



Asheboro Planning Board
Asheboro City Hall (146 N. Church Street)
Monday, April 6, 2015
7:00 PM
AGENDA

- I. Call to Order
- II. Consent Agenda Items
 - a.) Approval of Minutes from March 2, 2015 meeting
 - b.) Approval of Findings of Fact for Board of Adjustment Case Number BOA-15-01 (Variance from front yard setback in Table 200-1 and Front Yard Averaging requirements in Section 305: Humble Street and Cracklin Drive)
- III. Review of Cases
- IV. Discussion of upcoming community meetings for Land Development Plan (LDP) proposed land use map update
- V. General overview of potential Zoning Ordinance updates
- VI. Discussion of potential statewide legislation related to development review processes
- VII. Items Not on the Agenda
- VIII. Adjournment

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MEETING OF THE ASHEBORO PLANNING BOARD
PUBLIC WORKS CONFERENCE ROOM, 1312 N. FAYETTEVILLE ST.
MONDAY, MARCH 2, 2015
7:00 p.m.

This being the time and place for meeting of the Planning Board, a meeting was held with the following officials and members present:

Van Rich) - Chair
James Lindsey) - Vice Chair

Ritchie Buffkin)
Lynette Garner)
David Henderson) - Members Present
Thomas Rush)
Dave Whitaker)

John Evans, Assistant Community Development Division Director
Justin Luck, Zoning Administrator/Planner
Bradley Morton, Planning Technician/Deputy City Clerk
Trevor Nuttall, Community Development Division Director
Jeff Sugg, City Attorney

13 citizens were present at this meeting.

I. CALL TO ORDER

Mr. Van Rich called the Asheboro Planning Board to order.

II. APPROVAL OF MINUTES FROM FEBRUARY 2, 2015 MEETING

Mr. Rich inquired if there were any corrections that needed to be made to the February 2, 2015 minutes. There being no corrections, the minutes were approved as presented.

III. REVIEW OF CASES

Mr. Justin Luck informed the board of the zoning related cases that went before the City Council in February.

IV. BOA-15-01: PLANNING BOARD FUNCTIONING AS BOARD OF ADJUSTMENT: VARIANCE REQUEST FROM FRONT YARD SETBACK REQUIREMENTS (TABLE 200-1) AND FRONT YARD AVERAGING REQUIREMENTS (SECTION 305): HUMBLE STREET AND CRACKLIN DRIVE

At this time, Mr. Rich opened a public hearing. Mr. Luck and applicant Donald Lanier were sworn in to give their testimony on the variance request. Mr. Luck stated that the request was for two (2) variances, being from the front yard 30 foot setback in the R10 zoning district and also from front yard averaging. He stated that the property was located at the corner of Humble Street and Cracklin Drive and listed the Parcel Identification Number (PIN) as 7762149744. He then stated that the applicant is requesting a front yard setback of 10 feet along Cracklin Drive. He stated that residential land uses surrounded the property. He then showed maps and photos of the property from all directions. He gave an analysis of front yards on corner lots and stated that a corner lot essentially has two (2) front yards and two (2) side yards, which would mean front yard and side yard setbacks would typically have to be met. He then gave information on front yard averaging, stating that this specific provision is a way to strike a good balance of setbacks in a residential neighborhood. He then showed graphically enhanced maps of the property with the 30 foot front yard setbacks at both streets, and informed the board on the small amount of built upon area. He then showed an aerial map with the front yard setback indicated at 10 feet on Cracklin Drive as requested, which showed the proposed buildable area. He ended his presentation stating that in order to grant a variance, the four (4) findings of fact had to be addressed and met by the applicant. Mr. Henderson asked when the subdivision was created, if the setbacks were the same as today's setbacks. Mr. Luck stated the setbacks have not changed since the subdivision was developed in 2006. Mr. Lanier, applicant, gave his testimony on the request. He presented the board with a

conceptual drawing of the single family residence that would be built on the lot if the requests were approved. He stated the particular lot was creating hardships to build because it was not a squared lot. He stated that the request would not harm public safety and the home would be consistent with the surrounding area. Mr. Henderson asked if it were practical to build within the current setbacks. Mr. Lanier stated it would create a 15 foot wide home and would not be practical. Mr. Dave Whitaker asked if access would be on Cracklin Drive. Mr. Lanier stated that the access likely will be from Humble Street. Ms. Garner made a motion to grant the front yard setback variance as well as the front yard averaging variance based on the testimony given by the applicant and that the four tests were met. Mr. Whitaker seconded the motion and the motion carried with six (6) voting to approve with Mr. Henderson voting to deny.

V. RZ-15-03: SCHWARZ, RJR, LLC: REZONE FROM CUI2 (CONDITIONAL USE GENERAL INDUSTRIAL) TO B2 (GENERAL COMMERCIAL): 309 WASHINGTON AVENUE

Mr. John Evans presented the rezoning case and stated that Dawn Williams, a representative for the applicant, was present. He stated that the Parcel Identification Number (PIN) was 7750865352 and that the request was to go from Conditional Use General Industrial to General Commercial. He gave a history of the property, stating that it was rezoned from B2 to CUI2 in April of 2003. He stated that the 2003 rezoning included the subject property and property to the west, and that the permitted use was an Industrial Development with Multiple Uses and Structures. He showed maps and photos of the property from all directions. He defined the B2 General Commercial zoning district and stated that the property has frontage on East Dixie Drive and Third Street. He then stated that Washington Avenue was closed as a publicly maintained street in 1999. He listed the Land Development Plan (LDP) recommendations and listed the goals and policies that staff believed supported the requested. He stated that there were no goals and policies negative towards the request in staff's opinion. He then stated that staff's recommendation was to approve the request based on the LDP proposed Land Use Map being in support of the request, the history of commercial use on the property, the support of the Central Small Area Plan and that the request is generally compatible with surrounding land uses. He then gave staff's consistency statement that the recommendation is in the public interest by allowing a reasonable use of the property and ensuring consistency with the LDP.

