

SPECIAL EXCEPTION, SPECIAL USE PERMIT SURVEY

Ed Neham, May 19, 2021

Background

The Planning Commission undertook a research study to identify the methodologies for permitting taller buildings used in other Virginia jurisdictions. The first thing that was determined is that the use of Special Exception and Special Use Permits is very confusing.

- The Virginia Code states:

§ 15.2-2201. Definitions. “Special exception” means a special use that is a use not permitted in a particular district except by a special use permit granted under the provisions of this chapter and any zoning ordinances adopted herewith. [N.B. Special use permit is not defined in the Code.]

§ 15.2-2310. Applications for special exceptions and variances. Applications [for special exception] shall be made to the zoning administrator in accordance with rules adopted by the board [of zoning appeals] ... The zoning administrator shall also transmit a copy of the application to the local planning commission which may send a recommendation to the board or appear as a party at the hearing.

- Per Zach Brown, attorney, Clark, Campbell, Lancaster & Munson, P.A., Lakeland, FL:

Distinguishing Variances and Special Exceptions, January 24, 2019.

Special exceptions are used by local governments when a particular use of the land is potentially problematic, but can be allowed if subjected to heightened development standards. These are also frequently referred to as special use permits or conditional use permits.

- Albert Solnit, in *The Job of the Planning Commissioner*, states:

The term “special use,” with its numerous subclassifications, is so widely and variously used as to make useful determination difficult. In the simplest sense, from the administrator’s point of view (and the applicant’s) a use as of right is one where the permit can be issued on the basis of the application alone, and the application can be processed under the permit without further referrals, or reviews, other than normal inspections. Using the exclusion approach, a special use may then be defined as a use other than a use by (or as of) right.

- In Thomas Daniels, et al, *“The Small Town Planning Handbook:*

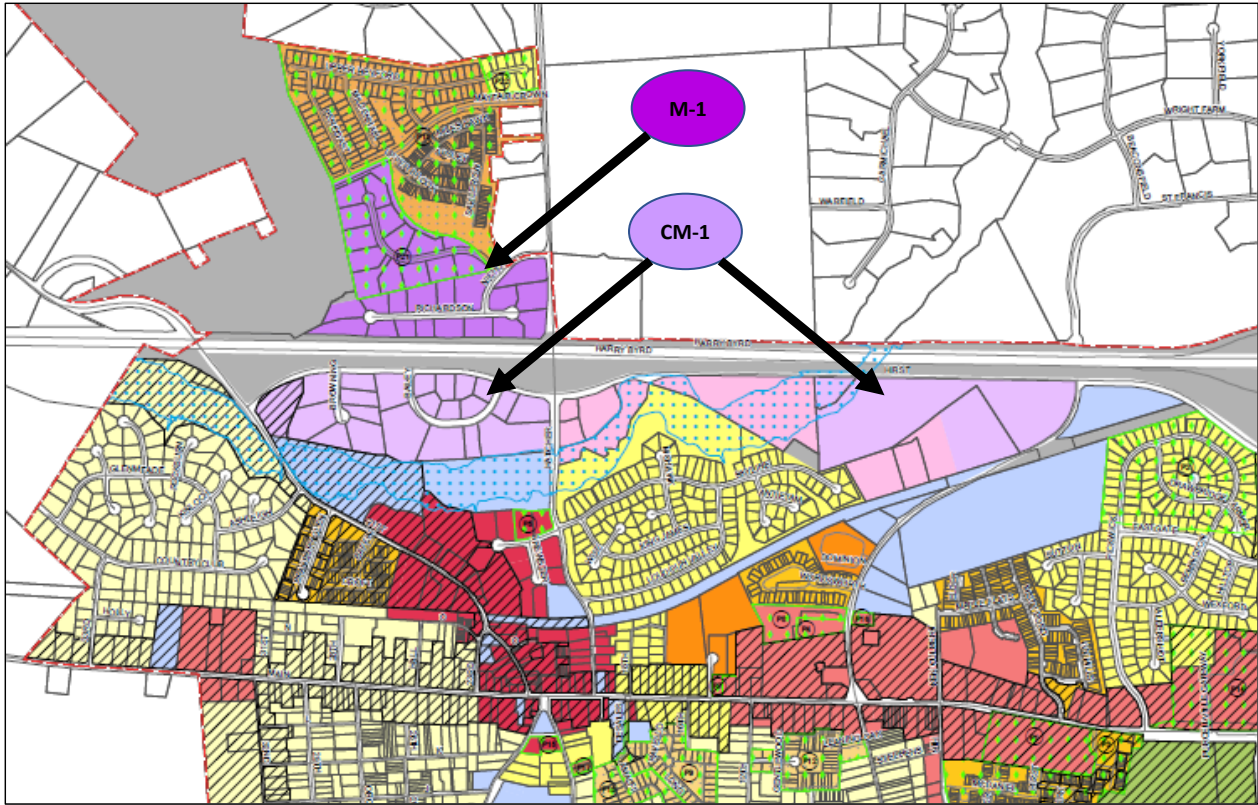
Certain uses ... might be permitted in [a] district, but only if they meet specific conditions listed in the standards for the zoning district. These are most frequently called *special exceptions* or *special uses*, the terms varying from state to state. Special exception standards should be clear and objective. The applicant applies to either the [Board of Zoning Appeals] or the planning commission for a special exception permit.

