

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

**ZONING MAP AMENDMENT
A-10024-C**

DECISION

Application: Amendment of Conditions
Applicants: DD Land Holding, LLC/Fairview Commercial
Opposition: Whitfield Garden & Civic Association, et.al.
Hearing Dates: April 5, 2017 and May 4, 2017
Hearing Examiner: Maurene Epps McNeil
Recommendation: Approval with Conditions

NATURE OF PROCEEDINGS

(1) A-10024-C is before the District Council upon a request for the amendment of Condition b, imposed by the District Council upon its adoption of Zoning Ordinance 10-2015 which rezoned approximately 7.65 acres of land located at the northwest intersection of Martin Luther King, Jr. Highway (MD 704) and Whitfield Chapel Road, identified as Parcel 109, Map 52, Grid C-3, Lanham from the R-R (Rural Residential) to the C-S-C (Commercial Shopping Center) Zone.

(2) On May 12, 2015, the District Council gave final approval to A-10024-C subject to the following conditions:

a. Prior to the issuance of any building permit for the subject property a Detailed Site Plan including architectural elevations shall be approved by the Prince George's County Planning Board, and if necessary the Prince George's County Council sitting in its capacity as the District Council.

b. Access to the subject property from Whitfield Chapel Road shall be evaluated at the time of any preliminary plan of subdivision and, if necessary, at the time of detailed site plan approval. At the time of preliminary plan of subdivision, and if necessary, at the time of detailed site plan approval, options for the entrance to the subject property shall not be limited to access from Whitfield Chapel Road. To the extent that there is substantial

evidence in the record at the time of preliminary plan of subdivision or, at the time of detailed site plan approval, that the development is not viable without access to the subject property from Whitfield Chapel Road, Applicant shall submit proposed alternative transportation improvements to mitigate the potential negative impacts on surrounding properties with existing residential uses. Alternative improvements shall include, but shall not be limited to, widening of Whitfield Chapel Road adjacent to the subject property, but shall not include direct access to the subject property from Whitfield Chapel Road via left turn. Any access to the subject property from Whitfield Chapel Road shall be right-in/right-out.

c. Applicant shall consider the impact of the proposed development project on surrounding properties with existing residential uses, including potential negative impacts on surrounding residential uses near the property, and shall not include drive-through uses unless the drive-through service component is associated with a financial institution, such as a bank.

d. Applicant, its successors and assigns, shall consider the impact of the proposed development project on surrounding properties with existing residential uses, including potential negative impacts on surrounding residential uses near the property. The Applicant shall meet with members of the surrounding community, homeowners associations (local community representatives) and persons of record prior to the submission of any Preliminary Plan of Subdivision and Detailed Site Plan to specifically discuss compatible proposed land uses as well as suitable ingress and egress issues for the development. The Applicant is encouraged to enter into private land use covenants with the local community representatives to consider appropriate permitted land uses for the subject property and to focus on "low intensity, locally-oriented businesses" as specified within the 1990 Master Plan recommendations.

e. In order to maintain the character of the neighborhood, commercial tenants shall not include automobile-oriented uses such as an eating and drinking establishment with a drive-through service window component or carry-out food service window component. Commercial tenants may include all other eating and drinking establishments.

f. Commercial tenants shall not include 24-hour businesses except emergency medical facility uses. Applicant shall

use its best efforts to encourage “low intensity, locally-oriented businesses,” which was specified within the 1990 Master Plan recommendations.

(Exhibit 4)

(3) Several individuals, including representatives from Whitfield Gardens Civic Association and the Carbondale Civic Association, appeared in opposition to the request.

(4) The record of the original Application A-9198-C has been made a part of the record in the instant Application. Copies of Applicant's acceptance of the above-referenced conditions have been included in this record as well. (Exhibits 14-15)

FINDINGS OF FACT

Instant Request

(1) Applicant requests that Condition b, above, be revised as follows:

Access to and from the subject property to Whitfield Chapel Road shall be evaluated at the time of preliminary plan of subdivision and, if necessary, at the time of detailed site plan approval. At the time of preliminary plan of subdivision and, if necessary, at the time of detailed site plan approval, options for the site entrance configuration to the subject property from Whitfield Chapel Road shall be approved by the appropriate review agencies. At the time of preliminary plan of subdivision, Applicant shall submit evidence to demonstrate that the proposed site ingress and egress from Whitfield Chapel Road will provide safe and visible access in accordance with applicable State and County standards.

