

*DeKalb County*  
**PLANNING & ZONING COMMITTEE**  
**Virtual *Special Meeting***

**Wednesday, September 2, 2020 – 5:00 p.m.**

Steve Faivre, Chairman

**Join Meeting:**

<https://us02web.zoom.us/j/86785156582>

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To connect by phone: 1 (312) 626-6799

**Meeting ID: 867 8515 6582**

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1. **CALL TO ORDER**
2. **ROLL CALL / INTRODUCTION OF VISITORS**
3. **APPROVAL OF AGENDA**
4. **PUBLIC COMMENT** (Open Floor to Anyone Wishing to Speak on Record Regarding and Item that has not been subject to a public hearing or appears on the agenda below.)
5. **OLD BUSINESS**
6. **NEW BUSINESS**
  - a. **CONSIDERATION AND ACTION** – Zoning Ordinance Amendments Regarding the 40-Acre Rule.
7. **OTHER BUSINESS / REPORTS**
8. **ADJOURNMENT**

## DeKalb County Zoning Ordinance

# Memo

**To:** Planning and Zoning Committee

**From:** Charles G. Brown, attorney and partner of Brown Law Group, LLC

**cc:** Derek Hiland, Director of Community Development

**Date:** August 26, 2020

**Re:** 4.02D2 and Related Text Amendments

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This Memorandum is presented to you as background information concerning the proposed text amendment to the DeKalb County Zoning Ordinance pertaining to the regulation of farm residences and structures and to supply additional information missing from the Staff's Memorandum concerning the history of the "40 acre" rule in DeKalb County. As an attorney who has represented agricultural property owners and businesses for the past 40 years, and as a lifelong resident of the county with agricultural roots that date back to the early 1900s in DeKalb County, I have had both a professional and personal interest in the County's regulation of residences and structures located in the A-Agricultural District.

### **Chronology of the History of Restrictions Placed on Residences and Structures Located in the A-Agricultural District**

Prior to 1949, DeKalb County did not have a zoning ordinance. In its first adopted zoning the County placed no restrictions on farm residences located on land used for agricultural purposes. The County's first comprehensive zoning ordinance was adopted on February 9, 1972. This comprehensive zoning ordinance organized the County into seventeen (17) different zoning districts. The Agricultural District (A-Agricultural District) was defined as that area of the county where the soil and topographic conditions are best adapted to the pursuit of agriculture and utilization of other natural land resources. The 1972 Zoning Ordinance created nine (9) different residential zoning districts, ranging in lot sizes from 20,000 square feet to in excess of five (5) acres, some were specifically designed for rural settings. Among the classifications was one district

designated the RR Rural Residence District which permitted the rezoning of land located in the A-Agricultural District where the land was not suitable for agricultural use due to soil productivity, vegetation, topography, man-made barriers, or the like. The lot size for the RR Rural Residence District required at least one (1) acre, but not more than five (5) acres in area and was subject to County Board Approval.

Initially, there were no lot size requirements for farm residences under the 1972 Zoning Ordinance. The County enacted its first lot size restriction for farm residences on October 20, 1976. It required all farm dwellings constructed in the A-Agricultural District to be located on a tract of land containing no less than forty (40) contiguous acres, unless the owner could meet the definition of being a "farm" as defined in the Zoning Ordinance. Section 3.02 of the Zoning Ordinance defined a "farm" as "any tract of land containing not less than forty (40) acres and any tract of land producing twelve thousand five hundred dollars (\$12,500) gross annual income from activities defined in the term "agriculture". The 1972 Zoning Ordinance set forth a predetermined gross income value for different types of agricultural products on a per acre or per animal unit basis. The value estimates were to be updated every two (2) years. In addition to the lot size restriction, the farm dwelling had to be occupied by a person whose principal occupation was the operation of a farm as defined by the Zoning Ordinance. The dwelling also could be occupied by the operator's spouse and such person's or spouse's lineal ancestors and descendants, and the spouses of such ancestors and descendants. The 1972 Zoning Ordinance also permitted one (1) single family dwelling for tenants of the owner for each forty (40) acres or fraction thereof of the tract or parcel in excess of forty (40) acres provided however such dwellings could only be occupied by a person who participates in the operation of a farm as (defined by Section 3.02 of the Zoning Ordinance) upon the tract or parcel of real estate where the tenant dwelling was located, and by such person's spouse, and such person's or spouse's ancestors and descendants, and the spouses of such ancestors and descendants. A person was deemed to participate in the farming operations if the person was actively engaged therein during planting, cultivation, and harvesting periods or tending to or caring for livestock held for trade or business even though such activity was neither the principal source of income for such person nor such person's primary occupation. This definition of a "farm" for purposes of the construction of a residence thereon continued until 1991.

