

Memorandum

To: Staff & Planning Commission Members

From: Mike Murphy

Date: October 18, 2021

Re: Proposed Town Center Code Revisions

Introduction

The City Council (CC) has asked the Planning Commission (PC) to review several proposed changes to the existing Town Center (TC) development regulations, which are codified at MICC Chap. 19.11. The key elements of the proposed changes would (1) create a new requirement (a Floor Area Ratio, or “FAR”) for the minimum square footage of commercial space (retail, restaurant and certain services) applicable to new development in the bulk of the TC, and (2) expand the area that would be subject to the new FAR requirement and frontage retail. Passage of new TC code provisions would allow the city to end the moratorium that currently applies to the SE portion of the TC. The PC is being presented with 4 choices:

1. Recommend approval of the proposed revisions
2. Recommend approval with changes
3. Recommend no action, i.e., rejection of the proposed revisions
4. Recommend no action and remand to the staff with suggested direction

The purpose of this memo is to (1) discuss certain concerns regarding the proposed TC code changes and (2) to identify an alternative approach, which is based on a mix of the alternatives previously considered by the CC.

A. Existing TC Code

The existing TC development code is found at MICC Chap. 19.11. This was first adopted in 2016 by Ord. 16C-06, and has undergone a few refinements since then.

B. Concerns with Proposed TC Code Changes as Presented

The centerpiece of the proposed changes is the application of a .2623 FAR for commercial space to all new development in most of the TC. Essentially this means that the building foot print must have a number of square feet of commercial space equal to .2623 x the gross square feet of the parcel. The FAR approach was a creative adaptation of an existing tool to try and craft a solution to the problem of preserving commercial space as the TC redevelops. Unfortunately, there do not appear to be any other jurisdictions that have used a Floor Area Ratio to preserve a certain amount of retail space. Accordingly, we have no examples to look at to see if this approach has been successful or what an appropriate commercial FAR is.

The .2623 FAR is the ratio of existing commercial plus 37,200 of “Additional Supportable Retail” less the post 2005 redevelopment commercial space divided by total SF of parcels in the designated FAR area (most of the TC not already redeveloped). This formula is

relatively simple, and gives the appearance of symmetry and a rational basis, but this symmetry and apparent mathematical precision is an illusion. While data should inform the policy, trying to mathematically balance commercial space is not practical. This particular application is problematic for several reasons.

1. The FAR approach takes most of the relatively concentrated TC commercial space and spreads that commercial space out in smaller pieces over a much more expansive and thus much less walkable area. Here is what would happen to our most retail-intensive parcels under the FAR approach:

QFC:

- 30,530 SF Building
- 88,672 Lot Size
- $.26^1 \times 88,672 = 23,055$
- Net loss of 7,475 SF (24.4% loss)

Met Market

- 37,076 SF Building
- 119,354 Lot Size
- $.26 \times 119,354 = 31,032$
- Net loss of 6,044 SF (16.3% loss)

Walgreens

- 37,488 SF Building
- 75,794 Lot Size
- $.26 \times 75,794 = 19,706$
- Net loss of 17,782 SF (47.5% loss)

Sano/Barrels Strip Center

- 15,081 SF Building
- 39,134 Lot Size
- $.26 \times 39,134 = 10,175$
- Net loss of 4,906 SF (32.5% loss)

Tabit Square

- 6,664 SF Building
- 37,858 Lot Size
- $.26 \times 37,858 = 9,843$
- Net gain of 3,179 SF (47.7% gain)

Islandia Shopping Center (Island Books)

- 23,700 SF Building
- 55,916 Lot Size

¹ I rounded the .2623 to .26 for simplicity. The additional .0023 is not material to this analysis.

