

## **RECOMMENDATION**

**Ordinance 05-087  
Application No. 05-0813-T**

**To revise Chapter 40 of the New Castle County Code  
(also known as the Unified Development Code or “UDC”)  
regarding Article 2 (“Establishment of Zoning Districts”),  
Article 3 (“Use Regulations”) and Article 31 (“Procedures and Administration”)**

September 20, 2005

### **DESCRIPTION**

This amendment removes the County Council review and approval process required by UDC § 40.03.319 for open space planned developments, open space subdivision option 2 developments, and former Code alternative developments in the “S” zoning district at the preliminary plan review stage. As an alternative it requires an exploratory plan public hearing for the purpose of obtaining public input earlier in the plan review process. The amendment also requires that the special buffer requirements in UDC § 40.03.320 be applicable when adjacent development contains lots equal to or greater than one (1) acre.

### **BACKGROUND**

Prior to the adoption of UDC § 40.03.319, both the former zoning code and the UDC had permitted cluster developments by right without the need for County Council approval. In March 1995, Ordinance 04-086 was adopted and provided for the by-right development of mixed housing units in previously single-family detached only R-1 and R-2 zoning districts. This was a major change to the nearly forty year history of single-family homes only in the R-1 and R-2 zoning districts, but was highly recommended in the 1992 New Castle County Comprehensive Plan Update and a subsequent Central Pencader District Plan, as a way to provide for more significant amounts of open space, preserve natural, environmental and historic resources, and to offer more diversity and affordable housing opportunities. While no approval by County Council was required, the cluster plans did require public notice.

Twenty cluster plans were recorded under the former cluster development option in its thirty-three month lifespan, including four plans that provided for mixed dwelling unit types.

When the UDC was adopted, the former code cluster development option was incorporated and renamed as an open space planned development. While it reduced the density permitted from a yield of 2.0 to 1.3 dwelling units per acre, it did recognize the importance of permitting this option by-right. On September 22, 1998, a large omnibus text amendment Ord. 98-080, including the addition of UDC § 40.03.319 was adopted.

Since the adoption of the UDC and the advent of UDC § 40.03.319 approval process (about seven years), there have been 23 open space planned applications. Nine have progressed to the public hearing stage and eleven were withdrawn or left to expire. One OSP has been recorded and is in the process of being built, while seven others have received preliminary plan approval. Only four, however, contain mixed dwelling unit types and one of these is age-restricted use only (The Village of Fox Meadow). The rest contain single-family dwelling types on ¼ to 1/3 acre lots and lack the diversity of housing types.

UDC § 40.03.320, Special Buffer Requirements is also proposed to be amended to require its application when an open space planned or open space subdivision option 2 development is proposed adjacent to neighborhoods with 1 acre or larger lots. This section was added to the UDC by Ordinance 99-142 adopted May 9, 2000 at the same time that the open space subdivision option 2 was added. The purpose of the 200 foot buffer was to provide additional space between these development options and any existing development with lots of 2 acres or more.

The amendment proposed also provides that the 200 foot buffer may be reduced by the Department to provide for a 0.4 opacity. A 0.4 opacity provides a minimum bufferyard width of 30 feet and 2.70 plant units per linear 100 feet (UDC Table 40.23.140).

The base UDC buffer yards for these development options are 0.3 (providing a minimum 15 foot buffer with a two foot berm or 25 feet with 2.1 plant units per 100 linear feet) against NC 40 zoning (1 acre lots) and 0.2 (providing a minimum of 15 feet and 1.55 plant units per 100 linear feet) against lots in the NC2a, SE and SR zoning districts (2 acre plus lots).

In 2003, Councilman Weiner introduced Ordinance 03-091 proposing to eliminate the review and approval process for open space planned developments and the additional buffer requirement. Both the Department and Planning Board recommended in a report dated November, 2003, that the UDC § 40.03.319 approval was contrary to the principles of Smart Growth and that a better approach to addressing the community concerns regarding mixed housing types and smaller lots might be improving various design standards to transition, buffer and complement the neighboring community. It was recommended that a public meeting occur at the exploratory plan review stage to allow public comment and to give the developer the ability to make design changes prior to the large expenditures required at the preliminary plan review stage.

