

DRAFT

**Cary Town Council
Tuesday, August 9, 2011
6:30 PM
Council Chambers
316 N. Academy Street, Cary, N.C.**

Present: Mayor Harold Weinbrecht, Mayor Pro Tem Julie Robison, Council Members Gale Adcock, Don Frantz, Jennifer Robinson and Jack Smith

The PowerPoint presentation for the meeting is attached to and incorporated herein as **Exhibit A**.

A. COMMENCEMENT

1. Call to Order (Mayor Weinbrecht)

Mayor Weinbrecht called the meeting to order at 6:30 p.m.

2. Ceremonial Opening (Mrs. Robinson)

Mrs. Robinson provided the ceremonial opening.

3. Adoption of agenda (Town Council)

ACTION: Mrs. Robison moved to adopt the agenda. Mrs. Adcock provided the second; council granted unanimous approval.

B. CONSENT AGENDA

1. Regular Consent Agenda (any regular consent agenda item pulled for discussion will be discussed at the end of the old/new business portion of the agenda, which is item H on this agenda)

a. Consideration of approval of the minutes of the regular town council meeting held on July 14, 2011 and the minutes of the work session held on July 19, 2011. (Town Council)

ACTION: Mrs. Adcock moved to approve the consent agenda. Mrs. Robison provided the second; council granted unanimous approval.

b. Consideration of approval of the July 2011 tax report. (Mr. Ben Shivar)

July 14, 2011

The Wake County Board of Commissioners, in regular session on July 6, 2011 approved and accepted the enclosed tax report for the Town of Cary.

It is hereby submitted for your approval.

Refunds of taxes, interest and penalties	\$0.00
Relief of late list penalty	8
Relief of late filed application	3
Non-cash rebates	160

ACTION: Mrs. Adcock moved to approve the consent agenda. Mrs. Robison provided the second; council granted unanimous approval.

2. Land Development Consent Agenda (*any land development consent agenda item pulled for discussion will be discussed at the end of the land development discussion portion of the agenda, which is item F on this agenda*)

a. Davis Residence Holding LLC & HF Investors LLC

(1) Annexation 10-A-15

Property Owner: Davis Residence Holding LLC & HF Investors LLC

Location: Unaddressed Property (2,220 ft. southwest of Pittard Sears Road, O'Kelly Chapel Road, and Yardley Lane intersection)

Zoning: Chatham County R1

Contiguous to Primary Corporate Limits: Yes

Existing Use: Vacant

Proposed Use: Single-family Residential

Proposed Council Action: Council may take action

Speaker: Mr. Wayne Nicholas

Annexation Petition Number: 10-A-15

Property Address: Unaddressed Property (see location)

Chatham County Parcel Number: 0726-30-4388.000

Chatham AKPAR Number: 0084836

Petition Date: 11/18/2010

OWNER(S)

Davis Residence Holding LLC

& HF Investors LLC

8368 Six Forks Road

Raleigh, NC 27615

LOCATION

2,220 feet southwest of Pittard Sears Road, O'Kelly Chapel Road, and Yardley Lane intersection

ZONING & PROPOSED USE

Current Zoning: Chatham County R1

Acres: 10.10 plus 0.67 adjacent right-of-way = 10.77 total deeded acres

Contiguous to Primary Corporate Limits: Yes

% Contiguity (excluding satellite town limits): 19 percent

Existing Use: Vacant

Proposed Use: Single-family Residential

Active Associated Case(s): 10-REZ-14 and 10-CPA-10 (Davis Residence Holding LLC)

UTILITIES

Water: On Site
Sewer: 620 feet southeast

DISTRICTS & TAX VALUE

Fire District: Parkwood
Voting District: A
Tax Value: \$292,500

MEETINGS

Town Council – Certificate of Sufficiency and Resolution Ordering Public Hearing:
12/16/2010

Staff Recommendation: Forward to public hearing on 1/27/2011

Action: Forwarded to public hearing on 1/27/2011

Town Council – Public Hearing: 1/27/2011

Staff Recommendation: Defer action to a future council meeting to allow final vote on the annexation to coincide with final vote on the associated 10-REZ-14 (Davis Residence Holding LLC) and-CPA-10 (Davis Residence Holding LLC) cases

Action: Public Hearing open and closed; Staff directed to add case to a future agenda for ordinance adoption.

Town Council – Ordinance Adoption: 8/9/2011

Staff Recommendation: Adoption with an effective date determined by Council action

The document that Council will consider for adoption at this meeting follows:

10-A-15

AN ORDINANCE ANNEXING LANDS CONTIGUOUS TO THE MUNICIPAL BOUNDARIES OF THE TOWN OF CARY

WHEREAS, on 11/18/2010, the Town Council has been petitioned under G.S. 160A-31 to annex the area described below:

Davis Residence Holding LLC & HF Investors LLC; Chatham County Parcel Identification #0726-30-4388.000; including 10.10 acres, plus 0.67 acres of adjacent right-of-way; which are Contiguous to the existing municipal limits of the Town of Cary; and

WHEREAS, on 12/16/2010, the Town Clerk of the Town of Cary certified the sufficiency of said Petition, the same being duly made after investigation; and

WHEREAS, on 12/16/2010, the Town Council of the Town of Cary ordered a public hearing on the question of said annexation and Notice of a Public Hearing was published in the newspaper of general circulation as required by law; and

WHEREAS, the matter came for public hearing before the Town Council of the Town of Cary on 1/27/2011 at which time all persons opposed and all persons in favor of said annexation were allowed to be heard; and

WHEREAS, the Petition above mentioned meets all the requirements of G.S. 160A-31.

NOW, THEREFORE, BE IT ORDAINED by the Town Council of the Town of Cary, North Carolina that:

Section 1. The area described in the petition and depicted on the map, (which is on file in the Planning Department) is hereby annexed to and made a part of the Town of Cary, effective on 8/9/2011 with a condition that the property owner connect to the Town of Cary sewer/water line based upon the Town's policy(ies) in place on the effective date of this ordinance.

LEGAL DESCRIPTION

Chatham County Parcel Identification #**0726-30-4388.000**

Section 2. That from and after the effective date of this ordinance, the territory and its citizens and property shall be subject to all debts, laws, ordinances and regulations in force in the Town of Cary, and shall be entitled to the same privileges and benefits as other parts of the municipality. Said annexed territory shall be subjected to municipal taxes according to G.S. 160A-58.10.

Section 3. The Mayor of the Town of Cary shall cause an accurate map of the newly annexed territory together with a copy of this ordinance, duly certified, to be recorded in the Office of the Register of Deeds of Wake County and in the Office of the Secretary of State of North Carolina.

Section 4. Pursuant of G.S. 160A-22, the Town Clerk is directed to update the Official Town Map by drawing in the territory annexed, or setting out the boundaries in a written description, or showing the current Town boundaries by a combination of these techniques. Such a map shall also be delivered to the Wake County Board of Elections as required by G.S. 163-288.1

Section 5. Pursuant of G.S. 160A-23, the boundaries of Electoral District A are hereby revised to account for and include the territory annexed, and the Official Town Map of Electoral Wards is hereby amended to include the annexed territory in the said Electoral District.

Adopted on 8/9/2011.

(Ordinance No. 0-2011-22 is also on file in the town clerk's office.)

(2) Rezoning 10-REZ-14

Location: Chatham County PIN# 0726-30-4388.00 - West side of Pittard Sears Road, approximately 2,200 feet south of O'Kelly Chapel Road

Current Zoning: Chatham County R1

Proposed Zoning: Transitional Residential Conditional Use (TR-CU), with proposed zoning conditions that include limiting land use to 20 age-restricted single-family dwellings; and Watershed Protection Overlay District

Comprehensive Plan Consistency: *In accordance with N.C.G.S. 160A-383, and based upon the recommendations and detailed information developed by staff and/or the Planning & Zoning Board contained in the case report, approval of this case by the Cary Town Council will officially adopt the individual rezoning report as evidence that consistency with the Comprehensive Plan has been thoroughly evaluated and that this is a reasonable action to further the community's public interest in carrying out the Comprehensive Plan*

Planning and Zoning Board Recommendation: Unanimously recommended approval

Proposed Council Action: Council may take action

Speaker: Ms. Debra Grannan

REQUEST

To amend the Town of Cary Official Zoning Map to apply initial zoning to a 10.1-acre parcel located on Pittard Sears Road. Davis Residence Holdings, LLC has requested Transitional Residential District, Conditional Use (TR-CU).

There is a citizen-initiated annexation, case 10-A-15, associated with this request. Approval of this annexation request and application of Cary zoning will also place the subject property in the

Jordan Lake Watershed Overlay District. Although the rezoning case was included on the consent agenda at the July 14, 2011 Town Council Meeting, the annexation case was inadvertently not included. Since annexation into Cary's corporate limits must occur before a Cary zoning district may be applied, both the rezoning and annexation cases have been scheduled for final action at the August 9, 2011 Town Council meeting.

This case was presented to the Planning and Zoning Board on May 16, 2011. The board had questions about the enforceability of a zoning condition related to age restricted housing, and tabled the case to allow the applicant time to clarify the condition. This report contains the revised language.

NOTE: The purpose of the rezoning is to determine if the land uses and densities allowed in the proposed zoning district are appropriate for the site.

SUBJECT PARCEL

Property Owner	Chatham County Parcel Number (10-digit)	Real Estate ID	Deeded Acreage
Davis Residence Holding, LLC & HF Investors	0726304388	0084836	10.10
Total Area			10.10

PROJECT SUMMARY

The applicant has requested that the subject property be annexed into the Town of Cary corporate limits. Since the property is located outside of the Town's ETJ, it must be annexed and initial zoning applied. The applicant proposes to rezone a 10.10-acre parcel from Chatham County R1 to Transitional Residential Conditional Use. If approved, the subject property would also be placed in the Jordan Lake Watershed Overlay District. Proposed zoning conditions would limit development on the site to 20 age-restricted single-family-detached dwellings, provide a 20-foot streetscape along Pittard Sears Road, and prohibit any future request to reduce the required width of the perimeter buffer at the time of site plan review.

BACKGROUND INFORMATION

Applicant & Agent	Glenda S. Toppe Glenda S. Toppe, Associates gtplan@gmail.com		
Acreage	± 10.10		
General Location	West side of Pittard Sears Road about 2,200 feet south of O'Kelly Chapel Road		
<i>Tentative</i> Schedule	Public Hearing	Planning & Zoning Board	Town Council
	January 27, 2011	May 16, 2011 P&Z Second Meeting June 20, 2011	August 9, 2011
Land Use Plan Designation	Low Density Residential (LDR)		
Existing Zoning District(s)	Chatham County R1 (Previously RA-40)		
Proposed Zoning District(s)	Town of Cary Transitional Residential Conditional Use (TR-CU) Jordan Lake Watershed Protection Overlay District		

Proposed Zoning Conditions	<ol style="list-style-type: none"> 1. Land use shall be limited to 20 single-family-detached residential units. 2. To address the impacts on Chatham County schools reasonably expected to be generated by the development and use of the subject property, the property owner shall provide evidence, prior to recording any subdivision plats for the subject property, that shows a homeowners association has been established and restrictive covenants are recorded with the Chatham County Register of Deeds subjecting the whole of the development to an age restriction requirement such that at least 80 percent of all units (16 units if the property is developed with 20 units) shall be occupied by at least one person 55 or older. Such restrictive covenants shall (i) comply with all federal and state laws, including the Fair Housing Act, and (ii) shall vest the responsibility and obligation for enforcing the age restriction in the homeowners association. 3. A 20-foot streetscape planted or supplemented to meet the Type-A (opaque) standard of the LDO shall be provided along Pittard Sears Road. 4. No reduction or modification to the LDO required width of the perimeter buffer may be requested during development plan review. 5. The final plat shall designate a minimum of one acre to remain undisturbed, except as needed for utility easements, or as allowed by the LDO located as follows: <ol style="list-style-type: none"> a) Outside of Perimeter Buffer b) Outside of Urban Transition Buffer c) Within 325 feet of western property line
Town Limits	The subject property is located outside of the Town of Cary corporate limits and ETJ. An annexation petition (10-A-15) has been submitted. An annexation petition (10-A-15) was submitted by the applicant, and must be approved prior to action on the zoning request.
Valid Protest Petition	Protest petition is not applicable to map amendments that apply initial Town of Cary zoning to property.
Staff Contact	Debra Grannan Senior Planner (919) 460-4980 debra.grannan@townofcary.org

SITE CHARACTERISTICS

Stream, Floodplain or Wetland: None indicated on Town of Cary GIS maps. Final determination to be required during site plan review.

Surrounding Land Uses:

North – Single-family residential (Chatham County)

South – Single-family residential (Chatham County)

East – Carolina Preserve at Amberly (Phase 6) – *(Town of Cary Rezoning Case 09-REZ-10, approved on December 10, 2009, allows development of up to 155 age-restricted single-family dwelling units).*

West – Single-family residential (Chatham County)

CONSISTENCY WITH LAND DEVELOPMENT ORDINANCE

Land Use

Single-family residential use is an allowable use in the TR zoning district.

Density and Dimensional Standards

	Existing Zoning District (Chatham County R1)	TR District	Proposed Zoning District (TR-CU)
Max. Gross Density	0.92 du/acre	7.26 du/acre	2.0 du/acre <i>(based on proposed zoning condition limiting use to 20 single-family-detached lots)</i>
Min. Lot Size	40,000 square feet	6,000 square feet	
Minimum Lot Width	100 feet (single-family) 100 feet (duplex)	60 feet	
Front Yard Setback	40 feet	10 feet if parking is not provided between the front of the dwelling and the roadway 18 feet if parking is provided between the dwelling and the roadway	
Side Yard Setback	25 feet	The minimum required side yard for either side yard is three (3) feet, and the combined total of both side yards is required to be a minimum of 16 feet.	
Rear Yard Setback	25 feet	The combined total of the front and rear setbacks is required to be a minimum of 40 feet	
Maximum Building Height	60 feet	35 feet	

Streetscape

Pittard Sears Road is designated as a local street. The LDO does not require a streetscape along local streets. The rezoning request includes a zoning condition for a 20-foot opaque streetscape along Pittard Sears Road.

Perimeter Buffer

Per Chapter 7 of the LDO, a 30-foot Type B semi-opaque perimeter buffer is required where the adjacent land use includes residential lots larger than 8,000 square feet and the proposed use on the subject property is for single-family-detached residential lots 8,000 square feet or less. Proposed zoning conditions would prohibit the applicant from requesting a modification or reduction to the width of the perimeter buffer at the time of subdivision/site plan approval.

Traffic

The existing zoning would potentially allow nine single-family dwellings, which would generate seven trips during the AM peak-hour time period and 10 trips during the PM peak-hour time period using the ITE Single-Family Dwelling Unit category. The applicant has limited the maximum number of units to 20 age-restricted units for the proposed zoning. HNTB did a trip generation study of this particular use for the Pittard Sears Residential Development Traffic Study (10-TAR-314), using data from the Carolina Preserve since ITE does not have a use that fits this particular age-restricted single-family housing community. It was determined that a single dwelling unit in an age-restricted single-family community would generate 0.52 AM and 0.92 PM peak-hour trips per dwelling unit. Therefore, a 20 unit age-restricted development would generate 11 trips during the AM peak-hour time period and 19 trips during the PM peak-hour time period. Since the proposed zoning does not generate 50 or more peak-hour trips over the existing zoning, a traffic study is not required.

SUMMARY OF PROCESS AND ACTIONS TO DATE

Town Council Meeting (July 14, 2011)

The rezoning case was included on the consent agenda; however, action on the rezoning was premature since the subject property had not been annexed into Cary's corporate limits. Both the annexation request and this rezoning case have been scheduled for the August 9, 2011 Town Council meeting.

There have been no changes to the proposed zoning conditions since the June 20, 2011 Planning and Zoning Board meeting.

Planning and Zoning Board Meeting (June 20, 2011)

Staff presented a brief review of the case and discussed the revised zoning condition pertaining to age-restricted housing. The board asked if staff was satisfied that the condition was enforceable, and staff indicated that it was. The Planning and Zoning Board recommended the case for approval 9-0.

Planning and Zoning Board Meeting (May 16, 2011)

Staff presented the request and observed that, based on the conditions proposed by the applicant, especially to provide one acre of open space and to limit the number of dwelling units, the proposed zoning was consistent with the Comprehensive Plan and other applicable, adopted plans, policies and documents. The applicant spoke briefly and concurred with the staff comments.

Discussion

The board asked for clarification on the findings of how the plan was consistent with the Comprehensive Plan. There was discussion about the challenges with enforcement for age-restricted neighborhoods and several board members felt that more specific language needed to be added to strengthen the condition. The applicant stated they were agreeable to modifying the condition. The majority of the board members stated that they wanted to see how the language would be crafted regarding this condition before making a recommendation, and the board voted 6-3 to table the case.

Changes Since the Town Council Meeting

The Comprehensive Plan Amendment (10-CPA-10) associated with this case was approved by Town Council on April 28, 2011 changing the Land Use Designation from Very Low Density Residential to Low Density Residential. The proposed zoning conditions have been clarified in the staff report.

Town Council Public Hearing on January 27, 2011

The applicants' representative, Ms. Glenda Toppe, summarized the plan amendment request for council. She noted that the request was consistent with the latest proposed draft of the Chatham-Cary Joint Land Use Plan. No other citizens spoke during the public hearing.

Notification

On January 12, 2011, the Planning Department mailed notification of a public hearing on the request to property owners within 400 feet of the subject property. Notification of the proposed rezoning and Comprehensive Plan Amendment was also sent to the Chatham County Planning Department. Notification consistent with the NC General Statutes was published in the Cary News on January 12 and 19, 2011. Notice of the public hearing was posted on the property January 12, 2011.

Neighborhood Meeting

A neighborhood meeting is not required for requests that apply initial Town of Cary Zoning. However, according to the applicant a neighborhood meeting was conducted with 13 residents

attending. Notification of the meeting was sent to the owners of 13 parcels within 400 feet of the site. Minutes of the November 15, 2010 meeting were prepared by the applicant.

CRITERIA FOR CONSIDERATION IN REVIEWING REZONINGS

Section 3.4.1(E) of the Land Development Ordinance sets forth the following criteria that should be considered in reviewing rezonings:

1. The proposed rezoning corrects an error or meets the challenge of some changing condition, trend or fact;
2. The proposed rezoning is consistent with the Comprehensive Plan set forth in Section 1.3 (LDO);
3. The Town and other service providers will be able to provide sufficient public safety, educational, recreational, transportation and utility facilities and services to the subject property while maintaining sufficient levels of service to existing development;
4. The proposed rezoning is unlikely to have significant adverse impacts on the natural environment, including air, water, noise, stormwater management, wildlife and vegetation;
5. The proposed rezoning will not have significant adverse impacts on property in the vicinity of the subject tract; and
6. The proposed zoning classification is suitable for the subject property.

COMPREHENSIVE PLAN CONFORMANCE AND ANALYSIS

A. Land Use Plan

The subject parcel is located in Chatham County, within the boundaries of Cary's Northwest Area Plan, The parcel is also within the study area for the draft Chatham-Cary Joint Land Use Plan, which has not yet been completed, nor officially adopted. Both plans are discussed below.

Current Land Use Plan Designation, Northwest Area Plan

The Future Land Use Map of the Northwest Area Plan designates the subject parcel as "Low Density Residential" (LDR). LDR is defined as single-family at densities ranging from about 1-3 dwellings per acre, with lot sizes of between approximately 10,000 square feet and one acre. The plan does, however, state that: "Smaller lot sizes and single-family-attached housing are possible when using clustered/conservation development designs, although the overall density should not exceed three dwellings per acre."

Current Land Use Plan Designation, Draft Chatham-Cary Joint Land Use Plan

The draft plan currently recommends that the subject parcel, along with the neighboring properties having frontage on the west side of Pittard Sears Road, be developed as single-family residential at a density of one to two dwellings per acre.

Analysis: With respect to overall density, the proposed zoning conforms to both the Northwest Area Plan and the latest draft of the Chatham-Cary Joint Land Use Plan, since the maximum number of dwelling units is limited to 20.

B. Parks & Greenways Master Plan

According to the Parks, Recreation and Cultural Resources Facilities Master Plan there are no issues related to this site. A recreation payment-in-lieu will be required for any future residential development in accordance with the Land Development Ordinance.

C. Growth Management Plan

The Growth Management Plan includes the following Guiding Principles that are relevant to this case:

1. R1 Guiding Principle: Ensure that adequate infrastructure and services are available concurrently with new development.

2. L1 Guiding Principle: Concentrate growth near existing and planned employment centers and available and planned infrastructure to minimize costly service-area extensions.

3. L2 Guiding Principle: Ensure that future growth protects sensitive natural resources and protects open space.

4. A1 Guiding Principle: Increase permitted densities in preferred growth areas to encourage desired forms of development.

Analysis: The proposed rezoning furthers several of the guiding principles. Principle R1 is satisfied due to the proximity of public utilities and planned highway capacity in the area. Principle L1 is satisfied given that the subject parcel is located about two miles west of the western boundary of Research Triangle Park (RTP), and about one mile west of the Alston Regional Activity Center. Guiding Principle L2 is furthered somewhat by the proposed zoning condition providing for an additional acre of permanent open space, in addition to the regulatory open space and buffers. Guiding Principle A1 may be considered to be satisfied since in general the Northwest Area Plan is based on a premise of encouraging higher densities near RTP.

D. Affordable Housing Plan

The Affordable Housing Plan includes the following goals that are relevant to this case:

1. Provide for a full range of housing choices for all income groups, families of various sizes, seniors, and persons with special challenges.
2. Facilitate the creation of a reasonable proportion of the Town of Cary's housing as affordable units through additional homeownership opportunities for individuals and families earning between 60 to 80 percent of area median income and affordable apartments for individuals and families earning up to 60 percent of the area median income.

Analysis: The proposed zoning may somewhat help to further the first of the above housing goals by providing housing for individuals aged 55 and over.

E. Comprehensive Transportation Plan

Pittard Sears Road is designated as a Local Street.

Existing Section: Two-lane section (shoulder, no curb and gutter) with approximately 26-foot roadway section on 50-foot right-of-way

Future Section: Two-lane section with curb and gutter with 27-foot roadway section on 50-foot right-of-way

Sidewalks: None existing. Sidewalks are recommended on at least one side (preferably south/east side to connect to Pittard Sears Multi-use Trail between American Tobacco Trail and McConnell Lane just south of subject property)

Bicycle Lanes: None existing or planned

Transit: No existing or planned service

Status of Planned Improvements: None planned

F. Open Space Plan

According to the Open Space Plan, the majority of the subject property was identified as significant open space due to the forest stand of mixed hardwood and conifer forest on site. In terms of resource priority, this forest land was assigned a relatively modest priority score, ranking in the bottom third of identified priority natural resources. There is an exception to this at the western edge of the property, where a small area of riparian forest is ranked in the top quarter of identified priority resources.

G. Historic Preservation Master Plan

There are no existing buildings on the subject parcel.

STAFF OBSERVATIONS

- The applicant proposes a limit of 20 single-family-detached units on the subject property, which produces a calculated gross density of two dwelling units per acre.
- The proposed zoning is TR-CU. The minimum lot size under TR zoning is 6,000 square feet. Theoretically, the TR district allows density up to 6.0 d.u./acre.
- Based on materials submitted by the applicant with the rezoning request, the overall property is approximately 10 acres in size, with approximately one acre within a resource buffer. In addition to this area, the requested rezoning proposes to include (as conditions) approximately one acre of open space, and a 20-foot-wide streetscape on a road that would not otherwise require a streetscape under the Town's LDO. Based on Town GIS maps, the depth (east-to-west) of the subject property is approximately twice as long as the width (north-to-south).
- Based on the proposed total number of dwelling units allowed and the gross acreage of the subject property, the resulting potential density yield of 2.0 d.u./acre is consistent with the corresponding Land Use Plan Map designation of LDR. This is supported by the "Analysis" statement in Section A of the "Comprehensive Plan Conformance and Analysis" section of this staff report.
- Section A of the "Comprehensive Plan Conformance and Analysis" section of this staff report also indicates that the Land Use Plan designation of LDR typically contains lot sizes between 10,000 square feet and one acre, and that smaller lot sizes and single-family-attached housing are possible when cluster/conservation development design are utilized, although overall density should not exceed three units per acre. At this time, the draft Joint Chatham-Cary Land Use Plan focuses only on density, not lot size. The proposed request does not address the specific type of development design that will be used.
- Based on the maximum number of units proposed and the gross acreage of the subject property, the request meets the density aspect of the Land Use Plan. With respect to lot size, based on the conditions proposed by the applicant with respect to buffers and open space, the resulting density limit, and the existing shape of the subject property (described above), on balance the requested zoning of TR-CU is consistent with the Land Use Plan.

APPLICANT'S JUSTIFICATION STATEMENT

The following statements are provided by the applicant (shown below in italics) in response to the criteria established in the application (shown below in bold) and do not necessarily represent the views or opinions of the Town of Cary. Any statements as to the type, the quality, or the physical features are at the direction of the applicant and may be formulated into a condition:

1. Any issues with the size of the tract?

Response: *The buffered areas of the site provide an excellent transition to the adjacent parcels.*

2. How is the request compatible with the comprehensive plan (i.e. Land Use, Transportation, Open Space and Historic Resources)?

Response: *The request is not compatible with the adopted Land Use Plan. However the proposed density is consistent with the draft Chatham County-Cary Joint Land Use Plan.*

3. What are the benefits and detriments to the owner, neighbors and the community?

Response: *The proposed density conforms to the draft Chatham County-Cary Joint Land Use Plan. The Plan uses Pittard Sears road as the dividing line between the higher density residential in the Amberly PDD and the lower density envisioned on the west side of Pittard Sears Road. The*

buffered areas of the parcel will provide protection to the adjacent property owners. To further minimize the impact on the community, the residential use is limited to age-restricted housing.

4. How are the allowable uses with the proposed rezoning compatible with, or how do they relate to, the uses currently present on adjacent tracts?

Response: The allowable use in the proposed rezoning is single-family residential, age restricted. The current uses on the adjacent tracts are also single-family residential and age-restricted. The proposed use is compatible with the existing uses. Good land use planning principles typically support the development of this type of use in this type of location. The interests of the residential property owners will be adequately protected by the provisions of the LDO and the conditions of the rezoning.

5. What reductions/amendments and/or modifications to the development standards of the LDO are being requested and how are they justified? (PDD, new or amended) Applicants must list these items and/or clearly highlight them within the Planned Development document.

Response: N/A

ORDINANCE FOR CONSIDERATION

10-REZ-14 Davis Residence Holding, LLC

AN ORDINANCE TO APPLY INITIAL TOWN OF CARY ZONING TO APPROXIMATELY 10.10 ACRES LOCATED ON THE WEST SIDE OF PITTARD SEARS ROAD APPROXIMATELY 2200 FEET SOUTH OF O'KELLY CHAPEL ROAD OWNED BY DAVIS RESIDENCE HOLDING, LLC & HF INVESTORS, BY REZONING FROM CHATHAM COUNTY R1 TO TRANSITIONAL RESIDENTIAL CONDITIONAL USE (TR-CU) AND JORDAN LAKE WATERSHED OVERLAY DISTRICT.

BE IT ORDAINED BY THE TOWN COUNCIL OF THE TOWN OF CARY:

Section 1: The Official Zoning Map is hereby amended by rezoning the area described as follows:

PARCEL & OWNER INFORMATION

Property Owner	Chatham County Parcel Number (10-digit)	Real Estate ID(s)	Deeded Acreage
Davis Residence Holding, LLC & HF Investors	0726-30-4388	0084836	10.10
Total Area			10.10

Section 2: That this Property is rezoned from Chatham County R1 to Town of Cary TR-CU and Jordan Lake Watershed Overlay District subject to the individualized development conditions set forth herein, and all the requirements of the Cary Land Development Ordinance (LDO) and other applicable laws, standards, policies and guidelines.

Section 3: The conditions mutually approved by the Town and the applicant for promoting public health, safety and the general welfare are:

1. Land use shall be limited to 20 single-family-detached residential units.
2. To address the impacts on Chatham County schools reasonably expected to be generated by the development and use of the subject property, the property owner shall provide evidence,

- prior to recording any subdivision plats for the subject property, that shows a homeowners association has been established and restrictive covenants are recorded with the Chatham County Register of Deeds subjecting the whole of the development to an age restriction requirement such that at least 80percent of all units (16 units if the property is developed with 20 units) shall be occupied by at least one person 55 or older. Such restrictive covenants shall (i) comply with all federal and state laws, including the Fair Housing Act, and (ii) shall vest the responsibility and obligation for enforcing the age restriction in the homeowners association.
3. A 20-foot streetscape planted or supplemented to meet the Type-A (opaque) standard of the LDO shall be provided along Pittard Sears Road.
 4. No reduction or modification to the LDO required width of the perimeter buffer may be requested during development plan review.
 5. The final plat shall designate a minimum of one acre to remain undisturbed, except as needed for utility easements, or as allowed by the LDO located as follows:
 - a) Outside of Perimeter Buffer
 - b) Outside of Urban Transition Buffer
 - c) Within 325 feet of western property line

These conditions address conformance of the development and use of the Property to ordinances and officially adopted plans and address impacts reasonably expected to be generated by the development and use of the Property.

Section 4: This ordinance shall be effective on the date of adoption.

Adopted and effective: August 9, 2011

ACTION: Mrs. Adcock moved to approve the consent agenda. Mrs. Robison provided the second; council granted unanimous approval.

(Ordinance No. 0-2011-21(a) is also on file in the town clerk's office.)

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3. Planning and Development Committee, July 20, 2011 *(any committee consent agenda item pulled for discussion will be discussed at the end of the committee discussion portion of the agenda, which is item G on this agenda)* **(Mrs. Adcock)**
 - a. **Request to Adopt Policy Statement 167 - Quasi-judicial Hearing Procedures** (LG12-001)
Committee unanimously recommended adopting a new Policy Statement regarding flexible quasi-judicial hearing procedures.

STAFF REPORT

Planning and Development Committee, July 20, 2011

New Policy Statement - Quasi-judicial Hearing Procedures (LG12-001)

Consideration of adopting a new Policy Statement regarding flexible quasi-judicial hearing procedures

Speaker: Ms. Chris Simpson

From: Chris Simpson, Town Attorney

Prepared by: Chris Simpson, Town Attorney

Approved by: Benjamin T. Shivar, Town Manager

Approved by: Michael J. Bajorek, Assistant Town Manager

Executive Summary

Staff requests adoption of a new Policy Statement, Quasi-judicial Hearing Procedures (attached herein), which provides guidance to both Town Council and the Zoning Board of Adjustment regarding conduct of quasi-judicial hearings.

Policy Statement 167
QUASI-JUDICIAL HEARING PROCEDURAL GUIDELINES

Prepared by: Chris Simpson, Town Attorney

Approved by Council: 8/9/11

Effective: 8/9/11

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I. Purpose and General Information

Quasi-judicial decisions arise in a variety of local government settings. In Cary, the Town Council holds quasi-judicial hearings for special use permits, certain subdivision and site plan applications and for certain other applications. The Zoning Board of Adjustment ('ZBOA') holds quasi-judicial hearings for variance requests and appeals of staff decisions, including zoning and minimum housing appeals. The Town Council and ZBOA are collectively referred to in this policy as the "Hearing Body". The Cary Land Development Ordinance is referred to as the "LDO".

During a quasi-judicial hearing, the Hearing Body must hold an evidentiary hearing and make its decision based on the written and oral evidence presented. Unlike legislative decisions (like rezonings), a quasi-judicial decision must be based solely on the evidence presented and cannot be based on opinions of members of the Hearing Body. Put differently, a quasi-judicial decision is one that requires the Hearing Body to find facts and exercise discretion when applying the standards of an ordinance to a specific situation.

This policy is adopted not as binding rules of procedure but to provide flexible guidance for the conduct of quasi-judicial hearings. It is designed to be used in conjunction with Policy 143 (Rules of Procedure for the Cary Town Council) and the ZBOA Rules of Order. This policy is based on NC law, but is not designed to create any additional rights or obligations and does not provide any procedural rights to any person. The failure of Hearing Body or any other person to adhere to this policy shall not affect the validity of any hearing, action taken or decision made. To the extent there is conflict or any discrepancy between these recommended procedures and the NC General Statutes, case law, or Town ordinances (collectively "law"), the law shall prevail.

II. Who May Appear at the Hearing

Both individual applicants and individuals opposed to the application who are aggrieved may represent themselves or be represented by an attorney, and they may have expert witnesses testify for them. All applicants are strongly advised to have an attorney represent them. Applicants that are corporations ('corporate applicant') must be represented by an attorney. Engineers, architects, real estate agents, planners and other non-attorneys may only appear as expert witnesses; they may not represent an applicant or those opposed to an application. If a non-corporate applicant desires to have a non-attorney act as his or her representative (and not solely as an expert witness), the applicant should notify the attorney advising the Hearing Body who will then advise the Hearing Body that it must vote on whether to allow the representation. The request may be denied. Therefore, applicants or their attorney should always be present at the hearing.

III. Prior to the Hearing

To the greatest extent practical, all exhibits and evidence to be relied on during the hearing should be submitted electronically with the application or to the Town Clerk (if the hearing is before the Town Council) or the Board Secretary (if the hearing is before the Board of Adjustment) by 5 p.m. on the Tuesday the week before the hearing date (for hearings before the Town Council) and by _____ at **least fourteen (14) days before the hearing date** (for hearings before the Board of Adjustment). The Town Clerk and Board Secretary may designate Town staff members responsible for processing each application (sometimes 'Staff Representative') as the person to whom such exhibits should be submitted. Copies should also be provided to any other known party. By receiving exhibits and evidence with the application or no later than the deadlines shown above, the Town is able to post such exhibits with the hearing agenda. Failure to provide evidence or exhibits by the date and time specified shall mean the applicant or other witness is responsible for providing a sufficient number of copies of such exhibits at the hearing and may result in the hearing being continued. If possible, electronic submissions should meet ADA accessible guidelines (i.e., screen-reader friendly PDF, text file format, etc.). Photos and illustrations should be provided as jpeg or tiff format images. These jpeg or tiff images may be embedded in the PDF or text file provided but must also be provided as separate files.

If prior to the hearing an applicant or a person opposed to an application has questions about the process, he or she may contact the Staff Representative for more information. The person shall not contact any member of the Hearing Body.

Prior to the hearing the Staff Representative, applicant or other person may suggest time limits for testimony and agreement on other procedural issues, and agreement may be reached on such matters. The applicant may also request a continuance prior to the hearing by contacting the Staff Representative.

IV. Responsibilities of the Mayor/Chairperson

The Mayor (if the hearing is before the Town Council) or the Chair of the ZBOA (if the hearing is before that body), shall preside over the hearing. The Mayor/Chair must recognize speakers and members of the Hearing Body before they may be heard. The Mayor/Chair may rule on any objections or requests from participants in the hearing regarding the procedure of the hearing or evidence presented. The Mayor/Chair may rule on the competence (i.e. the admissibility) of evidence with or without an objection from a participant. The Mayor/Chair should allow every speaker to be heard, but may limit and/or cut off evidence or testimony that is irrelevant, repetitive, incompetent, inflammatory, or hearsay. The Mayor/Chair may place reasonable and equitable limitations on the presentation of evidence, arguments, and cross-examination of witnesses so that the matter at hand is heard without undue delay.

The Mayor/Chair may impose additional requirements and take actions as may be necessary or desirable to facilitate the fair and efficient conduct of the hearing and other agenda items. Additional requirements or actions may include requiring witnesses to sign up in advance of the hearing allocating reasonable time for each side to present their testimony and evidence, limiting the overall time for the hearing, and delaying a hearing to a later point in the agenda or continuing the hearing to a later meeting.

V. Responsibilities of the Hearing Body

Members of the Hearing Body must make their decision solely on the written and oral evidence presented and cannot consider information obtained through independent research or undisclosed *ex parte* communications. Members may, however, view the premises at issue before the hearing so long as at the commencement of the hearing the members disclose the site visit and any facts or information gleaned from the site visit that are relevant to the case. Likewise at the commencement of the hearing, or during the hearing if it only becomes evident then, members must disclose any specialized knowledge they may have that is relevant to the case.

