

CB-77-2022 – Planning Board Analysis (Attachment 2)

A bill to amend the Zoning Ordinance to clarify and update the scope of the transitional provisions of the Zoning Ordinance.

The Planning Board has the following comments for consideration by the District Council:

Policy Analysis:

Although a short bill, CB-77-2022 is extremely complex and wide-reaching in its potential impact and thus requires careful analysis of what it means and how it would affect the County's new Zoning Ordinance. The bill drastically alters the transitional rules that were placed in the new Zoning Ordinance by the Council in 2018 and 2021.

The Reasons Behind the Transition and Grandfathering Provisions That Were Adopted by the Council

The underlying intent of the development of the County's new Zoning Ordinance was to comprehensively replace the prior Zoning Ordinance which had not been subject to a systemic update in more than 50 years.

Any time a jurisdiction attempts to replace existing zoning and land use regulations a central consideration is how to deal with projects and development that was completed or initiated under the prior regulations. Such consideration was particularly important in Prince George's County due to the size of the County, and the number of affected developments and project proposals, in-process applications, and recently approved applications which may also require subsequent phases or revisions during the development of the project. The complexities of the prior regulations posed a major complicating factor that contributed to the process of developing the transition provisions of the new Zoning Ordinance and Subdivision Regulations informally known as "grandfathering provisions."

The development of the transition and grandfathering provisions involved substantial collaboration among numerous key stakeholders including the Prince George's County Council, Council staff, the Zoning Hearing Examiners, the Office of the County Executive, the Planning Board, the County Land Use Bar, the Maryland Building Industry Association, numerous developers, and others. The transition and grandfathering provisions were created during a multi-year process of multiple iterations and revisions. The Council carefully deliberated the transitional provisions in 2018, making multiple revisions, and then further refined the provisions in 2022 in response to stakeholder concerns. The result was the transition and grandfathering provisions currently found in Sections 27-1700, 27-1900, 24-1700, and 24-1900; of the new Zoning Ordinance and Subdivision Regulations.

The approved transition and grandfathering provisions responded to the intent of both the current and prior Councils, which consisted of two key directives conveyed to Planning Board:

1. Make sure the new Zoning Ordinance and Subdivision Regulations do not interfere with on-going projects, including new projects that were about to be submitted and accepted prior to the effective dates of the new Subtitles; and
2. The 30-year “overlap” period elected by Montgomery County where its prior Zoning Ordinance may still be in effect and available for new applications under defined circumstances was deemed far too long for Prince George’s County, and the County’s new laws must ensure a shorter “overlap” and transition period.

The enacted transition provisions cover previously built development, projects that have submitted applications that were not yet decided when the new codes took effect, and future applications that would be part of a “grandfathered” chain of entitlements. To protect projects that were contemplated by property owners and developers but that had not yet filed any application, the ordinance allowed, at the sole discretion of the applicant, an unrestricted two-year overlap period codified in 27-1900 and 24-1900 wherein the applicant can continue to file its first application under the prior codes until April 1, 2024. A first application accepted for processing prior to April 1, 2024, also allows the project to obtain the remainder of its entitlements using the prior codes.

To address Council concerns of the length of time the prior codes could continue to be used, the Council imposed 20-year periods of validity for application case types that previously never expired (e.g. Conceptual Site Plans and Comprehensive Design Plans), and subsequent steps in “grandfathered” entitlement chains remained available to developers only for so long as the validity of prior approvals remained intact. As a result, projects will be using the prior codes for decades into the future.

Any project built and legal as of the April 1, 2022, the effective date of the new codes is fully protected and deemed legal and not nonconforming until the owner elects to use the new Zoning Ordinance or makes changes to the project that are not eligible for a modification of the existing approvals. Projects which are built after April 1, 2022, under a grandfathered chain of approvals also are deemed legal and not nonconforming.

In summary, the transitional provisions already in the code provide broad and long-lasting protection for projects that have entered the approval process or that will enter it prior to April 1, 2024.

Changes to the Transitional Provisions Proposed by CB-77-2022

The bill proposes to add a new Section 27-1706 to the Zoning Ordinance. Portions of the proposed language merely restate the current transitional provisions. However, the proposed language significantly expands the scope of the transitional provisions in these respects:

First. The bill allows "projects which have been developed and constructed pursuant to the prior Ordinance" to use the prior ordinance in perpetuity for all purposes. This is quite different from the existing transitional provisions which require that an application for development be in process prior to April 1, 2024. CB-77-2022 appears to allow perpetual access to the prior ordinance for any property that has a structure in existence on April 1, 2022. For example, a large lot with a small commercial building could elect to build a large warehouse many years from now using the property's prior zone. This could occur even if the property is in a Plan 2035 center and the warehouse will be adjacent to a transit station and walkable neighborhoods.

