STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
23 CV 004711-910

GEORGE C. VENTERS and wife NICKYE Y. VENTERS, GREG LINCOLN PIERCE and wife AMY J. PIERCE, JOHN SOLIC and wife SAMANTHA SOLIC,

Plaintiffs,

v.

CITY OF RALEIGH, a body politic and corporate, 908 WILLIAMSON, LLC, a North Carolina limited liability company, RDU CONSULTING, PLLC, a North Carolina limited liability company, and CONCEPT 8, LLC, a North Carolina limited liability company,

Defendants.

DEFENDANT CITY OF RALEIGH'S BRIEF IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT (N.C.R. CIV. P. 12 (b)(6))

NOW COMES Defendant, City of Raleigh (the "City") and submits this Brief in support of its Motion to Dismiss Plaintiffs' Amended Complaint and Request for Declaratory Judgment and Injunctive Relief (the "Amended Complaint").

INTRODUCTION AND SUMMARY OF THE CITY'S POSITION

Housing in the City of Raleigh has become consistently less available and more expensive and there has been a constant demand for the City to provide solutions to the increasing lack of affordable housing. In response, in 2021 and 2022, the City Council enacted several text amendments to its Unified Development Ordinance (the "UDO") commonly known as "Missing Middle 1.0 and Missing Middle 2.0" (collectively the "Missing Middle Text Changes") to encourage and allow for the development of more housing types, such as townhouses and duplexes in, among others, the R-4 zoning district.

Missing Middle 1.0 allowed for the approval for a 17-lot subdivision at 908 Williamson Drive (the "Townhouse Subdivision") issued to Defendant 908 Williamson LLC. Plaintiffs live in the Hayes Barton area of Raleigh which they allege is "made up primarily of older, historic homes on relatively large lots." (Amended Complaint ["AC"] ¶ 14, *see also* ¶¶ 37-38). Plaintiffs are adamantly and steadfastly opposed to the Townhouse Subdivision because it allows for a building type different from single-family (townhouses) and at a higher density than previously allowed. As explained in more detail later in this Brief, there are currently two actions filed against the City and 908 Williamson LLC by Hayes Barton homeowners seeking to invalidate the Townhouse Subdivision approval: the current lawsuit and an appeal by Petition for Writ of Certiorari, which is also pending in this Court and awaiting review. Significantly, the Petition for Writ of Certiorari would void only the Townhouse Subdivision, while this lawsuit seeks to invalidate every single zoning, site plan and subdivision approval in the City's entire zoning jurisdiction under the Missing Middle Text Changes in the R-2, R-4, R-6 and R-10 districts starting as far back as July 2021. These approvals encompass far more housing developments and units across the City and numerous other ordinance provisions unrelated to the single preliminary subdivision plat to which the Amended Complaint is targeted.

It is the City's position that Plaintiffs lack standing to file this lawsuit and the claims asserted are likewise unsupported by well-established North Carolina law – most of which have no basis and are in fact directly contrary to binding precedent. This lawsuit is also not the proper vehicle to challenge a single administrative preliminary subdivision plan, but instead appears to be a method to unreasonably delay and thereby hopefully put an end to the Townhouse Subdivision, which was approved nearly one year ago. Plaintiffs' baseless litigation has already cost an enormous amount to the City's taxpayers and put a cloud over numerous approved and

much needed housing units across the City which have nothing to do with Hayes Barton or the 17 Townhouse Subdivision lots. Accordingly, and for the reasons set forth below, the City requests that the Amended Complaint be dismissed in its entirety.

STATEMENT OF THE CASE

Plaintiffs filed the original Complaint on March 9, 2023 which challenged: 1) the Missing Middle Text Changes as well as another text change referenced as the "Omnibus Ordinance;" and 2) the approval of the Townhouse Subdivision on the basis that its townhouse density (17 lots) was made possible by those text changes. On April 14, 2023, Defendants filed a Joint Motion for Local 2.2 Appointment. That Motion has not yet been ruled upon by the Court. On May 8, 2023, the City filed a Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6). On May 10, 2023, Defendants 908 Williamson LLC, RDU Consulting PLLC and Concept 8 Holdings LLC (collectively "908 Williamson") filed Motions to Dismiss under Rules 12(b)(1) and 12(b)(6) and a Motion to Strike.

On August 23, 2023, Plaintiffs filed an Amended Complaint which asserts the same Claims for Relief as the original Complaint, but also adds, *inter alia*, a claim challenging what they have called the "2023 Ordinance." The Omnibus Ordinance and the 2023 Ordinance are both amendments to UDO Sec. 1.4.2[1] which is a graphical chart summarizing the building types allowed by zoning district (collectively the "Sec. 1.4.2 Amendments"). The Amended Complaint also adds due process claims under the North Carolina and United States Constitutions. On September 21, 2023, the City and 908 Williamson filed Motions to Dismiss the Amended Complaint under Rules 12(b)(1) and 12(b)(6). 908 Williamson also filed a Motion to Strike. The case is before the Court on both Defendants' Motions to Dismiss pursuant to Rule 12(b)(6).

[1] The relevant UDO provisions are attached to this Brief as Exhibit A.

STATEMENT OF THE FACTS[2]

I. The Missing Middle Text Changes and the Sec. 1.4.2 Amendments (collectively the "Challenged Ordinances").

The Missing Middle Text Changes apply to all property in the City's zoning jurisdiction that is zoned R-2, R-4, R-6 or R-10. (AC Exs. 2, 3). They were enacted by the Raleigh City Council to, among other things, provide for greater housing choices and supply in residential areas by increasing the availability of "missing middle housing" such as townhouses, duplexes and accessory dwelling units (or "ADUs"). (AC Exs. 2, 3). The Missing Middle Text Changes also included other methods to increase housing supply and options, such as permitting smaller houses on smaller lots and increasing permitted residential density. (AC, Exs. 2, 3). (AC ¶ 29 ("The purpose and intent of the Missing Middle Housing 1.0 ordinance is stated on the City's website to be, among others, to 'expand[] missing middle housing options in many residential districts.'"); AC ¶ 31 ("The purpose and intent of the Missing Middle Housing 2.0 changes is stated on the City's website to be 'the next step in a more flexible zoning code designed to allow for smaller homes on smaller lots and denser development near high-frequency transit.'")).

The Missing Middle Text Changes provided additional entitlements and reduced restrictions on the properties located in the R-2, R-4, R-6 and R-10 zoning districts. The Amended Complaint alleges this multiple times and admits that Missing Middle 1.0 and 2.0 create a "substantial increase in land use entitlement . . . ." (AC ¶ 52); s*ee also* AC ¶ 15 (prior to Missing Middle, buildings with multiple dwelling units were "severely restricted, if not prohibited in R-4 . . . . including the Hayes Barton neighborhood . . . .); AC ¶ 17 (Missing Middle imposed "materially

[2] The Statement of the Facts is based on the allegations in the Amended Complaint, the Exhibits to the Amended Complaint, and the documents referenced in the Amended Complaint, including excerpts from the Raleigh UDO and the Petition for Writ of Certiorari.

different . . . benefits" to properties in the Frequent Transit Area); AC ¶18 (Missing Middle allowed the 908 Williamson project "as of right" when previously was not allowed in R-4); AC ¶¶ 26-32 (prior to Missing Middle the UDO "severely restricted" townhouses in R-4 and the text changes allowed many more uses with substantially less restrictions in R-4; townhouses were previously allowed only under the conservation development option); AC ¶ 38 (Missing Middle allows greater entitlements including higher density than had previously existed in R-2, R-4, R-6 and R-10); ¶¶ 39 and 46 (Missing Middle eliminated density and allowed new uses in R-4); AC ¶¶ 50 (Missing Middle 2.0's practical effect was to "substantially upzone R-4, R-6 and R-10" properties in Frequent Transit Areas); *see also* AC Ex. 2, Missing Middle 1.0 ("TC-5-20 . . . AN ORDINANCE TO INCREASE HOUSING OPTIONS BY EXPANDING THE ALLOWABLE BUILDING TYPES . . . AND REMOVING UNIT PER ACRE DENSITY RESTRICTIONS IN MOST RESIDENTIAL ZONING DISTRICTS"); AC Ex. 3, Missing Middle 2.0 ("TC-20-21 . . . AN ORDINANCE TO INCREASE HOUSING OPTIONS BY EXPANDING THE ALLOWABLE BUILDING TYPES . . . ACROSS RESIDENTIAL ZONING DISTRICTS [AND] ALLOWING HIGHER DENSITY DEVELOPMENT NEAR HIGH FREQUENCY TRANSIT.").

Although Plaintiffs appear to believe the Challenged Ordinances collectively operated to allow the Townhouse Subdivision, *see* AC ¶ 64, other allegations prove this is incorrect. Specifically, Plaintiffs admit the Townhouse Subdivision application was filed on June 31, 2022, but Missing Middle 2.0 was not effective until August 8, 2022. (AC ¶ 12; Ex. 2, p. 36). In addition, Missing Middle 1.0 is Amended Complaint Exhibit 2 and clearly provided the authority for the 17-lot subdivision in R-4 under the Compact Development Option. (*See, e,g,* AC Ex. 2., pp. 13, 19).

Plaintiffs challenge Missing Middle 2.0 because it allowed additional land use entitlements under the Frequent Transit Development Option (the "FTDO") for properties in Frequent Transit Areas, which are located within one half mile of corridors proposed for bus rapid transit or within a quarter mile of other frequent transit routes. (AC Ex. 3; ¶ 48). The FTDO is defined as a land "use" in the UDO and is included on the "Allowed Principal Use Table" at UDO Sec. 6.1.4 and is found in the "Use Standards" throughout the UDO. *See. e.g.,* UDO Sec. 6.2 ("Residential Uses). The FTDO was not applied and is unrelated to the Townhouse Development approval. (AC Exs. 2 and 3). Two of the Plaintiffs' properties, Venters and Pierce, however, fall within the FTDO area and could utilize those provisions for more intense development should they desire. (AC Ex. 1).

The last ordinances Plaintiffs seek to invalidate are the Sec. 1.4.2 Amendments which are two sequential adopted versions of the same graphical chart summarizing the building types allowed by district. The original Complaint challenged an earlier version of the chart, the "Omnibus Ordinance;" however, it had been repealed and replaced before the original Complaint was filed. Plaintiffs added the 2023 Ordinance to the Amended Complaint, but also left in the claim against the Omnibus Ordinance, while at the same time admitting that it no longer exists and was replaced by the 2023 Ordinance. (AC ¶ 65). The Court does not have jurisdiction to review a repealed ordinance; however, both are mere illustrative graphical charts which have no independent regulatory effect. *See* UDO Sec. 12.1.2 ("Graphics, Illustrations, Photographs & Flowcharts. The graphics, illustrations, photographs and flowcharts used to explain visually certain provisions of this UDO are for illustrative purposes only. Where there is a conflict between a graphic, illustration, photograph or flowchart and the text of this UDO

controls."). Therefore, the relevant ordinances at issue are the Missing Middle Text Changes because overturning the Charts alone would not provide Plaintiffs with any relief.[3]

II. The Parties and the Proposed Townhouse Subdivision.

Plaintiffs live and own properties located on Williamson Drive which is in the Hayes Barton area of Raleigh. Plaintiff John and Samantha Solic (the "Solics") own 912 Williamson Drive, Plaintiffs George and Nickye Venters (the "Venters") own 904 Williamson Drive, and Plaintiffs Greg and Amy Pierce (the "Pierces") own 912 Williamson Drive. All Plaintiffs' properties are in the R-4 zoning district, so can utilize the provisions of Missing Middle 1.0. Plaintiffs Venters and Pierces' properties are also in an area that allows the FTDO as a permitted use, so can take advantage of Missing Middle 2.0 as well.

The Townhouse Subdivision was approved administratively by Raleigh City staff on December 30, 2022. Three individuals living in Hayes Barton and represented by the same attorneys as Plaintiffs here, timely appealed that decision to the City's Board of Adjustment (the "BOA"), which is the statutory remedy to challenge an administrative subdivision. *See* N.C. Gen. Stat. § 160D-405. The BOA appellants include the Solic Plaintiffs, as well as two other neighboring property owners, Marvin and Rebecca Bennet and James and Angela Post. After a four-day hearing, the BOA affirmed the decision of the staff to approve the Townhouse Subdivision. Thereafter, the Solics and the Bennetts pursued their statutory remedy and filed an appeal by Petition for Writ of Certiorari for an on the record review pursuant to N.C. Gen. Stat. § 160D-1402. That appeal is currently pending in Wake County Superior Court.[4] Thus, Hayes

[3] Regardless, both versions of the Sec. 1.4.2 Amendments allow townhouses as a permitted building type in R-4 under the Compact Development Option. (AC ¶ 65, Plaintiffs concede "[n]o substantive changes to the prior UDO version were made.").

[4] Plaintiffs allege and acknowledge the administrative appeal in paragraph 11 of the Amended Complaint and it is attached to this Brief as Exhibit B (*Marvin Butler Bennett, II, Rebecca Garrison*

Barton homeowners and the same attorneys are concurrently pursuing two separate and different legal challenges to void the Townhouse Subdivision.

LEGAL ARGUMENT

I. Rule 12(b)(6) Standard.

A claim should be dismissed under N.C.R. Civ. P. 12(b)(6) for failure to state a claim when:

> "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim."

Wilson v. Suntrust Bank, 257 N.C. App. 237, 244, 809 S.E.2d 286, 292 (2017) (quoting *Freedman v. Payne*, 246 N.C. App. 419, 422, 784 S.E.2d 644, 647 (2016)).

Documents attached to and incorporated into the complaint "become part of the complaint and may be considered in connection with a Rule 12(b)(6) motion without converting it into a motion for summary judgment." *Id*. (quoting *Moch v. A.M. Pappas & Assocs., LLC*, 251 N.C. App. 198, 206, 794 S.E.2d 898, 903 (2016)). In this circumstance, the documents control and the Court may reject allegations that are contradicted by the documents attached, referred to or incorporated into the complaint. *Id*.

II. Plaintiffs' Complaint Should Be Dismissed For Lack of Standing.

A. Summary of the Applicable Standing Law.

The North Carolina courts "appropriately have set a high bar for third parties to establish standing" to bring actions challenging legislative rezonings. *Cherry Community Organization v. City of Charlotte*, 257 N.C. App. 579, 582, 809 S.E.2d 397, 399 (2018). As recently stated by the Court of Appeals: "It has become difficult for a neighboring property owner to establish that they have standing to challenge a zoning decision." *Violette v. Town of Cornelius*, 283 N.C. App. 565,

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Bennett, John Solic and Samantha Solic v. City of Raleigh, 908 Williamson LLC, RDU Consulting, PPLC, and Concept 8, LLC, Wake County Superior Court Case No. 23CV025381-910).

569, 874 S.E.2d 217, 220 (2022). In fact, few if any plaintiffs or petitioners have overcome this high bar in any case in the North Carolina appellate courts for the past 7 years challenging either a legislative zoning decision by a civil action or a quasi-judicial zoning decision by petition for writ of certiorari. *See, e.g., Cherry v. Weisner*, 245 N.C. App. 339, 781 S.E.2d 871 (2016); *Ring v. Moore County,* 257 N.C. App. 168, 809 S.E.2d 11 (2017); *Cherry Community Org. v. City of Charlotte,* 257 N.C. App. 579, 809 S.E.2d 397 (2018); *Brinkley Properties v. City of Kings Mountain*, 263 N.C. App. 409, 821 S.E.2d 902 (2018) (unpublished); *Hoag v. Pitt County. 270 N.C. App. 820, 839 S.E.2d 875 (2020)(unpublished); Violette v. Town of Cornelius,* 283 N.C. App. 565, 874 S.E.2d 217 (2022), *rev. denied*, ___ N.C. ___, 883 S.E.2d 606 (2023).

Standing is jurisdictional and Plaintiffs bear the burden of both pleading and proving standing by: 1) including allegations in the complaint that demonstrate they can survive a 12(b)(6) motion; and 2) meeting their "burden of proof" to present evidence that establishes "an injury has resulted or will result from the zoning action." *Cherry v. Weisner*, 245 N.C. App. *supra at* 339, 347, 781 S.E.2d at 877 (2016).[5] Simply disliking new zoning regulations does not confer standing, but instead, a plaintiff must allege and prove facts that establish: 1) the challenged ordinance[s] caused them special damages, *i.e.,* the ordinances at issue resulted in a reduction in the value of their own property; and 2) that the decrease in value from the challenged ordinance is distinct from that which will be suffered by the rest of the community. *See Violette, supra* at 569-570, 874 S.E.2d at 221. Allegations of a decrease in property values which are general to the community and that are not unique and "distinct to the particular landowner who is challenging" the decision will not

[5] Standing is properly challenged by a motion to dismiss for failure to state a claim upon which relief may be granted and/or a motion to dismiss for lack of subject matter jurisdiction. *Fairfield Harbour Property Owners Ass'n, Inc. v. Midsouth Golf, LLC*, 215 N.C. App. 66, 715 S.E.2d 273 (2011). The City of Raleigh raised both motions in its response to the Amended Complaint but has only set the 12(b)(6) for hearing.

confer standing. *Cherry v. Wiesner, supra* at 350, 781 S.E.2d at 879; *see also Cherry Community Org. v. City of Charlotte,* 257 N.C. App. 579, 809 S.E.2d 397 (2018); *Lloyd v. Town of Chapel Hill, supra* at 351, 489 S.E.2d. at 900-01(1997). The allegations in the Amended Complaint, taken as true, establish Plaintiffs cannot meet either prong of their standing burden.[6]

Plaintiffs have filed two separate Wake County Superior Court cases asking to set aside the City's approval of the Townhouse Subdivision. This lawsuit cannot challenge the Townhouse Subdivision approval, *see* Section III, *infra.,* but can only seek to invalidate the text amendments in the Amended Complaint. Accordingly, Plaintiffs must allege standing based on the effects of the Missing Middle Text Changes on their own properties, rather than the impact on 908 Williamson Drive which is not a Plaintiff in this action. Specifically, the allegations in the Amended Complaint must show Plaintiffs will suffer special damages from the *decisions that are being challenged* (i.e., the Missing Middle Text Changes) and those damages resulting from the *decisions that are being challenged* (i.e., the Missing Middle Text Changes) are different and distinct from the community at-large. *See, e.g., Ring v. Moore County*, *supra.* In this case, the Amended Complaint shows the Missing Middle Text Changes do exactly the opposite.

B. Plaintiffs' Properties Are Not Adversely Affected and Their Property Values Are Not Negatively Impacted By the Missing Middle Text Changes Because They Provide an Increase in Land Use Entitlements.

"A party has standing to challenge a zoning ordinance in an action for declaratory judgment only when it has 'a specific personal and legal interest in the subject matter affected by the zoning ordinance and . . . is *directly and adversely affected thereby*.'" *Templeton v. Town of Boone,* 208 N.C. App. 50, 58, 701 S.E.2d 709, 715-16 (2010)(*quoting Thrash Ltd. Partnership v. County of Buncombe,* 195 N.C. App. 727, 731, 673, S.E.2d 689, 692 (2009)(internal citations omitted)). In

[6] A plaintiff's standing burden is the same in a Superior Court proceeding whether challenging a legislative decision or a quasi-judicial one. *See Violette v. Town of Cornelius*, *supra*.

Templeton, the Town passed a zoning amendment subjecting plaintiffs' properties to steep slope and viewshed ordinances that limited and decreased development "within 100 feet from major traffic corridors within the county or that have a slope value of 30% or greater." The plaintiffs sufficiently alleged standing because the ordinances would have an adverse impact on their properties and would decrease the entitlements allowed.

Similarly, in *Thrash*, *supra,* the plaintiff challenged a zoning text amendment that imposed more stringent regulations on the development of multi-family dwellings 2500 feet above sea level. The rules for dwellings 2500 feet below sea level remained the same. The plaintiff owned property 2500 feet above sea level; "[t]herefore, plaintiff's use of its land *was limited by the zoning regulations*" so it had standing to challenge it based on procedural irregularities. *Id.* at 731, 673 S.E.2d at 692 (emphasis added). *See also Taylor v. City of Raleigh,* 290 N.C. 608, 620, 227 S.E.2d 576, 583 (1976)(standing requires a plaintiff to show: 1) a personal and legal interest in the subject matter affected by the zoning ordinance; and 2) that they are "directly *and adversely affected thereby*.")(emphasis added).

In *Taylor v. City of Raleigh*, the plaintiffs did not have standing when the challenged rezoning did not introduce new and different uses, but only increased the density and types of uses already permitted. In *Taylor,* the pre-rezoning regulations already allowed one utility apartment per parcel and also permitted townhouses within planned unit developments on 50 acres or more. The rezoning permitted a 200-unit apartment development on 39.89 acres. On these facts, the plaintiffs had no standing because the amendments to the zoning ordinance "did not, for the first time, authorize multifamily dwellings in the area; it merely increased the permissible types and units of dwellings." *Id.* at 621, 227 S.E.2d at 584.

Subsequent courts have analyzed *Thrash and Taylor* and have held that when the ordinance at issue does not limit uses or impose greater restrictions on the plaintiff's property – regardless of the nature of the challenge (a lawsuit or certiorari appeal) - there is no standing. In *Ring v. Moore County*, *supra,* the case was dismissed because the plaintiffs "failed to allege actual or imminent injury resulting from the rezoning." The *Ring* plaintiffs – like Plaintiffs here – alleged that the County failed to provide adequate notice and violated the plaintiffs' due process rights. Relying on *Taylor v. City of Raleigh,* the court held that allegations of an increase in traffic and light pollution did not establish standing when the permitted uses were unchanged.

The plaintiff in *Ring* – like Plaintiffs here – attempted to argue *Thrash* supported their standing argument, but the court disagreed holding: "*Thrash* . . .is inapposite to this case. There, the 'plaintiff's use of its land was limited by the zoning regulations.' By contrast, in this case Plaintiffs have not alleged that the zoning ordinance directly limits the use of their land." *Ring, supra at 172, 809 S.E.2d at 14* (*quoting Thrash*, at 731, 673 S.E.2d at 692). *See also Brinkley Properties, of Kings Mountain, LLC v. City of Kings Mountain*, 263 N.C. App. 409, 821 S.E.2d 902 (2018)(unpublished)(dismissing case for lack of standing because the plaintiff could not show the zoning regulation challenged would adversely affect or directly limit the use of its land making the case analogous to *Ring* and not *Thrash*).

The Amended Complaint proves Plaintiffs cannot meet the first standing prong for several reasons. First, it is undisputed that the Missing Middle Ordinances provided Plaintiffs with an increase in land use entitlements. This is alleged time and time again in the Amended Complaint as set forth in the Statement of the Facts *supra*. Because the Missing Middle Text Changes amended the regulations applicable to Plaintiffs' own properties, the standing question is answered by analyzing how those amendments affected Plaintiffs' own property rights. The Missing Middle

Text Change did not limit the use of Plaintiffs' properties, or adversely impact their development rights, but instead increased the potential building types and density and decreased the restrictions. Plaintiffs cannot show special damages as a matter of law when the face of the Amended Complaint proves their property rights are greater after the text changes than before.

Second, Plaintiffs' only special damages allegations are found in the Amended Complaint in paragraph 20 where they claim the development of the Townhouse Subdivision (approved under Missing Middle 1.0) will allegedly cause additional noise, stormwater runoff and light pollution, if and when townhouses are ever built upon the approved lots. Plaintiffs, however, admit in paragraph 26, that townhouses and other "multi-unit living" were already allowed in R-4 using the conservation development option. This is analogous to *Ring*, where "the permitted uses were unchanged" and their "conjecture of possible interference" by increased traffic and light pollution did not meet their burden to show "concrete injury or direct consequence." *Id.* at 172, 809 S.E.2d at 14. *See also Taylor v. City of Raleigh, supra* (plaintiffs did not have standing when townhouses and apartments were allowed on the property and rezoning only increased the density).

C. Plaintiffs' Allegations Establish They Have Not Suffered Damages Distinct From the Public At-Large Because Every R-4 Property In The City's Zoning Jurisdiction Was Subject to the Same Changes and in the Same Manner, and There Are No Allegations that Show How Plaintiffs Are Any Different Than Any and All Other R-4 Property Owners.

The Amended Complaint also shows Plaintiffs have not met their standing burden under the second prong, specifically that they will suffer damages distinct from the "public at large" which in this case means at a minimum, all other R-4 properties, including those subject to the FTDO in the City's zoning jurisdiction. The Amended Complaint alleges the Missing Middle Text Changes apply to all R-2, R-4, R-6 and R-10 residential zoning districts in the City's zoning jurisdiction which Plaintiffs admit includes thousands of properties. *See* AC ¶ 40 (alleging that the

ordinances challenged in the complaint could apply to "hundreds of thousands of different lots or parcels").