Members of the Hearing Body should refrain from *ex parte* communications about upcoming or ongoing cases with any parties or other members of the Hearing Body, and at the commencement of the hearing, members must disclose any intentional or inadvertent *ex parte* communications. Members may seek and receive general, technical information pertaining to the case from Town staff prior to the hearing, but the Town staff should provide the information to all during the hearing before the entire Hearing Body.

VI Responsibilities of those who Testify

In addition to other responsibilities of the applicant and others who testify ('witnesses'), witness shall observe time limits imposed on testifying unless the Mayor/Chair grants additional time for good cause shown. Witnesses shall avoid all hearsay evidence. Hearsay evidence is testimony that the witness does not know of his or her own personal knowledge, including that which someone else told the witness and the use or introduction of signed petitions and letters. Witnesses shall focus their testimony on the applicable criteria. Unless they are a qualified expert, witnesses are not competent to testify about the impact of a proposed land use on the value of nearby property, the danger to public safety resulting from increases in traffic or other matters that require special training or expertise like the level of noise that will be generated. Non-expert witnesses are competent to testify about facts known to them and their opinion so long as it is not about the impact on values, the danger to public safety from increases in traffic and other matters that require special training or expertise.

VI. Conduct of the Hearing

This section discusses the general format for a quasi-judicial hearing. Section VII provides details about testimony and evidence. The order of business for each hearing should be as follows:

- (a) All persons, including Town staff, who intend to present evidence must be sworn in.
- (b) The Mayor/Chair shall call the case as advertised on the agenda. The Mayor/Chair may state something along the lines of:
This matter requires this body to conduct a quasi-judicial hearing, which means the body must find facts and base its decision upon the application of the ordinance standards/criteria and the competent, substantial and material evidence received during this hearing. All testimony must be competent and not repetitious. Speculative opinions

and general expressions of fear of potential increases in crime, traffic or impacts on property values do not constitute competent evidence.

- (c) If the applicant is to be represented by anyone other than a licensed attorney, the applicant shall request the consent of the Hearing Body for such representation. See, Section II, above.
- (d) Members of the Hearing Body should disclose the following:
 - (1) Any site visits;
 - (2) *Ex parte* communications;
 - (3) Specialized knowledge they have relevant to the case;
 - (4) Whether they have a fixed opinion that is not susceptible to change based on what they learn at the hearing;
 - (5) Whether they have a close familial, business or other relationship with the applicant or other affected person;
 - (6) Whether they have a financial interest in the outcome of the case; and
 - (7) Any other information relevant to determining whether a conflict of interest exists. If necessary, the Hearing Body will vote on recusal of members at this time. A member shall not participate in the hearing if the member has a fixed opinion prior to the hearing that is not susceptible to change; has engaged in undisclosed *ex parte* communications; has a close familial, business or other associational relationship with the applicant or an affected person; or has a financial interest in the outcome of the matter.
- (e) The applicant or other affected person (having been sworn in) shall present any objections they may have to a member's participation. If an objection is made to the participation of a member based on personal bias or other ground for disqualification, the Hearing Body shall determine the matter as part of the record.
- (f) The Staff Representative should present the staff report.
- (g) Evidence and the appropriate number of exhibits that were not provided by the deadline in advance of the hearing shall be given to the Clerk/Board Secretary, and any opposing party. The Clerk/Board Secretary shall number the exhibits if they have not already been numbered and shall distribute to Hearing Body. If an exhibit is presented it becomes part of the record and will not be returned.
- (h) If all parties are represented by attorneys, the applicant, followed by any opposing party, may present a brief opening statement.
- (i) The applicant shall present the arguments and evidence in support of his/her case or application. The applicant shall address applicable approval criteria. Members of the Hearing Body or any attorney representing the Hearing Body or the Town may ask questions for clarification. If all parties are represented by attorneys, opposing parties may ask questions of (cross-examine) the applicant (if the applicant testifies) or supporting witnesses at this time. If those opposed to the applicant are not represented by attorneys, the Mayor/Chair may prefer to delay cross-examination until all sides present their arguments and evidence.
- (j) Persons opposed to granting the application shall present the arguments and evidence against the application based on the applicable approval criteria. Members of the Hearing Body or any attorney representing the Hearing Body or the Town may ask questions for clarification. If all parties are represented by attorneys, the applicant may cross-examine the speaker or opposing witnesses at this time.
- (k) If cross-examination was not done at the conclusion of each side's case, then both sides will be permitted to cross examine previous witnesses.

Those who oppose the application should cross examine the applicant (if the applicant testified) and the applicant's supporting witnesses first. Then the applicant may cross examine those witnesses who spoke in opposition to the application. Both sides will be permitted to present rebuttals to opposing testimony. Both sides may, as necessary, object to incompetent evidence and testimony (such as improper lay opinion testimony and hearsay) offered by other witnesses. The Mayor/Chair may rule on such objection or take it under advisement.

- (l) After all evidence has been presented, the Mayor/Chair may ask the parties if there is additional relevant information that has not been presented that would make a continuance in order. The Mayor/Chair will entertain objections and rule on the admissibility of the evidence or exhibit.
- (m) Unless the Mayor/Chair continues the public hearing to a publicly stated date, time and location, the Mayor/Chair shall close the period for public discussion. The Hearing Body shall publicly discuss the case without further general input from the public. Members of the Hearing Body, however, may seek clarification or ask questions of persons previously sworn on any piece of evidence presented. Cross-examination and rebuttals may be made only on new evidence presented. The Hearing shall be closed after Hearing Body deliberations are complete.
- (n) Unless the public hearing has been continued, the Hearing Body shall render a decision on the matter, or, if it so chooses, recess the case to a publicly stated date, time and location, which should generally be the next regular meeting of that body. The Town Council may approve an application by vote of a majority of the members. The Board of Adjustment may approve variances and reverse or modify a staff decision only by a vote of four-fifths of the members of the board (excluding vacant positions and members who are disqualified from voting, if there are no qualified alternates available).
- (o) The Hearing Body may attach conditions to the approval of any application in accordance with LDO § 3.1.8, or other applicable authority. Note, however, the Hearing Body's authority to attach conditions as part of an appeal is limited (See Section VIII).
- (p) A written decision must be approved for every quasi-judicial application, either by entering the decision at the end of the hearing or at a subsequent meeting of the Hearing Body, which shall generally be the next scheduled meeting. As part of the written decision, the Hearing Body must make findings of fact and conclusions as to applicable standards and any conditions (See Section IX). In cases where the findings of fact and conclusions are sufficiently complex, the Mayor or Chair may direct the attorney representing the Hearing Body to draft a written decision for approval by the Hearing Body at its next regularly scheduled meeting, which approval may be on a consent agenda.

VII. Burden of Proof, Testimony, and Evidence

(A) Burden of Proof for Special Use Permits and Subdivision/ Site Plan

Approvals: The applicant has the burden of producing sufficient substantial, competent and material evidence for the Hearing Body to conclude that the standards of the applicable ordinance(s) have been met. If the applicant shows they meet all the standards of the LDO, the applicant is entitled to approval unless those opposed to the application produce substantial, competent and material evidence that one or more of the standards have not been met. If the applicant fails to put forth sufficient evidence to show they meet all the criteria, then the Hearing Body must deny the application. For example, for a special use, the applicant must establish that the application meets the specific criteria for the specific use proposed and that it meets all of the

general criteria of LDO § 3.8.3. For a site/subdivision plans, the applicant must establish that the application meets the criteria of LDO § 3.9.2(l).

(B) Burden of Proof for Variances: The applicant has the burden of producing sufficient substantial, competent and material evidence for the Hearing Body to conclude that the standards of the applicable ordinance(s) have been met. The BOA must deny a request for a variance unless the applicant puts forth sufficient evidence that all of the criteria of LDO § 3.20.5 have been met. Unlike special use and subdivision/site plan applications, an applicant is rarely, if ever, entitled to a variance. Instead, variances should only be granted sparingly and when it is necessary to prevent the total loss of use of a property.

(C) Burden of Proof for Appeals: Appeals of administrative decisions are only quasi-judicial decisions in the limited sense that they require the same due process protections as are given in other quasi-judicial proceedings (for example, the rights to present evidence and cross examine). Unlike other quasi-judicial decisions, however, an appeal of an administrative decision presents a question of law, which the Hearing Body considers *de novo*. “*De novo*” means the Hearing Body is not bound by the ordinance interpretation of Town staff. Instead, the Hearing Body must seek to interpret the ordinance so as to give effect to the Town Council’s intent when it adopted the ordinance. Pursuant to § 3.21.4 of the LDO, the Hearing Body shall not reverse or modify an administrative decision unless it finds that the administrative officer erred in the application or interpretation of the terms of the LDO, Town Code, or related policies adopted by the Town. The other common rules of statutory construction apply as well.

In appeals, neither party has the burden of proof, and neither party has any right to any affirmative decision.

(D) Testimony and Evidence: All testimony, including from Town staff, must be sworn testimony. All persons wishing to speak will be given a reasonable time in which to be heard; however, groups are encouraged to select a spokesperson to speak for the group in order to avoid repetitive testimony. Inflammatory, irrelevant, repetitive and incompetent testimony and hearsay is not permitted.

The Hearing Body’s decision must be based on substantial, competent, and material evidence. Substantial evidence is “that which a reasonable mind would regard as sufficiently supporting a specific result”. Competent evidence is evidence that can be subjected to cross-examination, inspection, explanation and rebuttal. Courts often refer to competent evidence as being “admissible”. Material evidence is evidence that is relevant to the issue being considered by the Hearing Body.

(E) Lay Versus Expert Testimony: As a general rule, anyone with knowledge material (i.e. relevant) to the case may provide factual information, but only experts may provide opinion testimony. Except as provided in G.S. § 160A-393(k)(3), lay witnesses may provide opinion testimony, but this testimony is generally deemed incompetent unless it is corroborated by competent evidence. Even expert testimony must be competent (i.e. the expert has qualifications relevant to the issue) and material before the Hearing Body can rely on it.

G.S. § 160A-393(k)(3) now requires expert testimony in three cases:

- 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. other matters about which only expert testimony would generally be admissible under the rules of evidence, such as the level of noise that will be generated.

VIII. Conditions of Approval

(A) Conditions Generally: The Hearing Body may attach conditions to approvals of special use permits, subdivision and site plans, and variances, and such other approvals as law may permit. For special use permits and subdivision and site plans, conditions must be reasonable and limited to those that require changes in a project “that are necessary to bring the project into compliance with the standards” of the applicable statutes and ordinances. For variances, conditions must be “reasonably related to the condition or circumstance that gives rise to the need for a variance”.

Conditions cannot require the applicant to take action with regard to a piece of property that is not a part of the application being considered, and conditions cannot require the alteration of a special use permit previously issued to a third party.

(B) Conditions on Appeals Decisions: Unlike conditions on special use permits, subdivision plans, site plans, and variances, the Hearing Body’s authority in an appeal is limited to reversing or affirming, wholly or partly, or modifying the staff decision. Moreover, the Hearing Body only has only the powers of the officer from whom the appeal is taken. An appeal of an administrative decision cannot be used to impose conditions or vary the ordinance.

IX. Findings of Fact and Conclusions

To either approve or deny an application, the Hearing Body must make findings of facts and conclusions as to applicable standards. The findings of fact are a summation of the facts presented that the members of the Hearing Body think are relevant to the case. The Hearing Body may consider proposed findings of fact offered by the applicant or staff. Conclusions as to standards are the application of the facts to any specific standards for the particular use and the general standards contained in LDO § 3.8.3 for special uses, § 3.9.2(l) for subdivision plans and site plans, and § 3.20.5 for variances. For approvals or denials of these types of applications, the Hearing Body should make conclusions as to each applicable standard as appropriate. There are no specific LDO standards that apply to the appeal of an administrative decision; instead, the Hearing Body should make findings of fact and conclusions that are relevant to the specific ordinance that is at issue in the appeal.

Findings of fact must also be made to support conditions attached to a special use permit or variance.

There is no fixed method for making findings of fact and conclusions as to standards, but the following offers one approach: The Hearing Body begins with a motion to find that the application is or is not complete. If the Hearing Body finds that the application is not complete, it should state what items are missing. Unlike an application that has been denied on its merits, an application denied for incompleteness could be submitted again and would not be barred because it was already decided (*res judicata*). See, Section XI, “Reconsideration/Reopening”.

Assuming the application is found to be complete, the Hearing Body should then address each of the applicable criteria. For each criterion appropriate findings of fact and conclusions should be made. If, however, a member of the Hearing Body believes an application fails because it does meet any one or more of the applicable criteria, he or she may move to deny the application on that basis alone. If the Hearing Body approves such a motion, it should make findings of fact and conclusions to support that decision. Even if the Hearing Body denies an application because it fails to meet one or two criteria, the better practice is to make findings of fact and conclusions as to all standards anyway, so the record is clear in the event the decision is appealed.

Because the Town Council must approve special use permits, subdivision plans and site plans by a majority vote and because the LDO requires that all ordinance criteria be satisfied to grant an application, any motion to approve an application that does not get a majority vote effectively means the application has been denied. Even if an application is effectively denied,

however, the better practice is to approve a formal motion denying an application and then make findings of fact and conclusions to support that decision. The same applies to the Board of Adjustment, which must approve actions by a four-fifths majority.

In contrast, a motion to deny that fails does not mean that an application has been effectively approved. An application can only be approved on an affirmative vote, and should include findings of fact and conclusions as to each applicable standard to support the application approval.

X. Withdrawal of the Application

An application or appeal will be considered to have been withdrawn under the following circumstances:

- (1) The applicant submits a written request to withdraw the application or appeal;
- (2) The property owner, if different than the applicant, submits a notarized request to withdraw the application or appeal;
- (3) The Hearing Body requests the applicant to furnish additional information within a specified period of time, and such information is not furnished by the applicant within the time period allowed;
- (4) Without prior notification to the Mayor/Chair or Clerk/Board Secretary, the applicant does not appear at the scheduled hearing to testify regarding the merits of the application; or
- (5) The applicant appears at the scheduled hearing and requests that the application be withdrawn.

XI. Reconsideration/Reopening

Unless there is a significant change in circumstances, substantive decisions on the merits of a request cannot be reconsidered and decided cases cannot be reopened following the approval of a written decision. If there has been a significant change in circumstances, the case may be submitted as a new case under the zoning ordinance.

Background

At a work session held on March 22, 2011, Town Council directed staff to finalize a quasi-judicial hearing procedures document to be adopted as a Policy Statement. Quasi-judicial hearings are required for any quasi-judicial decision made by Council or the Zoning Board of Adjustment (ZBOA). The Land Development Ordinance requires Council to hold quasi-judicial hearings on all special use permits and on certain site or subdivision plans; while the ZBOA holds quasi-judicial hearings on variance requests and appeals.

The proposed Policy Statement provides guidance regarding the special procedural rules that apply to quasi-judicial public hearings. Adoption of this Policy Statement will provide a framework for quasi-judicial hearings that will be useful to Council, the ZBOA, and the applicants or other persons involved in those hearings.

Fiscal Impact

N/A

Staff Recommendation

Adopt the new Policy Statement, Quasi-judicial Hearing Procedures.

ACTION: Mrs. Adcock moved to approve the consent agenda. Mrs. Robison provided the second; council granted unanimous approval.

(Policy Statement No. 167 is also on file in the town clerk's office.)

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4. Operations Committee, August 4, 2011 (*any committee consent agenda item pulled for discussion will be discussed at the end of the committee discussion portion of the agenda, which is item G on this agenda*) (**Mr. Smith**)

a. **Swift Creek Parallel Force Main** (EN12-009)

Committee unanimously recommended awarding the Swift Creek Parallel Force Main project to Sullivan Eastern, Inc., for \$8,539,066.40 and authorizing the transfer of \$2,750,000 from the sewer development fee fund balance within the Utility Capital Reserve to the construction account of Project SW1170. The recommendation of award by Council represents a preliminary determination as to the qualifications of the bidder and no legally binding acceptance of the bid or offer occurs until the Town has executed a written agreement.

STAFF REPORT

Operations Committee, August 4, 2011

Swift Creek Parallel Force Main (EN12-009)

Consideration of Bid Award for the Swift Creek Parallel Force Main Project

Speaker: Mr. Tim Bailey

From: Tim Bailey, PE, Engineering Director

Prepared by: Robert Hirt, PE, Utility Engineer

Approved by: Benjamin T. Shivar, Town Manager

Approved by: Michael J. Bajorek, Assistant Town Manager

Executive Summary

The Engineering Department received bids for the Swift Creek Parallel Force Main, Project SW1170, on Thursday, July 14, 2011. The project includes the construction of a new force main and gravity interceptor that will allow the Swift Creek Pump Station to reach its designed and constructed capacity. Construction of the project is scheduled to start this fall and be completed within a year. After reviewing the bid proposals, staff recommends that the project be awarded to Sullivan Eastern, Inc. for \$8,539,066.40 and that \$2,750,000 be transferred from the sewer development fee fund balance within the utility capital reserve.

Discussion

This project will provide construction of a new 17,000-ft sewer force main, located primarily in Wake County, along portions of Holly Springs Road, Ten Ten Road, and Lawdraker Road. The sewer line becomes a gravity interceptor along Bentgrass Court and runs cross-country approximately 3,000 feet to an existing manhole on the northern edge of the Jamison Park Subdivision. Provisions have been made for an interconnection to the existing force main, emergency pumping locations, and various odor control devices throughout the corridor. It is expected that construction will be completed by October 2012.

The following contractors submitted bid proposals for the project:

Contractor	Bid Price
Sullivan Eastern	\$ 8,539,066.40
Central Builders	\$ 8,724,892.50
DeVere Construction	\$ 8,902,598.75
Hall Contracting	\$ 9,007,866.00
JF Wilkerson	\$ 9,283,653.93
Park Construction	\$ 9,358,249.00

Contractor	Bid Price
Triangle Grading & Paving	\$ 9,449,640.75
John D. Stephens	\$ 9,539,758.00
TA Loving Co.	\$ 9,795,340.00
Ruby Collins	\$ 9,974,008.00

The construction of this parallel force main is the final phase of the Swift Creek Pump Station expansion. This project enables the Swift Creek Pump Station to achieve its maximum constructed capacity. Although that capacity is not needed today, there are critical reasons for constructing the project. Once this force main is operational, the existing force main (under a separate project) can be taken out of service, inspected, and repaired as needed. Existing flows leaving the pump station prohibit most work without undertaking a major bypass operation. This project alleviates the need for costly bypass pumping and will allow for thorough maintenance work to occur.

Fiscal Impact

Operating: Short term personnel impacts include providing supervision by the Engineering Department of the construction administration and inspection that is being provided by the design firm, HDR, Inc., as part of the design contract. Long term operating impacts by Public Works and Utilities staff will differ only marginally from the current operations at the pump station today. All of the necessary supervision, operation, and maintenance requirements associated with this project can be provided by current Town staff.

Funding: A total of \$9,430,000 has been appropriated to date to the Swift Creek Parallel Force Main, Project SW1170. A total of \$2,255,036.91 has already been encumbered or expended for design and easement acquisition. These expenses significantly contributed to the budget shortfall as the selected corridor has numerous impacts to Wake County homeowners that resulted in a combination of design changes and payments for damages and easements. There are also design elements of the project that were added that increased the bid price beyond the budget. Among those items are the interconnection to the existing force main which will provide flexibility from an operational standpoint, the extensive odor control devices that are expected to result in zero odor complaints, and the inclusion of a wide range of erosion control devices that are required due to the topography.

From the funds that remain, \$525,000 is required to cover the expected condemnation decisions that are outstanding as well as the required testing that will occur during construction. The subsequent balance of \$6,649,963.09 is not adequate to cover the bid of \$8,539,066.40. A transfer of \$2,750,000 from the sewer development fee fund balance within the Utility Capital Reserve is being requested to cover the shortfall as well as to provide a 10 percent contingency during construction.

Staff Recommendation

Staff recommends awarding the project to Sullivan Eastern, Inc. for \$8,539,066.40. Staff also recommends that Council authorize the transfer of \$2,750,000 from the sewer development fee fund balance within the Utility Capital Reserve to the construction account of Project SW1170. The recommendation of award by Council represents a preliminary determination as to the qualifications of the bidder and no legally binding acceptance of the bid or offer occurs until the Town has executed a written agreement.

ACTION: Mrs. Adcock moved to approve the consent agenda. Mrs. Robison provided the second; council granted unanimous approval.

- b. **Recognition of Developer Funds for Morrisville Parkway Improvements (EN12-010)**
 Committee unanimously recommended recognizing \$75,855.04 from developers for appropriation into the Morrisville Parkway Projects, with \$47,498.74 to be appropriated to ST1104 and \$28,356.30 to be appropriated to ST1120.

STAFF REPORT

Operations Committee, August 4, 2011

Recognition of Developer Funds for Morrisville Parkway Improvements (EN12-010)
 Consideration of recognizing \$75,855.04 from developers for additional improvements to Morrisville Parkway

Speaker: Mr. Tim Bailey

From: Tim Bailey, PE, Director of Engineering
 Prepared by: Eric Simpson, PE, Engineer
 Approved by: Benjamin T. Shivar, Town Manager
 Approved by: Michael J. Bajorek, Assistant Town Manager

Executive Summary

Town Staff worked with adjacent developers of the Morrisville Parkway Extension to incorporate their required transportation development improvements during the construction of the Town project. Staff recommends recognizing \$75,855.04 from the developers for appropriation into the Morrisville Parkway Projects.

Background

Three developers along Morrisville Parkway requested that the Town of Cary revise the planned improvements to Morrisville Parkway to accommodate their proposed developments. The developers have agreed to reimburse the Town for all additional work required by these revisions. The improvements have been constructed and are complete for all three developers.

<u>Developer</u>	<u>Project</u>	<u>Amount</u>
Pulte Homes	ST1120	\$28,356.30
OC Creekside, LLC	ST1104	\$23,673.57
David S. Ferrell and Luanne F. Adams	ST1104	<u>\$23,825.17</u>
Total		\$75,855.04

Pulte Homes has submitted a payment of \$28,356.30. Staff will invoice the remaining developers upon approval of this staff report.

Fiscal Impact

Project ST1120 will increase \$28,356.30 in the construction account. Project ST1104 will increase \$47,498.74 in the construction account.

Staff Recommendation

Staff recommends recognizing \$75,855.04 from the developers for appropriation into the Morrisville Parkway Projects. Staff further recommends recognizing \$47,498.74 from the developers for appropriation into the Morrisville Parkway Extension Project ST1104 and \$28,356.30 from the developers for appropriation into the Morrisville Parkway Extension Project ST1120.

ACTION: Mrs. Adcock moved to approve the consent agenda. Mrs. Robison provided the second; council granted unanimous approval.

c. FY2011 Street Improvements (EN12-011)

Committee unanimously recommended awarding the FY2011 Street Improvements Project bid award to Rea Contracting, a Division of the Lane Corporation, for \$1,013,172.56. Committee further recommended transferring \$70,000 from ST1185 and \$70,000 from ST1195 to ST1201. The recommendation of award by Council represents a preliminary determination as to the qualifications of the bidder and no legally binding acceptance of the bid or offer occurs until the Town has executed a written agreement.

STAFF REPORT

Operations Committee, August 4, 2011

FY2011 Street Improvements (EN12-011)

Consideration of a Bid Award for the FY2011 Street Improvements Project

Speaker: Mr. Tim Bailey

From: Tim Bailey, PE, Director of Engineering
Prepared by: Tom Ellis, PE, Transportation Engineer
Approved by: Benjamin T. Shivar, Town Manager
Approved by: Michael J. Bajorek, Assistant Town Manager

Executive Summary

The Engineering Department received bids for the 2011 Street Improvements on July 14, 2011. After reviewing the base bid and the alternate prices, staff recommends that the project be awarded to Rea Contracting, A Division of the Lane Construction Corporation for \$1,013,172.56 and that Alternate 1 be used for minor crack pavement rehabilitation. In addition, staff recommends transferring \$70,000 from ST1185 and \$70,000 from ST1195 to ST1201.

Discussion

The Engineering Department received bids to resurface 56 street segments totaling 4.6 miles as shown on the list below.

STREET	FROM	TO	PCI
Abernathy Court	Kilarney Drive	Cul De Sac	37
Aerial Center Parkway	End Median	Cul De Sac	37
Barthel Drive	Merowe Court	Modena Drive	38
Barthel Drive	Modena Drive	Cul De Sac	25
Benwell Court	Otmoor Lane	Cul De Sac	34
Bridle Creek Drive	Prestonwood Parkway	Timber Hitch Road	39
Cambay Court	Barthel Drive	Cul De Sac	32
Cary Glen Boulevard	Mintawood Court	Howard Grove Parkway	39
Chamness Drive	Duden Court	Ludington Court	39
Clearport Drive	Goldenthal Court	Hardenbrook Court	38
Clydesdale Court	Smokehouse Lane	Charolais Trail	39
Convention Drive	Cary Towne Boulevard	End Maintenance	39
Crabtree Crossing Parkway (Northside)	Eaton Place	Pond Bluff Way	34
Crabtree Crossing Parkway (Northside)	NW Cary Parkway	High Country Drive	39

STREET	FROM	TO	PCI
Crabtree Crossing Parkway (Southside)	High Country Drive	Grey Bridge Row	24
Culcross Street	Cavendish Drive	Cul De Sac	35
Dominion Hill Drive	April Bloom Lane	Ballad Creek Court	27
Donaldson Drive	Donaldson Court	Jamestown Court	33
Draymore Way	Preston Village Way	Lutterworth Court	36
Farmington Woods Drive	Executive Circle	Bissett Drive	34
Forest Park Way	Renshaw Court	Rina Court	38
Glasgow Road	Annadale Drive	Tweed Circle	30
Heathridge Lane	Pennsbury Court	MacArthur Drive	36
Hunter Street	East Chatham Street	Waldo Street	34
Kitty Hawk Drive	First Flight Lane	Pilot Marks Court	38
Lake Pine Drive	Cork Harbor Drive	Helmsdale Drive	38
Lake Pine Drive	Helmsdale Drive	Laughridge Drive	33
Laura Duncan Road	SW Cary Parkway	Arvo Lane	33
Leckford Way	Kalida Court	Trappers Run Drive	38
MacArthur Drive	Blythewood Court	Polperro Drive	33
Maumee Court	Trafalgar Lane	Cul De Sac	35
Megan Court	Bonner Court	Cul De Sac	32
Modena Drive	Ludstone Court	Mereworth Place	36
Nathaniel Court	Greenwood Circle	Cul De Sac	38
North Academy Street	Ambassador Loop	Wilkinson Avenue	36
NW Cary Parkway	Nantucket Drive	Private Drive	37
Parkscene Lane	Parkknoll Lane	Parkroyale Lane	24
Preston Oaks Lane	NW Cary Parkway	Preston Grove Avenue	28
Preston Village Way	Conagra Court	Weingarten Place	35
Preston Village Way	Doric Court	Walcott Way	28
Preston Village Way	Walcott Way	Conagra Court	30
Prestonwood Parkway (Eastside)	Bridle Creek Drive	Torrey Pines Drive	33
Prestonwood Parkway (Eastside)	Torrey Pines Drive	Private Property (Clubhouse Entrance)	31
Prestonwood Parkway (Westside)	Torrey Pines Drive	Bridle Creek Drive	22
Prestonwood Parkway (Westside)	Torrey Pines Drive	Private Property (Clubhouse Entrance)	37
Sloan Drive	Montreal Court	SE Maynard Road	39
South Academy Street	Chatham Street	Waldo Street	33
South Academy Street	Waldo Street	Zev Summit Lane	27
South Harrison Avenue	Park Street	Awesome Court	36
Trailing Oak	Marilyn Circle	Pocono Lane	37
Uxbridge Court	Old Rockhampton Lane	Cul De Sac	29
Victor Hugo Drive	Lake Pine Drive	Devimy Court	35
Walcott Way	Bartica Court	Aberson Court	38
Walcott Way	Jesnck Lane	Peckskill Court	38
Walcott Way	Peckskill Court	Listokin Court	37
Winfair Drive	Chancellors Ridge Court	Pebble Ridge Farms Court	32

Pavement Condition Index (PCI) represents the overall condition of the street pavement. Street condition is considered poor and repairs are recommended when the PCI is 55 and under. Street condition is considered fair when the PCI is between 55 and 70 and in satisfactory to good condition when the PCI is over 70.

Staff also received alternate bids to repair areas exhibiting minor cracking. Alternate 1 incorporates use of chip seal, which is defined as a mixture of asphalt and stone to seal cracks. Alternate 2 incorporates the use of geosynthetic fabric over the existing pavement to seal cracks. Both alternates are effective in sealing cracks. Alternate 1 is recommended since the cost is 100,363.84 less than Alternate 2.

Construction of the project is expected to start in late September and be completed in late November.

Contractor	Base Bid	Alternate 1	Alternate 2	Base Bid and Alternate 1	Base Bid and Alternate 2
Rea Contracting	\$ 948,878.00	\$ 64,294.56	\$170,658.40	\$1,013,172.56	\$1,119,536.40
FSCII, DBA Fred Smith Co.	\$1,111,474.00	\$ 97,235.60	\$158,752.00	\$1,208,709.60	\$1,270,226.00
Barnhill Contracting	\$1,113,930.70	\$112,317.04	\$ 59,532.00	\$1,226,247.74	\$1,173,462.70
Triangle Grading and Paving	\$1,133,160.00	\$ 63,500.80	\$119,064.00	\$1,196,660.80	\$1,252,224.00

Fiscal Impact

The FY2011 Capital Improvements Budget included a \$1,000,000 appropriation to the 2011 Street Improvements project (ST1201). A total of \$47,310.36 has been expended to date to primarily cover the cost to complete the 2011 Pavement Condition Rating Survey. The current available balance is \$952,689.64. Staff has determined that an additional \$140,000 is required in order to award the contract and for contingency. Staff recommends funding this additional \$140,000 from existing appropriations among two capital projects.

ST1185 - Street Improvements FY2009: \$2,000,000 has been appropriated to this project. \$1,900,165.12 has been encumbered/expended to date leaving an available balance of \$99,344.88. Of the total bid detailed in this staff report, \$70,000 will be supported by available funds within ST1185.

ST1195 - Street Improvements FY2010: \$2,000,000 has been appropriated to this project. \$1,889,555.46 has been encumbered/expended to date leaving an available balance of \$110,444.54. Of the total bid detailed in this staff report, \$70,000 will be supported by available funds within ST1195.

Staff recommends transferring \$70,000 of funding from ST1185 and \$70,000 from ST1195 to ST1201. If approved, these appropriations will bring total ST1201 appropriations to \$1,140,000 and the available balance to \$1,092,689.64.

The Public Works and Utilities Department maintains Town streets. The construction administration and inspection requirements associated with this project can be provided by current Town staff with no additional staffing or funding required. Expending funding and performing more minor repairs on the prioritized streets now will be significantly cheaper than waiting until a future year and performing more costly repairs.

Staff Recommendation

Staff recommends awarding the project to Rea Contracting, a Division of the Lane Corporation for \$1,013,172.56. In addition, staff recommends transferring \$70,000 from ST1185 and \$70,000 from ST1195 to ST1201. The recommendation of award by Council represents a preliminary determination as to the qualifications of the bidder and no legally binding acceptance of the bid or offer occurs until the Town has executed a written agreement.

ACTION: Mrs. Adcock moved to approve the consent agenda. Mrs. Robison provided the second; council granted unanimous approval.

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- d. **Easement Conveyance to the NC Department of Transportation (EN12-012)**
Committee unanimously recommended granting an easement to the NC Department of Transportation for a traffic signal.

STAFF REPORT

Operations Committee, August 4, 2011

Easement Conveyance to the NC Department of Transportation (EN12-012)

Consideration of granting an easement to the NC Department of Transportation for a traffic signal

Speaker: Mr. Tim Bailey

From: Tim Bailey, PE, Director of Engineering
Prepared by: Yulonda Moore, Real Estate Specialist
Approved by: Benjamin T. Shivar, Town Manager
Approved by: Michael J. Bajorek, Assistant Town Manager

Executive Summary

The Town has received a request from a developer to convey a portion of Town property for the installation of a traffic signal pole and related equipment at the intersection of Regency Parkway and Regency Forest Drive. The easement will be conveyed to and maintained by the NC Department of Transportation (NCDOT). Staff recommends approval for execution of the easement to the NCDOT for the traffic signal easement.

Background

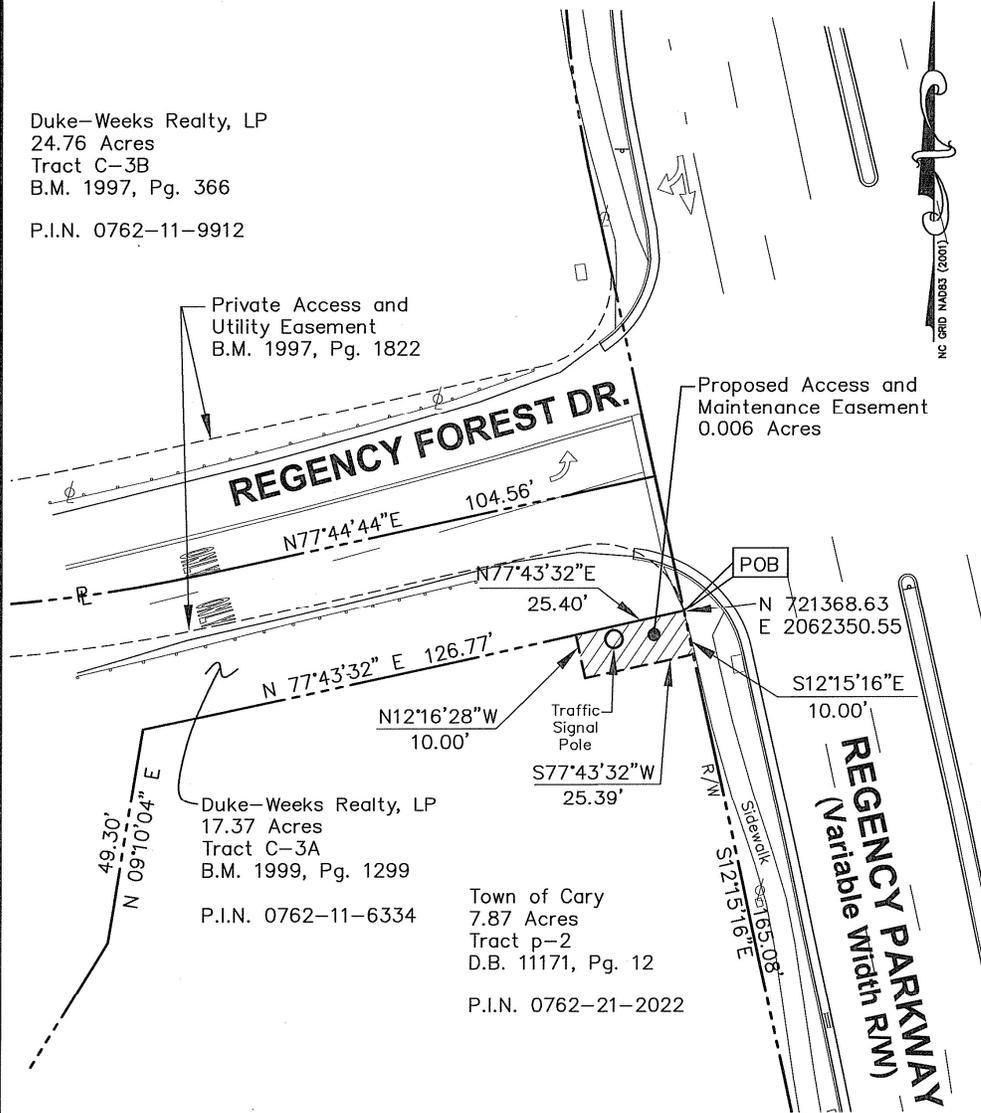
As part of its development of property, Duke-Weeks Realty, LP, is required to install traffic signal lights at the intersection of Regency Parkway and Regency Forest Drive. Installation of the lights requires a support pole to be located outside the existing right-of-way. An easement is required on the adjacent property containing 7.87 acres, identified by PIN 0762212022 and is owned by the Town. The easement will be located at the northeastern corner of the property. The proposed easement is 0.006 acres in size. The Town will convey the easement to the NC Department of Transportation (NCDOT) because Regency Parkway is a state maintained road. The easement will allow state officials access to install, maintain, operate, inspect, replace, and repair all equipment used for traffic control devices. A map of the proposed easement is attached below. An easement document is under review by the Town and the NCDOT and staff expects that the final document will contain standard language.

