



## ARLINGTON COUNTY, VIRGINIA

**County Board Agenda Item  
Meeting of January 24, 2009**

**DATE:** January 15, 2009

**SUBJECT:** Zoning Ordinance amendment to Section 2 General Regulations and Section 35 Nonconforming Buildings and Uses to allow, upon the acquisition of a portion of a lot by the County for a public purpose, and findings by the Board that the acquisition is in the public interest and that the conditions created will not be detrimental to adjacent property and will not change the character of the zoning district, the creation of nonconforming condition(s), to be treated as a nonconforming building or use, pursuant to the nonconforming buildings and uses provisions of the Zoning Ordinance.

**C.M. RECOMMENDATION:**

Adopt the attached ordinance to amend, reenact and recodify Section 2 General Provisions and Section 35 Nonconforming Buildings and Uses of the Arlington County Zoning Ordinance to allow, upon the acquisition of a portion of a lot by the County for a public purpose, the creation of a condition(s) that is not compliant with requirements of the Zoning Ordinance to be treated as a nonconforming building or use, pursuant to the nonconforming use provisions of the Zoning Ordinance.

**ISSUES:** This is a Zoning Ordinance amendment to allow, upon the acquisition of a portion of a lot by the County for a public purpose, the creation of nonconforming condition(s), to be treated as a nonconforming building or use. No issues have been identified.

**SUMMARY:** The Zoning Ordinance contains provisions that preclude alterations to a property that would create nonconforming conditions where a use or building is currently conforming, or that would exacerbate existing nonconforming conditions. When the County acquires a portion of a property for a public purpose (i.e. a street right-of-way), nonconforming conditions are sometimes created. This has created difficulty where property is needed for a public use. The proposed amendment would exempt a property from the aforementioned provisions if the nonconforming conditions are created as the result of acquisition by the County of a portion of the property for a public purpose, after certain findings by the County Board. The property would then be subject to the provisions in Section 35 of the Zoning Ordinance that govern legal, nonconforming buildings and uses.

County Manager: \_\_\_\_\_

County Attorney: \_\_\_\_\_

Staff: Deborah Albert, Planning Division, DCPHD

PLA-5173

**BACKGROUND:** While acquisition of property for public purposes is not a new issue for the County, property transactions have become increasingly complicated. Acquisitions required for several recently proposed public projects would reduce parking and/or setbacks on affected properties below minimums required in the Zoning Ordinance. In the past, the County has allowed such acquisition of property in situations where nonconforming conditions are created. However, there is no provision in the Zoning Ordinance to provide assurance to property owners that they will not subsequently be cited with a zoning violation. Staff would like to have a mechanism for assuring these property owners that the acquisition of a portion of their property for a public purpose will not put them in violation of provisions in the Zoning Ordinance that preclude the creation of nonconforming conditions or additional nonconforming conditions.

These provisions in the Zoning Ordinance most commonly affect older properties that have not been redeveloped since the Zoning Ordinance was enacted, or are by-right projects under the Zoning Ordinance. In contrast, public easements and acquisitions on properties that develop through the site plan process, are typically achieved through negotiation as part of that process, where density calculations, building placement and layout are determined in concert with other transactions affecting the property. For older properties, however, public property acquisitions separated by years or decades from construction or implementation of a use on a property have resulted in reduction in parcel size such that required setbacks, sideyards or lot area have been reduced below the minimums required by the Zoning Ordinance.

**DISCUSSION:** The Zoning Ordinance contains provisions in Section 2.D. General Provisions, Regulations in All Districts, that preclude alterations to a property that create nonconforming conditions where a use or building is currently conforming, or that exacerbate existing nonconforming conditions. These provisions address use, area, subdivision of lots, and parking and loading areas. When the County wants to acquire property for a public purpose (i.e. a street right-of-way), and such transfer of a portion of a parcel reduces setbacks or sideyards, eliminates required parking, reduces the remaining land area of the property, or otherwise changes conditions so that they no longer meet required minimums in the Zoning Ordinance, the existing use on the property, or the building or structure on the lot, becomes illegal. This puts the building or use in conflict with those provisions in the Zoning Ordinance which require a conforming condition to remain conforming. In order to avoid such conflict under adopted provisions, alteration of the building or use could be necessary in order to remain in compliance, or in the extreme case, the County could be required to acquire the entire property in order to forward the public purpose. In all cases, County acquisition of such property is rendered more difficult and/or expensive.

