

STATE OF NORTH CAROLINA
COUNTY OF HENDERSON

ADVENIR AZORA
DEVELOPMENT, LLC,

Plaintiff,

vs.

THE CITY OF
HENDERSONVILLE, a North
Carolina municipal corporation;

Defendant.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 26 CVS _____-440

26CV000562-440

**VERIFIED COMPLAINT FOR
DECLARATORY RELIEF AND
INJUNCTIVE RELIEF**

NOW COMES Advenir Azora Development, LLC (hereinafter “Plaintiff” or “Advenir”) pursuant to N.C. Gen. Stat. §§160D-1401 and 1-253 *et seq.* and North Carolina Rules of Civil Procedure 57, complaining of the Defendant, the City of Hendersonville (hereinafter “City”), and alleges and says as follows:

INTRODUCTION

In North Carolina, owners of property, developers, prospective purchasers of land, and business owners have a fundamental right to the free use and enjoyment of land as well as a fundamental right to conduct lawful businesses. While local governments can exercise their delegated police powers to impose reasonable restrictions on the otherwise lawful use of land or the operation of businesses, such restrictions cannot prohibit them or impose unreasonable regulations that effectively prohibit them. All local government regulations must find support in and abide by State enabling legislation.

Providing housing is critical to our State and its local communities. While local governments may desire to ignore or exclude from their environs natural population growth and the associated pressures of more housing, they must reasonably accommodate such trends and corresponding uses of land by enacting clear and

objective laws that provide predictability in the application of local development rules to avoid discriminatory treatment.

A lawful business or use of land cannot be made subject to the unguided discretion of city councils or zoning boards where its establishment in a community is determined by whether the decision-makers believe such business or use to be in the public interest, serves the public welfare, is otherwise suitable or satisfies the purpose or intent of some vaguely worded land plan or rule.

Here, the City, by the application of their development regulations, compelled Advenir through a conditional rezoning process in order for Plaintiff to establish its housing business which inevitably left Advenir's rights concerning the free use and enjoyment of land to the whims of the City leaders to withhold approval for any reason and not in accordance with any uniform rule of action. Ultimately, the City leaders rejected Plaintiff's plans for pretextual reasons, advancing their political interests and not supported by any objective development standards or by competent or substantial evidence in the record.

PARTIES AND APPLICABLE PROPERTIES

1. Plaintiff is a Delaware limited liability authorized to do business in North Carolina.

2. Defendant is a municipal corporation duly recognized and operating pursuant to Chapter 160A and Chapter 160D of the North Carolina General Statutes. The City is located in Henderson County, North Carolina.

3. Advenir is in the business of developing housing for rent or sale to the public. Types of housing that Advenir develops include attached housing in the form of single-family detached, duplexes, triplexes and quadraplexes.

4. At all relevant times, Advenir possessed a contract to purchase approximately 21 acres within the City at 1741 Haywood Road (Parcel Identification (PIN) 9569-22-9206) (hereinafter "Property" or "Site"). A true and accurate aerial depicting the Site and surrounding properties is attached hereto as Exhibit "1" and incorporated herein by reference.

5. The Property currently has one dilapidated house on it and is essentially vacant.

6. The Property is zoned R-15, Medium Density Residential by the City.

7. As noted on Exhibit "1", the Property adjoins or is near relatively dense housing projects located within and approved by the City with a mix of attached housing.

CITY'S CHARACTERISTICS AND REGULATORY ENVIRONMENT

8. The City's population currently exceeds 15,000 people. The land within the City's territorial or zoning jurisdiction is greater than 9,600 acres.

9. At all relevant times, the City has adopted zoning or development regulations that regulate the use and development of land and the establishment of businesses such as Plaintiff's within the City's corporate limits or its extraterritorial jurisdiction (ETJ).

10. Upon information and belief, the City is experiencing significant growth or a population boom that has highlighted and exacerbated the need for housing. The City's lack of housing supply, especially what is called "Missing Middle housing," greatly influences the affordability of housing.

11. "Missing Middle housing" refers to small-to medium sized homes that are available at various price points, which are often part of infill development. Examples of Missing Middle housing include duplexes, triplexes, quadraplexes, cottage courtyards, townhomes and small-scale apartments.

12. Advenir's business substantially involves developing Missing Middle housing.

13. By Ordinance 21-34, entitled "AN ORDINANCE OF THE CITY OF HENDERSONVILLE CITY COUNCIL TO READOPT AND AMEND THE ZONING ORDINANCE OF THE CITY OF HENDERSONVILLE, NORTH CAROLINA, FOR CONFORMANCE WITH CHAPTER 160D OF THE NORTH CAROLINA GENERAL STATUTES," the City repealed all prior conflicting development regulations and adopted a new set of development or zoning regulations, including setting development standards for land such as the Property zoned R-15.

14. By application of Ordinance 21-34, R-15 allows single family detached housing and attached two family housing (i.e., Residential dwellings, single-family and Residential dwellings, two-family). An accessory dwelling unit is also allowed on each lot.

15. R-15's lot size requirement for density purposes is generally 15,000 square feet, which can encompass up to one building supporting two dwelling units and an accessory dwelling. This is essentially three dwelling units per 15,000 square feet as of right for R-15 zoned properties, or a density of approximately 8.82 units an acre.

16. By Ordinance 21-34, the City confines most forms of Missing Middle housing such as triplexes and quadraplexes to limited commercial zones outside growing residential areas or in what is called a planned residential development conditional zoning district (hereinafter "PRDCZ District"). The latter category can only occur on a case-by-case basis at the will and discretion of the City Council through legislative rezoning action.

17. All the properties that are vacant or underdeveloped in the City or are otherwise reasonably available for Missing Middle housing are not zoned under one of the limited commercial zones.

18. Effectively, the City funnels all new Missing Middle housing developments on tracts such as the Property through the gauntlet of conditional rezoning in the form of a PRDCZ District.

19. By Ordinance O-22-22, entitled "AN ORDINANCE OF THE CITY OF HENDERSONVILLE CITY COUNCIL TO AMEND ARTICLE 4-ESTABLISHMENT OF DISTRICTS: SECTION 4-5; ARTICLE 5- ZONING DISTRICT CLASSIFICATIONS: SECTIONS 5-1-4; 5-2-4; 5-3-4; 5-4-4; 5-5-4; 5-6-5; 5-7-4; 5-8-4; 5-9-1; 5-10-4; 5-12-4; 5-13-5; 5-19-4; 5-22-5; 5-23-6 AND 5-27-5 OF THE CITY OF HENDERSONVILLE ZONING ORDINANCE TO ESTABLISH A CONDITIONAL REZONING REQUIREMENT FOR DEVELOPMENT AND REDEVELOPMENT OF 50,000 SQUARE FEET AND/OR 51 DWELLING UNITS OR MORE," the City further constrained new housing developments by requiring that any project that

exceeds fifty (50) dwelling units, regardless of the size or location of the tract to be developed, can only be approved through conditional rezoning.

20. For R-15 zoned properties like the Property, where normally up to three (3) units per 15,000 square feet are allowed as of right, Ordinance O-22-22 effectively downzones such tracts. For tracts zoned R-15 like the Property that exceed 5.8 acres, any developer or property owner for a new housing project seeking to employ R-15 density would have to now obtain the permission of City Council through a conditional rezoning process.

