

MEMORANDUM

March 17, 2016

TO: Planning, Housing, and Economic Development Committee

FROM: Jeff Zyontz, Senior Legislative Analyst

SUBJECT: Zoning Text Amendment 16-01, Ripley/Silver Spring South Overlay Zone – Standards

Zoning Text Amendment (ZTA) 16-01, introduced on January 19, 2016, would amend the Ripley/Silver Spring South Overlay zone by deleting the height restriction along Newell Street. Council Vice President Berliner is the lead sponsor of ZTA 16-01.

The Zoning Ordinance limits the maximum building height to 45 feet along Eastern Avenue and Newell Street. Building height may be 90 feet for any building or portion of the building if there is a minimum 60 foot setback. Building height for any building or portion of the building may be 125 feet if there is a minimum 100 foot setback. This ZTA would apply these building height limitations only to Eastern Avenue.

The Council conducted a public hearing on February 23, 2016. The Planning Board and Planning Staff recommended approval of ZTA 16-01. A representative of 8001 Newell Street, various commercial entities, and real estate organizations supported ZTA 16-01.

A representative and residents of the 8045 Newell Street Condominium Association and residents of 8045 Newell Street testified in opposition to ZTA 16-01. The residents reported that they bought their homes with the knowledge that development nearest them on the Newell Street side will be kept low by virtue of the long-standing application of the current Overlay zone. A founder of the Gateway Coalition also submitted testimony in opposition to ZTA 16-01. Opponents claim that the proposed change would be constitutionally prohibited as special legislation.

Issues

What guidance does the Silver Spring Sector Plan offer on the subject of building height limits along Newell Street?

The Ripley/Silver Spring South Overlay zone implements the Silver Spring Sector Plan. There is **different language in the two parts of the Silver Spring Sector Plan that refer to the same area.** In

the summary section of the Sector Plan, building height for new construction is limited only along Eastern Avenue, fronting one-family detached dwellings in DC, and where at the property line building heights should be limited to 45 feet. Above 45 feet, the building may step back 60 feet and its height may increase to 90 feet.¹ This is different from the statement in the urban design section of the Sector Plan, which states that building heights along both Newell Street and Eastern Avenue should ensure compatibility with the *adjacent* residential neighborhood. At the property line, building height is limited to 45 feet.²

What is the current height restriction in zoning and how has the Planning Board interpreted that provision?

Section 59-4.11.C, concerning the Ripley Street/South Silver Spring Overlay District, reads as follows:

The maximum building height is 45 feet along Newell Street and Eastern Avenue *that confronts a Residential zone in the District of Columbia*; however, this building height may be increased to:

- i. a maximum of 90 feet for any building or portion of a building that is set back a minimum of 60 feet from the street; or
- ii. a maximum of 125 feet for residential development that is set back at least 100 feet from Eastern Avenue and Newell Street and includes a public parking garage constructed under a General Development Agreement with the County.

The Sector Plan names both Newell Street and Eastern Avenue as roads at issue. In this regard, it implements the guidance of the urban design section of the Sector Plan and not the summary section. The zone calls for a height restriction along Newell Street and Eastern Avenue. The height limits clearly apply to buildings along Eastern Avenue that confront a residential zone in the District of Columbia. One can argue that the height limitation *ONLY* applies to Newell Street to the extent that property on Newell Street confronts a residential zone in the District of Columbia.

The argument that Newell Street property was only limited in height to the extent of the property confronting residential property in the District of Columbia was made unsuccessfully to the District Court. The Court found that if it agreed with that interpretation, there would be no property on Newell Street that “confronts” (lies face to face with) the District of Columbia. (Courts attempt to give statutory interpretations that do not result in meaningless words.) Under the Court’s ruling, the height limitation along Newell Street is not limited by the phrase “that confronts a Residential zone in the District of Columbia”; it applies to all property along Newell Street without any ambiguity.

The Planning Board’s interpretation of the current code provision has been inconsistent. In one plan approval, the Board cited the requirement for reduced building height along all of Newell Street.³ In a

¹ “Limit building height for new construction along Eastern Avenue, fronting one-family detached dwelling in the District of Columbia as follows: at the property line, building heights should be limited to 45 feet. Above 45 feet, the building may step back 60 feet and its height may increase to 90 feet.” Silver Spring Sector Plan, 2000, page 60, second bullet point.

² “Building heights along Newell Street and Eastern Avenue should ensure compatibility with the adjacent residential neighborhood. – At the property line, building heights should be limited to 45 feet. – Above 45 feet, the building may step back 60 feet and its height may increase to 90 feet.” Silver Spring Sector Plan, 2000, page 86, third bullet point.

³ February 12, 2003 memorandum from Mr. Kronenberg to the Planning Board recommending project plan approval for 8045 Newell Street: “The Overlay Zone requires that building heights along Newell Street confronting residential uses may not

more recent application that was overturned by the District Court, the Planning Board did not find that the building height limit applied to Newell Street beyond its Eastern Avenue frontage.

How does sector plan conformance relate to an overlay zone?

The general intent of all overlay zones is to provide requirements and standards that are necessary to achieve the planning goals and objectives for development or redevelopment of an area.⁴ It does not explicitly require conformance to a sector plan.

Site plan approval is required for new building in the CR zone.⁵ Site plan approval requires substantial conformance with the recommendations of the Silver Spring Sector Plan.⁶ The Maryland Land Use Article defines conformance in part as any action taken that will further, and not be contrary to, policies in the plan. Substantial conformance would allow variation from strict conformance. Restricting building heights to either along Eastern Avenue or both Eastern Avenue and Newell Street would be in substantial conformance to the Sector Plan.

Should the Council approve ZTA 16-01 to reverse the Circuit Court Judge's opinion in 8045 Newell Street Condominium Association v. Montgomery County Planning Board (2014)?

The Court reversed the Planning Board's approval of a project plan for 8100 Newell Street because the project would exceed the 45 foot height limit on Newell Street. The Planning Board had previously applied that height limit along Newell Street 10 years earlier.⁷ The Court did not give any deference to the Planning Board interpretation because the Planning Board changed its interpretation of the text without any intervening text change. The Court found the text of the overlay zone unambiguous. That opinion was not appealed.

The intent of the overlay zone is to implement the recommendations of the Sector Plan. Where the Sector Plan limited height to both Eastern and Newell, it was phrased in a manner to protect "adjacent" residential neighborhoods. Black's Law Dictionary defines adjacent as lying near or close to but not necessarily touching. The zone text used the word "confronting", not "adjacent". The District Court focused on the word "confronting", which is used in the current code. If the Council had used the same wording as the Sector Plan, the Court may have come to a different conclusion.

When a Court is called upon to interpret legislation, it must look to the words in the Zoning Ordinance. ZTA 16-01 is new legislation. The Council can decide that the Planning Board's view in reducing the area for lower building heights better serves the public interest. The Council can change the law after it learns of a Court's interpretation.⁸ While the Court will not strike a word through its interpretation of a code, the Council may strike a word in legislation if keeping the word misrepresents the Council's intent.

exceed 45 feet...." On December 20, 2012, Team Leader Glenn Kreger confirmed that height limitation along all of Newell Street in testimony to the Planning Board.

⁴ Section 59-4.9.1.A.

⁵ Section 59-4.9.12.D.

⁶ Section 59-7.3.4.E.2.g. The Silver Spring Sector Plan is the applicable plan for development along Newell Street.

⁷ The residents who brought the issue to court live in the building that was made subject to the building height restriction.

⁸ A notable example of this was the case of David Trail v. Terrapin Run. The Court interpreted the meaning of "conformance to a master plan". After the decision, the General Assembly changed the law to instruct future courts.

There are competing equities involved in this ZTA.

Some factors argue against approving ZTA 16-01. Past Planning Board interpretations applied the height limit to another property that borders Newell Street. The District Court ruled in favor of residents whose dwellings will be in the shade of a building more often if the height restriction along Newell Street is deleted from the code. Condominium purchasers bought in at least constructive, if not actual, reliance on the expectation that the height restriction would be consistently applied.

There are other factors that argue in favor of ZTA 16-01. If the Council believes that the Court's interpretation (and the Planning Board's prior interpretation) did not reflect its Sector Plan intent, then it should be corrected. The Planning Board recommended approving the ZTA to reflect what it believes was the Council's intent. Planning Staff, when it also recommended approval, believed that the concern for compatibility with single-family houses in the District of Columbia was inartfully addressed in both the Sector Plan and the zoning provision that implemented the Sector Plan. The Sector Plan encouraged redevelopment of vacant and underutilized land. The ZTA goes toward encouraging that redevelopment.⁹

How many properties are along Newell Street?

There are 7 properties bordering Newell Street. On the northwest quadrant of Eastern Avenue and Newell Street is the Spring Garden Apartment building (83 multi-family units – 8001-8015 Eastern Avenue). The property is on the Locational Atlas and Index of Historic Sites.¹⁰ The next property along the same side of the street is the MICA Condominiums (1220 Blair Mill Road). At the corner of Newell Street and Blair Mill Road is a 96 unit multi-family development completed in 2009 (1200 Blair Mill Road). On the south side of Newell Street, at the intersection of Newell Street and East West Highway, is Acorn Park, a designated historic resource owned by the Maryland-National Park and Planning Commission. At the northern intersection of Newell Street and Kennett Street is a 3 story building completed in 1996 (8045 Kennett Street). Only the southwest corner of the building abuts Newell Street. At the southeast corner of Newell Street and Kennett (8045 Newell Street) is a 120 unit condominium completed in 2005. The one-story warehouse property at 8001 Newell Street is in a position to use the additional height that would be allowed by ZTA 16-01.

What standard applies to determine that a ZTA is special legislation?

Equal protection of the law is guaranteed under the United States Constitution. The Maryland Constitution provides more detail on that subject and bars special laws.¹¹ The Maryland Court of

⁹ The District Court focused on the word "confronting". At least one author commented on confronting errors rather than confronting property on roads:

"The simple reality of life is that everyone is wrong on a regular basis. By confronting these inevitable errors, you allow yourself to make corrections before it is too late." Barry Ritholtz

¹⁰ The Council must consider whether the property should be included in the Master Plan for Historic Preservation before a demolition permit for these properties could be approved. If Council designated the site as historic, all exterior changes to the site would be subject to review and approval by the Historic Preservation Commission. The Commission has allowed demolition only under extreme circumstances.

¹¹ Article III, § 33: ... And the General Assembly shall pass no special Law, for any case, for which provision has been made, by an existing General Law.

Appeals ruled that the prohibition on special legislation applies to County laws. A special law is one that relates to particular persons or things of a class, as distinguished from a general law which applies to all persons or things of a class. If an act expressly states that it applies only to a particular named individual or entity, it may likely run afoul of the prohibition on special legislation. So may “equivalent” means of identifying a particular entity. Even when an individual was not named in legislation, where there was only one entity in the class and no other individual could get into the class, the Court of Appeals found the act to be prohibited special legislation.

In *Maryland Department of the Environment v. Days Cove Reclamation Co.*,¹² an act that affected only one entity but potentially affected others did not run afoul of the Maryland Constitution.

In determining whether the Maryland Constitution prohibits a particular piece of legislation, the Court of Appeals has “pointed to various considerations and factors, although certainly no one is conclusive in all cases.” Those “considerations and factors” include whether the legislation:

- 1) was actually intended to benefit or burden a particular member or members of a class instead of an entire class;
- 2) identifies particular individuals or entities;
- 3) was sought by a particular individual or business and whether the individual or business received special advantages from the Legislature, or if other similar individuals or businesses were discriminated against by the legislation;
- 4) had the practical effect of singling out one individual or entity, from a general category, for special treatment; and
- 5) made distinctions that are arbitrary and without any reasonable basis.”¹³

Would ZTA 16-01 be special legislation?

Testimony suggests that ZTA 16-01 would be special legislation because, in the opinion of those testifying that, “there is no realistic prospect for...fairly recently developed properties to redevelop in the foreseeable future.” In the opinion of those opposed to ZTA 16-01, the practical effect of the amendment would single out a single property.

