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

ZONING MAP AMENDMENT
A-10036

DECISION

Application:	R-T to C-M Zone
Applicant:	Visconsi Land Co., Ltd
Opposition:	None
Hearing Dates:	April 13, and May 25, 2106
Hearing Examiner:	Joyce B. Nichols
Recommendation:	Approval with Conditions

NATURE OF PROCEEDINGS

(1) A-10036 is a request for the rezoning of approximately 2.42 acres of R-T (Townhouse) zoned land, located in the southeast quadrant of the intersection of Donnell Drive and Pennsylvania Avenue (MD 4), identified as 3700 and 3710 Donnell Drive, District Heights, Maryland, to the C-M (Commercial Miscellaneous) Zone.

(2) The Applicant argues that the District Council made a mistake in the zoning designation for the subject property in the most recent comprehensive rezoning of the area (the 2010 Approved Subregion 4 Master Plan and Sectional Map Amendment). The Applicant does not allege a change in the character of the neighborhood since the 2010 Subregion Master Plan and Sectional Map Amendment.

(3) The Technical Staff recommended that the Application be approved, Exhibits 8 and 13, but that the subject property be rezoned to the C-O (Commercial Office) Zone, and the Planning Board recommended that the Application be approved and that the subject property be rezoned to the C-M Zone, with conditions. (Exhibit 43)

(4) No one appeared in opposition to the instant Application.

FINDINGS OF FACT

Subject Property

(1) The subject property is a combination of two adjoining parcels, part of Parcel A and Parcel 240. Parcel A is part of record plat recorded April 11, 1969, as Plat WWW71-72. Parcel 240 is not subject to a preliminary plat of subdivision or record plat and is a legal acreage parcel.

(2) The instant portion of Parcel A is improved with a vacant two-story office building last used as a bank and consists of approximately 1.35 acres. Parcel 240 is unimproved and consists of approximately 1.35 acres.

(3) The subject property adjoins the remainder of Parcel A (not a part of the instant Application) to the south. Parcel A is accessed via two driveways from the east side of Donnell Drive. Parcel 240 has a long panhandle drive to Donnell Drive for frontage and access, which is not developed. Neither parcel has access to Pennsylvania Avenue (MD 4).

History

(4) The 2010 Approved Subregion 4 Master Plan and Sectional Map Amendment (Zoning Change LF8) reclassified the subject property from the C-O to the R-T Zone.

Master Plan and Sectional Map Amendment

(5) The Plan Prince George's 2035 Approved General Plan (Plan Prince George's 2035) designates this area in the Established Communities Growth Policy area. The vision for Established Communities is a context-sensitive infill and low to medium-density development. This is to be accomplished through maintaining and enhancing existing public services (police and fire/EMS), facilities (such as libraries and schools), and infrastructure in these areas (such as sidewalks), to ensure that the needs of the existing residents are met. The Plan Prince George's 2035 land use goal is to direct future growth toward transit-oriented mixed-use centers in order to expand the commercial tax base, to capitalize on existing and planned infrastructure investments, and to preserve agricultural and environmental resources.

(6) The 2010 Approved Subregion 4 Master Plan and Sectional Map Amendment recommended the retention of the existing C-O zoning on both properties. A request for a zoning change from the C-O Zone to the R-T Zone for Parcel 240 as part of a larger lot consolidation was submitted to the Public Hearing record. Planning staff reviewed the request during the transcript analysis and the digest of testimony of the Public Hearing comments and recommended that Parcel 240 be changed from the C-O Zone to the R-T Zone as requested as part of Change Number LF8. Somehow, this change was also applied to this part of Parcel A, as well.

