

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

**ZONING MAP AMENDMENT
A-10049
DECISION**

Application: R-R to the C-M Zone
Applicant: Khan Properties, LLC
Opposition: None
Hearing Date: February 6, 2019
Hearing Examiner: Maurene Epps McNeil
Recommendation: Approval with Conditions

NATURE OF REQUEST

(1) A-10049 is a request to rezone approximately 4.592 acres of R-R (Rural Residential) zoned land to the C-M (Commercial Miscellaneous) Zone. The property is located at the northwest quadrant of the intersection of U.S. 301 (Robert Crain Highway) and Missouri Avenue, part of Tax Parcel 203 recorded in the Land Records for Prince George's County in Liber 4422 at Folio 143, and identified, as 0 Crain Highway, Brandywine Maryland.¹

(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 since that time.

(3) The Technical Staff recommended disapproval of the Application. (Exhibit 15) The Planning Board chose not to hold a hearing and adopted the Staff's recommendation as its own. (Exhibit 17(b))

(4) No one appeared in opposition at the hearing held by this Examiner.

(5) At the close of the hearing, the record was left open to allow Applicant additional time to submit certain documents. The last of these items was received on February 8, 2019, and the record was closed at that time. (Exhibits 6(b) and 41-47)

¹ The property is also described as 203 Crain Highway on a deed of sale. (Exhibits 44 and 45)

FINDINGS OF FACT

Subject Property

(1) The subject property is located in the median of Crain Highway (U.S. 301) with frontage on Missouri Avenue and the northbound lanes of U.S. 301. Missouri Avenue is listed in the Subregion 5 Master Plan as a primary road with a proposed right-of-way of 60 feet and two lanes, and U.S. 301 is a master plan freeway facility with a proposed right-of-way of 300 to 450 feet and six to eight lanes.

(2) The portion of the subject property at issue in this Application is triangular shaped and approximately 4.5928 acres of a 5.183-acre site. (Exhibits 15, p. 2, 43 and 44) It is mostly undeveloped and wooded, and quite flat in topography. (Exhibit 27, p. 3)

(3) Staff provided an excellent synopsis of the zoning history of the subject property. (Exhibit 15, pp. 4-5) The subject property was originally a 7.968-acre tract. Approximately 2.786 acres were conveyed to The Potomac Electric Power Company (PEPCO) and transmission lines were ultimately constructed thereon. This conveyance bisected Parcel 203 into 4.592 acres to the south of Parcel 293 (the PEPCO property) and 0.591 acres to the north. (Exhibit 28) Applicant is not seeking a rezoning of the portion to the north; therefore, it will remain in the R-R Zone.² Finally there is also a 100-foot-wide SMECO easement parallel and adjacent to the PEPCO transmission lines, placing a total of 300 feet of high voltage transmission lines near the subject property. (Exhibit 32, T. 57-58)

Neighborhood and Surrounding Properties

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

- North -- PEPCO transmission line right-of-way, the remainder of the subject property, and vacant C-M zoned land
- South -- Northbound Crain Highway (U.S. 301) and vacant R-R zoned land
- East -- Northbound U.S. 301 and vacant R-R zoned land
- West -- Vacant R-R zoned land

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

- North and West -- Dyson Road
- South -- U.S. 301 Northbound, and Brandywine Road (MD 381)
- East -- Crain Highway (U.S. 301) northbound

² Applicant explained that its property is not split-zoned, as incorrectly stated in portions of the record; and that the property lines for the remainder of its land to the north of the PEPCO transmission lines are incorrectly mapped. (Exhibits 28, 30, 43 and 44; T. 42-44)

(6) Applicant's land planner believes the northern and western boundaries should be revised as follows:

This planner believes that this neighborhood is unduly small; he would instead extend the northern and western boundaries to the PEPCO transmission rights-of-way, the northerly of which roughly parallels the southern boundary of the State of Maryland property containing the Cheltenham veterans' cemetery, and the westerly of which runs behind the Brandywine Landing subdivision. This change would include the County shooting range, the waste transfer station, Renard Lakes and the adjacent industrially-zoned properties, and make the location of the subject property more central to the neighborhood limits.

(Exhibit 27, p.3)

(7) Applicant submitted an Exhibit plotting the property over an aerial photo and one that shows the neighborhood suggested by staff as well as that proffered by Applicant. (Exhibits 31 and 32) I find that the boundaries of the neighborhood proffered in Exhibit 31 present a better neighborhood within which to evaluate the request (for the reasons discussed below).

Master Plan/Sectional Map Amendment

(8) The site lies within the Brandywine Community, discussed in the 2013 Subregion 5 Master Plan and Sectional Map Amendment.³ The Master Plan did not expressly discuss the subject property or commercial areas around it. The Master Plan did address major sources of noise in the area, including mining operations, vehicular traffic and local highways and recommended use of setbacks for development exposed to noise generators and roadways of arterial classification or greater. The Master Plan also provided goals for residential development which included achieving high quality suburban development organized around a network of parks, open space and community facilities.

