



DOCKET ITEM #13

Text Amendment #2013-0003

Issue: Initiate and consider a text amendment to Section 11-808 of the Zoning Ordinance regarding protest petitions.	Planning Commission Hearing:	December 3, 2013
	City Council Hearing:	December 14, 2013
Staff: Faroll Hamer, Director, Planning and Zoning, Faroll.Hamer@alexandriava.gov Karl Moritz, Deputy Director, Planning and Zoning, Karl.Moritz@alexandriava.gov Joanna Anderson, Assistant City Attorney, City Attorney's Office Joanna.Anderson@alexandriava.gov		

PLANNING COMMISSION ACTION, DECEMBER 3, 2013: On a motion by Vice Chair Dunn, seconded by Commissioner Lyman, the Planning Commission voted to initiate TA #2013-0003. The motion carried on a vote of 6 to 0.

On a motion by Vice Chair Dunn, seconded by Commissioner Macek, the Planning Commission voted to recommend approval of TA #2013-0003 with the exception of changes proposed to Section E(3). The motion carried on a vote of 6 to 0.

On a motion by Vice Chair Dunn, seconded by Commissioner Lyman, the Planning Commission voted to adopt the policy as set forth in Attachment #2 of the staff report. The motion carried on a vote of 6 to 0.

Speakers:

Nancy Jennings, 2115 Marlboro Drive, expressed a request for deferral because they haven't had time to discuss it.

Poul Hertel, 1217 Michigan Court, spoke as an individual and a representative of Old Town Civic Association in opposition to text amendment because the protest petition protects minority rights against the tyranny of the majority. He expressed that boards of home owners associations should be able to speak for the individuals on the petition and the small area plan process does not provide the protection at the hearing against ill-advised zoning that the protest petition protects.

Howard Bergman, 101 Quay Street, spoke in opposition to the text amendment expressing that since the protest petition is rarely used it does not put a burden on the city but it does provide citizens with an important right. Mr. Bergman expressed that the protest petition should apply to both map amendments and text amendment and requested that the Planning Commission and City Council replace the words “text or” in section D of 11-808 to accomplish that.

Katy Cannady, 29 East Oak Street, spoke in opposition to the text amendment and expressed concern that these changes will prevent any protest petitions in the future. She expressed that if you live within 300 feet of a property that is being rezoned with a map amendment that is close enough that you should have the right to protest regardless of whether there is a small area plan study and expressed that minority rights should be protected.

Jack Sullivan, 4300 Ivanhoe Place, spoke in opposition to the text amendment and expressed that he had submitted written comments with suggested amendments to the text amendment for the Planning Commission to consider. In addition he expressed that the law in Virginia is strong that condo boards can act for the people who own condominiums in that area and that in 2008 that the city allowed a condo board to sign a petition so Alexandria House was not in line with previous practice.

Michael Hobbs, 419 Cameron Street, spoke in opposition to the text amendment, specifically to the change to Section E that would remove the right to protest map amendments that are part of a small area plan and expressed that he submitted a written statement. Mr. Hobbs noted that the stated purpose of the amendments to Section 11-808 was to clear up any ambiguities but the proposed amendment goes beyond that and limits important rights. The small area plan process does not provide the same protection as a super majority vote and there is no compelling public need to reduce the right to protest.

This text amendment proposes to amend Section 11-808 of the Zoning Ordinance to 1) update outdated language regarding the calculation of the land area; 2) address condominium ownership; and 3) limit its applicability when the map amendment is to implement a new or revised Small Area Plan chapter of the Master Plan.

I. BACKGROUND

The Zoning Ordinance provides a mechanism whereby landowners adjacent to a site that is the subject of a zoning map amendment may “protest” the zoning map amendment and, upon a proper petition, require that the zoning map amendment be approved only by a supermajority vote of Council— a three fourths majority (6-1) vote.

This provision is a protection for property owners in cases involving zoning map amendments. Where the City initiates a zoning map amendment against the wishes of the property owner of the parcel being rezoned, the owner may protest the zoning map amendment under section 11-808. If a property owner asks for a zoning map amendment but property owners who live within 300 feet of the property to be rezoned oppose it, they may protest. In either case, the zoning ordinance legislates by mathematical calculation the degree of “protest” sufficient to require a supermajority vote by the City Council.

The intent of the protest petition provision is to give land owners in the closest proximity to a change to the zoning map the ability to require additional scrutiny when the change resembles disfavored spot zoning.

On March 16, 2013 the City Council approved a Text Amendment to Section 11-808 to address an ambiguity that had been raised with this provision that resulted in litigation. That change removed the word “text” from section 11-808(D) as follows:

(D) *Effect of protest.* If a protest to a proposed ~~text~~ map amendment is filed, the city council may not approve the proposed amendment except by an affirmative vote of three-fourths of its members.

When the Planning Commission and City Council reviewed that change, both boards requested that staff research additional potential changes to this section that had been raised including:

- 1) update outdated language regarding the calculation of the land area;
- 2) addressing condominium ownership;
- 3) limiting the applicability of this provision when the map amendment is to implement a new or revised Small Area Plan chapter of the Master Plan; and
- 4) expanding the applicability of the provision to include Text Amendments.

Staff did considerable research on these four areas and provided the Planning Commission with the memo dated April 24, 2013 and attached here as Attachment 3. The Planning Commission held two worksessions in May and again in October to discuss the matter and directed staff to propose a Text Amendment to Section 11-808 that addresses issues #1 through #3 above and to prepare a policy to address issue #4. Staff therefore proposes the Text Amendment herein and proposes the draft policy attached as Attachment #3.

II. PROPOSED TEXT CHANGE

The proposed Text change consists of three changes including 1) an update to outdated language regarding the calculation of the land area; 2) a provision addressing how land owned by a condominium unit owners association is calculated for purposes of this provisions; and 3) a change to the limitations section to limit the applicability of the provision when a Map Amendment is proposed to implement a new or substantially revised Small Area Plan Chapter of the city's Master Plan.

1. Update to outdated calculation language

This change proposes to remove the language that currently requires that the Department of Transportation and Environmental Services measure the land area included in the protest petition using a planimeter. A planimeter is a measuring instrument that is no longer commonly used to measure land areas. Currently, the Department of Planning and Zoning has GIS technology that allows the measurement to be calculated much more accurately and efficiently. The proposed change would leave the mechanism used to verify the land area and the required 20% of the owners open in order to allow for whatever latest technology should be used for this measurement. The new language just requires that the petition information be verified and keeps the responsibility with the Department of Planning and Zoning.

2. Condominium Unit Ownership

This change codifies the current interpretation of how land held in common ownership by condominium unit owners is counted in the calculation of the petition area. The protest petition provision gives the ability to sign the petition to owners of *land*. Condominium ownership includes separate and district ownership of the individual units and joint ownership, though the Condominium Unit Owners Association, of the common areas and land. Therefore, this change proposes to allow each individual owner of a condominium unit the ability to sign the petition for his or her allocated portion of the land. There have been suggestions that the president of the Board of the Condominium Unit Owners Association should be able to sign the petition on behalf of all of the owners of the

building. This approach would not allow the individual condominium owners to express his or her opinion. It has also been suggested that the land should be divided by the percentage of ownership each unit owner has which typically depends on the size of the unit. Using this approach would require that the condominium unit owners provide the city with proof of each of their percentage ownership which puts a burden on them that other owners of property would not have. Therefore, dividing the land evenly among the unit owners is the fairest, most efficient way to provide condominium unit owners with the same ability to avail themselves of the protest petition provision as other owners of land.

3. Map Amendments that implement a Small Area Plan Chapter of the Master Plan

This change proposes to add an exclusion to the protest petition provision for Map Amendments that implement a new or substantially revised Small Area Plan. Map Amendments that implement Small Area Plans are the result of a long, comprehensive, and inclusive process that cover a large area of the City. This process inherently already provides the same protection afforded by the protest petition provision.

When the City undertakes a Small Area Plan study which result in a new or a substantially revised Small Area Plan Chapter of the City's Master Plan, the community is closely involved in the process and has the ability to voice their concerns or support throughout the process. The study typically takes 12-18 months and involves an in-depth look at the impact of all proposed changes to the area. If the adoption of the new Small Area Plan results in necessary zoning changes including Map Amendments to implement the proposed changes, those amendments are a result of this collaborative and inclusive process. Additionally, Map Amendments that implement a Small Area Plan typically change a large area of property that affect the area as a whole, not a specific property that may have more impact on the immediate adjacent properties. Given the large areas, protest petitions applied to these map amendments are difficult and unwieldy, if they are possible at all.

