

Case No.: A-10030
Oak Crest Lots 11-13

Applicant: Nazario Family, LLC

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

ORDER OF DENIAL

IT IS HEREBY ORDERED, after review of the administrative record, that Zoning Map Amendment Application Number 10030 (A-10030) to rezone approximately 0.518 acre (approximately 22,500 sq. ft.) of R-55 (One-Family Detached Residential) zoned land to the C-S-C (Commercial Shopping Center) Zone, located at the northwest quadrant of the intersection of Magnolia Street and Clarke Avenue, approximately 320 feet east of Baltimore Avenue (US 1), identified as Part of Lot 23, and Lots 12-13, Block 3 of the Oak Crest Subdivision, Laurel, Maryland, is hereby, DENIED.

WHEREAS, as the basis for this final decision, the District Council adopts and incorporates the findings and conclusions of the Zoning Hearing Examiner, except where otherwise stated in this Order. *See Templeton v. County Council of Prince George's County*, 23 Md. App. 596, 329 A.2d 428 (1974).

I. FINDINGS AND CONCLUSIONS

a. Procedural History

On or about April 2015, property owners, Nazario Family, LLC, ("Nazario"), filed an application for a Zoning Map Amendment to rezone approximately 0.518 acre (approximately 22,500 sq. ft.) of R-55 (One-Family Detached Residential) zoned land to the C-S-C (Commercial

Shopping Center) Zone. Nazario alleges that the District Council made a mistake when it retained the subject property in the R-55 Zone during the adoption and approval of the 2010 Subregion 1 Master Plan and Sectional Map Amendment (“2010 Plan”). Ex. 1, 2.

In June 2015, the Development Review Division of the Prince George’s County Planning Department accepted Nazario’s application for review. Subsequently, Technical Staff of the Planning Department issued its Staff Report. Technical Staff recommended disapproval of Nazario’s application. Planning Board elected not to hold a hearing to consider Nazario’s application but instead adopted Staff’s recommendation of disapproval. Ex. 9, 27, 28.

On November 18, 2015, the Zoning Hearing Examiner held an evidentiary hearing to consider Nazario’s application to rezone the subject property. *See* (11/18/2015, Tr.)

On February 24, 2016, the Zoning Hearing Examiner issued her disposition recommendation of denial. *See* ZHE’s Notice of Decision, 2/24/2016.

On March 23, 2016, Nazario filed exceptions to the Zoning Hearing Examiner’s disposition recommendation. *See* Nazario’s Exceptions, 3/23/2016.

On June 20, 2016, the District Council held a hearing to consider Nazario’s exceptions. At the conclusion of the hearing, the District Council referred this matter to staff to prepare an order of denial. *See* Zoning Agenda, 6/20/2016.

b. The Subject Property

The subject property is approximately 0.51 acres in size, and square-shaped. It is undeveloped and heavily wooded. A lot line adjustment was approved by the Planning Board in 2014. Ex., p.4; Ex. 29. As a result the subject property was re-designated to Part of Lot 23 and

Lots 12-13, Block 3, of the Oak Crest Subdivision. The subject property has frontage on three rights-of-way – Clark Avenue, Baltimore Avenue (US 1) and Magnolia Street. Access to Magnolia Street is slightly limited under the approved plat of subdivision, and access to Baltimore Avenue (US 1) is via a common access drive through Lots 22 and 23. Ex. 21.

Nazario also noted that:

Oak Crest subdivision east of Baltimore Avenue is generally a grid layout, not all of the road network is continuous: Magnolia Lane is not connected to the roads further south, and the constructed roadway of Clark Avenue does not extend through the block on the south side of Magnolia Street. Ex. 5, p.4.

The property is surrounded by the following uses:

- North – Single-family residences along Clark Avenue in the I-1 Zone
- South – Single-family residences across Magnolia Street in the R-55 Zone
- East – Single-family residences along Clark Avenue in the R-55 Zone
- West – The site of the demolished Bay and Surf Restaurant in the C-S-C Zone.

