

Public Hearing Notice

The Clarke County Board of Supervisors will conduct three public hearings in the Berryville Clarke County Government Center Main Meeting Room, 101 Chalmers Court, 2nd Floor, Berryville, VA, on Tuesday, September 19, 2023, at 6:30 pm, or as soon thereafter as the matter may be heard, to hear public comment on the following:

PH 2023-08: (TA23-02) Maximum Lot Size Exception Regulations. Proposed text amendment to amend Section 6.2.6C (Maximum Lot Size Exception (MLSE) – Review Criteria and Regulations) of the Zoning Ordinance. The amendment clarifies that a MLSE can be granted for a lot containing a dwelling existing on that lot prior to October 17, 1980 that was later demolished, and that a MLSE can be applied to any lot in a proposed subdivision. Additional changes are proposed for clarification purposes.

Information regarding the above matters is available to the public in Clarke County Administration and on the County website. Any person desiring to speak on the above matters should appear at the appointed time and place. Written copies of statements are requested but not required. Clarke County does not discriminate on the basis of handicapped status in admission to its programs and activities. Accommodations will be made for handicapped persons upon prior request.

Chris Boies – County Administrator

ZONING ORDINANCE TEXT AMENDMENT (TA-23-02)

Maximum Lot Size Exception Regulations

July 18, 2023 Board of Supervisors Meeting – SCHEDULE PUBLIC HEARING

STAFF REPORT – Department of Planning

The purpose of this staff report is to provide information to the Planning Commission and Board of Supervisors to assist them in reviewing this proposed ordinance amendment. It may be useful to members of the general public interested in this proposed amendment.

Description:

Proposed text amendment to amend Section 6.2.6C (Maximum Lot Size Exception (MLSE) – Review Criteria and Regulations) of the Zoning Ordinance. The amendment clarifies that a MLSE can be granted for a lot containing a dwelling existing on that lot prior to October 17, 1980 that was later demolished, and that a MLSE can be applied to any lot in a proposed subdivision. Additional changes are proposed for clarification purposes.

Requested Action:

Schedule public hearing for the Board’s August 15, 2023 meeting.

Background:

At the Planning Commission’s October 4, 2022 work session, Staff requested policy direction regarding maximum lot size exceptions (MLSEs) granted for having a dwelling existing prior to October 17, 1980 on the property. Specifically, Staff asked whether a MLSE can be granted for such a dwelling if it had previously been demolished and whether the lot size exception can be applied to any lot in a proposed subdivision. Commissioners answered yes to both policy questions.

The primary purpose of the proposed text amendment is to incorporate these interpretations into Zoning Ordinance Section 6.2.6C. A secondary purpose is to clarify the text in this section to make the regulations clearer and more straightforward to apply.

Proposed Text Amendment:

Below is a breakdown of the proposed changes to Section 6.2.6C including explanations for the edits. Structurally, new subsections 2-4 will list the different criteria in which a MLSE can be granted – lot containing a dwelling existing prior to October 17, 1980; lot in permanent conservation easement; and lot with low quality land. Current subsection 4 containing the recently-amended regulations on MLSE lots reduced in size by boundary line adjustment will be renumbered as subsection 5 but otherwise is not changed.

New Proposed Subsections 1 and 2

1. Procedures for maximum **average** lot size exceptions. A lot ~~or lots~~ may qualify for a maximum **average** lot size exception by meeting one of the following criteria ***described in subsections 2-4 below.***∴

2. ***Exception for dwelling existing prior to October 17, 1980. A lot with a dwelling that existed prior to October 17, 1980 and is recognized as a farmstead or tenant house per Section 3.4 may be subdivided with a maximum lot size exception. Dwellings in existence and taxed as such or with a building permit issued before October 17, 1980 may be located on a lot that exceeds the maximum area requirements.*** Such lots may be created so long as:
- a. ***Their size and location does not create low quality land characteristics as described in subsection 4 below*** on any other lots created as a result of the division, or
 - b. ***If the lots created has have zero dwelling unit rights remaining (excluding any lots for residential dwelling units that do not exceed the maximum area requirements).***

