

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

**ZONING MAP AMENDMENT
A-9706-C/01**

DECISION

Application: Amendment of Conditions
Applicant: FV Flowers Road, LLC/ Vista 95 Logistics
Center (project name)
Opposition: None
Hearing Dates: July 28, 2021
Hearing Examiner: Maurene Epps McNeil
Recommendation: Approval with Conditions

NATURE OF PROCEEDINGS

(1) Applicant is the contract purchaser of the subject property which consists of six contiguous deed parcels of land, totaling approximately 47 acres in the I-1 (Light Industrial) and M-I-O (Military Installation Overlay) Zones. The subject property is located on the south side of the Capital Beltway (I-495), northeast of Flowers Road, in Upper Marlboro, Maryland.

(2) A-9706-C-01 is a request for the amendment of the twenty conditions of approval imposed by the District Council upon its adoption of Zoning Ordinance no-1989, which rezoned the subject property to the I-1 Zone. At the hearing Applicant proffered additional conditions based on conversations with some of the residents in the area.

(3) No one appeared in opposition to the request at the hearing held by this Examiner. Ms. Naomi Brown appeared to find out more about the Application. (T. 30)

(4) The record of the original Application A-9706-C has been made a part of the record and incorporated herein by reference.

(5) At the conclusion of the hearing, the record was left open to allow Applicant to submit some additional items. All were received on August 6, 2021, and the record was closed at that time.

FINDINGS OF FACT

(1) On July 13, 1989, upon adoption of Zoning Ordinance No. 35, 1989, the District Council gave final approval to A-9706 subject to the following conditions:

1. Vehicular access to the subject property shall be prohibited from Oak Street; Poplar Drive, and Willow Avenue. Access through Parcel 84, Tax Map 90 (Flowers Road Joint Venture/Swinney Property) shall be prohibited, subject to the acquisition of adequate right-of-way from the following owners:

- A) Mr. & Mrs. H. L. Harper
- B) Forest Mills Associates Limited Partnership
- C) Reverend & Mrs. Richard T. Herbert

to widen Flowers Road. The developer shall diligently pursue said right-of-way and to pay any commercially reasonable price for same; in the event that said right-of-way cannot be obtained, the developer may utilize the Swinney property for access provided that wooden around barriers (as utilized along 95/495) are installed from Westphalia Road to the industrial site. Lesser wooden sound barriers may be utilized subject to approval by the Maryland-National Capital Park and Planning Commission.

2. A minimum of 150 foot wide continuous natural tree screen and buffer shall be provided on the south and east side of the property, subject to Condition No.11.

3. Visible outdoor storage is prohibited.

4. All buildings shall be constructed of masonry and glass materials. with a finished height not to exceed three (3) stories, consistent With Washington Business Park, Lanham, MD and Inglewood Center, Landover, MD development sites.

5. Flowers Road shall be widened on the western side only, opposite the existing houses.

6. Heavy truck deliveries shall be prohibited between 9:00 p.m. and 6:00 a.m. along Flowers Road.

7. All required off-site road improvements shall be completed prior to the occupancy of any building.

8. Transportation of hazardous waste (explosives or the like) shall be prohibited to and from the site and storage thereon shall also be prohibited.

9. The developer shall:

- A) include in its Preliminary Plan (application) to the Washington Suburban Sanitary Commission (WSSC) a listing of all homeowners on Flowers Road.

B) employ the Washington Suburban Sanitary Commission in running a main line (water and sewer) on Flowers Road.

C) Pay the cost for said line (water and sewer) and for an extension of the water and sewer line to the properties of the homeowners on Flowers Road. Said properties shall include the following:

- a) 4410 Flower Road
Upper Marlboro, MD 20772
- b) 3306 Flowers Road
Upper Marlboro, MD 20772
- c) 3302 Flowers Road
Upper Marlboro, MD 20772
- d) 3304 Flowers Road
Upper Marlboro, MD 20772
- e) 3300 Flowers Road
Upper Marlboro, MD 20772
- f) 3308 Flowers Road
Upper Marlboro, MD 20772

10. The hook-up from the extension to each individual home shall be paid by and contracted by the Westphalia Community Coordination Council.

