

Resolution No.: 17-68
Introduced: March 1, 2011
Adopted: March 1, 2011

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

By: District Council

SUBJECT: APPLICATION DPA 05-2 FOR SCHEMATIC DEVELOPMENT PLAN AMENDMENT of G-540, previously approved by the District Council on August 3, 1987, and G-229, approved by the District Council on June 10, 1980; Jody Kline, Esquire, and Soo Lee-Cho, Esquire, Attorneys for the Applicant, Branch Banking and Trust Company; OPINION AND RESOLUTION ON APPLICATION; Tax Account Nos. 13-01026853, 13-02893234 and 13-02893223

OPINION

The case was filed by the original Applicant, Commerce Bancorp, Inc., on June 1, 2005. A hearing was scheduled for January 6, 2006, but was postponed at the former Applicant's request, followed by a long period of inactivity. New documents and plans were submitted on January 8, 2010, amending the application (Exhibit 44) to change the Applicant from Commerce Bancorp, Inc. to the present Applicant, Branch Banking & Trust Company (BB&T), and to revise the proposed Schematic Development Plan Amendment (SDPA). BB&T is the lessee of the site (Exhibit 47(a)). The owner, Lilianne Tran Duong, consents to the application (Exhibit 46).

The Subject Property is located at 11107 Valley View Avenue and 2907 - 2909 University Boulevard, which is in the northeastern quadrant of the intersection of West University Boulevard (MD 193) and Valley View Avenue, in Kensington, Maryland. The site contains 39,102 square feet of land in the C-T (commercial-transitional) Zone and consists of three subdivided lots - Lot 7, Lot 22 and Lot 23, on which three vacant and deteriorating buildings are located. Applicant proposes to construct a 4,080-square foot, 25-foot high bank building, plus four drive-through lanes, which would be under a 1,663-square foot, 16.5-foot high, detached canopy.

Lots 7 and 23 were re-zoned from R-60 to C-T Zone by Local Map Amendment G-540, approved by the District Council on August 3, 1987, under the optional method of rezoning. The Schematic Development Plan (SDP) and covenants (Exhibit 8) which Applicant seeks to amend have a binding element that restricts the use of Lots 7 and 23 to "utilizing the existing structures with improvements for C-T use." Absent approval of the requested SDPA, the existing SDP would prevent construction of the proposed bank building.

Lot 22 had been previously zoned C-T by LMA G-229 on June 10, 1980, but that was not done under the optional method of development and, therefore, is not subject to any binding

elements at present.¹ However, it is proposed by BB&T in DPA-05-2 that Lot 22, along with Lots 7 and 23, be made subject to revised binding elements under the optional method of development, and redeveloped in accordance with the revised SDPA (Exhibit 94(a)).

The Schematic Development Plan Amendment (Exhibit 94(a)) would also require corresponding amendments to the binding elements set forth in the exiting covenants (Exhibit 8). To accomplish this change, revised covenants have been executed and filed in the record (Exhibit 100(a)). Those revised covenants will be filed in the land records of Montgomery County, pursuant to the requirements of Zoning Ordinance §59-H-2.54(d).

The application for the SDPA was reviewed by the Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC), and in a report dated September 3, 2010, Staff recommended disapproval (Exhibit 68). Staff felt that the proposed development would conflict with the goals of the 1990 Sector Plan for Wheaton Central Business District and Vicinity and would not fulfill the purpose of the C-T Zone. The Montgomery County Planning Board ("Planning Board") disagreed with its Technical Staff. The Planning Board considered the application on September 16, 2010, and voted unanimously to recommend approval, but with revisions to Applicant's proposed binding elements, as stated in the Board's memorandum dated September 22, 2010 (Exhibit 74). The Planning Board recommended adding binding elements for setbacks and a maximum floor area ratio (FAR) for the smaller proposed lot (Lot 1B). The Board also recommended a condition relating to the rear property line. The Applicant agreed to those changes, and they are embodied in the revised SDPA.

