



G. Nicholas Herman	herman@broughlawfirm.com
Robert E. Hornik, Jr.	hornik@broughlawfirm.com
T.C. Morphis, Jr.	morphis@broughlawfirm.com
Albert M. Benshoff	benshoff@broughlawfirm.com
S. Ellis Hankins	hankins@broughlawfirm.com
Kevin R. Hornik	khornik@broughlawfirm.com
Brady N. Herman	bherman@broughlawfirm.com

October 20, 2022

**Via First Class Mail and
Email to agrahn@townofchapelhill.org**

Ms. Anya Grahn, Principal Planner
Town of Chapel Hill
405 Martin Luther King Jr. Blvd.
Chapel Hill, NC 27514

Re: Project 21-007, Special Use Permit Modification for Chapel Hill North,
1800 Martin Luther King, Jr. Blvd.

Dear Ms. Grahn,

My law firm has been retained to assist Harris Teeter Properties, LLC with the above-referenced special use permit modification application. Please find enclosed a Memorandum of Law I have prepared in anticipation of the November 16, 2022 Town Council meeting, during which the Council will be considering this application. Please let me know if I need to take any additional steps to ensure that the memorandum will be included with the agenda packet.

I also kindly ask that I be allowed five to ten minutes of time to address the Council on this issue. As the hearing has not been closed, I assume that I will be able to address the Council as part of the hearing. If this understanding is incorrect or if you have any questions, please do not hesitate to reach out to me.

Sincerely,

THE BROUGH LAW FIRM, PLLC

A handwritten signature in black ink that reads 'T.C. Morphis, Jr.' with a stylized flourish at the end.

T.C. Morphis, Jr.

TCMjr:las

Enclosure

cc: Ms. Megan Fitzsimmons, P.E., Kimley Horn (via email)
Mr. Garrett Maravetz, Harris Teeter Real Estate Manager (via email)

BEFORE THE CHAPEL HILL TOWN COUNCIL

In re: Project 21-007, Special Use Permit
Modification for Chapel Hill North, 1800
Martin Luther King, Jr. Blvd.

APPLICANT'S MEMORANDUM OF LAW

FACTUAL BACKGROUND AND STATEMENT OF THE CASE

The applicant Harris Teeter Properties, LLC (the "Applicant") has submitted an application to modify the 1991 special use permit (the "Special Use Permit") that governs the property located 1800 Martin Luther King, Jr. Blvd. (the "Property"), which is also referred to as Chapel Hill North. If approved, the Special Use Permit modification would authorize the construction of fuel pumps, the expansion of the existing Harris Teeter grocery store, and the addition of a drive-through pharmacy window to the grocery store.

On May 18, 2022, the Chapel Hill Town Council held a public hearing on the request. The Council continued the hearing to June 15, 2022, and the hearing was further continued to November 16, 2022.

ARGUMENT

I. The Applicable Law.

The decision to approve or deny a special use permit is quasi-judicial in nature, which means that the board considering the request "can dispense with no essential element of a fair trial," and "crucial findings of fact" must be based on competent, material and substantial evidence in the record. *Humble Oil & Refining Co. v. Board of Aldermen of Town of Chapel Hill*, 284 N.C. 458, 471, 202 S.E.2d 129, 137 (1974). Per Chapel Hill Land Use Management Ordinance ("LUMO") Sec. 4.5.4(b), the requested changes to the 1991 Special Use Permit constitute a request for a "major modification," which is considered in the same manner as an application for a new special use permit. LUMO Sec. 4.5.4(e).

Many governing boards are familiar with the broad discretion afforded to them to approve or deny a legislative zoning decision, which includes general district rezonings and conditional zoning, but they are often unfamiliar with the very different standards required for making quasi-judicial decisions. As discussed below, once an applicant meets its evidentiary burden for a quasi-judicial permit, the applicant is entitled to the permit, unless there is evidence in the record that could support the denial of the permit. Under well-established North Carolina law,

[T]he local governing board “must follow a two-step decision-making process in granting or denying an application for a [conditional] use permit.”¹ As an initial matter, the local governmental body must determine whether “an applicant has produced competent, material, and substantial evidence *tending to establish* the existence of the facts and conditions which the ordinance requires for the issuance of a [conditional] use permit.” (emphasis added). In the event that the applicant satisfies this initial burden of production, then “*prima facie* he is entitled to” the issuance of the requested permit. At that point, any decision to deny the application “should be based upon findings *contra* which are supported by competent, material, and substantial evidence appearing in the record,” with the local governmental body lacking the authority to “deny a permit on grounds not expressly stated in the ordinance.”

