

MEMORANDUM

September 11, 2013

TO: Planning, Housing, and Economic Development Committee

FROM: Jeff Zyontz, Legislative Attorney

SUBJECT: Worksession #8 – Administration and procedures
Zoning Text Amendment 13-04, Zoning Ordinance - Revised
District Map Amendment G-956

Alert: The changes to ZTA 13-04 and District Map Amendment G-956 that were tentatively recommended by the PHED Committee and staff recommended plain English changes are available online at www.zoningmontgomery.org. Chapters 8 and 9 will be revised at the conclusion of the PHED Committee worksessions.

The future PHED Committee schedule:

September 17: Unresolved issues from prior worksessions
September 20: Wrap-up, including any outstanding implementation issues
September 27: Wrap-up, continued if required

Future Council schedule:

October 11: Complete PHED recommended text and map online and notice of November 12 public hearing
November 12: Public hearing on PHED text and map recommendations
January: First Council worksession

The Committee's directions for staff from the July 30 worksession (only changes in the Committee's directions are noted) are as follows:

- 1) Redefine the Parking Benefit District as "a Parking Lot District or any other area as defined under Chapter 60 in which a parking minimum and parking maximum apply and developers have the option to pay a fee in lieu of providing off-street parking." (This may need to be revised if parking minimums are eliminated for the parking lot districts.)
- 2) Revise the parking table as recommended by Planning Staff:
 - a) Combine Group Day Care with Family Day Care and add "required spaces may be allowed on the street abutting the site."

- b) For hospitals, change 2.5 spaces per 1,000 to 1.75 spaces per 1,000.
 - c) For Animal Boarding and Care, replace 2.5 (per employee) +3 with 1 (per employee) +3 for the baseline minimum in the Agricultural, Rural Residential, Residential, and Industrial zones, and for the baseline minimum in areas outside of the Parking Benefit District (PBD) in the Commercial/Residential and Employment zones. Within a PBD, the baseline maximum changes from 2.5 to 3.
 - d) For Veterinary Office/Hospital; replace 2.5 (per employee) with 1 (per employee) for the baseline minimum in the Agricultural, Rural Residential, Residential, and Industrial zones, and for the baseline minimum in areas outside of the PBD in the Commercial/Residential and Employment zones. Also add (Minimum of 5) under the baseline minimum for the PBD.
 - e) For Landscape Contractor, change 1 space per employee to .5 space per employee.
 - f) Add "Combination Retail" in the retail category.
 - g) Amend the parking required for self-storage; change the metric to read "1,000 SF of GFA for Storage Units without driveway access or 1,000 SF of office space GFA for storage units with driveway access".
- 3) If a reduction is taken for a special housing type, then it should be the only reduction that can be taken.
 - 4) Set the maximum non-auto driver modal split (NADMS) reduction of the baseline minimum parking spaces at 20%.
 - 5) Limit the on-street parking space allowance for spaces constructed by the applicant to retail/service establishments, restaurant uses, or the provision of car-share spaces.
 - 6) Amend the bike-sharing facility allowance in 7.2.3.H.2.d so that it can only be used if the facility is part of a DOT-approved comprehensive plan of bike-sharing stations.
 - 7) For all alternative compliance provisions in Division 7, have a single provision:
The applicable deciding body may approve an alternative method of compliance with any requirements of Div. 7.1 through Div. 7.6 if it determines there are unique site or development constraints, such as grade, visibility, an existing building or structure, an easement, a utility line, or use restrictions that preclude safe or efficient development under the requirements of the applicable Division, and the alternative design will:
 - > satisfy the intent of the applicable Division;
 - > modify the applicable functional results or performance standards the minimal amount necessary to accommodate the constraints;
 - > provide necessary mitigation alleviating any adverse impacts; and
 - > be in the public interest.
 - 8) In the landscaping section, amend the definition of the height of a fence or a wall as follows: "Fence or wall height is measured from the lowest level of the [ground] grade immediately under the fence or abutting a wall."
 - 9) Section 7.7.11.D. Requirements for Limited Duration Sign in the Public Right-of-Way, should be amended as follows:

The sign must not be placed on a median strip or highway divider. ~~If DPS determines that a previously approved location could be a safety risk, DPS may provide assistance in finding a replacement site.~~

The Committee requested that the following items come back to the Committee:

- 1) For current parking lot districts, examine a parking alternative with no minimum parking requirement and an absolute maximum parking requirement.

- 2) Planning Staff was directed to work on the compatibility standards, rules for all zones, and building types to tie these things together better and be very clear about each.
 - 3) Provide an objective standard for the amount of light from a sign that can be allowed on neighboring property.
 - 4) Draft amendments to the floating zone provision to limit the applicability of CRF and CRTF zones on R-90 and R-60 zoned property.
 - 5) Review the current code concerning lot area minimums or street classification to determine if those provisions should apply to some or all floating zones, and make a recommendation concerning the addition of those limits to the proposed floating zone provisions.
 - 6) Revise or delete the description of non-residential buildings (currently described as general buildings) in residential zones.
 - 7) Review the situation on an existing place of worship in the AR zone that would not meet the minimum lot size.
 - 8) Evaluate the cost per public benefit point for CR and CRT zones.
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Chapter 8 Overview

Article 8 establishes the process for:

- The Council making zoning map amendments and text amendment approvals
- The Planning Board making sketch plan and site plan approvals
- The Board of Appeals making conditional use and variance approvals
- DPS making building permit and sign approvals

It includes the broadest grandfathering provision and provides for penalties and enforcement.

Everyone who is involved in the development process knows that the current process is both complicated and long. As proposed, the zoning aspects proposed by the new code would be less complicated. (There would be a requirement for sketch plans and floating zone plans, but not a requirement for project plans, diagrammatic plans, development plans, and schematic development plans.) The standards for approval for conditional uses and variances would be easier. (The requirement to find “need” for some conditional uses would be eliminated; fewer conditional uses would require approval by 4 members of the Board of Appeals; the inherent effects of a use would never be a reason to deny any a variance.)

Review Authority and Approvals Required (§8.1)

Section 8.1.1 would affirmatively place the burden of proof on the applicant.

Sections 8.1.2 and 8.1.3 are descriptive. The Planning Board believes this is helpful to the reader. Staff and the County Attorney’s office believe these sections are more harmful than helpful. Stating responsibilities twice (once in this overview section and then in the substantive section) can only lead to conflict and the potential for litigation. **Staff recommends deleting 8.1.2 and 8.1.3.**

Local Map Amendment (LMA) (§8.2.1)

General

Currently, there is no summary of the process, application requirements, or findings for Euclidean zone local map amendments in the current code. Instead, there are separate sections covering the three basic types of floating zone local map amendments: diagrammatic, development plan, and schematic development plan. The proposed code would have one application for any type of local map amendment and one type of plan for floating zones.

It is the intent of these changes to streamline the process and to rationalize the review requirements. Every local map amendment for a floating zone is followed by a site plan, which provides a detailed review including separate findings on compatibility, adequacy of open space and circulation, and conformance with environmental regulations, among other topics.

Approval Requirements

ZTA 13-04 as proposed would allow the approval of a floating zone using 6 criteria (8.2.E): 1) the public interest; 2) intent of the zone; 3) appropriate general layout; 4) be compatible with existing and approved adjacent development; 5) demonstrate adequate and safe circulation; and 6) ensuring that there will be no adverse neighborhood impacts.¹ All LMA applications for floating zones would require a floating zone plan.² The proposed code would allow the Planning Board to approve amendments to any approved plan at site plan that does not increase density, add height, decrease setbacks or change a binding element.³

Should a floating zone plan be required with all applications?

When the Council approves a zoning change in the LMA process, it need not also approve a particular site design. At least some property owners could be given the option of not proposing a particular plan with zoning. Any review would assume the maximum density of the requested zone at the maximum height, with the minimum setback and the land use that would have the most activity. When a preliminary plan is required after zoning, many of the findings that the Rewrite would have the Council make at zoning for a floating zone plan would be repeated at preliminary plan.

¹ 8.2.E.1. Necessary Findings.