The neighborhood of the subject property proffered by Staff has the following boundaries:

- North – Cherry Lane
- South – Maple Street
- East – CSX railroad tracks
- West – Baltimore Avenue (US 1).

Nazario generally agrees with the neighborhood defined by Technical Staff. It notes that the neighborhood has three distinct characters – more industrial uses to the north, a mix of commercial and service – commercial uses along US 1, and single-family residences to the southeast. Ex. 15. The site has been the subject, in part, of several previous development

applications:

- A-9908** The site (as Lots 11–13) was part of Zoning Map Amendment A-9908, which sought rezoning from the R-55 Zone to the Commercial Shopping Center (C-S-C) Zone. While the Prince George’s County District Council ultimately rezoned the lots to the west (Lots 7–10) on April 24, 1996, they denied the request for Lots 11–13.
- 5-14093** On September 25, 2014, the Planning Board approved a lot line adjustment via Final Plat 5-14093 which created Lots 22 and 23 and made Lot 11 part of Lot 23. At the same time, a shared access easement was created from Baltimore Avenue (US 1) serving both Lots 22 and 23.
- DSP-14016** On November 3, 2014, the Planning Director approved a detailed site plan for an urgent care facility on Lot 22. Lot 23 is included on the DSP to provide for half of the shared access easement and for stormwater management facilities. No development is proposed on the portion previously known as Lot 11.

c. Plan Recommendations

The 2010 Plan depicts the site within the Focus Area 4 (US 1 Academy Lane to Cherry Lane). The 2010 Plan created goals and policies to enhance, but not to expand, existing commercial uses along the Baltimore Avenue (US 1) corridor, supported by additional residential uses. The 2010 Plan, in pertinent part, provides as follows:

This vision for Focus Area 4 ... is new mixed-use development that complements and enhances the surrounding residential neighborhood....

The area is bounded by Cherry Lane to the north and Academy Lane to the south. The western boundary follows US 1 to Contee Road and extends further west to include the area between Contee

Road and Academy Lane. The eastern boundary encompasses the properties fronting US 1 and some adjacent residential properties and open space to the east. ... The area is defined by the commercial uses lining US 1 and an assortment of open space areas.... Existing commercial structures range in quality. While a few are appropriate for retention and reuse, the lesser quality structures represent future redevelopment opportunities....

Policy 1: Establish areas of mixed-use development to complement surrounding residential areas.

Strategies:

- Redevelop the northern portion of the study area from the Maple Street right-of-way to Cherry Lane with a mixed-use development along the east side of US 1

See 2010 Plan, pp. 31–33, Ex. 9 & 27, p. 5, Ex. 16–20. In the final analysis, the 2010 Plan retained the subject property in the R-55 Zone.

The Plan Prince George’s 2035 Approved General Plan (Plan Prince George’s 2035) depicts the site within the Established Communities policy area. The Plan Prince George’s 2035 recommends 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. In Section IV: Elements, Land Use (page 116), Policy 9 states the following which further supports the recommendation to retain the existing residential zoning for this property:

Policy 9 Limit the expansion of new commercial zoning outside of the Regional Transit Districts and Local Centers to encourage reinvestment and growth in designated center and in existing commercial areas. Ex. 9, 27, p. 5.

d. Nazario's Exceptions

Nazario notes two exceptions to the ZHE's disposition recommendation. Nazario contends that the ZHE's disposition recommendation to the District Council was based on or relied upon "the unsubstantiated opinion and speculative conclusions" contained within Technical Staff's report.

