

**MEMORANDUM**

June 14, 2012

TO: Planning, Housing, and Economic Development Committee  
FROM: Jeff Zyontz,  Legislative Attorney  
SUBJECT: Zoning Text Amendment 12-05, Commercial/Residential Zones - Grandfathering

Zoning Text Amendment (ZTA) 12-05, sponsored by the Planning, Housing, and Economic Development Committee, was introduced on February 28, 2012.

The purpose of ZTA 12-05 is to give greater force and effect to the terms and conditions of any special exception approvals, particularly when a sketch plan, preliminary plan, or site plan is before the Planning Board. ZTA 12-05 would also fully extend the grandfathering provisions of the CR zones to CRN and CRT zones. It would grandfather lawfully existing structures or uses, approved development plans, schematic development plans, preliminary plans, and special exceptions.

The issue concerning special exceptions was raised in the course of the Council's deliberations on the Wheaton and Kensington Master Plans and Sectional Map Amendments. Residents were concerned that the protections afforded residential properties in the course of special exception approvals would be completely ignored in the course of approving new plans.

The Planning Board recommended approval of ZTA 12-05 with a modification to retain notification to the Board of Appeals that the special exception has been abandoned. The Planning Board also recommended deleting a phrase concerning the status of uses and structures approved as special exceptions. Planning Staff recommended deleting the provision that stated "the Planning Board must consider the terms and conditions of the approved special exception" when approving a plan under the CR, CRN, or CRT zones. Planning Staff expressed the opinion that the new zone should reflect a new determination by the Council about the appropriateness of the allowed uses, and that property owners should be able to proceed accordingly. As an alternative to deleting the provision, Planning Staff recommended changing the "must consider" to "may consider". The Planning Board rejected these recommendations.

A public hearing on ZTA 12-05 was held on April 10, 2012 at 1:30 p.m. Testimony favored approval of ZTA 12-05.

## Issues

*Should the Zoning Ordinance continue to require notification to the Board of Appeals when a change in zoning makes the special exception approval unnecessary?*

Property owners with special exceptions are required to pay the Department of Permitting Services for annual inspections. If no payment is received, the Department will ask the Board of Appeals to revoke the special exception. A property owner may notify the Board of Appeals when a special exception is abandoned; however, the Zoning Ordinance still requires the Board of Appeals to revoke the special exception.<sup>1</sup> The process for revocation is far more onerous for the Board of Appeals if the property owner does not acknowledge the abandonment.<sup>2</sup> A property owner's acknowledged abandonment avoids the need for an adversarial show cause hearing.

The Department of Permitting Services needs to maintain accurate records of special exceptions so that it can efficiently schedule inspections. The Board of Appeals also requires accurate records. The Board of Appeals considers the location of special exceptions when it decides to grant or deny new special exceptions.

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<sup>1</sup> § 59-G-1.3. Compliance with special exception grant...

(d)...

- (1) If, after making an inspection of a property governed by special exception, the Department finds that the special exception use as granted has been abandoned, it must forward written notice of its findings to the last recorded holder of the special exception and to the property owner, advising of the Department's finding and directing that they forward to the Department, within 60 days from the date of mailing of the notice, a written statement confirming the Department's finding that the special exception has been abandoned or challenging said finding and requesting that said special exception be continued....

<sup>2</sup> § 59-G-1.3. Compliance with special exception grant...