1. For a Floating zone application the District Council must find that the floating zone plan will:
 - a. substantially conform with the recommendations of the applicable master plan, general plan, and other applicable County plans;
 - b. further the public interest;
 - c. meet the intent, purposes, and standards of the proposed zone and requirements of this Chapter;
 - d. be compatible with existing and approved adjacent development; e. demonstrate the ability to provide adequate and safe internal infrastructure, open space, public amenities, and pedestrian and transportation circulation; and
 - f. when applying a non-Residential Floating zone to a property previously under a Residential Detached zone, not adversely affect the character of the surrounding neighborhood.

² §8.2.B.3.e.

³ §8.2.I.2.

Staff recommends retaining the requirement for a floating zone plan. The plan provides specifics to determine master plan conformance and compatibility. The option of not requiring a floating zone plan might be more palatable if the applicability of floating zones is made more restrictive.

What level of traffic information should be required?

As proposed, a floating zone plan would require “a traffic study under the Planning Board’s LATR Guidelines if the incremental increase in vehicular peak-hour trips between the density of the base zoning and the density of the requested floating zone meets the minimum applicability requirement in the LATR Guidelines”.⁴ This is overkill when the only transportation finding is “adequate and safe transportation circulation”. **Planning Staff should explain why an LATR type traffic study would be required when the finding necessary for approval does not require all of that information.** The Hearing Examiner would argue that a finding of adequate transportation facilities (satisfying LATR guidelines or, at least in one case, tests more stringent than LATR guidelines) is a necessary part of determining if the zoning change is compatible with its surroundings and in the public interest.⁵ **Staff would argue that the subdivision traffic test will be applied later in the development process; a less stringent test should be required a zoning.** If the proposed zoning was anticipated by the master plan and the master plan infrastructure is foreseeable the zoning should be deemed to have adequate transportation facilities.

Do the findings for an LMA provide protection to residential neighborhoods?

Two proposed findings have generated testimony. Under the proposed code, an LMA must “substantially conform” the applicable master plan. Testimony recommended removing the word “substantial”.⁶ As proposed, a floating zone plan will “not adversely effect [sic] the character of surrounding neighborhood”. Testimony from home owners recommends amending this provision to protect the residential aspects of the surrounding neighborhood not the entire neighborhood. **Staff recommends retaining the text as proposed by the Planning Board.** Consistency with a master plan under state law may be contrary to land uses or densities recommended within priority funding areas.⁷

⁴ §8.2.B.e.v.(d).

⁵ On the traffic compatibility issue, it’s not just that the Hearing Examiner “will assume” that the traffic increase can make a development incompatible; it is, in the Hearing Examiner’s opinion, the case law which requires that evaluation if the evidence is presented. See *Tauber v. Montgomery County Council*, 244 Md. 332, 223 A.2d 615(1966); and *Montgomery County v. Laughlin*, 255 Md. 724, 732, 259 A.2d 293, 296-297 (1969):

In our opinion the denial by the District Council of the requested reclassification from the R-60 zone to the R-T zone was fairly debatable and did not deny the applicants due process of law as being arbitrary, unreasonable or capricious. ... In *Tauber*, we sustained a denial by the District Council of an application for R-H zoning (like the R-T zoning, a ‘floating’ zone) for property located at the northeast quadrant of the intersection of Massachusetts and Westbard Avenues in Bethesda, Montgomery County. The District Council found that the proposed apartment house would not be compatible with the surrounding area because it would create an unwarranted traffic hazard. We held that the issue in regard to the traffic hazard was fairly debatable.

Staff would note that the court was mirroring the test used by the District Council; it was not imposing its own test.

⁶ Under the current code, a development plan must substantially comply with the use and density indicated by a master plan. A diagrammatic plan must be “in accordance with all pertinent recommendations” of the relevant master plan.

⁷ Land Use Article §1-304, Maryland Code.

Should a plan compliant with all other provisions be presumed to be approvable?

Residents recommend the following provision, which is similar to the current code:

The fact that the floating zone application complies with all specific standards and requirements set forth herein does not create a presumption that the application is, in fact, compatible with surrounding land uses, and, in itself, is not sufficient to require the granting of any application.

The content of this provision is already in §5.1.3.E:

A Floating zone application that meets the prerequisites and requirements in this Article (Article 59-5) may not be sufficient to require approval of the application.

Duplicating this provision is not necessary.

Oral argument

The process for oral argument is partially described in §8.2.1.D.3.c. The process describes the actions by parties to the case but does not fully describe the subsequent actions of the Council. §59-H-6.5(b), (c), and (d). **Staff recommends retaining those provisions from the current code and deleting the second sentence in §8.2.1.D.3.c.ii.**⁸

Corrective Map Amendment (§8.2.2)

As introduced, a corrective map amendment would be allowed to enable the District Council to correct the depiction of a zoning boundary line resulting from an administrative or technical error or from “an error or omission in the findings of fact” during the District Council's proceedings regarding an earlier Map Amendment. Correcting administrative or technical errors is certainly within the scope of a corrective map amendment. An error of omission or finding of fact that cannot be described as a technical error is beyond the scope of a corrective map amendment. **Staff recommends deleting “an error or omission as a finding of fact” as a reason for a corrective map amendment.**

⁸ Current code description of the oral argument process:

- (b) The District Council may, in its discretion, grant or deny a request for oral argument. The District Council may, on its own motion, require oral argument on any aspect of the case. When oral argument is allowed, the Council must:
 - (1) set the day and time for oral argument;
 - (2) limit oral argument to specific topics;
 - (3) set time limits for oral argument; and
 - (4) specify the order of presentations.
- (c) Each oral argument must be limited to matters contained in the record compiled by the Hearing Examiner.
- (d) After oral argument, the District Council must either decide the application or remand the application to the Hearing Examiner for clarification or taking additional evidence.

Sectional and District Map Amendment (§8.2.3)

The term “substantial area” (§ 3.2.3.A.1) is used in the code to describe the area required for a sectional map amendment. This phrase was intentionally undefined to allow for future determination based on the totality of circumstances.

“On record requirement” removed

Currently, a sectional map amendment is required to be a decision on the record just like a local map amendment. This would not long be required under the proposed code. The Maryland courts have found Sectional Map Amendments to be quasi-legislative.⁹ Quasi-legislative actions need not be made on a record and the proposed code correctly removes the requirement that a Sectional Map Amendment be made from a formal record.

Method of Court review

Although the Court has entertained a petition for judicial review concerning a sectional map amendment, there may be occasions when a declaratory judgment would be in order. **The manner of appeal or judicial review should be left to state statute and case law and deleted from the proposed code.**

Zoning Text Amendments (§8.2.4)

There are no dramatic changes in the proposed section of code. The Planning Board, any resident, or Executive may request introduction; a Councilmember or the District Council must agree to introduce the ZTA requested.

Should the introduction of ZTAs be limited to 2 opportunities per year?

The Council may introduce ZTAs at any time. When the Council’s public hearing is scheduled close to 30 days from a ZTA introduction, the Planning Board rarely has time to submit its comments 5 days before the hearing (as currently required by both the current and proposed code).¹⁰ On at least 2 occasions, 2 different ZTAs have addressed the same section of code. Planning Staff believes that a filing period for introduction would allow for a more orderly process. **Staff does not recommend this change.**

Should the recording procedures in subsection F be deleted?

Subsection F has specific recording requirements for an approved ZTA:

1. When the District Council adopts a Zoning Text Amendment, it must also adopt and maintain in its permanent files an opinion stating the reasons for its adoption.

⁹ It is quasi-legislative and not legislative because zoning is not a Bill that requires the Executive’s signature or a veto override.

¹⁰ Planning Staff recommendations under Planning Board rules must be available 7 days before the Planning Board date.

2. The District Council must promptly send a copy of the opinion and Zoning Text Amendment to the County Executive, the Planning Board, the Hearing Examiner, the Board of Appeals, the Supervisor of Assessments, DPS, the Department of Finance, and all persons entering their appearance at the hearing.

The Council currently approves an opinion with each approved ZTA. It is a useful means of recording legislative history. Currently, approved ZTAs are posted online and sent to the County Attorney's Office to integrate it into the current code. Updates to the code are sent out to everyone with a paper copy of the code. **Staff recommends deleting subsection F as unnecessary.**

Conditional Use (§8.3.1)

General comments

As a general matter, the approval of special exceptions would be easier under the proposed code than the current code.

