on May 23 and May 30, 2003 in the Durham Herald-Sun.

Resource Person(s): Frank M. Duke, AICP, Durham City-County Planning Director

County Manager's Recommendation: The Manager recommended that the Board hold a public hearing on the proposed rezoning and approve it, if appropriate, based on public comment.

Chairman Reckhow, Vice-Chairman Bowser, and Commissioner Heron asked the following questions. Mr. Duke and applicant Ronald Horvath responded.

1. Would this development plan be brought back to the Board?
An R-10(D) rezoning request with a development plan must be brought back to the governing body.

2. With the minimum lot size is 10,000 square feet, why would one portion of the property hold more homes?
The physical layout of the development and the street layout impact lot sizes. The developer has attempted to avoid natural resource issues.
3. Why wasn't the total school impact shown on the chart?
The numbers were shown separately for the existing zoning and the proposed rezoning.
4. The number of students (33) for 83 homes seems high. Is this consistent with the formula typically used to calculate the number of students?
This is based on the standard single-family home formula, not the blended formula.
5. With the mass grading, how will the floodplains and streams be protected?
Mass grading is allowed under our ordinances. If sufficient precautions are taken with buffers and fencing, the site can be protected (provided there are no extreme weather conditions such as hurricanes, etc.).
6. Can standard erosion control measures be used to protect the creek?
Planning staff did not look at this issue and will rely on the County's Sedimentation and Erosion Control staff to ensure that erosion control measures will be taken.
7. Has the property been logged or farmed?
The land was logged approximately 15 years ago and roads were constructed but were not fully paved. The existing trees are being protected as a part of this plan.
8. Will the mass grading be done all at once?
The mass grading will be performed in sequential phases.

Chairman Reckhow opened the public hearing that was properly advertised.

The following citizens spoke in opposition to the rezoning and cited traffic, school impact, mass grading, and density concerns:

Teresa George, a 20-year resident of 345 Bandoack Drive, Durham 27703

Ray Corns, a 5-year resident of 241 Bandoack Drive, Durham 27703

Ann Parham, a 29-year resident of 319 Bandoack Drive, Durham 27703

E. L. Allison, PO Box 428, Durham 27702

The following citizens favored the rezoning. They felt that the plan was reasonable and that the applicant had addressed residents' concerns by making concessions and commitments.

Bill Patrick, a 33 three-year resident of 427 Olive Branch Road, Durham 27703

Sue Harris, a 32-year resident of 245 Bandoack Drive, Durham 27703

William B. Sparks, a 33-year resident of 248 Bandoack Drive, Durham 27703

Attorney Drew Marsh, counsel for the applicant, reviewed the plan and highlighted the proposed features and benefits.

Chairman Reckhow added that from an environmental standpoint, the proposal is preferable to the currently approved development.

The Commissioners asked general questions about the plan in terms of traffic impact, traffic signals, roads, and water and sewer extensions.

Chairman Reckhow closed the public hearing and referred to the Commissioners.

Commissioner Heron moved, seconded by Vice-Chairman Bowser, to approve Ravenstone Rezoning Case P03-02.

The motion carried unanimously.

(Legal description recorded in Ordinance Book 2, page ____.)

For the benefit of the citizens who opposed the rezoning, Chairman Reckhow offered that the Board was influenced by the fact that the current platting has major environmental flaws. This rezoning is in the best interest of the community.

Public Hearing—Zoning Text Amendment to Modify the Affordable Housing Unit Density Bonus [TC03-6]

Background: The Affordable Housing Coalition noted that while both the City and County authorize an affordable housing density bonus, the provision has never been used. Upon review of the existing language, staff determined that since Durham regulates by lot size, not density, and the existing language provided for a density bonus with no corresponding reduction in lot size, the existing provisions could not be implemented. Further complicating utilization of the existing bonus, no language or process for authorizing the bonus units is included in the ordinance.

Summary: Problems exist with the language of the Zoning Ordinance providing for an affordable housing density bonus and have prevented its use since adoption. Most significantly, the existing language authorizes a density bonus but makes no provision for a corresponding reduction in lot size and makes no provision for how the bonus is to be awarded. The proposed ordinance language provides for these corrections as well as a reorganization of the existing language for clarity.

The proposal addresses these deficiencies while also reorganizing the bonus provisions for greater clarity.

The JCCPC considered the proposal at its March meeting and forwarded it to the Zoning Committee for consideration. The Zoning Committee, after holding a public hearing on May 13, recommended approval with a change that the bonus cannot be used in the PDR zone. The Planning Department recommended that the Board approve the amendment with the change recommended by the Zoning Committee.

