

From: [Frank Johnson](#)
To: [Rob Robinson](#)
Cc: [Trudy Schwarz](#); [Gregory Mann](#); [Sharon Disque](#)
Subject: RE: Accessory Use Question
Date: Thursday, May 14, 2015 1:05:45 PM
Attachments: [image001.png](#)

Rob: Yes, what's accessory can be a good question, and it's probably true that almost every test at some level comes down to a "sniff" test. It also depends on what definition is provided in the Code itself, and of course how we measure or conclude what's accessory. But it turns out our specific language (also used by another local government, in that case Carroll County) was interpreted by the Maryland courts, so we do have some background guidance.

And in fact, it turns out Maryland does have one of the more restrictive definitions, coming out of a case from 1991 in the Court of Special Appeals, *County Commissioners of Carroll County v. Zent*, 86 Md. App. 745, 767 (1991). It was never appealed and has been cited as the Maryland precedent on accessory use, and it defines and interprets the same language you cite in our code.

The court decision finds no substantive guidance in Maryland law at the time, and thus reviews court decisions state by state in coming up with guidance. The court finally concluded that "accessory," includes two concepts – that the use is both subordinate to, and incidental of, the main primary use. That's the same language you reference in our Code definition, which leads me to conclude the *Zent* case definitions apply here.

As the court laid out, to be subordinate, the accessory use has to be "minor in significance" compared to the primary use. That means, in your example, the chocolate factory has to be minor compared to the retail operation which is the main, primary use. If in terms of any measure we're aware of, including floor area and traffic, the retail use is the minor use, then the chocolate factory, if it's permitted as an accessory use, is no longer an accessory use.

Also, the court held that adding the term "incidental" by itself adds the requirement that the accessory use be reasonably related to the primary use, and clearly "attendant or concomitant" to that use – meaning that it supports and is attendant to the main, primary use. So here, if the chocolate factory produces goods for retail sale, and is clearly less significant compared to the retail use, it would qualify as an accessory use. But if the main operation is the factory, and the retail sales are the more minor operation, then I don't see how they'd meet the definition of being an accessory. But I see the definition modifies the term "incidental" by also including the word "customarily," and that somewhat changes the applicable test. As the court in *Zent* explained, when the term "customarily" is included in the definition, as in ours, "the use must be further scrutinized to determine whether it has commonly, habitually and by long practice been established as reasonably associated with the primary use."

Thus, the two main parts of the definition are "subordinate" and "customarily incidental," which has been defined in *Zent*, which is still good law as far as I can see. To be subordinate, it means the accessory use has to be "minor" compared to the primary use. How that is defined may start with what we've done in the past, but may not be limited to any past practices as long as any process we

use is an identifiable way to determine whether an accessory use is, in fact, subordinate and minor to the primary use. And to be customarily incidental, it must be a use that traditionally supports or is attendant to the primary use.

As such, both definitions need to be met. If a use thus starts as “customarily incidental and subordinate,” meaning it’s minor compared to the primary use, and traditionally supports that primary use, that’s fine. But if over time the accessory use becomes more significant, once it’s no longer “minor,” or once the primary use ends up supportive the prior accessory use, you’d have a zoning violation based on the breach of the accessory use definition that we happen to use. It doesn’t call for any specific measurements or delineate what exactly is measured (floor space? Land area?), and could well be a “sniff test” in some cases. But the minor requirement combined with the traditional accessory requirement does provide some guidance in coming to a conclusion.

I hope that helps; but if any followup, let me know.

