

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

Monday, March 24, 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**

Commissioner Heron added one item to the agenda concerning board/commission members' property taxes.

Chairman Reckhow added an item at the end of the agenda to discuss setting ground rules for public comments at the April 7 Worksession.

**Minutes**

Commissioner Heron moved, seconded by Commissioner Cousin, to approve the November 4, 2002 Worksession, November 25, 2002 Regular Session, and the January 13, 2003 Regular Session Minutes of the Board as submitted.

The motion carried unanimously.

**Letter Concerning Property Along the Former Eno Drive**

Chairman Reckhow asked the County Manager if a letter had been written from this Board about the property along the former Eno Drive. The alignment has been relocated and is not in the area of West Point on the Eno. The City is researching the tract of land,

but the Council has not approved it. She requested that a letter be sent urging them to dedicate the alignment in that area to the park to ensure that it will remain park land.

The County Manager responded that a letter has been written and another letter would be written and sent tomorrow. A copy would be forwarded to the Commissioners.

Commissioner Heron proposed that the letter be sent to the City Council, Mayor Bell, and City Manager Conner.

### **Consent Agenda**

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

- \* (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).

The motion carried unanimously.

\*Documents related to these items follow:

Consent Agenda 4(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).

NORTH CAROLINA STATE DEPARTMENT OF TRANSPORTATION  
REQUEST FOR ADDITION OF STATE MAINTAINED  
SECONDARY ROAD SYSTEM

North Carolina  
County of Durham

Road Description: Tyndrum Drive (Tyndrum Subdivision)—.5 miles; .2 miles from the intersection of Route NC 751 and Route SR 1309

WHEREAS, the attached petition has been filed with the Durham Board of County Commissioners requesting that the above described road, the location of which has been indicated in red on the attached map,\* be added to the secondary road system; and

WHEREAS, the Board of County Commissioners is of the opinion that the above described road should be added to the secondary road system, if the road meets minimum standards and criteria established by the Division of Highways of the Department of Transportation for the addition of roads to the system:

NOW, THEREFORE, BE IT RESOLVED by the Durham Board of County Commissioners that the Division of Highways is hereby requested to review the above-described road, and to take over the road for maintenance if it meets established standards and criteria.

CERTIFICATE

The foregoing resolution was duly adopted by the Durham Board of County Commissioners at a meeting on the 24<sup>th</sup> day of March, 2003.

Witness my hand and official seal this the 25<sup>th</sup> day of March, 2003.

/s/ Garry E. Umstead  
Clerk, Board of Commissioners  
County of Durham

\*In the office of the Clerk to the Board.

Consent Agenda 4(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).

Due to property valuation adjustments for over assessments, listing discrepancies, duplicate listings, and clerical errors, etc., the attached report details releases and refunds for the month of February 2003.

Releases & Refunds for 2002 Taxes:

Real	\$	3,452.88
Personal	\$	22,677.79
Registered Vehicles	\$	26,813.33
Vehicle Fees	\$	280.00
Solid Waste Fees	\$	195.00
Total for 2002 Taxes and Fees	\$	53,419.00

Prior Years (1998-2001) releases and refunds for February 2003 are in the amount of \$15,570.96.

Total Current Year and Prior Year Releases and Refunds \$68,989.96.

(Recorded in Appendix A in the Permanent Supplement of the March 24, 2003 Regular Session Minutes of the Board.)

Consent Agenda 4(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).

DURHAM COUNTY, NORTH CAROLINA  
 FY 2002-03 Budget Ordinance  
 Amendment No. 03BCC000047

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	\$261,304,243	\$165,939	\$261,470,182

Expenditures:

<u>Activity</u>			
<u>GENERAL FUND</u>			
Human Services	\$323,528,346	\$165,939	\$323,694,285

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

This the 24<sup>th</sup> day of March, 2003.

(Budget Ordinance Amendment recorded in Ordinance Book \_\_\_\_\_, page \_\_\_\_\_.)

