

# PRINCE GEORGE'S COUNTY COUNCIL

## COMMITTEE REPORT

2022 Legislative Session

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**Reference No.:** CB-077-2022

**Draft No.:** 2

**Committee:** PLANNING, HOUSING AND ECONOMIC DEVELOPMENT

**Date:** 9/7/2022

**Action:** FAV(A)

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### **REPORT:**

Committee Vote: Favorable as amended, 3-1-1 (In favor: Council Members Franklin, Harrison, Hawkins; Oppose: Council Member Glaros; Abstain: Council Member Turner)

The Planning, Housing, and Economic Development (PHED) Committee convened on September 7, 2022 to consider CB-77-2022. The Planning, Housing and Economic Development Committee Director summarized the purpose of the legislation and informed the Committee of written comments received on referral. CB-77-2022 amends the Zoning Ordinance to clarify transitional provisions for the development of properties that are constructed, have valid specified development or construction approvals, or for which development or construction approvals are pending as of the effective date of the new Zoning Ordinance (April 1, 2022), by providing authorization for these qualifying developed or developable projects to utilize the provisions of the prior Ordinance. PHED Chair Franklin, the bill sponsor, informed the Committee that he proposed CB-77-2022 to make the grandfathering provisions of the new Zoning Ordinance real grandfathering provisions and to address the unintended consequences of some uses that were allowed in prior zones no longer being allowed in the new zone assigned to properties that are the subject of approved development applications.

The Planning Board was scheduled to discuss CB-77-2022 during their Thursday, September 8, 2022 meeting. The Planning Department staff provided an analysis recommending the Planning Board oppose the legislation with detailed policy analysis provided in a staff memorandum to the Planning Board with recommended technical corrections and conclusion as follows:

#### “Technical Corrections

Lines 2 and 3 on Page 2 should be underlined since they propose new text. Additionally, Line 2 proposes CB-77-2022 as a new Section 27-1706 but there is no Section 27-1705 in the current Zoning Ordinance. Staff is aware CB-69-2022 proposes to add a Section 27-1705 but should that bill not pass there will be no such section. Line 2 should be revised to reflect the proposed new Section as Section 27-1705; should both bills then pass, typical post-adoption administrative reconciliation can ensure consecutive Section numbers.

Line 6 on Page 2 of CB-77-2022 includes a reference to “preliminary subdivision plan.” The correct phraseology would be “preliminary plan of subdivision” or “subdivision applications of any type.” It must be noted that CB-77-2022 cannot ensure any subdivision application follows

or is subject to the prior Subdivision Regulations. Such authorization can only be made in a Subdivision bill and cannot be done through a Zoning bill.

### Conclusion

CB-77-2022 represents a drastic departure from the transitional provisions approved by the Council in 2018 and 2021. The bill will greatly increase the complexity and decrease the public transparency of development review in the County. The current transitional provisions were the result of a careful, years-long process and should be given a chance to work before making wholesale changes.”

The Chief Zoning Hearing Examiner (ZHE) submitted the following comments by memorandum dated September 6, 2022, to the PHED Committee Director:

Thank you for the opportunity to provide the following comment on the above-referenced bill that amends Section 27-1706 of the Zoning Ordinance to allow certain properties to operate in perpetuity under the Zoning Ordinance in effect prior to the effective date of the Countywide Map Amendment (April 1, 2022) under certain circumstances. As drafted, it raises technical and substantive concerns. The technical amendments are as follows:

- The title of the bill on p. 1, line 2, should delete “General Provisions” in order to align with past practices in legislative drafting (describing the language to be added or amended in the legislation solely).
- The section title on p. 2, lines 2-3, should be underlined as it is new language being added. The last section number assigned in LZIS is 27-1704; accordingly, this Section should be 27-1705.
- The language should clarify that the prior zoning shall apply as well as the prior Zoning Ordinance. The substantive issues to address are the continued applicability of the prior Zoning Ordinance and whether the new language would satisfy general legal tenets applicable to zoning legislation.
- It is questionable whether the applicants may legally have access to the prior Zoning Ordinance in perpetuity since Section 27-1701 of the new Zoning Ordinance repealed the prior one in its entirety. The language on p. 2, lines 9-11, should be removed.
- The law may be subject to challenge as being vague, overbroad and lacking a rational basis. Zoning laws are enforceable if there is a rational basis for their enactment – that is, an argument that they support or further the public health, safety, welfare or convenience – and if the basic substantive due process protections are intact – that is, the language is clear and understandable. There is clearly a rational basis for the District Council’s enactment of a law that allows property owners to continue to utilize the prior Zoning Ordinance for some period of time because some owners were already in the process of developing pursuant to the prior Zoning Ordinance and because the District Council recognized the possibility that the new Zoning Ordinance would require some fine tuning in its early days of application. Moreover, this grandfathering was included in the version of the Zoning Ordinance that was enacted and effective as of April 1, 2022, so general tenets of statutory construction may support a finding that the District Council did not repeal the prior Zoning Ordinance for these limited purposes. However, as noted above, the language on p. 2, lines 9-11, will allow indefinite use of the prior Zoning Ordinance, and lines 11-14 will allow this despite changes in use, occupancy or ownership. The language on lines 9-13 can even be interpreted as allowing rezoning of the property to a zone no longer allowed. Given the breadth of the new Section, it may also prove

difficult to enforce any zoning violations that may occur, and it will prove difficult to interpret the interrelationship between this new language and the language in Sections 27-1703, 1704 and 1900 (as required on p. 2, lines 14-16).