The intent of the protest petition provision is to give the land owners closest to a change to the Zoning Map the ability to require a higher threshold before City Council may approve an unpopular, seemingly spontaneous change to one piece of property. Map Amendments that are a result of a Small Area Plan study already have that protection since City Council is approving a well thought out, comprehensive plan at the same time as the Zoning change.

Therefore, there is already a process to protect the community when a Map Amendment implements a new or substantially revised Small Area Plan and applying the provision to these cases does not further the purpose of the protest petition provision.

III. PROPOSED NEW POLICY

Staff was also asked to review whether the protest petition provision should be expanded to also apply to Text Amendments in addition to Map Amendments. During the public hearings regarding the March 2013 text amendment to this provision that removed the words “text or” from subsection D of Section 11-808, the concern was raised by a number of people in the community that if the protest petition does not apply to Text Amendments then the City will use Text Amendments to change the zoning of one piece of property just to avoid the protest petition.

Staff’s research and review of this proposed expansion of the protest petition provision has revealed that the current provision is not structured to apply to Text Amendments, an expansion of the provision would require an amendment to the City Charter and that the type of Text Amendment that the community is concerned about is not commonly used in the City.

Zoning Ordinance Section 11-801 defines a Text Amendment as “A proposal to supplement, change, modify or repeal the provisions of the text of this ordinance” and a Map Amendment as “A proposal to change the boundaries established by the official zoning map.” As noted, Text Amendments change the language of the Zoning Ordinance and as such they typically apply generally either to an entire zone or to multiple zones. Therefore, applying the protest petition to Text Amendments is not possible given the calculations required by the provision. The provision applies to land owners that are within 300 feet of the proposed change. A typical Text Amendment does not apply to a specific area that can be measured. Additionally, in order to expand the application of the protest petition to text amendments the City would need to request a change to the City Charter from the General Assembly since the Charter provision was changed in 1990 to apply only to Map Amendments. Staff also researched the history of text amendments in the City and provided that research to the Planning Commission in the attached memo (Attachment #3). The research showed that the vast majority of text amendments approved in the last 20 years have applied generally rather than to one particular location. Staff found only two examples of Text Amendments that were written in such a way to apply to only one property or parcel.

After reviewing this information with the Planning Commission at the October 2013 worksession, the Planning Commission discussed potential solutions to address the

community's concern about narrowly written Text Amendments. As a result of that discussion, the Planning Commission requested staff to prepare a potential policy document that explains that Text Amendments that are written in a way that resemble Map Amendments should be avoided in order to preserve the protection granted to land owners in Section 11-808. The draft policy is attached as Attachment #2.

IV. STAFF RECOMMENDATION

Although the protest procedure is not used often, it is a practice that exists in other cities, both in Virginia and elsewhere, and is an important right of landowning citizens. It allows the public to participate in a zoning map amendment case to which they object and to require their legislators to approve the matter by more than the otherwise required simple majority vote.

Staff recommends that this text amendment be approved in order to update the language, preserve the rights of condominium unit owners and focus the provision on the type of Map Amendment to which it is intended to apply. Staff further recommends that the Policy on Text Amendments that Affect One Property be adopted in order to emphasize Planning Commission and City Council's commitment to this protection and the avoid confusion by using Text Amendments that resemble Map Amendments.

Attachments:

Attachment 1: Proposed Zoning Text Changes

Attachment 2: Policy on Text Amendments that Affect one Property

Attachment 3: Memo to Planning Commission dated April 24, 2013

ATTACHMENT #1

PROPOSED ZONING TEXT CHANGES

11-800 Zoning Amendments

11-808 - Protest of zoning map amendment by landowners.

(A) Who may protest. A protest shall be signed by the owners of at least 20 percent of:

- (1) The land proposed to be rezoned by the map amendment; or
- (2) All land within 300 feet of the boundaries of the land proposed to be changed by the map amendment.

(B) Deadline for protest. A protest must be filed with the city clerk no later than noon on the last working day before the day on which city council conducts its first public hearing on the proposed amendment.

(C) Calculation of ownership. The director shall verify that those filing are legal property owners **and that there are sufficient legal property owners signing to constitute the required 20 percent, subject to the following: Through mathematical calculation and the use of a planimeter, the department of transportation and environmental services shall verify said 20 percent area.**

(1) Streets, alleys and land dedicated to public use or owned by the city, state or federal government shall not be included in computing the areas of ownership required.

(2) If land included in the computation is owned by a Condominium Unit Owners Association then the square footage of the land shall be divided evenly by the number of units in the Condominium Unit Owners Association and each owner of a unit shall be entitled to sign for his or her allocated portion of the land.

(D) Effect of protest. If a protest to a proposed map amendment is filed, the city council may not approve the proposed amendment except by an affirmative vote of three-fourths of its members.

(E) Limitations.

- (1) Once a protest has been filed, no changes by way of addition, substitution, amendment or withdrawal may be made to the protest after the deadline provided for the filing of a protest in section 11-808(B).
- (2) A protest against a less restrictive change is not effective against a more restrictive change but a new protest may be filed against the more restrictive change and this paragraph does not prevent the filing of a protest against both a less and more restrictive change.
- (3) The provisions of this section 11-808 shall not apply to city owned property or be effective in the case of a map amendment which is part of a comprehensive implementation of **a new or substantially revised small area plan chapter of the master plan or** a new or substantially revised zoning ordinance.

Note: New text is shown in bold and underlined and deleted text is shown in bold and strikethrough.

ATTACHMENT #2

TEXT AMENDMENTS THAT AFFECT ONE PROPERTY

The following is intended to outline the Planning Commission and City Council's guidance to staff regarding Text Amendments to the Zoning Ordinance.

Introduction and Background:

Zoning Ordinance Section 11-801 defines a Text Amendment as "A proposal to supplement, change, modify or repeal the provisions of the text of this ordinance" and a Map Amendment as "A proposal to change the boundaries established by the official zoning map." While these two actions are separate and distinct actions, City Council acknowledges that there are some Text Amendments that can be written so narrowly that they have the same effect as a Map Amendment. A narrowly written text amendment is therefore discouraged because it confuses the line between these two very different tools to implement change.

Policy:

Planning Commission and City Council hereby discourage the use of a Text Amendment if the change to the Zoning Ordinance text will only affect one (1) property, lot, or parcel. If such a change is proposed, staff shall make every effort to process such a change as a Map Amendment that amends the zone of the property rather than a Text Amendment that changes the zoning ordinance text.

Examples of Text Amendments that affect one property:

- Language in one zone that outlines a particular address or block that is being changed. ie, If the property is surrounded by King Street, Fairfax Street, Royal Street and Cameron Street, then the FAR can be increased to a 3.0 with a Special Use Permit...
- Language that has so many exceptions that only one property satisfies the criteria. ie, All property within this zone that is three blocks from the River and is used as a Public Building may go up to a height of 200 feet with a Special Use Permit...

Examples of Text Amendments that would not fall within this policy:

- Text Amendments to change the language of the Table in Section 5-602 that outlines the zoning regulating for Coordinated Development Districts. Each CDD is considered a stand-alone zone so a text amendment to change the language of a CDD regulation in the table is equivalent to a text amendment to change the zoning regulations in a zone.
- Text Amendments to change the regulations of a particular zone including use, FAR, height, density, etc. that apply to the whole zone
- Text Amendments used to implement a new or revised small area plan chapter of the Master Plan.

City of Alexandria, Virginia

MEMORANDUM

DATE: APRIL 24, 2013

TO: CHAIRMAN AND MEMBERS OF THE PLANNING COMMISSION

FROM: FAROLL HAMER, DIRECTOR, PLANNING AND ZONING

SUBJECT: POTENTIAL CHANGES TO SECTION 11-808 OF THE ZONING ORDINANCE

On March 5, 2013, the Commission considered a text amendment (TA# 2013-0006) clarifying that, pursuant to section 11-808 of the zoning ordinance, the protest procedure applies to only map amendments, not text amendments. The Commission recommended approval and City Council considered and adopted the text amendment on March 16, 2013 and subsequently adopted an ordinance implementing the change on April 13, 2013.

As part of its discussion, the Commission asked Planning staff to consider the thoughtful and thorough comments of citizens who spoke at the hearing, and questions raised by the Commission itself, and to report to the Commission regarding the potential for additional changes to the language of section 11-808. This memorandum addresses that request, by discussing the following four areas of potential changes with regard to section 11-800:

- Modernizing outdated language for current practice;
- Applying the protest provisions to condominium ownership;
- Expanding the protest provisions to apply to text amendments; and
- Applying protests to map [and/or text] amendments implementing comprehensive planning changes.

A work session with the Commission has been scheduled for May 7 so that these issues can be discussed and so the Commission may provide guidance to staff about next steps and whether additional work is appropriate.