EXHIBIT A-1
TRAFFIC SIGNAL POLE EASEMENT
 LOCATED IN TRACT P-2, DB 11171, Pg 12
 TOWN OF CARY, WAKE COUNTY, NORTH CAROLINA

Duke-Weeks Realty, LP
 24.76 Acres
 Tract C-3B
 B.M. 1997, Pg. 366
 P.I.N. 0762-11-9912

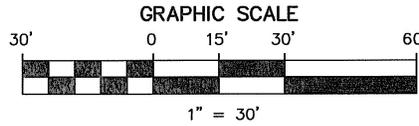
Private Access and
 Utility Easement
 B.M. 1997, Pg. 1822

Proposed Access and
 Maintenance Easement
 0.006 Acres



Duke-Weeks Realty, LP
 17.37 Acres
 Tract C-3A
 B.M. 1999, Pg. 1299
 P.I.N. 0762-11-6334

Town of Cary
 7.87 Acres
 Tract p-2
 D.B. 11171, Pg. 12
 P.I.N. 0762-21-2022



Douglas R. Hock
 DOUGLAS R. HOCK
 PLS L-4618
 7/12/11
 DATE

DRAWN BY: DRH	JOB NO.: 08-0050-04
DATE: 07/12/11	CHECKED BY: JDW

ADVANCED
 CIVIL DESIGN
 ENGINEERS SURVEYORS

51 Kilmayne Drive
 Suite 104
 Cary, North Carolina 27511
 ph 919.481.6290
 fax 919.336.5127

Fiscal Impact

There is no fiscal impact to the Town in the granting of this easement.

Staff Recommendation

Staff recommends approval for execution of the easement to the NCDOT for the traffic signal easement.

ACTION: Mrs. Adcock moved to approve the consent agenda. Mrs. Robison provided the second; council granted unanimous approval.

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- e. **Amendments to Traffic Schedule 15: Speed Limits in School Zones (PD12-001)**
Committee unanimously recommended adding a portion of Laura Duncan Road to Traffic Schedule 15.

STAFF REPORT

Operations Committee, August 4, 2011

Amendments to Traffic Schedule 15: Speed Limits in School Zones (PD12-001)

Consideration of adding a portion of Laura Duncan Road to Traffic Schedule 15

Speaker: Lt. T.C. Barker

From: Pat Bazemore, Police Chief
Prepared by: Lt. T.C. Barker
Approved by: Benjamin T. Shivar, Town Manager
Approved by: Michael J. Bajorek, Assistant Town Manager

Executive Summary

It is requested that Council approve additions to Town of Cary Traffic Schedule 15: Speed Limits in School Zone.

Discussion

It is requested that Council approve additions to Town of Cary Traffic Schedule 15: Speed Limits in School Zones; for the newly established school, Laurel Park Elementary, 10 mph less than the regular posted speed limit.

Traffic Schedule Amendment

A TRAFFIC SCHEDULE OF THE TOWN OF CARY, PROVIDING THAT THE TOWN OF CARY, NC TRAFFIC SCHEDULES, BE AMENDED
BY REVISING TRAFFIC SCHEDULE 15; PROVIDING FOR:

Traffic Schedule 15: Speed Limits in School Zones

In accordance with the provisions of section 34-151, Speed Limits in School Zones

Added:

L

SR 1308 (Laura Duncan Road) from a point 0.03 miles south of Old Apex Road to a point 0.21 miles south of Old Apex Road. (In effect 30 minutes before and 30 minutes after school begins and ends on school days only for Laurel Park Elementary School) - 35 mph

Fiscal Impact

None. A flashing warning system currently exists for northbound traffic and an additional flashing warning system will be installed for southbound traffic by a private development as a site plan requirement by the Town of Apex.

Staff Recommendation

Staff recommends approval of the addition.

ACTION: Mrs. Adcock moved to approve the consent agenda. Mrs. Robison provided the second; council granted unanimous approval.

(Traffic Schedule No. 2011-08 is also on file in the clerk's office.)

f. SRO Lieutenant Upgrade (PD12-002)

Committee unanimously recommended upgrading an existing Sergeant (non-exempt) position to a Lieutenant (exempt) position for the School Resource Officer Program.

STAFF REPORT

Operations Committee, August 4, 2011

SRO Lieutenant Upgrade (PD12-002)

Consideration to upgrade an existing Sergeant (non-exempt) position to a Lieutenant (exempt) position for the School Resource Officer Program

Speaker: Chief Pat Bazemore

From: Pat Bazemore, Chief of Police

Prepared by: Major David Wulff and Major Tony Godwin

Approved by: Benjamin T. Shivar, Town Manager

Approved by: Michael J. Bajorek, Assistant Town Manager

Executive Summary

To better serve the School Resource Officer (SRO) program, staff recommends upgrading a current police Sergeant's position to police Lieutenant for daily oversight of the program and supervision of the nine officers assigned to the team. The appropriate supervision level for a specialty team within the Police department is the rank of Lieutenant. This is based on Police department policy, span of control and level of overall responsibility. Currently, the overall program is assigned to the Field Operations Bureau Commander, a Major, and daily officer supervision is handled by the appropriate District Sergeant.

Discussion

In conjunction with the police department's reorganization to GeoPolicing in 2009, the School Resource Officer program was moved into the Field Operations Bureau and divided among our three Districts. During the initial years of GeoPolicing, that shift ensured school issues and considerations became a regular part of planning and response by our three District commanders, their supervisors and patrol officers. However, that reorganization has also resulted in a team of officers who perform a highly specialized police function in our schools and who fall under three different chains of command, reporting directly to a Sergeant who is otherwise tasked with leading a full team of patrol officers.

Now, two years later, GeoPolicing is firmly established as the service delivery methodology of the police department and there is a greater need to bring our SRO team under a dedicated supervisor. Creating an SRO Lieutenant in the Field Operations Bureau would allow our School Resource Officers to function as a cohesive team with a greater ability to address concerns that are unique to the environments in which they work. The new SRO Lieutenant will be responsible

for daily supervision and working with all three Districts to ensure good communication and fundamental practices of the GeoPolicing philosophy are maintained.

Fiscal Impact

Approval to upgrade a Police Sergeant position to Police Lieutenant would have a cost impact of \$3,248 for the FY2012 budget year. Based on anticipated lapsed salary throughout the FY2012 budget year, no additional funding is requested.

Staff Recommendation

Staff recommends that Town Council approve this request to upgrade an existing Sergeant position (non-exempt) to a Lieutenant position (exempt).

ACTION: Mrs. Adcock moved to approve the consent agenda. Mrs. Robison provided the second; council granted unanimous approval.

g. Recognition of Grant Award (PD12-003)

Committee unanimously recommended the following actions related to accepting the North Carolina Governor's Highway Safety Program grant award to assist with DWI enforcement: 1) Authorizing staff to accept the grant award and enter into the related grant agreement; 2) Authorizing the creation of two new Police Officer I positions; 3) Recognizing \$213,729 in FY2012 federal grant fund revenue into the General Fund as awarded by the Governor's Highway Safety Program; 4) Approving the appropriation of \$213,729 to the respective accounts within the Police Department's operating and capital equipment accounts to fund the two police officer positions, broken down as follows:

Permanent Salaries: \$76,584
FICA: \$5,835
401K: \$3,829
NC Retirement: \$4,909
Health Insurance: \$22,672
Equipment: \$39,900
Vehicles: \$60,000

STAFF REPORT

Operations Committee, August 4, 2011

Recognition of grant award (PD12-003)

Consideration of recognizing funds awarded by the North Carolina Governor's Highway Safety Program

Speaker: Captain Tracy Jernigan

From: Patricia Bazemore, Chief of Police
Prepared by: Tracy Jernigan, Police Captain
Approved by: Benjamin T. Shivar, Town Manager
Approved by: Michael J. Bajorek, Assistant Town Manager

Executive Summary

The police department requests the Cary Town Council recognize a total of \$213,729 in funding awarded by the North Carolina Governor's Highway Safety Program. The funding is specifically for associated personnel and operating costs for two officers dedicated to DWI enforcement (driving while impaired). The officer positions will promote highway safety; work to reduce alcohol

related traffic crashes and remove impaired drivers from the roadway. The federal award amount is \$213,729, with no matching funds required by the Town of Cary the first year of the grant.

The terms of the grant are for one year with the grant paying 100 percent of the personnel and equipment cost. It is anticipated that the grant will be reviewed and continued in year two at 85 percent of personnel cost, year three at 70 percent of personnel cost, year four at 50 percent of personnel cost, and year five and beyond the Town will be 100 percent responsible for the associated costs.

Discussion

The Cary Police Department proposes to spend the \$213,729 in funds received from this grant award to make the following purchases and fund the following salaries:

- **Two Police Officer Positions**
The Police Department will hire two officers and fill the “DWI Enforcement” positions. The cost includes base salary plus benefits. Total cost is \$113,829. (100 percent funded by grant this year)
- **Equipment**
The grant also addresses equipment needs to outfit these two positions. The equipment to be purchased includes two vehicles, all related vehicle equipment, uniforms and equipment for the officers. Total cost \$99,900. (100 percent funded by the grant this year)

Annually, the Cary Police Department receives numerous complaints related to drivers operating motor vehicles while under the influence of drugs and/or alcohol. As the demand for services increase, it becomes increasingly challenging to balance enforcement efforts with other service demands. This is especially true when it comes to DWI enforcement. The Town of Cary Police Department has always been committed to being proactive in the area of DWI enforcement and are active participants in all "Booze It and Lose It" campaigns promoted by the Governor's Highway Safety Program.

Having two additional officers that can commit 100 percent of their time to DWI enforcement efforts would allow for a more direct and targeted approach by our department. Listed below are several statistics over the past three years regarding DWI activity. In 2010 our DWI arrest numbers were down while our alcohol related crashes were up. The department is currently doing all it can to address the problem, but additional resources are needed in this specific area.

<u>Year</u>	<u>DWI Arrest</u>	<u>Alcohol Related Crashes</u>
2008	359	142
2009	397	123
2010	310	136

The Town of Cary, as well as the Police Department, is committed to making our streets safer for the motoring public and the DWI enforcement program will assist us greatly in that commitment.

Fiscal Impact

The first year of this grant will fund 100 percent of the personnel costs for two positions and 100 percent of the associated equipment costs, so the Town of Cary will incur no cost for the first year of this grant. Pending additional funding from North Carolina Governor's Highway Safety, the grant is expected to continue for three additional years. Grant applications will be completed for years two, three and four and have a high likelihood of being approved for funding, assuming federal funds are available.

Grant funding is expected to proceed as follows:

- 1st Year– Grant will fund 100 percent (\$213,729, both personnel and operating)

- 2nd Year – Grant will fund 85 percent (\$96,755), Town of Cary will fund 15 percent (\$17,074)
- 3rd Year – Grant will fund 70 percent (\$79,680), Town of Cary will fund 30 percent (\$34,149)
- 4th Year – Grant will fund 50 percent (\$56,914.50), Town of Cary will fund 50 percent (\$56,914.50)
- 5th Year and beyond – the Town of Cary will be responsible for all costs related to the two positions.

Staff Recommendation

Staff recommends that the Cary Town Council approve the following actions related to accepting the North Carolina Governor’s Highway Safety Program grant award to assist with DWI enforcement:

- 1) Authorize staff to accept the grant award and enter into the related grant agreement.
- 2) Authorize the creation of two new Police Officer I positions.
- 3) Recognize \$213,729 in FY2012 federal grant fund revenue into the General Fund as awarded by the Governor’s Highway Safety Program.
- 4) Approve the appropriation of \$213,729 to the respective accounts within the Police Department’s operating and capital equipment accounts to fund the two police officer positions, broken down as follows:

Permanent Salaries	76,584
FICA	5,835
401K	3,829
NC Retirement	4,909
Health Insurance	22,672
Equipment	39,900
Vehicles	60,000
TOTAL	\$213,729

ACTION: Mrs. Adcock moved to approve the consent agenda. Mrs. Robison provided the second; council granted unanimous approval.

(Resolution No. 2011-57 is also on file in the town clerk’s office.)

h. Consideration of 1) Amendment No. 1 to Wastewater Treatment Interlocal Agreement with Durham County and 2) Mutual Aid Wastewater Treatment Interlocal Agreement with Durham County (PWUT12-02)

Committee unanimously recommended: 1) approving Amendment No. 1 in substance and authorizing the Town Manager to make non-substantive revisions as needed based on further Durham County comments, provided the revisions do not increase the budget and are consistent with the general intent of the version of Amendment No. 1 approved by Council; 2) authorizing execution of Amendment No. 1; 3) approving the Mutual Aid Agreement in substance and authorizing the Town Manager to make non-substantive revisions as needed based on further Durham County comments, provided the revisions do not increase the budget and are consistent with the general intent of the version of the Mutual Aid Agreement approved by Council; and, 4) authorizing execution of the Mutual Aid Agreement

STAFF REPORT

Operations Committee, August 4, 2011

Consideration of 1) Amendment No. 1 to Wastewater Treatment Interlocal Agreement with Durham County and 2) Mutual Aid Wastewater Treatment Interlocal Agreement with Durham County (PWUT12-02)

Consideration of entering into 1) Amendment No. 1 to Wastewater Treatment Interlocal Agreement with Durham County and 2) Mutual Aid Wastewater Treatment Interlocal Agreement with Durham County

Speaker: Ms. Leila Goodwin

From: Stephen J. Brown, P.E., Public Works and Utilities Director

Prepared by: Leila Goodwin, P.E., Water Resources Manager

Approved by: Benjamin T. Shivar, Town Manager

Approved by: Michael J. Bajorek, Assistant Town Manager

Executive Summary

Council approved entering into the Wastewater Treatment Interlocal Agreement with Durham County on March 12, 2009. This proposed amendment extends the end date to June 30, 2015, provides Cary with some additional phosphorus loading allocation, and modifies some other specific terms. The new Mutual Aid Wastewater Treatment Interlocal Agreement (“Mutual Aid Agreement”) transfers ownership of the gravity sewer (which runs from the county line to the Triangle WWTP) to Durham County, and establishes terms for long-term mutual aid service to Cary after Western Wake facilities are online. Staff recommends entering into Amendment No. 1 to the Wastewater Treatment Interlocal Agreement and the Mutual Aid Agreement with Durham County.

Discussion

Council approved entering into the Wastewater Treatment Interlocal Agreement with Durham County on March 12, 2009 (PWUT09-16, Updated Interlocal Agreement For Wastewater Treatment Service From Durham County and Revisions to Sewer Use Ordinance). This agreement allows Cary to send raw wastewater from the Wake County portion of Research Triangle Park (RTP South) as well as parts of western Cary to the Durham County Triangle Wastewater Treatment Plant (WWTP). When the Western Wake Regional Wastewater Management Facilities (WWRWMF) are on-line – anticipated to be in 2014 – the wastewater will be re-routed to be treated at the Western Wake Regional Water Reclamation Facility.

Key terms of Amendment No. 1 are:

Final End Date: The current agreement has a Planned End Date of June 30, 2013 and allows month-to-month service to continue until the Final End Date of June 30, 2014. To provide for the possibility of any delay in the completion of the WWRWMF, these dates are both extended by one year, to June 30, 2014 and June 30, 2015 respectively.

Wastewater Flow Rate: Currently Cary can send up to 6.0 million gallons per day (mgd) on a monthly basis; that will be reduced to 5.5 mgd after June 30, 2014. This will allow Durham County to meet their obligations and, while reducing the flow rate of wastewater Cary can send on a monthly basis, does not reduce the pollutant loading and so will meet Cary’s needs for the short time period it is anticipated to be needed.

Phosphorus Loading: Cary is currently allocated 50 percent of the total phosphorus mass loading capacity as determined by the Triangle WWTP Head Works Analysis and Allocation Table (about 650 pounds per day) and the amendment increases that by 150 pounds per day. Cary will pay Durham County \$2,000 per month for the additional phosphorus loading capacity. This will allow Cary to meet the anticipated needs of business (including RTP South) and residential customers until the WWRWMF are online.

Reclaimed Water Blowoffs: Durham County will allow Cary to discharge water from its reclaimed water system into the sewer as necessary to maintain appropriate reclaimed water quality.

Key terms of the new Mutual Aid Agreement are:

Gravity Sewer: Durham County desires to use the gravity sewer between the county line and their Triangle WWTP, which is owned by Cary and operated and maintained by Durham County, on permanent basis. The agreement transfers ownership of that line to Durham County and they will maintain it to provide for continuous daily service to Cary now, for mutual aid service until 2035, and for their own use to serve customers. Durham County will pay Cary \$139,208 for the line, which takes into account the need for the depreciated value of the line size needed now, the need for some rehabilitation that Durham County will do, and Cary's avoided cost of maintenance in the future for mutual aid purposes.

Mutual Aid: After the WWRWMF are online and Cary re-routes the wastewater flow away from the Triangle WWTP to the Western Wake Regional WRF, Cary will still have the ability to pump wastewater to the Triangle WWTP under emergency conditions on a mutual aid basis. The Mutual Aid End Date is defined as June 30, 2035.

The Durham County attorney's office is still reviewing the documents and they will also need to be considered by the Durham County Commission so there may be some non-substantive changes to the amendment and/or the new agreement based on those reviews.

Fiscal Impact

The additional \$24,000 per year for the increase in phosphorus loading capacity was anticipated and included in the FY2012 budget which is also adequate to cover any short-term use of the mutual aid provision in the amendment. If a major unexpected event requiring use of the mutual aid wastewater treatment service for an unusually long period of time should occur, staff would request a budget adjustment at that time.

Staff Recommendation

Staff recommends that Council 1) approve Amendment No. 1 in substance and authorize the Town Manager to make revisions as needed based on further Durham County comments, provided the revisions do not increase the budget and are consistent with the general intent of the version of Amendment No. 1 approved by Council; 2) authorize execution of Amendment No. 1; 3) approve the Mutual Aid Agreement in substance and authorize the Town Manager to make revisions as needed based on further Durham County comments, provided the revisions do not increase the budget and are consistent with the general intent of the version of the Mutual Aid Agreement approved by Council and 4) authorize execution of the Mutual Aid Agreement.

ATTACHMENT 1

STATE OF NORTH CAROLINA
COUNTY OF DURHAM

AMENDMENT NO. 1 TO WASTEWATER TREATMENT INTERLOCAL AGREEMENT

THIS AMENDMENT NO. 1 (hereafter AMENDMENT NO. 1) to the WASTEWATER TREATMENT INTERLOCAL AGREEMENT dated April 1, 2009 (hereafter AGREEMENT), is made and entered into this 1st day of September, 2011 by and between the COUNTY OF DURHAM, a North Carolina County (hereafter "DURHAM COUNTY"), party of the first part; and the TOWN OF CARY, a North Carolina Municipal Corporation (hereafter "CARY"), party of the second part.

WITNESSETH:

THAT WHEREAS, CARY and DURHAM COUNTY entered into Agreement dated April 1, 2009 pursuant to which DURHAM provides wastewater treatment capacity and services ('wastewater treatment services') to CARY; and

WHEREAS, pursuant to AGREEMENT DURHAM COUNTY covenanted that such wastewater treatment services would be provided at least through June 30, 2013 and that if CARY'S need for such services continued, Agreement would continue on a month to month basis until the earlier of the last day of the first month during which Cary need for the services ends on June 30, 2014; and

WHEREAS, CARY has been diligently working with Apex and Morrisville to obtain permits for, design and construct new conveyance and reclamation facilities (hereafter "Western Wake Facilities") to treat CARY's wastewater currently being treated by DURHAM COUNTY; and

WHEREAS, the regulatory process has delayed the expected startup date of the Western Wake Facilities to 2014; and

WHEREAS, CARY desires to extend Agreement beyond June 30, 2014 until the earlier of that date that Western Wake Facilities are online and able to treat CARY wastewater or June 30, 2015; and

WHEREAS, CARY desires to obtain additional phosphorus treatment capacity; and

WHEREAS, DURHAM COUNTY has wastewater treatment capacity available for CARY's use until 2015 including additional phosphorus loading and desires to provide such service; and

WHEREAS, this AMENDMENT NO. 1 is authorized by NCGS Chapter 153A, Section 278 and Chapter 160A, Section 461.

NOW THEREFORE, in consideration of the premises and the respective rights, powers, duties, and obligations hereinafter set forth, the parties agree as follows:

I. PURPOSE

The purpose of this AMENDMENT NO. 1 is to modify AGREEMENT to extend continuous daily wastewater treatment services to CARY until the Western Wake Facilities are online and able to treat CARY wastewater, and modify other certain terms as described below. The recitals contained above are hereby incorporated by reference into the AGREEMENT. This AMENDMENT NO. 1 is effective on September 1, 2011 (hereafter "AMENDMENT EFFECTIVE DATE".)

II. AMEND SECTION 2, 'EFFECTIVE DATE/TERM OF AGREEMENT'

Section 2 shall be amended by deleting the words and phrases shown with strikethroughs and adding the words and phrases shown in bold as follows:

2. EFFECTIVE DATE/TERM OF AGREEMENT

This AGREEMENT shall become binding upon the parties hereto on April 1, 2009 (hereafter 'Effective Date'), and shall remain in effect until ~~at least June 30, 2013~~ **2015** (hereafter '~~Planned~~ **Final** End Date'.) **Notwithstanding the preceding, the parties desire that continuous daily service be terminated at the earliest possible date after June 30, 2014 ('Planned End Date'.) Therefore, after Planned End Date, this AGREEMENT's provisions for continuous daily wastewater treatment services.** ~~If CARY still has a need for wastewater treatment services from DURHAM COUNTY after Planned End Date, this AGREEMENT shall continue on a~~

month-to-month basis, and shall end the earlier of either the last day of the first month in which CARY does not send wastewater to the Triangle WWTP for treatment **on a continuous daily basis because the Western Wake Facilities are online and able to treat Cary wastewater** or June 30, 2015 ("Final End Date"). Upon the Effective Date, the original 2002 Agreement, as amended, shall terminate.

III. AMENDMENTS TO ADDRESS WASTEWATER FLOW

- A. Section 3 DURHAM COUNTY'S OBLIGATIONS AND REPRESENTATIONS, Subsection 3.1 shall be amended by deleting the words and phrases shown with strikethroughs and adding the words and phrases shown in bold as follows:

3.1 DURHAM COUNTY will accept and treat up to 6.0 million gallons per day (mgd) of wastewater from CARY, on an average monthly basis, beginning on Effective Date **and ending on Planned End Date. DURHAM COUNTY will accept and treat up to 5.5 million gallons per day (mgd) of wastewater from CARY, on an average monthly basis, between Planned End Date and Final End Date.** DURHAM COUNTY shall not interrupt nor suspend such wastewater treatment service except in cases of extreme emergency, force majeure, or court order, and then only to the extent DURHAM COUNTY interrupts or suspends service to its own citizens, or the citizens of the City of Durham who are wastewater customers. ~~DURHAM COUNTY will accept and treat wastewater from CARY until at least Planned End Date.~~

- B. Section 4 CARY'S OBLIGATIONS AND REPRESENTATIONS, Subsection 4.1 shall be amended by deleting the words and phrases shown with strikethroughs and adding the words and phrases shown in bold as follows:

4.1 Wastewater Flows

Beginning on the Effective Date **and until Planned End Date**, CARY will limit its daily wastewater flows to DURHAM COUNTY to no more than:

6.0 mgd on a monthly average basis;

12.0 mgd on a daily basis; and

18.0 mgd or 67 percent of the hydraulic capacity of the gravity sewer, whichever is the lesser amount, on an hourly basis. The capacity of the gravity sewer will be as specified in the final design documents.

After Planned End Date and until Final End Date, CARY will limit its daily wastewater flows to DURHAM COUNTY to no more than: 5.5 mgd on a monthly average basis; 12.0 mgd on a daily basis; and 18.0 mgd or 67 percent of the hydraulic capacity of the gravity sewer, whichever is the lesser amount, on an hourly basis.

IV. AMENDMENTS TO ADDRESS ADDITIONAL PHOSPHOROUS CAPACITY

- A. Section 4, CARY'S OBLIGATIONS AND REPRESENTATIONS, Subsection 4.2.1 shall be amended by deleting the words and phrases shown with strikethroughs and adding the words and phrases shown in bold as follows:

4.2.1 CARY agrees to limit the monthly pollutant mass loading of the wastewater flow it sends to DURHAM COUNTY to 50 percent of the Triangle WWTP total pollutant mass loading capacity as determined by the Triangle WWTP Head Works Analysis and Allocation Table, **except for Total Phosphorus. CARY agrees to limit the monthly pollutant loading for Total Phosphorus to an amount equal to 50 percent of the Triangle WWTP capacity plus 150 pounds per day.**

- B. The first paragraph of Section 6, PAYMENT Subsection 6.1.1 shall be amended by deleting the words and phrases shown with strikethroughs and adding the words and phrases shown in bold as follows:

6.1.1 Wastewater Treatment Service Rate

The WASTEWATER TREATMENT SERVICE rate shall be composed of ~~three~~ **four** components: an annual capital charge (hereinafter called "CAPITAL CHARGE"), a monthly operational and maintenance charge (hereinafter called "O & M CHARGES"), ~~and~~ a monthly pretreatment program administration charge (hereinafter called "PRETREATMENT CHARGE"), **and a phosphorous allocation charge (hereinafter PHOSPHORUS ALLOCATION CHARGE).**

- C. A new subsection (e) shall be added to Section 6, PAYMENT Subsection 6.1.1.as follows:

(e) PHOSPHORUS ALLOCATION CHARGE. This charge shall be \$2,000 per month beginning July 1, 2012.

V. AMENDMENTS TO ADDRESS FLOW MEASUREMENT AND SAMPLING STATION;
GRAVITY SEWER LINE

- A. A new subsection 3.18 shall be added as follows:

3.18 DURHAM COUNTY may install, operate and maintain pH or other monitoring equipment at the Kit Creek Pump Station and interconnect such monitoring equipment with existing telemetry. The location and installation of such equipment shall be coordinated with and approved by CARY

- B. Section 4 CARY'S OBLIGATIONS AND REPRESENTATIONS, subsection 4.2.4 shall be amended by deleting the words and phrases shown stricken through as follows:

4.2.4. CARY shall ~~operate and~~ maintain the phosphorus analyzer at the Kit Creek Pump Station.

- C. Section 4 CARY'S OBLIGATIONS AND REPRESENTATIONS, subsection 4.2.5 shall be amended by deleting the words and phrases shown stricken through and adding the words and phrases shown in bold as follows:

4.2.5. CARY shall **coordinate** ~~not~~ discharge **of** odor or corrosion control chemicals without ~~express written approval by DURHAM COUNTY, on a case-by-case basis.~~

- D. A new section 23 shall be added as follows:

**23. COORDINATION REGARDING GRAVITY SEWER CORROSION CONTROL
CARY and DURHAM COUNTY agree to coordinate discharge of chemicals for the purposes of odor and/or corrosion control so as to minimize potential impacts to the Triangle WWTP and to the gravity sewer. The goals for hydrogen sulfide concentration in the gravity sewer system are a daily average of 10 milligrams/liter (mg/l) and a peak of 30 mg/l.**

- E. Section 6, PAYMENT Subsection 6.2 shall be amended by deleting the words and phrases shown stricken through and adding the words and phrases shown in bold as follows:

6.2 Flow Measurement and Sampling Station; Gravity Sewer Line

CARY and DURHAM COUNTY agree that ~~after CARY ceases sending wastewater to DURHAM COUNTY for treatment,~~ DURHAM COUNTY has the right to purchase from CARY the gravity sewer line extending from approximately the Wake County/Durham County line to the Triangle WWTP, ~~if it elects to do so.~~ The Purchase Price for the gravity sewer line will be calculated by CARY based upon the size of a gravity sewer line in the same location as the gravity sewer built by CARY, but sized to serve the potential needs of that gravity sewer drainage basin within Durham County only, depreciated from the date of completion of construction by CARY of its gravity sewer line, using a straight-line depreciation method over a period **to be mutually agreed upon** of 50 years. **The purchase price shall also consider the continued availability of the line by CARY for mutual aid purposes.**

VI. AMENDMENTS TO ADDRESS THAT AGREEMENT PROVIDES IT IS A WASTEWATER TREATMENT SERVICE AGREEMENT ONLY

Section 8 WASTEWATER TREATMENT SERVICE AGREEMENT ONLY shall be renamed and the first sentence of that section shall be amended by deleting the words and phrases shown stricken through and adding the words and phrases shown in bold as follows. Except for the changes shown to the first sentence, the rest of section 8 remains.

8 **PARTICULAR OBLIGATIONS REGARDING** WASTEWATER TREATMENT SERVICE AGREEMENT ONLY

The parties agree that this is an AGREEMENT to provide CARY with **continuous daily** wastewater treatment service at DURHAM COUNTY's Triangle WWTP for a specific volume of raw wastewater ~~at least until Planned~~ **Final** End Date.

VII. AMENDMENTS TO ADDRESS RECLAIMED WATER DISCHARGE TO SEWER

A new section 24 shall be added as follows:

24. RECLAIMED WATER DISCHARGE TO SEWER.
DURHAM COUNTY shall allow CARY to discharge water from its reclaimed water system for the purposes of water quality management to the Triangle WWTP subject to all other provisions of the AGREEMENT, as amended.

VIII. OTHER PROVISIONS AS TO THIS AMENDMENT NO. 1

- A. **AGREEMENT Remains in Full Force and Effect.** Except as specifically modified and amended herein, all of the terms, provisions, requirements and specifications contained in AGREEMENT remain in full force and effect. Except as otherwise expressly provided herein, the parties do not intend to, and the execution of this AMENDMENT NO. 1 shall not, in any manner impair Agreement.
- B. This AMENDMENT embodies the entire agreement between CARY and DURHAM COUNTY with respect to the amendment of AGREEMENT. In the event of any conflict or inconsistency between the provisions of the AGREEMENT and this AMENDMENT NO. 1, the provisions of this AMENDMENT NO. 1 shall control and govern.

IN TESTIMONY WHEREOF, DURHAM COUNTY has caused this AMENDMENT NO. 1 to be executed by its Chairman, all by the authority of the Durham County Board of Commissioners, its official seal affixed and attested to by the Clerk to the Board, and CARY has caused this AMENDMENT NO. 1 to be executed by its Mayor, their corporate seal to be affixed

and attested by its Clerk, all by the authority of the Cary Town Council, on the day and year first written above.

ATTACHMENT 2

STATE OF NORTH CAROLINA
COUNTY OF DURHAM

MUTUAL AID WASTEWATER TREATMENT INTERLOCAL AGREEMENT

THIS MUTUAL AID WASTEWATER TREATMENT INTERLOCAL AGREEMENT ("MUTUAL AID AGREEMENT") is made and entered into this 1st day of September, 2011 by and between the COUNTY OF DURHAM, a North Carolina County (hereafter "DURHAM COUNTY"), party of the first part; and the TOWN OF CARY, a North Carolina Municipal Corporation (hereafter "CARY"), party of the second part.

WITNESSETH:

THAT WHEREAS, CARY and DURHAM COUNTY entered into Wastewater Treatment Interlocal Agreement dated April 1, 2009, and amended September 1, 2011 ("WASTEWATER TREATMENT AGREEMENT"), pursuant to which DURHAM provides continuous daily wastewater treatment capacity and services ('wastewater treatment services') to CARY; and

WHEREAS, WASTEWATER TREATMENT AGREEMENT will end the earlier of the last day of the first month during which Cary need for the continuous daily wastewater treatment service ends or June 30, 2015; and

WHEREAS, DURHAM COUNTY desires to own the gravity sewer between the Kit Creek Monitoring Station and the Triangle WWTP ('gravity sewer'); and

WHEREAS, CARY desires to have the ability to obtain mutual aid service from DURHAM COUNTY after WASTEWATER TREATMENT AGREEMENT ends; and

WHEREAS, DURHAM COUNTY has the ability to provide mutual aid wastewater treatment service and desires to provide such service; and

WHEREAS, this MUTUAL AID AGREEMENT is authorized by NCGS Chapter 153A, Section 278 and Chapter 160A, Section 318.

NOW THEREFORE, in consideration of the premises and the respective rights, powers, duties, and obligations hereinafter set forth, the parties agree as follows:

1. PURPOSE

The purpose of this MUTUAL AID AGREEMENT is to (1) transfer ownership of the gravity sewer to DURHAM COUNTY and (2) provide the ability for CARY to obtain wastewater treatment services from DURHAM COUNTY on an 'as needed' basis for mutual aid. The recitals contained above are hereby incorporated by reference into the MUTUAL AID AGREEMENT.

2. EFFECTIVE DATE/TERM OF AGREEMENT

This MUTUAL AID AGREEMENT is effective and shall become binding upon the parties hereto on September 1, 2011 (hereafter "EFFECTIVE DATE") and shall remain in effect until June 30, 2035 ("End Date".)

3. DURHAM COUNTY'S OBLIGATIONS AND REPRESENTATIONS

3.1 DURHAM COUNTY will provide wastewater treatment service to CARY on an as-needed basis as long as providing such service does not interfere with DURHAM COUNTY's ability to serve their regular customers or endanger the public health or environment ('Mutual Aid service'). Determination of whether Mutual Aid service can be provided will be at the sole discretion of DURHAM COUNTY, **consistent with the terms of this MUTUAL AID AGREEMENT**. The CARY Public Works and Utilities Director and the DURHAM COUNTY Utilities Director shall agree in writing on the need for Mutual Aid service by CARY, the availability of service from DURHAM COUNTY, the estimated time period service is needed, and the estimated flow rate.

3.2 DURHAM COUNTY will own, operate and maintain the gravity sewer downstream of CARY's connection point.

3.3 DURHAM COUNTY, in the event of a crisis or emergency, shall act unilaterally regarding the operation of its Triangle WWTP for the protection of the public health, safety and welfare and for the protection of the environment. DURHAM COUNTY will keep CARY immediately informed regarding any situations or actions that will affect the flow of wastewater to the Triangle WWTP from CARY.

3.4 DURHAM COUNTY may take whatever actions are necessary to prevent CARY's wastewater flows to the Triangle WWTP from causing the Triangle WWTP to exceed its permitted limits for treating wastewater or to produce contaminated residuals above exceptional quality concentrations as defined by 40 CFR 503.

4. CARY'S OBLIGATIONS AND REPRESENTATIONS

4.1 Cary shall immediately notify DURHAM COUNTY Utility Division Manager or his designee, by telephone upon discovery of any discharge that may cause the Triangle WWTP potential problems, including but not limited to exceedances of the DURHAM COUNTY Sewer Use Ordinance prohibitions and limitations. This notification shall include the location of the discharge and, if known, type of waste, concentration and volume, and corrective actions planned or taken by CARY or the user. The telephone notification will be followed within 24 hours by facsimile and e-mail transmittals of the notification information.

4.2 CARY shall own, operate and maintain the raw wastewater pumping station and force main, junction box, and flow measurement/sampling station upstream of the gravity sewer.

4.3 During times when DURHAM COUNTY is providing CARY with Mutual Aid service, CARY shall provide DURHAM COUNTY with access to the Kit Creek Monitoring Station as needed for the purposes of measuring flow and collecting wastewater samples.

