



THE PRINCE GEORGE'S COUNTY GOVERNMENT

Office of the Clerk of the Council
301-952-3600

October 12, 2023

**RE: ZMA-2022-001 Marianne Davies Trust Development
Land Development Investors II, LLC, Applicant**

NOTICE OF FINAL DECISION OF THE DISTRICT COUNCIL

Pursuant to the provisions of Section 27-3416 of the Zoning Ordinance of Prince George's County, Maryland requiring notice of decision of the District Council, you will find enclosed herewith a copy of the Council Order setting forth the action taken by the District Council in this case on October 10, 2023

CERTIFICATE OF SERVICE

This is to certify that on October 12, 2023, this notice and attached Council Order was mailed, postage prepaid, to all persons of record.

A handwritten signature in cursive script, reading "Donna J. Brown".

Donna J. Brown
Clerk of the Council

Case No.: ZMA-2022-001
Marianne Davies Trust Development

Applicant: Land Development Investors II, LLC¹

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

ORDER OF DENIAL

FINDINGS OF MATERIAL FACTS AND CONCLUSIONS

A. Introduction

On September 11, 2023, using oral argument procedures, this matter was considered by the District Council after Applicant filed exceptions to the Zoning Hearing Examiner's decision, which recommended denial of Applicant's request to rezone approximately 12.426 acres of land in the Residential, Rural Zone (RR) to the Residential, Multifamily-48 Zone (RMF-48) or alternatively, the lesser intense Residential, Multifamily-20 Zone (RMF-20), located on the south side of Greenbelt Road (MD 193), approximately .35 miles west of its intersection with Lanham-Severn Road (MD 564), identified as 10301 and 10303 Greenbelt Road, Lanham, Maryland.²

Having reviewed the record, including exceptions filed by Applicant, response in opposition filed by Wingate Homeowners Association, Inc., and oral arguments, the issues raised by all parties have been afforded full consideration. Except as otherwise stated herein,³ the District

¹ Other Applicants in the record include Diana L. O'Neil, Doreen Kramer, Robert Kramer, and Cottage City Mennonite Church/Capitol Christian Fellowship Church. Ex. 11, 12, 13, 15, 27, 35, and 36.

² Subsequently, the District Council directed its staff attorney to prepare an order of denial. PGCC § 27-3414; *Grant v. Cty. Council of Prince George's Cty.*, 465 Md. 496, 500, 214 A.3d 1098, 1101 (2019) (when exercising original jurisdiction, the District Council may delegate to its staff attorney the responsibility of preparing a proposed order and accompanying draft findings of fact).

³ Where the District Council maintains original jurisdiction, as is the case here, it is permitted to engage in its own fact-finding. *Grant*, 465 Md. 496, 214 A.3d 1098 (2019).

Council adopts and incorporates, as if fully restated herein, the findings and conclusions of the Zoning Hearing Examiner's recommendation of denial. *Templeton v. County Council of Prince George's County*, 23 Md. App. 596, 329 A.2d 428 (1974), A-2022-001 Record, Planning Board's Recommendation of Denial via Technical Staff Reports, 11/10/2022, 2/22/2023, (Transcript of ZHE proceeding, 2/8/2023), (Transcript of ZHE proceeding, 2/22/2023), (Transcript of ZHE proceeding, 3/1/2023), ZHE Decision, 4/20/2023, Applicant Exceptions, 5/14/2023, Wingate Homeowners Association Opposition, 9/6/2023, (Electronic/Transcript of District Council Oral argument proceeding, 9/11/2023, Tr.).⁴

B. The Subject Property and Existing Zone Classification

The subject property (or property) is a combination of Parcels 420, 421, and 422 as shown on Prince George's County Tax Map 36-A2, and a portion of Lot 1 on the "Reuth's Addition to Glenn Dale" plat, as shown in Plat Book 48 at Plat 61 among the Land Records of Prince George's County. It is improved with two single-family dwellings. ZHE Dec. at 1, Exhibits 3, 18, 21, and 25.

Prior to 2010, the property was zoned R-R (Rural Residential) in the 1993 Approved Master Plan and Sectional Map Amendment for Glenn Dale-Seabrook-Lanham and Vicinity (Planning Area 70). Subsequently, the property was *retained* in the R-R Zone (Rural Residential) in the 2010 Approved Glenn Dale-Seabrook-Lanham and Vicinity Sector Plan and Sectional Map Amendment (2010 SMA). Ex. 3, 20, and 32.

⁴ Hereinafter, the Zoning Hearing Examiner will be referred to as the ZHE. The Planning Board and Technical Staff, collectively, will be referred to as the Board because Technical Staff's recommendation of disapproval of the application constitutes the recommendation of the Board. Unless otherwise specified, reference to exhibit numbers are from the ZHE Exhibit List.

