

**CITY OF DOVER BOARD OF ADJUSTMENT
FEBRUARY 16, 2005**

The Regular Meeting of the City of Dover Board of Adjustment was held on Wednesday, February 16, 2005 at 10:00 AM with Mr. Sheth presiding. Members present were, Mr. Sheth, Mr. Nowak, Dr. Goate` and Colonel Ericson. Mr. Senato was absent.

Staff members present were Mr. Galvin, and Mr. Rodriguez. Also present were Mr. Dominic Balascio, Mr. Jeff Coates, Mr. William Carrow, Mr. David Braun, Mr. Tom Burns, and Dr. James McClements. Those speaking during public hearing include; Mr. John Walton, Mr. Bill Carrow, Ms. Tracey Murphy, Mr. Steven Cain, Mrs. Janice Sibbald, Mr. Kenneth Hoffmann, Mrs. Ann Rider, Mr. Matt Kropiewnick, Mr. Steve Saxe, Mrs. Elizabeth Hartley, Mr. Simon Lowe, Mr. Robert Taylor, and Mr. Mike Malkiewicz.

Mr. Sheth stated that per request of Staff and Board members Item V-05-03 Capital Baptist Church should be moved to item #1 on the agenda due to the intensity of issues involved with this case. Mr. Nowak moved to approve the amended agenda, seconded by Dr. Goate`, and the motion was unanimously carried.

Dr. Goate` moved to approve the regular minutes of December 15, 2004 and January 25, 2005 as submitted, seconded by Mr. Nowak and the motion was unanimously carried.

OPENING REMARKS CONCERNING DEVELOPMENT APPLICATIONS

Mr. Galvin advised the audience of policies and procedures for the meeting.

NEW DEVELOPMENT APPLICATIONS

Application V-05-01

401 Kesselring Avenue: Capital Baptist Church of 401 Kesselring Avenue, Dover, Delaware has applied to the City of Dover Zoning Board of Adjustment requesting a variance from the R-10 (One Family Residential) Zoning District Bulk Requirements (Article 4 §4.1) to allow the construction of a one-hundred (100) foot guyed tower, with associated guy anchors and equipment building at the nine (9) acres empty parcel of land behind 401 Kesselring Avenue. Specifically the applicant is requesting a variance of sixty-five (65) feet from the maximum building height of thirty-five (35) feet.

The subject property is located on the north side of Kesselring Avenue between New Burton Road and Alder Road. The owner of record is Capital Baptist Church.

Representative: Mr. Dominic Balascio; Attorney for Capital Baptist Church, Mr. Jeff Coates, Pastor; and Mr. William Carrow, Parishioner.

Mr. Galvin stated that the legal notice was published in the Delaware State News on February 6, 2005 and the public was notified in accordance with regulations.

Mr. Sheth questioned if there were any members that would have a conflict of interest? There were none.

Mr. Balascio stated that this application is unique in that it involves a church and a radio tower. These are very limited circumstances and the Board should have a concern with setting forth precedence today. First, the FCC has granted these types of permits on a very limited basis. Second, a lot of the laws that are going to be discussing today are limited to churches. This Board has already reviewed a recommendation provided by the City Planner and he would asked that the Board set aside the recommendation that was made by the City Planner and hear his presentation today with an open mind. He will discuss various laws that were not considered by the City Planner when he drafted his opinion from a code perspective.

Comment [JG1]: This does not make sense to me. I think it should be that "the Board should not have a concern with creating a precedent" with an action to approve.

Mr. Balascio further stated that the church has been a member of the community for over thirty-five (35) years and has administered to the needs of this community. In March of 2004 the FCC granted a permit to the church to allow them to operate a low powered FM radio station. The issuance of these type of permits is limited to community based churches and education entities. This was a one time offer by the FCC and no other such permits can be obtained in the future. The radio station will allow the church to broadcast Christian programming to it's parishioners in the immediate community. The radio station will also serve as the Emergency Alert System, the Amber Missing Persons Notification, and will also become part of Homeland Security.

Mr. Balascio provided the Board members with some pictures of the radio tower and what it would look like when installed. The colored pictures provide the type, style, and design of the tower to be installed. It has a hollow center with three external beams with internal support members. Another picture depicted a similar tower that has been installed to the rear of someone's yard and what it would look like from the distance shown. The third diagram shows the location of the radio tower with a 200x400 foot plot in the immediate center and coming off of what will be guyed anchors that extend to three different locations on the rails. Each one of these areas will be fenced in. Adjacent to the radio tower will be a 5x5 equipment building. The next diagram shows guyed wires that would come off of the tower. There will be four guyed wires that will come off of the tower on each side of the tower and will between 3/16 of an inch and 1/4 of an inch.

Mr. Balascio further stated that another diagram presented showed the actual cross section of the tower itself and the front view. In looking at this cross section, the three outer poles on the radio tower will be approximately 1.315 inches on the outside diameter. The internal bracing that goes up on a zig-zag will be approximately 3/8 of an inch.

Mr. Sheth stated that the City of Dover does not have an ordinance; therefore, this Board has to address this issue regarding the monopole tower. You strictly want to broadcast messages for the church? Responding to Mr. Sheth, Mr. Balascio stated that yes, this would not be for commercial purposes. The broadcast would only be for Christian

programming and considered low powered FM. The frequency coming off of the tower would only transmit about a 3.5 mile radius from the tower. The frequency to transmit to that radio tower at a 3.5 mile radius is dependent upon the FCC requirement that the tower be one hundred (100) feet in height because without that it would not serve the 3.5 mile radius.

Mr. Sheth further stated even though the decision is made by this Board it would then have to go before the Planning Commission because it would then be a Conditional Use, is this correct? Responding to Mr. Sheth, Mr. Galvin stated that the policy that the City has is represented in the Code and any application of a tower in a residential area would be considered a Conditional Use and would have to go before the Planning Commission.

Responding to Mr. Galvin, Mr. Balascio stated that he respectfully disagreed. Internal policy that he has reviewed that was provided by the Planning Department applies to telecommunications towers. This is not a telecommunications tower, this is a radio tower and as such, under section 12, the definition of radio towers has been defined as a building. The only thing that this tower violates in the R-10 district is the height requirements, there is no need for a Conditional Use application.

Responding to Mr. Balascio, Mr. Galvin stated that he would be happy to discuss this in the future; however, even as a non-residential use, it would be forward for Site Plan review, rather than have a Conditional Use review.

Dr. Goate` questioned if this tower would be in operation twenty-four hours a day, 365 days a year? Responding to Dr. Goate`, Mr. Balascio stated that ideally, yes.

Colonel Ericson stated that by ordinance the Board members have two requirements that they have to look at for request for variances. The first would be the hardship, in which the ordinance states that "the original ordinance would deprive the applicant of all reasonable use of the property and to grant a variance as necessary as a reasonable use of the property and that the minimum of this variance would accomplish this purpose." You did not address that in your application, how is this a hardship.

