

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

**A BUILDING PERMIT IN FOR A PROPERTY LOCATED WITHIN A PROPOSED
RIGHT-OF-WAY**

DECISION

Request: Authorization to Issue Building Permit for a Structure within a Proposed Right-of-Way

Applicant: Cherry Associates, Limited Partnership/Janjer Enterprises, Inc.

Opposition: None

Hearing Dates: May 15, 2019, June 27, 2019, July 19, 2019 and July 24, 2019

Examiner: Maurene Epps McNeil

Recommendation: Approval with Conditions

NATURE OF REQUEST

- (1) The subject request is on to authorize the issuance of permits (5920-2018-CGN and 4494-2018-G) for C-S-C (Commercial Shopping Center) zoned property within the proposed right-of-way for Indian Head Highway (MD 210), located in the southeastern quadrant of the intersection of Old Fort Road South and Indian Head Highway (MD 210). It is further identified as 12790 Old Fort Road, Fort Washington, MD.
- (2) The property is owned by Cherry Associates, Limited Partnership ("Cherry Associates") and a smaller portion of the site is being leased by Janjer Enterprises, Inc, a Popeye's Louisiana Kitchen franchisee and management company. (T.7) Both business entities submitted proof that they are in good standing to conduct business within the State of Maryland. (Exhibits 20 and 22)
- (3) No one appeared in opposition to the request at any of the hearings held by this Examiner.
- (4) The record was closed on July 24, 2019, at the close of the hearing held on that date.

FINDINGS OF FACT

(1) Applicant Cherry Associates, L.P. is the owner of a 7.7-acre property developed with the Potomac Village Shopping Center (“Potomac Village”). Potomac Village is currently leased, although not to full capacity. In early 2018 Applicant Janjer Enterprises, Inc. applied for a building permit (5920-2018-CGU) and fine grading permit (4494-2018G) to construct a 3,399-square-foot drive-through Popeye’s restaurant, parking, stormwater management, landscaping and other support facilities on the paved western portion of Potomac Village. (Exhibit 3 (a))

(2) The leased portion of the site is approximately 0.545 acres (23,740-square-feet) and is identified as 12790 Old Fort Road. The remainder of Potomac Village is identified as 12740-12788 Old Fort Road. Across Old Fort Road to the north is property in the C-O Zone partially improved with an office complex and a cellular telephone tower. To the south is a Gas Station and Food or Beverage Store (discussed below). The remainder of the surrounding area is residential in nature with the exceptions of an elementary school and a nursing home. (Exhibit 19)

(3) The property lies within an area governed by the 2006 Master Plan (“Master Plan”) and Sectional Map Amendment for the Henson Creek-South Potomac Planning Area. Map 26 in the Master Plan designates Indian Head Highway (MD 210) as a freeway and Old Fort Road as a collector. (Master Plan, pp. 69-71) The Master Plan recommended that MD 210 be upgraded “to a freeway consistent with the State Highway Administration’s MD 210 multimodal study” and noted that “[a]ddition of lanes beyond the six lanes that exist should only occur as a means of accommodation of bus transit and/or high-occupancy vehicles.” (Master Plan, p. 67)

(4) The 2014 General Plan (*Plan Prince George’s 2035*) provided the following recommendation concerning transportation priorities in the County:

Six out of ten Prince Georgians commute outside of the County for work, straining the County’s road and transit network and resulting in long and expensive commutes. The County’s congested road network is also burdened by residents from neighboring jurisdictions ... as they commute through Prince George’s County to the region’s major employment centers....

In order to develop targeted areas, the County needs to prioritize and coordinate where public funds are being channeled. Over the past four decades, transportation improvements have predominantly focused on vehicular transportation at the expense of building a comprehensive multimodal network. In recent years, funding priorities have shifted to transit and alternative modes due to air quality regulations and the increasing cost of widening existing roads in congested areas. Adapting our emerging land use patterns as well as established patterns to these new realities of transportation planning and implementation remain an important challenge for the County....