BACKGROUND AND HISTORY OF SECTION 11-808

The protest provisions of the Alexandria zoning ordinance provide an extra level of protection for property owners in map amendment cases. They apply in two situations: First, if the City initiates a map amendment against the wishes of the property owners, the owners of the parcel being rezoned may protest the map amendment under section 11-808. Second, and more typical, if a property owner asks for a map amendment but surrounding property owners oppose it, they

may protest.¹ In either case, the zoning ordinance legislates by mathematical calculation the degree of “protest” sufficient to require a supermajority vote by Council. Specifically, the rule requires a successful petition to include the signatures of the owners of at least 20 percent of the land area – either being rezoned or, in the second example, within 300 feet of the subject property. If sufficient property owners sign the petition – representing at least 20% of the land in the applicable area – then a supermajority vote by Council is required.

History and Authority for 11-808

Because authority for protest procedures is not found in the Virginia state code, landowners in most jurisdictions in Virginia do not have the ability to file protest petitions and to require a supermajority vote to approve a map amendment. Alexandria, Richmond and Falls Church² do have this power, and they do by virtue of the authority granted in each of their charters. In Alexandria, it was the City’s comprehensively revised 1950 charter that first included language regarding protest petitions, and the same language was incorporated into the City’s 1951 comprehensive zoning ordinance revision.

A series of amendments were made in 1965 (protest procedure applies when Council adopts comprehensive zoning changes); 1975 (protests must be filed by noon on the day preceding Council’s first hearing), and 1981 (the Planning department is to verify the signatures on the petition and the Department of T&ES, through mathematical calculation and use of a planimeter, is to verify the 20%).

Then, in 1990, in conjunction with other Charter changes modernizing procedures for zoning amendments, the protest procedures language was changed in a number of ways. Two significant changes affected the protest procedure:

- **Removal of text amendment language.** Before 1990, protest procedures had been theoretically applicable to changes to both the zoning map and the zoning text. Both the Charter and zoning ordinance were changed to make clear that the procedure applied only to map amendments, including changes to proffered conditions attached to a zoning map designation.
- **Not applicable to comprehensive rezoning.** The language regarding the provision’s application to comprehensive zoning changes was changed. Where previously it applied when “Council adopts comprehensive zoning changes or revisions,” it would now not apply when “Council adopts a new zoning code or a comprehensive revision to a zoning map...”

¹ This latter case also applies when a developer/property owner seeks a change to the language of a proffer already applied to the zoning. This type of case is considered a map amendment under state law and the City’s zoning ordinance.

² Staff contacted both Falls Church and Richmond and learned that the protest provisions are relatively unknown and have not been used in many years—if ever.

Alexandria history with protest cases

Although rarely used in Alexandria, there have been some protest cases over time. Over the last 10 years, protest petitions were filed in the following cases.

Date	Type	Case #	Address	Project Name
11/15/03	REZ	2002-0005	3517 Duke Street	Quaker Ridge
4/17/04	REZ	2002-0004	11 North Quaker lane	Quaker View
12/18/04	REZ	2004-0002	1323 Duke Street	Beasley Square
10/18/08	REZ	2007-0003	1199 South Washington Street	Hunting Terrace
6/25/11	REZ	2011-0001	717 North St. Asaph	Harris Teeter
1/21/12	TXT	2011-0005		Waterfront W-1 Zone

As noted in the March discussion, prior to the Waterfront case, no protest had ever been filed in a case involving a text amendment. In addition, no protest petition has ever been filed by the owners of the land being rezoned.

Zoning ordinance requirements for a sufficient protest petition

Each protest petition filed represents a large staff effort to determine the appropriate land area from which protest signatures may derive and to accurately validate signatures, and to determine that sufficient signatures have been submitted consistent with the ordinance to trigger the required supermajority vote. Although the language of the zoning provision makes that process appear simple, analysis of a protest petition requires a highly detailed, technical and mathematical research project. Specifically, staff's analysis requires it to take the following steps:

1. Draw a circle from the outer boundary of the map amendment parcel extending 300 feet in all directions.
2. Calculate the amount of land area within that 300-foot perimeter of the property, subtracting out all streets, alleys and public land.
3. Calculate the amount of land area that represents 20% of the total amount within the 300 foot perimeter.
4. Obtain a list of all private properties within the 300 foot perimeter.
5. Research the City's property records and identify the record property owners of those parcels.
6. Review the protest petition to verify that the signers are record property owners of the parcels within the perimeter area.
7. Calculate the amount of land represented by verified property owners on the petition.
8. Determine if that amount meets or exceeds the 20% figure calculated under #3.

The ordinance provides that the deadline for a protest is noon on the day prior to the first Council hearing on the map amendment. Thus, staff is required to perform the above functions extremely quickly. Although modern technology and electronic data are immensely helpful, it is still imperative, as the Commission considers potential changes to the protest process, that the end result be something that can realistically be accomplished in the short time available.

POTENTIAL CHANGES TO THE PROTEST PROCEDURE

1. Modernizing outdated language for current practice

The language of the section has been essentially the same through its history, with additional language being added as needed and to reflect changes to the authority in the charter. A few of the references in the section are no longer accurate as to how staff's research occurs today. Several speakers before the Commission pointed out that some details of the language are outdated, specifically as to:

Remove planimeter language

A planimeter is a handheld device, similar to a compass, which measures distances in diameter. Today, with modern technology, including electronic data, and especially the Geographic Information System (GIS) used for mapping, distances, property ownership and geographic calculations of land area can be accomplished electronically. In the past few protest cases, GIS was used successfully to identify all adjacent properties within 300 feet, to determine the total land area within that distance, to subtract from that amount all property used for public purposes, to identify the record owners of those properties and, after owners' signatures were verified, to determine whether the parcels represented by the verified signatures amounted to 20% of the land area to be counted. A planimeter is no longer necessary and is not the most efficient measurement tool to use.

Remove necessity for engineering assistance

Along with the historic need for a planimeter, engineers were required in the past to use the city's official maps and property surveys to find properties and calculate ownership. Thus the ordinance retains the reference to the Department of Transportation and Environmental Services, which includes the City's engineering and survey expertise. Again, because the data is electronic today, neither engineering nor survey staff is necessary. GIS is a function within the Planning and Zoning Department. Therefore, the reference to T&ES should be eliminated, leaving the Director of Planning responsible for verifying both the correct property owners and the calculation of ownership. This is exactly the process that has been used in protest cases in recent history.

If the above two changes are made, the language would be as follows:

(C) Calculation of ownership. The director shall verify that those filing are legal property owners and that there are sufficient legal property owners signing to constitute the required 20% . ~~Through mathematical calculation and the use of a planimeter, the department of transportation and environmental services shall verify said 20 percent area.~~ Streets, alleys and land dedicated to public use or owned by the city, state or federal government shall not be included in computing the areas of ownership required.

Additional organizing and formatting changes may be desirable, depending on the extent of changes eventually adopted.

2. Applying the protest provisions to properties in condominium ownership

The question of condominium ownership, not addressed in the language of 11-808, arose in the Harris Teeter case, when Alexandria House filed a petition protesting the Harris Teeter map amendment on North Pitt Street. The Director's finding that there were insufficient signatures included on the petition to amount to 20% of the landowners within 300 feet of the site was challenged. One of the issues raised was the director's treatment of the condominium board and unit owner signatures. The question was debated at the Board of Zoning Appeals, but the BZA determined that the issue was moot in that Council approved the map amendment on a unanimous vote.

To apply the protest language to a condominium within the 300 foot protest area, the director determined that the only method that would be fair to all unit owners and also be fair relative to other property owners within the 300 feet diameter was to divide the size of the horizontal condominium land parcel by the total number of condominium units and to multiply that unit ratio by each unit represented by a valid signature on the petition. Staff continues to support this interpretation, now public and known, and does not think a change to the zoning ordinance is necessary.

In the Harris Teeter case, three different methods were suggested by various parties as alternatives to the director's methodology. Staff does not believe that any of these alternatives present a fair method for calculating a condominium for protest petition purposes, as set forth more fully below:

- The condominium board of directors should be able to sign the petition on behalf of all unit owners;
- Condominium unit signatories should be allotted their proportional share of the whole property; and
- The amount of land included in a condominium should include all square footage in the building; it should not be limited to the horizontal land area of the parcel.

A condominium board, while granted authority to speak for the ownership with regard to some functions of condominium, such as hiring contractors or litigating inadequate workmanship on construction projects, does not have the authority, either as a legal or practical matter, to speak for individual unit owners as to zoning matters. Furthermore, under section 11-808, "owners" of "land" must sign the protest petition and a condominium board does not actually own any land. It does not even own the common elements of the condominium, even if it does have the legal authority to act on behalf of the owners as to common areas. And the common elements are only a fraction of the whole of the property, the remainder being represented by all of the individual owners.

