

MEMORANDUM TO: All Members of the Metropolitan Council

FROM: Jon Cooper, Director
Metropolitan Council Office

DATE: November 3, 2009

**RE: Analysis for Ordinances Amending
the Zoning Code Text**

ORDINANCE NO. BL2009-463 (TYGARD) – This zoning text change amends the sign provisions in the zoning code to implement the recommendations of the Sign Ordinance Task Force pertaining to electronic display signs. In March 2008, the Council considered Ordinance No. BL2008-152 to allow LED message boards in residential zoning districts for schools, churches, recreation centers and cultural centers on collector and arterial streets. This ordinance was deferred indefinitely. Subsequently, the Council approved Resolution No. RS2008-319 requesting the Vice Mayor to appoint a task force to study Metro's existing sign ordinance and to make recommendations to the Council regarding whether modifications to the sign ordinance were necessary given the recent technological advancements in the sign industry.

The Task Force met for several months to discuss revisions to the sign ordinance, and ultimately recommended this ordinance pertaining to electronic display signs to allow such signs with limitations by special exception in certain areas where they are now prohibited. As the Council is aware, special exception uses require approval of the board of zoning appeals after a public hearing.

Existing Zoning Code Provisions

The zoning code provisions pertaining to electronic display signs are currently located in the "prohibited signs" section. However, this section actually only prohibits the signs in certain districts. Further, the zoning code does not include a definition for LED or other electronic signs. These signs are allowed by right in the more intense commercial and industrial districts, but are prohibited in the agricultural, residential, mixed-use, office, and less intensive commercial areas except for time, temperature, and date signs. The sign image for LED signs must remain static and nonflashing for a period of 8 seconds, with all copy changes occurring instantaneously and without any special effects.

LED signs cannot be located within 100 feet of any agriculturally or residentially zoned property. Further, signs cannot have display areas "with varying light illumination and/or intensity, blinking, bursting, dissolving, distorting, fading, flashing, oscillating, rotating, scrolling, sequencing, shimmering, sparkling, streaming, traveling, tracing, twinkling, simulated movement, or convey the illusion of movement." Video, continuous scrolling messages, and animation signs are prohibited except in the commercial attraction (CA) district.

Proposed New Provisions

First, the ordinance adds a definition of "electronic display sign" in the zoning code to clarify the type of technology the ordinance is designed to cover. The definition includes on-premises signs that display electronic static images, static graphics or static pictures, with or without textual information. The definition retains the existing requirement that the sign image remain static for a minimum of eight seconds, and the change sequence be accomplished instantaneously. Video signs would continue to be allowed only in the CA district (Opryland area).

Second, the ordinance designates "electronic display sign" as a special exception use in the AG, AR2a, R, RS, RM, MUN, MUL, MUG, ON, OL, OG, OR20, OR40, CN, CL, SCC and SCN districts, and as a permitted use in the CA, CS, CF, CC, SCR, IWD, IR and IG districts (the districts where such signs are currently allowed). For those districts where electronic display signs would be permitted as a special exception use, all non-residential uses in the mixed-use, office, and lower intense commercial districts would be eligible for consideration. However, only churches, schools, community centers, and cultural centers would be eligible for an electronic display sign in the residential zoning districts.

Third, the sign must meet various specific conditions in order for the board of zoning appeals to approve an electronic display sign as a special exception use. The conditions are as follows:

- The electronic display sign must be replacing an existing back-lit or flood-lit sign on the property. No more than one electronic sign would be permitted on a given lot for each street frontage. This will ensure that allowing electronic display signs in these districts will not result in more total signs.
- Electronic display signs must be spaced at least 500 feet from another electronic display sign, and must be set back at least 250 feet from an existing residence.
- The intensity and contrast of light levels must remain constant, and the sign must use amber color lights as opposed to red.
- All parts of the electronic display sign must be oriented so that no portion of the sign face is visible from an existing single or two-family residence at the time the sign is installed.
- Each electronic display must shut off between the hours of 10:00 p.m. and 6:00 a.m., and must use automatic day/night dimming software to reduce the illumination intensity of the sign from dusk until 10:00 p.m.
- The size of electronic display signs will be limited to a maximum surface area of 32 square feet and must be integrated into a brick, stone or wood monument-style sign.
- The minimum street setback would be 15 feet and the sign could not encroach upon the required side setbacks of the base zoning district.
- The maximum height of the sign structure would be 8 feet.

