

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

**AMENDMENT OF CONDITION
CSP-10002-C/DSP-10011-C**

DECISION

Application: Amendment of Condition
Applicant: Queens Chapel Town Center, LLC
Opposition: The City of Hyattsville, et. al.
Hearing Date: December 15, 2021
Hearing Examiner: Maurene Epps McNeil
Recommendation: Approval with Condition

NATURE OF REQUEST

(1) The Applicant is a limited liability corporation in good standing to transact business within the State of Maryland. (Exhibit 22) It is the owner of a 6.05-acre Shopping Center ("Queens Chapel Town Center"), located in the northwest quadrant of the intersection of Hamilton Street and Queens Chapel Road in Hyattsville, Maryland. The subject property is zoned M-X-T (Mixed Use-Transportation Oriented)/R-55 (One-Family Detached Residential)/T-D-O (Transportation Development Overlay)).

(2) Subsequent to the latest revision to the West Hyattsville TDDP, Applicant filed requests to amend the Table of Uses therein (CSP-10002 and DSP- 10011) solely for the Queens Chapel Town Center. On February 24, 2011, the Planning Board approved both plans, subject to conditions, discussed below. (Exhibits 6 and 8)

(3) On June 13, 2011, the District Council enacted Zoning Ordinance No. 2-2011 and No. 3-2011, approving both the Conceptual and Detailed Site Plans, respectively, with the following nearly identical conditions:

(Excerpt from Exhibit 3, Zoning Ordinance No. 2-2011)

NOW, THEREFORE, BE IT ORDAINED AND ENACTED:

SECTION 1. The Zoning Map for the Maryland-Washington Regional District in Prince George's County, Maryland, is hereby amended by changing the use

table for the M-X-T/T-D-O and R-55/T-D-O zoned property that is the subject of Application No. CSP-10002, to permit the following uses, in addition to those listed in the July 2006 Approved Transit District Development Plan for the West Hyattsville Transit District, for the subdistrict in which the subject property is located:

1. Eating or drinking establishment, without drive-through service
2. Pizza delivery service
3. Clothing, dry goods
4. Confectioner
5. Florist
6. Food or beverage goods preparation on the premises of a food and beverage store
7. Sporting goods shop
8. Stationery or office supply store
9. Video game or tape store

SECTION 2. Approval of the change of uses and conceptual site plan is subject to the following conditions:

1. Prior to certification of the plan, the applicant shall:
 - a. Relabel the existing conditions plan as the natural resources inventory (NRI) for the property and submit it for approval.
 - b. Submit a copy of a standard letter of exemption for the property.
 - c. Revise the plan to list the additional permitted uses, use limitations, and note the provisions regarding the existing eating or drinking establishment, with drive-through service, per Condition 3.
2. Prior to issuance of any use and occupancy permits within the entire property, the proposed trees, as shown on the certified detailed site plan (DSP), shall be planted.
3. The following modifications shall be made to the applicant's request and to the Table of Uses for the commercial/retail section of the July 2006 *Approved Transit District Development Plan and Transit District Overlay Zoning Map Amendment for the West Hyattsville Transit District Overlay Zone*. The modifications to the Table of Uses are applicable only to the subject site, as follows:
 - a. The following uses shall be added as permitted uses (P):
 - (1) Eating or drinking establishment, without drive-through service
 - (2) Pizza delivery service
 - (3) Clothing, dry goods
 - (4) Confectioner

- (5) Florist
- (6) Food or beverage goods preparation on the premises of a food and beverage store
- (7) Sporting goods shop
- (8) Stationery or office supply store
- (9) Video game or tape store

b. The use table changes hereby approved for Queens Chapel Town Center are subject to the following limitations

(1) Pizza delivery service is permitted if and only if an additional parking space, over and above the required number of parking spaces, is provided at the rear of the building for each vehicle to be used for delivery. No more than six vehicles shall be permitted for the delivery service.

(2) A confectioner shall be for retail use only and shall not exceed 3,000 square feet.

(3) Food or beverage goods preparation on the premises of a food and beverage store is permitted provided the goods are sold only on the premises and at retail.

(4) A sporting goods shop shall be permitted provided that there is no outside storage or display of products and the sale of firearms and ammunition is prohibited.

(5) Video game or tape store uses shall not include adult, X-rated, nude or semi-nude venues of any type, including, but not limited to, film, digital, hologram and similar technology, and live performance.

c. Within Queens Chapel Town Center, any eating or drinking establishment, with drive-through service, operating pursuant to an approved detailed site plan as of the effective date of County Council Resolution CR-24-2006, shall remain valid, be considered a legal use, and shall not be deemed a nonconforming use. Such eating or drinking establishments, with drive-through service, and their underlying detailed site plans may be modified pursuant to the existing provisions relating to revisions or amendments to detailed site plans generally as they exist in the Zoning Ordinance. If the use is discontinued for a period of 180 or more consecutive calendar days, unless the conditions of non-operation were beyond the control of the owner or holder of the use and occupancy permit, then the use shall no longer be considered a legal use.

