



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



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Description

Completed: 02/4/16

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

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

Summary

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

Background/Analysis

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

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

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

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

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

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

Letter of Opposition from David W. Brown

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

Conclusion

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

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

Attachments

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

ATTACHMENT 1

Zoning Text Amendment No.: 16-01
Concerning: Ripley/Silver Spring
South Overlay Zone –
Standards

Draft No. & Date: 1 – 12/9/15
Introduced: January 19, 2016
Public Hearing:
Adopted:
Effective:
Ordinance No.:

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

Lead Sponsor: Council Vice President Berliner

AN AMENDMENT to the Montgomery County Zoning Ordinance to:

- Amend the development standards for the Ripley/Silver Spring South Overlay Zone

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

DIVISION 59-4.9. “Overlay Zones”

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

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

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

[Single boldface brackets] indicate text that is deleted from existing law by original text amendment.

Double underlining indicates text that is added to the text amendment by amendment or text added by this amendment in addition to ZTA 14-09.

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

** * * indicates existing law unaffected by the text amendment.*

ORDINANCE

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

1 **Sec. 1. DIVISION 59-4.9 is amended as follows:**

2 **DIVISION 4.9. Overlay Zones**

3 * * *

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

5 **A. Purpose**

6 The purpose of the RSS Overlay zone is to:

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

16 **B. Land Uses**

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

18 underlying zone:

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

23 **C. Development Standards**

24 **1. Building Height**

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

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

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

37 * * *

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

40

41 This is a correct copy of Council action.

42

43 _____

44 Linda M. Lauer, Clerk of the Council

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

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

Ripley/South Silver Spring Overlay Zone

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

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

SUMMARY OF RIPLEY/SOUTH SILVER SPRING OVERLAY ZONE

Draft Purpose Clause

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

Major Provisions

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

FENTON VILLAGE

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

VISION

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

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

SOUTH SILVER SPRING

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

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

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

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

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DAVID W. BROWN



February 2, 2016

MEMORANDUM ON ZTA 16-01

ZTA 16-01 is ostensibly intended to amend the development standards for the Ripley/Silver Spring South Overlay Zone by deleting the height restriction along Newell Street. What it actually would do, if enacted, is legislatively overrule, without justification, a final judgment in the Maryland Courts in a Planning Board development case involving the property at 8001 Newell Street. This Memorandum briefly explains why ZTA-16-01 should be disapproved. The Introduction Memorandum (Staff Report) for the ZTA does not withstand scrutiny. The ZTA does not resolve a conflict between master plan and zoning ordinance language; there is no such conflict. ZTA 16-01 has no practical application except to a single property and, as such, is highly suspect as unconstitutional special legislation or improper spot zoning. Nor would ZTA 16-01 “clarify” the law. Rather, the ZTA would overrule a decision by Montgomery County Circuit Court McCally whose sole focus was this Overlay Zone provision and its applicability at 8001 Newell Street. That decision, an impeccable statutory analysis, was potentially subject to *de novo* review in the Maryland Court of Special Appeals by either the Planning Board or the developer that had unsuccessfully sought to defend the Planning Board’s sudden and prejudicial reversal of position on the provision at issue. Neither the applicant nor the Planning Board saw fit to seek such review and the Circuit Court decision became the final judgment on the Overlay Zone provision. It should not now be changed by legislative fiat.

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

The Staff Report argues that “[t]he height limit was intended to apply only on that portion of Newell Street that confronts a residential zone in the District of Columbia.” Nothing in the history of the Sector Plan/Overlay Zone supports this alleged intent, and understandably so,

because it is nonsensical. No part of Newell Street “confronts” a residential zone in the District of Columbia, a point made emphatically by Judge McCally in her Opinion (at 6) **Exhibit 2**:

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

The Staff Report sees a conflict in the Sector Plan where none exists. Staff asserts that one finds in the “summary section of the Sector Plan” that the height-setback restriction applies “only along Eastern Avenue.” This is doubly incorrect. The “summary” being referred to is a summary of the provisions of the Overlay Zone, and there are no land use recommendations to be found elsewhere in the Sector Plan conflicting with the language added by Council. Judge McCally found no ambiguity in ruling that the terms of the Overlay Zone height-setback restriction apply along Newell Street. Further, as a summary of the Overlay Zone’s “major provisions,” there is no conflict in the omission from a summary of major provisions an exhaustive description of its operation and effect everywhere. By its very nature, a “summary” is not exhaustive. Here, more property in the Overlay Zone is impacted by the Eastern Avenue restriction than the Newell Street restriction, and the former was evidently viewed, as between the two, as the “major provision.” The conclusion might be different if, as the Staff Report asserts, the restriction were said to apply “**only** along Eastern Avenue,” but “only” was added by Staff to its Memo; it is not in the Sector Plan summary of major provisions.

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

It is therefore quite clear that ZTA 16-01 has the intended effect of changing the standards for redevelopment of a single property. This is, at the least, a very inappropriate way to establish a land use policy, if not outright illegal as unconstitutional special legislation or spot zoning. *See Beauchamp v. Somerset County Sanitary Comm’n*, 256 Md. 541, 261 A.2d 461 (1970) (where the practical and intended effect of a law is to address one situation, it is a “special law” enacted in

violation of Article III, § 33 of the Maryland Constitution); *Huff v. Board of Zoning Appeals of Baltimore County*, 214 Md. 48, 133 A.2d 83 (1957)(when a zoning enactment is for the benefit of an individual owner rather than pursuant to a comprehensive plan for the benefit of the community, it is viewed as illegal spot zoning).

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

3. Legislative Evasion of the Merits. Maryland Courts are very deferential to the expertise of administrative agencies, and in particular to their interpretation of statutes those agencies administer. Accordingly, although most Planning Board development decisions are subject to judicial review, they are infrequently challenged and Circuit Court reversal of a Board decision is rare. But if the Board is reversed in Circuit Court, with the Board and the applicant both participating, as was the case in the development approval for 8001 Newell Street, either or both of those losing parties has a right of appeal to the Maryland Court of Special Appeals. In that court, the review would be *de novo*, which means that the appellate court reviews the decision of the Board, not that of the Circuit Court, and the deference the Board is given in judicial review of its decisions would be back in place all over again. *See Naylor v. Prince George’s County Planning Board*, 200 Md. App. 309, 27 A.3d 597, 601 (2011).

Despite these advantages, neither the Board nor the applicant saw fit to appeal Judge McCally’s decision in the Court of Special Appeals, and her decision became the final judgment in the case in March 2014. Now, almost a year later, instead of attempting to demonstrate to an appellate court, obliged to be receptive to the Board and the applicant, that the Board’s interpretation of the Overlay Zone was correct in that case, the applicant has sought to legislatively overrule that final judgment. This “end run” around existing law, if enacted, would effectively dispense with the obligation to demonstrate that the Board was right all along in the 2013 decision in the 8001 Newell Street case, when it reversed a long-standing interpretation of the Overlay Zone. The Board should not be an enabling party to this reprehensible tactic. The Board, having failed to appeal Judge McCally’s decision, should, both for its internal purposes, and for making sensible recommendations to the Council on this ZTA, regard the issue of what the Overlay Zone says about what is required “along Newell Street” to be a resolved matter, not something in need of further “clarification” by councilmembers who had no involvement in the enactment of the Sector Plan and the Overlay Zone, and no independent knowledge of what the 2000 Planning Board and County Council intended for South Silver Spring with enactment of the Overlay Zone.