4.4 CARY shall pay all invoices for wastewater treatment services received from DURHAM COUNTY within 30 days of receipt.

5. DETERMINATION OF CARY'S WASTEWATER QUANTITY AND QUALITY

5.1 The monthly quantity in gallons of wastewater sent to the Triangle WWTP by CARY will be as measured by DURHAM COUNTY at the flow metering station.

5.2 The quality of the wastewater sent to the Triangle WWTP by CARY will be determined by the results of analysis by DURHAM COUNTY and/or CARY. In the event that DURHAM COUNTY and CARY analyzes a sample split and review of the sampling data indicates there

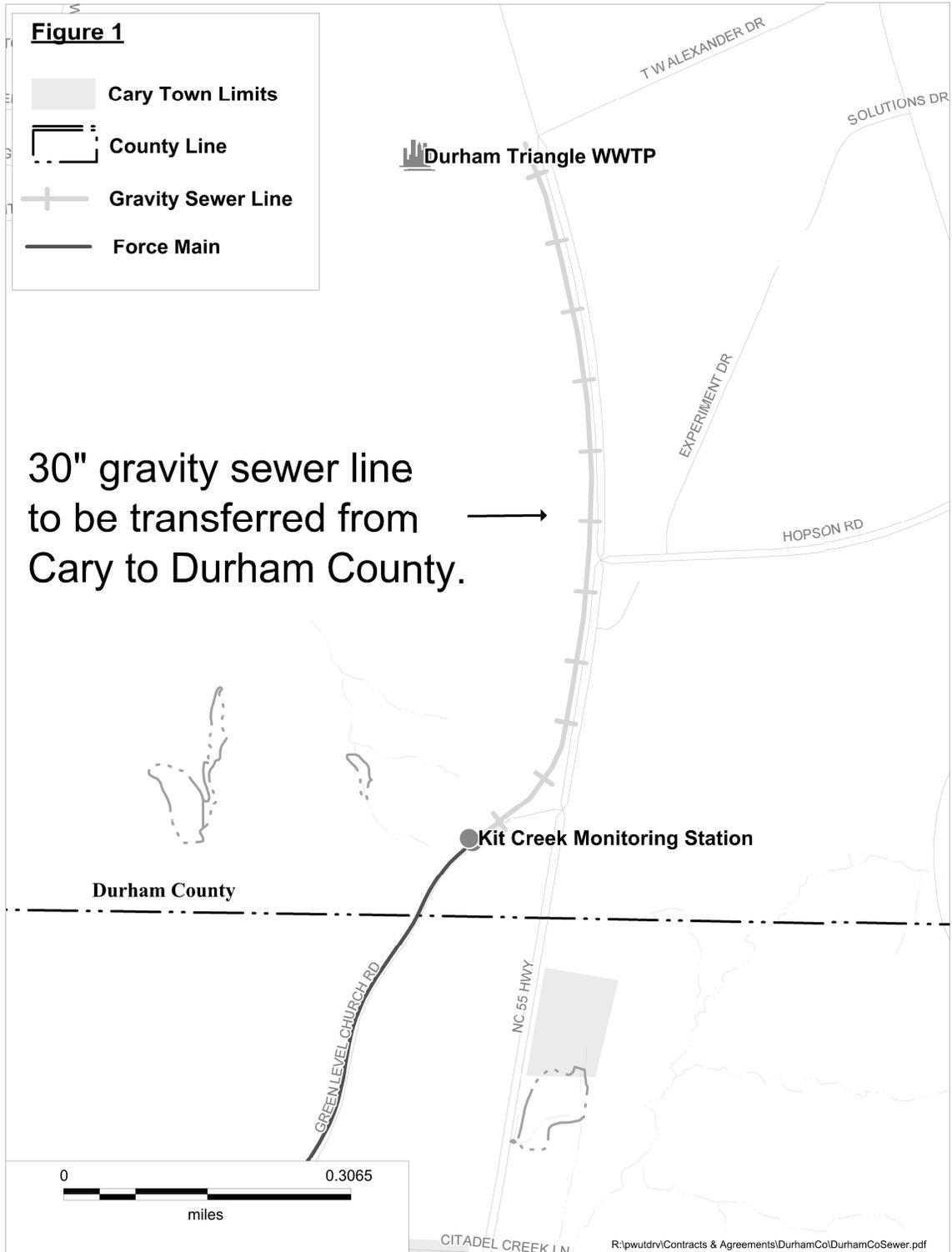
are no problems with the analysis or sampling procedure for either sample, the average of the two values for that sample event shall be used.

6. PAYMENT

DURHAM COUNTY may elect to charge CARY for Mutual Aid service based on consumption and wastewater strength, using sewer rates no higher than the lowest rate charged to DURHAM COUNTY customers; such charges, if levied, will be based on flow and sampling either measured by DURHAM COUNTY or documented at CARY's pump station. There will be no capital charges, O&M charges, pretreatment charges, or flow surcharges unless agreed to in writing.

7. GRAVITY SEWER LINE

Effective September 1, 2011, CARY transfers and conveys all of its ownership interest in the approximately 4,100 feet of gravity sewer line from the Kit Creek Monitoring Station to the Triangle WWTP, as shown on Figure 1 (attached herein), to DURHAM COUNTY. DURHAM COUNTY will be responsible for executing any and all necessary encroachment or other agreements with NCDOT and for obtaining any other applicable permits or easements. The Purchase Price for the gravity sewer line is \$139,208, to be paid by DURHAM by a credit to CARY to be applied by DURHAM COUNTY on the first monthly invoice due and payable under WASTEWATER TREATMENT AGREEMENT after September 1, 2011. DURHAM COUNTY will continue to maintain the gravity sewer for the purposes of fulfilling all other provisions of MUTUAL AID AGREEMENT.



8. WASTEWATER TREATMENT SERVICE AGREEMENT ONLY

The parties agree that this is an AGREEMENT to provide CARY with wastewater treatment service at DURHAM COUNTY's Triangle WWTP on an as-needed basis. DURHAM COUNTY makes no representations or warranties whatsoever with respect to the operation and maintenance of CARY'S wastewater collection system or CARY'S ability to deliver CARY's wastewater to the Triangle WWTP prior to treatment for discharge to the surface waters of the state. CARY assumes no responsibility for the treatment of CARY's wastewater at DURHAM COUNTY's Triangle WWTP. All determinations concerning the quality and quantity of CARY wastewater shall be made at the sampling station and meter, respectively, as per section 5. DURHAM COUNTY's obligations and representations regarding the ability to treat such wastewater are set forth in section 3. The parties agree that DURHAM COUNTY has no liability to CARY or to any other person, firm, corporation, municipality or any other wastewater consumer for loss, costs or damages resulting, directly or indirectly, from Triangle WWTP's failure to function in its intended of purpose of treating raw wastewater for discharge to the surface waters of the state. The parties agree that there are no third party beneficiaries to this AGREEMENT.

9. REIMBURSEMENT

CARY shall reimburse DURHAM COUNTY for any fines or penalties which in any way directly, or indirectly, were caused by or connected with CARY sending wastewater for treatment, the use or maintenance by CARY of its wastewater system or any violation by CARY of any law of the United States or the State of North Carolina or any rule or regulation of any state or federal agency in sending to DURHAM COUNTY such wastewater. CARY will only be responsible for reimbursing DURHAM COUNTY for the portion of fines or penalties that is caused by Cary's wastewater flows to the gravity sewer or the Triangle WWTP or by CARY's mass loading to the Triangle WWTP. This provision does not apply to any wastewater discharges that can directly be attributed to a user regulated by DURHAM COUNTY through an SIU or general or local wastewater discharge permit or where DURHAM COUNTY's Pretreatment Program is negligent in adequately responding to a known harmful pollutant discharge. CARY shall reimburse DURHAM COUNTY for sludge residual disposal cost increases caused by contamination by CARY due to its odor or corrosion control chemicals. DURHAM COUNTY will notify CARY via telephone call of the intent to recover any costs under this provision and arrange a meeting with CARY staff to discuss the facts and any aggravating or mitigating circumstances before seeking reimbursement from CARY. This provision shall survive the termination of this MUTUAL AID AGREEMENT.

10. BREACH

In the event of breach of this MUTUAL AID AGREEMENT, the parties shall be entitled to such legal or equitable remedy as may be available, including specific performance.

11. REPRESENTATIONS AND MODIFICATIONS OF MUTUAL AID AGREEMENT

No officer, official, employee or agent of DURHAM COUNTY or CARY may, or shall have the authority or power to terminate, amend, modify or alter this MUTUAL AID AGREEMENT or waive any of its conditions so as to bind DURHAM COUNTY or CARY by making any promise or representation not contained herein, unless such modification or revision is:

- 11.1 In writing; and
- 11.2 Formally approved in the same manner as this MUTUAL AID AGREEMENT is originally approved; and
- 11.3 Duly executed by all parties hereto.

12. WAIVER

The failure of either party at any time to require performance by the other of any provision hereof shall in no way affect the right of the other party to thereafter enforce the same. Nor shall waiver by either party of any breach of any provision hereof be taken to be a waiver of any succeeding breach of such provision or as a waiver of the provision itself. No provision of this MUTUAL AID AGREEMENT shall be deemed to have been waived by either party unless such waiver shall be in writing and executed by the same formality as this MUTUAL AID AGREEMENT.

13. CUMULATIVE PROVISIONS

The rights and remedies reserved to DURHAM COUNTY and CARY by this MUTUAL AID AGREEMENT are cumulative and shall be in addition to and not in derivation of any other rights or remedies which DURHAM COUNTY and CARY may have with respect to the subject matter of this MUTUAL AID AGREEMENT and a waiver hereof at any time shall have no effect on the enforcement of such rights or remedies at a future time.

14. CAPTIONS TO SECTIONS

Captions to sections throughout this MUTUAL AID AGREEMENT are for ease of reference only and shall not affect the meaning or interpretation of this MUTUAL AID AGREEMENT.

15. NO JOINT VENTURE

Nothing herein shall be deemed to create a joint venture or principal agent relationship between the parties hereto and no party is authorized to, nor shall, any party act toward third parties or the public in any manner, which would indicate any such relationship with the other.

16. ENTIRE AGREEMENT

This MUTUAL AID AGREEMENT and all attachments hereto and all material incorporated herein, represents the entire understanding and agreement of the parties with respect to the subject matter hereof, supersede all prior oral negotiations and can be amended, supplemented, modified or changed only as provided herein.

17. SEVERABILITY

If any section, subsection, sentence, clause, phrase, or portion of this MUTUAL AID AGREEMENT is, for any reason, held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision, and such holding shall not affect the validity of the remaining portions of this MUTUAL AID AGREEMENT. In the event any provision or part of this MUTUAL AID AGREEMENT is held to be void or unenforceable such may be deemed stricken and all remaining provisions shall continue to be valid and enforceable upon the parties hereto.

18. SUCCESSORS AND ASSIGNS

This MUTUAL AID AGREEMENT may not be assigned by either party without the written consent of the other party. Subject to the foregoing, this MUTUAL AID AGREEMENT shall be binding upon and its benefits inure to the parties, their successors and assigns. This provision shall not be construed as impeding the right of either party to sell raw wastewater collection and/or treatment services to other governmental entities.

19. NOTICE

19.1 Unless otherwise provided, all notices provided for herein shall be in writing and shall be sent properly addressed by first class mail to the parties at the addresses shown below:

DURHAM COUNTY TWWTP
Utility Division Manager
5926 NC Hwy 55
Durham, North Carolina 27713

TOWN OF CARY
Director of Public Works and Utilities
400 James Jackson Avenue
Cary, North Carolina 27513

All notice required to be given by telephone, email, or fax, shall be made to the individual currently serving in the position listed above, and, in addition, may be made to other staff members as appropriate.

19.2 APPOINTMENT OF PERSONNEL. Except to the extent provided otherwise in this Agreement, it is agreed that the DURHAM COUNTY Utility Division Manager shall be designated to carry out DURHAM COUNTY's obligations under this Agreement, and the CARY Director of Public Works and Utilities shall be designated to carry out the obligations of CARY under this Agreement.

20. DISPUTE RESOLUTION

Any claims, disputes or other controversies arising out of, and between parties to this MUTUAL AID AGREEMENT which may ensue shall be subject to and decided by the appropriate general court of justice of Durham County, North Carolina.

21. RECITALS

The Recitals are incorporated into this MUTUAL AID AGREEMENT.

22. COOPERATION AND GOOD FAITH.

DURHAM COUNTY and CARY, while meeting their respective regulatory requirements, will work together to collaboratively identify and resolve any potential water quality issues. The parties agree to work together to effectuate the purpose of this MUTUAL AID AGREEMENT and to act reasonably and in good faith in fulfilling their duties and rights hereunder.

IN TESTIMONY WHEREOF, DURHAM COUNTY has caused this MUTUAL AID AGREEMENT to be executed by its Chairman, all by the authority of the Durham County Board of Commissioners, its official seal affixed and attested to by the Clerk to the Board, and CARY has caused this MUTUAL AID AGREEMENT to be executed by its Mayor, their corporate seal to be affixed and attested to by the Clerk, all by the authority of the Cary Town Council, on the day and year first written above.

ACTION: Mrs. Adcock moved to approve the consent agenda. Mrs. Robison provided the second; council granted unanimous approval.

i. **Public-Private Photovoltaic Partnership (PWUT12-03)**

Committee unanimously recommended approving a public-private partnership with FLS Energy for installation of solar PV installations. Committee further recommended authorizing entering into a lease of up to 20 years for the development of solar PV generation at various Town properties and recognizing any associated revenue from the lease of these sites.

STAFF REPORT

Operations Committee, August 4, 2011

Public–Private Photovoltaic Partnership (PWUT12-03)

Consideration of Approval of a Private–Public Partnership and Lease of Property for the Purposes of Renewable Energy Generation

Speaker: Mr. Steve Brown

From: Stephen J. Brown, P.E., Director of Public Works and Utilities

Prepared by: David B. McNulty, PWUT Operations Analyst

Approved by: Benjamin T. Shivar, Town Manager

Approved by: Michael J. Bajorek, Assistant Town Manager

Executive Summary

Staff recommends that Council approve entering into a contract to install solar photovoltaic equipment on Town property through a partnership with a private renewable energy firm. Under the proposed arrangement, the Town will incur no upfront costs while generating revenue from the lease of various sites on Town owned properties that are particularly suitable for the efficient and effective collection of solar energy. Staff recommends that Council approve FLS Energy as the Town of Cary's solar energy partner for the projects listed in this staff report, providing for up to 20 year leases, and recognizing revenue from those leases. All electrical power produced by these systems will be returned to the electrical utility's power distribution grid as a renewable source of energy.

Discussion

North Carolina implemented the Renewable Energy and Energy Efficiency Portfolio Standard (REPS) in 2007, which mandates that electric utilities meet 12.5 percent of their electric needs through renewable sources. This action has furthered the development of private infrastructure for the purposes of generating renewable energy for sale to the electric utilities. Since 2008, the Town of Cary has investigated the possibility of installing photovoltaic (PV) systems at various locations on Town properties that are suitable for the collection of solar energy. Tax codes, however, do not make this project economically feasible. Therefore, the Town has sought proposals from firms to enter into a private-public partnership to produce renewable energy since the private firm can take advantage of tax incentives and pass these advantages along to the Town. Tax incentive benefits are fully realized after six years.

Another obstacle to development of this project has been that local governments have not had the statutory authority to enter into leases longer than 10 years without treating that lease as a sale of real property. But private solar project development business models require access to long term leases in order to provide sufficient benefit for private investors. During this past legislative session, the Town of Cary asked for and was granted the authority by the North Carolina General Assembly to enter into leases of up to 20 years for the purposes of generating renewable energy (ref: Session Law 2011-150).

The Town developed a request for proposals in which the Town would lease suitable sites for the installation of solar (photovoltaic, or PV) electrical power generation equipment. This lease will be for the purpose of generating renewable energy through a public–private partnership. The identified sites will not impede any Town operations or interfere with future expansion plans of any facilities. In response to the RFP, the Town received statements of qualifications and proposals from the following firms for evaluation, design and construction of a the proposed systems: FLS Energy, Argand Energy Solutions, and Eastlight Renewable Ventures and Vanguard Energy Partners.

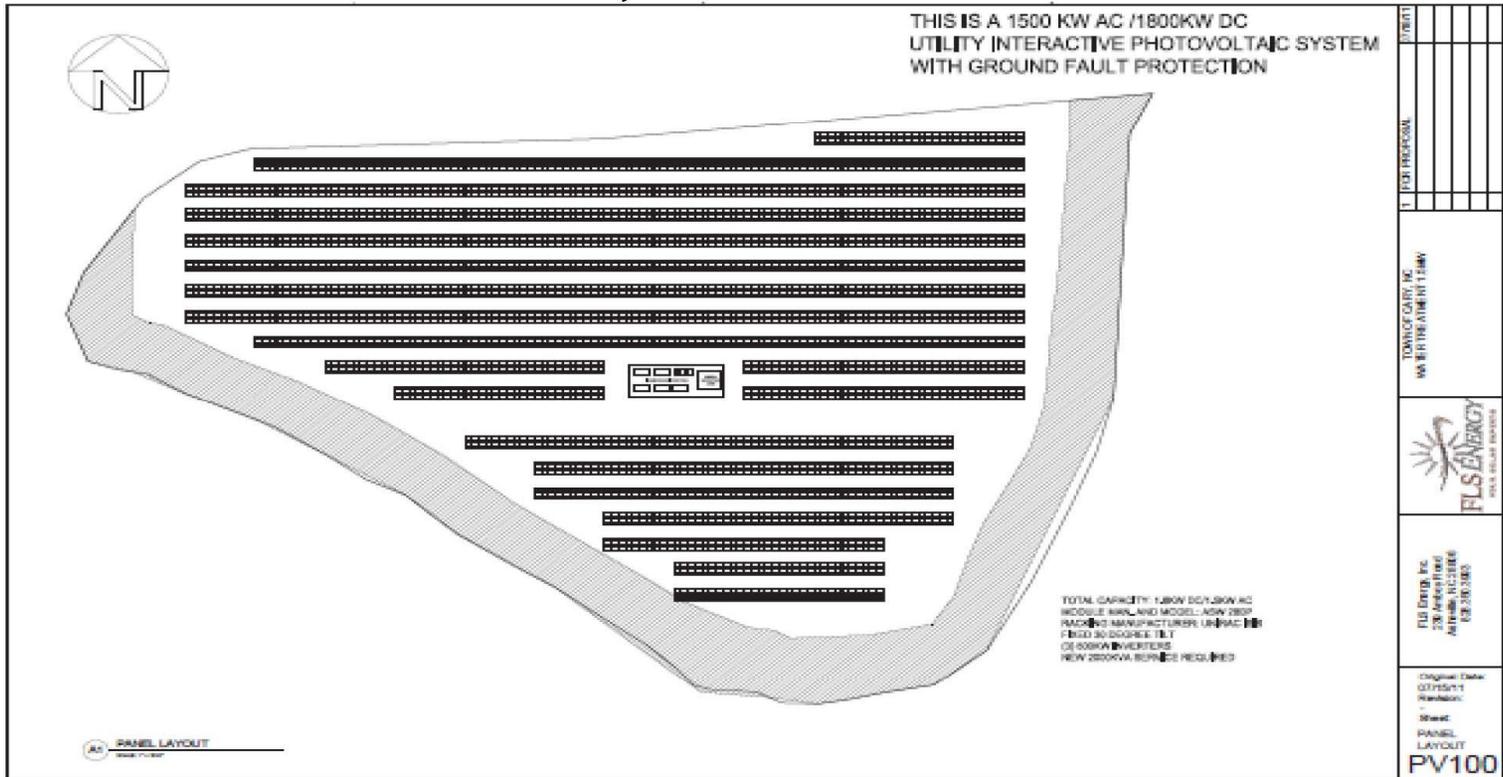
After careful consideration, evaluation and interviews with selected firms, staff recommends that the Town partner with FLS Energy for the development of solar PV energy on the Town properties identified in this staff report. FLS Energy has considerable local experience developing

solar projects in North Carolina including installations at SAS and atop the Food Lion on Kildaire Farm Road in Cary. Furthermore, they are currently in development of a similar rooftop project at on the Green Square parking deck in Raleigh. Along with their experience in developing local projects, FLS also has an established relationship with Progress Energy. FLS Energy also has established relationships with multiple financial institutions, providing stable financing to this project.

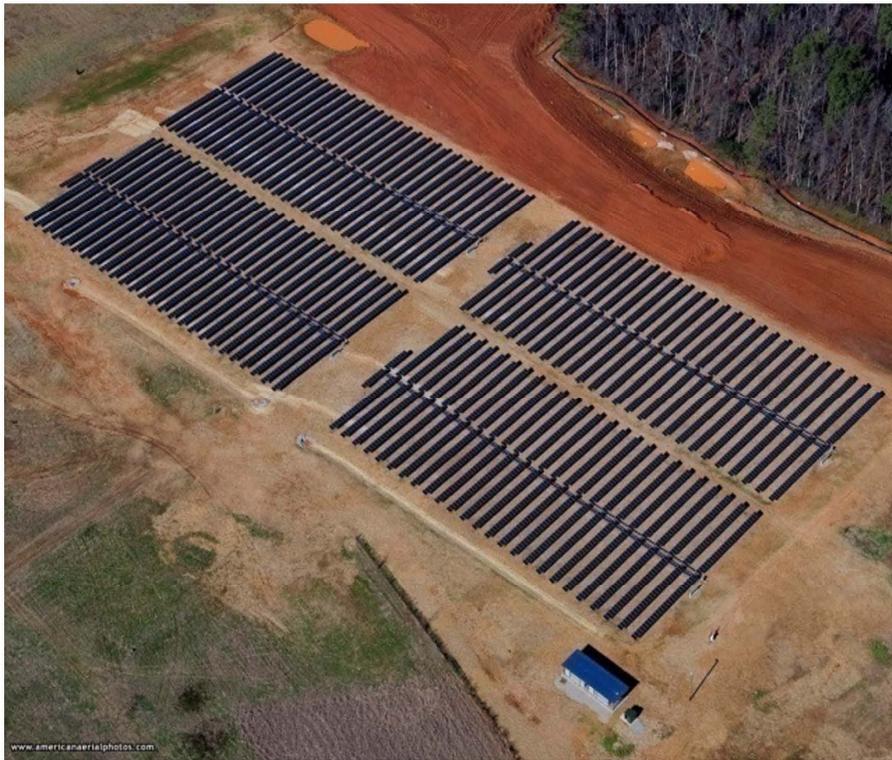
The selected firm will privately finance, install and operate the entire solar PV infrastructure on the lease site(s) for up to 20 years. At the end of the lease period, the Town of Cary will have the option to purchase the equipment at a depreciated cost to be determined at that time, or request its removal. This business model allows the Town to generate renewable energy at no upfront cost to the Town, while generating revenue from the lease of available sites. Risk to the town is also reduced by having an option, but not an obligation, to purchase the equipment at the end of the lease period.

In the recommended phased project approach, PV cells will initially be installed in a ground-mounted grid on an open field at the South Cary Water Reclamation Facility (SCWRF) and on top of the Town Hall campus parking deck. The installation at the SCWRF utilizes a large open field adjacent to the treatment works. This site is shielded from view of neighbors by trees and provides an opportunity to improve the aesthetics of the site through additional grading and landscaping. Attachment 1 shows the proposed layout of the SCWRF system. Attachment 2 shows an existing ground mounted system at another location to illustrate the appearance of the proposed SCWRF system. The proposed installation atop the parking deck will not interfere with any parking spaces since it will be mounted overhead. In fact, this proposed installation will add additional shaded parking to the Town Hall campus. Attachment 3 is an artist's rendering of a parking deck mounted system proposed for downtown Raleigh that illustrates the appearance of the proposed system. (Attachments 1, 2 & 3 are attached below.) At the conclusion of this first phase, staff recommends that the Town and FLS Energy evaluate further installations at the Garmon Operations Center on James Jackson Avenue, at the North Cary Water Reclamation Facility (NCWRF), and at the Cary/Apex Water Treatment Facility (CAWTF). All installations will comply with Town of Cary LDO requirements.

Attachment 1: Sketch of SCWRF Ground Mounted System



Attachment 2: SAS Ground Array under Construction and a Finished Array



Attachment 3: Artist Rendering of Green Square Parking Deck in Raleigh



Electricity generated by the solar PV installations will be sold to Progress Energy through a Power Purchase Agreement (PPA). State Law does not allow for net-metering, wherein power is used on site

and excess power is sold to the utility. Additionally the solar PV systems may not be able to meet the round-the-clock energy demands of these Town facilities without a considerable investment in batteries to store the power. Renewable energy sources are sold to the utility at \$0.18 per kWh, compared to the \$0.06-0.07 per kWh rate at which the Town currently purchases energy. Anticipated revenue to the Town is about \$0.02 per installed Watt of capacity. Therefore, staff recommends the arrangement whereby FLS Energy enters into a PPA with Progress Energy. If, at the conclusion of the lease period, the Town chooses to purchase the solar PV equipment, all PPA's, warranties and associated benefits would be transferred to the Town. The Town also would assume all operating and maintenance responsibilities.

It is estimated that phase one of the proposed project will produce approximately 2.265 megawatts (MW). This is equivalent to generating enough energy to power 217 homes and offset 2,211 tons of greenhouse gas emissions annually.

Fiscal Impact

Over the lease period, there will be no direct cost to the Town of Cary. The selected consultant will be tasked with all installation, operation and maintenance of the system, as well as making all PPA arrangements. FLS Energy will pay the Town approximately \$0.02 per watt of installed capacity. Based on the anticipated capacity of the system and this lease rate, the Town will generate as much as \$45,000 per year in general fund revenue for use of the lease sites.

Annually after year six (after the tax incentives are fully realized), the Town will have the option to purchase the equipment at a depreciated amount. The PV provider cannot provide the Town with this cost at this time, however, since a "fair market value" is established at the time of the sale. Current market estimates place the sale of equipment at the end of the lease period at approximately 10 percent of the initial capital cost. Purchase of the equipment will be evaluated in a future capital budget depending on satisfactory performance of the systems and future requirements on power utilities to maintain renewable energy infrastructure. Also to be considered at that time will be the value to the Town of Cary at the end of the lease period by continuing to generate and sell electricity to the utility. Staff will evaluate and monitor the performance of the installed system throughout its life cycle and return with a recommendation on the purchase of the equipment, or termination of the contract, at a later date.

Staff Recommendation

Staff recommends that Council approve FLS Energy as the Town of Cary's solar photovoltaic energy partner for the identified solar PV installations and authorize entering into a lease of up to 20 years for the development of solar PV generation at the South Cary Water Reclamation Facility, the Town Hall campus parking deck and roof structures, the Garmon Operations Center, the North Cary Water Reclamation Facility and the Cary/Apex Water Treatment Plant. Staff also recommends that Council recognize the associated revenue from the lease of the above sites.

ACTION: Mrs. Adcock moved to approve the consent agenda. Mrs. Robison provided the second; council granted unanimous approval.

C. RECOGNITIONS, REPORTS, AND PRESENTATIONS

1. Recognition of \$10,000 grant from REI. **(Mr. Dwayne Jones)**

Mr. Jones provided background on the grant. Mayor Weinbrecht thanked members of REI and Hemlock Bluffs.

-
2. Presentation of the Planning and Zoning Board's annual report. **(Ms. Kelly Commiskey)**

STAFF REPORT

Town Council Meeting, August 9, 2011

Planning and Zoning Board Annual Report (PL12-004)

Summary of activity and actions taken by the Planning and Zoning Board during FY2011

Speaker: Kelly Commiskey, Planning and Zoning Board Chairperson

From: Jeffery G Ulma, AICP, Planning Director

Prepared by: Jeffery G Ulma, AICP, Planning Director

Approved by: Benjamin T. Shivar, Town Manager

Approved by: Michael J. Bajorek, Assistant Town Manager

Executive Summary

The Planning and Zoning Board (P&Z) advises the Town Council on land development issues related to the Comprehensive Plan, plan amendments, rezonings, certain types of site and subdivision plans, and amendments to the zoning regulations (Land Development Ordinance). During FY2011, the board held 10 regular meetings and conducted seven work sessions as it conducted its work to provide recommendations to council.

Background

The P&Z consists of eight citizen volunteers from within the Town's corporate limits and one member from the extraterritorial jurisdiction (ETJ).

During FY2011, the P&Z Board reviewed numerous zoning and development-related proposals in relation to various applicable ordinances, regulations and adopted plans.

P&Z considered and forwarded recommendations to Town Council on the following items:

- 16 rezoning cases
- 10 Comprehensive Plan amendments (CPA)
- One development plan
- Five sets of Land Development Ordinance (LDO) Amendments

Most of the items involved conducting a public hearing on the request.

Additionally, the board participated in seven special work sessions to review a variety of planning and development topics, either for training purposes or to allow for in-depth reviews of complicated matters in advance of making recommendations on them. Items covered in such review sessions included:

- Transit and Transit-Oriented Development (in a joint work session with Town Council);
- Land Development Ordinance Amendments (Round 13), including major items such as the Town Center LDR-12 zoning district, adult businesses, sign regulations, residential parking and other minor items;
- The Hazard Mitigation Plan;
- The rezoning process;
- The Comprehensive Plan amendment process; and
- Stormwater requirements and processes

Mrs. Commiskey presented the report herein.

-
3. Presentation of the Town Center Review Commission's annual report. **(Ms. Julia Rudy)**

STAFF REPORT

Town Council Meeting, August 9, 2011

Town Center Review Commission Annual Report (PL12-002)

Summary of recent activity and actions taken by the Town Center Review Commission during FY2011

Speaker: Ms. Julia Rudy, Town Center Review Commission Chairperson

From: Jeffery G. Ulma, AICP, Planning Director
Prepared by: Bob Benfield, Principal Planner
Approved by: Benjamin T. Shivar, Town Manager
Approved by: Michael J. Bajorek, Assistant Town Manager

Executive Summary

The Town Center Review Commission provides representation for Cary citizens in the downtown area and is responsible for the review of subdivision plans, site plans and certain types of variance requests within the Town Center District. The commission conducts meetings on an as needed basis between January and December of the calendar year. Information was provided by Bob Benfield, staff liaison to the commission.

Background

The Town Center Review Commission consists of seven members appointed by the Town Council, all of whom must reside in the town limits of Cary, and shall be comprised as follows:

- one member of the Planning and Zoning Board;
- one member who resides in the area covered by the Town Center Plan;
- one member who is a downtown business owner;
- at least two members with expertise in architecture, urban design, landscape architecture, engineering, planning, art or a similar field; and
- two at-large members (may include additional members from the categories specified above)

Highlights of the commission's activities for FY2011 are as follows:

Number of meetings: Two

- Presentation of the Historic Preservation Master Plan Draft. A review of the Goals, Objectives, and Actions of the plan.
- Stalls Medical (10-SP-012) Site plan to develop approximately 22,520 square-feet of office, retail, warehousing, and potential handicap-accessible vehicular sales located at the intersection of Chapel Hill Road and Reedy Creek Road. (December 2010).
- Annadale Center (11-SP-018) Conversion of an existing 1,350 square foot single-family detached dwelling at 406 Faculty Avenue into a dance studio. (June 2011).
- Introduction of Ed Gawf, Town of Cary's new Downtown Development Manager (June 2011).
- The Commission also participated in the May 25, 2011, Boards and Commissions open house to provide potential, future board members with information about serving on the Town Center Review Commission.

Ms. Rudy outlined the report herein.

-
4. Presentation of the Zoning Board of Adjustment's annual report. **(Mr. Charles McDarris)**

STAFF REPORT

Town Council Meeting, August 9, 2011

Zoning Board of Adjustment Annual Report (PL12-005)

Summary of recent activity and actions taken by the Zoning Board of Adjustment in FY2011

Speaker: Charles McDarris, Zoning Board of Adjustment Chairperson

From: Jeffery G. Ulma, AICP, Planning Director
Prepared by: Debra Grannan, Senior Planner
Approved by: Benjamin T. Shivar, Town Manager

Approved by: Michael J. Bajorek, Assistant Town Manager

Executive Summary

The Zoning Board of Adjustment has review and decision-making responsibilities for:

- variance requests, as provided in the Land Development Ordinance (LDO), regarding lot width, setback, height, building coverage, or structure spacing standards;
- variance requests for the square-footage limitations set for verandah and wall signs, setback requirements for real estate signs, and the requirements for signage in the Town Center area; and
- appeals regarding any order, requirement, decision or determination by an administrative official charged with enforcement of the LDO.

Meetings are conducted on an as needed basis.

Background

Current members of the Board are: Robert Cassell, Madrica Lowery, Charles McDarris, William Upchurch (ETJ Representative), and Barry Shuster (Alternate). Town Council liaison is Gail Adcock; Town staff that provides administrative and technical support to the board includes: Assistant Town Attorney Lisa Glover, serves as legal consultant to the Board; Planning staff liaison is Debra Grannan, and Shelley Kirk serves as board secretary.

When considering requests for variances to setbacks, building size limits and allowable wall sign area, the Zoning Board of Adjustment must find unusual physical circumstances exist on the subject property. As required by the LDO, Planning Department staff conducts pre-application meetings with potential applicants in order to provide a detailed explanation of the board's obligations under the applicable regulations. Staff participated in approximately 12 pre-application meetings with citizens who were considering variance requests. The actual number of applications submitted is relatively low compared to other types of requests associated with development.

Summary of Board Activity 2010-2011:

June 14, 2010 Meeting to Hear Variance Request (Case #10-V-01)

The board heard a request by the owner of 305 Livingstone Drive to allow an encroachment of 1.9 feet for an existing structure into a required side yard setback. After conducting a duly advertised, quasi-judicial public hearing and after considering the application, testimony and evidence presented at the hearing, the board voted 5-0 to grant the variance with the conditions that the variance applies only to the existing principal structure on the subject property and that future buildings or additions would be required to comply with the recorded setbacks.

October 11, 2010 Meeting to Hear Variance Request (Case #10-V-02)

The board heard a request from the owners of 302 Schubauer Drive to allow the existing home to encroach 2.07 feet into a required 15-foot side yard setback. After conducting a duly advertised, quasi-judicial public hearing and considering the application, testimony and evidence presented at the hearing the board voted 5-0 to grant the variance with the conditions that the variance applies only to the existing principal structure on the subject property and that future buildings or additions would be required to comply with the recorded setbacks.

February 14, 2011 Meeting to Hear Variance Request (Case #11-V-01)

The owners of 4015 Yellowfield Way requested a reduction in the required building separation from 16 feet to 13 feet between Lots 60 and 61 at Creekside at Tryon Village townhomes. After conducting a duly advertised, quasi-judicial public hearing and after considering the application, testimony and evidence the board voted 5-0 to grant the variance with the condition that the landscaping between the buildings be enhanced.

March 14, 2011 Meeting to Hear Variance Request (Case #11-V-02)

The board heard a request by the owner of Wickham Place to a grant a variance to allow an existing storage shed to remain in its current location is approximately five feet into a 30-foot landscape buffer.

After conducting a duly advertised quasi-judicial public hearing and after considering the application, the testimony and the evidence the board found that the request did not present a hardship and the property was not subject to unusual circumstances and voted 5-0 to deny the variance

March 22, 2011 Work Session

The board participated in a work session to review the quasi-judicial meeting process and become familiar with sunshine policies.

April 25, 2011 Special Meeting

To ensure the findings made by the board during the March 14, 2011 meeting were accurately documented, the board held a special meeting to adopt the resolution for case 11-V-02. During this same meeting, staff presented a Volunteer Appreciation Proclamation on behalf of the Town Council thanking the board for their service, one new member was sworn in, and the Town's legal staff reviewed updated quasi-judicial process guidelines.

May 25, 2011 Boards and Commissions Open House

Two board members participated in the Boards and Commissions open house to provide potential, future board members with information about serving on the Zoning Board of Adjustment.

Mr. McDarris outlined the report herein.

D. PUBLIC SPEAKS OUT (one hour time limit)

No one came forward to speak.