The time frame between the date of acceptance of an application and the date of the hearing would be established at 120 days. (This provision should be redrafted to indicate that a hearing must be scheduled to begin within that time period.) This time frame allows Planning Staff to write its report before the hearing starts.

Currently, all special exceptions, except agricultural uses in agricultural zones, require 4 affirmative votes for approval by the 5 member Board of Appeals. Agricultural processing, farm supply sales service and storage, equestrian facilities, and wineries would require 4 affirmative votes under the proposed code (when 5 Board members are present). Three votes are currently required for those special exception uses. The proposed code would allow 3 affirmative votes when less than 5 members are present.

Decision making process

Some conditional uses are decided by the Hearing Examiner.¹¹ This is consistent with current code. The current provision to allow an appeal to the Board of Appeals for a decision made by the Hearing Examiner is also repeated.

Requiring a recommendation by the Hearing Examiner and then a decision by the Board of Appeals takes time. There is good reason to allow an appeal of the Hearing Examiner's recommendation when there is an aggrieved party. It makes less sense to take Hearing Examiner recommendations that are uncontested to the Board of Appeals. **If the Council is looking for process streamlining, it could give more authority to the Hearing Examiner to decide applications subject to an appeal to the Board of Appeals.** (Special exceptions for communication towers must now be decided within the FCC shot clock; at least towers should be added to the list of special exceptions approved by the Hearing Examiner but subject to an appeal to the Board of Appeals.)

¹¹ §8.6.2.C.

Cooling off period

Currently, the Board must find a change in facts to allow a special exception application on the same site within 36 months. The proposed draft would allow refile within 18 months. This cooling off period is County policy. Unlike the Land Use Article bar to zoning applications for a 36 month period after a local map amendment is decided on the record, the special exception cooling off period is a matter of Council policy. **The Council may wish to consider if this bar to future special exceptions is still sound policy.**

Inherent effects as a reason for denial

As proposed, only non-inherent adverse effects would trigger a denial.¹² Current code and BOA allow the combination of non-inherent and inherent effects as grounds to deny a special exception:

59-G-1.2.1. Standard for evaluation.

A special exception must not be granted without the findings required by this Article. In making these findings, the Board of Appeals, Hearing Examiner, or District Council, as the case may be, must consider the inherent and non-inherent adverse effects of the use on nearby properties and the general neighborhood at the proposed location, irrespective of adverse effects the use might have if established elsewhere in the zone. Inherent adverse effects are the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations. Inherent adverse effects alone are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site. **Non-inherent adverse effects, alone or in conjunction with inherent adverse effects, are a sufficient basis to deny a special exception.** [Emphases added]

The effect of the proposed change would be to allow more special exceptions than would be allowed under the current standard. The Council may use the current standard if it wishes to do so.

Need

A finding of neighborhood need is currently required for special exceptions for: gas station, motor car sales, vehicle rental lots, and swimming pools. A finding of County need is required for drive-in restaurants, funeral parlors, hotels, shooting ranges, solid waste facilities and conference centers. Need is a tricky concept when Maryland Courts have determined that it illegal (beyond the scope of the police power) to refuse zoning for the sole purpose of avoiding competition.¹³ A finding of need is fundamentally the economic judgment of the applicant in a free market economy. The proposed code would eliminate the finding of need for any special exception. Proof of need has been a way to avoid a perceived over-proliferation of a use.

Staff agrees with eliminating the need requirement.

¹² §8.23.1.E.1.g.

¹³ Aspen Hill Venture v. Montgomery County Council, 265 Md. 303 (1972).

Variance (§8.3.2)

As proposed, the standards for granting a variance would be more lenient than the current code. The current code requires the following:

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....

The proposed code would allow variance under a number of conditions:

E. Necessary Findings

To approve a variance, the Board of Appeals must find that:

1. One or more of the following unusual or extraordinary situations or conditions exist:
 - a. exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary conditions peculiar to a specific property;
 - b. the proposed development uses an existing legal nonconforming property or structure;
 - c. the proposed development contains environmentally sensitive features or buffers;
 - d. the proposed development contains a historically significant property or structure;
 - e. the proposed development substantially conforms with the established historic or traditional development pattern of a street or neighborhood; or
 - f. denying the variance would result in an inability to legally use the property.

Planning Staff believes that, as a general matter, variances should be granted more liberally to accommodate infill development without a need to resort to zoning text amendments.

The Council may use the current standard if it wishes to do so. **Staff recommends deleting subsections b, c, and d from the proposed draft.** These situations never **require** a variance.

Sketch Plan (§8.3.3)

Sketch plan would have a separate right to petition for judicial review as proposed.¹⁴ **Staff recommends removing this provision.** The right to petition for judicial review would be available at

¹⁴ §8.3.3.F.2.

preliminary plan and site plan. At sketch plan, a declaratory judgment or mandamus action would still be available without a specific right to petition for judicial review.

Site Plan (§8.3.4)

General

The site plan process currently requires approval by the Planning Board based on a subjective standard. There are few absolute standards for buffering and screening residential communities. The Planning Board must find that a proposed plan achieves “a maximum of compatibility, safety, efficiency and attractiveness before it may approve a site plan.” Although a site plan must conform to prior approvals (project plan, sketch plan, preliminary plan), it does not need to conform to an applicable master plan. In all but floating zones, the approval of a site plan can be avoided in every zone. Some site plan amendments may be approved administratively.

A site plan is more universally applicable in the proposed draft.¹⁵ It is still a subjective approval, but the plan need “only” be compatible with existing, approved, or pending adjacent development. Substantial conformance with master plan recommendations would be required. There are standards in the proposed code for buffering, screening, and height setbacks for development. The proposed draft would continue to allow minor site plan amendments administratively.

Residents would want a requirement for site plan approval for development wherever non-residential or mixed-use zones abut R-60 or R-90 zoning. As proposed, such development would have height and setback requirements.

Timing for decision-making

Currently site plans are required to get to the Planning Board in 45 days. This requirement is achieved in an interesting way. Staff provides comments to the applicant in the review process. The applicant can retain the plan as submitted and go to the Planning Board with a staff recommendation to deny the site plan or revise the plan. The staff considers any change to the submitted site plan a new start to the 45 day clock.¹⁶ Delays are sometimes due to the inaction of applicants. The proposed draft would require Board consideration of a site plan within 120 days.¹⁷ If that is an absolute standard from the date the application is accepted, it would be a significant improvement over current processing times.

Decision-making process

In many jurisdictions, site plan approval is an administrative process (approved by staff without a public hearing). Prior approvals (master plan, preliminary plan) establish the discretionary aspects of development approval. **If the Council wants a more streamlined process, staff could approve site plans with the possibility of an appeal to the Planning Board** (similar to an accessory apartment

¹⁵ §8.3.4.A.8.

¹⁶ Of the 19 site plan applications submitted during FY12, 8 were approved within 6 months. Another 10 were completed within 12 months. Of the 25 site plan applications submitted during FY13, only 7 were completed within 6 months. Another 3 were completed within 12 months. Memorandum from Marc Pfefferle to Planning Board, September 4, 2013.

¹⁷ §8.3.4.C.

application appeal of DHCA’s findings to the Hearing Examiner). This alternative would require changes to the findings necessary for approval. The findings would need to be objective, not subjective.

The Planning Board did not recommend the administrative approval of site plans. The Board did not wish to diminish the opportunity for public input in the development process. Aspects of a plan may be more objectionable to neighbors when only more detail is available. In the opinion of residents, the opportunities to comment at the master plan, sketch plan, and preliminary plan are insufficient. Neighbors change over time; aspects of the plan may change that make it less compatible.

Building permits (§8.4.1)

Although much of the subject matter is repeated from the current code, it should be deleted. Building permits are covered in Chapter 8 of the County Code. Appeal procedures are covered in Chapter 2. **The following subsections in §8.4.1 should be deleted:**

- Subsection B. 1 through B. 6 concerning application requirements
- Subsection E (all) concerning use and occupancy permit appeals
- Subsection F concerning appeal requirements for building permits

Installer license (§8.4.5)

Although much of the subject matter is repeated from the current code, **all of §8.4.5 should be deleted.** A sign installer license is not zoning. All references to an installer’s license (§8.5.1) should be deleted.