In September 2018, the District Council introduced—Council Bill (CB)13-2018—to adopt a New Zoning Ordinance. The purpose of CB-13-2018 was to repeal in its entirety the Old Zoning Ordinance, and to replace it with a New Zoning Ordinance. After public hearings, the New Zoning Ordinance was adopted in October 2018. In connection with the adoption of the New Zoning Ordinance, the District Council undertook a *comprehensive rezoning* by a Countywide Map Amendment (CMA) process to apply the appropriate zoning classification within the new Ordinance to each parcel of real property in the County. *Prince George's Cnty. Council v. Concerned Citizens of Prince George's Cnty.*, 2023 Md. LEXIS 378 (filed August 22, 2023).

To make sure that the effective date of the New Zoning Ordinance would be consistent with the adoption of the new zoning maps, CB-13-2018 specified that its effective date would be the same date that the District Council approved the CMA. *Concerned Citizens*, 2023 Md. LEXIS 378. With the adoption of the New Zoning Ordinance, the R-R Zone (Rural Residential) was redesignated as the RR Zone (Residential, Rural).

In July 2019, the District Council initiated the CMA process, which took over two (2) years and involved the rezoning of all Prince George's County properties located within the Regional District. Subsequently, the District Council enacted Council Resolution (CR)-27-2019, which adopted certain goals, concepts, and guidelines, a public participation program, a project schedule, and a proposed guide to the new zones. *Concerned Citizens*, 2023 Md. LEXIS 378.

After two (2) years of public hearings and meetings, the countywide *comprehensive rezoning* was completed in November 2021 with the District Council's adoption of Council Resolution (CR)-136-2021. With the adoption of the CMA, all properties located within the County that are

part of the Regional District were rezoned under the zoning classification set forth in the New Zoning Ordinance. The New Zoning Ordinance and its classifications, as designated on the CMA maps, became effective on April 1, 2022. *Concerned Citizens*, 2023 Md. LEXIS 378. In the 2021 CMA, the property was rezoned from the R-R Zone (Rural Residential) to the RR Zone (Residential, Rural). According to the record, the RR Zone classification was applied to ensure conformance with the recommended land use and intent of the 2010 SMA. Ex. 20, 32.

Under the Old Zoning Ordinance, the R-R Zone (Rural Residential) provided, in relevant part, as follows: the purposes of the R-R Zone are to provide for and encourage variation in the size, shape, and width of one-family detached residential subdivision lots, in order to better utilize the natural terrain; to facilitate the planning of one-family residential developments with moderately large lots and dwellings of various sizes and styles; to encourage the preservation of trees and open spaces; and to prevent soil erosion and stream valley flooding. PGCC § 27-428.

As noted above, under the New Zoning Ordinance, the R-R Zone was redesignated, RR Zone (Residential, Rural), which is essentially the same as its predecessor R-R Zone. The RR Zone provides, in relevant part, as follows: the purposes of the RR Zone (Residential, Rural) are to provide for and encourage variation in the size, shape, and width of single-family detached residential subdivision lots, in order to better utilize their natural terrain; to facilitate the planning of single-family residential developments with moderately large lots and dwellings of various sizes and styles; to encourage the preservation of trees and open spaces; and to prevent soil erosion and stream valley flooding. PGCC § 27-4202 (c)(1).

Moreover, under the New Zoning Ordinance, the RMF-48 Zone (the *most* intense zone requested) was the redesignation for the R-10A Zone (Multifamily High Density Residential-Efficiency) and R-H Zone (Multifamily High-Rise Residential) under the Old Zoning Ordinance—not the R-R Zone (Rural Residential) (under the 2010 SMA) or redesignated Residential, Rural (RR) Zone (under the New Zoning Ordinance). Furthermore, under the New Zoning Ordinance, the RMF-20 Zone (the *lesser* intense zone requested) was the redesignation for the R-18 Zone (Multifamily Medium Density Residential) and R-18C Zone (Multifamily Medium Density Residential-Condominium)—not the R-R Zone (Rural Residential) (under the 2010 SMA) or redesignated Residential, Rural (RR) Zone (under the New Zoning Ordinance). PGCC § 27-109 (Old ZO Class of Zones), CR-27-2019—Approved Guide to New Zones, House Bill (HB) 980, PGCC § 27-4102 (New ZO Class of Zones).⁵

C. Zoning Map Amendment Request

According to Applicant's Statement of Justification (SOJ), this piecemeal rezoning application is submitted in accordance with the *current* Zoning Ordinance that became effective on April 1, 2022, even though the basis for rezoning refers to the 2010 SMA. Ex. 3 at 3. Before the ZHE, Applicant argued that there has been both a substantial change in the character of the neighborhood and several mistakes in the 2010 SMA, which the ZHE summarized as follows:

- It was a mistake to retain the R-R zoning of the subject property in the 2010 SMA since this zoning did not serve the goals of the Master Plan with respect to designing infill to be compatible with existing neighborhood scale and character.