Exception One states

There is no language in the 2010 Approved Subregion 1 Master Plan and Sectional Map Amendment to support the M-NCPPC Technical Staff Report's conclusory statement, as set forth above, which was adopted by the ZHE as the sole basis for the Decision recommending "Denial" in this matter. There is no reference, or inference, by the District Council that the designation of the subject property and other similarly situated properties in Focus Area 4 as appropriate locations for "Mixed-Use Commercial" development was in any way conditioned in consolidation of properties, i.e., "...it is necessary that a larger collection of properties come in together." Or until a "comprehensive mixed-use development plan is put forward" as opined by the Technical Staff and adopted by the ZHE. Nor is there any discussion in the master plan text regarding leaving the subject [property] in its existing zoning classification to protect the adjacent property to the south and east. *See Nazario's Exceptions*, pp. 1-2.

Nazario's second exception is directed to paragraph 4 of the ZHE's "Conclusions of Law."

Exception Two states

The ZHE failed to consider the multiple means of demonstrating legal mistake as set forth in established Maryland case law and cited by Applicant in its Statement of Justification. The ZHE's narrow interpretation citing a portion of the lower Court's ruling in People's Zoning Counsel for Baltimore County v. Prosser Co., 119 Md. App. 150 (1988) and characterizing the Council's action as an exercise in bad judgment based on complete and accurate information is without any basis in the record. *See* Nazario's Exceptions, pp. 2-3.

e. Standard of Review

Nazario contends that retention of the R-55 (One-Family Detached Residential) Zone classification for the subject property by the District Council through the approval of the 2010 Plan constitutes a mistake pursuant to PGCC § 27-157(a)(1)(B)(ii). Ex. 2, p. 5. Section 27-157 provides 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. *See* PGCC § 27-157.

Nazario states that the most *appropriate* zoning classification for the subject property is the C-S-C (Commercial Shopping Center) Zone. Ex. 2, p. 12 (Emphasis added). According to Nazario, the C-S-C zone will allow development which implements the goals, policies and strategies of the 2010 Plan *without overburdening the property owner to secure the necessary entitlements*. Id. (Emphasis added).

In Maryland, the original or comprehensive zoning (in this case the 2010 Plan) **may**¹ be changed (unless by a subsequent comprehensive zoning) only by a subsequent piecemeal zoning, which in the case of a Euclidean zone may be granted only upon a showing of unforeseen changes in the surrounding neighborhood occurring since the prior original zoning or comprehensive rezoning or mistake of fact made by the zoning authority in the original zoning or previous comprehensive rezoning.

The “change-mistake” rule is a rule of the either /or type. The “change” half of the “change-mistake” rule requires that, in order for a piecemeal Euclidean zoning change to be approved, there must be a satisfactory showing that there has been significant and unanticipated change in a relatively well-defined area (the “neighborhood”) surrounding the property in question since its original or last comprehensive rezoning, whichever occurred most recently. **The “mistake” option of the rule requires a showing that the underlying assumptions or premises relied upon by the legislative body during the immediately preceding original or comprehensive rezoning were incorrect. In other words, there must be a showing of a mistake of fact. Mistake in this context does not refer to a mistake in judgment. Additionally, even where evidence of a change or mistake is adduced, there is no reciprocal right to a change in zoning, nor is there a threshold evidentiary standard which when met compels rezoning. Even with very strong evidence of change or mistake, piecemeal zoning**

¹ The words “shall,” “must,” “may only” or “may not” are always mandatory and not discretionary. The word “may” is permissive. *See* § PGCC § 27-108.01(19). Maryland cases consistently interpret ‘may’ as permissive; by contrast, ‘shall’, is consistently interpreted as mandatory under Maryland case law. *See Board of Physician Quality v. Mullan*, 381 Md. 157, 166, 848 A.2d 642, 648 (2004); *State v. Green*, 367 Md. 61, 82, 785 A.2d 1275, 1287 (2001); *Brodsky v. Brodsky*, 319 Md. 92, 98, 570 A.2d 1235, 1237 (1990).

may be granted, but is not required to be granted, except where a failure to do so would deprive the owner of all economically viable use of the property. In Maryland, the change-mistake rule applies to all piecemeal zoning applications involving Euclidian zones, including those involving conditional zoning. The change-mistake rule does not apply, in any event, to changes in zoning made in a comprehensive rezoning, or the piecemeal grant of a floating zone. *See Cnty. Council of Prince George's Cnty. V. Zimmer Dev. Co.*, 444 Md. 490, 512–515; 120 A.3d 677, 689–691 (2015) (citations omitted) (footnotes omitted) (Emphasis added).

