

MINUTES OF THE HENDERSON COUNTY
ZONING BOARD OF ADJUSTMENT

The Henderson County Zoning Board of Adjustment held its regular meeting, Wednesday July 29 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, Tony Engel, Ann Pouch, Dean Bonessi, Alternate Board Member Eric Goodman, Zoning Administrator Toby Linville, Deputy County Attorney Sarah Zambon, Planning Director, Anthony Starr, Senior Planner, Autumn Radcliff, County Engineer, Natalie Berry, and Zoning Board Secretary, Karen Ann Antonucci.

Chairman Phelps called the meeting to order at 4:00 PM. He introduced those present.

Chairman Phelps: Asked for a motion to accept the June 24, 2009 minutes as written.

JCrafton: I move we approve.

TEngel: Second.

Chairman Phelps: All in favor, Aye.

All board members were in favor of adopting the minutes.

Chairman Phelps: The next thing we have on the agenda is New Business and we have one case. Case number V-09-04, McGill Associates, P.A. requesting a variance for French Broad River Raw Water Intake for City of Hendersonville. The Flood Damage Prevention Ordinance states a Public Hearing must be held by the Zoning Board of Adjustment in accordance with 200A-339. Project located along French Broad River at river mile #171, just upstream from confluence of Mills River.

I will need a motion for us to go into the public hearing.

TEngel: I'll motion.

JCrafton: Second.

Chairman Phelps: All in favor, Aye.

All board members were in favor of going into public hearing.

Chairman Phelps: Unanimous. So we are now into public hearing which is really a quasi-judicial proceeding. Ladies and gentlemen, a quasi-judicial proceeding is being held today on the following petition variance, where McGill Associates is the petitioner. A quasi-judicial proceeding, much like a court proceeding, is one 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 proceedings, only persons who can demonstrate that they will be affected by the outcome of the decision are allowed to participate in 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 Flood Damage Prevention Ordinance Staff, who desire to become parties to this 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 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 the 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, McGill Associates, and the 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?

Chairman Phelps: I see none.

JCrafton: Mr. Chairman, can I raise a question?

Chairman Phelps: Certainly.

JCrafton: I'm curious as to why in this case as an engineering firm, McGill Associates, the applicant, as opposed to the City of Hendersonville on who's behalf, the variance is warranted.

Deputy County Attorney SZambon: Well that's who filled out the application.

DBonessi: It's been in the past that only attorneys...

Deputy County Attorney SZambon: Well they're not really representing the City of Hendersonville. They're the ones that filled out the application. What I'm usually more worried about in these instances is whether or not the property owner that this will go on is present and as far as I know the property owner is here. Again the main reason only attorneys can represent people in these hearings or the people themselves – usually the applicant or the property owner- are to make sure that whatever you all require that the property owner, the applicant can agree to.

JCrafton: But if in fact we grant the variance that McGill is applying for, the variance is in the name of McGill Associates. Are we then to hold them accountable for adhering to any conditions we set on them, not the property owner or not the City of Hendersonville?

Zoning Administrator TLinville: The City of Hendersonville doesn't own this property. Super Sod, Incorporated owns this property with Patten Seed Company and they will grant a lease to the City of Hendersonville. So the actual flood permit, the variance allows them to get a flood permit. And that flood permit will be in the name of Patten Seed Company.

Planning Director AStarr: The variance runs with the property.

Deputy County Attorney SZambon: So the variance will run with the property as Anthony said. And the variance, the way we'll structure it, given the property owner is here, and Toby and I had talked about this previously, that McGill Associates as the applicant can present any information they want. The property owner is here and he can present any evidence he wants. In the order besides having the chairman sign it, I'll have both McGill Associates and the property owner sign it.

JCrafton: But who is then to be held accountable for any conditions that are imposed on the variance if the variance is grounded. Because the applicant is clearly McGill, not the property owner.

Deputy County Attorney SZambon: Primarily the property owner and that's why we'll have both parties sign it.

JCrafton: Ok. I don't understand but I'll accept that.

Planning Director AStarr: The property owners or their successors, as with any board, so if you grant a special use to anybody, it can be in a particular name but if someone sells that to an entity they're held to the same requirements in the special use permit.

JCrafton: I understand but my concern...

Planning Director AStarr: It's the same principle, I guess

JCrafton: -Is the application is not in the name of the property owner it's in the name of an engineering firm that doesn't have an interest in the property.

Deputy County Attorney SZambon: And that's why we'll have the property owner sign it also. And one of your possible conditions you can put in is since they'll be leasing the property, under my understanding, through the City of Hendersonville and not buying it from the City of Hendersonville we can put in there that they either advise or make as part of their lease any conditions that you put on the property. So that the City of Hendersonville as the leasee will also be bound to those conditions. So all your conditions will be covered in that. And we'll have three different parties that we can hold responsible for it. Again, assuming that you have the evidence goes and what the property owner says and what the applicant says. It's a weird situation because the applicant is an engineering firm.

JCrafton: Ok. The difference would be if the applicant were the owner but did not show up and McGill came on their behalf.

Deputy County Attorney SZambon: Um-hm.

JCrafton: Then McGill could not represent them were the property owner the applicant.

Deputy County Attorney SZambon: Right. Well again...

JCrafton: Because we had a situation where the property owner wanted a contractor to be their representative and the property owner didn't show up and we didn't even hear it.