⁵ 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 §27-3414(f).

- It was a mistake for the District Council to not consider the effects of the alignment of the C-340 roadway.
- It was a mistake for the District Council to not have considered a recommendation of the 2002 General Plan to place the neighborhood of the subject property in the University Boulevard Corridor.
- There has been a change in the character of the neighborhood since the District Council's adoption of Council Bill 71-2016 which allowed one of the enclaved properties to operate a commercial use (a beauty salon) on site. ZHE Dec. at 4-5.⁶

The application was opposed by Wingate Homeowners Association, Inc. After holding evidentiary hearings on the application request, the ZHE issued a written decision rejecting Applicant's contentions of change and mistake. (Transcript of ZHE proceeding, 2/22/2023), (Transcript of ZHE proceeding, 3/1/2023), ZHE Decision, 4/20/2023. Applicant filed timely exceptions, which were opposed by Wingate Homeowners Association, Inc. Applicant exceptions abandons any argument of the "change" half of the "change-mistake" rule and argues only that the ZHE decision was erroneous on the "mistake" option of the rule. (9/11/2023, Tr.). Applicant Exceptions, 5/14/2023, Wingate Homeowners Association Opposition, 9/6/2023.

D. Standard of Review (Change-Mistake Rule)

In Maryland, the change-mistake rule applies to all piecemeal zoning applications involving Euclidian zones, including those involving conditional zoning. *Cnty. Council of Prince George's Cnty. v. Zimmer Dev. Co.*, 444 Md. 490, 512-515, 120 A.3d 677, 689-691 (2015). Under the New Zoning Ordinance, in determining whether to adopt or disapprove a proposed zoning map

⁶ Applicant SOJ indicates that a mistake occurred when the District Council *retained* the subject property in the RR Zone within the 2010 SMA. Ex. 3 at 4. Applicant is incorrect. The District Council *did not retain* the property in the RR Zone within the 2010 SMA—the property was retained in R-R (Rural Residential) Zone. The District Council *rezoned* the property to the RR Zone in the 2021 CMA—not the 2010 SMA.

amendment (ZMA), the District Council may consider many factors. In relevant part, no other zoning map amendment shall be granted without the applicant demonstrating either:

- (1) There has been a substantial change in the character of the neighborhood; or
- (2) There was a mistake in the original zone for the land subject to the amendment which has never been the subject of an adopted sectional map amendment; or
- (3) There was a mistake in the current sectional map amendment. PGCC § 27-3601(e).⁷

Under Maryland law, the original or comprehensive zoning *may*⁸ be changed (unless by a subsequent comprehensive zoning) only by a subsequent piecemeal zoning. In a Euclidean or conventional zone (such as the case here), the map amendment may be granted only upon a showing of unforeseen changes in the surrounding neighborhood occurring since the prior original zoning or comprehensive rezoning or mistake of fact made by the zoning authority in the original zoning or previous comprehensive rezoning.

The “change-mistake” rule is a rule of the either /or type. The “change” half of the “change-mistake” rule requires that, in order for a piecemeal Euclidean zoning change to be approved, there must be a satisfactory showing that there has been significant and unanticipated change in a relatively well-defined area (the “neighborhood”) surrounding the property in question since its original or last comprehensive rezoning, whichever occurred most recently. The “mistake” option of the rule requires a showing that the underlying assumptions or premises relied upon by the

⁷ The 2021 CMA is known as the “The Countywide Sectional Map Amendment.” CR-136-2021. *See also* (2/8/2023 Tr., p. 47, Lines 17-19) (Applicant’s land planner acknowledgment that “...when you look at CR-136-2021, which was the resolution adopting the CMA, it’s titled the county wide sectional map amendment”).