PHG Asheville, LLC v. City of Asheville, 374 N.C. 133, 149, 839 S.E.2d 755, 765-6 (2020) (*Emphasis original; citations omitted*). The LUMO reflects State law in that it assigns to the Applicant the “burden of presenting evidence sufficient to establish that the proposed development will comply with the determinations required in subsection 4.5.2.,” but it also mandates that, “The town council shall review the record of the evidentiary hearing and the town manager’s report and shall act on the application based on the findings required in subsection 4.5.2. All findings shall be based on competent material and substantial evidence presented at the evidentiary hearing.” LUMO Sec. 4.5.3(f)(4) and 4.5.3(h)(1).

The four standards in LUMO Sec. 4.5.2(a) are as follows:

¹ Legally speaking, a “conditional use permit” is identical to a “special use permit.” *See*, N.C. Gen. Stat. § 160D-102(30).

(1) That the use or development is located, designed, and proposed to be operated so as to maintain or promote the public health, safety, and general welfare;

(2) That the use or development complies with all required regulations and standards of this chapter, including all applicable provisions of articles 3 and 5, the applicable specific standards contained in the supplemental use regulations (article 6), and with all other applicable regulations;

(3) That the use or development is located, designed, and proposed to be operated so as to maintain or enhance the value of contiguous property, or that the use or development is a public necessity; and

(4) That the use or development conforms with the general plans for the physical development of the town as embodied in this appendix and in the comprehensive plan.

I. The Applicant has Met Its Evidentiary Burden and for that Reason Is Entitled to the Special Use Permit Modification.

The Applicant believes that its Special Use Permit application and associated written documents along with testimony provided during the May 18, 2022 hearing meet the Applicant's evidentiary burden with regard to the standards in LUMO Sec. 4.5.2(a)(1), (2), and (4).

Subsection (a)(3) requires a finding that, "That the use or development is located, designed, and proposed to be operated so as to maintain or enhance the value of contiguous property, or that the use or development is a public necessity." Although the Applicant did not submit evidence regarding the affect the proposed Special Use Permit modification would have on the value of contiguous property before or during the May 18, 2022 hearing, the Applicant's project team has since submitted to the Town a property value analysis by Mr. Richard Kirkland, an MAI North Carolina State Certified General Appraiser. A true and accurate copy of that report is attached to this memorandum. On page 7, Mr. Kirkland concludes his analysis by saying that, "I conclude that the proposed use is in harmony and will maintain or enhance adjoining property values."

With the addition of Mr. Kirkland's report, the Applicant has now met its burden of proof and is *prima facie* entitled to the requested Special Use Permit modification. The only basis for

denying the modification would be if there were evidence in the record that could support findings of fact and conclusions of law to the contrary. As no one has presented evidence in opposition to the proposal, there is no such contrary evidence in the record.

Moreover, the Town Council cannot deny requested modification based on standards not in the LUMO. During the May 18, 2022 hearing, members of the Town Council raised several valid concerns, including whether more gas pumps are needed at Chapel Hill North and the possible effect additional gas pumps could have on climate change. The LUMO permits additional gas pumps on the Property, and there is no standard in the LUMO that authorizes the Town Council to reject a project due to its possible effects on climate change. Even if the Council believes that the catchall “health, safety, and general welfare” standard in LUMO Sec. 4.5.2(a)(1) encompasses climate change concerns, there is no competent, material, and substantial evidence in the record to support such a finding. Moreover, even if there were such evidence, it is unclear whether any North Carolina municipality possesses the regulatory authority under North Carolina State law to deny a proposed use modification on the basis of possible climate change impacts.

CONCLUSION

For the reasons discussed above, the Applicant respectfully requests that Special Use Permit modification be approved.

This the 20th day of October, 2022.