This ordinance is an attempt by the task force to balance the need for electronic display signs in certain areas where they are now prohibited against the concerns of residents that such signs will negatively impact their neighborhoods. The spacing requirements will make it very difficult for property in the urban areas of Nashville (such as Hillsboro Village, East Nashville, and West End) to be eligible for an electronic display sign.

There are three proposed amendments for this ordinance. One of the amendments would require such signs to be at least 250 feet from any residential property, as opposed to a residential structure. Another amendment would allow electronic display signs by right in the CL district. Finally, the third amendment would prohibit the board of zoning appeals from allowing an electronic display sign in the single-family residential zoning districts.

This ordinance was disapproved by the planning commission.

ORDINANCE NO. BL2009-535 (MCGUIRE, GOTTO & HODGE) – This zoning text change amends the definitions of “family” and “residence for handicapped, more than eight individuals” in the zoning code to conform to the state law definitions. In addition to the traditional definition of “family”, meaning persons related by blood, marriage or law, the zoning code currently allows up to three unrelated persons, group homes for the disabled of not more than eight individuals (including persons being treated for drug and/or alcohol dependency), and group homes for up to eight elderly persons to be considered a single family. The current definition of family excludes the mentally ill, although courts have interpreted the Fair Housing Amendments Act of 1988 (FHAA) to include protections for persons that are mentally ill, thus requiring local governments to make reasonable accommodations in their ordinances to afford such persons an equal opportunity to use a dwelling.

State law excludes mentally ill from the definition of “mentally handicapped” only if the person’s mental illness poses a threat of serious harm or if the person has been convicted of a serious crime related to the mental illness. Metro’s existing definition of family is in conflict with the state law definition since it excludes all persons who are mentally ill. This ordinance simply amends these provisions to reflect the state law definitions.

The council office would point out that failure to enact this ordinance could subject the Metropolitan Government to further Fair Housing Act litigation and could jeopardize the Metropolitan Government’s consent decree with the U.S. Department of Justice.

This ordinance has been approved by the planning commission.

ORDINANCE NO. BL2009-536 (DUVALL) – This zoning text change would repeal the requirement in the zoning code that all amendments to the official zoning map or zoning regulations be submitted to the department of law for review upon being filed, and that a report be submitted as to the legality of the amendment prior to consideration on third reading. The code specifically requires the department of law to submit a report at least ten days before third reading as to whether the proposed legislation may “expose the metropolitan government to any liability for violation of federal, state or local law.” This provision was added to the zoning code in July 2008 upon the enactment of Ordinance No. BL2008-245, as amended.

This ordinance would simply delete the code section providing for legal department review of zoning legislation. The planning commission voted to make no recommendation on this ordinance.

ORDINANCE NO. BL2009-537 (JAMESON & TYGARD) – This zoning text change amends the zoning code to allow artisan distilleries in the commercial core (CC), core frame (CF), and industrial zoning districts. Prior to 2008, the zoning code considered the manufacturing of alcoholic beverages as a “medium manufacturing” use, which is only permitted in the industrial zoning districts. In September 2008, the zoning code was amended to create a new use called “microbrewery”, which would be permitted by right in the CF, IR (industrial restrictive) and IG (industrial general) zoning districts. The code defines “microbrewery” as the production of beer in quantities not to exceed 5,000 barrels per month. This definition does not extend to the production of other alcoholic beverages such as wine and whiskey.

This ordinance creates “artisan distillery” as a new use, which would be permitted in the CC, CF, and industrial zoning districts. In order to qualify as an artisan distillery, the operator would be limited to producing alcoholic beverages in quantities not to exceed 1,000 barrels per month, with one barrel holding 55 gallons. The purpose of this ordinance is to allow smaller-scale distilleries in the downtown area to serve as tourist attractions.

This ordinance has been approved by the planning commission.

ORDINANCE NO. BL2009-538 (GOTTO & PAGE) – This zoning text change amends the definitions pertaining to adult or sexually-oriented video and book stores. The zoning code currently defines these establishments as those that have a majority of its floor space or stock in trade devoted to sexually-oriented materials. Establishments classified as sexually-oriented businesses must be located within the adult entertainment overlay (primarily the downtown area) and receive approval from the sexually-oriented business licensing board. The department of codes administration has interpreted the phrase “majority of its stock in trade or a majority of its floor space” as being 50% or more. Thus, a book or video store that has less than of its floor space or stock in trade devoted to sexually-oriented material is considered a “retail” use, and is allowed anywhere retail uses are allowed, which includes the mixed-use and commercial zoning districts that extend throughout the county. A recent decision by the U.S. Court of Appeals for the Sixth Circuit upheld Knox County, Tennessee’s ordinance that included a threshold of 35% in adult material as being the determinative factor as to whether an establishment can be considered a sexually-oriented business for purposes of local regulations to diminish the adverse secondary effects to the community.

