PUBLIC HEARING MINUTES
MONDAY, FEBRUARY 26, 2018 AT 6:00 P.M.

COUNCIL MEMBERS: Mayor Rennie Brantz, Mayor Pro-Tem Loretta Clawson, Marshall Ashcraft, Sam Furgiuele, Lynne Mason, and Connie Ulmer

PLANNING COMMISSION MEMBERS: Chairman Connor Boyle, Vice Chairman Matt Vincent, Abie Bonevac, and Elizabeth Shay

PLANNING STAFF PRESENT: Jane Shook-Director of Planning and Inspections, Marty Little-Planner, and Brenda Henson-Board Secretary

OTHERS PRESENT: John Ward-Town Manager and Allison Meade-Town Attorney

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CALL TO ORDER

Mayor Brantz called the Town Council to order at 6:03 p.m.

Commission Chairman Boyle called the Planning Commission to order at 6:03 p.m.

APPROVAL OF MINUTES

Mayor Pro-Tem Clawson made a motion, seconded by Council Member Ashcraft, to approve the November 27, 2017 Public Hearing minutes as written.

Vote: Aye – All
Nay – None
The motion passed.

Commission Member Shay made a motion, seconded by Commission Member Bonevac, to approve the November 27, 2017 Public Hearing minutes as written.

Vote: Aye – All
Nay – None
The motion passed.

CASE PL01240-122217 HOWARD ST. VENTURES LLC REZONING - GENERAL USE ZONING MAP AMENDMENT

Council Member Furgiuele wished to be recused from this case because he is an adjoining property owner whose property values could be affected by the outcome of this request. Council Member Mason made a motion to recuse Council Member Furgiuele from this case. The motion was seconded by Mayor Pro-Tem Clawson.

Vote: Aye – All
Nay – None
The motion passed.

John Winkler, on behalf of Howard Street Ventures LLC, has submitted a Planning Permit Application for a General Use Zoning Map Amendment to rezone the properties at 783 West King Street (Watauga County PINs: 2900797562000 & 2900796480000) from Planned Development Marketplace to B1 Central Business.

Note: The applicant currently has approval for a site specific Planned Development project known as "Marketplace" and is requesting that the zoning of the property be returned to the original zoning of B1 Central Business. If approved, this rezoning would then terminate any vested rights the applicant has to the PD Marketplace approval.

Ms. Shook provided a brief description of the case and introduced Attorney Tucker Deal to outline the request.

Tucker Deal, attorney for the applicant, explained that the request was to return the properties that were granted a Planned Development approval in June 2016 back to the original zoning of B-1. Mr. Deal cited UDO Section 9.10.08 which states *Should the property fail to be developed in accordance with the terms and conditions of the PD approval, no subsequent use of the property shall be permitted without a new petition for zoning map amendment being filed.* He stated that the property owner had tried numerous things to make this project work but it had become infeasible, thus the request to return the property to B-1. Mr. Deal stated that returning the property to a B-1 zoning would be in conformity with the surrounding properties as well as the adopted plans of the Town.

With no questions or public comment, Mayor Brantz closed the public hearing for this case at 6:08 p.m.

Council Member Mason made a motion to have Council Member Furgiuele return to the meeting. The motion was seconded by Mayor Pro-Tem Clawson.

Vote: Aye – All
Nay – None
The motion passed.

CASE PL00981-092517 BEE HIVE REGULATIONS - UDO TEXT AMENDMENT

In 2015 the North Carolina General Assembly (Session Law 2015-246, House Bill 44) modified the General Statutes regarding limitations of local government regulation of [bee] hives . These changes were effective as of September 23, 2015. The proposed text brings the UDO into compliance with the North Carolina General Statutes.

Ms. Shook presented the case as outlined in the meeting packet and explained that these text changes would allow up to 5 hives per parcel, incorporate some additional regulations, and further define bees and hives.

Mayor Brantz asked if these regulations would make it difficult for the Town to become a Bee City. Ms. Shook felt the text would be an enhancement instead of an impediment.

Council Member Ulmer asked why the text was proposed. Ms. Meade replied that it was a requirement of State law.

Council Member Mason asked if the proposed text was taken from other model ordinances. Ms. Shook responded that the text was taken directly from State law.

Council Member Furgiuele asked if this was the same text that came before the Sustainability Committee. Ms. Shook replied that she believed it to be the same text. Council Member Furgiuele stated it was his recollection that the Sustainability Committee endorsed the idea. Ms. Shook stated that was correct.

Mayor Brantz asked what a bait hive was. Ms. Shook explained that a bait hive was an alternative place for bees to swarm to besides the original hive.

Commission Chairman Boyle asked why there was no reference to the 2030 Land Use Plan in the staff report. Ms. Shook replied that staff reports for text amendments usually do not have references to the 2030 Plan due to their lack of relevance with the 2030 Plan.

With no further questions or public comment, Mayor Brantz closed the public hearing on this case at 6:13 p.m.

CASE PL01265-011618 PLANNED DEVELOPMENT PROCESS - UDO TEXT AMENDMENT

At the January 8, 2018 Planning Retreat, Town Council directed Staff to draft text which would repeal the Planned Development Zoning Map Amendment process from the Unified Development Ordinance due to concerns, in part, over the types of projects the process was used for and how neighborhood meetings were conducted.

