

Alison Van Gorp

From: Dan Thompson <danielpthompson@hotmail.com>
Sent: Wednesday, March 22, 2023 12:19 PM
To: Planning Commission
Cc: Jeff Thomas; Jessi Bon; Council; Robert Medved
Subject: Re: 2023 Legislative Item: Amending Business Zone To Allow Schools As An Allowed Use/Planning Commission Agenda AB 6212/CPD RecommendationN

Hello, below is my Feb. 9, 2023 email re: this agenda item. On March 22, 2023 the CPD will present its proposed Option B to the Planning Commission. Here is a link to the agenda packet. [Planning Commission Regular Hybrid Meeting 03/22/2023 06:00 PM | Mercer Island, WA \(municode.com\)](#)

Here is a link to staff's memo and recommendation. [ITEM-Attachment-001-2d383f86cfc54b548f1987a99af3f7e7.pdf \(usgovcloudapi.net\)](#)

Although a little unorthodox, I think staff's recommendation of allowing schools as a use in the B zone along with increased regulatory limits is a fair solution.

Although staff are correct that this is not technically a spot zone since all three B zone properties will be allowed schools as a use, the reality is two of the B parcels are already developed, and the only B parcel on MI that this amendment will apply to is the Hertzl property. At the same time staff make a good point that a school is no greater, and in some cases less, of an intensive use than other allowed uses (like a gas station), depending on traffic.

An amendment to add a use to a zone is a major change. In fact, a variance cannot be used to add or change a use in a zone. To offset this change of use staff propose the following increased regulatory limits for a school over current B zone regulatory limits:

- 1 45' setback from a SFH zone.
- 2 Increasing the setback from a ROW from 10' to 30'.
- 3 Adding a 15' setback from a park.
- 4 Requiring 25% of the lot be vegetated with a 10' vegetated screened buffer.
- 5 A minimum $\frac{1}{4}$ acre playfield (similar to other zones that allow a school).
- 6 Two off-street parking spaces per classroom.
- 7 Height allowed in the B zone is greater than in the R zone, the lesser of three stories or 36' and no change is proposed.

[Since this amendment pretty much only applies to this parcel since the other two B zone parcels are developed it isn't clear to me which of these will actually apply, and whether the property Hertzl is on is R zone.]

Furthermore, any proposed development in a B zone is a regulated development and must go through the design process at the Design Commission. I think this will be the appropriate stage to determine traffic, levels of service under the TCO for this intersection that pre-pandemic was maxed out, and competing future needs for increased traffic since other property owners from the City to Globe Building to Hertzl to residents and the JCC all share this intersection. A traffic study was planned for this intersection pre-pandemic but postponed until normal traffic patterns are known post pandemic.

The only questions I would ask the Planning Commission to clarify are:

1 Can the playfield count as part of the 45' setback from a R zone (I think the only parcel that would be affected is Hertzl). Having a playfield within 10' of a SFH zone could be problematic.

2 The agenda packet states March 22 will be a "public hearing" which is a legal term of art. I anticipate that based on the PC's decision formal public notice at least 30 days before a public hearing before the PC will be issued for the actual code amendment, and signs posted on the three B zone parcels and mailed to those living within 300' of a B zone.

Thank you.

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Sent: Thursday, February 9, 2023 4:44 PM

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Cc: jeff.thomas@mercerisland.gov <jeff.thomas@mercerisland.gov>; jessi.bon@mercergov.org <jessi.bon@mercergov.org>; council@mercergov.org <council@mercergov.org>; Robert A. Medved <robertamedved@msn.com>

Subject: 2023 Legislative Item: Amending Business Zone To Allow Schools As An Allowed Use/Planning Commission Agenda AB 6212

Dear Planning Commission, later this month the suggested code amendment by Herzl Ner-Tamid is scheduled to come before the PC for a preliminary review of "options". Attached to this email are: 1. Herzl's Sept. 2021 Suggested Code Amendment to add schools as an allowed use in the B zone; and 2. the CPD's 2023 Legislative Work Plan presented to the council at the January 17, 2023 council meeting, including Herzl's suggested code amendment (page 2). Please consider these my public comments.