- (e) Show cause hearing for revocation of a special exception. If, under this Article, the Board receives a written notice from the Department that the terms or conditions of a special exception grant or that the terms, conditions or restrictions attached to the grant of any permit issued under this Article are not being complied with, the Board, by an affirmative vote of at least 3 members, may order the special exception holder and the property owner to appear before the Board at a date, time, and place specified to show cause why the special exception should not be revoked.
  - (1) The notice of a show cause hearing must be issued to the special exception holder, the property owner, the Department and to all parties who have submitted written complaints concerning the special exception. Written notice may also be sent, at the discretion of the Board, to those parties entitled to receive notice of the original petition for the special exception and to other interested persons, organizations or agencies.
  - (2) The notice of show cause hearing must contain the name of the special exception holder, the location and zoning classification, the case number, the telephone number, office address and business hours of the Board and the date, time and place fixed for the hearing.
  - (3) The notice of show cause hearing must state in detail the nature of the complaints received concerning the operation of the special exception and/or the nature of the alleged violations reported by the Department, and must state that the hearing is limited to a consideration and a determination of the validity of the allegations. The notice must further advise the special exception holder and the property owner that failure to attend and participate in the hearing may result in issuance of an order revoking the special exception.
  - (4) The Board must give such matters priority on its docket and must schedule show cause hearings as promptly as possible; provided, that such hearing must be held not less than 30 days following the date on which the notice was mailed. Nothing herein prohibits the Board from convening a hearing within a shorter period of time if the Board determines by the vote of at least 3 members that an emergency exists which poses an immediate threat to the public health, safety, convenience, welfare or necessity, or that delay would impose unusual individual or community hardship.
  - (5) The show cause hearing is be limited to consideration of the issues noted in the order and notice of hearing.
  - (6) Within 15 days after the close of the record of the proceedings, the Board must make a determination on the issues presented. The Board, by the affirmative vote of at least 4 members, may reaffirm or revoke the special exception, or amend, add to, delete or modify the existing terms or conditions of the special exception. The decision of the Board must be by the adoption of a written resolution. If necessary, the Board may adopt a resolution extending the time in which to issue its decision....

The current law does not contemplate the Council making zoning changes that make a special exception no longer necessary. This situation occurred in Wheaton and Kensington when residentially zoned parking lots were rezoned to the CRN or CRT zones from residential zones. Parking is a special exception use in residential zones, but is a permitted use in the CRN and CRT zones. In a perfect world, the rezoning action would automatically revoke the special exception, because a special exception is no longer required for the use.<sup>3</sup>

As introduced, ZTA 12-05 would relieve the property owner of notifying the Board that a special exception was abandoned, but would not relieve the Board of Appeals from the burden of revoking the special exception. Only an amendment to §59-G-1.3 would accomplish that objective, but the scope of the advertisement for ZTA 12-05 will not let the Council make such a change without re-advertising. **Staff recommends retaining the current notification requirements and looking to the Zoning Ordinance Rewrite for a more comprehensive approach.**

*Should the Zoning Ordinance require the Planning Board's consideration of the conditions of a special exception approval when the special exception is no longer required by zoning?*

Planning Staff recommended deleting the requirement for the Planning Board to consider the conditions of a special exception approval when it considers a sketch plan or preliminary plan under any of the CR zones. The Planning Board disagreed with Planning Staff. Considering the conditions of the special exception is the least that can be done to make sure that the protections in the special exception are not abandoned or modified without knowing that they existed, and that they might still be relevant when the Planning Board reviews the design elements of a new plan. **Staff agrees with the Planning Board; the Board should be required to consider the conditions of a special exception approval.**

*Should the Zoning Ordinance state that uses and structures approved under a special exception continue to be lawful?*

ZTA 12-05 would amend §59-C-15.9(a) by adding the underlined words in the following provision: “one or more lawfully existing buildings, structures, or uses that predate the application of the CRN, CRT, or CR zone to the land are conforming structures or uses....” ZTA 12-05 would also amend §59-C-15.9(e) to read, “A project that [has] had a special exception approved before application of the CRT, CRN, or CR zone to the site may...continue as a lawfully existing use and a lawful structure as long as it fully complies with the terms and conditions of its approval.” Without any explanation, the Planning Board recommended deleting “as a lawfully existing use and a lawful structure” from Subsection (e). It can be argued that any lawful building or use existing before rezoning continues to be legal (not legal merely due to the fact that it is a legal non-conforming use) under Subsection (a) without the repetition in Subsection (e). Staff would rather state the condition under which a special exception use may continue in Subsection (e) so that a single provision applies to special exceptions. **Staff recommends retaining ZTA 12-05 as introduced.**

This Packet Contains  
ZTA 12-05

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<sup>3</sup> In a perfect world, a Sectional Map Amendment transmitted by the Planning Board would list all special exceptions that would be extinguished by virtue of the rezoning. An annotated layer of the zoning map would also document the extinguished special exception number. Once approved, the Council would send the list and maps to the Department of Permitting Services and the Board of Appeals.

There is no testimony in the record to support the conclusion that we live in a perfect world.