With this earlier recommendation in hand, Councilman Wiener established a UDC § 40.03.319 Study Group to review the issues in detail and to create a substitute ordinance. While several alternative amendments were proposed, Council President Clark with the support of Council Weiner determined that perhaps the best way to approach this controversial issue was to introduce this ordinance.

### **PUBLIC HEARING COMMENTS**

At the Planning Board/Department joint public hearing on September 6, 2005, County Council President Clark explained the rationale behind his new proposal. He noted that it was clear from all the past discussion, that an earlier public hearing was absolutely necessary and that the current discussions taking place at the UDC § 40.03.319 hearings were not useful in advancing the public's interest. He stated that the UDC § 40.03.319 approval process had become a major stumbling block in the County's ability to move forward with Smart Growth principles through the creation of the open space planned developments.

Planning Board members questioned the process for the exploratory plan public hearing. President Clark noted that the early public hearing will not just apply to residential plans, but to all major plans and will be the first of two public hearings required prior to a record plan. He reiterated his understanding of the frustrations of the public and developer with trying to incorporate changes at the preliminary plan review stage. The first public hearing during the exploratory plan review stage will allow changes to be made to the plan without significant re-engineering costs; and the second public hearing would be the TAC hearing during the preliminary plan review. President Clark clarified that the details of the exploratory plan hearing still need to be worked out. He also clarified that the number of public hearings (2) for a major residential development does not change. The TAC hearing remains and the UDC § 40.03.319 County Council hearing is replaced with the early exploratory plan hearing.

Four speakers provided testimony at the public hearing. Herb Inden, from the Office of State Planning and Coordination spoke in favor of the ordinance noting that innovative community designs such as the open space planned development option should be encouraged rather than discouraged as has happened with the UDC § 40.03.319 approval process. The changes proposed by this ordinance will encourage developers to pursue more innovative development designs that the State is promoting through its Livable Delaware program.

The three other speakers were all opposed to the ordinance. Chuck Mulholland, president of the Southern New Castle County Alliance is opposed to the delegation of community character issues to the Department of Land Use and recommends that County Council should retain this approval right. Richard Davis, president of the Bear Glasgow Council agrees that County Council is the appropriate public body to hear and decide the public issues and suggests that once County Council is removed from the process, the public comments may not be taken so seriously. Mr. Davis is also concerned about the location and timing of the exploratory plan public hearing noting that the public needs to have a set time and place for these hearings. Dave Carter, a resident from the Townsend area of New Castle County, suggests that because the issues

surrounding the removal of County Council participation in the UDC § 40.03.319 process are so significant that perhaps this change is best reviewed and debated during the upcoming Comprehensive Plan update. He considers this amendment an upzoning. He suggests that the increased density permitted without County Council approval could have the impact of creating too many new housing units without having the population growth to support them.

At the request of several speakers, the public record for Ordinance 05-087 was left open until the close of business on Friday, September 9, 2005. The Department received letters of support for the ordinance from The Committee of 100, Vandemark and Lynch, Inc., and American Council of Engineering Companies Delaware Chapter. Each of these letters noted the uncertainty and expense associated with changes required at the preliminary plan review stage and suggested that many of their clients simply choose to avoid the open space planned option because of the risk of denial after so much had been invested.

The Department also received three letters in opposition, two from individuals who did not speak at the public hearing and one from Dave Carter as a follow-up to his public hearing comments. Nancy Willing provided a letter suggesting that the UDC § 40.03.319 amendment should be part of the comprehensive plan update discussions. Michael Ward suggested that the community character issue and the ability to place townhomes and other small lot dwellings near existing large lot single-family dwellings was indeed an adverse impact on the property values of the existing large lot homes. And, while he supports an earlier public hearing that would enable a developer to make changes to a plan, prior to the expenditure of major engineering costs, he is opposed to the loss of County Council approval powers.