The representative of a clear beneficiary of ZTA 16-01 argued that ZTA 16-01 is not special legislation. A single entity is not named in the legislation. There are several parcels of land in separate ownership that would be beneficiaries of ZTA 16-01. They argue that there is no requirement that future development be “reasonably foreseeable” on multiple properties; the mere existence of multiple beneficiaries for which the ZTA is potentially useful is sufficient.

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¹² 200 Md. App. 256 (2011).

¹³ *Cities Service Co. v. Governor*, 290 Md. 553, 568, 431 A.2d 663 (1981).

Zoning Text Amendment No.: 16-01
Concerning: Ripley/Silver Spring
South Overlay Zone –
Standards
Draft No. & Date: 1 – 12/9/15
Introduced: January 19, 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 Vice President Berliner

AN AMENDMENT to the Montgomery County Zoning Ordinance to:

- amend the development standards for the Ripley/Silver Spring South Overlay zone

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

DIVISION 59-4.9. “Overlay Zones”

Section 4.9.11. “Ripley/South Silver Spring (RSS) Overlay Zone”

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

Underlining indicates text that is added to existing law by the original text amendment or by ZTA 14-09.

[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 or text added by this amendment in addition to ZTA 14-09.

[[Double boldface brackets]] indicate text that is deleted from the text amendment by amendment or indicates a change from ZTA 14-09.

** * * 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 59-4.9 is amended as follows:**

2 **DIVISION 4.9. Overlay Zones**

3 * * *

4 **Section 4.9.11. Ripley/South Silver Spring (RSS) Overlay Zone**

5 **A. Purpose**

6 The purpose of the RSS Overlay zone is to:

- 7 1. Facilitate the implementation of an organized and cohesive
- 8 development pattern that is appropriate for an urban environment.
- 9 2. Encourage attractive design and ensure compatibility with existing
- 10 buildings and uses within and adjacent to the Overlay zone.
- 11 3. Provide flexibility of development standards to encourage innovative
- 12 design solutions.
- 13 4. Allow for the transfer of the public open space requirement to other
- 14 properties within the Overlay zone.
- 15 5. Allow new uses.

16 **B. Land Uses**

17 The following uses are permitted in addition to the uses allowed in the

18 underlying zone:

- 19 1. The following Light Manufacturing and Production use: assembly of
- 20 computer components; and
- 21 2. The following Retail/Service Establishment uses: bakery, if less than
- 22 1,500 square feet of gross floor area; and catering facility.

23 **C. Development Standards**

24 **1. Building Height**

- 25 a. The maximum building height is 45 feet along [Newell Street
- 26 and] Eastern Avenue that confronts a Residential zone in the

District of Columbia; however, this building height may be increased to:

- i. a maximum of 90 feet for any building or portion of a building that is set back a minimum of 60 feet from the street; or
- ii. a maximum of 125 feet for residential development that is set back at least 100 feet from Eastern Avenue [and Newell Street] and includes a public parking garage constructed under a General Development Agreement with the County.

* * *

Sec. 2. Effective date. This ordinance becomes effective 20 days after approval.

This is a correct copy of Council action.

Linda M. Lauer, Clerk of the Council



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

OFFICE OF THE CHAIR

February 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. 16-01

BOARD RECOMMENDATION

The Montgomery County Planning Board of The Maryland-National Capital Park and Planning Commission reviewed Zoning Text Amendment No. 16-01 at our regular meeting on February 11, 2016. By a vote of 5:0, the Planning Board recommends approval of the text amendment to amend the Ripley/South Silver Spring Overlay zone by deleting the height restriction that this provision has been interpreted to impose along Newell Street.

The Overlay Zone provides that building height of 45 feet "along Newell Street and Eastern Avenue that confronts a residential zone in the District of Columbia," with the ability to increase the height with appropriate set back. The Planning Board interpreted the restriction to apply only along Eastern Avenue and that portion of Newell Street where it intersects with Eastern and confronts the residential zone in the District of Columbia. However, the Circuit Court for Montgomery County interpreted the height restriction in the Overlay Zone to apply along Eastern Avenue **and all of Newell Street**. This ZTA would apply these building height limitations only along Eastern Avenue. The Board believes that it is appropriate for the County Council, as the policy-making body of the County, to revise statutory language so that the Council's intent would be interpreted as intended.

ZTA 16-01 would resolve conflicting language in the Silver Spring Sector Plan and clarify the Council's Sector Plan intent in the Zoning Ordinance. In the Summary of the Ripley/South Silver Spring Overlay Zone section (Major Provisions) of the Sector Plan, building height for new construction is limited only along Eastern Avenue, fronting one-family detached dwellings in the District of Columbia, and where at the property line building heights should be limited to 45 feet. Above 45 feet, the building may step back 60 feet and its height may increase to 90 feet. However, this statement differs from the language in the Urban Design section of the Sector Plan where it states that building heights along both

Newell Street and Eastern Avenue should ensure compatibility with the adjacent residential neighborhood. At the property line, building height is limited to 45 feet.

In the opinion of the sponsor, the Council did not intend for the Silver Spring Sector Plan to limit height to 45 feet and implement the related setback along the full length of Newell Street. The height limit was intended to apply only on that portion of Newell Street that confronts a residential zone in the District of Columbia (DC). Only the corner lots at Newell and Eastern Avenue confront single-family detached dwellings in DC. The height restriction would still apply to part of these lots because they are along Eastern Avenue. There was no indication that the Council wanted to limit heights to less than that allowed on adjacent properties in the zone in other areas along Newell Street.

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, February 11, 2016.



Casey Anderson
Chair

CA:GR



Zoning Text Amendment (ZTA) No. 16-01, Ripley/South Silver Spring Overlay Zone –Standards



Gregory Russ, Planner Coordinator, FP&P, gregory.russ@montgomeryplanning.org, 301-495-2174
Pamela Dunn, Chief, FP&P, pamela.dunn@montgomeryplanning.org 301-650-5649

Description

Completed: 02/4/16

ZTA No. 15-12 would amend the development standards for the Ripley/South Silver Spring Overlay Zone. Specifically, the ZTA would amend the Ripley/Silver Spring South Overlay zone by deleting the height restriction that this provision has been interpreted to impose along Newell Street.

Specifically, the Circuit Court for Montgomery County has interpreted the Overlay Zone to limit the maximum building height to 45 feet along Eastern Avenue and Newell Street. Building height may be 90 feet for any building or portion of the building if there is a minimum 60-foot setback. Building height for any building or portion of the building may be 125 feet if there is a minimum 100-foot setback. This ZTA would apply these building height limitations only to Eastern Avenue.

Summary

Staff recommends approval, as introduced, of ZTA No. 16-01 to clear up some confusion as to the development limits for property in South Silver Spring at the intersection of Eastern Avenue and Newell Street within the Ripley/Silver Spring South Overlay zone.

Background/Analysis

In May 2013, the Planning Board approved a Project Plan for 8100 Newell Street for development of a multi-family building that exceeded the height limits established under the Ripley/South Silver Spring Overlay Zone along the Newell Street side of the project. Certain residents in the immediate area opposed the Board's approval claiming that the height restriction applied along both the Eastern Avenue and the Newell Street property lines. They appealed the Board's decision, and the Circuit Court agreed based on the "clear" language in the Overlay Zone. The Court's Opinion is attached for reference (as part of the letter received from David W. Brown-Attachment 3).

Intent of Legislation (Mainly extracted from County Council introduction memorandum)

As indicated in the County Council staff's introduction memorandum, ZTA 16-01 would resolve conflicting language in the Silver Spring Sector Plan and clarify the Council's Sector Plan intent in the Zoning Ordinance. In the Summary of the Ripley/South Silver Spring Overlay Zone section (Major

Provisions) of the Sector Plan, building height for new construction is limited only along Eastern Avenue, fronting one-family detached dwellings in the District of Columbia, and where at the property line building heights should be limited to 45 feet. Above 45 feet, the building may step back 60 feet and its height may increase to 90 feet. However, this statement differs from the language in the Urban Design section of the Sector Plan where it states that building heights along both Newell Street and Eastern Avenue should ensure compatibility with the adjacent residential neighborhood. At the property line, building height is limited to 45 feet (see Attachment 2).

In the opinion of the sponsor, the Council did not intend for the Silver Spring Sector Plan to limit height to 45 feet and implement the related setback along the full length of Newell Street. The height limit was intended to apply only on that portion of Newell Street that confronts a residential zone in the District of Columbia (DC). Only the corner lots at Newell and Eastern Avenue confront single-family detached dwellings in DC. The height restriction would still apply to part of these lots because they are along Eastern Avenue. There was no indication that the Council wanted to limit heights to less than that allowed on adjacent properties in the zone in other areas along Newell Street. It should be further noted that garden apartments are located across Newell Street from the area where this change would apply where the compatibility concern that this provision seems to have been intended to address does not apply nearly as strongly, if at all, as across the street from single family residential development across Eastern Avenue.

The Planning Board's interpretation of the current code provision has been inconsistent. In one plan approval, the Board cited the requirement for reduced building height along all of Newell Street. In a more recent application (May 2013), the Planning Board did not find that the building height limit applied to Newell Street beyond its Eastern Avenue frontage, a decision that the Circuit Court reversed. That inconsistency resulted in a petition for judicial review. The Circuit Court barred buildings that did not satisfy the building height limits along Newell Street based on the text of the Zoning code and the Board's prior interpretation.

Letter of Opposition from David W. Brown

A letter from David W. Brown dated February 2, 2016 (Attachment 3) disputes the County Council's rationale for introducing ZTA 16-01. In summary, Mr. Brown states that: the ZTA does not resolve a conflict between the master plan and Zoning Ordinance language, since he believes that there is no conflict currently; the ZTA is highly suspect as unconstitutional special legislation or improper spot zoning; the ZTA would not clarify the law but would overrule a decision by Montgomery County Circuit Court. Should the Board desire additional discussion on these claims, the Planning Board legal staff will be available at the public meeting on February 11, 2016.

Conclusion

Staff agrees with the sponsor of ZTA 16-01 that this ZTA would clear up some confusion as to the development limits for property in South Silver Spring at the intersection of Eastern Avenue and Newell Street. The Silver Spring Central Business District Sector Plan recommended that the Ripley/South Silver Spring Overlay Zone "limit building height for new construction along Eastern Avenue, fronting one-family detached dwellings in the District of Columbia..." Staff does not believe that the height limits were intended to apply along the full extent of Newell Street, but instead along the portion of Newell

where it intersects with Eastern Avenue, and across from residential property located in the District of Columbia.

Attachments

1. ZTA No. 16-01 as introduced
2. Excerpts from Silver Spring CBD Sector Plan
3. Letter from David Brown in opposition to ZTA 16-01

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February 23, 2016

Montgomery County Council
Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850

RE: Zoning Ordinance Text Amendment No. 16-01,
Ripley/South Silver Spring Overlay Zone - Standards

Dear President Floreen and Members of the County Council,

I am writing on behalf of Silver Spring Extra Space LLC, the owner of the property located at the intersection of Newell Street and Eastern Avenue (8001 Newell Street) in the Silver Spring Central Business District. This property has been the center of the controversy that has stimulated Zoning Ordinance Text Amendment No. 16-01.

As the Councilmembers have undoubtedly already observed after reading the Technical Staff's report and recommendation, the Planning Board's letter of recommendation and Mr. Zyontz's staff report on this matter, ZTA 16-01 is intended to eliminate confusion created by text in the 2000 Silver Spring CBD Sector Plan and the companion Ripley/South Silver Spring Overlay Zone regarding development along Eastern Avenue ".....that confronts a residential zone in the District of Columbia." Examples of the confusion in the relevant text are shown on the attachment to this letter describing the evolution of language in the Master Plan in the Staff Draft, the Planning Board Draft and, eventually the adopted Sector Plan. There is no dispute, however, that the Planning Board specifically recommended, and the Council approved, very clear language found on page 60 of the Master Plan which reads

"Limit building height for new construction along Eastern Avenue, fronting one-family detached dwellings in the District of Columbia...." (emphasis added)

That statement is the clearest evidence of the intent of the Council about how redevelopment should occur along that stretch of Eastern Avenue facing single family houses in the District of Columbia and that intent should not be adulterated by later language in the Plan in the less specific design guidelines (page 86).

