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TO: Chuck Kitchen
Durham County Attorney

FROM: David Owens

RE: Watershed District Boundaries

DATE: March 23, 2009

You contacted me last week and asked my views on the degree to which the zoning administrator can adjust the boundary maps for an overlay district within the UDO. You sent me a package of background materials regarding a controversy on this matter involving a January 2005 determination by then-Planning Director Frank Duke regarding a re-interpretation of the Jordan Reservoir normal pool elevation and the associated watershed protection overlay districts. Later in the week I received additional packets of information on this same issue from Lacy Reaves and from Bill Brian, both of whom represent persons affected by this particular determination.

Given the press of business, I have to date only had a chance to briefly skim the materials you, Mr. Reaves, and Mr. Brian emailed to me. Nonetheless, as I understand you have a Commissioners meeting this evening on the matter, let me offer a few quick general observations that may be of some help as you address this issue. My comments are general in nature and are devoted only to the process by which a county amends or corrects its zoning district maps. I have not looked at the question of where these particular lines should be drawn.

G.S. 153A-343 specifically addresses the process a county must follow in when the boundaries of zoning districts are “determined, established, and enforced, and from time to time amended, supplemented, or changed.” Therefore, to the extent the boundaries and determinations at question here set zoning district boundaries, this section of the state zoning statutes is applicable. A zoning map is a part of the zoning ordinance and can only be adopted, amended, or repealed following the mandatory requirements of this statute. This includes a public hearing by the governing board with published, mailed, and posted notice. G.S. 153A-344 also requires referral of zoning map amendments to the planning board for review and comment.

In addition to these mandatory state procedures, any additional procedural requirements that supplement and are not inconsistent with the state mandates may be imposed by provisions of

your county ordinance. To the extent such supplemental requirements are included in the ordinance, they are binding on the county. See, for example, George v. Town of Edenton, 294 N.C. 679 91978) (holding ordinance waiting period between rezoning petitions for a parcel were binding on the town).

The North Carolina courts have long held that these statutory procedures must be carefully observed in the adoption and amendment of zoning ordinances. Two of our earliest zoning cases, Bizzell v. Board of Aldermen, 192 N.C. 364 (1926) and Shuford v. Town of Waynesville, 214 N.C. 135 (1938), invalidated the purported adoption of ordinances that failed to follow these procedural requirements. An Orange County attempt to repeal a rezoning without following the required notice and hearing requirements was invalidated in Orange County v. Heath, 278 N.C. 688 (1971).

A more contemporary illustration of the judicial insistence on close adherence to the rules is provided by Thrash Ltd. Partnership V. County of Buncombe, ___ N.C. App. ___ (2009), decided earlier this month by the court of appeals. The court invalidated the county's extension of zoning countywide in part because the county staff adjusted the zoning classifications after the planning board review and public hearing but prior to adoption by the board of commissioners. The court noted that changes in a zoning map must be referred to the planning board and said, "The language of this provision is mandatory, not discretionary. In its headlong rush to adopt the amendments to its ordinance, County violated this statutory provision." The court went on to note that proposed zoning maps were in existence at the time notice of the public hearings were published. The court said,

> Citizens are most concerned with how their property and their neighbors' property is zoned. In this case, changes were being made to the zoning maps, the only document showing how a particular property was to be zoned, up until the day before the public hearing. We fail to see how the citizens of Buncombe County could make any meaningful comment on the proposed zoning ordinance amendments under these circumstances.

Thus, to the extent the changes involved in your situation are an amendment to the boundaries of a zoning district, I believe they must go through the public notice and hearing process. The fact that the original district boundary may have been in error or more accurate information is now available to determine where the district boundary should be is legally irrelevant. The purpose or merits of the amendment are not the controlling factor. The simple requirement is that if a zoning district boundary is being changed, it must go through notice and hearing.

There are, however, two additional considerations that may come into play here. First, the zoning administrator does have the authority to interpret an adopted map (as does the board of adjustment under G.S. 154A-345(c)). At times the scale of zoning maps are such that it is not clear exactly where the line is on the ground and it is appropriate to delegate that precise determination to the administrator. I believe this is however limited to application of an adopted boundary, not correction or any substantial amendment of that line. Second, it may

be possible to use a textual definition of a district boundary rather than a map. For example, a highway corridor overlay may be applied to all land within 500 feet of the centerline of a specified road section. However, if a map is used to define and locate that area, a change to the reference point and map should go through the amendment process.

While I have not had a chance to apply these general observations to the rather complicated facts involved here, I hope this quick overview is of some help as you wrestle with the issue.

cc. Mr. Lacy Reaves
Mr. Bill Brian