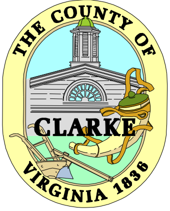
CLARKE COUNTY PLANNING COMMISSION
TABLE OF CONTENTS
October 4, 2022 Work Session Packet

Item #	Description	Pages
1	**Meeting Agenda**	**1**
4A	**Discussion, Waterworks and Sewerage System and Treatment Works Regulations Text Amendment – Zoning Ordinance Section 7.4.5**	**2-11**
	-- Staff Memo	2-11
4B	**Discussion, Structures Permitted in Required Setback Areas Text Amendment – Zoning Ordinance Section 7.1.2C**	**12-16**
	-- Staff Memo	12-16
4C	**Discussion, Interpretation of Maximum Lot Size Exception Regulations**	**17-19**
	-- Staff Memo	17-19



Clarke County Planning Commission

AGENDA – Work Session
Tuesday, October 4, 2022 – 3:00PM
Berryville/Clarke County Government Center– Main Meeting Room

1. **Approval of Agenda**

2. **Review of October 7 Business Meeting Agenda Items**

   A. Agenda Review

   B. Status of Deferred Applications

3. **Old Business Items**

   -- None Scheduled

4. **New Business Items**

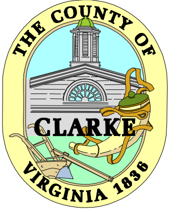
   A. Discussion, Waterworks and Sewerage System and Treatment Works Regulations Text Amendment – Zoning Ordinance Section 7.4.5

   B. Discussion, Structures Permitted in Required Setback Areas Text Amendment – Zoning Ordinance Section 7.1.2C

   C. Discussion, Interpretation of Maximum Lot Size Exception Regulations

5. **Other Business**

6. **Adjourn**



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TO: **Planning Commissioners**

FROM: **Brandon Stidham, Planning Director**

RE: **Waterworks and Sewerage System and Treatment Works Regulations – Zoning Ordinance Section 7.4.5**

DATE: **September 26, 2022**

Item 4A is a discussion about proposed changes to the waterworks and sewerage system and treatment works regulations found in Zoning Ordinance Section 7.4.5. This item was reviewed by the Ordinances Committee in May and September and was forwarded to the full Commission for consideration.

Background

The purpose of Section 7.4.5 is to prohibit uses in the AOC and FOC District that began after July 1, 1997 from using a "waterworks" or a "sewerage system and treatment works." A waterworks is defined in Section 7.4.5 as:

A system that serves piped water for drinking or domestic use for:

- *The public, or*
- *At least 15 connections, or*
- *An average of 25 individuals for at least 60 days out of the year.*

A waterworks shall include all structures, equipment, and appurtenances used in the storage, collection, purification, and distribution of pure water (except the piping and fixtures inside the building where such water is delivered).

A sewerage system is defined as:

Pipelines or conduits, pumping stations, and force mains and all other construction, devices and appliances appurtenant thereto, used for the collection and conveyance of sewage to a treatment works or point of ultimate disposal.

A treatment works is defined as:

Any device or system used in the storage, treatment, disposal or reclamation of sewage or combinations of sewage and industrial wastes, including, but not limited to, pumping, power and other equipment and appurtenances, septic tanks and any works (including land) as components of a mass drainfield, that are or will be:

- *An integral part of the treatment process or*
- *Used for ultimate disposal or residues or effluent resulting from such treatment.*

This term does not include subsurface drainfields smaller than mass drainfields. A mass drainfield is a subsurface drainfield that has loading rates in excess of 1,200 gallons per day for any acre and consists of more than 2,000 linear feet of percolation piping.

These regulations were added to the Zoning Ordinance in 1997 however there is limited background information in the form of staff reports or discussion in meeting minutes regarding the specific reasons for developing the regulations. Some likely reasons based on the County's land use philosophy include:

1. To prevent AOC and FOC uses from connecting to public water and public sewer.

2. To limit the scope of some AOC and FOC uses by capping the volume of usage for a private well and by capping the maximum size of an onsite sewage disposal system that can be installed – including preventing the use of "mass drainfields."

3. To prevent the development of new privately-owned/operated water systems (such as the private system that serves Shenandoah Retreat) and new privately-owned/operated sewage treatment systems for AOC and FOC uses.