E. PUBLIC HEARINGS

1. ECONOMIC DEVELOPMENT

Subject: The Town of Cary proposes to appropriate and expend town funds for an economic development project pursuant to North Carolina General Statute 158-7.1. Specifically, the Town Council intends to consider entering into an economic development incentive contract with a specific company for expansion in Cary. Under the proposed contract, the Town would make up to \$50,000 available to offset applicable impact fees (including water, sewer, reclaimed, and/or transportation). The Town believes this project will help stimulate the local economy, result in a substantial capital investment in real and personal property in the Town, and create a substantial number of new, permanent jobs in the Town. The Town believes this project will help stimulate the local economy, result in a substantial capital investment in real and personal property in the Town, and create a substantial number of new, permanent jobs in the Town.

Speaker: Mr. Scott Fogleman

Proposed council action: Council may take action

LORD CORPORATION, INC.

and

TOWN OF CARY, NORTH CAROLINA

INCENTIVE AGREEMENT

Dated as of August 10, 2011

INCENTIVE AGREEMENT

THIS INCENTIVE AGREEMENT is dated as of August 10, 2011 (as supplemented or amended, the "Agreement"), and is between **LORD CORPORATION, INC.**, a company qualified to do business in North Carolina, and the **TOWN OF CARY, NORTH CAROLINA**, a public body politic and a political subdivision of the State of North Carolina ("the Town").

RECITALS:

WHEREAS, North Carolina General Statute 158-7.1 authorizes the Town Council to undertake an economic development project by extending assistance to a company in order to cause the company to locate or expand its operations within the Town; and

WHEREAS, COMPANY desires to expand an existing office facility, and is considering expanding within the Town of Cary; and

WHEREAS, such location would involve a significant capital investment in a facility and equipment and the creation of 117 new jobs over five years beginning in 2012, including jobs added on the date of the State announcement; and

WHEREAS, the N.C. Department of Commerce has approved a Job Development Investment Grant that could yield as much as \$1.3 million in maximum benefits for the company; and

WHEREAS, the Town Council of the Town has determined and confirmed, following a public hearing on August 9, 2011 that the proposed activity by the Company in Cary will increase the taxable property base of the Town and will create 117 new jobs over the next five years with an average wage/salary of \$81,487, including jobs added on the date of the State announcement, and that it is in the public interest to provide incentive assistance up to \$50,000 to offset development fees for water, reclaimed water, sewer, and/or transportation associated with the company expansion in Cary, as authorized by N.C.G.S. 158-7.1; and

WHEREAS, the Town Council finds that the consideration the Town will receive, based on prospective tax revenues to be generated over the Performance Commitments term will exceed the amount of the incentive grant offered herein; and

WHEREAS, such incentive is made with the understanding that it is recoverable by Town if Company does not increase the taxable property base and create new jobs as agreed to herein; and

WHEREAS, the parties desire to enter into this Agreement to describe the incentive to be provided by the Town and the Company's obligation in regard to such incentive.

NOW, THEREFORE, for and in consideration of the mutual promises and covenants contained in this Agreement, the parties hereby agree as follows:

ARTICLE I

DEFINITIONS; RULES OF CONSTRUCTION

1.01. Definitions. For all purposes of this Agreement, unless the context requires otherwise, the following terms shall have the following meanings:

"Abandonment of Operations" means that for a period in excess of two (2) weeks the Company's level of Full-Time Equivalent Employees or Direct Investment goes below twenty percent (20%) of the guaranteed minimum levels of Performance Commitments for either Full-Time Equivalent Employees or Direct Investment.

"Beneficial Occupancy" means the date upon which (a) the Company occupies the expanded/new Facility for its intended purpose as such date may be evidenced by a Certificate of Occupancy or Lease Agreement for the Facility and (b) at least ten (10) persons are employed.

"Business Day" means any day that is not a Saturday or a Sunday, or a day on which banks in the State are required by law to be closed.

"Direct Investment" means the original tax value of all land, buildings, upfit of the building and equipment placed by the Company, or caused to be made by the Company, on the ad valorem tax rolls, regardless of the funding sources for said property located in Cary, NC.

"Facility" means the office facility intended to be built and/or leased by the Company in Town of Cary, North Carolina

The number of "Full-Time Equivalent Employees" means the total number of employees employed by the Company as of December 31 of each year during the term of this Agreement. Such employees may be hired at any time prior to December 31 and may be a variation of full or part time so long as the combination of the total number of employees is the equivalent of those shown in the Performance Agreement section of Exhibit B that shall total 117 Full-Time Equivalent Employees by December 31, 2016 being paid the equivalent of a Full-Time wage/salary that on average is equal to or greater than \$81,487 per year each year.

"Incentive" means the amount of credit being offered to help offset development fees for water, reclaimed water, sewer, and/or transportation that may be due associated with the Company expansion in Cary.

"Performance Commitments" means the levels of Full-Time Equivalent Employees to be hired by the Company and the levels of Direct Investment to be made or caused to be made by the Company in relation to the Company's operations in the Facility as detailed in Exhibit B.

"Occupancy Date" means the date on which the Company assumes Beneficial Occupancy of the Facility.

"Site" means the real property in the Town which the Company is to locate the Facility and occupy and operate as of the Occupancy Date.

"State" means the State of North Carolina.

1.02 Rules of Construction. Unless the context otherwise indicates:

(a) Words importing the singular shall include the plural and vice versa, and words importing the masculine gender shall include the feminine and neuter genders as well;

(b) All references to Articles, Sections or Exhibits are references to Articles, Sections and Exhibits of this Agreement;

(c) The headings and Table of Contents herein are solely for convenience of reference and shall not constitute a part of this Agreement nor shall they affect its meanings, construction or effect.

ARTICLE II

COMPANY'S PERFORMANCE COMMITMENTS

In return for the Incentives set forth herein, which are a competitive necessity for the Company to choose to locate its expansion in the Town, the Company commits to certain Performance Commitments related to jobs created and incrementally increased taxes in the Town. For the Town to provide incentives to support the location of the Facility in the Town there must be a competitive offer from another potential location for this Facility, and but for the provision of the incentives contemplated by this Agreement, the Company would not expand its facility in the Town or provide the new jobs. The parties acknowledge and agree that the consideration for the Town to enter into this Agreement is the expectation that the Company will meet or exceed these Performance Commitments.

Specifically, the Company agrees to meet or exceed the following Performance Commitments for a five year period ('guaranteed minimum level' of Performance Commitments):

- (a) The Company shall open and maintain the Facility as an office as part of its Cary campus and will create at least 117 Full-Time Equivalent Employees ('FTE') over the next five years beginning in 2012, including jobs added from the date of the State announcement on July 12, 2011, and maintain all added positions through the five year term ending December 31, 2016. It is understood that the number of jobs will be created gradually over the next five years beginning in 2012, including jobs added on the date of the State announcement on July 12, 2011. All 117 such FTEs, to be considered a basis for incentives covered hereunder, shall be made by January 1, 2017.
- (b) The Company shall make or cause to be made initial Direct Investments in: (1) furniture and equipment; and (2) building renovations, construction, and/or leasehold improvements. The total of these initial Direct Investments shall equal to or exceed Twenty Million dollars (\$20,000,000.00) on or by December 31, 2014 and remain at that level through January 1, 2017 as shown on Exhibit B (the Performance Commitment). The taxable property, including possible reductions in tax value due to depreciation, resulting from these initial Direct Investments shall remain in the Town subject to ad valorem tax assessments through January 1, 2017. It is understood that Direct Investments may be made over a period of time on a phased basis. All such initial Direct Investments, to be considered a basis for incentives covered hereunder, shall be made by no later than December 31, 2014. Once this threshold has been met, the year end Direct Investment must equal \$20,000,000 each year up to and including January 1, 2017.

Confirmations of the Company's attainment as to Performance Commitments shall be as follows: (1) the amount of Direct Investment shall be based upon the historical acquisition cost for all property related to the Facility in the Town as shown on its Business Real and Personal Property Tax Listings and (2) the number of Full-Time Equivalent Employees. Company shall provide written confirmations of attainment of Performance Commitments on or before March 1, 2013 and annually thereafter ("Annual Confirmation Date" i.e. March 1, 2014; March 1, 2015; March 1, 2016; March 1, 2017). Such confirmations shall be in substantially the same form as attached hereto as Exhibit C and shall be attested to by a duly qualified officer of Company. The Town may in its reasonable discretion require other documentation to verify the attainment of these Performance Commitments, provided however, the Company may at its sole discretion withhold records which contain confidential matters (e.g. trade secrets, and individual employee details). In the event Company fails to provide timely confirmation by the Annual Confirmation Date(s) the Town shall provide Company with written notice of such non-compliance and Company shall have 60 days to remedy. If Company fails to provide such confirmation prior to the expiration of the 60-day period, such failure shall constitute Abandonment of Operations.

ARTICLE III

INCENTIVE DELIVERY PROCESS

As the Company files building permit applications associated with expanding in Cary, development fees will become due and payable. Up to \$50,000 worth of credit will be made available to help offset the four types of possible development fees that will become due and payable including: water development fees, reclaimed water development fees, sewer development fees, and/or transportation development fees. Any development fees remaining in excess of the \$50,000 incentive amount will be the responsibility of the Company to pay prior to issuance of applicable permits. The maximum incentive amount of \$50,000 is not available to cover non-development fee related costs that may be associated with the expansion project (building permit fee application, utility tap fees, etc.).

This Incentive is designed to be an inducement to the Company to provide and maintain the required Performance Commitment levels of Full-Time Equivalent Employees and Direct Investment in property and equipment in the corporate limits of the Town of Cary. Exhibit A attached hereto and incorporated herein by reference provides a schedule whereby reimbursement of the Incentive will be due from the Company; in the event the Company has an Abandonment of Operations in the Facility. In such event, the Company would be obligated to reimburse a pro rata portion of the total incentive amount (up to \$50,000 total possible) based upon the number of years of the five-year Performance Commitment remaining.

If in any year of the five-year Performance Commitment the Company has a year whereby the number of Full-Time Equivalent Employees or the Direct Investment is less than the Performance Commitments, but not so low as to constitute Abandonment of Operations, the Company must reimburse the Town a pro rata share of the incentive amount. The pro rata share shall be computed as the average unweighted percentage by which the Company has failed to meet the Performance Commitments for Full-Time Equivalent Employees and/or Direct Investment. The calculation of these partial paybacks is as shown on Exhibit B attached hereto and incorporated herein by reference.

Any reimbursements due to be paid by the Company to the Town under the terms of this Article shall be paid no later than January 31 of the year following that in which the Company failed to meet one or both of the Performance Commitments.

ARTICLE IV

TERMINATION OF AGREEMENT

This Agreement shall terminate following satisfactory filing of the final "certificate confirming performance commitments" on March 1, 2017. Additionally, the Town shall have the option of terminating this Agreement upon an uncured default by Company or an Abandonment of Operations by the Company. In such an event, the Town shall provide written notice to the Company specifying the uncured default or Abandonment of Operations and Company shall have 30 days after receipt of written notice specifying the breach to remedy. If Company does not provide a remedy with such 30-day time period, then any sums due to be paid or reimbursed to Town shall be due and payable as provided herein.

ARTICLE V

ADJUSTMENTS OF PERFORMANCE TARGETS

All of the parties to this Agreement agree that if the Company determines in the future that it can significantly exceed the Performance Commitments of Direct Investment, but will not meet the Performance Commitments of Full-Time Equivalent Employees, all parties will negotiate in good faith to amend the agreed upon Performance Commitments and formulations for reductions or reimbursements set forth in Exhibit B.

ARTICLE VI

TEMPORARY REDUCTIONS IN PERFORMANCE COMMITMENTS

Notwithstanding anything herein to the contrary, if the Company shall be prevented or delayed from fulfilling, or continuing to fulfill, either or both of the Performance Commitments as set forth in herein, by reason of a:

- (a) Government moratorium;
- (b) Delay in obtaining any governmental or quasi-governmental approvals, permits or certificates, despite reasonable and good faith efforts by the Company to obtain same;
- (c) Enemy or hostile governmental or terrorist action;
- (d) Act of God, including but not limited to hurricane, tornado, snowstorm, windstorm, earthquake or flood, fire or other extreme weather conditions or other casualty;
- (e) Strike, lockout or a labor dispute involving entities other than the Company which causes the Company an inability to obtain labor or materials;
- (f) Delay in funding from any state or local government incentive to or for the benefit of the Company;

then the Company shall provide written certified explanation and documentation to Town of the reason for the failure or delay by a duly authorized officer of Company as soon after such event as is reasonably possible. The parties shall negotiate in good faith to make an equitable reduction in the Performance Commitments for an affected year(s).

ARTICLE VII

ASSIGNMENTS

Company may assign this Agreement, and/or any rights and/or obligations hereunder upon written notice and with the consent of the Town to (i) its parent company, or any subsidiary or affiliate of Company, or (ii) any successor pursuant to a merger, consolidation, sale of all or substantially all of its assets. The Town shall not assign this Agreement and/or any rights and/or obligations hereunder without Company's prior written consent. Any attempted assignment in violation of this Article shall be void. A copy of any assignment pursuant to this Article shall be promptly furnished to the Town and any Assignee shall provide a written assumption of covenants and obligations herein.

ARTICLE VIII

MISCELLANEOUS

8.01 Governing Law. The parties intend that this Agreement shall be governed by the laws of the State of North Carolina.

8.02 Notices. All notices, requests, demands and other communications hereunder shall be in writing and shall be deemed to have been duly given upon delivery if delivered by hand (against receipt), or as of the date of delivery shown on the receipt if mailed at a post office in the United States by registered or certified mail, postage prepaid, return receipt requested, in any case addressed to the attention of the persons listed below and to the party intended as the recipient thereof at the address of such party as set forth below or at such other address or to the attention of such other person as such party shall be designated for such purpose in a written notice (complying as to delivery with the terms of this Section).

- (1) If to the Company, to:

LORD Corporation
111 LORD Dr.
Cary, North Carolina
Attn: Tesa L. Oechsle

(2) If to the Town, to:

Town of Cary
PO Box 8005
Cary, N.C. 27512-8005
Attn: Town Manager

With a copy to: (which shall not substitute as notice)
Town of Cary
PO Box 8005
Cary, N.C. 27512-8005
Attn: Budget Director

(c) Any addressee may designate additional or different addresses for communications by notice given under this Section.

8.03 Non-Business Days. If the date for making any payment or the last day for performance of any act or the exercising of any right shall not be a Business Day, such payment shall be made or act performed or right exercised on or before the next preceding Business Day.

8.04 Severability. If any provision of this Agreement shall be determined to be unenforceable, that shall not affect any other provision of this Agreement.

8.05 Entire Agreement; Amendments. This Agreement, including Exhibits A, B and C attached hereto, which are incorporated herein and made a part hereof, constitutes the entire contract between the parties, and this Agreement shall not be changed except in writing signed by all the parties.

8.06 Binding Effect. Subject to the specific provisions of this Agreement, this Agreement shall be binding upon and inure to the benefit of and be enforceable by the parties and their respective successors and assigns.

8.07 Liability of Officers and Agents. No officer, agent or employee of the Town or the Company shall be subject to any personal liability or accountability by reason of the execution of this Agreement or any other documents related to the transactions contemplated hereby. Such officers, agents, or employees shall be deemed to execute such documents in their official capacities only and not in their individual capacities. This Section shall not relieve any such officer, agent or employee from the performance of any official duty provided by law.

8.08 Authority. The persons executing this Agreement on behalf of each of the parties represent and warrant that they have the authority: (a) to enter into this Agreement on behalf of their respective entities; (b) to bind their respective entities; and (c) this Agreement has been authorized and approved by the governing bodies of each party.

8.09 Exhibits. The following Exhibits are attached hereto and are incorporate herein as if fully set forth herein:

A – Schedule for Reimbursement of Initial Incentive – Abandonment of Operations
B – Schedule for Reimbursement of Initial Incentive – Change of Use
C – Certificate Confirming Performance Commitments

8.10 Counterparts. This Agreement may be executed in several counterparts, including separate counterparts. Each shall be an original, but all of them together constitute the same instrument.

EXHIBIT A

SCHEDULE FOR REIMBURSEMENT OF INITIAL DEVELOPMENT FEE CREDIT – DUE TO ABANDONMENT OF OPERATIONS

In the event of an Abandonment of Operations within the Facility at any time prior to December 31, 2016 the Company must reimburse the Town for the Maximum Amount Due (as set forth below) for the year shown below which corresponds to the date of the Abandonment of Operations. The examples below demonstrate the application of this reimbursement provision. Any reimbursement owed by the Company to shall be paid no later than December 31 of the year in which the Company had an Abandonment of Operations.

Maximum Amount Due

December 31, 2012	\$50,000 or the credit utilized, whichever is less (100 percent of incentive)
December 31, 2013	\$40,000 or the credit utilized, whichever is less (80 percent of incentive)
December 31, 2014	\$30,000 or the credit utilized, whichever is less (60 percent of incentive)
December 31, 2015	\$20,000 or the credit utilized, whichever is less (40 percent of incentive)
December 31, 2016	\$10,000 or the credit utilized, whichever is less (20 percent of incentive)

Example 1. The Company has Abandonment of Operations prior to December 31, 2012. It must reimburse the Town \$50,000 or the credit utilized, whichever is less (100 percent of incentive), no later than December 31, 2012.

Example 2. The Company has Abandonment of Operations in 2013. It must reimburse the Town \$40,000 or the credit utilized, whichever is less (80 percent of incentive), no later than December 31, 2013.

EXHIBIT B

SCHEDULE FOR REIMBURSEMENT OF INCENTIVE AMOUNT UTILIZED

In any year prior to December 31, 2016 that the Company, or an assignee (successor in interest), fails to meet the Performance Commitments set forth below for Full-Time Equivalent Employees and/or Direct Investment, the Company must reimburse the Town a pro rata share of the incentive amount, which pro rata share shall be computed as the average unweighted percentage by which the Company has failed to meet the guaranteed Performance Commitments for both Full-Time Equivalent Employees and Direct Investment. If Direct Investment is not applicable, the pro rata share of the investment amount the Company must reimburse the Town will be computed solely by the percentage the Company failed to meet the guaranteed Performance Commitments for Full-Time Equivalent Employees. The examples below demonstrate the application of this reimbursement provision. Any reimbursements owed by the Company to the Town shall be paid no later than January 31 of the year following that in which the Company failed to meet one or both of the Performance Commitments.

Performance Commitments

<u>Aggregate Date</u>	<u>Full-Time Equivalent Employees Hired</u>	<u>Direct Investment</u>
By December 31, 2012	15 of 117	None
By December 31, 2013	51 of 117	None
By December 31, 2014	75 of 117	\$20,000,000.00
By December 31, 2015	97 of 117	\$20,000,000.00
By December 31, 2016	117 of 117	\$20,000,000.00

Example 1. On December 31, 2013, the Company has 42 Full-Time Equivalent Employees, or 82 percent of the Performance Commitment and no Direct Investment is applicable. The Company therefore must reimburse the Town 18 percent of the total incentive amount. Assuming the maximum credit of \$50,000 was utilized by the company to offset applicable development fees, 18 percent repayment would equal \$9,000. In this example, 18 percent is the percentage by which the Company has failed to meet the guaranteed Performance Commitments for Full-Time Equivalent Employees (82 percent).

Example 2. On December 31, 2014, the Company has 38 Full-Time Equivalent Employees, or 50 percent of the Performance Commitment and \$16,000,000 in Direct Investment, or 80 percent of the Performance Commitment. The Company must reimburse the Town 35 percent of the incentive amount. Assuming the

maximum credit of \$50,000 was utilized by the company to offset applicable development fees, 35 percent repayment would equal \$17,500. In this example, 35 percent is the unweighted percentage by which the Company has failed to meet the guaranteed Performance Commitments for both Full-Time Equivalent Employees (50 percent) and Direct Investment (20 percent).

Example 3. On December 31, 2016, the Company has 58 Full-Time Equivalent Employees, or 50 percent of the Performance Commitment and \$10,000,000 in Direct Investment, or 50 percent of the Performance Commitment. The Company must reimburse the Town 50 percent of the incentive amount. Assuming the maximum credit of \$50,000 was utilized by the company to offset applicable development fees, 50 percent repayment would equal \$25,000. In this example, 50 percent is the unweighted percentage by which the Company has failed to meet the guaranteed Performance Commitments for both Full-Time Equivalent Employees (50 percent) and Direct Investment (50 percent).

EXHIBIT C

CERTIFICATE CONFIRMING PERFORMANCE COMMITMENTS

Town of Cary
PO Box 8005
Cary, N.C. 27512-8005
Attn: Town Manager

Re: Incentive Agreement by and between the Town of Cary, North Carolina and LORD CORPORATION, INC. dated August 10, 2011 (the "Incentive Agreement")
- Certificate Confirming Performance Commitments

Dear Cary Town Manager:

Pursuant to Article II of the Incentive Agreement, LORD CORPORATION, INC. (the "Company") makes the following certificate:

1. As of December 31, 20____, the Company has made Direct Investments as follows: (i) \$_____ in furniture and equipment and (ii) \$_____ in building renovations or construction which amounts are based on the Business Real and Personal Property Tax Listings available to the Company; and

2. As of December 31, 20____, the Company has _____ Full-Time Equivalent Employees.

Mr. Fogleman provided information on the economic development incentive grant from the Town of Cary to LORD Corporation, Inc. as outlined in the above agreement.

Mayor Weinbrecht opened the public hearing. No one spoke; he closed the public hearing.

ACTION: Mr. Smith moved to approve the incentive agreement. Mrs. Robison provided the second; council granted unanimous approval.

2. Mills Property Comprehensive Plan Amendment and Rezoning Request

a. Comprehensive Plan Amendment 11-CPA-03

Location: PIN 0723898432 and portion of 0723993883 (an approximately 2.7-acre parcel at 3529 Beaver Dam Road and an adjacent 1.23-acre portion of a 48-acre tract)

Current Land Use Plan Designation: Commercial (COM)

Proposed Land Use Plan Designation: Very Low Density Residential (VLDR)

Current Zoning: General Commercial (GC)

Speaker: Mrs. Meredith Chandler

Proposed Council Action: Refer to Planning and Zoning Board

REQUEST

This Comprehensive Plan Amendment case is a request to change the land use designation of approximately 3.93 acres (one 2.70-acre parcel and a 1.23-acre portion of a 48-acre tract) located on the east side of Green Level Church Road and the south side of Beaver Dam Road in southwest Cary. The applicant is proposing to change the long-range land use designation of the property from Commercial (COM) to Very Low Density Residential (VLDR). The subject property is located in the Green Level National Register Historic District and falls within the adopted Southwest Area Plan.

Both the CPA and the rezoning cases were presented at a public hearing on May 12, 2011. Subsequently, Town staff reconsidered Cary's notification process as it pertains to portions of a property proposed for rezoning. Staff determined that written notification should be mailed to property owners within 400 feet of the entire parcel, not just a portion of a parcel proposed for rezoning. As a result, both cases have been scheduled for new public hearings and new notifications have been mailed to property owners within 400 feet of each entire parcel.

NOTE: The purpose of a comprehensive plan amendment is to evaluate the appropriateness of a proposed land use and/or other issue, need, or opportunity for the subject parcel(s) of land.

SUBJECT PARCELS

Property Owner(s)	County Parcel Number(s) (10-digit)	Real Estate ID(s)	Calculated Acreage
Willard L. Mills, Jr., Trustee	0723898432	0047512	2.70
Green Level Beaver Dam LLC	0723993883 (portion)	0047511 (portion)	1.23
Total Area			+/- 3.93 acres

BACKGROUND INFORMATION

Applicant & Agent	Willard L. Mills, Jr. 3529 Beaver Dam Road Cary, NC 27519 919-362-7438 millsms1@juno.com		
Acreage	+/- 3.93		
Address/General Location	3529 Beaver Dam Road and the portion of 8508 Green Level Church Road that is located on the south side of Beaver Dam Road.		
Tentative Schedule	Initial Town Council Public Hearing May 12, 2011	Planning and Zoning Board Public Hearing August 15, 2011	Town Council September 8, 2011¹
	¹ The date of this meeting will be determined after the Planning and Zoning Board recommendation. This case will go to the first meeting Town Council meeting of the month if there is unanimous approval by the Planning and Zoning Board; otherwise, it will go to the second Town Council meeting of the month as a discussion item.		
Land Use Plan Designation	Commercial (COM)		
Existing Zoning District(s)	General Commercial (GC)		
Town Limits	The subject property is located within the Town of Cary's extra-territorial jurisdiction, but outside the Town's corporate limits.		

Staff Contact	Meredith Chandler, RLA, AICP Urban Designer/Senior Planner 919-460-4983 meredith.chandler@townofcary.org
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SUMMARY OF PROCESS AND ACTIONS TO DATE

Original Notification

On April 26, 2011, the Planning Department mailed notification of a public hearing on this request to property owners within 400 feet of the subject site. Notification consistent with General Statutes was published in the Cary News on April 27 and May 4, 2011. Notice of the public hearing was posted on the property.

On April 26, 2011 the Planning Department mailed notification of a public hearing on this request to property owners within 400 feet of the subject site. Notification consistent with General Statutes was published in the Cary News on April 27 and May 4, 2011, and again on July 6 and 13. Notice of the public hearing was posted on the property.

Town Council Public Hearing of May 12, 2011

After staff’s presentation, the applicant, Mr. Bill Mills, presented his case for changing the Land Use Plan designation of his property from Commercial (COM) to Very Low Density Residential (VLDR). He stated that it is his desire to preserve his house and property for his children, and also pointed out that his house is one of the last standing historic buildings in the Green Level Historic District. He noted that he has already put a conservation easement on the lower portion of his home site, as well as on his +/- 30-acre field across the street from his house, and he believes this land plan change would help tie it all together into one preserved package.

During the public hearing, two citizens spoke. Mr. Don d’Ambrosi, speaking on behalf of the owners of the adjacent Ferrell and Johnson tracts, spoke against the requested plan amendment. He and the adjacent owners believe that if the subject property were going to be changed from COM to VLDR, it should have been done during the original development of the Southwest Area Plan. He stated that a change to VLDR, coupled with the applicant’s requested rezoning to R-40 (via case 11-REZ-03) will force the adjacent commercially-zoned properties to leave a much bigger buffer when they develop, and this requirement, along with other required buffers and right-of-way dedications, will significantly reduce their developable area.

Ms. Carla Sadtler spoke in favor of the requested plan amendment. She stated she participated in the planning process for the Southwest Area Plan, and she believes a change to VLDR is appropriate because 1) it will help preserve the historic district, 2) it is in keeping with adjacent land uses, and 3) it would give the Town more flexibility should future owners of the land come back for a plan amendment and/or rezoning. She also believes there is enough other commercially designated land in the area, and thinks a larger buffer requirement is appropriate when developing a commercial use next to a home.

Notification for the Town Council Public Hearing August 9, 2011

After the Town Council public hearing on May 12, 2011, Town staff reconsidered Cary’s notification process as it pertains to plan amendment and rezoning cases where only a portion of a parcel is proposed for a plan amendment or rezoning. Staff determined that written notification should be mailed to property owners within 400 feet of the entire parcel, and not just the portion of the parcel proposed for an amendment or rezoning. As a result, this case and its corresponding rezoning case (11-REZ-03), have been scheduled for new public hearings on August 9, 2011. On July 26, 2011, new notifications were mailed to property owners within 400 feet of each entire parcel. Notification consistent with General Statutes was or will be published in the Cary News on July 27 and August 3, 2011. Notice of the public hearing was again posted on the subject property.

COMPREHENSIVE PLAN SUMMARY

A. Land Use Plan

The subject property is located within the **Southwest Area Plan**. The Future Land Use Map of the

Southwest Area Plan currently designates the subject property as Commercial (COM). The applicant is requesting that the land use designation be changed from Commercial to Very Low Density Residential (VLDR). The Southwest Area Plan defines VLDR as areas with existing single-family-detached dwellings on lots that are at least two to three acres in size.

B. Parks & Greenways Master Plan

According to the Parks, Recreation & Cultural Resources Facilities Master Plan there are no issues related to this site.

Recreational payment-in-lieu will be required for residential development in accordance with the LDO.

C. Growth Management Plan

The Growth Management Plan includes the following Guiding Principles that are relevant to this case:

1. L2 Guiding Principle: Ensure that future growth protects sensitive natural resources and protects open space.

Analysis: The subject property, along with an adjacent, 30-acre open field (not a part of this CPA request), make up the larger Alious and Daisy Mills farm, a noted and integral part of the Green Level Historic District landscape. The Green Level National Register report describes the Green Level landscape as historically significant because it depicts "the natural and man-made pattern of rural commercial and agricultural development that prevailed in late nineteenth- and twentieth-century Wake County." Changing the land use designation of the subject property from Commercial to Very Low Density Residential would help protect the subject property -- and the larger historic landscape of which it is a part -- from the effects of surrounding growth.

2. A1 Guiding Principle: Increase permitted densities in preferred growth areas to encourage desired forms of development.

Analysis: According to the overall vision of the Southwest Area Plan, the most appropriate area for intensive development in the southwest area of Cary is along the corridor between NC 55 and the Western Wake Freeway (I-540), and at the intersection of I-540 and Green Level West Road -- the site of a future planned activity center. The plan recommends decreasing levels of density from I-540 west to the Chatham County line. The applicant's request to change the land use designation of his property from Commercial to Very Low Density Residential is in harmony with the Southwest Area Plan's vision for density and growth in the southwest area of Cary.

D. Affordable Housing Plan

Based on the proposed land use, the goals of the adopted Affordable Housing Plan are not applicable.

E. Comprehensive Transportation Plan

Green Level Church is designated as a Major Thoroughfare

Existing Section: Two-lane road, approximately 60 feet of right-of-way

Future Section: Two-lane rural section with 12-foot lanes; four-foot paved shoulder and a four-foot unpaved shoulder; 12-foot swale

Sidewalks: Not planned; pedestrian connectivity to be accommodated via network of greenways

Bicycle Lanes: Four-foot paved shoulder

Transit: None

Status of Planned Improvements: Not planned

Beaver Dam is designated as a local road

Existing Section: Two-lane road within 60 feet of right-of-way

Future Section: Existing

Sidewalks: Not planned; pedestrian connectivity to be accommodated via network of greenways

Bicycle Lanes: N/A

Transit: None

Status of Planned Improvements: Not planned

F. Open Space Plan

According to the Open Space Plan, there are bottomland forests/hardwood swamps on the easternmost end of the site. Buildings on the site were identified as being on the National Register.

G. Historic Preservation Master Plan

The Historic Preservation Master Plan recommends the following action that is relevant to this case:

Action 2.1.5 - Develop for Town Council's consideration alternative zoning and site design standards for the Green Level and Carpenter historic districts to help mitigate threats to historic structures and landscapes.

The subject property is part of the Green Level National Register Historic District and contains two primary buildings and six outbuildings that are listed on the National Register of Historic Places. The Town's Historic Preservation Master Plan identifies the setbacks and building heights associated with a future commercial land use as potential threats to the historic integrity of the Green Level Historic District.

APPLICANT'S JUSTIFICATION STATEMENT

Provided below are the applicant's responses to the Comprehensive Plan Amendment justification questions contained in the application form. (The application questions are repeated). Please note that the statements below are those of the applicant and do not necessarily represent the views or opinions of the Town of Cary.

How is the proposed request reasonable? In explaining how it is reasonable, please address the following, if applicable:

1. Describe how the requested amendment is warranted due to changes in conditions, forecasts, or assumptions since the original Comprehensive Plan recommendations were developed.

Response: The owner has no interest in maintaining the General Commercial status. My only intent is to preserve my family's heirloom and open space. There is a new conservation easement on the adjoining 1.23 acres and on the adjacent 49.77 acres. This will assure the maintaining of the 51 acres as a historical landmark and open space.

2. Describe how the requested amendment is warranted due to new issues, needs, or opportunities that have arisen in this geographic area since the original Comprehensive Plan recommendations were developed.

Response: This will comply with the Southwest Area Plan of historical preservation and will comply with Cary's new historical preservation plan. It is also consistent with the recent approval for residential development (Singh project) across from the property.

3. Describe how the requested amendment is warranted due to changes in Town policies, objectives, or standards since the original Comprehensive Plan recommendations were developed.

Response: This will comply with the historical plan Cary has developed. This will also comply with Cary's open space goals. This will preserve the rural character of the Green Level area.

4. Describe how the requested amendment is warranted due to errors or omissions in the current Comprehensive Plan.

Response: The zoning should have been changed to reflect my views when the Southwest Area Plan was developed. At that time all the land uses in this commercial district were residential and rural in character.

CRITERIA FOR CONSIDERATION IN REVIEWING COMPREHENSIVE PLAN AMENDMENTS

Section 3.2.2(B) of the Land Development Ordinance states that proposals to amend the Comprehensive Plan shall be evaluated based upon whether the amendment is necessary in order to address conditions including, but not limited to, the following:

1. A change in projections or assumptions from those on which the Comprehensive Plan is based;

Analysis: No changes have been identified.

2. Identification of new issues, needs, or opportunities that are not adequately addressed in the Comprehensive Plan;

Analysis: No new issues, needs, or opportunities have been identified.

3. A change in the policies, objectives, principles, or standards governing the physical development of the Town or any other geographic areas addressed by the Comprehensive Plan; or

Analysis: In 2010, the Town adopted the Historic Preservation Master Plan, which identifies future commercial development of the subject area as a potential threat to the historic integrity of the Green Level Historic District because of the setbacks, heights, and wide range of uses associated with the existing General Commercial zoning. The plan goes on to recommend developing alternative zoning and site design standards for the Green Level Historic District to help mitigate these threats. The requested land use designation change is a first step in implementing this plan recommendation.

4. Identification of errors or omissions in the Comprehensive Plan.

Analysis: No errors or omissions have been identified.

STAFF ANALYSIS AND RECOMMENDATION

A. Staff Analysis

Historic Significance

In 2001, the subject property, as part of the Green Level Historic District, was placed on the National Register of Historic Places. Two primary buildings and six outbuildings on the property were designated as contributing historic buildings. The subject property is part of the larger, historic Alious Mills farm that includes the adjacent, 30-acre open field. The owner/applicant has voluntarily placed a conservation easement on a portion of the subject property, as well as on the adjacent field. The quality of the intact historic buildings on the subject property, as well as its setting in relation to the historic district as a whole, make it a very important element of the historic district. For the traveler moving north from the Green Level Church Road/Green Level West Road intersection, the subject property provides a visual transition from the busy intersection to the open landscape at the heart of the historic district. For the traveler moving south from the Green Level Church Road/ Green Hope School Road intersection, the farmhouse and outbuildings are visible in the distance across the open field, framing the landscape and providing a glimpse of Wake County's past.

Conformance With Adopted Plans

In 2004, the Town adopted the Southwest Area Plan, the guiding land use document for the subject property. Though the final plan kept intact the commercial designation first applied to the subject property by Wake County, the plan sets forth the following overall guiding principle and related objectives for future land use in the southwest area:

Guiding Principle 1: Preserve open space and significant natural and historic resources

Objectives:

- Protect special natural and historic resources, such as the Green Level Historic District and the American Tobacco Trail corridor
- Moving west to Jordan Lake, decrease allowable future development densities
- Shield new development from public view in order to minimize impacts on adjacent rural properties, and to help sustain a rural aesthetic.

Staff believes the land use designation requested by the applicant is in harmony with this guiding principle of the Southwest Area Plan.

In 2010, the Town adopted its first Historic Preservation Master Plan, which identifies the commercial zoning of the subject property and surrounding area as a potential threat to the integrity of the Green Level National Register Historic District. The plan thus recommends Action 2.1.5 - *Develop for Town*

Council's consideration alternative zoning and site design standards for the Green Level and Carpenter historic districts to help mitigate threats to historic structures and landscapes.

Staff believes the applicant's requested land use change is a first step toward implementing recommended Action 2.1.5 of the Historic Preservation Master Plan as it applies to Green Level.

