

Resolution No.: 19-299
Introduced: November 12, 2019
Adopted: November 12, 2019

**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 NO. H-134 FOR AMENDMENT TO THE ZONING ORDINANCE MAP, Patricia Harris, Esquire, and Christopher S. Cohen, Esquire, Attorneys for the Applicants, Hong Cheng LLC and Dong Ya LLC; OPINION AND RESOLUTION ON APPLICATION; Tax Account Numbers 05-01988445 and 05-01988434.

OPINION

On May 8, 2019, Hong Cheng LLC and Dong Ya LLC filed an application for a Local Map Amendment (LMA H-134) to reclassify two parcels of land totaling approximately 3.46 acres from the CRN (Commercial/Residential Neighborhood)-1.5, C-1.0, R-0.5, H-45 Zone to the CRTF (Commercial Residential Town Floating)-1.5, C-1.0, R-0.5, H-45 Zone. Exhibit 1. The properties are located at 15585 and 15595 Old Columbia Pike, Burtonsville, MD 20866, and are further identified as Parcel C (N913) and Parcel D (N924) in the "Parcels C and D Burtonsville" subdivision (Tax Account Nos. 05-01988445 and 05-01988434). *Id.*

Staff of the Montgomery County Planning Department (Planning Staff or Staff) recommended approval of the application, as did the Planning Board. Exhibit 40. Concurrent with its recommendation on the rezoning application, the Planning Board approved a Preliminary Forest Conservation Plan (PFCP) on September 19, 2019. Exhibit 48. The public hearing before the Hearing Examiner proceeded as scheduled on September 30, 2019. The Hearing Examiner issued her report on October 31, 2019. She recommended approval of the application because it will meet the standards required by the Zoning Ordinance and will be consistent with the coordinated and systematic development of the Montgomery County Regional District, as required by the State law. *Maryland Land Use Article, §§21-101(a) and (b).*

To avoid unnecessary detail in this Opinion, the Hearing Examiner's Report and Recommendation is incorporated herein by reference. Based on its review of the entire record, the District Council finds that the application meets the standards required for approval of the requested rezoning for the reasons set forth by the Hearing Examiner.

Subject Property

Parcel C is improved with an automobile filling station and convenience store. The filling station has eight fueling positions. Parcel D is improved with a retail building (a mattress store) of approximately 8,200 square feet. Approximately 0.38 acres of forest run along the southern property boundary. Other than the forest stand, the property has no protected environmental features. There is no stormwater management on the property. Exhibit 40(b).

In 2012, the Sectional Map Amendment (G-955) implementing the Burtonsville Crossing Neighborhood Plan rezoned the property from the C-2 Zone to the CRN Zone. This made the filling station a non-conforming use. The filling station is permitted as a conditional use in the CRTF Zone. The Applicants seek to make the existing filling station conforming, to upgrade and expand the filling station/convenience store and upgrade and increase the range of commercial uses permitted on Parcel D.

Surrounding Area

The “surrounding area” must be identified and characterized in a floating zone case to determine whether the FZP will be compatible with those properties directly impacted. Once identified, the surrounding area is “characterized” to measure the compatibility of the proposed FZP with the area’s existing character.

The Applicants and Staff agreed that the surrounding area is bounded by properties on both sides of Md. Rte. 198 between Route 29 and the intersection of Old Columbia Pike/Tolson Place. It also includes a strip of properties zoned R-200 that abut the south side of the commercial properties fronting on Old Columbia Pike. The residential properties front Tolson Place and a right-of-way extending from Tolson Place. Properties immediately adjacent to the subject property are improved with a McDonald’s Restaurant to the west, a single-family dwelling (zoned R-200) to the southwest, and unimproved R-200 property owned by the Applicants to the south. The boundaries of the surrounding area are depicted in the Hearing Examiner’s Report.

The Hearing Examiner found that the character of the area is a mix of commercial neighborhood retail and auto-related uses that culminate at the intersection of Md. Rte. 198 and Columbia Pike. She also found that there is a sharp transition from the commercial uses fronting Md. Rte. 198 to the R-200 properties adjacent to the south. Based on this record, the District Council adopts the Hearing Examiner’s characterization of the neighborhood.

Proposed Development

The Applicants do not propose to change maximum density or height permitted under the existing zoning. They seek to upgrade the existing filling station/convenience store by adding four new fueling positions (for a total of 12) and double the size of the convenience store (to approximately 5,000 square feet.) On Parcel D, the Applicants plan to retain retail uses but seek the flexibility to provide a greater variety of commercial uses available in the CRTF Zone. Approximately 0.28 acres of the existing forest on the property will be preserved in a Category I Forest Conservation Easement.