Responding to Colonel Ericson, Mr. Balascio stated that he was still trying to provide background facts and that he would address this standard as well as the laws that should be considered by this Board today.

Mr. Balascio further stated that the property is located within the R-10 zoning district and the height regulations for that district is thirty-five (35) feet. The radio antenna will be one hundred (100) feet in height and would need to be this tall in order to cover the radio transmissions to the local community with what the FCC considers the effective radiated power. The effective radio tower for low power FM is 100 feet and allows for a service reception of 3.5 miles. In sum, the effectiveness of the radio communication directly depends upon the height of the tower. The radio antenna will be located within the 200x200 foot plot and would be 100 feet in height. The guyed anchors coming off of the tower would be 80 feet in length.

Mr. Balascio further stated that this site is located directly adjacent to the Mayfair power station and the electric transmission line running up New Burton Road. In speaking with Mr. Enss, City of Dover Electric Department, the transmission line poles are approximately 65 feet in height and would be increased to a height of 70 feet in the near future. The City of Dover is in the process of upgrading these poles. The new poles would be 20" in diameter and would be a solid mass straight up. Across the top of these poles will be a t-brace that goes across them. It is very important that the Board recognize what these poles look like because they are compared to the radio tower, which will have a superior visual impact over the radio tower not only their size in diameter but also due to the number of them. Also, directly adjacent to this property is the railroad tracks and on those tracks there are cars parked along those tracks that are left there for some time.

Mr. Balascio further stated that at this time, he would like to pass out some pictures of the area. Included in this handout was a survey of the piece of property with pictures that were number one through eight. These numbered pages correspond with the pictures that have been marked so that you can look at those pictures and see where they are standing at.

Mr. Balascio stated that in the first picture, they are standing at the corner of New Burton Road and Kesselring Avenue, which also includes the Mayfair power substation, and various transmission lines. Directly behind the trees is where the radio power antenna would be located. The second picture is moving towards the Capital Baptist Church and if you look in the distant background, you can see the present substation and electric transmission lines. Picture four and five is where the open space is located and once again if you look in the distant background you can see the various transmission lines, the power substation and the trees. Moving towards the backside of the property depicted in picture six once again, you can barely, at this point in time, see the power substation and the transmission lines that are located on New Burton Road from that distance. This is the edge of their property line so in this picture, the poles that you are looking at now are sixty-five (65) feet in height with a solid twenty inch diameter. There is a substantial difference from their pole which will only be twelve (12) inches in width and would have a hollowed center with an inch size outer beam and three, six (6) inch interior beams. Moving further down on New Burton Road, depicted in picture eight, brings you closer to the substation. You can see the various transmission lines and the parked railroad cars.

Colonel Ericson stated that he was in this area and the first thing that impressed him about the area was the nice housing development very close to the church. In the pictures, very conveniently for you, you tend to ignore the fact that there is a nice residential area nearby.

Responding to Colonel Ericson, Mr. Balascio stated that this was not purposely done. The gentlemen that took the pictures for them followed instructions, which was to walk the perimeter of the nine (9) acre lot. The pictures were taken from an inward position only. At the edge of their property line, there are no residential houses that could be located there because of setbacks.

Mr. Balascio stated that he reviewed some of the various districts in the City of Dover and found that only three districts in the City of Dover would allow for a radio tower of this height without the need for a variance. It is very limited in where these towers can be located throughout the town as the Code is presently written in that it is very restrictive. Especially when you have a low powered FM radio that only extends to a 3.5 mile radius you would need to be close to your parishioners and close to the church because that is the community and the congregation that follows your church.

Mr. Balascio stated that he would now like to discuss with the Board the standard that they would need to satisfy in order for the variance to be granted.

Dr. Goate` stated with regards to Mr. Balascio`s statement that the parishioners of this particular church all come from the immediate area, do you know how many?

Responding to Dr. Goate`, Mr. Balascio stated that not all of them, no. He does not have any idea of how many are not. They would like to be in close proximity to the church and school so that broadcasts could go out in that immediate area. The other reason why they would like to have it located close to the church and school is that this would become part of the Amber Alert Missing Persons Notification.

Mr. Balascio further stated that the second standard would be the controlling law that the Board needs to be considering in granting the variance. The variance is an area variance governed by the "exceptional practical difficulty" standard. This standard has been screened by the Supreme Court of Delaware in great detail and he has brought with him the controlling case to provide to the Board so that you will have it for your records.

Mr. Sheth stated that he did not have to go into such great detail. Responding to Mr. Sheth, Mr. Balascio stated that he would be very brief. At this time, the handout was distributed to Board members.

Mr. Balascio further stated that the Delaware Supreme Court has stated that "Area variances are controlled by the least stringent standard of the "exceptional practical difficulties" standard." The court states that there are four items that you must look at when considering whether or not to grant the variance. The first is the nature of the zone in which the property lies, which would be the R-10 district. The second, the character of the immediate vicinity and the uses contained thereon. This includes the residential houses that surround the nine (9) acre community and church. Some of the commercial activities that go on in the area include the Mayfair power station, electric lines, and the railroad tracks. Number three, the Court states that you have to look at if the restriction on the property were removed, whether such removal would seriously affect the neighboring property. They feel that this tower in comparison to the substation and transmission lines will have a minimal visual impact with the exterior beams approximately one inch in diameter and the guyed anchors being about the same size. Fourth, the Courts state that if the restriction were not removed, whether the restriction would cause "exception practical difficulty" for the owner in his effort to make normal use of this land. They believe that this would be normal use of their land especially as a

church. It is very important as a church that they use as many means of communications to put forth the message of their ministry. They believe this to be a normal improvement of their land and if you look at how the City has already developed some of the land around it, they have chosen to put the power station there, which is a very similar use as the radio antennas.

Mr. Sheth stated that with this R-10 zoning (One Family Residential) zone you understand that we have not established any financial hardship. We have an obligation with regards to the City Ordinance that anyone can build in the R-10 zoning district and if they were to want to build the same thing, they would not be able to.

Responding to Mr. Sheth, Mr. Balascio stated that this is an exception in that you would not have to worry about precedent being set because this property is owned by a church and the reason for you granting the variance is limited to a church. The precedent here would only be set for other churches. Second, the FCC has issued these types of permits on a limited basis and this is a one time offering. Currently, they are the only church that has the permit because no one else can broadcast within their 3.5 mile radius with a low power FM radio station. These are very limited circumstances in that you would have to have the permit and also have to be a church so not any R-10 property could be developed in this manner.

Mr. Balascio further stated that also mentioned was the economical hardship. This is not part of the "exceptional practical difficulty" standard.

Dr. Goate` questioned why should they not look at the economical hardship? Responding to Dr. Goate`, Mr. Balascio stated that when the Delaware Supreme Court looked at area variances they came up with these four standards to look at. In this case, the economical hardship really does not bear too much on this project. They are not running this radio tower for commercial purposes. The economical hardship that you could consider would be the hardship of trying to take and relocate the tower to another location in the City of Dover on land that the radio tower would be allowed to go on. Other than that, there is no commercial business loss because they are not a commercial entity. Also looking at the economical impact you could also look at them having to relocate their church and having to purchase another piece of property.

