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

ZONING MAP AMENDMENT

A-10051

DECISION

Application:	R-R to M-X-T
Applicants:	Maria Volpe and Sandra Carey, Trustees/Carozza Property
Opposition:	None
Date:	January 15, 2020
Hearing Examiner:	Maurene Epps McNeil
Recommendation:	Remand with Conditions

NATURE OF REQUEST

(1) A-10051 is a request for the rezoning of approximately 60.02 acres of R-R (Rural Residential) zoned land to the M-X-T (Mixed Use – Transportation Oriented) Zone within the M-I-O (Military Installation Overlay) Zone. The subject property is located in the southwest quadrant of the intersection of Pennsylvania Avenue (MD 4) and Woodyard Road, and is identified as 9702 and 10200 Marlboro Pike, Upper Marlboro, Maryland. Pennsylvania Avenue (MD 4) is classified as a freeway and Woodyard Road is classified as an arterial.

(2) The Technical Staff recommended disapproval of the Application. (Exhibit 16) The Planning Board chose not to hold a hearing and adopted Staff's recommendation as its own.

(3) No one appeared in opposition to the Application. At the conclusion of the hearing the record was left open to allow Applicants to submit additional information. These items were submitted on January 27, 2020 and the record was closed that time.

FINDINGS OF FACT

Subject Property and Surrounding Uses

(1) The subject property is comprised of Parcels 32, 35 and 92 recorded in Liber 13557 at Folio 730. It has approximately 4,290 feet of frontage along, and access to, Marlboro Pike to the south, 4,300 feet of frontage along Pennsylvania Avenue (MD4) to the north, and 250 feet of frontage along Woodyard Road to the east. Applicant avers that

"excepting the estimated 0.1-acres of open lawn fronting the 336 square foot (per SDAT records) vacant brick structure located at 9702 Marlboro Pike, the site is observed to be covered in what appears to be naturally occurring secondary woodland vegetative growth of small trees and understory shrubbery." (Exhibit 16, Backup p. 69)

(2) The subject property is surrounded by the following uses:

- North – Pennsylvania Avenue (MD 4), and to the north, property being developed as the Westphalia Town Center in the M-X-T Zone; to the northeast the interchange between MD 4 and MD 223.
- South – Marlboro Pike and south of Marlboro Pike, single-family detached dwellings in the R-R Zone and townhouses.
- East – Woodyard Road (MD 223) and east of MD 223, vacant L-A-C (Local Activity Center) and M-X-T zoned property.
- West – A vacant commercial building on a 2-acre C-O (Commercial Office) zoned parcel and, further west, commercial uses in the C-O and C-S-C (Commercial Shopping Center) zones.

(Exhibit 16, pp. 4-5)

(3) The property to the east was rezoned from the R-R to the M-X-T Zone upon adoption of the 2013 Subregion 6 Master Plan and Sectional Map Amendment. The Planning Board has approved a Conceptual Site Plan for the property (CSP-18007), and said Plan is currently under review by the District Council.

(4) The Technical Staff established a neighborhood for the site with the following boundaries:

- North – Pennsylvania Avenue (MD 4), a master plan designated freeway.
- South – Dower House Road, a master plan designated arterial roadway, and McCormick Road, a master plan designated major collector roadway.
- East – Woodyard Road (MD 223), a master plan designated arterial roadway.
- West – Dower House Road.

(Exhibit 16, p. 4)

Applicants proffer the following neighborhood boundaries:

- North – Melwood Road, Central Park Drive. and Rock Spring Drive (areas to the north of Pennsylvania Avenue (MD 4).
- South – Dower House Road, McCormick Drive and an unnamed stream.
- East - PEPCO right-of-way, Woodyard Road and Melwood Road
- West- Dower House Road

(Exhibit 27, p. 5)

(5) This Examiner believes the northern boundary should go further than Pennsylvania Avenue which abuts the subject property. However, neighborhood, while relevant, plays less of a role when an applicant seeks rezoning to the M-X-T Zone, and the northern boundary proffered by Applicants includes land within a different planning area. (These lands are of some import in this Application but need not be considered part of the neighborhood.) For these reasons I accept the neighborhood proffered by the Technical Staff.