(9) The Community Planning Division provided the following analysis of the Master Plan's limited consideration of the subject property:

The 2013 Approved Subregion 5 Master Plan recommends Residential Low future land use on the subject property.... [T]he Applicant raises land use policies in the General Plan and the Master Plan that support non-residential zoning of land in the County.... During the preparation and approval of the Master Plan and SMA, there was no discussion of alternate land use and development in this portion of the US 301 median; no new land use policies were approved in the Master Plan.... Retention of the property in the R-R Zone is an affirmative action by the District Council consistent with the 2013 Master Plan's recommendation of Residential-Low development.

(10) The 2013 Subregion 5 Sectional Map Amendment ("SMA") retained the subject property in the R-R Zone.

³ The 2013 SMA is the most current zoning of the subject property, and any change or mistake argument proffered below will be focused on a mistake made by the District Council in this SMA or a change in the character of the neighborhood since adoption of this SMA.

(11) 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; however, the vision for the Established Communities is context-sensitive infill and low-to medium-density development.

Applicant’s Request

(12) Mr. Ahmed Khan, the sole member of Khan Properties, LLC, testified in support of the Application. Mr. Khan currently operates Colonial Auto Auction in Upper Marlboro, Maryland, a business that “auction[s] surplus vehicles for several counties including Prince George’s County, Montgomery County, Anne Arundel County, ... and some smaller municipalities.” (T. 10) Applicant also operates a towing service and auto repair business at this site.

(13) Applicant purchased the property in 2017 after reviewing a real estate broker’s listing agreement that noted that at least some portion of the site was in the C-M Zone. (Exhibits 21 and 43; T. 12-13) Mr. Khan would like the subject property to be placed in the C-M Zone because the site is too small for housing development, and he would like to operate an automotive repair business there. This commercial miscellaneous use would be similar to those developed on C-M zoned land to the north of the site in the median for Crain Highway and on the west side of the south bound lanes of Crain Highway. There are other concentrations of commercial miscellaneous uses in T.B., and at the intersection of Branch Avenue and Moore’s Road, both over a mile away to the south. (Exhibit 27)

(14) Mr. Michael Lenhart, accepted as an expert in the area of transportation planning and engineering, testified and submitted an analysis in support of the request. He disagreed with staff’s transportation analysis of the request, reasoning as follows:

Mr. Masog uses the entire 4.59 acres and he uses the transportation guidelines[.] [T]he guidelines for evaluation of transportation impacts has a floor to area ratio for land areas [and] when you don’t have a specific proposal you can use the floor to area ratio to establish a building footprint that could be developed on the property. Mr. Masog uses the entire 4.59 acres and a floor to area ratio of 40 percent to come up with a floor area of 79,976 square feet for a development on that site. Mr. Masog assumed a professional office building which would be a medical and dental office building as the highest and best use for the property and ... after looking at that and talking to the client and looking at the site and the market in the area we believe that the use of professional office is really not appropriate nor realistic and would overstate the traffic impacts associated with the rezoning....

[W]e don’t believe that it’s reasonable that this would develop as a professional office for previous. stated reasons. However, we did ... conduct an updated traffic generation report using the reduced land areas of 2.77 acres and if the development were to occur as a professional office building it would only be able to be a 48,000 square feet building not 79,000 as indicated by Mr. Masog because once you take out the right-of-way a floor area ratio of 0.4 on that 2.77 acres would get you 48,000 square feet of floor area. That would generate 40 percent less traffic than Mr. Masog had estimated. If that 48,000 square foot building were a general office instead of a professional office, it would generate 79 percent

less traffic than Mr. Masog had indicated.... [I]f it were retail it would be a 30,000 square foot based on 0.25 FAR, which would generate 50 percent less traffic than Mr. Masog had estimated, and if it were developed as a 15,000 square foot automobile dealership which is consistent with Mr. Khan's testimony... it would only generate 418 trips per day which is 87 percent less than Mr. Masog's estimate in his memo....

(T. 18-19, 25-26)

(15) Mr. Lenhart buttressed his testimony with a Transportation Analysis that found, in pertinent part, as follows:

The [Transportation] Guidelines indicate that a FAR of 0.4 could possibly be achieved on the net acreage of the site as such, Mr. Masog identified a potential maximum of 79,976 square feet of professional office space (based on 4.59 acres) which is ... unrealistic for the following reasons.

1. The site is located adjacent to the Master Plan alignment of F-10, which is the upgrade of U.S. 301 to a freeway designation.... There is roughly 1.58 acres of this property located within the ultimate F-10 right of way which should be reduced from the developable area of this property as no structures are allowed within the ultimate right of way without District Council approval. In addition, there is a small area of dedication that would also be required along Missouri Avenue. After eliminating these areas from the property, there is approximately 2.77 acres of developable area....

