

MEMORANDUM

March 28, 2013

TO: Planning, Housing, and Economic Development Committee

FROM: Jeff Zyontz,  Legislative Attorney

SUBJECT: Zoning Text Amendment 12-16, One-Family Dwelling – Pre-1928 Lots  
Zoning Text Amendment 12-18, Exemptions – Pre-1928 Resubdivisions  
Subdivision Regulation Amendment 12-03, Minor Subdivisions – Part of a Lot

Zoning Text Amendment (ZTA) 12-16, sponsored by Councilmember Floreen, was introduced on September 25, 2012. ZTA 12-16 would clarify that a one-family dwelling can be constructed on a lot recorded before 1928 on a land area smaller than 5,000 square feet, and existing houses on such lots can be reconstructed.

The Board of Appeals interprets the Zoning Ordinance as prohibiting the construction of a house on a lot recorded before 1928 that did not meet the minimum lot size for a one-family house (5,000 square feet of land area) required by the 1928 Ordinance.<sup>1</sup> In addition to preventing new construction, the Board's decision would prevent the reconstruction of existing houses without an approved variance. The Board's decision was petitioned for judicial review and is now before the Circuit Court. *ZTA 12-16 is an opportunity for the Council to determine its intent with regard to lots created before 1928.* In the absence of any clarification by the Council, the Circuit Court must determine the Council's intent when it enacted the provision of the Zoning Ordinance at issue.

ZTA 12-18, sponsored by Councilmember Floreen, was introduced on December 11, 2012. ZTA 12-18 concerns the **resubdivision** of pre-1928 lots. The current code does not allow the resubdivision of parts of lots with other land unless the resulting lot is at least 5,000 square feet. ZTA 12-18 would allow such subdivisions. SRA 12-03, sponsored by Councilmember Floreen, was introduced on November 27, 2012. SRA 12-03 would allow property within the circumstances of ZTA 12-18 to avoid the preliminary plan process and use the minor subdivision process.

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<sup>1</sup> BOA Case No. A-6361.

## **Planning Board Recommendation**

The Planning Board recommendation on ZTA 12-16 is based on an agreement among the Town of Glen Echo, represented by Norman Knopf; the applicant in the Board of Appeals case, represented by Soo Lee-Cho; and building industry representatives.

The Planning Board expressed concern about the unintended consequences of approving ZTA 12-16 as introduced. It recognized that there are several areas of the County where houses were constructed across pre-1928 lot lines. Under ZTA 12-16 as introduced, the houses could be replaced by 2 houses in a manner that would be out of character with established neighborhoods. The Planning Board recommended a requirement that adjoining substandard (smaller than 5,000 square feet) lots in common ownership must be combined.<sup>2</sup> In the Board's opinion, resubdivision should be required for both vacant lots and lots with houses on them. The Board supported SRA 12-03 to allow these resubdivisions to only file a plat (without a preliminary plan). Finally, the Board recommended a minor amendment to ZTA 12-18 to allow resubdivisions, even if the resulting lot does not meet the size and width requirements of the zone. The Planning Board's comments on ZTA 12-18 did not repeat their recommendation to require resubdivision of substandard lots under common ownership.

## **Planning Staff Comments**

Planning Staff recommended changing the word "size" to "area" in ZTA 12-16. They suggested that the provision to allow the construction of houses on all undersized lots could have undesirable consequences. The Planning Staff did not recommend a requirement for resubdivision when undersized lots in common ownership abut each other. They recommended a revision to ZTA 12-18 to clarify that it would allow development on substandard size lots if the lot contained a legally constructed one-family dwelling.

## **Public Hearing**

On November 13, 2012, the Council held a public hearing on ZTA 12-16. A representative of the owner of the lot that was denied a building permit by the Board of Appeals supported ZTA 12-16 as a reflection of the intent of the current provisions concerning pre-1928 lots. The Mayor of the Town of Glen Echo and the Cabin John Citizens Association supported the ability to rebuild an existing house, but believed that the ability to build on any size lot without a variance would be disruptive to the character of their neighborhoods. Citizens from Silver Spring and Capitol View also spoke in opposition to allowing houses on any size lot recorded before 1928. Chevy Chase Section 3, Chevy Chase West, and Kensington View opposed ZTA 12-16 as introduced. In correspondence, there was support for ZTA 12-16 from building interests.

On January 22, 2013, the Council held a public hearing on ZTA 12-18 and SRA 12-03. The one speaker, other than the representative of the Planning Board, testified in favor of SRA 12-03.

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<sup>2</sup> The Planning Board's recommendation on ZTA 12-16; however, ZTA 12-18 was advertised to address resubdivision issues, and the Board's recommendations may be addressed in that ZTA.

## **Background**

The County first adopted a Zoning Ordinance in 1928. The Ordinance required a minimum lot area of 5,000 square feet for a one-family dwelling constructed after the adoption of the Ordinance. Before 1928, there were no laws regulating record plats. Landowners filed plats at their own discretion starting in the late 1880s. The plats filed created lots without any standards for lot area or street frontage. There are a number of instances where a plat was recorded, but land was sold by deed for areas that included part of a lot or parts of several lots. It was not uncommon for a landowner to purchase 2 abutting lots and then build across lot lines when the lots were particularly small.

Houses built on lots smaller than 5,000 square feet are non-conforming and, currently, may not be reconstructed if demolished, in the absence of a variance.<sup>3</sup> Some lots created before 1928 are vacant. Vacant lots less than 5,000 square feet in area may not construct a new single-family house under the current Zoning Ordinance.

In tax records, there are 1,646 one-family zoned accounts (R-60 or R-90) in private ownership that are smaller than 5,000 square feet but more than 1,000 square feet.<sup>4</sup> This represents the minimum number of lots that could be affected by ZTA 12-16. The actual number of affected properties would be far greater. For example, the original Glen Echo subdivision created 486 tiny pie shaped lots. Most constructed houses are across 2 or 3 lots. There are approximately 110 houses in Glen Echo. The underlying lots in Glen Echo and elsewhere were not individually identified in the 1,646 number. The tax assessor generally combines abutting properties under common ownership into a single tax account.<sup>5</sup> The small lots are located in the oldest suburban areas of the County: Friendship Heights, Glen Echo, Capitol View, Chevy Chase, and Silver Spring.

### **The status of a house built on a substandard lot created before 1928**

The Board of Appeals concluded that, under the current Zoning Ordinance, one-family houses on lots smaller than 5,000 square feet recorded before 1928 are not conforming. If they are demolished or need substantial renovations (more than 50 percent of the building's floor area), they would be denied a building permit in the absence of applying for and getting a variance approved by the Board of Appeals.<sup>6</sup> Depending upon the circumstances, it is possible that the owner of a house demolished by fire that could not rebuild would argue that the use and enjoyment of their property has been "taken" by County regulations.

ZTA 12-16 would allow the reconstruction of existing houses without the need for a variance by amending §59-B-5.3(a).

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<sup>3</sup> This statement is true under the opinion of the Board of Appeals. The Department of Permitting Services is bound by that opinion unless it is overturned by judicial review or a new ZTA. The Department has not interpreted this provision consistently in the past. DPS has sometimes allowed construction of vacant substandard pre-1928 lots and has sometimes denied such permits. Since the recent Board of Appeals decision, the Department is not issuing permits for substandard pre-1928 lots.

<sup>4</sup> Of the 1,646 small tax accounts, 1,117 have houses on them and 486 are vacant. The number of undersized lots that have common ownership with abutting tracts defined by tax accounts is 134.

<sup>5</sup> Staff did not undertake the time-consuming task of counting all lots created on individual plats filed before 1928. Life is just too short.

<sup>6</sup> It is not certain that a variance would be issued by the Board of Appeals. See footnote 10.

The building permit applicant in the Board of Appeals decision took the position that “development standards” did not include compliance with the minimum lot area. In the 1928 Ordinance, there was no single section of code that used the term “development standards”. The provision for “area regulation” included minimum lot area and setbacks. Building height limits are in a separate subsection of the 1928 code. The Board of Appeals concluded that “development standards” includes minimum lot area. In the current code, the “development standards” subsection in residential zones includes minimum lot size, lot width, setbacks for lot lines, and building height. In any event, ZTA 12-16 would clarify that a one-family dwelling built before 1958 on a lot recorded before 1928 need not be on a lot that meets the development standards of 1928 with regard to lot size.

