

MEMORANDUM

January 27, 2011

TO: Planning, Housing, and Economic Development Committee

FROM: Jeff Zyontz,  Legislative Attorney

SUBJECT: Zoning Text Amendment 10-13, Hearing Examiner Waivers – Parking and Public Facilities

Zoning Text Amendment (ZTA) 10-13, sponsored by Councilmember Floreen, was introduced on December 14, 2010. This ZTA was introduced at the request of the Hearing Examiner. Currently, the Zoning Ordinance gives the Hearing Examiner the authority to approve or deny certain special exceptions. In other instances, the Zoning Ordinance gives the authority to grant special exceptions to the Board of Appeals. Although the Board of Appeals has the authority to waive parking requirements and to determine the adequacy of public facilities when it considers granting a special exception, the Hearing Examiner does not have similar authority.

The Council held a public hearing on January 18, 2011. The Planning Board and Planning Board Staff recommended approval of ZTA 10-13 with an amendment to delete the phrase “of Appeals” after the word “Board”. The Hearing Examiner spoke in favor of the ZTA as introduced; in the opinion of the Hearing Examiner, the amendment recommended by the Planning Board would be confusing because both the Board of Appeals and the Planning Board are referred to in the same provision. Mr. William Kominers recommended an amendment to clarify that, in some instances where an adequate public facilities determination was made, a new determination should not be required.

What is the Hearing Examiner’s authority to approve special exceptions?

Section 59-G-1.12 of the Zoning Ordinance authorizes the Hearing Examiner to hear and decide petitions for special exceptions for the following uses:

- (1) Boardinghouses for 3 guests or fewer, in the R-30, R-20 and R-10 zones.
- (2) Home occupations in the R-30, R-20 or R-10 zones.
- (3) Noncommercial riding stable for not more than 2 horses, for personal or family use, in the RE-2 zone.
- (4) Temporary structures, in residential zones.
- (5) Renewals of temporary special exceptions originally granted by the board, director or hearing examiner for boardinghouses, and home occupations.
- (6) Farm Tenant mobile homes, for more than one but less than 4; provided such farm tenant mobile homes meet the definition established for such uses by this chapter and that such uses are not within 200 feet of a non-farm residence.
- (7) Child day care facilities for up to 30 children.

Where the Hearing Examiner has the authority to approve a special exception, it is inefficient to require an applicant to seek other waivers or approvals from the Board of Appeals.

Should the set of special exceptions that require an adequate public facility determination by the Hearing Examiner and the Board of Appeals be clarified?

Currently, the only qualification on when a special exception must be examined for the adequacy of public facilities is as follows:

If the special exception does not require approval of a preliminary plan of subdivision, the Board of Appeals or the Hearing Examiner must determine the adequacy of public facilities when it considers the special exception application.

Any development that requires preliminary plan approval will have the adequacy of public facilities determined by the Planning Board after the approval of the special exception. The intent of the provision in question is to ensure that all development is found to have adequate public facilities; however, the provision does not currently recognize that some development was already tested for the adequacy of public facilities during the course of a previous approval of a preliminary plan. The following amended provision would avoid retesting development that was recently approved by the Planning Board (double underlining indicates additions to ZTA 10-13 as introduced):

- (B) If the special exception:
 - i) does not require approval of a new preliminary plan of subdivision, and
 - ii) the determination of adequate public facilities is not currently valid for an impact that is the same as or greater than the special exception's impact, then the Board of Appeals or the Hearing Examiner must determine the adequacy of public facilities when it considers the special exception application. ...

After consulting with Planning Staff and the Hearing Examiner, staff recommends this amendment.

Should the reference to the “Board of Appeals” be amended to the “Board”?

The “Board” is defined in the Zoning Ordinance as the Board of Appeals under §59-A-2.1; however, in the subject provision there is reference to both the “Board” and to the Planning Board. Given the Hearing Examiner’s opinion that removing “of Appeals” may add confusion, *staff does not recommend ZTA 10-13 as recommended by the Planning Board.*

<u>This packet contains</u>	<u>© number</u>
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Zoning Text Amendment No.: 10-13
Concerning: Hearing Examiner Waivers –
Parking and Public Facilities
Draft No. & Date: 1 – 12/1/10
Introduced: December 14, 2010
Public Hearing:
Adopted:
Effective:
Ordinance No.:

**COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL FOR THAT PORTION OF
THE MARYLAND-WASHINGTON REGIONAL DISTRICT WITHIN
MONTGOMERY COUNTY, MARYLAND**