(Excerpt from Exhibit 3, Zoning Ordinance No. 3-2011)

NOW, THEREFORE, BE IT ORDAINED AND ENACTED:

SECTION 1. The Zoning Map for the Maryland-Washington Regional District in Prince George's County, Maryland, is hereby amended by changing the use table for the M-X-T/T-D-O and R-55/T-D-O zoned property that is the subject of Application No. DSP-10011, to permit the following uses, in addition to those listed in the July 2006 Approved Transit District Development Plan for the West Hyattsville Transit District, for the subdistrict in which the subject property is located:

- (1) Eating or drinking establishment, without drive-through service
- (2) Pizza delivery service
- (3) Clothing, dry goods
- (4) Confectioner
- (5) Florist
- (6) Food or beverage goods preparation on the premises of a food and beverage store
- (7) Sporting goods shop
- (8) Stationery or office supply store
- (9) Video game or tape store

SECTION 2. Approval of the change of uses and conceptual site plan is subject to the following conditions

1. Prior to certification of the plan, the applicant shall:

- a. Relabel the existing conditions plan as the natural resources inventory (NRI) for the property and submit it for approval.
- b. Submit a copy of a standard letter of exemption for the property.
- c. Revise the landscape plan and tree canopy coverage worksheet to show, at a minimum, an additional 8 proposed shade trees, and five proposed evergreen trees in open tree wells and planting areas throughout the site.

- d. Revise the plan to list the additional permitted uses, use limitations, and note the provisions regarding the existing eating or drinking establishment, with drive-through service, per Condition 3.
2. Prior to issuance of any use and occupancy permits within the entire property, the proposed trees, as shown on the certified detailed site plan (DSP), shall be planted.
3. The following modifications shall be made to the applicant's request and to the Table of Uses for the commercial/retail section of the July 2006 *Approved Transit District Development Plan and Transit District Overlay Zoning Map Amendment for the West Hyattsville Transit District Overlay Zone*. The modifications to the Table of Uses are applicable only to the subject site, as follows:
 - a. The following uses shall be added as permitted uses (P):
 1. Eating or drinking establishment, without drive-through service
 2. Pizza delivery service
 3. Clothing, dry goods
 4. Confectioner
 5. Florist
 6. Food or beverage goods preparation on the premises of a food and beverage store
 7. Sporting goods shop
 8. Stationery or office supply store
 9. Video game or tape store
 - b. The use table changes hereby approved for Queens Chapel Town Center are subject to the following limitations:
 1. Pizza delivery service is permitted if and only if an additional parking space, over and above the required number of parking spaces, is provided at the rear of the building for each vehicle to be used for delivery. No more than six vehicles shall be permitted for the delivery service.
 2. A confectioner shall be for retail use only and shall not exceed 3,000 square feet.
 3. Food or beverage goods preparation on the premises of a food and beverage store is permitted provided the goods are sold only on the premises and at retail.

4. A sporting goods shop shall be permitted provided that there is no outside storage or display of products and the sale of firearms and ammunition is prohibited.
5. Video game or tape store uses shall not include adult, X-rated, nude or semi-nude venues of any type, including, but not limited to, film, digital, hologram and similar technology, and live performance.
- c. Within Queens Chapel Town Center, any eating or drinking establishment, with drive-through service, operating pursuant to an approved detailed site plan as of the effective date of County Council Resolution CR-24-2006, shall remain valid, be considered a legal use, and shall not be deemed a nonconforming use. Such eating or drinking establishments, with drive-through service, and their underlying detailed site plans may be modified pursuant to the existing provisions relating to revisions or amendments to detailed site plans generally as they exist in the Zoning Ordinance. If the use is discontinued for a period of 180 or more consecutive calendar days, unless the conditions of non-operation were beyond the control of the owner or holder of the use and occupancy permit, then the use shall no longer be considered a legal use.

(Exhibit 3)

(4) The District Council adopted the determinations of the Planning Board in its resolutions as its findings of fact and conclusions of law but revised said findings as related to a proposed carpet or floor covering store, concluding that such use would be inconsistent with the retail-commercial character of the shopping center on site. (Exhibit 3)

(5) By memorandum dated August 4, 2021, the Clerk of the Council notified the Office of the Zoning Hearing Examiner that Applicant requested that Condition 3(c) in both CSP-10002-C and DSP-10011-C be deleted in its entirety, pursuant to Section 27-135(c) of the Zoning Ordinance. (Exhibit 1) Subsequently, Applicant amended its request to ask that the condition be revised, as discussed *infra*.

(6) The City of Hyattsville and Mr. Alexi Sanchez Boado appeared in opposition to this request.

(7) At the conclusion of the hearing the record was left open to allow Applicant and those in opposition to submit some additional documents. The last of these items was submitted on February 16, 2022, and the record was closed at that time.

APPLICABLE LAW

(1) The District Council may amend a condition of approval for a Conceptual Site Plan

and Detailed Site Plan pursuant to Section 27-135 of the Zoning Ordinance. This Section provides, in pertinent part, as follows:

(c) The District Council may (for good cause) amend any condition imposed or site plan approved (excluding Comprehensive Design Zone Basic Plans or R-P-C Zone Official Plans) upon the request of the applicant without requiring a new application to be filed, if the amendment does not constitute an enlargement or extension.

