**Comments on TC2200001 From Tom Miller**

Before the Durham Planning Commission, December 13, 2022

Introduction

 Because the text of the proposed changes occupies nearly eighty pages and because the limited engagement format for hearings before the Planning Commission will not permit me to take the time to present all of my comments, I will only present highlights to illustrate larger general points. The sum of these points is that I believe the proposed changes to be deeply flawed and against the public interest. I respectfully request that the Planning Commission vote against the entire TC2200001 package and that you advise the Durham City Council and Board of County Commissioners to do the same.

Generally

1. Affordability – Although the proposed changes have been presented to the elected bodies, the commission, and to the public as serving the cause of affordability, the opposite is actually true. In almost every instance, the proposed changes allow developers to build more and build bigger at the expense of other considerations such as tree coverage, impervious surface, naturally occurring affordable homes, and community character and quality of life. The proposals favor the creation of larger, more expensive new residential construction and defeat even the policy purposes of much of the recently adopted EHC zoning changes. While the changes do relax to nearly zero standards and review mechanisms for certain affordable housing projects, the affordability components of these projects are chimerical and can be easily gamed.
2. Gentrification and Displacement – The effect of these proposals would be to accelerate gentrification and displacement. The significant development opportunities in these changes will be available primarily available to development interests who already enjoy most of the development opportunities our regulatory scheme allows. By allowing developers to build more and build larger, these proposals draw a bullseye on less expensive homes in Durham’s existing lower-wealth neighborhoods. Newer, wealthier neighborhoods are protected by private covenants. The impact of these changes will be concentrated in areas where no such private advantages exit. Less expensive existing smaller houses will be demolished for their lots and more, newer, and larger houses will be built. By far, most of the provisions in TC 2200001 contain no affordability requirements. The neighborhoods where the largest part of Durham’s affordable housing stock is reposed will be subject to plunder, driving prices up and people out. During their presentation of the changes to the InterNeighborhood Council on October 25, James Anthony, the named applicant and spokesman for the proponents, declared that gentrification is a “good thing,” especially in high crime neighborhoods.
3. Exclusion of Public Stakeholders – The proposed changes would expand dramatically the development community’s ability to build increasingly intense projects “by right” without public input and review. By expanding the uses allowed in a host of districts and by allowing new development forms in existing neighborhoods, these proposals are, in effect, a way of avoiding the rezoning process that gives community stakeholders a voice in how the places where they live are regulated and grow. Indeed, I suspect that in connection with at least some of the proposed changes, the proponents have specific properties and projects in mind that they have not disclosed. This proposal increases the trend of shutting ordinary people out of the planning and development process that is supposedly justifiable only as being for their welfare. For the vast majority of people who live in Durham, their homes and neighborhoods are their primary interests in the urban planning process, yet recent changes to Durham’s code have reduced their ability to participate to a few minutes at the microphone at a public hearing. The complexity of the code is alienating. The engagement processes, if they exist at all, are hostile.
4. Ineffective Public Engagement – The developers have held several sessions with interest groups and with the general public. In those instances where the general public was invited, attendance was poor. Most of those attending were people directly involved in the development and building business. In these sessions, the developers did not go through the provisions of their proposal, but instead presented limited scenarios of what might be done if the changes they have asking for are adopted. In most instances, the scenarios presented exceptional and unlikely circumstances – not the true impact of their proposals. The public engagement was not supervised by the planning staff. Also, the developers have constantly changed their proposals making it difficult for even those with some knowledge to keep up.
5. Confused Provisions and Ill-Thought-Out Consequences – The proposed changes make sweeping changes to things like mix of uses, buffers, site plan reviews for certain projects, required yards, shared driveways, and parking requirements without thinking through what the consequences of these changes might be. In several places, provisions are ungrammatical, lack regulatory commands, and fail to make clear what is intended.
6. Untimely – Durham is in the middle of changing its comprehensive plan and will soon undertake a rewrite of its development code. It is hoped that these efforts will be organized around more effective and staff-led public engagement. It is confusing and inappropriate to adopt sweeping changes to a UDO which is soon to be replaced.

Specific Examples of Problems

These problems are presented in the order in which they appear in the proposed text amendment and not in the order of their importance.

