

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

**ZONING MAP AMENDMENT
A-10046
DECISION**

Application: R-S to the I-1 Zone
Applicant: Strittmatter Properties,
LLC/Renard Lakes Holdings, LLC
Opposition: Darnetta Simmons, Jeffery Simmons and
Matthew Hitt
Hearing Date: April 18, 2018
Hearing Examiner: Maurene Epps McNeil
Recommendation: Approval with Conditions

NATURE OF REQUEST

- (1) A-10046 is a request to rezone approximately 167.84 acres of R-S (Residential Suburban) zoned land to the I-1 (Light Industrial) Zone. The property is located at the northwest quadrant of the intersection of US 301 (Robert Crain Highway) and Dyson Road, identified as Parcel 25 on Tax Map 135, Grid D-3, Brandywine Maryland.
- (2) The Applicant is alleging that there was a mistake in the adoption of the most recent comprehensive rezoning of the area and that there has been a substantial change in the character of the neighborhood.
- (3) The Technical Staff recommended disapproval of the Application. (Exhibit 18) The Planning Board chose not to hold a hearing and adopted the Staff's recommendation as its own. (Exhibit 65(b))
- (4) A few individuals 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 allow staff the opportunity to respond to Applicant's land use planning analysis. The last of these items was received on July 10, 2018, and the record was closed at that time. (Exhibits 49-67)

FINDINGS OF FACT

Subject Property

(1) The subject property is approximately 167.84 acres in size, and irregular in shape. (Exhibit 18, p. 24) It is mostly undeveloped and wooded, with the exception of the eastern portion. The site has approximately 1,200 feet of frontage along Dyson Road, and access to the property is proposed from Dyson Road. (Exhibit 17)

(2) Staff provided an excellent synopsis of the Zoning history of the subject property. (Exhibit 18, pp. 4-5) In 1988 the Planning Board Approved Permit # 6071-88U, which certified nonconforming uses on the site (sand and gravel wet processing, surface mining, asphalt mixing plant, and a concrete mixing plant). (Exhibits 23, 24 and 26). By law the surface mining use can continue even if Applicant discontinue operation for a period in excess of 180 days, and Applicant may expand to include the entire acreage owned or leased at the time the use became nonconforming. (Prince George's County Zoning Ordinance, Sections 27-241(d) and 242(b)(1)(A)) In 2005 the District Council reviewed a former owner's piecemeal rezoning application which requested that the property be rezoned from the I-1 Zone to the R-S Zone, and approved the request, with conditions (A-9970-C). (Exhibits 55(a) and (b))

Neighborhood and Surrounding Properties

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

- North -- Pepco transmission line right-of-way and R-O-S zoned land owned by the Maryland Veterans Commission.
- South -- Dyson Road and commercial uses in the C-M Zone along the south side of Dyson Road.
- East -- Developed and vacant properties in the I-1 Zone and, beyond, US-301.
- West -- Piscataway Creek Stream Valley Park owned by M-NCPPC, zoned R-O-S and R-R.

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

- North -- Surratts Road
- South -- Dyson Road

- East -- US 301
- West -- Lusbys Lane

Applicant's land planner believes the southern boundary (Dyson Road) should not be used since it is also the subject property's boundary. However, this is the neighborhood used by the District Council in the prior rezoning of the property and should, therefore, be accepted in the instant case. (Exhibit 53)

Master Plan/Sectional Map Amendment

(5) The site lies within the Brandywine Community, discussed in the 2013 Subregion 5 Master Plan and Sectional Map Amendment.¹ The Master Plan provided several goals and/or policies applicable to the subject property:

- It recognized that "valuable sand and gravel resources underlie many parcels and mining activity is expected to continue for many years", and set as a goal that "[t]he county capitalizes on the extraction of sand and gravel resources prior to land being pre-empted by other land uses."

(2013 Subregion 5 Master Plan, pp. 88 and 160);

- It set as a policy insurance "that excessive noise-producing uses [not be] located near uses that are particularly sensitive to noise intrusion."

(2013 Subregion 5 Master Plan, p. 88);

- It noted that one of the findings of the ongoing Prince George's County Industrial Land Needs and Employment Study is that "Subregion 5 was among three planning subregions under the greatest pressure for rezoning of industrial land...."

(2013 Subregion 5 Master Plan, p. 152);

- The Master Plan then noted that the industrial area near US 301 and Brandywine Road should "transition to other zones" given the decline in demand for industrial zones.

