

SCOPE AND PURPOSE OF ANALYSIS

This paper examines several of the most significant ways in which the alleged “by-right” plans for Greenville Center fail to comply with applicable law.

I. Overview and Summary.

Greenville Center does not conform to the current requirements of the Unified Development Code (“UDC”) because most of its existing buildings and structures were approved for development and use under previous regulations that have now been superseded. This makes it a “nonconforming” situation upon which specific restrictions are imposed by State and County law regarding (i) increase in size and (ii) changes in use.

The pending plans for Greenville Center seek to increase the square footage at Greenville Center by over 60%. They also seek to change its use by including a 180 foot high residential tower. The applicant claims to be proceeding “by-right,” meaning that its plans satisfy all applicable provisions of the law and must be approved by the County government. That can only be true, however, if at the outset the pending plans meet all State and County requirements both for increasing the size and changing the use of a nonconforming property.

Nonconforming situations are not favored. Article 8 of the UDC, which addresses nonconforming property, describes one of its principal purposes as restricting further investments that would tend to make such situations more permanent. To that end, in hopes of reducing nonconforming situations over time, various sections in Article 8 of the UDC withdraw permission for the continued existence of any nonconforming properties in which more than 50% of the buildings are destroyed, or in which the nonconforming

use is discontinued for more than 6 months.¹ Though Article 8 allows for the continued existence of lawfully nonconforming properties under certain circumstances, it repeatedly discourages changes in nonconforming use. One section provides that “[a] nonconforming use shall not be changed to any other nonconforming use” and notes that “[a]ny change in use must be in compliance with the use provisions of this Chapter.” Another section flatly provides that “the nonconforming use of a building or structure or lot shall not be extended or enlarged.” As for changes to physical nonconformities, other portions of Article 8 impose strict conditions on the repair, replacement or restoration of nonconforming buildings and structures.

These provisions of the UDC accord with 9 Del. C. §2610, which protects the continuation of nonconforming situations *only as they lawfully existed at the time when they became nonconforming*. This statute underscores the importance of nonconforming situations remaining unchanged by permitting a nonconforming use to be extended throughout an entire building only if the building were lawfully in existence when the property became nonconforming, and only if such extension is not accompanied by any structural change. The State statute goes on to provide that “restoration, reconstruction, extension or substitution of nonconforming uses” can be accomplished only “upon such terms and conditions as may be set forth in the zoning regulations.” These are strict and unmistakable limitations.

It is against this background that the proposed plans for Greenville Center seek approval to change its use to that of a “Mixed-Use” project. Only if allowed to convert to Mixed-Use can Greenville Center claim the right under the UDC to (i) eliminate much of

¹ Citations to specific sections of the UDC and more complete quotations of its provisions are omitted from this Overview but are set forth in detail commencing with page 4.

its present open space, (ii) significantly expand its square footage, and (iii) construct a 180 foot high residential tower with adjoining 7 storey garage. None of these changes would have been possible under the prior Code, and none of them will be possible if Greenville Center is required to continue being the same nonconforming property that existed when the UDC was enacted.

Clearly, this is not a routine application that merits a “relaxed” approval process by the County. Such radical changes in use and extreme physical enlargements of a non-conforming situation should not be permitted “by-right” unless the proposed plans conform in every detail with the applicable law. Approval should not be facilitated by the grant of discretionary waivers, questionable Code interpretations, and other administrative “favors.”

Unfortunately, the plans for Greenville Center are marching forward through the land approval process because numerous provisions set forth in State law, in the Comprehensive Development Plan, and in the UDC have either been ignored, misconstrued or (by the Land Use Department’s own admission) administratively waived. Moreover, these plans are being allowed to proceed towards final “by-right” approval even though they cannot legally be constructed as approved unless future variances are granted to make them workable. This is not the basis upon which a second Rollins Building should stab skyward in Christiana Hundred. The County can and must insist that these plans comply in all respects with each provision of the County Code and State law without waiver or favor, and without the need for future variances, before they are allowed to proceed any further.

II. Enlargement of Nonconforming Situations Is Strictly Limited.

The stated purpose of Article 8 of the UDC, as plainly and clearly set forth in Division 40.08.000(A), is (i) “to provide for the regulation of lawfully nonconforming situations” and (ii) “to specify those circumstances and conditions under which such nonconforming situations shall be permitted to continue.” These constraints are buttressed by the language in Division 40.08.000(B) which states that, although “[t]he regulations of this Article permit [lawfully] nonconforming situations that result from the adoption of this Chapter to *continue under certain circumstances* * * * it *restricts further investments* which would tend to make a nonconforming situation more permanent.” (Emphasis added.) Section 40.08.020 makes clear that, “*Except as otherwise specifically provided* in this Article, any nonconforming situation may continue to *remain as the same* nonconforming situation.” (Emphasis added.)

In these respects Article 8 simply follows State law, from which the County’s authority over nonconforming situations is derived. Under 9 Del. C. §2610, both Greenville Center and Barley Mill Plaza, like any other nonconforming properties, may lawfully continue as before, and their existing uses may even be extended throughout any existing building, but only if they comply with the following requirements:

The lawful use of a building or structure, or the lawful use of any land, *as existing* and lawful *at the time of the enactment* of a zoning regulation, or in the case of a change of regulations, then at the time of such change, *may, except as hereinafter be provided,*² *be continued* although such use does not conform with the provisions of such regulations or change, and such use may be extended throughout the same building, *provided no structural alteration of such building is proposed or made for the purpose of such extension.* County Council in any zoning regulations may permit

² Subsection (b) of 9 Del. C. §2610 provides an exception to subsection (a) by stating that any non-conforming property acquired by the County by reason of tax delinquency must be made to conform to the then current zoning regulations.

the restoration, reconstruction, extension or substitution of nonconforming uses *upon such terms and conditions as may be set forth in the zoning regulations.*

(Emphasis added.) Thus, neither County nor State law freely allow nonconforming properties to undergo substantial change, much less dramatic enlargement. A nonconforming use may be extended under State law but only within an existing building, and then only if such building undergoes no structural change. Nonconforming buildings and structures may be restored and reconstructed, and their uses may be extended or substituted, only as specifically allowed by the County's zoning regulations, if at all.

