

**BOARD OF COUNTY COMMISSIONERS  
AND  
DURHAM CITY COUNCIL**

DURHAM, NORTH CAROLINA

Monday, December 5, 2005

9:00 A.M. Special Session

**MINUTES**

Place: City Council Chambers, 101 City Hall Plaza, Durham, NC

Present: County Commissioners: Chairman Ellen W. Reckhow, Vice-Chairman Becky M. Heron, and Commissioners Lewis A. Cheek, Commissioner Philip R. Cousin Jr. (arrived 9:35 a.m.), and Michael D. Page

City Council: Mayor William V. Bell (arrived 9:47 a.m.), Mayor Pro Tempore Cora Cole-McFadden, and Council Members Eugene Brown, Diane Catotti, Howard Clement III, and Thomas Stith

Absent: Council Member John Best Jr. (unexcused)

Presider: Chairman Reckhow

County Commission Chairman Ellen Reckhow called the joint meeting to order.

**Unified Development Ordinance (UDO)**

Chairman Reckhow stated that the Board of County Commissioners (BOCC) and City Council held a special public hearing on August 29, 2005, at which time over two hours of public comments were heard. In addition, prior to the public hearing, both the BOCC and the City Council received several hundred written comments. At the August 29 meeting, staff was directed to review oral and written comments and to assess their appropriateness and inclusion in the UDO. Planning staff has revised the UDO accordingly; those revisions were included in the agenda packages for this meeting. Chairman Reckhow referenced the two documents placed at each Commissioner and Council Member's station: (1) memorandum from Planning Director Frank Duke regarding RU-3 revisions; and (2) additional legal and technical changes.

Chairman Reckhow conveyed that the primary purpose of today's meeting was to:

- review the UDO, including revisions which have been presented and take action, if appropriate; and
- revise the Planning Department fee resolution for FY 2005-06.

Chairman Reckhow pointed out that the Commissioners received a revised "Ordinance Adopting the Durham County Unified Development Ordinance" from County Attorney Chuck Kitchen to replace the ordinance in the original packet.

Chairman Reckhow called on Frank M. Duke, AICP, Planning Director, to present background information and an overview of revisions made since August, as well as summarize the memo concerning RU-3 revisions.

Mr. Duke shared that Planning staff reviewed the 350 oral and written recommended changes. County and City Attorneys advised that no recommendations be considered subsequent to the August 29 public hearing, unless the changes were directly related to comments received during or prior to the hearing. On October 14, Planning staff presented the 350 recommended revisions to the Joint City-County Planning Committee (JCCPC), which in turn recommended 146 revisions to the UDO. The largest group of changes dealt with issues raised by citizens; the second largest group dealt with legal issues directed by the City and County Attorneys.

Mr. Duke briefly summarized the changes reflected in the 80-page document, which had previously been submitted to the BOCC and Council. He then called attention to the "Additional Legal and Technical Changes to the Unified Development Ordinance" document that reflect changes recommended by the City and County Attorneys' offices.

### RU-3 Revisions

Mr. Duke referred the Commissioners and Council to copies of a memo regarding RU-3 zoning districts (placed at their stations prior to the meeting). He provided background, stating that the Consultant, in the initial review of Durham's development regulations, raised an issue that several zoning districts were duplicative with minor distinctions. The Consultant recommended drawing clear distinctions between such districts or consolidating them into a single district. Two such districts were the current R-3 and R-5, where the only distinction was that R-3 was not a single-family district, permitting duplexes and triplexes. The JCCPC originally concurred with the Consultant's recommendation, directing that the two districts be merged into a single RU district that would allow duplexes and multiplexes. This was contained in the draft UDO released for public review in Spring 2004. During public meetings, Urban Tier Neighborhood representatives objected, requesting that the two districts be separated. Consequently, the JCCPC directed that the two districts be separated with distinctions drawn between them. These revisions included use of a smaller lot size in the RU-3 district (3,750 square feet) with corresponding reductions in setbacks, along with the ability to utilize duplexes and multiplexes. The RU-5 district was left as a single-family district, utilizing the existing R-5 standards. These changes were included in the draft UDO used in the public hearings before the Planning Commission in Fall 2004 and extending through the August 29 public hearing. Urban Tier Neighborhood representatives objected to multiplexes in RU-3, while representatives of the Fayetteville Corridor Planning Group requested that the RU-3 area be made a single-family district. Accordingly, at the

October 14 meeting where each of the 350 comments raised during the public hearing process was reviewed, the JCCPC eliminated multiplexes in the RU-3 district. Elected officials continued hearing concerns focused on the dimensional standards of the RU-3 district. On December 4, JCCPC Chair Diane Catotti requested that staff prepare written alternatives for consideration by the governing bodies.

