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Re: Ordinance No. O-31-14
Technical Corrections to the Zoning Code - For the purpose of amending sections of Title 2, Title 20, and Title 21 to be consistent with the Land Use Article of the Annotated Code of Maryland

Dear Mayor, City Council and City Attorney:

Before you tonight on second reader will be Ordinance No. O-31-14, titled "Technical Corrections to the Zoning Code." The aim of the bill purports to be a simple one, but some of the ostensibly small "technical corrections" contained within the bill could have far-reaching,

unpredictable, and negative ramifications within the City.

To align the City Code's often disparate language regarding the Annapolis Comprehensive Plan into a uniform "consistent with" standard is a good idea. The City Code today says that some zoning applications must "conform to" the Comprehensive Plan, while others must be "compatible with" the Comprehensive Plan. Making these standards uniform would be logical and efficient.

However, it should be noted that the State Code's "consistent with" standard is not without problems.

Despite the General Assembly's effort to define the "consistency requirement" in 2009, the standard for "consistency" remains very unclear. Since 2009 Md. Laws, Chapter 181 first required that certain land use actions "further and not be contrary to the policies, [timing], and development patterns" in a comprehensive plan, the Court has yet to interpret what that requirement actually means.

As the Court of Appeals noted in *Rylyns Enterprises, Inc.*, 372 Md. 514, 814 A.2d 469 (2002),

> the [comprehensive] plan is intended not as a blueprint for future development which must be as carefully executed as the architect's design for a building or the engineer's plan for a sewer line, but rather as a set of policies which must be periodically reevaluated and amended to adjust to changing conditions. 372 Md. at 531, n.4, 814 A.2d at 479, n. 4.

By their nature, therefore, comprehensive plans often contain a multiplicity of policies, which may not be capable of being strictly interpreted as "consistent" with one another in every instance and application. For example, if a comprehensive plan includes a policy calling for the retention of trees throughout the City but also contains policies calling for economic growth, and urban development of certain forested areas, then it may not always be clear whether a particular action furthers and is not contrary to the collective *policies* in the plan. Similarly, a comprehensive plan may simultaneously seek to advance affordable housing and preserve older buildings. In some instances, an action may advance one policy but not another. Again, the question becomes when may an action be said to further the *policies,* considered as a whole.

Similarly, there will be difficult, subjective questions as to when a certain action furthers and is not contrary to the *development patterns* in a plan. It may frequently occur that furthering the land use scenario closest to the development patterns indicated in the plan requires rezoning a single parcel in a way which is different from the designation broadly indicated for a larger area in the comprehensive plan.

Generally, however, courts reviewing local government decisions related to planned developments, special exceptions, piecemeal rezonings, or other administrative approvals simply look to determine "if there is substantial evidence in the record to support the agency's findings and

conclusions." *Sugarloaf Citizens' Ass'n v. Dep't of Env't*, 344 Md. 271, 284, 686 A.2d, 618 (1996). Where such evidence exists, courts typically will not overturn the findings and conclusions of a local government agency. Therefore, all that can clearly be said of the "consistency requirement" is that in taking one of the actions covered in Md. Code, Land Use Art., §§ 1-301 or 3-303, a local government's decision must simply be based on substantial evidence that would support a finding that the action "will further and not be contrary to the... policies, [timing], and development patterns" in the comprehensive plan.

Where the record produced in hearings or other proceedings associated with a particular action includes substantial evidence that could support a decision that the action would further and not be contrary to the policies, timing, and development patterns in the comprehensive plan, a court will not likely overturn a local government agency decision to that effect. For example, where the Planning Commission finds that a given subdivision will further and not be contrary to the policies of the Comprehensive Plan, the courts will not usually overturn that decision if the record contains substantial evidence, which could support that decision. Nevertheless, in the absence of Court interpretation, the standard remains somewhat uncertain. Annapolis should therefore be very careful not to impose the requirement in actions beyond those indicated by the Land Use Article.

While the 2012 recodification of Md. Code of 1957 (*Supp.* 1992), Art. 66B as the Land Use Article worked no substantive change on the "consistency requirement," it now seems clear that certain land use actions must further and not be contrary to certain elements of the Comprehensive Plan.[1] Specifically, Md. Code, Land Use Art., § 3-303 requires (1) zoning laws, (2) planned development ordinances and regulations, (3) subdivision ordinances and regulations, and (4) other land use ordinances and regulations to "further and not be contrary to the... policies, [timing], and development patterns" in a comprehensive plan. Additionally, special exceptions provided for in § 1-101(p), and required findings for annexation under Md. Code, Local Govt. Art., § 4-415(c), as well as certain required findings under the Environmental Article[2] must be "consistent with" the Comprehensive Plan.

The City of Annapolis should not extend the still unclear consistency requirement beyond these land use actions specified in the Land Use Article. As proposed, O-31-14 inserts the "consistency requirement" language into City Code sections governing,

- Annexations,
- Subdivisions,
- Street design for new subdivisions,
- Street arrangements for new subdivisions,
- Right of way widths for new subdivisions,

1 2013 Md. Laws, Chapter 674 made certain changes to §3-303 which clarify the actions to which the consistency requirement applies.

2 Decisions under Md. Code, Env. Art., §§ 9-505(a)(1), 9-506(a)(1), and 9-507(b)(2) must also be consistent with the Comprehensive Plan.

- Site design plan review,
- Planned developments,
- Expired planned developments,
- Special exceptions,
- Zoning map amendments,
- Subdivision plats in the BCE zoning district,
- Food and beverage-related uses.

