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MEMORANDUM

TO: Mayor and Town Council

FROM: Ralph D. Karpinos, Town Attorney

SUBJECT: Revised Resolution E Denying Special Use Permit Modification

DATE: May 13, 2002

The attached revised Resolution E, denying the request to modify the current special use permit for this site, has been prepared for the Council's consideration this evening in response to the Council's request on April 22, 2002.

Also attached is an April 24, 2002 memorandum I received from the applicant's attorney.

RESOLUTION E
(Denying the Application)

A RESOLUTION DENYING AN APPLICATION FOR A SPECIAL USE PERMIT MODIFICATION FOR HOTEL L'EUROPA/VILLAGE OFFICE PARK COMPLEX BUILDING (2002-05-13/R-11e)

BE IT RESOLVED that the Council of the Town of Chapel Hill finds, in this particular case, that the following requested modifications of applicable regulations of the Development Ordinance would not result in a development in which any public purposes would be satisfied to an equivalent or greater degree than if the applicable regulations were followed:

1. Modification of Subsection 13.1.11 Use Group B, of the Development Ordinance to allow a total of 108,000 square feet of floor area on the Sheraton Hotel site (Chapel Hill Township Tax Map 27, Block E, Lot 2 PIN# 9799478402).
2. Modification of Subsection 14.12 to allow the existing landscape bufferyard width on the US 15-501 frontage on the on the Sheraton Hotel site (Chapel Hill Township Tax Map 27, Block E, Lot 2 PIN# 9799478402), in lieu of the required landscape bufferyard width.

BE IT FURTHER RESOLVED that the Council fails to find in this particular case that any public purposes would be satisfied to an equivalent or greater degree by the Council's allowing the above-described modifications to regulations as a part of the approval of this Special Use Permit modification application.

NOW, THEREFORE, BE IT RESOLVED by the Council of the Town of Chapel Hill that the Council, exercising the discretionary authority provided by Section 18.7.1 of the Development Ordinance (which says that if the Council does make the finding referred to above it "may make specific modifications of the regulations") declines to approve the requested modifications of Ordinance standards.

BE IT FURTHER RESOLVED by the Council that it finds that the Special Use Permit Modification application proposed by Duane Stewart and Associated, Inc., on property identified as Chapel Hill Township Tax Map 27, Block E, Lot 2 PIN# 9799478402, 7.27.E.2D PIN# 9799570157 and 7.27.E.2E PIN# 9799468987, if developed according to the site plan prepared on January 6, 1999, and conditions listed below, would not:

1. Be located, designed, and proposed to be operated so as to maintain or promote the public health, safety, and general welfare;
2. Comply with all required regulations and standards of the Development Ordinance, including all applicable provisions of Articles 12, 13, and 14, and with all other applicable regulations including the floor area and bufferyard for the motel site;
3. Be located, designed, and proposed to be operated so as to maintain or enhance the value of contiguous property, or be a public necessity;

4. Conform with the general plans for the physical development of the Town as embodied in the Development Ordinance and in the Comprehensive Plan.

NOW, THEREFORE, BE IT RESOLVED by the Council of the Town of Chapel Hill that the Council hereby denies the application for a Special Use Permit Modification for Hotel L' Europa/Village Office Complex.

This the 13th day of May, 2002.

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MEMORANDUM

TO: Ralph Karpinos

FROM: Michael B. Brough *MBB*

RE: Europa Office Building Special Use Permit

DATE: April 24, 2002

My understanding of the Council's action on my client's project at the meeting on April 22d is that the Council referred the matter to you for your opinion and guidance. I respectfully suggest that the Council should act favorably on both special use permits for the reasons set forth below.

As you are aware, the first special use permit request before the Council (which I have referred to as the "severance permit") involves a proposed modification of a 1981 special use permit that covered the Europa Hotel property, the Village Office Park site, my client's property, and some or all of the property across Europa Drive where the twin office buildings and adjoining parking garage have been constructed. The town has taken the position that the 1981 permit must be modified to remove my client's property from the permit before the Council can consider the second special use permit that would authorize the construction on this site of an office building.