## **DEPARTMENT OF LAND USE ANALYSIS**

Over the last 20 years, New Castle County has made a number of improvements to our Comprehensive Development Plans and Codes to implement Smart Growth principles. The 10 Smart Growth principles are: (1) mixing of land uses to create a better sense of place within one's community; (2) encouraging more compact building and lot design as an alternative to conventional, land consumptive development; (3) providing for a range of housing opportunities and choices for people of all income levels; (4) creating walkable integrated neighborhoods where one can live, work, learn, worship and play; (5) encouraging community design which incorporates both the natural and man-made environment to create unique and interesting neighborhoods; (6) preserving open space for important community space, habitat for plants and animals, recreational activities, and for critical environmental areas; (7) directing development towards existing areas already served or planned to be served by infrastructure; (8) providing for a variety of transportation choices including pedestrian, bike, transit and road facilities; (9) providing development regulations that are predictable, fair and cost effective; and, (10) creating an atmosphere that encourages citizen participation and values those opinions.

The Comprehensive Plan actively supports Smart Growth cluster development and the UDC requires this development to take place where there is adequate infrastructure, most notably highway and sewer. However, there is a real fear by the development community that discourages their use of this option. The uncertainty involved with Council's discretionary vote on UDC § 40.03.319 is a major disincentive to pursue the open space planned option.

One of the 10 principles of Smart Growth is "Predictability and Cost Effective Development Decisions." In order to encourage more Smart Growth development proposals, the County should make the process more predictable and certain. High standards should be required, but approval should be attained when the standards are met.

It is also important to provide members of the community with a structured public hearing process. The community needs to have the chance to express thoughts, concerns, and ideas about what is going on in their area. Public hearings at the beginning of the development planning process provide a forum for these concerns. A public hearing in front of the Planning Board has provided the opportunity for the community to express their thoughts and to have the appointed citizen Planning Board members follow-up with more detailed questions and issues for the developer to address. This process could accomplish even more in revising development proposals if they are conducted at the exploratory plan phase.

Section 3.319 is in conflict with the original purpose of the UDC in that it stifled the innovative creativity and flexibility originally expected for developments that provide a mix of housing types consistent with Smart Growth. And, it creates a significant disincentive and economic risk to land owners and developers wanting to create mixed housing developments in the S zoning district.

It is important for the County to provide and encourage people of all economic levels to have the ability to live throughout the county. Large lot developments consume much more land, fragment the environment, and contribute to sprawl and are not conducive to the Smart Growth initiatives in the New Castle County Comprehensive Plan and the State's Livable Delaware programs. Innovative development proposals such as the open space planned option provide more housing choices, help to preserve more open space, and provide for more cost-effective infrastructure.

Regarding the proposed change to UDC § 40.03.320, the Department is concerned that the public will gain a false expectation that the 200 foot buffer will be the preferred alternative, when in fact it is more likely that an open space planned application will propose that circumstances warrant a 0.4 opacity buffer. Lacking further guidelines from the legislation, the Department would prefer to see the required 200 foot buffer eliminated and the standards in UDC Table 40.04.111 be amended. The UDC was crafted to protect adjacent properties from adverse affects by use of density controls, open space, and buffer standards. If the current buffer standards are thought to be inadequate, revisions should be considered in Table 40.04.111.

The 200 foot buffer is extensive and could be considered excessive when like residential development is proposed adjacent to each other. The Department would like to see developments become more, not less, integrated in order to form real communities as opposed to separate subdivisions. It is also a counter-productive measure when trying to consolidate open space. The 200 foot buffer is not a sufficient size to support diverse bio-habitat and often fragments the open space component.

### **DEPARTMENT OF LAND USE RECOMMENDATION**

Pursuant to Section 40.31.420 (Standards for Text Amendment) of the Unified Development Code, in determining whether a text amendment shall be recommended or approved, all of the following factors shall be considered:

**A. Implementation of a new portion of the Comprehensive Development Plan.**

This standard does not apply.

**B. Implementation and achievement of the Comprehensive Development Plan's goals and objectives.**

The New Castle County Comprehensive Development Plan encourages the use of innovative cluster housing developments, which incorporate both increased preservation of open space and natural resource protection and diversity of housing. While the UDC mandates a minimum of fifty percent open space on all development proposals with greater than fifty acres, the UDC does not mandate plans with mixed housing alternatives, and clearly, the impact of UDC § 40.03.319 has had effects on the ability of the local development community to provide these alternatives.