Resource Person(s): Frank M. Duke, AICP, Durham City-County Planning Director

County Manager's Recommendation: The Manager recommended that the Board conduct a public hearing and if appropriate, adopt the amendment modifying the affordable housing unit density bonus.

Chairman Reckhow opened the public hearing that was properly advertised.

Dr. E. L. Allison, PO Box 428, Durham 27702, asked whether the affordable housing units could be distinguished from the more expensive houses.

Chairman Reckhow and Mr. Duke quoted sections of the ordinance. Under the new ordinance, the affordable housing units will have no distinguishing characteristics.

Chairman Reckhow closed the public hearing and referred to the Commissioners for comment or consideration.

Chairman Reckhow suggested that discussions in the development of the UDO should include decreasing the density for projects located within the Downtown Design Overlay and only allowing the maximum with the provision of some affordability.

Commissioner Jacobs moved, seconded by Vice-Chairman Bowser, to adopt the Zoning Text Amendment to Modify the Affordable Housing Unit Density Bonus [TC03-6].

The motion carried unanimously.

Zoning Text Amendment TC03-6 follows:

TC03-6

AN ORDINANCE TO AMEND THE DURHAM ZONING ORDINANCE
TO REVISE THE SUBSECTION PROVIDING FOR
AN AFFORDABLE HOUSING UNIT DENSITY BONUS

WHEREAS, the Durham Board of County Commissioners wishes to amend the zoning ordinance; and

WHEREAS, state enabling legislation allows a density bonus for the provision of affordable housing; and

WHEREAS, refinements to the existing standards will facilitate the provision of affordable housing to the citizens of Durham:

NOW, THEREFORE, BE IT ORDAINED THAT:

SECTION 1

That Subsection 8.1.28 be rewritten as follows:

8.1.28 Affordable Housing Density Bonus

In order to encourage the development of affordable housing throughout the community, a zoning density bonus is available for developments that include a residential component. Density bonuses can be applied to a proposed development with a residential component, subject to the following requirements:

1. This program may be applied as part of the site plan or subdivision approval process for projects in any zoning district where residences are permitted, except as noted below.
2. A project must propose a minimum of 20 new units to be eligible, either on a new site or as an addition to an existing development.
3. At least 15% of the units shall have payments affordable to persons and families with annual incomes at or below 60% of the area median family income by family size, according to target income limits set by HUD for Durham. A developer could receive up to a 20% density bonus if providing units for persons with incomes below 50% of the median family income and could receive up to a 15% density bonus for assisting persons between 50% and 60% of the median family income.
4. The required affordability limits shall be adhered to for a minimum of 15 years. The housing developer shall be required to submit an annual report during this time to the Housing and Community Development Director (in the City) or to the County Manager or his designee (in the County) to verify that incomes of persons residing in, rents being charged for, or the initial sale price of the affordable units are within the established limits. Compliance measures include but are not limited to: contracts, restrictive covenants, deed restrictions, and stipulated penalties.
5. All affordable units shall be incorporated throughout the project, using similar or compatible physical and design characteristics. These units shall not be physically grouped together nor otherwise separated from other units.
6. In determining the application of the density bonus, the following considerations shall be applied:
 - a. For multifamily developments, the maximum permitted density on the property may be increased by up to 15% or 20% (see [Section 3](#) above). Neither lot sizes nor setbacks of buildings from exterior property lines may be reduced.
 - b. For single-family developments, the percentage increase in density and corresponding decrease in allowable lot size and/or setbacks for internal lots shall be up to 15% or 20% (see [Section 3](#) above). No reductions in setbacks for exterior lots shall be permitted.
7. Units added through application of the affordable housing density bonus shall not be used to require an increase in the amount of open space otherwise required for a project.
8. This provision may not be used by projects meeting any of the following criteria:

- a. Projects proposed in any area of the City or County designated in the Comprehensive Plan as having a concentration of subsidized housing or poverty greater than that of the City or County as a whole;
- b. Projects zoned with an adopted development plan that specifies the number of units or maximum units per acre [for example, a PDR zone] to be allowed on the site;
- c. Projects located within the Downtown Design Overlay;
- d. Projects within a designated historic district; or,
- e. Projects that are 100% affordable.

SECTION 2

That the zoning ordinance be renumbered if necessary to accommodate this change.

SECTION 3

That this ordinance becomes effective upon adoption.

(Zoning Ordinance amendment recorded in Ordinance Book 2, page ____.)