2. The site is not a likely location for professional office development given the site location, small land area, and the market for office in that area.... While the rezoning to C-M from R-R will result in an increase in trips, it is highly unlikely it would result in the estimate as identified in the [Transportation Planning Section] memorandum. 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 23)

(16) Finally, Mr. Lenhart noted that the interchange near Branch Avenue (MD 5) and Brandywine Road (MD 381) (under construction and funded in the State budget since FY'15), and changes to current at grade intersections in the area, will substantially improve traffic in that area. (Exhibit 23; T. 27-28) Applicant believes this transportation improvement is one indicia of change in the neighborhood. (T. 29)

(17) Mark Ferguson, accepted as an expert in the area of land use planning, provided testimony and a written land planning analysis in support of the Application. Mr. Ferguson first discussed why the neighborhood should be expanded from that suggested by staff:

So Exhibit 31 is a plot of the zoning layer for the areas surrounding the subject property which is outlined in red, roughly in the center and identified as such on the legend. The applicant in its statement of justification and then the staff in its Staff Report proposed a neighborhood bounded on the east by U.S. 301, on the south by Brandywine Road and on the west and north by Dyson Road, and that's indicated by the solid blue and the dashed blue line on Exhibit 31.... [I]t made sense to me to incorporate really the areas to the north up to the transmission lines which are indicated by the solid blue lines to the north and

east. The Renard Lakes property ... is only 850 feet away from the subject property and it's closely connected by the road network and then ... there is both industrially zoned and used or service commercial uses in between the Renard Lakes property and U.S. 301 that are both proximate to and connected by the road network. And so I certainly believe that those should be part of the neighborhood and as well there are residential neighborhoods on the west side of Dyson Road which I believe should be included. So the neighborhood is expanded both to the north and to the west to what I believe is a better boundary and it puts the ... property much more centrally located in the limits of the neighborhood. I do believe that 301 continues to be a barrier on the east....

(T. 45-46)

(18) Mr. Ferguson concluded that the Application met all applicable provisions of the Zoning Ordinance reasoning, in pertinent part, as follows:

In its original Statement of Justification, the Applicant contended that there have been two substantial changes in the character of the neighborhood and three mistakes in the current Sectional Map Amendment. [I concur] with four of the Applicant's five contentions, and this report adds discussion of an additional mistake.

The two changes in the character of the neighborhood are contended to have arisen (1) out of the construction of the interchange of Brandywine Road and Branch Avenue, and (2) the resumption of the nonconforming surface mining activity at the Renard Lakes site, which had been suspended for at least ten years. [I agree] with the latter change, but [find] that since the interchange had been proposed by prior Master Plans, it cannot legally be considered as a change in the character of the neighborhood notwithstanding its substantive actual impact.

The first mistake cited by the Applicant in its Statement of justification is that the retention of the subject property in the R-R Zone did not consider the impact of residential lot standards in the Subdivision Ordinance for land abutting freeways.

The second cited mistake is that the District Council did not consider the effects of the adjacent high voltage transmission lines on the suitability of the subject site for residential development.

The third cited mistake is the disparity of the subject property's zoning with the adjacent C-M [z]oning to the north.

The fourth mistake which is contended by this report is that the cumulative history of the Council's zoning actions with respect to C-M [z]oned land in its adoption of SMAs over the years prior to the present and to the most recent Sectional Map Amendment affecting the subject property.

**Change in the Character of the Neighborhood:
Resumption of Surface Mining at Renard Lakes**

At the time of the preparation of the Master Plan and Sectional Map Amendment, both in its 2009 original incarnation and its 2013 reapproval, the longstanding surface mining activity at the nearby Renard Lakes property had ceased from the time that property was sold by its original operator (A. H. Smith Company) in June, 2005. A review of the historic aerial photography available on the County's PG Atlas GIS site confirms that the mining activity ceased between the 2005 and 2006 photos.

The ownership of Renard Lakes passed through a number of owners.... After the current

owner, Renard Lakes Holdings, LLC bought the property in March, 2017, State mining permit 00-SP-0571 was transferred to Strittmatter Land, LLC, who has since recommenced surface mining operations at the site.

The resumption of the surface mining and its accessory activities was uniquely enabled after a 12-year period of quiescence by the provisions of § 27-241(d)(2) of the Zoning Ordinance, which exempts certified nonconforming surface mining operations from the operation of the 180-day limit on the discontinuance of certified nonconforming uses. The Renard Lakes surface mining operation was certified as a nonconforming use by approval of CNU-6071-88 and current Use & Occupancy Permit 1208-2017-00....

The change of the actual use of Renard Lakes from vacant/platted residential lots to an industrial/extractive use is a substantive change in the character of the neighborhood, given that the Renard Lakes site comprises a substantive proportion of the land in the neighborhood; the activity at Renard Lakes, by virtue of its proximity to the subject property, its areal preponderance (166 acres) and by the amount and character of traffic which it creates on Crain Highway is a major determinant of the character of the neighborhood.

The effect of this change was recognized by the District Council in its approval of Zoning Ordinance 13-2018, approving the rezoning of Renard Lakes from the R-S Zone to the I-I Zone.

