

Resolution No.:	18-316
Introduced:	November 3, 2015
Adopted:	November 3, 2015

**COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL FOR THAT PORTION
OF THE MARYLAND-WASHINGTON REGIONAL DISTRICT
IN MONTGOMERY COUNTY, MARYLAND**

Lead Sponsor: District Council

SUBJECT: APPLICATION DPA 15-01 FOR A DEVELOPMENT PLAN AMENDMENT to Development Plan Amendment 02-02, approved by the District Council on July 1, 2003, as an amendment to the Development Plan approved in Local Map Amendments G-467 and G-468. Erica Leatham, Esquire, Attorney for the Applicant, USL2 MR Montgomery Village Business Trust; OPINION AND RESOLUTION ON APPLICATION; Tax Account No.: part of 09-00772244, described by metes and bounds in Attachment A.

OPINION

The Applicant, USL2 MR Montgomery Village Business Trust, filed this application for a Development Plan Amendment (DPA) on December 30, 2014, seeking to amend DPA 02-02, approved by the District Council on July 1, 2003, which is an amendment to the development approved in Local Map Amendments G-467 and G-468. The subject property is approximately 17.3 acres of the former Montgomery Village golf course, described by metes and bounds in Exhibit 40(a), and is located within the Town Sector (T-S) Zone. The Applicant seeks to redevelop this portion of the former golf course with 86 townhomes, 12.5% of which would be MPDUs.

Technical Staff recommended denial of the DPA because it did not conform to the land use and density recommended by the 1985 *Gaithersburg Vicinity Master Plan* (1985 Master Plan or 1985 Plan). The Land Use Plan adopted with the 1985 Plan designates the property for "private conservation/recreation." The Planning Board recommended denial for the same reason, concluding that public interest was better served by reviewing redevelopment of the Montgomery Village golf course through the *Montgomery Village Master Plan* (MVMP), which is currently pending before the Planning Board.

The Hearing Examiner issued her Report and Recommendation on October 7, 2015, which is incorporated herein by reference. The Hearing Examiner agreed with both Technical Staff and the Planning Board that the application did not conform to the land use and density recommended by the 1985 Master Plan and that redevelopment of property should occur through the comprehensive planning and zoning process. She also found that the DPA did not fulfill all of the purposes of the Town Sector Zone.

The Property and the Surrounding Area

The subject property consists of 17.3 acres within the 147-acre parcel that was the Montgomery Village golf course. Centrally located in Montgomery Village, the property is one mile north of the Montgomery Village Center, within the triangle formed by Arrowhead Road to the east, Montgomery Village Avenue to the west, and a wide PEPCO easement to the south. Exhibit 55, T. 31-35. Because of its former use, the property is shaped like a horseshoe. The golf course has never been subdivided. *See, Staff Memo, Montgomery Village Master Plan—Worksession 1, September 24, 2015.*

The Hearing Examiner concluded that the “surrounding area,” for the purpose of determining the compatibility of the proposed development, includes the adjacent townhouse communities of Ruxton Place, Partridge Place, Arrowhead, Green Tee, and Fairway Islands, and the single-family detached homes in the Fairridge community that border the north side of Meadowcroft Lane and the west side of Montgomery Village Avenue. The area is characterized by single-family attached townhomes at a density of 6-9 dwelling units per acre, with some single family homes more removed from the subject property, on the west side of Montgomery Village Avenue.

Zoning, Development and Master Plan History

Located within the geographic area covered by the *1985 Gaithersburg Vicinity Master Plan* (1985 Master Plan or 1985 Plan), Montgomery Village is one of the early “new towns” in Montgomery County. Created specifically for Montgomery Village, the Town Sector Zone was adopted in 1965 to permit more flexibility in design than other zones existing at the time. Rather than having many development requirements in the zone itself, it relied on the approval of a “development plan” that showed arrangement of land uses, roads, open space, and infrastructure.

