PROPOSED RESPONSE OF PLANNING AND ZONING COMMISSION TO MEMO FROM PRISCILLA HAYNER ET AL. DATED APRIL 5, 2021 (THE "HAYNER MEMO")

Below are the proposed Planning and Zoning Commission responses to the various comments and recommendations made in the various sections of the Hayner Memo. The captions below are the same as in the Hayner Memo.

As a preliminary note, the term "conditional use permit" has been changed in the revised zoning ordinance to "special use permit" because of the new terminology mandated by the new North Carolina General Statutes, Chapter 160D, effective July 1, 2021. Many of the revisions made throughout the revised zoning ordinance, not just in the provisions governing special use permits, were the result of changes mandated by NCGS Chapter 160D. NCGS 160D-111(a) provides that NCGS Chapter 160D is applicable to all local zoning ordinances and regulations as well as "any other local ordinance that substantially affects land use and development."

A. REDUCTION OF OPPORTUNITY FOR PUBLIC HEARING AND COMMENT

The Hayner Memo recommends that "the new zoning ordinance retain the required review and recommendation of the Planning and Zoning Committee before the Board of Adjustment can consider applications for Special Use permits." This is not permitted by the provisions of new NCGS Chapter 160D. Your attention is directed to the following provisions of NCGS Chapter 160D:

(1) Under NCGS 160D-705(a), only one board can be granted the authority to hear and decide on special use permits. NCGS 160D-705(a) states that the "zoning . . . ordinance may provide that the board of adjustment, planning board, or governing board may hear and decide special use permits (emphasis supplied). Thus, a local government may choose among its board of adjustment, planning and zoning board and governing board in specifying, in its zoning ordinance, which body will hear and decide on special use permits. The Town is not empowered to require that the Planning and Zoning Commission recommend granting a special use permit as a prerequisite to the Board of Adjustment hearing and deciding on special use permits. That procedure effectively requires two boards to approve a special use permit. NCGS Chapter 160D does not sanction two required approvals.

(2) This conclusion is underscored by NCGS 160D-301, which allows a local government to provide in its regulations for its planning board to provide a "preliminary forum" for the consideration of special use permits. But it requires that a planning board's proceedings and any action taken by a planning board must be virtually ignored by the board of adjustment in making its decision. NCGS 160 D-301(b)(6) states that a planning board may be

assigned the duty to “provide a preliminary forum for review of quasi-judicial decisions, provided that no part of the forum or recommendation may be used as a basis by the deciding board.” If a planning board’s action cannot be considered by a board of adjustment in making its decision, a local government certainly cannot require the recommendation of the planning board as a prerequisite to the board of adjustment taking action on the application.

Under NCGS 160D-301, the Town of Montreat could continue to have the Planning and Zoning Commission hold hearings as a “preliminary forum” on special use permit applications. But the Zoning Board of Adjustment could not consider the action taken by the Planning and Zoning Commission in deciding whether to approve the permit. The Zoning Board of Adjustment also could not consider any information given or statements made by the “public” at the Planning and Zoning Commission’s meeting. NCGS 160 D-301(b)(6) requires the Board of Adjustment to essentially ignore the entire Planning and Zoning Commission meeting as if it had not taken place.

Furthermore, the provisions of the current ordinance that allow for extensive public participation and comment during the Planning and Zoning Commission’s consideration of a special use permit application may not be permissible under the provisions of new NCGS Chapter 160D. NCGS 160D-406(a) seems to require that the planning board’s hearing under NCGS 160D-301 must be held using quasi-judicial procedure. NCGS 160D-406(a) states that “Boards shall follow quasi-judicial procedures in determining . . . special use permits.” Published notice, limitations on testimony and other procedural requirements provided for in NCGS 160D-406 are thus likely applicable to a planning board “preliminary forum” hearing. This conclusion is supported by NCGS 160D-705, which makes it clear special use permits are the result of quasi-judicial decisions.

