June 18, 2010

MEMO

From: Land Use Committee

To: Town Council

CC: Town Manager

RE: Summary of recommended changes to the Town's Building Code

During 2008-2009 and during 2009-2010, the Land Use Committee (LUC) reviewed and examined anomalies in Chapter 4 of the Town Code identified by Town staff and the Town Council. Recommendations for addressing the anomalies reviewed during 2008-2009 were presented to the Town Council in the LUC's July 6, 2009 report. Those recommendations and an additional set of "Housekeeping Code Changes" were discussed at the Town Council's September 23, 2009 work session. Some were resolved and others were referred back to the LUC for further study. During 2009-2010, the LUC has reviewed and examined these as well as additional "Housekeeping Code Changes". This report includes a compilation of the code anomalies and the LUC's recommendations for correcting them that were examined during 2009-2010; Attachments A and B contain summaries of those that were resolved at the September 23, 2009 work session.

1. Computation of rear setbacks – LUC June 18, 2010

At the Town Council's request, the LUC reexamined the method for calculating the rear setback that was proposed in the LUC's July 2009 report. The LUC focused on the effect of the proposed method on oddly shaped lots and on corner lots. The proposed change was an attempt to alleviate problems that have been observed for lots with side lot lines of unequal length. When side lot lines are unequal in length the current method for calculating the rear setback can result in an abnormally large setback on the shorter side. This in turn results in an awkward buildable area in the rear yard and sometimes in developmentally nonconforming structures, both of which have led to variance requests. The rear setback calculation proposed by the LUC in the July 2009 report involved calculating the rear setback for each side lot line separately, so that the setback on the shorter side would not be so large. (See Attachment 3 in the July 2009 report for details). The proposed change has no impact on the rear setbacks of lots with side lot lines of equal length, only on properties with side lot lines of unequal length.

The committee observed that the proposed change worked well for some lots, but did not work well for others. Additionally, the change could have deleterious impacts on adjoining properties. For example, because the proposed change results in a smaller rear setback on the shorter side, a structure can be built that extends further back on that side, which disproportionately affects the adjoining property on the shorter side. It was noted that while the current calculation method may result in a buildable area that does not allow the typical rectangular addition, this is actually beneficial as it forces a more creative footprint for the structure because it necessitates more articulations and wall planes of varying lengths (which help reduce the appearance of mass).

Committee recommendation: The LUC voted to withdraw the July 2009 recommendation for a new way to calculate rear setbacks.

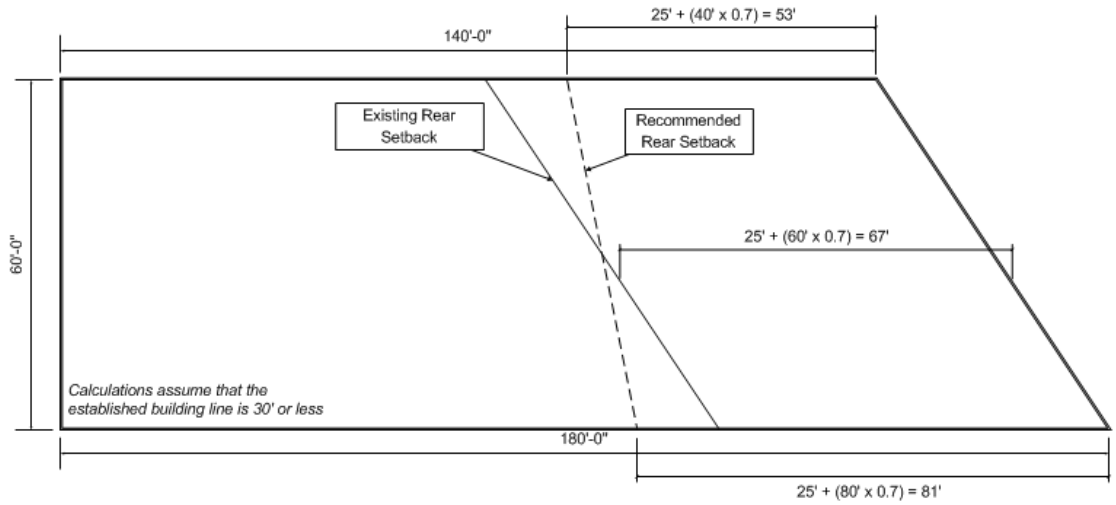
Computation of rear setbacks – Supporting Documents

Attachment 3 –July 2009 LUC Memo

Analysis and Recommendations for rear setbacks where the side lot lines are of unequal length.

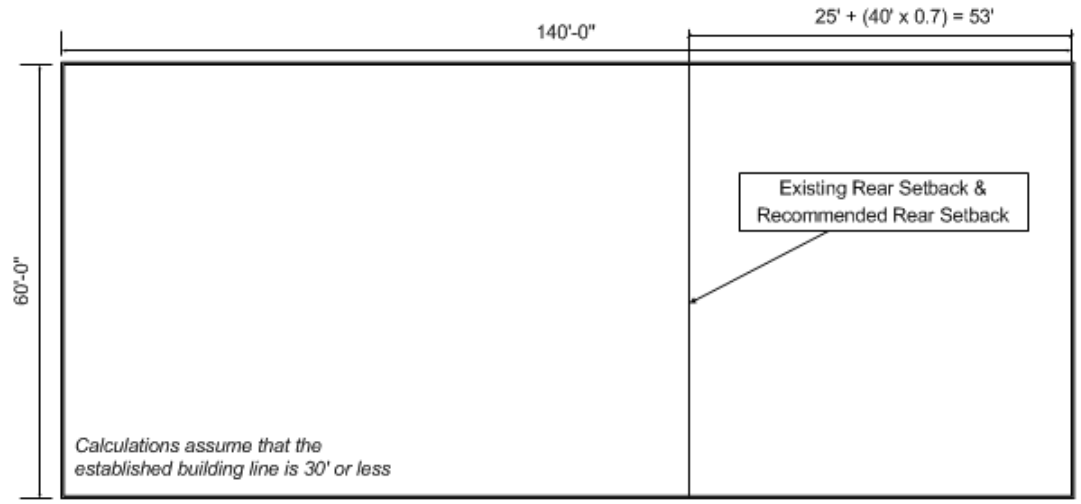
The definition of the ***depth of lot*** as defined in Section 4-1 Definitions of the Setback Ordinance is "The average (mean) length of the side lot lines." The ordinance fails to specifically state that the calculated setback line should be parallel to the rear lot line as was the intent of the Setback Committee. When the side lot lines are of unequal length this parallel line can create an abnormally large setback on the shorter of the two sides. This has been the subject of variance requests over the last several years.

We recommend that the rear setback be calculated for each side lot line independently. The rear setback as stated in the ordinance and Attachment 2 for the various lot depths would be applied to each side lot line. A point would be placed on each side lot line based on the appropriate setback. A line would then be drawn to connect the two points and this would be the rear setback line. See drawing 3-1.