The District Council approved the original development plan for Montgomery Village shortly after it adopted the Town Sector Zone in 1965. Kettler incorporated the golf course into its original development plan for Montgomery Village, listing it as part of the 557 acres of open space it promised to provide. Kettler represented that the open space for the Village would be in private ownership, including “private clubs” and homeowner’s associations to better coordinate development with the provision of amenities.

The *1971 Gaithersburg and Vicinity Master Plan* (1971 Master Plan or 1971 Plan) mirrors the original development plan for Montgomery Village, recommending land uses that reflect the golf course, school sites, and residential uses that had been approved in the development plan. The land use recommended for the golf course was “conservation/private open space” and the property is labelled on the 1971 Plan as “Montgomery Village Golf Course.” The 1971 Master Plan also relied on joint use of the school sites to provide recreational facilities in the area.

Kettler sold the golf course in 1981 to a professional golf course operator. At the time, Kettler sent a letter to residents assuring them that “no homes can, nor will, be built on this property.” The sales contract for the golf course contained several clauses permitting, but not requiring, the purchaser to restrict the use of the property for a golf course.

The Land Use Plan (in the form of a fold out map) adopted with the *1985 Master Plan* continued the land use recommendations for Montgomery Village in the *1971 Plan*, and retained both the “golf course” label. It designated the property for “private conservation/recreation” use.

Unlike the designation for the golf course, the 1985 Plan anticipated that several of the school sites shown on the original development plan for Montgomery Village as well as the 1985 Master Plan would not be needed because of declining population. During adoption of the 1985 Plan, the Planning Board and the Council considered the potential to re-use those sites. Because the 1971 Plan relied on joint use of school sites to provide active recreational facilities for the community, the 1985 plan recommended the following for these sites (1985 Plan, p. 95):

It is important that at least a portion of each undeveloped school site in the Village be transferred to the Montgomery Village Association for field sport recreation, if the site is not needed for school construction. For example, the ballfield site on Apple Ridge Road should be retained by the Association even if a portion of the site is ultimately used for non-school purposes.

Ultimately, only one of the school sites was needed by the public school system. Release of these sites prompted a series of amendments to the original development plan to permit redevelopment for other uses. The Apple Ridge Road site mentioned above (DPA 88-1) was approved in 1990. Binding elements of the DPA stipulated that the building envelope would not exceed 35% of the site and the remaining 65% be used for perimeter buffer open space and an active recreational area, include transfer of the existing ball field to the Montgomery Village Foundation. DPA 01-04 sought to develop of 36,000 square feet of administrative offices for a private, non-profit institutional use. A portion of this site (four acres) was reserved for recreation/open space, consistent with the Master Plan recommendation. The Council found that binding elements included in each of these plans made them similar to the school site recommendation originally called for in the 1985 Master Plan. In DPA 02-02, the Council approved redevelopment of a school site with 203 multi-family units, 20% of which were reserved for individuals with incomes below 50% of the median income. This site also reserved approximately four acres of passive open space because, at the time, the Montgomery Village Foundation did not wish to manage an active recreational property.

Proposed Development and Binding Elements

The Applicant proposed to build 86 townhomes, 12.5% of which (or 11 units) will be MPDUs. The Applicant arranged the townhomes in clusters with open space in between each cluster in order to reflect the original design concept for Montgomery Village. Along the northern and eastern portion of the property, the townhomes face the road, with parking in garages and on driveways in the rear. Entrance to the garages are from an access road in the rear of the property to minimize curb cuts, thereby enhancing pedestrian and bicycle safety. Most units have two parking spaces in the garage and room in the driveway for two tandem spaces. Thirty-five spaces line the main roadway through the development for visitor parking. Townhouse units along the southern leg of the property are aligned in sticks perpendicular to the road, with semi-private "mews" between them. This permits existing homes to the north to have views of the large PEPCO easement immediately to the south of the property.