Nazario misstates the evidence in the administrative record. Technical Staff's recommendation (which the ZHE relied upon) was based on factual findings in the record. On September 4, 2015, the Community Planning Division of the Planning Department sent a memorandum to Mr. Tom Lockard, (author of the Technical Staff Report) which made the following determinations:

- This application **does not conform** to the Plan Prince George's 2035 policies for Land Use.
- The application **does not conform** to the economic development and community character goals and vision and the Focus Area 4 vision, goals, and policies in the 2010 Approved Subregion 1 Master Plan. Ex. 9, 27–Memorandum to Tom Lockard from Community Planning Division, 9/4/2015 (Emphasis added).

To support these conclusions, Community Planning relied on specific provisions of Plan Prince George's 2035 and the 2010 Plan, which Mr. Lockard then relied upon to advance Staff's recommendations. Ex. 9, 27–Memorandum, pp. 1–3.

According to Nazario, the 2010 Plan states that the land-use recommendations should be viewed comprehensively, that site plan applications should be flexible, and rather than requiring a mix of uses for each application that the US 1 Corridor develop with the cohesive, horizontal and vertical mix of uses described by the master plan as a whole, and further, that applications for a mixed-use zone may be filed for evaluation and approval based only on the concepts and guidelines of this document. *See Nazario's Exceptions, p. 2.*

According to the ZHE, Technical Staff recommended denial of the rezoning, reasoning as follows:

The applicant contends that retaining the subject property in the R-55 Zone in the 2010 Subregion I Master Plan and SMA was a mistake. Their contention is that the District Council, at the time of the master plan and SMA, failed to take into account then existing facts when it retained the site in the R-55 Zone. They feel that the District Council should have recognized that the subject property is an anomaly; the only lots in the neighborhood north of Magnolia Street and west of Clark Street remaining in a residential zone. The master plan makes a recommendation that the northern section of Focus Area 4 be developed (in large part) as a mixed-use development of retail, office, and residential uses. Despite this, the Council chose to not rezone properties to Euclidean commercial zones (with the exception of a single lot on Holly Street), relying instead on the floating mixed-use zones (such as the M-X-T Zone) to implement the recommendation. The applicant notes that, although the Mixed Use-Transportation Oriented (M-X-T Zone) may be an appropriate vehicle for larger properties, it is not appropriate for this small site.

Staff points out that there is a strong presumption of validity accorded a comprehensive rezoning. The presumption is that, at the time of its adoption of the comprehensive rezoning, the District Council considered all of the relevant facts and circumstances then existing concerning the subject property....

The Subregion I Master Plan and SMA recommends a mixed-use development for the subject property and many of the other adjacent properties. That being said, the master plan and SMA did not expect this half-acre site to be a stand-alone mixed-use development. Because of the existing lotting and land ownership patterns it is necessary that a larger collection of properties come in together. While this delays the plan recommendation from coming to fruition, it does not constitute a mistake on the part of the District Council. The District Council considered the proper use for the site and concluded that commercial uses at this location were inappropriate at this time. Until a comprehensive mixed-use development plan is put forward, the Council decided to leave this site, and all of the other lots in Focus Area 4 (with the exception of one), in their existing zoning classification. Doing so protects the residential character of the surrounding properties to the east and south.

