



THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

**MCPB**  
**Item #6**  
**07/11/02**

**DATE:** July 5, 2002  
**TO:** Montgomery County Planning Board  
**VIA:** Michael Ma, Zoning Supervisor *ma*  
**FROM:** Greg Russ, Zoning Coordinator *GR*  
**REVIEW TYPE:** Transmittal to County Council for introduction as a Zoning Text Amendment  
**PURPOSE:** To eliminate the special exception neighborhood and county need requirement for all affected uses (Sections 59-G-1.24 and 1.25)

**TEXT AMENDMENT:** Not applicable until introduced  
**REVIEW BASIS:** Advisory to the County Council sitting as the District Council, Chapter 59, the Zoning Ordinance  
**INTRODUCED BY:** N/A  
**INTRODUCED DATE:** N/A

**PLANNING BOARD REVIEW:** March 7, 2002 & July 11, 2002  
**PUBLIC HEARING:** N/A

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**STAFF RECOMMENDATION:** TRANSMIT to County Council for introduction

#### **PURPOSE OF THE TEXT AMENDMENT**

To eliminate the special exception neighborhood and county need requirement for all affected uses (Sections 59-G-1.24 and 1.25)

#### **BACKGROUND**

Staff is in the process of examining the purpose for reviewing neighborhood and County need for certain special exception uses as stated in Sections 59-G-1.24 and 1.25. It should be noted that since the time the Board previously reviewed this issue, the need requirements for medical and dental clinics, senior housing and private educational institutions were eliminated as part of the Comprehensive Zoning Ordinance Review for special exceptions located in the one-family residential zones.

At the March 7, 2002 meeting, the Planning Board directed staff to provide additional analysis on its recommendation to eliminate County and neighborhood need as a basis for reviewing certain special exceptions. Issues addressed by the Board included: over concentration of a particular use in an area; possible elimination of certain uses from the need requirement; subjective nature of the need requirement; and alternative methods for evaluating County and neighborhood need.

## **ANALYSIS**

Staff continues to recommend that the Zoning Ordinance requirement for neighborhood and county need for all affected special exception uses be eliminated. Below is a summary of staff's analysis. The complete Research and Technology Center report is included as Attachment 2.

### Current Requirements

The current Zoning Ordinance language is as follows:

#### 59-G-1.24. Neighborhood need.

In addition to the findings and requirements of Article 59-G, the following special exceptions may only be granted when the Board, the Hearing Examiner or the District Council, as the case may be, finds from a preponderance of the evidence of record that a need exists for the proposed use to serve the population in the general neighborhood, considering the present availability of identical or similar uses to that neighborhood:

- (1) Automobile filling station.
- (2) Automobile and light trailer rental lot, outdoor.
- (3) Automobile, truck and trailer rental lot, outdoor.
- (4) Automobile sales and service center.
- (5) Swimming pool, community.
- (6) Swimming pool, commercial.

#### 59-G-1.25. County need.

In addition to the findings of Article 59-G, the following special exceptions may only be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that a need exists for the proposed use due to an insufficient number of similar uses presently serving existing population concentrations in the County, and the use at the location proposed will not result in a multiplicity or saturation of similar uses in the same general neighborhood:

- (1) Eating and drinking establishment--Drive-in restaurant.
- (2) Funeral parlors and undertaking establishment.
- (3) Hotel, motel or inn.
- (5) Rifle, pistol and skeet shooting range, outdoor.
- (6) Sanitary fill, incinerator, or private solid waste transfer station.

- (6) Public use heliport/helistop.
- (7) Conference center with lodging.

### Proof of Need

Staff believes that the following principles apply relating to proof of need analysis:

- A neighborhood is not the same as a market area.
- The competitive market economy is an efficient means of regulating market matters.
- The applicant's decision to build the facility creates a presumption of adequate market demand.
- It is not the purpose of the zoning regulations to keep applicants from making poor market decisions.
- It is not the purpose of the zoning regulations to keep existing businesses in the area from going out of business because of increased competition.
- The traditional supply and demand market analysis approach does not determine the needs of the community under either the neighborhood need or County need provisions of the ordinance.

### Market Viability Approach

The requirement of proof of need has been satisfied by studies that showed an excess of demand over supply, at average sales levels, in an applicant-defined market area for the proposed establishment. The staff and the Board question whether the traditional market supply and demand approach is what the zoning ordinance language intends by community need.

