



CITY OF DURHAM | DURHAM COUNTY  
NORTH CAROLINA



**Date:** June 20, 2016

**To:** Thomas J. Bonfield, City Manager

**Through:** Keith Chadwell, Deputy City Manager

**From:** Steven L. Medlin, AICP, Planning Director

**Subject:** *Unified Development Ordinance* Text Amendment, Technical Updates due to State Legislation and Case Law (TC1500007)

**Summary.** Numerous statutory changes involving planning and environmental regulation were passed by the North Carolina General Assembly, and signed into law by the governor, during this past legislative session. In addition, the North Carolina Supreme Court (NCSC) has recently held that uses not listed within a zoning ordinance (or in Durham's case, a Unified Development Ordinance (UDO)) cannot be prohibited because they are not listed within the ordinance. The attached draft ordinance (Attachment A) proposes changes based upon the following legislation (session laws) and judicial decision, with a hyperlink provided for each session law:

- [SL2015-1](#), Environmental Laws; [SL2015-241](#), Current Operations and Capital Improvements Appropriations Act of 2015
- [SL2015-86](#), Zoning/Design and Aesthetic Controls
- [SL2015-149](#), Stormwater/Built-upon Area
- [SL2015-160](#), Zoning Changes/Citizen Input
- [SL2015-246](#), Local Government Regulatory Reform of 2015
- *Byrd v. Franklin County* (issued November 6, 2015)

**Recommendation.** Staff recommends approval of the attached Ordinance to amend Article 3, Applications and Permits; Article 4, Zoning Districts; Article 5, Use Regulations; Article 6, District Intensity Standards; Article 7, Design Standards; Article 8, Environmental Protection; Article 9, Landscaping and Buffering; Article 12, Infrastructure and Public Improvements; and Article 16, Definitions, of the *Unified Development Ordinance*; and recommends approval of a consistency statement declaring the request consistent with the Durham *Comprehensive Plan* and that the request is reasonable and in the public interest. Information supporting these recommendations is found within this memo, attached documents, and any information provided through the public hearing.

**Background.** When the long session of the 2015/2016 legislative session had concluded, the legislature passed, and the governor signed into law, bills that

impacted the regulatory capabilities of the city and county, including land use and environmental regulations. These range from bee hive regulation to the elimination of design control over single-family residences to the limitation on more stringent riparian buffer and stormwater regulations.

On December 2, 2015, the Joint City-County Planning Committee (JCCPC) received a legislative update regarding a list of legislation that had either direct or tangential relevance to planning or environmental legislation. The memo that accompanied that presentation outlined how staff intended to proceed in regards to the requirements of the new legislation. Certain legislation required no changes to the UDO. For other legislation, staff determined certain technical changes to the UDO were required and could readily be addressed, or staff was still gathering additional information in order to determine how to proceed, if at all, in amending the UDO.

Additionally, in November 2015, the NCSC decided a case (*Byrd v. Franklin County*) regarding the regulation of uses not listed within an ordinance. The NCSC held that an ordinance cannot maintain a provision that considered a use prohibited if not listed. The UDO contains such a provision and will therefore require revision.

The JCCPC reviewed the proposed text amendment at its February 3, 2016, meeting and provided no additional comments. The Planning Commission recommended approval, 13-0, of the text amendment on April 12, 2016. The Planning Commission determined that the Ordinance request is consistent with the adopted *Comprehensive Plan* and that the request is reasonable and in the public interest based on comments received at the public hearing and the information in the staff report.

The Durham Board of County Commissioners will consider this amendment at its June 27, 2016, meeting.

**Issues.** Each of the session laws discussed at the December 2015 JCCPC meeting have been reviewed by staff in consultation with the City and County Attorney's offices, determining they either required no changes to the UDO, required technical changes to the UDO, or required further review and information before changes to the UDO, if any, are suggested by staff. The following is a summary of each session law, or part of a session law, staff has determined only requires technical changes to the UDO. Other amendments may be forthcoming once staff has determined the appropriate course of action based upon the additional information received.

As noted above, in *Byrd v. Franklin County*, the NCSC held that it is unlawful to automatically disallow a use simply because it was not listed within a zoning ordinance. In paragraph 5.2.1, Approach to Categorizing Uses, the UDO maintains a

two part process regarding a use that is not identified in the Ordinance. The Planning Director, through a series of review factors, can determine if the proposed use is similar to a use already listed within the UDO. If the director cannot make that determination, then the use is prohibited. After consultation with both City and County Attorney's offices, staff has proposed an amendment to paragraph 5.2.1 to remove the prohibition and comply with this court decision.