Thanks
Frank



Frank M. Johnson, Assistant City Attorney | Dept. of Legal Services

City of Gaithersburg | 31 S. Summit Avenue | Gaithersburg, MD 20877

P (301) 258.6310 x. 2284 | F (301) 948.6149

From: Rob Robinson
Sent: Thursday, May 14, 2015 12:23 PM
To: Frank Johnson
Cc: Trudy Schwarz; Gregory Mann; Sharon Disque
Subject: Accessory Use Question

Hi Frank,

I have a question, while Chapter 24 defines “accessory use” I cannot find in the code or a legal opinion a tangible limitation based on the definition: *Accessory use. A use on the same lot with, and of a nature customarily incidental and subordinate to, the principal use of the main building or lot.* In short, at what point does an accessory use become the primary use and possibly circumvent a site plan approval. Example as I broach amending the MXD Zone – the oft cited chocolate factory in Kentlands. Manufacturing is specifically prohibited, however if this came in as an accessory to the retail storefront- at what point can the case be made that the retail storefront is accessory to the primary use of chocolate production? Is there precedent based on percentage of GLA of both primary and accessory or some other standard that states a use is “accessory” when... or is just an arbitrary sniff test?

Rob

Rob Robinson III, AICP CEP
FCA Qualified Professional

Long Range Planning Manager
City of Gaithersburg
301-258-6330 Ext. 2122

The opinions expressed in this message are not necessarily those of the City of Gaithersburg Staff,
Mayor or Council.

From: [Rob Robinson](#)
To: [Rob Robinson](#)
Subject: MXD Zone Text Amendment follow up
Date: Tuesday, June 09, 2015 1:07:55 PM

From: Frank Johnson
Sent: Tuesday, June 09, 2015 1:06 PM
To: Rob Robinson
Subject: RE: MXD Zone Text Amendment follow up

Rob: To follow up, I'd recommend removing the special exception provision at City Code §24-160D.3(d) for "Assembling from prepared materials of electronic devices and electrical appliances" in the MXD zone.

First, subsection (d) refers applying the special exception uses to those uses "allowed as a permitted use in any other zones referred to in the above subsections (a) and (b)," but this electronic devices assembling would not be allowed – as it would be prohibited by the broader "manufacture, compounding and processing" prohibition included in subsection (b), §24-160D.3(b). Since the listing for subsection (d)'s special exceptions is limited to those uses otherwise allowed, it should not be included because it's part of a currently prohibited use. As such, it invites a potential conflict in listing a more limited use within a generally prohibited use.

Second, if the "manufacture, compounding and processing" prohibition is limited as per the proposed amendment, leaving this special exception at §24-160D.3(d) would create another conflict, as it would require a special exception by the Board of Appeals for one of the otherwise allowed light manufacturing uses (allowed by not being included in the general manufacture/compounding/processing prohibition), which would thus otherwise go through the normal MXD approval process for approval, involving both Planning Commission and the Mayor and City Council.

Thus, to avoid both conflicts and allow an effective approval process under the MXD zone, I'd recommend removing the line in City Code §24-160D.3(d) which refers to "Assembling from prepared materials of electronic devices and electrical appliances."

Hope that helps; if any question, let me know.

Frank

Frank M. Johnson, Assistant City Attorney | Dept. of Legal Services
City of Gaithersburg | 31 S. Summit Avenue | Gaithersburg, MD 20877
P (301) 258.6310 x. 2284 | F (301) 948.6149

From: Frank Johnson

Joint Hearing - MCC & PC
CTAM-7034-2015

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Sent: Tuesday, June 09, 2015 12:21 PM

To: Rob Robinson

Subject: RE: MXD Zone Text Amendment follow up

MEMORANDUM

TO: Mayor & City Council
Planning Commission

FROM: Rob Robinson, Long Range Planning Manager

RE: Proposed Text Amendment CTAM-7034-2015

DATE: June 15, 2015

During the Planning Commission’s May 20, 2015 meeting the Commission sponsored a proposed text amendment to Chapter 24 of the City Code, CTAM-7034-2015. Specifically, staff is proposing to amend §§ 24-1 & 24-160D.3.(b) and (d) “Uses Permitted MXD Zone.”

