


Action

**MEMORANDUM**

February 2, 2018

TO: County Council

FROM: Jeffrey L. Zyontz, Senior Legislative Analyst 

SUBJECT: Action: ZTA 17-13, Exemptions - Public Taking

**PHED Recommendation:** On January 29, 2018, the Committee (3-0) recommended approval of ZTA 17-13 with revisions to allow the expansion of structures that are made non-conforming due to public acquisition and to add provisions for parking lots. The Committee recommended that the new provision would read as follows:

A lawful structure or surface parking lot located on a lot reduced in area by a public acquisition that would render the structure or parking lot nonconforming is legal and the structure or parking lot may be repaired, altered, or reconstructed.

**Background**

Zoning Text Amendment (ZTA) 17-13 was introduced on October 31, 2017. Councilmember Floreen is the lead sponsor.

The 2014 Zoning Ordinance did not grandfather a lawful structure located on a lot that is reduced in area by a public acquisition after October 30, 2014. That acquisition could render the structure nonconforming. ZTA 17-13 would retain the pre-acquisition, legal status of the property. The amendment is recommended by Council and Executive staff for situations where less than an entire property is publicly acquired.

The Planning Board and Planning staff recommended approval of ZTA 17-13 with a note that a lot reduced in area by a public acquisition is already exempt from platting requirements.

The Council conducted a public hearing on December 5, 2017. Only the Planning Board representative testified. An email comment was received questioning whether the ZTA as introduced covered a reduction in the number of surface parking spaces.

On December 11, 2017, the Committee conducted a worksession on ZTA 17-13. Committee members wanted further discussion on allowing buildings on lots made non-conforming to enlarge. The Committee recommended changes to ZTA 17-13 on January 29, 2018.

## Issues

As proposed, the ZTA would add the following provision to zoning exemptions:

A lawful structure located on a lot reduced in area by a public acquisition that would render the structure nonconforming is legal and may be repaired, altered, or reconstructed, but may not be enlarged.

*Should the ZTA allow the enlargement of a structure made non-conforming by public acquisition?*

The Committee suggested revising the proposed text to allow building enlargements consistent with enlargements allowed immediately before the public acquired some of the lot. Staff did not find any legal or practical impediments to this approach.

**The Committee's objective was accomplished by a recommendation to delete the phrase "but may not be enlarged".** Synonyms of the word "alter" include:

change, amend, improve, modify, convert, revise, recast, reform, reshape, refashion, redesign, restyle, revamp, rework, remake, remodel, redo, reconstruct, reorganize, vary, transform.

After the Committee meeting, DPS reported that, under the proposed text, the enlargement would be allowed up to the height and footprint allowed by the applicable zoning at the time of permit application; setback and lot size and lot shape limits would not apply.

*Does ZTA 17-13 adequately cover a situation where the number of parking spaces is reduced?*

The term "Structure" is defined in the zoning code in Section 1.4.2:

Structure: A combination of materials that requires permanent location on the ground or attachment to something having permanent location on the ground, including buildings and fences.

The definition is very broad. It absolutely includes any structured parking area. Whether it includes surface parking is open to question. In other definitions of the code, surface parking is noted, even when the term "structure" is addressed.<sup>1</sup> The Committee recommended revising the proposed text as follows:

A lawful structure or surface parking lot located on a lot reduced in area by a public acquisition that would render the structure or parking lot nonconforming is legal, and the structure or parking lot may be repaired, altered, or reconstructed.

---

<sup>1</sup> Setback: The minimum distance that a structure or parking area must be located from a specified lot line or right-of-way.  
Setback, Front: A distance measured from the front lot line to a structure or surface parking lot.  
Setback, Rear: A distance measured from the rear lot line to a structure or surface parking lot.  
Setback, Side: A distance measured from the side lot line to a structure or surface parking lot.  
Setback, Side Street: A distance measured from the side street right-of-way to a structure or surface parking lot.

*Should the provision declaring the lot to be legal remain?*

The second provision of ZTA 17-13 reads as follows:

A lot reduced in area by a public acquisition is legal.

Both the zoning code (Chapter 59) and the subdivision code concern lots (not structures). The subdivision code requires a plat to divide a lot. A public taking is already an exception to the platting requirement in the subdivision code. The zoning code generally requires a minimum lot size. The provision as proposed establishes the legal ZONING status of the lot.

