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Mr. Gary Jackson
City Manager
City of Asheville
P.O. Box 7148
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Dear Mr. Jackson:

You asked me to review the files on three development decisions made by the city – signage for a Prudential Realty business on College Street, the Staples building on Merrimon Avenue, and the Greenlife Grocery on Merrimon Avenue. In each instance, I have undertaken a review of the city files and citizen concerns to assess whether the permitting decisions were consistent with the terms of the Unified Development Ordinance (UDO) in effect at the time of decision.

I understand that appeals were made on some or all of these decisions. My review has not included any assessment of legal procedural issues raised by appeals, such as jurisdiction, standing, or timeliness of appeals. I have examined only the interpretations of the UDO.

In my review I had access to what I gather are the complete city files on these three cases. You sent me packages that included the applications, decisions, citizen comments, correspondence, staff notes, emails, and board of adjustment files on all of the cases. This file material constituted the foundation of my review. I also reviewed supplemental packages of written information of all three cases submitted to me by Joseph Minicozzi on behalf of those challenging the decisions, materials on the Greenlife and Staples projects submitted by James Judd on behalf of the Coalition of Asheville Neighborhoods, and a written response to Mr. Minicozzi's materials prepared by City Planner Scott Shuford. I have based my review on these written materials alone. I have not interviewed or discussed the cases with the applicants, neighbors, staff, or elected officials. I have also not personally visited the sites.

In making this review I refer to Sections of the current edition of the Unified Development Ordinance (UDO) that you sent me. Subsequent amendments changed the numbering of several sections involved in these cases between the time these permits were decided and now. While I used the current code and its numbering throughout this letter, the substance of the provisions critical to these cases does not seem to have been affected by subsequent code amendments.

Guidance provided by the North Carolina courts as to how municipal ordinances are to be interpreted was also considered in my review. The courts have held that the principal consideration in ordinance interpretation is to give effect to the intent of the legislative body enacting the provision, considering the purpose of the ordinance and problems it attempts to address. The courts have also set out several specific rules of interpretation to be observed. Where clear, plain, unambiguous language is used in the ordinance, it controls. If the language is not ambiguous, there is no room for further interpretation by the staff or the courts. The staff must apply the ordinance as it is written. While the ordinance's statements of purpose or intent can be a guide to interpretation of standards, they cannot be used to create standards for decisions that are not otherwise set out in the ordinance. Only the rules clearly and explicitly identified as decision-making standards may be the basis of permit decisions. The common and ordinary meanings of non-technical words are to be applied unless the ordinance specifically defines a term, in which case the specified meaning must be applied. All terms within an ordinance section and all sections within the ordinance must be considered as an interrelated whole. If possible, an interpretation should be made that reconciles any conflicts between sections. When the ordinance restricts property rights, restrictions not clearly included within the ordinance may not be implied. The courts sometimes state this last point as a rule that any doubt regarding a restriction on property use should be resolved in favor of the property owner. Finally, I should note that interpretation of the ordinance is ultimately a question of law that can only conclusively be determined by a court. The courts have said that the expert determinations of those entrusted with ordinance implementation—both the professional staff and the board of adjustment—are entitled to some deference, but the courts remain the final arbiter of what the adopted ordinance means.

Given the importance of ordinance clarity for applicants, neighbors, and the staff, I have made an effort to identify areas where the intent of the ordinance is not clear. This is especially important where there are overlapping regulatory requirements. Section 7-2-4(b) provides a general rule of interpretation where there are conflicting sections of the UDO with no clear direction as to how the particular conflict is to be resolved. It states that if there is a conflict, the more restrictive provision is to be applied. The ordinance can and does to some extent create exceptions to rules and sometimes specifically indicates which of multiple rules is to take precedence. In several key instances in these cases, however, the council's intent was not entirely clear regarding the interplay of regulatory requirements and whether the default rule of using the more restrictive provision was intended to be applicable.

1. Prudential Realties Signage

This case involved erection of two signs for Prudential Lifestyle Realty on a building located at 31 College Place, between Tunnel Road and I-240. The two signs permitted and erected are each 64 sq. ft. and each includes backlighting. Among the issued raised were whether the signs violated height and size limitations in the UDO.

a. *Applicable regulation*
The sign regulations in Section 7 of the UDO are indeed complex as they deal with the full variety of types of signs throughout the city. However, the narrow issues presented are less complex than the other cases reviewed, as this project involves only the regulation of on-premise commercial signs within the Central Business District (CBD) zoning district.

As I understand the factual setting, these two signs are for a single realty office located in Building C at 31 College Place. This building is part of the larger Asheville Office Park complex of buildings. Thus the regulations applicable are those for tenant identification signs included within the rules for on-premise signs for multiple tenant developments.

b. *Type of sign*
The definition and characterization of sign types in a common difficulty in land use regulations. Even with a very detailed set of definitions, questions invariably arise as to novel and unanticipated placement of advertising. In a similar controversy that resulted in litigation, the North Carolina court in *Raleigh Place Associates v. City of Raleigh Board of Adjustment*, 95 N.C. App. 217, 382 S.E.2d 441 (1989), held that common and ordinary meanings of words should be used in distinguishing sign types. In that case, which involved a sign on a structure covering two lanes for drive-through teller windows at a bank, the court upheld the city's determination that these were a "roof sign" as opposed to a "canopy sign."

