

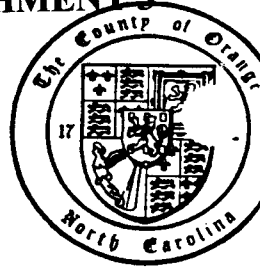
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ATTACHMENT 3

Barry Jacobs, Chair
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Alice M. Gordon

Orange County Commissioners
P.O. Box 8181
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MEMORANDUM

TO: *The Honorable Mike Nelson, Mayor, Town of Carrboro and Board of Aldermen*
The Honorable Kevin Foy, Mayor, Town of Chapel Hill and Chapel Hill Town Council
The Honorable Valerie Foushee, Chair, Chapel Hill-Carrboro Board of Education and Board Members
The Honorable Joe Phelps, Mayor, Town of Hillsborough and Board of Commissioners
The Honorable Barry Jacobs, Chair, Orange County Board of Commissioners and Board Members
The Honorable Brenda Stephens, Chair, Orange County Board of Education and Board Members

FROM: *Alice M. Gordon, Chair, Schools and Land Use Councils*

DATE: *February 8, 2002*

SUBJECT: *Schools Adequate Public Facilities Memorandum of Understanding and Ordinance*

COPIES: *Schools and Land Use Councils Members, Planning Directors, School Superintendents*

On November 14, 2001 the Schools and Land Use Councils (SLUC) unanimously recommended approval and forwarding of the Schools Adequate Public Facilities Memorandum of Understanding (MOU) and model Ordinance (Schools APFO) to the respective local governments and school boards. The two year process of developing these documents has been an important and progressive collaboration of many parties to create a policy and ordinance that will help maintain the high quality of education that serves as a linchpin to the quality of life in Orange County.

Amendments

Over the four months preceding the SLUC meeting, these two documents were amended from the earlier drafts by an Attorneys/Planning Directors/School Administrators (APS) Work Group composed of representatives from the local governments and school boards. The amendments, drafted to address comments from various public hearings, are summarized below:

DRAFT MATERIALS:
SCHOOLS ADEQUATE PUBLIC FACILITIES
ORDINANCE

- Transmittal Letter
- Draft Memorandum of Understanding
- Draft Model Ordinance
- October 11, 2001 Memorandum
- November 22, 2000 Letter

Materials Transmitted by Orange Commissioner Alice Gordon
Chair, Schools and Land Use Council
February 13, 2002

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1. Changing the timing of receipt of the Certificate of Adequate Public School Facilities (CAPS) to reduce upfront "locking up" of capacity
2. Phasing of development to synchronize the impacts with available capacity
3. Defining the Schools APFO implementing methodology and subsequent maintenance or revisions to the methodology

On November 14, the Schools and Land Use Councils (SLUC) made a few additional modifications before approving the MOU and the Schools APFO for transmittal. Since November 14, the staff has revised the agreement to reflect the changes made at the November 14 SLUC meeting and to clarify the timing of implementation contained in certain sections of the documents.

Transmittal of Documents

Accompanying this memorandum are the following documents:

1. Schools Adequate Public Facilities Memorandum of Understanding (Approved 11/14/01 by SLUC; Drafted 2/08/02 by staff)
2. Schools Adequate Public Facilities Model Ordinance (Approved 11/14/01 by SLUC; Drafted 2/08/02 by staff)
3. Memorandum from the APS Work Group to the Schools and Land Use Councils (10/11/01)

The MOU includes all of the general understandings used in the proposed implementing model ordinance (Schools APFO). However, there are four elements of the MOU that need to be decided prior to ordinance adoption to provide the technical basis and resulting methodology for the Schools APFO system. These elements are listed in Section 1c of the MOU.

The memorandum from the APS Work Group elaborates on the changes made by that group, and should be read with the understanding that further changes were made by the SLUC on November 14.

Adoption and Implementation

Because of the changes to the Schools Adequate Public Facilities documents, the approval process is likely to include an additional public hearing and adoption meeting. The MOU and ordinance can be evaluated in two phases, since it is anticipated that the MOU could be approved with the chosen four elements (in Section 1c) prior to the adoption of the ordinance. It is suggested that the time for implementing the ordinance be November 15, 2002. That should allow time for the necessary preliminary work and approvals.

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Craig Benedict, Orange County Planning and Inspections Director (and one of the APS work group team members that included your attorney and planning director or other representative), is available to meet with you or your board to answer questions as the public hearing and adoption process continues. He can also explain the ongoing preliminary work necessary for implementation.