Neighborhood and Surrounding Uses

(7) The subject property is located in a neighborhood defined by the following boundaries:

North - Pennsylvania Avenue (MD 4)

East- Forestville Road

South- Suitland Parkway

West- Walters Lane

The Applicant extends the neighborhood north to Marlboro Pike (MD 725), which overemphasizes the commercial uses found between Pennsylvania Avenue and Marlboro Pike. Pennsylvania Avenue is a four-to six-lane divided highway which separates the residential areas to the south from the large shopping centers to the north. It is unreasonable to have it bisecting a neighborhood rather than acting as its northern boundary. Staff's neighborhood contains a mix of uses with commercial uses predominating along the north side of Pennsylvania Avenue (MD 4), and directly to the rear of the site, where a self-storage building is located. Other commercial and industrial uses are found to the east along Forestville Drive and to the west at the intersection of Pennsylvania Avenue (MD 4) and Walters Lane. The remainder of the subject neighborhood to the west, east and further south is a mix of single-family and multifamily residences. The Forestville Military Academy is located to the south at the southern terminus of Donnell Drive.

(8) The property is surrounded by the following uses:

North- Across Pennsylvania Avenue (MD 4) is the Penn Mar Shopping Center in the C-S-C (Commercial Shopping Center) Zone.

East- The Holly Hills Condominium complex in the R-18 (Multifamily Medium Density Residential) Zone.

South- A self-storage business in the C-M Zone and undeveloped land in the R-T Zone.

West- Across Donnell Drive are the Penn Mar Apartments in the R-18 Zone.

Applicants Proposal

(9) The Applicant is requesting rezoning of the subject property from the R-T Zone to the C-M Zone.

(10) The Applicant contends that three mistakes were made by the District Council in applying the R-T Zone to the subject property. Your Examiner concurs with the Applicant's contentions as does the Technical Staff.

The first mistake is that in contravention of the provisions of §27-223(g)(2), the District Council created a Nonconforming Use on the subject property without identification of a significant public benefit and justification of the proposed rezoning; the then-existing use at the subject site, a bank, is not a permitted use in the R-T Zone. This action further arose out of a compendium of errors in the Sectional Map Amendment approval process.

The second mistake is related to a series of mistaken assumptions about the developability of the subject site for townhouses. Because of the proximity of the subject property to Pennsylvania

Avenue (MD 4), limitations on its physical access, reliance on a presumption of common ownership with property to the south, and related mistaken presumptions on the ability to develop the site in a comprehensive matter with the property to the south which ignored the existence of a significant area of regulated natural features, and ignorance of provisions of the Code which specifically provide that townhouses are not even a permitted use on the subject property, the rezoning of the subject property to the R-T Zone in the Sectional Map Amendment was a mistake.

The third mistake the Applicant has cited is that the Sectional Map Amendment did not follow the recommendations of the Master Plan with respect to the specific ultimate land use intent or the expressed goals of the Plan text.

APPLICABLE LAW

(1) The Applicants request for a rezoning to the C-M Zone must satisfy the provisions of §27-157(a) of the Zoning Ordinance, which provides in pertinent part:

> (a) **Change/Mistake rule**.
> (1) No application shall be granted without the applicant proving that either:
> (A) There has been a substantial change in the character of the neighborhood; or
> (B) Either:
> (i) There was a mistake in the original zoning for property which has never been the subject of an adopted Sectional Map Amendment; or
> (ii) There was a mistake in the current Sectional Map Amendment.

(2) The Applicant must also further the purposes of the C-M Zone, §27-459(a)(1):

> (1) The purposes of the C-M Zone are:
> (A) To provide locations for miscellaneous commercial uses which may be disruptive to the harmonious development, compactness, and homogeneity of retail shopping areas;
> (B) To provide these locations, where possible, on nonresidential streets; and
> (C) To provide concentrations of these uses which are relatively far apart.

(3) There is a strong presumption of the correctness of original zoning and of comprehensive rezoning. Pattey v. Board of County Commissioners, 271 Md. 352, 317 A.2d 142 (1974). Accordingly, strong evidence is required to overcome that presumption:

> [Z]oning and rezoning classifications are legislative functions. The role of the courts in zoning matters consists of a review of the zoning authority's decision-making process to ensure that it has not acted arbitrarily, capriciously or unreasonably. Absent any of these irregularities, the courts will leave untouched the quasi-judicial decision of the zoning authority.

Chesapeake Ranch Club, Inc. v. Fulcher, 48 Md. App. 223, 426 A.2d 428, 430 (1981).