Prior to the hearing, the SDPA was opposed by the Kensington View Civic Association (Exhibits 65 and 69). However, by the date of the hearing, Kensington View (KVCA) changed its mind and supported the application. Tr. 5 and Exhibits 76 and 97. Pre-hearing letters in support were also filed by the adjoining owner of a single-family residence (Exhibit 71(a)); by the Wheaton Urban District Advisory Committee (Exhibit 71(b)); and by the Wheaton Redevelopment Advisory Committee (Exhibit 71(c)).

The property was posted as required (Exhibit 77), and notice of the hearing was mailed by the Applicant (Exhibit 78). A public hearing began, as scheduled, on September 24, 2010, and it resumed on December 6, 2010, after the final SDPA (Exhibit 94(a)) was filed.² In addition to Applicant's four witnesses, two witnesses from the Kensington View Civic Association testified in support of the proposal. There were no opposition witnesses. The record ultimately closed on January 4, 2011, following receipt of revised covenants (Exhibit 100(a)) and comments by the parties.

On February 3, 2011, the Hearing Examiner filed his Report and Recommendation, recommending approval of the schematic development plan amendment, based on his conclusion that the proposed SDPA would be consistent with the purpose and regulations of the C-T Zone, compatible with surrounding development and in the public interest. Based on its review of the entire record, the District Council finds that the application does meet the standards required for approval of the requested schematic development plan amendment, for the reasons set forth by the Hearing Examiner. To avoid unnecessary detail in this Resolution, the Hearing Examiner's Report and Recommendation is incorporated herein by reference and his findings and conclusions are hereby adopted.

¹ The Hearing Examiner took official notice of the record in the rezoning cases, LMA Nos. G-229 and G-540. Tr. 9.

² Although the hearing resumed on December 6, 2010, there was no testimony taken on that date.

Technical Staff provided the following zoning history of the subject site (Exhibit 38, p. 8):

The site was placed in the R-60 Zone when the zone was enacted and mapped in the 1954 Regional District Zoning. The 1958 County-Wide Comprehensive Zoning confirmed the R-60 zoning of the site. The portion of the property that is currently identified as Lot 22 was reclassified from the R-60 Zone to the C-T Zone (Commercial Transitional) in 1980 by Application No. G-229. On August 3, 1987, the District Council approved Application G-540 with some development restrictions to allow the reclassification of the property currently identified as Lot 7 and Lot 23 from the R-60 Zone to the C-T Zone. The 1990 approved Sector Plan for Wheaton Central Business District and Vicinity retained the subject property in the C-T Zone . . . with [the aforementioned] restriction. . . .

The subject property is located in the northeastern quadrant of the intersection of West University Boulevard (MD 193) and Valley View Avenue, in Kensington, Maryland. The site contains 39,102 square feet of land in the C-T (commercial-transitional) Zone. The property consists of three subdivided lots - Lot 7, Lot 22 and Lot 23, and is improved with three single-family dwellings (one dwelling unit on each of the three lots) that are currently vacant and in a deteriorated condition. Tr. 40. The property has approximately 260 feet of frontage (combined) on University Boulevard and approximately 150 feet of frontage on Valley View Avenue, and it may be accessed from both streets, according to Technical Staff. Exhibit 68, p. 4.

The surrounding area must be identified in a floating zone case so that compatibility can be evaluated properly. The "surrounding area" is defined less rigidly in connection with a floating zone application than in evaluating a Euclidean zone application. In general, the definition of the surrounding area takes into account those areas that would be most directly affected by the proposed development. In the present case, Technical Staff recommended designating the surrounding area as generally defined by the Kensington View Subdivision to the north, Veirs Mill Road to the east, the Westfield Shopping Town Wheaton (Wheaton Plaza) to the south, and Hillsdale Drive and Drumm Avenue to the west. The Applicant agreed with this definition, as did the Hearing Examiner.

Technical Staff described existing development within the surrounding area as follows (Exhibit 68, p. 4):

. . . The subject neighborhood is characterized by a mixture of commercial and residential uses. The northern portion of the neighborhood is residentially developed with single-family dwellings in the R-60 Zone. The western portion is also residentially developed in the R-60 Zone with a concentration of special exception uses that are housed in some of the single-family structures north of University Boulevard. The eastern and southern portions of the neighborhood are commercially developed in the C-2 and C-O Zones. Westfield Shopping Town Wheaton, a regional shopping center, is located south of the site and directly across University Boulevard in the C-2 Zone. Properties west of the Shopping Center are residentially developed in the R-60 Zone.

