

Resolution No.: 16-1518  
Introduced: October 12, 2010  
Adopted: October 12, 2010

**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: District Council

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**SUBJECT:** APPLICATION NO. G-879 FOR AMENDMENT TO THE ZONING ORDINANCE MAP, Steven A. Robins, Esquire and Martin J. Hutt, Esquire, Attorneys for Applicant, Kensington Heights 2, LLC, OPINION AND RESOLUTION ON APPLICATION Tax Account No. 13-01199036

**OPINION**

Application No. G-879, as amended by Applicant Kensington Heights 2, LLC,<sup>1</sup> requests reclassification of 1.806 acres (78,672 square feet) of unimproved land located at 2609 McComas Avenue, Kensington, Maryland, from the existing R-60 Zone to the RT-8 Zone. The property, which consists of Part of Lot 16, Block E, Kensington Heights Subdivision, is situated just south of Wheaton Plaza Shopping Center (also now known as “Westfield Wheaton Shopping Center” and “Westfield Wheaton Mall”).

The application was filed under the Optional Method authorized by Zoning Ordinance §59-H-2.5, which permits binding limitations with respect to land use, density and development standards or staging. Applicant proposes to build a development that consists of eleven (11) new townhomes and three (3) single-family detached homes. The proposal is set forth in a revised Schematic Development Plan (SDP), Exhibit 63(a), which contains an illustrative diagram and a specification of the binding elements, as well as other information regarding the development.

The Applicant initially requested rezoning to the RT-10 Zone, with a plan to build 15 townhouses and two (2) single-family detached homes (Exhibit 8), but after consultation with Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC), Applicant amended its application to request rezoning to the RT-8 Zone, with 11 townhouses and 3 single-family detached homes. *See* Exhibits 27(a) and (c), later corrected in Exhibit 63(b).

Technical Staff reviewed the revised plans, and in a report dated October 19, 2009, recommended approval (Exhibit 33). The Planning Board considered the revised application on October 29, 2009, and by a vote of 4 to 0, recommended approval, as set forth in a memorandum

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<sup>1</sup> The application was filed on December 1, 2008, amended on June 18, 2009 to reduce the re-zoning request from RT-10 to RT-8 (Exhibit 27(a)), and corrected on November 20, 2009 (Exhibit 63(b)), to show the full amount of acreage to be rezoned (1.806 acres).

dated October 30, 2009 (Exhibit 43). The Planning Board agreed with its Technical Staff that the application satisfied all of the criteria for reclassification to the RT-8 Zone.

A public hearing was duly noticed and convened on November 6, 2009, at which time the Applicant presented evidence and testimony in support of the application. Martin Klauber, the former People's Counsel, participated in the hearing, but he did not call any witnesses. The Kensington Heights Citizens Association (KHCA) submitted its testimony in writing to all parties in advance of the hearing because its representative was scheduled to be out of town on the hearing date. KHCA did not oppose the rezoning, but expressed concerns about stormwater management and removal of the hill on the site, which is comprised of excavation fill. KHCA also wanted a binding element, to which Applicant agreed, requiring that any residences at the McComas property line be single-family detached units. Exhibit 42.

Three other community witnesses testified at the hearing to express their concerns, one of whom testified against the rezoning. Another neighbor, who had merely expressed concerns at the hearing, sent a letter after the hearing expressing her opposition, asserting lack of compatibility and the need for pedestrian access from the development to Wheaton Plaza. Exhibit 84.

The filing of a revised, illustrative, site layout after the initial hearing caused the Hearing Examiner to obtain additional analysis from Technical Staff. On January 15, 2010, Technical Staff responded saying that although Staff found the new layout to be "not as appealing" as the previous SDP site layout, Staff determined that it was acceptable, and because the SDP layout is illustrative, the final site layout would be determined at subsequent stages in the development process (*i.e.*, at site plan and subdivision reviews). Exhibit 78. Staff also agreed to the other changes in the SDP, including binding elements that limited the number of dwelling units to 14 and required that any units fronting on McComas Avenue be one-family detached units. Technical Staff did express reservations about the addition of a non-binding note specifying that no pedestrian sidewalk access to Wheaton Plaza was being proposed, but Staff supported the SDP nevertheless because the note was non-binding and connectivity issues would be examined at site plan review.