(4) The Applicant bears the burden of proof that its request to change the zoning classification for the subject property will not be a detriment to the public interest. The Bowman Group v. Dawson Moser, 112 Md. App. 694, 686 A.2d 643 (1996); Harford County v. Preston, 322 Md. 493, 588 A.2d 772 (1991). However, "a more liberal standard is applied when the property is being reclassified from one commercial subcategory to another than is applied when the reclassification involves a

change from one use category to another." Tennison v. Shomette, 38 Md. App. 1, 379 A.2d 187, 190 (1978).

(5) Once evidence of mistake or change is adduced, evidence must be presented which justifies the correctness of the new zone being sought. Boyce v. Sembly, 25 Md. App. 43, 334 A.2d 137 (1975); Mayor & Council of Rockville v. Stone, 271 Md. 655, 319 A.2d 536 (1974)

CONCLUSIONS OF LAW

(1) The process of the approval of the Master Plan and Sectional Map Amendment was replete with mistakes affecting the subject property.

(2) In the Preliminary Master Plan and Sectional Map Amendment, Map 14-2, "Proposed Land Use," indicated Commercial land use for Parcel A, and Medium-High Residential 8 to 20 du/acre" land use on Parcel 240[1]. Map 14-4, "Proposed Zoning," was not keyed but had a light pink color on both parcels which suggests retention of the previously-existing C-O Zone for both parcels, contradicting Map 14-2.[2] The Map and text specifically describing Change LF8 of the Sectional Map Amendment, illustrated the retention of the C-O Zone on Parcel 240, however the text describing the property included Parcel 240 for the zoning change from C-M to R-T, while the area of the zoning change as laid out in the description would not have included the area of Parcel 240.

After the publication of the Preliminary Master Plan, a letter was entered into the record of the District Council and the Planning Board's joint public hearing of September 9, 2009 by Mr. Russell Shipley, representing the two then-owners of Parcel A, "Donnell House" (lying immediately to the south of the subject Parcel A, "Penn-Mar Office Center") and the subject Parcel 240. This letter was marked as Exhibit 56 of that hearing. The letter indicated that the owners had sought application of the C-M Zone for Parcel 240, and R-T for the undeveloped residue of Parcel A, "Donnell House," but that they would accede to the Planning Staff's suggestion that the R-T Zone be applied to Parcel 240, "in order to encourage a comprehensive residential infill project that would be compatible with existing land uses,"[3] and to ensure that the C-M Zone be retained over the area physically occupied by the existing self-storage facility.

Subsequently, the Planning Staff published a digest of the testimony received at the joint public hearing; its summary of the change included a mistaken description of the Proposed Sectional Map Amendment action (the C-M to R-T was described, but not including the previously-retained area of C-O on Parcel 240) and in the Staff Recommendation section a mistake was made in the area to be rezoned to R-T (2.21 acres of Parcel A, "Donnell House" instead of 3.45 acres).

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1 M-NCP&PC, *Preliminary Subregion 4 Master Plan and Proposed Sectional Map Amendment* (August, 2009), p.404.
2 Ibid., p. 416.
3 Russell Shipley, Letter to Marilyn Bland. September 9, 2009 (Exhibit 56 of September 9, 2009 Joint Public Hearing).

On December 3, 2009, the Planning Board adopted Resolution 09-163, adopting the Master Plan with a number of amendments. Amendment 24 was to, "change the proposed zoning for LF8 to R-T zoning on Parcel 240 and the 2.21-acre portion of Parcel A, and retain the C-M zone on the area containing the self-storage facility." This amendment perpetuated the error in the staff recommendation in the digest of the joint public hearing testimony.

On February 2, 2010, the District Council held a work session to consider the Planning Board's adopted Master Plan and Sectional Map Amendment. None of the materials presented to the District Council contained any specific reference to the subject property. The property was circled on one of the slides, but the circle was keyed instead to reference the rezoning of nearby publicly-owned park space to the R-O-S (Reserved Open Space) Zone.

On March 2, 2010, the District Council adopted Resolution CR-15-2010 proposing amendments to the Adopted Master Plan and Sectional Map Amendment. In this Resolution, there was a revision proposed as Amendment 17 affecting zoning Change LF8, intending to apply the C-S-C Zone in lieu of the adopted R-T Zone, but closer examination reveals that this Change was meant to apply instead to a tract on Suitland Road, more than a mile from the subject property.

