



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

MCPB
Item #12
7/17/08

DATE: July 9, 2008
TO: Montgomery County Planning Board
FROM: Ralph Wilson, Zoning Supervisor *RW*
REVIEW TYPE: Zoning Text Amendment & Subdivision Regulation Amendment
PURPOSE: Generally amend the Zoning Ordinance and Subdivision Regulations to accommodate an arts and entertainment use in a designated Arts and Entertainment; to provide for the approval of a site plan to validate phases of a preliminary plan and project plan for certain properties under certain circumstances, and to provide for recordation of a final record plat to validate all phases of a multi-phase preliminary plan for certain properties under certain circumstances.

ZONING TEXT AMENDMENT: No. 08-15
SUBDIVISION REGULATION AMENDMENT: 08-03
INTRODUCED BY: District Council at the Request of the County Executive (ZTA); Council President at the request of the County Executive (SRA)
INTRODUCED DATE: June 24, 2008
PLANNING BOARD REVIEW: July 17, 2008
COUNCIL PUBLIC HEARING: July 29, 2008; 1:30pm

Staff Recommendation

Staff recommends that ZTA 08-15 and SRA 08-3 not be approved. Staff is opposed to any arrangement where the public use space requirement, public facility and amenity requirement, pedestrian access, and APF validity period are decided before a project plan is filed. The ZTA and SRA provide no opportunity for public and private interests to be balanced. Under ZTA 08-13, the Board's responsibility for determining issues of compatibility, sector plan compliance, and public benefit contributions would be preempted. The treatment under SRA 08-3 of APF validity periods for land conveyed to the County for an arts and entertainment use is not supported by staff. It is inconsistent with recent growth policy amendments that require a public interest finding and other terms of approval by the Board for any APF validity beyond five years. Staff also finds that structural and consistency issues exist with the proposed ZTA and SRA.

ZTA 08-13

The principle elements of ZTA 08-13 would allow: (1) the optional method public use space, and public facility and amenity requirements to be satisfied if the County accepts land or building space with gross floor area equal to at least 20 percent of the net lot area to accommodate an arts and entertainment use in a designated Arts and Entertainment District; (2) standard streetscape to be required only in connection with that phase of the project associated with the streetscape improvement; (3) a determination by County Police Department that a proposed pedestrian path is unsafe, to override a sector plan recommendation for a pedestrian path; (4) approval of a site plan to validate phases of a preliminary plan and project plan that includes an arts and entertainment use; and (5) recordation of a final record plat to validate all phases of a multi-phase preliminary plan that includes an arts and entertainment use..

Staff Comments: A typical CBD zone optional method project would contribute a minimum of 20 percent of the net lot area as public use space, and certain public facilities and amenities would be required to support the greater densities permitted under the optional method of development. It is not unusual for the public use space and public facility and amenity commitments to total between 40 and 60 percent of the projects net lot area. All interior public benefit commitments would be counted against the project's overall FAR. Applicants are expected to conform to applicable sector plan design guidelines, access, and pedestrian circulation recommendations. Examples of optional method projects that have followed the existing process and incorporated arts and entertainment uses include the Downtown Silver Spring project (AFI and Roundhouse Theater), the Chevy Chase Bank Building (Roundhouse Theater), and the Whitney project (Nederlander Theater).

Under ZTA 08-13, projects that include land or building space accepted by the County for an arts and entertainment use would not be held to these same standards. The question is whether the benefit to the public of receiving the arts and entertainment use is equal to or greater than the benefit that would be achieved under these standards. It is staff's opinion, that this is an analysis that should be made by the Planning Board at the time of plan approval, not dictated by legislation.

Staff provides the following analysis of specific sections of the ZTA:

- (a) In staff's view, the public use space proposal would be somewhat more reasonable if the footnotes on page 5 of the ZTA read as follows:

*This requirement is satisfied if the applicant conveys or dedicates land or building space that is accepted by the County and approved by the Planning Board for an arts and entertainment use. The gross floor area of any arts and

entertainment use accepted by the County and approved by the Planning Board may be excluded from the gross floor area of the optional method project for purposes of calculating density.

