MEMORANDUM

January 10, 2014

TO: County Council

FROM: Jeffrey L. Zyontz, Legislative Attorney

SUBJECT: Worksession- Zoning Text Amendment 13-04, Zoning Ordinance Rewrite; and District Map Amendment G-956

The Council has reserved January 14, 15, 16, and 21 for its worksessions on the Zoning Ordinance Rewrite. The worksessions will be an opportunity for the Council to take straw votes on all aspects of the new code. The Council may conclude its worksessions at any time before January 21. A final vote by the Council is expected by the end of February.

This memorandum is intended for use at all Zoning Ordinance Rewrite worksessions.

Recommendations by Councilmembers to amend a PHED Committee recommendation are highlighted in this memorandum.

PHED Recommendation: The Committee (2-1, Councilmember Elrich dissenting) recommends deferring action on District Map Amendment (DMA) G-956 and approval of ZTA 13-04 with amendments.

After conducting 13 worksessions fully devoted to ZTA 13-04 and DMA G-956, the Committee has recommended some 120 changes to the Planning Board proposed draft. Every chapter in the Planning Board proposed draft has PHED recommended changes. The essential themes of the Committee’s amendments can be characterized as:

1) Neighborhood protection
   a) Development standards
   b) Land use
   c) Current binding elements
   d) Floating zone limitations

2) CR zones revised
   a) MPDU points and provision for more than 12.5%
   b) Public Benefits – deleting categories and revising points
3) Grandfathering provisions
   a) Ability to expand under the current code
   b) Time limit to amend plans under the current code
   c) Binding elements

In addition to its specific recommendations, the Committee gave Staff latitude to make plain English changes. All changes to ZTA 13-04 (the Planning Board recommended code) as introduced are listed in table form.¹

Councilmember Elrich, based on the recommendations of Meredith Wellington and Julie Davis, recommends an additional public hearing before Council’s final action:

The final decision on the proposed code should be made only after the public has had ample opportunity to review and comment on any changes proposed by the Council staff after the full Council’s work sessions. The full Council held hearings on November 12 and 14, 2013 on the PHED Committee’s October draft; the Committee has since made a number of significant substantive and procedural changes to its draft since then.

The full Council will hold three work sessions in mid-January on whatever version the PHED Committee forwards after the first of the year. As a result, there are likely to be even more changes to the October PHED Committee draft that will never have been the subject of public hearing and comment. The final Council vote on the new code should not take place until the public weighs in on this critical document that will likely change the land use profile of the County for decades to come, so that Council members who are not on the PHED Committee have ample time to review the proposed Code and speak with constituents.

The Committee did not discuss this recommendation. It would lead to a never-ending cycle of public hearings if one had to be held each time the Council chose to amend what is before them.

Unless otherwise noted, the PHED Committee considered and rejected all of the ideas behind the amendments proposed by Councilmembers.

Overview

On May 7, 2013, the Council, at the request of the Planning Board, introduced a new Zoning Ordinance (Chapter 59) as Zoning Text Amendment (ZTA) 13-04 and a District Map Amendment. The Committee’s work sessions concerned both of these actions.

The ZTA would replace Chapter 59 in its entirety. The text of ZTA 13-04 (in excess of 300 pages, compared to some 1,100 pages in the current code) may be found on the Planning Department’s website: http://www.zoningmontgomery.org.

¹See www.zoningmontgomery.org.
The proposed code does more than merely reorganize the current code; it makes substantive changes to both land use and zones. These proposed changes were within the scope of the assignment. Planning Staff has described the need for a new code as follows:

The zoning code has not been comprehensively rewritten in over 30 years. During that time, the County has grown and changed substantially and many of the zoning laws have become antiquated. Piecemeal updates to the code over the last several decades have resulted in a document with more than 1200 pages, more than 120 zones, more than 400 footnotes, and many confusing, and sometimes contradictory, provisions.

As our road, forest conservation, and stormwater rules have evolved, our zoning ordinance has not kept up. In basic sustainability terms, our zoning ordinance has rules that not only encourage sprawl into our greenfields, but foster it by not allowing mixed-use, compact development in targeted locations.

Almost anyone involved or interested in the development process in Montgomery County cites the difficulty with using and understanding the current zoning ordinance. For these reasons, the County Council tasked the Planning Department with undertaking a comprehensive rewrite of the zoning code in 2007 with the following basic goals in mind:

simplify and consolidate;
improve clarity and consistency;
accommodate changing markets and demographics, while protecting established neighborhoods;
reflect more sustainable policy goals; and
provide the tools necessary to shift from greenfield development to infill, mixed-use development.

Structure of the proposed code

The proposed code is organized into articles by function. Article 59-1 contains introductory material and definitions used in the code. Article 59-2 establishes all of the zones and provides an intent statement for each zone or family of zones. Article 59-3 contains one use table. This is a huge improvement over the current code, which contains 14 use tables. The essential advantage of the new structure is that there is a single land use table for all zones. The land use list and the zoning list in the table are comprehensive. Every zone indicates whether the use is prohibited (blank), permitted (without limitation), limited (permitted under specific objective standards which currently may be in footnotes), or conditional (requires discretionary special exception approval).

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2 In FY 2008, the Planning Director listed the goals of the Zoning Ordinance Rewrite project as follows:

- Streamline the Ordinance -- all aspects of the document, from the number of districts to the number of processes outlined in various sections.
- Simplify all aspects of the document.
- Improve the organization of the document.
- Rationalize/update provisions to reflect the changing development climate with a greater emphasis on infill development.
- Create predictability in the standards as well as the format.
- Promote “green” land use policies.

The Council did not object to a scope of work that included substantive changes to the Zoning Ordinance.

Article 59-4 provides the development requirements for standard method development for all Euclidean zones. Article 59-5 contains the development requirements for all floating zones; this is significant because, in the current code, floating zones are indistinguishable from Euclidean zones. Article 59-6 contains regulations for the optional method of development for all Euclidean zones. Article 59-7 contains general development requirements such as parking, landscaping, lighting, and signs.

Article 59-8 establishes the administration and procedures of the code. This includes the procedures for: changing zones; getting conditional use and variance approvals; sketch plan and site plan approvals; and exemptions to the code. Exemptions include allowances for existing approved projects to proceed under the "old" code (grandfather provisions). Article 59-9 retains certain zones that would continue to exist as currently mapped but may not be applied to additional areas in future master plans. Each article has provisions that apply to each zone.

The Council received complaints on the proposed code's organization. The worst aspect of the proposed code is that locating all of the provisions governing any individual zone requires referencing almost every chapter. On the other hand, the best innovation in the proposed code is the single land use table. A completely zone-centric organization would undo a single land use table. Even the current code had separate chapters for parking, signs, and procedures. Some residents are familiar with the current code, even in all its complexity. Those who are familiar with the current code will be challenged by the proposed code until it, too, becomes familiar.

Staff is not convinced that there is any perfect solution to the code’s organization, but locating as many provisions as possible that apply to a zone in one place may make navigating easier. With some work, Articles 2, 4, and 6 could be reorganized so that they are zone-centric and not function-centric. There would still be the need to reference Chapters 3, 7, and 8 to know all aspects of a zone. Council could assign this task to staff.

Zones in the proposed code

The draft Ordinance has fewer zones than the current Ordinance, and collapses very particular land use categories (e.g., newspaper stand, flower shop) into more general land use categories (e.g., retail/service). Some examples of other significant substantive changes include:

- Mixed-use and commercial zones are different; these are all "new" zones, with the exception of the Council-approved LSC, CR, CRT, and CRN zones.
- All floating zones are new and clearly identified as floating zones.
- The standards for the number of on-site parking spaces are often reduced, especially in Parking Lot Districts, and design standards are added.
- The amount of open space required in mixed-use and employment zones is generally reduced.

The one-family residential zones are retained with the same development standards. The names of the zones remain the same. Three residential zones that cover very small amounts of land are proposed to be deleted and the land area reclassified into other residential zones with essentially the same

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4 For example, Agricultural zone references: 2.1.3; 3.1.6; 3.2.1-3.2.6; 3.2.7; 3.2.8; 3.2.10; 3.2.11A-3.2.11C; 3.2.12.B; 3.3.1.B; 3.3.2.E; 3.3.3.B-3.3.3.C; 3.3.3.E-3.3.3.H; 3.4.2; 3.4.4.C-3.4.4.F; 3.4.8-3.4.10; 3.5.1.B-3.5.1.C; 3.5.2.A-3.5.2.C; 3.5.4.A; 3.5.4.C; 3.5.10.J; 3.5.11.B-3.5.11.C; 3.5.14.A-3.5.14.C; 3.5.15.A; 3.5.15.C; 3.6.6; 3.6.6.C; 3.6.7.A-3.6.7.E; 3.7.1-3.7.3; 3.7.4.A-3.7.4.C; Division 4.2; 7.2.3; 7.2.4; 7.2.5.J.2; 7.4.2; 7.4.5.C.7; 7.7.7; 8.3.1.
development standards. The R-150 and RMH-200 zone are proposed to be included in the R-200 zone. The R-MH zone is proposed to be included in the R-60 zone.

The uses allowed in residential zones would be substantially the same. Those uses which require a special exception under the current code would require a special exception under the proposed code (special exceptions are called a conditional use in the new code); however, under the proposed code, a higher number of residents in a group setting is required to trigger a special exception for a new residential care facility.

Land use interpretations

Currently, every land use table starts with the following sentence: “No use is allowed except as indicated in the following table”. The proposed code allows far more discretion for DPS with regard to unlisted land uses:

Any use not specifically listed is prohibited unless DPS determines that the use is similar in impact, nature, function, and duration to an allowed use listed in this Division. Where the similar allowed use must satisfy a limited or conditional use standard and approval, the proposed use must meet such standard and obtain such approval. 5

Despite the stated prohibition in the current code, the proposed rule of interpretation represents the current practice of DPS. The PHED Committee recommended the following provision:

Replace 3.1.2.D with the following provision:
Uses listed are general.
1. The DPS Director or the Director’s designee must determine whether a specific use falls within the general use or is similar in impact, nature, function and duration. Uses that are not allowed as permitted, limited or conditional are prohibited.
2. Some factors DPS may consider in determining if a proposed use is similar in impact, nature, function and duration to an existing use include but are not limited to:
   a. The type of items or services sold and the nature and quantity of inventory on the premises;
   b. Any processing done on the premises, including assembly, manufacturing, and distribution;
   c. The amount and nature of any adverse impacts generated on the premises, including but not limited to noise, smoke, odor, illumination, glare, vibration, radiation and fumes;
   d. Any hazardous materials used on site;
   e. The number of employees and customers in relation to business hours and employment shifts;
   f. The type and size of structures; and
   g. Parking requirements, turnover, and the potential for shared parking with other use types.

Councilmember Elrich, based on the recommendation of Meredith Wellington and Julie Davis, would remove this discretion from DPS and would clearly state that uses not allowed as permitted, limited, or

5 ZTA 13-04, page 3-3.
conditional are prohibited. Staff made a similar recommendation to the PHED Committee, but a majority of the Committee recommended otherwise.

The Planning Department considers it necessary for DPS to have the discretion it currently employs, given the impossibility of anticipating every possible land use that may develop in the future and the undesirability of adding a new line to the use table every time a property owner wishes to do something that is in the interest of a vital local economy and community, but is not specifically listed in the use table.

District Map Amendment

Digital-web accessible maps

The current zoning maps of the County would be replaced by a District Map Amendment. This zoning map amendment would implement ZTA 13-04 and would make the GIS zoning layer, which is accessible online, the official zoning map of the County. The PHED Committee recommended deferring action on the DMA until at least 6 months after the Zoning Rewrite is approved. This was recommended by testimony. It would allow landowners to reflect on the approved new code before commenting on their proposed zone. It would also allow more time for people to review the proposed zoning in general. Some testimony recommended disapproving any district map amendment.

Councilmember Elrich, based on the recommendation of Meredith Wellington and Julie Davis, recommends retaining all current zones in the new code and only applying different zones by sectional map amendments following new master plan approvals.

Should the Council approve a District Map Amendment? Yes, it should. At the very least, even if the Council rejects the Draft Rewrite, a DMA is necessary to convert the County official zoning map from paper to an electronic media. The current mapping system is a hand-me-down from 1927.6 It takes some 1,200 maps to describe zoning in the County. Numerous properties are on the edge of a map, making it necessary to look at 2 or more maps to be certain of the zoning. There are only 3 official copies of the maps; the Planning Department, DPS, and the Board of Appeals each have one official copy. Residents must go to one of these locations to see the official maps. The original maps were printed on canvas to prevent deterioration over time. Twenty years ago, the production of canvas used for maps was discontinued. Since then, paper maps, which do not hold up well to long-term public use, have been used when zoning changes are made. In short, the paper maps are inaccessible, hard to use for consumers, and costly to maintain. A zoning map available on the web is accessible, adjustable to any location, scalable, and cheaper to maintain. In addition, a digital map negates the need for paper reproduction and distribution and extra storage space at information counters.

Assuming the Council does approve a version of the proposed code and in doing so repeals the current code without retaining all of the current zones, a DMA is necessary. It is impossible to implement zoning regulations when the zone on the map has no corresponding rules in the code.

If the Council retains all of the current zones in its approval of the new code (Article 9 of the proposed code already includes some existing floating zones for retention), a DMA is only necessary for the purpose of converting paper maps to digital maps. The newer zones could be applied over time through

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6 It can be stated with confidence that the County's physical zoning maps represent the late 19th century's state of the art technology.
master plans and subsequent sectional map amendments or just by a series of sectional map amendments. The goal of eliminating near duplicate zones and having a single land use table would be lost.

ZTA 13-04 would create new zones and eliminate most existing zones. Each zone on the current paper zoning maps is described in the current Zoning Ordinance. If the current zoning ordinance is repealed, the official zoning maps must be changed. Some zones will no longer exist. Some zones will be created. Some "old" zones are retained. Any zoning that the Council anticipates applying by the DMA must be included in the Zoning Rewrite.

The proposed zoning map and the current zoning also may be found on the Planning Department’s website: http://www.zoningmontgomery.org.

Councilmember Elrich recommends changing the rules for translating maximum building height for property currently zoned C-1 (assuming the C-1 zone is not retained). The current zoning ordinance defines the purpose of the C-1 zone as providing for “convenience shopping facilities which have a neighborhood orientation and which supply necessities usually requiring frequent purchasing with a minimum of consumer travel ... such facilities should not be so large or so broad in scope of services as to attract substantial amounts of trade from outside the neighborhood.” As a result of the current zoning code language, C-1 zones are the ones most frequently located adjacent to residential neighborhoods, where height is an important factor. The language in the current zoning code states that the height limit in the C-1 zone is 30’, allowing for additional heights up to 45’ on one or more sides of the building only to accommodate topographical features of the property. The Planning Board’s recommended zone conversions adopted the 45’ height, which clearly changes the nature of these zones and could adversely affect neighborhoods if/when formerly C-1-zoned properties redevelop.

Councilmember Berliner recommends translating the height allowed for all C-1 property to 35 feet.

Councilmember Elrich would recommend a special provision for property currently zoned C-1 and C-2 and developed with commercial uses (assuming the Council does not agree to retain C-1 and C-2 zones as recommended elsewhere). The new provision would require any redevelopment to retain the floor area of retail space in any redevelopment.

When non-residential zones abut residential zones, the compatibility standards would limit height or increase setbacks, even though some residential zones allow buildings 50 feet high.

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7 RMH, RMH-200, all RT zones, all “C” zones, all CBD zones, all RMX zones, all “I” zones, MXN, MXTC, TOMX-2, TSR, TSM, TMX-2, O-M, H-M, R&D, RS.
8 AR, GR, NR, EOF, IL, IM, IH, TLD, TMD, THD.
9 PD, TS, PNZ, PRC, PCC.

Notwithstanding any other provisions of this Code allowing greater height for any reason, no building shall exceed the height of 30 feet as measured from the average elevation of finished grade surface along the base of the front, rear and sides of the building to the highest point of roof surface of a flat roof; to the deck line of a mansard roof; and to the mean height level between eaves and ridges of a gable, hip or gambrel roof; provided, however, that the height in the front, rear or any side shall not exceed 45 feet. On lots having severe topography, the Board of Appeals shall have authority to grant variances from the maximum 45-foot height limitation on the front, rear or any side up to a maximum 60 feet on such side; provided, however, that the average height shall in no case exceed the 30-foot average height limitation contained herein.
The Committee recommended requiring physical copies of the digital zoning map for DPS, the Board of Appeals, and the Planning Staff when the new map is first approved and for every Council-approved zoning change thereafter. These copies will allow the detection of any tampering with the online maps.

The Committee recommended adding zoning history to official zoning maps. This history exists on the current paper maps and should be part of the electronic maps for the convenience of users. Absent map references to prior zoning actions, it would take an extraordinary effort to research Council’s zoning resolutions.

The Committee recommended having different noticing requirements for sectional map amendments and ZTAs. In the opinion of the Committee, ZTA newspaper ads should provide a summary of the proposed amendment as required by the current code.