Reduction of parking below minimum requirements, as compared to other requirements described above, could be viewed as having a more serious impact on the existing use of the property, as well as to neighboring properties. While many jurisdictions have provisions for uses or lots rendered nonconforming as a result of a reduction in land area or setbacks for a public purpose, few have provisions for loss of parking as a result of an acquisition or taking for a public purpose. Several mechanisms are employed in those jurisdictions that address the issue of public acquisition of property:

- Exemption from prohibition against reduction in lot size resulting in the lot area, side yards, open space, buildable area or width being reduced below the required minimums, when a portion of a lot is acquired for a public purpose.
- Lots rendered non-conforming as a result of a taking for a public purpose are treated as conforming parcels, provided they continue to contain at least a percentage (60-75%) of the required land area, width and buildable area.
- When area or setbacks are reduced below the required minimums due to conveyance for a public purpose, the parcel is deemed to be in compliance with the minimum lot size and setback standards without any need for variance.

Zoning ordinance provisions related to nonconforming conditions created as a result of acquisition of property by the County would provide a standardized and legal mechanism for a conforming lot to become nonconforming in order to further a public purpose. The proposed provisions also state that the use, the lot or the building rendered noncompliant by the acquisition, will be treated as a nonconforming use or building subject to the provisions of Section 35 of the Zoning Ordinance. In addition to providing a property owner with a legal mechanism with which to enter into the transaction, defining the Zoning Ordinance provisions to which the altered property would subsequently be subject, would afford the property owner knowledge of the impact of the acquisition on future use of the property, and contribute to an assessment of the fair market value of the property to be acquired.

Because nonconforming conditions resulting from property acquisition could impact neighboring properties, and in order to ensure that the County Board finds the acquisition to be appropriate in light of the resulting nonconformities, staff recommends that such transactions be permitted when the County Board finds that the acquisition of the property is in the public interest and the nonconforming conditions caused by the acquisition will not unduly impact adjacent properties or the character of the zoning district. In order to inform the County Board's decision, staff would include additional land use and zoning analysis in conjunction with an acquisition request coming before the County Board, that would address the anticipated impacts of the nonconforming conditions created from a proposed acquisition. The proposed provisions would also allow the County Board to impose conditions on the property as part of approval of the acquisition, in order to address impacts to neighboring properties.

**Community Process:** The proposed amendment was discussed at the September 17, 2008, and November 19, 2008, Zoning Committee of the Planning Commission (ZOCO) meetings. ZOCO members were generally supportive of the proposed amendment, recognizing that it would codify current practice. ZOCO members raised some procedural questions regarding how properties made nonconforming under the proposed provisions would be tracked by the County. Generally, the deed conveying the property interest would also reference and attach a certification of the County Board action approving the specific nonconforming conditions. The land records and County Board minutes would contain these records, but if a question arose, the property owner would be responsible for demonstrating the existence of the legal subdivision, reduction of parking, setbacks or other requirements in the future. ZOCO also discussed how properties affected by County acquisition of property in the past would be affected by the

proposed provisions. In the past, where County acquisition of property has created nonconforming conditions, consistent administrative practice has been to treat these properties as nonconforming.

The Planning Commission voted 10-1 to approve the proposed amendment at the January 12, 2009, meeting. As part of its recommendation, the Planning Commission voted that staff address some technical questions related to how the provisions amended in Section 2 (use, area, subdivision and parking) are referenced by the proposed Section 35.E, and to ensure that the referenced provisions are comprehensively addressed in Section 35.

- The Planning Commission asked that staff replace “Subsection” with a Section and Subsection reference for clarity. Because the referenced portions of the Ordinance are not full sections, but subparts thereof, staff has retained the word “Subsection.” A reference to Subsection 2.D.1 was added into Subsection 35.E, where it was unintentionally omitted, and “lot” was added to “use, building or structure rendered noncompliant” (see Line 52) in Subsection 35.E in order to comprehensively address all situations from the referenced Subsections in Section 2. These changes from the advertised language are shown with highlight and double underline to indicate text to be added, and highlight and strikethrough to indicate text to be removed.
- No other modifications have been made to the proposed amendment advertised. A use is nonconforming if it does not meet the current provisions of the Zoning Ordinance, including parking. A building or structure is nonconforming if it does not meet its setbacks or sideyards or exceeds its coverage requirements. A lot is nonconforming if it does not meet its average width, minimum area or access requirements. Therefore, all the provisions proposed to be amended in Section 2, as subject to the proposed “nonconforming due to public acquisition of land” provisions, are addressed in Section 35.E.

The Planning Commission also asked staff to ensure that the process for real estate transactions impacted by this amendment include notification to adjacent properties and civic associations, given that the amendment would require the County Board to make findings related to the impact of nonconforming conditions on adjacent properties and the surrounding neighborhood. A public hearing is required for a transaction that requires the County Board to make a finding, as is proposed in this amendment. Real Estate staff have agreed to incorporate notification to abutting property owners and affected civic associations into their guiding policies for acquisitions that would create nonconforming conditions under the proposed provisions.