Conclusion

The preparation of the Schools Adequate Public Facilities MOU and model Ordinance represents a major effort of many contributing boards, committees, and work groups. There have been many benefits already from improved data standardization, collection, and reporting and from cooperative planning and discussion among all the parties. The proposed ordinance can help us ensure that our school construction keeps pace with our rapid growth, so that our children can be educated in facilities that truly meet their needs. Excellent schools are essential elements of our quality of life here in Orange County.

Thank you very much for your consideration of the Memorandum of Understanding and Schools Adequate Public Facilities Ordinance.

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SCHOOLS ADEQUATE PUBLIC FACILITIES MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding is entered into this ____ day of _____, 200__, by and between the Town of _____, the Town of _____, Orange County, and the _____ (the "School District").

WHEREAS, the portion of Orange County, served by the [Chapel Hill/Carrboro] [Orange County] School System has for the past decade been experiencing rapid growth in population; and

WHEREAS, this growth, and that which is anticipated, creates a demand for additional school facilities to accommodate the children who reside within new developments; and

WHEREAS, the responsibility for planning for and constructing new school facilities lies primarily with the [Chapel Hill/Carrboro] [Orange County] School Board, with funding provided by Orange County; and

WHEREAS, [Chapel Hill, Carrboro, Orange County and the Chapel Hill School District] [Orange County, Hillsborough, and the Orange County School District], have recognized the need to work together to ensure that new growth within the School District occurs at a pace that allows Orange County and the School District to provide adequate school facilities to serve the children within such new developments;

WHEREAS, the parties have worked cooperatively and developed a system wherein school facilities are currently adequate to meet the needs of the citizens of the county and will continue to maintain a Capital Investment Plan (CIP) that is financially feasible and synchronized with historical growth patterns;

NOW, THEREFORE, the parties to this Memorandum hereby agree as follows:

Section 1. The parties will work cooperatively to develop a realistic Capital Improvement Plan for the construction of schools such that, from the effective date of this Memorandum, school membership within each school level (i.e. elementary, middle or high) does not exceed the following:

Elementary School	105% of Building Capacity
Middle School	107% of Building Capacity
High School	110% of Building Capacity

a. For purposes of this Memorandum, the term "school membership" means the actual number of students attending school as of November 15 of each year. The figure is determined by considering the number of students enrolled (i.e. registered, regardless of whether a student is no longer attending school) and making adjustments for withdrawals, dropouts, deaths, retentions and promotions. Students who are merely absent from

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class on the date membership is determined as a result of sickness or some other temporary reason are included in school membership figures. Each year the School District shall transmit its school membership to the parties to this agreement no later than five (5) school days after November 15.

- b. For purposes of this Memorandum, "building capacity" will be determined by reference to State guidelines and the School District guidelines (consistent with CIP School Construction Guidelines/policies developed by the School District and the Board of County Commissioners) and will be determined by a joint action of the School Board and the Orange County Board of Commissioners. As used herein the term "building capacity" refers to permanent buildings. Mobile classrooms and other temporary student accommodating classroom spaces are not permanent buildings and may not be counted in determining the school districts building capacity.
- c. Prior to the adoption of the ordinances referenced in Section 2, the parties shall reach agreement on the following:
- (i) A Capital Improvement Program (CIP) that will achieve the objectives of this Memorandum;
 - (ii) A projected growth rate for student membership within the School District's three school levels during the ten year life of the CIP;
 - (iii) A methodology for determining the projected growth rate for student membership; and
 - (iv) The number of students at each level expected to be generated by each new housing type (i.e., the "student generation rate").
- d. After the adoption of the ordinances referenced in Section 2, the Orange County Board of Commissioners may change the projected student membership growth rate, the methodology used to determine this rate, or the student generation rate if the Board concludes that such a change is necessary to predict growth more accurately. Before making any such change, the Board shall receive and consider the recommendation of a staff committee consisting of the planning directors of the Town(s) and the County and a representative of the School District appointed by the Superintendent. The committee shall provide a copy of its recommendation to the governing boards of the other parties to this memorandum at the time it provides such recommendation to the Board of Commissioners. In making its recommendation, the committee shall consider the following, and in making its determination, the Board of Commissioners shall consider the following:

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- (i) The accuracy of the methodology and projected growth rate then in use in projecting school membership for the current school year;
- (ii) The accuracy of the student generation rate then in use in predicting the number of students at each level actually generated by each new housing type;
- (iii) Approval of and issuance of CAPS for residential developments that, individually or collectively, are of sufficient magnitude to alter the previously agreed upon school membership growth projections; or
- (iv) Other trends and factors tending to alter the previously agreed upon projected growth rates.