Ms. Shook presented the case as it was outlined in the meeting packet.

Council Member Furgiuele asked when the Planned Development text was adopted. Ms. Shook replied that she did not recall. General consensus was that the text was adopted in 2015. Council Member Furgiuele asked how many PD applications had been received since the text was adopted. Ms. Shook stated there had been 3 applications; Marketplace, Rivers Walk, and King & College. Mr. Ward added that there had been 2 or 3 others who had attempted to go through the Planned Development process but stopped after the neighborhood meetings due to the input they received at those meetings.

Council Member Furgiuele asked if a Planned Development essentially created a one of a kind zoning district with no restrictions to building heights and setbacks without having to obtain any variances. Ms. Shook stated that was correct, unless it was to a standard set forth by the state such as an environmental standard. Council Member Furgiuele asked if this essentially amounted to spot zoning because the Planned Development did not necessarily have to relate to surrounding properties. Ms. Shook replied that it would be a unique zoning district specific to that project that wouldn't necessarily have to meet the same standards that the properties around it meet. Council Member Furgiuele stated that PD's were legislative decisions and not decisions by the Board of Adjustment.

Council Member Furgiuele noted the 3 applications for Planned Development that had been received and asked how many of the neighborhood meetings staff attended. Ms. Shook stated that Planning staff did not attend any of the neighborhood meetings. Council Member Furgiuele asked if it was accurate to say that staff had no knowledge of whether or not the information reported regarding the course and outcome of the neighborhood meetings was accurate. Ms. Shook stated that was correct.

Council Member Furgiuele asked Ms. Meade if the courts viewed the Planned Development zoning as spot zoning. Ms. Meade replied that most commentators feel the PD plan is lawful and the way the UDO is worded gives Town Council the responsibility of making sure the PD does not become spot zoning. Ms. Meade explained that PD's were supposed to be designed to produce a product that was substantially better than what the underlying zoning would allow and felt the notion that Planned Developments were independent of their original zoning was not accurate.

Council Member Furgiuele mentioned the requirements to request a PD. Ms. Shook replied that there were 2 ways to qualify; 1) a minimum 3 acres lot size, or 2) create a mixed-use development containing both commercial and residential, on any size lot. Council Member Furgiuele asked if a mixed-use project could get a PD on a 1/8 acre lot in a neighborhood. Ms. Shook stated they could make application and approval would be up to Town Council. Council Member Furgiuele felt this could allow a development that did not resemble the character of the projects surrounding uses.

Commission Chairman Boyle asked why Town Council wanted to remove the Planned Development process from the UDO. Council Member Furgiuele replied that he proposed the repeal and while he was not against some of the aspects of the process he felt some aspects, such as the neighborhood meetings, were defective. Council Member Furgiuele felt the PD process was way too broad and the controls were not adequate to prevent people from abusing the process. He thought the process could be very destructive to surrounding neighbors. Council Member Furgiuele stated the PD process may still be a good idea for certain larger properties and was not against incorporating some of the regulations into the UDO.

Mayor Pro-Tem Clawson stated she never liked the PD process and noted that Town Council does not have the same level of expertise at reviewing plans and projects as the Board of Adjustment.

Commission Chairman Boyle stated he thought the PD process was a valuable tool and asked why the Town couldn't work with it instead of scrapping it. Council Member Furgiuele replied that he wanted it off the books before anything else could sneak in. Commission Chairman Boyle pointed out that Town Council did not have to approve a project if it felt the project was not a good fit or inappropriate for the area. Council Member Furgiuele replied that was not the point.

Council Member Ashcraft asked Council Member Furgiuele if there were alternatives that could change his mind about the PD process such as increasing the minimum lot size to 10 acres. Council Member Furgiuele responded that the did not want to just monkey around the edges. He went on to say that members of the public have told him they are unhappy with the types of development in this town.

Council Member Mason stated that some developers have probably used the PD process as a loophole to get the type of development they want and suggested that maybe the PD process was not refined well enough when it came to how neighborhood meetings should occur.

Commission Member Bonevac suggested have the Planning Commission meet with Planning staff to reconcile the language instead of repealing it. She felt a repeal of the PD process would hurt the rights of citizens to develop a unique project. Council Member Furgiuele stated there could be 9 good projects and 1 bad project but 1 bad project was too many. He suggested the Town hire a Public Advocate that could provide other aspects of a project that the developer would not provide. Council Member Furgiuele felt

the PD process should be repealed, the process should then be reviewed, and relevant parts should be incorporated into the UDO or a reconfigured PD process should be created.

Mayor Brantz called for public comment.

The first speaker was Pam Williamson. Ms. Williamson stated she is a Town resident and had been a neighborhood advocate for over 30 years, attending many Town and County meetings. She felt the PD process took away the predictability of Town zoning and what was substantially better for one person may not be substantially better for others. Ms. Williamson felt that PD's provided loopholes for developers. She stated that the Board of Adjustment provided ample opportunity for neighbors to make their case and be heard. Ms. Williamson suggested incorporating neighborhood meeting requirements into the UDO but felt the minutes of the neighborhood meetings should not be taken by the developers. Ms. Williamson stated she was not opposed to PD's on large tracts of land. She stated it was hard to fight a legislative decision but Board of Adjustment decisions can be fought in court. Ms. Williamson asserted that neighborhoods and people who wanted to protect their property did not need a free form code.