It should be noted that the State's definition of waterworks differs from the Zoning Ordinance definition in that a waterworks is a system that serves water for "human consumption" rather than only for "the public." Some examples of existing AOC and FOC uses on private property that are currently permitted for a "waterworks" by the Virginia Department of Health (VDH) include:

- Berryville Moose Lodge
- Calcagnini Contemplative Center/Georgetown University
- Grafton School
- Keystone Baptist Church
- L'Auberge Provencale
- Northern Virginia Lions Youth Camp
- Shenandoah Retreat (private water system)
- River Park (private water system)
- Watermelon Park

The definitions used by the State for sewerage system and treatment works also differ from the Zoning Ordinance definition with the main difference being the exclusion of language regarding mass drainfields. The State's definition for a "mass sewage disposal system ("mass drainfield") also does not include Section 7.4.5's language that the system also consists of more than 2,000 linear feet of percolation piping.

Issues for Discussion

The Planning Commission's Ordinances Committee reviewed several discussion issues with Staff resulting in the development of a proposed text amendment to the Zoning and Subdivision Ordinances. Below is a summary of these issues.

Public Water and Public Sewer in the AOC District

Section 7.4.5 initially came under evaluation in the context of the County's efforts to extend public water and public sewer from Frederick County to the Double Tollgate plan area and potentially to the adjacent AOC-zoned properties owned by various State agencies. In consultation with the County Attorney, it was determined that Section 7.4.5 could be interpreted to prohibit extension of a public water or public sewer system (owned or operated by a local government entity) into AOC-zoned properties.

To address this concern, Staff recommends new language to specify that Section 7.4.5 does not apply to development of new public water or public sewer infrastructure, owned and/or operated by a local government entity, on AOC-zoned properties. This would not create a risk of private landowners in the AOC District gaining access to public water and public sewer as the Board of Supervisors has ultimate authority over which County properties may be served.

Application of Waterworks Regulations

As noted above, Section 7.4.5 would prohibit AOC and FOC uses that provide water for drinking and domestic purposes to:

1. The public, OR

2. At least 15 connections, OR

3. An average of 25 individuals for at least 60 days out of the year

This presents a challenge to developing some AOC and FOC uses that propose a public service component in which water is provided – most commonly some form of meal service. The Zoning Ordinance was amended in 2016 specifically to exclude farm wineries, farm breweries, and farm distilleries from the waterworks prohibition. There are still other AOC/FOC uses that could be impacted by this prohibition – potentially making the use infeasible as we previously noted in 2016 with farm wineries, farm breweries, and farm distilleries. These uses include:

- Home occupation bed-and-breakfast
- Wholesale or retail sale of agricultural products
- Community services facility (special use)
- Minor commercial public assembly (special use)
- Country inn (special use)
- Day care center (special use)
- Campground (special use)
- Churches and other places of worship (special use)
- Community center (special use)
- Private club (special use)

- Summer camp (special use)
- Retail business (special use)

The Ordinances Committee discussed the merits of modifying Section 7.4.5 to remove the blanket waterworks prohibition for AOC and FOC uses. The Committee and Staff recommended adding language to require such uses to maintain waterworks approval with VDH in good standing for the life of the use. Failure to do so can be grounds for revocation of zoning approval.

The current language of Section 7.4.5 is not clear in regards to shared private water systems such as the existing systems in Shenandoah Retreat and River Park subdivisions. While it is clear that a waterworks cannot serve water to the public, it also states that a waterworks cannot serve 15 or more connections. One could make the argument that a small subdivision can be served by a private water system by virtue of having less than 15 lots, by not providing water to the public, and by not serving an average of 25 people for at least 60 days out of the year.

To remedy this concern, the Committee and Staff recommend adding language to the Subdivision Ordinance to prohibit new AOC and FOC subdivisions from utilizing a private water system. Language is also included to ensure that this regulation does not prevent new homes from connecting to existing private water systems such as in Shenandoah Retreat and River Park, subject to VDH approval.

As an additional amendment, language is added to link to County Code Chapter 184 which governs the construction and use of new wells.