In 1991, the 1972 Zoning Ordinance was amended in its entirety. The 1991 Zoning Ordinance continued to restrict the construction of a residence to tracts of land defined as a "farm", but the definition of "farm" was changed. Under the 1991 Zoning Ordinance "farm" was defined as "real property used for commercial agriculture comprising at least forty (40) contiguous acres of which at least twenty-five (25) acres have been utilized for agricultural pursuits for the last three years, all of which is operated by a sole proprietorship, partnership, or corporation and including all necessary farm buildings, structures and machinery". The Zoning Ordinance, however, continued an exception for smaller tracts of land if the owner could show that the acreage produced a gross annual income, as averaged over the most recent three-year period, of \$13,590 from activities defined as agriculture. The 1991 Zoning Ordinance removed any restrictions on who could occupy the residence.

By 1979, the County recognized the hardship that it had created by requiring a minimum lot size of 40-acres for a residence. As noted above, prior to 1976 a property owner who wanted to sell off a residence from the existing farmland could subdivide the house onto a smaller tract of land and sell it to anyone. Also, prior to 1976, there was no restriction on who could be the occupants of a farm residence. To ameliorate this hardship, the County enacted section 7.02 3b to the 1972 Zoning Ordinance. This section authorized the subdivision, for the purpose of the sale or transfer of ownership, of a one (1) lot subdivision, containing an existing farm residential structure constructed prior to August 15, 1979. The lot had to be at least one (1) acre in area. The subdivision could be approved by the zoning officer without county board approval. A plat of survey was required but there was no restriction placed on the remaining acreage from which the residential structure was subdivided as to future residences.

This right to subdivide an existing residence constructed prior to August 15, 1979 was retained in the 1991 comprehensive amendment to the Zoning Ordinance with the exception that the minimum lot area had to be at least two (2) acres in area. Again, there was no restriction placed on the remaining acreage for future farm residences.

In 1997, the State legislature enacted enabling legislation to allow non-home rule counties to set minimum lot sizes for residences located on land used for agricultural purposes. Prior to this enabling legislation, non-home rule counties, like DeKalb County, did not have the legal authority or right to require a minimum lot size for farm residences. This law became effective on January 1, 1998. To bring the County's ordinance into compliance with state law, the County adopted a new 40-acre minimum lot size restriction for farm residences in the A-Agricultural District effective January 1, 1998. The County, however, did not provide any relief to property owners who built residences after 1976 and who would have preferred to build their residence on less than 40 acres but were told they could not. (Ordinance 98-03)

In 2000, the County again enacted a comprehensive amendment to the Zoning Ordinance. This amendment retained the right to subdivide an existing farm residence constructed prior to August 15, 1979 on a lot at least two (2) acres in area. The County, however, added a restriction to the subdivided lot by declaring that any such lot so created was to be treated as a "legal, nonconforming residential lot in the A-1 district". It further restricted the right to build any future residences on the balance of the parcel from which the lot was subdivided. This restriction of the lot as a "legal, nonconforming residential lot" served as the basis for the county staff to begin regulating all structures located on the lot that was subdivided from the existing farmland. The amendment also required a plat of survey to be prepared but did not require that it be recorded or that it contain any information regarding the non-buildable restriction for the balance of the parcel. Following a lawsuit challenging the County's right to restrict the balance of the parcel as being non-buildable without a document being recorded in the County's recorder of deed's office to put the public on notice of the restriction, the County amended the zoning ordinance to require that the plat of survey showing the parcel from which the lot was subdivided be recorded with a statement contained therein declaring the balance to be non-buildable.

