

TJS

FROM	NAME & TITLE	THOMAS J. STOSUR, DIRECTOR	CITY of BALTIMORE MEMO	
	AGENCY NAME & ADDRESS	DEPARTMENT OF PLANNING 417 E. FAYETTE STREET, 8 th FLOOR		
	SUBJECT	CITY COUNCIL BILL #09-0387/ZONING-CONDITIONAL USES-SUSPENSION, REVOCATION, ETC.		

TO

DATE:

September 25, 2009

The Honorable President and
Members of the City Council
City Hall, Room 400
100 N. Holliday Street

At its regular meeting of September 24, 2009 the Planning Commission considered City Council Bill #09-0387, for the purpose of authorizing the non-renewal, modification, suspension, or revocation of a conditional use for failure to comply with a condition, restriction, or limitation imposed on that use; providing for the automatic lapse of a conditional use that has been discontinued for a certain continuous period; authorizing the grant of a conditional use subject to a time limit and periodic renewal; and generally relating to the imposition and enforcement of conditions, restrictions, and limitations on conditional uses.

In its consideration of this Bill, the Planning Commission reviewed the attached staff report which recommended amendments to and approval of City Council Bill #09-0387. Also, the Commission recommended an additional amendment that adds #3 to Section 14-503 (B). The wording should read as follows: “(3) A copy of notice to be provided to the Planning Department.” Thus, the Commission adopted the following resolution, seven members being present (seven in favor).

RESOLVED, That the Planning Commission concurs with the recommendation of its departmental staff, added an amendment, and recommends that City Council Bill #09-0387 be amended and passed by the City Council.

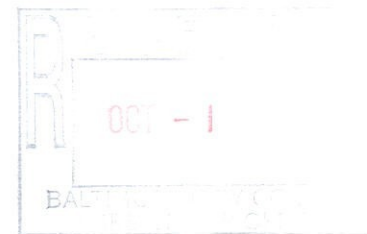
If you have questions, please contact Mr. Wolde Ararsa, Chief of Land Use and Urban Design Division, at 410-396-4488.

TJS//WA/ttl

Attachments

cc:

- Mr. Andrew Frank, Deputy Mayor
- Mr. Demuane Milliard, Chief of Staff
- Ms. Angela Gibson, Mayor’s Office
- The Honorable Rochelle “Rikki” Spector, Council Rep. for Planning Commission
- Mr. David Tanner, BMZA
- Mr. Geoffrey Veal, Zoning Administration
- Ms. Nikol Nabors-Jackson, DHCD
- Mr. Larry Greene, Council Services



T/A



Sheila Dixon
Mayor

PLANNING COMMISSION

Wilbur E. "Bill" Cunningham, Chairman

STAFF REPORT



Thomas J. Stosur
Director

September 24, 2009

REQUEST: City Council Bill #09-0387 / Zoning – Conditional Uses – Suspension, Revocation, Etc.:

For the purpose of authorizing the nonrenewal, modification, suspension, or revocation of a conditional use for failure to comply with a condition, restriction, or limitation imposed on that use; providing for the automatic lapse of a conditional use that has been discontinued for a certain continuous period; authorizing the grant of a conditional use subject to a time limit and periodic renewal; and generally relating to the imposition and enforcement of conditions, restrictions, and limitations on conditional uses.

RECOMMENDATION: Amendment and Approval, the amendments are as follows:

- That the proposed §14-103(c), and any related text for periodic reviews is deleted in its entirety;
- That line 22 and 23 on page 2, concerning the proposed §14-103 new (b) *Guarantees – GENERAL* is amended to read: "assure that the conditions, restrictions, and limitations imposed BY THE BOARD OR CITY COUNCIL will be met and complied with."
- That lines 7 and 8 on page 3, concerning the proposed §14-103(e), is amended to read: "Failure to comply with any condition, restriction, or limitation imposed BY THE BOARD OR CITY COUNCIL under this [section] TITLE:";
- That line 14 on page 3 of the bill concerning the proposed §14-104 is amended to read as follows: "§14-104. LAPSE ON FAILURE TO EXERCISE[; ABANDONMENT]." and that lines 15 and lines 20-24 on page 3 are deleted;
- That §2-105(b) of the Zoning Code is amended to add this review and enforcement of conditional uses to the specific duties of the Zoning Administrator;
- That the proposed §14-502 is amended to read as follows: "WHENEVER THE ZONING ADMINISTRATOR MAKES A DETERMINATION THAT A VIOLATION OF A CONDITION, RESTRICTION, OR LIMITATION IMPOSED BY THE BOARD OR CITY COUNCIL UNDER THIS TITLE HAS OCCURRED, THE ADMINISTRATOR MUST ATTEMPT TO RESOLVE IT INFORMALLY AND PROMPTLY.";
- That line 13 on page 4 concerning the proposed §14-503(b)(2) is amended to clarify that unless the violation is corrected, the matter will be "...REFERRED TO THE BOARD FOR POTENTIAL SUSPENSION OR REVOCATION OF THE CONDITIONAL USE.";

- That the proposed §14-503(c) is amended to read as follows:
“(C) *HOW SERVED*.
ALL NOTICES MUST BE SERVED BY ONE OF THE FOLLOWING METHODS:
(1) FIRST CLASS MAIL;
(2) POSTING OF THE PROPERTY; OR
(3) PERSONAL SERVICE BY AN AUTHORIZED REPRESENTATIVE OF THE CITY, WHICH SERVICE MUST BE CERTIFIED ON THE RECORDS OF THE ZONING ADMINISTRATOR.”;
- That lines 28 and 29 on page 4, concerning the proposed §14-505 is amended to read: “IF, AFTER NOTICE TO THE PARTIES AND AN OPPORTUNITY TO BE HEARD, THE BOARD FINDS, WITH SUCH FINDINGS SPECIFICALLY ENUMERATED IN THE RECORD, THAT A CONDITION, RESTRICTION, OR LIMITATION IMPOSED BY THE BOARD OR CITY COUNCIL UNDER THIS TITLE”; and
- That the proposed §14-505 is further amended to delete lines 5 through 8 on page 5 of the bill, and that references to modification be removed from the proposed §14-103(e).

STAFF: Eric Tiso

INTRODUCED BY: Councilmember Spector, President Rawlings Blake, Councilmembers Holton, Henry, Curran, Middleton, Kraft, Conaway, Welch, Clarke, Reisinger, Cole, Young

CONFORMITY TO PLANS

This project is consistent with the Comprehensive Master Plan’s LIVE section, Goal Two: Elevate the Design and Quality of the City’s Built Environment, Objective 2: Streamline and Strengthen the Development Process, by modernizing the zoning code to meet current needs.

ANALYSIS

Background:

In each of the various Zoning Districts, there are three general types of uses of land. Permitted uses are those that are allowed “by right” in the district, meaning that no public review is required. An accessory uses is one that: serves and customarily is incidental and subordinate to the principal use or structure; is subordinate in area, extent, or purpose to the principal use or structure; contributes to the comfort, convenience, or necessity of occupants, business, or industry in the principal use or structure served; and except in a planned unit development, is located on the same lot as the principal use or structure served (§1-102). Conditional uses are those that because of their unique characteristics must be considered on a case-by-case basis, to evaluate the impact of those uses on neighboring land, and of the public need for the particular use at the particular location. Conditional uses come in two forms, one that can be approved by the Board of Municipal and Zoning Appeals (hereinafter Board), and one that is approved by the Mayor and City Council by way of an Ordinance.

This bill proposes to add a set of enforcement tools that will create the ability for conditional uses to be modified, suspended, or revoked for not complying with conditions of approval placed on that conditional use. Under today’s law, Zoning Enforcement can only compel a property owner or operator to comply with the restrictions through violation notices, and ultimately, legal action. This can at times result in long periods of noncompliance during

enforcement actions, and does little to prevent the need for recurring enforcement actions. This bill's proposed control mechanism was modeled in part on similar provisions in Howard and Montgomery Counties. While this legislation is a result of the ongoing discussion on live entertainment, please note that as written, this affects all conditional uses throughout the City.