To implement these strictures, Section 40.08.130 of the UDC provides as follows:

A. Nonconforming use. *Nonconforming use³ of a building or structure or lot shall not be extended or enlarged. A nonconforming use terminates when the building, structure or other improvement is destroyed in excess of fifty (50) percent of the assessed value of such building, structure or other improvement.*

B. Nonconforming building, structure or situation. *A nonconforming building, structure or situation may be enlarged, extended or replaced only as provided below.*

1. **Extensions and enlargements.** Any new extension or enlargement, one thousand (1,000) square feet or greater, shall comply with this Chapter provided the total site development complies with the total site capacity requirements of Article 5, and further provided that the existing nonconformities shall be brought into compliance proportional to the increase in the proposed development. * * * However, nonconforming building setbacks are not subject to this proportional improvement requirement. * * *

2. **Alteration.** Alteration of a building within an existing footprint is permitted, provided that the alteration does not increase the degree of nonconformity.

³ Subsection (A) of 40.08.130 prohibits changes in nonconforming *use*, while Subsection (B) (quoted next) permits but stringently limits the *physical* expansion or extension of nonconforming buildings, structures and other situations.

3. **Restoration.** Restoration of a building or structure destroyed less than fifty (50) percent of its replacement market value . . . shall be permitted, provided that the restoration commences within twelve (12) months

4. **Replacement or repair.** The replacement or repair of portions of a building or structure declared by the County to be a hazard or unsafe shall be permitted provided the repairs or replacements do not increase the gross floor area of the building or increase the degree of nonconformity . . .

5. **Reconstruction.** Any nonconforming building or structure destroyed more than fifty (50) percent of its gross floor area (GFA) or replacement market value may be reconstructed in accordance with the redevelopment standards in this section or full compliance with this Chapter.

6. **Redevelopment and Brownfields.**

a. **Purpose.** Redevelopment is intended to facilitate and encourage the continued viability of previously developed land by granting a credit for . . . sites with legally existing gross floor area (GFA) that has been demolished by more than fifty (50) percent of its GFA. * * * ⁴

(Emphasis added.)

It is within this context of restrictive State law and County code provisions that the pending plans for Greenville Center must be evaluated.

III. Greenville Center Cannot Physically Expand “By-Right” As Proposed.

The proposed plans for Greenville Center will expand the floor area of its buildings by 60%, decrease its open space, provide for a 7 storey garage and add a new 180 foot high residential tower. These plans reflect an anticipated further investment in a nonconforming situation that will change its use, compound its anomalies and perpetuate

⁴ Subsection (B)(6) of 40.08.130, providing for Redevelopment and Brownfields, is more extensively quoted and discussed *infra* with respect to Barley Mill Plaza. Provisions applicable to Brownfields are omitted as having no relevancy to this Analysis.

its existence, contrary to the intent stated in Division 40.08.000(B). As such, the “by-right” claim to approval that the applicant asserts for these plans must be subjected to the most careful scrutiny in order to assure their compliance with the law.

Ironically, the most objectionable aspect of these plans, namely, the proposal to erect a 180 foot high residential tower in a Commercial Regional district, would never have been allowed under the old zoning code.⁵ Nor would it be possible under the present zoning code if the Greenville Center were seeking to be rezoned Commercial Regional on its own merits, because the Greenville Center does not meet or fulfill the UDC’s present standards for Commercial Regional districts. (See Section IV, *infra*, discussing the Greenville Center’s status as a nonconforming Commercial Regional use.) Paradoxically, the applicant’s plans are possible only if it is allowed, without any authority in the UDC, to claim *dual and conflicting benefits* to achieve results that violate the letter, purpose, intent and spirit of the UDC and Comprehensive Development Plan.

On the one hand, the applicant insists retaining all the benefits of being a nonconforming situation created under the previous Code, which had no need to protect against a residential high-rise because it would not have allowed anything of this sort to be created. On the other hand, the applicant demands that selected portions or “islands” of the Greenville Center to be approved by-right for “Mixed-Use” development as if they were an integral part of a site that satisfied, in its entirety, all the UDC provisions for CR Districts which are the basis for allowing Mixed-Use to be considered. However, as

⁵ Greenville Center had been zoned C-2 under the prior code in effect when the UDC was adopted. Neither this zoning classification, nor the more intense zoning classification of C-3 under the previous code (which the UDC now classifies as CR), permitted residential development. Heights in C-2 districts were limited to 45 feet, and in C-3 districts were limited to 55 feet. Since the present nonconforming lack of buffers and set-backs arose when the adjoining communities had no need for protection against a 180 foot high residential tower, the applicant’s effort to retain the benefit of these nonconformities in order to jam a 180 foot high residential tower next to the adjoining communities is incongruous and irresponsible.

discussed in Section V, *infra*, is not a “by-right” use even in fully conforming CR Districts. It is a “limited use” which the Department may consider permitting, and may decide to certify as being permissible, only upon finding that all standards of the UDC will thereby be met, including the standards for size, configuration and character that the UDC requires of conforming CR properties.⁶ Table 40.03.110 of the UDC expressly notes that, even in otherwise satisfactory CR Districts, not all conforming properties will be deemed suitable for conversion to Mixed-Use with its allowance of reduced open space, increased Gross Square Footage, and building heights of up to 180 feet.