**CONCLUSION:** Staff recommends that the County Board adopt the attached ordinance to amend, reenact and recodify Sections 2 and 35 of the Arlington County Zoning Ordinance to allow for the reduction of a lot below certain minimum standards in the Zoning Ordinance and the creation of nonconforming conditions, as a result of acquisition of a portion of a property by the County for a public purpose, where the County Board makes certain findings, and in order to facilitate the creation of a convenient, attractive and harmonious community and for other reasons required by the public necessity, convenience and general welfare and good zoning practice.

**AN ORDINANCE TO AMEND, REENACT AND RECODIFY SECTION 2 GENERAL PROVISIONS AND SECTION 35 NONCONFORMING BUILDINGS AND USES OF THE ARLINGTON COUNTY ZONING ORDINANCE TO ALLOW, UPON THE ACQUISITION OF A PORTION OF A LOT BY THE COUNTY FOR A PUBLIC PURPOSE, THE CREATION OF CONDITIONS THAT ARE NOT COMPLIANT WITH REQUIREMENTS OF THE ZONING ORDINANCE TO BE TREATED AS A NONCONFORMING BUILDING OR USE PURSUANT TO THE NONCONFORMING BUILDINGS AND USES PROVISIONS OF THE ZONING ORDINANCE, IN ORDER TO FACILITATE THE CREATION OF A CONVENIENT, ATTRACTIVE AND HARMONIOUS COMMUNITY AND FOR OTHER REASONS REQUIRED BY THE PUBLIC NECESSITY, CONVENIENCE AND GENERAL WELFARE AND GOOD ZONING PRACTICE.**

Be it ordained that Section 2 General Provisions and Section 35 Nonconforming Buildings and Uses of the Arlington County Zoning Ordinance is hereby amended, reenacted and recodified as follows to reduce or prevent congestion in the streets, to facilitate the creation of a convenient, attractive and harmonious community; and for other reasons required by the public necessity, convenience and general welfare and good zoning practice:

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**SECTION 2. GENERAL REGULATIONS**

\* \* \*

**D. Regulations in All Districts.**

1. *Use.* No building or structure shall be erected, reconstructed, structurally altered, enlarged or moved, and no land or building shall be used or designed to be used for any purpose other than is hereinafter permitted except as may be permitted by Subsection 35.E.
2. *Height.* No building or structure shall be erected, reconstructed, structurally altered, enlarged or moved to exceed in height the limit hereinafter designated.
3. *Area.* No building or structure shall be erected, reconstructed, structurally altered, enlarged or moved, no open space surrounding any building shall be encroached upon or reduced in any manner, no lot shall be reduced in area, except in conformity with all area and building location, bulk, placement and coverage regulations hereinafter designated except as may be permitted by Subsection 35.E. No yard or other space provided about any building shall be considered as providing a yard or open space for the building on any other lot.
4. *Subdividing, Resubdividing, Parcels of Land.*
  - a. No parcel of land held under separate ownership, with or without buildings, at the time this ordinance became effective, shall be subdivided, resubdivided, or reduced in any manner below the minimum lot width and lot area required by this ordinance except as may be permitted by Subsection 35.E.

25 b. In addition, every lot must meet the required minimum lot width for the  
26 applicable zoning district at the midpoint of the depth of the portion of the  
27 lot used for the calculation of the minimum lot width except as may be  
28 permitted by Subsection 35.E. The midpoint lot width shall be measured at  
29 right angles to the lot depth line at its midpoint.

30 5. *Parking, Standing or Loading Areas*. No parking area, parking space, standing  
31 space or loading space which existed at the time this ordinance became effective  
32 or which subsequent thereto is provided shall thereafter be relinquished or reduced  
33 in any manner below the requirements established in this ordinance except as may  
34 be permitted by Subsection 35.E.

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### 36 SECTION 35. NONCONFORMING BUILDINGS AND USES

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#### 38 **E. Nonconforming Due to Public Acquisition of Land.**

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42 When, due to acquisition by the County of a portion of a lot for public purposes, either:  
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44 (a) the use of the land, the lot, or a building or structure no longer complies with the  
45 requirements of the Zoning Ordinance; or (b) an existing nonconforming use or building  
46 becomes further noncompliant with the requirements of the Zoning Ordinance; then, upon a  
47 finding by the County Board that the acquisition of the property will be in the public interest and  
48 that the noncompliant conditions caused by the acquisition will not be of substantial detriment to  
49 adjacent property and the character of the zoning district will not be changed, then, subject to  
50 such conditions as the County Board may approve, the provisions of Subsections 2.D.1, 2.D.3,  
51 2.D.4, and 2.D.5 shall not apply to the acquisition and the lot, use, or the building or structure  
52 rendered noncompliant by the acquisition shall be treated as a nonconforming use or  
53 nonconforming building pursuant to the provisions of this Section 35. The foregoing provisions  
54 shall apply only to the noncompliant conditions caused by acquisition by the County, and in no  
55 event shall the foregoing provisions be construed to confer nonconforming status on any  
56 condition that was not created or furthered by acquisition by the County.  
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