

May 8, 2017

Item # 2

ZONING TEXT AMENDMENT

UDO-276

**FORSYTH COUNTY**  
**BOARD OF COMMISSIONERS**

**MEETING DATE:** May 8, 2017      **AGENDA ITEM NUMBER:** \_\_\_\_\_

**SUBJECT:-**

- A.    Public Hearing on an Ordinance Amendment Proposed by the City Attorney's Office Amending Chapters B and C of the *Unified Development Ordinances* to Reflect Changes in State Law (UDO-276)
  
- B.    Ordinance Amendment Proposed by the City Attorney's Office to Amend Chapter B, Article III, IV, and VI, and Chapter C, Article V of the Unified Development Ordinances to Reflect Changes in State Law

**COUNTY MANAGER'S RECOMMENDATION OR COMMENTS:-**

**SUMMARY OF INFORMATION:-**

See attached staff report.

After consideration, the Planning Board recommended approval of the rezoning text amendment.

**ATTACHMENTS:-**     YES       NO

**SIGNATURE:** \_\_\_\_\_      **DATE:** \_\_\_\_\_

**UDO-276**  
**AN ORDINANCE AMENDMENT PROPOSED BY THE CITY ATTORNEY'S OFFICE**  
**TO AMEND CHAPTER B, ARTICLE III, IV, AND VI, AND**  
**CHAPTER C, ARTICLE V OF THE**  
***UNIFIED DEVELOPMENT ORDINANCES***  
**TO REFLECT CHANGES IN STATE LAW**

Be it ordained by the Board of Commissioners of Forsyth County, North Carolina, that the *Unified Development Ordinances* is hereby amended as follows:

**Section 1.** Chapter B, Article III, Section 3-4.9 – Variance (F) is hereby amended as follows:

**3-4.9 VARIANCE (F)**

Applications for variances from the requirements of the landscaping and screening standards may be approved by the Board of Adjustment after such Board of Adjustment holds a duly advertised public hearing in each case. Said application for a variance will be governed by the procedures set forth in Section B.6-1.4(B). ~~Approval of a variance shall include the determination that there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the Ordinance because of one or more of the following conditions:~~

- ~~(A) — Narrow .....Unusually narrow (less than ten (10) feet) sections of land available for planting because of existing permanent structures, existing paving, or natural features such as rock outcroppings.~~
- ~~(B) — Elevation Change .....Elevation change of more than twelve (12) feet within the area where the screening would be located.~~
- ~~(C) — Public Safety .....Specialized land uses such as public utilities, airports, etc. where strict adherence to the screening standard would significantly interfere with the function of that use and would create a public safety problem.~~
- ~~(D) — Public Agency .....Actions of a public agency.~~
- ~~(E) — Platting or Deeding .....Difficulties arising from the recording platting or deeding of land prior to the adoption of this Ordinance.~~

**Section 2.** Chapter B, Article III, Section 3-5.5 – Bufferyard Variance is hereby amended as follows:

**3-5.5 BUFFERYARD VARIANCE**

Application for variances from the requirements of the bufferyard standards may be approved by the Board of Adjustment in accordance with the procedures in Section B.6-1.4(B). ~~Approval of a variance shall include the determination that there are practical difficulties or unnecessary~~

hardships in the way of carrying out the strict letter of the ordinance because of one or more of the following conditions:

- (A) ~~Narrow .....Unusually narrow (less than ten (10) feet) sections of land available for planting within the back and/or side yards because of existing permanent structures, existing paving, or natural features such as rock outcroppings.~~
- (B) ~~Steep Slopes/Elevation Change .....Existing slopes in excess of two (2) to one (2:1) in locations where a bufferyard is required.~~
- (C) ~~Public Safety .....Specialized land uses such as public utilities, airports, etc. where strict adherence to the screening standard would significantly interfere with the function of that use and would create a public safety problem.~~
- (D) ~~Public Agency .....Actions of a public agency.~~
- (E) ~~Platting or Deeding .....Difficulties arising from the recorded platting or deeding of land prior to the adoption of this Ordinance.~~