(General Plan, pp. 146-147)

(5) As noted above, the subject property is located to the south of a 7-Eleven Gas Station and Food or Beverage Store approved pursuant to SE-4575/02 and an authorization to build within the same right-of-way at issue in this case. In the right-of-way case this Examiner recommended, and the District Council approved, the issuance of a building permit to construct what ultimately became the adjacent 7-Eleven Gas Station and Food or Beverage Store. (Exhibits 3(r) and (s)) The recommendation of approval included the following discussion on the proposed right-of-way also at issue in the instant request:

The State Highway Administration ("SHA") has prepared a proposal (the "Route 210 Multi-Modal Study, Final Environmental Impact Study"), to widen Indian Head Highway. This Multi-Modal Study was endorsed in the recently adopted 2006 Master Plan and Sectional Map Amendment for Henson Creek and South Potomac. This study essentially recommends a grade-separated interchange at MD 210/Old Fort Road thereby impacting the southwestern portion of the subject property. (Exhibits 4 and 6) Applicant submitted a map that indicates that this interchange will dissect the existing building located in the southeast portion of the subject property.... The underground storage tanks are also located within the area of the proposed interchange.

Applicant's witness, accepted as an expert in the area of transportation planning and traffic engineering, learned, after speaking with a representative of the SHA, that it is the State's intent to construct seven (7) interchanges at the intersections along MD 210 starting from the Beltway and moving south.... Thus, the interchange at issue is simply one of seven (7) proposed at this time, and no engineering, right of acquisition or construction has occurred.... Indeed, there is no guarantee that the project will ever come to fruition.... However, if the interchange is constructed the entire site would be impacted. Therefore, the State would exercise its power of eminent domain over the entire site....

(Exhibit 3(u)) In its approval the District Council did not include any condition requiring removal or alteration of structures within the proposed right-of-way in the event that removal or alteration is required. (Exhibit 3(w))

(6) Janjer Enterprises currently operates 20 Popeye's franchises within Prince George's County. Mr. Jonathan Friedlander, a representative of Janjer's, explained the process used in deciding where to locate:

It's... a very laborious process. We, first of all... have brokers, real estate brokers that we use [who] constantly [scour] the area looking for locations where they would not cannibalize our existing locations... and the... other Popeye's franchises. The first thing that... they look at is really visibility of the site from the... main road. We ... found ... since 1981 [that] the success that we've had is visibility [which] is absolutely critical to the success of our restaurants....

[I]n every site that we have approved, we have what's called a Director of Development that visits the site. The Director of Development and... myself and another team member walk the site, drove the site, drove the area and he goes ahead and makes a recommendation and then it gets put in front of a board, in front of Popeye's internal development committee and they either approve or disapprove the site. And in fact, I happen to be on the franchise side of the development committee for Popeye's. So I'm very active in what... Popeye's looks

at in sites, what they approve in sites and this particular site would only have been approved given where our location is because of... the visibility of the site from 210....

This is a shopping center which does not have a traditional anchor...[s]o visibility is even that much more important on that road because you don't have a traditional anchored type shopping center....

(T.9-11)

(7) Mr. Friedlander further noted that Applicant did not consider the possibility of moving the pad site outside of the proposed right-of-way "because you would not have the site visibility that's necessary to make this a successful Popeye's restaurant." (T.1112) He further emphasized this point by noting that the Popeye's organization would not approve the franchise if the restaurant is moved further back on the site outside of the right-of-way. (T.15)

(8) Mr. Peter Federowicz, Vice-President of the general partner in the Cherry Associates Limited Partnership, the managing agent for the Potomac Village Shopping Center, provided the following testimony in support of the instant request:

So Potomac Village Shopping Center [is] about a 78,290 square foot center situated in Fort Washington, Maryland at the corner of Old Fort Road and Indian Head Highway. We've owned the property since 1995 and the property is in a very, a very nice part of Prince Georges County. Over time the center has been a little bit challenging from a leasing perspective as the population density [is] not as dense as some of the closer in areas within the county so as far as getting on the radar screen of perspective tenants, often times you have to do a little bit more selling to convince them that this is you know an area or that this is a shopping center that they should locate at. Currently the center is occupied with a variety of service and retail tenants that serve that area including fitness center, a dollar store, beauty supply, dentist, barbershop, a dialysis clinic, those sorts of uses....