11. Development for buildings and parking areas shall be limited to thirty-seven (37) net acres of the subject parcel. The remaining ten (10) acres shall not be disturbed or developed beyond utility rights of ways and other engineering requirements, as necessary, to support the development.

12. The maximum number of buildings constructed on said parcel shall be limited to six (6).

13. The Westphalia Community Coordination Council shall be provided an opportunity by the developer to review and comment on any proposed subdivision and site plan(s) prior to its submittal to local government for review and approval.

14. The developer shall contribute the amount of \$150, 000.00 to an escrow account created by the Westphalia Community Coordination Council before any permits of any kind are issued. Said funds may be utilized at the discretion of the Westphalia Community Coordination Council.

15. No development shall take place unless and until adequate public facilities (including public roads and streets) necessary for this development are deemed adequate by the Planning Board of the Maryland-National Capital Park and Planning Commission.
16. Minority contractors/ suppliers in the development of this project shall be utilized at a minimum in the amount of thirty percent (30%) of any contracts for services or supplies; providing that the minority contractor/ supplier's bid is competitive with all legitimate bids received. The builder shall utilize fifteen percent (15%) minority contractors/ suppliers in the construction of the buildings on this site, under the same criteria as previously set forth in this condition. The developer/builder shall certify to the Westphalia Community Coordination Council at the time of building permits that the condition has been fulfilled, including names and addresses of such contractors/ suppliers.
17. The Westphalia Community Coordination Council may monitor at all times the development of the property to ensure its conformance to these conditions.
18. The developer shall notify by mail all parties of record of any further hearings on the Preliminary Plat, Record Plat or Site Plan.
19. All site plans shall be reviewed for approval by the District Council. Concurrent with site plan review, the District Council shall also review a traffic study prepared by the applicant and reviewed by the Technical Staff, and the District Council shall additionally review the list of contractors/ suppliers to ensure compliance with Condition No. 16.
20. No loading bays shall be visible from 1-95 and all loading bays shall be situated so as to face internal to the subject site.

(Exhibit 3)

Applicant's request

- (2) Applicant intends to construct two single-story Class A logistic warehouse buildings on the site with a total gross floor area of approximately 387,556 square feet, associated parking, landscaping, retaining walls and a sound attenuation fence. (Exhibit 31)
- (3) Applicant provided an exhibit discussing each of the District Council's original conditions, *supra*, and requests revision of these conditions to either delete or revise Conditions 1 through 7, 9 through 10, and 13 through 16. (Exhibit 2(b))
- (4) Applicant also submitted the following list of proposed conditions that explained which conditions were revised or retained:

1. A 40-foot landscape buffer (including 120% of the planting units outside of PMA areas as required by the Landscape Manual) shall be provided as shown in applicant's Exhibit _____. (Revision of existing condition 2).
2. Outdoor storage shall not be visible from a street. (Revision of existing condition 3).
3. All buildings shall utilize modern construction materials consistent with other logistic/warehouse buildings in the County. Heights of buildings shall not exceed 50 feet. (Revision of existing condition 4).
4. All required off-site road improvements shall be (with the exception of the ultimate improvements at the intersection of Westphalia Road/MD 4 to be funded/provided pursuant to CR-66-2010) permitted and bonded prior to issuance of any building permit. (Revision of existing condition 7).
5. Transportation of hazardous waste (explosives or the like) shall be prohibited to and from the site and storage thereon shall also be prohibited. (Existing condition 8)
6. Development for buildings and parking areas shall be limited to thirty-seven (37) net acres of the subject parcel. The remaining ten (10) acres shall not be disturbed or developed beyond utility rights of ways and other engineering requirements, as necessary, to support the development. (Existing condition 11)
7. The maximum number of buildings constructed on said parcel shall be limited to six (6). (Existing condition 12)
8. No development shall take place unless and until a preliminary plan of subdivision is approved by the Planning Board of the Maryland-National Capital Park and Planning Commission. (Revision of existing condition 15).
9. The developer shall notify by mail all parties of records of any further hearings on the Preliminary Plat, Record Plat or Site Plan. (Existing condition 18)
10. Review of a Detailed Site Plan in accordance with Part 3, Division 9 of the Zoning Ordinance shall be required. (Revision of existing condition 19).
11. All loading bays shall be situated so as to face internal to the subject site. (Revision of existing condition 20).