In 2011, the County acknowledged that prior to 1998 it did not have the legal authority to require minimum lot sizes for farm residences. The County therefore amended its zoning ordinance to treat only lots of less than 40 acres created after 1997 containing a farm residence as illegal non-conforming lots. This amendment to the zoning ordinance protected those who did not follow the County's lot size restriction prior to 1998, but did not provide relief to those who built homes on 40 or more acres, but would have preferred to build on less than 40 acres but did not because of the 40-acre restriction. A building on an illegal non-conforming lot cannot be rebuilt or repaired if it is damaged beyond 50% of its value. Also, a building on an illegal non-conforming lot cannot be enlarged or renovated.

Other than authorizing a minimum lot size and setback, State Law does not allow a non-home rule county to regulate residences or buildings located on land used for agricultural purposes. State Law has carved out one limited exception to the general prohibition of a non-home rule county's ability to regulate residences or buildings on land used for agricultural purposes. State Law allows non-home rule counties with a population of 300,000 to 400,000 and non-home rule counties contiguous to counties with a population of 300,000 to 400,000 residents, to regulate parcels of 5 acres or less by ordinance, but only if less than a \$1,000 of agricultural products are sold from the parcel in any calendar year. Since 2010, DeKalb County is a county that meets the above population criteria because it is contiguous to McHenry County that has a population in excess of 300,000. Even though DeKalb County has never adopted an ordinance to regulate parcels of less than five (5) acres in the A-Agricultural District, the County has nonetheless regulated farmsteads of less than five (5) acres containing a residence even if the farmsteads are still being used for agricultural purposes. This conflict between state law and the county's regulation has been and continues to be the source of much confusion to the public and the agricultural community.

### **Proposed Text Amendment**

The proposed text amendment to the current zoning ordinance will do the following:

1. It will increase the minimum lot area for a newly constructed farm residence to 80 acres commencing January 1<sup>st</sup>, 2025.
2. It will permit any farm residence to be subdivided and separated from the adjoining farmland onto a lot that is at least two (2) acres in area.
3. For residences constructed before January 1<sup>st</sup>, 2025, a plat of survey must be recorded depicting both the lot containing the farm residence and the balance of the forty (40)-acre parcel from which the lot is subdivided. The balance of the forty (40)-acre parcel will be non-buildable for future farm residences.
4. For residences constructed after January 1<sup>st</sup>, 2025, a plat of survey must be recorded depicting both the lot containing the farm residence and the balance of

the eighty (80)-acre parcel from which the lot is subdivided. The balance of the eighty (80)-acre parcel will be non-buildable for future farm residences.

5. The definition of forty (40) acres and eighty (80) acres is clarified to include any 40-acre or 80-acre tract as defined by a government survey description regardless if there is actually 40 or 80 acres contained in the tract of land.
6. Authorizes the County to regulate only residences on parcels of less than two (2) acres in size as permitted by state law.

PROPOSED TEXT AMENMENTS

4.02 D Lot area requirements:

1. The minimum lot area for a farm residence constructed on or prior to January 1<sup>st</sup>, 2025, or that replaces a farm residence that was constructed on or prior to January 1<sup>st</sup>, 2025, shall be forty (40) acres. The minimum lot area for a farm residence constructed subsequent to January 1<sup>st</sup>, 2025 shall be eighty (80) acres.

