

October 27, 2010
4:00 PM

MINUTES OF THE HENDERSON COUNTY
ZONING BOARD OF ADJUSTMENT

The Henderson County Zoning Board of Adjustment held its regular meeting October 27th at 4:00 p.m. in the King Street Meeting Room, 100 N. King Street, Hendersonville, North Carolina. Those present were: Jim Phelps, Chairman, Jim Crafton, Vice Chairman, Ann Pouch, Hunter Marks, Alternate JoAnne Telker, Zoning Administrator Toby Linville, Deputy County Attorney Sarah Zambon, Zoning Board Secretary, Karen Ann Wall. Tony Engel was not present.

Chairman Phelps: Called the meeting to order at 4:00 PM. He introduced the board members.

Chairman Phelps: The first thing we have is review and approve the September 29 twenty ten minutes which are probably the very shortest minutes we've ever had. Any corrections or additions, comments to the minutes? If not do I hear a motion that we adopt as presented?

APouch: I motion.

Chairman Phelps: All in favor, aye.

All board members indicated they're approval.

Chairman Phelps: Ok, minutes are approved. Our new business today, Case A-10-04 Charles Stambaugh and Associates, P.A., requesting appeal of civil penalties assessment for Case number HENDE-2007-065 Four Sims Hollow. I will need a motion then to go into public hearing.

HMarks: I make a motion.

JCrafton: Second.

JCrafton: Motion has been made and second. All in favor say aye.

All board members stated aye.

Chairman Phelps: Opposed no. It's unanimous. We are now in the public hearing portion of this meeting.

HMarks: Mr. Chairman, before we start can I make a statement?

Chairman Phelps: Yeah, I was going to read this and I'll get to that.

HMarks: Ok, fine.

Chairman Phelps: Ladies and Gentlemen, a quasi-judicial proceeding is being held today on the following petition, appeal of erosion control penalties, where Charles Stambaugh, owner of Four Sims Hollow subdivision is the petitioner. A quasi-judicial proceeding, much like a court proceeding is on in which one's individual rights are being determined under specific rules of procedure. As such, not every person has a right to give evidence in a quasi-judicial proceeding. Under the Rules of Procedure for quasi-judicial proceeding, only persons who can demonstrate they will be affected by the outcome of the decision are allowed to participate the proceeding. All persons who are allowed to speak and participate in this hearing, including all witnesses that will be called, must be placed under oath. The proceedings will be as follows:

-The board will ask any persons, other than the petitioner and the Henderson County Staff, who desire to become parties to his action to explain how they would be affected by this proceeding. For example, they may be the owner of an adjoining parcel of property, or have some other special and unique interest that justifies their participation as a party. You should understand that you do not have to be a party in order to testify in this proceeding, if some other party calls you as a witness.

-Then all witnesses and parties will be sworn as a group to tell the truth in their testimony.

-The board will then have the Zoning Staff summarize the petition and what is sought by the petitioner.

-The board will then have the petitioner or the petitioner's attorney present their evidence in support of the request.

-Each party has the right to ask questions of the witnesses.

-After the petitioner is finished presenting evidence, the other parties are then allowed to present their evidence.

-Again, each witness who testifies may be asked questions by the other parties.

-The members of this board may also ask questions.

After the evidence is presented the board will discuss the issues raised and will make a decision. The board's decision must be made in writing within 45 days of the hearing. We will now identify the parties. The board acknowledges the petitioner, Charles Stambaugh, and the County Staff as parties to this proceeding. Are there any other persons present who can demonstrate that they will be affected by the outcome of this proceeding and who wish to be a party to this proceeding? Sir, would you come forward please to the podium. You will need to state your name and address and how you will be affected by the outcome of the proceedings. For example, you are an adjacent owner. The Board of Adjustment then determines which, if any will be allowed as parties.

HDavenport: Yes, sir. My name is William Hume Davenport. I go by my middle name, Hume, h,u,m,e. I own the property adjacent to the Stambaugh property. My property is at 600 Turley, t,u,r,l,e,y, Falls Road.

Chairman Phelps: So you're an adjacent property to...

HDavenport: Yes, sir.

Chairman Phelps: Ok. Any questions? If not we will consider you a party. And when we call parties to be sworn in just please come forward at that time.

HDavenport: Will do, thank you.

Chairman Phelps: Are there any others? If not, I will now swear in all the parties. And so, if you will come forward, Hume, Stambaugh, and any others that might be testifying.

Zoning Board Secretary, Karen Ann Wall swore all parties in.

Chairman Phelps: No. Let me give you the copy. That's not the proper – (Chairman Phelps is person that must swear parties in). Do you swear of affirm to tell the truth, the whole truth, and nothing but the truth under the penalty of perjury?

All parties stated, "I do".

Parties:

Charles Stambaugh, property owner
Sarah Grace Zambon, Deputy County Attorney
Parker Sloan, Henderson County Planner
Tim Fox, Henderson County Soil Erosion Technician

Witnesses:

Hume Davenport, adjacent property owner
Luther Smith, Luther Smith Associates

Chairman Phelps: Good, we got that. Now before we begin we need to ask the board members if any board member here has a conflict or any relevance or will be affected by the outcome of this case.

HMarks: Mr. Chairman, just to make a statement for the record, at the time the plans were prepared for Mr. Stambaugh's property, I worked for Luther Smith and Associates. However, I did not work on this project. And I don't believe it's a conflict of interest and wouldn't be prejudiced about the case, but I do want to get that on the record.

All board members indicated they did not have a problem with Hunter Marks continuing with the case.

Chairman Phelps: We're all ok. Any others? If not then we'll begin. The staff at this time will present their evidence.

Deputy County Attorney SZambon: The County would like to call Parker Sloan. Mr. Sloan can you please state your job title and duties for the board.

PSloan: I'm Parker Sloan, I'm a Planner in the Planning Department here in Henderson County. I've been here about three years.

Deputy County Attorney SZambon: How did you come to work on Four Sims Hollow?

PSloan: The first thing that came across my desk was in 2009. I received a revised plan and I wrote them a conditional letter of approval, just a kind of preliminary approval for this type of subdivision.

Deputy County Attorney SZambon: What kind of subdivision is Four Sims Hollow?

PSloan: It's considered a minor subdivision in the category of six to ten lots.

Deputy County Attorney SZambon: What kind of use is it for?

PSloan: This was for residential purposes.

Deputy County Attorney SZambon: Can you describe – you've been to the property?

PSloan: Yes.

Deputy County Attorney SZambon: Can you describe for me the area of the County that it's in.

PSloan: It's right off Davis Mountain Road near Laurel Park. As you go down Winterview Trail it gets steeper. The last time I'd been there it's very wooded property, mainly. There's just one road on it.

Deputy County Attorney SZambon: Is it flat?

PSloan: It's steep especially in the beginning of the property.

Deputy County Attorney SZambon: And what is the property like? The actual subject property, is it flat?

PSloan: No, it's basically a mountainside. The last time I was there which was several months ago, it's just trees and one road on the mountainside.

Deputy County Attorney SZambon: And you said you had worked on it in relation to subdivision approval. How many lots is this development?

PSloan: The revised planner received, approved it up to nine lots but currently it's three lots owned by the applicant.

Deputy County Attorney SZambon: So three lots have been recorded.

PSloan: Yes. Two lots have been recorded and the remainder lot makes a total of three.

Deputy County Attorney SZambon: So the remainder lot is like future expansion space?

PSloan: Yes.

Deputy County Attorney SZambon: In order to have the subdivision approved did the Planning Department require any infrastructure go in?

PSloan: Yes. To approve and lots, whether it was one lot or several lots a road was required to the property, to the lot.

Deputy County Attorney SZambon: Did this road require any land disturbing activity?

PSloan: Yes.

Deputy County Attorney SZambon: Was there a road there before they put in the road?

PSloan: It's a new road, to my knowledge. I don't know if there's an old roadbed there, but to my knowledge, a brand new road.

Deputy County Attorney SZambon: Ok. I am going to pass him something so he can look at it. Mr. Sloan, can you identify this for me?

PSloan: This is the conditional approval letter I was talking about earlier from 2008 that I wrote and signed.

Deputy County Attorney SZambon: So that's your signature on the back?

PSloan: Yes.

Deputy County Attorney SZambon: And you wrote this letter?

PSloan: Yes.

Deputy County Attorney SZambon: What's the date on the letter?

PSloan: January 2008.

Deputy County Attorney SZambon: At this time now that he's authenticated the document I'm going to enter it into evidence as Henderson County A. Mr. Sloan, can you read into the record what you put under number 2?

PSloan: So this is an item for sedimentation and erosion control: The applicant must submit to the subdivision administrator a notice from the appropriate agencies verifying that an erosion and sedimentation control plan has been approved or a written notice from a professional land surveyor, engineer, landscape architect, architect, professional planner, certifying that no plan is required. And it references the LDC chapter that that's from, that requirement's from.

Deputy County Attorney SZambon: So this letter's from the beginning of 2008, correct?

PSloan: Yes.

Deputy County Attorney SZambon: So at least to your knowledge the developer, slash, owner was aware that soil erosion was a concern or a possible concern starting in 2008, based on that provision?

PSloan: Yes, this is something that we would put in the, as a letter like this, to a subdivision of that size.

Deputy County Attorney SZambon: I have no further questions for Mr. Sloan. Mr. Stambaugh may have questions or the board may have questions.

CStambaugh: No, thank you.

Deputy County Attorney SZambon: Does the board have any questions for Mr. Sloan? Ok. You can go sit. The next person we're going to call is Tim Fox. Mr. Fox, can you please tell us what you do for the County?

TFox: I'm the Henderson County Soil Erosion Control Technician and I've held that position since October 1, 2007.

Deputy County Attorney SZambon: And what do you do in your job?

TFox: I enforce the Henderson County Soil Erosion Control Ordinance as well as, I inspect permitted sites that regulate land disturbance and I also respond to citizen complaints and calls regarding land disturbance.

Deputy County Attorney SZambon: Does the Four Sims Hollow development fall under the Henderson County Soil Erosion Control Ordinance?

TFox: Yes. It's a land disturbing activity over one acre in size. So it would be a site that we would inspect.

Deputy County Attorney SZambon: You're familiar with the Henderson County Ordinance?

TFox: Yes.

Does it fall under any of the exceptions to the ordinance?

TFox: No, it does not.

Deputy County Attorney SZambon: It's not – they weren't doing any timber work out there or farming or mining?

TFox: No, it's land disturbing activity related to development.

Deputy County Attorney SZambon: What was the – you said land disturbing activity three times now, what land disturbing activity were they doing out there?

TFox: Building a road for a subdivision.

Deputy County Attorney SZambon: For a soil erosion plan to get approved is it correct that someone has to sign a Financial Responsibility Form?

TFox: Yes.

Deputy County Attorney SZambon: What is the purpose of the Financial Responsibility Form?

TFox: That is the person that's held responsible if there's any violations against our Ordinance.

Deputy County Attorney SZambon: To your knowledge, who signed the Financial Responsibility Form in this case?

TFox: Charles Stambaugh.

Deputy County Attorney SZambon: Was there a Soil Erosion Plan submitted and approved on the subject property?

TFox: Yes.

Deputy County Attorney SZambon: I have a map over there. Can you go look at it and tell me if that is the Soil Erosion Plan for Four Sims Hollow?

TFox: Yeah, this is the plan that our office received as the approved plan for Four Sims Hollow Subdivision.

Deputy County Attorney SZambon: Mr. Fox, I am going to pass you this which is just a smaller version. Please come back to the mic because you are not as loud as I am. Can you please read Number B, Note B?