Judy Higgins, who testified on behalf of the Kensington View Civic Association (KVCA), stated that Kensington View is a small community of approximately 160 homes of varying size

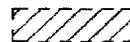
and age and architecture styles. According to Ms. Higgins, the subdivision has eight roads total, and all of those roads dead end at County property. Tr. 102. Both she and Applicant's land planner, Joe Davis, described the subject site as a gateway to the community. Tr. 85 and 103.

The subject Schematic Development Plan amendment seeks approval to raze the existing improvements and redevelop the entire site with a newly constructed branch bank building, a detached drive-thru facility, four drive-thru lanes, one bypass lane and associated surface parking. To do so, the three existing lots are proposed to be re-subdivided into two lots, consisting of a 21,799 square-foot corner lot (Proposed Lot 1A) and a 17,303 square-foot interior lot (Proposed Lot 1B), as shown on the submitted SDP. The new Schematic Development Plan would apply to all three lots (7, 22, and 23) and would replace the existing binding elements with new, more specific limitations.

The new SDP (Exhibit 94(a)) shows one building, a maximum of 25 feet in height, consisting of 4,080 square feet of gross floor area; four drive-thru lanes and a bypass lane with a 1,663 square foot, detached canopy located to the east of the building; 23 parking spaces; and a new six foot high screening fence along the northern lot line of the development. There will be a 15 foot wide landscaped area to the rear of the site, in addition to the aforementioned screening fence, and it is marked on the SDP by the diagonal hatch marks to designate that it is required by one of the binding elements. The Binding Elements are specified on the SDP and in the covenants in a table reproduced below.

These binding elements remove and replace the exiting binding element which restricts development on the site. The existing binding elements included the following restrictive language (Exhibit 8, p.2):

So long as the aforesaid property is zoned C-T, pursuant to the Zoning Ordinance for Montgomery County, Maryland, the use of the land on the aforesaid property will be limited to utilizing the existing structures with improvements for C-T use.

CATEGORY	PERMITTED /REQUIRED	BINDING ELEMENT	
		PROPOSED - LOT 1A	PROPOSED - LOT 1B
LAND USE	SEE SEC. 59-C-4.2(e) FOR C-T ZONE	1. Uses Permitted - Bank/Financial Institution 2. Any building or structure must have pitched roofs and be residential in character/style. 3. Running the entire length of the northern boundary of the Subject Property, there will be no other land use than a green space, at least 15' wide, as a buffer to screen the parking/paved area on the Subject Property. Within this green space, which is marked thusly on the SDP  there will be no improvements installed except landscaping, a 6 foot high screen fence, light poles/fixtures, surface drainage facilities and any other features approved/required at the time of Site Plan review.	1. Uses Permitted - Bank/Financial Institution (Drive-Thru Canopy) 2. Any building or structure must have pitched roofs and be residential in character/style. 3. Running the entire length of the northern boundary of the Subject Property, there will be no other land use than a green space, at least 15' wide, as a buffer to screen the parking/paved area on the Subject Property. Within this green space, which is marked thusly on the SDP  there will be no improvements installed except landscaping, a 6 foot high screen fence, light poles/fixtures, surface drainage facilities and any other features approved/required at the time of Site Plan review.
MAX. FLOOR AREA RATIO	0.5	0.2	0.13
MAX. BUILDING COVERAGE	35%	20%	13%
MAX. BUILDING HEIGHT	35'	25'	20'
MIN. GREEN AREA	10%	35%	40%
MIN. BUILDING SETBACKS			
FRONT SETBACK (UNIVERSITY BLVD.)	10'	10'	10'
FRONT SETBACK (VALLEY VIEW AVE.)	10'	10'	N/A
SIDE SETBACK (RESIDENTIAL ZONE-NORTH)	15'	72'	55'
SIDE SETBACK (COMMERCIAL ZONE-EAST)	15'	N/A	62'
FROM PROPOSED LOT LINE	15'	26.5'	15'

The development of the subject property in the C-T Zone is limited to the re-use, remodeling or reconstruction of the two buildings existing on the site at the time the C-T Zoning is granted as provided, Section 59-C-4-3.02 (B), (C) (D) of the Zoning Ordinance of Montgomery County . . .