Resolution No.: 14-416
Introduced: February 1, 2000
Adopted: February 1, 2000

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

By: District Council

Subject: Approval of Planning Board (Final) Draft Silver Spring Central Business District and Vicinity Sector Plan

1. On, April 22, 1999, the Montgomery County Planning Board transmitted to the County Executive and the County Council the Planning Board (Final) Draft Silver Spring Central Business District and Vicinity Sector Plan.
2. The Planning Board (Final) Draft Silver Spring Central Business District and Vicinity Sector Plan amends the approved and adopted 1993 Silver Spring CBD Sector Plan, as well as an amendment to the General Plan (On Wedges and Corridors) for the Physical Development of the Maryland-Washington Regional District Within Montgomery County and Prince George's Counties, as amended. This Sector Plan also amends the 1997 approved and adopted Master Plan for Silver Spring-East and the Master Plan of Highways within Montgomery County, Maryland as amended.
3. On June 21, 1999, the County Executive transmitted to the County Council his comments on the Silver Spring Central Business District and Vicinity Sector Plan.
4. On July 27, 1999, the County Council held a public hearing regarding the Planning Board (Final) Draft Silver Spring Central Business District and Vicinity Sector Plan. The Master Plan was referred to the Planning, Housing, and Economic Development Committee for review and recommendation.
5. On October 25, 1999, and November 22, 1999, the Planning, Housing, and Economic Development Committee held worksessions to review the issues raised in connection with the Planning Board (Final) Draft Silver Spring Central Business District and Vicinity Sector Plan.

- Building heights along Georgia Avenue should contribute to an attractive and coherent street.
 - at the building line, limit height to 90 feet, consistent with height limits on the east side of Georgia Avenue. (See Figure 6.)
 - the building may step back and its height may be increased up to 143 feet, provided that the building is contained within a 2:1 slope.
- Building heights along Dixon Avenue and Ripley Street should contribute to an attractive street with adequate light and air.
 - to be in proportion with the 70 to 80 foot street widths, building height should be limited to 80 feet at the property line. (See Figure 13.)
 - beyond 80 feet, the building may step back and its height may be increased up to 143 feet, provided they are contained within a 2:1 slope. (See Figure 13.)

SOUTH SILVER SPRING

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

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

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

- Improve links within South Silver Spring and between South Silver Spring and the Core, the Ripley District, the Transit Station, Montgomery College, and the District of Columbia.
- Building heights along Newell Street and Eastern Avenue should ensure compatibility with the adjacent residential neighborhood.
 - at the property line, building heights should be limited to 45 feet
 - above 45 feet, the building may step back 60 feet and its height may increase to 90 feet.

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

RECEIVED
FEB 24 2014

8045 Newell Street Condominium Assoc.,
et al. :

v. :

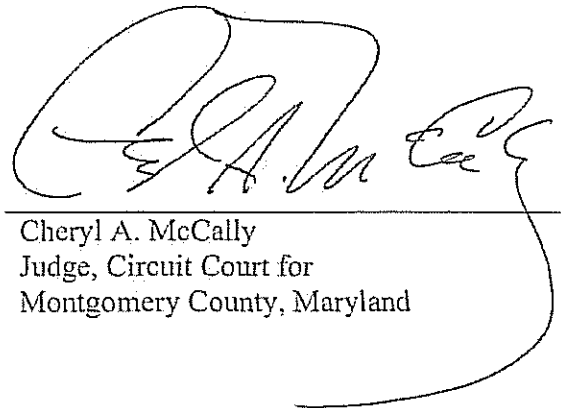
Montgomery County Planning Board :

Civil No. 378604

Order

For the reasons stated in the court's opinion, the decision in Resolution No. 13-74 of the Montgomery County Planning Board, this 20th day of February, 2014, by the Circuit Court of Montgomery County, Maryland, is hereby VACATED; and it is further

ORDERED, that this matter be REMANDED to the Montgomery County Planning Board for further proceedings consistent with this opinion.



Cheryl A. McCally
Judge, Circuit Court for
Montgomery County, Maryland

ENTERED

FEB 21 2014

Clerk of the Circuit Court
Montgomery County, Md.