As to the division of ownership among unit owners, it is true that ownership interests are typically not equal and often, but not always, based on the relative size of each unit share. While applying a different ownership ratio to each signing unit owner on a petition has some appeal because it would be more precise, as a practical matter it is difficult for staff to know with

certainty the ownership proportions within the project, or to determine them within the time allotted. The relevant condominium documents are researchable in the courthouse land records, but are not typically part of the City's electronic real estate data. Thus, a unit-by-unit assignment of shares would have to be made from researching the land records in either case, after careful historical research of the condominium documents for each condominium project within the protest area. The required research could not confidently be done within the extremely short time period allowed for staff to assess the validity of signatures and to calculate the sufficiency of a protest petition within the time allowed for staff review.

Finally, staff rejected the notion that a condominium's vertical size, including all of its square footage, was the appropriate size of the property for protest purposes because to do so would be unfair to a smaller condominium with the same land area and to non-condominium properties within the protest area. To follow the argument to a consistent conclusion, all *buildings* – not *land* -- within the 300 feet would have to be considered, in direct contravention of the language of the ordinance.

Therefore, for both legal and practical reasons, staff cannot support any of the alternative suggested methods for protest petitions involving condominium property. Instead it suggests that the City's current interpretation should continue. It is fair, clear, and achievable as a practical matter.

3. Expanding the protest procedure to apply to text amendments.

The recent text change, removing “text or” from the language of section 11-808, was critical to clarifying the provision's status and meaning today. The text now reflects the City's longstanding application of the protest process only for map amendment cases, as well as the limits of the City's legal authority in its charter. A potential expansion to include text amendments raises several issues for consideration and requires an understanding of some zoning basics. An expansion to include text amendments will also require a change to the City's charter.

The difference between map and text amendments

Map and text amendments are two very different zoning mechanisms and the difference has provided the rationale for protest petitions being limited to map changes.

Every piece of land is “zoned,” meaning it has been legally designated in one of the City's zoning categories. The zones include such names as CL, RB, CRMU, etc. The city's zoning map graphically shows those designations in different colors and labels. Property owners can find their property on the zoning map and learn its designated zone. Then, by using the zoning ordinance or text, they may learn what is permitted in that particular zone. Within the ordinance document are, for each zone, all of the uses that are allowed, the rules for the type and size building that can be built and a variety of other particulars that apply as a matter of zoning for the use of an owner's land. There are also many rules, such as parking and procedural requirements that apply either to all zones or to certain uses or circumstances regardless of the zone.

Map amendments and text amendments are both generally addressed in the zoning ordinance as “zoning amendments.” Section 11-800. Section 11- 801of the ordinance sets out the distinction between a map and text amendment:

A proposal to supplement, change, modify or repeal the provisions of the text of this ordinance shall be referred to as a text amendment. A proposal to change the boundaries established by the official zoning map shall be referred to as a map amendment.

The procedures for each are different in some important ways. For example, the notice required for a map amendment includes written notice to adjacent property owners and newspaper notice, while the notice required for a text amendment only requires newspaper notice. See section 11-301 and 11-302(B). Initiation procedures are also different; a property owner can generally not apply to amend the text of a zone. See section 11-802(C). This distinction between map amendments and text amendments is not unique to the City’s zoning ordinance; it is a cornerstone of zoning in general. The official zoning map and the official zoning ordinance are two very distinct tools used in zoning in very different ways. The map is specific to each particular piece of property and affects the property more directly while the text of the ordinance applies generally and is considered to affect properties more indirectly.

Modern Alexandria Zoning

Traditional, Euclidean zoning is characterized by the segregation of land uses into specified geographic districts with the identical rules applicable to all land within the mapped zone. Several of Alexandria’s zones are of this type, including the basic residential and commercial zones. There are advantages to Euclidean zoning in that it is relatively effective, easy to use, has a long-established legal precedent, and is familiar. The term “Euclidean” comes from the seminal zoning case, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), in which the U.S. Supreme Court upheld the legality of zoning in general and single family zoning in particular. Significantly, it was these Euclidean zones that were in place when the protest procedures originated, and was the type of zoning for which the protest mechanism was designed. Although traditional, Euclidean zones, such as R-20 and Commercial general (CG), have a place in Alexandria and work well in parts of the City, they do not provide sufficient design review or the wide mix of uses required for many of the city’s development areas.

Modern Alexandria zoning has therefore become more flexible and nuanced, in some respects, including form based regulations, design guidelines, development SUPs, and proffered rezonings with unique regulations for development sites. Thus text amendments such as the Mount Vernon Overlay District, the infill regulations, and the small business zoning procedural changes reflect Alexandria’s need for fine-grained, detailed-but-flexible regulations appropriate to today’s urban fabric. The Coordinated Development District (CDD) zoning is another modern example. It originated with the 1992 ordinance revisions, and is the latest iteration of what had previously been Alexandria’s PUD and later CO zoning. It is designed to consider a development area uniquely without the necessity of applying an existing traditional zone to it. It is typically an important tool for implementing a small area plan, because it allows significant development but with specific design related regulations and a mix of uses that are critical if the development is to

fit within the context of an established part of the City. What is new about the CDD approach, however, is that a CDD zone is created by both a map and a text amendment. A map amendment is required to include a new CDD on the zoning map. However, the regulations that apply within that CDD are found in the text of the ordinance under section 5-602. In this way it is not different from a traditional zone. What is different is that each CDD site has its own unique regulations found in the chart at section 5-602.

The purpose of the protest process.

The protest process provides citizens with the highly extraordinary ability to require a greater degree of consensus among lawmakers in order to change the zoning of a property. As designed, this ability is available only to those who own the property being rezoned, or to those who own property in very close proximity. It is not available generally to all landowners, even to stop what some may consider an egregious or radical zoning change.

The protest process is not designed to apply to all important or substantial changes. Some have suggested that because changes to the text can be significant, protests should be applied to text amendments. There is no question but that changes to the text are substantive and can create a significant change in zoning. In fact, all density, height and use particulars are found -- not on the map -- but in the text of the ordinance. But that fact alone should not be dispositive regarding the question of protests.

Instead, the protest process is specifically designed to apply only when one isolated and measurable group feels the zone change discretely, and not when a zone change operates to affect a large number in a more universal way. An appropriate zone change for the protest process is one that affects those within a special zone of impact, and that zone is legislatively described: 20% of the landowners within 300 feet of the property being rezoned. Where the group impacted is small and identifiable, and a significant percentage of landowners agree, the change comes close to resembling disfavored spot zoning, and it should be difficult to make the change. In the past, with only Euclidean zones, a map change would affect disproportionately one group by changing the mapped zone applied to neighboring property. On the other hand, where the impact is diffuse, applicable to all or to a great number, this particular mechanism is not appropriate. This distinction provides the rationale for not making changes to the zoning text subject to the protest process. Instead, text amendments are subject to the regular legislative process, with its constitutional protections in the form of multiple public hearings, notice and a majority vote of the elected legislative body.

Text amendment history

In order to assist the Commission and to see whether it could isolate types or categories of text amendment for consideration, Staff reviewed the number and type of text amendments in the city's recent history. During the last 20 years, from 1993 through today, for example, there have been 194 text amendments considered. During the prior 10 years, there were 170 text amendments considered. Looking more closely at the last 20 years, staff found that the great majority of text amendments were of citywide application (130 out of 194 cases). Examples of this group include proposals with regard to:

Open space	Political signs	ATM machines
Parking	Air conditioning noise	Group homes
Infill development	Big box retail stores	Rooming houses
Floodplain regulations	Curb cuts	Car title loan businesses
Recycling locations	Drive through facilities	Rows of townhouses
School heights	Convenience stores	Food court definition
School trailers	Rental bicycles	Cell phone towers
Chesapeake Bay protection	Sexually oriented business	Farmers markets
Nonconforming uses	Outdoor dining	

In addition to these topics, 27 of the citywide text amendments during the last 20 years relate to procedures in the zoning ordinance, including with regard to:

Subdivision regulations (4)	Zoning enforcement and fines
Period of validity (2)	BAR procedures
Variance standards	Development application procedure
Special exception	Notice of appeals
Small business zoning/admin SUPs (2)	Notice of final CDD site plan
Disclosure requirements	Change of ownership SUP
BAR administrative approvals (2)	Site plan process
Third party review of traffic studies	Minor amendment procedure

As a point of reference, staff also researched the rezoning or map amendment cases over the last 20 years. There were approximately 100 of them, and a good sample is listed in Table B. They cover near all of the significant development sites in the City, including Carlyle, James Bland, Cameron Station, Potomac Yard, as well as some smaller but important rezonings, such as Chatham Square, the Delaney, Safeway, Braddock Gateway and Jefferson Houston. All were legally amenable to a protest petition, even though only a few actually were protested.