Therefore, at a minimum, Plaintiffs must allege facts that show how their damages are different from all other R-4 properties in the City's zoning jurisdiction and they have not done so. Plaintiffs' entire argument is based on the alleged secondary effects caused by the Townhouse Subdivision which is a single development also zoned R-4 along with the numerous other properties across the City. There are no facts that could show how Plaintiffs' proximity to a single subdivision plan is different from any other single-family property owner across the City near other approved Missing Middle townhouse approvals, or other projects which Plaintiffs concede not only allow townhouses, but tiny houses, duplexes and even apartments in areas similar to Hayes Barton. Therefore, the Missing Middle Text Changes do not uniquely impact Plaintiffs differently than all other R-4 single-family homeowners in the entire City and its extraterritorial jurisdiction.

D. The Amended Complaint Fails to Contain Any of the Required Allegations Necessary for Standing to Challenge Missing Middle 2.0 or the Sec. 1.4.2 Amendments.

The Townhouse Subdivision was allowed by Missing Middle 1.0. Thus, impacts from that preliminary plat cannot be relied upon to show standing for Missing Middle 2.0 or the Sec. 1.4.2 Amendments. Therefore, Plaintiffs must show standing to challenge those ordinances through other allegations. The Amended Complaint reveals that Missing Middle 2.0 and the Sec. 1.4.2 Amendments have even more significant standing flaws because Plaintiffs have made no attempt to allege standing independent from the Townhouse Subdivision. Specifically, the only claimed impacts from Missing Middle 2.0 are found in Amended Complaint ¶ 22, which states: "Plaintiffs' properties are either within the Frequent Transit Area or are otherwise affected by the ordinance changes complained of herein, and they as property owners are specifically injured by the

procedural defects in the enactment of the ordinances as identified below, and the failure of the City to comply with the limitations on zoning authority. . . ." This paragraph contains none of the required elements for standing allegations by alleging special damages, a decrease in property values, or that Plaintiffs Venters and Pierce have damages unique from all others subject to the FTDO in the City's jurisdiction. Thus, the City's 12(b)(6) motion must be granted as to their challenge to Missing Middle 2.0.

Paragraphs 62-65 contain the allegations related to the Sec. 1.4.2 Amendments and likewise do not claim special damages, a decrease in property values or that Plaintiffs' damages from these ordinances are unique from the public at large. That alone requires dismissal. Regardless, as explained above, the Omnibus Ordinance has been repealed and the 2023 Ordinance is only an illustrative chart, thus, cannot cause a decrease in property values as a matter of law.

III. Plaintiffs Have Failed to Exhaust their Administrative Remedies and are Attempting an Unlawful Collateral Attack of An Administrative Preliminary Subdivision Decision.

Plaintiffs attempt to frame their claims as a challenge to the Missing Middle Text Changes; however, based on Plaintiffs' own allegations, it is clear that their true objective is to stop the Townhouse Subdivision. Examples include the following: Plaintiffs allege they are property owners living near 908 Williamson Drive and all their standing allegations relate to the impact the Townhouse Subdivision will allegedly have on their properties (AC ¶¶ 2-4,10-16, 18-21); the standing allegations are essentially the same as those in the petition for writ of certiorari which challenges only the approval of the Townhouse Subdivision (Ex. A to Brief ¶¶ 15); Plaintiffs have named the owner and developer of the Townhouse Subdivision as Defendants, even though they have no role in enacting the challenged ordinances (AC, ¶¶ 7-9); the "Nature of the Action" states: "Plaintiffs seek injunctive relief to bar the development of a dense townhouse project in the Hayes

Barton neighborhood . . . .” (AC p. 2); “[S]ome of the Plaintiffs are separately contesting the correctness of the December 2022 Approval in an administrative appeal.” (AC ¶ 11); Plaintiffs’ properties and 908 Williamson Drive are all zoned R-4 and are in the Hayes Barton neighborhood. (AC ¶¶ 13 and 14); and Plaintiffs’ requested relief in the Fourth Cause of Action and the Prayer for Relief is to enjoin further development of the Townhouse Subdivision. (AC ¶ 92, p. 28).

The Townhouse Subdivision was an administrative subdivision approval made by Raleigh City staff (AC ¶ 11). Appeals of administrative subdivision decisions must be made in accordance with state statutes allowing for such an appeal. *See, e.g., Northfield Development Co., Inc. v. City of Burlington,* 165 N.C. App. 885, 887, 599 S.E.2d 921, 924 (2004)(“In North Carolina, there is no inherent right to appeal … . Rather, avenues of appeal are created by statute.”). Like standing, exhaustion is jurisdictional and the Court cannot consider claims purporting to challenge an administrative approval. *See, e.g. Sanford v. Williams,* 221 N.C. App. 107, 727 S.E.2d 362 (2012).

State statutes set forth a clear appeal process. Once an administrative subdivision decision has been made, appeal “shall be made to the board of adjustment.” *See* N.C.G.S. § 160D-405(a); *see also*, N.C.G.S. §§ 160D-808 and 160D-1403(b)(2). The BOA shall follow quasi-judicial procedures in determining the appeal (*see* N.C.G.S. § 160D-406) and the BOA’s decision is “subject to review by the superior court by proceedings in the nature of certiorari pursuant to G.S. 160D-1402.” *See* N.C.G.S. § 160D-406(k). North Carolina courts have routinely dismissed lawsuits attempting to challenge administrative decisions by civil lawsuits outside this mandatory statutory process.

In *Ward v. New Hanover County*, 175 N.C. App. 671, 625 S.E.2d 598 (2006) the plaintiff owned a marina to which it claimed it could add a forklift under an existing special use permit. The County disagreed and indicated it would deny approval. Instead of waiting on a decision and

then appealing that to the board of adjustment which is the procedure required by law to challenge the interpretation of a zoning ordinance, the plaintiff sued the County in a civil action seeking a declaratory judgment that the forklift was allowed. The Court disagreed and held: "As a general rule, where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts." *Id* at 674, 625 S.E.2d at 601. The court lacks subject matter jurisdiction when a plaintiff fails to exhaust their remedies. *Id.* The *Ward* court further explained, "[t]his is especially true where a statute establishes . . . a procedure whereby matters of regulation and control are first addressed by commissioners and agencies particularly qualified for the purpose." *Id.* The General Assembly has provided a specific remedy to challenge local administrative land use decisions, which is an appeal to the board of adjustment, and then an appeal by certiorari to the Superior Court. The plaintiff in *Ward* did not exhaust this procedure and the case was dismissed. *See also Potter v. City of Hamlet,* 141 N.C. App. 714, 720, 541 S.E.2d 233, 236 (2001)(plaintiff failed to appeal zoning officer's administrative determination to the board of adjustment and, thus, "failed to avail himself of the only judicial review authorized by statute and may not otherwise collaterally attack the determination of the zoning officer" in a civil action).

Similarly, in *Northfield Development Co., Inc. v. City of Burlington, supra,* the city council denied the plaintiff's permit for a cemetery following a quasi-judicial hearing. Instead of appealing by filing a petition for writ of certiorari as required, the plaintiff filed a civil action asking for the court to order the permit granted. The court held "[i]t is the province of the General Assembly to create alternative avenues of appeal and review, not the courts" and held it was without jurisdiction because the plaintiff failed to follow the mandatory procedure for review. *Id.* at 889, 599 S.E.2d at 924-25. The court was also not persuaded by the plaintiff's characterization of its case as a

mandamus claim in an attempt to confer jurisdiction and held, "[w]here a statute stipulates a specific route for an appeal to the superior court for review, this procedure is the exclusive means for obtaining judicial review" and "[t]hus, plaintiff cannot create jurisdiction by couching its claim in the guise of a mandamus proceeding." *Id.* at 889, 599 S.E.2d at 925. *See also Sanford v. Williams,* 221 N.C. App. 107, 727 S.E.2d 362 (2012)(court lacked subject matter jurisdiction to consider mandamus claim asking court to reverse city's approval of a carport because the plaintiff failed to exhaust by following required appeal process).

In the case *sub judice,"*some" of the Plaintiffs and other Hayes Barton residents have appealed the Townhouse Subdivision by petition for writ of certiorari. (AC ¶ 11). The Amended Complaint is Plaintiffs' attempt for a second "bite at the apple," to overturn the Townhouse Subdivision; however, state statutes and case law make clear that the pending petition for writ of certiorari is their exclusive statutory procedure and Plaintiffs cannot use this civil action to challenge that administrative decision. *See* N.C.G.S. §§ 160D-808; 160D-1403(b)(2); 160D-405(a); 160D-406(k); 160D-1402.[7] Plaintiffs may argue that they can use this alternative procedure to attack the Townhouse Subdivision, but the very same arguments were rejected in the cases above. Thus, all claims in the Amended Complaint asking this Court to review, reverse and enjoin the Townhouse Subdivision must be dismissed.

[7] Note that a new statute, N.C.G.S. § 160D-1403.1, that allows a person with standing to challenge a municipal land use ordinance under which an administrative approval was granted, but still does not allow the collateral attack of the decision itself by a civil lawsuit, which Plaintiffs here are attempting to do. Regardless, Plaintiffs did not follow the procedure in N.C.G.S. § 160D-1403.1, because among other reasons, the original Complaint was filed before the decision of the BOA. *See* N.C.G.S. § 160D-1403.1(a).

IV. Even Assuming *Arguendo* that the Court Has Jurisdiction to Hear Plaintiffs' Substantive Claims, the Allegations In the Amended Complaint Establish Those Claims Fail As a Matter of Law.

A. Zoning Ordinances are Entitled to a Presumption of Validity.

Zoning ordinances are entitled to a presumption of validity and the burden is on the complaining party to prove they are invalid. *See, e.g., Huntington Properties, LLC v. Currituck County*, 153 N.C. App. 218, 569 S.E.2d 695 (2002). "This is a heavy burden." *Id*. at 223, 569, S.E.2d at 699. *Alderman v. Chatham County*, 89 N.C. App. 610, 366 S.E.2d 885 (1988). This presumption exists in actions, such as the case *sub judice,* where the complaint alleges an ordinance is invalid for the failure to provide proper notice. *See Helms v. City of Charlotte,* 255 N.C. 647, 122 S.E.2d 817 (1961). Thus, the burden is on the Plaintiffs in this case to show the invalidity of the Challenged Ordinances. As explained below, this cannot be met because none of Plaintiffs' substantive claims have merit and in fact are completely contrary to controlling law and are defeated by the allegations in the Amended Complaint

B. Plaintiffs' First Claim for Relief Must Be Dismissed Because Plaintiffs Claims Are Contrary to Controlling State Statutes and Appellate Law and Wrongfully Requests that the Court Overrule Established Precedent and Create Causes of Action Never Before Recognized in this State.

i. The Challenged Ordinances Were Text Amendments Under North Carolina Law and The First Claim for Relief that the City Was Required to Follow the Notice Procedures for "Map Amendments" Must Be Dismissed.

There are two basic components to exercise the zoning power set forth in Chapter 160D: 1) the establishment of zoning districts; and 2) the enactment of regulations that apply within those zoning districts. *See, e.g.,* N.C.G.S. § 160D-703(a)("[The City] may divide its territorial jurisdiction into zoning districts of any number, shape, and area …. [and] within those districts, it may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land.") .

The first component is accomplished by the enactment of a map amendment (or rezoning) which changes a property's designation on the City's zoning map from one zoning district to another.[8] The second component is accomplished by text amendments (or text changes) which amend the written provisions and regulations in the UDO that apply within the existing zoning districts. The procedures for each are set forth specifically in Article 6 of N.C.G.S. Chapter 160D and UDO Article 10.2.[9]

For example, Plaintiffs' properties are currently in the R-4 district. If the City had rezoned their properties and changed their district designation to R-10, that would have been a "map amendment," and the change would be noted on the zoning map, but there would be no change to the text of the UDO. See N.C.G.S. §§ 160D-102(34) and 160D-602. Amending the regulations that apply within the existing R-4 district, such as here, to allow the townhouse building type at a greater density is a text amendment because the language of the UDO changes, but the designation of the property as R-4 on the zoning map did not.

The procedures to adopt a zoning map amendment and a text amendment are found at N.C.G.S. §§ 160D-601 and 602. These provisions establish that the General Assembly believed that several additional notice steps should be required for map amendments that are not required for text amendments. Section 160D-601(a) sets forth the procedures that must be followed for both map amendments and text amendments, and it requires a legislative hearing noticed by two

[8] The City is required by statute to enact and maintain an official zoning map, which indicates the district designation for every parcel in its jurisdiction and is maintained for public inspection. See N.C.G.S. § 160D-105(a). *see also* UDO Article 1.2 – "Zoning Map."

[9] The term "text change" and "text amendment" are interchangeable. The City of Raleigh uses the term "text change" in its UDO, but it is a text amendment under Chapter 160D.

newspaper publications. *See also* N.C. Gen. Stat. § 160D-501(c)("the process mandated for zoning text amendments [is] set by G.S. 160D-601).

N.C. Gen. Stat. § 160D-602 is entitled "**Notice of hearing *on proposed zoning map amendments*"** and requires the City also provide notice by mailing and posting for a legislative hearing on a proposed rezoning. If, however, the proposed rezoning is for more than 50 properties owned by at least 50 property owners, mailed notice is not required, but can be substituted for publication if the advertisement is no less than one half the newspaper page in size. *Id.* The process for adopting zoning map amendments is also set forth in the City's UDO (*see* UDO Section 10.2.4 – "Rezoning") and those procedures are consistent with and comply with state law. The UDO has a separate procedure and a different section that governs the notice for text amendments. *Compare* UDO Sec. 10.2.3 ("UDO Text Changes") with Sec. 10.2.4 ("Rezoning."). The UDO requires mailing for rezonings but contains the same exception as state law for cases involving 50 or more properties. *See* UDO Sec. 10.2.1.C.1.g.[10]

Plaintiffs have attached all of the Challenged Ordinances as Exhibits to the Amended Complaint. The face of those documents unequivocally and specifically shows the exact amendments to the written *text* of the previous UDO provisions and proves there was no change to the district designation or the zoning map. Nonetheless, in the First Claim for Relief, Plaintiffs ask the Court to convert the text changes to map amendments and hold that they rezoned and changed the zoning map designation, of every property in R-2, R-4, R-6 and R-10 in the City's entire zoning jurisdiction to some non-specified and currently non-existent district, therefore,

[10] Plaintiffs persist in claiming they were entitled to individual mailed notice, when they also admit no mailed notice is required if an ordinance rezones more than 50 properties and that the Missing Middle Text Changes applies to more than 50 properties, therefore, admitting their claim to mailed notice has no merit. (AC ¶¶ 46, 55, 73).

requiring the City to use additional notice methods not otherwise required for text amendments. As explained below, this position is unprecedented, directly contrary to North Carolina law, nonjusticiable and asks the Court to overrule all controlling statutes and appellate law that now govern this topic.

First, Chapter 160D specifically defines what a map amendment is in North Carolina:

> "Zoning map amendment or rezoning. - *An amendment to a zoning regulation for the purpose of changing the zoning district that is applied to a specified property or properties.* The term also includes (i) the initial application of zoning when land is added to the territorial jurisdiction of a local government that has previously adopted zoning regulations and (ii) the application of an overlay zoning district or a conditional zoning district. The term does not include (i) the initial adoption of a zoning map by a local government, (ii) the repeal of a zoning map and readoption of a new zoning map for the entire planning and development regulation jurisdiction, or (iii) updating the zoning map to incorporate amendments to the names of zoning districts made by zoning text amendments where there are no changes in the boundaries of the zoning district or land uses permitted in the district."

See N.C.G.S. § 160D-102(34)(emphasis added). The Challenged Ordinances do not meet this definition because they did not *"chang[e] the zoning district that is applied to"* Plaintiffs' or any other property in the City's jurisdiction. *Id.* (emphasis added). Thus, the Challenged Ordinances plainly fall outside the plain statutory definition of zoning map amendment.

Other provisions in Chapter 160D also recognize the differences between the text amendment and map amendment procedures and instruct when a local government should use the procedures for each. Significantly, nothing in Chapter 160D provides that a text amendment should ever be converted to a map amendment regardless of the nature of the language and alleged impact. *See, e.g.,* N.C.G.S. § 160D-501(c)(local government shall use the "the process mandated for zoning text amendments" when adopting a comprehensive plan); N.C. Gen. Stat. § 160D-605 (a consistency statement must be adopted when enacting any zoning amendment but requiring an

"Additional Reasonableness Statement for Rezonings."). Thus, the First Claim for Relief should be rejected on the plain language of the controlling statutes alone. [11]

Secondly, however, the North Carolina appellate courts have routinely held that a local government can regulate uses and other zoning provisions such as density and building type by text amendment. Not surprisingly, the cases all relate to text amendments that restrict uses or impose additional requirements on property, which makes sense because most property owners – unlike Plaintiffs – do not complain when a text change increases rather than restricts their entitlements.

Tonter Investments, Inc. v. Pasquotank County, 199 N.C. App. 579, 681 S.E.2d 536 (2009) is directly on point and completely dispels Plaintiffs First Claim for Relief. *Tonter* analyzed the County's zoning powers under N.C.G.S. §160A-342 (now found in N.C.G.S. §§160D-701 and -702). The plaintiff in *Tonter* purchased three tracts of land in March 2007 to develop for residential subdivisions. Tracts 1 and 2 were zoned A-2 and Tract 3 was zoned A-1 all of which permitted the plaintiff's intended use at that time. On August 6, 2007, the County passed a text amendment prohibiting all residential uses in the A-2 district (the "August Amendment"). Then, on September 4, 2007, the County passed another text change which prohibited any building or structure which

[11] Plaintiffs attempt to rely on *Embreeville Redevelopment, L.P. v. Bd. of Sup'rs of W. Bradford Twp.,* 134 A.3d 1122 (Pa. Commw. Ct. 2016) in the Amended Complaint in support of their claim that the challenged text amendments are map amendments. This case is obviously not controlling and does not allow this court to overrule the North Carolina General Statutes and case precedent. Regardless, the controlling factor in *Embreeville Redevelopment, L.P.,* was that the terms "map amendment" and "text amendment" were not defined by ordinance or statute, so the court held: "[s]ince the legislature has not defined a zoning map amendment versus a text or curative amendment, such a determination has been left to the judiciary." *Embreeville Redevelopment, L.P.,* 134 A.3d at 1126. That is absolutely not the case here where the Court can look to both Chapter 160D and the UDO which define and explain both terms and their adoption procedures.

did not have a minimum of 25 feet of frontage on a state maintained or County approved road and was not on a lot within 1000 feet of a public water supply (the "September Amendment").

The *Tonter* plaintiff sued the County claiming the August and September Amendments were *ultra vire*s, exceeded the County's zoning authority and should be declared void. The Court disagreed and held: "[t]he General Assembly has provided that a county may divide its jurisdiction into 'districts of any number, shape, and area that it may consider best suited to carry out the purposes of [zoning],' and within each district, the county is authorized to regulate and restrict the 'use of buildings, structures or land.'" *Id.* at 585, 681 S.E.2d at 540 (quoting N.C.G.S. § 153A-342 (now codified at N.C.G.S. § 160D-703)). The Court also stated: "[a] zoning ordinance will be declared invalid only when the record shows it has no foundation in reason and bears no relation to the public health, the public morals, the public safety or the public welfare in its proper sense..." *Id.* at 583, 681 S.E.2d at 540. The courts "are not free to substitute their opinion for that of the legislative body so long as there is some plausible basis for the conclusion reached by that body." *Id.* Both text amendments at issue in *Tonter* were within the County's zoning power and it had reasonable grounds to believe it would aid the public health, safety and welfare and would not be second-guessed by the courts. *See also Carter v. Stanly County,* 125 N.C. App. 628, 482 S.E.2d 9 (1997)(upholding text change allowing government buildings including prisons to the list of permitted uses in certain zoning districts); *Templeton v. Town of Boone* at 61, 701 S.E.2d at 717 ("Steep Slope" and Viewshed" text changes were lawful because the governing statutes "permit a municipality to pass zoning ordinances that changes the use of a landowner's property); *Dockside Discotheque, Inc. v. Board of Adjustment of the Town of Southern Pines,* 115 N.C. App. 303, 444 S.E.2d 451 (1994)(text change prohibiting "special use entertainment" in central business zoning district was valid); *Elizabeth City v. Aydlett,* 201 N.C. 602, 161 S.E. 78 (1931) (text change

prohibiting gasoline filling stations from the "A" zoning district was a lawful exercise of the city's zoning power).

In the case *sub judice* like in *Tonter*, Plaintiffs allege the City was not authorized to change the regulations for building type and density in established zoning districts by text amendments. Specifically, Plaintiffs claim allowing townhouses at a greater density than previously allowed amounted to a map amendment and ask the Court to second guess the City's decision to add more uses to R-4. As *Tonter* and the other cases above clearly hold, the City is permitted to add and take away uses and density as a part of its zoning power through text amendments and this is commonly done, and under North Carolina law *this is not considered to be a map amendment*. This was not the case in *Tonter* even though it completely prohibited residential uses where they were previously allowed. The City passed the Missing Middle Text Changes for the purpose of increasing housing choices and options to address the lack of affordable housing. This is a proper goal to further the public health, safety and welfare. *See Tonter v. Pasquotank County, supra.* Therefore, the First Claim for Relief should be dismissed.

ii. Assuming, <u>Arguendo</u>, that the Missing Middle Text Changes and the 2023 Ordinance Were Map Amendments, then Plaintiffs First Claim for Relief Must Still Be Dismissed because It is Barred by the Statue of Limitations.

N.C.G.S. § 160D-1405 provides the statute of limitations for challenging map amendments and text amendments and the time periods are substantially different. With respect to map amendments, subsection (a) provides:

> (a) Zoning Map Adoption or Amendments. – A cause of action as to the validity of any regulation adopting or amending a zoning map adopted under this Chapter or other applicable law or a development agreement adopted under Article 10 of this Chapter accrues upon adoption of the ordinance and shall be brought within 60 days as provided in G.S. 1-54.1.

Subsection (b) applies to text amendments and provides statute of limitations of one or three years.

In this case, Missing Middle 1.0 was adopted on July 6, 2021; Missing Middle 2.0 was adopted on May 10, 2022 and the Omnibus Ordinance was adopted on November 15, 2022. Plaintiffs filed their original Complaint on March 2, 2023 which was more than 60 days following the adoption date of each meaning claims that they were illegal map amendments are time barred. The 2023 Ordinance was adopted on January 17, 2023. The Amended Complaint adding this claim was filed on August 23, 2023, at least seven months later. As such, if the First Claim for Relief is in fact a claim against a "map amendment," it must be dismissed because the statute of limitations has run on all of the Challenged Ordinances. See N.C.G.S. § 160D-1405(a).

The burden is on the Plaintiffs to demonstrate their First Claim for Relief is not barred by the statute of limitations and was brought within the applicable time period. Stratton v. Royal Bank of Can., 211 N.C. App. 78, 81, 712 S.E.2d 221, 226 (2011). To do that in the case *sub judice,* Plaintiffs will have to concede the Missing Middle Text Changes and the Sec. 1.4.2 Amendments are text amendments, which then defeats their claim they are challenging map amendments, thus, requiring dismissal of the First Claim for Relief.

To state the obvious, Plaintiffs cannot have it both ways. Plaintiffs' First Claim for Relief rides entirely on their assertion that the ordinances they challenge were map amendments and the City failed to follow the map amendment process. (AC ¶¶ 66-80). Plaintiffs cannot allege on the one hand that the ordinances were map amendments, and then because they need a longer statute of limitations, claim the longer time period applicable to text amendments applies to their claim. *See, e.g., Tillery v. Tillery,* 248 N.C. App. 304, 790 S.E.2d 755 (2016)(unpublished)(a plaintiff cannot have the protection of one statute of limitations while "seek[ing] to invalidate the very [claim] to which the [longer statute of limitations] would apply."); *Baars v. Campbell Univ., Inc.,*

148 N.C. App. 408, 414, 558 S.E.2d 871, 875 (2002)("When determining the applicable statute of limitations, [North Carolina courts] are guided by the principle that the statute of limitations is not determined by the remedy sought, but by the substantive right asserted by plaintiffs."). In this case, the substantive right asserted by Plaintiffs in their First Cause of Action is the Missing Middle Ordinances and the Sec. 1.4.2 Amendments are map amendments that were enacted in violation of the procedures required for map amendments, thus, it is the map amendment statute of limitations applies.

North Carolina courts have also "strictly applied statutes of limitation in zoning cases" and routinely dismiss challenges to the validity of legislative zoning decisions when they are not brought within the applicable statute of limitations. *See e.g., Schwarz Properties, LLC v. Town of Franklinville,* 204 NC. App. 344, 348, 693 S.E.2d 271, 274 (2010). In *Thompson v. Town of Warsaw,* 120 N.C. App. 471, 462 S.E.2d 691 (1995), the plaintiff claimed property was rezoned "under the guise of a variance," and filed an action claiming notice was defective years later, after the rezoning statute of limitations had run. In dismissing this claim, the court held that "even where an amendment is adopted inconsistent with the notice requirements of Chapter 160[D], an action which attacks the validity of the amendment commenced [outside the statute of limitations] is barred." See Id. at 473, 462 S.E.2d at 692.

