

Case No.: A-9955-C

Applicant: Florida on the Potomac, LLC

COUNTY COUNCIL OF PRINCE GEORGE'S COUNTY, MARYLAND,
SITTING AS THE DISTRICT COUNCIL

ZONING ORDINANCE NO. 5 - 2005

AN ORDINANCE to amend the Zoning Map for the Maryland-Washington Regional District in Prince George's County, Maryland, with conditions.

WHEREAS, Application No. A-9955-C was filed for a Chesapeake Bay Critical Area growth allocation, to rezone from the R-C-O Zone to the L-D-O Zone property called River's Edge, approximately 9.968 acres of land on the west side of Riverview Road, about 1,650 feet south of its intersection with West Riverview Road, Fort Washington; and

WHEREAS, the application was advertised and the property posted prior to public hearing, in accordance with all requirements of law; and

WHEREAS, the application was reviewed by the Technical Staff and the Planning Board, which filed recommendations with the District Council; and

WHEREAS, the Zoning Hearing Examiner held a public hearing on the application, and, after remand, held a second hearing; and

WHEREAS, the Examiner's recommendations were filed with and

considered by the District Council; and

WHEREAS, having reviewed the record, the District Council has determined that the application should be approved, and the rezoning with growth allocation should be granted, including the 300-foot-wide buffer area north of the boat ramp, so that the buffer area is included in the growth allocation, and the applicant is permitted waterfront lots in a future subdivision or resubdivision; and

WHEREAS, as the basis for this action, the District Council adopts the recommendations after remand of the Zoning Hearing Examiner, as noted below in Attachment A, the District Council's findings of fact and conclusions of law; and

WHEREAS, to protect the Chesapeake Bay Critical Area in Prince George's County and to preserve historic resources and artifacts in the Fort Washington area, the growth allocation and rezoning approved herein are subject to conditions, as stated in Attachment B.

NOW, THEREFORE, BE IT ORDAINED AND ENACTED:

SECTION 1. The Zoning Map for the Maryland-Washington Regional District in Prince George's County, Maryland, is hereby amended by changing the Chesapeake Bay Critical Area zoning of the property which is the subject of Application A-9955-C from the R-C-O Zone to the L-D-O Zone. This growth allocation and rezoning action changes the property's zoning classification from R-E/R-C-O to R-E/L-D-O, as to the 9.968-acre property shown in

the application; the action changes the zoning of no other land; but the action includes, as to growth allocation only, all of the 300-foot buffer area adjacent to the Potomac River.

SECTION 2. Application No. A-9955-C is approved subject to the conditions stated in Attachment B.

SECTION 3. BE IT FURTHER ENACTED that this Ordinance shall become effective on the date of its enactment and the rezoning approved herein shall become effective when the applicant accepts in writing the conditions in Section 2.

Enacted this 11th day of July, 2005, for initial approval, by the following vote.

In Favor: Council Members Dean, Dernoga, Exum, Harrington,
Hendershot, Knotts and Peters

Opposed: Council Member Bland

Abstained:

Absent: Council Member Campos

Vote: 7-1

COUNTY COUNCIL OF PRINCE
GEORGE'S COUNTY, SITTING AS
THE DISTRICT COUNCIL FOR THE
MARYLAND-WASHINGTON REGIONAL
DISTRICT IN PRINCE GEORGE'S
COUNTY, MARYLAND

BY: _____
Samuel H. Dean, Chairman

ATTEST:

Redis C. Floyd
Clerk of the Council

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The District Council adopts the following as its findings of fact and conclusions of law, to support the Chesapeake Bay Critical Area rezoning and growth allocation approved herein.

1. The subject property includes about 9.96 acres of land in the R-E/R-C-O Zone. The applicant, Florida on the Potomac, LLC, requests approval of a rezoning and growth allocation, to change the Chesapeake Bay Critical Area classification from the R-C-O Zone (Resource Conservation Overlay) to the L-D-O Zone (Limited Development Overlay).

