

Action

MEMORANDUM

October 23, 2009

TO: County Council

FROM: Jeffrey L. Zyontz,  Legislative Attorney

SUBJECT: Action -Zoning Text Amendment 09-05,
Burtonsville Overlay Zone - Allowed Uses

PHED Recommendation: On October 8, 2009 the Committee (2-0-1; Councilmember Elrich generally approves of ZTA 09-05 but would recommend revisions to add to the list of uses prohibited in the zone) recommended approval of the proposed ZTA with revisions to allow recently approved preliminary plans to proceed under the conditions of their approval. The Committee (3-0) believed that the substantial investment made by the holder of a recently approved preliminary plan justified a grandfathering provision in this instance.

On October 27, 2009 Councilmember Navarro will propose an additional amendment to ZTA 09-05 (see © 23). The amendment would add to the list of prohibited uses in the Burtonsville Overlay zone; it would also grandfather current uses that would be made non-conforming by the adoption of her amendment.

Background

Zoning Text Amendment (ZTA) 09-05, sponsored by Councilmember Navarro, was introduced on June 23, 2009. There are 3 zones beneath the Overlay zone for the Burtonsville Employment Area of the Fairland Master Plan (Burtonsville Overlay zone): I-1, I-3, and OM. The permitted land uses in each zone are different. The Planning Board denied a preliminary plan for a self-storage facility because the Fairland Master Plan did not envision a self-storage use in the I-3 zone.¹ A recent Circuit Court opinion overturned the Planning Board's opinion. The Circuit Court determined that the Burtonsville Overlay zone gave a property owner the right to use any of the uses allowed in the I-1, I-3, and OM zones. ZTA 09-05 would sustain the Planning Board's interpretation of the allowable uses in the zone.

¹ The approval of a preliminary plan requires a finding that the plan substantially conforms to the applicable master plan; §50-35(l).

Public Hearing

On July 28, 2009 the Council held a public hearing on ZTA 09-05. The Planning Board recommended approval of ZTA 09-05; it implements the intent of the 1997 Fairland Master Plan. The Planning Board suggested different text changes to accomplish the intent of ZTA 09-05.

The Executive recommended that ZTA 09-05 should only be approved if it includes a grandfathering provision for any preliminary plan or site plan application filed before September 1, 2009. The Executive is concerned about the fairness of removing allowable uses under the circumstances presented by the self-storage facility.

The representative of the self-storage facility (Siena Corporation) characterized ZTA 09-05 as “unlawful, unfair, unfortunate, and a textbook example of abuse of powers.” In their opinion, it is targeted to one property and one specific use.

The East Citizens Advisory Board urged support for ZTA 09-05. The Montgomery Civic Federation supported ZTA 09-05 but urged caution about reducing land for necessary industrial uses. The residents of Valley Stream Avenue urged approval of ZTA 09-05; they wanted attractive buildings not visible from highways, a diversity of businesses, safe access to Route 198, and the completion of Dino Drive by the County. Stuart Rochester urged support for ZTA 09-05.

Data requested

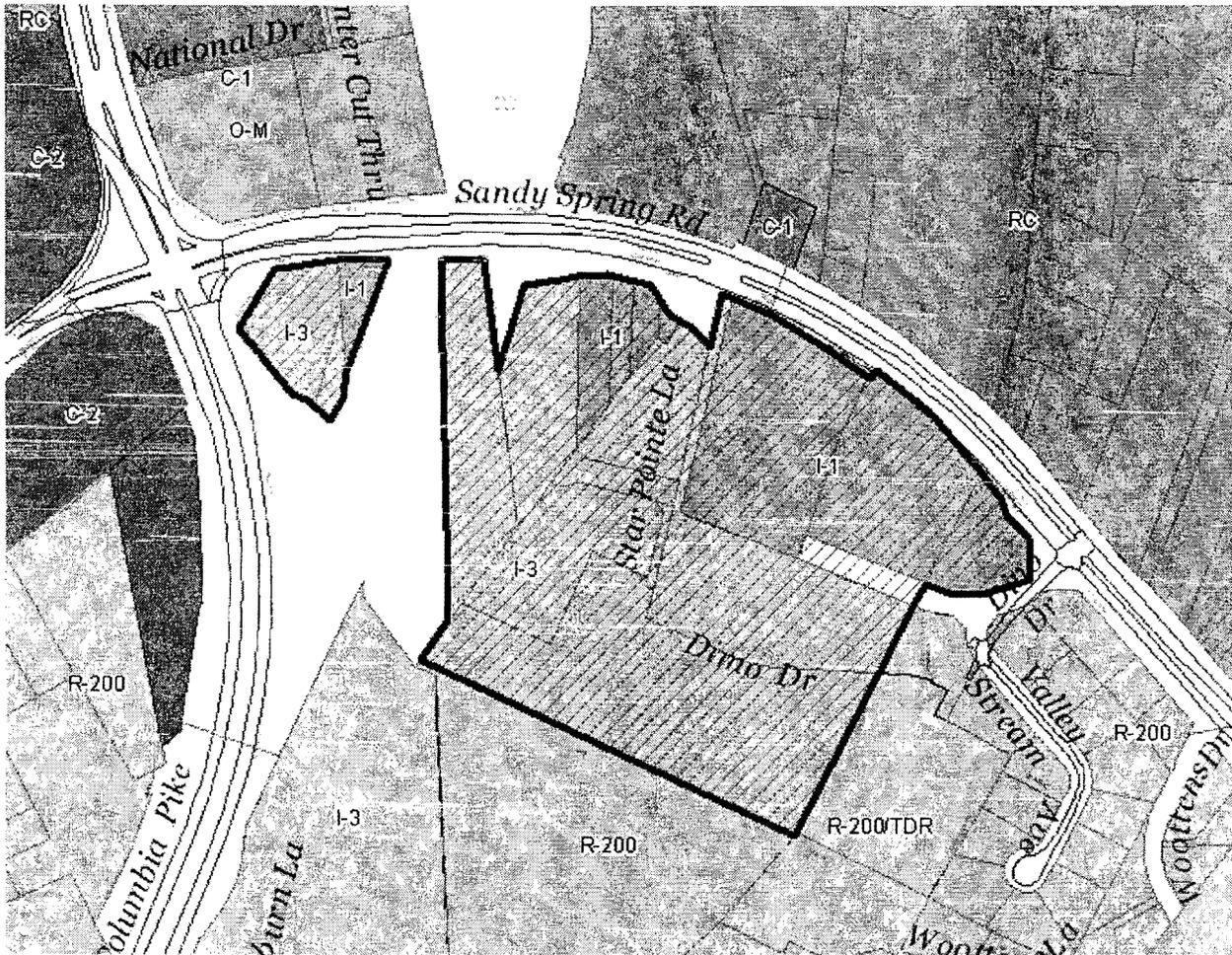
Councilmember Floreen wanted to know where, in the County, self-storage facilities were allowed and whether there was a sufficient amount of properly zoned land.