On June 1, 2010, the District Council ultimately adopted CR-49-2010, approving the Subregion 4 Master Plan. This Resolution perpetuated the amendment to Change LF8 proposed by CR-15-2010, this time as Amendment 30. Neither CR-15-2010 nor CR-49-2010 contained changes to the Planning Board's adopted action.

Nevertheless, when the Subregion 4 Master Plan was published, Change LF8 illustrated the extension of R-T zoning over the subject Parcel A, "Penn-Mar Office Center." The area of change from C-M to R-T was corrected from 2.21 acres to 3.445 acres, but the area of change from C-O to R-T only included to 1.354-acre area of Parcel 240. The "Property Description" did not include Parcel A, "Penn-Mar Office Center," but the property description (which had been left blank in the Preliminary Master Plan) did include the bank on the subject Parcel A.[4]

This action created a nonconforming use of the bank. Furthermore, the bank, not being aware of the rezoning, subsequently closed their operations and sold the property, causing the nonconforming use to lapse. While this zoning action was clearly in part arising from an apparent mapping error during the final publication, the recitation of the history of the Plan approval is intended to illustrate that errors affecting the subject property were perpetuated throughout the approval process.

(3) In the recitation of the approval history, the letter from Russell Shipley acceding to the staff's recommendation for the application of the R-T Zone to Parcel 240 is instructive as to the assumptions and intent behind the Sectional Map Amendment's action. The prior owners acceded to the Staff's recommendation for R-T to "encourage a comprehensive residential infill project that would be compatible with existing land uses."

4 M-NCP&PC, *Approved Subregion 4 Master Plan and Endorsed Sectional Map Amendment* (June, 2010), p.482.

The Staff's intention that the zoning of Parcel 240 would enable a comprehensive residential infill project – on which the District Council clearly relied in its zoning action – was a mistake for several reasons.

The first reason is that there is a consequential regulatory impediment to the development of townhouses. Because the site is located in a Revitalization Tax Credit District, the use of the property for the development of townhouses in the R-T Zone is, amazingly enough, not a permitted use at the subject property. This was the case at the time of the approval of the Master Plan and Sectional Map Amendment: The proscription was enacted by CB-112-2004, which remains in force today.

The second reason is that the property is dimensionally unsuitable for the development of townhouses, given its particular location. The southern edge of Parcel 240 is 228.20' from the southern edge of the Pennsylvania Avenue (MD 4) right-of-way (classified as an Expressway), along which the planned Purple Line extension from New Carrollton to National Harbor has been shown on the November, 2009 Master Plan of Transportation, as well as in the subject Master Plan.[5] Section 24-121(a)(4) in the Subdivision Ordinance of the County Code provides that, "Residential lots adjacent to an existing or planned roadway of freeway or higher classification, or an existing or planned transit right-of-way, shall be platted with a depth of three hundred (300) feet." Given that this 300' requirement, intended to protect residential development from the adverse effects of noise and poor air quality which are associated with major roadways, exceeds the depth of the property without even allowing for the additional depth necessary to provide for access and buffering from the adjacent self-storage facility, the assumption that the property is physically suitable for townhouse development was mistaken, whether it was a part of a comprehensive development with the remainder of Parcel A, "Donnell House," or not.

If the C-O Zone were restored only to Parcel A, "Penn-Mar Office Center," additional dimensional impediments to the development of Parcel 240 with townhouses would be created. The area of Parcel 240, approximately 1.3265 acres, is less than the 2-acre minimum provided for by Section 27-443(h)(1) and, the property has only 13.81' of frontage on Donnell Drive, which is insufficient to meet the requirement for 100' of frontage at the front street line.

The third reason is that the environmental constraints associated with the perennial stream which crosses Parcel A, "Donnell House" make the creation of a comprehensive residential infill development unlikely. The existence of the perennial stream and its regulatory buffer, one hundred year floodplain, nontidal wetlands and adjacent steep slopes, present a barrier to a physical connection between any development on Parcel 240 and the Sectional Map Amednmentll remaining developable area on Parcel A, "Donnell House." These environmental constraints, coupled with the existence of a designated strip of land for access to Donnell Drive, suggests that obtaining a permit to cross the nontidal wetlands would be difficult to obtain as a feasible alternative exists which would avoid the impact.