⁸ May is permissive. PGCC § 27-2100(s). Maryland cases consistently interpret ‘may’ as permissive. *Board of Physician Quality v. Mullan*, 381 Md. 157, 166, 848 A.2d 642, 648 (2004); *State v. Green*, 367 Md. 61, 82, 785 A.2d 1275, 1287 (2001); *Brodsky v. Brodsky*, 319 Md. 92, 98, 570 A.2d 1235, 1237 (1990).

legislative body during the *immediately preceding original or comprehensive rezoning* were incorrect. In other words, there must be a showing of a mistake of fact. Mistake in this context does not refer to a mistake in judgment. Additionally, even where evidence of a change or mistake is adduced, there is no reciprocal right to a change in zoning, nor is there a threshold evidentiary standard which when met compels rezoning. Even with very strong evidence of change or mistake, piecemeal zoning may be granted, but is not required to be granted, except where a failure to do so would deprive the owner of all economically viable use of the property. In Maryland, the change-mistake rule applies to all piecemeal zoning applications involving Euclidian zones, including those involving conditional zoning. *Zimmer Dev. Co.*, 444 Md. 490, 512-515, 120 A.3d 677, 689-691 (2015) citing *Mayor & Council of Rockville v. Rylyns Enterprises, Inc.*, 372 Md. 514, 539, 814 A.2d 469, 483 (2002) (Although the zoning authority may rezone a property into a Euclidian zone only upon a threshold finding of a mistake of fact in the previous comprehensive rezoning or original zoning or an unforeseen change in the neighborhood occurring since then, the zoning authority is not required to rezone the property after making such a finding, unless a failure to do so would deprive the property owner of all economically viable use of the property).

E. Exceptions

As a threshold matter, the 2010 SMA is *not* the *current sectional map amendment or comprehensive rezoning* of the property. As noted above, the current sectional map amendment or comprehensive rezoning of the property is the 2021 CMA. With the adoption of the 2021 CMA, all properties located within the County that are part of the Regional District were rezoned under the zoning classification set forth in the New Zoning Ordinance. The New Zoning Ordinance and

its classifications, as designated on the CMA maps, became effective on April 1, 2022. *Concerned Citizens*, 2023 Md. LEXIS 378. As such, the property was *rezoned* to the RR Zone in the 2021 CMA—not in the 2010 SMA. Ex. 20, 32. According to the record, “[a] search of the analysis testimony during the CMA Public Hearing Process revealed that no testimony or written correspondence was submitted refuting the proposed RR zone for the subject property.” Community Planning Division Memo at 2, 10/19/2022.⁹ *See also* ZHE Dec. at 4.

Assuming, *arguendo*, that the 2010 SMA was the *current* sectional map amendment or comprehensive rezoning for the property, Applicant’s exceptions based on mistake in the 2010 SMA lack merit. As noted above, the Applicant abandoned the “change” half of the “change-mistake” rule. Instead, before the District Council, Applicant elected to challenge the ZHE decision only on the “mistake” option of the change-mistake rule. Applicant Exceptions, 5/14/2023, (9/11/2023, Tr.). Primarily, Applicant argues that the decision of the ZHE was incorrect and not based on the facts or evidence in the record. Exceptions at 1. Each exception will be addressed in turn below.

First, Applicant took exception to Conclusion of Law No. 4 of the ZHE decision. According to Applicant, the [ZHE] states:

“Applicants didn’t point to any incorrect premises that the District Council relied on, other than its decision to retain the RR zoning despite the congruent zoning of the surrounding donut. If that failure is incorrect it falls into the category of bad judgment based on accurate information which cannot support a finding of mistake.”

⁹ According to Applicant’s land planner, on the issue of mistake, the District Council made a mistake in both the 2010 SMA and 2021 CMA—but the land planner *presumed* (contrary to Maryland law), *Concerned Citizens of Prince George’s Cnty.*, 2023 Md. LEXIS 378, that the 2010 SMA (and *not* the 2021 CMA) was the most current SMA/comprehensive rezoning of the property. (2/8/2023, Tr., pp. 46-52, 73-75).

Quoting from Exceptions at 1. But Conclusion of Law No. 4 of the ZHE decision (in its entirety) states as follows:

(4) As noted in Prosser, above, “in order to find legal mistake, there must be evidence that assumptions or premises relied on ... were invalid ...[and this] ... is different from the exercise of bad judgment based on complete and accurate information.” Applicants didn’t point to any incorrect premises that the District Council relied on, other than its decision to retain the RR zoning despite the congruent zoning of the surrounding donut. If that failure is incorrect it falls into the category of bad judgment based on accurate information which cannot support a finding of mistake. Moreover, Applicants have not submitted sufficient justification to support a rezoning from one of the lease-dense residential zoning categories (RR) to the densest (RMF-48). They have only noted that the RMF-48 Zone would be more economically feasible, not that there can be no reasonable use of the property in its current zoning. ZHE Dec. at 20 (Emphasis added).

To prove that the District Council made a mistake when it *retained* R-R Zone for the subject property in the 2010 SMA, it is necessary not only for Applicant to show the facts that existed at the time of the comprehensive zoning *but also which, if any, of those facts were not actually considered by the [District] [C]ouncil.* *Boyce v. Sembly*, 25 Md. App. 43, 334 A.2d 137 (1975), Exceptions at 2.

