

MINUTES
JOINT TRAINING SESSION OF THE
BOARD OF COMMISSIONERS, PLANNING BOARD
AND HISTORIC DISTRICT COMMISSION

Monday, September 25, 2006
7:30 PM, Holiday Inn Express

BOARD OF COMMISSIONERS MEMBERS PRESENT: Commissioners Evelyn Lloyd, Mike Gering, and Brian Lowen.

PLANNING BOARD MEMBERS PRESENT: Chair Matthew Farrelly, Edna Ellis, Paul Newton, Eric Oliver, Dave Remington, and Barrie Wallace.

BOARD OF ADJUSTMENT MEMBERS PRESENT: Chair Bill Crowther.

HISTORIC DISTRICT COMMISSION MEMBERS PRESENT: Acting Chair Max Preston, Barbara Church, Jessica Dockery, John MacAulay, Will Moye, and Susanne Vergara.

STAFF PRESENT: Assistant Town Manager/Public Works Director Demetric Potts, Planning Director Margaret Hauth, Planner Stephanie Trueblood, Town Attorney Bob Hornik, and Attorney Mike Brough with the Brough Law Firm.

Also present were Chapel Hill Herald staff reporter and Jo Soulier.

Mr. Potts opened the meeting at approximately 7:34 p.m., and read brief comments from Mayor Stevens, who was unable to be present due to his attendance at an out-of-State conference.

Mr. Hornik provided a brief introduction, noting they would be discussing the roles of the various boards in the decision-making process. He stated he would talk specifically about the Town's zoning and subdivision ordinances, and the various boards' roles in specific types of cases. Mr. Hornik said once he and Mr. Brough had concluded their presentations, they would open up discussion on specific problems faced on a day-to-day basis and answer questions.

Mr. Brough provided an overview of the various boards and their roles, and State laws that pertained to the various boards. He said there were four different kinds of zoning decisions: legislative, quasi-judicial, administrative, and advisory. Mr. Brough said the legislative decisions were made only by the Board of Commissioners, noting they established what the ordinances would say and how they were to be interpreted or amended. He said that quasi-judicial decisions were made by the Board of Commissioners, the Board of Adjustment or the Historic District Commission. Mr. Brough noted that the Planning Board normally would make recommendations to the Board of Commissioners regarding such matters.

Mr. Brough said the Board of Commissioners could act in two different roles, which was sometimes confusing. He said they could adopt an ordinance, and when it came time to issue a Special Use Permit (SUP) they could act in a different role by considering that permit.

Mr. Brough stated that an administrative decision was one made by an administrator or an administrative body. He said such decisions did not involve the level of discretion that was applicable in a quasi-judicial situation. Mr. Brough said that advisory decisions were basically the kinds of

recommendations that the Planning Board made, in that they advised the Board of Commissioners on what they believed was the best course of action, in respect to zoning, rezonings, or SUPs.

Mr. Brough said regarding legislative decisions, there was a new statute that addressed conflict of interest. He said the law had long been that a board member must asked to be excused from consideration under circumstances where a particular vote would involve their own financial interest or official conduct. Mr. Brough said a commissioner did not have the luxury of abstaining from a vote because if they did it would be counted as an affirmative vote, unless they had been properly excused from that vote.

Mr. Brough said the new statute provided more particularity with respect to zoning decisions, in that it now applied not only to the elected board but also to advisory boards. He said the new statute, G.S. 168-381(d), stated "A city council member shall not vote on any zoning map or text amendment where the outcome of the matter being considered is reasonably likely to have a direct, substantial and readily identifiable financial impact on the member." Mr. Brough said that language was much more specific than the previous statute. He said the statute further read, "Members of appointed boards providing advice to the city council board or commissioners shall not vote on recommendations regarding any zoning map or text amendments where the outcome of the matter being considered is reasonably likely to have a direct, substantial and readily identifiable financial impact on the member." Mr. Brough said the standard now applied to both Planning Board members, which it had not previously, as well as the Board of Commissioners with respect to zoning map or text amendments. He said what the statute did not say was whether or not the standard would apply, for example, to a vote by a member of the Planning Board recommending a decision in a quasi-judicial matter.

