CITY OF CHARLOTTESVILLE
"A World Class City"

Department of Neighborhood Development Services

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April 4, 2012

TO: Charlottesville Planning Commission, Neighborhood Associations & News Media

Please Take Notice

A Work Session of the Charlottesville Planning Commission will be held on **Tuesday April 24, 2012 at 5:00 p.m. in the NDS Conference Room in City Hall (610 East Market Street).**

AGENDA

1. Zoning Text Amendments – removal of Waiver provisions
2. Public Comment – 15 minutes

cc: City Council
Maurice Jones
Aubrey Watts
Jim Tolbert
Neighborhood Planners
Melissa Thackston, Kathy McHugh
Mary Joy Scala
Craig Brown, Rich Harris

CITY OF CHARLOTTESVILLE
NEIGHBORHOOD DEVELOPMENT SERVICES

MEMORANDUM

To: Charlottesville Planning Commission
From: Missy Creasy, Planning Manager
Date: April 11, 2012
Re: Zoning Text Amendments to address Waiver Provisions

Background

On January 13, 2012 the Supreme Court of Virginia issued a ruling in the case of Sinclair v. New Cingular Wireless PCS, LLC, et al. that effectively invalidated waiver, exception and modification provisions found in the City Zoning Ordinance. Staff has reviewed the ordinance and found a number of instances where changes are required to comply with the court ruling.

The Court held that a Planning Commission is not enabled to approve waivers, that the approval of "departures" from a zoning ordinance is a legislative act, and that this authority could be delegated only to the zoning administrator under the administrative modification enabling authority in Virginia Code 15.2-2286(A)(4), or to the BZA under the special exception enabling authority, in Virginia Code 15.2-2309(6). Immediately following the court ruling, staff began a review of the zoning ordinance for sections which do not comply with the ruling. As this interpretation is different than many practices in Charlottesville and throughout the state, it was discovered that a number of code sections exist in violation of the current interpretation. Known instances in the zoning code were communicated to City Council as part of the initiation request for code changes and a more thorough review was conducted which uncovered additional sections for revision.

Staff requested initiation for study of both the Zoning and Subdivision ordinances and found only references in the Zoning Ordnance needed to be revised. A public hearing was scheduled for March 13, 2012 on the revisions but was removed from that agenda to allow for additional refinement of the text. At that time, the Commission requested the opportunity to discuss these changes in a work session and April 2012 was the first opportunity for this to be scheduled. Following the integration of comments from this work session, staff expects to schedule the text amendments for public hearing.

Attachments:
1. Proposed text amendment details
2. Jan 13, 2012 Virginia Supreme Court Ruling

Proposed Changes to Zoning and Subdivision Ordinances to address References to Waiver Provisions

Design Control

Waiver provisions designated for the Board of Architecture Review are removed and a code reference was corrected.

Sec. 34-282. - Application procedures.

(a)

Applications shall be submitted to the director of neighborhood development services, by a property owner, contract purchaser, or lessee of the property, or by the authorized agent of any such person. Each application shall be accompanied by the required application fee, as set forth within the most recent zoning fee schedule approved by city council.

(b)

Prior to submission of an application for a certificate of appropriateness, a property owner or his agent may request a conference with the full BAR, the chairman of the BAR or the director of neighborhood development services ("pre-application conference") to discuss and review a proposal for activities that require such certificate. The principal objective of the conference shall be to simplify and expedite the formal review process.

(c)

A pre-application conference with the entire BAR is mandatory for the following activities proposed within a major design control district:

(1)

Development by the City of Charlottesville, or on land owned by the city;

(2)

Development on property owned by the city that is being sold for private development;

(3)

Development being financed in whole or in part by the city, or by a related governmental authority (such as the Economic Development Authority or the Redevelopment and Housing Authority);

(4)

Development having a projected construction cost of three hundred fifty thousand dollars ($350,000) or more; and,

(5)

Any other development deemed significant by the director of neighborhood development services or the chair of the BAR, due to its size, location or potential impact on surrounding properties.

The required pre-application conference shall take place prior to an applicant's submission of a completed application.

(d)

After the pre-application review, if any, has been completed, and at least twenty-one (21) days prior to the meeting at which an application will be considered by the BAR, a **property** owner or his agent may apply for a certificate of appropriateness. ~~The BAR may waive the twenty-one-day requirement when necessary for reasons of public health of safety.~~ The following information and exhibits shall be submitted along with each application:

(1)

Detailed and clear descriptions of any proposed changes in the exterior features of the subject property, including but not limited to the following: the general design, arrangement, texture, materials, plantings and colors to be used, the type of windows, exterior doors, lights, landscaping, parking, signs, and other exterior fixtures and appurtenances. The relationship of the proposed change to surrounding properties will also be shown.

(2)

Photographs of the subject property and photographs of the buildings on contiguous properties.

(3)

Samples to show the nature, texture and color of materials proposed.

(4)

The history of an existing building or structure, if requested by the BAR or staff.

(5)

For new construction and projects proposing expansion of the footprint of an existing building: a three-dimensional model (in physical or digital form) depicting the site, and all buildings and structures to be located thereon, as it will appear upon completion of the work that is the subject of the application.

(6)

In the case of a demolition request where structural integrity is at issue, the applicant shall provide a **structural** evaluation and cost estimates for rehabilitation, prepared by a professional engineer, ~~The BAR may waive the requirement for a structural evaluation and cost estimates in the case of an emergency, or if it determines that the building or structure proposed for demolition is not historically, architecturally or culturally significant under the criteria set forth in section 34-274~~

(e)

The director shall establish submission deadlines for applications. For purposes this division, a complete application shall be deemed to be "officially submitted" on the date of the next submission deadline following the date on which the application was received by the director.

(9-15-03(3); 4-13-04(2), § 1; 6-6-05(2); 9-4-07)

Sec. 34-283. - Administrative review.

(a)

Notwithstanding any contrary provision of this article, the director of neighborhood development services may review, and may approve or deny, applications for certificates of appropriateness, in the following situations:

(1)

Exterior alterations which are shown, through adequate documentation, to have been approved for a tax credit under either the federal rehabilitation tax credit program or the similar Virginia state tax credit program;

(2)

The repainting of an existing building or structure in a different color;

(3)

The addition or deletion of awnings, canopies, storm windows, storm doors, gutters, and similar appurtenances;

(4)

The addition, alteration or removal of any sign(s) where such sign(s) are the sole subject of the application, or where all other improvements comprising part of the application are subject to administrative review under this section or sections ~~34-1049 and 34-1052~~ 34-1041 through 34-1043; and

(5)

Structural changes to a building or structure which do not require issuance of a building permit under the Uniform Statewide Building Code except for the following, which must be reviewed by the BAR: replacement of roof coverings and installation or replacement of siding on any buildings or structures, and replacement of windows and doors on any buildings or structures.

Certificate of Appropriateness

The waiver provisions have been removed and the requirement for building elevations added to 34-312(a) (1).

Sec 34-309 (c) (3)

(c) All applications for the certificates required by subparagraph (a)(3) above shall be reviewed and approved by the ERB following the process set forth within sections 34-310 through 34-313

(1)

The ERB shall approve or disapprove an application and, if approved, shall issue a certificate of appropriateness with any reasonable conditions as it may deem necessary to ensure compliance with this division. Failure of the ERB to act upon an application within sixty (60) days from the date of its original submission shall be deemed to constitute approval of the application.

(2)

Nothing contained in this subsection shall be deemed to compromise, limit, or otherwise impair the planning commission in its exercise of preliminary or final site plan review as set forth within Article VII, section 34-800, et seq. of this zoning ordinance.

(3)

It is the express intent of the city council in enacting the provisions of this subsection that matters related to public health and safety, as may be defined by the planning commission, shall prevail over issues within the purview of the ERB. ~~Therefore, the planning commission in its review of any preliminary or final site plan may modify, vary or waive any requirement of the certificate of appropriateness as issued by the ERB, upon finding that such action would serve the interests of public health or safety.~~

Sec. 34-312. - Application requirements.

(a)

Application for a certificate of appropriateness pursuant to this division shall be filed with the director of neighborhood development services by the owner, contract purchaser, or lessee of the property, or by the authorized agent of any such person, of the subject property.

(1)

A complete application shall include all plans, maps, studies, reports, photographs, drawings, building elevations, and other informational materials which may be reasonably required in order to make the determinations called for in a particular case.

~~**(2)**~~

~~Building elevations shall be provided, unless **waived** by the director.~~

(2) ~~**(3)**~~

Each application for a certificate of appropriateness shall be accompanied by the required application fee, as set forth within the most recent zoning fee schedule approved by city council.

(b)

The director shall establish submission deadlines for applications. For purposes of this division a complete application shall be deemed to be "officially submitted" on the date of the next submission deadline following the date on which the application was received by the director.

(c)

Each application shall include a landscaping plan, for the uses described following below.

(1)

For development subject to site plan review, such plan shall meet the requirements set forth below as well as those required within Article VII, section 34-867

(2)

For other applications, the landscaping plan shall consist of drawings, documents and information sufficient to allow the director to determine whether the following requirements are satisfied:

a.

Uses to be screened: Parking lots, loading areas, refuse areas, storage areas, detention ponds and mechanical equipment shall be screened from view from the adjacent EC street.

b.

Standards for screening: When required, screening shall consist of the following:

(i)

A planting strip of vegetation or trees, an opaque wall, an opaque fence or a combination of these.

(ii)

Where only vegetative screening is provided, such screening strip shall not be less than twenty (20) feet in depth and shall consist of a double staggered row of evergreen trees on fifteen-foot centers, a minimum of five (5) feet in height when planted, or a double staggered row of evergreen shrubs on five-foot centers, a minimum of twenty-four (24) inches in height when planted. Alternative methods of vegetative screening may be approved by the ERB or the director in connection with approval of a certificate of appropriateness.

(iii)

Where a fence or wall is provided for screening, it shall be a minimum of six (6) feet in height with planting required at ten-foot intervals along such structure.

(3)

Landscaping. All nonresidential uses, including parking lots and vehicular display areas, shall have all of the street frontage, exclusive of driveways and walkway connections, landscaped with trees and other varieties of plant material at least eighteen (18) inches in height at maturity. ~~The planning commission or the planning director may allow a deviation from these requirements if, in its judgment, such deviation is consistent with the intent of this article.~~ The tree varieties shall conform to those recommended in the city's List of Approved Plantings. All uses shall have the side and rear property edges defined with a fence, wall or curbed planting strip of trees and other plantings a minimum of twenty-four (24) inches in height at maturity.

(d)

Each application shall include information about proposed lighting. Lighting fixtures shall be harmonious with the character of existing and proposed structures fronting along the EC street, and shall not exceed the height of any buildings on the site. Further, lighting shall comply with the provisions of Article IX, Division 3, section 34-100, et seq.

(9-15-03(3); 6-6-05(2))

Public Park Overlay

Provision for a reduction or waiver of parking regulations in the Public Park Overlay has been designated to City Council.