APPLICATION FOR REZONING AND DENIAL

21. Around July 4, 2025, in furtherance of its housing business, Advenir submitted to the City an application to rezone the Property from R-15 to the PRDCZ District. Advenir sought to develop on the Property a housing project consisting of 180 dwelling units with a mix of two-family units, triplexes and quadraplexes (hereinafter “Project”). Based on the City’s method for calculating density for projects that included smaller homes (i.e., units less than 1,200 sq. ft.), the proposed density of the Project was approximately 5.74 units per acre.

22. Prior to the application submittal, Advenir met with City staff on several occasions and conducted meetings with neighbors. Such communications led to substantial modifications to the Project plans, including greater building setbacks, more buffers and a reduction in the number of proposed units from 200 to 180.

23. After the application submittal, Advenir received additional comments from City staff, which led to even more adjustments to the Project plans to accommodate staff wishes, including moving the primary internal road to lessen impacts to Britton Creek.

24. With its rezoning application and modifications to the Project plans, Advenir complied with all the development standards of R-15 as well as the standards in Section 5-14 for PRDCZ Districts, including building setbacks and building heights. No variances were requested. A true and accurate copy of Section 5-14 is attached hereto as Exhibit “2” and incorporated herein by reference.

25. The PRDCZ District standards allow up to 10 units per acre. The proposed Project density was 5.74 units per acre.

26. The PRDCZ District requires that new housing projects be in “one of the following Future Land Use designations as illustrated in the City’s most recently adopted Comprehensive Plan: Rural Residential, Family Neighborhood Living, and Multi-Generational Living.” The Property is labeled as Family Neighborhood Living in the City’s Comprehensive Plan.

27. The PRDCZ District requires 40% of open space. The Project plans showed at least 55% of total open space.

28. Multiple neighbors objected to the Project based on traditional “Not in My Backyard” complaints.

29. For approximately a year, City staff communicated support for the Project and the conditional rezoning. Advenir incurred substantial expenses in engineering and site design fees in modifying its plans to accommodate staff’s wishes, and to provide requested documentation, including traffic impact studies.

30. All the studies performed by Advenir demonstrated compliance with the objective standards of the City’s zoning ordinance.

31. Attached as Exhibit “3” is a true and accurate copy of portions of the City staff report to City Council for the Project and rezoning request describing Project details and reports, findings and comments from Staff, including the City Fire Marshal.

32. The City’s Fire Marshal approved the Project plans, including access and grade, with the condition that the buildings have sprinklers installed.

33. The City’s Comprehensive Plan shows the Site to be “underdeveloped” and “suitable” for redevelopment.

34. The matter came before the City Council of the City for public hearing on January 7, 2026.

35. After conducting the hearing, the City Council rejected the rezoning application (hereinafter “Rezoning Denial Decision”). Stated reasons for the Rezoning Denial Decision were: (1) the Project’s inconsistency with the

Comprehensive Plan's designation of the Property as Family Neighborhood Living, which targets single-family detached housing; (2) adequacy of site access for emergency services and lack of interconnectivity; (3) compatibility with surrounding development; and (4) grading and environmental impacts. As will be more fully elaborated below, these findings were not supported by competent or substantial evidence in the record and were arbitrary and capricious.

JURISDICTIONAL ISSUES AND VENUE

36. There is an actual controversy between the parties. This Court has jurisdiction pursuant to N.C.G.S. §160D-1401, the Declaratory Judgment Act (N.C.G.S. §1-253 et seq.) and North Carolina Rule of Civil Procedure Rule 57.

37. N.C.G.S. §1-254 provides in pertinent part. "Any person . . . whose rights, status or other legal relations are affected by a statute, municipal ordinance . . . may have determined any question of construction or validity arising under the . . . statute, ordinance, . . . and obtain a declaration of rights, status, or other legal relations thereunder."

38. As more fully explained below, Advenir's rights, status or other legal relations as a developer and business owner are affected by the above-described City ordinances and the question of their validity considering State statutes and the North Carolina Constitution.

39. As more fully explained below, Advenir contends that the City ordinances are illegal or invalid for violating on their face or as-applied various State statutes and the North Carolina Constitution. The City disagrees.

40. As more fully explained below, Advenir contends that the City's Rezoning Denial Decision was arbitrary and capricious. The City disagrees.

41. Because of the Rezoning Denial Decision, Advenir has standing to challenge the City ordinances on their face and as-applied (e.g., Rezoning Denial Decision) as a prospective vendee or holder of a contractual interest in the Property, an interested developer of the Property and a rezoning applicant whose application was denied by the City. Advenir has a specific personal and legal interest in the subject matter discussed in this Complaint consisting of the application of the various

statutes and ordinances mentioned herein and is directly and adversely affected thereby.

42. Venue is proper in Henderson County.

COUNT ONE
Ultra Vires/Lack of Statutory Authority

43. Plaintiff incorporates by reference the allegations contained in paragraphs 1-42 above.

44. The power to zone is the power of the State; as a result, a city has no inherent power to zone its territory and restrict to specified purposes the use of private property in each zone. *Zopfi v. City of Wilmington*, 273 N.C. 430, 433-34 (1969). A city's power to enact and enforce zoning regulations does not exist in the absence of statutory authority and therefore the validity of zoning ordinances must be tested by the limitations of the enabling act. *State v. Owen*, 242 N.C. 525, 527 (1955); *Keiger v. Winston-Salem Bd. of Adj.*, 278 N.C. 17, 19 (1971). As creatures of the State, local governments are subject to General Assembly control and their authority can be enlarged, modified or abridged at the will of the State legislature. *Quality Built Homes, Inc. v. Town of Carthage*, 369 N.C. 15, 18-19 (2016).

45. N.C.G.S. §160D-702 provides the authority to local governments to “regulate and restrict the height, number of stories, and size of buildings and other structures; the percentage of lots that may be occupied; the size of yards, courts and other open spaces; the density of population; and the location and use of buildings, structures, and land.”

46. The power to “regulate” is not normally construed to include the “prohibition” of a legitimate business. *State v. Byrd*, 259 N.C. 141, 146-47 (1963); *State v. Thomas*, 118 N.C. 1221, 1225 (1896). The term “regulate” means “to govern or direct according to rule . . . to bring under control of law or constituted authority.” *State v. Gullede*, 208 N.C. 204, 208 (1935). The power to prohibit the use of private property other than one that constitutes an inherent nuisance is not given to local governments through the delegation of the power to establish regulations. *State v.*

Whitlock, 149 N.C. 542, 63 S.E. 123 (1908); *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854, 863 (1940) (“The power to regulate a business or occupation does not necessarily include the power to exclude person from engaging in it.”).

47. While the North Carolina General Assembly has plainly conferred power to local governments to prohibit uses or activities in multiple contexts, e.g., N.C.G.S. §153A-128 (weapons of mass death and destruction) and N.C.G.S. §160A-302.1 (fishing from bridges), the provision of housing is not one of those uses or activities.

48. The North Carolina General Assembly in multiple statutory sections has demonstrated that the public policy of this State is to promote housing as a legitimate use of private property. E.g., N.C.G.S. §160D-702; House Bill 488 (Session Law 2023-108). In a city that shares the same or similar characteristics of the City in terms of size and population, local government must reasonably accommodate housing including Missing Middle housing; such a city has no authority to ban such use or establish unreasonable or unnecessary restrictions against same.