Approach and Results

The following table presents the study results, with Purcellville shown first, based on internet findings and telephone conversations with staff members in other jurisdictions. Note that Purcellville's administrative process for Special Exceptions is out of sync with most of the other Virginia jurisdictions surveyed:

LOCALITY	SPECIAL EXCEPTION	SPECIAL USE PERMIT
Purcellville	<p>The board of zoning appeals shall have the following powers and duties: ... To hear and decide on applications for special exceptions upon which the board is specifically authorized to pass under this ordinance as hereinafter provided.</p> <p>In order to provide for adjustments in the relative locations of uses and buildings of the same or different classifications, to promote the usefulness of these regulations as instruments for fact finding, interpretation, application and adjustment, and to supply the necessary elasticity to their efficient operation, special exceptions and, limited as to location and especially in locations described in the district regulations and in this article, special use and yard exceptions are permitted by the terms of these regulations. In considering an application for a special exception, the board shall give due regard to the specific guides and standards of this section and those listed elsewhere in this ordinance, and in general to the nature and condition of adjacent uses and structures, and the probable effect upon them of the proposed exception.</p> <p>5.1 Special use exceptions. 5. An exception to the height limits for special purpose structures in the CM-1 and the M-1 industrial districts.</p>	<p>The purpose of the special use permit procedure is to provide for certain uses which cannot be well adjusted to their environment in particular locations with full protection offered to surrounding properties by rigid application of the district regulations. These uses either have unusual characteristics, or have characteristics which are different from those of their immediate surroundings and are essential and desirable for the general convenience and welfare, but because of the nature of the use, and possible impact, not only on neighboring properties, but on a large section of the town, require the exercise of planning judgment on location and site plan.</p> <p>The zoning administrator shall schedule the special use permit application for public hearing with the planning commission. The administrator shall provide the recommendations and proposed conditions (if any) from the reviewing agencies to the planning commission and the town council.</p> <p>Once the planning commission has forwarded a recommendation to the town council, the zoning administrator shall set a time and place for a public hearing by the town council. The town council shall take action to approve, approve with conditions or deny the application within a reasonable time of the</p>

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		public hearing.



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Culpeper	Conditional Use: Legislative - first to the Planning Commission, then to the Town Council.	
Fairfax County	There are certain uses which by their nature or design can have an undue impact upon, or be incompatible with, other uses of land. In addition, there are times when standards and regulations specified for certain uses allowed within a given zoning district should be allowed to be modified, within limitations, in the interest of sound development. These uses, described as special exception uses in the Zoning Ordinance, may be allowed to locate within designated zoning districts under the controls, limitations and regulations of a special exception approved by the Board of Supervisors.	There are certain uses which by their nature or design can have an undue impact upon, or be incompatible with, other uses of land. In addition, there are times when standards and regulations specified for certain uses allowed within a given zoning district should be allowed to be modified, within limitations, in the interest of sound development. These uses, described as special permit uses in the Zoning Ordinance, may be allowed to locate within designated zoning districts under the controls, limitations and regulations of a special permit approved by the Board of Zoning Appeals (BZA).