- (b) Section 59-C-6.2356 (lines 18-57) is problematic in that land or building space dedicated for an arts and entertainment use, accepted by the County, would be exempt from any public use space or amenity commitments, except standard streetscape. Staff would, at a minimum, include discretionary language in this section for the Board to make a meaningful assessment of the public benefit from a trade-off of the public facility and amenity requirement for an arts and entertainment use.
- (c) Section 59-D-2.42 (lines 65-74) would put in place a process where a determination by the County Police Department, before the filing of the project plan, that a proposed pedestrian path is unsafe, to override a sector plan recommendation for a pedestrian path. Staff does not support a process where a potential safety hazard could not be redesigned to be safe. A sector plan recommended path should be reviewed by the Development Review Committee and Planning Board for a determination of whether the path is safe.
- (d) Sections 59-D-2.7 and 59-D-3 (lines 75-108) would tie the validity period for a project plan and site plan that contains land or building space for an arts or entertainment use to proposed Section 50-34(h) and Section 50-20(c)(3)D of the Subdivision Regulations. Although, these provisions are somewhat ambiguous in form and substance, they seem to preserve the validity period for all phases of a project plan and a site plan that include an arts and entertainment use, on approval of a preliminary plan or recordation of the phase that contains the arts and entertainment use. This does not sound like standard practice and potential consequences need to be carefully examined.

SRA 08-03

SRA 08-03 would establish a 10 year APF validity period for projects that include land or building space accepted by the County for arts and entertainment use. A 5 year extension would be granted if: (1) 20 percent of the project, other than the arts and entertainment use, had been built, or (2) the land is subject to a lease, or (3) there is a 10 percent vacancy rate in class "A" office buildings in the CBD, or (4) the applicant makes a contribution to the County for potential loss of County property tax revenues. Other provisions of the SRA would validate all remaining phases of any preliminary plan of subdivision or project plan on approval of a site plan for the phase containing the arts and entertainment use, or by recordation of a final record plat for the phase containing the arts and entertainment use.

Staff Comments: Under current growth policy provisions, a determination of adequate public facilities for a plan approved after August 1, 2007, remains valid for no less than 5 years and no more than 10 years after the preliminary plan is approved. A 5 year extension may be granted on a finding that the extended validity period would promote the public interest. A development schedule or phasing plan that shows the minimum percentage of the project that the applicant expects to complete in the first 5 years is taken into account. Other transportation improvements or mitigation conditions may be imposed to assure adequate levels of transportation service during the validity period. All building permits must be issued for the entire project, before expiration of the adequate public facilities validity period.

Staff provides the following analysis of specific sections of the SRA;

- (a) Section 50-20 (lines 4-57) is generally inconsistent with recent growth policy amendments that require a public interest finding and other terms of approval by the Board for any AGP validity beyond five years. As expressed in the Growth Policy report last year, at least one objective of the reduced validity period is to encourage subdivisions to apply for approval closer to the time when they are expecting to move to construction, in order to have a more active pipeline. A more active pipeline has public policy benefits by providing the public sector with a more accurate measure of expected demand for public facilities. This, in turn, allows impact taxes and other revenues to be better allocated toward the public facilities that will be needed. The public facility impacts would be expected to substantially change in the 10 year validity period proposed in SRA 08-3.

Staff knows of a previous occasion where an extended APF validity period was allowed for a specific project. The provision approved by the Council, which currently exist in the subdivision regulations, authorized the Planning Board to extend a determination of adequate public facilities once for up to 12 more years beyond the otherwise applicable validity period if:

- (1) the preliminary subdivision plan for the development required a significant commitment of funds by the applicant, amounting to at least 2,500,000, to comply with specific infrastructure conditions;
 - (2) the applicant had met or exceeded the required infrastructure conditions during the original validity period; and
 - (3) the applicant's satisfaction of the required infrastructure conditions provides a significant and necessary public benefit to the County by implementing infrastructure goals of an applicable master of sector plan
- (b) Sections 50-34 and 50-35 (lines 59-91) would validate all remaining phases of any preliminary plan or project plan on approval of a site plan for the phase

containing the arts and entertainment use, and by recordation of a final record plat for the property in the phase containing the arts and entertainment use. It also states that any amendment or modification to the phasing plan or preliminary plan will not affect the validations. The same comments noted under the ZTA discussion apply as well to the SRA, as follows. Although, these provisions are somewhat ambiguous in form and substance, they seem to preserve the validity period for all phases of project plan and a site plan that include an arts and entertainment use, on approval of a preliminary plan or recordation of that phase that contains the arts and entertainment use. This does not sound like standard practice and potential consequences need to be carefully examined.

For the reasons cited, Staff recommends that ZTA 08-13 and SRA 08-3 not be approved.