The proposed Rewrite would change the zoning on rights-of-way. Currently, rights-of-way are zoned to the least intensive zone of the properties on either side of the right-of-way. The proposed code would apply the zone on each side of the street to the mid-point of the right-of-way. There was no testimony on this point until staff raised the issue in a PHED worksession.

This new rule would increase allowable density to the extent of a property’s right-of-way dedication when the zoning on the opposite side of a street is different. There are Court cases that found that zoning can not be withheld for the purpose of reducing the future cost of right-of-way acquisition to the County. Extending zoning to the middle of the street is in line with that case law, but there are no cases directly on point. Prince George’s County and Arlington County zone to the centerline of the right-of-way.

Councilmember Erlich, based on the recommendation of Meredith Wellington and Julie Davis, recommends retaining the current rule on zoning rights-of-way; rights-of-way, in the opinion of the Councilmember, should be zoned to the least intensive zone of the properties on either side of the right-of-way.

Section 4.1.7.A.1 defines tract area. The density (FAR or units per acre) allowed on any site is determined by the tract area. Land sold to the County for right-of-way is excluded from the tract area. Land dedicated to the County for no payment (“consideration” in legal terms) is included in the tract area. Councilmember Floreen was made aware that there are deeds of dedication that indicate nominal consideration but are essentially dedication for no payment. The Councilmember recommends the following amendment to the definition of tract area.

A tract is a contiguous area of land, including all proposed and existing rights-of-way, lots, parcels, and other land dedicated by the owner or a predecessor in title. A tract does not include land conveyed for more than nominal consideration.

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11 Section 2.2.1.A.4.
12 Section 2.2.1.A.3.
13 Section 8.5.2.
14 Section 2.2.4.A.
15 Hoyert v. Board of County Comm’rs, 262 Md. 667 (1971).
Agricultural Zones

ZTA 13-04 would only have one zone within the Agricultural classification; that zone would be the Agricultural Reserve zone (AR). The AR zone, in concept and by its proposed zoning map area, is an updated RDT zone. It is the Agricultural Reserve of the County. The agricultural community wanted the name of the zone to reflect the primary land use in the zone. All RDT zoned land is proposed to be classified as AR zoned land.

AR Zone Intent

The proposed code includes this statement of the intent of the AR zone:

The intent of the AR zone is to promote agriculture as the primary land use in areas of the County designated for agricultural preservation in the general plan, the Functional Master Plan for Preservation of Agriculture and Rural Open Space, and other current or future master plans. This is to be accomplished by providing large areas of generally contiguous properties suitable for agricultural and related uses and permitting the transfer of development rights from properties in this zone to properties in designated receiving areas. Residential uses should be located and arranged to support agriculture as the primary use and to support the rural character of the area.

The last sentence was called into question by public testimony. It expresses an aspiration that is out of character to an intent statement. The location and arrangement of residential lots is a matter of subdivision, not zoning. As a standard for subdivision approval, it is misplaced. The Committee recommended relocating this thought to Article 4 and inserting the following provision into Sec. 4.2.2. General Requirements (underlining indicates new text):

A. Building Types...
B. Location of Residential Uses

Residential uses must be located and arranged to support agriculture as the primary use and to support the rural character of the area.

Testimony indicated that the development standards and lot size requirements in the Planning Board Proposed Draft were not clear. The PHED Committee recommended amending the development standards table for the AR zone by:

1) deleting site coverage and specification for site coverage;
2) including Voluntary Conservation Lots and related specifications;
3) adding a row for Density (units/lot; clarified that nonresidential buildings require a 25 acre site and can only have one lot per 25 acres; however, a voluntary conservation lot may be 3 acres).
**Development Standards**

Similar to the current code, Article 4 would allow a Detached House or a Building for a Cultural Institution, Religious Assembly, Public Use, or a Conditional Use in the AR zone if it met the necessary development standards. Under state law, a building permit may not be required for any building or structure used exclusively for agriculture. Staff was informed that the Planning Board does not intend these development standards to apply to buildings used in the course of farming. The PHED Committee recommends adding a provision to make the intent clear.

The PHED Committee recommended retaining the general building type (with unique setback and lot coverage standards) only for commercial, industrial and mixed use zones. Staff's implementation of that recommendation deleted the general building in the AR zone. The allowed building type in AR as proposed to the Council is a “Detached House or a Building for a Cultural Institution, Religious Assembly, Public Use, or a Conditional Use allowed in the zone”. A barn does not fall into any of those categories; it is not a detached house but is permitted as of right. Staff recommends revising Section 4.1.3 as follows:

Section 4.1.3. Building Types in the Agricultural, Rural Residential, and Residential Zones (pg. 4-4)
A. Detached House or a Building for a Cultural Institution, Religious Assembly, Public Use, or Conditional Use allowed in the Zone.
A detached house is a building containing one dwelling unit that may contain ancillary nonresidential uses, such as Home Occupation or Family Day Care. A building for a Cultural Institution, Religious Assembly, Public Use, or a Conditional Use allowed in the zone is a building that accommodates only a Cultural Institution, Religious Assembly, Public Use, or an approved conditional use allowed in the applicable zone under Article 59-3, Uses and Use Standards. This building type includes buildings used for agriculture associated with Farming.

**Voluntary Conservation Lots**

The Agricultural Advisory Board recommended allowing voluntary conservation lots to be larger than 3 acres if required for septic approval. The PHED Committee agreed with this recommendation.

**AR Focused Land Uses**

**Farming**

In the Planning Board Draft, farming is defined as including accessory agricultural processing, storage and sale of “products grown or raised on-site or on property owned, rented, or controlled within Montgomery or adjacent counties by the farmer.” The Agricultural Advisory Committee (AAC) believes that the italicized portion of this definition is an unnecessary and overly burdensome restriction on the operations of Montgomery County farms. It would restrict the properties that these products come from if such products are not raised or grown on-site. The PHED Committee agreed with AAC recommendation to delete the phrase “within Montgomery or adjacent counties” from the definition.

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16 Land Use Article §20-502(b).
17 Sections 4.2.5.C.3 and 4.2.5.F.1.
18 Section 4.2.5.B.
The current code restricts “the sale of products of agriculture and agricultural processing to that grown on-site”. The PHED Committee recommended removing this restriction. The proposed code expands this to include property owned, rented, or controlled by the farmer.

**Farm Tenant Dwelling**

Farm Tenant Dwelling is a “new” use in that it would combine “Accessory Dwelling for Agricultural Workers” and “Farm Tenant Mobile Home more than one but less than 4” with other farm tenant dwellings.19 “Farm Tenant Mobile Home more than one but less than 4” currently requires a special exception. The proposed code would make it a limited use; in that respect, Farm Tenant Dwelling would be more permissive than the current code.

**Agricultural Processing**

The AR zone would continue to allow agricultural processing as a primary use of land NOT used for farming as a conditional use. This use is currently a special exception for non-farms and is allowed on farms as an accessory use.20 Currently, agricultural processing is defined as the:

> processing of an agricultural product that causes a change in the natural form or state of the product and that entails operations of a commercial or industrial character that must be regulated to mitigate potential adverse external impacts. Agricultural processing includes, but is not limited to, an abattoir, milk plant and similar non-farm operations.

ZTA 13-04 would amend that definition to:

> An operation that transforms, packages, sorts, or grades farm products into goods that are used for intermediate or final consumption, including goods for non-food use, such as the products of forestry. Agricultural Processing includes milk plant, grain elevator, and mulch or compost production and manufacturing, but does not include Slaughterhouse (see Sec. 3.2.8, Slaughterhouse).” [Emphases added]

ZTA 13-04 would include “products of forestry” within the scope of agricultural processing. DPS would interpret this change to allow firewood operations that truck in downed trees and truck out firewood as a conditional use. Currently, a sawmill use is only allowed by special exception in the RDT zone.

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19 Sections 3.1.6 and 3.3.3.E.
20 A farm is tract of land, with or without associated buildings, that is devoted to agriculture. Agriculture includes processing on the farm of an agricultural product in the course of preparing the product for market and may or may not cause a change in the natural form or state of the product. Staff believes that the published code includes an error concerning “agricultural processing, primary”. The use was deleted by the Council in 1985 by Ordinance 10-69.
**Slaughterhouses**

ZTA 13-04 would include on-farm animal slaughter as a part of the definition of farming. Slaughtering is specifically excluded from the definition of agricultural production on non-farm sites, but is allowed as a distinct land use (as a conditional use). This is not a change from the current code.

**Educational Institutions**

Currently, educational institutions are allowed in the RDT zone by special exception, but special exceptions are not allowed when TDRs are severed. ZTA 13-04 would not allow educational facilities in the AR zone. Existing schools (which may be conforming by virtue of existing before January 6, 1981, or receiving special exception approval) would be subject to Section 3.1.2.D. Grandfathered Uses Not Indicated with a “P”, “L”, or “C” in Section 3.1.6, which allows any lawfully existing Educational Institution (at date of adoption minus one) in the AR zone to be continued, renovated, repaired, or enlarged under the conditional use requirements and Section 8.3.1. Conditional Use.

A footnote in the current code severely restricts educational institutions in the RDT zone:

Limited to individual or small class instruction provided within a dwelling or an accessory use, such as a swimming pool, by a resident of the dwelling. However, a private educational institution for persons with disabilities may be established subject to the special exception requirements of section 59-G-2.19, and provided (1) the site was previously used to provide educational services to persons with disabilities, (2) no more than 75 students are enrolled at any one time, (3) enrolled students are not boarded, and (4) improvements exist on the property (as of July 21, 2003) to accommodate the school’s educational programs. A residence may be provided on site for use by a caretaker. Educational services to persons without disabilities are limited to enrichment activities related to providing educational services to persons with disabilities. A private educational institution lawfully existing prior to January 6, 1981, when the Rural Density Transfer Zone sectional map amendment was enacted is a conforming use, and may be extended, enlarged or modified by special exception subject to the provisions of section 59-G-2.19, "Educational Institutions, Private."

The Planning Board removed the allowance for the conditional use because it thought that was consistent with the intent of the current code. The use would be grandfathered in a separate section of code.

**The following PHED Committee recommendation would greatly expand the opportunity for educational opportunities in the Agricultural zone by recommending a new land use:**

**Agricultural Education/Tourism**

**Defined**

Agricultural Education/Tourism means agricultural and accessory activities conducted as a part of a farm’s regular operations, with emphasis on hands-on experiences and events that foster increased knowledge of agriculture, including cultivation methods, animal care, water conservation, Maryland’s farming history, the importance of eating healthy, locally grown foods, and including corn mazes, hay rides, and educational tours, classes, and workshops.
Use Standards
Where Agricultural Education/Tourism is allowed as a limited use, it must satisfy the following standards:

The property must be farmed and agriculturally assessed.
A minimum of 80% of the property is maintained in agricultural cultivation, pasture land, woodland, or natural features.
Impervious area is a maximum of 8% of the portion of the site where the Agricultural Education/Tourism area is located.
The property must have proper sanitation facilities approved by DPS.
The use must be an accessory use to a farm.21

Testimony recommended deferring major changes to the uses allowed in the AR zone until stakeholders could reach an agreement. There has been a reoccurring issue concerning the legality or illegality of the “Calleva Farm” operation. Calleva states their mission as primarily education. Based on Calleva Farm’s website, staff suspects that the vast majority of the income derived from Calleva Farm is not from products produced on the farm.22

There have been no reported problems with DPS’s administration of agricultural tourism aspects; DPS has not stopped any hay rides, farm tours, Halloween events, corn mazes, or any other function that is accessory to the farm. The PHED recommended changes were viewed in testimony as problematic because of the concern with educational facilities. The Council prohibited large institutional uses in the Agricultural Reserve in 2008. This would reverse that past decision. If places of worship are treated less favorably than other places of assembly, the County can expect future court claims.

In prior years, a ZTA was proposed by Calleva’s representative to expand Calleva’s teambuilding program with buildings and structures for rope climbing. That proposed ZTA did not get Councilmember sponsors.

Staff supports the recommendation made in testimony to not change any land uses in the Agricultural zone (remove the Agricultural Education use inserted by the Committee). Staff recommends getting a group of stakeholders together to resolve these issues in a holistic manner.

Bed and Breakfast

Currently, a Bed and Breakfast with 2 or fewer rooms is permitted in the RDT zone; with a special exception, up to 5 guest rooms are allowed. The use is not allowed if TDRs were severed.

ZTA 13-04 would allow Bed and Breakfasts as a limited use, having the same objective standards that are currently required for a special exception.23 When the Bed and Breakfast is accessory to a farm, a

21 Sections 3.1.6 and 3.2.11.A.
22 The Calleva web site provides the following information:
   Calleva Farm: 19120 Martinsburg Rd. Dickerson MD 20842
   Calleva Farm is a 165-acre working farm just outside of Poolesville. Using sustainable methods (no pesticides/no fertilizers), we grow produce, raise cows, pigs, chickens & turkeys for meat, pasture 20+ horses, and have 8 bee hives. We also grow enough hay to feed our animals through the winter. All of our farming is done on a small scale and is tied to our educational mission. In addition, our farm is home to:
   the one and only MARKOFF’S HAUNTED FOREST,
   year-round Calleva Equestrian Education Program (CEEP) – horseback riding lessons & boarding, outdoor & environmental education and teambuilding programs.
23 Section 3.5.6.B.
use and occupancy permit may be granted, even if TDRs have been severed. Bed and Breakfasts can provide a supplementary income for farmers.

**Family Day Care**

The day care for seniors use is consolidated with the day care for children use. Family Day Care for up to 8 children is a permitted use under current zoning. Currently, day care for 4 or more adults requires a special exception. Day care for seniors is proposed as a permitted use up to 8 persons because the impact of such a facility would be similar to that of a child day care facility.

Councilmember Berliner recommends allowing composting by amending Section 3.2.6 as follows:

Farming includes the following accessory uses:

1. Accessory agricultural processing and storage of products grown or raised on-site or on property owned, rented, or controlled by the farmer. Accessory agricultural processing includes a milk plant, grain elevator, and on-farm animal slaughtering [, and mulch or compost production and manufacturing].
2. The sale of products of agriculture and agricultural processing, if products are produced on-site or on property owned, rented, or controlled by the farmer.
3. The sale of horticultural products grown off-site, but kept on the farm temporarily on a maximum of 2 acres or 20% of the site, whichever is less.
4. The delivery and installation of horticultural products grown on the farm.
5. The production and manufacturing of mulch or compost where up to 20% of the materials used in accessory processing can come from off-site sources.

**Residential zones**

The current code characterizes the Rural, Rural Cluster, and Rural Neighborhood Cluster zones as agricultural. ZTA 13-04 would put them in a new Rural Residential category of zones. The Rural Neighborhood Cluster (RNC) zone currently restricts land uses more than the other Rural Residential zones. This would remain true in ZTA 13-04.

For the most part, zones have not changed their name (although the Rural would be abbreviated as R) or their location on the zoning map. ZTA 13-04 would incorporate the R-150 and RMH-200 zone into the R-200 zone. The R-MH zone would be consolidated into the R-60 zone. The Planning Board proposed the same location of the zones on the zoning map.

All Residential Townhouse (RT) zoned land would stay RT until amended by future SMAs based on future master plan recommendations. For future townhouse areas, Euclidian townhouse zones would allow 3 levels of townhouse density (low, medium, and high). These zones would be established as Euclidian zones, available for application in future SMAs, but would not be mapped by the proposed District Map Amendment. Residential Townhouse Floating zones would be available for future townhouse development.

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24 Section 3.4.4.C.
25 The Planning Board proposes that the RS zone, which is currently also in the agricultural zoning category, should go into the industrial category of zones.
26 The RNC does not allow industrial agricultural uses, resource extraction, and most recreational facilities.
Country Inn zone

Country Inn zoned property would revert to the property’s previous rural or residential zone. Existing country inns would continue to be allowed as a limited use. Any new country inn would be a conditional use. A country inn would be allowed in any house legally existing when the application is filed, without regard to lot size or setbacks. Testimony recommended retaining the C-Inn zone. The Planning Board considered this request but did not agree. The Country Inn zone is the most restrictive zone in the current Ordinance. It only allows a country inn as a principle use. All other allowed uses are essentially accessory to that use. Even a dwelling must be accessory to the country inn.

The PHED Committee agreed with the elimination of the Country Inn zone but not with the idea that existing dwellings could gain approval as a conditional use without needing to meet any standards for minimum lot size, maximum coverage, and minimum setback.

The PHED Committee recommended requiring a conditional use approval for new country inns with the limited use standards that appeared in the Planning Board draft (minimum 2 acre lot size, maximum lot coverage 10%, minimum open space 50%, and minimum setback of 50 feet from the street and 75 feet from any other lot line). The Committee recommended grandfathering both existing and approved but unbuilt country inns.

General Building

Even though non-residential use buildings are not new to residential zones, the PHED Committee recommended deleting the development standards for a general building in the Agricultural, Rural Residential, and Residential zones. Libraries, museums, places of worship, and respite care homes are currently permitted uses in residential zones. Chanceries, philanthropic institutions, medical clinics, large care centers, hospitals (for humans and non-humans), and nursing homes are currently allowed by special exception. The Committee agreed with the following description for the types of buildings to be permitted in the Agricultural, Rural Residential, and Residential zones:

Detached House or a Building for a Cultural Institution, Religious Assembly, Public Use, or a Conditional Use allowed in the zone

Councilmember Elrich, based on the recommendation of Meredith Wellington and Julie Davis, would exclude “Cultural Institutional” as a building type and add text that any building and site design in a residential zone must, to the maximum extent practicable, have the exterior appearance of a detached house.