2. A subdivision, for the purposes of the sale or transfer of ownership of a lot containing an existing single farm residence and being not less than two (2) acres in area may be approved by the Plat Officer. The zoning lot that results from such subdivision shall be a nonconforming lot in the A-1 district. For purposes of review and approval, a plat of survey shall be required for said division depicting both the lot containing the farm residence constructed on or prior to January 1<sup>st</sup>, 2025, or that replaced a farm residence constructed on or prior to January 1<sup>st</sup>, 2025, and the forty (40) acre parcel from which it is divided. The balance of the forty (40) acre parcel from which the lot is subdivided shall be a non-buildable zoning lot for additional farm residences. For farm residences constructed subsequent to January 1<sup>st</sup>, 2025, the plat of survey shall depict both the lot containing the farm residence and the eighty (80) acre parcel from which the lot is divided. The balance of the eighty (80) acre parcel from which the lot is subdivided shall be a non-buildable zoning lot for additional farm residences. The non-buildable restriction shall be indicated on the plat of survey and shall be a covenant running with the land in favor of the County of DeKalb. The Plat Officer's signature, along with signature of the owner or owners of the nonconforming residential lot and the non-buildable zoning lot, shall be placed on the plat of survey, and the plat of survey containing the non-buildable restriction shall be recorded by the Plat Officer at the owner(s) expense. The nonconforming lot created by the subdivision herein authorized must meet all set back requirements and have a minimum lot width at the minimum front setback line of 200 feet.

3. Special use. The lot size and lot width for a special use shall be designated in the permit granting the special use.

8.05 Nonconforming Lots.

A.

B.

C. Use of a farm residence on legal nonconforming lots of less than two (2) acres in area in the A-1 District.

A residence on a legal nonconforming lot in the A-1 District which is less than two (2) acres in area shall be subject to all applicable

building codes and regulations. Any residence damaged or destroyed may be repaired or replaced. Enlargements, additions, extensions and alterations to the residence are permitted provided all minimum bulk regulations and setbacks are met.

D.

E. *Use of illegal nonconforming lots in the A-1 District.*

A farm residence in the A-1 District existing prior to January 1, 1998 on a zoning lot which is less than the minimum lot area required for a farm residence, where the zoning lot was a lot of record prior to January 1, 1998 shall be treated as a legal nonconforming lot. The farm residence may be enlarged, expanded, extended or altered, and, if damaged or destroyed may be repaired or replaced. If the nonconforming lot was created on or after January 1, 1998, by action or actions of the current or previous property owner(s) without government approval and not by government action, the lot shall be deemed an illegal nonconforming lot in the A-1 District. The farm residence may not be enlarged, expanded, extended or altered, and may not be replaced, if destroyed, or repaired, if the cost of repair exceeds 50 percent of its value.

## 2.03 Definitions.

"Dwelling, farm" shall mean a detached single-family dwelling located on land used for agriculture purposes.

"Farm residence": see "Dwelling, farm"

"Forty (40) acres" shall mean an area containing 1,742,400 square feet as measured by metes and bounds survey or a quarter-quarter section as defined by the government survey established for each township regardless if the area is more or less than 1,742,400 square feet.

"Eighty (80) acres" shall mean an area containing 3,484,800 square feet as measured by a metes and bounds survey or two (2) quarter-quarter sections sharing a common boundary line as defined by the government survey established for each township regardless if the area is more or less than 3,484,800 square feet.

"Lot, zoning non-buildable" means all contiguous land under single ownership or control, located wholly within the boundaries of the county, and on one side of a street or highway that is the remainder of a parcel from which a farm residence was subdivided. No portion of the non-buildable zoning lot may be combined with another parcel to meet the minimum lot area required for an additional farm residence.



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**MEMORANDUM**

**TO:** Planning and Zoning Committee

**FROM:** Derek Hiland  
Director of Community Development

**DATE:** August 21, 2020

**SUBJECT:** Proposed Zoning Ordinance Changes

Most of what you read below was included in a memorandum written by Mr. Anderson to the Committee about a year ago but the information brought forward regarding this proposal remains relevant today.

