

This packet does not include the Hearing Examiner's report and recommendations. That material is in the Council's July 28, 2009 packet (item #11); it is available on the Council's web site:

<http://www.montgomerycountymd.gov/content/council/pdf/agenda/col/2009/090728/2009072811.pdf>

AGENDA ITEM #4  
September 15, 2009

**Action**

**MEMORANDUM**

September 11, 2009

TO: County Council

FROM: Jeffrey L. Zyontz,  Legislative Attorney

SUBJECT: Action – Resolution to Disapprove Local Zoning Map Amendment – G-878

On June 25, 2009 the Hearing Examiner issued his report and recommendation on Local Map Amendment G-878. The Hearing Examiner recommended approval. On July 14, 2009 the Council granted a request for oral argument on Local Map Amendment G-878. The Council heard oral argument on July 28, 2009. After hearing the oral argument and discussing the facts of the case in the Hearing Examiner's record, the Council directed staff to draft a resolution reflecting the Council's straw vote to deny G-878. The draft resolution requested by the Council is attached. The Council may amend the resolution to reflect the opinion of the Council. A denial of the Local Map Amendment will bar the owner from applying for another local map amendment for the same zone for 3 years.<sup>1</sup> The applicant would be barred from applying for a different zone for 18 months.<sup>2</sup>

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<sup>1</sup> §59-H-2.23(a):

No application for a local map amendment shall be accepted for filing for land that was in whole or in part the subject of a previous zoning application for the same zoning classification filed within the last 36 months and decided on its merits.

<sup>2</sup> §59-H-2.23(c).

After the Council's straw vote on July 28, the applicant repeated his desire for approval of the application. In the alternative, the applicant requested a remand of G-878 back to the Hearing Examiner.

The opponents object to the applicant's requests. In their opinion, the applicant was already given the opportunity to make their case, and the record of the case warrants the Council's denial.

<u>This packet contains</u>	<u>© Page</u>
Resolution to deny	1 – 10
Request from applicant	11 – 15
Letters in opposition to applicant's request	
Anne Marie Martinez	16 – 17
Thomas Williams	18 – 22

Agenda Item No 4  
Resolution No. \_\_\_\_\_  
Introduced: \_\_\_\_\_  
Adopted: \_\_\_\_\_

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND  
SITTING AS THE 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: 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. 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 District Council first considered the matter on July 14, 2009 and granted a request for oral argument. The oral argument was conducted on July 28, 2009.

Based on its consideration of all the evidence of record, the District Council concludes that the application does not conform with the purpose clause of the RT-15 Zone as the proposal is not appropriate at the proposed location, that it is incompatible with existing uses in the area and it is not in the public interest.

#### **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 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 dry cleaner and a satellite station for the Montgomery County Police Department, which is periodically used as a meeting space by community groups. 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.

Nevertheless, persuasive evidence shows that the site is a busy and popular shopping and gathering spot for existing nearby communities. The demographics of the area have dramatically changed over time and significant increases in Latino, Asian, Caribbean, African and immigrant populations patronize the shopping center. There is no evidence that the current zoning operates in a confiscatory manner.

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 low to medium densities made up of townhouses, four-plexes and single-family detached homes. The surrounding area is residential in character. This area was developed in the 1980s.

Cinnamon Woods is a large, stable and mature 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 and is developed at a density of 8.2 dwelling units per acre under the R-60 Zone and its density is well distributed over a 72 acre enclave. This community contains Clopper Mill Elementary School and the entry to Gunners Branch Local Park. Cinnamon Woods has the lowest overall density in the area.

Located 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 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. 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 shopping areas developed with the Lotte Plaza at Wisteria and Route 118. The 1989 Master Plan explicitly recommends the subject property for an “other convenience retail center”. Residential use is not recommended for this location.

### **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. The townhouses would be 3-story 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 unit. The project would be developed around a central "village green", or open space, linked with a series of smaller open spaces with pedestrian walkways and trails.

The proposal includes six binding elements to the SDP:

- Density limited to no more than 112 dwelling units;
- MPDUs would be provided at 12.5% of total density;
- A minimum of 45% green area would be provided;
- The Applicant, its successors or assigns, would preserve and perpetually maintain the existing Graff-Musser Cemetery on the property;
- The site plan for the RT-15 project would 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

- The site plan for the project would 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 Applicant chose the “appropriate” standard, which 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 not appropriate for residential development at the RT-15 density.

The Cinnamon Woods community is the most affected by the proposed density increase and there would be a significant disparity between Cinnamon Woods, at the density of 8.2 dwelling units an acre, and the proposed use at a density of 13.2 dwelling units per acre.

