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Fulton County Board of Commissioners
141 Pryor Street, SW
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Dear Commissioners:

On behalf of the over 7,500 members of the Atlanta Board of REALTORS® (ABR) and the Atlanta Commercial Board of REALTORS® (ACBR), their affiliates, clients, and property owners, I am writing to share our comments and recommendations on **2012Z-0014 SFC**, a petition to amend Articles 3 and 4.18 of the Fulton County Zoning Resolution (the "Proposed Amendment").

Executive Summary

ABR and ACBR request that the Board of Commissioners defer action on the Proposed Amendment for at least 60 days. Our analysis has found numerous structural and technical problems with the measure. Enactment of the proposal will inhibit private property rights, reduce property values, and have a chilling effect on economic development. The need for this legislation is questionable, and its ability to deliver favorable outcomes for any of the numerous stakeholders involved is hypothetical at best.

Issue: Current law sufficiently addresses the concept of "Environmental Justice."

ABR and ACBR find that current law is sufficient as it relates to the concept of environmental justice. The current law contains numerous safeguards for environmental assessment of proposed uses, multiple opportunities for full and meaningful engagement by affected communities in the permitting process, and reasonable standards for land use separation.

The current Zoning Resolution has in place standards that are relevant to environmental justice considerations. Under the Zoning Resolution, all rezoning and use permit petitions must include an

Environmental Site Assessment (ESA). The ESA requires an applicant to consider how, among other things, the proposed use would “minimize[e]... negative impacts on environmentally stressed communities.”¹ The ESA also requires an applicant to demonstrate “how the project conforms to the Comprehensive Land Use Plan.”² Any proposal for an industrial rezoning or use permit must include an Environmental Impact Report (EIR).³ Additionally, the EIR is required to demonstrate “conformance to the Comprehensive Plan including each of the policies regarding environmental justice.”⁴

Despite the reference in the Zoning Resolution to “policies regarding environmental justice” the 2030 Fulton County Comprehensive Plan does not appear to address “environmental justice” as a distinct topic. The Comprehensive Plan does set forth certain policies that may be relevant to environmental justice considerations. First, the Comprehensive Plan recognizes that separation distances are needed between certain incompatible uses. In particular, with regard to the industrial zoning district, the Comprehensive Plan states that “most industrial uses require large landscaped buffers and separation from incompatible uses.”⁵ The uses in the business zoning district, however “do not require the same level of separation and buffering as the heavy industrial uses because the uses are not as incompatible with the residential neighborhoods.”⁶ In addition, the Comprehensive Plan seeks to “protect existing residential uses from negative impacts of industrial uses, including quarries” and, at the same time, “allowing for compatible institutional uses in neighborhoods and communities.”⁷

The Comprehensive Plan also includes specific policies and strategies for guiding development in Unincorporated South Fulton County. One policy related to Unincorporated South Fulton is to “promote and protect industrial uses by limiting incompatible uses, such as residential uses, in areas designated as Industrial Zone and Business Park on the Future Development Map” in response to the recent economic downturn.⁸ Further, due to limited financial resources, “new tools need to be adopted to enhance greenspace amenities for the citizens of Unincorporated South Fulton County” because much of that land has been acquired by annexing municipalities.⁹ The Comprehensive Plan also notes a great disparity in economic distribution in Unincorporated Fulton County that must be addressed.¹⁰

¹ Fulton County Zoning Resolution, Article 28.4.3.1.3.e.

² *Id.* at Article 28.4.3.1(1).

³ *Id.* at Article 28.4.3.

⁴ *Id.* at Article 28.4.3.2.1.

⁵ 2030 FULTON COUNTY COMPREHENSIVE PLAN, at 25 (Dec. 7. 2011).

⁶ *Id.* at 26.

⁷ *Id.* at 38. The Comprehensive Plan includes as a strategy: “Evaluate Quarry Impact Zone to protect residential uses.” *Id.* at 39.

⁸ *Id.* at 46.

⁹ *Id.* at 43.

¹⁰ *Id.* at 89.

The Department of Health and Wellness reviews all EPAs and EIRs for, among other things, compliance with the Comprehensive Plan, and submits recommendations to the planning staff of the Planning and Community Services Department. The recommendations – including the anticipated impact of the proposed use on an environmentally stressed community – are then included in a staff analysis report that is submitted to the Fulton County Board of Commissioners.