49. Local governments only have zoning or land development regulatory tools authorized by the General Assembly. *Lanvale Props., LLC v. County of Cabarrus*, 366 N.C. 142, 152 (2012); *County of Lancaster v. Mecklenburg County*, 334 N.C. 496, 509 (1993) (“zoning authority cannot be exercised in a manner contrary to the express provisions of the zoning enabling authority.”). “Any action of a local unit that disregards fundamental zoning concepts may be arbitrary and capricious.” *Gregory v. County of Harnett*, 128 N.C. App. 161, 164 (1997).

50. N.C.G.S. §160D-701 provides the purposes of zoning, which includes the following: “The regulations shall be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the local government’s planning and development regulation jurisdiction.”

51. For new Missing Middle housing developments like the Project, the thrust of the City’s zoning ordinance is to mandate that they be reviewed through a

conditional rezoning process where the outcomes rest in the unguided discretion of the City Council.

52. In the early 1900's, the use of zoning sprung into the mainstream of the United States after the United States Supreme Court's decision to affirm the constitutionality of a comprehensive zoning ordinance in *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114 (1926). Following the *Euclid* case, many states adopted model acts promulgated by the U.S. Department of Commerce to apply zoning. This national trend took root in North Carolina and in 1923 the North Carolina General Assembly adopted the model legislation proposed by the Department of Commerce, thus giving cities the authority to adopt zoning ordinances. *Harden v. City of Raleigh*, 192 N.C. 395, 135 S.E. 151 (1926) (*citing* to Public Laws 1923, c. 250).

53. Most zoning ordinances have traditionally followed the Euclidean model which is to create zoning districts to separate uses which are perceived to be incompatible. *Chrismon v. Guilford County*, 322 N.C. 611 (1988). By using zoning to prevent incompatible uses from being too close together and by providing a degree of predictability about future land uses, local governments provide a degree of stability to the land market that property owners, developers, investors and other financial lenders and buyers all find reassuring.

54. To enact zoning, a local government must adopt a map showing the location of zoning districts and adopt a text of an ordinance that describes what uses are permitted or prohibited in each district and the development standards that must be met. *Town of Green Level v. Alamance County*, 184 N.C. App. 665, 670 (2007). The primary purpose of zoning ordinance is "to specify the types of land use activities that are permitted, and prohibited, with particular zoning districts." *Lanvale*, 366 N.C. at 158.

55. N.C.G.S. §160D-703(a) directs a local government to divide its territorial jurisdiction into zoning districts on a map that lists where uses are allowed or prohibited. Reading the statutory requirements for a zoning map together with the zoning text, and based on North Carolina common law principles, all legitimate uses

of land must be allowed somewhere in the City where available property is suitable and reasonably adaptable to the use and not subject to unreasonable and unnecessary restrictions. Failing to do so, a local government would be unlawfully banning legitimate uses or businesses. *Land v. Village of Wesley Chapel*, 206 N.C. App. 123, 132 (2010); *King v. Town of Chapel Hill*, 367 N.C. 400, 408-09 (2014); *Whitlock*, supra.

56. N.C.G.S. §160D-703(a) lists the currently available methods or tools of zoning. A “conventional district” in subsection (a)(1) is the traditional Euclidean approach of spelling out allowable uses in each district, typically separating those uses deemed incompatible.

57. A form-based district in subsection (a)(3) of N.C.G.S. §160D-703 allows a city to regulate physical form, type and density and of the built landscape; it does not include the ability to dictate use.

58. A conditional zoning district in subsection (a)(2) of N.C.G.S. §160D-703 can be employed where proposed development would normally be permitted in higher or less restrictive zoning districts (i.e., up zone) than the current zoning district and with conditions to ameliorate any adverse impacts. Conditional zoning, however, is a voluntary tool that requires the petition of all affected owners and written consent to conditions. N.C.G.S. §160D-703(b).

59. N.C.G.S. §160D-703(c) mandates that “all regulations shall be uniform for each class or kind of building throughout each district but the regulations in one district may differ from those in other districts.” This is consistent with the constitutional equal protection principle embodied in N.C. Constitution Article I, Sec. 19 that “ordinances must be uniform, fair, and impartial in their operation.” *Town of Clinton v. Standard Oil Co.*, 193 N.C. 432, 137 S.E. 183, 184 (1927).

60. The scheme for addressing new Missing Middle housing projects in the City’s zoning ordinance as codified by Ordinance 21-34 and Ordinance O-22-22 is the antithesis to a guaranteed uniform rule for determining how one uses property. Conditional zoning only occurs through a legislative zoning map amendment on a case-by-case basis where the government can turn down an applicant for an infinite number of reasons.” N.C.G.S. §160D-102(17) (defining conditional zoning). See, e.g.,

Ashby v. Town of Cary, 161 N.C. App. 499, 504 (2003) describing the deferential standard for judging rezoning denials).

61. With a conditional zoning district like the PRDCZ District, there are no community wide placements on a zoning map based on the factors in N.C.G.S. §160D-701. Rather, they are placed on a map piecemeal and *ad hoc*. While the PRDCZ District has standards for density, location, setbacks and other criteria, they can be (and are) ignored as demonstrated by the Rezoning Denial Decision, as more fully elaborated below.

62. Utilizing conditional zoning as a gatekeeping tool to allow or disallow an otherwise lawful use of land (e.g., not inherently a nuisance) is not authorized by Chapter 160D and more particularly N.C.G.S. §§160D-701, 702 or 703. Because conditional rezoning must be a voluntary act of petitioning by a landowner with all conditions on development to be enforceable only through written consent of the landowner, the City's conditional zoning scheme effectively mandates such approach by regulatory fiat by establishing thresholds or tripwires for when conditional zoning *must* be used. Expressly funneling Missing Middle housing in the form of triplexes, quadraplexes, etc. or housing of 51 or more units through conditional legislative rezoning decision giving the City unlimited authority to reject any such application for any reason is inimical to the concept of the consent of the property owner, which denotes making a choice not brought on by duress or lack of viable options. Advenir was presented with a Hobson's choice of not being able to conduct its normal, lawful business of providing Missing Middle housing or going through the conditional rezoning process, which is not reflective of a voluntary act. *Quality Built Homes*, 371 N.C. at 75. Tracts such as the Site that are underdeveloped or vacant that are reasonably adapted for new residential housing are not zoned commercial. The City has provided only one option to use the Site for residential uses at the density normally allowed in R-15 and that is conditional rezoning.

63. N.C.G.S. §160D-705(c) authorizes local government to allow new land uses via a special use permit; but in those instances, specific standards must be

prescribed in the ordinance and must be followed by the government to guard against arbitrary or unconstitutional permit denials. *In re Ellis*, supra.; *Woodhouse*, supra.

64. If local government could simply box in more controversial uses as the subject of conditional zoning without reasonably accommodating them in a general zoning districts with prescribed standards, then many of the zoning tools, including special uses, would be rendered meaningless or superfluous.

65. Predetermining that certain land uses like Missing Middle housing must go through a conditional rezoning process regardless of the size or location of property that is sought to be developed, the characteristics of the land, the compatibility of nearby existing uses or other considerations referenced in N.C.G.S. §160D-701 conflicts with said statute and other enabling statutes, is *ultra vires*, invalid and is arbitrary for violating fundamental concepts of zoning.