To make the Council's job easier, this debate has been the subject of analysis in the past by your own staff. Attached is a copy of a memorandum authored by Ms. Marlene Michaelson in response to an inquiry from Councilmember Valerie Ervin. I highly recommend your review of the February 21, 2013 memorandum (attached) which concluded that "Staff does not believe that it was the Council's intent that the Sector Plan requires the 45 foot height limit and related setback on the full length of Newell, but only at the corner where it confronts a residential zone in the District of Columbia."

Zoning Ordinance Text Amendment No. 16-01 will clarify that intent of the Council when it adopted the 2000 Silver Spring CBD Sector Plan.

Thank you for your consideration of these comments. On behalf of the property owner whose redevelopment plan has been placed on hold as a result of the unfortunate misinterpretation by the Circuit Court of the intent of the language as it reads in the Zoning Ordinance today, we ask that you adopt ZTA 16-01 as a proposed.

Sincerely Yours,

Miller, Miller & Canby

A handwritten signature in black ink that reads "JODY KLINE". The signature is written in a bold, slightly slanted, sans-serif style. The "J" is large and loops around the "O". The "K" is also large and has a distinct shape. The "L" and "I" are smaller and more straightforward. The "N" and "E" are also clearly defined. The signature is written on a white background.

Jody S. Kline

JSK/dlc

cc: Jeff Zyontz
Harvey Maisel
Michael Hollins

EVOLUTION OF RELEVANT TEXT IN THE SILVER SPRING CBD
SECTOR PLAN AND THE RIPLEY/SOUTH SILVER SPRING OVERLAY ZONE

August, 1998

The Public Hearing (Staff Draft) of the Silver Spring CBD Sector Plan update, prepared by Staff at M-NCPPC, read:

“Design Guidelines for Development in Ripley District

* * *
* * *

- Building heights along Newell Street and Eastern Avenue should ensure compatibility with the adjacent residential neighborhood.
- at the property line, building heights should be limited to 45 feet
- above 45 feet, the building may step back 60 feet and its height may increase to 90 feet (*see Figure 44*).” (Staff Draft Plan, page 99)

April, 1999

The Planning Board Draft transmitted to the County Council for public hearing contained very specific language about new construction in the Ripley/South Silver Spring district:

“Summary of Proposed Ripley/South Silver Spring Overlay Zone

* * *
* * *

Major Provisions

- Limit building height for new construction along Eastern Avenue, fronting one-family detached dwellings in the District of Columbia as follows: at the property line, building heights should be limited to 45 feet. Above 45 feet, the building may step back 60 feet and its height may increase to 90 feet. (See Figure 15.)” (Planning Board Draft, page 42)(emphasis added)

April, 1999

Notwithstanding the text added to the Planning Board Draft of the “Major Provisions” of the Overlay Zone, the language related to the Design Guidelines was not changed or reconciled with the Staff Draft except to modify the introduction to the subject to read “Design Guidelines for Development in South Silver Spring.”

- Building heights along Newell Street and Eastern Avenue should ensure compatibility with the adjacent residential neighborhood
- at the property line, building heights should be limited to 45 feet
- above 45 feet, the building may step back 60 feet and its height may increase to 90 feet

In other words, no attempt was made to reconcile the Design Guideline language carried over from the Staff Draft with the Planning Board’s new language on the Overlay Zone that was added to the Planning Draft and addressed only compatibility issues only “...along Eastern Avenue, fronting one-family detached dwellings in the District of Columbia...” (emphasis added).

February, 2000

The text of the Approved and Adopted Silver Spring CBD Sector Plan of February, 2000 repeated the same text on the subject of the Overlay Zone (page 60), citing only Eastern Avenue frontage as the point of focus, and the design guidelines. Therefore, there was no effort by the Council to detract from the clear intent of the Plan expressed in the Planning Board’s Draft.

MEMORANDUM

February 21, 2013

TO: Councilmember Valerie Ervin

FROM: Marlene Michaelson, Senior Legislative Analyst

SUBJECT: Silver Spring CBD Sector Plan and Newell Street Height Limits

You asked me to comment on a letter you received from Daniel Meijer, asserting that the intent of the Silver Spring CBD Sector Plan (February 2000) was to limit heights along Newell Street to 45 feet and that the zoning text amendment creating the Ripley/South Silver Spring Overlay Zone incorrectly added the words indicating that the height limit only applied to land confronting a residential zone in the "District of Columbia".

I staffed the Council review of the Silver Spring Sector Plan and the zoning text amendment and recently reviewed both the Sector Plan language and the Council minutes to help me recall the Council discussion. Unfortunately, the Sector Plan has conflicting language. On page 60 in the summary of the overlay zone, there is a bullet that describes one of the major provisions of the overlay zone as follows:

- Limit building height for new construction **along Eastern Avenue**, fronting **one-family detached** dwellings in the **District of Columbia** as follows: at the property line, building heights should be limited to 45 feet. Above 45 feet, the building may step back 60 feet and its height may increase to 90 feet. (bolding added by Staff for this memo)

Then on page 86 in the Urban Design section of the Sector Plan, it has a somewhat different recommendation:

- Building heights along **Newell Street and Eastern Avenue** should ensure compatibility with the **adjacent residential neighborhood**.
 - At the property line, building heights should be limited to 45 feet.
 - Above 45 feet, the building may step back 60 feet and its height may increase to 90 feet.

The current Zoning Ordinance includes the following language¹:

- (1) Building height in the overlay zone along **Newell Street and Eastern Avenue** that confronts a **residential zone in the District of Columbia** must not exceed a height of 45 feet. However, this building height may be increased to:
 - (A) a maximum of 90 feet for any building or portion of a building that is set back at least 60 feet from the street; or
 - (B) a maximum of 125 feet for residential development that is set back at least 100 feet from Eastern Avenue and Newell Street and includes a public parking garage constructed under a General Development Agreement with the County.

The language on page 60 does not include Newell and clearly references **one-family detached** dwellings in the **District of Columbia**. The language on page 86 includes both Eastern and Newell and more broadly refers to "adjacent residential neighborhood". My recollection is that the Council was primarily concerned with compatibility with the **single-family detached** homes along Eastern. I do not recall, nor is there anything in the Council minutes to indicate that the language on page 86 was added to intentionally broaden the scope of the height limit.² By contrast, the Council minutes indicate that the Planning, Housing, and Economic Development (PHED) Committee and Council voted on the specific language in the text amendment quoted above.³ Council minutes also indicate that, in discussions regarding height on other properties in the Sector Plan, the Council's goal was to encourage redevelopment while also trying to ensure compatibility. Based on this review, I have no reason to believe the Council inadvertently included the wrong language in the zoning text amendment.

Moreover, from a substantive point of view, I do not believe the Council's intent for the property on the southeastern side of Newell Street was to limit height to significantly less than allowed by zoning for the adjacent properties. The Council frequently limits the height on properties adjoining single-family detached residential homes (which exist on Eastern Avenue in the District of Columbia). To my knowledge, it has never limited the height to 45 feet on a property **between** other properties zoned CBD-1 and R-10 (high density multi-family). Other than the single-family detached residential across Eastern Avenue, the property is surrounded by properties zoned R-10 and CBD-1, and the existing development includes garden apartments, multi-family buildings, and non-residential buildings. While current heights range from 40 feet to 110 feet, zoning would allow the CBD property to be as high as 143 feet, and **there is no height limit** in the R-10 zone. When the Council makes a determination on a specific property to create limits inconsistent with typical practices, it generally includes an explanation for this deviation. There is no indication that the Council's intent was to limit heights to significantly less than allowed on the adjacent properties and no rationale included in the Sector Plan language on page 86.

Where the height limit does apply, it can exceed 45 feet if it is set back 60 feet. However, the property being considered for redevelopment is only 100 feet wide. If this language were to apply to this property, Planning Staff concluded that such a restriction "would effectively eliminate the applicant's ability to develop the property to the density allowed by the optional method of development", making redevelopment unlikely. The Council upzoned this property along with others in South Silver Spring

¹ §59-C-18.202(b)(1).

² The language on page 60 was in the Planning Board Draft submitted to the Council. The language on page 86 was added as part of an entirely new chapter on Urban Design.

³ The Council held a public hearing on the text amendment, conducted worksessions open to the public, and specifically voted on the language in question, so I do not agree with Mr. Meijer's assertion that the language related to the District of Columbia was "a legislative act without any due process by the codification ministerial or administrative authors".

from CBD-0.5 to CBD-1 for the specific purpose of encouraging revitalization and the redevelopment of vacant or underutilized land. Given the strong emphasis placed on the importance of redevelopment throughout the Sector Plan, the heights allowed by the zoning on surrounding properties, and the record of the Council discussion, Staff does not believe it was the Council's intent that the Sector Plan require the 45 foot height limit and related setback requirement along the full length of Newell, but only at the corner where it confronts a residential zone in the District of Columbia. It is important to note that the Planning Board considers a number of factors when they review development plans and could determine that it needs to limit height for a variety of different reasons other than conformance with the Sector Plan. I am unable to comment on whether there are other factors that could lead to such a decision in this particular case.

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March 14, 2016

Montgomery County Council
Stella B. Werner Council Office Building
100 Maryland Avenue
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RE: Zoning Ordinance Text Amendment No. 16-01;
Ripley/South Silver Spring Overlay Zone – Standards

Dear President Floreen and Members of the County Council:

The following analysis is submitted in response to certain assertions made by opponents that enactment of Zoning Ordinance Text Amendment No. 16-01 (ZTA 16-01) would constitute “unconstitutional special legislation or spot zoning.” This analysis confirms that ZTA 16-01 has no legal infirmities and will cause neither of the alleged above results.

1) Enactment of ZTA 16-01 Would Not Constitute Unconstitutional Special Legislation Because it Applies to More Than One Property

Attached is Exhibit A showing that the text of Section 59.4.9.11.C.1 of the Zoning Ordinance sought to be amended by ZTA 16-01 applies to three separate properties of land “Spring Gardens, Block A, Lots 1 and 2” both addressed at 8001 Eastern Avenue, and “Parcel A” at 8001 Newell Street.

One would expect that having three parcels of land in separate ownership that are affected by a Zoning Ordinance Text Amendment would undermine the argument that the ZTA constitutes special legislation. Opponents of ZTA 16-01 attempt to distinguish the parcels of land by suggesting that only the self-storage facility located at 8001 Newell Street might benefit from ZTA 16-01 because the ZTA would be useful to only one property within the foreseeable future. Not only is this premise faulty as a matter of constitutional law (discussed further in

Section 2 herein), it is not consistent with the facts and the development pattern in the surrounding area.

Lot 1, Block A, "Spring Garden" (8001 Eastern Avenue) located in the northern quadrant of the intersection of Eastern Avenue and Newell Street, is a "U"-shaped, four story brick apartment building which, according to the records of the Montgomery County Department of Permitting Services, was constructed in 1940. Although habitable, the building is beyond its planned functional life. The same facts and circumstances apply to the "sister" building (see attached aerial photograph) also addressed as 8001 Eastern Avenue but on a separate lot (Lot 2). These buildings are, in actuality, "ripe" for redevelopment.

Opponents of ZTA 16-01 have proffered that only the self-storage facility located at 8001 Newell Street, in the eastern quadrant of the intersection of Eastern Avenue and Newell Street, is likely to be redeveloped in the foreseeable future and, therefore, would be the exclusive beneficiary of the change in development standards to be accomplished by ZTA 16-01. But surrounding redevelopment activity disproves that allegation.

Just a block northwest of the intersection of Eastern Avenue and Newell Street, at 8107 Eastern Avenue, the site of the former Blair Towers is being redeveloped. The Blair Towers was a multi-family apartment project constructed in 1959. Due to the strength of the housing market in south Silver Spring, the Tower Companies have found it advisable to demolish the original apartment buildings of late 1950's vintage and replace them with modern multi-family residences for which construction activity is on-going at this time.

In summary, there is no rational or legal basis for excluding two other properties located at 8001 Eastern Avenue that are affected by ZTA 16-01 on the basis that they are not likely to be redeveloped in the foreseeable future. Current development activities in the immediate surrounding area demonstrates that the buildings at 8001 Eastern Avenue are appropriate for redevelopment and should be considered in the pool of properties that are affected by ZTA 16-01. Therefore, ZTA 16-01 cannot be criticized as benefitting only a single property.