According to Jeff Thomas at the January 17, 2023 council meeting the options are:

A. "No change" to the B zone.

B. "Adding schools as an allowed use in the Business Zone (as proposed)";

C. "Rezoning the B-zoned parcels owned by Herzl Ner-Tamid to Commercial-Office, which allows schools". (See, page 2 of the attached January 17, 2023 legislative work plan).

SUMMARY OF PUBLIC COMMENTS:

1 Rezoning the B-zoned parcels owned only by Herzl Ner-Tamid to Commercial-Office was never part of the suggested code amendment, and was never part of the council's approval to put this suggested amendment on the PC docket, or part of the public notice. This option simply is not before the planning commission, and has never been part of the suggested code amendment until the January 17, 2023 council meeting.

2 A rezone of Herzl's B zone properties to C-O would require amending the land use map, and require a concurrent application to amend the comprehensive plan, and an application to rezone the property as opposed to simply a code amendment to allow schools as an authorized use.

3 Rezoning only the B-zoned parcels owned only by Herzl Ner-Tamid to allow schools as an allowed use would be a spot zone, which is not appropriate for the suggested code amendment docket, in part due to the cost to the city of such a zoning change, and spot zones are highly disfavored in law.

4 The reason the council placed the suggested code amendment on the PC docket in 2021 was because Herzl told the council time was of the essence because Herzl had an interested party wanting to build a school on the property (the Bellevue Jewish Day School). That deal never happened, and so there is no urgency for such an upzone *of all B zoned properties*, and this application should be tabled until Herzl can identify an actual party wanting to apply for the building permit to build a school on the property before applying for the

extraordinary relief of adding schools as an allowed use in the B zone, and having the city incur the costs of such an upzone.

5 There currently is a compliance action involving this area and intersection that requires a traffic concurrency study once traffic resumes to normal. It is not productive to upzone the Herzl properties to allow a very intensive use like a school only to find a later a traffic study shows the intersections and streets do not meet the levels of service in the TCO. **A traffic study to show a land use action will comply with the levels of service in the TCO comes *before* the proposed land use action can be taken.**

6 The public notice for the code amendment docket in 2021 never mentioned upzoning the properties to C-O. As a result, the citizens and surrounding neighbors were never given the opportunity to provide public comments on such an upzone.

7 As far as I know no other B zone property owners have been given public notice of this application, and the surrounding neighbors of those B zoned properties that will allow schools as an allowed use if this suggested amendment is adopted.

8 There are no restrictions in the suggested code amendment limiting the ability of Herzl to sell or transfer the property once the upzone has been adopted by the council, *especially if the upzone is to C-O, and nothing to ensure the upzone is used for a school.* In this situation it is impossible for citizens and neighbors to meaningfully comment because they can't know the intended use, including town center style office towers and regulatory limits.

HISTORY OF PROCEEDINGS:

Herzl filed a timely Docket request in Sept. 2021 (attached). The request was reviewed by the Planning Commission along with many other suggested code amendments, three from the City, six from Daniel Thompson, two by planning Commissioner Boatsman, and two by other residents.

The City Council took up the Docket issue at their 12/07/21 meeting. After much debate the Council decided to only docket the State mandated items the City proposed along with the Herzl suggested amendment.

The general consensus among the council (and CPD) was that the CPD and PC did not have the time to take up the suggested code amendments that were not State mandate. Council Member Rosenbaum, after stating that he checked with the City attorney, stated he had no conflict of interest and would therefore participate in the discussions and vote, moved to add the Hertzl suggested amendment to the docket.

This was seconded by Mayor Salim Nice, who stated that Herzl needed a variance (which would be applied for at the same time an actual permit application to build a school on the B zoned property was filed), but Mayor Nice did not want Herzl to wait too long for a decision if, as Herzl had indicated, an existing school had a

deadline to move to the property and construct a school. It also appeared Mayor Nice was mistaken in his understanding that not adding the Herzl suggested amendment would prohibit Herzl from suggesting a similar amendment for three years. As a result, the council voted 4-3 to add the Herzl suggested code amendment to the PC's docket.