The architecture of this building presents a complicated question of how to treat the area where the signs are located, particularly for the sign on the front (north side) of the building. The area to which the sign is affixed gives the appearance of a pediment, but it is only over the entryway and the projection from the roof appears to be more a decorative than functional area. It has the appearance of a small gable, but it is not over a projecting portion of the building, as one often sees with a projected entryway. It is also not on the side of the building, as is the case with the second sign. The projection could perhaps be characterized as a decorative dormer, but it is rather large for the common understanding of that term.

In any event, while this projection poses some uncertainty as to how it should be characterized, I concur with the interpretation that both of these signs are properly characterized as "wall signs." They are attached to vertical surfaces of the building under the eaves of a roof and these areas would commonly be referred to as "walls" of the building. While the front sign is above the roof line of the functional roof for the majority of this face of the building, the prohibition on roof signs in Section 7-13-3(4) would therefore not apply to these signs. If this is viewed by the council as an unintended loophole, the council can always refine the regulations to more precisely regulate signs located in this manner.

c. *Height limits*
A second area of contention is whether the height limits set out in a table in Section 7-13-4(c) apply to these signs. The ordinance is not clear on this point and is subject to several interpretations.

The ordinance states the height limits in a table but does not explicitly say whether this is meant to apply only to free-standing signs. The context of the ordinance (including the definition of how the height is computed and the figures used) leads to a reasonable conclusion that the height limits were intended to apply to freestanding signs only and not to attached signs, both of which are addressed in this Section and in the table. It would certainly be appropriate, and not very difficult, for the council to clarify its intentions on this particular point.

d. *Sign size*
A third area of contention is the maximum size of the permitted signs. Section 7-13-4(c)(2) allows one attached sign for each exterior business entrance. A key consideration in the ordinance is the identification of the "primary business entrance." This is the side of the building through which most customers enter – the principal, main, or most important customer entry point (as opposed to the side facing the most parking or the busiest street). This side of the building can have a wall sign of either: (1) 25 sq. ft.; or (2) one square foot per linear foot of that side of the building, with a maximum of 75 sq. ft. The ordinance allows the applicant to use the greater of these two figures, which in this case is the second option. The second tenant identification sign is limited to no more than one square foot per three feet of building frontage on the side of the building with a secondary entrance. There must be a legitimate business entrance on that side of the building to qualify for a second sign.

While the sign application form provides adequate information regarding the proposed sign itself, the application form is deficient in requiring a precise building schematic from which one can clearly identify each business entrance, determine which entrance is the primary entrance and which are secondary entrances, and have a precise delineation of the frontage on each side of the building. This information is particularly needed when the building involved has a more complex configuration than a simple rectangle with an obvious front side.

While the application diagrams are not entirely clear as to which side of the building contains the "primary entrance," all parties seem to have concluded and the photos indicate that it is the north side of the building. If that is indeed correct, and the parties agree that the building frontage on the north side is 64 feet, the UDO allows a wall sign of 64 sq. ft. on the north frontage, which is what was permitted and constructed. The second sign that was permitted, however, was clearly in error, as later acknowledged by the staff. How much of an error depends on where the "secondary entrance" is located and the amount of frontage of the side of the building with this secondary entrance (as the

business is entitled to a tenant identification size of no more than one square foot for each three feet of building frontage on that side of the building).

If a secondary entrance is on the east side of the building and the east frontage is 35 feet, as contended by the neighbors, this would allow a sign of only 11.66 sq. ft. The staff acknowledges that the second sign should be significantly smaller than permitted, but they arrive at a permitted size of 21.33 sq. ft., based on a 64 foot frontage of the building on the side with the secondary entrance. Again, I can not tell from the application form exactly where the secondary entrance is located and what the frontage of the building is on that side, so I can not advise which of these two figures is accurate. But both are substantially smaller than the second 64 sq. ft. sign that was permitted and constructed. It should also be noted that there must be a functional "public business entrance" on this side of the building to create eligibility for this second sign. It was not clear from the application and photographs whether the door on this side of the building is open for public entry or is just an emergency exit for those inside the building.

e. *Sign materials*
Finally, there is the issue of use of plastic and backlighting for the sign. Section 7-13-4(c)(b)(2)(b) specifically provides that on-premise tenant identification signs can be illuminated either internally or externally. The standards for illumination in Section 7-13-4(a)(7) also seems to be met.

The materials and illumination are apparently contrary to Downtown Design Guidelines. However, Section 7-9-4(g) provides that these guidelines are advisory rather than mandatory. The applicant is "strongly encouraged" to comply, but is not required to do so. Unless and until the council incorporates these or other design guidelines into the UDO regulatory requirements, the staff can not use them as the basis for a permit decision.

