

Case No.: DSP-22028
Fairwood Square
(former Frank's Nursery)

Applicant: Timberlake Homes, BT

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

FINAL DECISION — DISAPPROVAL OF DETAILED SITE PLAN

On July 5, 2023, using oral argument procedures, this matter was considered by the District Council, on its motion to review, written testimony by certain persons of record, and the Applicant's proffered revision to Condition 1.u., of the Board's approval. (7/5/2023, Tr.), Written Testimony, 6/12/2023, Applicant's Letter, 6/27/2023. The issues raised by all parties have been afforded full consideration. The Board's decision to approve Detailed Site Plan (DSP)-22028, for the development of 200-single-family attached dwelling units or town homes, and future commercial/retail uses, on property consisting of approximately 22.29 acres, located on the southeast quadrant of the intersection of MD 450 (Annapolis Road) and MD 193 (Enterprise Road), in Planning Area 71A, Council District 6, is REVERSED.¹ PGCC § 27-290.

FINDINGS AND CONCLUSIONS

A. Introduction

On April 1, 2022, the Old ZO was repealed and superseded by the New ZO. This site plan seeks to utilize Council Bill (CB)-50-2021, a text amendment to the table of uses in the R-E

¹ Under the New Zoning Ordinance (New ZO), which took effect April 1, 2022, a "Detailed Site Plan" is abbreviated as DET to distinguish it from DSP—the abbreviation used under the Old Zoning Ordinance (Old ZO). Here, because the application was filed under the Old ZO, the appropriate abbreviation for the application is DSP. The Old ZO, and the New ZO, remain under Subtitle 27 of the County Code, and will be cited as "PGCC § 27-___"—subject to any necessary distinction. The Planning Board will be referred to as the Board or the Planning Board when necessary. Technical Staff of the Board will be referred to as Staff. The Board's decision was embodied in Resolution No. 2023-44 and will be referred to as PGCPB No. 2023-44. The Applicant, Timberlake Homes, BT, will be referred to as the Applicant or when necessary, Timberlake Homes, BT. Meaning no disrespect, Fairwood Community Association, Inc., and other persons of record, will be referred to as Opposition—unless there is a need for individual distinction.

(Residential-Estate) Zone, adopted under the Old ZO, which would permit, under certain requirements, a mix of residential (town homes) and commercial/retail uses—*subject* to all uses being *consistent* to the M-X-T (Mixed-Use Transit Oriented) Zone—as opposed to the R-E Zone.² But for this site plan to move forward, or to be eligible for acceptance and approval, under the Old ZO, it must be authorized, in the first instance, under applicable Transitional Provisions in the New ZO.

As detailed *infra*, the Board had no statutory authority to accept and approve this site plan on January 18, 2023, because almost a month earlier on December 12, 2022, the District Council adopted Council Resolution (CR)-5-2023, which suspended the legal efficacy of CB-50-2021—pending final action on companion legislation to prohibit development projects pursuant to the Old ZO from being eligible to utilize CB-50-2021. CR-5-2023 at 3-4.

Moreover, on January 17, 2023 (before the Board formally accepted the site plan on January 18, 2023), the District Council took final action on companion legislation, Council Bill (CB)-12-2023, which repealed and reenacted certain Transitional Provisions in § 27-1900 *et seq.*, of the New ZO—to prohibit development projects pursuant to the Old ZO from being eligible to utilize CB-50-2021. CB-12-2023 at 4-5. Alternatively, even if this site plan could have been filed pursuant to Transitional Provisions in § 27-1700 *et seq.*, of the New ZO, as the Board concluded, the District Council recently adopted Council Bill (CB)-53-2023—to extend the prohibition on development applications filed pursuant to Transitional Provisions in § 27-1700 *et seq.*, of the New ZO—from being eligible to utilize CB-50-2021. CB-53-2023 at 4-6.

