ATTACHMENT D:

PLANNING COMMISSION COMMENTS
NOVEMBER 12, 2019

Case TC1900002 (Outdoor Lighting)

The Planning Commission, with a vote of 9-4, finds that the ordinance request is consistent with the adopted *Comprehensive Plan*. The Commission believes the request is reasonable and in the public interest and recommends approval based on comments received at the public hearing and the information in the staff report.

BAKER - This is the first vote that I regret casting since I joined the Planning Commission. I voted to recommend approval of this text amendment. Upon further reflection, I now believe the City Council should vote to deny this proposed text amendment. Durham has many problems and lacks time for staff to carry out critical planning functions; we have many priorities and I do not believe this should be at the top of the list. This application resembles a pay-to-play system where big developers and corporations that want to create regulatory loopholes profit and benefit at the expense of Durhamites. Obviously, through the development process we find needed changes to the UDO along the way and should work to be accommodating when appropriate. But why should Durham work to gratify a corporation that does not even pay their (non-unionized) workers a fair wage and has all-night working hours? I do not believe this to be the kind of economic development that Durham needs. Ultimately, that question is not part of this application, and should not necessarily weigh into a recommendation on this specific case. But I do not at all believe this proposed amendment furthers the health, safety, and welfare of the citizens of Durham. I see this as having at best neutral and at worst harmful effects, even with the 100-foot residential setback and the proposed additional next step of seeking a minor special use permit from the Board of Adjustment.

Please see Commissioner Miller's comments.

BRINE – I voted against recommending approval of this text amendment. In essence, this modification to the UDO is being requested in order to meet the needs of a single development. I do not believe that modification of the UDO for this purpose is a good practice. The process being put into place could have more widespread use and unintended consequences than presently anticipated. In addition, I think that the proposed minor use permit is too permissive (no upper limit, for example).

In my opinion some way to address the problem raised by the applicant needs to be found that impacts only the development in question. I suggested a variance, but both staff and the applicant thought that a variance was the wrong approach. I am not totally convinced of this. In south Durham Duke Medical was able to obtain a variance for the new building and parking deck between NC 54 and Crooked Creek Parkway (near Fayetteville Road). The variance allowed a portion of the parking deck to be sited in the flood plain. I guess the hardship was "not enough parking" without the extra deck (even though I have yet to see it full). Therefore, I believe that a case could be made for extended hours of recreational/clean up lighting if the applicant was willing to try.

HYMAN – Voted yes**;** still uncomfortable with an action that requires a change that can impact many when it is being done at the request of one business.

JOHNSON – Voted no as I'm not comfortable with the broad application of how the change would apply. However, I do recognize that the Board of Adjustment layer that an applicant would have to gain approval. For the minor special use permit provides some form of citizen engagement particularly the resident(s) and community that would be affected by the allowance of the permit.

KENCHEN – I vote to approve. I am confident that the owner will make sure that the lighting does not become a nuisance to any of the neighbors.

MACIVER – I vote for approval.

MILLER – The City Council should vote no on this private proposal to change the standards for outdoor lighting.

This request comes from the owner of property who proposes to lease the property to a firm, Top Golf, that operates a recreational facility that includes a driving range, miniature golf, a restaurant, bar, and other gaming. The business operates late into the evening – past midnight – and wants to use outdoor lighting for the benefit of its customers and its maintenance crews. At the hearing before the planning commission it was adduced that Top Golf would like to keep its outdoor lights on as late as 4 a.m. Other than Top Golf, neither the applicant nor the planning staff could identify any other beneficiary of the proposed change.

Under the current generous UDO, rules governing outdoor lighting, bright outdoor lighting for recreational and sporting events in most zones must be located 100 feet form adjacent residential uses and shut off by midnight during the week and 1 a.m. on Saturdays and Sundays. The reason for the rule is obvious. Imagine lights on masts 100 feet from your bedroom window. No matter how much the lights are shielded to damp down glare, the light pollution is enormous. The imposition on nearby neighbors is also enormous. 100 feet is not a very long distance. The masts holding lights could be nearly as tall. A cutoff time of midnight or 1 a.m. depending on the day is eminently reasonable.