2. Staples
The issues presented in this case involve the height limit and size of the signage on the Staples building constructed at the corner of Merrimon Avenue and Orange Street and the location of the building relative to the two streets. There was also apparently a good deal of citizen concern raised after construction regarding the appearance of the building and its landscaping.

a. *Sign height*
As noted above in the Prudential case discussion, I concur that the 25-foot height limit set out in a table in Section 7-13-4(b)(2) is intended to apply only to free-standing signs and does not apply to wall signs, with the continuing caveat that the ordinance is not clear on this point and the council should clarify its intentions on height limits for attached signs.

b. *Sign size*
The issue with computation of the sign size is primarily one of how to address the "background" for the lettering STAPLES.

Section 7-13-4(a)(1)(a) provides that the calculation is to be based on a rectangle that includes "all lettering, wording design or symbols, together with any background on which the sign is located." It is the last portion of this definition that is in dispute – what is intended to be calculated as within the "background" of the sign lettering. The staff calculation drew a box around the letters and included the space among and between the letters. Objectors contend the full area of the larger red background material on which the letters are placed should also have been considered part of the "sign" for area computation, arguing this larger red background rectangle is part of the standard Staples corporate logo.

This is a close call that could go either way. The measurement technique used by staff is a standard approach that is used in many cities and counties. If the letters were being mounted or painted on the building face with no special background that would certainly be the proper means of computing the area. If one accepts the premise that the red rectangular background is a part of the Staples logo and is viewed by the public and the owner as an integral part of the sign (as with other companies having a name within an oval with distinctive colors), it would be permissible to calculate the larger red rectangle as part of the "background" to be included within the measurement of the sign.

In the absence of a clear directive in the ordinance to include this larger area, it was not a clear error for the staff to exclude it nor would have been clear error to include it. The red metal backing material was only used in the portion of the building face behind the signs (supporting inclusion of it within the "sign" background), but this red paneling was also used on each of the four portions of the building that extend above the main roof lines of the building (supporting exclusion of it as an architectural embellishment rather than part of a sign).

The council should clarify its intent on how this should be resolved. The inclusion of illustrative graphics on this point, which is effectively done in several sections of the UDO, would help to clearly communicate the intent of the council. This would be particularly helpful in addressing the increasingly common use of a distinctive corporate color scheme to draw attention to and identify buildings.

c. *Building location and setbacks*
A major point of contention with the Staples project was the decision to characterize it as a "pedestrian oriented design" and thereby exempt it from the 15-foot setback along Merrimon Avenue.

Section 7-8-13(f)(5) requires a front setback of 15 feet, but it provides that this setback can be reduced to zero "in pedestrian-oriented areas" if "pedestrian-oriented design

features are incorporated in building and site design." The ordinance requires no rear or side yard setbacks and has a 15-foot side street setback for corner lots. The Staples structure as designed and built does not meet a 15-foot setback on either the Merrimon Avenue or the Orange Street frontages. While it is a judgment call, there are questions as to whether this facility falls within the intent of the ordinance as being (1) within a pedestrian-oriented area and (2) is a "pedestrian oriented design" as set out in Section 7-2-5.

The file materials do not substantially address the first point, whether the area is properly characterized as a pedestrian-oriented area. The zoning district designation of CB II indicates it may well, but the ordinance itself does not explicitly use the zoning district designation itself to define these areas. It would be useful then to know the historic, current, and the projected level of pedestrian use of this area and site. There do not appear to be other offices or businesses catering to foot traffic oriented along this immediate area of Merrimon Avenue. To the extent there is likely to be a substantial degree of walk-up business for the store or the concurrent use of nearby facilities by patrons making a single visit to the area, that would support a determination that this is a "pedestrian oriented area."

The more difficult question is whether the building itself falls within the anticipated "pedestrian oriented design." The site plan in many respects reflects more of an automobile oriented business, though less so than the typical shopping center big box retail store. The building entrance is from the rear parking lot rather than from the street. Some of the critical elements for the "pedestrian oriented design" definition in the ordinance are lacking in the building design. There is no entrance to the building from either street frontage. There are no windows at street level for pedestrian interaction on Merrimon Avenue (and the ordinance specifically notes a need to consider building design from a pedestrian perspective). There are pedestrian-level windows and a somewhat proximate door from the Orange Street frontage. Still, the "pedestrian amenities" noted in the definition (outdoor dining, landscape, hardscape, and seating) do not exist at street level along either street frontage. The site grading does not enhance the relationship of the building to the adjoining street and sidewalk, particularly for the Merrimon Avenue side of the building. The slope of the street also gives particular prominence to the south side elevation, which is likewise notably lacking in a pedestrian orientation. In sum, the notion of allowing building up to the street frontage rather than being setback at least 15 feet is generally premised on encouraging active pedestrian interaction with the building, much as is the case in downtown Asheville. This site and building design only marginally accomplishes this, particularly on its most visible sides. The council may want to consider more definitive standards for what design elements are required to allow street frontage setback relief.