Master Plan/Sectional Map Amendment/General Plan/Functional Plans

(6) The subject property lies within an area governed by the 2013 Subregion 6 Master Plan and Sectional Map Amendment ("SMA"). The 2013 Master Plan retained the prior Master Plan's recommendation of Residential Low land uses for the site, defined as up to 3.5 dwelling units per acre and primarily single-family detached dwellings. The 2013 SMA retained the R-R zoning classification for the site. The Master Plan included the following Policies within the Chapter on Environment that should be considered in the review of the instant request:

> Policy 1
> Protect, preserve, and restore the identified green infrastructure network and areas of local significance within Subregion 6 in order to protect critical resources and to guide development and mitigation activities….
>
> Policy 2
> Restore and enhance water quality in degraded areas and preserve water quality in areas not degraded.

(2013 Subregion 6 Master Plan, pp. 68 and 72)

(7) The subject property is to the south of Pennsylvania Avenue (MD 4), the right-of-way that abuts the land governed by the 2007 Westphalia Sector Plan and Sectional Map Amendment. The subject property is not located within the boundary of this Plan, however. The 2007 Westphalia Sector Plan notes that "the document contains recommendations for land use, protection and enhancement of existing communities…." (2007 Westphalia Sector Plan, p. vii). The Plan called for approximately 1,350,000-square-feet of new retail development, approximately 4,000,000-square-feet of new office development, 15,000 – 16,000 new residential dwelling units in a variety of housing types, and new infill industrial development along the I-95 corridor near Joint Base Andrews. (2007 Westphalia Sector Plan, p. 1) There is a recommendation that the scenic corridor buffer along Pennsylvania Avenue (MD 4) be preserved.

The 2007 Westphalia Sector Plan envisioned "[t]wo mixed-use neighborhood centers … to [serve] area neighborhoods" and "[f]our smaller-scaled mixed-use neighborhood centers to serve local neighborhoods." (2007 Westphalia Sector Plan, pp. 27, 29) The town center itself is to be developed as a regional center. One gateway was identified at Woodyard Road and Pennsylvania Avenue (MD 4).

(8) The 2014 General Plan classifies the Westphalia development located to the north of the subject property across Pennsylvania Avenue (MD 4) as a "Local Center" which is defined as "focal points of concentrated residential development and limited commercial activity serving our Established Communities." (2014 General Plan, p. 106) It is anticipated that this Local Center will on average net 10-60 Dwelling Units per acre and will have a FAR for new commercial development of 1-2.5. A policy of the General Plan is to "[l]imit future mixed-use land uses outside of the Regional Transit Districts and Local Centers" and "[r]e[-]evaluate mixed-use land use designations outside of the Regional Transit Districts and Local Centers as master plans are updated." (2014 General Plan, p. 114)

(9) The 2014 General Plan placed the subject property within the Established Communities, and described these communities as follows:

> **Established Communities**: Plan 2035 classifies existing residential neighborhoods and commercial areas served by public water and sewer outside of the Regional Transit Districts and Local Centers, as Established Communities. Established communities are most appropriate for context-sensitive infill and low- to medium-density development. Plan 2035 recommends maintaining and enhancing existing public services (police and fire/EMS, facilities (such as libraries, schools, parks, and open space), and infrastructure in these areas (such as sidewalks) to ensure that the needs of existing residents are met.

The 2014 General Plan also designated Regional Transit Districts and Local Centers and recommends "directing the majority of future employment and residential growth" to the Districts and "directing medium to medium-high residential development, along with limited commercial uses" to the Centers. (2014 General Plan, p. 19)

(10) The 2016 Military Installation Overlay ("M-I-O") Zoning Map Amendment placed the subject property within the M-I-O Zone in surfaces D (inner horizontal surface) and E (conical surface) which limits the height of any construction and Noise Intensity Zone Decibel Range of 60-74 dBA Ldn. (Exhibit16, Backup pp. 85-86 and Exhibit 30) The site is not within an accident potential zone.

(11) The 2005 Countywide Green Infrastructure Plan included the following explanation as to how the County's green infrastructure system was developed:

> Between 1995 and 1997 the Prince George's County Council undertook an extensive study of growth management, adequate public facilities ordinances, and the existing development pipeline in the county. Building on these initiatives the Council created Commission 2000, a 53-member, broad-based advisory panel to develop and recommend a growth management plan and strategies for implementation. Commission 2000 published its final report (in July 2000), entitled *Commission 2000, Final Report,* Biennial Growth Policy Plan. In November 2000, the County Council adopted the recommendations, with amendments as the Biennial Growth Policy Plan, which became the November 2000 Interim General Plan.

