

Resolution No.: 15-1586
Introduced: August 1, 2006
Adopted: August 1, 2006

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

By: County Council

SUBJECT: APPLICATION NO. G-840 FOR AMENDMENT TO THE ZONING ORDINANCE
MAP, Ann Martin, Esquire, Attorney for Applicant, Magruder/Reed Communities, LLC,
OPINION AND RESOLUTION ON APPLICATION Tax Account No. 09-00773044

OPINION

Application No. G-840, filed on September 1, 2005, by Magruder/Reed Communities, LLC, requests reclassification from the existing R-90/TDR-5 Zone (Residential- single family homes, with transferable development rights) to the R-T 10 Zone (Residential Townhouse, with maximum of 10 units per acre) of 3.28 acres of land known as the Mainhart property and located at 17720 Washington Grove Lane in the Gaithersburg vicinity. It is described as Parcel P520, in the western quadrant of the intersection of Washington Grove Lane and Mid-County Highway (MD Route 124).

Applicant has title to the land, and plans to build up to 32 townhouse units, including 4 moderately priced dwelling units (MPDUs), on it. The rezoning application was filed under the Optional Method authorized by Zoning Ordinance § 59-H-2.5, which permits the filing of a Schematic Development Plan (SDP), containing binding limitations with respect to land use, density and development standards or staging.

The Hearing Examiner recommended approval of the application on the basis that the R-T 10 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 July 18, 2006 is incorporated herein by reference. Technical Staff of the Maryland-National Capital Park and Planning Commission ("M-NCPPC") and the Montgomery County Planning Board ("Planning Board") also recommended approval. The Board added the caveat that it "will make compatibility with the surrounding residential uses a high priority during the site plan review." It also noted that "the final residential unit density is subject to Site Plan review of stormwater management facilities plans and a forest conservation plan prepared in accordance with Chapter 22A. The total number of residential units may ultimately be less than the maximum number of units proposed as binding elements by the applicant."

A public hearing was convened on May 8, 2006, at which time the Applicant presented the testimony of six witnesses. There were no letters of opposition filed in the record; however, four neighbors appeared at the hearing to testify about their concerns that the proposed development might adversely affect their neighborhood. Martin Klauber, the People's Counsel, participated in the hearing, and ultimately stated his support for the revised proposal. Based on its review of the entire record, 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 subject site is an irregularly shaped parcel of land, bordered to the north by Mid-County Highway, a major highway with an 150 foot right-of-way; to the east by Washington Grove Lane, a roadway with a 70 foot right-of-way; to the west by Woodward's Store Road, a residential lane with an existing 30 foot right-of-way; and to the south by a detached, single-family home. The Woodward's Store Road right-of-way connects Mid-County Highway and Washington Grove Lane; however, the existing pavement and roadway are only connected to Washington Grove Lane, with no access to Mid-County Highway. The property has 531.77 feet of frontage on Mid-County Highway and 197.59 feet of frontage on Washington Grove Lane.

The subject property is 3.28 acres in size and is zoned R-90/TDR5. According to the Technical Staff report, there is no forest on the property, nor are there 100-year floodplains or buildings of historical significance. However, 14 specimen trees, including a 60" Northern Red Oak, exist on the property, which slopes gradually towards the northeast. One single-family house and five smaller structures are located on the southern portion of the property.

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 recommends describing the "surrounding area" as bounded by the properties confronting the subject site across Mid-County Highway to the north, the developments fronting along Washington Grove Lane to the east and south, Town Crest Drive to the southwest, and the development in the City of Gaithersburg immediately to the northwest of Woodward's Store Road. The District Council accepts this definition of the "surrounding area."

The surrounding area includes properties with a variety of residential zoning categories and densities. The land adjacent to the subject property to the south is currently zoned R-90/TDR5 and is improved with single-family dwellings. Immediately to the west of the subject property, across Woodward's Store Road, are single-family homes in the R-90/TDR5 Zone that front on Woodward's Store Road, and the rear yards of single family home lots in the City of Gaithersburg that are adjacent to Mid-County Highway. Just beyond the adjacent land to the west and south are townhouse developments (Wedgewood and Washington Square) in the RT-12.5 Zone. Further west, just outside of the defined surrounding area, are several apartment buildings in the R-30 Zone. Further to the south are single-family homes in the R-60 Zone (just south of the Washington Square townhouse development) and the Washington Square neighborhood park, which is in the R-200 Zone. East of the subject property, along

Washington Grove Lane, is an RT-10 townhouse development called Hamlet North. To the north, across Mid-County Highway from the subject property, are apartments in the R-30 zone (Emory Grove Village), a strip of unimproved County land in the R-90/TDR 5 zone and single family homes in the R-60 zone.