<u>Application of Sewerage System and Treatment Works Regulations</u>
In December 2021, the Board of Supervisors adopted significant revisions to the County's septic system regulations found in County Code Chapter 143. One new provision that was included is a prohibition on the use of mass drainfields throughout the County (Section 143-3D). Previously, the only reference to prohibiting use of mass drainfields was in Section 7.4.5 and its earlier iterations. Chapter 143 also applies the State's definition of "mass sewage disposal system" which does not include reference to the "more than 2,000 linear feet of percolation piping" language in Section 7.4.3.

With the inclusion of this new language in County Code Chapter 143, retaining the current language in Section 7.4.5 may be redundant. The Committee and Staff recommend that the sewerage system and treatment works regulations be removed in favor of defaulting to the requirements of Chapter 143. New language is added to require all onsite sewage disposal systems to comply with the requirements of Chapter 143. This change would provide clarification by consolidating all septic system regulations in Chapter 143 and would link the two ordinances with the new reference.

<u>Proposed Changes</u>
Below is a summary of the proposed text amendment language for both the Zoning and Subdivision Ordinances as recommended by the Ordinances Committee and Staff. The draft text amendment language is included at the end of this memo.

Amend Zoning Ordinance Section 7.4.5, Waterworks and Sewerage System and Treatment Works

- To reflect replacement of current regulations with references to the Well and Septic Ordinances and to new proposed rules regarding public water and public sewage system usage, the title of this section would be changed to "Use of Private Wells and Onsite Sewage Disposal Systems; Use of Public Water and Public Sewer."

- All current language regarding the prohibition on the use of a waterworks or sewerage system and treatment works for uses in the AOC and FOC Districts commencing operation after July 1, 1997 would be deleted. This includes the County's definitions of "waterworks" and "sewerage system and treatment works" which both differ from the State's definitions of these terms.

- A new Subsection A would be added to state that private wells and onsite sewage disposal systems shall be designed in accordance with the Septic Ordinance (Chapter 143), the Well Ordinance (Chapter 184), the regulations of the Virginia Department of Health, and any other applicable regulations. This would establish necessary cross-references between the Zoning Ordinance and these County Code sections.

- A new Subsection B would be added to state that no use in the AOC or FOC Districts shall be served by public water or public sewer provided by the Town of Berryville, Clarke County Sanitary Authority, or other local governmental entity without approval by the Clarke County Board of Supervisors. This addresses the Ordinance Committee's concern that a landowner could work out a private deal with an adjoining jurisdiction to provide public water and/or public sewer to their property.

Amend Zoning Ordinance Section 7.5, RR District Design Standards and Development Regulations

- A new Section 7.5.2 would be added titled "Use of Private Wells and Onsite Sewage Disposal Systems; Use of Public Water and Public Sewer." This section would contain the same language being added to Section 7.4.5. A new Subsection A would establish cross-references to the Septic and Well Ordinances for the RR District that currently do not exist. A new Subsection B would prevent RR-zoned properties from being served by public water and public sewer without approval by the Board of Supervisors.

Amend Zoning Ordinance Section 7.2.3B, Public Water and Public Sewer Systems

- A new Subsection 1 would be added to state that no use shall be served by a public water or public sewer system that is not owned and/or operated by a governmental entity authorized to provide public water service by the Clarke County Board of Supervisors. Similar to language added to the regulations for the AOC, FOC, and RR Districts, this would extend the requirement to all uses requiring a site development plan.

- New language would be added to the current section (renumbered as Subsection 2) to state that all public water and public sewer systems shall be designed to meet or exceed the regulations and specifications of the Clarke County Sanitary Authority and/or any other applicable federal, state, or local agency. This would clarify that all public water and public sewer systems shall be designed to meet the criteria of the local government entities that would be operating and maintaining them. It would include the Town of Berryville and Frederick County for any public water and public sewer systems that they may operate in the County.

Amend Subdivision Ordinance Section 4.5.4A, Public Utilities

- A new Subsection 2 would be added stating that no new subdivision established after the adoption date of this text amendment shall be served by a waterworks (as defined by the Virginia Waterworks Regulations) or a sewerage system and treatment works (as defined by the Sewage Handling and Disposal Regulations, Virginia Administrative Code) that is not owned and/or operated by a governmental entity authorized to provide public water and public sewer service by the Clarke County Board of Supervisors. This new language would prohibit new subdivisions from using private shared water systems and onsite sewage disposal systems. It would also emphasize that no local government entity (such as the Town of Berryville or Frederick County) can provide public water or public sewer service to a new subdivision without prior approval by the Clarke County Board of Supervisors.