Mr. Crowther asked if a Planning Board member lived in a neighborhood about to be rezoned, would the financial impacts of the rezoning cause them not to be able to vote. Mr. Brough said that was a common question but not one easily answered. He said his advice would be no, stating that in his opinion the language "direct, substantial and readily identifiable financial impact" had to be interpreted fairly narrowly, since a "substantial" impact would be hard to measure, as would any "direct or readily identifiable financial impact."

Mr. Farrelly asked how far that statute would extend in regards to immediate family. Mr. Brough stated the statute regarded conflicts of interest in regards to legislative decisions, which was an important distinction. He said a piece of property owned by a spouse that was up for rezoning was not owned by the board member, but by the spouse. Mr. Brough said but, presumably you lived together and if that property was rezoned and the family made money on it, then you have benefited financially. He said the statute was designed to provide, for the first time, clear direction that advisory boards were subject to this principle where previously they were not.

Mr. Hornik asked if that statute would now require members to vote to excuse a member from voting, or was it automatic when the request to be excused was made. Mr. Brough said the statute did not speak to that.

Mr. Brough said that G.S. 168-388(e)(1) was a subsection of G.S. 168-381, and named "Board of Adjustment." He said it clearly applied to that Board, but there was a question as to whether it applied to the Board of Commissioners when they acted as the BOA, or the Planning Board if the Planning Board did have permanent quasi-judicial responsibilities. Mr. Brough said that statute read, "A member of the board or any other body exercising the functions of a board of adjustment, shall not participate in or vote on any quasi-judicial matter in a manner that would violate effective persons constitutional rights to impartial decision-making..." which raised the question that if the Board of

Commissioners were acting like the BOA, would it then apply to them, or did it mean more broadly when they were exercising functions that were “like” the BOA, i.e. acting in their quasi-judicial capacity.

Mr. Brough said according to the statute, impermissible conflicts included but were not limited to a member having a fixed opinion prior to the hearing on the matter that was not susceptible to change, undisclosed ex parte communications, a close familial, business, or other associational relationship with an effective person, or a financial interest in the outcome of the matter. He said that did not mean you could not have an opinion prior to a hearing, but you could not have a “fixed” opinion. Mr. Brough said it should be reasonable to assume that you may hear information at the hearing that would change that prior opinion.

Mr. Crowther asked if you could make those opinion statements after the public hearing. Mr. Brough said certainly, since it was assumed that your opinion was formed based on the evidence heard at that hearing.

Mr. Farrelly asked if the idea of looking at evidence had some subjectivity to it, in that some terms appear to be fuzzy or vague. Mr. Brough said yes, stating for example that almost anything he said could be interpreted in some other way. He said the best analysis of what constituted a quasi-judicial decision was that it was a decision made by a board typically after a public hearing in which the board was called upon to make a discretionary determination.

Mr. Farrelly asked what about when an interpretation was in a technical realm that they did not have expertise in? He said he could imagine an applicant challenging a decision because they believed the members had no expertise in that area. Mr. Brough said that was not a basis for challenge, but what would be the basis for challenge was that the board did not have the evidence they needed in order to make the decision that was made.

Mr. Brough noted that if a quasi-judicial matter was coming up for discussion, then no prior discussions should take place with any parties about the issue. He said that was more difficult for elected members than advisory board members, simply because the elected boards’ constituents expected them to discuss “business.” Mr. Brough said if a board member were to have such a conversation and it was not disclosed at the appropriate time, then according to the statute the board member should not vote on that matter.

Mr. Farrelly asked what do you do with unsolicited information coming to board members from the public, such as by email. Mr. Brough responded it should be disclosed in the hearing.