Mr. Whitaker made a motion to approve the request and consistency statement based on staff's recommendation. Mr. Henderson seconded the motion and the motion carried unanimously.

VI. RZ-15-04: Mc Mc PROPERTIES, LLC: REZONE FROM R7.5 (MEDIUM-DENSITY RESIDENTIAL) TO OA6(OFFICE-APARTMENT): 1129 SOUTH COX STREET

Mr. Evans presented the rezoning case and stated that Larry McKenzie, the applicant, was present. He stated that the PIN was 7750970562 and that the request was to go from Medium-Density Residential R7.5 to Office-Apartment OA6 zoning. He stated that the property was undeveloped, but previously occupied a multi-family structure. He showed maps and photos of the property from all directions. He stated that the property was in Tier 3 of the Center City Planning Area. He stated that the eastern portion of the property has significant slopes in topography. He defined the OA6 Office-Apartment zoning district and stated that the property is inside the corporate city limits and all city services are available. He listed some of the uses that are permitted by right in the OA6 district, including residential uses, office uses, limited service uses and mixed use structures. He also stated that certain design features such as pedestrian amenities, specifically sidewalks, are also required in the OA6 district. He went over the LDP recommendations and stated that several were supporting of the request and only one (1) of the LDP's goals and policies was negative towards the request. He stated that staff's recommendation was to approve the request because it was supported by the LDP proposed land use map and that it fits the context of South Cox Street and is in a transitional area between heavier commercial uses to the west and residential uses to the east. He then gave staff's consistency statement that the recommendation is in the public interest by allowing a reasonable use of the property and ensuring consistency with the LDP.

Mr. Buffkin made a motion to approve the request and consistency statement based on staff's recommendation. Ms. Garner seconded the motion and the motion carried unanimously.

VII. SUB-15-01: SUBDIVISION SKETCH DESIGN: OLDE TOWNE VILLAGE, PHASE III

Mr. Evans reported on a sketch design request as well as a variance from the subdivision ordinance. He stated that the property was located at the terminus of Olde Towne Parkway, which is off of Old Lexington Road. He stated that the property was zoned R15 and was 6.03 acres with 12 acres of future development area totaling approximately 18.03 acres. He stated that the request would be for five (5) lots plus common area and that a Special Use Permit (SUP) for a residential planned unit development (PUD) is also being considered with the request and will be heard by the City Council at its next meeting. He stated that Phase III would include five (5) single family detached

dwelling. He showed several maps as well as a plat showing a closer view of the development. He stated that the variance request would be from the required recreation space listed in Article X, Section IV.C.9 of the Subdivision Ordinance. He mentioned that the only department comments were from the Planning and Zoning department with regard to the HOA documents, more specifically including the prohibition of recreational vehicles. He stated that staff recommended approval of the sketch design noting the comments and subject to the approval of the Subdivision Variance. He advised the Board that they exercised an advisory role in this Subdivision Ordinance variance request, with the City Council considering the variance as part of the quasi-judicial proceeding for the Special Use Permit required for the PUD. Aden R. Stoltzfus, PE, Engineer for the project, spoke on various items, including the topography for the site and the recreational space challenges.

After Board discussion related to the practicality of providing the required recreational area, Mr. Whitaker made a motion to approve the request. Ms. Garner seconded the motion and the motion carried with six (6) in favor and Mr. Henderson opposing. Mr. Evans noted that these items would go before the City Council for final action.

VIII. SUB-14-01: SUBDIVISION PRELIMINARY PLAT: SPRINGWOOD TOWNHOMES

Mr. Evans reported on a preliminary plat request. He stated that the property was located at the terminus of Springwood Road. He stated that the request was for preliminary plat review for a Residential PUD. He gave the PIN as 7750423717 and stated that the property was approximately 6.75 acres. He stated that the request would be for 24 lots plus common area. He also stated that the units would be located in 12 structures, with two (2) dwellings per structure. He showed maps of the subject property as well as the overall site plan, grading plan and utility plan of the preliminary plat for review. He mentioned that certain changes have been made since the sketch design review, including the relocation of two of the residential dwelling units, a change in the location of one of the recreation areas and a small change in the size of the recreation area. After reviewing the record from the SUP public hearing, such changes are not considered a modification that requires a new SUP. He went over the department comments, noting that the Planning and Zoning department would require HOA documents to be recorded with the final plat, and that the prohibition of RVs in the development would need to be a part of said documents. He gave staff's recommendation to approve the request noting the department comments.

Mr. Henderson made a motion to approve the request. Mr. Buffkin seconded the motion and the motion carried unanimously.

IX. ITEMS NOT ON THE AGENDA

Mr. Sugg addressed the board regarding the Findings of Fact for BOA-15-01, which will be drafted and submitted for their approval at the April Planning Board meeting.

