



Resolution No: _____
Introduced: September 22, 2009
Adopted: _____
Agenda Item No: 6

MONTGOMERY COUNTY, MARYLAND

MEMORANDUM

August 26, 2009

TO: County Council

FROM: Martin L. Grossman *MLG*
Hearing Examiner

SUBJECT: Development Plan Amendment (DPA) 08-1

The application for Development Plan Amendment (“DPA”) No. 08-1 was filed on April 7, 2008. The subject property, consists of 117.73 acres of land located in Germantown, on the east side of the Great Seneca Highway, immediately north of the Seneca Creek State Park and approximately 3,000 feet south of the intersection with Clopper Road. It was reclassified to the PD-4 Zone in Local Map Amendment (“LMA”) G-650, in accordance with Resolution No. 11-2268, approved by the District Council on October 9, 1990. The entire tract, which is known as the Village of Clopper’s Mill East, was approved for a total of 602 dwelling units, along with 153,000 square feet of retail uses, 17,000 square feet of office uses, an automobile filling station, and a day care facility. Exhibit 35, p. 2.

The Applicant, Great Seneca Investments, seeks to amend the approved Development Plan (DP) so as to permit a maximum of twenty (20) townhouses on a 1.32 acre portion of the site known as Parcel U, which is currently undeveloped, but which had been previously approved for uses related to a commercial building and then later, the construction of elderly housing units. In July of 2004, the Planning Board approved relocation of the elderly housing units to an alternate site. Exhibit 35, pp. 2-3. It is the purpose of this application to complete the residential “build-out” for the Village of Clopper’s Mill East. The DPA would also call for two moderately priced dwelling units (MPDUs), but their location within the Village of Clopper’s Mill East is still an issue, and that issue will be discussed below. As a result, the Hearing Examiner has submitted two alternative resolutions, one carrying out the recommendation of the Planning Board for

textual binding elements (Exhibit 38), and the other carrying out the textual binding elements submitted in the Applicant's DPA (Exhibit 46(b)).

Technical Staff, in its memorandum dated June 15, 2009, described the proposed townhouses (Exhibit 35, p. 3):

The proposed 3 story townhouses are shown on the amended development plan located to the south of Clopper's Mill Drive. Each townhouse will have interior parking for two cars and two spaces per driveway. Based on the amended development plan, 10 spaces are proposed for visitor parking. Additionally, the applicant has agreed to grant a private parking and maintenance easement to the Riverstone Condominium Association and plant a landscape buffer along the common property line. . . .

Staff also noted that the proposed changes would have to go through both site plan review and an amendment to the underlying preliminary plan.

Technical Staff recommended approval of DPA 08-1, with the proposed binding elements as submitted by the Applicant (Exhibit 35, p. 4). These binding elements would permit Applicant to locate the two MPDUs either by establishing two of the newly proposed 20 townhouses as MPDUs or, alternatively, by converting two existing Riverstone Condominium units in the Village of Clopper's Mill East into MPDUs. Either alternative would have to be approved by the Department of Housing and Community Affairs (DHCA), which agreed to this arrangement. Exhibit 35, Attachment 7.

Concerns about this arrangement were raised in a June 29, 2009 e-mail from Cathy Balogh, a "spokesperson for Riverstone residents" because it gave Riverstone residents "no options" regarding the MPDUs. Exhibit 37. Ms. Balogh appeared before the Planning Board at its July 2, 2009 meeting and indicated her preference for the townhouse MPDU alternative, but did not oppose the overall 20-townhouse proposal. Exhibit 39. Ms. Balogh ultimately followed up with a one-line letter of July 7, 2009, indicating that she was not seeking a hearing before the Hearing Examiner in this case. Exhibit 40.