The ZHE did not err in Conclusion of Law No. 4. Applicant has failed to demonstrate anywhere in the record that at the time of the 2010 SMA (or the 2021 CMA), *which set of facts were not actually considered* by the District Council. The record also reflects that “the property owners have not requested a rezoning in the past and did not do so as part of the Sectional Map Amendment process in 2010 or the 202[1] Countywide Map Amendment process.” ZHE Dec. at 4. The record further reflects that “[a] search of the analysis testimony during the CMA Public Hearing Process revealed that no testimony or written correspondence was submitted refuting the

proposed RR [Z]one for the subject property.” Community Planning Division Memo at 2, 10/19/2022.¹⁰

As a matter of fact, the property could *not* have been rezoned in the 2010 SMA to the RMF-48 or RMF-20 Zones because those zones did *not* exist in 2010. The RMF-48 and RMF-20 Zones were *first* established in 2019 when the District Council adopted CR-27-2019—approving the Guide to New Zones for the New Zoning Ordinance. What’s more, the RMF-48 Zone (the *most* intense zone requested) was the redesignation zoning category for the R-10A (Multifamily High Density Residential-Efficiency) Zone and R-H (Multifamily High-Rise Residential) Zone under the Old Zoning Ordinance—not the R-R (Rural Residential) Zone. And the RMF-20 Zone (the *lesser* intense zone requested) was the redesignation zoning category for the R-18 (Multifamily Medium Density Residential) Zone and R-18C (Multifamily Medium Density Residential-Condominium) Zone under the Old Zoning Ordinance—not the R-R (Rural Residential) Zone.

Second, Applicant contends that, through its land planner, it unequivocally demonstrated that the District Council relied upon invalid facts, projects or trends which were reasonably foreseeable of fruition when it chose to retain the RR Zone for the subject property in the 2010 SMA. Exceptions at 2. Applicant has misrepresented the sworn testimony in the record. Applicant’s land planner testified before the ZHE as follows:

¹⁰ In the 2021 CMA, the Maryland General Assembly provided landowners in the County with an opportunity to request zone intensification upon demonstration of error. Specifically, HB-980 provided as follows: Except on a demonstration of error in the public record after a public hearing, the Prince George’s County Planning Board may not recommend, and the District Council may not approve, any request made by or on behalf of any person for zone intensification that differs substantially from the applicable zoning category or classification recommended in the Proposed Guide to New Zones adopted by the District Council on July 16, 2019, under Council Resolution [CR-27-2019]. As noted above, Applicant did not participate in the 2021 CMA process or the 2010 SMA process.

MR. FERGUSON: “[T]here is a vision statement at the very beginning of the plan, which I believe is the root of -- the root of the mistake and that vision is maintain the current density as residential neighborhoods. So that to me, says regardless of any facts, trends, projects, etcetera, etcetera, we’re not going there, we’re just leaving that alone.” (2/8/2023 Tr., p. 53, Lines 15-22).

MR. FERGUSON: “So I think the root of that -- that specific - - the mistake that’s specific to this property in this area is that there is an assumption that the subject donut hole, if you will, is in fact a *residential neighborhood*.” (2/8/2023 Tr., p. 54, Lines 16-20) (Emphasis added).

MR. FERGUSON: “[I]f you look at this, if you look at the actual land use pattern on the subject, you look at the actual ownership pattern, you look at the physical surroundings and you look at the -- at the land use principals, which *do* include things *like* not just *preserve residential neighborhoods* but encourage land uses that provide sensitive trans- -- transitions between commercial and employment centers and (2/8/2023 Tr., p. 55, Lines 14-22) residential areas (2/8/2023 Tr., p. 56, Line 1). And those commercial and employment areas surround the subject property. And, so, having low density residential be it the transitional use between that *boggles my planning mind*.” (2/8/2023 Tr., p. 56, Lines 2-5) (Emphasis added).

MR. FOREMAN: “The -- the planning principal of that was [inaudible] by the master plan sectional map amendment, if -- you -- you briefly just mentioned them, but a further discussion of that is located in your planning analysis; correct?” (2/8/2023 Tr., p. 56, Lines 6-10).

MR. FERGUSON: “Correct, on pages 7 and 8. I go through each of those principals. Some of them aren’t applicable because of, you know, what -- what the use and the nature of the property is. But a number of them are and *retaining the RR zone* in the light of the use of the subject and its immediate surroundings, the use of the -- the -- the larger surroundings, religious stands those recommendations on -- on their heads. Now, you *can* make a judgement to do that *and it’s just bad judgment, that’s not a mistake*.” (2/8/2023 Tr., p. 56, Lines 11-20) (Emphasis added).