(2013 Subregion 5 Master Plan, p. 153); and,

- It suggested that the site and other properties within the Brandywine Community be designated for future residential –low development (up to 3.5 dwelling units

¹ The 2013 SMA is the most current zoning of the subject property, and any mistake argument proffered below will be focused on a mistake made by the District Council in this SMA.

per acre) instead of the Employment-Industrial designation in the 1993 Master Plan.

(2013 Subregion 5 Master Plan, pp. 31 and 33; Exhibit 18, p. 5)

(6) The 2013 Subregion 5 Sectional Map Amendment (“SMA”) retained the subject property in the R-S Zone. The prior Master Plan and SMA (1993 Subregion V Master Plan and SMA) rezoned the property from the R-A Zone to the I-1 Zone, at the behest of the owners, in recognition of the existing sand and gravel mining operation and asphalt and concrete manufacturing plants on site. (Exhibit 53)

(7) The site also lies within the Established Communities Policy Area, discussed in the 2014 General Plan (“*Plan Prince George’s 2035*”). There are no specific recommendations therein for the subject property.

Applicant’s Request

(8) Applicant purchased the property in March, 2017. (T. 23) There was no active mining on site at the time of purchase and had arguably been none for the preceding 10-12 years, as indicated by the aerial photos of the area. (Exhibits 45(a)-(e); T.25) However, Applicant wishes to continue the surface mining operations (discussed above) on approximately 34 acres that have not yet been mined. Mr. Robert Strittmatter, managing member of Renard Lakes Holdings, LLC, testified that Applicant will resume mining since it has been issued the requisite surface mining permit from the Maryland Department of Environment (“MDE”).² Applicant has also submitted its request for the Use and Occupancy permit for the renewed surface mining operations. (Exhibit 30; T. 14-15)

(9) Mr. Strittmatter is also managing member of Strittmatter Contracting LLC, a contractor that “moves dirt.” This is a family business and either he or one of his brothers and employees are on the site daily. After discussing several residential development projects with which Applicant has been involved, he stated why he believes that the subject property should not be residentially zoned:

[I]f we’re successful here ... we believe it’s ... a good site for some light industrial uses warehouses, storage units....

[T]wo of my brothers are in the field as well as our employees and they’re, my brother[s] [are] on the site quite often and we have several employees there on the site daily....

[I’m familiar with the fact that there’s a police firing range located immediately contiguous to the north and west] I’ve been told

² After the hearing Applicant submitted a copy of the February 27, 2001 – February 28, 2021 Surface Mining Permit that was approved by MDE for transfer from the prior owner to Strittmatter Land, LLC. (Exhibits 51 (a)-(b))

is pretty much daily from about 7:00 am in the morning until 5:00 pm ... there's a continuous, continuous gunfire. A lot of automatic weapons that on the backside where the properties come together is quite loud and you can hear them constantly....

[A]ll our experience has been with residential and we've had quite a bit [of] success in ... Prince George's County with that. So, if ... we thought it was feasible, we would move forward with that, but ... the economics and the ... gun range and just the whole area [does not support residential development]

(T. 27-28, 30)

(10) Mr. Strittmatter noted additional reasons why developing homes on the property would not be feasible:

- There are environmental challenges on the eastern portion of the site that prohibit development therein, pushing the construction of any residence closer to the firing range;
- The 50-75 acres mined on site prior to Applicant's purchase may not support the construction of residences if the type of "back fill" used to reclaim the land was organic and if the method of filling was not "controlled" since the builder "would have to remove the dirt which again the expenses of that ... make it not feasible ... to pursue"; and
- The prior zoning approval (SDP-0505) included the requirement that the developer contribute \$750,000 prior to the first building permit and \$20,000 per lot for the first 100 lots, for a total contribution of 2.5 million dollars, and the balance after the issuance of the 49th building permit would be adjusted for inflation on an annual basis. This large monetary contribution "would not work for a home builder".

(Exhibits 36 and 38; T. 30-38)

(11) Mr. Paul Woodburn, accepted as an expert in the area of civil engineering, testified in support of the Application, and expounded upon the environmental constraints that impact the property:

[T]he property going from north to south is encumbered on primarily the eastern border by a 100-year floodplain, [and] other environmental features such as steep slopes, nontidal wetlands and existing woodlands....

The current ... permitted mining limits are [therefore] on the western side of the property which is flatter and is not encumbered by the environmental features....