The next speaker was Tucker Deal. Mr. Deal stated he lives in a neighborhood with an approved PD (King & College) and also provided legal representation for that PD. Mr. Deal noted that the property owners spent over a year speaking with neighbors and incorporating their ideas into their plan and he felt this would be a successful Planned Development in the Town.

Council Member Ulmer stated this was a personal issue to a lot of people. She questioned if citizens of Boone wanted to be a quaint town or a city. Council Member Ulmer thought a repeal of the Planned Development process should not be considered a dismissal but a reprieve in order to create a revised plan with clarity.

With no further comments, Mayor Brantz closed the public hearing for this case at 7:24 p.m. and called for a break until 7:33 p.m.

CASE PL01298-020218 REMOVAL OF BOONE 2030 LAND USE PLAN REFERENCES - UDO TEXT AMENDMENT

At the January 8, 2018 Planning Retreat, Town Council directed the Town Attorney to schedule a hearing for the February 15, 2017 regularly scheduled Town Council meeting in order to repeal the Boone 2030 Land Use Plan. This text amendment corresponds to this request and removes all references to the Boone 2030 Land Use Plan from the Unified Development Ordinance.

Ms. Shook presented the case as it was outlined in the meeting packet. She explained that this case was placed on the agenda in the event that Town Council voted to repeal the Boone 2030 Land Use Plan at their February meeting. Ms. Shook stated that Town Council decided to defer consideration of whether to repeal the Boone 2030 Land Use Plan until their March meeting.

Mayor Brantz asked if the 2030 Plan should be repealed before the Comprehensive Plan revisions were complete.

Ms. Meade noted that adopted plans do not require public hearings, which provided more flexibility for legislative changes when issues or problems occurred. Council Member Furgiuele stated it was staggering to him that an adopted plan could be amended on a dime.

There was reference to a memo sent to Town Council and Planning Commission members **(copy of memo attached)** by Ms. Meade which contained her opinion that retaining the 2030 Plan would only pose a minimal risk. Council Member Furgiuele disagreed and believed there would be a much greater risk.

Council Member Furgiuele asked Ms. Shook if it was possible to have inconsistencies between the UDO and the 2030 Plan. Ms. Shook replied that it was possible. Council Member Furgiuele expressed concern that developers would use this plan as a means to sue the town and his role was to help protect the Town's money. He felt it was problematic to have numerous different plans that are not combined or well known.

Ms. Meade felt that even though there were various adopted plans, some plans, such as the Comprehensive Plan, carry more weight than others.

Vice Chairman Vincent left the meeting at 8:00 p.m. Quorum of the Planning Commission was discussed. Mr. Ward explained that the Planning Commission had quorum at the beginning of the meeting do they could continue the remainder of the meeting as though they still had quorum.

Commission Member Shay felt it was helpful to know that the Comprehensive Plan has priority over other plans.

Commission Chairman Boyle asked why the Town wanted to repeal the 2030 Plan and not all the other plans. Council Member Furgiuele replied that he did not even know all of the plans the Town had adopted but did know that developers were referencing compliance with the 2030 Plan over compliance with the UDO when trying to get their projects approved. Commission Member Shay asked why developers reference the 2030 Plan so much. Ms. Meade replied that the 2030 Plan and the Comp Plan were the main plans of the Town. Commission Member Shay wondered if, while relying only on the 2006 Comprehensive Plan, there was something they would be missing from a repealed 2030 Plan.

Council Member Ashcraft asked if Town Council gave any direction about what parts to include or remove from the Comprehensive Plan and 2030 Land Use Plan merged document. Ms. Shook explained that the merger was only to remove any inconsistencies between the two documents and make them more cohesive.

Council Member Furgiuele stated that when the Town lost the ETJ it impacted the 2030 Plan because a lot of the basis for some parts of the document were dependent upon the ETJ and were no longer relevant. He further stated that the Town can only control 10-20% of the stormwater coming into the valley floor and the Town cannot be protected from consequences of high density development.

Council Member Mason felt that encouraging density within the Town helped to discourage urban sprawl.

Commission Chairman Boyle stated that the 2030 Plan addressed smart growth, walkability, stormwater, etc. and he did not want the Plan repealed. He questioned who chose what the good parts of the Plan were and stated if the Town does not build up it will force sprawl. Commission Chairman Boyle felt strongly that the Town needed to work with ASU to address housing for students as enrollment was only expected to increase.

Council Member Ulmer agreed that the Town and ASU needed to have more conversations and indicated the system was at fault, not ASU.

Commission Member Bonevac asked how much money and time were put into developing the 2030 Plan. Ms. Shook responded that she did not know the amount of money spent but felt it was roughly a year long process to develop.

Mayor Brantz called for public comment.

Pam Williamson spoke, stating she attended the Charrettes for the 2030 Plan and loved the process but felt there were major inconsistencies in the Plan. She asked if the Town wanted higher density, growth, increased traffic, tall buildings, no setbacks, and the loss of our beautiful corridors. Ms. Williamson felt the Plan should be revisited and the desires of the citizens should be prioritized so that the good parts of the Plan could be kept.

Council Member Furgiuele asked Ms. Williamson what type of people participated in the Charrettes. Ms. Williamson replied that there were a lot of people from the ETJ, developers, and neighborhood people. She estimated there were 3-4 residents to every developer.

