

Resolution No.: 16-1472  
Introduced: July 27, 2010  
Adopted: July 27, 2010

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

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By: County Council

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**SUBJECT:** APPLICATION NO. G-878 FOR AMENDMENT TO THE ZONING  
ORDINANCE MAP, Cindy Bar, Esquire, Attorney for Applicant, Germantown,  
LLC, OPINION AND RESOLUTION ON APPLICATION AFTER REMAND  
Tax Account No.03276364

**OPINION**

Application No. G-878, filed on October 1, 2006 by Applicant Germantown, LLC, initially requested reclassification from the C-1 Zone to the RT-15 Zone of 8.46 acres of land known as Germantown Park, Lot 685, Subdivision 21, located at 18451 Mateny Road, Germantown, Md. The amended application seeks to reclassify this land to the RT-12.5 Zone.

The application was filed under the Optional Method authorized by Code § 59-H-2.5, which permits binding limitations with respect to land use, density and development standards or staging.

The Technical Staff of the Maryland National Capital Park and Planning Commission (MNCPPC) reviewed the application and recommended approval. The Montgomery County Planning Board unanimously recommended approval on April 16, 2009. A public hearing was held on April 28, 2009, and the hearing examiner's report was issued on June 25, 2009, recommending approval.

The Opposition filed a request for oral argument, which took place on July 28, 2009. Following that oral argument, the District Council remanded the case to the hearing examiner on

September 15, 2009, for further proceedings. On the same date, the District Council adopted a resolution to permit the Applicant and other interested parties to present evidence on remand about specific economic and land use issues outlined in the resolution, Ex. 78. On December 11, 2009, the Applicant filed an amended application reducing the density it requested to the RT-12.5 classification. The amendment also reduced the maximum number of dwelling units (townhouses) from 112 to 105, specified that 12.5% moderately priced dwelling units (MPDUs) would be provided and added more binding elements. The proposal is set forth in a revised Schematic Development Plan (SDP), Exhibit 91, which contains an illustrative plan, specifications of the binding elements, and other information regarding the development. The Technical Staff continued to recommend approval of the amended application, and an additional hearing was conducted by the hearing examiner on May 17, 2010. The Hearing Examiner's supplemental report was issued on July 15, 2010. It addressed the questions raised by the District Council in its remand resolution, and recommended approval of the revised SDP.

The Hearing Examiner's recommended approval of the amended application based on his findings that the RT-12.5 Zone at the proposed location would satisfy the requirements of the zone and its purpose clause; that the proposed reclassification and development would be compatible with land uses in the surrounding area; and that the proposed reclassification bears sufficient relationship to the public interest to justify its approval. To avoid unnecessary detail in this Resolution, the Hearing Examiner's Report and Recommendation, dated June 26, 2009, and his Supplemental Report and Recommendation, dated July 15, 2010, are incorporated herein by reference.

**The Property, Surrounding Area and Zoning History**

The subject property forms an irregularly shaped parcel located near the northeast quadrant of the intersection of Clopper (Md. Route 117) and Mateny Roads. The site is generally flat and gently sloping from northwest to southeast at about a 3.6 percent grade in the developed area adjacent to the Mateny Road entrance. The site slopes away from Clopper Road. Mateny Road is about 30 feet higher than Cinnamon Drive as it abuts the site.

The site contains about 250 feet of frontage along Clopper Road, 400 feet of frontage along Mateny Road and 580 feet of frontage along Cinnamon Drive. There are steep slopes at the site where it abuts Clopper Road and Cinnamon Drive. Located immediately southwest of the site at the intersection of Clopper and Mateny Roads is a 7-11 gasoline filling station and convenience store, which is classified under the C-1 Zone. This property is not part of the instant zoning request. A storm water management (SWM) facility is located at the southeast corner of the site at the intersection of Clopper Road and Mateny Road. The facility is located at the low point of the site. The high point is at the northwest corner. The existing SWM facility is outdated and does not provide for quality controls.

Located in the southwest corner of the site is an existing cemetery known as the Graff-Musser Family Cemetery. The cemetery contains a plaque documenting its history. The cemetery dates to the 1800s and has African Americans and Caucasians buried side by side, apparently one of the first such burial patterns in the region. The cemetery was once included in the County Locational Atlas and Index to Historic Sites but was subsequently removed. There is a large retaining wall between the cemetery area and the adjacent convenience store. The Germantown Historical Society considers the cemetery to be historic and expressed concerns about the maintenance and future care of it. The Applicant submitted a binding element to the SDP to provide for perpetual maintenance and care of the cemetery.