Ostensible discrepancies in the evidence regarding the total size and boundaries of the subject property led the Hearing Examiner to schedule an additional day of hearings solely to address the property boundary issues. The hearing relating to the survey and boundary issues was held, as scheduled, on June 18, 2010. The Hearing Examiner left the record open after the survey hearing to allow comments from other parties who did not attend the hearing. The record closed on July 9, 2010.

The Hearing Examiner recommended approval of the application on the basis that the R-T 8 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 August 18, 2010, is incorporated herein by reference. Oral argument was held before the District Council on October 12, 2010. Based on

its review of the entire record and the oral argument, the District Council finds that the application does meet the standards required for approval of the requested rezoning for the reasons set forth by the Hearing Examiner.

### **The Property and the Acreage Issues**

The subject property (Part of Lot 16, Block E, Kensington Heights), which has an area of about 78,672 square feet (1.806 acres), is bordered by Westfield Wheaton Mall on the north and McComas Avenue on the south. About 100 feet to the west is Melvin Grove Court and 100 feet to the east is Littleford Lane. It is equidistant (about 2,000 feet) from Drumm Avenue on the west and Georgia Avenue (MD 97) on the east.

The subject site is rectangular in shape, measuring about 200 feet wide and 400 feet deep, with approximately 200 feet of street frontage along McComas Avenue, which will provide the sole vehicular access to the site. This site is not in a special protection area or a primary management area. Tr. 62. According to Technical Staff, the site is just within a half-mile of the Wheaton Metrorail Station. It takes about 15 minutes to walk there. Tr. 115. Staff describes the property as follows (Exhibit 33, p. 4):

The subject property is currently zoned R-60 and is undeveloped. It is the only undeveloped property on the block. However, the property contains a large dirt stockpile area that was created during the expansion of the Wheaton Plaza Shopping Center. Because of the stockpiling activity, the site's topography has a sharp 22 percent grade, resulting in a man-made grassy hill on the property.

Applicant's engineer, Curt Schreffler, testified that the elevation of that mound at approximately its highest point in the center of the site is 438 feet above sea level, compared to 420 feet for the adjoining properties to the east and west. Tr. 54-55.

Two issues arose in this case regarding the acreage of the subject site. The first was that the initial application form (Exhibit 1) and the amended application form (Exhibit 27(a)) listed the size of the property as 1.76 acres (76,666 square feet), which is smaller than the amount of land that Applicant actually seeks to rezone, 1.806 acres (78,672 sq. ft.), as determined by a survey of the site. Zoning Ordinance §59-H-2.24 provides, "*After acceptance for filing, an application for a map amendment shall not be modified or amended so as to increase the area proposed to be reclassified or as to the class of zone requested.*"

Thus, if this difference were actually an increase in the amount sought in the "application," the change would not be permitted; however, the initial application also included an Identification Plat (Exhibit 5) which specified that the larger figure referred to the survey results and the smaller figure to the number specified in a deed to the property. The Hearing Examiner concluded that, pursuant to Zoning Ordinance §59-H-2.4, the term "application" is broader than just the application form. It included both documents (as well as other items), and thus the Applicant was not seeking to enlarge the area to be rezoned, but rather had referenced it by the two figures mentioned. Tr. 27-31. The District Council agrees with this legal conclusion.

In order to avoid confusion, the Hearing Examiner directed Applicant to file a corrected application form to reflect the correct acreage, which Applicant did in Exhibit 63(b).

The second issue concerned whether Applicant's survey fairly represented the actual property owned by the Applicant and did not include any part of the abutting land owned by the neighbors. Zoning Ordinance §59-H-2.1 provides, in relevant part,

*Proposals for a local amendment of the zoning map may be made only by any governmental agency or by a person with a financial, contractual or proprietary interest in the property to be affected by the proposed amendment.*

The Hearing Examiner therefore correctly realized the importance of establishing in the record whether Applicant has "a financial, contractual or proprietary interest" in the entire property it seeks to have rezoned and of avoiding a mistaken rezoning of property belonging to the adjoining property owners.

Confusion was created in this case because the Applicant had presented three different figures for the size of its property. The initial application form recited that the property consisted of "1.76 acres or 76,666 square feet." Exhibit 1. This figure was based on a "metes and bounds" description for Part of Lot 16, Block E (Exhibit 6), which concluded that the property contained "76,665.60 square feet (1.7602 acres), more or less." This description was premised on the tax records, not on the actual surveyed size of the property. Exhibit 90(a), pp. 3-4, ¶ 12(a).

