

**SPECIAL CALL MEETING OF THE INDIAN RIVER COUNTY**  
**BOARD OF COUNTY COMMISSIONERS**

**THE SOURCE – JURISDICTIONAL DETERMINATION AND**  
**APPEAL BY IAM MINISTRIES**

**APRIL 24, 2008**

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April 24, 2008

**SPECIAL CALL MEETING OF THE INDIAN RIVER COUNTY**  
**BOARD OF COUNTY COMMISSIONERS**

The Board of County Commissioners of Indian River County, Florida, held a Special Call Meeting at the County Commission Chambers, 1801 27<sup>th</sup> Street, Vero Beach, Florida, on Thursday, April 24, 2008, to address The Source – Jurisdictional Determination and other matters. Present were Chairman Sandra L. Bowden, Commissioners Joseph E. Flescher, Peter D. O’Bryan, and Gary C. Wheeler. Vice Chairman Davis joined and departed the Workshop intermittently. Also present were County Administrator Joseph A. Baird, County Attorney William G. Collins II, and Deputy Clerk Athena Adams.

**1. CALL TO ORDER 9:00 A.M.**

Chairman Bowden called the meeting to order at 9:00 a.m.

**2. INVOCATION**

Stan Boling, Planning Director, delivered the Invocation.

**3. PLEDGE OF ALLEGIANCE**

Commissioner Gary C. Wheeler led the Pledge of Allegiance to the Flag.

#### **4. COUNTY ATTORNEY MATTERS**

##### **A. THE SOURCE – JURISDICTIONAL DETERMINATION**

County Attorney William Collins recapped the backup memorandum of April 18, 2008 and explained that this matter has an extensive history, both administratively at the County level, and in the Courts. He disclosed that the issue centers on an inquiry by Mr. King of The Source as to whether the property on 37<sup>th</sup> Street could continue to be used as a non-residential treatment center, and the subsequent determination by the Community Development Department that it could. That decision was questioned by the residents of the subject area through a letter from Attorney O’Haire to Attorney Collins. Attorney Collins then referred the matter to the Planning and Zoning Department which subsequently reaffirmed its July 10<sup>th</sup> decision that the use could continue. Thereafter, an appeal to the Planning & Zoning Commission (PZC), determined that staff had made an improper decision and that the use should not be continued.

Attorney Collins explained how, at the PZC Hearing, Attorney Henderson, on behalf of The Source, had raised jurisdictional issues of the timeliness of appeal, and a lack of filing fees, and how he appealed (to the Board of County Commissioners) PZC’s decision overturning The Source’s right to continue the Residential Treatment Center use. The Commission found at that time that it did not have jurisdiction to hear the appeal, based on Attorney Collins’s recommendations. That action resulted in Attorney O’Haire filing a Petition for *certiorari* in the Courts in order to protect his clients’ interests. Attorney Collins reminded the Board of its subsequent actions and of Judge Hawley’s Order Denying Petition for Writ of Prohibition, filed by Attorney Henderson. Said Order was subsequently upheld by the 4<sup>th</sup> District Court of Appeal on December 19, 2007, and the matter remanded to the Board of County Commission to determine, under our Ordinance, whether the County has jurisdiction to hear the case, and if they so find, then the Board would have to hear the appeal on the merits.

Attorney Collins looked at the timeliness of the appeal, the form of the appeal, the place of filing, and filing fee, and presented his findings. He recommended that the Board make findings that it does not have jurisdiction over the merits of this case because:

1. The September 5, 2008 letter from Mr. O’Haire was not an appeal
2. As an “appeal”, the letter was untimely under Code Section 902.07(3)(b).
3. The appeal was not filed on the form prescribed by the County, as required by Code Section 902.07(3)(b).
4. The appeal was not filed within a specified time limit with the Planning Department as required by the Code Section 902.07(3)(b).
5. The appeal was not accompanied by a fee as required by Code Section 902.07(3)(b).

Attorney Collins, after presenting his review and analysis, reminded the Board that due process requires that they do not simply accept his recommendations, but to make its own findings with respect to the issues, after hearing from the parties involved.

**OPENING STATEMENT BY ATTORNEY VITUNAC**

**Douglas Vitunac**, Esquire, Collins, Brown, Caldwell, 756 Beachland Boulevard, Attorneys for The Source, presented his client’s arguments in opposition to the Board of County Commissioners hearing the matter. He described how his client bought the property in reliance on the July 10<sup>th</sup> determination (by the Community Development Department), which allowed use as a residential treatment facility, and as a legal continuation of a non-conforming use. He argued that the July 10<sup>th</sup> decision was never properly appealed by the Metzses or by anyone else, and he provided relative facts in support of his arguments. He also argued that they have cited case law that explains where the County Ordinance contains mandatory language relative to the appeal procedures of the Code that those procedures have to be followed or else the County does

not have jurisdiction to hear the appeal. Further, that Mr. O'Haire has cited cases that they do not think apply.

**Attorney Vitunac** referenced several case laws, in particular, the Ocean Concrete's case, where the Board took the advice of the County Attorney and recognized that the decision to strictly enforce its appeal procedures as outlined in the Ordinance would be precedential to their case today. He thought it was the proper decision, and one that shows the community that we have a consistent government that gives equal treatment to all applicants. He urged the Board to make the decision that the appeal was invalid and to reaffirm the July 10, 2006 letter stating that they have legal nonconforming use status.

*(Clerk's Note: Attorney Vitunac submitted to record an approved excerpt from that portion of the Minutes of March 18, 2008, regarding Ocean Concrete hearing - **Exhibit 1**)*

**OPENING STATEMENT BY ATTORNEY HENDERSON**

**Steve Henderson**, Esquire, Collins, Brown, et al, representing The Source, recalled that following the Board's February 13, 2007 hearing, holding that the Board lacked jurisdiction, there were various comments made afterwards that this was a technicality and that The Source prevailed on the basis of a technicality. He believed the question of jurisdiction has very important issues of public policy involved in it, and the terms of our ordinance represent a balance between two competing interests; one being the right of an affected party in a land use decision to complain and appeal a decision by an administrative official or this Board, and on the other hand the right of an applicant, or a developer, or a person issued a permit or an approval, to rely upon a finality of that approval in proceeding with its business. His point in case was that The Source obtained an official administrative approval dated July 10, 2006; it was properly issued pursuant to the County's ordinance; and they relied upon that in proceeding with the purchase of the property. He suggested those were important things.

**Attorney Henderson** spoke to the issues of his client's investment (over a half (½) a million dollars), and the property rights of affected parties, which are all important to pursue, but must be pursued properly and in accordance with the ordinance. To provide a better understanding of the facts and circumstances surrounding the jurisdictional issues, Attorney Henderson, through a PowerPoint presentation, addressed the section of the Code that deals with appeal requirements and Public Notice. He also presented a timeline of activities to show the important dates involved in this matter, including the date the appeal period began to run.

He presented six (6) questions and answers to the Board for consideration and response, and claimed there were multiple defects in the Metz appeal:

(1) What are the Metz's appealing?

*(Answer: John McCoy's administrative letter decision dated July 10, 2006)*

(2) When did the Metz's receive the actual notice of the 7/10/06 McCoy letter?

*(Answer: August 15, 2006)*

(3) What are the requirements of the IRC Code for filing a timely and proper appeal?

*(Answer: It requires a filing and that it be filed with the Planning Division)*

(4) Can the O'Haire letter dated 9/5/06 be considered a timely and proper appeal?

*(Answer: No, it cannot; it was filed late, it went to the wrong office; was not on a proper form, and no fee was included)*

(5) Was the formal appeal filed on 11/1/06 a timely appeal?

*(He did not read Question No. 5 because he thought he covered it "pretty good" under Item 4)*

(6) Can the County ignore or waive the appeal requirements of its ordinance?  
(Answer: No, this is a quasi-judicial requirement and strict compliance with appeal requirements and conditions is necessary to create jurisdiction)

**Attorney Henderson** opined that the case on jurisdiction should be seen as compelling because the County Attorney is advising the Board that he sees the same defects as they have, and he did not think the Commission has any other choice but to hold that the appeal filed on November 1<sup>st</sup> was untimely, and that the letter delivered on September 7<sup>th</sup> was not the proper appeal. He urged the Board to find, as it did on February 13, 2006, that it lacked jurisdiction to hear the merits of this case. He made it clear that they think they have merits on their side in this case.

**OPENING STATEMENT BY ATTORNEY O'HAIRE**

**Michael O'Haire**, Esquire, Law Firm of O'Haire, Quinn, Casalino, Offices on Cardinal Drive, Vero Beach, Attorney for the Metzses, Hedin's, and other neighbors adjacent to The Source property, informed the Board that he would be taking some testimony, and would show that what The Source is desperate to achieve is to prevent the Board from hearing this case on the merits.

**Attorney O'Haire** drew attention to the County Ordinance relating to appeals (§902.07) listed at page 4 of the backup, and asked the Board to look with him at the Ordinance under the heading of "appeal procedures." He argued the issues of the Ordinance's requirement for Notice of filing, when the appeal time ran out, and highlighted its relevance to this case. He promised to provide evidence from the neighbors regarding their knowledge of The Source coming into their neighborhood, or that the McCoy's letter existed.

**Attorney O’Haire** said he would show that the Ordinance applies in their case, because one could not appeal something he knew nothing about. He submitted that the Ordinance (§902.07) was designed to fit 99.99% of the cases that turned around a decision of the Planning Department, and Ocean Concrete was one of them. He argued the intent of the ordinance, stating that based on the lack of notice to petitioners, he would submit that the Board would have to find that the Ordinance was not designed to fit a situation that is going to affect people who were not involved in the process or who had no knowledge as to what was going on, and by the time a decision was made, have had the clock run out on them. He reminded the Board that he won the appeal (4<sup>th</sup> District Court of Appeal affirmed Judge Hawley’s decision) that the ordinance does not have application. He suggested the Board has to find that the strict language of the appeal Ordinance does not apply to this issue.

**WITNESSES:**

**Attorney O’Haire** called Steve Metz to explain what exactly happened in the process and how he discovered what had been done to him and his neighborhood.

