

Action

MEMORANDUM

July 10, 2009

TO: County Council

FROM: Jeffrey L. Zyontz, Legislative Attorney *JZ*

SUBJECT: Action - Oral Argument and Consideration of Hearing Examiner's Report and Recommendation – G-878

The Hearing Examiner issued his report and recommendation on G-878 on June 25, 2009. The deadline for requests for oral argument was July 6, 2009. On July 2, 2009 the Council received the following e-mail from Ms. Martinez, who appeared at the Hearing Examiner's hearing.

Dear Mr. President Andrews and Council Members:

I respectfully request that I be allowed to present testimony at the hearing on the above matter [G-878]. I am opposed to certain aspects of this proposal.

An identical e-mail was received from Mr. Heise on July 3.

Staff informed Ms. Martinez and Mr. Heise that:

- 1) their e-mail was assumed to be a request for oral argument;
- 2) new testimony was prohibited on G-878; and
- 3) there would not be any type of hearing before the Council in the absence of oral argument.

Staff asked for confirmation of staff's assumption and provided a brief description of the rules for oral argument.

Other than a complaint about not allowing additional testimony, staff has not heard back from either Ms. Martinez or Mr. Heise. Staff put the request for oral argument on the Council's agenda to leave it as an option for the Council.

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July 9, 2009

Cindy Bar
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VIA ELECTRONIC MAIL AND REGULAR MAIL

The Honorable Phil Andrews
President, Montgomery County Council
100 Maryland Avenue
Rockville, MD 20854

Re: Oral Arguments for Case G-878
Germantown Park

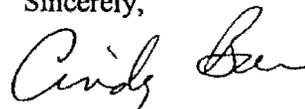
Dear Councilmember Andrews:

I am writing in response to two identical e-mails submitted by Anne Marie Martinez and Mr. Heise dated July 6, 2009, requesting oral arguments in Case G-878, an application for approval of a local map amendment for a change in zoning for the site which currently houses the Germantown Park shopping center from the C-1 to the RT-15 zone.

The submitted requests have not provided a legitimate basis for the District Council to grant oral arguments in this case. During the hearing on this matter, and in correspondence submitted to the Hearing Examiner, both Ms. Martinez and Mr. Heise testified that the requested rezoning would "negatively impact their neighborhood." The Applicant provided testimony to refute this claim, and the Hearing Examiner found that the Applicant had met the burden of proof on all required elements of the rezoning and recommended that the rezoning should be approved.

It is clear that the points raised by the opponents of the local map amendment request both during the hearing, and in written submissions, were carefully evaluated by the Hearing Examiner in his detailed report. The opponents have had the opportunity to fully argue their positions, and they have been well set out in the Hearing Examiner's report for the District Council to review. Disagreement with the conclusions of the Hearing Examiner is not a legitimate basis for granting oral arguments. We respectfully request that the Council deny the request for oral arguments and proceed to vote in favor of the rezoning request based on the Hearing Examiner's findings and recommendations.

Sincerely,


Cindy Bar

cc: Martin Klauber, Esquire
Ms. Anne Marie Martinez
Mr. Jeffrey Zyontz
Mr. Phil Tierney

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Agenda Item No 6
Resolution No. _____
Introduced: July 14, 2009
Adopted: _____

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

By: County Council

Subject: APPLICATION NO. G-878 FOR AMENDMENT TO THE ZONING
ORDINANCE MAP, Cindy Bar, Esquire, Attorney for Applicant,
Germantown, LLC, OPINION AND RESOLUTION ON
APPLICATION Tax Account No.03276364

OPINION

Application No. G-878, filed on October 1, 2006 by Applicant Germantown, LLC, requests reclassification from the C-1 Zone to the RT-15 Zone of 8.46 acres of land located at 18451 Mateny Road, Germantown, Md. The application was filed under the Optional Method authorized by Code § 59-H-2.5, which permits binding limitations with respect to land use, density and development standards or staging. The Applicant proposes to build a development that consists of one hundred twelve new townhouses, including fourteen moderately priced dwelling units (MPDUs). The proposal is set forth in a revised Schematic Development Plan (SDP), Exhibit 64(g), which contains an illustrative plan, specifications of the binding elements, and other information regarding the development.