Commissioner Gering said there had been instances in the past where that type of prior communication was received, and it was placed on the record at the public hearing. Mr. Brough said he had also seen cases where, at the hearing, the Mayor would announce that the board members had received a packet of information but it had not been opened, but would now be opened and the information placed in the record for disclosure. He said the concept was that the decision-making body was unbiased and making decisions on the facts.

Mr. Farrelly asked about situations where an applicant was advised by, say, the Planning Board, to work with neighbors to negotiate some issue. He asked how that resulting information would apply. Mr. Brough said the statute did not address advisory boards that made recommendations on quasi-judicial decisions, so that kind of contact was not addressed by the statute. He said he would be very

leery of doing that, and would want the Planning Board not to engage in the kinds of things that were proscribed to the Board of Adjustment or the Board of Commissioners.

Mr. Remington asked about developers “feeling out” the board in advance. Mr. Brough said the point of no contact was reached when the developer submitted an application, at which time further contact should cease. He said when someone comes to a board member and indicates they have several options to consider, and wants the board member’s opinion on which option is preferable, at that stage it was somewhat troubling but likely not problematic. Mr. Brough said one point to keep in mind was the closer something got to the formal application point, the more focused it became and the less board members should have any discussion about it.

Mr. Farrelly asked for clarification about directing further negotiation between the developer and neighbors. Mr. Brough said there was really no problem with that, as long as the decisions about that negotiation were disclosed publicly during a meeting.

Mr. Farrelly said Mr. Brough had mentioned close familial relationships. He said this was a small town and many of them were members of neighborhoods with many friends in that neighborhood. He asked how would you make a decision regarding recusing yourself when something might affect your own neighborhood or friendships. Mr. Brough said each individual would have to interpret that within reason. He said if you went very far along that route, no one would be able to make any decisions in a small town. Mr. Brough said he would interpret that relationship to a close familial or business relationship or other associational relationship. He said for example, the fact that you went to the same church or lived in the same neighborhood as an applicant would not be relevant.

Ms. Ellis stated that you don’t always get everything needed in public hearings. She asked if it was appropriate to talk with people to verify information heard at the public hearing. Mr. Brough said for the Planning Board, if you were talking about a permit, that was not too troubling but you would be getting the information to make your decision from outside the hearing. He said if you were talking about a rezoning or a text amendment, you could get information from any place you chose. Mr. Brough said the law did not constrict an advisory board in where it obtained its information. However, he said, if an advisory board that provided recommendations to an elected board was obtaining information in ways different that the elected board would obtain information, he found that troubling and uncomfortable. Mr. Brough said there was nothing illegal about obtaining information outside the hearing but not something he would advise doing. He added that obtaining information in that manner was a problem for quasi-judicial boards, noting those boards must obtain their information in quasi-judicial hearings.

Ms. Trueblood said regarding the Historic District Commission (HDC), could ex parte communication lead to an appeal to the BOA? Mr. Hornik replied it could be grounds for appeal if the information were not disclosed. Mr. Brough said he would question whether this provision applied to the HDC, since the HDC was not a BOA process.

Mr. Preston asked would the ex parte communication have to be material to the decision made by the HDC? He said it seemed that if the communication were immaterial, it would not matter. Mr. Brough said an appeal could be made on many grounds to the BOA.

Ms. Trueblood stated that their ordinance specified that such appeals had to be made on procedural grounds, and the BOA had to base its decision on the same evidence as provided to the HDC. Mr. Brough said his advice would be not to have those kinds of contacts with the applicant, neighbors or anyone else, because it appeared to be “lobbying.” He said for a quasi-judicial board, that board’s

decision must be based upon the standards in the ordinance and the information received during the hearing.

Ms. Church said it was assumed that on-site visits would be made prior to a hearing. She asked if such on-site visits were appropriate. Mr. Brough said it was okay for general familiarity, but if you see something particularly material that might affect your opinion then you should disclose it at the hearing. He said it was important to remember that all evidence was subject to cross-examination in a quasi-judicial process.

