

M E M O R A N D U M

October 20, 2016

TO: Planning, Housing, and Economic Development Committee
FROM: Jeff Zyontz,  Senior Legislative Analyst
SUBJECT: Zoning Text Amendment 16-14, Special Exception – Amendments

Zoning Text Amendment (ZTA) 16-14, lead sponsor Council President Floreen, was introduced on August 2, 2016. ZTA 16-14 would clarify that a special exception approved under the prior zoning code may be expanded under the procedures and substantive provisions of the prior zoning code without regard to the size of the expansion.

The Hearing Examiner and the Board of Appeals are in need of a clarification of the zoning code's grandfathering provision for Commercial/Residential, Employment and Industrial zones. The Hearing Examiner holds the opinion that all special exception expansions above the lesser of 10 percent of the gross floor area, or 30,000 square feet of floor area (major expansions), require the development to proceed under the new zoning code.

The Board of Appeals believes that under Section 59-7.7.1.B.1 of the new zoning code, any special exception filed or approved before October 30, 2014 can be modified or expanded under the old zoning code unless the applicant chooses to proceed under the new code. The Board acknowledges that the language in Section 59-7.7.1.C raises questions about this interpretation with respect to special exception uses in the Commercial/Residential, Employment and Industrial zones. The board does not agree that the Hearing Examiner has initial jurisdiction of conditional use applications and amendments under the new code if the Board made the ultimate decision on the conditional use.

ZTA 16-14 would codify the Board of Appeal's understanding of the current code. It would allow expansion of all special exceptions submitted or approved before October 30, 2014 to proceed under the old code.

The Council conducted a hearing on September 20, 2016. The sole speaker was the Planning Board representative. The Planning Board comments recommended amendments to require that major expansion be governed by the new code (agreeing with the Hearing Examiner). In addition, the Planning Board recommended allowing the Hearing Examiner to have initial jurisdiction over major expansions of conditional uses.

Issues

Why is this coming to the Council at all?

Staff thought that the process for amending a conditional use approved after October 2014 was clear. The amendment would go to the Hearing Examiner. The Board of Appeals is asserting authority over amendments to conditional use approvals when the Board made the decision on the initial approval. (This occurs under the new code when an aggrieved party from the Hearing Examiner's decision asks the Board of Appeals to review the Hearing Examiner's decision.) The applicable code, and procedures for a major special exception amendment that was approved under the standards of the old code in light of the interpretations by the Hearing Examiner and the Board of Appeals, is clearly being questioned. In the absence of Council clarification, applicants for a major change to a special exception would be in jeopardy of filing with the wrong body and arguing about the wrong standards.¹

The Council is being asked to decide whether the Hearing Examiner or the Board of Appeals should have jurisdiction over amendments to older special exceptions and newer conditional use approvals and when, if ever, the new zoning substantively should apply to significant amendments.

There are 3 questions:

Should the old zoning code apply to amendments to all special exceptions when the floor area increases by the lesser of 30,000 square feet or 10% of the gross floor area on the site?

Should the Board of Appeals be the deciding body for all amendments to special exceptions (conditional uses approved under the old code)?

Should the Board of Appeals be the deciding body for all conditional use amendments when the Board made the final decision previously in the case?

If the Council can make its position known on these questions, Staff can redraft the code to reflect its decision. Staff recommends answering all of these questions in the negative so that the more streamlined process in the new code would apply.

What is the difference between the new code and the old code?

The old code always requires an applicant to file with the Board of Appeals. The ultimate decision under the old code is always made by the Board of Appeals. Under the new code, an initial application goes to the Planning Director for a review of completeness and then to the Hearing Examiner. Under the new code, the Hearing Examiner makes a decision. Only if that decision is challenged by a party does it go to the Board of Appeals for a final decision.

There are more design standards in the new code which, under a conditional use approval, must be met "to the extent the Hearing Examiner finds necessary to ensure compatibility."²

¹ Staff is thinking of a second career as a Talmudic scholar. Talmudic scholarship seems less complicated, the arguments change at a slower pace, and there is more common agreement among scholars. Staff is now comfortable with the fact that every conclusion may lead to another question and every question may lead to a different conclusion.

² §59-7.3.1.E.1.b.

What was the Council's intent with regard to expansions of previously approved development when it approved the Zoning Rewrite?