The FZP includes six binding elements that will restrict future development. These binding elements (1) prohibit 22 uses otherwise permitted in the CRTF Zone, (2) require a 50-foot buffer from the residential properties to the south, (3) require frontage improvements including a pathway and street trees, (4) restrict the eastern site access to right-in, right-out turns, (5) reserve a future access road connecting to the adjacent McDonald's site, and (6) require the open space to be located on-site. Exhibit 42. These binding elements are reproduced in detail in the Hearing Examiner's Report.

Criteria for Approval

Under Zoning Ordinance §59-7.2.1.B.2.g., every application for rezoning to a Floating Zone must be accompanied by an FZP which meets certain requirements. The Applicant has filed the required FZP (Exhibit 42) and related documents, which are described in both the Staff Report and the Hearing Examiner's Report.

Before approving a floating zone application, the District Council must find that the proposal will meet the standards required by the Zoning Ordinance and that it will be consistent with a coordinated and systematic development of the Regional District. *See, Md. Land Use Art.*, §21-101(a) and (b). Generally, these standards fall into five categories: (1) the compatibility of the FZP with adjacent properties and the surrounding area, (2) whether the FZP conforms to the applicable Master Plan, (3) whether public facilities will be adequate to serve development under the FZP, (4) whether the property meets technical requirements allowing the Council to apply a Floating Zone, and (5) whether the FZP meets the development standards of the zone requested.

Substantial Conformance with the Master Plan

Several sections of the Zoning Ordinance require the FZP to conform to the governing master plan.¹ The subject site lies within the area covered by the *2002 Approved and Adopted Burtonsville Crossroads Neighborhood Plan* (Master Plan or Plan). The Plan seeks to create a "complete community designed at a scale to serve the surrounding area with small businesses, retail, local services, offices, residential, and open spaces for local events, conservation, and recreation." *Plan*, p. 5. Key to this vision is a connected system of "enhanced streets, sidewalks, and trails." *Id.*

To accomplish this goal, the Plan recommends reviewing new development under four themes: (1) connectivity through an expanded network of streets, bikeways, and pedestrian routes, (2) design that will create an identity that will help to foster a sense of place, (3) encouraging the economy by improving the mix of uses and new implementation tools, and (4) preserving the environment including tributary headwaters and maintaining the rural character where it exists. *Id.* at 7. Staff advises that the Master Plan recommended the CRN Zone for this property to create

¹ Section 59-7.2.1.E.1.a. of the Zoning Ordinance requires the District Council to find that the FZP "substantially conforms with the recommendations of the applicable master plan, general plan, and other applicable County plans." Section 59-7.2.1.E.1.b requires the FZP to be "in the public interest", which includes a review of conformity with County plans and policies and whether the development will be consistent with the coordinated and systematic development in the Regional District under State law. Section 59-7.2.1.E.1.c requires the FZP to further the intent of Floating Zones. The intent of Floating Zones incorporates compliance with the applicable master plan. *Zoning Ordinance*, §59-5.1.2.A.1.

a transition between the Burtonsville Town Shopping Center (zoned CRTF) to the north and the residential properties immediately to the south. Exhibit 40(b).

The Hearing Examiner found that the FZP will achieve the Plan's vision. The requested zone does not change the existing height and density permitted, ensuring that future development will continue to serve as a transition between the uses on the north side of Md. Rte. 198 and the residential properties to the south. The Hearing Examiner determined that the FZP implements the connectivity and sense of place through binding elements that require open space to be located on the property and an enhanced streetscape that includes a pathway. The economy will be supported by expanding the variety of commercial uses available under the CRTF Zone to serve the neighboring area. The FZP will further environmental goals by introducing stormwater management where none currently exists and by permanently preserving forest on the site. Based on this record, the District Council agrees with the findings of the Hearing Examiner that the FZP conforms to the Master Plan.

Compatibility with Adjacent Uses and the Surrounding Area

Multiple standards for approval of this LMA stress that the FZP must be compatible with adjacent uses and the surrounding area.² The uncontroverted evidence in this case demonstrates that the FZP will be compatible with surrounding area. The District Council has characterized the surrounding area as a mix of neighborhood retail and auto-related uses transitioning to residential properties immediately to the south. The Hearing Examiner found that the zone requested does not change the existing height and density permitted, thus continuing the property's transitional function. Binding elements prohibit development of inappropriate uses (not compatible with the surrounding area) that would otherwise be permitted under the CRTF Zone, furthering the intent of floating zones. The FZP utilizes design flexibility to provide open space and an enhanced streetscape with a pedestrian/bike connection. The forest conservation easement on the southern property line will buffer the residential properties to the south.