### **The status of vacant substandard lots created before 1928**

The owner of an undersized lot may not get a building permit for a house under the Board of Appeals interpretation. This is a point of contention with DPS. In the case that gave rise to the Board of Appeals interpretation, DPS looked at the following section of code:

Sec. 59-B-5.1. Buildable lot under previous ordinance.

Any lot that was recorded by subdivision plat prior to June 1, 1958, or any lot recorded by deed prior to June 1, 1958 that does not include parts of previously platted properties, *and that was a buildable lot under the law in effect immediately before June 1, 1958*, is a buildable lot for building a one-family dwelling only, even though the lot may have less than the minimum area for any residential zone. *(emphases added)*

DPS read this provision (“buildable lot under the law in effect before June 1, 1958”) as meaning that a lot buildable for ANY purpose (church, museum, library, etc.) is then buildable for a single family. The Board of Appeals did not find this to be a sound interpretation, given the context of the sentence, which was grandfathering lots.

If the Council agrees with the DPS interpretation, the construction of a house on any size lot created before 1928 would be allowed. It would, as testimony suggested, allow the demolition of houses that are built across 2 undersized lots to build 2 houses. In addition, currently vacant lots created before 1928 (as many as 529) would be buildable, even when they are the side yards of abutting houses.

A substandard lot either is in common ownership of an abutting lot or parcel or it is not. If the lot is abutting property in common ownership and the lot area for the house is less than 5,000 square feet, a Court may conclude that there has been a defacto subdivision by merger.<sup>7</sup> In this instance, a second house could never be built on the second lot unless the current house was demolished and the code allowed new construction on substandard lots.

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<sup>7</sup> Remes v. Montgomery County, 387 Md 52 (2005). Where 2 lots were in common ownership and the house on one lot was built closer to the second lot than would be permitted under setback requirements of the property’s zone, the Court of Appeals denied a building permit for a house on the second lot. The Court explained that a zoning merger did not nullify the prior subdivision; it merely consolidated lots to determine what could be constructed on the land and the use made of the land. The zoning merger that occurred in this case forestalled the creation of a non-conformity. Without the use of one lot as accessory to the second lot, the uses of both lots would have violated the zoning ordinance.

Ridge v. Baltimore Gas & Elec. Co., 352 Md. 645 (1999). The court held that the landowner was entitled by right to construct the enlargement of the substation on their parcel without regard to the original lot lines that initially separated the three parcels, so long as setback requirements were met from the exterior property lines of the combined parcel. A variance was not required.

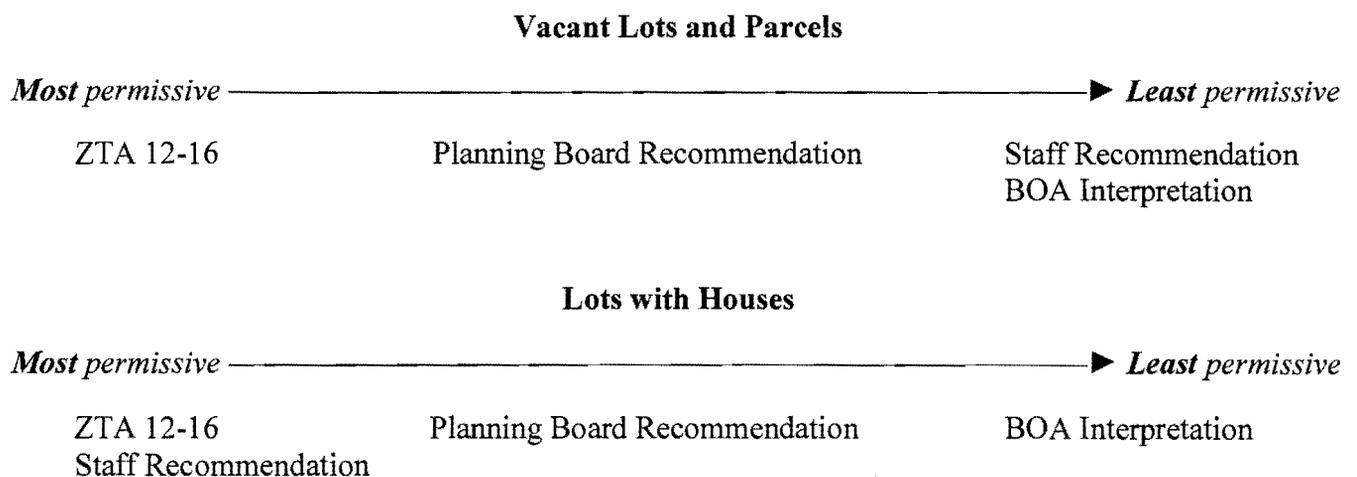
If the lot is owned without abutting property under common ownership, the owner might argue that the use and enjoyment of their property has been “taken” by County regulations.

**The status of a house on part of a lot**

A subdivision creates lots. Deeds create parcels. Before 1928, there was nothing to prevent an owner from ignoring a record plat and selling property described by deed with different boundaries than the record plat. This confusing series of transactions can result in the ownership of part of a lot. The Planning Board was particularly concerned about any house built on part of a lot when the abutting property is in common ownership. The Board recommended making the building “not non-conforming” and requiring a new record plat to consolidate 2 abutting undersized lots in common ownership. This issue may be addressed in ZTA 12-18 and SRA 12-03, which concern the ability of any lot owner to build on a resubdivided substandard lot that contains a legally constructed one-family dwelling.

**Issues**

The fundamental issue for the Council is how permissive the Zoning Ordinance and Subdivision Regulations should be regarding development of pre-1928 lots and parcels. The ZTAs and the SRA introduced would make development and redevelopment permissive. The Board of Appeals decision makes development very restrictive. The Planning Board recommended being permissive but requiring adjoining property in common ownership to consolidate into a single lot. The alternative proposed by Staff is identical to the Board of Appeals interpretation concerning vacant lots, but more permissive than the Planning Board’s recommendation for land with previously constructed housing. The following illustration puts the 3 alternatives (ZTA 12-16 as introduced, the Planning Board recommendation, and Staff’s recommendation) on a continuum between most permissive and least permissive for vacant property and property with houses.



## Vacant pre-1928 substandard lots

*Should lots or parts of lots be buildable without regard to the area of the lot?*

ZTA 12-16 as introduced will make all pre-1928 lots and parcels buildable, without any conditions. Any lot could become vacant by the demolition of the building on it. A house that crosses pre-1928 property lines could be demolished and then replaced by 2 houses. Testimony indicated that this would be disruptive to established neighborhoods. ZTA 12-16 includes the following text:

### **Sec. 59-B-5.1. Buildable lot under previous ordinance.**

Any lot that was recorded by subdivision plat [prior to] before June 1, 1958, or any lot recorded by deed [prior to] before June 1, 1958 that does not include parts of previously platted properties, and that was a buildable lot under the law in effect immediately before June 1, 1958, is a buildable lot for building a one-family dwelling only, even though the lot may have less than the minimum area for any residential zone. Any such lot may be developed under the zoning development standards in effect when the lot was recorded, except that:

- a) a lot recorded before March 16, 1928[,] in the original Maryland-Washington Metropolitan District must meet the development standards in the 1928 Zoning Ordinance; however, compliance with the minimum lot size for a one-family dwelling is not required;

The Planning Board recommended allowing construction on any size pre-1928 lot or parcel IF any abutting parcels in common ownership are resubdivided.<sup>8</sup>

The Planning Board draft would place a burden on DPS to verify the ownership history on property abutting a substandard sized lot and check the ownership going back in time to the effective date of the ZTA. It would place a burden on property owners with abutting property to resubdivide. If the Council agrees with the Planning Board's recommendation, it would be a revision to ZTA 12-18.

The Board of Appeals interpreted the current code to prohibit building houses on undersized lots. Staff recommends clarifying the provision for buildable lots and parcels in a manner that codifies the Board of Appeals interpretation.<sup>9</sup> This provision would prohibit the construction of a house on a substandard sized vacant lot under all circumstances. It would also prohibit the construction of 2 houses when a

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<sup>8</sup> **Sec. 59-B-5.1. Buildable lot under previous ordinance.**

....Any such lot {created before 1958 and buildable under prior law} may be developed under the zoning development standards in effect when the lot was recorded, except that:

- a) a one-family dwelling on a lot recorded before March 16, 1928[,] in the original Maryland-Washington Metropolitan District must meet the [[development standards in]] building line, and the front, side, and rear yard provisions of the 1928 Zoning Ordinance; [[however, compliance with the minimum lot size for a one family dwelling is not required.]] if such lot smaller than 5,000 square feet in land area adjoins any other lot in common ownership on November 8, 2012 or any time thereafter, the lots must be resubdivided under Section 59-B-5.4(c).

