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Cc: [Gregory Mann](#)
Subject: RE: Retool Comments
Date: Monday, March 4, 2024 10:54:13 AM
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montgomerycounty-md-1 (9).pdf

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Rob – thanks again for your time on this. In addition to Phil’s comments, I think the grandfathering provisions (Sec. 24-1.2(E)) need to include all of the required development approvals that flow from the initial approval. For example, with Metrogrove , we had sketch approved, now we should get SDP approved before the rewrite is effective, but then we’ll have the FSP which is likely to come after the effective date. The FSP has to be reviewed under the current ZO. If this was your intent with Sec. 24-1.2(D), I suggest the language could be more clear. You may want to consider language along the lines of the language in bold the County put in their 2014 rewrite:

Sec. 7.7.1.B. Application Approved or Filed for Approval before October 30, 2014

1. Application in Progress before October 30, 2014

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 October 30, 2014 must be reviewed under the standards and procedures of the property’s zoning on October 29, 2014, unless an applicant elects to be reviewed under the property’s current zoning. Any complete Local Map Amendment application submitted to the Hearing Examiner by May 1, 2014 must be reviewed under the standards and procedures of the property’s zoning on October 29, 2014. If the District Council approves such an application after October 30, 2014 for a zone that is not retained in Chapter 59, then the zoning will automatically convert to the equivalent zone as translated under DMA G-956 when the Local Map Amendment is approved. **The approval of any of these applications or amendments to these applications under Section 7.7.1.B.1 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 on October 29, 2014.** The gross tract area of an application allowed under Section [7.7.1.B.1](#) may not be increased.

There are other grandfathering concepts in Sec. 7.7.1.B of the County ZO that you may want to consider (excerpt attached), such as allowing relatively small expansions to proceed under the old ZO at the applicant’s discretion, but I understand your viewpoint that the changes you are proposing are generally not substantive and therefore more grandfathering is not necessary. That may be true in general, but there always seems to be unintended consequences from a ZO overhaul.

Let me know if you have questions. Thanks.



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From: Rob Robinson <Rob.Robinson@gaithersburgmd.gov>
Sent: Wednesday, February 28, 2024 12:31 PM
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Cc: Gregory Mann <Greg.Mann@gaithersburgmd.gov>
Subject: [EXTERNAL] Retool Comments

[EXTERNAL]

Hi All, I wanted to touch base to again thank you for the focus group and to let you know, if you have any specific personal technical comments for edits (not reflecting your firm's position), it would be great to receive those by noon next Monday so we can include as discussion items in our March 11th JWS packet. We have already received Phil's (attached). Thanks!

Rob

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Division 7.7. Exemptions and Nonconformities

Section 7.7.1. Exemptions

A. Existing Structure, Site Design, or Use on October 30, 2014

1. Structure and Site Design

A legal structure or site design existing on October 30, 2014 that does not meet the zoning standards on or after October 30, 2014 is conforming and may be continued, renovated, repaired, or reconstructed if the floor area, height, and footprint of the structure are not increased, except as provided for in Section 7.7.1.C for structures in Commercial/Residential, Employment, or Industrial zones, or Section 7.7.1.D.5 for structures in Residential Detached zones.

2. Use

- a. Except for a Registered Living Unit, any use that was conforming or not nonconforming on October 29, 2014 and that would otherwise be made nonconforming by the application of zoning on October 30, 2014 is conforming, but may not expand.
- b. Any allowed use, up to the density limits established by the current zoning, may be located in a building or structure deemed conforming under Section 7.7.1.A.1.

B. Application Approved or Filed for Approval before October 30, 2014

1. Application in Progress before October 30, 2014

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 October 30, 2014 must be reviewed under the standards and procedures of the property's zoning on October 29, 2014, unless an applicant elects to be reviewed under the property's current zoning. Any complete Local Map Amendment application submitted to the Hearing Examiner by May 1, 2014 must be reviewed under the standards and procedures of the property's zoning on October 29, 2014. If the District Council approves such an application after October 30, 2014 for a zone that is not retained in Chapter 59, then the zoning will automatically convert to the equivalent zone as translated under DMA G-956 when the Local Map Amendment is approved. The approval of any of these applications or amendments to these applications under Section 7.7.1.B.1 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 on October 29, 2014. The gross tract area of an application allowed under Section 7.7.1.B.1 may not be increased.