The purpose of this ordinance is to prevent the secondary effects associated with sexually-oriented businesses. Numerous studies from across the country have concluded that sexually-oriented businesses are associated with a wide variety of negative secondary effects, including personal and property crimes, prostitution, potential spread of disease, illegal drug use, reduction in property values, urban blight, and sexual exploitation.

Since adult entertainment is a protected form of free speech under the First Amendment to the U.S. Constitution, regulations of such establishments must pass constitutional muster. The U.S. Supreme Court has held that regulations upon the location of adult entertainment establishments are constitutional provided that reasonable alternative avenues of communication are left open. Further, the courts have held that local governments have a substantial interest in controlling the adverse secondary effects of sexually-oriented businesses and that the adverse effects noted above are indeed adverse secondary effects of these

establishments. The courts have also held that local governments are not required to conduct their own studies as to the adverse secondary effects, but may rely on studies produced by other cities, as well as previous judicial decisions, that are reasonably believed to be relevant. Studies have shown that off-site and retail-only sexually oriented businesses produce these adverse secondary effects. Summaries of adverse secondary effect studies are on file in the council office.

First, this ordinance would amend the definitions for sexually-oriented/adult bookstore and sexually-oriented/adult video store to provide that these establishments are those offering, as one of their principal business purposes, sexually-oriented material. Second, and most importantly, the ordinance adds a definition for "principal business purpose" to include any one of the following:

1. At least 35% of the business's displayed merchandise consists of books, magazines, periodicals, photographs, films, videos, etc., that are characterized by their emphasis upon the display of "specified sexual activities" or "specified anatomical areas" as defined in the code;
2. At least 35% of the wholesale or retail value of the business's displayed merchandise consists of the foregoing items;
3. At least 35% of the business's revenues derive from the sale or rental of the foregoing items;
4. At least 35% of business's interior business space is used for the display, sale, or rental of the foregoing items; or
5. The business regularly features the foregoing items, and prohibits access by minors to the premises, and advertises itself as offering "adult" or "XXX" or "x-rated" or "erotic" or "sexual" or "pornographic" material on signage visible from a public right-of-way.

As evidenced from the definition of "principal business purpose", this ordinance would not only reduce the threshold of adult material to 35%, but would expand the criteria for determining whether an establishment is a sexually-oriented business. Instead of just looking at floor space and stock in trade, the department of codes administration would also look at the value of the merchandise and the revenues derived from the sale of adult material. Further, a business that has signs visible from the public right-of-way advertising itself as offering adult material and prohibiting access to minors would be considered a sexually-oriented business, regardless of the percentage of inventory, revenue, or floor space.

According to the planning department staff analysis, there are currently 13 adult entertainment uses within the adult entertainment overlay district. There are 721 properties upon which an adult entertainment establishment could possibly locate within the adult entertainment overlay, which leaves ample alternative avenues of communication for new book or video stores that would qualify as sexually-oriented businesses under this new ordinance.

All existing establishments selling adult material that are currently classified as a retail use would be allowed to continue operation as a legal nonconforming use under current state law.

This ordinance has been approved by the planning commission.

ORDINANCE NO. BL2009-552 (CLAIBORNE) – This zoning text would allow residential development as part of an adaptive reuse of existing buildings within the downtown Donelson urban zoning overlay. In 2005, the council enacted Ordinance No. BL2004-492 to allow the redevelopment/reuse of certain commercial property within the urban zoning overlay district for residential purposes. The commercial zoning districts currently prohibit residential uses unless the property satisfies the requirements of the adaptive reuse code provisions. Thus, developers seeking to redevelopment commercial property for residential uses in commercial zoning districts located outside of the urban zoning overlay must have the property rezoned by the council.

The downtown Donelson urban design overlay district (UDO) envisions various mixed-use developments. But since the Donelson area is outside of the urban zoning overlay district, mixed-use development in commercial areas of Donelson is not permitted without rezoning the property. This ordinance would add a provision to the zoning code to specifically allow the adaptive reuse of commercial properties within the downtown Donelson UDO as residential properties, provided the conditions in the adaptive reuse code section are satisfied. These conditions include a requirement that at least 40% of the building's floor area be devoted to residential uses and that the buildings entrance be oriented to an arterial street.

This ordinance has been approved by the planning commission.