Exhibit 2

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

8045 Newell Street Condominium Assoc.,
et al.
v.
Montgomery County Planning Board

Civil No. 378604

RECEIVED
FEB 26 2014

Opinion

Pursuant to Maryland Rule 7-200, *et seq.*, Petitioners, 8045 Newell Street Condominium Assoc. *et al.*, seek judicial review of Respondent, Montgomery County Planning Board's (Board), decision in Resolution No. 13-74 to approve Respondent, Comstock Newell, L.C.'s (Developer), Project Plan No. 920130020 (Plan) for the development of 8100 Newell Street, Silver Spring, Maryland (Property). Petitioners filed Petitioners' Rule 7-207 Memorandum. D.E. 13. The Board filed Answering Memorandum of The Montgomery County Planning Board. D.E. 15. The Developer filed Respondent Comstock Newell, L.C.'s Response to Petitioners' Memorandum of Law. D.E. 16. Petitioners filed Petitioners' Consolidated Rule 7-207 Reply Memorandum. D.E. 17. On January 14, 2014, all parties appeared before the court represented by counsel for a hearing to supplement their filings.

Background

The Property lies in an area of Silver Spring that is zoned as CBD-1 and is part of the Ripley/South Silver Spring Overlay Zone. The Property lies on the boundary of the Overlay Zone. Section 59-C-18.2 of the Montgomery County Code addresses the restrictions that govern this overlay zone. Specifically, § 59-C-18.202(b) states:

ENTERED

FEB 21 2014

u
Clerk of the Circuit Court
Montgomery County, Md.

Development standards. The development standards are the same as those in the underlying zones, except:

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

Montgomery Cnty. Zoning Ordinance (2013), available at

http://www.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=amlegal:montgome_mont_md_mc.

In this Overlay Zone, the border between Maryland and the District of Columbia runs along Eastern Avenue. Newell Street runs perpendicular to Eastern Avenue and the District of Columbia border. Across Eastern Avenue lie single-family homes in the District of Columbia. Continuing east along Eastern Avenue, the single-family homes on the District side end and non-residential buildings begin. Across Newell Street lie multi-dwelling garden apartments. Currently, a public storage facility is on the Property at the corner of Newell Street and Eastern Avenue. At issue is the first sentence of § 59-C-18.202(b)(1). Specifically, regarding the application of the qualifying phrase "that confronts a residential zone in the District of Columbia."

After two hearings, held December 20, 2012 and continued May 16, 2013, the Board interpreted the qualifying phrase to apply to both Newell Street and Eastern Avenue. Interpreted in this way, the height restriction would only apply to the areas of either street where that street "confronts a residential zone in the District of Columbia."

This interpretation directly contradicted the Board's February 12, 2003 decision. That ten (10) year old decision, which determined the restrictions on the development of Petitioners'

ENTERED

FEB 21 2014

Clerk of the Circuit Court

building, interpreted the qualifying phrase to apply only to Eastern Avenue. Interpreted in this way, the height restriction applied along the entirety of Newell Street.

The Board's most recent interpretation of the height restriction allows the Developer to proceed with the Plan to turn the storage facility into a 3,100 square foot retail and 156,815 square foot residential development. Petitioners appeal the Board's decision. They argue the height restriction should apply along the length of Newell, as the Board previously decided.

Standard of Review

Generally, "judicial review of administrative agency action is narrow." *Watkins v. Dep't of Pub. Safety & Corr. Servs.*, 377 Md. 34, 46, 831 A.2d 1079, 1086 (2003) (citation omitted). This court "may not substitute its judgment for the administrative agency's in matters where purely discretionary decisions are involved, particularly when the matter in dispute involves areas within that agency's particular realm of expertise ... so long as the agency's determination is based on 'substantial evidence.'" *People's Council for Balt. Cnty. v. Surina*, 400 Md. 662, 681, 929 A.2d 899, 910 (2007). The agency is accorded deference to its interpretation of a statute that it administers. *Watkins*, 377 Md. at 46, 831 A.2d at 1086.