Sec. 34-328. - Regulations.

(a)

No park property within the PPO district shall be sold except by an ordinance passed by a recorded affirmative vote of three-fourths (¾) of all the members elected to city council, following a public hearing on the proposed sale. Nothing herein shall prohibit the use of property within the PPO district for public parking, public utilities, improvements for storm water management, streets, roads or any other public improvements as may be authorized by city council.

(b)

The ~~planning commission~~ City Council may grant a reduction or **waiver** ~~-~~of off-street parking regulations required in section 34-984 of this Code in the Public Park Protection Overlay District (PPO) upon a determination that: (i) there is adequate on-street parking available; and/or (ii) the amount of parking required by section 34-984 would be unreasonable to serve the proposed use of the property and would be inconsistent with the park classification as identified in the City of Charlottesville Comprehensive Plan.

(9-15-03(3); 9-2-08)

Conservation Districts

The waiver provision has been removed while maintaining alternate requirements for properties used as an applicant's primary residence

Sec. 34-343. - Standards for review of demolition, razing or moving of a contributing structure.

The following factors shall be considered in determining whether or not to permit the demolition, razing or moving, in whole or in part, of a contributing structure:

(1)

The historic, architectural or cultural significance, if any, of the specific building or structure, including, without limitation:

a.

The age of the building or structure;

b.

Whether it has been listed on the National Register of Historic Places, or listed on the Virginia Landmarks Register;

c.

Whether, and to what extent, the building or structure is associated with an historic person, architect or master craftsman, or with an historic event;

d.

Whether the building or structure, or any of its features, represent an infrequent or the first or last remaining example within the city of a particular architectural style or feature;

e.

The degree to which distinguishing characteristics, qualities, features or materials remain;

(2)

Whether, and to what extent, a contributing structure is linked, historically or aesthetically, to other buildings or structures within the conservation district, and whether the proposed demolition would affect adversely or positively the historic or aesthetic character of the district;

(3)

The overall condition and structural integrity of the building or structure. ~~, as indicated by studies prepared by a qualified professional engineer and provided by the applicant (studies may be waived by the director if the building is the applicant's primary residence), or other information provided to the BAR;~~

(4)

Whether, and to what extent, the applicant proposes to preserve portions, features or materials that are significant to the property's historic, architectural or cultural value; and

(5)

Any applicable provisions of the city's conservation district design guidelines.

(3-16-09(2))

Sec. 34-345. - Application procedures.

(a)

Applications shall be submitted to the director by a property owner, contract purchaser, or lessee of the property, or by the authorized agent of any such person. Each application shall be accompanied by the required application fee, as set forth within the most recent zoning fee schedule approved by city council.

(b)

The director shall require the applicant to submit sufficient information for the preliminary review to make a determination whether further review and a certificate of appropriateness is required. If the director determines that review and approval by the BAR is required, then the applicant shall submit a complete application that includes the following information:

(1)

A written description of proposed exterior changes;

(2)

A general sketch plan of the property including: the location of existing structures; property and setback lines; and any proposed new construction, additions or deletions, parking areas, and fences;

(3)

The total gross floor area of the existing building and of any proposed additions;

(4)

Elevation drawings depicting existing conditions and proposed exterior changes;

(5)

Photographs of the subject property in context of the buildings on contiguous properties;

(6)

In the case of a demolition request where structural integrity is at issue, the applicant shall provide a structural evaluation and cost estimates (unless the building is the applicant's primary residence) for rehabilitation, prepared by a professional engineer. ~~The director may waive the requirement for a structural evaluation and cost estimates in the case of an emergency, or if the building is the primary residence of the applicant.~~

(3-16-09(2))

Site Plans

Waiver provisions have been removed.

Sec. 34-801. - Administration.

(a)

Except as otherwise expressly provided within this article, the city council hereby designates the planning commission as the approval body for site plans. Recognizing that not all plans may require review and deliberation by the commission, council also provides for an administrative review under which the director of the city's department of neighborhood development services (hereinafter, "director") is authorized to act on behalf of the commission. ~~The director shall have no authority to act on behalf of the commission to modify, vary, waive or accept substitution for any requirement of this chapter, except where expressly provided~~.

Sec. 34-802. - Site plans—When required.

(a)

In all zoning districts, a site plan shall be required for any construction, use or change in use, for any development, and prior to the removal of trees having a caliper of fifteen (15) inches or more, except that no site plan shall be required for the following:

(1)

The construction, addition to, or location of any single-family detached dwelling upon a lot whereon there are located, or proposed to be located, an aggregate of two (2) or fewer dwellings.

(2)

The construction or location of a two-family dwelling on any lot not occupied by any other dwellings.

(3)

Any accessory structure to a single-family detached or two-family dwelling.

(4)

Any change of a use, provided that:

a.

Such change does not occasion additional parking under the requirements of this chapter;

b.

No additional ingress/egress, or alteration of existing ingress/egress is recommended by the city, based on intensification of use; and

c.

No additional ingress/egress, or alteration of existing ingress/egress is proposed.

d.

No removal of trees having a caliper of fifteen (15) inches or more is proposed.

~~**(b)**~~

~~**The planning commission may waive the requirement of a site plan in a particular case, or one (1) or more submission requirements, upon a finding that the requirement of such site plan or submission would not forward the purposes of this chapter or otherwise serve the public interest. No such waiver shall be granted until the commission has considered the recommendation of the director. In the event the director recommends a conditional approval, the director shall, within his recommendation, state the relationship of the recommended condition to the provisions of this article.**~~

~~**(c)**~~

~~**The director may waive the requirement of a site plan, or one (1) or more particular submission requirements, for an addition to any existing building, structure or use, upon a determination that such addition will not adversely impact:**~~

~~**(1)**~~

~~**Other existing buildings and land uses in the surrounding area;**~~

~~**(2)**~~

~~**The existing natural environment;**~~

~~**(3)**~~

~~**The safety or convenience of traffic and pedestrian circulation in the surrounding area;**~~

~~**(4)**~~

~~**Drainage and public utilities; or**~~

~~**(5)**~~

~~**Existing trees having a caliper of eight (8) inches or more.**~~

~~**Alternatively, the director, in his sole discretion, may refer any waiver request to the planning commission for consideration. Any decision of the director denying a waiver request may be appealed by the developer to the planning commission.**~~

(9-15-03(3))

Landscaping

Waiver provisions have been removed. Additions to the tree/plant listing may be done administratively with arborist approval so if an additional species is proposed, it could be added to the list if appropriate.

Sec. 34-862. - Approved list of plantings.

The director shall, from time to time, promulgate a list of trees and other plant materials acceptable for use in meeting the landscaping requirements of this division ("list of approved plantings"). This list shall be maintained in the department of neighborhood development services and shall be available for inspection. ~~Except where otherwise authorized by the director as an approved variation or~~ **waiver**, ~~all~~ All trees and other plant materials required by this article shall be selected from the current list of approved plantings.

(9-15-03(3))

~~**Sec. 34-865. - Variations, waivers.**~~

~~**(a)**~~

~~**The director may vary or waive the requirement of a landscape plan, in whole or in part, or any improvements required by this article, upon a finding that the requirement of such plan and/or improvements would not forward the purposes of this chapter or otherwise serve the public interest; provided that such variation or waiver shall result in a plan substantially in compliance with the approved site plan, together with all conditions imposed by the director or commission; and provided further that any such variation or waiver shall have no additional adverse visual impact on adjacent properties or public areas, nor otherwise would be inconsistent with the stated purposes of this section.**~~

~~**(b)**~~

~~**A developer requesting a variation or waiver pursuant to this section shall file with the director a written request that shall state reasons and justifications for the request, together with such alternatives as may be proposed by the developer. The director may approve, approve with conditions, or deny such request. In the case of conditional approval, or of denial, the director shall notify the developer in writing as to the reasons for such action within five (5) days of such decision. Thereafter, the developer may appeal the director's decision to the commission, by submitting a written notice of appeal to the director.**~~

~~*(9-15-03(3))*~~

Drainage

Remove waiver provision and replaced with reference to proper source per engineering review.

Sec. 34-913. - Drainage; stormwater management; soil erosion.

(a)

~~Slopes in excess of ten (10) percent shall be treated in a manner acceptable to the director of neighborhood development services or the planning commission~~ All disturbed areas shall be stabilized in accordance with the current edition of the Virginia Erosion and sediment Control Handbook to prevent soil erosion and excessive runoff; provided, that measures taken for erosion and sedimentation control shall conform to the standards and procedures set forth in Chapter 10 of this Code; and provided further that, in cases where an erosion and sedimentation control permit is required, the necessary plans and data shall be submitted, reviewed and approved concurrently with the site plan.

(b)

The following guidelines shall be followed in developing all site plans:

(1)

New drainage facilities or improvements to existing drainage facilities shall be designed to cope with storms having a ten-year recurrence interval.

(2)

Drainage improvements or those constructed in conjunction with site or subdivision plans shall be constructed downstream to a location where the receiving channel or conduit will convey the ten-year storm without overtopping its banks or eroding.

(3)

All site plans shall include provisions for on-site detention of runoff, or in lieu thereof the developers may be required to contribute the pro rata share for the site toward the estimated cost of a planned neighborhood or regional detention basin. Where on-site detention ponds are proposed, plans shall include a description of the maintenance to be provided for such ponds.

(4)

On-site detention design is intended to restrict post-development runoff to no more than the calculated predevelopment runoff. For new or redevelopment sites the design storm shall be the ten-year storm, or a two-year storm when calculated as if the site were totally vacant in the predevelopment stage, whichever is greater.

~~(c)~~

~~The director of neighborhood development services or the planning commission may waive or modify the above requirements on the basis of best engineering practices, or may require the installation of water quality devices in lieu of detention. Such devices can include but are not limited to: sand filters, bio-swales, grassed swale with check dams, filter strips with level spreaders and other practices as defined in the Virginia Erosion Control Handbook.~~

(9-15-03(3))

Off Street Parking

Remove waiver provisions and retain objective criteria for location of off site parking. City Council is given the ability to modify parking requirements in some zones.

Sec. 34-971. - Applicability.

(a)

~~Except to the extent that an exemption is granted,~~ O~~o~~ff-street parking and loading spaces shall be provided in accordance with the provisions of this division, at the time of construction, erection,

alteration, enlargement or change in use of any building, structure or use. Thereafter, such spaces shall be maintained and kept available for such use, to the extent of the minimum number of spaces required hereunder, unless there is a change of use or floor area.

(b)

Any use for which the required amount of parking was approved as of December 15, 1975 shall be considered as conforming as to the parking requirements, so long as the use remains unchanged. Otherwise, only those uses for which parking or loading space was approved and provided prior to the effective date of this chapter shall be considered in conformance with this division, provided the intensity of such use remains unchanged.

