

**Wake County Board of Commissioners  
Growth, Land Use and Environment Committee Meeting  
March 29, 2010  
10:15 a.m.**

**Committee members present:**

Betty Lou Ward, Chair  
Paul Coble (Alternate for Harold Webb)  
Tony Gurley

**Other Commissioners present:**

Lindy Brown  
Stan Norwalk

**Staff present:** Joe Durham, Deputy County Manager; Scott Warren, County Attorney; Tommy Esqueda, Environmental Services Director; Frank Cope, Community Services Director; Britt Stoddard, Water Quality Director; Steven Finn, Land Development Administrator; Denise Hogan, Deputy Clerk to the Board

**Others present:** Lacy Reaves, Smith Anderson Law Firm; Mayor Charles Meeker, City of Raleigh; Kenny Waldroup, Assistant Director, City of Raleigh Public Utilities; Mitchell Silver, City of Raleigh Planning Director

Chairman Ward called the meeting of Board of Commissioners' Growth, Land Use and Environment Committee to order at 10:15 a.m on March 29, 2010, in the Ground floor Conference Center, Wake County Office Building. She said there would be a brief overview given from the March 16, 2010 Growth Land Use and Environment Committee meeting.

**Discussion of Proposed Ordinance Amendment to the Unified Development Ordinance – OA 03-09-Section 4-11**

Mr. Steven Finn, Land Development Administrator, provided a summary of the proposed text amendment. He noted it creates a special use option for nonconforming uses to redevelop in R-40W and establishes "elimination and redevelopment of non-conforming use" in the land use table. He further noted the proposed standards allowing Board of Adjustment discretion reviewing a "site specific development plan." The proposed standards increase the range of potential uses, allow an applicant to submit a site plan to the Board of Adjustment with features such as building size, the size and number of signs and establish setbacks that may differ from the base zoning district. He also explained how the Board of Adjustment evaluates special use applications in a quasi-judicial hearing with "findings of fact" that must be considered as part of the decision making process.

Mr. Stoddard briefly gave an overview of the four tables (how the proposal duplicates current regulations, how the proposal is different, selected concepts from the land use

plan, and possible committee actions) that were distributed at the last meeting. Mr. Stoddard described the two options that the petitioner has offered on the way the 60% nitrogen and phosphorus reduction could work. Choice one is to move forward with the proposal as written which requires a 60% reduction if the project plan is submitted to the county before the Falls Rules become effective. Choice two applies the 60% reduction regardless of when the project plan is submitted to the county.

Mayor Meeker said that the City of Raleigh's water system serves 60-65% of all of Wake County. Falls Lake has been the only resource for Raleigh since the 1960's. In the mid-1980's there were some water restrictions put into place. He said that an impairment has been found in the Falls Lake Watershed. In the summer, the algae backwash had to be performed every 36 hours, which is expensive. He said the purpose of the Falls Lake initiative is to stabilize the stream banks. He said there should be legislative assistance to include Durham City and County in the process of reducing nitrogen and phosphorus by 60% in Falls Lake.

Mayor Meeker said that non conforming use (does not conform to current standards) has an economic life. The property may be a residential use at some point, but the proposed ordinance would allow permanent commercial or industrial uses. He said a shopping center will draw development into the watersheds. Durham City and Durham County are concerned that this proposal loosens the regulations. Standards should be strengthened. He said the ordinance would not improve the situation. He expressed concern with the compatibility of the proposal and the county code, technical issues dealing with wastewater disposal, with permitting of the Little River Reservoir, and policy issues.

Mr. Kenny Waldroup, Assistant Director, City of Raleigh Public Utilities, said that the county ordinance change could be detrimental to Falls Lake's cleanup and impact the quality of Raleigh's drinking water. He said a family restaurant could exceed up to 10,000 gallons of water a day. This is beyond utilization of onsite spray irrigation capacity on the site. Low pressure pipe systems and spray irrigation systems have failed in the past. Mr. Warren clarified that this was during the hurricane and in 1994 and there were financial problems. He pointed out that the spray systems did not fail. The failure was from fallen trees. The piping was close to the surface which caused the failure. Commissioner Ward said that the state failed to monitor these spray systems. Commissioner Norwalk said that that spray irrigation is not being offered to Wake County.

