

PHED Committee #3
July 9, 2018

MEMORANDUM

July 5, 2018

TO: Planning, Housing, and Economic Development Committee

FROM: Jeff Zyontz, Senior Legislative Analyst

SUBJECT: Zoning Text Amendment 18-04, Exemptions – Agricultural Zone

Purpose: Worksession to development recommendation on ZTA 18-04 for consideration by the Council

Expected Participants:

- Ramona Bell-Pearson
- Gwen Wright
- Pam Dunn
- Greg Russ

Background

Zoning Text Amendment (ZTA) 18-04, lead sponsor Council President Riemer at the request of the County Executive, was introduced on April 10, 2018. ZTA 18-04 would allow the expansion of uses in the Agricultural Zone that were legal before October 30, 2014 but were subsequently made non-conforming.

The Executive's transmittal letter includes the following statement:

In light of the fact that there continues to be legitimate concerns about protecting farmland and agriculture, we need to restrict uses in those zones. For that reason, this proposed amendment to the zoning text is proposed to apply only to those uses and structures that were existing and legal at the time the 2014 zoning text went into effect.

ZTA 18-04 would expand, not restrict, the potential for non-farm uses in the Agricultural zone. The ZTA as proposed would allow the expansion of uses that were made non-conforming by the 2014 Zoning Rewrite.

On April 27, 2018, the Planning Staff memorandum to the Planning Board recommended denial of ZTA 18-04 as introduced. Planning Staff wrote:

Staff is concerned with the overly broad expansion capability established in the text of the amendment. To this end, staff is concerned that ZTA 18-04 would allow for the expansion of

uses that are not necessarily consistent with the established policy of preservation of agricultural land and uses in the AR zone.

The County Executive responded to Planning Staff concerns in a memorandum to Council President Riemer, dated May 2, 2018.

The Executive proposed revising the text of ZTA 18-04 by deleting the proposed text and replacing it with the following revision to Section 7.7.2.A, Nonconforming Uses – Expansion.

A lawful nonconforming use of a structure or lot must not be expanded unless in the Agricultural Reserve Zone, a Federal or State health or safety law or regulation requires the expansion. Before expanding the use or structures the property owner must provide to the Director of the Department of Permitting Services a certification from the applicable Federal or State entity that the expansion or enlargement is necessary.

In proposing the revision, the Executive expressed his intent “to assure that protection of the agricultural reserve continue, and as little impact as possible occurs to the existing protected area.”

On May 3, 2018, the Planning Board voted to recommend denial of ZTA 18-04 as introduced. The Board agreed with Planning Staff that ZTA as introduced was overly broad. The Board recognized the revision proposed by the Executive on May 2. The Board wrote that it “believes that the amended language of ZTA 18-04 is consistent with the purpose of Chapter 59 to provide zoning requirements designed to promote public health, safety, and general welfare.”

The public hearing on ZTA 18-04 was held on May 15, 2018. There were 2 speakers.¹ Alicia Stanley, representing Davis Airport, spoke in favor of ZTA 18-04 as amended by the Executive’s May 2 memorandum. She testified that Davis Airport was created in 1946, decades before the imposition of agricultural zoning in 1980. That zoning, she reports, tied the hands of the owner in keeping up with aviation advances. In her opinion, expansion of the Davis Airport is needed to be able to assure the well-being of pilots and neighbors as many modern single-engine airplanes need more space to take off and land.

Ramona Bell-Pearson represented the County Executive and supported the May 2 revision.² She said, “Mr. Leggett has been made aware that there are businesses such as airports and landscaping operations that have equipment and fixtures which from time to time need to be improved, expanded, or upgraded to meet health or safety requirements.”

Issues

Is there a basis for allowing the expansion of non-conforming uses?

A non-conforming use describes legally made improvements that would not be allowed under the current zoning ordinance. The policy of allowing nonconforming uses to continue originated in concerns that the application of zoning regulations to uses existing before the current zone’s enactment

¹ Greg Russ spoke in the hearing on ZTA 18-03, which was held at the same day and time as the hearing on ZTA 18-04. In that testimony he repeated the Planning Board’s position in support of the ZTA as revised by the Executive.

² Ms. Bell-Pearson is no longer an Assistant Chief Administrative Officer in the County Executive’s Office.

might be construed as confiscatory and unconstitutional. Jurisdictions limit their enlargement and reconstruction so that they will disappear over time.³ The ultimate goal of the zoning code is to achieve uniformity of property uses within each zoning district which can only be accomplished by the elimination of uses that do not conform to the specifications of district regulations.