From this labyrinth of contradictions a simple truth emerges. The pending plans for Greenville Center do not present a “by-right” application that County government must approve. They propose radical changes in the use and extreme additions to the physical configuration of a nonconforming situation that can only be permitted in strict compliance with 9 Del. C. 2610 and Article 8 of the UDC. Their approval will occur only if the Land Use Department, as a matter of unwritten discretion, allows the applicant to “have its cake and eat it too.”

This conclusion becomes crystal clear upon even a cursory review of the six subsections of Section 40.08.130 (B) (quoted above) that restrict the manner in which a “nonconforming building, structure or situation may be enlarged, extended or replaced.”⁷

a) Not Redevelopment Under 40.08.130(B)(6). The Gross Floor Area at Greenville Center has not been (and is not planned to be) demolished by more than fifty percent as required under Section 40.08.130(B)(6). Accordingly, the Land Use Department has already determined that the proposed plans for Greenville Center cannot

⁶ For further discussion of “Mixed-Use” as a limited use, see Request For Interpretation from CRG to Department of Land Use dated April 7, 2009, copy attached as Exhibit A hereto.

⁷ For simplicity these six subsections are addressed in reverse order.

proceed as a “redevelopment,” so this section of the UDC need not be further considered here.

b) Not Reconstruction Under 40.08.130(B)(5). The 180 foot high tower planned at Greenville Center cannot be regarded as “reconstruction” of any building that has been destroyed more than 50% of its gross floor area, as permitted by 40.08.130(B)(5), because the two storey office building that currently occupies the future site of the proposed new tower has not yet been destroyed, and presumably will not be destroyed unless the new plans are approved. And if the existing two storey building is demolished, the new tower will in no way be a reconstruction of it – rather, it will present an entirely new building of vastly different size, height and nature on an expanded footprint. Reconstruction would mean simply that the existing two storey building, if over 50% destroyed,⁸ would be rebuilt as it had been before the destruction occurred.

The same analysis applies to the proposed new “post-office” building on the corner of the Route 52/Buck Road intersection,⁹ and the proposed 7 storey garage, both of which if approved and constructed would occupy a site on which no building had previously existed. Similarly, the proposed expansion of the existing post-office/jewelry store building is not reconstruction because it would expand a building no portion of which (let alone more than 50%) has been destroyed. Thus, the plans for Greenville Center cannot be approved under the guise of reconstruction.

⁸ While not explicitly stated, this provision allowing reconstruction of a partially destroyed building obviously assumes accidental destruction, not intentional demolition. Total demolition followed by new construction is contemplated in subsection (6) of 40.08.130(B), dealing with “redevelopment.” The 180 foot high residential tower has a two storey wing that will apparently require demolition of a second existing building. The wing’s foundation will in any case exceed the footprint of this second existing building.

⁹ The Land Use Department has required that this building not be labeled as a “post-office” but, for ease of reference, that designation will be used in this Analysis.

c) Not Replacement or Repair Under 40.08.130(B)(4). The planned 180 foot high tower cannot be characterized as the “replacement or repair of portions of a building or structure declared by the County to be a hazard or unsafe,” as permitted by Section 40.08.130(B)(4). No building or structure at Greenville Center has been declared by the County to be a hazard or unsafe, nor would the tower merely replace or repair “portions” of an existing building. The same analysis applies to the proposed new post-office building, the proposed 7 storey garage, and to the proposed expansion of the existing post-office/jewelry store building, which will add to an existing building in good condition, rather than replace or repair any portions of an existing structure that have been declared a hazard or unsafe. It follows that the plans for Greenville Center cannot be approved as if they merely proposed replacements or repairs pursuant to subsection (B)(4).

d) Not Restoration Under 40.08.130(B)(3). Neither the 180 foot high tower, the expansion of the existing post-office/jewelry store building, nor the addition of a new garage and post-office, qualifies as “restoration” of a building or structure destroyed less than 50% of its replacement market value, as permitted by Section 40.08.130(B)(3). Again, no building at the Greenville Center has been partially destroyed. None of the proposed new structures or additions is intended to “restore” any partially destroyed building. The residential tower would be built on the site currently occupied by an existing office building that is presently occupied and in good condition, but would not “restore” that existing office building. The expansion of the post-office/jewelry store building would simply add to (not restore portions of) a structure that is not presently damaged. And the 7 storey garage and new post-office would erect

entirely new structures where none had previously existed. Thus, the plans for Greenville Center cannot proceed as permitted for the restoration of nonconforming properties

e) Not Alteration Under 40.08.130(B)(2). The proposed 180 foot high tower, the proposed expansion of an existing building, and the proposed new garage and proposed new post-office cannot be characterized as mere alterations “of a building within an existing footprint” as permitted by Section 40.08.130(B)(2). Indisputably, none of these proposed structures would be constructed within an existing footprint. And while the expansion of the existing jewelry store/post-office would at least qualify as an “alteration,” neither the 180 foot high tower, nor the new garage, nor the new post-office in any way alter an existing building.

f) Not Extension/Enlargement of a Building, Structure or Situation Under 40.08.130(B)(1). As previously noted, Section 40.08.130(B) leads off by stating that “[a] nonconforming building, structure or situation may be *enlarged, extended* or replaced¹⁰ *only as provided below.*” (Emphasis added.) The term “nonconforming situation” is defined in Article 33 of the UDC as “[a] building/structure or the use of a lot or building/structure lawfully existing at the time this Chapter or a subsequent amendment to this Chapter became effective which does not conform to the dimensional and/or use requirements of the district in which it is located.” The only enlargement or extension allowed by Section 40.08.130(B)(1), therefore, is of an *existing* nonconforming building, or *existing* nonconforming structure, or *existing* nonconforming use of a lot, building or structure. It does not allow the creation of an entirely new building, new structure or new use. The 180 foot high residential tower and the 7 storey parking garage are not only new

¹⁰ Replacement, being covered by subsection (B)(4) discussed above, is not further dealt with here.

buildings but also new uses; and the proposed post-office is a new building. They are not mere enlargements or extensions.