**Steve Metz**, 5980 37<sup>th</sup> Street, under questioning by Attorney O’Haire, described the location of his residence in relation to the subject property; explained that it was through an article in the Press Journal that he first discovered The Source proposed to put a homeless shelter in his neighborhood; recalled that the article was published before August; and how after reading the article, he consulted with neighbors and family to discuss what they should do. Mr. Metz said he did not know the existence of the McCoy letter before he called the Planning & Zoning Department; Director Boling told him there was a letter, at the time he spoke with him; there was no mention of an appeal; and he was not told the clock had been running.

**ATTORNEY VITUNAC CROSS-EXAMINED MR. METZ**

**Mr. Metz** could not recall exactly the time they hired an attorney, and knew about The Source's decision for a recovery center after he read the newspaper article. In response to "what prompted you to file on an appeal form on November 1<sup>st</sup>", he said at that point they had contacted Attorney O'Haire.

**ATTORNEY O'HAIRE CALLED KEITH HEDIN**

**Keith David Hedin**, 6030 37<sup>th</sup> Street, Vero Beach, under questioning by Attorney O'Haire described his property's proximity in relation to Alchope (the subject property/a/k/a The Source). He explained that on August 6, 2006 from an article in the Press Journal he found out The Source was proposing to place a shelter on the subject property, after which he contacted his neighbors to discuss the matter. He had no idea of The Source's intent prior to the article in the Newspaper. He immediately contacted County staff but was not told that he had any appeal rights; was not told that the clock was running; was not told that the clock had run out; was not told that his time was up on July 31; and there was no mention of an appeal. He was only told "here is a copy of the letter Mr. McCoy has wrote endorsing The Source of buying this piece of property." The first time he saw the letter was August 9, 2006, and he did not, at that time, know of any right to appeal.

**Mr. Hedin** complained of not being notified by the County of a potential land use change in his area.

**ATTORNEY VITUNAC CROSS-EXAMINED MR. HEDIN**

Under cross-examination, Mr. Hedin affirmed that he did not hire Mr. O'Haire, he only spoke with him, and could not recall the exact date. He also affirmed that he did not know when Mr. Metz hired Mr. O'Haire; that he received "formal notice" from a newspaper article not from

County staff; and that he did not file an appeal within 21 days of getting the letter because he did not know that he could.

**Commissioner O'Bryan** wanted to make sure what staff's involvement was, and asked Mr. Hedin what he requested of Planning Director Stan Boling when he (Hedin) called Director Boling's office. **Mr. Hedin** said he just asked what was going on across the street from his home (at Alcohope on 37<sup>th</sup> Street); he did not ask staff about an appeal, and staff did not mention an appeal.

### **ATTORNEY O'HAIRE'S SUMMATION**

**Attorney O'Haire** declared his family ties to the Metz's. In summation, he stated that common sense and the plain language of the Ordinance dictate that it only applies to an Ocean Concrete situation. He argued that nobody knew that a letter was written, or that there was a letter requested, except the applicant and Planning staff, and they are the only ones that the ordinance can reasonably and with any common sense or fairness apply to. He also argued that the ordinance could not apply to residents because they knew not of the "letter" or that there was a time requirement, and that the process was already over by the time they knew about it.

**Attorney O'Haire** referenced page 5 of Judge Hawley's decision regarding the Board's jurisdiction to hear this matter, where the Court finds that the records fail to affirmatively show that the County Commission would be acting in excess of its jurisdiction by reconsidering the merits of the appeal of the Planning & Zoning (Commission). He noted that Judge Hawley "is saying there is no showing made and you all acted improperly, and his decision determined and said you did everything you should have done and you did it properly." Further, the 4<sup>th</sup> District Court of Appeals affirmed it, and we need now to make a ruling that this Ordinance cannot, with any reason, common sense or fairness or all, apply to the Metzses or Hedin's of the world; it

apply to the applicants and to the staff. That being said, he reasoned, we have to move on to the hearing of the merits.

### **ATTORNEY HENDERSON'S REBUTTAL**

**Attorney Henderson** argued Attorney O'Haire's statement that the appeal period ran out on the neighbors on July 31<sup>st</sup> which is 21 days after the date of the July 10<sup>th</sup> letter, and found that to be somewhat absurd. He asked the Board to notice in the Ordinance [Code Section 902.07(3)(a) in the backup] which states in part, "The applicant, or any other person(s) whose substantial interests may be affected ..." and suggested that "substantial interests affected" is referring to people like the Metz's. Therefore, by its terms, the Ordinance applies to persons whose substantial interests are affected, other than the applicant. They would concede that had the July 10<sup>th</sup> letter been adverse to their client, their appeal period would have run out on July 31<sup>st</sup>.

**Attorney Henderson** explained that the law applies a "chargeable with notice concept" when no notice is provided to persons with a substantial interest. He again argued points of the appeal period, and suggested that if the Board accepts Attorney O'Haire's arguments that this Ordinance does not apply, they would be left with a situation of exactly when and where the period began and ended. He suggested that that is not a logical interpretation of this Ordinance.

**Attorney Vitunac** displayed a copy of the appeal form filled out by the residents, and declared that they figured it out, but late, and that was not acceptable arguments.

### **COMMISSIONERS' COMMENTS**

**Chairman Bowden** opened the floor to questions from Commissioners and reminded everyone that they should conduct their questions only to the issues of jurisdiction.

**Commissioner Flescher** asked Attorney O’Haire whether there were any verbal or written communication regarding the process or any suggestion of objection. **Attorney O’Haire** did not think that Director Boling’s focus was on the process, the procedure, or the rules. He perceived that the response was, they needed to talk to Tom King, and nothing was said about an appeal or anything procedural.

**Vice Chairman Davis** wanted to clarify Attorney O’Haire’s statement “that Judge Hawley is right, and that the Appeals Court said that Judge Hawley is right,” and asked what exactly was Hawley right about. **Attorney O’Haire** said he was right about the fact that the Board alone had the power to decide what their jurisdiction is, and that the Board made that decision when it decided to hear it on the merits, and The Source filed a procedure to keep them from hearing it on the merits.

**Attorney Henderson** did not think that response was correct and **Vice Chairman Davis** re-directed the question to him, asking whether he disputed the fact that the Appeals Court has said that Judge Hawley’s decision is right. **Attorney Henderson** explained the Judge’s ruling/decision.

**Attorney Collins** gave his understanding of Attorney O’Haire’s arguments, in particular, that the process of Notice applies only to applicants and not substantially affected parties. He noted that on its face, it applies to both. He thought the issue is therefore, if it does apply, it is not fair it applies to substantially affected parties, but giving them additional time based on when they received the actual notice, he thinks, brings fairness back into it, and not holding them to July 31<sup>st</sup> once they have noticed timeframes apply. And whether they knew the process or not, there were timeframes warning and there wasn’t, in his opinion, a proper appeal form, place, time, fee-wise, but he understood their arguments.

*Chairman Bowden called a break 10:24 a.m. and reconvened the Meeting at 10:37 a.m., with Administrator Baird absent.*

### **PUBLIC INPUT**

Chairman Bowden opened the floor to public input.

**Spencer Simmons**, 118 43<sup>rd</sup> Avenue, believed there could be another timeline being looked at, a defense timeline. He was confused by Mr. Hedin's arguments about not knowing the procedures, and pointed out that ignorance of the law should be no excuse, because of Mr. Hedin's knowledge of County rules, he being a member of the Code Enforcement Board. He recalled how the issue was handled at the time it went before the Board when Commissioners Lowther and Neuberger sat as members.

*(Clerk's Note: Administrator Baird returned at 10:40 a.m.)*

**Mr. Simmons** said it seemed that there was "political gamesmanship," and he believed that residents were aware that the property was being sold and they had the proper notification.

*(Clerk's Note: Chairman Bowden called a short Break from 10:44a.m. to 10:47a.m., to facilitate certain attendees in securing their vehicles during a sudden rainstorm. [Vice Chairman Davis was absent at the resumption of the Meeting])*

**Tom Lowther**, 1655 27<sup>th</sup> Street, recalled that this issue had come up when he sat as Commissioner in the past (November 7, 2006). He asked Administrator Baird what would he have done, if he (Lowther), a Commissioner at the time, had asked him (Baird), how can we deal with this and keep the attorneys out of it; because it is an issue between the Board of County

Commissioners, the employer and staff, making this decision on a letter for a non-conforming use, and not looking into the due diligence of this establishment being non-operational for a year.

*(Vice Chairman Davis rejoined the meeting at 10: 49 a.m.)*

**Administrator Baird** replied that if the Commission had voted for staff to look into the matter they would have done a staff report and brought it back to the Commission with options.

**Mr. Lowther** also recalled that at the meeting of November 14, the matter had come back before the Board and staff had recommended that this go before the Planning & Zoning Board. The Planning & Zoning Commission ((PZC)) had heard the issue, and voted in favor of this nonconforming use being in place and in favor of the neighborhood at 37<sup>th</sup> Street; thereafter the appeals came in. He urged the Board to do the right thing because as Commissioners they took an oath to protect and serve.

**Joseph Paladin**, 6450 Tropical Way, felt The Source is not a part of what this discussion should be about; did not think anyone was against The Source or what it stands for; and did not see this as wrong or right. His goal was to try to find a happy medium for negotiations, and he suggested going back to the beginning to see where we started. He wanted to know if it was ever determined that if this use is allowed, it would be continually allowed; as well as, when it was not allowed. He had not heard the Board discuss those facts, and wanted to know what those facts were. He also wanted to know if there was some sort of compromise so the County does not end up in court.

**Keith Hedin**, 6030 37<sup>th</sup> Street, acknowledged that he is on the Code Board, and admitted he doesn't know all the procedures. He believed County staff made a grave error in determining the land use of this property (grandfathered property.). He also believed Mr. McCoy made a mistake and should never have written that letter because he never talked to area residents about

the use of the property. He was not against the homeless shelter, but against the process, because the place was vacant for more than 12 months, and this he knew because he lives across the street.

**Susan Hunter**, 1855 10<sup>th</sup> Avenue, believed no mistakes have been made and it was not a homeless center. She knew for a fact that there was always an attendant on the property, and there were always AA meetings being held at Alcohope, because she went.