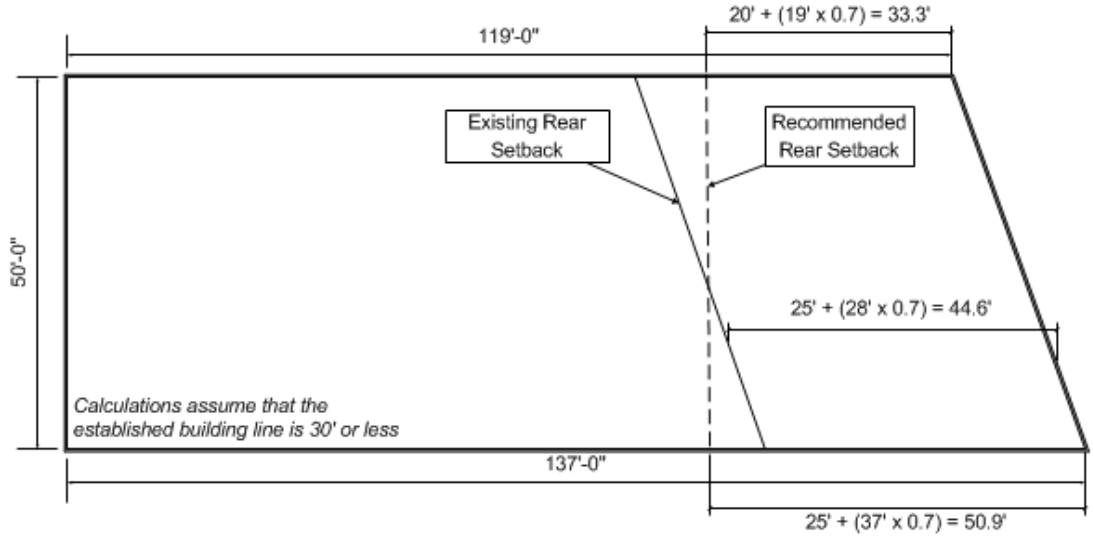
Drawing 3-1

This approach would be used for all lots. For rectangular lots, the calculations would be identical for both sides and would produce a setback line parallel to the rear lot line. For lots with unequal side lot line lengths, the rear setback line would not be parallel to the rear lot line. See drawing 3-2.



Drawing 3-2

This recommended change however may, in some situations, serve to increase the complexity of the rear setback calculation. In the case of side lot lines that fall into different parts of the rear setback formula, one side may have a minimum of 20 feet while the other side may have a minimum of 25 feet. In drawing 3-3 one side is 119 feet and the other side is 137 feet. The shorter side has a minimum of 20 feet and the longer side has a minimum of 25 feet.



Drawing 3-3

The wording of the ordinance for the rear setbacks would need to be adjusted as it references the "depth" of the lot rather than the length of the side lot line.

2. The "35% rule" - LUC June 18, 2010

In its July 2009 report, the LUC made a number of recommendations for changes to the Town code regarding the 35% rule designed to clarify it and improve its administration. Note: the 35% rule is the regulation limiting non-vegetative surface area to 35% of the front yard. The goal of the 35% rule is to maintain the maximum amount of green space in front yards and to limit front yard paving and parking pads.

The committee explored the suggestion made in the July 2009 report that driveway/parking regulations (specifically the prohibition of parking in any area of the front yard other than the driveway) might accomplish the goals of the 35% rule and be simpler to administer/enforce. The idea behind this suggestion was that most front yard paving is for parking pads, so if parking is only permitted in the driveway, there would be no reason to construct a front yard parking pad, and therefore, front yards would stay green. The LUC noted in its July report that to make this work bends and curves in driveways would have to be prohibited and that enforcement could be very difficult.

The LUC discussed the advantages and disadvantages of using the 35% rule to maintain green space compared with the advantages and disadvantages of using driveway/parking regulations to do this. The LUC discussed the legal issues of these two approaches with the Town's attorney, David Podolsky. Mr. Podolsky counseled that it would be inadvisable to use parking/driveway regulations to accomplish the goal of the 35% rule (maintain green space). He pointed out that the parking/driveway regulations are an indirect approach and would not actually limit the amount of nonvegetative area; in fact, a resident could pave their entire front yard and not violate those regulations. The 35% rule, on the other hand, is a direct approach and places clear limits on the amount of nonvegetative area permitted. Mr. Podolsky further advised that for a regulation to be effective its purpose must be clear to the public; and that regulations whose purpose is clear are more enforceable in court. The purpose of the 35% rule is clear, but it is not clear that one of the purposes of the driveway/parking regulations is to maintain green space.

The committee determined that the driveway/parking regulation alternative was not advisable and concluded its work on this topic by reviewing the LUC's July 2009 recommendations regarding the 35% rule.

> **Committee recommendation:** The committee voted to uphold all of the recommendations set forth in Attachment 1 of the July 2009 LUC report, except #7 (the driveway/parking regulation alternative to the 35% rule) which they recommend not be pursued. Specifically:
>
> a) Adopt the following proposed changes in terminology and re-definitions.
>
> 1) Replace the term ***front yard*** in Section 4-3(e) with the term ***front surface area*** and define the terms ***front surface area*** and ***front façade*** as follows,

Front surface area is the area bounded by the front lot line (versus the street as currently erroneously shown in the diagrams in the Code), *the side lot lines, and the perimeter of the front façade of the house.*

Front façade is the exterior face of a building which is adjacent to the front building restriction line.

2) Replace the term maximum ***non-vegetative surface area*** with the term maximum ***surfaced area***, and define ***surfaced area*** (modification of the proposed County definition in ZTA No. 09-03) as,

Surfaced area is the land where the natural surface has been altered by gravel, stone, brick, concrete, asphalt, or any other material.

3) Modify the current definition of ***driveway*** as follows:

Driveway: A surfaced area in the front yard that provides vehicular ingress to and egress from a property.

Note, use of the term ***front yard*** in Section 4-3(e), is inappropriate because it does not account for the many house configurations where the front wall plane is articulated, and as a result, some land area that should be included in the "front yard" surface area is not currently included.

Determining where to draw the line between the side yard and the "front yard" when designating the area to be included in the ***front surface area*** is complicated if there are side bump-outs and articulated front facades. The LUC proposed that this determination could be simplified by using the following rule (in an interpretation): "If the distance from the side bump-out to the front corner of the building closest to the side yard is greater than the width of the bump-out, then the area between the front corner and the bump-out is side yard, not a front yard. Refer to Annex 1 of Attachment 1 in the July 2009 report.

b) Delete the diagrams in Section 4-3(e) of the existing code and add the diagrams in Annex 1 of Attachment 1 of the July 2009 LUC report to the administrative interpretation. The diagrams in the code showing the application of the 35% rule must be deleted because they incorrectly show the front yard measured to the street, which includes the public right of way (but should not).

c) Require a permit for all front yard surface area improvements, including but not limited to front yard leadwalks, walkways, patios, steps/stairs, walls, surfaced areas (for any purpose). The Town already requires a permit for a driveway. Front yard surface area improvements should require a permit in order to make administration of the 35% rule possible. Another reason to require a permit for driveways and lead walks is that they usually impact the public right of way and the Town does require a permit to disrupt the public right-of-way. As many residents are unaware that part of their front yard is in the public-right-of-way, they may not realize they need a right-of-way disturbance permit. Requiring a permit for leadwalks will help alleviate this problem.

d) Grandfather existing driveways, leadwalks, walkways, steps/stairs and other surfaced areas with respect to the 35% rule. Allow their replacement in-kind subject to issuance of a permit. Replacement in-kind should be defined to allow for a narrow driveway to be replaced up to the width permitted by the Town Code (without being subject to the 35% rule limitation). Similarly, replacement in-kind of leadwalks, walkways, and steps/stairs should be defined so as to allow substandard leadwalks, walkways, and steps/stairs to be replaced so they meet appropriate standards (without being subject to the 35% limitation).

e) Modify the code to allow nonconforming narrow lots (<60 feet width) to install, by right, a 10' wide drivewayto the garage or to the outermost perimeter of the front of the house, and to install, by right, one walkway or leadwalk to the sidewalk or curb and one walkway or leadwalk to the driveway subject to the permit process. These improvements should not be subject to the 35% rule provided they do not exceed appropriate width standards, and are reasonably direct (minimum length to ahieve objective).

f) Relax the survey requirements set for driveways, leadwalks, walkways, and steps/stairs. For replacement in-kind of driveways, leadwalks, walkways, steps/stairs do not require a survey accurate to 1", unless the driveway, leadwalk, walkway, steps/stairs is close to the property line and is being widened with the new surfaced area placed closer to the property line than the original surfaced area. Do not require a survey accurate to 1" for new leadwalks, walkways, and steps/stairs if they are not close to a property line. Surveys accurate to 1' should suffice in most circumstances. A new driveway along the property line should require a survey accurate to 1".

g) Make the 35% rule applicable to both front yards of corner lots because both are highly visible to the public and directly impact the Town's goal of maintaining green space in all front yards.

