DeKalb County
PLANNING & ZONING COMMITTEE
Virtual Special Meeting

Wednesday September 30, 2020 – 6:30 p.m.
Steve Faivre, Chairman

Join Meeting:
https://us02web.zoom.us/j/86949801412

To connect by phone: 1 (312) 626-6799
Meeting ID: 869 4980 1412

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1. **CALL TO ORDER**
2. **ROLL CALL / INTRODUCTION OF VISITORS**
3. **APPROVAL OF AGENDA**
4. **APPROVAL OF MINUTES**
5. **PUBLIC COMMENT**
6. **OLD BUSINESS**
7. **NEW BUSINESS**
   a. **ZONING TEXT AMENDMENT (DC20-33)** – Request of the Planning and Zoning Committee for changes to the regulations regarding the 40 acre rule and farmhouse splits from agricultural land.
8. **OTHER BUSINESS / REPORTS**
9. **ADJOURNMENT**

PROPOSED TEXT ADMENDMENT

4.02 D *Lot area requirements:*

1. (No Change)

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 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. A statement indicating the balance of the forty (40) acre parcel is non-buildable, along with a statement indicating that the farm residence on the nonconforming lot is subject to the provisions of the Farm Nuisance Suit Act (740 ILCS 70/1 et seq.), shall be placed on the plat of survey. The non-buildable restriction 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 lot and the non-buildable zoning lot, shall be placed on the plat of survey, and the plat of survey 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. For farm residences constructed after the effective date of this amended ordinance, no subdivision for the purpose of a sale or transfer of the farm residence shall be approved by the Plat Officer sooner than two (2) years after the date a plumbing certificate has been issued by a licensed plumber pursuant to state regulation, unless the sale or transfer is to an ancestor or lineal descendant of the owner or to the spouse of an ancestor or lineal descendant of the owner.

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 two (2) acres or less in area in the A-1 District*.

A residence on a legal nonconforming lot in the A-1 District which is two (2) acres or less 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 less than 1,742,400 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.

REPORT AND RECOMMENDATIONS

PUBLIC HEARING DC-20-33

Petitioner: DeKalb County, Planning and Zoning Committee

Nature of Petition: Petition for Text Amendment - Articles 2,4 and 8

Date of Hearing: September 18, 2020 Time of Hearing: _1:00 P.M._

Prop. Address: DeKalb County Subject to County Zoning Ordinance

Location of Hearing: **REMOTE - PER COUNTY ORDINANCE -ZOOM FORMAT**

Meeting ID: 870 9527 4420
Telephonic: 1-312-626-6799

Present on behalf of County:
Mr. Derek Hiland, Planning / Zoning Director
Mr. Marcellus Anderson, Assistant Planning/Zoning Director

Present for Text Amendment as Outside Drafter of Proposed Amendment:
Attorney Charles G. Brown
Brown Law Group, LLC

Report of Proceedings and Recommendation

After recitation of the procedures for hearing and a brief description of the nature of the hearing, the public hearing on the proposed text amendment commenced promptly at 1:00 p.m. After swearing in all persons expected to offer statements, Director Hiland commenced the hearing by giving a brief description of the multi-year history that led to the present action being sought in the Petition. Director Hiland appropriately described the history of what is commonly known as the "40-acre Rule" as codified in the present County code, and the agricultural preservation goals underlying that provision. This hearing officer found Director Hiland's description and context very useful and informative in appropriately laying out the competing interests that underlie this long-standing provision in the County code.

Assistant Director Anderson also, prior to hearing, provided to the Hearing Officer a detailed and comprehensive legislative history of the County's authority to regulate lot sizes and land use concerning properties within the County's jurisdiction. I also received a detailed memorandum from Attorney Brown, who, as deduced from the memorandum and his testimony at hearing, was apparently enlisted by members of the Board to produce the memorandum and the proposed zoning text attached thereto to his memorandum.