(Exhibit 12)

(2) In support of its request Applicant proffered the following testimony from its civil engineer, Kimberly Morgan (in response to questions from Applicant's Counsel):

Mr. Nagy: Are the sight distances at the Fairview Avenue/Whitfield Chapel Road intersection better or worse than those proposed at the full movement intersection for the site entrance?

Ms. Morgan: Worse ... [b]ecause of ... where the high point is. If you're sitting at Fairview looking left the road drops off pretty quickly, so you have less sight distance than if you're at the proposed intersection from the shopping center....

[W]hat we're asking for is a full in and out, left and right entrance to Whitfield Chapel Road....

Full access would be a left turn in, left turn out; right turn out into the intersection, or into the shopping center.

(May 4, 2017, T. 16-17, 23 and 27)

(3) Applicant submitted three renderings of different means of access to the property, marked as Exhibits 9(a) – 9(c). Exhibit 9(c) depicts full access and reflects what Applicant is seeking in the instant request. (May 4, 2017, T. 27-28)

(4) Applicant also proffered testimony from Mr. Kenneth Schmid, accepted as an expert in the area of traffic engineering. Mr. Schmid opined that Condition b should be revised, as suggested by Applicant, for the following reasons:

Mr. Nagy: [I]f site access were only a right-in, right-out from Whitfield Chapel what would a patron's options for going north on Whitfield Chapel consist of?

Mr. Schmid: ... I believe if the left turn is not provided, and under the conditions out on Whitfield Chapel Road where I believe that left turns can legally be made safely, you're going to wind up having a lot of people just make left turns where they're not allowed to make left turns....

I think you're going to have a number of people that decide that there's no reason that you can't make a left, and they take it under their own hand and they make a left turn around that little island....

The legal option would be to go down and either make a right to go down to, across the ridge and come back, or go left to the next place that they could turn around and come back on Martin Luther King Boulevard. Those are the real ways, and that's going to be 3,000, 4,000 feet of extra driving through a couple of traffic lights, which it doesn't help anybody, we don't need more traffic going through those lights to make a simple left turn off of Whitfield to go north on Whitfield. So, I think that people doing it the right way are going to have more impact along the Martin Luther King Boulevard corridor

for having more traffic or having u-turn movements that could be eliminated if we just had a full moving access to Whitfield Chapel Road....

Mr. Nagy: Mr. Schmid, do you agree ... that the sight distances from Fairview Avenue northbound on Whitfield Chapel are less desirable than the sight distances from the proposed location of the intersection shown on Exhibit 10 looking north with those sight distances?

Mr. Schmid: ... I went out and I looked out, I can bend down to three and a half feet, and I've been doing this for 25 years, so I can sort of get a good idea of what the sight lines will be....

The access coming out of the existing road is a little worse because of the side slopes of the adjacent property, I can't remember if there was parking on the road or not, but it seemed to be just on the other side of the crest of the hill, so the crest of the hill had a bunch more limiting factor on that sideline....

(May 4, 2017, T. 44-47)

(5) Mr. Schmid prepared a concept plan of the proposed lane configurations for Whitefield Chapel Road if the request is granted. (Exhibit 11) The plan reveals that Applicant's striping, marking and widening along Whitfield Chapel Road will "ensure that vehicle queuing and vehicle blocking would not block any of these intersections [nor] ... have any impact further up the Whitfield Chapel Road towards the residential streets, [and] intersection of Fairview Avenue and Volta Street." (May 4, 2017, T. 50)

(6) Applicant has not filed a preliminary plan of subdivision or a Detailed Site Plan for the subject property. (May 4, 2017, T. 25, 29)

Opposition's Comment

(7) Those opposed to the requested Amendment of Condition are, in general, concerned with protecting the character of their neighborhood, as noted by the representative from the Whitfield Gardens Civic Association:

Good morning. I am providing testimony to express the Whitfield Gardens Civic Association's opposition to the County Council and Planning Board approval of the application of DD Land Holding to change the zoning of the property....