**Mistake #1:
Impact of Standards for Residential Lots Abutting Freeways**

In its Statement of Justification, the Applicant contended that the District Council did not serve the goals of its own Master Plan to achieve high-quality suburban development by retaining the R-R Zoning of the subject property in the Sectional Map Amendment. This planner concurs.

The existence of the abutting Crain Highway , (U.S. Route 301) listed as Freeway F-10 in the *Countywide Master Plan of Transportation*, acts to impose the requirements of Section 24-121(a)(4) of the Subdivision Ordinance on residential development of the subject property, which provides that, "Residential lots adjacent to an existing or planned roadway of freeway or higher classification, or an existing or planned transit right-of-way, shall be platted with a depth of three hundred (300) feet." The effect of this restriction, combined with the Master Plan's direction to expand the existing right-of-way approximately 127' into the subject property leaves only 40,000 square feet of the subject property's 4.59-acre gross area free of encumbrance from the effect of the abutting freeway.

The added presence of required buffers associated with a mapped regulated natural feature further reduce the unencumbered area of the subject property such that only two lots meeting the R-R Zone and Subdivision Ordinance standards appear to be developable.

The Applicant also points out that the operation of standards for the protection of residential development from noise impacts would further act to restrict development: While the southbound lanes of Crain Highway are not classified as a freeway by the Master Plan, the speed, composition and volume of the existing traffic on those southbound lanes generate a noise impact which is comparable to that generated by the northbound lanes. As such, additional setback requirements or economically unsupportable noise barriers could be required to achieve residential development on the otherwise unencumbered northwestern area of the subject property.

It is noted that the subject property was zoned C-2 in the 1961 original zoning for the surrounding area; the existing R-R zoning was applied to the subject property by a 1978 Sectional Map Amendment. At the time of that 1978 SMA, Crain Highway was only classified as an arterial roadway (A-48), and as such would not have required additional right-of-way dedication, and would only have required a lot depth restriction of 150' adjacent to an arterial roadway.... It is further noted that the application of the C-M Zone to the subject property was recommended by the Planning Board in its 1978 transmittal to the District Council; the District Council included a specific amendment to downzone the subject property to R-R. Notwithstanding the District Council's 1978 zoning action, it retained a "Commercial Areas" land use recommendation for the subject property in the subsequent 1993 Master Plan.

Crain Highway was subsequently upgraded to an Expressway by the 1982 General Plan, and upgraded again to a Freeway by the 1993 Subregion 5 Master Plan. So while the statutory and planning encumbrances reached their modern form by the 1993 Master Plan, the retention of the "Commercial Areas" land use recommendation for the subject property suggests that some planning thought was applied to the property at the time. No evidence in the current Master Plan, where the land use recommendation was changed to reflect the existing zoning, or in the examination of the operation of the County's laws and regulations on the subject property, suggests that a similar evaluation was applied during the 2013 Sectional Map Amendment....

In summary, the original zoning provided for the concentration of service commercial zoning in the neighborhood of the subject property. And while the District Council, for unknown reasons, decided to rezone the subject property to R-R in 1978, the statutory and planning encumbrances on the property at that time would have been less economically adverse.

Accordingly, this planner agrees with the Applicant's arguments for Mistake #1

Mistake #2:

Lack of Consideration of the abutting Transmission Lines

In its Statement of Justification, the Applicant contended that the District Council did not consider the effect of the presence of the existing high-voltage transmission lines in retaining the R-R Zone at the subject property.

The Subregion 5 Master Plan is silent on the effects of high-voltage transmission lines on adjacent development, but this planner agrees with Applicants for Mistake #2 that platting suburban single-family lots adjacent to two high-voltage transmissions lines would not result in the high quality which the Master Plan seeks for residential development in Subregion 5.

Applicant also notes that the District Council recently considered CB-77-2017, which, if approved, would have prohibited residential development within 1,000' of existing substations. It is also noted by this planner that the provisions of the new Landscape Manual approved by CB-68-2018 classifies the impact of "major utility facilities" as what would correspond in the current manual as a Medium Impact Use; currently, overhead power lines are classified as a Low Impact Use. While the drafting of the language of both CB-77-2017 and the Landscape Manual approved by CB-68-2018 are vague enough as to make it unclear how each would apply to high-voltage transmission lines, it is clear to this planner from both that modern regulatory thought is recognizing that the impacts of high-voltage transmissions lines are perceived to be substantive enough as to provide a chilling impact on the desirability of residential land use in their vicinity.

Mistake #3[:]**Disparity of the Subject Property's Zoning with Abutting Properties**

As noted in the discussion of Mistake #1, the subject property was included in a concentration of service commercial zoning (then as the C-2 Zone) which was created at the time of the original zoning of the surrounding area in 1961. While the subject property, for reasons unknown, was rezoned by the District Council to R-R (in contravention of the Planning Board's transmitted recommendation for C-M zoning) by the 1978 Sectional Map Amendment for Planning Areas 85A and 85B, the remainder of the originally-zoned service commercial zoning concentration has remained (being reclassified to the C-M Zone by the same 1978 Sectional Map Amendment). The 1993 application of the I-1 Zone to the Renard Lakes site and the properties between it and Crain Highway (and the uses which occupy these properties) only enhanced the character of the neighborhood.