Beyond this basic classification issue, the council should consider additional ordinance clarification regarding mandated setbacks. Section 7-8-13(f) (5) allows the front setback to be reduced to zero if prescribed conditions are met. The same standard was applied to

reduce the side street setback. The language on reduction of the setback in this section of the ordinance is only set out for the "front." If the council intends the same standard be applied to side streets on corner lots, the ordinance should be amended to explicitly say so.

The council may also want to address situations such as this where the ordinance terminology and common usage of terms may diverge. Here the "front" setback refers to frontage along the main adjoining street, but the functional "front" of the building faces the "rear" setback (and the "rear" of the building faces the "front" setback). If the intent is to relax the setback only where the front of the building is along the street and there is active pedestrian engagement with the building along that street and building front, the ordinance should explicitly require that.

The method for measuring the mandated sight triangle at street intersections and driveway entrances also warrants ordinance clarification. In this case, the question was whether the mandatory sight triangle that is to be measured from the edge of the right of way should be measured from the edge of the street or the edge of the sidewalk. Information submitted by the city's traffic engineer supports using the sidewalk a part of the sight triangle where there is no street widening proposed. However, Section 7-11-1(h)(3) states that the sight triangle is to be measured "along the right of way." Unless this section of the ordinance is amended to provide further guidance, the edge of the legal right of way should be the measuring point, regardless of the presence of a sidewalk, roadway widening plans, or other factors, as the staff must apply the rule as written. The current definition of "right of way" in Section 7-2-5 clearly includes the road but does not explicitly address the sidewalk. Since the adjacent sidewalks may or may not be within the legal street right of way, the ordinance should be clarified as to how this measurement is to be made.

d. *Other design issues*
The question of design standards for large commercial structures in the transitional areas between a strongly pedestrian-oriented downtown and a strongly automobile-oriented suburban setting is a difficult challenge facing cities around the country. Many communities want to encourage active commercial use in these areas, but want to do so in a manner that is harmonious with the neighborhood.

It is difficult to develop a consensus as to what the appropriate design features in this setting should be given the wide variety of contexts in which the issue arises. Stating the design requirements in clear, unambiguous, enforceable standards is even more difficult. The topography of Asheville further complicates the matter. But this is indeed an important question for the aesthetic, environmental, and economic vitality of these transition areas. This may well be a profitable area for neighborhood groups, businesses, city staff, the planning board, and the council to focus some effort on developing a more detailed consensus as to the appropriate policy and a substantially more detailed, clear set of regulatory expectations.

Also, a good deal of the underlying community concern is based on issues not directly addressed by compliance with the UDO. The elimination of the stone foundation base and relief panels along Merrimon Avenue had a strong effect on the appearance of the building from the street. The requirements of the UDO (as opposed to voluntary guidelines and suggestions) on the appearance of buildings and retaining walls, the materials used for building frontages, and architectural design standards for street fronts of commercial buildings, particularly in the context of redevelopment of areas, needs to be examined and strengthened if the council wants to address those concerns. The community concern in this instance was further exacerbated by design changes in building materials after application approval. But unless the ordinance has decision-making standards that address these issues, the staff cannot consider them in initial approval nor can it limit design changes relative to unregulated features of the building.

3. Greenlife Grocery

Many communities in the state have struggled with attracting and maintaining neighborhood scale grocery stores. In recent years the trend of many retailers has been to move to warehouse-sized stores in outlying areas, leaving older neighborhoods (particularly those with low and moderate income levels) without convenient access to grocery stores. There are emerging success stories, but fitting economically viable grocery stores into existing neighborhoods (and newer traditional neighborhood design developments) is challenging for the city, retailers, and neighbors.

The Greenlife Grocery case involves the conversion of an existing building on Merrimon Avenue (originally used as a grocery store and then as offices) into a grocery store. The issues raised with this project include the review process used, commercial truck traffic and parking on adjacent streets, and the design and adequacy of the loading dock and dumpster area, particularly as related to landscaping and buffer requirements. The size, location, and design of the buffer is particularly important as the ordinance does not regulate the number or location of dumpsters and loading docks on the site, provided the provisions of the ordinance on buffers, landscape, driveway design, and street access are met.

The voluminous materials on this case reflect the considerable staff, council, and neighborhood attention to this case over the past three years. The regulations applicable to the substantial renovation and reuse of this building are complicated, particularly given the interplay of numerous code provisions.

This case also involved related issues not directly a part of the UDO, such as noise and street parking regulations. These issues certainly affect how the use is carried out and its impacts on the adjacent neighborhood, but they are beyond the scope of this particular inquiry.

a. *Level of review*
A threshold question is what process should have been used by the city to review the application.

