

**Action**

May 8, 2009

**MEMORANDUM**

TO: County Council

FROM: Jeffrey L. Zyontz,  Legislative Attorney

SUBJECT: Action – Resolution regarding request for waiver of filing fees – Dr. Benesh requests a partial waiver of filing fees for a new zoning application on a 16,522 square foot property in Germantown

**Background**

On March 12, 2009 the Council received a request for a partial waiver of filing fees from Dr. Benesh's representatives. Dr. Benesh has a special exception to operate his non-resident medical practitioner's office. He intends to apply for the C-T zone on 16,552 square feet of property in Germantown. He also intends to file a schematic development plan with the application to limit the allowable density to the property's current density. The property is currently zoned RT-6. Dr. Benesh is requesting a partial waiver of fees because:

- 1) the last sectional map amendment mistakenly classified the property in the RT-6 zone instead of the R-200; therefore, this application removes the Planning Department's burden of filing a corrective map amendment; and
- 2) the application will not provide any opportunity to expand or redevelop the site because of the proposed limits in the schematic development plan that the owner intends to file with the application.

The established fees would require a payment of \$9,850 in the absence of a waiver. The request is to waive \$6,600 in fees. That amount is equal to the fee for the local map amendment; a waiver of the \$3,250 schematic development plan fee was not requested. As an alternative to waiving the local map amendment fee, Dr. Benesh requested a \$650 fee for the local map amendment. That fee is equal to the lowest fee for any local map amendment under 1 acre in size.

## Authority

The Council established fees for applications for local zoning map amendments and development plan amendments under Section 59-H-2.32. The Zoning Ordinance also allows the Council to waive those fees for good cause.<sup>1</sup>

## Prior Fee Waivers

This is the first applicant to ask this Council to approve a request for a fee waiver.<sup>2</sup> The Council's most recent experience with a similar request was on June 11, 1996.<sup>3</sup> In that case, the applicant requested a waiver of all filing fees as the contract purchaser of Montgomery County owned land. The Council allowed a partial waiver of fees, based on staff's representation that the established fees would exceed the cost of processing the application.

On April 2, 1996 the Council approved a full waiver of fees for an application that deleted 3.5 acres from a development plan.<sup>4</sup> The area of a pending local map amendment was identical with the revised area of the development plan. The Hearing Examiner and Planning Board staff recommended the revision. The Council determined that the staff time required to process the development plan amendment would not add to the time required to process the companion local map amendment.

The Council approved 2 other waivers between October 17, 1995 and March 12, 1996. Both cases involved applications for tracts of land that were the subjects of previously filed applications.<sup>5</sup> The Council did not make applicants pay twice for work already completed in either of these instances.

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<sup>1</sup> Section 59-H-2.32. Amount of fee:

The district council is hereby authorized to establish by resolution differential filing fees for applications for amendments to the zoning ordinance map. Such fees may be amended by the council from time to time. Such fees shall be based on the costs of processing a zoning application. No such resolution to establish or amend the filing fees shall be adopted except following a public hearing on reasonable notice. No filing fee shall be required in connection with applications filed by the district council or other governmental agencies except where such application is filed at the request of a person with a financial, contractual or proprietary interest in the property, in which event such person shall pay the fees as provided by resolution; provided, that the council may in its discretion, for good cause shown, waive such fee. Except as provided in subsection 59-H-2.33, no such fee shall be refunded unless the application is withdrawn prior to the time it is ordered advertised for hearing.

Rule 1.4, of the Rules of Procedure for Applications for Local Map Amendments and Petitions for Special Exceptions Approved by the District Council, Resolution number 13-414, January 30, 1996 states, "The District Council may waive a filing fee when it determines that a waiver is in the public interest." This rule does not supersede the Ordinance.

<sup>2</sup> "A conservative believes nothing should be done for the first time." Thomas Fuller.

<sup>3</sup> Resolution 13-557.

<sup>4</sup> Resolution 13-483.