2. The subject property is part of a larger 23.50-acre parcel known as Rivers Edge, on the eastern shore of the Potomac River, about 720 feet west of Riverview Road and 1,600 feet south of West Riverview Road. For purposes of growth allocation, the application includes all of the 300-foot buffer adjacent to the Potomac River, but the subject 9.96-acre tract includes only a small part of the buffer, at its southern end. A boat ramp, a water-dependent use, is at the southern end of the buffer, and the ramp and access road will be improved when the property is developed.

The remaining portion, about 10 acres, is not part of this application. It is zoned R-E (Residential Estate), is outside the Chesapeake Bay Critical Area, and has no Overlay Zone designation. The conditions below affect some parts of the

applicant's development of the subject property.

3. On November 22, 2004, the District Council remanded this case to the Examiner. Exh. Rem-3a. The Order of Remand directed the Examiner to allow the record to be supplemented, as follows:

Subject to the right of any party to argue relevance, the record should be supplemented with exhibits (and testimony, if deemed necessary by the Examiner) showing the results and subsequent analyses of: (a) the ground-penetrating radar studies ordered by the Planning Board; (b) the Phase II and Phase III report filed by the applicant (Exh. 127); and (c) other evidence in the record concerning the environmental or historical significance of the subject property. All studies and analyses (and all argument for or against the consideration of any evidence) shall be completed and submitted in the record within 90 days of the date of mailing of this Order.

4. On March 2, 2005, the Examiner held a hearing to allow new exhibits in the administrative record and testimony and argument on the remand issues.

5. The subject property is a flag-shaped parcel with open fields, an existing house, and a swimming pool close to the Potomac River. Exh. 5. The 23.50-acre parcel has frontage on Riverview Road, but the subject property does not. With the exception of a 60-foot wide strip that runs to the edge of the river, the site of the boat ramp, the subject site is located 300 feet east of the tidal waters of the Potomac. Exh. 78 (a). The sixty-foot wide strip contains an access roadway from Riverview Road and the boat ramp. *Id.*

6. The property has no areas of steep slopes with erodible

soils, and it has no streams, wetlands, floodplains, or associated buffers. Exh. 48. Before purchase of the property by its present owners, the property had been used as a grazing field for cattle and other agricultural purposes. Exhs. 6, 77 (e).

7. The subject property is surrounded by the following:

(a) To the north, the undeveloped Tent Landing residential subdivision, in the R-R/L-D-O Zone.

(b) To the south, individual single-family homes in the R-E/R-C-O Zone.

(c) To the east, across Riverview Road, the Riverview Reserve residential subdivision, in the R-E Zone.

(d) To the west, the Potomac River.

8. The neighborhood for the property is defined by the following boundaries: to the north, Broad Creek; to the south, Swan Creek and Swan Creek Road; to the east, Fort Washington Road; and to the west, the Potomac River. This neighborhood is residential in character.

9. The applicant's request for a rezoning to the L-D-O Zone must satisfy the requirements in Sections 27-213.11 (e), 27-213.12, and 27-213.13 of the Zoning Ordinance.

10. Section 27-213.11 (e) (1), ¶¶ (B), (D), and (E) provide as follows:

(e) **Required findings.**

(1) Prior to approving the Chesapeake Bay Critical Area Overlay Zoning Map Amendment, the Council shall make the following findings:

(B) Land classified in the Limited Development Overlay Zone exhibits at least one (1) of the following characteristics:

(i) Residential density ranging from one (1) dwelling unit per five (5) gross acres up to four (4) dwelling units per gross acre;

(ii) Areas not dominated by agriculture, wetlands, forest, barren land, or surface water;

(iii) Areas having public water, public sewer, or both; or

(iv) Areas possessing one (1) or more characteristics of land classified in the Intense Development Overlay Zone, regardless of the size of the area.

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(D) Adequate attention has been paid to the recommendations of Area Master Plans and the General Plan which are found to be applicable to property within the Chesapeake Bay Critical Area Overlay Zones.