Mr. Balascio further stated that he would now like to present to the Board the laws that are applicable only to churches that you should be aware of to make your decision today. There is a unique law that applies to religious entities only, called the "Religious Manuals and Isulis Persons Act" found under the Federal Code of Regulations. Under the Religious Land Use Act, the pertinent part of this code states "No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly or institution is in furtherance of a compelling government interest and is the least restrictive means of furthering that compelling governmental interest." Once the church has shown that denying the radio station on them would impose a substantial burden, on the free

exercise of their religious beliefs, the burden shifts to you as the Board of the town to show that you have a compelling government interest.

Colonel Ericson questioned when the church was built, was it zoned R-10? Responding to Colonel Ericson, Mr. Galvin stated that since the church was built thirty-five (35) years ago it was probably zoned some kind of residential zone, but may not have been R-10. A church is allowed in a residential district.

Colonel Ericson further questioned that when the church was built did they understand the restrictions of the property? Responding to Colonel Ericson, Mr. Balascio stated that this is a separate piece of property from the church and there are no restrictions put on the church. It has nothing to do with this consideration.

Mr. Balascio handed out a copy of cases directly related to this request. The case he would refer to is the Superior Court Case heard in New Jersey. What he believes is important is that he walk the Board briefly through the case because he believes that it's controlling will help the Board in making its decision today.

Mr. Balascio further stated that the case heard was regarding a church who wished to operate a radio station on its property located within a residential district. The station in this scenario would require that two towers of 184 feet in height be constructed and was necessary that they come before a board like yourselves for a variance. The Court in deciding this matter first look at the issue of "Freedom of Religion". The first thing that it looked at was the immunity that the Board would have in denying such a permit. The Court stated that "Municipalities have no immunity in a suit for damages under the Civil Rights Act. That if the town and Board were found to violate the churches constitutionally protected rights, both Board and township are liable for damages." By denying such a variance, the Civil Rights of the church would be violated and the town would then be subject to damages.

Mr. Balascio further stated that the Court next talked about religious uses in the first amendment. The Court states "under the first amendment whether the question here is whether the proposed radio station constitutes a religious use with which the municipality, in the adoption of its zoning ordinance and the Board of Adjustment in its implementation of that ordinance, cannot interfere." The Court goes on to say "the ends of municipal zoning regulation seldom are considered important enough to justify restrictions which cripple or even seriously inconvenience a religious institution."

Mr. Balascio further stated that the Court goes on and states that "the right of the community to impose appropriate and reasonable restrictions upon the use of property for religious purposes does not allow it to adopt regulations unrelated to the public welfare, which in effect excludes a proposed religious use from a residential district." The Court further states that "any state action, which here includes municipal action that unduly burdens the free exercise of religion violates the First Amendment." The action further states that "Government is precluded under the First Amendment from prohibiting the free exercise of religion." The Court further stated that "one must recognize that the

power to affect, through zoning, religious activity in a residential areas surely has its limits. Zoning authorities must be exercised for the general welfare of the community, and must be exercised within constitutional limits.” Religious institutions enjoy a highly-favored and protected status, which severely curtails the permissible extent of governmental regulations in this areas.”

Mr. Balascio further stated that the Court goes onto state that “the State to demonstrate some overriding governmental interest, that justifies the substantial infringement of the churches first amendment right and to show that no alternative forms of regulation would combat such abuses without infringing First Amendment Rights.” These are the same two prongs that we just previously talked about under the Religious Land Use Act. The court goes on and talks about the power of the proposed radio station and how it would communicate the religious beliefs of the church. This must be important for them to do because the FCC even grants permits to them for these purposes. Churches convey their constitutionally protected religious messages primarily by means of written and spoken word. The court realizes that radio broadcast has permitted millions of people to see and hear religious services and religious leaders. The churches desire to operate a radio station in connection with the church-owned school is simply adding one more activity to its list of religious undertakings.

Mr. Balascio further stated that the court goes on to say “The proposed radio station, as a religious use, is protected by our state and federal constitutions through their guarantees of the free exercise of religion. A zoning regulation which denies that use can accommodate the constitutional demand only if it is shown by the municipality to reflect an overriding governmental interest with no alternative available means to combat the claimed undesirable use.” The court goes on to conclude that “Height cannot be used as the means of prohibiting that religious use.”

Mr. Balascio further stated that the court again, revisits the fact that the FCC has licensed the proposed radio station to the church which shows that there is a federal interest in the encouragement of these types of operations. The court case goes on to state “Radio communication has become a central part of the daily life of our society. Radio keeps us informed; it promotes our education. The deprivation of that communication would be a great loss. A government which serves its people well is one which expands the avenues of communication. Its overriding interest is one which favors radio operations, not one which inhibits them.” The court is actually saying that you as a Board and as a compelling government interest are to promote this kind of activity and not prohibit it. The court goes on to conclude that “by preventing the operation of the church’s proposed radio station frustrates a religious activity. No overriding governmental interest justifies that frustration”.

Mr. Balascio further stated that the court goes on to speak of Freedom of Speech, which is separate from Freedom of Religion.

Mr. Sheth stated that this Board is aware of what the ordinances are and that he does agree with what you are saying about what the consequences would be and what the

courts say. We also understand what our obligations as a Board are. What he feels like Mr. Balascio is suggesting to the Board is that since the court says that you should do it that we are required to approve it.

Responding to Mr. Sheth, Mr. Balascio stated that when you add what he will collectively provide you with today this is what the courts have upheld. Normally, he does not go into as much detail as he has done today; however, he felt that it was important for the Boards decision and he wanted to walk you through it so that you would have it when the decision was made today.

Colonel Ericson stated that the court talks about whether it would be a concern if this tower is considered a safety hazard? One of the concerns he has is that there is an electric power station in this area. If this tower should fall down in high winds or for some other reason, is this a safety concern in your opinion?

Responding to Mr. Ericson, Mr. Balascio stated that no, this has already been addressed by the FCC and the guidelines that they give for the 200x200 foot perimeter and fencing that goes around it. The tower is anchored by not only guyed wires but is also bolted to a cement pad on the ground. For it to fall, you would have to have 12 guyed wires break, the cement block foundation that it is attached to would have to break, and it would have to fall in excess of 200 feet. The tower is only 100 feet in height. It will not go outside the perimeter of the property nor would it go outside the perimeter of the 200 feet and the substation is located way outside of that. If you would like, as part of the Boards consideration, they could move it an additional 100 feet away from the substation so that it would then have a 300 foot clearance as they have nine (9) acres of land.

Mr. Balascio further stated that with regards to Freedom of Speech they come back to looking at whether or not there is some compelling government interest. Once again, the court makes the same conclusion that they cannot find any compelling government interest and for this reason, it would also be for the variance not to be granted on basis of Freedom of Speech.