At the hearing on November 6, 2009, it was revealed by Applicant that there was a discrepancy between the figures contained in the application form (Exhibit 1) and a survey result embodied in the certified Identification Plat (Exhibit 5), also filed as part of the application. Tr. 12-15. Exhibit 5 lists the survey result as "78,672.18 SQ. FT (1.8060 AC.) (SURVEY)". The same document also lists the figure, "76,665.6 SQ. FT (1.76 AC.)" as the figure purportedly on the deed.

Moreover, it turned out that the figure listed in Exhibit 5 as being the acreage from the deed is not. It is the figure from the metes and bounds description in Exhibit 6, but it does not match the figure contained in "Exhibit A" to the deed (Exhibit 76(a)). That figure is "78,196 square feet or 1.79513 acres of land, more or less." To complicate matters further, Applicant supplied another metes and bounds description in Exhibit 63(e) to accompany its amended application (Exhibit 63(b)). That description concludes that the area in question is "78,672.18 square feet (1.8060 acres) of land, more or less." That figure matches the one on the "survey" data from Exhibit 5 and on the amended application form (Exhibit 63(b)), but not the one on the deed (Exhibit 76(a)), nor the one on the Exhibit 6 metes and bounds description.

Thus, there are at least three different area measurements in the record for the subject site, two of which do not precisely match the description in the deed. Although Applicant affirmed in its "Corrected Amended Application" form (Exhibit 63(b)), that "it is the owner of the entire 1.8060 acre property . . .," the Hearing Examiner felt that additional evidence was needed to make a fair determination of the boundaries of the property subject to the application. Applicant was therefore ordered to file an affidavit from a licensed surveyor explaining the

discrepancies. Exhibit. 86. On March 5, 2010, Applicant filed an affidavit signed by David John Ritchie, a professional surveyor licensed in the State of Maryland. Exhibit 90(a).

Applicant's surveyor in his affidavit swore that the kind of discrepancies evidenced in this case were common and inconsequential; however, a confronting neighbor argued that the surveyor had not sufficiently explained the reasons for the discrepancy, and an adjoining property owner to the west of the site, questioned the accuracy of the survey regarding the property line separating the subject site from his property.

In order to resolve these boundary issues and to give the adjoining property owners an opportunity to present evidence on these points, the Hearing Examiner formally noticed and held an additional hearing day on June 18, 2010, which addressed solely the boundary and survey issues. The hearing notice was sent directly to all adjoining and confronting landowners and was duly published in two newspapers. Exhibits 104 – 107. The notice stated, *inter alia*, "all parties are invited to produce expert testimony regarding the sufficiency of the survey data provided by Applicant and/or to provide additional evidence or expert opinions on the issue." Exhibit 104. Nevertheless, none of the adjoining property owners appeared for the hearing.

The testimony presented by the two confronting property owners who did appear was insufficient to outweigh the expert surveyor's testimony on the survey and boundary issues. The only expert evidence was presented by Applicant's licensed surveyor, David John Ritchie, who explained that an iron pipe identified by an adjoining neighbor actually did not mark the property line separating his property from the subject site. Rather, it was about seven feet northeast of the corner "monumentation" the surveyor had found when he did the survey in 2006. Mr. Ritchie located a number of markers around the site marking the actual property lines, which were as he had listed them in his survey and affidavit. 6/18/10 Tr. 24-25. Mr. Ritchie confirmed that the size and boundaries of the subject site were as he had determined them in his survey, 1.8060 acres. 6/19/10 Tr. 68.

The fundamental argument of the confronting neighbors is that the deed established the area of the property in this case, and the deed records the size of the parcel at 1.79 acres (78,196 square feet),<sup>2</sup> not 1.8060 acres (78,672.18 square feet). This argument missed the point. The District Council agrees with Hearing Examiner's finding that the surveyor's testimony doesn't outweigh the deed; it explains that the deed's figure of 78,196 square feet "more or less" is essentially the same as the final survey figure of 78,672.18 square feet, given the small size of the discrepancy and the nature of professional surveying standards. The District Council accepts the expert's testimony that the difference of 476 square feet between the deed's figure and his survey result is *diminimus* and within the range of professional differences in surveys. 6/18/10 Tr. 27 and Exhibit 90(a), pp. 4-5, ¶ 13. Not only is the difference very small, but the acreage figure of the 2006 deed conveying the property was qualified, as noted above – "78,196 square feet or 1.79513 acres of land, more or less." Exhibit 76(a), *Emphasis added.*

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<sup>2</sup> The initial ID Plat (Exhibit 5) incorrectly attributed the still smaller figure for the area of 1.76 acres to the deed. That figure was actually from the tax records. The language on the ID Plat was corrected in Exhibit 47 to show that that figure came from the tax records. The deed in question specifies the area as 1.79 acres.