The Applicant includes one binding element on the development plan:

Height is limited to 35', as measured from average grade along the front building wall of each townhouse to the midpoint of a sloped roof or the highest point of roof surface on a flat roof.

Standards of Review

The 2014 Zoning Ordinance requires the District Council to apply the procedures for amending a development plan included in the 2004 Zoning Ordinance and the development standards of the T-S Zone found in the 2014 Ordinance. *See, 2014 Zoning Ordinance, §8.1.2.* The procedures for amending a development plan, in Sections 59-D-1.61 and 59-D-1.7 of the 2004 Zoning Ordinance, require the District Council, to make five specific findings, "in addition to any other findings which may be necessary and appropriate to the evaluation of the proposed reclassification." *Montgomery County Zoning Ordinance, §59-D-1.61.*

The five specific findings required by §59-D-1.61 the Zoning Ordinance are:

(a) *T[hat t]he zone applied for is in substantial compliance with the use and density indicated by the master plan or sector plan, and that it does not conflict with the general plan, the county capital improvements program or other applicable county plans and policies. [The remaining language of this provision addresses height and density issues not at issue in this case; it is therefore not quoted here.]*

(b) *That the proposed development would comply with the purposes, standards, and regulations of the zone as set forth in article 59-C [now §59-8.3.3 of the 2014 Zoning Ordinance], would provide for the maximum safety, convenience, and amenity of the residents of the development and would be compatible with adjacent development.*

(c) *That the proposed internal vehicular and pedestrian circulation systems and points of external access are safe, adequate, and efficient.*

(d) *That by its design, by minimizing grading and by other means, the proposed development would tend to prevent erosion of the soil and to preserve natural vegetation and other natural features of the site. Any applicable requirements for forest conservation under Chapter 22A and for water resource protection under Chapter 19 also must be satisfied. The district council may require more detailed findings on these matters by the planning board at the time of site plan approval as provided in division 59-D-3.*

(e) *That any documents showing the ownership and method of assuring perpetual maintenance of any areas intended to be used for recreational or other common or quasi-public purposes are adequate and sufficient.*

In addition to these five findings, Maryland law also requires that the proposed rezoning be in the public interest. As stated in the State Zoning Enabling Act applicable to the County, all zoning power must be exercised to:

- (1) guide and accomplish a coordinated, comprehensive, adjusted, and systematic development of the regional district;
- (2) coordinate and adjust the development of the regional district with public and private development of other parts of the State and of the District of Columbia; and

(3) protect and promote the public health, safety, and welfare. Md. Land Use Article Code Ann., § 21-101(a)(4)(i).

Thus, there are six findings required (§59-D-1.61(a) through (e) and the public interest), which are addressed below.

Compliance with the Master Plan

The Council finds, as did the Hearing Examiner, the Planning Board and Technical Staff, that the DPA does not substantially comply with the land use and density recommended by the 1985 Master Plan because it is not the “private conservation/recreation” land use recommended by the 1985 Plan.

The Applicant’s argument that compliance with the broader goals of the master plan, rather than the land uses recommended, ignores the mandatory and plain language of the Zoning Ordinance: Section 59-D-1.61(a) requires substantial compliance with the “*land use and density* indicated by the master plan...” (Emphasis supplied). The only place the 1985 Plan indicates the land use and density for the subject property is the Land Use Plan adopted with the text of the 1985 Plan. The Land Use Plan designates this property as “private conservation/recreation” space. Were this not explicit enough, it also labels the property as the “Montgomery Village Golf Course.”

The Applicant also argues that the Master Plan defers land uses to the development plan amendment process. This interpretation is inconsistent with State law, which mandates that the Council exercise all zoning actions in accordance with a comprehensive plan. There is no evidence in this record that the Council delegated its responsibility to plan comprehensively to the development plan amendment process, especially when the Section 59-D-1.61 of the 2004 Zoning Ordinance explicitly requires development plan amendments to conform to the “land use and density” of the master plan.

