

**DISTRICT COUNCIL FOR PRINCE GEORGE'S COUNTY, MARYLAND
OFFICE OF THE ZONING HEARING EXAMINER**

**ZONING MAP AMENDMENT
A-10030
DECISION**

Application: R-55 to the C-S-C Zone
Applicant: Nazario Family, LLC/Oak Crest Lots 11-13
Opposition: None
Hearing Date: November 18, 2015
Hearing Examiner: Maurene Epps McNeil
Recommendation: Denial

NATURE OF REQUEST

- (1) A-10030 is a request to rezone approximately 0.518 acre (approximately 22,500 sq. ft.) of R-55 (One-Family Detached Residential) zoned land to the C-S-C (Commercial Shopping Center) Zone. The property is located at the northwest quadrant of the intersection of Magnolia Street and Clarke Avenue, approximately 320 feet east of Baltimore Avenue (US 1), identified as Part of Lot 23, and Lots 12-13, Block 3 of the Oak Crest Subdivision, Laurel, Maryland.
- (2) The Applicant is alleging that there was a mistake in the adoption of the 2010 Sectional Map Amendment ("SMA") for Subregion 1 (Planning Areas 60, 61, 62 and 64) when the District Council retained the property in the R-55 Zone.
- (3) The Technical Staff recommended disapproval of the Application. (Exhibit 9) The Planning Board chose not to hold a hearing and adopted the Staff's recommendation as its own. (Exhibit 28)
- (4) No one appeared in opposition at the hearing.
- (5) At the close of the hearing, the record was left open to allow Applicant additional time to submit certain documents and to clarify whether the Planning Board would hold a hearing. The last of these items were received on January 6, 2016, and the record was closed at that time. (Exhibits 24(a)-(b), 25, 26 and 28)

FINDINGS OF FACT

Subject Property

(1) The subject property is approximately 0.51 acres in size, and square-shaped. It is undeveloped and heavily wooded.

(2) A lot line adjustment was approved by the Planning Board in 2014. (Exhibit 9, p.4; Exhibit 29) As a result the subject property was re-designated to Part of Lot 23 and Lots 12-13, Block 3, of the Oak Crest Subdivision. The subject property has frontage on three rights-of-way – Clark Avenue, Baltimore Avenue (US 1) and Magnolia Street. Access to Magnolia Street is slightly limited under the approved plat of subdivision, and access to Baltimore Avenue (US 1) is via a common access drive through Lots 22 and 23 (Exhibit 21). Applicant also noted that:

Oak Crest subdivision east of Baltimore Avenue is generally a grid layout, not all of the road network is continuous: Magnolia Lane is not connected to the roads further south, and the constructed roadway of Clark Avenue does not extend through the block on the south side of Magnolia Street.

(Exhibit 15, p.4)

(3) Applicant conveyed its property fronting on US 1 to Adventist Hospital. That entity is in the process of constructing an urgent care facility and related parking thereon.

Neighborhood and Surrounding Properties

(4) The property is surrounded by the following uses:

- North – Single-family residences along Clark Avenue in the I-1 Zone
- South – Single-family residences across Magnolia Street in the R-55 Zone
- East – Single-family residences along Clark Avenue in the R-55 Zone
- West – The site of the demolished Bay and Surf Restaurant in the C-S-C Zone

(5) The neighborhood of the subject property proffered by Staff has the following boundaries:

- North – Cherry Lane
- South – Maple Street
- East – CSX railroad tracks
- West – Baltimore Avenue (US 1)

Applicant generally agrees with the neighborhood defined by Staff. It notes that the neighborhood has three distinct characters – more industrial uses to the north, a mix

commercial and service - commercial uses along US 1, and single-family residences to the southeast.

(Exhibit 15)

Master Plan/Sectional Map Amendment

(6) The site lies within Focus Area 4 (US 1 Academy Lane to Cherry Lane), an area discussed in the 2010 Subregion 1 Master Plan, in pertinent part, as follows:

This vision for Focus Area 4 ... is new mixed-use development that complements and enhances the surrounding residential neighborhood....

