

ORDINANCE # 09-05-04

AN ORDINANCE EXTENDING A TEMPORARY, LIMITED MORATORIUM ON THE ACCEPTANCE OF APPLICATIONS FOR AND/OR ISSUANCE OF ANY STORMWATER, SOIL & EROSION, FLOOD DEVELOPMENT, WELL & SEPTIC, OR BUILDING PERMITS AND/OR PERMITS FOR ADULT ENTERTAINMENT ESTABLISHMENTS, AMUSEMENT PARKS, ASPHALT PLANTS, CONCRETE PLANTS, CHIP MILLS, HAZARDOUS WASTE FACILITIES, INCINERATORS, JUNKYARDS, LANDING STRIPS, MOTOR SPORT FACILITIES, OUTDOOR SHOOTING RANGES, SLAUGHTERING PLANTS, MINING AND EXTRACTION OPERATIONS AND SOLID WASTE FACILITIES IN BUNCOMBE COUNTY, NORTH CAROLINA PURSUANT TO N.C. GENERAL STATUTE §153A-340(h)

- WHEREAS, on April 3, 2009 the Buncombe County Board of Commissioners did implement and impose, effective from and after Monday, April 6, 2009 at 12:01 a.m., to and including Wednesday, June 3, 2009 at 11:59 p.m., a moratorium prohibiting the acceptance of applications for and/or issuance of any and all permits for certain locally undesirable land uses; said ordinance is filed and known as "Ordinance # 09-04-01."
- WHEREAS, said moratorium was imposed in response to the Court of Appeals decision of March 17, 2009 in the matter of Thrash Limited Partnership and Lott Partnership II v. The County of Buncombe (COA 08-327), the effect of which decision is to render the County-wide Buncombe County Zoning Ordinance (Ord. No. 07-05-01) void upon entry of order of a superior court consistent with the said decision of the Court of Appeals.
- WHEREAS, Judgment was entered in Buncombe County Superior Court on April 9, 2009 declaring said ordinance and maps to be invalid, void ab initio and of no force and effect.
- WHEREAS, pre-existing zoning ordinances in Limestone Township and the Beaverdam Community remain in effect.
- WHEREAS, Ordinance # 09-04-01 indicates that County staff had determined that a proposal to re-enact zoning County-wide could be ready for public hearing on June 2, 2009, and that staff was thereby directed to work diligently towards re-enacting County-wide zoning consistent with the said Court of Appeals decision; and that by Ordinance # 09-04-01 this Board found that meeting the proposed June 2, 2009 public hearing date may require review of the proposed text and maps by Beaverdam and Limestone Community Councils and will require review of the text and maps by the County Planning Board, in addition to a number of periods of published and mailed legal notices.
- WHEREAS, this public hearing has been called by this Board to ascertain the progress County staff have made toward the proposed re-enactment of zoning regulation County-wide and to assess the status of a draft proposed county-wide zoning ordinance in order that this Board may determine whether this moratorium should be extended or allowed to expire.

WHEREAS, as instructed, County staff have taken all reasonable and feasible steps as necessary and proposed to be taken in the good faith attempt to meet the proposed June 2 public hearing date, and which efforts have included the following:

1. planning and organizing new elections in Limestone and Beaverdam townships for the Beaverdam Community County Council and Limestone Community Council such that these boards are now in position to conduct business pursuant to County ordinances in place for those zoning districts;
2. working diligently to review and adjust the proposed zoning text and maps and holding various meetings with the County Planning Board and both Beaverdam and Limestone Councils to gather input and present draft zoning maps.

WHEREAS, in the course further efforts to meet the proposed public hearing date the County Attorney has discovered new facts and conditions that warrant an extension of the current temporary, limited moratorium ordinance and has determined that it will not be possible to meet the June 2, 2009 target date to re-enact zoning County-wide for reasons including the following:

1. the current Limestone zoning ordinance calls for notice of a public hearing prior to amendments of the ordinance to be published once a week for two consecutive weeks with the first such publication to appear not less than 15 days or more than 25 days prior to the date fixed for the hearing, and also requires this Board of Commissioners to mail notice of such hearing to "adjoining property owners". These local requirements are more stringent than those set forth in state law. It has been determined that these provisions of the current Limestone zoning ordinance must be amended before action can be taken by this Board to re-enact zoning County-wide; this step will not be completed until July 7;
2. it has been determined that both Beaverdam and Limestone Councils must review the proposed text and maps for the proposed County-wide zoning and then be afforded the opportunity to make recommendations to the Board of Commissioners; this Board will not be able to refer any proposed County-wide zoning ordinance to the County Planning Board and the community councils until after the Limestone ordinance is amended;
3. the volume of required notices that must be sent to property owners by first class mail requires completed preparation and delivery to printing and mailing servicers well in advance of any date that is to be set for a public hearing on our County zoning ordinances;
4. possible technical deficiencies have been identified in the proposed County-wide zoning ordinance and these will require time to analyze and develop appropriate corrective strategies.