The following table indicates the zones that allow self-storage facilities as a permitted use, and the acreage of the zoning found in the County:

Zone	Acreage
C-2	694
C-3	131
I-1	1,559
I-2	1,038
I-4	790
MXTC	231
MXTC/TDR	66
CBD-1 (conditional)	165
TOMX-2.0 (conditional)	37

There are 3,472 acres of land that could unconditionally accommodate self-storage uses. Another 202 acres allow self-storage with the approval of a special exception. Staff will have GIS maps available at the Committee’s worksession. The maps will allow the Committee to see the geographic distribution of zones that allow self-storage facilities.

The black boundary in the zoning map below indicates the limits of the Burtonsville Overlay zone. The I-1 and I-3 zones are the only underlying zones in the Burtonsville Overlay Zone. The I-1 zone allows self-storage facilities; the I-3 zone does not allow self-storage facilities.



Issues

Why approve ZTA 09-05?

In the process of denying a preliminary plan for a self-storage facility, the Planning Board recognized the detailed uses allowed by the zoning were not in keeping with the vision of the Fairland Master Plan. If the Council believes the Planning Board’s interpretation of the Master Plan is correct, it may amend the zone.

What uses would be eliminated from the Burtonsville Overlay Zone by the adoption of ZTA 09-05?

The I-1 zone has the following uses that were NOT prohibited by the Burtonsville Overlay zone and not allowed in the I-3 zone:

- 1) Adult entertainment business;
- 2) Agricultural uses;
- 3) Aircraft parts, sales and services, including the sale of fuel for aircraft only;
- 4) Animal boarding places;
- 5) Alcoholic beverage manufacturing;
- 6) Dairy products processing;
- 7) Educational institution, private;
- 8) Highway fuel and food service;

- 9) Hospitals, veterinary, when in a soundproof building;
- 10) Landscape contractor;
- 11) Manufacturing and assembly of machine parts, components and equipment;
- 12) Manufacturing and assembly of mobile, modular, and manufactured homes;
- 13) Off-loading and transfer sites for storage of sand, gravel or rocks;
- 14) Parking of motor vehicle, off-street, in connection with any use permitted in a commercial zone;
- 15) Recycling facility;
- 16) Recreational or entertainment establishments, commercial;
- 17) Rifle or pistol ranges, indoor;
- 18) Self-storage facilities;
- 19) Service organizations;
- 20) Sign making shop;
- 21) Stockyards;
- 22) Storage, outdoor; and
- 23) Trucking terminals.

Under ZTA 09-05, all of these uses would still be allowed in the I-1 zoned area but would not be allowed in the I-3 zoned area. The amendment recommended by Councilmember Navarro would not allow the following uses in areas with an underlay zoning of I-1:

- Adult entertainment business;
- Agricultural uses;
- Aircraft parts, sales and services, including the sale of fuel for aircraft only;
- Highway fuel and food service;
- Off-loading and transfer sites for storage of sand, gravel or rocks;
- Parking of motor vehicle, off-street, in connection with any use permitted in a commercial zone;
- Recycling facility;
- Rifle or pistol ranges, indoor;
- Warehousing and storage services:
 - Industrial and commercial users;
 - Self-storage facilities;
- Stockyards;
- Storage, outdoor; and
- Trucking terminals.

There is no OM zoned land in the Burtonsville Overlay zone, but currently the Overlay zone allows all of the uses allowed in the OM zone. The OM zone has the following additional uses that were NOT prohibited or allowed by the overlay zone and not allowed in the I-3 zone:

- 1) Charitable institutions;
- 2) Educational institutions;
- 3) Funeral homes; and
- 4) Racquetball facilities.

The uses unique to the I-3 zone would not be allowed in the I-1 zoned area:

- 1) Conference centers;
- 2) Art or cultural centers; and
- 3) Private swimming pools.

What other options would accomplish the goals of ZTA 09-05?

Option 1 – Allow the permitted uses in the I-3 and OM zones

If the Council wanted to be more permissive of a variety of land uses consistent with the employment center concept of the Fairland Master Plan, ZTA 09-05 could be amended to allow all of the uses permitted in the I-3 and OM zones with the current additions and exclusions. This would exclude many industrial uses and uses that do not promote an employment center.

Option 2 – Add to the list of specifically prohibited uses

The structure of the Burtonsville Overlay zone already includes lists of uses allowed or prohibited without regard to the underlying zone.

Should the goals of limiting land uses be accomplished by eliminating any reference to the permitted uses in the Overlay zone?

The Planning Board recommended deleting all references to the underlying zones and their permitted uses. This would be different than all other overlay zones. It would not be clear from the text of the zone how to determine the uses permitted. *The Committee did not recommend eliminating all reference to the permitted uses in the Burtonsville Overlay zone*

Should a grandfathering provision be added to the ZTA to allow approved preliminary plans to proceed as approved?

The Maryland Court of Appeals has determined that vesting occurs when construction has started under a validly issued building permit.² The Siena Development Corporation has not vested its rights. The landowner could be held harmless from ZTA 09-05 by allowing any project with preliminary plan approval to proceed to construction as a matter of fairness. The Council has sometimes been persuaded by this argument in other situations. However, the Council is not required to grandfather any approved preliminary plans if the public interest is better served by more limited uses. The Committee (3-0) believed that the substantial investment made by the holder of a recently approved preliminary plan justified a grandfathering provision in this instance.

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² *County Council for Montgomery County v. District Land Corp.*, 274 Md. 691, (1975).