A key recommendation of the November 2000 Interim General Plan was to establish a green infrastructure system in the county as a planning tool to help guide future preservation efforts. The report set forth that environmental elements to be considered in the plan text and on an environmental overlay map as the starting point for mapping a green infrastructure network. In addition, it recommended that open space linkages, significant woodlands, and sensitive species habitat also be included in a green infrastructure system. The green infrastructure recommendations are included as a key component in the 2002 General Plan.

State Green Infrastructure Assessment

The Maryland Department of Natural Resources completed a statewide green infrastructure assessment in 2001 using a model and satellite images to identify an interconnected network of environmental resources of statewide significance. The map is used by the state as a reference and guide for land use decisions and the targeting of state land acquisition funds.

The state's green infrastructure network, in combination with environmental overlay, formed the foundation for the mapping of the green infrastructure network in Prince George's County. State-designated areas are included in the county plan, except in areas where existing and/or approved development compromised areas to the point where the definition of countywide significance could no longer be met. The state's green infrastructure assessment categorizes land as being either in hubs, corridors, or nodes. The county plan does not use the same categorization because the mapping criteria used does not result in easily discernible categories. Instead, land is designated as being outside the green infrastructure network or within one of the following three categories-regulated area, evaluation area, or network gap.

Much of the state's green infrastructure network is included in the county's network. However, the county's network also includes locally significant environmental features. For example, the minimum corridor width of the state's green infrastructure network is 1,100 feet, while the minimum corridor width of the county's green infrastructure network is 200 feet, in the Developing and Rural Tiers, with no minimum width in the Developed Tier. Because environmental opportunities are limited in the county's Developed Tier, all contiguous natural areas in that tier, regardless of width, have countywide significance.

(2005 Countywide Green Infrastructure Plan, pp. 12-13)

(12) The 2017 Prince George's County Resource Conservation Plan combined three plans, including an update to the Green Infrastructure Plan, the Agriculture Conservation Plan, and the Rural Character Conservation Plan. (2017 Resource Conservation Plan, pp. 6-8) The Resource Conservation Plan "supports the general vision and goal of Plan 2035, and specifically the environmental goal" which urges that growth be directed "to the designated Downtowns, Regional Transit Districts, the Innovation Corridor, and Local Centers" by "providing general direction on where development should not occur in order to protect the precious remaining resources." (2017 Resource Conservation Plan, p. 9)

Applicants Request

(13) Applicants request a rezoning from the R-R to the M-X-T Zone. It proposes to develop the property with a 30,000-square-foot shopping center, a 220-room hotel, 180 townhouses, 60,000-square-feet of general office, and a 250-seat church. Applicants submitted a Land Use Plan showing the proposed acreage assigned to the mix of uses: 8.13 acres of institutional uses to be located on the western portion of the site; 30.3 acres of single-family residential/attached/multifamily uses to be located in the middle of the site; and, 21.6 acres of neighborhood commercial/retail uses to be located on the eastern portion of the site. (Exhibit 42)

(14) The subject property has approximately 4,300 feet (0.81 mile) of frontage along Pennsylvania Avenue (MD 4), classified as a freeway within the Countywide Master Plan of Transportation. The subject property also adjoins the intersection of Pennsylvania Avenue and Woodyard Road which is classified as an arterial within the Countywide Master Plan of Transportation. Accordingly, the first criterion for approval of the M-X-T Zone (discussed more fully below) is met. The Zoning Ordinance also requires a finding that the approval of M-X-T zoning at the subject property will not substantially impair the integrity of the General Plan; that it be in keeping with the purposes of the M-X-T Zone, and the transportation facilities will be adequate to carry anticipated traffic for the proposed development. Each of these criteria were addressed by Applicants witnesses.

(15) Mr. Jeff Lugwick, Senior Vice President of the NAI Companies, and agent of Maria Volpe and Sandra Carey, Trustees, was accepted as an expert in the area of commercial real estate development. He provided the following testimony in support of the Application:

> I represented the [Applicants] family for 25 years and I've handled all of the real estate holdings, taking them through some of the early development processes or entitlement processes….
>
> I walked the site on numerous occasions including walking it after we had the selective timber harvest in the early 2000s….
>
> [T]he town center portion of the Westphalia [Sector Plan] was previously the [Carroza] property. And Mr. [Carroza] … had actually shown the vision of a 10 or 15 story high-rise office building on this site [the subject property] … with a big bridge connecting over to this town center that he wanted to build….[O]riginally when Mr. [Carroza] bought these properties to develop, he saw them as being developed together because they were on a major highway and on an interchange. And those are typically the places that … successful development occurs.
>
> [T]he vision of Westphalia is beginning to materialize…. The big interchange is one of the best things … happening in the area…. And Dower House Road improvements are being made also. So this whole area is being developed. But what's lacking is a service … what we would define in our business as neighborhood convenience…. That little center [on Hall Road in Bowie] we would call that a neighborhood convenience center…. [I]n the