Well the addition of Popeye's is really critical to the long term health and viability of the entire property. The world has changed, you know, shopping center historically going back to this discussion about anchors, historically you had anchors and stores that would be developed in the back of the center that would draw people into the center and then would help support the other stores and often times pad sites [such as Popeye's] out in front of the road would feed off of that traffic. The world's changed in the sense that in today's environment more often than not the pad sites are now driving traffic and bringing people into the centers. You know we see that with, you know, the likes of Starbucks and other restaurants the retail world a lot of historical, traditional type retail tenants and anchors really aren't the same businesses and traffic drivers that they used to be. We see bankruptcies, you know, you can't open the paper on any given month without seeing an article about a retailer that, you know, used to be, you know a mainstay whether it's a Sears going through their problems or you know any, any number of companies and concepts that just don't function like they used to with the rise of E-commerce and the internet. So the importance of restaurants like Popeye's to drive traffic into a center is very important. Also for this center in particular Popeye's being a national credit tenant, a brand name that people

know will help us not only direct traffic but also allow us to attract additional, you know high quality tenants. And the fact that Popeye's has identified this site and is interested in coming here, will lend itself as kind of a proof of concept and encourage other high quality tenants to locate there. The center itself too, with the way that it's situated in reference to the visibility discussion of earlier, you know, the ability to have a driver right out on the street is really critically important to get people up in to see the rest of you know the nice stores and other things that you know we hope to continue to be able to track and have at the center.

(T.18, 20-21)

(9) After determining that the subject property would be the best location, Janjer Enterprises applied for permits 4494-2018-G and 5920-2018-CGN in order to start the construction of a Popeye's Louisiana Kitchen on the subject property. These permits generated a comment from the State Highway Administration ("SHA") that the subject property lies within a proposed right-of-way. (T.7) Staff with the Maryland-National Capital Park and Planning Commission noted in an email to one of Applicants' agents that, per SHA "the proposed building could be impacted by future improvements to MD-210 ..., the building should be moved out of that [right-of-way] ... [and although] [t]he parking lot is not a major issue for SHA, ... to avoid impacts in the future, it should be moved as well." (Exhibit 21) Applicants then filed the Application for authorization to build within a proposed right-of-way.

(10) Mark Ferguson, accepted as an expert in the area of land use planning, also testified on Applicant's behalf, and prepared a Land Planning Analysis in support of the instant request. (Exhibit 19) He opined that the instant request satisfied all applicable provisions of law, reasoning as follows:

(1) The District Council shall only approve the request if it finds that:

The criteria for approval for the issuance of a permit for construction on land located within the right-of-way of a proposed widening of an existing street as shown on a Master Plan are as follows:

(1) *The District Council shall only approve the request if it finds that:*

- (A) *The entire property cannot yield a reasonable return to the owner unless the permit is granted;*
- (B) *Reasonable justice and equity are served by issuing the permit;*
- (C) *The interest of the County is balanced with the interests of the property owner; and*
- (D) *The integrity of the Functional Master Plan of Transportation, General Plan, and Area Master Plan is preserved.*

The applicant contends that all of the foregoing criteria are met.

- (A) *The entire property cannot yield a reasonable return to the owner unless the permit is granted;*

This criterion will be addressed by other witnesses.

(B) *Reasonable justice and equity are served by issuing the permit;*

The applicant contends that reasonable justice and equity would be served by permitting the construction of the proposed improvements.

The recommendation for the construction of an interchange at MD 210 and Old Fort Road has been in force since the October, 1981 Subregion VII Master Plan.

More than twenty years subsequently in 2004, the State Highway Administration received approval of a final environmental impact statement for the Indian Head Highway/MD210 corridor between I-495 and the Charles County Line; the EIS described the proposed interchange as part of the sixth of seven segments into which the proposed MD 210 corridor improvements were to be divided.

The seven segments are as follows:

1. Kerby Hill Road
2. Palmer Road/Livingston Road
3. Oxon Hill Road/ Old Fort Road (North)
4. Fort Washington Road
5. Swan Creek Road/ Livingston Road
6. Old Fort Road (South) - Subject property location
7. Farmington Road & Livingston Road/MD 373

The intersections at Farmington Road and Livingston Road/MD 373 were determined by SHA to need surface improvements only notwithstanding the County Master Plans' recommendations for interchanges; the six prior intersections were proposed by SHA to be upgraded to interchanges. Engineering for the first of the seven segments, at Kirby Hill Road, began in FY 2006, and took until FY 2015 to complete. Construction did not begin until FY 2016, twelve years after the EIS approval, and is still underway at this writing....