X. ADJOURNMENT

There being no further business to discuss, Mr. Whitaker made a motion to adjourn. Mr. Lindsey seconded the motion and with no objection, the motion carried and Mr. Rich adjourned the meeting.

Bradley Morton, Secretary, Planning Board

Van Rich, Planning Board Chairman



**Community meetings for Land Development Plan Proposed Land Use map
update**

Land Development Plan Update Schedule

January:

Announce public workshop to Planning Board and Council - COMPLETE

Mail invitations to stakeholders - COMPLETE

Advertise in Courier/Randolph Guide - COMPLETE

Public workshop - COMPLETE

February/March:

Report workshop summary to Planning Board and Council - COMPLETE

Gather and review public comments - COMPLETE

Identify areas and neighborhoods of focus - COMPLETE

April:

Community Workshop #1: Tuesday, April 14th 6:30 - 8p.m. (Presentation at 6:30)
Kingdom Life Community Church - 539 Cross St.

Community Workshop #2: Thursday, April 23rd 6:00 - 8p.m. (Presentation at 6:00)
Asheboro United Church of Christ - 801 Sunset Ave.

May:

Report workshop summary(s) to Planning Board and Council

Take comments from meetings, generate first draft of revised proposed land use map

Update supplemental maps (environmental, transportation, etc.)

June:

Schedule and announce public workshop to Boards and public

Hold public workshop to display first draft of revised maps

July:

Present first draft of all updated maps to Planning Board and Council

August:

Take comments from workshop, Planning Board, and Council and generate final draft

September:

Present final draft to Planning Board and Council for adoption

For more information, please call Justin Luck,
Zoning Administrator/Planner, at
(336) 626-1201, x292.



Land Development Plan Community Workshop

City of Asheboro staff invite you to assist with the update of the Asheboro 2020 Land Development Plan. This plan helps to guide how the city grows and develops. Don't miss this chance to have a voice in Asheboro's future land development!

Tuesday, April 14th
6:30 - 8 p.m. | Presentation begins at 6:30
Kingdom Life Community Church
539 Cross Street

For more information, please call or email
John Evans, Community Development Division, at
(336) 626-1201, x225 or jevans@ci.asheboro.nc.us.