If any such change is made in the projected growth rate, the methodology for determining this rate, or the student generation rate, the Orange County Board of Commissioners shall inform the other parties to this Memorandum prior to February 1st in any year in which such change is intended to become effective what change was made and why it was necessary.

- e. The Orange County Board of Commissioners shall provide a copy of the updated CIP to each of the parties to the Memorandum as soon as it is revised, annually or otherwise.

Section 2. The towns and the county will adopt amendments to their respective ordinances, in substantially the form attached hereto as Exhibit A, to coordinate the approval of residential developments within the School District with the adequacy of existing and proposed school facilities.

Section 3. The following process shall be followed by the School District to receive and take action upon applications for Certificates of Adequacy of Public School Facilities ("CAPS") submitted by persons who are required by an implementing ordinance conceptually similar to that attached as Exhibit A to have such certificates before the development permission they have received from the town or county becomes effective.

- a. On February 15th of each year, the School District shall calculate the building capacity of each school level and the school membership of each school level as of November 15th of the previous year. Also on February 15th of each year, the School District shall calculate the anticipated school membership for each school level and the anticipated building capacity for each school level as of November 15th in each of the following ten years. These calculations shall be made in accordance with the provisions of Section 1 and also in accordance with the remaining provisions of this section.

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- b. School membership calculations made on February 15th (utilizing the previous November 15th data) for each of the ten years following the year in which the calculation is made (the base year) shall be determined by applying the projected school membership growth rates determined in accordance with Section 1 of this Memorandum to the actual school membership numbers of the base year.
- c. The school building capacity calculations shall be based upon the following:
- (i) A calculation of the existing building capacity within each school level;
 - (ii) The anticipated opening date of schools under construction;
 - (iii) The anticipated opening date of schools on the ten-year CIP for which funding has been committed by the Board of Commissioners as a result of an approved bond issue, an approved installment purchase agreement, or otherwise; and
 - (iv) The anticipated closing dates of any schools within the School District.
- d. By comparing the existing and calculated school membership to the existing and calculated school building capacity each year, the School District shall determine what remaining capacity (if any) exists or is projected to exist to accommodate new development. The School District shall make that information known to the local governments within 15 days of the comparison.
- e. As CAPS are issued for new developments during the course of the twelve month period from February 15th of one year to February 15th of the next year, the School District shall continually reduce the remaining available school building capacity in each of the ensuing years wherein new students are projected to be added to the school system by the developments for which the CAPS are given during that year.
- f. When an application for a CAPS is submitted, the School District shall determine the impact on school membership for each school level as calculated on February 15th in each year of the period during which the development is expected to be adding new students to the school system as the result of such new construction. In making this determination, the School District shall rely upon the figures established under Section 1 of this Memorandum as to the number of students at each level expected to be generated by each housing type, and data furnished by the applicable planning department as to the expected rate at which new dwellings within developments similar in size and type to the proposed development are

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likely to be occupied. Notwithstanding the foregoing, if, upon request of the applicant, the planning jurisdiction approving the development imposes enforceable conditions upon the development (such as a phasing schedule) to limit the rate at which new dwellings within the development are expected to be occupied, then the School District shall take such limitations into account in determining the impact of the development on school membership.

- g. If the School District determines that the projected capacity of each school level is sufficient to accommodate the proposed development without exceeding the building capacity levels set forth in Section 1 of this Memorandum, then the School District shall issue the CAPS. If the School District determines that the projected capacity of each school level is not sufficient to accommodate the proposed development without exceeding the building capacity levels set forth in Section 1, then the School District shall deny the CAPS. If a CAPS is denied, the applicant may seek approval from the appropriate planning jurisdiction of such modifications to the development as will allow for the issuance of a CAPS, and then reapply for a CAPS.
- h. The School District shall issue CAPS on a "first come first served" basis, according to the date a completed application for a CAPS is received. If projected building capacity is not available and an application for a CAPS is therefore denied, the development retains its priority in line based upon the CAPS application date.

Section 4. A CAPS issued in connection with approval of a subdivision preliminary plat, minor subdivision final plat, site plan, or conditional or special use permit shall expire automatically upon the expiration of such plat, plan, or permit approval.

Section 5. The towns and the county will provide to the School District all information reasonably requested by the School District to assist the District in making its determination as to whether the CAPS should be issued.