Council Member Ashcraft stated he had read every word of the 2030 Land Use Plan and there was heavy emphasis on sustainability, walkability, and it reflected a lot of the values of the Town.

Commission Member Shay questioned why the 2030 Plan should be repealed when Town Council felt there were so many poor projects built under the UDO. Council Member Furgiuele expressed concern with the potential that arose from the State law change that could allow someone to sue the Town and that was his motivation for acting quickly to repeal the 2030 Plan. He stated he was not against incorporating the good parts of the Plan into the UDO, once they had been identified.

ADJOURNMENT OF TOWN COUNCIL

Mayor Pro-Tem Clawson made a motion to adjourn Town Council at 8:47 p.m. The motion was seconded by Council Member Furgiuele.

Vote: Aye – All
Nay – None
The motion passed.

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Mayor Rennie Brantz **Board Secretary Brenda Henson**

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Planning Commission Chairman Connor Boyle

At 8:51 p.m. Commission Chairman Boyle proceeded with the business of the Planning Commission.

APPROVAL OF PLANNING COMMISSION MEETING MINUTES

Commission Member Shay made a motion, seconded by Commission Member Bonevac, to approve the December 18, 2017 Planning Commission meeting minutes as written.

Vote: Aye – All
Nay – None
The motion passed.

CASE PL01240-122217 HOWARD ST. VENTURES LLC REZONING - GENERAL USE ZONING MAP AMENDMENT

Commission Member Bonevac asked if there was even a choice for this property to revert back to its original zoning of B-1 if the PD process was going to be repealed. Commission Chairman Boyle stated that this Planned Development had expired. Ms. Shook replied that their PD was not expired and further explained that a repeal of the Planned Development process would prevent someone new from making application but would not affect any existing, approved Planned Developments.

First Motion and Vote
Commission Member Shay made a motion that the proposed amendment to the Town's zoning ordinance is consistent with the Town's comprehensive plan and any other adopted plan(s) of the Town that are applicable because it simply follows the provisions of the rule that when a Planned Development expires the property reverts back to B-1. The motion was seconded by Commission Chairman Boyle.

Vote: Aye – All
Nay – None
The motion passed.

Second Motion and Vote
Commission Member Bonevac made a motion that the Planning Commission recommends approval of the proposed amendment to the Town's Zoning ordinance and believes approval is reasonable and in the public interest because the applicant is joining the surrounding land use as B-1 and meets all approved plans. The motion was seconded by Commission Member Shay.

Vote: Aye – All
Nay – None
The motion passed.

CASE PL00981-092517 BEE HIVE REGULATIONS - UDO TEXT AMENDMENT

Commission Member Shay recapped that this request would allow one more hive, require the hives be secured at ground level or on a stand, and require that unattended or inactive hives be removed. Commission Chairman Boyle stated that all of these changes seemed good.

First Motion and Vote
Commission Chairman Boyle made a motion that the proposed amendment to the Town's zoning ordinance is consistent with the Town's comprehensive plan and any other adopted plan(s) of the Town that are applicable because it provides habitat for pollinators which are a critical component of the world

in which we live and it aligns with the Comprehensive Plan policy 2.1.4 Agricultural and Rural Development. The motion was seconded by Commission Member Shay.

Vote: Aye – All
Nay – None
The motion passed.

Second Motion and Vote
Commission Member Shay made a motion that the Planning Commission recommends approval of the proposed amendment to the Town's Zoning ordinance and believes approval is reasonable and in the public interest because of the reasons noted above in the first motion and vote. The motion was seconded by Commission Chairman Boyle.

Vote: Aye – All
Nay – None
The motion passed.

CASE PL01265-011618 PLANNED DEVELOPMENT PROCESS - UDO TEXT AMENDMENT

There was some discussion about voting after Vice Chairman Vincent left the meeting and Ms. Shook advised the Commission that they could vote and Vice Chairman Vincent's vote would be counted with the majority vote.

Commission Member Shay admitted she was struggling with the PD. She stated it sounded as if there were specific concerns that should be focused on, like where it impinges on neighborhoods. Commission Member Shay stated if you had a large lot and you were doing mixed-use and adding a residential component, it would be different than this same project happening in a smaller area that would impinge on neighborhoods. She felt this was what was a main concern of Town Council. Commission Member Shay stated she did not really know how she felt about repealing the PD process.

Commission Chairman Boyle stated he agreed with what Commission Member Shay said and did not agree with striking the whole thing out of the UDO and eliminating the Planned Development process even temporarily. He mentioned the reference to a mixed-use project being built on a 1/8 acre lot and, while this was possible, it has not happened. Commission Chairman Boyle stated that there was some risk associated with the Planned Development process, Town Council still had the final decision on the project approval. Commission Chairman Boyle noted that nothing was infallible and asked how many times the text had been revised. Ms. Shook replied that the text had been revised once or twice. Commission Chairman Boyle stated you would expect there to be revisions as you go along on something of this scale. He felt the PD should not be repealed but would recommend it be taken a look at by people who are impartial and not just throw it away. Commission Chairman Boyle stated the PD process provided flexibility for challenging lots and felt it was a good tool.

Commission Member Bonevac stated she was thinking of the Industrial Park allowing uses that were not industrial as a way to help support revenue when she thought of Planned Developments.