**Ray Metz**, 5960 37<sup>th</sup> Street, residing directly across from the property, agreed with Mr. Hedin that a mistake was made (through McCoy's letter). He hoped the Board would let them tell their story.

**Commissioner Wheeler** thought they were getting into the appeal issues when they should only be considering jurisdictional issues. The Chairman agreed.

**Sonya Morrison**, 2680 68<sup>th</sup> Square, living down the street from subject property, heard arguments on whether or not to uphold the law, and whether or not it is okay to argue ignorance in the face of the law, and felt it was an important issue and we do need to uphold the law. She spoke about the Board's responsibility to protect the residents of County, and argued that if a mistake was made, there was a process in place in the Ordinance to address that; and if the process was not followed, there needed to be a ruling as such.

#### **CONCLUDING COMMENTS BY THE BOARD AND STAFF**

**Attorney Collins** did not think there was anything new to add but to get back to the rulings of Judge Hawley, to make determinations to resolve these factual issues relating to jurisdiction, and to make findings whether the letter was an appeal, whether it was filed timely,

on the proper form, and whether it was filed in the proper place, accompanied by the required fee. Therefore, if the Board finds that it doesn't, then it should find it does not have jurisdiction over the matter.

**Planning Director** Stan Boling had no further comments, but offered to answer questions from the Board.

**Commissioner O'Bryan** asked if staff ever received a check from Mr. O'Haire or the Metzses, as part of the appeal, and whether it was good. Staff affirmed that they had.

**Commissioner Flescher** inquired about the timeframe for a response to Mr. Metz and Mr. Hedin, as far as an inquiry; whether it was written or verbal; and whether it was customary for any correspondence to go out to a community when issues of this nature might impact the community. **Director Boling** replied, "No" to the latter, saying this is a zoning confirmation letter, and there was nothing in our Ordinance that requires us to notify residents in such matters.

**Commissioner Wheeler** inquired who gets the 21 days notification; what is actual Notice; and wanted an example of the letter/notice that was sent to Ocean Concrete. He also wanted to know if staff ever explains the process of appeal in a notification letter. Commissioner Wheeler did not believe to be valid the comments by Mr. Simmons about Mr. Hedin's ignorance of the law, because he was a County official.

**Commissioner Wheeler** remarked that this was one of the most difficult issues he has dealt with, and he could see a difference with the Ocean Concrete case. He wanted to deal with the merits of the actual facts rather than a technicality. He felt neighborhood residents were at a tremendous disadvantage to these issues, because they were ignorant of the process; they did not understand what they needed to do in a timely fashion; they did not have proper notice, and that could probably be an error. He felt they needed to revisit County rules to keep people notified.

He inquired of Attorney Collins how we could do this, in this instance, and still deal with Ocean Concrete. He declared that after listening to both sides of arguments, he had changed his position that he would listen to the appeal. He thought in this process it was important that we treat people fairly and objectively, and believed it was unfair to the neighborhood.

MOTION WAS MADE by Commissioner Wheeler,  
SECONDED by Commissioner Flescher, to hear the  
appeal.

**Chairman Bowden** gave her understanding of the process used by staff as it relates to the current issue. Director Boling affirmed her understanding as correct. She thought they should hear the appeal to be fair to the residents.

**Commissioner Flescher** addressed comments from Attorney Vitunac regarding rules of understanding, and defended Mr. Hedin's lack of knowledge on the procedure. He believed the timeline is somewhat convoluted, and felt we have an obligation to the community and all affected parties to have this heard.

**Commissioner O'Bryan** recalled that at the March 18, 2008 meeting regarding Ocean Concrete, he had spoken at length regarding the interpretation and intent of the law and legislative process, and had stated that the intent was to allow citizens the right to have their appeal heard before the Board. He recapped the subsequent actions of the Board regarding the Ocean Concrete appeal, and how he had opposed the Motion to not hear the appeal based on a technicality, that the check was not timely filed. He did not agree with that, but felt if that is our policy then we need to follow policy. His concern was, if we follow policy, then we have no alternative but to deny this appeal because it was not filed timely, among other things. He cited a portion of Section 902.07 of the Code regarding "purpose and intent" and reiterated his belief that residents should have the right to come before this Board and plead their case. On the other

hand, he felt it was critical that we follow our policy because if we mix and match our policies we will end up with more lawsuits.

**Commissioner O'Bryan** felt the issue of jurisdiction comes down to when the applicants were truly notified, and when the 21-day clock started ticking. He addressed the matter of notification to residents, and believed that at that time, the applicants were notified of their due process and of the timeframe and procedures under Section 902.07 (based on a letter to the applicants from Attorney Collins dated October 17, 2006 regarding the appeal timeframes). He understood that the proper form was delivered to the Planning Division on November 1 and that a check in good standing was delivered on November 7, which was within the 21-days appeal period. Therefore, in his opinion, and based upon those facts, and upholding our policy strictly to the ordinance, he believed official notice did not occur until October 17. The appeal was therefore timely, he held; it was on the appropriate form; funds were in good order; and he supported the Motion to hear the appeal.

**Vice Chairman Davis** surmised that we are victims of an inadequate policy and it is the policy that was in place. He deemed the two days were significant, and believed that is where we should draw the line, and it should be a bright line. He was not in favor of the Motion.

### **THE MOTION**

The Chairman CALLED THE QUESTION and the Motion carried 4-1 (Vice Chairman Davis opposed). The Board determined that it has jurisdiction, and approved to hear the appeal.

**Attorney Henderson** reminded the Board that Judge Hawley's decision directed them to make findings of fact with respect to that jurisdiction issue they just decided, and noted that he did not hear any findings of fact on that. He said the other issue was what constituted the appeal, and what is the appeal. He did not hear a clear statement from the Board on any of those either, and felt these findings of facts are important for purposes of preserving the record and pursuing further appeals.

**Commissioner Wheeler** gave his understanding on the findings of fact and expressed that this system was set up to hear people who have been turned down by PZC.

**Attorney Henderson** questioned the findings of fact to which Commissioner Wheeler gave an explanation.

**Attorney O'Haire** reminded the Chairman that this was a quasi-judicial hearing, and when they as lawyers appear before a Judge, they do not get to inquire of the Judge why they ruled the way they did or argue with them about the propriety of their ruling.

Chairman Bowden then declared that the Board has voted and they would hear the process. She thereafter consulted with Board members regarding taking a lunch break.

*The Chairman called a lunch break at 11:36 p.m., and reconvened the Meeting at 12:33 p.m., with all members present.*

## **5. DEPARTMENTAL MATTERS**

### **A. COMMUNITY DEVELOPMENT**

**APPEAL BY I AM MINISTRIES, INC (THE SOURCE) OF A DECISION BY THE PLANNING & ZONING COMMISSION TO UPHOLD AN APPEAL BY STEVEN & ERIN METZ AND OVERTURN A DECISION BY COMMUNITY DEVELOPMENT STAFF THAT THE NON-CONFORMING RESIDENTIAL TREATMENT CENTER USE AT 5925 37<sup>TH</sup> STREET DID NOT CEASE FOR MORE THAN ONE YEAR AND THAT THE USE MAY CONTINUE UNDER DIFFERENT OWNERSHIP (QUASI-JUDICIAL)**

**Chairman Bowden** requested that all potential speakers be sworn, pursuant to quasi-judicial requirements. The Deputy Clerk administered the Oath.

### **COUNTY STAFF'S PRESENTATION**

**Planning Director Stan Boling** recapped the backup memorandum dated April 17, 2008 and updated the Board on the request for a nonconforming residential treatment center use at 5925 37<sup>th</sup> Street. He provided detailed background and reminded the Board of previous consideration and decisions regarding this matter.

**Community Development Director Bob Keating** displayed the County land-use map, outlining the subject site and surrounding communities, with their respective zonings. He said the historical use and zoning for the subject site are different from surrounding properties on this site. He explained that if nonconforming uses are allowed to continue, they would be restricted to current building area and a capacity of 18 clients; and if the nonconforming uses are denied,

then the uses that are allowed would be single and multi-family district, and institutional (RM-6 and RS-3). He revealed that staff's decision was to allow continuation of a residential treatment center use on this property, restricting it. It could not be expanded beyond the current building area and the 18 resident clients.

**Director Boling** presented Planning & Zoning's (PZC's) decision; cited the reasons for nonconformities; and explained the purposes of nonconformities regulations and policies, as well as Ch. 904.08 "cessation of nonconformities." He suggested that the "Test" was, "did the non-conforming use cease for a continuous period of more than 1 year?" He pointed out that the Board should focus on the word "cease" in its interpretation, as well as, the timeline facts. Under Ch. 904.07(2) "reconstruction after declared disaster", he said the Test was, "do the disaster reconstruction allowances guarantee reconstruction of nonconformities regardless of the one year cessation regulation?" PZC determined that the use ceased for a continuous period of more than 1 year, and overturned staff's decision.

**Director Boling** then presented the four-part test to review PZC's decision (outlined at page 16 of the backup). Staff contends that PZC failed in two (2) aspects with regards to evaluating the appeal with respect to nonconformities regulations, and that PZC failed to apply the provisions of §902.07(2) and County policy, which modifies the one year cessation rule when the use is affected. Director Boling repeated staff's recommended that the Board review the four options; find that PZC failed with respect to item #4; uphold the appeal from The Source; overturn the Planning and Zoning Commission decision, and allow continuation of non-conforming use with the restriction of no expansions.

**Commissioner Wheeler** sought further background on zoning uses, and cessation of use, to which Director Boling responded. Commissioner Wheeler also questioned staff's opinion regarding cessation and wondered what would happen if this were reverse. He argued that if a

portion of the use ceases, would we then say it is all operational. He presented a scenario to explain his point, and Director Boling responded accordingly.

**Commissioner Davis** sought to understand “the Jordan situation” mentioned earlier, and Director Boling gave his understanding.

**Commissioner Flescher** believed it was inappropriate to draw correlations with other existing cases. He asked what portion of the timeline would be considered a part of the hurricane recovery period; what was the timeframe; and was there any record of any reconstruction, or applications, or process for hurricane recovery. Director Boling responded to his questions.