<sup>5</sup> Resolution 13-465, March 12, 1996 allowed a partial waiver of fees for an application to expand an area of CT zoning in an area where CT zoning was previously granted; Resolution 13-303, October 17, 1995 allowed a waiver of fees to file a development plan amendment that superseded a previously filed development plan amendment.

## Staff Comments

Planning staff confirmed the applicant's claim that the last sectional map amendment mistakenly put the property in the RT-6 zone. The sectional map amendment should have zoned the property R-200. The applicant is entitled to ask the Planning Board to undertake a corrective map amendment to make that change at the County's expense. A full waiver would be justified if the local map amendment application proposed the R-200 zone. Under those circumstances, the local map amendment would save the County the staff costs to prepare, file, and process a corrective map amendment. The proposed application is to rezone the property CT; it is not to rezone the property R-200. Planning Staff does not believe that the mistake in the sectional map amendment is a justification for a partial waiver of fees for a CT zoning application.

Schematic development plans can make a zone more acceptable to the Council. It binds the property to development standards below the maximums allowed by the zone. The applicant's request for a partial fee waiver stipulates that the proposed application will not provide any opportunity to expand or redevelop the site. Neither the Hearing Examiner nor the Planning Staff believe that the development limits in the schematic development plan will reduce the staff time to review the application.

Staff recommends denying the request for a partial waiver of fees by approving the attached resolution.

<u>This packet contains:</u>	<u>Circle number</u>
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Resolution #13-465	8
Resolution #13-303	9

**LINOWES**  
**AND BLOCHER LLP**  
ATTORNEYS AT LAW

March 10, 2009

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The Honorable Phil Andrews  
President, Montgomery County Council  
100 Maryland Avenue, 6<sup>th</sup> Floor  
Rockville, Maryland 20850

Re: 19330 Liberty Mill Road, Germantown (the "Property"), Request for Partial Waiver of Filing Fee for Local Map Amendment ("LMA") Application

Dear Council President Andrews and Members of the County Council:

On behalf of Dr. Curt Benesh, the owner of the above-referenced Property, we respectfully request a partial waiver of the LMA application fee pursuant to Section 59-H-2.32 of the Montgomery County Code (the "Zoning Ordinance"). We recently discovered that the Property was inadvertently reclassified from the R-200 single-family residential zone to the RT-6 townhouse zone. Instead of requesting the Planning Board to seek a Corrective Map Amendment to reclassify the Property back to the R-200 zone, Dr. Benesh would like to use this opportunity to submit an LMA application to reclassify the Property to the C-T (commercial transition) zone. Therefore, if the County Council, sitting as the District Council (the "Council") were to approve the LMA application for the C-T zone on the Property, the need for a Corrective Map Amendment would be eliminated. As way of explanation, but without a premature discussion of the merits of the proposed LMA application, Dr. Benesh seeks the C-T zone to provide more future flexibility with his current dentist office operations on the Property. However, the proposed LMA application will not propose any site or use changes, expansion or redevelopment on the Property. As such, we have committed to the Planning Board staff and community representatives to seek a Schematic Development Plan ("SDP") with the LMA application to the C-T zone to confirm a limitation of the type and manner of development on the Property (the C-T zone additionally has a Site Plan requirement, which will require amendments with future site changes). In consideration of these unique circumstances, we respectfully request that the Council approve a partial waiver of \$6,600 of the filing fee for the LMA application for the C-T zone, and permit Dr. Benesh to submit the LMA application with only the \$3,250 fee for the SDP portion of the LMA application fee and the sign fee. Since Dr. Benesh's LMA will replace the need for County staff resources for a Corrective Map Amendment to reclassify the property back to the R-200 zone and includes a commitment to maintain the current status of the site, there is good cause for the fee waiver in accordance with Section 59-H-2.32 of the Zoning Ordinance.