The property contains a shopping center with a grocery store, known as “Super Grand,” which sells Asian food among other types of groceries, a beer and wine store, a drycleaner and a satellite station for the Montgomery County Police Department. The site contains an asphalt parking lot for about 275 cars and grassy areas along the perimeter. The developed area is at the center of the site and this area constitutes about 90% impervious surface.

The Applicant bought the center in 2004 with the expectation that a retail upgrade would make the center competitive. However, a combination of factors has resulted in the center not producing expected income. These factors include the economic downturn, nearby competition, a fire that closed the grocery store for about a year, and an inability to attract the right mix of tenants including a national food chain as an anchor store. The site is also too small and has a visibility problem from the street because ongoing traffic cannot see the available retail uses.

In floating zone cases a surrounding area is defined so as to include uses that are most directly affected by the proposed development. The District Council adopts the surrounding area recommended by Technical Staff and Hearing Examiner. This area is bounded on the north by Pine Ridge Lane and Cinnamon Woods subdivision; bounded on the east by Gunners Branch Park and the Ashton Place subdivision; bounded on the south by Dairymaid Drive; and bounded on the west by Metz Road and the Stone Ridge subdivision.

The character of the surrounding area reflects medium densities made up of townhouses, four-plexes and single-family detached homes. The surrounding area is predominately residential with largely stable and mature communities.

Cinnamon Woods is a community located north and east of the site with about 640 older two-story four-plexes or “back to back” style townhouses and related surface parking lots. Much of the area has large green areas. This community contains Clopper Mill Elementary School and the entry to Gunners Branch Local Park. West and northwest of the subject property is the Stone

Ridge subdivision, classified under the RT-12.5 Zone, which contains about 305 older two-story townhouses without garages and the community relies on surface parking.

The area to the south is a stream valley of a tributary of the Gunners Branch beyond which lies the Ashton Place community, classified under the RT-12.5 Zone that contains about 257 two-story townhouses without garages and dependent on surface parking. Some isolated single-family detached homes are located along Metz Drive near Clopper Road.

The densities of these communities are in scale with each other. This area was developed in the 1980s. The site abuts townhouses and four-plexes to the north, west and southwest. Elements of the surrounding area also include the road network made up of Clopper Road, Mateny Road, Metz Road, Cinnamon Drive and stream valleys associated with Seneca Creek.

The property was the subject of countywide comprehensive zoning in 1958 when it was classified under the Rural Residential (R-R) Zone, which allowed for a density of two dwelling units per acre. In 1969, the property was reclassified from the R-R Zone to the C-1 Zone by Local Map Amendment F-345. The property was developed as a one story 46,193 square foot shopping center under the C-1 Zone in the 1984 and the Weis Market operated a grocery store there until it was leased to the Super Grand in 2004.

The 1989 Germantown Master Plan addresses shopping center uses and encouraged the concentration of retail uses in planned village centers. The plan discourages strip commercial zoning along highways like Clopper Road. Two retail village centers have since developed near the subject property. Kingsview Village center is located within 2,000 feet of the subject property and Clopper Village is located within 3,000 feet of the subject property. Both retail centers have been built in accordance with the Master Plan. Recently more competition developed with the Lotte Plaza at Wisteria and Route 118.

The 1974 Master Plan clearly shows that the Village Center for Clopper Village should be located at the intersection of Clopper Road and the Western Arterial, now the Great Seneca Highway. The subject property was deemed inadequate for a village center location. The 1989 Master Plan explicitly recommends the subject property for other convenience retail center. The plan also discouraged strip commercial development and encouraged sensitivity to development along Clopper Road because of its high visibility to travelers. The District Council concludes that housing would be a preferable use at this location because it will reinforce the established character and identity of the area. The District Council agrees with the conclusions of the Technical Staff, Planning Board and Hearing Examiner that the proposed use is consistent with the current Master Plan.

### **Proposed Development**

The proposed development would replace the existing 25-year-old retail center with 105 townhouses, at a density of 12.4 dwelling units per acre, including 12.5% MPDUs. The SDP proposes a village green, recreational open space, pocket parks and an enlarged storm water management (SWM) facility. The plan also proposes the preservation of the Graft-Musser family cemetery. The updated SWM facility will add to the open space for the project. The tree canopy will be significantly enlarged from 0.98 acres to 4.43 acres. Impervious surfaces will decrease from 4.93 acres to 4.42 acres. Existing green space shows 3.7 acres, and the plan is to increase this to 4.68 acres, as shown in Applicant's comparison chart, Ex. 87. The revisions will add more open space, recreational areas and allow for pedestrian links as shown on Ex. 84, a pedestrian circulation plan. A concept SWM plan was approved that will improve water quality and quantity.