**Attorney Collins** reminded the Board of the issue at hand and explained why The Source should be allowed to present its arguments first.

#### **PRESENTATION BY THE SOURCE**

**Attorney Steve Henderson**, representing The Source, said they would be presenting evidence on three issues: (1) under the County’s ordinance, did the activity as a residential treatment center cease for a period of one year; (2) whether the hurricane ordinance would excuse the cessation if it lasted for more than one year; and (3) this is a legal issue of equitable estoppel (when a person relies upon an official action by the County, in this case the zoning confirmation letter of July 10, 2006, and justifiably relies on that and expends money in reliance upon that.) He alluded that case law has imposed the doctrine of equitable estoppel to prevent the County from reversing that decision, even if the decision was wrong.

**Attorney Henderson** argued that because The Source did not buy the property until July 31, 2006, and because the period that is being examined is really the period before, they would present a witness, Linda Wakefield, from New Horizons, and the former owner of the property,

to provide details of exactly what occurred during the period of time from April 1, 2005, which was the date on which the residents at the Alcohope facility moved. He stated that Attorney Vitunac would discuss two cases that deal with the issues of cessation. Those cases stand for the proposition that in addition to actual use of the property ceasing, there has to be an element of intent to abandon. He also gave a brief description of the cases, their intent, and findings by the court.

**Attorney Henderson** suggested that as the Board listen to this testimony, he would like them to view it in the light of whether they detect an intent to abandon the residential treatment center use during the time-period in question. He contended that under the hurricane ordinance it would override the cessation provisions. He said there were three (3) hurricanes that occurred in that period of time, and the terms of the Ordinance are that the County has to be included in those counties that are declared disaster areas.

*(Clerk's Note: entered into evidence by Attorney Henderson, **Exhibit 1** – records from FEMA showing the disaster declaration numbers)*

**Douglas Vitunac**, Esquire, Collins, Brown, Caldwell 756, Attorney for The Source, presented case law in support of his arguments, the first being Sarasota vs. Bow Point on the Golf Condominium Developers, LLC, a 2<sup>nd</sup> District Court case from Florida, decided in October 26, 2007. Said case dealt with a grandfathered motel that had a change of zoning, but the doctrine of vested property rights allowed them to continue the use under the grandfathering status. Attorney Vitunac read the Circuit Court's decision on that matter, which concluded that here was a 13-month interruption of motel operation that was caused by necessary repairs and renovations and therefore did not trigger a discontinuance provision in the zoning ordinance. He believed that that discontinuance ordinance was very similar to ours, and he read that portion relative to non-conforming uses and cessation of use.

**Attorney Vitunac** discussed and argued the issues of due process and vested property rights, voluntary abandonment and voluntary cessation, and gave a Circuit Court opinion which was affirmed by the Department of Community Affairs (DCA). The case, Cook vs. the City of Lake Worth, Florida, published in the Florida Law Weekly [1 Fl Law Weekly, Supp. 383a] where the Petitioners bought a building (retail was permitted when they bought it); the zoning changed underneath them but they were grandfathered; then the economy went bad and they lost their retail tenants. He interjected that Lake Worth had a 6-month cessation ordinance. Upon appeal, the Court found that the doctrine of the vesting of property rights in nonconforming uses is based on the reluctance of courts to apply zoning ordinances retroactively and destroying existing rights. Attorney Vitunac hoped to show that New Horizons had attempted to sell this property for the same use.

#### **QUESTIONS FROM COMMISSIONERS**

**Vice Chairman Davis**, in reference to the case law regarding the Motel in Sarasota, asked whether there was a change in ownership in the process. **Attorney Vitunac** said, “No,” and explained the law on nonconforming uses, and property rights, which does not cancel grandfathering status.

**Vice Chairman Davis**, referencing the subject facility, asked if was there a Notice from the Health Department deeming it inhabitable or was that a choice made by the current owners. **Attorney Vitunac** promised to address those questions when Linda Wakefield is called to testify.

**Commissioner O’Bryan**, referring to the Sarasota case where Attorney Vitunac cited that the interruption of service was caused by repairs, asked if after September 2004, whether

Alcohope ever applied for any permits to initiate repairs on the property. **Attorney Henderson** said Linda Wakefield would respond to his query.

**Chairman Bowden** sought confirmation on Mr. Vitunac's or the court's definition of abandonment, and whether it meant it would have to be voluntarily, totally abandoning, and walking away. **Mr. Vitunac** affirmed as correct, and averred that they can show that the owners intended to try to sell it for this use, and the testimony of Linda Wakefield was intended to show that.

**ATTORNEY HENDERSON CALLED LINDA WAKEFIELD**

**Linda Wakefield**, 1742 Binney Drive, Fort Pierce, Operations Manager at new Horizons, in charge of facilities operation for 20 years, with 28 years with the company. In response to questions from Attorney Henderson, Ms. Wakefield explained the chain of events that occurred on the subject property on 37<sup>th</sup> Street, starting with Hurricane Frances in 2004. She described the state of the property prior to hurricane Frances; the damage to the property following that hurricane (noting that the bulk of the damage was sustained during Hurricane Jeanne); how they conducted repairs so the residents could move back in after being removed due to the damages sustained; and what occurred after Hurricane Jeanne hit in September 25, 2004. She said damage was significant and an alternate facility had to be sought for the clients.

**Ms. Wakefield** related that on October 5, 2004, the residents were moved back in although in less than ideal conditions. She revealed the purpose and mission of New Horizons, a non-profit organization facility, noting that they have been in business since 1958 and is the Behavioral Health Care Provider. She reported that the residents of Alcohope were permanently moved out on April 1, 2005; it was a planned move; and they were moved to a new facility called Hanley Hall, close to the Indian River Memorial Hospital. She explained why it was not the intent of New Horizons to terminate its campus residential treatment use as of April 1, 2005,

and the intentions of New Horizons after moving the residents out on April 1<sup>st</sup>. In response to questions regarding sale of the property, she said the property was listed for sale in December 2004.

*(Clerk's Note: entered into evidence by Attorney Henderson, **Exhibit 2** – a Listing Agreement with Lowes Realty)*

**Attorney Henderson** continued to question Ms. Wakefield asking whether there was any activity on the subject property after the residents were moved out. **Ms. Wakefield** replied that Case Management Services used the facility as a base station, and there was telephone use on the property until June 17, 2005. She described what took place after that in terms of seeking a potential buyer of the property, noting that they had been approached by a “faith-based” organization called “The Crossings,” (in the early summer months of 2005) who expressed an interest in taking over the Alcohope facility. There was discussion about doing a lease purchase agreement, and The Crossings began their due diligence process, which continued until late January 2006.

**Ms. Wakefield** identified the “Application for Sanitation Certificate” shown to her by Attorney Henderson. Said Certificate, she said, was issued by the Health Department for a commercial kitchen operator’s permit, which has to be renewed every year, and expires September of each calendar year. She read her comments as reflected on the form dated September 14, 2005, which states, “Facility is temporarily closed for repairs caused by Hurricane. Expect to re-open early 2006.”

*(Clerk's Note: entered into evidence by Attorney Henderson, **Exhibit 3** – copy of Application for Sanitation Certificate)*

**Ms. Wakefield** continued to answer questions from Attorney Henderson, and explained how their efforts of repairs failed with the onset of Hurricane Wilma in 2005, while they were still in the process of carrying out repairs on damages sustained from prior hurricanes. She also explained why the negotiations with The Crossings to sell the facility failed. She identified a copy of a letter from Jones & Jones dated October 1, 2006, as the proposal to do renovations at the Alcohope facility.

*(Clerk's Note: entered into evidence by Attorney Henderson, **Exhibit 4** – Letter from Jones & Jones with Estimates)*

**Ms. Wakefield** admitted that the efforts to have The Crossings occupy the facility ended in January 2006, and described the series of events that subsequently occurred. She said the Agency had a need to provide facilities for another program, the Mobile Crisis Response Team, and they felt the administrative building at Alcohope sustained the least amount of damage and that it would be easy to prepare that facility for Mobile Crisis.

**Ms. Wakefield** recounted the efforts made to have the building returned to habitable conditions, which activities took place from February 2006 to April 2006, including all the repairs undertaken to make the building habitable. Ms. Wakefield admitted that the Mobile Crisis Response Team moved into the property on May 15, 2006. She noted that May 2006 was when The Source showed an interest in the property, which was after the time the Mobile Crisis Team was located there. She identified a copy of the contract between New Horizons and I Am Ministries, Inc. dated June 21, 2006, which implied that The Source showed an interest in the property in May and entered into contract in June.

*(Clerk's Note: entered into evidence by Attorney Henderson, **Exhibit 5** – Contract between New Horizons & I Am Ministries, Inc., for Sale and Purchase)*

**Ms. Wakefield** in response to further questioning from Attorney Henderson disclosed that the closing on the sale of the property to The Source took place July 31, 2006, and they moved their Mobile Crisis Team to their outpatient department. To explain electrical usage on the property, she explained that they lost power to the site after hurricane Wilma, October 25, 2005, and that the electric was maintained during the period in question.

### **QUESTIONS FROM BOARD MEMBERS**

**Ms. Wakefield**, in response to **Commissioner Wheeler's** question regarding the water treatment plant, confirmed that the plant was replaced on May 11, 2006.

**Chairman Bowden** noted from one of the Exhibits that one of the out-buildings was not repairable and was to be torn down. She asked staff whether the building could be replaced if it is torn down. **Attorney Collins** said it depended on what building it was, and the usage. **Ms. Wakefield** said the particular building was used by their case management staff for counseling, and at the time they sold the facility, it was not torn down.

**Attorney Henderson** asked Ms. Wakefield if correspondence shown to her was a record of the payments made by New Horizons for electric utilities, and she answered affirmatively, noting that it was from the time period of June 23, 2005 through April 25, 2006.

*(Clerk's Note: entered into evidence by Attorney Henderson, **Exhibit 6** – copy of payments made by New Horizon for electric utilities)*

The Board and Ms. Wakefield discussed when the building was torn down. **Ms. Wakefield** said the building was subsequently destroyed by the hurricane but was still standing when they sold the property. **Chairman Bowden** therefore needed to know whether it could be

rebuilt under the grandfathering provision, and Director Keating replied affirmatively, noting that if a structure is destroyed by a storm or disaster and a national disaster is declared, it can be rebuilt; and there was no timeframe limitation on that.