While the difference in the figures contained in the tax records is somewhat larger, Mr. Ritchie believes that those figures on the tax records, from which the initial 1.76 acre figure came, were the result of somebody measuring incorrectly because their instrumentation at that point was not as good as present day. 6/18/10 Tr. 27-30. When asked by the Hearing Examiner what accounted for the three different figures given in this case, Mr. Ritchie testified (6/18/10 Tr. 26-27):

Surveyed areas are consistently different than what's deeded.

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The differences between surveys is techniques in surveying and equipment used and a lot of times, the time frame between. We have a much more accurate way of measuring distances now than they did back in even the '60s and '50s and, you know, the original Lot 16 was subdivided back in 1890 so just, it's all the differences between technique and equipment.

Mr. Ritchie stated that he uses state-of-the-art surveying equipment consistent with other companies in the area in the profession, and as is customary, he employs a two-man field crew. Mr. Ritchie further testified that the monumentation he found on the subject site (iron pipes and rebars) is indicated by small circles along the property line and noted by brief annotations on Exhibit 5. The pipes, rebars and caps were consistent with the record plats of the adjoining properties. To make sure that the monumentation he found correctly reflected the property lines, he located other monumentation randomly throughout the neighborhood to establish control coordinates. From those known points, the location of which was confirmed using GPS technology, he then determined the locations on the property to be surveyed. 6/18/10 Tr. 38-39; 49-50.

Based on his survey, Mr. Ritchie testified, "In my professional opinion, the land requested to be re-zoned by this local map amendment does not include any portion of the adjoining properties." 6/18/10 Tr. 37. This expert testimony was un rebutted, and the District Council finds that the evidence overwhelmingly supports Applicant's claim that it has a property interest in all of the land it seeks to rezone, and that none of it belongs to the adjoining property owners.

### **Surrounding Area and Zoning History**

The surrounding area must be identified in a floating zone case so that compatibility can be evaluated properly. The "surrounding area" is defined less rigidly in connection with a floating zone application than in evaluating a Euclidean zone application. In general, the definition of the surrounding area takes into account those areas that would be most directly affected by the proposed development.

Technical Staff proposed to define the surrounding area as bordered by Wheaton Plaza to the north, Georgia Avenue to the east, Kimberly Street and Calgary Avenue to the south, and the Wheaton Plaza ring road to the west. Exhibit 33, p. 5. Applicant's land planner proposed to define the surrounding area with slightly different boundaries, but he indicated that these differences were not significant and would not affect the compatibility analysis. Tr. 117. The

Hearing Examiner accepted Technical Staff's surrounding area definition, as does the District Council.

Technical Staff describes the surrounding area as made up of a mix of commercial uses and residential developments of varying housing types (Exhibit 33, p. 5):

Wheaton Plaza, a large commercial shopping center developed under the C-2 Zone, makes up the entire northern half of the surrounding area. Below the shopping center is a transitional block along the north side of McComas Avenue (where the subject property is located) that contains a mix of single-family detached housing and townhomes. This transitional block has developed under R-60, R-T 8, and PD-9 zoning. South of McComas Avenue, the predominant land use is single-family detached housing, developed under the R-60 Zone. More townhomes and higher-density apartments are located along Georgia Avenue.

To the west of the subject site are single-family, detached homes in the R-60 Zone. Most significantly, the property immediately to the east of the subject site is zoned RT-8, the very zoning classification that Applicant seeks. It is composed of townhouses on the side adjacent to Wheaton Plaza and single-family detached homes to the south, precisely the configuration suggested by Applicant for its property. Further to the east are townhouses and single-family, detached homes in the PD-9 Zone, also arranged with the same configuration (townhouses on the north and detached homes on the south). As noted by Applicant's land planner, "between the bulk of the residential development to the south and the intense activity of the mall is this transitional block that acts as a separator or a transition between the commercial activity and the residential neighborhood to the south." Tr. 118.

The zoning history of the subject site and its adjacent block was provided by Technical Staff (Exhibit 69):

. . . [T]he property has retained the R-60 zoning classification continuously since 1958, the year of the zoning ordinance rewrite and corollary comprehensive rezoning of the County involving the combining of Upper Montgomery County with the then-regional district of Montgomery County. In October of 1978, a sectional map amendment (SMA G-137) rezoned certain properties in the Wheaton Central Business District area, but the subject property was not affected and retained R-60 zoning.