<u>This Packet Contains</u>	<u>© number</u>
ZTA 17-13 as recommended by the PHED Committee	1 – 3
Planning Board Recommendation	4
Planning Staff Recommendation	5 – 6

F:\Land Use\ZTAS\ZYONTZ\2017 ZTAs\17-13 Exemptions - Public Taking\ZTA 17-13 PHED memo 1-29-18.docx

Zoning Text Amendment No.: 17-13  
Concerning: Exemptions - Public  
Taking  
Draft No. & Date: 2 – 1/29/18  
Introduced: October 31, 2017  
Public Hearing: December 5, 2017  
Adopted:  
Effective:  
Ordinance No.:

**COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND  
SITTING AS THE DISTRICT COUNCIL FOR THAT PORTION OF  
THE MARYLAND-WASHINGTON REGIONAL DISTRICT WITHIN  
MONTGOMERY COUNTY, MARYLAND**

---

Lead Sponsor: Councilmember Floreen

---

**AN AMENDMENT** to the Montgomery County Zoning Ordinance to:

- remove the possibility of structures located on a lot reduced in area by a public acquisition from becoming nonconforming;
- allow the repair, alteration, or reconstruction of such structure under certain circumstances;
- allow the lot reduced in area by public acquisition to be legal; and
- generally amend the provisions for exemptions

By amending the following sections of the Montgomery County Zoning Ordinance, Chapter 59 of the Montgomery County Code:

Division 7.7. “Exemptions and Nonconformities”  
Section 7.7.1. “Exemptions”

**EXPLANATION:** ***Boldface** indicates a Heading or a defined term.*  
*Underlining indicates text that is added to existing law by the original text amendment.*  
*[Single boldface brackets] indicate text that is deleted from existing law by original text amendment.*  
*Double underlining indicates text that is added to the text amendment by amendment.*  
*[[Double boldface brackets]] indicate text that is deleted from the text amendment by amendment.*  
*\* \* \* indicates existing law unaffected by the text amendment.*

## OPINION

Zoning Text Amendment No. 17-13 was introduced on October 31, 2017 to avoid making structures and lots non-conforming because of public acquisition.

In its report to the Council, the Montgomery County Planning Board recommended approval as introduced.

The County Council held a public hearing on December 5, 2017 to receive testimony concerning the proposed text amendment. In addition to the positive recommendation from the Planning Board, correspondence indicated a concern for parking standards.

The text amendment was referred to the Planning, Housing, and Economic Development Committee for review and recommendation.

The Planning, Housing, and Economic Development Committee held a worksession on December 11, 2017 and January 29, 2018 to review the text amendment. After careful review of the materials of record, the Committee recommended that ZTA 17-13 be approved with amendments. The Committee believed that any structure subject to public acquisition should be allowed to enlarge. In addition, the Committee recommended amendments to prevent parking from being made non-conforming. The District Council reviewed Zoning Text Amendment No. 17-13 at a worksession held on February 6, 2018. The Council agreed with the Committee's recommendation to approve ZTA 17-13 as amended.

For these reasons, and because to approve this amendment will assist in the coordinated, comprehensive, adjusted, and systematic development of the Maryland-Washington Regional District located in Montgomery County, Zoning Text Amendment No. 17-13 will be approved as amended.

## ORDINANCE

*The County Council for Montgomery County, Maryland, sitting as the District Council for that portion of the Maryland-Washington Regional District in Montgomery County, Maryland, approves the following ordinance:*

**Sec. 1. DIVISION 59-7.7 is amended as follows:**

**Division 7.7. Exemptions and Nonconformities**

**Section 7.7.1. Exemptions**

\* \* \*

**F. Public Taking**

1. A lawful structure or surface parking lot located on a lot reduced in area by a public acquisition that would render the structure or parking lot nonconforming is legal and the structure or parking lot may be repaired, altered, or reconstructed[[, but may not be enlarged]].

2. A lot reduced in area by a public acquisition is legal.

\* \* \*

**Sec. 2. Effective date.** This ordinance becomes effective 20 days after the date of Council adoption.

This is a correct copy of Council action.

---

Megan Davey Limarzi, Esq.  
Clerk of the Council



**MONTGOMERY COUNTY PLANNING BOARD**  
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

OFFICE OF THE CHAIR

December 4, 2017

TO: The County Council for Montgomery County, Maryland, sitting as the District Council  
for the Maryland-Washington Regional District in  
Montgomery County, Maryland

FROM: Montgomery County Planning Board

SUBJECT: Zoning Text Amendment No. 17-13

**BOARD RECOMMENDATION**

The Montgomery County Planning Board of The Maryland–National Capital Park and Planning Commission reviewed Zoning Text Amendment (ZTA) No. 17-13 at its regular meeting on November 30, 2017. By a vote of 4:0 (Commissioner Fani-Gonzalez absent), the Planning Board recommends approval of the text amendment to remove the possibility of structures located on a lot reduced in area by a public acquisition from becoming nonconforming; allow the repair, alteration, or reconstruction of such structure under certain circumstances; and allow the lot reduced in area by public acquisition to be legal.

