C I T Y O F W I N C H E S T E R, V I R G I N I A

CITY COUNCIL AGENDA ITEM

CITY COUNCIL MEETING OF: August 25, 2015

RESOLUTION ___ **ORDINANCE** ✓ **DESCRIPTION/PRESENTATION** ___

ITEM TITLE: AN ORDINANCE TO AMEND AND REENACT ARTICLES 1, 17, 18, AND 21 OF THE WINCHESTER ZONING ORDINANCE PERTAINING TO DEFINITIONS; NONCONFORMING STRUCTURES; PERMIT REQUIREMENTS FOR FAMILY DAY HOMES; POWERS, PROCEDURES AND EX PARTE COMMUNICATIONS OF THE BOARD OF ZONING APPEALS; AND VIOLATIONS AND PENALTY. (Amendment Will Incorporate Changes to the Board of Zoning Appeals and Family Day Homes Following Legislation Passed During the 2015 General Assembly Session)

PUBLIC HEARING DATE: September 22, 2015 at 6:00 PM

The initiating Department Director will place below, in sequence of transmittal, the names of each department that must initial their review in order for this item to be placed on the City Council agenda. The completion of review only addresses the readiness of the issue for Council consideration. This does not address the recommendation for approval or denial of the issue.

Review:

Aaron Grisdale	Completed	08/19/2015 2:35 PM
Timothy A. Youmans	Completed	08/19/2015 2:36 PM
Mary Blowe	Completed	08/19/2015 2:38 PM
Anthony Williams	Completed	08/20/2015 2:56 PM
Eden Freeman	Completed	09/03/2015 11:59 AM

Aaron Grisdale
Aaron Grisdale, Zoning and Building Inspections Director 8/19/2015

APPROVED AS TO FORM:
Anthony Williams
CITY ATTORNEY

Eden Freeman
Eden Freeman, City Manager 9/3/2015

CITY COUNCIL ACTION MEMO

To: Honorable Mayor and Members of City Council

From: Aaron Grisdale, Zoning and Building Inspections Director

Date: August 25, 2015

Re: AN ORDINANCE TO AMEND AND REENACT ARTICLES 1, 17, 18, AND 21 OF THE WINCHESTER ZONING ORDINANCE PERTAINING TO DEFINITIONS; NONCONFORMING STRUCTURES; PERMIT REQUIREMENTS FOR FAMILY DAY HOMES; POWERS, PROCEDURES AND EX PARTE COMMUNICATIONS OF THE BOARD OF ZONING APPEALS; AND VIOLATIONS AND PENALTY. (Amendment Will Incorporate Changes to the Board of Zoning Appeals and Family Day Homes Following Legislation Passed During the 2015 General Assembly Session)

THE ISSUE: A publicly sponsored Zoning Ordinance amendment to incorporate changes following modifications to enabling legislation in the Code of Virginia. The changes affect powers, duties and ex parte communications with the Board of Zoning Appeals, and licensing requirements for Family Day Homes.

RELATIONSHIP TO STRATEGIC PLAN:
(2) Promote and accelerate revitalization of catalyst and other areas throughout the city;

BACKGROUND:
This ordinance incorporates updates mandated by changes to Virginia Code during the 2015 General Assembly session. (See attached staff report).

BUDGET IMPACT:
None

OPTIONS:
Adopt the ordinance amendment.
Modify and adopt the ordinance amendment.
Decline to adopt the ordinance amendment.

RECOMMENDATIONS:
The Planning Commission unanimously forwarded the amendment with a favorable recommendation.

AN ORDINANCE TO AMEND AND REENACT ARTICLES 1, 17, 18, AND 21 OF THE WINCHESTER ZONING ORDINANCE PERTAINING TO DEFINITIONS; NONCONFORMING STRUCTURES; PERMIT REQUIREMENTS FOR FAMILY DAY HOMES; POWERS, PROCEDURES AND EX PARTE COMMUNICATIONS OF THE BOARD OF ZONING APPEALS; AND VIOLATIONS AND PENALTY. (AMENDMENT WILL INCORPORATE CHANGES TO THE BOARD OF ZONING APPEALS AND FAMILY DAY HOMES FOLLOWING LEGISLATION PASSED DURING THE 2015 GENERAL ASSEMBLY SESSION)

AN ORDINANCE TO AMEND AND REENACT ARTICLES 1, 17, 18, AND 21 OF THE WINCHESTER ZONING ORDINANCE PERTAINING TO DEFINITIONS; NONCONFORMING STRUCTURES; PERMIT REQUIREMENTS FOR FAMILY DAY HOMES; POWERS, PROCEDURES AND EX PARTE COMMUNICATIONS OF THE BOARD OF ZONING APPEALS; AND VIOLATIONS AND PENALTY.