The Hearing Examiner found that the FZP will be compatible with adjacent properties as well. The Maryland State Highway Administration (SHA) is currently studying congestion and safety improvements along the portion of Md. Rte. 198 within the surrounding area. Binding elements preserve access for the McDonald's site to Md. Rte. 198 if SHA approves a signal warrant at the subject property's western access. Expert testimony established that this property has no direct connection to the properties along Tolson Place. The forested buffer and the introduction of stormwater management onto the site will mitigate the impact of the development on the residential properties immediately to the south and southwest.

² The FZP must further the intent of Floating Zones in general and the CRTF Zone in particular. *Zoning Ordinance*, §§59-7.2.1.E.1.c; 59-5.1.2.C; 59-5.3.2. Floating zones are intended to (1) establish compatible relationships between new development and existing neighborhoods through limits on applicability, density, and uses, (2) provide development standards and general compatibility standards to protect the character of adjacent neighborhoods; and (3) allow design flexibility to mitigate any negative impacts found to be caused by the new use. *Id.*, §59-5.1.2.C. One purpose of the CRTF Zone is to provide "provide mixed-use development that is compatible with adjacent development." *Id.*, §59-5.3.2.C. Similarly, Section 59-7.2.1.E.1.d of the Zoning Ordinance requires the Council to find that the FZP is "compatible with existing and approved adjacent development."

The Applicant also presented evidence and expert testimony that the FZP will not impact traffic safety. An expert in transportation planning testified that most of the accidents related to the site arose from northbound left turns leaving the property's eastern access and westbound left turns entering the eastern access. Recently, the State has installed bollards on Md. Rte. 198 to prevent these turns and the FZP contains a binding element that also does so. SHA correspondence indicates that no further safety improvements will be necessary, in accord with the expert opinion of the transportation planner. The same expert also opined that there is space on Md. Rte. 198 to accommodate queues for vehicles turning left into the property's western access. For the reasons stated in the Hearing Examiner's Report, and based on this evidence, the District Council finds that the FZP will be compatible with the surrounding area and adjacent properties.

Adequacy of Public Facilities

To approve a Floating Zone, the District Council must find that public facilities will be adequate to serve the FZP. While a more detailed review will occur later in the development process, a threshold analysis must be performed at the rezoning stage (*Zoning Ordinance*, §59-7.3.1.E.1.e).³

For a Floating zone application the District Council must find that the floating zone plan will: . . .

e. generate traffic that does not exceed the critical lane volume or volume/capacity ratio standard as applicable under the Planning Board's LATR Guidelines, or, if traffic exceeds the applicable standard, that the applicant demonstrate an ability to mitigate such adverse impacts . . ."

The Applicant prepared a traffic study utilizing the Planning Board's LATR Guidelines, as required. Exhibit 42. The traffic study demonstrates that all but one of the studied intersections meets the average delay standards under the LATR Guidelines. The Applicant was unable to measure the average delay experienced at the northbound approach to the intersection of the property's western access with Md. Rte. 198 and the Burtonsville Town Shopping Center. The Applicants presented expert testimony that signalization of the intersection would mitigate any delays at that location. Expert testimony, along with the preliminary warrant analysis in the record (Exhibit 25), supports a finding that SHA's approval of a signal for the intersection is likely to occur. Even if the signal is not approved, development can proceed if the western access is restricted to right-in and right-out turns. Based on this evidence, the Council agrees with the Hearing Examiner that any average delays exceeding the LATR standards may be mitigated either by a traffic signal at the intersection or by restricting turning movements to right-in, right out at the western access.

³ Other sections of the Zoning Ordinance also incorporate the requirement that public facilities be adequate to serve the development. Such a review is part of the Council's determination that an application will be "in the public interest..." and that it be "it will be consistent with a coordinated and systematic development of the Regional District" under State law. *Zoning Ordinance*, §59-7.2.1.E.1.b; *Md. Land Use Art.*, §21-101(a) and (b). The intent of the Floating Zones is to "implement comprehensive planning objectives by...ensuring that the proposed uses are in balance with and supported by the existing and planned infrastructure..." *Zoning Ordinance*, §59-7.2.1.E.1.b; 59-5.1.2.A.2.

Uncontroverted evidence establishes that other public facilities are adequate as well. The Applicant's expert in civil engineering testified that gas, electric, water and sewer, and cable utilities are located at the property. He also testified that fire and police stations are within an acceptable distance from the site. The District Council finds that these public facilities will be adequate to serve the property under the FZP.

