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ATTACHMENT 1

M E M O R A N D U M

TO: The Honorable Mayor and Members of the Chapel Hill Town Council

CC: Mr. Ralph Karpinos; Mr. Roger Stancil

FROM: G. Nicholas Herman, The Brough Law Firm

RE: Comments on Proposed Revisions to the Duplex Design Guidelines

DATE: February 18, 2007

This Memorandum sets out our views about the legality of the proposed "Revision of Comprehensive Plan Design Guidelines Regarding Duplexes" provided in the Memorandum dated February 19, 2007 from J.B. Culpepper and Gene Poveromo to Town Manager, Roger Stancil. Discussed below are (1) the legal standards for valid aesthetic regulations, and (2) our comments on the validity of the proposed revisions to the duplex design guidelines in light of those legal standards.

I. The Legal Standard for Valid Aesthetic Regulations

In *State v. Jones*, 290 S.E.2d 675 (N.C. 1982), our Supreme Court set out three legal standards for valid aesthetic regulations:

First, an aesthetic regulation must be "reasonable" in the sense that "the aesthetic purpose to which the regulation is reasonably related outweighs the burdens imposed on the private property owner by the regulation." *Id.* at 681. The determination of this reasonableness depends upon a balancing of a property owner's right to the reasonable use of his property fkee from regulation against the corresponding gain to the public from the regulation. "Some of the factors which should be considered and weighed in applying such a balancing test include such private concerns such as whether the regulation results in a confiscation of the most substantial part of the value of the property or deprives the property owner of the property's reasonable use, and such public concerns as the purpose of the regulation and the manner in achieving a permitted purpose." *Id.* Factors that may be considered as providing corollary benefits to the general community from an aesthetic regulation include the "protection of property values, promotion of tourism, indirect protection of health and safety, preservation of the character and integrity of the community, and promotion of the comfort, happiness, and emotional stability of area residents." *Id.* In the final analysis, an aesthetic regulation will be upheld only if the purposes to which it is reasonably related outweighs the burdens that the regulation imposes upon private landowners.

Second, "the promulgation of regulations based *solely* upon aesthetic considerations… should not be delegated by [a town council] to subordinate groups or organizations which are not authorized to exercise the police power by the General Assembly." *Id.* (Emphasis in original). This means that although a town council may adopt objectively-specific regulations based on

aesthetic considerations, it is unlawful for any subordinate body of the Council (like the CDC) to make a d hoc, subjective aesthetic judgments.

Third, an aesthetic regulation will be declared void for vagueness if "it is not susceptible to reasonable understanding and interpretation." *Id. See also Connally v. General Constr. Co.*, 269 U.S. 385,391 (1926) ("[A regulation] which either forbids or requires the doing of an act in terms so vague that men of common intelligence must reasonably guess at its meaning and differ as to its application, violates the first essential of due process of law"). Thus, a regulation that structures be designed so as to be "compatible" or in "harmony" with nearby structures, or that exterior colors and other features of a structure be "harmonious" or "coordinated" will be declared unconstitutionally vague. *See, e.g., Anderson v. Issaquah*, 851 P.2d 744 (Wash App. 1993); *Morristown Rd. Assoc. v. Mayor of Bernardsville*, 394 A.2d 157 (N.J. 1978).

II. The Validity of the Proposed Revisions to the Duplex Design Guidelines

Provided below are our comments on each of the eight paragraphs of the proposed revisions to the Duplex Design Guidelines. As a threshold matter, five general points are in order.

First, the discussion below assumes *arguendo* that the aesthetic purposes to which the Guidelines are related outweigh the burdens imposed on private property owners by the Guidelines. No opinion is being offered here as to whether the Guidelines are valid under this balancing test.