The Montgomery County Planning Board reviewed DPA 08-1 at its regular meeting on July 2, 2009 and, by a vote of 3-to-2, the Board recommended that DPA 08-1 be approved, with modifications to the proposed binding elements. As stated in the Chairman's July 6, 2009 Memorandum to the Council (Exhibit 38, pp. 1-2):

The Planning Board had a lengthy discussion regarding the location of MPDUs for this project. Chairman Hanson and Commissioners Cryor and Presley voiced

support for providing the MPDUs on Parcel U, and eliminating any option for the MPDUs to be provided in the Riverstone Condominium community. They agreed that the financial implications for the applicant, alone, are not enough of a reason to not locate the MPDUs on site. Although Commissioners Robinson and Alfandre support the townhouse proposal, their preference is to allow flexibility in terms of location of MPDUs within the overall community and for the final decision over the location of MPDUs to be maintained under the jurisdiction of DHCA.

The modified binding elements, as approved by the majority of the Planning Board (and showing the changes), are as follows:

BINDING ELEMENTS

DEVELOPMENT STANDARDS	BINDING ELEMENTS
1. Number of dwelling units.	Not to exceed 20 DU's, including <u>2 on-site MPDUs.</u>
2. Building Height	Not to exceed forty feet in height <u>and 3 stories within the 40-foot height limit.</u>
3. Moderately Priced Dwelling Units (MPDUs)	<p>Under an agreement with DHCA, the applicant must provide two MPDUs to satisfy the overall MPDU requirement for the Village of Clopper's Mill East development by <u>either:</u></p> <ul style="list-style-type: none"> (1) Building 2 of the townhouses approved by this development plan amendment as MPDUs; or (2) Purchasing 2 existing Riverstone Condominium units in the Village of Clopper's Mill East and converting them into MPDUs. <p>Either alternative must be under agreement with DHCA.</p>

The Applicant did not accept all the modifications to the binding elements proposed by the Planning Board; however, Applicant did not request a public hearing before the Hearing Examiner. Instead, it submitted a revised DPA (Exhibits 46(a), (b) and (c)) which modified only Binding Element numbered 2 in accordance with the Planning Board recommendation, and a letter of August 24, 2009 (Exhibit 45) agreeing to have alternative resolutions submitted to the Council, one referencing binding elements consistent with the Planning Board's recommendation

and the other consistent with the Applicant's wishes. Applicant stated, "In the event that the Council . . . approves an Amended Development Plan with conditions as recommended by the Planning Board, then the Applicant will promptly file a revised Amended Development Plan that will be consistent with the conditions of approval of the District Council."

There is no opposition to DPA 08-1, 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 forwarded to OZAH on July 27, 2009.

However, in this case, alternative resolutions are appropriate. Resolution Alternative "A" would approve the DPA conditioned upon Applicant revising the DPA's Textual Binding Elements as proposed by the Planning Board. Resolution Alternative "B" would approve the DPA with the Textual Binding Elements essentially as written in the current version (Exhibits 46(a), (b) and (c)).

Because the Hearing Examiner has conducted no hearing in this matter, he has no recommendations on the substance of this issue. He does suggest one clarification to the box showing the textual binding elements on Exhibit 46(b), which would apply to both alternatives. That clarification would make it explicit that the language in new Binding Element 1 applies only to the portion of the site changed in this DPA (*i.e.*, the area currently designated "Parcel U"). Since the overall development has 602 units, the language in the current Binding Element 1 specifying that the number of dwelling units is "Not to exceed 20 DUs" may create confusion unless the text specifies that the "20 DU" limitation relates only to Parcel U. The recommended language in the Textual Binding Elements has been changed accordingly in both proposed resolutions.

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

MLG

cc: Jody S. Kline, Esquire
Martin Klauber, Esquire, People's Counsel
Carlton Gilbert, M-NCPPC

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 Development Plan Amendment (DPA) 08-1