66. Advenir requests that the Court grant declaratory relief and declare that Ordinance 21-34 and Ordinance O-22-22 and the existing conditional rezoning provisions of the City pertaining to Missing Middle housing are invalid, void or ineffective on their face and/or as-applied to the Site. *Keiger v. Winston-Salem Bd. of Adj.*, 281 N.C. 715, 720 (1972).

67. After exercising declaratory relief, Advenir requests such further relief, equitable or otherwise, that is just and proper, including approval of the Project and the associated rezoning request. E.g., N.C.G.S. §1-259.

COUNT TWO

Due Process/Law of the Land; Arbitrary and Capricious; Exclusionary Zoning; Equal Protection

68. Plaintiff incorporates by reference the allegations contained in paragraphs 1-67 above.

69. The right to use and enjoy real property in North Carolina is a fundamental right. *Carolina Beach Fishing Pier, Inc. v. Carolina Beach*, 274 N.C. 362 (1968). The free use of land is the public policy of our State. *J.T. Hobby & Son, Inc. v. Family Homes of Wake County, Inc.*, 302 N.C. 64 (1981). Governmental

restrictions on the use of land are strictly construed in favor of the free use of land. *Morris Communs. Corp. v. City of Bessemer City*, 365 N.C. 152 (2011).

70. The City is a political subdivision of this State and therefore is a state actor which perpetrated the violation of Advenir's constitutionally protected rights associated with the use and enjoyment of private property and depriving the Plaintiff of its trade or business and the fruits of its labor and its property interests under Article I, §1 and Article I, §19 of the North Carolina Constitution.

71. Due process under the "law of the land clause" in Article I, §19 of the North Carolina Constitution protects Plaintiff from government action that unreasonably deprives it of a liberty or property interest. Government action must have a rational connection to a valid state objective, and if so, the means chosen must not be unreasonable, arbitrary or capricious. *Responsible Citizens in Opposition to Flood Plain Ordinance v. City of Asheville*, 308 N.C. 255, 261 (1983); *Town of Beech Mt. v. Genesis Wildlife Sanctuary, Inc.*, 247 N.C. App. 444, 459 (2016), *aff'm per curiam*, 369 N.C. 722 (2011).

72. As explained in Count One above, the City's conditional rezoning provisions related to Missing Middle housing are beyond the power of the City and conflict with the public policy of this State as reflected in the above statutes and caselaw and therefore lack a rational connection to a valid state objective.

73. The City's prohibitive stance against Missing Middle housing is also not a reasonable regulation of land under our State's due process or law of the land clause. *State v. Williams*, 265 N.C. 173 (1965).

74. Advenir possesses a fundamental right to earn a livelihood, conduct its lawful business and enjoy the fruits of its labor. The City's zoning ordinance related to Missing Middle housing on its face and as applied represents an arbitrary interference with private business and an unusual and unnecessary restriction upon Plaintiff's trade and land use and denies Plaintiff the fruits of its labor contrary to Articles I, Sec. 1 and Sec. 19 of the North Carolina Constitution. *Treants Enterprises, Inc. v. Onslow County*, 320 N.C. 776 (1987); *In re Certificate of Need for Aston Park Hosp., Inc.*, 282 N.C. 542 (1973).

75. The City cannot “under the guise of protecting the public arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.” *King*, 367 N.C. at 408-09 (citing *Roller v. Allen*, 245 N.C. 516, 525 (1940)). “The power to regulate a business or occupation does not necessarily include the power to exclude person from engaging in it.” *State v. Harris*, *supra*.

76. The City’s zoning ordinance creates an arbitrary funnel for Missing Middle housing through conditional zoning, which places Plaintiff’s use of property and business totally at the arbitrary or despotic will of officials without a general or uniform rule applicable to all alike, where a rezoning application can be refused for any reason. *See, e.g., Bizzell*, *supra*. The City’s actions also violate Article I, §35 of the North Carolina Constitution: “A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty.”

77. The reasons given by the City for the Rezoning Denial Decision underscore why the City’s zoning ordinance (codified in the ordinances referenced above) on its face and as-applied does not satisfy a rational basis test or a heightened test under Article I, §1 or §19 of the North Carolina Constitution. *See, e.g., Wenco Management Co. v. Carrboro*, 53 N.C. App. 480 (1981) (effective ban on drive-in restaurants failed to demonstrate rational relation to a legitimate police power objective and contravenes constitutional limits). The City zoning ordinance is arbitrary and capricious and unduly discriminatory on its face and as applied. *Wenco*, *supra*.

78. The City’s claim that the Project is incompatible with the Site’s designation in the City’s Comprehensive Land Use Plan is not supported by competent or substantial evidence in the record and is specifically refuted by the record, including the following:

- a. Section 5-14-3a) of the City’s zoning ordinance mandates that Missing Middle housing projects must be located in areas designated in the Land Use Plan as either Rural Residential, Family Neighborhood Living, or Multi-Generational Living. If attached housing such as triplexes or

quadraplexes were not suitable for any one of those three areas, then Section 5-14-3a) would be superfluous or meaningless as a development standard. Moreover, the City has approved many attached housing projects in nearby areas designated in the Land Use Plan as Family Neighborhood Living, including Blythe Commons, Britton Creek Condos, Haywood Towns and The Oaks as generally shown on Exhibit “4”.

79. The City’s claim that the Project is incompatible due to so-called extensive grading that significantly affects the Site’s natural geography is not supported by competent or substantial evidence in the record and is specifically refuted by the record, including the following:

- a. Development allowed as-of-right in R-15 up to three housing units per 15,000 square feet at lesser open space requirements would generate more grading or property disturbance than what the Project plans depict.
- b. There is no baseline or standard in the ordinance for discerning what is or is not “extensive grading”.
- c. Much of the “grading” was the product of accommodating City staff wishes for the location of roads, walls and buildings and to more protect Britton Creek.
- d. Section 11-4 of the City’s zoning ordinance provides for consideration of the “effect on natural environment” in a rezoning request which is tied to impacts on “water, air, noise, storm water management, streams, vegetation, wetlands and wildlife.” None of those listed impacts are negatively affected, especially when considering what was allowed as-of-right in R-15 with development that does not have to go through the conditional zoning gauntlet. The Project plans demonstrate more protections given for stormwater management or tree canopy protection than what is normally permitted or at greater levels than the standards specifically listed in the ordinance.

80. The City's claim that Project access was not adequate for emergency services and lacks interconnectivity is not supported by competent or substantial evidence in the record and is specifically refuted by the record, including the following:

- a. The City Fire Marshal approved the Project plans. No other experts presented conflicting information.
- b. The Project plans complied with all City ordinances as to access.
- c. The Project complied with all stub-out or "interconnectivity" requirements.

81. The City's claim that the Project is not compatible with surrounding land uses or development is not supported by competent or substantial evidence in the record and is specifically refuted by the record, including the following:

- a. Multiple attached housing projects with greater or similar density as proposed with the Project are adjacent or near the Project. The term "surrounding" must account for adjacency or proximity at all boundaries without paramount importance given to one border over another.
- b. The Project's proposed density is less than or similar to what is allowed as-of-right in R-15.
- c. The City's staff report denotes compatibility with nearby housing developments.
- d. There is a lack of uniformity of density or housing type in the surrounding neighborhood.
- e. The Project complies with all R-15 development standards addressing off-site impacts and, in many cases, provide greater protection.