The type of residential unit at the density proposed is not consistent with the surrounding area even with 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 green space is largely made up of a SWM facility and a historic cemetery. The site does not meet the appropriate standard because of its location and excessive density.

### **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 not compatible with the nearby residential uses in terms of density and green area. The proposed development would contrast sharply with the Cinnamon Woods community and would be the highest housing density in the 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, and impact on public facilities.

The District Council concludes that the proposed zoning on balance is not in the public interest. The proposed use is inconsistent with the Master Plan, which specifically recommends the commercial use at this location. The site is located near several existing

townhouse communities that have enjoyed the convenience of the shopping center since 1984. The retention of the existing center will better serve a changing population that values the stores at the center and will be convenient for older and disabled residents. The proposed housing would not be a preferable use at this location because it would cram 112 units into 8.46 acres resulting in the highest density in the area.

The District Council determines that the retention of the current zoning better promotes Master Plan objectives 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 and gathering place. The Germantown Historical society provided probative evidence that the neighborhood in which the subject property is located was to have a shopping area within walking distance of residents. Cinnamon Woods was the first neighborhood developed in the area and the existing use operated as its shopping center. The shopping center development preceded the Master Plan, which raises an inference that the current use is consistent with the Master Plan or it would have been changed in 1989 when the plan was approved.

The evidence also indicates that schools will experience over capacity. The location of additional housing in this area will unduly tax school facilities. School capacity is at the brink of moratorium levels and approval of the proposed level of density is unwise at this time.

For all of these reasons, the District Council concludes, based on the preponderance of the evidence that the proposed reclassification would not be in the public interest.

**Conclusion**

Based on the foregoing analysis, and after a thorough review of the entire record, the District Council concludes that the application does not satisfy the requirements of the RT-15 Zone and its purpose clause; that the application proposes a form of development that would not be compatible with land uses in the surrounding area; and that the requested reclassification to the RT-15 Zone does not bear sufficient relationship to the public interest to justify its approval.

For these reasons and because denial 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 denied 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 9<sup>th</sup> Election District, is hereby denied

This is a correct copy of Council action.

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Linda M. Lauer, Clerk of the Council

# Holland & Knight

3 Bethesda Metro Center, Suite 800 | Bethesda, MD 20814 | T 301.654.7800 | F 301.656.3978  
Holland & Knight LLP | www.hklaw.com

August 28, 2009

Robert R. Harris  
301 215 6607  
[robert.harris@hklaw.com](mailto:robert.harris@hklaw.com)

Cynthia Bar  
301 664-7606  
[cindy.bar@hklaw.com](mailto:cindy.bar@hklaw.com)

VIA ELECTRONIC AND REGULAR MAIL

The Honorable Phil Andrews  
President  
Montgomery County Council  
Stella B. Werner Office Building  
100 Maryland Avenue  
Rockville, MD 20850

RECEIVED  
MONTGOMERY COUNTY  
COUNCIL  
2009 AUG 31 AM 9:05

Re: In the Matter of Germantown, LLC (Local Map Amendment No. G-878)  
Germantown Park Shopping Center

Dear Mr. Andrews:

We represent Germantown, LLC, the Applicant in this proceeding and the owner of the subject property. The purpose of this letter is to request that the Council review and reverse its straw vote to draft a motion to deny the rezoning request. In the alternative, we ask that the Council remand this matter to the Zoning Hearing Examiner for the clarification and taking of additional evidence on the points discussed herein. (This letter is being submitted in place of one dated August 20, 2009, which contained more detailed facts and figures, in order to avoid the conveyance to Council members of facts and figures contained in the previous letter which currently are not part of the record).

Comments made by various Council Members during the oral argument to the Council, suggest some misperception about issues of interest to the Council, particularly the financial viability of the shopping center and its tenants, given the fact that the property owner was not permitted to respond to Council questions during the oral argument. Substantial and probative evidence on the issues of interest to the Council, however, is available and, if allowed to be presented would fully support approval of the rezoning. If the straw vote is not otherwise reviewed and reversed, a remand would enable the Hearing Examiner to fully evaluate in more depth the issues raised by the Council at the oral argument.