In contrast, the pending plans to enlarge and extend the existing jewelry store/post-office building would add more than 1,000 square feet to an existing structure and might therefore be permissible under 40.08.130(B)(1), if the rest of this subsection's requirements could be met. However, one of subsection (B)(1)'s requirements for such enlargement or extension includes bringing "the existing nonconformities . . . into compliance proportional to the increase in the proposed development." The Greenville Center plans do not show how the existing nonconformities would be brought 60% into compliance with the UDC, proportionate to the 60% increase in the proposed development of the Greenville Center. The plans do not show even a proportionate increase in compliance based only on the relatively modest expansions of the existing jewelry store/post office-building. Thus, no part of the Greenville Center plans qualifies for favorable treatment under 40.08.130(B)(1) as it relates to extension or enlargement of an existing nonconforming building, structure or situation.

In conclusion, the pending plans for Greenville Center propose a significant physical expansion of its buildings, structures and other improvements existing when the UDC was enacted, none of which are permitted under any of the six subsections in 40.08.130(B). While seeking to retain all the benefits of being a nonconforming property, the Greenville Center plans fail to comply with any of the restrictions that the UDC has enacted to allow, under tightly limited circumstances, the enlargement or extension of nonconforming properties. Far from warranting mandatory approval "by right," these plans must be disapproved unless and until the Board of Adjustment grants

variances permitting the dramatic changes they seek in contravention of State and County law governing nonconforming situations.

IV. Greenville Center Cannot Change To Mixed-Use Without A Variance.

In addition to proposing completely new buildings and structures that violate the UDC's restrictions against physical change of nonconforming situations, the pending plans for Greenville Center seek to change a nonconforming property's use by adding a new residential component under the UDC's "Mixed-Use" ordinance. This likewise violates both State and County law, each of which prohibits any change in a property's nonconforming use without a Board of Adjustment variance.

When the UDC was enacted in 1997, the Greenville Center, along with the adjoining retail/office property known as Greenville Crossing I, was given zoning classification CR (Commercial Regional), because that was the nearest UDC equivalent to Greenville Crossing's C-3 classification under the previous Zoning Code, and evidently no reason was perceived for treating Greenville Center differently, even though its previous zoning classification had been C-2. On its own merits, however, Greenville Center does not fit the requirements that the UDC imposes on properties that seek to qualify for CR classification. Under Section 40.02.225(D), parcels zoned CR "should be large and deep. Small shallow frontages shall not be designated for this type of use." Large and deep sites are required for CR zoning in order to carry out the intent of Section 40.02.225(B), which calls for design controls in CR Districts to "lessen congestion on the roads and create large commercial complexes rather than development strips." It is because CR Districts are required to be large and deep enough for the development of large commercial projects, that UDC Section 40.02.225(C) allows "[m]ixed uses" in CR

Districts, under limited circumstances,¹¹ “to provide residential customers within the development” so as to “lessen congestion on the roads.”

Unlike Christiana Mall, the Concord Mall, or many other regional shopping centers in New Castle County that are zoned CR, Greenville Center is not “large and deep” and developed as a “large commercial complex” internally designed to “lessen congestion” as required by Section 40.02.225. Rather, consistent with its prior C-2 zoning, Greenville Center is relatively a “small” and “shallow” project with parking to the front and buildings to the rear, oriented to “in and out” vehicular traffic in the pattern typical of twentieth century roadside commercial strips. As a result, precisely because Greenville Center lawfully conformed¹² to the zoning requirements for C-2 Districts under the antiquated land planning principles on which the prior Code was based, it is now a nonconforming situation under the UDC when matched against the requirements of the CR classification.

The nonconforming nature of Greenville Center becomes even more starkly evident when consideration is given to the express intent of the CR classification as stated in Section 40.02.225 (A). CR Districts are intended “to provide for community *and*

¹¹ As discussed more fully in Section V below, and in CRG’s April 6, 2009, Request For Interpretation (appended hereto as Exhibit A), Mixed-Use is not a routine “by-right” use that the Land Use Department must approve whenever the applicable performance standards are met in any zoning district where Mixed-Use can be allowed. Rather, Mixed-Use is a “limited use” which the UDC expressly recognizes will not be appropriate for every property, even though the zoning classification of a property allows consideration of Mixed-Use under the right circumstances.

¹² Only situations that *lawfully* conformed to a previous Code may continue to exist as nonconforming situations under the current Code. Notwithstanding this clear requirement, the applicant’s predecessor, using the same engineer, was allowed to amend the plan for Greenville Center in 2004 in reliance on a note that *expressly disclaims* whether the existing structures there are lawfully nonconforming. Although the UDC provides methods whereby either the Land Use Department or the Board of Adjustment may certify a property’s lawful conformity under the previous Code, no such certification has ever been required by the Land Use Department for Greenville Center, or provided by the applicant. It therefore appears that the prior amendment was approved, and that the pending plans are being processed “by right,” on the *unvalidated assumption* (expressly disclaimed with the Department’s permission by the applicant’s engineer in 2004) that Greenville Center is a lawfully nonconforming situation.

regional commercial services” having a “character” that is “*suburban transition.*” Section 40.02.225(A) (emphasis added). The Greenville Center does not provide, and in fact is too small to provide, truly regional services;¹³ and nothing about Greenville Center has, or can have, the “suburban transition” character intended for CR Districts because there simply are no nearby urban areas to which Greenville Center now provides or can provide any transition. Rather, it is surrounded by residential, low rise office and low rise retail buildings, all of which are distinctly suburban. This makes the character of Greenville Center neighborhood and suburban, not regional and suburban transitional. Thus, not only the small size and shallow configuration, but also the scope and character, of Greenville Center makes it nonconforming under the CR zoning classification.