**Commissioner O'Bryan** clarified with Ms. Wakefield the timeline when electric power was lost due to hurricane Wilma on October 25, 2005, and seven months later, on May 15, 2006, was when the Mobile Crisis Team moved into the administration building. **Ms. Wakefield** responded affirmatively, and pointed out that it was in April, however, that they noticed there was no electric power to the site, and power was restored on April 18. She responded to further questioning from Commissioner O'Bryan regarding electric payments, the date of closing, and what had happened to the May and June electric payments.

**Commissioner Flescher** requested that the overhead projection of the site be brought back. **Ms. Wakefield**, upon request, pointed out the damaged structure/building in question.

**ATTORNEY O'HAIRE CROSS-EXAMINED MS. WAKEFIELD**

**Ms. Wakefield**, in response to questions regarding her employment with New Horizons, said she was never employed by Alcohope. She gave a history of ownership of Alcohope, Inc., which she said was formed in the year 2000; New Horizons had administrative responsibility for Alcohope until it transferred to its new location at Hanley Hall in April 2005; and Alcohope's personnel were paid by New Horizons. To the question of who was running Alcohope, she said Alcohope's staff and Executive Director were staff members of New Horizon, and New Horizons was running Alcohope until the time they moved in 2005.

**Ms. Wakefield** answered further questions regarding use of the facility after Hurricane Jeanne. In response to staff's statement that the County has no record of any building permits

issued for repairs, permanent or temporary, she recalled that repairs were made by their maintenance staff, which she classified “temporary repairs”; the roof had significant damage, and the photos displayed earlier showed that even in 2005 there was still blue tarp on the roof, so there would not have been applications for permits.

**Ms. Wakefield** admitted that in October 2004, she moved residents back into the Alcohope facility and they stayed until Hanley Hall opened in April 1, 2005. She responded to questions of the time the Mobile Crisis Unit moved in (in May 2006), when power was restored, an inoperable water treatment plant, removal of furnishings by the maintenance crew, whether there was furniture when the Mobile Crisis Team moved in, and the Jones and Jones report.

**Attorney O’Haire** questioned the Listing Agreement, in particular, the occupancy clause that states, the “property is not currently occupied by a tenant.” He noted that the Agreement is dated December 6, 2004, and asked if that was a correct statement on the Listing Agreement.

**Ms. Wakefield** said that was not a true statement; was not aware that the listing agreement was not signed by anyone. She was sure the Agreement was put into effect because Lowe’s was the Realtor that managed the closing for the Source in July. She knew that they sold it, but did not know whether it was according to the terms of this listing.

**Attorney O’Haire** objected to the Listing Agreement because it was never signed by anyone, and to the Jones correspondence as being irrelevant. He explained to Vice Chairman Davis the basis for his objection to the Listing Agreement.

**Ms. Wakefield** responded to questions from the Board of whether a fully executed copy of the Agreement existed. She was sure there was a signed copy on file because she had conversations with the former CEO Mr. Quam who indicated that he put the property on the

market because he was attempting to find somebody to provide services to indigent clients once Alcohope moved to its new location.

**Attorney O'Haire**, in the absence of Mr. Quam for questioning, moved that the Board strike any testimony of Ms. Wakefield about what Mr. Quam might have had to say because he was not present for questioning.

**Attorney Henderson** suggested to the Board that the value of this documentary evidence, they could judge for themselves as to whether to give it credibility or not; and further, that a Motion to strike at a hearing like this was not appropriate. He contended that the documents (Jones & Jones - Exhibit 4) are relevant in the sense that it shows in monetary terms the extent of the damage that existed on this property.

**Attorney O'Haire** continued his questioning of Ms. Wakefield regarding repairs to the administration building at the time of purchase of the facility. She said the repairs were made from the period of February 2006 to April 14, 2006, without water and without power.

*The Chairman called a break at 2:06 p.m., and reconvened the Hearing at 2:21 p.m., with all members present.*

**ATTORNEY HENDERSON CALLED PASTOR CRAIG BRIDGERS**

**Craig Bridgers**, 6109 Sunset Boulevard, Fort Pierce, Senior Pastor of The Crossing Community Church, at the request of Attorney Henderson, shared with the Board how his interest was perked in this property and what took place during late 2005 to early 2006. Mr. Bridgers explained his purpose for the property purchase, and how he became aware of the subject property. He recounted how his initial contact was with Hanley Hall, which referred him to Realtor, Mr. Lowe, who told him of New Horizon. He said they already had collaboration

with New Horizons in District 19, so he bypassed Mr. Lowe and contacted Mr. Bob Quam, and was subsequently introduced to Linda Wakefield. Mr. Bridgers disclosed that they never signed a contract with New Horizons to buy the property; they were only collaborating together to work as agencies for the betterment of the individuals. He acknowledged that he obtained an estimate for repairs of the property from Jones & Jones, which he identified as Exhibit 4.

**Attorney O'Haire** questioned Mr. Bridgers regarding the time he broke into the Alcohope facility (June 2005) and whether there was anyone occupying the property at the time. He saw no one there at the time; O'Haire's objection to the Jones & Jones estimate is that it is not relevant in relation to something that never came to be or passed.

**Attorney Henderson** explained to Vice Chairman Davis the relevance of the Jones & Jones documents, which he introduced to show the extent of the repairs necessary as it relates to the condition of the property.

**ATTORNEY HENDERSON CALLED TOM KING**

**Tom King**, 5525 16<sup>th</sup> Street, Vero Beach, Pastor & Executive Director of IM Ministries, under questioning by Attorney Henderson, explained the difference between The Source and I AM Ministries, stating that I AM Ministries is a 501C3 non-profit corporation, doing business as The Source. He explained how he became interested in the site at 37<sup>th</sup> Street, and how he sought to acquire the property. He signed the contract, and requested a letter from Planning & Zoning (P&Z) staff that the use he intended would be permitted; and he received a letter from P&Z staff dated July 10, responding to use of the property.

**Mr. King** thought the closing took place July 28 although Attorney Henderson had said earlier that it was July 31<sup>st</sup>. He admitted seeking mortgage financing of \$200,000.00 with U.S. Trust, and confirmed as correct the document shown to him by Attorney Henderson, reflecting

a summary and detailing expenditures by The Source, for the subject property, including the purchase price, and certain repair work that was done by Mr. King. He disclosed that they have a \$500,000.00 commitment with exception of the grant expenditures for the reconstruction. He stated that he had spent \$65,800.00 since the closing, for repairs and restoration of the property, and he described some of the work done on the property representative of the \$65,800.00.

*(Clerk's Note: entered into evidence by Attorney Henderson, **Exhibit 7** – Life Recovery Center expenditures as of 04-15-08)*

**Attorney Henderson** continued questioning Mr. King regarding money spent on repairs of the property after the purchase in July 2006.

**Mr. King** replied that they finished up the plumbing and electrical work, and explained why the project was delayed until February 13, 2007. In answer to the question of what he would do with the property if he is unable to use it for the intended purpose, Mr. King said he probably would have to look at what options are available to him, perhaps go into affordable housing or sell it. He affirmed that an appraisal was obtained in connection with the purchase of the property, (\$450,000.00) and at that time they were operating under the assumption of approved use. He divulged that the appraisal stated that the value in use was \$230,000.00.

*(Clerk's Note: entered into evidence by Attorney Henderson, **Exhibit 8** – copy of Boyle & Drake, Inc. Appraisal)*

**ATTORNEY O'HAIRE CROSS-EXAMINED TOM KING**

**Attorney O'Haire** questioned Mr. King in connection with his purchase of the property and at what point he got a lawyer involved.

**Mr. King** recalled that during the process of purchasing the property, he had legal advice from Jim Shroener, the Attorney who sits on their Board, and they later reserved the services of Attorneys Bruce Barkett and Steve Henderson after they had been notified that Attorney O'Haire had sent a letter. To the questions of what he did to verify his entitlement to an Alchope sort of use for the property, and whether he made any independent effort to verify that he would be able to use the property, Mr. King replied that they contacted New Horizons. He acknowledged that an attorney attended the closing with him; and he had not obtained affidavits from anyone connected with New Horizons or with Alchope as to what their use of the property had been and what period of time it might have covered. He admitted that at the time of closing, everything was not repaired and in working order.

**Attorney O'Haire** had no further questions, and **Attorney Henderson** said that concluded their presentation.

#### **ATTORNEY O'HAIRE QUESTIONED COUNTY STAFF**

**Attorney O'Haire**, before his presentation, asked Planning Director Stan Boling if he had reviewed and approved the letter written by John McCoy on July 10, 2006. **Director Boling** recalled that he was gone during the period the letter was sent, and did not think he saw it before it was sent out.

**Attorney O'Haire** asked further if Director Boling had made any effort to verify, investigate or do any due diligence past what the letter from Tom King requesting a letter from staff set forth. **Director Boling** said staff investigated the zoning, the use, some of the history of the property, and what the use had been on the property. He believed John McCoy had an understanding that there had been some use of the property and that there had been some hurricane damage to the property. To the question of whether or not he knew if he or anyone else from staff talked with Alchope about the property, he replied that he was not aware of that.

**PRESENTATION BY ATTORNEY O'HAIRE**

**Attorney O'Haire** argued that this is a stealth land use decision because it was made without notice to anyone, without an opportunity for anyone to be heard, and without an opportunity for an estoppel. He deemed that a huge part of the problem is that the due diligence that should have been done in connection with the six-figure closing of a non-residential property just did not get done. He reminded the Board of earlier arguments about estoppel and reliance on the letter; he talked about how real estate lawyers operate in these instances; and disclosed that he talked with Attorney Bruce Barkett who said he doesn't know anything about the property, or any use of the property before his client, The Source, purchased the property.