BACKGROUND

1. The application for Development Plan Amendment ("DPA") No. 08-1 was filed on April 7, 2008. The subject property, consists of 117.73 acres of land located in Germantown, on the east side of the Great Seneca Highway, immediately north of the Seneca Creek State Park and approximately 3,000 feet south of the intersection with Clopper Road. It was reclassified to the PD-4 Zone in Local Map Amendment ("LMA") G-650, in accordance with Resolution No. 11-2268, approved by the District Council on October 9, 1990. The entire tract, which is known as the Village of Clopper's Mill East, was approved for a total of 602 dwelling units, along with 153,000 square feet of retail uses, 17,000 square feet of office uses, an automobile filling station, and a day care facility. Exhibit 35, p. 2.
2. The Applicant, Great Seneca Investments, seeks to amend the approved Development Plan (DP) so as to permit a maximum of twenty (20) townhouses on a 1.32 acre portion of the site known as Parcel U, which is currently undeveloped, but which had been previously approved for uses related to a commercial building and then later, the construction of elderly housing units. In July of 2004, the Planning Board approved relocation of the elderly housing units to an alternate site. Exhibit 35, pp. 2-3. It is the purpose of this application to complete the residential "build-out" for the Village of Clopper's Mill East. The DPA would also call for two moderately priced dwelling units (MPDUs), with binding textual elements to govern their location within the Village of Clopper's Mill East.
3. Technical Staff, in its memorandum dated June 15, 2009, described the proposed townhouses (Exhibit 35, p. 3):

The proposed 3 story townhouses are shown on the amended development plan located to the south of Clopper's Mill Drive. Each townhouse will have interior parking for two cars and two spaces per driveway. Based on the amended development plan, 10 spaces are proposed for visitor parking. Additionally, the applicant has agreed to grant a private parking and maintenance easement to the Riverstone Condominium Association and plant a landscape buffer along the common property line. . . .

Staff also noted that the proposed changes would have to go through both site plan review and an amendment to the underlying preliminary plan.

4. Technical Staff recommended approval of DPA 08-1, with the proposed binding elements as submitted by the Applicant (Exhibit 35, p. 4). These binding elements would permit Applicant to locate the two MPDUs either by establishing two of the newly proposed 20 townhouses as MPDUs or, alternatively, by converting two existing Riverstone Condominium units in the Village of Clopper's Mill East into MPDUs. Either alternative would have to be approved by the Department of Housing and Community Affairs (DHCA), which agreed to this arrangement. Exhibit 35, Attachment 7.
5. Concerns about this arrangement were raised in a June 29, 2009 e-mail from Cathy Balogh, a "spokesperson for Riverstone residents" because it gave Riverstone residents "no options" regarding the MPDUs. Exhibit 37. Ms. Balogh appeared before the Planning Board at its July 2, 2009 meeting and indicated her preference for the townhouse MPDU alternative, but did not oppose the overall 20-townhouse proposal. Exhibit 39. Ms. Balogh ultimately followed up with a one-line letter of July 7, 2009, indicating that she was not seeking a hearing before the Hearing Examiner in this case. Exhibit 40.
6. The Montgomery County Planning Board reviewed DPA 08-1 at its regular meeting on July 2, 2009 and, by a vote of 3-to-2, the Board recommended that DPA 08-1 be approved, with modifications to the proposed binding elements. As stated in the Chairman's July 6, 2009 Memorandum to the Council (Exhibit 38, pp. 1-2):

The Planning Board had a lengthy discussion regarding the location of MPDUs for this project. Chairman Hanson and Commissioners Cryor and Presley voiced support for providing the MPDUs on Parcel U, and eliminating any option for the MPDUs to be provided in the Riverstone Condominium community. They agreed that the financial implications for the applicant, alone, are not enough of a reason to not locate the MPDUs on site. Although Commissioners Robinson and Alfandre support the townhouse proposal, their preference is to allow flexibility in terms of location of MPDUs within the overall community and for the final decision over the location of MPDUs to be maintained under the jurisdiction of DHCA.