This exception shall not be applied more than once per lot existing on March 20, 2001 containing one or more such pre-1980 dwellings. ~~or;~~ ***The maximum lot size exception may be applied to any lot created in the subdivision.***

Staff Discussion:

The new first sentence added to subsection 2 states that a MLSE can be granted for a lot containing a dwelling existing on that lot prior to October 17, 1980 if it had previously been demolished:

A lot with a dwelling that existed prior to October 17, 1980 and is recognized as a farmstead or tenant house per Section 3.4 may be subdivided with a maximum lot size exception.

The new language clearly describes a qualifying dwelling as one that existed prior to October 17, 1980 and for sliding-scale zoning purposes is a dwelling that received an exception to the original dwelling unit right (DUR) allocation (Section 3.4 – Exceptions to Allocation). This replaces current language, “Dwellings in existence and taxed as such or with a building permit issued before October 17, 1980,” which can be interpreted as requiring the qualifying dwelling to be intact in order to be eligible for a MLSE. Under the new language, Staff can determine whether a dwelling meets this requirement by verifying it against the DUR allocation records and such dwelling would not be required to be intact. The new language would also allow a MLSE to be granted if the qualifying dwelling was demolished and a new dwelling was constructed in its place. Current language would specifically prohibit a MLSE in this situation.

The new sentence added to the end of subsection 2b states that a MLSE may be applied to any lot created in a subdivision and is not required to be used only for the lot on which the qualifying is or was located. Staff recommends that the current language in parentheses be deleted. It appears to reference a major subdivision in which multiple residential-size lots are created in addition to a MLSE lot. It is proposed for deletion as it is not necessary and potentially confusing.

Additional edits in subsections 1 and 2 are included for clarification purposes.

Changes to Subsection 3

3. **Exception for lot in permanent conservation easement.** *A lot may be created with a maximum lot size exception if the parent parcel* ~~The lot being divided, including without limitation any residual lot irrespective of area,~~ has been placed under an **permanent conservation** easement granted to the Clarke County Conservation Easement Authority, the Virginia Board of Historic Resources, the Virginia Outdoors Foundation, and/or any other entity authorized to hold an open-space easement pursuant to the **Code of Virginia Open-Space Land Act (Va. Code §10.1-1700 et seq.)** ~~and approved by the Clarke County Board of Supervisors,~~ and that ***Additional requirements include:***
 - a. ***All the*** lots in the ***proposed subdivision shall be*** ~~are~~ located in a manner consistent with the physiographic and/or historic characteristics of the property ***as recommended by the primary holder of the conservation easement.***
 - b. ~~As to requests for a maximum lot size exception based upon the land having been~~ ***For lots that were*** placed in an easement held or co-held by the Clarke County Conservation Easement Authority (recorded after November 19, 2013), said easement must have included the termination of at least one (1) dwelling unit right in order for the property to qualify for a maximum lot size exception under this paragraph. ~~;~~

Staff Discussion:

New language is added throughout subsection 3 for clarification purposes. The current first two sentences are confusing to read and would be replaced with language clearly stating that a lot may be created with a MLSE if the parent parcel is in permanent conservation easement. The word “permanent” is added to avoid extending the MLSE provisions to lots in conservation easement for a fixed term of years. The language “and approved by the Clarke County Board of Supervisors” would be deleted. This language is in reference to “any other entity authorized to hold an open-space easement pursuant to the Virginia Open-Space Land Act” – the Board does not have authority under State law to approve holders of conservation easements in the County.

Edits to subsections a and b are mainly editorial. New language is added to the end of subsection a to state that lot arrangement would be based on comments and recommendations from the easement holder. As a matter of practice, MLSE applications would be forwarded by Staff to the easement holder and any comments received regarding lot arrangement would be incorporated into Staff’s recommendation to the Commission. As it is currently written, the Commission would be responsible for reviewing the lot arrangement per this subsection without specific guidelines or standards to support a determination.

