

ZONING: SPECIAL EXCEPTION, VARIANCE, TEXT AMENDMENT AND NEW APPROACHES

INTRODUCTION

Zoning is the legislative action by the County Council that imposes specified conditions and regulations developed through various plans upon particular parcels of land. The current zoning code is a use-based ordinance that specifies in great detail what use a particular parcel may be put to and provides standards for that development. This historically has been a tool for protecting neighborhoods from uses incompatible with the predominant or desired use of the land.

The current zoning code provides for some flexibility in use through designating some uses as special exception uses, identifying conditions to some extent under which they may be appropriate in some locations and providing for a process through which that determination can be made with additional conditions imposed if necessary. It also provides a process through which exception can be made to the application of provisions of the code by granting variances in specific unique situations.

Finally, the code can be altered by action of the County Council acting as the District Council through the zoning text amendment (ZTA) process. This practice, however, has led to a condition of the code described as cumbersome, confusing and contradictory. Both the Planning Board chair and the County Council president have indicated a desire to restructure the zoning code, and the proposed Planning Department budget includes funds to begin this process. Since both uses and processes are spelled out in the zoning ordinance, the opportunity to modify both aspects is at hand.

In the spring of 2006, the Department of Planning released a report suggesting a new framework for planning in the future. The Department had convened community sessions with local and national experts and community leaders to explore how to plan for and manage growth. Their recommendations with emphasis on revitalizing centers, reshaping boulevards and creating great public spaces may lead us toward using new concepts in zoning, particularly in more dense areas of the county.

BOARD OF APPEALS

The Board of Appeals is a five-member quasi-judicial body. Its members are appointed by the County Council for staggered four-year terms with no more than three members from the same political party. The board has county-wide authority except for incorporated cities within the county such as Rockville and Poolesville. The board is responsible for making final decisions on special exception petitions heard by a hearing examiner and for hearing and deciding on petitions for variances. The board also hears appeals of administrative decisions as designated by the County Code, for example, in a situation where a permit or license has been denied. These matters cover a broad range from building codes to food service facilities to weed removal. Administrative appeals comprise approximately a third of the cases heard by the board.

The Office of Zoning and Administrative Hearings is charged with scheduling and conducting hearings on special exception petitions. The hearing examiner must prepare a report on the findings of the hearing and send it with recommendations to the Board of Appeals. The board may request additional information in response to the report prior to making a final decision, but ultimately the board renders an opinion granting or denying the special exception use. In addition, at the request of a majority the Board of Appeals, any other matter pending before the board can be assigned to a hearing examiner for required hearings, but the board must render the final

decision. The hearing examiner has sole authority to both hear and decide petitions for special exceptions for seven use types: boarding houses for three or fewer guests in certain zones, home occupations, a non-commercial riding stable for not more than two horses for personal use, temporary structures in residential zones, farm tenant mobile homes, child day care facilities for up to 30 children and some renewals of temporary special exceptions.

SPECIAL EXCEPTION

A special exception is a conditional use which can be granted provided that it complies with standards set out in the County Zoning Ordinance. Each special exception use has specific standards set out in the code and each one must comply with the general standards, which pertain to compatibility with surrounding uses and consistency with the applicable master plan. By legislation, the County Council has specified uses permitted by right in the various zones and uses which can be allowed by special exception if there is a finding that the conditions governing the special exception in the zoning ordinance are met. If a property changes hands, a special exception use which continues to be operated remains with the property, but must be administratively transferred from one owner to the other. All conditions for the special exception must continue to be met by a new owner. Some examples of uses requiring special exception are: gas stations in certain zones, group homes, drive-in restaurants, landscape contractors and charitable institutions.