<sup>9</sup> **Sec. 59-B-5.1. Buildable lot under previous ordinance.**

...Any such lot {created before 1958 and buildable under prior law} may be developed under the zoning development standards in effect when the lot was recorded, except that:

- a) a one-family dwelling on a lot recorded before March 16, 1928[,] in the original Maryland-Washington Metropolitan District must meet the development standards in the 1928 Zoning Ordinance[[; however, compliance with the minimum lot size for a one-family dwelling is not required]], including the minimum lot area standard;

house built across 2 substandard sized lots is demolished. Under this change, a landowner who wanted to build a house on a substandard sized lot would have to get a variance from the Board of Appeals.<sup>10</sup>

*Should the lot or part of a lot be buildable if it is combined with an adjoining lot?*

Pre-1928 substandard lots or parts of lots with houses on them built before 1958 sometimes have common ownership with abutting property. Under these circumstances, the Planning Board recommends requiring a resubdivision.<sup>11</sup>

The Planning Board was guarding against one house becoming 2 houses and creating new houses on the side yards of existing houses.

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<sup>10</sup> A variance may not be required under the “merger” doctrine if an abutting lot is in common ownership and the combined lots equal or exceed the minimum lot size.

A variance, when required, may not always be granted by the Board of Appeals. Their latitude to grant variance is found in the following section:

Sec. 59-G-3.1. Authority-Board of Appeals.

The board of appeals may grant petitions for variances as authorized in section 59-A-4.11(b) upon proof by a preponderance of the evidence that:

- (a) By reason of exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary situations or conditions peculiar to a specific parcel of property, the strict application of these regulations would result in peculiar or unusual practical difficulties to, or exceptional or undue hardship upon, the owner of such property....

The Board of Appeals may not find that an undersized lot created before 1928 is “peculiar to a specific piece of property”. The provision for “undue hardship” requires that the situation be peculiar to a specific property.

In historic preservation cases, the Historic Preservation Commission and, ultimately, the Board of Appeals, must grant a requested building permit if:

“failure to grant the permit applied for will have the effect of denying the property owner of all reasonable use of his property or causing him to suffer undue hardship...”

The provision avoids a regulatory taking. If the Council agrees with Staff’s recommendation, the Council should introduce an additional ZTA to add this concept to the Board of Appeal’s variance granting authority.

<sup>11</sup> If the Council agrees with the Planning Board, Staff would recommend redrafting the Board’s proposed text as follows:

**Sec. 59-B-5.4. Resubdivision of lots, parts of lots, or parcels [[with dwellings]].**

- (a) Any two or more tracts of land created by deed or plat before June 1, 1958 may be consolidated by record plat into one building lot, even if the new lot does not meet the width and [[size requirements]] area provisions of the underlying zone, if:
  - (1) the tracts of land are under common ownership;
  - (2) a habitable one-family dwelling located on the tracts, before July 20, 2009, crossed a property line created by deed or plat documented by a professionally certified house location plan, previously issued demolition permit, or similar substantial evidence; [[and]]
  - (3) all the tracts of land on which the dwelling is, or was, located are included in the newly created lot; and
  - (4) if abutting vacant lots were in common ownership on November 8, 2012 or any time thereafter and the original lots were recorded in the original Maryland-Washington Metropolitan District before March 16, 1928, any such vacant lots under common ownership must be included in the newly created lot.
- (b) Any tract of land created by deed or plat before March 16, 1928 and containing a legally constructed one-family dwelling may be platted into one building lot. Such a tract of land [[may]] must be consolidated by the record plat with an [[adjacent]] abutting vacant tract of [[commonly owned]] land under common ownership on November 8, 2012 or any time thereafter, into a larger building lot, even if the resulting lot still does not meet the width and [[size requirements]] area provisions of [[any]] the applicable zone.
- (c) Any tract of land created by deed or plat before March 16, 1928 that fails to meet the width or area provisions of the 1928 Ordinance and is abutting a vacant tract of land under common ownership on November 8, 2012 or any time thereafter, must be platted into one building lot, even if the resulting lot still does not meet the width and area provisions of the applicable zone.
- (d) The dwelling on any lot created under [subsection] subsections (a), [[and]] (b), or (c) may be altered, renovated, enlarged, or replaced by a new dwelling under the zoning development standards in effect when the application is approved, even if the zoning [[standards]] provisions for the lot’s width and [[size]] [standards] area are not satisfied.

The Planning Board recommendation fails to recognize the concept of “merger” under the *Remes* decision. Under this doctrine, the Court would deny a building permit on the abutting undersized lot if the existing house was built within the zoning setback of the common lot line. Even if the *Remes* decision was not relevant, it would be unnecessary to have this safeguard if new houses on substandard sized lots were prohibited (as recommended by Staff).

*If abutting undersized lots in common ownership must resubdivide, what would happen if the abutting lot is sold before a permit was issued?*

Under the Planning Board’s recommendation, an abutting owner who sells an undersized lot would be barred from getting a building permit on the unsold lot without a variance. The new owner of the abutting lot would also need a variance for any building permit.

*Should the building renovation and rebuilding of houses on substandard sized pre-1928 lots be allowed as a conforming use?*

The Board of Appeal’s interpretation of the current code makes some existing dwellings non-conforming. If a non-conforming building is destroyed by any means (fire or intentional demolition), it may not be rebuilt. This outcome is extremely harsh and may result in litigation, particularly if the Board of Appeals has limited authority to grant variances.<sup>12</sup>

The Planning Board and Council Staff recommend approval of ZTA 12-16 for its treatment of existing houses (§59-B-5.3), with editorial changes.<sup>13</sup>

*Should the lot or part of a lot be required to combine with an adjoining lot?*

In its recommendation on ZTA 12-16, the Planning Board recommended a new provision that would require resubdivision of abutting substandard lots under common ownership.<sup>14</sup>

The Planning Board’s idea addresses the fear that a single house on a substandard lot could be replaced by 2 houses on 2 substandard lots if the original house is demolished. It would allow 2 houses on 2 substandard lots if the abutting lot is in different ownership. It is a reasonable fear, because the Planning Board also recommends allowing dwellings on any size pre-1928 vacant lots or parcels.

Staff recommends requiring resubdivision of abutting substandard lots under common ownership ONLY if the Council wants to allow building on any size lot or parcel recorded before 1928.

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<sup>12</sup> See footnote 10.

<sup>13</sup> **Sec. 59-B-5.3. One-family dwelling on a single lot.**

Any one-family dwelling in a residential zone or agricultural zone that was built on a lot legally recorded by deed or subdivision plat before June 1, 1958[,] is not a nonconforming building. The dwelling may be altered, renovated, [or] enlarged, or replaced by a new dwelling on a single lot, under the zoning development standards in effect when the lot was recorded, except that:

- (a) a one-family dwelling on a lot recorded before March 16, 1928[,] in the original Maryland-Washington Metropolitan District[,] must meet the [[development standards]] front, side, and rear yard provisions in the 1928 Zoning Ordinance; ~~[[however, compliance with the minimum lot for a one-family dwelling is not required;]]~~

<sup>14</sup> There are 3 circumstances under which a resubdivision would be required: 1) a house that crosses lot lines and the combined area of the lots is less than 5,000 square feet; 2) a house on a substandard sized lot that abuts a substandard sized lot under common ownership; and 3) vacant abutting lots.

*What development standards should apply?*

There is a consistent theme in both the Zoning Ordinance and Subdivision Regulations. Buildings on lots and parcels that do not change in terms of their size or shape are generally grandfathered; the building may be built or reconstructed under the standards of the zone applicable when the lot or parcel was created. Resubdivided property must be constructed to the standards of the current zone.<sup>15</sup>

Grandfathering provisions hold harmless buildings and land that have not changed BUT where the zone has changed. When the land ownership patterns change, the new standards become applicable. The standards in the most recently applied zone are in the public interest; otherwise, the Council would not have changed the standards in the zone.

In ZTA 12-16, where there is no change by the property owner, the 1928 standards apply. In ZTA 12-18, where the property owner is resubdividing, the current zoning standards apply except for minimum lot size.