“Cultural Institutional” is in the land use table as a permitted use in the Residential zones. It is not a building type. Cultural institutions (libraries and museums) are currently allowed and would continue to be allowed without any Planning Board review. A Cultural Institution means:

... any privately owned or operated structure and land where works of art or other objects are kept and displayed, or where books, periodicals, and other reading material is offered for reading, viewing, listening, study, or reference, but not typically offered for sale. Cultural Institution includes a museum, cultural or art exhibit, and library.
The Council could delete “Cultural Institutional” as a permitted land use in Residential zones or make it a conditional use in these zones, and then remove the phrase from the building description. That solution would restrict uses currently allowed in Residential zones. While it would not make existing uses non-conforming, existing Cultural Institutions would not be able to expand.

As for the language stating that “any building in a residential zone must, to the maximum extent practicable, have the appearance of a detached house”, where non-residential uses are allowed as limited uses, building permits would not be reviewed by the Planning Board. A design criterion (the exterior appearance of a detached house) would have no effect. Where non-residential uses are allowed as a conditional use, the proposed code would include the following provision:

Any structure to be constructed, reconstructed, or altered under a conditional use in a Residential Detached zone must be compatible with the character of the residential neighborhood.

Staff does not recommend adding text. A detached house has no legislatively defined appearance. There are no limits on architecture or materials. A detached house may have a flat roof. It can use unpainted aircraft aluminum for siding.

Residential - Land uses

Farming, On-site Farm Market, and Farm Tenant Dwelling

Currently, agricultural uses (farming) and farm tenant dwelling are permitted in the R-200, R-90, R-60 and R-40 zones. The proposed code continues to allow farming as a permitted use. Raising livestock would be allowed if shelter for the livestock meets additional setback requirements. Testimony suggested that these uses were no longer appropriate in small lot residential zones. Farming operations are not compatible next to small lot zones. Staff is unaware of any ongoing farming activity in any of these zones. The Committee recommended prohibiting farm tenant dwellings in small lot residential zones (R-90 through R-40).

Animal Husbandry

Animal husbandry is defined in the Planning Board proposed code as the practice of raising hens, ducks, miniature goats, rabbits or bees (maximum of 8 animals on a 40,000 square foot lot). It is a subset of farming which is and would still be a permitted use in rural zones. Unlike Rural zones, where animal husbandry is a permitted use, animal husbandry in residential zones would be a limited use. The maximum number of animals would be limited to 8 (not counting bees) but may not be more than one animal for every 1,000 square feet of lot area (recommended revision from land area). Roosters would be prohibited. Fencing would be required to contain animals inside the yard. The current setbacks for structures that house animals would be eliminated. Other jurisdictions have reduced or are reconsidering their restriction on suburban chickens. The current code requirements (25 feet from a side yard and 100 feet from a neighboring house) essentially prohibit the use on small lots.

27 Howard County is considering easing restrictions on keeping chickens in urban or suburban settings (from 40,000 square foot minimum lot size requirement to 10,000 square feet). The City of Annapolis gave residents in single-family homes permission last spring to keep up to five hens with the approval of abutting property owners. A group in Baltimore County is trying to muster support to soften the rules there. Arlington is expected to get a recommendation on this issue from a task force on June 11.
Some residents are passionate about this issue. Some see this as an issue of sustainability, pet choice, and an appropriate use for a backyard. To them, the current restrictions are nothing but over-regulation, and they point out that dogs and cats create more noise and pose greater health risks. Other residents want to enjoy their own backyard without hearing, seeing, or smelling their neighbor’s animals or the wild animals that might be attracted to them. To these residents, the current restrictions are warranted.

The provision as proposed in the Planning Board draft could present challenges to DPS. Instead of merely examining the location of a chicken coop and its distance from neighboring houses and a lot line, DPS inspectors would be required to count animals, determine the size of the lot, and determine the existence or non-existence of any roosters. The current provisions essentially prohibit chicken coops on all 6,000 square foot lots and most 9,000 square foot lots. There is the potential for the volume of complaints to go up as the number of residents raising chickens goes up.

Zoning was first deemed permissible by the Supreme Court in the 1926 Euclid v. Amber decision. In that case, Justice Southerland wrote: “A nuisance may be merely a right thing in the wrong place — like a pig in the parlor instead of the barnyard.” The Council needs to decide if a chicken shelter in the backyard is in the right place or if is too close to being a pig in the parlor.

No one testified against beekeeping. If the Council wants to retain setbacks for chicken coops, it could have more permissive standards for beehives. 28

The Committee’s initial recommendation was to essentially accept the Planning Board’s recommended relaxation of the rules for chickens; however the Committee reversed itself after hearing Dr. Tillman’s concern for the spread of salmonella.

**The PHED Committee recommended removing the “animal husbandry” land use to make the proposed code no different than the current code; Farming would be a permitted use in all Residential zones, but a provision in Article 59-4 for fowl would mirror the current code:**

Accessory building or structure for housing animals or fowl. Any accessory building or structure used for the housing, shelter or sale of animals or fowl other than a household pet must be located in a rear yard ... 25 feet from a lot line and 100 feet from a neighboring house.

The number of animals permitted on any lot would not be limited. Staff believes that the current provision for “pets” is a problem that the Council should correct. If the Council intends to exclude the possibility of chickens as pets, it should be clear. If the Council intends to allow chickens as pets then that exception will be used by chicken owners to the maximum extent possible.

Councilmember Riemer recommends retaining animal husbandry as a land use with the following definition and standards:

Animal Husbandry
1. Defined
Animal Husbandry is the practice of raising domesticated animals for the purpose of food production, as a hobby, or as pets.

28 To allow beekeeping in all zones, Urban Farming could be modified so that the limited use standard requiring a 2,500 square foot property does not apply to the keeping of bees, and the Urban Farming use could be extended to the IH zone (where agricultural uses are currently permitted).
2. Use Standards

Where Animal Husbandry is allowed as a limited use, it is subject to the following standards:

a. Any accessory structure used to house bees, hens, ducks, or adult miniature goats must meet the setback requirements of an accessory structure for the zone.

b. One miniature goat may be kept for every 2,000 square feet of land area with a maximum of two adult miniature goats. One hen or duck may be kept for every 1,000 square feet of land area, and not more than 10 animals are allowed per lot.

c. Hens and ducks must be contained within a fenced enclosure, or the perimeter of the property must be adequately fenced to prevent escape, with a minimum of 15 square feet of secure space per animal.

d. Roosters are prohibited.

e. In the CRN, CRT, CR, GR, NR, LSC, EOF, IL, IM, and IH zones, only bees are allowed.

Councilmember Riemer's recommendation would allow beehives with a 5 foot setback from a lot line. Assuming Councilmember Riemer's amendment is not approved by the Council, Councilmember Eirich recommends excluding beehives from the structure that must be 25 feet from a lot line and 100 feet from a neighbor's house.29

Community Garden

This use would allow a group of people to grow plants, fruits, vegetables, and grain. It would not allow sales on-site, although sales may be allowed off-site under “Seasonal Outdoor Sales” or Agricultural vending. It is not a new use to residential zones because agricultural uses are currently permitted.

Seasonal Outdoor Sales

Currently Christmas tree sales are a permitted use in residential zones between December 5 and December 25. ZTA 13-04 would expand that idea to allow the seasonal sale of farm products offered annually for a limited time (pumpkins and evergreen trees). The use would be limited to property used for non-residential purposes and would generally require that a property front on a primary street or higher. Sales at a religious institution would not be required to be on a primary road. The current restrictions on Christmas tree sales in the RE-2C zone are not included in the proposed text. It will be a challenge for DPS inspectors to determine if a use is seasonal when the duration of sale in any season is not limited.

The PHED Committee recommended adding limited use standards to Seasonal Outdoor Sales. A temporary permit would only be allowed for a maximum of 45 days and a maximum of 2 permits per site annually. A plan demonstrating adequate traffic circulation would be required, and obstructions that adversely affect visibility would be prohibited. Unique conditions would apply to Christmas tree sales: Evergreen trees may only be sold beginning the first Saturday following Thanksgiving Day through December 24th, and are exempt from other Seasonal Outdoor Sales use standards.30

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29 Accessory building or structure for housing animals or fowl. Any accessory building or structure used for the housing, shelter or sale of animals or fowl other than a household pet and a beehive must be located in a rear yard ... 25 feet from a lot line and 100 feet from a neighboring house.

30 Section 3.2.12.B.
Agricultural Vending

This use is currently allowed only in zones with larger minimum lot sizes (RE-2 through R-60 zones). Agricultural vending incorporates current standards in a footnote into limited use standards (must be located on a 2 acre non-residential site, frontage on a 4 lane road) and expands use to the R-40 and more dense residential zones where land is being farmed. The seller must be a farmer (certified as an agricultural producer under Chapter 47).

This would be a change from the current code, which allows Agricultural Vending as a P through the R-60 zones.

Councilmember Berliner recommends requiring frontage on a 2 lane road and not a 4 lane road.

Farm Market, On-site

Unlike Agricultural Vending, this use is limited to active farms. No more than 25% of produce may be grown off-site.\(^{31}\)

Councilmember Elrich, based on the recommendations of Meredith Wellington and Julie Davis, would prohibit farm markets on small lots (all lots ½ acre or less).

Currently, farm markets are permitted in the RE-2, RE-2C, RE-1 and R-200 zones.

Veterinary Hospitals and Animal Boarding Place

For Veterinary Hospitals, the Planning Board recommends reducing the setbacks from 200 feet to 75 feet for an exterior exercise area and expanding the hours that outdoor care would be allowed. Currently, outdoor activity, including exercise, is prohibited for Veterinary Hospitals between 6:00 pm and 8:00 am, and there are two standards for noise. Any building with an animal must mitigate sound to 40 dBA outside, measured 10 feet from the structure, and the sound at the nearest receiving property line must not exceed 60 dBA. ZTA 13-04 would only prohibit outdoor exercise between 9:00 pm and 7:00 am. Allowable noise level during the day would only be measured at the property line (60 dBA). Animal Boarding Places would allow identical increases in noise and an expanded time period for outdoor exercise. The setback would also be reduced from 75 feet to 50 feet.

Consistent with the current code, a veterinary hospital is a conditional use in all residential zones, but animal boarding is only allowed as a conditional use in the R-200 and larger lot zones. Animal Boarding and Care is a use for the benefit of healthy animals and their owners. Whereas veterinary hospitals are limited by the number of veterinarians in the County, there is no limit to the potential number of animal boarding establishments. There are more specific requirements for animal boarding

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\(^{31}\) The provision in code for getting a vendor license to sell produce along a road is different from the proposed provision in that it requires produce to be regionally grown: § 47-2(c):

A vendor who is a certified producer under standards set by regulation under method (2) may sell fresh produce on the right-of-way of any public road in locations and at times of the day that will not affect public safety. In this Section, “fresh produce” means:

1. regionally grown fresh fruit, vegetables, herbs, cut flowers, small trees, and plants; and
2. non-potentially hazardous prepackaged goods and eggs approved by the Department of Health and Human Services.
use than for an animal hospital regarding setbacks, acoustics, and animal waste. For these reasons, animal boarding is a prohibited use in small lot single-family zones.

The PHED Committee recommended amending 3.5.1.B. Animal Boarding and Care, replacing the proposed 50 foot setback with 75 feet.

Residential Care

There are only 2 uses in the R-60 and R-90 zones that currently require a special exception allowed by right under the proposed draft. One is a hospice care facility. Under the current code and State law, some group homes with up to 8 people must be allowed by right in single-family zones. The Planning Board’s recommendation grouped other care facilities (respite care home, adult foster care home) in R-60 and R-90 zones (respite care home, adult foster care home) with the small group home and renamed the use Residential Care Facility (up to 8 persons). A hospice care facility that houses 8 or fewer persons (currently allowed by special exception) is also grouped into this category because the impacts would be similar to that of a group home. This is a change that has not met with any opposition thus far.

Testimony suggested requiring a minimum distance between care facilities. Imposing any type of spacing requirement for some small group homes (those for the developmentally disabled) would violate State law; a small group home must be treated in the same manner as a single-family residence. A hospice care facility, or any other type of residential care facility with more than 9 persons, would be subject to the conditional use process and the use would be evaluated in the context of other nearby conditional uses.

Councilmember Eirich, based on the recommendation of Meredith Wellington and Julie Davis, would retain the current lower numbers (4 or more) for adult foster care that trigger a conditional use.

Day Care

Day care facilities for children in the R-60 and R-90 zones are allowed in the same manner as they are allowed in the existing code. A day care facility for up to 8 children is a permitted use, and a facility for over 8 children is a conditional use. The Planning Board recommended consolidating the existing “Day care facility for more than 4 senior adults and persons with disabilities” use with the day care for

§7-603. Designation as single-family dwelling.
(a) Applicability of section. -- This section applies only to public group homes, nonprofit private group homes, and alternative living units.
(b) Deemed single-family dwelling; location in all residential zones; not subject to special exceptions, conditional use permits, etc. --
(1) To avoid discrimination in housing and to afford a natural, residential setting, a group home or an alternative living unit for individuals with developmental disability:
   (i) Is deemed conclusively a single-family dwelling;
   (ii) Is permitted to locate in all residential zones; and
   (iii) May not be subject to any special exception, conditional use permit, or procedure that differs from that required for a single-family dwelling.
(2) The provision of separately identified living quarters for staff may not affect the conclusive designation as a single-family dwelling under paragraph (1) (i) of this subsection.
(3) A general zoning ordinance, rule, or regulation of any political subdivision that conflicts with the provisions of this section or any rule or any regulation that carries out the purpose of this section is superseded by this section to the extent of any conflict.
children use – thereby not distinguishing care by age – just a broader day care use for any individual. The result of this consolidation would allow a day care facility for 5-8 seniors or disabled persons as a permitted use rather than as a special exception. (Currently, day care for up to 4 seniors or persons with disabilities is a permitted use.) Because all types of day care facilities have similar impacts, the Planning Board and PHED Committee decided this was a welcome simplification to the code.

Councilmember Elrich, based on the recommendation of Meredith Wellington and Julie Davis, would require a conditional use for a day care facility with 5 or more senior adults and persons with disabilities.

**Bed and Breakfast**

A bed and breakfast would be a conditional use in the R-90 and R-60 zones for any number of guest rooms. Where allowed as a limited use, up to 3 guest rooms would be allowed when the lot size is smaller than 2 acres. A guest may stay for a maximum of 14 days for any one visit. Currently, only 2 rooms are allowed in all but the R-60 zone; in the R-60, even 2 rooms currently requires a special exception. Currently, any more than 2 rooms requires a special exception. The proposed text would allow an expansion of the bed and breakfast use in the R-200 and less dense zones without a review of any special circumstances. The parking standards would require 1 parking space for each guest room in addition to the spaces required for the house.

The bed and breakfast uses, Bed-and-breakfast lodging with 1 or 2 guest rooms and Bed-and-breakfast lodging with 3, 4 or 5 guest rooms, have been consolidated in the proposed draft into a new bed and breakfast use that limits the number of guest rooms to 5 rooms. In the R, RC, RNC, RE-2, RE-2C and R-200 zones, a bed and breakfast would be allowed as a limited use. In the current code and in the draft, Bed & Breakfast requires a special exception/conditional use approval in the R-60 and R-90 zones. In the R-200 and larger lot residential zones, Bed & Breakfast is proposed as a limited use, retaining the current non-discretionary special exception standards as the limited use standards. This use must occur in a house and requires the operator of the bed & breakfast to reside in the establishment.

**Self-Storage**

Self-storage containers would be allowed for a limited duration under 3.1.4.A.4.c. This is appropriate for rural and residential zones, but the 30 day limit may not be appropriate for all zones.

**Events to which the general public is invited**

Former Councilmember Ervin asked the Council to discuss how to avoid the conflicts that result from special events in residential neighborhoods where the general public is invited to attend. This issue was raised with the Haunted Garden in Silver Spring. DPS believes the Haunted Garden is an illegal commercial event. That interpretation requires no additional provision in code.

Staff notes that some one-time events require licensing under Chapter 4 of the code, but residential events do not currently require a license. In any event, the County cannot license that which is a zoning violation.

A provision could be written in zoning that says – “any event to which the general public is invited is an illegal use in residential zones”, but that provision would be overly broad. Places of worship, which usually invite the general public, are located in residential zones. If the provision were written to
exclude assemblies for worship from the prohibition, then the Haunted Garden may be advertised as a religious event.

Staff does not recommend zoning changes to address the Haunted Garden issue.

**Rural Zones – Land Uses**

*Playground, Outdoor Area (private)*

Playground, Outdoor Area (private) is a new use for rural and residential zones. It is defined as an outdoor area used for outdoor recreation. Such areas often contain outdoor recreational equipment such as slides, swings, trails, and greenways. As an accessory use to residential development, slides and swings would be allowed. Making it a separate land use would allow the use as a primary use.