Zoning Text Amendment No: 09-05
Concerning: Burtonsville Overlay Zone –
Allowed uses
Draft No. & Date: 1- 6/17/09
Introduced: 6/23/09
Public Hearing: 7/28/09
Adopted:
Effective:
Ordinance No:

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

By: Councilmember Navarro

AN AMENDMENT to the Montgomery County Zoning Ordinance to:

- amend the land uses allowed in the Overlay zone for the Burtonsville Employment Area of the Fairland Master Plan; and
- generally amend the Overlay zone for the Burtonsville Employment Area of the Fairland Master Plan.

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

DIVISION 59-C-18	“Overlay Zones”
Sec. 59-C-18.14.	“Overlay zone for the Burtonsville Employment Area of the Fairland Master Plan”
59-C-18.142	“Regulations”

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

OPINION

Zoning Text Amendment (ZTA) 09-05, sponsored by Councilmember Navarro, was introduced on June 23, 2009. There are 3 zones beneath the Overlay zone for the Burtonsville Employment Area of the Fairland Master Plan (Burtonsville Overlay zone): I-1, I-3, and OM. The permitted land uses in each zone are different. The Planning Board denied a preliminary plan for a self-storage facility because the Fairland Master Plan did not envision a self-storage use in the I-3 zone.¹ A recent Circuit Court opinion overturned the Planning Board's opinion. The Circuit Court determined that the Burtonsville Overlay zone gave a property owner the right to use any of the uses allowed in the I-1, I-3, and OM zones. ZTA 09-05 would sustain the Planning Board's interpretation of the allowable uses in the zone.

The Planning Board recommended approval of ZTA 09-05; it implements the intent of the 1997 Fairland Master Plan. The Planning Board suggested different text changes to accomplish the intent of ZTA 09-05.

On July 28, 2009 the Council held a public hearing on ZTA 09-05 to receive testimony concerning the proposed text amendment. The Executive recommended ZTA 09-05 should only be approved if it includes a grandfathering provision for any preliminary plan or site plan application filed before September 1, 2009. The Executive is concerned about the fairness of removing allowable uses under the circumstances presented by the self-storage facility.

The representative of the self-storage facility (Siena Corporation) characterized ZTA 09-05 as "unlawful, unfair, unfortunate, and a textbook example of abuse of powers." In their opinion, it is targeted to one property and one specific use.

The East Citizens Advisory Board urged support for ZTA 09-05. The Montgomery Civic Federation supported ZTA 09-05 but urged caution about reducing land for necessary industrial uses. The residents of Valley Stream Avenue urged approval of ZTA 09-05; they wanted attractive buildings not visible from highways, a diversity of businesses, safe access to Route 198, and the completion of Dino Drive by the County. Stuart Rochester urged support for ZTA 09-05.

The text amendment was referred to the Planning, Housing, and Economic Development (PHED) Committee for review and recommendation.

On October 8, 2009 the Planning, Housing, and Economic Development Committee held a worksession to review the amendment. At the conclusion of that worksession the Committee (2-0-1; Councilmember Elrich generally approves of ZTA 09-05 but would recommend revisions to add to the list of uses prohibited in the zone) recommended approval of the proposed ZTA with revisions to allow recently approved preliminary plans to proceed under the conditions of their approval. The Committee (3-0) believed that the substantial investment made by the holder of a recently approved preliminary plan justified a grandfathering provision in this instance.

¹ The approval of a preliminary plan requires a finding that the plan substantially conforms to the applicable master plan; §50-35(l).

The District Council reviewed ZTA 09-05 at a worksession held on October 27, 2009, and agreed with the recommendations of the PHED Committee.

For these reasons and because to approve this amendment will assist in the coordinated, comprehensive, adjusted and systematic development of the Maryland-Washington Regional District located in Montgomery County, Zoning Text Amendment No. 09-05 will be approved as amended.

ORDINANCE

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

1 Sec. 1. DIVISION 59 - C-18 is amended as follows:

2
3 Division 59-C-18. Overlay Zones.

4 * * *

5 Sec. 59-C-18.14. Overlay zone for the Burtonsville Employment Area of the Fairland
6 Master Plan.

7 * * *

8 59-C-18.142. Regulations.

9 (a) Land uses. [The following uses are allowed in the Burtonsville employment
10 overlay zone:]

11 (1) All permitted or special exception uses [in the I-1, I-3, and O-M zones as
12 shown in Sections 59-C-4.2 and 59-C-5.2 except] in a lot or parcel's
13 underlying zone are allowed; however,

14 (a) all permitted uses in the I-1, I-3, and O-M zones are permitted for any
15 tract of land with a preliminary plan approved by the Planning Board
16 after October 27, 2006 but before October 27, 2009; and

17 (b) the following uses are prohibited:

18 Automobile parts, sales and services, including but not limited to tire
19 sales and transmission service

20 Automobile filling stations

21 Automobile repair and services

22 Automobile sales, indoors and outdoors

23 Automobile, truck and trailer rentals, outdoor

24 Bakery

25 Blacksmith shops[,] and machinery shops

26 Bottling plant

27 Building materials and supplies, wholesale and retail

28 Confectionery production

- 29 Contractor's storage yards
- 30 Dry cleaning plants
- 31 Electroplating and manufacturing of small parts such as coils,
32 condensers, transformers, and crystal holders
- 33 Food production, packaging, packing and canning [of]
- 34 Fuel storage yards
- 35 Ice manufacturing and storage
- 36 Laundry plants
- 37 Lumberyards
- 38 Manufacturing of light sheet metal products
- 39 Manufacturing, compounding, assembling or treatment of articles
40 from the following previously prepared materials: bone,
41 cellophane, plastic, canvas cloth, cork, feathers, felt, fiber, fur,
42 hair, horn, leather textiles, yarns, glass, precious or semi-
43 precious metals or stones, and tobacco
- 44 Manufacturing, compounding, processing or packaging of cosmetics,
45 drugs, perfumes, pharmaceuticals, toiletries and products
46 resulting from biotechnical and biogenetic research and
47 development
- 48 Manufacturing, fabrication, and/or subassembly [or] of aircraft or
49 satellite parts, components, and equipment
- 50 Manufacturing of musical instruments, toys, novelties, and rubber and
51 metal stamps
- 52 Manufacturing of paint not employing a boiling or rendering process
- 53 Manufacturing of pottery and figurines or other products using
54 previously pulverized clay and kilns fired only by electricity or
55 gas
- 56 Paper products manufacturing

- 57 Sawmills
- 58 Stoneworks
- 59 Tinsmith and roofing services
- 60 Wholesale trades limited to sale or rental of products intended for
- 61 industrial or commercial users
- 62 Wood products manufacturing

63 In cases where uses are [permitted in one zone but] allowed by special
 64 exception [in another zone], the special exception [provision takes
 65 precedence] provisions must be satisfied.