(c)

For enlargements of existing structures, required parking must equal the sum of those spaces prior to the enlargement and the number of spaces required by these regulations for any additional use area, except no additional parking is required in the following circumstances:

(1)

Where the enlargement is less than twenty-five (25) percent of the structure's gross floor area; or ~~no additional parking is required.~~

(2)

~~The director of neighborhood development services may grant a reduction or waiver of this requirement upon a determination that: (i) space limitations do not permit the provision of additional parking, (ii) there is adequate on-street parking available, (iii) the provision of additional parking would necessitate the demolition of an existing structure, in whole or in part, and/or (iv) the provision of additional parking would necessitate excavation for underground parking.~~

2. Space limitations on site do not permit the provision of additional parking and there is on-street parking available on the same block as the structure in the number of spaces required;

(d)

For a change of use within an existing structure where there is no enlargement of the existing structure, no additional parking is required.

(e)

The following three (3) parking zones shall be subject to the specific requirements set forth hereunder:

(1)

The Urban Core Parking Zone is established as designated on the most recently approved City of Charlottesville Zoning Map. Provision of parking shall not be required for a development in the Urban Core Parking Zone unless such development requires a special use permit for increased residential density above that allowed by right. Parking required pursuant to Article IX shall be provided for all additional units allowed as a result of the increased density, unless such requirement is waived by council. Parking requirements may be fulfilled by the property owner or developer through any of the alternatives outlined in subsection (4) below.

(2)

The Corner Parking Zone is established as designated on the most recently approved City of Charlottesville Zoning Map. Provision of parking shall not be required for a development in the Corner Parking Zone unless such development requires a special use permit for increased residential density above that allowed by right. Parking required pursuant to Article IX shall be provided for all additional units allowed as a result of the increased density, unless such

requirement is waived by Council. Parking requirements may be fulfilled by the property owner or developer through any of the alternatives outlined in subsection (4) below.

(3)

The Parking Modified Zone is established as designated on the most recently approved City of Charlottesville Zoning Map. Provision of parking for a development in the parking modified zone shall be computed using the provisions of sections 34-984 and 34-985. Only if a development requires more than twenty (20) parking spaces pursuant to Sec. 34-984 of this Code shall parking be required as follows: non-residential developments shall provide fifty (50) percent of the required parking, and residential developments shall provide one (1) space per unit. Parking requirements may be fulfilled by the property owner or developer through any of the alternatives outlined in subsection (4) below. Affordable housing units (as defined by city council in its adopted affordable housing policy) created in any development shall not be included in the parking calculation, and parking shall not be required as a result of any such units as long as they remain affordable.

(4)

Required parking in the urban core parking zone, corner parking zone, and the parking modified zone shall be provided either:

a.

On site;

b.

Within one thousand (1,000) feet of the site, subject to all other conditions of section 34-973

c.

By payment into a city parking fund in a standard amount per space established by city council;

d.

By making a one-time contribution for transit improvements equivalent to the cost of each required parking space in a standard amount per space established by city council; or by

e.

Implementation of alternative transportation improvements equivalent to the cost of each required parking space in a standard amount per space established by city council, as approved by planning commission,

(5)

In addition to provision of parking as required herein, all developments requiring a site plan within the urban core parking zone, corner parking zone, and the parking modified zone shall provide bicycle storage facilities, other than bicycle racks, in accordance with section 34-881

(6) City Council may modify parking requirements within the urban core parking zone, corner parking zone and the parking modified zone following recommendation by the Planning Commission.

(9-15-03(3); 9-21-09(2))

Sec. 34-973. - Off-site locations permitted, subject to conditions.

All off-street parking spaces shall be located on the same lot as the use or structure to be served, except as follows:

(1)

Off-site spaces shall be within one thousand four hundred (1,400) feet of the use or structure served. For the purpose of this requirement, distance from parking spaces to the use or structure served shall be measured in a straight line from the nearest parking space to the use served.

(2)

Off-site parking spaces may be located in a different zoning district than the use or structure served, if permitted by right or by special use permit in such zoning district.

(3)

An off-site location must either: (i) be located on land in the same ownership as that of the use or structure served, or in the case of cooperative provision of parking space, in the ownership of at least one (1) of the participants in such provisions, or (ii) be subject to arrangements (such as long-term lease, recorded easement, etc., providing the required parking arrangements for a period of at least twenty-five (25) years) as will assure the availability of such space for the duration of the use or structure to be served.

(4)

No changes shall be made to any off-site parking lot that would reduce the parking available for a use or structure served by such lot, unless alternate parking arrangements are made to provide an equivalent number of spaces. ~~and such alternate arrangements are approved by the director of neighborhood development services.~~

~~(5)~~

~~Where a waiver has been granted pursuant to section 34-986, the director may alter some or all of the required off-street parking spaces for that use or structure.~~

(5) ~~(6)~~

The use or structure must supply at least forty (40) percent of its required spaces on-site.

(6) ~~(7)~~

~~The planning commission~~ ~~may, for reasonable cause shown, grant an exception to this requirement after consideration of the following factors: (i) proximity of proposed parking areas to the uses and structures served, (ii) ease of access between the proposed parking areas and the uses and structures served, (iii) present and future availability of on-street parking and/or cooperative parking facilities, and (iv) submission by the owner of the structure or use subject to the parking requirement of a parking management plan signed by a professional transportation engineer.~~ All required handicapped parking spaces must be located on site unless ~~This requirement may be waived by the director of neighborhood development services, upon a determination that~~ space limitations do not permit the provision of the required handicapped spaces and ~~, or~~ the owner of the use or structure to be served by such spaces demonstrates that the proposed use an be adequately served by existing designated on-street handicapped space(s) within seventy-five (75) feet of such use or structure.

~~(8)~~(7)

All required loading spaces for a use or structure must be located on site, except as provided in section 34-983 (Off-street loading area requirements).

(9-15-03(3); 6-6-05(2))

Sec. 34-983. - Off-street loading areas.

(a)

In addition to any required off-street parking spaces, there shall be provided adequate off-street space for loading and unloading vehicles owned or leased and regularly used in the operation of any commercial (business or industrial) use. In addition, when any such vehicles are to be parked on-site when not loading or unloading, there shall be provided adequate parking spaces to accommodate the maximum number of vehicles that may be reasonably expected to be parked on the site of such use at any one (1) time.

(b)

Each loading space shall have a minimum dimension of twelve (12) by thirty-five (35) feet, and a vertical clearance of at least fourteen (14) feet.

(c)

Loading requirements shall not apply ~~may be **waived** by the director of neighborhood development services~~ under the following circumstances: (i) space limitations do not permit the provision of off-street loading areas, and (ii) the owner of the use of structure demonstrates that the proposed use an be adequately served by an existing designated on or off-street loading facility within two hundred (200) feet of the use served.

(d)

Loading spaces may be provided cooperatively for two (2) or more uses, subject to the approval by the director of neighborhood development services of the appropriate legal instruments (a long-term lease, recorded easement, etc.) to ensure the permanent availability of off-street loading for all such uses.

(9-15-03(3))

Sec. 34-986. - Waivers.

~~The planning commission may waive off-street parking requirements, in whole or in part, in the following circumstances:~~

Off street parking requirements shall not apply in the following circumstances:

(1)

For a single-family detached dwelling, ~~upon a determination that~~ if (i) the dwelling is not located on a corner lot, (ii) the lot on which the dwelling is located has no access to a public alley, and (iii) the lot has fewer than thirty (30) feet of front yard street frontage.

(2)

For single-family attached and two-family dwellings, ~~upon a determination that:~~ if (i) the owner of the property has demonstrated the availability of adequate on-street parking; ~~or~~ and (ii) the lot on which such dwelling is located cannot accommodate the required number of parking spaces.

(3)

For multi-family dwellings, commercial and industrial uses, and mixed-use developments, ~~upon a determination that~~ if (i) the use or structure is not located on a corner lot, (ii) the lot on which the use or structure is located has no access to a public alley, and (iii) the lot has fewer than 40 feet of front yard street frontage.

(9-15-03(3); 6-6-05(2))

Lighting

Remove waiver provision and specific language to address lighted ball fields

Sec. 34-1003. - Standards.

The following standards shall apply to each outdoor luminaire:

(a)

~~Except as provided in section 34-1004, each outdoor luminaire subject to these outdoor lighting regulations shall be a full cutoff luminaire.~~

(b)

Measurement of lumens

(1)

For each outdoor luminaire subject to these outdoor lighting regulations, the maximum number of lumens emitted by such luminaire shall be determined from the information provided by the manufacturer of the lamp including, but not limited to, information on the lamp or on the lamp's packaging materials.

(2)

The following rated lamp wattages shall be deemed to emit three thousand (3,000) or more maximum lumens, unless the zoning administrator determines, based upon information provided by a lamp manufacturer, that the rated wattage of a lamp emits less than three thousand (3,000) maximum lumens:

a.

Incandescent lamp: one hundred sixty (160) or more watts.

b.

Quartz halogen lamp: one hundred sixty (160) or more watts.

c.

Fluorescent lamp: thirty-five (35) or more watts.

d.

Mercury vapor lamp: seventy-five (75) or more watts.

e.

Metal halide lamp: forty (40) or more watts.

f.

High pressure sodium lamp: forty-five (45) or more watts.

g.

Low pressure sodium lamp: twenty-five (25) or more watts.

(3)

If a luminaire is equipped with more than one lamp, the lumens of the lamp with the highest maximum lumens shall determine the lumens emitted.

(c)

Height.

(1)

No outdoor luminaire situated outside of a public right-of-way and within or immediately adjacent to any low density residential district shall be mounted or placed at a location more than twelve (12) feet in height.

(2)

No outdoor luminaire shall be mounted or placed at a location that is more than twenty (20) feet in height.

(d)

The spillover light from luminaires onto public roads and onto property within any low-density residential district shall not exceed one-half (½) foot candle. A spillover shall be measured horizontally and vertically at the property line or edge of right-of-way or easement, whichever is closer to the light source.

(e)

All outdoor luminaires, regardless of the number of lumens, shall be arranged or shielded to reflect light away from adjoining low density residential districts.

(f)

Illumination levels shall be measured with a photoelectric photometer having a spectral response similar to that of the human eye, following the standards spectral luminous efficiency curve adopted by the Internal Commission on Illumination. Within developments subject to the requirement of a site plan, all outdoor luminaires shall be of a type and size to provide sufficient illumination of a facility for its safe use, consistent with the recommended practices adopted by the Illuminating Engineering Society of North America for that facility.

