

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

**APPLICATION TO AUTHORIZE THE ISSUANCE OF
A BUILDING PERMIT IN CONJUNCTION WITH SPECIAL EXCEPTION**

DECISION

Request:	Authorization to Issue Building Permit for Structures within a Proposed Right-of-Way
Applicant:	Two Farms, Inc.
Opposition:	Sangee and Sulojana Tharmarajah
Hearing Date:	April 10, 2019
Examiner:	Joyce B. Nichols
Recommendation:	Approval

NATURE OF REQUEST

- (1) The instant Application is for authorization to construct two (2) pylon signs, 22 parking spaces, drive aisle, free air station, five (5) gas pumps with canopy, large vehicle parking areas, all of the required landscaping, and the stormwater management facility within the proposed right-of-way for F-11 and C-525. The Applicant has also submitted an application for a Special Exception for a Gas Station in combination with a Food or Beverage Store, Special Exception 4816. The subject property consists of approximately 2.94 acres of land in the C-S-C (Commercial Shopping Center) Zone, located on the west side of Indian Head Highway, in the southwest quadrant of its intersection with Livingston Road, also identified as 15808 and 15812 Livingston Road, 100 Biddle Road, and 16001 Indian Head Highway, Accokeek, Maryland.
- (2) Sangee and Sulojana Tharmarajah appeared in opposition to the request.
- (3) At the conclusion of the evidentiary hearing the record was kept open for several documents, upon receipt of which the record was closed on April 25, 2019.

FINDINGS OF FACT

- (1) The property consists of Parcels 52 through 55 on County Tax Map 151, Grid E-4 and is currently improved with a variety of buildings with various dates of construction, all of which are proposed to be razed in SE 4816.
- (2) Special Exception 4816 proposes the primary development of a 4,649 square feet Food or Beverage Store and eight (8) gasoline pump island with a covered canopy. (Exhibit's 14, 15 and 23)
- (3) The subject property is located within the Subregion V Master Plan and Sectional Map Amendment. The 1993 Subregion V Master Plan and Sectional Map Amendment shows the

entire property within the proposed interchange of MD 210 (Indian Head Highway) (F-11) (Master Plan Freeway) and MD 375 (Livingston Road) (C-525) (Collector Road). (Exhibit 32)

(4) In September, 2004, the Maryland Division of the Federal Highway Administration issued its Record of Decision selecting Alternative 5A Modified for proposed infrastructure improvements along F-11 (Indian Head Highway). (Exhibit 5 p. 6)

(5) Exhibit 9 are the scaled plans showing Alternative 5A Modified, MD 210-I-95/I-495 to MD 228. Exhibit 9(o) is the section along the frontage of the subject property. The subject property is in yellow and the Alternative 5A Modified is shown in red across part of the frontage along MD 210.

(6) The 2009 Subregion V Master Plan and Sectional Map Amendment continued to carry forward the 1993 Subregion V Master Plan and Sectional Map Amendment designation of the complete taking of the subject property by the right-of-way needed for the F-11-C-525 interchange. The 2009 Subregion V Master Plan and Sectional Map Amendment did not acknowledge FHA/SHA's 2004 endorsement of Alternative 5A Modified which discarded the 1993 large intersection and provided minimal effect on the subject property. (Exhibit 29)

(7) The November 2009 Countywide Master Plan of Transportation retains the 1993 Subregion V designation of the entire property within the proposed interchange of F-11 and C-525. (Exhibit 28) The 2009 Master Plan of Transportation does not reflect the 2004 right-of-way along the subject property as selected by the FHA/SHA.

(8) As a result of legal challenges which are not relevant to the subject property, the Subregion V Master Plan and Sectional Map Amendment was readopted in July, 2013 retaining the 1993 Master Plan and Sectional Map Amendment's acknowledgement of the total taking of the property by the (no longer) proposed interchange. (Exhibits 31(a) and (b)) However, Table VI-4: Recommended Road Improvements by 2030 shows a shift in this perspective as it includes the MD 210 and MD 375 interchange with the added proviso "if deemed necessary". (Exhibit 31(c))

(9) The County's Priority Project's List for the Fiscal Year 2019-2024 State Consolidated Transportation Program notably fails to include the MD 210 at MD 375 interchange. (Exhibit 35)

(10) Interestingly, PG Atlas does not show the total taking provided in the 1993, 2009 and 2013 Subregion V Master Plans and the 2009 Master Plan of Transportation, nor does it provide the very limited taking envisioned by the 2004 FHA/SHA approval of Alternative 5A Modified. Instead, PG Atlas provides an unsupported right-of-way designation across approximately 40 percent of the subject property. (Exhibit 3)

APPLICABLE LAW

(1) The District Council may authorize the issuance of permits under certain circumstances pursuant to §27-259, which provides in pertinent part, as follows:

(a) **Authorization.**

(1) With the exception of an arena (stadium) proposed to be constructed on land leased or purchased from a public agency, no building or sign permit (except as provided in Part 12 of this Subtitle) may generally be issued for any structure on land located within the right-of-way or acquisition lines of a proposed street, rapid transit route, or rapid transit facility, or proposed relocation or widening of an existing street, rapid transit route, or rapid transit facility, as shown on a Master Plan; however, the Council may authorize the issuance of the building or sign permit in accordance with this Section. For the purposes of this Section, "Master Plan" means the General Plan, the Functional Master Plan of Transportation, or any Adopted and Approved Area Master Plan or, if not yet approved, any such Master Plan adopted by the Planning Board, unless the Plan has been rejected by the Council.