Deputy County Attorney SZambon: Yes, and again that's based on North Carolina's bar's law, rule. Not an actual law or statute. So while I have to follow it then I have to advise all of you to follow it. If you chose not to follow it I can't really do anything.

JCrafton: No, I understand that I just want to be sure we're being consistent in what we're about to do today.

Deputy County Attorney SZambon: Yes, because the property owner is here, unlike when we had that organization where the people wanted to lease the property from that woman and they had applied and the application was in their name and we held the hearing until that woman could be here, even though she didn't speak at all.

JCrafton: Alright, Ok. I'm good.

Chairman Phelps: Are there other questions from the board? If not I'd like to call all those who will be testifying before us to come to the podium identifying yourself, your name and address so that we can swear you in. So the staff, McGill Associates and anyone else - and the owner. So if one by one you would state your name and position and address, please.

Assistant County Engineer NBerry: Natalie Berry, Assistant County Engineer, 100 North King Street.

Senior Planner ARadcliff: Autumn Radcliff, Senior Planner.

Planning Director AStarr: Anthony Starr, Planning Director.

KWebb: I'm Keith Webb, Vice President of McGill Associates, 55 Broad Street, Asheville.

JPJohns: JP Johns with McGill Associates, 55 Broad Street, Asheville.

DShafer: I'm Dave Shafer with Super Sod, Mills River.

Chairman Phelps: If you'll all gather around and be sworn in at this time.

Zoning Board Secretary KAAntonucci: Do you swear or affirm that the testimony you shall give to the Zoning Board of Adjustment shall be the truth, the whole truth and nothing but the truth; so help you, God.

All those being sworn in indicated: I do.

Chairman Phelps: Thank you, please be seated. At this time I'd like to call on the staff to give their overview.

Assistant County Engineer NBerry: Good afternoon. I am here to present the case for the City of Hendersonville requesting a flood damage prevention variance to place a raw water intake in the designated floodway. Section 200A-203.61 requires any development in floodways or non-encroachment areas, that you cannot put any structures. What it says is that the structure is a functionally dependant facility, excluding enclosed structures, new water and sewer lines provided no viable alternative exists or recreational uses excluding structures and stream bank restorations. In

this case they need to place a raw water intake closest to the water and if they try to stay out of the floodway, I believe it's about 1,500 feet? (to Planning Director Anthony Starr), 1,500 feet that they would have to place it and then run the line up to the water. So they are asking for a variance in that case. And if you have any questions I'd be glad to answer them.

Assistant County Engineer NBerry: Mr. Chairman, at this point the County would like to enter Ms. Berry's letter to the board and all the other information included in the packet that you were provided into evidence.

Assistant County Engineer NBerry: Sorry about that, it's been a long time, I forgot that.

Chairman Phelps: So ordered. It's been awhile. Are there questions for Ms. Berry?

JCrafton: I have one.

Assistant County Engineer NBerry: Yes, sir.

JCrafton: This is in line with the question I was asking earlier. I don't mean to belabor it, but your letter says the City of Hendersonville is making this request. And yet the applicant here today is McGill Associates. From a technical standpoint, which is it?

Assistant County Engineer NBerry: It's McGill and Associates, that's my mistake.

JCrafton: So your letter should read McGill Associates is requesting the variance?

Assistant County Engineer NBerry: Yes, sir. Sorry, my mistake.

Assistant County Engineer NBerry: Mr. Chairman before we get too far into the evidence, the other thing I would want to advise the board was that on the second and third page of Ms. Berry's memorandum to the board, it's labeled E – Granting Flood Prevention Variances, those factors that are listed there are the factors this board should consider in determining whether or not a variance is appropriate.

Assistant County Engineer NBerry: And McGill did submit, if you look on Attachment 2, they submitted their response to each one of those to say how they felt like they met those requirements.

Chairman Phelps: Will we hear, I'm assuming from McGill associates that...

Assistant County Engineer NBerry: Yes.

Chairman Phelps: Just how the structure will be built and tell us about height and size, etc.

Assistant County Engineer NBerry: Yeah.

APouch: I have one question. Is this water for flood control or for that and to have water for Henderson County?

Assistant County Engineer NBerry: I'll let McGill address that when they come up. But I think it's just for water intake, isn't it?

JPJohns: It's a supplemental supply for Hendersonville's water treatment facility. Just supplies water to all the customers supplied by the City of Hendersonville.

APouch: Does any of this go to Asheville?

JPJohns: No, ma'am.

Assistant County Engineer NBerry: Why don't you come up?

JPJohns: Hendersonville, the City of Hendersonville has interconnection with the City of Asheville and they can sell water to Asheville, but under the normal course of business they do not sell water to the City of Asheville.

Chairman Phelps: Hendersonville usually buys water from Asheville, don't they?

JPJohns: Right now, based on my last discussion with Lee, who's the Utilities Director, and Lee was going to be here, who's the Utilities Director for the City of Hendersonville, he called me five minutes before the meeting and said he was at the hospital with one of his employees who had some kind of accident and he felt he needed to be there. Right now Hendersonville on a normal basis buys a million gallons of water per day from the City of Asheville. Particularly last summer during those periods during the – because of the drought condition and the need for that purchase right now is because the City of Hendersonville has a major construction project under way because of their existing facility.

Chairman Phelps: Ok. Thank you. Are there further comments from the staff? Toby, do you have anything? Anyone else from the staff? If not we'll hear from McGill Associates, the petitioner.