The Economic Development Division in coordination with Planning staff brought forth a proposed text amendment to modify a specific prohibited use in the MXD zone. Section 24-160D.3.(b) Uses Permitted includes:

“...The following uses are specifically prohibited:

Manufacture, compounding, and processing of goods or articles”

Staff in conjunction with the Assistant City Attorney has determined that the above statement is overly broad given that neither “manufacture,” “compounding,” nor “processing” are defined in Chapter 24 and may be applied to uses beyond what was the original intent; namely to prohibit traditional “heavy” industrial uses. These are uses such as automobile, petroleum, and steel industries which require huge plants and often have external emissions or “nuisance” by-products. Products resulting from “heavy” industry are less likely to be targeted toward end consumers and would not integrate within a mixed-use development dynamic.

Of note, “manufacture,” “compounding,” and “processing” uses are allowed by-right or in some form in the City’s traditional Euclidean zones such as I-3 and E-1, but these zones prohibit other uses. These zones are often typified by parcels having a single-use development and preclude stand-alone retail or residential uses. Further, given the broad undefined application of “manufacture,” “compounding,” and “processing,” coupled with the strict prohibition of their use in the MXD Zone, a potential conflict may arise should one propose as an “accessory use” a use that would otherwise be prohibited. Chapter 24 does not define that prohibited uses may be “accessory uses” in the MXD Zone:

“Sec. 24-22.(a)(3) - Permitted and special exception uses.

(3) Prohibited uses are uses not identified as permitted uses, special exception uses or conditional uses in any specific zoning district in this chapter or specifically identified as a prohibited use in any specific zoning district. Lawful accessory uses and lawful non-conforming uses are not prohibited uses ...”

Staff is of the opinion that as written, the referenced sub-section above (§ 24-160D.3.(b)) does not accommodate changes found in the 21st Century economy. Changes in technology and advanced manufacturing practices have created “industrial” uses that neither conflict with retail, office and residential uses, nor conflict with the intent of the MXD Zone. The MXD Zone, under § 24-160D.1. - Purposes and objectives of zone, states:

(d) To ensure the integration and internal and external compatibility of applicable residential and nonresidential uses by providing a suitable residential environment that is enhanced and complemented by uses such as commercial, recreational, open space, employment and institutional uses and amenities within a multi-use development. A multi-use development is defined as a single parcel or a group of contiguous parcels of land zoned MXD which, among the various parcels comprising that contiguous area, include residential, commercial, recreational, open space, employment and institutional uses and amenities.

(e) To assure compatibility of the proposed land uses with internal and surrounding uses by incorporating higher standards of land planning and site design than could be accomplished under conventional zoning categories and to provide a superior quality of development exceeding that which could be achieved under conventional zoning regulations and procedures.

(f) To encourage the efficient use of land by: locating employment and retail uses convenient to residential areas; reducing reliance upon automobile use and encouraging pedestrian and other nonvehicular circulation systems; retaining and providing useable open space and active recreation areas close to employment and residential populations; and providing for the development of comprehensive nonvehicular circulation networks, separated from vehicular roadways, which constitute a system of linkages among residential areas, open spaces, recreational areas, commercial and employment areas, and public facilities.

In order to keep with the purposes and objectives listed above; staff is of the opinion that the MXD Zone not be static and instead be amended to reflect new business models and practices. Staff is proposing to amend § 24-160D.3.(b) to now read:

“...*The following uses are specifically prohibited:*

*Manufacture, compounding, and processing of goods or articles, **with the exception of Integrated Light Manufacturing uses.**”*

Staff drafted the amendment in the above structure to provide clarity and avoid potential conflicts. Had staff listed “Integrated Light Manufacturing” as an allowed use solely and not associated it with the prohibited uses, § 24-160D.3.(b) would conflict with itself.