Currently, the County Zoning code, like other zoning codes, does not allow the expansion of non-conforming uses. When health and safety regulations "require" the expansion, the variance process is available.⁴

When the Council changes the zoning codes, it does so in the belief that the change in code serves the public interest. Allowing the expansion of a use it deemed inappropriate (not being otherwise permitted) would then be inconsistent with the public interest. **Staff does not recommend the approval of ZTA 18-04, either as submitted or as revised, for this policy reason and because the expansion of an airport unrelated to agriculture in the Agricultural Reserve Zone is contrary to a 2010 ZTA approved by the Council.**

What is the Davis Airport story?

Part of Davis Airport is on County-owned land. Davis Airport, by using the airport for more than non-commercial, personal, is currently violating an "easement" it has with the County.⁵ The airport's runway is trespassing on County land to the extent that its current use exceeds the "easement".⁶ Neither

³ The allowance of nonconforming uses has been characterized by the courts as a "grudging tolerance" of them; the right of governing bodies to adopt reasonable measures to eliminate them has been recognized. A property owner's right to continue a nonconforming use may be lost by abandonment. Any discontinuance of the nonconforming use for 6 consecutive months constitutes abandonment. It has been held that local discontinuance periods apply even when the owner can prove that he did not actually intend to abandon the nonconforming use.

⁴ Granting the variance may only authorize a use of land allowed by the underlying zone. To approve a variance, the Board of Appeals must find that:

1. denying the variance would result in no reasonable use of the property; or
2. each of the following apply:
 - a. one or more of the following unusual or extraordinary situations or conditions exist:
 - i. exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary conditions peculiar to a specific property;
 - ii. the proposed development uses an existing legal nonconforming property or structure;
 - iii. the proposed development contains environmentally sensitive features or buffers;
 - iv. the proposed development contains a historically significant property or structure; or
 - v. the proposed development substantially conforms with the established historic or traditional development pattern of a street or neighborhood;
 - b. the special circumstances or conditions are not the result of actions by the applicant;
 - c. the requested variance is the minimum necessary to overcome the practical difficulties that full compliance with this Chapter would impose due to the unusual or extraordinary situations or conditions on the property;
 - d. the variance can be granted without substantial impairment to the intent and integrity of the general plan and the applicable master plan; and
 - e. granting the variance will not be adverse to the use and enjoyment of abutting or confronting properties.

⁵ The term "easement" is used in quotes because it was created in the course of a recorded settlement dialogue and was not recorded as a separate document. A 2003 court order in the matter of Marshall, Warner, and Montgomery County v. Mini Paille, case number 227176, created the "easement". The "easement" was for the personal, non-commercial use of the airport; "Personal means personal...it also means non-commercial." The lease also allowed the use of tie-down areas at no charge to Ms. Paille and her heirs.

⁶ There is a 1959 lease for some County-owned land, but it is unclear if that lease covers County-owned ground (Liber 2559 Folio 119). The terms of the lease (\$1/year payment and insurance indemnification) were said to be in force for as long as the area within the lease was integral to the operation of an airport. In any event, that lease was declared to be of "no effect, void" in a 2003 Consent Order (Liber 26044 Folio 644).

the current nor former County Executives have taken any action to enforce the County's easement on the property.

