

Case No.: SDP-0315-04 Beech Tree  
East Village, Sec. 4 & 5

Applicant: VOB Limited Partnership

COUNTY COUNCIL OF PRINCE GEORGE'S COUNTY, MARYLAND,  
SITTING AS THE DISTRICT COUNCIL

FINAL DECISION — ORDER DISMISSING REQUEST TO AMEND CONDITION 8

IT IS HEREBY ORDERED, after review of the administrative record, that VOB Limited Partnership's request to amend Condition 8 of an Order Affirming Planning Board dated April 1, 2014, be and the same is hereby DISMISSED.

On or about April 1, 2014, the District Council adopted a final order affirming the Planning Board's decision in a Specific Design Plan 0315-04 Beech Tree, East Village, Sec. 4 & 5, subject to 13 conditions. *See* District Council's Order, 4/1/2014.

More than 2 years later, on May 24, 2016, VOB Limited Partnership (VOB) filed a request with the District Council to amend Condition 8. *See* VOB's Request for Reconsideration (Condition 8), 5/24/2016.

On May 31, 2016, the Clerk of the County Council transmitted VOB's request to the Chief Zoning Hearing Examiner. *See* Clerk of the Council Memorandum, 5/31/2016.

On June 6, 2016, the Chief Zoning Hearing Examiner reviewed VOB's request. The Chief Zoning Hearing Examiner recommended that the District Council promptly dismiss or deny VOB's request based on the holding in *Cnty. Council of Prince George's Cnty. v. Zimmer Dev. Co.*, 444 Md. 490, 120 A.3d 677, (2015). *See* ZHE's Memorandum, 6/6/2016.

On June 14, 2016, VOB filed a response to the Examiner's Memorandum. VOB states, in part, that

The applicant takes no position on the ZHE's analysis of the Zimmer decision. However, it needs to be pointed out that condition 8 of SDP-0315/04 was, in fact, placed on the approval by the District Council alone. The Planning Board did not include condition 8 in its final decision. To this end, the applicant still believes that the ZHE should hold a brief hearing to determine whether or not condition 8, as imposed by the District Council, should be reconsidered pursuant to the evidence in the record before the Planning Board. Since condition 8 was not considered by the Planning Board, the Zoning Hearing Examiner would be able to quickly determine that there is no "substantial evidence in the record" to support the inclusion of condition 8 in the final order of approval. The only clear way to amend the final decision in this case, is for the ZHE to hold a hearing pursuant to Section 27-135(c)(i) of the Zoning Ordinance. Since condition 8 was created by the District Council and not the Planning Board, there is no other vehicle for reconsideration available to the applicant (since Planning Board should not be able to unilaterally reconsider a condition which it never placed on the final approval). *See* VOB's Response, 6/14/2016, pp. 1-2.

VOB's reading or interpretation of Section 27-135 is unpersuasive. Section 27-135 of the County Code provides as follows:

Sec. 27-135. - Reconsideration and amendment of decisions.

- (a) Reconsiderations and site plan amendments for Special Exceptions shall be as provided for in Part 4. All others are governed by this Section (except Zoning Ordinance text amendments).
- (b) Once a final decision has been made by the District Council, the decision may be reconsidered upon a written request filed by either the applicant or other person of record within thirty (30) days of the final decision if, based on the written request, the Council finds that there may have been an error in reaching the final decision that was caused by fraud, surprise, mistake, or inadvertence. The person of record filing the request for reconsideration shall, upon filing the request, send a copy to all other persons of record.
  - (1) If the District Council determines there may be grounds for reconsideration of their final decision, the Clerk of the Council shall schedule an evidentiary hearing on the request.
  - (2) After hearing, the District Council shall first vote to reconsider their final decision and, if an affirmative motion is adopted, vote on a new decision.

- (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.

- (d) An applicant may request the amendment of any Comprehensive Design Zone Basic Plan or R-P-C Zone Official Plan, as set forth in Sections 27-197 and 27-158. *See* Prince George's County Code, § 27-135 (2015 Edition).