In addition, the existing local community, while supportive of the general purpose and goals of the Comprehensive Development Plan, has consistently shown concern for developments meeting the Plan's goals, when small lots and different housing types are proposed on adjacent property established under different development regulations. The Comprehensive Plan does, however, speak to citizen involvement in protecting the quality of life. The balance seems to be getting citizen input at an earlier stage in the development process prior to the investment of more significant engineering and design costs that occur at the preliminary plan review stage.

With the advent of another update to the Comprehensive Plan, the County is in position to recommend and make additional improvements to the various residential development options now available. Increased density, mandated or added bonuses for affordable housing, and design guidelines for better integrating smaller lot developments with existing large lot communities are several of the improvements which can be made to the UDC to implement Smart Growth principles and development.

C. Consistency with the provisions of Chapter 40 (UDC) and standards for similar uses.

This standard does not apply.

D. Necessity to respond to State and/or Federal legislation.

This standard does not apply.

E. Flexibility in meeting the objectives of Chapter 40 (UDC).

This standard does not apply.

F. Changes to conditions, interpretations, and/or clarifications to existing language for new uses.

This standard does not apply.

G. Consideration of specific problems found in Chapter 40 (UDC).

The UDC § 40.03.319 approaches open space planned proposals in a fashion similar to rezonings.

Both require discretionary approvals by County Council at the preliminary plan review stage. Applicants have indicated that significant amounts of money are expended to reach this stage and the degree of certainty and predictability that was once part of the UDC for these desired development options has been removed. The economic risk is no longer worth the limited increase in density associated with the open space planned development. While the County has recognized the importance of this development option since 1995, it has since created a process that effectively discourages its use.

The problem with the process is not so much the method of review as it is with the issues to be reviewed. The consistency of the proposed development with the character of the community is a complex issue. Existing residents, living in communities designed under different regulations with no sewer and no significant open space, interpret this to mean that large lot residential to small lot residential with mixed housing types is a clear conflict in character issue. However, an alternative interpretation of the character issue is that all of the development proposed is of a low density residential character.

Clustered developments are a legitimate planning tool in the Smart Growth toolbox. Diversity of housing opportunities allows for the creation of communities that may include first time buyers, growing families, empty nesters and retirees. Residents need not move to another part of the county, or even another state, just because their life circumstances have changed. At the same time, clustered and attached housing allows for the resource protection of a quality and quantity never

realized with half-acre, one acre and two acre developments.

The UDC provides substantial concurrency protections, safeguards our environment, seeks to reduce impervious coverage, and requires fifty percent of the development parcel be set aside for open space. It does not, however, speak to the transition of existing communities established under septic regulations to compact designed communities on public sewer. While the comments at these hearings may wander, the concern and emotion of the citizens showing up is real. The Department believes public comment at the early exploratory plan stage can successfully integrate the developer's proposal into the existing fabric of the community. The focus of this comment and review should be on appropriate design transitions between the existing community and proposed community.

### **DEPARTMENT OF LAND USE RECOMMENDATION**

The Department has considered the *Standards for Text Amendment* in Section 40.31.420 of the UDC and comments received from the public and other state agencies. Based on this analysis, the Department recommends the **APPROVAL** of Ordinance 05-087, and requests Council to consider the following changes:

- ? The exploratory plan review stage public hearing should be held before the Planning Board on a regularly scheduled hearing night to maintain a consistent and acceptable time and place for the public to attend and comment. (With this change, and proposed improvements to the Gilliam Building, it may be possible for the Planning Board to consider relocating their hearing to make it more accessible and centrally located.) The language in Section 40.31.112 E 1 could be revised as follows to reflect this change: Upon a finding that the exploratory sketch plan is generally in compliance with this Chapter and prior to exploratory sketch plan approval, all major land development plans shall be subject to a public hearing. The Department shall schedule the application for the next available Planning Board public hearing with proper notice and posting.
- ? Section 40.03.320 of the UDC should be eliminated. Lacking additional guidelines for when circumstances may warrant the reduction of the 200 foot buffer to something less, the buffer requirements in Table 40.04.111 for an open space planned development are adequate or could be increased from 0.2 and 0.3 opacity adjacent to NC40, SE and SR to 0.4 or higher.