“Protestable” text amendments

If there are text amendments appropriate for the protest process, the text amendment, consistent with the purpose, intent and the limited nature of the procedural mechanism, must relate to a defined and identifiable piece of land, so that a 300 foot diameter can be drawn and so that property owners within that land area can be identified and 20% of them mathematically calculated. Staff’s research confirmed that most text amendments apply to the city as a whole, clearly not a type of zoning change anticipated by the protest procedure. A boundary of 300 feet would not include anyone in the city, become meaningless in application, and near impossible to manage, should one ever be attempted.

Staff does not find that text amendments that are applicable to one or more specific zones, or to specific locations in the City, to be “protestable” either. Table A shows the 40 text amendments in the last 20 years that related to a specific geographic area. None of the text amendments listed on Table A, except maybe those for Landmark Mall, and possibly one or two others, can be easily amenable to the protest rules. There have been several amendments to the Industrial zone, for example, over the last 20 years. But that zone is scattered in four different locations across the city. There was a relatively simple amendment in 1996 to allow massage establishment as a

use in the CL zone; however, the CL zone is located, in addition to along Mount Vernon Avenue, at several other sites throughout the City, including south Old Town, the West End, on Duke Street and in Parker Gray. At the other end of the spectrum, in 1994, the text was changed to allow density to be transferred among properties within a CDD or in one of the CRMU zones. This significant change was applied to numerous, unconnected properties across the city.

None of these examples could have easily or fairly been the subject of a protest process. Not only might there be literally thousands of involved properties, but the mathematical calculations also become quickly complex. With the zones scattered in different locations on the map, would each separate island of property subject to the text amendment have its own 300-foot border? If so, should there be a separate petition requirement with the 20% requirement applying to each area separately? If so, the result could be that some but not all of the land is subject to a supermajority vote of Council. Or would there be a 20% requirement for the aggregate of land areas and surrounding landowners? Even if we can agree on answers to these preliminary questions, staff is not likely to be capable of performing this function in a single afternoon. And the idea runs counter to the intent of the procedure to apply to a small, targeted group of landowners who are affected more than others by the zoning change.

CDD Zoning

The final category of text amendments staff reviewed relates to the CDD zones. There have been 24 CDD text amendments over the last 20 years but in 16 of those cases the text amendment was accompanied by a map amendment case as well. The map amendment case has been and continues to be subject to the protest provisions of the zoning ordinance, so in each of those text amendment cases there was an opportunity to file a protest petition. Table C lists the CDD text amendments over the last 20 years and indicates which ones were part of a TA/REZ package, and which ones were not accompanied by a map amendment case. In the latter eight cases, an existing CDD was changed by modifying the CDD chart under section 11-502 of the zoning ordinance.

For example, in 2000, in order to accommodate the Patent and Trademark Office, new zoning was approved. First a map amendment case created a new CDD and made it part of the zoning map. In addition, a text amendment was approved adding the new CDD regulations, heights, density, and other regulations to the CDD chart at section 5-602 of the zoning ordinance. On the other hand, after a CDD is created, subsequent amendments do not require a map amendment action. For example, the PTO chart was later amended to increase the height allowed for PTO property and only a text amendment was needed to change the CDD table. Likewise, in recent years there have been a series of changes to the requirements for parts of Potomac Yard, which has been, since 1992, part of one or more CDD zones. When in 2008, 2010 and 2012 changes to Land bays G, H, J and L were made to allow changes in uses, heights and as to parking, only the CDD charts in the text of the ordinance required a change.

One of the arguments raised at the Planning Commission hearing is that the city's zoning has become so sophisticated and flexible that the difference between a map and text amendment has become blurred. These CDD cases are examples. Although in some ways similar to a traditional zone, when the text of a CDD is changed, it is not dissimilar to changing a map because it only applies in one location. Arguably this last set of cases, CDD text amendments not accompanied

by a map amendment, might be the subject of a protest. In fact, several of these CDD chart amendments made significant changes to uses, density or height, matters that under traditional zoning would have required a map change. Thus there may be an argument for finding a way to segregate such cases for distinct treatment, so that when a zoning change, even though it is a text amendment, applies to a single property and addresses zoning fundamentals, such as use, density or height, then the protest procedure would be available. Such cases are similar to what historically, under traditional zoning, would have been a map amendment and thus may be suitable.

On the other hand, there are several factors to consider. First, there have been only eight CDD cases out of 194 text amendments over the last 20 years that met those criteria and were not accompanied by a map amendment. There may be one or two other text amendment cases that can be identified for similar treatment. For example, there was a 1995 text amendment in the CD-X zone for a property subject of a TranSUP that was also within 1000 feet of the King Street Metro. By its terms this increase in density in CD-X applied to only one property. Still, these cases as a group form a very small subset of all text amendments.

In addition, not all of the CDD sites are small and singular thus lending themselves to drawing a 300-foot radius around the land areas involved. In some cases the land area is not connected, as with Potomac Yard land bays, making application of the protest rules difficult. Where the land area is large and not coterminous, even a map amendment case, such as the recent Beauregard zoning, can create a very challenging protest case. And applying the protest petition to these CDD areas that are intended by definition to be large tracts of land dilutes the purpose of the protest petition which is to require a closer look at changes when one isolated group feels the zone change discretely, not when a zone change operates to affect a large number in a more universal way.

Finally, staff notes that it would be difficult to articulate legislatively the precise limits of such a category of text amendments. Defining the type of land area appropriate to a protest among the many CDDs and many text amendment examples is extremely challenging. Terms such as a “single property” or an “individual site” are subject to a wide variety of interpretation. “Lot” and “tract” are defined terms and, while useful, may not include all desirable cases.

4. Exempting zoning changes implementing small area plans.

Over the years, the protest process has been changed and changed again as to its application to comprehensive zoning or planning changes. First, in 1965 it was amended to be specifically applicable to comprehensive zoning changes; in 1990 it was changed to make it not applicable when Council adopts a new zoning code or a comprehensive revision to a zoning map. The question is difficult: what is appropriate as to protest petitions in the case of a comprehensive change to either zoning or the master plan.

The small area plan work undertaken over the last ten years includes substantial opportunity for public input and typically is discussed over years of public meetings and discussions with the affected public. Significantly, the small area plan work, even if applicable to only one area

within the city, is undertaken with the perspective of the needs and priorities of the city as a whole. It is not appropriate then for the implementing mechanism – whether it is a map or text amendment – to be the subject of a protest designed to afford protection to a narrowly defined and located group of property owners.

Staff supports the existing language, but recommends an additional exemption for zoning changes that implement a substantial revision to the master plan of the city, such as the adoption of a small area plan.

CONCLUSION

Staff presents the above information for the Commission’s consideration and discussion as it reviews the issue of expanding the reach of protests.

The protest petition process is and has been applicable only to map amendments because text amendments, with their typically broad application, are rarely sufficiently targeted and specific to a site capable of the specific measurement and calculation requirements of the protest. Until the waterfront controversy there has never been an attempt to protest a text amendment.

Staff recommends that the language of section 11-808 be updated, to eliminate reference to the planimeter and engineering staff, and to exempt zoning that implements a small area plan but otherwise cautions against tinkering with this difficult and quickly complex procedure.

Any change that expands the protest language to include text amendments will require a change to the City’s charter to broaden the scope of section 9.13. The Virginia General Assembly will have to agree with the change, and the process will take at least a year’s time.

STAFF: Faroll Hamer, Director, Planning and Zoning
Joanna Anderson, Acting Deputy Director, Planning and Zoning

ATTACHMENTS:

1. Language of section 11-808.
2. Table A: Text amendments related to specific geographical areas.
3. Table B: Sample Map Amendment cases.
4. Table C: CDD text amendment cases.

11-808 - Protest of zoning map amendment by landowners.

- (A) *Who may protest.* A protest shall be signed by the owners of at least 20 percent of:
- (1) The land proposed to be rezoned by the map amendment; or
 - (2) All land within 300 feet of the boundaries of the land proposed to be changed by the map amendment.
- (B) *Deadline for protest.* A protest must be filed with the city clerk no later than noon on the last working day before the day on which city council conducts its first public hearing on the proposed amendment.
- (C) *Calculation of ownership.* The director shall verify that those filing are legal property owners. Through mathematical calculation and the use of a planimeter, the department of transportation and environmental services shall verify said 20 percent area. Streets, alleys and land dedicated to public use or owned by the city, state or federal government shall not be included in computing the areas of ownership required.
- (D) *Effect of protest.* If a protest to a proposed map amendment is filed, the city council may not approve the proposed amendment except by an affirmative vote of three-fourths of its members.
- (E) *Limitations.*
- (1) Once a protest has been filed, no changes by way of addition, substitution, amendment or withdrawal may be made to the protest after the deadline provided for the filing of a protest in section 11-808(B).
 - (2) A protest against a less restrictive change is not effective against a more restrictive change but a new protest may be filed against the more restrictive change and this paragraph does not prevent the filing of a protest against both a less and more restrictive change.
 - (3) The provisions of this section 11-808 shall not apply to city owned property or be effective in the case of a map amendment which is part of a comprehensive implementation of a new or substantially revised zoning ordinance.