**Section 3.** Chapter B, Article VI, Section 6-1.4 - Board of Adjustment is hereby amended as follows:

#### **6-1.4 BOARD OF ADJUSTMENT**

##### **(B) Variances**

- (1) Authority. ....No provision of this Ordinance shall be interpreted as conferring upon the Board of Adjustment the authority to approve an application for a variance of the conditions of a permitted use except with respect to the specific waiving of requirements as to:
  - (a) General Dimension Requirements for Zoning Districts listed in Sections B.2-1.2, B.2-1.3, B.2-1.4 and B.2-1.5 and shall only include minimum zoning lot area and width, minimum setbacks, maximum impervious surface cover, or maximum height;
  - (b) Floodplain regulations as specified in Section C.2-2.7;
  - (c) Vehicular use landscaping requirements as specified in Section B.3-4;
  - (d) Bufferyard requirements as specified in Section B.3-5;
  - (e) Setback and landscaping requirements of the TO District as specified in Section B.2-1.6(B);

- (f) Width of private access easements where such easement is for single family residential uses and where said private access easement was established prior to April 17, 1978;
  - (g) Off-street parking and loading as specified in Section B.3-3;
  - (h) Delay of building permits within designated Transportation Plan corridors as specified in Section B.3-7.1;
  - (i) Residential infill setback requirements as specified in Section B.3-8; (F) and
  - (j) Conservation Standards for the NCO District as specified in Section B.2-1.6(A).
- (2) Limitations. ....The Board of Adjustment shall not grant a variance to permit a use not permitted in the applicable zoning district, nor shall it grant a variance for a site plan feature or condition adopted in conjunction with a special use district zoning.
- (3) Public Hearing. ....Applications for variances may be approved by the Board of Adjustment after such Board of Adjustment holds a duly advertised public hearing in each case.
- (4) Hardship. ....~~Said application for a variance may be approved only upon a finding of unnecessary hardship in meeting the dimensional requirements of this Ordinance. The hardship must arise from the recorded platting or deeding of land or any building constructed and completed prior to the adoption of this Ordinance, from any act of a public agency, or from natural conditions beyond the control of the property owner. The Board of Adjustment shall vary the provisions of the Ordinance upon a showing of all of the following~~When unnecessary hardships would result from carrying out the strict letter of a zoning ordinance, the board of adjustment shall vary any of the provisions of the ordinance upon a showing of all of the following:
- (a) The unnecessary hardship would result from the strict application of the Ordinance. It shall not be necessary to demonstrate that, in the absence of a variance, no reasonable use can be made of the property;
  - (b) The hardship results from conditions that are peculiar to the property, such as location, size, or topography. Hardships resulting from personal circumstances, as well as hardships resulting from conditions that are common to the neighborhood or the general public, may not be the basis for granting a variance;

- (c) The hardship did not result from actions taken by the applicant or the property owner. The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance shall not be regarded as a self-created hardship; and
- (d) The requested variance is consistent with the spirit, purpose, and intent of the Ordinance, such that public safety is secured, and substantial justice is achieved.

~~(5) Findings. ....The Board of Adjustment shall approve of a variance only when the Board of Adjustment makes an affirmative finding as follows:~~

- ~~(a) That the approval of the variance will not materially endanger the public health or safety if located where proposed and developed according to the application and plan as submitted and approved;~~
- ~~(b) That the use of the property otherwise meets all required conditions and specifications;~~
- ~~(c) That the approval of the variance will not substantially injure the value of adjoining or abutting property, or that the use is a public necessity; and~~
- ~~(d) That the location and character of the use, if developed according to the variance, will otherwise be in harmony with the area in which it is to be located and in general conformity with *Legacy*.~~
- ~~(e) That the basis for a hardship determination in subsection B.6-1.4(B)(4) is met.~~

(65) Review of Applications. ....Any such variance shall observe the spirit and purpose of this Ordinance and shall be granted only with reference to conditions and circumstances peculiar to the property involved. If the Board of Adjustment denies the application for a variance, it shall enter the reasons for the denial in the minutes of the meeting at which the action was taken.