1. Townhouse Exemption from Site Plan Review – Changes to UDO 3.7.2 would exempt townhouse projects with ten or fewer units from site plan review. This would apply only to projects where each of the units occupies a foot print of 1,000 SF. This means that the units could be quite large under the new height limits proposed. Exempting such a project from site planning leaves compliance issues up to building inspectors on the ground. It is easier to fix an incorrect site plan on paper than it is to fix an error discovered only after footings have been laid.
2. Common Plan of Development –This is the introduction of a new defined term designed to combat developers from dividing their projects into microphases that avoid review. It is a problem that already happens with subdivision review. The definition of the idea of a common plan of development is sloppy and can easily be gamed by changing the names of owners and by selling portions of the property as it is incrementally developed. Leaving the determination of constitutes a common plan to the planning director is fraught with legal issues. The word “assessed” in a passive voice 3.7.2 is unclear even in light of the proposed definition.
3. Old West Durham NPO – The text amendment would change UDO 4.6.6 to exempt ADUs, garages, and other accessory buildings from the OWD NPO’s Floor to Area Ratio requirement. The purpose of the FAR is to try to control the amount of building on a lot to keep the neighborhood of small lots and houses from being overbuilt at the expense of the neighborhood’s naturally occurring affordable housing and its historic character. The issue of how accessory structures would be treated with the FAR was something worked out among neighborhood stakeholders when the NPO was created. The proposed changes would essentially destroy the effectiveness of the FAR requirement. This requirement is the heart of the NPO. No proposal to change the NPO should be considered without working directly with the OWD neighbors.
4. Adding Residential Uses to Non-Residential Zoning Districts – While allowing some residential uses to the CI, CN, and OI zones may be workable, adding residential to the list of allowable uses in the CG, I, and IL zones is a bad idea without more specific requirements. The uses allowed in these zones can be obnoxious to residential uses both in terms of noise, materials, activities, and also scale. The IL zone, especially, allows so many disparate things that it has ceased to function meaningfully as a planning tool. Residential uses are not compatible with allowed industrial operations that might work at night with dangerous materials. It is not appropriate to marry residential uses to super-intense commercial uses that occupy very tall buildings without adequate separation, buffering and stepped intensity. In our 2005-6 planning, we created large belts of land marked for future manufacturing related activities. That world did not materialize. If these properties are to be devoted to other uses, the thing to do is to plan for that change with small area planning and implementation rezonings with robust public engagement – not the sloppy shortcut proposed by this text amendment. The purpose of this sweeping change is to cut the public out of the planning process by expanding dramatically “by-right” development. AND, once these residential uses are allowed, is it correct to refer to the districts as non-residential? What would that do to the proponents’ idea of killing off buffer requirements for like uses?
5. Adding Auditoriums to CI and CN Zoning Districts – This is a bad idea. These districts are meant to work as neighborhood compatible zones with low intensity development and uses designed to serve the nearby residential uses. An auditorium, except on the very smallest scale, is not compatible with the intent of these zones. When combined with the text amendment’s proposals to eliminate parking requirements and buffers in certain circumstances, the idea of allowing places meant to draw large numbers of people to nearby neighborhoods is a bad one.
6. Adding Business Schools to the CN Zone – This is one of those changes that probably has a specific project in mind. There cannot be a huge public interest in making this change. Sweeping text amendments should not be undertaken to serve secret projects when the changes desired should be the subject of a public zone change.
7. Adding B&Bs to the IL Zone – Again, this is another measure that will essentially make the IL zoning category an “everything and anything” district. Instead of zoning, it would become the absence of zoning.