Public Hearing—Zoning Text Amendment to Make Changes to the Board of Adjustment Voting Standards [TC03-7]

Summary: In 1997, the City of Durham and Durham County received special authority from the State to allow a 3/5-majority vote on applications before the Board of Adjustment (BOA) instead of the 4/5-majority generally required under North Carolina General Statutes (NCGS). While the Rules of Procedure for the BOA have been changed to reflect the new voting requirement, the Ordinance continues to require a 4/5-majority vote for appeals and variance applications.

Background: Durham's BOA is a seven-member City-County Board that decides zoning variances, minor use permits, appeals of zoning boundaries, and appeals of staff decisions. Decisions by the BOA may only be appealed in a court of law. Since the BOA takes quasi-judicial actions, NCGS contain very specific language about how the Board should operate (160A-388 and 153-345). These statutes state that a 4/5 vote is required for BOA actions related to interpretations and variances.

The City of Durham and Durham County received special state authorization in 1997 to allow the BOA to take these actions with a 3/5-majority vote rather than the 4/5-majority vote required under general legislation. The BOA desires this change and has amended its rules of procedure to implement the special legislation. This ordinance amendment proposes to modify the Zoning Ordinance to conform to this special statute.

The JCCPC considered the proposal at its March meeting and recommended it to the Zoning Committee for consideration. The Zoning Committee recommended approval after holding a public hearing on May 13.

The Planning Department recommended that the Board approve the amendment.

Resource Person(s): Frank M. Duke, AICP, Durham City-County Planning Director

County Manager's Recommendation: The Manager recommended that the Board conduct a public hearing and if appropriate, adopt the amendment concerning Board of Adjustment voting standards.

Chairman Reckhow opened the public hearing that was properly advertised.

Dr. E. L. Allison, PO Box 428, Durham 27702, had not signed to speak on the item but asked Mr. Duke if the amendment allows for a 3/5-majority vote on variances.

Mr. Duke responded that the amendment pertains to Board of Adjustment voting on variances and ordinance interpretation procedures.

Chairman Reckhow closed the public hearing and referred to the Commissioners for comment or consideration.

Commissioner Heron moved, seconded by Commissioner Jacobs, to adopt the Zoning Text Amendment to Make Changes to the Board of Adjustment Voting Standards [TC03-7].

The motion carried unanimously.

Zoning ordinance amendment TC03-7 follows:

TC03-7

AN ORDINANCE TO AMEND THE DURHAM ZONING ORDINANCE
TO PROVIDE FOR A THREE FIFTHS VOTE OF THE BOARD OF ADJUSTMENT
ON MATTERS OF INTERPRETATION AND VARIANCES INSTEAD OF A
FOURTH FIFTH VOTE OF THE MEMBERS

WHEREAS, the Durham Board of County Commissioners wishes to amend the zoning ordinance; and

WHEREAS, State Statutes mandate that the Board of Adjustment decide matters of interpretation and variances by a four fifths vote of the membership; and

WHEREAS, Durham City and County received special enabling legislation to allow these decisions to be made by a three fifth vote of the Board:

NOW, THEREFORE, BE IT ORDAINED THAT:

SECTION 1

That Section 3.3.6 (D.) [Powers and Duties] be rewritten as follows:

"Decide appeals of decision by the administrative officials interpreting the zoning ordinance. "

SECTION 2

That Section 16.3.3 [Action by the Board of Adjustment] be rewritten as follows:

16.3.3 Action by the Board of Adjustment

The Board of Adjustment, prior to the public hearing, shall receive the application and copies of any records pertaining to the application. The Board may take action at the public hearing or at a subsequent meeting. Each decision shall be accompanied by a finding of fact by the Board, which specifies the reasons for the decision. Decisions of the Board of Adjustment to approve a variance or reverse an interpretation require a 3/5th vote of the Board.

1. Variance Procedure

In case of variances, the Board of Adjustment may deny the application, hold the application for additional information, or approve the application. In approving the variance, the Board may prescribe reasonable and appropriate conditions that will assure that the use will be compatible with adjacent properties and will not alter the character of the neighborhood. The Board may not grant a variance to allow a use that is not already permitted in the district involved. Variances may be granted for, among other things, height, structure size, lot dimension, setback, and floor elevation in flood areas.

2. Ordinance Interpretation Procedure

In the case of an ordinance interpretation application, the Board of Adjustment may reverse, affirm, or modify the decision of an administrative official by a 3/5ths vote. In the event that the Board of Adjustment reverses or modifies the decisions of an administrative official, all similar and subsequent actions by the administrative officials shall be in accordance with the decision. Records shall be kept of all interpretational decisions.