By: Councilmember Floreen

AN AMENDMENT to the Montgomery County Zoning Ordinance to:

- allow the Hearing Examiner to decide adequate public facility issues and parking waivers when the Examiner is granted the authority to approve a special exception application; and
- generally amend the special exception provisions for parking and public facilities

By amending the following section of the Montgomery County Zoning Ordinance, Chapter 59 of the Montgomery County Code:

Division 59-E-4.	PARKING FACILITY PLANS FOR PROJECTS CONSTRUCTED IN ACCORDANCE WITH BUILDING PERMITS FILED AFTER JUN 28, 1984
Section 59-E-4.5.	Waiver – parking standards
Division 59-G-1.	SPECIAL EXCEPTIONS – AUTHORITY AND PROCEDURE.
Section 59-G-1.21.	General conditions

EXPLANATION: **Boldface** indicates a Heading or a defined term.
Underlining indicates text that is added to existing law by the original text amendment.
[Single boldface brackets] indicate that text is deleted from existing law by original text amendment.
Double underlining indicates text that is added to the text amendment by amendment.
[[Double boldface brackets]] indicate text that is deleted from the text amendment by amendment.
* * * indicates existing law unaffected by the text amendment.

ORDINANCE

The County Council for Montgomery County, Maryland, sitting as the District Council for that portion of the Maryland-Washington Regional District in Montgomery County, Maryland, approves the following ordinance:

1 **Sec. 1. DIVISION 59-E-4 is amended as follows:**

2 * * *

3 **Sec. 59-E-4.5. Waiver - parking standards.**

4

5 [The] When approving an application the Director, Planning Board, [or]
6 Board of Appeals, or Hearing Examiner may waive any requirement in this
7 Article not necessary to accomplish the objectives in Section 59-E-4.2, and in
8 conjunction with reductions may adopt reasonable requirements above the
9 minimum standards. Any request for a waiver under this Section must be
10 referred to all adjoining property owners and affected citizen associations for
11 comment before a decision on the requested waiver.

12 * * *

13 **Sec. 2. DIVISION 59-G-1 is amended as follows:**

14 * * *

15 **59-G-1.21. General conditions.**

16 (a) A special exception may be granted when the Board or the Hearing
17 Examiner finds from a preponderance of the evidence of record that the
18 proposed use:

19 * * *

20 (4) Will be in harmony with the general character of the
21 neighborhood, considering population density, design, scale,
22 and bulk of any proposed new structures, intensity and
23 character of activity, traffic and parking conditions, and number
24 of similar uses. [The Board or Hearing Examiner must consider
25 whether the public facilities and services will be adequate to
26 serve the proposed development under the Growth Policy

27 standards in effect when the special exception application was
28 submitted.]

29 * * *

30 (9) Will be served by adequate public services and facilities, including
31 schools, police and fire protection, water, sanitary sewer, public roads,
32 storm drainage, and other public facilities.

33 (A) If the special exception use requires approval of a
34 preliminary plan of subdivision, the Planning Board must
35 determine the adequacy of public facilities in its
36 subdivision review. In that case, approval of a
37 preliminary plan of subdivision must be a condition of
38 granting the special exception.

39 (B) If the special exception does not require approval of a
40 preliminary plan of subdivision, the Board of Appeals or
41 the Hearing Examiner must determine the adequacy of
42 public facilities when it considers the special exception
43 application. The Board must consider whether the
44 available public facilities and services will be adequate to
45 serve the proposed development under the Growth Policy
46 standards in effect when the application was submitted.

47 * * *

48 **Sec. 3. Effective date.** This ordinance takes effect 20 days after the date of
49 Council adoption.

50

51 This is a correct copy of Council action.

52

53

54 Linda M. Lauer, Clerk of the Council



MONTGOMERY COUNTY PLANNING BOARD

THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

OFFICE OF THE CHAIRMAN

MONTGOMERY COUNTY PLANNING BOARD

The Maryland-National Capital Park and Planning Commission

January 19, 2011

TO: The County Council for Montgomery County, Maryland, sitting as the District Council for the Maryland-Washington Regional District in Montgomery County, Maryland

FROM: Montgomery County Planning Board

SUBJECT: Zoning Text Amendment No. 10-13

BOARD RECOMMENDATION

The Montgomery County Planning Board of The Maryland–National Capital Park and Planning Commission reviewed Zoning Text Amendment No. 10-13 at its regular meeting on January 13, 2011. By a vote of 4:0, the Board recommends approval of the text amendment to provide the Hearing Examiner the authority to waive parking requirements and to determine the adequacy of public facilities in special exception cases where the Examiner has the authority to deny or approve the special exception, consistent with the authority that the Board of Appeals currently has when it decides a special exception. Planning Board staff's proposed modifications are minor clarifications to assist in achieving the proposed objective.