2. Application Approved before October 30, 2014

Any structure or site design approved before October 30, 2014 may be implemented by the property owner under the terms of the applicable plan.

3. Amendment of an Approved Plan or Modification of an Application Pending before October 30, 2014

- a. Until October 30, 2039, an applicant may apply to amend any previously approved plan or modify an application pending before October 30, 2014 (listed in Section 7.7.1.B.1 or Section 7.7.1.B.2) under the development standards and procedures of the property's zoning on October 29, 2014, if the amendment:
 - i. does not increase the approved density or building height, unless allowed under Section 7.7.1.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 the date the amendment or the permit is submitted; and
 - iii. does not increase the tract area.
- b. An applicant may apply to amend the parking requirements of a previously approved application (listed in Section 7.7.1.B.1 or 7.7.1.B.2) in a manner that satisfies the parking requirements of Section 6.2.3 and Section 6.2.4.
- c. Without regard to the limitations of this section, a special exception approved under the code in effect on or before October 29, 2014 may be expanded under the applicable standards and procedures of the code in effect on October 29, 2014.

4. Repair, Renovation, and Rebuilding Rights under Section 7.7.1.B

Any structure or site design implemented under Section 7.7.1.B is conforming and may be continued, renovated, repaired, or reconstructed.

5. Development with a Development Plan or Schematic Development Plan Approved before October 30, 2014

- a. Any development allowed on property where the zoning classification on October 29, 2014 was the result

of a Local Map Amendment must satisfy any binding elements until:

- i. the property is subject to a Sectional Map Amendment that implements a master plan approved after October 30, 2014 and obtains approval for development under the SMA-approved zoning;
- ii. the property is rezoned by Local Map Amendment; or
- iii. the binding element is revised by a development plan amendment under the procedures in effect on October 29, 2014.

b. Any development on a property that was zoned H-M on October 29, 2014 must include 45% green area, under the zoning in effect on October 29, 2014, until the property is subject to a Sectional Map Amendment or rezoned by Local Map Amendment. The green area required under this provision satisfies, and is not in addition to, any open space requirement of the property's zoning on October 30, 2014.

6. Density Transfers Approved before October 30, 2014

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 7.7.1.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

1. Limited Rights under Zoning before October 30, 2014

Until October 30, 2039, on land that is located in a Commercial/Residential, Employment, or Industrial zone, an applicant for an amendment to an existing approval or development, or a modification of an application listed in Section 7.7.1.B.1 may increase the floor area on the site under Section 7.7.1.C.2 or 7.7.1.C.3 following the procedures and standards of the property's zoning on October 29, 2014:

- a. if the building does not exceed the height limits and density of the property's zoning in effect on October 29, 2014;
- b. if 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 October 30, 2014, or satisfies the setbacks of the current zoning; and
- c. when a site plan or site plan amendment is required by the property's zoning on October 29, 2014, a site plan or a site plan amendment is approved under the standards of site plan approval on October 29, 2014.

2. Commercial/Residential, Employment, and Industrial Zones

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

3. Prior Floating Zones

- a. A property where the zoning on October 29, 2014 was the result of a Local Map Amendment with an approved development plan may expand as allowed under Section 7.7.1.C.3.b. Any expansion must satisfy Section 7.7.1.C.1.
- b. If the District Council approves a development plan amendment larger than allowed under Section 7.7.1.C.2, the zoning of the property subject to the amendment will automatically convert and be remapped to the equivalent zone as translated under DMA G-956, with the density and height approved in the amendment.

4. Expansion above Section 7.7.1.C.2

If any expansion exceeds Section 7.7.1.C.2, then the entire expansion must satisfy the applicable standards and procedures for the current zoning. After October 30, 2039, 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 associated with the expansion.