With respect to the memorandums, I found Assistant Director Anderson's memorandum on-point, instructive, and as having correctly stated the legislative history and underpinnings of the County's zoning practices and procedures, and the County's authority that derived therefrom. Assistant Director Anderson's memorandum also correctly and with necessary particularity, described the appropriate County goals in the passing and implementation of the County code, enabling the County to wield the necessary and duly authorized authority to manage growth in predominantly agricultural DeKalb County. Assistant Director Anderson's memorandum provided a much-needed counter-point to the many assertions of past County practices and authority contained in Attorney Brown's memorandum.

Attorney Brown's memorandum appeared to be directed to re-plowing old ground, to use the agricultural analogy, as much of the memorandum contained many long-standing positions held by Attorney Brown which have been previously raised in other proceedings. This hearing officer found much of the memorandum's content to be superfluous and not necessarily relevant to the primary issue at hearing, which was the content of the proposed text language to be changed in County code, a rather narrow issue and which was the purported subject of the hearing.

However, with respect to the actual proposed text language contained in the submitted memorandums, there was much commonality. Both County and Attorney Brown agreed or recommended language changes in the County code, to reflect the current agricultural environment, namely the desire by many landowners to parcel-out the areas of their 40-acre or 80-acre farmland containing the farm residence, so as to be able to sell that portion of the property as a separate and legal lot within the A-1, Agricultural District.

At present, absent certain limited circumstances which were the result of policy compromises made during the enactment of the County code on the issue, the general rule that has been in place for decades is that such a parcel-out of the area surrounding the farm residence has not been permitted. If a person wished to purchase the residence, the 40-acres (or more) came with it and had to also be purchased, which is and has historically been, quite an expensive and cost-prohibitive proposition. However, this provision virtually ensured that the purchaser would continue to farm or otherwise engage in agricultural production on the property, with the County goal of preserving agricultural production remaining intact.

Both memorandums acknowledged the changed agricultural environment, and the ageing of many current landowners and their near inability to sell their agricultural homesteads. Many older agricultural landowners, according to the testimony at hearing, desire to sell their residential home and a small surrounding lot, but perhaps continue to farm or lease the remaining acreage. Such a sale would permit the agricultural landowner in such a position, to obtain sales proceeds to fund their move off of the farm property, while retaining their often life-long interest in farming by continued personal farming operations or lease farming the remaining portion of the agricultural tract, also producing much-needed income. By the testimony at hearing as well, there appears to be a limited but certainly significant number of farms which could take advantage of a changed provision in the County code, and permit younger persons or families to purchase the smaller residential parcel who might otherwise be unable to purchase the entire agricultural tract.

Under both competing text proposals, the remaining agricultural land would be designated as "unbuildable", and remain dedicated to agricultural production.

The primary differences between the two proposals under consideration and presented at hearing, concern the following:

County Staff Proposal:

1. County Staff proposal contains a two-tiered system, and revision and addition of a new Code section, to permit two sub-divided parcel designations: an Estate Lot, consisting of between 2 and 5 acres, and a Farmette Lot of greater than 5 acres.
2. County Staff proposal contains an affidavit and acknowledgment of the Farm Nuisance Suit Act (740 ILCS 70/1 et. seq.) to be executed by the owner/creator of one of the permitted smaller lots, to be affixed to any deed of transfer, and run with the land.
3. County Staff proposal contains a 30-day timeline for the recording of the deed of the newly created parcel, running from the first day after preliminary plat approval.

Attorney Brown Proposal:

4. Does not require the creation of a new Code subsection.

5. Does not contain a two-tiered system, but rather calls for the permitted creation of only one type of reduced parcel, i.e. a single residence lot of at least 2 acres.

Please note that Attorney Brown's proposal does not include the owner/affidavit and acknowledgment process, nor a timeline for the recording of a deed for the newly created parcel after creation via the plat recording.

For reference as well, both proposals contain a new definition for what constitutes 40-acres, so as to conform with best practices.

