



City of Gautier
Agenda Item Request Form

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Representing: B&D Plastics, LLC
Department:

In the items below, please select the type of agenda you request your item to be placed on.

Date of meeting requested to be on:

City Council Meeting (Regular & Recessed)

- Employee: Please submit this request to the City Clerk by 5:00 p.m. on the Tuesday prior to the date of the next regular/recessed council meeting.
Citizen: Submit request to the City Clerk by 5:00 p.m. on the Tuesday prior to the date of the next regular/recessed Council Meeting.
Council: Submit memo/request to the City Manager of City Clerk

Council Meeting

- City Council Meeting (Business Agenda)
City Council Meeting (Consent Agenda)
City Council Meeting (Study Agenda)
Civil Service Commission Meeting
Submit request to the Human Resources Director by 5:00 p.m. on the Tuesday prior to the next regular Commission meeting.

SUBJECT MATTER: (If more space is required, reverse side may be used.)

See attached Memorandum, Code, and drawing.
Provision of Paragraph G2, Public Benefits, found on pages 166-168 of the Unified Development Ordinance. It is our intent to request the City Council to find that we have met the Public Benefits revision in the proposed drawing. We do not seek to rezone or for special permit use, because the property is classified C3 and is being used for light industrial which is a permit use.

Is there material you wish to be attached to the agenda? [X] Yes [ ] No

Do you wish to make an oral presentation personally? [X] Yes [ ] No

Has this item been approved for legal sufficiency by City Attorney? [ ] Yes [ ] No

This has been submitted to the City Attorney

Requestor's Signature: John L. Hunter Date: 3/23/16

FOR OFFICE USE ONLY

Received By: Title: Date: / / Time:

( ) Approved ( ) Denied for Agenda Date: Item No.:

To: Economic Development Director, Building Official, and City Attorney  
From: B & D Plastics, LLC  
Thru: Russell S. Gill, Esq. and John Hunter, Esq., attorneys for B & D  
Subject: Obtaining a Building Permit without need of a Conditional Use Permit or other procedures not required by law.

## **Memorandum Re: B & D Building Permit Application**

### **Purpose:**

This memorandum explains why B & D Plastics is entitled to a Commercial Building Permit, and is not required to submit an application for a Conditional Use Permit under the Unified Development Ordinance (hereinafter “UDO”) for the City of Gautier, MS.

### **Background:**

B & D seeks to construct a 53 ft. high metal building for light manufacturing on its property at 5500 Allen Road in Gautier, MS. The City of Gautier (hereinafter “the City”) has previously granted B & D permits to construct metal buildings of similar dimensions and designated for similar uses at the same Allen Road location, first in 2010 and again in 2012. B & D has not previously been required to obtain a Conditional Use Permit.

#### **A. Uses Permitted by Right**

Section 5.2.2 of the UDO, entitled “Uses Permitted by Right and Conditional Use,” states that “[n]o use shall be established in any zoning district unless it is expressly designated by this Ordinance as a ‘P-permitted use’... summarized in Tables 3, 4 and 5.” (See UDO, p. 117-128)

The property on which B & D Plastics operates was zoned C-3 by the City in 2011. B & D’s operations fall under the category of Light Manufacturing as defined in the UDO Section 2.1; manufacture or assembly of finished products from previously manufactured materials (UDO, p.32). The facility which B & D seeks to construct, and the operations which B & D

seeks to conduct on the Allen Road property also fall under the category of Light Manufacturing as defined in the UDO. Light Manufacturing is listed in Table 4 of Section 5 of the UDO, and designated as a permissible use in a C-3 district (UDO, p. 121).

**B. Intensity and Dimensional Standards**

In addition to the use restrictions, UDO Section 5.11 (UDO, p. 163) creates height, intensity, and density standards of development in each district, as outlined in UDO Table 7 on page 131. These standards are organized into a tier system. The maximum building height permitted under Tier 3 in a C-3 zoning district is 60 feet. In order to qualify for the dimensional bonuses available under Tier 3 status, building permit applicants must satisfy all of the requirements of Sections 5.11, F and G (UDO, p. 164-169). B & D has satisfied all the requirements of 5.11, F in B & D's application. Additionally, B & D has satisfied the requirements of 5.11, G by submitting with the application the architectural drawings for the proposed construction, and by providing public benefits in the form of an adjacent gathering area on Baker Road with benches, trash cans, lighting, and landscaping. Because B & D has satisfied the Tier 3 standards, B & D is entitled to the Tier 3 height and other bonuses.

