



THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

MCPB
Item #4
04/03/03

DATE: March 28, 2003
TO: Montgomery County Planning Board
FROM: Greg Russ, Zoning Coordinator *GR*
REVIEW TYPE: Transmittal to County Council for introduction as a Zoning Text Amendment
PURPOSE: To eliminate the neighborhood and county need requirement for special exception 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: April 3, 2003
PUBLIC HEARING: N/A

STAFF RECOMMENDATION: TRANSMIT to County Council for introduction

PURPOSE OF THE TEXT AMENDMENT

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

BACKGROUND

On July 11, 2002, the proposed text amendment was reviewed by the Planning Board and transmitted to County Council with a recommendation for introduction. Since there were only three Board members present during the hearing (a 2-0, one abstention vote) and Planning Board Chairman Berlage had not yet assumed his post, the Council requested that the Planning Board take another look at the proposal prior to a transmittal for introduction. Staff has attached the original technical staff report, dated July 5, 2002, to this cover memorandum. The Planning Board transmittal letter dated July 11, 2002, is also attached for further information. Staff continues to recommend that the proposed text amendment be transmitted to County Council for introduction.

GR

Appendices

1. **Technical Staff Report to Planning Board dated July, 5, 2002**
2. **Transmittal Letter to Council President Silverman dated July 11, 2002**



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 *R*
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

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