Staff is not proposing to circumvent the original intent and allow “heavy” or nuisance industries into the MXD Zone and has instead developed and defined “Integrated Light Manufacturing.” The definition to amend § 24-1 reads:

Integrated light manufacturing. The manufacturing, compounding, assembly, and/or processing of articles in a building, unit or floor thereof where the operations, emission, and by-products, such as external excessive noise, particulate matter, vibration, smoke, dust, gas, fumes, odors, radiation and/or other adverse effects or nuisances are neither created nor evident outside the enclosed building, unit or floor thereof. Integrated Light Manufacturing uses must be low impact and compatible with residential uses. Integrated Light Manufacturing should be located within a business park/campus, retail center or transit oriented development with additional retail, office, or research & development uses. Uses defined as Integrated Light Manufacturing include, but are not limited to:

- *Chocolatier / Specialty Gourmet*
- *Craft Brewery / Small Batch Distillery*
- *Pottery / Artisanal*
- *Electronics*
- *Precision Instruments*
- *Additive Manufacturing (3D printing)*
- *Medical Supplies and Devices*
- *Molecular Engineering / Nanotechnology*
- *Mechanical Equipment and Micro-manufacturing*
- *Cyber Security Technologies*

The proposed definition creates a specific subset of “Manufacture, compounding, and processing of goods or articles.” Of note, given that “Integrated Light Manufacturing” is a refinement of the broader “Manufacture, compounding, and processing of goods or articles” it would not be required to be specifically added to those zones where the broader “uses” are allowed by-right. In short, “Integrated Light Manufacturing” uses are currently allowed by-right in zones such as I-3 and E-1 and the proposed text amendment would have no impact on those Euclidean zones.

The proposed definition of “Integrated Light Manufacturing” as it relates to the MXD Zone:

- Reflects and accommodates new business models/practices of the 21st Century economy not envisioned when the MXD Zone was first enacted
- Creates a site/situation locational standard (business park/campus, retail center or transit oriented development) that would afford new (re)development opportunities for those properties, some of which were comprehensively rezoned to MXD from the I-3 Zone
- Reinforces the purpose and objectives of the MXD Zone by emphasizing compatibility with other uses and expanding employment opportunities proximate to residential
- Precludes external emissions or “nuisance” by-products; those typically associated with “heavy” industry.

The proposed definition and application thereof within the MXD Zone is expected to retain and attract employers and create opportunities for the redevelopment of aging business parks and freestanding industrial facilities either currently zoned or seeking to rezone to MXD in order to take advantage of “mixed-use.” It must be emphasized, as proposed, the amendment does not allow “Integrated Light Manufacturing” by-right in the MXD Zone. Any proposed use applicable under the definition would still require Council approval at either the sketch or schematic development plan stage following a Planning Commission recommendation and would be weighed on an application by application basis against the parameters discussed above.

Staff has included in CTAM-7304-2015 another amendment facet that is recommended to be approved regardless of the inclusion of “Integrated Light Manufacturing.” Section 24-160D.3.(d) Uses Permitted includes:

“(d) Special exception uses. The following uses shall be special exception uses in the MXD zone subject to approval by the city board of appeals notwithstanding the fact that such use may be allowed as a permitted use in any other zones referred to in the above subsections (a) and (b):

Assembling from prepared materials of electronic devices and electrical appliances.”

Staff, in consultation with the Assistant City Attorney, has proposed removing “Assembling from prepared materials of electronic devices and electrical appliances.” In the above section, (d) refers applying the special exception uses to those uses “allowed as a permitted use in any other zones referred to in the above subsections (a) and (b).” This presents a conflict within the code. Electronic devices assembling would be prohibited by the broader “manufacture, compounding and processing” prohibition included in § 24-160D.3(b). As currently written, it invites a further potential conflict in listing a more limited use within a generally prohibited use that could not be approved by the Council at sketch or schematic development plan (SDP), but could be approved by the Board of Appeals who traditionally have no role, by

code, in the sketch or SDP approval process. Additionally, should the Board of Appeals grant the use at final site plan, a conflict would arise in that the use would not comply with the approved uses defined at SDP: conflicting with the requirements of § 24-160D.9 Application and processing procedures.

