

Think Quality - Think Future

Blount County Planning Department

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TO: Blount County Planning Commission

FROM: John Lamb

DATE: August 18, 2010

SUBJECT: Long Range Planning agenda items for the August 26, 2010 meeting.

1. Discussion on ridge-top and hillside development regulations.

At the April regular meeting, the Attorney for the County Mayor presented his findings on the draft ridge-top and hillside development regulations. Copy of the report from Atty. Rob Goddard is attached at the end of this memo, along with copy of the draft regulations.

At the May regular meeting, the Planning Commission requested the background information used by Mr. Goddard and provided by staff. That information was enclosed with the June memo. The Planning Commission briefly discussed the report of Atty. Goddard at the July meeting and requested staff to seek clarification of main points. This item is open for discussion from the last regular meeting.

Staff discussed with Mr. Goddard two general areas of concern, and three specific areas that need to be addressed, particularly the third specific area of concern.

The first general area of concern is with equal protection, specifically if there is a valid or rational basis for treating some properties within the R-2 zone differently from others. Mr. Goddard indicated that a rational basis may be established and documented in the resolution adopting the regulations. Alternatively Mr. Goddard indicated that a separate zone for ridge-top and hillside regulations may be an appropriate response to this concern.

Second general area of concern is with taking of property or inverse condemnation. The memo notes that this would only be a concern if all internal mitigation processes and appeals had been exhausted. The proposed regulations have internal mitigation mechanisms when practical design difficulties are present, and hardship based on character of the property would be a valid consideration for Board of Zoning Appeals variance procedures. Mr. Goddard indicated that this is general to all regulations and not just ridge-top and hillside regulations.

The first specific area of concern involves the need for clear wording between paragraphs E1 and E2 in relation to inclusion of single family and duplex dwellings. Staff proposes the following to address that concern:

- E. Uses Requiring Site Plan Review:
 - 1. For general site plan review, all uses permitted as special exception in sub-sections B and C above, and permitted uses in subsection A above, except one or two single family or manufactured home dwellings on a single lot, duplex dwelling on separate lot, and customary accessory structures to such excepted uses.
 - 2. For specific ridge-top and hillside review, all uses and building sites, including one or two single family or manufactured home dwellings on a single lot, duplex dwelling on separate lot, and customary accessory structures to such uses, determined visible from a Scenic Landscape Resource of Significance (SLRS) and within five miles of such SLRS shall be subject to application of review procedure and standards in Section I below in addition to any other site plan or permit requirements.

The second specific area of concern related to Section I (1)(d)(ii) worded as follows:

- ii. No project shall result in an undue adverse impact on any SLRS, with “undue” meaning unwarranted, unjustified, inappropriate, or excessive by reason of conditions inherent in mountain areas, and the available design solutions that may be applied to the site.

Mr. Goddard found this to be subjective and in need of objective guidance. Staff discussed the possibility of deleting the section and relying on the more specific and objective design guidance in other portions of the proposed regulations. Mr.

Goddard agreed that deletion of the section may be appropriate if no other solution is forthcoming.

The third area of concern was a possible conflict between a plat approved using hillside and ridge-top standards through the Subdivision Regulations and a permit for a specific house on an approved lot, and posits a possibility that a lot created using the regulations would need a permit for building a house that could be denied based on the same standards. One should ask first how likely this would be, and second if avoiding the potential conflict would outweigh the desirability of using the same standards in both plat and lot development contexts. The purpose of setting similar standards in the platting process was to forestall the creation of lots that would not meet the standards which would be applied at the point of house construction permitting. Mr. Goddard is in agreement that it is desirable to have coordination and consistency between the two sets of regulations, and suggests consideration of requiring designation of a footprint for a house on the plat that meets requirements for ridge-top and hillside regulations.

This item is open for discussion and guidance to staff.

2. Discussion on RAC maximum building square footage Section 9.10(f).

See separate memo from Roger Fields.

3. Staff reports. Staff may supply other reports at meeting.

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September 3, 2009

DIANE M. HICKS *
LAJUANA G. ATKINS
* ALSO LICENSED IN FLORIDA

Mayor Jerry G. Cunningham
341 Court Street
Maryville, TN 37804

Dear Jerry:

You have asked me to review on behalf of the Planning Commission, the proposed zoning regulations relative to ridge-top and hillside development standards, as well as the proposed amendment to the subdivision regulations which would be necessitated by the adoption of the amendment to the zoning regulation.