Technical Staff recounted the zoning history of the area. The R-90 Zone was confirmed in the 1958 County-wide Comprehensive Zoning. On February 4, 1986, the R-90/TDR Zone was adopted in Sectional Map Amendment (SMA) G-502. The R-90/TDR Zone was confirmed in SMA G-568 on July 10, 1987.

The Applicant seeks to have the subject site reclassified from its current R-90/TDR5 Zone to the R-T 10 Zone so that it can construct a maximum of thirty-two (32) residential townhouse units, including four moderately priced dwelling units (MPDU's), with parking for 71 vehicles on the 3.28 acre subject site. 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.

The Applicant in the present case has proposed binding elements which limit development to a maximum of 32 one-family attached units (including 4 MPDUs), with a maximum building coverage of 22%, a minimum green area of 51%, setbacks as required in the zone, a 6½ foot noise wall, tree protection measures and various limitations on its use of Woodward's Store Road. Those elements designated by the Applicant as binding must also be set forth in a Declaration of Covenants to be filed in the county land records if rezoning is approved. The Applicant has filed the executed Declaration of Covenants in the administrative record of this case. The Binding Elements in this case would give the Planning Board some flexibility to make revisions because, the density, building coverage, setbacks and green space Binding Elements are expressed in maximums and minimums, rather than absolute values.

The design concept for the Project, as illustrated on the revised Schematic Development Plan (the "SDP"), proposes a vehicular access to the Property from Washington Grove Lane. Previous versions of

the SDP showed an additional access from Woodward's Store Road, but Applicant has agreed to drop that access from the SDP at the behest of the neighbors to the west, unless ordered to include it by the Department of Public Works and Transportation (DPWT) or the Fire Marshal.

The Schematic Development Plan shows six groups of townhouses. Each individual townhouse lot will have a driveway and a small amount of green space. Many of the front entrances of the townhouses are located on small, open green areas. Other units front on Woodward's Store Road and Washington Grove Lane. Each of the townhomes will have its own garage located within each home, and a guest parking area is proposed, overlooking a small tree save area. Construction of the development is proposed in a single phase. After rezoning, the proposal will have to go through review and approval of a Preliminary Plan of Subdivision and a Site Plan review.

The Applicant will dedicate 10 feet of additional right-of-way along Woodward's Store Road. Woodward's Store Road is accessed only from Washington Grove Lane, and dead ends before Midcounty Highway. Pedestrian crosswalks with handicapped ramps will be developed by the Applicant to cross the northwest leg of the intersection of Midcounty Highway and Washington Grove Lane.

According to Applicant, the Project was specifically arranged to minimize building fronts and windows on Mid-County Highway and to align the townhomes with the other adjacent residential streets or the internal green areas within the subject property. The development will improve the pedestrian connectivity of the area with the provision of external sidewalks, in addition to internal pedestrian paths. Further, the townhouse frontages, streetscape, landscaping and walls will be designed to enhance the facade of the subject site and to provide a sense of place and community. The Applicant will include some existing trees, new streetscaping treatment, and additional landscaping to provide quality green space areas in the project. Finally, the Applicant is committed to providing a 6.5 foot fence or wall adjacent to Mid-County Highway to buffer the sound from the highway and to physically and visually buffer the project.

Although the potential of noise from the nearby Mid-County Highway is a concern, the report of an acoustical expert from Polysonics Corporation indicates that appropriate sound mitigation measures can be taken to insure that noise from the roadway does not exceed County standards. Moreover, as noted by the Hearing Examiner, residential developments have been approved on both sides of Mid-County Highway, just as close to road as the proposed development, so apparently the highway noise can be sufficiently buffered. The Technical Staff report indicates that steps to deal with the noise problem will be considered at site plan review. The District Council directs that the Planning Board address the noise issue at site plan review and assure that sound mitigation measures are taken which will completely satisfy County noise standards.

The proposed development will meet, and in some instances exceed, the applicable development standards for the R-T 10 Zone. For example, maximum density is set at 10 units per acre, but Applicant's proposal calls for a density of only 9.8 units per acre. Maximum building coverage is specified as 35%, but Applicant has committed to a maximum coverage of 22%. Minimum green space in the zone is specified as 50%, but Applicant will have at least 51% green space. Although only 64 parking spaces are required by statute, Applicant plans on 71 spaces.

A floating zone, such as the R-T 10 Zone, is 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*.