Administrative Zoning District Line Adjustment (§8.4.6)

The proposed code would allow administrative changes to the County’s zoning map when surveyed plats show a different lot line that was used as a zoning line. **This proposal is beyond the scope of the Council’s authority and should be deleted.** Under §22-104(a) of the Land Use Article, the Montgomery Council District Council may by local law adopt the county’s zoning map. This specific language does not allow for a delegation of this responsibility. Under §22-201 of the Land Use Article, the District Council may divide the County into districts and zones. Technical errors to the map may be corrected by corrective map amendments.

Notice standards (§8.5)

Newspaper

Newspaper advertisement for sectional map amendments and zoning text amendments are a requirement of the current code. It is not required by the Land Use Article. These requirements are retained in the proposed draft. Newspapers are no longer a universal means of communication. Newspaper circulation numbers (except for free papers) are at historic lows, as the internet and cable news sources have become far more popular.

Application Notice v. Hearing Notice

The proposed code often requires both “individual application notice” and “individual hearing notice” for the same step in the process. **Whenever this occurs, the requirement of the application notice should be deleted.** Hearing notice in all cases will be within 5 days of an application. A repeat communication within 5 days would be wasteful.

Notice in general

There are a number of instances where notice is required to homeowners and civic associations within a set distance of an application. A municipality should not be given less consideration than a civic association. **Staff recommends that whenever notice to a civic association is required, notice should also go to municipalities within that distance area.**

A request was also made to increase the radius of such notice to ½ mile. Staff does not agree with this recommendation.

Notice of Sectional and District Map Amendments

Residents recommended the same notice requirements for sectional and district map amendments as local map amendments. **Staff does not recommend this additional notice.** Local Map Amendments are quasi-judicial; sectional map amendments are legislative in nature. In any event, posting signs on the subject property would be impossible.

Grandfather provisions (§8.7)

There is no legal requirement for grandfathering. As a matter of law, legally constructed buildings would still be legal, but they would be non-conforming uses that could not expand or rebuild if demolished for any reason. The theory is that the new code or zoning represents the best thinking of the Council as to what is in the public interest. Non-conforming uses and structures would be extinguished over time. There is a vested right to the use and structure that continues until a major event disrupts that right. Not all jurisdictions have grandfathering provisions to the extent existing in the County. Increased grandfathering extends the life of the prior code. There is less of a public policy reason to make ZTA and map changes as the extent of grandfathering increases.

ZTA 13-04 as introduced includes 7 pages of old and new text regarding grandfathering.¹⁸ There is a preoccupation of avoiding making existing buildings non-conforming. Complex current provisions concerning pre-1958 property, the area of Takoma Park annexed into Montgomery County in 1997, and non-conforming uses created by post-1958 zoning ordinances are repeated. New provisions concern exemptions from the new code.

The overlapping nature of these provisions and their conditional application could employ attorneys for years to come. It will ensure that every zoning practitioner will have to keep every previously adopted zoning ordinance nearby to answer questions. It is and will continue to be an administrative nightmare for landowners, Planning Staff, and DPS. Staff believes that the core idea behind these provisions can

¹⁸ ZTA 13-04, pages 8-44 to 8-50.

be articulated with greater precision and hopefully without the need to reference the current code after some specified period of time.

The Planning Board indicated that, when drafting the grandfathering sections of the code, they had a simple and clear goal used by physicians; first do no harm. If the Council wants to start the new age of zoning, it can:

- 1) make every existing building, not subject to current enforcement actions, conforming without a requirement to consult prior codes;
- 2) allow every approved and pending plan submitted X months after the ordinance is approved (development plan, concept plan, project plan, sketch plan, preliminary plan, site plan, special exception, and building permit) to complete that approved plan without regard to the requirements of the new zone;
- 3) allow residential parcels and lots that have not changed in size or shape since 1958 to build a house on the lot or parcel without regard to the minimum lot size and frontage requirements in their new zone – setbacks could be match the setbacks of neighboring houses to avoid reference to prior codes;
- 4) allow some amount of expansion for non-residential properties (the lesser of 10 percent of the current building or 30,000 square feet of floor area) with only the applicability of the density and height standards of the new zone.¹⁹

Staff assumes that the effective date on the rewrite would be 180 days after the Council's approval. That will give time for an applicant to submit plans in progress during the 180 days.

Staff would not be as permissive as the Planning Board regarding grandfathering. The Planning Board would allow an expansion of all building with plans approved (the lesser of 10% of gross floor area or 30,000 square feet) and all development on the ground under the current code for the next 15 years. Staff recommends allowing only existing development on non-residential zones to expand within the next 10 years under the current code.

To allow a more substantial expansion of small buildings, building industry representatives would want the ability to expand a minimum amount of floor area, even if that amounted to more than 10 percent of the existing floor area. For example, a filling station with only 1,000 square feet may want to expand by 500 square feet. Five hundred feet is not a lot of floor area, but it is a large percentage increase. Staff did not recommend this change.

Building industry representatives would want the ability to proceed with any zoning application approved or filed and an option to amend their plans indefinitely. At a minimum, these representatives want the ability to amend plans for 15 years.

Staff is recommending a more restrictive approach. Staff has no problem with grandfathering current approved plans without limit, but if the private sector wants the opportunity to change, then at that point

¹⁹ According to Planning Staff, the height and density of the current zoning and master plan recommendations are the basis for the density and height in the proposed zoning. Using the proposed zone standards does not require going back to the current zoning ordinance.

the public sector should have the opportunity to change requirements. If the Council believes the new code is in the public interest, it should apply to more situations and in less time than the Planning Board recommended.

Staff would propose the following alternative to the grandfathering provisions in ZTA 13-04 as introduced:

A. Existing Buildings and uses on [effective date]

Structures and site design existing on [effective date] are conforming and may be renovated or repaired if the floor area and footprint of the building are not increased. Any structure or site design involuntarily damaged beyond repair by fire, wind, falling debris, water, or other force of nature may be reconstructed.

Any use that was conforming or not non-conforming on [effective date], and would otherwise be made non-conforming by the application of zoning on [effective date] is conforming, but may not expand.

B. Zoning applications approved or filed for approval before [effective date]

The Council, DPS, the Board of Appeals, and the Planning Board must review any development plan, schematic development plan, diagrammatic plan, concept plan, project plan, sketch plan, preliminary plan, record plat, site plan, special exception, variance, and building permit filed or approved before [effective date] under the standards and procedures of the Zoning Ordinance in effect [one day before the effective date]. The approval of any of these steps in the zoning process will allow the applicant to proceed through any other required step in the process under the standards and procedures of the Zoning Ordinance in effect [one day before the effective date].

Any structure or site design approved by the Council, the Planning Board, the Board of Appeals or DPS may be completed by the property owner under the terms of the plan approving the structure.

Until [effective date plus 10 years], an applicant may apply to amend any previously approved zoning application, in conformance to the development standards and procedures of the property's zoning on [effective date minus one], if the amendment;

- 1) does not increase the approved density or building height unless allowed under Section C; and
- 2) either:
 - a) retains at least the approved setback from residentially zoned property; or
 - b) satisfies the setback required by its zoning on or after [effective date].

Any structure or site plan completed under this section is conforming and may be renovated or repaired. Any structure or site design involuntarily damaged beyond repair by fire, wind, falling debris, water, or other force of nature may be reconstructed.

C. Enlarging Approved Floor Area

Until [effective date plus 10 years], an applicant for a site plan amendment or a building permit on land that is located in a Commercial/Residential, Employment, or Industrial zone and not in an overlay zone

may increase the floor area on the site by the lesser of 10% of the gross floor area on the site on [effective date] or 30,000 square feet without following the procedural requirements and standards of the property's zoning on [effective date], if:

- 1) The building does not exceed the height limits and density of the zone in effect on [effective date];
- 2) Any building on the site is no closer to residentially zoned property than any existing structure on the site on [effective date] or satisfy the setbacks of the new zoning; and
- 3) If site plan or site plan amendment is required by the property's zoning on [one day before the effective date], then a site plan or a site plan amendment is approved under the standards of site plan approval on [one day before the effective date].

D. Residential lots and parcels

DPS must allow a building on any residential lot identified on a plat recorded before [effective date] without regard to the area or dimension requirements of its current zoning.