For over 25 years three neighborhood associations representing over 1,500-plus households have fought the change in the zoning [because] ... the planned commercial development will change the quality of life in this minority community by bringing in commercial development to what is currently a quiet residential community, plush with green spaces, and more or less bearable traffic congestion....

Besides seeking to maintain a quality of life in our community we oppose the zoning change because of the threat it has to our safety, and anyone who travels on the local roads that make up this community, ... roadway safety is a major issue in this community, and it has been well documented that there have been several hundred accidents over the years at the intersection of Whitfield Chapel Road and Martin Luther King, Jr. Avenue....

(May 4, 2016 T. 63-66)

LAW APPLICABLE

Amendment of Conditions

(1) An Application for the amendment of conditions attached to a piecemeal zoning map amendment may be approved in accordance with Section 27-135 (c)(1):

- (c) The District Council may (for good cause) amend any condition imposed or site plan approved (excluding Comprehensive Design Zone Basic Plans or R-P-C Zone Official Plans) upon the request of the applicant without requiring a new application to be filed, if the amendment does not constitute an enlargement or extension.
 - (1) In the case of an amendment of a condition (imposed as part of the approval of the zoning case), the request shall be directed, in writing, to the District Council, and shall state the reasons therefore. Before the Council amends a condition, the Zoning Hearing Examiner shall hold a public hearing on the request, in accordance with Section 27-129, and shall notify all parties of record (including all parties of record on the original application and any amendments thereto) in the same manner as required for an original application. The Planning Board shall post a sign on the subject property, setting forth the date, time, and place of the hearing, in the same manner as required for an original application. After the close of the hearing record, the Zoning Hearing Examiner shall file a written recommendation with the District Council. Any person of record may appeal the recommendation of the Zoning Hearing Examiner within fifteen (15) days of the filing of the Zoning Hearing Examiner's decision with the District Council. If appealed, all persons of record may testify before the District Council. Persons arguing shall adhere to the District Council's Rules of Procedure, and argument shall be limited to thirty (30) minutes for each side, and to the record of the hearing.

Good Cause

(2) The Court of Appeals of Maryland, in Kay Construction Company v. County Council, 227 Md. 479, 177 A.2d 694 (1962) considered the definition of "good cause" upon appeal of a Council resolution overturning a previous decision upon a reconsideration of that previous decision for "good cause shown." In Kay, the Court held that a change of mind on the basis of the evidence of record is not "good cause." In arriving at this conclusion the Court referred to a previous decision, Zoning Appeals Board v. McKinney, 174 Md. 551, 564, 199 A. 540, 171 A.L.R. 207, 564 (1938), which states that in the absence of a statutory requirement, "It may be conceded without discussion that the Board has the right to correct errors in its decisions caused by fraud, surprise, mistake or inadvertence, which any agency exercising judicial functions must have, to adequately perform its duties."

(3) Finally, Section 22-214 of the Maryland Land Use Article recognizes the right of the District Council to impose conditions when granting a rezoning request:

- (a) In general. – In approving any zoning map amendment, the district council may consider and adopt any reasonable requirements, safeguards, and conditions that:
 - (1) may be necessary to protect surrounding properties from adverse effects that might accrue from the zoning map amendments; or
 - (2) would further enhance the coordinated, harmonious, and systematic development of the regional district.

CONCLUSIONS OF LAW

(1) "Good Cause" for an amendment of a condition requires a "substantial reason" and not merely a change of mind. "Good Cause" depends upon the facts and circumstances of the case before the triers of fact and must be applied in a manner that is consistent with the fundamental purpose of the amendment statute, Section 27-135. The legal principal of res judicata would bar a request to amend Condition b unless there had been a mistake in law in the first decision or there has been a change in circumstances since that first decision. Neither has been demonstrated in the instant Application.

(2) Applicant does correctly point out that access to the site is a matter to be thoroughly considered at the time of subdivision review. However, the District Council

chose to approve the rezoning request with Condition b arguably because it acknowledged the citizens concern with the impact a shopping center would have on their tranquil, stable residential community, as can be inferred from the express language in Zoning Ordinance No. 10-2015:

We find particularly persuasive the testimony offered at the hearing by Applicant's expert in the area of traffic engineering, Mr. Kenneth Schmid, that "the intersection of Whitfield Chapel Road and Martin Luther King, Jr. Highway would operate at level of service A or B if the subject site were developed with a neighborhood commercial center, that the 'right-in, right-out' from MD 704 would eliminate left turns into the site from Whitfield Chapel Road...." We are also persuaded by evidence in the record consisting of the August 22, 2013, letter from SHA stating that the agency had determined that it could allow a right-in and right-out from MD 704, subject to further review....

