

**DISTRICT COUNCIL FOR PRINCE GEORGE'S COUNTY, MARYLAND  
OFFICE OF THE ZONING HEARING EXAMINER**

**ZONING MAP AMENDMENT  
A-10014**

**DECISION**

Application:	I-3 to the C-S-C Zone
Applicant:	FCD Development, LLC (t/a Brandywine Crossing Phase IIA)
Opposition:	None
Hearing Date:	February 18, 2009
Hearing Examiner:	Maurene Epps Webb
Recommendation:	Approval with Conditions

**NATURE OF REQUEST**

(1) A-10014 is a request to rezone approximately 3.6 acres of I-3 (Planned Industrial/Employment Park) zoned land to the C-S-C (Commercial Shopping Center) Zone. The property is located on the east side of US 301, approximately 1,260 feet north of Matapeake Business Drive in Brandywine, Maryland.

(2) The Applicant is alleging that there was both a mistake in the adoption of the 1993 Subregion V Sectional Map Amendment ("SMA") when the District Council retained the I-3 zoning of the property, and a change in the character of the neighborhood since the adoption of the SMA.

(3) The Technical Staff recommended approval of the Application. (Exhibit 19) The Planning Board adopted Staff's recommendation as its own. (Exhibit 24)

(4) No one appeared in opposition to the request.

**FINDINGS OF FACT**

**Subject Property**

(1) The subject property is approximately 3.6 acres in size, and consists of four (4) lots (Numbers 5-8 of the Long Subdivision) that are undeveloped and wooded. To the east and

south of the site is the Brandywine Crossing commercial shopping center, which was the subject of two (2) approved rezoning applications (A-9980 and A-9990).(Exhibits 10 (a)-(d) and 13 (a)-(d))

(2) The site is subject to the Woodland Conservation and Tree Preservation Ordinance and there is an approved Type I and Type II Tree Conservation Plan for the entire subdivision (TCPI/26/91 and TCPII/133/91) (Attachment to Exhibit 19, dated 10/27/2008 from Finch to Lockard)

### **Neighborhood and Surrounding Properties**

(3) The property is surrounded by the following uses:

- North – a golf cart rental, sales and service business in the I-3 Zone
- South and east – the Brandywine Crossing integrated shopping center
- West – US 301 and beyond that vacant property that was recently rezoned to the L-A-C Zone (A-9996/9997)

(4) The neighborhood of the subject property proffered by Staff has the following boundaries:

- North – Brandywine Road (MD 381)
- South – Cedarville Road
- East – Railroad right-of-way
- West – US 301/MD 5

### **Master Plan/Sectional Map Amendment**

(5) The site lies within Employment Area “C” of the Brandywine/Mattawoman Industrial Area, an area discussed in the 1993 Subregion V Master Plan. The Master Plan included the following discussion on Employment Areas:

Industrial areas within Subregion V are located along major highways (US 301, MD 5, and Indian Head Highway) and the Conrail Line .... The greatest existing industrial land use is warehousing. An M-NCPPC staff study, Industrial Land Use Trends and Projections, Subregion V (January 1991), examined the status and likely future of industrial land within Subregion V, Prince George’s County, and the metropolitan region. It found that Metropolitan Washington development patterns are such that already existing office/industrial parks closer to the Beltway and Washington, D.C. have a locational advantage over land in southern Prince George’s County. Therefore, it is not anticipated that Subregion V will become the location of a significant amount of regional construction in the near future.

The intention of this Master Plan is to provide for employment areas that take advantage of the Subregion’s location and proximity to major transportation facilities. As the Subregion and nearby areas grow in population, additional office and industrial space will be needed by firms providing products and services to homes and businesses. A reserve of developable industrial land within the Subregion will allow the County to better compete with other localities within and outside the metropolitan area.

(1993 Subregion V Master Plan, pp. 65-66)

(6) The Master Plan made the following recommendations for Employment Area “C”:

Employment Area “C” is a large, light and heavy industrial land use park which has direct access to regional highway and railroad systems. It has long been planned to develop with a mix of industrial land uses that can take advantage of the location. Most of the property located in Employment Area “C” is now in the development pipeline and will be built as the industrial market allows. It is one of the last large, uncommitted, general industrial areas remaining in the first tier of suburban jurisdictions surrounding Washington, D.C.

(1993 Subregion V Master Plan, p. 81)

(7) The 1993 SMA retained the I-3 zoning of the subject property, in keeping with the vision of the Master Plan.

(8) The site also lies within the Developing Tier, discussed in the 2002 General Plan. The vision for the Developing Tier “is to maintain a pattern of low-to-moderate density suburban residential communities, distinct commercial Centers, and employment areas that are increasingly transit serviceable.” (2002 General Plan, p. 36) The property is also designated within the Brandywine Community Center in a corridor with limited access.