The project does not meet the threshold for Level III projects, which require a conditional use permit. Level III applies to a change in use (here from office or vacant to commercial), but the building involved must have a gross floor area over 100,000 sq. ft. (45,000 sq. ft. if within a half-mile of the central business district) and this structure is only 20,412 sq. ft. The project also does not meet the threshold for a Level II review, which applies to renovations of commercial buildings with gross floor areas between 35,000 and 100,000 sq. ft. The additions proposed with the application are small enough not to trigger Level II review either (however the original application and record is not clear as to the breakdown between the square footage of additions as opposed to renovations).

The Level I standard is met because the renovation does not meet the Level II or III thresholds. This is the case regardless of whether the cost of the renovations exceed 50% of the assessed value of the building [Section 7-5-9(c)(1)(e)] because the project is a change of use [Section 7-5-9(c)(1)(f)]. While the structure was built and originally used as a grocery store, that particular use had long ago been abandoned and the structure had subsequently been converted to office use.

b. *Nonconformities*
The applicability of Article 17 of the UDO regarding nonconformities was also raised in this case.

Some of the confusion on this point stems from the fact that the Greenlife application was for renovation of the structure for use as a grocery store and the building was constructed and originally used as an A&P grocery store. However, that original use was discontinued. The structure was converted to office use over twenty years ago, so any nonconforming status (particularly regarding contentious issues such as loading dock location and use) relative to the prior grocery store use are irrelevant for UDO compliance purposes.

Section 7-17-7(b) specifically addresses the scope of relief for parking and loading requirements to be afforded some preexisting land uses and structures. To qualify for this relief, Section 7-17-7(b)(2) provides that the change in use must not involve any enlargement of a structure. Since the application specifically notes that additions to the structure are to be made (though the drawings are not clear as to their exact scope), this exemption from the loading requirements of the UDO would not be applicable.

c. *Location of buffers and landscaping*
An initial question is what type of buffer and landscaping is required by the UDO for this project. The UDO provisions on types of buffers, when each is applicable, and how they

can be adjusted are complicated and can be confusing. Some complexity is inherent as the ordinance addresses a wide variety of situations and attempts to allow some flexibility and creativity in balancing the needs of the land owners and the impacts on neighbors.

The starting point for this inquiry is Section 7-11-2(b)(1) on the applicability of the landscape and buffer requirements. Section 7-11-2(b)(1)(a)(2) requires full compliance with the buffering requirements for a change of use to a higher impact land use. Section 7-11-2(d)(10) defines "intensity of use" for this purpose. The prior use as an office (assuming the prior office use within the building was between 10,000 and 30,000 sq. ft, which is not in the record) and the proposed use as a grocery store with less than 30,000 sq. ft. floor area are both classed as medium impact uses. Thus the change in use itself would not trigger full compliance. However, Section 7-11-(b)(1)(a)(3) requires full compliance if the cost of the renovations exceeded 50% of the assessed value of the building. There was considerable dispute as to whether this project triggered this requirement. This is a threshold factual determination that must be made by staff. The original application was deficient in providing necessary information to make this determination (having only "TBD" in the space for required information on project cost). Since this is an important factor in determining which regulations apply, complete and accurate information on this point should be required in order to have a completed application ready for initiation of review. Consideration should be given to clarifying the necessary information submittal on this point as part of the application process. It may also be useful to set out the definitions and procedure to be used by staff in making this determination.

In this particular case, that determination is less critical than may arise with future cases because staff concluded full compliance was required by Section 7-11(b)(1)(b), which provides for compliance around the portions of the building being expanded. Since there were some additions on the sides of the building where the buffering was in controversy, buffers were required on these sides and the applicability of Section 7-11(b)(1)(a) became less critical. However, future in-fill and renovation projects might not be so configured, so attention to clarifying this definitional issue is warranted.

The next buffering issue is what type of buffer is required. Since the buffer along Maxell Street is the principal source of controversy, I address only that buffer. The record is not entirely clear as to the nature of the adjacent uses along Marcellus Street, so some of this discussion may not be applicable there.

Section 7-11(d)(12) establishes the basic buffering requirement. It requires a Type C buffer between a medium impact use (the grocery store) and a low density residential area (here the residences along Maxwell Street opposite the site). However, Section 7-11(d)(13) provides that this buffer is reduced by one level if there is a street between the two uses, which is the case here. Thus a Type B buffer is generally required on this site along Maxwell Street. Section 7-11(d)(15) provides that a Type B buffer has a 20-foot width and is vegetated.

Rather than provide an undisturbed 20-foot vegetated buffer along Maxwell Street, the applicant sought approval to exercise the flexibility built into the UDO in order to locate the store's loading dock in this portion of the site. There are two means of securing this flexibility. Section 7-11(d)(17) allows the buffer width to be reduced by up to 50% if a fence of at least six-foot height is located within the buffer area. If this section is used for buffer reduction, a vegetated five-foot planting strip between the fence and the property line is required. Section 7-11(b)(3) provides for even greater flexibility by permitting "alternative compliance" with the buffering requirements. In this case the applicant elected this third option—alternative compliance.