The Honorable Phil Andrews  
March 10, 2009  
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Dr. Benesh currently owns and operates a non-resident dental office use in a residential structure on the 16,552 square foot Property, which use was originally approved by the Board of Appeals in 1980 and modified in 1985 (Special Exception No. S-728A, the "Special Exception"). The Special Exception and the 1989 Germantown Master Plan both indicate the Property is in the R-200 zone. However, the current Zoning Map for Montgomery County indicates that the Property is classified in the RT-6 zone. Based on the records of LMA Case No. G-811 for the Liberty Townhomes project on the adjacent property that was approved pursuant to Council Resolution No. 15-464 on January 13, 2004 ("Liberty Townhomes"), our assumption is that the Property was inadvertently reclassified to the RT-6 zone with the rezoning of the Liberty Townhomes property. The documents in the record for Liberty Townhomes state that "the surrounding area north of the subject [Liberty Townhomes] property is entirely in a commercial use, although the dental office is located on property classified in the R-200 zone" and include a Zoning Map from 2004 demonstrating the R-200 zoning classification of the Property. Although the RT-6 zoning classification permits Dr. Benesh's non-resident medical practitioner's office use by special exception, the RT-6 zoning classification was incorrectly enacted without an LMA application or through a Master Plan recommendation, and as such it should be corrected. However, instead of requesting that the Planning Board initiate a Corrective Map Amendment to reclassify the Property back to the R-200 zone, Dr. Benesh would like to save the Planning Board and County a step and submit the LMA application for the C-T zone, wherein the dentist office use is permitted by right. Again, without expanding on the Master Plan recommendations or the merits of the C-T zone for this Property, we are hopeful that the proposed LMA application will not be contentious as Dr. Benesh is committed to include an SDP to maintain the current site conditions and restrict the type and manner of future development on the Property (and the C-T zone includes a Site Plan requirement).

For the reasons and good cause set forth above, we respectfully request this partial waiver of \$6,600 of the LMA application filing fee for this matter. (In the alternative, we would request that the Council waive \$5,950 of the LMA application fee, representing a LMA application fee of \$650, which is the lowest fee applicable for LMA applications for properties that are 1-acre or less, and which would be more appropriate than \$6,600 in this circumstance given the elimination of a Corrective Map Amendment process.) However, Dr. Benesh does propose to submit the SDP fee of \$3,250 (and sign fee) in acknowledgement of the additional time and resources of the Office of Zoning and Administrative Hearings necessary for an LMA application that are not necessary for a Corrective Map Amendment. Without getting into the substantive details of the proposed LMA to reclassify the Property to the C-T zone, we will note that procedurally, the Planning Board Staff have expressed support and encouraged the LMA request in lieu of a Corrective Map Amendment, particularly based on the agreement to restrict future development through a SDP and because no new development is proposed.

The Honorable Phil Andrews  
March 10, 2009  
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Thank you for your consideration of our request.

Very truly yours,

LINOWES AND BLOCHER LLP

  
Anne C. Martin

  
Debra S. Borden

cc: Françoise M. Carrier, Esq.  
Jeffrey Zyontz, Esq.  
Mr. Ralph Wilson  
Ms. Sue Edwards  
Dr. Curt Benesh

Resolution No.: \_\_\_\_\_  
Introduced: May 5, 2009  
Adopted: \_\_\_\_\_

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND  
SITTING AS A DISTRICT COUNCIL FOR THAT PORTION  
OF THE MARYLAND-WASHINGTON REGIONAL DISTRICT  
WITHIN MONTGOMERY COUNTY, MARYLAND

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By: District Council

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Subject: Request for Waiver of Filing Fee – Dr. Benesh requests a partial waiver of filing fees for a new zoning application on a 16,552 square foot property in Germantown

Background

1. On March 10, 2009 the applicant submitted a request for a partial waiver of filing fees for a local map amendment for CT zoning that he intends to file. The property is currently zoned RT-6.
2. Dr. Benesh requested a partial waiver of fees because:
  - a) the last sectional map amendment mistakenly classified the property in the RT-6 zone instead of the R-200; therefore, the application would remove the Planning Department's burden of filing a corrective map amendment; and
  - b) the application will not provide any opportunity to expand or redevelop the site because of the proposed limits in the schematic development plan that the owner intends to file with the application.
3. Under Section 59-H.2.32, the Council has the discretion to waive local map amendment fees for good cause.
4. The Hearing Examiner and the Planning Department Staff did not recommend approval of the waiver requested.
5. On May 12, 2009 the District Council reviewed the request for a partial waiver of filing fees.