(76) Conditions. ....Appropriate conditions may be imposed on any variance, provided that the conditions are reasonably related to the variance.

(87) Voting on Variance Requests. ....The concurring vote of four-fifths (4/5) of the Board shall be necessary to grant a variance. For the purposes of this subsection, vacant positions on the Board and members who are disqualified from voting on a quasi-judicial matter shall not be considered members of the Board for calculation of the requisite majority if there are no qualified alternatives to take the place of such members.

**Section 4.** Chapter C, Article V, Subsection 5-21.2 – Notice of Violation is, hereby, amended as follows:

#### **5-21.2 - NOTICE OF VIOLATION**

If, through inspection, it is determined that a person engaged in land-disturbing activity has failed to comply with the Act, this chapter, or rules or orders adopted or issued pursuant to this chapter, or has failed to comply with an approved plan, a notice of violation shall be served upon that person by registered or certified mail or other means reasonably calculated to give actual notice. The notice shall specify a date by which the person must comply with the Act, or this Ordinance, or rules or orders adopted pursuant to this Ordinance, and inform the person of the actions that need to be taken to comply with the Act, this Ordinance or rules or orders adopted pursuant to this Ordinance. The notice will set forth the measures needed to comply and will state the time within which such measures must be completed. In determining the measures required and the time allowed for compliance, the Local Government serving notice shall take into consideration the economic feasibility, technology, and quantity of work required, and shall set reasonable and attainable time limits of compliance. Any person who fails to comply within the time specified is subject to additional civil and criminal penalties for a continuing violation, as provided in G.S. 113A-64 and this Ordinance. If the person engaged in the land-disturbing activity has not received a previous notice of violation under this Subsection 5-21.2, the Local Government shall deliver the notice of violation in person and shall offer assistance in developing corrective measures. Assistance may be provided by referral to a technical assistance program in the North Carolina Department of Environmental Quality, referral to a cooperative extension program, or by the provision of written materials, such as North Carolina Department of Environmental Quality guidance documents. If the Local Government is unable to deliver the notice of violation, in person, within fifteen (15) days following discovery of the violation, the notice of violation may be served in the manner prescribed for service of process by N.C.G.S. 1A-1, Rule 4, and shall include information on how to obtain assistance in developing corrective measures.

**Section 5.** Chapter C, Article V, Subsection 5-22.1 – Civil Penalties is, hereby, amended as follows:

#### **5-22.1 – CIVIL PENALTIES**

- (A) Procedure .....Any person who violates any of the provisions of ~~this section- Article V of Chapter C of the Ordinance~~, or rules, or orders adopted or issued pursuant to ~~this section Article V of Chapter C of the Ordinance~~, or who initiates or continues a land-disturbing activity for which an erosion and sedimentation control plan ~~is~~ required, except in accordance with the terms, conditions, and provisions of an approved plan, shall be subject to a civil penalty of ~~not more than up to~~ five thousand dollars (\$5,000.00) per day, except that the ~~penalty fee~~ for failure to submit an erosion and sedimentation control plan shall be as provided in Subsection C.5-16.2. Each day of continuing violation shall constitute a separate violation. A person may be assessed an initial civil penalty of up to five thousand dollars (\$5,000.00) for the first day the violation is detected, and daily civil

penalties, thereafter, for every day the violation continues. Notwithstanding any of the foregoing, if the person has not previously been assessed any civil penalty under G.S. 113A-64(a) or this Subsection 5-22.1 for any prior violation, and has since abated any continuing environmental damage resulting from the current violations, within one hundred eighty (180) days from the date of the notice of violation, the maximum cumulative total civil penalty assessed under this Subsection 5-22.1 for all violations associated with the land-disturbing activity for which the erosion and sedimentation control plan is required will be twenty-five thousand dollars (\$25,000). No penalty shall be assessed until the person alleged to be in violation has been notified of the violation by registered or certified mail, return receipt requested, or other means reasonably calculated to give actual notice. The notice shall describe the violation with reasonable particularity, specify a reasonable time period within which the violation must be corrected, and warn that failure to correct the violation within the time period will result in the assessment of a civil penalty or other enforcement action. If, after the allotted time period has expired, the violator has not completed corrective action, a civil penalty may be assessed from the day the violation is first detected. However, no time period for compliance need be given for failure to submit an erosion control plan for approval or for obstructing, hampering, or interfering with an authorized representative while in the process of carrying out his official duties. ~~Each day of continuing violation shall constitute a separate violation. A person may be assessed a one-time civil penalty of up to five thousand dollars (\$5,000.00) for the day the violation is first detected.~~