In reviewing the proposed amendment to the zoning regulations, two potential issues are raised. The first issue is whether the proposed zoning amendment is constitutionally valid under the provisions of the United States Constitution and the State of Tennessee Constitution from an equal protection stand point. Under the equal protection provisions of the Constitutions of the State of Tennessee and the Constitution of the United States, property owners are NOT members of a protected class, and only property owners similarly situated must be treated by the government in the same manner unless there is a rational basis for the differential treatment.

Property owners are NOT members of a protected class; therefore, property owners would be proceeding under the "class of one" theory annunciated in Village of Willowbrook v. Olech, 528 U.S. 562 (2000). To succeed under this theory, property owner must show: (1) it was treated "differently from others similarly situated," and (2) that there is no rational basis for such difference in treatment.

The first question then becomes what is the class for the purposes of equal protection. In other words, does the class constitute only those that are effected by the amended zoning regulations, (i.e. those property owners who own ridge-top and hillside property which may be viewed from the two roadways which are designated as Scenic Landscape Resource of Significance, and are located within five (5) miles of said roadways), or in the alternative, is the class all those property owners located in a R-2 Rural District. If the class is simply those property owners who are affected by the zoning amendment, then the county would be required

to treat all those who are affected by the proposed amendment in the same manner. If on the other hand the class is defined to include all those property owners who own property in the R-2 Rural District, then obviously certain property owners who own property in the R-2 Rural District are being treated differently by the proposed amendment than other property owners who own property in the R-2 Rural District. If that be the case, then there must in the R-2 zone some rational basis for the different treatment of property owners affected by the proposed zoning amendment and the property owners in the R-2 zone which are not affected by the proposed zoning amendment.

Tennessee courts have held that “the concept of equal protection espoused by the federal and our state Constitutions guarantees that “all persons similarly circumstanced shall be treated alike.” TN Small School Systems v. McWherter, 851 S.W.2d 139, 153 (Tenn. 1993) (quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)). “Things which are different in fact or opinion are not required by either constitution to be treated the same.” *Id.* at 153 (citing Plyler v. Doe, 457 U.S. 202, 216 (1982)).

“In this regard: The initial discretion to determine what is ‘different’ and what is ‘the same’ resides in the legislatures of the States, and legislatures are given considerable latitude in determining what groups are different and what groups are the same . . . In most instances the judicial inquiry into the legislative choice is limited to whether the classifications have a reasonable relationship to a legitimate state interest. . .” *Id.* (citations omitted).

Consequently, “if some reasonable basis can be found for the classification [in the statute] or if any state of facts may reasonably be conceived to justify it, the classification will be upheld.” *Id.*; Newton v. Cox, 878 S.W.2d 105, 110 (1994).

If a property owner’s claim can survive the first prong, the property owner must show that there is no rational basis for such difference in treatment.

“It is clear that the police powers of the Legislature include restricting use of property if it is reasonably related to the public health, safety and welfare.” Riggs v. Burson, 941 S.W.2d 44, 50 (Tenn. 1997).

“Furthermore, the passage of this Act was a legitimate exercise of police power, and upon that ground also the legislation is well sustained. The first right of a State, as of a man, is self-protection, and with the State that

right involves the universally acknowledged power and duty to enact and enforce all such laws, not in plain conflict with some provision of the State or Federal Constitution, as may rightly be deemed necessary or expedient for the safety, health, morals, comfort, and welfare of its people.” Spencer-Sturla Co. v. Memphis, 155 Tenn. 70, 83-84 (Tenn. 1927).

The argument which the county would make in the event of an attack on the zoning amendment would be that the amendment was essential to protect the public health, safety or welfare of the citizens of Blount County. Specifically, the county's argument would be that the proposed amendment was necessary to protect the tourist trade which is an integral part of the economy of Blount County. Obviously I cannot predict what the outcome would be in the event that a property owner or property owners instituted suit against the county and raised a constitutional equal protection argument.

The second major issue which is raised by the zoning amendment involves the issue of whether the proposed amendment amounts to a taking of property interest of affected property owners, and as such, would the county be responsible to the property owners under a theory of inverse condemnation.

Inverse condemnation “is a shorthand description of the manner in which a landowner recovers just compensation for a taking of property when condemnation proceedings have not been instituted. Universal Outdoor, Inc. v. Tenn. DOT, 2008 Tenn. App. LEXIS 558, 29-28 (Tenn. Ct. App. Sept. 24, 2008)(quoting Jackson v. Metropolitan Knoxville Airport Authority, 922 S.W.2d 860, 861-62 (Tenn. 1996)).

