

MINUTES

**STATE OF NORTH CAROLINA
COUNTY OF HENDERSON**

**BOARD OF COMMISSIONERS
MARCH 26, 2007**

The Henderson County Board of Commissioners met for a special called meeting at 9:00 a.m. in the Commissioners' Conference Room of the Henderson County Office Building.

Those present were: Chairman Bill Moyer, Vice-Chairman Charlie Messer, Commissioner Larry Young, Commissioner Chuck McGrady, Commissioner Mark Williams, County Manager Steve Wyatt, Assistant County Manager Selena Coffey, County Attorney Russell Burrell, and Clerk to the Board Elizabeth W. Corn.

Also present were: Fire Marshal's Administrative Assistant Cathy Justice, Planning Director Anthony Starr, Planner Matt Card, County Engineer Gary Tweed, and Associate County Attorney Sarah Zambon.

CALL TO ORDER/WELCOME

Chairman Moyer called the meeting to order and welcomed all in attendance. He stated that the occupancy was already more than was contemplated and that a discussion was going to be held in regards to the parameters associated with the hearing so that everyone would understand and so that the Board could make a decision as to how to proceed. The public hearing would be called to order and the Chairman would recognize a motion to continue at the Monday, April 2, 2007 meeting. Between this meeting and Monday's meeting the Board would try to arrange a date that West Henderson High School's auditorium could be used. Chairman Moyer explained that nothing would be done, in regards to the vested rights hearing, at the April 2 meeting except continue the vested rights hearing to another date.

Attorney Bill Alexander, representative for the petitioners, stated that the petition coming before the Commissioners on Monday, April 2, would be withdrawn on March 27, 2007.

County Attorney Russ Burrell explained that in terms of how the hearing would proceed, he recommended a quasi-judicial hearing, which is similar to a court hearing in which you have parties who have demonstrated specific and particular interest in the case, not in terms of their personal interest but in terms of them being, i.e., a next door neighbor of this project or having some other specific interest different from that of a general citizen. Mr. Burrell had difficulty squaring this with the General Statute §153A-344.1 which talks about the statutory vested rights proceeding, such as the one being held here, and specifies that there will be ample opportunity for public participation. This is not what a quasi-judicial hearing is. A quasi-judicial hearing has parties on each side, and not the public, which have a specific individualized interest in the case. The statute also continues on how a vested rights hearing is to be established and expressively uses the words "public hearing". It does not use "quasi-judicial hearing". Mr. Burrell was not familiar with a statute that used public hearing and quasi-judicial hearing in the same type of proceeding. Under these circumstances he recommended that this be a public hearing and that the Board make their decision based on whatever information they receive at that public hearing. This is consistent with the Federal language in the statute which states "A

County may approve or disapprove a condition for whatever plan that may be reasonably necessary to protect the public health, safety and welfare.” This is a legislative decision and not a judicial decision. This supports the idea that this needs to be a public hearing.

Chairman Moyer stated that he would be giving council an opportunity to speak before the Board had discussions.

Bill Alexander appeared along with Angela Beeker on behalf of the applicant in the proceeding for vested rights specifically for approval of a site development plan pursuant to N.C. General Statue §153A.344.1 and chapter 189 of the Henderson County Code. They had prepared and distributed a position statement of the applicant relative to the nature of the proceeding and the standard for a decision in their opinion that this hearing could only constitute a quasi-judicial proceeding. A quasi-judicial proceeding has traditionally been understood in this area of the law as one in which the Commissioners are applying a set policy (existing ordinances) against the individual facts of a case. The right of this applicant to have a site specific development plan approved is clearly judicial and not legislative.

Boyd Massagee appeared on behalf of Fritz McPhail, an adjoining property owner.

No other council was present to speak.

Commissioner McGrady requested time to review materials and get a response from the County Attorney.

County Attorney Russ Burrell referred to the case of Michael Weimann Associates General Partnership versus Town of Huntersville. The only statutory vested rights case in North Carolina that he had found that deals with the City version with identical language. It talks about the requirements for vested rights hearing in regards to public notice and an open hearing. It is not defined any further. Open does not sound like what you would get with a quasi-judicial hearing.

Chairman Moyer stated that this meeting was advertised as quasi-judicial so if the Board decides to go with a public hearing it would be advertised again.

Planning Director Anthony Starr stated that his understanding of the ordinance as written is that the hearing had to be set for the 45 day window so the opening of the hearing tonight and continuing it to another date will satisfy any local ordinance requirement.