The "35% rule" Supporting Documents

*** (Staff Note)- The attached illustrations have not been updated to reflect the use of the term "front façade" or reflect the recommendation that the 35% front surfaced area rule be applied to all front yards of corner lots.*

Attachment 1 –July 2009 LUC Memo

Analysis and Recommendations for 35% *Maximum Nonvegetative Surface Area Rule*

1. The definition of ***front yard*** as it applies to Section 4-3(e), ***maximum non-vegetative surface area***, is inappropriate for two reasons. First, the diagrams in the code describing the application of the 35% rule,incorrectly show the front yard measured to the street, which includes the public right of way (but should not). Second, it does not account for the many house configurations where the front wall plane is articulated, and as a result, some land area that should be included in the "front yard" surface area is not currently included. To correct these problems, the LUC proposes replacement of the term "front yard" in the ordinance with a new term, "front surface area". Our assessment found the impact of this change on conforming properties (e.g. a 60'x 120'lot with 25' established building line) to be minimal, in that this would permit a 10' driveway to the front of a new house and a 3' walkway to the front lot line. See paragraph 5 below for recommendations that will address existing homes and non-conforming lots.

We recommend a different term, ***front surface area*** *to replace* ***front yard.*** The LUC has drafted the following definition of ***front surface*****:**

> *The front surface area is the area bounded by the front lot line* (versus the street as currently shown in the diagrams),
> *the side lot lines, and the perimeter of the front façade of the house.*

The following definition of "front facade" will also need to be added :

> *The front façade is the exterior face of a building which is adjacent to the front building restriction line. For corner lots, the front façade is determined by the mailing address at the time of permitting.*

We recommend that the term ***maximum non-vegetative surface area***, be replaced with ***maximum surfaced area***, and that a modified version of the proposed County definition of surfaced area (see Zoning Text Amendment No: 09-03) be adopted.

> *The surfaced area is the land where the natural surface has been altered by gravel, stone, brick, concrete asphalt, or any other material.*

We recommend that the diagrams included in the existing ordinance be deleted and the new diagrams in Annex 1 be adopted as part of administrative interpretations.

2. The LUC notes that determining where to draw the line between the side yard and the front yard when determining the area to be included in the front surface area is complicated when there are side bump-outs and articulated front facades. The committee proposes that this determination could be simplified using a proportion as follows:

If the distance from the bump out to the front corner closest to the side yard is greater than the width of the bump out, then it is a side yard, not a front yard. Refer to Annex 1.

3. All front surface area improvements should require a permit in order to administer the 35% rule. Otherwise this rule will be unenforceable. Accordingly, to properly and effectively administer Section 4-3(e) the LUC recommends that the Town should require a permit for all front surface area improvements including but not limited to front yard leadwalks, walkways and surfaced areas (for any purpose).

We also recommend that the definition of driveway be modified as follows:

Driveway: A surfaced area in the front yard that provides vehicular ingress to and egress from a property.

The 35% rule should be interpreted so as to place an upper limit on front surface area improvements and be administered as an element of the permitting process versus as separate approval/ permitting process.

4. a) Existing driveways, leadwalks, walkways and other surfaced areas should be grandfathered with respect to the 35% rule and may be replaced in-kind subject to permit. Replacement-in kind should be defined to allow for a narrow driveway to be replaced up to the width permitted by the Town Code, and should not be subject to the 35% rule limitation.

b) Similarly, replacement in-kind of leadwalks, walkways and steps/stairs should be defined so as to allow for substandard leadwalks, walkways and steps/stairs to be replaced to meet appropriate standards, and should not be subject to the 35% rule.

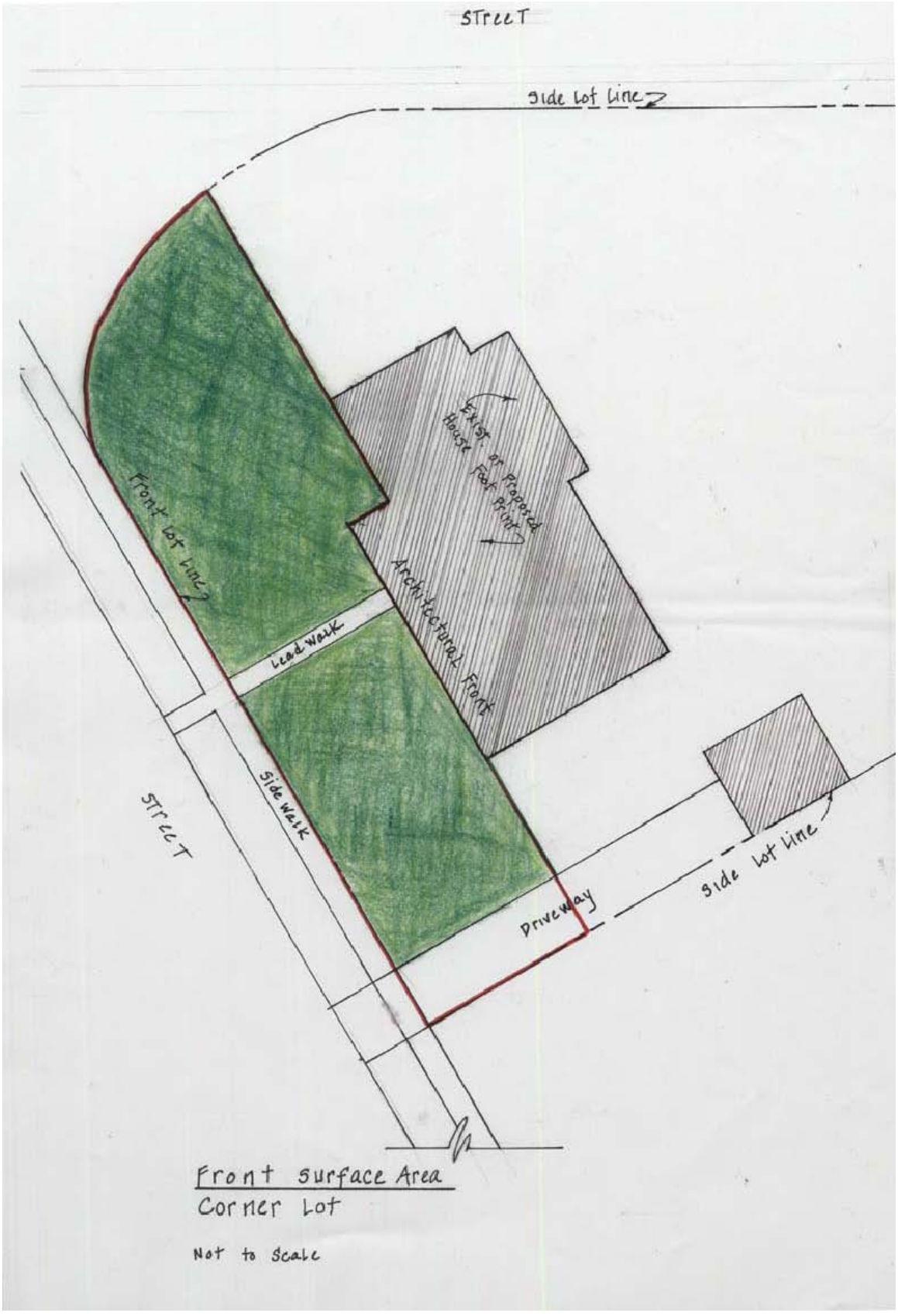
c) Non-conforming narrow lots (<60' width) may, by right install a 10' driveway to the garage or outermost perimeter of the front of the house and install, by right, one walkway or leadwalks to the curb or sidewalk and one walkway or leadwalk to the driveway subject to the permit process. These improvements should not be subject to the 35% rule.