In sum, assuming, *arguendo,* that the Challenged Ordinances were map amendments, Plaintiffs First Claim for Relief must be dismissed, because the statute of limitations has expired for each.

C. Plaintiffs' Second Claim for Relief Alleging Violations of State and Federal Procedural Due Process Should be Dismissed.

i. Plaintiffs have Not Alleged and Do Not Have a Protected Property Interest in the Continuation if Existing Zoning.

Plaintiffs' Second Claim for Relief claims that the notices for the legislative hearings for the Challenged Ordinances violated their state and federal procedural due process rights because they failed to apprise them of "the pendency of the action" and afford them an opportunity to object. (AC ¶ 82). As explained below, Plaintiffs' Second Claim for Relief should be dismissed because Plaintiffs have not alleged, nor do they have, a constitutionally protected property interest sufficient to support the due process claims which requires they be dismissed.

It is black letter law that "the threshold question" in any state or federal procedural due process claim, "is whether a 'constitutionally protected property interest exists.'" *Coventry Woods Neighborhood Ass'n v. City of Charlotte*, 202 N.C. App. 247, 688 S.E.2d 538 (2010)(*quoting Reese v. Charlotte Mecklenburg Bd. of Educ.*, 196 N.C. App. 539, 555, 676 S.E.2d 481, 492 (2009). "Where there is no property interest, there is no entitlement to constitutional protection." *Id.* (*quoting State ex rel. Utilities Comm'n v. Carolina Utility Customer's Ass'n,* 336 N.C. 657, 678, 446 S.E.2d 332, 344 (1994)). The source of the required property interest stems from state law, and the plaintiff "must have a legitimate claim of entitlement to it . . . not an abstract need or desire for it or a unilateral expectation of it." *Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430, 436 (4th Cir. 2002). "To state a procedural due process claim," a plaintiff must demonstrate the existence of "a constitutionally cognizable . . . property interest." *Id.; see also Nance v. City of Albemarle,* 520 F. Supp. 3d 758, 789 (M.D.N.C. 2021); *Lipinski v. Town of Summerfield,* 230 N.C. App. 305, 750 S.E.2d 46 (2013).

North Carolina courts have routinely held that there is no protected property right in existing zoning regulations. *See e.g., Coventry Woods, supra,* at 258, 688 S.E.2d at 545. ("if all that Plaintiffs have is an expectation that existing land use rules will continue unchanged, they do not have a constitutionally-protected property interest sufficient to support a due process claim.");

Armstrong v. Armstrong, 322 N.C. 396, 401, 368 S.E.2d 595, 598 (1988)("There is no such thing as a vested right in the continuation of an existing law."); *MLC Automotive, LLC v. Town of Southern Pines,* 207 N.C. App. 555, 702 S.E.2d 68 (2010), (holding that plaintiff did not have a protected property right in the existing zoning regulations needed for due process claim and that "[t]he adoption of a zoning ordinance does not confer upon citizens . . . any vested rights to have the ordinance remain forever in force, inviolate and unchanged." *(quoting Browning-Ferris Indus. of South Atlantic v. Guilford County Bd. of Adjustment,* 126 N.C. App. 168, 171, 484 S.E.2d 411, 414 (1997))).

In the case *sub judice*, the Amended Complaint does not allege the existence of a protected property right, which is required to state a constitutional due process claim, so the Second Claim for Relief fails for this reason alone. *See e.g., Coventry Woods Neighborhood Ass'n v. City of Charlotte, supra.* The facts alleged also establish the absence of a property right, so the factual allegations further support dismissal.

Plaintiffs' properties are located in the R-4 zoning district, so all of their properties are governed by Missing Middle 1.0 and Plaintiffs Venters and Pierces are both subject to Missing Middle 2.0. Plaintiffs claim they object to changes in the previously applicable zoning regulations and they had a due process right to notice before that occurred. Plaintiffs allege that "they have an expectation and right that the zoning of their properties and those of the adjoining area will not be materially altered." (AC ¶ 37). Under controlling precedent, this is insufficient as a matter of law to create the required property rights. *See MLC Automotive, LLC v. Town of Southern Pines* and *Coventry Woods Neighborhood Ass'n v. City of Charlotte, supra.*

The Plaintiff-Solics' property is not governed by Missing Middle 2.0, but it is adjacent to 908 Williamson, part of which is subject to Missing Middle 2.0. However, the rules are the same.

In *Coventry Woods*, the plaintiffs claimed that they were not provided sufficient notice of a zoning change and had a property right against changes to the rezoning of adjoining tracts of property. The court rejected this argument and held: "There is no such thing as a vested right in the continuation of an existing law" and the plaintiff had no property right against a change to the zoning regulations for adjoining properties.

In sum, Plaintiffs have not alleged a protected property right necessary to provide them procedural due process rights and the facts in the Amended Complaint establish no such property right exists.[12]

ii. Plaintiffs' State Due Process Claim Must Also be Dismissed Because They Have Not Alleged the Lack of an Adequate State Remedy.

A plaintiff seeking relief for the violation of a state constitutional right through a direct claim must allege in the complaint the absence of an adequate state remedy or that claim must be dismissed. *See Copper ex rel. Copper v. Denlinger*, 363 N.C. 784, 788, 688 S.E.2d 426, 428 (2010)("To assert a direct constitutional claim . . ., a plaintiff must allege that no adequate state remedy exists to provide relief for the injury.") (citations omitted); *Nanny's Korner Day Care v. NCDHHS*, 264 N.C. App. 71, 79, 825 S.E.2d 34, 40 (2019) ("Plaintiffs have the burden of showing, by [the] allegations in the complaint, that the particular remedy is inadequate." (internal quotation marks and citation omitted)). Here, Plaintiffs have not alleged the absence of an adequate state remedy, nor have they alleged any facts which might show why any other remedies are inadequate. In fact, they have separately filed an administrative appeal which is their sole remedy to reverse

[12] Plaintiffs cite two cases in the Amended Complaint allegedly in support of the procedural due process claim, but neither control. *Frizzelle v. Harnett County*, 106 N.C. App. 234, 416 S.E.2d mentions due process in *dicta*, but the case was decided on different grounds, so the property rights analysis was never discussed. *In re: Appeal of McElwee*, 304 N.C. 68, 283 S.E.2d 115 (1981) related to the notice required for a County tax revaluation, thus, has no application the case *sub judice*.

the Townhouse Subdivision. Thus, Plaintiffs have yet again not met their pleading burden and the state due process claim must be dismissed for this reason as well.

iii. The Allegations in the Complaint Establish the Substantive Claim Alleging Inadequate Notice Should be Dismissed.

Even assuming Plaintiffs had a protected property right and had pleaded that along with the lack of an adequate state remedy, their claims of inadequate notice must fail. "The published notice must provide sufficient detail to apprise interested parties of the nature of the proposed action." David Owens, Land Use Law in North Carolina, 160-61 (4th ed. 2023). "A legal description of the property is not required, *and the full text of the proposed ordinance does not have to be published*." *Id.* (emphasis added).

The Court in *Carter v. Stanly County,* 125 N.C. App. 628, 482 S.E.2d 9 (1997) evaluated the notice rules as they apply to text amendments and *Carter* controls in the case *sub judice*. Stanly County passed an ordinance that allowed a prison to be located on property adjacent to the plaintiffs. The plaintiffs claimed that "the newspaper advertisement for the zoning text amendment hearing stated that the County intended to add "'government owned buildings, facilities, and institutions to the list of permitted uses in certain zoning districts" was insufficient to provide notice that 'prisons" would be included in that description." *Id.* at 635, 482 S.E.2d at 13. The Court disagreed and held that a legal advertisement is legal

> "so long as it fairly and sufficiently notifies the affected property owner of the character of the action proposed. We are not empowered to look behind the motives of the duly elected members of the County Commission, so long as they act in compliance with the law. In this instance, the Commission provided facially accurate notice to plaintiffs of the zoning text amendments under consideration."

Id. The *Carter* court continued to state: "We are not empowered to look behind the motives of the duly elected members of the County Commission, so long as they act in compliance with the law. In this instance, the Commission provided facially accurate notice to plaintiffs of the zoning

text amendments under consideration." *Id.* The court concluded with the following language that is particularly instructive in the current case:

> "We are mindful that, in the eyes of a property owner, abutting a state prison is quite a different thing from abutting a veteran's service office. However, we are a judicial, not a political, body. Since the Commission has adhered to the letter of the law, plaintiffs' true remedy in this case is a political one, and that we cannot give."

Id.

The Missing Middle 1.0 text change is 30 pages long and contains numerous regulations relating to housing types in certain residential districts in the City. (AC Ex. 2). Like in *Carter,* the City of Raleigh did not need to specifically list all of the proposed building types covered and referring to "certain zoning districts" was sufficient. The Missing Middle 1.0 notice includes the following information: the text change name "Missing Middle Housing" and number (TC-5-20); that it applies to certain *residential* districts (not *all* districts as ¶ 40 erroneously claims); and that it will add housing types, change density and lot sizes and setbacks (the very issues of which Plaintiffs complain). Lastly, it provides the name and contact information of who to contact for more information, which is additional information that was not in the *Carter* publication. This notice is more than sufficient under *Carter* to provide notice to anyone owning property in a residential district that new and more dense uses could be allowed and who to call to find out the details.

Like with Missing Middle 1.0, Plaintiffs claim that notice for Missing Middle 2.0 should have followed the rules for map amendments. They do not, however, include the language of the advertisement itself, but state only that the "actual printed notice" did not "employ content" that would fairly apprise interested parties of the nature of the action proposed. (AC ¶ 51). This is a legal conclusion and there are no facts, including the text of the notice, to support the claim, thus, it must be dismissed under Rule 12(b)(6). *See, e.g., Robertson v. Boyd*, 88 N.C. App. 437, 440,

363 S.E.2d 672, 675 (1988) (a motion to dismiss under Rule 12(b)(6) should be granted when the complaint fails to allege *facts* sufficient to state a cause of action).

The same is true with claims relating to the legal advertisement for the Sec. 1.4.2 Amendments. Paragraphs 62 and 65 state only that "upon information and belief" the newspaper notices were insufficient. Without more, those claims must also be dismissed as well.

D. Plaintiffs' Third Claim For Relief Must be Dismissed Because Missing Middle 2.0 Complies with North Carolina Law.

Plaintiffs allege that the Frequent Transit Development Option (FTDO) created by Missing Middle 2.0 is unlawful under N.C.G.S. § 160D-703 because it provides additional land uses and development entitlements to property owners in the Frequent Transit Area that are not available to other properties in R-4 and other districts that are not within a Frequent Transit Area. Plaintiffs are, again, incorrect for several reasons.

Section 160D-703 is entitled "Types of Zoning Districts" and subsection (a) provides that a city "may divide its territorial jurisdiction into zoning districts of any number, shape, and area deemed best suited to carry out the purposes of this Article. Within those districts, it may regulate and restrict the erection, *construction,* reconstruction, alteration, repair, *or use of buildings, structures, or land*." (emphasis added). Subsection (c) states *"[e]xcept as authorized by the foregoing,* all regulations shall be uniform for each class or kind of building throughout each district but the regulations in one district may differ from those in other districts." The FTDO regulates the construction and use of buildings within the R-4, R-6 and R-10 districts. (AC Ex. 3). This is expressly allowed under Subsection (c) and the appellate cases have never interpreted a zoning provision which regulates the use and construction of buildings in relation to its to distance from another use, road or other physical landmark to violate the statute and these ordinances are quite common. *See, e.g., Mangum v. Raleigh Bd. of Adj.,* 196 N.C. App. 249, 674 S.E.2d 742

(2009)(applying provision that required adult establishments to be 2000 feet from a school); *MCC Outdoor LLC v. Town of Franklinton Bd. of Commissioners,* 169 N.C. App. 809, 610 S.E.2d 794 (2005)(ordinance required property with a sign to be adjacent to an interstate or FAP highway and 600 feet from the edge of the right-of way); *Templeton v. Town of Boone,* 208 N.C. App. 50, 701 S.E.2d 709 (2010)(steep slope and viewshed regulation applied only to properties 100 feet from major traffic corridors and with a slope of 30% or greater").

Tonter v. Pasquotank County, supra is again on point where the court analyzed the predecessor statutes to N.C.G.S. §§ 701, 702 and 703 and upheld a text change that imposed different regulations on all properties within the County that did not have 25 feet of frontage on a state or County approved road and were not within 1000 feet of a public water supply. Even though the ordinance imposed different regulations on properties in the same zoning district, *Tonter* did not consider the text change to violate N.C.G.S. §160D-703(c), and held it was valid because it furthered a proper health, safety and welfare purpose.

Thus, *Tonter* upheld the validity of a County ordinance that regulated the use of buildings by distance from among other things, a roadway, and found that ordinance to comply with the predecessor statute to N.C.G.S. §160D- 703(a), as well §160D-701 and 702. This is identical to the FTDO which provides different regulations to property within one-have mile of certain transit corridors. The FTDO provisions further the public purposes of adding more housing options and types and reducing carbon emissions and other air pollutants. (AC Ex. 3).

Finally, even if the FTDO creates a type of sub-class within R-4 and other districts, all similarly situated property owners are still treated the same because the differences are based on the physical location of property which has different characteristics. This is consistent with the cases cited above, particularly *Tonter* where the regulations applied equally to all properties falling

within and without the same areas (with road frontage and proximity to public water supply). *See Walker v. Town of Elkin,* 254 N.C. 85, 87 118 S.E.2d 1, 3 (1961)(interpreting predecessor statute to N.C.G.S. § 160D-703 to require uniformity "in all areas in a defined *class* or district")(emphasis added).

CONCLUSION

Based on the foregoing, the City respectfully requests that Plaintiffs' Amended Complaint be dismissed in its entirety pursuant to N.C.R. Civ. P. 12(b)(6).

Respectfully submitted, this the 27th day of November, 2023.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing ***City of Raleigh's Brief In Support of Motion To Dismiss Amended Complaint (N.C.R. Civ. P. 12 (b)(6))*** has been duly served by electronic mail addressed to the following counsel of record:

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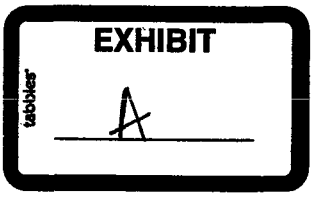
This, the 27th day of November, 2023.

/s/ *Robin L. Tatum*
Robin L. Tatum

Exhibit A

Excerpts from City of Raleigh Unified Development Ordinance



Article 10.2. Review Procedures

Sec. 10.2.1. Common Review Procedures

A. Applicability

The following requirements are common to many of the procedures contained in this UDO and apply to applications submitted under this Chapter. Additional details may be included for each specific procedure.

B. Application Requirements

1. Initial Application Submittal

All applications for development approval shall be submitted in accordance with the requirements of this UDO and shall be filed with the City.

2. Forms

Applications required under this UDO must be submitted, fully completed, on forms and in such numbers as required by the City. For required application forms, as may be found on the City's web portal, see *Sec. 10.2.2.* through *Sec. 10.2.18.*

3. Fees Schedule

a. The City of Raleigh Fee Schedule is maintained by the Budget and Management Services Department and is updated annually, with fees to be effective the first day of the fiscal year, July 1. Except as otherwise provided within the City of Raleigh Fee Schedule, fee increases shall be based on the average annual prior calendar year United States Department of Labor Consumer Price Index - All Urban consumers and as may be modified from time to time by the City Council.

b. Before review of an application, including applications for re-hearings, all filing fees must be paid in full. No refund of the fee or any part of the fee shall be made unless the application is withdrawn prior to a hearing.

c. A fee shall not be required if the application is made by the City or any agency created and appointed by the City Council to perform governmental functions.

4. Application Deadline

Complete applications shall be submitted in accordance with the City's filing calendar. A calendar indicating submittal dates shall be developed by the City each year and shall be maintained and updated by the City.

C. Public Notice Requirements

For public notice, meeting and hearing requirements applicable to each procedure, see *Sec. 10.1.8.* Any defective notification of a required City procedure, not otherwise required by State or Federal law, does not invalidate the proceedings if the defect is determined to be harmless error by the City.

1. Mailed Notice

a. Whenever mailed notice is required by Sec. 10.1.8. or elsewhere in this UDO, at the time of submission of the application, the applicant shall deliver to the City first class stamped envelopes addressed to the property owners of the property included in the proposed application and the owners of all property within 100 feet on all sides of the subject property at the time of submittal. If a portion of a property is requested for rezoning, the notification radius shall be calculated from the property lines, and not the requested zoning boundary. For zoning map amendments, the mailing radius shall be increased to 500 feet. The mailing radius for neighborhood meetings is that set forth in *Section 10.2.4.D.* For zoning map amendments that directly affect more than 50 properties owned by a total of at least 50 different property owners, the applicant may elect to provide mailed notice of the Planning Commission public meeting by postcard instead of firstclass mail. Envelopes shall be provided, and notice given to non-owner tenants in accordance with subsection b.

b. Mailed notice shall be provided to all property owners and tenants as reflected in the Wake County tax records at the time of submittal. Additionally, all property owners and tenants in the area of request shall receive mailed notice.

c. Where the tax records reflect a mailing address for an owner of property under subsection a. to be different than the address of the property owned, then notification shall also be mailed to the address of the property itself. The applicant shall comply with the Section *10.2.1.C.1.a.* requirements, except if the individual mailing addresses of tenants in any

type multi-tenant properties are not readily available, the multi-tenant property shall be posted in accordance with *Section 10.2.1.C.4(f)*.

d. When mailed notice is required for pre-submittal public meetings, the applicant may provide to the City return receipts from the mailing notification by the applicant to the required property owners and tenants by certified mail, returned receipt requested.

e. Mailed notices must be sent to the addressees at least 10 calendar days prior and not more than 25 calendar days prior to the date of any public meeting.

f. Except as otherwise directed by the City Council, the City Board or Commission reviewing the matter shall not require additional notification.

g. For zoning map amendments that directly affect more than 50 properties owned by a total of at least 50 different property owners, the City may elect to forego mailed notice and instead give notice of the public hearing by publication provided that the newspaper advertisement is not less than ½ of a newspaper page in size. Property owners who reside outside of the newspaper circulation area, according to the addresses listed in the most recent property tax listing for the affected properties, shall be notified by first class mail.

h. Except for a City-initiated zoning map amendment, when an application is filed to request a zoning map amendment and that application is not made by the owner of the parcel of land to which the amendment would apply, the applicant shall certify to the City Council that the owner of the parcel of land, as shown on the county tax listing, has received actual notice of the proposed amendment and a copy of the notice of public hearing. The applicant shall certify to the City Council that proper notice has been provided in fact and such certification shall be deemed conclusive in the absence of fraud. Actual notice shall be achieved as follows:

   i. Actual notice of the proposed amendment and a copy of the notice of public hearing shall be by any manner permitted under N.C. Gen. Stat. §1A-1, Rule 4(j).

   ii. If notice with due diligence cannot be achieved by personal delivery, registered or certified mail or by a designated delivery service, notice may be given by publication consistent with N.C. Gen. Stat. §1A-1, Rule 4(j1). (See N.C. Gen. Stat. §160D-601).

   i. For quasi-judicial hearings, mailed notice shall be provided to all other persons with an ownership interest in the subject property as set forth in all applicable State and local laws.

2. Published Notice

a. When published notice is required, notice of the public hearing shall be published by the City at least once in a newspaper having general circulation in the City not more than 25 or less than 10 calendar days prior to the date of the public hearing.

b. In the case of any ordinance adopting, amending or repealing any provision of this UDO, including zoning map amendments, notice of a public hearing shall be published once a week in a newspaper having general circulation within the City for 2 successive calendar weeks.

c. In determining the time period, the day of publication is not to be included but the day of the hearing shall be included.

3. Web Notice

a. When web notice is required, notice shall be posted on the City's web portal within 5 business days following acceptance of a complete application; required web notice of the decision shall be posted on the City's web portal no later than 3 business days from the date of decision.

b. When web notice of any public meeting is required, notice of the public meeting shall be posted on the City's web portal not less than 10 calendar days prior to the date of the public hearing.

c. In determining the time period, the day of posting on the City's web portal is not to be included but the day of the hearing shall be included.

4. Posted Notice

a. When posted notice of any public meeting is required, signage shall be posted by the City on the property at a point visible from the nearest public street or streets if the property fronts on multiple streets.

b. In the case of multiple parcels, a posting on each individual parcel is not required, but sufficient signage shall be posted to provide reasonable notice to interested persons.

c. The sign shall not measure less than 18 inches x 24 inches, and constructed of durable materials sufficient to withstand the effects of weather. Signage shall be posted at least 10 calendar days prior to the date of the public meeting.

d. The posted sign shall be returned to the City by the applicant either at the public meeting or within 3 business days following the public meeting.

e. Posted notice shall not be required for Planning Commission meetings for zoning map amendments that directly affect more than 50 properties owned by a total of at least 50 different property owners.

f. When multi-tenant properties are required to be posted pursuant to *Sec. 10.2.1.C.1. b.*, signage shall be posted by the applicant, and shall comply with the following:

   i. Signage shall be posted in the right-of-way immediately adjacent to the multi-tenant property at a conspicuous location visible from the nearest public street or streets if the property fronts on multiple streets.

   ii. The sign shall not measure less than 18 inches x 24 inches, and constructed of durable materials sufficient to withstand the effects of weather. Signage shall be posted at least 10 calendar days prior to the date of the meeting.

   iii. The content of the required posted notice shall be as follows:

      a) a case number (if one has been assigned);

      b) a description of application type;

      c) the address to the City's web portal where more information about the application can be obtained; and

      d) a phone number and email to contact the Applicant.

   iv. The Applicant shall provide the City with documentation (photo and attestation as to date of posting) establishing compliance with the posting requirements of this subsection.

5. Content of Notice

a. Published, Web or Mailed Notice

The content of required published, web or mailed notice shall be as follows:

i. A case number;

ii. The address or Parcel Identification Number of the subject property (if available). Zoning map amendments that directly affect more than 50 properties owned by a total of at least 50 different property owners are exempted from this specific content requirement.

iii. The general location of the land that is the subject of the application, which may include a location map;

iv. A description of the action requested and nature of the questions involved;

v. The time, date and location of the public hearing, public meeting or the neighborhood meeting if applicable and the name of the reviewing body;

vi. A phone number and e-mail address to contact the City;

vii. The address for the City's web portal;

viii. A statement that persons may appear at the public hearing, public meeting or at the neighborhood meeting if applicable or make written comments to the City as applicable; and a statement that more specific information is available at the City.

b. Posted Notice

Required posted notice of a public meeting or public hearing shall provide at least the following:

i. A case number;

ii. A description of the action requested;

iii. The address for the City's web portal; and

iv. A phone number and e-mail address to contact the City.

6. Notice of Decision

a. Except when notice is provided by permit issuance, notice of decision shall provide at least the following:

i. A case number;

ii. The address of the subject property (if available and relevant);

iii. The general location of the land (if relevant) that was the subject of the application, which may include a location map;

iv. A description of the application;

v. The date the application was decided;

vi. A description of whether the application was approved, approved with conditions or denied;

vii. A phone number and e-mail address to contact the City; and

viii. The address for the City's web portal.

b. Unless otherwise stated by general law, this UDO or by the rules of procedure adopted by the applicable reviewing body, within 10 business days following the effective date of a decision, a copy of the decision shall be sent by either electronic notification or first class mailing to the applicant and the property owner (if the property owner is not the applicant) and filed with the City, where it shall be made available for public inspection during regular office hours. In the case of permit issuance, receipt of the permit by the applicant, contractor, property owner or their representative shall constitute written notice of the decision.

c. In the case of a quasi-judicial decision, notice of the decision shall also be given to the applicant, the property owner (if the property owner is not the applicant) and each person who has filed a written request for notice with the presiding officer or secretary of the reviewing body (if any) at the time of the hearing of the case, with such notice to be delivered to the requesting party by either personal service or by registered mail or certified mail, return receipt requested.