2) For the legal reasons stated hereafter, enactment of ZTA 16-01 by the County Council Would Not Constitute Unconstitutional Special Legislation

Article III, § 33 of the Maryland Constitution states, in pertinent part, that "the General Assembly shall pass no special law, for any case, for which provision has been made, by an existing General Law." This language has been interpreted by the Maryland appellate courts to apply to legislative bodies of municipalities to which the General Assembly has delegated power. *Mears v. Town of Oxford*, 52 Md. App. 407, 449 A.2d 1165 (1982); *Vermont Federal Savings and Loan Association v. Wicomico County*, 263 Md. 178, 182-3, 283 A.2d 384 (1971); *Potomac Sand and Gravel Co. v. Governor of Maryland*, 266 Md. 358, 378-9 (1972).

The Court of Appeals has held that if an act expressly states that it applies only to a particular, named individual or entity, it may run afoul of Article III, § 33. *Reyes v. Prince George's County*, 281 Md. 279, 380 A.2d 12 (1977) Clearly, that is not the case here. ZTA 16-01 does not name a particular individual or entity, or a specific parcel of land. Instead, the ZTA merely deletes the phrase "along Newell Street" from existing text of the Zoning Ordinance to clarify the original intent of the County Council and the authors of the applicable area Master Plan. Nonetheless, the opponents of ZTA 16-01 maintain that since the ZTA is useful to only

one property within the foreseeable future, it violates Article III, § 33. Established case law, however, disagrees.

In *Maryland Dep't of the Environment v. Days Cove Reclamation Co.*, 200 Md. App. 256, 27 A.3d 565 (2011), the Court of Special Appeals held that an act that affected only one entity but potentially affected others did not run afoul of the Maryland Constitution. (Emphasis added). The opponents' written submission to the County Council on this matter (dated February 23, 2016) states that "ZTA 16-01 has no practical or foreseeable application to more than one of the three properties in the Overlay Zone that are "along Newell Street" clearly recognizes that there is more than one property covered by the legislation.

It is, therefore, uncontroverted that there are three properties along Newell Street to which proposed ZTA 16-01 could potentially apply. Since the potential scope of ZTA 16-01 reaches more than one property, it clearly does not violate Article III, § 33. The fact that one of the affected properties may be in a position to more immediately utilize the correction of law being proposed by ZTA 16-01 does not convert the proposal into unconstitutional special legislation. Therefore, because there is more than one property that is covered by the scope of ZTA 16-01, from a legal perspective, the Zoning Ordinance Text Amendment cannot be considered unconstitutional special legislation.

3) Enactment of ZTA 16-01 by the County Council Would Not Constitute Spot Zoning

In *Tennison v. Shomette*, 38 Md. App. 1, 8, 379 A.2d 187, 192 (1977), the Court of Special Appeals pointed out that "spot zoning occurs when a small area in a District is placed in a different zoning classification than the surrounding property ... Spot zoning is not invalid per se. Rather, its validity depends on the facts of each individual case.... while spot zoning is illegal if it is inconsistent with an established comprehensive plan and is made solely for the benefit of a private interest, it is a valid exercise of the police power where the zoning is in harmony with the comprehensive plan and there is a substantial relationship to the public health, safety and general welfare."

More recently, the Court of Appeals has held that "a 'spot zoning' ordinance, which singles out a parcel of land within the limits of a use district and marks it off into a separate district for the benefit of the owner, thereby permitting a use of that parcel inconsistent with the use permitted in the rest of the district, is invalid if it is not in accordance with the comprehensive zoning plan and is merely for private gain. On the other hand, it has been decided that a use permitted in a small area, which is not inconsistent with the use to which the larger surrounding area is restricted, *although it may be different from that use*, is not "spot zoning" *when it does not conflict with the comprehensive plan but is in harmony with an orderly growth of a new use for property in the locality.*" *Mayor & Council of Rockville v. Rylyns Enters.*, 372 Md. 514, 814 A.2d 469 (2002) (Emphasis added)

ZTA 16-01 clearly does not result in the reclassification of the zoning of any property. Furthermore, it makes the legislation available to and applicable to other properties similarly situated. It is legislation that merely seeks to make the Overlay Zone consistent with the original intent of the authors of the area Master Plan. We submit that what ZTA 16-01 is seeking to achieve is use of property in a manner that is, in fact, *more consistent* with the comprehensive zoning plan and, as such, it is the very antithesis of invalid spot zoning.

Although the timing of this corrective action by the County Council might be something that opponents of the text amendment find objectionable, it is nonetheless well within the Council's purview to clarify what it deems to have been misinterpreted in the past.

For both practical reasons (redevelopment potential for all properties subjected to the proposed legislation) and based on a thorough analysis of applicable law, ZTA 16-01 is neither unconstitutional special legislation nor does it create illegal spot zoning.

Sincerely yours,

MILLER, MILLER & CANBY

JODY KLINE

Jody S. Kline

Soo Lee-Cho
Soo Lee-Cho

cc: Jeff Zyontz
Harvey Maisel
Michael Hollins
David Brown, Esq.

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Figures, Tables

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TESTIMONY OF DAVID W. BROWN

KNOFF & BROWN

For

8045 NEWELL STREET CONDOMINIUM ASSOCIATION

On

ZTA 16-01

February 23, 2016

President Floreen and Members of Council: I welcome the opportunity to present the views of the 8045 Newell Street Condominium Association on proposed ZTA 16-01. ZTA 16-01 should be rejected. It perversely seeks to clarify what needs no clarification and does so in a way exactly the opposite of what the Council intended in 2000 when it enacted the Ripley/Silver Spring South Overlay Zone along with adoption of the Silver Spring CBD Sector Plan. Both the Overlay Zone and the Sector Plan itself imposed a height-setback restriction of 45' in two places in the Overlay Zone: (1) along Eastern Avenue where there were single-family residences across the street; and (2) along Newell Street. Despite claims to the contrary, there is no ambiguity or confusion about this.

In addition, since 2000, two of the three properties along Newell Street subject to the restriction have undergone redevelopment in conformity with the restriction. The ZTA would eliminate the existing restriction along Newell Street and thereby benefit only a single property at 8001 Newell Street, the owner of which is presumably the impetus behind the ZTA. Please consider with some perspective what it would mean to be receptive to this sort of special interest tinkering with the new Zoning Ordinance. I still have in my office the pre-October 2014 Zoning

Ordinance, whose many inches of paper weigh about 6 pounds. The new Ordinance comes in at under 2 pounds, a 66% reduction, as a result of a monumental effort by this Council, the Planning Board and your staffs, for which those of us who work with the Ordinance daily are in perpetual gratitude, and for which no measure of congratulations to you is too much. One of the major differences between then and now is that the new Ordinance has been largely cleansed of special interest provisions. Enactment of any special interest ZTA should occur only to correct some manifest injustice. This one corrects no injustice; it gives 8001 Newell Street a development benefit that the two other properties along Newell Street were denied.

1. **No Conflict.** The Staff Report accompanying the introduction of ZTA 16-01 states that “ZTA 16-01 would resolve conflicting language in the Silver Spring Sector Plan and clarify the Council’s Sector Plan intent in the Zoning Ordinance. . . . In the opinion of the sponsor [Council Vice President Berliner], the Council did not intend for the Silver Spring Sector Plan to limit height to 45 feet and implement the related setback along the full length of Newell Street.” In fact, no member of the Council, including the sponsor of ZTA 16-01, was a member of Council when the Sector Plan was adopted in 2000. Further, the clearest evidence of the Council’s intent at the time comes from its decision to amend the Planning Board Draft to state unambiguously that the height setback restriction was to be imposed in two places: along Eastern Avenue and along Newell Street. Council Resolution 14-416 at 22 (Feb. 1, 2000). **Exhibit 1.**

The Staff Report argues that “[t]he height limit was intended to apply only on that portion of Newell Street that confronts a residential zone in the District of Columbia.” Nothing in the history of the Sector Plan/Overlay Zone supports this alleged intent, and understandably so, because it is nonsensical. No part of Newell Street “confronts” a residential zone in the District of Columbia. Any doubt about this was definitively resolved in litigation over a year ago involving

my client on one side and, on the other, the Planning Board and a prospective developer of 8001 Newell Street. The Planning Board counsel and lawyers for the developer made this same argument to Circuit Judge McCally, who recognized she was supposed to be deferential to the Board's interpretation of the statutes it is charged with administering. Nevertheless, she rejected this argument in her Opinion reversing the Board's approval of development at 8001 Newell Street as in violation of the height-setback restriction. Here is what she said about the so-called Newell Street confrontation:

Newell Street runs perpendicular to the District of Columbia. Given the common meaning of "confront," it is not possible for Newell Street to be "face to face" with any zone in the District of Columbia, residential or otherwise. Thus, an interpretation that applying the qualifying phrase "that confronts a residential zone in the District of Columbia" to Newell Street would render the limitation meaningless in regards to Newell Street.

Exhibit 2 at 6.

The Staff Report sees a conflict in the Sector Plan where none exists. Staff asserts that one finds in the "summary section of the Sector Plan" that the height-setback restriction applies "only along Eastern Avenue." This is doubly incorrect. The "summary" being referred to is a summary of the "Major Provisions" of the Overlay Zone, **Exhibit 3**, and there are no land use recommendations to be found elsewhere in the Sector Plan conflicting with the language added by Council. Judge McCally found no ambiguity in ruling that the terms of the Overlay Zone height-setback restriction apply along Newell Street. Further, as a summary of the Overlay Zone's "major provisions," there is no conflict in the omission from a summary of major provisions an exhaustive description of its operation and effect everywhere. By its very nature, a "summary of major provisions" is not exhaustive of all provisions. Here, more properties in the Overlay Zone are impacted by the Eastern Avenue restriction than the Newell Street restriction, and that would certainly explain why the former was viewed, as between the two, as the "major provision." The

Staff Report asserts that the restriction was written to apply “**only** along Eastern Avenue,” but “only” was added by Staff to its Memo; it is not in the Sector Plan summary of major provisions.

2. Intent to Protect the Newell Street Edge

Apart from the fact that there is no conflict or confusion in need of clarification, there is sound planning policy underlying the 2000 Sector Plan and Overlay Zone decision to place the 45-foot height-setback restriction not only on Overlay Zone properties along Eastern Avenue, but also on Overlay Zone properties along Newell Street. When this issue came up in December 2012 in the first Planning Board hearing on the 8001 Newell Street development proposal, Glenn Kreger, the Team Leader for the Sector Plan, was asked by Board Chair Carrier, in the course of the hearing, to explain whether staff intended that the restriction apply along Newell Street. His recollection was unequivocal:

[W]e made a conscious effort to protect the edges. . . . [W]e felt strongly that we need to have a good relationship and compatibility with what was across the District line. And, my recollection is that we also felt that we needed to treat Newell Street as an edge because there were garden apartments across the street, not single-family homes. But the correct use at that time, and I believe still today, is garden apartments that are fairly low-rise. . . . [T]here’s certainly nothing inconsistent about applying [the height-setback restriction] on Newell Street any my recollection is that when the previous Newell Street project came in that we applied it in the way I just described it and it sounded right to me at the time.

Exhibit 4, Transcript of Mr. Kreeger’s testimony at the December 20, 2012 hearing on 8001 Newell Street, pp 78-80.

Mr. Kreger’s recollection of what is across Newell Street from the 8001 property was correct in 2000, correct again in 2012, and is still correct today. The apartments, known as the Spring Garden Apartments, are still in operation. They have a height of 40’, and they are listed in the County’s Locational Atlas and Index of Historic Sites as Resource #36/19. Any redevelopment

of them would be subject to historic preservation review under MCC § 24A-10. In terms of compatibility, they would confront a redeveloped 8001 Newell Street property with a building height at the property line of 45', but without the height restriction, the property's current zoning (CR-3.0, C-2.0, R-2.75, H-125T) would permit a height of up to 125'. Plainly, a 45' height limit in this location along Newell Street is far more compatible with 40' apartments across the street than a redeveloped height anywhere near 125'.