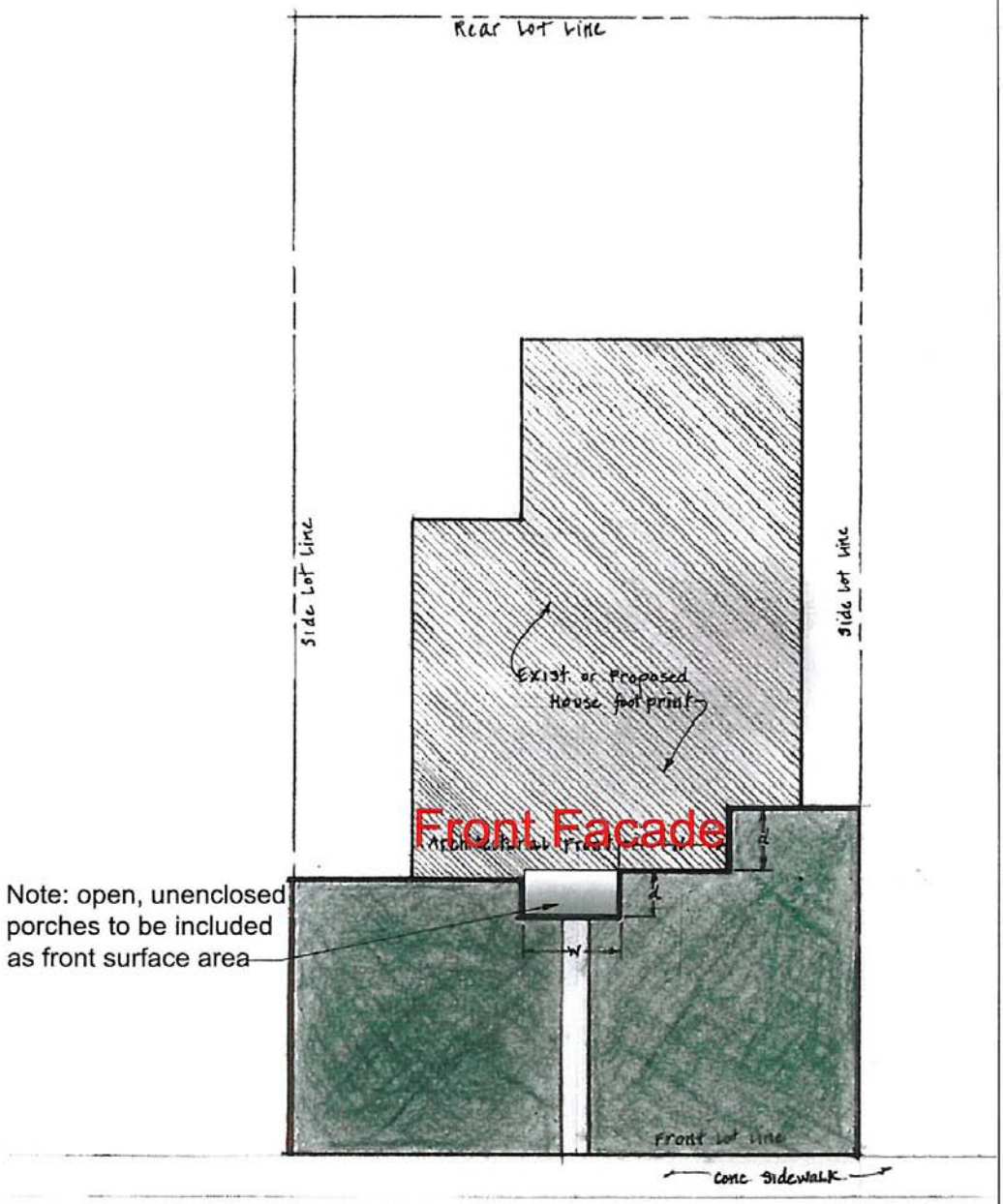
5. The LUC recommends that the Council not require a survey accurate to 1" for approval of driveways (except driveways that are near the property line), leadwalks, walkways and pads. Surveys accurate to 1' should suffice in most circumstances.. A new driveway along the property line should require a 1" survey.

6. The LUC also suggests that the Council reconsider the limitation of the 35% rule to a single front on corner lots. In the spirit of the initial conception of maintaining green space, the 35% rule should apply to both front yards of a corner lot.

7. The LUC examined an alternative to the 35% rule. An option could be to prohibit front yard parking in any area other than the approved driveway (per the revised definition as proposed in this memo), as surfaced areas adjacent to a driveway used for parking, and curves or bends to a driveway that increase the width of a driveway above 10' are prohibited. This could obviate the need for the permitting of walkways, leadwalks and other surfaced areas. However, this could be difficult to enforce. The LUC found that some provisions of the Town's parking code (Chapter 15) are not enforced. Should the Council decide to pursue this option, the enforcement issues would need to be addressed. The LUC respectfully suggests that the Public Services committee review Chapter 15 with an eye toward eliminating unenforced or unenforceable requirements or to initiate or investigate other actions as appropriate.

Annex 1


Street
Side lot line
Exist. or Proposed House Foot Print
Front lot line
Lead walk
Architectural Front
Side walk
Street
Driveway
Side lot line
Front surface Area
Corner Lot
Not to scale



"Front Surface Area"
The area within the front façade articulations
where width (W) > depth (d)

Not to scale

"Front Surface Area"
The area within the front façade articulations where width (W) > depth (d)

Not to scale

3. Article III, Fences, Walls, Hedges, etc. and the public right of way. - LUC June 18, 2010

Article III has a different organization than Article I. It begins with a section on penalties, followed by sections on variances and appeals. The code pertaining to walls, fences, hedges,, and the public right of way appear at the end of the article. The committee thought that the regulations about fences, hedges, walls, and the public right-of-way should be moved forward in the article, and the sections on penalties, variances and appeals should be moved to the end

The Town regulations pertaining to the public right of way are confusing, incomplete, and at times contradictory and even incorrect. The LUC has reviewed and examined them and has a number of specific recommendations for modifications. The committee did not, however, come up with a definition of "disturbance of the public right of way" . It suggests that Town staff together with the Town attorney draft a definition and add it to the code.

Many of the regulations pertaining to the public right of way are in Article III Fences, Walls, Hedges, ETC.

a) Section 4-54 Public property devoted to private use.

1) As noted in the Housekeeping Changes presented at the September 23, 2009 work session, the description of public property in the first sentence of this section is incomplete because it does not include the public property between the sidewalk and the curb. Additional phrasing should be inserted in the first sentence: Mr. Podolsky is working on this.

2) Insert additional wording into the last sentence of 4-54, "provided that this usage does not violate the provisions of this article",

"The town, by this article, grants to such abutting property owners , their successors, assigns, and occupants so using this area (LUC notation – for private use), a license to continue to use such area, **provided that this usage does not violate the provisions of this article** and provided that this license may be revoked at any time by the town in accordance with the provisions of this article.

3) Consider moving 4-55 (c) to 4-54. Sec 4-55 (c) deals with the Town's right to revoke the license to use the public right-of –way and therefore seems to fit better in 4-53. Add to the list of items that must be removed from the public right-of-way should the Town revoke the license to use it, such underground items as invisible dog fences, underground sprinkler systems, etc.

b) Revise 4-55 as follows:

1) Re-title 4-55 to read: "Structures, walls, fences, earth berms trees, hedges, shrubbery and other plant growth, surface area improvements, invisible dog

fences, underground sprinkler systems". Alternatively, come up with a title such as "Improvements in the public right-of-way".

2) Separate possible uses of the public right-of-way into classes:
   - Forbidden uses
   - Allowed uses that require a permit
   - Allowed uses that do not require a permit
   - Grandfathered uses

3) Forbidden uses.

   No structure, wall, fence, earth berms, tree, hedge, shrubbery, shall be placed on public property devoted to private use.

4) Allowed uses that require a permit

   Invisible dog fences and underground sprinkler systems provided that they are set in 2 feet from the public sidewalk, or in the absence of a public sidewalk, set in 2 feet from the curb.
   Pavers, provided they are not placed too close to trees and provided the minimum number is used (for example to extend a leadwalk to the street). .

5) Allowed uses that do not require a permit

   Low-growing plants such as grass, ground cover, flowers, and similar plantings are permitted on public right-of-way devoted to private use.