Action

The County Council for Montgomery County, Maryland, sitting as the District Council for that portion of the Maryland-Washington Regional District in Montgomery County, Maryland approves the following resolution:

The request to waive the filing fees for the proposed local map amendment for a 16,552 square foot parcel in Germantown is denied.

This is a correct copy of Council action.

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Linda M. Lauer, Clerk of the Council

Resolution No.: 13-557  
Introduced: June 11, 1996  
Adopted: June 11, 1996

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND  
SITTING AS A DISTRICT COUNCIL FOR THAT PORTION  
OF THE MARYLAND-WASHINGTON REGIONAL DISTRICT  
IN MONTGOMERY COUNTY

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By: County Council

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Subject: Request to Waive Filing Fee

Background

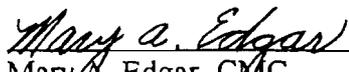
1. On April 24, 1996, the Applicant submitted a letter citing unique circumstances in support of a request for waiver of the filing fee for Zoning Application G-729 for the O-M Zone filed under the Optional Method of Application. The subject property covers approximately 24,692 square feet of land known as Parcel P820, located at the northeast quadrant of the intersection of Democracy Boulevard and Rockledge Drive, Bethesda, in the 4th Election District.
2. The Applicant is a contract purchaser of the property owned by Montgomery County and declared to be surplus. The contract between the Applicant and the County is contingent upon rezoning of the property to the O-M Zone. The purchase price will be \$410,000.
3. After considering the Applicant's request, the District Council determines under the provisions of Rule 1.4 of the Rules of Procedure that a partial waiver of filing fee would be in the public interest.
4. On June 11, 1996, the District Council reviewed the request to waive the filing fee.

Action

For these reasons, the County Council for Montgomery County, Maryland, sitting as the District Council for that portion of the Maryland-Washington Regional District in Montgomery County, Maryland, approves the following resolution:

The request to waive the filing fee for Zoning Application G-729 pertaining to 24,692 square feet of land known as Parcel P820, located at the northeast quadrant of the intersection of Democracy Boulevard and Rockledge Drive, Bethesda, in the 4th Election District, is granted in part in the amount of \$2,000.

This is a correct copy of Council action.

  
Mary A. Edgar, CMC  
Acting Secretary of the Council

(6)

Resolution No.: 13-483  
Introduced: April 2, 1996  
Adopted: April 2, 1996

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND  
SITTING AS A DISTRICT COUNCIL FOR THAT PORTION  
OF THE MARYLAND-WASHINGTON REGIONAL DISTRICT  
IN MONTGOMERY COUNTY

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By: County Council

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Subject: Request for Waiver of Filing Fees for Development Plan Amendment (DPA)

Background

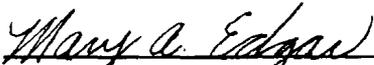
1. On March 22, 1996, the Applicant submitted a letter citing unique circumstances in support of a request for a waiver of filing fees for DPA 96-3. The DPA proposes an adjustment to the boundaries of the PD-9 Zone to coincide with pending local map amendment No. G-722, which proposes to replace the PD-9 Zone with the RT-12.5 Zone on 3.5 acres known as Parcel 3A, Block "B", Fair Hill Farm Subdivision, located at 3031 Spartan Road, at the intersection of Spartan Road and Appomattox Avenue, Olney, in the 8th Election District.
2. After considering the Applicant's statement that the DPA will not involve additional hearings or staff time already expended on a companion case, Local Map Amendment G-722, the District Council determines under provisions of Rule 1.4 of the Rules of Procedure that a full waiver of filing fees in the amount of \$3,000 is in the public interest.
4. On April 2, 1996, the District Council reviewed the request to grant a waiver of the filing fee.