The Hearing Examiner recommended approval of the application on the basis that the RT-15 Zone at the proposed location would satisfy the requirements of the zone and its purpose clause; that the proposed reclassification and development would be

compatible with land uses in the surrounding area; and that the proposed reclassification bears sufficient relationship to the public interest to justify its approval. To avoid unnecessary detail in this Resolution, the Hearing Examiner's Report and Recommendation, dated June 26, 2009, is incorporated herein by reference. Technical Staff of the Maryland-National Capital Park and Planning Commission ("M-NCPPC") and the Montgomery County Planning Board ("Planning Board") also recommended approval.

A public hearing was convened on April 28, 2009 and testimony was presented both in support of and in opposition to the application. At the conclusion of the hearing, the record was held open to permit the Applicant an opportunity to file revisions to the SDP and allow the Opposition time to respond. The record closed on May 12, 2009.

The Property, Surrounding Area and Zoning History

The subject property forms an irregularly shaped parcel located near the northeast quadrant of the intersection of Clopper (Md. Route 117) and Mateny Roads. The site is generally flat and gently sloping from northwest to southeast at about a 3.6 percent grade in the developed area adjacent to the Mateny Road entrance. The site slopes away from Clopper Road. Mateny Road is about 30 feet higher than Cinnamon Drive as it abuts the site.

The site contains about 250 feet of frontage along Clopper Road, 400 feet of frontage along Mateny Road and 580 feet of frontage along Cinnamon Drive. There are steep slopes at the site where it abuts Clopper Road and Cinnamon Drive. Located immediately southwest of the site at the intersection of Clopper and Mateny Roads is a 7-11 gasoline filling station and convenience store, which is classified under the C-1 Zone.

This property is not part of the instant zoning request. A storm water management (SWM) facility is located at the southeast corner of the site at the intersection of Clopper Road and Mateny Road. The facility is located at the low point of the site. The high point is at the northwest corner. The existing SWM facility is outdated and does not provide for quality controls.

Located in the southwest corner of the site is an existing cemetery known as the Graff-Musser Family Cemetery. The cemetery contains a plaque documenting its history. The cemetery dates to the 1800s and has African Americans and Caucasians buried side by side, apparently one of the first such burial patterns in the region. The cemetery was once included in the County Locational Atlas and Index to Historic Sites but was subsequently removed. There is a large retaining wall between the cemetery area and the adjacent convenience store. The Germantown Historical Society considers the cemetery to be historic and expressed concerns about the maintenance and future care of it. The Applicant submitted a binding element to the SDP to provide for perpetual maintenance and care of the cemetery.

The property contains a shopping center with a grocery store, known as "Super Grand," which sells Asian food among other types of groceries, a beer and wine store, a drycleaner and a satellite station for the Montgomery County Police Department. The site contains an asphalt parking lot for about 275 cars and grassy areas along the perimeter. The developed area is at the center of the site and this area constitutes about 90% impervious surface.

The Applicant bought the center in 2004 with the expectation that a retail upgrade would make the center competitive. However, a combination of factors has resulted in

the center not producing expected income. These factors include the economic downturn, nearby competition, a fire that closed the grocery store for about a year, and an inability to attract the right mix of tenants including a national food chain as an anchor store.

In floating zone cases a surrounding area is defined so as to include uses that are most directly affected by the proposed development. The District Council adopts the surrounding area recommended by Technical Staff and Hearing Examiner. This area is bounded on the north by Pine Ridge Lane and Cinnamon Woods subdivision; bounded on the east by Gunners Branch Park and the Ashton Place subdivision; bounded on the south by Dairymaid Drive; and bounded on the west by Metz Road and the Stone Ridge subdivision.