Mr. Balascio further stated that he believed that these towers are already regulated by the FCC through federal regulations and he has found numerous case law which basically states that Municipalities such as the City of Dover are federally pre-empted from regulating these types of towers because they are already regulated under the Federal Code by the FCC. There is a Telecommunications Act of 1996, which is also in the Federal code. Once again, he found very similar circumstances where people would put in telecommunications towers and the court concluded that once again the municipality or local jurisdiction was pre-empted by federal law.

Mr. Balascio further stated that the last two things that he would like to speak about today is with there being so many areas or districts in the town that this would not be permitted in and what the courts have recognized is that if you do not allow these types of uses you have effectively zoned out the given use. The Courts have gone on to say that "the ordinances cannot totally take and exclude an otherwise legitimate use." The court

further states that “reasonable accommodations must be made by the local Board.” The overriding interest here would be the general welfare and if it can be shown that the tower can be installed safely then reasonable accommodations must be made by the Board.

Dr. Goate` stated that the federal decisions override anything that the local government is interested in, could you also argue the idea that a local governmental agency can make a decision that we feel would work, and that City Council feels that it is not needed for the citizens?

Responding to Dr. Goate`, Mr. Balascio stated that unfortunately it seems that the Boards considerations have been very limited due to the fact of the Religious Land Use Act, the Constitutional considerations under the First Amendment, and then going one step further and looking at the pre-emption by Federal regulations. When these types of things emerged, towns were taken into perspective and saying no, that they did not want them. The Courts stated that these cases are Federal pre-empted and is a Federal importance for radio broadcast and cellular phones.

Mr. Sheth opened a public hearing.

IN FAVOR OF APPLICATION:

Mr. John Walton, Deacon of Capital Baptist Church - 9559 Shawnee Road,

Greenwood, DE - Stated that their church has an outreach ministry at Heritage of Dover and other nursing homes in this area. Many people in these nursing homes cannot come to church for weekly services. It is there hope and aspiration that by the introduction of this to their ministry that they could go to other churches on Sunday’s and Wednesday’s and teach the ministry of their church and that these people would be able to tune into this radio station on their FM radio. It would be a blessing to all of them to be able to do this. We work with Heritage of Dover and Capitol Nursing Home and there are others in the area that would also be able to do this. We plan on going out to these nursing homes and telling them what is available as they do not plan to advertise. With regards to the definition of hardship, this is a hardship because we are a volunteer parish and all of us work on a volunteer basis. To be able to add this to our ministry would facilitate what we do. There is a great need in the City of Dover for an outreach ministry in the nursing homes.

Colonel Ericson questioned how many homes this would reach within the 3.5 mile radius? Responding to Mr. Ericson, Mr. Walton stated that offhand he would say about a dozen; however, there are probably more.

Dr. Goate` stated that he was not aware of that many nursing homes in the City of Dover within 3.5 miles. Responding to Dr. Goate`, Mr. Walton stated that they are located at Silverlake, Artis Drive, Westminster Village, Capitol Nursing Home, Heritage at Dover, as well as assisted living facilities such as Green Meadows and Luther Towers. He just took a guess; however, there are a lot of nursing homes in the City of Dover as well as assisted living facilities.

Mr. Frank Wolfe – 108 Blue Beach Drive – Stated that he lives at the entrance to Crossgates and has lived there since 1967. He can remember this church starting with the basement and has watched it grow over the years. He is not a member of this church; however, he thinks that they have provided a tremendous service to this community. This would be an outreach for the church and gives them the opportunity to reach additional people. We have to remind ourselves that we have an aging population and some of those people who are members of this church would not be able to attend. This will give them an opportunity to stay in touch with their church and he feels that this is important. There are a lot of things that can be done to outreach the community.

Mr. Bill Carrow – Parishioner of Capital Baptist Church – Stated that he is the parishioner that filled out the application for the last three and a half years with the FCC to see this through to its fruition. Basically it is a very, very limited window of opportunity. The FCC has granted such applications for one reason and one reason only, there is no spectrum available for high power FM such as you already have in the City of Dover. If they wanted to even try to put a full blown FM station up on the air, they could not do that. This was the FCC's way of appeasing the local community and allowing the churches, schools and non-commercial entities an avenue to branch out with their ministry. They have an eighteen month window of opportunity, which closes in August of this year and that is why they are approaching the Board at this time. They need the time if they are granted successful rights to move forward through the process.

Mr. Carrow further stated that he feels that they were successful in their attempt to try to show the community that they did not want to put it anywhere near the existing homes as Colonel Ericson previously mentioned. They are very much aware of the community strength that is there. The residential area has been in existence before the church was built and they have seen us grow. We have been out to talk to many of these folks, many of which are here today; however, we have nine acres and we tried our best to fit this in with what he would call like infrastructure. You have a sub-power station that is sixty-five (65) feet high, soon to go to seventy (70) feet high poles and super structure. There is also other poles that are located on the other side of the street that run up and down the railroad tracks so we thought aesthetically that we were doing the right thing by at least trying to place it within a fall zone that would still remain on their property. They would fence everything in and could even plant trees; however, what has not been mentioned is that this tower is only twelve (12) inches wide. Most towers that you are used to seeing are 300 foot towers and they are almost a half a block wide. When you look at the pictures provided, you will see the difference between a man lifting it out of the back of a truck and how miniscule this tower is.

Mr. Carrow further stated that with regards to the hardship of this application, to show the hardship is often hard to put in writing. They have been a good neighbor for close to thirty-eight (38) years and they certainly don't want to leave the community; however, they do feel strongly that they want to get up on the air and to promote the gospel of Jesus Christ and by doing that if we are restricted to such a point, then we may be forced to find other property where we can do that.

Christopher Murphy – 116 Blue Beach Drive – Stated that with regard to the community and visual aspect of it, from his backyard he can look out and barely see the substation. He obviously can see the poles and he thinks that with the schematics that were given, there does not seem to be any kind of impact on the surrounding community.

Mr. Galvin asked for a show of hands of those people who concur with the two speakers in approval of this application, with a count taken there were twenty (20) people in favor.

AGAINST APPLICATION:

Steven Cain - 436 Fiddlers Green – Stated that he is one block from the church property and is the President of the Neighborhood Association. He represents 425 homes in this area that encircles the church property. With everyone that he has spoke to, he would like to make this perfectly clear, he is not coming here on his own. He has consulted with all the Executive Committee members and they are unanimous in their opinion. They should oppose the building of this tower, basically not the tower itself but by raising the height limitations on this property. They consider the church to be a good neighbor as everything that they state in their applications is true. They have been a part of the neighborhood for thirty-five (35) years and no one is against the church. We are all in favor of the idea of a low power FM radio station being utilized and are not opposed to the church having a radio station. What they are opposed to is raising the height limitation of this parcel. A 100 foot radio tower is really not in keeping with the character of the neighborhood. On the contrary, he thinks that the tower would be very aesthetically displeasing to the neighborhood. Currently, people drive by and they see an empty parcel and if this was ever built upon, we feel that the property should maintain the thirty-five (35) height limit that is already there by law. A tower of this type, with all the fencing around, will give it a very industrial look, which is very much out of keeping with the aesthetics of the neighborhood.