Mr. MacAulay asked if it were appropriate for the town to hire a consultant to provide more technical information prior to the hearing, recognizing that it might be a point of contention. Mr. Brough said the broad answer was that you had to deal with the evidence that was on record, but often you may be uncomfortable with that information, particularly if the applicant brought in an expert. He said that traffic and property values seemed to be the two biggest issues. Mr. Brough said if the applicant had such an expert and the opponents did not, you might not be sure you were getting all the information you needed. He said at the least if you decided you were not getting objective information you could ask the staff to conduct some research, but you may want to postpone the hearing and give the opponents an opportunity to provide additional information. Mr. Brough said there was no legal reason why a hearing could not be postponed for that or other reasons.

Mr. Brough said he did not believe it was appropriate for an applicant to present a traffic study prepared by an expert, and the Town to then hire a consultant to do a second traffic study to counterman it. But, he said, if you were concerned about the objectivity of such information you could certainly hire someone to study it.

Mr. Oliver commented that the members conduct a lot of background work and sharing of information with other board members at the meetings. He asked if that was appropriate. Mr. Brough said yes, noting it was appropriate to do background investigations and the information obtained disclosed at a meeting. Mr. Brough emphasized that neutrality was an important element of that.

Mr. Preston said if such information came in as part of the record as evidence, should that board member be sworn, as well as staff. Mr. Brough said he did not believe it was necessary. He said there were cases when testimony must be sworn, but there was case law that indicated it was okay not to do so. Mr. Brough said the members took an oath to be on the advisory board in the first place.

Mr. Crowther asked if neighbors and applicants should be avoided during site visits. Mr. Brough responded absolutely.

Ms. Wallace asked how was the town assured of getting all information? Mr. Brough said the nature of the process was such that it was not necessarily designed to get objective information. He said the applicant would not be giving objective information, but information designed to sway you to their point of view. Mr. Brough said if the board was not comfortable that it was getting all necessary information then the hearing could be postponed so that additional information could be obtained.

Mr. Brough said regarding cross-examination, that worked fine when there were just two parties, but often you have multiple parties. He said many times it was sufficient, once someone completed their statements, to ask if anyone wanted to ask follow-up questions. Mr. Brough said these types of meetings were for the most part informal and there was no need for a formal cross-examination, but it was necessary to allow someone to ask those questions or cross examine witnesses.

Mr. Brough said another issue was the burden of proof for particular issues. He asked was it enough for someone to raise a question, or did they have to prove proof. Mr. Brough said when taking testimony, that was a problem. He said in the absence of competent information on a particular issue, who would lose. Mr. Brough said the one who had the burden of proof loses if they do not produce that information, adding the opposing side did not have to do anything.

Mr. Brough said the next question was what exactly competent evidence was, and what sorts of things could you rely on. He reiterated that the two issues most in question were traffic or traffic safety and property values, and the courts had been particular about requiring that you had to have someone that was truly qualified as an expert. Mr. Brough said that qualification had to be through training and experience as well as some documentation that the expert had some experience with determining if information was speculative or fact. He said that for example, you could not deny an application based solely on its effect on property values if you had only the testimony of persons with no expertise in that field.

Mr. Brough said even more complicated was the issue of traffic safety. He said the courts had gone both ways, in that the Supreme Court had said that the fact that traffic would increase with the construction of certain kinds of developments did not equate to increased safety concerns, so if you have only the speculation of untrained persons then the testimony was not valid. Mr. Brough said you could not rely on untrained laypersons that were not qualified traffic experts in such cases. He said if a development complied with all Town standards, then the fact that traffic might increase would not be grounds to deny the application, unless an expert study had been conducted that indicated elevated safety problems. Mr. Brough said it would be difficult in any case, but expert testimony was certainly worthwhile particularly if you were dealing with technicalities.