THE BROUGH LAW FIRM, PLLC

By: T.C. Morphis, Jr.
T.C. Morphis, Jr.
N.C. State Bar # 28699
1526 E. Franklin Street, Suite 200
Chapel Hill, North Carolina 27514
Tel.: 919/929-3905 Fax: 919/942-5742
Email: morphis@broughlawfirm.com
Attorneys for Appellants



Kirkland Appraisals, LLC

Richard C. Kirkland, Jr., MAI
9408 Northfield Court
Raleigh, North Carolina 27603
Phone (919) 414-8142
rkirkland2@gmail.com
www.kirklandappraisals.com

September 28, 2022

Mr. T.C. Morphis
The Brough Law Firm
1526 E. Franklin Street, Suite 200
Chapel Hill, NC 27514

Mr. Morphis:

I have considered the likely impact of the proposed expansion of the Harris Teeter located at 1800 Martin Luther King Jr Boulevard, Chapel Hill, North Carolina.

The scope of this assignment is to address the likely impact this may have on adjoining property values. To this end I have reviewed the site plan, inspected the subject property and researched other similar shopping center sites and adjoining property prices. I have not been asked to assign any value to any specific property.

This letter is a limited report of a real property appraisal consulting assignment and subject to the limiting conditions attached to this letter. My client is The Brough Law Firm represented to me by Mr. T.C. Morphis. The intended use is to assist in the Special Use Permit application. The effective date of this consultation is August 30, 2022, the date of my inspection of the property and surrounding area.

Current Use Description

The property is currently improved with a 51,212 square foot grocery store as part of the Chapel Hill North Shopping Center, which also includes a neighborhood retail shopping center building with 7,640 square feet and another neighborhood retail shopping center building with 37,000 square feet. The total square footage within the shopping center is therefore 95,852 square feet on two parcels with a combined 15.41 acres for a Floor Area Ratio of 14.3%. There is also an outparcel with an Exxon gas/convenience store at the entrance off Perkins Drive. The closest distance from the existing shopping center to the apartments to the east is 115 feet and that is off the retail shops, not the grocery store building. The grocery store building is 345 feet to the closest apartment building.

This was part of a mixed-use development with the adjoining tract to the west being developed with a large apartment development known as Chapel Hill North. Additional parcels to the south include the ABC Store and a large powerline easement. South of that are more retail and office buildings.

To the north lies Interstate 40. There is significant separation between uses north and south of I-40 at this location due to the ramps. The closest distance is 367 feet from the subject property line to the property line of a vacant residential tract north of I-40.

To the west lies Martin Luther King Jr Boulevard. Across Martin Luther King Jr Boulevard which is a divided road at this location is North Chapel Hill Baptist Church and then south of that are single family homes within Northwood subdivision that front onto Northwood Drive.



Proposed Use Description

The proposed addition will add 12,029 square feet to the north side of the grocery store space increasing that building size to 63,241 square feet and the overall shopping center size to 107,881 square feet on 15.41 acres for a Floor Area Ratio of 16.1%.

The addition also proposes to add 7 fuel pumps under a canopy with a 240 s.f. kiosk. Including the kiosk to the total shopping center building area makes it 108,121 square feet on 15.41 acres for a Floor Area Ratio of 16.1%.

As the proposed expansion of the building is on the north side of the building, the building will not get any closer to the adjoining uses south of I-40 than the current improvements already are located. The closest distance is still 115 feet to the apartments from the retail shops and still 345 feet from the grocery store building.

The properties north of I-40 are significantly more impacted by I-40 than anything south of that use. The noise from I-40 is substantially louder than a grocery store use.

Mr. T.C. Morphis
September 28, 2022

The proposed gas pumps and kiosk are to be located on what is currently the 2.02-acre parcel at the northwest corner of the property, which adjoins the onramp to I-40 East. A gas station use at such an intersection with an onramp is a very common use of such a location. This parcel is within similar proximity to the houses in Northwoods to the west as the existing Exxon station to the south at Perkins Drive and does not change the expectation of this parcel being developed in some commercial outparcel use as part of the Chapel Hill North Shopping Center.