- Any other uses legally constructed and/or operating prior to April 1, 2022, or approved pursuant to Section 27-1704, may not expand or change to a zone or use not permitted in the current Zoning Ordinance, but those that satisfy the strictures of this bill are allowed to utilize the prior Zoning Ordinance. This may violate the uniformity requirement set forth in the Maryland Annotated Code, Land Use Article that requires a zoning law to treat similarly situated properties equally, absent reasonable justification for the disparate treatment (i.e., furtherance of a public policy).

In conclusion, I would suggest that the language on lines 11-14 be revised to not allow rezoning applications to a zone regulated under the prior Zoning Ordinance. Since the bill provides no reasoning for the disparate choice of law provided for similarly situated properties the language on p. 2, lines 9 to the start of line 13 should be deleted. If the District Council chooses to allow the language to remain the bill should be revised to include the rational basis and public policy that support the disparate treatment of properties. Finally, the language on p. 2, lines 14-16 should be deleted and further review of its impact on Sections 27-1703, 1704 and 1900 conducted since much of the express language in these Sections directly conflict with the language in the bill.”

The Office of Law reviewed CB-77-2022 as it was presented on August 29, 2022, and found it to be in proper legislative form with no legal impediments to its enactment. Terry Bell, County Council Liaison, stated that the County Executive takes no position on CB-77-2022. Rana Hightower, M-NCPPC Planning Department Intergovernmental Affairs and Acting Deputy Planning Director Derick Berlage commented on the Planning staff’s memorandum and responded to Council Members’ questions.

The Zoning and Legislative Counsel summarized revisions in a Proposed Draft-2 (DR-2) prepared at the bill sponsor’s request to address the ZHE comments to 1) clarify that the provision is that which is allowed by the Council and is not discretionary to an applicant 2) does not create a right to rezone to a zone that was extinguished by the Countywide Map Amendment and 3) provides a finer point that the intention of the language is to be clear that provision this new Section stands on its own. Proposed DR-2 contained the following amendments:

**Sec. 27-1706. Projects Which Are Developed and Constructed Pursuant to the Prior Ordinance.**

Unless or until an applicant elects to utilize the provisions of this Ordinance, FOR projects which have been developed and constructed pursuant to the prior Ordinance, or projects which have an application for a building permit, preliminary subdivision plan or a site plan of any type filed and accepted by April 1, 2024, AN APPLICANT may proceed to the next steps in the approval process and may be reviewed, approved and constructed under the prior Zoning Ordinance and Subdivision Ordinance. All of such projects shall indefinitely be entitled to utilize the provisions of the prior Ordinance for any purpose including, but not limited to, site modifications, expansions or reconstruction, changes in use, occupancy or ownership. This shall also include the right to utilize the processes and procedures for development approvals (NOT TO INCLUDE A REZONING) and the use tables of the prior Ordinance. The rights under this

Section shall not be affected by changes in ownership or tenancy. The right to utilize the provisions of the prior Ordinance established by this section ~~are in addition to the rights established pursuant to~~ SHALL NOT BE LIMITED OR AFFECTED BY Sections 27-1703, 27-1704 and 27-1900 of this Ordinance. Maurene McNeil, Chief ZHE, was present to inform the Committee that the revisions address comments provided in her memorandum.

Janet Gingold, Chair, Prince George's County Sierra Club, submitted a September 6, 2022 letter to the PHED Committee in opposition to CB-77-2022. Edward Gibbs and Thomas Haller, Law Offices of Gibbs and Haller, submitted a September 6, 2022, letter to Council Chair Hawkins in support of CB-77-2022.

The following individuals testified in support of CB-77-2022: Edward Gibbs, Thomas Haller, Matthew Tedesco, Mark Ferguson, Stuart Bannett, Justin Korenblatt, Robert Smith, Joseph Addison, Nate Forman, Lawrence Taub, William Addison, Christian Duffy, Terry Richardson, Robert Antonetti, Nicholas Cintron, Stephen Michaels, Peter Herring, William Shipp, Brandon Bellamy, Arthur Horne, Richard Thometz, R. Glen Stephens, Dick Patterson, and Rick Bailey. Cheryl Cort and Janet Gingold testified in opposition to CB-77-2022.

On a motion by Council Chair Hawkins and second by PHED Committee Chair Franklin, the Committee voted favorable with the amendments as contained in Proposed DR-2 as well as amendments to underline the new Section 27-1706 on page 2, line 2, and to change the effective date on page 3, lines 1-2, to provide that the bill take effect 45 days after its enactment.