D. Additional Requirements

1. Quasi-Judicial Public Hearing Requirements

For notice and hearing requirements applicable to each quasi-judicial procedure see *Sec. 10.1.8.*

a. Rules of Procedure

i. In all quasi-judicial hearings, rulings must be based only upon the evidence received by the reviewing body at the hearing.

ii. The review body shall act as an impartial decision-maker. See Sec. 10.1.9.D. for additional requirements of an impartial decision maker.

iii. The reviewing body shall act as a fact-finding body and shall approve or disapprove the application in accordance with the evidence presented before it which is substantial, competent, relevant and material.

iv. The burden of proof is upon the party who files the application and if the party fails to meet its burden, the reviewing body shall deny the request.

b. Conduct of Hearing

i. The presiding officer of the reviewing body shall call the proceedings to order and announce that the hearing has begun.

ii. All witnesses who are to testify at the hearing shall be sworn in.

iii. The City's officer shall briefly describe the applicant's request, introduce and review all relevant City Code provisions and answer questions from the reviewing body.

iv. The applicant (if acting in a pro se capacity) or their legal counsel shall present the case in support of its application.

v. Parties in interest, including the City, shall have the right to present evidence and cross-examine witnesses, as to any competent, material and relevant facts, inspect documents and make oral argument.

vi. Counsel for the reviewing body may advise the reviewing body as to the applicable law and the findings of fact that must be made to approve or deny the request.

vii. The reviewing body shall conduct open deliberation of the application. The presiding officer of the reviewing body shall have the discretion to reopen proceedings for additional testimony or argument by the parties when the reviewing body determines that a decision cannot be made with the testimony at hand.

viii. Reasonable and appropriate conditions and safeguards may be imposed as part of any approval. A condition offered by the reviewing body for an approval must be related to the evidence received by the reviewing body at the hearing as provided for under all applicable State and local laws.

ix. Every decision shall include the vote, abstention from voting or absence of each member. The decision, including findings of fact and conclusions of law, shall be filed with the City Clerk. A written copy of the decision shall be delivered in accordance with *Sec. 10.2.1.C.6.*

x. The presiding officer of the reviewing body shall rule on the admissibility of evidence and make determinations on whether evidence is competent, material, relevant or redundant.

c. Examination

Members of the reviewing body may ask questions of persons presenting testimony or evidence at any time during the proceedings until commencement of deliberation.

d. Cross-Examination of Witnesses

After each witness testifies, testimony is subject to cross-examination.

e. Rules of Evidence

i. Competent evidence shall not preclude reliance by the decision-making board on evidence that would not be admissible under the rules of evidence as applied in the trial division of the General Court of Justice if;

a) The evidence was admitted without objection; or

b) The evidence appears to be sufficiently trustworthy and was admitted under such circumstances that it was reasonable for the reviewing body to rely upon it.

ii. Competent evidence shall not be deemed to include the opinion testimony of lay witnesses as to any of the following:

a) The use of property in a particular way would affect the value of other property;

b) The increase in vehicular traffic resulting from a proposed development would pose a danger to the public safety; and

c) Matters about which only expert testimony would generally be admissible under the rules of evidence.

iii. Documentary business records may be presented in the form of a copy or the original. Upon request, parties shall be given an opportunity to compare the copy with the original.

f. Statements of Counsel

Statements of counsel, or any individual acting in a pro se capacity, shall only be considered as argument and not testimony unless counsel or the individual is sworn in and the testimony is based on actual personal knowledge of the matters which are the subject of the statements.

g. Continuances and Deferrals

The reviewing body shall consider requests for continuances and may grant continuances in its sole discretion. If, in the opinion of the reviewing body, any testimony or documentary evidence or information presented at the hearing justifies allowing additional research or review in order to properly determine the issue presented, then the reviewing body may continue the matter to a time certain to allow for such research or review.

Sec. 10.2.2. Comprehensive Plan Amendment

A. Applicability

1. The City Council shall consider amendments to the Comprehensive Plan.
2. Amendments to the Comprehensive Plan shall be made in accordance with the provisions of this section.

B. Pre-Application Conference

Before submitting an application for a Comprehensive Plan amendment, an applicant shall schedule a pre-application conference with the Planning Director to discuss the procedures, standards and regulations required for approval. This requirement may be waived at the discretion of the Planning Director.

C. Application Requirements

1. An application for a Comprehensive Plan amendment shall be submitted in accordance with the general application requirements of *Sec. 10.2.1.B.*
2. An application for a Comprehensive Plan amendment will only be accepted in accordance with the City's filing calendar.
3. A Comprehensive Plan Amendment form must be filled out completely to initiate a change.

D. Approval Process

1. Planning Director Action

a. The Planning Director shall review the application for a Comprehensive Plan amendment in accordance with Planning Director Review in *Sec. 10.2.2.E.* and provide a report and recommendation to the Planning Commission of a completed application.

b. The Planning Director shall also provide a report and recommendation to the City Council when the City Council considers authorizing a public hearing on the proposed Comprehensive Plan amendment.

2. Planning Commission Action

a. Within 45 days following submission of a completed application and City approval of all required technical documents, the Planning Commission shall hold a public meeting on the proposed amendment which shall be noticed in accordance with *Sec. 10.1.8.* and *Sec. 10.2.1.C.*

b. The Planning Commission may refer the proposed amendment to a work session of the Planning Commission or one of its committees for additional consideration or the Planning Commission may act upon the application.

c. Within 90 days after its receipt of the proposed amendment, the Planning Commission shall make its recommendation to the City Council. Within this time period, the Planning Commission may request extensions of time which may be granted by the City Council. If no recommendation is made within this time period and if no extension is granted, the City Council may take action on the application without further involvement of the Planning Commission.

d. The Planning Commission shall make its recommendation to the City Council in writing. The Planning Commission shall recommend that the request be approved, approved as revised, denied or request further study.

3. Public Hearing by City Council

a. Following the recommendation of the Planning Commission or expiration of the applicable Planning Commission review period without a recommendation, the City Council shall conduct a public hearing. Notice of the public hearing shall occur within 60 days of receiving the request from the Planning Commission.

b. The public hearing shall be noticed in accordance with *Sec. 10.1.8.* and *Sec. 10.2.1.C.*

4. City Council Public Hearing and Action

a. Before taking final action on a proposed Comprehensive Plan amendment, the City Council may consider the recommendations of the Planning Commission and Planning Director and comments made at the public hearing.

b. The City Council may review the application in light of the considerations in *Sec. 10.2.2.E.*

c. The City Council shall approve, approve as revised, deny, send the proposed Comprehensive Plan amendment back to the Planning Commission or Planning Director for additional consideration.

d. Approval by the City Council shall include the adoption of a statement describing how the City Council considers the action taken to be reasonable and in the public interest.

e. All enactments, amendments and changes must be in the form of a resolution. Copies of Comprehensive Plan amendments shall be kept on file at the office of the City Clerk.

E. Considerations for Planning Director Review

The following lists of considerations for the Planning Director's review and recommendations regarding a proposed Comprehensive Plan amendment are not all-inclusive. Review and recommendations of proposed Comprehensive Plan amendments may consider whether:

1. The proposed amendment corrects an error or meets the challenge of some changing condition, trend or fact;
2. The proposed amendment is in response to changes in state law;
3. The proposed amendment constitutes a substantial benefit to the City as a whole and is not solely for the good or benefit of a particular landowner or owners at a particular point in time; and
4. The proposed amendment is consistent with other identified Plan policies and adopted area plans;
5. The impact of the proposed amendment has with regard to:
   a. Established property or proposed development in the vicinity of the proposed amendment;
   b. Existing or future land use patterns;
   c. Existing or planned public services and facilities;
   d. Existing or planned roadways;
   e. The natural environment, including air, water, noise, stormwater management, wildlife and vegetation; and
   f. Other policies of the Comprehensive Plan.

Sec. 10.2.3. UDO Text Changes

A. Applicability

1. Text changes are legislative decisions. There are two types of text changes:
   a. a text change to the provisions of this UDO (a "TC"); and
   b. a text change to a conditional use zoning condition, including an amendment to any Planned Development Master Plan (a "TCZ").
2. Requests for TC's may be made by the City Council, the City staff or members of the public.
3. Requests for TCZ's can only be made by the owner of the property that is the subject of the TCZ. A request for a TCZ shall follow the procedures for conditional use rezoning applications under *Sec. 10.2.4*.

B. Pre-Application Conference

Before a member of the public may submit an application for a text change, the applicant shall schedule a pre-application conference with the Planning Director to discuss the procedures, standards and regulations required for approval. This requirement may be waived at the discretion of the Planning Director.

C. Application Requirements

1. An application for a TC shall be submitted in accordance with the general application requirements of *Sec. 10.2.1.B*.
2. A request for a TC by a member of the public must obtain Council authorization. To initiate that process, the applicant must submit an application describing the request to City Planning. Within 90 days of submission, the Planning Director shall provide a report and recommendation and place the request on the City Council's agenda. If Council authorizes the request, the applicant shall thereafter follow the process set forth in this Section.

D. Approval Process

1. Planning Director Action

The Planning Director shall review the TC application in accordance with *Sec. 10.2.3.E*. and provide a report and recommendation to the Planning Commission.

2. Planning Commission Action

a. Upon acceptance of the TC application, the Planning Commission or one of its committees shall hold a legislative hearing on the request. Public notice of the legislative hearing shall be provided in accordance with *Sec. 10.1.8*.
b. When conducting a review of a TC application, the Planning Commission shall advise and comment on whether the proposed action is consistent with any comprehensive plan that has been adopted, and any other applicable adopted plan.
c. Within 60 days after receipt of the proposed amendment, the Planning Commission shall provide a written report to the City Council. If no recommendation is made within this time period and if no extension is granted, the City Council may nonetheless take action on the application without further involvement of the Planning Commission.
d. The Planning Commission's written report to the City Council shall contain its recommendation, which addresses the proposed text amendment's plan consistency and other matters it deems appropriate.

3. City Council Legislative Hearing and Action

a. Following the recommendation of the Planning Commission or expiration of the applicable Planning Commission review period without a recommendation, the City Council shall conduct a legislative hearing.
b. Notice of the public hearing shall occur within 60 days of receiving the Planning Commission's written report.
c. Notice of the hearing shall be given in accordance with *Sec. 10.1.8*.

d. At the hearing, the Planning Director shall present the request, including the recommendation and comments of the Planning Commission, if any. If the request was submitted by a member of the public, those in favor of the TC will be allowed a total of 8 minutes to explain their support and those opposed shall be allowed a total of 8 minutes to explain their opposition. The Council, in its discretion, may grant an equal amount of additional time to each side.

e. The City Council shall approve, approve as revised, deny or send the proposed TC back to the Planning Commission or Planning Director for additional consideration.

f. When adopting or rejecting any TC, the City Council shall approve a brief statement describing whether its action is consistent or inconsistent with the Comprehensive Plan.

E. Considerations for Planning Director Review

The following is a non-exclusive list of considerations for the Planning Director to take into account when reviewing a TC request. The Planning Director may consider whether:

1. The proposed TC corrects an error or meets the challenge of some changing condition, trend or fact;
2. The proposed TC is in response to changes in state law;
3. The proposed TC is generally consistent with the Comprehensive Plan and other applicable adopted plans;
4. The proposed TC is generally consistent with the stated purpose and intent of this UDO;
5. The proposed TC provides a benefit to the City as a whole and is not solely for the good or benefit of a particular landowner or owners at a particular point in time;
6. The proposed TC significantly impacts the natural environment, including air, water, noise, stormwater management, wildlife and vegetation; and
7. The proposed TC significantly impacts existing conforming development patterns.

Sec. 10.2.4. Rezoning

A. Applicability

This Section applies to requests to change the City's Official Zoning Map ("rezonings") and TCZ's as defined in Sec. 10.2.3. Rezonings and TCZ's are legislative decisions.

B. Pre-Application Conference

Before submitting an application for a rezoning or TCZ, an applicant shall schedule a pre-application conference with the Planning Director to discuss the applicable procedures, standards and regulations. This requirement may be waived by the Planning Director.

C. Neighborhood Meetings

1. Pre-Submittal Neighborhood Meeting.

a. A pre-submittal neighborhood meeting is required for all rezoning and TCZ applications, except where the City is the applicant. The applicant shall provide an opportunity to meet with property owners of the development site and property owners and tenants within the mailing radius described in Sec. 10.2.1.C.1. The location of the neighborhood meeting must be at, or in reasonable proximity to, the subject property.

b. The required pre-submittal neighborhood meeting must be conducted prior to submittal of the rezoning or TCZ application. The meeting may not occur more than 6 months prior to the submittal of the application. Notice of the neighborhood meeting must be provided in accordance with Sec. 10.2.1.C.1.

c. A written report of the meeting, made by the applicant, shall be included with the application given to City Planning. The report shall include at a minimum, a list of those persons and organizations contacted about the neighborhood meeting, the date, time and location of the meeting, a roster of the persons in attendance at the meeting and a summary of issues discussed at the meeting.

2. Second Neighborhood Meeting.

a. A second neighborhood meeting shall be required for applications requiring a pre-submittal neighborhood meeting, which meet any of the following criteria:

i. The subject property is five acres or more;

ii. The proposed change increases the maximum building height to 5 stories or more, or increases the maximum building height by 5 stories or more;

iii. The proposed change increases residential density by an additional 10 dwelling units per acre;

iv. The request is to change from a Residential or Conservation Management (CM) zoning district to a mixed use or special zoning district (other than CM); or

v. The request seeks to create any type of PD district.

b. The second required neighborhood meeting must be conducted in a manner consistent with Sec. 10.2.4.C.1.a. and after City Planning has confirmed that the application is complete, but no earlier than thirty days following the application submittal date. Notice of the second required neighborhood meeting must be provided in accordance with Sec. 10.2.1.C.1.; however, the notice radius shall be one thousand feet. In addition, the property shall be posted in accordance with Sec. 10.2.1.C.4.

c. A report of the second meeting, made by the applicant, shall be delivered to City Planning no less than ten days prior to the first Planning Commission meeting at which the application is considered. The report shall include at a minimum, a list of those persons and organizations contacted about the neighborhood meeting, the date, time and location of the meeting, a roster of the persons in attendance at the meeting and a summary of issues discussed at the meeting. Any other person attending the second neighborhood meeting may submit written

comments following the meeting; however, the written comments must be received by City Planning within the same time frame described above in order to be included in the Planning Commission agenda packet.

D. Application Requirements

1. General Requirements

a. An application for any rezoning or TCZ shall be submitted in accordance with the application requirements of Sec. 10.2.1.B.

b. Where practicable, rezonings should correspond with the boundary lines of existing tracts and lots.

c. No rezoning that down-zones property shall be initiated without the written consent of all property owners whose property is the subject of the proposed down-zoning, unless the down-zoning amendment is initiated by the City. "Down-zoning" means a zoning amendment that affects an area of land in one of the following ways:

   i. By decreasing the development density of the land to be less dense than was previously allowed; or

   ii. By reducing the permitted uses of the land to fewer uses than were previously allowed.

d. If the change in intensity from the proposed rezoning or TCZ meets or exceeds the thresholds for a traffic impact analysis ("TIA") as described in the Street Design Manual, then submittal and staff review of a TIA shall be required as a part of completing the application.

e. No application shall be deemed complete until all the applicable documentation described in Sec. 10.2.4.D. has been submitted

f. An application for any rezoning or a TCZ may be, but is not required to be, submitted concurrently with an application for a Comprehensive Plan amendment, and the two applications may be processed and reviewed concurrently.

g. Should the property subject to the application not include an entire tax parcel, a survey-based metes and bounds of the subject property shall be required.

h. If an application is placed on hold at the request of the applicant for a period of six (6) consecutive months or more, or the applicant fails to respond to comments or provide additional information requested by the City for a period of six (6) consecutive months or more, the application review shall be discontinued and the application will be considered administratively withdrawn. A new application and fee shall be required to resume the rezoning effort. The development regulations in effect at the time the new application is submitted shall be applied to the application.

2. Additional Requirements for Conditional Rezoning and TCZ Applications

a. Conditional rezoning and TCZ applications must contain conditions which propose greater restrictions on development and use of the property than would apply in the corresponding general use district, and this UDO. The conditions may specify the use or uses prohibited or the use or uses allowed, including the maximum number of dwelling units and all development regulations which are requested for the property submitted for rezoning; however, the requested use or uses must be permitted in the corresponding general use district.

b. All those regulations which apply to the corresponding general use zoning district are the minimum requirements in the conditional district.

c. The City Council may accept zoning conditions that alter the maximum block standards in Sec. 8.3.2., the stub streets standards in Sec. 8.3.4.C. and the driveway standard for Residential Uses, Mixed Use and Nonresidential Uses in Sec. 8.3.5.C.2. and 3. No such zoning conditions shall be accepted for applications within the -TOD unless the means of providing for safe, efficient and convenient vehicular, bicycle and pedestrian circulation are demonstrated in a site plan, rendering or other image included with the conditional rezoning application per Sec. 10.2.4.D.2.g. Such zoning conditions may be approved by the City Council when the offered zoning conditions provide for safe, efficient and convenient vehicular and pedestrian access within developments and between adjacent developments and do not adversely affect traffic congestion. When these zoning conditions are included, the application shall be accompanied by additional information addressing how safe, efficient, and convenient vehicular and pedestrian access within developments and between adjacent developments is being achieved.

d. Zoning conditions associated with a lot line common to the subject property and an adjacent property shall reference the Deed Book/Page Number or recorded Book of Maps/Page Number of the associated adjacent property.

e. Exclusionary conditions which discriminate based on race or religion, specify ownership status or a minimum value of improvements shall not be submitted as a part of the petition.

f. No condition shall be submitted that proposes to regulate right-of-way reimbursement values or prohibit submittal of a traffic impact analysis. Any condition that prohibits street access or public street connections or extensions shall comply with subsection c above.

g. Site plans, renderings or other images may be submitted as part of the conditional rezoning application provided all elements of the site plan, rendering or image graphically illustrate the written text of the conditions in which case the written zoning conditions shall remain as the controlling instrument.

h. No condition may be made part of the petition which specifies the establishment and protection of tree conservation areas or tree protection areas unless the condition ensures that 100% of the critical root zones of trees proposed for protection and located on the subject rezoned property shall also be undisturbed areas.

i. No condition may be made part of the petition which specifies the authorization or consideration of a Design Alternate.

j. No variance shall be allowed to a zoning condition that is approved in conjunction with a conditional rezoning or TCZ.

3. Additional Requirements for CMP and PD District Applications

In addition to a Rezoning Application, a Master Plan Application must be submitted in complete form to initiate a Campus (Sec. 4.6.3. Campus (CMP)) or Planned Development (Sec. 4.7.4. Planned Development (PD)) rezoning.

4. Additional Requirements for -HOD-G and -HOD-S Applications

a. Any application for rezoning property to an -HOD-G and or -HOD-S districts, not filed by the City, must be signed by all of the property owners within the area proposed to be rezoned to an historic overlay district.

b. An investigation and report describing the significance of the buildings, structures, features, sites or surroundings included in any proposed -HOD-G and -HOD-S and a description of the boundaries of the district, changes in boundaries or de-designation due to loss of significance, shall be prepared and/or reviewed by the Historic Development Commission. The City Council shall refer the report to the North Carolina Department of Cultural Resources.

c. The Department of Cultural Resources, acting through an agent or employee designated by its Secretary, may analyze and make recommendations concerning such report and description of proposed boundaries. Failure by the Department of Cultural Resources to submit its written analysis and recommendations to the City within 30 calendar days after a written request for such analysis has been received by the Department of Cultural Resources shall relieve the City of any responsibility for awaiting such analysis (N.C. Gen. Stat. §160D-944(b)(2).

d. The City Council shall refer the report and proposed boundaries to the Planning Commission, in accordance with Sec. 10.2.4.F.4.

e. The City Council may refer the report to any other interested body for its recommendations prior to taking action to amend the Official Zoning Map.

5. Additional Requirements for -NCOD Applications

a. Except for applications filed by the City, City Planning is instructed not to accept -NCOD applications unless the application meets all the following:

i. Is requesting that either at least a minimum of 15 contiguous acres be zoned -NCOD or that an existing -NCOD be extended. If allowed in the underlying zoning district, all uses in the civic use category shall be excluded when determining the minimum 15-acre requirement; however, such civic uses may be used in determining contiguity of the area.

ii. Is signed by all of the property owners within the area proposed to be rezoned -NCOD.

iii. Is applied to an area where at least 75% of the lots are developed.

iv. Is located in an area in which the City Council has adopted into Sec. 5.4.3.F. specific neighborhood built environmental characteristics and regulations.

b. Within four years following the City Council adoption of specific neighborhood built environmental characteristics and regulations, City Planning may accept an application rezone property to a -NCOD.

c. If the City Council accepts a rezoning petition to apply a -NCOD, staff shall provide direct mailed notice to all property owners in the proposed overlay district. Additional mailed notice shall be provided in accordance with Sec. 10.2.1.C.1.

6. Additional Requirements for DX- District Applications

New applications requesting a DX- District must be for property located contiguous to or directly across the street from an existing DX- District.

7. Additional Requirements for TOD- Applications

Except for applications initiated by the City, new applications requesting a TOD- District must be for property located contiguous to or directly across the street from an existing TOD- District or within 1,320 feet of a bus rapid transit (BRT) route.

E. Approval Process

1. Planning Director Action

a. The Planning Director shall review the application for a proposed rezoning or TCZ in light of the considerations for Planning Director Review in Sec. 10.2.4.E. In reviewing any required CMP or PD master plan, the Planning Director shall consult with the heads of the departments of Public Utilities, Transportation, Engineering Services, Parks and Cultural Resources, Development Services and Fire to check the proposed master plan against the requirements of the UDO and other applicable technical requirements of the City.

b. Following review, the Planning Director shall prepare a report and forward the application to the Planning Commission.

2. Planning Commission Action

a. The Planning Commission, or one of its committees shall hold a legislative hearing on the application. The legislative hearing shall be noticed in accordance with the provisions of Sec. 10.2.1.C.

b. During the review and deliberations of the Planning Commission, conditions may be removed, added, or modified, zoning districts changed and/or zoning boundaries altered, no more than one (1) time.

c. No changes to the conditions shall be considered and deliberated on by the Planning Commission unless the following limitations are met:

i. Unsigned conditions must be submitted to City Planning at least 10 calendar days before the date of the next meeting at which the Planning Commission discussion of the application is scheduled;

ii. The unsigned conditions must be signed by all owners of the property sought to be rezoned and submitted to City Planning at least two business days before the date of the next meeting at which the Planning Commission discussion of the application is scheduled; and

iii. The signed conditions cannot modify the unsigned conditions except to respond to staff comments or to make non-substantive or clerical corrections.

d. Within 60 days after its receipt of the proposed rezoning, the Planning Commission shall make its recommendation to the City Council. Within this time period, the Planning Commission may request extensions of time which may be granted by the City Council. If no recommendation is made within this time period and if no extension is granted, the City Council may take action on the application without further involvement of the Planning Commission.

e. When conducting a review of proposed rezoning or TCZ pursuant to this section, the Planning Commission shall advise and comment on whether the proposed action is consistent with the Comprehensive Plan and any other officially adopted plan that is applicable.

f. The Planning Commission shall make its recommendation to the City Council in writing. The Planning Commission shall recommend that the request be approved, approved as revised or denied. A written recommendation shall address plan consistency and other matters as deemed appropriate by the Planning Commission.

g. In no case shall changes to the conditions be accepted following an action by the Planning Commission and prior to the Planning Commission's written recommendation being received by the City Council, other than non-substantive, technical revisions to the text of the conditions, in which case such revised conditions must be signed by all of the property owners of the land proposed to be rezoned to a conditional district and must be submitted to City Planning at least 2 business days before the date the City Council schedules the matter for public hearing.

3. Legislative Hearing by City Council

a. Following the recommendation of the Planning Commission or expiration of the applicable Planning Commission review period without a recommendation, the City Council shall conduct a legislative hearing. City Council shall act to schedule the hearing within 60 days of receiving the request from the Planning Commission, and notice shall be given in accordance with Sec. 10.1.8.

b. Changes to the conditions may be made following City Council's receipt of the Planning Commission recommendation subject to the following limitations:

i. Unsigned conditions with the changes must be submitted to City Planning at least 10 calendar days before City Council acts to schedule the matter for public hearing;

ii. The unsigned conditions must be property sought to be rezoned and submitted to City Planning at least two business days before the date the City Council acts to schedule the public hearing; and

iii. The signed conditions cannot modify the unsigned conditions except to respond to staff comments or to make non-substantive or clerical corrections.

4. Conduct of the Legislative Hearing

a. The Planning Director shall provide a report describing the application, including analysis of the considerations listed in Sec. 10.2.4.F. as deemed appropriate.

b. The presiding officer shall open the legislative hearing. Those in favor of the rezoning will be allowed a total of 8 minutes to explain their support and those against the rezoning will be allowed a total of 8 minutes to explain their opposition. Additional time may be allowed by the City Council, but must be the same amount of time for those in support and against.