6) Grandfathered uses
   Structures, wall, fences, trees, hedges, shrubbery, and other forms of plant growth that are located on public property devoted to private use as of July 13, 2007, may be maintained, but not enlarged, provided that they do not:…

   Add that the town manager shall determine whether there is compliance with the provisions of this section (as in 4-56 (c)).

7) In 4-55 (b) (1) and in 4-56 there are references to public "streets". These references are inconsistent. Sometimes the term "roadways" is used, at other times "road", at other times "streets, avenues, or roadways". This should be made consistent.

c) Revise 4-56 as follows:

1) Revise the title so it is the same as the tile for 4-55 except it ends in "on private property".

2) Currently, 4-55 (a) requires that all plant growth on private property be set back two feet from the public right of way. Clearly, this is not the intent; rather the intent was to set large plant growth back from streets and sidewalks by two feet.

The list of plants is also incomplete. The committee recommends revising to read,

> Sec 4-56 (a) Trees, hedges, shrubbery, or any other forms of plant growth except low-growing grass, ground cover, flowers, and similar plantings located on private property shall be set back two (2) feet from the public right of way.

3) Sec 4-56 (d) is extremely confusing and should be reworded so its meaning is clear. For example, in the first clause of the first sentence,

> "No person shall erect any fence, wall, earth berm, tree, hedge, or other form of plant growth (LUC note, on private property) along any sidewalk, street, avenue, or roadway, without first obtaining a permit".

What does "along any sidewalk" mean? And again, as in 4-56 (a) it appears that low-growing plant growth is also prohibited. The second clause of the first sentence prohibits any other person from being allowed to erect those items "along or parallel to any sidewalk, street, avenue, or roadway" (no mention of a permit).

Supporting Documents - None

4. Housekeeping code changes - LUC June 18, 2010

a) Alternate term for 'Front Building Line': Section 4-5(h)) mandates that a front-loading garage must be set back or set forward by a minimum of three feet from the ***front building line*** of the main building. But the *front building line* is defined to be "a line extending from property line to property line at the outermost wall of the building". Therefore, by definition, the garage can never be in front of the front building line because if the garage is set forward from the rest of the front wall plane of the house, the building line is also set forward. Thus, new wording was needed. Finding alternative wording was tricky because the front of the house may have other articulations besides the garage. The purpose of the garage forward/back regulation is to break up the front wall plane of the house to reduce visual mass. Stipulating that the garage be set forward of or backward from the portion of the front wall of the house immediately adjacent to the garage is essential, but it is not essential that the 3 foot articulation be maintained across the entire front of the house. The committee concluded that the adjacent wall section, from which the garage is set forward or back, should be at least three feet in length.

Committee recommendation: Replace ***front building line*** in 4-5(h) with *adjacent* ***front wall plane of at least three feet in width****.* Thus, 4.5(h would read "A front-loading garage shall be set back or set forward a minimum of three (3) feet from the adjacent front wall plane of the main building (the adjacent section of wall must be at least three feet in width)."

b) Sections 4-2 (b)(6), 4-11 (b), and 4-53 are contradictory about when an applicant may file a Town building permit application.

> Sec 4-2 (b)(6) Subject to the requirements of this subsection, a town building permit application may be filed at any time; however, no town building permit shall be issued unless and until a county building permit for the same work has been issued and the applicant has held a site management meeting, if required by subsection (c) below.
>
> Sec 4-11 (b) Nothing in this chapter shall be construed to relieve any person from the requirement of first obtaining a building permit from the county department of environmental protection or its successor agencies prior to applying for a town building permit.
>
> Sec 4-53 All applications for a fence, wall, eath berm, hedge, tree, or other forms of plant growth permit shall be made to the town manager or designee after first obtaining all applicable permits from the county.

The current administrative practice allows for the submission of a Town building permit application at any time (following 4-2 (b)(6)). This seems desirable particularly given the requirements of the pre-permit application regulations.

Committee recommendation: Reword 4-11 (b) and 4-53 as follows:

Sec 4-11 (b) Nothing in this chapter shall be construed to relieve any person from the requirement of ~~first~~ obtaining a building permit from the county department of ~~environmental protection~~ ***permitting services*** or its successor agencies when required. ~~prior to applying for a town building permit.~~

Sec 4-53 All applications for a fence, wall, earth berm, hedge, tree, or other forms of plant growth permit shall be made to the town manager or designee at any time; however, no town permit shall be issued unless and until all applicable county permits for the same work have been issued ~~after first obtaining all applicable permits from the county~~.

c) **Committee recommendation**: In 4-8 (d)(2), the word "pubic" should be corrected to read "public".

d) **Committee recommendation**: Correct the code reference in Section 4-5(b)(3)a. from (4-4)(b)(1) to (4-4)(a)(1).

e) 4-4 (b)(2)(3) Requires at least 70% of the exterior walls to be retained in order to continue a wall that is more than 7 feet from a side lot line but does not conform to the Town's current side setbacks. Is the intent that this be a linear footage calculation or an area calculation? **(Note: Needs recommendation from Council).**

f) **Handicapped access ramps**. The Town Code does not currently address projections required for handicapped access. Montgomery County's Zoning Code Sec. 59-B-7.1 exempts these structures from zoning regulations as long as they do not exceed the minimum design specifications in the Maryland Accessibility Code and Montgomery County Building Code.

County Code Sec. 59-B-7.1. Accessibility Improvement.
An accessibility improvement is not subject to setback, or lot coverage limitations if the size of the accessibility improvement does not exceed the minimum design specifications in the Maryland Accessibility Code and Montgomery County Building Code.

Committee recommendation: The Town should follow the County's regulation and adopt the same standard so that the Town can grant a permit for these structures if a County permit was issued, regardless of setback. In most cases, construction of accessibility improvements will violate setback regulations and in most cases, the affected resident would not be able to obtain a variance because variances are not granted on the basis of personal hardship. The committee recommends adopting the county regulation but adding a stipulation that the improvement should comply, to the extent that is feasible, with setback, tree, and storm water regulations:

An accessibility improvement is not subject to setback limitations if the size of the accessibility improvement does not exceed the minimum design specifications in the Maryland Accessibility Code and Montgomery County Building Code, complies as much as is feasible with the town setback, tree, and

water management regulations, and a county permit has been obtained for construction of the improvement.

g) **Demolition of accessory building**s. Town code requires a preliminary plan and a pre-permit application consultation prior to issuing a permit when 50% or more of the exterior walls of any structure, including accessory buildings, are to be demolished

> Sec 4-2 (b) (1) a. (3): A preliminary plan shall be filed with the town manager before a person may file a building permit for: c) The demolition of more than fifty (50) percent of the exterior walls of a structure (measured in linear feet) and including only that area which is entirely above ground).

The original intent was that this apply only to demolition of a main building, not to demolition of accessory buildings. The purpose of the pre-permit application consultation is to provide a forum for dialogue about a major construction project. When a major project is proposed, there is the potential that modifications of the original proposal may result from the meeting, although modifications cannot be mandated. The committee discussed the pros and cons of requiring preliminary plans and pre-application consultation meetings for the demolition of garages (particularly when there is a shared driveway or a shared garage). The committee noted that the removal of a garage, shed (or part thereof) generally has a relatively minor impact on the abutting neighbors, this is not a case where modifications are likely to be relevant, reconstruction of any accessory building would not trigger the process because they typically are well under the 500 square foot threshold, and neighbors will be aware of the demolition because they are notified prior to issuance of a permit. Therefore requiring a preliminary plan and pre-permit application consultation for demolition of accessory structures seems an unnecessary burden on residents and on Town staff. Note that a permit is still required before accessory structures can be demolished.

Committee recommendation: Substitute ***main building*** for ***structure*** in this section of code.

h) **Definition of rear yard**: A definition of “rear yard” is needed because accessory buildings are permitted only in rear yards. The committee decided that the County definition of rear yard is adequate for interior lots but not for corner lots.

> Rear yard: Open space extending across the full width of lot between the rear line of the lot and the nearest line of the building, porch or projection thereof.

