

9

ATTACHMENT 2

LAW OFFICES

COLEMAN, GLEDHILL, HARGRAVE & PEEK
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FROM THE DESK OF
GEOFFREY E. GLEDHILL
E-MAIL: geoffreygledhill@cgandh.com

January 12, 2005

Moses Carey, Jr., Chair
Valerie P. Foushee
Alice M. Gordon
Stephen H. Halkiotis
Barry Jacobs
Orange County Board of Commissioners
Post Office Box 8181
Hillsborough, North Carolina 27278

RE: Preserve at Erwin Trace

Dear Board Members:

Orange County has received notice that Durham County has, pursuant to the Durham City-Durham County Subdivision Ordinance (hereafter, "the Ordinance"), "reserved" the land owned by Duke University that is under contract for sale to Crosland Properties for the development of the Preserve at Erwin Trace. The Board of Commissioners has asked me to report on this reservation process. This letter does so and provides you with additional information pertinent to the proposed Preserve at Erwin Trace.

Crosland Properties has pending before Durham County, Durham City and Orange County a development plan for the approximately 43.5 acres under contract. The development plan calls for the subdivision of the property into residential building lots, all of which will be located in Durham County, and dedicated open space that will be located in Durham County and Orange County. The plan calls for all of the property

Orange County Board of Commissioners

Page 2

January 12, 2005

located in Orange County to be open space and to be made subject to a conservation easement deeded to Orange County. This deed of conservation easement would permit public access to a trail or trails traversing the land subject to the easement. It would also permit a public right-of-way to traverse it for the access road to the subdivision from Erwin Road. A copy of a small scale map of the proposed development is enclosed. The map is not the "last word" on the proposal but it gives you the big picture. The map does not locate the trail or trails that would be within the conservation easement.

The subdivision is being processed by the joint Durham City/County Planning Department and is pending before both Durham County and Durham City for different reasons. It is pending before Durham County for subdivision approval because the property is presently not in the City of Durham. It is pending before the City of Durham for (1) annexation, (2) subdivision approval and (3) public water and sewer approval. The development is also pending before Orange County because of the fact that the part of the development in Orange County will be a separate, "subdivided" lot, although no portion of the property located in Orange County will be further subdivided.

Durham County has "reserved" the portion of the property located in Durham County pursuant to Sec. 7D. of the Ordinance. The Ordinance provides for a 45 calendar day delay of consideration of preliminary plats which "contain sites which appear in an adopted plan or policy document as a site for a public school, ...greenway or other open space..."¹ During this 45 day period the appropriate "public agency" (board of education, agency of Durham County or agency of Durham City) determines if the public agency wishes to reserve the site. If the public

¹ There is some question about whether any portion of the Preserve at Erwin Trace development that is located in Durham County is designated in the Durham Comprehensive Plan or other Durham policy document as open space or a greenway. The New Hope Creek Corridor Master Plan talks about this Duke land being part of the New Hope Creek Corridor greenway. But, the map that backs up the language narrating this greenway designates only the Orange County portion of this Duke University land for acquisition for greenway purposes. The ERCDC Department can better address this point.

Orange County Board of Commissioners

Page 3

January 12, 2005

agency determines that it wants the site reserved, it is "reserved." The public agency then has either 18 months (board of education for a school site) or 120 days (other public agency) after preliminary plat approval to acquire the property.

North Carolina General Statute § 153A-331 authorizes a county to require money from a developer to be used by the county for it to acquire recreation land. N.C. Gen. Stat. § 153A-331 also authorizes the "reservation of land for school sites," provided the school site to be reserved is identified in the county's approved comprehensive land use plan. That latter reservation authority allows for the approval of the subdivision with the school site reserved and gives the appropriate board of education 18 months to acquire, by voluntary means, the school site or begin condemnation proceedings to acquire the school site reserved. There is no comparable site reservation process with respect to the acquisition of land for open space or greenways. There is, however, in that same statute, authority for a county to require the dedication or the reservation of recreation areas "serving residents of the immediate neighborhood within the subdivision...and for requiring the developer to provide funds to the county whereby the county may acquire recreation land or areas to serve the development or subdivision, including the purchase of land which may be used to serve more than one subdivision or development within the immediate area." This power on the part of a county to "exact" recreation land has constitutional limitations which are illustrated below in the review of Orange County's regulatory authority. I have enclosed correspondence between the attorney for the developer and the Durham County attorney which fairly well frames a debate about the "authority" of Durham to do what it is doing. I have also enclosed a copy of the pertinent provisions of the Durham County Ordinance for your information.

By local act, Orange County's authority with respect to recreation land dedication and payment-in-lieu of dedication is more broadly written than the general law with respect to the location of recreation land dedicated and purchased with payment-in-lieu and is based on the district park system laid out in the County's Comprehensive Plan. So far as I know, no other county has similar broadly based recreation land reservation and dedication powers. However, the amount of land

Orange County Board of Commissioners
Page 4
January 12, 2005

that can be required to be dedicated or for which payment-in-lieu is exacted for each subdivision is based on a service model that does not result in much land being dedicated or much money being paid for the typical Orange County subdivision (no more than 1/20 acre for each dwelling unit and a land use plan which generally requires 2-3 acres per dwelling unit). A service model is required to demonstrate that the land or money exaction meets "proportionality" requirements of the United States Constitution. On the other hand, Orange County's flexible development requirements do result in considerable open space being preserved though not much of that preserved land ends up being available for active public use.