² Without CB-50-2021, no project application for the subject property, utilizing the Old ZO, could be filed, accepted, completed, or approved, because prior to the adoption of CB-50-2021, the Table of Uses for the R-E Zone did not permit a mix of residential (town homes) and commercial/retail uses. CB-50-2021, PGCC § 27-441(b).

Finally, even if the amendments to certain Transitional Provisions above were not applicable to this project, as a matter of law, the Board’s approval of this site plan was arbitrary, capricious, or otherwise illegal because—under CB-50-2021—development for this project requires approval of a Conceptual Site Plan (CSP). Here, the Board approved a Preliminary Plan of Subdivision and Detailed Site Plan—without the necessary or requisite CSP. CB-50-2021 at 3-4, PGCC § 27-546, Board’s Votes Letter, and Policy Analysis, July 15, 2021.

B. The Subject Property — Development Approvals

The subject property obtained two (2) approvals *after* the Old ZO was repealed and superseded by the New ZO—on April 1, 2022. First, the Board accepted a Preliminary Plan of Subdivision (PPS) application for the property on July 20, 2022, and subsequently approved the PPS on November 10, 2022. PGCPB No. 2022-108.³ Second, the Board accepted this site plan on January 18, 2023 (not January 17, 2023), and subsequently approved it on April 20, 2023. PGCPB No. 2023-44, Staff Report at 1, (4/13/2023, Tr., p. 4, Lines 15-18) (...the *accurate* acceptance date of this application [is] January 18, 2023) (Emphasis added).⁴

³ The District Council may take judicial notice of any evidence contained in the record of any earlier phase of the approval process relating to all or a portion of the same property, including the approval of a preliminary plat of subdivision. PGCC § 27-141. The District Council may also take administrative notice of facts of general knowledge, technical or scientific facts, laws, ordinances and regulations. It shall give effect to the rules of privileges recognized by law. Moreover, the District Council may exclude incompetent, irrelevant, immaterial or unduly repetitious evidence. District Council Rules of Procedure Rule 6.5(f).

⁴ PGCC § 27-282(h) (A Detailed Site Plan shall be considered submitted on the date the Planning Director determines that the applicant has filed a complete Plan in accordance with the requirements of this Section).

C. The Board's Resolution

To justify processing this site plan (*contrary to existing law*), the Board concluded as follows:⁵

This application was filed on January 17, 2023, in accordance with the provisions of Section 27-1704(b) of the Zoning Ordinance. This section allows valid projects that received development or permit approvals under Subtitles 27 and 24 of the prior Prince George's County Code, to proceed to the next stages of the development approval process.

On October 20, 2022, the Planning Board approved PPS 4-21058 (PGCPB Resolution No. 2022-108). Later, on January 17, 2023, the District Council enacted CB-12-2023, which made CB-50-2021 inapplicable to applications filed and accepted under Section 27-1900 of the Zoning Ordinance, unless such applications were already filed and accepted.

Staff find[s] that CB-12-2023 is *not* applicable to the subject application, as this application was *filed* under the provisions of Section 27-1704(b), *not* 27-1900, and is a project that received prior development approval. Therefore, this DSP application can proceed to be developed, in accordance with the *prior* Zoning Ordinance, including the requirements of CB-50-2021.

PGCPB No. 2023-44 at 6, Staff Report at 9 (Emphasis added).⁶ The Board erred.⁷

D. The PPS Application

It is undisputed that the PPS application was *not* filed *prior* to the effective date of the New SR and New ZO. Here, the PPS application was filed in July 2022, *after* the effective dates of the New SR and New ZO. Moreover, the PPS application was filed pursuant to Transitional Provisions

⁵ The Board's Resolution adopted the findings and conclusions of Staff, as its legal basis, to review and approve this site plan. PGCPB No. 2023-44 at 6 and Staff Report at 9.