A one-family detached dwelling unit, excluding a farm tenant dwelling and a farm tenant mobile home, on a lot, part of a lot, or on a parcel, that is involuntarily damaged beyond repair by fire, wind, falling debris, water, or other force of nature may be reconstructed on its existing footprint or on a location that satisfies current setback requirements without regard to any area or dimension requirements of its current zone.

A one-family detached dwelling unit on a parcel, which has not changed in size or shape since June 1, 1958 may be constructed or reconstructed without regard to a minimum lot width at the front lot line.

A building constructed or reconstructed on any lot or part of a lot recorded before 1928 may satisfy the side yard setbacks of the 1928 Zoning Ordinance. A new building must satisfy the established building line requirements if applicable.

Attachments

Changes in Chapter 8

© number

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Changes to the Administration and Procedures of the Code in the Planning Board Draft

Introduction

Below is a summary, by section, of changes to our current zoning ordinance that are proposed in the Planning Board Draft.

Division 8.1. Review Authority and Approvals Required

Summary of Division 8.1.

The intent of the overviews in this Division is to provide the reader with a quick synopsis of the review and approval authority of the various departments, boards, and the council involved in ensuring compliance with the zoning code. The second table also provides an introduction to the applicability of each application, i.e., when a particular application is required.

Summary of Changes from Current Code

In the current code, there is a table providing a key to regulatory approvals per zone in Article 59-D. These tables replace that table and are organized by application type rather than zone. The review processes that these tables describe are the same procedures that currently exist; the primary modifications to existing zoning procedures are changes in the timeframes, submittal requirements, and findings required for approval. There are numerous technical differences as well. The changes to these sections are noted in each applicable summary below.

Division 8.2. District Council Approvals

Summary of Division 8.2.

Division 8.2 covers those applications that are decided by the District Council:

- Local Map Amendments, Sec. 8.2.1
- Corrective Map Amendments, Sec. 8.2.2
- Sectional and District Map Amendments, Sec. 8.2.3
- Zoning Text Amendments, Sec. 8.2.4

Sec. 8.2.1. Local Map Amendments

Summary of Sec. 8.2.1., Local Map Amendments

This Division covers Local Map Amendments, which are requests for a specific zone by a property owner. Both "Euclidean" zones (Article 59-4) and "floating" zones (Article 59-5) may be requested. The process is identical, but to approve a local map amendment for a Euclidean zone, there is a specific "change or mistake" threshold that must be satisfied. This threshold is largely based on case law and the findings in this section are succinct in deference to that body of law.

The process for submittal, review, and decision making is similar to the current code. Currently, the Hearing Examiner accepts applications and forwards them to the Planning Director¹ which leads the review by all applicable agencies. To ensure an application is complete, and to increase efficiency in the application process, the Planning Board recommends that all applications be submitted and reviewed by the Planning Department. Technical staff for the Planning Department performs most of the analysis, site visits, and reporting, therefore, it makes sense that they should ensure all relevant material is included in an application.

After the application is verified as complete, the applicant files the application with the Hearing Examiner and receives a hearing date. The Planning Director provides a report and recommendation to the Planning Board, who holds a public meeting and then forwards a recommendation to the Hearing Examiner. The Hearing Examiner then holds a public hearing on the application and forwards their report and recommendation to the District Council. Finally, the District Council renders a decision on the application. There are opportunities for review of the public record, providing testimony, public discussion, oral argument, etc. at each stage. The steps are timed, with an ability to extend, when applicable; important milestones in the review process must be publicly noticed via mail, signs on site, and/or the internet.

After a decision is made, there are particular rules for subsequent applications, the scope of approval, recording procedures, and amendments.

Summary of Changes from Current Code for Sec. 8.2.1., Local Map Amendments

The regulations that determine when a property owner may request a specific floating zone are established in Article 59-5. Division 8.2.1 only covers the procedures for submitting, reviewing, and making a decision on a local map amendment.

There is no summary of the process, submittal requirements, or findings for Euclidean zone local map amendments in the current code. Instead, there are separate sections covering the three basic types of floating zone local map amendments: diagrammatic, development plan, and schematic development plan. The diagrammatic plan only applies when rezoning to the MXN zone. It is proposed that all of these plans be consolidated into one application because the submittal requirements and required findings are similar in nature and there are no distinguishing or unique regulations that require separate review processes.

Because the Planning Board is recommending consolidation there are, of course, some changes to the current filing requirements. It is the intent of these changes to not only streamline the process, but rationalize the review requirements. Every local map amendment for a floating zone is followed by a site plan(s), which provides a detailed review including separate findings on master plan and neighborhood compatibility, adequacy of open space and circulation, and conformance with environmental regulations among other topics. It is the Planning Board's opinion that approval of a floating zone should be decided on basic issues regarding larger planning objectives, the public interest, intents of the zone, appropriate general layout, and ensuring that there will be no adverse neighborhood impacts.

¹ For the purposes of review and decision authority, the proposed code uses "Planning Director" to include Planning Department Staff.

For consistency with the required findings, the submittal requirements have been modified to align with the proposed findings. A traffic study under the LATR Guidelines is required if the incremental increase in vehicular-peak-hour trips between the density of the base zone and the density of the requested floating zone meets the minimum applicability requirement in the LATR Guideline. No stormwater management concept, or forest conservation plan is required. Because detailed review will follow and – typically – will result in numerous changes, these documents are more appropriate for review concurrently with the detailed site plan(s). On the other hand, to ensure that an application is feasible the basic strategies for stormwater management and traffic impacts are incorporated into the review.

The steps for review of a local map amendment are generally similar to the current code with modifications to certain technical aspects and the introduction of certain time restrictions. New specific sections on the scope of approval, recording procedures, and amendments are meant to ensure the applicants and the public understand what is involved in the approval or denial of an application. An allowance for minor amendments – specifically listed – is proposed to allow ministerial approval of changes that do not increase height or density, or decrease mitigating restrictions such as buffers or setbacks.

The following are the proposed application requirements and the findings necessary for approval:

Application Requirements

1. An applicant must file a Local Map Amendment application with the Hearing Examiner.
 - a. Before filing, the applicant must submit an initial application to the Planning Director for approval of completeness. The Planning Director must review the application for completeness no later than 10 days after receipt. An application is incomplete if any required element is missing or is facially defective, e.g., a drawing that is not to scale or lacks proper signatures. The assessment of completeness must not address the merits of the application.
 - b. The applicant must submit any required revisions to the Planning Director. The Planning Director must review the revised application for completeness no later than 10 days after receipt.
 - c. After the Planning Director verifies that the application is complete, the applicant must file the final application with the Hearing Examiner, who will accept the application and establish a hearing date under Sec. 8.2.1.C.
 - d. The applicant must be a government agency, own the subject property, or be authorized by the owner to file the application. If any land or right-of-way is owned or controlled by the State, County, or any other entity or agency, the applicant must submit written authorization from that entity or agency with the application.
2. Public notice is required for accepted applications under Div. 8.5.
3. The applicant must submit the following for review:
 - a. An application form and fees approved by the District Council;
 - b. The identity of each person who has a substantial interest in the property under the application, including any person with a share in the property amounting to 5% or more (whether held in an individual or corporate capacity) of the full cash value of the property after subtracting all mortgages, deeds of trusts, liens, and encumbrances. The application must also contain the names of any contract purchaser or person holding a mortgage, deed of trust, or option to purchase the property.
 - c. A statement disclosing political contributions to the treasurer or political committee of any candidate for County Council and County Executive or slate that contributes to

candidates for County Council or County Executive, under State law. The applicant must submit the disclosure statement on a form approved by the District Council.

- d. A statement explaining how the proposed development satisfies the criteria to grant the application;
- e. For a Floating zone, a floating zone plan depicting:
 - i. building density, massing, height, and anticipated use;
 - ii. locations of open spaces and preliminary stormwater management strategy;
 - iii. pedestrian, bicycle, and vehicular circulation, parking, and loading;
 - iv. any binding element on the application. An applicant who proposes a binding element must submit an unexecuted covenant suitable for filing in the land records reflecting any restriction on the development standards, development program, or use that will be applicable to the property if the District Council approves the application; and
 - v. the following additional information:
 - (a) current and proposed zone;
 - (b) existing site conditions and vicinity;
 - (c) existing or approved adjacent land uses, buildings, and rights-of-way;
 - (d) a Traffic Study under the Planning Board's LATR Guidelines if the incremental increase in vehicular peak-hour trips between the density of the base zoning and the density of the requested floating zone meets the minimum applicability requirement in the LATR Guidelines; and
 - (e) general phasing of structures, uses, rights-of-way, sidewalks, dedications, and future preliminary and site plan applications.
- f. For a Euclidean zone application, exhibits showing:
 - i. the subject property and the proposed neighborhood, identifying uses and zoning; and
 - ii. an explanation of the changes that have occurred in the neighborhood since the original zoning or previous comprehensive rezoning, or evidence of the alleged mistake made by the District Council in the previous Sectional or District Map Amendment, in support of the requested Euclidean zone.