At hearing, no one spoke or commented in opposition to the overall concept of redefining the County code to permit such parcels. The following comments and/or correspondence were received into the record:

Linda Drosulm, Sandwich Township - submitted correspondence in favor

Greg Millburg - Sycamore Township and Executive Director of the DeKalb County Farm Bureau, and also speaking on behalf of Mr. Tittle - submitted correspondence in favor and also oral testimony in favor of the proposed text changes submitted by Attorney Brown.

Anita Zurbrugg, DeKalb Township -- submitted a letter of support for the text as proposed by the PNZ Committee, Attorney Brown's proposal. She was not in favor of the procedural changes contained in County Staff proposal, and also not in favor of the two-tiered parcel designations as proposed by County Staff.

Mark Bemis, Afton Township - spoke in support of the PNZ proposal (Attorney Brown) and described how the current rule has affected his family and his mother's attempts at estate planning and facilitation.

Steve Faivre - Board Member - stated that creating two lots would be unwieldy, and creating the larger lot as proposed by County Staff doesn't address the issue attempting to be resolved.

Roy Plote - Board Member - stated his agreement with Mr. Faivre.

John Frieders - Board Member - stated he only wanted the one new designation.

Mark Peitrowski - County Board President - in favor of the one new designation as proposed by the PNZ/ Attorney Brown proposal

Sue Willis - County Board Member - concurred with the other Board members speaking on the issue at hearing.

Near the close of hearing, Attorney Brown made comments concerning his personal views on the process, and what he believed was County Staff's untimely proposal for consideration and lack of participation in the process. Attorney Brown made references to the prior Director and what he recalled as past Staff practices. As Hearing Officer, I found his comments unproductive, irrelevant and most importantly, incorrect. The Director, Assistant Director, and all County Staff have been professional and diligent in all matters that have been presented for my consideration, and have been diligent and active participants in the proceedings and discussions that culminated in the public hearing on this particular matter as well.

Recommendation:

Based on the above and foregoing, and there being general consensus on the record from all testifying parties and written submissions, I recommend approval of the Proposed Text Amendment as submitted by the PNZ Committee/Attorney Brown. While I appreciate County Staff's efforts to address some unresolved zoning authority issues and the various likely uses for the second-tier lot proposal, I agree with the commenters at hearing that the Proposed Text Amendment is more appropriate in scope and design at this time.

There may well be a need in the near future to consider that next level tier, as appropriately proposed by County Staff, but at present that second-tier need was not identified or discussed at hearing.

The Proposed Text Amendment appears to be in proper form, and sufficiently addresses the issues identified at hearing. Further, there were no comments or written materials submitted opposing the Proposed Text Amendment.

Respectfully submitted,

Dale J. Clark
Hearing Officer

To: Honorable Dale Clark, Hearing Officer
From: Charles G. Brown, Attorney
Re: In re Petition of DeKalb County Planning and Zoning Committee
Petition No. DC-20-33
Date: September 16, 2020

MEMORANDUM IN SUPPORT OF TEXT AMENDMENT DC-20-33

This memorandum is submitted in support of the proposed Text Amendment DC-20-33. The proposed Text Amendment, if approved by the County Board, will provide regulatory certainty in the County's regulation of the construction, sale and use of farm residences and structures in the A-1, Agriculture District. If enacted, the Text Amendment will preserve and protect the property rights of the citizens of DeKalb County while at the same time strike a reasonable balance with the County's 2011 Comprehensive Plan. The County's 2011 Comprehensive Plan which is the last comprehensive plan adopted, had as one of its stated goals the preservation of prime agricultural land, the discouragement of scattered residential developments in the agricultural areas, and the protection and furtherance of agricultural pursuits. This goal has been largely achieved by the elimination of all zoning which permitted the development of rural subdivisions, the enactment of a 40-acre minimum acreage requirement for farm residences (commonly referred to as the "40-acre rule")[1], and the clarification of the definition of "agriculture" for zoning purposes. Despite this notable effort to protect and preserve prime farmland, the 40-acre rule and its implementation has been confusing for farm residents for a number of different reasons and has had unintended consequences which were not fully appreciated or understood by farm residents when the rules were enacted, all of which is discussed below.