Currently, DPS would allow a playground on a separate lot as long as a fee is not charged for the use. When a fee is charged, DPS would consider the use to be a “Recreation and Entertainment Facility” (permitted as a conditional use only in the Rural zone). Free miniature golf would be within the scope of a private outdoor playground. The addition of this land use would not change DPS’ treatment of playgrounds.

Currently, the RNC zone only allows trails, amenities for those trails, or other recreational facilities recommended in the relevant master plan in rural open areas. This was a debated issue when the Council first established the RNC zone. The PHED Committee recommended changes (prohibiting this use in the rural open space in the RNC zone under Article 59-7) to retain the current characteristics of RNC open space.

*Cemetery*

A family burial plot is currently prohibited in the RNC zone, even though a cemetery is allowed as a special exception. ZTA 13-04 would continue to prohibit a family burial plot in the RNC zone.

*Bed and Breakfast*

Currently, a Bed and Breakfast with 2 or fewer rooms is permitted in the R, RC, and RNC zones; with a special exception, up to 5 guest rooms are allowed. ZTA 13-04 would allow a bed and breakfast as a limited use with up to 3 guest rooms when the lot is smaller than 2 acres. The minimum lot size for a bed and breakfast would be the minimum lot size of the zone. On lots 2 acres or larger, 5 rooms would be allowed as a limited use.

*Camp Retreat*

Under the current code, a Camp Retreat, Nonprofit is a permitted use in the RC zone if it existed before April 11, 2005. The Planning Board proposed draft added Campground as a limited use to the RC zone where the limited use standard requires the use to be in existence prior to April 11, 2005. The definition of Campground, however, does not cover all of the structures and activities allowed under the Camp Retreat, Nonprofit use.

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33 §59-C-9.572.
The PHED Committee recommended treating "Camp Retreat, Nonprofit" in the same manner as the existing educational institutions in the AR. Both of these uses under the current code are only allowed if they existed by a particular date. To allow these uses, the Committee recommended changes to Section 3.1.2.

CR Zone

Applicability

Currently the CRN, CRT, and CR zones can only be applied when specifically recommended by an approved and adopted master or sector plan, and only by sectional map amendment.\(^{34}\) This limitation on applying these zones is nowhere to be found in ZTA 13-04. The CR, CRN, and CRT zones would be used to replace: C-T, C-4, HM, RMX zones, MXTC, TOMX, TMX-2, TSR, TSM, MXN, MXPD, and CBD zones. The family of CR zones would also substantially replace: O-M, C-1, and C-2 zones. In the absence of replacing these zones with a new zone on the County's zoning maps, all of these zones would have to be retained, along with their standards, definitions, land uses, and procedures.

Assuming the Council agrees with the PHED Committee's recommendation to defer action on the DMA, the issue of applying the CR zones is not before the Council; however, if the Council does not intend to apply the CR zones to areas without a specific master plan recommendation, then it should retain zones that it will want to apply.

Did the Council make a commitment to only using the CR family of zones when specifically recommended by a master plan? The restriction on using the CR family of zones is in the current code. ZTA 13-04 would replace the entire code. Every line of zoning code is subject to change by this ZTA. When the Council adopted changes to establish the CRT and CRN zones, it said the following in its opinion:

The Council retained the provision that only allowed the application of the CR, CRN, and CRT zones by the specific recommendation of a master plan. In doing so, the Council did not intend to prejudice if that provision might be retained or amended when it considers a rewritten zoning ordinance.

Staff supports the concept of applying CR, CRN, and CRT zones without a master plan change. These zones better conform the height and density recommendations of a master plan to the zone applied. Using the CR zones also allows the elimination of near duplicative mixed-use zones. The delay in adopting the District Map Amendment would allow time to determine if there are occasions where CR zones are inappropriate.

MPDUs

Concern was voiced by some members of the Committee that the CR zones allow many ways for developers to get to their maximum density, and that this works to the detriment of getting MPDUs over

\(^{34}\) Sec. 59-C:15.13.
the required minimums. The Committee made recommendations concerning MPDUs with regard to public benefit.

Points, FAR calculations, and height limits would be as follows:

- Revise public benefit points to grant 12 points for every 1% of MPDUs greater than 12.5%
- Above 12.5% MPDUs – do not count FAR or height to extent required to provide MPDUs
- Above 15% MPDUs – do not count any of the FAR used for MPDUs and require one less public benefit category
- Above 20% MPDU – no other public benefit point category need be satisfied

One of the previously touted benefits of CR zones when they were established was honesty in zoning. With the changes listed above, the new zones would no longer state a maximum FAR. The Planning Board’s and Committee’s recommendation to accommodate MPDUs would again be in excess of stated maximums. The same provision can be accomplished by increasing the stated FAR and height but only allowing the marginal increase to the extent that MPDUs are provided in excess of minimum requirements.

The Planning Department endorses giving developers additional points, FAR, and height as an incentive to provide additional MPDUs, although the Department has a concern that allowing more than 20% MPDUs to fulfill the entire public benefit requirement could have unintended negative consequences from an urban design standpoint.

All optional method projects in the CR and CRT zones require a developer to provide public benefit. The CRT and CRN zones were established in October 2011, and the issue of MPDU incentives within the point structure was addressed by the Committee. The Committee majority at that time recommended increased incentives for MPDUs above 12.5% by recommending a shorter list of public benefits for projects zoned CR or CRT. The Council did not approve that recommendation.

The Planning Board took a different approach. The Planning Board recommended reducing the point value of 20 out of 34 current non-MPDU public benefits. This has the effect of increasing the relative value of the benefits that did not reduce in value, including providing MPDUs above the minimum required.

The Planning Board recommended a distinction between areas zoned CR or CRT by a master plan recommendation and those areas that get those zones by the application of a DMA. The latter would be designated with a “T” and would be entitled to a 22% density bonus for MPDUs in excess of the standard 12.5% requirement, just as they have currently. This is in recognition of the fact that when these properties were zoned pursuant to a master plan, the appropriate zone was chosen with the knowledge that densities could increase by 22 percent under the County’s MPDU law. Properties that were classified in a CR zone by master plan were given an individualized density limit that was not intended to increase to provide an MPDU density bonus. The proposals now in front of the Council would allow these properties to exceed their stated FAR and building height limits to the extent necessary to accommodate MPDUs exceeding 12.5% of the number of residential units.

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35 Planning Staff demonstrated that very few developers actually chose to provide more than the required minimums before the CR zones were adopted. MPDUs in excess of the required 12.5% are most likely in developments that do not have structured parking.

36 Section 2.1.6.A.6.
Scaling the number of required Public Benefit Points

The more points required for an optional method project, the more interest a developer may have in obtaining points by providing more MPDUs. The Planning Board recommended scaling the public benefit points required based on the size of the project or the FAR. This change was prompted by concern that very large developments provide the same number of public benefit points as some more modest projects.

<table>
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<tr>
<th>Zone</th>
<th>Tract Size OR Max Total FAR</th>
<th>Public Benefit Points (min)</th>
<th>Number of Benefit Categories (min)</th>
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<tr>
<td></td>
<td>≥ 1,250,000 SF OR ≥ 3.5 max FAR</td>
<td>75</td>
<td>4</td>
</tr>
<tr>
<td>CR</td>
<td>&lt; 10,000 SF OR &lt; 1.5 max FAR</td>
<td>50</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>10,000 SF to &lt; 1,250,000 SF OR 1.5 to &lt; 3.25 max FAR</td>
<td>100</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>≥ 1,250,000 SF OR ≥ 3.5 max FAR</td>
<td>125</td>
<td>5</td>
</tr>
</tbody>
</table>

The Planning Board would use FAR and GFA to determine if a project should be required to provide more public benefit points. An FAR of 3.5 or greater is not uncommon. Many projects in the Bethesda Central Business District are 4.0 FAR. A project of 1.25 million square feet of floor area (Montgomery Mall includes approximately 1.5 million square feet of floor area) is uncommon.

For the CRT zone, projects over 1,250,000 square feet or 3.5 maximum FAR would be required to provide 75 public benefit points in 4 categories. For the CR zone, projects over 1,250,000 square feet or 3.5 maximum FAR would be required to provide 125 public benefit points in 5 categories.

Public Benefit Points for each category

The Planning Board draft recommended relatively minor changes from the Council approved CR, CRT, and CRN zones. The Committee majority recommends a reduced set of public benefit classification and public benefit points, with more points and other considerations for MPDUs above 12.5%. The non-MPDU provisions recommended by the Committee were previously reviewed and rejected by the Council when it established the CRN and CRT zones.

It should not go unnoticed that the Planning Board proposed 4 new benefits: Enhanced Visitability for Seniors or the Disabled; Workforce Housing; Enhanced Recreation Facilities; and TDRs. The split of

37 Under the current code, a different number of public benefit points is required for the CR zone (100) than for the CRT Zone (50). Projects less dense than 1.5 FAR or smaller than 10,000 square feet of gross floor area would require half the number of points otherwise required. All projects greater than 10,000 square feet of gross floor area require the same number of points.
the “Energy and Conservation” benefit into 2 parts would increase the total amount of possible benefit points for this use from 15 to 25.

<table>
<thead>
<tr>
<th>Changes in Public Benefit Points by Category</th>
<th>Current Code</th>
<th>Planning Board Draft</th>
<th>PHED Committee Recommendation 2011</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Major Public Facilities</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>LSC</td>
<td>n/a</td>
<td>20</td>
<td>n/a</td>
</tr>
<tr>
<td>EOF or CRT</td>
<td>40</td>
<td>40</td>
<td>40</td>
</tr>
<tr>
<td>CR</td>
<td>70</td>
<td>70</td>
<td>70</td>
</tr>
<tr>
<td><strong>Transit Proximity</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>LSC</td>
<td>n/a</td>
<td>0-10</td>
<td>n/a</td>
</tr>
<tr>
<td>EOF or CRT</td>
<td>7.5-25</td>
<td>0-25</td>
<td>5-15</td>
</tr>
<tr>
<td>CR</td>
<td>15-50</td>
<td>2.5-50</td>
<td>10-25</td>
</tr>
<tr>
<td><strong>Connectivity and Mobility</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Advance Dedication</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>LSC</td>
<td>n/a</td>
<td>8</td>
<td>n/a</td>
</tr>
<tr>
<td>EOF or CRT</td>
<td>30</td>
<td>15</td>
<td>0</td>
</tr>
<tr>
<td>CR</td>
<td>30</td>
<td>30</td>
<td>0</td>
</tr>
<tr>
<td>Minimum Parking</td>
<td>10</td>
<td>10</td>
<td>20</td>
</tr>
<tr>
<td>Neighborhood Services</td>
<td>15</td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>Public Parking</td>
<td>25</td>
<td>25</td>
<td>20</td>
</tr>
<tr>
<td>Through-Block Connections</td>
<td>20</td>
<td>15</td>
<td>0</td>
</tr>
<tr>
<td>Transit Access or Streetscape Improvement</td>
<td>n/a</td>
<td>20</td>
<td>(combined)</td>
</tr>
<tr>
<td>Transit Access</td>
<td>20</td>
<td>n/a</td>
<td>5</td>
</tr>
<tr>
<td>Streetscape Improvement</td>
<td>20</td>
<td>n/a</td>
<td>10</td>
</tr>
<tr>
<td>Trip Mitigation</td>
<td>20</td>
<td>15</td>
<td>5</td>
</tr>
<tr>
<td>Way-Finding</td>
<td>10</td>
<td>5</td>
<td>0</td>
</tr>
<tr>
<td><strong>Diversity of Uses and Activities</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Adaptive Buildings</td>
<td>15</td>
<td>10</td>
<td>0</td>
</tr>
<tr>
<td>Affordable Housing</td>
<td>40</td>
<td>40</td>
<td>40</td>
</tr>
<tr>
<td>Care Centers</td>
<td>20</td>
<td>20</td>
<td>15</td>
</tr>
<tr>
<td>Dwelling Unit Mix</td>
<td>10</td>
<td>10</td>
<td>5</td>
</tr>
<tr>
<td>Enhanced Accessibility for Seniors or the Disabled</td>
<td>20</td>
<td>15</td>
<td>20</td>
</tr>
<tr>
<td>Enhanced Visitability for Seniors or the Disabled</td>
<td>n/a</td>
<td>15 (new)</td>
<td>n/a</td>
</tr>
<tr>
<td>“Live/Work”</td>
<td>15</td>
<td>10</td>
<td>0</td>
</tr>
<tr>
<td>Small Business Opportunities</td>
<td>20</td>
<td>20</td>
<td>10</td>
</tr>
<tr>
<td>Workforce Housing</td>
<td>n/a</td>
<td>20 (new)</td>
<td>n/a</td>
</tr>
<tr>
<td><strong>Quality Building and Site Design</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Architectural Elevations</td>
<td>20</td>
<td>20</td>
<td>0</td>
</tr>
<tr>
<td>Enhanced Recreation Facilities</td>
<td>n/a</td>
<td>10 (new)</td>
<td>n/a</td>
</tr>
<tr>
<td>Exceptional Design</td>
<td>10</td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>Historic Resource Protection</td>
<td>20</td>
<td>20</td>
<td>15</td>
</tr>
<tr>
<td>Public Open Space</td>
<td>20</td>
<td>20</td>
<td>15</td>
</tr>
<tr>
<td>Public Art</td>
<td>15</td>
<td>15</td>
<td>10</td>
</tr>
<tr>
<td>Changes in Public Benefit Points by Category</td>
<td>Current Code</td>
<td>Planning Board Draft</td>
<td>PHED Committee Recommendation 2011</td>
</tr>
<tr>
<td>---------------------------------------------</td>
<td>--------------</td>
<td>----------------------</td>
<td>-------------------------------------</td>
</tr>
<tr>
<td>Structured Parking</td>
<td>20</td>
<td>20</td>
<td>20</td>
</tr>
<tr>
<td>Tower Step-back</td>
<td>10</td>
<td>5</td>
<td>(included in Exceptional Design)</td>
</tr>
<tr>
<td>Protection and Enhancement of the Natural Environment</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Building Lot Termination</td>
<td>30</td>
<td>30</td>
<td>30</td>
</tr>
<tr>
<td>Building Reuse</td>
<td>100</td>
<td>100</td>
<td>100</td>
</tr>
<tr>
<td>Cool Roof</td>
<td>10</td>
<td>5</td>
<td>0</td>
</tr>
<tr>
<td>Energy Conservation and Generation</td>
<td>15</td>
<td>n/a (split)</td>
<td>0</td>
</tr>
<tr>
<td>Energy Conservation</td>
<td>n/a</td>
<td>10</td>
<td>n/a</td>
</tr>
<tr>
<td>Energy Generation</td>
<td>n/a</td>
<td>15</td>
<td>n/a</td>
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<tr>
<td>Habitat Preservation and Restoration</td>
<td>20</td>
<td>20</td>
<td>0</td>
</tr>
<tr>
<td>Recycling Facility Plan</td>
<td>10</td>
<td>5</td>
<td>0</td>
</tr>
<tr>
<td>Transferable Development rights</td>
<td>n/a</td>
<td>20</td>
<td>0</td>
</tr>
<tr>
<td>Tree Canopy</td>
<td>15</td>
<td>10</td>
<td>0</td>
</tr>
<tr>
<td>Vegetated Area</td>
<td>10</td>
<td>5</td>
<td>0</td>
</tr>
<tr>
<td>Vegetated Roof</td>
<td>15</td>
<td>10</td>
<td>0</td>
</tr>
<tr>
<td>Vegetated Wall</td>
<td>10</td>
<td>5</td>
<td>0</td>
</tr>
</tbody>
</table>

Transit Proximity Public Benefit – PHED proposed

<table>
<thead>
<tr>
<th>Proximity</th>
<th>Abutting or Confronting</th>
<th>Within ¼ mile</th>
<th>Between ¼ and ½ mile</th>
<th>Between ½ and 1 mile</th>
</tr>
</thead>
<tbody>
<tr>
<td>Transit Level</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>CRT</td>
<td>25</td>
<td>15</td>
<td>20</td>
<td>12.5</td>
</tr>
<tr>
<td>CR</td>
<td>50</td>
<td>30</td>
<td>40</td>
<td>25</td>
</tr>
</tbody>
</table>

Transit Proximity Public Benefit – Planning Board Draft

(trans last 2 rows repeat current code for CRT and CR)

<table>
<thead>
<tr>
<th>Proximity</th>
<th>Abutting or Confronting</th>
<th>Within ¼ mile</th>
<th>Between ¼ and ½ mile</th>
<th>Between ½ and ¾ mile</th>
</tr>
</thead>
<tbody>
<tr>
<td>Transit Level</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>LSC</td>
<td>10</td>
<td>5</td>
<td>2.5</td>
<td>8</td>
</tr>
<tr>
<td>EOF or CRT</td>
<td>25</td>
<td>15</td>
<td>5</td>
<td>20</td>
</tr>
<tr>
<td>CR</td>
<td>50</td>
<td>30</td>
<td>10</td>
<td>40</td>
</tr>
</tbody>
</table>

Councilmember Floreen recommends retaining the points as they currently exist in the code, with the PHED Committee recommended amendments for MPDUs. Under this recommendation, the Council would approve the second column in the comparison table above. It would also delete the proposed variable number of points for large projects.
The Town of Kensington objected to the Committee’s proposed reduction in points by resolution. In their opinion, development in Kensington is sufficiently challenging without eliminating less costly but desirable public benefits. The Town’s resolution triggers the need for an affirmative vote of 6 members of the Council, if the Council approves the PHED Committee recommendation. Approving Councilmember Floreen’s revision would only require 5 votes.