Section 6. The School District will use its best efforts to construct new schools and permanent expansions or additions to existing schools in accordance with the CIP.

Section 7. Orange County will use its best efforts to provide the funding to carry out the Capital Improvement Plan referenced in Section 1 above.

Section 8. In recognition of the fact that some new development will have a negligible impact on school capacity, a CAPS shall not be required under the following circumstances:

- a. For residential developments restricted by law and/or covenant for a period of at least thirty years to housing for the elderly and/or adult care living and/or adult special needs;

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- b. For residential developments restricted for a period of at least thirty years to dormitory housing for university students.

If the use of a development restricted as provided above changes, then before a permit authorizing such change of use becomes effective, a CAPS must be issued just as if the development were being constructed initially.

Section 9. The parties acknowledge that this Memorandum of Understanding is not intended to and does not create legally binding obligations on any of the parties to act in accordance with its provisions. Rather, it constitutes a good faith statement of the intent of the parties to cooperate in a manner designed to meet the mutual objective of all the parties that the children who reside within the School District are able to attend school levels that satisfy the level of service standards set forth herein.

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Exhibit A

**AN ORDINANCE AMENDING THE _____ DEVELOPMENT
ORDINANCE TO REQUIRE THAT THE ADEQUACY OF PUBLIC
SCHOOL FACILITIES TO ACCOMMODATE NEW DEVELOPMENT
BE CONSIDERED IN THE APPROVAL PROCESS**

WHEREAS, the portion of Orange County served by the [Chapel Hill/Carrboro] [Orange County] school system, has for the past decade been experiencing rapid growth in population; and

WHEREAS, this rapid growth, and that which is anticipated, creates a demand for additional school facilities to accommodate the children who reside within new developments; and

WHEREAS, the responsibility for planning for and constructing new school facilities lies primarily with the [Chapel Hill/Carrboro School Board] [Orange County School Board], with funding provided by Orange County; and

WHEREAS, [Chapel Hill, Carrboro, Orange County and the Chapel Hill/Carrboro School District] [Orange County, Hillsborough, and the Orange County School District] have recognized the need to work together to ensure that new growth within the School District occurs at a pace that allows Orange County and the School District to provide adequate school facilities to serve the children within such new developments; and

WHEREAS, to implement the Memorandum of Understanding between [Orange County, Chapel Hill, Carrboro, and the Chapel Hill/Carrboro School Board] [Orange County, Hillsborough, and the Orange County School Board], the [governing body] desires to provide a mechanism to assure that, to the extent possible, new development will take place only when there are adequate public school facilities available, or planned, which will accommodate such new development;

NOW THEREFORE, _____ ORDAINS:

Section 1. Section _____ of the _____ Development Ordinance is amended by adding a new _____ to read as follows:

ADEQUATE PUBLIC SCHOOL FACILITIES

1. Purpose.

The purpose of this ordinance is to ensure that, to the maximum extent practical, approval of new residential development will become effective only when it can reasonably be expected that adequate public school facilities will be available to accommodate such new development.

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2. Certificate of Adequacy of Public School Facilities.

(a) Subject to the remaining provisions of this [article], no approval under this ordinance of a subdivision preliminary plat, minor subdivision final plat, site plan, or conditional or special use permit for a residential development shall become effective unless and until Certificate of Adequacy of Public School Facilities (CAPS) for the project has been issued by the School District.

(b) A CAPS shall not be required for a general use or conditional use rezoning or for a master land use plan. However, even if a rezoning or master plan is approved, a CAPS will nevertheless be required before any of the permits or approvals identified in subsection (a) of this section shall become effective, and the rezoning of the property or approval of a master plan provides no indication as to whether the CAPS will be issued. The application for rezoning or master plan approval shall contain a statement to this effect.

(c) A CAPS must be obtained from the School District. The School District will issue or deny a CAPS in accordance with the provisions of the Memorandum of Understanding between [Chapel Hill, Carrboro, Orange County, and the Chapel Hill Carrboro School District] [Orange County, Hillsborough, and the Orange County School District] dated _____.

(d) A CAPS attaches to the land in the same way that development permission attaches to the land. A CAPS may be transferred along with other interests in the property with respect to which such CAPS is issued, but may not be severed or transferred separately.

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3. Service Levels.

(a) This section describes the service levels regarded as adequate by the parties to the Memorandum of Understanding described in subsection (b) with respect to public school facilities.