(1) In the case of an amendment of a condition (imposed as part of the approval of the zoning case), the request shall be directed, in writing, to the District Council, and shall state the reasons therefore. Before the Council amends a condition, the Zoning Hearing Examiner shall hold a public hearing on the request, in accordance with [Section 27-129](#), and shall notify all parties of record (including all parties of record on the original application and any amendments thereto) in the same manner as required for an original application. The Planning Board shall post a sign on the subject property, setting forth the date, time, and place of the hearing, in the same manner as required for an original application. After the close of the hearing record, the Zoning Hearing Examiner shall file a written recommendation with the District Council. Any person of record may appeal the recommendation of the Zoning Hearing Examiner within fifteen (15) days of the filing of the Zoning Hearing Examiner's decision with the District Council. If appealed, all persons of record may testify before the District Council. Persons arguing shall adhere to the District Council's Rules of Procedure, and argument shall be limited to thirty (30) minutes for each side, and to the record of the hearing.

(2) Where a site plan has been approved by the Council, the applicant may request an amendment to the site plan in the form of an application filed with the Planning Board. The Technical Staff shall analyze the proposed amendment, taking into consideration the requirements of this Subtitle. The staff shall submit (for the record) a recommendation. This recommendation, along with the proposed amendment, shall be transmitted by the Technical Staff directly to the District Council. The Zoning Hearing Examiner shall hold a public hearing on the request, in accordance with [Section 27-129](#), and shall notify all parties of record (including all parties of record on the original application and any amendments thereof) in the same manner as required for an original application. The Planning Board shall post a sign on the subject property, setting forth the date, time, and place of the hearing, in the same manner as required for an original application. After the close of the hearing record, the Zoning Hearing Examiner shall file a written recommendation with the District Council. Any person of record may appeal the recommendation of the Zoning Hearing Examiner within fifteen (15) days of the filing of the Zoning Hearing Examiner's recommendation with the District Council. If appealed, all persons of record may testify before the District Council. Persons arguing shall adhere to the District Council's Rules of Procedure, and argument shall be limited to thirty (30) minutes for each side, and to the record of the hearing.

(2) "Good cause" is not defined in the Zoning Ordinance. Pursuant to Section 27-

108.01(a)(7):

Words and phrases not specifically defined or interpreted in this Subtitle or the Prince George's County Code shall be construed according to the common and generally recognized usage of the language. Technical words and phrases, and others that have acquired a peculiar and appropriate meaning in the law, shall be construed according to that meaning.

(3) The Maryland courts have applied the definition of “good cause” found in Black’s Law Dictionary. *See, In re Trevor A.*, 55 Md. App. 491,496, 462 A.2d 1245 (1982). Black’s Law Dictionary (7th Edition) defines “good cause” as follows:

A legally sufficient reason. Good cause is often the burden placed on a litigant ... to show why a request should be granted or an action excused....

(4) The Court of Appeals has held that the determination whether “good cause” exists to allow the waiver of a condition precedent is left to the discretion of the trier of fact and will only be reversed “where no reasonable person would take the view adopted....” *Rios v. Montgomery County*, 386 Md. 104, 121 (2005) (Citations omitted)

(5) The request does not constitute an “enlargement or extension” as defined in Section 27-107.01(a) of the Zoning Ordinance.

FINDINGS OF FACT

Zoning History

(1) A brief history of the zoning approvals applicable to this site is helpful in determining whether Applicant’s requests should be granted.

(2) The portion of the subject property impacted by Condition 3 (c), *supra*, is improved with a Kentucky Fried Chicken (“KFC”) fast-food restaurant with a drive-through aisle on 0.655-acre within Parcel A-13. In 2000 the Planning Board approved the original Detailed Site Plan (SP-00040) that authorized the construction of the KFC, in accordance with the 1998 West Hyattsville Transit District Development Plan for the Transit District Overlay Zone. (PGCPB Resolution No. 00-230)¹ While the drive-through lane was ultimately approved Staff noted its concern “with the potential traffic operation problems and unsafe situation between the exiting traffic from the ‘Drive Thru’ and the traffic that would be entering from Ager Road, at the ... site’s access closest to Ager Road” and recommended a condition to address its concern. (PGCPB Resolution No. 00-230, p. 11)

¹ This Examiner and the District Council may take official notice of the Planning Board’s Resolution No. 00-230 approving SP-00040.

(3) The 1998 TDDP was superseded by the 2006 Approved Transit District Development Plan and Transit District Overlay Zoning Map Amendment for the West Hyattsville Transit District Overlay Zone (“2006 TDDP”). The 2006 TDDP amended the permitted uses allowed. It provided the following introductory comment pertinent to the instant request:

The goal of the West Hyattsville TDDP is to provide a clear and predictable path for transit-oriented development (TOD) within the West Hyattsville Transit District Overlay Zone (TDOZ).

TOD is not simply development that happens to be located at or near a transit station. The 2002 Prince George’s County Approved General Plan (page 44) defines TOD as development that actively seeks to increase transit use and decrease automobile dependency....