This case involves the proposed downzoning of a functionally obsolete and under-performing shopping center, from the C-1 zone to the RT-15 zone, to accommodate townhouse development which is compatible to what surrounds the property. Staff of the Maryland-

Atlanta • Bethesda • Boston • Chicago • Fort Lauderdale • Jacksonville • Los Angeles  
Miami • New York • Northern Virginia • Orlando • Portland • San Francisco  
Tallahassee • Tampa • Washington, D.C. • West Palm Beach

National Capital Park and Planning Commission supported the request, and the Planning Board voted unanimously for approval. The Zoning Hearing Examiner took testimony on the project, including that from various witnesses in support, as well as from two opposing witnesses. After weighing the evidence and testimony, the Hearing Examiner also recommended approval. The property owner testified generally that due to inherent location and design circumstances of the property, limited customer support for the tenants, and declining sales, tenants are suffering financially and have received significant rent reductions in order to continue operating (Transcript, pp. 13, 15, 25, 29). Due to these circumstances, the owner expressed a fear the tenants will leave and the center will go dark with no viable replacement tenants and an inability to meet the mortgage payments. (Transcript, pp. 29-31). The Hearing Examiner was persuaded by the Applicant's testimony that the center was no longer viable, and further evidence on this issue was not required.

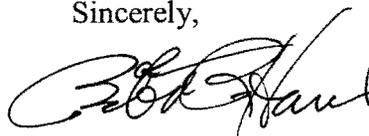
At the oral argument, however, several Council members raised questions regarding (1) the economic performance of the current tenants in the shopping center; (2) the economic viability of the center itself in light of other larger, newer shopping areas nearby; (3) the benefits to the environment by converting the property to residential uses; (4) calculations and performance of proposed green space, open space and recreation facilities; and (5) the overall balancing of public interests in the rezoning.

Given that the oral argument was confined to evidence already in the record, these questions by the Council were not elaborated on fully by the Hearing Examiner, even though the record and findings had addressed the issues. Should the Council remand the case, the Applicant will provide additional detailed information regarding: (1) past and present rental rates; (2) tenant performance or lack thereof of lease obligations including rental payments; (3) financial stability of tenants (4) overall financial performance of the property, and (5) the anticipated future for the shopping center. If the Council desires, these and the other issues of interest to the Council outlined above can be addressed more fully if the matter is remanded.

While we believe there already is sufficient evidence in the existing record to justify that the Council review and reverse its straw vote and approve the rezoning, based on the comments at oral argument the Council may desire additional information. In that case the matter should be remanded in order for the Zoning Hearing Examiner to obtain more information to better advise the Council on these issues, and to make a more complete recommendation to the Council on the rezoning request. Such an action would be consistent with many zoning cases where more information is desired by the Council in order for them to make a fully informed decision, or where revised features and conditions may be required to address Council interests. We respectfully request that the Council either review and reverse the straw vote to draft a motion to deny the application, or remand the case back to the Hearing Examiner to consider more evidence on these points.

The Honorable Phil Andrews  
August 28, 2009  
Page 3

Sincerely,



Robert R. Harris

  
Cynthia Bar

cc: Marc Solomon  
David Fink  
Phil Tierney, Esquire  
Martin Klauber, Esquire  
Anne-Marie Martinez  
Thomas C. Williams, Jr.  
Jeff Zyontz, Esquire  
Royce Hanson, Esquire  
Ralph Wilson

# 8779606\_v4

## 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 9<sup>th</sup> 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.

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Linda M. Lauer, Clerk of the Council

  
A handwritten signature in a circle is positioned above the number 14, which is also circled.

**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 9<sup>th</sup> Election District, is hereby remanded to the Hearing Examiner to obtain additional evidence on the following:

- 1) The economic performance of the current tenants in the shopping center;
- 2) The economic viability of the center in light of larger, newer nearby centers;
- 3) The benefits to the environment by converting the property to residential uses;
- 4) Proposed green space, open space and recreational facilities.

This is a correct copy of Council action.

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Linda M. Lauer, Clerk of the Council

Montgomery County Council  
c/o Jeffery Zyontz

Attention: The Honorable Philip Andrews, President, of the Montgomery County Council and  
Council Members:

In Re: G878

September 8, 2009

Dear Mr. President:

After checking with several members of our committee, "the Opposition to G878", I wish to formally oppose/object to the applicants/developers, Attorney's request to the Council to (1) reverse its original roll call, straw vote, of 5-2, taken on Tuesday, July 28, 2009, And, (2) oppose/object as well, the request to remand back to the Hearing Examiner. Please deny both of these requests.

All of us believe that the 5 members of the Council, sitting as the District Council, would not have voted to deny on July 28, 2009, both the application or remand back to the Hearing Examiner, if they were not satisfied with what appears in the official record.

After studying the official record, many times, it is the belief of our committee, that the official record clearly spells out on many pages, this application and subsequent site plan, is NOT compatible with our communities. The official record clearly speaks to the issue of density, thus bringing about a total disruption to our quality of life, if this were to be approved.