3. Applicability to One Property. ZTA 16-01 has no practical or foreseeable application to more than one of the three properties in the Overlay Zone that are "along Newell Street." One is my client, the 8045 Condominium at 8045 Newell Street, which was built after the Sector Plan was enacted and in compliance with the height-setback restriction. At that time the Planning Board imposed the height-setback restriction along Newell Street and my client complied. The second property is the office building with the actual address of 8045 Kennett Street, also built in compliance with the height-setback restriction. There is no realistic prospect for either of these fairly recently developed properties to redevelop in the foreseeable future and especially, to do so in a way that would contravene the height-setback restriction along Newell Street to which they now conform. The third property, 8001 Newell Street, is why we are here today. It is a low-rise storage facility for which redevelopment without the height-setback restriction was sought and approved by the Planning Board, by reversing its prior interpretation of the height-setback restriction to suddenly find it did not apply along Newell Street. This approval is the one reversed by Judge McCally last year.

It is therefore quite clear that ZTA 16-01 is aimed at changing the standards for redevelopment of a single property so that something higher than 45' can be built along Newell Street at the 8001 location. If ZTA 16-01 is enacted, it might precipitate a legal challenge as

unconstitutional special legislation or spot zoning. See *Beauchamp v. Somerset County Sanitary Comm'n*, 256 Md. 541, 261 A.2d 461 (1970) (where the practical and intended effect of a law is to address one situation, it is a “special law” enacted in violation of Article III, § 33 of the Maryland Constitution); *Huff v. Board of Zoning Appeals of Baltimore County*, 214 Md. 48, 133 A.2d 83 (1957)(when a zoning enactment is for the benefit of an individual owner rather than pursuant to a comprehensive plan for the benefit of the community, it is viewed as illegal spot zoning). But this Council should not reject ZTA 16-01 due to this risk; it should reject it as simply bad legislation and a reversion to the old days of too much receptivity to larding the Zoning Ordinance with narrowly conceived, narrowly applicable exceptions.

The inappropriateness of changing the rules for the benefit of a single property is well-illustrated by this case. As noted by Judge McCally, “businesses and the public have developed and purchased property in the Overlay Zone in at least constructive, if not actual, reliance on the Board’s interpretation of this ordinance over the previous ten years.” **Exhibit 2** at 7. This observation was prompted by historical evidence that was part of the record of the Board hearings on 8001 Newell Street redevelopment that the height-setback restriction along Newell Street had a material impact not only on the configuration options for the 8045 Condominium building, but also on subsequent unit purchasers in that Condominium, who bought in reliance on the expectation that the height-setback restriction would subsequently be consistently applied to any redevelopment of the adjacent property at 8001 Newell Street.

4. Legislative Evasion of the Merits. Maryland Courts are very deferential to the expertise of administrative agencies, and in particular to their interpretation of statutes those agencies administer. Accordingly, although most Planning Board development decisions are subject to judicial review, they are infrequently challenged and Circuit Court reversal of a Board

decision is rare. But if the Board is reversed in Circuit Court, with the Board and the applicant both participating, as was the case in the development approval for 8001 Newell Street, either or both of those losing parties has a right of appeal to the Maryland Court of Special Appeals. In that court, the review would be *de novo*, which means that the appellate court reviews the decision of the Board, not that of the Circuit Court, and the deference the Board is given in judicial review of its decisions would be back in place all over again. See *Naylor v. Prince George's County Planning Board*, 200 Md. App. 309, 27 A.3d 597, 601 (2011).

Despite these advantages, neither the Board nor the applicant saw fit to appeal Judge McCally's decision in the Court of Special Appeals, and her decision became the final judgment in the case in March 2014. Now, almost two years later, instead of attempting to demonstrate to an appellate court, obliged to be receptive to the Board and the applicant, that the Board's interpretation of the Overlay Zone was correct in that case, you have before you an attempt to legislatively overrule that final judgment by amending a statute tied to a Sector Plan for which none of you had any official involvement as a councilmember. Please do not substitute your judgment on what the Council intended in 2000 for South Silver Spring for what the 2000 Council actually did in enacting the Sector Plan and the Overlay Zone. Such an "end run" around existing law is especially inappropriate on a fully litigated matter in a now 16-year old Sector Plan. If the Sector Plan and Overlay Zone merit any change in this respect, it should occur in the course of a comprehensive review of the Sector Plan and its Overlay Zone when they come up in the master plan revision schedule.

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DAVID W. BROWN

March 10, 2016

Via Email

Nancy Floreen, President
and Councilmembers
Montgomery County Council
100 Maryland Avenue
Rockville, Maryland 20850

Re: **Zoning Text Amendment 16-01**

Dear President Floreen and Councilmembers:

I write to revise and supplement my February 23, 2016, testimony in opposition to ZTA 16-01 on behalf of the 8045 Newell Street Condominium Association. In that Testimony I detailed why the legislative staff's Introductory Memorandum for the ZTA was erroneous. As there explained, there is no need to "resolve conflicting language" in the 2000 Silver Spring CBD Sector Plan and no need to "clarify" the Council's intent in enacting the Ripley/Silver Spring South Overlay Zone, because there is no conflict that requires any clarification. Rather, it was Council's clear intent to apply the 45' height/setback restriction to properties within the Overlay Zone both along Eastern Avenue and along Newell Street.

In my Testimony, I stated that the Council's intent for the dual placement of this restriction could be gleaned from its decision to amend the Planning Board draft to specify that the restriction was to be imposed to buildings along Newell Street as well as Eastern Avenue, citing the Resolution adopting the new Sector Plan, i.e., Council Resolution 14-416 at 22 (Feb. 1, 2000) (Exhibit 1 to my Testimony). I explained that this evidence of the 2000 Council's intent contradicted the opinion of ZTA 16-01's Councilmember sponsor that the earlier Council

did not intend for the Silver Spring Sector Plan to limit height to 45 feet and implement the related setback along the full length of Newell Street. The height limit was intended to apply only on that portion of Newell Street that confronts a residential zone in the District of Columbia.

Introductory Memorandum at 1 (Jan. 15, 2016). Since submitting my Testimony, however, I have done further research into the Council's intent in enacting the Overlay Zone in 2000, and I wish to revise the prior discussion about that intent with what follows. As will be detailed below, this legislative history makes clear that the premise for adoption of ZTA 16-01 is not simply mistaken, it is squarely contradicted by that history.

ZTA 16-01

First, however, it is necessary to put the matter in proper context. The current text restricting building height in the Overlay Zone reads as follows:

The maximum building height is 45 feet along Newell Street and Eastern Avenue that confronts a Residential zone in the District of Columbia;

Zoning Ordinance, § 59-4.9.11.C.1.a. This limitation is then followed by two exceptions that allow increased height when the building is setback a specified amount under specified circumstances. The first exception allows building height to 90 feet when the increase above 45 feet is set back 60 feet. § 59-4.9.11.C.1.a.i. ZTA 16-01 would delete the words "Newell Street" from the above language so that the restriction only applies along the part of Eastern Avenue confronting a residential zone across the street, which is the boundary with the District of Columbia.

The obvious question raised by the ZTA's proposed deletion of the words "Newell Street" is why were those two words in the provision in the first place, if the "corrected" version limits the restriction to properties along Eastern Avenue? When the issue of what this language meant was litigated to a final judgment before Montgomery County Circuit Judge McCally, she properly refused to read the words "Newell Street" out of the statute and concluded that their inclusion produced only one plausible interpretation of the above language, as follows:

Newell Street runs perpendicular to the District of Columbia. Given the common meaning of "confront," it is not possible for Newell Street to be "face to face" with any zone in the District of Columbia, residential or otherwise. Thus, an interpretation that applying the qualifying phrase "that confronts a residential zone in the District of Columbia" to Newell Street would render the limitation meaningless in regards to Newell Street.

Opinion in *8045 Newell Street Condominium Ass'n v. Montgomery County Planning Board*, Civil No. 378604 at 6 (Feb. 21, 2014)(Exhibit 2 to my Testimony). The prevailing party in that case was my client, and both the Board and the applicant for development of 8001 Newell Street, who participated in the case, declined the opportunity to appeal Judge McCally's ruling to the Court of Special Appeals, where the Board's decision would have enjoyed deferential, *de novo* review. As a result, the court ruling became final, and under standard principles of *res judicata*, collateral estoppel and issue preclusion, the Board was legally precluded from ever again interpreting the

contested provision as not applicable along all of Newell Street (unless, of course, the Council were to change the law thereafter, as is now proposed by ZTA 16-01).

Judge McCally's reading of the disputed text is confirmed by the inconsistency between the proffered rationale for ZTA 16-01 and the proposed solution. As noted above, the ZTA 16-01 solution is deletion of any reference to Newell Street, thus limiting the restriction exclusively to properties along Eastern Avenue. Yet the sponsoring Councilmember reportedly claims that the text was also intended to apply to "that portion of Newell Street that confronts a residential zone in the District of Columbia." Introductory Memorandum at 1. That this language refers to no possible building is confirmed by both (a) ZTA 16-01's failure to provide for the limitation at such "portion of Newell Street," and (b) Judge McCally's straightforward analysis that this same interpretation, made by the Planning Board in the 8001 Newell Street case, was not a reasonable interpretation of the statute because it made the words "Newell Street" superfluous. Opinion at 7.

In support of ZTA 16-01, counsel for the owner of the property at 8001 Newell Street, whose development contrary to the height/setback restriction came to a halt with Judge McCally's ruling, has provided the Council a copy of February 21, 2013 memorandum by Senior Legislative Analyst Marlene Michaelson. Ms. Michaelson stated in her memorandum that her recollection, as part of the Council staff that reviewed the 2000 Sector Plan and Overlay Zone, was that the height/setback restriction did not "apply along the full length of Newell, but only at the corner where it confronts a residential zone in the District of Columbia." Memo at 3. This is, as detailed above, essentially the same rationale as set forth in the Introductory Memorandum. Despite Ms. Michaelson's participation in the Council's adoption of the Overlay Zone, her "recollection" of events from 13 years earlier is not true legislative history. Her memorandum, created in the midst of the recent legal dispute about the applicability of the height/setback restriction to the 8001 Newell Street project, is not part of the legislative history from 1999-2000 when the Overlay Zone was developed and enacted. *See Hackley v. State*, 161 Md. App. 1, 14, 866 A.2d 906, 914 (2005) ("Legislative history includes the derivation of the statute, comments and explanations regarding it by authoritative sources **during the legislative process**, and amendments proposed or added to it . . .") (emphasis added). The Michaelson memorandum did not contain, even by attachment, any part of the real legislative history of the Overlay Zone.

ZTA 99012

The legislative process leading to enactment of the Overlay Zone is a matter of record, and it is inexplicably not mentioned in the Introductory Memorandum, perhaps because it was not consulted. I have rectified this omission by attaching as **Exhibit 5** (continuing the exhibit numbers in my Testimony) a copy of Ord. No. 14-16, also known as ZTA 99012, creating the Ripley/South Silver Spring Overlay Zone on the same day the Sector Plan was adopted—February 1, 2000. Comparing the above-quoted text from the current Ordinance, it is plainly apparent that the current text is unchanged from that when ZTA 99012 was first introduced on October 12, 1999, which was during the period the Planning Board Draft of the Sector Plan (April 1999) was before the Council.

As is standard practice for the Council in enacting ZTA's, ZTA 99012 as adopted is accompanied by an "Opinion" that sets forth the intentions of the Council in enacting it and includes a summary of its major provisions. In this case, that Opinion includes the following description of where the height/setback restriction is applicable:

Restrict building height along Newell Street and Eastern Avenue for properties that confront a residential zone in the District of Columbia;

Exhibit 5 , p. 2. In short, the definitive legislative history of the current text sought to be amended by ZTA 16-01 confirms that there is an exact match between its stated intention in the accompanying Council Opinion and the definitive determination of the plain meaning of that text in a contested case leading to a final judgment in a court of law. Thus, there is no conflict or interpretation problem impairing the current height/setback restriction in the Overlay Zone. The statute is not "broken" and does not need to be "fixed."