The council should consider modifications to the "alternative compliance" section of the ordinance for several reasons. One reason is exemplified by this case. Alterations in prescribed objective standards set by the UDO, particularly on sensitive issues like buffers between commercial uses and adjacent established residential areas, is inherently controversial. A procedure that requires greater public input prior to the decision may well be warranted. Also, the ordinance is not clear as to the range of discretion that may be exercised. For example, there are apparently not any minimum standards that must be included within the alternative compliance (such as the required five-foot planting strip required when the buffer size is reduced by inclusion of a fence).

There are also legal reasons to consider modifications to the process. In North Carolina, a land use decision that requires application of standards involving judgment and discretion is a quasi-judicial rather than an administrative decision. A quasi-judicial zoning decision cannot be delegated to staff and it requires an evidentiary hearing prior to a decision. County of Lancaster v. Mecklenburg County, 334 N.C. 496, 502, 434 S.E.2d 604, 612 (1993); Humble Oil & Refining Co. v. Board of Aldermen, 284 N.C. 458, 202 S.E.2d 129 (1974); Knight v. Town of Knightdale, 164 N.C. App. 799, 596 S.E.2d 881 (2004); William Brewster Co., Inc. v. Town of Huntersville, 161 N.C. App. 132, 588 S.E.2d 16 (2003).

There are several reasons this body of law likely applies to the decision to approve an "alternative compliance" buffer. First, under the terms of Section 7-11(b)(3) the applicant is entitled to use alternative compliance in certain circumstances. It "shall be accepted" if one of more of the conditions are met. As with a special or conditional use permit, this gives the applicant a legal property right to approval upon establishing the conditions are met. Second, the conditions for approval set out in the ordinance involve some degree of judgment and discretion. The planning director must find that the alternative will "comply with the intent" of the buffer requirements. Subsection (a) allows use of alternatives where compliance is "unreasonable." Subsection (c) allows use of alternatives if the alternative is "equal or better than normal compliance" and it "exhibits superior design quality." Use of this type of decision-making criteria makes the decision to approve alternative compliance legally similar to a special or conditional use permit decision. If the council desires to maintain these flexible standards that require

application of judgment and discretion, the ordinance needs to be modified to make this a quasi-judicial decision with appropriate procedural safeguards.

An additional legal concern about this ordinance provision is raised by subsection (b), which describes circumstances wherein alternative compliance may be desirable (in terms that apply to this project). This subsection then fails to provide guiding standards as to when the alternative should be approved. Our courts have long held that it is impermissible to have quasi-judicial decisions without adequate guiding standards. Jackson v. Guilford County Board of Adjustment, 275 N.C. 155, 166 S.E.2d 78 (1969). The applicant and neighbors need to know just what the standards are – when must the alternative compliance be approved and what are the grounds for denial? Setting those decision-making standards is a policy choice that must be done by the council in framing the ordinance. It cannot be left to the unbounded professional judgment on the staff or the unbridled discretion of a board reviewing an individual application.

d. Use of the buffer area

The location of the loading dock for the Greenlife store is a difficult design challenge for the applicant. They have an existing building on a very tight site that is adjacent to an established neighborhood. Previous additions to this side of the building (referred to as the "laundry" addition) brought it closer to Maxwell Street and further reduced design flexibility. Grade changes on the site add additional challenges. The mechanics and logistics of grocery store supply are substantially different than when the building was originally designed forty years ago. In fact, the change to use of 70-foot trucks between the time of the original application and the completion of the project contributed significantly to the difficulty in maintenance of a buffer along Maxwell Street.

A key issue in this case is what use may be made of the required buffer (which makes a precise delineation of exactly what is included within the "buffer" all the more important). The council's intent for the buffer is set out in Section 7-11-2(a). It includes protecting vegetation, improving aesthetics, enhancing environmental quality, separating dissimilar uses, and providing privacy. It is difficult to reconcile the permanent occupation of the required buffer area by operational activities of the business with this intent. The original application, for example, had a dumpster partially located within the originally designated 20-foot buffer. Such an unshielded, on-going use of the buffer area is inconsistent with the buffer intent. Some modest encroachment may be permissible if a dumpster and loading dock is screened by a fence or if appropriate screening is provided in an "alternative compliance plan' that meets the intent of the buffer requirement.

While this statement of intent in Section 7-11-2(a) provides an important context, two other provisions provide specific regulatory guidance that is critical in this case. These are key provisions where the council intent regarding interplay of regulations is not clear. Section 7-11-2(e) provides that landscaping "shall not interfere with the access and operation" of dumpsters and loading docks. This section must be read in conjunction with Section 7-11-2(d)(4) regarding use of bufferyards. That section specifically provides that

buffers are not to be disturbed except for driveway openings and other passive or minor uses "compatible with the general separation of uses."