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 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 *Gaithersburg Vicinity Master Plan*, approved and adopted in 1985, did not designate the subject site for the R-T Zone, and thus the Purpose Clause cannot be satisfied under that criterion. 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 District Council finds that the subject site satisfies the “appropriateness” criterion. The proposed townhouse development would be surrounded by residential developments, including single family homes (Woodwards Store Road community and houses to the north across Mid-County Highway), townhouse communities (Wedgewood, Washington Square and Hamlet North) and multi-family uses (Emory Grove Village), all within the surrounding area. The nearby townhouse and multi-family communities have the following densities: Emory Grove Village – 14.7 dwelling units per acre; Hamlet North – 10.3 dwelling units per acre; Washington Square – 12.5 dwelling units per acre; and Wedgewood – 11.6 dwelling units per acre. Thus, the proposed development, at a maximum planned density of 9.8 dwelling units per acre, will be appropriate in that its use and planned density will be consistent with, and in fact slightly lower than, many of the surrounding uses.

Also, Applicant has committed, in binding elements, to take steps which will minimize any adverse impact from the proposed townhouse community upon adjacent single-family homes on Woodward's Store Road. The proposed development would provide more parking than required and would not generate

enough peak hour trips to create traffic problems for the neighbors. Concerns about the level of noise from the adjacent Mid-County Highway do not make this site inappropriate because steps can be taken to mitigate the noise through a noise-wall and acoustical construction of the units, as will be determined at site plan.

An application for a floating zone reclassification must be evaluated for compatibility with land uses in the surrounding area. The primary compatibility issue is with the single-family detached housing located to the west of the subject site. The proposal provides sufficient building setbacks, height limits, residential design and landscaping to ensure compatibility with the surrounding residences, including the nearby single-family detached homes. The District Council approves of the steps taken by the Applicant to alleviate the community's concerns by eliminating access from the proposed development onto Woodward's Store Road (subject to approval of the Fire Marshal), by agreeing not to seek any widening or other improvements to the roadway and by providing a significant landscape buffer. The Project is also compatible with the neighborhood because it is consistent with the densities of the developments in the surrounding area and compliments the wide range of existing housing types, lot sizes, and ownership composition in this area. For these reasons, and those set forth in the discussion related to the Purpose Clause of the R-T 10 Zone, the District Council finds that the proposed townhouse development on the subject site would be compatible with development in the area.

Finally, 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 conformity, the recommendations of the Planning Board and Technical Staff, and any adverse impact on public facilities or the environment.

The subject property is located in the area covered by the *Gaithersburg Vicinity Master Plan*, approved and adopted in January 1985, and amended in 1988 and in 1990 (the "Master Plan"). The subject site is not specifically mentioned in the text of the Master Plan, but it is included as part of "Analysis Area 4" in Table 3 on page 46, and it is depicted in the map on the preceding page of the Master

Plan. The Master Plan recommended the R-90/TDR-5 Zone for Analysis Area 4, which at the time (*i.e.*, prior to the construction of Mid-County Highway), was an 8-acre area, including part of what is now Mid-County Highway and land across Mid-County Highway. Given the current size of the property (3.28 acres), neither the Applicant nor the Technical Staff believes that utilizing TDRs is feasible because only one additional unit would be gained. Thus, the zone recommended in the Master Plan for the subject site no longer has practical application.

The requested rezoning to a higher density residential use (R-90 to RT-10) would support the goals and objectives of both the General Plan and the Master Plan. The General Plan encourages a pattern of the “wedges and corridors” – concentrated development along the urban transportation corridors with low-intensity and agricultural uses within the wedges. In order to accomplish the general intent of wedges and corridors concept, the Master Plan (pages 8-9) incorporates the following purposes and objectives:

- *Residential densities are the highest near the center of the area, closest to I-270, and lower along the edges of the Planning Area;*
- *Higher density development is channeled to areas of high accessibility by private automobile and public transit; and*
- *New residential communities proposed in the Plan are planned with a variety of housing types with local shopping and educational and recreational facilities.*

The proposed townhouse development would be near to the I-270 corridor, adjacent to a major roadway, and would provide additional variety in available housing, thus meeting all three objectives. Moreover, the Master Plan, on its first page, lists, *inter alia*, the objective of

Increasing the County's total housing stock and concurrently providing an appropriate mix of affordable housing.

Applicant's proposed townhouse community, with four MPDUs, would help to achieve that objective in a community with developments including single-family detached residences, townhome communities, and apartment developments. The proposed project and RT-10 zoning classification are thus

more consistent with the Master Plan goals for housing than the base zoning recommendation, and are more appropriate given the current density and character of the surrounding area.

It also must be remembered that the Master Plan is only a guide, and compliance with its recommendations is not mandatory unless the Zoning Ordinance makes it so. See *Richmarr Holly Hills, Inc. v. American PCS, L. P.*, 117 Md. App. 607, 635-636, 701 A.2d 879, 893, n.22 (1997). Since the provisions of the R-T 10 Zone (Zoning Ordinance §§59-C-1.7, *et seq.*) do not require compliance with the Master Plan, the question of whether or not to reject a requested reclassification due to lack of Master Plan compliance becomes a policy issue, and not a legal question.