82. The effect of the City's zoning ordinance on its face and as-applied with the Rezoning Denial Decision is to allow City Council to decide the fate of Missing Middle housing developments like the Project based on whether such uses are in the public interest, serve the public welfare, are suitable, or meet the purpose or intent of vague standards. The City has acted with unguided discretion contrary to the

rights of Plaintiff to pursue a lawful calling or to freely use the Site without unreasonable restraints. *Bizzell*, supra.; *In re Application of Ellis*, 277 N.C. 419, 425 (1970); *Woodhouse v. Board of Com'rs of Town of Nags Head*, 299 N.C. 211, 216-17 (1980); *Keiger*, 271 N.C. at 23; *Northwestern Financial Group, Inc. v. County of Gaston*, 329 N.C. 180, 190 (1991).

83. Conditional zoning is a voluntary tool when a developer seeks to fit between two zoning district categories. As noted in Count One, a local government is not authorized nor is it constitutional to put specific uses or businesses in a box and require any person seeking to engage in those uses or businesses to submit to the will of the local leaders to decide their fate based on any reason – good or bad. Ultimately, the test of an ordinance's constitutionality is what it empowers those in authority to do, not what they may end up doing. *State v. Williams*, 61 S.E. at 65.

84. There is no adequate State remedy for Avenir's constitutional injuries that would preclude declaratory or injunctive relief in this case.

85. As a proximate result of the unlawful, *ultra vires* and unconstitutional actions of the City as set forth above, Plaintiff has been directly and adversely affected and injured and is entitled under N.C.G.S. §160D-1401 and/or our State Constitution to declaratory and injunctive relief, declaring the City's conditional zoning provisions to be void, invalid and unenforceable. *State v. Williams* at 62.

COUNT THREE

Arbitrary and Capricious; Lack of Substantial Evidence

86. Plaintiff incorporates by reference the allegations contained in paragraphs 1-85 above.

87. A zoning decision is arbitrary and capricious when it ignores fundamental zoning concepts, See *Gregory*, supra., or when it is whimsical, willful, and an unreasonable action without consideration or in disregard of facts or law or without determining principle, *Sanchez v. Town of Beaufort*, 211 N.C. App. 574, 580 (2011), or when it lacks substantial evidence in the record. *Godfrey v. Zoning Bd. of Adj.*, 317 N.C. 51, 60 (1986).

88. Plaintiff's Project and its associated rezoning request satisfied all the standards in Section 11-4 and Section 5-14 of the City's zoning ordinance and there was not competent or substantial evidence showing otherwise.

89. For these reasons and as set forth in paragraphs 77-81 and in Count One, the City's Rezoning Denial Decision was arbitrary and capricious, and must be set aside.

90. Plaintiff's Project and its associated rezoning request satisfied all the standards in Section 11-4 and Section 5-14 of the City's zoning ordinance and there was not competent or substantial evidence showing otherwise.

91. As noted above, Plaintiff requests such supplemental relief that is just and proper, including approval of the Project and its associated rezoning, to the extent allowed by North Carolina law.

WHEREFORE, the Plaintiff prays Judgment of the Court as follows:

1. For declaratory and injunctive relief as described above, including declaring the City's conditional zoning mandates in its zoning ordinance (codified in Ordinance 21-34 and Ordinance O-22-22) invalid and unenforceable.
2. For reasonable attorneys' fees as allowed by law, including N.C. Gen. Stat. §6-21.7;
3. That the costs of this action be taxed to the Defendant; and
4. For such other and further relief as the Court deems just and proper.

This the 9th day of March, 2026.

WILKERSON JUSTUS PLLC

By:  _____

Craig D. Justus
NC Bar # 18268
9 SW Pack Square, Suite 301
Asheville, NC 28801
Telephone: (828) 373-0464
Attorneys for Plaintiff

STATE OF NORTH CAROLINA
COUNTY OF HENDERSON

ADVENIR AZORA
DEVELOPMENT, LLC,

Plaintiff,

v.

THE CITY OF
HENDERSONVILLE, a North
Carolina municipal corporation,

Defendant.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
CASE NO. 26 CVS _____-440

VERIFICATION

Marc A. Mariano, being first duly sworn, deposes and says:

1. That I am the Vice President of Advenir Azora Development, LLC.
2. That I have received a copy of and have read the Complaint for Declaratory Relief and Damages and know the contents thereof; that the same are true of my knowledge, except as to the matters and things therein stated to be upon information and belief, and that as to those matters and things I verily believe them to be true.

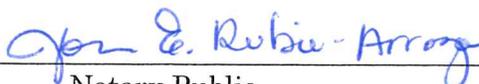
Advenir Azora Development, LLC, by and through its Vice President



Marc A. Mariano

SWORN TO AND SUBSCRIBED before me this 9 day of March 2026.

[Notary Stamp/Seal]