(9-15-03(3))

~~Sec. 34-1004. - Modification or waiver.~~

~~(a)~~

~~Any standard of this division may be modified or waived in an individual case, as provided herein:~~

~~(1)~~

~~The planning commission may modify or waive any standard set forth in this division in an individual case, and the planning commission may impose conditions on such a modification or waiver which it deems appropriate to further the purposes of these outdoor lighting regulations, in either of the following circumstances:~~

~~a.~~

~~Upon finding that strict application of the standard would not forward the purposes of this chapter or otherwise serve the public health, safety or welfare, or that alternatives proposed by the owner would satisfy the purposes of these outdoor lighting regulations at least to an equivalent degree.~~

~~b.~~

~~Upon finding that an outdoor luminaire, or system of outdoor luminaires, required for an athletic facility cannot reasonably comply with the standard and provide sufficient illumination of the facility for its safe use, as determined by recommended practices adopted by the Illuminating Engineering Society of North America for that type of facility and activity, or other evidence if a recommended practice is not applicable~~

~~(2)~~

~~Prior to considering a request for a modification or waiver, five (5) days' written notice shall be provided to the owner or owner's agent and to the occupant of each abutting lot or parcel and each parcel immediately across the street or road from the lot or parcel which is the subject of the request. The written notice shall identify the nature of the request and the date and time the commission will consider the request.~~

~~(b)~~

~~Appeals.~~

~~(1)~~

~~Where the planning commission considers a request for a modification or waiver as part of an application for approval of a site plan, the decision of the commission shall be deemed part of the decision on the site plan, appealable only as set forth within section 34-823~~

~~(2)~~

~~When the planning commission considers a request for a modification or waiver as part of an application for approval of a rezoning or special use permit, the commission's decision shall be subject to review by the city council. Otherwise, neither the grant or denial of a modification or waiver request may be appealed to the city council.~~

~~(9-15-03(3))~~

Section 34-1004 – Lighting for Recreational Facilities, Outdoor

An outdoor luminaire or system of outdoor luminaires required for an athletic facility may exceed the lumens and height standards in Section 34-1003 to the minimum extent necessary to provide sufficient illumination of the facility for its safe use as determined by recommended practices adopted by the Illuminating Engineering Society of North America for that type of facility and activity.

Signs

Waiver provisions and references to alternate appeal processes have been removed.

34-1038 General Sign Regulations

(c)

Marquee signs.

(1)

Signs on marquees for establishments other than theaters shall not exceed twenty (20) square feet on any side or front section of the marquee. Signs may extend above the top of the marquee on which they are located, provided that the vertical dimension of the marquee and sign, together, does not exceed five (5) feet. If such signs are illuminated, exposed light sources shall not be used.

(2)

Signs may be mounted or located underneath a marquee, subject to the following restrictions:

a.

There shall be only one (1) sign for each entrance to an establishment.

b.

Such signs shall not exceed twelve (12) inches in depth, with not more than an additional three (3) inches in depth to include the supports and hangers attaching the sign to the marquee.

c.

If such signs are illuminated, the illumination shall be by interior lighting only, subject to the interior lighting restrictions as set forth in this chapter.

(3)

Theatre marquees including readerboards shall not exceed five (5) feet in the vertical dimension. Such signs may extend above the top of the marquee; provided, the vertical dimension of the structure, including both marquee and sign, shall not exceed five (5) feet. If such signs are illuminated, exposed light sources shall not be used.

(4)

Unless otherwise provided within this article:

a.

No marquee sign shall exceed an area of sixty (60) square feet including all faces of the sign.

b.

No part of any marquee shall be lower than ten (10) feet from grade.

~~**(5)**~~

~~The height standards set forth in this section for marquees located within architectural design control or entrance corridor districts may be~~ **modified** ~~by the BAR or ERB, respectively, in approving a proposed comprehensive signage plan.~~

Sec. 34-1041. - Downtown and University Corner architectural design control districts—Special regulations.

In addition to other applicable regulations set forth in this article, the following regulations shall apply to establishments located within the downtown and university corner architectural design control districts (reference section 34-272) except as approved with an optional comprehensive sign plan.

(a)

Freestanding and monument signs shall not be permitted.

(b)

Pole signs may be permitted with Board of Architectural Review approval.

(c)

Internally lit signs and neon signs shall not be permitted.

(d)

One (1) projecting sign is permitted for each separate storefront fronting on a public right-of-way at ground level.

(e)

No single sign face of any projecting sign shall have an area greater than ten (10) square feet.

(f)

Projecting signs shall have a projection of not more than thirty-six (36) inches beyond the facade of the building to which it is attached, except marquees, which shall be subject to regulations as provided in section 34-1038(c).

(g)

One (1) additional projecting sign may be permitted for a doorway entrance that provides primary access to a business located on an upper floor or basement level.

(h)

The character of all signs shall be harmonious to the character of the structure on which they are to be placed. Among other things, consideration shall be given to the location of signs on the structure in relation to the surrounding buildings; the use of compatible colors; the use of appropriate materials; the size and style of lettering and graphics; and the type of lighting

(i)

Except in the case of new construction, all signs in this district shall be subject to administrative review by the director of neighborhood ~~of~~ development services, with appeals to the board of architectural review. The board of architectural review shall review all signs for new construction. ~~The director of neighborhood development or board of architectural review may, as part of the appropriate review, waive the requirements herein if necessary to permit the restoration or reconstruction of an original sign associated with a protected property.~~

(j)

~~Notwithstanding any contrary provisions of this article, the director of neighborhood development services may approve~~ A sign many be attached to ~~the attachment or suspension of a sign from~~ an existing freestanding or projecting sign. ~~or, in~~ In the case of a building on a site with more than one (1) street frontage or more than one (1) principal entrance, one (1) additional freestanding or projecting sign per additional street frontage or principal entrance is permitted. ~~, if the director of neighborhood development services determines that such an arrangement is in keeping with the architectural character of the property.~~

(k) Notwithstanding any contrary provisions of this article, the restoration or reconstruction of an original sign associated with a protected property is permitted, if that establishment is still in operation at that location.

(2-19-08)

Sec. 34-1042. - West Main Street architectural design control district—Special regulations.

In addition to other applicable regulations set forth within this article, the following regulations shall apply to certain signs within the West Main Street Architectural Design Control district (see section 34-272), except as approved with an optional comprehensive sign plan:

(a)

One (1) projecting sign is permitted for each separate storefront fronting on a public right-of-way at ground level. One (1) additional projecting sign may be permitted for a doorway entrance that provides primary access to a business located on an upper floor or basement level.

(b)

No single sign face of any projecting sign shall have an area greater than ten (10) square feet.

(c)

Projecting signs shall have a projection of not more than thirty-six (36) inches beyond the facade of the building to which it is attached, except marquees, which shall be subject to regulations as provided in section 34-1038(c).

(d)

No internally lit signs, except internally lit channel letters, or neon signs shall be permitted.

(e) The character of all signs shall be harmonious to the character of the structure on which they are to be placed. Among other things, consideration shall be given to the location of signs on the structure in relation to the surrounding buildings; the use of compatible colors; the use of appropriate materials; the size and style of lettering and graphics; and the type of lighting;

~~(e)~~ (f)

Except in the case of new construction, all signs in this district shall be subject to administrative review by the director neighborhood development, with appeals to the

board of architectural review. The board of architectural review shall review all signs for new construction. ~~The director of neighborhood development services or board of architectural review may, as part of the appropriate review, **waive** the requirements herein if necessary to permit the restoration or reconstruction of an original sign associated with a protected property.~~

(g) Notwithstanding any contrary provisions of this article, the restoration or reconstruction of an original sign associated with a protected property is permitted, if that establishment is still in operation at that location.

(2-19-08)

Sec. 34-1043. - North Downtown, Wertland Street, Ridge Street, Oakhurst Circle, and Rugby Road architectural design control districts—Special regulations.

In addition to other applicable regulations set forth in this article, the following regulations shall apply to establishments located within the North Downtown, Wertland Street, Ridge Street, Oakhurst Circle, and Rugby Road architectural design control districts (reference section 34-272), except as approved with an optional comprehensive sign plan:

(a)

The total area of all signs permitted for any establishment shall not be greater than twelve (12) square feet.

(b)

No single wall sign shall have an area greater than six (6) square feet.

(c)

Freestanding signs other than pole signs shall not be permitted.

(d) The character of all signs shall be harmonious to the character of the structure on which they are to be placed. Among other things, consideration shall be given to the location of signs on the structure in relation to the surrounding buildings; the use of compatible colors; the use of appropriate materials; the size and style of lettering and graphics; the type of lighting; and whether an original sign associated with a protected property is being restored or reconstructed.

~~**(d)**~~ **(e)**

Except in the case of new construction, all signs in this district shall be subject to administrative review by the director of neighborhood development, with appeals to the board of architectural review. The board of architectural review shall review all signs for new construction. ~~The director of neighborhood development or board of architectural review may, as part of the appropriate review, **waive** the requirements herein if necessary to permit the restoration or reconstruction of an original sign associated with a protected property.~~

~~**(e)**~~ **(f)** Notwithstanding any contrary provisions of this article, ~~the director of neighborhood development services may approve~~ a sign may be attached to ~~the attachment or suspension of a sign from~~ an existing freestanding or projecting sign or, in the case of a building on a site with more than one (1) street frontage or more than one (1) principal entrance, one (1) additional freestanding or projecting sign per additional street frontage or principal entrance is

permitted. ~~, if the director of neighborhood development services determines that such an arrangement is in keeping with the architectural character of the property.~~

~~(f)~~ (g)

No internally lit signs or neon signs shall be permitted.

(h) Notwithstanding any contrary provisions of this article, the restoration or reconstruction of an original sign associated with a protected property is permitted, if that establishment is still in operation at that location.

(2-19-08)

Sec. 34-1045. - Optional comprehensive signage plan.

(a)

For a proposed development subject to site plan review, and for any development that is subject to architectural review under Article II, Divisions 2 ~~or~~ 3, or 5 of this chapter, the ~~reviewing official or public body may waive or~~ City Council may modify requirements of this division by approving a comprehensive signage plan for such development or project. ~~Where a particular development is subject to both site plan review and architectural review, the official or public body conducting the architectural review shall be the decision-maker upon a proposed comprehensive signage plan.~~

(b)

For the purposes of this section, the term "comprehensive signage plan" refers to a written plan detailing the type, quantity, size, shape, color, and location of all signs within the development that is the subject of the plan,-where the number, characteristics and/or locations of one (1) or more signs referenced within the plan do not comply with the requirements of this division.

(c)

~~The official or public body~~ City Council may approve a comprehensive signage plan, upon a determination that:

(1)

There is good cause for deviating from a strict application of the requirements of this division, and

(2)

The comprehensive signage plan, as proposed, will serve the public purposes and objectives set forth within section 34-1021 of this division at least as well, or better, than the signage that would otherwise be permitted for the subject development.

(d)

Applications for approval of a comprehensive signage plan shall be submitted in writing to the director of neighborhood development services, and shall be accompanied by the required application fee, as set forth within the most recent zoning fee schedule approved by city council.