The ordinance therefore allows driveways and accessways through a buffer to access these service locations. For example, if a fence is part of a buffer, allowing the fence to have a gate to allow truck access to a dumpster or loading dock is entirely consistent with the ordinance requirements. However, it is not clear that the ordinance allows use of a required buffer as a part of the loading dock, which includes the space in which a truck is designed to be parked during normal operation. It appears in this case that the permitted modification to the loading dock to accommodate larger trucks may result in trucks parked right up to (and sometimes extending into) the sidewalk. Backing a truck through the buffer is certainly permissible, while routine parking within the buffer would be another matter altogether. It is hard to see how regular parking within the buffer complies with the stated intent of a buffer requirement.

However, an argument can be made that since the ordinance includes the term "operation" of the dock as well as "access" to it, parking is part of the "operation" of the dock and can be permitted within the buffer. The context of the ordinance, given the intent of the buffers and the sight triangle issue discussed below, would lead me to a different interpretation, but the lack of clear standards in the ordinance for approval of "alternative compliance" for buffers and the lack of a clear direction as to how these two provisions are to be reconciled produces substantial uncertainty. Does the "access and operation" provision create an exception to the buffer intent? Does the more restrictive requirement that the buffer be located between a "vehicular use area" and the property line take precedence over the "access and operation" requirement? Arguments can be made for either and there are rules of interpretation that support either. The council needs to provide a more definite resolution of this question within the terms of the ordinance so that applicants, neighbors, staff, and reviewing courts do not have to surmise the council's intent.

Another aspect of the UDO that needs clarification is the definition of what area must be included within the loading dock design and how truck maneuvering for access to the dock is to be addressed. A major point of contention in this case is the site design that incorporates substantial truck maneuvering on a public street to get into the loading dock. This presents safety, noise, and convenience concerns, particularly given the residential nature of the adjoining uses on this particular street. Just as many ordinances mandate sufficient on-site space for cars in line awaiting service if a drive-through window is allowed at a fast-food restaurant or bank, many ordinances mandate sufficient maneuvering space on-site for truck access to loading docks. Section 7-11-1(d)(1) requires an off-street loading dock for commercial uses with more than 5,000 sq. ft. of floor area and Section 7-11-1(d)(2) provides that the minimum size for an off-street loading dock is 250 sq. ft. "plus any additional area needed for maneuvering delivery vehicles." It would not be an unreasonable interpretation of that language to conclude the

intent is that the entire routine maneuvering area necessary for a particular loading dock design must be in an off-street area.

However, once again the interplay of regulatory provisions is critical. The regulation of parking lots, Section 7-11-1(b)(6), provides that public rights of way can be used for maneuvering by delivery trucks, provided no rights of way are blocked by parked trucks. It is not unreasonable to conclude the intent of this specific provision on trucks maneuvering within a street was intended to override the general loading dock design standard, but if so it would be helpful for the ordinance to explicitly state this. This interpretation would allow trucks to pull into Maxwell Street when backing into the loading dock, provided once they are fully in the dock no part of the truck is left within the right of way (and the buffer standards are also met). It would be useful to clarify the interplay of these various regulations in the UDO to more explicitly state the council's intention, particularly regarding how and under what conditions streets and sidewalks can be used for delivery truck maneuvering if it is intended to allow such.

A closely related question is the maintenance of sight triangles at driveways. This visibility and safety concern is sometimes addressed by using the buffer area for required sight lines for those using the driveways. The regulatory requirements are in Section 7-11-1(h). Subsection (1) requires maintenance of a sight triangle at all driveway access points; Subsection (3) defines the protected area as the area formed by a triangle measured 10 feet up the driveway and extending 50 feet along the street right of way. Subsection (5) prohibits placement of fences or parking within this protected triangle that would obstruct views at the level of three to ten feet above the street level.

The UDO does not state is how these requirements relate to a potential "alternative compliance" buffer. If the intent is that the sight triangle is a minimum standard to be applied in all overlapping buffer situations (which seems a reasonable interpretation of the current ordinance given the public safety purpose of the sight triangle requirements and the provision in Section 7-10-3(a)(2) that fences shall not obstruct required sight triangles), the ordinance should be amended to make that intention explicit. An alternative would be for the council to provide a clear process with adequate guiding standards for when the sight triangle requirement can be modified. As the ordinance currently exists, the sight triangle requirement applies in addition to the buffering standards and if a part of the buffer is also a part of the mandated sight triangle, fences, trucks parked at a loading dock, or on-street parking within the triangle would not be permissible.

As noted in the discussion of the Staples case, greater clarity in the UDO regarding the measurement points for the sight triangle is also needed.

e. *Commercial truck routing*
One of the initial neighborhood complaints was the adverse impact of commercial truck traffic on the adjacent residential use along Maxwell Street. Trucks were apparently

driving along this narrow street, blocking the street while maneuvering into the loading dock, and blocking parking and street use as they waited for loading space to open. I gather subsequent agreements to direct truck traffic to enter the Greenlife site from Merrimon Avenue, not to allow them to idle or park on Maxwell Street, and closing Maxwell Street to commercial truck traffic have alleviated this concern to some degree.