Mr. Waldroup said the WSP Sells engineering report was silent on the spray system issue. He said that if the site goes unchanged then it would have a state stormwater permit. He said that the Falls Lake Watershed and Little River Reservoir cannot handle the change. Protection of the watershed may be in jeopardy and prevent future permitting of the Little River Reservoir. He said the proposed text change is too global.

Mr. Mitchell Silver, City of Raleigh Planning Director, said that the ordinance needs further review and there are other remedies that would make things better. He provided the following overview of his concerns with the amendment:

**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?”
- b) Nonconforming uses have several options for change:<sup>1</sup>
- 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.
- 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?

**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?

Commissioner Brown said she needed clarification of the county ordinance concerning the Board of Adjustment's approval allowing unlimited expansion of nonconformities. The process was used 15 times in two years until that provision was repealed by the Wake County Board of Commissioners in June 1997. Mr. Silver said that he is concerned the text change would cause problems similar to 1997. Mr. Warren said all the requests prior to 1997 were submitted lawfully and the Board of Adjustment reviewed the causes. He said the Board of Adjustment applied the law with the information given.

Mr. Joe Durham said the proposed text amendment offers limited expansion. Commissioner Norwalk was uneasy about the Board of Adjustment process. Mr. Reaves read aloud an e-mail from residents about the Amran Temple. There was community concern about rezoning of this property in the watershed. Mr. Reaves said that zoning cases were not approved if they were in the watershed because the Commissioners the effect of the policy was to not to allow rezoning in watersheds.

Mr. Reaves said that in 1996 the Board of Adjustment process was quasi-judicial in an evidentiary context as it is today. Commissioner Ward said that in 1996 no one could overturn a Board of Adjustment decision except Superior Court Judges. Mr. Warren said that a shift has occurred over the years and the Planning Board has been more active in development related cases.

Mayor Meeker reiterated his issues with the compatibility of the proposal, the county code, technical issues dealing with wastewater disposal, permitting of the Little River Reservoir and policy issues.

Commissioner Ward said a City/County-wide planning system is needed. She asked about the planning relationship between Wake County and Raleigh. Mr. Silver said there is a lot of collaboration and there are regular meetings of staff. Commissioner Coble asked how many times the mayor and city manager have met with the applicant Mr. Reaves. Mr. Meeker said that he has not met with Mr. Reaves.

Mr. Silver said that he preferred staff and the Planning Board to handle these issues.

Mr. Reaves said that he has asked that the amendment be modified that the 60% standards be applied county-wide. He noted that WSP Sells reviewed all potential redevelopments sites using the proposed standards. The application calls for the nutrients to be reduced which is the standard proposed by the Division of Water Quality (DWQ). Mr. Reaves said that Mr. Silver has challenged the legal text of the amendment. The ordinance amendment has been processed through the county attorney's office and the Planning Board. The amendments are in place. Article 7 does not deal with special use permits which are in the proposed text amendments. Non-conforming uses are not a good thing in the R-40W district. He said in terms of Durham County's scrutiny in they

should be asked to do the same. Durham County should be pro-active with clean up actions such as the redevelopment option.

Mayor Meeker said if all 15 sites are developed there will be a big draw of business, there are code issues, and Durham County considers this a major loophole. He said the text change would set a bad precedent and undercut the city's efforts to persuade Durham officials to reduce development in Durham County's part of Falls Lake Watershed. Durham County is upstream of the Falls Lake reservoir, which is the source of drinking water for Raleigh and several surrounding communities. Polluted runoff from Durham, Granville and other counties upstream have been blamed for the declining water quality in Falls Lake. Mayor Meeker said additional problems in the watershed would be created.

Mr. Waldroup said that Durham County views the changes as forced action. Commissioner Gurley agreed with Mr. Silver that these issues should have been settled at the Planning Board level.

Commissioner Ward thanked the Mayor and his staff for coming to discuss the issue. Commissioner Ward asked county staff if there have been conversations with the City of Raleigh Planning staff. Mr. Stoddard said that he has had conversations with Raleigh's staff. Commissioner Gurley said that Triangle J Council of Governments has discussed this issue in the past.

### **Committee Action**

**To send the recommendation back to the full Board of Commissioners for a decision on April 5, 2010.**

### **Adjournment**

The Chairman adjourned the meeting at 11:30 a.m.

Respectfully submitted,

Denise Hogan, CCC  
Deputy Clerk