The grandfathering provisions in the new code allow expansions of approved developments under the old code, to a limited extent:

Existing development in a Commercial/Residential, Employment, or Industrial zone may expand by up to the lesser of 10% of the gross floor area approved for the site on October 30, 2014 or 30,000 square feet, except for properties with 2,000 square feet or less of floor area, which may expand by up to 30% of the gross floor area approved for the site on October 30, 2014. Any expansion must satisfy Section 7.7.1.C.1. The gross floor area in a pending application listed in Section 7.7.1.B.1 may be expanded up to the full amount allowed under the property's zoning on October 29, 2014, but once the application is approved, the gross floor area may expand by up to the lesser of 10% of the gross floor area or 30,000 square feet.³

The Board of Appeals believes that conditional uses approved under the old code are not subject to that limitation. The Board cites the code section concerning amendments:

Until October 30, 2039, an applicant may apply to amend any previously approved **plan** or modify an application pending before October 30, 2014 (listed in Section 7.7.1.B.1 or Section 7.7.1.B.2) under the development standards and procedures of the property's zoning on October 29, 2014, if ...⁴ {The provision excludes expansions covered by Subsection C, above.}

Because amendments to special exceptions are not PLANS, in the opinion of the Board of Appeals, the Council intended to allow amendments to special exceptions under the old code without limits (with the possible exception of significant expansions in certain zones). ZTA 16-14, as introduced, would ensure that Section 59-7.7.1.C of the code conforms to this interpretation by the Board of Appeals.

The Hearing Examiner believes that the Council intended to allow the expansion of special exceptions up to the lesser of 10% of the gross floor area or 30,000 square feet under the old code but, beyond that expansion, the new code would apply. Exceeding the limits of Subsection C should require a review under the new code.

Staff agrees with the Planning Board and would recommend amending ZTA 16-14 accordingly. Section 59-7.7.1.C.5 (lines 24 to 27 of ZTA 16-14 as introduced) would be revised as follows:

[Without regard to the limitations of Section 7.7.1.C a] A special exception approved in any zone under [the] a code in effect on or before October 29, 2014 may only be expanded under the applicable standards and procedures of the code in effect on October 29, 2014 to the extent that it does not violate or exceed the standards of Section 7.7.1.C.1 or 7.7.1.C.2. Any expansion that violates or exceeds the standards of Section 7.7.1.C must satisfy the current code.

The Council approved the new code because it leads to better development and would streamline the development process. In Staff's opinion, ZTA 16-14 would expand the reach of the old code to include

³ §59-7.7.1.C.2.

⁴ §59-7.7.1.B.3.a. The Council could choose to amend this provision to make it applicable to special exceptions as well, but that would make less significant amendments go through old code procedures.

major expansions. All other development approved as a development plan, schematic development plan, diagrammatic plan, concept plan, project plan, sketch plan, preliminary plan, record plat, site plan, special exception, variance, or building permit that exceeds stated limits must follow the new code. Allowing major expansions in any zone for special exception decisions under the old code is inconsistent.

Are there other aspects of the code that govern jurisdiction when major amendments to conditional uses are proposed?

As introduced, ZTA 16-14 does not address whether the Board retains decision-making authority over conditional uses once approved by the Board of Appeals after oral argument. Currently, under the language of §59.7.3.1.K, an application to amend a special exception or conditional use would be governed by the same procedures as the original filing. Staff would assume this means it would go to the Planning Department for completeness review and then to the Hearing Examiner for a decision, even when it was the Board of Appeals that made the final decision. The Board of Appeals believes that the application for an amendment should be filed with them if either it was an approval as a special exception under the old code or if the conditional use was the subject of a Board decision. In a sense the Board believes that the current code allows for sticky jurisdiction; if the BOA touches it, it sticks no matter whether it is a special exception under the old code or a conditional use under the new code. This stems from a provision in Section 59-7.3.1.F.1.c:

Any party of record or aggrieved party may file a written request to present oral argument before the Board of Appeals within 10 days after the Office of Zoning and Administrative Hearings issues the Hearing Examiner's report and decision. The filing of such a request transfers jurisdiction over the matter from the Hearing Examiner to the Board of Appeals.

Staff recommends a simple, customer-friendly approach that takes advantage of the new code's streamlined procedure. Any amendment to either a special exception (under the old code) or a conditional use should start with the Hearing Examiner and end with the Hearing Examiner, unless a request is made for oral argument before the Board of Appeals. This is the new code's streamlined approach.

Staff recommends making the Board's jurisdiction less sticky by amending the last sentence of Section 59-7.3.1.F.1.c. so that it would read:

The filing of such a request [transfers jurisdiction over the matter from the Hearing Examiner to] authorizes the Board of Appeals to approve, modify, or disapprove the Hearing Examiner's decision.

Staff would also recommend the following revision to 59-7.3.1.K.1.b:

K. Amendments

1. Major Amendment

- a. A major amendment to a conditional use is one that changes the nature, character, or intensity of the conditional use to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected, when considered in combination with the underlying conditional use.
- b. A major amendment to a conditional use must follow the procedure in Section 59-7.3.1.

