

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660

IN THE MATTER OF: *
POTOMAC FOODS REAL ESTATE, LLC *
Applicant *
Mark James *
Lee Ann Gudorp *
Luke Fetcho *
Joseph Caloggero *
Thomas Flynn *
For the Application *
Jody S. Kline, Esquire *
Attorney for the Applicant *

OZAH Case No. CU 17-03

Before: Martin L. Grossman, Hearing Examiner
Director, Office of Zoning and Administrative Hearings

**OPINION AND ORDER ADMINISTRATIVELY APPROVING A MINOR
AMENDMENT TO CONDITIONAL USE CU 17-03**

I. BACKGROUND

On August 10, 2016, the Applicant, Potomac Foods Real Estate, LLC (hereinafter, “Potomac Foods” or the Applicant), filed an application for a Conditional Use pursuant to Zoning Ordinance §59.3.5.14.E, to permit two drive-thru restaurants at 16004 Shady Grove Road, Gaithersburg, Maryland, in the General Retail GR 1.5, H-45 Zone. Because two drive-thrus were initially sought, the case was captioned as CU 17-03-A and CU 17-03-B. The subject property is on Parcels N017, N016, N019, which is also known as Part of Parcel X in the Washington Industrial Park (Tax Account Numbers 09-01782294, 09-02716114, 09-02714651).

A motion to amend the application was filed on April 21, 2017 (Exhibit 51) and noticed on May 25, 2017 (Exhibit 55). The motion was accompanied by amended plans which reduced the proposed number of drive-thrus to one, an existing Burger King, with three other restaurants also housed on site, but having no drive-thru. The motion was unopposed, and was granted, as announced at the hearing. Tr. 6. Reduced to just one drive-thru, the case was re-captioned as CU 17-03. Exhibit 54.

The subject site is owned by Comprint Court Joint Venture, which consented to the amended application (Exhibit 57(a)). A restaurant with a drive-thru window currently exists on the site. It was approved under site plan review in accordance with the previous C-3 (Highway Commercial) zoning on the property, prior to adoption of SMA G-956.

The site is in the area subject to the 2010 *Great Seneca Science Corridor Master Plan*. Restaurants are permitted uses in the GR Zone, and drive-thru windows are allowed as limited or

conditional uses; however, the drive-thru window in question does not meet the limited use standards under Zoning Ordinance Section 59.3.5.14.E.2.a, so the Applicant sought conditional use approval.

As described by Mark James, Applicant's Vice President for Operations, Potomac Foods owns and operates 29 Burger Kings and other restaurants in Maryland, Virginia, Delaware, and the District of Columbia. The subject Burger King has been on site since about 1975. Tr. 16.

After numerous postponements at the Applicant's request, an OZAH hearing date was scheduled for July 7, 2017, and a notice of public hearing was issued on May 25, 2017 (Exhibit 55).

The Technical Staff of the Montgomery County Planning Department issued a report on June 9, 2017, recommending approval of the application, subject to four conditions. Exhibit 58. The Planning Board met on June 22, 2017, and voted unanimously (4-0) to recommend approval with the conditions recommended by Staff. The Planning Board's recommendations are contained in the Chair's letter of June 26, 2017. Exhibit 59.

No correspondence either for or against the application was received by either the Hearing Examiner or Technical Staff (Exhibit 58, p. 11).

The public hearing proceeded as scheduled on July 7, 2017. The Applicant called five witnesses – Mark James, Applicant's vice-president for operations (Tr. 15-32); Lee Ann Gudorp, an expert in site design and project management (Tr. 32-61); Luke Fetcho, a civil engineer (Tr. 62-67); Joseph Caloggero, a traffic engineer (Tr. 67-78); and Thomas Flynn, a Market Demand Analyst (Tr. 79-93). A revised Needs analysis (Exhibit 63) and a revised traffic study (Exhibit 64) were filed at the hearing, and the Applicant introduced a memorandum showing approval of the Preliminary Forest Conservation Plan (Exhibit 67) and approval by the Department of Permitting Services (DPS) of Applicant's stormwater management concept plan (Exhibit 69). The record closed, as scheduled, on July 17, 2017, following receipt of electronic copies of the new exhibits and the hearing transcript.

On July 25, 2017, the Hearing Examiner granted the requested conditional use, subject to eight conditions. Condition Number 5 provided that "The Applicant is bound by its site layout and other plans filed [in] this case (Exhibits 51(a) through 51(m))."

II. The Modification Request

By letter filed on December 27, 2019 (Exhibit 71), counsel for the conditional use holder, Potomac Foods Real Estate, LLC,¹ requested that the Hearing Examiner approve a minor amendment of the conditional use by administratively modifying the Conditional Use Plans to allow the retention and extension of an existing retaining wall along the southwest side of the subject

¹ The letter was initially filed on behalf of "Potomac Food Groups, Inc.", but the identity of the filer was clarified by counsel for the conditional use holder on January 3, 2020. The request for a minor amendment is made on behalf of the conditional use holder, "Potomac Foods Real Estate, LLC." Exhibits 73 and 74.

property, differing slightly from the approved conditional use plans which had called for the rebuilding of the existing retaining wall.