(E) The Chesapeake Bay Critical Area Commission has approved the Chesapeake Bay Critical Area Overlay Zoning Map Amendment.

11. Section 27-213.12, governing amendments of approved Chesapeake Bay Critical Area Overlay Zones, provides in pertinent part as follows:

(a) **In general.**

(1) The Planning Board may, upon the concurrence of the District Council by resolution, initiate amendments to the approved Chesapeake Bay Critical Area Overlay Zoning Map Amendment. The initiating resolution shall specify the area of the Overlay Map to be amended and shall be processed in accordance with the provisions of this Subdivision for initial approval.

(2) A request to change the boundaries or zone of an approved Chesapeake Bay Critical Area Overlay Zone may also be made by a property owner. The request shall be in the form of an application.

(3) Except as provided for in this Section, amendments to change the boundaries of a Chesapeake Bay Critical

Area Overlay Zone shall be approved by the District Council in accordance with the provisions of this Subdivision for initial approval. Amendments of Chesapeake Bay Critical Area Overlay Zones shall also be subject to Section 27-213.13, and shall be subject to the approval of the Chesapeake Bay Critical Area Commission.

* * * *

(b) **Applications.**

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(3) Other submission requirements.

(A) Along with the application, the applicant shall submit the following:

* * * *

(iii) Three (3) copies of a typewritten statement of justification in support of the request. The statement shall set forth the legal basis by which the requested amendment can be approved, and factual reasons showing why approval of the request will not be detrimental to the public health, safety, and welfare. This statement may be accompanied by three (3) copies of any material which (in the applicant's opinion) is necessary to clarify or emphasize the typewritten statement. This additional material, if not foldable, shall be not larger than eighteen (18) by twenty-four (24) inches;

* * * *

(vii) Three (3) copies of a concept plan of any proposed development and an estimated timetable of when the various stages of development are anticipated to occur;

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12. Section 27-213.13 provides, in pertinent part, as

follows:

(a) **Mistake rule.**

(1) Except for Subsection (b), no application for amendment of a Chesapeake Bay Critical Area Overlay Zone shall be granted

without the applicant proving that there was a mistake in the original zoning or subsequent rezoning.

(b) Expansion of Intense Development and Limited Development Overlay Zones.

(1) The boundaries of the Intense Development and Limited Development Overlay Zones may be expanded within the Chesapeake Bay Critical Area only in accordance with the following:

(A) Acreage. The maximum area of future additional Intense Development or Limited Development Overlay Zones shall be five percent (5%) of the total area designated as Resource Conservation Overlay Zones at the time of adoption of the initial Chesapeake Bay Critical Area Overlay Zoning Map Amendment. A maximum of fifty percent (50%) of the permissible growth increment may be used to rezone a Resource Conservation Overlay Zone to another Chesapeake Bay Critical Area Overlay Zone.

(B) Location. Expanded Intense Development or Limited Development Overlay Zones may be approved subject to the following locational criteria:

(i) New Intense Development Overlay Zones shall:

(aa) Be located in existing Limited Development Overlay Zones or contiguous to existing Intense Development Overlay Zones;

(bb) Be located at least three hundred (300) feet from tidal waters or tidal wetlands if the land was originally designated in the Resource Conservation Overlay Zone, except for Water-Dependent Uses; and

(cc) Minimize impacts on Habitat Protection Areas and on land in Resource Conservation Overlay Zones in proximity to an expanded Intense Development Overlay Zone.

(ii) New Limited Development Overlay Zones shall:

(aa) Be located contiguous to existing Limited Development Overlay Zones or Intense Development Overlay Zones;

(bb) Be located at least three hundred (300) feet from tidal waters or tidal wetlands if the land was originally designated in the Resource Conservation Overlay Zone, except for Water-Dependent Uses; and

(cc) Minimize impacts on Habitat Protection Areas and land in Resource Conservation Overlay Zones in proximity to an expanded Limited Development Overlay Zone.

