

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
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SCHEMATIC DEVELOPMENT PLAN AMENDMENT 16-01

LOCAL MAP AMENDMENT H-117

**ORDER GRANTING WITHDRAWAL OF SDPA 16-01 APPLICATION AND
TRANSFER OF THE SDPA FILING FEE TO THE FILING FEE IN LMA H-117**

BACKGROUND

On December 1, 2015, Wildwood Medical Center, LLC, filed SDPA 16-01, an application to amend SDPA 12-01, which had been approved by the Montgomery County Council on January 22, 2013, in Resolution 17-653, and modified the Schematic Development Plan (SDP) first approved in Local Map Amendment G-851 on November 27, 2007, in Resolution 16-392.

The subject site consists of approximately 3.47 acres (151,220 square feet) on the eastern side of Old Georgetown Road (MD Route 187), just north of its intersection with Democracy Boulevard. The site is described as Lot N-541, Wildwood Manor Shopping Center Subdivision, and it is located at 10401 Old Georgetown Road, in Bethesda, Maryland.

Schematic Development Plan 12-01 had contemplated construction of a five (5) story building containing fifty-eight (58) dwelling units. The residential use in the O-M office zone was authorized by Special Exception No. S-2830 granted by the County Board of Appeals under provisions in the Zoning Ordinance allowing “productivity housing” in commercial zones.

Sectional Map Amendment No G-956 rezoned the subject property from the O-M Zone to the CRT (Commercial-Residential Town) Zone, specifically, CRT 1.25, C0.5, R-0.75, H-50. The Applicant filed SDPA 16-01 to take advantage of additional development possibilities under the new zone; however, after consulting with Technical Staff of the Planning Department, Applicant decided that it would require a further rezoning, rather than merely an amendment of the SDP, to accomplish its ends. It therefore filed a motion to withdraw SDPA 16-01 (Exhibit 22), and seeks to apply OZAH’s portion of the fees it paid in filing SDPA 16-01 against the fees owed for its new rezoning application (LMA H-117).

The Applicant paid OZAH a filing fee of \$2,850, and a sign fee for two signs of \$400 in connection with SDPA 16-01. A notice of a hearing was mailed out on December 11, 2015, to abutting and confronting landowners and local civic associations, among others, scheduling the hearing for March 18, 2016 (Exhibit 19). Upon the Applicant’s request (Exhibit 20), the hearing was rescheduled to April 29, 2016, and a new notice was mailed out on February 2, 2016 (Exhibit 21). After OZAH received Applicant’s motion to withdraw SDPA 16-01 (Exhibit 22), a new notice was mailed out cancelling the hearing scheduled for April 29, 2016 (Exhibit 23).

Withdrawal of an SDPA Application

Neither the 2004 Zoning Ordinance nor the 2014 Zoning Ordinance specifies procedures for withdrawal of an application for an SDPA. However, both Ordinances stipulate that the Hearing Examiner may allow withdrawal of a rezoning application. Section 59-H-5.3(d) of the 2004 Zoning Ordinance provides:

(d) The Hearing Examiner may allow an applicant to withdraw an application for a local map amendment at any time. If a request for withdrawal is filed after the notice of hearing is published, an application to reclassify all or any part of the land in the previous application must not be filed within the time limit in subsection 59-H-2.23 unless the application satisfies subsection 59-H-6.6.

Section 59.7.2.1.D.4 of the 2014 Zoning Ordinance provides:

4. Withdrawal of Application

The Hearing Examiner may allow an applicant to withdraw an application for a Local Map Amendment at any time before the Hearing Examiner issues the report.

Because a schematic development plan (SDP), as it is known under the 2004 Zoning Ordinance, or a floating zone plan (FZP), as it is known under the 2014 Zoning Ordinance, can only be created by a rezoning application, the Hearing Examiner concludes that an application to amend an SDP or an FZP should be governed by the same withdrawal provisions that govern withdrawal of rezoning applications. It makes no sense to require an application for an SDP amendment or an FZP amendment to continue to a hearing when the applicant wishes to withdraw it.

Therefore, the Hearing Examiner will grant the Applicant's request to withdraw the cited subject SDPA application.

Refund of Filing Fees

Both Zoning Ordinances are also silent on the issue of refunds of fees for SDPA applications. Once again, both Zoning Ordinances do permit refunds of filing fees for rezoning applications that have been withdrawn and meet specified criteria. Section 59-H-2.33 of the 2004 Zoning Ordinance provides:

- (a) The District Council may refund all or part of a filing fee if:*
- (1) the application has not been advertised for public hearing;*
 - (2) the application has been advertised for public hearing but the applicant files a request to withdraw it within 90 days after a master plan, sector plan, sectional map amendment, or zoning text amendment which materially affects the property is approved, or condemnation proceedings or public acquisition of the subject property has been initiated; or*
 - (3) the applicant shows that undue hardship will result if the refund is not approved.*

