

MEMORANDUM

TO: Roger L. Stancil, Town Manager

FROM: J.B. Culpepper, Planning Director
Ralph Karpinos, Town Attorney

SUBJECT: Public Hearing: Land Use Management Ordinance Text Amendment – Resource Conservation District findings for a variance

DATE: October 19, 2009

INTRODUCTION

Tonight's public hearing has been called to consider a proposed Land Use Management Ordinance text amendment regarding when private covenants would be considered a relevant factor in granting a variance from the Town Resource Conservation District. We recommend that the Council open the public hearing and receive comment regarding the proposed Land Use Management Ordinance text amendment.

BACKGROUND

On December 12, 2008, the Supreme Court of North Carolina filed its decision in the case of Chapel Hill Title and Abstract Company, Inc., et. al v. Town of Chapel Hill and the Town of Chapel Hill Board of Adjustment. The case involved a property owner's application to the Chapel Hill Board of Adjustment for a variance from provisions of the Town's Resource Conservation District (RCD). The variance was sought for the purpose of permitting the construction of a single family residential structure. The case has a lengthy history and has been before the Board of Adjustment and in the Court system. The property owner previously had received a building permit allowing construction of a single family dwelling outside the RCD but was prevented from constructing the building due to enforcement of the front yard setback in the private covenants. The Board denied the variance on the grounds that the RCD had not prevented construction.

The Supreme Court ruled that the Town of Chapel Hill Board of Adjustment erred in its denial of the variance application. The Court found that "the plain language of the ordinance" required the Board to "consider the uses available to the owner of the entire zoning lot that includes area within the Resource Conservation District." The Court said that the ordinance "instructs the Board to consider the actual state in which the property is found—including both its physical and legal conditions . . ." The Court's determination establishes a binding legal precedent for the interpretation and application of the current language in the Town's Land Use Management Ordinance.

CURRENT LAND USE MANAGEMENT ORDINANCE

Section 3.6.3(j)(2) in the Land Use Management Ordinance (LUMO) specifies the findings the Board of Adjustment shall consider when deciding whether to grant a variance. This section of the ordinance is copied below:

“(2) Required findings:

- A. The review of the Board of Adjustment shall extend to the entire zoning lot that includes area within the Resource Conservation District. The Board of Adjustment shall grant a variance, subject to the protections of this article, if it finds:
 - 1. That the provisions of this article leave an owner no legally reasonable use of the portion of the zoning lot outside of the regulatory floodplain; and
 - 2. That a failure to grant the variance would result in extreme hardship.

- B. In making such findings, the Board of Adjustment shall consider the uses available to the owner of the entire zoning lot that includes area within the Resource Conservation District.”

The Supreme Court determined that the language in paragraph B requires the Board to consider the legal restrictions on the property established by private covenants or other similar legal limitations on a property.

DISCUSSION

We think that the Land Use Management Ordinance should be amended to clarify when and if private covenants, or other similar legal or physical limitations, should be considered by the Board of Adjustment when determining if application of the Resource Conservation District regulations leave no legally responsible use of a property.

PROPOSED LAND USE MANAGEMENT ORDINANCE TEXT AMENDMENT

The proposed text amendment would clarify the required findings of the Board of Adjustment by adding the following language to paragraph A of Section 3.6.3(j)(2):

- 1. That the provisions of this article **and any applicable legal conditions including private covenants and deed restrictions** leave an owner no legally reasonable use of the portion of the zoning lot outside of the regulatory floodplain; and

In addition, we recommend that paragraph B of Section 3.6.3(j)(2) be revised to read as follows:

B. Subject to the provisions of paragraph A above, in making such findings, the Board of Adjustment shall consider the uses available to the owner of the entire zoning lot that includes area within the Resource Conservation District. Private covenants and deed restrictions shall not be the basis for granting a variance if the Board finds:

1. That public environmental interests would be negatively affected by the granting of a variance; and,

2. That the variance would not be needed to make legally reasonable use of the portion of the zoning lot outside of the regulatory floodplain in the absence of such private restrictions.

ZONING AMENDMENT

Article 4.4 of the Land Use Management Ordinance establishes the intent of Zoning Amendments (including both atlas and text amendments to the Ordinance) by stating that, “In order to establish and maintain sound, stable, and desirable development within the planning jurisdiction of the Town it is intended that this chapter shall not be amended except:

- a) to correct a manifest error in the chapter; or
- b) because of changed or changing conditions in a particular area or in the jurisdiction generally; or
- c) to achieve the purposes of the Comprehensive Plan.

Article 4.4 further indicates:

It is further intended that, if amended, this chapter be amended only as reasonably necessary to the promotion of the public health, safety, or general welfare, and in conformance with the Comprehensive Plan.

A) An amendment to the Land Use Management Ordinance (text amendment) is necessary to correct a manifest error in the chapter.

Staff Comment: We believe the information in the record to date can be summarized as follows:

Argument in Support: The Court’s determination establishes a binding legal precedent for the interpretation and application of the current language in the Town’s Land Use Management Ordinance. We believe it would be appropriate to consider modifying this current language in the Land Use Management Ordinance to adjust the language to respond to the Court’s decision because we believe that in some circumstances Town regulations enacted for the benefit of the public good and the community as a whole should not be varied on the grounds of a private covenant which is focused on a more narrow private benefit.

Argument in Opposition: Two dissenting voices on the Planning Board cited a concern that this new language would create a litigious situation for homeowner associations and the concern that homeowner associations would suffer financial penalties as a result of people purchasing restricted property knowing they could challenge the association. The planning board expressed a desire that only homeowners who owned property at the time the RCD regulations went into effect should be able to seek relief from private covenants.

B) An amendment to the Land Use Management Ordinance (text amendment) is necessary because of changed or changing conditions in a particular area or in the jurisdiction generally.

Staff Comment: We believe the information in the record thus far can be summarized as follows:

Argument in Support: We are unable to identify any arguments in support of changed conditions.

Argument in Opposition: To date no arguments in opposition have been submitted.

C) An amendment to the Land Use Management Ordinance (text amendment) is justified to achieve the purposes of the Comprehensive Plan.

Staff Comment: We believe the information in the record thus far can be summarized as follows:

Argument in Support: We believe the justification of the text amendment application is to achieve the purposes of the following major themes of the Comprehensive Plan as it relates to:

- **Conserving and protecting the Town's existing natural setting**

Staff Comment: Clarification of the required findings necessary for granting a variance to the Resource Conservation District regulations will help insure that the regulations, which protect our natural resources, are consistently and fairly applied.

Argument in Opposition: To date no arguments in opposition have been submitted.

RECOMMENDATIONS

Planning Board Recommendation: The Board voted 5-2 to recommend approval of the Land Use Management Text Amendment with the following suggested change to paragraph B:

“Private covenants and deed restrictions shall not be the sole basis for a variance. The Board shall consider other factors such as the project’s impact on environmental resources and the legally available use of the property.”

Staff Preliminary Recommendation: Staff and the Town Attorney consulted after the Planning Board recommendation and developed the attached draft Ordinance. We recommend that the Council open the public hearing and receive comment regarding the proposed Land Use Management Ordinance text amendment.

ATTACHMENTS

1. Proposed Text Amendment (p. 5).
2. Summary of Planning Board Action (p. 7).
3. October 6, 2009 Planning Board Staff Memorandum (p. 8).
4. September 15, 2009 Planning Board Staff Memorandum (p. 10).