*Were there any issues raised regarding SRA 12-03?*

SRA 12-03 allows the resubdivision of certain abutting properties into 1 single lot under the minor subdivision process (no requirement to submit a preliminary plan). There was support for SRA 12-03 as introduced.

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<sup>15</sup> §59-B-5.4(b)(b). The dwelling on any lot created under subsection (a) may be altered, renovated, enlarged, or replaced by a new dwelling **under the zoning development standards in effect when the application is approved**, even if the lot's width and size standards are not satisfied. (*emphases added*)

1           **Sec. 1. DIVISION 59-B-5 is amended as follows:**

2   DIVISION 59-B-5. SPECIAL PROVISIONS FOR CONDITIONS PREDATING  
3   1958.

4   \*   \*   \*

5   **Sec. 59-B-5.1. Buildable lot under previous ordinance.**

6   Any lot that was recorded by subdivision plat [prior to] before June 1, 1958, or any  
7   lot recorded by deed [prior to] before June 1, 1958 that does not include parts of  
8   previously platted properties, and that was a buildable lot under the law in effect  
9   immediately before June 1, 1958, is a buildable lot for building a one-family  
10   dwelling only, even though the lot may have less than the minimum area for any  
11   residential zone. Any such lot may be developed under the zoning development  
12   standards in effect when the lot was recorded, except that:

13       a) a one-family dwelling on a lot recorded before March 16, 1928[,] in the  
14       original Maryland-Washington Metropolitan District must meet the  
15       [[development standards in]] building line, and the front, side, and rear yard  
16       provisions of the 1928 Zoning Ordinance; [[however, compliance with the  
17       minimum lot size for a one family dwelling is not required.]] if such lot  
18       smaller than 5,000 square feet in land area adjoins another lot in common  
19       ownership on November 8, 2012 or any time thereafter, the lots must be  
20       resubdivided under Section 59-B-5.4(c).

21   \*   \*   \*

22   **Sec. 59-B-5.3. One-family dwelling on single lot.**

23   Any one-family dwelling in a residential zone or agricultural zone that was  
24   built on a lot legally recorded by deed or subdivision plat before June 1,  
25   1958[,] is not a nonconforming building. The dwelling may be altered,  
26   renovated, [or] enlarged, or replaced by a new dwelling on the single lot,

27 under the zoning development standards in effect when the lot was recorded,  
28 except that:

29 (a) a one-family dwelling on a lot recorded before March 27 16, 1928[,]  
30 in the original Maryland-Washington Metropolitan District[,] must  
31 meet the [[development standards in]] front, side, and rear yard  
32 provisions of the 1928 Zoning Ordinance; [[however, compliance  
33 with the minimum lot size for a one family dwelling is not required.]]

34 \* \* \*

35 **Sec. 59-B-5.4. Resubdivision of lots, parts of lots, or parcels [[with dwellings]].**

36 (a) Any two or more tracts of land created by deed or plat before June 1, 1958  
37 may be consolidated by record plat into one building lot, even if the new lot  
38 does not meet the width and [[size requirements]] area provisions of the  
39 underlying zone, if:

- 40 (1) the tracts of land are under common ownership;
- 41 (2) a habitable one-family dwelling located on the tracts, before July 20,  
42 2009, crossed a property line created by deed or plat documented by a  
43 professionally certified house location plan, previously issued  
44 demolition permit, or similar substantial evidence; [[and]]
- 45 (3) all the tracts of land on which the dwelling is, or was, located are  
46 included in the newly created lot; and
- 47 (4) if abutting vacant lots were in common ownership on November 8,  
48 2012 or any time thereafter and the original lots were recorded in the  
49 original Maryland-Washington Metropolitan District before March  
50 16, 1928, any such vacant lots under common ownership must be  
51 included in the newly created lot.

52 (b) Any tract of land created by deed or plat before March 16, 1928 and  
53 containing a legally constructed one-family dwelling may be platted into one

54 building lot. Such a tract of land [[may]] must be consolidated by the record  
55 plat with an [[adjacent]] abutting vacant tract of [[commonly owned]] land  
56 under common ownership on November 8, 2012 or any time thereafter, into  
57 a larger building lot, even if the resulting lot still does not meet the width  
58 and [[size requirements]] area provisions of [[any]] the applicable zone.

59 (c) Any tract of land created by deed or plat before March 16, 1928 that fails to  
60 meet the width or area provisions of the 1928 Ordinance and is abutting a  
61 vacant tract of land under common ownership on November 8, 2012 or any  
62 time thereafter, must be platted into one building lot, even if the resulting lot  
63 still does not meet the width and area provisions of the applicable zone.

64 (d) The dwelling on any lot created under [subsection] subsections (a), [[and]]  
65 (b), or (c) may be altered, renovated, enlarged, or replaced by a new  
66 dwelling under the zoning development standards in effect when the  
67 application is approved, even if the zoning [[standards]] provisions for the  
68 lot's width and [[size]] [standards] area are not satisfied.

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

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73 This is a correct copy of Council action.

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Linda M. Lauer, Clerk of the Council

1           **Sec. 1. DIVISION 59-B-5 is amended as follows:**

2   DIVISION 59-B-5. SPECIAL PROVISIONS FOR CONDITIONS PREDATING  
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4   \*   \*   \*

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6   Any lot that was recorded by subdivision plat [prior to] before June 1, 1958, or any  
7   lot recorded by deed [prior to] before June 1, 1958 that does not include parts of  
8   previously platted properties, and that was a buildable lot for a one-family dwelling  
9   under the law in effect immediately before June 1, 1958, is a buildable lot for  
10   building a one-family dwelling only, even though the lot may have less than the  
11   minimum area for any residential zone. Any such lot may be developed under the  
12   zoning development standards in effect when the lot was recorded, except that:

13   a)   a one-family dwelling on a lot recorded before March 16, 1928[,] in the  
14        original Maryland-Washington Metropolitan District must meet the  
15        development standards in the 1928 Zoning Ordinance[; however,  
16        compliance with the minimum lot size for a one-family dwelling is not  
17        required]] including the minimum lot area standard;

18   \*   \*   \*

19   **Sec. 59-B-5.3. One-family dwelling.**

20   Any one-family dwelling in a residential zone or agricultural zone that was built on  
21   a lot legally recorded by deed or subdivision plat before June 1, 1958[,] is not a  
22   nonconforming building. The dwelling may be altered, renovated, [or] enlarged, or  
23   replaced by a new dwelling, under the zoning development standards in effect  
24   when the lot was recorded, except that:

25   (a)   a one-family dwelling on a lot recorded before March 16, 1928[,] in the  
26        original Maryland-Washington Metropolitan District[,] must meet the

27 development standards in the 1928 Zoning Ordinance; however, compliance  
28 with the minimum lot [[size]] area for a one-family dwelling is not required;

29 \* \* \*

30 **Sec. 59-B-5.4. Resubdivision of lots, parts of lots, or parcels with dwellings.**

31 (a) Any two or more tracts of land created by deed or plat before June 1, 1958  
32 may be consolidated by record plat into one building lot, even if the new lot  
33 does not meet the width and size requirements of the underlying zone, if:

- 34 (1) the tracts of land are under common ownership;
- 35 (2) a habitable one-family dwelling located on the tracts, before July 20,  
36 2009, crossed a property line created by deed or plat documented by a  
37 professionally certified house location plan, previously issued  
38 demolition permit, or similar substantial evidence; and
- 39 (3) all the tracts of land on which the dwelling is, or was, located are  
40 included in the newly created lot.

41 (b) Any tract of land created by deed or plat before March 16, 1928 and  
42 containing a legally constructed one-family dwelling may be platted into one  
43 building lot. Such a tract of land may be consolidated by the record plat with  
44 an adjacent tract of commonly owned land into a larger building lot, even if  
45 the resulting lot still does not meet the width and size requirements of any  
46 zone.

47 (c) The dwelling on any lot created under [subsection] subsections (a) or (b) may  
48 be altered, renovated, enlarged, or replaced by a new dwelling under the  
49 zoning development standards in effect when the application is approved,  
50 even if the zoning standards for the lot's width and size [standards] are not  
51 satisfied.