(2) Notwithstanding the definition of a "street" (Section 27-107.01), building permits may be issued without such Council authorization for any structures on:

(A) Land which:

- (i) Was in reservation but is now not in reservation; and
- (ii) Has not been acquired and is not being acquired.

(B) Land which was subdivided after the adoption of a Functional Master Plan of Transportation, Area Master Plan, or the General Plan, but was not reserved or required to be dedicated for a street or rapid transit route or facility shown on the Plan.

(3) A permit may be issued without such Council authorization for the replacement of a legally erected sign if the replacement sign is otherwise in conformance with this Subtitle, is not an intensification of signage for the subject property, and if the proposed transportation facility is not fully funded for construction in the adopted County Capital Improvement Program or the current State Consolidated Transportation Program.

(b) **Application.**

(1) Where a Special Exception, Detailed Site Plan, Specific Design Plan, or Departure is pending, or where application for issuance of a permit has been made and recommended for denial pursuant to Sections 27-254 and 27-255 of this Subtitle, the owner of the land may make a written request to the District Council to authorize the issuance of the permit. In the latter case, the recommendation for denial of the permit shall not have been based on any failure of the applicant to comply with any requirement of this Subtitle (other than Subsection (a) of this Section), Subtitle 24, the Regional District Act, or any condition placed on the property in a zoning case or subdivision plat approval. The request shall be in writing and shall be filed with the Clerk of the Council within thirty (30) days after notice of the denial is given.

(2) Along with the application, the owner shall submit the following:

(A) A statement listing the names and the business and residential addresses of all individuals having at least a five percent (5%) financial interest in the subject property;

(B) If any owner is a corporation, a statement listing the officers of the corporation, their business and residential addresses, and the date on which they assumed their respective offices. The same statement shall also list the current Board of Directors, their business and residential addresses, and the dates of each Director's term. An owner that is a corporation listed on a national stock exchange shall be exempt from the requirement to provide residential addresses of its officers and directors;

(C) If the owner is a corporation (except one listed on a national stock exchange), a statement containing the names and residential addresses of those individuals owning at least five percent (5%) of the shares of any class of corporate security (including stocks and serial maturity bonds);

(3) For the purposes of (A), (B), and (C), above, the term "owner" shall include not only the owner of record, but also any contract purchaser.

* * * * *

(g) **Criteria for approval.**

- (1) The District Council shall only approve the request if it finds that:
- (A) The entire property cannot yield a reasonable return to the owner unless the permit is granted;
 - (B) Reasonable justice and equity are served by issuing the permit;
 - (C) The interest of the County is balanced with the interests of the property owner; and
 - (D) The integrity of the Functional Master Plan of Transportation, General Plan, and Area Master Plan is preserved.

(h) **Conditions placed on approval.**

(1) If the Council authorizes the issuance of the permit, it shall specify the exact location, ground area, height, extent, and character of the structure to be allowed. The Council may also impose reasonable conditions which benefit the County.

CONCLUSIONS OF LAW

(1) All of the Subregion V Master Plan's and the 2009 Master Plan of Transportation show a taking of the entirety of the subject property. The 2004 FHA/SHA adoption of Alternative 5A Modified includes a much more limited right-of-way on the subject property and the 2013 Subregion V Master Plan includes the limiting acknowledgment "if deemed necessary". Nonetheless, all of the Master Plan's adopted by the County continue to reflect interchange right-of-way across the entire property. Since the entire property is located within the Master Plan's right-of-way for the interchange at MD 210 and MD 373, it is self evident that the entire property cannot yield any return to the owners unless authorization is granted to construct within the right-of-way. §27-259(g)(1)(A)

(2) Reasonable justice and equity will be served by allowing the Applicant to construct and occupy a use on the subject property within the Master Plan right-of-way especially considering that the FHA/SHA determined not to construct this interchange over 15 years ago in 2004 and the County has not included this interchange in its 2019 CTP priorities request. §27-259(g)(1)(B)

(3) Authorization to build within the interchange right-of-way will balance the interest of the County by creating a tax base on property that has been acknowledged to be unnecessary for an

interchange and the interest of the Applicant by permitting the possibility of a financial return on its investment on the land. §27-259(g)(1)(C)

(4) The integrity of the most recent area Master Plan, the 2013 Subregion V Master Plan, will be preserved as it acknowledges that the interchange right-of-way should be retained only “if deemed necessary” and the 2004 FHA/SHA Decision selecting Alternative 5A Modified rendered the right-of-way for the interchange no longer necessary as it deleted any proposal for a new interchange at this location. §27-259(g)(1)(D)

RECOMMENDATION

It is the recommendation of this Examiner that any and all permits be authorized for the subject property in conjunction with the approval of Special Exception 4816 for a Gas Station. If Special Exception 4816 is denied, this authorization will automatically terminate in accordance with the provisions of §27-259(i)(1). A copy of the approved Site Plan for Special Exception 4816 shall be filed in the record of the instant Application prior to the issuance of permits.