5 *Approved Master Plan*, p.246.

The final reason is that there was a mistaken assumption that Parcel 240 would remain in common ownership with Parcel A, "Donnell House" so as to be able to eventuate the comprehensive residential infill development. Even at the time of the approval of the Master Plan, the two parcels were separate legal parcels, owned by separate legal entities. The environmental constraints further emphasize the separate character of the two parcels, making reliance on the joint developability of the two parcels unreasonable.

Parcel A, "Penn-Mar Office Center" and Parcel 240 share a common situation, frontage, access and topography. It is these two parcels which should share common zoning (as they always had prior to the approval of the current Sectional Map Amendment,) not Parcel A, "Donnell House" and Parcel 240, as provided for by the Sectional Map Amendment.

(4) The text of the Sectional Map Amendment opens with the following statement of its intent: "This chapter presents the sectional map amendment necessary to implement the vision of this master plan and to bring the zoning of the master plan area into conformance with the land use plan (See maps 14-1 and 14-2 on pages 370 and 380)."[6]

The content of the Land Use Plan, however, is not in concert with the implemented R-T zoning. Map 14-2, entitled "Proposed Land Use," shows "Commercial" land use for Parcel A, and "Medium High Density Residential 8 to 20 du/acre" land use for Parcel 240.[7] This recommendation replicates the recommendation of Map 4-3, entitled "Proposed Land Use Plan."[8] As noted supra, however, the Plan's appended Land Use Map recommends "Commercial" land use for the subject property as well as the parcel immediately to the south. This recommendation was also carried forward in the 2012 General Plan's Generalized Future Land Use Map.9

No specific Master Plan recommendation for the subject property was made in the Master Plan text, but many of the Plan's recommendations are applicable.

The subject property is located in (what was at the time of the adoption of the Master Plan) the Pennsylvania Avenue Corridor. The Master Plan contained a brief discussion of the Pennsylvania Avenue Corridor:

> "A large portion of the corridor frontage stretching from Forestville Road to Southern Avenue is dedicated to existing single-family residential development and higher density, gated apartment/condominium complexes, both of which currently side or back onto Pennsylvania Avenue. Given the current role, development pattern and condition of the corridor, the potential for future mixed-use redevelopment is viewed as limited to key intersections at Donnell Drive and Silver Hill Road where higher density residential and

6 Ibid, p.377.
7 Ibid., p.380.
8 Ibid., p. 62.
9 *General Plan*, as amended by Prince George's County Planning Board Resolution 14-10, Attachment B, p. 9 (not affected by Revisions in CR-26-2014).

commercial development could be redeveloped as higher, vertically integrated mixed-use areas."[10]

In the Plan's text in its Land Use and Urban Design element, the Plan lays out its guiding principles, stating that, "the land use plan for Subregion 4 is built upon the following key guiding land use principles that emerged from the community's input and professional analysis made during the public planning process:

- Focus mixed-use development in the designated urban growth centers.

- Reinforce commercial development along main streets and in corridor nodes and regional centers"[11]

The Plan then lays out an "overall approach to forming land use recommendations for Subregion 4." In it, the text states that,

> "Specifically, the future land use plan presented in this section incorporates changes that are suggested from the proposed plans for the General Plan centers, the opportunity sites concept development plans, the Marlboro Pike Sector Plan, and additional land use changes within the living areas that aim to resolve issues of incompatible uses, economic development, and quality of life. (See Map 4-2 on page 61.)"[12]

Unfortunately, the key to Map 4-2, entitled "Proposed Generalized Land Use and Community Design Framework Concept," is incomplete; a description of the pink designation which overlays the subject property and the (self-storage) property to the south is not provided and is a lighter tint of pink than the red-tinted (and also unkeyed) designation for the shopping centers along Donnell Drive north of Pennsylvania Avenue, but a comparison with other similarly tinted areas (i.e. Walker Mill Business Park or the industrially-zoned areas near the Pennsylvania AvenueI-495 interchange) suggests light industrial or possibly service commercial land use. In any event, the designation on this Map is consonant with the ultimate "Commercial" recommendation on the attached Land Use Map at the corridor node at the intersection of Pennsylvania Avenue (MD 4) with Donnell Drive.