- c. A major amendment to a conditional use [follows the same procedures,] must meet the same criteria[,] and must satisfy the same requirements as the original conditional use application, except that[,]:
 - i. The public hearing must be limited to consideration of the proposed modifications specified in the notice of public hearing and to those aspects of the conditional use that are directly related to those proposals; and
 - ii. The Hearing Examiner or the Board of Appeals, as applicable, may require the underlying conditional use to satisfy the conditional use requirements of the applicable zone, to the extent necessary to avoid substantial adverse effects on the surrounding neighborhood.
2. Minor Amendment
- a. A minor amendment to a conditional use may be approved administratively by the Hearing Examiner [or, Board of Appeals, as applicable, depending on which entity approved the conditional use]. A minor amendment to a conditional use is one that does not change the nature, character, or intensity of the conditional use to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected, when considered in combination with the underlying conditional use.

Are there any other recommended changes?

The phrase added in lines 17 and 18 of ZTA 16-14 as introduced (“and does not satisfy Subsection b”) is incorrect. That phrase should be deleted.

The ZTA also needs to be revised to reflect the possibility of approvals under all prior codes.

Without regard to the limitations of Section 7.7.1.C, a special exception approved under [the] a code in effect on or before October 29, 2014 may be expanded under the applicable standards and procedures of the code in effect on October 29, 2014.

This Packet Contains
ZTA 16-14

© number
1 – 4

Zoning Text Amendment No.: 16-14
Concerning: Special Exception -
Amendments
Draft No. & Date: 1-07/21/16
Introduced: August 2, 2016
Public Hearing:
Adopted:
Effective:
Ordinance No.:

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

Lead Sponsor: Council President Floreen

AN AMENDMENT to the Montgomery County Zoning Ordinance to:

- clarify that a special exception approved under the prior zoning code may be expanded under the procedures and substantive provisions of the prior zoning code.

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

DIVISION 1.4.	“Defined Terms”
Section 1.4.2.	“Specific Terms and Phrases Defined”
DIVISION 7.7.	“Exemptions and Nonconformities”
Section 59.7.7.1.	“Exemptions”

EXPLANATION: ***Boldface** indicates a Heading or a defined term.*

Underlining indicates text that is added to existing law by the original text amendment.

[Single boldface brackets] indicate text that is deleted from existing law by original text amendment.

Double underlining indicates text that is added to the text amendment by amendment.

[[Double boldface brackets]] indicate text that is deleted from the text amendment by amendment.

** * * indicates existing law unaffected by the text amendment.*

ORDINANCE

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

1 **Sec. 1. Division 59-1.4 is amended as follows:**

2 **DIVISION 1.4. Defined Terms**

3 **Section 1.4.2. Specific Terms and Phrases Defined**

4 * * *

5 **Conditional Use:** A use that must meet the conditional use standards in Division
6 3.2 through Division 3.7 and requires approval by the Hearing Examiner, under the
7 findings in Section 7.3.1. [A] In zoning codes effective before October 30, 2014, a
8 conditional use [is] was referred to as a special exception.

9 * * *

10 **Sec. 2. Division 59-7.7 is amended as follows:**

11 **DIVISION 7.7. Exemptions and Nonconformities**

12 **Section 7.7.1. Exemptions**

13 * * *

14 **C. Expansion of Floor Area**

15 * * *

16 **4. Expansion above Section 7.7.1.C.2**

17 If any expansion exceeds Section 7.7.1.C.2 and does not satisfy
18 Subsection b, then the entire expansion must satisfy the applicable
19 standards and procedures for the current zoning. After October 30,
20 2039, any amendment to a previously approved application must
21 satisfy the applicable standards and procedures for the current zoning
22 to the extent of (a) any expansion, and (b) any other portion of an
23 approved development associated with the expansion.

24 **5. Without regard to the limitations of Section 7.7.1.C, a special**
25 exception approved under the code in effect on October 29, 2014 may

26 be expanded under the applicable standards and procedures of the
27 code in effect on October 29, 2014.

28 * * *

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

31

32 This is a correct copy of Council action.

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34

35 _____
Linda M. Lauer, Clerk of the Council



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

OFFICE OF THE CHAIR

September 19, 2016

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. 16-14

BOARD RECOMMENDATION

The Montgomery County Planning Board of The Maryland-National Capital Park and Planning Commission reviewed Zoning Text Amendment (ZTA) No. 16-10 at its regular meeting on September 15, 2016. By a vote of 4-0 (Commissioner Dreyfuss was absent from the meeting), the Planning Board provides the following comments on the text amendment to clarify that a special exception approved under the prior zoning code may be expanded under the procedures and substantive provisions of the prior zoning code.