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

Centex Homes presented 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 recommended 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 this 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 M. Duke, AICP, Planning Director, Durham City-County Planning Department

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

Chairman Reckhow said that this public hearing was continued at the September 23, 2002 Regular Session of the Board. She recognized Planning Director Frank Duke and asked him to present the background on this case.

Mr. Duke said that this request is from Centex Homes covering the 133.3-acre Herndon tract along Grandale Drive. The request has been modified since the September 23, 2002 public hearing. The modifications are consistent with the direction the Board of County

Commissioners gave to the developer. Specifically, the proposed number of dwelling units has been reduced from 271 to 251 single-family dwelling units with a modification in the overall density from PDR 2.1 to PDR 1.93. The other changes largely deal with committed elements. There are two additional changes in the development plan. The Board of County Commissioners specifically directed the first change, which was to delete the lots originally proposed to surround the cul-de-sac at the end of Hamilton Way. The other issue was increasing the size of the lots on the west side of this project. The size has been increased and the combination of these two factors leads to a reduced number of units. The stub streets from the adjoining projects connect within this project to provide connectivity through the area. The proposed minimum lot size continues to be 9,000 square feet. The average lot size has increased from a commitment of 11,000 square feet to a commitment of 11,250 square feet. In addition, there is a commitment of a 30-foot tree preservation area for a buffer for all lots adjoining the Fairfield Development. All lots abutting stream buffers will have a minimum size of 12,500 square feet. A number of traffic calming measures have also been added, and to the degree allowed by the governing regulatory agencies, installed as a part of the subdivision infrastructure. These include providing a raised table on Fenwick Parkway at the common boundary of the Fairfield Subdivision, providing an entry sign for the Herndon Tract at the common boundary with the Fairfield Subdivision, and addressing the existing dip in Fenwick Parkway located at the proposed connection with the Herndon Tract. Additional traffic calming measures along Fenwick Parkway will be decided at the time of site plan review.

The Zoning Committee held a public hearing on this case on July 9, 2002 and voted for denial due to school enrollment and stormwater concerns. Parkwood Elementary School does not have the capacity to accept the additional students, even with the revised development plan. The other schools seem to have the capacity to accept additional students. There is a possibility of a new school to relieve overcrowding in this area of the county. School overcrowding was the major issue raised by the Planning Commission. City/County Planning staff recommended approval based on compliance with the adopted NC 54/I-40 Corridor Plan. The rezoning request also complies with all the requirements of the Zoning Ordinance for a PDR.

Mr. Duke closed his presentation by asking the County Commissioners for any questions.

The Board of County Commissioners asked several questions and made comments about the rezoning request.

Mr. Duke and his staff responded to the questions and comments.

Chairman Reckhow opened the public hearing that was properly advertised. Each speaker was given three minutes to make comments.

The following citizens spoke in opposition to Centex Homes Rezoning Case PO2-25. Opposition was due to the overcrowding of schools, inadequate roads system, ordinance concerns, environmental concerns, density of the development, stormwater concerns, lack of infrastructure, and sewer problems.

Dr. E. Lavonia Allison, 1315 McLaurin Avenue, Durham 27707

Christine Davies, 129 Monterey Lane, Durham 27713

Brett Hiemenz, 921 Fenwick Parkway, Durham 27713

Carol W. Young, 5808 Williamsburg Way, Durham 27713

Tracy Stark, 5724 Williamsburg Way, Durham 27713

Bernd Haneke, 1017 Hamilton Way, Durham 27713

Liz Pullman, 1114 Scott King Road, Durham 27713

Marilyn Link, 1017 Fenwick Parkway, Durham 27713

Jim Tepperberg, 7519 Chesley Lane, Durham 27713

David Monahan, 1001 Goldenview Court, Durham

Floyd Diaz, 106 Khalsa Court, Durham 27713

Roger Fortman, 706 Braden, Durham 27713

Lloyd Redick, 5824 Williamsburg Way, Durham 27713

Denise Dawson, 5828 Williamsburg Way, Durham 27713

Ginny Dudek, 1115 Scott King Road, Durham 27713

Allan Ward, 5106 Granbury Drive, Durham was the only citizen to speak in support of the rezoning request.