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	<p>The Board of Supervisors may approve a special exception under the provisions of Article 9 of the Zoning Ordinance, when it concludes that the proposed use complies with all specified standards, including the standards that such use will be in harmony with the Comprehensive Plan and will be compatible with existing and/or planned development in the general area. In addition, in approving a special exception, the Board may impose conditions and restrictions to ensure that the standards will be met. Where such cannot be accomplished, or when it is determined that the use is not in accordance with all applicable standards of the Zoning Ordinance, the Board will deny the special exception.</p> <p><u>Process Overview</u></p> <ol style="list-style-type: none"> 1. Application is filed by the Applicant. 2. Application submissions are reviewed. When all Zoning Ordinance submission requirements are met, application is accepted and distributed to various county agencies. 3. Application is scheduled for Planning Commission Public Hearing and is assigned to a staff coordinator. 4. Prestaffing of application/Applicant will be contacted by staff about initial staff comments. 5. Revisions relating to prestaffing comments are submitted. 6. Staffing of 	<p>The BZA may approve a special permit under the provisions of Article 8 of the Zoning Ordinance when it concludes that the proposed use complies with all specified standards, including the standards that such use will be in harmony with the Comprehensive Plan and will be compatible with existing and/or planned development in the area. In addition, in approving a special permit, the BZA may impose conditions and restrictions to ensure that the standards will be met. Where such cannot be accomplished, or when it is determined that the use is not in accordance with all applicable standards of the Zoning Ordinance, the BZA will deny the special permit.</p> <p><u>Process Overview</u></p> <ol style="list-style-type: none"> 1. Application is filed by the Applicant. 2. Application submissions are reviewed. when all Zoning Ordinance submission requirements are met, applications are accepted (start of the 90 day process). 3. Application is scheduled for Board of Zoning Appeals public hearing, is assigned to a staff coordinator, and distributed to various county agencies. 4. Prestaffing of application. Applicant contacted by staff about initial staff comments. 5. Revisions relating to prestaffing comments are submitted. 6. Staffing of application/Applicant will be contacted by staff about

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	<p>application/Applicant. Will be contacted by staff about final staff comments.</p> <ol style="list-style-type: none"> 7. Revisions relating to the staffing comments are submitted. 8. Final submission deadline (6 weeks prior to Planning Commission Public Hearing. Staff report is published based on information received by this date). 9. Notification to adjacent property owners (sent to Applicant 30 days prior to hearing, notices mailed by Applicant postmarked at least 15 days prior to hearing). 10. Staff report published (2 weeks prior to public hearing). 11. Planning Commission Public Hearing. 12. Application is scheduled for Board of Supervisors Public Hearing. 13. Notification to adjacent property owners (sent to Applicant 30 days prior to hearing, notices mailed by Applicant postmarked at least 15 days prior to hearing). 14. Board of Supervisors Public Hearing. 	<p>final staff comments.</p> <ol style="list-style-type: none"> 7. Revisions relating to the staffing comments are submitted. 8. Notification to adjacent property owners (sent to Applicant 40 days prior to hearing, notices mailed by Applicant postmarked at least 15 days prior to hearing). Instructions for Preparing Legal Notices for Board of Zoning Appeals Public Hearings. 9. Staff report published (1 week prior to public hearing). 10. Board of Zoning Appeals Public Hearing.
Fauquier County	<p>A Special Exception is a permit for a use or structure that is not allowed as a matter of right, but may be permitted, if certain standards defined in the Zoning Ordinance are met. A Special Exception use is one that may be appropriate in certain site locations but not in all locations; thus, review is made on a case-by-case basis to ensure the surrounding area and wider community are not adversely</p>	<p>A Special Permit is for a use or structure that is not allowed as a matter of right, but may be permitted, if certain standards defined in the Zoning Ordinance are met. The purpose of a Special Permit is to carefully review uses which need extra deliberation to ensure the surrounding area is not adversely impacted.</p> <p>Special Permit applications in</p>