### **Applicant’s Request**

(9) The Applicant seeks a rezoning for the subject property from the I-3 to the C-S-C Zone. If the request is granted Applicant intends to develop the site with approximately 70,000 square feet of commercial, retail and office uses. Applicant believes approval of the request is necessary “in order to maintain a cohesive and comprehensive design concept among all the proposed phases of Brandywine Crossing.” (Exhibit 2)

(10) Applicant first argues that a mistake was made by the District Council when it chose to retain the industrial zoning for the site. In support of this argument it submitted an economic analysis prepared by Dr. Stephen Fuller, an individual who has been accepted as an expert in economic analysis in the Applications involving the adjacent properties. Dr. Fuller noted that several economic trends support the instant request:

The Prince George’s County economy has been in transition from a goods-producing to a services-producing base since the 1970’s with manufacturing and wholesale employment declining as a percentage of County jobs; combined these two sectors currently account for 6.3 percent of all jobs, down from 8.5 percent in 1983 while retail and service sector jobs have increased from 44.9 to 50.8 percent....

With 84, 345 households and total household income totaling \$8.2 billion (\$1.9 billion retail and service expenditure potential), the Brandywine Market Area was found to be presently underserved by retail and service uses. Projected residential and household income growth over the next fifteen years (24, 367 new households at \$118,780 average household income in 2020) will increase the retail and service space requirements supportable within the Brandywine Market Area by almost 5 million square feet....

The current economic slowdown impacting the County, Region and nation will further shift the development patterns away from the County's historic patterns. Demand for industrial and warehouse uses has weakened further during this current period and the competitive market environment impacting commercial and office development has intensified. As the County's economy recovers from the current business cycle employment growth will likely accelerate in the services sector building first from convenience and region-serving retail to office uses while industrial and warehouse uses will lag and be increasingly vulnerable to the area's high operating costs.

(Exhibit 3, pp. 2-3)

(11) Applicant also submitted copies of two studies that were completed by M-NCPPC and made part of the record in the 1993 Master Plan, the 1991 Industrial Land Use Trends & Projections for Subregion V and the 1993 Subregion V Retail Market Analysis. (Exhibits 40 and 41) These studies mirror Dr. Fuller's comments. Applicant contends that the District Council was also mistaken in ignoring the predictions in these studies that industrial uses would fail to materialize and that there would be a need for additional retail uses in the area of the subject property.

(12) Applicant also argued there has been a substantial change in the character of the neighborhood since the adoption of the SMA. The District Council recently approved Zoning Map Applications A-9980 and A-9990 (both rezoning industrially-zoned land to the C-S-C Zone). The properties involved in the two (2) applications are to the immediate south of the subject property and within its neighborhood. (Exhibit 35) Properties to the north of the subject property, and within its neighborhood, have also been rezoned to the R-M, E-I-A and L-A-C Zones. (Exhibit 35) As noted by Applicant's witness, accepted as an expert in land use planning, "[i]t stands to reason that ... since the area to the south and east of the subject property has been rezoned and permits have been obtained for construction – that there has been a distinctive and substantial change to the character of the neighborhood as Exhibit 39 pictorially represents." (T. 17)

(13) Applicant agrees with the conditions suggested by Staff. However, it requests that the second condition be amended, since "[t]he issue of driveway access to U.S. 301 is something that can probably best be left towards the Preliminary Plan and Detailed Site Plan Processes." (T. 21)

### **Agency Comment**

(14) Staff ultimately concluded that the Application should be approved, reasoning as follows:

In as much as the subject property was placed in its current zone based on the same premises as the adjacent properties that were recently rezoned based on a mistake, it is reasonable to conclude that the same mistake that placed the adjacent property in the I-1 and I-3 Zones applies to the subject property. In addition, staff agrees that the rapid development of the Brandywine Crossing shopping center (some of which is now open for business) pursuant to those rezonings has substantially changed the character of the neighborhood to the

extent that this change in zoning is appropriate.

(Exhibit 11, p. 9)

(15) The Subdivision Section noted that the request would require approval of a preliminary plan of subdivision since Applicant intends to develop approximately 70,000 square feet of gross floor area. This Section opined as follows:

The property fronts on US 301 to the west, a designated freeway. Section 24-121 (a)(3) of the Subdivision Regulations requires that a lot fronting on an existing or planned right-of-way of arterial classification or higher shall be designed to front on either an interior street or a service road. At the time of review of the preliminary plan of subdivision, issues relating to access will be evaluated.

(Attachment to Exhibit 19, October 10, 2008 letter to Lockard from Dubicki)

(16) The Community Planning Section opined that the Zone does not fully implement the General Plan's goals for Community Centers because it is not a mixed use zone. However, it believed that the Application could be approved if a detailed site plan is required since that would ensure that the community center characteristics are imposed. (Attachment to Exhibit 19, November 20, 2008 letter from Irminger to Lockard)

### **LAW APPLICABLE**

(1) The C-S-C Zone is a conventional zone as defined in the Zoning Ordinance and must be approved in accordance with the strictures of Section 27-157(a). This provision of law generally holds that no application can be granted without the Applicant proving that there was a mistake in the original zoning or subsequent SMA or that there has been a substantial change in the character of the neighborhood. It provides, in pertinent part, as follows:

#### **Sec. 27-157. Map Amendment approval.**

##### **(a) Change/Mistake rule.**

(1) No application shall be granted without the applicant proving that either:

(A) There has been a substantial change in the character of the neighborhood; or

(B) Either:

(i) There was a mistake in the original zoning for property which has never been the subject of an adopted Sectional Map Amendment; or

(ii) There was a mistake in the current Sectional Map Amendment.