Sec. 8.2.2. Corrective Map Amendments

Summary of Sec. 8.2.2., Corrective Map Amendments

This section covers the process to review and make decisions on corrections to the zoning maps, which are the legal descriptions of zones on the properties under the jurisdiction of the District Council. These corrections range from minor typographical or administrative errors to errors based on incorrect information before the District Council. An example of the latter would be if a zone that requires the presence of public water and sewer was applied to land that was incorrectly thought to have such a connection.

Summary of Changes from Current Code for Sec. 8.2.2., Corrective Map Amendments

There are no significant changes to this process from the current code. The various sections have been reorganized and elaborated on to fit the new format and sections.

Sec. 8.2.3. Sectional and District Map Amendments

Summary of Sec. 8.2.3., Sectional and District Map Amendments

This section covers the submittal requirements, review process, decision criteria, and subsequent steps for review of a map amendment that covers a distinct area made of up several properties. These map amendments are for changes (or reconfirmation) to Euclidean zones and must be based on a comprehensive statement describing the rationale in support of the proposed zoning changes. Sectional and district map amendments may only be applied for by the Planning Board or the District Council.

Summary of Changes from Current Code for Sec. 8.2.3., Sectional and District Map Amendments

There is no substantive change to the review process for sectional or district map amendments. One change, however, is that there are no specific “applicability” standards for the Euclidean Zones under Article 59-4. Instead, each zone has an intent statement and, following a comprehensive analysis, may be applied to properties under the District Council’s plenary zoning authority. Application of a Euclidean zone in the proposed code is based on an “approved master, sector, comprehensive, or functional plan” (Sec. 8.2.3.D).

Sec. 8.2.4. Zoning Text Amendments

Summary of Sec. 8.2.4., Zoning Text Amendments

This section covers the submittal requirements, review process, decision criteria, and subsequent steps for review of zoning text amendments.

Summary of Changes from Current Code for Sec. 8.2. 4., Zoning Text Amendments

There is no substantive change to the review process for zoning text amendments.

Division 8.3. Regulatory Approvals

Summary of Division 8.3.

Division 8.3 covers the regulatory approvals that are made by the Hearing Examiner, the Board of Appeals, and the Planning Board.

- Conditional Use, Sec. 8.3.1
- Variance, Sec. 8.3.2
- Sketch Plan, Sec. 8.3.3
- Site Plan, Sec. 8.3.4

Sec. 8.3.1. Conditional Use Plan

Summary of Sec. 8.3.1., Conditional Use

What is currently known as a “special exception” has been renamed “conditional use” because the uses regulated by this Section are allowed, but must meet conditions of approval beyond a permitted or limited use and must be approved, in most cases, by the Board of Appeals. Because some conditional

use applications are more like site plans, it is assumed by the proposed code, that technical staff from the Planning Department may become more involved in the review and hearing process for especially complicated applications than has been true in the recent past.

The applicability, submittal requirements, review process, decision criteria, and subsequent steps for a conditional use approval are delineated below:

- Site plans are not required by code for any property or part of a property subject to a conditional use, but may be required by the Hearing Examiner or Board of Appeals;
- The Hearing Examiner may decide some conditional use applications, but most are decided by the Board of Appeals;
- Submittal requirements include:
 - Statement of how the proposed development satisfies the criteria to grant the application,
 - Zoning certification,
 - Identification of abutting and confronting property owners,
 - List of any civic and homeowner associations within ½ mile,
 - Traffic statement/study,
 - Site inventory,
 - Utility concept,
 - Written description of operational features of the proposed use,
 - Development program and inspection schedule, and
 - If exterior changes are proposed, plans of the development showing:
 - footprints, ground-floor layout, and heights of all buildings and structures;
 - required open spaces and recreational amenities;
 - layout of all sidewalks, trails, paths, roadways, parking, loading, and bicycle storage areas;
 - rough grading;
 - landscaping and lighting;
 - an approved Natural Resources Inventory/Forest Stand Delineation;
 - Forest Conservation Plan application, if required under Chapter 22A, or an approved preliminary forest conservation plan;
 - Stormwater Management Concept or Water Quality Plan application, if required under Chapter 19 ; and
 - supplementary documentation showing or describing how the application satisfies previous approvals and applicable requirements.
- Special considerations for telecommunications towers are retained;
- Review procedures and timeframes are provided;
- The findings necessary for approval are laid out;
- The decision process is defined; and
- Steps for withdrawal, subsequent applications, scope of approval, recording procedures, and amendments.
- A special section on compliance and enforcement is included in this section.

Summary of Changes from Current Code for Sec. 8.3.1., Conditional Use Plan

Aside from reorganization, clarification, and simplification, the conditional use submittal requirements and findings are the most significant changes. Numerous meetings were held with the Hearing Examiner and Board of Appeals while drafting these sections.

It should be remembered that, in addition to the general submittal requirements and approval criteria that apply to all conditional uses, there are specific requirements under each conditional use in Article 59-3. The current general submittal requirements are attached to this summary (59-G-1.21) as are the proposed submittal requirements in the Planning Board Draft (Sec. 8.3.1.B.4). The proposed submittal requirements are similar to site plan submittal requirements and are intended to ensure that the reviewing and deciding bodies can make a fair determination of compatibility and mitigation of any inherent adverse impacts.

The findings for approval have been significantly modified:

Existing "general considerations":

59-G-1.21. General conditions.

- (a) A special exception may be granted when the Board or the Hearing Examiner finds from a preponderance of the evidence of record that the proposed use:*
- (1) is a permissible special exception in the zone;*
 - (2) complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted;*
 - (3) will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny a special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*
 - (4) will be in harmony with the general character of the neighborhood, considering population density, design, scale, and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*
 - (5) will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*
 - (6) will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*
 - (7) will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the*

predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master plan do not alter the nature of an area.

- (8) will not adversely affect the health, safety, security, morals, or general welfare of residents, visitors, or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*
- (9) will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage, and other public facilities.*
 - (A) If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of granting the special exception.*
 - (B) If the special exception:
 - (i) does not require approval of a new preliminary plan of subdivision; and*
 - (ii) the determination of adequate public facilities for the site is not currently valid for an impact that is the same as or greater than the special exception's impact;*then the Board of Appeals or the Hearing Examiner must determine the adequacy of public facilities when it considers the special exception application. The Board of Appeals or the Hearing Examiner must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application was submitted.*
 - (C) With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.*

(b) Nothing in this Article relieves an applicant from complying with all requirements to obtain a building permit or any other approval required by law. The Board's finding of any facts regarding public facilities does not bind any other agency or department which approves or licenses the project.

(c) The applicant for a special exception has the burden of proof to show that the proposed use satisfies all applicable general and specific standards under this Article. This burden includes the burden of going forward with the evidence, and the burden of persuasion on all questions of fact.

59-G-1.22. Additional requirements.

(a) The Board, the Hearing Examiner, or the District Council, as the case may be, may supplement the specific requirements of this Article with any other requirements necessary to protect nearby properties, and the general neighborhood.

(b) Using guidance by the Planning Board, the Board, the Hearing Examiner, or the District Council, as the case may be, may require a special exception to comply with Division 59-D-3 if:

- (1) *The property is in a zone requiring site plan approval, or*
- (2) *The property is not in a zone requiring site plan approval, but the Planning Board has indicated that site plan review is necessary to regulate the impact of the special exception on surrounding uses because of disparity in bulk or scale, the nature of the use, or other significant factors.*

59-G-1.23. General development standards.