The 40-acre rule, although part of the County's zoning regulations beginning in 1976, has been legally authorized by state law only since 1998. Prior to 1998, non-home rule counties, like DeKalb County, did not have the legal authority to require minimum lot sizes for farm residences. In 1997, the Illinois state legislature enacted enabling legislation to authorize non-home rule counties to impose minimum lot sizes for farm residences. In 2011, the County grandfathered as "legal non-conforming lots" any farm residence built prior to 1998 that was separated on less than 40 acres. However, no corresponding relief was granted to owners who did not separate their residence but would have preferred to do so. This difference in treatment is fundamentally unfair and confusing to farm residents. The Text Amendment will remedy this unfair treatment.

[1] See review of the history of the 40-acre rule in Memo to Planning and Zoning Committee dated August 26, 2020.

While achieving the goal of eliminating scattered residential developments in the agricultural areas of the County and preserving agricultural land, the County's minimum lot size for farm residences and the regulation thereof has had unintended adverse consequences for farm families that were not fully appreciated when the 40-acre rule was first enacted. First, except for farm residences built before August 15, 1979, the rule has made it impossible for farm families to sever the farm residence from the farmland and sell it and retain the farmland for investment or retirement purposes. For retirement purposes, a farm resident may wish to sell the residence and move to a retirement community near health services and other conveniences, but retain the balance of the 40 acres for retirement income. Under the current 40-acre rule, the farm residence and 40 acres must be sold together. For estate planning purposes, a farm family may wish to sell the residence after a parent's death, and retain the balance of the 40 acres for farming or investment income purposes. Again, the current 40-acre rule prohibits this type of estate planning for a farm family. Lastly, the 40-acre rule makes it impossible for a young farmer or any young person starting out in farming to build a farm residence near his or her farming operation. The capital outlay to both build a residence and purchase 40 acres makes it financially prohibitive for beginning young farmers and entrepreneurs.

The purpose of the 40-acre rule is to limit the number and density of future farm residences in the agricultural district, not to eliminate them. So long as the density of farm residences is limited and the inventory of available acres upon which future farm residences can be built is reduced, it should not matter whether a farm residence remains on a 40-acre lot or lesser acreage for zoning purposes. The proposed Text Amendment will treat all farm residences the same regardless of when built. It will permit the subdivision, for sale or transfer purposes, of any farm residence on a lot 2 acres or more in size provided the owner owns at least 40 acres and is willing to declare the balance of the 40 acres from which the farm residence is subdivided to be a non-buildable zoning lot for future farm residences. Similar to the current 4.02D2 subdivision requirements, a Plat of Survey must be presented to the Plat Officer for approval. The Plat of Survey must depict both the lot containing the farm residence and the forty (40) acres from which it is being subdivided. A statement must be placed on the face of the Plat indicating the balance of the forty (40) acres will be non-buildable for future farm residences. A statement also must be placed on the face of the Plat giving notice to all future owners that the farm residence is subject to the provisions of the Illinois Farm Nuisance Suit Act (740 ILCS 70/1) This state Act protects existing farming operations from unwarranted claims of nuisance arising out of normal farming practices and operations. The non-buildable restriction must be signed by the owner or owners of the 40-acre parcel and is to be a covenant running with the land in favor of the County of DeKalb. The nonconforming lot must meet all set back requirements and have a minimum width of 200 feet at the front setback line. Finally, to deter the unintended use of this subdivision ordinance for land speculation purposes, no sale or transfer of a farm residence may be approved by the Plat Officer sooner than two (2) years after the date a plumbing certificate

has been issued by a licensed plumber pursuant to state regulation, unless the sale or transfer is to an direct family member of the owner.