Lowell Siler, Deputy County Attorney, told the Board of County Commissioners that Durham County had received three valid protest petitions. Two petitions had been received prior to the last public hearing and one was received last week.

Mr. Jack Markham Jr., Attorney for Centex Homes, responded to the citizen comments. A comment was made that the lot size has been increased by extending the lots into the floodplain. We have done exactly the opposite. There are only four lots that have a small portion in the floodplain. The floodplain maps have changed over the last 20 or 30 years at least once. The most recent change was made in 1996. A hydrological report was prepared and it called for drainage swells; they are indicated on the development plan.

Mr. Markham asked Chairman Reckhow to defer this rezoning request for an appropriate period of time. The comments at tonight's public hearing have left some room for negotiation.

Chairman Reckhow said that this rezoning request has been in the approval stage for a long period of time. Any deferral would need to be extremely short. The Commissioners had asked for significant changes at the September public hearing; this is a very environmentally fragile site. There must be a commitment to address the issues raised at

this hearing and the September hearing. Drainage is a very big issue. The storm drainage problem must have a higher commitment than in our current stormwater ordinance.

The Board of County Commissioners had a lengthy discussion on the rezoning request.

The residents asked the Commissioners to make a decision at tonight's meeting on the rezoning request.

Mr. Markham told the Commissioners that there is room for compromise on the concerns regarding this development.

Chairman Reckhow stated that, in her opinion, several of the lots should not be developed because of the very steep slopes in proximity to streams. If the Board decides to defer this item, she advised Centex to reduce the lots, protect these resources, and respond to the issues raised at the public hearing.

Chairman Reckhow closed the public hearing and referred the matter back to the Commissioners for their consideration and action.

Vice-Chairman Bowser wanted to offer a motion for deferral until May 27, 2003.

Chairman Reckhow said that the Planning Director indicated that the rezoning request must be revisited by the Planning Commission if the developer makes the substantive changes recommended by the Board.

Mr. Duke said that in order to place this item on the Commissioners' May 27, 2003 meeting agenda, he would need the revised documents from the developer by April 11, 2003.

Vice-Chairman Bowser moved, seconded by Commissioner Cousin, to defer this rezoning request until such time the alterations can be made and the developer can meet with the opposing residents and present a revised plan to this Board by May 27, 2003.

Commissioner Heron said if the developer doesn't feel that he can stay out of the floodplains and stay off of the steep slopes, we are wasting our time.

Chairman Reckhow asked Mr. Markham if he will make a commitment to consider these issues seriously, bargain in good faith with the citizens, and make the suggested changes. She asked for a commitment on the drainage.

Mr. Markham responded that he was willing to consider all of of the recommendations.



Chairman Reckhow told Mr. Markham not to come back to the Board without the changes. The tolerance level will be very low unless the issues are addressed. The next request will be the third time before the Commissioners. Mass grading and trail easements need to be moved to committed elements.

The motion carried unanimously.

**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 13<sup>th</sup> 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 13<sup>th</sup> 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.

Chairman Reckhow asked Mr. Sepe to come forward to make his presentation.

Mr. Sepe stated that he is Durham County's cable television consultant through Triangle J Council of Governments with Action Audits. He was asked to look at Time Warner's rate filings for Year 2003. He made a lengthy presentation to the Commissioners to explain how the rate filing system works. Local government has the power to determine whether the basic rate and the equipment and installation rates are reasonable. The FCC does not look at these numbers. It is up to the local government to look at the numbers. The local government may approve the numbers, approve the numbers with conditions, or deny the rate increase if there is a material reason for denial.