The Council agrees with the Planning Board and the Hearing Examiner that the golf course was a major amenity for the Village and integral to its design. Kettler represented that its “new town” would include recreational facilities established by “private clubs” on private property. It is also clear that the County’s two master plans, the 1971 and 1985 Plans, incorporated this central amenity as part of its comprehensive planning efforts. Both the 1971 and 1985 Plans reaffirmed the land uses existing in areas it deemed already “committed” and sought to coordinate planning for uncommitted and committed areas. The Sectional Map Amendment implementing the 1985 Plan demonstrates this when it explicitly re-confirmed the zoning for committed areas that had not been studied in detail in the 1985 Plan.

The Council disagrees with the applicant’s argument that the three DPAs for redevelopment of school sites justifies significant deviations from the land use and density recommended by the 1985 Plan. The 1985 Master Plan anticipated that these sites would redevelop and included recommendations for re-use. In all three DPAs, binding elements significantly limited each use so that it was consistent with the school site designation in the Master Plan. The site plan relied upon by the Applicant is not persuasive because approval of a site plan does not require substantial conformance to the land use and density shown on the master plan.

Those in opposition argue that Kettler's representations, along with the development plan and the Master Plan combine to create a covenant that the land remain as a golf course in perpetuity. The Council disagrees with this argument. Zoning and land use covenants operate independently of one another. *City of Bowie v. Mie Properties, Inc.*, 398 Md. 657, 695-96, (2007). Even if they did not, the Council may not contractually agree to forego its authority to zone in the future. See, *Mayor & Council of Rockville v. Rylyns Enterprises, Inc.*, 372 Md. 514, 547 (2002).

Other County Plans and Policies

Other than Master Plan compliance, none of the parties contend that the DPA conflicts with other County plans and policies. Evidence demonstrates that the application will meet the requirements of the *2012 – 2016 Subdivision Staging Policy*. The Applicants' expert traffic engineer, presented a traffic report concluding that traffic expected to be generated by the development will not exceed the maximum congestion levels for the policy area. The Applicant's expert in civil engineering testified that all utilities were available to the site and that all County and State requirements for stormwater management could be met for the property. For these reasons, the Council finds that the DPA will not conflict with the General Plan, the Capital Improvements program, or other County policies.

Compliance with the Purposes and Development Standards of the Town Sector Zone

Purposes of the Town Sector Zone

The Council finds that the DPA fulfills some, but not all, of the purposes of the Town Sector Zone for the reasons below:

First Purpose (Section 8.3.3.A.1.)

1. The T-S zone is designed to permit development of or additions to planned new towns or additions to existing urban developments. Such towns must contain, to the extent possible, all of the residential, commercial, civic and institutional, and industrial facilities needed to make a town reasonably self-sufficient for all purposes, except major employment and central business district shopping. A development in the T-S zone must:

- a. provide for the maintenance of open space;*
 - b. locate streets and highways to assure orderly traffic circulation;*
 - c. include housing for families of low and moderate incomes; and*
- place a wide variety of types of housing accommodations in an efficient and orderly design.*

Conclusion: The Council finds that this standard has been met because the application includes MPDUs, and because the use of parking access roads reduce the number of curb cuts, enhances pedestrian and bicycle traffic, and the two of the three access points have been aligned for safety. The third access point is a limited turn, right-in, right-out movement for safety. The residential housing type (i.e., single-family attached units) does not add to the variety within the surrounding area, but does support the compatibility of the proposed development with the immediate neighborhood.

Second Purpose (Section 8.3.3.A.2.)