The Claimed Conflict in the Sector Plan

My Testimony also details why there is no basis for the claimed conflict in the Sector Plan language relating to the height/setback restriction in the Sector Plan. The only point of arguable discrepancy arises from comparing the language in the Design Guidelines on page 86 of the Sector Plan, which mentions both Newell Street and Eastern Avenue, with that on page 60, which mentions Eastern Avenue but not Newell Street. **Exhibit 6.** The latter, however, is a summary of the Overlay Zone's "major provisions," whereas page 86 constitutes a complete recitation of the Design Guidelines for South Silver Spring. By its very nature, a "summary of major provisions" need not be exhaustive of all provisions, and the omission from the Overlay Zone summary of one provision is hardly determinative of conflicting intentions, especially given the Council Opinion accompanying ZTA 99012, which is all the "clarification" that is needed today.

In addition, it is clear that Council action on the Sector Plan did not create any confusion or uncertainty regarding what was intended in the Overlay Zone. Comparing the corresponding provisions of the Planning Board Draft of the Sector Plan from April 1999, **Exhibit 7**, with what the Council adopted, **Exhibit 6**, it is clear that the language in both documents relating to the restriction is, for all practical purposes, identical in both places where it is discussed. Hence, the only question that needs addressing is whether what the Planning Board intended in its Sector Plan Draft differs from what the Council intended in enacting the Overlay Zone. The question of the Planning Board's intent in 1999 was definitively answered by Glenn Kreger, the Team Leader of the Planning Board staff on the Sector Plan, when he testified before the board on December 20, 2012 in the 8001 Newell Street development application case. He said that the intention was to protect the low-rise garden apartments confronting across Newell Street by applying the height/setback restriction along Newell Street, not just along Eastern Avenue to protect confronting single-family residences in the District of Columbia. See Exhibit 4 to my Testimony. Mr. Kreger's testimony also squares with the 2003 decision of the Planning Board, as recommended by staff, to apply the height/setback restriction to my client, whose project came before the Board for approval soon after adoption of the Sector Plan and Overlay Zone. **Exhibit 8.**

Planning Board Recommendation on ZTA 16-01

On February 19, 2016, the Planning Board submitted to Council its recommendation to approve ZTA 16-01. A review of the basis for that recommendation reveals that the arguments for adoption of the ZTA track to the letter all of the arguments for adoption that have been shown above to be without any foundation. Specifically, the Board advised that it "interpreted the restriction to apply only along Eastern Avenue and that portion of Newell Street where it intersects with Eastern and confronts the residential zone in the District of Columbia." Recommendation, p.1. But as explained above, there is no such physical location, and ZTA 16-01 does not purport to apply its protection at this nonexistent location in any event. Rather, the ZTA completely eliminates any reference to Newell Street or "portion of Newell Street."

In the end, however, the Board has deferred to the Council on the ZTA as follows: "The Board believes that it is appropriate for the County Council, as the policy-making body of the County, to revise statutory language so that the Council's intent would be interpreted as intended." Id. at 2. In essence, my client agrees: the Council has the authority to amend existing law to eliminate confusion and uncertainty about what is intended. In this case, however, the alleged statutory uncertainty does not exist. The confusion and conflict being touted for correction are manufactured out of whole cloth in a transparent attempt to enhance the development potential of one property over and above what was clearly intended when the Sector Plan and the Overlay Zone were enacted in 2000. Any such adjustment should occur, if at all, in the ordinary course of a full-blown Master Plan revision.

For the foregoing and previously stated reasons, I respectfully urge the Council to reject ZTA 16-01.

Sincerely yours,


David W. Brown

Attachments

CORRECTED COPY

Ordinance No: 14-16

Zoning Text Amendment No: 99012

Concerning: Creating the Ripley/South
Silver Spring Overlay Zone

Draft No. & Date: 2 - 2/1/00

Introduced: October 12, 1999

Public Hearing: 11/16/99; 1:30 PM

Adopted: February 1, 2000

Effective: February 21, 2000

**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: District Council at the Request of the Planning Board

AN AMENDMENT to the Montgomery County Zoning Ordinance for the purpose of:

- creating the Ripley/South Silver Spring Overlay Zone.

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

Division 59-C-18 "Overlay Zones"

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.*

EXHIBIT 5

34

OPINION

Zoning Text Amendment No. 99012 was introduced on October 12, 1999 to create the Ripley/South Silver Spring Overlay Zone. The Ripley/South Silver Spring Overlay Zone is intended to encourage redevelopment in the Ripley District and in South Silver Spring by providing flexible development standards and a range of permitted uses. The major provisions of the zone, as introduced, would:

- 1) allow certain uses not allowed by the underlying zones;
- 2) restrict building height along Newell Street and Eastern Avenue for properties that confront a residential zone in the District of Columbia;
- 3) prohibit parking in front yards of properties along the west side of Georgia Avenue;
- 4) allow a transfer of development credit to occur between properties in the overlay zone;
- 5) allow the transfer of public use space to other sites in the overlay district or a contribution to a fund;
- 6) allow alterations, repairs or reconstruction of a building to occur under the standards of the zone in effect at the time the building was constructed.

The Montgomery County Planning Board in its report to the Council recommended that Zoning Text Amendment be approved with certain revisions.

The County Council held a public hearing on November 16, 1999, to receive testimony concerning the proposed text amendment. The text amendment was referred to the Planning, Housing, and Economic Development (PHED) Committee for review and recommendation.

The PHED Committee held a worksession on November 22, 1999 to review the text amendment. The Committee agreed with the goals and development objectives of the text amendment, but raised concerns regarding several of its major provisions. After careful review of the issues raised by staff and all materials of record, the Committee recommended approval of Zoning Text Amendment 99012, with clarifying revisions affecting: (1) the transfer of development credits between properties, (2) alterations, repairs, or reconstruction of existing buildings, and (3) transfers of public space between properties. The Committee supported the three proposed new uses – catering facilities, bakeries, and assembly of computer components – and recommended that these uses be considered for other CBD zones during the comprehensive review of the Zoning Ordinance.

The District Council reviewed Zoning Text Amendment No. 99012 at a worksession held on December 7, 1999, and agreed with the recommendations of the Planning, Housing, and Economic Development Committee, with one exception. While the text amendment, as introduced, prohibited front yard parking on the west side of Georgia Avenue, the Council revised the zoning text amendment to prohibit all front yard parking on both sides of Georgia Avenue.

It is the opinion of the Council that the Ripley/Silver Spring Overlay Zone will facilitate the implementation of an organized and cohesive development pattern appropriate for an urban environment, will provide flexibility in development standards to encourage innovative design solutions, and is an essential component of the Silver Spring Central Business District Sector Plan Update. For these reasons, Zoning Text Amendment No. 99012 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 **59-C-18. OVERLAY ZONES.**

3 **59-C-18.20. Ripley/South Silver Spring Overlay Zone.**

4 **59-C-18.201. Purpose.**

5 It is the purpose of the Ripley/South Silver Spring Overlay Zone [[is]] to
6 address the special development issues in the [[Fenton Village]]
7 Ripley/South Silver Spring area as identified in the Silver Spring Central
8 Business District Sector Plan. Specifically, the zone is designed to:

- 9 (a) facilitate the implementation of an organized and cohesive
10 development pattern that is appropriate for an urban environment;
11 (b) encourage attractive design and ensure compatibility with existing
12 buildings and uses within and adjacent to the overlay zone;
13 (c) provide flexibility of development standards to encourage innovative
14 design solutions;
15 (d) allow for the transfer of the public use space requirement to other
16 properties within the Overlay District; and
17 (e) allow new uses.

18
19 **59-C-18.202 Regulations.**

- 20 (a) Land uses.
21 Permitted [[or]] and special exception uses allowed under the standard
22 and optional method of development in the underlying CBD zones are
23 allowed in the overlay zone. In addition, any combination of [[the]]
24 permitted and special exception uses may be considered as part of a
25 site plan or project plan [[submitted for review]]. The following
26 additional uses are permitted in the Overlay Zone:

Catering facilities

Bakeries, less than 1500 square feet

Assembly of computer components

(b) Development standards.

The development standards are the same as those in the underlying zones, except [[as follows]] :

- (1) Building height in the Overlay Zone along Newell Street and Eastern Avenue that confronts a residential zone in the District of Columbia must not exceed a height of 45 feet. This building height may be increased to a maximum of 90 feet for [[a]] any building[[s]] or portion of a building that is set back at least 60 feet from the street, or as allowed in 59-C-18.204(b), Transfer of Development Credits.
- (2) Parking [[is prohibited]] in the front yard of properties fronting on [[the west side of]] Georgia Avenue is prohibited.
- (3) The transfer of public use space to other properties within the Overlay Zone is allowed, and must be shown on an approved project plan or site plan for both the property transferring the public use space and the property receiving the public use space in accordance with Division 59-D-2 and 59-D-3. The public use space may be transferred between property owners in accordance with an agreement as approved by the Montgomery County Planning Board.
- (4) Costs associated with meeting the public use space offsite may be shared by multiple property owners.
- (5) Transfer of development credits may occur between properties within the overlay zone for Ripley/South Silver Spring.

59-C-18.203. Methods of Development.

(a) Standard method of development in accordance with the underlying zone provisions.

(1) The public use space requirement may be transferred to other properties within this overlay zone if approved by a site plan in accordance with Division 59-D-3.

(2) The transfer of development credits to other properties within the overlay zone may be allowed with approval of a site plan in accordance with Division 59-D-3.

(b) Optional method of development in accordance with the underlying Zone provisions except as modified by this overlay zone.

59-C-18.204. Density of development.

Development in the overlay zone may proceed under one of the following options:

(a) Underlying zone standards. Except as regulated by this overlay zone, development may proceed under the standards of the underlying CBD Zone, in accordance with the provisions of Sec. 59-C-6.23.

(b) Transfer of development credits. A transferable development credit, in square feet of gross floor area, may be established with the demolition of a building before August 24, 2000 that exceeds the amount of floor area allowed under the standard method of development in this Overlay Zone. A development credit may be retained for purposes of reconstruction on the property generating the development credit, or transferred and used for new construction on any property in this Overlay Zone that does not confront a one-family

1 zone. Use of a transferable development credit either on property
2 generating the development right or on another property using the
3 development credit must be submitted before August 24, 2005 and
4 must be shown on either:

5 (1) a site plan approved under Division 59-D-3. ~~[[and t]]~~ The
6 transferable development credit must not exceed 50% of the
7 FAR allowed for the receiving property ~~[[allowed]]~~ under the
8 standard method of development; or

9 (2) ~~[[on]]~~ a project plan approved under Division 59-D-2. A
10 project plan may exceed the allowable maximum FAR of the
11 underlying zone.

12 ~~[[Any building constructed pursuant to a project plan or site plan~~
13 ~~approved under this section is a conforming structure and may be~~
14 ~~repaired on reconstructed in accordance with the approved project~~
15 ~~plan or site plan.]]~~

16 (3) A transferable development credit must be established,
17 transferred, and attached to a property only ~~[[be]]~~ by means of
18 documents, including an easement and appropriate releases, in a
19 recordable form approved by the Planning Board. Any
20 easement must:

- 21 1. limit future construction of the property that transfers the
22 development credit to the amount of gross square feet of
23 the demolished building minus all development credits
24 transferred;
25 2. indicate the amount of development credit, in gross
26 square feet to be transferred;

1 3. indicate the maximum gross square feet of future
2 development for the property that transfers the
3 development credit, but no less than the amount that
4 could be constructed on the property under the standard
5 method of development; and

6 4. be recorded in the land records of Montgomery County.

7 (c) Any building constructed pursuant to a project plan or site plan
8 approved under this section is a conforming structure and may be
9 repaired or reconstructed in accordance with the approved project plan
10 or site plan.

11 [(c) Any building, or structure for which a valid building permit was
12 issued prior to the date of application of this overlay zone is
13 conforming and subject to the following standards:

14 (1) Existing structures which exceed the standards of the
15 underlying zone. Structural alterations, repairs or
16 reconstruction of such buildings or structures may proceed
17 under the standards of the zone in effect at the time the building
18 was constructed. However, such alterations, renovations or
19 reconstruction must not increase the gross floor area existing or
20 approved as of application of this overlay zone. In the case of
21 reconstruction, if the existing building has a height greater than
22 that allowed in the underlying zone, such height may be
23 allowed but must not be exceeded.

24 (2) Existing structures as of the date of application of this overlay
25 zone, that do not exceed the standards of the underlying zone.
26 Structural alterations, repairs or reconstruction of such
27 buildings or structures may proceed under the standards of the]]

1 [[zone in effect at the time the building was constructed.
2 However, such alterations, renovations or reconstruction must
3 not exceed the standards of the underlying zone, except as may
4 be further regulated by this overlay zone.]]