An applicant for a special exception must obtain the necessary forms from the Board of Appeals at the board's office or Web site. A petition for a special exception must be filed with the board or, where appropriate, with the hearing examiner on forms provided for that purpose, together with the applicable fee. Each petition for special exception must be accompanied at the time of its filing by four copies of a statement that includes:

- (1) Survey plats or other accurate drawings showing boundaries, dimensions, area, topography and frontage of the property involved, as well as the location and dimensions of all structures existing and proposed to be erected, and the distances of such structures from the nearest property lines.
- (2) Plans, architectural drawings, photographs, elevations, specifications, or other detailed information depicting fully the exterior appearance of existing and proposed construction, including signs, involved in the petition.
- (3) A statement explaining in detail how the special exception would be operated, including hours of operation, number of anticipated employees, occupants and clientele, equipment involved and any special conditions or limits which the applicant proposes.
- (4) Complete information concerning the size, type and location of any existing and proposed trees, landscaping and screening and exterior illumination.
- (5) Certified copy of official zoning vicinity map of 1,000-foot radius surrounding the subject property and other information to indicate the general conditions of use and existing improvements on adjoining and confronting properties, along with a list of those adjoining and confronting property owners in the county tax records who are entitled to notice of the filing.
- (6) If the applicant is not the owner of the property involved, the lease, rental agreement or contract to purchase by which the applicant's legal right to prosecute the petition is established.
- (7) Applicable master plan maps reflecting proposed land use, zoning and transportation, together with any other portions of the applicable master plan which the applicant considers relevant.
- (8) A preliminary forest conservation plan prepared under the Forest Conservation ordinance, and an approved natural resources inventory prepared in accordance with the technical manual adopted by the Planning Board, and in addition:
 - (i) Other natural features, such as rock outcroppings and scenic views; and
 - (ii) Historic buildings and structures.

(9) A preliminary or final water quality plan if the property is located in a special protection area subject to the Erosion, Sediment Control and Storm Water Management ordinance.

(10) All additional exhibits which the applicant intends to introduce.

(11) A summary of what the applicant expects to prove, including the names of applicant's witnesses, summaries of the testimonies of expert witnesses and the estimated time required for presentation of the applicant's case.

The schedule of fees is designed to cover some of the cost of the review and approval process and varies with the type of special exception sought. Some examples are: automobile filling station \$12,500; clinic, medical or dental \$7,500; radio and TV broadcasting stations and towers \$18,750; hospice \$1,000; parking garage \$250 per space to a maximum of \$18,750; accessory apartment \$400; landscape contractor \$6,250.

When the application is complete and filed in the office of the Board of Appeals, a hearing date is scheduled at least 60 days later at a time agreeable to the applicant and hearing examiner. Using the list supplied by the applicant, the office will notify the owners of the confronting and adjoining properties of the hearing date. Appropriate civic organizations and other governmental agencies will also be notified. The applicant is given an official sign that must be posted at the site and remain up until he/she receives the board's written opinion. If there is opposition to a request, the sign must remain up for 30 days after receiving the written opinion at the conclusion of the case.

The materials submitted are forwarded to the hearing examiner and Planning Board staff for review. If the planning staff feels that the proposal has major impacts, a hearing is scheduled before the Planning Board. Recommendations are forwarded for the hearing examiner's fact-finding public hearing. These reports customarily recommend conditions for approval if the hearing examiner so requests and approval is recommended. For complex or controversial cases the planning staff may attend the hearing. At this hearing, the applicant presents the project. If there is opposition, the opposition may submit written questions to the applicant about the project. Opponents and other parties who wish to testify also have the opportunity to participate. Cross examination is allowed. Anyone can speak at these hearings. Continuances may be required to allow time for additional information to be gathered to resolve questions raised.

Once the hearing is completed, the hearing examiner sends a report and recommendations to the Board of Appeals for its action. There is a ten-day opportunity for parties to request oral argument on the hearing examiner's report and recommendation before the Board of Appeals. The hearing examiner's report and recommendation is generally scheduled for action on the board's next consecutive work session, following the ten-day period. The board can then act to grant or deny the special exception use based upon the record compiled by the hearing examiner, or it may grant a request for oral argument, which is scheduled for a later date. If the board finds, either before or after an oral argument, that further evidence is necessary for it to make its decision, it can remand the case to the hearing examiner for further fact-finding.

The Zoning Ordinance provides that a special exception can be modified without a public hearing if the Board of Appeals finds that requested changes will not substantially change the nature, character or intensity of the use, or its effect on traffic or the immediate neighborhood. Modification requests which do not meet this test require a public hearing. The board considers administrative or minor modification requests at work sessions. The fees for minor modifications are less than for initial special exception filings. The resolution granting an administrative modification is mailed to all parties of the original hearing. A request for a hearing can be made in writing within 15 days of receipt of the resolution. In that case, the board must suspend its ruling and hold a public hearing.