Commission Member Shay asked if the Commission would be comfortable with a motion that said something like the Planning Commission recognizes some of the shortcomings but also the benefits the PD offers and recommends that Town Council get an expert analysis on how to fine tune it to best serve

the Town's purposes. She stated that might mean looking at residential versus commercial and industrial, looking at applying this to only larger projects, and other considerations that would make this a better and accurate tool for the Town's purposes without tossing out something that is beneficial.

Commission Chairman Boyle agreed that he would like to have someone analyze it and go through the "what if" scenarios in order to determine the worst thing that could happen in a given development situation. He stated he would also like to look back at projects that were approved for PD's and projects that were not approved to see what could have been done to improve the projects.

Mr. Ward noted that the King & College PD garnered neighborhood support and was approved unanimously by Town Council. Ms. Shook noted there was some neighborhood concern, nothing really strong but there were questions. Commission Chairman Boyle felt this was a difficult lot and the PD process allowed them to do their development rather than having to go to the Board of Adjustment

Commission Member Shay stated she rejected the idea that all neighborhood meetings had to be positive. She felt they could flush out negative feelings and comments and suggested that unproductive and contentious meetings could be a part of the whole check on things. Commission Member Shay stated the neighborhood meetings give neighbors the sense that they have gotten to participate in the process beforehand instead of seeing something being built that they did not get to have input on and she contended that even an unpleasant process could be useful.

Commission Member Bonevac liked the idea of having an unbiased third party attend the neighborhood meetings in order to provide an accurate report of what took place.

Commission Member Bonevac asked if Commission members were all in agreement. Commission Chairman Boyle stated he was in agreement to deny the repeal and recommend that the PD process be looked at more closely.

First Motion and Vote

Commission Member Shay made a motion that the proposed amendment to the Town's zoning ordinance is not consistent with the Town's comprehensive plan and any other adopted plan(s) of the Town that are applicable because it does not honor the spirit of Comprehensive Plan policy 2.1.1 Economic Development in regards to enhancing the area's physical and human resources. The motion was seconded by Commission Chairman Boyle.

Vote: Aye – All
Nay – None
The motion passed.

Second Motion and Vote

Commission Member Shay made a motion that the Planning Commission recommends denial of the proposed amendment to the Town's Zoning ordinance and believes denial is reasonable and in the public interest because the Town would be better served by an analysis on how to maintain the best features of the PD and analyze weaknesses that could result in universally unfavorable development. She added that completely eliminating the PD process could be more detrimental than the potential benefits of retaining the text. The motion was seconded by Commission Chairman Boyle.

Vote: Aye – All

Nay – None
The motion passed.

CASE PL01298-020218 REMOVAL OF BOONE 2030 LAND USE PLAN REFERENCES - UDO TEXT AMENDMENT

Because Town Council has not acted on the repeal of the Boone 2030 Land Use Plan, Commission members felt they would rather wait until that time to make their recommendations on the removal of references to the Plan from the UDO.

Commission Chairman Boyle made a motion to table this agenda item until the March Planning Commission meeting. The motion was seconded by Commission Member Shay.

Vote: Aye – All
Nay – None
The motion passed.

ELECTION OF OFFICERS

Due to the fact that there were only 3 members of the Planning Commission present at this time, Commission members agreed they would rather elect officers when there were more members present.

Commission Chairman Boyle made a motion to table election of officers until the March Planning Commission meeting when more members could be present. The motion was seconded by Commission Member Bonevac.

Vote: Aye – All
Nay – None
The motion passed.

ADJOURNMENT OF PLANNING COMMISSION

Commission Chairman Boyle made a motion to adjourn the meeting at 9:40 p.m. The motion was seconded by Commission Member Shay.

Vote: Aye – All
Nay – None
The motion passed.

Planning Commission Chairman Connor Boyle **Board Secretary Brenda Henson**

MEMORANDUM

To: **Town Council & Planning Commission Members**

From: **Allison M. Meade, Town Attorney**

Subject: ***The 2030 Plan, "Plan Consistency Statements" And Related Issues***

Date: **February 26, 2018**

Issue: An issue has been raised as to whether the 2030 Plan should be repealed at least in part because it poses a litigation threat to the Town. In particular, it has been suggested that developers will use the 2030 Plan as a basis for suing the Town if a proposed development is rejected even though the development plan is allegedly consistent with the 2030 Plan. It has been suggested that the risk of such legal challenges has increased as the result of changes to G.S. §160A-383 concerning "plan consistency statements."

Relevant law:

(1) State law: Effective this past October 2017, Session Law SL 2017-10, section 2.4, changed current law regarding the consistency of zoning regulations and comprehensive plans as follows.

§ 160A-383. Purposes in view.

(a) Zoning regulations shall be made in accordance with a comprehensive plan. ~~When~~

(b) Prior to adopting or rejecting any zoning amendment, the governing board shall ~~also approve a statement~~ adopt one of the following statements which shall not be subject to judicial review:

(1) A statement approving the zoning amendment and describing ~~whether its action is consistent~~ its consistency with an adopted comprehensive plan and ~~any other officially adopted plan that is applicable, and briefly~~ explaining why ~~the board considers~~ the action taken ~~to be~~ is reasonable and in the public interest. ~~That statement is not subject to judicial review. The~~

(2) A statement rejecting the zoning amendment and describing its inconsistency with an adopted comprehensive plan and explaining why the action taken is reasonable and in the public interest.