The area is bounded by Cherry Lane to the north and Academy Lane to the south. The western boundary follows US 1 to Contee Road and extends further west to include the area between Contee Road and Academy Lane. The eastern boundary encompasses the properties fronting US 1 and some adjacent residential properties and open space to the east. ... The area is defined by the commercial uses lining US 1 and an assortment of open space areas.... Existing commercial structures range in quality. While a few are appropriate for retention and reuse, the lesser quality structures represent future redevelopment opportunities....

Policy 1: Establish areas of mixed-use development to complement surrounding residential areas.

Strategies: ...

- Redevelop the northern portion of the study area from the Maple Street right-of-way to Cherry Lane with a mixed-use development along the east side of US 1

(2010 Subregion 1 Master Plan, pp. 31-33)

(7) The 2010 Sectional Map Amendment (“SMA”) retained the subject property in the R-55 Zone.

(8) The site also lies within the Established Communities Policy Area, discussed in the General Plan approved in 2012, Plan Prince George’s 2035. There are no specific recommendations therein for the subject property.

Applicant’s Request

(9) The subject property is an unimproved, heavily-wooded parcel of land. (It is outlined in red on Exhibit 22). The adjoining land to the west was the site of the former Bay and Surf Restaurant. Applicant purchased that property as well as the subject property in 2007. (T. 39-40) The Bay and Surf property has been conveyed to Adventist Hospital, as noted above.

(10) Applicant requests a rezoning of the subject property from the R-55 Zone to the C-S-C Zone, alleging a mistake by the District Council in its decision to retain the R-55 zoning of the property in the 2010 Sectional Map Amendment for Subregion 1. The Applicant did not make a rezoning request at the time the Master Plan and SMA were being considered. (T. 38-39)

(11) Applicant's witness, Mark Ferguson, accepted as an expert in the area of land use planning, testified, and prepared a written analysis in support, of the application. (Exhibit 15; T. 5-48) Mr. Ferguson first pointed out that the Future Land Use Map in the 2010 Master Plan placed the subject property within a mixed-use commercial zone. (Exhibits 16 and 17) However, the SMA retained this small area of land in the R-55 zone while allowing properties to the west to be zoned C-S-C and properties to the north to be zoned I-1. (Exhibit 18) The witness believes it was a mistake to retain the R-55 zoning for the subject property, reasoning as follows:

The applicant does not contend that there has been a substantial change in the character of the neighborhood. Further, this subject property has been the subject of a number of Sectional Map Amendments over the years. Accordingly, the applicant argues that there was a mistake in the current Sectional Map Amendment.

Despite its detailed recommendations for the character of mixed-use development it seeks along the Baltimore Avenue corridor, the Sectional Map Amendment (with one minor and technical exception) left the status *quo ante rationem* stand, in stark contrast to its grand plan for redevelopment of the US1/Baltimore Avenue Corridor.

The Subregion 1 Master Plan has a clear and consistent goal for the US Route 1 corridor through the area of the subject site, which is summarized in its background discussion of its vision for the Developing Tier: "... the revitalization and redevelopment of the US1 Corridor as a pedestrian-friendly commercial destination with a complementary residential component."...

This principle is repeated and reinforced throughout the Plan, including several of the explicit Goals for the Developing Tier:

- "Maintained roads and improved pedestrian access
- Sustainable economic development
- Increased utilization of transit."...

Policy 2 of the Development Pattern Element is to, "Encourage low- to moderate-density transit- and pedestrian-oriented development." The relevant strategy to implement this policy is, "Promote development of mixed residential and nonresidential uses at moderate to high densities and intensities in context with surrounding neighborhoods and with a strong emphasis on transit-oriented design, particularly in proposed mixed-use areas along US 1 in Beltsville and South Laurel."... This policy is entirely consonant with the Plan's recommendation for... "Mixed Use Commercial" land use.

The Master Plan's discussion of the specific area of the subject site designated the area surrounding the [subject property] as "Focus Area 4" within the US1/Baltimore Avenue Corridor. It laid out a vision of, "new mixed-use development that complements and enhances the surrounding residential neighborhood.... Commercial redevelopment consolidates automobile sales operations into one coordinated shopping destination." The Plan continued to provide superficially consistent policies and strategies to reinforce

its goal of mixed-use development for the area of the subject site, including:

“Redevelop the northern portion of the study area from the Maple Street right-of-way to Cherry Lane with a mixed-use development along the east side of US 1....