8. Unlimited ADUs with Places of Worship UDO 5.2.4 and 5.4.1B – The UDO was recently changed to allow a number of ADUs on property occupied by a place of worship. The proposal to open this up is ill-conceived and can be gamed. The idea, I suppose, is that churches, etc., will be affordable housing landlords. While this might be true in some circumstances, the proposed changes do not actually require affordability. The provision is subject to being gamed as the definition of “Place of Worship” is weak. This provision would allow an overload of the newer, larger, ADUs proposed by the text amendment on almost any property as long as the developer sets up a Place of Worship. Under the definition that could be a small building with a concrete seahorse labelled the “Universal Temple of Neptune.” Limitations on the number of ADUs allowed at places of worship should relate to the size of the property and the size of the place of worship. The new rule would also set percentages of the Place of Worship property that would be occupied by the ADUs – 75% - in the urban tier - but offers no guidance on how this is to be calculated. What property does an ADU occupy? Is it just the footprint? What if the ADU is part of or in the church or mosque? Can the percentage be broken up and spread over the property or must it be in a block? If there is no site plan, how will this be shown and measured? Surely this provision is not ready for prime time.
9. Accessory Dwelling Units UDO 5.4.1 – The proposed text amendment would increase the size of an ADU up to 1,200 SF as long as it is not larger than the primary structure. Of course, this change completely undoes the accessory nature of ADUs and, by allowing ADUs to be larger, defeats their virtue as a source of relatively affordable housing. We cannot regulate rents, but we can encourage, even require, smaller dwelling units. Smaller units are generally (though admittedly not always) cheaper than larger units in the same market, but larger units are more profitable, so these applicants want to build larger units. Under the current rules, an ADU can be 800 SF as long as it is subordinate to the primary structure. This change could eliminate in many cases the primary-accessory relationship that makes ADUs acceptable in traditional neighborhoods. The proposal also changes the maximum ADU height from 25 to 32. This would allow a two-story ADU instead of the more subordinate 25 ft. Ironically, the ADU could work a bigger imposition on the neighbors than the “primary” residence. Finally, under the proposed changes an ADU could be built before there is a primary residence. What happens if no primary residence is ever built? Must the ADU be torn down? Is the CO withheld?
10. Height of Residential Structures UDO 6.3.1 and 6.12.1 – The proposal would raise the height limits for all residential structures. A lot for some, and a little for others. Again, this is an instance where this text amendment favors bigger, more expensive, and more profitable homebuilding in Durham. The proponents argue that the current way of measuring height is confusing and could yield unexpected results. The fact is that we have used the current system for more than thirty years with no significant problems – certainly none of the strange things the developers have shown in their presentation. The proposed way of measuring uses stories as a supplement to height measured in feet, but it does not say what a story is. Also, it allows the developer to measure from the highest corner on the foundation to the roof peak. On flat property this might system would make a slightly taller house in many situations, on sloped property, it could yield results as unexpected as anything the proponents have shown in their presentation slides. Rather than simplifying the UDO with a new mechanism for determining height, the proposed change actually makes it more complex because it retains the old system for many buildings in Durham. This is a case of if it isn’t broke, don’t fix it. If a change must be made, let’s keep the current system, but simplify it by making the bottom starting point for measuring the midpoint between the highest and lowest places in the foundation of any building as it emerges from the ground. This involves a much simpler calculations and it could be applied to all buildings. Note that the illustrations proposed in the UDO changes seem to be erroneous about how mansard roofs are to be measured under new rules. Why are we exempting towers of 250 SF from height rules? Is there a demand for towers? Why must they be so big?
11. Height of Buildings on the Edges of Compact Neighborhood Tiers UDO 6.6.2 E – The Current UDO provisions limit height to 55 feet at the edges of Compact Tiers nearest traditionally zoned and built residential areas. This is an intentional step-down in intensity to ease the transition between development types. The changes proposed by this text amendment would raise that height to 60 feet with no strong policy reason in favor of it. The ill-effect would be to incrementally erode the protection the current provision has for traditional neighborhoods.
12. The PATH Program UDO 6.6.4 – This ostensibly affordable housing program is the fig leaf for the whole text amendment. It would allow a more intense residential development with a significant unit bonus if 25% of the units are affordable at 60% AMI for rental units and 80% for for-sale units. There are several problems with the proposed idea. First the units would have an unacceptably short affordable life – five years for rental units and one sale for for-sale units. There is no real enforcement mechanism. What is there to make the developer keep his promise? What is the remedy if he does not? There is no D-plan with commitments? If the developer sells the property during the period of affordability, is the subsequent developer bound to keep the original developer’s promises? Does North Carolina law even allow this? With for-sale units, what keeps the developer from gaming the project by setting up buyers the units for resale? There is no owner-occupancy requirement. Once sold, the units could be market rental units still controlled by the developer or its allies and confederates. Finally, ADUs could count as affordable units. Under the PATH rules, the market units could be big, but the affordable units could be small ADUs. This is not consistent with Durham’s approach to integrating affordable housing into the community.