KWebb: Thank you, once again my name is Keith Webb with McGill Associates. I'll start out and kind of give an over-brief of the need for the project. And then JP Johns with my office will go through what his staff did as far as the flood ordinance part of it. The City of Hendersonville owns an existing water treatment facility located on Mills River.

JPJohns: It's located right here on the map.

KWebb: Right now the current supplies are Mills River and two intakes up in the headwaters of Mills River. One on Bradley Creek and one on the north fork of the Mills River. Those supplies have historically supplied Hendersonville the water needed at the treatment facility. The treatment facility has a capacity of twelve million gallons a day. Because of the recent drought events, starting in 2002 and then what had occurred last year, the available water out of Mills River is inadequate to meet our demands of twelve million gallons a day. We're fortunate right now in that there's no in-stream flow requirements on the Mills River. The City of Hendersonville has a permit from Division of Water Resources Public Water Supply to allow us to operate that plant at twelve million gallons a day and take all of the water, if there's twelve million gallons a day, if we so elected. But because of some recent studies Division of Water Resources in conjunction with North Carolina and Federal Fish and Wildlife have determined that there needs to be an in-stream flow requirement on the Mills River so that in the future if the City of Hendersonville wants to withdraw more water we have to leave more water in the Mills River. Which means that there's not enough water in the Mills River to meet our demands. Last summer for example, there was days, about ten days in a row that the flow in the Mills River was about sixteen millions gallons a day. So the City of Hendersonville identified the need for an additional supply of water. That additional supply has been identified as the French Broad River. So our proposal is to come down to the French Broad River and build an intake as a supplemental supply for the Mills River when there's inadequate flow in the Mills River. The proposed intake is located approximately 1,000 feet downstream of the confluence of the Mills River and will consist of a small canal. There's an existing drainage feature, ditch that comes down two existing fields. One field is owned by Patten Seed, Super Sod and Dave Shafer is the manager, one of the owners of that property. It's a large sod production facility. On the other side of that small stream is property that Patten Seed leases from the City of Hendersonville. And they use that as sod production. So our proposed improvements are to widen that canal at the river back about 100 feet to allow water to come out of the French Broad into a pump station. The pump station will be a concrete facility approximately 40 feet by 30 feet in size with the first floor being located two feet above the 100 year flood plain, so that all the mechanical equipment is up above the 100 year flood plain.

Chairman Phelps: You said two feet above, so that'll be the minimum they'll be above that clearance?

KWebb: Yes, at the 100 year flood. So when you go out there the structure will stick up fairly high out of the ground. As a part of the flood ordinance what we were asked to do was to do a hydraulic model of the Mills River to show this structure, if built would not create a rise in the flood elevation. And JP's office has done that and I will let him address that. But if there's any questions first about the water supply, I'd be glad to answer those before JP addresses what we did from the flood ordinance. One point of clarification has to do with the ownership of the property and McGill Associates being the applicant. The City of Hendersonville has been in negotiations with Patten Seed and other property owners along this proposed route. As a part of the project there will be a pump station here and a large water line that comes up through Patten Seed's property and then adjacent property owners to bring water up to the existing water treatment plant. The City of Hendersonville is working to negotiate easements for the installation of that permanent raw water line to convey water to the French Broad River to the plant. We are also, the City of Hendersonville is also negotiating with Patten Seed to possibly purchase that small piece of property where the intake

is. But the rest of it would be a lease from Patten Seed. So if there's any questions about the water supply before we let JP discuss the flood issue.

JCrafton: Mr. Chairman, I have a question. So that we're clear on what we're about today, and Natalie, to be sure we're clear on the application before us today, the matter of taking water out of the French Broad River and the right to use that amount of water and that sort of thing is not an issue before us.

Assistant County Engineer NBerry: No, sir.

JCrafton: The only issue before us is placing that structure in the flood plain.

Assistant County Engineer NBerry: Correct. Floodway.

JCrafton: The floodway. Ok. That's the only issue before us today is whether we agree to allow a variance to place that structure in the floodway.

Assistant County Engineer NBerry: Right. Because the Board of Commissioners adopted this ordinance saying there was no structures to be allowed in the floodway at all.

JCrafton: Ok. Others would deal with the issue of whether they can take water out of the French Broad or any other...

Assistant County Engineer NBerry: They have permits for that.

JCrafton: Any other of the sort. Ok. I just wanted to be sure so when we focus our discussion we don't get caught up in issues that are not ours.

Assistant County Engineer NBerry: Yeah, it's strictly on the structure placed in the floodway.

JCrafton: Thank you.

KWebb: Thank you very much.