The character of the surrounding area reflects medium densities made up of townhouses, four-plexes and single-family detached homes. The surrounding area is predominately residential with largely stable and mature communities.

Cinnamon Woods is a community located north and east of the site with about 640 older two-story four-plexes or “back to back” style townhouses and related surface parking lots. Much of the area has large green areas. This community contains Clopper Mill Elementary School and the entry to Gunners Branch Local Park. West and northwest of the subject property is the Stone Ridge subdivision, classified under the RT-12.5 Zone, which contains about 305 older two-story townhouses without garages and the community relies on surface parking.

The area to the south is a stream valley of a tributary of the Gunners Branch beyond which lies the Ashton Place community, classified under the RT-12.5 Zone that contains about 257 two-story townhouses without garages and dependent on surface

parking. Some isolated single-family detached homes are located along Metz Drive near Clopper Road.

The densities of these communities are in scale with each other. This area was developed in the 1980s. The site abuts townhouses and four-plexes to the north, west and southwest. Elements of the surrounding area also include the road network made up of Clopper Road, Mateny Road, Metz Road, Cinnamon Drive and stream valleys associated with Seneca Creek.

The property was the subject of countywide comprehensive zoning in 1958 when it was classified under the Rural Residential (R-R) Zone, which allowed for a density of two dwelling units per acre. In 1969, the property was reclassified from the R-R Zone to the C-1 Zone by Local Map Amendment F-345. The property was developed as a one story 46,193 square foot shopping center under the C-1 Zone in the 1984 and the Weis Market operated a grocery store there until it was leased to the Super Grand in 2004.

The 1989 Germantown Master Plan addresses shopping center uses and encouraged the concentration of retail uses in planned village centers. The plan discourages strip commercial zoning along highways like Clopper Road. Two retail village centers have since developed near the subject property. Kingsview Village center is located within 2,000 feet of the subject property and Clopper Village is located within 3,000 feet of the subject property. Both retail centers have been built in accordance with the Master Plan. Recently more competition developed with the Lotte Plaza at Wisteria and Route 118.

The 1974 Master Plan clearly shows that the Village Center for Clopper Village should be located at the intersection of Clopper Road and the Western Arterial, now the

Great Seneca Highway. The subject property was deemed inadequate for a village center location. The 1989 Master Plan explicitly recommends the subject property for other convenience retail center. The plan also discouraged strip commercial development and encouraged sensitivity to development along Clopper Road because of its high visibility to travelers. The District Council concludes that housing would be a preferable use at this location because it will reinforce the established character and identity of the area. The District Council agrees with the conclusions of the Technical Staff, Planning Board and Hearing Examiner that the proposed use is consistent with the current Master Plan.

Proposed Development

The proposed development would replace the existing 25-year-old retail center with 112 townhouses including 14 MPDUs, which would yield a density of 13.2 dwelling units per acre or 42 units less than full development authorized under the R-15 Zone. The townhouses would be 3-story units with rear or front garages arranged in a traditional configuration to orient the front of the units to the street and create an active pedestrian environment.

The Applicant's illustrative plan shows 426 non-binding parking spaces or 3.8 spaces per dwelling unit. The zoning requires 224 spaces or 2.0 spaces per dwelling units. The community would be developed around a central "village green", or community open space, linked with a series of smaller open spaces by pedestrian friendly streetscapes, walkways and trails.

The proposal was revised before the record closed to add several binding elements to the SDP. The binding elements now include the following six items.