2. *A new town located on a substantially undeveloped site must:*

- a. be self-sufficient and contain, as nearly as possible, all of the commercial, employment, cultural, and recreational facilities desirable and necessary for the satisfaction of the needs of its residents;*
- b. include a wide variety of residential facilities to offer a wide range of structural types, site planning layouts and arrangements, and rental and purchase prices;*
- c. have an urban rather than rural density that would:*
 - i. facilitate travel between residential, commercial, employment, and other types of areas;*
 - ii. make the most efficient use of public utilities;*
 - iii. permit the incorporation of large amounts of open land within the town for recreational and scenic purposes;*
 - iv. have or plan for the construction of transportation facilities adequate to serve the anticipated total population; and*
 - v. have public sewer and water available at the site or planned for construction.*

While the development plan meets many of the purposes listed above, it also forecloses a major recreational and green space amenity in the center of the Village. Because this application only addresses a relatively small portion of the golf course, it fails to address the impact of the loss of this major amenity to Montgomery Village, either as an aesthetic or recreational facility.

Third Purpose (Section 8.3.3.A.3.)

3. *The T-S zone is designed to:*

- a. eliminate some of the specific restrictions which regulate, in other zoning categories, the height, bulk, and arrangement of buildings and the location of the various land uses;*
- b. provide for more flexibility in development;*
- c. achieve flexibility of design, integration of mutually compatible uses, and optimum land planning with greater efficiency, convenience, and amenity than the standards permitted by right and required in conventional zoning categories; and*
- d. preserve and take the greatest possible aesthetic advantage of trees by minimizing the amount of grading necessary for construction of a development.*

The Council finds that the DPA fulfills this purpose of the T-S Zone, as did the Hearing Examiner. The site design utilizes the "cluster development" concept, as did the original design for Montgomery Village. This permits different orientations of the townhomes along the road and common green areas to break up the design. Townhomes within the southern leg of the "horseshoe" were oriented perpendicular to the road with semi-private mews to maximize views of the open space in the PEPCO easement. The Planning Board has approved a preliminary forest conservation plan for the proposed use.

Development Standards of the Town Sector Zone

Area Requirements (Section 59-8.3.3.A.1)

- a. Each development in the T-S zone must have a minimum area of 1,500 acres unless a sectional map amendment reduces the area zoned T-S to less than 1,500 acres.*
- b. A maximum of 10% of the total area of the town sector may be devoted to commercial purposes. All required parking for commercial purposes must be included within the 10% calculation.*
- c. A maximum of 6% of the total area of the T-S zone may be devoted to industrial purposes and other major employment facilities.*
- d. A minimum of 10% of the total area of the T-S zone must be devoted to open space. This open space may include publicly owned, community-wide, or common open space and facilities, but must not include streets and parking areas.*

Montgomery Village currently contains 2,434.8 acres, which is not affected by this DPA. The DPA proposes only residential development, and does not affect the cap on commercial, industrial or major employment development. Technical Staff advises that approximately 28.62% of the land area in Montgomery Village consists of open space, as that was defined in the 2004 Zoning Ordinance. Based on this evidence, the Council finds that the DPA meets the area requirements of the T-S Zone.

Height (Section 59-8.3.3.A.2.3)

The height of any building in the T-S zone must be consistent with the limits set in other zoning classifications for areas of similar density or similar use.

Staff concluded that the T-S Zone was similar in use and density to the Townhouse Low Density and Townhouse Medium Density Zones in the 2014 Zoning Ordinance. These zones have a height limit of 35 feet. The DPA includes a binding element limiting the height to 35 feet, "as measured from average grade along the front of the building wall of each townhouse to the midpoint of a sloped roof or the highest point of roof surface on a flat roof," which is similar to the height requirement in the Townhouse Low Density Zone. See, 2014 Zoning Ordinance, §§4.4.11.B.4, 4.1.7.C; Exhibit 136.

Parking and Signage

Divisions 6.2 and 6.7 of the 2014 Zoning Ordinance governs parking and signage, respectively. *Id.*, §8.1.2. The minimum required parking for this use is 2 spaces per unit. *Id.*, §6.2.4.B. The Applicant's expert land planner testified that the DPA exceeds this requirement because each unit has a garage with two parking spaces, some of the units have a driveway that provides two more tandem spaces, and there are 35 spaces along the street for visitor parking. He further testified that the application meets all other parking requirements of Division 6.2. T. 56, 57. Testimony indicates that a signage plan will be developed at the time of site plan review. It

will be designed in accordance with Division 6.7 of the 2014 Zoning Ordinance. The Council finds that this standard has been met.