Mr. Cain further stated that something that should be considered during your decision is that the attorney for the churches side listed a lot of law. The neighbors would like you to consider the law of unattended consequences and that is, if we allow a tower of this sort to be built, what is it going to look like in five to ten years later? He has tried to do some research of his own to find out if there would be any restrictions in attaching wireless communication devices to this tower down the road. During the public hearings that the FCC had, some of the main concerns were what it was going to look like after it has been there for awhile and what would prevent a private owner to have a private tower on private property and entering into agreements with wireless communication companies. This is a non-profit license, which means that only non-profit organizations can get the license and the broadcast itself must be non-profit. They would not be allowed to sell time on the radio to advertisers. Could this tower be peppered with microwave dishes, cell phones, and transponders? One of the big things now in wireless communications is co-locating. There are companies that go around and are looking for sites to put their wireless communication devices on. In the amounts of research that he has done as a resident, he has not found anything that would prohibit them from entering into agreements in the future.

Mr. Cain further stated that denial of the request to raise the height limit in order to build a radio station tower will not cause hardship to the church, in his opinion. In their goals and ability to worship or communicate with their parishioners there is a whole host of options for churches and organizations to communicate with people. Partnering with other Baptist churches for example, where the height limitation is not an issue could be an option. There are many AM towers if you only have a broadband connection you could pretty much do a broadcast from anywhere. The proximity of a tall guyed wired tower next to a City park, if you look at the location of the City land, it kind of looks like the State of Oklahoma. You have the park then a narrow strip of land that goes in between the two properties of the church over to the sub-station and on that small piece of land is a children's playground. We have all heard about stories of icicles building up on the towers and falling off and hurting people. This would potentially be a safety issue. The current height limitation of thirty-five (35) feet for this parcel of land next to a sensitive neighborhood is reasonable and in their opinion, must be maintained by this Board. With regards to being neighbors, no one is against the church we value the presence of the church in our neighborhood and always have. If one neighbor is going to build a tall structure that will affect another neighbor he believes that it is contingent upon the neighbor to notify the other neighbor. There obviously is minimal legal requirements such as placing notices on people's doors. The application for a radio tower was received in March of 2004. He received a phone call from the church last night. The neighborhood has had very little discussion and no notification at all.

At this time, Mr. Cain submitted a petition with a list of all of the residence surrounding the area who signed this petition, which was also accompanied by a letter from the Neighborhood Association.

At this time, Mr. Sheth advised Mr. Balascio that he would not be given the chance to rebuttal any opposition testimony. Mr. Rodriguez also stated that this Board has never allowed rebuttal and that Mr. Balascio's objection would be so noted.

Mrs. Janice Sibbald – 144 Blue Beach Drive – Stated that the petition that was just given to the Board was signed by the residents of the area that were notified. The people here today should be represented by the people who signed the petition because they were the ones the City of Dover said would be impacted; therefore, when everyone raises their hand and says that they are for the church, if they do not live in our area and will not be directly impacted, that should have no consequences at this point. She has lived at her address since 1968 and no one has ever said that the church is not a good neighbor. We feel that we have been good neighbors; however, in their recent discussions by testimony they mentioned Heritage of Dover, which is a nursing home at 1203 Walker Road. Yesterday afternoon at 2:30 she took a tour of that facility and the reason for that was that they have a radio broadcast tower directly behind them, a radio broadcast on station 1600. Heritage of Dover has been there for over five years and the station was in place before Heritage of Dover was built. During this time, for the entire five years, they have no way of blocking out that radio station. The radio station comes in over their radios on FM/AM and interferes with their computers. It also interferes with anytime they try to use a public address system where they are having a function and want to have someone

sing, they can't. They have spent over \$50,000 to try and block this. They have contacted the FCC repeatedly. The broadcast being spoken of today is a pre-recorded program as well as someone speaking person to person. There has been no solution to this problem and it still exists today. It is worse on rainy days and snowy days when there is more moisture in the air. The people in our area and further out would be subjected to this. We have already had a lot of problems with the telephones in our area. The only thing that they have been able to do is put in up to four filters, which were purchased at Radio Shack per telephone. In some instances, even using four filters, has knocked out the telephone line completely. The FCC has granted the license to these people and has taken no responsibility for the interference in that area; therefore, this tower should not be built so that this area is not put into that problem the same way.

Mr. Ken Hoffmann – 135 Blue Beach Drive – Stated that he would like to reiterate that the subject of interference is of great concern of his. He is less concerned with the aesthetics because he does not believe that he would actually see the tower; although, he may because of the height. He does know for a fact that even low FM broadcast transmissions, when you are close to that transmission, can over power such things as telephones, televisions, and radio reception. In addition to that, he works from home and conducts about 75% of his business from home. He relies on a wireless network that he has installed in his home and knows that low power transmission could interfere with this network. It can reduce his transmission rates and this could cause a financial hardship to himself if he were to have to make other investments to replace what he has already purchased to conduct his business as well as his children who are in high school and use the computers. He would also like to know if there is any recourse if this tower does go up and they find out that there are problems that would exist.

Mrs. Ann Rider – 124 Blue Beach Drive – Stated that she has lived here nine (9) years. She chose to live there because her family lives there as well and she grew up in this neighborhood. The church, nine years ago, when she first purchased her house, purchased the nine acres that is adjacent to her property. At that time, they were all sent letters because they wanted to change it from agricultural zoning to residential zoning and to also divide the property. At that time, they were not allowed to divide agricultural property and leave the farmers residence on the property with less then two acres, which was the law. They did this for the sole purpose of using that field as an athletic field to go along with their school. No one in the neighborhood objected to it because we have always had such a good relationship with the church. This is why everyone in this neighborhood and in that surrounding area is so opposed to it now and so upset by it. She also believes that constructing a tower can also have a negative environmental impact. There are many studies that state that even with low FM towers like that adjacent to where children play and neighborhoods can have higher increases such as childhood leukemia and this is something that bothers her. She was also a little insulted that the representation for the church is trying to present their case by saying that our neighborhood area appearance is such that a tower would be camouflaged and not be noticed. She feels that everyone could testify that it would be noticed. Also, that it would not negatively affect our real estate values. She purchased her house nine years ago and if this tower had been behind her house in that field she would not have

purchased her home. She believes that it will eventually have a negative impact on our real estate value in that area.

Mr. Matt Kropiewnick – 155 Blue Beach Drive - Stated that he came here in 1965 with the Air Force and has lived in the same house since 1965. He was there before the church got there. The church came and he had no objection to the church being there even though the zoning had to be changed so that they could buy the property. It is his understanding that at that time, they didn't even have the number of square feet per child in the school. They were using the public park, which is across the street from his home. He wants to be perfectly clear that he does not want to see a tower when he comes out his front door looking down towards the playground. Aesthetically this is not proper and he does not think anyone would buy a lot near WDOV or near the AM/FM towers on North Denney's Road.