Changes to Subsection 4

4. **Exception for low quality land.** *A lot may be created with a maximum lot size exception if it is determined by the Planning Commission,* ~~prior to subdivision approval,~~ that the lot

to be subdivided is of sufficiently low quality *as described below* to justify using more than the maximum lot area of low quality land for a proposed lot.

- a. Low quality land characteristics. ~~Low quality land contains one or more of the following characteristics: The following are considered characteristics of low quality land that would permit maximum lot sizes for dwelling purposes in excess of the maximum lot size allowed by this section:~~
- Physical features or small size or irregular shape of potential residual lot such that efficient use of farm machinery would not be possible or that said land would be left to no useful purpose; or
 - Combination of physical features and setting such that the maximum lot size allowed in this section for a lot proposed in a minor or major subdivision is too small to accommodate a dwelling, drainfield, and well so as to meet the minimal applicable health standards and provided that no lot may be created or increased in area so as to exceed a maximum area of four acres. An application for a maximum lot size exception, submitted under this section, shall be accompanied by a written statement prepared by ~~the~~ a Virginia ~~Health~~ Department ~~of Health environmental specialist~~ or ~~an onsite soil evaluator (OSE) a professional soil scientist~~ (as defined in County Code Chapter 143, Septic Systems) stating why the proposed lot could not accommodate a dwelling, drainfield, and well meeting Virginia and Clarke County health standards within the maximum lot size allowed in this section. Lots proposed in a major subdivision are not eligible for a Maximum Lot Size Exception under this section; or
 - Land that is part of a lot where such land has been determined by the Zoning Administrator *not* to be ~~not~~ important farmland.
- b. Important farmland determination. ~~For the purpose of granting maximum lot size exceptions under this section, the dominant decision-making tool shall be The Clarke County Land Evaluation and Site Assessment (LESA) System, edition dated March 24, 1992, shall be used as the primary decision-making tool to evaluate maximum lot size exception requests under this subsection. This tool which~~ is maintained for public use, inspection and information in the Clarke County ~~Department of Planning Administrative Offices in Berryville, Virginia,~~ and is hereby incorporated into and made a part of this Ordinance as if fully set out herein. ~~The Zoning Administrator shall use the aforementioned LESA System to evaluate a maximum lot size exception.~~ A report on the result shall be forwarded to the Commission. The Commission shall designate as Important Farmland any lands with the following characteristics:

Lot Size	LESA Rating
Under 40 Acres	72% or More
40-129.99 Acres	68% or More
130 Acres or More	64% or More

In instances where the LESA score of a lot is within four points above or below the minimum LESA rating that qualifies a lot as Important Farmland, the Commission may grant or deny a maximum lot size exception, depending on the evidence presented indicating whether the subject land is important farmland. In these instances, the Commission may consider:

- The extent that the proposed lot exceeds the maximum lot size allowed in this section;
- Whether the LESA System accurately reflects the suitability of the subject lot for continuing agricultural use; and
- Factors reasonably related to agricultural suitability of the subject lot that are not appropriately addressed by the LESA System, such as physical features.

~~In instances where the lot being subdivided is 20 acres or larger, The maximum allowable lot size shall be determined using the following chart however, in any instance, the Commission may set a maximum lot size less than specified in the chart:~~

<i>LESA rating for important farmland</i>	<i>Maximum lot size</i>
<i>Within 4 points above or below minimum LESA rating, lot is 20 acres or larger</i>	<i>4 acres</i>
<i>Between 5 and 12 points below the minimum LESA rating, lot is 20 acres or larger</i>	<i>6 acres</i>
<i>12 or more points below the minimum LESA rating OR the lot is less than 20 acres</i>	<i>As determined by the Commission</i>