(C) Additional requirements. Prior to developing land in an expanded Chesapeake Bay Critical Area Overlay Zone, the area shall be mapped and submitted to the Chesapeake Bay Critical Area Commission for informational purposes only. This submission shall include an analysis of:

(i) The manner in which the proposed expansion conforms to the locational criteria;

(ii) How the proposed expansion affects the total growth allocation; and

(iii) How the proposed expansion will accommodate the growth needs of municipalities impacted by the Chesapeake Bay Critical Area Overlay Zones.

(c) Conditional approval.

(1) When it approves a Zoning Map Amendment for a Chesapeake Bay Critical Area Overlay Zone, the District Council may impose reasonable requirements and safeguards (in the form of conditions) which the Council finds are necessary to:

(A) Protect surrounding properties and property within the Chesapeake Bay Critical Area Overlay Zones from adverse effects which might accrue from the requested amendment; or

(B) Further enhance the coordinated, harmonious, and systematic development of land within the Chesapeake Bay Critical Area Overlay Zones, including the use of time limitations for the commencement of construction.

(2) In no case shall these conditions waive or lessen the requirements of, or prohibit uses allowed in, the approved Overlay Zone.

(3) All building plans shall list the conditions and shall show how the proposed development complies with them.

(4) Conditions imposed by the District Council shall become a permanent part of the Zoning Map Amendment, and shall be binding for as long as the Overlay Zone remains in effect on the property (unless amended by the Council).

(5) If conditions are imposed, the applicant shall have ninety (90) days from the date of approval to accept or reject the rezoning as conditionally approved. He shall advise the Council (in writing), accordingly. If the applicant accepts the conditions, the Council shall enter an order acknowledging the acceptance and approving the Zoning Map Amendment, at which time the Council's action shall be final. Failure to advise the Council shall be considered a rejection of the conditions. Rejection shall void the Zoning Map Amendment and revert the property to its prior zoning classification. The Council shall

enter an order acknowledging the rejection, voiding its previous decision, and reverting the property to its prior zoning classification, at which time the Council's action shall be final.

(6) All Zoning Map Amendments which are approved subject to conditions shall be shown on the Zoning Map with the letter "C" after the application number.

* * * *

13. An application for the L-D-O Zone must further L-D-O Zone purposes, found in Section 27-548.14 (a). This section provides:

(a) **Purposes.**

(1) The purposes of the L-D-O Zone are to:

(A) Maintain or, if possible, improve the quality of runoff and groundwater entering the tributaries of the Chesapeake Bay;

(B) Maintain existing areas of natural habitat; and

(C) Accommodate additional low- or moderate-intensity development in accordance with the Conservation Manual.

* * * *

14. The stated purposes of the R-C-O Zone (Resource Conservation Overlay), in Section 27-548.15 (a), show the District Council's basis for the initial R-C-O zoning:

(a) **Purposes.**

(1) The purposes of the R-C-O Zone are to:

(A) Provide adequate breeding, feeding, and wintering habitats for wildlife populations that require natural coastal environments along the tributaries of the Chesapeake Bay in order to sustain their populations;

(B) Conserve, protect, and enhance the overall ecological values of the Chesapeake Bay Critical Area, its biological productivity and diversity;

(C) Protect the land and water resource base necessary

to support resource-oriented land uses, such as agriculture, timber harvesting, or fisheries activities; and

(D) Conserve existing woodlands and forests for the water quality benefits they provide.

15. The applicant submitted the Technical Staff's report recommending approval of the Chesapeake Bay Critical Area Conservation Plan (CP-04008) in the pending subdivision case, filed for the entire 23.50-acre parcel. Exh. Rem-12 (b). The report was placed in this record to show staff's finding that the subdivision conforms with the requirements of the Conservation Manual and the purposes of the L-D-O Zone. In particular, the staff report shows that there are no endangered species or protected habitats on the site. Rem T. 6-8.

