

SUMMARY OF PLANNING BOARD ACTION

Subject: Saint Thomas More School and Church - Application for Master Land Use Plan Modification

Meeting Date: August 5, 2008

Recommendation: That the Council approve the Resolution of approval for a Master Land Use Plan Modification.

Vote: 9-0

Ayes: George Cianciolo (Chair), Michael Collins (Vice-Chair), John Ager, Jason Baker, Michael Gerhardt , Andrea Rohrbacher, Del Snow, James Stroud, and Judith Weseman

Nay: None

Prepared by: George Cianciolo, Chair
Phil Mason, Staff

SUMMARY OF TRANSPORTATION BOARD ACTION

Subject: Saint Thomas More Catholic Church and School Master Land Use Plan Modification Application

Meeting Date: June 26, 2008

Recommendation: That the Council adopt Resolution A included as Attachment 3 in the June 17, 2008 Staff Report.

Vote: 5-0

Ayes: Rudy Juliano, Matt Scheer, Mirta Mihovilovic, Augustus Cho, and Bharath Iyengar

Prepared by: Rudy Juliano, Chair, Transportation Board
Ryan Mickles, Transportation Planner

**SUMMARY OF
COMMUNITY DESIGN COMMISSION ACTION**

Subject: Saint Thomas More Catholic church and School Master Land Use Plan
Modification Application

Meeting Date: June 18, 2008

Recommendation: That the Council adopt Resolution A of the Master Land Use Plan
Modification included as Attachment 2 to the June 17, 2008 Staff Report.

Vote: 8-0

Ayes: Mark Broadwell, Mary Margaret Carroll, George Cianciolo, Chris
Culbreth, Kathryn James, Laura King Moore, Glenn Parks and Jonathan
Whitney.

Nays: None

Prepared by: Jonathan Whitney, Chair
Kay Pearlstein, Staff

SUMMARY OF BICYCLE AND PEDESTRIAN ADVISORY BOARD ACTION

Subject: Saint Thomas More Catholic Church and School Master Land Use Plan Modification Application

Meeting Date: July 22, 2008

Recommendation: That the Council adopt Resolution A included as Attachment 2 in the June 17, 2008 Staff Report.

Vote: 6-0

Ayes: Linda Gaines, Jed Dube, Teressa Jimenez, Chris Clemmons, Dylan Sandler, Ray Magyar

Prepared by: Linda Gaines, Acting Chair, Bicycle and Pedestrian Advisory Board
Ryan Mickles, Transportation Planner

LAW OFFICES
COLEMAN, GLEDHILL, HARGRAVE & PEEK
A PROFESSIONAL CORPORATION

129 E. TRYON STREET
P. O. DRAWER 1529
HILLSBOROUGH, NORTH CAROLINA 27278
919-732-2196
FAX 919-732-7997
www.cgghp-law.com

FROM THE DESK OF
GEOFFREY E. GLEDHILL
E-MAIL: ggledhill@cgghp-law.com

April 24, 2007

Ms. Pam Jones
Director
Orange County Purchasing &
Central Services
Post Office Box 8181
Hillsborough, North Carolina 27278

**RE: Animal Services Operation Center Land Use Planning
Proceedings and Opinion 2006-1, the Authorized
Practice Committee of the North Carolina State Bar**

Dear Pam:

This letter is in response to the April 18, 2007 email you received from Tony Whitaker regarding the impact of Opinion 2006-1 of the Authorized Practice Committee of the North Carolina State Bar (hereafter, "Opinion 2006-1"). I have enclosed a copy of the email correspondence prompting this letter and a copy of Opinion 2006-1.

For purposes of the Animal Services project, it is necessary to divide Opinion 2006-1 into two parts. First, the legislative process of rezoning the Animal Services Operation Center property will include a public hearing on April 26, 2007. This public hearing will be followed by a decision of the Town Council of Chapel Hill and a decision of the Orange County Board of Commissioners. The Animal Services Operation Center application seeks a zoning atlas amendment to rezone the property from Residential-1 (R-1) to Office Institutional-1-Conditional (OI-1-C). The decision to rezone the property or not is a legislative one.

It is clear to me that Opinion 2006-1 does not prohibit the architects employed by Orange County and their engineering consultants from appearing and speaking on the County's

application for a zoning change and from doing so in a representative capacity. They can do so at the public hearing on the application and at the governing board meetings at which the decision is made. The only restriction placed on these County employed professionals in this rezoning process is that they "not hold themselves out as attorneys, provide legal services or advice, or draft any legal documents with regard to [the County's application]."

On the other hand, should the Chapel Hill Town Council and the Orange County Board of Commissioners approve the zoning district change requested, the development of the Animal Services Operation Center will require approval by the Chapel Hill Town Council of a special use permit. The presentation of that special use permit application cannot be done by the County's architects and engineers. That application must be presented, at the public hearing on the special use permit application, by an attorney at law. On the other hand, it is equally clear that the County's architects, engineers and other experts will be fact and opinion witnesses with respect to that special use permit application and the special use permit application public hearing. The attorney presenting this application on behalf of Orange County will be responsible for eliciting the presentation of the County's witnesses, including eliciting its expert witnesses' qualifications and their testimony.