(b) As provided in the Memorandum of Understanding between [Orange County, Chapel Hill, Carrboro, and the Chapel Hill/Carrboro School District] [Orange County, Hillsborough, and the Orange County School District], adequate services levels for public schools shall be deemed to exist with respect to a proposed new residential development if, given the number of school age children projected to reside in that development, and considering all the factors listed in the Memorandum of Understanding, projected school membership for the elementary schools, the middle schools, and the high school(s) within the [Chapel Hill/Carrboro] [Orange County] School District will not exceed the following percentages of the building capacities of each of the following three school levels:

elementary school level	<u>105%</u>
middle school level	<u>107%</u>
high school level	<u>110%</u>

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For purposes of this ordinance, the terms "building capacity" and "school membership" shall have the same meaning attributed in the Schools Adequate Public Facilities Memorandum of Understanding among the Towns of _____, _____ and _____, Orange County and the _____ Board of Education.

4. Expiration of Certificates of Adequacy of Public School Facilities.

A CAPS issued in connection with approval of a subdivision preliminary plat, minor subdivision final plat, site plan, or conditional or special use permit shall expire automatically upon the expiration of such plat, plan, or permit approval.

5. Exemption From Certification Requirement for Development with Negligible Student Generation Rates

In recognition of the fact that some new development will have a negligible impact on school capacity, a CAPS shall not be required under the following circumstances:

- a. For residential developments restricted by law and/or covenant for a period of at least thirty years to housing for the elderly and/or adult care living and/or adult special needs;
- b. For residential developments restricted for a period of at least thirty years to dormitory housing for university students.

If the use of a development restricted as provided above changes, then before a permit authorizing such change of use becomes effective, a CAPS must be issued just as if the development were being constructed initially.

6. Applicability to Previously Approved Projects and Projects Pending Approval.

(a) Except as otherwise provided herein, the provisions of this ordinance shall only apply to applications for approval of subdivision preliminary plats, minor subdivision final plats, site plans and conditional or special use permits that are submitted for approval after the effective date of this ordinance

(b) The provisions of this ordinance shall not apply to amendments to subdivision preliminary plats, minor subdivision final plats, site plans, or special or conditional use permit approvals issued prior to the effective date of this ordinance so long as the approvals have not expired and the proposed amendments do not increase the number of dwelling units authorized within the development by more than five percent or five dwelling units, whichever is less.

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(c) The [governing body] shall issue a special exception to the CAPS requirement to an applicant whose application for approval of a subdivision preliminary plat, minor subdivision final plat, site plan or conditional or special use permit covers property within a planned unit development or master plan project that was approved prior to the effective date of this ordinance, if the [governing body] finds, after an evidentiary hearing, that the applicant has (1) applied to the School District for a CAPS and the application has been denied, (2) in good faith made substantial expenditures or incurred substantial binding obligations in reasonable reliance on the previously obtained planned unit development or master plan approval, and (3) would be unreasonably prejudiced if development in accordance with the previously approved development or plan is delayed due to the provisions of this ordinance. In deciding whether these findings can be made, the [governing body] shall consider the following, among other relevant factors:

(1) Whether the developer has installed streets, utilities, or other facilities or expended substantial sums in the planning and preparation for installation of such facilities which were designed to serve or to be paid for in part by the development of portions of the planned unit development or master planned project that have not yet been approved for construction;

(2) Whether the developer has installed streets, utilities, or other facilities or expended substantial sums in the planning and preparation for installation of such facilities that directly benefit other properties outside the development in question or the general public;

(3) Whether the developer has donated land to the School District for the construction of school facilities or otherwise dedicated land or made improvements deemed to benefit the School District and its public school system;

(4) Whether the developer has had development approval for a substantial amount of time and has in good faith worked to timely implement the plan in reasonable reliance on the previously obtained approval;

(5) The duration of the delay that will occur until public school facilities are improved or exist to such an extent that a CAPS can be issued for the project, and the effect of such delay on the development and the developer.

(d) The decision of the [governing body] involving a special exception application under subsection (c) is subject to review by the Orange County Superior Court by proceedings in the nature of certiorari. Any petition for review by the Superior Court shall be filed with the Clerk of Superior Court within 30 days after a written copy of the

decision [of the governing body] is delivered to the applicant and every other party who has filed a written request for such copy with the Clerk to the [governing body] at the time of its hearing on the application for a special exception. The written copy of the decision of the [governing body] may be delivered either by personal service or by certified mail, return receipt requested.

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(e) The [chair or the mayor] of the [governing body] or any member temporarily acting as [chair or mayor] may, in his or her official capacity, administer oaths to witnesses in any hearing before the [governing body] concerning a special exception.