The Council could avoid both the need for a supermajority and Kensington’s objections and still approve a reduced set of public benefit points for new development. If the reduced set of benefits only applied to areas not currently zoned CR or CRT, it would NOT affect development deprived areas such as Kensington, Takoma Park, and Long Branch.

Councilmember Elrich, based on the recommendation of Meredith Wellington and Julie Davis, recommends restricting public benefit points for major public facilities to only those facilities named in the applicable master plan. As currently drafted, the Planning Board would have the discretion to award points for public facilities that it found to be “at least as beneficial” as those named in the applicable master plan.

This proposed amendment would limit the discretion granted to the Planning Board. Changed circumstances from the adoption of a master plan would have to be addressed by a master plan amendment.

### Employment/Industrial Zones

#### New Employment Zones

Section 2.1.7.A establishes 3 new Employment zones: Neighborhood Retail (NR); General Retail (GR); and Employment Office (EOF). Life Science Center (LSC) is an existing zone that would be amended.

The stated intent of the NR, GR, EOF, and LSC zones is to:

a) implement the recommendations of the applicable master plans;
b) target opportunities for employment, technology, and general commercial uses;
c) allow a flexible mix of uses, densities, and building heights appropriate to various settings to ensure compatible relationships with adjoining neighborhoods; and
d) establish minimum requirements for the provision of public benefits.

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38 Town of Kensington Resolution 17-2013 adopted October 21, 2013.
39 Maryland Code – Land Use Article §24-201. Town of Kensington.
(a) Concurrent jurisdiction to enforce zoning laws. -- The Town of Kensington has concurrent jurisdiction to enforce the county zoning laws within its boundaries.
(b) Vote to overturn zoning resolution. -- A two-thirds majority vote of both the district council and the county planning board is required to take any action relating to zoning within the Town of Kensington that is contrary to a resolution of the Mayor and Town Council.
(c) Vote to overturn land use resolution. -- A two-thirds majority vote of the county planning board is required to take any action relating to land use planning within the Town of Kensington that is contrary to a resolution of the Mayor and Town Council.
40 §2.1.7.B.
On the zoning map, each GR, NR, LSC, and EOF zone classification would be followed by the maximum total FAR allowed and the symbol H, which is followed by the maximum building height in feet allowed.

The maximum FAR and building height is very much like the CR family of zones, except that there is no designation for a maximum of commercial FAR or a number for a maximum of residential FAR. The maximum commercial FAR is the same as the total FAR. The maximum of residential FAR in these zones is always 30% of total FAR. Unlike the CR family of zones, the maximum FAR can always be achieved without using any residential density. If residential is provided, it cannot exceed 30% of the floor area in the development.

Employment zones would allow up to 30% percent of the FAR for housing without a special exception. These zones, when compared to the zones they would be replacing, would also add agricultural uses to the list of allowed uses. A number of other uses are common additions among all zones. It is fair to say that all of these zones would allow a broader mix of uses than the zones that they would replace. The GR and NR zones allow flexibility in building, circulation, and parking lot layout.

Just like the CR family of zones, there would be an optional method process for the EOF and LSC zones that require public benefit points. The number of points required increases with the size or FAR of the proposed project. The appropriate table of requirements is printed with each zone.

The differences between the current standards and the new standards depend upon how the current zoning would be translated into new zoning

New industrial zones

The proposed code would create 3 Industrial zones: Light Industrial (IL), Moderate Industrial (IM), and Heavy Industrial (IH). Each IL, IM, and IH zone classification would be followed by a number and symbol, H, which would be followed by another number where the number following the classification is the maximum total FAR allowed, and the number following the H is the maximum building height in feet allowed.

The IL, IM, and IH zones will be applied on the Zoning Map by showing, for each property classified, the maximum total FAR and maximum height (H). Each unique sequence of maximum total FAR and maximum height (H) is a zone under the following limits:

<table>
<thead>
<tr>
<th>Zone</th>
<th>Total FAR (max)</th>
<th>Height (max)</th>
</tr>
</thead>
<tbody>
<tr>
<td>IL</td>
<td>0.25 to 1.5</td>
<td>25’ to 50’</td>
</tr>
<tr>
<td>IM</td>
<td>0.25 to 2.5</td>
<td>25’ to 120’</td>
</tr>
<tr>
<td>IH</td>
<td>0.5 to 4.0</td>
<td>35’ to 200’</td>
</tr>
</tbody>
</table>

The Industrial zones, like the Employment zones, do not specify a mix of commercial and residential density allowed – only total FAR and maximum height.

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41 Community Garden, Urban Farming, Animal Husbandry, Farm Market, On-site Agricultural Vending, and Seasonal Outdoor sales.
As a general matter, the proposed code would add allowable land uses and would change some land uses that require special exceptions to be limited uses.

Commercial Building Heights

The height of a building in the Agricultural, Rural Residential, and Residential zones would be calculated along the front of the building, using the average of the highest and lowest elevation along pre-development or finished level of ground, whichever is more restrictive. It does not matter if the lot is terraced. The height measurement for employment and mixed-use zones is different.

Height of building: Building height is measured from the level of approved curb grade opposite the middle of the front of a building to the highest point of roof surface of a flat roof or to the mean height level between eaves and ridge of a pitched roof. If a building is located on a terrace, the height may be increased by the height of the terrace. On a corner lot exceeding 20,000 square feet, the height of the building may be measured from either adjoining curb grade. For a lot extending through from street to street, the height may be measured from either curb grade. In the case of a building set back from the street line 35 feet or more, the building height is measured from the average elevation of finished ground surface along the front of the building.

The only change between this language and the current code is requiring the measurement of height from “curb” grade rather than “approved street grade”. The Planning Board believes that it is appropriate to give non-residential development more height flexibility than residential development. **The Committee was convinced that retaining 2 different ways to measure height is a good idea.** The Committee would also allow properties that are not currently recommended for CR, CRT, or CRN zones in adopted master plans (properties whose zoning would be “translated” to these zones) to exceed the stated maximum in the zone under the following provision:

Height on a portion of a building may be increased above the number following the H on the zoning map, so long as the average height of the building is no greater than the maximum height allowed by the mapped zone. Average building height is calculated as the sum of the area of each section of the roof having a different height multiplied by that height, divided by the total roof area. Height is measured at the midpoint of each roof section along each frontage.

Councilmember Elrich recommends defining height in Chapter 1 as follows: “Height: See Building Height; also see Section 4.1.7.C. Height.”

This was not raised to the Committee’s attention. Staff has no objection.

Overlay Zones

Every so often (16 times in the current code), a master plan found that the 120 zones in the current code were inadequate to regulate land uses or development characteristics (density, impervious surface, building height, setbacks, parking, or impervious surface) in a manner that would accomplish the goals of the master plan. When the menu of zones had nothing that came close to the plan’s aspirations, the
Planning Board would propose a new zone. When an existing zone failed to meet the aspirations of a master plan, the Planning Board persuaded the Council to create an overlay zone.

As the name implies, an overlay zone is placed on top of an underlying zone. An overlay zone may modify any aspect of the underlying zone but need not change any standard. From a legal perspective, an overlay zone is a new zone. An overlay zone, although generally more restrictive than the underlying zone, could be more permissive than the underlying zone.

The proposed code retains most overlay zones, adds 4 new overlay zones, and deletes 4 current overlay zones. The zones are established in Sec. 2.1.9, described in Division 4.8, and some zone aspects are detailed in Division 6.3.

The following overlay zones currently exist and will be retained:

- Burtonsville Employment Area
- Chevy Chase Neighborhood Retail
- Neighborhood Retail (renamed Community-serving Retail so as not to be confused with the Neighborhood Retail Euclidean zone.)
- Takoma Park/East Silver Spring Commercial Revitalization
- Fenton Village
- Garrett Park
- Ripley Street/South Silver Spring
- Rural Village Center
- Sandy Spring/Ashton Rural Village
- Upper Paint Branch
- Upper Rock Creek

Some overlay zones are proposed to be added:

- Regional Shopping Center
- Transferable Development Rights (TDRs)
- Germantown Transit Mixed-Use
- Twinbrook

The following Overlay zones are not recommended for inclusion in the new code:

- Wheaton Central Business District
- Arlington Road District of Bethesda CBD
- US 29/Cherry Hill Road Employment Area
- Chevy Chase Comparison Retail

Former Councilmember Ervin requested consideration of protection for residential areas that are planned to have a Purple Line stop. These communities assert that it was promised that zoning increases will not be approved due to a planned Purple Line Station.

Any zoning change requires that the Council find the change to be in the public interest. If the Council believes that it would be tempted to rezone these stops in the middle of purely residential communities,
then it might want to consider the proposal. It would be necessary to create the overlay in text in order to be able to map it in the DMA.

An overlay zone could accomplish that objective. Overlay zones are generally established by the recommendation of the master plan. There are no master plans that recommend an overlay zone for residential areas with planned Purple Line stops.

**Floating Zones**

*Introduction to Floating Zones*

Euclidian zones are generally mapped by the County to implement Master Plans. Euclidian zones do not require owner consent. A floating zone includes standards that must be met before that zoning district can be approved for an existing piece of land. An owner must make an application for a zoning map amendment. The zone does not land on the ground until the application is approved. In that respect, the zone “floats” in the ether until it lands on the ground by the Council’s approval of a particular application.

It is much more difficult to get approval for a local map amendment for a Euclidian zone than to get a floating zone application approved. A successful Euclidian zone application requires proof of a change in the neighborhood or a mistake in the original zoning approved by the Council. A successful floating zone application only requires conformance with the applicability standards and approval by the Council. In the past 6 years, no Euclidian local map amendment applications in the County were applied for or approved.

The Court of Appeals described a floating zone as follows:

A floating zone is a special detailed use district of undetermined location, a district in which the proposed kind, location, size and form of structures must be pre-approved, and which, like a special exception use, is legislatively pre-deemed compatible with the areas in which it may thereafter be located on a particular application, provided specified standards are gratified and actual incompatibility is not revealed.

[A] floating zone is subject to the same conditions that apply to safeguard the granting of special exceptions. special precautions are to be applied to insure that there will be no discordance with existing uses.

Floating zones can be used to avoid the Court devised “change/mistake rule” that restricts the approval of Euclidian zone local map amendments. It is a method to assure zoning flexibility without a requirement for an updated master plan.

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42 In Maryland, it is presumed that the original zoning was well planned and designed to be permanent; it must appear, therefore, that in the absence of mistake in the original zoning, the character of the neighborhood was changed to an extent which justifies the amendatory action. Wakefield v. Kraft, 202 Md. 136, (1953). Thus, there is a strong presumption of correctness of original zoning and of comprehensive rezoning. Stratakis v. Beauchamp, 268 Md. 643 (1973).


Current Floating Zones

When the County Attorney's Office held the opinion that a requirement for site plan approval could not be imposed except by the consent of the owner, floating zones were used in some instances (RT zones in particular) to assure that such consent was given. Since that time, the Council has required site plan approval in a variety of Euclidian zones.

The floating zones in the current Zoning Ordinance are not obvious. The Ordinance lacks a table that calls a floating zone a floating zone; they are identifiable only by their requirements. There are 22 floating zones. Some floating zones (R-4 plex and Mineral Resource Recovery) have never landed on the ground. There are three zones that require a specific master plan recommendation to be applied (LSC, Mineral Resource Recovery, and Rural Service); another two zones require a master plan recommendation for mixed-use without requiring the named zone (MXPD, and MXN). Six zones (TSR, TSM, RT, CT, C-P, and C-3) require a master plan recommendation or specific attribute (current zoning, distance from transit). Fifteen zones have a minimum area for an application. Ten floating zones require a minimum frontage on an arterial road or better.

There have been 50 local zoning map applications in the past 10 years. The greatest number of applications was for a PD zone (15); the second greatest number was for RT zoning (14). There were 10 applications for TSM (3) and TSR (7) zones. The last notable floating zone is OM (5).

Most of the new zones created in the past decade have been Euclidian zones. Floating zones have proved difficult to apply, even when recommended by the master plan. The Planning Board was more interested in getting the master plan recommended zoning on the ground. The use of floating zones that require applications by the owner did not result in uniformly getting the zoning recommended by the master plan.

Purpose

Nothing is more important for a floating zone than its purpose. The proposed code, as recommended by the PHED Committee, has a separate purpose clause for each of the 4 families of floating zones. The proposed floating zones are for all uses in the land use table: Residential (detached through high-rise), Commercial/Residential, Employment, and Industrial. This is a remarkable scope for a single purpose clause. It speaks to the proposed code's quest for flexibility.

Many jurisdictions use floating zones to provide for unforeseen circumstances. The American Planning Association had this comment on floating zones:

Floating zones can be used to plan for future land uses that are anticipated or desired in the community, but are not confirmed, such as affordable housing, shopping centers, and urban development projects. They can also be used for cluster zoning, planned-unit developments (PUDs), and urban development projects.

A land use law professor put the reasons for a floating zone this way:

A floating zone is a useful tool when the need for the presence of a particular land use is hard to predict. Thus, such zones are used to locate quarries, ... garden apartments, or a bed and breakfast in a single family residential zone. When a particular land use is emerging, or responding to a development market, a floating zone for locating it on a
zoning map is useful when the parcel is large enough, or is configured in such a way that potentially negative effects on neighbors can be minimized with standards pre-set in advance. 45

The APA and Professor Burke did not state the only reasons to use a floating zone, but they are describing the more typical use.

The breadth of floating zones proposed in the new code is equal to the breadth of Euclidian zones. Flexible development standards under the proposed code exist in the Euclidian zones. The floating zones as proposed by the new code would also be flexible to take advantage of development opportunities. Planning Staff believes that, given the difficulty of rezoning in Euclidean zones under the “change or mistake” rule, and given the length of time that elapses before master plans can be redone, such flexibility may well make sense. The PHED Committee recommended additional protections for residential communities. It might go without saying, but flexibility to some property owners is nothing but uncertainty to other residents.

Limitations

The proposed floating zones use the land use and standards of Euclidian zones as the basis for floating zones and the maximum density of the floating zone. With the exception of the Heavy Industrial zone, every Euclidian zone has a floating zone counterpart. There would never be a need to confront the burdens of proving a change or mistake from the current zone when a floating zone is available to accomplish the same objective. In staff’s opinion, Euclidian zone local map amendment applications would be never be used under the proposed code as a practical matter. In the past 10 years there have been only 2 such applications.

The special purpose floating zones (retirement communities, mobile homes, quarries, hotels, and Country Inns) would be absent from the new code. All floating zones would be general under the proposed code. An applicant may voluntarily prohibit specific uses or establish binding elements that restrict proposed uses or the density of development to support the necessary findings for approval.

The Committee recommended restricting the applicability of floating zones by adding conditions and amending the prerequisite provision to protect residential neighborhoods. Most floating zone applications in residential areas would be required to concern property that fronts on a non-residential street or the property must abut or confront a non-residential zone. The particular PHED Committee recommendations follow:

2. Residential Base Zone
   a. When requesting a **Residential Detached** Floating (RDF) zone for a property with a Residential base zone:
      i. [a] If [no] neither commercial uses [are requested and no] nor any increase in density above that allowed by the base zone is requested, there are no prerequisites for an application;
      ii. [b] If a commercial use or an increase in density above that allowed by the base zone is requested, the application must satisfy [at least] a minimum of 2 [of the] prerequisites for each of the [following] categories under Section 5.1.2.D.:

   45 Understanding the Law of Zoning and Land Use Controls, Barlow Burke (2009).
b. When requesting a Townhouse Floating (TF) zone, Apartment Floating (AF) zone, or Commercial Residential Neighborhood Floating (CRNF) zone for a property with a Residential base zone:
   i. The property must front on a nonresidential street or must confront or abut a property that is in a Residential Townhouse, Residential Multi-Unit, Commercial/Residential, Employment, or Industrial zone; and
   ii. The application must satisfy a minimum of 2 prerequisites for each of the categories under Section 5.1.2.D.

c. When requesting a Commercial Residential Floating (CRF) zone, Commercial Residential Town Floating (CRTF) zone, or any Employment Floating zone (NRF, GRF, EOFF, LSCF) for a property with a Residential base zone:
   i. The property must front on a nonresidential street or must confront or abut a property that is in a Commercial/Residential, Employment, or Industrial zone; and
   ii. The application must satisfy a minimum of 2 prerequisites for each of the categories under Section 5.1.2.D.

d. When requesting any Industrial Floating zone (ILF or IMF) for a property with a Residential base zone:
   i. The property must abut a property in an Industrial zone; and
   ii. The application must satisfy a minimum of 2 prerequisites for each of the categories under Section 5.1.2.D.

