

Action

MEMORANDUM

June 5, 2009

TO: County Council
FROM: Jeffrey L. Zyontz,  Legislative Attorney
SUBJECT: Action – Schematic Development Plan Amendment 09-2

Under §59-D-1.74(c)(3), the Hearing Examiner must forward the Planning Board's report and recommendation directly to Council if there is no opposition and no one requested a hearing. There was no opposition to SDPA 09-2 and no one requested a hearing.

The Hearing Examiner forwarded the SDPA 09-2 as required on April 15, 2009. The sole contested issue is whether the Council's resolution of approval is sufficient notice to Park and Planning staff and anyone else reviewing the record or if, in addition to the resolution, the amendment should also be printed on the SDPA as a non-binding site note. The Planning Board recommended documenting the amendment solely by the Council's resolution. The Hearing Examiner believed that a non-binding site note would be preferable.

After the Hearing Examiner submitted his memorandum, the applicant's representative submitted a request to open the record to address the process to document the approval of the SDPA. In the Hearing Examiner's opinion, he lacked the jurisdiction to reopen the record, as the issue was before the Council. Neither the Hearing Examiner nor the applicant's representative objected to including the applicant's request as an attachment to this memorandum. The request speaks to the process for putting a non-binding note on the SDPA.

The Hearing Examiner presented 2 options for the Council. Alternative "A" is a resolution approving the SDPA consistent with the recommendations of the Planning Board and the desires of the applicant. Alternative "B" would remand the SDPA back to the Planning Board. The remand would allow the addition of a non-binding note. If the Council believes that a remand is in order, staff recommends deleting the requirement to notice the SDPA again and the requirement for the Planning Board and Planning Staff to reconsider the SDPA (items b. and c. in the action section of alternative "B").

LINOWES
AND BLOCHER LLP
ATTORNEYS AT LAW

May 8, 2009

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Hearing Examiner
Office of Zoning & Administrative Hearings
100 Maryland Avenue, Room 200
Rockville, Maryland 20850

Jeff Zyontz, Esquire
Legislative Attorney
Montgomery County, Maryland
100 Maryland Avenue
Rockville, Maryland 20850

Re: Mainhart Property, Gaithersburg; Schematic Development Plan Amendment No. 09-2 (the "SDPA")

Dear Messrs. Grossman and Zyontz:

On behalf of Magruder Reed at Woodward Hall, LLC (the "Applicant"), we respectfully request to open the record for the limited purpose of accepting this clarification correspondence to address the comments raised in the Hearing Examiner's Memorandum to the Council dated April 15, 2009 (the "Memorandum"). In consideration of the "Alternative B" proposed in the Memorandum, we wanted to clarify that the references in our April 10, 2009 correspondence regarding the Applicant's submission of October 24, 2008, the Hearing Examiner's notice of November 24, 2008, the meetings with the interested neighbors, and the Planning Board's review and recommendation of approval of the SDPA as submitted were referenced only to reassure and remind the Hearing Examiner that all of the parties had notice and were aware of the SDPA to delete Binding Element No. 5, with the Commitments to be Implemented at Site Plan referenced only in the Council Resolution. Since the neighbors have requested that the Applicant seek some alternatives to address some of the concerns in the site design effort (e.g. parking restrictions), we wanted to avoid the unnecessary last minute addition of the Commitments to be Implemented at Site Plan to the SDPA creating any potential confusion and limitations on flexibility to address them.