7. The Applicant did not accept all the modifications to the binding elements proposed by the Planning Board; however, Applicant did not request a public hearing before the Hearing Examiner. Instead, it submitted a revised DPA (Exhibits 46(a), (b) and (c)) which modified only Binding Element numbered 2, relating to the height of the townhouses, in accordance with the Planning Board recommendation, and left unchanged its binding elements 1 and 3 which relate to locating the MPDUs. Nevertheless, in a letter dated August 24, 2009 (Exhibit 45), Applicant agreed to have alternative resolutions submitted to the Council, one referencing binding elements consistent with all the Planning Board's recommendations and the other consistent with the Applicant's wishes. Applicant stated, "In the event that the Council . . . approves an Amended Development Plan with conditions as recommended by the Planning Board, then the Applicant will promptly file a revised Amended Development Plan that will be consistent with the conditions of approval of the District Council."
8. There is no opposition to DPA 08-1, 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 (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.
9. However, in this case, because of the MPDU location issue, the Hearing Examiner submitted alternative resolutions. Resolution Alternative "A" would approve the DPA, conditioned upon Applicant revising the DPA's Textual Binding Elements as proposed by the Planning Board. Resolution Alternative "B" would approve the DPA with the Textual Binding Elements substantially as written in the current version (Exhibits 46(a), (b) and (c)).
10. The District Council, having reviewed the record in this case, is persuaded by the Planning Board's majority recommendation to require that both MPDUs be located among the twenty new townhouses to be constructed on Parcel U. The District Council notes that even the two minority members of the Planning Board felt that it would be better to locate the MPDUs among the townhouses, but they wished to give DHCA the flexibility to make the call.
11. Because the Hearing Examiner has conducted no hearing in this matter, he has no recommendations on the substance of this issue. He did suggest one clarification to the box showing the textual binding elements on Exhibit 46(b), which would apply to both alternatives. That clarification would make it explicit that the language in new Binding

Element 1 applies only to the portion of the site changed in this DPA (*i.e.*, the area currently designated "Parcel U"). Since the overall development has 602 units, the language in the current Binding Element 1 specifying that the number of dwelling units is "Not to exceed 20 DUs" may create confusion unless the text specifies that the "20 DU" limitation relates only to Parcel U. The language in the Textual Binding Elements has been changed accordingly.

12. The Textual binding Elements which must be imprinted on the approved DPA are as follows:

DEVELOPMENT PLAN TEXTUAL BINDING ELEMENTS	
DEVELOPMENT STANDARDS	BINDING ELEMENTS
1. Number of dwelling units.	Not to exceed 20 DUs in the tract currently identified as "Parcel U," including 2 on-site MPDUs.
2. Building Height	Not to exceed forty feet in height
3. Moderately Priced Dwelling Units (MPDUs)	Under an agreement with DHCA, the applicant must provide two MPDUs to satisfy the overall MPDU requirement for the Village of Clopper's Mill East development by building 2 of the townhouses approved by this development plan amendment as MPDUs

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.

DPA 08-1, which requests an amendment to the Development Plan approved on October 9, 1990 in LMA G-650 (Resolution No. 11-2268), for 117.73 acres of land known as the Village of Clopper's Mill East, located in Germantown, on the east side of the Great Seneca Highway, approximately 3,000 feet south of the intersection with Clopper Road, Maryland, to permit a maximum of twenty (20) townhouses on a 1.32 acre portion of the site known as Parcel U and to provide textual binding elements as spelled out in Paragraph numbered 12 above, **is hereby approved**, subject to the specifications and requirements of the Development Plan Amendment, Exhibits 46(a), (b) and (c), **provided that** the Applicant revises the Development Plan Amendment,

Exhibits 46(a), (b) and (c), with the modified textual binding element language specified in the table in Paragraph numbered 12 of this Opinion; and that the revised DPA is submitted to the Hearing Examiner for certification within 10 days of the District Council's action, pursuant to the provisions of Zoning Ordinance §59-D-1.64.

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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interior parking for two cars and two spaces per driveway. Based on the amended development plan, 10 spaces are proposed for visitor parking. Additionally, the applicant has agreed to grant a private parking and maintenance easement to the Riverstone Condominium Association and plant a landscape buffer along the common property line. . . .

