

# COUNTY OF ALBEMARLE



## MEMORANDUM

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**TO:** Mark Graham, Director of Community Development  
Wayne Cilimberg, Director of Planning

**FROM:** Greg Kamptner, Deputy County Attorney  
Amelia McCulley, Director of the Division of Zoning and Current Development  
Elaine Echols, Principal Planner

**DATE:** February 4, 2008

**RE:** *Hollymead Town Center Area C; requirement that all owners in a planned district consent to the rezoning*

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This memorandum explains the analysis the Department of Community Development and the County Attorney's Office conducted to determine whether all owners within HTC-C must consent to the proposed rezoning.

**1. State law and the County Zoning Ordinance require that the owners of the property which is the subject of the rezoning sign the application**

Virginia Code § 15.2-2286(A)(7) provides in part that a zoning map amendment ("rezoning") may be initiated:

(iii) by petition of the *owner*, contract purchaser with the owner's written consent, or the owner's agent therefor, *of the property which is the subject of the proposed zoning map amendment*, addressed to the governing body or the local planning commission, . . . (italics added)

Albemarle County Code § 18-33.2.1 authorizes an owner to initiate a rezoning as follows:

By the filing with the board of supervisors of a petition of any owner or owners of land proposed to be rezoned, which petition shall be addressed to the board of supervisors and shall be on a standard form and accompanied by a fee as set forth in section 35.0. (Amended 5-5-82)

The language in Albemarle County Code § 18-33.2.1 is slightly different from the language in Virginia Code § 15.2-2286(A)(7) and its use of the phrase "any owner" could, arguably, be interpreted to allow the owner of a single parcel to initiate the rezoning of multiple parcels of land under different ownership. The language in Albemarle County Code § 18-33.2.1 is closer to the language in the corresponding state law in effect prior to July 1, 1982, which authorized "any property owner" to initiate a rezoning. (*former Virginia Code § 15.1-491*) However, the County's zoning regulations must be applied in a manner that is consistent with

current state law and therefore, the County requires that a rezoning be initiated by an application that is signed by each owner of the property which is the subject of the proposed rezoning. As will be explained in Section 2(A), this requirement means that the owner of each parcel in a planned district must sign the application. There are limited exceptions, and they are examined in Sections 2(B) and 2(C).

2. **Hollymead Town Center Area C is a planned district and, with limited exceptions, a rezoning that changes the applicable regulations and requirements in the district affects all of the properties in the development**

Hollymead Town Center Area C (“HTC-C”) is a planned district that is subject to an Application Plan and Proffers, including a proffered Code of Development (the “Code”). As a development in the PD-MC zoning district, HTC-C is subject to Albemarle County Code §§ 18-8 *et seq.* and 25A. The Application Plan, Proffers and Code apply to all of the lands within HTC-C.

A. **Planned districts are governed by specific policies and rules**

The intent of a planned district is, among other things, to promote “economical and efficient land use through unified development” and to provide “appropriate and harmonious physical development.” *Albemarle County Code § 18-8.1*. In order to qualify as a planned development, a project must meet the requirements of Albemarle County Code § 18-8.3:

A planned development is a development that meets all of the following criteria: (1) the land is under *unified control* and will be *planned and developed as a whole*; (2) the development is in general accord with one or more approved application plans; and (3) in all planned development districts other than a planned historic district, the development will provide, operate and maintain common areas, facilities and improvements for some or all occupants of the development where these features are appropriate. (italics added)

Consistent with the intent of planned districts generally expressed in Albemarle County Code § 18-8.1, the intent of the PD-MC zoning district is to have commercial projects developed “under a unified planned approach.” *Albemarle County Code § 18-25A.1*.

Under conventional zoning districts, each property is viewed as separate from all other properties and developed without regulatory consideration of the uses on adjoining properties, access, setbacks, scale and massing, or utilities. In a planned district, adjacent uses are planned to be compatible with one another. Setbacks, heights, scale, massing, and, in many cases, architecture, constitute the unifying features of a planned district. Because the use of the lands in a planned district is planned as a whole, the building locations and parking needs are generally known and the owner(s) can take advantage of shared facilities such as stormwater management, utilities, amenities, and parking. As a result, planned districts provide economical and efficient land use through unified development and, in many cases, greater economy of scale.

Each application for a planned district must be submitted as provided for other zoning map amendments. *Albemarle County Code § 18-8.5.1*. One of those requirements, of course, is that all of the owners of the property affected by the rezoning must sign the application. This rule applies not only to the creation of the planned district but also to any amendments to the district. *Albemarle County Code § 18-8.6*.

B. **Some changes to a planned district do not require a rezoning consented to by all of the owners**

Some minor changes to a planned district’s application plan or code may be approved by the County’s director of planning without going through the rezoning process. *Albemarle County Code § 18-8.5.5.3*. These minor changes are expressly delineated in *Albemarle County Code § 18-8.5.5.3(a)*:

1. Minor variations to yard requirements, maximum structure heights and minimum lot sizes;

2. Changes to the arrangement of buildings and uses shown on the plan, provided that the major elements shown on the plan and their relationships remain the same;
3. Changes to phasing plans;
4. Minor changes to landscape or architectural standards; and
5. Minor variations to street design.