B. Recommendation

Given the documented historic importance of the subject property, and given that the requested plan amendment is in harmony with both the 2004 Southwest Area Plan and the 2010 Historic Preservation Master Plan, staff recommends approval of this Comprehensive Plan Amendment request.

b. Rezoning 11-REZ-03

Location: PIN 0723898432 and portion of 0723993883 (an approximately 2.7-acre parcel at 3529 Beaver Dam Road and an adjacent 1.23-acre portion of a 48-acre tract)

Current Land Use Plan Designation: Commercial (COM)

Current Zoning: General Commercial (GC)

Proposed Zoning: Residential 40 (R-40)

Speaker: Mrs. Debra Grannan

Proposed Council Action: Refer to Planning and Zoning Board

REQUEST

The applicant, Willard Lee Mills, Jr., has requested an official change to the zoning map of the Town of Cary to rezone approximately 3.9 acres of land from General Commercial (GC) to Residential 40 (R-40). This area is comprised of a 2.7-acre parcel and a 1.23-acre portion of a larger 48-acre tract. The subject property is located in the Green Level National Register Historic District and falls within Cary's adopted Southwest Area Plan.

There is a Comprehensive Plan Amendment (**11-CPA-03**) associated with this case.

Both the CPA and the rezoning cases were presented at a public hearing on May 12, 2011. Subsequently, Town staff reconsidered Cary's notification process as it pertains to portions of a property proposed for rezoning. Staff determined that written notification should be mailed to property owners within 400 feet of the entire parcel, not just a portion of a parcel proposed for rezoning. As a result, both cases have been scheduled for new public hearings and new notifications have been mailed to property owners within 400 feet of each entire parcel.

NOTE: The purpose of the rezoning is to determine whether or not the land uses and densities allowed in the proposed zoning district are appropriate for the site.

SUBJECT PARCELS

Property Owner(s)	County Parcel Number(s) (10-digit)	Real Estate ID(s)	Calculated Acreage
Willard L. Mills, Jr., Trustee 3529 Beaver Dam Road Cary, NC 27519	0723898432	0047512	+/- 2.7
Green Level Beaver Dam LLC 8508 Green Level Church Rd. Cary, NC 27519	0723993883 portion	0047511 portion	+/- 1.23
Total Area			+/-3.93 acres

BACKGROUND INFORMATION

Applicant/Agent	Willard L. Mills, Jr. 3529 Beaver Dam Road Cary, NC 27519
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	919-362-7438 millsms1@juno.com		
Acreage	+/- 3.93		
Location	3529 Beaver Dam Road and the portion of 8508 Green Level Church Road located on the south side of Beaver Dam Road at its intersection with Green Level Church Road		
Tentative Schedule	Initial Public Hearing May 12, 2011	Planning & Zoning Board October 17, 2011	Town Council * November 17, 2011
	New Public Hearing August 9, 2011		
Existing Land Use Plan	Commercial (COM)		
Existing Zoning District(s)	General Commercial (GC)		
Proposed Zoning District(s)	Residential 40 (R-40)		
Town Limits	Outside Cary's corporate limits, but inside Cary's Extra Territorial Jurisdiction (ETJ)		
Valid Protest Petition	To be determined prior to the public hearing		
Staff Contact	Debra Grannan, Senior Planner (919) 781-0128 Debra.grannan@townofcary.org		

SITE CHARACTERISTICS

Streams: According to Cary GIS maps, the majority of the smaller 1.23-acre area is impacted by a stream buffer. Note: This portion of the property is held in a Conservation Easement. In the event of future development projects on the subject property, field determination of stream locations is required during site plan review.

Floodplain: According to Cary GIS maps, the subject property is not located in a floodplain area.

Existing Use: The 2.7-acre tract of the subject property is developed with a single-family residential home and with several accessory buildings. The 1.23-acre area is vacant and is held in a Conservation Easement.

Surrounding Land Uses:

North - South – Single-family Residential (Highcroft Subdivision)

East - Wake Memorial Park Cemetery

West - Single-family Residential (Fryar PDD)

CONSISTENCY WITH LAND DEVELOPMENT ORDINANCE

Density and Dimensional Standards

	General Commercial	Proposed Zoning Residential 40 (R-40)
Maximum Gross Density	Not applicable	1.08 du/acre
Minimum Lot Size	Not applicable	40,000 square feet
Minimum Lot Width	20 feet	125 feet
Front Yard Setback	Non-residential buildings generally must be setback from roadways a minimum of 30 feet. If parking is located between the building and the street, the setback must 50 feet. (LDO 6.3.2)	50 feet
Side Yard Setback	Setback not specified (Buffer regulations may apply)	15 feet
Rear Yard Setback	Setback not specified (Buffer regulations may apply)	30 feet

Maximum Building Height	35/50 feet ^[1]	35 feet plus one foot for every foot provided in addition to the minimum building setback
<p><i>[1] Per the LDO: If a structure is within 100 feet of a residential zoning district boundary the maximum height is 35 feet. If the structure is more than 100 feet from a residential zoning district boundary, the maximum height is 50 feet. The maximum height limits may be increased by one foot for every additional foot provided between the building and minimum required setbacks, unless limited by a zoning condition. (LDO 6.1.2)</i></p>		

Landscape Buffer

Single-family-detached dwellings on lots 8,000 square feet in area or larger that are located on non-residentially zoned property are classified as vacant non-residential for determining the required buffer. If the adjacent property were to develop with the current General Commercial (GC) zoning, the required buffer width would range from a 40-foot Type A (opaque) buffer (for uses such as offices totaling 50,000 square feet or less) to a 20-foot Type C (aesthetic) buffer (for uses such as retail or restaurants.)

If the subject property is rezoned to R-40, it will be classified as a Class 2 use. In that event, the required buffer width might range from a 40-foot Type A buffer (for uses such as offices totaling 50,000 square feet or less) to a 65-foot Type A buffer (for uses such as retail or restaurants).

In either case, and assuming the existing residential use remains on the subject property, responsibility for installation of the required perimeter buffer would be incumbent upon the adjacent commercially zoned property at the time that property is developed.

Streetscape

Per Chapter 7 of the LDO, a 50-foot opaque streetscape is required along Green Hope School Road.

Traffic

The existing use and proposed zoning of single-family-detached housing generates approximately four trips during the AM peak-hour period and approximately five peak-hour trips during the PM period. (Based on ITE Trip Generation Code 210.) The existing zoning of general commercial has the potential to generate 40 trips during the AM peak-hour time period and 147 trips during the PM peak-hour time period. (Based on ITE Trip Generation Code 820.) Since this is a down zoning, no traffic study was required for this rezoning. The Adequate Public Facilities Ordinance (APFO) requires a traffic study when the proposed zoning generates 50 or more peak-hour trips over the existing zoning.

SUMMARY OF PROCESS AND ACTIONS TO DATE

Notification for August 9, 2011 Public Hearing

On July 26, 2011 the Planning Department mailed notification of a public hearing on the request to property owners within 400 feet of the property lines for both entire parcels. Notification consistent with the General Statutes was published in The Cary News on July 27, 2011 and August 3, 2011. Notice of the public hearing was posted on the property on July 27, 2011.

Town Council Public Hearing on May 12, 2011

Following staff's combined presentation for both the CPA and REZ request, the applicant and property owner, Mr. Bill Mills, presented his justification for requesting a change to the Land Use Plan designation and zoning of his property. He stated that it is his desire to preserve his house and property for his children, and noted that his house is one of the last standing historic buildings in the Green Level Historic District. He noted that he has put a conservation easement on the lower portion of his home site, as well as on his +/- 30-acre field across the street from his house, and he believes this land plan change would help tie it all together into one preserved package.

During the public hearing, two citizens spoke. Mr. Don d'Ambrosi, speaking on behalf of the owners of the adjacent Ferrell and Johnson tracts, spoke against the requested plan amendment. He stated that he and the adjacent owners believe that if the subject property were going to be changed from COM to VLDR, it should have been done during the original development of the Southwest Area Plan. He stated that a change to VLDR, coupled with the applicant's requested rezoning to R-40 will force the adjacent

commercially-zoned properties to leave a much bigger buffer when they develop, and this requirement, along with other required buffers and right-of-way dedications, will significantly reduce their developable area.

Ms. Carla Sadtler spoke in favor of the requested plan amendment. She stated she participated in the planning process for the Southwest Area Plan, and she believes a change to VLDR is appropriate because 1) it will help preserve the historic district, 2) it is in keeping with adjacent land uses, and 3) it would give the Town more flexibility should future owners of the land come back for a plan amendment and/or rezoning. Regarding the rezoning, she stated that she believes there is sufficient commercially designated land in the area, and thinks a larger buffer requirement is appropriate when developing a commercial use next to a home.

Following the public hearing the Town Council asked staff to verify the LDO buffer requirement, and staff confirmed that a 65-foot Type- A buffer would be a requirement if the property to the south were to develop commercially. Staff confirmed that this was correct.

Notification for May 12, 2011 Public Hearing Notification

On April 26, 2011, the Planning Department mailed notification of a public hearing on the request to property owners within 400 feet of the subject property. Notification consistent with the General Statutes was published in The Cary News on April 27, 2011 and May 4, 2011. Notice of the public hearing was posted on the property on April 27, 2011.

Neighborhood Meeting

According to information provided by the applicant, a neighborhood meeting was held on March 4, 2011 at 6 p.m. Three people attended the meeting, and a fourth neighbor called the applicant to share comments. One adjacent property owner expressed concern regarding how the proposed rezoning would impact the value of his property.

CRITERIA CONSIDERATION IN REVIEWING REZONINGS

Section 3.4.1(E) of the Land Development Ordinance sets forth the following criteria that should be considered in reviewing rezonings:

1. The proposed rezoning corrects an error or meets the challenge of some changing condition, trend or fact;
2. The proposed rezoning is consistent with the Comprehensive Plan set forth in Section 1.3 (LDO);
3. The Town and other service providers will be able to provide sufficient public safety, educational, recreational, transportation and utility facilities and services to the subject property while maintaining sufficient levels of service to existing development;
4. The proposed rezoning is unlikely to have significant adverse impacts on the natural environment, including air, water, noise, stormwater management, wildlife and vegetation;
5. The proposed rezoning will not have significant adverse impacts on property in the vicinity of the subject tract; and
6. The proposed zoning classification is suitable for the subject property.

APPLICABLE COMPREHENSIVE OR AREA PLAN REQUIREMENTS

Comprehensive Plan Element	Consistent	Not Consistent	Not Applicable
A. Southwest Area Plan		X	
B. Parks, Recreation, and Cultural Resources Facility Master Plan	X		
C. Growth Management Plan	X		
D. Affordable Housing Plan	X		
E. Comprehensive Transportation Plan	X		
F. Open Space Plan	X		
G. Historic Preservation Master Plan	X		

A. Southwest Area Plan

The **Southwest Area Plan** is the governing Land Use Plan for the subject parcel. The Southwest Area

Plan currently designates the future land use of the subject property as Commercial (COM). An associated Comprehensive Plan Amendment case, 11-CPA-03, includes a request to change the land use designation to Very Low Density Residential (VLDR), a category that refers to existing single-family-detached residential on 2-acre to 3-acre lots.

B. Parks & Greenways Master Plan

According to the Parks, Recreation & Cultural Resources Facilities Master Plan, there are no issues related to this site.

Recreational payment-in-lieu will be required for future residential development, in accordance with the LDO.

C. Growth Management Plan

The Growth Management Plan includes the following Guiding Principles that are relevant to this case:

1. L2 Guiding Principle: Ensure that future growth protects sensitive natural resources and protects open space.
2. A1 Guiding Principle: Increase permitted densities in preferred growth areas to encourage desired forms of development.

D. Affordable Housing Plan

Based on the proposed rezoning, the goals of the adopted Affordable Housing Plan are not applicable.

E. Comprehensive Transportation Plan

Green Level Church is designated as a Major Thoroughfare

Existing Section: Two-lane road, approximately 60 feet of right-of-way

Future Section: Two-lane rural section with 12-foot lanes; four-foot paved shoulder and a four-foot unpaved shoulder; 12-foot swale

Sidewalks: Not planned; pedestrian connectivity to be accommodated via a network of greenways

Bicycle Lanes: Four-foot paved shoulder

Transit: No requirements

Status of Planned Improvements: Not planned

Beaver Dam is designated as a local road

Existing Section: Two-lane road within 60 feet of right-of-way

Future Section: Existing

Sidewalks: Not planned; pedestrian connectivity to be accommodated via a network of greenways

Bicycle Lanes: N/A

Transit: No requirements

Status of Planned Improvements: Not planned

F. Open Space Plan

According to the Open Space Plan, there are bottomland forests/hardwood swamps on the easternmost end of the site. Buildings on the site were identified as being on the National Register.

G. Historic Preservation Master Plan

The Historic Preservation Master Plan recommends the following action that is relevant to this case:

Action 2.1.5 - Develop for Town Council's consideration alternative zoning and site design standards for the Green Level and Carpenter historic districts to help mitigate threats to historic structures and landscapes.

The subject property is part of the Green Level National Register Historic District and contains two buildings that are listed on the National Register of Historic Places. The Town's Historic Preservation Master Plan identifies the setbacks and the building heights associated with the General Commercial zoning of this property as potential threats to the historic integrity of the Green Level Historic District.

APPLICANT'S JUSTIFICATION STATEMENT

The following statements are provided by the applicant (shown below in italics) in response to the criteria established in the application (shown below in bold) and do not necessarily represent the views or the opinions of the Town of Cary. Any statements as to the type, the quality, or the physical features are at the direction of the applicant and may be formulated into a condition:

1. Any issues with the size of the tract?

Response: The three-acre tract is appropriate for a single-family residence. This tract contains my [Mr. Mills'] primary residence occupied since 1973. This residence and adjoining farm structures were built by my grandfather in 1916. Included on this tract is what was my grandfather's country store. It was closed in 1978 and there are no plans to reopen it. The building is currently vacant and used for storage only. The three-acre tract adjoins a 1.23-acre tract which is part of a 51-acre tract split by Beaver Dam Road. This 1.23-acre tract is part of a Conservation Easement. Both of these tracts are consistent with the present rural and open space character surrounding them.

2. How is the request compatible with the comprehensive plan (i.e. Land Use, Transportation, Open Space and Historic Resources)?

Response: The Historical Perspective Plan encourages the historic preservation of this farm setting and is in conjunction with Cary's Historical Preservation Plan. It will preserve one of the last remaining historic settings in the Green Level Historic District. The down zoning will help reduce the number of residences thereby reducing the traffic at nearby intersections. This proposed rezoning would have no negative impact on any of the adjacent land owners.

3. What are the benefits and detriments to the owner, neighbors and community?

Response: The benefits are that this 4.25 acres will be preserved and the rural character of this historic setting will continue to be consistent with the open space of the adjoin Conservation Easement. I can see no detriment to myself as owner, only benefit, for I wish to maintain it as my permanent residence. I further see no detriment to the community or my neighbors.

4. How are the allowable uses with the proposed rezoning compatible with, or how do they relate to, the uses currently present on adjacent tracts?

Response: All three adjacent tracts were used as residential; two residences have been destroyed by fire. There are tow remaining residences within this commercial triangle at this time. The tract across Green Level Church Road directly in front of the three-acre tract is zoned R40 (Singh Project) and is approved for 45 houses on 19 acres. My down zoning will maintain/tie the Masonic Lodge, Green Level Baptist Church (both historic properties/structures) and my residence as a historic area and scenic open space.

5. What reductions/amendments and/or modifications to the development standards of the LDO are being requested and how are they justified? (PDD, new or amended) Applicants must list these items and/or clearly highlight them within the Planned Development document.

Response: Not applicable

ORDINANCE FOR CONSIDERATION

11-REZ-03

AN ORDINANCE TO AMEND THE OFFICIAL ZONING MAP OF THE TOWN OF CARY TO REZONE APPROXIMATLEY 3.93 ACRES OWNED BY WILLARD L. MILLS AND GREEN LEVEL BEAVER DAM LLC, FROM GENERAL COMMERICAL (GC) TO RESIDENTIAL 40 (R-40). BE IT ORDAINED BY THE TOWN COUNCIL OF THE TOWN OF CARY:

Section 1: The Official Zoning Map is hereby amended by rezoning the area described as follows:

PARCEL & OWNER INFORMATION

Property Owner(s)	County Parcel Number(s) (10 digit)	Real Estate ID(s)	Area ± (Acres)
Willard L. Mills, Jr., Trustee 3529 Beaver Dam Road Cary, NC 27519	0723898432	0047512	2.7 ±
Green Level Beaver Dam LLC 8508 Green Level Church Rd. Cary, NC 27519	0723993883 portion	0047511 portion	1.23 ±
Total Acreage			3.93 ±

Section 2: That these properties are rezoned from General Commercial (GC) to Residential 40 (R-40) and are subject to all the requirements of the Cary Land Development Ordinance (LDO) and to other applicable laws, standards, policies, and guidelines.

Section 3. This ordinance shall be effective on the date of adoption.

Ms. Chandler presented the staff report herein on the comprehensive plan amendment. (See Pages 7 through 26 of Exhibit A.)

Mrs. Grannan presented the staff report herein on the rezoning request. (Refer to Pages 29 through 40 of Exhibit A.)

Bill Mills, the applicant, asked council's approval on the request.

Don d'Ambrosi, representing adjacent property owners, stated they object to the request. He said the development and amending of the Southwest Area Plan took several years, in which the applicant had opportunity to raise the zoning questions and have it thoroughly vetted by the community. He provided two letters, a proposed compromise and points regarding staff's analysis, that are attached to and incorporated herein as **Exhibit B**.

Carla Sadtler spoke in favor of the request. She said changing the Southwest Area Plan will help protect the historic district. She said it's easier to up zone from residential than to downzone from commercial. The land has been residential for as long as she has lived there. She said something nice will be put there with creative planning. She asked council to consider the existing residents.

Mayor Weinbrecht closed the public hearing.

Mr. Frantz doesn't know if the current compromise is the answer. He encouraged both sides to work together before the P&Z hearing.

ACTION: Council referred 11-CPA-03 and 11-REZ-03 to the Planning and Zoning Board.

3. Site Development Plan Revisions 11-SP-018 (Annandale Center)

Location: Wake County PIN# 0763495767 – 406 Faculty Avenue

Current Zoning: Town Center (TC) in the Cottage Business and Residential (CB&R) sub-district

Proposed Zoning: Conversion of existing residence to personal service use

Town Center Review Commission Recommendation: Unanimously recommended approval

Proposed Council Action: Council may take action

Speaker: Mr. Kevin Hales

REQUEST

The applicant, Danny Howell, on behalf of the property owner, Patricia Johnston, has requested approval of a site plan to convert an existing 1,350-square foot single-family detached dwelling located at 406 Faculty Avenue into a dance studio (personal service) use.

NOTES: In accordance with the LDO, the Town Council must follow quasi-judicial procedures when deciding site plans.

SUBJECT PARCEL

Property Owner	Wake County Parcel Identification Number (PIN) (10-digit)	Real Estate ID Number	Deeded Acreage
Patricia T. Johnston 215 SE Maynard Road Cary, NC 27511-4509	0763495767	0070077	0.25
Total Area			0.25

BACKGROUND INFORMATION

Agent & Applicant	Danny Howell Bass, Nixon & Kennedy, Inc. 6310 Chapel Hill Road, Suite 250 Raleigh, NC 27607 (919) 851-4422 danny.howell@bnkinc.com
General Location Vicinity Map	Western side of Faculty Avenue, across from the Cary Arts Center
Land Use Plan Designation	Cottage Business and Residential
Base Zoning Districts	Town Center – Cottage Business and Residential
Existing Use	Single-family-detached Dwelling
Proposed Use	Personal Service
Staff Contact	Kevin A. Hales Town of Cary Planning Department P.O. Box 8005 Cary, NC 27512-8005 (919) 469-3944 kevin.hales@townofcary.org

SITE CHARACTERISTICS

Streams: According to both the documents submitted for review and the Town’s GIS maps, no streams impact the subject property.

Floodplain: According to both the documents submitted for review and the Town’s GIS maps, no floodplains or floodways impact the subject property.

Wetlands: According to the documents submitted for review, there are no wetlands located on the subject property.

Topography: The property slopes downward from Faculty Avenue toward the southwestern corner of the site. The change in elevation is approximately 15 feet.

Surrounding Land Uses:

- North – Single-family-detached Dwelling
- South – Vacant (stormwater device for Cary Elementary School)
- East – Cary Arts Center parking (across Faculty Avenue)
- West – Professional Office (parking for Bliss Real Estate)

PROJECT DESCRIPTION

The property owner proposes to convert the existing dwelling, with the removal of the existing garage, into a dance studio. The residential driveway would be closed and the applicant would widen Faculty Avenue to accommodate three new parallel parking spaces along the property’s frontage. The design of this parking would be consistent with new parallel parking spaces to be installed by the Town along

Faculty Avenue fronting the property immediately south of the subject property. Sidewalk would be provided across the property frontage and a new handicap access ramp would provide accessible entry to the building.

The removal of the driveway and garage impervious footprint provides the opportunity for the applicant to provide the on-street parking without requiring installation of a stormwater device on-site. As a result, the property would retain a more residential appearance. The plans also propose to supplement the perimeter buffers with shrubs and trees to meet the performance requirements.

SUMMARY OF PROCESS AND ACTIONS TO DATE

Pre-application Conference

The applicant attended a pre-application conference with the Town of Cary Development Review Committee on January 19, 2011.

Town Center Review Commission (TCRC)

The plan was presented to the TCRC on June 8, 2011 showing three on-site parking spaces. That plan received a unanimous recommendation for approval. Topics of discussion during the meeting included the amount of impervious surface being proposed on the site, whether gravel parking could be used in-lieu of asphalt, and whether changes to the façade had been considered.

As a result of the discussion at the TCRC meeting and with staff, the applicant revised the original plan to provide on-street parking in-lieu of the on-site parking originally proposed.

TENTATIVE SCHEDULE

Meeting	Date	Action
Town Center Review Commission	June 8, 2011	Forwarded to Town Council with an unanimous recommendation for approval
Town Council	August 9, 2011	

Comprehensive Plan Summary

Comprehensive Plan Element	Consistent	Not Consistent	Not Applicable
A. Land Use Plan	x		
B. Parks, Recreation, and Cultural Resources Facility Master Plan			x
C. Growth Management Plan			x
D. Affordable Housing Plan			x
E. Comprehensive Transportation Plan	x		
F. Open Space and Historic Resources Plan			x

A. Land Use Plan

The subject property is located in the Town Center Area Plan and is designated Cottage Business and Residential. This land-use designation includes single-family homes and light office or commercial uses that retain the appearance of single-family dwellings. The proposed conversion does not include significant changes to the existing site, retaining the residential appearance of the property.

B. Parks & Greenways Master Plan

The Parks, Recreation, and Cultural Resources Facilities Master Plan does not indicate any required improvements that would impact the proposed development.

C. Growth Management Plan

The Growth Management Plan is not applicable to the proposed development.

D. Affordable Housing Plan

The proposed development has no residential component; therefore, the Affordable Housing Plan does not apply to this development.

E. Comprehensive Transportation Plan

Faculty Avenue is designated as a local street

Existing Section: Two-lane, undivided within a 40-foot (approximate) right-of-way

Proposed Section: Two-lane, undivided within a 50-foot right-of-way (an additional 9.5 feet of right-of-way would be dedicated with this project to accommodate the on-street parking)

Sidewalks: None existing; sidewalk would be provided along the western side

Bicycle Lanes: None

Transit: The proposed development is located within walking distance of fixed C-Tran routes and the Cary Depot.

F. Open Space and Historic Resources Plan

The Open Space and Historic Resources Plan identifies no significant resources on the subject properties.

CONSISTENCY WITH THE LAND DEVELOPMENT ORDINANCE (LDO)

Traffic

The proposed use would not generate more than 50 peak-hour trips per day. Therefore, no Traffic Impact Analysis was required by the Land Development Ordinance.

Buffers and Streetscapes

Section 7.2.3 of the LDO exempts properties located within the Town Center (TC) zoning district from the strict application of the perimeter buffer requirements found in the majority of the Town. Since it is still desirable, in most cases, to provide a buffer between different but compatible land uses, the installation of a perimeter buffer that meets the performance criteria of the LDO is often provided.

The applicant has proposed a 10-foot buffer along the northern, the western, and the southern property lines consisting of a mixture of evergreen shrubs and deciduous trees. The existing wooden fences would remain along the northern and the western property lines, enhancing the performance of the proposed vegetation and meeting a Type A (Opaque) buffer. The vegetation proposed along the southern property line is required to meet a Type C (Aesthetic) buffer.

The applicant will install plantings in the streetscape along Faculty Avenue to maintain and complement the residential character of the community.

Architectural

The applicant has not proposed any changes to the existing residential building façades. A new handicap ramp is required to meet ADA accessibility requirements for the new use.

MINOR MODIFICATION to the Development Standards

Parking

Section 7.8.2(H) of the LDO allows council, as part of their approval of a development plan in Town Center, to approve a reduction of up to 50 percent in the number of designated parking spaces upon finding that the parking provided is sufficient to satisfy the expected parking based on the nature of the use, the number of trips generated, the time of day the trips occur, the extent that opportunity exists for shared trips, and/or the availability of on-street parking.

The proposed personal service use would require seven parking spaces based on the gross square footage of the existing structure that is being retained. The applicant originally proposed to provide three spaces (two normal and one handicap) on the site. Additionally, the applicant provided future expansion space to accommodate two additional spaces for a total of five on-site spaces if deemed necessary by the Town. Staff offers the following observations on the approval criteria for the requested parking reduction:

Nature of the Use: The applicant has proposed to use the existing structure as a dance studio, with only limited modifications to the interior. The internal layout of the structure is very residential in nature and would significantly limit the number of students.

Number of Trips Generated: The proposed personal service use would generate approximately three vehicle trips in the evening peak-hour (none in the morning peak-hour).

Time of Day: The applicant has indicated that the majority of classes would be held after-school and in the evenings. This would allow the proposed business to take advantage of available on-street parking located farther south on Faculty Drive if necessary. In addition, the parking at the Cary Arts Center could also be used when available.

Shared Trips: The applicant has indicated that the majority of students would be dropped off, reducing the demand for patron parking.

Availability of On-street Parking: The applicant would provide three additional on-street parking spaces along the property frontage.

Subsequent to the TCRC meeting, the applicant met with the Planning and Engineering Departments, and the Downtown Development Manager to request consideration of an alternative parking arrangement to replace the five on-site spaces with three on-street spaces, using available parking in the area as equivalent to the two "future" spaces shown in the original plan. Section 7.8.3(E) of the LDO allows the Town Council to consider alternative parking arrangements provided the plan satisfies the following criteria:

1. The proposed plan will protect surrounding neighborhoods;

Observations: Provision of on-street parking would significantly reduce the disturbed area on-site. This, in-turn, would provide more opportunity for the applicant to maintain the residential character of the property, especially within the rear of the property, which abuts the rear yard of an adjacent residential dwelling. The proposed on-street parking would represent the same number of spaces originally considered as acceptable by staff and the TCRC; however, with on-street parking installed, there would be less opportunity for future parking on-site should such parking be deemed desirable by the Town.

2. maintain traffic circulation patterns;

Observations: The on-street parking would be included in a widened portion of the street, limiting the impacts of the proposed parking on the traffic circulation along Faculty Avenue.

3. and promote quality urban design to at least the same extent as would strict compliance with otherwise applicable off-street parking standards.

Observations: The provision of on-street parking in-lieu of on-site parking is consistent with general urban design of downtown areas. Such provisions also eliminate the need for a stormwater control device on-site, which would represent a disruption of the residential character of the neighborhood.

CARY TOWN COUNCIL

WORKSHEET AND SUGGESTED MOTIONS

ACTION 1:

MOTION TO GRANT THE MINOR MODIFICATION TO THE DEVELOPMENT STANDARDS

Upon conducting a duly-advertised public hearing and considering the application materials, the testimony, and the evidence presented at the hearing or otherwise appearing in the record and upon considering the criteria of Section 7.8.2(H), I move that we **APPROVE** the request for minor modification to the development standards including the staff comments contained in the staff report [**ALT: with the following changes to the staff comments ____**] as findings to support the determination that the reduced number of required off-street parking spaces (5) will be sufficient to satisfy the demand for parking expected for the proposed use as described within the staff report.

MOTION TO DENY THE MINOR MODIFICATION TO THE DEVELOPMENT STANDARDS

Upon conducting a duly-advertised public hearing and upon considering the application materials, the testimony, and the evidence presented at the hearing or otherwise appearing in the record and upon considering the criteria of Section 7.8.2(H), I move that we **DENY** the request for minor modification to the development standards, finding that the reduced number of required off-street parking spaces (5) will not be sufficient to satisfy the demand for parking expected for the proposed use as described within the staff report, based on the following findings with regard to the criteria set forth in Section 7.8.2(H), which shall be set forth in the **DECISION**. Specifically, [choose the criteria below that have not been met and state the reason why it is not met.]

With regard to the nature of the use, the proposed modification would _____;

With regard to the number of trips generated, the proposed modification would _____;

With regard to the times of day when the use generates the most trips, the proposed modification would _____;

With regard to the extent to which other establishments are located on the same property and may reduce the number of vehicle trips required between different establishments, the proposed modification would _____;

With regard to the availability of nearby on-street spaces or public parking facilities, the proposed modification would _____.

ACTION 2:

MOTION TO GRANT PARKING ALTERNATIVE

Upon conducting a duly-advertised public hearing and considering the application materials, the testimony, and the evidence presented at the hearing or otherwise appearing in the record and upon considering the criteria of Section 7.8.3(E), I move that we **APPROVE** the proposed alternative to providing off-street parking including the staff comments contained in the staff report [***ALT: with the following changes to the staff comments*** _____] as findings to support the determination that the proposed alternative parking arrangement as described within the staff report is satisfactory with regard to the criteria listed in Section 7.8.3(E) of the LDO to at least the same extent as would strict compliance with otherwise applicable off-street parking standards.

MOTION TO DENY PARKING ALTERNATIVE

Upon conducting a duly-advertised public hearing and considering the application materials, the testimony, and the evidence presented at the hearing or otherwise appearing in the record and upon considering the criteria of Section 7.8.3(E), I move that we **DENY** the proposed alternative to providing off-street parking, finding that the proposed alternative parking arrangement as described within the staff report is not satisfactory to at least the same extent as would strict compliance with otherwise applicable off-street parking standards, based on the following findings with regard to the criteria set forth in Section 7.8.3(E), which shall be set forth in the **DECISION**. Specifically, [choose the criteria below that have not been met and state the reason why it is not met.]

With regard to protecting surrounding neighborhoods, the proposed alternative would _____;

With regard to maintaining traffic circulation patterns, the proposed alternative would _____;

With regard to promoting quality urban design, the proposed alternative would _____.

ACTION 3:

Section 3.9.2(l) of the Town of Cary Land Development Ordinance requires that the following five (5) criteria (in bold text below) be met in order for the Town Council to approve a Site Plan:

- (1) The plan complies with all applicable requirements of this Ordinance, including the development and design standards of Chapters 7 and 8 as well as the dedication and improvements provisions of Chapter 8 as well as all applicable Town specifications.**

Staff Comments:

Except as mentioned above in the Minor Modifications section, the proposed development plan complies with the LDO, the Community Appearance Manual, and all other regulations and plans as applicable.

TEST SATISFIED? YES NO

(2) The plan adequately protects other property, or residential uses located on the same property, from the potential adverse effects of the proposed development;

Staff Comments:

The plan proposed supplementation of the existing vegetation on site to satisfy the required performance criteria for the perimeter buffers. The provision of on-street parking would provide opportunity to limit disturbance of the rear yard, further strengthening the residential character of the project.

TEST SATISFIED? YES NO

3) The plan provides harmony and unity with the development of nearby properties;

Staff Comments:

The proposed plan preserves the residential character of the area through limiting the disturbances on-site. The plan also proposes to preserve the existing structure on the property.

TEST SATISFIED? YES NO

(4) The plan provides safe conditions for pedestrians of motorists and prevents a dangerous arrangement of pedestrian and vehicular ways;

Staff Comments:

The revised proposal now includes a continuation of the pedestrian facility being installed south of the site. The elimination of the driveway also eliminates a potential pedestrian/vehicular conflict.

TEST SATISFIED? YES NO

(5) The plan provides safe ingress and egress for emergency services to the site;

Staff Comments:

The existing structure is located toward the front of the site and adequate access for fire fighting purposes is available from the street. Sidewalk connections to the public sidewalk would also be provided to allow access for emergency personnel into the site.

TEST SATISFIED? YES NO

MOTION TO GRANT THE APPLICATION WITHOUT CONDITIONS

Upon conducting a duly-advertised public hearing and considering the application materials, the testimony, and the evidence presented at the hearing or otherwise appearing in the record and upon considering the approval criteria of Section 3.9.2, I move that we **APPROVE** the request including the staff comments shown on the worksheet [**ALT: with the following changes to the staff comments_____**] as findings to support the determination that the proposed development plan meets all of the approval criteria set forth in Section 3.9.2.

MOTION TO DENY THE APPLICATION

Upon conducting a duly-advertised public hearing and upon considering the application materials, the testimony, and the evidence presented at the hearing or otherwise appearing in the record and upon considering the approval criteria of Section 3.9.2, I move that we **DENY** the request, finding that the proposed development plan does not meet all of the approval criteria set forth in Section 3.9.2 based on the following findings, which shall be set forth in the **DECISION**. Specifically, the application does not: [choose the criteria below that have not been met and state the reason why it is not met.]

- The plan does not comply with all applicable requirements of this Ordinance, including the development and design standards of Chapters 7 and 8 as well as the dedication and improvements provisions of Chapter 8 as well as all applicable Town specifications because _____;
- The plan does not adequately protect other property, or residential uses located on the same property, from the potential adverse effects of the proposed development because _____;
- The plan does not provide harmony and unity with the development of nearby properties because _____;
- The plan does not provide safe conditions for pedestrians or motorists and does not prevent a dangerous arrangement of pedestrian and vehicular ways because _____;
- The plan does not provide safe ingress and egress for emergency services to the site because _____.

The deputy town clerk administered oaths to persons wishing to speak at this public hearing (attached to and incorporated herein as **Exhibit C**).

Council members had no ex parte communication to disclose.

Planner Kevin Hales outlined the staff report herein (refer to Pages 46 through 65 of Exhibit A). He stated the site plan before council was revised to provide on-street parking in-lieu of the on-site parking originally proposed. This will be a continuation of the current downtown parking pattern of on-street parking and will allow the applicant to put in a sidewalk along Faculty Drive frontage, tying into the sidewalk being provided by the Town south of this property. The new plan represents only approximately 1,000 square feet of additional impervious surface, and parking lot lighting will not be needed. It also represents a covered porch, which will need to be reviewed at the staff level.

Attorney Beth Trahos, applicant's representative, provided affidavits for expert witnesses (attached to and incorporated herein as **Exhibit D**) who were available for expert testimony. She said the applicant has worked with Town staff to prepare a site plan that accommodates the use and will be attractive.

The applicant, Patricia Johnson, wants to provide a social and cultural experience for the town. Scottish dance classes have a small number of students per class. Most classes will occur during after school hours and will not affect traffic near the school on Faculty Avenue. They plan to have two dance studios within the existing house; one class will have four to five students, and the other will have about eight students. The applicant doesn't anticipate multiple classes occurring at the same time.

Project Engineer Danny Howell stated the existing house is 1,352 square feet. He said most of the impervious surface to be added will be for parking spaces in the right-of-way. This is a reduction of impervious surface from the original plan, which allows the removal of the proposed on-site BMP and causes no need for the proposed bio-retention area in the rear of the lot. The on-street parking also allows the driveway to be located in a more visually safer area. On-street parking gives a pedestrian friendly environment and tends to slow traffic. The proposed use has an urban feel, but it keeps the residential feel of the neighborhood. His professional opinion is that the proposed use will provide harmony and unity of the neighborhood, while providing a safe and pedestrian friendly environment.

Ms. Trahos asked Mr. Howell to speak to the parking.