- $.26 \times 55,916 = 14,538$
- Net loss of 9,162 SF (61.3% loss)

Rite Aid

- 41,572 SF Building (partial 2 stories)
- 121,712 Lot Size
- $.26 \times 121,712 = 31,645$
- Net loss of 9,927 SF (23.9% loss)

In theory, the above losses could be made up over time by redevelopment of the other TC parcels that currently have little or no retail, but the time horizon of that development is extremely long, uncertain at best, and the recovery rate of losses in the core retail area would be very slow because of the parcel sizes. This is concerning because, based on the above analysis, the FAR approach may actually incentivize existing more concentrated commercial parcels to redevelop and shed retail space in large chunks in exchange for more profitable residential space.

2. To meet future new demand, 37,200 SF of commercial space was added to the numerator in the FAR equation, thus boosting the FAR. While the idea of having “room to grow” seems desirable, this approach does not appear supportable. There is no basis for equating additional retail sales based on population growth Island-wide with a direct increase in “supportable” retail square feet in the TC. The analysis includes no consideration of how much of the additional spending would go to the existing south end retail, the existing TC retail, or off-island.
3. There does not appear to be a component related for encouraging readily accessible parking. Lack of available parking is a recurring complaint from many parties.
4. Similarly, there does not appear to be a component encouraging public spaces.

There are a number of other unintended consequences that are contrary to the desired outcomes:

1. The FAR percentage requirement of .26 is based on the parcel square footage and not the building footprint. As a result, this requirement is likely to discourage creation of publicly accessible open space because having public open space would make the required percentage of the building ground floor devoted to commercial use even higher, regardless of its utility.
2. Parking for the retail/restaurants in the newer buildings is often on the floor level behind the retail/restaurants. Since the proposal mandates 2.5 times more SF of commercial space on the ground floor compared to the average for newer buildings (.11), the proposed code changes is likely to substantially reduce the readily available parking for the activity we are trying to promote.

3. The CAI Consultant Reports indicate 2 over 1 is marginal economically now; with a .26 FAR for commercial space, developers will need to have more below ground parking. That will result in a significant cost increase making the redevelopment needed to make up for commercial space lost elsewhere (see above) less likely. This is counterproductive.
4. The depth and configuration of viable/optimal retail and restaurant space is driven by factors other than a percentage of the parcel footprint. Whether the .26 FAR creates space that is practical to lease and won't create substantial unusable space is unclear and has not been examined for the various parcels. Wrong sized retail/restaurant spaces (designed to meet a certain ratio rather than viable configurations) may adversely affect the ability of an owner to actually lease the very types of spaces we want to promote.

C. An Alternative Approach that Borrows From the Work Already Done

At the July 6, 2021 CC meeting, staff identified several non-exclusive options, plus the potential for mixing and matching the alternatives. Those options were:

1. Do nothing.
2. Amend the TC Sub Area Plan and Zoning Map to remove the moratorium area from the TC and rezone to an exclusive commercial zone such as “General Commercial,” “Community Business,” or “Neighborhood Business.”
3. (A) Amend MICC 19.11.020 Figure 2 to require blanket “retail street frontage” throughout the TC or only blanket throughout the moratorium boundary.
(B) Amend MICC 19.11.020 Figure 2 to complete surgical additions / deletions to the current map.
(C) Repeal MICC 19.11.020 (B) and Figure 2 that require “retail street frontage” in the TC and replace with the regulations existing prior to the adoption of Ordinance No. 16C-06.
4. Amend MICC 19.11.020 to add a “no net loss” commercial retail square footage requirement throughout the TC administered on a parcel-by-parcel basis.
5. Amend MICC 19.11.020 to add a “commercial floor area ratio” requirement for properties subject to the requirement in Figure 2.