**C. Building Permits**

A building permit must be issued by the Building Official (UDO, Section 4.13, p. 92) if a building permit application conforming to the requirements of UDO Sections 4.5.1 and 4.13, A, has been reviewed and approved by the Economic Development Director, or his or her designee in accordance with the provisions of Article IV of the UDO (UDO, Section 4.5, B). Among the requirements of Section 4.5.1 is that the applicant identify the intended use of the proposed building. While the UDO does delineate the required supplemental documents which must be submitted with a permit application to the Economic Development Director, it does not provide

any criteria by which the Building Official or Economic Development Director are to determine whether to approve a building permit application.

In the absence of criteria by which to judge a building permit application, the Building Official or Economic Development Director may not exercise discretion in approving applications which otherwise comply with the provisions of the UDO. See Tinseltown Cinema, LLC v. City of Olive Branch, 158 So. 3d 367, 373 (Miss. Ct. App. 2015).<sup>1</sup> In light of the fact that the uses to which the land in each zoning district may be put is prescribed by Article 5 of the UDO, and that the Building Official does not have discretion<sup>2</sup> in the issuing of building permits, B & D should be issued a building permit unless it has failed to comply with a particular provision of the UDO.

Even if the Building Official or Economic Development Director were given discretion under the UDO in approving applications which otherwise comply with the provisions of the UDO, which they are not, all decisions regarding whether to approve a permit application would be impermissibly arbitrary and capricious unless based on specifically defined and relevant standards.

Additionally, the building for which a permit is now sought is within the same dimensions as the last building for which B & D was issued a permit, and the uses to which it is to be put are nearly identical. Absent a subsequent change to the UDO in such a way that the two previous permits could not be validly issued under the current provisions UDO, *res judicata* prevents the Building Official and Economic Development Director from now changing their positions on whether the use now proposed by B & D satisfies the requirements entitling them to

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<sup>1</sup> (“We do not apply a deferential standard of review to decisions regarding building permits. Instead, the issuance of a building permit is a ‘purely ministerial’ function. A city does not have the discretion to deny a building permit when an applicant meets the necessary building-code requirements and zoning ordinances[.]”).

<sup>2</sup> UDO, Section 3.5.3 (“... the Building Official ... *shall* issue official building permits”) (emphasis added)

the issuance of a building permit under the UDO. Barnes v. Bd. of Sup'rs, DeSoto Cty., 553 So. 2d 508, 511 (Miss. 1989).

#### **D. Conditional Use Permits**

Conditional use permits are required for “*uses which ... because of their nature are not allowed by right...*” (UDO, Section 2.1, p.15). Here, the *use* to which B & D proposes to put the land is allowed by right under the UDO; namely, light manufacturing, as explained above. The facility for which the building permit is sought will house operations that fall under the definition of light manufacturing under the UDO definition and are nearly identical to the operations twice previously approved by the Building Official or Economic Development Director. **Because the proposed use is allowed by right, B & D is not required to obtain a Conditional Use Permit.**

#### **E. Tier 3 Approvals**

The question is how a Tier 3 approval for this particular permit application needs to be addressed. One issue is whether a “Tier 3 Development Order” is necessary, and hence a public hearing is required by the Planning Commission and City Council under Table No. 1: “Required Reviews,” found in Section 4.14: “Actions Requiring a Planning Commission and/or City Council Review.” (UDO, p. 92-93).

What is a Tier 3 Development Order? The UDO does not explain that, and the only place those words appear are in Table No. 1. Section 4.1, Development Orders and Permits (UDO, p. 62) describes development orders. Section 4.1.2 Authorization for Development Permit, states: “No development activity may be commenced without a final development order, except as provided by Section 4.1.4.” Section 4.1.4 Exceptions to the Requirement for a Development

Order, states a construction permit may be issued without a development order under certain exceptions listed in paragraphs A, B, C, D, E, F, G, and H. (UDO, p. 69).

Section 4.1.12 Development Order, generally provides that if the requirements of the UDO and Code of Ordinances is met,

“the City shall issue a development order to the developer within seven (7) calendar days from the approval date of said development order application.<sup>3</sup> The development order is not a construction permit. An approved development order is required prior to the City’s issuance of any construction permit(s).”  
(UDO, p. 69).

What does all this mean to the B & D building permit application? In a nutshell, not one thing. None of these procedures were required of B & D in 2010 or 2012 when two almost identical buildings were permitted. These procedures set forth in Section 4.1, Development Orders and Permits, are clearly intended to deal with new developments like subdivisions, shopping centers, malls, apartment complexes, and the like.

