Zoning Text Amendment (ZTA) No. 16-16, Conditional Use Decisions

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Description

ZTA 16-16 would: 1) amend provisions governing OZAH's decisions in conditional use cases; 2) amend provisions governing requests for oral argument before the Board of Appeals in conditional use cases; 3) permit applicants for conditional uses approved by the Hearing Examiner to implement a conditional use when a request for oral argument before the Board of Appeals is pending; 4) authorize the Board of Appeals to stay the Hearing Examiner's decision upon motion of any party; 5) authorize the Board of Appeals to place conditions on the approval or denial of requests for a stay; and 6) generally amend provisions concerning conditional use appeals.

Summary

Staff recommends approval, as introduced, of ZTA No. 16-16 to modify the provisions for appeals of conditional use decisions by clarifying who may appeal a decision. In the Hearing Examiner's opinion, the current code provisions allow unintended delays in reaching a final decision.

Background/Analysis

The Hearing Examiner believes that the current provisions for appeals of conditional use decisions is causing confusion on who may appeal a decision. In the Hearing Examiner's opinion, the current code provisions allow unintended delays in reaching a final decision.

Currently, the conditional use decision process is as follows. Substantive changes proposed by the Hearing Examiner as introduced in the ZTA are discussed in italics:

- The Hearing Examiner must issue a report and decision no later than 30 days after the close of the record of the public hearing. The Hearing Examiner may extend the time.

- The Hearing Examiner must issue a notice, on the day the report and decision is issued, to the Board of Appeals, the applicant, and all parties of record that the report and decision is complete and available for review. If a timely request for oral argument is not received under
Section 7.3.1.F.1.c, the Hearing Examiner’s report and decision becomes the final decision. ZTA 16-16 proposes to modify this provision by making the Hearing Examiner’s report and decision effective on the date issued.

- Any party of record or aggrieved party may file a written request to present oral argument before the Board of Appeals within 10 days after the Office of Zoning and Administrative Hearings issues the Hearing Examiner’s report and decision. The filing of such a request transfers jurisdiction over the matter from the Hearing Examiner to the Board of Appeals. ZTA 16-16 modifies this provision by requiring any party of record to appeal the Hearing Examiner’s decision for the purpose of oral argument with the Board of Appeals within the 10-day window after the Hearing Examiner’s decision.

- A written request for oral argument must be filed with the Board of Appeals and the Hearing Examiner, and must concisely identify the matters to be presented at the oral argument.

- Any party of record or aggrieved party may, no later than 5 days after a request for oral argument is filed, file a written opposition or request to participate in oral argument. An opposition to a request for oral argument must be sent to the Board of Appeals and all parties as listed by the Hearing Examiner, and must be concise and limited to matters raised by the party who requested oral argument.

- The Board of Appeals may, in its discretion, grant or deny an oral argument request. If the Board of Appeals grants a request for oral argument, the argument must be limited to matters contained in the record compiled by the Hearing Examiner.

- Regardless of whether the Board of Appeals has elected to hear oral argument, the Board of Appeals must, under Section 7.3.1.F.2, approve or deny the conditional use application or remand it to the Hearing Examiner for clarification or the taking of additional evidence, if appropriate. The ZTA makes clear that the BOA must approve or deny the appealed conditional use application.

- ZTA 16-16 further adds a provision stating that a request for an appeal of the Hearing Examiner’s decision does not stay the decision of the Hearing Examiner. Upon motion by any party, the Board of Appeals may grant or deny a stay and may impose conditions on the grant or denial necessary to protect nearby property owners and the neighborhood (consistent with language in Section 7.3.1.F.2. for the BOA deciding a conditional use application).

Staff has no objection to the changes proposed by the Hearing Examiner but notes that the Board of Appeals does not support this ZTA. The Board notes that in cases where oral argument is not requested, this ZTA would make the conditional use decision effective 10 days earlier than it would otherwise become effective. The Board does not believe that this short time savings is worth the risk when compared with the potential risk that an applicant who chooses to move forward during those 10 days is
exposed to (i.e. the risk that the conditional use grant will be appealed, that it might be stayed, and that it could conceivably be remanded or denied). The Board of Appeals believes that the benefit of waiting these 10 days outweighs any inconvenience.