Section 5.1.2.D contains the amended prerequisites.

Councilmember Elrich would prohibit all non-residential floating zones on land with a residential base zone unless the floating zone is recommended in a master plan and to incorporate the protections of current floating zones in the requirements for residential floating zones. In addition to the current protection of the current floating zones, based on the recommendation of Meredith Wellington and Julie Davis, Councilmember Elrich recommends that the RDF zone only be applied if the property fronts on a non-residential street or abuts or confronts property already zoned for a transitional or non-residential zone.

The following material was provided by Councilmember Elrich in support of his recommendation:

*Purpose of amendment:* To delay the use of non-residential floating zones on residentially zoned land until we better understand the ramifications of the Zoning Rewrite and consider them through the master plan process. Also, to incorporate additional language from the current PD and R-T zones. There are several reasons why this approach is desirable:

- The Zoning Rewrite greatly expands the use of floating zones beyond those in the current zoning code. It proposes three types of residential floating zones, three types of commercial/residential floating zones, four types of employment floating zones, and two types of industrial floating zones. In other words, there are a dozen floating zones not only for existing residential zones but also for the new zones created by the Rewrite. If the zone conversions are being done correctly and the new zones allow significantly more flexibility and mixed uses than before, why are so many floating zones needed to allow further changes to the newly converted zoning maps?
- See Section 5.1.2 Applicability/C for the requirements that apply if a floating zone is not recommended in a master plan. C.2. lists the requirements for a floating zone in a Residential Base Zone. It says that you can apply for a number of floating zones, including nonresidential...
floating zones, if your property fronts on a nonresidential street OR confronts or abuts a property that is in a Residential Townhouse, Residential Multi-Unit, Commercial/Residential, Employment, or Industrial zone (and can meet prerequisites that are still very easy to meet, i.e. sewer service, on a bicycle route, etc. despite PHED Committee attempts to strengthen them). The term “nonresidential street” may give some comfort, until one realizes that anything other than a primary, secondary or tertiary residential street designation would be opened up to floating zone applications, including the following streets and roads that are primarily residential in character: Dale Drive, Forest Glen Road, Dennis Avenue, Arcola Avenue, Kemp Mill Road, Briggs Chaney Road, Norwood Road, Strathmore Avenue, Tuckerman Lane, Bradley Boulevard, Wilson Lane, Muncaster Mill Road, Bowie Mill Road, Brink Road, Wightman Road, West Old Baltimore Road, Clarksburg Road, and Comus Road. As for residential areas that confront or abut commercial, employment, or industrial zones, there are many places throughout the county where abutting or confronting properties that intrude into residential neighborhoods could apply for floating zones – one example is Lorain Avenue in Four Corners, which runs between the Safeway commercial property on University Boulevard West and a residential neighborhood on both sides of Lorain Avenue. In these kinds of circumstances, the application of floating zones would erode the edges.

- We have been told that the new requirements for floating zones are more restrictive than the requirements in the current zoning code. It remains unclear how the rewrite provides greater protections, given the extensive language in the current code that greatly circumscribes the approval of floating zones in residential neighborhoods. The most commonly used floating zones in the current code are the PD (Planned Development), R-T (Residential Townhouse), and O-M (Moderate Intensity Office) zones. Each one is discussed below.

- The PD Zone. See Section 59-C-7.1 for the purpose and applicability of the PD zone. To summarize here, its purpose is “to implement the general plan and the area master plans by permitting unified development consistent with densities proposed by master plans” (emphasis added). It is intended that this zone provide a means of regulating development which can achieve flexibility of design, the integration of mutually compatible uses and optimum land planning with greater efficiency, convenience and amenity than conventional zoning categories. Since many of the purposes of the zone can best be realized with developments of a large scale in terms of area of land and numbers of dwelling units which offer opportunities for a wider range of related and nonresidential uses, it is therefore the purpose of this zone to encourage development on such a scale.” The applicability section 59-C-7.12 states that “no land can be classified in the planned development zone unless such land is within an area for which there is an existing, duly adopted master plan which shows such land for a density of 2 dwelling units per acre or higher” (in other words, densities at R-200 and higher). Section 59-C-7.132. Commercial explains the circumstances under which the district council can approve commercial facilities not indicated on the master plan for the area if they are necessary for the service of the residents of the proposed development and adjacent residential developments. These large-scale visions and ties to master plan compatibility and densities do not appear in the floating zones proposed in the Zoning Rewrite, so this is a change from the current code that may not prove to be compatible with or advantageous to existing residential neighborhoods.

- The R-T Zone. See Section 59-C-1.72, Special regulations. The stated purpose of the R-T Zone “is to provide suitable sites for townhouses (a) in sections of the County that are designated or appropriate for residential development at densities allowed in the R-T zones or (b) in locations in the County where there is a need for buffer or transitional uses between commercial, industrial, or high-density apartment uses and low-density one-family uses.” This section also says that the intent of the zone is “to provide the maximum amount of freedom possible in the design of townhouses and their grouping and layout, to provide the amenities normally
associated with less dense zoning categories, to permit the greatest possible amount of freedom in types of ownership of townhouses, and to prevent detrimental effects to the use or development of adjacent properties or the neighborhood.” This paragraph concludes by saying “the fact that an application for R-T zoning complies with all specific requirements and purposes shall not be deemed to create a presumption that the resulting development would be compatible with surrounding land uses and, in itself shall not be sufficient to require the granting of the application.” There is no comparable language in the floating zone section of the Zoning Rewrite that addresses compatibility or buffering needs, nor is there language indicating no presumption of approval.

- The O-M Zone. See Section 59-C-4.31 for the purpose and development standards. It states that “the purpose of the O-M zone is to provide locations for moderate-intensity office buildings in areas outside of central business districts. It is intended that the O-M zone be located in areas where high-intensity uses are not appropriate, but where moderate intensity office buildings will not have an adverse impact on the adjoining neighborhood. This zone is not intended for use in areas which are predominantly one-family residential in character.” Once again, there is language that makes it clear that the fact that an application complies with all specific requirements and purposes is not sufficient to require the granting of the application. There is no comparable language in the Rewrite that states that moderate intensity office uses are not intended for use in predominantly one-family neighborhoods.

- To summarize, Article 59-5, Floating Zone Requirements in the proposed rewrite establishes a dozen floating zones without offering the same requirements, language, specific standards, and ties to master plans and the general plan found in the current code for the three most widely used floating zones. These changes erode protections for existing residential neighborhoods throughout the county and for that reason, the applicability of floating zones should be tied to the master plan process.
The following table reflects all floating zones in the current code:

<table>
<thead>
<tr>
<th>Zone</th>
<th>Requirement for a specific master plan recommendation</th>
<th>Neighboring zones</th>
<th>Transportation access</th>
<th>Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>R-4 Plex</td>
<td>None – but harmonious in style with adjoining residential bldg.</td>
<td>w/in 1,500 of CBDs or commercial zones</td>
<td>100 ft of arterial frontage</td>
<td>None</td>
</tr>
<tr>
<td>RMH -200</td>
<td>None</td>
<td>None</td>
<td>None</td>
<td>5 acres in MP recommended</td>
</tr>
<tr>
<td>RT</td>
<td>Required or buffer between SF detach and more intense uses</td>
<td>Commercial/multifamily &amp; SF</td>
<td>None</td>
<td>20,000 for RT-12.5 or lower 40,000 for RT 15</td>
</tr>
<tr>
<td>R-H</td>
<td>None</td>
<td>Not detrimental to adjacent property or the general neighborhood</td>
<td>200 feet frontage</td>
<td>40,000 sf</td>
</tr>
<tr>
<td>R-MH</td>
<td>None</td>
<td>Maximize compatibility and adjoining development</td>
<td>None</td>
<td>15 acres</td>
</tr>
<tr>
<td>CT</td>
<td>Required or locational criteria</td>
<td>between one-family residential areas and high-intensity commercial development</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>O-M</td>
<td>None</td>
<td>Not intended in predominantly one-family areas</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>C-P</td>
<td>Required or where “such uses are appropriate”</td>
<td>Low/medium density residential or non-residential</td>
<td>100 feet of frontage on arterial or higher</td>
<td>5 acres</td>
</tr>
<tr>
<td>H-M (hotel-motel)</td>
<td>None</td>
<td>Intend for tracts planned for commercial, (but not CT or C-1 land) industrial or high density residential</td>
<td>None</td>
<td>2 acres</td>
</tr>
<tr>
<td>C-3</td>
<td>Required or abuts/confronts major highway</td>
<td>None</td>
<td>Abuts/ confronts major highway or MP recommendation</td>
<td>None</td>
</tr>
<tr>
<td>C- Inn</td>
<td>None</td>
<td>Rural areas</td>
<td>None</td>
<td>2 acres unless less recommended in MP</td>
</tr>
<tr>
<td>Zone</td>
<td>Requirement for a specific master plan recommendation</td>
<td>Neighboring zones</td>
<td>Transportation access</td>
<td>Size</td>
</tr>
<tr>
<td>--------------</td>
<td>------------------------------------------------------</td>
<td>-------------------------</td>
<td>-----------------------</td>
<td>------------------------------------</td>
</tr>
<tr>
<td>LSC</td>
<td>Required</td>
<td>None</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>PD</td>
<td>None</td>
<td>Must be recommended for residential density 2 units per acre or more</td>
<td>None</td>
<td>Acre sufficient to yield 50 units</td>
</tr>
<tr>
<td>TS</td>
<td>Area must be identified as corridor city</td>
<td>None</td>
<td>None</td>
<td>1,500 acres (unless adjoining other TS land)</td>
</tr>
<tr>
<td>PN</td>
<td>None</td>
<td>None</td>
<td>Major transportation arteries on the perimeter</td>
<td>Minimum number of units yield 450 primary students</td>
</tr>
<tr>
<td>PRC</td>
<td>None</td>
<td>None</td>
<td>None</td>
<td>25 acres</td>
</tr>
<tr>
<td>MXPD</td>
<td>Must recommend mixed-use</td>
<td>None</td>
<td>Readily accessible to a major highway or freeway</td>
<td>20 acres</td>
</tr>
<tr>
<td>MXN</td>
<td>Must recommend mixed-use at neighborhood scale</td>
<td>None</td>
<td>Adjacent to arterial road or higher</td>
<td>20 acres less is recommended in the MP</td>
</tr>
<tr>
<td>PCC</td>
<td>None</td>
<td>None</td>
<td>Frontage/accessible from a major highway</td>
<td>5 acres</td>
</tr>
<tr>
<td>TSR / TSM</td>
<td>Required or existing multifamily/commercial</td>
<td>Adjacent to CBD &amp; multifamily residential is recommended</td>
<td>Within 1,500 feet of metro rail</td>
<td>None</td>
</tr>
<tr>
<td>Mineral</td>
<td>Required</td>
<td>None</td>
<td>None</td>
<td>10 acres</td>
</tr>
<tr>
<td>Resource</td>
<td></td>
<td>Rural</td>
<td>Direct access to a road of arterial or higher classification</td>
<td>None</td>
</tr>
</tbody>
</table>

Of the 26 Council approved floating zones presented in the table below, 18 occurred on property with a single-family detached residential based zone. Fourteen of the re-zonings were from a residential base zone to mixed-use (PD included) or commercial zone. Twelve of the re-zonings shown below were not recommended in a master plan.
<table>
<thead>
<tr>
<th>Opinion #</th>
<th>Existing Zone</th>
<th>New Zone</th>
<th>Abut/Confront Detached Residential</th>
<th>Transitional *</th>
<th>MP Recommendation</th>
</tr>
</thead>
<tbody>
<tr>
<td>G-881</td>
<td>RE-2</td>
<td>PRC</td>
<td>Y</td>
<td>N</td>
<td>N</td>
</tr>
<tr>
<td>G-913</td>
<td>R-60</td>
<td>C-T</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>G-851</td>
<td>R-90</td>
<td>O-M</td>
<td>Y</td>
<td>Y</td>
<td>N</td>
</tr>
<tr>
<td>G-908</td>
<td>R-60</td>
<td>TS-R</td>
<td>Y</td>
<td>Y</td>
<td>N</td>
</tr>
<tr>
<td>G-909</td>
<td>R-10</td>
<td>PD-100</td>
<td>Y</td>
<td>Y</td>
<td>Only part of site</td>
</tr>
<tr>
<td>G-862/863</td>
<td>RT-12.5, R-30, O-M</td>
<td>TS-R</td>
<td>Y</td>
<td>N</td>
<td>Only part of site</td>
</tr>
<tr>
<td>G-892</td>
<td>R-60</td>
<td>RT-12.5</td>
<td>Y</td>
<td>Y</td>
<td>N</td>
</tr>
<tr>
<td>G-619</td>
<td>R-60</td>
<td>O-M</td>
<td>Y</td>
<td>Y</td>
<td>N</td>
</tr>
<tr>
<td>G-861</td>
<td>C-4</td>
<td>PD-44</td>
<td>Y</td>
<td>Y</td>
<td>N</td>
</tr>
<tr>
<td>G-735/784</td>
<td>R-200</td>
<td>PD-4</td>
<td>N (part of larger PD rezoning)</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>G-907</td>
<td>I-1</td>
<td>RT-15</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>G-540</td>
<td>R-60</td>
<td>C-T</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>G-876</td>
<td>R-60</td>
<td>TS-R</td>
<td>Y</td>
<td>Y</td>
<td>N</td>
</tr>
<tr>
<td>G-864</td>
<td>R-60</td>
<td>PD-44</td>
<td>Y</td>
<td>Y</td>
<td>N</td>
</tr>
<tr>
<td>G-879</td>
<td>R-60</td>
<td>RT-8</td>
<td>Y</td>
<td>Y</td>
<td>N (MP rec PD-9)</td>
</tr>
<tr>
<td>G-885</td>
<td>R-200</td>
<td>PD-3</td>
<td>Y</td>
<td>N</td>
<td>Y</td>
</tr>
<tr>
<td>G-878</td>
<td>C-1</td>
<td>RT-12.5</td>
<td>Y</td>
<td>Y</td>
<td>N</td>
</tr>
<tr>
<td>G-884</td>
<td>RE-2</td>
<td>PD-2</td>
<td>Y</td>
<td>N</td>
<td>Y</td>
</tr>
<tr>
<td>G-813/814</td>
<td>R-200</td>
<td>PD-2</td>
<td>Y</td>
<td>N</td>
<td>Y</td>
</tr>
<tr>
<td>G-627</td>
<td>C-T, C-1, C-2</td>
<td>O-M</td>
<td>Y</td>
<td>Y</td>
<td>Y (Confirmed O-M)</td>
</tr>
<tr>
<td>G-865/</td>
<td>R-60</td>
<td>TS-R</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>G-779</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>G-875</td>
<td>R-90</td>
<td>PD-35</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>G-873</td>
<td>R-30, C-O</td>
<td>PD-28</td>
<td>Y</td>
<td>Y</td>
<td>N</td>
</tr>
<tr>
<td>G-874</td>
<td>R-200</td>
<td>O-M</td>
<td>Y</td>
<td>Y</td>
<td>N</td>
</tr>
<tr>
<td>G-866</td>
<td>R-90</td>
<td>O-M</td>
<td>Y</td>
<td>N</td>
<td>N</td>
</tr>
<tr>
<td>G-860</td>
<td>C-2</td>
<td>TS-M</td>
<td>N</td>
<td>N</td>
<td>Y</td>
</tr>
</tbody>
</table>

*Transitional = between single family residential and a more intense use*
Chapter 7

Parking

With the exception of CR, CRT, and CRN zones, parking requirements are found in Chapter E of the current code. The current code is intended to provide adequate parking (except for retail parking in the peak of the Christmas season). The Planning Board draft of the proposed code would provide parking consistent with achieving transit ridership goals in areas designated as parking benefit districts (Current Primary districts – Silver Spring, Bethesda, Montgomery Hills, and Wheaton; Proposed secondary districts – White Flint and Great Seneca Science Corridor). If parking demands start to exceed supply, the Parking Districts would want to regulate demand by increasing the price of parking.

The approval of the Zoning Rewrite as proposed by the Planning Board would trigger the need to approve amendments to parking district legislation (Chapter 60).

The Committee recommendation distinguishes between parking lot districts and reduced parking areas rather than setting up a parking benefit district; this recommendation would not require additional legislation.

Open Space and Recreation

The proposed code would create 4 open space classifications: rural, common, public, and amenity. Rural Open Space is only applicable to the RNC zone and under optional method cluster development in the RC zone.

Common Open Space

Common open space is intended for the use of residents and their visitors; it is required in:

- Any optional method development in any RNC or Residential Detached zone;
- Any development with a townhouse, or apartment building type in a Residential Townhouse and Residential Multi-Unit zone;
- Any townhouse development in any Commercial/Residential or Employment zones; and
- Any Floating zone, as required under the equivalent Euclidean zone that determines uses.

Public Open Space

As recommended by the PHED Committee, Public Open Space would be devoted to public use or enjoyment that attracts public appreciation due to its location and amenities. Public Open Spaces are required for any development with an apartment, multi-use, or general building type in a Commercial/Residential, LSC, Commercial/Residential Floating, or LSCF zones.