Mr. Duke explained the following options to address the issue regarding the RU-3 district:

- use the current standards proposed by the JCCPC;
- increase the minimum lot size and dimensional standards of the district; rename as RU-4 to reflect the change;
- retain the existing dimensional standards with the only distinction between this and the RU-5 district as the ability to utilize duplexes; rename RU-3 as RU-5(2) to reflect the change; or
- merge the RU-3 and RU-5 districts into a single RU district without the ability to utilize duplexes.

The Planning Director summarized the options in the following table:

	Existing RU-3	RU-4	RU-5(2)	RU
Lot Size (Sq. Ft.)	3,750	4,500	5,000	5,000
Lot Width (Ft.)	40	40	45	45
Street Yard (Ft.)	15	15	20	20
Side Yard (Ft.)	6	6	6	6
Rear Yard (Ft.)	25	25	25	25
Maximum Density (small projects)	12.3 units/acre	9.7 units/acre	7.4 units/acre	7.4 units/acre
Duplexes Permitted	Yes	Yes	Yes	No
Duplex Lot Size (Sq. Ft. per Unit)	3,500	3,500	3,500	N/A

Chairman Reckhow clarified that the “Existing RU-3” is proposed in the draft UDO. The actual area for the current R-3 zone is 5,000 square feet. “RU-5(2)” is the closest to the existing ordinance standards for R-3.

Council Member Catotti expressed that, after considerable consideration and consultation with staff and attorneys, she prefers RU-5(2) that most closely addresses Waltown community concerns and most closely mirrors the exiting R-3.

Per a question posed by Council Member Stith, Mr. Duke replied that the only way to address the issue raised by the Fayetteville Corridor Planning Group would be to rezone their area or adopt the merged RU district. Mr. Duke stated his recommendation to adopt either RU-4 or RU-5 (2). As stated by Chairman Reckhow and Council Member Catotti, the RU-5(2) creates the least disruption in current ordinance standards.

### Adult Uses

Chairman Reckhow mentioned an issue raised very fervently in the past week relating to a proposed adult establishment. She asked City Attorney Blinder to opine why the governing bodies may not address the issue now.

City Attorney Blinder conveyed that both procedural and substantive issues prohibit the governing bodies from dealing with adult establishments at today's meeting. Procedurally, a sufficient change would necessitate all steps required for a rezoning text amendment. Substantively, since adult uses are protected under the Constitution's First Amendment, a number of steps must be taken to change the standards, including an analysis by the Planning Department and Law Enforcement agencies.

Chairman Reckhow shared that she has spoken with Council Member Catotti (JCCPC Chair) who has agreed to discuss this matter at tomorrow's JCCPC meeting.

Council Member Clement asked about the process involved in the adult use application, whether elected bodies would have an opportunity to speak on this issue, and if the Council could issue a resolution.

Mr. Duke replied that since the adult use application to locate an adult establishment has been filed, the proposed UDO would not apply, even if changes were made to the adult entertainment provision. Mr. Duke stated that the special minor use permit application has yet to be filed; however, it would likely be filed and presented to the Development Review Board (DRB) in January to address technical standards. The Board of Adjustment (BOA) would hold a quasi-judicial public hearing (possibly in February) to address technical compliance, as well as disruption to neighborhoods, impact on property values, etc. If a use permit were issued, site plan approval would be revisited by the DRB (early or late March). Mr. Duke informed that Council members would have an opportunity to provide testimony before the BOA at the quasi-judicial public hearing.

City Attorney Blinder advised that Council members state their positions individually at the quasi-judicial public hearing. A resolution passed by City Council could not be allowed by the BOA as evidence.

City Manager Baker shared concerns of the community regarding adult entertainment use; however, a body of evidence must be developed and presented at the quasi-judicial hearing.

Council Member Stith remarked that all should be done within the bounds of the law to restrict the adult establishment use.

Mr. Duke stated that one option would be to revise the adult entertainment provisions of the UDO as a separate ordinance amendment, following the process outlined by City Attorney

Blinder. To ensure this would be allowed in regards to legal issues, an analysis must be conducted to determine where adult entertainment establishments could be located within Durham, since such uses are constitutionally protected.