66 (2) The following retail commercial uses are [permitted] allowed without regard
 67 to the underlying zone:

- 68 Antique shops, handicrafts, or art sales.
- 69 Barber or beauty shop.
- 70 Banks.
- 71 Bookstores.
- 72 Drugstore.
- 73 Eating and drinking establishment, excluding a drive-in.
- 74 Express or mailing offices.
- 75 Florist.
- 76 Food and beverage store.
- 77 Newsstand.
- 78 Photographic and art supply stores.
- 79 Shoe repair shops.

80 * * *

81 **Sec.2. Effective Date.** This ordinance takes effect immediately upon the date of
 82 Council adoption.

83

84 This is a correct copy of Council action.

85

86

87 Linda M. Lauer, Clerk of the Council



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

OFFICE OF THE CHAIRMAN

MONTGOMERY COUNTY PLANNING BOARD

The Maryland-National Capital Park and Planning Commission

July 23, 2009

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. 09-05

BOARD RECOMMENDATION

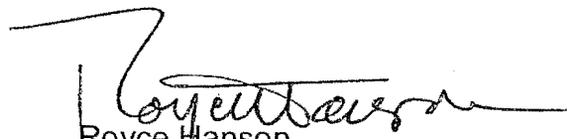
The Montgomery County Planning Board of The Maryland–National Capital Park and Planning Commission reviewed Zoning Text Amendment No. 09-05 at its regular meeting on July 23, 2009. By a vote of 3:1, the Board recommends approval of the text amendment as modified by staff to clarify the intent and included in the technical staff report.

The text amendment proposes to clarify that in enacting the Burtonsville Overlay Zone, it was not the legislative intent of the Council to permit land uses to be interchanged among the various underlying zones. The ZTA is consistent with past actions of the Planning Board and with the Board's understanding of the intent of the Burtonsville Overlay Zone. An important objective of the master plan is to diversify uses in the US 29/Cherry Hill Road Area and the Burtonsville Industrial Area. For the Burtonsville Industrial Area, the master plan's goal is to develop a diversity of uses to serve and support the businesses, employees, and area residents, with the objective of enabling the Burtonsville Industrial Area to develop as a diversified, but unified employment center. The master plan also discusses the importance of limiting land uses in the I-1 zone, permitting additional uses in the I-3 zone, and making certain adjustments to the land uses of the base zones consistent with master plan recommendations.

The Planning Board believes that the text amendment supports the master plan objectives, and that the overlay zone is not intended to allow uses not otherwise allowed in the underlying zones, unless the uses are specifically identified in the overlay zone's list of permitted uses. The Board further agrees with staff that the sponsor's intent in introducing ZTA 09-05 is more clearly expressed by eliminating lines 9-13 and lines 62-64 altogether.

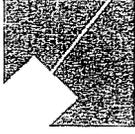
CERTIFICATION

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 on a motion by Commissioner Cryor, seconded by Commissioner Presley, with Commissioners Cryor and Presley and Chairman Hanson voting in favor of the motion, and with Commissioner Alfandre voting against the motion, at its regular meeting held in Silver Spring, Maryland, on Thursday, July 23, 2009.



Royce Hanson
Chairman

RH: GR



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

MCPB
 Item 10
 7/23/09

DATE: July 13, 2009
TO: Montgomery County Planning Board
VIA: Rose Krasnow, Chief, Development Review *RK*
 Ralph Wilson, Zoning Supervisor *RW*
FROM: Greg Russ, Zoning Coordinator *GR*
REVIEW TYPE: Zoning Text Amendment
PURPOSE: To amend the land uses allowed in the Overlay zone for the
 Burtonsville Employment Area of the Fairland Master Plan.

TEXT AMENDMENT: No. 09-05
REVIEW BASIS: Advisory to the County Council sitting as the District
 Council, Chapter 59 of the Zoning Ordinance
INTRODUCED BY: Councilmember Navarro
INTRODUCED DATE: June 23, 2009

PLANNING BOARD REVIEW: July 23, 2009
PUBLIC HEARING: July 28, 2009; 1:30pm

SUMMARY RECOMMENDATION: APPROVAL with modifications.

The Court has interpreted lines 9-13 of the Burtonsville Overlay Zone as giving a property owner in the overlay zone the right to use any of the land uses allowed in the I-1, I-3 and OM zones, irrespective of whether the use is allowed in the underlying zone. Zoning Text Amendment 09-05 was introduced by Councilmember Navarro to clarify that in enacting the Burtonsville Overlay Zone, it was not the legislative intent of the Council to permit land uses to be interchanged among the various underlying zones. The ZTA is consistent with past actions of the Planning Board and with staff's understanding of the intent of the Burtonsville Overlay Zone. Staff supports ZTA 09-05 with some rewording to avoid any future confusion regarding how the overlay zone is to be administered

ANALYSIS

ZTA 09-05 is consistent with the land use recommendations of the 1997 Fairland Master Plan. An important objective of the master plan is to diversify uses in the US 29/Cherry Hill Road Area and the Burtonsville Industrial Area. For the Burtonsville Industrial Area, the master plan's goal is to develop a diversity of uses to serve and support the businesses, employees, and area residents, with the objective of enabling the Burtonsville Industrial Area to develop as a diversified, but unified employment center. The master

plan also discusses the importance of limiting land uses in the I-1 zone, permitting additional uses in the I-3 zone, and making certain adjustments to the land uses of the base zones consistent with master plan recommendations. ZTA 09-05 is supportive of these master plan objectives.

Based on a careful reading of the master plan, staff believes that the overlay zone was not intended to allow uses not otherwise allowed in the underlying zones, unless the uses are specifically identified in the overlay zone's list of permitted uses. The proposed ZTA will clarify the intent of the master plan by not allowing land uses to be interchanged among the various underlying zones.

RECOMMENDATION

Staff believes the sponsor's intent in introducing ZTA 09-05 is more clearly expressed by eliminating lines 9-13 and lines 62-64 altogether. With these revisions, staff recommends approval of ZTA 09-05.