Public Interest

Section 59-7.2.1.E.1.b requires that a floating zone application demonstrate that it is "in the public interest." In addition to the adequacy of facilities and conformance to the Master Plan, Staff concluded that the FZP furthers the public interest because it will retain a needed auto-related use on the property. The Hearing Examiner found that the FZP will further the environmental goals reflected in the Planning Board's Environmental Guidelines. The Applicants' expert in land planning testified that the property lies within the Little Paint Branch watershed, which has a relatively high water quality. No stormwater management currently exists on the property; the FZP demonstrates the property may be developed under current stormwater management standards. T. 40-41. The District Council agrees with the Hearing Examiner's finding that the application serves the public interest.

Environmental Impacts

Before the District Council may approve a FZP, "a Planning Board recommendation to the District Council on the preliminary forest conservation plan must be made under Section 59-7.2.1." *Montgomery County Code*, §22A-11(b)(2)(C). There is an existing forest stand on the property consisting of approximately 0.38 acres. Exhibit 40(b). Planning Staff advised that, under the Planning Board's Environmental Guidelines, 0.28 acres of forest retention and afforestation is required. *Id.* The Planning Board has approved a Preliminary Forest Conservation Plan (PFCP) for the property which requires this amount to be placed in a Category I environmental easement running along the southern boundary. Development will impact three specimen trees off-site. The approved PFCP grants a variance for the impact to these trees. Exhibit 48. The District Council concludes that this requirement is met.

The uncontroverted evidence demonstrates that there are no other protected environmental features, such as streams, wetlands or floodplains, located on the property. Exhibit 40(b).

The Intent and Standards of Floating Zones (Section 59.5.1.2.)

The District Council must determine whether the FZP furthers other aspects of the Floating Zone's intent.⁴ The balance (from Section 59-5.1.2) are included here:

The ... Commercial/Residential Floating...zones are intended to provide an alternative to development under the restrictions of the Euclidean zones mapped by Sectional Map Amendment...The intent of the Floating zones is to:

⁴ The intent of Floating Zones contained in Sections 59-5.1.2.A.1 and 2 and 59-5.1.2.C of the Zoning Ordinance has already been addressed in the Council's findings relating to the compatibility of the FZP and the adequacy of public facilities. The balance of the Floating Zone intent clauses is discussed here.

A. Implement comprehensive planning objectives by:

* * *

- 3. allowing design flexibility to integrate development into circulation networks, land use patterns, and natural features within and connected to the property; and*

The Hearing Examiner found that the FZP meets this standard through binding elements that require open space to be provided on the site, an enhanced streetscape, preservation of forest, and pedestrian and bicycle connections. The access road to the McDonald's site ensures that development on the subject property will not cut off the McDonald's property from Md. Rte. 198. For the same reasons, the District Council finds that this standard has been met.

B. Encourage the appropriate use of land by:

- 1. providing flexible applicability to respond to changing economic, demographic, and planning trends that occur between comprehensive District or Sectional Map Amendments;*
- 2. allowing various uses, building types, and densities as determined by a property's size and base zone to serve a diverse and evolving population; and*
- 3. ensuring that development satisfies basic sustainability requirements including:*
 - a. locational criteria,*
 - b. connections to circulation networks,*
 - c. density and use limitations,*
 - d. open space standards,*
 - e. environmental protection and mitigation; and*

Both Staff and the Hearing Examiner found that the FZP met this intent of the Floating Zones. Staff determined that the wider range of uses permitted in the CRTF Zone will encourage economic development on the property and provide more flexibility to address future populations. Exhibit 40(b), p. 17. The Hearing Examiner agreed, relying also on the binding element that prohibits development of inappropriate uses on the property. The record demonstrates that the FZP will greatly improve sustainability of development on the property by introducing stormwater management under current standards, improving pedestrian and bike connections, preserving forest, and reserving a road connection for the McDonald's property. The District Council finds that this standard has been met.

The Purpose of the Commercial/Residential Floating Zones

Section 5.3.2. Purpose

The purpose of the Commercial/Residential Floating zones is to:

- A. allow development of mixed-use centers and communities at a range of densities and heights flexible enough to respond to various settings;***
- B. allow flexibility in uses for a site; and***
- C. provide mixed-use development that is compatible with adjacent development.***

The District Council has already found that the FZP further the purpose in Section 5.3.2.C (the compatibility of the FZP with adjacent development). Staff found that the FZP fulfilled the remaining standards because the purpose of the existing CRN Zone is identical to that of the CRTF

Zone. Exhibit 40(b), p. 21. The Hearing Examiner agreed with Staff that the FZP fulfills the purpose of the CRTF Zone. She concluded that the cap on height and density maintains the property's existing transitional setting. At the same time, the CRTF Zone expands the range of commercial uses permitted on the site, establishing more flexibility to provide new retail services in the future. A binding element prohibiting incompatible uses protects the immediately adjacent properties and the surrounding area. Based on this evidence, the District Council finds that the FZP fulfills the purposes of the CRTF Zone.