[T]he property that currently could be mined, which I would use that as your developmental envelope [for residences], is approximately 110 acres....

(T. 72-73)

(12) Applicant submitted a copy of the mining site plan used from the time that mining commenced on site (prior to 1960) until 1988 (when the use was certified) which depicts the phases of mining and reclamation on site. (Exhibit 40) Mr. Woodburn has personal knowledge of what occurred on the site in 1989 and explained why he does not believe the property is stable enough to support residential housing:

Mr. Gibbs: Okay. And given the fact that you were involved at that time, do you have any knowledge, personal knowledge as to after the mining activity occurred in those phases, how they were filled and compacted?

Mr. Woodburn: So these areas at that time after they were mined, after the material was taken from the site being reclaimed or backfilled with uncontrolled fill, not being placed in a controlled manner for future use, future development, basically they're put in un-compacted and large lifts with I would say little attention to future use of the ground.

Mr. Gibbs: And could you explain, well first of all, given the fill, given the matter in which this fill and compaction occurred in your opinion would it support without remediation single family residential development?

Mr. Woodburn: My opinion is no, it would not.

Mr. Gibbs: Okay. What is the difference between the level of fill and compaction that's needed for residential versus industrial development of property?

Mr. Woodburn: So residential houses, the level of compaction for the design and construction of the footers is at a lower, a higher level than would be of an industrial. As well as the materials that are mixed with the fill material that was placed. In other words, this fill material when it went in ..., has other materials mixed in it. It's not just dirt, there's asphalt, bricks, organics, all of these things have to be removed to be placed in a residential subdivision for various other reasons than just compaction. You have utilities that need to go in that are public that get maintained by public entities such as WSSC, DPIE or Public Works and these agencies won't accept into their maintenance system or roads, for that matter, utilities and roads that are built on fills that aren't compacted properly or that have organics.

Mr. Gibbs: Okay. So, is it fair to say that if the property were to be developed under the R-S Zone and classification, at least in the areas that have previously been mined under the ownership of Mr. Smith, remedial actions would need to be taken to create a situation where that property could accept residential development?

Mr. Woodburn: Yes. That's correct.

(T. 77-78)

(13) Michael Lenhart, accepted as an expert in the area of transportation planning, prepared a memorandum in response to staff's comments on the potential traffic impact of the instant request. The memorandum provided, in pertinent part, as follows:

It is our opinion that Mr. Masog's memo drastically overestimates the potential traffic associated with the proposed rezoning. Mr. Masog calculates the maximum potential office space that could possibly be developed on this site as the highest and best use, assuming the maximum potential Floor-to Area (FAR) ratio that is referenced in the Transportation Guidelines. The Guidelines indicate that a FAR of 0.4 could possibly be achieved on the net acreage of the site (gross acreage minus floodplain). As such, Mr. Masog identified a potential maximum of 2.545 million square feet of general office space which is an unrealistic for the following reasons. First, the site is not a likely location for any substantial office development given the site location and the market for office in that area.

Secondly, the more realistic use for this site given the location and market is light industrial use, which has a lower FAR due to the design characteristics of these uses. Based upon the layout and constraints of the overall property, it is our opinion that the site would be more likely to develop as light industrial with an overall amount of approximately 500,000 square feet. This is 80% lower than Mr. Masog's maximum estimate and has a much lower potential trip generation as shown on the attached trip generation exhibit.

Furthermore, it should be noted that this property will ultimately need a Preliminary Plan of Subdivision which would require an Adequacy Test per 24-124 of the County Code. The property is located within the boundary of the Brandywine Road Club and will be required to participate in the Road Club in order to develop....

(Exhibit 42)

(14) Mark Ferguson, accepted as an expert in the area of land use planning, testified and prepared a written land planning analysis in support of the Application. (Exhibit 44)

(15) Mr. Ferguson's land planning analysis notes that there were mistakes in the prior rezoning and that a change has occurred since that time:

The neighborhood of the subject property ... has three separate and distinct characters: A strip of detached suburban development along Lusby's Lane, along the very western edge of the neighborhood; a large area of publicly-owned lands, mostly open space but with a couple of significant exceptions, between the residential strip and the subject site; and, the light industrial or "heavy service-commercial" uses at the subject property and its neighbors to the east and south. The subject property comprises 69% of this third character area....