Public Open Space would be the only open space category that has a separate provision for an off-site option.

Amenity Open Space

Amenity Open space would be an outdoor area providing recreational and natural amenities for the use and enjoyment of employees and visitors. Amenity space must be provided in:
Any development in the Industrial zones and development of any apartment, multi use, or general building type in the GR, NR, EOF, GRF, NRF, or EOFF zones.

The difference between public open space and amenity open space is in the zone where it is located, the off-site option for Public Open Space, and that the general public need not be welcomed on amenity open space.

Councilmember Elrich recommends adding a definition of open space in Chapter 1 as follows: “Open Space: See Section 7.3.1”. There are definitions for public open space, rural open space, common open space, amenity open space, etc. All of these defined terms refer to Division 7.3. Open Space and Recreation. Councilmember Elrich believes it makes sense to include the overall term “Open Space” in the defined terms section to enhance the usability of the zoning rewrite.

This amendment was not discussed by the PHED Committee. A definition would need to be added to Section 7.3.1 that included public open space, rural open space, common open space, and amenity open space.

Recreation Guidelines

The proposed code would explicitly allow recreation guidelines issued by the Planning Board. The Planning Board currently approves and uses such guidelines (applicable to development with 20 or more units) but without explicit authority to do so in County law. Section 22-104(b) of the Land Use Article allows County zoning to locate and allow the use of buildings and structures for recreation.

Alternative Compliance

Alternative compliance under Division 7.8 would give the Board the authority to approve “alternate methods of compliance, based on their conclusion that the intent of the division is satisfied.”

Compatibility Standards

The proposed code is sensitive to the building height, setbacks, and screening requirements for development abutting a property in an Agricultural, Rural Residential, or Residential Detached zone that is vacant or improved with an agricultural or residential use. The totality of these provisions codifies the minimum requirement for compatibility; it is a valuable addition to the code.

An undiscovered issue is whether the compatibility standards apply when the residential zone is in a municipality or a neighboring County. In the absence of any clarification, DPS would not respect the zoning in a jurisdiction with its own zoning authority; the compatibility standards would not apply.

Building height is generally measured from the front of a building. The compatibility standards refer to the height of a building along the side and rear of the building. The Committee recommended a clarification as to how to measure a building’s height, other than at the front of the building, for the purpose of the compatibility standards.

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46 Sec. 7.3.1. Intent.
Open space provides adequate light, air, circulation, and recreation and encourages preservation and enhancement of natural resources, including improvement of water and air quality.
**Landscaping**

This Division (Div. 7.5) applies to landscaping required under this Chapter and to installation of any new outdoor lighting fixture or the replacement of any existing outdoor fixture.\(^{47}\)

The landscaping provisions would prohibit DPS from issuing a final certificate of occupancy in the absence of required landscaping. Landscaping plans must be prepared by a licensed landscape architect. Planting methods are described by reference to the American Standard for Nursery Stock, minimum size at planting for trees and understory, evergreen and shrubs. The failure to maintain landscaping required under 7.5.3.D.1 would be a violation whenever it occurs.

Under a subsection mislabeled in the Planning Board draft as “Fences and Walls Defined” (7.5.3.C.1), the proposed code retains the following description of height:

> Fence or wall height is measured from the lowest level of the ground immediately under the fence or wall.

This was recently an issue at the Board of Appeals because, in all cases, the earth is immediately under a wall, but the lowest level of the ground could be where the ground meets bedrock. The following amendment is recommended by the Committee:

> Fence or wall height is measured from the lowest level of the [ground] grade immediately under the fence or abutting a wall.

**Lighting**

The lighting provisions of the proposed code apply to installation of any new outdoor lighting fixture or the replacement of any existing outdoor fixture. Replacement of a fixture refers to a change of fixture type or change to the mounting height or location of the fixture.

Routine lighting fixture maintenance, such as changing a lamp or light bulb, ballast, starter, photo control, housing, lenses, and other similar component, does not constitute replacement and would be permitted if such changes do not result in a higher lumen output.

The provision establishes the maximum height for parking lot lighting (40 feet, but 15 feet if within 35 feet of a detached house) and the allowable lamps, and requires full or partial cutoff fixtures. The new code would also have standards to prevent excessive illumination. Except where specifically allowed, on-site illumination would be limited to 0.5 footcandles at the lot line, excluding street lights in the right-of-way. Having established these standards, the proposed code would again allow alternative compliance as long as it meets the intent of the provision.\(^{48}\)

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\(^{47}\) Replacement of a fixture refers to a change of fixture type or change to the mounting height or location of the fixture.

\(^{48}\) Sec. 7.5.1. Intent.

This Division (Div. 7.5) regulates minimum standards for quantity, size, location, and installation of landscaping and outdoor lighting on private property. The requirements are intended to preserve property values; to preserve and strengthen the character of communities; and to improve water and air quality.
Outdoor display and storage

Division 7.6 would apply to any site where merchandise, material, or equipment is displayed or stored outside of a completely enclosed building. Merchandise, material, or equipment for agricultural uses in an Agricultural or Rural Residential zone would be exempt.

Outdoor display is permitted with any nonresidential use following approval of the applicable plan illustrating the extent of the permitted area for outdoor display. Any outdoor display must be removed and placed inside a fully-enclosed building at the end of each business day. Any propane gas storage rack, ice storage bin, soft drink or similar vending machine may remain outside overnight. Any outdoor display must not impede pedestrian use of the sidewalk or parking areas.

Limited outdoor storage is allowed when it is accessory to an allowed use following approval of the applicable plan illustrating the extent of the permitted area for limited outdoor storage. Limited outdoor storage must satisfy the standards of the zone or the use. General outdoor storage includes, but is not limited to, any material associated with industrial uses such as equipment, lumber, pipe, steel, salvage, or recycled materials. General storage would only be allowed on a site of at least 5 acres and with frontage on primary or higher standard roads. Once again, alternative compliance would be allowed if it meets the intent of the outdoor storage provision.49

Signs

The proposed sign provisions replicate the current code. The sign permit provisions are located in §8.4.3.- §8.4.5. There are 2 issues to note.

Illumination (§7.6.E.2)

The proposed code requires illuminated signs to use an enclosed lamp design or indirect lighting from a shielded source “in a manner that prevents glare from beyond the property line”. This is a slight improvement over the current code:

Sign illumination must use an enclosed lamp design or indirect lighting from a shielded source in a manner that prevents glare from beyond the property line. Glare is a direct or reflected light source creating a harsh brilliance that causes the observer to squint, shield or avert the eyes.50

The brilliance that would cause an observer to “squint, shield, or avert the eyes” is an unenforceable subjective standard. The PHED Committee recommended limiting glare to 0.5 footcandles or less at the property line if the subject property abuts a property that is improved with a residential use in any zone or is vacant in a Residential zone.

49 Sec. 7.6.1. Intent
The intent of this Division (Div. 7.6) is to regulate the size, location, height, and screening of all outdoor storage and display. The requirements are intended to protect public safety, health, and welfare; to preserve and enhance property values; and to preserve and strengthen the character of communities.

50 §59-F-4.1(e).


Electronic Variable message signs (7.7.6.F.5)

Signs that have characters that are changed manually or electronically must not be changed more than once each day. This includes a sign that gives the appearance or illusion of movement for a written or printed message. The intent is to avoid excessively distracting drivers.

The appearance of electronic signs at high schools has given rise to a phenomenon that Freud might characterize as “sign envy”. These signs are not subject to County zoning laws and may change their message continually, while electronic signs at most other establishments may be changed only once each day. New County facilities, which are also exempt from zoning, are adding variable message signs. Volunteer fire departments have been early adopters of electronic variable message signs. At the very least, the firehouses would want to have more latitude on how often a message can change. (White Flint Mall and Montgomery Mall have grandfathered electronic signs.)

Staff recommends allowing variable message signs to be changed no more than once per minute; the County’s variable message at the Potomac Recreation Center is already exceeding this standard. Based on the recommendation of DPS, the Committee did not recommend amending this provision.

The Committee recommended adding a provision to ensure that signs that display the number of available parking spaces are exempt from the limitation on the number of message changes allowed during any given period of time.

Limited Duration Signs (7.7.11.C.2)

A sign permit used to be required for a Limited Duration Sign on private property, and duration of display was set at one year. However, previous legislative action eliminated the need for a limited duration sign permit, and the duration of display limit has been dropped. Staff agreed with DPS’ recommendation to add the following language as #3. “The date of erection of a limited duration sign must be written in indelible ink on the lower right corner of the sign.” The Committee did not agree with this recommendation.

Chapter 8

Overview

Article 8 establishes the process for:

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

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

51 §59-F-4.1(f)(5).
Everyone who is involved in the development process knows that the current process is both complicated and long. As proposed, the zoning aspects in the new code would be less complicated. (There would be a requirement for sketch plans and floating zone plans, but not a requirement for project plans, diagrammatic plans, development plans, and schematic development plans.) The standards for approval for conditional uses and variances as proposed by the Planning Board would be easier than the approvals as proposed by the Committee.

The standards for master plan conformance in the current code for project plans, conditional uses, and local map amendments are inconsistent. The current code uses all of the following terms: consistent; substantially consistent; substantially complies with the use and density; conform; is in accordance with; and is not in conflict with the relevant master plan. The Planning Board recommended and the PHED Committee endorsed a uniform standard “substantially consistent” with the applicable master plan.

Councilmember Eirich, based on the recommendations of Meredith Wellington and Julie Davis, recommend using the phrase “consistent with” without the modifier “substantially” for all administrative and Council approvals.

Staff would note that there is no current requirement for the approval of a site plan to be consistent with a master plan to any degree whatsoever. In this regard, the proposed code is more stringent than the current code. In struggling with the definition of the term consistent in the State code, the general assembly did not require consistency with the recommended land use and density in a master plan when property was located in the County’s priority funding area. In terms the Court of Appeals has used, the fundamental issue for the Council is whether the master plan is designed to be a guide or a straightjacket.

Local Map Amendment (LMA) (§8.2.1)

General

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

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

Approval Requirements

ZTA 13-04 as proposed would require the Council to consider the approval of a floating zone using 7 criteria in the process of approving or denying a floating zone application (8.2.E): 1) the public interest; 2) the intent of the zone; 3) the general layout; 4) compatibility with existing and approved adjacent development; 5) adequate and safe circulation; 6) adverse neighborhood impacts; and 7) substantial

52 Land Use Article §1-304, Maryland Code.
conformance with the applicable master plan. All LMA applications for floating zones would require a floating zone plan. The proposed code would allow the Planning Board to approve amendments to any approved plan at site plan that does not increase density, add height, decrease setbacks, or change a binding element.

**What level of traffic information should be required?**

As proposed, a floating zone plan would require "a traffic study under the Planning Board’s LATR Guidelines if the incremental increase in vehicular peak-hour trips between the density of the base zoning and the density of the requested floating zone meets the minimum applicability requirement in the LATR Guidelines". This is overkill when the only transportation finding is "adequate and safe transportation circulation. The Hearing Examiner would argue that a finding of adequate transportation facilities (satisfying LATR guidelines or, at least in one case, tests more stringent than LATR guidelines) is a necessary part of determining if the zoning change is compatible with its surroundings and in the public interest. Staff would argue that the subdivision traffic test will be applied later in the development process; a less stringent test should be required at zoning, at least for zones recommended by master plans. If the proposed zoning was anticipated by the master plan and the master plan infrastructure is foreseeable, the zoning should be deemed to have adequate transportation facilities.

The Committee recommended deleting 8.2.1.E.1.e and replacing it with:

Generate traffic that does not exceed the critical lane volume or volume/capacity ratio standard as applicable under the Planning Board’s LATR Guidelines, or, if traffic exceeds the applicable standard, that the applicant demonstrate an ability to mitigate such adverse impacts:

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

54 §8.2.B.3.e.

55 §8.2.1.2.

56 §8.2.B.e.v.(d).

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

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

Staff would note that the court was mirroring the test used by the District Council; it was not imposing its own test.
Do the findings for an LMA provide protection to residential neighborhoods?

As proposed, a floating zone plan will "not adversely effect [sic] the character of surrounding neighborhood". Testimony from homeowners recommends amending this provision to protect the residential aspects of the surrounding neighborhood, not the entire neighborhood. The Committee recommended retaining the text as proposed by the Planning Board.

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

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

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

The content of this provision is already in §8.2.1.E.1:

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

Duplicating this provision is not necessary.

Oral argument

The process for oral argument is partially described in §8.2.1.D.3.c. The process describes the actions by parties to the case but does not fully describe the subsequent actions of the Council. §59-H-6.5(b), (c), and (d). The Committee recommended retaining those provisions from the current code and deleting the second sentence in §8.2.1.D.3.c.ii.58

Corrective Map Amendment (§8.2.2)

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

58 Current code description of the oral argument process:

(b) The District Council may, in its discretion, grant or deny a request for oral argument. The District Council may, on its own motion, require oral argument on any aspect of the case. When oral argument is allowed, the Council must:
   (1) set the day and time for oral argument;
   (2) limit oral argument to specific topics;
   (3) set time limits for oral argument; and
   (4) specify the order of presentations.

(c) Each oral argument must be limited to matters contained in the record compiled by the Hearing Examiner.

(d) After oral argument, the District Council must either decide the application or remand the application to the Hearing Examiner for clarification or taking additional evidence.
Sectional and District Map Amendment (§8.2.3)

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

“On record requirement” removed

Currently, a sectional map amendment is required to be a decision on the record just like a local map amendment. This would no longer be required under the proposed code. The Maryland courts have found Sectional Map Amendments to be quasi-legislative. Quasi-legislative actions need not be made on a record and the proposed code correctly removes the requirement that a Sectional Map Amendment be made from a formal record.

Although the Court has entertained a petition for judicial review concerning a sectional map amendment, there may be occasions when a declaratory judgment would be in order. The manner of appeal or judicial review should be left to State statute and case law and deleted from the proposed code, in the opinion of the Committee. To that end, the Committee recommended deleting § 8.2.3.D.4.

Zoning Text Amendments (§8.2.4)

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

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

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

Should the recording procedures in subsection F be deleted?

Subsection F has specific recording requirements for an approved ZTA:

1. When the District Council adopts a Zoning Text Amendment, it must also adopt and maintain in its permanent files an opinion stating the reasons for its adoption.
2. The District Council must promptly send a copy of the opinion and Zoning Text Amendment to the County Executive, the Planning Board, the Hearing Examiner,

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

60 “Any party aggrieved by a decision of the District Council may file a petition for judicial review of the decision no later than 30 days after the District Council’s action.”

61 Planning Staff recommendations under Planning Board rules must be available 7 days before the Planning Board date.
the Board of Appeals, the Supervisor of Assessments, DPS, the Department of Finance, and all persons entering their appearance at the hearing.

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

**Conditional Use (§8.3.1)**

**General comments**

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

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

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

Councilmember Floreen, based on the recommendations of the Building Industry Association, would remove the requirement for submission to the Planning Director for a determination of completeness.62

This issue was not discussed by the PHED Committee. The process was put in the code to allow the scheduling of hearings with greater certainty. The Zoning Advisers (Planning Staff, the County Attorney, the Hearing Examiner, DPS, and the Board of Appeals’ Executive Director) reviewed this provision and had no objections to it.

Councilmember Elrich, based on the recommendation of Meredith Wellington and Julie Davis, recommend that the Council “retain the current, stricter special exception standards to provide needed protection to single-family neighborhoods. Alternatively, if the Council approves the lax standards now contained in the current draft, then “Non-residential” buildings should not be allowed to house conditional uses in single-family residential zones.”

The complaint about lax standards refers to using “substantial conformance” vs conformance. That issue was raised in another context. That issue refers to the ability under the current code to recommend against a particular location for a special exception which is not specifically provided for under the proposed code.

62 §8.3.1.B.3 thru 5.
The alternative recommendation is to not allow a non-residential building in a residential zone. The code, as recommended by the PHED Committee, includes only a single building type in residential zones. That building would be described as a “Detached House or a Building for a Cultural Institution, Religious Assembly, Public Use, or Conditional Use allowed in the zone”. A request to remove the land uses that result in a non-residential building (other than Cultural Institutional discussed elsewhere) was not made.

**Decision making process**

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

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

**Cooling off period**

Currently, the Board of Appeals must find a change in facts to allow a special exception application on the same site within 36 months. The proposed draft would allow refilling within 18 months. This cooling-off period is County policy. Unlike the Land Use Article bar to zoning applications for a 36-month period after a local map amendment is decided on the record, the special exception cooling-off period is a matter of Council policy.