Question on Property Value Impacts

The shopping center building is not getting closer to any of the adjoining uses other than those that are significantly separated from the project by Interstate 40. The gas pumps are at a similar distance to adjoining uses as the existing gas station. The location of the proposed gas pump location is on an outparcel that would be developed in some commercial use regardless. These factors significantly limit the items that I can test for in terms of impacts on adjoining property values as the differences are very limited on those adjoining uses.

The primary impact that I can test for is the Floor Area Ratio that has changed from 14.3% to 16.1%. This change in the overall use of the site reflects not just building size, but would similarly address increases in potential traffic assuming building size is a good indicator of traffic impacts.

I have therefore considered other shopping centers in the Triangle for the mix of adjoining uses and the Floor Area Ratios (FAR).

Shopping Centers In and Around Chapel Hill

Timberlyne Shopping Center has a gross building area of 104,656 square feet on a 12.90-acre site for a FAR of 18.6%. There are no gas pumps on this property or any of the outparcels. It adjoins a number of apartments with the closest apartment building being 175 feet.

Midtown Shops at 762 Martin Luther King Jr Boulevard has 20,918 square feet on a 1.67-acre parcel for a FAR of 29%. There are no gas pumps on this property or the outparcel. It adjoins single family housing and commercial uses. The closest residential building is 60 feet from the building.

Glenwood Square at 1216 Raleigh Road has 52,045 square feet on a 4.74-acre parcel for a FAR of 25.2%. There is a gas station outparcel. Adjoining uses are commercial, a school and a golf course.

The Harris Teeter at Meadowmont includes 45,517 square feet on 4.33 acres for a FAR of 24.1%. Adjoining uses include commercial and office uses as well as townhome apartments. The closest townhome unit is 88 feet from the grocery store.

The Falconbridge Shopping Center at NC-54 at I-40 has 63,399 square feet on 7.486 acres for a FAR of 19.4%. There is a gas station outparcel and another gas station across the street. Adjoining uses are apartments, commercial and townhomes. The closest adjoining apartment building is 95 feet.

The Plaza Mall Shopping Mall at S. Elliot Road and Franklin Street has 74,709 square feet on 6.02 acres for a FAR of 28.5%. There is no gas station here and adjoining uses are office,

commercial as well as the Village Apartments to the south with only 75 feet separating the apartments from the shopping center.

Eastgate Shopping Center is located at Franklin Street and Fodham Boulevard and includes 158,207 square feet on 13.83 acres for a FAR of 26.3%. There is no gas station on this property. Adjoining uses are primarily commercial.

Rams Plaza shopping center is located across Fordham Boulevard from Eastgate and includes 108,918 square feet on 11.82 acres for a FAR of 21.2%. There is no gas station on this property. Adjoining uses are commercial and apartments. The closest apartment building is 115 feet from the shopping center.

The Food Lion at 602 Jones Ferry Road, Carrboro includes 63,112 square feet on 8.04 acres for a FAR of 18.2%. Adjoining uses include commercial, medical office and apartments. The closest apartment building is 240 feet.

Carrboro Plaza shopping center includes 127,137 square feet on 16.97 acres for a FAR of 17.2%. This includes a Circle K gas and convenience store. Adjoining uses are commercial and apartments. The closest apartment building is 65 feet from the shopping center.

The data identified shows that the subject property even after the expansion has a FAR lower than all of the comparables identified in the market.

Name	GBA	Acres	FAR
Timberlyne	104,656	12.90	18.6%
Midtown	20,918	1.67	28.8%
Glenwood	52,045	4.74	25.2%
Meadowmont	45,517	4.33	24.1%
Falconbridge	63,399	7.49	19.4%
Plaza	74,709	6.02	28.5%
Eastgate	158,207	13.83	26.3%
Rams Plaza	108,918	11.82	21.2%
Jone Ferry	63,112	8.04	18.0%
Carrboro Plaza	127,137	16.97	17.2%
Average	81,862	8.78	22.7%
Median	69,054	7.76	22.6%
High	158,207	16.97	28.8%
Low	20,918	1.67	17.2%

Specific Factors on Harmony of Use

I have completed a number of Impact Studies and I have found that the most common areas for impact on adjoining values typically follow the following hierarchy with descending levels of potential impact. I will discuss each of these categories and how they relate to the subject property.