The zoning ordinance mentions two rather vague criteria, convenience and service, for judging neighborhood need. For the past few decades, applicants provided analyses of market supply and demand to demonstrate County and neighborhood need. The staff believes that market support by itself does not demonstrate neighborhood need. Market based studies measure demand against the typical sales level for each type of facility. There is an implicit assumption that when facilities are operating at above the typical sales level the neighborhood is not being well served. Therefore, if sales are higher than average the community must need another similar facility. However, increased sales do not equal unmet need.

In summary, if adequate market demand is to be the standard of neighborhood need, a needs analysis is superfluous. Market forces continually act to balance supply and demand.

### Alternative Approach

Research staff has examined another approach that looks at how the neighborhood is presently served by similar uses in a more direct qualitative way. Staff has explored four ways at looking at convenience and service for the neighborhood: **convenience, capacity for service, choice, and competition (see Attachment 2 for details)**. These indicators could be subjectively weighed against detriments from the project such as

added congestion and neighborhood impact. If these could be objectively measured against accepted standards they might provide a better way of evaluating neighborhood need. However, just as the market viability approach is not an adequate measure of community need, the more direct observations of convenience and service also present practical problems. Most of these observations are not quantifiable. Even when they are, there are no established standards against which to compare the convenience and service needs of a neighborhood. Also, unlike for the market approach, there is no published data to provide a common basis for analysis and review. Almost any commercial facility can reasonably be said to add at least some small degree of the convenience and service; so what would be the basis of denial of an application based on need? Therefore it appears that these indicators would provide little help for the Planning Board or the Board of Appeals in making decisions.

### Summary of Uses Table

Staff has provided a table that depicts the zones where the affected uses are located by special exception and by-right (Attachment 3). The table further provides the total number of each use approved by special exception through December of 2000. As seen, there are no zones where automobile filling stations are permitted as a matter of right. The table also depicts a number of uses that have had very few or no special exception applications approved. As stated above, staff believes that County and neighborhood need should be eliminated from the Zoning Ordinance. Should the Board recommend that only some uses be eliminated, staff suggests that, at a minimum, the rarely used special exception categories be removed. These categories include: rifle, pistol and skeet shooting range, outdoor; sanitary fill, incinerator, or private solid waste transfer station; conference center with lodging; funeral parlors and undertaking establishments; commercial swimming pool; public use heliport/helistop; and automobile, truck and trailer rental lot, outdoor.

### Land Use Issues

As mentioned in the previous staff report, staff also believes that the Zoning Ordinance would continue to protect neighborhoods from adverse impacts of the uses through the adherence to the special exception general conditions provided in Section 59-G-1.21. Additionally, general condition #7 of this section states the following:

*(7) Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Condition #7 minimizes the proliferation of special exceptions in a neighborhood, thereby reducing the likelihood of having a number of abandoned or empty special exception use structures in an area (should a senior housing use, for example, cease to exist). Staff does not believe that providing additional language to limit the over

concentration of one particular use is necessary since any impacts associated with such use can be addressed by the special exception general conditions provided in Section 59-G-1.21 and could therefore be used in evaluating the appropriateness of the use at that location.

For these reasons, staff believes that the needs analysis requirement should be eliminated from special exceptions.

## **RECOMMENDATION**

The staff recommends that the proposed amendments to eliminate the county and neighborhood needs requirement for those uses as established in Sections 59-G-1.24 and 1.25 be transmitted to the County Council for introduction.

Attachment 1 depicts the proposed amendments as proposed by staff.

GR

### **Attachments**

1. Proposed Zoning Text Amendment
2. Memorandum from Fred Peacock to Gregory Russ
3. Table of Special Exception Uses That Require Need Analysis

ATTACHMENT 1

Zoning Text Amendment No: 02-  
Concerning: Special Exception County and  
Neighborhood Need Requirement  
Draft No. & Date: 2 & July 5, 2002  
Introduced:  
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

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By:

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AN AMENDMENT to the Montgomery County Zoning Ordinance for the purpose of:

- To eliminate the neighborhood and county need requirement for all affected special exception uses (Sections 59-G-1.24 and 1.25)
- making plain language changes throughout.

