

Resolution No.: 17-906
Introduced: October 1, 2013
Adopted: October 1, 2013

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

By: District Council

SUBJECT: APPLICATION NO. G-829 FOR AMENDMENT TO THE ZONING
ORDINANCE MAP; Francis Koh, Esquire, Attorney For Applicant, Jae H. Koh;
OPINION AND RESOLUTION ON APPLICATION; Tax Account No. 06-
03142681

OPINION

Local Map Amendment Application No. G-829 (LMA G-829) was filed on September 13, 2004. In the application, David D. Freishtat, former attorney for Applicant Jae H. Koh, requested rezoning of property known as Lots 12 and 13, Block B, Bealemont Partnership Subdivision, located at 12201-12219 River Road, Potomac, consisting of 5.61 acres in the 6th Election District, from the RE-2 Zone to the Country Inn Zone.

The above-referenced re-zoning application was filed in 2004, but scheduled hearings were postponed numerous times at Applicant's request. According to the records of the Office of Zoning and Administrative Hearings (OZAH), it was last scheduled for hearing on January 28, 2008, and postponed indefinitely at the request of Applicant's former counsel in a letter dated January 24, 2008 (although the hearing had to be convened to announce the postponement, apparently because counsel's letter requesting postponement did not reach OZAH in time to notify the community.) *See Exhibit 79.*

The convening and indefinite postponement of the hearing on January 28, 2008, was the last recorded activity in the case until the Hearing Examiner wrote to Applicant's counsel of record on April 22, 2013 (*Exhibit 81*) to give the Applicant 30 days notice of the Hearing Examiner's intention to recommend dismissal of the application, absent a showing of good cause that the application should not be dismissed.

On April 29, 2013, Applicant's former counsel, David Freishtat, Esquire, responded to the Hearing Examiner, indicating that he no longer represents the Applicant and that he had forwarded the Hearing Examiner's notice letter to the Applicant at his last known address. *See Exhibits 82 and 83.*

The Hearing Examiner thereafter obtained that address from Mr. Freishtat and sent the notice of intent to dismiss letter directly to Mr. Koh at that address on June 5, 2013, giving him a deadline to respond by July 8, 2013, with either an indication that he consented to dismissal of his application or a showing of good cause as to why the application should not be dismissed. *See Exhibit 84.* No response was received; however, because state property tax records list 12219 River Road, Potomac, MD 20854, as Mr. Koh's principal residence, on July 11, 2013, the 30-day notice letter was also sent to him at that address, and it gave him until August 14, 2013, to consent to dismissal or to show good cause as to why the application should not be dismissed. *See Exhibit 85.*

On August 14, 2013, Applicant's new attorney, Francis Koh, Esquire, sent an e-mail to OZAH, attaching a letter erroneously dated August 2, 2013 (*Exhibit 86*), asking that the case not be dismissed. The entire body of that letter is reproduced below:

In response to your letter dated July 11, 2013, I represent the applicant in the above-captioned zoning matter and request that the matter not be dismissed but rather converted to a special exception application in light of the major zoning ordinance rewrite. After the last scheduled hearing on January 28, 2008, applicant had been revising the plans in view of the opposition and opinions of the neighborhood.

Subsequently, the applicant had not been able to pursue the Zoning amendment application last year due to the uncertainty surrounding the country inn zone. It appears the PHED committee plans to reconvene in September to work on the zoning ordinance rewrite but it is not clear who would ultimately have jurisdiction over the country inn zone, whether it be the Board of Appeals or the Office of Zoning and Administrative Hearing. The County Council has yet to finalize the proposed rewrite of the Zoning Ordinance thus leaving applicant unsure of what procedure to follow.

Accordingly, applicant respectfully requests that the above-mentioned application not be dismissed but rather stay pending until the new Zoning Ordinance is finalized to determine what procedural course of action the applicant should take for a country inn. If the new zoning ordinance is approved, applicant requests that the application be converted to special exception application. If you have any questions or concerns, please feel free to contact me. Thank you.

Mr. Koh's sole reason for opposing dismissal of the zoning application, which has been pending without any activity since 2008, appears to be that he wants to "convert" it to a special exception application, depending on the outcome of the pending re-write of the Zoning Ordinance. He indicates that until the re-write of the Zoning Ordinance is adopted, he is uncertain whether the Board of Appeals or the Office of Zoning and Administrative Hearings will adjudicate the special exception he wishes to pursue.

Zoning Ordinance §59-H-6.8 provides:

Dismissal of application.

The district council may dismiss an application for local map amendment in the following circumstances unless the applicant shows good cause that the application should not be dismissed:

- 1. The application has been pending for 2 years or longer;*
- 2. The application has not been actively pursued by the applicant; and*
- 3. The hearing examiner, after giving the applicant 30 days' notice of intention to do so, recommends dismissal of the application.*

Pursuant to Zoning Ordinance §59-H-6.8, the Hearing Examiner, on August 16, 2013, recommended dismissal of LMA G-829 based on the facts that:

1. The application has been pending for over 8 years;
2. The application has not been actively pursued by the applicant for over 5 years;
3. The Hearing Examiner, after giving the Applicant more than 30 days' notice of intention to do so, recommends dismissal of the application; and
4. The response of Applicant's new attorney, Francis Koh, Esquire (*Exhibit 86*), fails to state a basis which can be characterized as "good cause" for not dismissing this case for want of prosecution.

The District Council agrees with the Hearing Examiner's findings and recommendation of dismissal for the reasons stated therein.

The problem with Mr. Koh's rationale (in addition to the fact that he failed to raise it for the five years this case sat idle) is that there is no process to "convert" a rezoning application into a special exception application, nor is such a process contemplated in the Planning Board Draft of zoning rewrite, introduced to the Council in proposed Zoning Text Amendment No. 13-04, on May 7, 2013. Since such a conversion process does not exist, Mr. Koh's desire to pursue a special exception fails to establish good cause not to dismiss this idle rezoning case.

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-829, Jae H. Koh, Applicant, requesting rezoning of property known as Lots 12 and 13, Block B, Bealemont Partnership Subdivision, located at 12201-12219 River Road, Potomac, consisting of 5.61 acres in the 6th Election District, from the RE-2 Zone to the Country Inn Zone, is hereby dismissed in accordance with the provisions of Zoning Ordinance §59-H-6.8.

This is a correct copy of Council action.



Linda M. Lauer, Clerk of the Council