##### **(b) Conditional approval.**

(1) When it approves a Zoning Map Amendment, the District Council may impose reasonable requirements and safeguards (in the form of conditions) which the Council finds are necessary to either:

(A) Protect surrounding properties from adverse effects which might accrue from the Zoning Map Amendment; or

(B) Further enhance the coordinated, harmonious, and systematic development of the Regional District.

(2) In no case shall these conditions waive or lessen the requirements of, or prohibit uses allowed in, the approved 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 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 (in writing) the Council, accordingly. If the applicant accepts the conditions, the Council shall enter an order acknowledging the acceptance and approving the 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 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.

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(2) The Application must also meet the following purposes of the C-S-C Zone, found in Section 27-454(a)(1) of the Zoning Ordinance:

(1) The purposes of the C-S-C Zone are:

- (A) To provide locations for predominantly retail commercial shopping facilities;
- (B) To provide locations for compatible institutional, recreational, and service uses;
- (C) To exclude uses incompatible with general retail shopping centers and institutions;  
and
- (D) For the C-S-C Zone to take the place of the C-1, C-2, C-C, and C-G Zones.

### **Change or Mistake**

(3) There is a presumption of validity accorded comprehensive rezoning and the presumption is that at the time of its adoption the District Council considered all of the relevant facts and circumstances, then existing, concerning the land in question. Howard County v. Dorsey, 292 Md. 351, 438 A.2d 1339 (1982). *Strong* evidence of mistake and/or evidence of a *substantial* change in the character of the neighborhood is required to overcome the presumption. Pattey v. Board of County Commissioners for Worcester County, 271 Md. 352, 317 A. 2d 142 (1974); Clayman v. Prince George's County, 266 Md. 409 (1971)

(4) Mistake or error can be shown in one of two ways: (a) a showing that at the time of the comprehensive rezoning the District Council failed to take into account then existing facts or reasonably foreseeable projects or trends; or (b) a showing that events that have occurred since the comprehensive zoning have proven that the District Council's initial premises were incorrect. The mistake must have occurred in the rezoning and not in the Master Plan. Dorsey, supra.

(5) The zoning agency may review cumulative changes in the neighborhood since the prior rezoning when assessing whether a zoning amendment request should be granted. Town of Somerset v. County Council for Montgomery, 229 Md. 42, 181 A. 2d 671(1962); Montgomery County v. Greater Colesville Citizens Assn., 170 Md. App. 374, 521 A.2d 770 (1987). Some cumulative changes that may be indicative of substantial change in the character of the neighborhood are road upgrades, prior rezonings, new and modified infrastructures, and new development. Bowman Group v. Moser, 112 Md. App. 694, 686 A.2d 643 (1996); Pattey, *supra*. It is clear, however, that the change cannot be something anticipated at the time of the adoption of the SMA, and must occur in the immediate neighborhood and be of such a nature as to have affected its character.

### **Burden of Proof**

(6) The burden of proof in any zoning case shall be the Applicant's. (Prince George's County Code, Section 27-142(a)) Zoning cases are those matters designated to be heard before the Zoning Hearing Examiner by the Zoning Ordinance of Prince George's County. Section 27-107.01(a)(266). In an attempt to rezone its property, Applicant has the burden of proving that the request will not be a real detriment to the public. Bowman, *supra*. Finally, sufficient evidence to "permit" a rezoning does not "require" a rezoning unless an Applicant is denied all reasonable use of the property. Valenzia v. Zoning Board, 270 Md. 479, 484, 312 A.2d 277 (1973); Messenger v. Board of County Commissioners, 259 Md. 693, 271 A.2d 166, 171(1970).

### **CONCLUSIONS OF LAW**

(1) Applicant has met its burden of showing a change in the character of the neighborhood given the plethora of rezoning approvals that have been granted over the past few years which have replaced the industrial zoning with the L-A-C, E-I-A, R-M and C-S-C Zones. (Exhibit 35). Applicant has also met its burden in showing that a mistake occurred in 1993 when the District Council retained the industrial zoning of the site despite Staff's studies that indicated that industrial uses would fail to materialize and there would be an increasing need for retail uses.

(2) The request would also satisfy the purposes of the C-S-C Zone since it will provide a location for predominantly retail commercial shopping facilities. If detailed site plan approval is imposed as a condition of approval, the request will satisfy general purposes of the Zoning Ordinance by insuring that what is ultimately developed will be compatible with surrounding development.

### **RECOMMENDATION**

I recommend approval of A-10014, subject to the following conditions:

1. Prior to development of the site, the Applicant shall obtain approval of a

detailed site plan to address views from US 301, connections to adjoining development, and compatibility with the architecture and development standards of the Brandywine Crossing development.

2. The subject property shall not have direct driveway access to US 301/MD 5, unless the Planning Board expressly finds there to be good cause for such access at the time of subdivision review.