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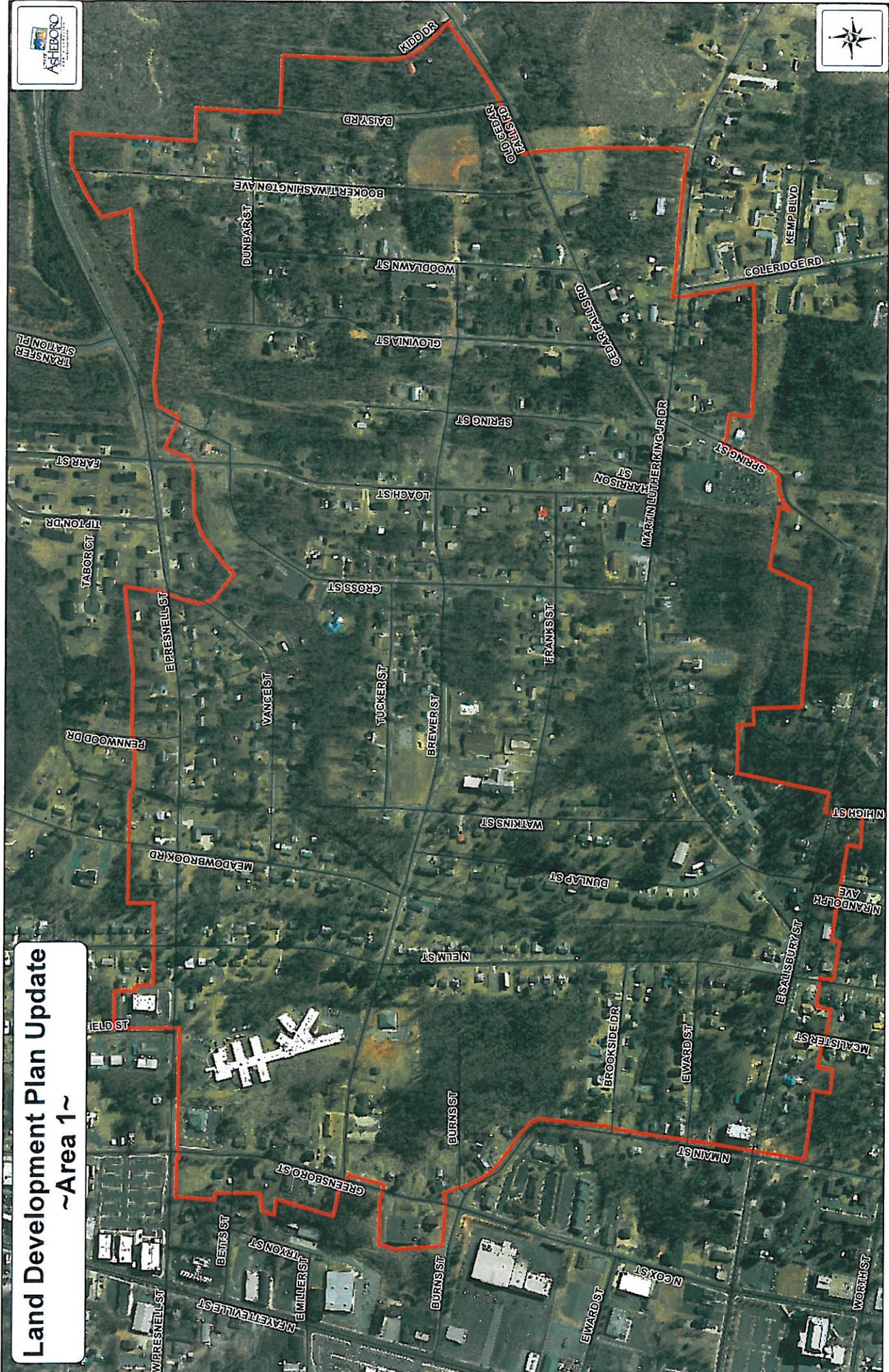
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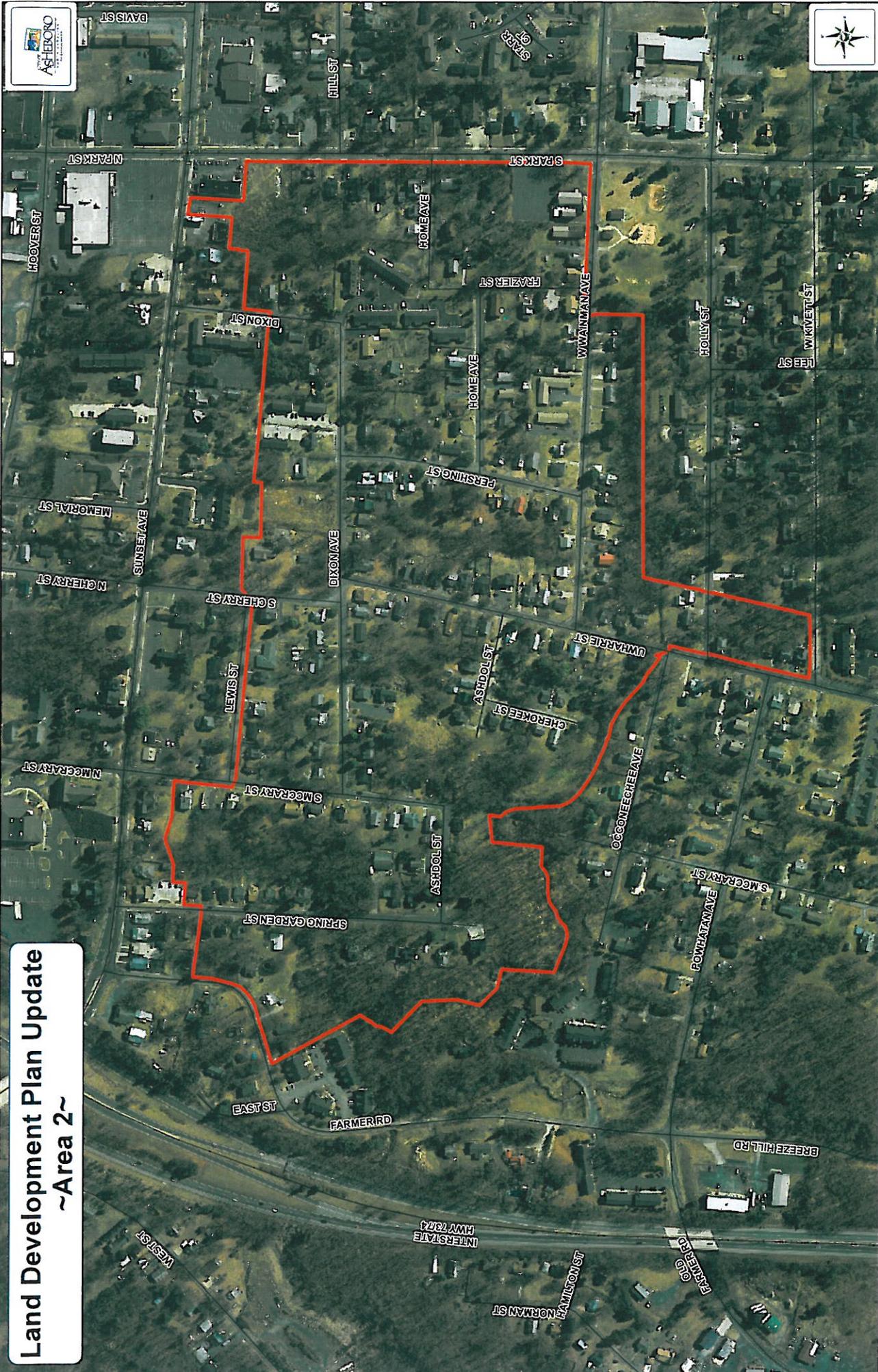




Land Development Plan Update
~Area 1~



Land Development Plan Update
~Area 2~





General Overview of potential Zoning Ordinance Updates:

Staff will discuss this item during the Planning Board meeting.



Supplemental material pertaining to Agenda Item VI:

Discussion of potential statewide legislation related to development review processes

Overview of Proposed Chapter 160D

Summary: Moves city and county zoning statutes to a new and common platform with policy neutral or consensus changes that make development regulations easier to follow, simpler to find, and consistent with 21st century business and government needs. Sponsored by NC Bar Association which has worked aggressively to seek and include input from all sectors. It is estimated that over 4,000 attorneys, industry members/groups, planners and others have been included in the process as to notice of bill and had opportunity for input on proposed drafts.