JPJohns: Good afternoon. As Keith said, my name is JP Johns and I'm going to talk about the, as he just mentioned, the topic of the day is the variance. As Natalie mentioned the floodplain ordinance as it's written does not allow structures to be put in the floodway. I just want to make sure everybody who probably doesn't read floodplain ordinances all day and do modeling all day like I do just want to give a little background so that you'll understand the difference between the floodway and the floodplain. On this map here we can see the blue area. The blue area is the floodplain. We have the blue area in the French Broad River. We have the floodplain in the Mills River. The floodplain is what we're used to hearing that we do the models on, how far does it go out and what's the elevation of the floodplain. So a lot of times when we hear, 'what's the floodplain elevation', that's on the blue. Now the floodway is in the yellow. The floodway by definition is how far you shrink the floodplain then to make the water surface elevation go up one foot. And it's also considered usually more your high hazard area. You know, when you do have flooding in areas you're going to have maybe a little bit more velocity in those areas. So the way to ordinance is written, is we don't allow structures in the floodway. But there is a variance procedure and that's what we're here for today. One thing I want to show you is if you're not familiar with floodplains, this is a big floodplain. This is not your normal floodplain that we run into in some areas, you know, as we go out 2,000 to 3,000 feet. And this is also an extremely wide floodway. Or as Natalie mentioned before we're at 1,500 feet. So our raw water intake structure as we were saying is a functionally dependent structure. We need the intake near the water-body. From construction costs the feasibility of making the operation work. If we're going to take water from one point we want to be able to have our channel there and our pump working at that location. So that's why our red dot's all the way over here. Now per the variance requirements we did look at what could we do to move this out and it would cost about roughly, just under 700,000 dollars to move that location from here to this point. And that's just in our general costs, and that's not even could that be done because we're starting to look at what kind of velocities do we have in our intake channel, how do we design that? How do we have that work with the whole system? So are there any questions about where that point is and why we're here for the variance because again we're in the floodway. Now what the variance says is the variance procedure highlights two very important topics that we want to talk about is basically, it says in the 203.6 is that variances may be issued for functionally dependant facilities. If determined to meet the following

criteria: And it says a facility which cannot be used for its intended purpose unless it's located in close proximity to water. That's pretty much what we have here. When you have a raw water intake they typically need to be close proximity to the water. So we feel that our variance request does meet that requirement. Now another thing that is required in this is if we do put this structure in and we're within the floodway other things need to be met. And one thing that I would like to talk about is a thing called a No-Rise certification. Are you familiar with the No-Rise certification? The No-Rise certification says that we must demonstrate that if we do put this structure in the floodway we don't have any adverse impact. So that's when you run your hydraulic models. You obtain the existing models from the state and you basically run those, verify that the way we have the model set up it matches exactly what the state's model does. What we do is we put the structure in and we rerun the model. If we get any rise in our floodplain elevation we don't meet the requirements for a No-Rise certification. So we're talking 0.0 feet of rise. We ran the model in there, put this in this very large floodway. In this case having a very large floodway and floodplain is an advantage because it's so vast. Our structure doesn't have very much impact. So you can see here, this is a cross section from our HEC-RAS model. HEC-RAS is the model that the state has us run to do analysis. And you can see here, here's this big, huge floodplain and here's our structure. When we rerun the model with that it does not have an increase on what the elevation is. So this is just kind of to stress that this isn't a very big obstacle in the middle of the floodplain. If our floodplain was only this wide there's a pretty good chance that we'd have a rise and we'd have to look at different ways to do this project. But that is one of the requirements for the variance request and there is a whole engineering document that you will see. This is in their packet, Natalie, the No-Rise?

Assistant County Engineer NBerry: Yeah.

So here's the whole engineering certification of a No-Rise which we signed and sealed that we ran the model per the requirements of your ordinance and per the requirements of North Carolina Floodplain Mapping. We explained exactly what was done. We have tables of everything in here so you can see how we ran them, the models, what numbers we're talking about but I guess on the one page the key here is our base floodwater elevations. We basically have a difference of zero. Now it's very important thing so just to make sure you understand that while you're reviewing the variance process that we did meet that component because that is one of the largest engineering components of the variance.

Assistant County Engineer NBerry: I would like to interject here too, even if they get the variance I still look at this No-Rise and review it very closely to make sure it meets all the requirements after the variance.

Chairman Phelps: So what you're telling me is that you will monitor the actual construction and make sure it complies.

Assistant County Engineer: Yes. They have to actually get a floodplain application by me that shows me that they've got the variance from you. And then they still have to meet all my requirements.

Chairman Phelps: Thank you.

JPJohns: Each on of these things is kind of the building block to the next step. So we had to for the variance process prove that we get the No-Rise and then Natalie will receive that as we go on and make sure that it is constructed the way we say because that's a very important component in the process, that we don't go out there and build something that's a 100 foot wide instead of the 30 foot wide building. Any questions on that No-Rise? There are other factors that are in the variance request that we responded to. One of them is the hydraulic forces. This is a concrete building. It's built, designed to withstand flood forces so we don't have to worry about the structure being built then having the floodwaters come and tumble it over. There's also some other questions about 'habitable'. This structure is not intended to be habitable. People will get in there every now and then to do some maintenance but no one's living in the structure so we don't have a habitable structure in the floodway. We also don't see any need for access to this during the flood event. During the flood event, as Keith pointed out before, the equipment and everything will sit above the 100 year

elevation. There's really no need to get access to that at that point. The flood waters will come, the flood waters will go down, then you'll go back out and see how everything's going. Probably pretty dangerous to be out there during the flood event so, that's one of the questions that is in here. And then of course the other one is the, as the raw water intake as we had mentioned. It's really, to be functional, it needs to be in that location. So if you have any questions on that we'll definitely entertain questions, myself or Keith, if there's any questions about why we need to have that structure in that location.

DBonessi: You had mentioned the cost to relocate this out of the floodway. What is the total cost of this project?

KWebb: The total cost is estimated to be about ten and a half million dollars.