In addition to removing the quoted restriction, the new binding elements would impose new development limits which would extend to the entire site, inclusive of the land area that comprises current Lot 22, which is presently not subject to a schematic development plan or a declaration of covenants.

The legal effect of the covenants is to obligate any future owner of the property to comply with the binding elements specified in the covenants. Thus, the optional method allows an applicant to specify elements of its proposal that the community, reviewing agencies and the District Council can rely on as legally binding commitments. Illustrative elements of the SDP or the SDPA may be changed during site plan review, but the binding elements cannot be changed without a separate application to the District Council for a schematic development plan amendment.

The usual language in such covenants requires that they remain in effect until the property is rezoned or they are amended by the Council or invalidated by a court. At the request of the KVCA, Applicant added the following language to the covenants (Exhibit 100(a), p. 4):

In the event that the Property is zoned to a zoning classification other than the C-T zone, the restrictions on development provided herein shall remain in force and effect to the extent permitted by law; otherwise they shall terminate and have no further force and effect.

These binding elements were designed to keep the location, scale and size of the proposed structures compatible with other properties in the immediate area and to ensure appropriate screening of the site. They were amended, at the suggestion of the Planning Board (Exhibit 74), to address the concerns that had led the Technical Staff to recommend disapproval of the SDPA (Exhibit 68).

The District Council finds that the proposed Binding Elements will achieve the desired end of keeping the location, scale and size of the proposed structures compatible with other properties in the immediate area and will ensure appropriate screening of the site.

A floating zone is a flexible device that allows a legislative body to establish a district for a particular category of land use, with regulations specific to that use, without attaching that district to particular pieces of property. Individual property owners may seek to have property reclassified to a floating zone by demonstrating to the Council that the proposed development will be consistent with the purpose and regulations of the proposed zone and compatible with the surrounding development, as required by the case law, *Aubinoe v. Lewis*, 250 Md. 645, 244 A.2d 879 (1967). Any zone must also be consistent with a coordinated and systematic development of the regional district and in the public interest, as required by the *Regional District Act, Maryland-National Capital Park and Planning Commission Article (Art. 28), Md. Code Ann., § 7-110*.

These are the standards that were applied in 1980 when part of the subject site was rezoned to the C-T floating zone by LMA No. G-229, and in 1987, when the remainder of the site was rezoned to C-T by LMA G-540. The Schematic Development Plan Amendment proposed now must be evaluated under these same standards.

The C-T Zone contains a post-zoning review process, subdivision and site plan review, that generally delegates to the Planning Board the details of site specific issues such as building location, stormwater control, vehicular and pedestrian routes, landscaping and screening. We turn now to the three areas of Council review discussed above – the purposes and requirements of the applicable zone, compatibility with land uses in the surrounding area and relationship to the public interest.

Purpose Clause of the C-T Zone

The purpose clause for the C-T Zone, Zoning Ordinance §59-C-4.301, provides:

The purpose of the C-T zone is to provide sites for low-intensity commercial buildings which, singly or in groups, will provide an appropriate transition between one-family residential areas and high-intensity commercial development. The C-T zone is intended to constitute a margin of limited width at the border between a commercial area and a one-family residential area. For that reason, the C-T zone can only be applied:

(a) *In areas designated for the C-T zone on adopted and approved master or sector plans; or*

(b) *On property so located that it is between and adjoining or separated only by a street, highway, or utility right-of-way from both of the following uses:*

(1) *Existing or proposed one-family residential uses; and*

(2) *Existing high-intensity commercial uses. As used herein, the term "high-intensity commercial use" refers to any commercial or central business district development with an existing height that is greater than 40 feet. The term "high-intensity commercial use" does not include development in the C-1 zone.*

The fact that an application complies with all specific requirements and purposes set forth herein shall not be deemed to create a presumption that the application is, in fact, compatible with surrounding land uses, and, in itself, shall not be sufficient to require the granting of an application.