As shown by the sworn testimony above, Applicant’s land planner *admitted* that the District Council *did not* make a *mistake* in the 2010 SMA to *retain* the property in the R-R Zone. Moreover, facts and evidence existed at the time of the 2010 SMA to justify a determination to *retain* the property in the R-R Zone because there was substantial evidence in the record to maintain current

residential densities in the R-R Zone within the 2010 SMA. *See* A-2022-001 Record, Planning Board’s Recommendation of Denial via Technical Staff Reports, 11/10/2022, 2/22/2023, (Transcript of ZHE proceeding, 2/8/2023), (Transcript of ZHE proceeding, 2/22/2023), (Transcript of ZHE proceeding, 3/1/2023), ZHE Decision, 4/20/2023, Applicant Exceptions, 5/14/2023, Wingate Homeowners Association Opposition, 9/6/2023, (Electronic/Transcript of District Council Oral argument proceeding, 9/11/2023, Tr.). Piecemeal rezoning decisions are reviewed most frequently under the substantial evidence test. *Zimmer Dev. Co.*, 444 Md. 490, 510 (2015). If substantial evidence supports the conclusion of the zoning agency, the courts may not disturb that conclusion, ““even if substantial evidence to the contrary exists.”” *Cremins v. County Comm’rs of Washington County*, 164 Md. App. at 438 (quoting *White v. Spring*, 109 Md. App. 692, 699 (1996)).

Third, Applicant contends that it was error for the ZHE to retain the RR Zone for the property because the ZHE concluded, in part, that the property is akin to an undeveloped “donut hole” in the middle of an eclectic neighborhood that would not be described as “rural residential” given its mix of uses. Exceptions at 2, ZHE Dec. at 19. Fourth, Applicant also contends that the conclusion of the ZHE that the neighborhood would not be described as “rural residential” is buttressed by comments (or the lack thereof) from certain comments made by Technical Staff. Exceptions at 3-4.

It was not an error of law for the ZHE to find that the neighborhood would not be described as rural residential *and still recommend denial* of Applicant’s rezoning request based solely on mistake in the 2010 SMA. Even where evidence of a change or mistake is adduced, there is no

reciprocal right to a change in zoning, nor is there a threshold evidentiary standard which when met compels rezoning. And even with very strong evidence of change or mistake, piecemeal zoning *may* be granted, but is *not required to be granted*, except where a failure to do so would deprive the owner of all economically viable use of the property. *Zimmer Dev. Co.*, 444 Md. 490, 512-515, 120 A.3d 677, 689-691 (2015) citing *Ryllys Enterprises, Inc.*, 372 Md. 514, 539, 814 A.2d 469, 483 (2002).

As noted above, Applicant's land planner *admitted* that the District Council's decision to *retain* the property in the R-R Zone within the 2010 SMA *was not a mistake*. (2/8/2023 Tr., p. 56, Lines 11-20). Regardless of Applicant's admission that the District Council did not make a mistake when it retained the property in the R-R Zone within the 2010 SMA, Applicant has failed to demonstrate that denial of the rezoning request would deprive it of all economically viable use of the property. To the contrary, there is substantial evidence in the record that if the property is retained in the R-R Zone the owners would not be deprived of all economically viable use of the property. Ex. 20, 32 (The sector plan and SMA recommends residential low land use on the subject property, with a focus on single-family detached units. Per the plan, Residential Low is defined as 0.5 to 3.5 dwelling units per acre (page 200 and Map 36 Proposed Land Use on page 202). The allowed density would permit between 6 and 43 single-family residences on the subject property. Per the Zoning Ordinance, the maximum density allowed in the RR Zone is 2.17 dwelling units per acre, with a minimum lot area of 20,000 square feet (Section 27-4202(c)). This would allow maximum density of 26 single-family residences on the 12.43-acre site).

Alternatively, the District Council is not bound by the ZHE conclusion that the neighborhood would not be described as “rural residential” given its mix of uses. ZHE Dec. at 19. In addition to the neighborhood described in the ZHE decision, the record also indicates evidence that the property is surrounded by the following zones and uses:

- **North**—Abutting the site to the north is Lot 1, a privately owned property in the RR Zone, containing a single-family residence (10211 Greenbelt Road). Also abutting the subject property is MD 193, an arterial roadway, which is the northern boundary of the sector plan and SMA area. Across MD 193, are properties located within the 2006 Approved Sector Plan and Sectional Map Amendment for the East Glenn Dale Area (Portions of Planning Area 70), with commercial and office uses in the Industrial, Employment Zone.
- **East**—Place of Worship in the RR Zone.
- **South**—Undeveloped land in the RR Zone.
- **West**—Place of Worship in the RR Zone. Ex. 20, 32 (Emphasis added).