TFox: Note B is all, oh I'm sorry, All retaining wall design to be completed by a licensed civil engineer.

Deputy County Attorney SZambon: And for the board's purposes, Note B is right here on this plan. Mr. Fox, to the best of your knowledge, in your abilities as part of the Soil Erosion Control Department have you ever seen any proof or evidence that the retaining wall design was completed by a civil engineer?

TFox: No.

Deputy County Attorney SZambon: Now I'm going to point you to Note A, which for the board is right here. Can you read that into the record for me?

TFox: Notes: All graded fill slopes greater than a 2 to 1 and all graded fill – all graded cut slopes greater than 1 ½ to 1 and all retaining walls greater than four feet are to be designed and installed under the supervision of a licensed geotechnical engineer.

Deputy County Attorney SZambon: Mr. Fox, have you been out to the site?

TFox: I have.

Deputy County Attorney SZambon: Have you seen these slopes?

TFox: I have.

Deputy County Attorney SZambon: Have you measured the slopes?

TFox: I have estimated some of the slopes, yes.

Deputy County Attorney SZambon: And are the slopes steeper than stated in the notes?

TFox: Yes, the sum of the slopes are steeper than 1 ½ to 1.

Deputy County Attorney SZambon: So under the note on that plan those slopes should be certified by a geotech engineer.

TFox: Yeah, as well as the retaining walls. Have you had any proof or evidence as the authority over the implementation of this plan that a geotech engineer has certified those?

TFox: No.

Deputy County Attorney SZambon: Why did you go inspect the property?

TFox: I went to inspect the property for two reasons. I received some complaints on the property and I also went there to start my inspection of the property for compliance with our Ordinance.

Deputy County Attorney SZambon: When you went out to the property, what if any violations did you discover?

TFox: The violations that I found were: Failure to follow the approved plan. Failure to provide adequate ground cover, Insufficient measures to retain sediment on site, Failure to take all reasonable measures, and Failure to maintain erosion control measures. Also graded cut and fill slopes too deep. Failure to correct an unstable slope, and Failure to provide and engineered report by a North Carolina licensed professional engineer addressing the slope stability and recommendations for correction. And that last violation was the result of a slope failure we had asked in our Notices of Violation for Mr. Stambaugh to provide us with an engineered report on how to correct that slope.

Deputy County Attorney SZambon: Mr. Fox, can you tell us what dates you inspected this property on?

TFox: Yes, on 4/26, 10/10/10, 7/12/10, 8/30/10, and today, the 27th, I also went out and inspected the site.

Deputy County Attorney SZambon: And on these various times that you've inspected this property, four times now, have you observed similar violations at each time?

TFox: Yeah, each violation still stands that I read previously. Today I didn't see any work that has been accomplished since my first inspection on 4/26/10.

Deputy County Attorney SZambon: I am going to show you some pictures. Can you – do you recognize these pictures?

TFox: Yeah, these are pictures that I took on 7/12/10 on an inspection that I did.

Deputy County Attorney SZambon: So you took all these pictures?

TFox: I did.

Deputy County Attorney SZambon: Ok. I'm going to hand you to pictures and you tell me why it is bad or what is wrong with it. Ready?

TFox: This is a picture of deposited sediment in a stream channel.

Chairman Phelps: Excuse me. Do we have those pictures?

Deputy County Attorney SZambon: You do not and as soon as I'm done with him going over them I'm going to hand them up to you.

TFox: This is a picture of deposited sediment from above the slope failure area in a stream channel near a spring that is in the stream channel of Hume Davenport's property. Why it's bad is because there's deposited sediment in the stream which is not good for water quality or the environment for various reasons; for wildlife and water quality.

Deputy County Attorney SZambon: Mr. Chairman unless there's any objections from the board or from Mr. Stambaugh, I'm going to enter all these pictures into evidence. But I'll hand them up to you one at a time. You'll know what he's talking about. So this will be County Exhibit B collectively. Mr. Fox, what is this picture? I'm going to hold it like this so they can see it.

TFox: This is a picture along the roadway with a slope failure.

Deputy County Attorney SZambon: Why is that?

TFox: It's bad because it's unstable and it's showing that this area is unstable and it needs to be addressed immediately. And we need an engineered report to tell us how to do that correctly. Our Ordinance is performance based so if measures are not working we can ask for additional measures to be installed. This area also has a retaining wall near there that's missing.

Deputy County Attorney SZambon: Can you point on the Soil Erosion Plan where the missing – where the retaining wall is sited but is not in place?

TFox: This area between my fingers and this highlighted area says; Proposed four foot retaining wall. And that's not there.

Deputy County Attorney SZambon: What is this picture of?

TFox: This is an outlet pipe. A pipe that's coming across the road and there's no out-fall protection. And out-fall protection is rip rap, that when the water comes out of the pipe that helps to illuminate scour and erosion and reduce the velocity of the water to keep erosion from happening. And that measure also is missing.

Deputy County Attorney SZambon: So it's supposed to have a cap or something on it?

TFox: We call it a rip rap apron.

Deputy County Attorney SZambon: Like something to slow it?

TFox: Right, and protect the ground around it.

Deputy County Attorney SZambon: And what is this a picture of?

TFox: That's another picture of the slope failure area.

Deputy County Attorney SZambon: So this is another slope failure. Is slope failure a danger at all to public health or safety or welfare?

TFox: It could be a big safety concern to anyone driving on the road. If somebody were to drive down there and get too close to the shoulder of the road or if additional failures happen, yes, it could be additional safety –

Deputy County Attorney SZambon: And this is another picture of slope failure?

TFox: Yes.

Deputy County Attorney SZambon: Can you point out on the map for me where there's slope failure, if you know?

TFox: The main slope failure is in this area right here. And there's a few smaller ones in this area right here.

Deputy County Attorney SZambon: And what's this a picture of?

TFox: That's a picture of un-maintained silt fence. Silt fence is down in many sections the silt fence is completely not being maintained. And sediment is moving across the sediment fence area depositing onto the property below.

Deputy County Attorney SZambon: So this is a measure that was to prevent –to hold back silt and sedimentation, correct?

TFox: Right.

Deputy County Attorney SZambon: And it has not been maintained.

TFox: It has not been maintained.

Deputy County Attorney SZambon: Now what's this a picture of?

TFox: That is a picture of deposited sediment in a stream channel. And that stream channel feeds into Hume Davenport's pond.

Deputy County Attorney SZambon: Hume Davenport who is the adjacent property owner, who is a party to this action.

TFox: Correct.

Deputy County Attorney SZambon: And what's this a picture of?

TFox: That is a picture of Hume Davenport's pond.

Deputy County Attorney SZambon: And why did you take a picture of his pond?

TFox: Well, it shows the turbidity of the water. Turbidity is the color of the water.

Deputy County Attorney SZambon: What affects the turbidity of the water?

TFox: Suspended solids in the water make it dirty or a different color

Deputy County Attorney SZambon: Ok. This is all fancy talk for "it's dirty".

TFox: When sediment or any kind of soil gets into, or leaves or anything, into water it increases the turbidity of water. So it's the color.

Deputy County Attorney SZambon: So this is the result of the soil erosion stuff that we've already seen the pictures of?

TFox: Right. There's also deposited sediment in the mouth of that pond.

Deputy County Attorney SZambon: You're jumping the gun. That's in the other pictures. County Exhibit C, can you identify these please?

TFox: These are pictures that I took today around 11 o'clock.

Deputy County Attorney SZambon: You took these pictures?

TFox: I did.

Deputy County Attorney SZambon: These are your initials at the bottom?

TFox: They are.

Deputy County Attorney SZambon: You initialed it?

TFox: I did.

Deputy County Attorney SZambon: And dated it?

TFox: I did.

Deputy County Attorney SZambon: And they are from today?

TFox: They are.

Deputy County Attorney SZambon: And I'd like to enter these pictures into the record. I'm not going to go through them all. I'll hand them up in a minute and I'll only go over the real exciting ones. What's this picture of?

TFox: That's deposited sediment into a ditch line.

Deputy County Attorney SZambon: Ok. And this is?

TFox: That is a slope that needs ground cover.

Deputy County Attorney SZambon: Are these the same?

TFox: Yeah, these are the same. That is deposited at the mouth or the beginning of Hume Davenport's pond.

Deputy County Attorney SZambon: And why do you believe the sediment that has deposited in Hume Davenport's pond is from Four Sims Hollow?

TFox: Because there's un-maintained measures at Four Sims Hollow Subdivision that are contributing to sediment moving. And there's been slope failures and an out fall pipe that is scouring the earth. And all those are contributing to sediment getting into stream drainages that all follow – one of the stream drainages goes to a stream drainage to Hume Davenport's spring. The other side of the property feeds a stream that goes to the pond. So from my investigations and inspections nothing's being done to maintain the site. And it's the only land disturbance activity that I know feeding into that stream drainage. And I've actually witnessed it, the deposition of sediment from the property, on the property line, and on Hume Davenport's property.

Deputy County Attorney SZambon: From what you are saying from when you went over the pictures, would you agree that the soil erosion plan is a fine plan but that it was not implemented to the plan?

TFox: The glooming violation here is that there's failure to follow the approved plan, which means there are measures on the approved plan that have not been installed. Two retaining walls have not been installed. There's a slope failure area. There's out fall protection, that I already mentioned, that's not installed. There's pipe number one is not installed. And I don't have any kind of documentation from a civil engineer that any of the walls were designed as per the approved plan. So those are the big violations. If all those issues were installed, if the walls were put in and there was maintenance and ground cover those may stopped all this erosion and sedimentation from happening.

Deputy County Attorney SZambon: Have you sent the owner any notification of these violations?

TFox: Yes. I sent a Notice of Violation approximately 5/10/10. And then I sent a Continuing Notice of Violation on 7/8/10 and on 7/12/10 I had a brief conversation with Mr. Stambaugh and he – I express that there was issues that were not followed in the

approved plan and that sediment was leaving the site. He gave me his email address and we started to correspond, email. And then on 7/20 we also sent a clarification letter stating what needed to be done to bring this project into compliance with Henderson County Erosion Control. And then on 9/15, I sent a penalty letter.

Deputy County Attorney SZambon: And who did you send these – what was the name of the party that you sent these Notices of Violation, Continuation of Violation, and Penalties Letter to?

TFox: Charles Stambaugh.

Deputy County Attorney SZambon: Can you please identify this for me?

TFox: This is an inspection report that I did for Four Sims Hollow on 8/30/2010.

Deputy County Attorney SZambon: And you wrote that?

TFox: I did.

Deputy County Attorney SZambon: Is that your signature at the bottom?

TFox: It is.

Deputy County Attorney SZambon: At this time we'd like to submit the inspection report into the record. This was in your packet, so you already have this. And in this inspection report did you observe similar violations to the ones you've already discussed?

TFox: I did.

Deputy County Attorney SZambon: So that will be County Exhibit D for the record. Can you identify this for me?

TFox: This is the penalty letter that I sent to Charles Stambaugh approximately around 9/15/10. It's dated 9/13 but I don't think I sent it 'till the 15th.

Deputy County Attorney SZambon: And did you write this letter?

TFox: I did.

Deputy County Attorney SZambon: And what's the date on it?

TFox: 9/13/2010.

Deputy County Attorney SZambon: The County would like to enter this into evidence as County E. This is also in your packet of materials. This is the penalty packet. So Mr. Fox, what was the first time you inspected this property?

TFox: 4/26/2010.

