

Citizens for Responsible Growth In New Castle County

P.O. Box 3592, Greenville, Delaware 19807

April 7, 2009

**VIA HAND DELIVERY (Tri-State Courier)
VIA EMAIL (dmculver@co.new-castle.de.us)**

Mr. David M. Culver
General Manager
New Castle County
Department of Land Use
87 Reads Way
New Castle, DE 19720

Re: Citizens For Responsible Growth
Request For Interpretation of UDC

Dear Mr. Culver:

Enclosed please find a Request for Interpretation submitted to the Department of Land Use by Citizens For Responsible Growth In New Castle County. This reflects our perception that both developers and the communities in which new projects are being proposed need guidance as to exactly what UDC requirements must be met by mixed use developments in Regional Office and Regional Commercial zoning districts. We hope the care and detail with which we have set forth our twenty page analysis of the Unified Development Code, resulting in nine specific questions underlying our single broad Request for Interpretation, will be useful to your Department as well as to the County Law Department.

While it seems the Code contemplates a response to Requests for Interpretation within twenty days, our intent is not to add unnecessary pressures to the Department's workload or divert its attention from other time sensitive matters. Accordingly, we are willing for the Department to take longer in formulating a reply, if that would be helpful.

Should the Stoltz organization re-file its proposed plans for Barley Mill Plaza and Greenville Center showing reduced proposals that the community could support, we would be happy to withdraw our Request for Interpretation, if doing so would enable the

www.crginnewcastlecounty.com

Mr. David M. Culver

April 7, 2009

Page 2

County's resources could to be put to better use. However, it appears no such filing is imminent. Offers by CRG to have its consultants meet with the Stoltz organization and its engineers for the purpose of negotiating reduced and improved plans have not yet led to any meetings. Meanwhile, the developer continues to advance the plans as previously filed. Therefore, we have reluctantly but firmly resolved to continue addressing the pending plans, and hope that our request for interpretation, and your response, will be useful in this respect to all concerned.

Sincerely,



Mark Chura, Executive Director
Citizens For Responsible Growth In New Castle County

cc: The Honorable William Tansey
The Honorable Robert S. Weiner
Gregg E. Wilson, Esquire
Pamela J. Scott, Esquire
The Civic League for New Castle County
Council of Civic Organizations of Brandywine Hundred
Delaware Greenways
The Kennett Pike Association, Inc.
Eleuterian Mills-Hagley Foundation Incorporated
Brandywine Conservancy
Greater Hockessin Area Development Association

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Mr. David M. Culver
General Manager
New Castle County
Department of Land Use
87 Reads Way
New Castle, DE 19720

Re: Request for Interpretation of UDC Provisions
Pursuant to Sections 40.31.520 and 40.31.522

Dear Mr. Culver:

This request for written interpretation is made pursuant to New Castle County Code Sections 40.31.520 and 40.31.522 by Citizens For Responsible Growth In New Castle County LLC (“CRG”), acting for itself and on behalf of its Alliance Organizations as listed on the signature page, some of which include among their members citizens who own and reside in homes abutting Barley Mill Plaza on Route 141, or Greenville Center on Route 52, in Christiana Hundred, New Castle County, Delaware.

During the March 3, 2009 public hearing on the plans proposed for Barley Mill Plaza (Application #2008-0275-S) and Greenville Center (Application #2008-0272), it became apparent that many provisions in the Unified Development Code (NCC Chapter 40, hereinafter “UDC”) concerning Mixed Use development in Office Regional (“OR”) and Commercial Regional (“CR”) zoning districts are understood quite differently by the applicant and by the community. We appreciate the Land Use Department (“Department”) conditioning its approval of these two plans on the applicant’s explaining how the plans comply with various sections of the Unified Development Code (Chapter 40 of the New Castle County Code, hereinafter “UDC”) that seem to have been overlooked by the applicant’s planners and engineers.

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Since the community will not have an official opportunity at this juncture in the review and approval process to comment on whatever explanation the applicant may provide, we are asking the Land Use Department, in conjunction with the Department of Law, to review and interpret the UDC provisions discussed below, so as to provide guidance for both developers and citizens in proposing and commenting on Mixed Use plans in OR and CR zoning districts, such as those presently pending for Barley Mill Plaza and Greenville Center. By taking this initiative now, CRG is providing the applicant with timely notice of the legal issues that are likely to require judicial resolution if the Barley Mill Plaza and Greenville Center plans are not modified.

Our overall request for interpretation, stated broadly as a question, is:

Which provisions in the UDC and Comprehensive Development Code govern whether a proposed mixed use development in OR and CR Districts will be approved and permitted?

An examination of the various Articles, Divisions, Sections and Tables in the UDC that are either explicitly or inferably applicable to mixed use development in OR or CR Districts reveals that the foregoing general question elicits the need for nine specific interpretations and clarifications along the way, which we have organized under three headings. Each of our requests for a specific interpretation and clarification has been underlined in the discussion below, which sets forth the analysis and context in which our inquiries arise.

I. MIXED USE AS A LIMITED USE NOT ENTITLED TO APPROVAL
BASED SOLELY ON COMPLIANCE WITH ENGINEERING
STANDARDS.

UDC Table 40.03.110 lists the type of uses permitted in each zoning district and assigns one or more capital letters to each use type indicating whether it is permitted, prohibited, or limited in a given district. The letter "L" is assigned to "Mixed Use" in OR and CR districts.¹ The letter L stands for "limited use" and indicates (emphasis added)

a use permitted *only if a limited use is approved* pursuant to Section 40.31.210. *The limited use review determines whether the location, design, or other criteria of Table 40.03.210, Division 40.03.300 and other sections of this Chapter have been met for the proposed site or specific use.* Not all properties may meet these requirements, thus limiting the sites upon which the

¹ By way of comparison, the letter Y indicates "a permitted use, where the use is permitted as a matter of right, subject to all performance standards." The letter N indicates "a prohibited use."

use may be established. Where the limited use standards apply to only a specific use, all other uses in the general use category are permitted by right and without the need for a limited use permit. *A limited use permit must be issued by the Department certifying compliance before the limited use is lawfully permitted.*²

The foregoing establishes that Mixed Use, being assigned the letter “L” in Table 40.03.110, is a “limited use” which requires issuance of a limited use permit that in turn depends on certification of compliance by the Land Use Department. Mixed Use is not “permitted as a matter of right, subject to all performance standards,” because Table 40.03.110 does not apply the letter “Y” to Mixed Use.