GR
Attachments

1. Proposed Text Amendment No. 09-01 as modified by staff



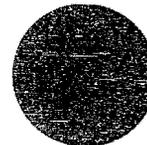
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OFFICE OF THE COUNTY EXECUTIVE
ROCKVILLE, MARYLAND 20850

051098

Isiah Leggett
County Executive

MEMORANDUM



2009 SEP 10 AM 9:21

RECEIVED
MONTGOMERY COUNTY
COUNCIL

September 8, 2009

TO: The Honorable Phil Andrews, President
Montgomery County Council

FROM: Isiah Leggett, Montgomery County Executive 

SUBJECT: Zoning Text Amendment 09-05 – Burtonsville Employment Area Overlay
Zone-Easy Storage

ZTA 09-05 is currently pending before the District Council. This ZTA changes the approach to the Burtonsville Employment Overlay Zone. The zone as originally established, allowed all permitted and special exception uses in the I-1, I-3 and O-M zones except for a discrete list of prohibited uses.

This ZTA is a reaction to a recent court opinion that interpreted the zoning ordinance as allowing in the Burtonsville Employment Overlay Zone all uses that are allowed in the underlying zones. The court opinion was rendered in a legal action filed by Siena Corporation which is seeking to use its property within the overlay zone. Siena purchased its site and filed an application for preliminary plan approval for a self storage facility which, as a permitted use within the I-1 Zone, would be permitted within the Burtonsville Employment Overlay Zone under the court's interpretation of the zoning ordinance.

The ZTA will, in effect, reverse the court's decision and prevent Siena from developing its site. I am concerned about the fairness and policy implications of taking away a use under the circumstances presented with respect to the Burtonsville site. The Circuit Court of Montgomery County has already ruled in *Siena Corporation v. Montgomery County Planning Board*, Civil No. 299136 that Siena's application for preliminary plan approval should have been granted. In fact, the Circuit Court found that the Planning Board even acknowledged that the self-storage use is a permitted use in the Burtonsville Employment Area Overlay Zone.

The Honorable Phil Andrews
September 8, 2009
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The property owner, in reliance upon the plain language of the Zoning Ordinance and after working with Planning Board staff, expended millions of dollars to acquire the land and go through the subdivision process. It is fundamentally unfair to now change the zoning ordinance to prohibit the use.

If the Council wants to rethink its approach to the Burtonsville Employment Area Overlay Zone and to address some of the issues raised by the Circuit Court, I urge the Council to include a provision that would grandfather any property for which an applicant both owned the property and filed a preliminary plan or site plan application with the Montgomery County Planning Board on or before September 1, 2009.

I appreciate your consideration.

IL:dsj

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LINOWES
AND BLOCHER LLP
ATTORNEYS AT LAW

July 28, 2009

C. Robert Dalrymple
301.961.5208
bdalrymple@linowes-law.com

By Hand

The Honorable Phil Andrews, President
Montgomery County Council
100 Maryland Avenue, Sixth Floor
Rockville, Maryland 20850

Re: Testimony for Submission into Record of Zoning Text Amendment 09-05 (the "ZTA") –
Burtonsville Employment Area Overlay Zone - ezStorage

Dear President Andrews and Members of the District Council:

This firm represents Siena Corporation ("Siena"), the developer/owner of a proposed ezStorage self-storage facility located in the southeast quadrant of the intersection of U.S. Rt. 29 and MD 198 in Burtonsville (the "Property"). The proposed ZTA is for the single purpose of stopping the entitlement of the ezStorage facility, a use permitted by right and the subject of an approved preliminary plan of subdivision mandated by order of the Circuit Court of Montgomery County, Maryland. This proposed ZTA is unlawful, unfair, unfortunate and a textbook example of abuse of governmental powers.

The Montgomery County Planning Board (the "Planning Board") recently approved Preliminary Plan Application No. 120070510 (the "Preliminary Plan") for the ezStorage facility on the Property, located in the Burtonsville Industrial Park. The Property, comprised of 3.04± acres, is zoned I-3 and is subject to the Burtonsville Employment Area Overlay Zone (the "Overlay Zone"), both as prescribed by the 1997 Approved and Adopted Fairland Master Plan (the "Master Plan"). The Overlay Zone was enacted concurrent with and for the express purpose of carrying out the intent of the Master Plan. Relative to the Property, the Burtonsville Industrial Park, and the Burtonsville Employment Area, the clear intent and purpose of the Overlay Zone was to eliminate residential zoning and to expand nonresidential uses by allowing all uses permitted in the I-1, I-3 and O-M Zones, except as otherwise specifically established in the table of uses set forth in the Overlay Zone text. Included in the uses permitted as a matter of right in the Overlay Zone, applicable to the Property, is a self-storage facility (subject only to site plan approval).

(14)

The Honorable Phil Andrews, President

July 28, 2009

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Prior to commencing any development approval processes for the ezStorage facility on the Property, Siena confirmed the permissiveness of self-storage in the Overlay Zone and on the Property through email correspondence with appropriate persons at M-NCPPC, with input from Development Review, Community Based Planning and legal departments (which correspondence is attached hereto as Exhibit "A"). With this confirmation of the permitted nature of self-storage in the Overlay Zone, in conformance with the Zoning Ordinance and the Master Plan, Siena purchased the Property and commenced the entitlement processes to locate ezStorage on the Property. Being a permitted use notwithstanding, the Preliminary Plan was erroneously denied by the Planning Board upon a finding that the self-storage use was not consistent with the Master Plan. On appeal to the Circuit Court, the Court held that the self-storage use was permitted by right, was consistent with the Fairland Master Plan, and that denial by the Planning Board was arbitrary, capricious and unlawful. The Court remanded the Preliminary Plan to the Planning Board with an order to approve the Preliminary Plan (a copy of the Court Order is attached hereto as Exhibit "B").¹ As a result, the Planning Board approved the Preliminary Plan (reluctantly and by a 3-2 vote) on May 14, 2009 in accordance with the Court Order. One month later, the ZTA was introduced.