The ZHE also concluded that the property is surrounded by other properties that are in the rural residential zones. ZHE Dec. at 19. As noted above, under the Old and New Zoning Ordinance, the purposes of the rural residential zone are to, among other things, provide for and encourage variation in the size, shape, and width of *one-family detached residential subdivision lots, to facilitate the planning of one-family residential developments with moderately large lots and dwellings of various sizes and styles, and to encourage the preservation of trees and open spaces; and to prevent soil erosion and stream valley flooding.* PGCC § 27-428, PGCC § 27-4202 (c)(1) (Emphasis added). In accordance with the purposes of the R-R/RR Zone, the District Council finds that the neighborhood can be described as rural residential because not only is the property zoned

rural residential, but the property is also surrounded by other properties that are in the rural residential zone.

The District Council also finds that a mere “mix of uses” on other properties that are in the rural residential zone or where other surrounding properties are not necessarily in the rural residential zone is not by itself dispositive of whether *this* neighborhood can be described as rural residential. Nor are such circumstances dispositive of whether the property could not be retained in the R-R Zone within the 2010 SMA or whether there was a mistake in the 2010 SMA that compels Applicant’s request to rezone the property from the R-R/RR Zone to the most intense RMF-48 Zone or lesser intense RMF-20 Zone.

Fifth, Applicant takes further exception to Conclusion of Law No. 4 of the ZHE decision as follows:

“Also, in Conclusion No. 4 the ZHE asserts that the Applicants did not submit sufficient justification to support rezoning from one of the least-dense residential zoning categories (RR) to the densest (RMF-48)—characterizing the justification as being that the RMF-48 Zone would be more economically feasible and failure to rezone the site to RMF-48 would result in no reasonable use of the property under its current zoning. This is a patently incorrect characterization of Applicant’s request for the RMF-48 Zone.” Exceptions at 4.

According to Applicant, the ZHE patently mischaracterized the request to rezone the property to the RMF-48 Zone concerning development standards and achievable density. *Id.* But, in full context, Conclusion No. 4 of the ZHE decision states as follows:

(4) As noted in Prosser, above, “in order to find *legal mistake*, there must be evidence that assumptions or premises relied on ... were invalid ...[and this] ... is different from the exercise of bad judgment based on complete and accurate information.” Applicants didn’t point to any incorrect premises that the District Council relied on, other than its decision to retain the RR zoning despite the congruent zoning of the surrounding donut. If that failure is incorrect it falls into

the category of bad judgment based on accurate information which cannot support a finding of mistake. Moreover, Applicants have not submitted sufficient justification to support a rezoning from one of the lease-dense residential zoning categories (RR) to the densest (RMF-48). They have only noted that the RMF-48 Zone would be more economically feasible, not that there can be no reasonable use of the property in its current zoning. ZHE Dec. at 20 (Emphasis added).

Relevant testimony from Applicant's land planner on this issue was as follows:

MR. FERGUSON: "Now, I don't believe that the economics prevalent for multi-family development today would support density that high at the subject property. What the applicant has proposed and it's in the record in an exhibit, I'm not sure of what the number is, but there is an illustrative plan in the exhibit that proposes podium buildings, so surface parking, sub- -- structured parking on the ground level and then four stories of residential above. That is RMF20 kind of development." (2/8/2023 Tr., p. 64, Lines 8-17).

MR. FERGUSON: "So the RMF48 zone provides for 60 percent lot coverage instead of 40 percent lot coverage in the RMF20 zone. I do believe that the additional lot coverage will be most beneficial in developing -- being able to develop the subject property at the densities which you do find in -- in the surrounding land uses that are characteristic in the neighborhood." (2/8/2023 Tr., p. 65, Lines 3-9).

When Conclusion 4 of the ZHE decision is viewed in context with other relevant testimony in the record, and in accordance with the standard of review for piecemeal rezoning, based on mistake (as is the case here), the ZHE did not patently mischaracterize Applicant's rezoning request. The ZHE was legally correct (in the context of mistake) to conclude and characterize that Applicant's justification to rezone the property to the RMF-48 Zone would be more economically feasible, and failure to do so would *not* result in no reasonable use of the property under its current zoning. *Zimmer Dev. Co.*, 444 Md. 490, 512-515, 120 A.3d 677, 689-691 (2015) citing *Ryllys Enterprises, Inc.*, 372 Md. 514, 539, 814 A.2d 469, 483 (2002) (Even where evidence of a change or mistake is adduced, there is no reciprocal right to a change in zoning, nor is there a threshold

evidentiary standard which when met compels rezoning. And even with very strong evidence of change or mistake, piecemeal zoning may be granted, but is not required to be granted, except where a failure to do so would deprive the owner of all economically viable use of the property).