The excerpt quoted above also makes clear that not all mixed use plans proposed in OR and CR districts are expected to qualify for a limited use permit. Some properties may not be suitable for mixed use, or for the kind of mixed use that has been proposed. However, the Barley Mill Plaza and Greenville Center developer has repeatedly insisted that its pending mixed use development proposals are “by right” plans that the Department must approve so long as certain specific performance standards have been met.

Request No.1:

The Department is therefore requested to interpret Division 40.03.100 and Table 40.03.110 so as to clarify whether Mixed Use proposals in OR and CR districts such as Barley Mill Plaza and Greenville Center are “by right” plans that the Department must approve subject only to finding compliance with performance standards measured by engineering calculations; or are “limited use” plans that the Department may approve only upon finding compliance both with all specifically applicable performance standards and with all other generally applicable UDC criteria and provisions.

² Of course, more than one limited use can be proposed for a particular site in a district. As discussed more fully *infra*, a mixed use (which in and of itself is a limited use) may incorporate and rely on “Commercial retail and service” which in OR Districts is also designated in Table 40.03.110 with the letter “L.” When that occurs, as seems to be contemplated at Barley Mill Plaza, the UDC requirements for both limited uses in OR Districts should be met in order for both to be permitted.

II. MIXED USE AS REQUIRING DEPARTMENTAL CERTIFICATION THAT ALL GENERALLY APPLICABLE CRITERIA AND PROVISIONS OF THE UDC HAVE BEEN MET.

Division 40.03.100 provides that mixed use will be “permitted only if a limited use is approved pursuant to Section 40.31.210.” Such approval requires a “limited use review” to determine “whether the location, design, or other criteria of Table 40.03.210, Division 40.03.300 and other sections of this Chapter have been met for the proposed site or specific use. See Division 40.03.100.C (emphasis added.) Division 40.31.200, in which Section 40.31.210 occurs and by which it is governed, states that “The Department’s review shall be based, *first*, on the standards³ of this Chapter (i.e., the entire UDC), and then goes on to state that “The following sections shall *also* guide the award of such permits or approvals.” (Emphasis added.) Thus, Mixed Use approval depends not only on compliance with specific Articles, Divisions, Sections and Tables containing specific performance requirements, but also expressly requires compliance with other generally applicable criteria and standards in the UDC. In what portions of the UDC are these other general criteria and standards found?

It cannot be imagined that County Council enacted extensive portions of the UDC which first lay out its general purpose and intent, next describe the overall purpose and intent of various Articles, and then implement such purpose and intent with specific provisions that are expressly required to be consistent with the spirit of the Comprehensive Development Plan, without intending for developers, the Department and the public to take all of these provisions into account when preparing, reviewing and evaluating proposed plans. Otherwise, contrary to common sense and to settled rules of statutory construction, large portions of the UDC would be superfluous.

Ordinance 01-112, Substitute No. 2 as amended by Oral Amendment Nos. 1 and 2, relocated the provisions setting forth the UDC’s purpose and intent from Article 32 to Article 1 in order “to reinforce the importance of these statements.” Their placement in Article 1 “is a reflection of the importance of the purposes and intent language to the understanding and interpretation of the UDC.” See Ordinance 01-112, Substitute No. 2.

³ The word “standard” is not given any technical or other special definition in the UDC. Whenever a word is not specifically defined in the Code, its definition according to Websters Unabridged Dictionary should be followed. See Division 40.33.000. Webster’s New Twentieth Century Dictionary of the English Language, Unabridged, Second Edition, defines “standard” as “something established for use as a rule or basis of comparison in measuring or judging capacity, . . . value, quality etc.” * * * “a level or grade of excellence, attainment, etc., regarded as a goal or measure of adequacy.”

Thus, the general purpose and intent of the UDC and spirit of the Comprehensive Development Plan should certainly be applicable to every mixed use proposal.⁴

(a) The purpose of the UDC as stated in Section 40.01.100 is

to establish standards, procedures, and *minimum* requirements, *consistent with the Comprehensive Development Plan*, which regulate and control . . . the general development of real estate in . . . New Castle County, Delaware” (emphasis added).

Thus, the UDC recognizes that its provisions are only the minimum, not the maximum, which proposed development plans must meet in order to be approved, and states that such minimum requirements must be administered in a manner that is consistent with the Comprehensive Development Plan. Clearly, proposed development that seeks to satisfy minimum UDC specific performance standards in a manner that is not consistent with the Comprehensive Development Plan or with other generally applicable standards reflecting the UDC’s state purpose and intent violates Section 40.01.100.

(b) The intent of the UDC as stated in Section 40.01.015 includes “protect[ing] the interests of both current and future New Castle County residents and neighbors from the potential adverse impacts of land uses” and “minimizing development impact on current property owners and the environment.” The UDC’s objectives of protecting existing community character and providing safety are further reflected in the following subsections of 40.01.015 (emphasis below is added):

A. Land use patterns and community character. * * * [P]reserve lifestyles of an area, visual aspects, image and historical/cultural area by:

1. Establishing rational land use and growth patterns and encouraging the most appropriate use of individual pieces of land *consistent with the Comprehensive Development Plan.*”

* * *

⁴ This conclusion is further reinforced by Sections 40.31.520 and 40.31.522 expressly stating that “The Department shall evaluate a request for interpretation in light of the Comprehensive Development Plan, this Chapter, and/or the zoning map, whichever is appropriate.”