The Zoning Resolution currently requires separation distances from residential uses, and or separation between similar uses, for the following categories of industrial use:

- **Article 4.15.A Airport:** “New residential development proposed within 5 miles of Hartsfield Jackson International Airport Boundary shall comply with the Fulton County Site Acceptability Noise Standards.”
- **Article 4.16.A Landfill:** “No portion of a new proposed residentially zoned property or used property shall be located within a 1 mile radius of property lines of an existing active landfill.”
- **Article 4.16.B Transfer Station:** “No portion of a new proposed residentially zoned or used property shall be located within a 1 mile radius of the property lines of an existing active transfer station.”
- **Article 4.16.C Quarry:** “No portion of a new proposed residentially zoned or used property shall be located within a 1.5 mile radius of the property lines of an existing active quarry.”
- **Article 4.16.D Surface Mining:** “No portion of a new proposed residentially zoned or used property shall be located within a 500 foot radius of the property lines of an existing active surface mining site.”
- **Article 19.4.32.B Quarries and/or Surface Mining Sites:** “No portion of a new or expanded quarry shall be located within a 1.5 mile radius of the property lines of a residentially zoned or used property. An expanded quarry shall not include any expanded use within the parcel boundaries of an existing site or location. No portion of a new or expanded surface mining site shall be located within a 500 foot radius of the property lines of a residentially zoned or used property. An expanded surface mining site shall not include any expanded use within the parcel boundaries of an existing site or location.”
- **Article 19.4.25.B Inert Waste Disposal Landfill:** “No portion of a new landfill shall be located within a three mile radius of the property line of an existing landfill....The waste disposal boundary of a landfill shall be located at least 500 feet from all property lines except adjacent to M-1 (Light Industrial) and M-2 (Heavy Industrial) zoned districts.... No portion of a new or expanded landfill shall be located within a one (1) mile radius of the property lines of residentially zoned or used property.”
- **Article 19.4.26.B Solid Waste Disposal Landfill:** “No portion of a new landfill shall be located within a three mile radius of the property line of an existing landfill....The waste disposal boundary of a landfill shall be located at least 500 feet from all property lines except adjacent to M-1 (Light Industrial) and M-2 (Heavy Industrial) zoned districts. . . . No portion of a new or expanded landfill shall be located within a one (1) mile radius of the property lines of residentially zoned or used property.”

- **Article 19.4.37.B Reprocessing Recycling Center:** “No portion of a new recycling facility shall be located within a 3 mile radius of the property lines of an existing recycling facility.”
- **Article 19.4.39.B Salvage, Storage and/or Junk Facility:** “No portion of a new salvage, storage, and/or junk facility shall be located within a three mile radius of the property lines of an existing salvage, storage, and/or junk facility.... A minimum 200-foot buffer and 10-foot improvement setback shall be required along all property lines except public rights-of-way.”
- **Article 19.4.43.B Transfer Station:** “No portion of a new transfer station shall be located within a three mile radius of the property lines of an existing transfer station. ... A minimum 200-foot buffer and 10-foot improvement setback shall be required along all property lines except public rights-of-way. No portion of a new or expanded solid waste transfer station shall be located within a one (1) mile radius of the property lines of a residentially zoned or used property.”
- **Article 34.5.10.A Pipeline Easement:** “No buildings used for human occupancy shall be permitted within forty (40) feet of any easement containing a gathering or transmission line as defined in the resolution.”
- **Article 34.5.12 Wastewater Pump and Lift Station:** “A minimum 50-foot buffer and 10-foot setback shall be provided along all property lines adjacent to residentially and/or agriculturally zoned properties used for residential or public recreational purposes.”

The staff analysis of the Proposed Amendment contains a list of existing separation distance requirements that omits *Salvage, Storage and/or Junk Facility* and *Transfer Station*.

The U.S. Environmental Protection Agency defines “environmental justice” as the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.¹¹ Meaningful Involvement means that: (1) potentially affected community members have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment and/or health; (2) the public’s contribution can influence the regulatory agency’s decision; (3) the concerns of all participants involved will be considered in the decision-making process; and (4) the decision makers seek out and facilitate the involvement of those potentially affected.¹²

Affected communities in Fulton County have multiple opportunities for meaningful involvement in the zoning and permitting process under current law, including the opportunity to offer comment at meetings of the Fulton County Community Zoning Board and the Board of Commissioners – and have, in fact, influenced the decisions by both bodies on such matters.