JPJohns: And that value of about 700,000 dollars that I mentioned would just be to physically to try to build a canal type structure to get that over there.

Chairman Phelps: What is the total height of that structure?

JPJohns: The total height is 40 feet.

Chairman Phelps: It will be standing out and visible from a distance?

JPJohns: Yes. And again the thought is we've got to get that, the thing is we have such a vast floodplain there, we've got to get this 13 plus feet in the air just to get it out of the 100 year floodplain. And then to get the equipment above that, and then get that within the enclosed structure. That increases the elevation. Then also down here where the pump shafts are we are enclosing that. So when there are flood events we don't have anything coming through actually damaging, that's why this is an enclosed structure. Chairman Phelps: You're a pretty good distance from this road, aren't you, if I'm looking at this map correctly?

JPJohns: Well what we have is...

JCrafton: Get him to show us on our map where it is (to Chairman Phelps).

Chairman Phelps: Maybe you could show us on our map, one of our little, small ones here after you've pointed out it out there.

KWebb: This is Hooper Lane which is a state maintained road right here.

Chairman Phelps: On this little green map that I have would be?

KWebb: This is Hooper Lane here.

Chairman Phelps: Right and so that would be the closest road which is a pretty good...

KWebb: Correct.

Chairman Phelps: If it is 30 – 40 feet up.

JCrafton: That's the proposed structure?

KWebb: This is the proposed structure. This is actually the City of Asheville's intake on the French Broad River.

Chairman Phelps: This is where 'ours' is, not far away.

KWebb: That's right.

Chairman Phelps: Are we upstream or downstream?

KWebb: Downstream.

APouch: What powers the plant?

KWebb: Electrical power. There'll be a electrical service to the pumps from Duke Power.

Chairman Phelps: Is that underground?

KWebb: Right now there's an overhead line that actually goes across this property right here.

Chairman Phelps: So it's an existing one?

KWebb: Right. On your map there's actually an electrical substation right down in here, a Duke Power electrical substation. And there's several large transmission lines that go across the property now.

JCrafton: In the channel that you create to divert or to allow the water from the French Broad to approach your structure what are the safety issues for venturing children or people in that area for

accidental fall in type things. I know the river's right there and they could fall in the river too but is there anything different or, about this or the velocity of the water as a hazard?

KWebb: The velocity is significantly less. The reason for the canal is we are making a large canal coming off the French Broad River. So that when the water comes out of the French Broad River the velocity drops to a half foot per second, which allows some of the sediment that may be in the water to drop out before we pump it to their water treatment plant. It also allows, in the fall when we typically have problems with leaves in our existing intake, the velocity in the French Broad will be greater than the velocity coming back into the canal. So under normal operations most debris gets pushed on by the intake so we don't take debris into the intake. Also the intent is for this property to remain in farm production. Our discussion with Super Sod, that is their biggest concern that whatever we do as the City of Hendersonville to build this facility, we have zero impact on their ability to farm and grow sod at this location. So the property right now is secured by current owner, Super Sod, that doesn't allow people to get on to the property. That doesn't prevent them from floating down the river and getting off the bank at the site where we're at, but it's fairly secure right now because it's a farming operation. JP mentioned this, there will be a screen at the mouth of the canal, a mechanical screen. If there's anything big that gets in there, to remove it and protect the pump. As I mentioned the water is moving so slowly that if someone does venture in there it's not enough velocity to pull them into the intake. And actually the science behind the half foot per second is North Carolina and U.S. Fish and Wildlife is that velocity so the fish don't get pulled into the intake.

Chairman Phelps: There was some mention of flood insurance but this doesn't involve any flood insurance or anything, does it, in its requirements for this building?

KWebb: I'm not sure. I'm sure the City of Hendersonville has flood insurance on their existing facility and probably be covered under their same policy.

JPJohns: We're putting all the electrical equipment and all that stuff two feet above per what the ordinance says. So we are meeting that requirement to have that raised above there in that elevation.

Assistant County Engineer NBerry: Like the County, they have flood insurance on all the properties they own in the floodplain as well. And the City of Hendersonville will most likely place this with their Risk Manager in that same policy. But in order to get the flood insurance they just have to meet all the requirements and they would be.

Chairman Phelps: Do you feel, I know that one of the requirements in here was that they meet all the specifications for building in here, and preventing, and assuring that they meet the floodplain requirements for the 100 year flood, and you're telling us that they have done that in their designs?

Assistant County Engineer NBerry: Yes, sir. They have.

Chairman Phelps: Thank you.

KWebb: One point of clarification I would like to give is; we have discussed this project at length with Super Sod and Patten Seed and I've indicated to Mr. Shafer that we will need a letter from the landowner supporting this project that we can give to your board, that they support the variance. If that's something that you need, but we've already had that discussion with Mr. Shafer and his company.

Chairman Phelps: Do we have that letter?

KWebb: We do not have that yet, but...

APouch: Is he here?

KWebb: Yes, yes, ma'am.

Chairman Phelps: Can we hear from Super Sod?

DShafer: Chairman, members of the board.

Chairman Phelps: And you are?

DShafer: My name's Dave Shafer, with Super Sod.

Chairman Phelps: And would you like to comment on their proposal?

DShafer: As with anything, you know, we're dirt farmers, so we want to be a good neighbor to our community, the City. Certainly don't want to be a hindrance to anyone, any property or any projects. The only concern, as mentioned, which doesn't effect today's topic which is the variance of the ordinance, future land use restrictions is a concern of ours. Other than that as long as we can have future in the writing to protect our land use, we don't see any problem with this.

