



# the north carolina humble case and its impact on planned unit developments

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Through the years, the planning profession has been seeking alternative land use guidance tools to co-exist with the traditional zoning and subdivision regulations that encourage conventional land-consuming, lot-by-lot designs. These regulations tend to establish a pre-set formula of standards, which is applied generally to all conditions regardless of environmental constraints. Standards within zoning ordinances and subdivision regulations are rigid and detailed since they are required to be self-administrating by the appropriate agency. This requirement has been established through the American courts in an effort to prevent conditions conducive to arbitrary decisions by governmental agencies.<sup>1</sup> On the other hand, planners have recognized the need for another tool to provide developers with an alternative development choice having more flexible criteria.

Such an alternative land use guidance tool is the planned unit residential development. . . . hereafter referred to as PUD. Exactly what is a planned unit development? A good description would be a unitary site plan which integrates housing types, roads, and facilities, and which clusters dwelling units for the preservation of open spaces and natural features.<sup>2</sup> The objectives of this development alternative and supporting ordinances have been well delineated by an American Society of Planning Officials study. They are as follows:

- (1) To promote flexibility in design and permit planned diversification in the location of structures;
- (2) To promote the efficient use of land in order to permit a more economic arrangement of buildings, roadways, land use, and utilities;
- (3) To preserve to the maximum extent the existing natural features and environmental amenities and provide structures and uses which are in harmony with the natural surroundings;
- (4) To provide more usable and suitably located recreational and other common facilities which could not be provided under more conventional land development procedures;
- (5) To combine and coordinate different architectural styles, building forms and building relationships within planned unit

development; and

(6) To insure a quality of construction commensurate with other developments within a community.<sup>3</sup>

Thus, planners view the PUD as one sound development alternative for those people disenchanted with "cookie cutter" subdivisions. In order to meet the above land development and design objectives, development requirements must be embodied within some legally enforceable public instrument. Such instruments are represented by a planned unit development ordinance, a special use or conditional use permit, and a floating zone stipulation contained in a zoning ordinance. Within these instruments, as they relate to a PUD, lot sizes, setback lines, yard areas, building height, and dwelling unit types may be varied to achieve particular design objectives and to obtain provisions for open space, common areas, public utilities, and basic public improvements.

The use of a PUD can preserve much flexibility in design, arrangement, and mixture of housing types. After all:

...planned unit development ought not to be constrained by the minutiae that invariably find their way into standard zoning and site planning control.<sup>4</sup>

The flexibility of development criteria theoretically will promote open ended negotiations among the community's planners, appropriate public officials, and the developers.

In North Carolina, planned unit development is controlled within a local government's zoning ordinance. For development requiring more flexible regulations, the State zoning enabling legislation authorizes municipalities to issue special use permits. This grant of power is stated in the following manner:

...the board of adjustment or the city council may issue special use permits. ...in the cases or situations and in accordance with the principles, conditions, safeguards, and procedures specified. ...and may impose reasonable and appropriate conditions and safeguards upon these permits. Where appropriate, such conditions may include requirements that street and utility rights of way be dedicated to the public and that provisions be made for recreational space and facilities.<sup>5</sup>

A special use permit is issued for a particular use which an ordinance permits in a designated zone; this permit does not change the underlying zoning classification of the district in which the proposed use will be located. If a municipality adopts and incorporates the special use permit process into its zoning ordinance, then the ordinance must clearly specify the special use permit principles, the conditions that can be exacted, and the procedures to be followed in the granting or denial of a permit. The community must assure that development will not negatively impact upon the neighboring property values nor create situations in which the general health, welfare, and safety of the public is threatened. Therefore, conditions imposed by the permit must be carefully and closely related to some aspect of the government's police power; these conditions become legally enforceable like any portion of the zoning ordinance.

A recent North Carolina Supreme Court case, **Humble Oil and Refining Company v. Board of Aldermen of the Town of Chapel Hill**, dealt with some special use permits, and the decision should have significant ramifications.<sup>6</sup> The Court ruled that the Board of Aldermen failed to follow the proper procedure outlined within the town zoning ordinance in denying the petitioner's request for a special use permit. In this particular case, the Board of Aldermen failed to defer their decision until the Planning Board had time to review the proposal and offer its recommendations.<sup>7</sup> The Supreme Court indicated that the purpose of this provision in the zoning ordinance is to:

...insure that every application for a special use permit receives the same careful, impartial consideration. Thus, whether the application is to be allowed or denied the Board of Aldermen must proceed under standards, rules, and regulations uniformly applicable to all who apply for a permit.<sup>8</sup>

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## the humble case and the state's special use permit process





Here the importance of the constitutional right of due process is emphasized in actions which affect the disposition of private land use by individual property owners.