B & D is an existing business in compliance with C-3 zoning, seeking to erect a metal building similar to what it has been permitted to do twice already. The only conceivable additional requirement for B & D to get a Tier 3 waiver to erect a 53 ft. tall building, like it has done twice already, is get the Gautier City Council approval of the public benefit requirement set forth on page 167 of the UDO, Paragraph 2, Public Benefits, which simply states that “the final determination of what satisfies the Tier 3 public benefit requirement lies with City Council.” It says nothing about a public hearing before the planning commission.

How can that requirement be satisfied? Simply by making it an agenda item at the next city council meeting, which is what B & D intends to do.

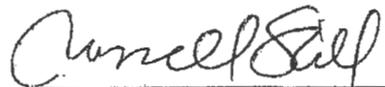
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<sup>3</sup> The UDO says nothing about development order applications or how such applications are to be prepared and submitted.

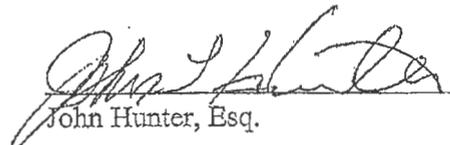
The bottom line is that B & D's application to erect a metal building is in full compliance with the UDO, and should be reviewed by staff, approved by the Economic Development Director, and issued as soon as the City Council approves the additional height as allowed in the Tier 3 bonus provisions. Denial of this permit, or forcing B & D to submit applications and obtain approvals not required by the UDO or by law, will result in litigation.

**Conclusion**

Because the proposed facility is intended for a use that is permitted under Section 5 of the UDO, and because the proposed facility and operations comply with this ordinance in all other respects, and because the Economic Development Director has twice previously granted B & D Commercial Building Permits for the construction of facilities with nearly identical dimensions and uses, B & D's application for a Commercial Building Permit should be granted forthwith.



Russell S. Gill, Esq.



John Hunter, Esq.

planted on the top of the berm. All berms must have at least a three (3) foot wide crest.

6. **Open space.** Development proposed in the R-2, R-3, MURC, and TCMU zoning designations shall provide an additional five percent open space in addition to the required minimum. Developments proposed in the MURC and TCMU zoning designations can omit this provision, provided it meets the definition of infill development.
  7. **Landscaping.** All developments shall meet the following landscaping requirements.
    - a. *Trees.* The number of required trees shall be increased by twenty (20) percent above the minimum requirements for trees set forth in Article XI. Palm trees cannot comprise more than forty (40) percent of the total number of all required trees.
    - b. *Shrubs.* The number of required shrubs shall be increased by twenty (20) percent above the minimum requirements for shrubs set forth in Article XI. All shrubs shall be sized in accordance to the following specifications: one-third (1/3) shall be a minimum of thirty-six (36) inches in height at the time of planting; one-third (1/3) shall be a minimum of eighteen (18) inches in height at the time of planting; and one-third (1/3) shall be ground cover plantings of a one (1) gallon size.
    - c. *Landscaping south of the coastal construction control line (CCCL).* For that portion of a development area that lies along the CCCL, all landscaping shall only meet the landscaping standards set forth in the permit issued by the Department of Environmental Quality.
  8. **Pedestrian amenities.** All developments shall provide gathering/sitting areas that at a minimum include the following decorative pedestrian amenities: benches, waste containers, planters, and pedestrian lighting fixtures. Other types of pedestrian amenities may be incorporated and include: decorative water fountains, sculptures, drinking fountains, phone booths and bicycle racks.
- G. Tier 3 Standards.** In order to qualify for Tier 3 height, density and intensity bonuses, an applicant must demonstrate that they have met the Tier 2 supplemental standards, Tier 3 supplemental design analysis, and are providing "public benefits" as stated in subsection 2, below.
1. *Supplemental design analysis.* As part of the application for a Tier 3 project, the applicant shall demonstrate the impact of the project on access to light, impact on airflow dynamics, as well as the visual impacts that may adversely affect adjacent properties, motorists, pedestrians, or segments of the population. This shall be demonstrated by submitting architectural renderings, shadow analysis and/or other analyses that are appropriate to the character of the development proposed as determined by the Economic Development Director or designee.

