

MEMORANDUM

TO: Mayor and Town Council
FROM: Ralph D. Karpinos, Town Attorney
DATE: June 26, 2019
SUBJECT: Proposed Changes to Blue Hill Stormwater Regulations

Introduction

On May 22, 2019 the Town Council opened a public hearing on a proposed amendment to the Land Use Management Ordinance regarding Stormwater Management in the Blue Hill District. The amendment is in response to recent changes in State Law.

State Law now prohibits local requirements that stormwater controls be implemented to address preexisting development. Stormwater controls for redevelopment can only be required for the amount of impervious surface that exceeds the amount that existed before redevelopment.

This memorandum responds to questions that were raised regarding the proposed LUMO amendment presented at that hearing.

Background

Section 26(b) of North Carolina Session Law 2018-145, effective Dec. 27, 2018, reads as follows:

SECTION 26. (b) G.S. 143-214.7(b3) reads as rewritten:

“Stormwater runoff rules and programs shall not require private property owners to install new or increased stormwater controls for (i) preexisting development or (ii) redevelopment activities that do not remove or decrease existing stormwater controls. When a preexisting development is redeveloped, either in whole or in part, increased stormwater controls shall only be required for the amount of impervious surface being created that exceeds the amount of impervious surface that existed before the redevelopment. This subsection applies to all local governments regardless of the source of their regulatory authority. Local governments shall include the requirements of this subsection in their stormwater ordinances.”

(Underlining reflects amendment to law.)

This law effectively voids a stormwater standard in the Blue Hill District which required treatment of stormwater for more than just the amount of additional impervious surface being added as part of a Blue Hill redevelopment project.

This enhanced stormwater standard in the Blue Hill District was a principle basis for the decision to enact Blue Hill District regulations.

In an effort to maintain the enhanced stormwater standards in the Blue Hill District, Town Staff is proposing to convert the Blue Hill redevelopment regulations from required zoning standards to an option which an applicant could choose. If chosen, the applicant would have the opportunity to take advantage of the density, procedural and other benefits of Blue Hill zoning and in return would agree to comply with the enhanced stormwater standards which are now not allowed to be required.

For this to be an option, there needs to be an alternative, by right, available zoning designation which does not have the enhanced stormwater standard and would thus conform with the changes in State Law.

A public hearing on this proposed alternative and revision to the Blue Hill zoning regulations was opened on May 22 and recessed to the Council's June 26 meeting.

The staff is recommending that the alternative, by right, Conventional Path standards would include many of the standards which were in place in this area of Town prior to the establishment of the form-based code and Ephesus/Fordham (now Blue Hill) District. The information in your Agenda materials explains this in greater detail.

Issue referred to Town Attorney

At the public hearing on May 22 Council members asked questions regarding the legal viability of this first option, the one which would be added to respond to changes in State Law and would allow an option to develop/redevelop and only provide stormwater treatment for new development.

Specifically, the concerns raised were whether this option should be comparable as an alternative to the Enhanced Development Blue Hill option and whether the Conventional Path option needs to provide similar benefits to the Enhanced Development Path.

Response

Zoning regulations cannot be confiscatory. They must provide an opportunity for reasonable use of property.

Where zoning does not provide an opportunity for reasonable use, it can be considered a taking and can require payment of compensation. Alternatively, depending on the particular facts and circumstances, zoning which does not provide an opportunity for a reasonable use could be deemed *ultra vires* (beyond the authority of the regulating authority). Regulations determined by a Court to be *ultra vires* would be invalid.

The converse is also true: where zoning affords a reasonable use of property it is generally considered valid. Zoning need not afford an owner the opportunity to make the preferred use or the highest and best use or the most profitable use, as long as some reasonable use is provided by right.

"By right" use means a use that can be made of the property without seeking some discretionary approval from a governing authority, such as a rezoning, and, without the need to be issued a special or conditional use permit.

"By right" use would include an obligation to comply with the reasonable and lawful standards established under a land use ordinance. Typically, by right uses in Chapel Hill involve those uses for

which site plan approval is sought and considered by the Town's Planning Commission and, in some cases, by the Town Staff.

As long as the zoning regulations afford property a by right practical use and reasonable value, even if there was, as a result, a substantial reduction in the property's value, the regulations would be expected to be held to be valid under North Carolina Law. If the property were not afforded a practical use and a reasonable value due to a zoning regulation, the zoning regulation would likely be determined to be confiscatory and a taking, requiring the payment of just compensation or, beyond the zoning authority's power (*ultra vires*).

In this case, the Conventional Path does provide a practical use and a reasonable value for the property. This option is based essentially on the commercial zoning regulations that applied generally in this area prior to the Blue Hill District being established.

The Conventional Path need not be comparable to the Enhanced Development option. It only needs to afford a reasonable use for the property. In this case, most of the property in the Blue Hill District is either: already developed and assigned to uses which were established under the prior zoning; or, has already been redeveloped under Blue Hill standards. The Conventional Path essentially allows the existing uses that were allowed under the prior zoning to be reconstructed subject to regulations similar to those in place prior to the creation of the Blue Hill standards (modified by the application of some of the current Blue Hill standards as explained in the Staff's report). One net result of this change could be, for buildings already in existence, less incentive and likelihood for redevelopment under the Conventional Path; but this Path remains an option and affords property some practical use and reasonable value.

Summary and Conclusion

The Conventional Path might not afford a use that is "comparable" to what is available if the Enhanced Development Path is chosen and enhanced stormwater standards are met. It is not legally required to provide a comparable option to the Enhanced Development Path, only an opportunity to use, develop, and redevelop property so that the practical uses are permitted and the property continues to have reasonable value.