- (b) *The Hearing Examiner may refund a filing fee less than \$25,000, if any condition of subsection (a) is satisfied.*
- (c) *Notwithstanding subsection (a), the District Council and the Hearing Examiner may elect to not refund a filing fee, or may approve a partial refund.*

Section 59.7.6.5.B. of the 2014 Zoning Ordinance provides:

B. Waiving or Refunding of Local Map Amendment Fees

- 1. The District Council may waive or refund any Local Map Amendment required filing fee, in whole or in part, if:*
 - a. the application has not been advertised for public hearing;*
 - b. the application has been advertised for public hearing but the applicant files a request to withdraw it within 90 days after a master plan, Sectional Map Amendment, or Zoning Text Amendment that materially affects the property is approved, or condemnation proceedings or public acquisition of the subject property has been initiated; or*
 - c. the applicant shows that undue hardship will result if the refund is not approved.*
- 2. The Hearing Examiner may refund a Local Map Amendment filing fee of less than \$25,000, if any condition of Section 7.6.5.B.1 is satisfied.*

One could argue that these provisions allow the refund of SDPA application fees as well as rezoning application fees based on the logic discussed above in connection with withdrawals. On the other hand, absent a specific provision allowing a refund of SDPA application fees, the Hearing Examiner is more comfortable allowing an offset of the SDPA fees against rezoning application fees for the same property since fees are designed to cover processing costs, and the only costs thus far expended on the SDPA are the costs of issuing and mailing notices and the cost of preparing this Order. Deducting out amounts for those costs should satisfy the intent of the Council approved fee schedule.

On July 27, 2016, the Applicant filed a rezoning application (H-117) covering the same property as encompassed by SDPA 16-01, which the Applicant now seeks to withdraw (Exhibit 22). The new rezoning application seeks to reclassify the 3.47 acre subject site from the current CRT-1.25 C-0.5, R-0.75, H-50 Zone to the CRTF-1.25 C-0.5, R-0.75, H-70, a floating zone with more flexibility for the height of the buildings.

The OZAH fee schedule provides for a fee of \$7,150 for the first acre in the CRTF zone and \$700 for each additional acre. That adds up to a fee of \$9,250 ($\$7,150 + (3 \times \$700)$). OZAH's share of that fee is 75%, which results in an application fee of \$6,937.50 to be paid to OZAH for the rezoning.

A sign fee of \$200 per sign for the required two signs results in the addition of \$400 to the application fee, yielding a total of \$7,337.50.

To determine the amount of the offset against the H-117 application and sign fee based on the withdrawal of SDPA 16-01, we must deduct OZAH's costs of mailing notices in that case and preparing this Order from the SDPA fee of \$2,850.

OZAH's administrative staff indicates that it mailed out 45 copies of the hearing notices three times in SDPA 16-01, and spent one hour per mailing at the rate of \$40.65 per hour (SDPA Exhibit 24). In addition, the OZAH Director's time of approximately 1.2 hours at \$83 per hour in preparing this Order should be added, resulting in the following calculation:

45 Letters mailed for each notice at \$0.49 per letter = \$22.05
 $\$22.05 \times 3$ mailings (12/11/15, 2/2/16, 4/7/16) = \$66.15 Total Mailing Costs

Time spent by OZAH administrative staff -- 1 hour per mailing $\times 3$ mailings at \$40.65 per hour = \$121.95 Staff Administrative Costs

The OZAH Director's time of approximately 1.2 hours at \$83 per hour results in an additional cost of \$99.60

TOTAL MAILING/ADMINISTRATIVE COSTS = \$287.70 (\$66.15 + \$121.95 + \$99.60)

Thus, we must deduct \$287.70 from the SDPA fee of \$2,850 to determine the appropriate reduction of the H-117 application fee. $\$2,850 - \$287.70 = \$2,562.30$. The appropriate reduction of the H-117 fee is therefore \$2,562.30.

Since the total OZAH portion of the H-117 application and sign fee, before reduction, is \$7,337.50, reducing it by \$2,562.30 results in a required H-117 application and sign fee to be paid to OZAH of \$4775 (\$4775.20 rounded down).

ACTION

Therefore, it is, this 27th day of July, 2016, ORDERED that:

1. Application No. SDPA 16-01, seeking to modify SDPA 12-01, is hereby dismissed as withdrawn; and
2. \$2,562.30 in fees paid to OZAH by Applicant, Wildwood Medical Center, LLC, shall be applied to Applicant's rezoning application in H-117, resulting in a net fee to the Applicant for the filing of rezoning application H-117 and for obtaining to notice signs of \$4775.



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

Copy of Order forwarded this 27th day of July, 2016, to:

Wildwood Medical Center, LLC, Applicant
Soo Lee-Cho, Esquire, Attorney for Applicant
All parties of record in both cases
Rose Krasnow, M-NCPPC
Kate Clark, M-NCPPC