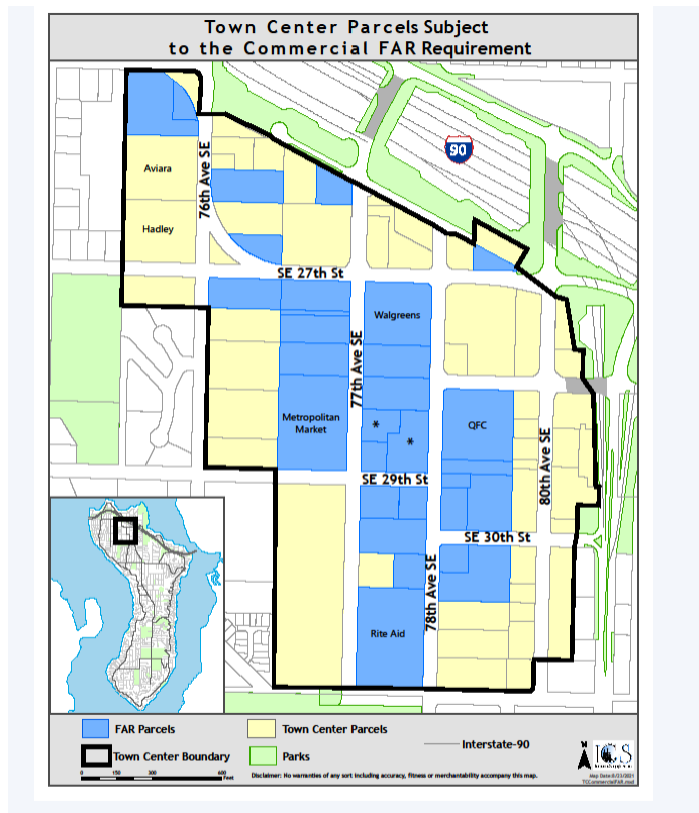
Significantly, there was support for consideration of a “no net loss” component in tandem with other elements. The “no net loss” component, however, was, in the end, only included for the post 2005 developments, which have an average commercial FAR of only .11. As such, its inclusion in that form contributes nothing to the goal of preserving commercial space. “No net loss” was not included for the remainder of TC, or any part of it. As the above analysis indicates, replacement of a “no net loss” element with a FAR requirement is not an effective substitute and creates a number of unintended adverse consequences. Accordingly, I propose the following alternative approach:

Step 1: A Moratorium for entire TC

- Focusing on the existing moratorium area ignores the bigger picture.

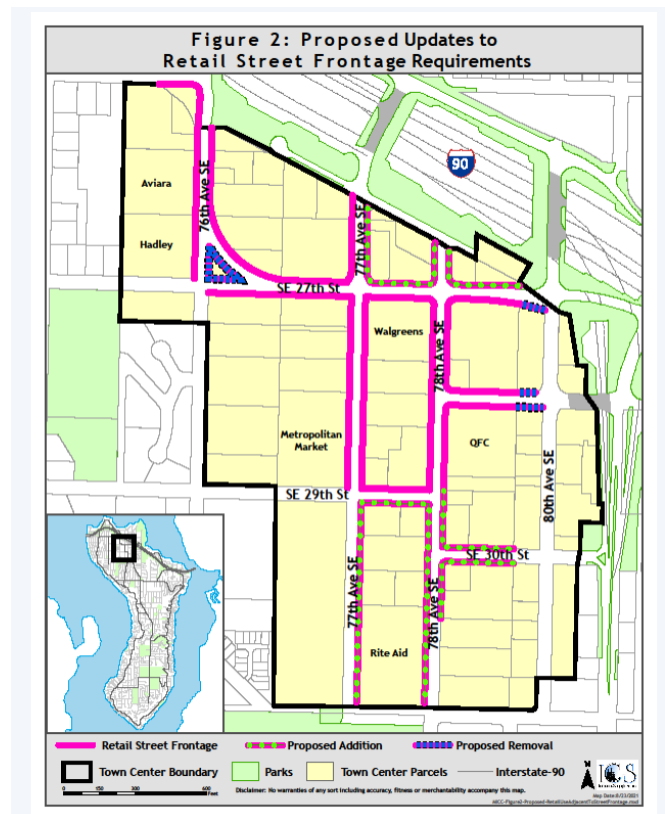
Step 2: Draft code amendments that combine a *modified* no net loss provision with some of the other elements favored by the CC.

