

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

**ZONING MAP AMENDMENT
A-10000-C/01**

DECISION

Application:	Amendment of Conditions
Applicants:	LMJ Real Properties and Investments, Inc./Linda Jones/Defiance Drive
Opposition:	None
Hearing Dates:	May 9, 2018, May 22, 2018 and September 5, 2018
Hearing Examiner:	Maurene Epps McNeil
Recommendation:	Denial

NATURE OF PROCEEDINGS

(1) The subject property, approximately 5.068 acres in size, is located at the terminus of Defiance Drive, approximately 160 feet east of its intersection with Star Drive. It consists of two (2) parcels (Parcel 16 and Parcel 311) and is surrounded on all sides with single-family detached residential development in the Aragona Village/Potomac Knolls subdivision. Parcel 311, is 1.06 acres in size, has street frontage on Defiance Drive, and is partially wooded. Parcel 16, being approximately four (4) acres in size, is two-thirds wooded. Parcel 16 and 311 are in common ownership and Parcel 16 does not have frontage on a public street. Zoning Map Amendment A-10000 was requested to rezone the subject property from the R-E (Residential Estate) Zone to the R-R (Rural Residential) Zone. It was ultimately approved by the District Council with a "condition".

(2) A-10000-C is before the District Council upon a request for the amendment of the "condition" imposed by the District Council upon its adoption of Zoning Ordinance 11-2010, which rezoned the subject property from the R-E Zone to the R-E and R-R (Rural Residential) Zones. The Council also imposed a limit on the number of homes that could be constructed. Applicant requests that the District Council amend the condition that split zoned the property and limited the number of dwelling units.

(3) No one appeared in opposition to the request at any of the hearings held by this Examiner.

(4) The record of the original Application A-10000-C has been made a part of the record and incorporated herein by reference.

(5) At the first hearing, it became clear that additional information (discussed below) would be needed before the request could be considered. Accordingly, the hearing was recessed. The additional information was not available at the time of the second hearing so it was ultimately rescheduled. At the conclusion of the final hearing the record was left open to allow Applicant to submit a revised Exhibit 8. That item was received on September 12, 2018, and the record was closed at that time. (Exhibits 31 (a) and (b))

FINDINGS OF FACT

(1) On October 26, 2010, the District Council gave final approval to A-10000-C subject to the following language at issue in this request:

- A. The District Council adopts the descriptions of the subject and surrounding properties and the neighborhood, as set out by the staff in the Technical Staff Report. As indicated by staff and examiner, surrounding and neighborhood properties are most often developed with single-family detached residential units on lots of about one quarter to one half acre. Though they are in the R-E Zone, requiring minimum lot sizes of 40,000 square feet, most existing housing lots are smaller than 20,000 square feet, because they were subdivided earlier than 1967, the grandfather date.
- B. The subject property at this time, on what is called parcel 311, 1.06 acres, has a single-family dwelling, a barn, and other accessory buildings. The remainder of the tract, called Parcel 16, about 4 acres, has stables and other outbuildings. The applicant initially proposed single-family detached residential development, with lots 20,000 square feet or larger, but in the applicant's most recent revision, the rezoned property will have R-R zoning on only a part, as shown in the attached exhibit, and the remainder will be left in the R-E Zone. With total acreage of about 5.068, the applicant and subsequent owners will be allowed no more than six dwelling units, instead of the nine units first proposed.
- C. Development of the property with six new single-family detached dwelling units will be in keeping with the density and character of the neighborhood, as defined by staff and examiner in the record. As stated, existing residential densities are about two units per acre, on housing lots subdivided in the 1950s and 1960s.
- D. As the basis for this rezoning, under [Section] 27-157 (a) of the Zoning Ordinance, the District Council concludes from the record that the Council made an error, as to the subject property, in the most recent Sectional Map Amendment. The Henson Creek-South Potomac Master Plan and SMA, approved by the District Council in 2006, left the subject tract in the R-E Zone. But this land, undeveloped and surrounded by lots of one half acre or less, should have been allowed about six residential lots, as that density is consistent with what exists in this part of the defined neighborhood.

NOW, THEREFORE, BE IT ORDAINED AND ENACTED:

SECTION 1. The Zoning Map for the Maryland-Washington Regional District in Prince George's County, Maryland, is hereby amended by rezoning in part the property that is the subject of Application No. A-10000 from the R-E to the R-R Zone. The center line of Defiance Drive, as extended by the applicant, shall be the dividing line between the portion of the property (to the west and south) remaining in the R-R Zone and the portion (north and east, closest to Defiance Drive) reclassified to the R-R Zone. By the rezoning, with a part of the subject property rezoned R-R and the remainder left in the R-E Zone, the applicant shall be permitted to construct, under current zoning densities (20,000 square feet per unit in R-R and 40,000 square feet per unit in R-E), no more than six residential units on the subject property. The rezoning shall conform substantially to Exhibit A1, submitted by the applicant in October 2010.