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4. Technical Staff recommended approval of DPA 08-1, with the proposed binding elements as submitted by the Applicant (Exhibit 35, p. 4). These binding elements would permit Applicant to locate the two MPDUs either by establishing two of the newly proposed 20 townhouses as MPDUs or, alternatively, by converting two existing Riverstone Condominium units in the Village of Clopper's Mill East into MPDUs. Either alternative would have to be approved by the Department of Housing and Community Affairs (DHCA), which agreed to this arrangement. Exhibit 35, Attachment 7.
5. Concerns about this arrangement were raised in a June 29, 2009 e-mail from Cathy Balogh, a "spokesperson for Riverstone residents" because it gave Riverstone residents "no options" regarding the MPDUs. Exhibit 37. Ms. Balogh appeared before the Planning Board at its July 2, 2009 meeting and indicated her preference for the townhouse MPDU alternative, but did not oppose the overall 20-townhouse proposal. Exhibit 39. Ms. Balogh ultimately followed up with a one-line letter of July 7, 2009, indicating that she was not seeking a hearing before the Hearing Examiner in this case. Exhibit 40.
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7. The Applicant did not accept all the modifications to the binding elements proposed by the Planning Board; however, Applicant did not request a public hearing before the Hearing Examiner. Instead, it submitted a revised DPA (Exhibits 46(a), (b) and (c)) which modified only Binding Element numbered 2, relating to the height of the townhouses, in accordance with the Planning Board recommendation, and left unchanged its binding elements 1 and 3 which relate to locating the MPDUs. Nevertheless, in a letter dated August 24, 2009 (Exhibit 45), Applicant agreed to have alternative resolutions submitted to the Council, one referencing binding elements consistent with all the Planning Board's recommendations and the other consistent with the Applicant's wishes. Applicant stated, "In the event that the Council . . . approves an Amended Development Plan with conditions as recommended by the Planning Board, then the Applicant will promptly file a revised Amended Development Plan that will be consistent with the conditions of approval of the District Council."
8. There is no opposition to DPA 08-1, 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 (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.
9. However, in this case, because of the MPDU location issue, the Hearing Examiner submitted alternative resolutions. Resolution Alternative "A" would approve the DPA, conditioned upon Applicant revising the DPA's Textual Binding Elements as proposed by the Planning Board. Resolution Alternative "B" would approve the DPA with the Textual Binding Elements substantially as written in the current version (Exhibits 46(a), (b) and (c)).
10. The District Council, having reviewed the record in this case, is persuaded by the Planning Board's minority recommendation to give DHCA the flexibility to determine the best location for the two MPDUs.
11. Because the Hearing Examiner has conducted no hearing in this matter, he has no recommendations on the substance of this issue. He did suggest one clarification to the box showing the textual binding elements on Exhibit 46(b), which would apply to both alternatives. That clarification would make it explicit that the language in new Binding Element 1 applies only to the portion of the site changed in this DPA (*i.e.*, the area currently designated "Parcel U"). Since the overall development has 602 units, the language in the current Binding Element 1 specifying that the number of dwelling units is "Not to exceed 20

DUs” may create confusion unless the text specifies that the “20 DU” limitation relates only to Parcel U. The language in the Textual Binding Elements has been changed accordingly.

12. The Textual binding Elements which must be imprinted on the approved DPA are as follows:

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DEVELOPMENT STANDARDS	BINDING ELEMENTS
1. Number of dwelling units.	Not to exceed 20 DUs in the tract currently identified as “Parcel U,” including MPDUs if they are located on Parcel U.
2. Building Height	Not to exceed forty feet in height
3. Moderately Priced Dwelling Units (MPDUs)	<p>The applicant must provide two MPDUs to satisfy the overall MPDU requirement for the Village of Clopper’s Mill East development by building 2 of the townhouses approved by either:</p> <ul style="list-style-type: none"> (1) Building 2 of the townhouses approved by this development plan amendment as MPDUs; or (2) Purchasing 2 existing Riverstone Condominium units in the Village of Clopper’s Mill East and converting them into MPDUs. <p>Either alternative must be under agreement with DHCA.</p>

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.

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provide textual binding elements as spelled out in Paragraph numbered 12 above, **is hereby approved**, subject to the specifications and requirements of the Development Plan Amendment, Exhibits 46(a), (b) and (c), **provided that** the Applicant revises the Development Plan Amendment, Exhibits 46(a), (b) and (c), with the modified textual binding element language specified in the table in Paragraph numbered 12 of this Opinion; and that the revised DPA is submitted to the Hearing Examiner for certification within 10 days of the District Council's action, pursuant to the provisions of Zoning Ordinance §59-D-1.64.

This is a correct copy of Council action.

Linda M. Lauer, Clerk of the Council