

**MINUTES
COUNCIL MEETING VILLAGE HALL
110 VILLAGE CENTER DRIVE
AUGUST 9, 2007
9:30 A.M.**

CALL TO ORDER

Mayor Shaw presided over the Council Meeting of August 9, 2007, at 9:30 a.m., in the Village Hall assembly room. Those present were Mayor Shaw, Vice Mayor Staton, Council Members Boleman, Bucher, Hicks, and Weedman, Village Clerk Collier, approximately 50 citizens and one member of the media. Council Member Wert was not present.

MOMENT OF SILENT MEDITATION / PLEDGE OF ALLEGIANCE

Mayor Shaw led the group in a moment of silent meditation followed by the Pledge of Allegiance.

APPROVAL/CHANGE AGENDA

Council Member Hicks moved to approve the agenda as presented, seconded by Vice Mayor Staton. The vote was unanimous, motion carried.

Public Hearing (continuance)

1. HIGHLAND LAKE

Mayor Shaw stated that two public hearings would be heard today, Highland Lake and Braewood. He also said that these were quasi-judicial hearings and those wishing to speak needed to be sworn in, however those sworn in at a previous meeting was not required to do so again. Mayor Shaw swore in Ms. Nancy Smith.

Vice Mayor Staton moved to enter into a public hearing on the Highland Lake project, seconded by Council Member Boleman. The vote was unanimous, motion carried.

Mayor Shaw then asked Roger Ambrose, Zoning Administrator and Ken Howard, Deputy Zoning Administrator, if they had the required documents needed since the previous meeting. They both replied, "no." Mr. Howard stated that Mr. Lindsey lacked the Henderson County Fire Marshals, EMS documents. Steve Collin from Highland Lake stated that a letter was to be faxed to them yesterday from the Fire Marshals office for EMS approving the plan, but have not received at this time.

Mayor Shaw asked for any comments, there was none.

Kerry Lindsey, owner of Highland Lake presented the master plan for Highland Lake and explained each unit, road, and density changes.

Sharon Alexander, Village Attorney, stated that Council should not be real concerned about setting a precedence. She said that this had some very unique characteristics. The conditions of the Special Use Permit specifically provide that Section 1207 of the 1998 Zoning Ordinance would apply to this master plan, she said. She went on to say that she did not believe that, based on the history of how this has been developed, the conditions and what has actually occurred on the ground and as phases have been submitted and changed, and what has occurred, and going back to the spirit and intent of the Council at the time the SUP was issued, she did not believe that they intended for this type of change to be a substantive change. She went on to say that phase one and two was approved at the same time that the master plan was approved. From all the information she had there was not a site plan with phase one that would necessarily be inconsistent with what they're now proposing to do. She said that based on all that, she thought that the spirit and intent of the past and present Councils, she did not believe that this should be considered the kind of substantive major change that would trigger review under the current Ordinances.

Vice Mayor Staton stated that looking at the plan as a PMUD and not in phases, the overall density has not changed. He said that he thought it was not a substantive change.

Council Member Hicks asked Ms. Alexander if this were challenged legally could she defend the decision. She replied yes.

Council Member Weedman asked if the roads were in compliance. He said that he did not know if that would apply under a PMUD. Mr. Lindsey stated that if the resident park in an undesignated area they will told to remove their vehicle and then sent a legal letter.

Council Member Bucher asked if anything had been done with high density areas regarding stormwater issues. Mr. Lindsey said that it was a North Carolina requirement. He then said that he had met with the engineers and made sure all the requirements were current. Mr. Collins stated that they have not received the papers, but they will have them soon.

Mayor Shaw stated that there were several emails that had been received and should go into the record as part of these minutes.

Mr. Lindsey was asked about the noise late at night. He replied that the caterers had made reservations a year ago. Recently, he said, noise from wedding celebrations has been limited to 10:00 p.m., which will be better for neighbors.