- Develop the area north of Lindendale Drive as a mix of higher-density residential, commercial and office uses.”...

The Urban Design Element of [the] Master Plan also included specific guidance for the area of the subject site, including:

“Ensure appropriate building heights. Proposed building heights for mixed-use development are as follows...:

- US 1, north of Mulberry Street: 5-8 stories.
- Include retail or office uses on ground floors, with ground-floor retail conforming to requirements for 15-foot floor-to-ceiling heights.
- Include residential or office uses on upper floors.”...

In its discussion of the US 1/Baltimore Avenue Corridor, however, the Master Plan recognized that, “challenges to redevelopment of US 1 include narrow [i.e. shallow] lot depths in key locations and fragmentation of property ownership, which impedes opportunities for land assemblage. Moreover, US 1 already carries high volumes of traffic and opportunities for road widening are limited due to a lack of right-of-way space for such improvements”....

So, on the one hand the Master Plan gave a recommendation for mixed land uses at moderate to high densities and intensities, and yet simultaneously recognized the structural impediments which take away the ability to accomplish the type, character and intensity of development envisioned by the Plan. And seemingly in recognition [of] this essential conflict, the Sectional Map Amendment declined to zone the US1 Corridor to implement the Plan’s recommendations – in contrast to having chosen to affirmatively apply mixed-use zones in commercial corridors with fragmented ownership in other contemporaneous Sectional Map Amendments such as the Port Towns Sector Plan/SMA – and instead offered property owners the travail of the zoning map amendment process: “This plan identifies areas for mixed-use zoning. Applications for a mixed-use zone may be filed for evaluation and approval based only on the concepts and guidelines contained in the text of this document.”...

Since the Plan’s goals of revitalization and redevelopment of the US1 Corridor was not to be implemented by the proactive application of mixed-use zoning, the only reasonable action the District Council could have taken without abdicating an effort to implement its Plan was to apply other zoning that would allow property owners to achieve the Plan’s stated goal for sustainable economic development.

Given that the plan’s recommendation for this portion of Focus Area 4 is for “Mixed Use Commercial” land use – as distinct from its recommendation in other portions of Focus Area 4 for “Mixed Use Residential” land use – an appropriate implementation zone would have been the C-S-C Zone, which the applicant is now requesting. The C-S-C Zone allows for the Plan’s recommendation of commercial and office uses, and even a limited amount of upper-story residential uses, and its Euclidean nature is particularly appropriate for smaller parcels which cannot economically bear the costs of the more

arduous M-X-T approval process....

(Exhibit 15, pp. 5-6)

Agency Comment

(12) The Technical Staff recommended that the request for rezoning be denied, reasoning as follows:

The applicant contends that retaining the subject property in the R-55 Zone in the 2010 Subregion I Master Plan and SMA was a mistake. Their contention is that the District Council, at the time of the master plan and SMA, failed to take into account then existing facts when it retained the site in the R-55 Zone. They feel that the District Council should have recognized that the subject property is an anomaly; the only lots in the neighborhood north of Magnolia Street and west of Clark Street remaining in a residential zone. The master plan makes a recommendation that the northern section of Focus Area 4 be developed (in large part) as a mixed-use development of retail, office, and residential uses. Despite this, the Council chose to not rezone properties to Euclidean commercial zones (with the exception of a single lot on Holly Street), relying instead on the floating mixed-use zones (such as the M-X-T Zone) to implement the recommendation. The applicant notes that, although the Mixed Use–Transportation Oriented (M-X-T Zone) may be an appropriate vehicle for larger properties, it is not appropriate for this small site....

Staff points out that there is a strong presumption of validity accorded a comprehensive rezoning. The presumption is that, at the time of its adoption of the comprehensive rezoning, the District Council considered all of the relevant facts and circumstances then existing concerning the subject property....