RDW/GR

Attachments

Circle Number

- | | |
|---|-------|
| 1. Zoning Text Amendment No. 08-15 | 1-9 |
| 2. Subdivision Regulation Amendment 08-03 | 10-14 |

Zoning Text Amendment No: 08-15
Concerning: Arts or Entertainment Use –
CBD Zones

Draft No. & Date: 2– 6/24/08

Introduced: _____

Public Hearing: _____

Adopted: _____

Effective: _____

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

By: District Council at the Request of the County Executive

AN AMENDMENT to the Montgomery County Zoning Ordinance to:

- establish a definition for an arts or entertainment use;
- expand the means to satisfy the public use space and public facility and amenity requirements of the optional method of development in the CBD Zones under certain circumstances;
- **amend the findings required for approval of a project plan;**
- amend certain development standards for a project that includes an arts or entertainment use; and
- allow for the establishment of a different project plan and site plan validity period for an arts or entertainment use.

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

DIVISION 59-A-2 “DEFINITIONS AND INTERPRETATION”
Section 59-A-2.1 “Definitions”

DIVISION 59-C-6 “CENTRAL BUSINESS DISTRICT ZONES”
Section 59-C-6.23 “Development Standards”
Section 59-C-6.233 “Minimum Public Use Space (percent of net lot area)”
Section 59-C-6.234 "Maximum Density of Development"

DIVISION 59-D-2 “PROJECT PLAN FOR OPTIONAL METHOD OF
DEVELOPMENT, CBD ZONES AND RMX ZONES”
Section 50-D-2.4 “Action by planning board”
Section 59-D-2.42 “Findings required for approval”

①

Section 59-D-2.7 "Duration of validity period and actions required to validate the plan"

DIVISION 59-D-3 "SITE PLAN"

Section 59-D-3.8 "Validity"

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

Section 59-C-6.2356 "Special regulation for optional method development projects that include an arts or entertainment use"

*EXPLANATION: **Boldface** indicates a heading or a defined term.
Underlining indicates text that is added to existing laws by the original text amendment.
[Single boldface brackets] indicate text that is deleted from existing law by the original text amendment.
Double underlining indicates text that is added to the text amendment by amendment.
[[Double boldface brackets]] indicate text that is deleted from the text amendment by amendment.
* * * indicates existing law unaffected by the text amendment.*

ORDINANCE

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

1 **Sec. 1. DIVISION 59-A-2 is amended as follows:**

2 **DIVISION 59-A-2. DEFINITIONS AND INTERPRETATION.**

3 **59-A-2.1 Definitions**

4 * * *

5 **Arts or Entertainment Use.** An activity that is dedicated to the visual or
6 performing arts and is readily accessible to the public, including:

7 (a) live performance of music, theater, or dance;

8 (b) the production of art, fine crafts, digital imagery, or film;

9 (c) radio production; or

10 (d) a museum.

11 * * *

12 **Sec. 2. DIVISION 59-C-6 is amended as follows:**

13 **DIVISION 59-C-6. CENTRAL BUSINESS DISTRICT ZONES.**

14 * * *

15 **59-C-6.23. Development Standards.**

16 * * *

17

	CBD-1		CBD-2		CBD-3	
	S ⁹	O	S ⁹	O	S ⁹	O
59-C-6.233. Minimum Public Use Space (percent of net lot area)¹⁵	10	20 ^{20*} _—	10	20 [*] _—	10	20 [*] _—
* * *						



	CBD-1		CBD-2		CBD-3	
	S ⁹	O	S ⁹	O	S ⁹	O
59-C-6.234. Maximum Density of Development						
* * *						
(b) Optional Method of development (see section 59-C-6.215(b)):						
* * *						
(2) Nonresidential, including transient lodging (FAR):		2 ^{19,**}		4 ^{**}		6 ^{**}
(3) Mixed residential and nonresidential						
-- Nonresidential, including transient lodging (FAR):		2 ^{5,**}		3 ^{5,**}		5 ^{5,**}
-- Total FAR ^{13, 15}		3 ^{**}		5 ^{**}		8 ^{**}

* The optional method public use space requirement is satisfied if: (1) the applicant has provided to the County, by conveyance or dedication, land or building space to accommodate an arts or entertainment use under Section 59-C-6.2356; and (2) the gross floor area of the space available for the arts or entertainment use equals at least 20% of the net lot area.

** The gross floor area of the arts or entertainment use that satisfies the public use space and the public facility and amenity requirements for the optional method of development under Section 59-C-6.2356 must not be counted in the gross floor area of the optional method project.