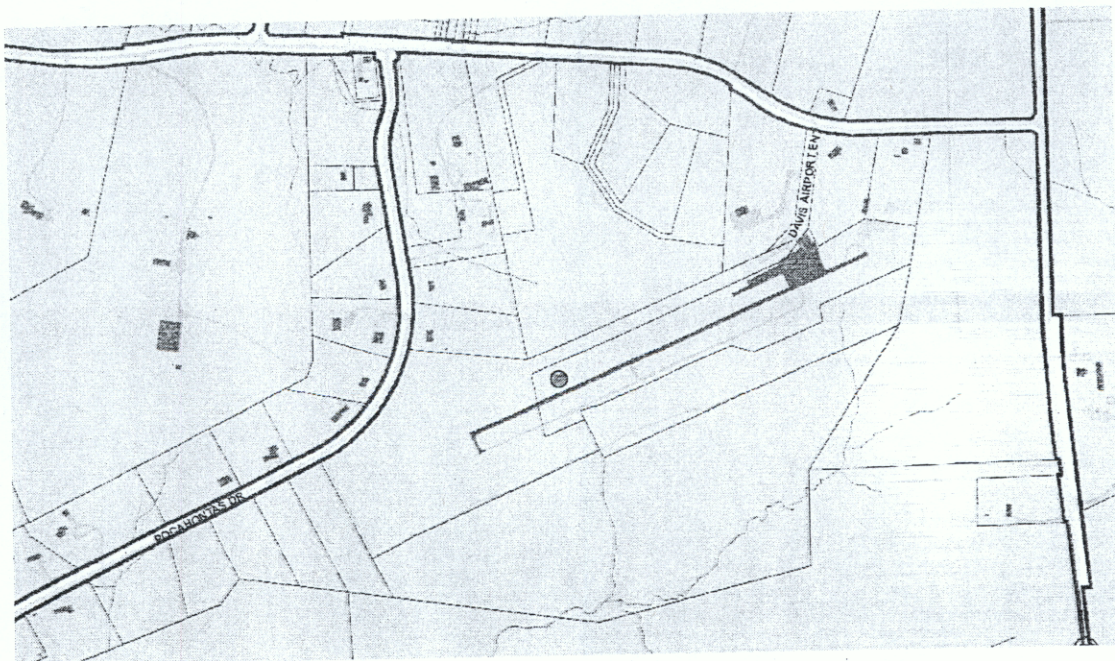
The intended expansion of the runway would require the disposition of additional County land. Any disposition issues will be addressed after the Council's consideration of ZTA 18-04.

Despite all of that, the airport is home to 22 single-engine airplanes. It has a 2,005-foot runway that is 25 feet wide. The Maryland Aviation Administration (MAA) lists the Davis Airport (W50) as a public use airport. It was included in a 2013 MAA report on the economic impact of airports as having 3 employees and direct personal income impact of \$116,000.

The FY 2018 Maryland Consolidated Transportation Program included a state grant to the Davis Airport of \$1,654,000. The airport manager is currently in the process of getting approval to resurface and widen the runway to a new width of 50 feet. The proposal includes moving the runway 20 feet away from the hangar building and the residential area of Pocahontas drive.

The airport recently completed tree-trimming operations on one end of the runway and has plans to do the same at the other end.

Davis Airport offers flight instruction (in a Cessna 172), airplane rentals, and airplane rides. If expanded, the runway expansion could shift some airport operations (take-offs and landings) from the Montgomery County Airpark.



How has the Council treated airstrip in the Agricultural Reserve Zone?

Zoning Text Amendment (ZTA) 10-15, sponsored by Councilmembers Elrich and Rice, was introduced on December 14, 2010. This ZTA clarified when airstrips would be permitted in Agricultural zones. It added 3 provisions for the conditional use approval of an airstrip associated with a farm:

- 1) The aircraft using the airstrip must aid farming operations;
- 2) The airstrip must not be paved;
- 3) The airstrip must be set back from any property line a minimum of 1,000 feet.⁷

The ZTA limited future airstrip approvals. The Council was made aware of the Davis Airport and that it did not have conditional use approval (in 2011, such an approval was called a special exception approval) and that ZTA 10-15 did not affect it.⁸

To the extent that ZTA 18-04 would allow an expanded airport in the Agricultural Reserve Zone, it is counter to the limitations on airstrips in the zone approved in 2011.

Are there any other situations where ZTA 18-04 would be applicable?

Staff is unaware of any other current situations where an expansion is required to meet health or safety regulations; however, the need may arise in the future. Research has not been undertaken to identify every non-conforming use in the AR Zone. The plain language of both ZTA 18-04 as introduced and the Executive-proposed revision are inclusive of multiple situations.

If approved, should the ZTA be revised as recommended by the Executive?

Yes. The revision would limit unintended consequences to a greater extent than the ZTA as introduced. The revision, with an editorial correction proposed by Executive Staff, would be as follows:

A lawful nonconforming use of a structure or lot must not be expanded unless in the Agricultural Reserve Zone, a Federal or State health or safety law[or], regulation, or agency requires the expansion. Before expanding the use or structures the property owner must provide to the Director of the Department of Permitting Services a certification from the applicable Federal or State entity that the expansion or enlargement is necessary.