(Exhibit 21)

- (5) At the start of the hearing Applicant's counsel provided evidence that the

Westphalia Community Coordination Council, LLC has forfeited its standing to operate within the State. (Exhibit 26) Accordingly Applicant seeks revision or deletion of all conditions that pertained to this defunct entity.

(6) Mr. Eric May was authorized to speak on Applicant's behalf. (Exhibit 22) He testified that Applicant, as the contract purchase, seeks a revision to many of the original conditions for the following reasons:

[S]ome of these conditions are either inconsistent or inappropriate as it relates to current development standards. And so... that necessitates modification as it relates to current development standards. There are also some environmental features on this property that we're forced to work around that kind of make navigating development of this site much more difficult with the existing conditions as written. And lastly ... this is a... viable site for warehouse and logistics activities given its proximity to ... the beltway....

So we ... are proposing two buildings totaling about 387,000 potential square feet. The larger of the two buildings [is] being pushed up against the beltway.... These buildings will serve for kind of modern logistics warehousing given again the proximity to the beltway and the proximity to the urban core of D.C. and ... the surrounding areas. So we would expect tenancy here to be probably multitenant. Most likely doing short delivery of materials or goods to again the urban core which this site is so proximate to....

(T. 35-37)

(7) Mr. May also explained how the layout of the site was necessitated in part by avoidance of environmental constraints and the desire to minimize any impact on the surrounding community:

[T]he buildings are shown where they are primarily due to the significant environmental limitations that exist on the site. We did a comprehensive wetlands and floodplain analysis [that] identified areas of ... critical concern and have sited these buildings in a manner to avoid as much ... as possible interaction with any of those environmentally sensitive locations. So the buildings themselves sit completely outside of any environmental conditions....

[I]n addition to the environmental constraints on the property we've been heavily focused on, on siting these buildings in this development in a manner to minimize impact to surrounding properties, both from a ... size configuration and noise abatement standpoint. So ... the configuration is such that the loading activities of these buildings are inwardly focused. The buildings themselves end up becoming significant sound buffers to existing beltway noise, which as the property currently stands there is no buffering.... [T]hese buildings in addition to

some sound attenuation, fencing and walls that will be constructed, will actually reduce the amount of sound coming off the beltway sheeting up this property towards the neighboring properties, so will ... benefit the neighbors from a sound attenuation standpoint. And then we've ... worked with Mr. Rizzi and others to site these buildings and use the grade to our advantage to lower these buildings on the land such that they give the appearance of being much shorter than the 32 foot clear height that they are currently designed to....

(T. 37-39)

(8) Mr. May noted that the architectural renderings illustrate conceptually what the viewshed will look like from various vantage points on adjacent properties and clearly the two buildings will be "sunk down" with "a great amount of distance between them and adjacent structures." (T. 44) When the additional foliage is added, as well as the six-foot board-on-board fence, the development will be sufficiently screened from adjacent properties. (Exhibit 9(a)) Finally, he discussed why the Applicant is seeking the deletion of existing condition 6 (which prohibits truck deliveries between 9:00 pm and 6:00 am along Flowers Road):

[T]he short answer is we don't believe it's applicable and the reason being is that [it is] a master planned public roadway dictated to be a major collector. And so if and when at some point in the future there's connection made for this roadway there will be traffic generated on that roadway that is ... outside of the use of this development. And so obviously there's no ability to control traffic travelling on that road that is outside of ... the development itself. And so ... we've been focused on sound mitigation to ensure that the use of this road does not ... increase sound as it relates to neighboring properties and have come up with solutions to ensure that doesn't happen. And so the combination of sound attenuation methods that can be implemented, coupled with the fact that it is a public roadway to be maintained and ultimately used by others that don't specifically use this project, we think the ... condition isn't applicable to this roadway....