(3) A statement approving the zoning amendment and containing at least all of the following:

a. *A declaration that the approval is also deemed an amendment to the comprehensive plan. The governing board shall not require any additional request or application for amendment to the comprehensive plan.*

b. *An explanation of the change in conditions the governing board took into account in amending the zoning ordinance to meet the development needs of the community.*

c. *Why the action was reasonable and in the public interest.*

(c) Prior to consideration by the governing board of the proposed zoning amendment, the planning board shall advise and comment on whether the proposed amendment is consistent with any comprehensive ~~plan that has been adopted and any other officially adopted plan that is applicable.~~ plan. The planning board shall provide a written recommendation to the governing board that addresses plan consistency and other matters as deemed appropriate by the planning board, but a comment by the planning board that a proposed amendment is inconsistent with the comprehensive plan shall not preclude consideration or approval of the proposed amendment by the governing board.

(d) Zoning regulations shall be designed to promote the public health, safety, and general welfare. To that end, the regulations may address, among other things, the following public purposes: to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to lessen congestion in the streets; to secure safety from fire, panic, and dangers; and to facilitate the efficient and adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. The regulations shall be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such city.

(e) As used in this section, "comprehensive plan" includes a unified development ordinance and any other officially adopted plan that is applicable.

(2) The UDO

The Town's UDO has several provisions that speak to how adopted plans are to be taken into account upon consideration of zoning amendments and other zoning decisions.

(a) UDO Section 1.08 provides as follows:

§ 1.08 RELATION TO COMPREHENSIVE PLAN, BOONE 2030 LAND USE PLAN AND OTHER OFFICIALLY ADOPTED PLANS.

1.08.01 It is the intention of the Council that this ordinance implement the planning policies adopted by the Council for the Town and its extraterritorial planning area, as reflected in the Comprehensive Plan.
1.08.02 The goal of the Council is to implement the Boone 2030 Land Use Plan and other officially adopted plans; however, it recognizes that this is a process that requires continued

study and analysis and may occur in stages. While the Council reaffirms its commitment that this ordinance and any amendment to it be in conformity with adopted plans, the Council hereby expresses its intent that neither this ordinance nor any amendment to it may be challenged on the basis of any alleged nonconformity with such plans.
(Ord. passed 12-16-2013)

(b) Article 6, which concerns Board of Adjustment hearings, requires in part as follows:

§ 6.02 SPECIAL USE PERMIT, TRANSITIONAL ZONES AND MAJOR SUBDIVISION PRELIMINARY PLAT APPLICATIONS.
6.02.01 An applicant for a special use permit or major subdivision preliminary plat approval must demonstrate all of the following:

A. The application is complete;
B. If completed as proposed, the development or subdivision:
1. Will comply with the requirements of this ordinance;
2. Will not materially endanger the public health or safety;
3. Will not substantially injure the value of adjoining or abutting property;
4. Will be in harmony with the area in which it is to be located;
5. Will be in general conformity with the Comprehensive Plan, Boone 2030 Land Use Plan, and all other relevant plans officially adopted by the town; and
6. In cases involving transitional zones, meets the standards of Subsection 6.02.02.

(c) Article 9, which concerns Council consideration of zoning amendments, provides as follows in part:

9.06.03 When adopting or rejecting any UDO text or map amendment, the Council shall adopt a statement describing whether its action is consistent with the Comprehensive Plan, the Boone 2030 Land Use Plan and other officially adopted plan that is applicable and explaining why the Council considers the action taken to be reasonable and in the public interest. That statement is not subject to judicial review.

"Expert" opinion on Plan consistency

SOG staffer and UNC professor David Owens wrote an essay on the history and implications of the changes to § 160A-383 in a Coate's Canons Blog published on June 20, 2017, *A Statutory Modification for Plan Consistency Statements.* I believe this essay is worth quoting at length (emphases added):

Cities and counties routinely consider proposals to amend their zoning ordinances. Amendments vary from the rezoning of a single parcel of land to major rewrites of the whole ordinance. The decision of whether or not to make a particular amendment is a legislative policy choice left to the good judgment and discretion of the elected governing board.

A variety of factors are considered by the governing board in making these decisions. For the past decade in North Carolina, one of the factors that must be considered is how the proposal relates to previously adopted plans. Under the General Statutes a zoning amendment is not required to be consistent with the plan, but both the planning board and governing board are required to consider the plan and to document that consideration with a written statement approved by the board. For the most part this has become a routine and noncontroversial step in the zoning amendment process. But there has been enough confusion about this requirement that the General Assembly has amended the plan consistency statement requirement . . . * * **

It has always been presumed that a comprehensive plan or land use plan is an essential tool to produce the data analysis, community engagement, and policy direction needed to allow rational choices in applying zoning. From the earliest days of zoning, statutes across the country have required that zoning be undertaken "in accordance with a comprehensive plan." Some states, by statute or case-law, require zoning regulations to be in substantial compliance with an adopted plan.

That is not the case in North Carolina. Our courts have not mandated that zoning be consistent with a comprehensive plan. However, in 2005 the North Carolina planning statutes were amended to require that planning boards and the governing board review and consider any adopted plan when a zoning amendment is proposed. . . .