TA 15-376
Draft 1 - (07/02/15)

Ed. Note: The following text represents excerpts of the Zoning Ordinance that are subject to change. Words with strikethrough are proposed for repeal. Words that are boldfaced and underlined are proposed for enactment. Existing ordinance language that is not included here is not implied to be repealed simply due to the fact that it is omitted from this excerpted text.

ARTICLE 1
DEFINITIONS

1-2-94.2 **VARIANCE: A reasonable deviation from those provisions regulating the shape, size, or area of a lot or parcel of land or the size, height, area, bulk, or location of a building or structure when the strict application of the ordinance would unreasonably restrict the utilization of the property, and such need for a variance would not be shared generally by other properties, and provided such variance is not contrary to the purpose of the ordinance. It shall not include a change in use, which change shall be accomplished by a rezoning or by a conditional zoning.**

1-2-94.2~~2~~**3** WELLNESS & FITNESS CENTER: A facility which consists of physical fitness and therapy, wellness services, and related educational and/or informational programs, and sports medicine as the primary components of healthcare services provided. (1/11/11, Case TA-10-473, Ord. No. 2010-63)

ARTICLE 17
NONCONFORMITIES

SECTION 17-2 NONCONFORMING STRUCTURES

17-2-1 General Requirements

A. Any lawfully constructed structure which existed at the time of this Ordinance or any amendments thereto may continue in its legally nonconforming status so long as the

structure does not violate other legal provisions and otherwise complies with the provisions of this Article.

B. No additional structure not conforming to the requirements of this Ordinance shall be erected in connection with such nonconforming use of land.

C. A nonconforming structure may be used for any use allowed in the underlying zoning district, subject to all applicable use standards.

~~D. If a variance is approved from otherwise applicable zoning district dimensional standards, the subject structure still shall be deemed nonconforming~~. **Notwithstanding any other provision of law, general or special, the property upon which a property owner has been granted a variance shall be treated as conforming for all purposes; however, the structure permitted by the variance may not be expanded unless the expansion is within an area of the site or part of the structure for which no variance is required. Where the expansion is proposed within an area of the site or part of the structure for which a variance is required, the approval of an additional variance shall be required.**

ARTICLE 18
GENERAL PROVISIONS

SECTION 18-19. HOME OCCUPATIONS.

18-19-3 The operation of a family day home may occur as an accessory and subordinate use to a residence provided the following:

A. A family day home for not more than ~~five (5)~~ **four (4)** children shall be considered as residential occupancy by a single family; and, therefore does not require a Certificate of Home Occupation.

B. A family day home serving ~~six~~ **five (5)** through twelve **(12)** children, exclusive of the provider's own children and any children who reside in the home, shall obtain a Certificate of Home Occupation and shall be licensed by the Virginia Department of Social Services, provided the following:

1. Prior to the issuance of a Certificate of Home Occupation for a family day home serving ~~six~~ **five (5)** through twelve **(12)** children, the applicant shall send a notice developed by the Administrator to each adjacent property owner by registered or certified mail, and shall provide proof to the Administrator of the completion of such mailings.

2. If the Administrator receives no written objection from a person so notified within thirty (30) days of the date of sending the letter and determines that the family day home otherwise complies with the provisions of this Ordinance, the Administrator may issue the permit sought.

3. Any applicant denied a permit through this administrative process may request that the application be considered by City Council after a hearing following public notice per Section 23-7-1 of this Ordinance.

4. Upon such hearing, City Council may, in its discretion, approve the permit, subject to such conditions as agreed upon by the applicant and the locality, or deny the permit.

C. No family day home shall care for more than four children under the age of two, including the provider's own children and any children who reside in the home, unless the family day home is licensed or voluntarily registered.

D. A family day home where the children in care are all ~~grandchildren of the provider~~ **related to the provider by blood or marriage** shall not be required to be licensed or obligated to obtain a Certificate of Home Occupation.