Staff recommends that the Commission discuss these proposed changes and provide direction to Staff on whether to add the draft text amendment to the October 7 Business Meeting agenda to schedule public hearing. Please advise if you have questions or concerns in advance of the work session.

Zoning Ordinance

7.4 AOC AND FOC DISTRICT DESIGN STANDARDS AND DEVELOPMENT REGULATIONS

7.4.5 *Use of Private Wells and Onsite Sewage Disposal Systems; Use of Public Water and Public Sewer*
Waterworks and Sewerage System and Treatment Works

A. Private wells and onsite sewage disposal systems proposed for use shall be designed in accordance with Code of Clarke County Chapter 143 (Septic Ordinance) and Chapter 184 (Well Ordinance), the regulations of the Virginia Department of Health, and any other applicable regulations.

B. No use in the AOC or FOC Districts shall be served by public water or public sewer provided by the Town of Berryville, Clarke County Sanitary Authority, or other local governmental entity without approval by the Clarke County Board of Supervisors.

A. **Installation of waterworks or sewerage system and treatment works.** No use in the AOC or FOC Districts commencing operation after July 1, 1997 shall result in the installation of waterworks or sewerage system and treatment works. The prohibition on waterworks usage shall not apply to farm breweries, farm wineries, and farm distilleries allowed as permitted uses in **Section 5.2 (Uses)**.

B. **Definition of waterworks.** A waterworks is a system that serves piped water for drinking or domestic use for:

- The public, or
- At least 15 connections, or
- An average of 25 individuals for at least 60 days out of the year.

A waterworks shall include all structures, equipment, and appurtenances used in the storage, collection, purification, treatment, and distribution of pure water (except the piping and fixtures inside the building where such water is delivered).

C. **Definition of sewerage system and treatment works.**

1. Sewerage System. Pipelines or conduits, pumping stations and force mains and all other construction, devices and appliances appurtenant thereto, used for the collection and conveyance of sewage to a treatment works or point of ultimate disposal, and

2 Treatment Works. Any device or system used in the storage, treatment, disposal or reclamation of sewage or combinations of sewage and industrial wastes, including, but not limited to, pumping, power and other equipment and appurtenances, septic tanks and any works (including land) as components of a mass drainfield, that are or will be

- ~~An integral part of the treatment process or~~
- ~~Used for ultimate disposal or residues or effluent resulting from such treatment.~~

~~This term does not include subsurface drainfields smaller than mass drainfields. A mass drainfield is a subsurface drainfield that has loading rates in excess of 1,200 gallons per day for any acre and consists of more than 2,000 linear feet or percolation piping.~~

7.5 RR DISTRICT DESIGN STANDARDS AND DEVELOPMENT REGULATIONS

7.5.2 Use of Private Wells and Onsite Sewage Disposal Systems; Use of Public Water and Public Sewer

A. ***Private wells and onsite sewage disposal systems proposed for use shall be designed in accordance with Code of Clarke County Chapter 143 (Septic Ordinance) and Chapter 184 (Well Ordinance), the regulations of the Virginia Department of Health, and any other applicable regulations.***

B. ***No use in the RR District shall be served by public water or public sewer provided by the Town of Berryville, Clarke County Sanitary Authority, or other local governmental entity without approval by the Clarke County Board of Supervisors.***

7.2 SITE DEVELOPMENT PLAN DESIGN STANDARDS AND DEVELOPMENT REGULATIONS

7.2.3 Public Utilities; Use of Private Wells and Onsite Sewage Disposal Systems

B. Public Water and Public Sewer Systems.

1. ***No use shall be served by a public water or public sewer system that is not owned and/or operated by a governmental entity authorized to provide public water service by the Clarke County Board of Supervisors.***

2. All public water distribution and public sewer collection systems shall be designed to accommodate normal and peak demand loads. All such systems shall be designed to meet or exceed the ***regulations and*** specifications of the ***Clarke County Sanitary authority and/or any other applicable federal, state, or local agency*** ~~Berryville Area Water and Sewerage Program~~. ~~Regulations of the Virginia Department of Health and other state agencies shall also be met, as applicable.~~

Subdivision Ordinance

4.5 SUBDIVISION AND CONSTRUCTION PLAN DESIGN STANDARDS

4.5.4 Public Utilities and Utility Easements

A. Public Utilities.

1. Where public water and/or public sewer facilities are available or required by the Clarke County Zoning Ordinance or the Code of Clarke County, or may be reasonably required by the approval authority in the interest of the public health, safety and general welfare, the service shall be extended to all lots within a subdivision and shall meet ***or exceed*** ~~all~~ ***the*** regulations and specifications of the Clarke County Sanitary Authority and***/or*** any other applicable federal, state, or local agency.