1. Hazardous material
2. Odor
3. Noise
4. Traffic
5. Stigma
6. Appearance

1. Hazardous material

The proposed expansion of the grocery store presents no potential hazardous waste byproduct as part of normal operation. I consider this to be a non-factor for the impact analysis. The gas pumps will be installed based on current requirements. A similar gas station use is located in similar proximity to adjoining properties. And even if there was a spill, the topography would have that spill stay on this parent tract. For these reasons, I conclude that this is not a factor on adjoining property values.

2. Odor

The project as presented has no specific concerns related to odor and is therefore a non-factor in this impact analysis.

3. Noise

The subject property is located within a shopping center near a high traffic corridor and interchange with Interstate 40. The noise associated with this project is expected to be consistent with this area and the current use and present no additional impact on adjoining property values.

4. Traffic

Traffic impacts are to be addressed by a traffic study and this analysis assumes that the advice on traffic impacts and confirmed by the NCDOT adequately address this issue. I therefore conclude that the traffic generated by this site will have no negative impact on adjoining property values.

5. Stigma

There is no stigma associated with the proposed use.

6. Appearance

The project will be in harmony with the surrounding area in terms of appearance and is consistent with the existing shopping center. I therefore conclude that there is no negative impact related to appearance.

7. Conclusion

Mr. T.C. Morphis
September 28, 2022

On the basis of the factors described above, it is my professional opinion that the proposed project will be in harmony with the area in which it is to be developed and have no negative impact on adjoining property values.

Conclusion

The proposed use is a typical use for this type of location along a high traffic commercial corridor and an expansion of an existing use that does not decrease the separation between the shopping center and adjoining uses. Even after the expansion, the project will have a lower Floor Area Ratio than all of the other shopping centers identified in this market and shown in this report.

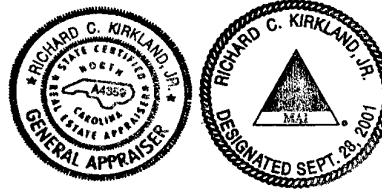
I conclude that the proposed use is in harmony and will maintain or enhance adjoining property values.

If you have any further questions please call me any time.

Sincerely,



Richard C. Kirkland, Jr., MAI
State Certified General Appraiser



Certification – Richard C. Kirkland, Jr., MAI

I certify that, to the best of my knowledge and belief:

1. The statements of fact contained in this report are true and correct;
2. The reported analyses, opinions, and conclusions are limited only by the reported assumptions and limiting conditions, and are my personal, unbiased professional analyses, opinions, and conclusions;
3. I have no present or prospective interest in the property that is the subject of this report and no personal interest with respect to the parties involved;
4. I have no bias with respect to the property that is the subject of this report or to the parties involved with this assignment;
5. My engagement in this assignment was not contingent upon developing or reporting predetermined results;
6. My compensation for completing this assignment is not contingent upon the development or reporting of a predetermined value or direction in value that favors the cause of the client, the amount of the value opinion, the attainment of a stipulated result, or the occurrence of a subsequent event directly related to the intended use of the appraisal;
7. The reported analyses, opinions, and conclusions were developed, and this report has been prepared, in conformity with the requirements of the Code of Professional Ethics and Standards of Professional Appraisal Practice of the Appraisal Institute;
8. The reported analyses, opinions and conclusions were developed, and this report has been prepared, in conformity with the Uniform Standards of Professional Appraisal Practice.
9. The use of this report is subject to the requirements of the Appraisal Institute relating to review by its duly authorized representatives;
10. I have made a personal inspection of the property that is the subject of this report, and;
11. No one provided significant real property appraisal assistance to the person signing this certification.
12. As of the date of this report I have completed the requirements of the continuing education program of the Appraisal Institute;
13. I have not appraised this property within the last three years.

Disclosure of the contents of this appraisal report is governed by the bylaws and regulations of the Appraisal Institute and the National Association of Realtors.

Neither all nor any part of the contents of this appraisal report shall be disseminated to the public through advertising media, public relations media, news media, or any other public means of communications without the prior written consent and approval of the undersigned.



Richard C. Kirkland, Jr., MAI
State Certified General Appraiser