The Authorized Practice Committee of the North Carolina State Bar carved out an exception to the requirement that represented parties before quasi judicial boards must be represented by attorneys licensed to practice law. That exception is that individual parties may represent themselves before these boards. That is, an application by John Q. Public can be presented by John Q. Public. In such a case, John Q. Public will be responsible for performing all of the functions of an attorney at law. Similarly, John Q. Public can represent himself before any court without violating the prohibition against the unauthorized practice of law. This exception, however, does not pertain to Orange County. That is, Orange County can only appear at a quasi judicial proceeding through its representatives because it is not a "natural" person. And, although Orange County employees may provide testimony and other evidence on behalf of the County, those employees cannot elicit

Ms. Pam Jones
Page 3
April 24, 2007

questions from other witnesses, cross examine other witnesses or argue for approval of the permit on behalf of the County.

If you have any questions about how to proceed, please advise. I am providing a copy of this letter to Craig Benedict, Laura Blackmon and Ralph Karpinos. Much of what is contained in this letter and all that is contained in Opinion 2006-1 pertains to land use decisions made by the Orange County Board of Commissioners and the Orange County Board of Adjustment.

Very truly yours,

COLEMAN, GLEDHILL, HARGRAVE & PEEK, P.C.



Geoffrey E. Gledhill

GEG/lsg
Enclosures
xc: Craig Benedict
Laura Blackmon
Ralph D. Karpinos, Esquire

lsg:letters\Pam Jones Land Use Planning ltr.doc

Geof Gledhill

From: Pam Jones [Pjones@co.orange.nc.us]
Sent: Thursday, April 19, 2007 12:21 PM
To: Geof Gledhill
Subject: FW: Animal Services

You comments would help me understand reality.

PJ

From: Tony Whitaker [mailto:tony.whitaker@civil-consultants.com]
Sent: Wednesday, April 18, 2007 1:07 PM
To: 'Ellen Weinstein'; Pam Jones; 'Jim Compton'; Bob Marotto
Subject: Animal Services

I want to make everyone aware of a fairly new issue that has cropped up relating to participation in public hearings. A committee of the N.C. State Bar has issued an opinion that essentially says that the kind of representation that we (Ellen and I) have been doing for the Animal Services project constitutes the "unauthorized practice of law", which is illegal. There are nuances of this that need more detailed explanation, but the ruling has affected how professionals like me have been able to perform our traditional services. For example, the legal counsel for my registration board has advised me to stop taking the lead in client representation at hearings. Due to my emphatic disagreement with their position, I have declined to follow this advice. Nevertheless, we should deal with this issue, because we don't want the approval process for the Animal Services project to have a basis for a legal challenge by any disgruntled parties.

The bottom line seems to be that an attorney needs to lead the representation, and others (architects, engineers, and others) may offer testimony, under the direction of the lead attorney. Alternately, the Applicant may represent "himself", but I'm not sure what that means for this project. The County Attorney's office is very much aware of this ruling. I suggest that Geoff be consulted about how the Animal Services project should be represented at the upcoming joint public hearing for the zoning case, and for the subsequent SUP hearing(s) with the Town.

Tony M. Whitaker, P.E.
Civil Consultants, Inc.
(919) 490-1645
<http://www.civil-consultants.com>

Authorized Practice Advisory Opinion 2006-1

October 20, 2006

Quasi-Judicial Hearings on Zoning and Land Use

Inquiry:

May a person who is not a lawyer appear before planning boards, boards of adjustment, or other governmental bodies conducting quasi-judicial hearings in a representative capacity for another party?

Opinion:

At its October 2005 meeting, the Authorized Practice Committee responded to an inquiry concerning the propriety of a person who is not a lawyer appearing before planning boards, boards of adjustment, and city and county government in a representative capacity. The committee's advisory opinion distinguished appearances on legislative concerns, such as general rezoning cases and ordinance amendments, from appearances on behalf of petitioners for special use permits and variances, which are quasi-judicial matters. The committee has received comments from a number of interested parties, including architects, land use planners, and city and county attorneys as a result of that opinion. The committee is issuing this advisory opinion to supplement the prior opinion.

First, the committee reiterates that the adoption of ordinances and amendments to official zoning maps (i.e. general rezoning cases) by the elected officials in city and county governments are legislative in nature and that any interested person may appear and speak on such matters before governmental bodies, even as representatives of groups or interested parties, without engaging in the unauthorized practice of law. Nonetheless, the general statutory prohibitions on unauthorized practice of law still apply even to persons who appear before governmental bodies on legislative matters. Non-lawyers may not hold themselves out as attorneys, provide legal services or advice, or draft any legal documents with regard to such matters. See N.C. Gen. Stat. §§ 84 2.1 and 4.