The Court was also concerned that arbitrary decisions might arise from public hearings dealing with special use permits. It pointed out that the Board of Aldermen was conducting a quasi-judicial hearing. Due to this special condition, the Board must adhere to rules of procedure applicable to any court review. The Court ruled that the following procedures must be strictly followed:

- (1) The party whose rights are being determined must be given the opportunity to offer evidence, cross examine adverse witnesses, inspect documents, and offer evidence in explanation and rebuttal;
- (2) A board may not base findings as to the existence or non-existence of crucial facts upon unsworn statements; and
- (3) Crucial findings of fact which are unsupported by competent, material and substantial evidence in view of the entire record as submitted cannot stand. (Note: . . . If a party makes a subjective statement, he must back it up with reliable facts).<sup>9</sup>

In summation, the Supreme Court of North Carolina delineated four requirements a community must follow in any permit procedure:

- (1) The board must follow the procedures specified in the ordinance;
- (2) It must conduct the hearings in accordance with fair trial standards;
- (3) It must make its decision upon findings of fact based upon competent, material, and substantial evidence;
- (4) In allowing or denying an application, the board must state the basic facts on which it relied with sufficient clarity so the affected parties and any court will understand what induced its decision.<sup>10</sup>

The ramifications of this decision on any North Carolina community's special use permit process seems to be substantial, especially if one considers Chapel Hill's experience to be a common example. Obviously, the importance of due process was reinforced as an important principle to be followed at all times. Yet this decision might have an interesting impact upon the overall permit granting process. As an example, the final granting or denial process in Chapel Hill must be clarified. To grant a permit, the Board of Aldermen must decide that the proposal is consistent with four findings of fact:

- (1) That the use will not materially endanger the public health or safety if located where proposed and developed according to the plan as submitted and approved;
- (2) That the use meets all required conditions and specifications (e.g., as stipulated in the zoning ordinance);
- (3) That the use will not substantially injure the value of adjoining or abutting property, or that the use is a public necessity; and
- (4) That the location and character of the use if developed according to the plan is submitted and approved will be in harmony with the area in which it is to be located and in general conformance with the plan of development of Chapel Hill and its environs.<sup>11</sup>

With the character of the factual evidence established by the Humble Case, the burden of proof that an application meets these four findings falls upon the applicant, who must factually display beyond reasonable doubt that his proposed use will completely satisfy these findings. On the other hand, to deny a permit, the opposition to a proposal, whether the town planning staff or privately affected parties, must provide documented facts displaying the reasons this proposal fails to meet the four findings. Theoretically, the Court's requirement that the Board of Aldermen consider only sworn evidence, which met the standards set forth in the Humble decision, in their application of the zoning ordinance's four findings rule might stimulate several positive results in the Chapel Hill permit process:

- (1) The developer is induced to be sensitive to the community's development plan for Chapel Hill, the impact of his proposal upon the surrounding neighborhood's property value, and the public welfare and safety. He is forced to make a case for his proposal by

carefully analyzing these latter elements and how his use meets the four findings;

(2) Private opposition to a proposal is now induced to fully familiarize itself with the community's development policy and the four findings procedure. Thus, their presentation becomes more professional and organized because their opposing statements must be supported by factual evidence to qualify as formal evidence to be weighed against the proposal;

(3) The Board of Aldermen must confine its rigorous analysis to the sworn testimony presented at the public hearing and weigh it in accordance with the four findings. Now the importance of a comprehensive town development plan and zoning ordinance is obvious because the information contained within each is entwined in the four findings. With the goals, objectives, and standards set forth in these two documents, a governing body has a solid benchmark with which to analyze a proposal's consistency with a community's development plans and desired patterns of growth. One of Chapel Hill's problems in this special use permit process is that it presently lacks a formally approved comprehensive development plan, and the difficulty this situation poses to the Board of Aldermen and other involved town commissions will be discussed later.