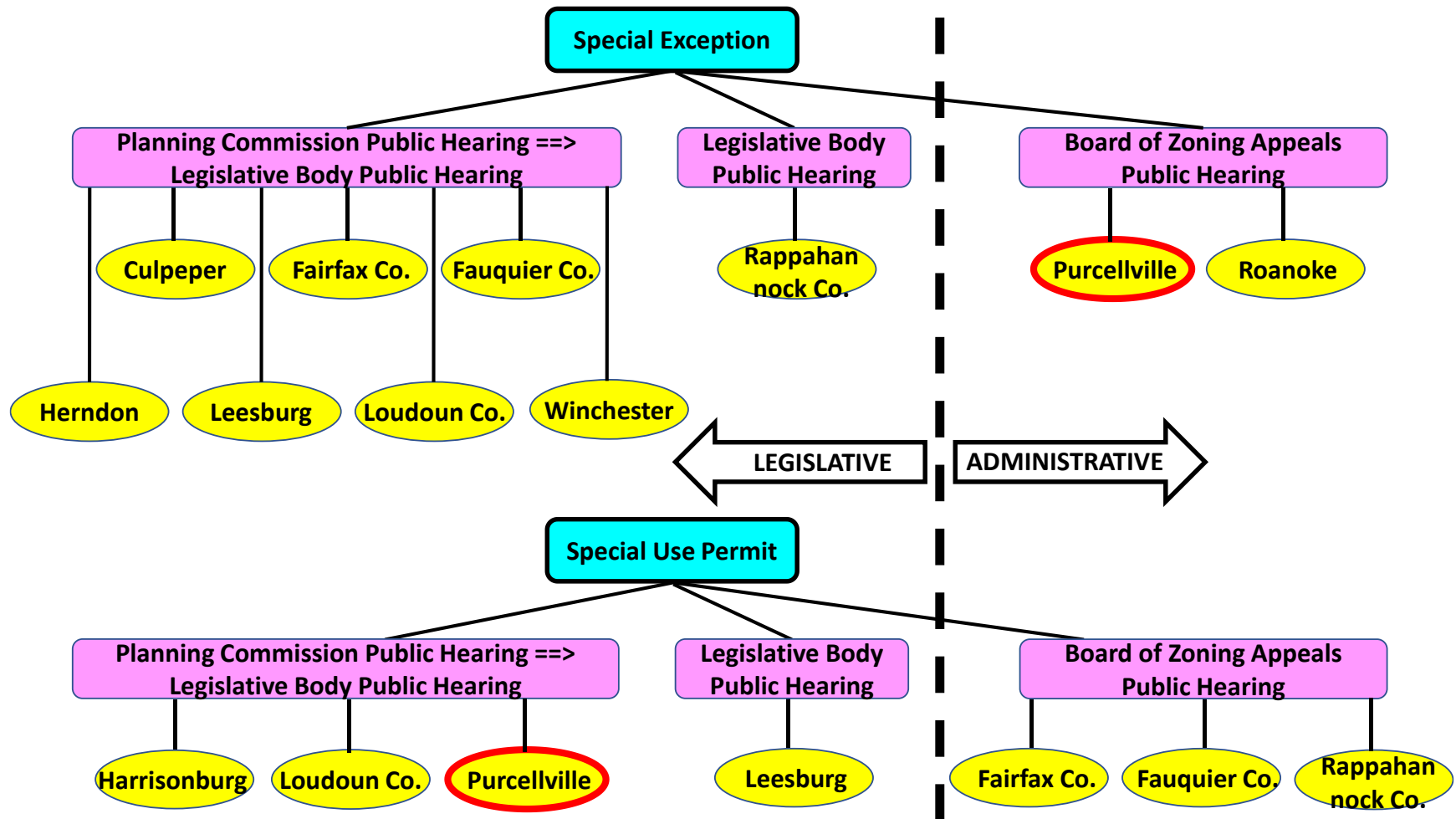
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	<p>affected by the use.</p> <p>Special Exception applications in Fauquier County go through a two-step public hearing process. The first public hearing is before the Planning Commission, which makes an advisory recommendation to the Board of Supervisors. The second public hearing is held by the Board of Supervisors, which makes the decision on whether the Special Exception application is approved (with or without conditions), denied, or deferred for further consideration.</p>	<p>Fauquier County go through a public hearing process with the Board of Zoning Appeals. The Board of Zoning Appeals makes the decision on whether the Special Permit application is approved (with or without conditions), denied, or deferred for further consideration.</p>
Harrisonburg		<p>Special permit uses are those which, if not specially regulated, may have an undue impact on or be incompatible with other uses of land within or adjacent to a given zoning district. These uses either have unusual characteristics, or have characteristics which may be different from those of their immediate surroundings. Upon the granting of a special use permit by city council, these uses may be allowed to locate or expand within designated zoning districts under the standards, controls, limitations, performance criteria, restrictions and other regulations of this article.</p> <p>No special use permit shall be approved unless the proposal has been reviewed by the planning commission. Following planning commission's public hearing, the planning commission shall prepare and by motion adopt its recommendations, which may include changes in the applicant's original proposal resulting from the</p>