Even assuming the funding rate for MD 210 improvements did not diminish due to other prioritized spending, at the rate of ten years' engineering time for each segment, right-of-way acquisition at the subject property would be expected to occur in fifty years. And at the historic rate of fourteen years between the beginning of engineering expenditures for each segment (assuming that the corridor-wide engineering for FY2020 will be spent on the Palmer Road interchange), right-of-way acquisition at the subject property would be expected to occur in seventy years, or more than one hundred ten years after the interchange first appeared on a master plan.

It is also reasonable to ask whether, in light of the changing funding priorities, that MD 210 improvements will continue to be prioritized for the remaining interchanges as traffic diminishes with increasing distance south of I-495: At Kerby Hill Road, the latest (2017) SHA traffic maps indicate an ADT of 77,002 vehicles per day. Between Oxon Hill Road and Fort Washington Road (segments three and four), the count drops to 67,600 VPD. But after that, the drop is more dramatic: Just north of the subject property, that volume decreases to 50,702 vehicles per day....

Denying a permit for the proposed improvements on the basis of a planned improvement which past progress suggests will materialize only in the very distant future, even without accounting for adverse changes in the County's spending priorities and Charles County's land use policies, would be unjust and unequitable, in this planner's opinion.

(C) *The interest of the County is balanced with the interests of the property owner;*

The applicant contends that the interest of the County would be balanced with the interests of the property owner in the following ways:

1. The County will benefit by receiving enhanced tax revenues for the foreseeable future from the improved land and the income of forty to fifty County-based employees working at the proposed station.
2. The interests of the property owner will be served by the grant of the subject permit application by allowing the construction of the proposed improvements.

(D) *The integrity of the Functional Master Plan of Transportation, General Plan, and Area Master Plan is preserved.*

The General Plan does not make any improvement-specific transportation recommendations which affect the subject request. Generally, however, the policies cited above do discourage prioritization of funding for the interchange adjacent to the subject property.

The area Master Plan does provide for the proposed interchange, but also recommends continued commercial land use at the subject property.

The Countywide Master Plan of Transportation only provides for the construction of an interchange; the degree to which the proposed improvements will impair it is to be balanced against other considerations is the nature of the process by which the subject request is being considered.

Given that the realization of the proposed interchange is at best very long-range, allowing an existing shopping center the permission to make improvements will not substantively impair the integrity of the Master Plan of Transportation, General Plan, and Area Master Plan.

CONCLUSION:

The criteria from the approval to permit construction in a proposed right-of-way found in Zoning Ordinance Section 27-259(g)(1) are met by the subject application.

(Exhibit 19, pp. 4-7)

APPLICABLE LAW

(1) Pursuant to Section 27-259 of the Zoning Ordinance, the District Council may authorize the instant request if the following provisions are met:

(a) **Authorization.**

(1) With the exception of an arena (stadium) proposed to be constructed on land leased or purchased from a public agency, no building or sign permit (except as provided in Part 12 of this Subtitle) may generally be issued for any structure on land located within the right-of-way or acquisition lines of a proposed street, rapid transit route, or rapid transit facility, or proposed relocation or widening of an existing street, rapid transit route, or rapid transit facility, as shown on a Master Plan; however, the Council may authorize the issuance of the building or sign permit in accordance with this Section. For the purposes of this Section, "Master Plan" means the General Plan, the Functional Master Plan of Transportation, or any Adopted and Approved Area Master Plan or, if not yet approved, any such Master Plan adopted by the Planning Board, unless the Plan has been rejected by the Council.

(2) Notwithstanding the definition of a "street" (Section 27-107.01), building permits may be issued without such Council authorization for any structures on: (A) Land which:

(i) Was in reservation but is now not in reservation; and (ii)

Has not been acquired and is not being acquired.

(B) Land which was subdivided after the adoption of a Functional Master Plan of Transportation, Area Master Plan, or the General Plan, but was not reserved or required to be dedicated for a street or rapid transit route or facility shown on the Plan.

(3) A permit may be issued without such Council authorization for the replacement of a legally erected sign if the replacement sign is otherwise in conformance with this Subtitle, is not an intensification of signage for the subject property, and if the proposed transportation facility is not fully funded for construction in the adopted County Capital Improvement Program or the current State Consolidated Transportation Program.