We wanted clarify these statements since the Memorandum proposes two alternative Resolutions for the County Council, sitting as the District Council. The proposed "Alternative B" Resolution requires the change to add the "Commitments to be Implemented at Site Plan" to the Amended SDP as well as the Council Resolution, and requires the issuance of new notices

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Martin L. Grossman, Esquire
Jeff Zyontz, Esquire
May 8, 2009
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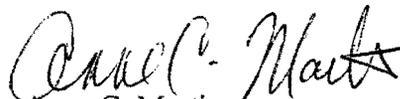
and additional Planning Board review and comment. These additional notice and comment suggestions were based on the mistaken impression that the Applicant considered these steps necessary. We apologize for any confusion and would like to clarify that the Applicant does not feel that issuances of new notices and additional Planning Board review is necessary. In fact, such process could ultimately create the confusion we intended to avoid. Therefore, we respectfully request that if the Council is inclined to adopt the proposed "Alternative B" Resolution, that the current steps b. and c. proposed be deleted.

For additional reassurances, we note that submission of a Council Resolution for an SDPA is a Site Plan application requirement. Further, for all practical purposes, the proposed Commitments to be Implemented at Site Plan for the instant SDPA have already been addressed as part of the ongoing Site Plan review for this development.

Thank you for your assistance in this matter and consideration of our request to re-open the record to clarify this item. Please feel free to contact me if you have any questions.

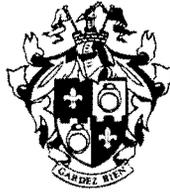
Very truly yours,

LINOWES AND BLOCHER LLP


Anne C. Martin

cc: Martin Klauber, Esq.
Mr. Richard Ratliff
Ms. Sandra Pereira
Mr. Walter H. Magruder
Mr. William Magruder





MONTGOMERY COUNTY, MARYLAND

MEMORANDUM

April 15, 2009

TO: County Council

FROM: Martin L. Grossman 
Hearing Examiner

SUBJECT: Schematic Development Plan Amendment (SDPA) 09-2

The application for Schematic Development Plan Amendment (“SDPA”) No. 09-2 was filed on November 24, 2008. The Applicant, Magruder Reed at Woodward Hall, LLC, seeks to amend the approved Schematic Development Plan (SDP) applicable to 3.28 acres of land located in the northwestern quadrant of the intersection of Washington Grove Lane and Mid-County Highway. The property’s address is 17720 Washington Grove Lane, Gaithersburg, Maryland. The amendment sought is solely to delete one of the binding elements (Binding Element #5) from the SDP and from the Declaration of Covenants.

The property was reclassified to the RT-10 Zone in Local Map Amendment (“LMA”) G-840, in accordance with Resolution No. 15-1586 approved by the District Council on August 1, 2006. The approved SDP for the property anticipates a maximum density of 9.8 DUs/acre and a maximum of 32 townhomes, including 12.5% (*i.e.*, 4) Moderately Priced Dwelling Units (MPDUs).

As part of the zoning application and SDP approval, the Applicant committed to several binding elements addressing density, building coverage, green area, tree protection, noise protection and obligations for the Applicant to minimize potential adverse impacts upon adjacent single-family homes located on Woodward's Store Road. The approved binding elements are included on the final SDP and in the Declaration of Covenants recorded in the Land Records of Montgomery County on February 28, 2007. Exhibit 10.

These binding elements had been included in the SDP by the Applicant, following negotiations with the neighbors and the People's Counsel. However, during Site Plan review, Technical Staff of the Maryland-National Capital Park and Planning Commission, expressed concern that Binding Element #5 might unduly restrict the Planning Board's flexibility in site design. Specifically, it would limit both vehicular and pedestrian connections between the site and Woodward's Store Road in a way that would result in what Staff characterized as "an awkward configuration." Exhibit 20, p. 3.

After attempting several piecemeal revisions to the site plan to address site design and compatibility concerns, the Applicant drafted a new site design which is inconsistent with Binding Element #5. Applicant therefore proposed the subject SDPA (Exhibit 9), which would remove Binding Element #5 from the schematic development plan, as shown in highlights on the original SDP (Exhibit 8).