WHEREAS, this Board is of the opinion that it is in the best interests of the citizens and residents of Buncombe County to extend and adopt the temporary, limited moratorium ordinance pursuant to the authority conferred in §153A-4 and §153A-340 as follows:

NOW, THEREFORE, BE IT RESOLVED by the Board of Commissioners for the County of Buncombe as follows:

SECTION I
STATEMENT OF THE PROBLEMS OR CONDITIONS NECESSITATING THE MORATORIUM
AND WHAT COURSES OF ACTION, ALTERNATIVE TO A MORATORIUM, WERE
CONSIDERED BY THE COUNTY AND WHY THOSE ALTERNATIVE COURSES OF ACTION
WERE NOT DEEMED ADEQUATE

In addition to the reasons set forth in Section I of said Ordinance # 09-04-01 this Board finds and concludes that an extension of the temporary, limited moratorium is necessary and appropriate due to the discovery and understanding of new facts and conditions that were not available on April 3, 2009, and which facts and conditions include the following:

1. the current Limestone zoning ordinance must be amended before any proposed County-wide zoning ordinance can be referred to the County Planning Board and the community councils for review and comment and such amendment will not be completed until July 7, 2009;
2. in addition to the required review by the County Planning Board, both Beaverdam and Limestone Councils must review the proposed text and maps for the proposed County-wide zoning and then be afforded the opportunity to make recommendations to the Board of Commissioners;
3. printing and mailing servicer requirements necessitate that any public hearing date for board action must be set well in advance to ensure proper, timely and lawful notice to affected property owners; and
4. possible technical deficiencies have been identified in the proposed County-wide zoning ordinance and these will require time to analyze and develop appropriate corrective strategies.

Therefore, in addition to the reasons stated in Section I of Ordinance # 09-04-01, and which reasons are incorporated herein by reference, this Board continues to believe, and hereby finds, that to simply allow such locally undesirable land uses to be permitted without regard to location, height, size, density, population and type of trade, industry, residence or other purposes would be to disregard the good faith efforts of all parties that have relied on zoning and land use laws these past two (2) years and particularly those uses which are locally undesirable land uses.

SECTION II
STATEMENT OF THE DEVELOPMENT APPROVALS SUBJECT TO THE MORATORIUM AND
HOW A MORATORIUM ON THOSE APPROVALS WILL ADDRESS THE PROBLEMS OR
CONDITIONS LEADING TO IMPOSITION OF THE MORATORIUM

The moratorium shall apply to the acceptance of applications for and/or issuance of permits for stormwater, soil and erosion, flood development, well and septic and building of any new or expanded adult entertainment establishments, amusement parks, asphalt plants, concrete plants, chip mills, hazardous waste facilities, incinerators, junkyards, landing strips, motor sport facilities, outdoor shooting ranges, slaughtering plants, mining and extraction operations and solid waste facilities. In any case where an application has been accepted and not yet timely approved no

permit shall issue unless it meets one of the statutory exceptions as same are set forth in Section V below.

Definitions:

Adult entertainment establishment means any establishment which would be considered an adult bookstore, adult motion-picture theater, adult mini-motion-picture theater, or adult live entertainment business as each is defined in N.C.G.S. 14-202.10. This definition does not include bona-fide massage parlors.

Amusement park means establishments of the type known as "amusement parks," "theme parks," and "kiddie parks," which group together and operates in whole or in part a number of attractions, such as mechanical rides, amusement devices, refreshment stands, and picnic grounds and all associated activities. This definition specifically excludes camps, motion picture theaters, museums, art galleries, arboreta and botanical and zoological gardens.

Asphalt plant means an establishment, whether portable or nonportable, engaged in petroleum refining, manufacturing asphalt-type roofing materials, asphalt and tar paving mixtures and paving block made of asphalt and various compositions of asphalt or tar with other materials; and the recycling of old asphalt into asphalt-type material.

Chip mill means any nonportable wood-chipping facility that stands alone and apart from a sawmill or a pulpmill, and whose purpose is to provide wood chips to an off-site fabricating facility including, but not limited to, a papermill or oriented strand board (OSB) mill.

Concrete plant means an establishment, whether portable or nonportable, primarily engaged in manufacturing hydraulic cement, including portland, natural, and masonry cements delivered to a purchaser in a plastic and unhardened state. This industry includes production and sale of central-mixed concrete, shrink-mixed concrete, and truck-mixed concrete. Also included are the manufacture of concrete products from a combination of cement and aggregate.