1. Reorganizes and consolidates city and county planning and development statutes (retains intentional differences, such as agricultural exemption for county zoning, protest petition only for city zoning); consolidates provisions applicable to all development regulations (definitions, vested rights, moratoria in Article 1, boards and commissions in Art. 3, administrative procedures in Art. 4, ordinance adoption and amendment procedures in Art. 6); while retaining specialized provisions in individual Articles (such as zoning, subdivision, building inspection, housing codes)
2. Establishes uniform, consistent procedures
3. Clarifies confusing, dated statutory language
4. Makes consensus, common sense reforms (Examples listed below by chapter; Numbers refer to proposed 160D sections)
 - 1-2. Places definitions of common terms in one place
 - 1-9. Ethics – Additional limits on participation by board members and staff in decisions where close relationship to applicant would require it
 - 2-3. Allows cities and counties to agree on single jurisdiction for regulation of parcels with split jurisdiction
 - 2-4. Allows hearings and permit processing, but not decisions, to proceed in anticipation of jurisdiction shift
 - 3-1. Updates planning board functions; acknowledge advisory reviews of quasi-judicial decisions and limits use of evidence not presented to decision-making board
 - 3-8. Specifies that boards can adopt rules of procedure, and specifies where public can find copies
 - 4-1. Consolidates basic administrative procedures in Art. 4
 - 4-3. Clarifies who can make applications; requires specification of who makes final, binding administrative decisions; specifies process for permit modification and revocation; expressly allow certificates of compliance/occupancy
 - 4-4. Clarifies process for notices of violation
 - 4-6. Clarifies administrative file/record for quasi-judicial matters, clarifies distribution of record to protect citizens' rights

- 5-1. Requires jurisdictions to have a comprehensive plan in order to apply zoning (12/2017 phase in for jurisdictions without plans); specifies process for plan adoption and amendment

- 6-3. Clarifies who can sign protest petition and timing of filing if there are multiple hearings; intentionally does not become involved in debate over validity of protest petitions themselves.
- 6-4 Clarifies that planning board review of matters other than zoning amendments is permissible
- 6-5. Limits required governing board statement of reasonableness requirement to zoning map amendments

- 7-2. Clarifies use of mitigation impacts in zoning
- 7-3. Simplifies processes by eliminating use of concurrent legislative rezoning and quasi-judicial CUP; allows legislative conditional zoning and quasi-judicial SUP, just not as single process; recognizes use of form-based districts; allows option of administrative process for minor modification of conditional districts
- 7-4. Allows statewide use of incentives for affordable housing
- 7-5. Allows minor modifications of SUP as administrative decision; clarifies modification process where multiple owners/parcels involved

- 8-4. Codifies constitutional limits on exactions; codifies express authority required for exactions; clarifies that there is no general authority for school impact fees; provides general authority for comparable fees in lieu of dedication or construction of facilities

- 9-3. Clarifies scope of city regulation of agricultural activity in ETJ
- 9-14. Clarifies county role in street setback and curb cut regulations
- 9-47. Specifies that certificates of appropriateness in historic districts are quasi-judicial; allows minor work as administrative decision

- 10-2. Explicitly allows concurrent rezoning and development agreement
- 10-3. Allows local government to set term of development agreement; allow less than 25 acre site in downtowns
- 10-4 Clarifies hearing requirement for development agreements
- 10-5. Reduces list of mandated contents of agreements; clarifies process for voluntary provision of public facilities and cost-sharing if beyond permissible exactions
- 10-7. Allows local government to set time for periodic compliance review of agreements, rather than mandated time; allows for bi-lateral enforcement of agreements
- 10-10. Specifies no permits may be issued until agreement is recorded

- 12-2. Extends provision on abandonment of intent to repair statewide with uniform process for all jurisdictions

- 13-Part 2. Applies same community development programs to cities and counties



Coates' Canons Blog: A Conditional What? Clarifying Some Confusing Zoning Terminology

By David Owens

Article: <http://canons.sog.unc.edu/?p=6916>

This entry was posted on November 13, 2012 and is filed under Land Use & Code Enforcement

A contemporary zoning ordinance can be a complicated proposition. A small town or rural county's ordinance often runs over 100 pages. Some of the zoning ordinances in our larger cities approach (and in a few instances pass) 1,000 pages. All of the details can be confusing even for the staff and board members who work with it every day. Imagine how it must perplex the landowner, neighbor, or developer who is picking it up for the first time and trying to figure how it applies to a particular project.

One common dimension of the confusion with zoning ordinances stems from an unfortunate use of very similar terminology to describe very different things. In North Carolina land use law the leading example, and our topic for this post, is the use of the terms "conditional use permit," "conditional use district" zones, and "conditional zoning." These three things sound alike, but in the world of zoning they are very different.

Just what are these three things? A conditional use permit is an approval issued upon an applicant establishing that standards set out in the zoning ordinance have been met. A conditional use district rezoning involves two decisions – a rezoning to a district that has only conditional uses (and no permitted uses) plus concurrent consideration of a conditional use permit. A conditional zoning attaches individual, site-specific conditions to the rezoning and does not involve a separate conditional use permit. While the chart below summarizes these differences, it is easy to see why confusion arises.

Conditional use permit	Quasi-judicial permit
Conditional use district	Rezoning plus quasi-judicial permit
Conditional zoning	Rezoning only, but with conditions

So let's look at each of these in a little more detail.