The statute only requires that the plan be considered, not that it be followed. Some zoning ordinances make plan compliance a mandatory factor for individual permit decisions, typically for a special use permit. But when a legislative decision is being made on a proposed zoning amendment, the statutes are clear that the plan is advisory in nature. A zoning amendment that is inconsistent with an adopted plan is legal, so long as the governing board was aware of what advice and guidance the plan offers. The statutory requirement is that the governing board's awareness must be documented by a statement describing plan consistency that is approved at the time the zoning amendment is adopted. * * * * *

One might think that a simple statutory requirement that planning boards and governing boards pull out their adopted plans and think about what, if any, useful guidance the plan provides before making a decision on a pending zoning amendment would be straight-forward and non-controversial. After all, the boards are not required to take action consistent with the plan, only to know and consider what it says. In most instances that has indeed proven to be the case. But there has been confusion and controversy about plan consideration in a few high profile zoning disputes that led to litigation.

In the first case addressing the plan consistency statement requirement, the City of Kannapolis was considering a proposal to rezone a large recently annexed parcel from low-density residential to a district that would allow retail, office, and light industrial uses. The staff prepared an analysis of the compatibility of the proposed uses with the adjacent area and concluded the rezoning was consistent with the long-range goals of the city. The staff report was presented to the city council and the rezoning was approved.

Opposing neighbors challenged the rezoning. The court in Wally v. City of Kannapolis, 365 N.C. 449 (2012), sided with the neighbors. The court held the statutory requirement for the council to approve

a statement addressing plan consistency is clear and mandatory. The fact that a staff analysis was available for the board's review is not the same as the governing board itself approving a statement on plan consistency. . . .

The Wally case makes the fairly simple point that when the statute says the board must approve a statement, it means the board must really approve a statement, not just have a staff report in its meeting packet. While the substance of the statement is not subject to judicial review, whether it was formally approved by the governing board is subject to review. If the statement did not exist or was not clearly approved by the board, the statute is violated and the zoning amendment is invalid.

The second case addressing the plan consistency statement requirement arose when Queens University in Charlotte sought a zoning amendment to facilitate construction of a parking deck. Adjacent residents in the Meyers Park neighborhood objected. The city's zoning commission found the proposed amendment to be consistent with city plans and recommended approval. The city council agreed and adopted a statement that "this petition is found to be consistent with adopted policies."

In Atkinson v. City of Charlotte, 235 N.C. App. 1 (2014), the court found this conclusory statement failed to meet the requirement of the statute that the governing board statement describe how the action is consistent with adopted plans and explain why it is reasonable and in the public interest. . .

These two cases confirm that the governing board must actually approve a statement when it amends a zoning ordinance and that statement must be more than a checklist conclusion – it must include some modest discussion and explanation. * * * * *

In 2017 the General Assembly amended G.S. 153A-341 and 160A-383 to add more specificity to the law regarding the mandated plan consistency statements. . . * * * *

In some respects this amendment heightens the tie between the plan and zoning ordinances. If a proposed zoning amendment is consistent with the plan it may be approved and if it is inconsistent with the plan it may be rejected. But if the zoning amendment is inconsistent with the plan and the governing board wants to approve the amendment anyway, the plan is deemed amended and the governing board must set forth the "change in conditions" that led it to take that action.

The statute does not address a fourth possibility – that the board finds the amendment consistent with the plan but decides to reject the amendment anyway. Prior case law allows this to happen and given the advisory nature of the plan, that is likely still permissible. But the fact that it is not listed as an option in the new statute does give some pause to consider whether it is implied that this is no longer permissible. After all, the amended statutes uses mandatory language, saying the governing board "shall adopt one of the following statements." To avoid a potential problem in this situation, it would be prudent for a governing board rejecting a zoning amendment that is consistent with its plan to concurrently amend the plan.

Presumably the discretion of the governing board is not substantially limited when it decides to approve a zoning amendment that is inconsistent with the plan. The board can decide which "changing conditions" to consider and whether they are sufficient. For example, there may have been changes

in physical conditions on the site, on the infrastructure available, on the demand for new development, on the policies or priorities of the board, on the board's assessment of neighborhood needs, or on a host of other potential "conditions."

In any event, the lessons of the Wally and Atkinson cases noted above should continue to be carefully observed. The statutory requirement for consideration of plan consistency is not a legislative suggestion. A statement on plan consistency must be explicitly approved by the governing board at the time a zoning amendment decision is made. The statement must be more than a one-sentence conclusion. It must both describe plan consistency or inconsistency and it must explain the rationale of the decision. The statement is to take the form of one of the three options noted above.

That said, the statement does not need to be a long, complicated, legalistic document. The statement does not have to be supported by evidence in the record, as would be the case for a quasi-judicial decision. But it must be real, it must be approved by the board, and it must have a brief description of why the action is or is not consistent with the plan. Anything less risks judicial invalidation of the zoning amendment.

IMPLICATIONS FOR LEGAL RISKS TO THE TOWN

As Professor Owen's analysis makes clear, it is important to note that courts have reversed legislative zoning decisions on grounds that the governing board has failed to issue an appropriately detailed statement explaining their decision, not on grounds that the zoning decision was inconsistent with official plan(s). In other words, North Carolina law mandates that a governing board consider and articulate its consideration of its official plans in making a zoning decision, but the law does not require a town council to follow the plan(s), nor does the law give any other party a right to challenge a town council's decision on the basis of plan inconsistency. Further, the statute specifically states that the contents of the governing board's consistency statement are not subject to judicial review.

