ATTACHMENT C:

PLANNING COMMISSION COMMENTS
NOVEMBER 12, 2019

<u>Case TC1900005</u> (Affordable Housing Dwelling Unit Definition)

The Planning Commission, with a vote of 12-1, 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 - I voted to recommend approval of this text amendment. I did so despite the fact that the Planning Commission was not provided with complete information. Please see Commissioner Durkin's comments.

BRINE – Although I voted to recommend approval of this text amendment, I have serious reservations. As I understand things, a separate set of rules (perhaps better called policies and procedures) is being developed that would go along with this text amendment. However, these rules did not come to the Planning Commission for review. This is unfortunate because it leaves the Commission acting in limbo on the text amendment. It is also quite possible that the Commission could make some valuable suggestions about the rules, especially concerning whether or not some of the rules need to be part of the text amendment.

Take homeownership units, for example. The household income at the closing must be at or below 80% of the Area Medium Income. However, after closing, there are no limits on increases in income as long as the unit remains the principal residence of the household. This much is specified in the proposed amendment. What is not specified is that if the homeowner decides to sell, he or she must sell to someone whose income is at or below 80% of the Area Medium Income (as I heard the response to my question). I believe that this latter specification should be part of the UDO. Another unanswered question is this: if, after closing, the income of the owner exceeds the 80% Area Medium Income, does the property developer have to provide another house for sale to someone who meets the initial affordable requirement?

I recommend that the Governing Bodies refer this text amendment as well as the accompanying rules back to the Planning Commission for further review. This is a very important topic, and I believe that it is important to get it right. I am presently not convinced that we have gotten it right.

DURKIN - We were asked to vote on the amended definition of Affordable Housing Dwelling Unit, but without reviewing the proposed rules and regulations that will provide additional, necessary information in considering this amendment. For a rental unit, the proposed definition provides that a unit is affordable if it is rented to household earning at or below 60% of Area Median Income. Staff assured us that the rule and regulations drafted by the Community Development Department clarify that an Affordable Housing Dwelling Unit must also be rented at a rent at or below 30% of 60% AMI – without that additional caveat, a landlord could rent a unit to a household earning at or below 60% of AMI, but at a rent that could make that household rent burdened. We need to ensure that clear, enforceable standards are in place. I voted

in favor of this amendment more out of a desire to move the affordable housing regulations forward in Durham than from the language we were asked to review (if based purely on the language, I would have opposed it). I voted in favor of this amendment only with the confirmation from Planning Department staff and Community Development Department staff that my concerns are adequately addressed in the rules and regulations that we were not provided, which I understand will be delivered to the City Council with this proposed amendment. Without additional rules and regulations governing the corresponding required rent levels, this definition is meaningless.

I would also urge the City Council to require a restriction or declaration that is to be recorded in against the property in the public records, which will allow future owners and occupants to be aware of the requirements for a specific property.

HYMAN – Voted yes; we need to move expeditiously to get this definition in place so that it can fit with other regulations guideline that make this a reality for implementation

KENCHEN – I vote to approve. Our staff is committed to affordable housing and I trust them to work out the language and the details in a way that is consistent with the wishes of the voters, the city council and the county commissioners.

MACIVER – I vote for approval.

MILLER – The City Council and Board of County Commissioners should reject this proposed change to the UDO text.

While I support changing the definition of an affordable housing dwelling unit in the definitions section of the UDO, the current proposal must not move forward until legal flaws in the text and the procedure for adopting it are corrected.

The problematic part of the proposed definition is the underlined text below:

"A dwelling unit committed for a minimum 30-year term as affordable, through covenants or restrictions, to households with incomes as follows. Income eligibility, affordable rent levels and affordable for sale prices, as well monitoring and compliance requirements for Affordable Housing Dwelling Units, will follow the policies and procedures of the City of Durham's Community Development Department."

1. As a matter of legislative drafting, the sentence is terrible. It's in the passive voice. "[W]ill follow" is a weak and indeterminate way to express what is meant. The sentence should at least say what it means: "The City of Durham's Community Development Department shall determine Income eligibility, affordable rent levels and affordable for sale prices, and monitoring and compliance requirements for Affordable Housing Dwelling Units through appropriate policies and procedures."

2. But even if the sentence is corrected as a matter of legislative drafting, the proposed language is incompetent because it seeks to repose substantive rules within a definition. Definition sections in legal codes and bodies of legislations should be definitional only. Provisions that govern conduct or grant authority should be reposed in the code proper, not hidden among definitions.