Nothing in Section 27-135 provides for a reconsideration of a condition based on lack of “substantial evidence in the record.” *See Lussier v. Md. Racing Comm’n*, 343 Md. 681, 696–97, 684 A.2d 804 (1996); *McCullough v. Wittner*, 314 Md. 602, 612, 552 A.2d 881 (1989) (An agency’s interpretation of the statute that it administers will be given considerable weight). VOB is factually and legally incorrect that there were no other vehicle for reconsideration available to it. *See* VOB’s Response, 6/14/2016, p. 2. Other “vehicles for reconsideration” were available to VOB, but it failed to act. If, according to VOB, Condition 8 was imposed without “substantial evidence in the record,” it could have filed for reconsideration promptly after the final order was

adopted. *See* Rule 8, District Council Rules of Procedure (An action of the District Council may be reconsidered...on the *next regular session of the District Council*, provided the action has not been appealed or the statutory time for action has not expired) (Emphasis added). VOB failed to do so. Alternatively, if, according to VOB, Condition 8 was imposed without “substantial evidence in the record,” it could have filed a petition for judicial review to the Circuit Court for Prince George’s County, within 30 days of April 1, 2014. *See* Md. Ann. Code, Land Use Art., § 22-407 (upon judicial review, a court may reverse or modify a final decision of the District Council if the decision was made on unlawful procedure, affected by other error of law, *unsupported by competent, material, and substantial evidence in the record, or arbitrary or capricious*) (Emphasis added). Again, VOB failed to do so.

Moreover, according to VOB, Condition 8 of the final order states as follows:

The following lots shall have side entry units:

Block R, Lots 1, 3, 4, 6, 7, 9, 20, 21, 24, 27, 28, 30, 31, 36, 37, 42;  
Block Z, Lots 1, 5, 6, 10, 11, 16, 17, 23, 24, 28, 29, 34, 35, 40, 41,  
47, 48, 54, 55, 59, 60, 64, 65, 68, 69, and 72. *See* VOB’s Request  
for Reconsideration (Condition 8), 5/24/2016, p. 2.

VOB requests that Condition 8 be re-considered and modified as follows:

The following lots shall have side entry units:

Block R, Lots 1, 3, 4, 6, 7, 9, 20, 21, 24, 27, 28, 30, 31, 36, 37, 42;  
~~Block Z, Lots 1, 5, 6, 10, 11, 16, 17, 23, 24, 28, 29, 34, 35, 40, 41,~~  
~~47, 48, 54, 55, 59, 60, 64, 65, 68, 69, and 72;~~ **Block Z, Lots 1, 5,**  
**10, 11, 16, 17, 23, 24, 54, 55, 65, and 72.** (~~Strikethrough~~ represents  
deleted language; Underline represents new language). *See* VOB’s  
Request for Reconsideration (Condition 8), 5/24/2016, p. 2–3.

Recently, the Court of Appeals of Maryland held that Planning Board has original jurisdiction to decide whether to approve or deny a Specific Design Plan, not the District Council. *See Cnty. Council of Prince George’s Cnty. v. Zimmer Dev. Co.*, 444 Md. 490, 120 A.3d 677, (2015). *See also* ZHE’s Memorandum, 6/6/2016. VOB requests that the District

Council strike and modify portions of Condition 8, which it concedes Planning Board never imposed. *See* VOB's Request for Reconsideration (Condition 8), 5/24/2016, p. 2. Therefore, in light of *Zimmer*, the District Council would exceed its statutory authority or jurisdiction to grant VOB's request to amend Condition 8. *See Powell v. Calvert Co.*, 368 Md. 400, 795 A.2d 96 (2002) (a board must apply the law in effect at the time the case is heard). *See also* Md. Ann. Code, Land Use Art., § 22-407 (upon judicial review, a court may reverse or modify a final decision of the District Council if the decision was made on *unlawful procedure, affected by other error of law, unsupported by competent, material, and substantial evidence in the record, or arbitrary or capricious*) (Emphasis added).

For the reasons stated herein, VOB's request to amend Condition 8 of the final order affirming Planning Board in Specific Design Plan 0315-04 Beech Tree, East Village, Sec. 4 & 5, is hereby DISMISSED.

Ordered this 11<sup>th</sup> day of July, 2016 by the following vote:

In Favor: Council Members Franklin, Davis, Glaros, Harrison, Lehman, Patterson, Taveras, and Turner.

Opposed:

Abstained:

Absent: Council Member Toles

Vote: 8-0

COUNTY COUNCIL OF PRINCE GEORGE'S  
COUNTY, MARYLAND, SITTING AS THE  
DISTRICT COUNCIL FOR THAT PART OF  
THE MARYLAND-WASHINGTON REGIONAL  
DISTRICT IN PRINCE GEORGE'S COUNTY,  
MARYLAND

By: \_\_\_\_\_  
Derrick L. Davis, Chairman

ATTEST:

\_\_\_\_\_  
Redis C. Floyd  
Clerk of the Council