The West Hyattsville Transit District is located in Planning Area 68 in the northern part of Prince George’s County. It encompasses [approximately 203] acres including the West Hyattsville Metro Station. This Metro Station is the first of four Green Line Metrorail stations serving northern Prince George’s County and is located just outside of the District of Columbia....

The District Council created the TDOZ in 1984 in order to address the problems of sprawl, traffic congestion, depletion of environmental resources, and the growing demand for housing opportunities. Development that meets this requirement is defined as TOD....

The main purpose of this plan is to maximize the public benefits from the West Hyattsville Metro Station. The plan sets out primary goals [including to] ... [e]nsure that all new development in the transit district is pedestrian -oriented....

(2006 West Hyattsville TDDP, pp. 1-4)

(4) The Planning Board resolutions recommending approval of the CSP and DSP that included Condition 3(c) provide, in relevant part, as follows:

The subject property is bounded to the south by Hamilton Street, and, across the street, by commercially developed property in the M-X-T Zone; to the east by Queens Chapel Road, and, across the road, by a metro parking property in the M-X-T Zone; to the west by Ager Road, and, across the road, by a metro parking lot in the M-X-T Zone; to the northeast by Hamilton Manor Apartments in the R-18 Zone; and to the north, by single-family homes in the R-55 Zone....

The subject parcels are already developed with various commercial buildings that present themselves as a shopping center. This DSP proposes no new physical development on-site, so the following is a description of the existing layout of the property.

The shopping center is comprised of multiple connected and disparate buildings

measuring a total of 64,740 square feet divided over 15 parcels, all of which are under the same ownership. The buildings are generally located no more than 14 feet behind the right-of-way line along Hamilton Street and Queens Chapel Road, although one building is set back further, at approximately 48 feet. The on-site parking is generally located behind the buildings, accessed from a public alley that runs along the rear of the property, although there are a few locations in which small parking lots are adjacent to the rights-of-way. Additionally, for most of the site's frontage along Hamilton Street and 31st Avenue, either angled or parallel parking spaces are located within the rights-of-way. The site is accessed from multiple driveways off of Ager Road, Queens Chapel Road, Hamilton Street and 31st Avenue.

Starting at the southwest corner of the site is Residue Parcel A-13, which is the subject of a prior approval of Detailed Site Plan DSP-00040 2, and is developed with a 2,839-square-foot, brick and stucco, fast-food, Kentucky Fried Chicken restaurant. This building sits within 2.5 feet of the right-of-way at the corner of Hamilton Street and Ager Road and the existing drive-through lane runs along the north side of the building, with parking beyond it. Within the eastern portion of this parcel is a one-story, cinder block, 4,523-square-foot building with three tenants, specifically a bakery, furniture store and liquor store. There is parking located between this building and Hamilton Street and within a parking lot that takes up the remainder of the eastern portion of the parcel....

The existing buildings on-site were mostly built prior to 1965 and have been the subject of various permits over the years. Detailed Site Plan DSP-00040, for Residue Parcel A-13, was approved by the Planning Board on December 31, 2000 (PGCPB Resolution No. 00-230), under the previous June 1998 *West Hyattsville Approved Transit District Development Plan for the Transit District Overlay Zone*, with six conditions. These conditions are no longer outstanding as they were complied with and completed through the certification, permit and construction processes....

Approved Transit District Development Plan and Transit District Overlay Zoning Map Amendment for the West Hyattsville Transit District Overlay Zone (TDDP). This document supersedes the Table of Uses for permitted uses in the Zoning Ordinance for the M-X-T Zone. Additionally, since the shopping center exists and no new construction is proposed, the site plan design guidelines of the Zoning Ordinance are not applicable....

The existing shopping center was renovated in 2001, 2006 and 2007 to create a unique, urban appearance, which does serve to create a strong street presence that is integrated with the surrounding commercial uses.... Proposed changes to the Table of Uses, as limited by the conditions of approval, will not reduce or compromise the compatibility of the existing shopping center with the other existing or proposed developments in the transit district.... The mix of uses will be enhanced by the expansion of permitted uses in the Table of Uses, as limited by the conditions of approval, and better enable the shopping center to sustain an independent environment of continuing quality and stability....The shopping center is located entirely within one-half mile of the West Hyattsville Metro Station. It is surrounded by sidewalks on the southern, eastern and western edges of the property, along Hamilton Street, Queens Chapel Road, and Ager Road, which provide connections to the pedestrian system within the transit district area. Proposed changes to the Table of Uses, as limited by the conditions of approval, will not reduce or

2 As noted *supra*, this "DSP" was entitled "SP" in the Planning Board's Resolution of Approval.

compromise the convenience or design of facilities provided for pedestrians in the development....

The applicant contends that the table of uses for this particular subarea is too restrictive and does not allow many uses common to similar shopping centers. The property was retained in the M-X-T Zone at the time of the approval of the July 2006 *Approved Transit District Development Plan and Transit District Overlay Zoning Map Amendment for the West Hyattsville Transit District Overlay Zone*. The existing shopping center development does not necessarily comply with all of the recommendations for the Developed Tier per the General Plan nor the *Approved Transit District Development Plan and Transit District Overlay Zoning Map Amendment for the West Hyattsville Transit District Overlay Zone*. However, it will remain as an existing use until such time as a redevelopment application is presented and, until then, it would be best if it remains a viable shopping center with legitimate retail uses....