Orange County does not have the strict timelines for development approval that are present in the Durham City-Durham County Subdivision Ordinance. Therefore, the reservation language in question would have only marginal utility to Orange County in its consideration of a proposed development involving land that it would like to consider acquiring. Put another way, Orange County's regulations, with respect to the timing of development approval, provide a reasonable amount of time before preliminary plan approval for a determination to be made as to whether public acquisition of property being proposed for development is possible.

With respect to Orange County's consideration of the preliminary plan for the Preserve at Erwin Trace, Orange County's Subdivision Regulations require, with respect to a subdivision that is proposed with a public road dedication, that the preliminary plan of the subdivision be approved by the Board of Commissioners. And, before the subdivision receives preliminary plan approval, the utility provider, where public water and/or sewer are proposed to serve the subdivision, must certify that the proposed subdivision is suitable for those utilities. Orange County has not received that certification from the City of Durham. Orange County is not likely to receive that certification from the City of Durham unless the City of Durham annexes the Durham County portion of the Preserve at Erwin Trace development and approves the subdivision and those utilities. I do not know about the imminence of decisions by the City of Durham on this project.

Orange County Board of Commissioners
Page 5
January 12, 2005

Further, approval by Orange County of the preliminary plan of the portion of this development located in Orange County will not result in any property, Preserve lots or otherwise, located in Orange County being served with public water or public sewer. The sewer lines that are proposed to serve the development will not be extended into Orange County at all. I am told that the preferred plan for serving this development with public water will bring the water line from Durham County into Orange County along Erwin Road from the north and into the development. Water lines along Erwin Road will not require Durham County to acquire any land because they will be accomplished by an encroachment agreement between the City and NC DOT. However, extension of water lines from Erwin Road through Orange County and to the homes in the development in Durham County will require the acquisition by the City of Durham of easements for that purpose. Since the acquisition of the easements will require Orange County's approval, Orange County will be able to condition that approval on their being no water service in Orange County.

I have enclosed an October 5, 2004 letter that I wrote to Craig Benedict about public water service to lots in the Preserve at Erwin Trace and the enclosure to that letter. My October 5 letter refers to uncertainty on my part as to the annexation boundary between the Town of Chapel Hill and the City of Durham. I have received, from the Chapel Hill Town Attorney, the annexation boundary information I did not have in October. The Preserve at Erwin Trace and the property north of that development to Cornwallis Road, encompassing almost all of the Rural Buffer, is subject to the annexation boundary agreement and by reference the City of Durham/OWASA utility agreement. By virtue of those agreements, the City of Durham cannot serve homes located in Orange County with public water anywhere along the water lines proposed to serve the Preserve at Erwin Trace without OWASA approval, which approval cannot occur because of OWASA's commitments in the Water and Sewer Management, Planning and Boundary Agreement.

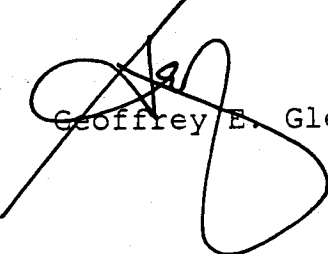
Approving the preliminary plan of the Orange County portion of this subdivision will enable Orange County to acquire a conservation easement in the Orange County portion of this development at no public cost which greenway would permit public access to this property and accomplish the piece of the New Hope

Orange County Board of Commissioners
Page 6
January 12, 2005

Creek Corridor greenway identified in the Corridor greenway plan. Agreeing to an extension of Durham City's water as described here, so long as it is clear that there will be no public water service to homes in Orange County along that water line will, not conflict with any Orange County laws, regulations or policies.