Chairman Phelps: You mean by that to protect your land usage you intend to use it as a farmland?

DShafer: Yes, sir.

Chairman Phelps: Questions?

Deputy County Attorney SZambon: Mr. Chairman, if I may, I have a few questions. Have you reached an agreement with the City yet to use your property?

Chairman Phelps: A lease agreement?

Deputy County Attorney SZambon: Yeah, have you...

DShafer: No.

Deputy County Attorney SZambon: Would you say you guys are close on doing a lease?

DShafer: There's conversations.

Deputy County Attorney SZambon: Ok. If this, during the course of this hearing, after this board has heard all the testimony, they discuss whether or not they're going to give the variance and they can put conditions on it, and then as you heard in the beginning we have the property owner usually sign, would you have a problem with signing the variance order depending on the conditions?

DShafer: Again, if the conditions are which we can continue farming, I don't know if there'd be a lifetime, I don't know how it would work, how the wording is done. Again, we're dirt farmers, but five years from now, ten years from now, as long as we're protected for the lifetime ownership of the property to be able to farm it under best management practices, I don't think there'd be any issues at all.

Deputy County Attorney SZambon: I don't have any other questions.

Chairman Phelps: That could be similar to they have these conservation districts where...

DShafer: Conservation easement?

Chairman Phelps: Well not an easement necessarily but that you can carry on forever a certain use of the property. That's a different whole thing, but that would give you an option.

DShafer: That's what we would need, sir.

Chairman Phelps: Thank you.

DShafer: Thank you.

Chairman Phelps: Is there any of you that would like to cross examine who has spoken? Or ask questions thereof? Does staff have any additional evidence or comments at this time?

JCrafton: I'd like to ask a question, if I could. Natalie or Toby, either one, the information on our packet indicates that staff is recommending approval of this variance. I take that to mean then that you've examined the requirements of our ordinance that they have to meet and have in fact determined they are meeting those requirements?

Assistant County Engineer NBerry: Yes, sir.

JCrafton: I mean it's a little difficult for all of us to go through those but you're tell us that you've evaluated all of these requirements in the ordinance and that their application meets those requirements?

Assistant County Engineer NBerry: Yes, sir. As you know I'm not a big proponent of variances in a floodplain but this one, there's not any other alternatives. So I do support it.

Chairman Phelps: Ok, any other rebuttal evidence or any closing remarks anyone would like to make before we close this hearing? If not then I'll entertain a motion to close the hearing and go into discussion.

Chairman Phelps: Ann made the motion. All in favor raise your hand?

All board members indicated they were in favor of closing the public hearing.

Chairman Phelps: So we are now closed to public hearing and we are now in our discussion.

APouch: How are we going to do our part?

Chairman Phelps: So now we have to discuss this among ourselves. If we can't get a vote today – direct the staff to bring back findings and conclusions consistent with the decision to a future meeting of the board for our review, or we can continue our discussion and decision until a later date. I remind the board, however, that the board must issue a written decision within 45 days of the conclusion of the hearing. Discussion?

TEngel: There's no agreement between them and the City of Hendersonville, correct?

APouch: But could we put that as a condition?

TEngel: That could be one condition we could enter.

Deputy County Attorney SZambon: What would you like the condition to be?

TEngel: That it is subject to coming up with an agreement with the City of Hendersonville.

Chairman Phelps: The land owner and the City - to a common agreement.

TEngel: Right.

APouch: And then who's accountable for making sure all of these things or rules are...

Chairman Phelps: Natalie.

APouch: Natalie is? Ok, that suites me.

JCrafton: But the question again is, 'who does she hold accountable?'

Deputy County Attorney SZambon: She will hold accountable...

Assistant County Engineer NBerry: All three of them.

Deputy County Attorney SZambon: All three of them because depending on the conditions both McGill and Associates is the applicant and Mr. Shafer as the property owner are both going to sign your variance. So they will be bound to the variance and the conditions through their signature. They were here, they heard everything. That won't be a problem. Then depending on the agreement between Super Sod and the City of Hendersonville and what you all want, their lease agreement can bind the City of Hendersonville to the conditions of the variance. Also as Natalie had mentioned earlier this is just one step in them getting the structure. And the permit, I believe, will be in the City of Hendersonville's name.

Assistant County Engineer NBerry: I would think so because they're going to own the building.

TEngel: So all three will be responsible? The City of Hendersonville, the owners of the property and McGill?

Assistant County Engineer NBerry: I would ask for the same thing you're asking for, is the owner's agreement that it's placed on the property. You know, on the flood permit. I would request them to give me something saying the owner is in agreement with the application because it's their property.

JCrafton: So that would be two conditions, one is the letter that the owner is agreeing to do this. And the other condition I'd like to suggest in addition, the suggestion was made that we grant a variance conditional a lease agreement being entered into with the City. I'd like to suggest further to the board that, that lease agreement include the binding of the City to the stipulations of the ordinance and the variance because they're going to be the operators of the facility. McGill's going to be in Asheville and the owner's going to be on his sod farm but the City are the ones in control of the facility. Just a suggestion, how does the board feel?

TEngel: I think it's a very good suggestion.

DBonessi: I guess my question is, is it's the City now, five years from now, ten years from now is it the City or could there be some other – do we need make sure it's the City or assign...