2. *Public benefits.* The Economic Development Director shall be responsible for consulting with the applicant concerning the Tier 3 public benefit requirement of subsection b. The applicant shall bear the burden of demonstrating that the specific character, design, and investment commitment is a significant overall public benefit. The City retains the decision making power to determine whether the specific private investment, including the project amenities, together with the public benefits, are commensurate with the increment of increased height, density or intensity that the applicant seeks. The final determination for what satisfies the Tier 3 public benefit requirement lies with City Council. In order for a project to be approved for the additional height, density, or intensity provided for in Tier 3, the applicant must meet, to the satisfaction of City Council, one (1) of the items listed below in subsections a thru e.
  - a. Must provide one (1) of the following.
    - i. Develop senior and/or student housing in the mixed use, medium or high density residential future land use designations in the comprehensive plan. An applicant must satisfy one of the following items or an equitable combination of the two (2).
  - b. Developments located on property within the R-1 and R-2, TCMU, MUMS and MURC zoning designation shall either:
    - i. Build one senior or student housing unit on the development site for each ten thousand (10,000) square feet of floor area developed, excluding areas devoted to structured parking and access ways; or
    - ii. Dedicate two dollars (\$2) per square foot of floor area developed into a dedicated "community housing fund" maintained by the City or a housing cooperative within the City of Gautier that would be used for the purpose of providing units owned and operated by seniors/ students.
    - iii. Provide a proportionate combination of i. and ii. in such a manner that, for example, if half of the required housing units are physically provided, then one-half (1/2) of the two dollars (\$2) per square foot dedication would be required. If seventy-five (75) percent of the required housing units are physically provided, then only twenty-five (25) percent of the two dollars (\$2) per square foot dedication would be required.
  - c. Relocation and conversion of above ground utilities to below ground locations. An applicant can qualify for Tier 3 bonuses by relocating and converting all above-ground utilities to below ground locations for that portion of the above ground utilities that are located on the subject property and that are in an adjacent right-of-way. Additionally, the applicant can choose to pay the City the amount it would cost for the relocation and conversion of the above ground utilities to below ground locations, based on a binding cost estimate provided by the power company, instead of performing the work. The City would then place

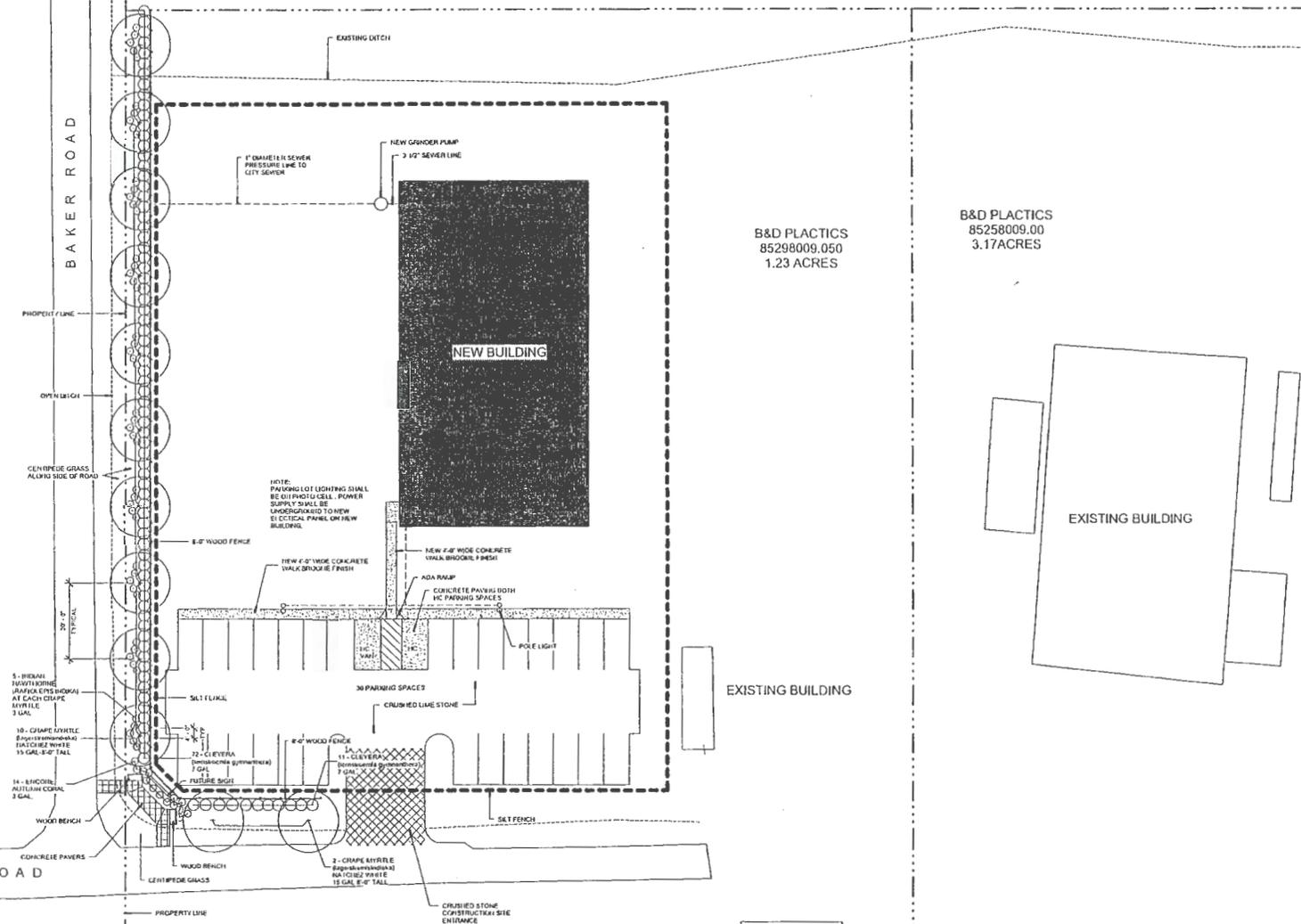
the money into a separate fund (underground utility improvement fund), which would be used to accomplish several projects at once instead of piecemeal.

