

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

**ZONING MAP AMENDMENT
A-10024
REMAND
DECISION**

Application:	R-80 to the C-S-C Zone
Applicant:	DD Land Holding, LLC/Fairview Commercial
Opposition:	Judith Dobbins, et. al.
Hearing Date:	August 28, 2013
Hearing Examiner:	Maurene Epps Webb
Recommendation:	Denial

NATURE OF REQUEST

(1) A-10024 is a request to rezone approximately 7.65 acres of R-80 (One-Family Detached Residential) zoned land to the C-S-C (Commercial Shopping Center) Zone. The property is located at the northwest quadrant of the intersection of Martin Luther King, Jr. Highway (MD 704) and Whitfield Chapel Road, identified as Parcel 109, Map 52, Grid C-3, Lanham, Maryland.

(2) The Applicant is alleging that there was a mistake in the adoption of the 1990 Sectional Map Amendment ("SMA") for Largo-Lottsford when the District Council rezoned the property to the R-80 Zone.

(3) The Technical Staff recommended disapproval of the Application. The Planning Board also recommended that the Application be denied. This Examiner issued a decision that also recommended disapproval.

(4) On June 14, 2013, the District Council issued an Order of Remand and requested that an additional hearing be held. The Order of Remand directed, in pertinent part, as follows:

The record should be reopened, and further testimony and evidence shall be taken to specifically address the access to and from the proposed rezoning site to Martin Luther King, Jr., Highway (MD 704), and specifically to take additional evidence and testimony from the Maryland State Highway Administration ("SHA") concerning its recommendation as to access to Martin Luther King, Jr., Highway from the site proposed for rezoning. The additional evidence should

be received and reviewed by the Examiner, who should then supplement her decision and re-file that decision with the District Council....

On remand, the record should be reopened, and further evidence and testimony taken by the Examiner, concerning outreach efforts by Applicant, including meetings and other discussions between Applicant and registered civic associations in the vicinity of the site that is the subject of Application No. A-10024, regarding the proposed tenants to locate at site if the property is rezoned from the R-80 Zone to the C-S-C Zone....

On remand, the Zoning Hearing Examiner should allow interested persons who are not parties of record to attend and give evidence and testimony at the hearing to become parties in the case.

(Exhibit R-3)

(5) Several individuals appeared in opposition at the remand hearing.

(6) At the close of the hearing, the record was left open to allow Applicant additional time to meet with those in opposition, and to allow others to submit requests to become persons of record. On July 10, 2014, this office received several requests from individuals to become persons of record. (Exhibits R-21(a)-(b)) Applicant submitted three letters on September 17, 2014, and the record was closed at that time. (Exhibits R-22(a)-(d))

(7) The record in the prior hearing is incorporated by reference and adopted herein.¹

FINDINGS OF FACT

Subject Property

(1) The subject property is approximately 7.65 acres in size, and irregularly-shaped. It is completely surrounded by dedicated public streets. Moreover, the entire property lies within the unmitigated 65dBA Ldn noise contour. (Exhibits 16(b) and 23)

(2) The site is undeveloped and primarily wooded. It has been the subject of three (3) preliminary plans of subdivision. The Technical Staff Report in the record of the original hearing includes an excellent synopsis of the prior zoning for the property. (Exhibit 15) The most recent plan of subdivision was for 12 lots and two (2) parcels subject to the approval of a detailed site plan to address noise and buffering issues.

Additional Evidence/Testimony Generated Upon Remand

(3) The Applicant seeks a rezoning for the subject property from the R-80 to the C-S-C

¹ Any reference to an Exhibit generated upon Remand will be preceded by an "R". Any reference to the transcript of the remand hearing will be preceded by "Rem".

Zone. If the request is granted Applicant intends to develop the site with “a neighborhood-oriented commercial development planned to contain approximately 35,000 square feet of retail uses, together with associated parking and landscaping.” (Exhibit 38, p. 4) Applicant alleges that the retention of the R-80 zoning of the property in the last comprehensive rezoning of the area constitutes a “mistake” under Section 27-157(a) of the Zoning Ordinance.

Applicant properly notes that case law has elucidated that mistake can be established by showing either the District Council failed to take into consideration then existing facts or failed to recognize reasonably foreseeable projects or trends; or that events occurring subsequent to the Master Plan have proven that the District Council's initial premises were incorrect.

(4) The issue of mistake was addressed at the initial hearing and was not an item to be revisited in the Remand Order issued by the District Council. However, Applicant did note that one of the properties that was to be developed commercially (Springdale Estates A-9775/01, also referred to as the Beall property) has since filed a rezoning request to delete all commercial and build townhouses. (Exhibit R-22(a)) This property, and the subject property, lie within the Enterprise Community, in Planning Area 73.

(5) Applicant's witness, Kenneth Schmid, accepted as an expert in the area of traffic engineering, prepared a limited traffic study that was submitted to the SHA for review. (Exhibit R9) After establishing existing traffic flows at the intersection of MD 704 and Whitfield Chapel Road, and the adjacent intersections along Whitfield Chapel Road, Mr. Schmid opined as follows:

Our professional opinion is that a [right-in/right-out access] can be provided to Maryland 704, and it will help internal traffic flow as well as external impacts to the adjacent road system

[F]rom an internal site standpoint, it helps balance the internal traffic flow. When you have a single access point on a corner piece of property like this, you then funnel all the traffic up to one area and one access point and it tends to create an unbalanced traffic flow for the internal site.