The Subregion I Master Plan and SMA recommends a mixed-use development for the subject property and many of the other adjacent properties. That being said, the master plan and SMA did not expect this half-acre site to be a stand-alone mixed-use development. Because of the existing lotting and land ownership patterns it is necessary that a larger collection of properties come in together. While this delays the plan recommendation from coming to fruition, it does not constitute a mistake on the part of the District Council. The District Council considered the proper use for the site and concluded that commercial uses at this location were inappropriate at this time. Until a comprehensive mixed-use development plan is put forward, the Council decided to leave this site, and all of the other lots in Focus Area 4 (with the exception of one), in their existing zoning classification. Doing so protects the residential character of the surrounding properties to the east and south.

The District Council chose to follow the recommendation of the master plan and restrict new commercial development along Baltimore Avenue (US 1) because of concerns with potential impacts on the residences to the east. If the applicant believes that residences are not viable on this property, staff would point out that there are many nonresidential uses that are permitted in the R-55 Zone, either by-right or by special exception. Staff assumes that some of those uses would be appropriate for this location....

(Exhibit 9, pp. 6-7)

(13) The subdivision section provided the following comment:

The subject property is known as Lots 12 and 13, Block 3-Oak Crest, recorded in Plat Book A at Page 108 in October 1930 and a Part of Lot 23, Block 3-Oak Crest, [recorded] in Plat Book 241 at Page 92 on February 5, 2015; is located on Tax Map 6 in Grid B -4 , and is approximately 22,500 square feet. The site is currently unimproved. The plan and statement of justification [for this Application] ... state that the purpose of the ZMA is to change the zoning of the property from R-55 to C-S-C. Neither ... provide a proposed gross square footage (GFA) for the site. Development of more than 5,000 square feet of GFA will require a preliminary plan of subdivision prior to approval of building permits. The plan erroneously indicates that the subject site is composed of Lots 11 through 13, Block 3. Lot 11 was re-subdivided as part of Lot 23, Block 3, per Plat 241-92. Furthermore, the plan shows that the existing 22 foot shared access easement for Lots 22 and 23, Block 3, extends to what is shown as Lot 11, however, this is not shown on the underlying plat. The plan should be revised in accordance with the current plats for the site, with proper references to each plat. A new final plat must be approved for any adjustment to the metes and bounds of the shared access easement, as the plan indicates that access will be provided through Lots 22 and 23. A PUE does not currently exist on Lots 12 and 13, and should therefore be labeled as Future 10 foot PUE. Denial of access to Baltimore Avenue (outside of the 22 foot shared Access Easement) and to Magnolia Street, should be reflected on the plan in conformance with Plat 241-92. A plat may be prepared to incorporate part of Magnolia Street to the subject property, pursuant to the enactment of Chapter 619 of the Law of 1908

(Exhibit 9, p. 34)

LAW APPLICABLE

(1) The C-S-C Zone is a conventional zone as defined in the Zoning Ordinance and must be approved in accordance with the strictures of Section 27-157(a). This provision of law generally holds that no application can be granted without the Applicant proving that there was a mistake in the original zoning or subsequent SMA or that there has been a substantial change in the character of the neighborhood. It provides, in pertinent part, as follows:

Sec. 27-157. Map Amendment approval.

(a) **Change/Mistake rule.**

(1) No application shall be granted without the applicant proving that either:

(A) There has been a substantial change in the character of the neighborhood; or

(B) Either:

(i) There was a mistake in the original zoning for property which has never been the subject of an adopted Sectional Map Amendment; or

(ii) There was a mistake in the current Sectional Map Amendment.

(b) **Conditional approval.**

(1) When it approves a Zoning Map Amendment, the District Council may impose reasonable requirements and safeguards (in the form of conditions) which the Council finds are necessary to either:

(A) Protect surrounding properties from adverse effects which might accrue from the Zoning Map Amendment; or

(B) Further enhance the coordinated, harmonious, and systematic development of the Regional District.

(2) In no case shall these conditions waive or lessen the requirements of, or prohibit uses allowed in, the approved zone.

(3) All building plans shall list the conditions and shall show how the proposed development complies with them.

(4) Conditions imposed by the District Council shall become a permanent part of the Zoning Map Amendment, and shall be binding for as long as the zone remains in effect on the property (unless amended by the Council).