This Packet Contains

ZTA 18-04

Executive Transmittal

Executive Memorandum to Council President Riemer

Planning Board Recommendation

Planning Staff Recommendation

© number

1 – 2

3 – 4

5 – 6

7

8 – 10

⁷ ZTA 10-15, adopted March 8, 2011.

⁸ In the March 4, 2011 memorandum from Staff concerning ZTA 10-15.

Zoning Text Amendment No.: 18-04
Concerning: Exemptions –
Agricultural Zone
Draft No. & Date: 1 – 3/1/2018
Introduced: April 10, 2018
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 President Riemer at the request of the County Executive

AN AMENDMENT to the Montgomery County Zoning Ordinance to:

- grandfather existing legal uses in the Agricultural zone; and
- generally amend the provisions related to uses in the Agricultural zone

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

Division 7.7. “Exemptions and Nonconformities”
Section 7.7.1. “Exemptions”

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

ORDINANCE

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

1 **Sec. 1. Division 7.7 is amended as follows:**

2 **Section 7.7.1. Exemptions**

3 * * *

4 **F. Existing Uses and Structures in the Agricultural Zone**

5 In the Agricultural Zone, any legal use and associated structures in existence
6 on October 30, 2014 that do not meet the zoning standards on or after
7 October 30, 2014 are conforming and may be expanded.

8 * * *

9 **Sec. 2. Effective date.** This ordinance becomes effective 20 days after the
10 date of Council adoption.

11
12 This is a correct copy of Council action.

13
14 _____
15 Megan Davey Limarzi, Esq.
16 Clerk of the Council



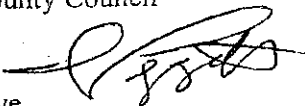
OFFICE OF THE COUNTY EXECUTIVE
ROCKVILLE, MARYLAND 20850

Isiah Leggett
County Executive

MEMORANDUM

March 1, 2018

TO: Hans Riemer, President
Montgomery County Council

FROM: Isiah Leggett 
County Executive

SUBJECT: Exemptions Agricultural Zone- Zoning Text Amendment

I am attaching Zoning Text Amendment (ZTA) for Council's consideration that would amend zoning regulations related to the Agricultural Zone. The amendment would grandfather existing legal uses in the agricultural Zone and would generally amend the provisions related to uses and structures in the Agricultural Zone.

At the time that the Agricultural Zone was established in 1980 there were legal uses in place that became non-conforming as a result of the use restrictions that the agricultural zoning imposed. Those uses then became non-conforming legal uses and while many continued to operate under that classification they were restricted from any expansion under the agricultural zone. This is based on the intent behind the zoning to preserve and protect farmland and agriculture through a land conservation policy. This restriction applies to the 93,000 acres covered by the agricultural zone.

In light of the fact that there continues to be legitimate concerns about protecting farmland and agriculture, we need to continue to restrict uses in those zoned areas. For that reason this proposed amendment to the zoning text is proposed to apply only to those uses and structures that were existing and legal at the time the 2014 zoning text went into effect. This amendment would allow those legal uses of structures or lots to be grandfathered as conforming and permits them to be expanded under this exemption.

3

Hans Riemer, President

March 1, 2018

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Executive Staff has consulted with the Office of the County Attorney and Council Staff in the development of this proposal to assure that this amendment continues protections for the agricultural reserve and results in as minimal an impact as possible to the existing protected area.

Executive Staff is available to offer any further information that the Council may need in order to give full consideration to this recommended amendment.

Attachment -- Proposed ZTA- Exemptions Agricultural Zone

cc: Councilmember Craig Rice
Councilmember Sidney Katz



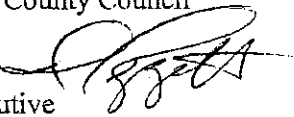
OFFICE OF THE COUNTY EXECUTIVE
ROCKVILLE, MARYLAND 20850

Isiah Leggett
County Executive

MEMORANDUM

May 2, 2018

TO: Hans Riemer, President
Montgomery County Council

FROM: Isiah Leggett 
County Executive

SUBJECT: Amendment to ZTA 18-04, Exemptions Agricultural Zone- Zoning
Text Amendment

I have been made aware that there are some concerns about the current language in the above captioned zoning text amendment that I proposed on March 1, 2018. In an effort to address those concerns, I asked Executive Staff to work with the County Attorney, Council Staff, and the Community to understand and work through those concerns.