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

DIVISION 59-G-1	“SPECIAL EXCEPTIONS-AUTHORITY AND PROCEDURES”
Section 59-G-1.24	“Neighborhood need”
Section 59-G-1.25	“County need”

*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:*

**Sec. 1. Division 59-G-1 is amended as follows:**

**DIVISION 59-G-1. SPECIAL EXCEPTIONS-AUTHORITY AND PROCEDURES.**

**59-G-1.2. Conditions for granting.**

\* \* \*

**59-G-1.24. [Neighborhood need] Reserved.**

[In addition to the findings and requirements of Article 59-G, the following special exceptions may only be granted when the Board, the Hearing Examiner or the District Council, as the case may be, finds from a preponderance of the evidence of record that a need exists for the proposed use to serve the population in the general neighborhood, considering the present availability of identical or similiar uses to that neighborhood:

- (1) Automobile filling station.
- (2) Automobile and light trailer rental lot, outdoor.
- (3) Automobile, truck and trailer rental lot, outdoor.
- (4) Automobile sales and service center.
- (5) Swimming pool, community.
- (6) Swimming pool, commercial.]

**59-G-1.25. [County need] Reserved.**

[In addition to the findings of Article 59-G, the following special exceptions may only be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that a need exists for the proposed use due to an insufficient number of similar uses presently serving existing population concentrations in the County, and the use at the location proposed will not result in a multiplicity or saturation of similar uses in the same general neighborhood:

- (1) Eating and drinking establishment--Drive-in restaurant.
- (2) Funeral parlors and undertaking establishment.
- (3) Hotel, motel or inn.
- (4) Rifle, pistol and skeet shooting range, outdoor.
- (5) Sanitary fill, incinerator, or private solid waste transfer station.
- (6) Public use heliport/helistop.



1           (7) Conference center with lodging.]

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3           **Sec. 3. Effective date.** This ordinance becomes effective 20 days after the  
4 date of Council adoption.

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6 This is a correct copy of Council action.

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11 Mary A. Edgar, CMC

12 Clerk of the Council



THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION  
Office of the Chairman, Montgomery County Planning Board

# Memo

**To:** Gregory Russ, Development Review

**From:** Fred Peacock, Research & Technology Center *Fred*

**Date:** June 20, 2002

**Subject:** Proof of Need Requirement for Special Exceptions

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## Introduction

The zoning ordinance's County and neighborhood need requirements seek to prevent the over concentration of facilities by establishing whether or not they are needed for the convenience and service to the general neighborhood. The Planning Board and Board of Appeals must decide whether one more of a particular use is "needed" in the general neighborhood where the applicant proposes to build it. To assist them in these decisions, applicants provide a statement of need, often accompanied by an elaborate analysis. The traditional approach to needs analysis has been one of establishing that the proposed use can generate an average level of sales for its type of business given the existing competition in the area. In this memo the Research staff of the Park & Planning Department will examine whether either the traditional approach or an alternative approach developed by the staff provide satisfactory guidance to the boards in making this decision.

## Conclusion and Recommendation

The staff believes that the traditional approach, by focusing on the commercial viability of the proposed project, does not address the needs of the neighborhood. The staff establishes in this memo that the commercial viability of a project is a poor measure of neighborhood need. Alternative qualitative approaches, which seek to evaluate the needs of the neighborhood for convenience and service more directly, fail because of practical problems of measurement. Most of the indicators are not quantifiable; there are no published data for them, and no standards against which to judge observations. Therefore, while an alternative qualitative approach is interesting, it is probably of little help in guiding decision makers. Because neither of these approaches accomplishes the goal of establishing clearly whether the applicant's project is needed by the neighborhood, the Research staff recommends deleting the County and neighborhood need requirements for special exception applications.

## **Zoning Ordinance Requirements**

The Zoning Ordinance lists two community need requirements for different special exception uses. They are very similar in their wording.

### **“59-G-1.24. Neighborhood need.**

The following special exceptions may only be granted when the board, the hearing examiner or the district council, as the case may be, finds from a preponderance of the evidence of record that, **for the public convenience and service, a need exists for the proposed use for service to the population in the general neighborhood, considering the present availability of such uses to that neighborhood:**

- (1) Automobile filling station.
- (2) Automobile and light trailer rental lot, outdoor.
- (3) Automobile, truck and trailer rental lot, outdoor.
- (4) Automobile sales and service center.
- (5) Swimming pool, community.
- (6) Swimming pool, commercial.”

Article 59-G-1.25 County Need, states that special exceptions for the following uses “may only be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that, **for the public convenience and service, a need exists for the proposed use due to an insufficient number of similar uses presently available to serve existing population concentrations in the County, and that the uses at the location proposed will not result in a multiplicity or saturation of similar uses in the same general neighborhood of the proposed use.**” This two-fold statement is interpreted as requiring demonstration of need on both Countywide and neighborhood levels.