Mr. Steve Saxs, City of Dover, Director of Electric Department - Stated that a letter was sent to this Board this morning regarding their concerns. Several years ago we had a fatality on our electric system from someone who put up a flag pole at the race track during one of the races by getting into our 69,000 volt system and that person died from that. The plan before the electric system is that we would be increasing the electric voltage down the street to this substation. The reason we are doing that is for reliability of the area and neighborhood and is the reason the poles are going in. The poles will be taller because of the higher voltage. Whenever someone wants to place a tower we obviously have a concern of its impact into the power system. He expressed some of these concerns in a letter to this Board; however, he is also concerned about the difference between wooden poles and metal poles. The tower they are talking about seems to be fairly small in construction and he wonders if this also does not work against them. By being so small in frame and size he wonders whether this would be subject for the tower falling over. There is also an issue with maintenance on these towers, which he has not heard mentioned today. If this tower ever got any taller, it would have to be lit. Their concern is that the tower in the future could always go taller and that the transmitting power would go up. Mr. Saxs stated that he will also re-iterate some of the comments made by testimony regarding radio interference. We have a lot of highly sensitive radio equipment in our station in this area and with the upgrade there will be even more. In his opinion there will be an interference problem.

Mrs. Elizabeth Hartley – 148 Blue Beach Drive – Stated that some people from her neighborhood cannot see the field. She lives in front of the field and will see it. She moved to the area about thirty-five, forty years ago and she enjoys seeing the trains. When she moved to the area there was no church. The church was very small when it was built and then they added on the school and the church has been using the playground area for a long time which is no problem. We start with a little church, the church adds on a school, then the church adds on a radio tower, then the church adds on a radio station where does it stop? Recently when the church changed the preacher they had the preacher's wife come around to the neighborhood houses for a meet and greet. No one ever mentioned a tower. They were asked what they were planning on doing

with the land. They knew what they were doing with the land and they never mentioned it.

Mr. Simon Lowe – 140 Blue Beach Drive - Stated that he came her with an open mind but after hearing the lawyer and his speaking, I believe he was speaking about New Jersey and we are not in New Jersey. He does not want to see it.

Mr. Galvin asked for a show of hands of the people who would be against this application. There were thirteen (13) people against this application.

Mr. Sheth closed the public hearing.

Mr. Sheth asked if there was any correspondence. Responding to Mr. Sheth, Mr. Galvin stated that there was a letter received from the City of Dover Electric Director, Mr. Steve Sax. The letter was read into record as such:

The letter was addressed to the Chairperson, Mr. K.C. Sheth, City of Dover, Board of Adjustment. Dear Mr. Sheth, The Dover Electric System has serious concerns about the proposed radio transmission tower being considered adjacent to our Mayfair Substation. The Mayfair Substation provides electric power to our customers throughout the southwest portion of Dover. This substation has been in service for over fifty years and has a primary voltage of 22,000 volts and a secondary voltage of 13,000 volts.

Communication towers have serious impacts on electric systems. Most important is the possibility of the tower falling into the substation. Should the tower fall within the substation fence, we could have an extended power outage in the area while the tower structure is removed.

A second concern is the Radio frequency noise generated from radio transmission facilities. Both AM and FM radio signals can become impressed onto the grounding systems within the substations. This is also true for telephone lines, control cables and remote control equipment located within the station. Since the distance away from the station reduces the impact of radio signals, the location of this tower would be critical to our system design and maintenance engineers.

Finally, we have concerns of ice blowing off the tower onto our substation equipment. We have seen serious damage from the weight of ice falling from communications towers onto metal buildings, vehicles, transformers and metal clad equipment. This issue is diminished by the distance away from the station and should be considered while locating the tower. The electric Staff would be happy to discuss these and any other issues with you concerning this proposed project. Sincerely, Steven Sax, the Dover Electric System.

Dr. Goate` moved that the requested 100 foot tower as described be denied.

Mr. Galvin suggested that any motion on this application have the explanations for the reasons of the motion.

Dr. Goate` moved to withdraw his motion and moved to adjourn for a brief discussion with our attorney, seconded by Colonel Ericson and the motion was unanimously carried.

Responding to Dr. Goate`, Mr. Balascio stated that he objects to the fact that he is not being allowed to speak again and second, under the Freedom of Information Act, all discussion must be occur in this room unless it is an exception.

Responding to Mr. Balascio, Mr. Sheth stated that this Board has a right to hold an Executive Session at this time.

At 11:35, the Board recessed for a brief Executive Session. The regular meeting was continued at 11:40 AM.

Dr. Goate` moved that this application be tabled to request further advise from the Board's legal council regarding application V-05-03 Capital Baptist Church of 401 Kesselring Avenue.

Mr. Sheth clarified that this application is tabled for decisions until the next session and not the hearing. Seconded by Colonel Ericson and the motion was unanimously carried.

Application V-04-16

381 College Road: Whatcoat Social Services of 381 College Road, Dover, Delaware has applied to the City of Dover Zoning Board of Adjustment requesting a variance from the RM-2 (Medium Density Residential) Zoning District Bulk Requirements (Article 4 § 4.9) to allow the construction of a ten (10) transitional housing units, at 381 College Road that will not comply with the maximum lot coverage and minimum parking requirements. The maximum permitted lot coverage is thirty-five (35) percent: the applicant is requesting a variance of fifteen (15) percent to allow the total lot coverage constructed to be fifty (50) percent. The minimum required parking for the project size is thirty-seven (37) parking spaces; the applicant is requesting a variance of nine (9) parking spaces to permit the construction of twenty-eight (28) parking spaces.

Subject property is 1.377 acres +/- and located on the north side of College Road between Jason Street and Conwell Street. The owner of record is Whatcoat Social Services.

Representative: Mr. David Braun, Donovan & Associates representing Whatcoat Social Services, LLC and also Bill Byler; and Mrs. Ruth Pugh, Director of Whatcoat Social Services.

Mr. Galvin stated that the legal notice was published in the Delaware State News on February 6, 2005 and the public was notified in accordance with the regulations.

Mr. Sheth questioned whether there were any members who would have a conflict of interest with this application? There were none.

Mr. Sheth stated that the ordinance would be changed regarding zoning so the variance that you are requesting regarding land use versus parking could be withdrawn. Responding to Mr. Sheth, Mr. Braun stated that he would rather not at this point and he would discuss it in a few moments.

Mr. Braun stated that instead of going through the application in the order that it was submitted, he would address Mr. Sheth's question at this time. With regards to the rezoning issue, the concern of the owner at this point with waiting for a rezoning is that the site improvements shown on the site plan are conditioned upon a series of grants that have specific dates required for construction to begin centered around this summer. The report that he received did not have a specific date for the rezoning. Their concern would be that if they would have to wait for the rezoning process, they then would not be able to submit a site plan until the rezoning was approved, which would then push everything back and could possibly jeopardize the grants that funded this project. This is why he hesitated in saying that he wanted to withdraw the request for the variance.