Council Member Catotti announced that on behalf of the JCCPC, an unambiguous message has been received from the community, Council Members, County Commissioners, Planning staff, and legal staff in regards to the proposed adult establishment. The JCCPC will make this a top priority beginning tomorrow.

Council Member Brown stressed that legal issues must be thoroughly reviewed and considered before moving forward.

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Council Member Stith stated two outstanding UDO issues: (1) the type of swimming pool fencing and the six-month timeline for compliance; and, (2) the change related to real estate signs.

#### Swimming Pool Fencing

Mr. Duke reported that a citizen who bought a home adjacent to an unfenced pool presented the issue to the JCCPC and to the Planning Commission over a year ago; however, the current ordinance requires no fencing for pools built prior to 1994. The citizen received support from the Interneighborhood Council to require that the swimming pool be fenced; therefore, a period of time for compliance had to be established to meet the legal requirements. City and County Attorneys considered the issue; a period of six months is reflected in the draft UDO. A policy decision could be made by the governing boards to extend the period beyond six months, but not decrease the sixth-month period. Regarding the recommendation for opaque fencing, the issue is not aesthetics; the issue is safety. An opaque fence is much more difficult to climb over/through than fencing such as rod iron, split rail, or chain link.

Mr. Duke clarified for Council Member Brown and Chairman Reckhow that Section 7.41.2 of the current ordinance states that the "pool shall be completely enclosed by an opaque fence". Pools built after 1994 that do not have opaque fencing are in violation of the ordinance.

Chairman Reckhow explicated that the revision to the proposed UDO requires that existing pools with no fenced enclosure must be enclosed by an opaque fence within six months from the date of adoption of the ordinance.

Council Member Stith echoed the remark by Mr. Duke that no fencing was required prior to 1994.

The Commissioners and City Council members devoted considerable discussion to the opaque fencing issue.

Mr. Duke restated that pools with an existing enclosure would not be affected by the modification in the proposed UDO.

At the recommendation of Council Member Catotti, Mr. Duke (with the assistance of City Attorney Blinder) suggested that Section 5.4.9-A.2 be amended to read “Existing pools that do not have a fenced enclosure ~~as described above~~ shall have six months from the date of adoption of this ordinance within which to provide ~~the required~~ an enclosure as described in Section 5.4.9-A.1 above.”

Due to a request by Council Member Clement, Chairman Reckhow echoed the comments made by Mr. Duke regarding the current ordinance and the proposed UDO concerning the rationale for opaque fences.

Vice-Chairman Heron stressed the importance of fencing around swimming pools for the safety and protection of children and pets.

Mr. Duke pointed out that in the current ordinance, the issue of opacity is only addressed for private pools. For community pools, such as those in an apartment complex, the only requirement is that the pool be screened from view from the streets of residential property.

At the request of Chairman Reckhow, Mr. Duke re-read the amended language on page 5-67, paragraph 5.4.9-A.2. As revised, this language would apply to community as well as private pools.

Council Member Stith suggested “grandfathering” existing community/commercial pools and applying the opacity stipulation to private pools only. He opined that all pools should have some type of fencing.

Mr. Duke reiterated that the current ordinance does not require that community pools be fenced.

Chairman Reckhow stated that the Public Health Department and insurance companies require fencing.

Mr. Duke suggested that, if the Council and Commissioners wish to require a fence for community pools but wish to apply the opacity requirement to private pools only, the verbiage and numbering could be revised as follows:

#### 5.4.9 Swimming Pools

When allowed, in-ground and aboveground swimming pools that have a water depth over 24 inches and have a surface area of at least 100 square feet shall be subject to the following additional requirements:

##### A. Private Pools

1. Private swimming pools (as well as the decking and equipment associated with the pool) on single-family, duplex, and multiplex lots shall not be located in the street yards and not be closer than five feet to any property line.
2. The pool shall be completely enclosed by an opaque fence at least six feet in height if any portion of the pool or pool decking is within 20 feet of a property line. Pools not within 20 feet of the property line shall be enclosed with an opaque fence that is at least four feet in height. The exterior walls of the residence or buildings may be incorporated as a portion of the fence to create a fully enclosed area around the pool. All fence openings into the pool area shall be equipped with self-closing and self-latching gates.
3. Existing pools that do not have a fenced enclosure shall have six months from the date of adoption of this ordinance within which to provide an enclosure as described in Section A.2 above.