(T. 48)

(9) Mr. May testified that the Applicant would have no objection to a prohibition of direct vehicular access from the site to the residential streets in the area; that the development be compliant with the County's noise ordinance and that noise mitigation structures be provided and shown at the time of Detailed Site Plan review; or a revision to Condition 16 to encourage participation by women or disadvantaged business owners in the development of the property. (T. 49-50)

(10) Mr. Chris Rizzi, accepted as an expert in landscape architecture, described the Concept Plan, illustrative of potential development for the development 'prepared by him (or under his direction). (Exhibits 2(c) and 31; T. 13-15) The project's sole access

will be from Westphalia Road just east of the Capital Beltway via the future Presidential Parkway (MC-634) which will ultimately come through the subject property. (T. 26) The landscaping and setbacks shown on the Concept Plan will exceed the buffer and setback requirements of the Landscape Manual. (T. 17) Mr. Rizzi noted that the proffered "combination of both deciduous and evergreen and varying heights of plant materials ... clustered in the manner depicted [in the Concept Plan] in conjunction with existing plant material and in consideration of the vertical difference between the adjoining properties and the much lower proposed property development will provide a visual screen from the adjoining properties into our site." (T. 18) All of the landscaping requirements would be addressed as part of detailed site plan review.

(11) Mr. Rizzo concluded that there is good cause to delete Condition 2 since

[t]hese plant buffer yards as well as the vertical difference between them will provide a sight line that basically looks over top of this development and it will not be visible, so it's essentially less of an issue of the number of feet than the fact that we've effectively screened this proposed use completely from these adjoining residential properties.

(T. 29)

(12) Mr. Michael Klebasko, accepted as an expert in environmental science, testified on Applicant's behalf. He prepared a Natural Resources Inventory ("NRI") and a Wetland Delineation Report for the subject property that was reviewed and approved by the Army Corps of Engineers. (Exhibit 24) He discussed the various regulations adopted since the approval of the I-1 Zone for the site including the need to prepare an NRI for the property, the need to show and avoid impacting significant and sensitive environmental features, and the requirement to seek State authorization prior to any impact upon wetlands, streams, or floodplain. (T. 63-64)

(13) Mr. Klebasko found a wetland with a stream running through the center in the northern portion of the site flowing in a westerly direction toward the Capital Beltway; a second perennial stream to the south of the site that flows in a northerly direction and empties into the other stream; associated forested wetlands, smaller wetland areas and an isolated wetland right where Flowers Road intersects a corner of the property. (T.66) He noted that it is unlikely that the regulatory agencies would allow "what's called lot fill or the placement of buildings or parking lots ... in any of these jurisdictional areas." (T. 67) However, with authorization Applicant would be allowed to place infrastructure such as road crossings, utility lines, and storm drain outfalls in such areas. Future impact to all environmental features will be reviewed as part of detailed site plan and/or preliminary plan of subdivision review. (T. 68-69)

(14) Mr. Kody Snow, accepted as an expert in acoustical engineering, discussed the positive impact that the request would have on noise attributed to the Capital Beltway

and the trucks that would access the site if this request is granted. He co-authored a Noise Analysis that provided, in pertinent part, as follows:

Phoenix Noise & Vibration has conducted an analysis of noise impact generated by the proposed Vista 95 logistics center in Prince George's County, Maryland upon the neighboring residential developments located to the east and south. Under the current site plan, the Vista 95 logistics center will consist of two industrial buildings and a new roadway (Presidential Parkway) providing access to the facility. Future noise impact due to traffic on Presidential Parkway and heavy truck/facility operations were calculated and evaluated separately using a computerized noise model....