As already noted, Section 40.08.020 unequivocally states that, “Except as otherwise specifically provided in this Article, any nonconforming situation may continue to *remain as the same* nonconforming situation.” (Emphasis added.) This corresponds with 9 Del. C. §2610(a) which likewise permits nonconforming uses to continue only “as existing and lawful at the time” when the UDC was enacted. Greenville Center will not remain as the same nonconforming situation as lawfully existed when the UDC was enacted if it is allowed to convert to “Mixed-Use” for the purpose of adding residential units, decreasing open space, increasing Gross Floor Area, and qualifying for building heights of up to 180 feet.

In contrast with the six subsections of 40.08.130(B) that allow limited changes under specific circumstances not present at Greenville Center, Subsection (A) of UDC Section 40.08.130(A) flatly prohibits any change in “use.” As therein stated,

¹³ CRG believes that the applicant, or one of its affiliates, has publicly stated that even the much larger and modern retail complex being proposed at Barley Mill Plaza would not have a regional draw.

“Nonconforming *use* of a building or structure or lot shall not be extended or enlarged.” (Emphasis added.) This unequivocal prohibition against any change in use – including, necessarily, the introduction of “Mixed-Use” to accommodate a 180 foot high residential tower where no such use would previously have been possible – leaves no room for interpretation. Unless the Board of Adjustment has granted a variance permitting a change in use, the Land Use Department should not hesitate to apply and enforce these clear restrictions against increasing, extending and changing the nonconforming situation at Greenville Center, because the stated intent of Article 8 of the UDC is to limit and ultimately phase nonconforming situations out of existence. To quote again from UDC Division 40.08.000(B), “[t]he regulations of this Article permit nonconforming situations that result from the adoption of this Chapter to *continue under certain circumstances*” but at the same time it “*restricts further investments* which would tend to make a nonconforming situation more permanent.” (Emphasis added.)

V. Greenville Center’s Pending Plans Do Not Qualify As Mixed-Use.

By processing the Greenville Center plans as if they were entitled to “by-right” approval as a “Mixed-Use” project, the Land Use Department has committed two errors. First, it has ignored the status of Greenville Center as a nonconforming situation, except for allowing all its existing dimensional nonconformities, such as inadequate buffers and set-backs, to remain. In other words, the Land Use Department has lost sight of the fact that nonconforming situations have both pluses (continuation of their existence as previously approved) and minuses (considerable constraints against further change).

Second, the Department has failed to recognize that, as a matter of explicit law, “Mixed-Use” is not a by-right use in CR Districts, *even for conforming properties*.

Mixed-Use is a “limited use” that may be permitted only if the Land Use Department certifies that the location, design and other requirements of the UDC “have been met for the proposed site for specific use” pursuant to Section 40.31.210. In contrast, “by right” uses are “permitted as a matter of right, subject to all performance standards.” UDC Table 40.03.110. Thus, limited uses should never be permitted as a matter of right merely because they meet all applicable “performance standards.” Rather, they should be allowed only where *all* applicable standards in the UDC are clearly satisfied, including its stated purpose and intent, and the purpose and intent behind allowing Mixed-Use in existing communities as stated in the County’s Comprehensive Development Plan.¹⁴

UDC Table 40.03.110 specifically cautions that “[n]ot all properties may meet these requirements, thus limiting the sites upon which [mixed] use may be established.” Since the UDC anticipates that not all properties, even if they are otherwise UDC conforming, will be suitable for Mixed-Use, considerable caution should be exercised before approving Mixed-Use in nonconforming properties such as Greenville Center. Only if an existing property is clearly suitable for Mixed-Use development despite its nonconforming status, and clearly meets all Article 8 requirements for the extension or expansion of nonconforming situations, should a limited use certification be given by the Department allowing the introduction of Mixed-Use to extend and expand a nonconforming property.

UDC Section 40.33.240.J defines “Mixed-Use” as “[o]ne (1) or more buildings on a lot planned, designed and managed as an integrated development comprised of residential and non-residential uses oriented to a pedestrian precinct and intended to

¹⁴ For a more complete discussion of “limited use” and Mixed-Use, see CRG’s Request For Interpretation to the Land Use Department dated April 7, 2009, appended hereto as Exhibit A.

provide convenient shopping, employment and residential opportunities while reducing vehicular trip generation.” If Greenville Center were an unimproved parcel on which the pending plans had been submitted for approval as a totally new development, the Department would reject it because these plans unmistakably present a mid-1900’s retail/office project oriented to automobile traffic and parking on which a residential tower has been added at one corner, with no attention to integration of residential and non-residential uses, and with no “pedestrian precinct” that residents or other pedestrians would ever actually frequent as a community gathering place. The Department has shown that it knows the difference between acceptable and unacceptable Mixed-Use design by rejecting the same engineering firm’s plans submitted by an affiliated applicant’s proposed Mixed-Use rezoning and development on Route 202 and Beaver Valley Road, named The Shoppes At Brandywine Valley.¹⁵

Nothing in the UDC suggests, much less requires, that so-called “Mixed-Use” plans which would never qualify for approval on an unimproved but “conforming” parcel of land, must be approved “by-right” to enlarge and extend a non-conforming parcel that was developed decades ago under an entirely different set of laws and planning concepts. This would amount to the establishment and application of two separate interpretations of “Mixed-Use” under the UDC, one of which rewards nonconforming situations with

¹⁵ Expert testimony was introduced at the January 5, 2010, Planning Board hearing on this application to establish that erecting a residential tower at the corner of an old shopping center did not and could not satisfy either the UDC’s literal definition of Mixed-Use, or good land planning principals and criteria insofar as the term “Mixed-Use” is understood and advocated nationwide by knowledgeable land use planners and engineers. However, the Land Use Department had no need to look outside the UDC for such guidance in order to conclude that the pending plans for Greenville Center should not be certified as a permissible “limited use” at this property and location. It need only have given due consideration to the stated purpose and intent of the UDC and the New Castle County Comprehensive Development Plan, and applied the same expertise that it demonstrated in rejecting plans for The Shoppes At Brandywine Valley, which have since expired and are no longer currently pending.

approvals that could never be achieved by new conforming proposals, in direct contravention of the provisions of Article 8.