Hazardous Waste Facility means any industrial facility that stores, handles, processes or manufactures any material, substance or product that is considered to be a Class 1 explosive; a Class 2, Division 2.3 gas (gases toxic by inhalation); a Class 6 toxic material or infectious substance; or a Class 7 radioactive substance or material, all as classified by the United States Department of Transportation Hazard Classification System. This term shall also mean any industry or facility that is a large quantity generator of hazardous waste as that term is defined by the North Carolina Department of Environment and Natural Resources.

Incinerator shall mean: (1) any enclosed device that burns material other than the classic boiler fossil fuels, such as natural gas, coal, or fuel oil, is a principal use on any lot or parcel, and (a) uses controlled flame combustion and neither meets the criteria for classifications as a boiler, sludge dryer, or carbon regeneration unit, nor is listed as an industrial furnace; and (b) meets the definition of "infrared incinerator" or "plasma arc incinerator." This definition does not apply to afterburners, flares, fume incinerators, and other similar devices used to reduce process emissions of air pollutants. Specifically excluded from this definition and any regulation under this chapter are those incinerators that are constructed and/or operated by or on behalf of any federal, state, or local

governmental entity; provided, however, that this exclusion from regulation only applies to those incinerators not operating as a hazardous waste facility.

Junkyard means a parcel of land on which waste material or inoperative vehicles and other machinery are collected, stored, salvaged, or sold.

Landing strips means aircraft landing strips without normal airport facilities including, but not limited to runways, landing fields, and heliports.

Mining and extraction operation means any establishment or business primarily engaged in dressing and beneficiating of ores; the breaking, washing and grading of coal; the crushing and breaking of stone; and the crushing, grinding, or otherwise preparing of sand, gravel, and nonmetallic chemical and fertilizer minerals.

Motor sports facility means any facility, track, or course upon which racing or motor sporting events are conducted including, but not limited to vehicles, motorcycles, all-terrain vehicles, motor scooters, go-carts, etc.

Outdoor shooting range means an improved area that is commercially operated for the use of rifles, shotguns, pistols, silhouettes, skeet, trap, black powder, air guns, archery, or any other similar sport shooting in an outdoor environment.

Slaughtering plant means an establishment primarily engaged in slaughtering animals or poultry/small game. This definition includes slaughtering plants that conduct processing of animals or poultry/small game, including dressing, packing, freezing, canning, cooking, and/or curing of animals or poultry/small game or their carcasses. This definition specifically excludes slaughtering and processing activities performed for personal use only.

Solid Waste Management Facility means land, personnel, and equipment in the management of solid waste including a transfer station, landfill, or materials recovery facility. Specifically excluded from this definition are incinerators and drop-off recycling centers; and those solid waste management facilities that are constructed and/or operated by or on behalf of any federal, state, or local governmental entity; provided, however, that this exclusion from regulation only applies to those solid waste management facilities not operating as a hazardous waste facility.

This Board does not feel that it is in the best interest of the citizens and residents of Buncombe County to stop all approvals and permitting for development in the County. Accordingly, residential and commercial development as well as other uses not listed above are not affected by this ordinance. In addition, Buncombe County Planning Department will continue to accept and review applications for all major, minor and special subdivisions and such applications shall be heard by the Buncombe County Planning Board as required. This Board recognizes the possibility that land uses could occur which might also have potentially undesirable impacts and not be covered by this moratorium, but this Board is of the opinion that allowing development options during this time of transition is a good compromise which protects both property owners who have relied on the zoning ordinance and potential developers who would experience harm as result of a blanket moratorium on many more types of land use.

This Board finds that in light of the available options for the protection of property, and the potential harm to property owners who have previously acted in a good faith effort based upon the legality of the aforementioned County-wide Zoning Ordinance, that said moratorium on the land uses with

potentially undesirable impacts set forth above provides the best alternative for the protection of Buncombe County's citizens during this time of transition and the proposed re-enactment of zoning regulation County-wide.

A moratorium on the acceptance of applications for and/or issuance of these specific development permits hereby is established.

SECTION III

AN EXPRESS DATE FOR TERMINATION OF THE MORATORIUM AND A STATEMENT SETTING FORTH WHY THAT DURATION IS REASONABLY NECESSARY TO ADDRESS THE PROBLEMS OR CONDITIONS LEADING TO IMPOSITION OF THE MORATORIUM

This moratorium shall become effective upon its adoption and will continue through and including December 31, 2009. This duration is found to be necessary to allow ample time to address and correct the issues identified in Section I above and to avoid a rush to meet any artificial deadline. County staff is directed to continue to work diligently and purposefully toward the goal of re-enacting County-wide zoning as soon as this goal can be accomplished.