2. ***No new subdivision approved after [INSERT ADOPTION DATE] shall be served by a waterworks (as defined by the Virginia Waterworks Regulations) or by a sewerage system and treatment works (as defined by the Sewage Handling and Disposal Regulations, Virginia Administrative Code) that is not owned and/or operated by a governmental entity authorized to provide public water service by the Clarke County Board of Supervisors.***

4.5.6 Private Wells and Onsite Sewage Disposal Systems

B. Use of Private Wells.

1. ***Private wells proposed to serve new lots shall be designed in accordance with Code of Clarke County Chapter 184 (Well Ordinance), the regulations of the Virginia Department of Health, and any other applicable regulations.***

2. If lots less than 40 acres in size are to be served by an individual onsite water well, the well site for each lot shall show the distance and bearing to one corner of the well from two property corners. The final plat shall indicate Health Department approval of such sites, pursuant to a certificate of approval signed by the Health Official evidencing conformity with VDH requirements with respect to individual on-site subsurface septic systems and potable water supply systems, as applicable.

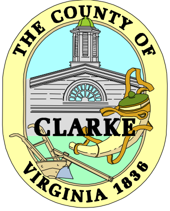
C. Use of Onsite Sewage Disposal Systems.

1. ***Onsite sewage disposal systems proposed to serve new lots shall be designed in accordance with Code of Clarke County Chapter 143 (Septic Ordinance), the regulations of the Virginia Department of Health, and any other applicable regulations.***

2. If lots less than 40 acres in size are to be served by an individual onsite sewage disposal systems, the primary and reserve drain field areas for each lot so served shall show the distance and bearing to one corner of the drainfield from two property corners. The final plat shall indicate Health Department approval of such areas, pursuant to a certificate of approval signed by the Health Official evidencing conformity with VDH requirements with respect to individual on-site subsurface septic systems and potable water supply systems, as applicable.

Other Editorial Changes (Zoning Ordinance references to waterworks and sewerage system and treatment works)

- Page vii -- Table of Contents
- Page 4-6 (Development Regulations list – AOC District)
- Page 4-10 (Development Regulations list – FOC District)
- Page 7-1 (Section 7 Table of Contents)



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TO: **Planning Commissioners**

FROM: **Brandon Stidham, Planning Director**

RE: **Structures in Setback Areas – Zoning Ordinance Section 7.1.2C**

DATE: **September 16, 2022**

New Business Item 4B is a discussion regarding potential technical changes to Zoning Ordinance Section 7.1.2C which contains a list of structures and building features that may be located within a required setback area. This item was reviewed by the Ordinances Committee at their September 2 meeting and forwarded to the full Commission for consideration.

Section 7.1.2C allows certain structures and building features to be located in a setback area either subject to or without restriction. Structures and building features that may be located in a setback area without restriction include:

- Driveways or patios with an elevation that is no more than 24 inches above grade.
- Fences and walls up to seven (7) feet in height or hedges.

"Building elements" may project into a required setback area but not more than 50% of the required setback. These include:

- Porches, balconies, and decks that do not have more than 36 square feet and do not have roofs
- Steps without roofs
- Bay or bow windows
- Projecting roof elements without columns
- Chimneys
- Eaves
- Architectural features
- Swimming pools (above or in ground)
- Mechanical equipment

Gasoline pump canopies are also allowed to project into a setback area but cannot be closer than 10 feet to any property line or right of way.

Staff has identified concerns with some of the items in this section which are addressed separately below.

<u>"Mechanical equipment"</u>
One concern is the scope of the term "mechanical equipment" which is currently undefined but could apply to any of a building's mechanical systems including heating, cooling, electrical, water, or sewer/sewage disposal systems. A common application would be an outdoor heat pump or a window air conditioning unit – equipment that is typically attached to or located freestanding in close proximity to the building it serves.