3. Prohibiting uses, buildings, or structures that are incompatible with the *character of established zoning districts* and [by] providing *suitable transitions between different community character areas* to minimize the amount of incompatible land use and adverse impacts on property value.

* * *

7. Securing of *adequate light, clean air, privacy, convenient and safe access* to property, and a safe environment.

* * *

D. Public infrastructure.

1. Ensure the provision of adequate public facilities including transportation . . . by *providing that development does not exceed the carrying capacity of these facilities or systems*, or requiring impact fees to offset the cost of the improvements.
2. Ensure *safe and convenient traffic control and movement* including a reduction or prevention of congestion on public streets, *convenience of access, multiple modes of transportation*, and an interconnected and well planned street system.
3. *Reduce the danger and congestion of traffic* on roads and highways by limiting both the number of friction points, such as intersections and driveways, and *minimizing other hazards*.

* * *

10. *Expedite the provision of adequate police, fire protection, disaster evacuation, . . . and emergency management*

(c) Implementation of the foregoing purpose and intent is accomplished in Section 40.02.010 by dividing the County “into the minimum number of zoning districts necessary to *achieve compatibility of uses and character . . . consistent with the spirit and intent of the Comprehensive Development Plan.*” Division 40.02.200 reiterates that “all districts share *the purpose of implementing the Comprehensive Development Plan.*” The districts are organized into four major community character classes. One such class is called “Suburban

Transition”⁵ and includes Regional Office (“OR”) and Regional Commercial (“CR”).
Section 40.02.220.

Regional Office is described in Section 40.02.224 as being intended (emphasis added):

- A. To accommodate large regional employment centers that are primarily office employment *together with support type uses*.⁶

* * *

- C. Other land uses *that support office employment* are permitted within the buildings and in large developments with freestanding uses. * * *

[T]o reduce automobile traffic on surrounding roads * * * [m]ixed uses are permitted

Having thus emphasized that the “other” uses in Regional Office are intended to be support type uses (not uses having an independent regional retail draw), and that mixed use is permitted in Regional Office in order to “reduce” vehicular traffic on surrounding roads (not increase such traffic by providing an independent regional retail draw), Section 40.02.224 goes on to say that OR districts are intended to work in general unison with BP and I zoning districts. By way of contrast, ON (Office Neighborhood) districts are intended to provide a suburban transition to adjoining residential

⁵ The term “Suburban Transition” as applied to a major community character class is not defined in the UDC, and therefore is subject to Department interpretation under Sections 40.31.520 and 40.31.522, consistent with the Comprehensive Development Plan. An examination of Sections 40.02.221 through 40.02.227, describing the seven kinds of district in the Suburban Transition community character class, reveals that each one is intended to serve a suburban transition purpose. Where Mixed Use is proposed on a particular site that, as presently developed, provides an appropriate transition to adjoining communities but that, as proposed, will result in a jarring transition contrary to the intent of Mixed Use as envisioned in the Comprehensive Development Plan, then it would seem that the provisions of Table 40.03.110, *supra*, are implicated which recognize that “Not all properties may meet these requirements [for limited use, such as Mixed Use], thus limiting the sites upon which the use may be established.”

⁶ To assure that other uses, such as commercial retail, will simply support the primary office use in OR districts, commercial retail and services are designated in Table 40.03.110 as a limited use in OR districts that cannot exceed 10% of the total GFA, as discussed in greater detail *infra*.

communities.⁷ See Section 40.02.223. Thus, special sensitivity is warranted with respect to development proposed in an OR district that, instead of transitioning to adjacent BP or I districts as intended under the UDC, abuts single family detached residential communities with a radically dissimilar community character.

When a mixed use plan is proposed in an OR district on a site that, as presently developed, provides a smooth transition to adjoining single family detached residential communities, but that as proposed for mixed use development will result in a jarring juxtaposition of building heights, mass and uses, critical questions arise. Will mixed use development be allowed if it merely satisfies all technical performance standards measured by engineering calculations? Or will the Department require that the proposed plans also (i) conform to the purpose and intent of the UDC as expressed in Articles 1 and 2 of the UDC, which call for “[p]rohibiting . . . buildings and structures that are incompatible with the character of established zoning districts by providing suitable transitions between different community character areas”, and (ii) conform to the spirit of the Comprehensive Development Plan, which repeatedly states that mixed use developments should “respect the character and integrity of existing communities”?⁸

Stated specifically with respect to the plans proposed for Barley Mill Plaza, will mixed use development be allowed to proceed that, instead of simply providing support services for a large employment center in order to reduce automobile traffic on surrounding roads as contemplated by Section 40.02.224, grafts a sizable strip shopping center intended to have regional draw onto the end of an office building complex that will actually increase traffic on surrounding roads by creating a flow of shoppers having no connection with the office uses on the parcel being developed, and who would not otherwise travel to this site?

Regional Commercial is described in Section 40.02.225 as being intended:

- A. To provide for both community and regional commercial services.⁹

⁷ Commercial Neighborhood Districts are intended “to primarily serve the surrounding residential neighborhoods” with “[r]oof design and landscaping intended to reinforce the compatibility of these uses with the neighborhoods.” Section 40.02.231.

⁸ See, for example, Comprehensive Plan 2007 Update, Section II, Subsection D, Goal 3; Objectives 1, 2, 4 and 10; and Strategy 3.

⁹ Note the distinction with OR districts, which are not described as being intended to provide regional commercial services.