5. City Council Action

a. Revisions may be made to proposed conditions in conditional rezoning and TCZ cases during the legislative hearing or within 30 days following the date on which the hearing is closed subject to the following limitations:

i. Unsigned conditions with the changes must be submitted to City Planning at least 10 calendar days before the date of the next meeting at which the City Council discussion of the application is scheduled;

ii. The unsigned conditions must be signed by all owners of the property sought to be rezoned and submitted to City Planning at least two business days before the date of the next meeting at which the City Council discussion of the application is scheduled; and

iii. The signed conditions cannot modify the unsigned conditions except to respond to staff comments or to make non-substantive or clerical corrections.

b. Signed conditions may be submitted electronically so long as the original signed petition is received by the Planning Director at least 24 hours before the date of the meeting where final City Council action is taken; provided that the electronic signature is (1) unique to the person using it; (2) capable of certification; (3) under the sole control of the person using it; and (4) linked to the same page as the petition.

c. Should the applicant wish to revise the zoning conditions to be less restrictive or revise the request to a less restrictive zoning district, the City council shall schedule a new legislative hearing and provide notice in accordance with the provisions of Sec. 10.2.1.C. The applicant shall be responsible for the cost of legal advertisement of the new legislative hearing. The City Council may, in its sole discretion, refer such an application to the Planning Commission before scheduling the new legislative hearing. If the City Council refers an application that will be subject to a new legislative hearing back to the Planning Commission for review, the applicant shall conduct a neighborhood meeting in accordance with Sec. 10.2.4.C 2.

d. When approving or denying any rezoning or TCZ, the City Council shall approve a brief statement describing whether its action is consistent or inconsistent with the Comprehensive Plan.

e. If a rezoning or TCZ is adopted and the action was deemed inconsistent with the adopted plan, the zoning amendment shall have the effect of also amending the future land-use map, and no additional request or application for a plan amendment shall be required.

f. A statement analyzing the reasonableness of the proposed rezoning or TCZ shall also be approved by the City Council. This statement of reasonableness may consider, among other factors:

   i. the size, physical conditions, and other attributes of the area proposed to be rezoned;

   ii. the benefits and detriments to the landowners, the neighbors, and the surrounding community;

   iii. the relationship between the current actual and permissible development on the tract and adjoining areas and the development that would be permissible under the proposed amendment;

   iv. why the action taken is in the public interest; and

   v. any changed conditions warranting the amendment.

g. The statement of reasonableness and the plan consistency statement may be approved as a single statement.

F. Considerations for Planning Director Review

The following is a non-exclusive list of considerations the Planning Director may take into account when reviewing a rezoning or TCZ application:

1. The application corrects an error or meets the challenge of some changing condition, trend or fact;
2. The application is generally consistent with the Comprehensive Plan;
3. The application is generally consistent with the stated purpose and intent of this UDO;
4. The application will reinforce the existing or planned development pattern of the area;
5. The site is appropriate for the development allowed in the proposed district;
6. The application is reasonable and in the public interest;
7. The City and other service providers will be able to provide sufficient public facilities and services including schools, roads, recreation facilities, wastewater treatment, water supply and stormwater facilities, police, fire and emergency medical services, while maintaining sufficient levels of service to existing development; and
8. The application will not have a significant adverse impact on property in the vicinity of the subject property.

G. Time Lapse between Applications

1. Limitations Between Applications

a. In the absence of a special waiver approved by the City Council, the Planning Director is not authorized to accept an application for a rezoning or a TCZ on the same property that was the subject of an application advertised for a City Council legislative hearing unless 24 months has passed since the date of the withdrawal or denial of the prior application.

b. The 24-month waiting period does not apply to any City Council-initiated rezoning.

2. Special Waiver

City Council may grant a waiver of the 24-month waiting period for one or more of the following grounds:

a. Materially changed circumstances;

b. Clerical correction as the basis for the previous rezoning;

c. Newly discovered evidence of adverse impact of the current zoning which by due diligence could not have been discovered in time for the earlier public hearing;

d. Substantially changed zoning request; or

e. For any other circumstance determined by the City Council to be reasonable and in the public interest.

H. Modification of Previously-Approved Conditions or PD Master Plan

When a property has been rezoned into a conditional district, including PD and CMP, the property owner can request subsequent modifications to the zoning conditions or Master Plan. Modifications can be minor or major; however,

only PD and CMP districts are eligible for minor modifications.

1. Minor modifications to PD that can be administratively approved are described in Sec. 4.7.6.A.
2. Minor modifications to CMP that can be administratively approved are described in Sec. 4.6.4.A.
3. If multiple parcels or land are subject to a conditional zoning, the owners of individual parcels may apply for modification of the conditions so long as the modification would not result in other properties failing to meet the terms of the conditions. Any modifications approved shall only be applicable to those properties whose owners petition for the modification.
4. Modification that do not qualify as minor are major and shall require a new zoning or TCZ application.

Article 1.2. Zoning Map

Sec. 1.2.1. Establishment of Official Zoning Map

A. The location and boundaries of zoning districts established by this UDO are shown and maintained as part of the City's Geographic Information System (GIS) under the direction of the Planning Director. The Zoning GIS layer constitutes the City of Raleigh's Official Zoning Map and is part of this UDO. All notations, references and other information shown shall have the same force and effect as if fully set forth or described in this UDO.

B. At the direction of City Council, the Planning Director is authorized to revise the Official Zoning Map. No unauthorized person may alter or modify the Official Zoning Map.

C. City Planning must maintain digital or printed copies of the Official Zoning Map and maintain records of superseded official maps.

D. All changes to the Official Zoning Map of the City shall be identified by updating the original computer digital data of each change, together with the date of the change.

E. When the City's extraterritorial jurisdiction is expanded, changes in the Official Zoning Map shall be identified by updating the original computer digital data with the date of the change.

F. A hard copy of the data and changes to the data will be kept by City Planning; all revisions to hard copies will be numbered, dated and signed by the Planning Director.

Sec. 1.2.2. Interpretation of Map Boundaries

A. In the event that any uncertainty exists with respect to the intended boundaries as shown on Official Zoning Map, the Planning Director is authorized to interpret the boundaries.

B. Where uncertainty exists as to the boundaries of any zoning district shown on the Official Zoning Map, the precise location is to be determined as follows:

1. Where a boundary line is shown as coinciding, binding along or superimposed upon a lot line, such lot line shall be deemed to be a boundary line.
2. Where the location of a boundary line is indicated by a designated number of feet, that distance controls.
3. Where a boundary line is shown as within or binding along a street, alley, waterway or right-of-way, the boundary line is deemed to be in the center of the street, alley, waterway or right-of-way except in the cases where the edge of the street, alley, waterway or right-of-way is designated as the boundary line.
4. Where a boundary line is shown as binding along a railroad track or as being located a designated number of feet from a railroad track or where the location of a boundary line may be scaled from a railroad track, the nearest rail of the track designated controls.
5. Where a boundary line is superimposed on a topographic elevation line, the precise location of the boundary line must be determined by field survey of the topographic elevation line, unless the topographic elevation has been relocated through grading subsequent to establishment of the boundary line.
6. Where a boundary line is shown and its location is not fixed by any of the rules above, its precise location shall be determined by the use of the scale shown on the map.

Sec. 1.2.3. Rules of Interpretation

Where an approved zoning condition conflicts with a standard of the corresponding general use district, the following shall apply.

A. The new general use district is controlling.

B. The UDO height, setback, parking, landscaping and screening regulations when more stringent than in the conditional zoning district ordinance are controlling. The calculation of height, setback and parking shall be in accordance with the UDO.

C. All approval processes shall follow the regulations of this UDO.

D. If the conditional zoning ordinance limits uses to a former legacy zoning district, those use limitations shall continue except if the former allowed use is not allowed in the new UDO general use zoning district. Limited uses and special uses will be determined by the UDO general use district.

Sec. 6.1.4. Allowed Principal Use Table

USE CATEGORY Specific Use	RESIDENTIAL					MIXED USE							SPECIAL				Definition/ Use Standards
	R-1	R-2	R-4	R-6	R-10	RX-	OP-	OX-	NX-	CX-	DX-	IX-	CM	AP	IH	MH	
RESIDENTIAL																	
HOUSEHOLD LIVING, AS LISTED BELOW:																	*Sec. 6.2.1.A.*
Single-unit living	P	P	P	P	P	P	--	P	P	P	P	--	--	P	--	P	*Sec. 6.2.1.B.*
Two-unit living	L	P	P	P	P	P	--	P	P	P	P	--	--	--	--	--	*Sec. 6.2.1.C.*
Multi-unit living	--	L	L	P	P	P	--	P	P	P	P	L	--	--	--	--	*Sec. 6.2.1.D.*
Cottage court	--	P	P	P	P	P	--	P	P	P	--	--	--	--	--	--	*Sec. 6.2.1.E.*
Conservation development	P	P	P	P	P	--	--	--	--	--	--	--	--	--	--	--	*Sec. 6.2.1.F.*
Compact development	P	P	P	P	P	--	--	--	--	--	--	--	--	--	--	--	*Sec. 6.2.1.G.*
Frequent Transit Development Option	--	--	L	L	L	L	--	L	L	L	--	L	--	--	--	--	*Sec. 6.1.2.K*
Manufactured home development	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--	L	*Sec. 6.2.1.H.*
Multi-unit supportive housing residence	L	L	L	L	L	L	--	L	L	L	L	L	--	L	--	--	*Sec. 6.2.1.I.*
Supportive housing residence	L	L	L	L	L	L	--	L	L	L	L	L	--	L	--	--	*Sec. 6.2.1.J.*
GROUP LIVING, EXCEPT AS LISTED BELOW	S	S	S	S	S	P	--	P	P	P	P	P	--	--	--	--	*Sec. 6.2.2.A.*
Boardinghouse	--	--	--	--	S	L	--	L	L	L	L	--	--	--	--	--	*Sec. 6.2.2.B.*
Congregate care	S	S	S	S	L	L	--	L	L	L	L	L	--	--	--	--	*Sec. 6.2.2.C.*
Dormitory, fraternity, sorority	--	--	--	--	--	P	--	P	--	P	P	P	--	--	--	--	*Sec. 6.2.2.D.*
Continuing care retirement community	S	S	S	S	L	L	--	L	L	L	L	L	--	--	--	--	*Sec. 6.2.2.E.*
Rest home	S	S	S	L	L	P	--	P	P	P	P	P	--	--	--	--	*Sec. 6.2.2.F.*
SOCIAL SERVICE, AS LISTED BELOW:																	*Sec. 6.2.3.A.*
Emergency shelter type A	--	--	--	--	--	--	--	S	--	S	S	S	--	--	L	--	*Sec. 6.2.3.B.*
Emergency shelter type B	--	--	--	--	--	L	--	L	--	L	L	L	--	--	L	--	*Sec. 6.2.3.C.*
Special care facility	S	S	S	S	S	S	L	L	L	L	L	L	--	--	L	--	*Sec. 6.2.3.D.*
PUBLIC & INSTITUTIONAL																	
CIVIC, EXCEPT AS LISTED BELOW:	P	P	P	P	P	P	P	P	P	P	P	P	--	P	P	P	*Sec. 6.3.1.A. & E.*
Cemetery	L	L	L	L	L	L	L	L	L	L	L	L	L	L	L	L	*Sec. 6.3.1.B.*

Key: P = Permitted Use L = Limited Use S = Special Use -- = Use Not Permitted

USE CATEGORY Specific Use	RESIDENTIAL					MIXED USE							SPECIAL				Definition/ Use Standards
	R-1	R-2	R-4	R-6	R-10	RX-	OP-	OX-	NX-	CX-	DX-	IX-	CM	AP	IH	MH	
College, community college, university	--	--	--	--	--	--	P	P	--	P	P	P	--	--	--	--	*Sec. 6.3.1.C.*
School, public or private (K-12)	L	L	L	L	L	L	L	L	L	L	L	L	--	L	--	L	*Sec. 6.3.1.D.*
PARKS, OPEN SPACE AND GREENWAYS	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	*Sec. 6.3.2.A.*
MINOR UTILITIES	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	*Sec. 6.3.3.A.*
MAJOR UTILITIES, EXCEPT AS LISTED BELOW	--	--	--	--	--	--	--	--	--	--	--	S	--	--	S	--	*Sec. 6.3.3.B.*
Telecommunication tower (<250 ft)	L	L	L	L	L	L	L	L	L	L	L	L	--	L	L	L	*Sec. 6.3.3.C.*
Telecommunication tower (≥250 ft)	S	S	S	S	S	S	S	S	S	S	S	S	--	S	S	S	*Sec. 6.3.3.D.*
Water/Wastewater treatment plant - Government	L	--	--	--	--	--	--	--	--	--	--	L	--	--	L	--	Sec. 6.3.3.E
COMMERCIAL																	
DAY CARE, AS LISTED BELOW:																	*Sec. 6.4.1.A.*
Day care, home	L	L	L	L	L	L	--	L	L	L	L	L	--	L	--	L	*Sec. 6.4.1.B.*
Day care center	S	S	S	S	S	S	L	L	L	L	L	L	--	--	--	S	*Sec. 6.4.1.C.*
INDOOR RECREATION, EXCEPT AS LISTED BELOW:	--	--	--	--	--	--	--	--	P	P	P	P	--	--	--	--	*Sec. 6.4.2.A.*
Adult establishment	--	--	--	--	--	--	--	--	--	S	S	S	--	--	S	--	*Sec. 6.4.2.B.*
Dance, martial arts, music studio or classroom	--	--	--	--	--	--	--	P	P	P	P	P	--	--	--	--	
Health club	--	--	--	--	--	L	P	P	P	P	P	P	--	--	--	--	*Sec. 6.4.2.C.*
Sports academy	--	--	--	--	--	--	--	P	P	P	P	P	--	--	--	--	*Sec. 6.4.2.D.*
MEDICAL	--	--	--	--	--	L	P	P	P	P	P	P	--	--	--	--	*Sec. 6.4.3.A. & B.*
OFFICE	--	--	--	--	--	L	P	P	P	P	P	P	--	--	P	--	*Sec. 6.4.4.A. & B.*
OUTDOOR RECREATION, EXCEPT AS LISTED BELOW:	--	--	--	--	--	--	--	--	--	P	P	P	--	--	--	--	*Sec. 6.4.5.A.*
Golf course	L	L	L	L	L	--	--	--	--	P	--	P	--	--	--	--	*Sec. 6.4.5.B.*
Outdoor sports or entertainment facility (≤250 seats)	P	P	P	P	P	P	P	P	P	P	P	P	--	P	--	P	*Sec. 6.4.5.C.*
Outdoor sports or entertainment facility (>250 seats)	S	S	S	S	S	S	S	S	S	S	S	S	--	S	S	S	*Sec. 6.4.5.C.*

Key: P = Permitted Use L = Limited Use S = Special Use -- = Use Not Permitted

USE CATEGORY Specific Use	RESIDENTIAL					MIXED USE							SPECIAL				Definition/ Use Standards
	R-1	R-2	R-4	R-6	R-10	RX-	OP-	OX-	NX-	CX-	DX-	IX-	CM	AP	IH	MH	
Riding stables	L	--	--	--	--	--	--	--	--	--	--	L	--	L	--	--	*Sec. 6.4.5.D.*
OVERNIGHT LODGING, EXCEPT AS LISTED BELOW:	--	--	--	--	--	--	P	S	--	P	P	P	--	--	--	--	*Sec. 6.4.6.A.*
Short-Term Rental	L	L	L	L	L	L	--	L	L	L	L	--	--	--	--	--	*Sec. 6.4.6.E*
Bed and breakfast	--	--	--	--	L	L	--	P	P	P	P	--	--	--	--	--	*Sec. 6.4.6.B.*
Hospitality house	--	--	--	--	L	P	--	P	--	P	P	P	--	--	--	--	*Sec. 6.4.6.C.*
PARKING, AS LISTED BELOW																	*Sec. 6.4.7.*
Parking Facility	S	S	S	S	S	L	L	P	P	P	P	P	--	--	L	--	*Sec. 6.4.7.*
PASSENGER TERMINAL , EXCEPT AS LISTED BELOW:	--	--	--	--	--	--	--	--	--	P	P	P	--	--	P	--	*Sec. 6.4.8.A.*
Airfield, landing strip	--	--	--	--	--	--	--	--	--	--	--	S	--	S	S	--	*Sec. 6.4.8.B.*
Heliport, serving hospitals	--	--	--	--	--	--	--	L	--	L	L	L	--	--	--	--	*Sec. 6.4.8.C.*
Heliport, all others	--	--	--	--	--	--	S	S	--	S	S	S	--	S	S	--	*Sec. 6.4.8.D.*
PERSONAL SERVICE, EXCEPT AS LISTED BELOW:	--	--	--	--	--	L	--	L	P	P	P	P	--	--	--	--	*Sec. 6.4.9.A. & G.*
Animal care (indoor) Except as Listed Below:	--	--	--	--	--	--	--	--	L	L	L	L	--	L	L	--	*Sec. 6.4.9.B.*
Veterinary Clinic/Hospital	--	--	--	--	--	--	--	L	L	L	L	L	--	L	L	--	*Sec. 6.4.9.B.*
Animal care (outdoor)	--	--	--	--	--	--	--	--	--	--	--	S	--	S	S	--	*Sec. 6.4.9.C.*
Beauty/hair salon	--	--	--	--	--	L	P	P	P	P	P	P	--	--	--	--	*Sec. 6.4.9.D.*
Copy center	--	--	--	--	--	L	P	P	P	P	P	P	--	--	--	--	*Sec. 6.4.9.E.*
Optometrist	--	--	--	--	--	L	P	P	P	P	P	P	--	--	--	--	*Sec. 6.4.9.F.*
RESTAURANT/BAR, AS LISTED BELOW:																	*Sec. 6.4.10.A.*
Bar, nightclub, tavern, lounge	--	--	--	--	--	--	--	--	L	P	P	P	--	--	--	--	*Sec. 6.4.10.B.*
Eating establishment	--	--	--	--	--	L	--	L	P	P	P	P	--	--	--	--	*Sec. 6.4.10.C.*
RETAIL SALES, EXCEPT AS LISTED BELOW:	--	--	--	--	--	L	--	L	P	P	P	P	--	--	--	--	*Sec. 6.4.11.A.& C.*
Mobile Retail - Long Term	--	--	--	--	--	--	--	--	L	L	L	L	--	--	--	--	*Sec. 6.4.11.C.*
Pawnshop	--	--	--	--	--	--	--	--	--	--	P	P	--	--	--	--	*Sec. 6.4.11.B.*
SHOPPING CENTER	--	--	--	--	--	--	--	--	P	P	P	P	--	--	--	--	*Sec. 6.4.12*

Key: P = Permitted Use L = Limited Use S = Special Use -- = Use Not Permitted

Use Category / Specific Use	RESIDENTIAL					MIXED USE							SPECIAL				Definition/ Use Standards
	R-1	R-2	R-4	R-6	R-10	RX-	OP-	OX-	NX-	CX-	DX-	IX-	CM	AP	IH	MH	
Vehicle Fuel Sales (including gasoline and diesel fuel)	--	--	--	--	--	--	--	--	L	L	L	L	--	--	--	--	*Sec. 6.4.11.D.3.*
Vehicle Sales/Rental	--	--	--	--	--	--	--	--	L	L	L	L	--	--	P	--	*Sec. 6.4.12.A.& B.*
INDUSTRIAL																	
Heavy Industrial, except as listed below:	--	--	--	--	--	--	--	--	--	--	--	--	--	--	P	--	*Sec. 6.5.1.A.*
Detention center, jail, prison							S	S	S	S	S	S			P		*Sec. 6.5.1.B.*
Towing yard for vehicles	--	--	--	--	--	--	--	--	--	--	--	S	--	--	S	--	*Sec. 6.5.1.C.*
Light Industrial, Except as listed below	--	--	--	--	--	--	--	--	--	--	--	P	--	--	P	--	*Sec. 6.5.2.A.*
Brewery, winery, distillery, cidery	--	--	--	--	--	--	--	--	--	L	L	P	--	--	P	--	*Sec. 6.5.2.A.*
Light Manufacturing	--	--	--	--	--	--	P	--	--	P	P	P	--	--	P	--	*Sec. 6.5.3.A.*
Research & Development	--	--	--	--	--	--	P	P	--	P	P	P	--	--	P	--	*Sec. 6.5.4.A.*
Self-Service Storage	--	--	--	--	--	--	L	--	--	L	L	L	--	--	P	--	*Sec. 6.5.5.A. & B.*
Vehicle Service, as listed below:																	*Sec. 6.5.6.A.*
Car wash	--	--	--	--	--	--	--	--	--	L	--	L	--	--	P	--	*Sec. 6.5.6.B.*
Vehicle repair (minor)	--	--	--	--	--	--	--	--	L	L	L	P	--	--	P	--	*Sec. 6.5.6.C.*
Vehicle repair (major)	--	--	--	--	--	--	--	--	--	L	L	P	--	--	P	--	*Sec. 6.5.6.D.*
Vehicle repair (commercial vehicle)	--	--	--	--	--	--	--	--	--	--	--	P	--	--	P	--	*Sec. 6.5.6.E.*
Warehouse & Distribution	--	--	--	--	--	--	--	--	--	--	--	P	--	--	P	--	*Sec. 6.5.7.A. & B.*
Waste-Related Service	--	--	--	--	--	--	--	--	--	--	--	--	--	--	P	--	*Sec. 6.5.8.A.*
Wholesale Trade	--	--	--	--	--	--	--	--	--	--	--	P	--	--	P	--	*Sec. 6.5.9.A.*
OPEN																	
Agriculture, except as listed below:	--	--	--	--	--	--	--	--	--	--	--	--	--	P	--	--	*Sec. 6.6.1.A.*
Community garden	L	L	L	L	L	L	L	L	L	L	L	L	--	L	--	S	*Sec. 6.6.1.B.*
Community garden (on-site sales)	L	S	S	S	L	L	L	L	L	L	L	L	--	--	--	--	*Sec. 6.6.1.B.*
Plant nursery	S	--	--	--	--	--	--	P	P	P	P	P	--	L	--	--	*Sec. 6.6.1.C.*
Produce stand	L	L	L	L	L	L	L	L	L	L	L	L	--	L	L	L	*Sec. 6.8.2.D.*
Restricted agriculture	P	--	--	--	--	--	--	--	--	--	--	--	P	P	--	--	*Sec. 6.6.1.D.*
Urban farm	S	S	S	S	S	S	S	S	S	S	S	S	--	--	--	--	*Sec. 6.6.1.E.*
Resource Extraction	--	--	--	--	--	--	--	--	--	--	--	--	--	L	L	--	*Sec. 6.6.2.A.*

Key: P = Permitted Use L = Limited Use S = Special Use -- = Use Not Permitted

Article 6.2. Residential Uses

Sec. 6.2.1. Household Living

A. Household Living Use Category

Residential occupancy of a dwelling unit by a household. Household living includes the following uses.

1. Single-unit living, two-unit living, multi-unit living.
2. Cottage court.
3. Conservation development.
4. Compact development.
5. Manufactured home development.
6. Multi-unit supportive housing residence.
7. Supportive housing residence.

B. Single-Unit Living

1. Defined

One dwelling unit in a single principal structure.

C. Two-Unit Living

1. Defined

Two dwelling units in a single principal structure.

2. Use Standards

In the R-1 district, two-unit living is only permitted in association with the Tiny House building type.

D. Multi-Unit Living

1. Defined

Three or more dwelling units in a single principal structure. Multiple principal buildings are allowed on the same lot.

2. Use Standards

a. In a Residential District where multi-unit living is allowed as a limited use, it is allowed only in a compact, conservation, or frequent transit development (see Article 2.3. Compact Development, Article 2.4. Conservation Development, or Sections 2.7.1 Frequent Transit Development).

b. In an IX- District where multi-unit living is allowed as a limited use, it is allowed only in the upper stories of a building. A lobby or other entrance is allowed on the ground floor.

E. Cottage Court

1. Defined

A group of small detached houses, tiny houses, attached houses or townhouses (two-unit maximum per building) sharing a common courtyard.

F. Conservation Development

1. Defined

A conservation development trades smaller lot sizes (with smaller setbacks) and additional density in exchange for protecting a significant amount of open space.

G. Compact Development

1. Defined

A compact development permits a reduction in lot size for residential subdivisions in exchange for an increase in common open space. This allows for efficient residential subdivisions and ample amenity area for the residents.

H. Manufactured Home Development

1. Defined

A site which contains or is intended for the long-term location of manufactured homes that may include services and facilities for the residents. Includes both manufactured home park (with leased or condominium spaces) and manufactured home subdivision (individually platted spaces).

2. Use Standards

Manufactured home developments must meet standards in *Article 4.5. Manufactured Housing (MH).*

I. Multi-Unit Supportive Housing Residence

1. Defined

A facility housing persons who are disabled emotionally, mentally or physically or otherwise possess a disability that is protected by the provisions of either the Americans with Disabilities Act 42 USC 12101 or N.C. Gen. Stat. Article 3, Chapter 168, along with support or supervisory personnel or family members who may reside, but are not required to reside, at the facility.

2. Use Standards

a. Each multi-unit supportive housing residence must be composed of no less than 2 and no more than 4 attached dwelling units.

b. The total number of individuals occupying a multi-unit supportive housing residence cannot exceed 6.

c. Each multi-unit supportive housing residence must be treated for zoning purposes in the same manner as single-unit living, except parking must be provided in accordance with *Article 7.1. Parking*.

d. No multi-unit supportive housing residence can be located within 300 feet of another multi-unit supportive housing residence or supportive housing residence (determined by a straight line from property line to property line).

e. The multi-unit supportive housing residence must conform to one of the following:

i. It is licensed by the federal or state government; or

ii. It is funded in part by a government grant or loan.

f. Nothing in this section can prevent 4 or fewer persons with disabilities from occupying any lawful dwelling as a household.