3. District Boundary Interpretation Procedure

In case of a dispute in the location of a district boundary, the Board of Adjustment may determine the exact location of the boundary. Records shall be kept of the interpretation and the action shall be noted on the Official Zoning Map.

SECTION 3

That the zoning ordinance be renumbered if necessary to accommodate this change.

SECTION 4

That this ordinance becomes effective upon adoption.

(Zoning Ordinance amendment recorded in Ordinance Book 2, page ____.)

Request by Time Warner to Reconsider Rate Order

The County received a letter from Time Warner requesting that the Board of County Commissioners rescind the Rate Order disapproving Time Warner's requested rate increase. Representatives of Time Warner were present to explain their position. Robert Sepe, Action Audits LLC, was also present to answer questions.

Resource Person(s): Brad Phillips, Time Warner Cable, and Robert Sepe, Action Audits, LLC.

County Manager's Recommendation: The County Manager recommended that the Board receive the information from Time Warner and Robert Sepe, and based on the information presented, determine whether or not to rescind the previous Order.

Mr. Phillips, Vice President of Government and Public Affairs, expressed appreciation to the Board for revisiting this issue. He apologized for his absence at the May 12, 2003 Board of County Commissioners' meeting when this item was addressed. The cable system serving Durham County citizens has been upgraded and is unmatched by any other Time Warner cable system in the U.S. He mentioned the many current services offered by Time Warner not available seven years ago. Time Warner's operating revenue has increased, as well as the franchise fees paid annually to Durham County. Mr. Phillips asked the Commissioners to rescind the previously approved Order. The County has certified to the FCC that through the rate regulation process, it will follow certain guidelines when reviewing cable operator rates. The cable operator, in turn, must follow certain guidelines when calculating the rates. The local franchising authority must also follow guidelines. By denying the 2003 Rate Filing, Durham County has not followed those guidelines. Furthermore, the FCC has gone on record as reversing a local rate order that denies the basic service tier rate when that order is based on factors outside of those guidelines. Some of the factors cited in the guidelines are incorrect mathematical calculations, forms filled out incorrectly, forms filed incorrectly, or unmet time deadlines. The consultant's report specified none of these items. Recently the FCC ruled on an order at the Town of Smithfield, NC, that has a direct implication on the action taken by Durham County. One paragraph from the January 2003 rate order on appeal with the FCC reads, "In the Smithfield Order, the FCC found that the Town must follow the Commission's rate regulations when reviewing an operator's rate filings. If a local franchising authority does not dispute the basis for the figures presented in a cable

operator's rate forms and has not discovered any mathematical error in the forms, the Local Franchising Authority should approve the operator's rates as derived from those forms. The LFA concern about the rate level does not provide a legitimate basis for rejecting Time Warner Cable's calculations." The consultant's report stated that there were no mathematical errors. In fact, in review of the tape of the BOCC meeting, the consultant actually recommended approval of the rate filing. Based on those and other factors, Mr. Phillips respectfully requested that the Commissioners rescind the previous Order and approve Time Warner's rate filing for 2003 as did 17 other members of the Triangle J consortium. Time Warner has followed the law according to FCC regulations and asks that the Commissioners follow the same guidelines that were set by the FCC as a regulatory authority.

Commissioner Cousin asked County Attorney Chuck Kitchen on what grounds the Board can deny the rate increase.

County Attorney Kitchen responded that he had read the FCC's order explaining rate approvals. However, the actual provision is limited to a short paragraph which states that unreasonable rate increases can be denied, but the interpretation of this is somewhat unusual. County Attorney Kitchen found no court cases directly on point in the Federal court system. He suspects the reason for this is that cases are not appealed beyond FCC ruling because of costs involved. The issue isn't whether Time Warner has increased the rate appropriately. The real question is whether the initial rate is reasonable, based upon other jurisdictions. The FCC does not appear to go forward in its rulings to say this issue can be considered; however, in considering the code and the Order on setting the rates, it appears it can be addressed. At this point, the FCC has not recognized that right.

County Attorney Kitchen answered questions posed by Vice-Chairman Bowser by stating that the FCC in Washington would hear an appeal by Time Warner. Durham County may appeal the decision made by the FCC. The appeal would be filed in the DC Circuit, which means the attorney representing Durham County must be a member of that bar.

Vice-Chairman Bowser asked Mr. Phillips how much revenue is produced by Durham County and how much revenue the increase would generate.

Mr. Phillips stated that he does not know the answer but would obtain exact figures; however, the more revenue generated, the greater the franchise fee paid to the County. As compared to other communities within Time Warner's Raleigh division, which serves 16 counties and 95 franchises, the rates are comparable across the board.