ARTICLE 20
BOARD OF ZONING APPEALS

SECTION 20-2. POWERS OF THE BOARD OF ZONING APPEALS.

20-2-1 The Board of Zoning Appeals shall have the following powers and duties:

20-2-2 To hear and decide appeals from any order, requirement, decision, or determination made by an administrative officer in the administration or enforcement of this Article or of any ordinance pursuant thereto. **The determination of the administrative officer shall be presumed to be correct. At a hearing on an appeal, the administrative officer shall explain the basis for his determination after which the appellant has the burden of proof to rebut such presumption of correctness by a preponderance of the evidence. The board shall consider any applicable ordinances, laws, and regulations in making its decision. For purposes of this section, determination means any order, requirement, decision or determination made by an administrative officer. Any appeal of a determination to the board shall be in compliance with this Article.**

20-2-3 To ~~authorize~~ **grant** upon appeal **or original application** in specific cases ~~such~~ **a** variance ~~from the terms of the ordinance as will not be contrary to the public interest when, owning to special conditions, a literal enforcement of the provisions will result in unnecessary hardship;~~ provided that ~~the spirit of the Ordinance shall be observed and substantial justice done, as follows:~~ **the burden of proof shall be on the applicant for a variance to prove by a preponderance of the evidence that his application meets the standard for a variance, provided below:**

20-2-3.1 ~~When a property owner can show that his property was acquired in good faith and where by reason of the exceptional narrowness, shallowness, size, or shape of a specific piece of property at the time of the effective date of the Ordinance, or where by reason of exceptional topographic conditions or other extraordinary situation or condition of such piece of property, or of the use or development of property immediately adjacent thereto, the strict application of the terms of the Ordinance would effectively prohibit or unreasonably restrict the use of the property or where the Board is satisfied, upon the evidence heard by it, that the granting of such variance will alleviate a clearly demonstrable hardship, as distinguished from a special privilege or convenience sought by the applicant, provided that all variances shall be in harmony with the intended spirit and purpose of the Ordinance.~~

Notwithstanding any other provision of law, general or special, a variance shall be granted if the evidence shows that the strict application of the terms of the ordinance would unreasonably restrict the utilization of the property or that the granting of the variance would alleviate a hardship due to a physical condition related to the property or improvements thereon at the time of the effective date of the ordinance, and:

A. The property interest for which the variance is being requested was acquired in good faith and any hardship was not created by the applicant for the variance;

B. The granting of the variance will not be of substantial detriment to adjacent property and nearby properties in the proximity of that geographical area;

C. The condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance;

D. The granting of the variance does not result in a use that is not otherwise permitted on such property or a change in the zoning classification of the property; and,

E. The relief or remedy sought by the variance application is not available through a special exception process or the process of an administrative modification at the time of the filing of the variance application.

(7/15/09, Case TA-09-66, Ord. No. 2009-18)

20-2-3.2 ~~No such variance shall be authorized by the Board unless it finds:~~**Repealed.**

~~a. That the strict application of this Ordinance would produce a clearly demonstrable hardship. (9/13/05, Case TA-05-03, Ord. No. 026-2005)~~

~~b. That such hardship is not shared generally by other properties in the same zoning district and the same vicinity.~~

~~c. That the authorization of such variance will not be of substantial detriment to adjacent property and that the character of the district will not be changed by the granting of the variance.~~

20-2-3.3 Repealed. (10/13/92, Case TA-92-02, Ord. No. 016-92)

20-2-3.4 ~~No variance shall be authorized unless the Board finds that the condition or situation of the property is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the Ordinance.~~ **Repealed.**

20-2-3.5 In ~~authorizing~~**granting** a variance the Board may impose such conditions regarding the location, character, and other features of the proposed structure ~~for~~**or** use as it may deem necessary in the public interest, and may require a guarantee or bond to ensure that the conditions imposed are being and will continue to be complied with.