Conditional Use Permits

The first of these terms to enter the zoning lexicon was the "conditional use permit." In the zoning ordinances of eighty years ago, a specific land use was either permitted in a particular zoning district or it was prohibited in that district. For example, a single family home was permitted (sometimes referred to as a "use by right") in a residential zoning district, while commercial and industrial land uses were prohibited in that zoning district. If you asked if a specific land use was permitted to be located on a specific parcel, the answer was yes or no, depending on whether or not it was a permitted use there. Simple rules for a simpler time.

But about fifty years ago many local governments decided they needed more nuanced land use rules – that we needed to add "maybe" to the options of "yes" or "no." The idea was to add some flexibility to zoning ordinances while retaining oversight of individual projects. For example, a city might want to allow a small multi-family building to be located in some portions of a residential zoning district. This use would not be suitable for every location in the district, but with a case-by-case review it could be allowed in some locations within the district.

The "conditional use permit" was zoning's answer as to how to accomplish this. Rather than making small multi-family buildings a permitted use in the zoning district, the zoning ordinance would allow it only where it could be established that specified conditions would be met, hence the name "conditional use permit." Over 90% of the zoning ordinances in North Carolina now include provisions for some conditional use permits. And to add one more layer of confusion, the law allows [individual "conditions"](#) to be added to any quasi-judicial approval – not just for conditional use permits – including



zoning variances and certificates of appropriateness under historic district regulations.

In addition to the concept itself, two factors related to this innovation immediately added complexity and confusion to the zoning world.

First, the conditions specified in the ordinance that determine whether or not the use would be permitted usually included discretionary standards. For example, the zoning ordinance could condition whether a use would be allowed on a particular parcel upon a determination that it would be harmonious with the surrounding neighborhood and that it would not have a significant adverse impact on neighboring property values. Our courts soon ruled that since a person has a legal right to their permit upon establishing that the conditions have been met and since facts have to be ascertained to determine if the standards involving judgment and discretion have been met, the board making these decisions must follow quasi-judicial procedures. This means a number of complex limitations on the decision-making process are required – testimony by witnesses under oath and subject to cross-examination, having substantial evidence in the record to support factual findings, limits on [opinion testimony](#) and gathering [evidence outside the hearing](#), mandates for [impartiality](#) by decision-makers, requirements for a written decision that adequately explains how the decision was reached, and so forth. These requirements and how they are followed are described in more detail in this [report](#).

Second, the terminology used for this “maybe” of the zoning world has from the outset been confusing. Many ordinances use the term “conditional use permit” to describe this type of approval. Others use the term “special use permit.” Still others call them “special exceptions.” Even more mystifying, some ordinances provide for both “conditional use permits” and “special use permits.” The key thing to remember is that all three of these terms describe the same thing. There is no legal difference between the three. For the most part it is just a matter of local preference which of the three is used in any particular ordinance.

The rationale for some ordinances having both conditional use permits and special use permits is straightforward. Under North Carolina law a zoning ordinance can assign final decision-making on these permits to the governing board, the board of adjustment, or the planning board. Some ordinances assign some of these to one board and others to a different board. For example, most of the permits may be assigned to the board of adjustment but a few more sensitive ones (such as projects with more than 100,000 sq. ft. of floor space) may be assigned to the governing board. In those situations, the ordinance may use the term “conditional use permit” for all of those that go to the board of adjustment and “special use permit” for those going to the city council. This is just a convenience and there remains no legal difference (other than the decision-making board) between the two differently named permits. But this differing terminology has been a source of confusion for decades.

Conditional Use District Zoning

North Carolina land use law prohibits imposing individual, site-specific conditions on a regular rezoning to a conventional zoning district. If city or county governing board considers only a particular proposed project rather than the full range of uses that would be allowed in the new zoning district, the courts will invalidate the rezoning if it is challenged in court. If an owner promises the governing board that the new zoning would be used only for a particular project, that promise is not binding. Once the property is rezoned, the owner (and anyone the person may sell the property to) can undertake any use permitted in the new zoning district. In addition, any special conditions imposed on a conventional rezoning—such as requiring a buffer strip of a certain size—are not enforceable. Only those standards that apply to all property in the zoning district are legally enforceable. In this situation, the North Carolina courts will generally uphold the rezoning but without the invalid condition. These limits on zoning are described in more detail in this [earlier post](#).

These limits on the use of conditions with a standard rezoning led in the 1980's to use of a new zoning tool in this state – the “conditional use district zone” (also called a “special use district zone” by some ordinances). A conditional use district rezoning is initiated when the owner asks for a rezoning to a new zoning district that does not have any automatically permitted uses, only uses allowed by the issuance of a conditional use permit. In the usual conditional use district rezoning process, the owner applies for a special or conditional use permit for a particular project at the same time the rezoning is requested and the two decisions (the rezoning and the permit) are considered in a single proceeding. This process is also described in more detail in an [earlier post](#).

Conditional use district zoning is a complicated process. Although the rezoning request and the permit application are processed at the same time, the governing board treats the two proposals as legally independent, separate decisions. All



of the detailed conditions and specific restrictions on the project are attached to the conditional use permit (which is legal) rather than to the rezoning itself (which would not be enforceable). The board must make two decisions that have different procedural requirements, but usually the board attempts to make both at the same time and with a single hearing.