Although the property is zoned R-60, the 1978 Wheaton Sector Plan first recommended the site as suitable for the PD-9 Zone. In fact, in the 1978 Sector Plan a large stretch of the northern side of McComas Avenue was mentioned as suitable for PD-9 zoning. In the time period between the adoption of the 1978 and 1990 Wheaton Sector Plans, much of the northern side of McComas Avenue developed in a piecemeal fashion under both R-T 8 and PD-9 zoning. The 1990 Sector Plan retained the recommendation that the subject property was suitable for PD-9 zoning.

**Proposed Development and Binding Elements**

The Applicant proposes to level the existing hill of the site and construct 11 townhouses and three single-family detached houses. Applicant’s vision for the project was discussed by its managing partner, Sterling Mehring, who testified that his plans were based on the Sector Plan, which contemplates a mix of housing types and a transition from the intense C-2 zoning on the north to the R-60 zoning which is to the west and to the south. Also, the Planning Board clearly preferred the maintenance of a single-family streetscape along McComas, with townhomes behind. Tr. 37.

Technical Staff characterized Applicant’s proposal with similar language (Exhibit 33, p. 6):

The proposal maintains the established pattern of single-family detached homes fronting on McComas Avenue. The proposal places townhomes closer to the rear of the property, behind the single-family detached housing and abutting Wheaton Plaza.

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Pursuant to Code § 59-H-2.52, the Applicant in this case has chosen to follow the “optional method” of application. The optional method requires submission of a schematic development plan (SDP) that specifies which elements of the plan are illustrative and which are binding, *i.e.*, elements to which the Applicant consents to be legally bound. Those elements designated by the Applicant as binding on the SDP must be set forth in a Declaration of Covenants to be filed in the county land records if the rezoning is approved. The Applicant’s final SDP (Exhibit 63(a)), which was revised after the hearing and approved by Technical Staff (Exhibit 78), sets forth the four binding elements for the development as follows:

**BINDING ELEMENTS**

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1. Vehicular access to this site shall be limited to McComas Avenue.
  2. Building coverage shall not exceed 25% of the gross tract area.
  3. The maximum number of dwelling units shall be 14. The final number of dwelling units will be established at site plan review.
  4. Any units that have frontage on McComas Avenue shall be one-family detached homes.

Applicant has also filed an executed copy of the Declaration of Covenants in the record of this case as Exhibit 63(f), and it contains the specified binding elements, as required. The legal effect of the covenants is to obligate any future owner of the property to comply with the binding elements specified on the SDP. Thus, the optional method allows an applicant to specify elements of its proposal that the community, reviewing agencies and the District Council can rely on as legally binding commitments. Illustrative elements of the SDP may be changed during site plan review, but the binding elements cannot be changed without a separate application to the District Council for a schematic development plan amendment.

The graphic portion (*i.e.* site layout) of the revised SDP (Exhibit 63(a)), is illustrative (except as specified in the binding elements). The plan shows three single-family detached homes located generally on the southern and western sides of the site, adjoining the R-60 zoned land to the south and west, and townhouses on the east and north, adjoining the RT-8 zoned land to the east and the C-2 zoned land to the north. It should be noted that the stormwater management facility located in the southwest corner of the site may be moved elsewhere on the site at site plan and subdivision reviews. However, if it is moved and replaced with a dwelling unit at that location along McComas Avenue, the dwelling unit would have to be a single-family detached home, pursuant to the binding elements. Moreover, wherever it is located, Applicant plans for it to be an underground facility, so that the area will not be unattractive. Tr. 68-69.

The SDP also contains Site Data, Development Standards and General Notes.

The fifth general note specifies, "No pedestrian sidewalk access to Wheaton Plaza is being provided or proposed per the direction of the community." It was added by Applicant to address concerns expressed by the People's Counsel and a number of community residents who fear that a pedestrian connection to Wheaton Plaza would bring crime into their neighborhood. Tr. 38-41. It is non-binding and this plan can be changed by the Planning Board at Site Plan review, but Applicant's land planner, Alfred Blumberg, testified that such a connection is unlikely because of the large difference in elevations between the subject site and Wheaton Plaza and because there is no sidewalk to connect it to in this area of the Wheaton Plaza site. Tr. 120-121.