Second. CB-77-2022 gives properties perpetual access to the use tables of the prior zone. The current transitional provisions protect existing uses by making them legal and not non-conforming. However, when a grandfathered use is discontinued for a lengthy period (180 days normally and three years for properties formerly in a commercial, industrial, M-X-T or M-U-I zone) the use may not be reestablished. This has always been the Council's approach to rezoning because properties are expected to come into compliance with the current zone eventually. The effect of CB-77 is to give every property two different zones, with two different use tables, in perpetuity. The Planning Board does not believe this is sound policy and it certainly does not give the neighborhood or other stakeholders any sense of predictability regarding what may be built over time.

CB-77-2022 makes several policy changes to the existing transition and grandfathering provisions:

1. It replaces provisions that refer to projects (and by extension, developers/property owners) that may one day be required to follow the requirements and procedures of the new Zoning Ordinance with a much more generous authorization that any such compliance is solely at the election of the applicant.
2. By placing the sole decision authority in the hands of applicants, it supersedes the ability of the local government – including the Council – to require conformance to the new zoning regulations and procedures that resulted from nine years of collaborative effort under any circumstances the Council had identified in approving the new Zoning Ordinance.
3. It replaces the carefully negotiated validity periods and the policy decision to avoid a Montgomery County-style, 30-year overlap period of prior and current regulations with an indefinite authorization clause that would allow applicants – at their sole discretion – to use the prior Zoning Ordinance in perpetuity.
4. It extends exemptions from the new Zoning Ordinance for changes in ownership and changes in occupancy to include changes in use and enshrines the prior use tables of the prior zones – which no longer legally exist after April 1, 2022 – in perpetuity, making uses that were permitted in the prior zones available to applicants forever.
5. It enshrines the accessibility of the application types and procedures of the prior Zoning Ordinance in perpetuity.

6. It grants the above rights to all future owners and occupants of grandfathered or in-process projects.
7. It may create difficult problems of interpretation when comparing the proposed provisions to the enacted and current transition and grandfathering provisions.

Additional Policy Concerns

As indicated, the most significant impact of CB-77-2022 would be to overturn the policy direction of the current and former Council regarding the prior Zoning Ordinance. Additional concerns include:

1. Long-standing competitive disadvantages with peer jurisdictions will be greatly compounded by – not alleviated by – CB-77-2022 should it take effect as drafted because the number one concern cited by the development community over the last 20 years regarding development in the County was the complexity of the County’s Zoning laws. Restoring those laws through CB-77-2022 and compounding the issue with the simultaneous use of the new/current Zoning Ordinance is significantly worse than simply using one code or the other.
2. Additional complexity approaching an order of magnitude in application, development review, decision-maker review and approval, and other aspects of the development process as a direct result of operating two quite different Zoning Ordinances simultaneously in perpetuity.
3. The need to process two codes in perpetuity will create budgeting and staff training challenges and require additional funding for all agencies involved in development review, approval, and enforcement.

CB-77-2022 is Premature Because There Has Been Insufficient Time to Evaluate the Impact of the New Zoning Ordinance and Subdivision Regulations

The new Zoning Ordinance and Subdivision Regulations took effect April 1, 2022. Five months is insufficient time to fully evaluate the effectiveness of the new zones, the new Zoning Ordinance and Subdivision Regulations, and the zones applied to property through the CMA technical rezoning exercise. It is premature to propose a bill of such significance and broad impact as CB-77-2022, particularly given the already-generous grandfathering and transition provisions of the new Zoning Ordinance and Subdivision Regulations which were the result of much collaboration among the Council, development community, and other key stakeholders.

The Planning Board believes that CB-77-2022 is motivated in part by property owner concerns that the use table of their new zone leaves out some uses that are important and appropriate. If so, the correct approach is to revise the use tables in the new code. Allowing access to two zones and use tables in perpetuity as a solution represents overkill and raises many risks.

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. The Planning Board 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.

Impacted Property:

By its unique nature, this bill will affect all properties in the County but is oriented more directly to any property that had any development or approval approved or accepted prior to April 1, 2022.

Following discussion, the Planning Board voted to oppose CB-77-2022.