- B. * * * [T]o promote circulation by foot and automobile within contiguous commercial or office areas. These design features are intended to lessen congestion on roads and create large commercial complexes rather than development strips.
- C. Mixed uses are permitted to provide residential customers within the development. Transit facilities are also required.”
- D. The new areas to be zoned for this use should be large and deep” rather than having “[s]mall shallow frontages”

Section 40.02.225 does not specify which other zoning districts and uses CR is intended to work with (unlike Section 40.02.224, which plainly states that OR is intended to work in general unison with BP and I districts). However, a clue is provided by Section 40.02.231, which makes clear that CN (Commercial Neighborhood) districts are intended to provide a harmonious suburban transition to adjoining residential communities.¹⁰ When a mixed use plan is proposed in a CR district on a small shallow site that, as presently developed, provides a smooth transition to adjoining residential community, but that as proposed for mixed use development will result in dramatically incompatible building heights and visual disharmony, then critical questions arise. Will mixed use development be allowed if it merely satisfies all technical performance standards measured by engineering calculations? Or will the Department require that the proposed plans also (i) conform to the purpose, intent and spirit of the UDC as expressed in Articles 1 and 2 of the UDC, which call for “[p]rohibiting . . . buildings and structures that are incompatible with the character of established zoning districts by providing suitable transitions between different community character areas”, and (ii) conform to the spirit of the Comprehensive Development Plan, which repeatedly says that mixed use development should “respect the character and integrity of existing communities”?¹¹

Stated specifically with respect to the plans proposed for the Greenville Center property, which is too small and shallow to qualify for CR re-zoning today but which is presently compatible with adjoining communities because of the low height of its existing buildings, will mixed use development be allowed so that a 12 story condominium and 7 story garage

¹⁰ Commercial Neighborhood Districts are intended “to primarily serve the surrounding residential neighborhoods” with “[r]oof design and landscaping intended to reinforce the compatibility of these uses with the neighborhoods.” Section 40.02.231.

¹¹ See citations in Footnote 8 above.

can be placed against an existing single family detached home community, under the guise of providing residential customers for the on-site shops?

Request No. 2:

The Department is therefore requested to interpret Sections 40.01.100, 40.01.015, 40.02.010, 40.02.220, 40.02.223, 40.02.224, 40.02.225, 40.02.231 and Divisions 40.02.200, 40.03.100.C and 40.31.200 of the UDC so as to clarify whether the purpose and intent of the UDC as stated in Article 1 and 2 and elsewhere, whether the spirit of the Comprehensive Development Plan with respect to mixed use, whether the transitional objectives of Suburban Transition districts, and whether other applicable criteria not susceptible to engineering measurements, must be met and satisfied by mixed use development proposals in OR and CR Districts, particularly where the proposal will replace an existing compatible transition with a dramatically disharmonious one.

III. MIXED USE AS REQUIRING DEPARTMENTAL CERTIFICATION
THAT ALL ADDITIONAL SPECIFIC REQUIREMENTS OF THE UDC
HAVE ALSO BEEN MET.

As already noted, in addition to requiring compliance with Section 40.31.210, Division 40.03.100 states that “[t]he limited use review determines whether the *location, design, or other criteria of Table 40.03.210, Division 40.03.300* and other sections of this Chapter have been met for the proposed site or specific use.” (Emphasis added.) Similarly, Section 40.03.110 requires consideration of two specific categories of criteria before the Department certifies that Mixed Use proposals in OR and CR districts are permitted limited uses, namely, Table 40.03.210, and Division 40.03.300. Thus, any Mixed Use proposal in an OR or CR District requires analysis under Table 40.03.210 and Division 40.03.300, and those portions of the UDC that provide interpretational context for such materials or are further cited therein.

(a) Analysis of whether a Mixed Use proposal satisfies all applicable specific requirements for a limited use of this type begins of course with the UDC’s definition of “Mixed Use.” Section 40.33.240.J defines this category of limited use as “One (1) or more buildings on a lot planned, designed and managed as an integrated development comprised of residential and non-residential uses oriented to a pedestrian precinct and intended to provide convenient shopping, employment and residential opportunities while reducing vehicular trip generation.” While this definition of Mixed Use is minimalistic in nature, it clearly describes four attributes, all of which must be present.

First, the lot and buildings thereon must all clearly be *planned* as an integrated development, *designed* as an integrated development, and *managed* as an integrated development comprised of *residential* and *non-residential* uses. The UDC definition of Mixed Use does not suggest that limited use developments in this category can be created merely by adding a residential building at the corner of an existing retail/office shopping center that was planned and designed decades ago without any thought of including a residential component, much less planned and designed with the intention of orienting residential and non-residential uses to a pedestrian precinct so as to provide convenient shopping, employment and residential opportunities while reducing vehicular trip generation, as required by the UDC definition of “Mixed Use.”

Second, the lot and all buildings thereon must comprise both residential and non-residential uses *oriented to a pedestrian precinct*. The term “Pedestrian precinct” is defined in Section 40.33.300 as “A paved or largely paved area such as a plaza or courtyard set aside for pedestrian use that provides amenities, including but not limited to seating areas and other street furniture, lighting, landscaping, fountains, water features, art or other appropriate elements.” The obvious intent is for such a precinct to serve as a place where pedestrians would naturally gather, socialize, rest and enjoy the development as a destination with its own sense of “place.” That intent is not met by simply inserting a long, narrow paved area at the end of an existing parking lot with a few benches that has no inherent attraction for pedestrians.

Third, the lot and buildings must be intended to provide *convenient shopping, employment and residential opportunities*. The intended convenience results from the juxtaposition of buildings, uses and amenities that creates a walkable community, in contrast with shopping, employment and residential opportunities that favor vehicular access. Obviously, a retail and office center created decades ago with retail and parking “out front” and offices “in back” does not morph into a conveniently walkable development merely by the addition of a high rise office-residential condominium and structured garage at one corner of the property, and the location of a post office at the opposite corner surrounded by large surface parking areas and drives, far from the nearest offices and shops. A design of that sort may be suitable for vehicular borne customers off the site but not for anyone on foot at the site.

