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**Civic Federation Testimony to Planning Board on Item #10 on September 4, 2014 Agenda--
ZTA 14-08, to Change Geographical Applicability Standards of the TS-R Zone**

I am Jim Humphrey, Chair of the Planning and Land Use Committee of the Montgomery County Civic Federation (MCC), providing comments on Zoning Text Amendment 14-08, to amend the geographical standards for applicability of the Transit Station-Residential (TS-R) Zone.

At their August 21, 2014 meeting, the members of the MCCF Executive Committee voted unanimously to recommend that the County Council not approve ZTA 14-08, as it would permit different qualifying standards to be applied to a single property seeking TS-R zoning than those applied to all others in the county.

As stated in the staff packet prepared for the Board, there is only one final rezoning application, which was filed by the May 1 deadline, for reclassification of a property to the TS-R Zone, a zone that will cease to be applied to properties when the new zoning code takes effect on October 31 of this year. If approved, the altered TS-R standards proposed in ZTA 14-08 would be and could be applied in only one rezoning request for one property in the county. It is a piece of "single-member class" zoning legislation that constitutes a "special law for a special case," which is unlawful under Article III, Section 33 of the Maryland Constitution.

Not only would the geographical standards for application of the zone be different for this single property than for any other, but the standards for permitted land uses would also be unique to the single Bethesda site that is the subject of the sole, and last, pending application for TS-R zoning. To explain, retail uses are permitted in the existing TS-R Zone, but only as specified in 59-C-8.54, a section of County Code entitled "Special requirements in the TS-R zone - Ancillary commercial uses." Section 59-C-8.54 states that ancillary commercial uses "*may be permitted as follows:*

"(a) The amount of floor area devoted to commercial uses cannot exceed the amount or substantially alter the configuration specified for the site in the applicable master or sector plan.

"(b) If the master or sector plan does not make a specific recommendation as to the amount of floor area allowed, then commercial uses are limited to the street level only.

"In addition, a restaurant may be permitted on the top or penthouse floor. All commercial uses must be so located and constructed to protect tenants of the building from noise, traffic, odors and interference with privacy."

All of the properties recommended for TS-R zoning in the Bethesda CBD Sector Plan are located in the Transit Station Residential District of the Plan area. And the Plan contains language in its Transit Station Residential District section that limits retail space as a TS-R zone ancillary commercial use to "*locations along Hampden Lane, and on or near Woodmont Avenue across from the Metro Core District*", and only permits office uses "*in locations along Arlington Road and Montgomery Lane.*"

There is Plan language regarding commercial uses on all anticipated TS-R properties in Bethesda, namely those in the Transit Station Residential District. These are limited under Sec.59-C-8.54(a) of the County Code [see text above]. But there is no Plan language regarding ancillary commercial uses for a TS-R zoned property on Battery Lane, since such an occurrence was not anticipated or recommended in the Plan. Such uses would be guided by Sec.59-C-8.54(b) of the County Code [see text above]. Permitted land uses, therefore, are an additional basis on which ZTA 14-08 would allow the Battery Lane site to be treated differently than all others--certainly differently than all those sites in Bethesda considered for TS-R rezoning in the past (and to reiterate, no future TS-R rezonings are allowed under the new code).

As Montgomery County Circuit Court Judge John W. Debelius III wrote in his August 5, 2003 Opinion that struck down Council enactment of another single-member class zoning law (ZTA 02-04):

"The enactment of 'special laws for special cases' is generally inappropriate... Even an ordinance which does not on its face identify a specific property or situation, will run afoul of the prohibition if its practical and intended effect is to address one situation in a statutory plan already covered by a general law."

The argument could be made that the TS-R Zone might be resurrected by the current or some subsequent County Council, and the amended standards proposed in ZTA 14-08 could be applied to other sites in future. But at this time, only the Battery Lane site in Bethesda could take advantage of the alteration of the TS-R zone being considered in ZTA 14-08. An identical conclusion to the finding made by Judge Debelius in 2003 is inescapable at this time--"There simply are no other properties that qualify."

We do not believe that Council approval of Zoning Text Amendment 14-08 could survive judicial scrutiny and, respectfully, request the Planning Board to urge Council not to approve it. Thank you.