Responding to Mr. Braun, Mr. Galvin stated that currently, we are scheduling several Comprehensive Plan Amendments that include a change in the Land Development Plan and the zoning map, which it is based on, that and will all go to PLUS in March. If it goes to PLUS in March, we would be able to get it before Planning Commission in April and before City Council, possibly the first meeting in June.

Mr. Braun stated that their concern with waiting to have the rezoning approved maybe in June and then having to wait to submit a site plan, they would have four months of work between the site plan review and agency approval of the site plan that would put them beyond the date that those grants require construction.

Colonel Ericson questioned when the grants were received? Responding to Colonel Ericson, Mrs. Pugh stated that they have one \$500,000 grant that states that they have to start construction in June.

Colonel Ericson further questioned how long from the issuance of the grant until now? Responding to Colonel Ericson, Mrs. Pugh stated that the grant was received last July. They did request rezoning several months ago.

Also responding to Colonel Ericson, Mr. Braun stated that once the grant was received in July, they hired Donovan & Associates and Mr. Byler. They worked for a month or two to develop the plans that are before you today. They then had a meeting with City Staff in late September, early October and submitted this application in October. They lost three months following that because after they submitted the application, Staff felt that they needed to have the Minor Lot Line Adjustment Plan approved and recorded before they would proceed with this hearing. Since the grant was received in July they have been working non-stop on this project.

Colonel Ericson stated that with regards to putting us up against the Planning Commission, you have two groups working on this application and he feels that if you are

going to rezone the property you should go through the Planning Commission and have them make a decision because we do not want to create a variance on a property that they may later disapprove of.

Responding to Colonel Ericson, Mr. Braun stated that they found out about the proposed rezoning when they received the report. In their early meetings he does not think that anyone had thought of rezoning the property at that point because it was not brought up.

Mr. Galvin stated that the proposal on the Land Development Plan was that this be an Institutional Land Use and it makes sense to have the IO zoning for that institutional use.

Mr. Sheth questioned if it is zoned IO then the applicant would not need a lot coverage variance? Responding to Mr. Sheth, Mr. Galvin stated that they would not. The institutional zoning allows up to eight-five (85) percent lot coverage and the current allows up the thirty-five (35) percent.

Mr. Braun further stated that with regards to parking they have provided parking that meets the requirements for the existing shelter use and the proposed office use as it works out number wise. What they are requesting is to be allowed to just provide one parking space for each of the transitional units rather than the two that would be required by the zoning code. The users of these transitional units are not going to be the type that will have a whole lot of vehicle use. There is public transportation available right at the site that would off-set some of the vehicle use.

Mr. Nowak stated that considering down the line in the future as you grow and move onto another site. This site has a certain amount of allotted spaces what would happen in the future if it was used for a different use? Responding to Mr. Nowak, Mr. Braun stated that it would depend on the use itself. If everything were to move then the existing two story house, small office building, and some affected townhouses he is not sure that it would of interest with regards to another buyer.

Mr. Sheth opened a public hearing.

IN FAVOR OF APPLICATION:

Mrs. Luna Mishoe – 335 State College Road – Stated that his mother’s property is right next door adjacent to the proposed project. While this could be one of those “not in my backyard” issues it is not why we are here this morning. We are here not to oppose but to support the project; however, would request some stipulations. Those stipulations have to do with property securing, protecting property, and her. My mother will be 91 years old this year and does not need to have additional headaches as there are already enough. He would request that they look into some fencing, lighting, and containing the walkway, pathways, and ingress and egress matters. These items would make it much more palatable for us to be good neighbors. They want to be cooperative and want to know what is going on and be kept apprised of things.

Responding to Mr. Mishoe, Mr. Sheth stated that he was sure that all of the questions that you raised will be addressed at the Planning Commission level and you may be able to raise these same questions to them.

AGAINST APPLICATION: None

Mr. Sheth questioned whether there was any correspondence regarding this application. Mr. Galvin stated that there was none. There have been a few inquiries over the phone.

Mr. Galvin stated that the Comprehensive Plan stipulated that the property should have an institutional use and the IO district allows that most effectively. Planning Commission and City Council approved the Land Development Plan.

Dr. Goate` questioned in light of City Council how do you think the motion should be read into record, straight approval? Responding to Dr. Goate`, Mr. Rodriguez stated that the rezoning would allow for everything that has been requested for the variance. The hardship is with concern to losing their grants.

Dr. Goate` made a motion that the presentation as discussed receive approval.

Mr. Galvin questioned whether they were approving the parking and lot coverage or just the parking? Responding to Mr. Galvin, Mr. Sheth stated that two separate motions should be made.

Mr. Sheth stated that Dr. Goate`s motion would be withdrawn.

Colonel Ericson moved that application V-14-16 Whatcoat Social Services at 381 College Road be approved for the reduction of minimum parking spaces as outlined in the proposal, seconded by Dr. Goate` and the motion was unanimously carried.

Mr. Galvin stated that part of the hardship that may be associated with this is the nature of the lot and the fact that they only have one option for providing the parking, road coverage, and driveway coverage into the lot, which is the bulk of the square footage that is necessary to impervious surface. If they did not have to have so much driveway coming into the site then they would be closer to lot coverage that is allowed.

Mr. Sheth moved that application V-14-16 Whatcoat Social Services at 381 College Road Land Use Coverage be approved, seconded by Mr. Nowak and the motion was unanimously carried.

Application V-05-02

20 Baltray Road: Fox Hall Plantation Company of 50 South Prestwick Court, Dover, Delaware has applied to the City of Dover Zoning Board of Adjustment requesting a variance from the Environmental Protection Construction Requirements (Article 6 § 11.13) to allow the construction of a single family home at 20 Baltray Road. The

applicant is also requesting a variance of ten (10) feet from the required floodplain setback of twenty-five (25) feet.

The subject property is located in the Baltray Subdivision on the south side of the Baltray Road cul-de-sac. The owner of record is Fox Hall Plantation Company.

Representatives: Mr. Tom Burns, Burns & Ellis; and Dr. James McClements, Landowner.

Mr. Galvin stated that the public notice was published in the Delaware State News on February 6, 2005 and the public was notified in accordance with the regulations.

Dr. McClements stated that he would let Mr. Burns give the presentation. The Board is always interested with regards to hardship and basically the hardship with this application is the fact that the ground rules were changed long after this development was recorded and this is where they are running into these problems.

Mr. Burns stated that he would like to hand out a colored version showing the original flood plain. The original flood plain on the map is depicted as the red line and the original engineering for this subdivision was completed in 1987. Three things have happened since 1987. The benchmark, which is referred to as the datum, which is the benchmark for establishing the topographic lines for this entire region was a 1929 datum and was the appropriate datum to be used on the topography when the subdivision was laid out in 1987. The new data for that area was established in 1988 and 1989 so the engineering of this subdivision predates the current datum.