In recent years, Staff has encountered situations in which mechanical equipment located away from a building has qualified for a 50% setback reduction. Freestanding solar panels serving a single-family dwelling are considered to be mechanical equipment and can be located a significant distance from the dwelling. A structure used to house an outdoor wood furnace or backup generator could also qualify for the 50% setback reduction if used exclusively for the mechanical equipment.

Staff is concerned that this interpretation may not be consistent with the original intent of this section to provide relief for "building elements." All of the items in the list of building elements are features which are part of or attached to a structure with the exception of "swimming pools (above ground or in ground)" – the issue of pools is addressed later in this memo. Freestanding solar panels and outbuildings housing mechanical equipment including backup generators are more recent structures likely not contemplated when this section was originally created.

Staff is also concerned about the possibility that an accessory structure approved for a 50% setback reduction could be used for storage or other purposes and not just to house mechanical equipment. In one example, a property owner had an illegally located, unpermitted accessory structure (pergola). The structure was converted into a support structure for solar panels which allowed it to be legally located within the 50% reduced setback area but it also resulted in the pergola having a roof. Staff included a condition on the zoning permit, affirmed by the applicant, that the structure could not be used for any other purposes such as a carport or storage. This and other similar situations could result in ongoing issues with permit compliance especially with subsequent owners.

Staff recommends adding language to "mechanical equipment" to clarify that the 50% setback reduction would not apply to equipment "housed within or supported on a separate, freestanding structure such as an outdoor wood furnace or solar panels." If adopted, these structures – including freestanding solar panels – would have to comply with the standard setback requirements for an accessory structure. If an applicant has trouble complying with the standard setback requirement, they may still be eligible to apply for a variance.

In conjunction with this discussion, Ordinances Committee members noted correctly that there are other above-ground, freestanding structures associated with a building's mechanical systems that should be allowed in setback areas. These include:

- Well structures such as a well head
- Onsite sewage disposal system structures such as a riser or associated equipment
- Structures associated with the building's electrical or telecommunications systems including transformers, equipment boxes, meters, dish antennae, and utility poles

Placement of these structures is governed by other bodies of law or, in the case of public utility equipment, are often required to be located on or near lot lines. Planning Staff has never interpreted these features as being subject to zoning setbacks but by definition they would be considered "structures" that must be located in compliance with setback requirements.

To address this potential conflict, Staff recommends adding language to allow freestanding structures associated with a private well or onsite sewage disposal system to be located in setback areas subject to any State or local ordinance requirements which govern their installation. This would make it clear that Virginia Department of Health regulations and the County's Septic and Well Ordinances would be the sole authority for placement of these structures on a lot. Staff also recommends adding language to allow structures owned or provided by a public utility company or telecommunications service provider for the provision of electric, telephone, or internet service to be located in setback areas subject to any State or local ordinance requirements which govern their installation. This provision would not apply to a pole-style antenna or telecommunications tower which would be considered a wireless communications facility (WCF).

"Architectural Features"
Another concern is the building element "architectural features." This term is not defined however Staff interprets it to mean parts of a building that are purely decorative in nature and are not required structural elements. This interpretation is consistent with the other items on the list of "building elements" such as bay or bow windows and projecting roof elements without columns. Staff is concerned that "architectural features" could be interpreted more broadly by applicants or future staff members to include almost any part of a building. To clarify this term, we recommend changing it to read, "Decorative architectural features which are not required structural elements of the building." This would codify the current interpretation of the term.

"Swimming Pools"
Staff recommends deleting "swimming pools (above or in ground)" from the list of structures eligible for a 50% setback reduction. A swimming pool is not a "building element" and, as with freestanding structures housing mechanical equipment, can be located a significant distance from the primary dwelling. A swimming pool can also have a greater visual impact depending upon its size, decking, and mechanical equipment than a small accessory structure not eligible for a 50% setback reduction would have. If deleted, swimming pools would have to be located entirely within the required building envelope. As with the proposed change to "mechanical equipment," an applicant may be eligible to apply for a variance if they cannot comply with the setback requirements.

Additional Proposed Changes

- Modifications to the section title and introduction to clarify that this section applies to "structures" and not to "uses" as there are no uses (as enumerated in Zoning Ordinance Section 5) included in this section. Also replacing "shall" with "may" to clarify that items in this section may be allowed in the setback area if the applicant demonstrates full compliance with ordinance requirements.