Vice-Chairman Bowser asked about financial support that Time Warner provides to the Durham Education Network and St. Joseph's Foundation.

Mr. Phillips chose not to disclose the amount, but added that Time Warner's support includes cash, in-kind services, and many volunteer hours from its employees.

Vice-Chairman Bowser voiced an intense concern that companies providing services to Durham County do not supply jobs for our citizens. Time Warner moved many customer service jobs from Durham County to Morrisville.

Commissioner Cousin asked if revenue from the rate increase will be used to supply service to downtown areas.

Mr. Phillips replied that Time Warner is working with the City of Durham to address this issue.

Commissioner Jacobs referenced the letter requesting that Durham County rescind its Order in a timely manner. When must the Commissioners make a decision in order to prevent Time Warner from filing an appeal?

Mr. Phillips stated that Wednesday is the deadline for filing an appeal so a decision must be made at tonight's meeting.

Vice-Chairman Bowser stated, for the record, that Durham County should appeal FCC's decision should it rule in Time Warner's favor.

Chairman Reckhow read a statement in FCC's first rule-making order that "the priority established in the act is clearly to protect the interest of subscribers. An important focus for both basic tier and cable programming service rates consistent with providing system operators a fair return is the establishment of rate levels equivalent to rates that would be charged in the presence of effective competition. The criteria to be applied in setting both basic tier and cable programming service rates include a comparison with the rates for cable systems, if any, that are subject to effective competition." She asked why Time Warner takes the position that rates cannot be considered and evaluated on that basis.

Mr. Phillips responded that, based on FCC guidelines, effective competition does exist in Durham County because of the dish network penetration level of 17 percent.

Chairman Reckhow pointed out that the consultant's report argues that truly effective competition is another cable provider.

Chairman Reckhow also questioned the extent of the rate increase when, according to the Bureau of Labor statistics, the consumer price index only rose by 1.1 percent between June 2001 and June 2002. Time Warner's proposed rate increase is considerably higher.

Mr. Phillips responded that the consumer price index is only one factor used to determine the rate. Other factors are inflation and programming costs incurred by the cable operator. In 2003, on the basic tier alone, programming costs increased 27 percent. On the standard tier of service, the increase was 17 percent.

Chairman Reckhow expressed frustration that upgrades in other utilities do not necessitate rate increases that match those imposed by Time Warner.

Mr. Phillips commented that some utility companies are state regulated as opposed to cable operators that are regulated on a federal level with some input on the local level. It only appears that the Commissioners would be voting on an increase in cable rates. In fact, the matter in question is whether to approve the method by which the rate is determined, not the rate itself.

Chairman Reckhow added that an argument of cross subsidy may be applicable as Time Warner charges lower rates in areas with other cable operators and charges higher rates in areas with no cable competitors.

County Manager Ruffin asked if Time Warner opposed the merger of dish network.

Mr. Phillips replied that Time Warner took no position.

County Manager Ruffin wished to know why Time Warner is selective in its response to Commissioner concerns. Why does Time Warner choose not to respond to the issue of lower rates in other market areas, given that the issue was raised at the last Commissioner meeting and was of great concern to the Commissioners?

Mr. Phillips responded that he is conversant with rate comparisons across the division and the state and does not address unfamiliar topics.

Mr. Sepe stated that the manner in which the rate increase is calculated must be mathematically correct, according to the FCC. However, other factors do exist. The magnitude of the rate increase alone cannot be the sole determinant. Another factor the Board may consider is that the rate must be a rate that one would see in a competitive marketplace. Time Warner contends that the dish network is competitive. The true competitor is the wireline provider. Mr. Sepe stated that the rate was calculated correctly; however, the rate did not reflect the rate that one would find in a competitive marketplace (wireline provider). In this community, that rate should be \$10.45 and not \$14.95. This body must go forward with its original intent, let the rate order stand, and let the FCC sort out the process. Clearly, the forms that are used, although the mathematics is correct, do not yield the result that Congress intended.

Mr. Phillips stated that it would be difficult for a cable operator to speculate on the intent of Congress. Time Warner must follow FCC regulations and guidelines.

Commissioner Heron asked for advisement from County Attorney Kitchen.

Attorney Kitchen stated that he agreed with Mr. Sepe. Considering the FCC's ratemaking order and congressional intent, the Commissioners should make a determination as to whether a rate is reasonable. However, the FCC routinely has not allowed the local governing body this authority. They simply substitute their judgement for that of the local franchising authority. Durham County's chances of winning at the FCC are not good.

Chairman Reckhow asked Attorney Kitchen if he feels that the Board has a basis for moving forward.