##### B Outdoor Community Pools, Private Club Pools, or Pools in Multifamily Complexes

1. Outdoor pools including decking shall be located at least 100 feet from any property line adjacent to a single family residential district or use, and at least 50 feet from any property line adjacent to any other district or use.
2. When the pool is adjacent to off-site residences, the playing of music detectable off-site on a public address system shall be prohibited. Informational announcements shall be permitted. This requirement may be waived if a permit has been issued for a special event.
3. All outdoor pools shall be enclosed by a fence that is at least four feet in height. The exterior walls of the buildings may be incorporated as a portion of the fence to create a fully enclosed area around the pool. All fence openings into the pool shall be equipped with self-closing and self-latching gates.

Council Member Stith reaffirmed that the sixth-month criteria would apply only to pools that have no enclosure.

Chairman Reckhow voiced agreement.

Due to an issue brought up by City Attorney Blinder and briefly discussed by Chairman Reckhow and Council Member Catotti regarding fence replacement and repairs, Mr. Duke

suggested applying the rules related to nonconformities in Article 14 of the UDO to deal with the value of the fence being replaced.

In response to a request by Commissioner Page, Mr. Duke restated the required fence heights.

Vice-Chairman Heron moved, seconded by Commissioner Cheek, to approve the swimming pool fencing amendments. (The changes are reflected in the verbiage and numbering above.)

The motion carried unanimously.

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Council Member Stith moved, seconded by Council Member Catotti, to approve the swimming pool fencing amendments.

The motion carried with the following vote:

Ayes: Bell, Cole-McFadden, Brown, Catotti, Clement, and Stith  
Noes: None  
Absent: Best

### Real Estate Signs

The governing bodies addressed the second issue raised by Council Member Stith involving the change from five real estate signs within a two-mile radius to five in a one-mile radius.

Because of community concerns about problems associated with the signs, Council Member Catotti asked for an exchange of ideas about a possible compromise of 1.5 miles.

Vice-Chairman Heron voiced her support of the one-mile limit.

Mr. Duke spoke to the difficulty, from an enforcement standpoint, of establishing a fraction of mile.

Commissioner Page brought up the subject of commercial signs.

Mr. Duke informed him that commercial signs are illegal, stating that Planning has increased the penalty to the maximum allowed by State law (\$500 per violation as opposed to the previous \$200 per violation).

Commissioner Cheek gave his reasons for preferring the two-mile limit.



Council Member Brown supported the compromise offered by Council Member Catotti.

Mr. Duke explained that the two miles was amended to one mile by the JCCPC because of a citizen's request and concern. Staff recommended two miles.

Chairman Reckhow gave her opinion that the two-mile limit allows too many signs from Wake County, which does not allow such signs. She requested approval of one mile or the 1.5-mile compromise.

Council Member Stith moved, seconded by Council Member Brown, to modify the draft UDO to reflect five signs within at least 1.5-miles.

Mr. Duke advised that in Council Member Stith's motion, the "at least" should be changed to "a maximum".

Council Member Catotti presented a substitute motion that the language remain "one-mile". Council Member Clement seconded the motion.

The motion carried with the following vote:

Ayes: Bell, Cole-McFadden, Catotti, and Clement  
Noes: Brown and Stith  
Absent: Best

Chairman Reckhow entertained a similar motion for the County Commissioners.

Commissioner Cheek expressed that no action was necessary since the recommended revision to the draft UDO states "one-mile."

#### RU-3 Revisions (continued)

Mr. Duke conveyed that action should be taken concerning RU-3 revisions.

Council Member Clement moved, seconded by Council Member Catotti, to adopt the RU-5(2) district, which would leave residents of current R-3 at the existing restrictions and uses.

Mr. Duke clarified that adoption of the RU-5(2) will require changes to the other sections of the UDO as noted in the memo; most are simply changes in the district names. The more significant changes deal with dimensional standards.

Mayor Bell called for the question on the motion.

The motion carried with the following vote:

Ayes: Bell, Cole-McFadden, Brown, Catotti, Clement, and  
Stith  
Noes: None  
Absent: Best

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Commissioner Cheek moved, seconded by Commissioner Cousin, to adopt the RU-5(2) district, which would leave residents of current R-3 at the existing restrictions and uses.

The motion carried unanimously.