CERTIFICATION

This is to certify that the attached report is a true and correct copy of the technical staff report and the foregoing is the recommendation adopted by the Montgomery County Planning Board of The Maryland-National Capital Park and Planning Commission, at its regular meeting held in Silver Spring, Maryland, on Thursday, January 13, 2011.

Françoise M. Carrier
Chair

FC: GR



MONTGOMERY COUNTY PLANNING DEPARTMENT
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

MCPB
Item #10
1/13/11

DATE: January 3, 2011
TO: Montgomery County Planning Board
VIA: Rose Krasnow, Chief, Area 1 *JK*
FROM: Greg Russ, Zoning Coordinator, Functional Planning & Policy *GR*
REVIEW TYPE: Zoning Text Amendment
PURPOSE: To allow the Hearing Examiner to decide adequate public facility issues and parking waivers when the Examiner is granted the authority to approve a special exception application

TEXT AMENDMENT: No. 10-13
REVIEW BASIS: Advisory to the County Council sitting as the District Council, Chapter 59 of the Zoning Ordinance
INTRODUCED BY: Councilmember Floreen
INTRODUCED DATE: December 14, 2010

PLANNING BOARD REVIEW: January 13, 2011
PUBLIC HEARING: January 18, 2011; 1:30pm

STAFF RECOMMENDATION: Approval with modifications to provide the Hearing Examiner the authority to waive parking requirements and to determine the adequacy of public facilities in special exception cases where the Examiner has the authority to deny or approve the special exception. The Board of Appeals currently has this authority when it decides a special exception. Staff's proposed modifications are minor clarifications to assist in achieving the proposed objective.

ANALYSIS

A summary of the proposed changes, by general category, is discussed below.

I. Provide the Hearing Examiner the authority to grant parking waivers (Section 59-E-4.5)

Currently the Director of DPS, the Planning Board or the Board of Appeals may waive any off-street parking and loading requirement not necessary to accomplish the objectives in Section 59-E-4.2 (parking facilities). This section provides authority to the applicable agency/department where final decision

making is granted. In the case of special exception approvals, the Board of Appeals has the decision-making authority for most special exception types and has parking waiver authority for these uses.

In addition to the authorization given to the Board of Appeals to hear and decide petitions for special exceptions under Section 59-A-4.11, the Hearing Examiner may hear and decide petitions for special exceptions for several uses that include: boardinghouses for 3 guests or fewer and home occupations (in both cases if located in the R-30, R-20 or R-10 zones); noncommercial riding stable for not more than 2 horses, for personal or family use in the RE-2 zone; temporary structures in residential zones; renewals of temporary special exceptions originally granted by the Board, Director of DPS or Hearing Examiner for boardinghouses, and home occupations; farm tenant mobile homes, for more than one but less than 4, provided such farm tenant mobile homes meet the definition established for such uses by this chapter and that such uses are not within 200 feet of a non-farm residence; and child day care facilities for up to 30 children. ZTA 10-13 modifies Section 59-E-4.5 by establishing parking waiver authority for the Hearing Examiner, consistent with the authority granted to other application-approving agencies/departments as stated above. Staff recommends approval of these changes.

II. Provide the Hearing Examiner the authority to determine the adequacy of public facilities in certain special exception cases (Section 59-G-1.21-General conditions)

Under the general conditions of approval for a special exception application (Section 59-G-1.21), a special exception may be granted when the Board of Appeals or the Hearing Examiner finds from a preponderance of the evidence of record that the proposed use complies with a number of findings, one being the adequacy of public facilities and services to serve a proposed development (Section 59-G-1.21(a)(9)). Currently subsection 9(B) only includes the Board of Appeals as an agency/department authorized to make a determination of adequate public facilities when a special exception does not require approval of a preliminary plan of subdivision. ZTA 10-13 clarifies subsection 9(B) to make certain that the Hearing Examiner also has authority to determine the adequacy of public facilities and services for special exception developments that it has authority to hear and decide. Staff recommends approval of these changes with several additional modifications as depicted below and included on lines 40 and 43 of ZTA 10-13 (see Attachment 1). Staff's proposed deletions are **[[Double boldface bracketed]]** and additions are Double underlined

- (B) If the special exception does not require approval of a preliminary plan of subdivision, the Board **[[of Appeals]]** or the Hearing Examiner must determine the adequacy of public facilities when it considers the special exception application. The Board or Hearing

Examiner must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application was submitted.