Deputy County Attorney SZambon: Well again, a variance travels with the land so the reason we're having both McGill and the property owner sign it is because one is the property owner and one is the one who applied for this. Once there's a variance it travels with the land. So if Super Sod sells the property the new people would still be bound by the variance. If the water distribution changes hands from the City of Asheville or I'm sorry, the City of Hendersonville to someone else, whoever, the property owner, assuming the property owner is still the same will still be bound by those conditions in

the variance. Any successors to that property will be bound to that variance. They will have a duty to whoever is the new leasee to make sure that they follow those rules. Kind of like if you rent property to someone you don't let them violate the nuisance ordinance. Because then Toby goes out and yells at you. And then you have to yell at the renter. Same kind of thing. Tony you don't look like you believe me.

Assistant County Engineer NBerry: Can I say something?

Deputy County Attorney SZambon: Not really.

Assistant County Engineer NBerry: Not really? I was just going to suggest maybe you could record the variance at the courthouse, on the property.

Deputy County Attorney SZambon: You can.

Assistant County Engineer NBerry: Then anybody that did due-diligence...

TEngel: I take it the City of Hendersonville will draw up a long lease on this.

Deputy County Attorney SZambon: I'm not responsible for the City of Hendersonville. I'm only responsible for ya'll right now.

JCrafton: A question, Mr. Shafer, the owner of the property was concerned whether any conditions in granting the variance would hinder him in any way from using the land for his farming activity. And I gather these conditions we're talking about relate to the structure and its meeting the variance. And they would not bear on any of the rest of his land or its use.

Deputy County Attorney SZambon: The variance is for how far away from the flood, in the floodway the structure will be placed. It does not have any other conditions on the property. So, no, it should not effect his use of the land.

JCrafton: So we'll not impact the use of your land, the variance or its conditions.

TEngel: That's upstream from his property where it's located, I take it. I was just wondering chemicals and things like that. Which way do we flow? Which way does the river flow?

DBonessi: Yeah, but that's not up for us to govern.

TEngel: Yeah, I guess.

DBonessi: It's for the powers that be.

Deputy County Attorney SZambon: Again, a different issue.

DBonessi: That's not for us to decide.

Chairman Phelps: But we're not here to discuss what the land use is. Only that they be allowed to put this structure in the floodplain. Further discussions, questions?

TEngel: Do we care what it looks like?

Chairman Phelps: It's going to be a large structure as far as height. It's a concern but in order to meet the floodplain requirements and be above to get the electrical stuff above water line.

TEngel: Well sometimes you see these towers that look, that have been owned by water companies that are beautiful looking shapes and so on. And others you see that look like a factory.

Chairman Phelps: It's so far removed even from a road or anything.

JCrafton: Item G does say the compatibility of the proposed use with existing and anticipated development, which is the question Tony's raising.

TEngel: I think of all those people having fun going downstream and this. It would be nice to...

DBonessi: You might see in some subdivision, I mean I don't know. I'm just trying to think where it is that, what are these people overlooking from a half mile away?

JCrafton: I don't see a reason to be concerned. Here's a subdivision up here and here's a structure down here.

Chairman Phelps: This is farm land right around it.

TEngel: And it'll always be farmland because it's floodplain. We don't have anything that shows what it looks like from the outside, an elevation?

Chairman Phelps: We know from drawings that were in here.

TEngel: Floor plans in sections.

Chairman Phelps: I was dependant on you.

TEngel: It's a nice tree here. (Ha-ha). We're not talking about little tiny structures. It's a large structure. What does it look like from the outside?

Deputy County Attorney SZambon: He can't...

APouch: A big concrete structure.

KWebb: A brick veneer building. If you look, go to Mills River right and look downstream.

Chairman Phelps: I'm sorry, you're not allowed to speak during closed session.

TEngel: Can we open it again.

Chairman Phelps: We can if you would like to have him testify. If there's no objection, shall we open it again?

All board members indicated they had no objection.

Chairman Phelps: Ok. Now we can hear you.

KWebb: The plan is for it to be a brick veneer building. If you go to the Mills River right now and look immediately downstream of the bridge across from Mills River is Hendersonville's existing intake, which is an approximately 20 x 30 brick veneer building. This building will look exactly the same. The only difference is that the part that is coming up out of the ground in the floodway may be reinforced concrete. But we have the option of putting brick veneer on that if that's what the landowner and the County is wanting as part of the building plan approval. That's all negotiable.

TEngel: Ok. So they should take care of that aspect.

KWebb: That's right.

TEngel: We're not responsible for appearance.

Deputy County Attorney SZambon: I mean, you can make a condition if you want. I mean, under letter G, but you don't have to.

TEngel: Well maybe we should just ask for at least the upper portion to be brick. They said they're going to do that anyway, right?

KWebb: That's correct.

TEngel: It would look better than concrete.

JCrafton: I agree, but I think it's kind of being arbitrary because what our particular taste is. The thing is way out in the middle of a huge field.

TEngel: But it will still look better if it's brick.

JCrafton: I agree, but suppose I want it to be purple and you want it to be brick. To me I think that's just a matter of taste. Well anyway...

APouch: They could put coloring in concrete.

DBonessi: I'm kind of partial to pink, myself.

Chairman Phelps: Any other questions? If not shall we close the hearing again?