Action

For these reasons, the County Council for Montgomery County, Maryland, sitting as the District Council for that portion of the Maryland-Washington Regional District in Montgomery County, Maryland, approves the following resolution:

The request to waive the filing fee for Development Plan Amendment 96-3, which involves 3.5 acres known as Parcel 3A, Block "B", Fair Hill Farm Subdivision, located at 3031 Spartan Road, at the intersection of Spartan Road and Appomattox Avenue, Olney, in the 8th Election District, is approved.

This is a correct copy of Council action.



Mary A. Edgar, CMC  
Acting Secretary of the Council

Resolution No.: 13-465  
Introduced: March 12, 1996  
Adopted: March 12, 1996

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND  
SITTING AS A DISTRICT COUNCIL FOR THAT PORTION  
OF THE MARYLAND-WASHINGTON REGIONAL DISTRICT  
IN MONTGOMERY COUNTY

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By: County Council

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Subject: Request for a Filing Fee Refund and Waiver of Filing Fees for a new application

Background

1. On July 21, 1995, the Applicant submitted a letter citing unique circumstances in support of a request for a filing fee refund and a waiver of filing fees for two adjacent parcels. The refund involves \$2,000 paid with Application G-659 which obtained C-T zoning for 8,593 square feet known as Parcel P213, Chestnut Ridge, located at 19323 Darnestown/Germantown Road (Route 118), Germantown, in the 9th Election District. The waiver involves 9,354 square feet known as Parcel P212 which is located adjacent to Parcel P213. The normal C-T Zone filing fee for a property of this size is \$4,000.
2. The District Council determines that the request for any refund for Application G-659 is unjustified at this time and the request is denied.
3. After considering the Applicant's statement of hardship connected with Parcel P212, the District Council determines under provisions of Rule 1.4 of the Rules of Procedure that a partial waiver of filing fees in the amount of \$2,000 is in the public interest.
4. On March 12, 1996, the District Council reviewed the request to grant a waiver of the filing fee.

Action

For these reasons, the County Council for Montgomery County, Maryland, sitting as the District Council for that portion of the Maryland-Washington Regional District in Montgomery County, Maryland, approves the following resolution:

The request to waive the filing fee for a new C-T zoning application pertaining to 9,354 square feet known as Parcel P212, Chestnut Ridge, adjacent to Darnestown/Germantown Road (Route 118), Germantown, in the 9th Election District, is granted in part in the amount of \$2,000. The request for a filing fee refund for Application G-659 is denied.

This is a correct copy of Council action.

  
Mary A. Edgar, CMC  
Acting Secretary of the Council

(8)

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND  
SITTING AS A DISTRICT COUNCIL FOR THAT PORTION  
OF THE MARYLAND-WASHINGTON REGIONAL DISTRICT  
IN MONTGOMERY COUNTY

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By: County Council

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Subject: Request to Waive Filing Fee for Development Plan Amendment (DPA) 96-1

Background

1. On September 25, 1995, the Council received a letter citing unique circumstances in support of a request to waive the filing fee for a revised DPA involving 10.27 acres which includes property of DPA 95-2, located at the intersection of Waters Landing Drive and Father Hurley Boulevard, Germantown, in the 2nd Election District.
2. The applicant filed a pending DPA 95-2, for which a filing fee of \$3,000 was paid. The new application is intended to replace DPA 95-2 with a new and larger site configuration which also requires a \$3,000 filing fee. Since the costs of evaluating and processing the new application will be covered by the DPA 95-2 filing fee, the applicant contends that a waiver of the second fee is justified.
3. The District Council's Rules of Procedure provide that filing fees may be waived when such waiver is determined to be in the public interest.
4. On October 17, 1995, the District Council reviewed the request to waive the filing fee.

Action

For these reasons, the County Council for Montgomery County, Maryland, sitting as the District Council for that portion of the Maryland-Washington Regional District in Montgomery County, Maryland, approves the following resolution:

The request to waive the filing fee for a revised DPA 96-1, filed September 25, 1995, containing 10.27 acres located at the intersection of Waters Landing Drive and Father Hurley Boulevard, Germantown, in the 2nd Election District, is granted in the amount of \$3,000.

This is a correct copy of Council action.

  
Kathleen A. Freedman, CMC  
Secretary to the Council