Finally, Applicant contends that it was error for the ZHE to conclude that the area is not rural residential in character, and yet deny the rezoning of the property to the RMF-48 Zone—which Applicant claims is the more *compatible* zone for the neighborhood. Exceptions at 4.

Applicant is factually and legally incorrect. Compatibility with a neighborhood is *relevant* when rezoning a parcel to a *floating zone*—which is *not* the case here. Floating zones are used often to allow the development of specialized or mixed uses. More specifically, floating zones have been used to permit large commercial and industrial uses, mixed uses, multifamily residences, and planned unit developments. To rezone a property to a floating zone, the zoning authority (i.e., District Council) *must* find generally that the legislative prerequisites for the zone are met and the rezoning is *compatible* with the surrounding neighborhood. Planning considerations are normally accorded greater weight in assessing piecemeal rezoning applications for *floating zones* compared to those for *Euclidian zones*, the latter of which are linked to the *change/mistake rule*. *Zimmer Dev. Co.*, 444 Md. 490, 515-517, 120 A.3d 677, 691-694 (2015). (Emphasis added.)

Under the New Zoning Ordinance, PGCC § 27-3601(d)(8) provides, in relevant part, as follows:

- (A) *After receipt of the ZHE's **recommendation***, the District Council shall conduct a public hearing on the application in accordance with Section 27-3414, Oral Argument Hearing, and render a final decision in accordance with Section 27-3601(d), Zoning Map Amendment (ZMA) Decision Standards. The District Council shall adopt written findings of material facts and conclusions.

- (B) *The District Council may approve a less intense zone* than that requested by the applicant for any part of the land subject to the application.¹¹
- (C) If the subject property is located within the boundaries of a municipality, a less intense zone may only be approved if there was testimony on the less intense zone before the Zoning Hearing Examiner, and an opportunity given for the municipality to make a recommendation. If there was no testimony or opportunity, the application shall be remanded to the Zoning Hearing Examiner for this purpose. Upon remand, the Hearing Examiner shall notify all persons of record and any municipality in which the property is located. The Hearing Examiner shall conduct further hearings if the case warrants.
- (D) A two-thirds majority vote of the full Council shall be required to approve any portion of the amendment that is contrary to the recommendation of a municipality concerning land within its boundaries, the recommendation of a governed special taxing district concerning land within its district, or a zoning map amendment that is contrary to an approved Area Master Plan or Sector Plan. PGCC § 27-3601(d)(8) (Emphasis added).

In the final analysis, for the reasons set forth above, nothing in PGCC § 27-3601(d)(8) *compels* the ZHE to recommend that the District Council rezone the property to the *lesser* intense RMF-20 Zone. Exceptions at 4. Nor, alternatively, even if the ZHE *had recommended* the lesser intense RMF-20 Zone, that the District Council was reciprocally *compelled*, based on the record, to rezone the property to the lesser intense RMF-20 Zone—except where a failure to do so would deprive the owner of all economically viable use of the property. *Zimmer Dev. Co.*, 444 Md. 490, 512-515, 120 A.3d 677, 689-691 (2015) citing *Rylyns Enterprises, Inc.*, 372 Md. 514, 539, 814 A.2d 469, 483 (2002).

¹¹ As noted above, may is *permissive*. PGCC § 27-2100(s). While the District may do something, it is not compelled to do so. Maryland cases consistently interpret ‘may’ as *permissive*. *Mullan*, 381 Md. 157, 166, 848 A.2d 642, 648 (2004); *Green*, 367 Md. 61, 82, 785 A.2d 1275, 1287 (2001); *Brodsky*, 319 Md. 92, 98, 570 A.2d 1235, 1237 (1990).

F. Conclusion

Based on findings of material facts and conclusions set forth herein, Applicant has failed to carry its burdens of production and persuasion to demonstrate, among other things, that Zoning Map Amendment A-2022-001, a request to rezone approximately 12.426 acres of land in the Residential, Rural Zone (RR) to the Residential, Multifamily-48 Zone (RMF-48) or alternatively, the lesser intense Residential, Multifamily-20 Zone (RMF-20), located on the south side of Greenbelt Road (MD 193), approximately .35 miles west of its intersection with Lanham-Severn Road (MD 564), identified as 10301 and 10303 Greenbelt Road, Lanham, Maryland, is compelled, based on mistake within the 2010 SMA, because if a failure to do so, or rezone the property, would not deprive the owner of all economically viable use of the property.

ENACTED this 10th day of October, 2023, by the following vote:

In Favor: Council Members Burroughs, Blegay, Dernoga, Fisher, Harrison, Hawkins, Ivey, Olson, and Watson.

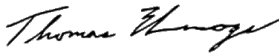
Opposed:

Abstained:

Absent: Council Members Franklin and Oriadha.

Vote: 9-0.

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