- (B) Amount and Enforcement .....The Director of Inspections shall determine the amount of the civil penalty to be assessed under this Subsection 5-22.1 and shall provide notice to the person in violation, directing the violator to either pay the assessment or contest the assessment by a written demand for a hearing within thirty (30) days after receipt of the notice of assessment. The notice shall set forth, in detail: (i) the civil penalty amount, (ii) a description of the violation for which the penalty has been imposed and, (iii) the basis for assessment, (iv) the option available to the violator to request a remission of the civil penalty, under G.S. 113A-64.2 and Subsection 5-22.1(E), below, (v) the date by which the violator must make the remission request regarding the particular penalty, and (vi) if the violator has not previously been assessed any civil penalty under G.S. 113A-64(a) or this Subsection 5-22.1 for any prior violation, the date by which the violator must abate continuing environmental damage resulting from the violation, in order to qualify for the twenty-five thousand dollar (\$25,000) cap on cumulative total civil penalty under Subsection 5-22.1(A), above. In determining the amount of the penalty, the Director of Inspections shall consider the degree and extent of harm caused by the violation, the cost of rectifying the damage, the amount of money the violator saved by noncompliance, whether the violation was committed willfully, and the prior record of the violator in complying or failing to comply with this ordinance. Notice of the assessment shall be by registered or certified mail or other means reasonably calculated to give actual notice. If payment is not made within thirty (30) days after it is "due", as that term is used below, or if demand for hearing to contest the assessment is not received or equitable settlement reached within thirty (30) days after demand for payment is made, the matter shall be referred to the City/County Attorney for



institution of a civil action in the name of the City of Winston-Salem/Forsyth County in the ~~appropriate division of the general courts of justice~~ superior court of the county where the violation occurred or the violator's residence or principle place of business is located, for recovery of the penalty. Any sums recovered shall be used to carry out the purposes and requirements of this chapter. Such actions must be filed within three (3) years of the date the ~~final decision was served on the violator~~ the assessment was due. An assessment that is not contested is due when the violator is served with a notice of assessment. An assessment that is contested is due at the conclusion of the administrative or judicial review of the assessment, as the case may be.

- (C) Contest of Assessment .....A hearing on a civil penalty shall be conducted by the Director of Inspections within thirty (30) days after the date of receipt of the written demand for hearing. The Director of Inspections shall render his or her decision on the civil penalty at the conclusion of the hearing. Appeal from the final decision of the Director of Inspections shall be to the Superior Court of Forsyth County, where the violation occurred.
- (D) Disbursal of Penalties .....Civil penalties collected pursuant to this Ordinance shall be used or disbursed as directed by G.S. 113A-64(a)(5).
- (E) Requests for Remission of Civil Penalties

- (i) A request for remission of a civil penalty imposed under G.S. 113A-64 or this Subsection 5-22.1 may be filed with the North Carolina Sedimentation Control Commission within sixty (60) days of receipt of the notice of assessment. A remission request must be accompanied by a waiver of the right to a contested case hearing, pursuant to Chapter 150B of the General Statutes, and a stipulation of the facts on which the assessment was based.
- (ii) The following factors shall be considered by the North Carolina Sedimentation Control Commission in determining whether a civil penalty remission request will be approved:
  - (a) whether one or more of the civil penalty assessment factors in G.S. 113A-64(a)(3) were wrongly applied, to the detriment of the petitioner,
  - (b) whether the petitioner promptly abated continuing environmental damage resulting from the violation,
  - (c) whether the violation was inadvertent or the result of an accident,
  - (d) whether the petitioner has been assessed civil penalties for any previous violations,
  - (e) whether payment of the civil penalty will prevent payment for necessary remedial actions or would otherwise create a significant financial hardship, and