Technical Staff, by memorandum dated March 17, 2009, recommended approval of SDPA 09-2, and concluded: "Deleting Binding Element # 5 will . . . provide greater flexibility for optimal site design to be achieved during site plan review; . . . [will r]esolv[e] any ambiguity as to the Planning Board's authority under Binding Element No. 5 [; and] will provide a more effective site plan review process." Staff also noted that Applicant's newly "proposed commitments to be implemented at site plan will help to alleviate the community concerns regarding specific site design impacts to Woodward's Store Road." Exhibit 20, p. 4.

Technical Staff elaborated on why it found the new design to be preferable to earlier designs limited by Binding Element #5 (Exhibit 20, p. 4):

The revised site design includes a loop road in the townhome development and an orientation of the townhomes away from Woodward's Store Road, which eliminates the awkward relationship between the internal street in the project and Woodward's Store Road and provides an improved orientation of the townhomes within the development and frontage on Washington Grove Road. Further, the revised site design reorients the townhomes on the western side of the property inward and creates a larger and enhanced buffer area between the townhomes and Woodward's Store Road, thus eliminating the need for fencing or restrictions on pedestrian connections.

The applicant reviewed the revised site design with staff, and staff agreed it provided the optimal site design solution to address compatibility concerns as well as address the zoning standards and most of the binding elements.

According to the Technical Staff Report (Exhibit 20, p. 4), the Applicant's new design also was positively received by the neighbors and the People's Counsel, who agreed that a fence and a prohibition against a pedestrian connection (*i.e.*, items required by Binding Element #5) were not necessary given the compatible layout and buffer treatment of the revised site design. They are reportedly willing to have Binding Element #5 removed in order to allow the new design to be used.

Currently, Binding Element #5 provides:

Applicant will meet with the property owners on Woodward's Store Road and the Peoples Counsel as a group to develop a Landscape Plan prior to filing a Site Plan submission for the development. The proposed Landscape Plan will include a fence to eliminate pedestrian cross traffic between the development and Woodward's Store Road and the southern property line.

In lieu of Binding Element #5, Applicant proposes to make the following commitment which would be included in the Council's resolution approving the SDPA, but would not appear on the SDPA itself:

1. *Subject to Planning Board review at the time of Site Plan, the site plan will reflect that:*
 - a. *the townhomes will be oriented away from Woodward's Store Road;*
 - and*
 - b. *landscape and screening improvements will be added to provide an appropriate buffer between the project and the single-family neighbors on Woodward's Store Road.*
2. *Applicant will coordinate with the adjacent neighbors on Woodward's Store Road before and during the site plan review process to review the project and to collaborate regarding the landscape plan, and*
3. *Applicant will pursue with the Department of Transportation (DOT) the feasibility of installing no parking signs along the Woodward's Store Road right-of-way to deter future residents and guests of the project from parking off-site.*

The Montgomery County Planning Board reviewed SDPA 09-2 at its regular meeting on April 2, 2009 and, by unanimous vote, approved the proposed SDPA and the plan to place Applicant's new commitment in the resolution to be signed by the District Council. Exhibit 21. On April 9, 2009, Technical Staff provided a copy of the Planning Board Transcript (Exhibit 24), and on April 10, 2009, Applicant supplemented the record with an executed copy of the proposed covenants and copies of notices sent regarding the SDPA (Exhibit 25).

There is no opposition to SDPA 09-2, and no request has been made for a hearing. The Planning Board also does not recommend a public hearing in this case. Therefore, under the provisions of Zoning Ordinance §59-D-1.74(c)(3), “the office of zoning and administrative hearings [OZAH] must forward the planning board’s report and recommendation directly to the council,” without a hearing by OZAH. Usually, in these cases, a draft resolution is prepared by OZAH based solely on the Planning Board’s transmittal and the record prepared by Technical Staff, including its report.

There is no issue on the substance of this proposal; however, there is a procedural issue raised by the Hearing Examiner – whether Applicant’s new commitment should be printed on the proposed SDPA as a non-binding “Site Note” (i.e., not a Binding Element), or just be included in the resolution to be signed by the District Council.