TEngel: Ok. Let's close the hearing.

All board members indicated the hearing should be closed.

Chairman Phelps: Ok. Unanimous, we are all in agreement. We now close the hearing again. And we will continue any discussion, questions amongst ourselves.

DBonessi: I personally think it's pretty obvious. The only question I ask myself if this is not the City of Hendersonville making this request, but if Budweiser wanted to build a bottling plant in this intake, would we think of it in the same way?

APouch: Probably. The President needs some beer.

DBonessi: I'm just saying though, I mean it's the City of Hendersonville but they should have - there should be no difference in standards, whether it's the City of Hendersonville or a private entity. I mean as a board we're - just to me it's the same thing.

JCrafton: Although there is a community well being involved in the City's effort as opposed to a private enterprise. But I don't think the judgments we've made so far have been in difference because it's the City.

DBonessi: Yeah. I agree.

JCrafton: I'm just concerned, are there any other conditions that would be useful or important? Toby had suggested maybe we specify what the façade looks like. We've identified there needs to be a letter from the owner giving permission for the facility. And then there needs to be the lease agreement which binds the City as well. Are there any other conditions that would be important?

TEngel: Well to me it would be to have a brick façade.

Chairman Phelps: I don't know, we have cell phone towers and everything else.

APouch: Yeah, and some of those are pretty ugly looking too. It's going to be a large building. And they did say they were going to use brick.

Chairman Phelps: Above where the floodplain part, whatever few feet that is concrete to prevent the water damage. I don't know, do we need to go that far to specify the exact building type?

JCrafton: It's up to the board.

Chairman Phelps: I know, that's what I'm asking.

TEngel: I would like to see it that that way.

APouch: I think we have before, haven't we?

DBonessi: Yeah, but location to, I mean...

APouch: I don't think it's that important.

DBonessi: I'm not passionate about it either way.

Chairman Phelps: Ok. Now of the three we have so far that will be mandatory, right? That they will have to abide by all of those as part of our approval, assuming we approve it?

Deputy County Attorney SZambon: Yes. But I only have two. You have three conditions? I have the agreement between the landowner and the City – has to be binding on the City on the conditions. And that there has to be a letter from the owner being ok for McGill and the City to do this. Then there's a third one you said?

TEngel: It was subject to them coming - the City and the landowner coming to an agreement.

Deputy County Attorney SZambon: I think I just combined those into one. So are there two then, is that correct?

TEngel: Um-hm.

DBonessi: What about the recording? Natalie had made mention of the fact that...

Chairman Phelps: Yeah, the recording

Deputy County Attorney SZambon: If you want that as a condition.

Chairman Phelps: Put that in there that we want it recorded.

APouch: Do we say Natalie, well we know Natalie will supervise this but we don't have to put that in there.

Chairman Phelps: I think that's stated in one of the letters.

JCrafton: What are we requiring to be recorded?

Deputy County Attorney SZambon: The variance.

DBonessi: At the courthouse.

Deputy County Attorney SZambon: So that anybody who bought the property or did a title search or anything, this would come up.

Chairman Phelps: Anything else? Do I hear a motion?

APouch: You'd have to say it. I'd say it but...

Chairman Phelps: There is no – do I have a motion?

Deputy County Attorney SZambon: I didn't write a motion, I'm sorry.

Chairman Phelps: Is there one in any of the other yellow sheets?

Deputy County Attorney SZambon: Yeah, there should be a motion at the bottom of your variance sheet.

Chairman Phelps: Ok. Here's the suggested approval motion. Jim, do you want to make it since you...

JCrafton: Ok. I move that the Zoning Board find and conclude that the variance application, and is this their number, FPV in this first sentence of – what's the case number?

Deputy County Attorney SZambon: Karen Ann says it's V-09-04.

JCrafton: Let me start again for Karen's recording. I move that the Zoning Board find and conclude that variance application V-09-04, McGill Associates P.A. complies with the necessary provisions of Henderson County Zoning Ordinance for the follow reasons: The ordinance items have all been investigated and compared to the applicant's proposal by staff and they have indicated to the board that all the measures were met. And along with this approval the board places the following two conditions on the variance - the following three conditions: the first condition being that there be a letter submitted by the property owner indicating his permission for the project to take place on is property. Second condition, that there be a lease agreement executed between the property owner and the City of Hendersonville – same lease agreement so also bind the City of Hendersonville to compliance with the ordinance and variance along with McGill Associates and the property owner. The third condition being that there be the requirement that this variance be recorded at the Henderson County Courthouse for the benefit of any future purchases of the property.

Chairman Phelps: Thank you, is there a second?

TEngel: I'll second.

Chairman Phelps: Is there any discussion on the motion? If none shall we come to a vote? All those in favor, please let it be known by raising your right hand. Opposed no. unanimously passed.

All board members were in favor of granting the variance.

Chairman Phelps: So, you can come forward to the podium once more, please. As you heard, the board has approved this with certain stipulations and Sarah we will have the written...

Deputy County Attorney SZambon: At the next meeting.

Chairman Phelps: At the next meeting.

KWebb: Alright, thank you very much.

Chairman Phelps: Any further business to come before the board at this time? If not I'll entertain a motion to adjourn.

JCrafton: I move

TEngel: Second.

All board members were in favor of adjourning the meeting at 5:04 p.m.

Chairman, Jim Phelps

Karen Ann Antonucci, Secretary