The Board of County Commissioners asked questions and made remarks to which Mr. Sepe responded.

Chairman Reckhow asked the two citizens signed to speak about this item to come forward.

Larry Holt, 5110 Stardust Drive, Durham 27712, said he came to the meeting to express opposition to this rate increase for four reasons:

1. The rate increase does not correspond with the improvement in service.
2. Time Warner has basically already implemented this rate increase.
3. Time Warner has refused to provide a response to a letter he sent in February 2003 asking for an explanation as to why the rates were increased and why they were increased without advance notification.
4. The increase on his bill seems to be twice the specified amount.

Mr. Holt asked the Commissioners to deny Time Warner permission to increase its rates prior to Board approval. The Commissioners should instruct Time Warner to provide a 30-day notice before rates are increased. Time Warner needs to have competition.

Dr. E. Lavonia Allison, 1315 McLaurin Avenue, Durham 27707, urged the Commissioners not to approve the rate increase.

Vice-Chairman Bowser said that there is no reason to approve this rate increase.

Commissioner Heron wanted to know if this agenda item was advertised as a public hearing. We may need to do that if we did not advertise.

Mr. Sepe said the County Commissioners have the option to hold a public hearing. Time Warner was notified that this item was on the agenda for this meeting. They chose not to have a representative present.

Commissioner Jacobs wanted to know if all citizens in the County have access to cable television.

Mr. Sepe responded that all citizens cannot receive cable in their homes. All of the downtown area should have cable. This should be a discussion point for the City's franchise renewal.

Commissioner Cousin requested permission to make a motion to deny the rate increase.

The Board of County Commissioners and Mr. Sepe had a lengthy discussion.

Vice-Chairman Bowser moved, seconded by Commissioner Cousin, to deny this rate increase on the grounds stated by Commissioner Cousin that cable is not available to all the citizens in our community and that the service is not a direct upgrade for the majority of citizens who receive the service.

Chairman Reckhow asked the County Attorney about the ramifications of denying this increase.

County Attorney Kitchen responded that Time Warner will appeal a refusal. He remarked that we do have a bad franchise ordinance. There are no enforcement powers in the ordinance. That needs to be changed.

The motion carried unanimously.

Chairman Reckhow requested that County Manager Ruffin take this franchise renewal process as an opportunity to "gear up" for the franchise renewal. We don't want to be playing catch up during the process. The Commissioners may want to hold a public hearing at the beginning of the process to receive citizen input. The Board must obtain documentation to build a file. An assessment needs to be done on community needs.

### **Request from the Little River Community Complex**

At the March 3, 2003 Board of County Commissioner 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 description; 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 recommended that the Board authorize an appropriation of \$12,500 from its contingency account.

County Manager Ruffin explained the recommendation to the Commissioners. The request was for \$25,000 but the bid was approximately \$19,000. He recommended a payment of \$12,500 only because this is former County property. The organization has managed its money very well. Although they have a small reserve, it is enough to make up the difference between \$12,500 and \$19,000. They have received another bid lower than \$19,000.

Mr. Ross said the lower bid is \$16,000.

Commissioner Heron said she understands that the original agreement between Durham County and the Northern Athletic Association states that the building reverts to the County if the organization goes out of business. I don't want to see the building deteriorate. I know that the Northern Athletic Association will not let that happen.

Chairman Reckhow agreed with Commissioner Heron. In a way, the County is protecting its investment.

Dr. E. Lavonia Allison, 1315 McLaurin Avenue, Durham, NC 27707, said if the County's policy is not followed based on what Commissioner Heron just said, then we have to open up for some other crisis situations and have them come requesting funding. The crisis situations I am talking about are not dealing with capital, but people and children. If you give the \$12,500, you will be setting a precedent. I am going to be with the persons when they come requesting the money for human needs. This request is coming in after the fact.