Fourth, convenient shopping, employment and residential opportunities must be provided in a way that *reduces vehicular trip generation*. If the shopping targets a regional market, and the mixed use development will result in dramatically increased trip generation from off-site rather than meaningfully reduced trips from off-site due to on-site pedestrian flow, then the proposed mixed use development is not serving its

intended purpose. To the extent that any question remains within the four corners of the UDC regarding County Council's vision for mixed use development, there are ample provisions in the Comprehensive Development Plan to guide the Department, the developer and community.¹²

Request No. 3(a):

The Department is therefore requested to interpret Section 40.33.240, and Section 40.33.300 in the context of the purpose and intent of the UDC and the spirit and vision of the Comprehensive Development Plan, so as to:

(i) clarify whether in a CR District a developer can satisfy the definition of, and meet the criteria for, mixed use development simply by "tacking on" a 12 story residential building, a 7 story hypothetical garage and a paved sitting area to an existing shopping center/office complex designed decades ago, and obtain its approval for development regardless of inconvenient layout, increased traffic or adverse impact on the adjoining residential community; and

(ii) clarify whether in an OR District a developer can satisfy the definition of, and meet the criteria for, mixed use development by constructing a regionally oriented strip shopping center with parking "out front" at one end of the complex, which will increase rather than reduce traffic, separated by a "pedestrian precinct" from the offices, garages and residences being constructed at the other end of the complex, without regard for adverse impact on adjoining residential communities.

(b) Table 40.03.210 states that **Limited & Special Use Standards** are governed by Section 40.03.318 and Division 40.25.200. Column C of Table 40.03.210 makes clear that these two portions of the UDC are "**Additional Standards (all districts).**" Thus, the provisions in Section 40.03.318 and Division 40.25.200 are applicable to *all* Mixed Use plans, regardless of the zoning district in which they are proposed.

(i) **Section 40.03.318**, headed "**MIXED USE**," is not only identified in Table 40.03.210, but is also a portion of Division 40.03.300 compliance with which is required under Division 40.03.100. Subsection A of Section 40.03.318 requires "mixed use development" to include dwelling units comprising "a minimum of twenty-five (25) percent or a maximum of fifty (50) percent of the total gross floor

¹² See citations in Footnote 8 above. Sections 40.31.520 and 40.31.522 make clear that the Department should have recourse to the Comprehensive Development Plan when rendering interpretations of the UDC.

area¹³ on the site.” Subsection B of 40.03.318 requires mixed use development to include “a minimum of three (3) different uses from at least two (2) of the following categories” of which the first listed is “Commercial retail and service.”¹⁴ Subsection C states that “[r]esidential uses shall provide outdoor areas greater than or equal to one hundred twenty (120) square feet per unit, or the equivalent using one or a combination of the following methods: * * *” And Subsection D requires that, in OR districts, “a minimum of sixty-seven (67) percent of the nonresidential gross floor area of the mixed use development shall consist of office uses.”¹⁵

(A) Ordinance 01-112 amended Section 40.03.318.D for the purpose of increasing the required minimum percentage of office floor space when mixed use development is proposed in OR Districts. Together with the description of Regional Office in Section 40.02.224, this amendment makes clear that mixed use is permitted on parcels zoned OR merely to provide on-site support for large office complexes while reducing traffic trips from surrounding roads – not for the purpose of creating independent regional shopping centers that will attract traffic that would otherwise not come to the site.

Reinforcing County Council’s intent to limit commercial uses in OR Districts is Table 40.03.210, which identifies “Commercial retail and service” as being a “limited use” in OR Districts. This limitation means that Commercial retail and service, like Mixed Use, must receive a certification of compliance by the Department in order to be approved for development in any parcel zoned Regional Office. Table 40.03.210 not only identifies Commercial retail and service as a limited use in any OR District, but it also imposes a “Max 10% of GFA . . .” limitation on the amount of floor space that may be devoted to this limited use in Regional Office. This logically follows from the fact that non-office uses are only allowed in OR Districts as “support type uses” * * * “that support office employment.” See Section

¹³ Gross Floor Area is sometimes abbreviated “GFA.”

¹⁴ As discussed further *infra*, Commercial retail and service, defined in Section 40.33.240.E, is itself a limited use category to which Table 40.03.210 applies specific GFA restrictions in OR Districts, such as Barley Mill Plaza, namely, a maximum Gross Floor Area for commercial and retail service uses not to exceed 10% of the total of all GFA within any OR parcel.

¹⁵ Of course, these requirements in Section 40.03.318 presuppose the existence of a development plan that meets the definition of “mixed use” as set forth in Section 40.33.240.J, discussed above.

40.02.224 A. and C. They are not intended to provide independent retail opportunities for off-site shoppers who would otherwise have no reason to come to the OR Parcel.¹⁶

Commercial retail and service is one of the use categories specifically encouraged in Mixed Use developments by Section 40.03.318. However, nothing in the UDC provides or intimates that proposing Mixed Use in an OR District allows Commercial retail and service uses to evade the 10% GFA limitation that would otherwise apply. On the contrary, Division 40.03.200 headed "LIMITED AND SPECIAL USE" states in its introductory language that: "A site plan consistent with the standards set forth in this Article shall be submitted for *all limited* or special uses." (Emphasis added.) If Mixed Use could be proposed in OR Districts as a means of evading the 10% GFA limitation on Commercial retail and service that would otherwise apply, then developers would have yet another way to achieve the "back-door" rezoning of large OR Parcels in order to construct regional shopping facilities that would attract significant numbers of off-site shoppers, rather than serve on-site office workers, contrary to the UDC's stated purpose and intent for the Regional Office zoning classification.

The legislative history behind Table 40.03.110, which defines the letter "L" and describes the approval process for limited uses, supports the foregoing analysis. Originally this Table stated simply that, "Where the limited use standards apply to only a specific use, all other uses in the general use category are permitted." Ordinance 01-112 amended this by adding the words, "by right and without the need for a limited use permit." Ordinance 01-112 explains that this amendment "clarifies that *other uses within a general use category* definition are permitted by right and not subject to the limited use review process *when only one particular use is highlighted.*" (Emphasis added.) Thus, the fact that a particular use being proposed in a development has been highlighted as a "limited use" by the UDC does not automatically subject all other general uses that have not been highlighted to the limited review and certification process. But neither does it automatically exempt all other limited uses in the proposed development from the review and certification requirements which would otherwise apply.