⁶ As detailed *infra*, the Board, in the first instance, was legally incorrect to conclude that this site plan was filed under PGCC § 27-1704(b), because § 27-1704 governs "**Projects Which Received Development or Permit Approval Prior to the Effective Date of [the New ZO]**". PGCC § 27-1704 (Emphasis added).

⁷ The Applicant aligns itself with the Board's erroneous findings and conclusions. Statement of Justification, 12/29/2022, Applicant's Letter to the Board, 3/12/2023 (Additional Backup at 3-4 of 79), (4/13/2023, Tr.), (7/5/2023, Tr.). But, among other things, (as explained below), the Board's transcript of proceedings *confirms* (which was *re-confirmed* by Staff at oral argument) that the site plan was accepted on January 18, 2023—*not* January 17, 2023. (7/5/2023, Tr.).

§ 24-1900—which authorizes development pursuant to *prior* Subdivision Regulations. PGCPB No. 2022-108 at 1, PGCC § 24-1900.

Because the PPS application was approved pursuant to § 24-1900, it is considered “grandfathered” under § 24-1903(b) for the purposes of the project moving to the next steps in the approval process and to be reviewed and decided using the *Old* SR and *Old* ZO—not because it was an application *pending prior* to the effective date of the New SR or April 1, 2022. PGCC §§ 24-1704 *et seq.*

Nothing in §§ 24-1900, 24-1903, 24-1704(b) retroactively morphs a PPS application approved for this project (*after* the *effective* date of the *New* ZO) into a § 27-1704(b) project which *received* development or permit approval *prior* to the *effective* date of the *New* ZO.

E. The Site Plan

It is also undisputed that the site plan was *not* filed *prior* to the effective date of the New ZO or New SR. As such, Transitional Provisions § 27-1700 *et seq.*, ***do not*** apply to this site plan because those provisions apply to projects that *received* development or permit approval *prior* to the *effective* date of the New ZO—which is not the case here. Based on the approved PPS application under Transitional Provisions § 24-1900—development pursuant to Old SR—this site plan was authorized to move forward under Transitional Provisions § 27-1900 *et seq.*, of the New ZO—which *applies* to development *pursuant* to the Old ZO—which is the case here. Consequently, CR-5-2023 and CB-12-2023 apply with equal force to this site plan. PGCPB No. 2023-44 at 1 (...the applicant has *elected* to pursue approval of a Detailed Site Plan *under the prior Zoning Ordinance*) (Emphasis added).

Having found that this site plan *is* subject to Transitional Provisions § 27-1900 *et seq.*, CR-5-2023, and CB-12-2023, and that the Board formally accepted this site plan on January 18, 2023—

the Board *erred* when it found that CB-12-2023 is *not* applicable to the subject application and that the site plan *can* proceed to be developed, in accordance with the prior Zoning Ordinance, including the requirements of CB-50-2021. PGCPB No. 2023-44 at 6, Staff Report at 9.

To be sure, on December 12, 2022, the Board was on lawful notice, *before* it accepted this site plan, that the District Council had adopted CR-5-2023, pursuant to Title 14, Land Use Article, having the force and effect of law, to suspend certain Chapter Laws of Prince George’s County. What’s more, CR-5-2023 placed the Board on lawful notice that the District Council had *suspended* Chapter 39, 2021 Laws of Prince George’s County—which previously passed CB-50-2021. Moreover, CR-5-2023 was *unambiguous* that upon its adoption, the District Council had also (*on the same day*) introduced CR-12-2023—to codify the provisions of CR-5-2023. CR-5-2023 at 3-4 and CB-12-2023 at 1.