Mr. Farrelly asked how would you deal with property value issues, and how a development would affect adjoining properties? Mr. Hornik responded that when the Planning Board was making recommendations to the Board of Commissioners on SUPs or Conditional Use Zoning applications, or making a recommendation to the BOA on Conditional Use Permits (CUP), that in those types of cases the impact on adjoining or nearby property values could be an issue. He said with respect to SUPs, the ordinance said that if the application met the standards of the zoning ordinance then the SUP should be issued unless the Board found that there would be a negative impact on nearby or adjoining property values. Mr. Hornik said in such cases the party opposing the permit had the burden of proof to prove there would be a negative impact. He said with a CUP, the ordinance stated that the BOA should not issue a CUP unless it found that the use of the property would not have a negative impact on property values, in which case the applicant had the burden of proof to show that there would not be a negative impact on nearby or adjoining property values.

Ms. Wallace asked who would pay for engineers or other experts? Mr. Brough said the public could not fund one side over the other. Ms. Wallace said that would mean there was not a level playing field. Mr. Brough replied there was never a level playing field on either side of an issue. He said when an applicant walked into a hearing with 300 people waiting to speak, that certainly was not level. On the other hand, Mr. Brough said an applicant may have had a year or more to prepare for that hearing, whereas the public may have had a matter of weeks or even days. He said that was why he was comfortable with suggesting that hearings be delayed if additional information was deemed necessary.

-----The participants took a short break.-----

Mr. Hornik provided specific information related to the Town's ordinance. He said currently the BOA conducted site plan review, but the ordinance was currently being revised to provide differing levels of review. Mr. Hornik said there would be a public hearing on those suggested changes in October.

Mr. Hornik explained that throughout the State SUPs and CUPs were used interchangeably since the standards were similar. He said there was a presumption that if issued, the use of the property would be harmonious with the district in which it was located, and that the application met the standards. Mr. Hornik we needed to pay particular attention to the standards that our ordinance set out for various types of uses that were being reviewed. He said we should spend more time looking at specific zoning ordinance standards for specific types of uses.

Mr. Hornik said Sections 5.10 to 5.35 or 5.40 spelled out the different kinds of uses for which there were specific standards set out, and he was not sure that they were being taken into account by those reviewing applications. He said he was also not sure that a lot of attention was paid to the performance standards in the ordinance, noting there was a lot of detail that they could assure applicants were providing and if they did not then that was a basis for denial.

Mr. Hornik distributed copies of the sections of the ordinance and explained some of the provisions, including the performance standards. He called attention to particular sections and provided an overview of the requirements of each. Mr. Hornik said that perhaps we did not pay enough attention to the development standards contained in Section 5 of the zoning ordinance, which contained 20+ different standards as well a detailed types of considerations for different types of uses. He suggested that when looking at applications, they should look at the big picture such as the findings in Section 4.3 as well as the fine detail in the standards of Section 5.

Mr. Hornik when over the general requirements of the ordinance for SUPs and CUPs. He noted that some of those requirements were found in Sections 4.10 through 4.37 of the zoning ordinance. Mr. Hornik provided a brief overview of those sections.

Mr. Oliver said the expectation was that the staff would inform the board as to whether the specific standards of the ordinance were met. Mr. Hornik agreed, noting that the staff should be providing in its recommendations to the board where the application was particularly strong or particularly weak, especially in regards to the performance standards. He said that Planning Director Margaret Hauth employed a checklist that was used by staff to pinpoint standards that were or were not being met by the application.

Mr. Farrelly stated that Section 4.3 went beyond a checklist. Mr. Hornik said the checklist covered general provisions of the ordinance. He added that the performance standards applied to all applications. Mr. Hornik said the checklist was to make sure that when reviewing the application that those standards were looked at.

Mr. Hornik stated that many times boards ran into situations that were simply not covered by the ordinance. He said in those cases you had to define the policies of the law, define what you believed the Town Board meant when it adopted the ordinance, and come to a reasonable interpretation. Mr. Hornik said an alternative would be to amend the ordinance to speak to a particular circumstance.