The District Council chose to follow the recommendation of the master plan and restrict new commercial development along Baltimore Avenue (US 1) because of concerns with potential impacts on the residences to the east. If the applicant believes that residences are not viable on this property, staff would point out that there are many nonresidential uses that are permitted in the R-55 Zone, either by-right or by special exception. Staff assumes that some of those uses would be appropriate for this location. Ex. 9, 27, pp. 6-7).

Technical Staff's recommendation was premised, in part, on the fact that Nazario did not advance any argument of a change to the character of the neighborhood and Staff's analysis that there has been no substantial change to the character of the neighborhood since the last comprehensive zoning of the area in 2010. Ex. 9, 27, p. 6. The language on page 159 of the 2010 Plan is not contrary to, but rather consistent with Technical Staff's opinion or recommendation.

Nazario also contends that it was a mistake for the District Council only to provide property owners with only the M-X-T Zone as an option of rezoning because the Council failed to take into account that the 2010 Plan land-use recommendations could be implemented just as

easily by allowing the option of the C-S-C Zone. *See* Nazario's Exceptions, p. 2. This argument is circular because one could argue that if the 2010 Plan land-use recommendations only provided property owners with the C-S-C Zone as an option of rezoning, the Council would have failed to take into account that the Plan land-use recommendations could be implemented just as easily by allowing the option of the M-X-T Zone.

Moreover, the ZHE's conclusions of law were not erroneous. As a threshold matter, the ZHE, after considering Nazario's legal arguments (including multiple means of demonstrating legal mistake), found that the District Council did not make a mistake by failing to rezone Nazario's property. Relying on Maryland case law, the ZHE found that the Council's decision not to rezone the subject property to a zone preferred by Nazario was not a mistake because there must be evidence that the Council relied on assumptions or premises that were invalid when the 2010 Plan was approved.

Finally, Nazario is legally incorrect that a finding of mistake (including multiple means of demonstrating legal mistake), compels rezoning. In Maryland, even where evidence of a change or mistake is adduced, there is no reciprocal right to a change in zoning, nor is there a threshold evidentiary standard which when met compels rezoning. Even with very strong evidence of change or mistake, piecemeal zoning **may** be granted, but is not required to be granted, except where a failure to do so would deprive the owner of all economically viable use of the property. *Zimmer Dev. Co.*, 444 Md. 490, 519–520; 120 A.3d 677, 694–695 (2015) citing *Mayor & Council of Rockville v. Rylyns Enterprises, Inc.*, 372 Md. 514, 539, 814 A.2d 469, 483 (2002) (Although the zoning authority may rezone a property into a Euclidian zone only upon a

threshold finding of a mistake of fact in the previous comprehensive rezoning or original zoning or an unforeseen change in the neighborhood occurring since then, the zoning authority is not required to rezone the property after making such a finding, unless a failure to do so would deprive the property owner of all economically viable use of the property). There is no evidence in the record that Nazario would be deprived of all economically viable use of its property. Ex. 1-29, (11/18/2015, Tr.).

To the contrary, the record demonstrates that the property has many economically viable uses. *See* Ex. 9, 27, p.7) (If the applicant believes that residences are not viable on this property, staff would point out that there are many nonresidential uses that are permitted in the R-55 Zone, either by-right or by special exception. Staff assumes that some of those uses would be appropriate for this location).

For the reasons set forth above, Zoning Map Amendment Application Number 10030 (A-10030) to rezone approximately 0.518 acre (approximately 22,500 sq. ft.) of R-55 (One-Family Detached Residential) zoned land to the C-S-C (Commercial Shopping Center) Zone, located at the northwest quadrant of the intersection of Magnolia Street and Clarke Avenue, approximately 320 feet east of Baltimore Avenue (US 1), identified as Part of Lot 23, and Lots 12-13, Block 3 of the Oak Crest Subdivision, Laurel, Maryland, is hereby, DENIED.

ENACTED this 19th day of July, 2016, by the following vote:

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

Opposed:

Abstained:

Absent:

Vote: 9-0

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