## uniqueness of the north carolina humble decision

The Humble Case certainly is not unique just to North Carolina. For example, through its court system, Oregon confronted many of the same issues in the case of **Fasano v. Board of Commissioners, Washington County**. Here too, the court distinguished between quasi-judicial and legislative actions performed by local governing bodies dealing with land use decisions. In this case, the Court offered the following test in determining the latter distinction:

One must determine whether an action produces a general rule or policy which is applicable to an open class of individuals, interests, or situations, or whether it entails the application of a general rule or policy to specific individuals, interests or situations. If the former determination is satisfied, there is legislative action; if the latter determination is satisfied, the action is judicial.<sup>12</sup>

The Oregon Supreme Court then proceeded to explain that it is:

... not part of the legislative function to grant permits, make special exceptions, or decide particular cases. Such activities are not legislative, but administrative, quasi-judicial. . . . in nature.<sup>13</sup>

With this statement in mind, the Court determined this particular land use case, which dealt with a zoning change to accommodate a specific land use, was judicial in nature. Therefore, the Court was concerned that this zoning change request was not measured in accordance with certain standards (e.g., compatibility with the county's comprehensive development plan), nor was the county decision opened to public scrutiny through a public hearing conducted according to court room procedures. Since the Court recognized that many governmental agency decisions concerning land use are judicial, it required the same court room procedures mandated in the later North Carolina Humble Case and the basic requirements for factual evidence. This action was a mandate to provide equitable procedures for land use decisions and review in order to preclude arbitrary decisions, which violate the property owner's and the developer's constitutional right of due process and other basic rights attached to their land. Thus, not only was the zoning process (e.g., zoning changes, special exceptions, conditional use permits) opened up to the scrutiny of the public hearing and the official record, but this decision also placed the burden of proving these latter actions are necessary directly upon the petitioner.

While these two independent cases do not represent a documented trend in the treatment of land use proposals before governments today, they may be an indicator of a future trend. Equity in land use decisions has continually confronted local government. Perhaps the efforts of these two state supreme courts to mandate court room procedures in hearing, reviewing, and deciding the acceptability of certain land use proposals in the quasi-judicial realm will encourage greater equity and objectivity to be applied to all land decisions



affecting the private land owner's bundle of rights and the public interest.

## questions raised by the decision

The benefits this Court decision may encourage in subsequent land decisions have been amply covered in past discussions. On the other hand, North Carolina planning agencies and local governments must be aware of several potential problems resulting from their own Court's decisions. These problems are:

- (1) A shift to a more judicial process might very well remove the proceedings from what a common man and his neighbors can comprehend to a new kind of forum where only lawyers can function. This situation means more expense for those aggrieved property owners as well as developers;
- (2) This decision appears to go against the poor, and it discourages people from presenting information (e.g., the spectre of cross examination);
- (3) Further, the added preparation required in all such cases is bound to overload the agenda of planning commissions and take away time from dealing with policy and plans on which these very special use permits depend.

## impact of the humble case on the special use permit process in chapel hill

In Chapel Hill, planned unit development has been named unified housing development, and to pursue this type of residential construction, one must apply to the Board of Aldermen for a special use permit. After the Humble decision, a recent application for a unified housing development special use permit in this community not only displayed the impact of this court case on the permit process, but also raised several other key issues pertinent to any community in North Carolina.

In review, for the Board of Aldermen to grant or deny a special use permit, this Board must base its decision solely on the official facts presented at the public hearing and determine whether all four findings of fact have been satisfactorily met by the proposal. The burden of proof that all four findings have been met is entirely up to the petitioner. If any doubt of meeting one finding is established, then that finding is grounds for the Board to reject the application.

The proposed project in question was a unified housing development comprised of 225 condominium units located just outside Chapel Hill's corporate limits, but well within the community's planning jurisdiction. The developer wanted to establish a closed, private development with a single entrance and no public thoroughfares or access to contiguous property. He also mentioned the possibility of a guard gate provided to insure the security of the development, contingent upon approval by the homeowners association.<sup>14</sup>

The Board of Aldermen denied the grant of a special use permit for the project because it failed to meet two of the required four findings of fact:

- (1) Finding 1. This Board determined the development would materially endanger the public health and safety if located where proposed and developed according to the plan as submitted for two reasons. First, at the public hearing a traffic consultant established that the project's traffic generation would burden an already congested road system and would provide potential hazards at various interchanges in the area. Finally, there were logistical problems in providing the project with ample public water and sewage connections the developer desired;
- (2) Finding 3. The petitioner failed to clearly establish that the proposal would not damage substantially the value of adjoining or abutting property.<sup>15</sup>

Even though this permit proposal was denied based upon the factual evidence provided only at the public hearing, the Planning Board and Town Planning Staff displayed a growing feeling of uneasiness with this development and similar ones to follow outside the corporate limits of the city. A key issue both groups identified was that a development of this nature and size in predominantly undeveloped sector of the community should be timed in conjunction with improvements of transportation routes in the project area.<sup>16</sup> Yet the community cannot legally deal with the timing and sequence of development in the extremities of the planning district by following its Thoroughfare Plan and

providing road improvements or extensions for areas existing outside the city limits. The lesser public roads outside the town may be built only by the North Carolina Department of Transportation or by developers, subject to this latter Department's standards (especially if State maintenance is expected).

