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**LAND USE AND ZONING COMMENTS RELATED TO WAKE COUNTY ORDINANCE AMENDMENT
OA-03-09**

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1) It is unclear how the 10 sites countywide would be affected by the proposed text change.

- a) A Wake County staff report dated February 3, 2010 stated there are 10 potential sites countywide and that the proposed text change has potentially positive and negative impacts. However, aside from the impacts to the Board of Adjustment, the staff report did not disclose what the positive and negative impacts would be.

2) The proposed text change is inconsistent with the intent of nonconforming uses and is being proposed in the wrong article of the code.

- a) The proposed text change seeks to alter the use regulations in **Article 4: Use Regulations**, when nonconformities are found in **Article 7: Nonconformities**. Adding "Other Use Group" and "Elimination and Redevelopment of Nonconforming Use" is an extremely usual practice for zoning ordinances to address non-conforming uses. The intent of nonconformities under **Section 7-10-2 (A) through (C)** underscores that the proposed text does not belong in Article 4, but in Article 7.
- b) If the text amendment would have been proposed for **Article 7: Nonconformities**, it would be obvious that R-40W district was given preferential treatment as it relates to nonconforming uses and this "special benefit" is not afforded to any other property owners in the County's 18 other zoning districts. One of the principles of zoning is that similarly situated property should be treated similarly. If this property is not treated similarly then a decision favoring property in R-40W only could be deemed to be arbitrary.

3) Introducing the "elimination and redevelopment of non-conforming uses" raises an equity issue with all non-conforming uses throughout Wake County in all zoning districts.

- a) No where in **Article 7: Nonconformities** is the "elimination and redevelopment of non-conforming uses" found. The only option is by the Planning Director so long as he or she determines the nonconforming use is a "comparable use of intensity."

4) The existing UDO has already established a precedent for changing nonconforming uses in the watershed.

- a) Under **Section 7-12-2 (E)**, the provision reads "Changing of nonconforming use is not allowed in areas governed by the Swift Creek Land Management Plan. The UDO recognizes the impact of changing nonconforming uses with the watershed. Is the water quality more important in Swift Creek than in Falls Lake, the County's primary drinking water supply?"

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- b) Nonconforming uses have several options for change:¹
 - Termination – in rare cases of a public health danger (i.e., noxious use).
 - Continuation with limits
 - Expansion, enlargement and intensification
 - Repair and replacement
 - Change in use (*some zoning ordinances allow changes to a less intensive use or a use of similar character*).
 - Resumption and abandonment
 - Amortization

5) The applicant has other options to redevelop the site that would improve water quality.

- a) Mr. Reeves claimed at a February 3, 2010 Planning Board meeting that, “it is impossible under the current UDO provisions to redevelop nonconforming uses within activity centers in these districts for land uses that are authorized in the County Land Use Plan. **This is not true.**
- b) The applicant can develop the site as residential, cluster residential and non-residential, up to 15,000 square feet. It should be noted that the County Commission increased the maximum size of non-residential from 5,000 to 15,000 square feet within the last five years to allow a slightly larger non-residential use within the non-urban activity centers.
- c) The applicant could apply for a rezoning to a Planned Development (PD) District, which allows mixed-use zoning within activity centers. The applicant may choose from Classic Mixed-Use or Residential Mixed-Use. **(Section 3-52)**
- d) The applicant could request that the Planning Director authorize a change from one nonconforming use to another nonconforming use of a comparable level of intensity, except for property within the Swift Creek Watershed. **(Section 7-12-2 (E)).**

6) The text change will open Pandora’s box to new text changes, land use amendments and legal challenges.

- a) There are currently 10 activity centers in R-40W.
 - ❑ 3 in Falls Lake Watershed
 - ❑ 4 in the Little River Watershed
 - ❑ 2 in the Swift Creek Watershed (not affected due to Session Law 1998-12)
 - ❑ 1 near Holly Springs
- b) The 15,000 square foot maximum for non-residential uses within non-urban activity centers will be shattered. Property owners of conforming uses within non-urban activity centers will request the same benefit.
- c) The non-urban activity center definition may be changed. The Staff Report of OA-03-09 already states that the Land Use Plan regarding redevelopment and non-residential uses in watersheds should be amended.

¹ David Owens, Land Use Law in North Carolina (p. 157-166),

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- d) Attorney Clyde Holt has already introduced language that would allow this text change to either 1) limit the building footprint to the existing amount or 2) to have the building footprint to be 50% of the lot size.
 - e) Prior to 1997, Wake County's Ordinance allowed unlimited expansion of nonconformities pursuant to Board of Adjustment approval. The process was used 15 times in two years until that provision was repealed by the Wake County Board of Commissioners in June 1997. County Commissioner amended the ordinance in 1997 and treated nonconformities consistent with those employed by most local governments to grandfather nonconforming uses, but prohibit their expansion or enlargement. This text change is reverting back to pre-1997 practices with alleged water quality protections.
 - f) New requests may be filed amend the Land Use Map to apply activity centers over existing non-conforming uses to take advantage of the text change.
 - g) Mr. Alan Swanstorm, a Planning Board member, raised this issue at a Feb. 3, 2010 Planning Board meeting and cautioned that if this amendment is approved, it could create a groundswell of similar changes in other districts and multiple amendments to the UDO. Mr. Reeves response? Any citizen can propose a text change.
 - h) Would increasing the non-residential square footage change the designation of this activity center from non-urban to neighborhood or community?
- 7) The Staff Report concluded that the proposed special permit for the elimination and redevelopment of non-conforming uses by the Board of Adjustment would have significant impacts.**
- a) Wake County staff has indicted that shifting the site plan approval as a "special permit" would have a **significant impact** on the role that the Board of Adjustment has historically played in reviewing development proposals. The Board would be given increased discretion and flexibility, including the authority to approve uses and development standards that differ from the base R-40W district regulations, such as off-street parking, outdoor storage, and the number, type, height and size of signs. Typically, when a significant impact finding is made, either the approval body disagrees with that conclusion or the significant impact is mitigated.
- 8) The Wake UDO has a provision regarding amendments of provisions and district boundaries related to water supply watershed protection.**
- a) Pursuant to **Section 19-21-12 (A)**, any amendments must be submitted to the State EMC for compliance. The City of Raleigh does not recall receiving the EMC's determination on compliance. Is this filed before or after the amendment is adopted?

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9) Finding E of the Special Use Standards may be inconsistent the characteristics of non-urban activity centers as described in the Land Use Plan.

- a) Finding E under **Section 19-23-8 Conclusions of Approval** requires the Board of Adjustment to find that “the proposed development will be consistent with the Wake County Land Use Plan.” As currently written, the uses within non-urban activity centers consist of primarily convenience retail goods and personal services, or small scale development with a maximum of 15,000 square feet for non-residential. This finding cannot be made until the Land Use Map is amended. Staff has recommended that the Land Use Plan be changed, but staff has not disclosed what will be changed.

- b) How would a change to the Land Use Map for non-urban activity centers affect the Little River Inter-Local Agreement?