Mr. Kitchen replied that “we certainly have an argument, but I have to, in all honesty, say that our chances of success at the FCC level are not very good, I think, on this argument.”

Commissioner Jacobs inquired about the legal costs involved if the Board does not rescind the order.

County Attorney Kitchen responded that Time Warner would be requesting attorney fees but was unsure whether the FCC has ever granted those fees. He was also unsure if the FCC has the authority to grant attorneys’ fees. Attorneys in the Washington DC area charge at least \$250 per hour.

Commissioner Heron asked if a compromise is possible between local government and Time Warner.

Mr. Phillips responded that Time Warner has followed the FCC’s guidelines and is asking Durham County to do likewise by rescinding the order.

Chairman Reckhow concluded that the Board of County Commissioners would not rescind the rate order adopted at its May 12, 2003 Regular Session.

Resolution Setting a Public Hearing on the American Tobacco Project

The Board was requested to adopt a resolution setting the public hearing on the financing for the American Tobacco Project. The proposed financing is with Bank of America with a 15-year fixed rate of 4.415%. The date of the public hearing is proposed for the June 23, 2003 Regular Session.

The resolution additionally makes findings as to why the Board is using a G.S. § 160A-20 financing instead of a general obligation bond. These findings are required by statute.

Resource Person(s): George Quick, Finance Director, and Chuck Kitchen, County Attorney

County Manager’s Recommendation: The County Manager recommended that the Board approve the resolution setting the public hearing on the proposed financing.

Victoria Peterson, PO Box 101, Durham, NC 27702, questioned the amount of money going into the American Tobacco Project. She expressed the opinion that the County Commissioners should spend more money to implement apprenticeship programs, which would reduce crime in the African-American community. Also, she contended that too much money is being spent bringing new businesses into Durham County. None of the new businesses are African-American owned.

County Attorney Kitchen clarified that the public hearing is not on the propriety of the project. The public hearing is related to the financing. This is a private placement with a single bank. The loan would not be secured by the taxing power, it would be secured by a deed of trust on the parking deck. Attorney Kitchen reported that a tax increase for this project alone would be no more than 73 hundredths of a cent per \$100. This does not include revenue from the project.

Chairman Reckhow felt it was important to point out that the 73 hundredths of a cent does not include a property tax revenue increase and the parking deck revenue, which largely mitigates our commitment.

Commissioner Cousin asked, for the record, if the acquisition of this long-term debt affects our bond rating status.

Mr. Quick answered that the debt should have no affect on our bond rating.

Commissioner Cousin moved, seconded by Commissioner Jacobs, to approve the resolution setting the public hearing on the proposed financing.

Before the final vote, Chairman Reckhow wanted to address the issue raised by Ms. Peterson. Providing business incentives is a decision made by the Board. The Commissioners consider the revenue to be generated within five years from increases in property taxes. The Board's policy is not to provide incentives greater than the flow of return money, which is spaced out over five years. We are never ahead in terms of what we are spending versus what we receive in return.

Commissioner Heron added that, according to our industrial policy, new businesses are required to employ a certain percentage of Durham County citizens.

Commissioner Bowser strongly disagreed with Commissioner Heron's statement.

Commissioner Heron asked if the requirements of the industrial policy are being met.

County Manager Ruffin responded that the agreements and the thresholds are monitored.

The motion carried unanimously.

The public hearing would be held at the Commissioners' next Regular Session scheduled for June 23, 2003.

FY 2003-2004 Funding for Holloway Street Neighborhood Achievement School

The Board's review of the FY 2003-2004 Budget was complete with the exception of a decision regarding an application submitted by the Durham Business and Professional

Chain for \$100,000 to establish the Holloway Street Neighborhood Achievement School. An initial staff review was conducted late last week after the application was received; however, due to the limited time available to review the application, important information relative to zoning at the proposed school site was not available until today (June 9). According to the City/County Planning Director, use of the property for a school will require a minor special use permit, which must be issued by the Board of Adjustment. However, the Planning Department has several concerns about the suitability of the site since both the site and the building are nonconforming, meaning that neither complies with the current requirements imposed by the zoning ordinance. Moreover, and more importantly, variances from the off-street parking, buffer, and setback requirements will be required due to the nonconforming nature of the site. The Planning Department does not believe the Board of Adjustment can grant a variance for the setbacks and noted that no variance has ever been granted by the BOA for the elimination of a buffer. Finally, the Planning Department questions whether any relief will be granted from the ordinance's off-street parking requirements and advised that the Board has a demonstrated record of refusing to relax off-street parking requirements that are stipulated by the zoning ordinance.