With the second access point, you provide ... an emergency access point that allows people to get out of the site if something happens to the main access point, as well as you better displace that traffic around the center. So, from an internal site standpoint, it benefits the internal site traffic flow and safety.

From an external standpoint, again, you allow people to make right-ins, which are simpler movements than left-ins. They yield to less traffic, and they're much safer and more expedient traffic movement.

So, by getting the right in off of [MD] 704, we eliminate left turns from Whitfield Chapel road into the site access. I think that's important to note that that really minimizes or helps minimize some of the impact to that Whitfield Chapel Road corridor.

The right-out also allows us again to keep traffic that's destined for [MD] 704 westbound to not have a drive out onto Whitfield Chapel Road ... So, it serves as a good way to split up our traffic on the adjacent road system as well....

(Rem. T. 27-29)

(6) Mr. Schmid also testified that existing traffic flow along Whitfield Chapel Road adjacent to the subject property is approximately "700 cars in the a.m. peak hour" and "in the evening it's a little over 1,000 vehicles an hour." (Rem. T. 54) If the instant request is approved there will be "about...90 traffic movements or 45 vehicles to come in and out in the morning peak hour" and "about 160 vehicles to come in and out in the p.m. peak hour." (Rem. T. 54) The witness noted that the Whitfield Chapel and MD 704 intersection would operate at level of service A or B if the request is approved.

(Rem. T. 55-57)

(7) The SHA had an additional opportunity to review the request. On August 22, 2013 it provided the following comment:

Based on the meeting and discussions, the SHA determined that a right-in only entrance along MD 704 could be acceptable subject [to the] design details in the Pre-Permit Engineering Plan Review Phase. The entrance should be placed as far west of Whitfield Chapel Road as possible in order to reduce any potential weaving issues. Changes to lane configurations or phasing along the southbound approach of Whitfield Chapel Road may be necessary in order to accommodate the entrance. Alternatives for this approach should be evaluated in the full Traffic Impact Study (TIS) for the development when it is submitted. In addition, the SHA could allow a right-out driveway from the site, provided that a full acceleration lane is constructed.

(Exhibit R-9(e))

Opposition Comment

(8) Many noted that there has been an increase in traffic and criminal activity in the area and believed approval of the request would exacerbate the problem. (Rem. T. 6, 12, 15, 18, 21) Others reiterated that there is no need for additional retail shopping in the area. (T. 17, 19, 60)

(9) Some opposed to the request who were unavailable at the 1st hearing, were allowed the opportunity to comment. This Examiner also allowed some follow up testimony from individuals who were present at the original hearing.

(10) There were some complaints that Applicant had never truly attempted to discuss the rezoning with them, or explain the planned development if the request were approved. Applicant countered that it met with various community stakeholders about the Application over the past 3 years. (Exhibits R. 12(a) – (g)) The record was left open, in part, to allow

Applicant the opportunity to again speak with any in the community that wished to hear more about its request. It submitted a letter that indicated that some meetings were held. (Exhibit R-21(a))

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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Change or Mistake

(2) 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)

(3) 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*.

(4) 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. (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, courts have generally held that sufficient evidence to "permit" a rezoning does not "require" a rezoning unless an Applicant is denied all reasonable use of the property:

The drawing of the line between zones is a function of the legislative body and the fact that the legislative body has rezoned an adjoining or nearby property does not require it to rezone the property under consideration....

Even if an applicant meets his burden of proving that there was a mistake in the original comprehensive zoning or that changes have occurred in the neighborhood causing a change in the character of the neighborhood, this merely *permits* the legislative body to grant the requested rezoning but does not *require* it to do so.

(Messenger v. Board of County Commissioners, 259 Md. 693, 703, 271 A.2d 166, 171(1970))

CONCLUSIONS OF LAW

(1) The surrounding area was primarily residential in nature at the time of the adoption of the SMA, and it remains so today. Applicant submitted some evidence that supports its belief that the District Council may have made a mistake when it retained the R-80 zoning of the subject property. However, at the original hearing, this Examiner found that Applicant had not shown that it will be denied all reasonable use of its property if the request is not granted, just that it would prefer to develop a commercial use on the site.

Impermissible Change of Mind

(2) It is a general tenet of law that an administrative body is precluded from changing its position on a case absent a substantial change in facts or law since “it is well settled that a mere change of mind is not an adequate or valid reason for reversing a previous finding.” Gaywood Community Ass’n v. Metropolitan Transit Authority, 246 Md. 93, 99 (1967). See, *also*, Hamza Halici v. City of Gaithersburg, 180 Md. App. 238 (2008). This Examiner did have reservations about the Application based on traffic concerns. These reservations have dissipated since the SHA has indicated that Applicant will be allowed limited access to the site from MD 704, and will be required to provide an access lane. However, I have not heard additional testimony on mistake in the last comprehensive rezoning that would be sufficient for me to change my prior decision. (The rezoning request filed by Springdale Estates (the former Beall property) may be of relevance if granted, but it has not yet been heard by the District Council). No other relevant evidence on the issue of mistake was presented at the remand hearing that would authorize this Examiner to change her prior recommendation. Accordingly, I cannot find sufficient evidence of change in the character of the neighborhood nor mistake in the adoption of the prior comprehensive rezoning to justify approval of the instant request.

RECOMMENDATION

I recommend denial of A-10024.