20-2-4 To hear and decide appeals from the decision of the Zoning Administrator **after notice and hearing as provided in this Article**. (10/13/92, Case TA-92-02, Ord. No. 016-92)

20-2-5 Repealed. (9/13/05, Case TA-05-03-05, Ord. No. 026-2005)

20-2-6 To hear and decide applications for interpretation of the district map where there is any uncertainty as to the location of a district boundary. After notice to the owner**s** of the property affected by any such question, **and after public hearing with notice,** the Board ~~shall~~ **may** interpret the map **in such way as to carry out the intent and purpose of the ordinance for** ~~in~~ the particular section or district in question. The Board shall not have the power to change substantially the locations of district boundaries as established by the Ordinance. (3/15/88, Case TA-87-17, Ord. No. 014-88; 10/13/92, Case TA-92-02, Ord. No. 016-92)

20-2-7 **No provisions of this Article shall be construed as granting the board the power to rezone property or to base board decisions on the merits of the purpose and intent of local ordinances duly adopted by the governing body.**

SECTION 20-3. PROCEDURES.

20-3-1 An application or appeal to the Board may be taken by any person aggrieved or by any officer, department, board, or bureau of the locality affected by any decision of the Administrator or from any order, requirement, decision or determination made by any other administrative officer in the administration or enforcement of this Ordinance, or any modification of zoning requirements pursuant to §15.2-2286 of the Code of Virginia, as amended. Notwithstanding any charter provision to the contrary **and violations provided in Section 20-2-3**, any written notice of a zoning violation or a written order of the Administrator dated on or after July 1, 1993, shall include a statement informing the recipient that he may have a right to appeal the notice of a zoning violation or a written order within 30 days in accordance with §15.2-2311 of the Code of Virginia, as amended, and that the decision shall be final and unappealable if not appealed within 30 days. The zoning violation or written order shall include the applicable appeal fee and a reference to where additional information may be obtained regarding the filing of an appeal. The appeal period shall not commence until the statement is given. A written notice of a zoning violation or a written order of the Administrator that includes such statement sent by registered or certified mail to, or posted at, the last known address of the property owner as shown on the current real estate tax assessment books or current real estate tax assessment records shall be deemed sufficient notice to the property owner and shall satisfy the notice requirements of this section. The application or appeal shall be taken within thirty (30) days after the decision appealed from by filing with the Administrator, and with the Board, a notice of appeal specifying the grounds thereof.

The Administrator shall forthwith transmit to the Board all the papers constituting the record upon which the action appealed was taken. An appeal shall stay all proceedings in furtherance of the action appealed from, unless the Administrator certifies to the Board that by reason of facts stated in the certificate a stay would in his opinion cause imminent peril to life or property, in which case proceedings shall not be stayed otherwise than by a restraining order granted by the Board or by a court of record, on application and on notice to the Administrator and for good cause shown. (10/13/92, Case TA-92-02, Ord. No. 016-92; 9/14/10, Case TA-10-334, Ord. No. 2010-39)

20-3-2 All applications or appeals to the Board shall be made to the Administrator on a form provided for such purpose, and shall be accompanied by a filing fee as per Section 23-8, evidence of delinquent tax payment per Section 23-9, and disclosure of real party interest per Section 23-10 of this Ordinance. The fee for filing an appeal shall not exceed the costs of advertising the appeal for public hearing and reasonable costs. Except as provided for below, the time period for appeal shall be no less than thirty (30) days from the date of receipt of the Notice of Violation sent by the Administrator, pursuant to § 15.2-2311 and § 15.2-2286, Code of Virginia, et seq.: (3/13/90, Case TA-89-12, Ord. No. 008-90; 10/13/92, Case TA-92-02, Ord. No. 016-92; 8/16/02, Case TA-02-04, Ord. No. 014-2002;

3/11/09, Case TA-08-14, Ord. No. 2009-09; 9/14/10, Case TA-10-334, Ord. No. 2010-39)

a. An appeal period of ten (10) days shall be provided for violations of this Ordinance pertaining to maximum occupancy of residential dwellings.

b. Any violation of Sections 18-8-12.1 through 18-8-12.3, pertaining to temporary signs.

c. Any violation of Sections 18-9-5 through 18-9-5.4, pertaining to yard sales.

d. Any violation of Section 18-12, pertaining to visual obstructions.

e. Any violation of Section 18-17, pertaining to mobile storage units and temporary events.

20-4 EX PARTE COMMUNICATIONS

20-4-1 The non-legal staff of the governing body may have ex parte communications with a member of the board prior to the hearing but may not discuss the facts or law relative to a particular case. The applicant, landowner or his agent or attorney may have ex parte communications with a member of the board prior to the hearing but may not discuss the facts or law relative to a particular case. If any ex parte discussion of facts or law in fact occurs, the party engaging in such communication shall inform the other party as soon as practicable and advise the other party of the substance of such communication. For purposes of this section, regardless of whether all parties participate, ex parte communications shall not include (i) discussions as part of a public meeting or (ii) discussions prior to a public meeting to which staff of the governing body, the applicant, landowner or his agent or attorney are all invited.