The applicant is not proposing any new development or redevelopment to the existing shopping center. However, the current development is pedestrian-oriented as, generally, the buildings front on the street with parking in the rear. Additionally, in order to ensure all future tenants within this subject property are pedestrian-oriented, the applicant's request for approval of a fast-food restaurant with drive through as a permitted use is denied. However, a condition has been included in this approval that allows the existing fast-food restaurant with drive through within the subject property to remain as a valid, legal use....

This application is not consistent with the 2002 General Plan Development Pattern policies for the Developed Tier and this application does not conform with the commercial/retail land use recommendations of the 2006 *Approved Transit District Development Plan and Transit District Overlay Zoning Map Amendment for the West Hyattsville Transit District Overlay Zone*.

More particularly, the purpose of the application is to amend the table of uses within the *West Hyattsville Transit District Development Plan*. The West Hyattsville TDDP promotes moderate- to higher-density, pedestrian friendly development within a half mile vicinity of the metro station. The subject property is located in the Main Street Commercial/Retail District. It is part of the Hamilton neighborhood, which is envisioned to be the most active of the three neighborhoods due to its central location and diverse development mix....

In a letter dated October 12, 2010, the City of Hyattsville state the City is not supportive of many of the applicant's requested uses, as they are inconsistent with the intent of transit-oriented design. Due to the number of requested amendments to the Table of Uses, it is the City's position that the applicant's request for changes should be made through an application to revise the zoning of the TDDP, so that the requested amendments can be reviewed in a comprehensive manner.

The Planning Board found that the applicant is able to request a change to the list of allowed uses in T-D-O Zone per Section 27-548.09.01 of the Zoning Ordinance, which puts no limitation on how extensive the requested change can be....

(Exhibit 6 concerning DSP, pp. 1-6,8, 13-14, and 16; similar language found in Exhibit 8

concerning CSP)

Applicant's request

(5) Applicant owns the Queens Chapel Town Center, located within the municipal boundaries of the City of Hyattsville. Although it initially sought removal of Condition 3(c) imposed by the District Council in its original approvals of CSP-10002 and DSP-10011, Applicant amended its request to ask that Condition 3 (c) in both the CSP and DSP be revised as follows:

Within Queens Chapel Town Center, any eating or drinking establishment, with drive-through service, operating pursuant to an approved detailed site plan as of the effective date of County Council Resolution CR-24-2006, shall remain valid, be considered a legal use, and shall not be deemed a nonconforming use.

(Exhibit 9; T. 4-5)

(6) Harvey Maisel³ is one of the members in the Queens Chapel Town Center, LLC and was authorized to testify on Applicant's behalf. He noted that Applicant purchased the subject property approximately 20 years ago from the original owners. (T. 8) The prior owners made an effort to maintain the property but approximately thirty percent of the shopping center was boarded up. Applicant made improvements including new store fronts , new roofs, parking and mechanical systems. It became a "vibrant center." (T. 8) In the spring of 2021 KFC "had a significant decline with business " and decided to leave and not renew their lease. (T. 9, 13-14) Applicant has been actively marketing the site since that time but has learned that many possible tenants are concerned that they may not be able to operate with the drive-through portion of the site given the language in Condition 3 (c) that precludes operation of a drive-through if the eating and drinking establishment is closed for more than 180 days.

(7) Mr. Jonathan Weiss, an agent for the Applicant and the principal broker at SES Realty Advisors, testified on Applicant's behalf. He has been the leasing agent for the subject property for approximately twenty years and has led the effort to replace KFC. (T. 25-26) He provided the following testimony as cause to remove Condition 3(c):

We've done a comprehensive ... marketing plan to solicit and ... find replacement tenant for the property. We've talked to a variety of tenants including McDonald's, Boston Market, Roaming Rooster, Pollo Campero, Mezah, Shook, Hook and Reel, Krispy Kreme, Burger King, among others....

³ Mr. Maisel's name was misspelled as "Mazell" in the transcript of the hearing.

[Those we've spoken to are concerned] over whether the condition for the use of that drive-thru will in fact allow them to utilize it for a couple of different reasons. Number one, ... following KFC's vacating the building, if that 180 days passes, whether they would be able to get a use and occupancy to use for that purposes. And secondly, from some of the larger tenants, we're required over time, to renovate their properties every seven to ten years, typically. Whether they, if they were in a position to have to shut down the restaurant in order to do a full renovation and the renovation exceeded 180 days, whether that would also figure [as] an issue for them to reopen and utilize the drive-thru.

Those concerns have turned away, unfortunately, the bulk of the tenants we've spoken with who want to use that drive-thru as part of their business operation....

[A] lot of the national tenants ... are typically risk adverse and don't want to make the investment in the process if there is sort of a cloud of uncertainty....