The lack of a formally approved comprehensive development plan was another issue identified by the Planning Board. The Planning Board did not have a community approved statement of policy, goals, or objectives embodied within a comprehensive plan which it could use to determine whether or not a particular proposal is consistent with desired community development patterns. Without such an official document, Chapel Hill is placed in a precarious position when it attempts to establish that a proposal is inconsistent with the fourth finding of fact, i.e. that the special use permit is in harmony with the area in which it is located and in general conformity with the plan of development of Chapel Hill and its environs. Therefore, during a public hearing subject to the Humble Case's stipulations, the town's governing body and professional staff are forced to find substantive areas of concern in the remaining three findings when confronted with a development proposal which might stimulate growth patterns not wanted by the community government.

The Humble Case seemed to constrain one aspect of the PUD or unified housing development concept in Chapel Hill — the effectiveness of negotiation between the developer and the planning staff. Negotiation implies compromises between both the developer and a planning staff in order for each to obtain the desired end product. However, little contact occurs between these two actors, and perhaps this latter Court decision is one explanation for this situation. The public hearing is conducted in a court room atmosphere, with the Board of Aldermen eventually making the final grant or denial for a special use permit, subject to the official evidence presented. This situation certainly decreases the level of negotiation since the planning staff cannot legally commit itself to any compromises in density for design objectives. However, the degree this situation negatively impacts upon the product design is debatable.

On the positive side, the Humble Case seems to have increased the level of professionalism in all aspects of the special use permit process in Chapel Hill. Certainly the developer is induced to be sensitive to the community's plans, policies, and ordinances. On the other hand, the Planning Board and staff, the Appearance Commission, and the Board of Aldermen must analyze any proposal's potential impacts on the surrounding site area and the town and establish whether the project is consistent with the appropriate plans, policies, and ordinances. This entire process mandated by the Humble decision becomes very educational, and it may help elected and appointed governing bodies in other North Carolina communities who have their own permit system to identify factors constraining their ability to make effective land use decisions. Once these factors are identified, solutions to alleviate their constraining character can be found. For example, in Chapel Hill, the Planning Board felt uneasy without formally mandated development policies which adequately confront the issues presented by current development proposals. They recognized the need for a formal, comprehensive development plan with which to guide their decisions concerning a wide variety of projects.

In sum, the process mandated in the North Carolina Humble Case causes communities regulating PUD's with special use permits to face planning issues similar to those faced by Chapel Hill. These issues must be confronted constructively in the immediate future.

#### Footnotes

<sup>1</sup>Jan Krasnowiecki, "Legal Aspects of Planned Unit Development in Theory and Practice," **Frontiers of Planned Unit Development**, (New Brunswick, New Jersey: Center for Urban Policy Research, 1973), p. 100.

<sup>2</sup>Frank F. So, David R. Mosena, and Frank S. Banks, Jr., **Planned Unit Development**

**Ordinances**, American Society of Planning Officials, (1973), p. 1.

<sup>3</sup>**Ibid.**, p.11.

<sup>4</sup>Jan Krasnowiecki, **op. cit.**, p.100.

<sup>5</sup>**North Carolina General Statutes**, Article 19, 160A-381.

<sup>6</sup>284 N.C. 458.

<sup>7</sup>**Ibid.**

<sup>8</sup>**Ibid.**

<sup>9</sup>**Ibid.**

<sup>10</sup>**Ibid.**

<sup>11</sup>Chapel Hill, **Ordinance Providing For The Zoning of Chapel Hill And Surrounding Areas**, Section 4-B, p. 46.

<sup>12</sup>Department of Justice, the State of Oregon, **Attorney General's Opinion on the Fasano v. Board of County Commissioners, Washington County**, (1973).

<sup>13</sup>**Ibid.**

<sup>14</sup>Chapel Hill, **Minutes of a Public Hearing and a Regular Meeting of the Mayor and Board of Aldermen of the Town of Chapel Hill Held in the Town Hall**, (Subject: The Laurel Hills Condominium Special Use Permit), (October 14, 1974), pp. 1-15.

<sup>15</sup>Chapel Hill, **Minutes of a Public Hearing and a Regular Meeting of the Mayor and the Board of Aldermen of the Town of Chapel Hill Held in the Municipal Building**, (November 11, 1974), p. 3.

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