**Attorney O'Haire** viewed talk of estoppel as a meaningless concept, when one has not taken any actions to protect oneself. He voiced that we all know, and it's clear from staff's treatment of the matter, that residential treatment centers are permitted in only one residential category under current zoning (M8-10) the high density category; and they are not permitted in the subject area under the zoning unless they are legitimately grandfathered. He said the facility started out as a summer camp for kids, which is a lot different from a residential treatment facility for recovering alcoholics, and different from the sort of homeless refuge that has been proposed. He believed the use is only permissible if it is appropriately grandfathered, and he suggested to the Board that it is not a compatible use with the homes around it.

**Attorney O'Haire** referenced section 904.08 of the Code, which, he said, is really what this issue and this part of the appeal is all about, and what PZC considered and had based its decision on. He cited a portion of Code Section 904.08(1), "Cessation of a nonconformity for one year" that states, "If, for any reason, a nonconforming use of land, a nonconforming structure or an establishment having a site-related nonconformity ceases operation for a continuous period of one year or more, all nonconformities shall be considered terminated and shall not thereafter be reestablished."

To show that these entities are completely separate and independent of each other and have been since the year 2000, Attorney O'Haire submitted into the record a Report from the Secretary of State's Office, which described Alcohope as a separate and independent entity from New Horizons of the Treasure Coast, whose principal address is 4500 West Midway Road, Fort Pierce, Florida and as of 2008, the address of Alcohope is 3395 11<sup>th</sup> Court.

*(Clerk's Note: entered into evidence by Attorney O'Haire, Exhibits 1 & 2 – copies of the registration with the Florida Department of State, Division of Corporations, for Alcohope of the Treasure Coast, Inc., and New Horizons of the Treasure Coast, Inc.)*

**Attorney O'Haire** alluded that what has to be shown in order to terminate a nonconforming use is an intentional abandonment of a piece of property, and suggested to the Board that they are able to show that, in the case of Alcohope. He presented a copy of the Lease Agreement between Alcohope of the Treasure Coast, Inc., and Health Systems of Indian River, Inc., (*Exhibit 3*) and called attention to certain provisions of said contract which he deemed were significant to whether or not there was a legitimate grandfathering that The Source can piggyback on.

*(Clerk's Note: entered into evidence by Attorney O'Haire, Exhibit 3 – Lease Agreement between Health Systems of Indian River, Inc., and Alcohope of the Treasure Coast, Inc. )*

**Attorney O'Haire** argued the issues of Alcohope's contractual obligation to build, and its intent and commitment to move the facility from 37<sup>th</sup> Street. He pointed to the Lease Agreement [page 5 (c) ] that states that the Treatment Center shall be completed and a certificate of occupancy for the Treatment Center shall be issued and received no later than the 1<sup>st</sup> day of September, 2004. Therefore, he discerned, if things had gone according to plan they would have been in their new facility before Hurricanes Frances and Jeanne hit the County.

To show that Alcohope and New Horizons had severed relationship before October 2003, Attorney O’Haire cited portions of the Lease (Page 13, subsection (d)) which stated that “Lessee has recently amended its Articles of Incorporation to remove as its sole member, New Horizons of the Treasure Coast, Inc. At the same time, he said, the Hospital Corporation subsidiary and Alcohope of the Treasure Coast entered into an Ingress Egress Drainage and Utility Easement Agreement providing Alcohope the right to use hospital infrastructure, which was also dated October 9, 2003, and recorded in the public records (IRC) November 11, 2003 .

*(Clerk’s Note: entered into evidence by Attorney O’Haire, **Exhibit 4** – Ingress/Egress Drainage and Utility Easement Agreement)*

**Attorney O’Haire** concluded that it was clear that in 2003, Alcohope had the intent and the commitment to move its facility to the hospital campus, and they had leased the property to do that. He provided proof from an Alcohope 2005 Newsletter which reads, “Alcohope has moved - New address above.”

*(Clerk’s Note: entered into evidence by Attorney O’Haire, **Exhibit 5**, Alcohope’s 2005 Newsletter)*

**Attorney O’Haire** noted that attached to the exhibit was the April 2005 calendar, which showed that the meeting dates in the Newsletter coincided with the calendar for 2005, and that indicated that Alcohope had moved everything away from their former facility, and in accordance and agreement with its commitment of 2003, to the Indian River Hospital subsidiary. He also noted that there was admission on the part of The Source that this happened, as shown in the letter from Bruce Barkett to John McCoy, dated September 27, 2006, confirming that Alcohope had left the 37<sup>th</sup> Avenue property in April of 2005.

He summed up the reasons why New Horizons therefore has no interest in or right to occupy the Alcohope site because they were piggybacking also on the Alcohope use of the property, which has ceased to exist. He argued that there was nothing to show occupancy or use of the property from the period April 2005 until May 2006; May 2006 was simply too late under the provisions of our zoning ordinance; and that the storms could not have had anything to do with the decision to abandon the facility. He argued the issue of abandonment and called Steve Metz to attest to the facts of abandonment.

**ATTORNEY O'HAIRE CALLED STEVE METZ**

**Steve Metz**, 5980 37<sup>th</sup> Street, in response to questions from Attorney O'Haire, described the location of his home in relation to the subject property. He has lived at his current location since 1986 and has a clear view of the property from his residence. He could recall a time when the Life for Youth Camp was located at the Alcohope facility; and the last time he saw the property in use was when his wife visited the property and informed him that it looked like the occupants had vanished overnight and left the doors open. He also recalled that the property might have been vacant months before the storms rolled in; and he visited the site after it was abandoned because he liked to visit the pond and fish.

**Mr. Metz** recounted that in 2004, prior to the storm when he went on the property, he did not observe anyone there - no office workers, no cars, no one who looked like they were living there, and there were open doors. He said there were no signs of occupancy or life on the property back then, and did not notice any use of the office building in the complex. His personal observation was that all use of the property was abandoned for over a year. He recalled that the use stopped before the storms and he did not see any use after the storms.

**ATTORNEY HENDERSON CROSS-EXAMINED MR. METZ**

**Attorney Henderson** reminded Mr. Metz of the testimony of Linda Wakefield who testified that residents were on the property prior to the storms; they were moved out for a period of time; they reoccupied the property and then moved out entirely on April 1, 2005. He asked Mr. Metz if he disagreed with that.

**Mr. Metz** said he disagreed because he did not recall it, and he did not know if Ms. Wakefield was lying. Mr. Metz recounted how he visited the property about 2, 3, or 4 times a week, riding his bike, and there was no one there, or any “no trespassing” signs. He said it basically became a neighborhood hangout; and he had done those activities with friends, neighbors, and his kids.

**ATTORNEY O’HAIRE CALLED ERIN METZ**

**Erin Metz** (nee O’Haire), 5980 37<sup>th</sup> Street, recollected that it was before the hurricanes that she noticed the site was totally abandoned. She frequented the property with her kids, before the storms, and saw no signs of life there at all; nor any parked cars, office workers, nor anybody who looked like they have been living there. She had never seen anybody there since she had been going on the property. She recalled that it was May of 2006 that she first observed a “For Sale” sign, and she was certain because she had called the week before and was told they were going to begin using that front building for their case workers working out in the fields, so they could have some place “to land” instead of having to return to their office in Fort Pierce. She did not observe, for the preceding entire year, anyone using the office.

**ATTORNEY HENDERSON CROSS-EXAMINED MS. METZ**

**Attorney Henderson** reminded Ms. Metz that she and her husband made reference to the status of the property before the storm, and noted there was a storm (Hurricane Wilma) in 2005 as well. He asked Ms. Metz if she was sure she was not confused as to the identity of these

hurricanes. **Ms. Metz** replied that to the best of her knowledge it was before the 2004 hurricanes, because she did not believe they boarded up for the 2005 hurricanes.

**ATTORNEY O'HAIRE CALLED KEITH HEDIN**

**Keith Hedin**, 6030 37<sup>th</sup> Street, has lived at this address since 2002 with his family, across the street from Alcohope. He explained that he has had occasion, everyday, coming and going from his house, to look into the Alcohope property; and that prior to the 2004 storms he trespassed on the property when he rode his ATV in the lake. He remembered the property was vacant before and after the storm, and could not state specifically the date Alcohope packed up and left, but was sure it was prior to the storms of 2004. He could not say that anybody else occupied the property after Alcohope left, and the only activity was when the new owners bought the property and moved in dumpsters, and semi-trailers, among other things, and that was in 2006.

**Mr. Hedin** observed that by that time the property had been continually abandoned for more than a year. He also noticed that doors, air conditioning and window units were gone, and there was no one there. The only real repairs, he noticed, happened in 2006 when the new owners took over. Mr. Hedin said he researched and found out that the roof did not get permits (for repair work) until 2006. Mr. Hedin obtained roofing, plumbing and air conditioning permits for September and October 2006, from the County, the first time any permanent repairs had been done.

*(Clerk's Note: entered into evidence by Attorney O'Haire, **Exhibit 6**, Permits – 1 Mechanical, an inspection history print [remodel bathrooms] and 4 roofing)*

**Mr. Hedin**, in response to the question of whether he was sure, in his own mind, that the property was abandoned at some point prior to the storms of 2004, replied, “Absolutely.” He was also absolutely sure that the facility was abandoned for at least a year continuously before it was purchased by The Source in May of 2006. He never observed any repairs being done, and said the only repairs that happened were the blue tarps placed on the roofs, but the building was never occupied. He attested to the abandonment of the property, revealing that he was the one who told Waste Management to stop coming because there was no one there, and he had asked the driver of the Florida Gas propane truck if it was not kind of odd that he kept coming and not putting anything in. He said the building was wide open and he could have taken anything he wanted.

**ATTORNEY HENDERSON CROSS-QUESTIONED MR. HEDIN**

**Mr. Hedin**, in response to questions from Attorney Henderson, said he moved into his residence in 2002; built his own home; and was aware of the use of the property as an Alchope facility.

**ATTORNEY O’HAIRE CALLED RAY METZ**

**Ray Metz**, 5960 37<sup>th</sup> Street, (without questioning from Attorney O’Haire) spoke about his timeline, the Source’s timeline, and the decision the Board has to make (whether the residential treatment stopped for over a year.) He too believed Alchope moved out around the time of the first hurricanes. He did not go on the property in 2004, but after that, and in subsequent years, he frequented the property with his kids. As he rode on the property, he could see doors left open, air conditioning units had been stolen, and windows were broken.