In its original Statement of Justification, the Applicant has contended that two mistakes were made by the District Council in retaining the R-S Zone at the subject property. This planner concurs with the Applicant's contentions. This report adds discussion of a change in the character of the neighborhood and two additional mistakes.

The change in the character of the neighborhood arises out of the resumption of the nonconforming surface mining activity at the site, which had been suspended for at least ten years. The first mistake is that the retention of the subject property in the R-S Zone did not serve the goals of the Master Plan with respect to preservation of access to mineral resources.

The second mistake ... is that the District Council did not consider the effects of the adjacent firing range, on the suitability of the subject site for residential development.

The third mistake which is alleged in this report expands on the discussion of the second mistake, specifically that [the] burden imposed by the remedy for the adverse impact of the firing range was not considered by the District Council in its retention of the R-S Zone.

The fourth mistake which is alleged in this report is that the suitability of the previously-mined and reclaimed land to physically support residential development was not considered by the District Council in its retention of the R-S Zone.

**Mistake #1:
Nonconformity with the Goals of the Master Plan...**

Applicant cites the Master Plan's goal for preserving access to mineral resources, and [notes] that the subject property is located in the Brandywine Formation, and that a mining operation had existed at the subject property. Applicant contends that the District Council did not recognize the provisions of its own Ordinance which would have allowed mining to resume even though it had by then been quiescent for almost eight years.... This planner agrees with the Applicant's arguments for Mistake #1.

**Mistake #2:
Lack of consideration of the abutting Firing Range...**

Applicant contended that the District Council did not consider the effect of the noise generated by the adjacent firing range and concerns about safety in retaining the R-S Zone at the subject property. This planner agrees with the Applicant's arguments for Mistake #2, but will further amplify them in the discussion of Mistake #3....

This planner also feels that it is appropriate to point out that Community Planning Staff notes in ... (the backup to the Technical Staff Report) that they could find, 'no evidence that the firing range on the adjacent property was considered during the SMA preparation and approval process....

**Mistake #3:
Burden of the remedy to the Firing Range on Residential
Development ...**

This planner notes that the Technical Staff's original recommendation in A-9970 was for Disapproval. Certainly, among the considerations for this original recommendation was the recommendations of the owner of land on which the firing range was located: In 2005, the Department of Parks and Recreation stated that they recommended 'disapproval of this rezoning application [emphasis added in the original].' They went on to state that, 'DPR staff believes that it is incompatible to have a residential community next to Fire Arms Range. [It jeopardizes] ... the important services M-NCPPC facility provides to the County and State.... We believe that it's unsafe to have a residential community next to Firearms Range.'...

Concerns about the impact of the firing range were exacerbated by the presence of regulated environmental features on the eastern part of the site; as a result of the site's configuration, the residential development pods were necessarily forced westward, towards the firing range.

In response to the concerns, a number of conditions were eventually placed on the development approvals, one of which required the applicant to enter into an agreement with M-NCPPC to provide no less than \$2,750,000 to fund improvements at the range ... with the payment adjusted for inflation at the fiftieth permit.

As of the date of this writing, the escalation in the consumer price index has increased the required total [payment] ... to \$3,365,736....

Until the payment of the monetary contribution, however, the safety improvements would not be put in place (and do not seem to even have been guaranteed); thus, a very significant financial burden was imposed on the construction of the early part of the development, while house sales would continue to be adversely affected by the continued presence of the unabated effect of the activities at the range.

The dual burden of the financial condition materially detracting from the viability of developing the site residentially, together with the absence of the actual improvements which would mitigate the adverse acoustic and safety impacts has been a significant barrier to the feasibility of residential development at the subject site, as evidenced by the choice of a residential developer – who held the subject property long after the end of the housing market crash – to instead donate the property to a not-for-profit corporation.

These conditions – the presence of the range and its adverse impacts, as well as the substantial financial obstacle to abating those impacts – were certainly in the public record of the development approvals at the subject site, but were, as staff has acknowledged, not considered during the SMA preparation and approval process....

(Exhibit 44, pp. 4-5, 7-9)

(16) Mr. Ferguson addressed the fourth ground for mistake at the hearing. He reiterated the fact that the fill used would have to be removed to ensure that all organic materials and asphalt are hauled away “[a]nd that would have to be done for presumably the entire mined area because the mined areas ... coincided with the development pods in the residential approvals.” (T. 122) Since these were facts readily discernable in 2009 when the property was first zoned R-S, and in 2013 when that zoning was retained in the SMA, it was a mistake made by the District Council.