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#### UDO Adoption

Council Member Clement moved, seconded by Mayor Pro Tempore Cole-McFadden, to adopt the UDO as amended (at today's meeting) and include the recommendations in the 80-page supplemental material and the additional legal and technical changes. In addition, repeal the existing Durham Zoning Ordinance, the Durham Subdivision Ordinance, and other ordinances identified in Section 1.8 of the UDO.

The motion carried with the following vote:

Ayes: Bell, Cole-McFadden, Brown, Catotti, Clement, and  
Stith  
Noes: None  
Absent: Best

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Commissioner Cheek moved, seconded by Vice-Chairman Heron, to adopt the UDO as amended (at today's meeting) and include the recommendations in the 80-page supplemental material and the additional legal and technical changes. In addition, repeal the existing Durham Zoning Ordinance, the Durham Subdivision Ordinance, and other ordinances identified in Section 1.8 of the UDO.

The motion carried unanimously.

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Planning Department Fee Resolution for FY 2005-06

At Chairman Reckhow's request, Mr. Duke gave an overview of the revised Planning Department Fee Resolution for FY 2005-06. He stated that the current Zoning Ordinance makes provisions for four types of site plan submittals, with each category being charged a fee based on the anticipated person-hour costs, complexity of the review, and approving authority. The UDO establishes a different set of criteria that modifies the classifications of plans and the approval authority. As part of the 2005-06 budget consideration, a fee resolution was adopted based on the existing Zoning Ordinance standards. To implement the UDO, modifications to the Planning Department fee resolution are required to revise the site plan categories to match UDO standards. The revision to the resolution recognizes three categories for site plans and builds into the fee structure thresholds for charging fees based on the size and scope of projects. No changes are proposed to the fees as adopted.

Mr. Duke stated that in addition, greater notification requirements are being imposed on Major Site Plans, Preliminary Plats, and Plan Amendments. The fee structure has been modified to require the payment of surcharges for letter notices by the applicant to recover all costs associated with this requirement.

Mr. Duke responded to questions by Mayor Bell about the technology surcharge percentages and advertising surcharges.

Mayor Pro Tempore Cole-McFadden moved, seconded by Council Member Catotti, to approve the Resolution Establishing Fees and Surcharges Charged by the City-County Planning Department for Development Reviews, Public Hearing Notification, Technology and Other Services; and by the City-County Inspections Department for Technology Services.

The motion carried with the following vote:

Ayes: Bell, Cole-McFadden, Brown, Catotti, Clement, and Stith  
Noes: None  
Absent: Best

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Commissioner Page moved, seconded by Commissioner Cousin, to approve the Resolution Establishing Fees and Surcharges Charged by the City-County Planning Department

for Development Reviews, Public Hearing Notification, Technology and Other Services; and by the City-County Inspections Department for Technology Services.

The motion carried unanimously.

Council Member Brown stated that today's action by the governing bodies is vital in moving Durham forward. He congratulated Mr. Duke and City and County Planning staff. He also recognized four elected officials (Chairman Reckhow, Vice-Chairman Heron, Mayor Pro Tem Cole-McFadden, and Council Member Catotti), thanking them for their instrumental and great leadership and four years of hard work.

Mr. Duke acknowledged the efforts of all City and County departments and divisions, especially Public Works, Transportation, Stormwater, Sedimentation and Erosion Control, Open Space, and the City and County Managers' offices and Attorneys.

Council Member Catotti echoed the acknowledgements of her colleagues, thanked Jackie Brown and Planning Commission members, and spoke about the invaluable contributions of the entire community. She believes the UDO to be a work in progress as the JCCPC will be considering the work plan and prioritizing 39 text amendments at tomorrow's meeting.

Vice-Chairman Heron congratulated all persons involved in the lengthy process. The community, City, and County have and will continue to work together.

Chairman Reckhow dittoed the comments of her contemporaries and expressed gratitude to the consultant (Duncan Associates), the Planning Commission, and to all citizens who attended community meetings. She also expressed appreciation to the JCCPC for the many hours and days spent on UDO development and to Commissioner Cheek for his efforts during the past year.

Mayor Pro Tempore Cole-McFadden expressed thanks to Mr. Duke and Planning staff, Assistant City Attorney Karen Sindelar, Assistant City Manager Ted Voorhees, and City and County Governments for their countless hours dedicated to the project. She stated that the endeavor has been a cordial and cooperative experience.

### **Adjournment**

Chairman Reckhow declared the meeting adjourned at 10:49 a.m.

Respectfully submitted,

Vonda C. Sessoms  
Clerk to the Board