~~and the LESA score of a lot is within four points above or below the minimum LESA rating that qualifies a lot as Important Farmland, and the Commission grants a maximum lot size exception, the area of the proposed lot shall not exceed four acres. If the LESA score is between five and twelve points below the minimum LESA rating, the area of the proposed lot shall not exceed six acres. In instances where the LESA score of a lot is twelve or more points below the minimum LESA rating, or the lot being subdivided is less than 20 acres, the area of the proposed lot shall not exceed the acreage determined by the Commission. In any instance, the Commission may set a maximum area less than specified above.~~

Staff Discussion:

All of the proposed changes to this subsection are made to clarify the language and to update terminology that is out of date.

As noted previously, the only change to the regulations for boundary line adjustments of lots approved with a MLSE (current subsection 4) is the renumbering of the subsection to 5.

Planning Commission Recommendation:

Following a duly advertised public hearing on July 7, 2023, the Commission voted 7-0-4 (Dunning, Glover, Hunt, Staelin absent) to recommend adoption of the text amendment. No one spoke for or against the text amendment at the public hearing.

Staff Recommendation:

Staff has no outstanding concerns with the adoption of this text amendment and recommends the Board schedule public hearing for the August 15, 2023 meeting.

History:

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| May 15, 2022. | Ordinances Committee agreed by consensus to forward the proposed text amendment to the full Commission for consideration. |
| May 30, 2023. | Placed on the Commission’s Work Session agenda for initial discussion. |
| June 2, 2023. | Commission voted 8-0-3 (Glover, Ohrstrom, Staelin absent) to schedule public hearing for the July 7 Business Meeting. |
| July 7, 2023. | Commission voted 7-0-4 (Dunning, Glover, Hunt, Staelin absent) to recommend adoption of the text amendment |
| July 18, 2023. | Placed on the Board of Supervisors Meeting agenda to schedule public hearing. |

Ordinance Amendment Text (changes shown in bold italics with strikethroughs where necessary):

6.2.6 Maximum Lot Size Exception (MLSE)

C. Review Criteria and Regulations

1. Procedures for maximum **average** lot size exceptions. A lot ~~or lots~~ may qualify for a maximum **average** lot size exception by meeting one of the following criteria ***described in subsections 2-4 below.***

2. ***Exception for dwelling existing prior to October 17, 1980. A lot with a dwelling that existed prior to October 17, 1980 and is recognized as a farmstead or tenant house per Section 3.4 may be subdivided with a maximum lot size exception. Dwellings in existence and taxed as such or with a building permit issued before October 17, 1980 may be located on a lot that exceeds the maximum area requirements.*** Such lots may be created so long as:
 - a. ***Their size and location does not create low quality land characteristics as described in subsection 4 below*** on any other lots created as a result of the division, or
 - b. ***If the lots created has have zero dwelling unit rights remaining (excluding any lots for residential dwelling units that do not exceed the maximum area requirements).***

This exception shall not be applied more than once per lot existing on March 20, 2001 containing one or more such pre-1980 dwellings. ~~or;~~ ***The maximum lot size exception may be applied to any lot created in the subdivision.***

3. ***Exception for lot in permanent conservation easement. A lot may be created with a maximum lot size exception if the parent parcel*** ~~The lot being divided, including without limitation any residual lot irrespective of area,~~ has been placed under ~~an~~ ***permanent conservation*** easement granted to the Clarke County Conservation Easement Authority, the Virginia Board of Historic Resources, the Virginia Outdoors Foundation, and/or any other entity authorized to hold an open-space easement pursuant to the **Code of Virginia Open-Space Land Act (Va. Code §10.1-1700 et seq.)** ~~and approved by the Clarke County Board of Supervisors,~~ ***and that Additional requirements include:***
 - a. ***All the*** ~~lots in the~~ ***proposed subdivision shall be*** ~~are~~ located in a manner consistent with the physiographic and/or historic characteristics of the property ***as recommended by the primary holder of the conservation easement.***
 - b. ~~As to requests for a maximum lot size exception based upon the land having been~~ ***For lots that were*** placed in an easement held or co-held by the Clarke County Conservation Easement Authority (recorded after November 19, 2013), said

easement must have included the termination of at least one (1) dwelling unit right in order for the property to qualify for a maximum lot size exception under this paragraph. ~~or;~~