Resource Person(s): Mike Ruffin, County Manager; Carolyn Titus, Deputy County Manager; and Frank Duke, Planning Director

County Manager's Recommendation: The County Manager recommended that the funding for the application be denied due to problems that have surfaced regarding the suitability of the site for a school and that the \$100,000 be appropriated to Durham Public Schools for Current Expense.

County Manager Ruffin referenced the information provided to the Commissioners regarding zoning issues and the general assessment of the property located at 405 Canal Street.

Vice-Chairman Bowser asked if it is customary for staff to provide this amount of background information regarding a nonprofit funding request.

County Manager Ruffin responded that this level of assessment is probably not customary. He has never known an application for nonprofit funding to be considered outside of the application period.

Vice-Chairman Bowser asked County Manager Ruffin if he remembered the Literacy Council's application that was submitted a day prior to approval of the FY 2002-2003 Budget.

County Manager Ruffin thought the Literacy Council had applied for funding during the application process.

County Manager Ruffin continued by saying that the County has a commitment to make sure our children are tutored in a safe environment. Staff has reservations that this

environment is safe based on the assessment of the structure. Until this afternoon, he was unaware of a zoning problem, but this was a fair question to ask for a structure being proposed in a residential area for nonresidential use. Both the lot and structure were found to be nonconforming, meaning that they do not conform to the current provisions of the Zoning Ordinance. The project will require at least two special use permits (for the use as well as the nonconforming lot) as well as variances from at least two sections (setbacks and buffers) of the Zoning Ordinance and possibly one additional section (parking). Based on conversations with Planning Director Frank Duke, the test in the ordinance is not met for the setback variance that would be required. There is very strong likelihood that the Board of Adjustment would not grant any variance request from the setback requirements. Regarding the buffer and off-street parking variances, historically there has never been a decision by the Board of Adjustment to grant a variance for the elimination of a buffer which would be required in order to accommodate the off-street parking requirement. The only other remedy would be a variance from the off-street parking requirement and again, the Board of Adjustment has remained firm in its refusal to relax off-street parking requirements. It appears that there is no likelihood that the site would be approved for the intended use. The Board needed to be made aware of these issues.

Vice-Chairman Bowser asked if staff had received permission to walk on the property, take pictures, and make them public.

County Manager Ruffin would ask Mr. Turner. (Mr. Turner was not present for this portion of the meeting.)

Dr. Lavonia Allison began speaking from the audience.

Chairman Reckhow reminded her that she had not signed to speak on this item and was out of order. She was not recognizing people in the audience during Board discussion.

Commissioner Bowser asked Mr. Ruffin if the property owner had been contacted to ask about planned upgrades to the property.

County Manager Ruffin responded that several calls had been made to Ms. Eaton, but she had not returned the calls.

Commissioner Heron referenced the number of e-mails she had received over the weekend concerning this budget request.

Ann Recesso, 8 Winslow Place, Chapel Hill 27517, was fully supportive of programs to improve reading and math skills. However, she felt that this particular school's request should raise many red flags. As a taxpayer, she does not want nonprofits to be funded without hard evidence of their success. We need to invest in the programs that are already in place.

Commissioner Bowser related that three of the persons managing the program have doctorates and two are retired principals. They are well qualified to run this program which was developed because of the oppressed test scores at Eastway Elementary School.

County Manager Ruffin stated that Commissioner Bowser was correct in his earlier statement that the additional amount given last year to the Literacy Council was outside the application process.

Commissioner Heron moved, seconded by Chairman Reckhow, that the funding for the application be denied due to problems regarding the suitability of the site for a school. Also, that the \$100,000 be appropriated to Durham Public Schools for Current Expense and that any additional monies go toward funding the teachers that were lost during the cuts, particularly on the state level.