- (1) Drive-in restaurant.
- (2) Funeral parlors and undertaking establishment.
- (3) Hotel, motel or inn.
- (4) Rifle, pistol and skeet shooting range, outdoor.
- (5) Sanitary fill, incinerator, or private solid waste transfer station.
- (6) Public use heliport/helistop.
- (7) Conference center with lodging.

## **Background**

Over the past two-and-a-half years the Montgomery County Park & Planning staff, with the guidance of the Planning Board, has wrestled with the requirement for proof of neighborhood need for commercial uses requiring a special exception to develop in certain zones.

Over the past few decades, the requirement of proof of need has been satisfied by studies that showed an excess of demand over supply, at average sales levels, in an applicant-defined market area for the proposed establishment. Park & Planning Research staff started reviewing these studies early in 2000. The staff and the Board question whether the traditional market supply and demand approach is what the zoning ordinance language intends by community need.

The Park and Planning Department has developed the following principles relating to proof of need analyses.

- A neighborhood is not the same as a market area.
- The competitive market economy is an efficient means of regulating market matters.
- The applicant's decision to build the facility creates a presumption of adequate market demand.
- It is not the job of the Planning Board to keep applicants from making poor market decisions.
- It is not the job of the Planning Board to keep existing businesses in the area from going out of business because of increased competition.
- The traditional supply and demand market analysis approach does not determine the needs of the community under either the neighborhood need or County need provisions of the ordinance.

The zoning ordinance mentions two rather vague criteria, convenience and service, for judging neighborhood need. For the past few decades, applicants provided analyses of market supply and demand to demonstrate County and neighborhood need. Does the ability of the market to support another similar use demonstrate a need for this use in the general neighborhood? The Research staff of the Park & Planning Department believes that market support by itself does not demonstrate neighborhood need. These market based studies measure demand against the typical sales level for each type of facility. There is an implicit assumption that when facilities are operating at above the typical sales level the neighborhood is not being well served. Therefore, if sales are higher than average the community must need another similar facility. However, increased sales do not equal unmet need. Most retail and service facilities have much more capacity for convenient sales and service than they use. Therefore, unless there is chronic excessive queuing or some other evidence of lack of capacity for service, mere higher than average sales is not evidence of neighborhood need. In most cases the community can increase their purchases substantially and still easily buy them from existing facilities. Where there is enough capacity, market support for another facility is not perceived as need by the community because the community has no difficulty in making its purchases. Therefore staff does not agree that the community's ability to support above average sales at existing facilities indicates a need for another facility.

If the adequate market demand is to be the standard of neighborhood need, a needs analysis is superfluous. Market forces continually act to balance supply and demand.

### **AN ALTERNATIVE APPROACH**

Research staff has examined another approach that looks at how the neighborhood is presently served by similar uses in a more direct qualitative way. Staff has explored four ways at looking at convenience and service for the neighborhood: **convenience, capacity for service, choice, and competition**. These indicators could be subjectively weighed against detriments from the project such as added congestion and neighborhood impact. If these could be objectively measured against accepted standards they might provide a better way of evaluating neighborhood need.

#### **Convenience**

Neighborhoods benefit from the convenience of having retail and service vendors at an easily accessible distance with easy ingress and egress. How many vendors in similar lines of business

are presently serving the neighborhood and its adjacent areas? These should be mapped to graphically display the convenience of neighborhood residents' access. The applicant should indicate which, if any, potential customers would have the added convenience of shorter trips with the proposed facility and how much their average trip lengths would be reduced. For auto-oriented facilities, which potential customers will find the applicant's facility easier to get into or out of from the street compared to currently available competitors? Which potential customers would find the applicant's facility within walking distance compared to currently available choices? Other convenience features such as a drive-up window could also be noted. These indicators could help decision makers understand how the proposed facility could enhance the convenience of the neighborhood but they are not objective measures against established standards.

### **Capacity for Service**

Neighborhoods benefit if there is enough capacity for service to reduce frequent long waits at times of high demand. Frequent long lines at similar vendors in the area indicate lack of capacity for service. Are there any such indicators of capacity limitations at the present? Existing facilities usually have a great deal of flexibility in meeting increased demand without new facilities being added in the neighborhood. More staff can be added, and technology, such as with pay-at-the-gas-pump service and laser scanners at checkouts, can also be used to speed service.

Two other aspects, choice and competition, also relate to convenience and service.