The Hearing Examiner suggested to Staff and Applicant’s counsel that it would be preferable to include the commitment language in the SDPA, not just in the Council Resolution, because planners do not always have the Resolution before them when examining a plan. Exhibits 22 and 23. Since Applicant’s counsel assures us that the above commitment reflects Applicant’s intended plan, the Hearing Examiner feels that it is a better practice for Applicant’s formal plans to reflect Applicant’s intended plans.

Applicant’s counsel refuses to do so because the formal notice did not mention the proposed commitment; Technical Staff and the Planning Board have already reviewed the matter and agreed to including the proposed language in the Council Resolution; and there is precedent for using a Council Resolution to accomplish this sort of change. Exhibit 25.

The Hearing Examiner suggested, in light of these arguments, that Applicant file an alternative SDPA with the proposed language, so that the Council could decide which, if any, SDPA to approve (Exhibit 23), but Applicant’s counsel has also refused to do that. Exhibit 25.

The Hearing Examiner therefore now presents a set of alternative draft resolutions to the Council. Resolution Alternative “A” would approve the SDPA as proposed by Applicant, in the event the Council feels that a revision to the SDPA, as suggested by the Hearing Examiner, is unnecessary. Resolution Alternative “B” would send this matter back to the Planning Board with instructions that Applicant is to provide a revised SDPA with the commitment language italicized on the previous page of this memorandum included as a non-binding Site Note; that new notice should be issued to satisfy Applicant’s concern in that regard; and that the Planning Board and its

Staff should be given another opportunity to review the matter to alleviate Applicant's concern in that respect.

The Hearing Examiner is not persuaded by Applicant's argument that there is some precedent for the process it is suggesting. The fact that the Council, on a prior occasion five years ago,¹ may have approved a different applicant's commitment in a Council resolution, without the commitment being reflected in a site note on the SDP, does not mean that that is the better practice. The Hearing Examiner is not suggesting that the Council resolution in this case should be silent regarding Applicant's new commitment; rather that it should appear in both places, the SDPA and the resolution, so that the likelihood of it being observed and followed by future planners is enhanced.

Alternative draft Resolutions "A" and "B" are attached hereto.

MLG

¹ Applicant cites the case of LMA G-817, approved in Council Resolution 15-788 on October 12, 2004.

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

By: District Council

Subject: Approval of Schematic Development Plan Amendment (SDPA) 09-2

BACKGROUND

1. Schematic Development Plan Amendment ("SDPA") No. 09-2 was filed on November 24, 2008. The Applicant, Magruder Reed at Woodward Hall, LLC, seeks to amend the approved Schematic Development Plan (SDP) applicable to 3.28 acres of land located in the northwestern quadrant of the intersection of Washington Grove Lane and Mid-County Highway. The property's address is 17720 Washington Grove Lane, Gaithersburg, Maryland. The amendment sought is solely to delete one of the binding elements (Binding Element #5) from the SDP and from the Declaration of Covenants.
2. The property was reclassified to the RT-10 Zone in Local Map Amendment ("LMA") G-840, in accordance with Resolution No. 15-1586 approved by the District Council on August 1, 2006. The approved SDP for the property anticipates a maximum density of 9.8 DUs/acre and a maximum of 32 townhomes, including 12.5% (*i.e.*, 4) Moderately Priced Dwelling Units (MPDUs).
3. As part of the zoning application and SDP approval, the Applicant committed to several binding elements addressing density, building coverage, green area, tree protection, noise protection and obligations for the Applicant to minimize potential adverse impacts upon adjacent single-family homes located on Woodward's Store Road. The approved binding elements are included on the final SDP and in the Declaration of Covenants recorded in the Land Records of Montgomery County on February 28, 2007. Exhibit 10.