- Add “freestanding” to “walls” to make it clear that this does not refer to a wall of a building or other structure.

- Delete “hedges” as a listed feature that can be in a setback area. Specifically allowing hedges to be located within a setback area could result in conflicts with Section 7.1.1F which prohibits vegetation – including hedges – from being placed or allowed to grow to produce a sight distance impediment. This is the only context in which the Zoning Ordinance currently regulates “hedges.” Since “hedges” are not considered to be structures, they would be allowed in setback areas whether or not they are specifically listed in Section 7.1.2C unless they constitute a sight distance impediment.

Proposed text amendment language is included at the end of this memo. Staff recommends that the Commission discuss this issue and, if comfortable with the proposed changes, consider adding an action item to initiate consideration of the text amendment and to set public hearing at the October 7 Business Meeting. Please advise if you have questions or concerns in advance of the Work Session.

PROPOSED TEXT AMENDMENT LANGUAGE:

C. ~~*Uses and*~~ **Structures** ***or Portions of Structures*** **Permitted in Required Setback Areas.** No ***structure or*** portion of any ~~building~~ ***structure*** shall be permitted in any required setback area, however, the following ~~uses and~~ structures ~~shall~~ ***may*** be permitted in required setback areas~~,~~ subject to the limitations established below.

1. Driveways or patios with an elevation that is no more than 24 inches above grade.

2. Fences and ***freestanding*** walls up to seven feet in height ~~or hedges~~.

3. Building elements as enumerated below. Such elements or equipment may project into any required setback area, but shall be set back from property lines at least 50% of the minimum setback requirement:

   - Porches,~~/~~balconies,~~/~~ ***or*** decks ~~that do not have more than~~ ***with a maximum area of*** 36 square feet and ~~do not have~~ ***without*** roofs
   - Steps without roofs
   - Bay or bow windows
   - Projecting roof elements without columns
   - Chimneys
   - Eaves
   - ***Decorative a***~~A~~rchitectural features ***which are not required structural elements of the building***
   - ~~Swimming pools (above or in ground)~~
   - Mechanical equipment ***essential to the building's heating, cooling, electrical, water or sewer/sewage disposal systems. This provision shall not apply to mechanical equipment housed within or supported on a separate, freestanding structure such as an outdoor wood furnace or solar panels except as described in subsections 4 and 5 below.***

4. ***Freestanding structures associated with a private well (such as a well head) or onsite sewage disposal system (such as a riser and associated equipment) may be located within a setback area subject to compliance with any other State or local ordinance requirements which govern the installation of such features.***

5. ***Structures owned or provided by a public utility company or telecommunications service provider for the operations of an electrical, telephone, or internet system (such as a transformer, equipment box, meter, dish antenna, or utility pole) may be located within a setback area subject to compliance with any other State or local ordinance requirements which govern the installation of such features. This subsection shall not apply to wireless communication facilities (WCFs) per Section 5 (Uses).***

6. Gasoline pump canopies shall not be closer than 10 feet to any property line or right-of-way.

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TO: **Planning Commission**

FROM: **Jeremy F. Camp, Senior Planner / Zoning Administrator**

RE: **Discussion, Interpretation of Maximum Lot Size Exception Regulations**

DATE: **September 29, 2022**

GENERAL ISSUE

Interpretation questions have been identified with 6.2.6C-1a of the Clarke County Zoning Ordinance as it pertains to allowing maximum lot size exceptions (MLSE) for pre-1980 dwellings.

SPECIFICS

In a recent meeting with a property owner and local surveyor, the property owner was of the opinion that he qualified for a MLSE because there was once a dwelling on the property. This dwelling is a documented pre-1980 dwelling, but was demolished after the property owner obtained a demolition permit from the Building Department in 2020.

6.2.6C-1a states the following: "*Dwelling existing prior to October 17, 1980. 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 their size and location does not create low quality land characteristics on any other lots created as a result of the division, or if the lots created 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 issue raised by the property owner's opinion of the code appears to depend on the interpretation of the header and first part of the first sentence in 6.2.6C-1a, as follows: ***"Dwelling existing prior to October 17, 1980. Dwellings in existence and taxed as such or with a building permit issued before October 17, 1980…"***

Staff reviewed previous subdivision applications dating back to 2010, some of which were provided by the applicant's surveyor. No examples were found where a MLSE was issued for a lot that involved a pre-1980 dwelling that was completely demolished. However, one instance was found from 2020 where a lot was granted a MLSE with a pre-1980 house that was not habitable and in a condition of ruins.