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

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 Agricultural, Residential, or Rural Residential zoned lot or parcel identified on a plat

recorded before October 30, 2014, a part of lot recorded before June 1, 1958, or a deed recorded before June 1, 1958, without regard to the street frontage and lot size requirements of its zoning, except as provided in Section 7.7.1.D.3.b.

2. Pre-1958 Parcel

A detached house on a platted lot, parcel, or part of a previously platted lot that has not changed in size or shape since June 1, 1958, exclusive of changes due to public acquisition, may be:

- a. constructed under its current zoning without regard to the minimum lot width at the front lot line and front building line;
- b. reconstructed either on its current footprint and up to its current maximum building height; or
- c. constructed or reconstructed in a manner that satisfies the maximum building height, lot coverage, and established building line of its zone when the building permit is submitted and the side yard and rear setback required by its pre- 1958 zoning in effect when the lot, parcel, or part of a lot was first created.

3. Pre-1928 Lot

- a. In addition to the provisions of Section 7.7.1.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 4.4.1.A 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 without regard to the minimum width and area requirements of the applicable zone.

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.

5. Additions to Dwellings

In addition to the authority to renovate, repair, and reconstruct under Section 7.7.1.A.1 and without regard to the standards of its current zoning, the owner of a detached house that:

- a. is in a housing project constructed before January 1, 1945 that was owned by the government when constructed, may construct an addition to the detached house if, after the addition,;
 - i. the front setback of the detached house on the subject property is equal to the average of all the front setbacks of the detached houses on the same side of the right-of-way;
 - ii. the minimum side setback between a detached house on an abutting lot and the subject detached house is 18 feet; and
 - iii. the minimum rear setback is 20 feet or the sum of the rear setbacks between any 2 detached houses is a minimum of 40 feet;
- b. was constructed under density control standards in the R-150 zone before October 30, 2014 may construct an addition to the dwelling if, after the addition,;
 - i. the minimum front setback is 30 feet;
 - ii. the minimum side setback is 10 feet;
 - iii. the minimum rear setback is 25 feet; and
 - iv. the maximum lot coverage is 30%;
- c. was constructed under density control standards in the R-200, R-90 or RMH-200 zone before October 30, 2014 may construct an addition that satisfies the development standards of their current zone under the standard method of development; or
- d. is in an area rezoned from R-60 to R-90 may construct an addition that satisfies the development standards of the R-60 zone under the standard method of development.

6. Exempted Lots and Parcels in the RE-2, RE-2C, and RE-1 Zones

- a. A lot or parcel in the RE-2, RE-2C, or RE-1 zone, in addition to other exemptions in this subsection, is exempt from the lot area and lot width requirements of its zone, but must satisfy the requirements of the zone applicable to it before its classification to the RE-2, RE-2C, or RE-1 zone if:
 - i. the record lot was approved for recordation by the Planning Board before the approval date of the most recent Sectional Map Amendment that included the lot; or

ii. the lot was created by deed on or before the earlier of either the approval date of the most recent Sectional Map Amendment that included the lot or October 30, 2014.

b. A lot or parcel in the RE-2C zone, in addition to other exemptions in this subsection, is exempt from the area and dimension requirements of the RE-2C zone, but must satisfy the requirements of the zone applicable to it before its classification to the RE-2C zone if:

- i. the property owner held title to the property before March 17, 1982;
- ii. a reduced lot size is required for a lot created for a detached house;
- iii. the child of the property owner, or the spouse of a child, or the parents of the property owner will reside in the house on the additional lot; and
- iv. the overall density of the tract owned on March 17, 1982 is 1.1 units per acre or lower.