Eleven days *prior* to the passage of CB-12-2023 on January 17, 2023, the Board, on January 6, 2023, provided the District Council with a policy analysis on CB-12-2023, as follows:

- *This bill amends the current Zoning Ordinance to limit an applicant’s ability to make use of certain enumerated text amendments* that existed in the prior Zoning Ordinance and that were approved by prior Councils.
- *CB-12-2023 proposes to eliminate the ability of new applicants to utilize eighteen such site-specific text amendments, notwithstanding the grandfathering period granted to other applicants under Section 27-1900 of the new Zoning Ordinance. Section 27-1900 permits the filing of new development applications using the regulations of the prior Zoning Ordinance for the development of projects for a transitional period of two years until April 1, 2024.*
- The Planning Board and the Planning Department have generally *opposed site-specific text amendments* because they reduce the uniformity and consistency of treatment that are core purposes of any zoning ordinance.
- *One of the purposes of the transitional and grandfathering provisions of the new Zoning Ordinance* was to give these property owners a reasonable period of time to apply under the prior ordinance, *while at the same time repealing*

site-specific text amendments so that they would no longer be available after the grandfathering period.

- ***Section 27-1900*** established a two-year “grandfathering” period in which ***new applications utilizing the provisions of the prior Zoning Ordinance could be submitted and accepted.*** The two-year period was a *policy choice* by the Council that sought to balance property owners’ near-term development plans *with the goal of eventually eliminating site-specific text amendments.* *Reducing that two-year period is likewise a policy decision for the Council,* and therefore the Planning Board takes no position on CB-12-2023.
- *The legislation will affect **all development applications**⁸ permitted under CB-8-2021(DR-2), CB-23-2021(DR-3), **CB-50-2021(DR-3)**, CB-55-2021 (DR-2), CB-81-2021 (DR-2), CB-83-2021 (DR-2), CB-106-2021(DR-2), CB-40-2020 (DR-2), CB-41-2020, CB-54-2020 (DR-2), CB-69-2020 (DR-2), CB-10-2019 (DR-2), CB-13-2019, CB-18-2019, CB-19-2019 (DR-2), CB-45-2019 (DR-2), CB-60-2019 (DR-2), CB-88-2018 (DR-3), and CB-89-2018 (DR-3), **that have yet to be filed and accepted and/or constructed under the prior Zoning Ordinance.*** Board’s Votes Letter, and Policy Analysis Attachment 1, 1/6/2023 (Emphasis added).

On January 17, 2023, *prior* to the Board’s formal acceptance of this site plan on January 18, 2023, the District Council passed CB-12-2023, which, among other things, *codified* the provisions of CR-5-2023—to make the enactment of CB-50-2021—*ineligible* for processing under the prior Ordinance. Specifically, and relevant here, CB-12-2023 repealed and reenacted Transitional Provision § 27-1903 as follows:

Unless an application for development is already filed and accepted and/or constructed, the following enactments are ineligible for processing under the prior Ordinance:

*

CB-050-2021 (Chapter 39, 2021 Laws of Prince George’s County, Maryland) AN ORDINANCE CONCERNING R-E ZONE for the purpose of amending the residential table of uses to permit development of a mix of residential and commercial/retail uses in the R-E (Residential Estate) Zone of Prince George’s County, under certain circumstances.

⁸ Under the New ZO, *as applied to its Transitional Provisions*, an application or development application is defined as “[t]he completed form or forms and all accompanying documents, exhibits, and fees required of an applicant by this Ordinance and the District Council, Board of Appeals, or Planning Director as part of the review of a permit or development approval.” PGCC § 27-2500. The New SR *does not* define an application or development application. PGCC § 24-2300.

CB-12-2023 at 4-6 (Emphasis added).

Remarkably, despite the Board's prior policy analysis of CB-12-2023, days earlier, the Board changed course, just days later, to justify processing *this* site plan (as previously noted), as follows:

This application was filed on January 17, 2023, in accordance with the provisions of Section 27-1704(b) of the Zoning Ordinance. This section allows valid projects that *received* development or permit approvals under Subtitles 27 and 24 of the *prior* Prince George's County Code, to proceed to the next stages of the development approval process.

On October 20, 2022, the Planning Board approved PPS 4-21058 (PGCPB Resolution No. 2022-108). Later, on January 17, 2023, the District Council enacted CB-12-2023, which made CB-50-2021 inapplicable to applications filed and accepted under Section 27-1900 of the Zoning Ordinance, unless such applications were already filed and accepted.