(17) Mr. Ferguson also believes that resumption of mining on the property is a substantial change in the character of the neighborhood that warrants approval of the request:

Mr. Ferguson: So the neighborhood ... is an area just a little under two square miles....

There are three distinct character areas in the neighborhood. The first is a very thin strip, a single strip of residential lots, some of which are developed, some of which are only platted along the east side of Lusbys Lane on the very western edge of the neighborhood. That area occupies about 3 percent of the area of the neighborhood and is separated from the subject site by several thousand feet and ... more than ... a 1,000 acres of public land....

The area of public land is 77 percent of the area of the neighborhood.... What's left over is an area that is 20 percent of ... the whole neighborhood area and right now all of that whether the subject site or the properties to the east and south is used or zoned, industrially or for service commercial uses. So, it's all C-M or I-1 and the subject site, which has the mining use going on on it....

So, the change from activity at the site being vacant and platted residential lots to mining is a substantial, substantial change....

Mr. Gibbs: So in your opinion as a planner, given the character of the neighborhood, the existing uses in the neighborhood and the impact which this property has on the neighborhood, the resumption of a mining operation, the physical activity of the mining operation, resuming after 12 years, is a substantial change in and of itself in character -

Mr. Ferguson: That ... is absolutely my opinion, yes.

Mr. Gibbs: And that of course occurred after the adoption of both the 2009 and the 2013 Sectional Map Amendment for Subregion 5?

Mr. Ferguson: That's correct, it did.

(T. 99 -103, 107)

(18) Applicant submitted Staff's comment on the prior zoning map amendment case requesting a change from the I-1 Zone to the R-S Zone, in which Staff noted opposition to the rezoning:

Department of Parks and Recreation (DPR) staff has reviewed the submitted Basic Plan Application A-9970 for rezoning of 167.84-acre property from I-1 zone ... to R-S ... zone and recommends disapproval.... This project is located east of M-NCPPC Police Fire Arms Range. This facility includes Administrative Office Classrooms, Trap and Sheet Range, Shooting Stations. The facility provides the services to more than 40 different State agencies. Our record shows that [a] total [of] 1,315,171 rounds [were] fired in 2004. The hours of operation [are] 8 am to 10 pm Monday through Friday and some weekends all year around.

DPR staff believes that it is incompatible to have a residential community next to Fire Arms Range. [It] jeopardize(s) the important services M-NCPPC facility provides to the County and State. [Our] major concern is the safety of residents and effect of the noise [generated] by Firearms Range....

(Exhibit 46)

(19) Applicant then proffered that it would have no objection to the approximate 47.56 acres on the northwest portion of the site and adjacent to the gun range owned by M-NCPPC being rezoned to the I-4 (Limited Intensity Industrial) Zone. (T. 81-82)

Opposition's comment

(20) Mrs. Donnetta Simmons and Mr. Jeffery Simmons testified in opposition to the request. Mr. Simmons admitted that she does not support development of over 400 residences as currently permitted. However, both witnesses are concerned with the existing number of industrial uses in the area, their impact on the environment, and the uncertainty (at this point) of what would ultimately be developed by the Applicant.

Agency Comment

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

[T]he applicant does not put forth an argument of change to the character of the neighborhood. Staff finds there has been no substantial change to the neighborhood character since the last comprehensive zoning of the area....

The applicant contends that retaining the subject property in the R-S Zone in the 2013 Subregion 5 Master Plan and SMA was a mistake by the District Council. Their contention is that the assumptions or premises relied upon by the District Council, at the time of the master plan and SMA approval, were invalid or have proven erroneous. The applicant points to two distinct mistakes:

Mistake 1: The District Council did not accurately consider its own recommendations for bolstering economic development in the area, especially regarding mineral resource extraction and further, with regard to the positive economic development incentive, which development in the I-1 Zone would foster....

Mistake 2: The District Council, by retaining the site in the R-S Zone, failed to fully and accurately consider the physical character of the property and the impact of the surrounding neighborhood, specifically the firing range, on the subject property as a residential development....

Staff finds the retention of the subject property in the R-S Zone was intended. There was no mistake made by the District Council in its approval of the 2013 Subregion 5 Master Plan and SMA....