Effects of Proposed Legislation:

Title 14: This is the portion of the Zoning Code that governs conditional uses. It specifies that they can be approved by either the Board or City Council, that conditions can be imposed, guarantees for compliance can be secured, and that compliance is required. This Title also lists the procedures for approving conditional uses, the required findings and considerations, along with additional special considerations for specific uses.

Compliance Required: A portion of §14-103.e *Compliance Required* will be augmented to state that any failure to comply with any condition, restriction, or limitation imposed not only constitutes a violation of the article, but also is grounds for modification, suspension or revocation of the conditional use. This creates the authority to go beyond just enforcing the conditions, and allows for the additional enforcement tools. This section could also be clarified in meaning by adding a reference to those restrictions imposed by the Board or City Council, as the case may be.

Guarantees – Periodic Renewal: The bill will add a new section under §14-103 that allows the Board of Municipal and Zoning Appeals (Board) or City Council to add a requirement for periodic renewal. In that case, the applicant must apply to the Board for review after the specified time. If the Board then makes a finding that the applicant has been in substantial or repeated violation of a condition, restriction, or limitation, it must deny the application for renewal.

Staff finds that this provision is redundant, and creates the potential for administrative process problems. In the live entertainment discussion, when there was no other provision for controlling conditional uses, a periodic review of certain uses was seen as a positive improvement in enforcement capability. Under this bill, a conditional use can be brought before the Board for violations at any time. This should provide more safeguards than periodic reviews. Additionally, staff fears that the periodic review requirement may unintentionally create a chilling effect on a property owner's ability to secure financing. When a lending institution looks at a proposal, they may be hesitant to offer a loan that goes beyond the initial periodic review date, since the use is not guaranteed to exist after that time.

With the ability to bring these additional enforcement tools at any time, forcing complying property owners into a periodic public hearing and review process appears unfair, and may have financial repercussions that were not intended. This provision should be removed in its entirety.

Failure to Exercise/Abandonment: A new §14-104 will be added that will specify that an approval for a conditional use must be exercised within twelve months (as per §2-602), after which time the approval automatically lapses and is void, unless it is granted an extension by the Board (§2-604). Similarly, if a conditional use is discontinued for a continuous period of at least two years, the conditional use automatically lapses and is void. A new application and approval will be required for the use to continue.

Staff recommends retaining the failure to exercise provision, as it is similar in nature to other provisions in the zoning code where a property owner or operator is required to begin using their approval within twelve months' time (with a potential extension of up to twelve months for demonstrated cause), or the approval should lapse.

Unfortunately, there is a practical difficulty in enforcing a two-year abandonment or lapse provision. Staff understands that the closest example of this type of provision in the existing Zoning Code is for nonconforming uses. However, the case of a conditional use that is allowed in the zoning district, versus a nonconforming use that is not allowed under current rules, deserves to be treated differently. It is difficult for the City to track all existing conditional uses that are in existence, and resources most likely do not exist to provide for periodic inspections of these uses. Furthermore, there is no clear standard of proof for what is required to demonstrate that a use has actually ceased for at least a two-year period of time. Due to these impediments, staff recommends deleting the abandonment (lapse) provision from this bill.

Suspension, Revocation, etc.: A new Subtitle 5 will be added to Title 14, that will outline the procedures for suspensions or revocations of conditional uses. First, the Zoning Administrator must attempt to resolve the violation informally and promptly. Should that attempt fail, the Zoning Administrator must then issue notification of proposed revocation. If the violation is still not corrected, the Zoning Administrator may then refer the case to the Board for a revocation hearing. In the revocation hearing, the Board may then revoke the conditional use, suspend the conditional use, affirm the conditional use subject to a schedule for corrective action (including a mandatory compliance time limit), modify the conditional use, or other action as may be required.

Attempted Resolution: Under the proposed §14-502, "whenever the Zoning Administrator learns of a violation..." is a bit unclear. The Zoning Administrator should make a determination that a violation has occurred, regardless of where the source of information may originate (i.e. either from inspection or reliable neighbor complaint). This text should read "Whenever the Zoning Administrator determines a violation of a condition, restriction, or limitation..." to make it clear that a finding has been made.