Notary Public

Print Name: JOANMAIR E. RUBIO-ARROYO

My Commission Expires: 10/10/2029

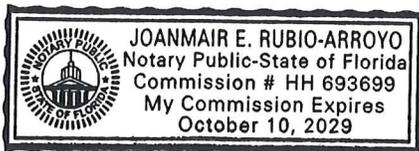


EXHIBIT 1

Haywood Townes -
attached townhome
units

Ewbank Gardens
Condominiums - 13+
units per acre

Blythe
Commons -
duplex and
triplex units

Haywood
Manor
Condominiums
- 10+ Units per
acre

The Oaks -
attached
dwelling units

Plantation Walk
- townhome
units

*Site

Britton Creek
Condos - 10+ units
per acre

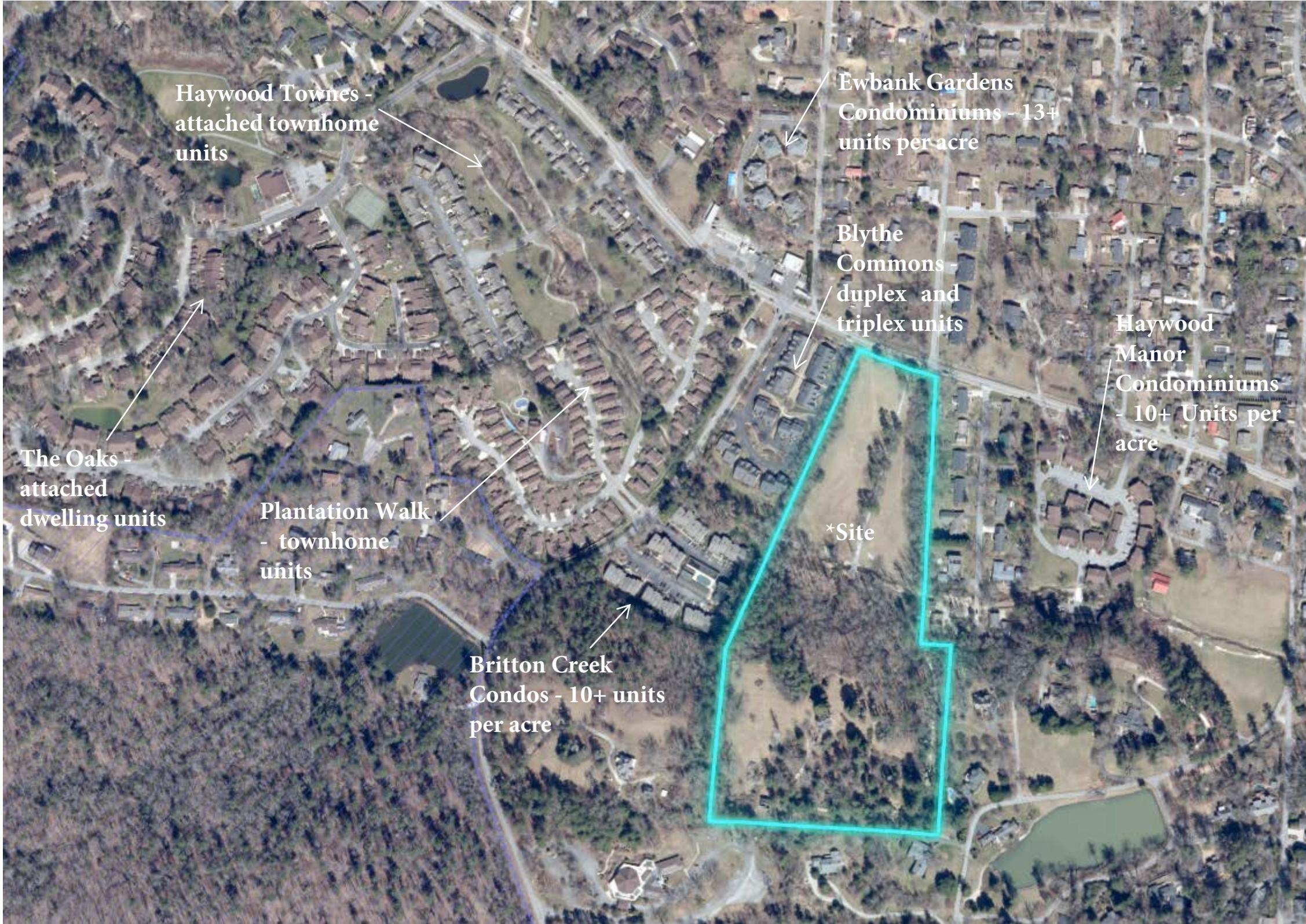


EXHIBIT 2

Sec. 5-14. - PRD Planned Residential Development Conditional Zoning District Classification.

This zoning district classification is designed to accommodate planned residential developments with a rezoning to a Planned Residential Development Conditional Zoning District in accordance with article VII herein. Such rezoning to a Planned Residential Conditional Zoning District is required as a prerequisite to any use or development in the PRD Zoning District Classification, and no use shall be permitted except pursuant to such permit. The rezoning shall insure that the proposed use or development is consistent with the requirements of this section and may further specify the timing of development, the location and extent of rights-of-way and other areas to be dedicated for public use, and other such matters as the applicant may propose as conditions upon the request. In granting the rezoning for a planned residential district, city council may impose such additional reasonable and appropriate safeguards upon such approval as it may deem necessary in order that the purpose and intent of this chapter are served, public welfare secured and substantial justice done.

5-14-1. - Application.

The reclassification of property to PRD Planned Residential Development Conditional Zoning District shall constitute an amendment of the official zoning map which may be initiated only by all of the owner(s) of a legal interest in the affected property. Such amendment shall be initiated by means of an application for rezoning to a PRD Planned Residential Development Conditional Zoning District. No permit shall be issued for any development within a PRD Planned Residential Development Conditional Zoning District except in accordance with an approved rezoning.

5-14-2. - Permissible uses subject to rezoning to a Planned Residential Development Conditional Zoning District.

A building or land shall be used only for those purposes specified in the rezoning for the project which may include one or more of the following:

Accessory structures

Accessory dwelling units subject to supplementary standards contained in section 16-4, below

Adult care centers registered with the NC Department of Health and Human Services (DHSS)

Adult care homes

Camps

Child care centers subject to supplementary standards contained in section 16-4, below

Child care homes

Congregate care facilities, subject to supplementary standards contained in section 16-4, below

Customary accessory uses

Home occupations

Neighborhood-oriented offices located, designed, and proposed to be operated so as to be compatible with the particular neighborhood in which they are to be located

Neighborhood-oriented personal services consistent with the purposes of this classification, such as barber and beauty shops, medical and dental labs and clinics, opticians and optical services and prosthetics and orthopedics where the gross floor area of any individual unit does not exceed 2,000 square feet. In combination, neighborhood-oriented nonresidential uses may not exceed a footprint of 8,000 square feet per building.

Neighborhood-oriented restaurants, consistent with the purposes of this classification (no drive-thrus) where the gross floor area of any individual unit does not exceed 2,000 square feet. In combination, neighborhood-oriented nonresidential uses may not exceed a footprint of 8,000 square feet per building.

Neighborhood-oriented retail stores consistent with the purposes of this classification, such as gift shops, florist shops and pharmacies where the gross floor area of any individual unit does not exceed 2,000 square feet. In combination, neighborhood-oriented nonresidential uses may not exceed a footprint of 8,000 square feet per building.

Nursing homes, subject to supplementary standards contained in section 16-4, below

Parks

Progressive care facilities, subject to supplementary standards contained in section 16-4, below

Public utility facilities, subject to supplementary standards contained in section 16-4, below

Religious institutions

Residential dwellings, single-family

Residential dwellings, two-family

Residential dwellings, three-family

Residential dwellings, four-family

Rest homes, subject to supplementary standards contained in section 16-4, below

Schools, primary, elementary and secondary

Telecommunications antennas, subject to supplementary standards contained in section 16-4, below

Telecommunications towers, subject to supplementary standards contained in section 16-4, below

5-14-3. - Site requirements.

Planned residential development conditional zoning districts shall have the following site and density requirements:

- a) Sites should be located in one of the following Future Land Use designations as illustrated in the City's most recently adopted Comprehensive Plan: Rural Residential, Family Neighborhood Living, Multi-Generational Living.
- b) Density authorized for a planned residential development conditional zoning district shall not exceed 10 units per acre. The following recommended maximum densities are based on the Future Land Use designation of the site:
 - i. Rural Residential = 2 units per acre
 - ii. Family Neighborhood Living = 6 units per acre
 - iii. Multi-Generational Living = 10 units per acre

5-14-4. - Development standards.

Unless noted otherwise, the following development standards shall apply to all planned residential developments, whether major or minor. In addition, planned residential developments shall meet all applicable standards contained in article VI, below.

5-14-4.1. Open space and footprint requirements. Planned residential developments shall have a maximum footprint of 40 percent of the site and shall have, as a minimum, 40 percent of the site as open space. In addition, planned residential developments shall meet the common open space requirements of section 6-16.

5-14-4.2. Dimensional standards. City council shall require reservations of rights-of-way, as well as increased setbacks, for roads identified in the comprehensive transportation plan, including existing roads to be widened as well as corridors of new roads.

Minimum lot area in square feet:	0
Minimum lot width at building line in feet:	None

Minimum yard requirements for principal structures in feet:	Front: 40, reduced to 0 when parking is situated to the rear of the lot and screened from view from public right-of-way, provided, however, that front-facing garages shall be setback a minimum of 45 feet.
	Side: 0. If provided, setbacks shall be a minimum of 5 with exception of corner lots where setback shall be <u>7.5</u> from side street right-of-way.
	Rear: 20
Maximum height in feet:	35
Minimum yard requirements for accessory structure in feet:	Front: Located to side or rear of principal structure.
	Side: 0 with exception of corner lots where setback shall be <u>7.5</u> from side street right-of-way.
	Rear: 0

5-14-4.3. Subdivision of planned residential developments. Planned residential development projects may be subdivided provided that arrangements for such subdivision are made at the time of the planned residential development application.