As a result of those collaborations, I am now proposing language as an amendment to the existing language in ZTA 18-04. Please accept the following amendment to be substituted for the earlier language:

Replacement for ZTA 18-04

Section 7.7.2. Nonconforming Use

A lawful nonconforming use may be continued under the following limits:

A. Expansion

A lawful nonconforming use of a structure or lot must not be expanded unless, in the Agricultural Reserve Zone, a Federal or State health or safety law or regulation requires the expansion. Before expanding the use or structures, the

Hans Riemer, President

May 2, 2018

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property owner must provide to the Director of the Department of Permitting Services a certification from the applicable Federal or State entity that the expansion or enlargement is necessary.

As has always been my intention, this amendment is an attempt to assure that protections for the agricultural reserve continue, and as little impact as possible occurs to the existing protected area.

Executive Staff is available to offer any further information that the Council may need in order to give full consideration to this recommended amendment.

cc: Councilmember Craig Rice

Councilmember Sidney Katz

Casey Anderson, Chair of the Planning Board



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

OFFICE OF THE CHAIR

May 9, 2018

TO: The County Council for Montgomery County, Maryland, sitting as the District Council for the Maryland-Washington Regional District in Montgomery County, Maryland

FROM: Montgomery County Planning Board

SUBJECT: Zoning Text Amendment No. 18-04

BOARD RECOMMENDATION


The Montgomery County Planning Board of The Maryland-National Capital Park and Planning Commission reviewed Zoning Text Amendment No. 18-04 (ZTA 18-04) at its regular meeting on May 3, 2018. By a vote of 5:0, the Planning Board recommends approval of the zoning text amendment as amended by the County Executive on May 2, 2018, to clarify the original intent of the text which is to allow expansion of nonconforming uses located in the AR zone only when a Federal or State health or safety law or regulation requires it.

The technical staff report dated April 27, 2018, recommended denial of ZTA 18-04, as introduced, to grandfather existing legal uses in the Agricultural Reserve zone that were made nonconforming as of October 30, 2014. Staff was concerned with the overly broad expansion capability established in the text amendment language. To this end, staff was concerned that ZTA 18-04 would allow for the expansion of uses that are not necessarily consistent with the established policy of preservation of agricultural land and uses in the AR zone.

Since the publication of the technical staff report, the County Executive (the ZTA was introduced at the request of the Executive) requested modification of the ZTA to address the concerns expressed by staff and the agricultural community. Specifically, the amended text narrows the scope of the ZTA to expansions of existing nonconforming uses under certain circumstances. The intent is to allow expansion of nonconforming uses located in the AR zone only when a Federal or State health or safety law or regulation requires it. The Board believes that the amended language of ZTA 18-04 is consistent with the purpose of Chapter 59 to provide zoning requirements designed to promote health, public safety, and general welfare.

CERTIFICATION

This is to certify that the attached report is a true and correct copy of the technical staff report and the foregoing is the recommendation adopted by the Montgomery County Planning Board of The Maryland-National Capital Park and Planning Commission, at its regular meeting held in Silver Spring, Maryland, on Thursday, May 3, 2018.


Casey Anderson
Chair

CA:GR

⑦



Zoning Text Amendment (ZTA) No. 18-04, Exemptions – Agricultural Reserve Zone

- ☐ Gregory Russ, Planner Coordinator, FP&P, gregory.russ@montgomeryplanning.org, 301-495-2174
- ☐ Pam Dunn, Chief, FP&P, pamela.dunn@montgomeryplanning.org, 301-650-5649

Completed: 04/27/18

Description

Zoning Text Amendment (ZTA) 18-04 would grandfather existing legal uses in the Agricultural Reserve (AR) zone; and generally amend the provisions related to uses in the AR zone.

Summary

Staff recommends denial of ZTA No. 18-04, as introduced, to grandfather existing legal uses in the Agricultural Reserve zone that were made nonconforming as of October 30, 2014. Staff is concerned with the overly broad expansion capability established in the text amendment language. To this end, staff is concerned that ZTA 18-04 would allow for the expansion of uses that are not necessarily consistent with the established policy of preservation of agricultural land and uses in the AR zone.