Mayor Shaw then swore in those wishing to speak, Tom Robertson, Russell Guerard, Tara Guerard, Beverly Stoney-Johnson and Susan Cowardin.

Those speaking in opposition of the change request were Tom Robertson, Beverly Stoney-Johnson, Judith O-Conner, Russell Guerard, Tara Guerard, and Susan Cowardin.

After comments were made Council Members spoke with neighbors regarding roads, cul-de-sacs, the Market Center, and emergency vehicles access.

Mayor Shaw asked if there were any wishing to speak on behalf of the Highland Lake property. There was none.

Vice Mayor Staton moved to exit the Public Hearing for Highland Lake and return to the regular session, seconded by Council Member Boleman. The vote was unanimous, motion carried.

2. BRAEWOOD SUBDIVISION

Vice Mayor Staton moved to enter into a public hearing for the Braewood Subdivision, seconded by Council Member Boleman. The vote was unanimous, motion carried.

Mayor Shaw swore in Brenda Farren, Dries Jansma, Lex Veazey, Robert Horky, Jr., and Clement Riddle.

Ken Howard, Deputy Zoning Administrator stated that there are six conditions proposed by the Planning Board. He said the following conditions are recommended to be imposed upon the approval of the first Braewood Site plan and Special Use Permit and all are to be attested to by the Zoning Administration as satisfied prior to first breaking of ground for creation of infrastructure.

1. Financial Guarantee of Performance for Phase I approved by the Village Council
2. Full set of instruments covering transfer to, ownership and maintenance of common areas acceptable to Village designated reviewers
3. Acceptance by the City of Hendersonville of the submitted water and sewer plans
4. Documented acceptance by NCDENR of the submitted Soil Erosion and Sedimentation Control Plan
5. Documented modification of Site Plan to provide turn around at the end of dead end street abutting Lewis property
6. Engineering certification that rate of water flow for Phases II and III will meet ordinance requirements

Mayor Shaw opened the floor for those wishing to speak in favor of the Braewood Subdivision. Those speaking were Nancy Smith, Dries Jansma as a member of Historic Flat Rock and Sense of Place, and Robert Horky, Jr.

Those speaking in favor indicated that it was well planned and it will give the community a larger tax base. There was also a discussion on the sewer system.

Mayor Shaw asked if there was anyone wishing to speak in opposition of the Braewood Subdivision. Those speaking were Judith O'Connor, Tom Robertson, and Jane Lewis.

Those speaking in opposition of the Braewood Subdivision expressed their concerns regarding the cutting of trees, increased traffic, noise and traffic during construction, property zoning, buffering, and sewer issues.

Council expressed their concerns regarding Ms. Lewis's driveway, construction traffic and noise, and buffering. Mr. Swing stated that Ms. Lewis's driveway will be used by the Subdivision. He went on to say that the homeowners association will maintain it and the pull off areas as well, since the driveway is so narrow. To widen the driveway, he said, would mean cutting a lot of trees. The sewer line connection was also discussed.

Council Member Hicks asked Ms. Alexander, Village Attorney, about the merging of R10, R20, and R40 and the legal rights to do that. Ms. Alexander stated that the way the Zoning Ordinance is currently written she believed that it does give the legal right to merge districts, but there is a grey area. She said that the density on the R40 exceeds what the Zoning Ordinance allows on that portion of the property. She said that initially she thought she could recommend to Council that a SUP could be issued and one of the conditions would be to obtain a variance from that density requirement from the Board of Adjustment if it was otherwise qualified. She then said that there is case law, one in particular, that says that the statute that enables the Board of Adjustment to issue variances does not allow variance from density requirements. She said that she does not believe that Council would approve this without that density being out of compliance with the ordinance without attaching some condition.

Council Member Hicks asked what these conditions would be.

Ms. Alexander stated that one condition should be to obtain a variance from the Board of Adjustment; another would be that the Council considers a text change, which would be the cleanest and with the spirit of the ordinance. She said that would allow residential plan use development that merging districts would be allowable as long as the over all density is preserved.