However, the court's review is "less deferential ... where the legal conclusions reached by that body are based on an erroneous interpretation or application of the zoning statutes, regulations, and ordinances relevant and applicable to the property that is the subject of the dispute. *Surina*, 400 Md. at 682, 929 A.2d at 911. "When the question before the agency involves one of statutory interpretation" review is more expansive and the court "may substitute [its] judgment for that of the agency." *DLLR v. Muddiman*, 120 Md. App. 725, 734, 708 A.2d 47, 52 (1998). The court is not bound by the agency's statutory or legal conclusions. *Id.*

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The goal of statutory construction “is to ascertain and effectuate the intent of the Legislature.” *Walzer v. Osborne*, 395 Md. 563, 571, 911 A.2d 427, 431 (2006) (citation omitted). The court first looks to the plain language of the statute and gives the language its natural and ordinary meaning. *Id.* The Legislature is “presumed to have meant what it said and said what it meant.” *Id.* at 572, 911 A.2d at 432 (citing *Witte v. Azarian*, 369 Md. 518, 525, 801 A.2d 160, 165 (2002)). If this natural and ordinary meaning is clear and unambiguous, construction of the statute is at an end. *Id.* (citing *Chow v. State*, 393 Md. 431, 443-44, 903 A.2d 388, 395 (2006)).

The words are given effect as written if, “construed according to their common and everyday meaning, [they] are clear and unambiguous and express a plain meaning.” *Id.* (citing *Jones v. State*, 336 Md. 255, 261, 647 A.2d 1204, 1206-07 (1994)). This plain meaning “is controlled by the context in which it appears.” *Id.* at 573, 911 A.2d at 432-33 (citing *State v. Pagano*, 341 Md. 129, 133, 669 A.2d 1339, 1341 (1996)). As a part of the context, “related statutes or a statutory scheme that fairly bears on the fundamental issue of legal purpose or goal must also be considered.” *Id.* at 573, 911 A.2d at 433 (citing *Gordon Family P'ship v. Gar on Jer*, 348 Md. 129, 138, 702 A.2d 753, 757 (1997)).

An ambiguity exists when there are two or more reasonable alternative interpretations of the statute. *Id.* at 572-73, 911 A.2d at 432 (citing *Chow*, 392 Md. at 444, 903 A.2d at 395). However, the court will “neither add nor delete words to a clear and unambiguous statute to give it a meaning not reflected by the words of the Legislature used or engaged in forced or subtle interpretation in an attempt to extend or limit the statute’s meaning.” *Id.* at 572, 911 A.2d at 432 (citing *Taylor v. Nations Bank, N.A.*, 365 Md. 166, 181, 776 A.2d 645, 654 (2001)). Further, the court is “required to read the rule so as to give effect and meaning to all of it, thus avoiding an

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interpretation that renders any part of the rule nugatory or meaningless.” *Blundon v. Taylor*, 364 Md. 1, 12, 770 A.2d 658, 664 (2001).

An agency’s interpretation is entitled to deference where it is a consistent and long-standing construction. *Marriott Emps. Fed. Credit Union v. Motor Vehicle Admin.*, 346 Md. 437, 445, 697 A.2d 455, 459 (1997) (citation omitted). The weight given to an agency’s construction depends on several factors including the duration and consistency of the administrative practice and the extent to which the agency engaged in a process of reasoned elaboration in formulating its interpretation. *Id.* at 445-46, 697 A.2d at 459 (citations omitted). However, where the construction “conflicts with the unambiguous statutory language” the construction is not entitled to deference. *Id.* at 446, 697 A.2d at 459 (citing *Falik v. Prince George’s Hosp.*, 322 Md. 409, 416, 588 A.2d 324, 327 (1991)).

Analysis

The court’s analysis begins, and quickly ends, with the plain, unambiguous language of the zoning ordinance at issue in the context of the overlay zone. “Building height in the overlay zone along Newell Street and Eastern Avenue that confronts a residential zone in the District of Columbia must not exceed a height of 45 feet.”

Foremost, the court finds it cannot give the Board’s interpretation the deference it seeks. This interpretation has not been applied consistently over time. Rather, just the opposite. The Board’s current interpretation directly contradicts its own interpretation of the same section ten years earlier. Further weighing against deference is that the Board’s current interpretation conflicts with the unambiguous language of the zoning ordinance.

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The court finds that the language of the Zoning Ordinance, taken in context, is not open to two or more reasonable interpretations. The Board argues that “confront” has a special meaning in zoning parlance. Yet, this argument is not supported by the statutory scheme.