The 2014 Zoning Ordinance did not grandfather a lawful structure located on a lot that is reduced in area by a public acquisition. That acquisition could render the structure nonconforming since Section 7.7.1.A.1 (Existing Structure, Site Design, or Use on October 30, 2014) applies only to structures that existed on October 30, 2014.

The Board believes that the amendment is necessary and is consistent with public taking language of the previous Zoning Ordinance. The Board notes that proposed Section 7.7.1.F.2. that spells out that *a lot reduced in area by a public acquisition is legal* doesn't appear to be necessary given that the Subdivision Regulations (Chapter 50) provide an exemption provision from the platting requirement before building permits can be issued for lots reduced through transfers for public use (Section 50.3.3.B.2). The primary downside to the creation of an "unlawful" lot through eminent domain is that you can't pull building permits to repair, reconstruct, etc. an existing structure, which would be taken care of by Section 7.7.1.F.1 of the proposed ZTA language.

**CERTIFICATION**

This is to certify that the attached report is a true and correct copy of the technical staff report and the foregoing is the recommendation adopted by the Montgomery County Planning Board of The Maryland-National Capital Park and Planning Commission, at its regular meeting held in Silver Spring, Maryland, on Thursday, November 30, 2017.

  
Casey Anderson  
Chair

CA:GR



**Zoning Text Amendment (ZTA) No. 17-13, Exemptions - Public Taking**

---

- ☐ Gregory Russ, Planner Coordinator, FP&P, [gregory.russ@montgomeryplanning.org](mailto:gregory.russ@montgomeryplanning.org), 301-495-2174
- ☐ Pam Dunn, Chief, FP&P, [pamela.dunn@montgomeryplanning.org](mailto:pamela.dunn@montgomeryplanning.org), 301-650-5649

Completed: 11/20/17

---

**Description**

ZTA No. 17-13 would remove the possibility of structures located on a lot reduced in area by a public acquisition from becoming nonconforming; allow the repair, alteration, or reconstruction of such structure under certain circumstances; and allow the lot reduced in area by public acquisition to be legal.

**Summary**

Staff recommends approval of ZTA 17-13, to remove the possibility of structures located on a lot reduced in area by a public acquisition from becoming nonconforming; allow the repair, alteration, or reconstruction of such structure under certain circumstances; and allow the lot reduced in area by public acquisition to be legal. Staff notes that proposed Section 7.7.1.F.2. that spells out that *a lot reduced in area by a public acquisition is legal* doesn't appear to be necessary given that the Subdivision Regulations (Chapter 50) provide an exemption provision from the platting requirement for lots reduced through transfers for public use.

**Background/Analysis**

The 2014 Zoning Ordinance did not grandfather a lawful structure located on a lot that is reduced in area by a public acquisition. That acquisition could render the structure nonconforming since Section 7.7.1.A.1 (Existing Structure, Site Design, or Use on October 30, 2014) applies only to structures that existed on October 30, 2014. ZTA 17-13 would retain the pre-acquisition, legal status of the property. The amendment is recommended by Council and Executive staff for situations where less than an entire property is publicly acquired. Staff believes that the amendment is necessary and is consistent with public taking language of the previous Zoning Ordinance.

Staff notes that proposed Section 7.7.1.F.2. that spells out that *a lot reduced in area by a public acquisition is legal* doesn't appear to be necessary given that the Subdivision Regulations (Chapter 50)



provide an exemption provision from the platting requirement before building permits can be issued for lots reduced through transfers for public use (Section 50.3.3.B.2). The primary downside to the creation of an "unlawful" lot through eminent domain is that you can't pull building permits to repair, reconstruct, etc. an existing structure, which would be taken care of by F.1. The language of the ZTA is stated below for your convenience.

**F. Public Taking**

1. A lawful structure located on a lot reduced in area by a public acquisition that would render the structure nonconforming is legal and may be repaired, altered, or reconstructed, but may not be enlarged.
2. A lot reduced in area by a public acquisition is legal.

**Attachments**

1. ZTA No. 17-13 as introduced