The committee proposes the following definition of rear yard for corner lots:

> For a corner lot that adjoins another corner lot (no interior lots on the street they both border) the rear lot line is their shared lot line. For a corner lot that adjoins interior lots on both streets, the rear lot line is whichever adjoining lot line is so specified at the time of permitting. The rear yard for a corner lot is the area bordered by the rear lot line, the rear façade of the house, the other adjoining lot line, and the line from the rear street-side corner of the house to the rear lot line.

Supporting Documents - None

5. Invisible dog fences and underground sprinkler systems.

As part of the public right-of-way regulations review, the committee discussed the pros and cons of the Town regulating invisible dog fences and underground sprinkler systems located in front yards. The Town attorney, David Podolsky, stated that other communities are debating adding regulations about these and advised that the Town should consider doing so and should consider requiring a permit to install them. Invisible dog fences and underground sprinkler systems installe din the front yard frequently end up partially in the public right-of-way, both because people use the public right of way for private uses and because they often do not realize where their property ends and the public property begins. If the Town or a utility company works in the public right-of-way (installing a street tree, fixing a utility line etc.) the work could result in damage to the fence or sprinkler system. While the Town and utility company would not be liable for the damage, this leads to bad feelings. If the Town knew the systems were there they could warn the resident in advance that work would be occurring and give them an opportunity to remove/relocate that portion of the system. In addition, if a permit is required for installation of these systems, it provides the Town with an opportunity to educate the resident about rules regarding use of the public right-of-way, particularly that the Town has the right to revoke that use at any time and the resident then has the responsibility to remove the systems from the public right-of-way.

The committee also notes that there are public safety elements that should be considered. Currently, with no regulations in place about the location of invisible dog fences and underground sprinkler systems, residents can locate them right up against the public sidewalks and/or curbs. With a dog fence, this would mean that the dog could come up to within striking distance of people passing along the sidewalk/curb. Regulating their location could require them to be set back from the sidewalk/curb. Additionally, if a permit is required, one of the permit conditions could be to call Miss Utility to identify the location of underground gass, water, and electric lines. This could prevent potentially dangerous damage to the utility lines during installation of the systems.

The committee also notes that requiring a permit before installation would enable the Town to check that the installation will not damage any canopy trees on private property or any street trees and does not interfere with any front yard storm water management system that may be in place.

Committee recommendation: The committee recommends that the Town require a permit for the installation of invisible dog fences and underground sprinkler systems, that these types of systems be listed in 4-55 as an allowed by permit use of the public right-of way, that they be allowed if set back from public sidewalks and curbs by at least 2 feet, and that conditions of the permit be that Miss Utility be called to identify utility lines and that the placement of the systems not interfere with canopy trees, street trees, or storm water management systems.

Supporting documentation: None

6. Developmental nonconformities - LUC June 18, 2010

The committee was asked to consider whether or not the Town should allow replacement of developmental nonconformities. A question has been raised about whether the current wording of the Town's building code permits replacement of developmental nonconformities by right or only maintenance/repair. The issue arose in the context of decks (at the rear of a house), stoops (at the front of a house), and bay windows (at the side of a house) that were nonconforming and were in such disrepair that the only way to "repair" them was to replace them. If these developmentally non-conforming structures are allowed to be replaced by right, a permit could be issued without the Town requiring a boundary survey, established building line calculation, and a variance hearing, all of which cost the applicant time and money. In some cases, the expense involved in obtaining /filing these documents exceeds the actual replacement cost of the structure. Because of the time and costs associated with these applications, the Town staff wants to ensure that the Town code is being enforced correctly. The Town attorney opined that the replacement of developmental non-conformities for buildings could be allowed under the code; however, applying that interpretation could lead to unintended consequences.

The committee discussed the issue extensively. The consensus at the conclusion of the discussion was that only the replacement of non-conforming structures that are "projections" (decks, stoops, bay windows, chimneys, etc.) should be allowed by right. Given the costs involved and the small size of these replacement projects, this seems reasonable. However, replacement of non-conforming structures that involves walls should not be allowed by right (except in the case of an act of God as already stated in the code). The reason for this distinction is that when a non-conforming house is torn down, the Town wants the new house to be conforming, they do not want a new house to replace it that is also nonconforming. This would indeed be an unintended consequence of the Town attorney's interpretation. The committee recommended that the code be clarified to permit repair/maintenance of structures in general but replacement only of projections

Developmental nonconformities – Supporting Documents

STAFF REPORT

TO: Land Use Committee/Town Council
FR: David Walton, Permitting and Code Enforcement Manager
RE: Developmental Nonconformities
DATE: June 14, 2010

Staff is asking for clarification on how to administer the sections of the Town building code relating to the repair or replacement of developmental nonconformities. A developmental nonconformity is an existing structure, which was lawful when established, but which no longer conforms to the requirements of the code (as a result of a code amendment).

Buildings
Section 4-7 of the code reads "A developmental nonconformity may be maintained, altered or repaired provided that it may not be enlarged beyond the dimensions that existed on February 22, 2006, except in accordance with this chapter."

The Town's attorney has provided an opinion (attached) that indicates that the replacement of developmental non-conformities for buildings could be allowed under the code; however, applying that interpretation to every developmental nonconformity may result in unintended consequences. The staff would like to clarify whether the attorney's interpretation reflects the intent of the Council, and what, if any, restrictions should be included in this interpretation.

This issue has specifically arisen in the context of appurtenant structures that are in such disrepair that the only way to "repair" them is to replace them. Examples include a failing stoop at the front of a house, a rotten wooden deck at the rear of a house, or a rotting bay window at the side of a house. The Town's larger setbacks have created an increased number of situations where an existing structure is non-conforming. From an administrative perspective, if some structures that are developmentally non-conforming are allowed to be replaced by right, a permit could be issued without the Town requiring a boundary survey, established building line calculation, and variance hearing, all of which cost an applicant time and money. In some cases, the expense involved in obtaining/filing these documents exceeds the actual replacement cost of the structure. Because of the cost and time associated with these applications, staff wants to ensure that the code is being enforced correctly.

If the attorney's interpretation is applied to all developmental nonconformities for buildings, then theoretically a house that doesn't meet the Town's current setback requirements could be replaced with a new house that doesn't meet the setback requirements as long as the nonconformity along any setback wasn't increased (staff doesn't believe this was intended).

The County doesn't specifically allow the replacement of nonconforming structures, but has a looser interpretation of its building code that allows for projections such as steps, stoops, etc. to be added or replaced on non-conforming buildings as long as the allowable projection does not extend beyond what would be allowed if the building conformed to the minimum setback.

For example, if a house has a front building line of 30 feet and an Established Building Line of 35 feet, the county would allow a porch to project 9 feet from the front of the house (the Town would only allow a 4 foot projection). In cases where the house is non-conforming to the 25 foot minimum

setback for the R-60 zone (say it was only 20 feet from the front property line), the County would allow a porch to encroach to 16 feet from the front property line (9 feet from the 25-foot minimum front setback). In this case the allowable projection would extend 4 feet beyond the front of the house. In all cases, the Town allows a porch to project a maximum of 9 feet from the Established Building Line, which tends to result in cases where no (or very little) projection is allowed, especially if the subject house is set forward of the adjacent houses.

Options:

- The Town can continue to disallow the construction of non-conforming replacement structures and require variances for all structures that do not meet the current setback requirements.
- The Town can allow the in-kind replacement of certain non-conforming appurtenant structures such as front stoops, porches, bay windows, and steps. Replacement of these structures would still require a county permit, so zoning checks would be done to ensure they meet the county minimum setback.
- The Town can follow the County's interpretation and use the front wall of an existing house instead of the established building line as the minimum front setback for new and replacement front projections (as long as it is setback at least 25' from the front property line). Similarly, the Town can look at following the County in regards to rear and side projections; however, these are trickier as the Town's setbacks for rear and side yards are not uniform.
- The Town can allow the in-kind replacement of all structures (including houses, accessory buildings, etc.), as long as they are not expanded in a way that increases the non-conformity (County zoning standards would apply).