The reason for the change proposed by the Applicant is explained in the Applicant's motion (Exhibit 71):

Field inspections after completion of the conditional use process made the project engineers aware of the fact that the existing retaining wall, made of poured-in-place concrete, was quite stable and its total replacement was unnecessary from a structural point of view and rebuilding the wall added undesired construction cost. Therefore, the engineers simply decided to retain the existing wall but to extend it at both ends to address the new alignment of the reconstructed restaurant drive thru lane.

* * *

The entire new wall will remain in a poured-in-place concrete form. As it is today, the retaining wall will remain at approximately five feet high at its maximum height in the approximate center of the existing wall. The extensions on either end will taper down in terms of height until the grades on both sides of the wall at each end are equal and no retention along the drive thru lane is needed any further.

The Applicant attached four exhibits demonstrating the proposed change:

Exhibit 71(a) is a copy of the "Existing Conditions" Plan from Case No. CU 17-03 on which the location of the existing retaining wall is highlighted and annotated in red.

Exhibit 71(b) is a copy of the approved conditional use plan ("Site Layout") showing where a new retaining wall was to be constructed to replace the existing retaining wall.

Exhibit 71(c) is a plan highlighting and noting the retention of the existing retaining wall (in red) and indicating and annotating the extension of the retaining wall in both the northwest and southeast directions (in light green).

Exhibit 71(d) is the same base drawing as Exhibit 71(c) but is "unhighlighted" and has no annotations so that the Hearing Examiner can have a "clean" copy of a revised conditional use plan for inclusion in OZAH's records.

The Applicant argued that the proposed minor amendment is justified (Exhibit 71, p. 2):

Potomac Foods Group believes that it is readily obvious from the narrative above and the attached drawings that the proposed modification to the approved conditional use does not change the nature, character or intensity of the approved use to the extent that substantial adverse effects on surrounding could reasonably be expected. For all intents and purposes, the retention wall will appear the same and will function the same with no adverse consequences as would a new retaining wall originally contemplated by the Petitioner. Accordingly, Potomac Foods Group believes that this request for a minor amendment of Conditional Use CU 17-03 can be granted

administratively by the Hearing Examiner subject to the provisions of Section 59.7.3.1.K.2 of the Zoning Ordinance.

On December 30, 2019, the Hearing Examiner sent the Technical Staff of the Planning Department an email requesting Technical Staff's opinion as to whether or not the proposed amendment will meet the Zoning Ordinance standard for approval of a Minor Amendment—*i.e.*, whether or not the proposed amendment to the conditional use will “change the nature, character, or intensity of the conditional use to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected . . .” Zoning Ordinance §59.7.3.1.K.2.a. Exhibit 72.

Technical Staff responded on December 31, 2019 in an email to the Hearing Examiner stating (Exhibit 72):

I concur that the proposed modification to the retaining wall will not change the nature, character, or intensity of the conditional use to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected.

III. The Governing Law

Requests to amend a conditional use are governed by Zoning Ordinance §59.7.3.1.K. Whether an amendment request is characterized as one for a major amendment or for a minor amendment is significant because a *major amendment* application must “*follow[] the same procedures, must meet the same criteria, and must satisfy the same requirements as the original conditional use application . . .*” Zoning Ordinance §59.7.3.1.K.1.b. However, an application for a *minor amendment* need not go through those extensive procedures. Rather, “. . . *it may be approved administratively by the Hearing Examiner.*” Zoning Ordinance §59.7.3.1.K.2.a.

Zoning Ordinance Section 59.7.3.1.K. also defines major and minor amendments:

§59.7.3.1.K.1.a. *A major amendment to a conditional use is one that changes the nature, character, or intensity of the conditional use to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected, when considered in combination with the underlying conditional use.*

§59.7.3.1.K.2.a. *A minor amendment to a conditional use is one that does not change the nature, character, or intensity of the conditional use to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected, when considered in combination with the underlying conditional use.*

Whether an application to amend a conditional use is characterized as a major amendment or a minor amendment, the County Council has made it clear that the request to amend a conditional use must be filed with the Hearing Examiner, and not the Board of Appeals.² See Zoning Text Amendment (ZTA) 16-16, (Ord. No. 18-25, eff. 2/27/17), which amended Zoning Ordinance §59.7.3.1.K. to clarify jurisdiction over applications to amend conditional uses and special exceptions. Thus, the Hearing Examiner has the jurisdiction to act on the Applicant's request for a

² The opposite is true with requests to modify special exceptions. They must be filed with the Board of Appeals.

minor amendment of the conditional use in question.

IV. Evaluation and Decision

The evidence before the Hearing Examiner consists of copies of the revised plans; the Applicant's description of the proposed change; its assertion that "the proposed modification to the approved conditional use does not change the nature, character or intensity of the approved use to the extent that substantial adverse effects on surrounding could reasonably be expected" (Exhibit 71); and the Technical Staff's Email of December 31, 2019, "concur[ring] that the proposed modification to the retaining wall will not change the nature, character, or intensity of the conditional use to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected." Exhibit 73.