Mr. Howell said there will probably be students (kids and adults) dropped off for dance classes. There is adequate parking in the front and additional parking on-street, as well as surplus parking at the Cary Arts Center and the elementary school.

Ms. Trahos asked if it was Mr. Howell's professional opinion that the proposed parking modifications meet the Town's ordinance requirements. Mr. Howell said yes.

Ms. Trahos asked if the Town required a traffic study. Mr. Howell said no; the use does not generate more than 50 trips a day.

Mrs. Robinson asked if the three on-street parking spaces will be reserved for the dance facility. Mr. Howell said no; it will be public parking.

Landscape Architect Chris Pope stated they were excited about the reduction of pavement with the revised plan. He said the original proposal required a 27-foot driveway and a BMP with high-cost and long-term maintenance impacts.

Ms. Trahos asked Mr. Pope to comment on the comprehensive plan and the appropriateness of this use in the Town Center District. Mr. Pope said the reduction of impervious surface aligns with one of the subdistrict goals, which is to maintain the neighborhood residential feel of development. He said the applicant will also be able to redirect money that would have been spent on pavement into upgrading the appearance of the building. The revised plan will help maintain or achieve the comprehensive plan goals.

Ms. Trahos asked Mr. Pope to comment on the design of the use to comport with adjacent residential uses. Mr. Pope said the use is a low impact business that will not adversely affect the adjacent residences.

Real Estate Broker Sharon Riccobono said she sold the house to the applicant.

Ms. Trahos said that concludes her initial presentation.

Mayor Weinbrecht asked for speakers in favor of the proposal; no one spoke.

Mayor Weinbrecht asked for speakers in opposition to the proposal.

John Duncan, adjacent property owner, said he is not opposed to the site plan and the proposed use. His concern is with the possible traffic impact on the Cary Arts Center and the school traffic. He said if the three parking spaces remain public, the dance students may not get a parking space because of the closeness to the Cary Arts Center.

Mayor Weinbrecht asked if Mr. Duncan's only concern was the parking. Mr. Duncan stated his main concern is the loading and unloading of students on a two-lane road.

There were no other speakers in opposition to the proposal.

Ms. Trahos asked Mr. Howell how many parking spaces are being made with the Town's Faculty Avenue on-street parking project adjacent to the site. Mr. Howell thinks nine parking spaces will be made.

Ms. Trahos asked how the parking is being done. Mr. Howell said it's parallel and set back from the road.

Ms. Trahos asked if that would make it easier for moving vehicles to pass parked vehicles on Faculty Avenue. Mr. Howell said yes; it will not impede the flow of traffic.

Ms. Trahos asked if spaces are sufficient for the proposed use. Mr. Howell said yes.

Ms. Trahos asked if it is Mr. Howell's professional opinion that there will be sufficient ingress/egress for emergency vehicles. Mr. Howell said yes.

Ms. Trahos asked if Mr. Duncan has any type of professional state licenses. Mr. Duncan said no. He said his expertise comes from living on that corner for 35 years.

Ms. Robison asked staff to address the issue of signage identifying the three parking spaces specifically for this facility. Mr. Hales said staff was not supportive of restricting the parking spaces because they are in the public right-of-way.

Mrs. Robison asked if additional on-street parking spaces being installed by the Town will also be in the right-of-way. Mr. Hales said yes, and they will also be for public parking.

Mrs. Robison asked if the parking spaces would be immediately adjacent to the site. Mr. Hales said yes.

Mrs. Robison asked if the parking spaces will be marked. Mr. Hales said yes.

Mrs. Robison asked if the additional public parking spaces would be installed in time for this project. Mr. Hales believes they will be.

Mr. Frantz asked if the applicant prefers the most current proposed plan. Ms. Trahos said yes, but if council prefers the previous plan they will revert back to it.

Mr. Frantz asked if the approval of the proposed project would prohibit a future driveway or additional parking. Mr. Hales said the proposed on-street parking would have to be removed and replaced with on-site parking. Mayor Weinbrecht noted the BMP's would then have to be installed.

Mrs. Robison asked if there is anything that would prohibit revisiting signage for parking in the public right-of-way if the proposed parking becomes a problem. Mr. Hales said he is not sure the engineering department or the police department wants enforced parking for use.

Ms. Trahos said the Town retains the right to regulate parking within its right-of-way, even if it means limiting parking during certain hours.

Mr. Frantz asked for TCRC's comments on the revised plan. TCRC chair Julia Rudy believes the committee would be favorable to the revised plan, mainly due to the reduction of impervious surface.

Mr. Frantz said the proposed use fits with adjacent uses. He likes the first site plan better, but he likes the reduction in impervious surface. He understands that additional parking could be added in the future if needed.

Mrs. Robinson asked for clarification of Action 3 noted in the staff report. Mr. Hales said it is currently a personal service use and would be allowed under that approval.

Mr. Smith believes a close working relationship will be needed between staff and residents with these type of site plans, which will be more prevalent in the town center. He stated police working with the cueing effort would help things run smoothly.

Mrs. Robison suggested a time period for checking on the parking to determine if signage is needed.

Mayor Weinbrecht asked for additional evidence that warrants a continuance of this hearing. No one spoke; he closed the public discussion.

ACTION: Mr. Frantz moved to approve the requested parking reduction. Mrs. Robinson provided the second; council granted unanimous approval.

ACTION: Mr. Frantz moved to approve the requested alternative to onsite parking. Mrs. Robison provided the second; council provided unanimous approval.

ACTION: Mr. Frantz moved to approve the proposed site plan. Mrs. Robinson provided the second; council granted unanimous approval.

Mayor Weinbrecht closed the quasi-judicial public hearing.

F. LAND DEVELOPMENT DISCUSSION ITEMS (any item pulled from the land development consent agenda for discussion [item B.2. on this agenda] will be discussed during this portion of the agenda)

G. COMMITTEE REPORTS (discussion items)

1. Planning and Development Committee, July 20, 2011 *(any committee consent agenda item pulled for discussion will be discussed at the end of the committee discussion portion of the agenda, which is item G on this agenda)* **(Mrs. Adcock)**
 - a. **Austin Foods Redevelopment (11-SP-016) – Request to Waive Roadway Improvements** (EN12-007)
Committee unanimously recommended approving a request for a waiver of LDO required roadway improvements along the north side of East Durham Road as a requirement for site plan approval of Austin Food Redevelopment Plan (11-SP-016).

STAFF REPORT

Planning and Development Committee, July 20, 2011

Austin Foods Redevelopment (11-SP-016) – Request to Waive Roadway Improvements (EN12-007)
Consideration of a request to waive required roadway improvements along East Durham Road

Speaker: Mr. Jerry Jensen

From: Tim Bailey, Engineering Director

Prepared by: Jerry J. Jensen, P.E., Traffic & Transportation Engineering Manager

Approved by: Benjamin T. Shivar, Town Manager

Approved by: Michael J. Bajorek, Assistant Town Manager

Executive Summary

The applicant for Austin Foods Redevelopment Plan has requested a waiver for roadway improvements along the north side of East Durham Road as a requirement for site plan approval. The applicant is seeking a waiver from the following LDO requirements: installation of approximately 80 linear feet of curb and gutter, approximately four to five feet of pavement widening associated with the installation of curb and gutter, and approximately 330 linear feet of concrete sidewalk along the entire frontage. Staff recommends that Town Council deny the request to waive LDO required roadway improvements.

Background

A site plan has been submitted to the Town for approval of the Austin Foods Redevelopment Plan (11-SP-016) located on the north side of East Durham Road, immediately west of East Chatham Street. The property is a Brownfield Remediation site, and it is the applicant's stated intention to improve the site primarily for environmental remediation reasons. There are two existing structures on the property, which will be retrofitted to facilitate a 6,256 square foot warehouse building and a 1,727 retail building. In addition, the applicant proposes to improve the existing gravel parking lot with pavement, add a stormwater BMP, and relocate the existing driveway on East Durham Road. The property has approximately 330 feet of frontage along East Durham Road. Approximately one-half of the frontage has existing curb and gutter, but there is no existing sidewalk.

Constructing missing curb and gutter and sidewalk along Durham Road are requirements of site plan approval for the project as outlined in LDO Section 8.1.3 (A) (3) and (4) as provided below:

- 8.1.3 (A) (3) Install curbs and gutters along all streets adjoining the property and to pave all streets adjoining the property, in accordance with the requirements set out in the Town's Standard Specifications and Details Manual and the Town's Comprehensive Transportation Plan;
- 8.1.3(A) (4) Install sidewalks and pedestrian pathways in accordance with the requirements set out in the Town's Standard Specifications and Details Manual where the Town Council or Planning and Zoning Board determines that the public safety and convenience warrant in view of existing and expected pedestrian traffic.

The applicant proposes to construct approximately 70 feet of missing curb and gutter on East Durham Road that will terminate at the relocated driveway. The applicant is now seeking a waiver from the LDO requirement to install approximately 80 linear feet of curb and gutter, approximately four to five feet of pavement widening associated with the installation of curb and gutter, and approximately 330 linear feet of concrete sidewalk along the entire frontage.

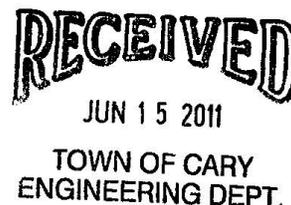
Discussion

The applicant has provided a letter (attached herein) explaining the purpose of the redevelopment project as well as justification for the waiver request. The applicant states that the objective for improving the site is to promote the environmental remediation work of the property, not development per se. As part of the remediation work, the selected remedy is intended to create a barrier over the contamination, while disturbing the site as little as possible.

Reland Development, LLC
4108 Darlington Place
Raleigh, NC 27612
Phone 919-782-1703

June 8, 2011

Mr. Jerry J. Jensen
Engineering Department
Town of Cary
P.O. Box 8005
Cary, NC 27512-8005



Re: Reland Development Brownfield Remediation Site Plan

Dear Mr. Jensen:

We have reviewed the Town of Cary's Development Review Committee's April 10, 2011 letter to Commercial Site Design regarding our proposed site plan. Based on the Town of Cary's comments and the fact that the subject site is contaminated, we respectfully request that certain of the requested design revisions be waived.

As you may be aware, the site was formerly used for the manufacture of pesticides and also for a business that cleaned and reconditioned steel drums. These operations are believed to be the source of the soil and groundwater contamination that includes volatile and semi-volatile organic compounds, organochlorine pesticides, and toxic metals. As you may also be aware, Reland Development entered into a Brownfield Agreement with the North Carolina Department of Environment and Natural Resources ("DENR") in order to implement a remedy for the contamination and put the property back into productive use. The negotiated remedy includes source removal, application of engineered controls, and land use restrictions. DENR has determined that these measures are sufficiently protective of human health and the environment within the context of the intended use. For the foreseeable future Reland intends to use the existing structures as currently zoned with only minor renovation.

We request that the provision to install sidewalks, additional curb and gutter, and to widen the road be waived for the following reasons:

1. There is documented evidence that land adjacent to the Reland property is contaminated; this includes the right of way and the storm water ditch that has received contaminated run-off for nearly 40 years.
2. Roadways and roadway shoulders are notorious for petroleum and toxic metal impacts from automobiles; other contaminants are also quite common.
3. The presence of contaminants in these work areas outside our property boundary will create assessment and remediation liabilities for which we are not responsible.
4. There are other potential contaminant sources in the immediate area and assigning responsibility for the contaminants that will be discovered will be very difficult.
5. Off site contamination would likely be under the jurisdiction of the Inactive Hazardous Sites program not Brownfields. Their respective missions are very different.
6. The Brownfield remedy approved by DENR will make the site safe for the intended use. However, sidewalks will encourage pedestrian traffic over and above that normally associated with office and warehouse use. The Brownfield Agreement did not anticipate uncontrolled access to the site by the general public.

Reland has indicated to the Town of Cary on multiple occasions that the objective of submitting the site plan is to promote the environmental remediation work and not development per se. The selected remedy

is intended to create a barrier over contamination while disturbing the site as little as possible. Constructing the requested improvements will increase soil disturbance and create unnecessary liabilities. You should know that the environmental remediation cost already exceeds the tax value of the property by several multiples. The requested improvements will be an unnecessary financial burden to the project and will compromise the remediation effort. When representatives of Reland and the former owner met with the Cary Planning Department in June of 2009 we were assured that the site conditions and the Brownfield remedy would be taken into consideration in the site plan review process; we hope this is still the case.

We believe that our plan for addressing the legacy contamination at this site is good for the environment and good for Cary. We hope that The Development Review Committee will consider our request and approve our site plan soon so that we can begin our remediation during optimum weather.

Please do not hesitate to contact me if I answer any questions or provide you with additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Deakle", written in a cursive style.

Jerry Deakle
Managing Member

Staff does not support the waiver request on the basis that curb and gutter, and sidewalk improvements are consistent requirements of any site plan approval, and it is the desired goal of the Town to have streets with curb and gutter and sidewalk. In addition, if the applicant is granted the waiver, then the Town will be responsible for the installation of these improvements in the future; whereby, the Town could be exposed to the assessment and remediation liabilities if contaminated soils are encountered.

Fiscal Impact

There is no immediate fiscal impact to the Town of Cary based on staff's recommendation.

Staff Recommendation

Staff recommends that Town Council deny the request for a waiver to LDO required roadway improvements along the north side of East Durham Road, as a requirement for site plan approval of Austin Food Redevelopment Plan (11-SP-016).

Engineer Jerry Jensen outlined the staff report herein. (Refer to Pages 89 through 91 of Exhibit A.) He said the property is made up of two parcels with a total acreage consisting of approximately two acres. The applicant's main purpose is to implement a remedy for the contamination on the site and put the property into productive use. The long-range goal is to redevelop the property for higher and better uses once the market demand is established. The brownfield remediation plan was negotiated with the North Carolina Department of Environment and Natural Resources (DENR) and the property owner, and basically consisted of: 1) source removal of hard contaminated soils; 2) application of engineered controls, which consist of capping the contaminated soil areas with paving, gravel or crushed stone; and 3) DENR restrictions; generally limited to no day care facilities, residential uses, or other similar type uses.

Mrs. Adcock stated the northeastern parcel was a pesticide business and the western parcel was Cary Barrel and Drum. Both businesses left this site with soil and groundwater contamination, most of which occur in the top several feet of topsoil. The applicant is proposing to remove from 1,000 to 2,000 cubic yards of soil on the larger tract, and pave the parking lot to prevent rain water from contacting the contaminated soil and washing off the site. The bio-retention basin will capture 100 percent of the stormwater. A cut-out of the contaminated soil of about two feet around the bio-retention basin will decontaminate the rainwater as it's absorbed. The vegetation, debris and soil on the west side of the smaller tract will be replaced with compacted crusher run, which is a fine stone that will create a barrier between the surface and subsurface to prevent penetration. She said the applicant wants to rehabilitate this unusable site. The property will not be returned to its natural state, but will be sufficiently mitigated to make it safe for its intended use.

Mr. Frantz said the proposed project will be a much better product for Cary. The property owner will have to address road improvements if the property is redeveloped in the future.

Mayor Weinbrecht said the applicant is proposing decontamination of the property and stormwater BMP's to help control further decontamination. He said the Town currently has no road extension plans for this area.

Mrs. Robinson asked if a more thorough cleanup is anticipated at the time of a future redevelopment. Mr. Jensen said that question is unknown at this time. The current remediation plan is a negotiated settlement on how to minimize risk for anyone who uses the site.

Mrs. Adcock understands that if redevelopment occurs, particularly if a change of use is proposed, more remediation would be needed.

Mrs. Robinson asked if a partial clean up is typical. Mr. Jensen said the contamination encountered on this site warrants the proposed type of treatment/remedy in order to reuse the site.

Mrs. Robinson asked if staff has major concerns about the unknown factors that the Town may encounter if it installs the sidewalks. Mr. Jensen said staff believes it would be an encumbrance upon the Town because of the cost of construction and the possibility that experts would be needed for handling and processing any contaminated soils.

Mrs. Robinson asked if a payment-in-lieu was discussed with the applicant. Mr. Jensen said no, but it could be an option at council's discretion.

Mayor Weinbrecht asked if widening of the road is in the Comprehensive Transportation Plan. Mr. Jensen said the widening required is to add curb and gutter to be consistent with existing improvements on East

Durham Road. He said four or five feet of right-of-way would be needed to establish two-way traffic with bike lanes. He added that only two-lanes of road are needed for the planned round-about at the intersection of Durham Road and Chatham Street.

Mrs. Adcock stated establishing a fair fee for a payment-in-lieu would be difficult with so many unknowns.

Mrs. Robison asked if another waiver request would be needed if changes are made to this site..
Mr. Jensen said yes, but at staff approval level.

Mrs. Robison asked if staff reviewed the Brownfield Agreement. Mr. Jensen is not aware that staff has reviewed it, but staff has spoken at length with the owner about the main points in the agreement.

Mrs. Robison stated there is not enough information to support this request.

Mr. Jensen said based on engineering's recommendation, there are concerns with unknown factors regarding the widening of East Durham Road.

Mrs. Robison asked if potential future cleanup efforts would be possible if the waiver request is approved. Mr. Jensen said the same requirement would be made for any future redevelopment of this property.

ACTION: Mr. Frantz moved to approve 11-SP-016. Mrs. Adcock provided the second.

Ms. Adcock stated the issue to be considered is the waiver of street improvements. She said DENR's job is to determine a sufficient remediation.

Mr. Smith said he's not comfortable with taking on any risk at this time.

Mrs. Robison agrees. She wants assurance from DENR that this won't provoke additional risks in any way to any party, and it doesn't alleviate any responsibility of the original polluter.

Mr. Frantz stated the environmental concern associated with this property will only get worse if nothing is done.

ACTION: Mayor Weinbrecht called for a vote on the motion. Mr. Smith and Mrs. Robison voted "no"; all others voted "aye". The motion passed by a majority vote.

b. LDO Amendments – 11-LDO-04 (PL12-003)

Committee unanimously recommended setting a public hearing date of August 25, 2011 for the proposed LDO text amendments included in 11-LDO-04 with some slight adjustments to Item 1B: Bed and Breakfast Use and Item 1D: Non-Conforming Lots of Record. Committee recommended Option 1 of Item 2A, and requested staff to bring back for consideration at a future date a draft amendment to the LDO concerning the location of accessory structures on residential lots in relation to the principal structure. Committee also recommended Option 1 of Item 2B and requested staff to bring back for consideration at a future date a draft amendment to the LDO that would allow businesses with permanent locations to temporarily expand their sale of seasonal products to additional locations on their sites.

STAFF REPORT

Planning and Development Committee, July 20, 2011

LDO Amendments – 11-LDO-04 (PL12-003)

Review of proposed amendments to the Land Development Ordinance, and consideration of setting a public hearing, and provide direction to staff concerning potential amendments regarding the location of accessory structures in relation to a residence on a lot, and temporary retail sales in parking lots.

Speaker: Mr. Wayne Nicholas

From: Jeffery G. Ulma, AICP, Planning Director
Prepared by: Wayne P. Nicholas, AICP, Planning Manager
Approved by: Benjamin T. Shivar, Town Manager
Approved by: Michael J. Bajorek, Assistant Town Manager

Executive Summary

Staff has compiled a series of amendments to the Land Development Ordinance in response to concerns identified by the Town Council, Planning and Zoning Board, and staff. Staff seeks council direction regarding certain amendment items, feedback on other potential amendments, and recommends that council schedule a public hearing for the proposed amendments for August 25, 2011.

Tentative Schedule for 11-LDO-04 (Round 17) LDO Amendments

Planning and Development Committee	July 20, 2011
Advertisements in <i>The Cary News</i>	<i>August 10, 2011*</i> <i>August 17, 2011*</i>
Public Hearing	<i>August 25, 2011*</i>
Planning and Zoning Board Worksession	<i>September 12, 2011*</i>
Planning and Zoning Board Meeting	<i>October 17, 2011*</i>
Final Action by Town Council	<i>November 17, 2011*</i>
Effective	Upon Adoption

* Italicized dates are tentative.

Background

Staff has identified amendments to various portions of the Land Development Ordinance text to be included in LDO Amendment 11-LDO-04. A summary of the proposed amendments for which preliminary text has been drafted is provided below.

In addition, staff seeks direction from the Committee regarding the possible development of two additional amendments that may be included in a future round of amendments.

The staff contact for the amendments included in this report is Wayne Nicholas, Planning Manager.

1. Proposed Land Development Ordinance Amendments

Item A: Miscellaneous Administrative and Procedural Changes and Corrections

The proposed amendment would:

- *correct unintentional omissions that occurred during the recent update of the Town's sign regulations, correct typographical errors, and, correct a section reference to the Town Charter;*
- *replace a graphic to clarify how protest petition validity is calculated;*
- *clarify density limits for multifamily use in the Mixed Use Overlay District and Planned Development District;*
- *clarify and correct several procedural provisions related to quasi-judicial hearings;*
- *include buffer setback requirements in both Chapter 6 and Chapter 7 for ease of reference; and*
- *clarify that some development in or disturbance of buffers might occur for public purposes.*

Item B: Bed and Breakfast Use

The proposed amendment would provide approval procedures and development standards for bed and breakfast facilities in locations outside of the Town Center (where currently permitted).

Item C: Size of Accessory Structures

The proposed amendment would increase the allowable size of certain types of structures accessory to residential uses on lots larger than one acre. (Currently, the total of all accessory structures may be no greater than 33 percent of the area of the principal structure).

Item D: Non-Conforming Lots of Record

The proposed amendment would allow recorded lots that are made non-conforming under certain situations to be viewed as conforming lots for purposes of maintenance and/or future development.

Item E: Modifying Placement of Streetscape Vegetation

This amendment would allow greater flexibility in the location of required streetscape vegetation to facilitate appropriate visibility/identification of features intended for public purposes. The required number of plantings in the streetscape will not be reduced by this change.

2. Issues/Concerns Needing Town Council Direction

a) Location of Accessory Structures in Relation to Residence

Background:

The LDO contains requirements for locating accessory structures on lots. These apply to various types of detached accessory structures such as garages, sheds, carports, and similar construction. The regulations require that accessory structures shall not be located in the required front setback or corner side setback on a lot, and shall not be located within five feet of the rear or side lot lines or the edge of a required buffer. The purpose of such setbacks is to help maintain a consistent appearance among the principal structures in an area, as well as to avoid having accessory structures appear as the dominant feature on a lot as opposed to their intended purpose as incidental or subordinate to the principal use of the property.

In addition to the requirements noted above, the LDO also stipulates that accessory structures located closer than five feet to the principal structure shall be deemed attached to the principal structure. In other words, if located closer than five feet to the principal structure, the detached structure (due to its close proximity) would need to meet the more restrictive setbacks required of the principal structure. This requirement is also intended to help minimize the potential for detached accessory structures to dominate the appearance on a lot.

Staff has received concerns from citizens about the location requirements for accessory structures and the resulting types of development that can occur. Of particular concern is the potential for accessory structures to be located in front of the principal structure, especially in residential settings. As noted above, an accessory structure is only required to be outside of the minimum required front setback. If the front of a principal structure (such as a dwelling) were constructed adjacent to the minimum front setback, then any accessory structure(s) would also be no closer to the front of the lot than the principal structure. However, if a principal structure is built further back on a lot (i.e., beyond the minimum front setback), then the potential exists for accessory structures to be located closer the front of the lot than the principal structure. While this may not be as common an issue on larger lots in less-dense areas, this can be problematic in areas with smaller lots and less spacing between dwellings.

In response to the above concerns, staff has evaluated two options for consideration by Town Council:

Option 1:

Amend the current LDO requirements to require that accessory structures on residential lots, with the exception of detached garages and carports, shall not be closer to the front of a lot than the principal structure. Garages, structures located between the minimum front setback and the setback of the front of a dwelling must be attached to the principal structure by at least 50 percent of the attached side of the garage. If the garage or carport is detached then it must be at the same

setback distance of the existing structure or greater and not be closer than five feet from the principal structure.

Pros:

- This would prevent a garage from being built that may dominate the front yard of the lot; and
- This may better protect the character of existing neighborhoods.

Cons:

- This may make some existing structures non-conforming; and
- This may further limit the expansion/redevelopment of existing homes, especially for irregular-shaped lots.

Option 2:

Do not amend the current LDO requirements.

Pros:

- Would not create non-conforming structures; and
- Allows homeowners more use of their lots for expansion/re-development.

Cons:

- Potential for accessory structures to be located in a manner that may appear inconsistent with the intended use as incidental and/or subordinate to the principal structure; and,
- May prevent the Town from addressing citizen concerns regarding the appearance of their existing community.

Staff is seeking general feedback and direction from the Town Council on the above options.

b) Temporary Retail Sales in Parking Lot

Background:

The LDO currently contains two separate provisions for the temporary sale of products on a site: the sale of agricultural products grown off-site; and, the sale/display of goods other than agricultural products. The first provision allows the sale of agricultural products from vacant property, as well as developed sites where the principal use is retail sales. The latter provision is interpreted to apply only to merchants that do not already have an established place of business in the town. The purpose of such a provision on temporary sales is to prevent permanent seasonal expansion of businesses into parking lots or other areas without expanding their permanent facilities. Under a separate provision in the LDO, businesses with a permanent location already have the opportunity for outdoor display/sales of their own products immediately adjacent to the storefront.

Staff has received inquiries from businesses, including Home Depot and Lowe's, about adding flexibility to the current requirements regarding the temporary sale/display of goods on an already developed site. In particular, businesses that already have a permanent location have requested the ability to temporarily sell seasonal products (not necessarily agricultural) in location(s) on their sites that would be in addition to their storefront areas.

In response to these requests, staff has evaluated two options for consideration by Town Council:

Option 1:

Amend the current LDO requirements to allow businesses with permanent locations to temporarily expand their sale of seasonal products to additional locations on their sites.

Pros:

- Provides businesses that deal with seasonal products the opportunity to temporarily expand their activities without making significant expenditures;
- Allows for more effective use of excess parking areas on a site; and

- Provides opportunities for increased availability of certain goods/products that are in high demand at certain periods of the year.

Cons:

- The appearance of products/goods in a parking lot may take away from the aesthetics of the site;
- Placing these goods in a parking lot area may increase the potential for accidents between pedestrians and automobiles;
- Without additional restrictions, businesses can do this on a permanent basis each year for up to 180 days; and,
- Determining “seasonal” products may be difficult to implement/enforce (e.g., should an item that is available throughout the year be allowed with “seasonal” products?); and
- Parking lots or other areas on sites may become an area for unscreened, outdoor storage of products/goods (e.g. mulch piles, equipment, building materials, etc.).

Option 2:

Do not amend the current LDO requirements.

Pros:

- Prevents areas of excess parking from potentially becoming permanent seasonal expansions of such businesses;
- Encourage the construction of permanent structures that are more compatible in appearance with other structures on a site; and
- Maintains the attractive appearance of businesses within Cary.

Cons:

- Enforcement/compliance demands on staff;
- Unauthorized displays/sales could increase potential for problems with pedestrian/vehicle circulation on sites; and
- Business owners may find it financially difficult to provide a permanent expansion for seasonal goods.

Staff is seeking general feedback and direction from the Town Council on the above options.

Fiscal Impact

Implementation of most of the recommendations should be absorbed by existing staff. The extent of the fiscal impact will not be known until specific ordinance requirements are implemented.

Staff Recommendation

Staff recommends that council:

1. Set a public hearing date of August 25, 2011 for the proposed LDO text amendment items A through E included in 11-LDO-04 attached below.
2. Provide direction to staff regarding the location of accessory structures in relation to a residence on a lot (2a), and temporary retail sales in parking lots (2b).

LAND DEVELOPMENT ORDINANCE TEXT AMENDMENTS

11-LDO-04 LDO Amendments (Round 17)

Planning and Development Committee

July 20, 2011

ITEM A – Miscellaneous Administrative and Procedural Changes/Corrections

ITEM A-1 Minor Correction/Clarification

BACKGROUND

The proposed amendments would accomplish the following: 1) correct unintentional omissions that occurred during the recent update of the Town’s sign regulations; 2) correct a typographical error; and 3) correct a reference to the Town Charter.

1) Signs Requiring Permits

The proposed changes would correct omissions and oversights that occurred in the recent revamping of the Town’s sign regulations.

PROPOSED TEXT

9A.1.5 Plans and Permits Required

Permits are required for the following permanent sign types: Awning, Directory, Menu Board, Principal Ground, Entry Monument, Suspended, Projecting, Wall, and ~~Neon~~ Verandah.

9A.3.1(M) Mailbox Sign

Signage on mailboxes shall be limited to that allowable under U.S. Postal Service Provisions, and shall also be limited to individual name(s) and the address of the property served by the mailbox.

TABLE 9A.3-1: TABLE OF PERMITTED PERMANENT SIGNS			
Sign Type		Sign Permit	Conditions
Awning Sign		Required	9A.3.1(A)
Directory Sign	Directory Ground Sign	Required	9A.3.1(B)(1)
	Wall-Mounted Directory Sign	Required	9A.3.1(B)(2)
Permanent Flagpoles With Flags		Not Required	9A.3.1(C)
Identification Sign		Not Required	9A.3.1(D)
Incidental sign		Not Required	9A.3.1(E)
Menu Board		Required	9A.3.1(F)
Principal Ground Sign		Required	9A.3.1(G)
Entry Monument Alternative to Principal Ground Sign		Required	9A.3.1(H)
Projecting Sign		Required	9A.3.1(I)
Suspended Sign		Required	9A.3.1(J)
Verandah Sign		Not Required	9A.3.1(K)
Wall Sign	Single-Tenant Buildings	Required	9A.3.1(L)(2)
	Multi-Tenant Buildings	Required	9A.3.1(L)(3)
	Multi-family or Institutional Buildings in Residential Districts or PDDs	Required	9A.3.1(L)(4)
	Theatres	Required	9A.3.1(L)(5)
<u>Mailbox Sign</u>		<u>Not Required</u>	<u>9A.3.1(M)</u>
Menu Box (Allowed only in Town Center and Mixed Use Overlay District)		Not Required	9A.3.2(A)
Neon Sign (Allowed only in Town Center and Mixed Use Overlay District)		<u>Not</u> Required	9A.3.2(B)

2) Typographical Errors

The proposed changes would correct typographical errors.

PROPOSED TEXT

10.5.1 Nonconforming Signs Protected

..... Further, any nonconforming sign or any new sign that is part of a Master Sign Plan (formerly known as a ~~Master~~ Uniform Sign Plan) within a Planned Development

11.2.3 Inspections

The Directors ~~or~~ of Planning, Engineering, and/or Inspections and Permits or his or her designees shall have the authority,

3) Correct Reference to Town Charter

The proposed amendment would correct a reference to the Town Charter to be consistent with a change in the numbering system that occurred when the Charter was restructured in February 2011.

PROPOSED TEXT

3.24.1 Authority

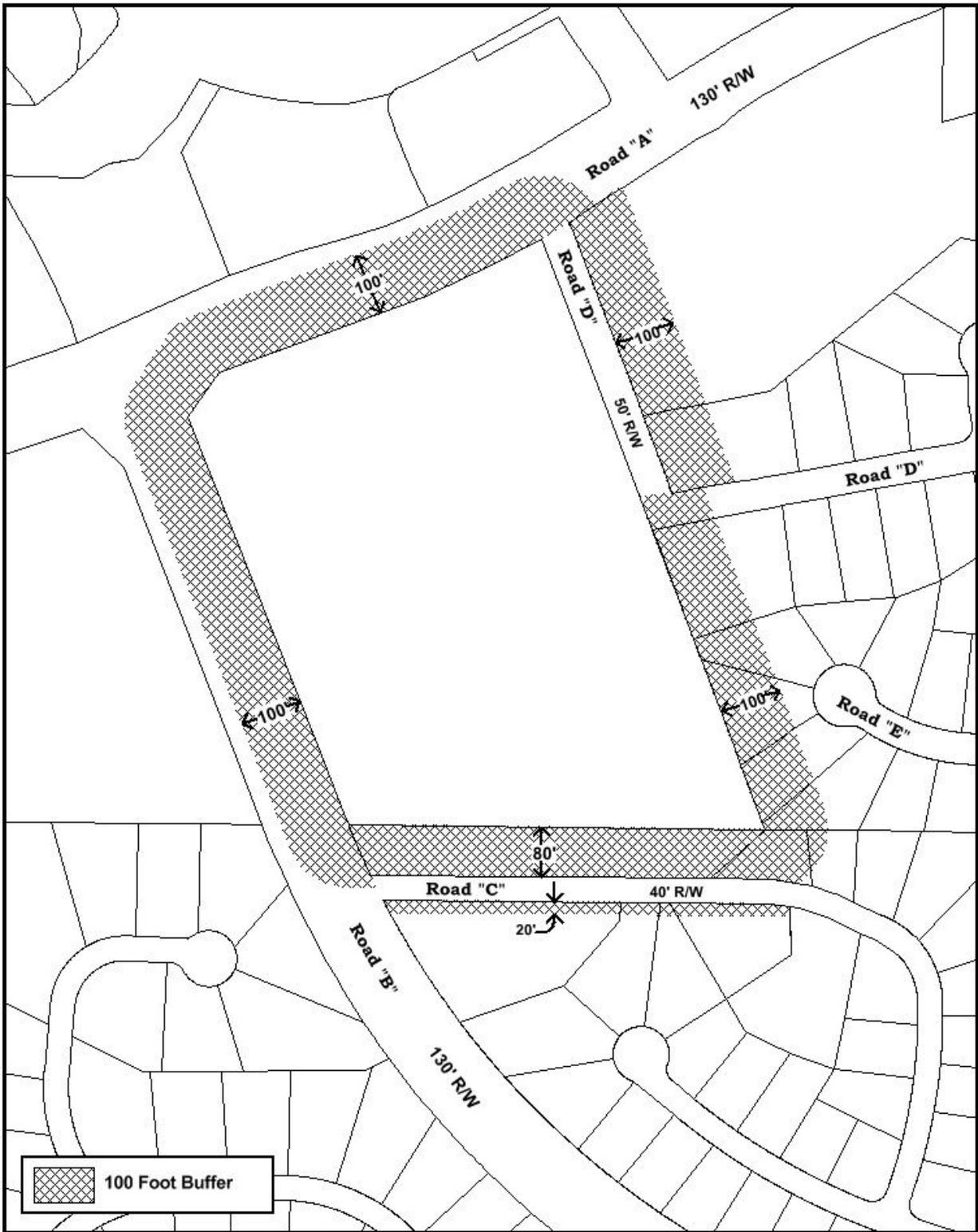
..... This Ordinance is authorized by Charter ~~Sec. 8.10~~, App. 2.11, G.S. 160A-309, G.S. 160A-320 and G.S. 160A-499. Town approval authority for agreements under this section shall be governed by general Town contracting authorizations and delegations.