GR
Attachments

1. Proposed Text Amendment No. 10-13

MEMORANDUM

January 7, 2011

TO: Valerie Ervin, President
Montgomery County Council

THROUGH: Jeff Zyontz
Legislative Counsel

FROM: Martin L. Grossman, Director
Office of Zoning and Administrative Hearings

SUBJECT: Statement of OZAH in Support of Proposed ZTA 10-13 to Clarify Hearing Examiner's Authority under Zoning Ordinance §59-E-4.5, §59-G-1.21(a)(4) and §59-G-1.21(a)(9)(B) in Cases Decided by the Hearing Examiner

The Office of Zoning and Administrative Hearings supports proposed ZTA 10-13, which is needed to clarify the Hearing Examiner's authority in cases decided by the Hearing Examiner.

The issue arose out of a petition for a child care center special exception for under 30 children, which, by statute, is decided by the Hearing Examiner. In that case, Petitioner requested a waiver of certain parking regulations pursuant to Zoning Ordinance §59-E-4.5. Under the existing statutory provision, the Hearing Examiner is not given the authority to grant such a waiver, only the DPS Director, the Planning Board and the Board of Appeals. In order to avoid unnecessary delay and additional process before the Board of Appeals in cases to be decided by the Hearing Examiner, the list of those empowered to waive a parking standards when approving an application, should include the Hearing Examiner.

The language proposed in ZTA 10-13 to accomplish this end is appropriate:

Sec. 59-E-4.5. Waiver - parking standards.

[The] When approving an application the Director, Planning Board, [or] Board of Appeals, or Hearing Examiner may waive any requirement in this Article not necessary to accomplish the objectives in Section 59-E-4.2, and in conjunction with reductions may adopt reasonable requirements above the minimum standards. Any request for a waiver under this Section must be referred to all adjoining

property owners and affected citizen associations for comment before a decision on the requested waiver.

The second change proposed in ZTA 10-13 would appropriately eliminate the last sentence in Zoning Ordinance §59-G-1.21(a)(4), which requires the Board of Appeals or the Hearing Examiner, in acting on a special exception petition, to consider whether the public facilities and services will be adequate, regardless of whether that evaluation must be performed by the Planning Board at preliminary plan of subdivision. As such, that requirement conflicts with §59-G-1.21(a)(9)(A), which requires APF determination to be made by the Planning Board, not the Board of Appeals, when a preliminary plan of subdivision is required.

The following language proposed in ZTA 10-13 accomplishes this change:

59-G-1.21. General conditions.

(a) A special exception may be granted when the Board or the Hearing Examiner finds from a preponderance of the evidence of record that the proposed use:

* * *

(4) Will be in harmony with the general character of the neighborhood, considering population density, design, scale, and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses. [The Board or Hearing Examiner must consider whether the public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the special exception application was submitted.]

Finally, in cases decided by the Hearing Examiner that do not require a preliminary plan of subdivision, the APF determination should be made by the Hearing Examiner; however, the existing language in Zoning Ordinance §59-G-1.21(a)(9)(B) does not authorize the Hearing Examiner to make the decision regarding the adequacy of public facilities in such cases. Only the Board of Appeal is given that authority. Clearly, the Hearing Examiner, as well as the Board, should be given this authority under §59-G-1.21(a)(9)(B), in order to avoid unnecessary additional proceedings before the Board of Appeals in cases decided by the Hearing Examiner. Interestingly, the last sentence in the existing §59-G-1.21(a)(4), a sentence which, as noted above, should not be in the Zoning Ordinance given the subdivision/no-subdivision dichotomy of §59-G-1.21(a)(9)(B), does authorize the Hearing Examiner to make the public facilities decision. Moreover, Zoning Ordinance §59-G-1.21(a)(9)(C) allows the Hearing Examiner to make a finding on road safety. Apparently, the Hearing Examiner's authority was inadvertently omitted from the existing §59-G-1.21(a)(9)(B).

The following language in ZTA 10-13 would correct this omission:

59-G-1.21. General conditions.