(b) **Application.**

(1) Where a Special Exception, Detailed Site Plan, Specific Design Plan, or Departure is pending, or where application for issuance of a permit has been made and recommended for denial pursuant to Sections 27-254 and 27-255 of this Subtitle, the owner of the land may make a written request to the District Council to authorize the issuance of the permit. In the latter case, the recommendation for denial of the permit shall not have been based on any failure of the applicant to comply with any requirement of this Subtitle (other than Subsection (a) of this Section), Subtitle 24, the Regional District Act, or any condition placed on the property in a zoning case or subdivision plat approval. The request shall be in writing and shall be filed with the Clerk of the Council within thirty (30) days after notice of the denial is given.

* * * * *

(g) **Criteria for approval.**

(1) The District Council shall only approve the request if it finds that:

(A) The entire property cannot yield a reasonable return to the owner unless the permit is granted;

(B) Reasonable justice and equity are served by issuing the permit;

(C) The interest of the County is balanced with the interests of the property owner; and

(D) The integrity of the Functional Master Plan of Transportation, General Plan, and Area Master Plan is preserved.

(h) **Conditions placed on approval.**

(1) If the Council authorizes the issuance of the permit, it shall specify the exact location, ground area, height, extent, and character of the structure to be allowed. The Council may also impose reasonable conditions which benefit the County.

* * * * *

CONCLUSIONS OF LAW

(1) The Application is to allow the construction of a Popeye's Eating or Drinking Establishment on a portion of a larger site that includes an existing Commercial Shopping Center. The Popeye's location is in the southeastern portion of the intersection of Old Fort Road South and Indian Head Highway (MD 210). The 2006 Master Plan and the 2009 Master Plan of Transportation indicate that most, if not all, of the property leased by Applicants lies within the proposed right-of-way for Indian Head Highway (MD 210). As a result, a hold has been placed on Applicants building permits until the instant Application is approved. (Section 27-259(b)(1))

(2) The record indicates that the Commercial Shopping Center is located further back from Indian Head Highway and has been experiencing vacancies. Applicants believe that the Popeye's will rejuvenate the Center, and Popeye's does not believe it can be successful unless it is located closer to Indian Head Highway. Indeed, its internal franchise development committee will not approve the location unless there is visibility from this main road. Accordingly, Applicants will not yield a reasonable return on their property unless the permits are granted. (Section 27-259 (g)(1)(A))

(3) Applicants land use planner noted that improvements to Indian Head Highway at this particular intersection are scheduled to take place after the six prior intersections between this site and I-495 are constructed; and it took 12 years after engineering approval for the construction of the first of the seven segments to begin. Reasonable justice and equity will be served by allowing Applicant to operate its use within the right-of-way, especially since there is no time table as to when, or if, the planned expansion of MD 210 at its intersection with Old Fort Road will occur. (Section 27-259(g)(1)(B))

(4) Approval of the Application will balance Applicants and the County's interests – Applicant will be able to bring a thriving business to an existing underperforming Shopping Center which may provide jobs for County residents and add funds to the County coffers. (Section 27-259(g)(1)(C))

(5) The integrity of the applicable Plans will be preserved since the Plans do not specifically address the uses on site, and the 2014 General Plan notes a need to prioritize transit and alternative modes of transportation (making it less likely that a traffic interchange will be constructed this far from I-495). (Section 27-259(g)(1)(D))

RECOMMENDATION

(1) It is the recommendation of this Examiner that the District Council authorize the issuance of Permits 5920-2018-CGN and 4494-2018-G (or similar permits if these numbers have expired) to allow Applicants to construct within the proposed right-of-way for Indian Head Highway (MD 210), subject to the condition that any new improvements constructed within the right-of-way be removed or altered if removal or alteration is required. I recognize that Applicants object to this condition, and that the District Council may waive it (as was done for the adjacent site), but this condition is usually imposed in these types of cases, is one that benefits the County, and the record indicates that it will be many years before Applicants may be requested to comply. (Section 27-259(h))

(2) I also recommend that a site plan showing the exact dimensions and location of the structures within the proposed right-of-way be submitted to the Office of the Zoning Hearing Examiner for review and inclusion in the record of the instant Application prior to the issuance of permits.