**Mr. Metz** exhibited and talked about a letter from John McCoy to Bruce Barkett seeking to know what happened on that property. He read the response to Mr. McCoy, and presented

more evidence to show there was no residential treatment taking place in the period discussed. He compared timelines from staff and Linda Wakefield and insisted there was no activity, and that the property was vacant during the period. He resides across the street from the subject facility with his wife and five children, and declared that this is a commonsense issue and a safety issue. He argued the use of the property and asked staff how the County would react if the use is allowed, and Mr. King sells the property, and the new owner wants to turn it into a residential treatment center for sexual predators.

**Director Boling** was not sure that was an issue they would get into. To get into that issue of use, staff would probably have to look to see if there were any other laws, State or County.

**Mr. Metz** reiterated that this was a safety issue, especially for children, and he was concerned because there was the potential for 18 convicted criminals to be living across the street from his home. He wished the facility could be placed in another area that is suitable, remarking that it doesn't belong in any neighborhood.

*The Chairman called a break at 3:46 p.m., and reconvened the Hearing at 3:57 p.m., with Administrator Baird absent.*

**Attorney O'Haire** resumed his arguments by reflecting on the timeline prepared by Linda Wakefield. He pointed out that the timeline (chronology: Alcohope, p. 128 of backup) showed that on April 1, 2005 residential clients and telephone services linked to the Alcohope program were moved to Hanley Hall, and reasoned that since Case Managers have already been relocated, all facilities on campus were now vacated. On May 15, 2006 (according to page 129 of the backup chronology) the Mobile Crisis Response Team members Chris Paganelli and Robert McGuire moved into the Administration Building. That was too late, he argued, because that was more than a year later, and there was no grandfathering anymore for any purpose at all.

**Attorney O’Haire** suggested that all that was heard about timelines occurred after John McCoy wrote his letter; none of it was available to John McCoy when he wrote his letter, and the Planning and Zoning Commission zeroed in on that point and chastised Planning. He concluded his presentation by introducing an audio-visual clip of the Planning & Zoning Commission meeting of 12/04/06 to show what transpired at that meeting.

*(Clerk’s Note: entered into evidence by Attorney O’Haire, **Exhibit 7**, a CD of PZC meeting of 12/04/06 discussing Alcohope/New Horizons and The Source)*

*(Clerk’s Note: Administrator Baird returned at 4:02 p.m.)*

**Commissioner Flescher** requested clarification to earlier comments by Ms. Metz that she was told that “the group would have a place to land.” **Ms. Metz’s** understanding was that case workers in the field would have a place to sit down to work, without having to return to their office in Fort Pierce. The only activity she saw at the facility was in May when she witnessed a couple cars there, just before the “For Sale” sign went up.

**ATTORNEY HENDERSON RE-CALLED LINDA WAKEFIELD**

**Attorney Henderson** reminded Ms. Wakefield of the Metz’s statements that prior to the storms the facility looked abandoned and stayed abandoned until May 2005. Ms. Wakefield reaffirmed her prior testimony that residents were in residence immediately prior to the September 2004 hurricanes.

**Ms. Wakefield** affirmed that the facility was evacuated due to Hurricane Frances; and that the residents were moved back in for a very brief time after Hurricane Frances had passed. She also recalled that Hurricane Jean forced another evacuation. In response to whether there

was a time after Hurricanes Frances and Jeanne that the residents were moved back in prior to their departure on April 1, 2005, Ms. Wakefield said it was October 5, 2004. Attorney O’Haire asked Ms. Wakefield if she could explain why the place might have appeared vacated to area residents in 2004, and she thought perhaps they were confusing the hurricanes (Wilma versus Jeanne and Frances). Looking at her journals, she was positive that her timeline is accurate.

**Chairman Bowden** asked Ms. Wakefield if she physically saw people at Alcohope during the questioned period. **Ms. Wakefield** saw them there in early 2005 (February maybe).

**Vice Chairman Davis** also questioned the time period of occupancy, where, according to Ms. Wakefield’s testimony, the facility was vacant 4/1/05 and it was not reoccupied until 5/16/06, which is more than a 12-month period.

**Attorney Henderson** said they conceded that and explained that they have not been arguing that. He said the intended use of the property by The Source is really irrelevant, but there has been testimony regarding that and he felt like he must clear that up, and would ask Tom King to return for questioning.

**Commissioner Wheeler** said if it would make a difference, he agreed with Attorney Henderson, and felt the testimony and what the use of the facility is, was irrelevant. He explained why it made no difference.

**COMMENTS FROM COUNTY STAFF AND BOARD MEMBERS**

**County Attorney William Collins** presented the issue as it has been framed by Attorney O’Haire “that there has been cessation of use for over a year,” noting that even by the chronology of New Horizons as presented (at page 128 of backup) and the burden of proof approving abandonment of non-conforming use, lies with the party asserting that abandonment.

He stated that The Source has shown through its own testimony and the chronology of New Horizons that the property was not used or occupied at least for a period of over one (1) year; and that creates the presumption of an intent to abandon the property and puts the burden back on the property owner to rebut the presumption of abandonment, and that would be up to Attorney Henderson to do at his closing.

**Attorney Collins** argued that ultimately there was a contract because there was a later contract with Lowe's Realty in which the property was sold from New Horizons to I AM Ministries, despite the unsigned listing agreement which Attorney O'Haire objected to earlier. He reminded the Board that the argument is, the listing agreement showed there was not a consistent attempt to sell, but the issue for the Board is, was there an intent to abandon or were they making good faith efforts to have the property put in a status where it could be occupied.

**Attorney Collins** discussed the rule of abandonment, and whether the effort to put the property back in use was made. He pointed out that there has also been some evidence with respect to the hurricane permits, that the permits were not applied for in 2004/2005, but there were blue tarp temporary repairs done to protect the property; and that the permits were not actually applied for to do the repairs until two years later when I AM Ministries/The Source had actually closed on the property. He felt that was attempting to demonstrate that there was no effort by the Sellers to do repairs during that period, when they could, under the hurricane reconstruction period, have gotten more than one year for cessation. He submitted to the Board that the rule being argued was, if use ceases for any period greater than a year, it is considered abandoned and nonconformity is lost.

**Attorney Collins** noted that the exception that the staff pointed out was for hurricane situations where there were no reconstruction timeframes, and the ability to put property back in use may take substantially more than one year. Therefore, the issue perhaps is, was that effort put forward to get the property back in use or was it simply marketed haphazardly and any

improvements done by the seller after closing. That was generally how he understood Attorney O'Haire's arguments, and felt it was in Attorney Henderson's court, in the Closing, to show that there was not intentional and voluntary abandonment; and that there were consistent efforts to go forth and make the useable property as it formally had been used as a residential treatment center.

**Director Boling** reiterated that staff had reviewed this and partially relied on data from Mr. Barkett's letter dated September 27, 2006. Looking at the timeline, he asked if there was some portion of the site used or some component of the residential treatment center use going on, intermittent or sporadic, or did the use completely cease for any 12-month period. Under the reconstruction aspect of Section 904, he asked if that modified or applies to the cessation of use.

**Director Boling** argued other points of consideration as follow: If the Code says you are allowed to rebuild a nonconforming use or structure that houses a nonconforming use, do you get to use it; does the Code allow you to rebuild a structure that has been damaged by the hurricanes, but not let you use it for the previous use or not. He said staff's reading of Section 904 and the practice of the County has been to allow that timeframe to be modified when there is hurricane damage involved, and there is nothing in Section 904, he continued, that speaks to how long one has to recover from a hurricane. Therefore, we do not apply one (that provision) and have not done so for people recovering with repairs.

**Commissioner O'Bryan** questioned staff regarding Section 904 of the Code that deals with hurricanes and recalled that said section referenced another section of the Code. He asked Director Boling if that was correct.

**Director Boling** affirmed it was correct, and elaborated that that specific Section of the Code that is referenced had to do with the 50% threshold (if a building is damaged, 50% or less one could rebuild it; and if it is damaged 50% or more one could not rebuild it.)

**Commissioner O'Bryan's** next question was to County Attorney Collins, asking if Alcohope moved all their activities on April 1, 2005, and they were no longer affiliated with New Horizons, then was it a moot point whatever happens after that because it was not under Alcohope, which was the owner of the property, and they had disassociated themselves from New Horizons.

**Attorney Collins** said the fact that the tenant left to go to Hanley Hall does not mean that the property loses its status as nonconforming. He thought it was then up to the owner to maintain that nonconforming status through reconstruction or sale or lease to a new tenant.

**Commissioner Flescher** asked staff what waivers, amnesty, or lack of obligation was applied, for the permitting process for residential or commercial, at the time of hurricanes. **Director Boling** explained the provisions of the reconstruction (the 50%) rule, saying there was nothing in the Code, and we have not applied a timeframe, for how long a person may take to effect repairs because of damages from a hurricane. He said if there was no amnesty one needed to have a building permit.

**Vice Chairman Davis** needed clarification on the 50% rule of grandfathered structures, and **Director Boling** explained the section of the Code that deals with reconstruction of non-conformities.

**Chairman Bowden** asked Director Boling to explain how damages are assessed, and **Director Boling** said it was with difficulty, because they have to determine which building was damaged because of a hurricane and which was not.

**Commissioner Wheeler** asked how staff determined if the grandfathered clause applies to this; and would they have ruled the same way knowing and hearing all they had today.

**Director Keating** said it keeps getting more confusing and the facts keep getting more muddled. He said they were still operating under the provisions in Bruce Barkett's letter, that there was a crisis counseling staff out there from right after 2005 until 2006. Therefore, staff's determination was based on the fact that the use never completely stopped. However, hearing both arguments, he felt they were even more unsure after today than they were before.