Table A
April 24, 2013 Memo to Planning Commission

Text Amendments related to geographic areas (40)

<u>Year:</u>	<u>Description</u>	<u>Zone Changed</u>
2013	W-1 changes	W-1 zone
	Schools, day care added	I zone
	Public schools added	CR zone/Landmark Mall
2011	W-1 changes	W-1 zone
	Car title loans	NR and MV overlay zone
2009	Administrative review of signs	historic districts
	Small business for Cameron Station	Cameron Station
	Public recycling	I zone
2004	FAR	CD-X zone
2005	Mount Vernon Overlay district	Mount Vernon Ave (Nelson to Hume)
2000	Apartments	CD zone/Old Town commercial
1998	Homeless shelter	CRMU-H zone
1997	Residential/retail focus uses	CRMU-X zone
	Corner lots (2F)	R-2-5 zone
	Parking space as open space	RM /Old Town residential
	Open space	RM/Old Town residential
1996	Height increase for retail	King St Metro District (1000 ft from Metro entrance)
	Massage added	CL zone
1995	Add garden centers	All commercial and industrial zones
	Freestanding signs allowed	historic districts
	Add amusement enterprise	I zone
	Change yard requirements	RB, RM zones within historic districts/and different rules apply to each
	Height increase for retail	King St Metro District (1000 feet from Metro entrance)
	Increased FAR	OCH zone parcel within 1000 ft of Metro and part of a TransUP
	Drive through banks on Washington St	CD zone on Washington Street
	Apartments above commercial	CD zone
	Light assembly allowed	CSL zone
No freestanding signs	Washington Street	
1994	Density transfer allowed	CDD and CRMU zones
	Density change	CSL zone
	Farmers markets allowed	all commercial zones
	Density and lot size	RC-X
	Signs	CRMU commercial
1993	Corner lots	RM and CD zones residential
	Sheds	All TH zones
	Private school added	CR zone/Landmark
	Density	CD-X zone
	Open space	RM zone
	Height increase	POS zone
	Retail added	Industrial zone

Table B
April 24, 2013 Memo to Planning Commission

Sample Map Amendment Cases (100)			
year	project name	address	zone change
2012	The Delaney	100 S Pickett	CG to CRMU-M
	Jefferson Houston	1501 Cameron	R8 to POS
	East Reed	118 E Reed	CDD7 to CRMU-M
	Beauregard	multiple	new CDDs
2011	Harris Teeter	735 N St Asaph	CD to new CDD
	Safeway	3526 King St	CG to OC/proffers
2010	Freedmens Cemetery	1001 S Washington	CL to POS
2009	Potomac Yard/Landbay F	3601 Jeff Davis	change to new CDD
	Carlyle	1800 Eisenhower	add land to CDD
	The Calvert	3110 Mt Vernon	change proffer
2008	James Bland	918 N Columbus	new CDD
	Landmark Gateway	631 S Pickett	new CDD
2007	ACC holdings	717 Pendleton St	remove proffer
	Witter Field	2600 Bus Center Dr	Industrial to POS
	Braddock Gateway	1200 N Fayette	new CDD
2006	Extend historic district	1500 King Street	
2005	Mt Vernon Overlay	multiple	new CDDs
	King Street Retail Strategy	multiple	KR Zone on King Street
	Hunting Creek	Implementation	RC and OCM(50) to UT and RC
	King Street Outdoor Dining	multiple	King Street Outdoor Dining Overlay
	Diamond	800 Slaters Lane	CSL to RC
2004	Beasley Square	1323 Duke St	CD to CRMU-L
2003	Eisenhower East	multiple	new CDDs
	Arlandria	multiple	new CDD
	Quaker Ridge	3701 Duke St	CL to CRMU-H w/proffer
	TC Williams	3330 King St	POS to R20
2002	Preston	181 E Reed	RB, CSL to CRMU-M
	Chatham Square	409 N Pitt	RM to CRMU-X
2001	Lindsay Cadillac	Kenwood/Osage	RB, OC to CSL
	Alexandria Hospital	4320 Seminary	R12 to R8
2000	Expansion of historic district	N Washington Street	
	Marriott	1460 Duke	OCM 100 to CDD#1
	Animal Shelter	4075 Eisenhower	POS to I
1999	Cameron Station V	5010 Duke St	Increase heights for CDD 9
	Coca Cola	5401 Seminary	R-20 to I
	Hopkins House	1224 Princess St	change to proffer
1998	Plaza at King St Metro	1900 King St	UT to OCH
1997	Beatley Library	5019 Duke St	POS to CG
	Hoffman	2400 Eisenhower	Increase heights
1996	Fords Landing	700 S Union	Removal of proffers
	Old Town Village	409 S Henry	OC, RA and RB to CRMU-L
	Alexandria Toyota	3800 Jeff Davis	OC to CG
1995	Potomac Yard	3601 Jeff Davis	RB to CRMU-L for CDD 10
	Summers Grove	5701 Eisenhower	UT to OCH
1994	Carlyle	2000 Duke St	UT to CDD 1

Table C
April 24, 2013 Memo to Planning Commission

CDD Text amendment cases with or without companion rezoning case (24)

<u>Year</u>	<u>Text Amendment</u>	<u>with a Rezoning?</u>
2013	Beauregard CDD	REZ new CDD
2012	PY: Land bay G (change hotel use to office)	no REZ (CDD table)
2011	Harris Teeter	REZ: new CDD
2010	PY: Land bays H, I, J and G (changes to retail, heights and mix of uses)	no REZ (CDD table)
	North PY	REZ new CDD
2008	Landmark Gateway	REZ new CDD
	James Bland	REZ new CDD
	PY: Land bays J, L, H (changes to allow use changes, increase heights)	no REZ (CDD table)
	Braddock Gateway	REZ new CDD
2005	Access to Monroe Ave Bridge(change to alignment)	no REZ (CDD table)
	Carlyle/Eisenhower East (design review board for CDDs 2, 11)	no REZ (CDD table)
2003	Eisenhower East SAP	REZ new CDDs
2000	Carlyle/PTO (increase height)	no REZ (CDD table)
	Carlyle/PTO	REZ new CDD
1999	Cameron Station (school)	REZ
1998	Cameron Station Phase II (increase height of MF for parking)	no REZ (CDD table)
	Hoffman height	REZ
1996	Cameron Station CDD	REZ
	Alex Toyota CDD	REZ
1995	Potomac Yard/Potomac Plaza	REZ
1993	Hoffman CDD	REZ
	Winkler CDD	REZ
	Cameron Center/Hoffman (increase height)	no REZ (CDD table)
	PY/PG (density increase)	no REZ (CDD table)

December 3, 2013

Planning Commission

Subject: Appeal of Zoning Decisions - Text, MAP etc.

Dear Planning Commission:

I object strongly to any measure that will make it harder for citizens to overturn major zoning decisions that require Council approval. And that seems to be intent of these changes before you tonight.

I believe that both text and map amendments should be included in the "right" to appeal such decisions. It's already quite difficult for citizens to get the City and its quasi-democratic Council to reverse or modify major zoning decisions. In fact I think the current "protest" barriers are too high, and that the Planning Commission should make it harder for the Council to approve these decisions. Indeed, I think we need to add rules that make it easier for citizens to appeal decisions of the Planning Commission directly to the planning board itself.

We are losing our way as a City of concerned and involved citizens and we are fast becoming a "City of developers" whose interests may or may not coincide with those of the broader community.

These proposed rule changes and the opposition to citizen led protests (such as the waterfront plan, but also generally) reflects this trend toward a City run by special interests. I urge you to strengthen, not weaken, the rights of citizens in Alexandria with regard to appealing and protesting changes to small area plans and other zoning proposals.

Sincerely,

Andrew Macdonald
217 N Columbus St
22314

Howard J. Bergman
101 Quay Street
Alexandria, VA 22314

Text Amendment #2013-0003 Protest Petitions

To the Planning Commission:

I am Howard Bergman, and I live at 101 Quay Street. Among other things, I am a Senior Fellow at the Corporate Governance Center of The Conference Board.

I encourage the Planning Commission use its influence to maintain the right of citizens of Alexandria to protest Map Amendments, including Map Amendments that implement new or substantially revised Small Area Plans, and to restore their right to protest Text Amendments.