Very truly yours,

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

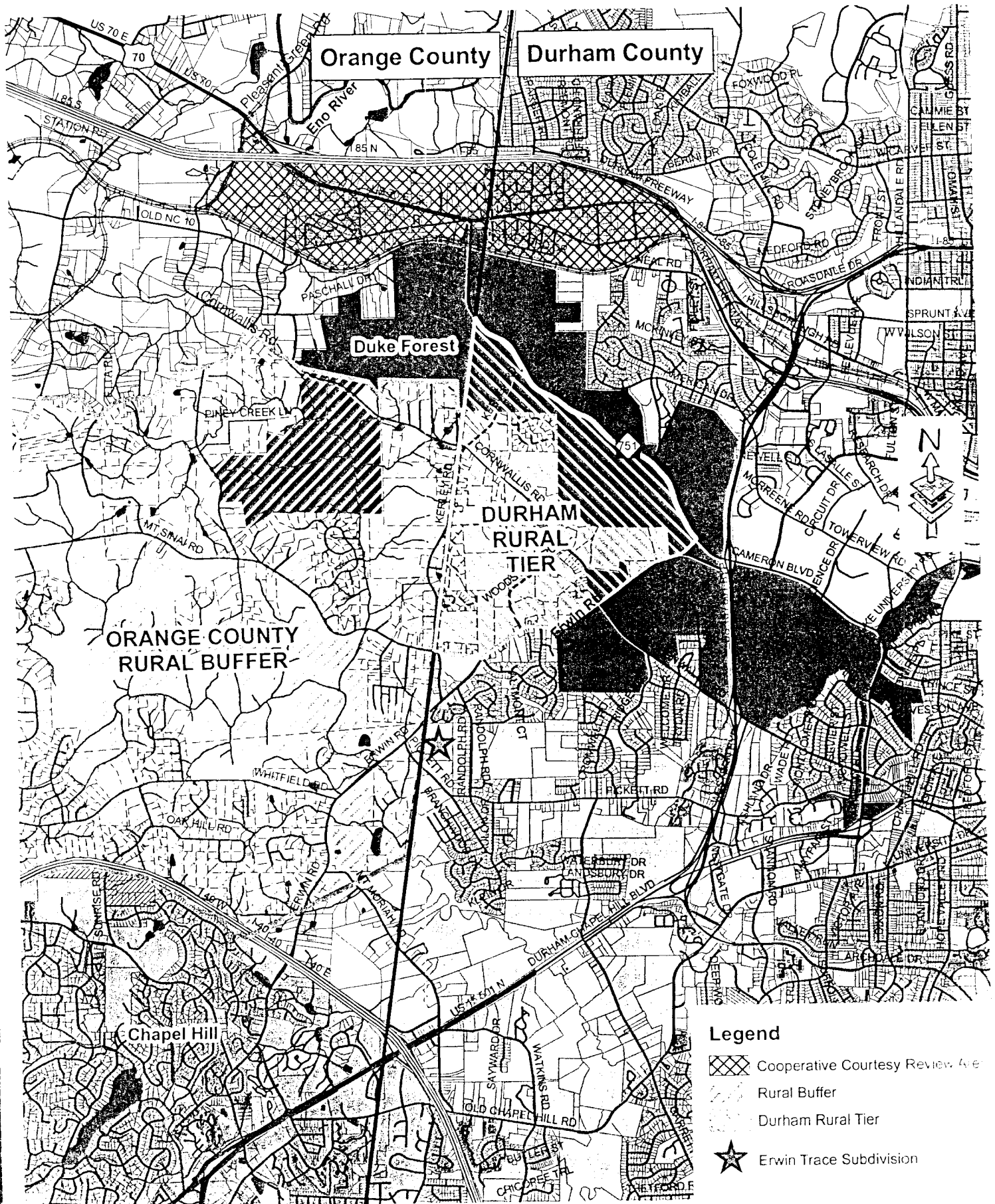


Geoffrey E. Gledhill





GEG/lsg
Enclosures

xc: Craig Benedict
Robert Epting, Esquire
Ralph D. Karpinos, Esquire ✓
John M. Link, Jr.
David Stancil

Cooperative Courtesy Review Area



Legend

-  Cooperative Courtesy Review Area
-  Rural Buffer
-  Durham Rural Tier
-  Erwin Trace Subdivision

16

Duke University
Korstan Division of
Duke Forest

Oahler Property

Softerra
Community

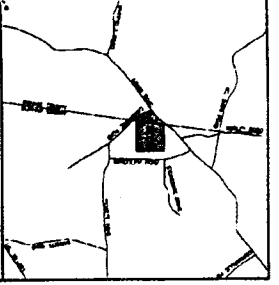
Orange County

Kendrick
Estates

Randolph Road



VICINITY MAP



Site Summary

| | |
|------------------------------|-----------------------|
| Total Area | 43.54 Ac (31.63 Ac) |
| Zoning | R-20 (Cluster) |
| Number of Single Family Lots | 49 |
| Proposed Density | 1.1 DU/AC (1.5 DU/AC) |
| Open Space Required: | 5.74 Ac |
| Open Space Provided: | 21.54 Ac (10.71 Ac) |

Preserve

AT ERWIN TRACE



Deane K. Stewart & Associates, Inc.
 223 S. Orange St.
 Raleigh, NC 27601
 Phone: 919.978.1100
 Fax: 919.978.1101
 www.dksa.com

Preserve

AT ERWIN TRACE

DURHAM COUNTY / ORANGE COUNTY NORTH CAROLINA

DATE: 07-01-2004
 SCALE: 1"=100'
 SHEET NO.: 128-0128
 DRAWN BY: JZ
 CHECKED BY: M.S.

(17)

THE BROUGH LAW FIRM

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November 24, 2004

Mr. S. Chuck Kitchen
Durham County Attorney
Government Administration Complex
Durham, North Carolina 27701

Re: Preserve At Erwin Trace

Dear Chuck:

I represent Crosland, Inc. in connection with an issue that has arisen regarding the County's consideration of an application for approval of the above-referenced proposed subdivision on Erwin Road. My understanding is that the County accepted Crosland's preliminary plat application, and Crosland paid the applicable fees for the processing of this application, on July 7, 2004. Four months later, on November 8, 2004, the Board of Commissioners, purportedly acting under a section of the County's ordinance dealing with the reservation of public facility sites, "reserved" the entire 32 acre portion of the subject tract that is located in Durham County.

