



434 Fayetteville Street
Suite 2800
Raleigh, NC 27601
Tel (919) 755-8700 Fax (919) 755-8800
www.foxrothschild.com

HAYES FINLEY
Direct No: 919.755.8837
Email: HFinley@Foxrothschild.com

May 12, 2021

VIA EMAIL

Esther Manheimer, Mayor
esthermanheimer@avlcouncil.com

City Council Members
AshevilleNCCouncil@ashevillenc.gov

Planning and Zoning Commissioners
tony.hauser@woodplc.com

Debra Campbell, City Manager
dcampbell@ashevillenc.gov

Todd Okolichany, Planning Director
tokolichany@ashevillenc.gov

City of Asheville
70 Court Plaza
P.O. Box 7148
Asheville, NC 28802

Re: P&Z Public Hearing on May 5, 2021

Dear Mayor Manheimer, Council Members, Commissioners, Ms. Campbell, and Mr. Okolichany:

A Pennsylvania Limited Liability Partnership

California Colorado Delaware District of Columbia Florida Georgia Illinois Minnesota Nevada
New Jersey New York North Carolina Pennsylvania South Carolina Texas Virginia Washington

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Fox Rothschild LLP represents the Preservation Society of Asheville and Buncombe County (PSABC). I am writing to you today to express the PSABC's objections to the conduct of the remote public hearing held by the Planning and Zoning Commission on May 5, 2021 regarding the conditional rezoning application for the Charlotte Street Development. This required hearing was plagued with numerous technical difficulties as detailed below. The result was a hearing that failed to meet the legal requirements of an open public hearing that gives fair opportunity to be heard to those for and against a legislative rezoning request. PSABC respectfully demands that P&Z continue their consideration of the application and conduct a new public hearing in accordance with the law.

The manifest intention of the General Assembly was that a public hearing be conducted at which those who opposed and those who favored adoption of the ordinance would have a fair opportunity to present their respective views.

Freeland v. Orange Cty., 273 N.C. 452, 456, 160 S.E.2d 282, 286 (1968).

Conditional rezonings are legislative decisions. Legislative decisions are “those that affect the entire community because they set general policies that are applicable throughout the zoning ordinance.” David W. Owens, *Legislative Zoning Decisions, Legal Aspects* 10 (2d ed.1999). Under the Asheville UDO, actions taken to approve a conditional zoning district must be “reasonable and in the public interest.” UDO 7-7-8(c)(7). Because they affect the entire community, not just the applicant, a public hearing for a legislative decision is required with a fair opportunity to hear from both sides, equally.

Although the town council may adopt “reasonable” rules governing the conduct of public hearings, such as setting a maximum time allotted to each speaker, those rules must not violate the requirement that a public hearing be conducted openly and with fair opportunity for both sides to present their respective views. G.S. § 160A-81.

The following bullets summarize the issues caused the May 5 meeting to come up far short of providing a fair hearing:

- (1) The procedural rules stated an applicant has 10 minutes to present and other members of the public have 3 minutes each. On May 5, the Applicant was given 25 minutes to present. Those members of the public who were able to connect to the hearing (see problems below) were regularly interrupted while they had the floor and told to wrap up at the 3 minute mark.
- (2) The Applicant was permitted to participate via video. Those members of the public who were able to connect were limited to an unreliable audio connection.

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- (3) The Applicant was permitted to deliver a PowerPoint video presentation. Our office requested similar treatment for the PSABC but this request was denied.
- (4) Members of the public were unable to sign up to speak in advance leaving the Commission unable to determine how many speakers had been overlooked or disconnected by the remote meeting system.
- (5) While having already grossly exceeded the procedural time limits, the Applicant was permitted to provide rebuttal to the comments of the public. No similar opportunity was afforded to the PSABC or other members of the public.
- (6) PSABC submitted written comments before the P&Z Board meeting and in the 24-hour period following the public hearing as allowed by N.C. Gen. Stat. § 166A-19.24(e). These comments are not to be found in the City's public comments folder and presumably were not provided to the members of P&Z Commission.
- (7) The video feed cut out during the public comment period, specifically during PSABC's remarks. N.C. Gen. Stat. § 166A-19.24(b)(9) requires that a remote meeting be "simultaneously streamed live online so that simultaneous live audio, and video, if any, of such meeting is available to the public." Portions of the meeting (including public comments) were never broadcast and have apparently been lost.
- (8) Members of the public were cut off multiple times from the audio dial-in connection. In certain cases reconnection was not possible.
- (9) The instructions provided in the notice for the Planning Board meeting and on the website were incorrect. Dialing-in and pressing * was not sufficient to be given an opportunity to be heard. An individual had to also know to press "3" or the individual would not be identified as wishing to make a comment. Multiple members of the public never had an opportunity to speak.

The public hearing conducted remotely on May 5, 2021 failed to meet the legal requirements for such meetings. The remote meeting authorization under G.S. § 166A-19.24 *permits* public body to conduct public hearings remotely, but does not require them. If public hearings cannot be done remotely in a way that complies with the law, they should not be done at all.

For these reasons, we ask the P&Z Commission to conduct a proper and legal public hearing on this matter, to correct the procedural deficiencies laid out above, and allow those supporting and opposing the project a fair opportunity to present their respective views.

I look forward to hearing from you and continuing to participate in the public process.



Fox Rothschild LLP
ATTORNEYS AT LAW

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Sincerely,

Hayes Jernigan Finley

cc: Jessie Landl, Chair, Preservation Society of Asheville and Buncombe County
Brad Branham, Esq., City Attorney