Lastly, as it relates to the inclusion of “Integrated Light Manufacturing” in the MXD Zone, leaving this special exception in §24-160D.3(d) would create another conflict, as it would require a special exception by the Board of Appeals for an otherwise allowed “light manufacturing use” that had gone through the normal MXD approval process involving both Planning Commission and the Mayor and City Council. In short, by leaving “Assembling from prepared materials of electronic devices and electrical appliances” as a special exception, a sole specific use possible under “Integrated Light Manufacturing” would require yet another approval procedure that, as related to the specific use to other “Integrated Light Manufacturing” uses, could appear to be arbitrary and burdensome.

MEMORANDUM

To: Mayor & City Council
Planning Commission

From: Tom Lonergan, Economic Development Director
Sharon Disque, Business Services Coordinator

Date: 6/15/2015

Re: Proposed Text Amendment CTAM-7034-2015

The Office of Economic Development, working with Planning staff, proposed changes to the MXD zone to allow modern manufacturing processes as permitted uses. Currently, a general prohibition of manufacturing, compounding and processing limits the locations available to employers whose operations are, in fact, compatible with other commercial and residential uses.

The local commercial real estate market continues to evolve, with a decline in inquires for single use – single tenant spaces and an increase in requests for multi-tenanted locations in settings proximate to restaurants, shopping and housing.

Occurring in tandem with this trend toward mixed-use settings is the aging of existing office and light industrial facilities in Gaithersburg. Expanding the permitted uses within MXD to accommodate more types of uses creates an opportunity for property owners to increase value through redevelopment. This discourages the typical decline found in aging commercial buildings, where replacement tenants tend to be those that cannot afford the newer facilities.

Changes in technology and advanced manufacturing practices have created industrial uses that do not conflict with retail, office and residential uses. By amending the City's ordinance to allow low-impact manufacturing uses in MXD areas, the City would be positioned to retain and attract employers, while creating opportunity for redevelopment of aging business parks and freestanding industrial facilities.

Incorporating lighter manufacturing uses into Mixed Use development would:

- a) Maintain the goal of including employment opportunities within close proximity of residential units;
- b) Enhance the variety of workplace settings available to new and expanding light industrial employers, who desire amenities just as office tenants do;
- c) Acknowledge the contemporary changes in modern manufacturing, including a greater dependence on technology and a move away from

-
- “smokestack” activities;
- d) Accommodate Research & Development activities, including those associated with businesses that produce related products;
 - e) Support innovation and build upon the assets of the community, especially the City’s proximity to NIST;
 - f) Create transit-rich location opportunities for manufacturers;
 - g) Offset the decline in “bricks and mortar” retailers, which is frequently a primary business type in mixed use plans.
 - h) Encourage property owners of obsolete industrial and office facilities to invest in redevelopment.

The City’s ability to attract new and expanding employers depends upon the desirability of available properties, as compared with the communities elsewhere in the metro area. Gaithersburg can optimize its location by supporting new investment in development patterns that are compatible with the market’s demand for mixed use.