7. Appeal of School District Denial of a CAPS.

The applicant for a CAPS which is denied by the School District may, within 30 days of the date of the denial, appeal the denial to the [governing body] of [local government from which development permit is sought]. Any such appeal shall be heard by the [governing body] at an evidentiary hearing before it. At this hearing the School District will present its reasons for the denial of the CAPS and the evidence it relied on in denying the CAPS. The applicant appealing the denial may present its reasons why the CAPS application should have, in its view, been approved and the evidentiary basis it contends supports approval. The [governing body] may (1) affirm the decision of the School District, (2) remand to the School District for further proceedings in the event evidence is presented at the hearing before the [governing body] not brought before the School District, or (3) issue a CAPS. The [governing body] will only issue a CAPS if it finds that the CAPS should have been issued by the School District as prescribed in the Memorandum of Understanding among the School District, Orange County and the [governing body]. A decision of the [governing body] affirming the School District may be appealed by the applicant for a CAPS by proceedings in the nature of certiorari and as prescribed for an appeal under Section 6(d) of this ordinance.

8. Information Required From Applicants.

The applicant for a CAPS shall submit to the School District all information reasonably deemed necessary by the School District to determine whether a CAPS should be issued under the provision of the Memorandum of Understanding between the [governing body], Orange County, and the School District. An applicant for a CAPS special exception or an applicant appealing a CAPS denial by the School District shall submit to the [governing body] all information reasonably deemed necessary by the [governing body] to determine whether a special exception should be granted as provided in Section 6(d) of this ordinance or for the hearing of an appeal of a School District denial of a CAPS as provided in Section 7 of this ordinance. A copy of a request for a CAPS special exception or of an appeal of a School District denial of a CAPS shall be served on the superintendent of the School District. Service may be made by personal delivery or certified mail, return receipt requested.

Section 2. This ordinance shall become effective _____.

The foregoing ordinance, having been submitted to a vote, received the following vote and was duly adopted this ____ day of _____, 200__.

Ayes:

Noes:

Absent or Excused:

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MEMO

Date: October 11, 2001
To: Schools and Land Use Councils
From: Adequate Public School Facilities Program
Planners, School Administrators and Attorney Work
Group

Enclosed with this memorandum are revised versions of the model Ordinance and model MOU to implement the Adequate Public School Facilities program in Orange County. They have been revised since the last time you looked at these documents to address concerns about the ability under previous drafts for larger developments to obtain certificates of adequate public schools and "lock up" school capacity. One of the concerns expressed was that other projects which contain amenities, for example, affordable housing, might not be able to be built because the school capacity is reserved for one or more large projects. The other concern expressed was that as proposed, the MOU and the Ordinance could result in certificates being issued significantly prior to development approval so as to "lock up" school capacity unnecessarily.

The new documents address these concerns by requiring local government approval of a development before the certificate of adequate public schools facilities application is made. Local government approval of the development will be contingent on the development applicant thereafter receiving the necessary certificate from the Board of Education. Furthermore, the documents provide that the certificate can be issued according to a phasing plan that is incorporated into the development approval and which would limit the rate at which new dwellings within the development could be constructed.

These changes to the structure of the documents, in the opinion of the members of the work group, address the concerns as far as they can be addressed. In that regard, consideration was given to limiting the life of

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certificates. However, this idea was not incorporated into the documents because of a concern about the risk of vesting or other due process claims associated with time limiting the certificates. These issues could arise because of the fact that preliminary plan approval typically is a "green light" for development infrastructure to be constructed by the development applicant. If a development receives preliminary approval and receives a certificate from the Board of Education, the development applicant will be prompted to construct infrastructure and to begin other development activities. A certificate expiring thereafter raises the vesting/due process question. On the other hand, the MOU and Ordinance provide that if the development approval lapses, the certificate from the Board of Education lapses with it. The work group thought that the lapsing of certificates should be linked to the development lapse and not independent from it.

The work group also refined the documents to make clear the methodology for determining building capacity and the process for applying student membership information to determine whether a certificate should be issued by the Board of Education. Particularly, the work group recommends, consistent with the recommendation of the School Facilities Task Force to the Board of Commissioners, that school membership be the benchmark for calculating school capacity. The MOU selects November 15 as the date to determine school membership because it was deemed to be far enough into the school year to be reliable. Further, the MOU envisions that agreement would be reached on a projected growth rate for student membership within each school district's three school levels and agreement would be reached on the methodology for determining the projected growth rate for student membership. Once agreement is reached on the projected growth rate and the methodology for determining the projected growth rate, maintenance and recalibration of those indicators would become a staff function with regular reports to the governing boards. Any concern about the results of staff maintenance or recalibration could be addressed as needed by the governing board parties to the MOU.