Council Member Hicks stated that the Zoning Ordinance does not permit Council the legal authority, according to the Zoning Ordinance, to approve this master plan.

Vice Mayor Staton stated that a text amendment to approve what this plan proposes would be a far better alternative than jamming 60 to 64 units in 16 acres. That would not make a very attractive development at all, he said.

Council Member Hicks stated that he just wanted to know where Council stood in approving this master plan today.

Ms. Alexander stated that it is clear that but for the case law, a variance would be appropriate based on what Mr. Staton just said. She said that this plan is a much better plan for the use of this property. She also said to allow a change in density is a legislative decision that would need to be made at this level.

Mr. Veazey stated that in the current ordinance in Section 1205 it says, for planning and development, which this is R40, R20, R10, RC and MF districts are permitted. The way I see it, he said, it is to determine its special use. It doesn't say that it can not be combined, he said,

It does say that a RPUD shall have a minimum lot area of five contiguous acres in the R10, R20, RC and MF districts and 10 contiguous acres in a R40 district and the minimum acreage shall be based upon the buildable acreage of the site. He said that he did not see anything in Section 1205 that indicates that it could not be combined. He stated that Mr. Swing was asking for a special use.

Council Member Boleman stated that a text change would be a better avenue than a variance. Ms. Alexander said that one case decided in 1984 says that you can not modify density based on a variance. She said that the developer could pursue a variance. She also said that when Mr. Veazey studies this case he may not have as much concern about the validity of a variance as she has and it may not be challenged. She then said there was no reason that the developer couldn't request a variance at the same time that Council was considering a text change.

Vice Mayor Staton stated that a text change would prevent this type of cross district planning, which he felt is the intent of the RPUD section. Council then discussed the process of a text change to the Zoning Ordinance and conditions that the developer must do prior to breaking ground.

Mayor Shaw stated that the Planning Board had put six conditions on the plan prior to the approval of the Braewood Site Plan and Special Use Permit.

Council Member Hicks stated that if the Council went back and made a text change of the ordinance, would this public hearing need to be continued? Vice Mayor Staton replied, no.

Council Member Hicks then moved to close the public hearing and return to regular session, seconded by Vice Mayor Staton. Mr. Veazey and Mr. Hilton discussed with Council the Zoning Ordinance sections regarding RPUD and R40. Mr. Swing stated that when the Village was incorporated, the new zoning split the property into three districts. Mr. Veazey stated that this was a whole district when the districts are put together. He said that he thought that there should be some clarification of words in that section. He also said that everyone applying for a RPUD assumed that there would only be one district. Council and Ms. Alexander then discussed with Mr. Swing and Mr. Veazey districts in Section 1205 of the Village Zoning Ordinance. With no further discussion, the vote was unanimous, motion carried.

Highland Lake

After a five minute break Mayor Shaw asked Council if they wanted to take action on either of these public hearings.

Council Member Hicks moved to approve the Highland Lake application, seconded by Council Member Staton. Council Member Boleman requested discussions. Council Member Bucher stated that he did not see how Council can approved without handling stormwater issues.

Council Member Boleman stated that she would add in the stormwater, I can support that when those come in based on those coming in to us within the next two weeks, she said.

Vice Mayor Staton stated that he did not understand what we're waiting for in the way of stormwater management.

Council Member Bucher stated that their stormwater plans have to be approved by the state.

Vice Mayor Staton stated that he did not understand, if there were conditions, and acceptance of these things, why wait?

Mayor Shaw stated that the motion on the floor was they can be approved provided those two documents can come in within two weeks.

Council Member Hicks revised his motion that had been seconded by Vice Mayor Staton, to include that these two documents be in the Village Hall prior to any construction.

The vote was three yes and two no. Those voting yes were Vice Mayor Staton, Council Member Boleman and Hicks. Those voting no was Council Members Bucher and Weedman. The motion carried.