Attachments

1. ZTA No. 16-16 as modified by staff
AN AMENDMENT to the Montgomery County Zoning Ordinance that is effective October 30, 2014 to:

- amend provisions governing OZAH’s decisions in conditional use cases;
- amend provisions governing requests for oral argument before the Board of Appeals in conditional use cases;
- permit applicants for conditional uses approved by the Hearing Examiner to implement a conditional use when a request for oral argument before the Board of Appeals is pending;
- authorize the Board of Appeals to stay the Hearing Examiner’s decision upon motion of any party;
- authorize the Board of Appeals to place conditions on the approval or denial of requests for a stay;
- generally amend provisions concerning conditional use appeals.

By amending the following sections of the Montgomery County Zoning Ordinance, Chapter 59 of the Montgomery County Code effective October 30, 2014 (as amended):

Division 59-7.3. “Regulatory Approvals”
Section 59-7.3.1. “Conditional Use”
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 59-7.3 is amended as follows:

Division 7.3. Regulatory Approvals

Section 7.3.1. Conditional Use

F. Decision

1. Hearing Examiner

a. The Hearing Examiner must issue a report and decision no later than 30 days after the close of the record of the public hearing. The decision may recommend that the application be approved, approved with conditions, or denied. The Hearing Examiner may supplement the specific requirements of this Chapter with any other requirements necessary to protect nearby properties and the general neighborhood. The Hearing Examiner may by order extend the time to issue the report and decision.

b. The Hearing Examiner must issue a notice, on the day the report and decision is issued, to the Board of Appeals, the applicant, and all parties of record that the report and decision has been issued and is available for review. [If a timely request for oral argument is not received under Section 7.3.1.F.1.c, the Hearing Examiner's report and decision becomes the final decision.] The Hearing Examiner’s report and decision is effective on the date issued.

c. Any party of record [or aggrieved party may file] may appeal the Hearing Examiner’s decision by filing a written request to
present oral argument before the Board of Appeals within 10
days after the Office of Zoning and Administrative Hearings
issues the Hearing Examiner's report and decision. The filing of
such a request transfers jurisdiction over the matter on appeal
from the Hearing Examiner to the Board of Appeals.

i. A written request for an appeal and oral argument must
be filed with the Board of Appeals and the Hearing
Examiner, and must concisely identify the matters to be
presented at the oral argument. A person requesting an
appeal must send a copy of that request to the Hearing
Examiner, the Board of Appeals, and all parties of record
before the Hearing Examiner.

ii. Any party of record [or aggrieved party] may, no later
than 5 days after a request for an appeal and oral
argument is filed, file a written opposition or request to
participate in oral argument. An opposition to a request
for an appeal and oral argument must be sent to the
Board of Appeals and all parties as listed by the Hearing
Examiner, and must be concise and limited to matters
raised by the party who requested oral argument.

iii. The Board of Appeals may, in its discretion, grant or
deny an oral argument request. If the Board of Appeals
grants a request for oral argument, the argument must be
limited to matters contained in the record compiled by
the Hearing Examiner.

iv. Regardless of whether the Board of Appeals has elected
to hear oral argument, the Board of Appeals must, under
Section 7.3.1.F.2, approve or deny the appealed conditional use application or remand it to the Hearing Examiner for clarification or the taking of additional evidence, if appropriate.

v. A request for an appeal of the Hearing Examiner’s decision does not stay the decision of the Hearing Examiner. Upon motion by any party, the Board of Appeals may grant or deny a stay. The Board of Appeals may impose conditions on the grant or denial necessary to protect nearby property owners and the neighborhood.

2. Board of Appeals
   a. If the Board of Appeals is deciding the appeal of an application, it must make the necessary findings under Section 7.3.1.E and must:

   * * *

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

This is a correct copy of Council action.

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Linda M. Lauer, Clerk of the Council