¹¹U.S. Environmental Protection Agency, *Interim Guidance on Considering Environmental Justice During the Development of an Action*. Available at: <http://www.epa.gov/compliance/ej/resources/policy/considering-ej-in-rulemaking-guide-07-2010.pdf>.

¹² U.S. Environmental Protection Agency, *Plan EJ 2014: Overview*, at 3 (September 2011)

Issue: The Proposed Amendment fails to adequately define key terms.

Vulnerable Residential Community and Overburdened Community

The Proposed Amendment at Section 4.18.1 states that “if a proposed zoning, use permit, land disturbance permit or building permit (a building permit will be reviewed by Planning and Environmental Justice Staff as to whether it will be required to comply) is suspected or determined to be in the vicinity (1/2 mile) of a vulnerable residential community, and Environmental Justice Review (EJR) will be required.”

The term “*vulnerable residential community*” is not defined in the proposal. Staff indicates in its analysis and recommendation dated February 28, 2013, that determinations will be made on a subjective basis, based on the definitions in current law for *Environmentally Stressed Community* and *Environmentally Adverse* as well as an additional definition to be added to Article 3 of the Zoning Resolution for the term “overburdened community,” defined as

the minority, low-income, tribal, and indigenous populations or communities in the United States that potentially experience disproportionate environmental harms and risks as a result of greater vulnerability to environmental hazards. This increased vulnerability may be attributable to an accumulation of both negative and lack of positive environmental, health, economic, or social conditions within these populations or communities.

The definition does not offer objective guidance as to how an applicant or a government official is to determine whether a certain community constitutes an overburdened community. Nor does it indicate how “vulnerability to environmental hazards” is to be determined and what level of “vulnerability” renders a particular community “overburdened” or not. Moreover, it is not clear how the geographic boundaries of a “community” are to be determined. This is particularly significant in the context of a zoning requirement like the Proposed Amendment which is premised on separating particular uses from such communities.

Additionally, this definition is circular in nature. It defines an overburdened community as one that “potentially experience[s] disproportionate environmental harms and risk” but measures this standard by examining the community’s vulnerability to environmental hazards.

Potential Disproportionate Environmental Impact

Section 4.18.1 requires the application of distance separation requirements to a proposed use if the staff determines during the EJR that a proposed use will create any “potential disproportionate environmental impacts.”

The term “potential disproportionate environmental impact” is critical to the application of the Proposed Amendment, but is also vague, insufficiently precise, and inherently subjective.

What does it mean to cause a “potential disproportionate environmental impact?” The Proposed Amendment provides no guidance or criteria addressing how to measure whether environmental impact is “disproportionate” or what standards the County would apply in order to determine whether a request for rezoning, use permit, land disturbance permit, or building permit near a vulnerable residential community would result in a “potential disproportionate environmental impact.”

The absence of clear definitions will make it difficult for applicants and government officials to know what is required. This is likely to result in arbitrary, inconsistent decision-making by the County, and creates uncertainty, risk, and cost for property owners and businesses seeking to locate in the County.

Issue: The Proposed Amendment lacks adequate procedural safeguards.

Office of Environmental Justice

The Proposed Amendment specifies that “the final finding of the EJR shall be made available no more than 10 business days from the date of receipt by the Environmental Justice Staff of all requested documentation.”

It is unclear what the Fulton County Office of Environmental Justice is. There is no department or agency by that name listed on the County website. The Proposed Amendment does not establish such an office and the staff recommendation contains no discussion how it was or will be created, how it is or will be staffed and managed, and what County agency or department it is or will be under, if any.

Staff has indicated in oral testimony at before the Community Zoning Board that this office consists of one staff member in the Department of Health and Wellness. Given the potentially large number of applications and detailed reports that the Office of Environmental Justice would be charged with reviewing and evaluating, it would presumably entail a significant commitment of staff and funding to implement the Proposed Amendment in a way that does not create delays for applicants.

Unclear and Subjective Standards

Section 4.18.2 of the Proposed Amendment states that separation distances for a proposed use that is not addressed on the separation distance chart “shall be determined by the Planning and Environmental Justice staff based on the information received in the EJR, standards established for other similar uses in the separation chart and/or other current scientific data.” There are no guidelines provided in the Proposed Amendment for how to evaluate whether a use not addressed on the chart is similar to other uses that are addressed in the chart, or what scientific data is needed or relevant to determining a separation distance for such a use.