Existing and future roadway noise impact upon the residential properties adjacent to the proposed logistics center has been calculated at the ground level (5 feet above grade) throughout the site and upon the neighboring residential properties....

Roadway noise impact has been evaluated according to the transportation noise policy guidelines typically used within Prince George's County for residential development, which require noise levels in residential outdoor activity areas to be maintained below 65 dBA Ldn and additional analysis of proposed residences impacted by noise levels greater than 65 dBA Ldn to determine if they will be capable of maintaining an interior noise level of 45 dBA Ldn. Note that these regulations do not apply to existing residential developments and are not required of the applicant to be evaluated but are instead provided as a reference to compare roadway noise impact upon the nearby residential properties with and without Presidential Parkway.

Results indicate that traffic on future Presidential Parkway will not generate a perceivable change in the existing Ldn noise level for the residential properties along Poplar Drive and Flowers Road above that of the existing impact from I-95. Mitigation provided by the construction of six-foot tall vinyl fences along Presidential Parkway will help provide attenuation of noise from the roadway. Additionally, future I-95 roadway noise levels at the adjacent residential properties located east of the site will be slightly lower due to the shielding provided by the future industrial buildings at the [site]. After these buildings are constructed, noise impact upon these residences east of the site will decrease approximately 2 dBA Ldn (from 66 to 64 dBA Ldn)....

In addition to calculating roadway noise levels generated by Presidential Parkway, instantaneous noise impact generated by heavy truck (i.e. tractor trailer) operations within the logistics center has been evaluated upon the neighboring residences. Heavy truck operations that were evaluated include noise due to trucks idling, backup beepers, and the hookup of trailers to trucks

(i.e. latching). These noise events are regulated by the Prince George's County Code, which requires that noise levels be maintained at 65 and 55 dBA during daytime and 55 dBA during daytime and nighttime hours, respectively, as measured at a receiving residential property....

Any events generated by the logistics center that are considered a prominent discrete tone or impulsive noise will be required to comply with a more restrictive requirement of 60 and 50 dBA during the daytime and nighttime hours, respectively. Some backup beepers produce sound classified as a prominent discrete tone and instantaneous noise events such as hooking up a trailer to a truck is considered an impulsive noise. These events are likely to occur and were evaluated[d] against the stricter noise level limits at the neighboring residential properties.

Based upon the various modeled scenarios and calculated noise levels, it is likely that noise generated by heavy truck use at the logistics center will not exceed the Prince George's County daytime and nighttime noise level limits at the property line with the implementation of mitigation. Mitigation in the form of sound attenuation fencing will be required at various locations on the property to help achieve compliance with the Prince George's County daytime and nighttime noise level requirements. Fencing on top of the retaining walls nearest Building 1 will need to be a minimum of 15 feet tall and fencing ranging from six to seven feet in height will need to be constructed along the eastern and southern property lines, providing separation from the adjacent residences....

(Exhibit 18, pp. 2-3)

(15) Michael Lenhart, accepted as an expert in the area of transportation planning, prepared a Traffic Impact Study (Exhibit 23) and offered the following testimony in support of the request:

[W]e conducted a scoping agreement ... to identify the study intersections, which included [MD] 4 at Westphalia Road, the site access on Westphalia Road and Westphalia Road at [D'Arcy] Road and conducted counts, added background developments and then site traffic and the results show that Route 4 at Westphalia fails the adequacy test. However, there's a PFFIP that was adopted at that location by the District Council to accept funding for an interchange and in so doing that allows projects to satisfy the adequacy requirements.

The site access on Westphalia Road and Westphalia at [D'Arcy] are both unsignalized intersections and are projected to pass the adequate public facilities test [under] total traffic conditions....