4. These binding elements had been included in the SDP by the Applicant, following negotiations with the neighbors and the People's Counsel. However, during Site Plan review, Technical Staff of the Maryland-National Capital Park and Planning Commission, expressed concern that Binding Element #5 might unduly restrict the Planning Board's flexibility in site design. Specifically, it would limit both vehicular and pedestrian connections between the site and Woodward's Store Road in a way that would result in what Staff characterized as "an awkward configuration." Exhibit 20, p. 3.
5. After attempting several piecemeal revisions to the site plan to address site design and compatibility concerns, the Applicant drafted a new site design which is inconsistent with Binding Element #5. Applicant therefore proposed the subject SDPA (Exhibit 9), which would remove Binding Element #5 from the schematic development plan, as shown in highlights on the original SDP (Exhibit 8).
6. Technical Staff, by memorandum dated March 17, 2009, recommended approval of SDPA 09-2, and concluded: "Deleting Binding Element # 5 will . . . provide greater flexibility for optimal site design to be achieved during site plan review; . . . [will r]esolv[e] any ambiguity as to the Planning Board's authority under Binding Element No. 5 [; and] will provide a more effective site plan review process." Staff also noted that Applicant's newly "proposed commitments to be implemented at site plan will help to alleviate the community concerns regarding specific site design impacts to Woodward's Store Road." Exhibit 20, p. 4.
7. Technical Staff elaborated on why it found the new design to be preferable to earlier designs limited by Binding Element #5 (Exhibit 20, p. 4):

The revised site design includes a loop road in the townhome development and an orientation of the townhomes away from Woodward's Store Road, which eliminates the awkward relationship between the internal street in the project and Woodward's Store Road and provides an improved orientation of the townhomes within the development and frontage on Washington Grove Road. Further, the revised site design reorients the townhomes on the western side of the property inward and creates a larger and enhanced buffer area between the townhomes and Woodward's Store Road, thus eliminating the need for fencing or restrictions on pedestrian connections.

The applicant reviewed the revised site design with staff, and staff agreed it provided the optimal site design solution to address compatibility concerns as well as address the zoning standards and most of the binding elements.
8. According to the Technical Staff Report (Exhibit 20, p. 4), the Applicant's new design also was positively received by the neighbors and the People's Counsel, who agreed that a fence

and a prohibition against a pedestrian connection (*i.e.*, items required by Binding Element #5) were not necessary given the compatible layout and buffer treatment of the revised site design. They are reportedly willing to have Binding Element #5 removed in order to allow the new design to be used.

9. Binding Element #5 on the old SDP provides:

Applicant will meet with the property owners on Woodward's Store Road and the Peoples Counsel as a group to develop a Landscape Plan prior to filing a Site Plan submission for the development. The proposed Landscape Plan will include a fence to eliminate pedestrian cross traffic between the development and Woodward's Store Road and the southern property line.

10. The Montgomery County Planning Board reviewed SDPA 09-2 at its regular meeting on April 2, 2009 and, by unanimous vote, approved the proposed SDPA and the plan to place Applicant's new commitment in the resolution to be signed by the District Council. Exhibit 21. On April 9, 2009, Technical Staff provided a copy of the Planning Board Transcript (Exhibit 24), and on April 10, 2009, Applicant supplemented the record with an executed copy of the proposed covenants and copies of notices sent regarding the SDPA (Exhibit 25).

11. There is no opposition to SDPA 09-2, and no request has been made for a hearing. The Planning Board also does not recommend a public hearing in this case. Therefore, under the provisions of Zoning Ordinance §59-D-1.74(c)(3), the matter can be considered directly by the District Council without a hearing by the Office of Zoning and Administrative Hearings.