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		hearing, and shall transmit such recommendations, together with any explanatory material, to the city council.
Herndon	First to the Planning Commission Public Hearing, then to the Town Council	
Leesburg	A Special Exception or Minor Special Exception application is a request to permit certain uses not allowed "by-right". These uses may not be permitted "by-right" because of the potential for adverse impacts upon adjacent properties and the health, safety or welfare of the community due to their nature, design or location. Special Exception applications are initially reviewed by staff, with a recommendation to the Town Council made by the Planning Commission; however, The Town Council has discretionary power to approve or deny any application.	The Minor Special Exception process does not require review by the Planning Commission prior to the Town Council public hearing.
Loudoun County	Special exceptions: Legislative - first to the Planning Commission, then to the Board of Supervisors.	Minor exceptions: Legislative - first to the Planning Commission, then to the Board of Supervisors.
Rappahannock County	No use of a structure or land that is designated as a special exception use in any zoning district shall hereafter be established, and no existing use shall hereafter be changed to another use that is designated as a special exception use in such district, unless a special exception has been secured from the Rappahannock County Board of Supervisors (Board) in accordance with the provisions of Article VI.	No use of a structure or land that is designated as a special use in any zoning district shall hereafter be established, and no existing use shall hereafter be changed to another use that is designated as a special permit use in such district unless a special permit has been secured from the Board of Zoning Appeals (BZA) in accordance with the provisions of Article VI.
Roanoke	A special exception authorizes a use not permitted in a particular district except when specific standards set forth in the City's Zoning Ordinance are met. A special exception may	

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	<p>also authorize a development pattern or dimensional standard not typically permitted in a particular district when specifically identified in the City's Zoning Ordinance. Uses and dimensional standards allowed only by special exception are those considered to have potentially greater impact upon neighboring properties or the public. The special exception process allows potential impacts to be addressed through conditions. A granted special exception runs with the property.</p> <p>At the Board of Zoning Appeals Public Hearing, the applicant presents the request; staff presents its report and recommendation; the BZA takes public comment; and the BZA discusses the request and takes action. In authorizing a special exception, the BZA may impose such conditions relating to the use for which a permit is granted as it may deem necessary in the public interest, including limiting the duration of the permit. Any decision of the Board is final; however, the applicant or an aggrieved party may file an appeal with the Clerk of the Circuit Court within thirty (30) days after the final decision of the Board.</p>	
Winchester	<p>A Conditional Use is a land use that is provided for in the Zoning Ordinance, but requires specific case-by-case approval by the City Council. A Conditional Use may be appropriate for a particular site, but only if the impacts of the use on the neighborhood can be mitigated.</p> <p>The Planning Commission holds a</p>	

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	public hearing and makes a recommendation to Council. City Council holds public hearing.	

A graphical summarization of this information is presented on the following page.