The Department, if requested, will assist the sponsor with the preparation of a substitute ordinance to incorporate the changes recommended herein.

While the Department is supportive of this amendment, it is concerned about the cost and time element involved with two public hearings requiring notice and reports. We also note that this ordinance adds a hearing for all non-residential plans potentially adding time and cost to economic development projects.

The Department is interested in a future amendment to more accurately reflect the local development process and to incorporate the State's (Preliminary Land Use Service) PLUS review. Because the State's PLUS review must occur at the earliest stage of a developer's formal application, it represents an opportunity to incorporate both the PLUS comments and the public comments with a Department exploratory plan report. All of the comments could be received and provided to the applicant prior to exploratory plan approval and should eliminate much of the expense and time involved with the preliminary plan review. This may make it possible to go to a two-phase review process as opposed to the current three phases.

## **PLANNING BOARD RECOMMENDATION**

At its business meeting held on September 20, 2005, the Planning Board considered the recommendation offered by the Department of Land Use.

The Planning Board voted to concur with the Department of Land Use analysis, reasoning and recommendation and on a motion by Mr. McDowell and seconded by Mr. Weinberg voted to recommend **APPROVAL** of Ordinance 05-087 including the Department's recommendations. The motion was adopted by a vote of **8-0-0** (*YES: Singer, Anderson, MacArtor, Maloney, McDowell, Walker, Weinberg, Wilson; NO: none; ABSENT: none*).

In a discussion that preceded the vote, the following comments were offered:

Mr. Maloney asked about the potential fiscal impact to the county for the additional public hearing. It was noted that the sponsor at the public hearing indicated that additional fees would likely be necessary to cover the extra costs.

Ms. Anderson questioned why the Department's recommendation to eventually reduce the current three phase review to a two phase review could not be accomplished within a substitute ordinance for the current text amendment. Mr. Baker noted that the complexity involved in reducing the exploratory, preliminary and record plan stage review to only a two stage review would require changes to dozens of UDC sections. And, in each instance the Department would need to carefully consider the language to be modified.

Mr. Weinberg questions the Department's use of the word "could" in suggesting that the buffers for an open space planned development "could" be increase to a from a 0.2 and 0.3 to a 0.4 opacity. The Department noted that its recommendation is to remove the UDC § 40.03.320, but if the sponsor still considers the need to increase the buffer for open space planned developments that it could be accomplished in UDC Table 40.04.111 with a 0.4 or more opacity. The requirement that a 200 foot buffer be provided is wasteful of open space and the conditions that might warrant a reduction are not specified.

Mr. Singer noted that the recent efforts to remove the 3.319 approval process focused of the substantial

expenditures for bringing the development plan to the usual level of sophistication prior to the 3.319 proceeding, and the potential for costly re-engineering to accommodate comments received this late in the process from the public and from Council. The opportunity to comment earlier should translate to better plans at a lesser cost to the applicant. However, Mr. Singer is concerned about the lack of a County Council final review and questions how the Planning Board comments will be received and dealt with. Mr. Baker reminded the Board that the comments received under this new scenario will be no different than the Planning Board comments now made during a TAC hearing. Department staff are present at these hearings and the comments received are reported back to the applicant through the preliminary plan and TAC final review letter. Mr. Baker further indicated that the recommendation is clear that the SLD review process should be both predictable and certain. The ability of County Council to issue a discretionary decision whether it be at preliminary or exploratory is inappropriate and unnecessary.

Mr. Maloney suggested that if the Planning Board members developed a sense that their comments and concerns at the proposed early exploratory plan review meeting or TAC hearings were not being considered seriously, that it would be appropriate for the Board to organize those comments into an informal recommendation as an indication of their importance.

### **STATUTORY GUIDELINES**

In the phraseology of 9 Delaware Code Section 2603 (a), the Department finds that this text amendment as modified would promote the convenience, order and welfare of the present and future inhabitants of this State.

SIGNED 9/23/05

SIGNED 9/23/05

---

Victor Singer  
Planning Board Chairman

---

Charles L. Baker  
General Manager