Chairman Moyer noted that the meeting would be started and then continued to Monday, April 2, 2007 to set another date. All decisions would be deferred in regards to quasi-judicial versus public hearing until Monday when all materials will have been viewed.

QUASI-JUDICIAL PUBLIC HEARING – Vested Rights Application VR-2007-01 for the Proposed Continuing Care Retirement Community Development Known as The Glen and Highlands at Flat Rock

Commissioner McGrady made the motion to begin the public hearing on Vested Rights Application VR-2007-01 for the Proposed Continuing Care Retirement Community Development Known as The Glen and Highlands at Flat Rock. All voted in favor and the motion carried.

Chairman Moyer made the motion to continue the public hearing until Monday, April 2, 2007 at 5:30, as the first item of business, for discussion of the nature of the hearing and continuing the hearing until a later date. All voted in favor and the motion carried.

Commissioner Messer made the motion to go out of public hearing. All voted in favor and the motion carried.

Chairman Moyer requested council to provide the Board with a list of dates that they would not be able to attend.

Construction Management Services for Henderson County Schools – AIA Document B801 CMA - 1992

Chairman Moyer called the meeting back to order. Chairman Moyer stated that this item was tabled at the last meeting on March 21, 2007.

County Engineer Gary Tweed stated that the Board had received the revised document in which Bo Caldwell had referenced at their last meeting. He informed the Board that Bill Cram of M.B. Kahn was also in attendance at this meeting. Mr. Tweed had reviewed the document and determined that the document included what the Board had requested; to set a budget, to have a phase of preliminary pre-construction analysis, and come back with an estimate. This includes an architect fee of approximately 5% of the project. The construction management fee is approximately 5%. Normally architects doing a project like this, where they provide the construction, administration and management is usually in the range of 12%. The advantage of how they plan to bid is that they are going to seek both single and multi-prime bids. If the project comes in to the County's advantage as a multi-prime bid then the construction manager would be managing those contracts. This gives you the potential to save the overhead that a general contractor would be charging. If the bid comes in above the amount contracted the school has the right to not use these folks and terminate the contract (Article §9.8). Discussion followed in regards to "green schools" and the additional cost up-front versus the savings in the future.

Commissioner Williams stated that the design and contingency cost of \$1,190,000 was very high and needed more discussion. He questioned if the County could possibly hire an engineer to do this in-house?

Gary Tweed responded that there were a couple of options if a construction management firm were not used. In a traditional construction project, the architect designs, prepares bid documents, bids the project, and provides project administration (review of shop drawings, change orders, pay requests, etc.). The owner can provide a person to manage the project from a standpoint of working with the architect to administer the job. Mr. Tweed had done this previously in-house. This can be done but with these type projects,

he feels that a team of folks is needed such as an engineer, architect and a project inspector. If the bids come in where we can't cover the fees then the County must look at those options.

Steve Wyatt stated that he and Mr. Tweed had discussed the possibility of bringing this function in-house and Mr. Tweed had laid out what he believes the requirements would be. The need was seen for an architect and a project manager. A shortcoming would be the experience and the lack of a large team behind a contracted construction management firm.

Bill Cram explained that they employed about sixty-five degreed professionals in their division for this school project in particular. In the pre-construction phase they have a team of seven people that work through the estimating and value engineering constructability reviews. They would be coordinating the design, looking for better material and ethics. When construction begins they will have a project manager, site manager (full time at each site), and a project engineer splitting time between the sites. That would be four people dedicated to Henderson County to manage the construction of two schools. If a contractor gets behind they supplement the contractors and get the project done on time.

Steve Wyatt stated that Mr. Cram, Mosley Architects, and the school board is on record to deliver a quality project for \$27,837,500.00.

Commissioner Williams asked Russ Burrell, Gary Tweed and Steve Wyatt if they would recommend this proposal from their professional opinion and from the time they had spent reviewing the contract.

Gary Tweed stated that this was the first time he had seen a contract written with a budget number included as to the construction limit.

Steve Wyatt emphasized that based on where the County had been in the last two years with this project and where they are now, we have come a long way.

Russ Burrell pointed out that the school board had as many options as they could have under these circumstances. They have to meet the budget.

Chairman Moyer made the motion to advise the school board that this approach was acceptable to the Board of Commissioners, and the Board authorizes and encourages the school board to proceed in accordance with the AIA Document B801 CMA – 1992 dated March 27, 2007. All voted in favor and the motion carried.

ADJOURN

Commissioner McGrady made the motion to adjourn. All voted in favor and the motion carried.

Attest:

Terry Wilson, Deputy Clerk to the Board

William L. Moyer, Chairman