Mr. Burns further stated that in 2003 FEMA within this entire region did a complete review and overlay of their floodplain maps and this altered the flood plain line. Since the subdivision was recorded the City of Dover created a twenty-five (25) foot buffer from flood plains and this twenty-five (25) foot buffer goes back on any existing recorded lots.

Mr. Burns further stated that the colored map shows the red line as the original flood plain line in 1987 and then they super imposed the twenty-five (25) foot buffer as if it existed from the beginning, which it did not and then the green shaded area is the entire buildable area on that lot.

Mr. Burns handed out new FEMA maps. When the FEMA maps were changed the flood plain line itself changed dramatically. What impacted them the most was the change in the data itself. The datum was adjusted by two feet so when they had to super impose the new flood plain line not only did the flood plain increase ever so slightly, but the two foot adjustment in the datum because of the gradual sloping of this lot moved the flood plain line dramatically. When you add the twenty-five (25) foot buffer to the adjustment from the 33.4 foot line you can see that the buildable area has shrunk dramatically. In essence, understanding the variance should not be granted for a self imposed hardship. Anyone of

the three issues would not have adversely impacted the buildable area on this lot but the three together have had a dramatic reduction in their buildable area.

Mr. Burns further stated that they made the original application after several discussions with the City of Dover Planning Department and their cooperation. We made the application to be ten (10) feet forward on the front setback line, all of which are different and unusual in the subdivision because of the unique characteristics of the land. This particular lot has a seventy-six (76) foot setback. The adjacent lot that Mr. Taylor owns has a ninety (90) plus setback on lot #5 and lot #4 only has a thirty (30) foot setback. They made the application with being able to move ten (10) feet forward into the setback line and ten (10) feet back into the flood plain buffer. We were always aware that they had a deed restriction that would prevent them or require anyone to build a home to adhere to the front setback. Optimistically we looked at this by possibly altering the deed restrictions. After a strict legal opinion, it has been determined that deed restrictions cannot be modified as there is specific language that states that "no modifications can occur to the restrictions after 1993."

Mr. Burns further stated that they were forced because of the deed restriction to withdraw a portion of the application dealing with the ability to move ten (10) feet forward. We ask that we be able to modify the restriction to move from ten (10) feet back to twenty (20) feet to the buffer. The significance of the buffer is to protect lands as there are only twenty-one (21) lots in this subdivision. There is this lot and three other vacant lots in the subdivision for a total of seventeen (17) homes built already, which have been there from the very beginning and probably most of which violate either existing new flood plain or the existing twenty-five (25) foot buffer; however, were grandfathered in. In an attempt to build consistent style homes for the neighborhood we have worked very closely with the neighbors in an attempt to talk to the City about obtaining this variance. Recognizing the significance of the twenty-five (25) foot buffer there are deed restrictions already in place that prohibit out buildings and unnecessary clearing of the lot. The overall practical aspect of maintaining lands within the buffer would be maintained. We would not be infringing in any way upon the flood plain itself, which would require flood insurance but also require dealing with DNREC and Corp of Engineers.

IN FAVOR OF THE APPLICATION:

Mr. Robert Taylor – 24 Baltray Road, Lot #6 - Stated that we are a small neighborhood and care very deeply about our community. He has been there since December of 1995. Everyone that is coming here today is coming in with clean hands. We had five neighbors that were actually here and not knowing what the length of the proceedings would be, they have put testimony in his hands to make adequate representation to this distinguished Board about their position. What has happened because of the buffer is that the neighbor that comes in beside him will not be able to build the size of home with the architectural dimensions that are prevalent in the neighborhood. It puts the whole neighborhood at a disadvantage because you can see from the plot plan that it is a very small subdivision and we have reviewed, as an attorney, the declarations of restriction and as far as being able to go forward as far as

making the front setback less, that is a problem because as of June 1, 1993 there could be no amendments. Additionally, he has a ninety-nine (99) foot setback because the way it works with these pie shaped lots is once you get back to a width of one hundred (100) feet that is where the setback has to be. On lot #5 it is about seventy-six (76) feet. There becomes a problem as you are entering the neighborhood if you move the house to far to the front then you would actually block the view of his house and you then get into aesthetics. Paul Mazzuli from lot #3, Mark McNulty, Lot #4, Steve Spangler from Lot #6, and Don Glanden were all here to today for this application. He spoke with Nancy Pierce who also received notice and it seems to be a manifest hardship and he believes that the application should be granted. He really does not feel that twenty (20) feet is going to make any difference whatsoever as far as ecological nature of the community.

Colonel Ericson questioned Mr. Taylor that when a person buys this house, will they be notified that there is a variance and the fact that they will be very close to the flood plain?

Responding to Colonel Ericson, Mr. Taylor stated that they are actually working with Dr. McClements who was gracious enough, along with Mr. Burns, to help try to facilitate this because they have a builder that is interested in building. This particular builder recently built a home on Lot #15 so they know about the characteristics of this builder and the quality of the home that would be built and having been shown plans that show the general dimensions of the house, the square footage, and the architectural features. What they were hoping to do was make a motion for an amendment with it not being a material change that they might be able to deal with this issue here today.

Mr. Galvin stated that as to the issue of increasing the setback that was requested in the variance for encroachment into the buffer beyond what was requested in the application, an additional ten (10) feet he does not feel is significant enough to make them go through the process again. The Board could consider something other than the original ten (10) feet and not have it be a significant change to the application.

Dr. Goate` questioned if it would be possible to make a recommendation of fifteen (15) feet rather than double? Responding to Dr. Goate`, Mr. Galvin stated that the Board could make any recommendation that they deem appropriate.

Mr. Sheth stated that we could grant what we wanted to grant legally with a motion? Responding to Mr. Sheth, Mr. Rodriguez stated that he agreed with the Planner and he thinks that the amendment requested by the applicant can be considered without another public hearing of any nature.

Colonel Ericson questioned that the applicant feels they need twenty (20) feet would you support it five (5) feet forward? They are stating they need twenty (20) feet behind and he is concerned about going back over ten (10) feet. You would close the flood plain and someday someone is going to get washed out there. He is not sure, whoever the new buyers are will be fully aware of the danger they face.

Responding to Colonel Ericson, Mr. Galvin stated that FEMA does not prohibit construction in a flood plain. They allow it under certain circumstances. This is a 100 year flood plain meaning that there is a 1% chance of having a flood within any year. The additional twenty-five (25) feet is something the City puts on above and beyond as an environmental protection measure.

Mr. Sheth moved to approve Application V-05-02 20 Baltray Road: Fox Hall Plantation Company with the amendment of a fifteen (15) foot setback instead of the ten (10) foot proposed, seconded by Colonel Ericson and the motion was unanimously carried.

Meeting Adjourned at 12:25 PM

Respectfully Submitted,

Diane Metsch
Secretary