The work group also developed alternatives to this staff approach. One alternative would make this

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methodology maintenance and calibration a function of the Orange County Board of Commissioners with notice to the other MOU parties of any methodology change and the reasons for the change. In the other alternative, the Orange County Board of Commissioners would perform the methodology maintenance and calibration and provide the other MOU parties with an opportunity to object to any change. Any objection would call for the changed parameter to be approved by all MOU parties before it is effective. As to the methodology maintenance and calibration, it is worth noting that the long term viability of the Adequate Public Facilities MOU and Ordinance depends on long term agreement among the parties of the methodology used in their application.

School building capacity will be founded on State and school district guidelines, the latter being developed by the School Boards and the Board of County Commissioners and approved by each. School building capacity projections will combine school building capacity with projected opening dates of schools under construction, closing dates of any schools proposed to be closed and projected opening dates of schools in the 10 year CIP for which funding has been committed as the result of an approved bond issue, an approved installment purchase agreement or other funding source.

The work group also offers the following comments with respect to concerns about affordable housing and capacity within a school district among towns.

1. Affordable housing. Affordable housing is addressed in the November 2000 letter from Moses Carey to the Mayors of Carrboro, Chapel Hill and Hillsborough and the Chapel Hill-Carrboro and Orange County Board of Education Chairs that is with this memorandum. It continues to be the opinion of the work group members that what is stated in that November 2000 letter pertains. Reserving certificates to accomplish other, albeit very worthy public policies, subjects the adequate public schools facilities program to substantial legal risk. The members of the work group also think that stand-alone affordable housing projects, because of their small size, are unlikely to be denied a certificate and therefore will have minimal impact

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on school facilities planning. This is especially true with the modifications to the MOU and Ordinance proposed that are designed to minimize certificate "hoarding."

2. Allocating school capacity among jurisdictions. Allocating school capacity within a school district by the use of an adequate public schools facility program draws the adequate public school facilities program into attendance zone issues. These issues are wholly independent of school level capacity. The concern of school capacity is whether there is school capacity in the school district and taking steps to insure that there is. Whether school capacity is absorbed by one town's development or another town's development, although important, is not pertinent to facilities capacity in the school district. Similarly other attendance zone issues which may or may not cross town boundaries, neighborhood schools and minimizing busing are examples, are not part of the adequate public schools facilities program. The program must be designed to deal only with capacity of school buildings on school level and school district bases. Allocating school capacity among or between towns and the rural part of the county therefore must be accomplished with some other "tool."

The charts that follow are designed to aid in your review of the draft Memorandum of Understanding and Ordinance.

GEG/lsg
Enclosure

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ORANGE COUNTY
HILLSBOROUGH
NORTH CAROLINA

Established 1752

November 22, 2000

The Honorable Mike Nelson,
Mayor, Town of Carrboro and
Board of Aldermen
Town Hall
301 W. Main Street
Carrboro, North Carolina 27510

The Honorable Rosemary I. Waldorf
Mayor, Town of Chapel Hill and
Chapel Hill Town Council
306 N. Columbia Street
Chapel Hill, North Carolina 27516

The Honorable Horace Johnson
Mayor, Town of Hillsborough and
Board of Commissioners
Town Hall
101 E. Orange Street
Hillsborough, North Carolina 27278

The Honorable Elizabeth Carter, Chair and
Board Members, Chapel Hill-Carrboro
Board of Education
Lincoln Center, Merritt Mill Road
Chapel Hill, North Carolina 27516

The Honorable Keith Cook, Chair and
Board Members, Orange County
Board of Education
200 E. King Street
Hillsborough, North Carolina 27278

RE: Adequate Public School Facilities

Dear Elected Officials:

Enclosed with this letter is the form of the SCHOOLS
ADEQUATE PUBLIC FACILITIES MEMORANDUM OF UNDERSTANDING ("MOU")
and the form of AN ORDINANCE AMENDING THE _____
DEVELOPMENT ORDINANCE TO REQUIRE THAT THE ADEQUACY OF PUBLIC

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SCHOOL FACILITIES TO ACCOMMODATE NEW DEVELOPMENT BE CONSIDERED IN THE APPROVAL PROCESS ("the Ordinance") recommended for your consideration by the Orange County Board of Commissioners. The Board of Commissioners will present these documents for public comment at a public hearing scheduled for November 27, 2000. The public hearing will begin at 7:30 p.m. and be held in the Gordon Battle Courtroom in Hillsborough.