Mr. Hornik said regarding the HDC, there were many guidelines that had been identified. He said the question was whether or how to incorporate the guidelines specifically into the ordinance. Mr. Hornik said one problem that he saw happening was HDC decisions where the Board said that guidelines must be complied with, and applicant would say show me where it says that in the ordinance. He said the

problem was that those guidelines were not in the ordinance, and you had to be careful when applying standards that were not specifically in the ordinance. Mr. Hornik said they were working towards rectifying that.

Mr. Farrelly asked for further clarification. Mr. Hornik said an example would be what the HDC had confronted, and that was the use of either hardy plank or vinyl. He said he believed the HDC had taken the position that they did not want vinyl. Mr. Hornik said that was mentioned in the guidelines but was not in the ordinance. He said regulating building materials was authorized by General Statute, but our ordinance was not yet that specific.

Ms. Trueblood said the HDC had standards, and each of the guidelines related to one of their standards. She said the problem was that the standards were vague. Mr. Hornik said the enabling statute for the HDC was vague as well. He said the good thing was that we did have the standards and the HDC was attempting to uniformly apply those standards. Mr. Hornik said what would be even better would be to try to eliminate or reduce the vagueness by being more specific.

Mr. Hornik emphasized that the standard was that as long as there was competent evidence in the record to support the Board's decision, even if there was competent evidence in the record to support a different decision, the court would not substitute its judgment for the Board's judgment as long as it was competent evidence. He said if you had a real estate appraiser hired by an applicant who said there would be no effect on property value, and an appraiser for the neighbors who said there would be an impact on property value, then that was a good position for the Board to be in because in that case they could decide either way.

Mr. Hornik said the intent of our appellate process in HDC context of the ordinance was meant to do was to make it so that the BOA would not have to hear appeals in cases when people were unhappy by HDC decisions and wanted to have one form of evidence rejected in favor of another form of evidence. He said they did not want the BOA to be able to substitute its judgment for the HDC's judgment in those matters that were a matter of choice. Mr. Hornik said if there was absolutely no evidence in the record to support an HDC decision, then that could be considered a legal error.

Mr. Hornik stated that if a Board member were making a decision based on a site visit, then that had to be disclosed during the hearing. He said at that point the applicant would have the opportunity to cross-examine the member. Mr. Hornik said what you say you saw on that site visit should be exactly what you saw and it should be determined whether or not you might have missed some aspects that should be considered. He said that would give the applicant and opportunity to "flush out" those aspects, and that would save the Board from having a due process issue.

Mr. Preston asked if the staff presented such information, would that be considered evidence if they were sworn. Mr. Hornik said certainly, noting that in any quasi-judicial process the staff would be sworn. He said that was one of the primary differences between quasi-judicial processes and administrative processes.

Mr. Farrelly stated that many times in public hearings evidence was not backed up with documentation, and asked what could the boards ask for? Mr. Hornik said it depending on how far away it was from the performance standard it was, and if it was material to the application. He said if it was some fact that had no bearing on the merits of the application, then documentation was not needed. Mr. Hornik said the closer it had bearing on the performance standard the more important it was to have that documentation. He said that went to the competence of the statements or evidence.

Ms. Wallace asked how was that relevant to a land use determination. Mr. Hornik said he could not give an exact answer to that. He said it was relevant to general economic development consideration, i.e. what was good for the economy of the area, but was not sure it could be tied in to the land use plan. Mr. Hornik said that was something that could be looked at as we start to consider further revisions to our ordinances.

Commissioner Gering asked did declaring an area a special use zoning district actually limit the board's authority to deny? Mr. Hornik said that was part of the legislative process. He said the Board could limit the range of uses and how specific a rezoning would be on a master plan. Mr. Hornik said then, when it came back for an SUP, that might be too late to place those limitations on the property.

The meeting was adjourned at 10:09 p.m.

Respectfully submitted,
Margaret Hauth, AICP
Planning Director