J. Supportive Housing Residence

1. Defined

A facility in which more than 4 unrelated persons may reside who are battered individuals, abused children, pregnant women and their children, runaway children, temporarily or permanently disabled mentally, emotionally or physically, individuals recovering from drug or alcohol abuse, and all other persons who possess a disability that is protected by the provisions of either the Americans with Disabilities Act 42 USC 12101 or N.C. Gen. Stat. Article 3, Chapter 168, along with family members and support and supervisory personnel.

2. Use Standards

a. The total number of individuals occupying a supportive housing residence cannot exceed 12.

b. A resident manager must reside permanently on the premise.

c. No supportive housing residence can be located within 1,125 feet of another multi-unit supportive housing residence or supportive housing residence (determined by a straight line from property line to property line).

d. The supportive housing residence must conform to one of the following:

i. It is licensed by the federal or state government; or

ii. It is funded in part by a government grant or loan.

K. Frequent Transit Development Option

1. Defined

A development where higher density and relaxed district standards may be utilized if the subject property is located within a Frequent Transit Area as designated in the City's Comprehensive Plan encouraging higher density development as a way to focus density and growth towards areas with more intensive transit networks.

2. Use Standards

a. This option may only be applied to properties shown within a Frequent Transit Area as designated in the City's Comprehensive Plan.

b. The development must meet the standards of either Sections 2.7.1. or 3.7.1., as applicable.

Sec. 6.2.2. Group Living

A. Group Living Use Category

Residential occupancy of a structure by a group of people that does not meet the definition of household living. Generally, group living facilities have a common eating area for residents and residents may receive care or training. Group living includes the following uses.

1. Boardinghouse.
2. Congregate care.
3. Dormitory, fraternity, sorority.
4. Hospice.
5. Continuing care retirement community.
6. Monastery, convent.
7. Orphanage.
8. Rest home.

B. Boardinghouse

1. Defined

A facility that contains individual rooms that are rented to the general public to more than 4 unrelated persons for periods in excess of 30 days, and which includes a rooming house.

2. Use Standards

a. The facility was constructed originally as a detached house.

b. The total number of individuals occupying a boardinghouse is limited to 6.

c. In a Residential District, there is no exterior advertising except 1 unlit announcement sign not to exceed 2 square feet in area.

d. No boardinghouse can be located within 1,200 feet of another boardinghouse (determined by a straight line from property line to property line).

e. The minimum tenant rental period exceeds 30 days.

f. Cooking facilities shall not be permitted in the rented rooms of the boarding house.

g. The facility shall comply with the City's Housing Code, Article 11.6 of this UDO.

C. Congregate Care

1. Defined

A long-term care facility for elderly people who are able to get around on their own but who may need help with some daily activities and have staff on call. Includes assisted living and independent living.

2. Use Standards

a. The facility must comply with the Housing for Older Persons Exemptions of the Fair Housing Act (24 C.F.R. Sections 100.300 through 100.308).

b. In the R-6 and R-10 districts, a congregate care facility is allowed a number of rooming units and dwelling units equal to 2 times the density of the applicable district.

c. Each rooming unit or dwelling unit may be occupied by no more than 2 persons not related by blood, marriage or adoption.

d. Facilities for resident managers or custodians providing administrative services and medical services for the exclusive use of the residents shall be located on site and open and staffed for at least 4 hours, one day a week.

e. The facility must contain indoor shared food preparation service, common dining halls and common recreation rooms, for the exclusive use of all residents and their guests, and these facilities together shall total a minimum of 30 square feet per constructed rooming unit or dwelling unit, as applicable, exclusive of circulation space. Common indoor social and related service facilities may also be part of the facility.

f. Structures shall demonstrate a comprehensive pedestrian circulation plan, including internal accessible walkways, is submitted and approved with provisions for alternative transportation services for the residents of the facility. Alternative transportation services may include, but are not limited to, regularly scheduled or on-call van services, tram services and full bus service.

g. Outdoor open space or park area must be provided at a minimum rate of the greater of either 10% of the land area of the facility or 218 square feet per rooming unit or dwelling unit, as applicable, excluding private drives and off-street parking areas. A majority of the open space or park area must be located no further than 300 feet from the controlled entranceway of the facility.

D. Dormitory, Fraternity, Sorority

1. Defined

A social organization of students providing group living accommodations for a college or university.

E. Continuing Care Retirement Community

1. Defined

Facility providing a continuum of residential and health care services to persons meeting the Housing for Older Persons Exemptions of the Fair Housing Act (24 C.F.R. Sections 100.300 through 100.308). Allows residents to continue living in the same complex as their housing and health care needs change. Continuing care retirement communities may offer a variety of services such as congregate care, skilled nursing, rest home, health and wellness, recreational facilities, support services and entertainment and social uses, as well as offering a range of residential opportunities (apartments, townhouses, cottages). A rest home must be provided as a component of a continuing care retirement community.

2. Use Standards

a. The continuing care retirement community and accessory facilities must be designed and used to serve its residents and their guests only.

b. The continuing care retirement community must be planned, developed and operated according to a unified plan under the direction of a single owner or agent for the owner.

c. Density limitations apply in accordance with the underlying zoning district unless otherwise noted herein.

d. The continuing care retirement community may provide individual dwelling units in any combination of residential building types or housing options as allowed in the respective zoning district under Article 2.3.

Compact Development and Article 2.4 Conservation Development Option.

e. If provided, a congregate care facility must meet the requirements under Sec. 6.2.2.C.

f. A rest home must meet the requirements under Sec. 6.2.2.F.

g. Additional facilities designed only to serve members of the continuing care retirement community may include, but not be limited to, health and wellness, medical, recreation and support services such as a private chapel, bank, hairdressers, pharmacy, library and convenience shopping.

h. A minimum of 10% of the total site area must be designated and maintained as common open space under Sec. 2.5.

i. The Continuing Care Retirement Community must provide skilled nursing.

j. If provided, the density of a congregate care is calculated in keeping with Sec. 6.2.2.C.2.b.

k. The density of a rest home is calculated in keeping with Sec. 6.2.2.F.2.Rest Home

3. Defined

A long-term care facility for individuals who need full-time assistance and supervision. The focus is on individuals who cannot live independently and require full-time nursing assistance, and on younger individuals who have physical or mental handicaps.

4. Use Standards

The number of total occupants allowed is based on 4 persons being the equivalent of 1 dwelling unit. The number of occupants cannot exceed the equivalent number of units per acre allowed in the respective zoning district.

F. Rest Home

1. Defined

A long-term care facility for individuals who need full-time assistance and supervision. The focus is on individuals who cannot live independently and require full-time nursing assistance, and on younger individuals who have physical or mental handicaps.

2. Use Standards

The number of total occupants allowed is based on 4 persons being the equivalent of 1 dwelling unit. The number of occupants cannot exceed the equivalent number of units per acre allowed in the respective zoning district.

Sec. 6.2.3. Social Service

A. Social Service Use Category

Facilities that provide treatment for psychiatric, alcohol or drug problems. Also includes facilities that provide transient housing related to social service programs. Social service includes the following uses.

1. Emergency Shelter Type A.
2. Emergency Shelter Type B.
3. Special care facility.

B. Emergency Shelter Type A

1. Defined

A facility providing temporary sleeping facilities for displaced persons with no limit on the number of individuals accommodated.

2. Use Standards

a. The shelter must provide a minimum of 50 square feet of sleeping space per person.

b. An employee or volunteer must maintain continuous on-site supervision during hours of operation.

c. No shelter can be located within 2,640 feet of another emergency shelter Type A or emergency shelter Type B (determined by a straight line from property line to property line).

d. No emergency shelter Type A can be located within 300 feet of a supportive housing residence or multi-unit supportive housing residence (determined by a straight line from property line to property line). No later establishment of a supportive housing residence or multi-unit supportive housing residence closer than 300 feet to a previously permitted emergency shelter may be construed to create a nonconformity or illegality on the part of the existing emergency shelter.

e. The shelter is not allowed in an Airport Overlay District.

C. Emergency Shelter Type B

1. Defined

A facility providing temporary sleeping facilities for not more than 10 displaced persons at any one time.

2. Use Standards

a. No individual shall remain in the facility longer than 30 consecutive days per calendar year. No individual shall be readmitted until at least 14 days have elapsed from their last residency at that shelter.

b. No counseling or therapeutic activities may be conducted. Referral of residents to employment agencies and other personal service agencies shall not be deemed to be counseling.

c. No shelter can be located within 2,640 feet of another emergency shelter Type B, or emergency shelter Type A (determined by a straight line from property line to property line).

d. No emergency shelter Type B can be located within 300 feet of a supportive housing residence or multi-unit supportive housing residence (determined by a straight line from property line to property line). No later establishment of a supportive housing residence or multi-unit supportive housing residence closer than 300 feet to the previously permitted emergency shelter shall be construed to create a nonconformity or illegality on the part of the existing emergency shelter.

e. The shelter is not allowed in an Airport Overlay District.

D. Special Care Facility

1. Defined

A facility which provides psychosocial rehabilitation, skill development activities, educational services and pre-vocational training and transitional and supported employment services to individuals with severe and persistent mental illness. Incudes a rehabilitative clinic and adult rehabilitation center.

2. Use Standards

a. No special care facility can be located within 1,200 feet of another special care facility (determined by a straight line from property line to property line).

b. To permit a special care facility in a Residential District, the following minimum lot areas per enrollee apply:

i. R-1, R-2, and R-4: 1,040 square feet;

ii. R-6: 640 square feet; and

iii. R-10: 240 square feet.

c. In a Residential District, 1 unlit announcement sign not to exceed 2 square feet in area and 3½ feet in height is permitted.

d. Only 1 vehicle used in connection with the special care facility may be parked or stored on the premises or residential street.

type multi-tenant properties are not readily available, the multi-tenant property shall be posted in accordance with *Section 10.2.1.C.4(f)*.

d. When mailed notice is required for pre-submittal public meetings, the applicant may provide to the City return receipts from the mailing notification by the applicant to the required property owners and tenants by certified mail, returned receipt requested.

e. Mailed notices must be sent to the addressees at least 10 calendar days prior and not more than 25 calendar days prior to the date of any public meeting.

f. Except as otherwise directed by the City Council, the City Board or Commission reviewing the matter shall not require additional notification.

g. For zoning map amendments that directly affect more than 50 properties owned by a total of at least 50 different property owners, the City may elect to forego mailed notice and instead give notice of the public hearing by publication provided that the newspaper advertisement is not less than ½ of a newspaper page in size. Property owners who reside outside of the newspaper circulation area, according to the addresses listed in the most recent property tax listing for the affected properties, shall be notified by first class mail.

h. Except for a City-initiated zoning map amendment, when an application is filed to request a zoning map amendment and that application is not made by the owner of the parcel of land to which the amendment would apply, the applicant shall certify to the City Council that the owner of the parcel of land, as shown on the county tax listing, has received actual notice of the proposed amendment and a copy of the notice of public hearing. The applicant shall certify to the City Council that proper notice has been provided in fact and such certification shall be deemed conclusive in the absence of fraud. Actual notice shall be achieved as follows:

   i. Actual notice of the proposed amendment and a copy of the notice of public hearing shall be by any manner permitted under N.C. Gen. Stat. §1A-1, Rule 4(j).

   ii. If notice with due diligence cannot be achieved by personal delivery, registered or certified mail or by a designated delivery service, notice may be given by publication consistent with N.C. Gen. Stat. §1A-1, Rule 4(j1). (See N.C. Gen. Stat. §160D-601).

   i. For quasi-judicial hearings, mailed notice shall be provided to all other persons with an ownership interest in the subject property as set forth in all applicable State and local laws.

2. Published Notice

a. When published notice is required, notice of the public hearing shall be published by the City at least once in a newspaper having general circulation in the City not more than 25 or less than 10 calendar days prior to the date of the public hearing.

b. In the case of any ordinance adopting, amending or repealing any provision of this UDO, including zoning map amendments, notice of a public hearing shall be published once a week in a newspaper having general circulation within the City for 2 successive calendar weeks.

c. In determining the time period, the day of publication is not to be included but the day of the hearing shall be included.

3. Web Notice

a. When web notice is required, notice shall be posted on the City's web portal within 5 business days following acceptance of a complete application; required web notice of the decision shall be posted on the City's web portal no later than 3 business days from the date of decision.

b. When web notice of any public meeting is required, notice of the public meeting shall be posted on the City's web portal not less than 10 calendar days prior to the date of the public hearing.

c. In determining the time period, the day of posting on the City's web portal is not to be included but the day of the hearing shall be included.

4. Posted Notice

a. When posted notice of any public meeting is required, signage shall be posted by the City on the property at a point visible from the nearest public street or streets if the property fronts on multiple streets.

b. In the case of multiple parcels, a posting on each individual parcel is not required, but sufficient signage shall be posted to provide reasonable notice to interested persons.

Sec. 10.2.3. UDO Text Changes

A. Applicability

1. Text changes are legislative decisions. There are two types of text changes:
   a. a text change to the provisions of this UDO (a "TC"); and
   b. a text change to a conditional use zoning condition, including an amendment to any Planned Development Master Plan (a "TCZ").
2. Requests for TC's may be made by the City Council, the City staff or members of the public.
3. Requests for TCZ's can only be made by the owner of the property that is the subject of the TCZ. A request for a TCZ shall follow the procedures for conditional use rezoning applications under *Sec. 10.2.4*.

B. Pre-Application Conference

Before a member of the public may submit an application for a text change, the applicant shall schedule a pre-application conference with the Planning Director to discuss the procedures, standards and regulations required for approval. This requirement may be waived at the discretion of the Planning Director.

C. Application Requirements

1. An application for a TC shall be submitted in accordance with the general application requirements of *Sec. 10.2.1.B*.
2. A request for a TC by a member of the public must obtain Council authorization. To initiate that process, the applicant must submit an application describing the request to City Planning. Within 90 days of submission, the Planning Director shall provide a report and recommendation and place the request on the City Council's agenda. If Council authorizes the request, the applicant shall thereafter follow the process set forth in this Section.

D. Approval Process

1. Planning Director Action

The Planning Director shall review the TC application in accordance with *Sec. 10.2.3.E.* and provide a report and recommendation to the Planning Commission.

2. Planning Commission Action

a. Upon acceptance of the TC application, the Planning Commission or one of its committees shall hold a legislative hearing on the request. Public notice of the legislative hearing shall be provided in accordance with *Sec. 10.1.8.*
b. When conducting a review of a TC application, the Planning Commission shall advise and comment on whether the proposed action is consistent with any comprehensive plan that has been adopted, and any other applicable adopted plan.
c. Within 60 days after receipt of the proposed amendment, the Planning Commission shall provide a written report to the City Council. If no recommendation is made within this time period and if no extension is granted, the City Council may nonetheless take action on the application without further involvement of the Planning Commission.
d. The Planning Commission's written report to the City Council shall contain its recommendation, which addresses the proposed text amendment's plan consistency and other matters it deems appropriate.

3. City Council Legislative Hearing and Action

a. Following the recommendation of the Planning Commission or expiration of the applicable Planning Commission review period without a recommendation, the City Council shall conduct a legislative hearing.
b. Notice of the public hearing shall occur within 60 days of receiving the Planning Commission's written report.
c. Notice of the hearing shall be given in accordance with *Sec. 10.1.8.*

d. At the hearing, the Planning Director shall present the request, including the recommendation and comments of the Planning Commission, if any. If the request was submitted by a member of the public, those in favor of the TC will be allowed a total of 8 minutes to explain their support and those opposed shall be allowed a total of 8 minutes to explain their opposition. The Council, in its discretion, may grant an equal amount of additional time to each side.

e. The City Council shall approve, approve as revised, deny or send the proposed TC back to the Planning Commission or Planning Director for additional consideration.

f. When adopting or rejecting any TC, the City Council shall approve a brief statement describing whether its action is consistent or inconsistent with the Comprehensive Plan.

E. Considerations for Planning Director Review

The following is a non-exclusive list of considerations for the Planning Director to take into account when reviewing a TC request. The Planning Director may consider whether:

1. The proposed TC corrects an error or meets the challenge of some changing condition, trend or fact;
2. The proposed TC is in response to changes in state law;
3. The proposed TC is generally consistent with the Comprehensive Plan and other applicable adopted plans;
4. The proposed TC is generally consistent with the stated purpose and intent of this UDO;
5. The proposed TC provides a benefit to the City as a whole and is not solely for the good or benefit of a particular landowner or owners at a particular point in time;
6. The proposed TC significantly impacts the natural environment, including air, water, noise, stormwater management, wildlife and vegetation; and
7. The proposed TC significantly impacts existing conforming development patterns.

Sec. 10.2.4. Rezoning

A. Applicability

This Section applies to requests to change the City's Official Zoning Map ("rezonings") and TCZ's as defined in Sec. 10.2.3. Rezonings and TCZ's are legislative decisions.

B. Pre-Application Conference

Before submitting an application for a rezoning or TCZ, an applicant shall schedule a pre-application conference with the Planning Director to discuss the applicable procedures, standards and regulations. This requirement may be waived by the Planning Director.

C. Neighborhood Meetings

1. Pre-Submittal Neighborhood Meeting.

a. A pre-submittal neighborhood meeting is required for all rezoning and TCZ applications, except where the City is the applicant. The applicant shall provide an opportunity to meet with property owners of the development site and property owners and tenants within the mailing radius described in Sec. 10.2.1.C.1. The location of the neighborhood meeting must be at, or in reasonable proximity to, the subject property.

b. The required pre-submittal neighborhood meeting must be conducted prior to submittal of the rezoning or TCZ application. The meeting may not occur more than 6 months prior to the submittal of the application. Notice of the neighborhood meeting must be provided in accordance with Sec. 10.2.1.C.1.

c. A written report of the meeting, made by the applicant, shall be included with the application given to City Planning. The report shall include at a minimum, a list of those persons and organizations contacted about the neighborhood meeting, the date, time and location of the meeting, a roster of the persons in attendance at the meeting and a summary of issues discussed at the meeting.

2. Second Neighborhood Meeting.

a. A second neighborhood meeting shall be required for applications requiring a pre-submittal neighborhood meeting, which meet any of the following criteria:

i. The subject property is five acres or more;

ii. The proposed change increases the maximum building height to 5 stories or more, or increases the maximum building height by 5 stories or more;

iii. The proposed change increases residential density by an additional 10 dwelling units per acre;

iv. The request is to change from a Residential or Conservation Management (CM) zoning district to a mixed use or special zoning district (other than CM); or

v. The request seeks to create any type of PD district.

b. The second required neighborhood meeting must be conducted in a manner consistent with Sec. 10.2.4.C.1.a. and after City Planning has confirmed that the application is complete, but no earlier than thirty days following the application submittal date. Notice of the second required neighborhood meeting must be provided in accordance with Sec. 10.2.1.C.1.; however, the notice radius shall be one thousand feet. In addition, the property shall be posted in accordance with Sec. 10.2.1.C.4.

c. A report of the second meeting, made by the applicant, shall be delivered to City Planning no less than ten days prior to the first Planning Commission meeting at which the application is considered. The report shall include at a minimum, a list of those persons and organizations contacted about the neighborhood meeting, the date, time and location of the meeting, a roster of the persons in attendance at the meeting and a summary of issues discussed at the meeting. Any other person attending the second neighborhood meeting may submit written

comments following the meeting; however, the written comments must be received by City Planning within the same time frame described above in order to be included in the Planning Commission agenda packet.

D. Application Requirements

1. General Requirements

a. An application for any rezoning or TCZ shall be submitted in accordance with the application requirements of Sec. 10.2.1.B.

b. Where practicable, rezonings should correspond with the boundary lines of existing tracts and lots.

c. No rezoning that down-zones property shall be initiated without the written consent of all property owners whose property is the subject of the proposed down-zoning, unless the down-zoning amendment is initiated by the City. "Down-zoning" means a zoning amendment that affects an area of land in one of the following ways:

   i. By decreasing the development density of the land to be less dense than was previously allowed; or

   ii. By reducing the permitted uses of the land to fewer uses than were previously allowed.

d. If the change in intensity from the proposed rezoning or TCZ meets or exceeds the thresholds for a traffic impact analysis ("TIA") as described in the Street Design Manual, then submittal and staff review of a TIA shall be required as a part of completing the application.

e. No application shall be deemed complete until all the applicable documentation described in Sec. 10.2.4.D. has been submitted

f. An application for any rezoning or a TCZ may be, but is not required to be, submitted concurrently with an application for a Comprehensive Plan amendment, and the two applications may be processed and reviewed concurrently.

g. Should the property subject to the application not include an entire tax parcel, a survey-based metes and bounds of the subject property shall be required.

h. If an application is placed on hold at the request of the applicant for a period of six (6) consecutive months or more, or the applicant fails to respond to comments or provide additional information requested by the City for a period of six (6) consecutive months or more, the application review shall be discontinued and the application will be considered administratively withdrawn. A new application and fee shall be required to resume the rezoning effort. The development regulations in effect at the time the new application is submitted shall be applied to the application.

2. Additional Requirements for Conditional Rezoning and TCZ Applications

a. Conditional rezoning and TCZ applications must contain conditions which propose greater restrictions on development and use of the property than would apply in the corresponding general use district, and this UDO. The conditions may specify the use or uses prohibited or the use or uses allowed, including the maximum number of dwelling units and all development regulations which are requested for the property submitted for rezoning; however, the requested use or uses must be permitted in the corresponding general use district.

b. All those regulations which apply to the corresponding general use zoning district are the minimum requirements in the conditional district.

c. The City Council may accept zoning conditions that alter the maximum block standards in Sec. 8.3.2., the stub streets standards in Sec. 8.3.4.C. and the driveway standard for Residential Uses, Mixed Use and Nonresidential Uses in Sec. 8.3.5.C.2. and 3. No such zoning conditions shall be accepted for applications within the -TOD unless the means of providing for safe, efficient and convenient vehicular, bicycle and pedestrian circulation are demonstrated in a site plan, rendering or other image included with the conditional rezoning application per Sec. 10.2.4.D.2.g. Such zoning conditions may be approved by the City Council when the offered zoning conditions provide for safe, efficient and convenient vehicular and pedestrian access within developments and between adjacent developments and do not adversely affect traffic congestion. When these zoning conditions are included, the application shall be accompanied by additional information addressing how safe, efficient, and convenient vehicular and pedestrian access within developments and between adjacent developments is being achieved.

d. Zoning conditions associated with a lot line common to the subject property and an adjacent property shall reference the Deed Book/Page Number or recorded Book of Maps/Page Number of the associated adjacent property.

e. Exclusionary conditions which discriminate based on race or religion, specify ownership status or a minimum value of improvements shall not be submitted as a part of the petition.

f. No condition shall be submitted that proposes to regulate right-of-way reimbursement values or prohibit submittal of a traffic impact analysis. Any condition that prohibits street access or public street connections or extensions shall comply with subsection c above.

g. Site plans, renderings or other images may be submitted as part of the conditional rezoning application provided all elements of the site plan, rendering or image graphically illustrate the written text of the conditions in which case the written zoning conditions shall remain as the controlling instrument.

h. No condition may be made part of the petition which specifies the establishment and protection of tree conservation areas or tree protection areas unless the condition ensures that 100% of the critical root zones of trees proposed for protection and located on the subject rezoned property shall also be undisturbed areas.

i. No condition may be made part of the petition which specifies the authorization or consideration of a Design Alternate.

j. No variance shall be allowed to a zoning condition that is approved in conjunction with a conditional rezoning or TCZ.

3. Additional Requirements for CMP and PD District Applications

In addition to a Rezoning Application, a Master Plan Application must be submitted in complete form to initiate a Campus (Sec. 4.6.3. Campus (CMP)) or Planned Development (Sec. 4.7.4. Planned Development (PD)) rezoning.

4. Additional Requirements for -HOD-G and -HOD-S Applications

a. Any application for rezoning property to an -HOD-G and or -HOD-S districts, not filed by the City, must be signed by all of the property owners within the area proposed to be rezoned to an historic overlay district.

b. An investigation and report describing the significance of the buildings, structures, features, sites or surroundings included in any proposed -HOD-G and -HOD-S and a description of the boundaries of the district, changes in boundaries or de-designation due to loss of significance, shall be prepared and/or reviewed by the Historic Development Commission. The City Council shall refer the report to the North Carolina Department of Cultural Resources.

c. The Department of Cultural Resources, acting through an agent or employee designated by its Secretary, may analyze and make recommendations concerning such report and description of proposed boundaries. Failure by the Department of Cultural Resources to submit its written analysis and recommendations to the City within 30 calendar days after a written request for such analysis has been received by the Department of Cultural Resources shall relieve the City of any responsibility for awaiting such analysis (N.C. Gen. Stat. §160D-944(b)(2).

d. The City Council shall refer the report and proposed boundaries to the Planning Commission, in accordance with Sec. 10.2.4.F.4.

e. The City Council may refer the report to any other interested body for its recommendations prior to taking action to amend the Official Zoning Map.