The form of the MOU and the Ordinance are, for the most part, the same as was recommended by resolution of the Schools and Land Use Councils. The two documents differ from that recommended by the Schools and Land Use Councils in several important respects. This letter will explain those differences. As to the points of difference, the documents that are being transmitted here are in the form recommended by the planners, school administrators and attorneys when that group developed the documents and transmitted them to the Schools and Land Use Council for consideration. The recommendation coming from the Schools and Land Use Councils was submitted to the attorneys for final legal review. The comments received from our attorneys were consistent; their recommendation is reflected in the documents as they appear here.

Affordable Housing

The Ordinance and the MOU omit altogether consideration of affordable housing. It is not reasonable to think that the Ordinance and MOU can be sustained if they create an exception or an exemption for the certificates (CAPS) for affordable housing projects or affordable housing units. This is so because affordable housing impacts public school facilities in the same way that non-affordable housing does. Therefore any attempt to exempt affordable housing units or to reserve space in public schools for affordable housing projects or affordable housing units would put the program at risk of being determined to be unlawful.

It is not contemplated by an adequate public schools facilities program that the tools, the Ordinances and the MOU, are growth-limiting devices. Rather, the chief objective of these tools is to provide a reasonable amount of time for the County as the fiscal "agent" and the schools as the education "agent" to respond to the impact of residential growth on the

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schools. That is, they allow both the County and the Boards of Education to reasonably respond to the pace of development. In that context, it is not likely that affordable housing will be adversely impacted by the CAPS requirement. Affordable housing projects have not historically been and are not predicted to be large enough to in and of themselves cause a CAPS denial. And, if these projects come along at a time when the School System is denying all of the CAPS applications it receives, the response cannot be to increase the overcrowding of the schools by approving projects which will have that result. The response also cannot be that the schools and the County must build a school solely to move an affordable housing project through the process.

The only sound approach to balancing school facilities and residential growth (student generation) is to regularly chart the school children "generated" by growth to see what school construction will be required. This can be compared with a fiscal limiting chart (the amount of money reasonably available for public school facilities). If the two charted lines "cross," work needs to be done. More money must be found for school construction or countywide (County and Towns) growth-limiting land use regulations must be implemented.

Although the Schools Adequate Public Facilities Ordinances and Memorandum of Agreement are not an appropriate place to address affordable housing, that does not mean that the County Commissioners along with the other elected officials in Orange County are not committed to affordable housing. The opposite is, as we all know, true.

Appeal of a CAPS Denial

Another important change in the documents from that which was recommended by the Schools and Land Use Councils is the way in which the documents handle appeals of CAPS denials. As developed by the lawyers, planners and school administrators, the final administrative decision regarding a CAPS denial rests with the governing board responsible for issuing development permits. The Schools and Land Use Councils recommendation was that that final decision be made by the Boards of Education. Again, our attorneys advise that the final administrative

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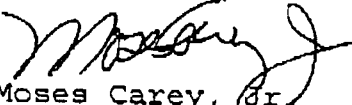
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decision from which an appeal moves to the courts should be with the governing board responsible for the development permitting. This is consistent with the legislation enabling the County and the Towns to issue development permits. Furthermore, it is not the responsibility of the board of education to "take on" developers when developments are stopped as the result of a CAPS denial. Since the planning government is ultimately responsible for the planning decision, any litigation related to the planning decision should follow a final administrative decision of the planning government. A final concern about the recommendation from the Schools and Land Use Councils on this point is that its proposal creates a never-ending loop. That is, there is no stopping point in the review by the planning government governing board of a CAPS denial decision.

There is one other point of clarification in the MOU from that recommended by the Schools and Land Use Councils. The MOU recommended by the Board of County Commissioners calls for school district building capacity to be determined by joint action of the applicable Board of Education and the Orange County Board of Commissioners. These two governmental units partner in school facilities. There must be agreement between them with respect to the all-important school district building capacity determination.

On behalf of the Board of Commissioners, we look forward to the public hearing process regarding the Adequate Public School Facilities program and ultimately implementing the program. We look forward to your continued support.

Sincerely,



Moses Carey, Jr.
Chair, Orange County Board of
Commissioners

MC/lsg
Enclosures

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