**Inherent effects as a reason for denial**

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

59-G-1.2.1. Standard for evaluation. A special exception must not be granted without the findings required by this Article. In making these findings, the Board of Appeals, Hearing Examiner, or District Council, as the case may be, must consider the inherent and non-inherent adverse effects of the use on nearby properties and the general neighborhood at the proposed location, irrespective of adverse effects the use might have if established elsewhere in the zone. Inherent adverse effects are the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations. Inherent adverse effects alone are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are physical and operational characteristics not necessarily associated

63 §8.6.2.C.
64 §8.23.1.E.1.g.
with the particular use, or adverse effects created by unusual characteristics of the site. Non-inherent adverse effects, alone or in conjunction with inherent adverse effects, are a sufficient basis to deny a special exception. [Emphases added]

The effect of the Planning Board proposed code would be to allow more special exceptions than would be allowed under the current standard. The Committee recommended the following revision:

Delete §8.3.1.E.5. and replace §8.3.5.E.1.g. with:

"will not cause undue harm to the neighborhood by virtue of a non-inherent adverse effect alone or the combination of an inherent and a non-inherent adverse effect in the following categories:"

**Need**

A finding of neighborhood need is currently required for special exceptions for: gas station, motor car sales, vehicle rental lots, and swimming pools. A finding of County need is required for drive-in restaurants, funeral parlors, hotels, shooting ranges, solid waste facilities, and conference centers. Need is a tricky concept when Maryland Courts have determined that it is illegal (beyond the scope of the police power) to refuse zoning for the sole purpose of avoiding competition.\(^{65}\) A finding of need is fundamentally the economic judgment of the applicant in a free-market economy. The proposed code would eliminate the finding of need for any special exception. Proof of need has been a way to avoid a perceived over-proliferation of a use.

Staff agreed with eliminating the need requirement. The Committee recommended retaining the requirement to find County and neighborhood need as currently required.

**Variance (§8.3.2)**

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

Sec. 59-G-3.1. Authority-Board of Appeals.

The board of appeals may grant petitions for variances as authorized in section 59-A-4.11(b) upon proof by a preponderance of the evidence that:

(a) By reason of exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary situations or conditions peculiar to a specific parcel of property, the strict application of these regulations would result in peculiar or unusual practical difficulties to, or exceptional or undue hardship...

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

E. Necessary Findings
To approve a variance, the Board of Appeals must find that:

1. One or more of the following unusual or extraordinary situations or conditions exist:

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The Planning Board believes that, as a general matter, variances should be granted more liberally to accommodate infill development without a need to resort to zoning text amendments. The PHED Committee agreed with the Planning Board recommendation.

**Sketch Plan (§8.3.3)**

In the Planning Board proposed code, parties to sketch plan would have a separate right to petition for judicial review. The Committee recommended removing this provision. The right to petition for judicial review would be available at preliminary plan and site plan. At sketch plan, a declaratory judgment or mandamus action would still be available without a specific right to petition for judicial review.

Councilmember Floreen, based on extended discussions between the Planning Director and the Building Industry Association, recommends requiring a posted schedule of meetings and a hearing date for both sketch plans and site plans within 120 day review cycles, based on the date of application. The schedule should have dates for an original DRC meeting to discuss staff's initial comments, a date by which an applicant must respond to all of those comments, and a second DRC to see if any issues remain outstanding. If issues have not been addressed to staff's satisfaction, an applicant may choose to go to the Board with a recommendation of denial or may submit, in writing, a request for a 30-60 day extension.

**Site Plan (§8.3.4)**

**General**

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

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66 §8.3.3.F.2.
A site plan is more universally required in the proposed draft. It is still a subjective approval, but the plan need "only" be compatible with existing, approved, or pending adjacent development. Substantial conformance with master plan recommendations would also be required. There are standards in the proposed code for buffering, screening, and height setbacks for development. The proposed draft would continue to allow minor site plan amendments administratively.

As recommended by the Planning Board and the PHED Committee, such development would have height and setback requirements. Site plan approval is always required for optional method development in all zones. Under standard method, a requirement for site plan approval may be triggered by a use standard in Article 3, or by the intensity of the proposed project (i.e., greater than 10,000 sq. ft., greater than 40 ft. in height).

Councilmember Elrich, based on the recommendations of Meredith Wellington and Julie Davis, recommends a requirement for site plan approval for development wherever non-residential or mixed-use zones abut R-60 or R-90 zoning.

**Timing for decision-making**

Currently, the code calls for site plans to be heard by the Planning Board 45 days after an application is received. In light of the time it takes for an application to be reviewed at DRC and for applicants to respond to all of the comments received, as well as to notice the hearing and post the staff report 10 days before, the 45-day turnaround is not really feasible. Currently, staff starts the 45-day clock once the applicant has submitted a final set of plans that adequately responds to the comments from all the reviewing agencies. The proposed draft would require Board consideration of a site plan within 120 days. If that is an absolute standard from the date the application is accepted, it would be a significant improvement over current processing times, in the opinion of Planning Staff.

**Decision-making process**

In many jurisdictions, site plan approval is an administrative process (approved by staff without a public hearing). Prior approvals (master plan, preliminary plan) establish the discretionary aspects of development approval. **If the Council wants a more streamlined process, staff could approve site plans with the possibility of an appeal to the Planning Board** (similar to an accessory apartment application appeal of DHCA’s findings to the Hearing Examiner). This alternative would require changes to the findings necessary for approval. The findings would need to be objective, not subjective.

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

**Building permits (§8.4.1)**

Although much of the subject matter in the Planning Board draft is a repeat of text from the current code, it should be deleted. Building permits are covered in Chapter 8 of the County Code. Appeal
procedures are covered in Chapter 2. The following subsections in §8.4.1 were recommended for deletion by the Committee:

- Subsection B.1 through B.6 concerning application requirements
- Subsection E (1 and 2) concerning necessary findings
- Subsection F concerning appeal requirements for building permits

Staff would re-title §8.4.1.E to reflect the fact that the provision would only concern conditional uses.

**Sign Installer license (§8.4.5)**

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

**Administrative Zoning District Line Adjustment (§8.4.6)**

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

**Notice standards (§8.5)**

**Newspaper**

Newspaper advertisement for sectional map amendments and zoning text amendments are a requirement of the current code. It is not required by the Land Use Article. These requirements are retained in the proposed draft. Newspapers are no longer a universal means of communication. Newspaper circulation numbers (except for free papers) are at historic lows, as the internet and cable news sources have become far more popular. In the opinion of Planning Staff, at some time in the future, a ZTA to allow a different means of advertising sectional map amendments and local map amendments may become necessary.

**Application Notice v. Hearing Notice**

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

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

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

Councilmember Elrich, based on the recommendation of Meredith Wellington and Julie Davis, recommends that notice should be posted on-site and mailed to abutting property owners and civic associations at least 30 days before all meetings and hearings.

When newspaper notice is required, it must be published at least 30 days before the meeting. Only notice of a pre-submittal meeting requires 15 days notice. Individual mailed notice would be required 5 days after the application is accepted. Mailed notice is not required for sectional or district map amendments, building permits, use and occupancy permits, sign permits, minor floating zone plan amendments, minor conditional use amendments, or minor site plan amendments.

**Notice of Sectional and District Map Amendments**

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

**Grandfather provisions (§8.7)**

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

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

The overlapping nature of these provisions and their conditional application could employ attorneys for years to come. It will ensure that every zoning practitioner will have to keep every previously adopted zoning ordinance nearby to answer questions. It is and will continue to be an administrative nightmare.

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68 ZTA 13-04, pages 8-44 to 8-50.
for landowners, Planning Staff, and DPS. Staff believes that the core idea behind these provisions can be articulated with greater precision and hopefully without the need to reference the current code after some specified period of time.

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

1) make every existing building, not subject to current enforcement actions, conforming without a requirement to consult prior codes;
2) allow every approved and pending plan submitted X months after the ordinance is approved (development plan, concept plan, project plan, sketch plan, preliminary plan, site plan, special exception, and building permit) to complete that approved plan without regard to the requirements of the new zone;
3) allow residential parcels and lots that have not changed in size or shape since 1958 to build a house on the lot or parcel without regard to the minimum lot size and frontage requirements in their new zone – setbacks could match the setbacks of neighboring houses to avoid reference to prior codes;
4) allow some amount of expansion for non-residential properties (the lesser of 10 percent of the current building or 30,000 square feet of floor area) with only the applicability of the density and height standards of the new zone.\(^{69}\)

Staff assumes that the effective date of the rewrite would be October 30, 2014. That will give time for an applicant to submit plans before the effective date.

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

Staff is recommending a more restrictive approach. Staff has no problem with grandfathering approved plans without limit, but if the private sector wants the opportunity to change, then at that point the public sector should have the opportunity to change requirements. If the Council believes the new code is in the public interest, it should apply to more situations and in less time than the Planning Board recommended. At a minimum, the grandfathering provision applies to 50 million square feet of approved but non-built non-residential gross floor and 25,000 approved dwelling units. It also applies to completed projects with approved plans.

**The Committee recommended allowing amendments under the current code for 25 years.**

To allow a more substantial expansion of small buildings, building industry representatives would want the ability to expand a minimum amount of floor area, even if that amounted to more than 10 percent of the existing floor area. For example, a filling station with only 1,000 square feet may want to expand by

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\(^{69}\) According to Planning Staff, the height and density of the current zoning and master plan recommendations are the basis for the density and height in the proposed zoning. Using the proposed zone standards does not require going back to the current zoning ordinance.
500 square feet. Five hundred feet is not a lot of floor area, but it is a large percentage increase. Staff did not recommend this change. The Committee recommended allowing buildings with less than 2,000 square feet of gross floor area to expand by 30% of their gross floor area.

The Committee proposed the following alternative to the grandfathering provisions in ZTA 13-04 as introduced; however, the underlined and bracketed amendments are recommended by Councilmember Floreen:

A. Existing Structure, Site Design, or Use on {effective date}

1. Structure and Site Design
   A structure or site design existing on {effective date} that does not meet the zoning standards on or after {day after effective date} is conforming and may be continued, renovated, repaired, or reconstructed if the floor area, and height [and footprint] of the structure is not increased, except as provided for in Section 8.7.1.C.

2. Use
   Any use that was conforming or not nonconforming on {one day before effective date} and that would otherwise be made nonconforming by the application of zoning on {effective date} is conforming, but may not expand.

B. Application Approved or Filed for Approval before {effective date}

1. Application in Progress before {effective date}
   Any development plan, schematic development plan, diagrammatic plan, concept plan, project plan, sketch plan, preliminary plan, record plat, site plan, special exception, variance, or building permit filed or approved before {effective date} must be reviewed under the standards and procedures of the Zoning Ordinance in effect {one day before the effective date}. Any complete Local Map Amendment application submitted to the Hearing Examiner by April 1, 2014, must also be reviewed under the standards and procedures of the Zoning Ordinance in effect {one day before the effective date}. The approval of any of these applications will allow the applicant to proceed through any other required application or step in the process within the time allowed by law or plan approval, under the standards and procedures of the Zoning Ordinance in effect {one day before the effective date}.

2. Application Approved before {effective date}
   Any structure or site design approved before {effective date} may be implemented by the property owner under the terms of the applicable plan.

3. Plan Amendment for Plans Approved or Pending before {effective date}
   a. Until {effective date plus 25 years}, an applicant may apply to amend any previously approved application (listed in Section 8.7.1.B.1 or Section 8.7.1.B.2), under the development standards and procedures of the property’s zoning on {one day before effective date}, if the amendment:
      i. does not increase the approved density or the maximum building height allowed by the current zone unless allowed under Section 8.7.1.C; and
ii. either:
   (a) retains at least the approved setback from property in a Residential Detached zone that is vacant or improved with a Single-Unit Living use; or
   (b) satisfies the setback required by its zoning on or after {effective date}.

b. An applicant may apply for a minor site plan amendment to amend the parking requirements of a previously approved application (listed in Section 8.7.1.B.1 or Section 8.7.1.B.2) in a manner that satisfies the parking requirements of Section 7.2.3 and Section 7.2.4.

4. Repair, Renovation, and Rebuilding Rights under Section 8.7.1.B
Any structure or site design implemented under Section 8.7.1.B is conforming and may be continued, renovated, repaired, amended under subsection 3, or reconstructed.

5. Development with a Development Plan or Schematic Development Plan Approved before {effective date}
Any development allowed on property subject to the binding elements of a District Council approved development plan or schematic development plan on {effective date} must satisfy those binding elements until the property is subject to a Sectional Map Amendment that implements a master plan approved after {effective date} or is rezoned by Local Map Amendment.

6. Density Transfers Approved before {effective date}
On a property that is subject to an effective density transfer easement and density transfer deed, the total density or density associated with a commercial or residential use, including any density approved by an amendment of a previously approved application listed in Section 8.7.1.B.1, may exceed that allowed by the existing zoning as long as the total density or density associated with a commercial or residential use does not exceed that allowed by the density transfer easement and density transfer deed.

C. Expansion of Floor Area Existing on {effective date}

1. Limited Rights under Zoning before {effective date}
Until {effective date plus 25 years}, on land that is located in a Commercial/Residential, Employment, or Industrial zone, an applicant for a project plan, sketch plan, preliminary plan amendment, site plan amendment, or a building permit may increase the floor area on the site by the lesser of 10% of the gross floor area approved for [on] the site on {effective date} or 30,000 square feet, except for properties with 2,000 square feet or less of floor area, which may expand up to 30% of the gross floor area on the site on {effective date}, following the procedure and standards of the property’s zoning on {effective date minus one}, if:
   a. The building does not exceed the height limits and density of the property’s zoning in effect on {one day before effective date};
   b. Any building on the site is no closer to property in a Residential Detached zone that is vacant or improved with a Single-Unit Living use than any existing structure on the site on {effective date} or satisfies the setbacks of the current zoning; and
c. If a site plan or site plan amendment is required by the property’s zoning on {one day before the effective date}, then a site plan or a site plan amendment is approved under the standards of site plan approval on {one day before the effective date}.

2. Expansion above Section 8.7.1.C.1 or Amendment after Section 8.7.1.B.3.a

Any portion of an enlargement that exceeds Section 8.7.1.C.1 must satisfy the applicable standards and procedures for the current zoning. After {effective date plus 25 years}, any amendment to a previously approved application must satisfy the applicable standards and procedures for the current zoning to the extent of (a) any expansion, and (b) any other portion of an approved development that the amendment changes.

D. Residential Lots and Parcels

1. Residential Lot

Unless adjoining lots have merged by virtue of ownership and zoning requirements, DPS may issue a building permit for a detached house on any Residential or Rural Residential zoned lot identified on a plat recorded before {effective date} without regard to the street frontage and lot size requirements of its zoning, except as provided in Section 8.7.1.D.3.b.

2. Pre-1958 Parcel

A detached house on a parcel or part of a lot that has not changed in size or shape since June 1, 1958, exclusive of changes due to public acquisition, may be constructed under its current zoning without regard to the minimum lot width at the front lot line or may be reconstructed either on its current footprint and up to its current maximum building height or in a manner that satisfies the setback and height requirements of its current zoning.

3. Pre-1928 Lot

a. In addition to the provisions of Section 8.7.1.D.1, a new or reconstructed detached house on any lot recorded before 1928 must satisfy the front, rear, and side yard setbacks of the 1928 Zoning Ordinance; however, a new building must satisfy the established building line requirements under Section 4.4.2.C if applicable.

b. Before DPS may issue a building permit for a new detached house on a lot less than 5,000 square feet in land area that was recorded before 1928 and adjoins vacant land in common ownership any time since November 8, 2012, the lot must be subdivided with such adjoining property.

4. Damage in Flood Plain

If a detached house that is located within a 100-year flood plain and abuts any waterway, is damaged or destroyed by flood to the extent of up to 75% of the reconstruction value of the building, the dwelling may be repaired or reconstructed to preexisting dimensions.

Staff comments on the proposed grandfathering amendment:

§A.1 The deletion of the word “footprint” is significant. It would allow far more changes to existing building than as proposed. An existing building owner would be allowed to reconstruct and redesign to the same floor area, even if the floor area exceeded the current zoning.

§B.1.b.i “The maximum building height allowed by the current zone” would be allowed under subsection C in any event. Subsection C allows amendments to building approvals that do not exceed the height limits and density of the property’s zoning in effect on {one day before effective date}. Staff notes that the zoning referred to would not reflect master plan recommendations on height or density.
§B.4 The amendment to add the phrase “amended under subsection 3” is completely unnecessary in a provision that describes repair, renovation, and rebuilding rights under Section 8.7.1.B. Section 8.7.1.B includes subsection 8.7.1.B.3. The amendment is an example of both redundant and repetitive drafting that should be avoided.

§C.1. Project plans and sketch plans were mistakenly absent from the list of possible plan approvals that are to be grandfathered.

Staff recommends a revision to §B.5 concerning development with a development plan or Schematic Development Plan Approved before {effective date}. In addition to being able to release binding limits by a Sectional Map Amendment that implements a master plan approved after {effective date} or rezoning by Local Map Amendment, an applicant should be able to amend binding elements under Subsection B.1 of the grandfathering provisions.

Chapter 9 – Retained Floating zones

The Planning Board recommended retaining several zones applied by local map amendments. These zones include RT zones, RH, PD zones, T-S, PN, PRC, and PCC. The only changes made were for plain English purposes. Mixed-use zones such as TSM and TSR were not retained.

Editing authority

Staff requests the Council’s approval to make additional editorial changes to the code (plain English, grammar, and punctuation) after the Council’s straw vote and before Council approval.