As proposed, all units will have front entry, two-car garages. The three single-family detached homes, in addition to the two-car garages, will have driveways deep enough to accommodate additional parking for two extra cars. Twelve guest parking spaces are also planned within the development. Thus, the parking count for the development is 40 spaces, 12 spaces more than required by the ordinance, even without counting the six extra driveway spaces. Exhibit 33, p. 6.

Internal vehicle circulation will be provided by a private street. Pedestrian access is provided through lead-in sidewalks. Vehicular access will be limited to McComas Avenue. One concern raised by a confronting neighbor was that the sight distances from the access road west along McComas Avenue will not be great enough for safety because there is a "blind curve" just before Melvin Grove Court. Tr. 156. However, Applicant's traffic engineer, Michael Lenhart, testified that the sight distance is more than adequate. Mr. Lenhart stated that he measured the sight distances at the proposed entrance into the subject property and found them to be around 200 feet in both directions. The American Association of State Highway Transportation Officials (AASHTO) produces the guidelines that jurisdictions utilize in designing highway facilities. It shows that for the 25 miles per hour speed limit posted on this road, one would need 155 feet of sight distance for a vehicle to come to a safe stop. Because the sight distances are about 200 feet in either direction from the property access, the access sight distances exceed the AASHTO minimum requirement. Tr. 88. Moreover, Transportation Staff found that the proposed access and vehicular/pedestrian circulation are safe and adequate, with final refinement to be considered at site plan review. Exhibit 33, p. 16. There is no contradictory expert evidence on

the point, and the District Council therefore finds that the record supports the finding that the planned access location is not unsafe.

### **Standard for Review**

A floating zone, such as the RT-8 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 R-T 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 subject site is located in the area subject to the *1990 Wheaton Central Business District and Vicinity Sector Plan*. The Sector Plan did not designate the subject site for the RT-8 Zone, and thus the Purpose Clause cannot be satisfied under that criterion.<sup>3</sup> However, there are three alternative methods of satisfying the Purpose Clause, and an Applicant is required to satisfy only one of them. Accordingly, the Purpose Clause may also be satisfied by development in areas “*appropriate for residential development at densities allowed in the R-T Zones*” or in areas “*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 evidence in this case supports Applicant’s contention that the subject site satisfies both the “appropriateness” and the “transitional” criteria. In this regard, Applicant’s land use planner, Al Blumberg, testified that the development is appropriate at this location because it is compatible with the abutting developments on either side and because of the location of this transitional block. As stated by Mr. Blumberg, “it is an appropriate location for this density. It’s an appropriate location for this design and it’s an appropriate location for the zone. . . . The

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<sup>3</sup> Applicant argues that its proposal does satisfy the “designated” prong of the statutory test because the proposed density and residential use will be the same as the PD-9 Zone, which is the zone that was actually recommended in the Sector Plan. Tr. 131-132. Technical Staff agreed for the same reasons. Exhibit 33, pp. 11-12. While this interpretation is arguable because the language of the statute could be read as allowing the term “designated” to refer to the density allowed in the RT Zone, not just to the RT Zone itself, the District Council concludes that a better interpretation of the term “designated” is that it is referring to the RT-Zone, while the term “appropriate” is referring to the densities allowed in the RT Zones. As discussed in the above text, this difference in interpretation of the statute does not affect the outcome of the case because the statutory test may be satisfied by meeting any one of the three alternative criteria.

whole purpose of the transitional block is to provide that transition between the mall and the Kensington Heights residential neighborhood. So, it meets at least, two of the three, if not three of those criteria of the zone.” Tr. 132-133.

The density proposed by Applicant is 7.75 dwelling units per acre (*i.e.*, 14 Dwelling Units on 1.806 acres). Technical Staff found that the residential density proposed is appropriate because it is close to the densities of the nearby residential developments on the block and because “the site is designed in a way that matches single-family homes to its R-60 neighbors and townhouses to its R-T 8 neighbors. Additional factors, such as the site being in close proximity to the Wheaton Metrorail Station and that the proposal does not generate many peak-hour trips, lead to a conclusion that the proposed density is appropriate for the area.” Exhibit 33, p. 14.

Technical Staff also found that the application satisfies the transition prong of the R-T Zone purpose clause because it will contribute to an existing transitional block from the Wheaton Plaza commercial shopping center to the single-family detached homes to the south of the site. The entire block along the northern side of McComas Avenue has developed with single-family homes facing the McComas Avenue street frontage and more clustered homes with increased density closer to Wheaton Plaza. As stated by Technical Staff, “A need has clearly been established in the past for an appropriate transitional block at this location. The subject property should complete the transition along the northern side of McComas Avenue.” Exhibit 33, p. 12.