The Plan text then lays out a number of policies and strategies to flesh out its guiding principles.

> "Establish an adequate supply and clear hierarchy of neighborhood, regional, and transit-oriented commercial centers to serve the Subregion 4 area and its surrounding edge communities.

10 *Master Plan, p. 192.*
11 Ibid., p. 59
12 Ibid.

- Develop a community level "village center" or node to support the southeastern portion of the subregion."[13]

"Support additional sites for lower-density, village-scale, mixed use commercial development outside of the centers in areas where existing freestanding underutilized commercial uses are struggling and could redevelop to better serve the surrounding neighborhoods.

- Support an additional mixed-use area to serve the southeast portion of the subregion at the Donnell Drive area (Forest Park Mall [now the Centre at Forestville] and Penn-Mar Shopping Center)(Zone 3)."[14]

"Support additional sites for lower-density, village-scale, mixed use commercial development outside of the centers in areas where existing freestanding underutilized commercial or industrial uses are struggling or in conflict with neighboring residential areas.

- Designate the Donnell Drive corridor area for mixed –use residential focusing on infill development or redevelopment of the Forest Village Park Mall and the Penn-Mar Shopping Center for a mixed-use village environment."[15]

In the discussion of Living Areas and Industrial Centers, the Plan text noted that, "Although there are eight General Plan centers in Subregion 4, citizens asked if additional opportunity areas should be considered in the southern and southeaster portions of Subregion 4 to better serve the community."[16] In the recommendations of this element, it was directed to,

- "Site an additional village center at Donnell Drive to serve the southeast corner of the subregion Action Sites: Mall and shopping center redevelopment for urban lifestyle center."[17]

Clearly, the Plan intends the Centre at Forestville and Penn-Mar Shopping Center to be redeveloped with mixed uses which would provide for higher-density residential and complementary retail uses, a vision illustrated on Map 4-2. But also needed to support these uses are ancillary service commercial uses, which are located with sufficient proximity as to be convenient and supportive, but with sufficient separation so as not to be disruptive. This principle has also been expressed on Map 4-2 and the Plan's Land Use Map, as well as the text on page 192 supra, specifically discussing the intersection of Pennsylvania Avenue (MD 4) and Donnell Drive.

13 Ibid., p. 60.
14 Ibid., pp. 65-66.
15 Ibid., p. 66.
16 Ibid., p. 114.
17 Ibid., pp. 116.

(5) The proposed zoning change to the C-M Zone is in conformance with the purposes of the C-M Zone, §27-459(a)(1), as follows:

(A) To provide locations for miscellaneous commercial uses which may be disruptive to the harmonious development, compactness, and homogeneity of retail shopping areas;

As the subject property is near to an existing retail shopping area but physically separated by the width of Pennsylvania Avenue (MD 4), and is adjacent to existing C-M zoning, it will not be disruptive to the harmonious development, compactness, and homogeneity of a retail shopping area.

(B) To provide these locations, where possible, on nonresidential streets; and

The subject property is located at the intersection of a high functional classification roadway with a road with a 70' right-of-way width serving the existing bank and self-storage facility, and as such is in harmony with this Purpose.

(C) To provide concentrations of these uses which are relatively far apart.

The proposed use is in harmony with this Purpose because the concentration of C-M zoned land at the Pennsylvania Avenue (MD 4)/Donnell Drive intersection is approximately a mile and a quarter distant from the center of a strip of miscellaneous commercial uses which line the southern side of Suitland Road about one-third mile inside the Beltway, and slightly closer to two C-M zoned properties on Whitney Place on the north side of Marlboro Pike.

RECOMMENDATION

APPROVAL of A-10036, subject to the following Conditions:

1. A Detailed Site Plan shall be approved prior to the issuance of any building permit.

2. A 75 foot vegetative buffer shall be established along the eastern boundary of Parcel 240, Tax Map 89 (3710 Donnell Drive) as shown on Exhibit 22.