I have two concerns about this process. First, unless the County has obtained special legislation, it does not appear to me that the County has the statutory authority to engage in such a reservation. G.S. 153A-331 does empower the County to provide for the "dedication or reservation of recreation areas *erving residents of the immediate neighborhood within the subdivision,*" (emphasis added), but this obviously does not apply in this case because the reservation includes the entire tract. This same section also establishes a procedure to reserve *school sites* for the benefit of the general public, but no such authority is provided for the reservation of recreation areas designed to serve the general public. If the County does have special legislation that provides additional authority, I would appreciate receiving a copy of it.

Second, and more importantly for purposes of this discussion, even if the County does have statutory authority to adopt the above-referenced ordinance, the County did not follow the clear dictates of its own ordinance. According to the information I received, the County's ordinance provides that "the appropriate agency responsible for future site acquisition [which I presume means the Board of Commissioners with respect to recreation areas or park sites] shall be given forty-five (45) calendar days *from date of plat/plan submission* to decide if it wishes to reserve the site." (Emphasis added). The obvious intent of this provision is to give the County a fairly short period – 45 days – after a formal application has been submitted for the County to make a determination as to whether it wants to acquire a site shown on some adopted plan as a

18

proposed public facility. The ordinance is not ambiguous as to when the 45 day period begins to run – it starts when the plat is submitted. That occurs when a formal application is filed and the County accepts payment of the filing fee. And it certainly makes sense to start the clock on that date, since that is the point at which the County is notified in a formal and official way that development of the land is imminent, and the specific plans for development are revealed. Furthermore, in the more typical situation, where potential County acquisition involves only part of the proposed development tract, an early decision by the County facilitates any necessary revisions of the plans as the development moves toward approval. Everyone understands that plans are tweaked or additional information provided in response to staff review, but the ordinance is clear that the 45 days begins to run when the plans are *submitted*, not at some later date immediately prior to actual approval of the development.

I respectfully request that the County Board of Commissioners immediately release this development from the purported reservation and allow the approval process to go forward without the reservation.

Thank you for your consideration. I look forward to hearing from you.

Sincerely,

THE BROUGH LAW FIRM



Michael B. Brough

MBB:las

cc: Mr. Jim Anderson
Durham County Board of Commissioners



COUNTY OF DURHAM
OFFICE OF THE COUNTY ATTORNEY

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COUNTY ATTORNEY

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ASSISTANT COUNTY ATTORNEYS
CATHY L. MOORE
CURTIS MASSEY
LUCY CHAVIS
CAROL W. HAMMETT
GERI NETTLES

December 2, 2004

Michael B. Brough, Esquire
The Brough Law Firm
1829 E. Franklin Street, Suite 800-a
Chapel Hill, NC 27514

Re: Preserve at Erwin Trace

Dear Mike:

I am in receipt of your letter regarding the above-entitled property. The facts as you have presented them are not entirely correct. Initially, it should be pointed out that the County did not receive the preliminary plat application or fees; they were received by the Planning Department which is a department of City government. The City conducts the administrative planning functions for the County under contract. Therefore, the County is not aware of nor normally receives notice of preliminary plat application filings at the time of filing. Additionally, while it is true that Crosland made an application in July, it was not "accepted" at that time in that the preliminary plat was not in compliance with County ordinances. A preliminary plat which did comply with the County's ordinances was not filed by Crosland until November 15, 2004.

It should also be noted that while the process being used is being referred to as a "reservation", it is not a true reservation in the legal sense. As I am sure you are aware a "reservation" normally indicates that land is required to be donated or committed to public use. The process being utilized should more properly be referred to as a delay in approval which allows the governing unit a chance to acquire property in compliance with adopted plans. The land is not being required to be dedicated to public use, and no exaction occurs. Therefore, I believe the ordinance provision is authorized by G.S. §§ 153A-121 and 153A-331.

As to your point on compliance with the ordinance, I believe the County did comply regardless of the interpretation of the ordinance. First, the Planning Director has made an

(20)

Michael B. Brough, Esquire

-2-

December 2, 2004

interpretation of the ordinance that the 45 days you refer to is a guaranteed period in which an agency has the right to act. The time for acting does not expire until the preliminary plat is actually approved. Even if he were not correct in his interpretation, which has not been challenged, the action of the Board was within 45 days of notification of the Board of County Commissioners and its Open Space Coordinator by the City. And finally, a preliminary plat which was in compliance with the County's ordinances was not filed until November 15. With any of the three interpretations, the County's action was within the time period as prescribed by the ordinance.

Should you have any further questions, please feel free to give me a call.

Sincerely,



S. C. Kitchen
County Attorney

xc: Board of Commissioners
Wendell Davis

(21)

Sec. 7D. Reservation of public facility sites and lands.

(This section does not apply to the reservation of lands for public streets and roads which is regulated according to the procedures set forth by the General Statutes of North Carolina.)