- (a) A special exception may be granted when the Board or the Hearing Examiner finds from a preponderance of the evidence of record that the proposed use:

* * *

- (9) Will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage, and other public facilities.
- (A) If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of granting the special exception.
- (B) If the special exception does not require approval of a preliminary plan of subdivision, the Board of Appeals or the Hearing Examiner must determine the adequacy of public facilities when it considers the special exception application. The Board or Hearing Examiner¹ must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application was submitted.

In sum, I believe that the changes proposed by ZTA 10-13 will appropriately clarify the Hearing Examiner's authority in cases it decides and will prevent unnecessary delay in resolving all issues in those cases.

Please let me know if you have any questions.

MLG

¹ I added the double-underlined language to the proposed ZTA at the suggestion of Technical Staff (memorandum of 1/3/11). I did not agree with the other suggested change of Technical Staff which would have removed the words "of Appeals" after the word Board, because the same section of the Code also discusses the Planning Board, and to refer only to the "Board" would create confusion in the section.

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Zoning Text Amendment No. 10-13 (Testimony of William Kominers; January 18, 2011)

Good Afternoon President Ervin and Members of the Council. My name is Bill Kominers. I am an attorney with Holland & Knight in Bethesda, and I am here to testify on Zoning Text Amendment No. 10-13.

The theory behind this text amendment is fine. However, there is one nuance in the current process that this legislation provides an opportunity to address. That is the treatment of a special exception that does not require approval of a preliminary plan of subdivision at the Board of Appeals or Hearing Examiner, because it already has preliminary plan and/or APF approval at the time it arrives. In the instance where a property already has an approved preliminary plan or an approved adequate public facilities approval, no determination of adequacy is needed because it has already been done. (Obviously this only applies to a situation where the special exception has the same or lesser APF impact as the pre-existing approval.)

The way the current Code and this legislation reads -- and the dilemma in which it has placed the Hearing Examiner at times -- is the matter of compliance with the direction that "if the special exception does not require approval of a preliminary plan . . ." then the Hearing Examiner or Board of Appeals must determine the adequacy of public facilities when considering the special exception. However, a special exception might "not require approval of a preliminary plan" because one has already been approved, either immediately before proceeding to the Board of Appeals or long before. In these instances, no determination of APF is needed because the Planning Board has already done so. But, the Hearing Examiner is often left with a strict reading of the Code that if approval of a preliminary plan is not required (presumably meaning after the special exception decision) then the Examiner must make an APF determination.

The law should be clear that when a property seeking a special exception already has preliminary plan/APF approval for the same or greater impact than is proposed by the special exception, no additional independent determination on that issue is required by the Board of Appeals or the Hearing Examiner.

As you may imagine, this is not a frequent situation. But the situation can arise in a variety of contexts. A pre-existing APF approval or preliminary plan approval can exist in the reuse or conversion of use of a property, or an undeveloped lot in an existing subdivision, originally approved for a more impactful use, that for market reasons now seeks a special exception that has the same or lesser APF impact. In these conditions, a new APF determination is not needed; the property has already obtained that approval.

There is no need to go back to the Planning Board to obtain approval of a preliminary plan of subdivision -- the property already has one. To the extent any determination is needed for the special exception, the "determination" should be simply to acknowledge and use the APF determination that already exists for the property.

This problem arises because the Board and/or Hearing Examiner may be constrained by the introductory phrase in the existing law that states "if the special exception does not require approval of a preliminary plan of subdivision . . ." While this language really means to apply only when the property does not require a "new" preliminary plan of subdivision, or a preliminary plan approval after the special exception, that is not always the way it is read. Under a very technical reading of the Code, when the matter comes to the Hearing Examiner or the Board of Appeals, the foregoing special exception "does not require" subsequent approval of a preliminary plan. As a result, the Hearing Examiner has felt constrained to make an APF finding, simply because of the instruction of the introductory phrase.

To address this anomaly, I recommend that in Subsection (9)(B) of the ZTA:

(1) insert the word "new" at the end of Line 39 and

(2) the following phrase at Line 40: "and does not already have a currently valid APF determination for the same or greater impact as the special exception."

With these additions, the lead-in sentence would read as follows: "if the special exception does not require approval of a new preliminary plan of subdivision, and does not already have a currently valid APF determination for the same or greater impact as the special exception, then, the Board of Appeals or the Hearing Examiner must determine . . ."

Thank you for your consideration of this unusual situation. I hope you will take the opportunity to make an appropriate correction.