52



**MONTGOMERY COUNTY PLANNING BOARD**  
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

OFFICE OF THE CHAIR

**MONTGOMERY COUNTY PLANNING BOARD**

The Maryland-National Capital Park and Planning Commission

November 16, 2012

**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. 12-16

**BOARD RECOMMENDATION**

The Montgomery County Planning Board of The Maryland–National Capital Park and Planning Commission reviewed Zoning Text Amendment No. 12-16 at our regular meetings on October 25, 2012 and November 8, 2012. By a vote of 5:0, the Board recommends approval of the text amendment, as modified, to allow, under certain circumstances, the construction of a one-family dwelling located on any size lot recorded before 1928 and allow the reconstruction of any one-family dwelling located on any size lot recorded before 1928. Modifications to the text amendment as introduced will eliminate the ability of small lots that currently contain one dwelling built over the lot lines of two or more small lots to redevelop with multiple dwellings.

Currently, any lot recorded by subdivision plat prior to June 1, 1958 (or recorded by deed prior to June 1, 1958 that does not include parts of previously platted properties) and a buildable lot under the law in effect immediately before June 1, 1958 are considered a buildable lot for a one-family dwelling only, even though the lot may have less than the minimum area for any residential zone. Any such lot may be developed under the zoning development standards in effect when the lot was recorded, although there are several exceptions to this allowance. One exception requires lots recorded before March 16, 1928, in the original Maryland-Washington Metropolitan District to meet the development standards in the 1928 Zoning Ordinance. These standards include a requirement that a one-family residential lot have a minimum area of five thousand (5,000) square feet and a minimum width of fifty (50) feet at the front building line. The minimum side yard was established at 7 feet, except when a lot or parcel of land has a width of forty (40) feet or less and is included in

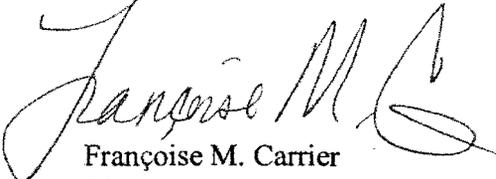
a plat of record at the time of the passage of the 1928 Ordinance, in which case the minimum side yard setback is five feet.

The Board of Appeals interprets the Zoning Ordinance as prohibiting the construction of a house on a lot recorded before 1928 that did not meet the minimum lot area required by the 1928 Ordinance. ZTA 12-16 would establish that a one-family dwelling can be constructed on a lot smaller than 5,000 square feet, and existing houses on such lots can be reconstructed. All other dimensional and setback requirements would apply.

Planning Board staff as well as several County citizen groups and other interested parties recognized that the ZTA as introduced could also permit redevelopment in those situations where one dwelling is built over the lot lines of two or more small lots. There are many neighborhoods where the established character results from dwellings being located on more than one small lot. In those neighborhoods in particular, redevelopment of each lot separately could be an undesirable consequence of the proposed ZTA as introduced. The Planning Board believes that this unintended consequence of the legislation could be minimized with the proposed modifications, as included as a separate attachment to the technical staff report. The Board's modifications would require consolidation of the substandard lots should the property owner wish to replace the existing dwelling.

#### 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, November 8, 2012.

  
Françoise M. Carrier  
Chair

FC: GR/am

**AS MODIFIED BY THE PLANNING BOARD NOVEMBER 8, 2012**

Zoning Text Amendment No.: 12-16  
Concerning: One-Family Dwelling -  
Pre-1928 Lots  
Draft No. & Date: 1- 9/19/12  
Introduced: September 25, 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: Councilmember Floreen

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

- allow the construction of a one-family dwelling located on any size lot recorded before 1928;
- allow the reconstruction of any one-family dwelling located on any size lot recorded before 1928;
- require consolidation of certain contiguous lots recorded before 1928; and
- generally revise the grandfathering provisions for undersized lots

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

DIVISION 59-B-5. "SPECIAL PROVISIONS FOR CONDITIONS PREDATING 1958."

Section 59-B-5.1. "Buildable lot under previous ordinance."

Section 59-B-5.3. "One-family dwelling."

Section 59-B-5.4. "Resubdivision of lots, parts of lots, or parcels with dwellings."

Add new Section

Section 59-B-5.5. "One-family dwelling built on contiguous substandard lots recorded before March 16, 1928"

**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 text that 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-B-5 is amended as follows:**

2   DIVISION 59-B-5. SPECIAL PROVISIONS FOR CONDITIONS PREDATING  
3   1958.

4   \*   \*   \*

5   **Sec. 59-B-5.1. Buildable lot under previous ordinance.**

6   Any lot that was recorded by subdivision plat [prior to] before June 1, 1958, or any  
7   lot recorded by deed [prior to] before June 1, 1958 that does not include parts of  
8   previously platted properties, and that was a buildable lot under the law in effect  
9   immediately before June 1, 1958, is a buildable lot for building a one-family  
10   dwelling only, even though the lot may have less than the minimum area for any  
11   residential zone. Any such lot may be developed under the zoning development  
12   standards in effect when the lot was recorded, except that:

13   a)   a one-family dwelling on a lot recorded before March 16, 1928[,] in the  
14        original Maryland-Washington Metropolitan District must meet the  
15        [[development]] setback and yard standards [[in]] of the 1928 Zoning  
16        Ordinance; [[however, compliance with the minimum lot size for a one-  
17        family dwelling is not required.]] provided that if such lot adjoins a  
18        substandard lot in common ownership any time after {effective date of the  
19        ZTA}, the lots must be consolidated under Section 59-B-5.4.

20   \*   \*   \*

21   **Sec. 59-B-5.3. One-family dwelling on single lot.**

22   Any one-family dwelling in a residential zone or agricultural zone that was built on  
23   a lot legally recorded by deed or subdivision plat before June 1, 1958[,] is not a  
24   nonconforming building. The dwelling may be altered, renovated, [or] enlarged, or  
25   replaced by a new dwelling on the single lot, under the zoning development  
26   standards in effect when the lot was recorded, except that:

27 (a) a one-family dwelling on a lot recorded before March 16, 1928[,] in the  
28 original Maryland-Washington Metropolitan District[,] must meet the  
29 ~~[[development]]~~ setback and yard standards ~~[[in]]~~ of the 1928 Zoning  
30 Ordinance; ~~[[however, compliance with the minimum lot size for a one-~~  
31 ~~family dwelling is not required.]]~~

32 \* \* \*

33 **Sec. 59-B-5.4. Resubdivision of lots, parts of lots, or parcels with dwellings.**

34 (a) Any two or more contiguous tracts of land created by deed or plat before  
35 June 1, 1958 that are individually substandard may be consolidated by  
36 record plat into one buildable lot, even if the new lot does not meet the width  
37 and size requirements of the underlying zone, if:

- 38 (1) the tracts of land are under common ownership;
- 39 (2) a habitable one-family dwelling located on the tracts, before ~~[[July 20,~~  
40 ~~2009]]~~ {effective date of the ZTA}, crossed a property line created by  
41 deed or plat documented by a professionally certified house location  
42 plan, previously issued demolition permit, or similar substantial  
43 evidence; and
- 44 (3) all the tracts of land on which the dwelling is, or was, located are  
45 included in the newly created lot.

46 (b) The dwelling on any lot created under subsection (a) may be altered,  
47 renovated, enlarged, or replaced by a new dwelling under th zoning  
48 development standards in effect when the application is approved, even if  
49 the lot's width and size standards are not satisfied.

50

51 **Sec. 59-B-5.5. One-family dwelling built on contiguous substandard lots**  
52 **recorded before March 16, 1928.**

53 Any one-family dwelling in a residential zone or agricultural zone that was built on  
54 two or more contiguous substandard lots recorded before March 16, 1928 in the  
55 original Maryland-Washington Metropolitan District is not a nonconforming  
56 building and may be altered, renovated or enlarged. A dwelling that is, or was,  
57 located on such contiguous substandard lots as of {the effective date of the ZTA}  
58 may be replaced by a new dwelling but only upon consolidation of the substandard  
59 lots in accordance with Section 59-B-5.4, including any vacant substandard lot  
60 adjacent to the lots upon which the dwelling was located if in common ownership.