13. PATH 100% program UDO 6.6.4 H – Alarmingly, the text amendment releases PATH projects with 100% affordable units from all dimensional requirements and density restrictions. How would this work? Who would oversee it and enforce it? What does “combined street frontage” mean? Do not people who live in affordable housing deserve the same planning protections for space and environment as those lucky enough to afford a home in the marketplace?
14. Cluster Subdivision UDO 6.7.2 and 6.7.6 – The proposal would reduce the minimum cluster subdivision from four to two acres. That is too small to make the idea work. It would also allow the required open space perimeter buffer to be on private property rather than on commonly held land. How will this be enforced? Would the HOA be required to enforce the buffer requirements parcel, by parcel? Is there an HOA? The neighbors would have no inherent right to sue. The city will have to do the job. These changes are formulas for mischief.
15. Infill Standards UDO 6.8.2 and 3 – This text amendment would essentially eliminate the effectiveness of infill standards by allowing the street yard of any infill property to always be the base zoning requirement even when the block face would require something different. In a different place the text amendment also reduces street yard requirements for all residential zones and housing types. The purpose of infill standards is to preserve neighborhood character. When the EHC was being pushed by the city staff, the planning director, Pat Young, told concerned residents that their traditional neighborhoods would be protected by the infill standards. That promise would be broken by this proposal. Under the proposed rules, the base zoning requirements will allow a shorter street yard in most situations. The proposed rules would also eliminate the height standard for infill which would allow essentially 14 extra feet in most instances.
16. Vehicular use Area Rules UDO 6.8.4 - The proposed rules would eliminate the limitations on paving over lots reposed in the recently adopted vehicular use area rules. This is a bad idea on a lot of levels. Durham is a green city, but only because our rules leave room for trees and surfaces that can absorb runoff. This change would eliminate that.
17. CI Rule Changes – The CI district was created by a coalition of neighbors, commercial stakeholders, and planners who desired to sort out the regulatory environment of the West Chapel Hill Street business district adjoining the Morehead Hill, Burch Avenue, and West End neighborhoods. Although it was created with that area in mind, the district could, through rezoning, be applied anywhere in Durham. For CI, the text amendment would eliminate the street and rear yard requirements from CI. The rear yard requirement is important to neighbors as it puts distance between their homes and the neighboring businesses. The changes also provide that in the CN, OI, IL, and CG districts, CI dimensional rules, as modified, can be used on lots smaller than 20,000 sf. Just how this will be worked out is difficult to say. Can the developer pick and choose between the CI standards and the base zoning standards in those other districts to get whatever result is most advantageous? Under this change, a CG building could have no rear yard. Such a project would also be exempt from site plan review – again, another bad idea, especially for IL properties. This is another situation that can be gamed by dividing the property into smaller parcels and developing separate microphases to avoid oversite.
18. Residential in Non-Residential Zones UDO 6.10.2 – In a series of complex changes the text amendments would allow SFRs, townhouses, apartments, and multiplexes in the CN zone at intensities entirely inconsistent with the neighborhood-friendly intent of the CN zone. This is simply a way to avoid rezoning land by accomplishing it all in a text amendment. The effect would be to exclude neighborhood stakeholders from having a say in what gets developed in and near their neighborhoods. Their rights are diminished so that the rights of the developer class can be increased.
19. PDR Changes UDO 6.11.3 – Eliminates the 100 unit minimum for PDRs without setting a new minimum. This is dangerous. A tiny PDR is not really “planned” in its context. The changes also eliminate the requirement that nonresidential uses in a PDR serve the community. The rules raise building heights for PDRs to 100 feet and eliminate building separation requirements. Where there are building separations shown, the changed rules would give the elected bodies the power to increase or decrease them. This discretion is unlawful on its face. D-plans require developer assent. The Planning Commission used to complain about bare-minimum D-plans. This will make that situation even worse. What is unclear is what effect these changes will have on older adopted D-plans.
