



MEMORANDUM

TO: Chairman Durham and Planning Commissioners
FROM: Kathleen Dooley, City Attorney
Charles R. Johnston, Director of Community Planning & Building
SUBJECT: Proposed restatement and confirmation of the PD-C 10% rule
DATE: June 30, 2022 (for the July 13, 2022 Planning Commission Meeting)

ISSUE

Shall the Planning Commission recommend approval of an amendment to the Unified Development Ordinance, section 72-33.2, "Planned Development – Commercial," to restate and confirm the application of the 10% rule that applies to residential developments in the Planned Development-Commercial District?

RECOMMENDATION

Yes, the Planning Commission should recommend approval of the text amendment restating and confirming the application of the 10% rule in the "Planned Development – Commercial" zoning district.

DISCUSSION

The Planned Development-Commercial District permits residential development to occur, not to exceed 10% of the "overall PD-C District" and 24 units per acre. This "10% rule" has been consistently applied since 1998 to mean 10% of any particular PD-C development, and not the aggregate acreage of all land zoned PD-C. The 10% rule has been applied to residential development in Celebrate Virginia South, the only PD-C district in which residential development is permitted under current zoning proffers and conditions, and all eligible acreage within Celebrate Virginia South has now been developed for residential uses. The residential build-out of Celebrate Virginia South further underlies the recently-adopted Area 1 Small Area Plan and its recommendation for future UDO text amendments.

However, two owners of undeveloped parcels within Celebrate Virginia South contend that the 10% rule in fact means that the residential development in any one PD-C development may comprise 10% of the aggregate acreage of all land zoned PD-C. Those landowners have obtained a formal Zoning Administrator's determination of the interpretation of the 10% rule,

and have appealed that determination to the Board of Zoning Appeals. The Board of Zoning Appeals upheld the Zoning Administrator's determination at their meeting on June 20.

The landowners have stated that they plan to pursue an appeal of the BZA's decision. The appeal process requires substantial staff resources; the litigation process, including judicial appeals, could take more than a year. Meanwhile, a third landowner in Celebrate Virginia South is planning a residential development, but awaiting the amendment of the PD-C regulations to permit additional residential development under a special use permit, as recommended by the Area 1 Small Area Plan.

It is therefore prudent for the City Council to amend the PD-C District regulations to restate and confirm that the 10% rule applies to the overall acreage within a single PD-C development.

The proposed text amendment clearly states that 10% of any single PD-C development may be developed for residential uses. It further explains that the phrase "overall PD-C development" means "the gross acreage included within the perimeter of a land area zoned PD-C through a single zoning map amendment, or related zoning map amendments adopted contemporaneously by City Council, or an area governed by a single generalized development plan where applicable. For example, and by way of illustration, Celebrate Virginia South is one PD-C development and Central Park is another PD-C development."

The proposed text amendment is consistent with the 10% rule as it has been applied to the ~541-acre Celebrate Virginia South development since its creation in 1998. The staff report submitted in connection with that rezoning clearly stated as follows:

Rezoning these sites to PDC – Planned Development Commercial will mean that the planned residential uses would likely not be developed as PDC zoning only permits residential uses by special use permit. PDC also limits to 10% the amount of the overall site to be devoted to residential uses, but with a 24 units per acre density. Thus, if granted a special use permit, the developer could construct about 1,298 residential units (541 acres x 10% x 24 units per acre).

The interpretation urged by the landowners, where the 10% rule would be applied to all PD-C zoned acreage in the aggregate, would create several absurd and undesirable results. For example, all of the residential potential of the 304-acre Central Park development (~30 acres)

would be transferred to Celebrate Virginia South. Whenever any new area is zoned PD-C, the residential potential of the new area would be added to Celebrate Virginia South. Even a PD-C generalized development plan that excluded residential uses (such as the current GDP for Central Park, the PrimeCore property, or the DVDs-on-the-Run property) would nonetheless add to the total number of acres in Celebrate Virginia South that could be developed for residential uses. An applicant for PD-C zoning could not effectively proffer out residential uses, but neither could the applicant fairly be asked to pay a voluntary cash proffer for school capacity associated with that new residential use potential. Celebrate Virginia South would be the beneficiary of this new residential development potential.

Moreover, the Silver Companies have acknowledged that the residential use potential of Celebrate Virginia South has been developed. This text amendment will not upset any investment-backed expectations based on a misreading of the regulation or confusion as to its meaning. In 2017 and 2018, the Silver Companies submitted site plans for the Silver Collection at Celebrate Virginia South, including the note:

“PD-C LIMITS RESIDENTIAL DENSITY TO 10% OF THE OVERALL DISTRICT.

- CELEBRATE VIRGINIA SOUTH PROPERTY AREA = 543.722 AC
- ALLOWABLE RESIDENTIAL LAND (10%) = 54.722 AC
- EXISTING AND PROPOSED RESIDENTIAL USES:
 - THE HAVEN PHASE I = 13.475 AC
 - THE HAVEN PHASE II = 16.843 AC
 - SILVER COLLECTION (PROPOSED ON THIS PLAN) = 24.051 AC
 - TOTAL RESIDENTIAL LAND = 54.369 AC”

And in June 2021, CVAS P8A, LLC (one of the two landowners in the BZA appeal), filed an application for a special exception from the 10% rule, stating, in the application “Narrative,”

“The current zoning allows 24 units per acre density (for up to 10% of the PDC-zoned lands); the proposed development comes in at 20.5 units per acre density. Because this would exceed the above mentioned 10% provision by appx 3.5 percent **a special exception is requested for no more than 3.5% residential acreage/use above the PDC-listed 10% provision.**” (emphasis in original.)

The Area 1 Small Area Plan recommends that City Council consider an amendment to the PD-C regulations to permit additional residential use by special use permit. The resolution of the

meaning of the 10% rule will permit City staff to turn their attention to the text amendments recommended by the Area 1 Small Area Plan.

Finally, and fundamentally, it the role of the governing body to resolve the interpretation of the 10% rule definitively for the benefit of all landowners in the PD-C, rather than await the conclusion of what could be a lengthy litigation process, leaving that job to others.

FISCAL IMPACT

The prompt but deliberate clarification of the 10% rule is intended to limit the hours of staff resources devoted to attending to the pending BZA appeal and potential judicial review of the matter. The City will bear the cost of publishing notices for the Planning Commission and City Council public hearings. The value of avoided costs, and a fair and prompt resolution of the question, should exceed the cost of publishing the required notices of this text amendment by many multiples.

Attachments:

- Draft Ordinance 22-__ Amending City Code §72-33.2 to clarify the application of the 10% rule that applies to residential developments in the Planned Development-Commercial District.