While adding the requirement of "consistency" makes sense with regard to some of these actions, it would clearly be a mistake to add the requirement with regard to the following sections:

- Street design for new subdivisions (Page 4, Lines 13-18),
- Street arrangements for new subdivisions (Page 4, Lines 20-42),
- Right of way widths for new subdivisions (Page 5, Lines 1-17),
- Site design plan review (Page 18, Lines 30-42),
- Subdivision plats in the BCE zoning district (Page 51, Lines 1-34),
- Food and beverage-related uses (Page 53, Lines 9-10).

The consistency requirement is not mandated for these specific actions. Rather, it is applicable only for the larger decisions and approvals on annexation, subdivision, planned development, zoning map amendments, and special exceptions, as a whole. For example, the Planning Commission may approve a subdivision where the subdivision as a whole will further the policies, timing and development patterns in the Comprehensive Plan. It is not required that the street widths, specifically, will "further and not be contrary to the policies, [timing] and development patterns" in the Comprehensive Plan.

As discussed below, with regard to subdivisions specifically, adding the consistency requirement to approvals of various decisions incorporated into other approvals would create unintended redundancy. Worse, it would create that redundancy by way of imposing a vague requirement which has not yet been interpreted by the Court. While there may be good reason to add the consistency requirement to the criteria for a limited set of land use decisions, the City should leave the extension at requiring a general finding of "consistency" for those actions named by the land use article.

Returning from the State level back down to our own City Code, I question the utility of a few inclusions in O-31-14 in particular:

Page 4, Line 9: The bill would make consistency with the Comprehensive Plan a requirement for subdivisions. To my knowledge, the City has never evaluated subdivisions for compatibility or consistency with the Comprehensive Plan. Comprehensive Plan consistency has been a matter for zoning applications – not subdivisions, which deal primarily with technical and objective matters like the accuracy of metes and bounds descriptions, sufficient lot size, proper alignment of utilities, adequate turning radii for vehicular circulation, etc. Adding into the subdivision process an

evaluation of subjective criteria like consistency with the Comprehensive Plan and its visionary principles would change the process entirely and would add an additional administrative review layer on top of the City's current development review process, which is not often lauded for its efficiency. Given the spirt of working to streamline the City's current administrative processes – an aim that I believe the Administration and Council generally support – it would seem that if subdivisions are to be evaluated for consistency with the Comprehensive Plan, O-31-14 should be amended, *at the very least, to clarify that only subdivisions which are not part of a project that is simultaneously undergoing Comprehensive Plan consistency review in connection with a parallel zoning application (i.e. planned development, special exception) would be so evaluated.* Otherwise, a project might be subjected to separate and potentially disparate consistency determinations.

Page 8, Lines 24-28, and Page 9, Lines 33-37: The bill would require that certain applications to the Planning Commission and the Board of Appeals shall be approved "only if a majority of the members...each find that all of the necessary review criteria have been met." I imagine these provisions are geared toward addressing the procedures surrounding the residential planned development for *The Reserve at Quiet Waters*. Though it had not been issued at the time of O-31-14's introduction, the Court of Special Appeals recently held that "neither the Board's rules of procedure nor the Code provides any support for the [Board of Appeals] Chairman's assertion that, 'if there's a finding by any individual that any one of the criteria is not met[,] it by definition under the Code must be a no vote.'" *Ray Sullivan, et al. v. QW Properties, LLC*, Unreported, In the Court of Special Appeals of Maryland, No. 1565, September Term, 2013, page 10. However, while the Court of Special Appeals ruled in favor of *Quiet Waters* in its decision, O-31-14 now aims to convert the Board of Appeals' overturned procedures into law. The City's boards and commissions have always acted diligently and carefully on the applications before them. Asking that their decisions – rendered by laypersons who volunteer to serve our community – be handled in such a minute and formulaic manner may not be helpful to the City, to the administrative process, or to the volunteer members themselves. For example, one (1) of the six (6) criteria for approval of a planned development, at 21.24.090 E., is that it "complies with the Site Design Plan Review criteria provided in Section 21.22.080." Section 21.22.080 itself contains eight (8) criteria, one (1) of which, at 21.22.080 A., is that the "proposed design plan meets all of the requirements of the zoning district in which it is located, including but not limited to the site design standards set forth in Chapter 21.62." Chapter 21.62 contains nineteen (19) additional criteria, many of which themselves cite to additional Code standards. Under O-31-14, the Planning Commission would arguably be expected to vote separately, and to produce written findings, on thirty (30) or more Code criteria in order to determine if one (1) of the criteria for approval of a planned development at 21.24.090 is satisfactorily met. This type of exponential scenario could overburden everyone and result in a procedural nightmare. I agree that the rules of procedure for all the City's boards and commissions – not just the Planning Commission and the Board of Appeals – could and probably should be tightened up, but O-31-14 does not handle this in the right way.

Page 15, Lines 4-7: I am not clear why the Council would want to remove a time constraint on the Department of Planning and Zoning. O-31-14 would delete the existing Code provision that, for administrative interpretations, the Planning and Zoning Director shall inform an applicant in

writing of the Director's decision within thirty (30) days of the determination of completeness of the application and will state the reasons and analysis upon which the determination is based.

The review time requirement is important to predictability and accountability in the approval process and should not be removed. The notice requirements added to 21.10.020(E) may easily be added without eliminating the current review time requirement.

In light of the problematic aspects of O-31-14, I would urge the Council to give this bill more careful study, with the aim of adopting appropriate amendments, before it votes to approve the legislation. Thank you for your consideration of these matters.

Very truly yours,

HYATT & WEBER, P.A.

Alan J. Hyatt

AJH/

cc: Sally Nash, AICP, Acting Director, Department of Planning and Zoning ***(VIA E-MAIL snash@annapolis.gov)***

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