While the subject property –whatever its zoning –represents the transition between the service commercial (and light industrial) character of the neighborhood, it is noted that a substantive wooded buffer of undeveloped lots exists between the subject property and the nearest existing residential development. It is also noted that the presence of regulated natural features will challenge the development of those intervening lots.

The Applicant notes in its Statement of Justification that while the presence of adverse impacts, including the abutting freeway, the abutting high-voltage transmission lines, the abutting service commercial zoning, noise impacts from the “non-freeway” southbound lanes of Crain Highway all are individually and cumulatively hostile to the Master Plan's recommendations for quality residential development and the purposes of the existing R-R Zone, they are in fact harmonious with the Master Plan's Economic Development goals, its policies for Industrial, Office and Retail development, and with the purposes of the requested C-M Zone. This planner agrees.

Mistake #4[:]**Failure to Consider the Cumulative Impact of Reduced Inventory of C-M Zoned Land**

Finally, this Planner points out that for the last decade, and certainly in the years preceding there has been a consistent trend to remove C-M Zoned land from the County's inventory, and there does not appear to be an associated overarching policy to correlate the land inventory with demand. In fact, in justifying a 49-acre downzoning of underdeveloped land from the C-M Zone in the 2013 Sectional Map Amendment, the SMA cites a General Plan policy to, “ensure that adequate amounts of properly zoned land are available for economic development activities while avoiding overzoning that encourages sprawl and inhibits revitalization efforts....”

Yet despite this policy, the cumulative effect of the 25 Master Plans and Sector Plans which have been approved since 2008 has been to reduce the inventory of C-M-zoned land by 274.70 acres, which represents 23.4% of the area zoned C-M before the operation of the associated Sectional Map Amendments. If the period is confined to the time prior to the adoption of the Subregion 5 Master Plan, the effect is even greater: the inventory of C-M Zoned land was reduced by 29.3% of the inventory in place before the 14 Sectional Map Amendment approved between July, 2008 and July, 2013.

Of all of the twenty-one Sectional Map Amendments approved in the last decade, only one has operated to increase the inventory of C-M zoned land: the March, 2010 Glenn Dale-Seabrook-Lanham Master Plan and SMA, which added 1.9 net new acres of C-M zoning (or a 2% increase of the C-M inventory within its limits).

These direct reductions in the C-M inventory compound the effect of other changes in the ordinances to reduce the effective inventory of the C-M zoned land which remains: More

than 110 acres of C-M zoned land was effectively removed from the inventory by text amendments which allowed the Faison retail development in Bowie. The application of many Development District Overlay Zones throughout the Count (most particularly the November, 2004 Gateway DDOZ) have operated to restrict service commercial uses from land which retains C-M base zoning.

No discussion of this long-standing and cumulative trend on the availability of C-M zoned land exists in any of the planning documents with which this Planner is familiar, yet the facts are clear, present and publicly-available.

This planner believes that had these facts been considered, together with the facts laid out in the other three mistakes described above, that the District Council would have concluded that the existing R-R Zone is not appropriate for the subject property, and that given the subject property's location adjacent to a concentration of service commercial zoning and land uses, that the application of the C-M Zone would be most appropriate as a remedy....

(Exhibit 27, pp. 5-9)

(19) At the hearing Mr. Ferguson provided further testimony in support of his conclusion that there exists both a change in the character of the neighborhood since the most recently adopted comprehensive rezoning, and that the Council made a mistake in retaining the property within the R-R Zone:

[T]he subject property is adjacent to the planned freeway expansion or relocation of U.S. 301 which will involve the taking of approximately 130 feet from the eastern side of the property. Whether or not there is a taking, there is nonetheless that Master Plan line which establishes ... the street line. Section 121(a)(4) of the Subdivision Ordinance ... provides that residential lots which are created adjoining a freeway classification must have a lot depth of 300 feet and that 300 feet gets measured from that right-of-way line.... Exhibit 32 is a drawing plotting the deed of the property ... [and] it illustrates the 300 foot lot depth and there is only a tiny, tiny, little sliver of land which is available outside that 300 foot lot depth....

Now you can certainly have a lot within that ... 300 feet, the question is what is left over. And you'll see there's only a sliver of land and of that sliver is mapped on the Green Infrastructure Plan layer as being encumbered [by] a regulated natural feature which is stream drainage....

And so my analysis is there would be enough land to create two conforming lots. But you also have to consider that regardless of the classification of the southbound lanes high speed, high truck volume traffic which generates a lot of noise and there are requirements that require you to mitigate the effects of that noise either by locating lots outside of a 65 dBA line or putting up noise barriers to mitigate that sound so that you can, you can occupy land within it. So if you only look at the 300 foot lot depth in the regulated areas, you're left with two and you might only be left with just one ... residential lot for the whole of ... the subject area of the property....