A legislative zoning decision must be rational, and not arbitrary and capricious, and may not constitute illegal spot zoning. It is on one of these bases that a challenge to a legislative zoning decision must be brought. Of course, a challenger may claim that inconsistency between a development decision and an adopted plan establishes irrationality, arbitrariness, or capriciousness. Thus, the mere existence of the 2030 Plan – and any other officially-adopted plan -- in some sense increases the chances of a challenge to a zoning decision on the basis of irrationality, arbitrariness, or capriciousness. But this is an argument that has always been open to a party challenging a legislative zoning decision. I do not believe that the changes to §160A-383 have substantially changed the likelihood of such cases being brought or the chances that such challenges would succeed.

(1) Do the changes to G.S. §160A-383 increase the risk of a lawsuit being filed over a zoning amendment decision by Council?

The answer is yes, but only in the limited sense identified by David Owens: the change to the statutory language creates some uncertainty as to whether the legislature intended to limit a governing board's authority to reject a proposed development even though the proposal is consistent with a comprehensive plan. One could take the position, alluded to by Professor Owens above, that by setting forth the three statement "options" in §160A-383, the state legislature implicitly changed the law to prohibit a governing board from rejecting a new development that is "consistent" with its official plans. Even if this view is not ultimately accepted by the courts, the possibility does create uncertainty, and uncertainty, by its very nature, increases the risk of litigation.

However, I believe that the risk is not substantial and should not drive the Town's policy choices. The changes to G.S. § 160A-383 appear intended to clarify and emphasize the necessity for municipal boards to consider their adopted plans and articulate how those plans figured in consideration of a zoning amendment. The statutory changes do not indicate any clear intent by the legislature to change established law and limit a town council's legislative decision-making authority. Had that been the intent of the legislature, it would have been very easy for the legislature to have included language clearly limiting the governing board's authority, but no such language was included. In my view, a court looking at the statutory changes would most likely conclude that the statute has not changed established law in North Carolina, which allows a governing board to adopt or reject a zoning amendment in its legislative discretion on rational grounds – regardless of whether the amendment is consistent or not consistent with adopted plans.

It should be noted how difficult it may be in many cases to say whether a particular zoning request is 'consistent" or "inconsistent" with a community's adopted land use plans. In many cases, there may be inconsistency within one plan or between plans. There may be parts of a development proposal that are consistent and parts that are inconsistent with adopted plans. This is another reason, in addition to the traditional deference given to local government's legislative decisions, that I believe a court is unlikely to conclude that the changes to §160A-383 fundamentally changed and reduced the legislative authority of local governing boards.

(2) Do the statutory changes mean that the 2030 Plan in particular now poses a greater legal risk to the Town?

In my view, no. Under the prior statutory language, the 2030 Plan had to be considered in connection with any zoning amendment as an "officially adopted plan that is applicable." Now it is defined under the statute as part of the "comprehensive plan." The effect is the same under both versions of the statute: when the Council makes legislative zoning decisions, the 2030 Plan, like all of the Town's applicable, officially adopted plans, must be considered for "consistency." Thus, the status of the 2030 Plan has not changed. Town Council needed to consider the 2030 Plan upon consideration of any zoning amendment before the law was changed, and continues to need to consider it now.

Finally, it is worth keeping in mind that there is always a risk of "inconsistency" regardless of whether the Town has only a single "comprehensive plan" document or has a number of plans that together are now considered the "comprehensive plan." If the Town's other official plans are folded into a single comprehensive plan document, the risk of inconsistency will simply change to being located within the various parts of the one large document, whereas currently the inconsistencies might be more spread out in several documents. Either way, there is always a risk (perhaps even a likelihood) of inconsistency between some details of any comprehensive plan and any particular development plan decision by Council. In all likelihood, this is precisely one reason that our state courts and state legislature have not required legislative zoning decisions to be consistent with comprehensive plans.

(3) Should the 2030 Plan be repealed?

This very obviously is a question for the Town Council to answer, not me. The point of this memo is simply to explain why the recent changes to § 160A-383 might or might not be considered sufficient to justify repealing the 2030 Plan.

The challenge to the 2030 Plan does raise the serious policy question of whether that Plan is or is not consistent with what the Council envisions for the Town. While I believe that the Town Council continues to have the authority to reject development proposals even if they are supposedly "consistent" with the 2030 Plan, it clearly is not good practice for the Town to regularly reject projects that appear to be consistent with one of its adopted plans. If that happens, or is expected to happen, then the Town needs to reconsider and modify or repeal that particular plan.

It should also be noted that for quasi-judicial decisions that proceed before the Board of Adjustment for special use permits or subdivision approval, the applicant is required to show, and the Board of Adjustment must find that the proposal "[w]ill be in general conformity with the Comprehensive Plan, Boone 2030 Land Use Plan, and all other relevant plans officially adopted by the town." Unlike the Town Council's decisions on zoning amendments, the BOA's decision-making is not a matter of legislative discretion but is more tightly constrained and must follow the UDO. The Town should avoid a situation where the Board of Adjustment is required to approve projects that are in "general conformity" with a plan that the Council believes is no longer consistent with its planning objectives.