So the site will have access, the development buildings will have access to MC-634. MC-634 travels through the site from Westphalia Road through Parcel 84 and then through the site to where it ties into the alignment north of the property... [This site will have one access point via MC-634 to Westphalia Road].... Flowers Road is a small roughly 20 foot wide roadway that is unmarked, there's no pavement markings, no designations. All of the properties along Flowers Road are zoned industrial, however, some of them are actually residential uses, some are industrial uses. The use of Flowers Road as it is today would be inappropriate for the amount of traffic that would be generated by our subdivision.... And furthermore, if Flowers Road were to be upgraded as per the prior condition and MC-634 were constructed it would result in two significant intersections in very close proximity.... [I]t would be more appropriate and make sense to leave Flowers Road as it is since we are not generating Traffic on that roadway, [and] we're not connecting to it....

(T. 73-74, 76-77)

(16) Mr. Lenhart opined that there is good cause to amend or delete original Conditions 1, 5, 7 and 15 in light of current County transportation relations. There is no longer a need to widen Flowers Road given the anticipated construction of MC-634 (Condition1); the site will not be accessed from Flowers Road (Condition 5); current law requires a finding of adequacy at the time of preliminary plan review/approval and requires bonding and permitting of offsite improvements prior to the issuance of permits, so it would be confusing to retain the language in Condition 7, especially given Applicant's payment of its errata share toward the interchange improvement at MD 4 and Westphalia Road; and, again, adequacy will be determined upon preliminary plan of subdivision review/approval so language in Condition 15 should mirror current law. (T. 77-81) Mr. Lenhart concluded that the traffic analysis indicates that the development will satisfy all transportation guidelines and adequacy will be tested again, in detail, upon preliminary plan review/approval. (T. 80-81)

(17) Mr. Mark Ferguson, accepted as an expert in land use planning, opined that there is good cause for the District Council to revise the original conditions, reasoning as follows:

[T]he approval of Zoning Ordinance 35-1989... predated several important changes in local planning, the content of the zoning and subdivision ordinances, associated design regulations and other aspects of land development regulation. These changes include ... [t]he amendment of the Master Plan of Transportation to include Presidential Parkway[']s reclassification to a] major collector roadway MC-634....

While the 2007 *Westphalia Sector Plan* contracted the area of land proposed for Employment/ Industrial land use and downgraded Presidential Parkway from [an] arterial roadway to a major collector roadway, it retained the subject property in the Industrial

land use classification and the issues cited by the 1994 plan affecting the subject property remain, and are reflected on the first strategy for Industrial Areas, "locate new industrial development primarily near the Capital Beltway and MD 4 where the Andrews Air Force Base flight paths result in noise rating 70 dBA or higher....

Presidential Parkway is proposed to travel down the length of Parcel 84 (one of the Applicant's six contracted parcels) from Westphalia Road, and bisect the remainder of the development site on its route to the north and east. This amendment has a consequential effect on the application of Conditions 1,5,6 and 9....

The Landscape Manual was first adopted as a development regulation in October, 1989, after the July,1989 approval of Zoning Ordinance 35-1989. The regulations of the Landscape Manual address the contents of Conditions 2,3 and 20....

The adoption of CB-100-1989 in late 1989 removed an exemption which would have allowed the development of the subject property without the requirement for the subdivision review process. The removal of this exemption has a consequential effect on the application of Conditions 7 and 15....

The adoption of CB-42-2015 created the Military Installation Overlay Zone to codify development restrictions in the vicinity of Joint Base Andrews, and applied it to the area surrounding the subject property.... [A]pproximately 40% of the subject property is located within Accident Potential Zones I and II, which means that there are limitations on the amount of office space which can be constructed. Offices uses were what was contemplated for the subject property at the time of the approval of Zoning Ordinance 35-1989. Instead, low-occupancy employment uses are now proposed, in keeping with the intent and requirements of the M-I-O-Z.... The enactment of the M-I-O-Z is therefore consequential on the application of Condition 4. The noise impacts associated with Joint Base Andrews are also relevant to the application of Condition 1....