In addition to their failure to present a true “Mixed-Use” design as defined in the UDC, the pending Greenville Center plans also propose a jarring rupture of community character in violation of the stated intent and purpose of the UDC and the Comprehensive Development Plan. These “non-performance” standards are not only important, but they also warrant primary consideration whenever the Department considers whether to approve Mixed-Use as a limited use in a lawfully nonconforming situation. As stated in Division 40.31.200, “[t]he Department’s review [of limited use applications] shall be based, *first*, on the standards of this Chapter” (i.e., the UDC).

When County Council relocated the provisions setting forth the UDC’s purpose and intent from Article 32 to Article 1, it did so expressly “to reinforce the importance of these statements.” See Ordinance 01-112, Substitute No.2 and amended by Oral Amendment Nos. 1 and 2. The Land Use Department recognized as much by requesting the applicant to address the UDC’s purpose and intent when submitting its Preliminary Record Plan. However, the Preliminary Record Plan for the Greenville Center has been submitted without discussing the purpose and intent of the UDC, and the Department has apparently decided not to require any further response to its request.

As spelled out in UDC Section 40.01.100, the purpose of the UDC includes the establishment of “standards, procedures and minimum requirements, *consistent with the Comprehensive Development Plan*, which regulate and control . . . the general development of real estate in . . . New Castle County.” (Emphasis added.) To implement this purpose, Section 40.01.015 describes the UDC’s intent as, among other things,

protecting “New Castle County residents and neighbors from the potential adverse impacts of land uses” and “minimizing development impact on current property owners and the environment.” To carry out this intent, 40.01.015(A) lists as primary objectives:

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

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

* * *

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

(Emphasis added.)

The foregoing statements of purpose and intent make clear that all provisions in the UDC should be interpreted and applied in a manner that is consistent with the Comprehensive Development Plan, not at odds with its letter, purpose or spirit. The Comprehensive Development Plan recognizes that Mixed-Use can serve as an important means of in-fill where adequate infrastructure already exists, but it also repeatedly asserts in various stated Goals, Objectives and Strategies that mixed-use development should “respect the character and integrity of existing communities.”¹⁶ No one can credibly contend that the 180 foot high residential tower and 7 storey garage which will follow if the Department approves Greenville Center for “Mixed-Use” respects the character and integrity of the existing community.

¹⁶ For a more thorough discussion of the Comprehensive Development Plan in this regard, see January 5, 2010 comments of CRG presented at the Planning Board Hearing on Greenville Center, and memorandum on the Effect of Quality of Life Act, Comprehensive Plan, and 2007 Update, appended hereto as Exhibit B.

On the contrary, approving the conversion of Greenville Center to Mixed-Use so that a 180 foot residential tower and possible 7 storey garage can be jammed on the corner of a decades old retail/office project, where they could never have been constructed under the prior Zoning Code, and could not be constructed if the entire project had to conform with the requirements of the UDC, will devastate the existing community and desecrate the character of the Nationally Designated Scenic Byway that runs past this property. As discussed above, this can only be accomplished by ignoring the letter, purpose, intent and spirit of the UDC and the Comprehensive Development Plan, as well as the State and County laws restricting expansion and enlargement of nonconforming uses. Requiring compliance with each and every material provision of the UDC, both those of a general nature such as the UDC's stated purpose and intent, as well as those which are dimensional or specifically measurable and quantifiable, is essential to assure New Castle County residents that theirs is a government of law, not of men.

VI. The Greenville Center Pending Plans Violate Numerous Performance Standards.

Finally, since Section 40.31.210 requires the Department to review limited use applications based on all standards of the UDC, the Department must consider not only the definition of "Mixed-Use" and its compliance with the purpose and intent of the UDC as discussed above, but also whether the pending plans comply with all other applicable performance (i.e., measurable engineering) criteria. Even a cursory examination of the pending plans shows that they do not meet applicable performance criteria. On the contrary, they contain gross dimensional misrepresentations and can be approved only if

the Department tolerates “omissions,” grants administrative “waivers,” and will permit the recording of plans that cannot be constructed without the granting of future variances.

A. Inadequate Building Set-Back.

Section 40.04.110(C) requires that any building over 50 feet tall proposed for construction on a parcel having a property line within one hundred (100) feet of any adjoining single family detached or attached dwelling, must be set back at least the distance of its height from such property line. The pending Greenville Center plans erroneously report the distance between the nearest home in Greenville Manor, and the adjoining property line of Greenville Center, as being 109.28 feet. A recent survey by Merestone Consultants establishes a distance of 99.72 feet between the Lunger residence on Ardliegh Drive, and the nearest boundary line for Greenville Center. (See Merestone report, and copy of the UDC definition of “building,” attached as Exhibit C hereto.) This means that the 180 foot residential tower proposed for construction at Greenville Center should be at least 180 feet away from this property line – not approximately 30 feet as reflected on the pending plans. While the Department can grant dimensional variances of one foot or less in its discretion, it should not do so where the public interest would clearly be harmed.

B. Inadequate Loading Bays.

Section 40.03.510(A) establishes the number of required off-street loading bays for commercial (retail) and office uses. With respect to retail uses, two bays are required for buildings between 8,001 and 20,000 square feet, such as Janssen’s Market, which is 18,000 square feet; and one additional bay is required for each additional 20,000 square feet of floor area, not to exceed four required bays. Since the pending plans propose a

total of 93,651 square feet of commercial floor space, there should be a total of at least four bays to serve the proposed retail uses. With respect to office uses, one bay is required for buildings between 8,000 and 20,000 square feet, and one additional bay for each additional 50,000 square feet of office space, not to exceed three required bays. Since 63,308 square feet of office space is proposed, at least two bays are required to serve this purpose. Thus, a total of six off-street loading bays should be shown on the pending plans.