Planning Director Frank Duke spoke on this item from a planning perspective. He had looked at the issues associated with changing the use of the property located at 405 Canal Street to accommodate the Neighborhood Achievement School. The property is zoned RM-20. The change in use will require a Minor Special Use Permit that can be granted only if the BOA determines that the use "is in harmony with the area, not substantially injurious to the value of properties in the area, and will not adversely affect the health or safety of the public" (Section 13.1.3). The lot is nonconforming. Section 4A.8.5 requires a minimum lot size in this district of 7500 square feet; this lot is approximately 5500 square feet. The property's residential use may be changed to either a daycare or a school only through the issuance of a Minor Special Use Permit from the Board of Adjustment (BOA) (Section 19.5.3). The existing building is nonconforming. Section 4A.8.6 requires a minimum front yard setback of 25 feet with 6-foot side yard setbacks for single-family uses and 8-foot side yards for all other uses; the building is approximately 20 feet back from the street and approximately 6 feet from the east side yard. The change in use of the structure to a non-residential use will require a variance from the BOA (Section 16) for both of these setbacks. Section 16.4.2.2 explicitly acknowledges that construction of a building on a site in violation of the setback requirements "shall not be grounds for a variance". The Zoning Ordinance in effect prior to the 1994 merged ordinance also required these setbacks, precluding the structure from being treated as a grandfathered structure (Section 19.2.1). It is unclear whether the BOA could approve this variance. Development as a school create an on-site parking requirement of 6 spaces per room plus one space for every 300 square feet of administrative area (Section 9.4.1); this would suggest a minimum of 19 parking spaces on-site. The only location on site where this amount of parking might be provided is the rear yard, but access to this area will require an additional variance. The additional variance would be from buffer provisions (Section 10.2.4). The standard buffer required would be 20 feet, but can be reduced to 5 feet with the construction of an opaque wall or similar visual barrier and the written consent of the adjoining property owners. This provision will be required for any non-residential development, given the limited space on the east side of the property; however, if parking is provided for a school, there will be no room for a buffer on the

west side of the property. The Neighborhood Achievement School would require either a variance from the parking requirements completely or a variance from the buffer requirements completely. In sum, the project will require at least two special use permits (for the use as well as the nonconforming lot) as well as variances from at least two sections (setbacks and buffers) of the Zoning Ordinance and possibly one additional section (parking).

Chairman Reckhow was troubled because the budget numbers on the application are not identical. Additionally, the application lacks specificity in terms of objectives and how progress will be measured. She could not determine who would be administering the program. There is no name on the application showing who is directly associated with this program. Another concern is the high administrative costs. Most of the salary dollars would go to administrators as opposed to teachers. The 1,100-square-foot facility seems inadequate for accommodating 100 students. As a result, she supported Commissioner Heron's motion.

Commissioner Jacobs wanted to know if the Board could find out the names of the people on the Holloway Neighborhood Achievement School Planning Committee.

Commissioner Cousin summarized the three issues being discussed regarding the school—the application, program viability, and the facility. There are problems with the facility; however, the program has very lofty objectives. We should not deny funding based on the facility. Can't the program be moved to another facility? What other options do we have?

Chairman Reckhow stated that Eastway is the only elementary school in the system that has a free after-school program currently provided by the Durham Parks and Recreation Department. The City Manager has made a recommendation for the City to discontinue that program but has agreed to pay the \$44,000 to the Community-In-Schools program to continue the free after-school program. Chairman Reckhow suggested dedicating \$10,000 - \$20,000 to pay teachers to provide tutoring and remediation in the after-school program. This would be a higher level of service than currently being provided.

Commissioner Cousin expressed his desire for the children to receive the optimal level of education that is required to address their needs.

Chairman Reckhow commented that the Board's ultimate goal is to address the needs of the children. She recommended using the money to help the children this year rather than waiting for the Holloway Neighborhood Achievement School to begin its operation, which could potentially take months.

Vice-Chairman Bowser favored providing \$100,000 as "seed" money to the achievement school.

Commissioner Jacobs stated that several questions remain unanswered in regards to this school. We have not had an opportunity to talk with the planning committee because we

do not know who serves on the committee. Could the money be dedicated to teacher assistants at Eastway?

Chairman Reckhow recommended that the Board support the motion and talk with the school system about using the money as Commissioner Jacobs suggested.

Commissioner Cousin asked that the Board arrange a meeting with the applicants and have them address the issues that have been raised.

Chairman Reckhow pointed out that several tutoring, computer training, and educational programs serve Northeast Central Durham.

Commissioner Cousin made a substitute motion, seconded by Vice-Chairman Bowser, to delay the Board's decision until the Commissioners and staff meet with the planning committee for the proposed school and ask questions regarding the site and application.

Chairman Reckhow stated that no one knows the composition of the planning committee.

Commissioner Cousin suggested that Ms. Delores Eaton be contacted because she presented the initial proposal.

Chairman Reckhow understood that staff has attempted to contact Ms. Eaton numerous times with no success.

Commissioner Heron expressed that the Board should concentrate its efforts on the program already established at Eastway.

Chairman Reckhow called the question on the substitute motion.

The motion carried with the following vote:

Ayes: Bowser, Cousin, and Jacobs
Noes: Heron and Reckhow

Adjournment

Chairman Reckhow adjourned the meeting at approximately 11:00 p.m.

Respectfully submitted,

Garry E. Umstead, CMC
Clerk to the Board