The law is clear that hearings on applications for special use permits and variances under zoning ordinances, as well as appeals from staff level interpretations related to permits, are quasi-judicial proceedings. N.C. Gen. Stat. §§ 153A-345 and 160A-381 and 388. See, *Humble Oil & Refining Co. v. Bd. of Aldermen of Chapel Hill*, 284 N.C. 458, 202 S.E.2d 129 (1974) and *Woodhouse v. Board of Comm'rs of Nags Head*, 299 N.C. 211, 261 S.E.2d 882 (1980). (For simplicity, the quasi-judicial hearings before these bodies are hereafter referenced to as a "variance hearing" unless the context indicates otherwise.) The governmental body before which the variance hearing is conducted sits in a judicial role of applying the standards of an ordinance to the particular circumstances of a particular party. Accordingly, the role of the governmental body is to receive evidence and make decisions based upon the evidence presented.

Variance hearings require the governmental body hearing the matter to observe certain formalities. Evidence, including witness evidence, is presented to the hearing body, although the Rules of Evidence need not be strictly observed. All witnesses before the body must be sworn and their testimony is subject to cross-examination. The hearing body has the power and authority to issue subpoenas to compel witness testimony. A record of the proceedings must be preserved. The decision is to be based upon the evidence presented at an open hearing, and not on extraneous matters or personal knowledge of the members of the board. The applicant has the burden of proof. The board must make written findings of fact to support its decision. And, the decision of the board is reviewable by the courts on appeal based solely upon the record of the proceedings.

The committee believes that the law is also clear that an appearance on behalf of another person, firm, or corporation in a representative capacity for the presentation of evidence through others, cross-examination of witnesses, and argument on the law at a quasi-judicial proceeding is the practice of law. N.C. Gen. Stat. §§ 84 2.1 and 4. Consequently, because the variance hearings are by definition quasi-judicial proceedings, the committee concludes that it is the unauthorized practice of law for someone other than a licensed attorney to appear in a representative capacity to advocate the legal position of another person, firm, or corporation that is a party to the proceeding.

The committee has been urged to recognize that architects, landscape architects, land use planners, and engineers play a vital role at these quasi-judicial proceedings by presenting necessary facts and information on behalf of their clients at variance hearings. The committee agrees that the information these professionals can present is critical to the decision before the hearing body. These professionals are subject matter experts whose expert opinions, as witnesses, must be presented to the hearing body. They are witnesses who are in the best position to explain to the hearing body the facts of the proposed design and its anticipated effects on a variety of factors, including traffic, environment, and aesthetics, within the framework of matters properly under consideration at the variance hearing. The committee does not believe that the role of legal advocate by attorneys in quasi-judicial proceedings should interfere with or inhibit the role of non-lawyer professionals who speak as witnesses and present information at these quasi-judicial proceedings. In fact, their roles should be complementary.

It is axiomatic that the committee has no authority to amend or formulate exceptions to the statutes. In issuing an advisory opinion, it simply articulates how it believes a court would ultimately resolve the question for the guidance of the public. The committee cannot recognize or create exceptions to the law as expressed by the legislature and the courts. Further, we believe, as a practical matter, that effective representation of parties in variance hearings is becoming increasingly dependent upon legal advocacy of the rights of the parties with an eye toward compiling a supportable record in the event of an appeal. These are the skills an attorney provides. While it is true that many of these hearings involve routine and non-controversial matters, even questions about matters such as the height of residential fences may become the subject matter of an appeal where the appellate courts may only consider the record produced at the variance hearing. See

Robertson v. Zoning Board of Adjustment for the City of Charlotte, 167 N.C. App. 531, 605 S.E.2d 723 (2004). It is difficult to predict in advance when a matter may require a comprehensive record for appellate purposes. Therefore, with this further elaboration, the committee re-affirms its initial opinion expressed by letter dated October 31, 2005, that the representation of another person at a quasi-judicial hearing is the practice of law.

That said, this opinion should not be interpreted to diminish the role and expertise of land use professionals as witnesses at variance hearings. These professionals may still present their evidence in support of the position of their clients. However, they may not examine or cross-examine other witnesses or advocate the legal position of their clients.

The committee's opinion is also not intended to affect the ability of city and county planning staff to present factual information to the hearing board, including a recitation of the procedural posture of the application, and to offer such opinions as they may be qualified to make without an attorney for the government present, as the committee understands is the proper, current practice and role of the planning staff. Further, nothing in this opinion should be interpreted as limiting the ability of a corporate officer or employee from testifying on factual matters on behalf of a corporate party during a hearing or suggesting that individual parties may not represent themselves before these boards.

In sum, the committee is of the opinion that land use professionals, including architects, engineers, and land use planners, may appear and testify as to factual matters and any expert opinions that they are qualified to present at quasi-judicial proceedings, but the presentation of other evidence, including the examination and cross-examination of witnesses, making legal arguments, and the advocacy for results on behalf of others before quasi-judicial zoning and land use hearings, is the practice of law that may be performed only by licensed attorneys at law.

THE NORTH CAROLINA STATE BAR

208 Fayetteville Street • PO Box 25908 • Raleigh, NC 27611-5908 • 919.828.4620

Copyright © North Carolina State Bar. All rights reserved.