Section 7-11-1 defines the access requirements imposed by the UDO. The provisions now codified as Section 7-11-1(i) limit access onto residential streets by nonresidential uses. Subsection (1) of Section 7-11-1(i) defines the streets for which nonresidential use is limited and subsection (2) provides standards for access for nonresidential uses.

It is clear from the original controversy that greater clarity in subsection (1) is needed to define which streets qualify for limitations on nonresidential traffic, particularly for those streets that separate a commercial and a residential zoning district. This subsection provides that the restrictions on access for nonresidential uses apply to streets "abutted primarily by residential uses." My understanding of the facts is that the area directly opposite the Greenlife project on Maxwell Street consists of single-family detached residences in a RM-8 zoning district, a medium density residential district. This seems to meet both the intent and terms of ordinance requirement that that street "function primarily to provide direct access to residences." A secondary function of providing rear access to office or commercial uses would not change this. Detailed information as to actual volume of relative use of the street would be important in resolving a dispute as to which type of access is in fact primary.

A modest complicating factor is added by a qualification to this rule that is made in the last sentence of this subsection. It provides that the limits on nonresidential access do not apply if the nonresidential use (here the Greenlife grocery) is located in a mixed use zoning district and has its only access from residential streets. The Greenlife site is zoned Community Business II, which allows a mix of residential, institutional, office, and business uses, but the Greenlife site also has access from Merrimon Avenue, thereby rendering this exception inapplicable.

Subsection (2) goes on to provide standards for access in these situations. It explicitly says that in situations such as the Greenlife site (a nonresidential use on a lot with access to multiple streets), access shall be from the nonresidential street (as is now being required for Greenlife). There was considerable disagreement as to the applicability of the next sentence, which allows access to a nonresidential use from a side street if "that portion of the street is zoned a nonresidential or mixed use or mixed use district." This provision is inartfully drawn and needs clarification. It is unclear if the reference is meant to apply to a zoning district that allows mixed uses (such as the CB II, Urban Village, Neighborhood Corridor, Urban Residential, or PUD districts) or to a street that has multiple zoning districts fronting it. It is also unclear whether the term "that portion" of the street refers to the zoning on the site where the accessway to the nonresidential use is

located, the zoning on both sides of the street at that point, or some consideration of zoning along a larger portion of the street.

In any event, subsection (2) goes on to also provide that if the "portion of the street" qualifies, the limits on access for nonresidential uses cannot be relaxed unless the city traffic engineer determines that such additional access would improve traffic flow on the major street or not negatively impact residential uses on the side street. I did not see such a determination in the files and it did not seem likely either situation applies here to allow Maxwell Street access. The council may want to consider making such a determination by the traffic engineer a more public and more structured part of the decision-making process. It should also be noted that the standards provided to guide the traffic engineer may well involve application of judgment and discretion, thereby raising the quasi-judicial procedure issues noted earlier in the discussion of the alternative compliance buffer.

f. Driveway permits
Another contested issue in this project was the decision to approve modifications of the driveway configurations on Merrimon Avenue and Maxwell Street.

Section 7-11-1(g)(1) provides that driveways from two-way public streets into nonresidential projects be between 24-feet and 36-feet wide. When the loading dock design was amended for Greenlife, a larger curb opening was allowed to facilitate maneuvering of trucks into the dock, essentially combining the loading dock entry and a store driveway entry.

As noted above, the tight location of the dock relative to the street and the lack of on-site maneuvering room, along with a need to remove through truck traffic from Maxwell Street, led to this wider curb opening. However, the requirements for Section 7-11-1(g) do not itself provide for such design flexibility. Whether the opening has dual use for customer traffic and a loading dock entrance does not seem to be addressed in setting the maximum width of a driveway. If the council wants to allow flexibility in driveway design, that should be made explicit in this section of the ordinance. It is also critical that standards for application of that flexibility be placed in the ordinance. If entirely objective standards are used, the approval decision can be delegated to staff. If the standards involve judgment and discretion (such as balancing impacts on public safety, street traffic, use of the property, and impacts on neighbors), a quasi-judicial process would be needed.

As the controversies generated by these three decisions indicates, there is often a need for cities to evaluate the implementation of ordinance provisions with a view towards assessing whether they are having the intended effects and noting where improvements in the ordinance are warranted. I hope a retrospective review of these and other contentious

cases can assist the staff, council, and citizens in identifying where ordinance improvements are needed.

While reasonable people may certainly have differing judgments on some aspects of interpretation of the ordinance, it seems the staff has made a good faith attempt to apply the ordinance as written. That said, there are certainly some key provisions of the ordinance that would benefit from amendments to provide greater clarity as to the council's intent and to directly address the interplay between overlapping regulatory requirements.

For a city of Asheville's size, with development issues as complex as you face, production and implementation of an ordinance that provides certainty, clarity, and flexibility is no easy task. The more precision and detail are added to the UDO, the lengthier and more complex it becomes. Finding a reasonable balance of flexibility and clarity is a real challenge, but one that the council can achieve.

Please let me know if you have questions about any aspect of this report.

Sincerely,

David W. Owens
Professor, Public Law and Government