And, therefore have a negative impact on our neighborhoods, our homes, our schools, and our community village/shopping center (all stores are open for business), as well as our Community Meeting Place, the District 5, Montgomery County Police Sub-station.

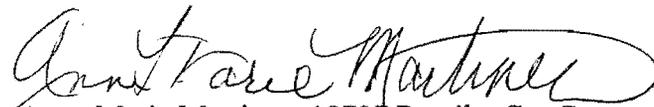
This rezoning application, G878, is most definitely not good for our public interest. The letters in opposition with all of the signatures attached, all from our community, clearly show that the members of the surrounding communities, are opposed to the approval of G878. The Germantown Historical Society also, oppose this application.

The testimony offered by the opposition, in this case, along with the photographs entered as exhibits, depicting the vast open spaces and recreation areas in our communities as well as the fact there are no town homes, crammed into small pieces of land. For example: Cinnamon Woods has 684 homes spread over 77 acres of land. We trust there is no other alternative but, to deny the application #G878. And, thus, deny the requests made by the applicant to (1) reverse the vote of 5-2 to deny and (2) deny the request to remand back to the hearing examiner.

Therefore, I respectfully request the County Council, sitting as the District Council, approve the formal Resolution to deny, G878, during the Council's session on September 15, 2009.

Thank you.

Respectfully submitted:

A handwritten signature in cursive script that reads "Anne Marie Martinez". The signature is written in black ink and is positioned above the typed name.

Anne Marie Martinez, 18707 Paprika Ct., Germantown MD 20874



Thomas C. Williams, Jr.  
12871 Sage Terrace  
Germantown, MD 20874

August 25, 2009

VIA ELECTRONIC AND REGULAR MAIL

The Honorable Phil Andrews, President  
Montgomery County Council  
Stella B Werner Office Building  
100 Maryland Avenue  
Rockville, MD 20850

Re: In the Matter of Germantown, LLC (Local Map Amendment No. G-878)  
Germantown Park Shopping Center

Dear Mr. Andrews:

I send this letter in response to the letter from the applicant requesting a reversal of the Council's straw vote, or remanding of the Council's decision back to the Hearing Examiner. The applicant's counsel suggests the record is less complete and suggest there is "additional information to raise, in more depth, the issues of interest to the Council." In response to the applicant's assertions, I submit to you and the Council, the following response.

The applicant continues to mischaracterize the shopping center as a functionally obsolete and under-performing entity; however by definition, it has been determined there are no retail tenant vacancies and the shopping center is patronized by the multi-ethnic community as the current retail composition provides an alternative compliment to the two larger shopping centers located in the nearby villages. The Germantown Park shopping center also serves a community who are within walking distance to the shopping center. It is far from obsolete or under-performing.

The proposed townhouse development poses more problems for the community regarding the overpopulating of the nearby schools, provides no recreational area for young families, may be "compatible" by technical definition, but will add congestion to our existing community and while there may be a limited amount of moderately priced development units (MPDU), it has not been determined to be affordable overall.

Please remember that our area schools are on the brink of overcrowding at this time and are very close to imposing a moratorium. The current proposal, if approved, may squeeze in before it reaches that threshold, but it will surely trigger the moratorium and put our schools into an overcapacity situation. While we may not have the top schools in Montgomery County, our schools have come a long way

toward improving their education quality. We do not need to compromise that progress by overloading and overcrowding our area schools.

In essence, reversing the straw vote will, as Councilmember Elrich stated, take an existing retail center from the village and force the residents to go to other villages, as well as trigger an overcrowded school situation. While the hearing examiner may have declared “the applicant to be in the best position to assess the financial viability of the center given its experience in retail property management and its self-interest in making the center work”, but we contend that the applicant does not live in our community and has not demonstrated how to best meet the needs of the community. I believe those of us who live in the community are in the best position to assess the needs of the community and we also have a self-interest in making the center work; in fact, we’d be happy to explore the possibility of a community advisory board with the applicant to promote the center and sustain its long-term viability.

The applicant suggests that due to the confinement of evidence already on the record questions raised by the Council regarding “(1) economic performance of the current tenants, (2) economic viability of the center itself in light of other, larger, newer shopping areas nearby; (3) the benefits to the environment by converting the property to residential uses; (4) calculations and performance of proposed green space, open space and recreation facilities; (5) overall balancing of public interests in the rezoning,” these questions and others were not answered fully by either the Hearing Examiner or the applicant to the satisfaction of the Council. The applicant had the opportunity to anticipate and make the case for these questions as part of their application process. You will note in your summary that I initially requested additional time to organize and prepare a case in opposition which the applicant (or applicant’s counsel) was unwilling to agree to. Let’s play by the same rules.