We find the evidence in the record, specifically the recommendations within the 1990 Largo-Lottsford Master Plan calling for residential development throughout the planning area in the vicinity of the site proposed for rezoning lends further support for a finding of need to harmonize the proposed uses on the subject property with existing residential uses in the immediate area.... Moreover, we find further corroboration in the plan language stating that "properly designed street networks should be provided to facilitate the desired traffic flow and circulation. Residential streets should be designed to discourage through traffic; and points of ingress and egress should be minimized to avoid conflicts with through traffic flow while retaining adequate access to properties...." We find pertinent to this subject request the recommendation of the 1990 master plan that "in order to facilitate transportation efficiency in the vicinity of high intensity uses, provision should be made for adequate access to collector and arterial highways, deceleration and acceleration lanes, and appropriate signalization...." We find these master plan recommendations consistent with the evidence in the record as to citizens' concerns regarding potential through-traffic on Whitfield Chapel Road, as well as a concern about automobile parking at the rear portion of the proposed development on the site....

(Exhibit 4, pp. 9, 15-16)

RECOMMENDATION

(1) Since it is premature at this point for a finding that there is good cause to delete Condition b, it is recommended that Condition b be revised to allow the right-in, right-out access along Whitfield Chapel to be eliminated if the Planning Board or the Maryland State Highway Administration finds that this limited access would adversely impact the public health, safety or welfare.

(2) Accordingly, the conditions of approval in A-10024-C would be revised as follows:

a. Prior to the issuance of any building permit for the subject property a Detailed Site Plan including architectural elevations shall be approved by the Prince George's County Planning Board, and if necessary the Prince George's County Council sitting in its capacity as the District Council.

b. Access to the subject property from Whitfield Chapel Road shall be evaluated at the time of any preliminary plan of subdivision and, if necessary, at the time of detailed site plan approval. At that time of preliminary plan of subdivision, and if necessary, at the time of detailed site plan approval, options for the entrance to the subject property shall not be limited to access from Whitfield Chapel Road. To the extent that there is substantial evidence in the record at the time of preliminary plan of subdivision or, at the time of detailed site plan approval, that the development is not viable without access to the subject property from Whitfield Chapel Road, Applicant shall submit proposed alternative transportation improvements to mitigate the potential negative impacts on surrounding properties with existing residential uses. Alternative improvements shall include, but shall not be limited to, widening of Whitfield Chapel Road adjacent to the subject property. Any access to the subject property from Whitfield Chapel Road shall be right-in/right-out, unless the Planning Board and/or the State Highway Administration finds that such limited access will adversely impact the public health, safety or welfare.

c. Applicant shall consider the impact of the proposed development project on surrounding properties with existing residential uses, including potential negative impacts on surrounding residential uses near the property, and shall not include drive-through uses unless the drive-through service component is associated with a financial institution, such as a bank.

d. Applicant, its successors and assigns, shall consider the impact of the proposed development project on surrounding properties with existing residential uses, including potential negative impacts on surrounding residential uses near the property. The Applicant shall meet with members of the surrounding community, homeowners associations (local community representatives) and persons of record prior to the submission of any Preliminary Plan of Subdivision and Detailed Site Plan to specifically discuss compatible proposed land uses as well as suitable ingress and egress issues for the development. The Applicant is encouraged to enter into private land use covenants with the local community representatives to consider appropriate permitted land uses for the subject property and to focus on "low intensity, locally-oriented businesses" as specified within the 1990 Master Plan recommendations.

e. In order to maintain the character of the neighborhood, commercial tenants shall not include automobile-oriented uses such as an eating and drinking establishment with a drive-through service window component or carry-out food service window component. Commercial tenants may include all other eating and drinking establishments.

f. Commercial tenants shall not include 24-hour businesses except emergency medical facility uses. Applicant shall use its best efforts to encourage "low intensity, locally-oriented businesses," which was specified within the 1990 Master Plan recommendations.