20. Required Yards UDO 6.12.3 – The proposed provision concerning the applicant’s option when there are “multiple lot lines” is unclear on its face. Who is the “applicant” in this provision?
21. Encroachments – Allows stoops, decks, etc., to encroach eight feet into street and rear yards, but does not include a height requirement for these structures. Encroaching decks should not be more than four feet in height. The proposed changes would allow HVAC and other mechanicals to encroach right up to the property line. This allows an owner to impose the noise of his systems on his neighbor with no separation at all. Also, what if both neighbors put their HVAC systems right up next to each other? This would fill the interval between houses and block access to the houses, yards, and the systems. It would impede firefighter access.
22. Flag Lots UDO 6.12.5 and 6 – The text amendment would eliminate the flag lot limits which apply today which require each flag lot to have a 20 ft “pole” or would allow one flag lot with a small house on a 12 foot “pole.” The new rule would allow up to four flag lots to be calved from a parent lot and allow all four to share a single driveway. This raises all sorts of access and safety issues. What if someone leaves a car on the shared drive and blocks access? Will firefighters be able to respond effectively to a call under so constrained an access problem? Will setting this situation up require subdivision approval or can it be gamed by using microphasing? The language requiring sustainability is not grammatical here and where it appears elsewhere.
23. Small Lots and Small Houses – The recent EHC rule changes allow small lots if they have small houses. The rule applies to certain zones in the urban and suburban tiers. The lot cannot be smaller than 2,000 SF or wider than 25 feet and the house cannot be larger than 1,200 SF. The footprint cannot be larger than 800 SF. Under the current rules, a garage would be included within the 1,200 SF limit. The virtue of the small lot rules is that they incentivize the creation of market-entry housing. It lowers the bottom rung on the wealth ladder to the point where some people can reach it. Property developed under the EHC has produced little in the way of affordable housing, but this rule has sparked interest and resulted in a number of small houses across town (sometimes at the expense of naturally occurring affordable housing). But under the proposed rules, garages would not be included in the 1,200 SF. Nor would heated square footage that is “below grade.” Under the guidelines adopted by the State of North Carolina for measuring residential square footage, “below grade” means any area that has a portion of its floor level below the ground level outside. The effect of these changes, then, is that the house which today must be relatively small will grow to 2,000 SF and have a garage. It can have basement living area of up to 800 SF in addition to the 1,200 SF above grade. Additionally, the height limit for a small house will go from 25 feet to two stories or 32 feet. This means that basement living area can be mostly above ground. In a stroke, we will move the bottom rung of the wealth ladder up beyond the reach of market entry purchasers and renters. It will be more profitable, but that is not a consolation to most people in Durham.
24. Townhouses – The proposed changes kill the articulation design requirement and also remove the privacy yard requirement of 100 SF. It adds detached townhouses, but there is no compelling public reason for doing so. It requires following townhouse rules, but doesn’t explain how that is to be done. This needs to be pulled and thought through. What is the policy reason for creating detached townhouses? How will Durham be better for it?
25. Buffers – The proposed changes would eliminate buffer requirements between uses described only at the highest level. Buffers protect residential uses from neighboring uses which are obnoxious because of noise, activity, lighting, hours of operation, safety, and scale. The proposed rules would eliminate all buffer requirements between neighboring residential uses regardless of scale. Under the proposed rules, it would be appropriate for a nine-story building in a PDR to be next door to a small single-family neighborhood with nothing to soften the transition. The rule does not contemplate what is required when large buildings contain residential and nonresidential uses. The rule is based on use, not zoning district. This is a very bad idea. If it is adopted it will destabilize existing neighborhoods for the benefit of the development community. It is another example of where this text amendment commodifies homes for profit and diminishes residential quality of life as a policy interest of the planning process.
26. Parking – The proposed changes would eliminate all minimum parking requirements, but people will still have and use automobiles. Adjusting minimum parking requirements may be called for, but eliminating them altogether in all situations is foolhardy and will cause a host of entirely foreseeable consequences not the least of which is overloading on-street parking in traditional neighborhoods.