Enforcement

The Department of Permitting Services (DPS) has authority under the County Code to administer and enforce the Zoning Ordinance, including inspecting special exception properties. In 2001 the County Council approved the addition of two employees to staff the special exception inspection program and established a fee for enforcement of all special exceptions. Currently, this annual inspection fee is \$143 plus a Board of Appeals administrative fee of \$97 and applies to all special exception uses.

After a special exception is initially granted, the owner is given up to two years to implement the use in compliance with the conditions that were required. The DPS then conducts an inspection for a Use and Occupancy Permit at which time the site plan, parking provisions, landscaping, etc. are reviewed for adherence to the special exception conditions. Scheduled future reviews, which assume that the special exception will continue to be active, vary from one to three years depending on the type of use. Accessory apartments are inspected annually by the Department of Housing and Community Affairs (DHCA) and generate very few complaints once the special exception has been granted.

Although the DPS receives few complaints alleging failure to comply with the terms of special exceptions, if a complaint is received via the DPS complaint phone line, DPS personnel try to schedule an inspection within 24 to 48 hours, even if the complaint is anonymous. For any complaints sent to the Board of Appeals, the ordinance establishes more precise requirements. These complaints must be written, include the complainant's name and address and describe the alleged violation, as well as the name and address of the premises and of the special exception holder. The Board of Appeals then requests DPS to conduct an inspection within 21 days or more promptly if it seems necessary.

If an inspection reveals a violation, the special exception holder must be given at least 15 days to correct it, unless the violation poses an immediate threat to health, safety, welfare, convenience or unusual hardship on the community. If violations of a special exception persist beyond the compliance times set out in the code, DPS can give the board a written request to hold an enforcement proceeding called a show cause hearing, in which the special exception holder must appear and show cause why the special exception should not be revoked. At the conclusion of a show cause hearing, the board can reaffirm or revoke the special exception, or amend, add to, delete or modify the existing terms or conditions of the special exception. Failure of a special exception holder or owner of a special exception property to appear at a show cause hearing may result in revocation of the special exception.

Accessory Apartments

Accessory apartments are a small but significant source of much-needed affordable housing in Montgomery County, but each one requires the granting of a special exception. DHCA conducts an inspection for an accessory apartment prior to the special exception hearing and reports findings to the hearing examiner. Currently around 400 such apartments are legally occupied in the county; however, each year approximately 100 illegal apartments are reported to the DPS. When the Planning Board sponsored a series of community discussions with national experts on urban planning last year, Anthony Downs of the Brookings Institution recommended that accessory housing be permitted by right.

An accessory apartment is a completely independent living facility for which rent is charged, with separate cooking, eating, sanitation and sleeping areas that is either in or added to an existing single-family dwelling unit or in a separate accessory structure (grandmother cottages). These units may only be located in or on the same lot as an owner-occupied single family detached home with some flexibility for lots larger than one acre. The house must be at least five years old and be occupied by one family only.

The apartment can be a maximum of 1,200 square feet and must be less than half of the square footage of the total dwelling. The minimum lot size is 6,000 square feet, except where the minimum lot size of the zone is

larger. An accessory apartment must not, when considered in combination with other existing or approved accessory apartments, result in an excessive concentration of similar uses, including other special exception uses, in the general neighborhood of the proposed use. Usually there must be a minimum of two off-street parking spaces.

For the past five years the number of accessory apartment special exceptions revoked (usually because the use was discontinued) has equaled the number of new accessory apartments being approved. While accessory apartments are viewed as a source of affordable housing in the County, there has not been a net gain in the number of units in recent years. In 2004 a ZTA modifying some of the restrictions and defining an administrative process similar to licensing was proposed, but not adopted. The most recent census shows that 51% of all women and 49% of all men in the United States live without a spouse at home. An accessory apartment could facilitate home ownership by providing additional income for such persons. It would also increase the supply of affordable housing for beginning teachers, our newest citizens, retail clerks, etc.