1. The review of preliminary plats may be delayed by no more than 45 calendar days if the proposed subdivision contains sites which appear in an adopted plan or policy document as a future site for a public school or other public facility, recreation area, park, greenway or other open space, or railroad corridor. During preliminary plat review, the appropriate agency responsible for future site acquisition shall be given 45 calendar days from date of plat/plan submission to decide if it wishes to reserve the site.
2. If the site is not to be reserved, the subdivision shall be processed in the normal fashion. If the agency wishes to reserve the site and specifies such intent in writing to the planning director, the subdivision shall not be approved without the reservation.
3. Public school authorities shall have 18 months from the date of preliminary plat approval to acquire the site by purchase, by receipt of dedication, or by initiating condemnation proceedings. If, at the end of the 18-month period, none of the above actions has occurred, the subdivider may consider the land free from reservation and apply for revised preliminary plat approval for its use. (See G.S. 153A-331 and G.S. 160A-172.)
4. Other public agencies shall have 120 calendar days from the date of preliminary plat approval to arrange for site acquisition for public facilities by option to purchase, by purchase, by receipt of dedication, or by initiating condemnation proceedings. If, at the end of the 120-day period, none of the above actions has occurred the subdivider may consider the land free from reservation and apply for revised preliminary plat approval for private use of the property.

(Ord. of 5-10-93, § 1e(2); Ord. of 11-10-97(1), § 8)

Sec. 7E. Site improvements.

Upon preliminary plat (or site plan) approval, the subdivider may apply for permits to begin site work and the installation of improvements. All site work shall be performed in compliance with the requirements of this ordinance and other applicable regulations of the city, county, and state.

Sec. 7F. Final plats.

1. When the installation of required site improvements is nearing completion, the subdivider may submit a final plat for review and approval.
2. Complete sets of final plat documents shall be submitted to the planning department in the required number, along with a completed application for review, and payment of the prescribed review fee. Staff shall check the submittal for completeness and, if found to be in order, it shall be transmitted to appropriate public and utility agencies for review and comment.
3. Review agencies will transmit review comments back to planning. If required corrections are minor, planning shall schedule the final plat for review at the next development review board meeting. If required corrections are extensive, the subdivider shall be given an opportunity to correct the plat before it is scheduled for DRB.
4. The final plat documents, along with the review comments, will then be considered by [the] development review board at a public meeting at which a representative of the subdivider or any other interested person may be heard. The DRB shall then approve the plat as is, approve it subject to additional corrections, defer it for additional information and/or

22

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FROM THE DESK OF
GEOFFREY E. GLEDHILL
E-MAIL: geoffreygledhill@cgandh.com

October 5, 2004

Mr. Craig Benedict
Orange County Planning Director
Orange County Planning Department
Post Office Box 8181
Hillsborough, North Carolina 27278

RE: Public Water Service to Lots in the Preserve at Erwin Trace

Dear Craig:

This letter is in response to memos from you and Robert Davis and an email from Robert Davis. My response assumes the following: (1) that all of the lots proposed in the development will be located in Durham County; (2) that initially access to this development will be limited to Erwin Road at a point where Erwin Road is in Orange County; (3) that the development proposal includes an offer of dedication to Orange County of a conservation easement in all of the Preserve at Erwin Trace property that is located in Orange County and that that conservation easement will extinguish all development rights of the property located in Orange County; (4) that the public water line extensions will not require the acquisition by the City of Durham of utility easements within Orange County; and (5) that the portion of the Preserve at Erwin Trace that is located in Orange County is located in property zoned Rural Buffer.

The Joint Planning Agreement among Orange County, Carrboro and Chapel Hill describes the Rural Buffer as being "a low-density area consisting of single-family homes situated on large lots

(23)

Mr. Craig Benedict
Page 2
October 5, 2004

having a minimum size of two (2) acres. The Rural Buffer is further defined as "land which, although adjacent to an urban or transition area, is rural in character and which will remain rural, contain low-density residential uses and not require urban services (public utilities and other town services)." This definition is not and never has been a statement that public utilities are prohibited in the Rural Buffer. I have written about this in the past. A copy of the most recent such writing is enclosed. For the most part, public water and sewer service has not been extended into the Rural Buffer. Further, OWASA, the principal utility provider in southern Orange County, as a matter of policy, does not extend public water and sewer into areas where the planning local governments do not want it.

Much of this utility practice and policy has become a part of the Joint Planning Agreement by the incorporation into that agreement of the Water and Sewer Management, Planning and Boundary Agreement. Furthermore, although OWASA is not a party to the Joint Planning Agreement, it is a party to the Water and Sewer Management, Planning and Boundary Agreement. That agreement, since August 2002, a part of the Joint Planning Agreement, prohibits public water and sewer service, with certain exceptions not applicable to the Preserve at Erwin Trace development, within interest areas. The Rural Buffer is located within the OWASA interest area. Public water or public sewer service is defined in the Water and Sewer Management, Planning and Boundary Agreement as "the provision of water and/or sewer service by a party to this agreement." There is nothing in the Water and Sewer Management, Planning and Boundary Agreement which prohibits the extension of public utility lines into interest areas so long as there is no public water or public sewer service to be provided in the interest area.