Staff find[s] that CB-12-2023 is *not* applicable to the subject application, as this application was *filed* under the provisions of Section 27-1704(b), *not* 27-1900, and is a project that received prior development approval. Therefore, this DSP application can proceed to be developed, in accordance with the *prior* Zoning Ordinance, including the requirements of CB-50-2021.

PGCPB No. 2023-44 at 6, Staff Report at 9 (Emphasis added). The Board erred when it accepted and approved this site plan *contrary* to the *same* law it *previously* acknowledged would bar acceptance and approval. Board's Votes Letter, and Policy Analysis Attachment 1, 1/6/2023.

F. CB-53-2023 — Limitation and Prohibition on Development Authority Pursuant to Old ZO

Notwithstanding CR-5-2023, and CB-12-2023, which the Board previously endorsed *against* site-specific text amendments, the District Council passed Council Bill (CB)-53-2023, which, among other things, expanded the prohibition to utilize CB-50-2021, *absent vested rights*, to development applications filed *pursuant* to Transitional Provisions § 27-1700 *et seq.* CB-53-2023 at 4-6. Therefore, even if, as the Board concluded, that this site plan was filed pursuant to Transitional Provisions § 27-1700 *et seq.*, (which it was *not*), CB-53-2023, by its terminology,

applies with *equal force* to prohibit the District Council from approving *any* development project filed (*not* just by the Applicant) pursuant to Transitional Provisions § 27-1700 *et seq.* In Maryland, the law on vested rights is as follows:

To obtain a vested right in an *existing zoning use that will be protected against a subsequent change in a zoning ordinance prohibiting that use*, the owner must initially obtain a valid permit. Additionally, in reliance upon the valid permit, the owner must make a substantial beginning in construction and in committing the land to the permitted use before the change in zoning ordinance has occurred. *Md. Reclamation Assocs. v. Harford Cty.*, 468 Md. 339, 227 A.3d 230 (2020); *Ross v. Montgomery Cty.*, 252 Md. 497, 506-07, 250 A.2d 635 (1969) (holding that expenditures on architectural planning do not create vested rights) and *Cty. Council for Montgomery Cty. v. District Land Corp.*, 274 Md. 691, 707, 337 A.2d 712 (1975) (holding that one million dollars in expenditures and a valid building permit did not create a vested right in a previous zoning classification of the land at issue) (Emphasis added).⁹

The record reflects that the Applicant has *not* obtained vested rights *prior* to (or *after*) passage of CR-5-2023, CB-12-2023, or CB-53-2023. As a result, under Maryland law, the Applicant is *not* protected against a subsequent *change* in the law (as is the case here) when the District Council amended certain Transitional Provisions of the New ZO to *prohibit* development projects from *uses* previously permitted pursuant to the Old ZO. (4/13/2023, Tr.), Appeal, 6/12/2023, Applicant's Letter, 6/27/2023, (7/5/2023, Tr.), *Md. Reclamation Assocs.*, 468 Md. 339, 227 A.3d 230 (2020).

Consequently, considering the subsequent change in law, through lawful adoptions of CR-5-2023, CB-12-2023, and CB-53-2023, the District Council is *required*, under *current* Maryland law, to reverse and deny the Board's arbitrary, capricious, and illegal approval of this site plan. *Cnty. Council of Prince George's Cnty. v. Zimmer Dev. Co.*, 444 Md. 490, 120 A.3d 677 (2015)

⁹ Counsel for Applicant *conceded* at oral argument (and is *correct*) that Maryland has *not* adopted principles of zoning estoppel. (7/5/2023, Tr.). Moreover, the facts here are *consistent* with procedural and factual background of other Maryland cases which the Supreme Court of Maryland has opined, absent vested rights, *does not* warrant the adoption of zoning estoppel principles. *Md. Reclamation Assocs.*, 468 Md. 339, 227 A.3d 230 (2020).