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

Whereas the *prior* future land use designated for the subject property (1993 Subregion V Master Plan) was Employment-Industrial, the 2013 Subregion V Master Plan and SMA changed it to Residential-Low because (1) the subject property was currently zoned R-S; (2) there were existing development approvals (CDP, SDP and PPS) for residential development of the site; (3) residential zoning was consistent with the surrounding land uses; and (4) in furtherance of planning policy, future employment land use is to be planned in designed centers, not scattered throughout the County. Growth that supports the economic development goals of the master plan is planned for the Brandywine Community Center (a Plan Prince George's 2035 Local Center) and in the Clinton planning area, where recently an approved sector plan recommended revitalization in several focus areas south of the Branch Avenue Metro Station.

The master plan also cites the Industrial Land Needs and Employment Study which, contrary to the applicant's characterization, concluded that the County has an oversupply of industrially- zoned land. Page 146 of the master plan discusses industrially-zoned land in Subregion 5 stating, "Of the industrially zoned land, 1,324 acres or 60 percent, was undeveloped, a significantly higher share than the countywide total of 45 percent." Furthermore, the master plan states, "Land once considered appropriate for employment—or industrial development along railroad rights-of-way and major highways—is now obsolete and inappropriate in many locations" (page 146). In this context, and with full consideration of the economic development goals of the master plan, the residential zoning was retained on the subject property.

Not only did the 2009 Preliminary Subregion 5 Master Plan and Proposed SMA recommend changing the future land use from Employment-Industrial to Residential-Low for the subject property, it proposed to rezone the adjacent vacant (approximately) 34-acre site from I-1 to R-R. The proposed 2009 SMA discusses this rezoning proposal, as follows: "Rezoning this property from I-1 to R-R reinforces the existing residential development pattern and makes the zoning consistent with the surrounding residentially zoned properties. In addition, this property has remained undeveloped for a long period of time." This zoning change was not approved in 2009 for the adjacent property "because the property owner testified in opposition to the change during the public comment period" (Exhibit 70, Speaker 44). However, the fact remains the additional land at this location was

considered for further transitioning from industrial to residential land use and zoning in the 2009 Preliminary Subregion 5 Master Plan and Proposed SMA. The 2009 public hearing record was transmitted to the District Council for consideration during the process of approving the 2013 Subregion 5 Master Plan and SMA when the District Council retained the residential zoning of the subject property. This is strong evidence suggesting that no mistake was made in the 2013 Subregion 5 Master Plan and SMA when the District Council retained the residential zoning of the subject property.

Mistake 2: Regarding the applicant's second argument (i.e., that the District Council failed to recognize the inhospitable environment for residences that would be created), staff fails to find mistake in the comprehensive rezoning. The District Council chose to follow the recommendation of the master plan as part of ZMA A-9970, that rezoned subject property from I-1 to R-S. The Planning Board determined that this rezoning to residential was in accordance with the 2002 General Plan's goals and policies of the Developing Tier. At that time, the Developing Tier indicated areas where the County anticipated and encouraged new development in "contiguous and compatible growth patterns." Specific goals of the Developing Tier, which supported the requested rezoning, were: (1) to maintain a pattern of low-to moderate-density land uses (except in centers and corridors); (2) to reinforce existing suburban residential neighborhoods; and (3) to preserve and enhance environmentally-sensitive areas....

The retention of the R-S Zone on the subject property was intended to shift future development at this location away from industrial, to bring it into conformance with the predominantly residential land use in this part of the Brandywine community. The District Council chose to retain the residential zoning due to the character of the surrounding neighborhood and future residential land use recommendations for the area. Finding neither substantial change to the character of the neighborhood, nor mistake in the comprehensive rezoning, staff recommends DISAPPROVAL of Zoning Map Amendment Application No. A-10046.

(Exhibit 18, pp. 6-11)

(22) The Environmental Planning Section of M-NCPPC noted that "[t]he application meets all applicable environmental requirements." (Exhibit 18, p. 35)

(23) The Countywide Planning Division of M-NCPPC opined that "[t]he request to rezone from R-S to I-1 will have no impact on public facilities." (Exhibit 18, p. 39)

(24) The Department of Permitting, Inspections and Enforcement listed several items that Applicant must address if the application is approved. (Exhibit 18, pp. 42-44) However, it noted "no objection to the proposed rezoning of the property from the C-S-C and R-5 zone to I-1 zone, provided that the development project evaluates and improves Crain Highway to ensure sufficient traffic capacity and operations into the subject property." (Exhibit 18, p. 43)

(25) The Transportation Planning Section of M-NCPPC noted that daily vehicular trips could increase by 12,668 if the most intensive I-1 uses are developed on the site, but conceded that “there is no indication that the proposed rezoning would result in sizable impacts on the existing transportation facilities in the area of the subject property.” (Exhibit 18, p. 32) It did suggest the following condition be imposed if the Application is approved:

“If any of the six record plats for Renard Lakes (Plat Book PM 219, pages 42 to 47) are to be vacated, the dedicated right-of-way along the Dyson Road frontage shall be retained in public usage.”