So I think the concern ... really comes down to uncertainty.... [T]he permitting process, construction process is tricky....[Y]ou don't know the what ifs, what could happen.... So I think you know in terms of the renovation process, you know, you hope you have all your ducks in a row so that you can start construction and complete construction, but you're dealing with utilities, you're dealing with inspections and what an inspector may find, you know, during that process. And these tenants are, they're risk adverse, you know, they don't want to make the financial commitment or time commitment if they're not comfortable that they're going to be able to ... open and operate.

(T. 26-28, 34-35)

(8) Mark Ferguson, accepted as an expert witness in land use planning, testified and prepared a Land Planning Analysis in support of the request. The Analysis provided the following reasoning to support the expert's belief that the condition in the CSP and DSP should be revised:

The applicant's intent is to retain the ability to re-lease the existing building containing the former KFC eating and drinking establishment with drive-through services (which closed prior to March, 2021) to another similar national credit tenant....

The modern development history of the subject property begins in the early 1960's with the commercial development of what is now known as Queens Chapel Town Center. Circa 2000, a building at the corner of Ager Road and Hamilton Street was demolished, and the construction of a KFC restaurant with drive-through service was approved by DSP-00040. At that time, the June, 1998 *Approved Transit District Development Plan for the West Hyattsville Transit District Overlay Zone* permitted an "Eating [or] Drinking Establishment" in Subarea 4A of the transit district without any restrictions regarding drive-through service.

In May, 2006, CR-24-2006 approved a new *Approved Transit District Development Plan and Transit District Overlay Zoning Map Amendment for the West Hyattsville Transit District Overlay Zone*, which permitted (only) "Eating or drinking establishments with live music and patron dancing," again without restrictions regarding drive-through service. This 2006 Transit District Development Plan is still the applicable plan to the subject property....

At the outset, it should be stated that it is an open question in this planner's mind as to whether the decision of KFC, the lessee of the building in question, to cease its operation was beyond the control of the Applicant in this matter, who is the owner of the property. If it is affirmatively determined that the actions of the lessee are beyond the control of the owner, then the owner could retain the right under the provisions of condition(s) 3c to re-lease the property to a similar use as a valid, legal not-nonconforming use. If, however, it is determined that the removal of Condition(s) 3c is necessary to allow the continued occupancy of the former KFC as another eating and drinking establishment with drive through service, the following discussion is offered.

Personal communications by this planner with Applicant indicated that notwithstanding a proffer of the foregoing interpretation of Condition 3c, the Applicant has found that national credit restaurant tenants are not willing to enter into a lease for the subject property because of uncertainty about the durability of that interpretation.

If a national credit tenant is not willing to lease the subject property, the other available option is a small local business. This planner's extensive experience with this business sector is that small local businesses are uniformly undercapitalized, and have very limited ability to fund the cost of improvements which would transform the existing structure from looking like a former KFC occupied by a small local business. It is further this planner's experience that – even independent of the effect of the ongoing COVID pandemic – that there is an increased demand for drive-through service at all levels of the restaurant industry up to and including “fast-casual” service. Restricting the future use of the property from drive-through service will greatly inhibit the ability of the owner to maintain this site as part of “a viable shopping center with legitimate retail uses” as envisioned in the Planning Board's recommendation.

It was further indicated to this planner by the Applicant that it is the Applicant's belief that the feasibility of redevelopment of the subject property for the kind of development envisioned by the *Transit District Development Plan* (TDDP) is still perhaps fifteen to twenty years in the future: The current TDDP provides that buildings fronting Ager and Hamilton Streets be a minimum of three stories in height and a maximum of six stories, which would require a complete redevelopment of the entire Queens Chapel Town Center, beyond the limits of the subject property. The subject property is narrow, with a buildable width of less than 120', too narrow for the multi-level parking structure which would be required to support the development envisioned by the TDDP.

In summary, this planner believes that the perceived uncertainty of the application of Condition(s) 3c by the national credit restaurant tenants who are most able to maintain a viable use at the subject property, and the infeasibility of a subject-property-specific redevelopment constitute good cause for addressing the content of Condition(s) 3c.

This planner does note, however, that the deletion of Condition(s) 3c could raise an unintended consequence: Because (1) the applicability provision of the 2006 TDDP which preserved the conformity of the existing KFC only lasted until a site plan was filed; and (2) a site plan (CSP-120002 & DSP-10011) was in fact filed in 2010, the removal of Condition(s) 3c would make the KFC nonconforming. Since the closure of the KFC in or prior to March, 2021 would (as of this writing) entail a discontinuation of more than 180 days, the ability to reestablish a different eating and drinking establishment with drive-through service may no longer be available.

Accordingly, this planner would instead recommend a modification of Condition(s) 3c to simply delete the final sentence, and instead have it read:

“Within Queens Chapel Town Center, any eating or drinking establishment, with drive-through service, operating pursuant to an approved detailed site plan as of the effective date of County Council Resolution CR-24-2006, shall remain valid, be considered a legal use, and shall not be deemed a nonconforming use. Such eating or drinking establishments, with drive-through service, and their underlying detailed site plans may be modified pursuant to the existing provisions relating to revisions or amendments to detailed site plans generally as they exist in the Zoning Ordinance.”