7. Exempted Lots and Parcels in the Rural Zone

a. A lot or parcel in the Rural zone, in addition to other exemptions in this subsection, is exempt from the lot area and lot width requirements of the Rural zone, but must satisfy the requirements of the zone applicable to it before its classification to the Rural zone if:

- i. the property owner can establish that the owner had legal title on or before June 4, 1974;
- ii. the child of the property owner, or the spouse of a child, or the parents of the property owner will reside in the house on the additional lot; and
- iii. the overall density of the property does not exceed one dwelling unit per 5 acres in any subdivision.

b. A lot or parcel in the Rural zone, in addition to other exemptions in this subsection, is exempt from the lot area and lot width requirements of the Rural zone, but must satisfy the requirements of the zone applicable to it before its classification to the Rural zone if:

- i. the lot was created by deed executed before June 5, 1974; or
- ii. the recorded lot has an area of less than 5 acres and was created after June 4, 1974 by replatting 2 or more lots, provided that the resulting number of lots is not greater than the number of lots that were replatted.

8. Exempted Lots, Parcels, and Buildings in the Rural Cluster Zone

a. A lot or a parcel in the Rural Cluster (RC) zone, in addition to other exemptions in this subsection, is exempt from the minimum area requirements and dimension requirements of the Rural Cluster zone, but must satisfy the requirements of the zone applicable to it before its classification to the RC zone if:

- i. the property owner held title to the property before June 4, 1974;
- ii. a reduced lot size is required for a lot created for a detached house; and
- iii. the child of the property owner, or the spouse of a child, or the parents of the property owner will reside in the house on the additional lot.

b. A lot or parcel in the Rural Cluster (RC) zone, in addition to other exemptions in this subsection, is exempt from the minimum lot area requirements and lot width requirements of the Rural Cluster zone, but must satisfy the requirements of the zone applicable to it before its classification to the RC zone if:

- i. the lot was created by deed executed on or before the earliest of the following dates:
 - the approval date of the most recent Sectional Map Amendment that included the lot;
 - the approval date of the most recent Local Map Amendment that included the lot;
 - October 30, 2014; or
- ii. the recorded lot has an area of less than 5 acres and was created before the earliest of:
 - the approval date of the most recent Sectional Map Amendment that included the lot;
 - the approval date of the most recent Local Map Amendment that included the lot; or
 - October 30, 2014;

by replatting 2 or more lots, provided that the resulting number of lots is not greater than the number of lots that were replatted.

c. Any parcel with an existing building on October 30, 2014 is exempt from the minimum lot area and frontage requirement. Any existing building located on any lot or parcel on October 30, 2014 is exempt from the minimum side setbacks of the zone.

d. Any landscape contractor in the RC zone in operation on October 30, 2014 is a permitted use if it satisfies any master plan or zoning impervious surface limits and is not required to obtain a conditional use, unless:

- i. the on-site operation as of October 30, 2014 is expanded or enlarged;
- ii. the on-site operation is diversified to include retail facilities or related uses not in operation before October 30, 2014; or
- iii. the operation is discontinued for a period of 6 months or more.

9. Exempted Lots and Parcels in the Agricultural Reserve Zone

A lot or parcel in the Agricultural Reserve (AR) zone, in addition to other exemptions in this subsection, is exempt from the minimum lot area requirements and lot width requirements of the AR zone, but must satisfy the requirements of the zone applicable to it before its classification to the AR zone if:

- a. the lot or parcel was created before January 6, 1981; or
- b. the recorded lot has an area of less than 5 acres and was created after January 6, 1981 by replatting 2 or more lots, provided that the resulting number of lots is not greater than the number of lots that were replatted.

10. Subdivision of Lots, Parts of Lots, or Parcels

- a. Any two or more tracts of land created by deed or plat before June 1, 1958 may be consolidated by record plat into one buildable lot without regard to the minimum width and area requirements of the applicable zone, if:
 - i. the tracts of land are under common ownership;
 - ii. a habitable detached house located on the tracts before July 20, 2009 crossed a property line created by deed or plat documented by a professionally certified house location plan, previously issued demolition permit, or similar evidence;
 - iii. all the tracts of land on which the dwelling is, or was, located are included in the newly created lot; and
 - iv. if abutting vacant lots were in common ownership on November 8, 2012 or any time thereafter and the original lots were recorded in the original Maryland-Washington Metropolitan District before March 16, 1928, any such vacant lots under common ownership must be included in the newly created lot.
- b. The dwelling on any lot created under this Section may be constructed or reconstructed in a manner that satisfies the development standards in effect when the building permit is issued.