Throughout this process, the applicant has enjoyed the benefit of the advantage via approvals by the Planning Staff, Maryland-National Capital Park and Planning Commission, Planning Board, and the Hearing Examiner. We who are members of the opposition had to learn and understand this process as we went along, and we fought discouragement after discouragement not because we chose to be a disruption, but because this is OUR community and OUR concerns needed to be addressed throughout this process. This effort had to come before the County Council before our concerns were addressed and resolved.

We strongly oppose any attempt to reverse the straw vote decision of the Council as we argued our case fairly and within the confines of the procedures albeit that we were out-resourced by the applicant and the applicant's attorneys, traffic experts, civil engineer-experts, county and local government agencies, and a host of other professionals.

We feel the applicant has already been given the opportunity to make their case and this should not be remanded by the Council, we understand it is part of the aggrieved party's right to request a reconsideration or remand. To that effect, as a precaution, if the Council chooses to remand this case to the Hearing Examiner, we respectfully request an equal opportunity to add evidence in support of our opposition should the Council require to add a more "fully informed decision" to the record.

As a precaution, to expedite the process, should the Council choose to remand this case, I request a full copy of the transcript of the hearing conducted by the Hearing Examiner for review.

To further expedite the process, as a precaution, should the Council choose to remand this case, I request the following information be provided to the opposition by the applicant based upon the applicant's claims in their request for reconsideration:

1. Copies of all past and current leases with signature pages and amendments specific to:
  - a. Grandmart/SuperGrand
  - b. Beer and Wine Mart
  - c. Drycleaners
  - d. Police Substation
  - e. Copy of the July 1, 2009 Germantown LLC v. GrandMart/SuperMart court transcript and judgment award
  - f. Audited reports of lease delinquency rates for the Germantown Park shopping center and ALL other properties managed by the applicant (for comparative purposes).
  - g. Audited reports of income statements for the Germantown Park Shopping Center including capitalization rates (aka "cap" rates).
2. Independent report applicant s using to show evidence of leasing market rates for the Germantown area
3. Copy of original bill of sale and all closing documents for the Germantown Park Shopping Center in general and specifically:
  - a. Signed purchase contract with identification of all principals for both buying (Germantown LLC) and selling (Lucky World LLC) LLC's
  - b. Financing application and documents for the property in question
4. Measurement calculations and performance of the following:
  - a. CURRENT green space
  - b. Estimated tot impervious coverage of proposed development
5. Original schematics provided to the county with the original application (if not still on file)

As a precaution, to further expedite the process, should the Council choose to remand this case, I request the following people (or persons) be made available to provide information or testimony:

- a. Clopper Mill Elementary School principal
- b. Roberto Clemente Middle School principal
- c. Northwest High School principal
- d. MCPS long range facilities planner (specific individual unknown at the time of this writing)
- e. Park and Planning technician responsible for applicant's request (specific individual unknown at the time of this writing)
- f. Fire and Rescue planning technician (specific individual unknown at the time of this writing)
- g. Police Department Crime Statistician (specific individual unknown at the time of this writing)

I would also appreciate advance time to study and review the above mentioned documents prior to a remand hearing, should the Council decide to take this course of action. If the Council decides to move forth in this matter, please advise me on the method of receiving the requested documents in a way that will document the date received and when the "clock" starts in order to schedule a remand hearing, if the Council decides to take this course of action.

In review and summary, please remember the applicant turned down my request for an extension whereby information from the above mentioned sources may have provided the applicant the opportunity to provide answers to the Council's questions; the applicant did not want to discuss the subject of leases during the Hearing Examiner's original hearing; and the applicant could have provided the obvious answers in anticipation of the Council's questions, but failed to do so previously.

Please also remember the applicant has another option available to him which will not disrupt the community; sell the shopping center to another management company who has an interest in nurturing and developing a multi-ethnic retail area. We respectfully request the Council consider moving forward with their straw vote decision of July 28, 2009 and spare our community any further anguish.

Sincerely,



Thomas C. Williams, Jr.

Cc:	Marc Solomon	David Fink
	Cynthia Bar, Esquire	Phil Tierney, Esquire
	Martin Klauber, Esquire	Anne-Marie Martinez
	Jeff Zyontz, Esquire	Royce Hanson, Esquire

**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 Mateney Road, Germantown in the 9<sup>th</sup> Election District, is hereby denied in the amount requested.

This is a correct copy of Council action.

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Linda M. Lauer, Clerk of the Council