5 (d) Any building for which a valid building permit was issued before
6 approval of the Ripley/South Silver Spring Overlay Zone Sectional
7 Map Amendment, is a conforming building and may be altered,
8 repaired or reconstructed under the standards of the zone in effect at
9 the time the building was constructed, except:

10 (1) If the building exceeds the standards of the underlying zone,
11 any alteration, repair, or reconstruction of the building must not
12 increase the gross floor area or the height of the building above
13 that which existed as of the date of application of the
14 Ripley/South Silver Spring Overlay Zone; or

15 (2) If the building does not exceed the standards of the underlying
16 zone, any alteration, repair, or reconstruction of the building
17 must conform to the standards of the underlying zone, except as
18 may be further regulated by the Ripley/South Silver Spring
19 Overlay Zone.

20
21 **59-C-18.205. Procedure for application and approval.**

22 A site plan and, where applicable a project plan, for any development in the
23 [[Fenton Village]] Ripley/South Silver Spring Overlay Zone must be approved
24 under the provisions of Divisions 59-D-2 and D-3.

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

3

4 This is a correct copy of Council action.

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6

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8



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Mary A. Edgar, CMC

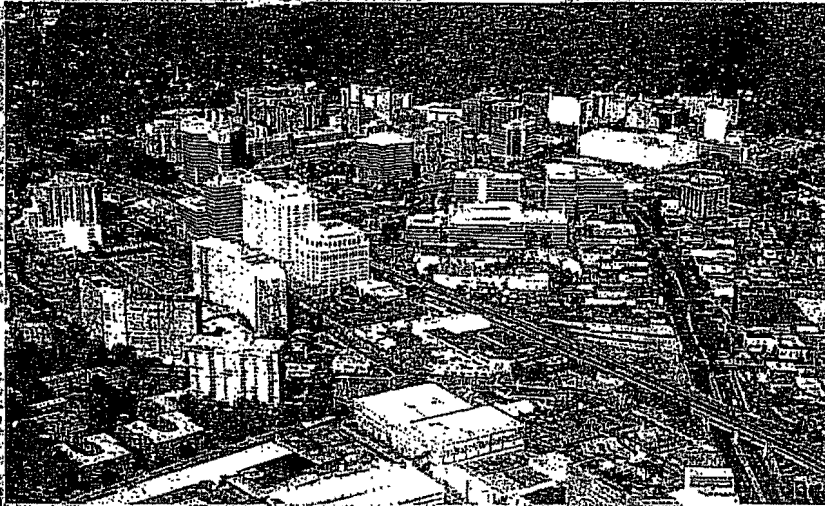
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Clerk of the Council

Silver Spring CBD Sector Plan

Approved and Adopted

February 2000



Maryland-National Capital
Montgomery County Department of Planning and
Economic Development

EXHIBIT 6

44

- Apply the Ripley/South Silver Spring Overlay Zone to portions of South Silver Spring.

This overlay zone will encourage redevelopment in South Silver Spring by providing more flexibility in the development standards and the range of permitted uses, while ensuring that new development is compatible with nearby uses.

Ripley/South Silver Spring Overlay Zone

This overlay zone would encourage redevelopment in the Ripley District and in South Silver Spring by providing more flexibility in the development standards and the range of permitted uses. At the same time, the overlay zone would be structured to ensure that new development is compatible with nearby uses and that it incorporates critical design elements, such as streetscaping and useful public open spaces (Map 20).

- Apply the Ripley/South Silver Spring Overlay Zone to portions of the Ripley and South Silver Spring Revitalization areas to: allow the needs of a specific area to be addressed without affecting all of the CBD zones, provide for a mix of housing and commercial uses, allow small parcels to become usable development sites, allow transfer of density and open space within the overlay area, improve the character of Georgia Avenue, provide the option to create larger open spaces, and encourage redevelopment of the Williams and Gramax properties in South Silver Spring.

SUMMARY OF RIPLEY/SOUTH SILVER SPRING OVERLAY ZONE

Draft Purpose Clause

- Facilitate the implementation of an organized and cohesive development pattern appropriate for an urban environment.
- Encourage attractive design and ensure compatibility with existing buildings and uses within and adjacent to the overlay zone.
- Provide flexibility in development standards to encourage innovative design solutions.
- Allow for the transfer of development credits and open space requirements within the Overlay District, which would:
 - recapture some developable area lost to the construction of circulation projects, thereby making small parcels developable
 - enable the transfer of open space increases in the buildable area of the site, thereby providing market feasible floor area on small parcels.
- Allow new uses.

Major Provisions

- Allow new uses.
- Limit building height for new construction along Eastern Avenue, fronting one-family detached dwellings in the District of Columbia as follows: at the property line, building heights should be limited to 45 feet. Above 45 feet, the building may step back 60 feet and its height may increase to 90 feet.
- Allow the transfer of development credit from razed buildings (similar to the existing text amendments). Transfer may be to other sites within South Silver Spring or the Ripley District only.
- Allow the transfer of public use space requirement to other sites in the same district. Joint funding of off-site public use space may occur by multiple property owners.
- No front yard parking along Georgia Avenue.
- Allow alterations, repairs or reconstruction of buildings under the standards of the zone in effect at the time the building was constructed.

FENTON VILLAGE

With an upgraded streetscape, new housing, and lively mix of multi-cultural, specialty, and convenience shops serving local and regional customers, the neighborhood-scale commercial uses along Fenton Street and its cross streets can become Silver Spring's own global village.

VISION

Fenton Village is envisioned as a diverse community of people living and working together to create a tightly-knit urban neighborhood, conducive to strolling and browsing; its businesses providing personal service and a traditional town atmosphere not found in shopping centers or malls. Fenton Village has many strengths, including multi-cultural shops and restaurants, unique small businesses, a pedestrian-scaled physical environment, clusters of complementary businesses, "captive" market demand from surrounding neighborhoods, and proximity to Washington, D.C. Many of these specialty businesses already draw customers from a regional market, and by capitalizing on redevelopment in the Core, can begin to fill an unserved market niche (Maps 22, 23, 24, and 25).

New zoning should include incentives that capitalize on the momentum created by the proposed projects for Silver Spring's CBD Core. The zoning objectives for the Fenton Village include: providing development incentives, ensuring accomplishment of the vision/urban design goals for the district, and providing a housing incentive. Height limits would be implemented through the proposed overlay zones to ensure compatibility with adjoining neighborhoods.

SOUTH SILVER SPRING

South Silver Spring is the CBD's gateway and offers many opportunities for redevelopment. The following guidelines should be incorporated into redevelopment.

- Prepare studies and drawings that illustrate development options for South Silver Spring

Further efforts to identify and examine revitalization issues and illustrate an urban design vision of the area through drawings and perspective sketches is important in realizing South Silver Spring's potential. These initiative can be used to encourage business relocation to the area and assist staff in evaluating development proposals. It should explore development patterns; open space as an organizing feature; car, pedestrian, and bike connections, as well as potential of adaptive reuse, infill development sites, and site assemblage in the context of market needs and building programs.

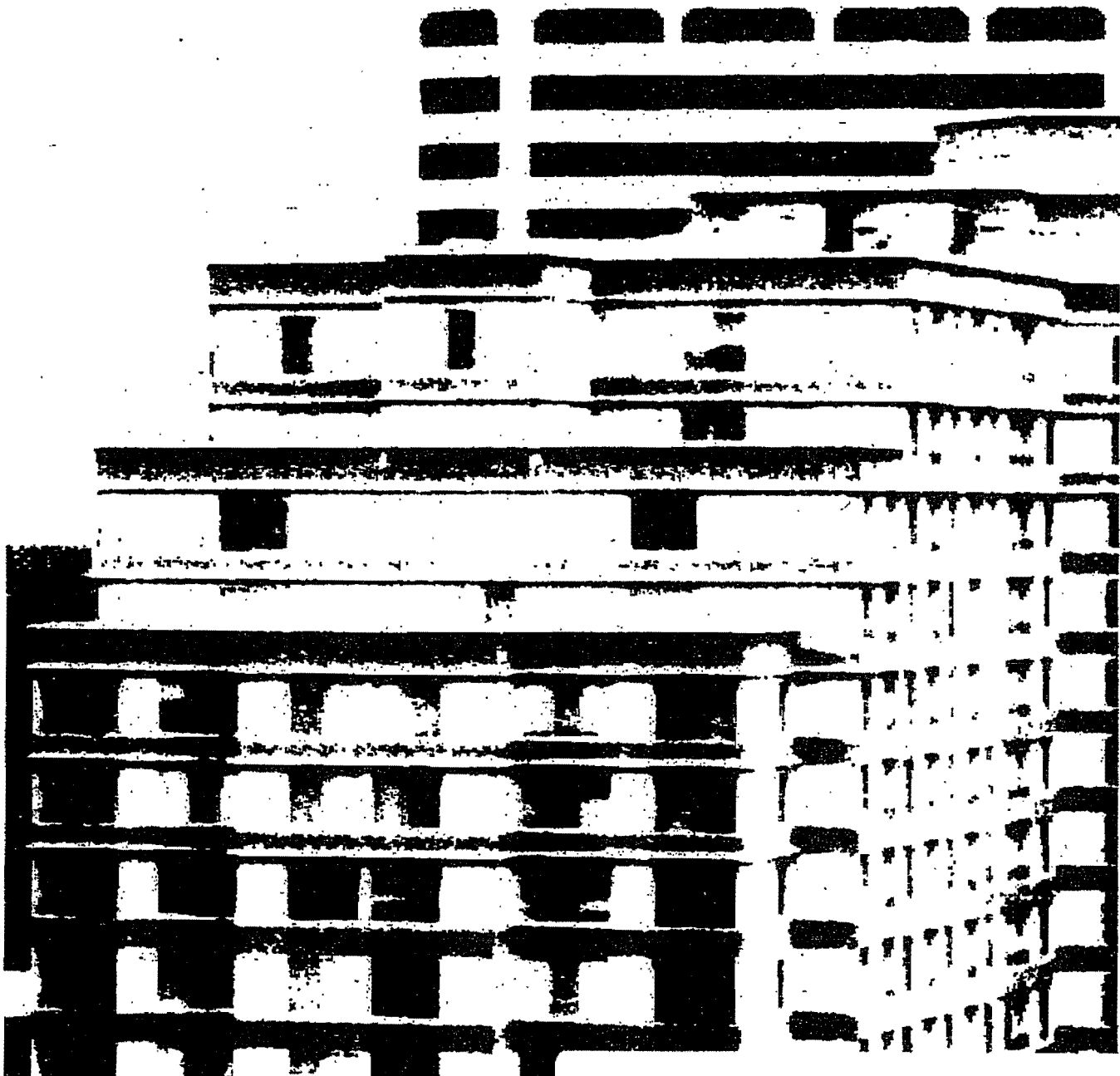
- Improve links within South Silver Spring and between South Silver Spring and the Core, the Ripley District, the Transit Station, Montgomery College, and the District of Columbia.
- Building heights along Newell Street and Eastern Avenue should ensure compatibility with the adjacent residential neighborhood.
 - At the property line, building heights should be limited to 45 feet.
 - Above 45 feet, the building may step back 60 feet and its height may increase to 90 feet.
- Building heights along Georgia Avenue should contribute to an attractive and coherent street.
 - At the building line, limit height to 90 feet, consistent with height limits on the east side of Georgia Avenue.
 - Beyond 15 feet, the building may step back and its height may be increased up to 143 feet, provided that the building is contained within a 2:1 slope.
- Building heights along East West Highway should contribute to a coherent and attractive streetscape with adequate light and air.
 - Building heights on the street's west side are limited to 90 feet by the CBD-1 Zone.
 - Building heights on the street's east side can go up to 143 feet, allowed in the CBD-2 Zone, provided that the building height is contained with a 2:1 slope after the initial 90 feet.