Finally, the modification of Condition 3c would not constitute an enlargement or extension of the existing development.

(Exhibit 5, pp. 1, 4-5)

(9) At the hearing, Mr. Ferguson provided the following interpretation of Condition 3 (c) in its current iteration:

Well, there [are] three components to it. The first provides that eating and drinking establishments with drive-thru's which existed prior to the adoption of the 2006 West Hyattsville TDDP are considered valid, not nonconforming uses and that ... nonconforming status is confirmed by the second sentence, which says that should you need to alter them, you go through the normal Site Plan amendment to process rather than a special exception which would be the case were the use considered a nonconforming use.

However, the third condition introduces the stipulation which is commonly associated with nonconforming uses, namely that if they are discontinued for a period of more than 180 days then they are no longer considered to be a legal use.

Now I will add that there is a proviso in that stipulation... and that is ... if the discontinuation or the conditions of nonoperation ... were beyond the control of the owner or the holder of the use and occupancy permit then that would allow it to go forward. So I would argue that the discontinuation of operation and subsequently the lease by KFC was a business decision of the tenant and therefore beyond the control of the owner of the property and therefore doesn't interrupt the nonconforming use. That would be how I read it.

But I'm not the potential lessor and what Mr. Weiss has told us is that regardless of my reading ... their perception is that there is sufficient uncertainty as to restrict them from entering into a lease agreement....

[Moreover] their ability to secure a ... vital active tenant [on this pad site may be] the principal driver of traffic to a retail... establishment.... [T]he ability to have a vital ... active use there, is a market function.... Certainly as a planner ... with a

special interest in long activity and... revitalization it's hard, it's not just a simple matter of zone it and they will come. It's really an incremental effect of building the conditions where reinvestment makes sense....

So having a, whether it's vacant or even a less successful, less vital, less active use at that property, will have affects not just on the center and you know [Applicant's] financial return, but really on the whole of the surrounding neighborhood and thereby for the ability of the Transit District to continue to redevelop and revitalize....

[T]he City ... [is not wrong in arguing that a] drive-thru is not a transit friendly pedestrian oriented use.

That having been said, you can't just snap your fingers and make the use that you don't want disappear and the use that you do want appear because there are many constraints that stand in the way of something happening.... Mr. [Maisel] testified ... that he did not believe the redevelopment of this part of the entire center was feasible on its own, but would be in context of a redevelopment of the whole center. From a zoning standpoint I agree because the dimensions of this property are very, very narrow.

What the Transit District Development Plan insists on for this property is a building of three to six stories occupying a substantial amount of its frontage.... The site is just too small to physically accommodate multistory development. The rest of the center has ... ample areas that are not dimensionally constrained and will support parking structures that will support development on this site. But this site is a stand-alone, it can't.

(T. 46-47, 50,54-55)

(10) At the conclusion of the hearing held by this Examiner, Applicant's counsel provided a closing memorandum. (Exhibit 21) The memorandum explained that the property would be rezoned to the LTO-Core Zone upon the effective dates of the Countywide Map Amendment and the revised Zoning Ordinance (scheduled to occur on April 1, 2022). That Zone does not permit the current use (which has been renamed to "quick service drive-through restaurant"), but as a preexisting use it will be deemed conforming under Section 27-1704 (d) of the revised Zoning Ordinance.

(11) As a result of these changes to the County Code Applicant amended its request once again, as follows:

Within Queens Chapel Town Center, any eating or drinking establishment, with drive-through service, operating pursuant to an approved detailed site plan as of the effective date of County Council Resolution CR-24-2006, shall remain valid, be considered a legal use, and shall not be deemed a nonconforming use. Notwithstanding the above, any future redevelopment of the entire Queens Chapel Town Center Property, as shown on CSP-

10002 and DSP-10011, shall not include a quick service restaurant with drive-through.

(Exhibit 22)

Opposition's concerns

(12) The City of Hyattsville submitted a letter dated December 8, 2021, noting its opposition to the request, that included the following support for its position:

The Hyattsville City Council voted in opposition to the applicant's request to eliminate Condition 3c of Planning Board Resolutions [No.] 11-07 and No. 11-08. The Subject Property is less than 0.25 miles from the West Hyattsville Metro Station and a continuation of the drive-through use is in direct contradiction to the vision and guidelines of the West Hyattsville Transit District Development Plan.

In its most recent vote to oppose the applicant's request, the City Council reaffirmed its May 16, 2011 vote in opposition [to] DSP-10011 and CSP-10002, a prior request for amendment to the Table of Uses in the West Hyattsville Transit District Development Plan (TDDP). In its letter of opposition, the City stated that the proposed uses contradicted the intent of the main street commercial districts which should provide for a more pedestrian and non-motorized vehicle-oriented environment. The City also requested the District Council consider specifically prohibiting the pre-existing non-compliant use of drive-thru establishments when a property becomes vacant and/or transfers ownership.