Ordinance 01-112 does not say what happens when more than one particular use is highlighted by Table 40.03.210 as being limited in a given zoning district. Clearly, Ordinance 01-112 neither states nor intimates that only one of the highlighted uses (say, for example, mixed use) must be certified by the Department

¹⁶ Following the same logic, County Council has not imposed a GFA limitation on Commercial retail and service uses in parcels zoned CN or CR, because those zoning categories (unlike OR districts) are intended to provide general neighborhood and regional retail opportunities.

for approval as complying with the applicable requirements of the UDC, while the other highlighted use (say, for example, commercial retail and service) ceases to become limited and escapes whatever restrictions would otherwise apply. If an implication must be drawn when more than one particular use is highlighted, then the Ordinance can only be construed as no longer providing that “all other uses . . . are permitted by right and without the need for a limited use permit.” That means the second proposed limited use would have to comply with all UDC requirements specifically applicable to it.

Unfortunately, in a large Mixed Use project such as proposed for Barley Mill Plaza, where the commercial buildings could approach 750,000 GFA, the developer could attempt to evade County Council’s intent and achieve a “back-door” rezoning if allowed to (i) construct a regional shopping center while the office and residential components remain un-built indefinitely, and/or (ii) ignore the 10% GFA limitation on Commercial retail and service. The only way to protect the integrity of the UDC in such situations would appear to be a combination of requirements (x) that building permits be simultaneously pulled for all three required uses (office, residential and commercial) in proportion to the applicable percentages approved for mixed use development, (y) that permanent certificates of occupancy be issued in proportion to the applicable percentages (with temporary c/o’s being issued subject to short time limitations), and (z) that the approved plans and deed restrictions clearly spell out the GFA limitation on Commercial retail and use.

Request No. 3(b)(i)(A):

The Department is therefore requested to interpret and clarify the application and means of enforcement of the GFA ratios and limitations set forth in Section 40.03.318 and Table 40.03.210, in light of the provisions of Section 40.02.224, when mixed use development with a commercial retail and service is proposed in OR Districts.

(B) The term “gross floor area” (abbreviated GFA) is defined in Section 40.33.300 as “the sum of the total horizontal areas of *every floor of every building on a lot*” *including* “D. All parking structures . . . *unless specifically exempted by other Sections*” of the UDC. (Emphasis added.)¹⁷ Article 5 of the UDC specifically

¹⁷ The language including all parking structures in the computation of GFA unless specifically exempted by other Sections of the Chapter was added to the UDC by Ordinance 98-080. If the exemption in Article 5 carried over to all GFA calculations in all other Articles, including Article 3, then the language regarding garages added by Ordinance 98-080 accomplished nothing and would be superfluous, contrary to the rules of statutory construction. Later, Ordinance 01-112 added a new subsection to the GFA definition that states: “E. Unheated structures or buildings, not fully enclosed whether temporary or permanent and exposed to the elements through the absence of walls on at least 25% of its perimeter shall not be counted as GFA.” However, this Ordinance did

exempts parking structures from the site capacity calculations that a developer is required to submit “[a]t the pre-application stage for a rezoning or a major or minor subdivision or land development proposal . . .” See Section 40.05.050. These pre-application calculations require the developer to “conduct a carrying capacity analysis which regulates the maximum intensity of development based on actual infrastructure capacity.” See Division 40.05.000. Other portions of Article 5 make clear that the maximum capacity calculated for one purpose, such as sewer, may not control the entire development due to application of another requirement (such as traffic) which results in the calculation of a lower maximum capacity. Nothing in Article 5 suggests that it overrides otherwise applicable limitations for special or limited uses that are not specifically addressed in Article 5, and that result in lower capacity calculations under other Articles of the UDC or applicable provisions of the New Castle County Code. On the contrary, the language in Section 40.05.050 makes clear that the exemption in Article 5 for parking structures is strictly limited to Article 5, as it states:

The floor area of parking structures shall not be considered as part of the floor area required in the site capacity calculation *in this Article*. (Emphasis added).

The constraints for Mixed Use in Article 3 do not contain any exemption of parking in calculating limitations based on gross floor area. They simply impose additional requirements which would not apply if the applicant were not seeking approval for a mixed use plan. Thus, regardless of whether the pre-application calculation would exempt garages under circumstances not involving mixed use, the requirement that “a minimum of twenty-five (25) percent or a maximum of fifty (50) percent of the total gross floor area on the site” must be residences would appear to require that the GFA of garages be included for purposes of meeting the mixed use requirements. The same can be said of the requirement that “a minimum of sixty-seven (67) percent of the nonresidential gross floor area of the mixed use development shall consist of office uses.”¹⁸

not add anything to the language governing garages indicating that they were now intended to be subject to the new subsection applicable to unheated structures or buildings. In other words, Ordinance 01-112 did not state that “D. All parking structure count toward GFA unless specifically exempted by other Sections of this Chapter or by Subsection E, below in this Section of this Chapter.” Thus, the exemption for parking structures was left by Ordinance 01-112 as specifically limited to “other Sections” of the UDC, meaning Sections *other than* Division 40.33.300 in which definitions are contained.