The service area boundary agreement between the Orange Water and Sewer Authority and the City of Durham creates a water and sewer service area boundary that is co-terminus with the annexation boundary between the Town of Chapel Hill and the City of Durham. On the Chapel Hill side of that boundary OWASA is the sole water and sewer service provider. On the Durham side of that boundary, the City of Durham is the sole water and sewer service provider. That agreement further authorizes adjustments to that boundary, presumably as either Chapel Hill or Durham annex and

(24)

Mr. Craig Benedict
Page 3
October 5, 2004

modify their annexation agreement. That agreement further provides that the parties to it may install in the service area of the other "hydrants, lines, manholes, meters, pumps and other appurtenances and facilities...., provided, specifically, that no retail services may be provided by either party through such facilities except with the prior, written approval of the party in whose service area the facilities are located."

I do not have a map of the annexation agreement between the Town of Chapel Hill and the City of Durham. And, I do not know whether that boundary agreement includes land north of Chapel Hill to include the Preserve at Erwin Trace or any other part of the Rural Buffer. If it does, it is consistent with the Joint Planning Agreement and the Water and Sewer Management, Planning and Boundary Agreement. The only question that can't be answered without knowing the extent of the Chapel Hill/Durham annexation boundary is whether Durham needs OWASA's permission to serve residences in the Rural Buffer. If that permission were necessary it could not be granted by OWASA because of OWASA's agreement not to provide through contract or otherwise water or sewer service in its interest area except as permitted in the Water and Sewer Management, Planning and Boundary Agreement. That agreement would not authorize OWASA or by permission, Durham to serve the Orange County portion of the Preserve at Erwin Trace.

The City of Durham can extend its water utility lines into Orange County without Orange County permission, so long as in doing so it does not have to acquire land, including easements, located in Orange County. North Carolina General Statute § 153A-15 prohibits a county, city or town which is located wholly or primarily outside another county to acquire by condemnation, exchange, purchase, lease or otherwise real property located in the other county without having first received the approval of the board of commissioners of the county where the land is located. The only exception to this law pertains to land located in the city or town: The exception therefore does not require a city like Mebane to obtain Orange County's permission to acquire land in Orange County within the city limits of Mebane even though Mebane is located primarily outside of Orange County. Similarly, Chapel Hill can acquire land within Durham County without Durham County's permission in those areas of Chapel Hill located in Durham County. And, if there's any part of the City of Durham located in Orange

25

Mr. Craig Benedict
Page 4
October 5, 2004

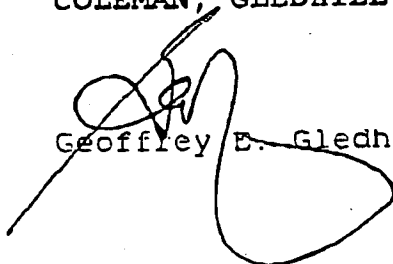
County, the City of Durham could acquire land in that portion of Orange County without the permission of the Orange County Board of Commissioners. This statute therefore prohibits the City of Durham from acquiring utility easements in Orange County that are not located in a portion of the City of Durham located in Orange County without the permission of the Orange County Board of Commissioners. If Orange County permission is required for this public water and sewer extension because the City of Durham will have to acquire easements located in Orange County, the Orange County Commissioners could condition approval on an interlocal agreement permitting line extensions in Orange County but prohibiting service within Orange County except pursuant to the further agreement between Orange County (and where applicable OWASA) and the City of Durham on a case by case basis.

In summary, even though the Joint Planning Agreement, the Water and Sewer Management, Planning and Boundary Agreement and the agreement between OWASA and the City of Durham do not appear to prohibit the City of Durham from extending public utility lines into Orange County to serve lots in the Preserve at Erwin Trace that are located in Durham County, any such extension which requires the acquisition of utility easements cannot occur without the permission of the Orange County Board of Commissioners.

I recommend that we sit down with all of the pertinent maps, including the Chapel Mill/Durham annexation boundary agreement to be sure that any advice given to either the developer or the City of Durham concerning this project is made knowing all the facts.

Very truly yours,

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


Geoffrey E. Gledhill

GEG/lsg
Enclosure
xc: Robert Epting, Esquire
Paul Thames

(26)

LAW OFFICES

COLEMAN, GLEDHILL & HARGRAVE

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ALONZO BROWN COLEMAN, JR.
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May 3, 1993

Moses Carey, Jr., Chair
Alice Gordon
Stephen Halkiotis
Verla Insko
Don Willhoit
Orange County Board of Commissioners
Post Office Box 8181
Hillsborough, North Carolina 27278

RE: Rural Buffer - Response to January 28, 1993 letter from
Kenneth S. Broun, Mayor, Town of Chapel Hill to Moses
Carey, Chairperson, Orange County Commissioners

Dear Board Members:

At the request of Moses Carey I have analyzed the assertion in the referenced January 28, 1993 Ken Broun letter that the Joint Planning Agreement and the Joint Planning Area Land Use Plan prohibit the extension of public water and sewer into the Rural Buffer portion of the Joint Planning Area. There is nothing in Mayor Broun's letter or in the accompanying memorandum and its attachments from the Town Manager to the Mayor and the Council of Chapel Hill that changes the express conclusion reached by me in July 1989 (letter enclosed) and the implicit conclusion reached by me in March of 1988 (letter enclosed) that there is no agreement between Orange County and Chapel Hill prohibiting the extension of public water and sewer into the Rural Buffer. The documentation accompanying the January 25, 1993 Horton memorandum to the Chapel Hill Mayor and Council on this issue provides additional support to the conclusions reached by me on this issue.