SECTION IV

STATEMENT OF THE ACTIONS, AND THE SCHEDULE FOR THOSE ACTIONS, PROPOSED TO BE TAKEN BY THE COUNTY DURING THE DURATION OF THE MORATORIUM TO ADDRESS THE PROBLEMS OR CONDITIONS LEADING TO IMPOSITION OF THE MORATORIUM

1. amend the Limestone zoning ordinance provisions relating to notice and mailing requirements to conform with state statute and community standards by July 7, 2009;
2. identify and correct any technical deficiencies in the proposed County-wide zoning ordinance;
3. refer the proposed County-wide zoning ordinance to the County Planning Board and both Beaverdam and Limestone Councils for review and recommendation once the Limestone ordinance is amended, and prepare the proposed ordinance for review at public hearing by this Board as soon as is practicable.

SECTION V

EXCEPTIONS TO MORATORIUM

This temporary, limited moratorium does not apply to the following:

- any project for which a valid building permit issued pursuant to G.S. 153A-357 is outstanding;
- any project for which a conditional use permit application or special use permit application has been accepted;
- to development set forth in a site-specific or phased development plan approved pursuant to G.S. 153A-344.1;

- to development for which substantial expenditures have already been made in good faith reliance on a prior valid administrative or quasi-judicial permit or approval; or
- to preliminary or final subdivision plats that have been accepted for review by the County prior to the call for public hearing to adopt the moratorium. Any preliminary subdivision plat accepted for review by the County prior to the call for public hearing, if subsequently approved, shall be allowed to proceed to final plat approval without being subject to the moratorium.

In any case where an application has been accepted and not yet approved no permit shall issue unless it meets one of the statutory exceptions as same are set forth in this Section V.

SECTION VI LEGAL STATUS PROVISIONS AND ENFORCEMENT

Conflict with other Laws: Wherever the regulations of this ordinance impose more restrictive standards than are required in or under any other statutes, the requirements of this ordinance shall govern. Whenever the provisions of any other statute require more restrictive standards than are required by this ordinance, the provisions of such other statute shall govern.

Severability: If any portion of this ordinance is deemed unconstitutional or unenforceable by a court of competent jurisdiction, the remainder shall remain in full force and effect.

Enforcement: Any person, firm, company, corporation, limited liability company, partnership, association, organization and any other group or individual entity acting as a unit, as well as any individual, (hereinafter collectively referred to as "person") in violation of the terms and conditions of this ordinance shall be punishable in accordance with the General Penalty provisions of the Buncombe County Code of Ordinances §1-7. The maximum fine and/or civil penalty shall be \$500.00 and each day of continuing violation shall constitute a separate offense.

In case any building is erected, constructed, reconstructed, altered, repaired, converted or maintained, or any building or land is used in violation of this article, the planning director, his designee or any other appropriate county authority, or any person who would be damaged by such violation, in addition to other remedies, may institute an action for injunction, or mandamus, or other appropriate action or proceedings to prevent such violation.

Civil penalties may be imposed for failure to comply with the terms and conditions of this ordinance. A civil penalty may be assessed by the planning director or his designee as set forth above against any person deemed in violation of this ordinance by mailing by registered or certified mail, return receipt requested, or by any other means authorized under G.S. 1A-1, Rule 4 of the North Carolina Rules of Civil Procedure or by posting the property where the violation occurred, or by other means reasonably calculated to give actual notice, to the owner of the property and/or any person deemed responsible for the violation, and which notice shall include a description of the violation for which the penalty has been imposed, the amount of the penalty, and the reason for assessing the penalty.

Civil penalties assessed for violations may be appealed pursuant to the provisions of Limestone Township Zoning ordinance, as set forth in §78-184 of the Buncombe County Code of Ordinances.

This ordinance may be enforced by any legal and equitable remedies including, but not limited to, injunctive relief.

NOW, THEREFORE, BE IT ORDAINED BY THE BUNCOMBE COUNTY BOARD OF COMMISSIONERS that after careful, deliberate and studied contemplation of the above does hereby implement and impose a moratorium prohibiting the acceptance of applications for and/or issuance of any and all permits for stormwater, soil and erosion, flood development, well and septic and building of any new or expanded adult entertainment establishments, amusement parks, asphalt plants, concrete plants, chip mills, hazardous waste facilities, incinerators, junkyards, landing strips, motor sport facilities, outdoor shooting ranges, slaughtering plants, mining and extraction operations and solid waste facilities. This ordinance will be effective in the unincorporated areas of Buncombe County and outside the jurisdiction of towns and municipalities. Further, the Limestone Township Zoning Ordinance and the Beaverdam Community Land Use Ordinance will remain in effect and the areas within these jurisdictions are not subject to this ordinance.

This moratorium shall become effective upon its adoption and will continue through and including December 31, 2009.

This the 19th day of May, 2009.

ATTEST

BOARD OF COMMISSIONERS FOR THE
COUNTY OF BUNCOMBE


KATHY HUGHES, CLERK

By: 
DAVID GANTT, CHAIRMAN

APPROVED AS TO FORM


COUNTY ATTORNEY