5. Additional Requirements for -NCOD Applications

a. Except for applications filed by the City, City Planning is instructed not to accept -NCOD applications unless the application meets all the following:

i. Is requesting that either at least a minimum of 15 contiguous acres be zoned -NCOD or that an existing -NCOD be extended. If allowed in the underlying zoning district, all uses in the civic use category shall be excluded when determining the minimum 15-acre requirement; however, such civic uses may be used in determining contiguity of the area.

ii. Is signed by all of the property owners within the area proposed to be rezoned -NCOD.

iii. Is applied to an area where at least 75% of the lots are developed.

iv. Is located in an area in which the City Council has adopted into Sec. 5.4.3.F. specific neighborhood built environmental characteristics and regulations.

b. Within four years following the City Council adoption of specific neighborhood built environmental characteristics and regulations, City Planning may accept an application rezone property to a -NCOD.

c. If the City Council accepts a rezoning petition to apply a -NCOD, staff shall provide direct mailed notice to all property owners in the proposed overlay district. Additional mailed notice shall be provided in accordance with Sec. 10.2.1.C.1.

6. Additional Requirements for DX- District Applications

New applications requesting a DX- District must be for property located contiguous to or directly across the street from an existing DX- District.

7. Additional Requirements for TOD- Applications

Except for applications initiated by the City, new applications requesting a TOD- District must be for property located contiguous to or directly across the street from an existing TOD- District or within 1,320 feet of a bus rapid transit (BRT) route.

E. Approval Process

1. Planning Director Action

a. The Planning Director shall review the application for a proposed rezoning or TCZ in light of the considerations for Planning Director Review in Sec. 10.2.4.E. In reviewing any required CMP or PD master plan, the Planning Director shall consult with the heads of the departments of Public Utilities, Transportation, Engineering Services, Parks and Cultural Resources, Development Services and Fire to check the proposed master plan against the requirements of the UDO and other applicable technical requirements of the City.

b. Following review, the Planning Director shall prepare a report and forward the application to the Planning Commission.

2. Planning Commission Action

a. The Planning Commission, or one of its committees shall hold a legislative hearing on the application. The legislative hearing shall be noticed in accordance with the provisions of Sec. 10.2.1.C.

b. During the review and deliberations of the Planning Commission, conditions may be removed, added, or modified, zoning districts changed and/or zoning boundaries altered, no more than one (1) time.

c. No changes to the conditions shall be considered and deliberated on by the Planning Commission unless the following limitations are met:

i. Unsigned conditions must be submitted to City Planning at least 10 calendar days before the date of the next meeting at which the Planning Commission discussion of the application is scheduled;

ii. The unsigned conditions must be signed by all owners of the property sought to be rezoned and submitted to City Planning at least two business days before the date of the next meeting at which the Planning Commission discussion of the application is scheduled; and

iii. The signed conditions cannot modify the unsigned conditions except to respond to staff comments or to make non-substantive or clerical corrections.

d. Within 60 days after its receipt of the proposed rezoning, the Planning Commission shall make its recommendation to the City Council. Within this time period, the Planning Commission may request extensions of time which may be granted by the City Council. If no recommendation is made within this time period and if no extension is granted, the City Council may take action on the application without further involvement of the Planning Commission.

e. When conducting a review of proposed rezoning or TCZ pursuant to this section, the Planning Commission shall advise and comment on whether the proposed action is consistent with the Comprehensive Plan and any other officially adopted plan that is applicable.

f. The Planning Commission shall make its recommendation to the City Council in writing. The Planning Commission shall recommend that the request be approved, approved as revised or denied. A written recommendation shall address plan consistency and other matters as deemed appropriate by the Planning Commission.

g. In no case shall changes to the conditions be accepted following an action by the Planning Commission and prior to the Planning Commission's written recommendation being received by the City Council, other than non-substantive, technical revisions to the text of the conditions, in which case such revised conditions must be signed by all of the property owners of the land proposed to be rezoned to a conditional district and must be submitted to City Planning at least 2 business days before the date the City Council schedules the matter for public hearing.

3. Legislative Hearing by City Council

a. Following the recommendation of the Planning Commission or expiration of the applicable Planning Commission review period without a recommendation, the City Council shall conduct a legislative hearing. City Council shall act to schedule the hearing within 60 days of receiving the request from the Planning Commission, and notice shall be given in accordance with Sec. 10.1.8.

b. Changes to the conditions may be made following City Council's receipt of the Planning Commission recommendation subject to the following limitations:

i. Unsigned conditions with the changes must be submitted to City Planning at least 10 calendar days before City Council acts to schedule the matter for public hearing;

ii. The unsigned conditions must be property sought to be rezoned and submitted to City Planning at least two business days before the date the City Council acts to schedule the public hearing; and

iii. The signed conditions cannot modify the unsigned conditions except to respond to staff comments or to make non-substantive or clerical corrections.

4. Conduct of the Legislative Hearing

a. The Planning Director shall provide a report describing the application, including analysis of the considerations listed in Sec. 10.2.4.F. as deemed appropriate.

b. The presiding officer shall open the legislative hearing. Those in favor of the rezoning will be allowed a total of 8 minutes to explain their support and those against the rezoning will be allowed a total of 8 minutes to explain their opposition. Additional time may be allowed by the City Council, but must be the same amount of time for those in support and against.

5. City Council Action

a. Revisions may be made to proposed conditions in conditional rezoning and TCZ cases during the legislative hearing or within 30 days following the date on which the hearing is closed subject to the following limitations:

i. Unsigned conditions with the changes must be submitted to City Planning at least 10 calendar days before the date of the next meeting at which the City Council discussion of the application is scheduled;

ii. The unsigned conditions must be signed by all owners of the property sought to be rezoned and submitted to City Planning at least two business days before the date of the next meeting at which the City Council discussion of the application is scheduled; and

iii. The signed conditions cannot modify the unsigned conditions except to respond to staff comments or to make non-substantive or clerical corrections.

b. Signed conditions may be submitted electronically so long as the original signed petition is received by the Planning Director at least 24 hours before the date of the meeting where final City Council action is taken; provided that the electronic signature is (1) unique to the person using it; (2) capable of certification; (3) under the sole control of the person using it; and (4) linked to the same page as the petition.

c. Should the applicant wish to revise the zoning conditions to be less restrictive or revise the request to a less restrictive zoning district, the City council shall schedule a new legislative hearing and provide notice in accordance with the provisions of Sec. 10.2.1.C. The applicant shall be responsible for the cost of legal advertisement of the new legislative hearing. The City Council may, in its sole discretion, refer such an application to the Planning Commission before scheduling the new legislative hearing. If the City Council refers an application that will be subject to a new legislative hearing back to the Planning Commission for review, the applicant shall conduct a neighborhood meeting in accordance with Sec. 10.2.4.C 2.

d. When approving or denying any rezoning or TCZ, the City Council shall approve a brief statement describing whether its action is consistent or inconsistent with the Comprehensive Plan.

e. If a rezoning or TCZ is adopted and the action was deemed inconsistent with the adopted plan, the zoning amendment shall have the effect of also amending the future land-use map, and no additional request or application for a plan amendment shall be required.

f. A statement analyzing the reasonableness of the proposed rezoning or TCZ shall also be approved by the City Council. This statement of reasonableness may consider, among other factors:

i. the size, physical conditions, and other attributes of the area proposed to be rezoned;

ii. the benefits and detriments to the landowners, the neighbors, and the surrounding community;

iii. the relationship between the current actual and permissible development on the tract and adjoining areas and the development that would be permissible under the proposed amendment;

iv. why the action taken is in the public interest; and

v. any changed conditions warranting the amendment.

g. The statement of reasonableness and the plan consistency statement may be approved as a single statement.

F. Considerations for Planning Director Review

The following is a non-exclusive list of considerations the Planning Director may take into account when reviewing a rezoning or TCZ application:

1. The application corrects an error or meets the challenge of some changing condition, trend or fact;
2. The application is generally consistent with the Comprehensive Plan;
3. The application is generally consistent with the stated purpose and intent of this UDO;
4. The application will reinforce the existing or planned development pattern of the area;
5. The site is appropriate for the development allowed in the proposed district;
6. The application is reasonable and in the public interest;
7. The City and other service providers will be able to provide sufficient public facilities and services including schools, roads, recreation facilities, wastewater treatment, water supply and stormwater facilities, police, fire and emergency medical services, while maintaining sufficient levels of service to existing development; and
8. The application will not have a significant adverse impact on property in the vicinity of the subject property.

G. Time Lapse between Applications

1. Limitations Between Applications

a. In the absence of a special waiver approved by the City Council, the Planning Director is not authorized to accept an application for a rezoning or a TCZ on the same property that was the subject of an application advertised for a City Council legislative hearing unless 24 months has passed since the date of the withdrawal or denial of the prior application.

b. The 24-month waiting period does not apply to any City Council-initiated rezoning.

2. Special Waiver

City Council may grant a waiver of the 24-month waiting period for one or more of the following grounds:

a. Materially changed circumstances;

b. Clerical correction as the basis for the previous rezoning;

c. Newly discovered evidence of adverse impact of the current zoning which by due diligence could not have been discovered in time for the earlier public hearing;

d. Substantially changed zoning request; or

e. For any other circumstance determined by the City Council to be reasonable and in the public interest.

H. Modification of Previously-Approved Conditions or PD Master Plan

When a property has been rezoned into a conditional district, including PD and CMP, the property owner can request subsequent modifications to the zoning conditions or Master Plan. Modifications can be minor or major; however,

only PD and CMP districts are eligible for minor modifications.

1. Minor modifications to PD that can be administratively approved are described in Sec. 4.7.6.A.
2. Minor modifications to CMP that can be administratively approved are described in Sec. 4.6.4.A.
3. If multiple parcels or land are subject to a conditional zoning, the owners of individual parcels may apply for modification of the conditions so long as the modification would not result in other properties failing to meet the terms of the conditions. Any modifications approved shall only be applicable to those properties whose owners petition for the modification.
4. Modification that do not qualify as minor are major and shall require a new zoning or TCZ application.

Article 12.1. General

Sec. 12.1.1. General Meaning of Words and Terms

A. All words and terms used have their commonly accepted and ordinary meaning unless they are specifically defined in this UDO or the context in which they are used clearly indicates to the contrary.

B. In the absence of court decisions or Board of Adjustment decisions specifically interpreting a provision in question, specific definitions listed in this UDO or previous interpretations of a provision by the Zoning Administrator, the meaning of provisions shall be based on the following general hierarchy of sources:

   1. For a legal term, definitions in a legal dictionary or if not a legal term, definitions in an ordinary dictionary;
   2. Statements of the purpose and intent of particular sections or background reports and studies adopted or referred to in this UDO, although such documents cannot overrule a specific code provision;
   3. Minutes of discussions of legislative or advisory bodies considering adoption of the provision in question;
   4. Definitions of similar terms contained in Federal and State statutes and regulations; and
   5. Ordinary rules of grammar.

C. When vagueness or ambiguity is found to exist as to the meaning of any word or term used, any appropriate cannon, maxim, principle or other technical rule of interpretations or construction used by the courts of this State may be employed to resolve vagueness and ambiguity in language.

Sec. 12.1.2. Graphics, Illustrations, Photographs & Flowcharts

The graphics, illustrations, photographs and flowcharts used to explain visually certain provisions of this UDO are for illustrative purposes only. Where there is a conflict between a graphic, illustration, photograph or flowchart and the text of this UDO, the text of this UDO controls.

Sec. 12.1.3. Abbreviations

A. BFE: Base Flood Elevation

B. DBH: Diameter at Breast Height

C. FAA: Federal Aviation Administration

D. FC: Footcandle

E. FEMA: Federal Emergency Management Agency

F. FIRM: Flood Insurance Rate Map

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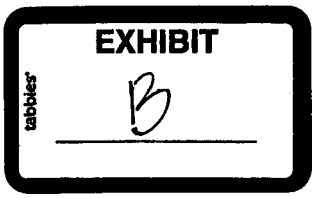
STATE OF NORTH CAROLINA COUNTY OF WAKE MARVIN BUTLER BENNETT, III, REBECCA GARRISON BENNETT, JOHN SOLIC, and SAMANTHA SOLIC, Petitioners, v. CITY OF RALEIGH, a body politic and corporate; 908 WILLIAMSON, LLC, a North Carolina limited liability company; RDU CONSULTING, PLLC, a North Carolina limited liability company; and CONCEPT 8, LLC, a North Carolina limited liability company, Respondents.	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 23 CVS _____ **PETITION FOR WRIT OF CERTIORARI**

NOW COME Marvin Butler Bennett, III, Rebecca Garrison Bennett, John Solic and Samantha Solic (hereinafter collectively "Petitioners") and petition the Superior Court of Wake County, North Carolina, pursuant to N.C. Gen. Stat. §160D-406(k) and N.C. Gen. Stat. §160D-1402, to review a decision of the City of Raleigh (hereinafter "City"), by and through its zoning board of adjustment (hereinafter "BOA"), as hereinafter set out, by proceedings in the nature of certiorari, and in support thereof show unto the Court as follows:

1. Marvin Butler Bennett, III, and wife Rebecca Garrison Bennett (collectively "Bennetts") are citizens and residents of Wake County, North Carolina and own property located at 1517 Iredell Drive in Raleigh, North Carolina, as described in a deed recorded in Deed Book 19090, at Page 74, Wake County Registry (the "Bennett Property").

2. John Solic, and wife Samantha Solic (collectively "Solics") are citizens and residents of Wake County, North Carolina and own property located at 912 Williamson Drive in Raleigh, North Carolina, as described in a deed recorded in Deed Book 18407, at Page 1082, Wake County Registry (the "Solic Property").



3. The City is a municipal corporation organized and existing under the laws of the State of North Carolina and is governed by or is subject to N.C.G.S. Chapter 160D in the exercise of its zoning authority.

4. The BOA is an administrative agency of the City organized pursuant to law to, among other things, hear appeals of aggrieved parties from rulings of the City's zoning or code enforcement officers related to the City's land development regulations or unified development ordinance (hereinafter "UDO").

5. 908 Williamson, LLC ("Williamson") is a North Carolina limited liability company with its principal place of business located in Wake County, North Carolina. Williamson is the owner of property located at 908 Williamson Drive, Raleigh, North Carolina ("Site"). On the Site, an intense townhouse development (consisting of seventeen (17) multi-unit attached housing on 2.432 acres) is planned ("Project"). The Bennett Property and Solic Property adjoin the Site.

6. RDU Consulting, PLLC ("RDU"), is a North Carolina limited liability company with its principal place of business located in Wake County, North Carolina. On June 21, 2022, this Respondent applied for development approval in the form of a compact subdivision application to the City of Raleigh Planning and Development Department for the development of the Site.

7. Defendant Concept 8, LLC, is a North Carolina limited liability company with its principal place of business located in Wake County, North Carolina. This Respondent is the developer of the Project on the Site ("Developer").

8. On December 30, 2022, the City by and through its City staff ministerially issued a final development approval for the Project as a compact subdivision ("December 2022 Approval"). The development approval allows for the Site to be developed with seventeen (17) lots to be used for multi-unit living within a townhouse style of buildings, including 2, 3 and 4 multi-unit townhouse buildings.

9. The City's position is that recent changes in the City's zoning regulations - called the "Missing Middle Housing ordinances" - purportedly authorize the Project. Some of the Petitioners are separately contesting the validity of the applicable ordinances related to Missing Middle Housing in Superior Court, Wake County File No.: 23 CVS 004711-910.

10. The Petitioners' properties (identified above) and the Site are all zoned R-4.

11. The Petitioners' properties and the Site are part of the Hayes Barton neighborhood that runs, in part, along Williamson Drive and Iredell Drive in the City of Raleigh that is made up primarily of older, historic homes on relatively large lots. The Site and the Petitioners' properties are situated in the southernmost section of the Hayes-Barton neighborhood.

12. Historically, and prior to the Missing Middle Housing ordinances referenced herein, buildings with multiple dwelling units attached such as duplexes, triplexes and quadraplexes and the use of property for multi-unit living were severely restricted, if not prohibited, in R-4 within the developed areas of Raleigh, including the Hayes Barton neighborhood.

13. Based on the zoning regulations in place at the time of the application for the Project, townhouses were not generally allowed in R-4. The only exceptions were townhouses that were part of an approved compact, conservation or cottage court development. (UDO, Sec. 1.4.2).

14. Each of the Petitioners have a single-family detached dwelling or home on their respective lots.

15. Petitioners as owners of property adjoining the Site will be uniquely and adversely affected by the Project as authorized by the December 2022 Approval and BOA's decision to affirm, and will suffer special damages different than or distinct from the rest of the community or the public at large, in the form of increased traffic and parking on Williamson and Iredell Drives, the decreased safety of the intersection of Williamson and Iredell (which is in the vicinity of the driveway entrances to Petitioners' properties), increases in the rate and flow of stormwater, noise and light pollution and a diminution in the value of Petitioners' properties. As a result of these unique or special damages, the Petitioners have standing to pursue this appeal under N.C.G.S. §160D-1402(c)(2).

16. Petitioners timely appealed the December 2022 Approval to the BOA.

17. The appeal came before the BOA for hearing held on the following dates: May 8, June 29, June 30, August 9, and August 14, 2023 (hereinafter collectively the "Hearing").

18. At the Hearing, the BOA, by a 3-2 vote, affirmed the December 2022 Approval for the Project at the Site. Prior to that vote, the Board, by a 3-2 vote, determined that Petitioners had standing to bring this appeal and denied the City's motion to dismiss related thereto.

19. The BOA's written decision to affirm the Application (hereinafter "Order") was filed by the Clerk to the BOA on August 14, 2023 and thereafter delivered to Petitioners on August 15, 2023, a true and accurate copy of which is attached hereto as Exhibit "1" and incorporated herein by reference.

20. The Petitioners have timely appealed the Order to the Wake County Superior Court.

Count One
Errors of Law

21. Petitioners incorporate by reference the allegations contained in paragraphs #1-20 above.

22. The principal requirement of a compact development that is in dispute is found in UDO, Sec. 2.3.1C entitled **Transitional Protective Yard**, which mandates that a developer or project applicant either install a B1 or B2 Transitional Protective Yard, a vegetative buffer, around the perimeter of the proposed site or develop "perimeter lots" in accordance with the following language: "perimeter lots must meet the dimensional standards of Article 2.2 Conventional Development Option of the district where the property is located."

23. The Project does not propose, nor does the December 2022 Approval require, a B1 or B2 vegetative buffer along the perimeter of the Site nor are there perimeter lots divided around the periphery of the Project.

24. Except for two secondary tree conservation areas ("TCAs") in the northeast and southwest corners of the property, the Project proposes no vegetative buffer around most of the perimeter of the Site, including the areas immediately bordering the Petitioners' properties.

25. Running generally with and along the perimeter of the Project outside the two TCAs, a proposed road known as Fairview Farm Circle and a surface parking area is located four to five feet from the common property line shared with the Solics and Bennetts. This road is the only and principal means of access to the future townhouses. Between the road and the perimeter bordering the Petitioners, what is proposed and authorized by the City's erroneous approval are retaining walls or insignificant open, undefined space.

26. The Project consists of a large open space area in the middle or interior of the development that is intended to be conveyed to a homeowner's association. This

relatively large open space area is then drawn in a way on the plans so that it connects with a boundary that encompasses the road, parking area, TCAs and the narrow strip of ill-defined bits of open area and retaining walls along the perimeter of the Site. The City and Project Developer referred to this bounded area as Lot 18 or the "common HOA lot".

27. Transitional protective yards ("TYPs") are mandated by the UDO in instances where a developer is seeking to develop smaller lot sizes (and therefore achieve higher density) than those normally associated with conventional development or where incongruous land uses or building styles with different impacts are requested to establish separation or buffers. They are required for compact or conservation developments.

28. Transitional standards in the UDO reflected by TPYs are intended to soften the edges of higher density areas so they blend with lower-density areas, lessen the impact of disparate land uses for adjacent single-family homeowners, protect existing neighborhood character and provide aesthetic or acoustic buffers for adjoining properties.

29. From at least 2013 until changes in the UDO zoning text with the first Missing Middle Housing Ordinance in 2021 (TC-5-20), compact or conservation developments were only allowed on large parcels of land. For compact development, the minimum site acreage was historically 8 acres. For conservation development, it was historically 12 acres. That changed with the first Missing Middle Housing Ordinance adopted in July 2021, where the large minimum acreage requirements were eliminated for those type of developments.

30. With the first Missing Middle Housing Ordinance, the City Council also made townhouses an allowed use in R-6 or R-10 zoning districts with a conventional development. However, the Council only made townhouses potentially allowed in the R-4 district as part of a compact, conservation or cottage court development, while at the same time retaining the requirements for Transitional Protective Yards for those types of projects in R-4. The net effect of those recent changes is that a developer may be able to generate townhouses with higher densities in R-4 but only by satisfying, among other things, Transitional Protective Yard provisions.

31. On March 14, 2022, Jason Meadows, the site design consultant for the Project, asked two City of Raleigh zoning administrators, Keegan McDonald and Eric Hodge, for their interpretation of the UDO of whether a singular common HOA lot containing no vegetative buffers around the perimeter of the development would

satisfy the compact subdivision standard for Transitional Protective Yards. The initial response from Keegan McDonald was negative.

32. In an email dated March 16, 2022, Keegan McDonald informed Jason Meadows:

> I spoke with staff and it is my understanding the exemption [from a vegetative buffer] refers to the perimeter residential lots, not the common area lot(s).

Keegan McDonald later informed his supervisor Travis Crane, then acting Zoning Administrator, that he had "explained to Jason [Meadows] that the protective yard would be required under today's code as there are no lot dimensional standards for townhouses in R-4."

33. From March 2022 until sometime in the early fall of 2022, the City staff informed Jason Meadows for the Developer and RDU that upcoming changes to the UDO contained in a second Missing Middle Housing Ordinance would establish conventional lot standards for fee simple conveyance of 2-unit townhouses that could suffice if those buildings were laid out within lots comprising "perimeter lots" under Section 2.3.1C.

34. Prior to the Project application, the City had not dealt with a development that sought to use a singular "HOA common lot" around the perimeter, or a substantial part thereof, as a means to satisfy the TPY standards for either compact or conservation developments.

35. Developers of compact or conservation development requests prior to the Project between 2013 and 2022 essentially used two methods, or a combination thereof, to satisfy the TPY perimeter protection standards: (1) a vegetative buffer along the entire perimeter of a project following either specific B1 or B2 criteria or a heightened vegetative screening as part of a tree conservation area or a riparian buffer; or (2) subdivided conventional lots along the perimeter intended for residential structures, usually single family detached units, meeting the conventional dimensional standards for such lots in Article 2.2.1 of the UDO.

36. The UDO does not define the phrase "perimeter lots" found in Section 2.3.1C. As a result, the UDO informs a reader to consider a standard dictionary definition, which would plainly show that multiple lots must be around the perimeter. The ordinary meaning of "lots" is the plural of "lot".

37. Section 1.5.2A of the UDO defines "Lot" as "A parcel of land either vacant or occupied intended as a unit for the purpose, whether immediate or in the future, of transfer of ownership or possession or for development." A "lot" contains a "lot area" that is bounded by rear, side and front lot lines. UDO, Section 1.5.2B. A "lot" has a "lot width" and a "lot depth". UDO, Section 1.5.2C & D.

38. Brinley Manor, a conservation development approved by the City in 2016, is illustrative of using conventional "perimeter lots" to satisfy the TPY requirements. This development approved by the City had smaller lot sizes in the interior for detached housing with periphery lots for detached housing meeting the conventional dimensional standards in Article 2.2 of the UDO. For those property owners adjoining the periphery, their properties were protected by having conventional lots with conventional lot sizes, shape and setbacks next to them rather than higher intensity or smaller lots.

39. Laurel Hills Townhomes, a compact development approved by the City in 2022 for a R-4 zoned property, is illustrative of providing B1 or B2 vegetative buffers to satisfy the TPY perimeter requirements to soften the impacts of a higher intensity development.

40. For the Elmwood Subdivision, a compact development, the City staff noted that "perimeter lots share a front, side, or rear property line."

41. For the Project, and as authorized by the December 2022 Approval, there are no conventional lots proposed to be subdivided around the periphery of the Site that share a front, side or rear property line.

42. Lot 18 is a mishmash of interior constituted open space acreage with space around the periphery serving different functions (E.g., TCA, road, parking, retaining walls) connected by a gerrymandered, haphazard boundary line. Its nonconventional design, which was done purely to scam the transitional protective standards for compact developments, leaves this so-called lot without a discernable front, side or rear property line.

43. The Respondents and BOA contend that Lot 18 is an "open lot" as defined in Section 1.4.1H of the UDO. An "open lot" is defined there as follows:

> Open lots are used to accommodate uses with large outdoor or open areas. An open lot can also accommodate open space, parks or natural areas.

44. For the Project and as authorized by the December 2022 Approval, there are no "large outdoor or open areas" around the perimeter of the Site excluding the TCAs. In this space, there are no areas that qualify as open space in Article 2.5 of the UDO, either in terms of function or use or dimensions (e.g., 50 foot minimum width). For example, roads and parking areas are prohibited in open space. UDO, Section 2.5.6. In this narrow strip, there are no parks or natural areas such as riparian buffers.