Deputy County Attorney SZambon: And when did you finally assess penalties against Mr. Stambaugh?

TFox: Penalties-

Deputy County Attorney SZambon: What was the date on your penalty packet?

TFox: Yeah, September 13, 2010.

Deputy County Attorney SZambon: Ok. Now we're going to go over the penalties. Would it help you if you looked at this while I ask you questions?

TFox: Yeah.

Deputy County Attorney SZambon: How many violations did you site him for on the subject property? Or what were they, how about that?

The violations that were sited were: Failure to follow the approved Plan, Failure to provide adequate ground cover, Insufficient measures to retain sediment on site, Failure to take all reasonable measures, and Failure to maintain erosion control measures. And those are all on Worksheet #1 that you received. Those were the violations for Worksheet 1. Violations for Worksheet 2: Graded cut and fill slopes too steep, Failure to correct an unstable slope, and Failure to provide and engineered report by a North Carolina

licensed professional engineer addressing slope stabilization and recommendations for correction.

Deputy County Attorney SZambon: And before we get too far into this, Mr. Fox, what did you, what did you use – how do I want to phrase this – what law or regulation or ordinance from the County did you use in the creation of this penalty packet?

TFox: The Sediment Pollution Control Act of 1973. The Henderson County Erosion Control Ordinance.

Deputy County Attorney SZambon: At this time I assume, *do you have a copy?* (*asking Mr. Stambaugh*), I assume the board did not bring their copy of the Ordinance with them so I copied just the part on the penalties, not the whole 20 page ordinance. I'll pass up the copies of that for you just so you can see it while we're talking about it. I'm not going to enter this into evidence because it's public document. So Mr. Fox how many days did you site Mr. Stambaugh for the property being in violation?

TFox: 21 working days. We excluded Saturday, Sunday, and holidays, and any day that rainfall was over point one five inches (.15).

Deputy County Attorney SZambon: And what was the start date that you chose for the penalty assessment?

TFox: Penalties were assessed from 7/23/2010 to 8/30/2010.

Deputy County Attorney SZambon: But again, you observed penalties on the property starting 4/30, correct?

TFox: That's correct.

Deputy County Attorney SZambon: Why did you wait to assess penalties until July?

TFox: Well in any proper procedure that we go through in our department we first try to get compliance and work with the landowner on trying to get compliance, until we are certain that compliance is not going to be met. We always start a project, a violation with a deadline to make compliance, to see if the developer will correct the problems. So that's where we began back in my first inspection report. And that's why we waited until we, it was evident that no progress was being made.

Deputy County Attorney SZambon: And why in your penalty packet did you assess it 'per day'? ie: is there a section of the ordinance that directs you to do that?

TFox: That's just something typically that we do. We do it 'per day'. The total cannot exceed five thousand dollars per day. That's just typically what we do.

Deputy County Attorney SZambon: And as the board can see, under 237-A1, the last sentence there says: Each day shall be a continuing violation shall constitute a separate violation. Mr. Fox, in assessing the penalties it looks like you pretty much went through the penalties assessment factors listed in the ordinance, is that correct?

TFox: That's correct.

Deputy County Attorney SZambon: Can you discuss a little bit about how much the property owner and financially responsible party saved by not following proper soil erosion measures?

TFox: Sure. On Worksheet #1, items F and G come to, F is the amount of money the violator saved by his non-compliance and G is the cost of rectifying the damage. For Worksheet 1 I came up with \$76,750. And if you look on Attachment #5, the second item, Worksheet #1, items F and G, what I did was I estimated the cost of a retaining wall on the internet. If I had the designs of the wall which should have been provided with, before construction, I could have been more accurate with the materials used and

exactly what the wall was designed as. So what I did was I took an estimate of a retaining wall cost. Then I measured on the scale of the approved plan how long that wall should have been. And then I estimated that the four foot retaining wall was around 175 feet. And the cost that I got off the internet was for every 50 feet a four foot retaining wall would cost at estimate \$11,900. And so when you times that out by 175 feet you come to the \$41,650. And then I did the same thing with the eight foot retaining wall. The eight foot retaining wall was approximately 100 feet. So I took that times \$13,700 times 2 is \$27,400. And then I added those totals together. I also include labor by consulting professionals in the industry and just, you know, getting an average of what labor would be. And an estimate of how long I'd thought it would take to build a retaining wall. It's just an estimate. And that's when I came up with \$76,750 for Worksheet #1. And then Worksheet #2, F and G is, I called an engineering firm and got an estimate of what the cost would be for an engineered report with the scenario of the problems for this development, and they quoted me a price of \$4,000.00 for them to come out, do whatever tests they need to do with the soil and estimate and submit an engineered report to us, was \$4000.00. So when you total those two together I came up with \$80,750.00 as an estimate of what the violator saved by non-compliance.

Deputy County Attorney SZambon: You sited several violations on this the project, on this development. Is it possible for these problems to be fixed?

TFox: If everything is installed as per the approved plan and we are provided and engineered report by a North Carolina engineer on how to stabilize the site and recommendations to fix, yes, it can be corrected.

Deputy County Attorney SZambon: And beyond the cost of what you just covered in terms of what Mr. Stambaugh saved by not following the plan correctly, what other, if any costs are there to remedy these problems on the site?

TFox: One other cost would be staff investigative cost. I have that in my daily penalty. In our daily penalties we include the degree and extent of harm caused by the violation. That's at the beginning of your Worksheet. It goes from severe to none. I gave it 'moderate'. I think it's moving towards severe. But again, we give people the chance to correct things. So I gave that \$200.00. I think that's reasonable in this case. And we also – Item C is adherence to the plan, Effectiveness of the plan, and Maintaining measures. We have a penalties chart which we also included, that's attachment #4. And there were the items that included the penalties on Attachment #5, the very top of the page. The four foot retaining wall's missing. On our penalty chart for measures that are not installed we can fine up to \$1,000.00 per measure not installed at all. So the four foot retaining wall's missing. The eight foot retaining wall's missing. The out fall protection is missing. Those all got \$1,000.00. And then silt fence is not being maintained. I put \$500.00 for that but that could have been way higher but I considered all silt fencing as one measure. But we could have measured the linear feet and that could have been more. But that's how I came up with that number.

Deputy County Attorney SZambon: So Mr. Fox, based on your testimony, what I'm hearing you say is absent the maintenance with the silt fence the problems with the project are the implementation of the plan, not maintenance of existing measures, necessarily. Is that fair to say?

TFox: It's both because there is some maintenance that needs to be upheld. But the big problems deal with not following the approved plan, that's correct.

Deputy County Attorney SZambon: Was Mr. Stambaugh the financially responsible party? Was he informed of the violations on this property?

TFox: Yes.

Deputy County Attorney SZambon: What if any action on the property did Mr. Stambaugh take in response to these violations?

TFox: Mr. Stambaugh acknowledged my correspondence with him but no action has been taken to correct the problems. And as time goes on more environmental damage is happening and more damage is happening to Hume Davenport's property. And if it's not maintained and if these issues are not addressed then there's going to be continued damage.

Deputy County Attorney SZambon: To the best of your knowledge have any other agencies beyond Henderson County noted violations on this property?

TFox: Yes.

Deputy County Attorney SZambon: If you know, who?

TFox: The Division of Water Quality also has issued a Notice of Violation.

Chairman Phelps: Is that the North Carolina Division?

TFox: Yeah, that is DENR, Department of Environment and Natural Resources, Water Quality Section. Any time a permitted site – anytime I witness in an inspection, sediment leaving a site, I notify the Division of Water Quality who then also comes and assesses to see if there's a violation with them, the Division of Water Quality. And they have issued a Notice of Violation for in-stream sediment for this project. I also have old inspection reports from the Department of Environment and Natural Resources who started the inspection of this project. And I have about five inspection reports and they all list violations. One of them has a note that there was in-stream - that sediment was leaving the site. And they all have 'not following the approved plan'. So let me-

Deputy County Attorney SZambon: And by old do you mean like earlier this year? When would you characterize as old, these inspection reports of which you have knowledge of?

TFox: Before December, 2009.

Deputy County Attorney SZambon: Before December, 2009. Throughout the time the County has had authority over this project, and you have inspected this project, has this property ever been compliant with the Henderson County Soil Erosion Ordinance?

TFox: No.

Deputy County Attorney SZambon: And you said you were out there today. Is the property currently in compliance with the Henderson County Soil Erosion Ordinance?

TFox: No.

Deputy County Attorney SZambon: I have no further questions for Mr. Fox but the board, or Mr. Stambaugh, or Mr. Davenport may.

Chairman Phelps: Questions from the board?

CStambaugh: If I may. Mr. Fox, I think you testified that all of your personal observations and your personal knowledge of the violations of the Henderson County Sedimentation Control Statute were of this year, 2010, correct?

TFox: Yes. Yeah.

CStambaugh: And do you also testify that in terms of the calculations of the potential fines that could be assessed that much of that was based upon estimates gathered off the internet and that indeed somebody could come up with another estimate.

TFox: The only estimate I came up with off the internet was retaining wall cost.

CStambaugh: Well even in your personal testimony though, it sounded like you were using some discretion in terms of how to evaluate certain failures on the property as you saw them, as well as the remedial actions that would be required as well as what the cost would save in terms of –

TFox: What I meant was when I was explaining about the retaining wall is if I don't have a design by a civil engineer, retaining walls can vary. So it's really hard for me to pinpoint exactly what kind of retaining wall should be there. So that's what I was talking about with getting an estimate. It's really hard to estimate that unless I know what was meant to be there.

CStambaugh: I understand.

TFox: In the engineered report that's a general figure. But I feel like that's - I feel like I did a pretty good estimate of that, as well as the labor and my investigative costs. Because of the slopes of your development it could cost a lot more to put a retaining wall on some of those slopes because it's going to be very challenging. So that's just – that was my best estimate, ok?

CStambaugh: Fair enough. To your knowledge did Mr. Davenport take any mitigating steps to try and protect his property or his pond from the soil erosion?

TFox: Did Mr. Davenport?

CStambaugh: Yeah. I'm just asking, are you aware of anything that he may have done when he saw what was happening to try and mitigate the damage?

TFox: He contacted me. And I think that's what I was here for to do. But to be fair with that question, there's not much he can do because you – until some of these measures – he can't hold a slope back. Silt fence is not going to hold the silt flowing down a hill. These are serious problems, stability issues, so they need to be dealt with by engineers and there's not much, I don't think he can do much.

CStambaugh: That's it, thank you very much. That's all.

Deputy County Attorney SZambon: If the board wouldn't mind I have three rebuttal questions. Mr. Fox, Mr. Stambaugh pointed out that you did not have estimates for the actual retaining walls. Why didn't you have those?

TFox: They were not submitted.

Deputy County Attorney SZambon: Did we ask – did you ever ask Mr. Stambaugh for those?

TFox: In our Notices of Violation, Continuing Notice of Violation, and Clarification Letter, we asked to please provide our office with appropriate documents in hope that we wouldn't have to get to this stage today. If we would have got those documents maybe some things would have been addressed.

Deputy County Attorney SZambon: And he also brought out that Mr. Davenport, uh yeah, Mr. Davenport didn't mitigate the problem with his turbidity, the dirtiness of his pond. Under the Soil Erosion Ordinance does Mr. Davenport have any obligation to do that?

TFox: No.

Deputy County Attorney SZambon: And could he have done anything?

TFox: That's what I was, yeah, that was the point I was trying to make is there's not anything he can do, other than go through the proper law to get this site into compliance. It's creating an environmental hazard.