(Exhibit 3, pp. 2-3)

(2) Applicant requests that the language above be revised as follows:

Whereas, as the basis for this action, adopts the following as its findings of fact and conclusions of law in this case:

A. The District Council adopts the descriptions of the subject and surrounding properties and the neighborhood, as set out by the staff in the Technical Staff Report. As indicated by staff and examiner, surrounding and neighborhood properties are most often developed with single-family detached residential units on lots of about one quarter to one half acre. Though they are in the R-E Zone, requiring minimum lot sizes of 40,000 square feet, ~~most existing housing all of the lots contiguous to the subject property~~ are smaller than 20,000 square feet, because they were subdivided earlier than 1967, the grandfather date.

B. The subject property at this time, on what is called Parcel 311, 1.06 acres, has a single-family dwelling, a barn, and other accessory buildings. The remainder of the tract, called Parcel 16, about four acres, has stables and other outbuildings. The applicant initially proposed ~~nine~~ single-family detached residential development, with lots 20,000 square feet or larger, ~~but in the applicant's most recent revision, the rezoned property will have R-R zoning on only a part, as shown in the attached exhibit, and the remainder will be left in the R-E Zone. With total acreage of about 5.068, the applicant and subsequent owners will be allowed no more than six dwelling units, instead of the nine units first proposed.~~

C. Development of the property with ~~six~~ new single-family detached dwelling units ~~on lots with a minimum size of 20,000 square feet or larger~~ will be in keeping with the density and character of the neighborhood, as defined by staff and examiner in the record. As stated, existing residential densities are about two units per acre, on housing lots subdivided in the 1950s and 1960s.

D. As the basis for this rezoning, under § 27-157(a) of the Zoning Ordinance, the District Council concludes from the record that the Council made an error, as to the subject property, in the most recent Sectional Map Amendment. The Henson Creek – South Potomac Master Plan and SMA, approved by the District Council in 2006, left the subject ~~property~~~~tract~~ in the R-E Zone. ~~But t~~This land, undeveloped and surrounded by lots of one half acre or less, should have been allowed ~~to develop about six residential lots, as that a density that~~ is consistent with ~~surrounding what exists in the part of the~~ defined neighborhood.

NOW, THEREFORE, BE IT ORDAINED AND ENACTED:

SECTION 1. The Zoning Map for the Maryland-Washington Regional District in Prince George's County, Maryland, is hereby amended by rezoning ~~in part~~ the property that is the subject of Application No. A-10000 from the R-E to the R-R Zone ~~subject to the following condition~~. ~~The center line of Defiance Drive, as extended by the applicant, shall be the dividing line between the portion of the property (to the west and south) remaining in the R-R Zone and the portion (north and east, closest to Defiance Drive) reclassified to the R-R Zone. By the rezoning, with a part of the subject property rezoned R-R and the remainder left in the R-E Zone, the applicant shall be permitted to construct, under current zoning densities (20,000 square feet per unit in the R-R and 40,000 square feet per unit in the R-E), no more than six residential units on the subject property. The rezoning shall conform substantially to Exhibit A1, submitted by the applicant in October 2010.~~

1. A maximum of eight (8) single-family detached lots with a minimum lot size of 20,000 square feet may be developed on the subject 5.068 acre property.

(Exhibit 8)

(3) At the first hearing Applicant proffered testimony from Mark Ferguson, accepted as an expert in the area of land use planning. Mr. Ferguson noted that "the current zoning is R-R" and Applicant simply wished to develop 20,000-square-foot lots, as permitted in that zone. (May 9, 2018 T. 7) He and Applicant's counsel then proffered a copy of the zoning of the property as shown in P.G. Atlas which indicated that the entire subject property lies within the R-R Zone and is not split-zoned as approved by the District Council, *supra*. The hearing was continued to address this discrepancy.

(4) Subsequently, Staff with the Maryland-National Capital Park and Planning Commission ("MNCPPC") responsible for updating the County GIS information reviewed evidence submitted in the original case and revised the County GIS zoning map to show the split-zoning of the property. (Exhibits 21(a)-(c), 22 and 26)

(5) At the final hearing Applicant's counsel submitted evidence that the original District Council approval was conditional in nature, and that Applicant accepted the conditions. (Exhibit 28; September 5, 2018 T. 7-8)

(6) Mark Ferguson again testified in support of the request at this hearing. He noted that the lots surrounding the subject property were recorded under "old R-R provisions and as such are typically smaller than 20,000 square feet ... can be as small as 10,000 square feet, [and] on average ... are a little over 13,000 square feet in size...." (September 5, 2018 T. 8-9)¹ Applicant is proposing an eight-lot layout with a minimum lot size of 20,067 square feet. (Exhibits 6 and 7; September 5, 2018 T. 9)

(7) As noted below, the District Council may grant Applicant's request if it finds "good cause" to do so. In 2010 the District Council found that it erred in allowing the tract to remain in the R-E Zone when it approved the 2006 Henson Creek-South Potomac Sectional Map Amendment. It, therefore, split-zoned the property and held that "the applicant shall be permitted to construct, under current zoning densities (20,000 square feet per unit in R-R and 40,000 square feet per unit in R-E), no more than six residential units on the subject property." (Exhibit 3, p. 3) Applicant believes that the District Council should not have capped the density in this manner since the Master Plan calls for density of 1.6 to 2.6 units per acre. In its statement in support of removing the condition Applicant first argues that the District Council should not have retained R-E zoning on any of the site:

At the advertised public hearings before both the Zoning Hearing Examiner and the District Council no opposition from any of the adjoining property owners or the surrounding community was present. There are no letters or evidence in the record of any opposition to the requested ... R-R zoning for the entire 5.068 acres parcel or the number of lots. Based on substantial evidence in the record, the District Council found that the existing residential densities are about two units per acre. (Note, that at two units per acre the subject property, which is 5.068 acres in size would yield a maximum of ten (10) one-half (1/2 acre lots). After correctly making the appropriate findings that the property should be rezoned to R-R, the District Council mistakenly conditioned their approval on limiting the number of lots to six (6) new single-family detached units '... in keeping with the density and character of the neighborhood.' This condition imposed R-E zoning on a portion of the property.

Evidence in the record demonstrates that the average lot size abutting the subject property is 13,787 square feet and the actual average density of development is 3.15 dwelling units per acre (an increase of 1.15 dwelling units per acre over the average cited by the District Council). The lots in the neighborhood and those abutting the subject property are as small as 10,000 square feet (one-half of the minimum lot size of an R-R zoned lot and one quarter the minimum lot size in the R-E zone). Requiring any lot to be a minimum of 40,000 square feet (as required by the current R-E zoning) would not be in keeping with the density and character of the neighborhood. The R-E lots would be two to four times larger than any of the existing platted lots and the proposed residential density would be less [than] one dwelling unit (0.83) per acre, which is less than one-half of the density which the District Council cited (2.0 dwelling units per acre) and less than one-third of the

¹ Pursuant to Section 27-442(b), the minimum net lot area for one-family detached dwellings in the R-E and R-R Zone is generally 40,000 and 20,000 square feet, respectively.

actual density (3.15 dwelling units per acre) of the immediately surrounding lots.

Through the ZMA application, the Applicant and Property Owner requested that the entire property be rezoned to R-R and presented a schematic plan illustrating nine (9) 20,000 square foot lots. Instead the Council conditioned the rezoning by split zoning the property along the centerline of future Defiance Drive extended to limit the number of lots at six (6).

Applicant and Property Owner hereby respectfully request that the District Council reconsider the condition to split zone the property and adopt language that zones the entire 5.068 acres subject property to the R-R Zone, caps the number of lots at eight (8) and requiring each of the 8 lots to be a minimum of 20,000 square feet in size, all of which are supported by the evidence in the record and the findings in Zoning Ordinance No. 11-2010.

The requested maximum of eight (8), minimum twenty thousand (20,000) square foot lots will allow for the provision of significant buffering and setbacks from the adjoining lots and will allow for the on-site provision of environmental site design (ESD) methods to accommodate stormwater management for the site development. (Ex. 3). The proposed 8 lots range in size from 20,067 to 34,394 square feet in size and average 24,196 square feet in size. On average the proposed lots will be 43% larger (or 10,409 square feet larger) [than] the abutting R-E Zoned lots (Ex. 4).

On behalf of the Applicant and Property Owner we are hereby formally requesting that the District Council reconsider certain qualifying language of the referenced Zoning Ordinance and adopt an Amended Order. A proposed Revised Zoning Ordinance No. 11-2010 that would correct the conditional language is attached hereto for the Council's convenience....

(Exhibit 2, pp. 2-3)

(8) At the last hearing Applicant added that there is good cause to revise the condition in the manner noted above since:

[T]he findings originally made by the District Council ... that we met the conditions for the rezoning to the R-R [were sufficient and] ... it should have stopped there [T]here was no reason, no need once they made the findings for a rezoning to restrict it to a portion of the property or to condition that rezoning to cap the density at a maximum of six when the finding was in conformance with the Master Plan.... So that's the good cause and it was unduly restricted and the rational that they gave for the restriction does not support the condition.

(September 5, 2018, T. 18-19)

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) which provides as follows:

(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."

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.

(2) Applicant argues there is "good cause" to amend the condition but in support thereof merely notes that the District Council was wrong to only rezone a portion of the site to the R-R Zone, relying on the same evidence in its original Application to rezone the subject property. In effect, Applicant requests that the District Council change its mind, something that it is not permitted to do.

(3) Finally, the District Council's Zoning Ordinance notes in Paragraph (B) that the subject property should be R-R in part with the remainder in the R-E Zone per the Applicant's "most recent revision."² While the Zoning Ordinance was unusually formatted, one cannot interpret the entire document as a condition. Accordingly, any revision to the conditional language in Section 1 of the Zoning Ordinance would not change the District Council's determination in B to split-zone the subject property.

RECOMMENDATION

(1) I would recommend that the application be denied since the Applicant has not provided good cause for the Amendment of Condition.

² The original Application was remanded to the Office of the Zoning Hearing Examiner to allow Applicant the opportunity to enter an additional exhibit into the record – Exhibits 35(a) and (b). Exhibit 35(a) shows R-E zoning on proposed Lots 1-3, and R-R zoning on proposed Lots 4-6.