**Commissioner Wheeler** remarked that after today, we need to look at our procedure on these things.

#### **CLOSING ARGUMENTS BY ATTORNEY HENDERSON**

**Attorney Henderson**, sought to disprove cessation of use, based on the earlier testimony of Ms. Wakefield. He admitted that the property was vacated on April 1, 2005 by residents and that buildings were in use by employees, the Mobile Crisis Response Team that moved back in on May 15. Therefore, at first glance, one might argue that there is a one-year period that the property was not in use, and therefore the ordinance requires that the nonconforming use is no longer valid. But he is saying that is not quite the case, and it is not the proper analysis, because there has to be shown an intent to abandon the use. He referenced an earlier point by Attorney O'Haire who contended that Alcohope signed a lease in 2003 to move elsewhere, which proved they intended to abandon their operation. That, he felt, was not the criteria, because according to testimony they did not move out until April 1<sup>st</sup>.

**Attorney Henderson** argued that the criterion was, what did New Horizons intend. He recapped the testimony from Linda Wakefield and the Pastor from the Crossings which purports that there was an effort being made from April 1, 2005, all the way to the acquisition of the property by The Source, to find a buyer for the property that would use it as a residential treatment center. Ms. Wakefield also testified that the Director of New Horizons recognized the

fact that the facility being built at Hanley Hall was going to be a “for-fee” facility, that they needed a place for residential treatment facility at no fees.

**Attorney Henderson** referenced the one-year listing agreement with Lowe Realty, starting in December 2005 and ending December 2006, to show there was proof of activity that the owner of the property, New Horizons, was attempting to find a buyer for the property. He believed that the proof that they submitted concerning that listing of the property for sale, rebuts any presumption that there was an intent to abandon on the part of New Horizons. And that, he contends, fits squarely within the Lake Worth case discussed earlier.

**Attorney Henderson** felt that the activity regarding repair to the property that took place from the end of the hurricanes of 2004 and at various points in between, also shows a lack of intent to abandon the property, and that it fits squarely within the Bow Point Case cited earlier, where the motel owner was conducting repairs for a period of 18 months and the city in that case was trying to shut them down because he had gone over the one year. Therefore, that should, on the issues of cessation only, lead the Board to a conclusion that there was no intent to abandon the use of this property by New Horizons. Adjunct to that, he said, there was the hurricane ordinance, and they have submitted proof that there were in fact three hurricanes during that period of time (Frances, Jeanne & Wilma), all declared natural disasters. Therefore they think this property qualifies under that ordinance; and as Director Boling indicated, the ordinance has been interpreted consistently in this County as excusing an owner of a nonconforming use of structure from the application of the one-year cessation period. He pointed out that in the John McCoy letter dated October 3, 2006, it is shown that staff relied heavily upon that ordinance; and relied more on that than on the question of whether there was a complete cessation of use of the property for a period of one year.

**Attorney Henderson**, in conclusion, reminded the Board that he had mentioned earlier the concept of equitable estoppel. He remarked that he did not have a realistic expectation that

the Board would rule that they are estopped from reversing this, if that was what they wanted to do, because most Boards would not agree with equitable estoppel. He argued that when his client signed the contract to buy the property, the client conducted due diligence and conducted it in a manner that was sufficient. He believed that if one gets a determination letter from the County, they should be able to rely on that and not have to conduct their own investigations into the facts on which the County relied.

**Attorney Henderson** then alluded to Attorney O’Haire’s criticism of The Source for not hiring an attorney to look into the background of that determination, and asserted that being a lawyer for a long time, he would have accepted that kind of determination letter as being reliable. He pointed out that to date, his client has spent over ½ million dollars on this property, which will not be recovered, if they are not able to develop this residential treatment center. He believed Attorney O’Haire’s witnesses are confused on the question of when the property was vacated, because Hurricane Wilma occurred in October 2005 and at that time the property had been vacated, so if that is the hurricane they are thinking of, then there is no inconsistency in the testimony. But if they are talking about prior to September of 2004, The Source’s testimony and the proof presented shows that the property was actually occupied by residence during that time. He noted that when questioned about whether the property had been vacated prior to the storms of 2004, the witnesses used expressions like, “I believe,” “to the best of my knowledge,” and giving the benefit of the doubt, Attorney Henderson believed they are confused as to 2005 and 2004. He reserved the right to make a final response.

### **CLOSING ARGUMENTS BY ATTORNEY O’HAIRE**

**Attorney O’Haire** began with the issue of whether there was confusion of the date of the hurricanes, and argued that there was no confusion and that the witnesses knew which storm they boarded up for. He therefore did not think confusion was an issue, and felt the real basic issue

was not any use of the property by New Horizons, because New Horizons did not use it for anything until Alcohope had left. He pointed out that what The Source is trying to do is piggyback on Alcohope's use of the property, and it is known that Alcohope, in October 2003 had made the decision, and not just an intention, but had made a legal commitment to leave that property before there were any storms, by signing a lease with the hospital entity, and promising to build a new facility on the hospital campus.

**Attorney O'Haire** argued that there is no ambiguity that Alcohope intended to abandon the property, because they did on April 1, 2005. He suggested that there could be no debate or arguments in that regard because there was no one from Alcohope to counter what Alcohope actually did, and that was, they promised to leave in 2003 and left in 2005. He alluded to references from Attorneys Henderson and Vitunac about a case involving a property owner who had the intent to lease the property, and felt that was not the same as having an intent to sell the property. He argued that when one leases a retail property and intends to continue to lease it, that person intends to use it as retail to successive tenants. But when one intends to sell a property one has no control over what a new owner is going to do and so the intent is not to have a continuing use. He contended that it cannot be, because it is not going to be your use once you sell it. He further argued that an intent to sell is not the same as an intent to lease, because it does not indicate any intention about what use the property would be put to. Therefore the cases do not give any guidance at all.

**Attorney O'Haire** thought the hurricane waiver was a total "red herring," because Alcohope was leaving before there was any storm; and they left after the storm had occurred, as they planned to do before there was any storm on the horizon. Therefore, they are not entitled to any additional time for repairs. He argued that New Horizons use of the property was all through the testimony of Ms. Wakefield, and questioned where were the people she claimed were working on the property after April 1, 2005, and why we have not heard from any of those

workers. Attorney O’Haire contended that the neighbors know best and they did not hear from anyone who was working on 37<sup>th</sup> Street.

**Attorney O’Haire** submitted to the Board that there was no evidence and they have to base their decision on what the courts call “competent and substantial evidence.” In summation, he reiterated that the property was abandoned by Alcohope; they intended to abandon it; their intention was clear from the lease that they signed; it was abandoned, and their timeline proved they did it. He submitted to the Board that they have no option but to say the use was not grandfathered, and it was an incompatible and an inappropriate use. Because what was once perhaps a compatible or an appropriate use, is not right any longer, especially after it has been abandoned.

**ATTORNEY HENDERSON’S REBUTTAL/FINAL STATEMENT**

**Attorney Henderson** deduced from Attorney O’Haire’s “excellent presentation” that he apparently wanted a strict interpretation of the one-year provision, but a not so strict interpretation of the provision dealing with the filing of appeals.

**Attorney Henderson** re-emphasized that he did not believe it is relevant as to what the intentions of Alcohope were at the time; the arguments are about a nonconforming use; and the owner at all times was New Horizons. He believed the question is whether they intended to abandon this use on a permanent basis. The evidence shows that they did not, because they were trying to find a substitute owner that would do the same thing as Alcohope was doing, and because they were making repairs. Further, if they had intended complete abandonment, they would have abandoned the place and not even bothered with repairs.

### **FINAL COMMENTS FROM BOARD MEMBERS**

**Chairman Bowden** invited comments from all Board members.

**Commissioner O'Bryan** referred to inconsistencies in the evidence presented and noted that Mr. Lowe was not there to verify the real estate lease; there was no original signed copy; and there was no true date on the lease to show that it did go into effect. He gave his understanding of the issues as presented, and remarked that the biggest thing in his mind was the timeline provided by New Horizons (beginning April 1, 2005 when the facilities on campus were vacated). There was also the June 2005 breaking and entering; and when power went out in October 2005, which was not restored until April 2006 and then the Mobile Team came in May 2006, which, in his timeline, is greater than 12 months. Commissioner O'Bryan believed this goes back to the 50% rebuild rule and does not apply to the continuing use criteria. He did not see that the use was continued within the one-year period, and thought the one-year period was valid, and therefore would deny staff's recommendation.

**Commissioner Flesher** remarked that there was only one timeline and everyone was in agreement. He also discussed the timeline of April 1, 2005 when all activities ceased, and personnel and occupants vacated the facility, up to the time (May 15 or 16, 2006) when the Mobile Crisis Team moved in. Commissioner Flesher disclosed that he contacted staff about the permitting process and work being attempted, and it does not appear that there was any steadfast evidence that there were any confirmed work being done by staff. To him, the only thing that had extreme clarity in today's process was the two dates, and that was what he rested his decision and support upon. He acknowledged that The Source provides a well needed service to the County.

**Vice Chairman Davis** did not think the subject property was in use or was occupied during the 12-month period to meet the requirement.

**Commissioner Wheeler** felt everything was said and proceeded to make a Motion.

MOTION WAS MADE by Commissioner Wheeler,  
SECONDED by Commissioner Flescher, to uphold the  
appeal and to deny the recommendations of staff.

**County Attorney William Collins** clarified that the appeal is to overturn the Planning and Zoning Commission's (PZC) decision, and if the Board voted to uphold the appeal they would be overturning PZC's decision.

**THE MOTION**

**Commissioner Wheeler** restated the Motion.

MOTION WAS MADE by Commissioner Wheeler,  
SECONDED by Commissioner Flescher, to make a  
finding that P&Z was correct.

**Chairman Bowden** thanked everyone for coming and being so patient. She declared that after listening to all the evidence today, she too came to the conclusion that PZC ruled correctly.

There were no further discussions.

The Chairman CALLED THE QUESTION and the  
Motion carried unanimously. The Board found that the  
Planning and Zoning Commission's ruling was correct.

**6. ADJOURNMENT**

There being no further business the Chairman declared the Meeting adjourned at 4:59 p.m.

ATTEST:

\_\_\_\_\_  
Jeffrey K. Barton, Clerk

\_\_\_\_\_  
Sandra L. Bowden, Chairman

Minutes Approved: \_\_\_\_\_

BCC/Special Call Meeting/The Source/AA/2008/minutes