The Technical Staff felt that the application would not provide the kind of “*transition between one-family residential areas and high-intensity commercial development*” that is the general purpose of the zone. Staff reached this conclusion because the SDP calls for tearing down the three existing residential structures and replacing them with a single bank and parking lot. It would also consolidate and resubdivide the three existing lots into two lots. In Staff’s opinion, that would change the cohesiveness of existing as well as future development of the C-T zoned properties in the block. Exhibit 68, p. 13.

The Planning Board disagreed with its Staff (Exhibit 74, p. 1):

The Planning Board found that the application is consistent with the purposes of the Commercial, Transitional (C-T) Zone and it satisfies all relevant standards of the C-T Zone.

The District Council agrees with the Planning Board’s finding. With the addition of the previously discussed binding elements, the proposed development should serve precisely the goal articulated in the C-T Zone’s purpose clause. The proposed bank will indisputably be a “*low-intensity commercial building,*” and the District Council finds that it will “*provide an appropriate*

transition between one-family residential areas [i.e., Kensington View] and high-intensity commercial development [i.e., Wheaton Plaza].”

Moreover, the SDPA satisfies both of the alternative criteria specified in subsections (a) and (b) of the purpose clause. The site is in an area “*designated for the C-T zone on adopted and approved master or sector plans,*” since the 1990 Wheaton Sector Plan specifically recommends the site for the existing C-T Zone. It thus meets criterion (a). It meets criterion (b) because the property is located between existing one-family residential uses [i.e., Kensington View] and existing high-intensity commercial uses [i.e., Wheaton Plaza].

Based on this record, the District Council finds that the proposal, as limited by its binding elements, conforms with the C-T Zone’s purpose clause.

Regulations (i.e., Development Standards) of the C-T Zone

The regulations of the C-T Zone are provided in Zoning Ordinance §§59-C-4.302 to 4.309. Most of the development standards for the C-T Zone were set forth in a Binding Elements Table on the revised SDPA (Exhibit 94(a)), which is reproduced above. As shown in that chart, the development standards Applicant has committed to in binding elements are well within the requirements of the C-T Zone.

For example, the Binding Elements restrict the bank height to 25 feet and the canopy height to 20 feet, although a 35 foot height is permitted in the C-T Zone. The Binding Elements also restrict floor area ratio (FAR) to 0.2 for the bank building and 0.13 for the canopy, although an FAR of 0.5 is permitted in the C-T Zone. Similarly, the building coverage on Lot 1A is limited to 20% and on Lot 1B to 13%, although a building coverage of 35% is permitted in the C-T Zone. There will also be a minimum Green Area of 35% on Lot 1A and 40% on Lot 1B, although the C-T Zone specifies a minimum Green Area of only 10%. The Binding Elements also restrict setbacks and many other aspects of the proposed development. The revised Binding Elements were approved by Technical Staff in a post-hearing review. Exhibit 92(a).

Applicant’s proposal also more than meets the minimum of 12 parking space required for the site (by providing 23 spaces), and the lot frontage exceeds the minimum of 100 feet called for in Zoning Ordinance §59-C-4.302(a). The property has approximately 260 feet of frontage on University Boulevard and approximately 150 feet of frontage on Valley View Avenue. Exhibit 68, p. 4.

Based on the entire record, the District Council finds that the proposed development meets the purposes and requirements of the C-T Zone, and that the proposed development’s binding elements will permit the Planning Board flexibility to approve a design at site plan review which will meet all applicable standards.

Compatibility

Compatibility was discussed in Part III.E. of the Hearing Examiner’s report. Based on the record discussed there and on the above analysis of the applicable purpose clause, the District Council finds that the proposed use would be compatible with the surrounding area, and that the SDPA, as currently proposed, is appropriate at this stage of review, and capable, under its binding elements, of producing a project compatible with its surrounding development. The Planning Board will also evaluate compatibility at site plan review.

Public Interest

Maryland law requires that zoning powers be exercised in the public interest. As stated in the State Zoning Enabling Act applicable to Montgomery County, all zoning power must be exercised:

. . . with the purposes of guiding and accomplishing a coordinated, comprehensive, adjusted, and systematic development of the regional district, . . . and [for] the protection and promotion of the health, safety, morals, comfort, and welfare of the inhabitants of the regional district.” [Regional District Act, Maryland-National Capital Park and Planning Commission Article (Art. 28), Md. Code Ann., § 7-110].