The interests of City Council and its citizens are not always aligned. Good governance suggests that we need a process that balances the City Council's ability to implement its plans, while protecting the interests of its citizens. Requiring City Council to develop a broad consensus to make divisive zoning changes provides an appropriate balance.

Planning and Zoning Staff suggest otherwise. It is disappointing that they are eager to limit the ability of property owners in Alexandria to protest zoning changes, whether through Map or Text Amendments. They might find citizen protests to be a burden. But it is a burden that citizens should be able to impose on the government that represents them.

Let's keep in mind that the protection offered by protests is limited.

Organizing a protest is difficult. Identifying the 20% of landowners in the area to be rezoned or with 300 feet of that area, and persuading them to sign the protest requires significant time and effort. Unless a significant portion of other landowners agree with the protest, the organizers are unlikely to succeed. And all of this must be done prior to the first public hearing on the proposed amendment. In fact, few protests are filed. According to Staff, there have been only six protests filed in the past 10 years (including the Waterfront protest).

When 20% of the landowners sign the protest, the City Council should be sensitive to their concerns. The ordinance forces City Council to be sensitive by requiring 75% of the Council members to vote for the rezoning.

This is not a 'highly extraordinary', as suggested by Staff. On the contrary, requiring a broad consensus on City Council to pass a divisive zoning amendment provides the correct balance between the interests of the 'City' and the interests of the 'citizens'. It does not prevent the City Council from implementing its plans. It only requires

that it work to develop a broad consensus for that plan. Once a broad consensus is reached, the city may proceed.

Staff argues that the protection provided by the protest process is not necessary for Map Amendments that implement a new or substantially revised Small Area Plan. In their view, those Map Amendments are the result of a long, comprehensive, and inclusive process that covers a large area of the City and that 'inherently' provides the same protection afforded by the protest petition provision.

The process does not, however, provide the same protection as the protest petition provision. In particular, the process does not provide any mechanism for the affected citizens to force the City Council to reach a broad consensus before it makes the change. And the broad consensus is what the City should have before it imposes divisive zoning changes. (No one will argue that the planning process is long or that the city gives citizens an opportunity to voice their views. But that does not mean that the views expressed during the process are 'comprehensive' or that they 'include' the voices of the people most affected by the proposed changes. And, as I mentioned, the process does not provide the same good governance mechanism that protects the citizens.)

Staff also argues that the protest process should not apply to Text Amendments. They state, "The protest process is specifically designed to apply when one isolated and measurable group feels the zone change discretely, and not when a zone change operates to affect a large number in a more universal way."

Staff might believe that this is the intent of the ordinance, but it is not what the ordinance actually says. There is no reference to 'isolated' groups who 'feel the zone change discretely'. Moreover, as Staff mentions, the distinction between Text and Map Amendments is not always clear, and, on occasion, a Text Amendment can operate as a Map Amendment.

Staff's recommendations would create a bizarre outcome from a governance perspective. They would deny citizens the ability to force City Council to reach a broad consensus if the zoning change affects citizens broadly, but grant it only if the change affects 'isolated' groups.

Whether the amendment is Map or Text, it is the burden of the protestors to get the signatures of 20% of the affected landowners. If the zone change 'operates to affect a large number in a more universal way', the burden on the protestors to collect the required signatures increases dramatically. If the zone change affects the entire city, the protestors would be required to obtain the signatures of 20% of Alexandria's landowners. And if someone were to obtain the signatures of 20% of Alexandria's landowners, we would definitely want City Council to reach a broad consensus before proceeding.

The protest process does not significantly burden the City, but it does provide an important mechanism that balances the interests of the 'City' and the 'citizens'. It should be available for Map and Text Amendments, without an exclusion for amendments related to Small Area Plans.

Sincerely,

Howard Bergman

Statement of Michael E. Hobbs
for the Planning Commission
December 3, 2013

Text Amendment #2013-0003

Thank you, Chairman Komoroske and members of the Commission. I am Michael Hobbs, residing at 419 Cameron Street.

You are considering a proposal to adopt three amendments to the “protest petition” provision of the Zoning Ordinance. Since I do not even pretend to any expertise on the use of planimeters or the intricacies of condominium ownership, I want to confine my comments to the third item: the proposal to further reduce the scope of protest petitions so that they would apply only to certain kinds of Map Amendments.

Last March, you initiated an amendment of the protest petition provisions to delete any reference to “text” amendments. The stated purpose was not to narrow the permissible scope of protest petitions, but to remove any ambiguity, and to correct what you believed was a misimpression that they could be lodged against text amendments as well as map amendments.

Several witnesses urged, regardless of your conclusion as to the meaning of the existing ordinance, that you consider whether there might be unforeseen or unnecessary consequences to the proposal then before you. When you adopted the amendment, you asked staff to consider several possible further amendments to the protest provisions. I believe that the sense of your discussion was, at least in part, to provide some assurance to concerned citizens that their questions would be carefully considered—that you would take care not to go farther than was really necessary or intended to restrict the availability of their right to protest proposed zoning changes which they believed would be grievously harmful to their interest, whatever the particular mechanism employed to effect that change.

In fact, the amendment before you tonight does not redress any degree to which your simple March 2013 amendment restricted the right to file protest provisions. Indeed, it restricts such protests still further, with the result that practically nothing would remain of this right which has been protected in our ordinance for decades. I believe what is proposed goes far beyond the stated purpose of “clarifying” or “removing ambiguity” from this provision: it substantially curtails its applicability, not only to Text Amendments, but now to Map Amendments as well.

Your staff report suggests that this is appropriate because Map Amendments that implement a Small Area Plan are already the subject of a substantial public process—that “this process inherently already provides the same protection afforded by the protest petition provision.” That is not correct; the Small Area Plan discussion does not provide the same protection. The protest petition, if properly filed, requires a three-fourths “supermajority” vote of the Council; to adopt a Small Area Plan, the barest majority is enough. With this amendment, not even the agreement of three dissenting Councilmembers could deter the adoption of a zoning change which the petitioning landowners believed would do them grave and needless damage.

COMMENTARY ON THE "PROTEST PETITIONS" TEXT AMENDMENT

The proposed changes to Section 11-808 of the Zoning Ordinance fall woefully short of addressing the problem that citizens attempted to correct following the Council action eliminating the phrase "text and" from the statute. Instead the amendments further undermine the protections that Alexandria property owners have used for decades to ward off spot zoning of the most egregious kind.

The staff report blithely notes that text amendments are not commonly used to change zoning status. But in the case of the Waterfront re-zoning that is exactly what happened.

Moreover the proposed amendments weaken the entire statute by changing the way that condominiums can make their opinions known through a 11-808 petition against an unwanted adjacent re-zoning. In the case of the 2008 attempted rezoning on South Washington Street (Hunting Terrace), the Condominium Board of Porto Vecchio approved a petition, signed by the Board President, that was approved as valid by the then City Attorney. It helped prevent a 14 story building from being constructed on the George Washington Parkway.

The ability of a condo board to speak for its membership would be replaced by dividing the property evenly among all the members of the condominium, regardless of how much property they actually owned. Thus a person owning a studio apartment would have just as much "say" as someone with a three bedroom apartment. That seems to fly in the face of measuring properties as is done so carefully under Section 11-808. It frankly makes no sense.

The proposed changes also weaken the statute by exempting Small Area Plans or amendments to existing Small Area Plans. The grounds given are that the statute is to protect landowners against "seemingly spontaneous changes to one piece of property. That is a novel reading of the meaning and intent of the statute which nowhere mentions "seemingly spontaneous changes" but deals with zoning changes -- period. Small Area Plans are being changed regularly. For example, the Winkler Property Coordinated Development District underwent a number of amendments over the years as the developers sought to change the zoning on parcels within the CDD. To disallow neighbors the ability to file a protest petition in such situations, common in the past and likely so in the future, is to deny an important current right.

Moreover, the word "substantially" is highly problematic. Who determines if a change is substantial? The Office of Planning and Zoning? The Planning Commission? Council?

The word is broad enough to drive a truck -- or high powered spot zoning -- through it. Nowhere in the amendment is the word defined. The word has no recognized legal meaning and should not be allowed in any well-crafted statute.

Small Area Plans have changed character in recent years. In the 1992 change to the Master Plan through SAPs they generally were based on sizable geographic areas that encompassed one or more neighborhoods. They were not based on any immediate development schemes. The more recent SAPs have been development based, e.g. the Waterfront and the Beauregard Plan. They are smaller and definitely based on attracting or satisfying specific development objective. As in the case of the Beauregard Plan, it was implemented by two (CDDs) for rezoning. One of the CDDs, in effect, rezoned only one parcel owned by Home Properties. Under the current Section 11-808, that CDD would have been subject to a Section 11-808. The new provision would eliminate that possibility.