The City Council, nor the community it is elected to represent, support the applicant's request, due in part because land-use policies explicitly do not support restaurant with drive-through uses because as an auto-centric use, it undermines, and in no way furthers the goal of, both the current and new West Hyattsville Transit District Development Plan....

(Exhibit 17)

(13) Mr. Alexi Sanchez-Boado, a resident of the City of Hyattsville, provided the following testimony in opposition to the request:

If you've spent 20 years in this neighborhood and in this area specifically of Hyattsville, you'll have noticed that we've had especially in the last five years a serious problem with homelessness and loitering and drunkenness. And our fear as a community and we've spoken about this on our private list serve is that additional fast food, it that's what they intend to bring such as something that has a cheap dollar menu or something to that effect, would catalyze more loitering because you would have a bunch of ... inebriated men looking for something to eat at all hours of the day. So that's a big fear for us. The other fear is garbage, of course, and traffic.

I mean this plan is incongruous with pedestrian, with a pedestrian intense area , as the City has said. The blind corner coming out of that alleyway which would increase traffic if they got their way which is to have a very heavily used drive-thru, if you've tried to cross that alleyway day or not, especially at night, especially in the wintertime, the drivers are

looking the opposite direction and they cannot see you coming until you're right in their path. I do it all the time, it's terrifying....

The ... other issue is that somehow and I wonder why this is, the poor communities are always saddled with garbage food. And today we've been lucky in that we haven't had an influx of fast food restaurants right in the area, but we don't ... need a KFC, we don't need a McDonald's, we don't ... need junk food. Poor neighborhoods don't need access to bad quality food, which is what they could potentially do if ... that kind of establishment is what decides to lease the ... location.

(T. 76)

(14) in response to cross examination by People's Zoning Counsel, Mr. Boado admitted the neighborhood was more "working class" than "poor", noting the number of "alcohol places" and a check cashing business nearby. (T. 77-78)

CONCLUSIONS OF LAW

(1) Pursuant to Section 27-135(c), *infra*, the District Council may amend the conditions for good cause. Good cause has been shown to accept the revised condition as proffered if the request is considered in a vacuum (i.e., without consideration of the goals of the TDDP, the basis for the imposition of the condition initially, and the City's concerns) since there may conceivably be obstacles in finding a tenant, or in developing this portion of the shopping center in the manner conceived by the TDDP. However, I don't believe good cause can be considered in a vacuum.

(2) While Applicant notes that it may have an easier time locating a new tenant if the condition is revised, it has known for over twenty years that the uses within that area were to become more pedestrian friendly and less dependent on vehicular traffic, and that the drive-through should eventually disappear. Moreover the Zoning Ordinance has been revised and the use is no longer permitted in the new zone placed on the property. I would, therefore, recommend that the request be denied if it were not for the language at issue in Condition 3(c).

(3) The condition notes that the use shall remain a legal use but "[i]f the use is discontinued for a period of 180 days or more consecutive calendar days, unless the conditions of non-operation were beyond the control of the owner or holder of the use and occupancy permit, then the use shall no longer be considered a legal use."

(4) People's Zoning Counsel correctly noted that the law in Maryland, absent statutory language to the contrary, holds that a nonconforming use can be considered abandoned upon a finding of an intention to abandon or relinquish or some overt act or failure to act which implies that the owner neither claims nor retains any interest in the use. (Landau v. Board of Appeals, 173 Md. 460, 196 A, 293 (1938); Sizemore v. Town of Chesapeake Beach, 225 Md. App. 631 (2015)). If there is a statute the intent of the party abandoning

the use is eliminated as a factor for consideration. (Sizemore, at 651)

(5) It is beyond cavil that the tenant (holder of the use and occupancy permit) abandoned its use of the property when it ceased operations in early 2021. While the District Council included a statutory standard in its ordinances of approval of the site plans the language it used arguably allows the Applicant (as owner) to continue to lease the property to an eating or drinking establishment with drive-through since there is no evidence in the record to indicate Applicant had any control over KFC's decision to vacate.

(6) I would therefore urge the District Council to allow a revision to the condition but make clear that the use must cease if it discontinues within some period of time after the District Council's action unless the delay is a result of permissible renovations or to address Code violations, and if either of those situations are at issue the use shall be reestablished within one calendar year from the date when the use last ceased.

RECOMMENDATION

I would recommend that Condition 3(c) in CSP-10002-C and DSP-10011-C be revised as follows:

Within Queens Chapel Town Center, any eating or drinking establishment, with drive-through service, operating pursuant to an approved detailed site plan as of the effective date of County Council Resolution CR-24-2006, shall remain valid, be considered a legal use, and shall not be deemed a nonconforming use. Notwithstanding the above, any cessation of the use for a period of time in excess of 180 calendar days that is not caused by permissible renovations to the use nor required to address Code violations shall constitute abandonment of the use. If the use has temporarily ceased operation due to permissible renovation or to address a Code violation it shall be reestablished within one (1) calendar year from the date upon which the use last ceased.

Future redevelopment of the entire Queens Chapel Town Center Property, as shown on CSP-10002-C and DSP-10011-C, shall not include a quick service restaurant with or without drive-through if the use is not permitted in the zone at the time of redevelopment.