Second, assuming that the Town Council chooses to have the CDC continue to decide whether an applicant has complied with the Guidelines (see the further comment on this matter under the fifth point below), the language of the Town's LUMO at Section 6.19 (d) should be rewritten with greater clarity. As currently written, subsection (d) provides that "[t]he Community Design Commission shall approve duplex building elevations and site plans to determine if the elevations/site plans are in accordance with the adopted design guidelines." This language is awkward insofar as it literally calls upon the CDC to engage in a task that was not intended—i.e., to "*approve* duplex building elevations and site plans," when the actual intent of the provision is to have the CDC decide whether an applicant has complied with the Guidelines. Thus, this ordinance subsection might be rewritten to say: "The Community Design Commission shall review duplex building elevations and site plans to decide whether the proposed duplex satisfies the requirements of the design guidelines." (A similar revision should be made to the language of subsection (f) of Section 6.19).

Third, different paragraphs of the proposed revisions to the Guidelines use the word "shall" or "should" in connection with a particular provision. The word "shall" connotes a mandatory obligation, whereas the word "should" is merely precatory. A decision needs to be made about whether the Guidelines are merely precatory (i.e., are merely desirable but not required) or are truly mandatory. Presumably, both Section 6.19 (d) of the LUMO and the Guidelines would be cast in mandatory language.

Fourth, some of the proposed revisions refer only to "new" duplex structures, whereas other provisions are silent about whether they apply to "new" or "existing" structures. Thus, the provisions need to be written in a way that makes clear which provisions apply to the construction of a "new" duplex structure and which apply to an "existing" structure that the applicant is seeking to convert into a duplex. (For example, it is unclear under Paragraph 4 of the proposed Guidelines whether the provision that garage doors not be the dominant feature of the structure applies only to a newly constructed duplex or also to an existing structure that an applicant seeks to convert into a duplex),

Fifth, because valid aesthetic regulations must be objectively specific (not subjective) and must be susceptible to reasonable understanding and interpretation, there would not seem to be any reason why a special body, like the CDC, need administer such regulations for duplexes. Based on the comments given below about Paragraphs 1-8 of the proposed revisions to the Guidelines, any revised Guidelines could simply be applied and administered by the Town staff rather than a special body like the CDC.

Comments on Paragraphs 1-3, and 6

Taken together, these paragraphs provide that the "appearance" of duplex structures be "consistent" and "comparable" with other neighborhood structures, and that exterior designs be "coordinated with regard to color, materials, architectural form and detailing." Although the definition of "neighborhood" in paragraph 3 is clear; the provisions in paragraphs 1, 2, and 6 are unlawful because (a) they are "solely aesthetic and call for purely subjective and *ad hoc* aesthetic judgments that cannot be delegated to the CDC; and (b) they otherwise are unconstitutional on vagueness grounds. *See, e.g., Anderson v. Issaquah*, 851 P.2d 744 (Wash App. 1993); *Morristown Rd. Assoc. v. Mayor of Bernardsville*, 394 A.2d 157 (N. J. 1978). In our judgment, there is no cure to the legal infirmities of these particular provisions.

Comments on Paragraph 4

This paragraph provides that "Garage doors, if facing the street, should not be the dominant feature of the structure." The phrase "dominant feature of the structure" is impermissibly vague and subjective because reasonable minds might differ as to whether a particular garage appears or does not appear to be the "dominant" feature of the structure. The legal infirmity of the provision might be cured by language to the effect that the size of garage doors, if facing the street, not exceed a certain percentage of the total surface area of the front elevation of the structure.

Comments on Paragraph 5

This paragraph essentially provides for the identification of entrances and entranceways. In order to avoid the subjectivity, ambiguity, and vagueness about how entrances might be "defined by architectural styles and features" and "how landscaping should frame and accentuate the architectural styles and features of the entrances," the provision might be rewritten to the effect that "Entrances shall be visible, and approaches to entrances shall be clearly delineated by sidewalks, landscaping, or other features."

Comments on Paragraph 7

This paragraph provides for the illumination of entrances. In our judgment, there is no legal infirmity to this provision.

Comments on Paragraph 8

This paragraph is directed at defining parking areas. In order to avoid the subjectivity, ambiguity, and vagueness of whether plantings or landscape materials adequately "minimize the visual impact of front yard parking," the provision might be rewritten to the effect that "Parking areas must be clearly designated by covering such areas with a paved or gravel surface and by delineating the edges of such areas through the use of landscape timbers, plantings, or other materials."