Section 40.22.621(A) states that:

Dimensions. Each outdoor loading bay area's minimum dimensions shall be twelve (12) feet wide and sixty (60) feet long. At no time shall any part of a truck or van be allowed to extend into a public thoroughfare or right-of-way while the truck or van is being loaded or unloaded. If the outdoor loading area is covered, but not totally enclosed, the minimum height of the outdoor loading bay area shall be fourteen (14) feet.

The pending plans for Greenville Center show only one existing loading area labeled "Ex. Loading Area 12' x 60' minimum." This serves a loading dock at the rear of Janssen's and an adjoining retail building. No other existing loading bay, docks or areas are shown. Two new "Proposed Loading" areas are indicated, one being next to the proposed expansion of the existing jewelry store/post-office, and one being next to a proposed new two storey office building next to the 180 foot residential tower. Each of these is arguably 12 feet wide by 60 feet long (although the one next to the new office building is curved so that its 60 foot length could not readily be used by a tractor trailer). This means that the pending plans are short two or three loading areas. To overcome this deficiency, the applicant's engineer has drawn a line mid-way between each of the

Proposed Loading areas, to create two which are 12 feet wide by 30 feet long. (See Exhibit D appended hereto.) This does not meet the requirements of the UDC.

Clearly, the pending plans for Greenville Center are not entitled to approval “by right” because they require either a Board of Adjustment variance, or some form of “waiver” by the Land Use Department which, if authority is claimed under the UDC, should not be exercised to allow a plan with a Rollins-size building to be approved as if “by-right” when in fact it requires waivers and/or variances. The Department has admitted granting certain unspecified waivers in conjunction with the Greenville Center plan and promised the Planning Board to describe them. However, despite repeated requests, no written or retrievable description of these waivers has been forthcoming.

C. Violation of Riparian Buffer.

Division 40.33.300 defines Riparian Buffer as an area of land 100 feet on either side of perennial and intermittent streams, and divides them into two zones, namely, Zone 1 which is within 25 feet of the water body, and Zone 2 which consists of the remaining 75 feet. The definition goes on to state that “[m]easurements for the Zone 1 boundary are to be made horizontally, perpendicular from the . . . top of bank of perennial streams,” and requires “[f]ield verification to determine evidence and location of channelized flow . . . for a specific determination.” Squirrel Run, a stream which touches the northerly corner of Greenville Center, is perennial under the UDC because it is a “channel with banks and a bed within which concentrated water flows all of the time.” Riparian Buffers also include an all flood plains plus 50 feet beyond the edge of a flood plain. The existence of a flood plain delineation from a previous microfilm is noted on the pending Greenville plans that extends onto the property when Squirrel Run overflows its banks.

Section 40.10.331 requires delineation of Riparian Buffer Areas (“RBA’s”), on all plans, stating:

The riparian buffer shall be mapped to delineate the resource for Table 40.10.010. Existing native vegetations shall be preserved to the maximum extent possible. All RBA areas shall be classified as old field, disturbed land, or meadow, and planted in accordance with this section where native vegetation is not present. The mapping of RBA’s shall be supplied with the exploratory plan and at subsequent plan submissions to meet the standards of this Chapter.

Table 40.10.010 establishes a 100% resource protection level for Riparian Buffers in all zoning districts, including CR and OR. **Section 40.10.210** makes clear that “Any use” of a protected resource “not listed” in Table 40.10.210 “shall be considered prohibited.” **Table 40.10.210** delineates certain uses permitted in Riparian Buffers, but buildings and parking garages are not among the permitted uses. Specifically, parking lots are not permitted in either Zone 1 or Zone 2.

No clear Riparian Buffer Area has been delineated and characterized on the pending plans for Greenville Center. This violates the UDC provisions requiring such delineation. Its omission is particularly noteworthy because the same applicant and engineer, when submitting a previous plan for Greenville Center in 2004 seeking approval for development at the other end of the project, clearly showed a 100 foot Riparian Buffer line. (See Exhibit E, RBA 1.) Assuming this delineation was accurate, much of the existing paving for parking at the northerly end of the property encroached upon the Riparian Buffer, and was allowed to continue doing so without being required to achieve any increased compliance with the UDC. When the same line is superimposed upon the now pending plans for Greenville Center, one end of the future 7 storey parking garage encroaches by about 10 feet into the Riparian Buffer Area. (See Exhibit E, RBA

2.) The future 7 storey parking garage will also consume approximately 4,800 square feet of required open space shown on either side of ground level parking behind the new two storey building.

The encroachment by the future parking garage may actually be worse, because the Riparian Buffer Area line on the earlier plan would appear to be less than 100 feet from the shoulder of Squirrel Run, based on still earlier plans for the property. Both Ramesh Batta and MCA Engineering showed the northerly corners of Greenville Center lying within the center of Squirrel Run. (See Exhibit E, RBA 3.) The applicant's current plans conveniently move the sketched in shoulder of Squirrel Run away from these corners. (See RBA Schedule 6.) Development over the decades has increased the flows through Squirrel Run and likely widened its course. If the Department had followed the UDC by requiring a new and accurate delineation of the Riparian Buffer Area, the encroachment threatened by the proposed 7 storey garage would probably be even greater. (See Exhibit E, RBA 4.) If the 7 storey garage cannot be constructed, then the pending plans cannot take advantage of the shared parking calculations upon which they clearly depend for approval.