Section 59-A-2.1 of the Montgomery County Code specially assigns definitions to a wide variety of words. These definitions include common words that the Montgomery County Council intended to give a specific meaning (for example “Yard”, with separate definitions for “Yard, front”, “Yard, rear”, and “Yard, side”) and words more specialized to the zoning world (for example, “Frontage” and “Individual living unit (ILU)”). Nowhere in this expansive definition section is “confront” given a special meaning beyond its everyday use. Therefore, the court must apply its “common and everyday meaning.” *Walzer*, 395 Md. at 572, 911 A.2d at 432.

The Merriam-Webster Dictionary defines “confront” as:

- 1: to face especially in challenge: OPPOSE <confront an enemy>
- 2: a: to cause to meet: bring face-to-face <confront a reader with statistics>
b: to meet face-to-face: ENCOUNTER <confronted the possibility of failure>.

“confront.” Merriam-Webster Dictionary, 2014, available at <http://www.merriam-webster.com/dictionary/confront>. Newell Street runs perpendicular to the District of Columbia. Given the common meaning of “confront”, it is not possible for Newell Street to be “face to face” with any zone in the District of Columbia, residential or otherwise. Thus, an interpretation applying the qualifying phrase “that confronts a residential zone in the District of Columbia” to Newell Street would render the limitation meaningless in regards to Newell Street.

Therefore, the Board’s interpretation is not a reasonable alternative which would result in an ambiguity of the plain language of the statute. Rather, the record demonstrates that the Board impermissibly “engaged in forced or subtle interpretation in an attempt to” limit the reach of the zoning ordinance. *Walzer*, 395 Md. at 572, 911 A.2d at 432. The Board’s reasoning that

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“confront” is “less than artful drafting” does not permit it to go beyond the plain language of the statute. The only reasonable interpretation of the Zoning Ordinance is to apply the height restriction to all of Newell Street.

The court’s unambiguous interpretation of the Zoning Ordinance is supported by the context of the property at issue. In the Overlay Zone, some length of Eastern Avenue confronts residential zones in the District of Columbia while some length of Eastern Avenue confronts non-residential zones in the District of Columbia. This makes the phrase necessary to qualify to which areas of Eastern Avenue the height restriction applies. In contrast, as already stated, no length of any portion of Newell Street confronts any zone in the District of Columbia. Applying the phrase to Newell Street would be superfluous.

Finally, the court’s unambiguous interpretation of the Zoning Ordinance is supported by the fact that this exact interpretation was applied by the Board ten years ago when they first had occasion to fully consider this statute. It is worth noting that businesses and the public have developed and purchased property in the Overlay Zone in at least constructive, if not actual, reliance on the Board’s interpretation of this ordinance over the previous ten years. The court views the Board’s decision to change its mind because, as the Developer argues, the property was “underutilized” to be unequitable to those who engaged in these previous transactions precisely because of the height limitations Respondents previously applied to the property. Of course, the Montgomery County Council is always permitted to amend or change the language of the Zoning Ordinance through the proper procedure. As currently written, however, the height restriction ordinance unambiguously applies along Newell Street.

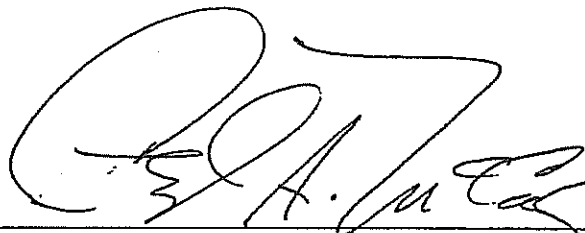
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Conclusion

For the reasons stated above, the decision in Resolution No. 13-74 of the Montgomery County Planning Board is hereby **VACATED**. Further, this matter is **REMANDED** to the Montgomery County Planning Board for further proceedings consistent with this opinion. An appropriate order follows this opinion.



Cheryl A. McCally
Judge, Circuit Court for
Montgomery County, Maryland

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