- (f) the property tax value of the petitioner's property, upon which the violation occurred, excluding the value of any structures located on the property.
- (iii) The petitioner shall have the burden of establishing that the civil penalty imposes financial hardship and of providing supporting information and documentation.
- (iv) The North Carolina Sedimentation Control Commission may remit the entire amount of the penalty only when the petitioner has not been assessed civil penalties for previous violations and payment of the current civil penalty will prevent payment for necessary remedial actions.
- (v) The North Carolina Sedimentation Control Commission will not impose a penalty under G.S. 113A-64.2 that exceeds the civil penalty imposed by the North Carolina Department of Environmental Quality.

**Section 6.** Chapter C – Environmental Ordinance is, hereby, amended as follows:

All references to the term “Director of Inspections” shall be replaced with the term “Stormwater Director or his/her designee”.

**Section 7.** This ordinance shall be effective upon adoption.

# Memorandum



**Winston-Salem**

City Attorney's Office

P.O. Box 2511  
Winston-Salem, NC 27102  
CityLink 311 (336.727.8000)  
Fax 336.748.3816

**TO:** Mayor Allen Joines and Members of the City Council  
**FROM:** Angela I. Carmon, City Attorney  
Jerry N. Kontos, Assistant City Attorney  
Marilena Jensen-Guthold, Assistant City Attorney  
**DATE:** March 6, 2017  
**RE:** Proposed *Unified Development Ordinances* Text Amendments to Reflect Changes in State Law (UDO-276)

It is necessary that certain provisions of the *Unified Development Ordinances* (UDO) be updated in order to accurately reflect recent changes in state law. There have been revisions to 160A-388, the state statute authorizing Boards of Adjustment, which require changes to UDO provisions regarding the granting of variances. Additionally, the General Assembly has done away with the statute governing protest petitions, yet allowing for the submission of a written statement regarding a proposed amendment, modification or repeal to a zoning ordinance.

The General Assembly has also enacted changes to the state statutes governing notices of violation and civil penalties for erosion control violations due to land disturbing activities. The proposed text amendments would update the UDO accordingly to reflect all of these changes in state law.

The proposed amendment was reviewed by the City-County Planning Board at their April 13 public hearing and they recommended approval of the amendment.



Call 311 or 336-727-8000

## STAFF REPORT

DOCKET # UDO-276

STAFF: Jerry Kontos

### REQUEST

An ordinance amendment proposed by the City Attorney's Office amending Chapters B and C of the *Unified Development Ordinances* to reflect changes in state law (UDO-276).

### BACKGROUND

Attached is a memo from the City Attorney's Office describing several amendments to the UDO that are necessary due to recent changes in state law.

### ANALYSIS

Planning and Development Services staff reviewed the proposed changes with City Attorney staff and are supportive of the proposed changes.

### RECOMMENDATION

### APPROVAL

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**CITY-COUNTY PLANNING BOARD  
PUBLIC HEARING  
MINUTES FOR UDO-276  
APRIL 13, 2017**

Jerry Kontos presented the staff report.

**PUBLIC HEARING**

FOR: None

AGAINST: None

**WORK SESSION**

During discussion by the Planning Board, the following points were made:

Civil penalties for erosion control violations were discussed.

A hardship is required to get a variance.

Jerry Kontos answered questions concerning Findings of Fact for hardships and use permits.

MOTION: Clarence Lambe moved approval of the text amendment.

SECOND: Jason Grubbs

VOTE:

FOR: George Bryan, Melynda Dunigan, Jason Grubbs, Arnold King, Clarence Lambe,  
Chris Leak, Brenda Smith, Allan Younger

AGAINST: None

EXCUSED: None

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A. Paul Norby, FAICP  
Director of Planning and Development Services