The Applicant's illustrative plan shows 429 parking spaces (4.08 spaces per dwelling unit). The zoning requires 210 spaces or 2.0 spaces per dwelling units. The community would be developed around a central "village green," or community open space, linked with a series of smaller open spaces by pedestrian friendly streetscapes, walkways and trails.

The proposal was revised before the record closed to add several binding elements to the SDP. The binding elements now include the following seven items.

1. Density limited to 105 dwelling units
2. MPDUs will be provided at 12.5% of total density
3. The Applicant or its' successors in interest will preserve and professionally maintain the existing cemetery
4. The minimum building setbacks will be 30 feet from north property line; 25 feet from the western property line; 100 feet from the southern property line; and 30 feet from the eastern property line.
5. Minimum parking will provide 3.0 parking spaces per unit;
6. Maximum building height will be 35 feet; and
7. Minimum green space of 50%

### **Standard for Review**

A floating zone, such as the RT-12.5 Zone, is a flexible device. 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), and that it will 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*.

**Requirements and Purpose of the Zone**

Under the “purpose clause” set forth in Zoning Code §59-C-1.721, the R-T Zone may be applied if a proposal meets any one of three alternative criteria: (1) it is in an area designated for R-T Zone densities (implying a master plan designation); (2) it is in an area that is appropriate for residential development at densities that are allowed in the RT Zones; or (3) it is in an area where there is a need for buffer or transitional uses between commercial, industrial, or high-density apartment uses and low-density one-family uses.

The Opposition raised the issue of need with respect to the existing shopping center use. The site is located near several existing townhouse communities that have enjoyed the convenience of the shopping center since 1984 and some of whose residents oppose the reclassification. The Opposition contends there is a need to retain the existing center to better serve a changing population that values the stores at the center and to which residents can easily walk. Need is not a requirement for the location of the RT-12.5 Zone. Need is sometimes relevant depending on the use. For example, a need requirement must be satisfied for a special exception for a gasoline filling station. However, the need requirement has not been extended to the proposed use. Therefore, need is not a relevant factor to evaluate the appropriateness of the proposal. Even if need was a requirement, the evidence is clear that ample shopping facilities are in the area and the competition from these facilities is one of the reasons the existing center has not done as well as expected.

The “appropriate” standard is usually measured by density, that is, whether or not the proposed density is a good fit in the particular neighborhood. The District Council finds that the subject property is located in a section of the County that is appropriate for residential development at the RT-12.5 density. Stone Ridge is directly west of the site and reflects a density of 12.6 dwelling units per acre. Aston Place is southwest of the site and reflects a density

of 12.3 dwelling units per acre. Cinnamon Woods, located north and west of the site along Mateny Road, reflects a density of 8.2 dwelling units per acre.

The District Council finds that the type of residential unit at the density proposed is entirely consistent with the surrounding area given the SDP commitments to a maximum density limit of 105 dwelling units (*i.e.*, 12.41 dwelling units per acre) and a provision for a minimum of 50% green space. The site meets the appropriate standard because of its location, relationship to, and compatibility with, surrounding townhouse developments.

The District Council determines that the proposed development meets the development standards of the RT-12.5 Zone. The design layout, green space, setbacks, density and parking all exceed zoning requirements. The Technical Staff and Planning Board recommendations also confirm that the proposed development would be appropriate for this location and meets the development standards of the RT-12.5 Zone. Therefore the Applicant has submitted sufficient evidence to satisfy the requirements of the zone.

### **Compatibility**

An application for a floating zone reclassification must be evaluated for compatibility with land uses in the surrounding area. The District Council finds that the proposal is compatible with the nearby residential uses in terms of height, scale and building mass. By creating an architectural and building mass edge along Clopper Road, the proposed development will function as a buffer use between the higher intensity uses of the Clopper Road corridor and the adjacent residential communities. The proposed development will function as a buffer between the convenience store and gas station and the nearby residential areas.

The proposed development will be compatible with the existing community because the SDP will provide for substantial green space, density limitations, setbacks, parking, and less

impervious surface. The Technical Staff and Planning Board reviews confirm that the proposed development will be compatible with existing and planned uses in the surrounding area.