(e)

Each application for approval of a comprehensive signage plan shall include the following information:

(1)

A written narrative description of the overall plan, including, without limitation: a tally of the total number of signs included within the coverage of the plan, and a summary of how the

applicant believes the comprehensive signage plan will serve the objectives set forth within section 34-1021

(2)

A color illustration or photograph of each sign included within the plan. For signs with multiple faces, an illustration or photograph shall be provided for each face. For monument and pole signs, an illustration or photograph of proposed landscaping shall be provided;

(3)

A written description of the type, size (dimensions), materials, and proposed location of each sign;

(4)

A map or other written identification and description of all existing signs on the property comprising the proposed development;

(5)

Color illustrations or photographs of signage existing on adjacent properties;

(6)

A written description (and illustration or photograph) of proposed lighting (for illuminated signs).

~~**(f)**~~

~~Appeals from decisions of a city official or public body reviewing a proposed comprehensive signage plan shall be taken in the same manner as provided within this chapter with respect to other decision(s) of that official or public body.~~

(2-19-08)

Telecommunications

Waiver provisions have been removed.

Sec. 34-1075. - Setback requirements.

(a)

All communications facilities shall comply with the minimum setback requirements of the zoning district in which they are located.

(b)

Support structures for freestanding communications facilities shall be located on a lot in such a manner that, in the event of collapse, the structure and supporting devices shall be contained within the confines of the property lines.

(c)

No portion of any freestanding communications facility shall project into a required setback more than the maximum projection permitted in the zoning districts in which the facility or antenna is located.

(d)

Where alternative tower, monopole tower, lattice tower or other self-supporting tower support structures are permitted, either by right or by special use permit:

(1)

The communications facility shall be set back from any existing residence, residentially-zoned property, public street or other public property, a distance of at least the height of the PWSF or communications facility, but in no event less than one hundred (100) feet.

~~(2)~~

~~The planning commission may waive or reduce setback requirements applicable to such support structures, if presented with engineering data that proves, to its satisfaction, that adjacent properties are reasonably protected from the potential impact of a support structure failure.~~

~~(e)~~

~~Upon receipt of evidence that the failure characteristics of a freestanding communications facility are such that the required setbacks would be insufficient to contain debris in the event of the failure of a facility or its support structure, the director of neighborhood development services or his designee shall have the authority to increase any required setback to a distance sufficient to contain debris in the event of a such failure.~~

(9-15-03(3))

Sec. 34-1077. - Screening and landscaping.

(a)

Landscaping shall be used to screen the view of freestanding communications facilities from adjacent public streets and public property, adjacent residentially-zoned property and adjacent residences. The minimum landscaping requirements shall be as follows:

(1)

For facilities one hundred fifty (150) feet in height or less, at least one (1) row of evergreen shrubs capable of forming a continuous hedge at least five (5) feet in height within two (2) years of planting shall be spaced not more than five (5) feet apart within ten (10) feet of the perimeter of the required setback area.

(2)

For towers more than one hundred fifty (150) feet in height, in addition to the requirements set forth in subsection (a)(1), above, at least one (1) row of deciduous trees, with a minimum caliper of two and one-half (2½) inches at the time of planting, and spaced not more than forty (40) feet apart, shall be provided within twenty (20) feet of the perimeter of the required setback area.

(3)

All security fencing shall be screened from view.

(b)

Landscaping materials shall consist of drought-resistant native species.

(c)

Landscaping materials shall be maintained by the owner and operator of the support structure for the life of the installation.

(d)

Existing vegetation on the site shall be preserved to the greatest practical extent. Existing vegetation, topography, walls and fences, etc., combined with shrubs or other features may be substituted for the required shrubs or trees, if the director of neighborhood development services or his designee finds that they achieve the same degree of screening as the required shrubs or trees.

~~(e)~~

~~In lieu of the landscaping requirements set forth within this section, an applicant may prepare a detailed plan and specifications for landscaping and screening, including plantings, fences, walls,~~

~~topography, etc., to screen support structures and accessory uses. The plan shall accomplish the same degree of screening achieved by the requirements of this section, but may deviate from the specific requirements set forth if, in the opinion of the director of neighborhood development services, or his designee, the public interest will be equally served by such plan. In certain locations where the visual impact of a proposed facility would be minimal (such as a property surrounded by undevelopable land, or a site located within a heavily developed area of the city) the specific landscaping requirements set forth within this section may be reduced or waived by the director of neighborhood development services or his designee.~~

(9-15-03(3))

Sec. 34-1078. - Lighting and security.

(a)

No communications facility shall be artificially lighted, except for:

(1)

Security and safety lighting of equipment buildings, if such lighting is appropriately down-shielded to keep light within the boundaries of the site.

(2)

Such lighting as may be required by the FAA, FCC or other applicable governmental authority, installed in such a manner as to minimize impacts on adjacent residences. Where the FAA or FCC requires lighting "dual lighting" (red at night/strobe during day) shall be utilized unless otherwise recommended by FAA or FCC guidelines.

(b)

Security fencing shall be required around the perimeter of support structures and any accessory utility structures associated with freestanding communications facilities, in accordance with the following minimum requirements:

(1)

Security fencing shall be maintained by the owner and operator(s) of the communications facility, for the life of the facility.

Security fencing shall be constructed of decay-resistant materials, and shall be not less than six (6) feet in height.

(2)

Security fencing shall be equipped with anti-climbing devices.

(3)

~~Security fencing requirements may be **waived** by the director of neighborhood development services or his designee, for alternative tower structures.~~

For alternative tower structures where the support structure is secured so that the public cannot access the antenna array, equipment shelter and other apparatus for a PWSF or other communications facility, security fencing shall not be required.

(9-15-03(3))

Critical Slopes

Waiver provisions outlined in 34-1120 (6) have been shifted to City Council with Planning Commission recommendation.

Section 34-1120

(a) . . .

(b) *Critical slopes.*

(1) *Purpose and intent.* The provisions of this subsection (hereinafter, "critical slopes provisions") are intended to protect topographical features that have a slope in excess of the grade established and other characteristics in the following ordinance for the following reasons and whose disturbance could cause one or more of the following negative impacts:

a. Erosion affecting the structural integrity of those features.
b. Stormwater and erosion-related impacts on adjacent properties.
c. Stormwater and erosion-related impacts to environmentally sensitive areas such as streams and wetlands.
d. Increased stormwater velocity due to loss of vegetation.
e. Decreased groundwater recharge due to changes in site hydrology.
f. Loss of natural or topographic features that contribute substantially to the natural beauty and visual quality of the community such as loss of tree canopy, forested areas and wildlife habitat.

These provisions are intended to direct building locations to terrain more suitable to development and to discourage development on critical slopes for the reasons listed above, and to supplement other regulations and policies regarding encroachment of development into stream buffers and floodplains and protection of public water supplies.

(2) *Definition of critical slope.* A critical slope is any slope whose grade is 25% or greater and:

a. A portion of the slope has a horizontal run of greater than 20 feet and its total area is 6,000 square feet or greater; and
b. A portion of the slope is within 200 feet of any waterway as identified on the most current City Topographical Maps maintained by the Department of Neighborhood Development Services."

Parcels containing critical slopes are shown on the map entitled “Properties Impacted by Critical Slopes” maintained by the Department of Neighborhood Development Services. These critical slopes provisions shall apply to all critical slopes as defined herein, notwithstanding any subdivision, lot line adjustment, or other action affecting parcel boundaries made subsequent to the date of enactment of this section.

(3) *Building site required.* Every newly created lot shall contain at least one (1) building site. For purposes of this section, the term building site refers to a contiguous area of land in slopes of less than twenty-five (25) percent, as determined by reference to the most current City Topographical Maps maintained by the Department of Neighborhood Development Services or a source determined by the city engineer to be of superior

accuracy, exclusive of such areas as may be located in the flood hazard overlay district or under water.

(4) *Building site area and dimensions.* Each building site in a residential development shall have adequate area for all dwelling unit(s) outside of all required yard areas for the applicable zoning district and all parking areas. Within all other developments subject to the requirement of a site plan, each building site shall have adequate area for all buildings and structures, parking and loading areas, storage yards and other improvements, and all earth disturbing activity related to the improvements.

(5) *Location of structures and improvements.* The following shall apply to the location of any building or structure for which a permit is required under the Uniform Statewide Building Code and to any improvement shown on a site plan pursuant to Article VII of this chapter:

a. No building, structure or improvement shall be located on any lot or parcel within any area other than a building site.

~~b.~~ No building, structure or improvement, nor any earth disturbing activity to establish such building, structure or improvement shall be located on a critical slope, except as permitted by a modification or waiver.

(6) *Modification or waiver.*

a. Any person who is the owner, owner's agent, or contract purchaser (with the owner's written consent) of property may request the ~~Planning Commission~~ City Council to modify or waive the requirements of these critical slopes provisions. Any such request shall be presented in writing and shall address how the proposed modification or waiver will satisfy the purpose and intent of these provisions.

b. All requests shall be reviewed by the Planning Commission. The Director of Neighborhood Development Services shall post notice of the date, time and place such request will be reviewed on the city website and cause written notice to be sent to the applicant or his agent; the owner, or agent for the owner, of each property located within five hundred (500) feet of the property subject to the waiver. Notice sent by first class mail to the last known address of such owner or agent as shown on the current real estate tax assessment books, postmarked not less than five (5) days before the meeting, shall be deemed adequate. A representative of the department of neighborhood development services shall make affidavit that such mailing has been made and file the affidavit with the papers related to the site plan application.

c. The Planning Commission shall make a recommendation to City Council. Thereafter, the City Council may grant a modification or waiver upon making a finding that:

(i) The public benefits of allowing disturbance of a critical slope outweigh the public benefits of the undisturbed slope (public benefits include, but are not limited to, stormwater and erosion control that maintains the stability of the property and/or the quality of adjacent or environmentally sensitive areas; groundwater recharge; reduced stormwater velocity; minimization of impervious surfaces; and stabilization of otherwise unstable slopes); or

(ii) Due to unusual size, topography, shape, location, other unusual physical conditions, or existing development of a property, one or more of these critical slopes provisions would effectively prohibit or unreasonably restrict the use, reuse or redevelopment of such property or would result in significant degradation of the site or adjacent properties.

No modification or waiver granted by the ~~Commission~~ City Council shall be detrimental to the public health, safety or welfare, detrimental to the orderly development of the area or adjacent properties, or contrary to sound engineering practices.

~~b.~~ d. In granting a modification or waiver, the ~~Commission~~ City Council may allow the disturbance of a portion of the slope, but may determine that there are some features or areas that cannot be disturbed. These include, but are not limited to:

(i) Large stands of trees;
(ii) Rock outcroppings;
(iii) Slopes greater than 60%.