The Applicability of the Zone (Section 59.5.1.3.)

Where a Floating Zone is not recommended by the Master Plan, Section 59.5.1.3. of the Zoning Ordinance sets up a series of tests to determine whether a Floating Zone may be applied to a property. *Zoning Ordinance*, §§59-5.1.3.B and C. These eligibility requirements prohibit Floating zones on properties in the Agricultural and Rural Residential Zones, which is not the case here. *Id.*, §59-5.1.3.A. Where the existing (*i.e.*, base) zone is non-residential, there are no prerequisites that must be met, even if a Floating Zone is not recommended in the Master Plan. *Id.*, §5.1.3.C.3.

The Master Plan does not recommend a Floating Zone for the property. However, the existing (or base) zone, the CRN Zone, which is commercial rather than residential. As summarized by the Hearing Examiner, the uncontroverted evidence in this case demonstrates that there are no prerequisites required before applying a Floating Zone to this property.

Development Standards of the Commercial/Residential Floating Zones (Uses Permitted, Building Types Allowed, Maximum Density, and Development Standards, Section 59.5.1.3 and Division 59-5.3)

Division 59-5.3 sets out the “development standards” or limitations on physical development and uses permitted under the CRTF Zone.

The CRTF Zone permits only those uses permitted by the CRT Zone and any building type authorized by the Zoning Ordinance. *Id.*, §§59-5.3.3.A.2, §59-5.3.4.A. The CRT Zone permits an automobile filling station by conditional use. The remaining retail uses proposed for the site are permitted by right. *Id.*, §59-3.1.6. As the CRTF permits all building types, the buildings proposed in the FZP meet this requirement. The District Council agrees with these findings of the Hearing Examiner that the FZP meets these provisions.

Other standards limit density, require setbacks, open space or public benefit points, landscaping, screening and minimum parking levels. *Id.*, §§59-5.1.3.C.1., 59-5.3.5. Some development standards, including maximum building height and setbacks from the property's boundaries are determined by approval of the FZP. Others, such as other building setbacks, lot size, landscaping, screening and parking, will be finally determined later in the development process, although the FZP must demonstrate that these can be accommodated on the property. *Id.*, §59-5.3.5.

The Hearing Examiner's Report includes a table prepared by Planning Staff comparing the required development standards of the CRTF Zone to the FZP. The table demonstrates that the FZP meets all standards of the CRTF Zone. No public benefit points are required because the new development presently proposed is under 10,000 square feet and 1.0 FAR, the trigger for mandating public benefit points. *Id.*, §59-5.3.5.E. In lieu of public benefit points, the FZP designates 10% of the tract area as open space, as required by the CRTF Zone. *Id.*, §59-5.3.5.D.2. Should future development exceed the threshold amount, public benefit points will be required in when that development occurs. Finally, the FZP demonstrates that parking, landscaping and screening may be accommodated on the site, and will be reviewed in detail at site plan or a conditional use approval. Based on this uncontroverted evidence, the District Council finds that the FZP meets all development standards required by the CRTF Zone, for the reasons set forth by the Hearing Examiner.

Conclusion


After a thorough review of the entire record, the District Council concludes that the proposed reclassification and development will meet the standards for approval of a rezoning to the zone requested, and that it will be consistent with a coordinated and systematic development of the Regional District.

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:

Local Map Amendment Application No. H-134, requesting reclassification from the existing CRN-1.5, C-1.0, R-0.5, H-45 Zone to the CRTF-1.5, C-1.0, R-0.5, H-45 Zone, of properties located at 15585 and 15595 Old Columbia Pike, Burtonsville, MD 20866, further identified as Parcel C (N913) and Parcel D (N924) in the "Parcels C and D Burtonsville" subdivision (Tax Account Nos. 05-01988445 and 05-01988434) is hereby **approved** in the amount requested and subject to the specifications and requirements of the Floating Zone Plan, Exhibit 42; provided that the Applicant files an executed Declaration of Covenants (Exhibit 44) reflecting the binding elements in the land records and submits to the Hearing Examiner for certification a true copy of the Floating Zone Plan approved by the District Council within 10 days of approval, in accordance with §§59.7.2.1.H.1.a. and b. of the Zoning Ordinance.

This is a correct copy of Council action.


Mary Anne Paradise
Acting Clerk of the Council