In addition to the unintended consequences of the 40-acre rule, the regulation of parcels separated from the adjoining farmland under Section 4.02D2 of the Zoning Ordinance has caused confusion in the farm community. Since 1979, the County has had an exception to the 40-acre rule. Under this exception, commonly known as a 4.02D2 subdivision, i.e. the applicable section the zoning ordinance which authorizes the exception, a farm residence existing as of August 15, 1979 can be subdivided from the farmland and transferred or sold on a separate lot containing no less than 2 acres in area. As originally enacted, there were no restrictions placed on either the use of the farm residence and lot or on the use of the balance of the property from which the farm residence lot was created. In 2000, the County added two restrictions to 4.02D2 subdivisions. First, it declared the balance of the property from which the farm residence was subdivided to be "non-buildable" for future farm residences. Second, it declared the lot created by the subdivision to be a "legal, nonconforming residential lot in the A-1 district". The first restriction was in keeping with the original goal of the 40-acre rule which was to reduce the density and number of farm residences in the A-1 District. The second restriction, however, was to restrict the use of the lot to residential use and to treat it as a residential lot for building code enforcement purposes. Under state law, a non-home rule county generally does not have legal authority to regulate farm residences and structures located on property used for agricultural purposes. The differential treatment for farm residences and structures located on parcels of less than 40 acres created under section 4.02D2 and those on 40 acres or more is not only confusing for farmers who continue to use the buildings and structures for agricultural purposes, but is difficult to explain or justify as a matter of law. The Text Amendment is intended to address this confusion and provided clarity, certainty and consistency in treatment for farmers and farm residents alike as discussed below.

As noted above, state law generally does not allow non-home rule counties to regulate residences or structures located on land use for agricultural purposes. There is one limited exception to this general rule. For non-home rule counties with a population of 300,000 to 400,000, or non-home rule counties contiguous to counties with a population of 300,000 to 400,000, the state law allows non-home rule counties to regulate by ordinance, parcels less than 5 acres in area, if less than $1,000 in agricultural products are sold from the parcel in any calendar year. In 2010, DeKalb County met the conditions for being able to regulate parcels of less than 5 acres because it is contiguous to McHenry County which has a population in excess of 300,000.

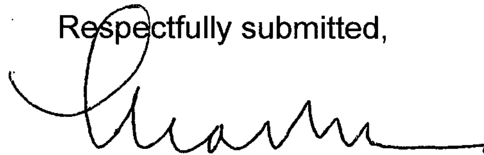
The proposed Text Amendment will treat all farm residences and structures on lots greater than 2 acres in area as used for agriculture purposes, and therefore not subject to the County's building codes and regulations. Farm residences on 2 acres or less shall be subject to the County's building codes and regulations unless the owner can

demonstrate that $1,000 or more worth of agricultural products are sold from the parcel in any calendar year. State law does not require non-home rule counties to regulate parcels less than five (5) acres. It simply authorizes it unless the requisite sales of agricultural products occur. It is a policy question for the County to regulate or not regulate. The Text Amendment also removes the restriction that the farm residence must be located on land "used *primarily* for agricultural purposes" and "used or intended for use by the person engaged in the agricultural use of the subject property". The definition simply provides that a "farm residence" is "a detached single-family dwelling located on land used for agriculture purposes."

Lastly, the proposed Text Amendment will clarify the definition of "Forty (40) acres" to mean an area containing at least 1,742,400 square feet as measured by a metes and bounds survey or a "quarter-quarter section" as defined by the government survey established for each township regardless if the area is less than 40 acres as measured by a metes and bounds survey.

Based on the above foregoing, I respectfully request that the Hearing Officer issue a favorable recommendation to the Planning and Zoning Committee for the adoption of the proposed Text Amendments.

Respectfully submitted,



Charles G Brown
Brown Law Group, LLC
301 E. Lincoln Hwy.
DeKalb, Il. 60115
(815)-756-6328
cbrown@brownlawdekalb.com