The commission shall consider the potential negative impacts of the disturbance and regrading of critical slopes, and of resulting new slopes and/or retaining walls. The Commission may ~~impose~~ recommend conditions as it deems necessary to protect the public health, safety or welfare and to insure that development will be consistent with the purpose and intent of these critical slopes provisions. Conditions ~~applied by the Commission~~ shall clearly specify the negative impacts that they will mitigate. Conditions may include, but are not limited to:

(i) Compliance with the "Low Impact Development Standards" found in the City Standards and Design Manual.
(ii) A limitation on retaining wall height, length, or use;
(iii) Replacement of trees removed at up to three-to-one ratio;
(iv) Habitat redevelopment;
(v) An increase in storm water detention of up to 10% greater than that required by City Development Standards;
(vi) Detailed site engineering plans to achieve increased slope stability, ground water recharge, and/or decrease in stormwater surface flow velocity;
(vii) Limitation of the period of construction disturbance to a specific number

of consecutive days;

(viii) Requirement that reseeding occur in less days than otherwise required by City Code.

~~c.~~ e. In considering a requested modification or waiver the planning commission shall consider the recommendation of the director of neighborhood development services or their designee. The director, in formulating his recommendation, shall consult with the city engineer, the city's environmental manager, and other appropriate officials. The director shall provide the commission with an evaluation of the proposed modification or waiver that considers the potential for soil erosion, sedimentation and water pollution in accordance with current provisions of the Commonwealth of Virginia Erosion and Sediment Control Handbook and the Virginia State Water Control Board best management practices, and, where applicable, the provisions of Chapter 10 of the City Code. The director may also consider other negative impacts of disturbance as defined in these critical slope provisions.

~~d. A modification or waiver granted or denied by the commission in conjunction with an application for a special use permit shall be subject to review by the City Council. The denial of a modification or waiver, or the approval of a modification or waiver with conditions objectionable to the developer, considered in conjunction with an application for approval of a site plan or subdivision plat may be appealed as set forth within Article VII of this chapter or within Chapter 29 of the City Code, as may be applicable. All other decisions of the commission with respect to a requested modification or waiver may be appealed to the city council.~~

(7) *Exemptions.* A lot, structure or improvement may be exempt from the requirements of these critical slopes provisions, as follows:

a. Any structure which was lawfully in existence prior to the effective date of these critical slopes provisions, and which is nonconforming solely on the basis of the requirements of these provisions, may be expanded, enlarged, extended, modified and/or reconstructed as though such structure were a conforming structure. For the purposes of this section, the term "lawfully in existence" shall also apply to any structure for which a site plan was approved or a building permit was issued prior to the effective date of these provisions, provided such plan or permit has not expired.

b. Any lot or parcel of record which was lawfully a lot of record on the effective date of this chapter shall be exempt from the requirements of these critical slopes provisions for the establishment of the first single-family dwelling unit on such lot or parcel; however, subparagraph (5)(b) above, shall apply to such lot or parcel if it contains adequate land area in slopes of less than twenty-five (25) percent for the location of such structure.

c. Driveways, public utility lines and appurtenances, stormwater management facilities and any other public facilities necessary to allow the use of the parcel shall not be

required to be located within a building site and shall not be subject to the building site area and dimension requirements set forth above within these critical slopes provisions, provided that the applicant demonstrates that no reasonable alternative location or alignment exists. The city engineer shall require that protective and restorative measures be installed and maintained as deemed necessary to insure that the development will be consistent with the purpose and intent of these critical slopes provisions.

Sidewalks

Waiver provisions have been removed.

Sec. 34-1124. - Vacant lot construction—Required sidewalks, curbs and gutters.

(a)

The director of neighborhood development services shall, from time to time, promulgate criteria by which the utility and necessity (i.e., high-priority versus low-priority, taking into account public necessity versus cost to the property owner) of community sidewalks may be assessed ("sidewalk criteria"). A copy of these criteria shall be maintained within the department of neighborhood development services.

(b)

For the protection of pedestrians and to control drainage problems, sidewalks, curbs and gutters shall be required along all public rights-of-way when any building or structure is constructed upon a previously unimproved lot or parcel, or when any single-family dwelling is converted to a two-family dwelling. ~~The director of neighborhood development services or planning commission may waive this requirement for sidewalks deemed unnecessary, or of only low-priority, based on the sidewalk criteria established by the director pursuant to paragraph (a), above.~~

~~(1)~~

~~If the director of neighborhood development services denies a request for a waiver, the applicant may appeal that decision to the planning commission. Any person who has been denied a waiver by the planning commission may appeal to the city council within thirty (30) days of the date of denial. The decision of the city council shall be final.~~

~~(2)~~

~~If the director of neighborhood development services intends to grant an exemption to the requirements of this section, he shall first give written notice to the members of the planning commission who have expressed in writing a desire to be so notified, at least seven (7) days prior to granting the proposed exemption. The chair or any two (2) members of the commission may then direct that the application for the exemption be heard and decided by the planning commission.~~

(c)

Sidewalks, curbs and gutters required by this section shall be constructed in accordance with the standards set forth within the city's subdivision ordinance.

(9-15-03(3))

PRESENT: All the Justices

KENT SINCLAIR

v. Record No. 101831

NEW CINGULAR WIRELESS PCS, LLC, ET AL.

OPINION BY
JUSTICE WILLIAM C. MIMS
January 13, 2012

FROM THE CIRCUIT COURT OF ALBEMARLE COUNTY
H. Thomas Padrick, Jr., Judge Designate

In this appeal, we consider whether an Albemarle County zoning ordinance governing construction on slopes within the county conflicts with statutory law or exceeds the powers delegated to the county by the General Assembly, in violation of the Dillon Rule.

I. BACKGROUND AND MATERIAL PROCEEDINGS BELOW

Kent Sinclair and Joan C. Elledge own adjacent residential parcels in Albemarle County. New Cingular Wireless PCS, LLC ("New Cingular") contracted with Elledge to install a 103-foot cellular transmission tower on her parcel. The steep topography of the parcel brings it within the scope of Albemarle County Code § 18-4.2 ("the Ordinance"), which restricts construction on land with slopes of 25 percent or more ("a Critical Slope").

Under Albemarle County Code § 18-4.2.5(a) ("the Waiver Provision"), the planning commission is authorized to grant a waiver from the restrictions otherwise imposed by the Ordinance after making certain findings or imposing conditions it deems necessary to protect the public health, safety, or welfare and to

ensure compliance with the intent and purpose of the Ordinance.[1] An appeal from the decision of the planning commission lies to the board of supervisors only if the waiver is granted subject to conditions objectionable to the applicant or is denied. Albemarle County Code § 18-4.2.5(a)(5). The Ordinance makes no provision for appeals by third parties, such as owners of adjoining parcels who believe themselves to be aggrieved by a decision of the planning commission to grant a waiver.

Elledge and New Cingular filed an application for a waiver as provided by the Waiver Provision. Sinclair opposed the application throughout the administrative staff review process and two public hearings. Nevertheless, the planning commission approved the application in February 2010.

Sinclair then filed a complaint in the circuit court seeking a declaratory judgment that (1) the Waiver Provision is invalid because it conflicts with the statutory scheme governing planning and zoning set forth in Title 15.2 of the Code of Virginia and (2) the county exceeded the power delegated to it by the General Assembly in violation of the Dillon Rule because its procedure for

[1] The Albemarle County Code § 18-4.2.5 also provides for an "administrative waiver" when the Critical Slope triggering application of the Ordinance was created during development of the property in accordance with a site plan approved by the county or to replace an existing structure located on a Critical Slope when the footprint of the new structure does not exceed the footprint of the structure it replaces. Albemarle County Code § 18-4.2.5(b). The "administrative waiver" provision is not relevant in this case and is not before us in this appeal.

considering waiver applications is not authorized by state law.[2] In particular, he asserted that the only departures from a zoning ordinance permitted by state law are variances, defined by Code § 15.2-2201, and zoning modifications, provided for in Code § 15.2-2286(A)(4). Under Code § 15.2-2312, a variance may only be approved by the board of zoning appeals and only upon a finding that criteria set forth in Code § 15.2-2309(2) have been met.[3] Under Code § 15.2-2286(A)(4), zoning modifications may only be granted by the zoning administrator and only upon a finding that identical criteria have been met. Thus, whether the waiver is a variance or a zoning modification, the Waiver Provision irreconcilably conflicts with state law because it permits waivers to be granted by the planning commission, rather than the board of zoning appeals or zoning administrator, and without a finding that the criteria in Code § 15.2-2309(2) have been met.

Sinclair also asserted that the Waiver Provision unlawfully circumvented his right to judicial review. Under Code § 15.2-

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[2] The Complaint named as defendants Elledge and New Cingular, Albemarle County and its board of supervisors and planning commission, and the director of the Albemarle County Department of Community Development in his official capacity. We refer to these parties collectively as "the Defendants."

[3] Code § 15.2-2309(2) permits a board of zoning appeals to grant a variance only if it finds that "the strict application of the ordinance would produce undue hardship relating to the property," "the hardship is not shared generally by other properties in the same zoning district and the same vicinity," and "the authorization of the variance will not be of substantial detriment to adjacent property and that the character of the district will not be changed by the granting of the variance."

2311(A), any person aggrieved by an adverse decision of the zoning administrator concerning the grant or denial of a zoning modification may appeal to the board of zoning appeals. Under Code § 15.2-2314, any person aggrieved by the decision of the board of zoning appeals, whether on an appeal from a decision of the zoning administrator concerning a zoning modification or from the board's grant or denial of a variance, may petition the circuit court for a writ of certiorari to review the board's decision. Because the Waiver Provision provided no right of appeal to aggrieved parties and particularly no judicial review in the circuit court, it again conflicted with state law.[4]

Sinclair and the Defendants filed competing motions for summary judgment. After a hearing, the circuit court determined that the waivers allowed by the Waiver Provision are not variances within the meaning of Code § 15.2-2201. Therefore, Code § 15.2-2312 did not reserve consideration of waiver applications to the board of zoning appeals and the criteria to be considered in granting or denying variances imposed by Code § 15.2-2309(2) did not apply. The court also ruled that the Ordinance's delegation to the planning commission of the decision to grant or deny waiver

[4] Sinclair also claimed that the planning commission erred in applying the Waiver Provision to Elledge and New Cingular's application because it provides for waivers only upon application by a "subdivider" or "developer," and neither Elledge nor New Cingular fell within the Ordinance's definition of either term. This claim was nonsuited and is not before us on appeal.

applications was within the broad grant of powers delegated to the county under Code §§ 15.2-2280 and 15.2-2286. Accordingly, it held the Waiver Provision did not conflict with state law and the county acted pursuant to power delegated to it by the General Assembly. The court therefore granted the Defendants' motion for summary judgment. We awarded Sinclair this appeal.

II. ANALYSIS

The circuit court's interpretation of the Ordinance and state law presents a legal question, which we review de novo. Jones v. Williams, 280 Va. 635, 638, 701 S.E.2d 405, 406 (2010). Localities have "no element of sovereignty" and are agencies created by the Commonwealth. Marble Techs., Inc. v. City of Hampton, 279 Va. 409, 417, 690 S.E.2d 84, 88 (2010) (quoting Whiting v. Town of West Point, 88 Va. 905, 906, 14 S.E. 698, 699 (1892)) (internal quotation marks omitted). Accordingly, when a statute enacted by the General Assembly conflicts with an ordinance enacted by a local governing body, the statute must prevail. Covel v. Town of Vienna, 280 Va. 151, 162, 694 S.E.2d 609, 616 (2010).