20-4-2 Any materials relating to a particular case, including a staff recommendation or report furnished to a member of the board, shall be made available without cost to such applicant, appellant or other person aggrieved under § 15.2-2314 of the Code of Virginia, as soon as practicable thereafter, but in no event more than three business days of providing such materials to a member of the board. If the applicant, appellant or other person aggrieved under § 15.2-2314 requests additional documents or materials be provided by the locality other than those materials provided to the board, such request shall be made pursuant to § 2.2-3704 of the Code of Virginia. Any such materials furnished to a member of the board shall also be made available for public inspection pursuant to subsection F of § 2.2-3707.

20-4-3 For the purposes of this section, "non-legal staff of the governing body" means any staff who is not in the office of the attorney for the locality, or for the board, or who is appointed by special law or pursuant to § 15.2-1542 of the Code of Virginia. Nothing in this section shall preclude the board from having ex parte communications with any attorney or staff of any attorney where such communication is protected by the attorney-client privilege or other similar privilege or protection of confidentiality.

ARTICLE 21
VIOLATION AND PENALTY

~~21-2-2~~ ~~The appeal period for violations of this Ordinance pertaining to the following uses shall be ten (10) days, pursuant to §15.2-2286 (12/10/13, Case TA-13-138, Ord. No. 2013-14):~~

~~a. Any violation of Sections 18-8-12.1 through 18-8-12.3, pertaining to temporary signs.~~

~~b. Any violation of Sections 18-9-5 through 18-9-5.4, pertaining to yard sales.~~

~~c. Any violation of Section 18-12, pertaining to visual obstructions.~~

~~d. Any violation of Section 18-17, pertaining to mobile storage units and temporary events.~~

City Council Work Session
August 28, 2015

TA-15-376 AN ORDINANCE TO AMEND AND REENACT ARTICLES 1, 17, 18, AND 21 OF THE WINCHESTER ZONING ORDINANCE PERTAINING TO DEFINITIONS; NONCONFORMING STRUCTURES; PERMIT REQUIREMENTS FOR FAMILY DAY HOMES; POWERS, PROCEDURES AND EX PARTE COMMUNICATIONS OF THE BOARD OF ZONING APPEALS; AND VIOLATIONS AND PENALTY. (Amendment Will Incorporate Changes to the Board of Zoning Appeals and Family Day Homes Following Legislation Passed During the 2015 General Assembly Session)

REQUEST DESCRIPTION
This is a publicly initiated ordinance amendment to incorporate updates to the Zoning Ordinance as a result of the actions of the General Assembly during their 2015 session. There were two main areas that impact the Winchester Zoning Ordinance: the Board of Zoning Appeals and Family Day Homes.

The more substantive changes dealt with the powers and review standards for the Board of Zoning Appeals, the definition of a variance, and ex parte communications for the BZA. The changes to the BZA review authority eliminates the undefined threshold of a “demonstrable hardship” and replaces the standard with “unreasonably restrict the utilization of the property.” Furthermore, the legislation included mandatory provisions pertaining to ex parte communications between the Board of Zoning Appeals, the applicant and staff. The intent is to eliminate the opportunities for discussions about the merits and law of the case outside of the formal hearing.

Secondly, the General Assembly made some major updates to state code pertaining to the licensure and other requirements for family day homes. The main impact on zoning regulations with the Family Day Home pertains to the threshold for when such facilities are permitted by-right and when the facilities may be regulated by local zoning ordinances. Previously any family day home with 5 or less children had to be treated as by-right in a single family dwelling; this threshold has been reduced to four children. Facilities with 4-12 children may be authorized by the Zoning Administrator in the form of a Home Occupation.

RECOMMENDATION
As these are updates to the enabling legislation in the Code of Virginia, Staff recommends favorable recommendation by City Council.

During their August 18th meeting, the Planning Commission forwarded **TA-15-376** with a favorable recommendation because the ordinance as presented provides for good planning practice in ensuring that the City’s Zoning Ordinance is consistent with mandatory provisions of the Code of Virginia.