At the time of approval of Zoning Ordinance 35-1989, numerous environmental protections were not in place; very few restrictions were in place on the ability to pipe minor streams, and to fill wetlands and floodplain areas.... Subsequently, there has also been extensive amendment of the County's Code to severely restrict impacts to environmental features, and provide peripheral buffers to the retained, protected environmental features. The effect of this evolution in regulatory laws and policies has substantively reduced the developable area of the subject property which remains after its bisection by Presidential Parkway.

These changes in planning, the Zoning Ordinance , the Subdivision Ordinance, and other development regulations provide significant protections to the environment, to surrounding properties and the County as a whole which were not present at the time of the approval of Zoning Ordinance 35-1989 and makes many of its conditions redundant or out of line with modern regulatory policy....

(Exhibit 20, pp. 2-5)

Opposition's concern

(18) Ms. Naomi Brown resides close to the subject property. She did not note any opposition per se to the request but attended the hearing primarily to learn more about the effect that the request might have upon her property, and to learn whether there would be sewer or gas extension to the area if the request were approved. (T.70-71)

LAW APPLICABLE**Amendment of Conditions**

(1) An application for the amendment of conditions attached to a piecemeal zoning map amendment may be approved in accordance with Section 27-135 (c), which provides, in relevant 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....

Good Cause

(2) As noted above, the District Council may grant Applicant's request if it finds "good cause" to do so. The Zoning Ordinance does not define "good cause", so we

must look to court opinions for guidance.

(3) In Kay Construction Company v. County Council, 227 Md. 479, 177 A.2d 694 (1962), the Court of Appeals of Maryland considered the definition of “good cause” where a Council resolution was reconsidered upon the resignation of a Councilmember and reversed allegedly for “good cause shown.” The Court held that “mere reargument based on the evidence originally presented to and accepted by the Council” is not good cause. (277 Md. At 488) The Court, in reliance on a prior decision (Zoning Appeals Board v. McKinney, 174 Md. 551, 199 A. 540 (1938)), did note that in the absence or presence of a statutory requirement, the administrative body has the right to correct errors in its decisions caused by fraud, surprise, mistake or inadvertence. More recently 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)

CONCLUSIONS OF LAW

(1) I agree with Applicant that there is good cause (substantial reason), and it would not be an impermissible change of mind, for the District Council to amend the conditions, as requested.

(2) First, the original Condition 1 referenced prohibited access to the site via certain residential streets, absent acquisition of right-of-way from listed owners. Applicant has agreed to a condition which will prohibit access to four residential streets, and since future Presidential Parkway will bisect the property and be Applicant’s sole access to the site there is no need to purchase additional right-of-way to widen Flowers Road.

(3) The Landscape Manual did not exist at the time the property was rezoned. Applicant reasonably requests to revise Condition 2 to allow it to comply with the current law. Moreover, the type of planting units proffered, the existing plantings, and the topography of the site will all provide a buffer equal to or better than the 150-foot buffer required in current Condition 2. Finally, given the environmental constraints on the site, imposing an additional 150-foot buffer would severely hamper the ability to develop the site.

(4) Applicant requests to reword the 3rd Condition since the current requirement for outdoor storage in an industrial zone set forth in Section 27-469 of the Zoning Ordinance provides that outdoor storage shall not be visible from a street, and it would be reasonable to mirror the law.

(5) Since there will be Detailed Site Plan review, per the new Condition 11, it would be reasonable to remove Condition 4 and add language to the new Condition 11 to limit building height and allow the Planning Board to consider the architectural elevations

during site plan review.

(6) Since Presidential Parkway will provide access to the site, and Applicant will not use Flowers Road or other residential streets it is reasonable to delete Condition 5 (which requires the widening of Flowers Road). For similar reasons, Condition 6 (prohibiting heavy truck deliveries along Flowers Road during certain hours) should be deleted.

(7) Applicant requests that Condition 7 be revised to reflect the facts that Applicant will be paying its pro-rata share to improve the MD 4/Westphalia Road intersection and cannot control its completion time, and that current practice is to require permitting and bonding prior to the issuance of any building permit.