Moreover, local governing bodies "have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable." Marble Techs., Inc., 279 Va. at 417, 690 S.E.2d at 88 (quoting Board of Zoning Appeals v. Board of Supervisors, 276 Va. 550, 553-54, 666 S.E.2d 315, 317 (2008) (internal quotation

marks omitted)). This principle, known as the Dillon Rule, is a rule of strict construction: "[i]f there is a reasonable doubt whether legislative power exists, the doubt must be resolved against the local governing body." Board of Supervisors v. Reed's Landing Corp., 250 Va. 397, 400, 463 S.E.2d 668, 670 (1995). There is no presumption that an ordinance is valid; if no delegation from the legislature can be found to authorize the enactment of an ordinance, it is void. Marble Techs., Inc., 279 Va. at 416-17, 690 S.E.2d at 88. Only where a delegation is found and "the question is whether [the delegated power] has been exercised properly, [may] the 'reasonable selection of method' rule . . . be applicable, [whereupon] the inquiry is directed to whether there may be implied the authority to execute the power in the particular manner chosen." Id. at 417 n.10, 690 S.E.2d at 88 n.10 (internal alterations omitted).

Sinclair first asserts that the Waiver Provision is void because the Ordinance prohibits construction on Critical Slopes. Because a landowner may not lawfully erect a structure on a parcel with a Critical Slope without obtaining a waiver, he argues, a waiver is in reality a variance or zoning modification and the criteria set forth in Code §§ 15.2-2309(2) and 15.2-2286(A)(4) must be met. We disagree.

A variance "allows a property owner to do what is otherwise not allowed under the ordinance." Bell v. City Council, 224 Va.

490, 496, 297 S.E.2d 810, 813-14 (1982). But where "the property may be developed in a way consistent with the ordinance, but only with approval of the [locality] after specified conditions are met," a variance is not necessary. Id. at 496, 297 S.E.2d at 814. Here, the Ordinance allows construction, provided that the landowner applies for the county's prior approval. The application process allows the county to review the proposed construction to ensure it will not precipitate the adverse effects it enacted the Ordinance to avoid, or to impose any conditions it determines to be necessary to ameliorate such adverse effects.[5] If the proposed construction does not precipitate such effects or if conditions may be imposed to ameliorate them, the construction will be allowed.

In Bell, we determined that when proposed construction is permitted by ordinance, subject to prior application to and approval by the local government, the approval was not a variance but a special exception. 224 Va. at 496, 297 S.E.2d at 814. The General Assembly has delegated to localities the authority to provide for "the granting of special exceptions under suitable regulations and safeguards" in a zoning ordinance. Code § 15.2-

[5] The Ordinance identifies such adverse effects to include "rapid and/or large-scale movement of soil and rock; excessive stormwater run-off; siltation of natural and man-made bodies of water; loss of aesthetic resource; and . . . greater travel distance of septic effluent, all of which constitute potential dangers to the public health, safety and/or welfare." Albemarle County Code § 18-4.2.

2286(A)(3). Moreover, Code § 15.2-2288.1 expressly permits the use of the special exception procedure for steep slope development.

Unlike variances, special exceptions are not required to be reviewed for compliance with the criteria set forth in Code §§ 15.2-2309(2) and 15.2-2286(A)(4). Accordingly, we reject Sinclair's argument that the Waiver Provision conflicts with state law because it does not require consideration of those criteria before a waiver application is approved.[6]

Sinclair next asserts that the procedure for reviewing waiver applications created by the Waiver Provision is not authorized by state law and therefore conflicts with the Dillon Rule. We agree.

As previously noted, the Waiver Provision purports to confer upon the planning commission the authority to grant or deny a waiver application. Albemarle County Code § 18-4.2.5(a). However, delegation of such authority to the planning commission is

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[6] Our holding on this issue is limited to addressing Sinclair's argument that a waiver granted under the Waiver Provision may only be either a variance or a zoning modification and that the mandatory criteria set forth by the General Assembly in Code §§ 15.2-2309(2) and 15.2-2286(A)(4) therefore must be considered before such a waiver is granted. We hold today that such a waiver need not be either a variance or a zoning modification and that the Code §§ 15.2-2309(2) and 15.2-2286(A)(4) criteria therefore need not be included in the consideration of such a waiver. We do not decide today that such a waiver is not a departure from the zoning ordinance because variances and zoning modifications are not the only form of departures. See, e.g., Code § 15.2-2201 (providing for special exceptions). However, that does not end our inquiry because Sinclair further argues that the planning commission lacks the authority to grant such a waiver. It is to that question that we now turn.

inconsistent with the general role of planning commissions, as reflected by their enabling statutes. Also, the General Assembly has specifically empowered only zoning administrators and boards of zoning appeals to authorize departures from zoning ordinances. The General Assembly was fully capable of empowering planning commissions in this regard and elected not to do so.

The General Assembly requires every locality to "create a local planning commission in order to promote the orderly development of the locality and its environs." Code § 15.2-2210. While the General Assembly describes planning commissions as "primarily" advisory bodies, id., it has declined to grant them executive, legislative, or judicial powers.[7]

For example, planning commissions are charged with preparing comprehensive plans to recommend to the local governing body. Code § 15.2-2223. To accomplish this task, they are authorized to survey and study development and growth trends, id.; to request reasonable information from any state entity responsible for any public facility within the locality, Code § 15.2-2202(B); to request reasonable information from any electrical utility

[7] Even their necessary incidental powers are specifically set forth in statute. See, e.g., Code § 15.2-2214 (power to fix the time for regular meetings); Code § 15.2-2214 (power to call special meetings); Code § 15.2-2217 (power to elect a chairman and vice-chairman, and appoint any other officers, employees, or staff authorized by the local governing body); Code § 15.2-2222 (power to spend funds allocated by the local governing body); Code § 15.2-2211 (power to adopt rules and appoint committees).

responsible for transmission lines of 150 kilovolts or more, Code § 15.2-2202(E); to meet with the Department of Transportation about any state highway affected by the plan, Code § 15.2-2222.1; to study public facilities necessary to implement the plan, and any associated costs or revenues, Code § 15.2-2230.1; to post the proposed plan on a website and hold public hearings, Code § 15.2-2225; and to review the plan every five years to determine whether it should be amended by the local governing body, Code § 15.2-2230.

Similarly, planning commissions may also prepare an official map and make any surveys necessary for such purpose, Code § 15.2-2233, and recommend the ensuing map for approval by the local governing body, Code § 15.2-2234.

Planning commissions may consult with the local governing body about the creation of an agricultural and forestal district, Code § 15.2-4305; recommend termination, modification, or continuation of an existing district, Code § 15.2-4311; make recommendations about proposals to build on or acquire land within a district, Code § 15.2-4313, or to withdraw land from an agricultural and forestal district, Code § 15.2-4314.

Planning commissions may prepare and recommend a subdivision ordinance for approval by the local governing body, Code § 15.2-2251, and recommend amendments to the subdivision ordinance, Code § 15.2-2253. They also may prepare and recommend a zoning ordinance for adoption by the local governing body, Code § 15.2-

2285, or recommend that the local governing body amend the zoning ordinance, Code § 15.2-2286(7).

But after reviewing the seventy sections in which the term "planning commission" appears in Title 15.2 of the Code, we have not identified a single provision of state law authorizing planning commissions to consider and rule upon departures from a zoning ordinance. The Defendants nevertheless argue that Code §§ 15.2-2280 and 15.2-2286 provide broad authority to localities for the administration and enforcement of zoning ordinances. The county's delegation to the planning commission is consistent with this broad authority, the Defendants continue, particularly when the power delegated is not legislative but ministerial or administrative in nature, as is the power to grant waiver applications. We disagree.

When the General Assembly has allowed local governing bodies to delegate additional powers to planning commissions, it has done so in express terms. For example, it has permitted local governing bodies to authorize them to receive funds or approve bonds or letters of credit relative to the dedication of public rights of way, Code § 15.2-2241(A); to assess whether a transfer of development rights complies with the locality's transfer of development rights ordinance, Code §15.2-2316.2; and to serve as a road impact fee advisory committee, Code § 15.2-2319. Likewise, it has permitted local governing bodies to delegate to planning commissions the enforcement and administration of subdivision

regulations, Code § 15.2-2255, and to consider subdivision plats and preliminary subdivision plats submitted for approval, Code §§ 15.2-2259 and 15.2-2260. It has not, however, authorized local governing bodies to delegate to planning commissions approval of departures from zoning ordinances or any other powers to administer or enforce an existing zoning ordinance.[8] Compare Code § 15.2-2255 (empowering local governing bodies to administer and enforce subdivision ordinances and expressly including planning commissions) with Code § 15.2-2286(A)(4) (empowering local governing bodies to administer and enforce zoning ordinances with no mention of planning commissions at all).

To the contrary, those to whom local governing bodies are authorized to delegate approval of departures from zoning ordinances are clearly set out in state law. Local governing bodies are expressly authorized to delegate approval of zoning modifications to a zoning administrator. Code § 15.2-2286(A)(4) ("Where provided by ordinance, the zoning administrator may be authorized to grant a modification from any provision contained in the zoning ordinance . . . ."). Likewise, they are expressly authorized to delegate approval of special exceptions to the board

[8] "The public policy of the Commonwealth is determined by the General Assembly." Uniwest Constr., Inc. v. Amtech Elevator Servs., 280 Va. 428, 440, 699 S.E.2d 223, 229 (2010). In Virginia, the General Assembly has decided that unless it provides otherwise by statute, planning commissions are advisory, not decision-making, bodies.

of zoning appeals. Compare Code § 15.2-2310 (applications for special exceptions "shall be transmitted promptly to the secretary of the board who shall place the matter on the docket to be acted upon by the board") with Code § 15.2-2286(A)(3) ("the governing body of any locality may reserve unto itself the right to issue such special exceptions"). Variances are to be considered by the board of zoning appeals. Code §§ 15.2-2309(2) and 15.2-2310.