Commissioner Heron said that the Operation Breakthrough funding request was for capital, also. This policy concerning capital expenditure is something the Commissioners must consider. This is a very worthy request. The Little River Community Complex and the Northern Athletic Association have never come to the County requesting funding since they've had the building, contrary to other projects on the other side of town that I could name tonight.

Commissioner Jacobs requested additional information on the usage and the participation level at the facility. I do not see anything about participant number or diversity.

Mr. Ross said that 60 to 70 percent of the participants are African American.

Vice-Chairman Bowser was in favor of supporting these projects, but he felt the Commissioners would be setting a precedent if the project is approved. Other nonprofits will be presenting special requests to the Board outside of the budget cycle. The County Manager should have recommended consideration of this request in the regular budget cycle.

Chairman Reckhow said that she does not see much difference in this request and Operation Breakthrough's request. We have obligations to both organizations. She voted in favor of Operation Breakthrough's request since it benefited children by putting them in safe quarters. We have the same relationship with the Northern Athletic Association, only a little less direct. As Commissioner Heron pointed out, we have essentially a long-term lease. If the facility ceases to be a community center, the building reverts back to Durham County. We should protect our investment. If the community center cannot repair the leak, the County should repair it. If we don't fix the roof, the leak will enlarge, the damage will increase, and it will be more costly to repair. The community center has been located there for ten years, and they have not asked the County for any financial help to keep the facility in operation or for repairs. The Northern Athletic Association has made many improvements to the building. This is not just any nonprofit in any building. This is a building that we have some relationship with.

Vice-Chairman Bowser stated that since we are nearing the budget process for FY 2003-2004, we need to do something that will not set a precedent so that everybody will not be coming to us between now and budget time for funding.

Mr. Ross responded to Vice-Chairman Bowser by saying that this is an emergency situation. We would not have come to you if it had not been an emergency.

Vice-Chairman Bowser said that when the Board was discussing additional financial help for Operation Breakthrough two weeks ago, Commissioner Heron stated that she was going to do the same thing for the Little River Community Complex. If not for that statement, he would be in favor of the Little River Community Complex request tonight.

Commissioner Heron moved, seconded by Chairman Reckhow, to approve the recommendation for the \$12,500 appropriation for Little River Community Complex repairs.

Vice-Chairman Bowser clarified that he is not against this request. He was against the way it was handled. He was not going to vote in favor of this motion tonight.

The Board of County Commissioners held a lengthy discussion on this agenda item.

Commissioner Jacobs said that people should come first when considering a proposal; therefore, she will vote in favor of the motion.

Commissioner Cousin said the Board will be setting a precedent, and other organizations will come to us for financial help. We should weigh other requests, as well, on their relative merits.

The motion carried with the following vote:

Ayes: Cousin, Heron, Jacobs, and Reckhow

Noes: Bowser

Absent: None

### **Proposed Stormwater Regulations**

The Department of Environment and Natural Resources has proposed new stormwater regulations that 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 that 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 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 nonextent 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.

County Attorney Kitchen presented an overview of the proposed stormwater regulations.

The Commissioners asked several questions about the agenda item.

County Attorney Kitchen responded to the questions.



Commissioner Cousin moved, seconded by Commissioner Jacobs, to authorize the County Attorney to prepare comments in opposition to adoption of the proposed stormwater rules. The County Attorney was directed to write a letter to the County's Legislative Delegation requesting its support for legislation to prevent DENR from adopting the regulations. The County Attorney was also authorized to file a suit challenging the regulations if they are passed and DENR attempts to regulate Durham County.

The motion carried unanimously.

### **Property Tax Status for Board and Commission Members**

Commissioner Heron said that the Board's *Resolution for Establishment of Policy and Procedures for Appointments to County Boards, Commissions, Committee or, Authorities* states that citizens' property taxes must be paid before applying for boards/commissions. She suggested that the Board add to that policy that taxes must remain current during service on these boards and commissions.