Notwithstanding the fact that there is no agreement between Orange County and Chapel Hill prohibiting the extension of public water and sewer into the Rural Buffer, it is clear that there are significant limitations on public water and sewer extensions into the Buffer. And, there are significant policy preferences against these extensions. The County's Water and Sewer Policy provides the prohibition in that portion of the Rural Buffer not in University

(27)

Orange County Board of Commissioners
Page 2
May 3, 1993

Lake Watershed. The County Zoning Ordinance, Section 6.25.7, significantly and almost totally precludes public water and sewer in the Watershed. (Ordinance sections are enclosed.) The Joint Planning Agreement and Joint Planning Area Land Use Plan provide the policy preferences against public water and sewer extensions. The point of my analysis is now and the point of it in the past has been that Orange County retains the authority to decide whether public water and sewer can be extended into the Rural Buffer. Consistently, Chapel Hill and Carrboro determine whether development in the Transition areas must be served by public water and sewer. Joint Planning Area planning documents make clear that public water and sewer "are now provided...or are projected to be provided" in the transition areas. However, there is no prohibition against development in the transition areas without public water and sewer. Similarly, Joint Planning Area planning documents state that development in the Rural Buffer will be that which does not "require" public water and sewer. However, there is no prohibition against public water and sewer serving Rural Buffer developments. What is equally clear is that there are practical limitations on public water and sewer development in the Rural Buffer: (1) For the most part, only residential development is permitted in the Rural Buffer; and, (2) the minimum residential lot size is 2 acres. It is also important to remember that Orange County has, consistent with the policy view of the County, Chapel Hill and Carrboro, insisted that developments within the Rural Buffer not be served by public water and sewer. This is evidenced by its very restrictive Water and Sewer Policy on this point. Orange County, however, does retain the authority to change that Water and Sewer Policy without the consent of Chapel Hill and Carrboro.

The Joint Planning Agreement, adopted by Orange County on November 2, 1987, is the logical starting point for an understanding of this issue. As pointed out in the January 25, 1993 Horton memorandum, Section 1.2G states, in pertinent part, that the Rural Buffer is defined as "land which, although adjacent to an Urban or Transition area, is rural in character and which will remain rural, contain low density residential uses and not require urban services (public utilities and other town services)." (Emphasis added.) In the sentence that precedes the quoted sentence, ~~Section 1.2G further defines the Rural Buffer as being a~~ "low density area consisting of single-family homes situated on large lots having a minimum size of 2 acres."

Section 1.2H of the Agreement defines the Transition area as being in transition from rural to urban. It then states that "[u]rban services (public utilities and other town services) are now provided to this area or are projected to be provided to this area." (Emphasis added.) The quoted sections of the Agreement

28

Orange County Board of Commissioners
Page 3
May 3, 1993

state the policy preference for public water and sewer development in the Transition areas and against public water and sewer development in the Rural Buffer. Neither prohibits that which it does not prefer. With respect to the provision of public water and sewer in the Rural Buffer, the conclusion that the policy preference against it is just that, a policy preference, is supported by the fact that the Appendix to the Agreement, in Paragraph 2.b states "except pursuant to the written consent of all three parties, no party shall seek or approve or encourage extension of water and sewer lines into the University Lake Watershed." This express prohibition, against public water and sewer, in the absence of consent of Orange County, Chapel Hill and Carrboro, was in place for a period of 90 days following the completion of the University Lake carrying capacity study. If Section 1.2G prohibited the extension of public water and sewer into the Rural Buffer, there would be no need for an express prohibition against the extension to the University Lake portion of the Rural Buffer.

The Joint Planning Area Land Use Plan continues with the theme of the Joint Planning Agreement, with respect to the extension of public water and sewer into the Rural Buffer. Again, portions of that document that I rely upon are the same as those cited in the January 25, 1993 Horton memorandum. The conclusions I reach, however, are significantly different. I have enclosed copies of those documents which include the whole of the cited provisions. Note that, with respect to the description of the rural residential land use plan category, there is a description of the development pattern in the New Hope Creek drainage basin of the Buffer, the University Lake area of the Buffer (that west of Carrboro) and the Southern Triangle area of the Buffer. Each of those descriptions makes clear that low density pattern of development, the watershed or site constraints dictate wells and septic tanks for water supply and sewage disposal will be used. When you add to this the two acre minimum lot size requirement of the Joint Planning Agreement, that predicted pattern is almost assured. It is not the prohibition against the extension of public water and sewer but rather the planned nature of the development that restricts the extension of public water and sewer.