Zoning Text Amendment No.: 12-05  
Concerning: Commercial/Residential  
Zones - Grandfathering  
Draft No. & Date: 2 – 2/15/12  
Introduced: February 28, 2012  
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**

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By: The Planning, Housing, and Economic Development Committee

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**AN AMENDMENT** to the Montgomery County Zoning Ordinance to:

- apply the grandfathering provisions of CR zones to CRT and CRN zones; and
- revise the grandfathering provision for projects with a previously approved special exception.

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

DIVISION 59-C-15 “COMMERCIAL/RESIDENTIAL ZONES”  
Section 59-C-15.9 “Existing Approvals”

**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-C-15 is amended as follows:**

2   DIVISION 59-C-15. COMMERCIAL/RESIDENTIAL ZONES.

3   \*   \*   \*

4   **59-C-15.9. Existing Approvals.**

5   (a)   One or more lawfully existing buildings, structures, or uses that predate the  
6       application of the CRT, CRN, or CR zone to the land are conforming  
7       structures or uses and may be continued, renovated, repaired, or  
8       reconstructed to the same size and configuration, or enlarged up to a total of  
9       10 percent above the total existing floor areas of all buildings and structures  
10      on site or 30,000 square feet, whichever is less, and such development does  
11      not require a site plan. Any enlargement of a building structure or use may  
12      be further limited by Subsection (e). Expansions in excess of the limitations  
13      in this Subsection will require compliance with the full provisions of this  
14      Division. Uses located in a building or structure deemed conforming under  
15      the provisions of this Subsection may be converted to any permitted non-  
16      residential or residential use(s) up to the density limits for the land use  
17      established by the CRT, CRN, or CR zone.

18   (b)   A project that received an approved development plan under Division 59-D-  
19       1 or schematic development plan under Division 59-H-2 before the  
20       application of the CRT, CRN, or CR [zones] zone to the land may proceed  
21       under the binding elements of the development plan and will thereafter be  
22       treated as a lawfully existing building, and may be renovated or  
23       reconstructed under Subsection (a) above. Such development plans or  
24       schematic development plans may be amended as allowed under Division  
25       59-D-1 or 59-H-2 under the provisions of the previous zone; however, any  
26       incremental increase in the total floor area beyond that allowed by  
27       Subsection (a) above or any incremental increase in building height greater

28 than 15 feet requires, with respect to the incremental increase only, full  
29 compliance with the provisions of this Division. Any failure to fully comply  
30 with the binding elements of the development plan will require full  
31 compliance with the provisions of this Division.

32 (c) At the option of the owner, any portion of a project subject to an approved  
33 development plan or schematic development plan described in Subsection  
34 (b) above may be developed under this Division. The remainder of that  
35 project continues to be subject to the approved development plan or  
36 schematic development plan under Subsections (a) and (b).

37 (d) A project which has had a preliminary or site plan approved before the  
38 application of the CRT, CRN, or CR zone to the property may be built or  
39 altered at any time, subject to either the full provisions of the previous zone  
40 or this Division, at the option of the owner. If built under the previous  
41 approval, it will then be treated as a conforming building, structure, or use  
42 and may be renovated, continued, repaired, or reconstructed under  
43 Subsection (a) above. If built with an incremental increase over the previous  
44 approval, only that incremental increase must comply with this Division.

45 (e) A project that [has] had a special exception approved before application of  
46 the CRT, CRN, or CR zone to the site may:

47 (1) continue as a lawfully existing use and a lawful structure as long as it  
48 fully complies with the terms and conditions of its approval[. Any];  
49 any failure to fully comply with the terms and conditions of the  
50 special exception approval will require full compliance with the  
51 provisions of this Division[.];

52 (2) [If a special exception holder chooses to] operate under this Division  
53 instead of under the special exception, [written notice must be  
54 provided to the Board of Appeals that the special exception has been

55                   abandoned] by the approval of a sketch plan, preliminary plan, or site  
56                   plan; any plan approved by the Planning Board under this Division  
57                   must consider the terms and conditions of the approved special  
58                   exception.

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60                   **Sec. 2. Effective date.** This ordinance becomes effective 20 days after the  
61                   date of Council adoption.

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63                   This is a correct copy of Council action.

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Linda M. Lauer, Clerk of the Council