Manufacturing Zones



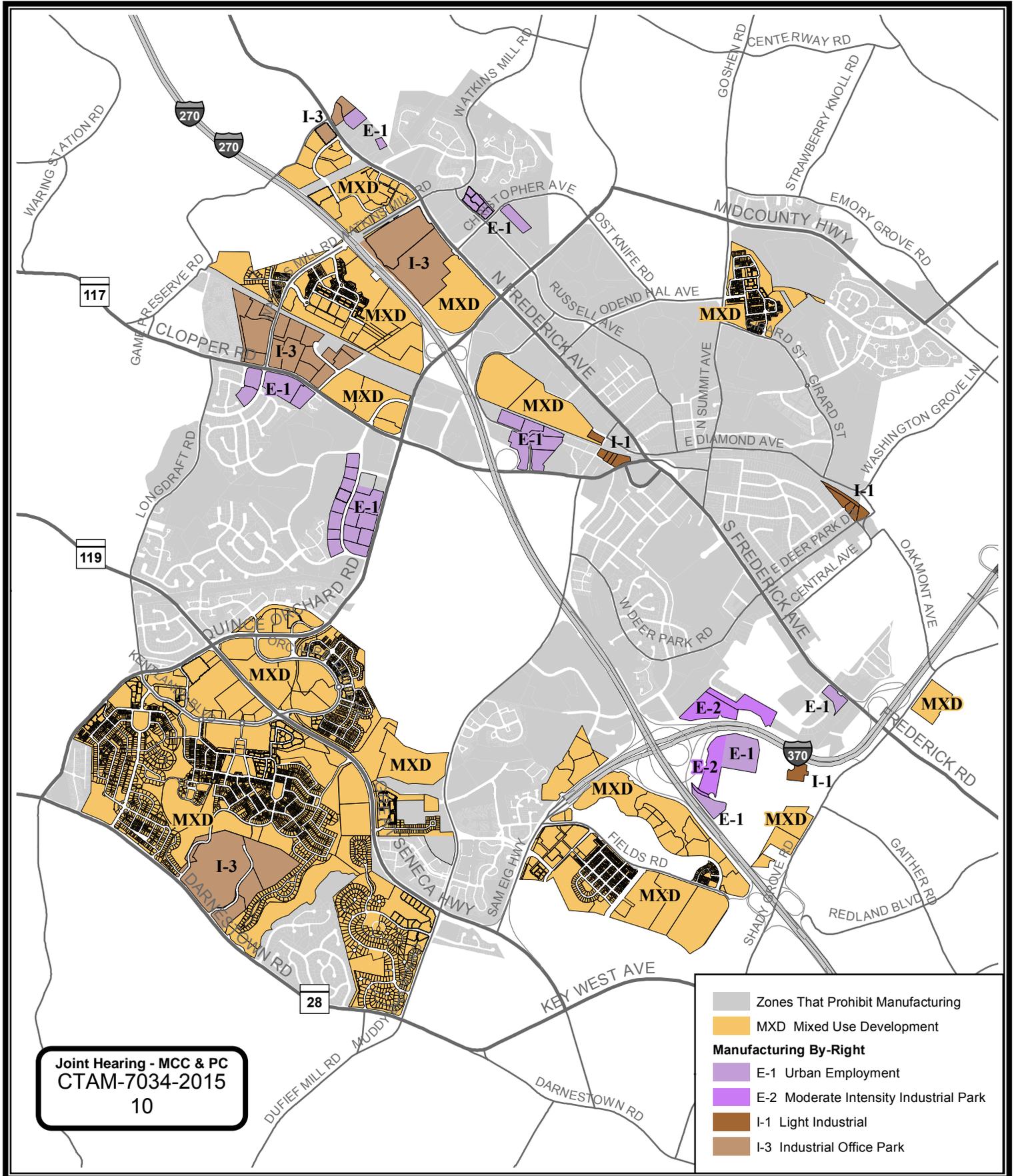
Property boundaries and planimetric base map courtesy M-NCPPC and City of Gaithersburg. All rights reserved.

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City of Gaithersburg
 Planning and Code Admin
 31 S Summit Ave
 Gaithersburg, MD 20877
 (301) 258-6330
 www.gaithersburgmd.gov

Manufacturing Zones.mxd • 15-Jun-2015 • jke



- Zones That Prohibit Manufacturing
- MXD Mixed Use Development
- Manufacturing By-Right**
- E-1 Urban Employment
- E-2 Moderate Intensity Industrial Park
- I-1 Light Industrial
- I-3 Industrial Office Park

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