1. Density limited to no more than 112 dwelling units;

2. MPDUs will be provided at 12.5% of total density;
3. A minimum of 45% green area will be provided;
4. The Applicant, its successors or assigns, will preserve and perpetually maintain the existing Graff-Musser Cemetery on the property;
5. The site plan for the RT-15 project will include the following minimum building setbacks:

North property boundary – 30 feet from property line;

West property boundary – 20 feet from Mateny Road right of way;

South property boundary – 100 feet from Clopper Road right of way; and

East property boundary - 30 feet from Cinnamon Drive right way; and

6. The site plan for the project will include parking at a minimum of 3.0 spaces per dwelling unit.

Standard for Review

A floating zone, such as the RT-15 Zone, is a flexible device. Individual property owners may seek to have property reclassified to a floating zone by demonstrating to the Council that the proposed development will be consistent with the purpose and regulations of the proposed zone and compatible with the surrounding development, as required by the case law, *Aubinoe v. Lewis*, 250 Md. 645, 244 A.2d 879 (1967), and that it will be consistent with a coordinated and systematic development of the regional district and in the public interest, as required by the *Regional District Act, Maryland-National Capital Park and Planning Commission Article (Art. 28), Md. Code Ann.*, § 7-110.

Requirements and Purpose of the Zone

Under the “purpose clause” set forth in Zoning Code §59-C-1.721, the R-T Zone may be applied if a proposal meets any one of three alternative criteria: (1) it is in an area designated for R-T Zone densities (implying a master plan designation); (2) it is in an area that is appropriate for residential development at densities that are allowed in the RT Zones; or (3) it is in an area where there is a need for buffer or transitional uses between commercial, industrial, or high-density apartment uses and low-density one-family uses.

The Opposition raised the issue of need with respect to the existing shopping center use. The site is located near several existing townhouse communities that have enjoyed the convenience of the shopping center since 1984 and some of whose residents oppose the reclassification. The Opposition contends there is a need to retain the existing center to better serve a changing population that values the stores at the center and to which residents can easily walk. Need is not a requirement for the location of the RT-15 Zone. Need is sometimes relevant depending on the use. For example, a need requirement must be satisfied for a special exception for a gasoline filling station. However, the need requirement has not been extended to the proposed use. Therefore, need is not a relevant factor to evaluate the appropriateness of the proposal. Even if need was a requirement, the evidence is clear that ample shopping facilities are in the area and the competition from these facilities is one of the reasons the existing center has not done as well as expected.

The “appropriate” standard is usually measured by density, that is, whether or not the proposed density is a good fit in the particular neighborhood. The District Council finds that the subject property is located in a section of the County that is appropriate for residential development at the RT-15 density. Stone Ridge is directly west of the site and

reflects a density of 12.6 dwelling units per acre. Aston Place is southwest of the site and reflects a density of 12.3 dwelling units per acre. Cinnamon Woods, located north and west of the site along Mateny Road, reflects a density of 8.2 dwelling units per acre.

The District Council finds that the type of residential unit at the density proposed is entirely consistent with the surrounding area given the SDP commitments to a maximum density limit of 13.2 dwelling units an acre and a provision for a minimum of 45% green space. The site meets the appropriate standard because of its location, relationship to, and compatibility with, surrounding townhouse developments.

The District Council determines that the proposed development meets the development standards of the RT-15 Zone. The design layout, green space, setbacks, density and parking all exceed zoning requirements. The Technical Staff and Planning Board recommendations also confirm that the proposed development would be appropriate for this location and meets the development standards of the RT-15 Zone. Therefore the Applicant has submitted sufficient evidence to satisfy the requirements of the zone.

Compatibility

An application for a floating zone reclassification must be evaluated for compatibility with land uses in the surrounding area. The District Council finds that the proposal is compatible with the nearby residential uses in terms of height, scale and building mass. By creating an architectural and building mass edge along Clopper Road, the proposed development will function as a buffer use between the higher intensity uses of the Clopper Road corridor and the adjacent residential communities. The proposed

development will function as a buffer between the convenience store and gas station and the nearby residential areas.

The proposed development will be compatible with the existing community because the SDP will provide for substantial green space, density limitations, setbacks, parking, and less impervious surface. The Technical Staff and Planning Board reviews confirm that the proposed development will be compatible with existing and planned uses in the surrounding area.

Public Interest

The Applicant must show that the proposed reclassification bears sufficient relationship to the public interest to justify its approval. When evaluating the public interest, the District Council normally considers Master Plan conformity, the recommendations of the MNCPPC, impact on public facilities, and important policy goals such as the provision of affordable housing and preservation of historic sites.