Commissioner Heron moved, seconded by Vice-Chairman Bowser, to add to the Board policy and procedures that citizens' property taxes must remain current during service on boards and commissions.

The motion carried unanimously.

Chairman Reckhow directed County Attorney Chuck Kitchen to amend the policy and bring it back to the Board for approval.

### **Worksession Scheduled for April 7, 2003**

Chairman Reckhow referred to the 24 citizens who had signed to speak at the April 7 Worksession. She reviewed the *Rules of Procedure* which states that five minutes can be allowed per person for public comment. The rules also permit the Chairman to set the time limit.

After some discussion, the Commissioners concurred to allow three minutes per speaker at the April 7 meeting due to the large number of speakers.

Chairman Reckhow asked the Clerk to the Board to contact the citizens and inform them of the three-minute time limit.

### **Boards and Commission Appointments**

Garry E. Umstead, CMC, Clerk to the Board, distributed ballots to make appointments to the following boards and commissions. (Asterisks designate appointees.)

#### Adult Care Home Community Advisory Committee (The term expires September 2004.)

\*James Walter Stockton—Bowser, Cousin, Heron, Jacobs, and Reckhow

#### City-County Appearance Commission (The terms expire April 2006.)

\*Kelly Matherly—Bowser, Cousin, Heron, Jacobs, and Reckhow

\*Brenda Hill Pollard—Bowser, Cousin, Heron, Jacobs, and Reckhow

#### Durham Technical Community College (The term expires June 30, 2007.)

\*Thomas J. White—Bowser, Cousin, Heron, Jacobs, and Reckhow

#### Environmental Affairs Board (The term expires June 1, 2006.)

\*Dock Terrell—Bowser, Cousin, Heron, Jacobs, and Reckhow

Lauren Whitley—no votes

#### Nursing Home Community Advisory Committee (The terms expire February 2004.)

\*Mildred Barnes—Bowser, Cousin, Heron, Jacobs, and Reckhow

\*Ethel Morris Foote—Bowser, Cousin, Heron, Jacobs, and Reckhow

\*Martin J. Neagle—Bowser, Cousin, Heron, Jacobs, and Reckhow

#### Open Space and Trails Commission (The term expires December 31, 2005.)

\*Marc deBree—Cousin, Heron, Jacobs, and Reckhow

Gary A. Rains—no votes

#### Planning Commission (The terms expire June 2006.)

David N. Blodgett—Cousin

Marc deBree—no votes

\*Deborah G. Giles—Bowser, Cousin, Heron, Jacobs, and Reckhow

\*Robert W. Jentsch—Bowser, Heron, Jacobs, and Reckhow

#### Public Health Board (The term expires 2006.)

Brian J. Caveney, MD, JD—no votes

Krishna J. Fisher, PhD—no votes

\*James Michael Shade, OD—Bowser, Cousin, Heron, Jacobs, and Reckhow

Transportation Advisory Board (The term expires April 1, 2006.)

\*Dan G. Smith—Bowser, Cousin, Heron, Jacobs, and Reckhow

Women's Commission (The term expires June 2006.)

\*Annette Anderson Bailey—Bowser, Cousin, Heron, Jacobs, and Reckhow

### **Notification of Board and Commission Vacancies**

Chairman Reckhow asked Deborah Craig-Ray, Public Information and Governmental Affairs Director, to talk with Mr. Fields about ways to inform our citizens of board and commission vacancies.

### **Announcement**

Chairman Reckhow announced that a candlelight vigil would be held on Thursday, March 27, 2003, on the steps of the Durham County Courthouse from 6:30 to 7:30 p.m. ARC of Durham County and the Alcohol Drug Council of North Carolina are sponsoring the vigil. The purpose is to promote appropriate and accessible health care for the people of Durham County.

### **Adjournment**

Chairman Reckhow adjourned the meeting at 10:15 p.m.

Respectfully submitted,

Garry E. Umstead, CMC  
Clerk to the Board