(5) If conditions are imposed, the applicant shall have ninety (90) days from the date of approval to accept or reject the rezoning as conditionally approved. He shall advise (in writing) the Council, accordingly. If the applicant accepts the conditions, the Council shall enter an order acknowledging the acceptance and approving the Map Amendment, at which time the Council's action shall be final. Failure to advise the Council shall be considered a rejection of the conditions. Rejection shall void the Map Amendment and revert the property to its prior zoning classification. The Council shall enter an order acknowledging the rejection, voiding its previous decision, and reverting the property to its prior zoning classification, at which time the Council's action shall be final.

(6) All Zoning Map Amendments which are approved subject to conditions shall be shown on the Zoning Map with the letter "C" after the application number.

* * * *

Change or Mistake

(2) There is a presumption of validity accorded comprehensive rezoning and the presumption is that at the time of its adoption the District Council considered all of the relevant facts and circumstances, then existing, concerning the land in question. Howard County v. Dorsey, 292 Md. 351, 438 A.2d 1339 (1982). *Strong* evidence of mistake and/or evidence of a *substantial* change in the character of the neighborhood are required to overcome the presumption. Pattey v. Board of County Commissioners for Worcester County, 271 Md. 352, 317 A. 2d 142 (1974); Clayman v. Prince George's County, 266 Md. 409 (1971) Mistake or error can be shown in one of two ways: (a) a showing that at the time of the comprehensive rezoning the District Council failed to take into account then existing facts or reasonably foreseeable projects or trends; or (b) a showing that events that have occurred since the comprehensive zoning have proven that the District Council's initial premises were incorrect. The mistake must have occurred in the rezoning and not in the Master Plan. Dorsey, *supra*.

(3) In People's Counsel for Baltimore County v. Prosser Co., 119 Md. App. 150,179, 704 A. 2d 483 (1998), the Court of Appeals explained further what must be shown in order to support an argument of mistake in the comprehensive rezoning:

In order to find legal mistake, there must be evidence that assumptions or premises relied on by the County Council were invalid. Beachwood, 107 Md. App. At 645. This situation is different from the exercise of bad judgment based on complete and accurate information.... The burden is on the entity seeking reclassification to show the conditions that made the comprehensive rezoning incorrect and the failure of the Council to have considered those conditions.... Hardship and economic disadvantage are insufficient; in that connection, there must be a showing that the owner is deprived of all reasonable use of his property.

The Court further noted that “the consistency of the proposed use with the Master Plan would have been insufficient alone” to show mistake in the comprehensive rezoning. Id., 119 Md. App. At 179.

CONCLUSIONS OF LAW

(1) The subject property lies within the boundaries of Focus Area 4 set forth in the Master Plan. In the blocks of Focus Area 4 bounded by Magnolia Street to the south, US Route 1 to the west, Oak Street to the north and Clark Street to the east, the subject property is the only property zoned R-55. All other lots are zoned C-S-C or I-1. Applicant believes it was a mistake for the District Council to have retained the R-55 zoning for the subject property.

(2) Applicant correctly noted that the Master Plan envisioned mixed use commercial zoning in Focus Area 4, but the subject property was not rezoned nor did the District Council choose to impose an overlay zone over the area that would encourage mixed use, as it did with other SMA’s approved along the US 1 Corridor around the same time as the instant SMA (I.E. Port Towns and Central US 1). (T. 24-25, 30) The Technical Staff disagrees, believing that the District Council chose to retain the existing zoning classification for all but one of the other lots in Focus Area 4 until a comprehensive mixed-use commercial development plan encompassing several parcels is submitted.

(3) I sympathize with Applicant, since the subject property is adjoining property in the C-S-C Zone, and it can be viewed as the same assemblage of land that could have been placed in the same zone. Indeed the neighboring properties may view it as one assemblage since no one appeared in opposition to the request at the hearing held by this Examiner.

(4) However, I cannot conclude that the District Council made a mistake by failing to rezone the property. Again, as noted in Prosser, above, “in order to find legal mistake, there must be evidence that assumptions or premises relied on by the County Council were invalid...[and] [t]his situation is different from the exercise of bad judgment based on complete and accurate information.” Applicant did not point to any incorrect premises that the District Council relied on, other than its decision not to impose a particular mixed use zone on the property at the time of the comprehensive rezoning. If that failure was incorrect it falls into the category of bad judgment based on accurate information – which cannot support a finding of mistake.

RECOMMENDATION

I recommend Denial of A-10030.