Although the Hayner Memo suggests that the Planning and Zoning Commission’s review of a special use permit application is the “main opportunity for the public to raise objections to the application,” we do not concur given the requirements of NDGS Chapter 160D. The Planning and Zoning Commission’s failure to recommend an application cannot effectively constitute a denial of the application. The Planning and Zoning Commission’s recommendation or failure to recommend an application cannot be considered by the Board of Adjustment in making its determination on a special use permit. The Zoning Board of Adjustment also cannot consider any information given or statements made by the “public” at the Planning and Zoning Commission’s meeting. Finally, it is likely that a quasi-judicial procedure is now required to be applicable to "preliminary forum" hearings held by planning boards in accordance with NCGS 160D-301(b)(6).

Instead of a Planning and Zoning Commission hearing, the main and only real opportunity for opponents of a special use permit to prevail in opposing the permit is to present competent, substantial and material evidence that disproves or rebuts the evidence presented by the applicant at the hearing as to the findings required to be made by the Board of Adjustment under section 310.62 of the revised zoning ordinance. That is the inescapable result of the provisions of NCGS Chapter 160D governing special use permits and the proper result if special use permits are to be decided pursuant to a quasi-judicial process.

In conclusion, the continued involvement of the Planning and Zoning Commission in the Special Use Permit process, which was recommended by the Hayner Memo, is in effect a meaningless and therefore purposeless exercise. As a result, we have proposed in the revised zoning ordinance to eliminate any role on the part of the Planning and Zoning Commission in order to avoid wasted time and effort on the part of all parties (and the Town's staff), as well as frustrated expectations on the part of members of the public who participate in a meaningless process with the mistaken belief that their statements and comments will be heard and considered by the Board of Zoning Adjustment in making its decision on a Special Use Permit.

B. WEAKENING AND ELIMINATING PROTECTIONS

We believe the findings required in section 310.62 of the revised ordinance, as originally drafted, did not diminish but in fact expanded the testimony and burden of proof required to be presented by an applicant for a special use permit. The existing ordinance does not require the Zoning Board of Adjustment to make any of the findings set forth in section 801 of the existing ordinance. Only the Planning and Zoning Commission is required to make such findings, even though it is only a recommending body. The revised ordinance requires the Board of Adjustment to make all the required findings set forth in section 310.62 of the revised ordinance. In addition, subsection 310.622 of the revised ordinance requires the applicant to demonstrate compliance with all the development standards and conditions of the Town, subsection 310.624 requires the applicant to show the location and character of the proposed use will be in harmony with the area in which it is to be located, and subsection 310.625 requires the applicant to show the proposed use will be consistent with the Comprehensive Plan and other adopted policies and plans of the Town. None of these requirements are contained in the existing ordinance.

However, to address concerns that the Hayner Memo raises regarding the wording of certain provisions in section 310.62 of the revised ordinance, we propose to make the following revisions to section 310.62, inserting and

referencing various terms used in the existing ordinance, as well as adding a new subsection 310.626, to make sure that in substance all the findings required in the existing ordinance are included in the required findings of the revised ordinance (new language is underlined):

310.621 That the Use will not be detrimental to or endanger the public health, safety or general welfare if located where proposed and developed according to the plan as submitted and approved;

310.622 That the Use meets or will meet all the required and applicable development standards and conditions of the Town of Montreat (including without limitation all development standards, conditions and requirements related to utilities, parking, access and storm water drainage and the applicable regulations of the Zoning District in which it is located, except as such regulations may, for each case, be modified by the Board of Adjustment);

310.623 That the Use will not substantially diminish and impair the value of any property any portion of which is located within two hundred fifty feet (250") of the boundary of the parcel on which the Use will be located;

310.624 That the location and character of the Use, if developed according to the plan as submitted and approved, will be in harmony with the area in which it is to be located and will not be injurious to the use and enjoyment of other property within the area in which it is located;

310.625 That the location and character of the Use, if developed according to the plan as submitted and approved, will be in general conformity with the adopted policies and plans, including the Comprehensive Plan of the Town of Montreat; and

310.626 That adequate measures have been taken or will be taken to provide ingress and egress so designed as to minimize congestion in the public streets.