D. Inadequate Parking.

To satisfy the UDC's minimum parking requirements, the pending plans for Greenville Center take advantage of shared parking calculations which, according to the applicant's engineer, allow the plans to be approved with as few as 517 parking spaces. This is 46 spaces *less* than the 563 spaces that were required on the 2004 plan expanding Greenville Center for the construction of what is now Janssen's Market. The 517 parking spaces now proposed include a row that abuts the rear of Janssen's Market at the Buck

Road entrance. This entrance as presently constructed contains just one lane in and one lane out, forming a two lane drive that extends between the existing row of parking spaces abutting the rear of Janssen's, and the opposite row towards Greenville Manor. The pending plans show the addition of a right turn exit lane, which will not provide any operational improvement, and which cannot safely be used in compliance with standard traffic engineering and design principles, unless cars are able to queue up leading into this new right turn exit lane. That will require elimination of at least ten parking spaces behind Janssen's to allow stacking for a minimum of four vehicles. (See attached excerpt from the pending plans, marked to show parking spaces that will be lost, at Exhibit F hereto.) By failing to require the applicant to show how the entrance will actually be designed so as to function, the Department is allowing the pending plans to masquerade as deserving "by-right" approval when, in fact, they will probably require a variance to permit the entrance to be safely reconstructed at the sacrifice of required parking spaces.

E. Incomplete Floor Area Calculations.

As noted, the shared parking on which the pending plans for Greenville Center depend, assume that a 7 storey garage can be built to provide another 236 parking spaces in the future when needed. However, the plans do not establish that Greenville Center will continue to meet the requirements of the UDC after construction of this garage, with its concomitant elimination of open space and increase in floor area. Since the footprint shown for the proposed future garage is twice the size of the 6,000 square foot site of the adjacent proposed two storey building, one may rationally calculate that each of the 7 floors of this garage will be 12,000 square feet, adding a total of 84,000 square feet to the Greenville Center when constructed. Section 40.03.318(A) requires not less than 25% of

the gross floor area in Mixed-Use developments to be located in residential dwellings, which means that at least another 21,000 square feet of residential dwellings would be needed to satisfy this mandatory Mixed-Use ratio.¹⁷ No provision for additional dwellings has been shown. Moreover, these additional dwellings would in turn require additional parking spaces, for which no provision is made on the plans; and they would cause the total GFA for Greenville Center to increase by a total of 105,000 square feet (84,000 of parking garage, plus 21,000 in dwelling units). The plans do not establish that this increase in GFA is permitted by the UDC. By approving the pending plans without proof that the proposed 7 storey garage can lawfully be constructed when needed, the Department is granting “by-right” approval to plans that may well require a future variance to be completed as proposed.

F. Extinction of County Public Sewer Easement.

Not clearly shown on the pending plans for Greenville Center, but existing and shown on previous plans, is a 10 foot wide easement in favor of the County for a 4 inch forced sewer main from the Greenville Manor pumping station that serves Greenville Manor, Montchanin Station, Montchanin Inn, Montchan, Briars, The Ponds at Greenville, and homes on Buck Road. (See Exhibit G attached hereto.) The future 7 storey parking garage would be built over this sewer main, vastly complicating its future maintenance, repair and replacement. The pending plans contain a note that all easements other than a certain 20 foot wide easement shown on the plans at another location will be extinguished and become private.

¹⁷ See CRG’s April 6, 2009 Request For Interpretation appended as Exhibit A for an in-depth discussion of the UDC Sections requiring that garages be calculated in GFA, even though exempted (quite logically) from square footage used to calculate highway traffic concurrency.

Section 38.02.007(B) of the County Code states that “[t]he County shall maintain and control the trunk sewers, street sewers and portions of the house laterals.” (Emphasis added.) Section 38.02.007(D) provides that “no entity, other than New Castle County or its assigns, may own, lease, operate . . . or otherwise maintain in any way any sewer system including, but not limited to, sewer lines” It strains credulity that the Land Use Department, in order to facilitate the proposed expansion of Greenville Center, would actually agree to eliminate the County’s easement for a 4 inch forced main serving various nearby communities, and put the residents whose sanitary sewer systems depend on this forced main at the mercy of the developer for future maintenance, replacement and repair, so that a 7 storey garage could be constructed over it.

VII. The Pending Plans For Greenville Contain Many Other Deficiencies.

The foregoing issues with the pending Greenville Center plans are illustrative, not exhaustive. Many other comments could be made, ranging from the Department’s failure to require an updated flood plain delineation for the Squirrel Run flood plain and require a clear, unequivocal absence of wetlands report, to the Department’s failure to insist on an entrance design at Buck’s Road that demonstrates how that entrance can be made workable and safe. The elimination of specimen trees without showing any replacement, the location of bike racks at inconvenient locations, absence of any indication of what supposedly serves as “open space,” acceptance of the so-called pedestrian precinct which is bisected by roads and abuts parking spaces, and virtual indifference to the scenic designation of Route 52, all deserve comment. But for purposes of this Analysis, the foregoing is offered to demonstrate that the pending plans for Greenville Center are not “by-right” plans that the County must approve. They propose an unlawful expansion of a

nonconforming situation in direct and repeated violation of the UDC, the Comprehensive Development Plan, and the Delaware statutes from which the County derives its land use regulatory powers.

By definition, limited use applications cannot demand approval “by right.” As a matter of law, legally nonconforming situations can insist on remaining as they were when a new Code was enacted, but cannot insist on expanding in ways that would not otherwise be possible under either the old Code or the new. No applicant, regardless of wealth, prominence, selection of legal counsel or political connections, should appear to be the beneficiary of subjective interpretations, waivers and other administrative favors. When hugely disruptive projects are proposed that any sane person can see violate clear UDC provisions calling for harmonious transitions between adjoining uses, then compliance with every legal requirement should be rigorously required to protect the community. In no other way can the citizens of this County rest assured that the land development approval process is indeed governed by law, not handed out or withheld as a matter of unwritten administrative discretion.