3. To the extent that the underlined provision seeks to delegate to the Community Development Department the power to make rules and regulations that refine the definition of affordable housing units and thereby determine which developers might be eligible to receive affordable housing density

bonuses, the provision is unlawful. The power to adopt ordinances – to legislate at the local level – is granted by statute to the city council and the board of county commissioners. The council and the board may not further delegate that power to staff departments or agencies. To do so is ultra vires and violates due process. As written, a developer who wishes to take advantage of the affordable housing density incentives built into the UDO would have to shape his request not on the provisions of the zoning ordinance but on the rules and policies of a city department. Those rules and policies may be practical, but they will not have been developed with the form of transparency contemplated by state law. If fact, during the planning commission's consideration of this matter, the commission's most ardent supporters of affordable housing complained that they were being asked to support a definition which, because they did not know what the Community Development Department's rules and policies were, they could not fully evaluate what is being proposed. Their complaint goes to the essential legal flaw in what it being proposed. The city council and board of commissioners cannot hand off the power to make substantive zoning rules to a city agency.

Only the council and commissioners can make zoning rules. To do so, they must follow the laws and rules governing the procedure for adopting zoning ordinances. At the heart of the procedures is notice and opportunity to be heard. In this case there is a fatal failure of notice. The public has the right to know what the full scope of the definition is before they can comment on a proposal to change the ordinance. The Planning Commission also must know the full scope of the definition before it can perform its statutory and UDO duties to air, digest, and advise on changes to the zoning rules. Because we do not know what the Community Development Department's portion of the definition is or will be, the public is deprived of its rights and the Planning Commission is defeated in its purpose.

4. The City Council and the Board of Commissioners may adopt and amend the UDO by incorporating by reference already published rules and standards established by another agency. Adopting by reference is only competent, however, when the material adopted is already extant when it is adopted by the legislative body. The reference must be specific so that persons governed by the material adopted know specifically what the rules are. The material incorporated by reference must not be obscure or difficult to obtain. If the purpose of the underlined sentence is to adopt by reference the policies and procedures of the Community Development Department, then those policies and procedural rules must already be in existence and the reference to them in the ordinance must be so specific that there can be no confusion about what is included in the zoning code by the reference. Customarily, such a reference will refer to an already published paper, book, or other document by reference to its title, author and the date of its publication. In this case, the underlined sentence fails. The reference is not sufficiently specific and the materials that might be adopted by reference – the procedures and policies – don't already exist. When questioned about this, the staff said the department is working on procedures and policies, but that they are not ready yet. This is not good enough. For the procedure to amend the UDO by incorporating material by reference to pass statutory and constitutional muster, the material to be incorporated by reference must be in existence at the beginning of the process.

If the purpose of the underlined provision is to not only to adopt by reference the procedures and policies of the Community Development Department as they exist, but also to automatically include changes the Community Development Department may make in the future, then the provision is unlawful. A city or county may not automatically incorporate into their own ordinances future changes by another body without express statutory authority to do so. N. C. G.S. 160A-76(b) authorizes incorporation by reference into city ordinances "any published technical code or any standards or regulations promulgated by any public agency." A similar provision in Chapter 153A grants the same power to counties. The word 'published" means the material to be incorporated must be in existence

and published before the adoption by reference occurs. The North Carolina Administrative Procedures Act specifically permits state agencies to adopt by reference future amendments to certain codes and regulations of other agencies, but no similar authority is expressly granted to cities and counties. Given the due process requirements imposed on cities and counties for ordinance making, it is unlikely that the Administrative Procedures Act can be read as authority to allow cities and counties to automatically incorporate into their codes future amendments in the rules and standards adopted by other bodies. Even if the City and County of Durham were allowed to incorporate future amendments into the UDO, it could not do so if the material incorporated was created by a city or county agency composed of local government staff. The material would not have been created by an "other" agency. The automatic incorporation by reference of future rules created by city staff into the UDO would be an unlawful delegation of the legislative power to the city staff and an impermissible by-pass of due process.

The City Council and the Board of Commissioners may incorporate the Community Development Department's rules and procedures into the UDO if the rules exist at the time of the incorporation. If it becomes necessary to change the rules and procedures in the future, the department may make those changes and propose them to the council and commissioners as a text amendment to the UDO. There is no other lawful way. The public has a right to see, understand, and comment on such rules and procedures if they are to be elevated to the status of ordinances that govern their lives.

I urge the council and the commissioners to send this proposal back to the staff to be fixed before it comes out again. I urge the staff to cross reference the new definition to an appropriate provision in the UDO itself that incorporates by reference the existing rules and procedures of the Community Development Department. I urge that department to create and publish their proposed rules so that they may be incorporated by reference and review by the public and the Planning Commission before this text amendment proceeds to the city and county elected bodies for adoption. Changing the definition of affordable housing units is a good thing. Let's not spoil it by doing it the wrong way.