The ZTA is clearly designed as a response to the Court Order and subsequent approval of the Preliminary Plan, and while it is stated to be necessary to clarify the intent of the Master Plan, it is instead intended to be an end-run around the Court Order and the Master Plan. There are significant logical, practical and legal problems with the ZTA. It is quite clear in the Master Plan that the purposes of the Overlay Zone were to address the "irregular zoning pattern" of the area characterized by residential parcels interspersed with industrial and O-M zoned parcels, and "the minimum lot standards and setbacks that make development for some properties impossible under the I-3 zone." (p.80.) The Overlay Zone, along with rezoning all R-200 properties and other small properties to the I-1 zone, was designed to correct the irregular zoning pattern and to expand the allowable uses by incorporating all uses allowed in the I-1, I-3 and O-M zones (unless expressly precluded by the Overlay Zone). In order to stop the ezStorage facility on the Property, made permissible in the I-1 zone by the Overlay Zone, the ZTA re-interprets the Overlay Zone to allow only those uses permitted in the underlying zones, which completely contradicts the Master Plan's and Overlay Zone's stated intent and purpose to diversify the types of permitted uses (I-1, I-3, and O-M) available in the area, while prohibiting residential uses altogether.² In the process of attempting to legislatively deny Siena's permitted self-storage use,

¹ The Circuit Court decision has been further appealed by the Planning Board and is currently pending before the Court of Special Appeals.

² At page 80 the Master Plan states, "Some of the R-200 parcels are too small or have little buildable area under the standards of the I-3 Zone. The I-1 Zone, which is less restrictive as to lot size and setbacks, *also permits more uses than the I-3 Zone*. However, rezoning the smaller

The Honorable Phil Andrews, President
July 28, 2009
Page 3

the ZTA will obviate the need for the Overlay Zone by returning to the underlying zones, and will be inconsistent with the recommendations of the Master Plan (thus also contradicting the Circuit Court's findings of consistency of self-storage use on the Property with the Master Plan that was at the core of the Court's remand order to approve the Preliminary Plan). [In fact, because no property in the Burtonsville Employment Area is zoned O-M, no O-M uses in the Overlay Zone would now be permitted, a result that blatantly contradicts the Master Plan intent. Attached hereto as Exhibit "C" is a spreadsheet showing the impacts of the ZTA in terms of uses originally intended to be allowed and uses that would now be allowed by virtue of returning to the underlying zoning.]

The ZTA, much like pending ZTA 09-01 (Sandy Spring Ashton Rural Village Overlay Zone), is targeted to one property and one specific use and business - ezStorage - in the middle of the development entitlement process³. Aside from the arbitrary, capricious and unlawful nature of the proposed ZTA, it is bad public policy to attempt to legislate away a permitted use, and it sends a horrible message to the business community regarding the willingness and ability of the County to act fairly, evenly and in good faith, especially in light of the failing economy and the need for public confidence in the government. Zoning by popular demand is chaotic and removes the certainty intended to be provided by Euclidian zoning. In addition, a comprehensive re-write of the Zoning Ordinance is currently underway, and the Council (and Planning Board) has expressed its desire to minimize ZTAs, particularly ZTAs that are targeted for single purposes, which this (and ZTA 09-01) certainly is.

In sum, this ZTA, especially coupled with ZTA 09-01 targeting this same business, is a terrible and direct governmental act upon a responsible business entity that has pursued its business interests in this County in good faith and in accordance with applicable laws with full intent to be a participating partner in economic development. We urge the Council to act responsibly and deny the ZTA. Thank you for your attention to this matter. Should you have any questions, please feel free to contact me.

properties to the I-1 Zone may result in a situation similar to that described previously in the US 29 employment area."

³ ZTA 09-01 was introduced on March 17, 2009 and proposes to modify the list of prohibited uses in the Sandy Spring/Ashton Rural Village Overlay Zone, thereby eliminating self-storage as a permitted use in the zone. ZTA 09-01 was introduced merely one month after the Planning board issued its resolution approving a Preliminary Plan of Subdivision for an ezStorage facility in Sandy Spring (Preliminary Plan Application No. 120080410).

Burtonsville Industrial Area

Uses in More than One Zone

#	Description of Use	I-1	I-3	O-M
1	Manufacturing and assembly of electronic components, instruments and devices	P	P	
2	Manufacturing and assembly of medical, scientific or technical instruments, devices and equipment	P	P	P
3	Manufacturing and assembly of semi-conductors, microchips, circuits and circuit boards	P	P	
4	Manufacturing of yeasts, molds, and other natural products necessary for medical and biotechnical research and development	P	P	
5	Printing and publishing	P	P	
6	Research, development and related activities	P	P	P
7	Amateur radio facility	P/SE	P/SE	P/SE
8	Electric power transmission and distribution lines, overhead, carrying more than 69,000 volts	P	SE	SE
9	Electric power transmission and distribution lines, overhead, carrying 69,000 volts or less	P	P	
10	Electric power transmission and distribution lines, underground	P	P	
11	Heliports	SE	SE	
12	Helistops	SE	SE	SE
13	Parking or motor vehicle, off-street, in connection with any use permitted	P	P	P
14	Pipelines, aboveground	P	SE	
15	Pipelines, underground	P	P	
16	Public utility buildings and structures	SE	SE	SE
17	Radio and television broadcasting stations and towers	P/SE	P/SE	
18	Railroad tracks	P	P	
19	Rooftop mounted antennas and related unmanned equipment building, equipment cabinets, or equipment room	P	P	P
20	Telecommunications facility	P	P	SE
21	Telephone and telegraph lines	P	P	
22	Telephone offices, communication and telecommunication centers	P	P	P
23	Cafeteria, dining room, snack bar, or other such facilities as an accessory use in connection with the operation and primarily for employees of the zone in which the use is located	P	P	
24	Eating and drinking establishments	SE	SE	P/SE
25	Daycare facility for senior adults and persons with disabilities	P	P	
26	Duplicating service	P	P	
27	Fire station, publicly supported	P	P	
28	General offices	P	P	P

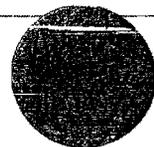
11	Hospitals, veterinary, v. in a soundproof building	P		
12	Landscape contractor	P		
13	Architectural uses	P		
14	Dairy products processing	P		
15	Stockyards	SE		
16	Warehousing and storage services - Self storage facilities	P		
17	Recreational or entertainment establishments, commerical	SE		
18	Rifle or pistol ranges, indoor	SE		
19	Service organizations	SE		
20	Conference centers - with lodging facilities		SE	
21	Art or cultural centers		SE	
22	Swimming pools, private		P	
23	Florist			P
24	Newstand			P
25	Ambulance or rescue squads, privately supported, nonprofit			P
26	Banks and financial institutions			P
27	Barber or beauty shops			P
28	Charitable or philanthropic institutions			P
29	Day care facility for senior adults or persons with disabilities			P
30	Duplicating services			P
31	Fire stations publicly supported			P
32	Funeral parlors or undertaking establishments			SE
33	International organizations public			P
34	Places of religious worship			P
35	Libraries and museums			P
36	Parks and playgrounds publicly owned			P
Total # of Uses		19	4	14