Conditional Zoning

The legal complexity and formality of the procedures required for conditional use district zoning led to an alternative that is increasingly common in North Carolina — “conditional zoning.” In the last decade both the courts and the legislature have approved use of purely legislative conditional zoning. This is different from a conditional use district in that there is no accompanying conditional use permit. All of the site specific standards and conditions (sometimes including a site plan) are incorporated into the zoning district regulations. Conditional zoning is proving to be very popular with elected officials, landowners, and many neighbors because it allows zoning to be tailored more carefully to a particular situation. In some of the state's larger cities, 80 to 90 percent of the rezonings use conditional zoning.

State law only allows conditional zoning and conditional use districts at the owner's request; they cannot be imposed without the owner's agreement. Also, the individual conditions and site-specific standards that can be imposed are limited to those needed to bring a project into compliance with city and county ordinances and adopted plans and those addressing the impacts reasonably expected to be generated by use of the site. Conditional zoning is not exempt from a spot zoning challenge. If the new district is relatively small—and virtually all of these are—the local government must assure that all of the factors defining [reasonable spot zoning](#) are fully considered and that the public hearing record reflects that consideration.

So, while these three terms sound very similar, they are in fact very different. Some zoning ordinances use all three terms, so a user must pay careful attention to exactly which term is being used. But once you have the distinctions down, you are well on the way to becoming a zoning pro. After all, not just anybody knows the difference between conditional use permits, conditional use district zoning, and conditional zoning.

Links

- www.sog.unc.edu/sites/www.sog.unc.edu/files/SS_22_v4b.pdf



Coates' Canons Blog: Protest Petitions: Going or Staying?

By David Owens

Article: <http://canons.sog.unc.edu/?p=7224>

This entry was posted on July 19, 2013 and is filed under Land Use & Code Enforcement

It is common in the waning days of legislative sessions for new and controversial issues to suddenly arise. This year one of those late session surprises has been a move to repeal the zoning protest petition statute.

A proposal to repeal the statute was added to a broad regulatory reform bill by the House Committee on Regulatory Reform on July 10 and approved by the full House on July 11. On July 19 the Senate adopted its version of this bill, which does not include the protest petition repeal.

What is a zoning protest petition?

The protest petition allows those most directly affected by a proposed zoning map amendment to make a formal objection (a protest petition) and thereby trigger a requirement that the amendment can only be adopted if approved by a three-fourths majority of the city council. If a person buys property zoned for commercial use and the city council later considers rezoning it to a less intensive use, that person can file a protest petition and trigger this supermajority voting requirement. Similarly, if someone buys a lot that is zoned for single-family residential use and after building their home the city council considers rezoning the lot next door to allow a fast food restaurant, that adjacent homeowner can file a protest petition and the zoning change can be made only if at least three quarters of the city council agrees to do so.

How did this special voting rule come to be a part of zoning ordinances? Who can trigger the higher voting majority? Why has this emerged as a late hot topic in the legislature?

Origins of the Protest Petition

While landowners and neighbors are significantly affected by zoning, the choice to change zoning restrictions is a discretionary policy choice of elected officials. Neither landowners nor neighbors can be given a veto over proposed zoning changes. Early cases set the general rule that making land use regulatory decisions subject to land owner or neighbor approval was an unlawful delegation of legislative authority. *Eubank v. City of Richmond*, 226 U.S. 137 (1912) (invalidating neighbor approval for setback line); *McKinney v. City of High Point*, 239 N.C. 232, 237, 79 S.E.2d 730, 734 (1954) (neither owners nor neighbors have a legal right to the continuation of a particular zoning restriction).

The zoning protest petition was included in New York's 1916 zoning ordinance, the nation's first comprehensive zoning ordinance. The protest petition was an alternative to giving owners or neighbors a veto. It was included to promote stability in the ordinances, giving those most affected by a proposed amendment a degree of protection from unwanted changes. Edward Bassett, the legal architect of the New York ordinance noted that the protest petition was "a device for the protection of the property owner" and that its purpose was "to prevent easy or careless changes in the zoning regulations." The city is allowed to make changes in the regulation, but there must be broad consensus among the elected officials to do so if those most directly affected object.



The same protest petition provision was included in the model zoning act that was promulgated by the U.S. Department of Commerce in 1919 and adopted by most states in the 1920s. The protest petition was included when North Carolina adopted its municipal zoning enabling statute in 1923. It was deemed a good way to provide a degree of certainty and stability in zoning while allowing elected officials sufficient flexibility to amend the ordinance to reflect changing needs and circumstances. All cities with zoning are subject to the protest petition requirement. When zoning authority was extended to counties in 1959 the protest petition was not included in the county statute given the more rural nature of unincorporated lands.

The protest petition only applies to zoning map amendments (prior to 2006 the statute was not expressly limited to map amendments). It most often arises when neighbors object to the rezoning of a parcel, but it also allows land owners to object to a rezoning of their property. For example, in *Unruh v. City of Asheville*, 97 N.C. App. 287, 388 S.E.2d 235, review denied, 326 N.C. 487, 391 S.E.2d 813 (1990), the provision for a protest petition was applied when affected property owners objected to the application of a new historic overlay district by the city.

For the most part the protest petition has been applied uniformly to all North Carolina cities. There have been a few exceptions, however. For example, the authority to file a protest petition was eliminated for Greensboro in 1971 and then restored in 2009. When city and county planning programs were merged, the authority for a protest petition was extended to Durham County in 2003.