Background/Analysis

According to County Council staff's introduction memorandum, the intent of ZTA 18-04 is to allow the expansion of uses in the Agricultural Reserve zone that were legal before October 30, 2014 but were subsequently made nonconforming on October 30, 2014. The Executive's transmittal letter attached to the Council Staff memorandum states that *"In light of the fact that there continues to be legitimate concerns about protecting farmland and agriculture, we need to restrict uses in those zones. For that reason, this proposed amendment to the zoning text is proposed to apply only to those uses and structures that were existing and legal at the time the 2014 zoning text went into effect"*.

According to County Council staff (and Planning staff agrees), ZTA 18-04 would expand, not restrict, the potential for non-farm uses in the Agricultural zone. The ZTA as proposed would not limit the expansion of uses that were made non-conforming by the 2014 Zoning Rewrite.

ZTA 18-04 Language as introduced

Below is the ZTA as introduced:

Section 7.7.1. Exemptions

* * *

F. Existing Uses and Structures in the Agricultural Zone

In the Agricultural Zone, any legal use and associated structures in existence on October 30, 2014 that do not meet the zoning standards on or after October 30, 2014 are conforming and may be expanded.

* * *

As introduced, staff has concerns about the meaning of the broad grandfathering language in proposed ZTA 18-04. It is unclear what the words "may be expanded" give license to do with both the existing structures and an existing use. It is unclear how much the use could be "expanded" or how large the structures can get.

When comparing the broad expansion authority granted under ZTA 18-04 with the limited grandfathering exemptions granted under the other provisions of Zoning Ordinance §59.7.7.1, staff believes that additional discussion is warranted before approving this legislation. Below are a few examples of exemption provisions currently under Section 7.7.1. Exemptions:

- A legal structure or site design existing on October 30, 2014 that does not meet the zoning standards on or after October 30, 2014 is conforming and may be continued, renovated, repaired, or reconstructed if the floor area, height, and footprint of the structure are not increased, except as provided for in Section 7.7.1.C for structures in Commercial/Residential, Employment, or Industrial zones, or Section 7.7.1.D.5 for structures in Residential Detached zones. (Section 7.7.1.A.1)
- Except for a Registered Living Unit, any use that was conforming or not nonconforming on October 29, 2014 and that would otherwise be made nonconforming by the application of zoning on October 30, 2014 is conforming, *but may not expand.* (Section 7.7.1.A.2.a)
- Any allowed use, up to the density limits established by the current zoning, may be located in a building or structure deemed conforming... (Section 7.7.1.A.2.b)
- Existing development in a Commercial/Residential, Employment, or Industrial zone *may expand by up to the lesser of 10% of the gross floor area approved for the site on October 30, 2014 or 30,000 square feet*, except for properties with 2,000 square feet or less of floor area, which may expand by up to 30% of the gross floor area approved for the site on October 30, 2014. (Section 7.7.1.C.2)

Intent of the AR Zone

The intent of the AR zone is to promote agriculture as the primary land use in areas of the County designated for agricultural preservation in the General Plan, the Functional Master Plan for Preservation of Agriculture and Rural Open Space, and other current or future master plans. The AR zone accomplishes this intent by providing large areas of generally contiguous properties suitable for agricultural and related uses and permitting the transfer of development rights from properties in this zone to properties in designated receiving areas.

Agriculture is the preferred use in the AR zone. All agricultural operations are permitted at any time, including the operation of farm machinery. An agricultural use cannot be restricted on the grounds that

it interferes with other uses permitted in the zone, but uses that are not exclusively agricultural in nature must satisfy additional use standards or the conditional use approval process. The County has spent millions of dollars to preserve agriculture through the purchase of easements. It has created the TDR program to compensate for reducing housing density. In staff's view, the overly broad expansion capability established in the text amendment language would be counter to the County's established policy for the AR zone.

There are a number of nonconforming uses in the AR including, but not limited to: golf courses, private schools, airports, market rental of farm tenant houses, landscape contractors, storage facilities, industrial uses. Again, a blanket approval to allow unconstrained expansion of these (and other unnamed) nonconforming uses conflicts with the goals of the AR master plan as well as standing law.

Conclusion

It should be noted that the County staff is drafting amended text to be discussed at the Planning, Housing and Economic (PHED) Committee worksession to possibly narrow the scope and reduce the impact of ZTA 18-04 on the AR zone. However, as introduced, Planning staff does not believe that ZTA 18-04 is consistent with the County's established policy for preserving agricultural land and land uses.

Attachments

1. ZTA No. 18-04 as introduced