[Exhibit] 35 is the future land use map 4-1 from the 2013 Master Plan but you can see from the legend at the bottom this was from the preliminary book. Exhibit 36 is the same future land use map that's ... from the ... recently published bound version. If you look at Exhibit 35 you will see that there is a little commercial concentration [circled] ... and a circle in the in the same area of [Exhibit] 36....

And what you'll see [in] the Preliminary Master Plan there is a little yellow sliver in the intersection of Missouri Avenue and 301 which represents the current property and it represents a land use recommendation of residential low, which corresponds to the R-R zoning which is in place....

To the north on Exhibit 35 you'll see the commercial land use recommendation which corresponds to the C-M zoning which is in place. Now late last evening I was going to simply prepare these land use exhibits and I said well why stick the preliminary book on the copier and print that, I'll just print off of the published PDF and I looked at the published PDF and I said what happened to the commercial land use recommendation. And I said ... they must have changed it in either the Planning Board resolution or the errata or the District Council resolutions, I need to amend my report and I went and read all of those to find where the citation was so that my report could be correct. And I found no evidence of any direction to change that land use map in this location....

Clearly from the prior exhibits you can see that the Sectional Map Amendment did not in fact remove the C-M zoning, it retained the C-M zoning in the neighborhood....

(T. 51-53 and 60-62)

(20) Mr. Ferguson noted that the discrepancies between the Future Land Use Map on the Preliminary Subregion 5 Master Plan and the Approved Subregion 5 Master Plan didn't impact the subject property but "is a pattern of things that aren't quite right ... [which makes one question] [w]hat is the actual [zoning] recommendation for the neighborhood?" (T. 67)

Agency Comment

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

In 2006, the District Council approved a rezoning of the Renard Lakes property to its current R-S zoning classification, pursuant to the approval of Zoning Map Amendment (A-9970). Subsequent to the rezoning, the Renard Lakes property was the subject of an approved Comprehensive Design Plan (CDP-0505), and Approved Preliminary Subdivision Plan (4-05048), and an approved Specific Design Plan (SDP-0505). All of these plans were approved in 2006. As approved, the R-S Zone authorized 315 single-family detached residential units and 78 single-family attached residential units. The Renard Lakes property never developed within its R-S zoning classification. More recently, the Renard Lakes property was once again sold. The current owner has filed a rezoning application seeking to restore the original I-1 zoning classification to the property (Zoning Map Amendment (A-10046)). Further, in March of 2017, the current owner of the Renard Lakes property re-established the surface mining operation on the property and is currently expanding that operation to the limits of the Renard Lakes property. The Renard Lakes property is once again being utilized for an industrial purpose. The applicant submits this too is a substantial change in the character of the neighborhood and is one which further supports a rezoning of the subject property from its current residential classification of R-R to C-M.

The following is staff's analysis of the neighborhood's distinct changes:

Change 1: The Applicant suggests that interchange improvements at MD 5 and MD 381, not directly affecting the subject property, should be considered a substantial change in the character of the neighborhood. The applicant states that it "is also anticipated that that this major new interchange improvement will have a dramatic impact on land development in this area" as discussed in page 19 of the applicant's Statement of Justification. The interchange improvements are part of the construction of the Brandywine Spine Road (A-63). The applicant provides no evidence of actual impact from the construction of this project causing a "substantial change" to character of the neighborhood.

It should also be noted that A-63 was identified in the 1993 *Approved Master Plan for Subregion V*. Development of a "comprehensive" master plan requires the Planning Board and District Council to take transportation improvements, and the impact thereof, into account when recommending or making land use policy and zoning changes. The subject property was retained in the R-R Zone by the District Council twice (in 1993 and 2009) with full knowledge that A-63 was to be constructed.

Change 2: Staff acknowledges the Applicant's arguments that the Renard Lakes rezoning from a residential to an industrial zone appears to be a change in neighborhood character: Staff agrees with the applicants that 1) Renard Lakes is proximate to the subject property; 2) Renard Lakes is a large property; and 3) while the Master Plan and SMA contemplated residential land use and development on the Renard Lakes site, substantially different industrial development will be resumed.

However, the Renard Lakes site was historically used as a surface mining operation, an industrial land use. Reportedly, from 2000-2017, the operation was discontinued, during which time residential development was approved but not built. The property owner, in 2017, resumed surface mining operation. This fact pattern does not demonstrate an actual change in the neighborhood; an industrial land use was discontinued for 17 years, during which the land was not redeveloped, and then the industrial land use resumed.

In addition, rural residential and undeveloped residentially-zoned land lie east and west of U.S. 301 and the subject site; the property is part of a larger swath of land in this part of the County envisioned to be largely residential, bisected by U.S. 301. Staff finds that, pursuant to section 27-157 (a)(1)(A) of the Zoning Ordinance, there is no evidence of a change in the character of the neighborhood to support the requested rezoning....

There was a mistake in the current Sectional Map Amendment.

The applicant contends that retaining the subject property in the R-R 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 failed to accurately consider the impact of existing and potential setback and lot size requirements on the property, as a residential development.