6. Repair of front yard fences and walls - LUC June 18, 2010

Town code allows existing non-conforming fences, walls and hedges (in the front yard) to be maintained/repaired but not to be replaced. Town staff has adopted a policy by which one-third of the material of a fence/wall may be replaced during any given year. This policy has never been formally adopted and Town staff requests that a formal policy be adopted that allows them to distinguish between repair/replacement of fences and walls. The committee concurs and found the 1/3 rule reasonable and recommended that the policy be formally adopted.

Repair of front yard fences and walls – Supporting Documents

Draft - Administrative Interpretation

The Issue: What are the Town's regulations regarding the repair and replacement of fences and walls, including fences and walls that do not conform to the Town's building regulations?

From the Code:

- Unless a permit has been issued by the Town Manager, it shall be unlawful for any person to erect a fence or wall.

- Hedges, trees, fences, walls, earth berms, shrubbery, and any other forms of plant growth existing as of November 8, 1986 and not conforming to this article (chapter 4) shall be regarded as nonconforming hedges, trees, fences, walls and plant growth which may be continued if properly maintained. Nonconforming hedges, trees, fences, walls, earth berms, shrubbery and other forms of plant growth which are relocated or replaced shall comply with all provisions of this article.

Interpretation: All new and replacement fences and walls require a Town building permit. If the existing fence or wall is non-conforming and proposed for replacement, the Town requires an approved variance in addition to an approved building permit.

If a continuous section of a fence or wall measuring 15 feet or more in length is removed and intended to be replaced (new posts, supports, and pickets), that portion of the fence will be considered by the Town to be a new fence, and a building permit will be required. If the fence is non-conforming to the Town Code, a variance also will be required.

If repairs to a fence or wall do not involve replacing a continuous section longer than 15 feet, the Town will allow the repair and replacement of one-third of the materials of the non-conforming portion of a fence or wall per year without a permit. The one-third replacement threshold shall apply to all contiguous sections of a fence or wall.

Attachment A

Building Code Changes from the July 2009 LUC Report

1. The LUC proposed and the Town Council agreed to adopt a change in the computation of the rear setback for lots greater than 120' but less than 137' deep. The change corrects a problem in the calculation of the rear setback for these lots that results in the rear setback for these lots being greater than that for lots of 120' in depth.

   Supporting Documentation:

   Rear setbacks for interior lots with 120 to 137 foot depths, supporting documentation

   The rear setback of interior lots as stated in Section 4-4 (b) (3) of the Setback Ordinance has a minimum of 20 feet for lots 120 feet in depth or less. If the lot is greater than 120 feet in depth the minimum increases to 25 feet. This results in an abrupt increase of 5 feet between 120 and 121 feet. Some lots with depths greater than 120 feet can build homes with a smaller footprint then lots of 120 feet or less. This issue has been the subject of only one variance request since the ordinance was adopted more than three years ago.

   Recalling the original discussion of the Setback Committee, a number of the members argued for a minimum 25 foot rear setback while others were in favor of retaining the existing 20 foot minimum. The Council during its deliberations decided to strike a compromise and retain the 20 foot minimum for lots more than 100 feet in depth, but 120 feet or less. For lots more than 120 feet in depth, the Council set the minimum at 25 feet. That decision produced an abrupt increase in the rear setback from 120 feet to 121 feet.

   We recommend that the rear setback be calculated for each side lot line independently. (See Attachment 3) In addition, we recommend that a separate formula be applied to side lot lines greater than 120 feet, but 136 feet or less in length. For lots with sides within this range the rear setback would be the rear setback of a lot 120 feet in depth (34 feet) plus the length of the side in excess of 120 feet. The formula would read as follows:

   Rear Setback = 34 + (Length of Side Lot Line – 120)

   The other provisions of the rear setback would continue to apply to lots with side lot lines greater than 120 feet, but 136 feet or less in length.

   - The rear setback would be reduced by one foot for each foot that the established building line front setback exceeded 30 feet

   - In no event would the setback be less than 25 feet

We recommend that no change be made to the rear setback calculation for lots with a side lot line 120 feet or less. In addition, we recommend that no change be made to the rear setback calculation for lots with a side lot line of more than 136 feet.

In Table 2-1 the current rear setbacks for a rectangular lot with a 30 foot established building line are compared with the recommended approach. In each case the recommended approach produces a smaller rear setback by spreading the additional 5 feet of setback (difference between 20 feet and 25 feet) across 16 feet rather than having it abruptly introduced at 121 feet.

Side Lot Length	Current Rear Setback	Alternate Rear Setback
119	33.3	
120	34.0	
121	39.7	35
122	40.4	36
123	41.1	37
124	41.8	38
125	42.5	39
126	43.2	40
127	43.9	41
128	44.6	42
129	45.3	43
130	46	44
131	46.7	45
132	47.4	46
133	48.1	47
134	48.8	48
135	49.5	49
136	50.2	50
137	50.9	

A graph of the of the current rear setback calculation Chart 2-1 shows the abrupt increase in the rear setback between 120 feet and 121 feet.

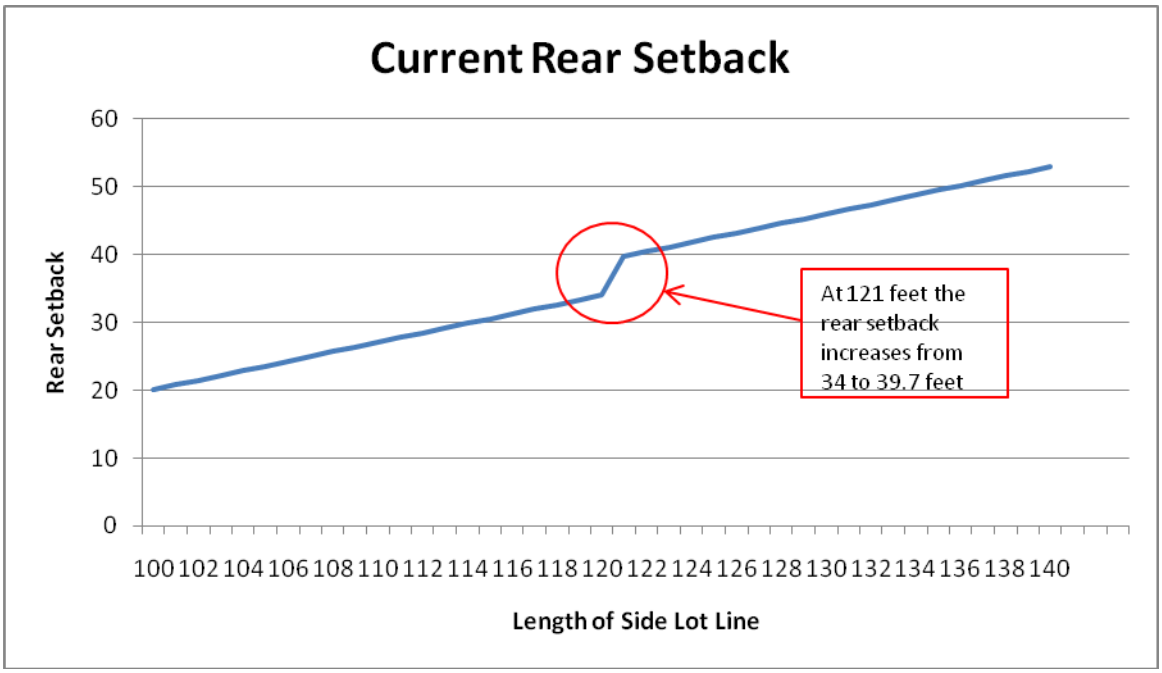


Chart 2-1

The recommended calculation in Chart 2-2 demonstrates that the additional 5 foot minimum is spread across 16 feet producing a smoothing of the line and removing the abrupt change from 120 feet to 121 feet.