- Goals: preserve as much existing retail areas as feasible (variation on no net loss); expand areas of potential retail (pink line map adjustments); make sure that the new retail requirements are properly incentivized and rationally related to what is leasable.
- Key elements of alternative approach:
 - a. Create new subarea “Town Center – Commercial” (TC-C) overlay to encompass existing areas dominated by retail or within the area of desired retail
 - i. TC-C map would be similar to Blue Parcel map, but not necessarily identical.



- b. TC-C overlay elements:
 - i. No net loss of commercial space required as measured by a date certain.
 - ii. Include a provision allowing for up to a 10% reduction of commercial SF otherwise required by the no net loss provision based on design considerations and subject to Design Commission approval.
 - iii. Include a provision that allows a 1:1 SF credit for amenities such as public space up to a certain amount. The goal is not to just try to have a number of commercial SF, but to have viable and attractive commercial spaces.

- iv. For Parcels in TC-C overlay area without existing retail, require future redevelopment to have an amount of commercial space expressed in FAR of building footprint on the ground floor(s). The FAR should be based on viability, not trying to add up to a number of total SF for the TC. Consider a sliding scale FAR based on parcel size (SF) and LF of frontage. The FAR needs to be based on realistic utility of space and other considerations (parking, etc.). Consult with architects to help formulate these standards.
 - v. Revisit minimum depth of commercial spaces (currently 16'), to ensure viability.
 - vi. Consider transferability of commercial SF among parcels.
 - vii. Consider allowing additional stories for significantly affected parcels (eg., greater than XX% of existing parcel).
- c. Pink Line Map adjustments:
- i. To expand areas of potential commercial, include existing TC commercial frontage requirements for 78th, 29th and 30th as proposed by CC, but do not include 77th



D. Legal Considerations Regarding “No Net Loss”.

A “no net loss” approach, as compared to some of the other approaches, may present a somewhat higher risk of a legal challenge because it could be characterized as disproportionately affecting some TC parcels based on their existing uses. I understand that we will discuss this issue in an executive session on the 20th.

For purposes of the meeting, it might be helpful for the Planning Commission members to have some general background, as opposed to specific advice, on the law relating to “regulatory takings,” the main legal theory under which land use regulations can be challenged. First, this area of the law is well developed. Since the *Village of Euclid* decision by the U.S. Supreme Court in 1926, routine zoning laws have been considered constitutional, even though by their very nature they disproportionately burden some property owners to benefit the public. Regulations, however, can be struck down if they “go too far,” but such cases are rare. Second, as the United States Supreme Court has repeatedly stated, a party pursuing a “regulatory takings” claim “faces an uphill battle.” A review of “regulatory takings” cases confirms that; they rarely succeed because the applicable standards are difficult to meet. Third, I am not aware of any cases that suggest that a modified “no net loss” zoning element would constitute a taking. Laws that disproportionately burden some properties are routinely upheld as long as the law does not “arbitrarily” single out a particular parcel for different, less favorable treatment than the neighboring ones, i.e., a spot zone. The leading case in this area is the 1978 U.S. Supreme Court decision in *Penn Cent. Transp. Co. v. City of New York*. This case established the standards under which regulatory takings claims are judged. In that case, the U.S. Supreme Court upheld the New York’s landmark preservation law and denied the developer the right to develop the airspace above Grand Central Station. The Supreme Court held that: (1) owners could not establish a “taking” merely by showing that they had been denied the right to exploit the airspace; (2) landmark laws which embody a comprehensive plan to preserve structures of historic or aesthetic interest are not discriminatory, like “reverse spot” zoning; (3) that the law affected some owners more severely than others did not itself result in a “taking;” and (4) the law did not interfere with owners' present use or prevent it from realizing a reasonable rate of return on its investment.