VARIANCES

A variance is a form of relief that is granted when the application of the zoning regulations, usually involving dimensional requirements, results in peculiar or unusual practical difficulties for a property owner. To qualify for a variance from the standards that apply to all the properties in a category of zoning, the applicant must show that there is a specific situation or condition that is peculiar to the property in question. The unique condition must make the property of the applicant different from that of neighboring properties by some inherent characteristic such as shape, topography, historic significance or environmental feature.

An applicant for a variance must show that the request is the minimum necessary to overcome the unique condition and that it would not be detrimental to the neighboring properties. The location of the house on the property which may restrict the buildable area on the property is not given consideration and the "practical difficulty" must result from the zoning standards, not the actions of the owner. Personal circumstances are not a basis for granting or denying a variance.

If a Building Permit is denied by the DPS and the condition is such that a variance could remedy the cause of denial, DPS issues a Building Permit Denial, which indicates that a variance is needed and describes the variance from the zoning regulations that would be required for a permit to be issued. The director of DPS may grant variances from the strict application of the code to setback and side yard requirements, where the request for a variance is in connection with a moderate price development as provided in the subdivision ordinance. The variances must be limited in scope or number to that necessary to achieve the objectives of the development and which will not substantially impair the intent, purpose and integrity of the general plan.

In other cases, the applicant must complete a Petition for Variance under the zoning ordinance and provide the information required by the Board of Appeals. This information is spelled out in items 1,2,5,10, and 11 on pages 2 and 3 above. When all material has been provided, the fee is paid. The fee is \$400 for single family residential if the variance is only for the existing nonconforming dwelling, \$800 for a single family residence under construction or newly constructed, \$2,500 for multi-family and \$3,000 for commercial or industrial use.

ZONING TEXT AMENDMENT

A zoning text amendment (ZTA) may clarify the intent of the code, modify the restrictions of the code for a particular zone, create a new zone or even set aside the restrictions of the master plan. A criticism of ZTA use is that it can be abused to generate spot zoning. A recent example of this is ZTA 06-18, which was not adopted. It would have modified the Planned Retirement Community (PRC) zone to allow industrial uses in the zone if it were within a prescribed distance from an airport. This was to accommodate a particular tract of land.

As an example of the clarification of intent, Councilmember Marilyn Praisner introduced ZTA 06-04 to the County Council in January 2006. The amendment was “for the purpose of requiring that all publicly held or privately held land in the rural open space area of the Rural Neighborhood Cluster (RNC) zone be preserved in perpetuity by easement or covenant; and generally amending the RNC zone.” Consistent with the recommendations and guidelines of the applicable master plan, in this zone builders construct homes on small lots on up to 40% of the property in exchange for a minimum of 60% of the property’s being preserved as contiguous rural open space that shares an extended boundary with the residential cluster neighborhood. Community representatives were concerned that there was no guarantee that the “open space” would be kept in its natural state forever. The ZTA assures this. The open space may preserve sensitive natural resources, other sensitive areas and associated habitat. Recreational facilities on it are limited to trails and related amenities or other facilities recommended in the master plan.

As an example of modifying restrictions, in 2003 via ZTA 03-21 the Council identified equestrian facilities as an agricultural rather than recreational use and changed those facilities from a special exception use to a permitted use in the agricultural reserve (the Rural Density Transfer Zone).

The proposed ZTA 06-27 makes a more dramatic change in the code by changing the purpose and standards for a Planned Retirement Community. What was previously a type of development limited to 750 acres or more (Leisure World) became one with modified requirements available for development on as few as 25 acres. Amenities are not required to be included in the development, only accessible from it. (Some of these changes were actually made via ZTA 02-05, but by mistake were not incorporated into the code.) Proposed ZTA 06-26 goes even farther, exempting existing commercially and industrially zoned land from a development plan finding of compliance with use and density recommended by a master or sector plan.

Process

Any interested party or governmental agency may submit to the Office of the County Council a proposed text amendment with supporting material. Amendments submitted by the Montgomery County Planning Board are transmitted directly to the County Executive and the Council President, who will place the proposed amendment on the council agenda for a decision as to whether or not the amendment will be introduced. All proposed amendments are transmitted to a staff screening committee for review and recommendation regarding introduction or other disposition. The screening committee consists of a representative of the staff of the County Council, the Planning Board, the County Attorney, the Hearing Examiner and the Department of Environmental Protection. The screening committee makes a written report for the County Council which includes revisions, comments and an analysis of the amendment and a recommendation as to whether the amendment should be introduced and the reasons. The public submittal process is currently under review by the County Council.