61

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

64 \* \* \*

65

66 This is a correct copy of Council action.

67

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69 \_\_\_\_\_  
Linda M. Lauer, Clerk of the Council

**Zoning Text Amendment (ZTA) No. 12-16, One-Family Dwelling - Pre-1928 Lots**

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 Gregory Russ, Planner Coordinator, Functional Planning & Policy Division, [gregory.russ@montgomeryplanning.org](mailto:gregory.russ@montgomeryplanning.org), 301-495-2174

 Mary Dolan, Chief, Functional Planning & Policy Division, [mary.dolan@montgomeryplanning.org](mailto:mary.dolan@montgomeryplanning.org) 301-495-4552

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Completed: 10/18/12

**Description**

ZTA 12-16 amends the pre-1928 provisions of Sections 59-B-5.1 and 59-B-5.3 of the Zoning Ordinance. Specifically, the ZTA allows the construction of a one-family dwelling located on any size lot recorded before 1928 and allows the reconstruction of any one-family dwelling located on any size lot recorded before 1928.

**Summary/Analysis**

Staff recommends that the Planning Board transmit the following comments to the County Council concerning ZTA 12-16:

- Staff recommends that the phrase on lines 15 and 27 be modified from “minimum lot size” to “minimum lot area” to adhere to consistent language usage of the Ordinance.
- ZTA 12-16 could potentially allow development of a number of properties with less than the minimum lot area and lot width required for any residential zone including, redevelopment of properties that currently have one dwelling on more than one small lot to build multiple dwellings.

Currently, any lot that meets the following criteria is considered a buildable lot for a one-family dwelling only, even though the lot may have less than the minimum area for any residential zone. This includes lots:

- recorded by subdivision plat prior to June 1, 1958, or
- recorded by deed prior to June 1, 1958 that do not include parts of previously platted properties, and
- buildable lots under the law in effect immediately before June 1, 1958.

Any such lot may be developed under the zoning development standards in effect when the lot was recorded although there are several exceptions to this allowance. One exception requires lots recorded before March 16, 1928, in the original Maryland-Washington Metropolitan District to meet the development standards in the 1928 Zoning Ordinance. These standards include a requirement that a one-family residential lot have a minimum area of five thousand (5,000) square feet and a minimum width of fifty (50) feet at the front building line. The minimum side yard was established at 7 feet, except

when a lot or parcel of land has a width of forty (40) feet or less and is included in a plat of record at the time of the passage of the 1928 Ordinance, the minimum side yard setback is five feet.

The Board of Appeals interprets the Zoning Ordinance as prohibiting the construction of a house on a lot recorded before 1928 that did not meet the minimum lot area required by the 1928 Ordinance. ZTA 12-16 would establish that a one-family dwelling can be constructed on a lot smaller than 5,000 square feet, and existing houses on such lots can be reconstructed. All other dimensional and setback requirements would apply.

#### ZTA Language

Under lines 13-16 and 24-27 of the ZTA the following phrase was added to Sections 59-B-5.1 and 59-B-5.3 to accomplish the intent:

however, compliance with the minimum lot size for a one-family dwelling is not required;

Staff recommends that the phrase “minimum lot size” be amended to state “minimum lot area” to adhere to consistent language usage of the Ordinance.

#### GIS Lot Size Information

Generally, there are thousands of lots presently zoned R-60 or R-90 (the current zoning for most small lots in the County) that were platted prior to 1928. To obtain specific details (number of lots, lot widths, etc.) would entail researching each plat book (100+ plats per book) and each plat (dozens to hundreds of lots per plat), since there is currently no GIS information based on properties platted prior to 1928 or based on the width of street frontage.

GIS provided information on the number of R-60 and R-90 properties that are less than 5,000 square feet. Currently there are approximately 15,910 (5.93% of total number of R-60 and R-90 properties) R-60 and R-90 lots less than 5,000 square feet in the County (There are a total of 268,276 R-60 and R-90 lots in the County). Again, we currently have no detailed information on the street frontage widths although generally, we know that thousands of lots in the down-county areas that are zoned R-60 and R-90 were originally recorded with widths between 20 and 40 feet. GIS data is not available to specifically identify how many of these small lots were recorded prior to 1928, but based on staff’s experience researching lots over the years, most of them were.

#### Effect of the Proposed ZTA

The existing provisions of 59-B-5.1 and 59-B-5.3 permit development on lots legally recorded by deed or subdivision plat before June 1, 1958, and after March 16, 1928, that may have less than the minimum area for any residential zone provided they meet the other development standards of the zone in effect when the lot was recorded. The existing provisions of subsections 59-B-5.1(a) and 59-B-5.3(a) override the exception from the minimum lot area requirement in these sections and require lots recorded by deed or subdivision plat before March 16, 1928, to have at least 5,000 square feet of lot area. ZTA 12-16 grants the minimum lot area exception to these lots. A significant number of the R-60 and R-90 lots that are noted above were recorded prior to March 16, 1928, so ZTA 12-16 would permit development or redevelopment of a number of properties with less than the minimum lot area and lot width required for the applicable zone that currently do not have that right. Redevelopment could include building

multiple dwellings on small lots that currently contain one dwelling built over the lot lines of two or more small lots. There are many neighborhoods where the established character results from dwellings being located on more than one small lot. In those neighborhoods in particular, redevelopment to create multiple dwellings could be an undesirable consequence of the proposed ZTA.

GR/MD/am

ATTACHMENTS

1. ZTA 12-16 as modified by staff

Subdivision Regulation Amendment No.: 12-03  
Concerning: Minor Subdivisions – Part of a Lot  
Revised: 12/4/12; Draft No. 1  
Introduced: December 11, 2012  
Public Hearing:  
Adopted:  
Effective:

**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: Councilmember Floreen

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**AN AMENDMENT** to the Subdivision Regulations to:

- (1) authorize the approval and recordation of a plat for certain properties classified in a one-family residential zone under the minor subdivision procedure under certain circumstances; and
- (2) generally amend the provisions for the application of the minor subdivision process

By amending

Montgomery County Code  
Chapter 50. Subdivision of Land.  
Section 50-35A. Minor Subdivisions – Approval Procedure.

<b>Boldface</b>	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by introduced Subdivision Regulation Amendment.</i>
[Single boldface brackets]	<i>Deleted from existing law by introduced Subdivision Regulation Amendment.</i>
<u>Double underlining</u>	<i>Added to the Subdivision Regulation Amendment by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the Subdivision Regulation Amendment by amendment.</i>
* * *	<i>Existing law unaffected by Subdivision Regulation Amendment.</i>

**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. Section 50-35A is amended as follows:**

2           **Section 50-35A. Minor Subdivisions – Approval Procedure.**

3           (a) *Preliminary Plan Not Required.* The submission of a preliminary  
4           subdivision plan, under [Sec.] Section 50-34 and [Sec.] Section 50-35, is not  
5           required for:

6           (1) Minor Lot Line Adjustment.

7           \* \* \*

8           (2) Conversion of an Outlot into a Lot.

9           \* \* \*

10          (3) Consolidation of Two or More Lots or a Part of a lot into One Lot.

11          \* \* \*

12          (4) Further Subdivision of a Commercial, Industrial or Multi-Family  
13          Residential Lot to Reflect a Change in Ownership, Deed, Mortgage or  
14          Lease Line.

15          \* \* \*

16          (5) Plat of Correction.

17          \* \* \*

18          (6) Plats for Certain Residentially Zoned Parcels Created by Deed Before  
19          June 1, 1958.

20          \* \* \*

21          (7) Plats for Existing Places of Worship, Private Schools, Country Clubs,  
22          Private Institutions and Similar Uses Located on Unplatted Parcels.

23          \* \* \*

24          (8) Plats for Certain Residential Lots located in the Rural Density  
25          Transfer Zone.

26          \* \* \*

27          (9) Parcels that satisfy Section 59-B-8.1 of Chapter 59 may be platted  
28          under the minor subdivision procedure if:

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\* \* \*

(10) Combining a lot and adjoining property. Except in agricultural zones, the Planning Board may approve plats under the minor subdivision process to consolidate an existing platted lot, or part of a lot that contains a legally constructed one-family dwelling unit and a partition of land created as a result of a deed, [provided] if:

- (A) in a one-family residential zone, the partition of land created by deed cannot itself be platted under the area and dimensional standards of the zone;
- (B) any conditions applicable to the existing lot remain in full force and effect on the new lot;
- (C) any required street dedication is provided; and
- (D) the subject lot was not identified as an outlot on a plat.

(11) Creation of a Lot from a Part of a Lot. A part of a previously recorded lot that was created as a result of a deed transfer of land from the lot, and which contains a legally constructed one-family residential dwelling, may be converted into a lot under the minor subdivision procedures if:

- (A) the part of lot is located in a one-family residential zone; and
- (B) all applicable conditions or agreements applicable to the subdivision approval creating the original lot will also apply to the new lot. The conditions and agreements may include, but are not limited to, any adequate public facilities agreement, conservation easement, or building restriction lines.