Under the proposed zoning amendment, in order for a property owner to construct a building on their property, there are certain limitations and restrictions imposed upon that construction, both as to the structure itself and as to the required screening from view of that structure. In the event that a person seeking a building permit cannot meet all of the requirements of the zoning regulations, then under paragraph four (4) of the zoning regulations, the property owner would be required to make expenditures of money for lesser requirements of screening. If a property owner could not physically or economically meet the lesser requirements required by the zoning regulations, then the property owner could apply to the Board of Zoning Appeals for a variance. If the variance is denied by the Board of Zoning Appeals, then theoretically a taking would occur and the county could be liable to the property owner under the theory of inverse condemnation.

The U.S. Supreme Court “discounted the lower court’s concern over potential takings of property through the application of the permit process:

We have made it quite clear that the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking. The reasons are obvious. HN6A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself “take” the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. **Only when a permit is denied and the effect of that denial is to prevent ‘economically viable’ use of the land in question can it be said that a taking has occurred.”** United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126-27 (1985) (citations omitted) (emphasis added).

“[R]egulatory takings challenges are governed by Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124, 57 L. Ed. 2d 631, 98 S. Ct. 2646. Penn Central identified several factors – including the regulation’s economic impact on the claimant, the extent to which it interferes with distinct investment-backed expectations, and the character of the government action – that are particularly significant in determining whether a regulation effects a taking. . . [The inquiries] aim to identify regulatory actions that are functionally equivalent to a direct appropriation of or ouster from private property, each of them focuses upon the severity of the burden that government imposes upon property rights.” Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (U.S. 2005).

Tennessee courts have held absent a total taking, the analysis established in Penn Central will be applied in a fact specific inquiry. STS/BAC Joint Venture v. City of Mt. Juliet, 2004 Tenn. App. LEXIS 821, 18-20 (Tenn. Ct. App. Dec. 1, 2004)

The ‘economically viable’ factors set out in Penn Central are applied through ad hoc factual inquiry with primary focus upon three factors:

- 1) The economic impact of the regulation;
- 2) The character of the governmental action; and
- 3) The regulation’s interference with reasonable investment-backed expectations.

“[I]n instances in which a state tribunal reasonably concluded that the health, safety, morals, or **general welfare** would be promoted by

prohibiting particular contemplated use of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests. Zoning laws are, of course, the classic example, see Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (prohibition of industrial use); Gorrie v. Fox, 274 U.S. 603, 608 (1927) (requirement that portions of parcels be left unbuilt); Welch v. Swasey, 214 U.S. 91 (1909) (height restriction), which have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property.” Penn Cent. Transp. Co., 438 U.S. at 125 (U.S. 1978)(citations omitted) (emphasis added).

The U. S. Supreme Court “has recognized, in a number of settings, that states and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city, see New Orleans v. Dukes, 427 U.S. 297 (1976); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); Village of Belle Terre v. Boraas, 416 U.S. 1, 9-10 (1974); Berman v. Parker, 348 U.S. 26, 33 (1954). Id. at 129.

The question then would become whether the denial of the permit by the Board of Zoning Appeals or the additional financial requirements imposed upon a property owner to comply with the proposed amendment to the zoning regulations would permit the economically viable use of the land by the property owner. Again, I cannot predict how a court might view a potential claim for inverse condemnation. Based upon this analysis, the result would be determined by the specific facts applicable to each specific property.

In addition to the two general overall issues raised by the zoning regulations, there are three specific items in the amended zoning regulations which I would also like to address.

1. There seems to be some confusion in my mind under paragraph E-1 and E-2, whether or not the proposed zoning amendments are indeed applicable to one or two single family or manufactured home dwellings on single lots, and duplex dwellings on separate lots. If it is the intention of the county and Planning Commission to make the zoning amendment applicable to these situations, I believe that some redrafting needs to be done to address this.

2. Under section I.(1.)(d)(ii.) the Planning Commission is to review undue adverse impact on a SLRS with "undue" meaning unwarranted, unjustified, inappropriate, or excessive by reason of conditions. This provision is rather subjective to me, and I believe that some objective standards or guidelines should be inserted in this analysis by the Planning Commission.

3. In viewing the proposed amendment to the subdivision regulations together with the proposed amendment to the zoning regulations, a developer who desires to subdivide his property into subdivision lots and sell lots would be required to obviously meet certain requirements under the Planning Commission Regulations. Then an individual to whom the developer sold the lot would have to obtain a building permit which would be governed by the zoning regulations. If the Planning Commission goes through the analysis required by the proposed amendment and approves the subdivision and then a lot is sold to an individual and the individual applies for a building permit and is denied by the Building Commissioner on the basis of the new proposed zoning amendment, then that would create in my opinion a conflict between the two county bodies which could be unjustifiable.

