

Mount Vernon Infill Task Force

Responses to Questions

1. What is the origin of the term "by-right"? Does it stem from federal, state, or Fairfax County law? How is it applied in the County?

The term "by right" is common terminology in land use and zoning practice. In terms of state law origins, Virginia Code § 15.2-2288.1 prohibits any local zoning ordinance from requiring special exception or special permit approval, as a condition of subdivision plat, site plan, building permit or development plan approval, to develop residential dwellings allowed by right under the local ordinance. Subsection [4101.1.A](#) of the Zoning Ordinance provides that uses that can be established "by right" in a zoning district, subject to compliance with related use standards, are identified with a "P" (for permitted) in the Use Table for the conventional zoning districts. Consistent with the Virginia Code, these uses do not require other entitlement approvals, such as a special permit approval from the Board of Zoning Appeals (BZA) or special exception approval from the Board of Supervisors (Board). By right uses are administratively approved, must meet all of the underlying zoning district regulations such as setbacks, density or FAR, building height, as well as any use specific standards in the Zoning Ordinance. These uses typically only require submission of a site/subdivision plan or infill lot grading plan for single-family detached structures, along with the necessary submissions to obtain building permit approval to establish the use. These site and building permit approvals apply to all uses, including those allowed by right or by entitlement, such as through a rezoning, special permit or special exception.

2. Does "by right" entitlement change with a change in ownership? Are subsequent owners entitled to previous owners vested rights?

If a use is allowed in a certain zoning district by right, the use of that property is not tied to ownership. What is allowed by right is distinct from vested rights, which, if established in accordance with Virginia Code § 15.2-2307, protect certain uses or structures against a change in zoning.

3. What is the interaction between zoning ordinances and "by-right? Is there any instance where zoning laws change the interpretation or application of by-right or vice versa?

The Zoning Ordinance is amended from time to time and those amendments may affect where (in which zoning districts) a use is allowed, what use standards apply, and whether the use requires any special approval (e.g., special exception or special permit).

4. Is the County limited by state law to specific actions it can take regarding zoning? If so, what limits does the state impose?

Virginia is a “Dillon’s Rule” state (in contrast to a “home rule” state), where local jurisdictions only have the authority that is expressly or implicitly granted to them by the state. The enabling legislation for zoning in Virginia is in Virginia Code §§ 15.2-2280 to -2316.

5. If zoning laws are changed, are the changes prospective only? Is there any case where they are retroactive?

Zoning Ordinance amendments operate prospectively. If a use or structure is legally established, it can continue to rely on previous approvals; however, enlargements or expansions may be subject to new regulations. See Zoning Ordinance Section 8104, Nonconformities: <https://online.encodeplus.com/regs/fairfaxcounty-va/doc-viewer.aspx#secid-269>; and Appendix 1, Provisions Relating to Previous Approvals: <https://online.encodeplus.com/regs/fairfaxcounty-va/doc-viewer.aspx#secid-483>.

6. When a property is sold, what version of the zoning law applies to the new owner? Does it continue with the original zoning or do the intervening versions/updates apply?

Generally speaking, a change in ownership does not subject a property to new regulations. However, certain zoning approvals are tied to a “person”; for example, a change in tenant requires a new nonresidential use permit (certificate of occupancy) and certain types of zoning permits are issued to the applicant only and are not transferable, such as a Home-Based Business Permit.

7. Can the zoning ordinance be applied by County locality, e.g. can Mount Vernon District have a different zoning than other districts? Do any other locations in the County have site specific zoning? Can zoning laws be established for a certain type of activity or development?

The Zoning Ordinance cannot be applied differently based on magisterial district. Under Virginia Code § 15.2-2282, zoning regulations must be uniform for each class or kind of buildings within each zoning district (e.g., the R-4 district), regardless of magisterial district.

Zoning regulates the uses and standards for the uses that are allowed in each zoning district. A property can be rezoned by the Board from one district to another through a public hearing process. If new uses or activities are created, the Zoning Ordinance generally can be amended to address those.

8. Does the zoning ordinance define different levels of density allowed? If so, how were they developed and how are they applied?

Yes, the permitted density and intensity of development vary according to the regulations for each zoning district. Residential [density](#) is a measurement of dwelling units/acre and nonresidential intensity is measured according to [floor area ratio](#) (FAR). Those regulations (i.e., the Zoning Ordinance text) were adopted, and can be amended, by the Board through a public hearing process. A property can be rezoned to another district, which might allow a higher density or intensity, through a similar process.

9. How does the Comprehensive Plan interact with "by-right" and the zoning laws? Does the Comp Plan have the force of law or is it more instructional in nature?

The Comprehensive Plan ([Fairfax County Comprehensive Plan | Planning Development](#)) is required by state law and serves as a guide in planning and decision-making about the natural and built environment. Any rezoning or other entitlement application is reviewed for conformance with the Comprehensive Plan. "By-right" development is generally not subject to the policies and guidance set forth in the Comprehensive Plan.

7. Do setback requirements originate in the zoning ordinance or another ordinance/regulation?

Setbacks are specified in the Zoning Ordinance.

11. How are the zoning laws changed in the County? Do changes spring from Staff suggestions only? Is there an on-going forum in which changes are developed, discussed, and adopted or rejected? What is the role of homeowners and neighborhoods in this process?

The Zoning Ordinance is amended by the Board through a public hearing process, which includes a public hearing by the Planning Commission which makes a recommendation to the Board. The Zoning Ordinance Amendment Work Program is also approved annually by the Board: <https://www.fairfaxcounty.gov/planning-development/zoning-ordinance/work-program>. Topics for consideration for the Work Program come from staff, the Board, the Planning Commission, residents, and other stakeholders. Changes to the Zoning Ordinance also sometimes result from changes to the Virginia Code. The process for each amendment is tailored to the topic and includes extensive community engagement.

12. Is building height limited by state regulation?

No, although the Virginia Code authorizes localities to regulate building height through zoning. See Virginia Code § 15.2-2280.

13. Perhaps there is a way to recognize that after a house has sat on 3 lots for 40-60 years it has become a common law single lot and then to separate it back out could require subdivision?

Although legally valid lots can be combined by building permit for construction of a single dwelling, if that dwelling is removed, the individual lots remain subdivided. Consequently, they may be developed separately—even if the lots do not meet the current lot area, lot width, or shape factor requirements of the zoning district—as long as all other regulations of the Zoning Ordinance are met, including setbacks. See Zoning Ordinance subsection [5100.2.J](#). Eliminating or modifying this longstanding recognition of legal lots of record would require further legal analysis.