(a) *Development Standards. Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.*

(b) *Parking requirements. Special exceptions are subject to all relevant requirements of Article 59-E.*

(c) *Minimum frontage. In the following special exceptions the Board may waive the requirement for a minimum frontage at the street line if the Board finds that the facilities for ingress and egress of vehicular traffic are adequate to meet the requirements of section 59-G-1.21:*

- (1) *Rifle, pistol and skeet-shooting range, outdoor.*
- (2) *Sand, gravel or clay pits, rock or stone quarries.*
- (3) *Sawmill.*
- (4) *Cemetery, animal.*
- (5) *Public utility buildings and public utility structures, including radio and T.V. broadcasting stations and telecommunication facilities.*
- (6) *Equestrian facility.*
- (7) *Heliport and helistop.*

(d) *Forest conservation. If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.*

(e) *Water quality plan. If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.*

(f) *Signs. The display of a sign must comply with Article 59-F.*

(g) *Building compatibility in residential zones. Any structure that is constructed, reconstructed or altered under a special exception in a residential zone must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must*

be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.

(h) Lighting in residential zones. All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:

- (1) Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.*
- (2) Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.*

59-G-1.24. Neighborhood need.

In addition to the findings and requirements of Article 59-G, the following special exceptions may only be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that a need exists for the proposed use to serve the population in the general neighborhood, considering the present availability of identical or similar uses to that neighborhood:

- (1) Automobile filling station.*
- (2) Automobile and light trailer rental lot, outdoor.*
- (3) Automobile, truck and trailer rental lot, outdoor.*
- (4) Automobile sales and service center.*
- (5) Swimming pool, community.*
- (6) Swimming pool, commercial.*

59-G-1.25. County need.

In addition to the findings of Article 59-G, the following special exceptions may only be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that a need exists for the proposed use due to an insufficient number of similar uses presently serving existing population concentrations in the County, and the uses at the location proposed will not result in a multiplicity or saturation of similar uses in the same general neighborhood:

- (1) Eating and drinking establishments—Drive-in restaurant.*
- (2) Funeral parlors and undertaking establishment.*
- (3) Hotel, motel or inn.*
- (4) Rifle, pistol and skeet shooting range, outdoor.*
- (5) Sanitary fill, incinerator, or private solid waste transfer station.*
- (6) Public use heliport/helistop.*
- (7) Conference center with lodging.*

59-G-1.26. Exterior appearance in residential zones.

A structure to be constructed, reconstructed or altered pursuant to a special exception in a residential zone must, whenever practicable, have the exterior appearance of a residential building of the type otherwise permitted and must have suitable landscaping, streetscaping,

pedestrian circulation and screening consisting of planting or fencing whenever deemed necessary and to the extent required by the Board, the Hearing Examiner or the District Council. Noise mitigation measures must be provided as necessary.

Many of these criteria apply to individual uses, where this is the case, they have been put under the applicable conditional use standards. Other criteria, such as landscaping, buffering, and lighting mitigation have been added to the general development regulations under Article 59-7. The inherent versus non-inherent impacts have been rewritten to be more rigorous and defensible.

The “need” requirements have been removed because they have proven to be difficult to analyze or establish in any meaningful way. The Planning Board believes that the individual and general approval criteria and the public process provide enough information and regulation for the Hearing Examiner or Board of Appeals to make a fair decision.

Proposed “approval criteria”:

E. Necessary Findings

1. To approve a conditional use application, the Hearing Examiner or Board of Appeals must find that the proposed development:

- a. satisfies any applicable previous approval on the subject site or, if not, that the previous approval must be amended;
- b. satisfies the requirements of the zone, use standards under Article 59-3, and applicable general requirements under Article 59-7;
- c. substantially conforms with the recommendations of the applicable master plan;
- d. is harmonious with and will not alter the character of the surrounding neighborhood in a manner inconsistent with the plan;
- e. will not, when evaluated in conjunction with existing and approved conditional uses in any neighboring Residential Detached zone, increase the number, intensity, or scope of conditional uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area; a conditional use application that substantially conforms with the recommendations of a master plan does not alter the nature of an area;
- f. will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage, and other public facilities. If an approved adequate public facilities test is currently valid and the impact of the conditional use is equal to or less than what was approved, a new adequate public facilities test is not required. If an adequate public facilities test is required and:
 - i. if a preliminary subdivision plan is not filed concurrently or required subsequently, the Hearing Examiner or Board of Appeals must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; or
 - ii. if a preliminary subdivision plan is filed concurrently or required subsequently, the Planning Board must find that the proposed development will

be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; and

g. will not have a significant non-inherent adverse impact in any of the following categories:

- i. the use, peaceful enjoyment, economic value or development potential of abutting and confronting properties or the general neighborhood;
- ii. traffic, noise, odors, dust, illumination, or a lack of parking; or
- iii. the health, safety, or welfare of neighboring residents, visitors, or employees.

2. Any structure to be constructed, reconstructed, or altered under a conditional use in a Residential Detached zone must, whenever practicable, have the exterior appearance of a detached house, duplex, or townhouse building type as allowed in the zone.

3. The fact that a proposed use satisfies all specific requirements to approve a conditional use does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require conditional use approval.

4. In evaluating the compatibility of an agricultural conditional use with surrounding Agricultural or Rural Residential zoned land, the Hearing Examiner or Board of Appeals must consider that the impact does not necessarily need to be controlled as stringently as if it were abutting a Residential zone.

5. A conditional use must be denied if any of the findings required in Sec. 8.3.1.E.1.a through Sec. 8.3.1.E.1.e cannot be made. A conditional use may be denied if it has non-inherent adverse effects in any of the categories in Sec. 8.3.1.E.1.g and the overall assessment of both inherent and non-inherent adverse impacts warrants denial to avoid undue harm to the general neighborhood.

Several other changes of note:

- Most special exceptions currently require an affirmative vote of 4 members of BOA. The current code contains a list of special exception uses that only requires an affirmative vote of 3 members of the BOA. In any agricultural zone, Agricultural Processing, Blacksmith, Country Market, Equestrian Facility, Grain Elevator, Manufacture of Mulch, Milk Plant, Retail Nursery or Garden Center, Sawmill, Wholesale Nursery or Greenhouse, Winery, Farm Machinery Sales and Service, and Farm Supplies only requires the approval of 3 BOA members.
- Conditional uses as proposed in the Planning Board Draft would require the affirmative vote of 4 members of the Board of Appeals when 5 members are present, or an affirmative vote of 3 members of the Board of Appeals when 4 or 3 member are present (Sec. 8.3.1.F.2);
- Currently, an applicant cannot re-file an application for a special exception for 36 months. As proposed in the Planning Board Draft, an applicant could re-file after 18 months (Sec. 8.3.1.G.1);
- The time frame between the date of acceptance of an application to the date of the hearing has been established at 120 days (Sec. 8.3.1.C.1);
- Changes in the modification of a conditional use are now under a section on amendments (Sec. 8.3.1.J).

Sec. 8.3.2. Variance

Summary of Sec. 8.3.2., Variance

This section provides the regulations for reviewing any application requesting a “modification from the standards or requirements of [the Zoning Code that is] not subject to a waiver or alternative compliance plan”. (Sec. 8.3.2.A.1)

Summary of Changes from Current Code for Sec. 8.3.2., Variance

Most sections are not substantively different from the current code except for organization, clarity, and simplification. The proposed approval criteria, however, have been modified:

E. Necessary Findings

To approve a variance, the Board of Appeals must find that:

1. One or more of the following unusual or extraordinary situations or conditions exist:
 - a. exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary conditions peculiar to a specific property;
 - b. the proposed development uses an existing legal nonconforming property or structure;
 - c. the proposed development contains environmentally sensitive features or buffers;
 - d. the proposed development contains a historically significant property or structure;
 - e. the proposed development substantially conforms with the established historic or traditional development pattern of a street or neighborhood; or
 - f. denying the variance would result in an inability to legally use the property.
2. The special circumstances or conditions are not the result of actions by the applicant;
3. The requested variance is the minimum necessary to overcome the practical difficulties that full compliance with this Chapter would impose due to the unusual or extraordinary situations or conditions on the property;
4. The variance can be granted without substantial impairment to the intent and integrity of the general plan or the applicable master plan; and
5. Granting the variance will not be adverse to the use and enjoyment of abutting properties.