Any proposed change to an approved application plan or code that is not one of the minor variations listed above may be accomplished only by a rezoning. *Albemarle County Code § 18-8.5.5.3*. A limited number of rezonings in a planned district have been allowed to proceed without the consent of all of the owners where the proposed change was determined not to materially affect other parcels within the planned district. Examples of these kinds of changes within the past 15 years include the relocation of pedestrian pathways, a change to the zoning district designation of certain lands in the development where there was no change to the permitted uses on those lands (*e.g.*, land used by residents for equestrian activities in a planned district was rezoned to Rural Areas to allow it to be eligible for land use taxation), and a modification to the applicable setback regulations in a newly developed section of a planned district. What we have distilled from these prior examples is that they did not propose changes in use, density, intensity, or key elements of the planned district, and they would not impact other parcels in the planned district. Also, the planned development policies of *unified control and planning and developing the district as a whole* were not threatened by the proposed changes.

**C. The proposed changes to the Application Plan and the Code of Development are material and, therefore, require the consent of all of the owners within HTC-C**

The ability to amend the HTC-C planned district is governed not only by the zoning regulations in Chapter 18 of the Albemarle County Code, but also by the Proffers and the proffered Code. The relevant portions of the Code pertaining to Block I of HTC-C provide as follows:

- **Narrative:** “The structure on the front site (lot one) will accommodate a casual dining restaurant with a deck overlooking the pond. Mid-sized retailers will utilize lots two and three. This business mixture allows for better traffic flow into, and by their use, there will be staggered peak business hours reducing parking and traffic congestion. The buildings have been situated to offer a pleasing view from Rt. 29 as the site ascends in a tiered fashion up the hill, and many walkways encourage shoppers to limit vehicular traffic and enjoy the pond. By utilizing a two-story structure on lot three, the design creatively addresses the grade differential of the topography eliminating the need for unsightly barrier walls as well as providing a ‘downtown style’ street entrance on the second floor. (*Code, page 6*) The proposed rezoning to increase the building height and square footage in Block I is to allow a hotel to replace the planned retail use.
- **Square footage:** The non-residential square footage ranges from a minimum of 35,000 square feet to a maximum of 55,000 square feet, with a maximum retail square footage of 55,000 square feet. (*Code, Table A, page 23*) The proposed rezoning would allow the maximum square footage in Block I to increase from 55,000 to 95,000 square feet and would correspondingly increase the overall square footage in HTC-C.
- **Building height:** Buildings in Block I may have a maximum of 3 stories. (*Code, Table B, page 24*) The proposed rezoning would allow the height of the buildings in Block I to increase from 3 to 4 stories.

The Code’s Narrative, Tables and Appendices were proffered.

Generally, changes in one part of a planned district can greatly affect development in other parts of the district. Thus, it is essential for unified control to be established over all parts of the development.

The proposed changes to the Application Plan and the Code are material to and affect all of the blocks in HTC-C. The proposed changes in building height and square footage allowed in Block I increase the intensity of the uses within HTC-C, specifically in Block I, and that increase will impact the other blocks. For example, a 4-story building proposed for one block could interfere with visibility of a 2-story building in another block. If the 2-story building was relying on wall signage for advertisement, the visibility of that signage could be eliminated by the height increase provided for the other block. When someone buys into a planned district, the buyer is relying on the commitments made in the planned district's application plan, proffers, and code of development for that plan to be accomplished. Based on the description in the Code's Narrative, the proposed change in use from "mid-sized retailers" to hotel may change the traffic impacts within HTC-C. Allowing individual block owners within HTC-C to unilaterally increase the intensity of the use on their land destroys two of the fundamental policies underlying planned districts – unified control and planning and developing the planned district as a whole. For these reasons, it is essential that all owners within the planned district consent to the substantive material changes within the district.

An apt analogy to the pending rezoning of HTC-C can be drawn from the typical residential subdivision and the restrictive covenants that are often recorded against, and applicable to, all of the lots. The restrictive covenants are created to establish common rules to which all of the owners of lots in the subdivision will adhere. Changes to those covenants typically are permitted only by the approval of the residents by either a supermajority or unanimous vote. An individual lot owner cannot amend the covenants as they apply to its lot to suit its needs. Thus, for example, a restrictive covenant that allows flag poles of not more than 20 feet cannot be unilaterally amended by the owner of a single residential lot to allow flag poles up to 100 feet in height only on that owner's lot.

### **3. Correction to the processing of the rezoning application**

The decision that all of the owners in HTC-C must sign the rezoning application was made after the application was filed, but before the application was accepted by the County. The applicant then submitted the signatures of all of the owners. Thereafter, the ownership of Block VIII changed, and the new owner contacted the County to indicate withdrawal of support for the change in Block 1. Processing of the application stopped until the new owner signed the application.

Despite the change in ownership, the application signed by all of the owners at the time it was submitted was a valid application. The applicants did not have to obtain the consent of the new owner in order for the application to be processed. However, the new owner of Block VIII has indicated it will withdraw the consent given by the prior owner, which could be done by any owner at any time prior to the Board of Supervisors beginning its consideration of the rezoning on its meeting agenda. *Albemarle County Code § 18-33.7*. The withdrawal, though currently provided via email and confirmed through a telephone conversation with the owner's representative, must be made in writing and be signed by the authorized representative of Block VIII's owner.

### **4. Conclusion**

Whether a proposed change requires the consent of all of the owners within a planned district is determined on a case-by-case basis considering the planned district policies and regulations in the Zoning Ordinance, the district's application plan, proffers and code of development, and the nature of the proposed change to determine its materiality under the principles discussed herein.

In this case, the County determined that the consent of all of the owners within HTC-C was required because the proposed changes are material. The proposed rezoning would increase the intensity of use within HTC-C and impact other blocks, possibly change traffic patterns, and require a substantive change to the Code.