Within five days of introduction of a text amendment, the Council must send a copy of the ZTA to the County Executive and the County Planning Board. And within 30 days of introduction, it must by resolution set a date and time for a public hearing on the proposed text amendment, unless the time is extended or the amendment is postponed indefinitely. Within five days of setting the hearing date, the County Executive and Planning Board must be notified of the hearing date. An advertisement must be placed in at least one newspaper of general circulation in the county not less than 30 nor more than 45 days prior to the hearing date giving date, time and place of hearing; a brief summary of the proposed ZTA; a brief summary of any amendment to the proposed ZTA submitted by a council member; notice of where and how the complete text may be obtained; and notice of the telephone number to call for information or to register to speak at the hearing.

The County Executive may furnish comments and information he deems pertinent to the proposed text amendment. The Planning Board reviews the ZTA at its open regular meeting, votes on and transmits its recommendations along with staff recommendations to the County Council for its consideration five days

before the hearing date. The Planning Board recommendation is available to the public upon request. At the date, time and place set for public hearing, the council must conduct the hearing or announce a continuance to a date certain.

Any interested person has the right to submit oral or written testimony or documentary evidence into the record at the hearing. There must be a complete stenographic report of the testimony at the hearing, and a typewritten transcript with all exhibits admitted at the hearing is incorporated into, and considered a part of, the record on the proposed amendment. At the close of the public hearing, the council may continue the hearing to a date certain; may hold the record open for additional written testimony; or may close the record. In addition, the council may request the Planning Board to submit a final recommendation within a stated period of time, including a revised text, if necessary.

The action of the County Council acting as the District Council amending the text of the zoning code must be taken in open session. A quorum of the council is not required to conduct a hearing on a proposed text amendment; however, any member not present at the hearing must read and sign the transcript before voting on the amendment. The vote on final adoption of a text amendment must be on a roll call by yeas and nays and to be adopted, a text amendment must receive the affirmative vote of five members.

All adopted text amendments must be accompanied by an opinion of the District Council stating its conclusions and reasons, which must be filed in the record. The Council must promptly send a copy of the opinion and amendment to the County Executive, the Planning Board, the Hearing Examiner, the Board of Appeals, the Supervisor of Assessments, the Departments of Finance and Permitting Services and all persons entering their appearance at the hearing as shown by the hearing transcript. Text amendments become effective 20 days after the date of council adoption unless otherwise stated in the ordinance.

There were 31 ZTAs introduced in 2006, about 25 in 2005 and approximately 27 in 2004. Of the 31 introduced in 2006, 21 were enacted, four lapsed or were deferred and three are pending. The text of all recent ZTAs is on-line at the Montgomery County Council Web site under Legislation and Resolutions.