The property owner is also of the opinion that they could apply the MLSE to a lot other than the lot where the pre-1980 dwelling once existed.

This issue raised by the property owner's opinion of the code appears to depend on the interpretation of the latter part of the same sentence noted above, as follows: ***"…may be located on a lot that exceeds the maximum area requirements."***

Staff found two examples since 2010 where a MLSE was granted for an existing pre-1980 dwelling but was applied to a different lot. While this would not be a precedent to allow MLSE approval when the pre-1980 dwelling no longer exists, it raises a question as to whether a MLSE lot approved under this criteria is required to contain the pre-1980 dwelling.

ANALYSIS

The code related to maximum lot size in the AOC District has been amended on a number of occasions in the past. This is important information to understand the intent of the current Zoning Ordinance language, particularly since the literal interpretation of the code language can be read in different ways.

To begin with, the MLSE requirements and the AOC lot size requirements used to be located in the Zoning Ordinance section containing the sliding-scale zoning regulations. They were moved to the AOC District requirements in the mid-1990s.

With the 2021 Zoning Ordinance rewrite, the MLSE requirements were moved to the administrative review processes section in Chapter 6. In the process of separating the MLSE review process from the AOC District requirements, Staff intentionally removed one of the original criteria for granting an MLSE which read, ***"A new dwelling unit is to be located on a lot of record existing as of October 17, 1980."*** Staff found this criteria to be confusing as there appeared to be no recent examples of a MLSE being granted using this criteria or any record of intent or interpretation.

The language removed in the 2021 Zoning Ordinance rewrite is found in the 1985 Zoning Ordinance under the AOC maximum lot area requirements. The 1985 Zoning Ordinance only allowed a new dwelling on a lot of record existing as of October 17, 1980 (a "tract" for sliding-scale zoning purposes), or on a newer lot no more than 2 acres in size. The 2-acre maximum could be exceeded if low quality land characteristics could be shown. These requirements were amended in 1990 to create the concept of a MLSE with the qualification criteria we are familiar with today, in addition to the criteria language that was removed in 2021.

One way of interpreting the language removed in 2021 is that any "tract" would automatically qualify for a MLSE. This does not appear to be the correct interpretation. If this were the case, the owner of a "tract" which also contained an existing dwelling would be eligible for **two** MLSEs. Staff has not found evidence of any examples of this. A different and literal way of interpreting this language is that it is saying a dwelling may be constructed on a **tract** regardless of what size the lot is. This is because the language references construction of a dwelling and not creation of a new lot.

It is quite possible that in the 1980s, there was a concept of a minimum/maximum lot size in order to construct a dwelling on a lot. This concept does not currently exist as a dwelling may be constructed on any nonconforming lot so long as all other requirements are met.

In the current scenario, the property owner recently demolished a pre-1980 dwelling and now wants to apply for a MLSE on grounds that the lot previously contained a documented pre-1980 dwelling. In Staff's opinion, the current code does not support granting a MLSE when the pre-1980 dwelling no longer exists --*"Dwelling existing prior to October 17, 1980. 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."* This appears to allow a MLSE only when there is a pre-1980 dwelling at the time of the subdivision, AND, when located on the MLSE lot.

DISCUSSION QUESTIONS

Staff is looking for policy direction from the Planning Commission on these issues because the Planning Commission is the approval authority for MLSEs and minor subdivisions. Any policy direction provided by the Planning Commission will be conveyed to the potential applicant. Below are discussion questions for the Planning Commission's review.

1) Does a documented pre-1980 dwelling have to be in existence on the lot in order to qualify for creation of a new MLSE lot? Furthermore, does the pre-1980 dwelling have to be habitable as a dwelling today in order to qualify for creation of a new MLSE lot?

2) When using the pre-1980 qualification criteria of a MLSE, does the MLSE have to be used for the lot where the pre-1980 dwelling will be on, or can it be used on any lot the applicant desires it to be used for?