Additional Retail Commercial Uses Permitted

#	Description of Use	I-1	I-3	O-M
1	Antique Shops, handicrafts and art sales			
2	Barber or beauty shops			P
4	Banks and financial institutions			P
5	Bookstores			
6	Drugstores			
7	Eating and drinking establishments	SE	SE	P/SE
8	Express or Mailing Offices			
9	Florist			P
10	Food & Beverage Store			
11	Newstand			P
12	Photographic and Art Supplies			
13	Shoe Repair Shops			
Total # of Uses		1	1	5

Marin, Sandra

From: Andrews' Office, Councilmember
Sent: Monday, July 13, 2009 2:38 PM
To: Montgomery County Council
Subject: FW: ZTA 09-05 re Burtonsville Overlay Zone



050185

*Done
NO
FOLDER*

-----Original Message-----

From: Rochester, Stuart, CIV, OSD-ODA&M [mailto:Stuart.Rochester@osd.mil]
Sent: Monday, July 13, 2009 1:55 PM
To: Ervin's Office, Councilmember; Berliner's Office, Councilmember; Andrews' Office, Councilmember; Knapp's Office, Councilmember; councilmember.trachtenburg@montgomerycountymd.gov
Cc: Navarro's Office, Councilmember; Leventhal's Office, Councilmember; Elrich's Office, Councilmember; Floreen's Office, Councilmember
Subject: ZTA 09-05 re Burtonsville Overlay Zone

Dear Councilmembers:

I have had a chance to discuss the Burtonsville ZTA with several of you but not all of you. Both the Burtonsville residential and business communities are especially grateful to Nancy Navarro for quickly comprehending the seriousness of the issue and taking prompt action to remedy the problem and place the matter on your agenda for July 28. I want to thank George Leventhal, Marc Elrich, and Nancy Floreen for having staff involved and, we trust, supporting the ZTA even though there was some reluctance to take the lead and sponsor the legislation until Councilmember Navarro impressively stepped up. We hope in the end you unanimously support the ZTA.

In brief, ZTA 09-05 has been introduced to correct a serious unintended consequence that never got scrubbed from the language of the Burtonsville industrial overlay zone. This oversight, despite UNANIMOUS denial by the Planning Board and strenuous opposition throughout Burtonsville, has made it possible for a self-storage facility to proceed on a key parcel at the entrance to the Burtonsville business district where the master plan called for creating a productive employment center as a signature piece of the Burtonsville revitalization. The issue is critical--for Burtonsville, the east County, and the larger County as well, both from an economic development perspective and this being the gateway into Montgomery from Howard and Prince George's Counties. Indeed there is NO ONE--among area residents or businesses, in the County agencies, or among Planning Board members and staff--that supports the storage facility, which besides being fundamentally at odds with the Fairland Master Plan would undermine the job creation goal for east county and affect the character of the business district and surrounding community.

The last thing the east side of US 29 needs is another large, visible self-storage facility to underscore the transiency, scattershot development, and poor planning implementation that have marred efforts to rehabilitate the area. We all have an interest in seeing that this key gateway into Montgomery from two neighboring counties becomes a source of pride rather than embarrassment, and that the master plan intent and direction of the County Council and Planning Board is fulfilled rather than ignored.

Sincerely,

Stuart Rochester
Chair, Fairland Master Plan Citizens Advisory Committee

To: Mr. Phil Andrews and the Montgomery County Council
Subject: Zoning Text Amendment 09-05
Date: 27 July 2009

Council members,

The undersigned are residents of Valley Stream Avenue which is on the eastern border of the Burtonsville Industrial Tract. We urge the county to adopt Text Amendment 09-05 and provide the Burtonsville community with growth and diverse employment opportunities without sacrificing environmental considerations and esthetic appeal. Our properties are only accessible via Dino Rd. which is also the only public road within the tract. Because of the shared road, developments and traffic within the tract impact our community. We would like to see the following:

1. **Attractive buildings not visible from the highways:** About ten years ago, what is now Extra Space Storage was built on the eastern edge of the industrial tract; we were told by MD-NCPPC that it would be screened from Rte.198 by a barrier of trees; after ten years that has not been accomplished. Furthermore, the view of Extra Space from our development is rows of concrete block buildings behind a chain-link fence; not unlike a prison. The proposed ezStorage building on the western border of the tract will be highly visible from Rte. 29; it will be about 35 feet tall and extremely close to the north-bound down ramp. It will appear to be a huge concrete wall and if ezStorage elects to put their block lettering around the top of the building, like they have on their building on Berger Lane in Howard County, the facility will serve as a concrete billboard. If you drive north on Rte. 29 through Howard county, you do NOT see any signage or buildings, rather the natural landscape lines the highway. Montgomery County should follow suit to beautify the area.
2. **Diversity of Businesses:** On Rte. 198 between the existing Extra Space Storage and the ezStorage site, there is a large billboard stating "*FOR LEASE, 5.2 acres, Storage Lot*". One self-storage is too much, two is intolerable, and now the property owners are encouraging a third? We urge the council to enforce diversity in the industrial park.
3. **Safe access to and from Route 198:** The County needs to work with the State Highway Administration (SHA) to ensure safe access to the industrial park. When Rte. 29 was realigned several years ago, the crossover of Rte. 198 at Star Pointe was closed; this had been the main access to the industrial tract. To access the ezStorage site from the east (I-95 and Laurel), customers will need to drive pass the ezStorage site, drive through the traffic light at the Rte. 29 down ramp, and then at the old Rte 198/29 intersection, attempt to make a u-turn from the left-most of five lanes. Equally challenging, customers leaving the site and wishing to go to Burtonsville, must first drive east to Dino Rd. and attempt a u-turn. Their view of on-coming traffic will often be blocked by residents of Wooten and Cedar Tree lanes coming from Laurel who are making u-turns in the opposite direction. Into this gridlock is traffic exiting Dino and going halfway across Rte. 198 to go west; it becomes a game of chicken. SHA has two proposals which need to be implemented; widen Rte. 198 at Dino and build a crossover with a traffic light at Cedar ~~Lane.~~
Tree

4. **The county should complete Dino Road, not the Road Club:** At their June 22 community meeting, ezStorage stated MNCPPC required them to join the Road Club to complete Dino Road. In the late 1990's, the Road Club was tasked with constructing a realigned Dino Rd. It took them over five years and prodding by several county offices to complete several hundred yards; it was never finished through to Star Pointe. During these five years, we endured a Dino Rd. consisting of potholes, Jersey barriers on both sides, and continual erosion. Marilyn Praisner's office informed Mr. Sylwester in 2004 that the concept of a Road Club would not be used again.