5-14-4.4. Circulation and access. Internal streets, drives and parking areas shall provide safe and convenient access to dwelling units and recreation facilities, and for service and emergency vehicles. Connectivity is a goal of the internal street system and external connections to areas outside and adjacent to the Planned Residential Development Conditional Zoning development shall be constructed.

- i. The site shall be traversed by a network of internal streets built according to city standards. Internal streets should seek to avoid cul-de-sacs and dead-end roads and other features that hamper connectivity. However, roads may terminate at a monumental structure or green space.

In such cases a sidewalk or other connection shall be provided to ensure the goals of connectivity.

- ii. Internal streets shall have sidewalks and street trees.
- iii. If a bus line serves, or is expected to serve, the district, a bus shelter is required. Larger projects may require more shelters as determined by a traffic impact analysis.
- iv. Alleys providing access to the rear of lots are encouraged. Public alleys shall meet the specifications of relevant city standards. Where individual lots have frontage on another city street, private drives may be used as alleys, in which case they may be constructed within common space at the rear of lots or, in conjunction with the use of cross-access easements, they may be constructed within a series of rear setbacks. One-way alleys shall be a minimum of eight feet wide. Two-directional alleys shall be a minimum of 16 feet wide.
- v. All new development with fewer than ten dwelling units are required to provide stub-outs to adjacent property to extend and connect streets and drives with future streets and drives where feasible and practical.
- vi. All new development with more than ten but fewer than 100 dwelling units are required to provide at least one stub-out to extend and connect streets and drives with future streets and drives on adjacent property. In the event that adjacent land is already developed with stub-outs present, the developer shall connect to the existing stub-out(s). In the event that the proposed development is able to provide three or more points of access to the existing street network, this provision may be waived.
- vii. Residential developments containing 100 or more dwelling units shall provide required street connections and stub-outs at a ratio of one stub-out per 100 dwelling units to extend and connect streets and drives with future streets and drives on adjacent property. In the event adjacent land is already developed with stub-outs present, the developer shall connect to the existing stub-out(s).

5-14-4.5. Maintenance of common facilities. The developer, project owner, or a properly established homeowners association shall provide for the continuing maintenance of common open space, recreational facilities, sidewalks, parking, private streets and other privately owned but common facilities serving the project.

5-14-4.6. Site design.

- i. It is preferred that primary façades face the adjacent street or common space. A main entrance shall face a connecting walkway with a direct, safe, pedestrian connection to the street. Where the main entrance does not face the adjacent street, buildings should nonetheless be designed to provide an attractive streetside façade.
- ii. Buildings shall be situated with regard to pedestrian and vehicular connectivity. It is preferred that they be located close to the pedestrian street with off-street parking behind and/or beside the building. Important mountain vistas and/or views of significant historic sites shall be

protected and accentuated to the extent practicable.

- iii. Front-facing garages should be recessed from the front façade of the house and visually designed to form a secondary building volume. Developers are encouraged to turn garages and carports so the openings or doors are not visible from the street.

5-14-5. - Minor planned residential developments.

An applicant may elect to have a development processed as a minor planned residential development so long as the proposed development, including all phases, is greater than two dwelling units but does not exceed 50 dwelling units. Minor planned residential developments may consist of any residential uses permitted under section 5-14-2, regardless of the underlying zoning district. No commercial development may be part of a minor planned residential development. A minor planned residential development may be located in one or more of the following zoning district classifications: R-40, R-20, R-15, R-10, R-6, MIC, RCT, C-2, C-3, C-4.

5-14-5.1. Density. The maximum number of dwelling units which may be constructed in a minor planned residential development shall be 50 or a number computed on the basis of the following table, whichever is less.

Use District	Dwelling Units Per Acre
R-40	2.0
R-20	3.0
R-15	4.0
R-10	5.5
R-6	8.5
MIC	8.5
RCT	8.5
C-4	8.5
C-2	10.0
C-3	10.0

5-14-5.2. **Development standards for minor planned residential developments.** Except as otherwise noted herein, minor planned residential developments shall be governed by the development standards for planned residential developments contained in subsection 5-14-4, above.

5-14-5.3. **Procedures for reviewing.** Unlike other planned developments which undergo rezoning to a conditional zoning district, minor planned residential developments undergo site plan review pursuant to section 7-3.

5-14-6. - Procedures for reviewing rest homes, nursing homes, congregate care facilities and progressive care facilities.

Rest homes, nursing homes, congregate care facilities and progressive care facilities are permitted uses, subject to supplementary standards contained in section 16-4, below, in the following use districts: C-3, C-2, I-1 and MIC. When it is proposed to locate one of these uses in one of the foregoing districts, it shall undergo site plan review pursuant to the provisions of section 7-3, below. These uses are permitted uses in a PRD Planned Residential Development Conditional Zoning District, in which case it shall undergo rezoning in accordance with section 7-4, below.

(Ord. No. 22-57, 10-6-22; Ord. No. O-25-33, 6-5-25)

EXHIBIT 3

STAFF SITE PLAN REVIEW – SUMMARY COMMENTS

PROPOSED REQUEST DETAILS

Site Plan Summary:

- Proposed Uses:
 - 180 Residential dwellings, two, three, and four-family
- Building:
 - 180 Units Total
 - Duplex (1 BR and 2BR) – 728 sf – 30
 - Stacked Duplex (1 BR) – 624 sf – 8 (4 below, 4 above)
 - Duplex (1 BR and 2 BR) – 1,064 sf – 30
 - Duplex (2 BR and 2 BR) – 1,064 sf – 4
 - Townhomes (2 BR) – 1,152 sf – 44
 - Townhomes (2 BR) – 1,365 sf – 20
 - Townhomes (3 BR) – 1,430 sf – 44
 - Building Coverage: 3.58 acres
 - 8.47 units per acre
 - 5.74 units per acre utilizing City’s new ½ unit calculation for units under 1,200 sf
 - 122 units on the upper (southern) portion of the site.
 - 58 units on the lower (northern) portion of the site.
- Site Coverage:
 - Open space – 13.5 acres
 - Streets and Parking – 3.75 acres
 - Stormwater Detention - .42 acres
 - Wetlands - .4 acres
- Site Access
 - The site will have one access point off of Haywood Road. See TIA Analysis for more information on mitigation required at this access.
 - Two stub-outs are provided on the southern and southwestern part of the property. These will be provided to the property line and will be designated for possible future connections.
 - All roads on the property will be private. However, the main access road must be constructed to public street standards per section 5-14-4.4 of the zoning ordinance.
- Sidewalk
 - There is an existing sidewalk on Haywood Road.
 - The developer will establish internal sidewalks throughout the site. The internal sidewalks will connect to the sidewalk on Haywood Road.
- Parking
 - The developer is required to provide 202 parking spaces. They have proposed 330 spaces, including in-garage spaces.
- Natural Resources
 - The developer has proposed providing a greenway trail easement through the property.