ITEM A-2 Protest Petition

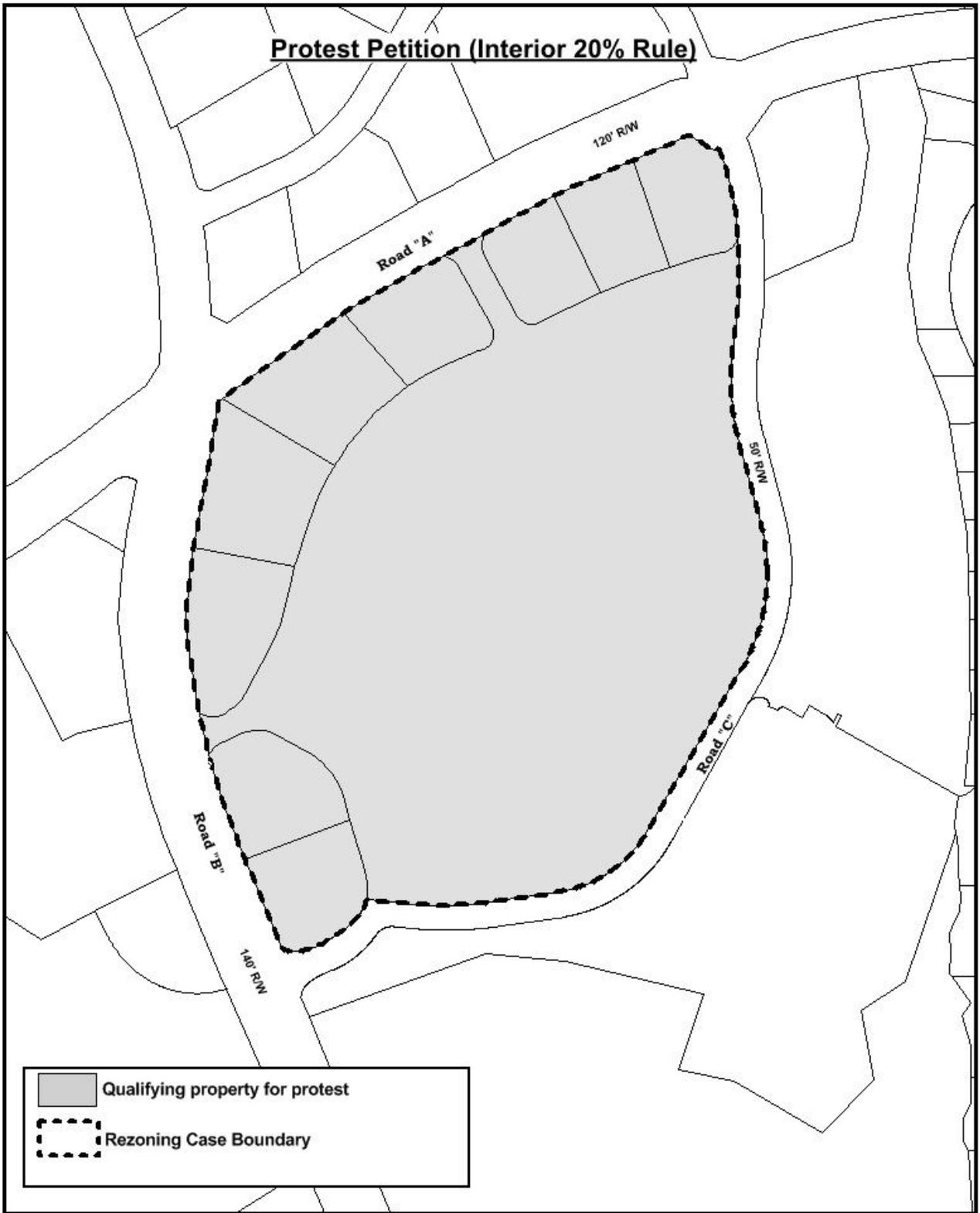
BACKGROUND

Current North Carolina General Statutes regarding how protest petitions are evaluated and determined to be valid (or not) are complex, especially in instances where there is adjoining right-of-way. In particular, how the statutes are applied is dependent upon the width and proximity of adjoining public rights-of-way. The proposed new graphic illustrations would supplement the existing graphics associated with Section 3.4.1(F)(B) to better clarify how the validity of a protest petition is determined for different situations.

PROPOSED GRAPHICS



Protest Petition (Interior 20% Rule)



ITEM A-3 Use-Specific Standards – Clarification of Density Limits for Multi-family Dwellings

BACKGROUND

The proposed amendment clarifies existing text in the LDO regarding multi-family dwelling density standards. This amendment does not change the density standards or limits presently contained in the LDO. The text is only being reworded to clarify the existing density limitations for each of the zoning districts where such units may be proposed.

PROPOSED TEXT

5.2.1 USE-SPECIFIC STANDARDS – Residential Uses

(F) Multi-Family Dwelling, and Multi-Family Dwelling, Mid-Rise

- (4) The maximum density for multi-family dwelling developments shall be as follows:
- (a) In the RMF district, the total density shall not exceed twelve (12) units per acre be in accordance with Table 6.1-1, *Table of Density and Dimensional Standards Residential Districts (Not including TC District)*;
- (b) densities within the TC district, total density shall be in accordance with the ~~Town Center Area Plan~~ Table 6.1-3, *Table of Density and Dimensional Standards Town Center District*;
- (c) but there are no density limits within the mixed use center overlay district for multi-family dwellings approved through the mixed use district (MXD) zoning process, Section 3.4.5, the maximum density shall be that shown on the approved preliminary development plan (PDP);
- (d) for multi-family dwellings approved through the Planned Development District (PDD) zoning process, Section 3.4.3, the maximum density shall be that shown on the approved master plan.

ITEM A-4 Quasi-Judicial Hearing Procedures

BACKGROUND

Consistent with NC General Statutes, previous changes in the LDO require certain types of site/subdivision plans to be reviewed and decided upon by Town Council through the quasi-judicial hearing process. The nature of the quasi-judicial process limits the amount and/or type of information the approval authority may receive prior to conducting a public hearing on such matter. As such, and similar to special uses, prior review and recommendation by the Planning Board is not consistent with this requirement.

PROPOSED TEXT

3.9.2 Common Procedures for Review and Approval of Subdivisions and Site Plans

- (D) Coordination of Site Plan Review with Special Use and/or Subdivision Plan Review**
The review and approval of site plans should be coordinated with the review and approval of both Special Uses (see Section 3.8) and/or Subdivision Plans (see Section 3.9.3) to the maximum extent possible. An application for approval of a site plan may be submitted at the same time as an application for approval of a special use or a subdivision plan for the same development. However, the Development Review Committee ~~and/or the Planning and Zoning Board~~ shall render separate recommendations and the Town Council (if subject to its approval) shall render a separate decision on each application, recognizing the applications as distinct and subject to different standards for approval. However, the Council may choose to approve both applications with one (1) vote.

(F) Approval Authority

(1) Approval by Town Council

The Town Council shall have final decision-making authority on the following types of site and/or subdivision plans, which shall be reviewed using the procedure set forth in this Section:

- (a) Plans that seek reductions or deviations from the buffering (see Section 7.2.3) or parking requirements (see Section 7.8) of this Ordinance beyond the Minor Modifications (see Section 3.19) allowed by staff; and
- (b) Plans for uses that require approval of a Special Use (see Section 3.8); and
- (c) Plans for new development on parcels or sites within the Town Center (TC) District (See Section 4.2.2(N)); and
- (d) Plans that seek reductions or deviations from the minimum required setbacks for telecommunications facilities (see Section 5.2.4(D)).

(H) Town Council Review and Approval Process

(1) Director Forwards Application

(add "quasi-judicial hearing" in graphic flow chart)

(3) Action by Town Council

The application, recommendations, and comments of the appropriate review bodies shall then be forwarded to the Town Council for action. The Town Council shall review this information, hold a quasi-judicial hearing, and approve, conditionally approve, or reject the plan within 90 days of receipt of the plan unless the applicant has caused additional delay beyond this 90-day period by failing to provide necessary or accurate information.

ITEM A-5 Setbacks From Buffers

BACKGROUND

The proximity of buildings, structures and parking areas from required buffers (e.g. landscape buffers or stream buffers) is currently addressed in Section 7.2.3(L) of the LDO, which provides detailed information regarding *Landscaping, Buffering, Screening, and Tree Protection*. Staff experience indicates that this information would more intuitively fit in Section 6.3, which addresses *Setback Measurement and Requirements*. Moving the more detailed existing information regarding building setbacks in Section 7.2.3(L), and replacing it with a reference to the new location of those dimensional standards, would help minimize potential oversight and allow the requirements to be more logically identified within the overall regulations.

PROPOSED TEXT

6.3.2 General Setback Requirements

(A) ~~Required Setbacks~~ General Requirements

- (1) A building, structure, or lot shall not be developed, used, or occupied unless it meets the minimum setback requirements set forth in Section 6.1 for the zoning district in which it is located, except as otherwise established in this Ordinance for particular uses or unless a variance has been granted.
- (2) A setback, court, or other open space required by this Ordinance shall not be included as part of a setback or other open space required by this Ordinance for another building or structure or lot.

(B) Setbacks from ~~Thoroughfares~~ Roadways

- (1) In all zoning districts the roadway setback from a thoroughfare shall be a minimum of 30 feet.

~~(C) Parking Setbacks~~

- (2) Non-residential buildings generally must be set back from roadways a minimum of 30 feet; however, if parking is located between the building and the street, then the building must be set back at least 50 feet from the street.

(C) Distance of Buildings and Structures from Required Buffers

- (1) The principal building or structure on a lot shall be located no closer than 10 feet to any perimeter or other buffer, except for streetscape buffers.
- (2) With the exception of principal buildings or structures adjacent to stream buffers or within single family residential developments, this setback requirement may be less than 10 feet when no existing vegetation is located within the buffer area and new buffer vegetation is planted to upgrade the buffer.
- (3) All accessory uses and structures, in any district except for parking lots or vehicular use areas fronting rights-of-way, shall be located no closer than five feet to any landscape, stream or other buffer, except for a streetscape buffer.
- (4) Parking lots and vehicular use areas fronting a right-of-way need not meet the five-foot setback required in this Section.

7.2.3 LANDSCAPING, SCREENING, BUFFERING AND TREE PROTECTION – Requirements for Perimeter Buffers and Landscape Areas

(L) Distance of Buildings and Structures from Required Buffers

- (1) ~~The principal building or structure on a lot shall be located no closer than ten (10) feet to any perimeter or other buffer, except for streetscape buffers.~~
- (2) ~~With the exception of principal buildings or structures adjacent to stream buffers or within single family residential developments, this setback requirement may be less than ten (10) feet when no existing vegetation is located within the buffer area and new buffer vegetation is planted to upgrade the buffer.~~
- (3) ~~All accessory uses and structures, in any district except for parking lots or vehicular use areas fronting rights-of-way, shall be located no closer than five feet to any landscape, stream or other buffer, except for a streetscape buffer.~~
- (4) ~~Parking lots and vehicular use areas fronting a right-of-way need not meet the five-foot setback required in this Section.~~

Building, structures, parking lots and vehicular use areas shall be set back from perimeter or other buffers as specified in Section 6.3.2(C) of this Ordinance.

ITEM A-6 Statement Regarding Development in Buffers for Public Purpose

BACKGROUND

Cary's LDO (Section 7.1.5) provides general information about the types of locations where land disturbing activities should or should not take place on a development site. The LDO also provides examples of land disturbing activities that may occur within these types of areas provided necessary approvals are obtained. However, the operating authority conferred upon governmental or quasi-governmental agency (such as for construction of highways or utility transmission facilities) exempts them from local development requirements in some cases, particularly where strict compliance with the requirements would impede their ability to provide services. The proposed amendments would acknowledge and disclose this possibility.

PROPOSED TEXT

To be prepared prior to August 25, 2011 Public Hearing

ITEM B Bed and Breakfast Use

BACKGROUND

Bed and Breakfasts are currently permitted in the LDO under the definition for a "Guest House", being allowed only in the Town Center District and classified as a commercial use. Staff has received interest in having the bed and breakfast use added to the General Use zoning districts, particularly for single-family dwellings on large lots in less-developed areas. Larger lot zoning, such as R-80 and R-40, would help accommodate the additional parking that would be required for such uses and help to minimize potential compatibility concerns. Also, these districts are the most restrictive of the residential zoning districts with regard to types of residential uses allowed, required setback distance for principal structures, and minimum required lot area. Staff believes this use, under the General Use zoning districts, is more appropriately classified as a residential land use, with use-specific standards to facilitate compatibility with surrounding properties.

The proposed amendments would make the necessary changes to the LDO to clearly establish the Bed and Breakfast use as a residential use that is permitted if use-specific standards are met.

PROPOSED TEXT

5.2 USE-SPECIFIC STANDARDS

5.2.1 Residential Uses

(B) ~~[Reserved]~~ Bed and Breakfast

- (1) The property owner must reside on the premises on a full-time basis;
- (2) The property owner shall maintain a current guest register;
- (3) The structure(s) shall be located on a lot which complies with the required minimum lot area and dimensional standards for existing uses in its respective zoning district;
- (4) The structure(s) shall not be altered in a way that changes its general residential appearance;
- (5) No meals other than breakfast may be served to registered guests;
- (6) No meals shall be served to the general public;
- (7) No cooking or kitchen facilities, apart from microwaves, hot plates, or mini-refrigerators, shall be allowed in the guest rooms;
- (8) A maximum of eight bedrooms may be rented to registered guests for a period of no more than 14 consecutive days;
- (9) One off-street parking space shall be required for each guest bedroom in addition to parking required for the residential dwelling;
- (10) Guest parking located less than 50 feet from side and rear property lines shall be screened with landscaping meeting the performance standard of a Type A opaque buffer. Guest parking shall not be located within 20 feet of a side or rear property line or within the applicable front setback. This section 5.2.1(B)(10) shall not apply to Bed and Breakfast use in the Town Center; and
- (11) The resident owner shall comply with all business license and revenue collection laws of the Town of Cary, Wake County or Chatham County, and the State of North Carolina.

5.2.3 Commercial Uses

(D) ~~[Reserved]~~ Guest House

- ~~(1) Structures shall not be altered in a way that changes their general residential appearance; and~~
- ~~(2) Other than registered guests, no meals shall be served to the general public. No cooking or kitchen facilities, apart from microwaves, hot plates, or mini-refrigerators, shall be allowed in the guest rooms.~~

12.3 USE CLASSIFICATIONS

12.3.2 Residential Uses

(B) Household Living

This use category is characterized by residential occupancy of a dwelling unit by a family. Tenancy is arranged on a month-to-month or longer basis (lodging where tenancy may be arranged for a period of less than 30 days is classified under the "Visitor Accommodation" category). Common accessory uses include recreational activities, raising of pets, gardens, personal storage buildings, hobbies, and parking of the occupants' vehicles. Home Occupations, Accessory Dwelling Units, and Caretaker's Residence are accessory uses that are subject to additional regulations (see Section 5.3.4). Specific use types include, but are not limited to:

(2) ~~[Reserved]~~ Bed and Breakfast

An operator-occupied single-family residence where eight or fewer rooms are rented on an overnight basis, for a period of no more than 14 consecutive days.

12.3.4 Commercial Uses

(I) Public Accommodation

For-profit facilities where lodging, meals, and the like are provided to transient visitors and guests for a defined period. Specific use types include:

~~(1)~~ ~~Guest House~~

~~An operator-occupied residence, such as a bed-and-breakfast, where eight or fewer rooms are rented on an overnight basis, guests are served no more than one meal per day, no cooking facilities are provided in the rooms, and the length of stay does not exceed 14 consecutive days.~~

~~(2)~~(1) Hotel or Motel

A building or group of buildings primarily containing guest rooms for sleeping purposes, but also including accessory dining areas, meeting rooms, and recreational facilities.

~~(3)~~(2) Hotel or Motel, Extended Stay

A hotel or motel typically rented or hired out for periods of one week or more that also provides kitchen facilities with refrigerators, stoves, and ovens for food preparation in individual rooms.

TABLE 5.1-1: TABLE OF PERMITTED USES - GENERAL USE DISTRICTS (EXCEPT TC & CT)

P = Permitted Use; S = Special Use (see Section 3.8); A = Accessory Use

Use Class is listed for determining the type of required perimeter buffers, and is repeated in Section 7.2

Use Category	Use Type and [Use Class]	RESIDENTIAL							NON-RESIDENTIAL					MIXED USE OVERLAY DISTRICT			Use-Specific Stds
		R80	R40	R20	R12	R8	TR	RMF	RR	OI	GC	ORD	I	NC	CC	RC	
RESIDENTIAL USES																	
Household Living	Bed and Breakfast	P	P														5.2.1(B)(2)

TABLE 5.1-2: TABLE OF TOWN CENTER (TC) DISTRICT USES

P = Permitted Use; S = Special Use (see Section 3.8); A = Accessory Use

Use Category	Use Type and [Use Class]	HMXD	MXD	HDR Mid-Rise	MXDR	HDR Garden	MDR	LDR	CB&R	COM	CLI	OFC/INS	INS	OFC/IND	Use Specific Stds
RESIDENTIAL USES															
Household Living	Bed and Breakfast	P	P	-	-	-	-	-	P	P	-	-	-	-	5.2.1(B)(2)
COMMERCIAL USES															
Public Accommodation	Guest house	P	P	-	-	-	-	-	P	P	-	-	-	-	5.2.3(D)

ITEM C Size of Accessory Structures

BACKGROUND

The LDO currently contains a requirement that the combined floor area of all accessory structures on a lot that are accessory to residential uses shall not occupy more than 33 percent of the total heated floor area of the principal structure. Staff has experienced multiple occasions where this requirement is problematic for owners of large lots (e.g. 40,000 square feet or greater) that contain a relatively small dwelling unit.

Examples of different size dwellings on same size lot:

	Principal Structure Floor Area (square feet)	Maximum Accessory Structure Floor Area Allowed (square feet)
Dwelling #1	1,500	495
Dwelling #2	2,500	825

In example 1, a typical detached two-car garage (approx 670 square feet area) would not be permitted under the Ordinance. In example 2 the same garage could be built, but a shed or similar type of detached accessory structure may exceed the total maximum allowable floor area. Larger-size lots in less developed areas do not typically have the same spacing concerns with accessory structures that are often common with smaller lots in more-developed (dense) areas.

PROPOSED TEXT

5.3.2 General Standards and Limitations

(A) Compliance with Ordinance Requirements

All accessory uses and accessory structures shall conform to the applicable requirements of this Ordinance, including the use regulations of Chapter 5 and the dimensional standards of Chapter 6. The provisions of this section establish additional requirements and restrictions for particular accessory uses and structures.

(B) Approval of Accessory Uses and Structures

Unless otherwise specified in this Section, any accessory use or accessory structure shall be treated as a permitted use in the zoning district in which it is located. An accessory use or structure may be approved in conjunction with approval of the principal use or structure.

(C) Accessory Use Permit

Some accessory uses in this Section require the issuance of an Accessory Use Permit consistent with the requirements set forth in Section 3.5 of this Ordinance.

(D) Location of Accessory Buildings, Structures, or Vehicles

- (1) If an accessory structure is located closer than five feet to the principal structure, the accessory structure shall be deemed attached to the principal structure.
- (2) Unless otherwise specified, an accessory structure or vehicle shall not be located within a required front setback, the corner side setback, or within five feet of the rear or side lot lines. Any accessory structure shall be located at least five feet from the edge of a required buffer. Accessory uses and structures may not encroach into any easements, but may directly abut easements.

- ~~(3) For accessory structures accessory to residential uses, the combined floor area of all detached accessory structures shall occupy no more than 33 percent of the total heated floor area of the principal structure, unless otherwise allowed in this Ordinance.~~
- ~~(4)~~ (3) Storage or parking of all boats, recreational vehicles, and utility or travel trailers allowed by this Section shall be located within side or rear yards.

(E) Size of Residential Accessory Buildings and Structures

- (1) For accessory structures accessory to residential uses, the combined floor area of all detached accessory structures shall occupy no more than 33 percent of the total heated floor area of the principal structure, unless otherwise allowed in this Ordinance.

This requirement shall not apply to roofed structures without walls (such as carports) provided such structures are not located within the minimum required setbacks for the principal structure on the lot.

For lots 40,000 square-feet or greater in area:

- a) the combined floor area of all detached accessory structures shall not exceed five percent of the total lot area;
- b) No single detached structure shall exceed 70 percent of the total heated floor area of the principal structure, excluding accessory structures for agricultural purposes (e.g. barn).
- c) All detached accessory structures that exceed 50 percent of the total heated floor area of the principal structure shall meet the minimum required setbacks for the principal structure, regardless of their location on the lot in relation to the principal structure.

ITEM D Non-Conforming Lots of Record

BACKGROUND

The changes proposed to Section 10.4 would allow recorded lots that are made non-conforming to be viewed as conforming lots for purposes of maintenance and/or future development in the following situation: 1) a building permit and certificate of occupancy was issued for a structure built too close to a lot line, and 2) where a recombination plat was recorded that increased the size of the lot while reducing the size of an adjoining lot to a size that is less than the required minimum lot size, and 3) the Town did not discover the error until after the plat was recorded.

PROPOSED TEXT

10.4 NONCONFORMING LOTS OF RECORD

10.4.1 Nonconformity Related to Lots of Record

- (A) No use or structure shall be established on a lot of record that does not conform to the lot area and lot width requirements established in this Ordinance for the zoning district in which it is located, except as otherwise set forth in this Section 10.4.
- (B) The prohibition on development in paragraph (A) shall not apply to lots that are rendered nonconforming by government action (such as by identification of right-of-way), or by other action outside the control of the current property owner. In such cases where 1) a building permit and certificate of occupancy

was issued for a structure built too close to a lot line, and 2) where a recombination plat was recorded that increased the size of the lot while reducing the size of an adjoining lot to a size that is less than the required minimum lot size, and 3) the Town did not discover the error until after the plat was recorded, such lot shall be deemed conforming for the purposes of maintaining its pre-existing status as a buildable lot, subject to other provisions of this Ordinance.

- (C) If the nonconformity is due to failure to meet streetscape or buffer standards, the party whose actions rendered the streetscape or buffer non-conforming shall be responsible for bringing the streetscape back into compliance to the maximum extent practicable if required by the Planning Director.

ITEM E Modifying Placement of Streetscape Vegetation

BACKGROUND

Staff has received comments from applicants regarding their desire to have the regulations provide greater flexibility in the placement of streetscape vegetation, particularly when adjacent to certain types of uses. This interest is most often expressed when dealing with uses intended for public or civic purposes, such as art, monuments, memorials and similar features. Oftentimes these types of features are designed/constructed to be more readily visible and/or identifiable from the roadway due to their location on the site or their overall size. This amendment would allow greater flexibility in the location of required streetscape vegetation to facilitate appropriate visibility/identification of features intended for public purposes. The required number of plantings in the streetscape will not be reduced by this change.

PROPOSED TEXT

7.2.10 Allowable Modifications and Reductions

This subsection provides flexibility and presents alternative ways to meet the standards set forth in this Ordinance, while encouraging the preservation of existing healthy vegetation and innovation in site design.

- (A) Existing healthy vegetation and the area of land used to maintain the vegetation may be counted toward meeting the performance criteria for buffers, streetscapes, and vehicular use areas set out in Sections 7.2.3, 7.2.4, and 7.2.6.
- (B) Up to a 20 percent reduction in the number of parking spaces required on the site shall be allowed to the extent that the reduction in the amount of required pavement will preserve existing healthy trees in an undisturbed, natural condition.
- (C) The Town Council may reduce the width of required streetscapes and buffers to no less than 10 feet. Buffer reductions between uses may be considered based on the use of innovative site/building design concepts. The Council may make exceptions to this minimum width for development within the Town Center district and for redevelopment sites. Reductions in the width of streetscapes and buffers should only be allowed when meeting the required width prevents reasonable use of the property based on the zoning and/or when additional existing healthy vegetation or open space is provided elsewhere on the site.
- (D) An average buffer/streetscape width that equals the width of the required buffer/streetscape may be approved, provided that all of the following requirements are met:
 - (1) The buffer/streetscape average equals the required width {for example, a required 50-foot buffer could average a minimum of 50 feet in width.

- (2) In no case shall a buffer/streetscape that is adjacent to single-family residential development be less than 30 feet in width.
- (3) All buffer/streetscape areas that are less than the required minimum width must include additional vegetation, walls/fencing, and/or other measures.

(E) Where spacing of required streetscape trees evenly across the frontage of the property, would interfere with the visibility of features or landscapes intended specifically for public or civic purposes such as art, monuments, and memorials, the required number of trees may be staggered, clustered and otherwise arranged as deemed appropriate in order to promote optimal growth and health of the vegetation.

(E)-(F) The area used for preserving existing healthy vegetation (specimen trees preferred) within the site may be used as credit for required perimeter buffers, interior buffers, and/or streetscapes at a rate of one and one-half times. For example, if the area taken up by the preserved vegetation is 1,200 square feet, then the applicant may deduct an area equal to 1,800 square feet from other required landscape/buffer areas. However, the application of this subsection is subject to the limits provided under Section 7.2.10(C) and (D) above. In addition, the area removed from required perimeter buffers or streetscapes should not contain specimen trees. Area taken up by preserved vegetation includes the area under the tree canopies.

(F)(G) Interior buffer areas may be relocated provided that:

- (1) The square footage of area is relocated elsewhere on the site (preferably to save more existing vegetation).
- (2) Parking lot landscape areas are designed in a combined linear fashion instead of as small, isolated pockets of vegetation.

(G)(H) The required streetscape along thoroughfares and collectors may be reduced to 10 feet, and building setbacks from the streetscape to zero when buildings are placed close to the street inside Mixed Use Centers.

Mrs. Adcock stated the Planning and Development Committee (P&D) recommended Option 1 for item 2 and 2(b), which will be brought back at a future date for further vetting.

Mr. Frantz was concerned about temporary retail sales in parking lots. In regards to accessory structures in relation to residence, he supports Option 1.

Mrs. Adcock asked if the bed and breakfast use should be a special use so adjacent property owners can participate. Mr. Nicolas added it would have to be a conforming lot in R-40 zoning.

ACTION: Mrs. Adcock moved to approve P&D and staff's recommendations as outlined in the staff report herein regarding 11-LDO-04. Mrs. Robinson provided the second; council granted unanimous approval.

-
2. Operations Committee, August 4, 2011 (*any committee consent agenda item pulled for discussion will be discussed at the end of the committee discussion portion of the agenda, which is item G on this agenda*) **(Mr. Smith)**

N/A

H. OLD/NEW BUSINESS (any item pulled from the regular consent agenda for discussion [agenda item B.1.] will be discussed during this portion of the agenda)

1. Report of the voluntary dismissal of JTG Consulting Engineers, LLP v. The Town of Cary
(Mrs. Chris Simpson)

211211.001

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

COUNTY OF WAKE

FILE NO. 11 CVS 07596

JTG CONSULTING ENGINEERS, LLP,

Plaintiff

v.

THE TOWN OF CARY, a North Carolina
Municipal corporation,

Defendant

VOLUNTARY DISMISSAL
(VD)

The Plaintiff in the above cause hereby dismisses this cause of action against the Defendant,
THE TOWN OF CARY, a North Carolina municipal corporation, with prejudice.

This the 7th day of July, 2011.

THE SIGMON LAW FIRM, P.A.

C. Miller Sigmon

C. Miller Sigmon
N.C. Bar # 13949
Post Office Box 17249
Raleigh, North Carolina 27619
Telephone: (919) 855-8900

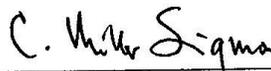
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by U.S. Mail, postage prepaid, addressed to:

TO: THE TOWN OF CARY, a North Carolina municipal corporation
c/o Christine B. Simpson, Esq.
P.O. Box 8005
Cary, NC 27512-8005

This the 7th day of July, 2011.

THE SIGMON LAW FIRM, P.A.



C. Miller Sigmon
N.C. Bar # 13949
Post Office Box 17249
Raleigh, North Carolina 27619
Telephone: (919) 855-8900

STATE OF NORTH CAROLINA

COUNTY OF WAKE

JTG CONSULTING ENGINEERS, LLP,)
)
 Plaintiff)
)
 v.)
)
 THE TOWN OF CARY,)
)
 Defendant)
)

**SETTLEMENT AGREEMENT
AND MUTUAL RELEASE**

THIS SETTLEMENT AGREEMENT AND MUTUAL RELEASE (the "Agreement") is made this 7th day of July, 2011, by and between JTG CONSULTING ENGINEERS, LLP, (the "Plaintiff") and THE TOWN OF CARY, (the "Defendant") (jointly "parties")

WITNESSETH:

WHEREAS, the Parties entered into a written contract for engineering services named Agreement for Provision of Professional Construction Materials Testing Services for the Black Creek Greenway, Segment 3, Phase II on or about March 31, 2010, which was amended by Amendment #1 on or about May 27, 2010 and Amendment #2 on or about July 22, 2010 ("Contract"), and

WHEREAS, Plaintiff and Defendant have alleged certain claims and disputes in a civil action entitled JTG CONSULTING ENGINEERS, LLP, V. THE TOWN OF CARY, File No. 11 CVS 07596 in the Office of the Clerk of Superior Court of Wake County, North Carolina, concerning contract (the "Action"); and

WHEREAS, Defendant denies such claims and disputes; and

WHEREAS, Plaintiff and Defendant desire to compromise, settle and resolve the disputed claims asserted in the Action.

NOW, THEREFORE, in consideration of these premises, the mutual promises and undertakings herein contained, and for other good and valuable consideration, the receipt and sufficiency of which are expressly acknowledged, the parties agree as follows:

1. Payment to Plaintiff. In reliance on the terms and conditions of this Agreement, on or before July 15, 2011, the Defendant shall deposit with the trust account of Plaintiff's attorney, C.

Miller Sigmon, the sum of \$10,500.00, which shall be paid to the Plaintiff in accordance with this Agreement as full and final payment and a settlement of the Contract and disputed claims asserted in the Action. Upon the execution of this Agreement and the execution and filing of a Notice of Dismissal with Prejudice of the Action and the delivery of such filed Dismissal with Prejudice to Defendant, the settlement payment of \$10,500.00 shall be paid from the trust account of C. Miller Sigmon to Plaintiff.

2. Dismissal With Prejudice. By the execution of this Agreement, Plaintiff authorizes and directs their legal counsel to execute a Notice of Dismissal With Prejudice of the Action upon receipt of funds for the settlement payment. Legal counsel for Plaintiff shall sign and file the Notice of Dismissal and shall return a filed copy of the Notice of Dismissal to the Defendant prior to disbursing final payment.

3. Mutual Release. Except with respect to the obligations created by or arising out of this Agreement, the parties release and forever discharge each other from any and all claims, demands, damages, actions, causes of action, suits, losses, costs, expenses, attorneys' fees and liabilities, however denominated, whether known or unknown, contingent or absolute, apparent or unapparent, accrued or unaccrued, state or federal, at law or in equity, in tort or in contract (whether express or implied), or under any statute, law or regulation, arising out of or related in any way to the Contract and, transactions, occurrences and circumstances which were the subject of the Action. This release and discharge extends to the activities of and inures to the benefit of the parties and their respective predecessors, successors, assigns, officers, employees, shareholders, agents, attorneys, accountants, insurers, subsidiaries and affiliated corporations or other municipal entities or agencies.

4. Non-Liability. By the execution of this Agreement, each of the parties hereto acknowledge, covenant and agree that this Agreement is the resolution of certain disputed claims and that nothing in this Agreement constitutes an admission of any liability by either party with respect to any aspect, whether factual or legal, of any of the disputed claims. The parties specifically deny and such liability and enter into this Agreement for the sole purpose of avoiding the possible costs associated with litigation of such claims.

5. Litigation Costs. Each party is responsible for paying its own attorney's fees, costs and other expenses incurred in connection with the Action.

6. Binding Effect. This Agreement shall not be effective until it has been signed by the Plaintiff and the Defendant. A copy of this Agreement shall be delivered to the legal counsel for each party.

7. Covenants. By the execution of this Agreement, each party and each person executing this Agreement on behalf of a party covenants and agrees as follows:

(i) The releases and undertakings of this Agreement have been properly authorized by all necessary action and that they have the power and authority to execute this Agreement;

(ii) This Agreement is a valid obligation and is binding and enforceable in

accordance with its terms against such party;

(iii) No promise or inducement has been made or offered to it except as set forth herein;

(iv) It has not assigned to any third party any right, title, interest or claim that is the subject of this Agreement or of the release and discharges contained in this Agreement; and

(v) It has carefully reviewed this Agreement, has had the opportunity to consult with its attorney regarding this Agreement, has without haste reflected upon the terms of this Agreement and the advice of its legal counsel, and it is satisfied with the terms of this Agreement.

8. Enforcement of Agreement. Upon a breach of this Agreement, any party may enforce this Agreement before the court in which the Action is pending. Any party successfully obtaining enforcement of this Agreement shall be entitled to payment of reasonable attorney's fees and costs incurred in obtaining enforcement, to be ordered as a part of the judgment, in the discretion of the court.

9. Governing Law. This Agreement shall be governed by and shall be construed in accordance with the laws of the State of North Carolina, without reference to any conflict or choice of law provision which would operate to make the laws of any other jurisdiction applicable.

10. Waiver and Modification. Neither this Agreement nor any provision of this Agreement may be waived, modified, amended, discharged, or terminated, except by written instrument signed by the party against whom the enforcement of such waiver, modification, amendment, discharge, or termination is sought, and then only to the extent set forth in such instrument.

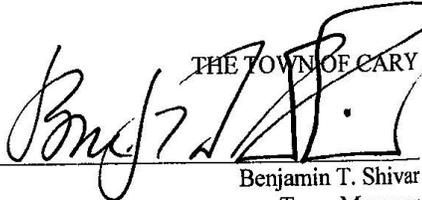
11. Entire Agreement. This Agreement is the only agreement between the parties and contains all of the terms and conditions agreed upon by the parties. There are no other inducements, representations or agreements, oral or written, between the parties with respect to the subject matter of this Agreement, and all prior negotiations, representations, inducements and agreements are merged into this Agreement. The terms of this Agreement are contractual and not a mere recital.

12. Execution in Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the day and year first above written.

JTG CONSULTING ENGINEERS, LLP,

BY: 
Jonathan T. Griffin
General Partner

BY: 
THE TOWN OF CARY
Benjamin T. Shivar
Town Manager

Mrs. Simpson reviewed the settlement agreement herein. She stated copies are available in the town attorney's office.

I. CLOSED SESSION

ACTION: Mr. Frantz moved to hold closed session for the following reasons. Mrs. Robison provided second; council granted unanimous approval.

PURSUANT TO G.S. 143-318.11(A)(5) AND (3), I MOVE THAT WE HOLD A CLOSED SESSION TO:

1. **INSTRUCT THE TOWN STAFF CONCERNING THE POSITION TO BE TAKEN BY OR ON BEHALF OF THE TOWN IN NEGOTIATING THE PRICE AND MATERIAL TERMS OF CONTRACTS OR PROPOSED CONTRACTS FOR ACQUISITION OF PROPERTIES OWNED BY:**

MICHAEL L. CLIFTON AND PATRICIA JOHNSON CLIFTON, 118 E. PARK STREET, CARY, NORTH CAROLINA 27511

R.G. POOLE, JR., 124 E. PARK STREET, CARY, NORTH CAROLINA 27511

FRED E. AND JANET H. HOLCOMBE, 110 E. PARK STREET, CARY, NORTH CAROLINA 27511

BENJAMIN EVERETT THOMPSON, JR., ET AL, 301 S. ACADEMY STREET, CARY, NORTH CAROLINA 27511

JANE FAIRBETTER, TRUSTEE, 109 WALNUT STREET, CARY, NORTH CAROLINA 27511

JANE FAIRBETTER, TRUSTEE, 113 WALNUT STREET, CARY, NORTH CAROLINA 27511

JANE FAIRBETTER, TRUSTEE, 105 WALNUT STREET, CARY, NORTH CAROLINA 27511

ROBERT DOLAN, 308-A SOUTH WALKER STREET, CARY, NORTH CAROLINA 27511

ROMIE THROCKMORTON, 306-B SOUTH WALKER STREET, CARY, NORTH CAROLINA 27511

RANDOLPH FOY NON MARTIAL TRUST, 324 S. ACADEMY STREET, CARY, NORTH CAROLINA 27511

MARION BROCK, 120 E. CHATHAM STREET, CARY, NORTH CAROLINA 27511

2. **CONSULT WITH ATTORNEYS EMPLOYED BY AND/OR RETAINED BY THE TOWN IN ORDER TO PRESERVE THE ATTORNEY-CLIENT PRIVILEGE BETWEEN THE ATTORNEYS AND THE TOWN. AMONG OTHER THINGS, THE COUNCIL EXPECTS TO RECEIVE ADVICE CONCERNING THE FOLLOWING LAWSUIT:**

WILLIAM DAVID BOWDEN V. TOWN OF CARY

J. ADJOURNMENT

ACTION: At 9:59 p.m. Mr. Smith moved to adjourn. Mrs. Adcock provided the second; council granted unanimous approval. (Mrs. Robison and Mrs. Robinson were not present for the vote, so their votes counted as “aye” votes.)