\* \* \*

54           **Sec. 2. Effective date.** This ordinance takes effect 20 days after the date of  
55 Council adoption.

*Approved:*

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Isiah Leggett, County Executive

Date

*This is a correct copy of Council action.*

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Linda M. Lauer, Clerk of the Council

Date



**MONTGOMERY COUNTY PLANNING BOARD**  
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

OFFICE OF THE CHAIR

**MONTGOMERY COUNTY PLANNING BOARD**

The Maryland-National Capital Park and Planning Commission

January 17, 2013

**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:** Subdivision Regulation Amendment No. 12-03 & Zoning Text Amendment No. 12-18

**BOARD RECOMMENDATION**

The Montgomery County Planning Board of The Maryland-National Capital Park and Planning Commission reviewed Subdivision Regulation Amendment No. 12-03 and Zoning Text Amendment No. 12-18 at its regular meeting on January 17, 2013. By a vote of 5:0, the Board recommends approval of the subdivision regulation amendment as introduced and the zoning text amendment as modified for plain language changes to clarify that a legally constructed one-family dwelling located on a tract that was deeded before March 16, 1928 may be platted into one building lot even if the resulting lot does not meet the width and size requirements of the applicable zone. These changes are provided as an attachment separate from the technical staff report.

SRA No. 12-03 proposes to expand the existing provisions of Chapter 50 for minor subdivisions to allow the Planning Board to approve plats for certain properties not classified in an agricultural zone under the minor subdivision process. Specifically, the expansion would allow consolidation of an existing *part of a lot that contains a legally constructed one-family dwelling unit* with a partition of land created as a result of a deed under the minor subdivision process. Currently under the minor subdivision provisions, a partition of land created by a deed can only be consolidated with an existing platted lot. Application for this new expanded provision would be permitted provided:

- in a one-family residential zone, the partition of land created by deed cannot itself be platted under the area and dimensional standards of the zone;
- any conditions applicable to the existing lot remain in full force and effect on the new lot;
- any required street dedication is provided; and
- the subject lot was not identified as an outlot on a plat.

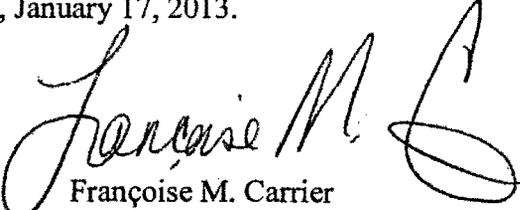
ZTA No.12-18 would allow any tract of land created by deed or plat before March 16, 1928 and containing a legally constructed one-family dwelling to be platted into one building lot. Such a tract of land would be allowed to consolidate by record plat with an adjacent tract of commonly owned land into a larger building lot, even if the resulting lot still does not meet the width and size requirements of the applicable zone. As such, ZTA 12-18 and SRA 12-03 are complementary amendments.

In general, the Board supports expanding the minor subdivision provisions to include additional specific instances that are appropriate for platting without preliminary plan rather than granting more waivers. This is the appropriate mechanism because it bases the decision to eliminate the requirement for preliminary plans on the specific conditions of the subdivision rather than on a judgment based on the case by case argument by the applicants. Specifically, SRA 12-03 brings the applicable properties, at a minimum, closer to compliance with the zoning standards.

The Planning Board further believes that ZTA 12-18 allows substandard pre-1928 properties that have a legal dwelling on them to come closer to complying with certain zoning standards by allowing consolidation with adjacent commonly owned land.

#### 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 17, 2013.

  
Françoise M. Carrier  
Chair

FC:GR:am

**AS MODIFIED BY THE PLANNING BOARD ON JANUARY 17, 2013**

Zoning Text Amendment No.: 12-18  
Concerning: Exemptions – Pre-1928  
Resubdivisions  
Draft No. & Date: 1 – 12/6/12  
Introduced: December 11, 2012  
Public Hearing:  
Adopted:  
Effective:

**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: Councilmember Floreen

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

- Provide an exemption from current zoning standards for pre-1928 property that resubdivide

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

DIVISION 59-B-5. “SPECIAL PROVISIONS FOR CONDITIONS PREDATING 1958.”

Section 59-B-5.4. “Resubdivision of lots, parts of lots, or parcels with dwellings.”

**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-B-5 is amended as follows:**

2    DIVISION 59-B-5. SPECIAL PROVISIONS FOR CONDITIONS PREDATING  
3    1958.

4    \*   \*   \*

5    **Sec. 59-B-5.4. Resubdivision of lots, parts of lots, or parcels with dwellings.**

6    (a)   Any two or more tracts of land created by deed or plat before June 1, 1958  
7        may be consolidated by record plat into one building lot, even if the new lot  
8        does not meet the width and size requirements of the underlying zone, if:

- 9        (1)   the tracts of land are under common ownership;  
10       (2)   a habitable one-family dwelling located on the tracts, before July 20,  
11         2009, crossed a property line created by deed or plat documented by a  
12         professionally certified house location plan, previously issued  
13         demolition permit, or similar substantial evidence; and  
14       (3)   all the tracts of land on which the dwelling is, or was, located are  
15         included in the newly created lot.

16   (b)   Any tract of land created by deed [[or plat]] before March 16, 1928 and  
17       containing a legally constructed one-family dwelling may be platted into one  
18       building lot even if the resulting lot does not meet the width and size  
19       requirements of the applicable zone. Such a tract of land may be  
20       consolidated by [[the]] record plat with an adjacent tract of commonly owned  
21       land into a larger building lot, even if the resulting lot still does not meet the  
22       width and size requirements of [[any]] the applicable zone.

23   (c)   The dwelling on any lot created under [subsection] subsections (a) or (b) may  
24        be altered, renovated, enlarged, or replaced by a new dwelling under the  
25        zoning development standards in effect when the application is approved,  
26        even if the zoning standards for the lot's width and size [standards] are not  
27        satisfied.

28 \* \* \*

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

31

32 This is a correct copy of Council action.

33

34 \_\_\_\_\_

35 Linda M. Lauer, Clerk of the Council



MCPB  
 Item Nos. 12 &  
 13  
 Date: 1-17-13

**Subdivision Regulation Amendment (SRA) No. 12-03, Minor Subdivisions-Part of a Lot;  
 Zoning Text Amendment No. 12-18, Exemptions-Pre-1928 Re-subdivisions**

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**Completed 1/10/13**

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**Description**

SRA No. 12-03 proposes to expand the existing provisions of Chapter 50 for minor subdivisions to allow the Planning Board to approve plats for certain properties not classified in an agricultural zone under the minor subdivision process. Specifically, the expansion would allow consolidation of an existing *part of a lot that contains a legally constructed one-family dwelling unit* with a partition of land created as a result of a deed under the minor subdivision process. Currently under the minor subdivision provisions, a partition of land created by a deed can only be consolidated with an existing platted lot. Application for this new expanded provision would be permitted provided:

- in a one-family residential zone, the partition of land created by deed cannot itself be platted under the area and dimensional standards of the zone;
- any conditions applicable to the existing lot remain in full force and effect on the new lot;
- any required street dedication is provided; and
- the subject lot was not identified as an outlot on a plat.

ZTA No.12-18 would allow any tract of land created by deed or plat before March 16, 1928 and containing a legally constructed one-family dwelling to be platted into one building lot. Such a tract of land would be allowed to consolidate by record plat with an adjacent tract of commonly owned land into a larger building lot, even if the resulting lot still does not meet the width and size requirements of any zone. As such, ZTA 12-18 and SRA 12-03 are complementary amendments.

**Summary**

Staff recommends approval of SRA 12-03, as introduced, and ZTA 12-18 with minor language modifications. The SRA would permit expansion of the minor subdivision provisions to allow consolidation of an existing platted lot *or part of a lot that contains a legally constructed one-family dwelling unit* with a partition of land created as a result of a deed under certain circumstances as outlined above. The ZTA would allow such lots to continue to be buildable lots even though the resulting lots might not meet certain zoning standards. The changes proposed by staff delete the word "plat" on line 16 and add language on line 18 clarifying that a legally constructed one-family dwelling located on a

deeded tract before March 16, 1928 may be platted into one building lot even if the resulting lot does not meet the width and size requirements of any zone.