12. The District Council agrees with the Planning Board's and Technical Staff's recommendations that Binding Element #5 should be deleted. In lieu of Binding Element #5, the District Council approves the following commitment:

1. *Subject to Planning Board review at the time of Site Plan, the site plan will reflect that:*
 - a. *the townhomes will be oriented away from Woodward's Store Road;*
 - and*
 - b. *landscape and screening improvements will be added to provide an appropriate buffer between the project and the single-family neighbors on Woodward's Store Road.*
2. *Applicant will coordinate with the adjacent neighbors on Woodward's Store Road before and during the site plan review process to review the project and to collaborate regarding the landscape plan, and*
3. *Applicant will pursue with the Department of Transportation (DOT) the feasibility of installing no parking signs along the Woodward's Store Road right-of-way to deter future residents and guests of the project from parking off-site.*

ACTION

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

SDPA 09-2, which requests an amendment to the Schematic Development Plan approved on August 1, 2006 in LMA G-840 (Resolution No. 15-1586), for 3.28 acres of land located at 17720 Washington Grove Lane, Gaithersburg, Maryland, to delete Binding Element #5 from the SDP and the Declaration of Covenants and to provide the commitment spelled out in Paragraph numbered 12 above, is hereby approved, subject to the specifications and requirements of the Schematic Development Plan Amendment, Exhibit 9, provided that the Applicant submits the Schematic Development Plan Amendment, Exhibit 9, for certification by the Hearing Examiner under the provisions of §59-D-1.64 within 10 days of the District Council action and that the amended Declaration of Covenants (Exhibits 25(c) and (d)) is filed in the County land records in accordance with § 59-H-2.54 of the Zoning Ordinance.

This is a correct copy of Council action.

Linda M. Lauer, Clerk of the Council

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

By: District Council

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12. There is no opposition to SDPA 09-2, and no request has been made for a hearing. The Planning Board also does not recommend a public hearing in this case. Therefore, under the provisions of Zoning Ordinance §59-D-1.74(c)(3), the matter can be considered directly by the District Council without a hearing by the Office of Zoning and Administrative Hearings.

13. There is no issue on the substance of this proposal; however, there is a procedural issue raised by the Hearing Examiner – whether Applicant’s new commitment should be printed on the proposed SDPA as a non-binding “Site Note” (i.e., not a Binding Element), or just be included in the resolution to be signed by the District Council.
14. The Hearing Examiner suggested to Staff and Applicant’s counsel that it would be preferable to include the commitment language in a non-binding site note on the SDPA, not just in the Council Resolution, because planners do not always have the Resolution before them when examining a plan. Exhibits 22 and 23. Since Applicant’s counsel indicates that the above commitment reflects Applicant’s intended plan, the Hearing Examiner feels that it is a better practice for Applicant’s formal plans to reflect Applicant’s intended plans. The District Council agrees with the Hearing Examiner’s observation. The fact that there may have been some instance in the past where this kind of change was made by language in the resolution alone does not mean that the Council should not employ a superior procedure where it can be done. Applicant’s stated commitment should appear in the SDPA as a nonbinding site note and in the Council’s resolution, so that the likelihood of it being observed and followed by future planners is enhanced.

ACTION

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

SDPA 09-2, which requests an amendment to the Schematic Development Plan approved on August 1, 2006 in LMA G-840 (Resolution No. 15-1586), for 3.28 acres of land located at 17720 Washington Grove Lane, Gaithersburg, Maryland, to delete Binding Element #5 from the SDP and the Declaration of Covenants and to provide the commitment spelled out in Paragraph numbered 12 above, is hereby remanded to the Planning Board, with the following instructions:

- a. Applicant is to provide a revised SDPA with the commitment language italicized on the previous page of this memorandum included as a non-binding Site Note;
- b. A new notice should be issued to satisfy Applicant’s concern that earlier notice mentioned only the deletion of Binding Element #5; and
- c. The Planning Board and its Staff should be given another opportunity to review the matter to alleviate Applicant’s concern that their prior review considered only including Applicant’s new commitment in the Council’s resolution.

This is a correct copy of Council action.

Linda M. Lauer, Clerk of the Council