The definitional distinction between a major and minor amendment is whether the proposal, if granted, would *"change the nature, character, or intensity of the conditional use to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected, when considered in combination with the underlying conditional use."* Under the facts of this case, the Hearing Examiner finds that the proposed change would clearly not change the nature or character of the use.

It would still be operating as a drive-thru restaurant pursuant to Zoning Ordinance §59.3.5.14.E. It would not be expanded in size, nor in the scope of proposed operations. The proposed change appears designed mostly to reduce construction costs by utilizing an existing retaining wall, and extending it.

Given the nature of the proposed change and Technical Staff's evaluation of its likely impact, one would not reasonably expect substantial adverse effects on the surrounding neighborhood from the proposed amendment. There is also no evidence in the factual record compiled by the Hearing Examiner to demonstrate that the proposed change would be a significant issue for the neighborhood.

Based on this record, the Hearing Examiner agrees with the Applicant and the Technical Staff that the proposed amendment would not change the nature, character, or intensity of the conditional use. The Hearing Examiner therefore concludes that the proposed modification is properly characterized as a minor amendment – one which will not change the nature, character, or intensity of the conditional use to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected, when considered in combination with the underlying conditional use. Thus, the statutory standard for an administrative modification to allow a minor amendment is satisfied, and it is hereby approved without a public hearing, subject to reconsideration if a request for a hearing is received in accordance with the provisions of this Order.

The Hearing Examiner hastens to add that this ruling does not address whether or not the conditional use holder must obtain any further authorization from any other agency to make the proposed change. The Hearing Examiner holds only that the terms of the conditional use, as amended by this Order, do not prohibit the plan amendment proposed by the conditional use holder.

The filing of Amended Conditional Use Plans (Exhibit 71(a) – 71 (d)), requires a slight modification to the language of Condition 5 of the Conditional Use, which cite to plans that are now partially superseded. Condition 5 will now read:

5. The Applicant is bound by its site layout and other plans filed in this case (Exhibits 51(a) through 51(m), as amended in Exhibits 71(a) through 71(d)).

The added language has been underlined.

ORDER

Based on the foregoing, it is, this 7th day of January, 2020:

ORDERED: That the request for a minor amendment to Conditional Use CU 17-03, allowing changes to the Conditional Use Plans, as depicted in the revised plans (Exhibits 71(a) – 71 (d)), is hereby administratively **APPROVED**, under the terms of the 8 Conditions set forth in Part IV of the Hearing Examiner's Report and Decision of July 25, 2017, as modified herein; and, it is

FURTHER ORDERED: That the language of Condition 5 of the Conditional Use is hereby modified to read as follows:

5. The Applicant is bound by its site layout and other plans filed in this case (Exhibits 51(a) through 51(m), as amended in Exhibits 71(a) through 71(d)).

and, it is **FURTHER ORDERED:** That this amendment and the continued use of the conditional use are subject to all terms and conditions imposed in connection with the initial approval, except as specifically amended by the Hearing Examiner in this Opinion and Order. The Conditional Use holder is directed to comply fully with all applicable county, state and federal regulations; and, it is

FURTHER ORDERED: That pursuant to Section 59.7.3.1.K.2.b. of the Zoning Ordinance, any party may request a public hearing on the Hearing Examiner's action within 15 days after this decision is issued. The request for public hearing must be in writing, and must specify the reason for the request and the nature of the objection or relief desired. If a request for a hearing is received, the Hearing Examiner must suspend his administrative amendment and conduct a public hearing to consider whether the amendment substantially changes the nature, character, or intensity of the conditional use or its effect on the immediate neighborhood. If the Hearing Examiner determines that such impacts are likely, then the amendment application must be treated as a major amendment application. A decision of the Hearing Examiner may be appealed on the basis of the Hearing Examiner's record to the Board of Appeals.



Martin L. Grossman
Hearing Examiner

NOTICES TO:

Potomac Foods Real Estate, LLC, Applicant
Jody S Kline, Esquire, Applicant's attorney
Mark James
Lee Ann Gudorp
Luke Fetcho
Joseph Caloggero
Thomas Flynn
Barbara Jay, Executive Director
Montgomery County Board of Appeals
Gwen Wright, Director, Planning Department
Emily Tettelbaum, Planning Department
Ehsan Motazedi, Department of Permitting Services, Zoning & Site Plan Enforcement
Greg Nichols, Manager, DPS Zoning & Site Plan Enforcement
Barbara Cox, DPS Zoning & Site Plan Enforcement
Michael Coveyou, Acting Director, Finance Department
Charles Frederick, Esquire, Associate County Attorney
Current abutting and confronting property owners
All parties entitled to notice at the time of the original filing:
Abutting and Confronting Property Owners (or a condominium's council of unit owners or renters, if applicable)
Civic, Renters' and Homeowners' Associations within a half mile of the site
Any Municipality within a half mile of the site