16. The applicant also submitted information from a Maryland Department of Natural Resources employee, who states: "Geese prefer to land and feed in areas where they have an unobstructed view." Exh. Rem-12 (c). Applicant sought to show that zoning would have nothing to do with whether the geese would land at the subject site. Counsel for some of the opposition objected to this letter, since it did not directly reference the subject property. However, the exhibit was allowed for the general purpose of showing that geese would tend not to land in an area with obstructed views.

17. The applicant also submitted three analyses performed

at the request of the Planning Board, to ascertain whether items of archeological or historic significance were located on site. Exh. Rem-13 (a)-(f), 15, 16, and 17. Three types of tests were performed: ground-penetrating radar, magnetic gradiometry, and DC resistance mapping. Several anomalies were found, 35 in all, indicators that something was lodged in the soil. For each anomaly, the surface layer was removed and examined. Exh. Rem-13 (f). Artifacts unrelated to burials were recovered, but no anomaly indicated burial site.

18. The applicant also argued that the request should be approved because the District Council approved the change from R-C-O to L-D-O requested for the Tepaske property, App. No. A-9849-C. Exh. 82 (a)-(h). The subject and Tepaske properties are very similar in location and characteristics, and both meet the locational requirements to change the overlay zone.

19. Counsel for some opposition parties argued that none of the applicant's evidence is relevant to the CBCA zoning request. When the application was initially heard, the District Council had designated the entire site as a Historic Site, but that decision was overturned by the Circuit Court. Exh. Rem-12 (d). The Examiner allowed the historical significance evidence, to address the question whether there are historic artifacts on site.

20. The District Council adopts the Examiner's original decision, as to her determination that the application satisfied the criteria for L-D-O growth allocation approval.

21. The information garnered on remand shows that no outstanding environmental or historic significance issues would preclude the District Council from granting the rezoning request.

22. The application generally meets the requirements of Section 27-213.13 and the purposes of the L-D-O Zone, found in Section 27-548.14. There is sufficient growth allocation available for the subject property to be placed in the L-D-O Zone. Section 27-213.13(b)(1)(A). The subject property is contiguous to property in the L-D-O Zone. Section 27-213.13(b)(1)(B)(ii)(aa). The subject property is located at least 300 feet from tidal waters, except for an area proposed for an improved boat ramp, a water-dependent use. Section 27-213.13(b)(1)(B)(ii)(bb). There are no identified Habitat Protection Areas on the subject property. Section 27-213.13(b)(1)(B)(ii)(cc). The purposes of the L-D-O Zone are met, as there are no existing areas of natural habitat, the property may be served with public water and sewer, and the Chesapeake Bay Critical Program Conservation Manual will require the applicant to provide an additional woodland cover of 15%. Section 27-548.14 (a).

23. The CBCA criteria for growth allocation have been addressed and satisfied, the applicant has met all requirements, and the District Council chooses, in its discretion, to approve

the requested rezoning and growth allocation. The attached conditions will limit the density of the proposed development and address the concerns raised by opposition parties and the Examiner.

(a) As to lot size and perceived residential distribution at the Potomac River, the applicant and builder will be required to have all lots of full size, 40,000 square feet or more. Lot size averaging is not permitted.

(b) As to historic preservation concerns, the District Council is fully satisfied, from evidence in this record, that the applicant has found and extracted all significant Native American artifacts on the 23.50-acre site. Those artifacts will be donated to the Maryland Historical Trust.

The record also indicates, and the Council concludes, that the subject property has no historic significance or importance. The property was not the site of the fishery at Tent Landing, as earlier believed; there is no evidence that a significant Native American village was located there; the Council also has no evidence that Revolutionary War military activity took place there; the Council has no basis for concluding that African-American activities, burials or otherwise, occurred there; and no other claim of historical significance has been substantiated by evidence.

(c) As to the effect that the residential development will have on neighborhood design or character, the District Council is requiring the applicant and builder to consult with Planning Department and Historic Preservation Commission staff, to ensure that no residential structure will detract from neighborhood character.