11. Historic Resources

On a residentially zoned property that is designated as a historic site or resource on the Master Plan for Historic Preservation and either has a density transfer easement or density transfer deed, or has frontage along an arterial or higher classified roadway, the following provisions apply:

- a. The following uses are allowed with site plan approval under Section 7.3.4.:
 - i. Clinic (up to 4 Medical Practitioners);
 - ii. Office;
 - iii. Retail/Service Establishment;
 - iv. Eating and Drinking Establishment;
 - v. Rural Antique Shop; and
 - vi. Drive-Thru as an accessory use to any other allowed principal use.
- b. Any use listed in section 7.7.1.D.11.a above must be closed to the public between 11:00 p.m. and 6:00 a.m.
- c. Any other use allowed in the underlying zone not listed in section 7.7.1.D.11.a above is allowed, subject to the provisions of Section 7.3.1 where applicable.
- d. The Planning Board and the Historic Preservation Commission must make the following findings:
 - i. any modifications to buildings, structures, or the land must protect the intent of the historic resource and be consistent with Chapter 24A of the County Code; and
 - ii. any operational characteristics must not encroach upon or destroy the historical, archaeological, or architectural character or value of the site.
- e. The project must be recommended for approval by the Historic Preservation Commission prior to approval of the Site Plan by the Planning Board.

E. Historic Building on County Property

A building designated as a historic resource in the Master Plan for Historic Preservation and located on publicly-owned property is exempt from the use and development standards of Chapter 59.

F. Public Taking

1. A lawful structure or surface parking lot located on a lot reduced in area by a public acquisition that would render the structure or parking lot nonconforming is legal and the structure or parking lot may be repaired, altered, or reconstructed.
2. A lot reduced in area by a public acquisition is legal.

(Legislative History: Ord. No. 18-08, §30; Ord. No. 18-09, §4; Ord. No. 18-16, §1; Ord. No. 18-22, §2; Ord. No. 18-23, §1; Ord. No. 18-40, §1; Ord. No. 18-47, §1; Ord. No. 18-49, §2; Ord. No. 19-25, § 1; Ord. No. 19-34, § 1.)

Section 7.7.2. Nonconforming Use

A lawful nonconforming use may be continued under the following limits:

A. Expansion

A lawful nonconforming use of a structure or lot must not be expanded unless in the Agricultural Reserve zone, a Federal or State health or safety law, regulation, or agency requires or recommends the expansion for safety purposes. Before expanding the use or structures, the property owner must provide to the Director of the Department of Permitting Services a certification from the applicable Federal or State entity that the expansion or enlargement is necessary.

B. Abandonment of Use

Except for a Registered Living Unit allowed under the code in effect on October 29, 2014, which may be abandoned, removed, or terminated under the code in effect on October 29, 2014, a nonconforming use or a use deemed to be conforming under Section 7.7.1.A.2 is abandoned if it ceases for at least 6 consecutive months. If a nonconforming use or a use deemed to be conforming under Section 7.7.1.A.2 is abandoned, it must not be reestablished unless it is a historic resource and satisfies Section 7.7.2.C.

C. Historic Resources

Any nonconforming use that has ceased operations for at least 6 consecutive months may be reestablished if the use is:

1. located in a historic structure or on a historic site identified in the Master Plan for Historic Preservation; and
2. consistent with the historic use of the property as documented in the Locational Atlas of Historic Sites, the Master Plan for Historic Preservation, or the land records.

D. Lawful Nonconforming Use Certification

The owner of property who wishes to establish that a use on the property is lawfully nonconforming, under the provision of this Chapter, must submit an application in a form provided by DPS. A nonconforming use certification must be issued by DPS if DPS determines that the use of the property is a nonconforming use as defined herein.

(Legislative History: Ord. No. 18-47, §1.)