Very truly yours,

A handwritten signature in black ink, consisting of a large, stylized initial 'R' followed by several vertical, wavy lines.

RNG/nea

Zoning Regulations:

That Section 9.3.E for the R-2-Rural District 2 be amended to read as follows:

- E. Uses Requiring Site Plan Review:
 - 3. For general site plan review, all uses permitted as special exception in sub-sections B and C above, and permitted uses in subsection A above, except one or two single family or manufactured home dwellings on a single lot, duplex dwelling on separate lot, and customary accessory structures to such excepted uses.
 - 4. For specific ridge-top and hillside review, all uses and building sites determined visible from a Scenic Landscape Resource of Significance (SLRS) and within five miles of such SLRS shall be subject to application of review procedure and standards in Section I below in addition to any other site plan or permit requirements.

That a new Section 9.3.I be added for the R-2-Rural District 2 to read as follows:

- I. Visually Subordinate Ridge-Top and Hillside Development Review Procedures and Standards:
 - 1. a. Applicants for all buildings requiring a building permit shall first confer with the Building Commissioner to determine if the proposed building site will be visible from one or more Scenic Landscape Resource of Significance (SLRS) listed under b. below, and within five miles distance from such SLRS. Assessment of visibility shall assume no intervening vegetation between the SLRS and the building site. The Building Commissioner shall utilize the County GIS and USGS topographical maps to assess visibility and distance by identifying location of building site by tax map parcel, and assess visibility and distance of the site from any SLRS by GIS sightline analysis and map distance measure. The applicant may further specify the actual building site by submission of latitude-longitude location certified by a surveyor, and the Building Commissioner may utilize such location information in addition to tax map parcel location.
 - b. Scenic Landscape Resources of Significance are those arterial road routes with relatively unobstructed views of mountains, and that are

within five miles of the R-2 zone. Scenic Landscape Resources of Significance (SLRS) shall be the following: Highway 411 from Sevier County Line to the Little River; Hwy 321 from intersection of Woodland Drive to Sevier County Line.

c. For any building site determined not visible from any of the above listed SLRS or farther than five miles from the closest of the above listed SLRS, no further review will be required under this section. For any building site determined visible from any of the above listed SLRS and within five miles of the SLRS, a site plan shall be submitted to the Building Commissioner for analysis and report of a Findings Statement assessing visual impact and measures needed to achieve visually subordinate development as specified below. The Findings Statement along with the site plan shall be forwarded to the Planning Commission, and the Planning Commission will be the approval authority for the site plan under this section. This site plan process may be in addition to other required site plan review and approval requirements for a permit.

d. In considering the site plan under this section, the Planning Commission shall utilize three decision principles as follows:

- i. Completeness of site plan and Findings Report information in relation to subsections 2 thru 4 below.
- ii. No project shall result in an undue adverse impact on any SLRS, with “undue” meaning unwarranted, unjustified, inappropriate, or excessive by reason of conditions inherent in mountain areas, and the available design solutions that may be applied to the site.
- iii. No project shall be approved if the site plan fails to apply available design solutions to the site to overcome adverse impacts to the maximum extent practicable, with “practicable” meaning what is able to be practiced on the site.

2. The site plan required under this section shall be drawn at a scale of no less than 1 inch equals 50 feet. The site plan shall include at least the following elements:

- a. applicant's name and address (including owner of land and owners representative if applicable), and signatures by owners or authorized representative certifying plan for review;
 - b. property boundary (survey boundary recommended), north arrow and map scale;
 - c. location map in relation to surrounding lands and roads;
 - d. written description of the proposed building and use;
 - e. list of SLRS visible from the site and direction of visibility shown by arrows;
 - f. topographic contours from USGS Quad sheet scaled and located to the property boundary;
 - g. location of existing buildings or structures on the property;
 - h. location to scale of proposed building(s) in plan view;
 - i. proposed building exterior color schemes and building materials;
 - j. required and proposed building setbacks from property lines;
 - k. present and proposed access roads or driveways;
 - l. present and proposed utility service lines;
 - m. plan for preservation or establishment of trees to meet requirements for screening under 3.a below, and plans for any tree removal;
 - n. proposed grading plan for the site;
 - o. areas managed specifically for fire risk reduction;
 - p. plan for exterior lighting;
 - q. other substantial landscape features such as prominent rock outcroppings greater than 1000 square feet in area, water bodies, perennial streams, and springs.
3. Design requirements for a visually subordinate building site shall include the following in addition to other requirements:
- a. retention of vegetation to achieve at least 75 percent screening of permitted buildings potentially visible from SLRS;
 - b. clearing of trees and vegetation for roads, drives and utility easements shall be the minimum extent necessary for construction;
 - c. trimming of trees shall be conducted in a manner that is sufficient only to allow a filtered view from the property towards any SLRS, that conforms to screening requirements in