Deputy County Attorney SZambon: I don't have any further questions for Mr. Fox.

Chairman Phelps: You have something? (to Mr. Crafton)

JCrafton: What documents did you say that you had requested in your correspondence with Mr. Stambaugh that you failed to receive regarding estimates?

TFox: In our Notice of Violation that was sent out in April we ask for, in the compliance deadline, 20 calendar days to provide an engineer report addressing slope failure, stabilization, and recommendations for correction. We also asked to address ground cover for 21 days and any maintenance issues in 10 working days. And then in the Continuing Notice of Violation on 6/30 there's a whole paragraph concerning the retaining walls. But it says: 14 calendar days to either install all measures as per the approved plan or provide our office with revisions for approval of items not installed on the approved erosion control plan. Additionally provide an engineer report by a North Carolina licensed engineer or landscape architect addressing slope failure, stabilization and recommendations for correction.

JCrafton: I guess what I was looking for in any of your requests, had you asked for any information regarding cost?

TFox: No. but, no I did not.

JCrafton: Then the thing I'd be interested in is how does your estimate of cost impact the degree of the fines?

TFox: It's just an estimate because I don't know- if he would have provided me exactly-

JCrafton: No. no. My question -what's the relationship between whatever value you established, whether it was 10,000 or 100,000, what was the relationship between that value, whatever it was, and how you determined the fine for the penalty to be?

TFox: The penalty actually even doesn't have anything to do with the cost of the wall, ok?

JCrafton: Ok.

TFox: If you look at the - can I explain that? If you look at the Worksheet 1 and if you - if you look at Worksheet 1 the total daily penalty is \$4,436 and that is adding up Item B which is \$200, Item C which is \$3,500 which was those items I went over on the penalty chart for the walls that were missing. And then Item H is staff investigation cost. So those are what was determined for the penalty.

JCrafton: Well I asked the question because you had given some detail on how you determined on the estimated value. And so I was interested in whether those values related to the degree of penalty and you're telling me they do not.

TFox: No. But it's still - if you think of it - this is how I think of it too is a penalty, ok, we're trying to get compliance here so that-

JCrafton: I understand why you gave a penalty. I just want to know if the value of the cost has a bearing on how much penalty.

TFox: Right. And if you look at \$76,750 is the amount that I estimated that he saved, ok? And then if you look at - the penalty is \$93,164. So the way that I look at that is that's really close to the amount of money that he would have saved if he would have just installed the measure itself, if that makes sense. We're not trying to come up with numbers that are not detailed and can't come up with why we did what we did. But we don't just randomly come up with a big huge number to fine people. But these retaining walls - he saved a lot of money by not putting them in and I think that should reflect the penalty.

JCrafton: Thank you.

Chairman Phelps: So basically you were talking about the retaining wall fee, that's something like averages you saw for that size fence. Now obviously a retaining wall on the side of a mountain in Henderson County, North Carolina versus a retaining wall on the edge of a swamp in Duval County, Florida would be quite different. Could be.

TFox: Could be.

Chairman Phelps: So what we've got here is strictly an average. And we all know what averages are but for lack of more information or a detailed plan as to how it would be constructed, you used the average. Now just for clarification, the day you initially inspected it you found these violations.

TFox: Um-hm

Chairman Phelps: You said you were back out there today. The violations still existed. So on the date of your initial investigation they existed and to the best of our knowledge they still exist today.

TFox: There's no question.

Chairman Phelps: Ok. Thank you. Did you have a question? (to Ms. Telker)

JTelker: How many feet of the - when I was reading your note on the silt fences and things I noticed that you could have levied \$5,000, uh, \$1,000 per measure of every 100 feet of silt fence. Is there more than a hundred feet of silt fence?

TFox: Yeah. There is much more silt fence. That's what I meant. I could have assessed more. I could have assessed - the pipe one's not even installed. I could have - it could be another \$1,000. The ground cover is not in this penalty assessment. I could have went a lot more crazier with this penalty package. But once again, we're trying to do an estimate and we're trying to be fair and reasonable.

Chairman Phelps: Any further questions from anyone? If not, thank you Mr. Fox.

Deputy County Attorney SZambon: The County's last witness for this time, as we reserve the right to call other witnesses, is Hume Davenport. Mr. Davenport, if you can please come up to the microphone. And Mr. Fox may return to his seat. Mr. Davenport can you please state your address again for the board?

HDavenport: It's 600 Turley Falls Road.

Deputy County Attorney SZambon: And where is it again in relation to Four Sims Hollow?

HDavenport: It's adjacent to, more north I believe. And it's down slope.

Chairman Phelps: Is there anyway on that may you could show us?

HDavenport: Tim, you want to come back and help me make sure I-

CStambaugh: It's behind lot seven.

HDavenport: I'm pretty sure it's right in here.

TFox: Right.

HDavenport: So this is my boundary. Yeah, so that's my boundary there. This is, this blue line is the creek that feeds into my pond. And then over – well, that's the creek that's shown.

Deputy County Attorney SZambon: Can you tell us how has the Four Sims Development affected your property?

HDavenport: It was probably late in the winter or early spring that I first started seeing with any modest rainfall, there would be some sediment deposition that would come into my pond. And as time went by and got to be into a bit more the thunderstorm season in the spring and the early summer, it seemed like something happened. Something let loose, was how I described it to Tim when I called him. All of a sudden with every rain there'd be a flush of soil and sediment erosion debris into my pond which would discolor it for days, and would accumulate at the mouth of the pond. And that's the primary impact.

Deputy County Attorney SZambon: How long have you owned this property?

HDavenport: Since September of 2004.

Deputy County Attorney SZambon: And prior to, you said earlier this year, early 2010, had you ever had, had you had any – prior to Four Sims Hollow coming in and starting development had you had any problems with the pond, with turbidity in the pond?

HDavenport: Yes, I had. There was another landowner who was further up the watershed who had performed some construction. That person had not taken soil erosion measures to contain, and I had been through a similar process. Stepping forth first to that property owner, then to the County, then to the State, and so forth.

Deputy County Attorney SZambon: Why do you think your current soil erosion is from Four Sims Hollow?

HDavenport: I know it's from Four Sims Hollow because I'm very familiar with the watershed. It's a small watershed. It's a small drainage. I've seen it from every angle. I've crawled up and down the mountainside on several occasions. And I know what the land disturbances are within the watershed. At this time and since this has begun in the late winter, early spring there has been no other land disturbance in this watershed. I have also been up onto the site. I have seen the control measures that Mr. Fox described. The control measures are as he describes. And I'm not a technician but a casual observer can see that something has let loose. And it's basically an unchecked roadbed. And there is a lot of soil that is eroding off of there. This stream unfortunately is adjacent to part of that area that is coming undone. And I'm seeing the results of that every time it rains now.

Deputy County Attorney SZambon: What is the condition of your pond? We've had three days of rain now. What's the current condition of your pond?

HDavenport: I don't - I cannot say first hand because as of October 1 I've rented the property and do not live there so I have not seen it in the last three days. I believe Tim had a photograph though.

Deputy County Attorney SZambon: Yes, which has been submitted to you already, from today. What damage or harm has the soil erosion done to you and your property?

HDavenport: This is something I've thought a lot about. The pond is really the centerpiece of the property. It's a very pretty – it's a small pond. It's about a quarter of

an acre, quarter to a half acre. It is surrounded by mature tree growth, hard woods and dense laurel. And it's just very picturesque. In addition to that it has some recreational infrastructure built into it. We've got a dock. We have a little housed cupola with a diving board out into the water and a little what we call, clubhouse right there by the pond. So it's not huge or elaborate but it's a lot of fun. So when these episodes occur the major problem is that we're not able to take advantage of that because no one really wants to be next to a body of water that looks like a dirty red mud puddle. Or coffee with cream is probably a better color description. We used to stock with trout. That seems like it's not feasible until there is some remedy or some solution to this. So we've stopped doing that. And it's just a drag to tell you the truth. It seems like every time I turn around somebody else is doing something upstream and bringing mud down. But I understand, I live at the bottom and that's the way it is sometimes.

Deputy County Attorney SZambon: I have no further questions for Mr. Davenport unless Mr. Stambaugh or the board does.

Chairman Phelps: Mr. Stambaugh?

CStambaugh: By the way does the board mind if I stay seated?

Chairman Phelps: No, as long as you speak into that microphone right there.

CStambaugh: Hello again, Mr. Davenport.

HDavenport: Yeah, hi.

CStambaugh: You mentioned you noticed the problem late winter or early spring. You're referring to this year, 2010?

HDavenport: I am.

CStambaugh: But you were – the earlier situation when you sited where another uphill developer had caused some sediment to go into your pond.

HDavenport: That's correct.

CStambaugh: Initially did you believe it came from the Four Sims Hollow property?

HDavenport: Initially I wasn't sure until I really took a in-depth look and really by ground studied the entire watershed.

CStambaugh: And did you actually, when you said you walked on the Four Sims Hollow property I believe if my memory serves me correctly, the development started about 2007, something like that.

HDavenport: Your development or the other the other development?

CStambaugh: My development, I believe. I think we did in earnest. Did you walk the Four Sims property and talk to the contractors and the other people that were there working on the Four Sims Hollow property putting in the road?

HDavenport: I did. I did.

CStambaugh: And during that time from 2007 to 2010 there were no issues, no problems?

HDavenport: There were – they were infrequent. And there were issues. I did speak with the gentleman who was working to create the roadway when there were those problems. For example, when they were putting in a culver here, which was kind of a very vulnerable position to be in, they had the roadbed kind of torn out and they didn't have the pipe in just yet, there was a big rainstorm. And so there was loose sediment and it washed down into my pond. So during the construction phase there were infrequent problems. I can't remember the name off the top of my head.

CStambaugh: Fortune. Chris Fortune.

HDavenport: That gentleman was very responsive to my telephone calls. I probably called him three or four times during the course of the construction phase.

CStambaugh: And so he addressed whatever the issues were?

HDavenport: He would take the time to explain to me why something was a mess and was very communicative and very responsive.

CStambaugh: No further questions.

Chairman Phelps: Mr. Davenport, I think I lost my train of thought, have you had to do any – take any measures to try to prevent any of this runoff from reaching your pond?

HDavenport: As has been pointed out I think I would be very hard pressed to be able to take any measures. The lay of that land is very steep and as I characterized it I have traveled up and down it. From my property going up towards Mr. Stambaugh's property, you almost have to get on all fours to go up the slope. It's very steep. It's very wooded. And it's overgrown with laurel and rhododendron thicket. I guess by some expensive engineering feat I could dig a big hole so his sediment doesn't go into my pond. But, no I haven't done anything like that.

Chairman Phelps: What is your property used for? Are there residences on it? You mentioned –

HDavenport: I own ten acres. They are mixed wooded and some open fields. There is one single home on it and it is about 1,000 square feet.

Chairman Phelps: Any other questions from the board? Anyone else? Mr. Davenport, we thank you.

HDavenport: Thank you.

Chairman Phelps: Sarah?

Deputy County Attorney SZambon: The County has no other witnesses at this time.

Chairman Phelps: Alright then Mr. Stambaugh, the floor is yours.