(8) Applicant agrees that current Conditions 8 (pertaining to transportation of hazardous waste), 11 (pertaining to net acres for development), 12 (pertaining to maximum number of buildings), and 18 (requiring notice to all parties of record) should remain.

(9) Flowers Road will not be accessed if the request is approved, and probably will not be widened given its proximity to the future Presidential Parkway. Accordingly, there is good cause to delete Condition 9.

(10) Applicant provided evidence that the Westphalia Community Coordination Council is defunct. Therefore, there is good cause to delete conditions referencing that entity – Conditions 10, 13, 14,16 and 17. Applicant also asks that the portion of Condition 16 requiring a minimum percentage of any contracts or services needed to develop the land be set aside for women/minorities be deleted since there is no basis in County law to impose this requirement.

(11) Applicant correctly notes that transportation adequacy is determined at the preliminary plan review stage, and that the Detailed Site Plan will be reviewed by the Planning Board. Accordingly, there is cause to delete Condition 19, and include a new condition mandating Detailed Site Plan review, also requiring review of materials used at that stage and restricting building height.

(12) Applicant asks that Condition 20 be revised to delete the requirement that no loading bays be visible from I-95 because ultimate build out will be affected by the environmental constraints on the site – a reasonable request since it is clear that there are wetlands and streams on the site. However, it would no object to the remainder of the condition that requires all loading bays to be situated to face internal to the site.

(13) Finally, Applicant requests that an additional condition be imposed to require submittal of a noise analysis at the time of preliminary plan review to insure that the outdoor noise levels meet all applicable County noise regulations. There is clearly good

cause to add a condition that will lessen the possibility of any negative impact on the public health, safety or welfare.

(Section 27-135(c))

RECOMMENDATION

For the foregoing reasons, I would recommend that the District Council find good cause to amend the original conditions imposed in its approval of A-9706-C, and revise them as follows:

1. Vehicular access to the subject property shall be prohibited from Oak Street, Poplar Drive, Willow Avenue, and Flowers Road. Notwithstanding, Flowers Road may be used as a temporary construction access during the development of the subject property.
2. A 40-foot landscape buffer (including 120% of the planting units outside of PMA areas as required by the Landscape Manual) shall be provided as shown in Applicant's Exhibit **2(d)**.
3. Outdoor storage shall not be visible from a street.
4. With the exception of the ultimate improvements at the intersection of Westphalia Road/MD 4(to be funded/provided pursuant to CR-66-2010), all required off-site road improvements shall be permitted and bonded prior to issuance of any building permit.
5. Transportation of hazardous waste (explosives or the like) shall be prohibited to and from the site and storage thereon shall also be prohibited.
6. Development for buildings and parking areas shall be limited to thirty-seven (37) net acres of the subject parcel. The remaining ten (10) acres shall not be disturbed or developed beyond utility rights of ways and other engineering requirements, as necessary, to support the development.
7. The maximum number of buildings constructed on said parcel shall be limited to six (6).
8. No development shall take place unless and until a preliminary plan of subdivision is approved by the Planning Board of the Maryland-National Capital Park and Planning Commission.
9. The developer shall notify by mail all parties of records of any further hearings on the Preliminary Plat, Record Plat or Site Plan.
10. Review of a Detailed Site Plan in accordance with Part 3, Division 9 of the Zoning

Ordinance shall be required. At that time, the Planning Board shall consider the architectural elevations and the quality of the construction materials, and shall ensure that building height not exceed 50 feet.

11. All loading bays shall be situated so as to face internal to the subject site.
12. Prior to acceptance of a preliminary plan of subdivision, a noise analysis shall be provided and shall demonstrate that outdoor noise levels generated by the proposed industrial use(s) will meet all applicable County noise regulations. The noise analysis shall also provide details for outdoor noise levels generated by the full length of future MC-634/Presidential Parkway on the proposed industrial use(s) to be developed on the subject property. All noise mitigation structures required for the proposed industrial use(s) to meet applicable County noise regulations shall be reflected on a detailed site plan.