* * *

18 **59-C-6.2356 Special standards for optional method of development projects**
 19 **that include an arts or entertainment use.**

20 (a) In the CBD-1, CBD-2, and CBD-3 zones, the land or building space
 21 for an arts or entertainment use satisfies the public use space
 22 requirements under Sections 59-C-6.233 and 59-C-6.234 and the
 23 public facility and amenity requirement for the Optional Method of

24 Development required under Section 59-C-6.215(b) if at the time the
25 applicant files the original application for an optional method project:

- 26 (1) the arts or entertainment use is located in an area
27 designated as an Arts and Entertainment District under
28 State law; and
- 29 (2) the Executive agreed in writing to accept a conveyance or
30 dedication of land or a building space to accommodate an
31 arts or entertainment use, after the Executive determined
32 in an Executive Order that the arts or entertainment use
33 will provide:
- 34 (A) a positive economic impact by generating activity
35 and by complementing area businesses in the Arts
36 and Entertainment District;
- 37 (B) for public use of a facility that accommodates an
38 arts or entertainment use; and
- 39 (C) cultural opportunities for the public that do not
40 otherwise exist in the Arts and Entertainment
41 District.

42 (b) After land or building space for an arts or entertainment use is
43 transferred to the County:

- 44 (1) the public use space and public amenity space
45 requirement is satisfied for any amendment to the
46 original project plan; and
- 47 (2) the Executive may transfer or lease the land or building
48 space without any effect on the approval of the project
49 plan or site plan.

50 (c) Standard streetscaping improvements along the frontage of the phase
51 of the project that is intended to accommodate an arts or entertainment
52 use must be required during the phase of the project that contains the
53 arts or entertainment use. Standard streetscaping improvements,
54 beyond the improvements required for the frontage of the phase of the
55 project associated with the arts or entertainment use, must be required
56 with the phase of the project associated with the standard
57 streetscaping improvements being required.

58 * * *

59 **Sec. 3. DIVISION 59-D-2 is amended as follows:**

60 **DIVISION 59-D-2. PROJECT PLAN FOR OPTIONAL METHOD**
61 **OF DEVELOPMENT, CBD ZONES, AND RMX ZONES.**

62 * * *

63 **Sec. 59-D-2.4. Action by planning board.**

64 * * *

65 **59-D-2.42. Findings required for approval.**

66 * * *

67 (b) It would conform to the applicable sector plan or urban renewal plan.
68 An optional method of development project need not conform to the
69 applicable sector plan's or urban renewal plan's recommendation to
70 provide a pedestrian path on private property if, **the County Police**
71 **Department found, in a Crime Prevention Through Environmental**
72 **Design Review or equivalent review, before the filing of the initial**



73 project plan application, that the recommended path would create an
74 unsafe pedestrian environment.

75 * * *

76 **59-D-2.7. Duration of validity period and actions required to validate the**
77 **plan.**

78 * * *

79 (b) Validity Period.

80 (1) An approved project plan will remain valid for up to 24 months
81 from the initiation date, provided applicant has filed a complete
82 site plan application, as determined by the Planning Board staff
83 within 18 months of the initiation date; and, in the absence of
84 governmental delay, received site plan approval within 6
85 months of the assigned complete application date. The timely
86 approval of a site plan validates a project plan.

87 (2) The validity period for a project plan that contains land or
88 building space for an arts or entertainment use approved under
89 Section 59-C-6.2356 is governed by Section 50-34(h).

90 * * *

91 **Sec. 4. DIVISION 59-D-3 is amended as follows:**

92 **DIVISION 59-D-3. SITE PLAN**

93 * * *

94 **59-D-3.8. Validity.**

95 * * *

96 (b) The effective period of a certified site plan depends on the expiration
97 date of the underlying approved preliminary plan. The site plan takes



98 effect when the final record plat is recorded for all of the property
 99 covered by the approved preliminary plan. Where phasing of
 100 development is required, each phase takes effect as provided in the
 101 preliminary plan. The effective period for a site plan that includes
 102 land or building space for an arts or entertainment use approved under
 103 Section 59-C-6.2356 is governed by Section 50-20(c)(3)D. After the
 104 record plat is recorded, the certified site plan does not expire or
 105 require amendment before a building permit is issued unless:

106 * * *

107 **Sec. 5. Effective date.** This ordinance takes effect 20 days after the date of
 108 Council adoption.

109
 110 This is a correct copy of Council action.