NEW APPROACHES TO ZONING

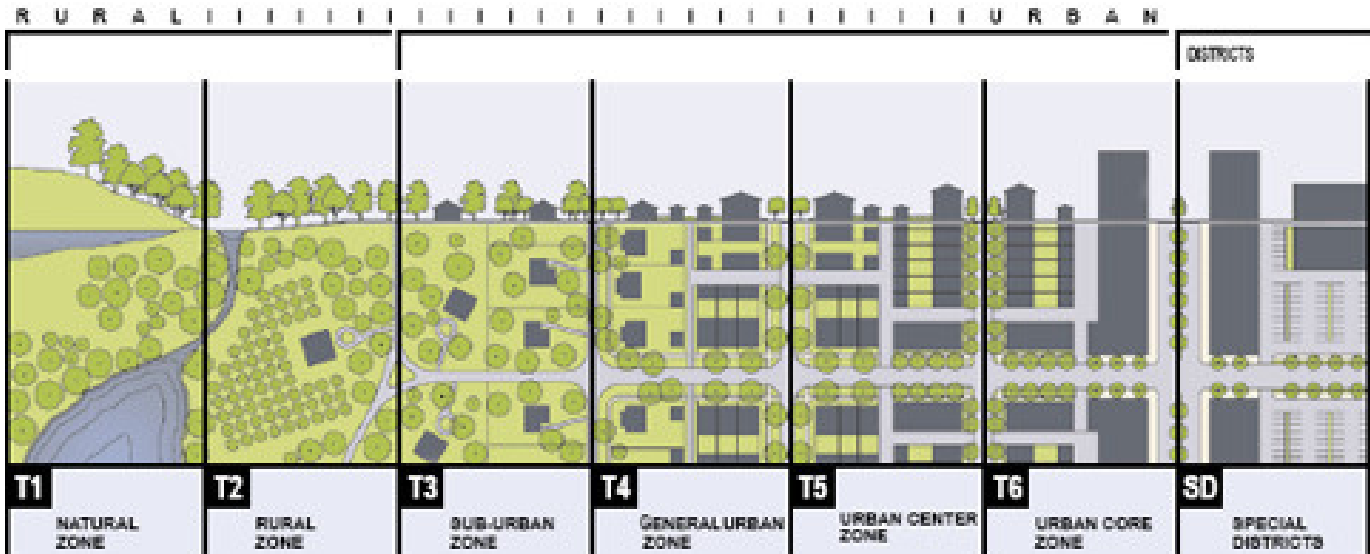
Beginning in November of 2005 the Department of Planning initiated a series of discussions referred to as “Centers and Boulevards”, calling in experts on urban planning and community leaders to address issues surrounding future growth of the county. The problems identified for discussion included the approaching “buildout” of the county, emphasis on smart growth, need for affordable housing, traffic congestion and changing demographics. It was suggested that these interrelated problems could be dealt with most successfully through new approaches to planning and zoning, a new planning paradigm, to create neighborhoods more dense, connected and heterogeneous, with emphasis on the quality of the public realm including streets, civic spaces and public parks.

This new paradigm would rely upon a new set of principles and rules for urban design, superseding zoning and would explicitly and comprehensively address patterns of land use, densities, infrastructure, building form, cityscape and landscape. To be effective this approach would demand fine-grained planning, smaller in scale than the current sector plan. The Kentlands development is an example of this approach in Montgomery County. One tool that has been suggested to implement such an approach throughout the county is called form-based zoning.

It is widely recognized that Smart Growth is hard to achieve under conventional zoning. With form-based codes, new regulations would support mixed-use neighborhoods with a range of housing types by focusing more on the size, form and placement of buildings and parking, and less on land use

(residential vs. commercial) and density (housing units per acre). There would still be regulations, such as minimum and maximum heights of buildings, but overall, there would be more flexibility for a land owner, developer, or building owner to meet changing real estate markets by having the flexibility to build single-family homes, apartments, offices or retail based on market demand, as long as the building form conforms to the community's vision as expressed in the form-based codes

This approach relies more on illustration and graphic depiction rather than long lists of uses and specifications. As an illustration of how zones might be depicted, Evanston, IL used this example:



Consensus Questions

1. Should the zoning ordinance be rewritten to:
 - a. Eliminate conflicts
 - b. Clarify language
 - c. Address infill development on large and/or individual sites
 - d. Modify special exception provisions by
 - i. Identifying uses appropriate for Hearing Examiner decision
 - ii. Redefining some uses into more discrete components
 - iii. Reviewing appropriateness of zone for particular uses
 - iv. Creating zones for uses not currently permitted by right in any zone
 - v. Providing standards and licensing in lieu of special exception for some uses
2. Should zoning text amendments
 - a. Be consistent with Master Plans
 - b. Be relevant to more than a specific plot

Study Committee: Elaine Apter, Margaret Chasson, Melpi Jeffries, Jean Lowder, Brigitta Mullican, Aleen Starkweather, Lois Stoner. The following persons were interviewed in the course of this study: Donna Barron, Vince Berg, Francoise Carrier, Jeremy Criss, Katherine Freeman, Royce Hanson, Martin Klauber, Tedi Osias, Barbara Pizak, Marilyn Praisner, Sally Roman, Jeff Zyontz. Assistance was provided by Allison Fultz, chair of the Board of Appeals, and by the MNCPPC Research Department. The committee consulted online resources of MNCPPC and the county government.