45. Following the logic of the City and BOA's contentions about the HOA common lot or Lot 18 in this case satisfying the TPY standards in Section 2.3.1 of the UDO, any open area, regardless of width or depth as it runs along the entire perimeter, that is set aside for conveyance to a HOA would suffice so long as it was connected to open area 65 feet in width at the primary street frontage. Juxtaposed to this result is Section 7.2.4 of the UDO where it sets the minimum widths of B1 or B2 vegetative buffers at 20 feet and 35 feet, respectively.

46. As applied to the Project, the City's UDO did not allow for townhouses on conventional lots within R-4 zoned properties. As a result, the traditional pattern for compact or conservation developments of having smaller lots for the contemplated housing product developed within the interior with conventional, larger lots for the similar housing product around the periphery, could not be achieved. This is the reason that Keegan McDonald told Jason Meadows, representing the Project Developer, that the only option was a vegetative buffer since perimeter lots were not viable.

47. To lay out on the Site conventional lots supporting different housing product allowed in R-4 (E.g., detach or attached house) would take up a significant portion of the property since it only comprises roughly two acres. This is in sharp contrast to the historical application of TPY standards for compact or conservation developments that were only possible on much larger tracts with a minimum of 8 acres or 12 acres, respectively.

48. In its responses to the City staff comments for the Project, RDU and the Developer admitted in September 2022 that no perimeter lots were laid out around the periphery nor any B1 or B2 vegetative buffer.

49. The City witnesses at the BOA hearings admitted that there were no plural number of lots positioned around the periphery of the Site as authorized by the December 2022 Approval.

50. Article 12.1 of the UDO sets forth the City standards for rules of construction of terms contained within the UDO.

51. Around September 2022, upon his return from a leave of absence, Justin Rametta, City Zoning Administrator, reversed Keegan McDonald's interpretation of whether a singular HOA common lot of ill-defined, mish-mashed dimensions could suffice for the TPY standards for the Project and decided that it could.

52. In making the December 2022 Approval, and interpretating the meaning of "perimeter lots" for satisfying TPY requirements, the City did not use or correctly employ the rules of construction in Article 12.1.

53. The compact development plans for the Project show neither B1 or B2 vegetative buffers nor "perimeter lots" around the periphery of the Site.

54. If the language of an ordinance is clear, a reviewing board or court must implement it according to the plain meaning of its terms. *Appalachian Materials, LLC v. Watauga Cty.*, 262 N.C. App. 156, 160, 822 S.E.2d 57, 60 (2018). The plain and ordinary meaning of "lots" is the plural of "lot". This is an unambiguous term. The City staff admitted that the ordinary meaning of the term "lots" from a standard dictionary would be the plural of "lot." *See* Webster's Online Dictionary, "Lots" (2023). The grammatical signal given by the plural "lots" cannot be ignored and must be applied as written. *See Pine Knoll Shores v. Evans*, 331 N.C. 361,366, 416 S.E.2d 4, 7 (1992); *Tutterow v. Hall*, 283 N.C. App. 314, 318, 872 S.E.2d 171, 175 (2022)(choice of singular signals only one UIM policy at issue); *City of Concord v. Duke Power* Co., 346 N.C. 211, 217, 485 S.E.2d 278, 282 (1977)(acknowledging plural "suppliers of electric service"); *State v. Sandy*, 25 N.C. 570, 576(1843)(the use of plural in a criminal code for offenses cannot be received as a substitute for one in the singular); *Pro-Tech Energy Solutions, LLC v. Cooper*, 2015 NCBC 73, ¶39 (2015)(citing *Swift v. Richardson Sports*, 188 N.C. App. 82, 87, 658 S.E.2d 674, 674 (2008), *State v. Edwards*, 185 N.C. App. 701, 704, 649 S.E.2d 646, 649 (2007) and Webster's Collegiate Dictionary, 11th Edition (for the meaning of "plural" as relating to more than one)).

55. Neither City staff, zoning boards of adjustment or courts possess the authority to insert language into an ordinance or to substitute words of their own choosing. *Appalachian Materials*, 262 N.C. App. at 162-163, 822 S.E.2d at 62. The Respondents' and BOA's construction substitutes the phrase "perimeter lot" for "perimeter lots," which is in error.

56. The Respondents and BOA's contentions that N.C.G.S. §12-3's rules of construction for state statutes supplants the City's rules of construction in Article 12.1 of the UDO is incorrect. While it is correct that rules applicable to statutes apply equally to the construction of local ordinances, these "rules" are those created by judicial decisions or common law, not legislatively prescribed rules of construction. *See Woodhouse v. Board of Com'rs*, 299 N.C. 211, 225, 261 S.E.2d 882, 891 (1980)(citing *Perrell v. Beaty Service Co.*, 248 N.C. 153, 102 S.E.2d 785 (1958)). Article 12.1 of the UDO does not incorporate by reference N.C.G.S. §12-3 or other construction rules established by the North Carolina General Assembly, and this result cannot be done under the guise of construction. *Cardwell v. Madison Bd. of Adj.*, 102 N.C. App. 546, 402 S.E.2d 866 (1991)(it was error for zoning administrator and zoning board to use State building code definition of "building" to replace term established by local ordinance when ordinance did not incorporate such State definition). An agency is required to follow its ordinances or regulations. *Humble Oil Refining Co. v. Board of Aldermen*, 284 N.C. 458, 467-468, 202 S.E.2d 129, 135 (1974). The Respondents and BOA did not consult or employ a dictionary definition to address the undefined meaning of "perimeter lots" or "lots", which violates the City's rules of construction.

57. Following Article 12.1's rules of construction mandated for construing undefined UDO terms, especially Sections 12.1.1A, 12.1.1B1. and 5., the Project clearly does not have multiple conventional lots around the Site's perimeter.

58. There are no conventional lots sharing a front, side or rear lot line around the periphery of the Site.

59. Besides not constituting multiple "perimeter lots," Lot 18 is not a perimeter lot. It has no discernable front, side or rear lot lines along the periphery of the Site.

60. Around the perimeter of the Site, the Project development plans do not show an area that qualifies as an "Open Lot" under Section 1.4.1H of the UDO. A road, parking surface area or retaining walls are hardly "large outdoor or open areas." The UDO in Section 1.4.1H provides examples of "open lots" when referencing "open space, parks or natural areas." Applying the construction principle of *noscitur a sociis* (the meaning of a word can be gathered by what is associated with), the spaces around the perimeter of the Site are not qualifying open spaces, parks or natural areas and would not, therefore, constitute an open lot, whether as part of an area bounded as a

singular lot or divided multiple ways. *Visible Props., LLC v. Vill. of Clemmons*, 284 N.C. App. 743, 754, 876 S.E.2d 804, 812 (2022) (citing *Jeffries v. Cty. of Harnett*, 259 N.C. App. 473, 493, 817 S.E.2d 36, 49 (2018)).

61. From past applications of TPY standards for compact or conservation developments and the plain meaning of the UDO, random open areas around the perimeter of a project cannot suffice as sufficient buffers or separation to preserve the character of adjoining properties or to soften or mitigate impacts related to higher intensity, compact developments. The City has consistently required more in terms of lots meeting conventional standards for some housing like those bordering the project or vegetative barriers either in the form of B1 or B2 buffers or TCAs, including riparian conservation areas.

62. A "protective yard" means in the UDO:

> A landscaped yard area which contains no buildings, vehicular surface area, loading, storage, or display service areas. . . . Protective yards include transitional protective yards, street protective yards and Zone A transition zones. Article 12.2.

63. There is no qualifying protective yard for the Project. See UDO, Section 7.2.4.

64. A qualifying "tree conservation area" may substitute for an obligation to install a TPY. UDO, Section 7.2.4A2, Section 9.1.10C.5. Examples of tree conservation areas are riparian buffers, UDO, Section 9.1.4A.6, or greenways. UDO, Section 9.1.4D.

65. Missing Middle Housing changes to the UDO did not change the requirement in R4 zoned properties of a protective barrier or fort around the periphery whenever a developer sought to take advantage of higher density or incongruous land uses or building types within the interior. This transitional area or barrier takes the form of vegetation screening or lots or uses or buildings designed to be like neighboring properties. The Project is devoid of any such protective transition area or barrier.

66. The plain outcome of the Respondents' and BOA's interpretation would nullify or render superfluous the requirements of a B1 or B2 buffer and of having

material vegetation along the perimeter of a compact or conservation development at widths of 20 feet or 35 feet to screen incongruous uses or buildings. The consequence of this interpretation would be a transitional area having little to no width or depth along a perimeter; essentially eliminating any protective transition between disparate lots, uses or buildings. Developed portions of uses or buildings at levels more intense than adjoining properties would be separated by little to no consequential intervening space. In this case, the Project development would start 4 to 5 feet from the Petitioners' common boundary with the Site. This reading of the UDO is at variance with the City Council making the legislative choice to leave the TPY standards for R-4 zoned properties in place as they have been historically since at least 2013. *See Coastal Ready-Mix Concrete Co. v. Board of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (the spirit and objectives of legislation are considered when interpreting an ordinance).

67. Primary street designation standards in Section 1.5.4 of the UDO establish setback criteria for dwellings and other buildings within a development project.

68. With the December 2022 Approval, the City determined that Williamson Drive was the primary street and not Iredell Drive. This determination affects the functionality of at least one of the proposed townhouse lots.

69. When a site has frontage on two City streets, subsection C of Section 1.5.4 of the UDO comes into play. The Project does not consist of "apartment, general, mixed-use or civic building types". Neither Iredell Drive nor Williamson Drive is presently developed with townhouse building types.

70. Iredell Drive is opposite the only rear yard of a lot adjoining the Site.

71. Iredell Drive is the primary street based on Section 1.5.4C3 of the UDO since a townhouse is a type of an attaching building, the Site is a corner lot and the only adjoining rear yard is opposite Iredell Drive. The BOA committed an error of law in concluding otherwise.

72. The BOA committed errors of law with its conclusions No. 1, 3-5, 7-8 and for affirming the December 2022 Approval.

73. The BOA violated the plain language of the UDO and committed errors of law in:

(i) Determining that the Project satisfied the compact development standards of the UDO;

(ii) Determining that the Project complied with the TPY requirements with no vegetative buffer and with the singular Lot 18, a so-called "lot;"

(iii) Determining that the phrase "perimeter lots" can mean one "lot;"

(iv) Employing "applicable state appellate case law and statutes" such as N.C.G.S. §12-3 when the UDO does not incorporate the latter statute or any other statute for UDO construction standards and which approach ignores the standards of construction in Article 12.1 of the UDO and the plain language of the term "lots", which is the plural of "lot;"

(v) Determining that Lot 18 was a "lot" or a "perimeter lot" since it is a mishmash of principally interior open space with road, parking, retaining walls and ill-defined areas around the perimeter with no discernible front, side or rear property lines;

(vi) Determining that Lot 18 was an "open lot" since it fails to satisfy the definition of "open lot" in the UDO; and

(vii) Determining that Williamson Drive was the primary street. The primary street designation, once made as stated in the December 2022 Approval, establishes with finality the setbacks for buildings, unless appealed.

74. Plaintiffs are entitled to judgment reversing the BOA's Order based on the above errors of law and voiding the December 2022 Approval.

Count Two

Arbitrary and Capricious Findings Improperly Labeled and/or Decision Not Supported by Record

75. Petitioners incorporate by reference the allegations contained in paragraphs #1-74 above.

76. Related to the reasons for approval, the BOA's Order is not supported by competent, material and substantial evidence and is therefore arbitrary and capricious. More particularly, and based on Count One, the following findings of fact in the Order are improperly labeled and are essentially conclusions of law that have been rendered in error: Findings of Fact Nos. 5, 7-8, 11, 13, 14, 16, 17, 18, 20, 26-27.

77. The three (3) members of the BOA who voted to affirm the December 2022 Approval through their deliberations and reasons given for their vote showed

arbitrary and capricious decision making and the lack of discerning principles consistent with the language of the UDO. See *Sanchez v. Town of Beaufort*, 211 N.C. App. 574, 710 S.E.2d 350 (2011) (deliberations from hearing transcript evidence arbitrary decision making); *Hall v. Durham*, 88 N.C. App. 53, 58, 362 S.E.2d 791, 794 (1987) (same). The following is a portion of their deliberations:

> Ms. Rudisill: I respectfully disagree with Mr. Rainey as the real estate of perimeter lot and the lot (inaudible) in the perimeter, a lot -- can be lots or lots. You can look at the ***North Carolina General Statute*** and **that's what the law says in statutes.** So I think the City of Raleigh made a correct decision based upon the applicable ordinances and law. And I would make a motion to approve the City's decision.
>
> Mr. Kenney: I also agree with Cathy on this one. It was a massive document, hundreds of pages. The, in fact, draw the rigorous analysis in looking at old cases. The smoking gun seems to be lot verse lots, since -- that's not much in my opinion. If working overtime and staff decision, it's a fairly extraordinary step for me, personally. It would need to be something far more robust. I've seen the letter to the Board and that alleged ambiguity.
>
> Mr. Swink: This is, again, a case where it may be that the -- the language of the ordinance is -- could be approved to -- to better protect neighbors in these circumstances. And yet I think the way it is written, to me it's very clear. I -- I believe that the City -- I believe the City has met the burden. ***I believe that the reference to the legal statutes, how that is applied here, plural is singular, singular is plural, I accept that application.*** I'm not an authority with -- we're subject to a review by higher courts than us. We're not a court. But I -- I support the City's decision in this. I think they acted within the realm of the way things were written in good faith. I do -- I would like to think from the balance perspective there was a little more room for them to get better buffering than their might be getting in this, but given the way it's written, I think you -- it's a pretty narrow interpretation and I think they've met that test. So I'll offer that as a -- in my second to your motion.

78. As is clearly evident from the above deliberations, the three (3) BOA members voting in favor of the City's interpretation did so out of a misapprehension of the law relating to N.C.G.S. 12-3's applicability to interpreting the UDO as well as by giving overwhelming deference to the City staff, which outcome eschews their

duties to interpret ordinances in cases of dispute and violates the *de novo* principles for zoning board review in N.C.G.S. §160D-406(j).

79. Plaintiffs are entitled to judgment reversing the BOA's Order for being arbitrary and capricious and lacking support in any proper findings based on the evidence in the record.

WHEREFORE, the Petitioners pray the Court as follows:

1. That a Writ of Certiorari be issued to the Respondent City by which the City shall be commanded within thirty (30) days of the issuance of the Writ to prepare and submit to the Court the complete record of the proceedings, including, but not limited to, all exhibits, minutes, audio and stenographic recordings of the Hearing in reference to the matter above described.

2. That the Court, for any or all reasons enumerated above, reverse the decision of the Respondent City's BOA and voids the December 2022 Approval.

3. That the costs of this action be taxed to the Respondents.

4. For such further relief this Court deems just and proper.

This the 12th day of September, 2023.

VAN WINKLE, BUCK, WALL, STARNES AND DAVIS, P.A.

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EXHIBIT

1

BEFORE THE CITY OF RALEIGH BOARD OF ADJUSTMENT
WAKE COUNTY NORTH CAROLINA

In Re: Marvin Butler Bennett III, Rebecca Garrison Bennett, James R. Post, Angela M. Post, John Solic, and Samantha Solic Appeal of December 30, 2022 Administrative Subdivision Approval (SUB-0045-2022) for 908 Williamson Drive, Raleigh NC	)	BOA Case No. 0011-2023

ORDER AFFIRMING ADMINISTRATIVE SUBDIVISION DECISION FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is an appeal to the Board of Adjustment (or "BOA") challenging the City's approval of an administrative compact preliminary subdivision for 17 townhouse lots and one perimeter (or open) lot for the property located at 908 Williamson Drive in Raleigh (the "Townhouse Subdivision"). The Appellants are owners of three separate parcels of land that abut the Property and allege the approval was in violation of the City's Unified Development Ordinance (the "UDO"). The appeal was filed pursuant to UDO Section 10.2.11 and N.C. Gen. Stat. § 160D-405 and came before the BOA for evidentiary hearings on May 8, June 29, June 30 and August 8, 2023.[1]

Based on the testimony of the witnesses, the record of the decision, the preliminary subdivision plan, the exhibits and other evidence presented, and arguments of counsel for the parties, the BOA finds and concludes that the approval of the Townhouse Subdivision should be affirmed. In support thereof, the BOA makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The property at issue consists of a single parcel which is 2.432 acres in size and located at 908 Williamson Drive (PIN: 1704365041) in Raleigh, North Carolina (the "Property").

2. The Property is zoned Residential-4 ("R-4") under the UDO.

3. The Property Owner is 908 Williamson, LLC, and the developer is Concept 8, LLC (collectively the "Developer").

4. On July 6, 2021, the Raleigh City Council adopted UDO text change TC-5-20 (commonly referred to as "Missing Middle 1.0") which allowed by right development of the Townhouse building type under the Compact Development Option in the R-4 District. Among other things, Missing Middle 1.0 allowed the development of townhouses by right on smaller lots and at a greater density than had been previously permitted in R-4 before the approval of that text change. Townhouses are also allowed in R-4 when the property is located in a Transit Overlay District ("TOD"), although that is not a requirement for the Missing Middle 1.0 rules to apply in R-4.

[1] The City filed a Motion to Dismiss for lack of standing which is addressed in a separate Order.

5. The Townhouse Subdivision was properly submitted for review and approved as a Compact Subdivision under the UDO, including Section 2.3, on December 30, 2022.

6. The UDO contains all requirements for approval of an administrative compact preliminary subdivision, and it is contained in the record, and Supplement 19 of the UDO was admitted into evidence at the evidentiary hearing on the appeal. The Administrative Approval for SUB-0045-2022 is found in the Record at pages 0178-0192.

7. The permitted density for the Townhouse Subdivision is governed by UDO Sections 2.3.4 and 2.3.1. Section 2.3.4, entitled "Townhouse," requires 6000 square feet in area for each townhouse and that each townhouse lot be at least 16 feet wide. Per Section 2.3.1, there is no limitation on the number of townhouse lots in R-4 as long as all requirements are otherwise met. The Property is a total of 105,531 square feet and when divided by 6000 square feet allows seventeen residential townhouse lots. Under Section 2.3.1.D, 100% of the residential units on the Property can be townhouses.

8. The Townhouse Subdivision contains 17 townhouse lots, 100% of which are allowed to be used as residential units.

9. UDO Section 2.3.1 sets forth the "General Requirements" for any Compact Development, including townhouses and the Townhouse Subdivision is required to meet its terms.

10. UDO Section 2.3.1.B is entitled "Open Space," and in the R-4 district requires at least 20% or 1 acre, whichever is greater, to be designated as open space. The open space must be a minimum of 50 feet in width.

11. The Property is 105,531 square feet in size so 20% is approximately 21,106 square feet. This is less than an acre, so one acre is the open space requirement for the Townhouse Subdivision. The Townhouse Subdivision contains 1.009 acres of open space. The open space is located in three areas designated on the approved plans, each of which is larger than 50 by 50 feet in size.

12. UDO Section 2.3.1.C is entitled "Transitional Protective Yard." Subsection C.1 requires the following for the minimum site boundary: "Type B1 or B2 Transitional Protective Yard (See Sec. 7.2.4.A) or perimeter lots must meet the dimensional standards of *Article 2.2 conventional development option* of the district where the property is located." The Townhouse Subdivision Developer could choose any of these three options to meet Section 2.3.1.C.

13. UDO Section 2.3.1.C can be satisfied by either a single perimeter lot or multiple perimeter lots.

14. The Developer chose to include the perimeter lot option to satisfy Section 2.3.1.C. The Townhouse Subdivision perimeter lot contains no buildings or other structures. UDO Section 2.2.6 contains the dimensional requirements for an "Open Lot" in R-4 under the Conventional

Development Option. Under Section 2.2.6.A, the open lot area must be a minimum of 10,000 square feet in size and 65 feet in width.

15. UDO Section 1.5.2.C sets forth the method to determine lot width whenever that term is used in the UDO. It provides: "Lot width is the distance between the side lot lines (generally running perpendicular to a street) measured at the primary street property line along a straight line or along the chord of the property line."

16. The Townhouse Subdivision's perimeter lot is 72,649 square feet in size. The Developer selected Williamson Drive as the primary street and the lot width is 321.8 feet in length. The lot width at the other street facing the Property, Iredell Drive, is 271.5 feet in length.

17. UDO Section 1.4.1.H defines "Open Lot" and states "[o]pen lots are used to accommodate uses with large outdoor or open areas." The Townhouse Subdivision perimeter lot is a large open area. "An open lot can also accommodate open space, parks or natural areas. The Townhouse Subdivision perimeter lot contains open space and tree conservation areas.

18. Neither the perimeter lot standard under Section 2.3.1.C nor the open lot standard in Section 2.2.6.A require any type of planted buffer, protective yard, tree conservation or any other type of landscaping or vegetation on the perimeter open lot.

19. UDO Section 2.3.4 contains the specific rules for the townhouse building type under the Compact Development Option. The minimum site area is 6000 square feet per unit, and the minimum lot width is 16 feet. The minimum outdoor amenity area is 5%.

20. The Townhouse Subdivision is 105,531 square feet which, when applying a 6000 square foot lot area, allows for 17 townhouse lots. Each townhouse lot is at least 16 feet wide. The outdoor amenity area is a total of 5,234 square feet, which is 5%.

21. UDO Section 2.2.7 governs "Residential Infill Compatibility" and when applicable, contains certain requirements for "building" setbacks and "building" height. There are no buildings or structures proposed by the Townhouse Subdivision nor were any building or structures approved by the Townhouse Subdivision.

22. A preliminary subdivision does not approve or authorize the construction of any buildings or structures because these are not regulated or allowed until after final subdivision plat approval. Therefore, UDO provisions relating to and governing buildings, including building setbacks and building height are not considered in preliminary subdivision review and approval.

23. UDO Section 9.1 requires tree conservation areas ("TCAs") for all subdivisions that are two acres or greater in size. These requirements apply to the preservation of existing trees and do not require the planting of new trees.

24. UDO Section 9.1.3.A requires that 10% of the net site area be designated as TCA. Under Section 9.1.4.B.4, the TCA requirements are met if the TCA areas are at least 32 feet wide in all directions and a minimum of 4,000 square feet.

25. The Townhouse Subdivision is greater than 2 acres. The required amount of TCA is 10,542 square feet, and the plan reserves 10,552 square feet of TCA. There are two TCA areas, and each area is at least 32 feet by 32 feet and in excess of 4,000 square feet.

26. A primary street must be designated for the Townhouse Subdivision, but this is required for only one reason for purposes of approval of a preliminary subdivision under the UDO, and that is to determine lot width under Section 2.3.1.C. Per that provision, the lot width must be at least 65 feet.

27. UDO Sections 1.5.4.C.1-8 provide the criteria to be used to designate a primary street. Applying those criteria here, the Developer is allowed to choose the primary street and the Developer chose Williamson Drive. Regardless, the lot width at Williamson Drive and the other potential primary street, Iredell Drive both exceed the 65 feet which is the required lot width for approval.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the BOA makes the following Conclusions of Law:

1. The Townhouse Subdivision was lawfully and properly approved, and the decision should be affirmed.

2. Preliminary subdivision plans are administrative decisions under the UDO and N.C. Gen. Stat. § 160D-102 and §160D-803 and contain objective standards for approval. If the Townhouse Subdivision met the administrative compact subdivision requirements of the UDO, the Developer is entitled to approval and the BOA does not have discretion to reverse the decision in that circumstance.

3. The competent, material, and substantial evidence presented at the evidentiary hearings established that the Townhouse Subdivision met all the UDO standards required for approval.

4. The term "lots" in UDO Section 2.3.1.C is a plural term but it also includes the singular, *i.e.*, a single lot. Therefore, that provision can be satisfied by either a single perimeter lot or multiple perimeter lots.

5. A preliminary subdivision does not approve any buildings because they cannot be requested or allowed until after final subdivision approval. Therefore, the UDO infill provisions relating to and governing buildings, including building setbacks and building height, are not

relevant to preliminary subdivision approval and should not have been considered in the review of the Townhouse Subdivision.

6. Townhouses are allowed by right using the Compact Development Option on any property zoned R-4 in the City's land use jurisdiction and are not limited to properties in the transit overlay district.

7. The Developer was not required to include or provide a planted buffer, protective yard, tree conservation or any other type of landscaping or vegetation on the perimeter open lot.

8. In reaching this decision, the BOA considered and applied the relevant and controlling rules of ordinance construction found in UDO Section 12.1.1 ("General Meaning of Words and Terms") and applicable state appellate case law and statutes.

THEREFORE, based on the foregoing Findings and Conclusions, the BOA hereby affirms the December 30, 2022 administrative preliminary subdivision approval (SUB-0045-2022) for 908 Williamson Drive.

This the 14 day of August, 2023.

Rodney Swink
Chair of the Raleigh
Board of Adjustment