CStambaugh: Thank you, sir and thank you all for giving me the opportunity to come here and give my side of things. First off let me recognize that I'm aware that there is erosion. I'm not contesting that all, nor that there has been a lack of maintenance to prevent that during this year. I do contest the charge of poor design or lack of follow through on the design that was initially offered. But I do want to stress that it's not because of negligence that I think we're here. In fact I'll try to show I tried to get the best people, spent a lot of money trying to do the best job I could. But something happened which we'll get to in a moment which prevented me from doing that. What I'd like to hopefully accomplish with you tonight – the idea would be of course to get to you to withhold assessing fines but beyond that should you fine me, to delay any civil action, and again I'll make that apparent as to why at the end of my testimony. What I'd like to do tonight is give some personal testimony myself and then call on Luther Smith who was the landscape architect and the expert that I employed in the design and construction of the property and then come back and testify as a follow up to the information I'm going to present. I did prepare, I think I was told, eight copies. I did prepare some documentation for the board. If you'll take a look and you'll see that there are basically five stapled packets, A,B,C,D,E, that I will refer to as I go through and as Luther gives his testimony. And I know it's informal but I would ask you to bear with me. In that stapled Exhibit A, those documents, if you look at the first page, for a little

back ground my wife and I bought the property back in December of 97. I was employed with a firm in Ohio. We wanted to build our own home and so what I did was I hired Ed Lastein. You may know him, a landscape architect from Flat Rock. Because we were just going to build a home and he started designing and in fact he started dynamiting and doing a few other things with the property. And we hired Bill O'Cain to design a house for us. And he designed the house. And we were in the process of starting to get the construction bids when I lost my employment and so that stopped for quite a while. The property was ours. We had paid for it, it was sitting there. And then in June of 06, I believe, my wife and I decided that we still loved the property, wanted to build a house but since we couldn't afford to build it ourselves since it was 16 ½ acres we thought we'd divide it up and by selling off the lots, be able to build a house on one of the lots. So we met with Luther Smith Associates, interviewed him and hired his team to start designing the property for us, the Four Sims Hollow. And in, you'll see why this is relevant later, after selecting Luther and coming up with some initial estimates, which by the way the initial estimate from the contractor was \$98,000, \$350,000 we're still not finished. So I have a new-found respect for developers. All justified in my opinion. It's just what you uncover when you start to develop land especially in a steep environment. But anyway in January of 07 we obtained a loan from Carolina First. That loan was renewed in January of 08. We were making great progress sticking to our schedule and in fact in June of 08 we platted lots 1 and 9, the first two lots as you come into the property. Because of the expense of the effort we were running out of development funds but we had enough to go through 2013. And so the intent was to try and sell off lots 1 and 9 as further funds to continue development. And you'll see when Luther testifies where we were at that point. The paving on the road, the paving that was required based upon its slope was completed in June of 09. We had to post the bond because the bond was returned to us. We had completed it to their satisfaction. So from the point of view the road had to be paved. That was done as planned. And then at the end of 09, before all of this started in terms of sediment erosion, Carolina first decided breach contract and stop funding. And we'll get to that a little bit later. On that second page you see the, well the first page was the permit when we were trying to build the house. The second page was when we got started in building Four Sims Hollow, developing the land for sale. That third page there in Exhibit Packet A you can see that we were dealing with DENR in terms of submitting plans. That started again as I said in May 07. In July we got designs back from those initial plans and you see a response letter. Jon Cannon was employed by Luther Smith Associates and he indicated to you – to DENR on that letter what changes were being made to the initial plan to comply with DENR's requirements and requests. And in fact you see item #2 there talking about those retaining walls. And in fact as #1 points out, in paragraph #1 we obtained Bunnell-Lammons Engineering to help design those retaining walls and make sure that we were on solid ground in terms of how we progress. You can see the following page it was approved. Back in – on the next page on January 28th a letter from the Henderson County Planning Department, back to Jon Cannon, this is from Parker Sloan. I believe this was entered in as an Exhibit earlier by the County. You see there #2 which has already been read into the record, has been approved or written notice by a professional land surveyor, engineer, landscape architect, which of course is Luther Smith. I'll have him address the changes to that plan in a moment. And the last page you have in this Exhibit Packet A is you see

that on July 14th, 2008 paving was complete. An inspection was done by DENR and there were no problems, at least none of any kind of permanent or significant nature. Whenever you're moving as much dirt as we moved on that property, just as Mr. Davenport testified, occasionally when you have severe rains you're going to have an occasional problem. But up to this point in time we were on target. We were doing what we were supposed to be doing and that's in 08. At this stage I'd like to call Luther Smith. If you wouldn't mind, Luther. Luther let me give you these two. Exhibits B and C I'll be asking Luther to address. You'll all notice that the Sedimentation Inspection Report, June 19th 2009, you see some issues there but there was no violation as you can see on Item #3. And at this point in 09 we had as I mentioned earlier, completed the first section with the road and it was in a stable environment. And by stable I mean stable development. We had gone to a point where we were financially solvent to carry on until we sold a lot or two, but we were maintaining the property. And at this stage I'd like to ask Luther to, and if fact Luther you have a diagram, which is the same one that's up here, but you have some colored items on it, do you want to replace it or use that one?

LSmith: Those have the same items.

CStambaugh: Ok, if you could use that and talk to the board in terms of specifically the retaining walls that were originally planned and the changes that you in your expertise made to those plans and why.

LSmith: I guess for the record my name's Luther Smith. I'm a landscape architect with offices here in Hendersonville. As Mr. Stambaugh indicated he contracted with our firm in the latter part of 2006 to work on Four Sims Hollow. A number of issues have come up, generally I guess, to give a little background, when we do a lay out such as this for a development obviously we're working on fairly accurate survey boundary information. We hire a surveyor to acquire that information. We generally hire a surveyor or and aerial surveying company to provide topographic information. Topographic information they will shoot from an airplane, stereoscopic photographs, and then the computer reads those in 3-D and establishes the contour lines that you see on that map. Obviously what shows up on a photograph is what the lens of the camera can see. And I've been here in the mountains for 35 years and I operate with the understanding that aerial topography is at best 40 to 45% accurate simply because cameras don't see through rhododendron and through laurel to the actual ground plate. So we keep this in mind when we are working and planning development. Generally the people who are working in the DENR office to the 30 years that I've been working up here also understand that. So when you lay out a plan you do a grading plan that we did here as we did on this particular project. Everybody understands that based on that information we have at that point in time this thing will work. But when you get out there and you start cutting down rhododendron and all of a sudden you find out, well this hill is not as steep as it reads on the topo because the rhododendron is higher at this end of the hill than this end, so it's a little flatter. Maybe this helps our grades in terms of the road and the side slopes. And somewhere else you cut the rhododendron and all of a sudden here's a 20 foot gully that didn't show up in the topo that you have to deal with. So by nature of the beast and the beast being the topography in the mountains, as you develop a plan or as you develop the project from the plan there are invariably minor changes that occur. If they become major changes historically DENR has said, wait a

minute if we're doing something way out of line, we've had to move the road 100 feet down here or whatever, let's stop, redo the plans and try and rethink what we're doing. If they are minor changes such as, we may have a pipe for example on this plan. There is a pipe shown crossing right there for that stream. In actuality on the ground that stream is back here. So we move the pipe where the stream is which on the plan it's about 50 feet in a different location. The same thing holds true with walls, whether they be low retaining walls or high retaining walls. And we make those judgments during construction as we go along as to whether we need that wall here. Now I understand from reading the County's report that yes, there are several walls that have not been installed. And if you go out there and look at some of the areas you'll see that what on the topo showed when we brought the side slope of the road in it was going to be a vertical drop or actually vertical rise at the property line, isn't that at all in reality. Because the way the road fit in the land, the way the topography changed we had a slope that was a manageable slope. We didn't need a retaining wall. So yes, there are some changes to the plan in terms of failure to follow the plan that invariably occur. There are other elements on this plan and I think part of the, say confusion that we have to deal with in this whole issue, is you all have to deal with, is that this was a two phase project. We finished the first phase which was coming in from here to approximately there, that phase, got that approved by the County and to allow Mr. Stambaugh to put two lots on record that he could then have available for sale. The remainder of the project, all the way out to the end, we continued to work on until such time, and I assume Mr. Stambaugh will go into detail, until such time as funding was no longer available. And at that time when we started the program of trying to cover, get temporary cover down on everything we could and get the thing stabilized, the project stabilized. Is that enough right now?

CStambaugh: It is. In fact if you'll take a look at the Exhibit Packet C, the first page on C, I see a report from DENR, August 6, 2009, and I see some sediment –some erosion issues listed there in terms of stabilizing the property but do you see anything there Mr. Smith, or were you told by DENR of any issues concerning the fact that we had changed the designs on the retaining walls?

LSmith: No, we had not received any information with DENR with regards to slight in-field modifications on the plan. Whether they be retaining walls, pipe locations or whatever.

CStambaugh: And then if you take a look at that next page in Exhibit C, the second and final page, you see two emails there. One from me to you and your response back to me. And what is the gist of the email, sir?

LSmith: At this point or this date, actually it was a little bit earlier in the summer we had completed the paving and all of Phase 1. The contractor at that time that was responsible for that had back filled the shoulders, had done seeding that was required. And from that period of time 'till about a little before this report the grass was growing but there was no activity on the project. No maintenance activity or construction activity going on. This report was made and what we suggested to Mr. Stambaugh was that we get in and start maintaining the property, the grass that has now grown up pretty good. And it was for example, keeping water from leaving the pavement and getting to the ditches and that sort of thing and causing other problems. But we made recommendations that we move forward to start maintenance and that sort of thing.

CStambaugh: And what did you do if anything in terms of after our agreement to move forward?

LSmith: We talked with a couple of different landscape contractors and decided that a gentleman by the name of Jim Ravis would be the most appropriate individual to work with. In coming in and not only maintaining the property but continuing the program of maintenance of ditches, cleaning out ditches, and erosion control things so the property would be stabilized and we would not have off site settlement.

CStambaugh: That's all. Your witness.

Deputy County Attorney SZambon: Mr. Smith, can you identify the map that is hanging up over there?

LSmith: Yes, it is a photocopy of a blueprint of a, what appears to be a set of plans that our office developed. Excuse me, erosion control plan for the Four Sims Hollow Development.

Deputy County Attorney SZambon: And is your seal on those plans?

LSmith: My seal is but my signature is not.

Deputy County Attorney SZambon: At this time the County would like to enter the Soil Erosion Plan into the record as County Exhibit G. Mr. Smith, you are a landscape architect correct?

LSmith: That's correct.

Deputy County Attorney SZambon: You are not a civil engineer.

LSmith: That's correct.

Deputy County Attorney SZambon: You are not a geotechnical engineer.

LSmith: That's correct.

SZambon: On the plans that you just referred to it says: 'Retaining walls have to be designed and completed by a civil engineer'. Is that correct?

LSmith: That's correct.

Deputy County Attorney SZambon: I'm going to direct you to Mr. Stambaugh's exhibits that he just handed up to you. Can you look at Exhibit B for me? Can you identify what Exhibit B is, the first page of Exhibit B?

LSmith: It appears to be a carbon copy of a Sedimentation Inspection Report completed, somewhere I saw the dates on there, 6,23,09.

Deputy County Attorney SZambon: So on 6,23,09 the following violations were checked, is this correct? Failure to follow the plan, under Number 5.

LSmith: That's correct.

Deputy County Attorney SZambon: Failure to take reasonable measures.

LSmith: That's correct.

Deputy County Attorney SZambon: Inadequate buffer zone.

LSmith: That's correct.

Deputy County Attorney SZambon: Failure to maintain erosion controls.

LSmith: That's correct.

Deputy County Attorney SZambon: And can you read into the record for me Number 9?

LSmith: Repair and maintain all erosion control measures throughout the project, silt fence –

Deputy County Attorney SZambon: I can't read what that word is either.