**Part 1:**

***SL2015-1, Environmental Laws; SL2015-241, Current Operations and Capital Improvements Appropriations Act of 2015.*** This legislation requires updating references to various State divisions and departments. Various sections of the UDO will be amended to reflect the new references.

**Part 2:**

***SL2015-86, Zoning/Design and Aesthetic Controls.*** This law limits design and aesthetic regulations on single-family and two-family structures. Unless agreed upon by the applicant of a zoning permit, architectural design and aesthetic regulations cannot be applied to single and two-family residential structures, including the location of garage doors. The law contains exclusions to this limitation, such as historic district and landmark properties (local and national), regulations related to applicable safety codes, regulations applied to manufactured housing, and conditions of participation in the National Flood Insurance Program. The Neighborhood Protection Overlay (Sec. 4.6) standards and infill standards (Sec. 6.8) are the primary sections of the UDO impacted by this legislation. The definition of "rear yard" is also modified to remove reliance on the placement of a primary entrance.

**Part 3:**

***SL2015-149, Stormwater/Built-upon Area.*** This legislation revised the definition of "built-upon area" as part of stormwater programs. It already excludes slatted decks and swimming pools, and adds a particular type of gravel and the method of installation. This term is currently not referenced in the UDO since it is a defined term regarding stormwater rules and runoff per NCGS 143-214.7, and thus is a definition applicable to the city and county stormwater ordinances. Staff has incorporated the term "built-upon area" within the definition of "impervious surface" in Sec. 16.3, Defined Terms.

**Part 4:**

***SL2015-160, Zoning Changes/Citizen Input.*** This legislation repealed the ability for citizens to file protest petitions that would force a supermajority vote of approval

for a zoning map change application filed on or after August 1, 2015. However, the legislation did not repeal the County's special legislation for protest petitions. Staff will revise the protest petition text within the UDO (paragraph 3.5.13, Protest Petition Sufficiency and Procedures) accordingly to clarify which zoning map change application can qualify for a protest petition.

**Part 5:**

***SL2015-246, Local Government Regulatory Reform of 2015.***

- a. **Riparian Stream Buffers.** This legislation prohibits more stringent local riparian buffer regulation, unless approved by the Environmental Management Commission after its review of studies submitted by the local jurisdiction, with specific findings made by the Commission. Staff is still gathering information, including discussions with state agencies and other municipalities, regarding how to proceed in regards to modifying buffer standards.

Ordinances must also allow riparian buffer areas to be credited towards density, tree coverage, open space, setbacks, lot area, and perimeter buffer requirements. The proposed text amendment addresses these new requirements.

- b. **Zoning Density Credits.** The UDO shall be required to provide density credit for dedicated rights-of-way. The proposed text amendment addresses this requirement.
- c. **Definition of Dwelling Unit.** The UDO definition cannot be more expansive than any definition of the same in another statute or rule adopted by a State agency. Staff will revise the definition of dwelling unit in the UDO accordingly.

**Part 6:**

***Byrd v. Franklin County.*** The NCSC has held in this recent decision that a use cannot be prohibited if it is not identified in the ordinance. Currently, the UDO would prohibit a use by default if it is not listed and if the Planning Director, using a set of review factors, cannot determine the use to be similar to a use already listed in the ordinance. Therefore, paragraph 5.2.1A, Approach to Categorizing Uses, is amended to remove the default prohibition. Instead, if the Planning Director could not determine a similar use already listed in the ordinance, a more generalized determination as to what "use group" would apply (agricultural, residential, public and civic, commercial, office, and industrial) would be made, and then a minor

Thomas J. Bonfield, City Manager  
*Unified Development Ordinance* Text Amendment, Technical Updates due to Legislation and Case Law  
(TC1500007)  
June 20, 2016

special use permit could be sought only in zoning districts where uses in the use group were allowed by-right.

**Consistency with the *Comprehensive Plan*; Reasonable and in the Public Interest.**

The purpose of this text amendment is to update the UDO to comply with recent state legislation and case law; a reasonable undertaking and in the public interest. These revisions are not addressed within the *Comprehensive Plan*, and may not be consistent with the *Comprehensive Plan*. However, the City and County are under legal obligation to comply with state law and the proposed changes have been determined by staff to be appropriate and necessary for compliance.

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**Attachments:**

**Attachment A:** An Ordinance to Amend Various Provisions of the Unified Development Ordinance Due to State Legislation and Case Law (TC1500007)

**Attachment B:** Statement of Consistency Pursuant to NCGS § 160A-383

**Attachment C:** Planning Commission Comments