The Planning Board and the Hearing Examiner agreed. Given the adjacent developments, especially the RT-8 development adjoining to the east, the District Council finds that the subject development, at the proposed density of 7.75 dwelling units per acre, is clearly appropriate for the area. Moreover, the townhouses to be located in the northern and eastern parts of the development will serve as a transitional buffer for the existing single-family detached homes. The purpose clause of the RT-8 Zone is therefore satisfied.

The intent clause of the R-T Zones will also be fulfilled. The R-T Zone will allow much more freedom of design than the PD-9 Zone because development under the PD-9 is restricted by the PD-9 Zone’s setback requirements, as applied to the narrow width of this site. Zoning Ordinance §59-C-7.15(b)(1). Also, by designing the townhouse units in small rows of three, with the only row of five abutting the Wheaton Plaza property, and by restricting any dwelling units abutting McComas Avenue to single-family detached units, Applicant will prevent detrimental effects on the adjacent properties in the neighborhood.

Applicant’s proposal also meets and even exceeds all the development standards and special regulations of the RT-8 Zone, as demonstrated in Part III. F. of the Hearing Examiner’s report. Most significantly, the maximum amount of building coverage is specified in the Zoning Ordinance as 35 percent in the RT- 8 Zone, and Applicant is binding itself to no more than 25 percent building coverage, considerably less than the maximum permitted.

In sum, the District Council finds that the subject application meets the purpose and requirements of the RT-8 Zone.

## Compatibility

An application for a floating zone reclassification must be evaluated for compatibility with land uses in the surrounding area. In addition to the matters discussed in the preceding section, Technical Staff found that the proposed development would be compatible with surrounding development for the following reasons (Exhibit. 33, pp. 6 and 15):

Given the narrow shape of the site, the general layout is compatible with neighboring patterns of development. The smaller groupings of townhomes on the east side of the site are in scale with abutting single-family detached homes. Further, the smaller groupings break the mass of what was originally proposed as a larger townhouse row. The row of five townhouses at the rear of the site (closest to Wheaton Plaza) provides a clear termination of the proposed private road and fits within an already existing transitional block that provides a buffer between Wheaton Plaza and the single-family homes on the south side of McComas Avenue.

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Comparative density is also an important factor in determining compatibility with adjacent properties. The proposal will be similar to the prevailing density of the northern portion of McComas Avenue. Other factors, such as building heights, materials, and the exact number of dwellings, will be further refined at the site plan stage to ensure compatibility.

The Applicant has also alleviated some of the community's concerns about compatibility by agreeing to limit the number of dwelling units to a maximum of 14 and specifying that any units that have frontage on McComas Avenue "shall be one-family detached homes." Binding Element 4.

The PD-9 Zone recommended by the Sector Plan permits a base density of nine dwelling units per acre, which is greater than the 7.75 density proposed here. Zoning Ordinance §59-C-7.14. Moreover, the PD-9 Zone requires that a minimum of 25% of the dwelling units be townhouses or attached. Zoning Ordinance §59-C-7.131. Thus, the Sector Plan's PD-9 Zone recommendation is, in effect, a determination that townhouses are not, *per se*, incompatible with the neighborhood.

Based on this record, the District Council agrees with the findings made by Technical Staff, the Planning Board and the Hearing Examiner that the proposed reclassification to the RT-8 Zone and the proposed development would be compatible with development 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 or Sector Plan conformity, the recommendations of the

Planning Board and Technical Staff, any adverse impact on public facilities or the environment, and factors such as the location near public transportation, especially a Metro station.