Even more persuasively, the section of the Joint Planning Area Land Use Plan dealing with sewer and water extension policy couldn't be more clear that it is "current Orange County policy" that prohibits the extension of public water and sewer to the Rural Buffer. In fact, that section of the Land Use Plan goes on to include a statement of the exceptions to the Water and Sewer Policy's prohibition against the extension of public water and sewer. Finally, in the last paragraph of that section is the statement of the prohibition against public water and sewer extensions in the University Lake Watershed contained in the Appendix to the Agreement and the fact that it was anticipated at

(29)

Orange County Board of Commissioners
Page 4
May 3, 1993

the time the Land Use Plan was developed that there would be an "out-right prohibition or a temporary prohibition on public sewer extensions" into the University Lake Watershed except where those extensions were necessary to remedy a public health emergency. This language is clearly inconsistent with the notion there is an agreement that all public water and sewer extensions are prohibited in the Rural Buffer.

The January 25, 1993 Horton memorandum also relies on the Orange County-Hillsborough Joint Planning Agreement for support of the contention that public water and sewer extensions are prohibited in the Rural Buffer. That agreement rather reinforces the notion that the decision to extend public water and sewer, made in the context of the Joint Planning Area Land Use Plan and Joint Planning Agreement preference against public water and sewer extensions, is an Orange County decision. It is the written consent of Orange County alone that Hillsborough must obtain before Hillsborough can extend its public water and sewer into the Rural Buffer. This same consent must be obtained by Hillsborough for Hillsborough to extend its public water and sewer into the Upper Eno Watershed (see attachment page 26 of the January 25, 1993 Horton memorandum).

The annexation agreement between Chapel Hill and Durham and the agreement defining service area boundaries between Durham and OWASA provide no support to the notion that the Joint Planning Agreement and the Joint Planning Area Land Use Plan prohibit the extension of public water and sewer into the Rural Buffer. The annexation agreement does not speak to the extension of public water and sewer. The agreement defining service area boundaries, on the other hand, expressly makes the Rural Buffer part of OWASA's service area. Clearly that is not a prohibition against public water and sewer extension. OWASA's only business is water and sewer. On that point, it is as it has been OWASA's policy to extend water and sewer "in accordance with the adopted policies of the applicable local governments." (The sewer and water extension policy section of the Joint Planning Agreement, page 90, which is enclosed.) Nothing more can be gleaned from the Chapel Hill-Durham annexation agreement and the Durham-OWASA service boundary agreement. I might add that the April 8, 1993 letter from Lois Herring, on behalf of OWASA, to Mayor Broun, a copy of which is enclosed, would seem to confirm this view.

Finally, there have been three significant attempts to amend the Joint Planning Agreement and the Joint Planning Land Use Plan to deal with water and sewer extensions. All three have failed. The first was an attempt to amend the Joint Planning Agreement, in the context of extending public water and sewer to the New Hope School, to permit the extension of public water and sewer lines

Orange County Board of Commissioners
Page 5
May 3, 1993

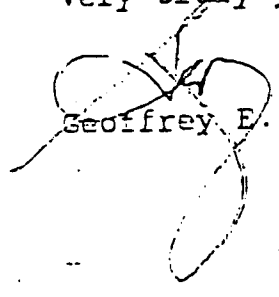
through the Rural Buffer for the purpose of serving outside of the Rural Buffer an essential public facility, such as a school, or to remedy a public health emergency not otherwise correctable. This amendment would have otherwise prohibited the extension of public water and sewer lines into or through the Rural Buffer. This amendment failed. There was not agreement among Orange County, Chapel Hill and Carrboro on the extent to which these public utility extensions should be prohibited.

The next effort to include a prohibition of the extension of public water and sewer into the Rural Buffer was made in the context of the University Lake Watershed study. This is the carrying capacity study referenced in the Appendix to the Joint Planning Agreement. There was general agreement among Chapel Hill, Carrboro and Orange County that public water and sewer should not be extended into University Lake Watershed. The amendments proposed contained this prohibition. However, the amendment was never adopted principally because an agreement was not reached on the fine points of impervious surface ceilings (and to a lesser degree on grandfathering existing lots). No agreement was ever reached on those issues. Therefore, no amendment to the Joint Planning Area Land Use Plan and the Joint Planning Agreement were made in the context of University Lake. Orange County unilaterally amended its Zoning Ordinance to provide for the prohibition of the extension of public water and sewer into the Rural Buffer that is contained in Section 6.25.7 of the Orange County Zoning Ordinance.

The last attempt to amend the Joint Planning documents in a manner which would have effected public water and sewer extensions into the Rural Buffer was related to the rural character strategies. This exercise has been recent enough in time for all to remember. It was unsuccessful.

I conclude by saying that, in my opinion, there is no basis upon which Chapel Hill should assume that its interpretation of the Joint Planning Agreement and the Joint Planning Land Use Plan is the same as that of Orange County. Those documents do not prohibit the extension of public water and sewer into the Rural Buffer. It is my view that this issue is easier addressed now with long, intermediate or otherwise term utility service area boundaries in Orange County.

Very truly yours,


Geoffrey E. Gledhill

GEG/lsg
Enclosures
xc: Marvin Collins
John M. Link, Jr.