(Exhibit 18, p. 32)

(26) The Community Planning Division was opposed to the 2005 rezoning from the I-1 to the R-S Zone (A-9970) reasoning in pertinent part, as follows:

This application is not consistent with the principles and guidelines of the 2002 General Plan. One of the goals in the Developing Tier is ‘to develop compact, planned employment areas.’ A major objective of the general plan is to increase the jobs-to-population ratio ... by 39 percent over the next 25 years.... The rezoning would remove a planned compact employment area of 167.84 acres in the Brandywine community....

The subject site is suitable for light industrial development because it is well buffered from residential development in the general area of the site. Proposed Brandywine Road/Brandywine Road Relocated, shown as a new Collector Road (C-613), the M-NCPPC lands to the west, and the electrical transmission line to the north provide substantial buffers from future residential development in the North Village....

There are potential long-term use compatibility issues with respect to proposed residential uses adjacent to the light industrial I-1 Zone along US 301, the commercial miscellaneous C-M Zone on the south side of Dyson Road, the public recycling depot, and the M-NCPPC firing range to the west of the subject site....

(Exhibit 53, pp. 6-7) The Technical Staff ultimately recommended that A-9970 be denied.

(27) As noted, *supra*, Applicant supplemented its argument for mistake and added an argument of change in the character of the neighborhood. It also noted that it would not be opposed to the District Council’s split-zoning of the property to place the 47.56 acres on the northwest portion of the site and closest to the adjacent gun range, in the I-4 Zone. (Exhibits 38(a) and (b) p. T-81) Initially Staff noted that it had no additional comment on either the new change argument or the possibility of split-zoning the property. (Exhibit 64) It later submitted revised comments stating that the additional mistake and change arguments submitted by Applicant “do not alter the Planning Department’s conclusion regarding the application but given the nonconforming status of the property ... the ... (I-1) Zone is not an inappropriate zone for the property.”

LAW APPLICABLE

(1) The purposes of the I-1 and I-4 Zones are set forth in Sections 27-469(a)(1) and 472(a)(1) of the Prince George's County Zoning Ordinance ("Zoning Ordinance"). These Sections provide as follows:

Sec. 27-469. - I-1 Zone (Light Industrial).

(a) **Purposes.**

(1) The purposes of the I-1 Zone are:

- (A) To attract a variety of labor-intensive light industrial uses;
- (B) To apply site development standards which will result in an attractive, conventional light industrial environment;
- (C) To create a distinct light industrial character, setting it apart from both the more intense Industrial Zones and the high-traffic-generating Commercial Zones; and
- (D) To provide for a land use mix which is designed to sustain a light industrial character.

Sec. 27-472. - I-4 Zone (Limited Intensity Industrial).

(a) **Purposes.**

(1) The purposes of the I-4 Zone are:

- (A) To provide for limited industrial and commercial development;
- (B) To provide for uses limiting employee and patron occupancy levels and floor area ratios; and
- (C) To provide development standards which assure limited intensity industrial development and the compatibility of proposed land uses with surrounding existing and proposed land uses (those proposed in the Master Plan) and zoning.

(2) The I-1 and I-4 Zones are conventional zones 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.

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Change or Mistake

(3) As noted *supra*, Applicant bears the burden of either showing "a substantial change in the character of the neighborhood or a mistake in the current Sectional Map Amendment." 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.