The District Council concludes that the proposed zoning is in the public interest and provides immediate and long-term benefits not only to the existing adjacent neighborhood but also the County as a whole. The Planning Board will revisit remaining noise, school, and traffic issues during the subdivision and site plan review stages.

The proposed development provides for a number of benefits. For example, a improved and enlarged SWM facilities will benefit the environment. The elimination of the Clopper Road access will permit the expansion of SWM facilities and allow for safer more adequate traffic patterns. The replacement of the shopping center will significantly reduce impervious surface and will allow for the introduction of a tree canopy and new green space that promote the environment. The introduction of housing at this location

will allow for more diversity and affordability. The preservation and perpetual maintenance of the historic cemetery will contribute to cultural heritage of the area. Finally, the proposed development is consistent with the master plan and promotes many of its goals and objectives as evidenced by the very detailed analysis by the Technical Staff.

The Opposition contends that the existing shopping center should be retained because it promotes a master plan objective for convenience neighborhood shopping areas, satisfies a community need for accessible shopping for older residents, provides a market for goods and services created by changing demographic patterns and otherwise unavailable in the area and functions as a Village Center that provides a community meeting place. The Opposition also contends that the proposed development will overwhelm schools and roads. In balancing of the public interest factors, the benefits of the proposed zoning appear to outweigh the detriments. Both the Technical Staff and the Planning Board provided strong, persuasive and unanimous support to approve the rezoning. The evidence is clear that the zoning is consistent with the 1989 Master Plan and will better serve the public interest than retention of the current use.

The evidence also indicates that the proposed development will not have a significant adverse impact on public facilities and will promote a better environment. Although the schools may experience some overcapacity, an elementary school facilities payment will be required to mitigate the impact of development. Middle and high schools are projected to be slightly over capacity in 2014. However, the small number of students generated does not appear to be sufficient to warrant denial of the zoning at this time. This issue will be revisited at the subdivision stage.

The impact on local traffic from this development would be minimal and will clearly meet LATR standards. No evidence was presented to suggest that the proposed development would produce any adverse levels of service after the applicant provided expected mitigation.

For all of these reasons, as more fully discussed in the Hearing Examiner's report, the District Council concludes, based on the preponderance of the evidence that the proposed reclassification and development would be in the public interest.

Conclusion

Based on the foregoing analysis, consideration of the Hearing Examiner's report, and after a thorough review of the entire record, the District Council concludes that the application satisfies the requirements of the RT-15 Zone and its purpose clause; that the application proposes a form of development that would be compatible with land uses in the surrounding area; and that the requested reclassification to the RT-15 Zone bears sufficient relationship to the public interest to justify its approval. For these reasons and because approval of the instant zoning application will aid in the accomplishment of a coordinated, comprehensive, adjusted, and systematic development of the Maryland-Washington Regional District, the application will be approved in the manner set forth below.

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, Maryland approves the following resolution:

Zoning Application No. G-878, seeking reclassification from the C-1 Zone to the RT-15 Zone of 8.46 acres known as Germantown Park, Lot 685, Subdivision 21, located at 18451 Mateny Road, Germantown, in the 9th Election District, is hereby approved in the amount requested and subject to the specifications and requirements of the final Schematic Development Plan (SDP), Ex. 64 (g);

Provided that, the Applicant submits to the Hearing Examiner for certification a reproducible original and three copies of the SDP within 10 days of approval, in accordance with Code § 59-D-1.64 of the Zoning Ordinance; and

Provided further that, the Applicant submits prior to certification an executed copy of the Declaration of Covenants, Ex. 12, which has been revised to include the most recent binding elements, Ex. 64 (g), and has been filed in the County land records in accordance with Code §59-H-2.54 of the Zoning Ordinance within the aforementioned 10 day period, and a suitable receipt of filing is presented to the Hearing Examiner prior to the certification.

This is a correct copy of Council action.

Linda M. Lauer, Clerk of the Council