As mentioned above, the *1990 Wheaton Central Business District and Vicinity Sector Plan* does not recommend the RT-8 Zone. However, compliance with Sector Plan recommendations is not mandatory in this case because the R-T Zones do not require it; rather, the courts have held that the Master Plan or Sector Plan should be treated only as a guide in rezoning cases like this one. As stated in *Trail v. Terrapin Run*, 403 Md. 523, 527, 943 A.2d 1192, 1195 (2008),

We also acknowledge our statement in *Mayor and Council of Rockville v. Rylyns Enterprises, Inc.*, 372 Md. 514, 530, 814 A.2d 469, 478 (2002) (citing *Richmarr*, 117 Md. App. at 635-51, 701 A.2d at 893-901, [1997] that:

We repeatedly have noted that [master] plans, which are the result of work done by planning commissions and adopted by ultimate zoning bodies, are advisory in nature and have no force of law absent statutes or local ordinances linking planning and zoning. . . .<sup>4</sup>

The Sector Plan and the recommendations of the Planning Board and Technical Staff were considered, at length, in Part III.G. of the Hearing Examiner's report. Although the Sector Plan does not specifically recommend the zoning change sought by Applicant, the requested rezoning is consistent with its objectives and general language. The Planning Board and its Technical Staff support the proposed rezoning, believing that the development will be compatible with surrounding uses and compliant with the purposes and standards of the RT-8 Zone.

The impact on public facilities was discussed in Part III. H. of the Hearing Examiner's report. The evidence indicates that, although the local elementary school experiences some overcrowding, a new school is scheduled to open in the same general time frame that the proposed development would be completed. Moreover, "[t]he current growth policy school test (FY 2009) finds capacity adequate in the Einstein Cluster." See March 26, 2009 letter from Bruce H. Crispell, the Director of Long-Range Planning for the Montgomery County Public Schools (Attachment 5 to the Technical Staff report, Exhibit 33). Given Mr. Crispell's conclusion and the plan for added capacity for elementary school students, the District Council finds that there is sufficient school capacity for the proposed development.

The evidence also supports the conclusion that the impact on local traffic from this development would be minimal and will clearly meet LATR and PAMR standards. Evidence was also presented that the proposed development would have no adverse effect on utilities or other public services.

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<sup>4</sup> Because the proposed RT-8 Zone does not require conformance or consistency with the Sector Plan, this case is not affected by legislation aimed at modifying *Terrapin Run's* interpretation of the words, "conformance" and "consistency." See Smart, Green, and Growing - Smart and Sustainable Growth Act of 2009, effective July 1, 2009.

The potential for any adverse environmental impact was discussed in Part III. I. of the Hearing Examiner's report. As noted there, the site is not in a special protection area, and a forest conservation plan will be required at subdivision to maximize tree retention. A stormwater management concept plan has been submitted to DPS, and it will be reviewed at subdivision. Neither Technical Staff nor the Planning Board noted any adverse effect on the environment; nor is there any other such evidence of record despite concerns raised by the neighbors about the safe removal of the man-made hill on site. That issue is more properly addressed later in the development process. Moreover, the undisputed evidence is that removal of the hill on the site will reduce stormwater runoff onto adjoining properties.

Technical Staff concluded that the proposed development would be in the public interest because ". . . the proposal furthers the general intent of the 1990 Wheaton Sector Plan and is consistent with its objectives and general language. . . . The proposal will not have any adverse impacts on public facilities, and the property's proximity to the Wheaton Metrorail station makes it an ideal location for townhouse development. For these reasons, the application bears a sufficient relationship to the public interest to justify its approval." Exhibit 33, pp. 15-16.

It is the District Council's conclusion that this proposal minimizes adverse impacts on the community, provides a buffer from commercial development for the nearby single-family detached homes, and establishes a walkable community with easy and quick pedestrian access to Metro and the nearby shopping mall.

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 have no adverse effects on public facilities or the environment, and that approval of the requested zoning reclassification would be in the public interest.

### **Conclusion**

Based on the foregoing analysis and the Hearing Examiner's report, which is incorporated herein, and after a thorough review of the entire record, the District Council concludes that the application satisfies the requirements of the RT-8 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-8 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-879, requesting reclassification of 1.806 acres (78,672 square feet) of unimproved land, known as Part of Lot 16, Block E, Kensington Heights Subdivision, and located at 2609 McComas Avenue, Kensington, Maryland, from the existing R-60 Zone to the RT-8 Zone, is hereby **approved** in the amount requested and subject to the specifications and requirements of the revised Schematic Development Plan, Exhibit 63(a); provided that the Applicant submits to the Hearing Examiner for certification a reproducible original and three copies of the Schematic Development Plan approved by the District Council within 10 days of approval, in accordance with §59-D-1.64 of the Zoning Ordinance and that the revised Declaration of Covenants (Exhibit 63(f)) is filed in the County land records in accordance with §59-H-2.54 of the Zoning Ordinance and proof thereof submitted to the Hearing Examiner within the same timeframe.

This is a correct copy of Council action.



Linda M. Lauer, Clerk of the Council