DeKalb County has long maintained a requirement that for a farmhouse to be placed on a farm in the A-1 District, said farm must be composed of a zoning lot containing not less than forty (40) acres and have not less than five hundred (500) feet of frontage at the front setback line (known informally as the "40-acre Rule"). The primary purpose of these requirements was the preservation of the farmland, and the preservation of the agricultural nature and character of the County. It was recognized that allowing scattered residential development throughout the agricultural portions of the County often precipitated conflicts between said developments and the pre-existing farms, and that these conflicts often resulted in farms being hampered in conducting their varied agricultural activities.

In 1991, the DeKalb County Board adopted a new County Zoning Ordinance, which contained a number of major changes and revisions. It was acknowledged at the time that the previous Zoning Ordinance contained a number of provisions which had the consequence of subverting the intention and goal of the 40-acre Rule. To correct this, changes such as the removal of several zoning districts were enacted and many provisions within the code revised. The result was a zoning ordinance which greatly strengthened the 40-acre rule. Since that time, both the DeKalb County Comprehensive plan and the DeKalb County Zoning Ordinance have been revised several times, each time with an eye towards the preservation of the agricultural character of the County and strengthening the 40-acre Rule.

Staff has reviewed the proposal presented by Steve Faivre and authored by Attorney Charles Brown and staff feels some of the elements presented would drastically alter the intent of the original language, and would not be consistent with the adopted goals of the DeKalb County Comprehensive Plan.

## 402D2 Splits

### Section 4.02.D.2:

*Subdivisions, for the purpose of the sale or transfer of ownership of a lot(s) containing an existing residential structure(s) constructed prior to August 15, 1979, said lot(s) being not less than two (2) acres in area and containing not more than one such residence, may be approved by the Plat Officer. This provision is intended to allow for the division of one or more existing farm residences from the fields used for agricultural activities. Such subdivision, if approved by the Plat Officer, is not a violation of this Ordinance. The zoning lots that result from such subdivisions shall be a legal, nonconforming residential lots in the A-1 district, and the balance of the property from which each such lot is divided shall not be buildable for future residences. For the purposes of review, a plat of survey shall be required for said division depicting both the lot containing the residential structure and the property from which it is divided. The Plat Officer's signature of approval shall be required on the survey prior to recording. (See 4.02.D.2 diagram in the Appendix)*

Shown above is the current text for Section 4.02.D.2, commonly referred to as a 402D2-split. It allows for the subdivision of an existing farmhouse from a farm for sale or transfer of ownership, effectively, allowing for a residence in the A-1 District on a parcel of less than forty (40) acres. This subdivision is subject to several restrictions, and while it does not change the zoning of the parcel from A-1, it does affect the primary use of the resultant parcel.

To qualify for a 402D2-split, the existing language requires that the farmhouse must have been constructed prior to August 15, 1979. The Proposal would change this date to January 1, 1998. Additionally, the Proposal would introduce new language allowing the 402D2-split procedure to also apply to residences constructed after January 1, 1998. Together, these two elements would greatly increase the number of properties that qualify for this type of subdivision. The proposed language does indicate that on or after January 1, 2025 the minimum acreage required to construct and farm residence shall be 80 acres. Eighty-acre parcels of land are certainly more difficult to assemble for the sole purpose of building a house in unincorporated DeKalb County however the provision would remain that one could then subdivide the house from the farming operation. This provision would significantly decrease the likelihood of a rural subdivision development although it remains plausible as an 8 lot subdivision at an intersection. Staff acknowledges that again not likely but plausible.

The Proposal also adds two new elements, and proposes relocating a third. First, it requires that in addition to the Plat Officer's signature, the 402D2-split plat must also have the signatures of the owner(s) of both the parcel split off and the remaining unbuildable lot indicating their approval of the unbuildable status being applied to the balance of the property. Secondly, it explicitly states that the lot created by the subdivision must meet all set back requirements. Lastly, the Proposal suggests moving the language regarding the minimum lot width for a 402D2-split into this Section as opposed to being in the following section. Staff agrees with all three of these suggestions.