The proposed change would allow an applicant who wants to operate outdoor light past the cutoff times to apply to the board of adjustment for a use permit. The rules set no outside limit and purport to leave it up to the board to set a new time limit if any – measuring the request against broad standards.

The City Council and Board of County Commissioners must reject this proposed change to the UDO text for a number of reasons:

1. The use permit mechanism as proposed is unlawful and vests too much power in the Board of Adjustment. Under state law, a board of adjustment may grant a use permit when competent evidence shows that established standards have been met. Indeed, the board must grant the permit if the standards are shown to have been met. The use the permit applies to is a defined use over and above what the baseline zoning allows by right. For example, imagine the zoning code states that in the R zone you can build a house, a townhouse, and an apartment building. These are the by-right uses allowed. Imagine that it also says that you can build a school with a use permit. To get the permit, the applicant must apply to the board of adjustment which will hold a quasi-judicial hearing to determine if the permit to build the school should be allowed. At the hearing the applicant must show that certain established standards have been met. Those with standing may oppose the application and present

evidence to the contrary. The use that is subject to the permit must be defined. It must be something that could have been by-right had the legislative body, the city council, decided to add it to the list of by-right uses. It cannot be discretionary. No by-right use in the UDO is discretionary. It must be empirical. In this lighting case, the rule purports to let the board of adjustment decide when the new cutoff will be. Even guided by the standards, the use permit process cannot give that degree of discretion to the board. There must be an outside limit. The rule might be competent to say that the board, upon being satisfied that the standards are met, can add no more than two extra hours to the by-right limits. As long as the available extension is definite – something that could have been by-right itself, then the process is allowable. The beauty of it is that under state law, within the definite limit, the board may impose conditions if they are related to the standards and promote their application. Because there is no outside limit in this proposal, because the board's ability to fix the shut-off time is open-ended, the text change as proposed is not competent under law.

2. Even if the text change was fixed to overcome its legal flaws, it is still too broad. This is a change in the zoning code that will reach from Rougemont to Jordan Lake when the only advocate for it is a sole user on 64-acre IL zoned tract in the eastern part of the county. The rest of Durham is content with the ordinance as it is currently written. No one else is clamoring for change. There is no strong policy argument for a broad change. Why not narrow the application further by making the use permit available only to properties located in I and IL zoned tracts of thirty or more acres? Why not add as a further requirement that the light masts must be 300 feet from the nearest residentially zoned or used property?

3. The change-the-zoning-ordinance-text approach is the procedure least likely to put stakeholders on notice to permit them to make a meaningful contribution to the debate over changing the ordinance. The present rule clearly identifies the class of residents most likely to be affected by changing the rules. They are the owners and occupants of residences near the facilities where outdoor lighting is used. Under the text amendment approach, the notice procedure is publication in the newspaper and posting to the new planning department e-notice system. That system explained the changes this way, "Outdoor Lighting Privately-initiated text amendment to revise sections 7.4.2 and 7.4.3." No letter was sent to any homeowner or resident. It is the notice system least likely to actually notify anyone – certainly not the identified class of stakeholders in the preservation of the current rule. As a consequence, only the applicant appeared at the public hearing in front of the planning commission. It is rule-making by ambush and I urge the council and the commissioners to reject it.

4. Finally, but most importantly, we should only undertake to change the zoning map or zoning rules when doing so is demonstrably in the public interest, for the public welfare. We should not change the rules when the entire benefit inures to a single user with no general benefit to the public at large. This principle is fundamental to local government's power to regulate land use, but it is forgotten or ignored all too often.

WILLIAMS – The use of these lights on such a broad scope and scale would be a blank check to use across the board by several others. Out of consideration for surrounding persons I also do not agree with the use of these recreational sites using the extended hours that will now include hours of drinking and essentially partying and further disturbing the peace. I do not think that on average non-intoxicated individuals would be still hitting golf balls at 2 o'clock in the morning.