LSmith: Inlet slash outlet protection, etcetera.

Deputy County Attorney SZambon: Number 2 under Number 9.

LSmith: Stabilize roadbed, ditch lines and shoulders with a ground cover sufficient to restrain erosion.

Deputy County Attorney SZambon: Number 3 under Number 9.

LSmith: Provide a vegetative ground cover on all bear areas in the project.

Deputy County Attorney SZambon: And can you please read into the record Number 10?

LSmith: Site is eroding and will continue to worsen if corrective actions are not addressed. Fill slopes are failing in several areas. Continue to monitor and repair slopes as needed. Ensure stormwater is directed away from fill slopes.

Deputy County Attorney SZambon: And can I direct you to the first sheet of Mr. Stambaugh's Exhibit C.

LSmith: I'm sorry.

Deputy County Attorney SZambon: Exhibit C, the first page. Can you identify the first page of C for me?

LSmith: Yes, it's also a carbon copy of a Sedimentation Inspection Report.

Deputy County Attorney SZambon: And what is the date on this one?

LSmith: 08,11,09.

Deputy County Attorney SZambon: And is it correct that these violations were checked on August 11th, 09?: Failure to follow approved plan.

LSmith: Yes.

Deputy County Attorney SZambon: Failure to provide adequate ground cover.

LSmith: Yes.

Deputy County Attorney SZambon: Failure to maintain erosion control measures.

LSmith: That's correct.

Deputy County Attorney SZambon: And can you read all three parts of Number 9 for me.

LSmith: Take all necessary actions to stabilize site in a manner sufficient to restrain erosion and retain sediment on site. Number 2: Provide a ground cover on all bear areas throughout project, and Number 3: Repair and maintain all erosion control measures throughout project.

Deputy County Attorney SZambon: Now I'll direct you to the first page of Exhibit C. Can you identify that for me? I'm sorry, D.

CStambaugh: We haven't submitted, I haven't submitted that.

Deputy County Attorney SZambon: Oh, you haven't submitted D yet?

CStambaugh: No, I have not.

Deputy County Attorney SZambon: Ok, Mr. Smith you stated that there were changes that were intended on this soil erosion plan, is that correct?

LSmith: I'm sorry, say that again.

Deputy County Attorney SZambon: Where you stated in your testimony that based on the nature of the beast, being the mountain topography, there were going to be changes to the soil erosion plan.

LSmith: Changes as to the design and construction of the development plan which would in turn require potential changes to the erosion control plan.

Deputy County Attorney SZambon: Were any of these changes ever approved by DENR or the County?

LSmith: At that point in time the County was not involved in the erosion control process. I believe, I do not know the exact date, but I believe it was either at the end of the year or in 2010 that the County assumed responsibility for erosion control. With regards to changes to DENR or changes referred to DENR, the modifications that had been made in the field at that time based on my years of experience with them were not substantial in terms of having to change the plans and we were not asked to change the plans.

Deputy County Attorney SZambon: So your comment before was that one of the changes you were making was to the retaining walls, is that correct, in your earlier testimony?

LSmith: I indicated, I believe, that in the grading of the road there were some areas where what was initially a proposed retaining wall in the plan, the wall was no longer required because of change in topography from the aerial information to what is on the ground. For example, that retaining wall would not be put in because it's no longer required.

Deputy County Attorney SZambon: When is the last time you were on the subject property?

LSmith: About eleven o'clock this morning. And it was raining.

Deputy County Attorney SZambon: Ok. Based on the property as you saw it today and based on the plan that your company drew, have all the measures from the plan been implemented on the project?

LSmith: No they have not.

Deputy County Attorney SZambon: What has not been implemented on the project?

LSmith: I would have to, well first I would have to break it into two sections. In terms of Phase 1 which was the approved Phase, approved in terms of planning and recording lots, the biggest element that has not been completed at this time and I believe it was picked up in Tim's report was pipe #2 does not have a outlet structure. The reason for that is pipe #2 was designed to drop the water into an erosion basin, or, basically an erosion basin. When it would build up to a point it went into a secondary basin and then would be filtered as it got to the creek. After the entire site was stabilized and so forth that pipe would then be extended down to the existing apron which is at the bottom of hill and the hole was eroded and the hole filled up so that has not occurred. There are – a retaining wall is shown on the plan on the left hand side as you go to the end, because of change in topography was not necessary. There is an area on the left of this second third that apparently over the winter vegetation has allowed the water to spill off the edge of the pavement there and it has eroded and area and taken out part of the pavement. Those are the primary items. That, plus in general the ditches need to be cleaned out because it has not been maintained.

Deputy County Attorney SZambon: You said you were splitting it up because part of it was approved and part of it wasn't. Isn't this entire plan approved?

LSmith: The entire plan is approved in terms of an erosion control plan. The entire plan is not approved yet by the County Planning Department. And so we had Phase 1 approved and two lots put on record. That indicates that from the planning standpoint all of the conditions that were required at that point in time have been met and the site, that portion of the site or whatever we asked to be approved, was in fact in compliance at that time. The second phase of the project which begins at the end of the pavement, approximately in this location, is considered from our standpoint still under construction even though no active construction has taken place on the project since I believe it was about June of 09.

Deputy County Attorney SZambon: Is it your testimony then because of – Planning has not approved it from a subdivision standpoint because the end property is for future expansion, that it does not have to meet the soil erosion control plan?

LSmith: I did not say that. I said that the second Phase of the project is not considered finished, finished being recordable, the lots being recorded in the County courthouse. It is currently considered to be under construction because we have not asked for, well one, the elements of the plan are not finalized in terms of construction and two we have not approached the County Planning Department for review and approval as a final plan as a permissible development.

Deputy County Attorney SZambon: On the plan there's a note that says: 'Final retaining walls design must be completed by a licensed civil engineer. To the best of your knowledge as the landscape architect on this project is there any proof of design plans being completed by a licensed civil engineer?

LSmith: It is my understanding that Mr. Stambaugh, at our suggestion did contract with Bunnell-Lammons and a gentleman by the name I believe of Jessie Scarborough was involved with the project. I have limited, I can only speak to that in a limited manner because Mr. Jonathan Cannon, who was with our office at that time was principally working on a day to day basis on the project. I would have to go back and look through all of the documentation and so forth.

Deputy County Attorney SZambon: So really you don't know if any of that documentation was given to DENR or to the County then?

LSmith: DENR had not requested any of that documentation. And historically when we turn in a request for a final report from DENR, it is that point in time that we provide them with information that they may have requested as being part of the whole process.

Deputy County Attorney SZambon: Is your answer similar then to the section about all graded fill slopes greater than 2 to 1, all graded cut slopes greater than 1.5 to 1, and all retaining walls taller than four feet are to be designed and installed under the supervision of a licensed geotechnical engineer. Is it your testimony that you don't have knowledge that those happened either? That there is any evidence that those happened either?

LSmith: I believe you asked me if I don't have knowledge that there is any evidence. I can't answer that question. I do not have direct knowledge at this point of what studies may or may not have been conducted by Bunnell-Lammons. I would have to refer to our files.

Deputy County Attorney SZambon: I don't have any further questions right now.

CStambaugh: Rebuttal please before you step down Luther. One for just for clarity you did testify that on the two inspection reports from DENR in the year 2009, while there was no violation they did site some issues to be concerned with concerning erosion and that you did testify that indeed you contracted Ravis Grounds Maintenance to start to pursue that, is that correct?

LSmith: That's correct. We contracted at your, at our suggestion and your approval. We contracted with Jim Ravis.

CStambaugh: And I think there's some confusion on the part of council in terms of she was quoting several times where the requirement of designing retaining walls required a certain engineering professional and degree. The question becomes though in terms of whether on is required. That is part of your job isn't it?

LSmith: Yes, it is and it was our recommendation as indicated and you, I guess, chose to follow that recommendation by signing the contract with Bunnell-Lammons to have them review the slopes and walls, any walls that were above four feet in slope areas that didn't meet certain criteria.

CStambaugh: Thank you. No further questions.

Deputy County Attorney SZambon: Does the board have any questions for Mr. Smith?

JCrafton: I have a question. Since Mr. Smith is at the podium I'll address the question to him but it's really in regard to something that Mr. Stambaugh just said. Mr. Smith as you look at the Exhibit B and C, Item 5 in each case, in bold letters what is the heading of those subjects?

LSmith: Item 5 the heading is 'Violations'.

JCrafton: Ok. And I just want to clarify that because I thought I heard Mr. Stambaugh say that DENR came on your site and found no violations.

CStambaugh: For clarity, sir, what I was referring to was Item #3 where it said that the site was under no violation and that what they had observed on this current inspection were certain things that had to be addressed, but that at no time did they ever issue a violation on the site. We were never under a violation of the site, in fact if you take a look at the second report in C, same individual I believe did the inspection, but right up again in number 3 it says, 'is it under violation'? No. Even though they had sited earlier things to address and be aware of, when he came back and looked we were still not under a violation. These were simple things that because of weather and time you have to address as you are developing a site.

JCrafton: Well this is for our discussion but I believe you'll find that they did find you in violation they simply didn't issue you a notice of an official violation.

CStambaugh: Well if that's the case then why would under B which was the earlier report it would say 'not under violation' but it lists certain things to address. And then a subsequent report, up at the top it says again we're not currently under violation.

JCrafton: Thank you.

CStambaugh: Luther, anything else?

LSmith: No.

CStambaugh: By the board? Thank you, Luther.

APouch: I have one question that I don't understand. Living in the mountains when you have a plan like this and you realize that you don't need a retaining wall here or you need a bigger one there, do you have to come back and change your plan and your permit?

LSmith: Again if, yes ma'am, if it were - for example this plan indicates that the proposal or part of the plan, excuse me, right here requires a retaining wall at this point, and that wall is not in at the moment because everything beyond here is still under construction. But if we get out there and I believe it says 'a four foot wall' and it's not necessary but we find that because of the slope change the wall is on this side that perhaps is a large enough of an element that we would show that and notify DENR, Henderson County now, that we have made this change. If we back up here, the beginning for example there is a wall that's shown here that's measured I'll say 60 feet long. In the field when it was built it perhaps only needed to be 40 feet. The fact that it's 20 feet shorter if it's still does what it's required to do and goes from ground to ground basically in terms of working, historically in working with DENR that would not be a change that we would necessarily have to submit to them. If we made major changes to pipe locations, yes. And then if we had major changes to slope stability or hit rock, a significant amount of rock that was unstable, yes, those are all changes that you would want to stop, find out what you have, have it tested so forth and then historically submit to DENR. Say, 'we ran into this, we got do this, this, and this.

APouch: ok.

LSmith: Does that-

APouch: Um.

JTelker: I have a question. Can you tell me where the first section ended in relationship to the stream on Mr. Davenport's property? The section you say is complete?

LSmith: This blue line is the stream.

LSmith: Is the stream and it heads up the original spring somewhere on this piece of property. The first section ends right about there.

JTelker: So then you're saying that, and the first section you say is in compliance so it wouldn't effect what's going on with the stream, the second section?

LSmith: Well, it would in the sense that you see this little branch that comes up, there's a spring head in the side of the hill here. So we had to pick that up and pipe it our and it runs into there. As you come up here the stream is paralleling that construction so yes, it could potentially negatively impact this. I'm not sure where Mr. Davenport?-

HDavenport: Um-hm.