### **Public Interest**

The Applicant must show that the proposed reclassification bears sufficient relationship to the public interest to justify its approval. When evaluating the public interest, the District Council normally considers Master Plan conformity, the recommendations of the MNCPPC, impact on public facilities, and important policy goals such as the provision of affordable housing and preservation of historic sites.

The District Council concludes that the proposed zoning is in the public interest and provides immediate and long-term benefits not only to the existing adjacent neighborhood but also the County as a whole. The Planning Board will revisit remaining noise, school and traffic issues during the subdivision and site plan review stages.

The proposed development provides for a number of benefits. For example, a improved and enlarged SWM facilities will benefit the environment. The elimination of the Clopper Road access will permit the expansion of SWM facilities and allow for safer more adequate traffic patterns. The replacement of the shopping center will significantly reduce impervious surface and will allow for the introduction of a tree canopy and new green space that promote the environment. The introduction of housing at this location will allow for more diversity and affordability. The preservation and perpetual maintenance of the historic cemetery will contribute to cultural heritage of the area. Finally, the proposed development is consistent with the master plan and promotes many of its goals and objectives as evidenced by the very detailed analysis by the Technical Staff.

The Opposition contends that the existing shopping center should be retained because it promotes a master plan objective for convenience neighborhood shopping areas, satisfies a community need for accessible shopping for older residents, provides a market for goods and services created by changing demographic patterns and otherwise unavailable in the area and functions as a Village Center that provides a community meeting place. The Opposition also contends that the proposed development will overwhelm schools and roads. The District Council finds that the evidence does not support this contention.

A school facility payment along with capital improvements indicate that the project will not cause an adverse impact on area schools. The latest requirements for school capacity are found in exhibits 96, 96 (a) and (b), 97 and 97(a). These requirements confirm that CIP funding for the Northwest Cluster will provide additional capacity that keeps the Cluster from going into moratorium. With the reduction of density, fewer students will be generated by the development. Under these circumstances, the APF review provides sufficient safeguards to allow the zoning request. Both the Applicant's expert and the Technical Staff concluded that the Applicant could satisfy adequate public facility (APF) requirements, and this issue will be reviewed again at the post-zoning stages.

The impact on local traffic from this development would be minimal and will clearly meet LATR standards. No evidence was presented to suggest that the proposed development would produce any adverse levels of service after the applicant provided expected mitigation. The evidence also indicates that the proposed development will promote a better environment.

In balancing of the public interest factors, the benefits of the proposed zoning far outweigh the detriments. Both the Technical Staff and the Planning Board provided strong, persuasive and unanimous support to approve the rezoning. The evidence is clear that the zoning

is consistent with the 1989 Master Plan and will better serve the public interest than retention of the current use.

For all of these reasons, as more fully discussed in the Hearing Examiner's reports, the District Council concludes, based on the preponderance of the evidence that the proposed reclassification and development would be in the public interest.

### **Conclusion**

Based on the foregoing analysis, consideration of the Hearing Examiner's report, and after a thorough review of the entire record, the District Council concludes that the application satisfies the requirements of the RT-12.5 Zone and its purpose clause; that the application proposes a form of development that would be compatible with land uses in the surrounding area; and that the requested reclassification to the RT-12.5 Zone bears sufficient relationship to the public interest to justify its approval. For these reasons and because approval of the instant zoning application will aid in the accomplishment of a coordinated, comprehensive, adjusted, and systematic development of the Maryland-Washington Regional District, the application will be approved 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:

Zoning Application No. G-878, seeking reclassification from the C-1 Zone to the RT-12.5 Zone of 8.46 acres known as Germantown Park, Lot 685, Subdivision 21, located at 18451 Mateny Road, Germantown, in the 9<sup>th</sup> Election District, is hereby approved in the amount

requested and subject to the specifications and requirements of the final Schematic Development Plan (SDP), Ex. 91;

Provided that, the Applicant submits to the Hearing Examiner for certification a reproducible original and three copies of the SDP within 10 days of approval, in accordance with Code § 59-D-1.64 of the Zoning Ordinance; and

Provided further that, the Applicant submits prior to certification a fully executed copy of the Declaration of Covenants, Ex. 98, which has been revised to include the most recent binding elements specified in the revised SDP, Ex. 91, and has been filed in the County land records in accordance with Code §59-H-2.54 of the Zoning Ordinance within the aforementioned 10 day period, and a suitable receipt of filing is presented to the Hearing Examiner prior to the certification.

This is a correct copy of Council action.

  
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Linda M. Lauer, Clerk of the Council