Staff has reviewed the Proposal, and while staff does agree with several of its proposed changes, staff believes that the elements of the Proposal would drastically alter the original goals and intents of the original language. Also, the proposed language does not address a number of procedural issues staff feels needs to be addressed. There are approximately 570 existing 402D2-splits spread across the County. The 4.02D2-split language was included into the 1991 Zoning Ordinance to address concerns raised regarding old, unused farmhouses in the A-1 District. The language as written allows for the separation of an existing farmhouse, constructed prior to August 15, 1979, on a residential parcel at least two (2) acres in area and at least two hundred (200) feet wide at the front setback line. Considering the County's goal of re-enforcing the 40-acre Rule, the language of the paragraph was designed with a number of inherent limitations meant to limit the potential "life" of the provision, and to try to prevent the misuse of this provision as a loophole to the 40-acre Rule. First, was to limit houses eligible for a 402D2 Split to those constructed prior to August 15, 1979, which as time passed would continually shrink the number of houses which would qualify, eventually becoming unnecessary once no more qualifying houses existed. Secondly, it required that those lands not included in the house parcel be designated unbuildable, which helped to maintain the lower residential densities that the 40-acre Rule was striving for and acted to prevent owners from effectively piecemealing together a subdivision through this process. Thirdly, it designated the primary use of the house parcel as a non-conforming residential use, re-enforcing the 40-acre Rule by identifying that the house was being separated from the farmlands and that its use as a single-family dwelling, as opposed to a farm dwelling, and was not a permitted nor Special Use, but a non-conforming one. By identifying the new house parcel as a non-conforming use, it highlighted that the residential use of the property was never meant to be a permanent feature, as it is on residentially zoned parcels, and that the use was meant to eventually cease or steps taken to re-establish the use as a conforming one. Finally, and most importantly, the language clearly indicates that the residence is being removed from the farm and will no longer be considered a farm dwelling, identifying that this provision is not meant as a way to circumvent the 40-acre Rule to create less-than 40-acre farms. In spite of the efforts of the original framers of this language, this section has seen far greater unforeseen circumstances than ever imagined at the time of its creation. Even with the various limitations included in the language, far too many applicants see this language as nothing more than a loophole around the 40-acre Rule. Staff has often found itself continually having to explain the trade-offs for being able to create this split to irate land owners unaware of the history of their parcel or the purpose of the 402D2-split.

Staff believes, that while well-intentioned, the time when this language seemed necessary has passed, and that this Section should be eliminated from the Zoning Ordinance. Staff has seen this provision consistently used as a loophole to try to circumvent the 40-acre Rule. Staff has also found the owners of the non-conforming residential lots created by this section neither understand nor appreciate the additional restrictions placed on these lots or that the residential use of these lots was not meant to last forever. More importantly, the staff has found that the language as written has been wholly inadequate for addressing the many issues that have arisen over the years in administering this provision. Elimination of this provision would strengthen the 40-acre Rule and strengthen the County's commitment to its comprehensive plan. Staff recommends that if it is the County Board's desire to allow for farm dwellings on less than 40 acres in the A-1 District, then it should consider lowering the minimum amount of acreage needed for a farmhouse. The Board needs to be aware however that such a revision will result in greater population densities in the A-1 District and in the likelihood of significant

long-term change in the nature and use of the agricultural areas of the County; one need only look to the Counties east of us to see impact such change can have. The Board should bear in mind that as population density increases, further conflict between these non-farming land owners and the existing farmers will likely increase.

Conversely, if the Board would rather not lower the minimum lot size for a farmhouse, but still wishes to allow for the kind of subdivision currently allowed for by Section 4.02.D.2, seeing this as an acceptable way to allow for controlled growth in the A-1 District, then staff would recommend continuing the discussion regarding a potential text update to the Zoning Ordinance to better serve these goals and to better facilitate staff's ability to make this happen.