The complete video of the 12/7/2-21 council meeting re: this amendment is at [Meetings | Mercer Island, Washington](#):

- Comments by City Attorney Bio Park at 2:41.
- Comments by Dave Rosenbaum at 2:49.
- Comments by Mayor Salim Nice at 2:56.

The CPD plans to present this issue to the Planning Commission at the next (Feb 24) Planning Commission meeting (see AB 6212) and has it on the work plan for council action in the 2nd quarter of 2023.

OBJECTIONS TO UPZONING THE HERZL B ZONED PROPERTIES AT THIS TIME:

1 Upzoning the Herzl B zoned properties to Commercial--Office was never part of the original suggested amendment, was never approved by the council, and is not before the Planning Commission. One suggested amendment added to the docket cannot serve as a vehicle for a completely different and much greater amendment. The original suggested amendment maintained the B zone and regulatory limits applicable to the B zone, but would allow schools as an allowed use. To then convert that suggestion to an application to rezone the entire parcel C-O with the dramatically different uses and regulatory limits applicable to a C-O zone in an area adjacent to residential neighborhoods is not appropriate, and was never part of the public notice to surrounding neighbors.

2 The "urgency" to add schools to the B zone to allow an existing school that had a deadline to find and build in a new location no longer exists. Herzl cannot show any school that is interested in building a school on this site. This is not unlike the application for hardship variances the JCC recently filed in which the CPD noted the applicant (JCC) was placing the cart before the horse by requesting a change in zoning, or a variance, without some kind of application for the intended use, and user. Herzl's suggested amendment is not ripe, and so it is virtually impossible for citizens and neighbors to comment because the scale of the school, and intensity of use, are unknown.

3 Upzoning only the Herzl properties, either to C-O or to allow schools, is a spot zone benefiting a single property. Either all B zoned properties are upzoned to allow schools, or none (and I am not sure the other B zone property owners have been given notice of this). Again, I don't think the suggested code amendment docket to upzone only the Herzl properties is appropriate or the allowed use of the docket, and would note the Beach Club was required to file a formal application to amend the development code and pay the required fee for a much smaller change in the code.

4 Without a concurrent application to actually build a school on the Herzl properties, any upzone -- especially to C-O -- is unknown, and there is nothing preventing Herzl from selling or transferring the property to a third party who has no intent of using the property for a school. This makes it impossible for surrounding neighbors (including the city) and citizens to provide meaningful public comments on the scale, size and intensity of use.

5 To upzone the Herzl property to anything other than B zone would require amending the land use map, require an application to rezone the property, and require a concurrent application to amend the comprehensive plan.

6 Until the traffic study for this heavily used intersection and area is completed, and it is shown the intersections and roads meet the TCO levels of service for this area, any upzone is both premature, and illegal. A determination of the impact on the levels of service comes **before** the requested land use action.

CONCLUSION

The only suggested amendment before the planning commission is whether to amend the **entire** B zone to allow schools as a use. Without an actual applicant and application to actually build a school onsite the suggested amendment by Herzl is premature, and allows citizens no opportunity to comment or object on a use, and intensity of use, they cannot possibly know. The city and applicant are obligated to perform a traffic study in an area already under a compliance review to determine whether the proposed use will meet the TCO's levels of service **before** amending the B zone to allow a very intensive use, a school.

Furthermore notice must be given to other B zoned properties, and the surrounding neighbors to allow them to comment and participate.

Since there is no identified school or applicant interested at this time to build a school on Herzl's properties consideration of adding schools as an allowed use in all B zoned properties is premature, and notice and consideration must be provided to other B zoned properties and their neighbors.

Therefore, the only legal and appropriate action at this time is **option A, do nothing**. If necessary, the suggested code amendment can remain dormant until a school ready and willing to build a school is identified, and provides some kind of application showing the scale, use, and intensity of use of the proposed school, and the required traffic study for this area has been completed and it is determined the levels of service in the TCO will support a very intensive use like a school.

Thank you.

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