Council Member Hicks stated that he did not believe that any of it was fair to the Planning Board until they have a complete package in front of them.

Braewood Subdivision

Vice Mayor Staton stated that he would like to have a discussion before making a motion. He then said that he was under the impression that Council could not approve a master plan Braewood as presented to us in view of what has been provided to us by Ms. Alexander today. I think that maybe there is a misconception, he said. He then asked Ms. Alexander to explain what the possibilities could be.

Ms. Alexander stated that as far as the R10 density question versus R40, she felt there was no reason that Council cannot approve a special use permit today with conditions of what you just did. The developer would have to obtain a valid variance either in addition to or instead of a text change. If a valid variance could not be obtained that the text of your ordinance would need to be amended to allow the density for RPUD be done across district lines.

Vice Mayor Staton then asked questions of Mr. Swing regarding phase lines and lots, on the master plan. Vice Mayor Staton then said if Council had all that was needed subject to the six conditions the Planning Board has outlined that effect the entire development, then Council could approve the master plan, Phases I and III, subject to these conditions and also subject to Ms. Alexander's suggestion that the developers obtain a variance from the Board of Adjustment for our amending the Zoning Ordinance to permit this cross district planning.

Council Member Hicks stated that he found that trying to divide this up in a piece mill creates more problems than to go back and within 30 days change the ordinance.

Council Member Boleman stated that the ordinance cannot be changed within 30 days due to time limits with the Planning Board and having a public hearing with a notice in the paper, there is just not enough time.

Vice Mayor Staton requested a straw pole of Council to see what feelings would be on approval of the master plan if the language was in place for the Zoning Ordinance, in what he's trying to do here. Can we give him some comfort? He asked the Council.

Council Member Hicks stated that he supports the idea of changing language and proceed to adopt the Braewood master plan.

Council Member Bucher stated that he thought that the plan was a good one, but he just wanted it done legally.

Council Member Boleman stated that she certainly supports this. She said she knew that a lot of work had gone into this project.

Council Member Weedman stated that this was a technicality that needed to be addressed carefully, but we need to get on with it.

Council Member Bucher told Mr. Swing that it would be better to send everything at one time and not piece mill documentations.

Vice Mayor Staton stated that Mr. Swing would be better off if he consented to the extension of that time to give us the opportunity to amend the ordinance. Mr. Swing asked when did Council expect to have the amendment accomplished. Vice Mayor Staton stated hopefully by the September Council meeting. Mr. Swing stated that if Council had enough confidence that the amendment will be ready by the next meeting, would there be a problem just approving the master plan today, with the understanding that the text amendment would be ready for the September meeting. Council Member Hicks stated that the master plan could not be approved because Council does not have the legal foundation to approve it.

Ms. Alexander stated that she thought the special use permit could be approved with a condition, that a text amendment be approved prior to any construction.

Vice Mayor Staton said that he would be in favor of approving the master plan subject to the condition that a text amendment will occur before any construction.

Council Member Hicks stated that he was in favor of an agreement to be with this, to know that we as a Council feel supportive of this conceptually. He said that he would like to see Council do a change to the ordinance and at the same time change the ordinance to approve this master plan. He went on to say that it seems to be the cleanest way, the least contested, and no one has to have any doubt about it.

Mr. Veazey asked if Council could not go ahead and approve site plans for the phases. He then said that they were looking for an approval for three things, the site plans, the master plan, and the permit approval.

Vice Mayor Staton stated that Council Member Hicks does not feel that Council can approve a master plan until we have this text change. He went on to say that he felt that the master plan could be approved subject to the text change. He said that what he did not want to see is a motion before Council to approve the master plan subject to the text amendment and then to have a vote against that and then you've got a disapproval of your plan. He told Mr. Swing that he would like for him to walk out of here with this approved.