While we have held that local governing bodies may delegate administrative or ministerial acts without statutory authorization, see Ours Props., Inc. v. Ley, 198 Va. 848, 850-52, 96 S.E.2d 754, 756-58 (1957), the power the planning commission purports to exercise in granting a waiver application is not administrative or ministerial in nature. Zoning is a legislative power, Andrews v. Board of Supervisors, 200 Va. 637, 639, 107 S.E.2d 445, 447 (1959), and approval of departures from zoning ordinances is a legislative act. Cochran v. Fairfax County Board of Zoning Appeals, 267 Va. 756, 765, 594 S.E.2d 571, 576 (2004); National Mem. Park, Inc. v. Board of Zoning Appeals, 232 Va. 89, 92, 348 S.E.2d 248, 249 (1986); Board of Supervisors v. Southland Corp., 224 Va. 514, 522, 297 S.E.2d 718, 721 (1982); see also Helmick v. Town of Warrenton, 254 Va. 225, 229, 492 S.E.2d 113, 114 (1997) (A decision "that regulates or restricts conduct with respect to property is purely legislative." (internal quotation marks and alterations omitted)). "If allowed by statute, local governing bodies may delegate the

exercise of these legislative functions to subordinate bodies, officers, or employees . . . ." Helmick, 254 Va. at 229, 492 S.E.2d at 115 (emphasis added). Here, as discussed above, the delegation authorized by statute is limited to the zoning administrator (for zoning modifications) or the board of zoning appeals (for variances and special exceptions).[9]

We therefore hold that the Waiver Provision's delegation of power to grant waiver applications to the planning commission is legislative in nature and is not authorized by state law. Accordingly, in enacting the Waiver Provision, the county exceeded its authority from the General Assembly in violation of the Dillon Rule and the Waiver Provision is void.

III. CONCLUSION

For the foregoing reasons, we will affirm the circuit court's judgment that waivers are not variances within the meaning of Code § 15.2-2201, reverse its judgment that the decision to grant or

[9] Decisions to grant or deny a departure from a zoning ordinance necessarily implicate important property rights, not solely for the landowner applying for such a departure but also for other parties who may be adversely affected by a ruling. Accordingly, the decision of the zoning administrator to grant or deny a zoning modification may be appealed to the board of zoning appeals by any aggrieved party. Code § 15.2-2311(A). Similarly, the decision of the board of zoning appeals – whether a decision to grant or deny a variance or special exception or an appeal from a zoning administrator's decision to grant or deny a zoning modification – may be appealed to the circuit court by any aggrieved party. Code § 15.2-2314. The Waiver Provision affords no right of appeal to an aggrieved party, other than a landowner whose application is approved with objectionable conditions or denied outright.

deny waiver applications may be delegated to the planning commission, and remand for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

JUSTICE McCLANAHAN, with whom JUSTICE POWELL joins, concurring in part and dissenting in part.

I would affirm the circuit court's judgment in its entirety.

In count I of his complaint, Sinclair asserted the Waiver Provision was void because it is in direct conflict with the Code provisions governing zoning variances and modifications. As the majority concludes, however, the Waiver Provision is not a mechanism for a zoning variance as defined by Code § 15.2-2201[1] nor a zoning modification as provided for in Code § 15.2-2286(A)(4)[2] since the

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[1] Variance "in the application of a zoning ordinance" is defined as

> a reasonable deviation from those provisions regulating the size or area of a lot or parcel of land, or the size, area, bulk or location of a building or structure when the strict application of the ordinance would result in unnecessary or unreasonable hardship to the property owner, and such need for a variance would not be shared generally by other properties, and provided such variance is not contrary to the intended spirit and purpose of the ordinance, and would result in substantial justice being done.

Code § 15.2-2201.

[2] Like a variance, a modification may be granted by zoning administrators upon satisfaction of certain criteria when "strict

Albemarle County Code zoning ordinance expressly allows disturbance of critical slopes upon compliance with the conditions promulgated by the board of supervisors. Therefore, I agree the circuit court did not err in granting the defendants' motions for summary judgment as to count I of Sinclair's complaint.

In count II of his complaint, Sinclair asserted that under Virginia law only a board of zoning appeals and a zoning administrator are given the power to authorize a "deviation" from a zoning ordinance, whether denominated as a zoning "variance" or "modification." Therefore, according to Sinclair, since the Waiver Provision grants to the planning commission the power to approve a zoning variance or modification, the Waiver Provision is void as being in violation of the Dillon Rule. As the majority concludes, though, the Waiver Provision is not a mechanism for a zoning variance or modification. Therefore, count II, being premised on Sinclair's assertion that the Waiver Provision is a zoning variance or modification, must necessarily fail.[3] My analysis would thus end here.

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application of the ordinance would produce undue hardship." Code § 15.2-2286(A)(4).

[3] I find it difficult to reconcile the majority's holding as to count II with its holding as to count I. Although the majority concludes the Waiver Provision is not a zoning variance mechanism since it does not allow a "deviation" from the zoning ordinance, it nevertheless concludes the Waiver Provision is void because it grants to the planning commission the power to allow a "departure" from the zoning ordinance. I see no meaningful distinction between the term "deviation," which is used by Sinclair, and the term

However, notwithstanding its conclusion that the Waiver Provision is not a mechanism for deviating from the zoning ordinance, the majority nevertheless holds the Waiver Provision is not authorized by state law because it grants legislative power to the planning commission.[4] I disagree.

In considering challenges to zoning ordinances, we have "repeatedly" held that "an administrative officer or bureau may be invested with the power to ascertain and determine whether the qualifications, facts or conditions comprehended in and required by the general terms of a law, exist in the performance of their

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"departure," which is used by the majority. Webster's Dictionary denotes no distinction either. It defines "departure" as "a deviation or divergence esp. from a rule, course of action, plan, or purpose." Webster's Third New International Dictionary 604 (3d ed. 1993).

Counts I and II of Sinclair's complaint are both premised on his position that the Waiver Provision is void because it is a mechanism allowing the County to avoid the application of the Code provisions governing zoning variances and modifications, which involve the power to permit a landowner to do something that is prohibited under legislatively enacted zoning provisions. As the majority concludes, the Waiver Provision does not grant power to the planning commission to permit a landowner to do what is not allowed under legislatively enacted zoning ordinance. Instead, the Waiver Provision is an integrated part of the legislatively enacted zoning ordinance and expressly allows the disturbance of critical slopes upon compliance with conditions set forth therein. As such, it does not grant the planning commission the power to "deviate" or "depart" from the zoning ordinance.

[4] It cannot be disputed that the board of supervisors had the authority to enact a zoning ordinance. Ours Props., Inc. v. Ley, 198 Va. 848, 850, 96 S.E.2d 754, 756 (1957). Thus, the issue raised by the majority's analysis and holding becomes whether the board of supervisors unlawfully delegated legislative authority to the planning commission. See Logan v. City Council of the City of Roanoke, 275 Va. 483, 659 S.E.2d 296 (2008); County of Fairfax v. Southern Iron Works, Inc., 242 Va. 435, 410 S.E.2d 674 (1991).

duties, and especially when the performance of their duties is necessary for the safety and welfare of the public." Ours Props., Inc., 198 Va. at 851, 96 S.E.2d at 757 (citations omitted) (zoning ordinance not an unlawful delegation of legislative power to building inspector given discretion to grant or deny permits).

> A legislative body, such as a city council, must work through some instrumentality or agency to perform its duties, since it does not sit continuously. Under the changing circumstances and conditions of life, it is frequently necessary that power be delegated to an agent to determine some fact or state of things upon which the legislative body may make laws operative. Otherwise, the wheels of government would cease to operate. Of course, the discretion and standards prescribed for guidance must be as reasonably precise as the subject matter requires or permits.

Id. Thus, "[c]onsiderable freedom to exercise discretion and judgment must, of necessity, be accorded to officials in charge of administering such ordinances." Id. at 851, 96 S.E.2d at 756-57.

The Albemarle County Code directs the planning commission to "[a]dminister the . . . zoning ordinance as set forth in such." Albemarle County Code § 2-406(G). This role is certainly consistent with the duty of planning commissions in Virginia to prepare the zoning ordinances for their respective localities. See Code § 15.2-2285(A). In fact, we have stated that "[t]he role of a planning commission is critical in the zoning process." City Council of the City of Alexandria v. Potomac Greens Assocs. P'ship, 245 Va. 371, 376, 429 S.E.2d 225, 227 (1993).

The Waiver Provision allows the disturbance of critical slopes upon a finding by the commission, in consultation with the county engineer, that the conditions promulgated by the board of supervisors and set forth in the provision have been satisfied.[5] Thus, in the scope of its duty to "administer" the zoning ordinance, the commission is given the power to determine the facts and whether those facts comply with the law and policy set forth by the board of supervisors. It is not, however, given the power to deviate or depart from the conditions set forth therein. Nor is it given the power to change the law or policy as set forth in the zoning ordinance.

> In the instant case, the ordinance merely conferred administrative functions upon the [commission] charged with the duty of carrying out the will and direction of the [board of supervisors]; the legislative purpose was disclosed by the enactment of the ordinance; and, as far as was reasonably

[5] In particular, "the commission shall consider the determination by the county engineer" as to whether the developer will address "the rapid and/or large-scale movement of soil and rock, excessive stormwater run-off, siltation of natural and man-made bodies of water, loss of aesthetic resources, and, in the event of septic system failure, a greater travel distance of septic effluent that might otherwise result from the disturbance of critical slopes" to ensure that the disturbance "will not pose a threat to the public drinking water supplies and flood plain areas, and that soil erosion, sedimentation, water pollution and septic disposal issues will be mitigated to the satisfaction of the county engineer." Albemarle County Code § 18-4.2.5(a)(1)-(2)(emphasis added). Based on the determination of the county engineer, the commission must find, among other things, that the disturbance "would not be detrimental to the public health, safety or welfare, to the orderly development of the area, or to adjacent properties; [and] would not be contrary to sound engineering practices." Albemarle County Code § 18-4.2.5(a)(2)-(3).

> practical, the ordinance left to the [commission] charged to act under it merely the discretion of determining whether a given status came within the provisions thereof.

Ours Props., Inc., 198 Va. at 853, 96 S.E.2d at 758. Cf. Laird v. City of Danville, 225 Va. 256, 262, 302 S.E.2d 21, 25 (1983) (authorizing planning commission to rezone property is unlawful delegation of legislative power).[6]

For these reasons, I would hold the circuit court also did not err in granting defendants' motions for summary judgment as to count II of Sinclair's complaint.

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[6] Delegation to planning commissions of the duty to administer zoning ordinances has been upheld by other states as well. See e.g., Wesley Inv. Co. v. County of Alameda, 151 Cal. App.3d 672, 679 (Cal. Ct. App. 1st Dist. 1984) (rejecting claim that county improperly delegated legislative power to planning commission and holding commission could properly administer existing policy set forth in zoning ordinance in denying site review applications); Bellemeade Co. v. Priddle, 503 S.W.2d 734, 739-40 (Ky. Ct. App. 1973) (city may delegate to planning commission authority to locate a "floating zone" since it is not a prohibited use nor is it authorizing the granting of a variance and ordinance contains standards for administration); Southland Corp. 7-Eleven Stores v. Mayor & City Council of Laurel, 541 A.2d 653, 656 (Md. Ct. App. 1988) (city may delegate to planning commission authority to determine under zoning ordinance when a proposed building would create a public hazard and reject site plan); Florka v. City of Detroit, 120 N.W.2d 797, 803 (Mich. 1963) (zoning ordinance lawfully conferred power upon planning commission to act on applications for business permits and, in doing so, determine whether business injurious to surrounding neighborhood and not contrary to spirit and purpose of ordinance).