Factors which are usually considered in determining the public interest include Master Plan conformity, the recommendations of the Planning Board and its staff, any adverse impact on public facilities or the environment, and factors such as provision of affordable housing.

1. Master Plan Conformity, Technical Staff and the Planning Board:

As discussed in the Hearing Examiner’s report, Technical Staff recommended disapproval, but the Planning Board disagreed and found that the proposed development, as limited by the binding elements, is appropriate and consistent with the Sector Plan. Exhibit 74. The Sector Plan recommends retaining the C-T Zoning that already exists on the site (Zoning Map on p. 47 of the Sector Plan) and recommends an office land use for the site (Land Use Map on p. 28 of the Sector Plan). The text of the Sector plan also recommends low-intensity new development on the site to buffer existing single-family residences from adverse effects associated with major traffic arteries and nearby commercial development. For the reasons discussed in Part III. E. of the Hearing Examiner’s report, the District Council finds that the proposed SDPA is consistent with the Sector Plan for Wheaton Central Business District and Vicinity, approved and adopted in 1990.

2. Public Facilities and the Environment:

The Transportation Planning staff reviewed the SDPA and found that it meets all requirements of Local Area Transportation Review and Policy Area Mobility Review, as discussed in Part III. D. 3. c. of the Hearing Examiner’s report. The record also supports the conclusion that other public facilities will not be adversely affected by the proposed use.

Environmental issues were discussed in Part III. D. 4 of the Hearing Examiner’s report. As mentioned there, a Natural Resource Inventory/Forest Stand Delineation (NRI/FSD) has been approved for the subject property, and Environmental Planning Staff found no environmental issues. A stormwater management concept plan has not yet been approved for the site, but that step will be required at subdivision.

One other factor bears mentioning in connection with the public interest. The evidence in this case is that the subject site is now “improved” with three vacant homes, which are in a deteriorated condition. Tr. 40. The record indicates that Applicant’s proposed building will create a much improved gateway to the community. Tr. 85 and 103. The District Council concludes, as did the community, that that would be in the public interest.

In sum, the District Council finds that the proposed use will not adversely affect surrounding development, will be consistent with the goals of the Sector Plan, will provide a useful service to the community and will not adversely affect public facilities or the environment.

The District Council therefore concludes that its approval would be in the public interest and appropriate for the comprehensive and systematic development of the County.

Conclusions

Based on the foregoing analysis and after a thorough review of the entire record, the District Council reaches the following conclusions with respect to DPA 05-2:

1. That the requested SDPA complies with the purpose clause and the development standards of the C-T Zone;
2. That the requested SDPA will be compatible with existing and planned land uses in the surrounding area; and
3. That the requested SDPA bears sufficient relationship to the public interest to justify its approval.

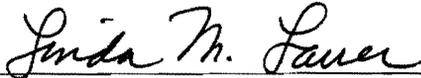
For these reasons and because granting the instant SDPA application would aid in the accomplishment of a coordinated, comprehensive, adjusted and systematic development of the Maryland-Washington Regional District, the application will be granted in the manner set forth below.

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:

Schematic Development Plan Amendment DPA 05-2, seeking to amend the Schematic Development Plan and Covenants approved by the Council on August 3, 1987, in Local Map Amendment G-540, and to amend LMA G-229, approved by the District Council on June 10, 1980, for a combined total of 39,102 square feet of land consisting of Lots 7, 22, and 23, located at 11107 Valley View Avenue, and 2907 - 2909 University Boulevard, Kensington, Maryland, **is approved** subject to the specifications and requirements of the Schematic Development Plan Amendment, Exhibit 94(a); provided that the Applicant submits to the Hearing Examiner for certification a reproducible original and three copies of the Schematic Development Plan Amendment within 10 days of approval, in accordance with §59-D-1.64 of the Zoning Ordinance; and that the Declaration of Covenants (Exhibit 100(a)) is filed in the County land records in accordance with § 59-H-2.54 of the Zoning Ordinance.

This is a correct copy of Council action.


Linda M. Lauer, Clerk of the Council