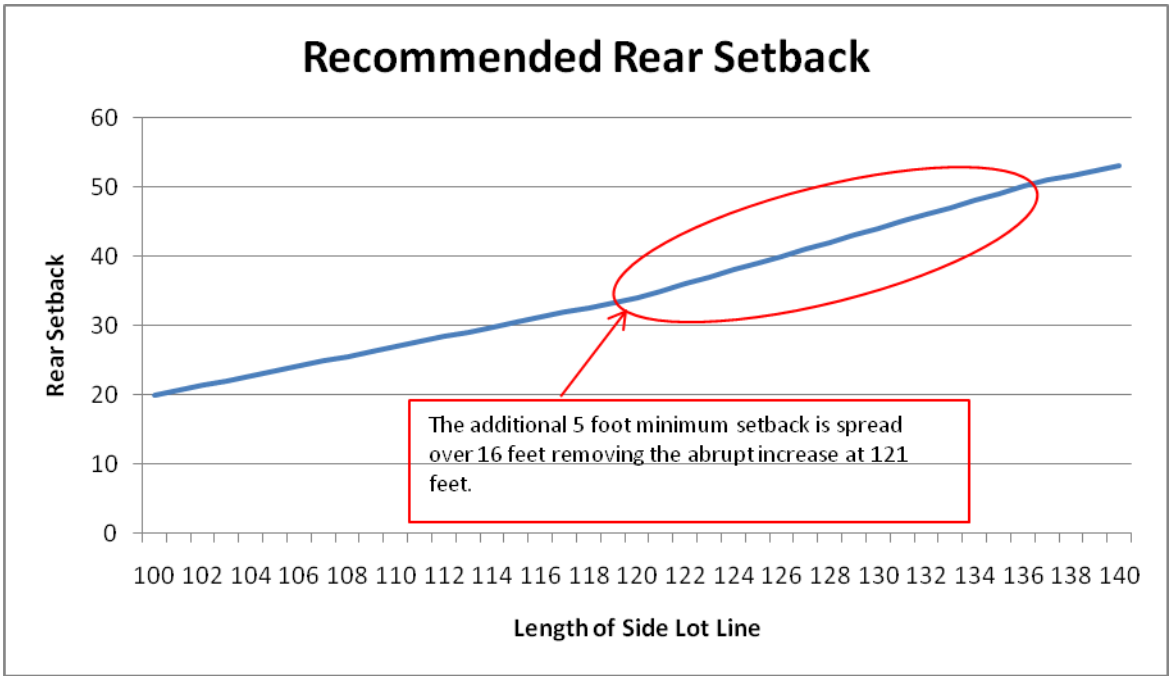


Chart 2-2

Based on data supplied to the Setback Committed 227 lots have at least one side lot line with a length that is greater than 120 feet, but 136 feet or less. Using that data approximately 22% of the homes in the town would be impacted by this change.

2. The Town Code does not properly grandfather the FAR ordinance. The current language refers to the date of the setbacks ordinance, not the FAR ordinance. **Accepted Correction**: Amend 4-7 to read:

   Sec 4-7. Developmental nonconformities.
   A developmental nonconformity may be maintained, altered, or repaired provided that it may not be enlarged beyond the dimensions that existed on May 17, 2008, except in accordance with this chapter.

   In view of the recent discussions about whether or not developmental nonconformities may be replaced, the above section of code requires some additional alterations.

3. **Front wall replacement**. The LUC recommended and the Town Council agreed to adopt the following change to the Town code regarding replacement of existing front yard walls:

   Existing front yard wall replacement in like kind material, dimension, and function shal be permitted by right subject to the conditions of any other required building permit, including but not limited to Montgomery County Department of Permitting Services.

   The LUC recommended the following permit application submittal requirements:

- Application fee
- House location survey or plat showing location of existing retaining wall
- Description of wall, including length, height, and materials
- Signed Building Permit Conditions..

See Attachment 5 in the July 2009 report for the discussion.

4. Front yard fence replacement. The LUC recommended that front yard fence replacement only be allowed subject to the following criteria:
   - Minimum size necessary to accomplish the objective
   - Attention paid to neighborhood line of sight
   - Maximum height of 36 inches
   - Minimum fenestration of 50%
   - Fencing not permitted to encroach into public right of way.
   - Chain link fencing not permitted.

   See Attachment 6 of the July 2009 report for the discussion.

Attachment B

Housekeeping Code Changes
Presented to the Town Council by the Land Use Committee
September 23, 2009

The following "housekeeping Code Changes" were identified by Dave Walton and reviewed and discussed by the Land Use Committee (LUC) in September 2009. Committee recommendations for their resolution were presented to the Town Council at the September 23, 2009 work session. The Council resolved most of the proposed code changes at that work session and referred a few back to the LUC for further discussion. The list below shows the items that were resolved at the work session.

1. The definitions of **Established Building Height** (EBH) and **Established Building Line** (EBL) need to be cleaned up. There are errors in the wording and some of the subsections differ from one to the other when they should be worded exactly the same.
    a. EBH (a): Are within three hundred (300) feet of each side lot line of the lot in question (excluding corner lots),
    EBL (a) (1) : Are within three hundred (300) feet of the side property line of the proposed construction site (excluding corner lots),
    Correction: Replace "*the side property line of the proposed construction site*" in the EBL definition with "*each side lot line of the lot in question*" from the EBH definition.

    b. EBH (e): Are not unlawfully constructed or constructed pursuant to a variance, EBL (1) (6) and (1) (7): (6) Were constructed pursuant to a valid building permit and (7) Were constructed pursuant to a variance.
    EBH (e) contains two conditions; the first clause has a double negative and the two clauses are joined by "or" rather than by "nor" (as it should be). "Not" was left out of EBL (1) (7).
    Correction: Insert "not" into EBL (1) (7) so it reads "Were **not** constructed pursuant to a variance". Delete EBH (e) and substitute EBL(1) (6) and EBL (1) (7) (so there are now two items in EBH).

2. The definition of "**attic**" includes a definition of "**structural headroom**." "Structural headroom" also appears separately in the code (and needs to remain as a separate definition because it is used in several places in the code).
    Correction: Remove the definition of structural headroom from the attic definition (the entire last sentence in the attic definition).

3. The last sentence in the definition of "**Building Height**" is unnecessary and confusing as it refers to "stories", "In all cases building height is limited to the specified maximum number of feet and the number of stories within the specified maximum height in feet".
    Correction: Delete the last sentence.

4. The requirement that accessory buildings be built in the rear yard appears twice in the code, once in 4-4 (e) and again in 4-5. Section 4-4 is the section devoted to rules pertaining to location of buildings, but section 4-5 is the section devoted to rules

pertaining to accessory buildings. Currently, the setback rules for accessory buildings are in Section 4-5 rather than in Section 4-4. **Correction**: For ease of reference, consolidate rules pertaining to accessory buildings in Section 4-5. Remove the accessory building location rule from 4-4 (replace it with a reference to 4-5, such as "Set forth under Section 4-5 ( ) of this chapter").

5. The height regulations for accessory buildings are currently only in Section 4-3 (the section pertaining to Building Height) in 4-3 (b) (2). Because most regulations pertaining to accessory buildings are in Section 4-5, the lack of height regulations in 4-5 may mislead some people who will not realize there are pertinent height regulations.
   Correction: Remove the accessory building height rule from 4-3 (b) (2) (replace it with a reference to 4-5, such as "Set forth under Section 4-5 ( ) of this chapter") and move it to Section 4-5.

6. In some places in the code the term "**accessory building**" is used whereas in other places "**garages and accessory buildings**" is used.
   Correction:: Replace "garages and accessory buildings" with "accessory buildings".
   .
7. Section 4-6 which stipulates that a permit is required for a dumpster is redundant with 4-2 Building Permits. This is redundant and confusing.
   Correction: Remove the dumpster permit rule from Section 4-6 and reserve this section for future use.

8. Section 4-54 relates to public property devoted to private use. As currently worded, public property between the street and a public sidewalk has been accidentally omitted.
   Correction: Reword this rule to include the public property between a street and the public sidewalk. The Town attorney will draft appropriate language.