Mistake 2: The District Council failed to accurately consider the adverse impacts on the property, as a residential development, of being adjacent to high voltage Pepco transmission lines.

Mistake 3: The District Council failed to accurately consider the fact that the property was previously zoned C-1 (Local Commercial, Existing), and that by placing the property in the R-R Zone, it became the only property in assemblage bounded by north and southbound lanes of U.S. 301, Dyson Road and Missouri Avenue (other than the PEPCO property) not zoned C-M.

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

In the 'mistake' argument, the Applicant raises land use policies in the General Plan and Master Plan that support non-residential zoning of land in the County and technical issues with setback requirements that could potentially impact residential development of the subject property. While these are all sound planning reasons to set aside land for non-residential land use and development, none of these considerations support the legal basis for an argument that the Council erred in retaining the residential zoning on this specific property. During the preparation and approval of the Master Plan and SMA, there was no discussion of alternate land use and development in this portion of the U.S. 301 median; no new land use policies were approved in the Master Plan because, in the context of the overall plan for Subregion 5, none were necessary. Retention of the property in the R-R Zone is an affirmative action by the District Council consistent with the 2013 Master Plan's recommendation of Residential-Low development. "There is a strong presumption of correctness of original zoning and comprehensive rezoning ...so that there must be strong evidence of mistake." *Anne Arundel County v. Maryland Nat'l Bank*, 32 Md. App.437 (1976).

While the property is adjacent to some Commercial- Miscellaneous (C-M)-zoned land to its north, it is surrounded on the east, west and immediate south by low-density residential and undeveloped property zoned R-R. The property is not, as characterized by the Applicant, surrounded by commercially zoned land. An abutting commercial zone does not constitute a mistake in the comprehensive rezoning.

Therefore, it is not possible to conclude that a mistake was made in the SMA in retaining the R-R Zone for the subject property.

In order for a mistake to be a legally-justifiable basis for rezoning, there must have been a basic and actual mistake by the legislative body, in this case the District Council. Staff finds that, pursuant to Section 27-257(a)(1)(B) of the Zoning Ordinance, there was not a 'mistake' in the 2013 Subregion 5 Master Plan and Sectional Map Amendment....

(Exhibit 15, pp. 7-19)

(22) The Historic Preservation Section of M-NCPPC noted that the Application would have no impact on any Prince George's County historic site or resource. (Exhibit 15, p. 8 in backup)

(23) The Transportation Section of M-NCCPC analyzed the net traffic impact of the highest use (professional office) permitted by right in the C-M Zone and determined that approval of the request would raise the number of daily trips by 3,127. It then noted:

Transportation staff is aware that the adequacy or inadequacy of transportation facilities is not a central issue pertaining to the change or mistake finding required for a Euclidean rezoning. Based on the potential trip generation, the proposed rezoning could have a significant impact on the existing transportation facilities in the area of the subject property. If rezoned transportation adequacy issues would be further reviewed at the preliminary plan of subdivision stage of review. No transportation facility conditions are warranted as a means of ensuring the coordinated, harmonious, and systematic development of the Regional District.

(Exhibit 15, p.13 of backup)

LAW APPLICABLE

(1) The purposes of the commercial zones, in general, and the C-M Zone, in particular, are set forth in Sections 27-446(a) and 459(a) of the Prince George's County Zoning Ordinance ("Zoning Ordinance"). These Sections provide as follows:

Sec. 27-446. - General purposes of Commercial Zones.

(a) The purposes of Commercial Zones are:

- (1) To implement the general purposes of this Subtitle;
- (2) To provide sufficient space and a choice of appropriate locations for a variety of commercial uses to supply the needs of the residents and businesses of the County for commercial goods and services;
- (3) To encourage retail development to locate in concentrated groups of compatible commercial uses which have similar trading areas and frequency of use;
- (4) To protect adjacent property against fire, noise, glare, noxious matter, and other objectionable influences;
- (5) To improve traffic efficiency by maintaining the design capacities of streets, and to lessen the congestion on streets, particularly in residential areas;
- (6) To promote the efficient and desirable use of land, in accordance with the purposes of the General Plan, Area Master Plans and this Subtitle;
- (7) To increase the stability of commercial areas;
- (8) To protect the character of desirable development in each area;
- (9) To conserve the aggregate value of land and improvements in the County; and
- (10) To enhance the economic base of the County.

Sec. 27-459. - C-M Zone (Commercial Miscellaneous).

(a) **Purposes.**

- (1) The purposes of the C-M Zone are:

- (A) To provide locations for miscellaneous commercial uses which may be disruptive to the harmonious development, compactness, and homogeneity of retail shopping areas;
- (B) To provide these locations, where possible, on nonresidential streets; and
- (C) To provide concentrations of these uses which are relatively far apart.