- Subject property has both 100 year and 500 year floodplain running through the middle of the property. No construction is proposed within the floodplain with the exception of the construction of a bridge across the stream.
- A portion of stream on the northeastern edge of the property will be piped.
- Applicant has proposed a condition related to the transitional buffer requirements of the stream buffer ordinance for a portion of the stream on the eastern portion of the property. This is to allow for the placement of units.
- The portion of the site plan on the southern side of the stream includes significant grading. Several retaining walls are proposed along the site, however, several of the retaining walls have been decreased in size since the project was first presented at Planning Board.
- Landscaping and Tree Preservation
 - Requirements:
 - Common and open space plantings
 - Bufferyard – 8' Type A Plantings
 - Vehicular Use Area Plantings
 - Street Trees
 - Tree Canopy Preservation
 - Total required for Tier I and II Tree Save – 105,070 sf
 - Total provided – 162,736 sf
 - Most of the tree canopy will be preserved in the center of the site along the stream corridor, as well as on the eastern edge of the property.

DEVELOPER-PROPOSED CONDITIONS:

- Minimum 25' building setback throughout the perimeter of the property.
- A minimum of 40% of the existing tree canopy will be preserved.
- The site will maintain a minimum of 55% open space.
- The site will maintain a minimum of 16% common open space.
- All exterior walls will have at least one window or doorway per floor. The garage bays are excluded from this requirement.
- All units will include a private fenced backyard.
- All open space and amenities will be professionally managed and maintained in perpetuity by the property owner.
- Transitional stream buffer shall be reduced to 0' for the area indicate below in the preliminary site plan.
- A maximum road slope of 12% is permitted for access road to the back phase of the project as noted on the preliminary site plan.
- The developer will either provide a secondary emergency access point or will provide fire sprinklers in every building/unit.
- Developer shall construct a greenway trail in coordination with the planning department and subsequently dedicate an easement to the city that is 50' wide for the location of the greenway trail. Utility infrastructure, roadways, and pedestrian pathways will be permitted within the 50' easement.
- The developer shall construct a westbound left turn lane on Haywood road at the site access with at least 50 feet of storage. The final design shall be done in coordination with NCDOT.
- The developer shall construct an eastbound right turn lane on Haywood road at the site access with at least 50 feet of storage. The final design shall be done in coordination with NCDOT.
- Fencing or other appropriate safety measures shall be installed at the top of every retaining wall greater that 30" in height.
- Stormwater features will be constructed to the 25-year storm level.

OUTSTANDING ISSUES & CITY PROPOSED CONDITIONS:

COMMUNITY DEVELOPMENT

Site Plan Comments:

- The site plan accompanying this petition meets the standards established by the Zoning Ordinance for Planned Institutional Developments (5-21) (minus any developer proposed conditions).
 - No additional comments

Proposed City-Initiated Conditions:

DEVELOPMENT REVIEW COMMITTEE COMMENTS:

The Development Review Committee consists of the following Departments/Divisions and Agencies: Engineering, Water/Sewer, Fire Marshal, Stormwater Administration, Floodplain Administration, Public Works, NCDOT, Henderson County Soil & Erosion Control and the City’s Traffic Consultant. While all pertinent members of the DRC reviewed this project, staff have provided only the relevant/outstanding comments / conditions below:

Public Works:

- Trash will need to be handled by City of Hendersonville. Concierge trash pickup proposed by developer is not allowed per-City ordinance. (To be resolved at Final Site Plan)
- Determination on whether the water/sewer lines need to be public and whether they can utilize a master meter. (To be resolved at Final Site Plan)

TRANSPORTATION CONSULTANT (KIMLEY HORN)

TIA Comments:

- o The Traffic Impact Analysis for the development was submitted on September 15th, 2025. Below are the review comments from the City Traffic Consultant regarding the TIA. The primary feedback on the initial TIA focused on the necessity for turn lane warrants at unsignalized intersections. These comments have been forwarded to the development team and their transportation engineer, who is currently addressing them to prepare version 2 of the TIA. We are awaiting this revised version, which will undergo review by Kimley Horn.
- o The expected **new** trip generation for the proposed development is as follows:
 - 1,321 Daily Trips
 - 88 AM Peak Hour Trips
 - 104 PM Peak Hour Trips

TIA Proposed Mitigation (both have been incorporated as conditions by the applicant):

- o Right Turn Lane Warrant
 - The right-turn lane warrants note that the opposing right turn lane is default 100 vph, while the note in the top right corner of the warrants state that the right urn should be 100 vph as a MINIMUM, not the default. With this revision in place, it is expected that a right turn-lane with 50’ storage would be warranted at the site access.
- o Support of the Left Turn Lane
 - The consultant supported the following recommendation from the TIA, “Construct a westbound left turn lane on Haywood Road at the site access with at least 50 feet of storage. Final design to be coordinated with NCDOT.”

SECOND ACCESS REQUIREMENTS

No Second Access Required:

- o Because this project is *not* proposing to subdivide any of the property, the developer is exempt from requirements in the City’s subdivision ordinance. One of these requirements, Section 4.03 – Street, Table

4.03.C.3: Required Points of Access, requires a second access for a subdivision with 31 or more residential lots. However, the applicant would be exempt from this portion of the ordinance through section 4.03.c.d.ii:

D. Development shall be exempted from these standards if it is demonstrated the following conditions apply:

- i. transportation impact analysis allows a deviation;
- ii. No other street access points can be located due to existing lot configurations, absence of connecting streets, environmental, or topographic constraints;
- iii. NCDOT will not authorize the required number of entrances; or
- iv. Alternative access can be provided in a manner acceptable to the city that is supported by a transportation impact analysis.

- With the revisions to our Planned Residential Development zoning ordinance, the developer is required to provide stub-outs, which is a continuation of the road to the property line to provide a potential connection point if the road was ever extended. The developer has proposed two stub-outs, one going to the south of the property and one going to the east.

Fire and Emergency Vehicle Access

- The City’s fire marshal reviewed the plans for the project and determined that one of two options would satisfy the fire requirements for this project. The developer could provide a second access onto the site, or they could use sprinkler systems throughout all the buildings. The developer is currently proposing sprinkler systems in all buildings.
- The fire marshal has also agreed to allowing an increased grade of 12% (from the 10% standard).

EXHIBIT 4

Ewbank Gardens Condominiums:
Zoning: R-15
Future Land Use: Multi-Generational Living
Total Dwelling Units: 35
Acres: ~2.65ac
Density: ~13.2du/ac

Haywood Townes
Zoning: R-15
Future Land Use: Family Neighborhood Living
Total Dwelling Units: ~50 (includes duplex and triplex units)
Acres: ~14.10ac
Density: ~3.54du/ac

Blythe Commons:
Zoning: PRDCZD
Future Land Use: Family Neighborhood Living
Total Dwelling Units: 20 (includes attached dwellings)
Acres: ~4.9ac
Density: ~4.08du/ac

Haywood Manor Condominiums:
Zoning: R-15
Future Land Use: Multi-Generational Living
Total Dwelling Units: 64
Acres: ~6.37ac
Density: ~10.04du/ac

Plantation Walk:
Zoning: R-15
Future Land Use: Family Neighborhood Living
Total Dwelling Units: 76
Acres: ~14.22ac
Density: ~5.33du/ac

Britton Creek Condominiums:
Zoning: R-15
Future Land Use: Family Neighborhood Living
Total Dwelling Units: 52 (includes stacked & attached dwellings)
Acres: ~5.06ac
Density: ~10.27du/ac

LEO @ Hendersonville
(Proposed)