(4) In Howard County v. Dorsey, 292 Md. 351, 438 A. 2d 1339 (1982) the Court of Appeals quoted the court in Boyce v. Sembly, 25 Md. App. 43-50-53 (1975) for the evidence needed to sustain a finding of mistake:

A perusal of cases ... indicates that the presumption of validity accorded to a comprehensive zoning is overcome and error or mistake is established when there is probative evidence to show that the assumptions or premises relied upon by the Council at the time of the comprehensive rezoning were invalid. Error can be established by showing that at the time of the comprehensive zoning the Council failed to take into account then existing facts, or projects or trends which were reasonably foreseeable of fruition in the future, so that the Council's action was premised initially on a misapprehension. [Citations omitted] Error or mistake may also be established by showing that events occurring subsequent to the comprehensive zoning have proven that the Council's initial premises were incorrect.... Because facts occurring subsequent to a comprehensive zoning ... could not have been considered, there is no necessity to present evidence that such facts were not taken into

account by the Council at the time of the comprehensive zoning. Thus, unless there is probative evidence to show that there were then existing facts which the Council, in fact, failed to take into account, or subsequently occurring events which the Council could not have taken into account, the presumption of validity accorded to comprehensive zoning is not overcome and the question of error is not 'fairly debatable'....

(*Id.* at 356-358)

(5) In People's Counsel for Baltimore County v. Prosser Co., 119 Md. App. 150,179, 704 A. 2d 483 (1998), the Court of Appeals further explained that "the consistency of the proposed use with the Master Plan would have been insufficient alone" to show mistake in the comprehensive rezoning. Moreover, the existence of a mistake by the District Council in retaining the R-S zoning of the property in its adoption of the 2013 SMA does not require that it approve the instant request. Chesapeake Ranch Club v. Fulcher; 48 Md. App. 223, 426 A2d 428(1981)

(6) Courts have upheld a finding of change in the character of the neighborhood when highway improvements were made (and not just proposed); when other rezonings had occurred nearby; and when lots contiguous to the subject property were rezoned to the requested zone at issue and considerable development had occurred. All changes must be considered cumulatively in determining whether Applicant has met its burden – not individually. Bowman Group v. Moser; 112 Md. App. 694, 678 A2d 643 (1996)

CONCLUSIONS OF LAW

(1) The subject property shares boundaries with R-O-S zoned property owned by the Maryland Veterans Commission to the north; vacant and developed I-1 zoned property to the east; Dyson Road and commercial uses in the C-M Zone to the south; and R-O-S and R-R zone property owned by M-NCPPC to the west. Applicant argues that the resumption of mining on the site approximately 12 years later, and subsequent to the adoption of the 2013 SMA is evidence of a substantial change in the character of this neighborhood.

(2) It was arguably a mistake to not consider the effect of Sections 27-242(d) and 27-242(b), which allowed the mining operation to continue despite the years-long cessation in activity, and allowed it to expand throughout the areas of the site not within the 100-year floodplain. If the District Council had considered this provision it might not have determined that such a use be placed in a residential zone. Accordingly, the "subsequently occurring event" of mining recommencing on site and spreading throughout all areas not within the floodplain is further support for a finding of mistake.

(3) It was arguably a mistake to not consider the suitability of the previously mined portions of the site (located closer to the firing range) for the construction of houses. The civil engineer noted that there were areas on site reclaimed with fill mixed with asphalt, bricks and organics that must be removed before utilities can be installed or

residences built. This, coupled with the fact that a large sum would have to be paid to MNCPPC to mitigate the noise emanating from its firing range, makes it unreasonable to assume that the residential development would ever come to fruition. Moreover, failure to determine whether Staff's 2005 objection to the R-S zone adjacent to the gun range bore further consideration, was also a ground for finding mistake.

(4) A change in the character of the neighborhood may have occurred upon the resumption of mining. At that point, the neighborhood became over 2/3 public land (owned by MNCPPC and the Maryland Veterans Commission), a few residential properties near Lusby's Lane, some C-M and I-1 zoned land, and the subject site (used for mining) – clearly a non-residential neighborhood. However, this may not rise to the level of a substantive change since the potential of resuming activities was always present.

(5) Finally, I believe there is support for the District Council's decision to rezone the acreage closest to the gun range to the I-4 Zone. This zone allows for more limited industrial development that reduces employee/patron occupancy levels – development that should be less impacted by any adverse effects of its location adjacent to a gun range.

RECOMMENDATION

I recommend Approval of A-10046, subject to the following conditions:

(1) Applicant shall submit a revised Zoning Plan (Exhibit 17) showing the exact metes and bounds of the 47.56 acres recommended for rezoning to the I-4 Zone, located to the northwest of the site, prior to or concurrent with its acceptance of the condition(s) imposed, should the request to split-zone the property be approved by the District Council.

(2) Prior to the issuance of permits, Applicant shall obtain approval of a Detailed Site Plan to ensure compatibility with the surrounding properties and compatibility between the I-4 and I-1 zoned portions of the subject property.