RECOMMENDATIONS

Deciding Height Exception Cases

Staff's April 15, 2021 report on C-4 Zoning District Text Amendments included:

Background: The law allows for "height exception" cases to be decided by either the Town Council, by Special Use Permit (Article 8), or by the Board of Zoning Appeals, by Special Exception (Article 9, Section 5). The current Zoning Ordinance delegates to the BZA the authority to decide "height exception" cases. However, the Planning Commission was of the opinion that the elected body, and not a quasi-judicial body, should decide "height exception" cases in the C-4 zoning district.

PC Recommendation: The Planning Commission recommends that "height exception" cases in the C-4 zoning district be decided by the Town Council, after recommendation from the Planning Commission.

Staff Recommendation: Staff has no recommendation as to which body (the Town Council or the BZA) decides height exception cases. Staff recommends, though, that one approach be selected across all zoning districts. Nonetheless, if a split-approach is desired, it is legally permissible.

The Planning Commission still recommends that "height exception" cases in the C-4 zoning district, whether considered as Special Exceptions or Special Uses, be decided by the Town Council after recommendation from the Planning Commission. A legislative approach is consistent with those employed by a majority of the ten other jurisdictions surveyed.

Inclusion of Findings

The Town's Director of Planning and Economic Development suggested that findings be included when increasing the building height is appropriate and consistent with the Comprehensive Plan. We don't have specific findings for that; we have general findings for Special Use Permits and we also have general findings for architectural review for Certificates of Design Approval. For Special Exceptions and Special Use Permits, the inclusion of one or two additional findings that go beyond the standard review could be very specific criteria such as, for buildings proposed to be greater than 35' but less than 45'.

Staff suggests referring increases in height to the Board of Architectural Review with additional findings that would specifically address the types of things the Commission is concerned about. The applicant could appeal the Commission's decision to the Board of Zoning Appeals - a completely internal process. On the other hand, if applicant goes directly to the Board of Zoning Appeals, there is no internal appeal path; they have to go to Circuit Court.

Possible Findings:

- Special Use Permits

Add the following factors to those given in Article 8. - Special Use Permits and Commission Permits, Section 1. Special use permit, 1.4 Procedures for approval of special use permits which require approval by the town council, D. Issues for consideration:

14. Whether the structure is in the C-4 Central Commercial District and its proposed height is between 35 feet and 45 feet tall and its design is compatible with its adjacent structures as well as with the overall C-4 Central Commercial District area.

15. Whether the structure is in the C-4 Central Commercial District and its proposed height is greater than 45 feet tall and the structure is a barn, silo, chimney, spire, cupola, gable, dome, flagpole, flue, monument, transmission tower, water tower, water tank or smokestack, and therefore may be excluded from this height limitation.

16. Whether the structure is in the C-4 Central Commercial District and its proposed height is greater than 35 feet tall and the structure has a parapet wall, cornice or similar projection exceeding the height limit by more than three feet.

17. Whether the structure is in the C-4 Central Commercial District and its proposed height is greater than 35 feet tall and the structure has rooftop guardrails required by the Virginia Uniform Statewide Building Code for safety reasons; the guardrails shall be excluded from building height.

- Special Exceptions

Add the following to Article 9. Board of Zoning Appeals, Section 5. Special exceptions. 5.2 Special yard and height exceptions:

6. An exception to the height limits for special purpose structures in the C-4 Central Commercial District where:

(a) The structure is in the C-4 Central Commercial District and its proposed height is between 35 feet and 45 feet tall and its design is compatible with its adjacent structures as well as with the overall C-4 Central Commercial District area.

(b) Where structure is in the C-4 Central Commercial District and its proposed height is greater than 45 feet tall and the structure is a barn, silo, chimney, spire, cupola, gable, dome, flagpole, flue, monument, transmission tower, water tower, water tank or smokestack, and therefore may be excluded from this height limitation.

(c) Where the structure is in the C-4 Central Commercial District and its proposed height is greater than 35 feet tall and the structure has a parapet wall, cornice or similar projection exceeding the height limit by more than three feet.

(d) Where the structure is in the C-4 Central Commercial District and its proposed height is greater than 35 feet tall and the structure has rooftop guardrails required by the Virginia Uniform Statewide Building Code for safety reasons; the guardrails shall be excluded from building height.