- d. Construct open space malls and arcades equipped with pedestrian-oriented furniture and streetscape that serve as gathering spaces for the general public. Encourage private investment in public gathering places. Site plans must demonstrate architecturally designed open space malls and arcades equipped with pedestrian-oriented furniture and streetscape. Pedestrian-oriented furniture and streetscape includes benches, trash receptacles, decorative light poles, paver blocks or stamped and colored concrete, water fountains, statues, splash pads, playgrounds, high quantity and quality landscaping, etc.
  - e. Create and/or reinforce a pedestrian friendly transit system. Proposed developments shall provide wayfinding signage and construct a transit stop where the City has the greatest need for one in closest vicinity to the project, or make a monetary contribution to the City in the amount that would equal the cost of constructing a transit stop, or some combination of the two (2).
3. Additional required public benefits (must provide at least one (1)).
- a. Waterway access improvements. For improved access to the Waterways, this objective shall be carried forth through dedicating pedestrian easements to the public for access from public areas to the shoreline (public access points); the design, permitting, and construction of wetland and/or marsh walkovers facilities; boardwalks along creek, bayous.
  - b. Off-site public parking garage. Non-residential uses located in the TCMU, MURC, MUMS, C-1, C-2, and C-3 districts are allowed to have up to 80 percent of their required parking located in an off-site parking garage. However, the applicant must also provide an equivalent of thirty (30) percent of the total required parking space for the proposed development in the proposed off-site parking garage be dedicated to the City for public use. This dedication shall be in the form of a license and shall cover the above-mentioned parking spaces and the ingress/egress to said parking spaces. The off-site parking garage is not required to be located within the same district as the non-residential use. All required handicap parking spaces and loading spaces must be provided for on-site.
  - c. Preserve significant view of Waterways. This incentive is applicable to sites that have direct access to rivers and bays and that have exceptional waterfront views that would clearly be imperiled without this incentive provision. In order to achieve the preservation of a significant view of the waterway the applicant shall be required to take the cumulative total of both side setbacks, minus fifteen (15) feet, and provide the entire combined setback on one (1) side of the property.

B&D PLACTICS  
85298008.000  
5 ACRES

B&D PLACTICS  
85298009.050  
1.23 ACRES

B&D PLACTICS  
85258009.00  
3.17 ACRES



NOTE: PARKING LOT LIGHTING SHALL BE SELF-POWERED. POWER SUPPLY SHALL BE IMPROVED TO NEW ELECTRICAL PANEL ON NEW BUILDING.

NOTE: SEE CIVIL ENGINEERING PLAN FOR DRAINAGE AND SITE CONSTRUCTION



1 SITE  
1" = 20'-0"

HOMES L & TRINA M. REEVES  
85298032.000  
5 ACRES

B&D PLACTICS  
85298033.00  
5 ACRES



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FOR B&D PLACTICS  
85298033.00  
5 ACRES ALLEN ROAD  
GRANTER, MISSISSIPPI



REVISION IS	
11 REVIEW ONLY	

DATE	DATE
BY	BY
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ISSUED BY: LDJ  
15 MARCH 2016

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