The Planning Board understands that the purpose of ZTA 16-14 is to clarify who has the authority to approve an amendment to a special exception approved before October 30, 2014 when the revised zoning code took effect. Under the prior code, the Board of Appeals had the authority to approve a special exception or an amendment thereto. Under the current code, the Hearing Examiner has the same authority with respect to a conditional use. Presumably, the question of who has the authority to review an amendment to an approved special exception has arisen because the zoning code allows a use approved under the old code to be continued but not expanded, suggesting that if a special exception approved under the prior code is to be expanded, it requires approval under the current code's rules for a conditional use. As drafted, ZTA 16-14 would clarify this question by allowing unlimited expansions of a grandfathered special exception under the prior code.

The Planning Board recommends that an amendment to a special exception (approved or filed prior to October 30, 2014) be decided by the Hearing Examiner unless a party of record or aggrieved party files a written request to present oral argument before the Board of Appeals within 10 days after the Office of Zoning and Administrative Hearings issues the Hearing Examiner's report and decision. Under Section 7.3.1F.1.c, the filing of such a request

transfers jurisdiction over the matter from the Hearing Examiner to the Board of Appeals. The Planning Board further recommends not allowing the unlimited expansion of a special exception under the old code, both because doing so would be inconsistent with the general approach of the new zoning code and because the Council cannot amend the prior zoning code to modify the requirements for a special exception use where it might be in the public interest to do so. Consistent with the grandfathering provisions of the current code, the Planning Board recommends that any proposed modification of a special exception that expands the approved floor area by the lesser of 10 percent or 30,000 square feet, or does not expand the external walls of the approved structures, should be reviewed by the Hearing Examiner under the standards of the prior zoning code. Expansions above this limit should be reviewed under the standards of the current code.

CERTIFICATION

This is to certify that the attached report is a true and correct copy of the technical staff report and the foregoing is the recommendation adopted by the Montgomery County Planning Board of The Maryland-National Capital Park and Planning Commission, at its regular meeting held in Silver Spring, Maryland, on Thursday, September 15, 2016.


Casey Anderson
Chair

CA:GR

Zoning Text Amendment (ZTA) No. 16-14, Special Exception - Amendments



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Completed: 09/8/16

Description

ZTA No. 16-14 would clarify that a special exception approved under the prior zoning code may be expanded under the procedures and substantive provisions of the prior zoning code. The Hearing Examiner and the Board of Appeals request clarification of the zoning code's grandfathering provision.

Summary

Staff recommends approval, with modifications, of ZTA No. 16-14 to clarify that a special exception approved under the prior zoning code may be expanded under the procedures and substantive provisions of the prior zoning code. The proposed changes include a broadening of new Section 7.7.1.C.5 to cover existing special exceptions that may have been approved under Zoning Ordinances previous to the 2004 Zoning Ordinance. Staff also believes that clarifications are needed on whether the ZTA would apply to an expansion of the use only or would an expansion of a structure beyond 10 percent or 30,000 square feet also be allowed. Clarification is also needed on the intended duration of the expansion provision (indefinitely or until October 30, 2039).

Background/Analysis

Zoning Text Amendment (ZTA) 16-14, would clarify that a special exception approved under the prior zoning code may be expanded under the procedures and substantive provisions of the prior zoning code. The Hearing Examiner and the Board of Appeals request clarification of the zoning code's grandfathering provision. The Hearing Examiner holds the opinion that all special exception expansions above the lesser of 10 percent of the gross floor area, or 30,000 square feet of floor area, require the development to proceed under the new zoning code. The Board of Appeals believes that it must decide such expansions under the old zoning code unless the applicant chooses to proceed under the new code. One of the differences between the new code and the old code is that the jurisdiction of the Hearing Examiner and the Board of Appeals changes. The Hearing Examiner has jurisdiction of conditional uses under the new code. The Board of Appeals decides all special exceptions under the old code. ZTA 16-14 would codify the Board of Appeal's understanding of the current code and allow special exception expansions (for applications submitted or approved before October 30, 2014) to proceed under the old code.

If the County Council believes that the proposed policy should be implemented, then staff believes that several issues need clarification prior to adoption of the text amendment:

- Does the ZTA apply to an expansion of the use only or does it also allow expansions of a structure beyond 10 percent or 30,000 square feet?
- Will the expansion provision remain in effect indefinitely (as currently drafted) or will it sunset on October 30, 2039?

In addition, the language in proposed Section 7.7.1.C.5 should be broadened to also cover existing special exceptions that may have been approved under Zoning Ordinances previous to the 2004 Zoning Ordinance. Staff has provided recommended language in lines 24 through 28 of the ZTA.

Staff is also unclear of the purpose of the added phrase “and does not satisfy Subsection b” on lines 17-18 as it pertains to “Expansion above Section 7.7.1.C.2”. The entire sentence with the added language reads as follows:

If any expansion exceeds Section 7.7.1.C.2 and does not satisfy Subsection b, then the entire expansion must satisfy the applicable standards and procedures for the current zoning.

Staff is unclear of the intent of this language and recommends that it be deleted.

Attachments

1. ZTA No. 16-14 as modified by staff