

CITY OF CHARLOTTE
OFFICE OF THE CITY ATTORNEY
Memorandum

TO: Mayor and Council

FROM: Robert E. Hagemann, City Attorney *REH*
Terrie Hagler-Gray, Senior Assistant City Attorney *THG*

DATE: October 14, 2015

RE: Opinion Regarding Petition 2015-026 – Petitioner Robert Drakeford

This is to address the unique procedural issue raised by the votes on Petition 2015-026 filed by Robert Drakeford at the September 21 Zoning Meeting. For the reasons stated below, it is our opinion that the votes cast by the Council were sufficient to deny the petition and to adopt a statement of plan consistency.

Background

Since there was a valid protest petition filed in the case, state law required a $\frac{3}{4}$ vote of the Mayor and Council to approve the petition. At the meeting, there was a motion to approve that failed by an 8-4 vote. As has long been the practice in Charlotte, when a protested petition does not obtain the requisite supermajority of 9 out of 12 votes, it is deemed to have been denied. So in our opinion, there is no question that the Council voted to deny Petition 2015-026.

Following the vote on the petition, Councilmember Kinsey made a motion to adopt a statement of plan consistency as is required by GS 160A-383 which provides: “[w]hen adopting or rejecting any zoning amendment, the **governing board** shall also approve a statement describing whether its action is consistent with an . . . officially adopted plan that is applicable.” (emphasis added). Ms. Kinsey’s motion was seconded and the vote was 4-7 (Mayor Clodfelter did not vote believing he only had a vote on the rezoning and not the consistency statement. While we believe that a strong case can be made that the Mayor does have a vote on the consistency statement, resolution of this question is not necessary to resolve the main issue).

Believing that a motion on plan consistency that supports the zoning decision needs six votes to pass, and since, to our knowledge, the Council had never faced this situation since the enactment of the consistency statement requirement in 2005, the Council, staff, and legal were uncertain as to how to proceed. At that point, the Mayor asked the Council to carry the matter over to the September 28 business meeting to allow for further review by the City Attorney’s Office and Planning Staff. Needing more time to research the issue, we asked that the case not be considered on September 28.

Analysis

While it is understandable to assume that six votes would be necessary to adopt a consistency statement, a consideration of: (1) the number of councilmembers necessary to take action on a protested petition; (2) legislative silence on the number of councilmembers necessary to adopt a consistency statement for a protested rezoning; (3) the fact that the consistency statement is, in many ways, an articulation of the reasons for the Council's decision; and (4) an analogous case from another jurisdiction; leads us to conclude that a majority vote of the prevailing side on a protested rezoning is sufficient to adopt a consistency statement.

As noted, if a protested rezoning does not garner the necessary $\frac{3}{4}$ vote, the petition is denied. That means that it is possible, as in this case, for less than a majority (*i.e.*, four, five, or six (out of twelve)) of the Council to actually take action on behalf of the governing board.

Despite the forgoing, the consistency statement statute does not specify the number of votes necessary to adopt the statement for a protested rezoning. Instead, and as quoted above, the statute states that "the **governing board** shall also approve...." (emphasis added). Obviously the phrase "the governing board" does not mean that every member of council must vote in support of a consistency statement. Instead it begs the question, what faction of Council actually made the decision on behalf of the governing board? As noted above, in this case four members of Council made the decision to deny the rezoning petition.

Now consider the logical consequence of requiring six votes to adopt a consistency statement when less than six councilmembers made the decision on behalf of the governing board. In order to adopt a consistency statement that supports the denial, one or more councilmembers who, presumably in good conscience, voted to approve the rezoning would be required to go on record supporting reasons that are contrary to their vote on the merits. We don't believe the legislature would have intended such a requirement.

Finally, we found a case out of Pennsylvania that supports this reasoning. In *Gaudenzia, Inc. v. Zoning Board of Adjustment*, 287 A.2d 698 (Pa. Cmwlth Ct. 1972), the Court considered the Philadelphia ZBA's decision to deny a certificate for a charitable institutional use. Despite the fact that three members voted to issue the certificate and two voted against, the certificate was denied due to a statutory requirement that four votes were necessary to issue. Since the findings and conclusions that supported the denial were adopted by only the two members voting against issuance, the applicant claimed that was insufficient to adopt the findings and conclusions. Noting that it is legally necessary for the ZBA to issue findings and conclusions, the Court had little trouble reading the findings and conclusions adopted by the minority of the board as being those of the board.

Conclusion

Petition 2015-026 remains on your agenda as directed by the Mayor. However, for the reasons stated above, we do not think that any action is required. On the other hand, if a sufficient number of councilmembers are willing to do so, a vote by at least six councilmembers in support of Ms. Kinsey's motion would eliminate any remaining uncertainty.