- a. above, and that assures continued health of each tree left standing;
 - d. tree root areas of retained trees shall not be filled above the natural grade;
 - e. use of contour grading and retaining walls if necessary;
 - f. use of dark earth-tone colors for exterior of permitted buildings visible from SLRS, such earth-tone colors as are found predominantly on the building site, in particular tree and bush summer leaf and bark color;
 - g. use of non-reflective or low-reflective exterior building materials and finishes, particularly low-reflective roof material.
 - h. avoiding building locations that are on highpoints, outcroppings or prominent knolls, and avoiding designs that push buildings up, out or away from a hillside;
 - i. outdoor lighting shall be directed downward, sited, limited in intensity, shielded and hooded in a manner that prevents lighting from projecting onto adjacent properties and roadways, and shielding and hooding materials shall be composed of non-reflective and opaque materials;
 - j. if the building site is on a ridge-top or ridgeline, the minimum building setback from property line shall be 75 feet if on a separate lot, or minimum building separation shall be 150 feet if multiple buildings on an undivided parcel.
4. If requirement for 75 percent visual screening under 3.a above cannot be attained feasibly with existing vegetation due to slope or other physical constraint specifically documented by the applicant, then a minimum of 50 percent visual screening may be accepted with use of a combination of five or more design options that may appropriately mitigate visual impact as follows:
- a. screening by constructed fences or walls of soil, rocks or bricks of dark earth-tone colors, or screening by planted vegetation, or a combination of both, provided that the screening does not in itself pose an impact as viewed from an SLRS;
 - b. relocation of a building site component to another place within the site which is less visible from an SLRS;
 - c. camouflage or disguise in character with the landscape of the building site;
 - d. reducing the height of a building or building component;

- e. downsizing by reducing the number, area or density of buildings and/or site components;
- f. decommissioning or removal of existing structures on the site;
- g. setdowns from ridge-tops (ridgelines) such that the structure does not exceed the ridge-top as seen from any SLRS;
- h. stepping or setting buildings in sections into the hillside by means of split development pads down the slope;
- i. terracing of retaining walls into sections down the slope and contoured with the slope;
- j. greater setbacks from property lines and/or other buildings;
- k. breaking of uniform and blank massing of surfaces, including building surfaces and other constructed elements such as retaining walls;
- l. use of low-reflectivity glass in windows;
- m. planting of new vegetation that will result in 75 percent screening within five years of planting, using a mix of vegetation matching both in species and density those indigenous to the areas.

Subdivision Regulations.

That a new Section 9.09 be added to the Subdivision Regulations to read as follows:

9.09. Subdivision within the R-2-Rural District 2 zone of the Zoning Resolution of Blount County, Tennessee.

The preliminary plat for any subdivision lying partly or wholly within the R-2-Rural District 2 zone shown on the Zoning Map for Blount County shall be assessed for impact on Scenic Landscape Resources of Significance as defined in Section 9.3.I.1.b of the Zoning Regulations of Blount County. If no part of the preliminary plat is visible from any SLRS or within five miles of such SLRS, then no further requirements under this section shall be applied. If any portion of the preliminary plat is visible from any SLRS and within five miles of such SLRS, then the following additional design requirements shall apply:

- 1. Lot locations and design elements of the plat such as roads and road cuts shall be assessed for visibility from any SLRS using County GIS;

2. Lots potentially visible from an SLRS shall be designed such that a building site is encompassed of less than 30 percent slope sufficient to accommodate a structure of intended size and use, and such that a sufficient amount of existing vegetation is present to meet screening requirements under Section 9.3.I.3.a of the Zoning Regulations of Blount County. An architect or landscape architect shall prepare a report on lots potentially visible from an SLRS certifying that the proposed lots can meet requirements of Section 9.3.I.3.a of the Zoning Regulations of Blount County.
3. Clustering of lots on areas of less than 30 percent slope is encouraged.
4. Roads and road cuts shall be designed to minimize visibility from any SLRS, and existing vegetation shall be retained to the maximum extent practicable to screen roads and road cuts from SLRS views.
5. For lots visible from an SLRS and on a ridge-top or ridgeline, minimum lot size shall be 3 acres, the minimum lot width shall be 200 feet along the ridgeline, and setbacks from all property boundaries shall be 75 feet.