The purpose of these changes is to allow property owners to construct buildings and structures that maintain traditional patterns, to further protect environmentally sensitive areas, and to allow legally nonconforming or historic structures to be reused. These allowances are balanced against the existing standards regarding adverse impacts, etc. listed in 3-5, above.

Sec. 8.3.3. Sketch Plan

Summary of Sec. 8.3.3., Sketch Plan

A sketch plan is required for optional method development in the Commercial/Residential and Employment Zones. This section describes the applicability, application requirements, review, approval criteria, decision, and subsequent steps for sketch plan applications.

Summary of Changes from Current Code for Sec. 8.3.3., Sketch Plan

There are no substantive changes from the current code. This section has reorganized, clarified, and simplified the current requirements for a sketch plan based on the C/R zones in Div. 59-C-15.

Planning Staff recommends that the following language be added to the findings necessary for the approval of a sketch plan:

If a property was subject to an approved development plan or special exception on [date of adoption minus one], the Planning Board in approving any sketch plan, preliminary plan, or site plan must consider the terms and conditions of the approved development plan or special exception.

This language is in the Planning Board Draft under the grandfathering provisions, but for clarity staff recommends it be added to this section as well.

Sec. 8.3.4. Site Plan

Summary of Sec. 8.3.4., Site Plan

A site plan is a detailed review of development and is required based on a development's:

- Zone;
- Use;
- Intensity of development (FAR, units/acre, or building height); and/or
- Zone of the abutting or confronting property.

This section describes the applicability, application requirements, review, approval criteria, decision, and subsequent steps for site plan applications.

Summary of Changes from Current Code for Sec. 8.3.4., Site Plan

The primary change in the proposed code is that site plans are required based on several factors (listed above) rather than generally by a particular zone of for a particular use (Sec. 8.3.4.A.8). The intent is to ensure review of applications based on impact and expectations for certain areas. For example, review of a commercial use at a low intensity in a commercial/residential zone would not be required, whereas the same use (at the same intensity and in the same zone) would require a site plan if it were next to a residentially zoned property housing a single-family dwelling. Thus, use, intensity, and adjacency serve to provide the appropriate review based on context. The table in Sec. 8.3.4.A.8 covers all zones, uses intensities, and adjacencies. Overlay zones stipulate whether a site plan is required in Article 59-4.

The review process for site plans is the same; the submittal requirements and approval criteria have been modified. A significant change to the approval of a site plan is the added requirement that the proposed development must substantially conform with the recommendations of the applicable master plan. The timeframes are new and the outline ensures a better understanding of the steps.

Like the sketch plan, Planning Staff recommends that the following language be added to the findings necessary for the approval of a site plan:

If a property was subject to an approved development plan or special exception on [date of adoption minus one], the Planning Board in approving any sketch plan, preliminary plan, or site plan must consider the terms and conditions of the approved development plan or special exception.

Division 8.4. Administrative Approvals

Summary of Division 8.4.

This division establishes several administrative approvals, including building permit, use and occupancy permit, temporary use permit, licensing for Home Occupation and Home Health Practitioner, sign permit, sign permit variance, sign installer license, and administrative zoning district line adjustments. As with other approvals, this section provides uniform information regarding applicability, application requirements, approval process, and approval criteria. Some approvals have information on appeals while others contain recording procedures, validity periods, and/or compliance and enforcement regulations.

Summary of Changes from Current Code for Division 8.4.

Almost all of the information contained in the Division 8.4 is not new; with the exception of the administrative zoning district line adjustment. All other administrative approvals proposed in the Planning Board Draft are copied from several sections of the current code. The text has been modified slightly for clarity and consistency.

The administrative zoning district line adjustments is a new administrative procedure proposed by the Planning Board that would allow the Planning Director to certify an adjustment to a zoning district line only under the following circumstances:

1. More accurate parcel information, such as a sealed survey plat or a recorded plat, becomes available and evidence indicates that the property boundary was intended to match the zoning district line; and
2. Adopted rezoning documentation clearly depicts a discrepancy between a zoning district line as shown on the digital zoning layer and the updated property boundary.

Furthermore, when an administrative zoning district line adjustment is approved;

The Planning Director must send a copy of the certification to all abutting and confronting property owners. The certification must state that any party, no later than 30 days after the certification is sent, may make a written request for public review by the Planning Board. If a request for public review is received, the Planning Director must suspend the certification of the administrative zoning district line adjustment and schedule a public review with the Planning Board. At the public review, the Planning Board may decide to approve the Planning Director's certification or require the administrative zoning district line adjustment to follow the procedures for a Corrective Map Amendment under Sec. 8.2.2.

Division 8.5. Notice Standards

Summary of Division 8.5.

This division establishes the noticing standards for all applications. A table has been provided (Sec. 8.5.1) for easy review of the notice requirements including:

- Newspaper;
- Pre-submittal meeting;
- Application sign;
- Individual notice of application;
- Individual notice of hearing;
- Individual notice of resolution;
- Building permit sign; and
- Website posting.

Summary of Changes from Current Code for Division 8.5, Notice Standards

This division is entirely new but composed of sections from throughout the current code. Importantly, this consolidation allows standardization of the various noticing requirements. Planning Staff is working with the various review and approval bodies to finalize presentation and dimensional standards for signs, mailings, and internet advertisement. Notice is required via the same means as currently required for most approval processes, with the exception of newspaper noticing for Local Map Amendments – this requirement has been removed in the Planning Board as the Board feels the other means of noticing provide sufficient, comprehensive notice. With respect to all noticing, the intent is to modernize public notice and ensure that appropriate stakeholders can become aware of applications and participate in the conversation regarding their review and approval or denial.

Division 8.6. Special Provisions

Summary of Division 8.6.

This section contains information on the powers of the various review bodies as well as the Sign Review Board. It also provides information of the establishment and collection of certain development fees.

Summary of Changes from Current Code

These provisions are taken from the current code.

Division 8.7. Exemptions and Nonconformities

Summary of Division 8.7

The purpose of this division is to establish the regulations regarding:

- Exemptions from the revised code and district map amendment;
- Provisions for conditions (buildable lots, re-subdivisions, and one-family dwellings) predating 1958;
- Annexed areas;
- Un-platted parcels with detached houses;
- Continuations of nonconforming structures, site design, and uses;

- Exceptions for certain housing projects, swimming pools, nonconformity through public taking, nonconforming detached house and reclassification from R-60 to R-90; and
- Noncomplying multi-unit dwellings.

Interim uses that do not conform to the current code are provided in other sections – such as parking lot landscaping – and are not considered nonconformities.

Existing “site design” has been added to consideration to allow for instances where the newer “form-based” elements of the code may not be satisfied. In addition, special consideration has been made for several categories:

- Existing structures, site design, or uses as of the adoption date of the new code;
- Existing structures, site design, or uses as of the adoption date of the district map amendment (mapping conversion);
- Previously buildable lots;
- Plans pending as of the adoption date of the new code; and
- Plans pending as of the adoption date of the district map amendment (mapping conversion).

A 180-day period to file under the previous code after the adoption date of the new code has been provided to ensure fair application and implementation.

Summary of Changes from Current Code

It is the intent of this section to carry forward the very specific regulations regarding certain properties, uses, and structures that are contained in the current code but consolidate the various “grandfathering” language found in most zones regarding legally non-conforming properties, uses, and structures. There are allowances for expansion, which currently range from no allowance to 500 square feet to 30,000 square feet depending on zone, and regulations on when compliance with the new code is required and what part of development is covered by the new regulations.

The changes from the current code affect commercial and mixed-use properties most. Comparison with the current code is difficult at best and the Planning Board Draft is an attempt to “rethink” the way we consider nonconformities. As noted, in many cases, there is very specific language for specific properties, structures, and uses – these have been retained. More general language is proposed for the numerous zones that had broader “renovation, continuation, etc” language that the Board feels is the appropriate way to balance allowances for renovation and expansion against the vision of more contemporary, pedestrian-oriented, and sustainable development.

Division 8.8. Violations, Penalties and Enforcement

Summary of Division 8.8.

This division establishes the general regulations for violations of the Code and Civil fines.

Summary of Changes from Current Code for Division 8.8.

The information contained in the Division 8.4 is not new; the language is copied from the current code. The text has been modified slightly for clarity and consistency.