In short, the proposed amendments to the text of Section 11-808 do nothing to strengthen the statute for Alexandria property owners and weaken it significantly in several other respects. My section by section recommendations are the following:

1. Update to Outdated Calculation Language - It is innocuous. Let it stand.
2. Condominium Unit Ownership - Section (A)(2)
Strike all the language after the word "Association" in Line 2 and add the following: **"then the Board of such Association shall have the right to file a petition on behalf of the condominium, the legitimacy of such petition dependent upon the decision process having followed the rules and regulations of the filing condominium."**
3. Map Amendments that Implement a Small Area Plan Chapter of the Master Plan -- Section (E)(3).
Strike all the language in Line 3 after the word "of" through the word "or" in Line 3. (In other words, strike the amendment in its entirety.)

Then add the following section:

"Subsection (F): For the purposes of this provision, any text amendment that is specific to a property or parcel within a zone shall be considered to be a map amendment."

RESPONSE TO "PROPOSED ZONING TEXT CHANGES", TEXT AMENDMENT #2013-0003, Protest Petitions

PLANNING COMMISSION HEARING: December 3, 2013

FROM: Kathryn Papp 504 Cameron St.

DATE: December 3, 2013

In general the proposed changes to Section 11-808 are seriously flawed in that:

1 – The **fundamental guiding principle is constantly violated**: that the protest petition must represent at least 20% of the land not the owners. As this is a common error in talking about this mechanism, it's persistent appearance throughout the documents shows it is a deliberate tactic used to confuse, not clarify.

This begins with (C) Calculation of ownership. The director shall verify that those filing are legal property owners and that there are **sufficient legal property owners signing to constitute the required 20 percent**, subject to the following: ..."

And continues with II. Proposed Text Change 1. Update to outdated calculation language. "The proposed change would leave the mechanism used to verify the land area and **the required 20% of the owners** open in order to allow for whatever latest technology ..."

2 – While the mechanism was handled in a timely and efficient manner by citizens, the **city's current internal evaluation and handling processes are wholly inadequate**. This can be addressed by the city manager for streamlining and efficiency.

3 – The documents highlight the effectiveness and efficiency of the mechanism. As such, the 1990 zoning changes need to be presented verbatim, not interpreted, so that the question of **why the City Charter remained unchanged through 22 years of use and said "text or map"**.

4 – The **policy for condos** is based on the Planning Director and staffs' understanding of "fairness". This is personal judgment, while zoning issues are legal in nature.

In fact, the **mechanism as is stands can accommodate condos**, as "land" not "ownership" remains the fundamental first principle. Condos are land-based and that land is shared by the legal entity that is the condo association. That land can be a part of the 20% of abutting lands. As with the waterfront petition, the condo owners can undertake to organize the remaining eligible landowners to accomplish the 20% of land requirement. There is no need for tortured definitions or calculations, although condominium law appears to support a proportional allotment of the building's land, based on the size of the unit, not the number of units as equal shares, i.e. a studio owns less land than a three bedroom unit.

5 – The claim that **GIS is more accurate or efficient is not supported**. The small parcels, some very very small, cannot be assessed through GIS unless a subsequent calculation based on parcel dimensions is done. The GIS web site is now a place where various maps are available. The Parcel Verification site is only partially useful.

This aspect of the verification process needs to remain with T&ES, as they are most experienced in evaluating and using GIS, especially for environmental regulatory compliance. This also

serves to put a critical element of verification outside the aegis of the Planning Department, thus eliminating conflict of interest and increasing credibility.

6 – Exceptionalism and generalization are used to justify a position to eliminate even the use for map amendments, which taken together with the elimination of “text”, can simply eliminate the protest petition mechanism all together. This does appear to be the intent of the Planning Commission. Or is it?

In addition, the direction to “prepare a potential policy document that explains that Text Amendments that are written in a way that resemble Map Amendments should be avoided in order to preserve the protection granted to land owners in Section 11-808.” Is **not strong enough** to ensure this will not happen.

Further – it is stated that this proposed policy document makes it possible, via exceptionalism, to use a text amendment “to change the regulations of a particular zone, including use, FAR, height, density etc that apply to the whole zone” and “used to implement a new or revised (not substantially revised?) small area plan chapter of the Master Plan.”

7 – Finally, this need to review the language of Section 11-808 originated in a motion made by the Board of Zoning Appeals on April 12, 2012 as part of consideration of the W-1/Waterfront Mixed Use Zone Text Amendment:

ADDITIONAL MOTION

Recommendation that Council appoint a committee to review the language of Section 11- 808.

BOARD ACTION: ___ APPROVED 6-0 _____

Does this require approval by the Board of Zoning Appeals for it to become law?
Especially in light of the fact that it was a unanimous decision?

RECOMMENDATION:

In light of the lack of understanding of the fundamental defining principle of the mechanism itself i.e. its focus on “Land” not “Ownership”, the clear inability to consider proposed changes in light of legal boundaries, and the numerous contradictions and persistent drive to eliminate the mechanism itself:

I highly recommend that outside legal review and commentary be done before either the Planning Commission or City Council either seriously consider or vote on this Proposed Zoning Text Change to Section 11-808 of the Zoning Ordinance regarding protest petitions as laid out in Docket Item #13, Text Amendment #2013-003, including attachments.

At a minimum the ordinance and attachments must be changed to reflect a logic train and language that shows an educational level the City of Alexandria deserves. As is, it is less than high school work.

Letter to Editor

Title: **Property Rights - Our Right to Petition**

Word Count: 679

March 11, 2013

Kathryn Rapp 504 Cameron St

On Saturday, March 16 at City Hall, elected officials will take a vote that seems intended to try to deny property owners' their day in court. This vote could easily end by depriving the *majority of property owners throughout the City of Alexandria* the right to freely petition against zoning decisions that affect them; it would restrict access to the city's own Protest Petition.

On March 5 citizens' clarity and the integrity of their arguments regarding the importance of the Protest Petition were in no doubt. Many favored relying on judicial reasoning for a full and final understanding of the Protest Petition process. This is scheduled on the Circuit Court docket for April 9.

If a super majority of council members agree on March 16 to limit access to the city's now freely available Protest Petition, this rarely used but highly important way to question and challenge city zoning, will be restricted to just a few property owners. The many who are left out can no longer simply present their petition to the city and appear before the Board of Zoning Appeals (BZA) in a fee-free, last resort to press their case.

The Protest Petition, cumbersome and difficult to achieve, is a way to require the city to respond to property owners' concerns about laws that might encourage tall buildings, dense neighborhoods, traffic congestion, or any change to where they live. In the past the city would indicate these changes by drawing maps to show where they could happen. But today, most changes like adding a hospital, several floors to a building, etc are best described with words and are called text amendments. If the city's March 16 vote creates new restrictive rules –property owners (commercial and individual) affected by text amendments cannot use the Protest Petition process.

The city's apparent purpose in limiting most property owners' access to a Protest Petition stems from fear it will stifle development. This is unreasonable and unsupported. The Protest Petition was designed to be so difficult to do and so uncertain in its outcome that is it truly a property owner's last resort when freely appealing to their city.

Firstly, the Petition must come from *property owners* representing 20% of the land - either within 300 feet of the parcel to be rezoned or 20% of the land inside the zone - not an easy number to attain. The larger the area zoned the tougher this is. Secondly, it requires a *planimeter* to measure the boundaries. Finally, filing it with the City might be a painfully difficult task. All together, the risk of even a few Protest Petitions being filed is probably smaller than a snowball's chance in summer. As such, this March 16 vote to whittle the number of Protest Petitions filed stands out as an exercise in intimidation and fear mongering.

This political maneuver of a re-vote seems a clever way to clear a path for the city's overly dense waterfront plan. The way was paved when the Planning Commission drafted amendments violating the current city charter and, perhaps, Virginia code. It also instructed staff to clarify the confused zoning advice regarding Protest Petitions. The BZA gave the same direction about a year ago - nothing was done. In fact, it is simply the City's 20 years of ad hoc rule making that has produced confused zoning law.

The Protest Petition process is one of the most valuable governance tools available to all property owners, but it is *especially important to the City*. It is the City's own platform for negotiation. With the City as mediator with *all* property owners at the table, it creates high transparency that raises trust levels all around. It is the City's last and best opportunity to *avoid* litigation.

Is the city taking a re-vote to prevent court costs? Or, to save face by avoiding the April 9 Circuit Court review of its own appeal of the BZA's decision, which upheld the Protest Petitioners? It is still possible to hammer out an equitable and optimal solution for less dense waterfront development – let's hope that happens.