Qualification to File a Protest Petition

A key question is how to precisely define who can file a protest petition to trigger the three-fourths vote requirement. For many years the North Carolina statutes used the formulation set in 1923. It included three qualifying areas: the property itself, the 100-foot strip immediately adjacent in the rear, and the 100-foot strip directly across the street. In 1959 the legislature amended the statute to add the 100-foot strip "on either side thereof" to the qualifying areas.

This formulation generated considerable confusion as to how it should be interpreted. Some local governments construed the statute to say that there were only two qualifying areas—the property being rezoned and a single 100-foot strip along the sides and the rear of the area being rezoned. Most local governments read it to say that there are five qualifying areas—the property being rezoned, the front, the rear, and two sides. Still others read it to allow for an indefinite number of additional qualifying areas, as if there is an irregularly shaped parcel with many jogs in the zoning district boundary and each jog creates another qualifying "side." The situation was further confused if there were streets adjoining the rezoned area on more than one side or if there was no clear "front" and "rear" to the affected area.

In 2005 the statute was amended to resolve the confusion. G.S. 160A-385(a)(2) now provides that the petition must be signed by the owners of either:

1. 20% or more of the area included in the proposed change, or
2. 5% of a 100-foot-wide buffer extending along the entire boundary of each area proposed to be rezoned.

As stated in a bill analysis prepared and distributed when this 2005 bill was first introduced:

This revision to GS 160A-385 clarifies the definition of a qualifying area for a zoning protest petition without making substantive changes in the law. It simplifies the qualifying area for a protest to be 5% of the land in the 100-foot wide buffer around each separate area proposed to be rezoned (rather than 20% of any one of four sides). Given that many rezonings are of irregularly shaped parcels, this will significantly simplify application of the protest calculation.

After several months of discussions with all affected parties, the bill was amended at its first committee hearing to add a provision suggested by the North Carolina Homebuilders Association to provide that if a street right of way of at least 100 feet width adjoined a property being rezoned, that right of way would be considered part of the buffer from which a qualifying protest could be made (and that the property owners across such a wide street could not file a protest petition). That amended formulation is still in effect today.

Use of Protest Petitions in North Carolina

Even though the protest petition has a long history in zoning, it is not frequently a factor in North Carolina rezonings. In a 2006 School of Government survey two-thirds of the responding cities reported that no protest petitions had been filed in the previous year. **David W. Owens, Zoning Amendments in North Carolina (2008)**. However, protests were much more common in those cities with large populations—50% of the cities with populations between 10,000 and 25,000 reported having received a protest petition and 71% of the cities with populations over 25,000 had received one or more protest petitions in the past year.

Responding municipalities reported a total of 181 protest petitions filed in the previous year. Of these, 134 were determined to be adequate, thereby requiring a supermajority vote for adoption of the rezoning. These same municipalities reported consideration of 2,167 rezoning petitions in the previous year. Thus only 6% of the municipal rezoning petitions had a sufficient protest to subject the proposed rezoning to the supermajority vote requirement.

Even when a valid protest petition is filed, it rarely has a direct effect on the outcome of the proposed rezoning. Survey respondents reported 43% of the protested rezonings did not receive a simple majority vote in favor and thus would have failed even if no protest petition had been filed. 52% were adopted by a majority of three-fourths or more, thus passing despite the protest petition. Only 5% of the rezonings subject to a valid protest petition received a majority favorable vote but less than a three-fourths majority, thus failing to be adopted as a direct result of the protest petition.

The informal impacts of a protest petition are typically more substantial than its formal impact. The 52% approval rate for projects subject to a protest petition was considerably lower than the overall 76% approval rate for rezoning petitions. This lower approval rate indicates that the depth of opposition reflected by a protest petition can convince a majority of the city council to oppose a rezoning. In addition, an actual or threatened protest petition encourages the landowner, the neighbors, and the city to negotiate prior to a vote on the rezoning. This often leads to project revisions (and sometimes withdrawal of the protest) that influence the final vote of the city council.

2013 Legislation

Unlike the 2005 amendments to the zoning statutes, or the 2013 amendments to the board of adjustment statutes described in an [earlier post](#), both of which underwent months of discussion, the proposal to repeal the protest petition statute emerged in the final days of the legislative session. It was reportedly incorporated into the House's broader regulatory reform bill ([S. 112](#)) at the request of members of the development community frustrated by neighborhood protests of rezoning proposals. (See comments on the proposal from municipal officials and developers reported by the Charlotte Observer [here](#).)

When the protest petition repeal was taken up on the House floor, an amendment was proposed to delete the repeal from the regulatory reform bill. That motion failed by a [35-76 vote](#). However, while the Senate incorporated most of the other new provisions of the House bill in its version of the regulatory reform bill ([H. 74](#)), the protest petition repeal was not included.

Negotiations in the coming week will determine the fate of the zoning protest petition. Will it go or stay? We'll know the answer soon.

UPDATE (August 2013): The protest petition stays for now. The conference committee report on H. 74 deleted the proposed repeal of the protest petition. So the final version, adopted as S.L. 2013-413, does not address the protest petition.



Links

- www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2013&BillID=s112&submitButton=Go
- www.charlotteobserver.com/2013/07/15/4166171/bill-would-weaken-neighbors-ability.html
- www.ncleg.net/gascripts/voteHistory/RollCallVoteTranscript.pl?sSession=2013&sChamber=H&RCS=1167
- www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2013&BillID=h74&submitButton=Go