Notice of Proposed Revocation: In the proposed §14-503, after an attempt at informal resolution has failed, the Zoning Administrator is required to issue notice of the violation to the owner of record of the property, as well as to the persons to whom the conditional use was granted. Staff understands that the intent behind this provision was most likely to provide for fair notice to both a property owner, and to the operator of a conditional use such as a tenant. Hopefully this would solve the problem of one party not getting reasonable notice, should a

property owner fail to inform his tenant of a problem, or vice versa. However, once a conditional use has been approved, there is no requirement for follow-on owners or operators to register themselves in any way. As a result, this provision may create a problem, in that the persons to whom the conditional use was granted may not be found.

Staff recommends that this section be modified to require notice only to the property owner of record. It is understood that this may expose a tenant to some risk of not being aware of a potential problem, but it is ultimately the property owner that will be the target of enforcement. It is also expected, that as a practical matter, City enforcement procedures will most likely try to inform all reasonably involved parties.

The contents of notice will specify the nature of the violation, and will warn the recipient that unless the violation is corrected, the matter will be referred to the Board for revocation of the conditional use. While staff believes that this will most certainly get the attention of those served, it may not be a fair way to phrase the notice. Staff recommends that this wording be amended to read "... the matter will be referred to the Board for potential suspension or revocation of the conditional use." This wording is a more complete description of the potential enforcement options.

In the proposed "How Served" portion of the proposed §14-503(C), notice by either first class mail or personal service is required. Staff recommends that this section be amended to add physical posting of the property, to align this notice procedure with other similar notice provisions.

Decision: Once a case is referred to the Board, under the proposed §14-505, the Board will have several options for enforcement. The Board could revoke the conditional use. The Board could suspend the conditional use, pending some form of corrective action. The Board could allow the conditional use to continue under the stipulation that some corrective action must be taken by a certain date, or the use will be terminated. The Board could modify, add to, delete, or otherwise amend the conditional use. Finally, the Board may make any other order, requirement, decision, or determination as ought to be made.

Staff finds that the first three options listed are reasonable, as shown under §14-505 (1) through (3). The proposed §14-505(4) is quite a broad authority, and would allow the Board to in essence re-hear the original granting of the conditional use, potentially adding any new conditions or rules they may see fit, with or without cause. While the initial intent was most likely not to be over-reaching, the potential exists, and should be removed. Staff recognizes that removing this option makes the Board's hearing an all-or-nothing review. It would however, enhance the deterrent effect of this enforcement tool. Likewise, if such changes to the use were really necessary, it would be more appropriate for the conditional use to be revoked, the owner should have to re-apply, and therefore include in public hearings any interested parties that would not otherwise be involved in the enforcement hearing.

Should a modification provision be kept, staff would recommend that conditional uses originally approved by the Board could be modified only with the consent of the owner. The risk with this concept is that potential parties of interest may not be present at the enforcement hearing, and so modifications made by the Board may not include all impacted by their decision.

For those conditional uses that were originally approved through a City Council Ordinance, conditions are normally specified in the text of the Ordinances. As a result, the Board would not have the authority to line-edit an Ordinance. It would appear that any of these conditional uses could only be suspended or revoked, but not amended without creating some additional process for Council to modify the original approval. As above, it would be better for the Board's review to be an all-or-nothing hearing. If modifications are required, the conditional use should be revoked, and the owner should have to re-apply for a new Ordinance.

The proposed §14-505(5) is unclear in its meaning, and appears to give the Board carte blanche authority. Without clear and compelling reason to keep this provision, staff recommends that it be deleted.

The proposed §14-505 should also be amended to clarify the initial paragraph. The Board should enumerate the findings in the record, to ensure clarity for all parties involved. Likewise, the conditions, restrictions or limitations should be specifically those made by the Board or City Council, as the case may be.

Notification: Staff sent notification letters to 773 entities listed in the current Community Association Directory. Additionally, a public information session was held on Monday September 21, 2009 for public input.



Thomas J. Stosur
Director