¹⁸ The language requiring a minimum 25% residential appears to relate solely to the dwelling units themselves and not the associated residential parking as the code language says “*dwelling units* comprising a minimum of twenty-five (25) percent.” (Emphasis added). In contrast, the 67% office space requirement is stated for “office

Request No. 3(b)(i)(B):

The Department is therefore requested to interpret Section 40.03.318, Division 40.05.000, Section 40.05.050 and Section 40.33.300 so as to clarify how the exemption of garages from GFA in Article 5 for pre-application calculation purposes carries over to Article 3 limitations on mixed use, notwithstanding the definition of GFA, and how the requirements in Article 3 regarding the calculation of GFA for Mixed Use residential purposes in a CR District are reconciled with the “hypothetical” design of a seven story garage that applicant shows in the Greenville Center for purposes of satisfying the “open space” requirement of Section 40.22.616.E.5, but ignores for purposes of calculating residential GFA (see fn 16).

(ii). **Division 40.25.200** is expressly designated in Table 40.03.210 as being applicable to mixed use development in “*all* districts” (emphasis added), even though Division 40.25.200 is headed “**TRADITIONAL NEIGHBORHOOD DESIGN.**” This makes sense given that New Castle County Code §1.01.044 mandates that no heading in bold type in the New Castle Code – which of course includes the UDC generally, as well as Division 40.25.200 along with all other Divisions and Sections – shall limit the meaning or interpretation of any portion of the code being construed and applied. Thus, the various code sections contained in Division 40.25.200 are not to be read as being limited to districts zoned “Traditional Neighborhood” (unless specifically so stated in their body) but are applicable to all districts as stated in Table 40.03.210.

Section 40.25.220, headed “NONRESIDENTIAL USES,” contains no reference to traditional neighborhood plans and states broadly that (emphasis added):

uses permitted by Table 40.03.110 as limited uses [which of course included Mixed Uses] shall be permitted *provided they meet the following*:

A. Location. They shall be permitted only in developments having a minimum of four hundred (400) dwelling units or where specified in Countywide or neighborhood plans adopted by County Council.

B. Road Access. * * *

uses” -- not units or spaces as such. (Emphasis added). This suggests that the 67% office uses requirement includes both the office spaces and the parking floors supporting office uses.

C. Design. * * * *All buildings shall be two (2) or three (3) stories high.* Either commercial apartments shall be located above the commercial space, or the buildings shall meet the requirements of mixed use structures. *The buildings shall be designed to harmonize with the surrounding residential areas.*

D. Parking. *Parking shall be located behind and to the side of the building with the majority to the rear.* * * *

Though not referenced by specific citation in Table 40.03.210, Division 40.25.300 is by its terms expressly related to Section 40.25.220, quoted above. After stating that it “controls the character of buildings to ensure that the overall character of the communities is not eroded by poor design”, Division 40.25.300 goes on to say that “Nonresidential uses are governed by the standards of Section 40.25.220 and 40.25.340 through 40.25.342. Section 40.25.342 provides that, “Where the development is a complex of buildings as a shopping center or an office or industrial park with its own design guidelines, the complex * * * *should not be out of keeping with the surrounding buildings,*” although it “may establish its own identity.” (Emphasis added.)

Division 40.25.300 is in turn expressly supported by design standards set forth in Division 40.25.400 and its component sections. These include the following from Section 40.25.410:

A. The project is *compatible with surrounding uses in terms of scale* and adherence to the traditional architectural styles and materials of the County architecture.

* * *

G. The streetscape and building design reduces the apparent building mass of large buildings *to match the nearby residential areas.*”

The foregoing design standards governing complexes of buildings have equivalents elsewhere in the UDC which apply to subdivision and land development design, including Division 40.20.000 which requires that (emphasis added):

A. The plan contributes to the development of the County as a community and is properly integrated into the *surrounding neighborhood.*

B. The plan preserves or enhances the character and the quality of the County and neighborhood.

The UDC's plan design standards are continued in Section 40.20.110 which provides that "[t]he Department may require that design modifications be made" and "D. The plan shall promote the best design for the use of the property in relation to the development's function *and adjoining portions of the neighborhood.*" (Emphasis added.)

Request No. 3(b)(ii):

The Department is accordingly requested to interpret Table 40.03.210, Division 40.25.200, New Castle County Code §1.01.044, Section 40.25.220, Division 40.25.300, Section 40.25.342, Division 40.25.400, Section 40.25.410, Division 40.20.100 and Section 40.20.110 so as to clarify how the design, height and location of the proposed 12 and 7 story buildings in Greenville Center, and of buildings up to 10 stories in Barley Mill Plaza, meet the requirements for being in keeping with the surrounding buildings, compatible with surrounding uses in terms of scale, and with building mass to match nearby residential areas, in order to preserve or enhance the character and quality of the surrounding neighborhood as required by the applicable UDC Sections in Divisions 40.25.200, 40.25.300, 40.25.400 and 40.20.100

(c) Table 40.03.210 further states that **Parking** for mixed use is governed by Table 40.03.522. Thus, the criteria in each of these portions of the UDC must also be met.

(i) Mixed Use is not separately identified in Table 40.03.522, which governs parking. Yet Table 40.03.522 is cited as a limiting factor for Mixed Use, based on which limited use approval may be granted or withheld, depending on considerations of parking. Section 40.03.522.B, which precedes the Table and which relaxes the Table's application for shopping centers with more than 10,000 GFA, is not cited in Table 40.03.210 as being part of the criteria that the Department should consider when approving or disapproving mixed use based on parking.

This should not be surprising because Ordinance 01-112 added subsection B to Section 40.03.522 for the express purpose of allowing "*existing* legal nonconforming shopping centers with greater than 10,000 GFA to change uses without having to recalculate parking spaces on a per use basis provided the number of parking spaces *was adequate at the time of recordation.*" (Emphasis added). Obviously, mere changes of use within an existing nonconforming shopping center

development, as contemplated by the Ordinance, have much less impact than expanding an existing shopping center and converting it to a mixed use development, which requires recordation of a new record plan. Since Mixed Use in any CR District will frequently involve a shopping center of more than 10,000 GFA, a question arises as to how parking constraints created by Table 40.03.522 would impose any meaningful limitation on Mixed Use if the relaxing provisions of Section 40.03.522 B are read into that Table. The community contends (backed by photographic evidence) that internal traffic and parking snarls at Greenville Center have already resulted from the application of Section 40.03.522 without the addition of further traffic and parking issues by the conversion over to Mixed Use at this site with the addition of new structures, and that Mixed Use should be permitted only if the plan, in addition to meeting all other standards and criteria for safe internal circulation and adequate parking, satisfies Table 40.03.522 without dilution by Section 40.03.522.B.