In a number of cases, landowners submitted subdivision plats with the County before the requirement for such in 1928. On occasion, property owners ignored the outlines of the lots created by these plats and created parcels by deed before 1928. Houses constructed on these deed parcels were considered only "part of a lot" because of the lot lines of the original subdivision. Although legally built, these houses were not on lots that conform to the zoning standards for residential structures based on the 1928 Zoning Ordinance. SRA 12-03 would allow the owner of a lot with a house on it that was built under these circumstances to use the minor subdivision process to add to the size of their property by re-subdividing and consolidating the adjoining properties. The resulting subdivision may still result in a lot that does not meet current zoning standards. ZTA 12-18 would allow a deeded tract of land that includes a legally constructed one-family dwelling to be platted into one buildable lot. The ZTA would also allow such lots to be consolidated with adjacent commonly owned land into a larger building lot, even if the resulting lot still does not meet the width and size requirements of any zone.

The Montgomery County Subdivision Regulations, Chapter 50 of the County Code, specify the procedures for approval of subdivisions by the Planning Board. The procedures involve the submission of a preliminary plan for staff review and Planning Board action. The preliminary plan stage of the process is followed by the submission of a record plat which is reviewed by staff, approved by the Planning Board, reviewed by other agencies, and then recorded in the land records of the county.

Years ago, in response to complaints that some types of simple subdivisions did not warrant the time and expense associated with the review of a preliminary plan, the Subdivision Regulations were amended to provide for approval of minor subdivisions. The minor subdivision process specifies certain types of subdivision that may proceed directly to review and approval of a record plat without the prior approval of a preliminary plan. SRA 12-03 would expand the process to cases as described above.

### **Requirements for Subdivision**

The Subdivision Regulations generally specify that whenever land in the county is subdivided for any purpose, a plat of such subdivision must be recorded in the land records of the county. They further specify that, with certain exceptions, the Department of Permitting Services must not approve a building permit for the construction of a dwelling or other structure, unless the dwelling or structure would be located on a lot or parcel of land which is shown on a recorded plat. They also prohibit, with certain exceptions, the issuance of a building permit for construction of a dwelling or other structure which is located on more than one lot, which crosses a lot line, which is located on the unplatted remainder of a resubdivided lot, or which is located on an outlot. Together, these requirements result in the need for platting of many properties prior to land development.

*In order to provide an orderly basis for the processing of subdivisions prior to approval, the Subdivision Regulations specify that the Board consider such plans in two stages. The first stage of the process, except for specific minor subdivisions, is submittal of a preliminary plan for approval. The second stage is submittal of a final plat for approval and recordation. In approving these applications, the Board must find that proposed subdivision will meet the standards established in both the Subdivision Regulations and in the road construction code or other ordinances or regulations. To ensure that these findings can*

be made, the preliminary plan and final record plat are referred to other county agencies or departments for their review and recommendations prior to Planning Board action.

*The scope of preliminary plan review includes: determination of required public and private improvements; design and layout of roads, lots and blocks; the need for public sites and adequate open spaces; and protection of environmentally sensitive areas.* In addition, the Board must find prior to approval of a preliminary plan that it will meet requirements of the applicable master plan, has adequate public facilities, and provides for sediment control, forest conservation, and water quality. Preliminary plan review is also a public process, so it includes requirements for pre-submission public meetings, site posting, noticing and public hearing. As such, the review of some preliminary plans can be quite complex and time consuming.

*Record plat review includes review of a detailed plat drawing that shows all boundaries, street lines, lot lines and other encumbrances, such as easements, with survey data that is sufficient to locate and reproduce them on the ground.* The layout of features on the plat drawing must be in substantial conformance with the applicable preliminary and site plans and their associated conditions of approval, and the plat must not be approved until other supporting plans such as road and street profiles and storm drainage construction plans have also been approved. A record plat application and initial drawing are reviewed by staff and referred to selected outside agencies and departments prior to the submittal of a final plat mylar. The final plat must be approved by the Planning Board within 30 days of its submittal. A plat may not be recorded until all required public improvements for the subdivision have been completed or guaranteed. Record plats are approved on the Board's consent agenda and are not noticed to the public.

### **Minor Subdivisions**

Prior to the late 90's, there was no way to avoid the two-step subdivision process except to request variations from the requirements which the Board was authorized to grant under the regulations at that time. Variations could be granted upon a finding that specific conditions or limitations of the land to be subdivided made it impossible or impractical, or would cause a singular and unnecessary hardship, if full conformance with the Chapter were required. Such variations were granted in several types of instances to waive the requirement to submit a preliminary plan. Staff at the time pointed out that the need for a majority of these variations could be avoided if a minor subdivision procedure were established. After further review of the issue by the Planning Board and County Council, provisions for minor subdivisions were added to the Subdivision Regulations by amendment in 1997. *The minor subdivision process permits recordation of plats for certain types of subdivisions without prior approval of a preliminary plan.* As of now, these subdivisions include:

- Minor lot line adjustments that do not exceed 5% of the combined area of the lots involved
- Conversion of certain outlots into a lot
- Consolidation of recorded lots or parts of lots that were created by deed prior to June 1, 1958
- Further subdivision of commercial, industrial or multi-family residential lots to create ownership or lease lines
- Plats of correction
- Plats for residential lots created from parcels that were created by deed prior to June 1, 1958
- Plats for existing places of worship, private schools, country clubs, private institutions and the like located on unplatted parcels

- Plats for up to five lots in the RDT zone provided they average 5 acres or less in size
- Plats to record certain parcels that were created by deed after June 1, 1958, that contain a lawfully constructed residential dwelling and meet the requirements of the zone in place when the dwelling was constructed
- **Consolidation of an existing platted lot and a partition of land created as a result of a deed (*proposed as the subject of SRA 12-03*)**
- Creation of a Lot from a Part of a Lot

In general, staff supports expanding the minor subdivision provisions to include other specific instances that are appropriate for platting without preliminary plan over granting waivers. This is the appropriate mechanism because it bases the decision to eliminate the requirement for preliminary plans on the specific conditions of the subdivision rather than on a judgment based on the case by case argument by the applicants. Also, the review process for an SRA ensures that all who may have concerns about loss of their authority to review matters associated with preliminary plans agree on what the specific conditions are. SRA 12-03 as introduced reflects the language modification as recommended by technical staff to address the combining of an existing platted lot or *part of a lot that contains a legally constructed one-family dwelling unit* with a partition of land created as a result of a deed. In all instances, the SRA brings the applicable properties, at a minimum, closer to compliance with the zoning standards.

The provisions by which this particular minor subdivision could occur ensure that:

- this minor subdivision won't be used to create larger residential lots in agricultural zones;
- in a one-family residential zone the size of the lot being created by this minor subdivision will be limited because the partition of land being consolidated could not by itself be platted under the standards of the zone;
- any required street dedications will be provided along the frontage of the lot being created;
- development of the resulting lot will continue to be limited by any applicable conditions of subdivision that applied to the original lots; and
- this minor subdivision is not interpreted to permit a recorded outlot to become a buildable lot.

Staff recommends approval of SRA 12-02 with these protections in place.

#### **Modifications to ZTA 12-18**

As stated above, ZTA No. 12-18 would allow a deeded tract of land that includes a legally constructed one-family dwelling to be platted into one buildable lot. The ZTA would also allow such lots to be consolidated with adjacent commonly owned land into a larger building lot, even if the resulting lot still does not meet the width and size requirements of any zone. Staff believes that the subject legislation allows substandard pre-1928 properties that have a legal dwelling on them to come closer to complying with certain zoning standards by allowing consolidation with adjacent commonly owned land. The changes proposed by staff delete the word "plat" on line 16 because there would be no need to re-plate already recorded tracks, and adds language on line 18 clarifying that a legally constructed one-family dwelling located on a deeded tract before March 16, 1928 may be platted into one building lot even if the resulting lot does not meet the width and size requirements of any zone. The language as modified is depicted below.

- (a) Any tract of land created by deed [[or plat]] before March 16, 1928 and containing a legally constructed one-family dwelling may be platted into one building lot even if the resulting lot does not meet the width and size requirements of any zone. Such a tract of land may be consolidated by [[the]] record plat with an adjacent tract of commonly owned land into a larger building lot, even if the resulting lot still does not meet the width and size requirements of any zone.

GR/MD/am

ATTACHMENTS

1. SRA 12-03 as introduced
2. ZTA 12-18 as modified by staff