(2) The C-M Zone is a conventional zone as defined in the Zoning Ordinance and must be approved in accordance with the strictures of Section 27-157. 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

- (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, 178-179, 704 A. 2d 483 (1998), the Court of Appeals more succinctly noted that “[i]n order to find legal mistake, there must be evidence that assumptions or premises relied on by the County Council were invalid... [and not just] the exercise of bad judgment based on complete and accurate information.” Moreover, it is generally held that the existence of a mistake by the District Council in retaining the R-R zoning of the property in its adoption of the 2013 SMA does not mandate that it approve the instant request. *Chesapeake Ranch Club v. Fulcher*, 48 Md. App. 223, 426 A2d 428 (1981)

(6) In *Rockville v. Henley*, 268 MD 469, 473, 302 A.2d 45 (1973), the Court noted that in meeting its high burden of proving change Applicant must show: what area reasonably constitutes the neighborhood; the changes that have occurred in that neighborhood since the comprehensive rezoning; and that these changes resulted in a change in the character of the neighborhood. 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) Finally “proof of change merely permits the legislative body to grant the rezoning; it does not compel it to do so.” *Henley*, at 473.

CONCLUSIONS OF LAW

(1) The request satisfies the purposes of the commercial zones, generally, and the C-M Zone specifically, since: the provision of service commercial uses would be more likely to protect the health, safety and welfare of the inhabitants of this County at this location adjacent to high voltage power lines and a designated freeway; there is some question as to why the proposed Future Land Use Map in the 2013 preliminary Master Plan recognizes the commercial uses near the property while the Approved Future Land Use Map deleted them (raising questions as to the weight to be given to the Map); the proposed use would meet the 2014 General Plan's vision of appropriate context-sensitive infill development in Established Communities; approval of C-M zoning for this small site would not affect the Master Plan of Transportation's designation of US 301 as a freeway (F-10), nor Missouri Avenue's as a residential roadway; any development larger than 5,000 square feet will require subdivision approval and findings of adequacy of public facilities; allowing limited commercial uses would encourage economic development and subsequent contribution to the County's tax base; any development will be required to protect the environment and natural features, and guard against undue noise, since Applicant will have to satisfy the remainder of the Zoning Ordinance's prescriptions and those in Subtitle 25; the site is near other existing miscellaneous commercial uses and will, therefore, not be disruptive to the development of retail shopping areas; although Missouri Avenue is a residential street the nearest residence served by it is more than 2,000 feet away from the subject property; and, this miscellaneous commercial use will be over one mile from the closest concentrations of C-M zoning near Branch Avenue. (Sections 27-446 and 27-459)

(2) The neighborhood proffered by Applicant's expert land use planner is reasonable – not overly large or small and not drawn in a manner to avoid any particular class of use.

(3) Applicant's expert proffers, as indicia of change in the character of the neighborhood, the resumption in 2017 of surface mining at the Renard Lakes property to the north. The District Council recently approved a conditional rezoning of this property (A-10046-C) from the R-S to the I-1 and I-4 zones, subject to the condition that all surface mining cease on the site. (Exhibit 25) It was not clear at the close of the instant record whether Applicant in A-10046-C accepted the conditions. If it does not, the surface mining may continue; if it does, over 160 acres will be rezoned from a residential zone to two industrial zones. Either event would bring a change to the character of the neighborhood. Applicant further suggests that recent improvements to Branch Avenue (MD 5) should also be indicia of change. I disagree because the improvements lie outside of the neighborhood; the transportation improvements in this area were discussed prior to the adoption of the 2013 SMA and the District Council had knowledge thereof prior to its decision to retain the residential zoning of the site; and, there was insufficient support in the record to conclude that improved traffic circulation is something that would be more supportive of commercial development than the residential development allowed in the R-R Zone.

(4) This Examiner believes that the Applicant met its burden in showing mistake in the retention of the R-R zoning of the subject property. The Master Plan recognized the need to protect development from the noise generated by roadways of arterial classification or greater – the subject property abuts a freeway (northbound U.S. Route 301). Thus, residential development at this location will most likely have to provide adequate setbacks and/or other noise barriers to protect against noise intrusion. The Subdivision Regulations in effect at the time of the adoption of the 2013 SMA limit the number of residential lots that can be constructed adjacent to a freeway since they must be platted to a minimum depth of 300 feet. (Section 24-121(a)) These two restrictions will limit the number of homes that could be developed, rendering this small lot less practical for residential development. The Master Plan included certain goals for residential development that cannot be satisfied on this relatively small property saddled with these noise and setback reductions. Moreover, any residence developed will be adjacent to high-voltage transmission lines – a use which could arguably hamper home sales.

(5) While the change in the character of the neighborhood and the mistakes noted above support a rezoning from the R-R Zone to the C-M Zone, the District Council is not mandated to rezone. I merely recommend that it could if it wished, based on the evidence in this record.

RECOMMENDATION

I recommend Approval of A-10049, subject to the following conditions:

- (1) A Detailed Site Plan shall be approved prior to the issuance of permits to ensure adequate buffering and compatibility with the platted residential development to the southwest, protection of any regulated natural features, and efficient internal circulation.
- (2) No development shall occur within the proposed right-of-way for U.S. 301.