The Planning Board, the Technical Staff and the Hearing Examiner all recommended approval of this application, apparently feeling that circumstances have changed significantly since the Mater Plan was adopted in 1985. There is now a major roadway next to the subject site and a mix of residential land uses in the immediate area of the subject site. Thus, developments since the Master Plan's adoption have made the subject site much more compatible with a higher density, townhouse development than it was before. The District Council finds that, given the surrounding development, a townhouse project in the R-T 10 Zone should fit in well and forward the aims of the Master Plan, albeit not its specific zoning recommendation.

The District Council also finds that the proposed development will not adversely impact on public facilities or the environment.

The evidence indicates that the 32 dwelling units proposed here are expected to generate fewer than 10 elementary, 4 middle and 6 high school students. The subject property is located within the service areas for the Judith A Resnick Elementary School, the Redland Middle School and the Col. Zadok Magruder High School. The current Annual Growth Policy (AGP) schools test finds capacity adequate in the Colonel Magruder School Cluster, and the District Council therefore finds adequate capacity in the affected schools.

Turning to transportation facilities, the evidence is that the proposed development will not cause any adverse effects on local traffic and safety. Local Area Transportation Review (“LATR”) generally involves a traffic study intended to evaluate whether a proposed development would result in unacceptable congestion during the peak hour of the morning and evening peak periods. As of July 1, 2004, an LATR traffic study is not required unless a proposed development would generate 30 or more peak-hour automobile trips. A traffic study is not required in this case because the proposed townhouse development will generate only 15 trips in the a.m. peak hour and 27 trips in the p.m. peak hour. Based on the evidence, including the testimony of Applicant’s transportation planning expert, Nancy Randall, the District Council finds that the proposed development would not create unacceptable traffic congestion and that the access and circulation would be safe and efficient for both pedestrian and vehicular traffic.

This case does raise some environmental issues with respect to stormwater management and forest conservation. As to stormwater management, the Department of Permitting Services made clear that quantity controls (i.e., channel protection), as well as quality and recharge facilities, must be located on site and that residential unit density might have to be reduced to properly control stormwater discharge. Exhibit 25, Attachment 6. Applicant’s expert in civil engineering, Joanne Cheek, disagreed in her testimony (Tr. 113-134). However, Technical Staff noted in its report that the Applicant must obtain a Stormwater Management Concept approval from the Department of Permitting Services, and “all stormwater management for this project must be met on-site, with no waivers or partial waivers necessary.” The Planning Board also recognized, in its memorandum recommending approval of the rezoning, that stormwater management might result in a reduction of density at site plan review. Therefore, the District Council is satisfied that stormwater management concerns will be fully addressed at subdivision and site plan reviews.

As to forest conservation, Applicant has submitted a preliminary forest conservation plan and has also provided in a binding element that it will provide tree protection measures for the specified trees and

place them in a Category II forest conservation easement. Technical Staff indicates that the Tree Save Plan must be approved and tree protection measures must be in place before any demolition or grading can take place. The Planning Board noted that the final residential unit density might be impacted by the forest conservation needs, as well as the stormwater management requirements, and the District Council finds that environmental concerns on the subject site are being appropriately addressed.

The District Council also finds that the preservation of Woodward's Store Road, and the trees abutting it, is an important environmental and public interest goal. Applicant has taken appropriate steps in its binding elements to address that issue, and the District Council is confident that both the Fire Marshall and the Department of Public Works and Transportation will take this goal into consideration in their planning.

For all of these reasons, 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.

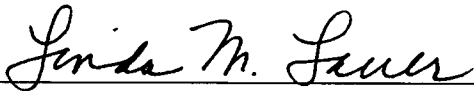
Based on the foregoing analysis and the Hearing Examiner's report, which is incorporated herein, and after a thorough review of the entire record, the District Council concludes that the application satisfies the requirements of the R-T 10 Zone and its purpose clause; that the application proposes a form of development that would be compatible with land uses in the surrounding area; and that the requested reclassification to the R-T 10 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-840, requesting reclassification from the R-200/TDR5 Zone to the R-T 10 Zone of 3.2816 acres of land, known as the Mainhart property (Parcel P520) and located in the western quadrant of the intersection of Washington Grove Lane and Mid-County Highway (MD Route 124), at 17720 Washington Grove Lane, Gaithersburg vicinity, in the 9th Election District, is hereby **approved in the amount requested and subject to the specifications and requirements of the final Schematic Development Plan, Ex. 47(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.**

This is a correct copy of Council action.


Linda M. Lauer, Clerk of the Council