I submit that the issuance of the severance permit is not really discretionary under the facts of this case. In the first place, as the 1984 letter from Steve Sizemore introduced at the April 22d meeting indicates, the town did *not* require any modification of the 1981 permit when it approved the office buildings across the street. In fact, the town regarded the 1981 special use permit as having been abandoned. Second, the three remaining tracts that the town now asserts are still covered under the 1981 special use permit – the hotel tract, the Village Office Park site, and my client's property – have long been in separate ownership. Thus, there is no legal connection between these properties, and the hotel has no legal right to use or encumber my client's property. Denial of the severance permit would achieve nothing since the two remaining parcels will remain precisely as they are and have been for over two decades. Accordingly, no public purpose would be served by a decision not to approve the severance permit. Third, and perhaps most importantly, since the town has asserted (see p. 54 of Agenda item 7b) that no permit for a development of any kind will be approved on this property until the severance permit is approved, a failure to approve this permit amounts to a decision – not only that the property cannot be used as proposed in the second SUP application – but that the property cannot be developed at all. I do not believe that the town can sustain this position unless it acquires the property and pays just compensation.

It is true that the hotel slightly exceeds the square footage that would be allowed under the current ordinance and that the landscape buffer along 15-501 may not meet current standards. However, there is nothing in the record to indicate that permit for the hotel, which was issued in

1979 for the 108,000 square foot building on the existing 5.5 acre site (i.e. prior to the hotel property and the other properties being combined under a single permit in 1980), did not comply with all town regulations in effect at that time. Assuming, therefore, that the hotel site was consistent with ordinance when it was developed pursuant to the 1979 permit, any nonconformities that may exist today on the site would be legitimized under the nonconforming use provisions of the ordinance. Moreover, under Section 18.7.1 of the Development Ordinance, the Council may modify the current regulations when "public purposes are satisfied to an equivalent or greater degree" by such modification. I submit that, for the reasons discussed above, a failure by the Council to make such modifications would constitute an abuse of discretion. A rejection of the severance permit will not increase the buffer, lessen the floor area of the hotel, add any land to the hotel site, or increase the buffer by one twig. Nor can a rejection of the severance permit be justified on the basis of purported concerns about the impact of the particular office project that is the subject of the second permit, since the issue in the first permit is whether my client's property should be severed from the 1981 special use permit so that it can be developed for *any* purpose. A rejection of this permit will therefore further only the objective of keeping this property in its undeveloped state, which is certainly not a legitimate use of the police power

Finally, as to the severance permit, the hypothesis offered by Ms. Coleman (and repeated by Dr. Krasny) that the hotel owner received permission to develop the hotel with greater density than allowed under the ordinance because of a commitment to leave my client's property in "low density usage" is nothing more than conjecture that is refuted by the facts in the record. As the planning staff report (Agenda item 7b. p. 58-59) reveals, in 1976 the town approved two office buildings on what is now the Village Office Park site and my client's property. This was nearly three years *before* the town authorized the 108,000 square foot hotel, and the permit linking the two properties was not issued until the following year. Thus, at the time the town approved the hotel, it could not have done so subject to some understanding that my client's property would be left in some "low density usage" since it had already approved an office building for this site.

With respect to the office building special use permit, there is simply no competent evidence in the record that would support the denial of the permit. The evidence presented by the town's own engineer, George Small, and by the traffic consultant retained by the town under its new policy, Ramey Kemp & Associates, supports only the conclusion that the project will *not* adversely affect the public health, safety or welfare. With the planned improvements to the Erwin Road/15-501 intersection, the Ramey Kemp report indicates that "the proposed development is expected to have minimal impact to the surrounding roadway network." (Agenda item 7a, p. 16). The proposed "superstreet" improvement to this intersection is not remote, speculative, or hypothetical. Rather, the evidence in the record is that the intersection "will be modified by the North Carolina Department of transportation under TIP U-4008," (Agenda item 7a, p. 5) and that "[c]onstruction of the superstreet is scheduled for 2004." There is no evidence that this improvement will not take place or that it will be delayed. Again, mere conjecture that it might not take place as scheduled cannot constitute the basis for a finding that is contrary to the evidence. Moreover, even if the improvement did not take place, there is no evidence whatsoever that the relatively minimal additional traffic generated by this office use would adversely affect the public health, safety, or welfare. There is undoubtedly considerable traffic in the area of the proposed office building, but the uncontradicted evidence submitted by

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George Small is that there would be "no significant change in the level of service or delay from the new traffic expected to be generated by the Europa Office Building." (Agenda item 7c, p. 85).

Given the unanimous support of this project by the planning staff, the town's traffic consultant, the planning board, transportation board, and other advisory boards, and the overwhelming evidence in the record as a whole that this project complies with all requirements of the Development Ordinance, I hope that you will reach the conclusion that this project must be approved under the law.

I appreciate your consideration.