Council Member Weedman stated that other action has to occur and it has to be successful. Presumably it will be, but who knows.

Vice Mayor Staton moved that Council approve the master plan for Braewood subject to a text amendment to the Zoning Ordinance that would permit crossing the districts for purposes of density according to the plan presented and also subject to the conditions set forth by the Planning Board, seconded by Council Member Boleman. Mr. Ken Howard stated that the motion should approve the master plan and the site plans. Vice Mayor Staton stated that he would amend his motion and include the site plans, however Mr. Swing requested that all he needed approved at this time was the master plan since they were two different issues. Vice Mayor Staton retracted the motion for the site plans. Mayor Shaw stated that there was a motion on the floor that has been seconded and discussed. He then requested a vote. Vice Mayor Staton and Council Members Boleman, Bucher, and Weedman voted yes, Council Member Hicks voted no. The motion carried.

Then Council and Mr. Swing had a lengthy discussion regarding recommended water pipes, a lift station and underwater sewer lines crossing Jordan Lake.

Vice Mayor Staton moved that Council approve all the site plans for all three phases subject to the text amendment to the Zoning Ordinance amending the crossing of district lines for density purposes and subject to the conditions one through six outlined by the Planning Board, seconded by Council Member Weedman. The vote was unanimous, motion carried.

Special Reports Items 4 - 9

Council Member Boleman moved to amend the Agenda to remove items four through nine of Special Reports, seconded by Vice Mayor Staton. The vote was unanimous, motion carried.

Consent Agenda Item 3

Vice Mayor Staton moved to approve the Consent Agenda adopting the minutes of the July 2, 2007, Agenda Workshop and the July 12, 2007, Council meeting, seconded by Council Member Boleman. The vote was unanimous, motion carried.

New Business

10. APPOINTMENTS TO BOARD OF ADJUSTMENT – Vice Mayor Staton

Vice Mayor Staton moved to reappoint Cam Boyd and Ed Lastein as members of the Board of Adjustment and Don Farr and Malcolm Allen as Alternate Members for a three year period ending August 13, 2010, seconded by Council Member Weedman. The vote was unanimous, motion carried.

11. APPOINTMENT TO THE PLANNING BOARD - Council Member Boleman

Council Member Boleman moved to appoint Kathy Brady to the Planning Board with a three year term ending August 13, 2010, seconded by Vice Mayor Staton. The vote was unanimous, motion carried.

Old Business

12. MAYOR – COUNCIL REPORTS

Council Member Weedman stated that the Tax Report for July 2007 was in Council packets for there viewing. He also said that if enough willing people were found the Village would enter the yearly Mayors Raft Race.

Vice Mayor Staton stated that there would be a training session for the 2010 Census. He then proposed that he along with Michelle Hill, Deputy Clerk, and Council Member Bucher take the course October 6 and 7, 2007.

Council Member Hicks stated that a time should be set for a public hearing on a text change for the Village Zoning Ordinance. Council agreed on Thursday, September 13, 2007, at 9:30 in the Village Hall. Village Clerk Collier will put the notice of public hearing in the Times-News.

Mayor Shaw stated that he would be out of town August 10 through August 21, 2007, and Vice Mayor Staton would be out beginning August 15 through September 6, 2007, which left no one responsible for the Mayor's position. He then asked Council Member Boleman if she would be acting Mayor until August 21, 2007. She said she would.

13. PUBLIC COMMENTS

Mr. Robertson requested that Council meetings be changed to night so more citizens could attend. Mayor Shaw stated that the meetings were at 7:00 p.m. at first but when changed to 9:30 a.m. there was no difference in attendance.

Ms. Judith Moore thanked the Council for their hard work and commitment.

14. ADJOURNMENT

At 1:05 p.m. Council Member Weedman moved to adjourn, seconded by Council Member Bucher. The vote was unanimous, motion carried.

Rowena M. Collier, CMC
Village Clerk

Ray E. Shaw, Jr.
Mayor