

January 9, 2018

TO THE CHAPEL HILL MAYOR AND COUNCIL

In October, 2017, the Chapel Hill Town Council forwarded to the Historic District Commission (HDC) proposed amendments to the sections of the Land Use Management Ordinance that would apply to Chapel Hill's three historic districts and the operations of the Historic District Commission. The Council requested the Commission's comments and recommendations prior to taking further action. We have reviewed those draft amendments as well as public comments and appreciate the effort to improve the management of the historic district program and to make the operations of the commission as effective, clear and fair as possible.

The HDC recently has been working with the North Carolina State Historic Preservation Office (NC SHPO) to improve information and operations and take advantage of their expertise and resources. In addition the UNC School of Government has published helpful articles and offered training on best practices relevant to historic district commissions. These comments are based on the information gained from these experts. The HDC shares the Council's goal of improving the process.

The NC SHPO has developed over several years a model ordinance for local governments to adopt for the administration of local historic districts. The Model Ordinance may be found at <http://www.hpo.ncdcr.gov/ModelPreservationCommissionOrdinance.pdf>.

The model ordinance was drafted to ensure compliance with state law and has been adapted over time to reflect both case law and needs for clarification identified by localities throughout the state. The Chapel Hill HDC looks to this model ordinance as the best source for achieving an effective local law. The HDC recommends that Council's suggestions all find resolution in the provisions of the Model Ordinance, and that we might achieve its goals by amending the LUMO according to its recommended practices.

The confusion and inconsistencies that currently exist with the historic preservation sections of the LUMO may be the result of periodic, piecemeal amendment of the LUMO without a comprehensive review designed to create greater clarity of the historic preservation requirements and program. For example, many citizens do not realize that there are 2 distinct sections of the LUMO – found in Appendix A, Sections 3 and 8 – that cover the requirements and operation of the HDC. Also, as is made clear by the advice of the experts at the UNC School of Government, the Guidelines developed by the HDC and adopted by the Council and approved by the NC SHPO, are integral and controlling to the legal application of the ordinance.

Some confusion likely has resulted recently by sections of the ordinance that cover the provisions addressed in the legally adopted Guidelines. Our concern is that if the Council's suggested amendments were to be adopted, the issues of duplication and inconsistency found scattered throughout the LUMO would be exacerbated. Since the entire LUMO is being revised and updated, this provides an opportunity to address the problems by substituting a unified section of the LUMO covering historic preservation, based on the recommended provisions that have been drafted, tested and adapted by experts, in the form of the Model Ordinance.

Chapel Hill has been designated a Certified Local Government (CLG), a provision of the national historic preservation program, administered through the National Park Service and the NC SHPO, for many years. <https://www.nps.gov/clg/> The CLG program provides substantial benefits (delegation of authority to the local level and financial assistance) and requirements (qualifying ordinance and HDC operations that Council adopts and NC SHPO approves). The recent efforts of the HDC in communicating with and asking for training from the NC SHPO is motivated by doing a better job of complying with CLG guidance and requirements and taking greater advantage of the benefits of CLG designation. We strongly urge the Council to only take action in amending the LUMO that reinforces these efforts and is consistent with guidance from NC SHPO.

The goals of the Council in the draft which the Council forwarded in November 2017 are more comprehensively addressed in the NC SHPO Model ordinance:

- 1) Requiring findings of fact in a written decision.

The NC SHPO Model Ordinance addresses this issue in Section 7.6 Applications and Required Procedures. Subsection (f) reflects that the findings of fact must be articulated and explained in the minutes of the meeting, including "indicating the extent to which the application is or is not in compliance with the review criteria." It is – in the view of the HDC – far more fair to applicants to articulate the reasons and factual findings in the meeting where the action is taken and the applicant or their representative – and other interested parties - are present and that these facts and reasoning are articulated in the official record of the meeting. The Model Ordinance also requires citation of evidence, studies and other authority upon which the HDC bases its decision. We recommend that this is better language than the November proposal.

- 2) Clarifying the congruity standard.

The issue of congruity is addressed throughout Section 7 of the Model Ordinance. As is made clear in a 2017 article published by the UNC School of Government: "To be sure, determinations about certificates of appropriateness are not simple, objective determinations—they require judgment from the decision-makers. That is why COA decisions require quasi-judicial procedures." <https://canons.sog.unc.edu/special-character-historic-district/>

The Model Ordinance comprehensively addresses this issue in a way that is consistent with state law and would achieve more clarity and consistency than the proposed language.

- 3) Reducing the amount of time for action on an application from 180 days to 120 days and clarifying the effect of an appeal on the tolling of the time period.

The Model Ordinance actually provides for an HDC to take action with 90 days rather than 120 days. (Section 7.6(g)) The language specifies that the 90 days begins to run from the submittal of a completed application. In recent years much of the delay has been due to applications being placed on the agenda and the HDC having to point out to the Applicant where it is not complete. The Model Ordinance allows for the time period to be extended by mutual agreement of the HDC and applicant. This is, in effect, what has caused rare applications to exceed 90 days for consideration. A recently improved application form and new procedure by the HDC are likely to help with this issue of time required. We recommend that the language of Section 7.6 – be revised to reflect consistency with the model ordinance provision. The Council remains free of course to modify the Model Ordinance time period to 120 days. Clarifying language regarding the effect of an applicant initiated appeal should be added elsewhere in the LUMO.

- 4) Clarify language regarding resubmittal of a new application, which must be “substantially different” from a recently denied application.

The Model Ordinance addresses the issue of a new application in Section 7.6 (i) in simple language that reflects state law. The proposed language on which the Council requested the HDC’s comments shifts the authority to determine whether the application has been substantially changed from the HDC to the Town Manager. The Council should fully consider the impact of this change in light of the special role and structure of the HDC. HDCs are unique in NC quasi-judicial bodies in that a level of expertise and experience is required. See Historic Preservation Commission Basics <https://canons.sog.unc.edu/historic-preservation-commission-basics/> and the recently published Quasi-Judicial Handbook <https://www.sog.unc.edu/publications/books/quasi-judicial-handbook-guide-boards-making-development-regulation-decisions> In our view, shifting the determination of whether a resubmittal is substantially different from the denied application from the HDC that made the original determination may raise issues under NC law governing quasi-judicial bodies and the requirements of the CLG program.

- 5) Clarify Council’s expectations of HDC and BOA members.

The HDC members have no problem with signing a document acknowledging our responsibilities. We question, however, whether this would be an appropriate amendment to the LUMO.

We feel that adoption of the Model Ordinance – as a substitute for the scattered provisions in the existing LUMO – will provide needed clarity, compliance with state law and an advantageous federal program that will benefit the community, particularly applicants, and allow the Town of Chapel Hill to better realize the many benefits of historic preservation to this community.

The HDC has scheduled a Workshop for the morning of Saturday, January 20 with staff members from NC SHPO to review the benefits and responsibilities of our participation in the CLG program. We invite Council Members, Town Managers Office and Planning Staff and their outside consultants to attend so that we have a consistent knowledge of our important historic preservation program. In addition, on January 22 there will be a Workshop for Quasi-Judicial Boards led by the UNC School of Government.

The Historic District Commission thanks you for the opportunity to review, comment on, and suggest these improvements to the Town's Ordinance provisions pertaining to our work. We hope that these recommendations, as well as the expertise provided at the upcoming workshops, will be useful to guide Council in its further deliberations, as we work together toward our common goal of improving the functions of the Commission.

Respectfully Submitted,

THE CHAPEL HILL HISTORIC DISTRICT COMMISSION

Robert Epting, Chair