4. **Exception for low quality land.** *A lot may be created with a maximum lot size exception if it is determined by the Planning Commission, prior to subdivision approval, that the lot to be subdivided is of sufficiently low quality **as described below** to justify using more than the maximum lot area of low quality land for a proposed lot.*

a. **Low quality land characteristics.** *Low quality land contains one or more of the following characteristics: The following are considered characteristics of low quality land that would permit maximum lot sizes for dwelling purposes in excess of the maximum lot size allowed by this section:*

- Physical features or small size or irregular shape of potential residual lot such that efficient use of farm machinery would not be possible or that said land would be left to no useful purpose; or
- Combination of physical features and setting such that the maximum lot size allowed in this section for a lot proposed in a minor or major subdivision is too small to accommodate a dwelling, drainfield, and well so as to meet the minimal applicable health standards and provided that no lot may be created or increased in area so as to exceed a maximum area of four acres. An application for a maximum lot size exception, submitted under this section, shall be accompanied by a written statement prepared by ~~the~~ a Virginia ~~Health~~ Department ~~of Health environmental specialist~~ or ~~an onsite soil evaluator (OSE) a professional soil scientist~~ (as defined in [County Code Chapter 143, Septic Systems](#)) stating why the proposed lot could not accommodate a dwelling, drainfield, and well meeting Virginia and Clarke County health standards within the maximum lot size allowed in this section. Lots proposed in a major subdivision are not eligible for a Maximum Lot Size Exception under this section; or
- Land that is part of a lot where such land has been determined by the Zoning Administrator **not** to be ~~not~~ important farmland.

b. **Important farmland determination.** ~~For the purpose of granting maximum lot size exceptions under this section, the dominant decision-making tool shall be~~ **The [Clarke County Land Evaluation and Site Assessment \(LESA\) System, edition dated March 24, 1992](#); shall be used as the primary decision-making tool to evaluate maximum lot size exception requests under this subsection. This tool** ~~which~~ is maintained for public use, inspection and information in the Clarke County ~~Department of Planning Administrative Offices in Berryville, Virginia,~~ and is hereby incorporated into and made a part of this Ordinance as if fully set out herein. ~~The Zoning Administrator shall use the aforementioned LESA System to evaluate a maximum lot size exception.~~ A report on the result shall be

forwarded to the Commission. The Commission shall designate as Important Farmland any lands with the following characteristics:

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- The extent that the proposed lot exceeds the maximum lot size allowed in this section;
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- Factors reasonably related to agricultural suitability of the subject lot that are not appropriately addressed by the LESA System, such as physical features.

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~~and the LESA score of a lot is within four points above or below the minimum LESA rating that qualifies a lot as Important Farmland, and the Commission grants a maximum lot size exception, the area of the proposed lot shall not exceed four acres. If the LESA score is between five and twelve points below the minimum LESA rating, the area of the proposed lot shall not exceed six acres. In instances where the LESA score of a lot is twelve or more points below the minimum LESA rating, or the lot being subdivided is less than 20 acres, the area of the proposed lot shall not exceed the acreage determined by the Commission. In any instance, the Commission may set a maximum area less than specified above.~~

5. No lot approved with a maximum lot size exception shall be reduced in size by boundary line adjustment without approval by the Planning Commission for one or both of the following hardship reasons:

- To correct an encroachment of a driveway, onsite sewage disposal system, or a structure located on an adjacent lot
- To aid in the repair or replacement of a failing onsite sewage disposal system located on an adjacent lot