### **Choice**

Added choices can increase convenience by providing desired products and services within the neighborhood. Neighborhoods benefit if there is a broad choice of products and services offered to satisfy a variety of preferences. What choices in similar product lines and services does the neighborhood have now? If the proposed project is a pizza restaurant, what are the pizza choices already available to the neighborhood? To what degree would the proposed project increase customers' potential choices? Is a whole new category of product or service introduced by the applicant's proposed facility or only fine distinctions? Adding one more brand of gasoline to several already available in the neighborhood increases choice by a small amount, but is this enough to justify another filling station?

### **Competition**

Competition can help keep prices lower and increase the quality of service provided in neighborhoods as vendors vie with each other to attract customers. How many nearby competitors exist for the proposed project? If there is only one, a good case might be made that the neighborhood would benefit from increased competition. For standardized goods like standard brand, regular grade gasoline, varying prices within the same area for very similar goods may indicate lack of competition. However, for most products, which are not perceived as exact substitutes, like pizza, price variations are hard to interpret.

Just as the market viability approach is not an adequate measure of community need, the more direct observations of convenience and service also present practical problems. Most of these observations are not quantifiable. Even when they are, there are no established standards against

which to compare the convenience and service needs of a neighborhood. Also, unlike for the market approach, there are no published data to provide a common basis for analysis and review. Almost any commercial facility can reasonably be said to add at least some small degree of the convenience and service; so what would be the basis of denial of an application based on need? Therefore it appears that these indicators would provide little help for the Planning Board or the Board of Appeals in making decisions.

### **Summary**

The Research staff of the Park and Planning Department has reviewed the traditional market analysis approach to special exception needs analysis and examined an alternative qualitative approach. It is probably relatively easy to judge need when there are no or very few competitors easily accessible to the neighborhood. However, as the number grows, it is hard to determine the need for just one more and when over concentration or saturation is reached. The decision-making boards need an approach that will help them decide the hard "just one more" cases.

The traditional approach is found to deal with whether the proposed project is apt to be economically viable in this neighborhood. It does not examine whether the neighborhood is already well served by similar uses.

The alternative approach looks at more direct indicators of convenience and service in the neighborhood. This approach would discuss the current convenience and service available to the neighborhood for the products and services offered by the applicant's project. It would also offer opinions on how the proposed project might change these as indicated by convenience, capacity for service, choice, and competition. The problem with the alternative approach is that it is largely unquantifiable and would offer the Planning Board and Board of Appeals a set of discussion points and opinions without a set of standards against which to compare them. It is the staff's opinion that this approach would not offer the boards enough guidance to make it superior to just letting zoning and market forces regulate the provision of products and services available to neighborhoods.

<b>USES REQUIRING SPECIAL EXCEPTION NEED ANALYSIS</b>			
	<b>Zones Where Permitted by SE</b>	<b>Zones Where Permitted By-Right</b>	<b>Total # of SEs Approved thru 12/31/00*</b>
Automobile filling station.	C-1, C-2, C-3, C-4, C-6, I-1, I-2, I-4, CBD-0.5, CBD-1, 2 & 3; CBD-R-2: TS-M		190
Automobile, light truck and light trailer rental lot, outdoor.	C-1		13
Automobile, truck and trailer rental lot, outdoor.	C-2	I-1, I-4	0
Automobile sales and service center.	C-2 (outdoor), CBD-1, 2 (Standard Method)	C-3, C-2 (indoor), I-1, I-4, CBD-1, 2 (Optional Method); TS-M (showroom only)	18
Swimming pool, community.	All one-family residential zones; RE-30, 20 and 10; C-O, C-2, C-4, C-6; CBD-3; Rural, RC, LDRC, RNC		54
Swimming pool, commercial.	C-2, C-4, CBD-3	C-3	0
Drive-in restaurant.	C-1, C-2, C-4, C-6, CBD-1, 2 & 3 (adjacent to one-family residential)	C-3, CBD-1, 2 & 3 (not adjacent to one-family residential)	65
Funeral parlors and undertaking establishments.	RE-2, RE-1, R-200, R-150, R-90, RMH-200, C-T, O-M, C-O, C-4, C-5; CBD-1, 2 (Optional Method); RDT	C-2, C-3, C-6	4
Hotel, motel or inn.	I-1 & I-3; TS-R, TS-M	C-2, H-M, CBD-1, 2 & 3; CBD-R-2; TS-R, TS-M (when in conjunction with public conference center)	35
Rifle, pistol and	Rural, RC, LDRC,		1

skeet shooting range, outdoor.	RDT, RS		
Sanitary fill, incinerator, or private solid waste transfer station.	I-2		0
Conference center with lodging.	I-3, R&D		0
Public use heliport/helistop		All zones through mandatory referral	

\* This number includes new special exceptions and modifications