111
 112 _____

113 Linda M. Lauer, Clerk of the Council

Ordinance No.: _____
Subdivision Regulation Amend. No. 08-03
Concerning: Arts or Entertainment Use –
Validity Period
Revised: _____ Draft No. 2
Introduced: June 24, 2008
Public Hearing: _____
Adopted: _____
Effective: _____

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

By: Council President at the Request of the County Executive

AN AMENDMENT to the Subdivision Regulations to:

- (1) provide for an extension of the validity period for an adequate public facilities determination for certain properties;
- (2) provide for the approval of a site plan to validate phases of a preliminary plan and project plan for certain properties under certain circumstances; and
- (3) provide for the recordation of a final record plat to validate all phases of a multi-phase preliminary plan for certain properties under certain circumstances.

By amending the following sections of Montgomery County Code Chapter 50:
Section 50-20. Limits on issuance of building permits.
Section 50-34. Preliminary subdivision plans—Filing and specifications.
Section 50-35. Preliminary subdivision plan—Approval procedure.

Boldface	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

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

1 **Sec. 1., Sections 50-20, 50-34 and 50-35 are amended as follows:**

2 **50-20. Limits on issuance of building permits.**

3 * * *

4 (c) (3) A determination of adequate public facilities made under this
5 Chapter is timely and remains valid:

6 * * *

7 (D) (i) For 10 years after the date of the conveyance of land
8 to the County, or possession of building space by the
9 County for an arts or entertainment use, under a
10 preliminary plan for an optional method of
11 development project approved under Section 59-C-
12 6.2356.

13 (ii) The Board must grant an application to extend the
14 validity period established under (D)(i) of this
15 subsection for an additional 5 years if:

16 a. at least 20% of the approved
17 development, excluding the arts or
18 entertainment use, either separately or in
19 combination:

- 20 1. has been built;
21 2. is under construction;
22 3. is subject to building permits that have
23 been issued;
24 4. is subject to a valid lease; or



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5. has had a site plan approved under Section 59-D-3; or

- b. at any time during the 24 months before the application for extension being filed, the vacancy rate for class A office buildings in the Central Business District in which the project is located reaches 10% for direct and sublet space combined, as measured by CoStar or a similar commercial Multiple Listings Service benchmark; or
- c. the applicant makes a binding commitment to the County to make a contribution, as compensation for potential loss of property tax revenues, an amount equal to \$2 for each square foot of approved gross floor area and thereafter makes the contribution within 6 months of final approval of the extension.

(iii) The validity period is extended for the duration of any government imposed moratorium, or other government action resulting in a similar effect, that would prevent the applicant from:

- a. completing the regulatory approvals necessary for obtaining a building permit;
or
- b. obtaining a building permit.

52 (iv) If the applicant proposes to change a use in a project
53 that is approved under Section 59-C-6.2356 and the
54 new use would have the same or lesser impact as the
55 original determination of adequate public facilities,
56 the adequate public facilities approval for the project
57 remains valid.

58 * * *

59 **50-34. Preliminary subdivision plans—Filing and specifications..**

60 * * *

61 (h) Staging schedule for land containing an arts or entertainment use as a
62 public use space. If a phasing plan for a preliminary plan of
63 subdivision includes land or building space that the County has
64 accepted for an arts or entertainment use under Section 59-C-6.2356,
65 approval of a site plan under Section 59-D-3 for the phase containing
66 that land or building space validates all remaining phases of the
67 preliminary plan and the project plan for the purpose of Section 59-D-
68 2.7(b).

69 [(h)] (i) * * *

70 [(i)] (j) * * *

71 [(j)] (k) * * *

72 **Sec. 50-35. Preliminary subdivision plan—Approval procedure.**

73 * * *

74 (h) *Duration of Validity Period and Actions Required to Validate the Plan.*

75 * * *

76 (2) *Duration of Validity Period.*

77 * * *

78

79 (D) An approved preliminary plan for a multi-phase project
80 that includes land or building space to be conveyed or
81 dedicated to the County for an arts or entertainment use
82 under Section 59-C-6.2356 is validated for all phases of
83 the approved preliminary plan by recordation of a final
84 record plat for all property in the phase containing the land
85 or building space to be conveyed or dedicated to the
86 County for an arts or entertainment use if recordation
87 occurs within 5 years after the final approval of the
88 preliminary plan. After approval, an amendment or
89 modification to the phasing plan or the preliminary plan
90 will not affect the validations, if the requirements of this
91 subsection have otherwise been met.

92
93 **Sec. 2. Effective Date.**

94 This Ordinance takes effect on the date of Council adoption.

95 *Approved:*

96
97
98 _____
99 Isiah Leggett, County Executive

_____ Date

100 *This is a correct copy of Council action.*

101
102
103 _____
Linda M. Lauer, Clerk of the Council

_____ Date