(d) As to residential design, including architecture and landscaping, the District Council is requiring review by limited detailed site plan before the Planning Board. That review will be limited to structure and site design.

(e) The Council also concludes, on the basis of the Examiner's findings, that approval of the growth allocation and rezoning will not be detrimental to natural features on and near the property and will not result in environmental compromise or damage. The Examiner's prior determination that waterfowl habitat or nesting or landing areas would be adversely affected has been shown, on remand, to be erroneous. After development is completed, the 300-foot buffer will be vegetated - as it is not, at this time - and wildlife will have better protection than it does now. Moreover, the Critical Area buffer will be enhanced and better protected after development, as it will have improved plant life and protection by the owners of the individual lots.

24. In view of the applicant's evidence, staff

recommendations, the testimony and other evidence in the record, and the conditions to be imposed, the District Council concludes that the application should be granted. The 9.96-acre subject property is rezoned from R-E/R-C-O to R-E/L-D-O; growth allocation is approved for the 9.96-acre tract and the remainder of the 300-foot buffer area, about 3.5 acres; and the conditions stated in Attachment B are imposed on the approved rezoning.

CONDITIONS

1. Lot size averaging is not permitted on the subject property. Within the property covered by the application, referred to in these conditions as the "subject property," there shall be no lots with area less than 40,000 square feet.

2. Before work on residential structures may commence, the Planning Department must approve a limited detailed site plan for the lot or lots for which the structures are proposed, as to design, landscaping, and architecture only. Before the first site plan is filed, the applicant shall consult with Historic Preservation Commission staff about the design and placement of the homes, to ensure design compatibility with surrounding residential development and preservation of neighborhood character.

3. All archeological or historical artifacts which have been extracted from any part of the 23.5-acre River's Edge property, anywhere within the area between Riverview Road and the Potomac River, shall be donated to the Maryland Historical Trust, in accordance with Maryland Historical Trust regulations.

Case No.: A-9955-C

Applicant: Florida on the
Potomac, LLC

COUNTY COUNCIL OF PRINCE GEORGE'S COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL

FINAL CONDITIONAL ZONING APPROVAL

AN ORDINANCE to incorporate the applicant's acceptance of conditional zoning and to grant final conditional zoning approval.

WHEREAS, the District Council in approving Application No. A-9955-C, to rezone the subject property from the R-C-O Zone to the L-D-O Zone, attached conditions; and

WHEREAS, the applicant has duly consented in writing to the conditions; and

WHEREAS, the District Council, having reviewed the application and the administrative record, deems it appropriate to accept the applicant's consent to the conditions and to approve final conditional rezoning.

NOW, THEREFORE, BE IT ORDAINED AND ENACTED:

SECTION 1. Final conditional zoning approval of Application No. A-9955-C is hereby granted. The applicant's written acceptance of the conditions referred to above, at the time of initial conditional zoning approval, is hereby incorporated into this amendment of the Zoning Map for the Maryland-Washington Regional District in Prince George's County, Maryland.

SECTION 2. Use of the subject property as conditionally

reclassified shall be subject to all requirements in the applicable zones and to the requirements in the conditions referred to above.

Failure to comply with any stated condition shall constitute a zoning violation and shall be sufficient grounds for the District Council to annul the rezoning approved herein; to revoke use and occupancy permits; to institute appropriate civil or criminal proceedings; or to take any other action deemed necessary to obtain compliance.

SECTION 3. This Ordinance is effective on July 15, 2005, the date of receipt of the applicant's acceptance of the conditions imposed.

COUNTY COUNCIL OF PRINCE GEORGE'S
COUNTY, MARYLAND, SITTING AS THE
DISTRICT COUNCIL FOR THAT PART OF
THE MARYLAND-WASHINGTON REGIONAL
DISTRICT IN PRINCE GEORGE'S COUNTY,
MARYLAND

BY: _____
Samuel H. Dean, Chairman

ATTEST:

Redis C. Floyd
Clerk of the Council