Request No. 3(c)(i):

The Department is accordingly requested to interpret and clarify how Table 40.03.522 should be applied to a proposed mixed-use plan that introduces new residential and additional office uses in an existing shopping center of more than 10,000 GFA, especially if the shopping center already contains a dysfunctional system for traffic access, circulation and parking.

(ii) Further complicating the issue of parking for Mixed Use development in CR Districts is the existence of an exception to the requirements in Section 40.03.522 as set forth in Section 40.22.616 whenever “any land or building is used for two (2) or more distinguishable purposes” which typically do not experience peak parking demands as the same time. To obtain the benefit of this exception, Section 40.22.616.E.5 requires that the “land development shall contain *additional open areas* in amounts equivalent to that needed to accommodate the total number of parking spaces required without applying the reductions permitted by this Section.”¹⁹ The applicant’s letter of October 15, 2008 with respect to Greenville Center states that a seven story parking garage has been shown “merely to comply with Section 40.22.616.E.5” and explains that the garage “is not intended to be constructed.” Clearly, the floors in a parking garage do not constitute “open areas” as that term is ordinarily understood within the context of the UDC.

¹⁹ The term “open area” is not defined as such in the UDC, but its definitions of open space indicate that open area and open space are virtually interchangeable, and that the concept of “open area” does not encompass floors in a multi-story garage. Any question that might at one time have existed as to whether Section 40.22.615.E was particularly applicable to “mixed use” was clarified by the amendment enacted by Ordinance 01-112, which replaced the term “mixed use” with “multiple use” to eliminate confusion.

Even if the Department surprisingly interpreted the term “open areas” to include the floors in a seven story garage, the plan should not be approved with the understanding that this garage would never be built, because future changes could indeed require construction of additional parking spaces, yet future changes in the code could prohibit construction of such a garage at a later time. Moreover, if such a garage ever were constructed, then the floors in the parking garage would obviously add significantly more GFA to the development. Depending on how the Department responds to the request for interpretation of Sections 40.05.050.K and 40.03.525 relating to garages in relation to 40.03.318 (see discussion above), the fact that the garage might later have to be constructed in order to achieve compliance with the UDC means that the percentage of residential GFA proposed by the pending plan for Greenville Center could become inadequate, unless a new plan were approved and additional residential were actually constructed, which interim code changes might prevent.

Request No. 3(c)(ii):

The Department is accordingly requested to interpret and clarify how Table 40.03.522 should be applied to a proposed mixed-use plan that seeks utilize shared parking in reliance on Section 40.22.616 by proposing a hypothetical structured parking garage that may never be built or be buildable for the purpose of demonstrating the existing of sufficient additional open space to accommodate the require parking if required in the future.

(iii) Section 40.03.528 states in pertinent part that “Parking structures shall be subject to the same bulk and area requirements as the principal use for which it is designed to serve.” Bulk and area requirements are set forth in Article 4. Table 40.04.110 specifies that for mixed use development in an OR district the maximum gross Floor Area Ratio is .71.

Based on this specification in Table 40.04.110, the maximum gross Floor Area Ratio for the proposed mixed use development at Barley Mill Plaza on a site of approximately 92 acres is 2.85 million square feet. Since Section 40.03.528 expressly subjects parking structures to the same bulk and area requirements as the principal structures, the maximum gross Floor Area Ratio for Barley Mill Plaza must take into account all parking structures. However, as currently proposed by the applicant, Barley Mill Plaza proposes principal structures of approximately 2.85 million square feet, without taking parking structures into account. When parking structures are included, the project currently proposed consists of approximately 4.1 million square feet.

Mr. David M. Culver

April 7, 2009

Page 22

The same issue arises at Greenville Center, where a seven story garage is “hypothetically” shown to qualify for shared parking, the floor space of which (since its construction could someday be required) should be taken into account in calculating maximum allowable Gross Floor Area.

Request No. 3(c)(iii):

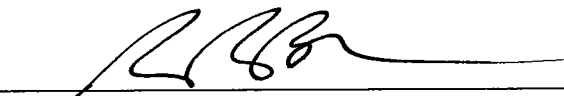
The Department is accordingly requested to interpret and clarify how Section 40.03.528 and Table 40.04.110 apply to mixed use projects in OR and CR districts which contain and rely on parking garages, including developments that rely on hypothetical multi-story garages to qualify for shared parking under Section 40.22.616

* * *

On behalf of its members and the members of the Alliance Organizations named below, encompassing thousands of area homeowners, CRG thanks the Department for considering these requests for interpretation, and looks forward to continuing as an active and constructive participant in assuring that the plans proposed for Barley Mill Plaza and Greenville Center comply fully not only with the engineering or “performance” standards of the UDC, but also with its expressed intent and purpose, including compliance with the provisions of the Comprehensive Development Code describing mixed use development and requiring that it “respect the character and integrity of existing communities.”

Respectfully,

Citizens For Responsible Growth in New Castle County

By: 
Richard P. Beck, Esquire, Co-Director

Mr. David M. Culver
April 7, 2009
Page 23

cc: The Honorable William Tansey
The Honorable Robert S. Weiner
Gregg E. Wilson, Esquire
Pamela J. Scott, Esquire
The Civic League for New Castle County
Council of Civic Organizations of Brandywine Hundred
Delaware Greenways
The Kennett Pike Association, Inc.
Eleuterian Mills-Hagley Foundation Incorporated
Brandywine Conservancy
Greater Hockessin Area Development Association