LSmith: Where Mr. Davenport when he walked around, was finding sediment flowing, I got, I sort of understood the way he was doing it. This area is an area where a slope failure has occurred. And I sort of, maybe I interpreted his conversation improperly, but that perhaps water coming off of that is working down towards his pond which sits in this area, and not maybe necessarily on the stream. When I was out there this morning or one of those days, I got to the site, the sun was shining. By the time I walked to the edge of the pavement down to this area you couldn't see 100 feet because the rain was coming down but it did give me an opportunity to observe the water that was coming out all across the slope pipes on the project and none of them appeared to be carrying any suspended solids or sediment. But that was this morning and one particular storm, so

I would have to know where his pond is exactly in order to know where stuff may be coming down. Does that answer your question?

JTelker: Um-hm.

LSmith: Any other questions?

Chairman Phelps: Any questions, additional questions for Mr. Smith? Thank you, sir. At this time the Chair would like to exercise a privilege to have a break until 6 o'clock. We'll take a six minute break by that clock. And we'll be back here at 6 o'clock. We'll stretch our legs and get a drink of water and make sure we're ok to continue. I'd like to ask the board, obviously we've been here a while longer, is there any need to plan on having that training tonight?

Deputy County Attorney SZambon: Anthony has already left. There is no training after this, just the hearing.

Chairman Phelps: Ok, if we may get reassembled here and we can proceed. Mr. Stambaugh you still have the floor.

CStambaugh: Thank you, sir. Just a few more moments if I could. If you take a look at Exhibit D all I'm trying to show there is that indeed we responded to the report from DENR in terms of pointing out the second page is simply the paid invoice for Ravis Grounds Maintenance where we did take action to address those issues. And if you take a look at Exhibit E you'll see that the next invoice I couldn't pay. Basically we had done Phase 1, we were in a holding plan for Phase 2, but never the less maintaining the site as best we could and as best we knew how, without any sited violations but obviously with issues that had to be addressed as were pointed out by DENR. But what happened if you turn to page 2 on Exhibit E is that Carolina First decided to cease funding. The issue is currently addressed in Federal Court in Asheville. I have a trial calendar date starting sometime in November of 2011. So at the end of next year we will reach decision on that if we don't reach it before then. But basically what happened was Carolina First decided to cease funding and I sued them for breach of contract. Initially what they did was to move forward and as you know this is s deed-trust state so they moved forward quickly on foreclosure. And in fact they sent down an appraiser and all this information will be presented of course in Federal Court. They sent an appraiser. The appraiser said the property was worth more than what I owed. They moved forward with foreclosure. I have emails where I sent to them and pointed out that there were erosion control issues that had to be addressed. They in fact sent someone to Luther Smith's office I to discuss those issues. They foreclosed I believe, in February or March, they actually foreclosed on the property. They scheduled sale dates on the property three times. Each time they cancelled those sale dates. And then in July I believe, they decided to drop the foreclosure suit and sue me personally on the note. As you all know, and you can read the text in page 1,2,4, you'll see, and 5 you'll see evidence submitted under oath to what I just attested to. As you know in 2008 the property market fell just out totally and so I'm not exactly why they decided to cease funding, whether it was because the market, whether it was because they were having difficulties themselves because as you know they were recently acquired by another bank, I don't know why. We'll find out in court through discovery. But the fact is that we were doing what I believe what we were supposed to be doing, what we had committed ourselves to do. And in fact there was

sufficient funding to take us through 2013. When the bank ceased funding I had no means to continue to do the maintenance control in terms of erosion on the property. I had no means to continue with Phase 2 of the plan. And of course because of the market place no one has stepped up to buy the lots as well. In fact all of my resources now are focused on legal fees as you might expect against Carolina First in Federal Court. So again I'll simply request again that because of those facts, it's no negligence on our part, my part, in terms of the current state of the land. I understand Mr. Davenport's situation and I sympathize with him. But by contract I think we did everything we said we would do and hopefully in Federal Court we will prove that point. So again I simply ask that you withhold any assessment of fines. And certainly withhold any civil action, because if indeed you were to take civil action I would join Carolina First of course as a necessary party. And you would only litigating what I'm already litigating in Federal Court. But anyway that's the information I have to present to you. Thank you for your attention.

Deputy County Attorney SZambon: I have some questions if I may. Mr. Stambaugh, can you state the address of your residence into the record?

CStambaugh: Yes, it's 1401 River Place Boulevard, Apartment 1606, Jacksonville, Florida, 32207. And can you identify this document for me?

CStambaugh: Yes I signed it, let's see, oh, it's an application form when we first started right back in 07.

Deputy County Attorney SZambon: So what is the date on that document?

CStambaugh: March 12, 07.

Deputy County Attorney SZambon: And what kind of application is it?

CStambaugh: I think it's just the initial application for us to develop the land.

Deputy County Attorney SZambon: For a subdivision?

CStambaugh: Ah-hu.

Deputy County Attorney SZambon: And is that your signature on it?

CStambaugh: Yes, it is.

Deputy County Attorney SZambon: Ok. And can you identify this document for me?

CStambaugh: This is the one I signed which you presented earlier in terms of financial responsibility. Yes, I signed that.

Deputy County Attorney SZambon: Financial responsibility under what act?

CStambaugh: Sedimentation and Pollution Control Act.

Deputy County Attorney SZambon: Ok. And then can you identify this letter for me?

CStambaugh: Yes, it's a correspondence between myself and Tim Fox after he had written me or called me. That was the response to his calls or-

Deputy County Attorney SZambon: And what's the date on that letter?

CStambaugh: August 10th, 2010.

Deputy County Attorney SZambon: And is that your signature?

CStambaugh: It is.

Deputy County Attorney SZambon: And can you read that first paragraph for me, just the first two sentences?

CStambaugh: "While I recognize and acknowledge the soil erosion problem to enforce Four Sims Hollow site I hope to enlist your patience to avoid any further action on part until ownership and responsibility is determined in court." Which is what I testified to.

Deputy County Attorney SZambon: And can you identify these two documents for me? They're both part of the same thing.

CStambaugh: Let's see, oh yes, in terms of the actual, of this hearing today –

Deputy County Attorney SZambon: For the record.

CStambaugh: Responding that I acknowledged or that I had received the information and that I had desired to appear.

Deputy County Attorney SZambon: And is your signature on both of those documents?

CStambaugh: It is.

Deputy County Attorney SZambon: At this time I'd like to submit all these documents he just authenticated into Henderson County Exhibits H through K. Mr. Stambaugh, you received notifications of the violations from DE – uh, the Inspection Reports from DENR? You receive all those?

CStambaugh: I did.

Deputy County Attorney SZambon: And in your previous testament you discussed number, or Exhibit D. Is it true that on Exhibit D the following violations were checked? : Failure to follow approved plan.

CStambaugh: I'll stipulate to the same list you read to Luther Smith, yes, I'm aware of what's on that page, all of it.

Deputy County Attorney SZambon: Including the comments that say, 'Site condition continues to worsen'?

CStambaugh: Yes.

Deputy County Attorney SZambon: 'Enforcement actions will be taken at the next inspection if corrective action has not been addressed.'

CStambaugh: Yes, as I said, yes.

Deputy County Attorney SZambon: And you received all the violations from Henderson County?

CStambaugh: Yes.

Deputy County Attorney SZambon: And you received the penalty packet from Mr. Fox?

CStambaugh: As I said, yes.

Deputy County Attorney SZambon: And you discussed in your testimony that the – that you were in litigation with the bank on this project. Did the bank sign a Financial Responsibility Form?

CStambaugh: Of course not.

Deputy County Attorney SZambon: Ok.

CStambaugh: They did sign a contract with me obligating to fund the project.

Deputy County Attorney SZambon: I understand that. But they did not sign a Financial Responsibility Form.

CStambaugh: No they're just a very relative third party.

Deputy County Attorney SZambon: I don't have any further questions for Mr. Stambaugh. I do have a closing argument when we get to that though.

Chairman Phelps: Any further questions from the board? Mr. Davenport, any questions?

HDavenport: May I say one more thing?

Chairman Phelps: Please come to the podium.

HDavenport: Thank you. What is your first name?

Deputy County Attorney SZambon: Sarah.

HDavenport: Sarah had asked me at the end of her questioning about impacts to my property and myself because of the sedimentation coming down the mountainside from the development. And as I sat down next to my neighbor, Gail Fisher, she reminded me that I had probably not mentioned one of the major impacts, which was she and I had entered into a contract early into the summer to transfer the property. She lives right next to me. She wanted to buy the property, I agreed, and we went through some due diligence. And in our discussions she had wondered about the property, the development about and how it impacted my property. I said, "You know in the summertime visibly it's not a horrendous impact. In the winter you can see all the erosion and that type of stuff". She was versed that sometimes there was sedimentation that comes down because she had seen it. As time went on she came to me and said that she would like to go ahead and opt out of the contract. Her primary reason for opting out of that contract was because of this unending question of how is this all going to be addressed. She wanted to buy the place as a retreat because it's a beautiful property. She was then disenchanted with the process particularly after she and her son went up and looked at Mr. Stambaugh's property and realized that it's a nightmare. And it's not going to be cleaned up readily or easily or cheaply. And with that information she came to me and said, "This is something I didn't bargain for. I didn't know it was that bad up there. I don't know when this would be resolved". And so we decided that we weren't going to be able to carry forth with the transaction. And if feel like that's a very tangible detriment and I wanted to make sure it was in the record.

Chairman Phelps: So in summary, in short then what you are saying is that because of the run-off issues that cost, lost you a potential sale.

HDavenport: It did. That's a correct characterization, sir.

Chairman Phelps: Ok, thank you. Any questions?

HDavenport: Thank you.

Chairman Phelps: Any other questions or further evidence to be presented by anyone?

Deputy County Attorney SZambon: I just have a closing statement.

Chairman Phelps: Yeah, I was going to come to that and progress to the closing.

JCrafton: A question for the County's counsel. Mr. Stambaugh has raised the issue of the foreclosure proceedings that began and then apparently ceased. For the benefit of this board, what are the legal ramifications of an owner's responsibility for a piece of property when the lending entity enters into foreclosure proceeding. How does that affect the owner's responsibility for that piece of property?

Deputy County Attorney SZambon: Well again in terms of this ordinance what we look for who to site for violations is the financial responsible party. In an instance where the property was foreclosed on which again in this case the property was not foreclosed on, the property is still in Mr. Stambaugh's name, so to a certain extent just having a foreclosure proceeding until a foreclosure is finalized, the owner is, it's still the owner until it is finalized.

JCrafton: Ok.

CStambaugh: If I may add to that sir, once the foreclosure preceding had been adjudicated though, while the sale hasn't occurred, for the title to change hands, the fact is that the foreclosing party has an equitable interest in that. And it would be unrealistic, foolish for the party that is about to loose that property who doesn't have

total interest even though it has title, to continue to invest in it. For example I could not have gone to another lender in that situation and even though the land was worth more than what I owed, and taken out a loan. They would not have approved it.

Chairman Phelps: So you were unable then to even seek another source of funding.
CStambaugh: I wasn't able to do anything. My hands were tied.

Chairman Phelps: If nothing else then we will move to the closing statements and you will be first Mr. Stambaugh.

CStambaugh: Thank you. Again I appreciate the opportunity to come and talk to you all. Again I would simply repeat that my wife and I tried to do the best we could. We love the area. We wanted to build a beautiful place for ourselves as well as others. In fact our ability to build a home was based on our ability to sell the lots and to make it beautiful. I know the property is gorgeous. We were surprised. We had never developed any property. We will never develop another piece of property. But the people we worked with I thought were good, competent, talented, and they made decisions and worked with the licensing parties that, of course I lived in Florida, I relied on them heavily but I think they did a great job. And I think we addressed issues as they arose. We were just caught off guard and surprised because of the action of Carolina First. And I doubt if I'm the only one who's been surprised lately by Carolina First. But the point is I understand Mr. Davenport's issues. I understand the County's issue but I'm not in a position to do that. And I'm not in that position because of a promise that was broken by me lender, not by me. Thank you.