We thank you for your consideration and appeal to the county to adopt Text Amendment 09-05.

Sincerely,

Robert L. Sara C. Sylwester
4324 Valley Stream Ave.
Burtonsville, MD. 20866
Phone: (301) 421-1419
Email: bobsylwester@erols.com

Robert L. Sara C. Sylwester
Sara C. Sylwester

James A. Curran
4317 - Valley Stream Ave.

Merrell A. Curran
4316 VALLEY STREAM AVE
PIARRA SINGH
4300 VALLEY STREAM AVE

Ellen Beck (BECK)
4325 Valley Stream Ave.
Burtonsville, MD 20866

Kathy Menasco-Smith
4327 Valley Stream Avenue
Burtonsville, MD 20866

Eddie Rodriguez
4303 VALLEY STREAM AVE, BURTONSVILLE, MD 20866

ANTHONY TAYLOR
4320 VALLEY STREAM AVENUE, BURTONSVILLE, MD 20866 TT

(22)

1 Sec. 1. DIVISION 59 - C-18 is amended as follows:

2
3 Division 59-C-18. Overlay Zones.

4 * * *

5 Sec. 59-C-18.14. Overlay zone for the Burtonsville Employment Area of the Fairland
6 Master Plan.

7 * * *

8 59-C-18.142. Regulations.

9 (a) Land uses. [The following uses are allowed in the Burtonsville employment
10 overlay zone:]

11 (1) All permitted or special exception uses [in the I-1, I-3, and O-M zones as
12 shown in Sections 59-C-4.2 and 59-C-5.2 except] in a lot or parcel's
13 underlying zone are allowed; however,

14 (a) all permitted uses in the I-1, I-3, and O-M zones are permitted for any
15 tract of land with a preliminary plan approved by the Planning Board
16 after October 27, 2006 but before October 27, 2009; and

17 (b) the following uses are prohibited:

18 Adult entertainment business

19 Agricultural uses

20 Aircraft parts, sales and services, including the sale of fuel for
21 aircraft only

22 Automobile parts, sales and services, including but not limited to tire
23 sales and transmission service

24 Automobile filling stations

25 Automobile repair and services

26 Automobile sales, indoors and outdoors

27 Automobile, truck and trailer rentals, outdoor

28 Bakery

- 29 Blacksmith shops[,] and machinery shops
- 30 Bottling plant
- 31 Building materials and supplies, wholesale and retail
- 32 Confectionery production
- 33 Contractor's storage yards
- 34 Dry cleaning plants
- 35 Electroplating and manufacturing of small parts such as coils,
- 36 condensers, transformers, and crystal holders
- 37 Food production, packaging, packing and canning [of]
- 38 Fuel storage yards
- 39 Highway fuel and food service
- 40 Ice manufacturing and storage
- 41 Laundry plants
- 42 Lumberyards
- 43 Manufacturing of light sheet metal products
- 44 Manufacturing, compounding, assembling or treatment of articles
- 45 from the following previously prepared materials: bone,
- 46 cellophane, plastic, canvas cloth, cork, feathers, felt, fiber, fur,
- 47 hair, horn, leather textiles, yarns, glass, precious or semi-
- 48 precious metals or stones, and tobacco
- 49 Manufacturing, compounding, processing or packaging of cosmetics,
- 50 drugs, perfumes, pharmaceuticals, toiletries and products
- 51 resulting from biotechnical and biogenetic research and
- 52 development
- 53 Manufacturing, fabrication, and/or subassembly [or] of aircraft or
- 54 satellite parts, components, and equipment
- 55 Manufacturing of musical instruments, toys, novelties, and rubber and
- 56 metal stamps

- 57 Manufacturing of paint not employing a boiling or rendering process
- 58 Manufacturing of pottery and figurines or other products using
- 59 previously pulverized clay and kilns fired only by electricity or
- 60 gas
- 61 Off-loading and transfer sites for storage of sand, gravel or rocks
- 62 Paper products manufacturing
- 63 Parking of motor vehicle, off-street, in connection with any use
- 64 permitted in a commercial zone
- 65 Recycling facility
- 66 Rifle or pistol ranges, indoor
- 67 Sawmills
- 68 Warehousing and storage services:
- 69 -Industrial and commercial users
- 70 -Self-storage facilities
- 71 Stockyards
- 72 Stoneworks
- 73 Storage, outdoor
- 74 Tinsmith and roofing services
- 75 Trucking terminals
- 76 Wholesale trades limited to sale or rental of products intended for
- 77 industrial or commercial users
- 78 Wood products manufacturing

79 In cases where uses are [permitted in one zone but] allowed by special
80 exception [in another zone], the special exception [provision takes
81 precedence] provisions must be satisfied. Any tract of land with a use-and-
82 occupancy permit issued before October 27, 2009 that otherwise would have
83 been made non-conforming because of Zoning Text Amendment 09-05 is a
84 conforming use, and may be modified, repaired, or reconstructed.

85 (2) The following retail commercial uses are [permitted] allowed without regard
86 to the underlying zone:

87 Antique shops, handicrafts, or art sales.

88 Barber or beauty shop.

89 Banks.

90 Bookstores.

91 Drugstore.

92 Eating and drinking establishment, excluding a drive-in.

93 Express or mailing offices.

94 Florist.

95 Food and beverage store.

96 Newsstand.

97 Photographic and art supply stores.

98 Shoe repair shops.

99 * * *

100 **Sec.2. Effective Date.** This ordinance takes effect immediately upon the date of
101 Council adoption.

102
103 This is a correct copy of Council action.

104
105 _____
106 Linda M. Lauer, Clerk of the Council