A constitutional principle known as the *nondelegation doctrine* prohibits a local legislative body from delegating its legislative or policy-making power to administrative boards or officials. The delegation of standardless authority can also result in unfair and arbitrary decision-making, which may expose the

Commissioners to claims based on the constitutional rights to due process and equal protection. A local legislative body can, however, delegate to an administrative body the authority to exercise discretion in carrying out its established policy, provided that the delegation is accompanied by adequate standards and specific procedural guidelines.¹³ These standards and procedural guidelines arguably are not present here.

Applicability to Expansion or Modification of Existing Facilities

The Proposed Amendment is unclear whether an EJR will evaluate the pre-existing operations of an industrial use when the owner or operator proposes an expansion or modification of that use at the same location.

No Right to Appeal

The Proposed Amendment does not provide a procedure for an applicant or anyone else to appeal or contest a finding by the Office of Environmental Justice that the use would cause a potential disproportionate impact, triggering application of the separation distances. It is possible that such a determination would be appealable under existing administrative appeal procedures of the Zoning Resolution, but there is no indication in the Proposed Amendment or the staff analysis that this would be the case.

Issue: The Proposed Amendment will impair economic development and hurt property values.

The economic viability and value of existing uses will be harmed by the prevention of their expansion or modification at their current locations. This proposal will also discourage companies from moving to, and establishing new facilities in, Fulton County.

As the staff analysis notes, the business community has raised concerns that the owners and tenants of property already comply with all existing federal, state, and local government laws, so there is no need to impose further requirements. On the other hand, if the Proposed Amendment passes, the County may be tempted to look at a proposed expansion of an industrial use as an opportunity to subject the entire use to an EJR. If the Proposed Amendment is applied in that context, it may impair the viability of existing industrial business operations in two respects. For one, if the owners of existing industrial businesses in the County see that the County is subjecting existing businesses to EJR when they propose an expansion or modification of their existing facility, it may discourage those owners from modernizing or upgrading their facilities because they do not want to endure the additional time intensive and costly process and incur the substantive requirements that may result from such a review.

¹³ BRIAN W. BLAESSER, DISCRETIONARY LAND USE CONTROLS: AVOIDING INVITATIONS TO ABUSE OF DISCRETION, (Thomson-Reuters/West: 2012), at § 1:18.

Depending on how it is applied, the Proposed Amendment may also have the effect of thwarting the expansion or modification of a facility that cannot meet the separation distance requirements, which could make it more difficult for local businesses to grow and compete effectively. In addition, the Proposed Amendment is likely to be viewed as a signal that the County is not “industry friendly” and discourage some businesses from moving to or opening new facilities in the County if they have alternative locations available in jurisdictions that are not as heavily regulated.

There is also a significant concern about the stigmatizing effect on residential property values that could follow after a property or neighborhood is designated as a *vulnerable residential community*.

Issue: The Proposed Amendment deviates significantly from the practices of other jurisdictions.

As noted in the staff analysis (and confirmed by our research) there are no local governments in the U.S. utilizing distance separation requirements between environmentally adverse uses and residential communities. Moreover, the Proposed Amendment is highly unusual, in that most local jurisdictions in this country do not even reference environmental justice considerations in local regulation.

Summary

Given the numerous flaws of the Proposed Amendment articulated in this letter, it is apparent that this measure has not been thoughtfully conceived, carefully drafted, or properly vetted. The Atlanta Board of REALTORS[®] and the Atlanta Commercial Board of REALTORS[®] respectfully submit that the Proposed Amendment should not be considered for adoption by the Board of Commissioners at this time. We recommend a deferral of at least 60 days to allow ABR, ACBR, and other stakeholders to work with the county staff on amendments or an alternative policy solution.

Thank you for your time and consideration. If you have questions, please contact me at (404) 732-0631 or by email at robert@abr.org.

Sincerely,



Robert Broome
Governmental Affairs Director

cc: The Honorable John Eaves
The Honorable Robb Pitts
The Honorable Liz Hausmann
The Honorable Tom Lowe
The Honorable Joan Garner

The Honorable Emma Darnell
The Honorable Bill Edwards
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