C. BURDEN SHIFTING

The revised ordinance does not “essentially assume the permits should be granted” or change the burdens of the parties at the heating of the Board of Adjustment. It merely makes these burdens clear so that the parties are aware of the burdens they must meet to propose or oppose a special use permit. Specifically, we do not believe section 310.61 of the revised ordinance implies that any sort of presumption a permit should be granted. Nonetheless, we are willing to revise it to read essentially the same as section 800 of the existing ordinance. We propose to amend 310.61 to read as follows:

> 310.61 Objectives and Purpose. The purpose of this section 310.6 is to ensure there is adequate review and control of the issuance of Special Use Permits, which may have a direct influence or impact upon neighboring or contiguous land uses. This review is intended to aid in protecting the private and public values and interests in such land uses whether residential, institutional, or commercial in nature. The Uses for which Special Use Permits are required are listed in the Table of Permitted Uses.

Furthermore, we also agree that the wording of several provisions of section 310.63 of the revised ordinance regarding the burdens of the parties could use clarification and improvement. We therefore propose to amend sections 310.634, 310.635 and 310.636 in their entirety as follows:

> 310.634. The Board of Adjustment shall only approve the requested application if it concludes, based upon the information submitted at the hearing, that:
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> (1) The requested permit is within its jurisdiction to grant according to the Table of Permitted Uses;
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> (2) The application for the permit is complete; and
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> (3) If completed as proposed in the application, the development will comply with all the requirements of this Ordinance.
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> 310.635 Even if the Board of Adjustment finds that the application complies with all other provisions of this Ordinance, it shall deny the permit if it is unable to make all the findings required in section 310.62, based upon a preponderance of the evidence submitted at the hearing.
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> 310.636 The burden of presenting a complete application to the Board of Adjustment shall be upon the applicant. However, unless the Board informs the applicant at the hearing in what way the application is incomplete and offers the applicant an opportunity to complete the application (either at that meeting or at a continuation hearing), the application shall be presumed to be complete. Once a completed

application has been submitted, the applicant shall have the burden to present competent, substantial and material evidence that would support findings by the Board of Adjustment in accordance with the requirements of section 310.62 (that is, the applicant has the burden to make a prima facia case sufficient to support the required findings), and that demonstrates the applicant has otherwise complied with all the requirements of this Ordinance applicable to the requested Special Use Permit. Upon such a showing by the applicant, those parties opposed to granting the Special Use Permit shall have the burden of presenting competent, substantial and material evidence that disproves or rebuts the evidence and information presented by the applicant.

D. CONFLICTS OF INTEREST

The conflict-of-interest provisions set forth in NCGS160D-109 are self-operative and do not require them to be repeated in the ordinance. NCGS 160D-109 also does not require zoning ordinances to include separate conflict of interest provisions. Nevertheless, we propose the following additions to the revised ordinance:

(1) To add the following sentence at the end of section 308.2 of the revised ordinance: “All members of the Planning Commission shall comply with NCGS 160D-109, and other applicable conflict of interest laws and requirements of the State of North Carolina.”

(2) To add the following sentence at the end of section 310.3 of the revised ordinance: “All members of the Zoning Board of Adjustment shall comply with NCGS 160D-109, and other applicable conflict of interest laws and requirements of the State of North Carolina.”

E. PRESERVATION OF CHARACTER OF MONTREAT

We have provided in section 310.625 of the revised ordinance that the applicant must prove the proposed use is in general conformity with the Comprehensive Plan and other policies and plans of the Town. This requirement is new and was not included in the prior ordinance.

F. ENVIRONMENTAL PROTECTIONS

The Town of Montreat has separate ordinances governing stormwater and steep slope development. The Planning and Zoning Commission anticipates that it will review these ordinances in the near future at the request of the

Town Council. However, these ordinances are not a part of, and necessarily are separate from, the zoning ordinance. Section 310.622 of the revised zoning ordinance will, unlike the existing zoning ordinance, require the applicant to present evidence that the proposed use meets or will meet all the required and applicable development standards and conditions provided for in these separate ordinances.