APRIL 1999

THE SILVER SPRING

CENTRAL BUSINESS DISTRICT & VICINITY
A PLAN FOR THE REVITALIZATION OF DOWNTOWN SILVER SPRING

SECTOR PLAN UPDATE -
PLANNING BOARD DRAFT



THE MARYLAND-NATIONAL CAPITAL
MONTGOMERY COUNTY DEPARTMENT OF PLANNING

EXHIBIT 7

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SUMMARY OF PROPOSED RIPLEY/SOUTH SILVER SPRING OVERLAY ZONE

Draft Purpose Clause:

- Facilitate the implementation of an organized and cohesive development pattern appropriate for an urban environment.
- Encourage attractive design and ensure compatibility with existing buildings and uses within and adjacent to the overlay zone.
- Provide flexibility in development standards to encourage innovative design solutions.
- Allow for the transfer of development credits and open space requirements within the Overlay District, which would:
 - recapture some developable area lost to the construction of circulation projects, thereby making small parcels developable
 - enable the transfer of open space increases in the buildable area of the site, thereby providing market feasible floor area on small parcels.
- Allow new uses.

Major Provisions

- Allow new uses.
- Limit building height for new construction along Eastern Avenue, fronting one-family detached dwellings in the District of Columbia as follows: at the property line, building heights should be limited to 45 feet. Above 45 feet, the building may step back 60 feet and its height may increase to 90 feet. (See Figure 15.)
- Allow the transfer of development credit from razed buildings (similar to the existing text amendments). Transfer may be to other sites within South Silver Spring or the Ripley District only.
- Allow the transfer of public use space requirement to other sites in the same district, or contribute to fund.
- No front yard parking along Georgia Avenue.

Prepare studies and drawings that illustrate development options for South Silver Spring

Further efforts to identify and examine revitalization issues and illustrate an urban design vision of the area through drawings and perspective sketches is important in realizing South Silver Spring's potential. These initiatives can be used to encourage business relocation to the area and assist staff in evaluating development proposals. It should explore development patterns; open space as an organizing feature; car, pedestrian, and bike connections, as well as potential of adaptive reuse, infill development sites, and site assemblage in the context of market needs and building programs.

DESIGN GUIDELINES FOR DEVELOPMENT IN SOUTH SILVER SPRING

The following design guidelines should be considered in reviewing development proposals. (See Figures 10, 14, and 15.)

- Proposed projects should conform to the requirements of the Land Use and Zoning section of this Sector Plan and to the standards of an updated *Silver Spring Streetscape Plan* that covers South Silver Spring.
- Improve links within South Silver Spring and between South Silver Spring and the Core, the Ripley District, the Transit Station, Montgomery College, and the District of Columbia.
- Proposed projects should provide efficient, safe, and attractive at-grade pedestrian links within South Silver Spring and to the surrounding CBD.
- Proposed projects should promote a pedestrian friendly environment by:
 - creating a well-defined street formed by a continuous building line at the sidewalk— buildings should not be separated from the streets by parking lots
 - providing street level activity—retail, cafes, building entrances, and showcase windows
 - providing a good pedestrian circulation system of wide, tree-lined sidewalks, lighting, and street furniture
 - creating attractive corridors with appropriate height transitions between buildings and neighborhoods.
- Building heights along Newell Street and Eastern Avenue should ensure compatibility with the adjacent residential neighborhood.
 - at the property line, building heights should be limited to 45 feet
 - above 45 feet, the building may step back 60 feet and its height may increase to 90 feet

**COMMUNITY EXHIBIT
RECEIVED BY MCPB**

DATE: 12/20/12
ITEM NO. 5
EXHIBIT NO. 6



THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

Item # 8
MCPB Agenda 2/27/03

MEMORANDUM

DATE: February 12, 2003
TO: Montgomery County Planning Board
VIA: Joe. R. Davis, Chief
Michael Ma, Supervisor *Ma*
Development Review Division
FROM: Robert A. Kronenberg, RLA *RAK*
Planning Department Staff
(301) 495-2187



PROJECT NAME: Newell Street Lofts
CASE #: 9-03000
REVIEW TYPE: Project Plan

ZONE: CBD-1
APPLYING FOR: Approval of 134, 821 gross square feet of development, including 120 residential condo units on approximately 1.41 acres
LOCATION: 8045 Newell Street, Southwest quadrant of the intersection of Newell Street and Kennett Street in Downtown Silver Spring
MASTER PLAN: Silver Spring Central Business District and Ripley/South Silver Spring Overlay Zone

REVIEW BASIS: Section 59-D-2.11 of the Zoning Ordinance requires submission of a Project Plan as part of the application for the use of optional method of development for a CBD zoned property.

APPLICANT: 8045 Newell Street, LLC
C/o Patriot Group, LLC
FILING DATE: October 4, 2002
HEARING DATE: February 27, 2003

Attached is the staff report for the proposed Newell Street Lofts Project Plan. The Planning Board public hearing for this application is scheduled for February 27, 2003. A draft Planning Board opinion for the Project Plan will be available on February 12, 2003. The staff recommends Approval with conditions as delineated in the staff report.

to a variety of professionals who wish to strengthen the economic viability of downtown Silver Spring. The project is being developed under the Optional Method of Development, which requires that applicants provide public use and amenity space on and off their site. This type of development provides residential corridors an opportunity to improve urban streetscapes and pedestrian circulation in an active urban setting. In addition to the proposed improvements, the Sector Plan specifically encourages the redevelopment of vacant or underutilized buildings.

- A. **Ripley/South Silver Spring Overlay Zone:** The project is located within the South Silver Spring Revitalization Area, one of four revitalization areas identified in the Sector Plan. The Sector Plan recommends an Overlay Zone for the Ripley/South Silver Spring revitalization areas designed to encourage development and provide incentives for revitalization through flexible development standards and a broader range of permitted uses. The Overlay Zone also provides for specific setbacks, specifically Newell Street, to ensure that new development is compatible with nearby existing residential uses. The overlay Zone was amended by the County Council to create development credits for the demolition of existing buildings, although no development credits are being requested for this project.

The Sector Plan also states that the *"revitalization of the under-used buildings and properties in this gateway to the County and the CBD will create a strong economic future for a neighborhood of complementary mixed uses spurred by spin-off use from Discovery Communications"* [Resolution 14-416, p. 7]. This development proposes to revitalize a significant portion of an urban block currently filled vacant or underused buildings. The applicant proposes to construct 120 market-rate residential condominium apartments to compliment the adjacent residential neighborhoods. The visibility of the project and will add to the economic viability of downtown Silver Spring.

- B. **Compatibility:** Directly across Newell Street is the Spring Garden Apartment and Springwood Apartment community. The Sector Plan and Ripley/South Silver Spring Overlay Zone address issues relevant to compatibility by requiring special development standards with regard to building heights and setbacks. The Overlay Zone requires that building heights along Newell Street confronting residential uses may not exceed 45 feet, although the building height may be increased to 90 feet if the structure is setback 60 feet from the street.

The proposed building will be 70 feet in height from the street grade at Newell Street and will be setback 62 feet from the Newell Street right-of-way. The building will be five stories along Newell Street and six stories along Kennett Street. The building frontage along Kennett Street will be at street level and will include the residential lobby. The buildings vehicular access to the parking garage, and primary loading and service area is located directly off of Newell Street. Loading will be visually screened to the south by the existing storage building and from Newell Street with appropriate landscaping. The access drops

MEMORANDUM

March 18, 2016

TO: Planning, Housing, and Economic Development Committee

FROM: *JZ* Jeff Zyontz, Senior Legislative Analyst

SUBJECT: Zoning Text Amendment 16-01, Ripley/Silver Spring South Overlay Zone – Standards

Although staff's memorandum of March 17 pointed out all 7 properties abutting Newell Street, it did not point out the boundary of the Ripley Street/Silver Spring South Overlay zone. Only the properties in the Overlay zone along Newell Street are on the southeastern side of Newell Street. Of the 7 properties along Newell Street, 4 are in the Overlay zone: 8001 Newell, 8045 Newell, 8045 Kennett, and Acorn Park at the corner of Newell and East West Highway. Spring Garden Apartments (8001 – 8015 Eastern Avenue, the MICA Condominiums (1220 Blair Mill Road), and 1220 Blair Road are described in the March 17 memorandum but are not in the Overlay zone and would not be affected by ZTA 16-01 in any way. The following map illustrates the boundaries of the Overlay zone near Newell Street.

Details

Layers

Info

Dev. Info

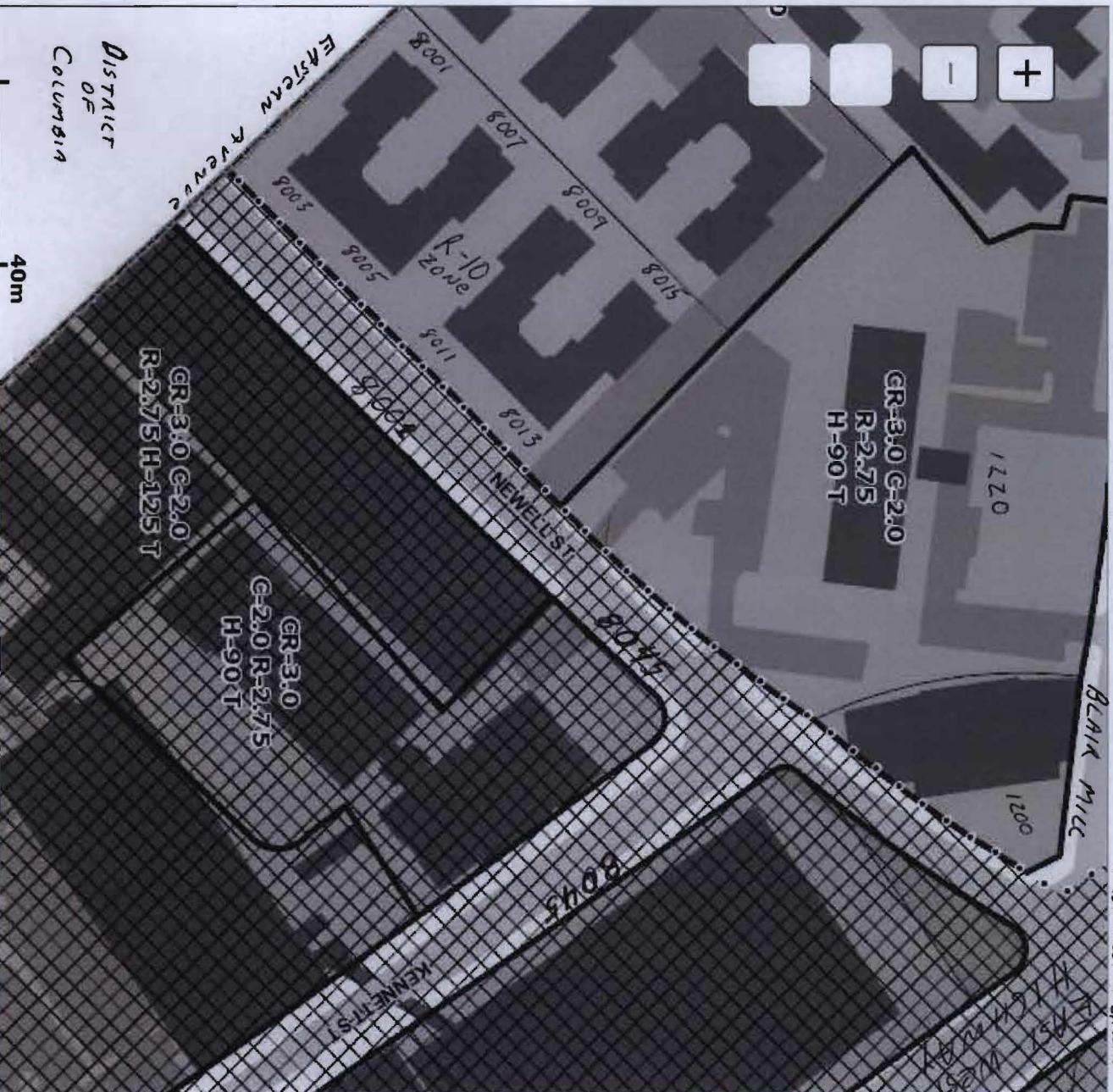
Print

Measure



AREA WITHIN
THE KILLEY STREET/
SILVER SPRING SOUTH
OVERLAY ZONE

X



DISTRICT
OF
COLUMBIA

40m