(no remand is necessary for further consideration by the agency [here the Board], when there remains *no administrative discretion or function* for the agency to exercise or perform properly and the outcome is required by law).

G. CB-50-2021 — Mandates this Site Plan to Comply with M-X-T Zone

Finally, assuming, *arguendo*, that CR-5-2023, CB-12-2023, and CB-53-2023 did not apply here, CB-50-2021, by its own terminology, requires the proposed development, a mix of residential (town homes) and commercial/retail uses, to comply with the M-X-T Zone. CB-50-2021, Footnote 143 (c), Board’s Votes Letter, and Policy Analysis, July 15, 2021. CB-50-2021 amended the text of the Table of Uses in the R-E Zone, as follows:

143 Provided, and notwithstanding any other provision of this Subtitle, that:

- (a) The uses are located on property or an assemblage of adjacent properties that:
 - (1) Prior to its subdivision to create any residential and commercial parcels or lots had a land area of at least twenty (20) acres;
 - (2) A portion of the boundary of the assemblage of adjacent properties is located at, and has frontage on, two intersecting roadways with a functional transportation classification of arterial or higher on the Master Plan of Transportation;
 - (3) A portion of the boundary of the assemblage of adjacent properties is adjacent to property that is located in a mixed-use zone or planned community zone.
- (b) A Detailed Site Plan shall be approved in accordance with Part 3, Division 9 of this Subtitle. Regulations concerning the net lot area, lot coverage, and green area, lot/width frontage, yards, building height, density, accessory buildings, minimum area for development, and any other requirements of the R-E Zone shall not apply. The maximum residential density shall not exceed 200 dwelling units. The applicable regulations for the M-X-T Zone as set forth in Sections 27-544(a) and 27-548(h) shall apply.
- (c) Notwithstanding the Table of Uses for the M-X-T Zone in Section 27-547(b), a gas station shall be prohibited. All other uses must be consistent with uses in the M-X-C Zone.

CB-50-2021 at 3-4 (Emphasis added).

Among other things, the M-X-T Zone requires that the Board approve a Conceptual Site Plan (CSP) and a Detailed Site Plan (DSP) for all uses and improvements—in accordance with Part 3, Division 9, of the Old ZO. PGCC § 27-546. Nothing in Footnote 143 waived or foreclosed the *requisite* filing and approval of a CSP for this development project pursuant to the Old ZO—utilizing CB-50-2021.

In the final analysis, the Board committed reversible error—when it approved this site plan. Under Division 9 of the Old ZO, the Applicant was required, under the Old ZO, to file a CSP, and the Board was required, under the Old ZO, to approve a CSP, in the first instance, before it was legally authorized to move forward to approve a Preliminary Plan of Subdivision (PPS), and subsequent DSP for the proposed development—to utilize CB-50-2021. PGCC § 27-270. PGCPB No. 2022-108, PGCPB No. 2023-44, Board’s Votes Letter, and Policy Analysis, July 15, 2021. Moreover, under Division 9 of the Old ZO, the Board also erred when it approved this site plan because it was not in general conformance with an approved CSP. PGCC § 27-285, PGCPB No. 2023-44.

H. Conclusion

For reasons stated herein, the Board’s approval of this site plan was arbitrary, capricious, or otherwise illegal. *Zimmer Dev. Co.*, 444 Md. 490, 120 A.3d 677 (2015).

ORDERED this 6th day of July 2023, by the following vote:

In Favor: Council Members Burroughs, Blegay, Dernoga, Hawkins, Ivey, Olson, Oriadha, Watson.

Opposed:

Abstained: Council Member Franklin.

Absent: Council Members Fisher and Harrison.

Vote: 8-0-1.

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: _____
Thomas E. Dernoga, Chair

ATTEST:

Donna J. Brown
Clerk of the Council