Chairman Phelps: Sarah?

Deputy County Attorney SZambon: The section I handed to you of the Ordinance 200A-237, on the first line of Section 1 it says, 'Any person who violates any provision of this subpart or rule or order adopted or who initiates or continues a land disturbing activity for which soil erosion control or plan is required' – and you all can read the rest of that, it's you know, is subject to a civil penalty. Nowhere in there does it require negligence. It just required violations. Nowhere in there does it say that if you run out of money you are no longer responsible for the violations that occurred. I understand Mr. Stambaugh's point about that you know, his issues with Carolina First thing, however that is not an issue before this board. That is a private action between two private parties that is not the subject of this action today. The subject of this action today is that there are violations on this property. And there have been violations on this property. Whether or not he was sited for those violations, he himself put into record three different Inspection Reports from DENR that all sited the same things. And they went back from June 09, August 09, and October 09. And they all you know, they sited similar things: Failure to follow approved plan, Failure to take all responsible measures, Failure to maintain adequate soil erosion controls. And they when the County took over this plan Mr. Fox went out there three times and so Mr. Stambaugh three different NOV's or CNOV's or explanations of the violations that are out there starting in August. The penalty packet that was submitted by the County only covers 21 days. These violations have clearly been going on for at least a year, if not longer. And Mr. Stambaugh admitted and there's proof in the record that he is the financially responsible party. There's nothing we can pin on Carolina First Bank.

He is the one who contracted with Luther Smith. To his own testimony he's the one who contracted with the Ravis Maintenance Group. So he is the one and he signed the subdivision application. He's the one who initiated all the land disturbing activity throughout this property. There is some argument about that only the first part was finished but the second part wasn't. The entire length of this property had land disturbing activity on it regardless of whether or not it was finished. Again the Ordinance doesn't say 'finished and then you have violations'. It just says if there are violations. Again the County to go over he admits there are violations on the property so then the question really before this board is whether or not the penalties assessed are fair. And Mr. Fox went over how he assessed those, the questions about whether not the money he saved was put into the violations was explained that no, it was not calculated in the daily amount. However it is important to look at how much money he saved by not following his own approved plan. This was a plan that was approved by DENR then by Henderson County and that he knew, he and his agents submitted, and that was never followed through with. And besides the general soil erosion violations and the damage to our environment, generally you heard from Mr. Davenport who told you his personal experience with the damage this is causing to his property, both in terms of the environmental damage and the financial damage. So in terms of these factors we've proven the extent and damage of the harm. You have all of those pictures. We've presented evidence regarding the cost of rectifying the damage. We had the amount of the money the violator saved by non-compliance. And I understand Mr. Fox took an average but that's the best he could do because nothing was ever submitted by Mr. Stambaugh. We can't get information that is not given to us and not submitted upon us asking. Whether the violations were committed willfully, he knew what his plan was and he knew that it wasn't implemented properly. And this is not - according to the letter he sent it said the problems started in December 09 and we have proof that the problems started much earlier. So you can't attribute all of this to him running out of money and to the bank. And even if it is an issue of money, that doesn't excuse him from accountability because he's the one who started this. The bank didn't do the land disturbing activity. He initiated land disturbing activity. And it's important for our environment and for the people of Henderson County and citizens like Mr. Davenport for us to hold violators accountable under this Ordinance. That's all I have.

Chairman Phelps: Any questions from the board? Now that the evidence has been presented and the closing remarks concluded it would be appropriate for the board to discuss the issue as presented today. We can either vote today, direct the staff to bring back findings of facts and conclusions constant with decisions to a future meeting of the board before our final review or we can continue our discussion and decision until a later date. However I remind the board that the board must issue a written decision within 45 days of the conclusion of the hearing. Before I ask for a motion to go out of public hearing, Sarah can we still ask you questions if we go out, since you're our attorney?

Deputy County Attorney SZambon: You can ask me general questions about procedure but you cannot ask me questions about the evidence the County has presented.

Chairman Phelps: Just procedural.

Deputy County Attorney SZambon: How long do we have until the decision needs to be written, that kind of stuff.

Chairman Phelps: Is that clear everyone? Do I have a motion that we go out of public hearing?

JTelker: Indicated motion to go out of public hearing. (nodded)

Chairman Phelps: JoAnne moves.

APouch: Second.

Chairman Phelps: Ann seconds. All in favor, aye.

All board members stated aye.

Chairman Phelps: Unanimous. We are now out of public hearing and open to discussion by the board.

JCrafton: I'll be the first to speak. Mr. Chairman for me the evidence is clear. There was an Erosion Control Permit issued based on a plan that called for certain procedures to manage erosion control. We have been presented with evidence from DENR, the findings of violations of not following those measures to the extent that there were erosion issues and problems developing in the DENR reports that we found. Subsequently the County Inspector has found issue at fault and has similarly issued warnings which apparently well, I won't say unheeded, but never the less, not resolved. I can appreciate the fact that Mr. Stambaugh perhaps has a real dilemma on his hand and that he had lost his bank funding. He's facing a substantial civil penalty on this issue we're discussing. And he's in Federal law – Federal Court dealing with the bank issue. He stated that given those circumstances it didn't seem prudent to continue investing in a piece of property. But I would contend that in developing the property and in signing the – applying for the Erosion Control Permit he took on an obligation to his neighbors and the community to protect them from the work that he did. And I don't see that as an investment but rather a fulfillment of an obligation which in my view he failed to do. I think our issue before us is simply has the civil penalty been applied appropriately by the County and have they appropriately found violations to warrant the civil penalty. And my conclusion is that the civil penalties that have been applied were applied fairly with considerable, can't think of the word I want to use, but, indifference to him only leveling the penalty for a 21 day period when the evidence before us is the violations have been for a much greater period of time. So my view would be that we would find in favor of the civil penalties have been appropriately applied and that we would deny the appeal.

Chairman Phelps: Thank you, Jim. Hunter?

HMarks: I have to agree with Jim. I think it's an unfortunate situation but I think Mr. Stambaugh and the bank, that's an issue between them. I think the County has quite a bit of difference as far as developing the penalty. There are, some of the problems have been caused and continued because of lack of funding, but it is evident that's not the entire story. And I don't, like I say it's an unfortunate situation but I don't see where there's much choice.

Chairman Phelps: Ann?

APouch: I just hate this. I have to agree with Jim and Hunter.

JTelker: I have to agree. Based on what I see here the thing that's disturbing to me is they didn't – I think the County bent over backwards. I think DENR bent over backwards by not putting them under Notice of Violation when the violations were repeated over and over and over again. You know I was like until the Notice of Violation went out I

don't see where there was that much work done here to try to rectify the situation or control the situation. Even in the paperwork that he gave us he's got four mowings in October and December but they had also recommended, Mr. Luther had recommended cleaning out drains and sections of pipes and everything in his notes in this. So I don't see where that was complied with. And I understand running out of money, don't we all but I think steep slope development has its own set of rules and regulations that have to be maintained. Especially when you have the kind of soil we have in North Carolina which is not going to hold when weather is the way it is. I think that should have been taken into consideration from day one on this plan. So I'm with you.

APouch: Now back to you Jim. Did you have anything?

Chairman Phelps: I think the issue before us was did the violations exist and I think that was clearly defined that the violations existed. The next point being, were the assessments fair and justified. We really didn't see anything that said they weren't. Unfortunately it was just a convolution of a lot of things, the bank, the development, the environment, the economic conditions, all when it hits you at once like that the question is not how do you drain the swamp it's why did I get in the swamp in the first place? But being that we're there and I think I agree with the others, we don't really have any other choice. So I will entertain a motion, Jim would you like to make that formal, proper motion to Sarah?

JCrafton: Let me find the case number. The case number listed in the agenda.

Chairman Phelps: Case Number A-10-04.

JCrafton: I move that in Case Number A-10-04 in the case of appellant Charles Stambaugh and Associates P.A. applying for an appeal of the civil penalty for Erosion Control Violations on the named property development that the Zoning Board of Adjustment deny the appeal based on the fact evidence clearly shows there were violations, erosion control measures going back into 2009 that have gone unabated and that in itself is sufficient for violation but to complicate the measure there has been a consequence which has been a financial damage to neighbors which is why we have these ordinances. So I could get carried away expanding on the motion.

Chairman Phelps: Can we just summarize it?

JCrafton: I just move we deny but we need to state into the record what the basis of the denial is, correct Sarah?

Deputy County Attorney SZambon: Yes.

JCrafton: So the basis would be one: the evidence of the violations from both DENR and from the County and the reports of lack of compliance and the evidence presented showing the clear erosion problems to us.

Deputy County Attorney SZambon: And what about the assessment of the penalties? You said so far that there are violations and that –

JCrafton: We need a motion to state the assessment? Just that we uphold the assessments?

Deputy County Attorney SZambon: Yeah, just that you uphold – because he appealed two parts in his letter really. He appealed that there were violations and he appealed the assessment based on those violations.

JCrafton: Do we need two motions?

Deputy County Attorney SZambon: No. You can make it in one motion.

JCrafton: Ok, well alright, continuing with the motion on this particular Case Number that we deny the appeal against the violations and that we find that there were violations and we deny the appeal of the assessment and that we find that the assessment, that while it's a large number was small compared to what it might have been given the duration of the violation situation that we deny the appeal of the assessment finding that the assessment is in order.

Chairman Phelps: You're ok, Sarah? Got that?

Deputy County Attorney SZambon: I got that for the Order.

Chairman Phelps: Do I have a second?

JTelker: I'll second.

Chairman Phelps: JoAnne.

Deputy County Attorney SZambon: JoAnne seconded?

Chairman Phelps: She seconded. Any discussions on the motion? If not shall we come to a vote? All those in favor of the motion raise your right hand. All those opposed likewise. It's unanimous we voted on to uphold the motion.

Chairman Jim Phelps – voted in favor to uphold motion

Vice Chairman Jim Crafton - voted in favor to uphold motion

Hunter Marks - voted in favor to uphold motion

Ann Pouch – voted in favor to uphold motion

JoAnne Telker – voted in favor to uphold motion

Chairman Phelps: You have heard the verdict of this board. You will be getting written –

Deputy County Attorney SZambon: At the next meeting.

Chairman Phelps: At the next meeting which we decided will be December 1st.

Deputy County Attorney SZambon: December 1st, yes that is correct Mr. Chairman.

Chairman Phelps: Thank you, sir.

There was a brief discussion on the 2011 calendar for the Zoning Board of Adjustment meetings. The calendar was approved by all board members.

Chairman Phelps: Motion to adjourn.

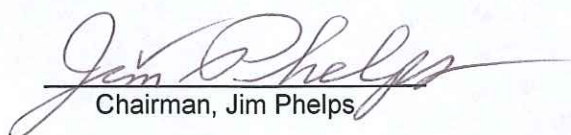
JTelker: I move that we adjourn.

Chairman Phelps: JoAnne motions.

Jim Crafton and Ann Pouch indicated second.

Chairman Phelps: All in favor. Alright everyone have a great Thanksgiving.

Meeting adjourned at 6:33 p.m.


Chairman, Jim Phelps


Karen Ann Wall, Secretary