Safety and Efficiency of Access

The third finding necessary for approval of a development is:

- (c) *That the proposed internal vehicular and pedestrian circulation systems and points of external access are safe, adequate, and efficient.*

The Applicant's expert land planner testified that two access points from the development have been aligned with the intersections of Meadowcroft Lane and Montgomery Village Avenue and Rothbury Drive and Arrowhead Road for safety. The southern access is a limited movement (i.e., right-in, right-out). The use of separate parking access drives to enter garages and driveways minimizes curb cuts and enhances pedestrian and bicycle safety. The Council finds that this standard has been met, as did the Hearing Examiner.

Environmental Findings

The fourth criterion for approval of the DPA is:

- (d) *That by its design, by minimizing grading and by other means, the proposed development would tend to prevent erosion of the soil and to preserve natural vegetation and other natural features of the site. Any applicable requirements for forest conservation under Chapter 22A and for water resource protection under Chapter 19 also must be satisfied. The district council may require more detailed findings on these matters by the planning board at the time of site plan approval as provided in division 59-D-3.*

The Applicant's expert in civil engineering testified that the grading plan attempts to minimize as much disturbance as possible while still keeping adequate drainage (T. 153) and that the property can accommodate all required stormwater management through bio-retention facilities and swales. The Applicant's land planner testified that the clustered development design, which permits greater amounts of open space, minimizes the impact of the development on the site. T. 52-53. As evidenced by an approved preliminary forest conservation plan, the application meets the requirements of Chapter 22A of the Code. The Council finds that this standard has been met.

Perpetual Maintenance of Common Areas

The last requirement for approval of a DPA is:

- (e) *That any documents showing the ownership and method of assuring perpetual maintenance of any areas intended to be used for recreational or other common or quasi-public purposes are adequate and sufficient.*

Technical Staff concluded that the "draft Homeowner's Association (HOA) documents...establish a mechanism for perpetual maintenance of the common areas." Exhibit 55, p. 21. Having no evidence to the contrary, the Council so finds.

The Public Interest

When evaluating the public interest, the District Council normally considers Master Plan conformity, the recommendations of the Hearing Examiner, the Planning Board and Technical Staff, any adverse impact on public facilities or the environment and public benefits such as provision of affordable housing.

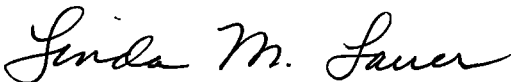
In this case, Technical Staff, the Planning Board, and the Hearing Examiner concluded that the proposed use does not substantially conform to the land use and density recommended by the 1985 Master Plan. The Hearing Examiner also concluded that the DPA does not fully meet the purpose clause of the T-S Zone. The Planning Board and Council are currently reviewing development of the area comprehensively through the *Montgomery Village Master Plan*. The Council finds that the public interest is better served by reviewing redevelopment of the golf course through the comprehensive planning process.

Action

The County Council for Montgomery County, Maryland, sitting as the District Council for that portion of the Maryland-Washington Regional District located in Montgomery County, Maryland approves the following resolution:

DPA 15-01, an application for a development plan amendment to Development Plan Amendment 02-02, approved by the District Council on July 1, 2003, as an amendment to the Development Plan approved in Local Map Amendments G-467 and G-468, seeking permission to construct 86 townhomes on 17.3 acres of land, formerly Holes 3 and 4 of the Montgomery Village golf course, is hereby *denied*.

This is a correct copy of Council action.

A handwritten signature in cursive script that reads "Linda M. Lauer".

Linda M. Lauer, Clerk of the Council