> Westphalia town center, they have a big retail power center, like what you might see at Vista Garden or Vista Marketplace… with big box store, restaurants.
>
> There is … a restaurant desert. I mean, all of Upper [Marlboro] is somewhat of a restaurant desert. And I've got some experience with that. I represented … [BET] Soundstage and Applebee's….I think one of the things that … we had submitted for the [Carroza] property was a couple of nice restaurant pad[s], a couple of nice hotel pads, and … a small neighborhood convenience center, those kind of things that will attract … going home folks who normally just drive to the county will stop and [give] some of their tax money as they are going through….
>
> [O]ur initial analysis was about 20 acres of the site would be for commercial use. And with two hotel pad site[s] at 2 1/2 acres each, a gas station site, and a 30,000 foot neighborhood convenience site. So the square footage, each hotel is about 100,000 square feet. Each restaurant is about 1,000 square feet. And the 30,000 feet. So maybe 250,000 feet to 260,000 feet of total development, but about a third of the property.[1]
>
> [I do not consider the commercial on this site would be competitive with the north side of Pennsylvania Avenue where the Westphalia power center is] because… of [the] completely different nature. A power center is mostly comprised of big boxes. So you know, a Home Depot, a grocery store, … those kind of big boxes,
> that's a power center…. And I believe … that when we can demonstrate that restaurants … are interested in coming to that marketplace and they can be successful … [We] will complement [what] was ultimately planned for the retail at Westphalia…
>
> We actually looked at this property over the last 25 years evaluating it every four or five years. And the RR zone was a rural [r]esidential, 25,000 square foot lots. And it was considered a zone to be parked in. Well because of the proximity of Pennsylvania Avenue, there was a requirement that the lot depth of the lots be 300 feet. So to get any kind of density out of it, one would have to be about 75 foot wide lots that are 300 feet long and are kind of like bowling alleys almost. We went to the market with builders and literally they felt it was going to be very expensive to develop because of the limited [development] ability for RR zoned properties. And so financially it's never been feasible. So every five years we … go back to the property and see what would be the best thing to do….

(T.25-26,33-34,,37,39,40, 42 and 45-47)

(16) Jacob McCarthy (employee of Bay Environmental) accepted as an expert wetland ecologist, with experience in preparing natural resource studies and wetland delineation reports, testified on Applicants behalf. Mr. McCarthy walked the subject property on several recent occasions, photographed what he saw on site and prepared a letter explaining why he believes there are no regulated streams on site (in contravention to the Technical Staff's opinion that "stream beds" bisecting the property" are one of the reasons the request should be denied).(Exhibits 16, p.13 and 28) His testimony provided, in pertinent part, as follows:

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[1] The Technical Staff reviewed a request for "a 30,000 square [foot] shopping center, a 220-room hotel, 180 townhouses, 60,000 square feet of general office, and a 250-seat religious institution." (Exhibit 16, Backup pp. 2, 91)

> When I was out on site evaluating all the channels that exist, I cannot find evidence of any regulated environmental streams out there, any features that would be regulated. Everything was an ephemeral channel, which only runs during or after – immediately after a rain event or precipitation. All the channels I saw had no defined bed and banks, no significant scouring or evidence of leaf litter being moved due to overland flows. There was no evidence of groundwater connection.
>
> Most of the channels were very shallow depressions. There were a few that were a little more in size, just due to the nature of the landscape position. Most of those were immediately abutting Route 4 along the roadway….
>
> [Upon review of aerials from 1938 until 2018, available on PG Atlas] the evolution of the property from when it … looks to be farmed back in the 30s to when Route 4 was being constructed and the site was being used for construction access and material to when it was left fallow from some time in the late 60s, early 70s. And then the tree, forest is starting to grow back. But I don't see anything that would indicate regulated environmental features based off these….
>
> [There is a lidar digital elevation model prepared by PG Atlas.] All these blue lines exist on [the] PG Atlas [elevation model] as a regulated environmental feature, the stream channels. But in the field, they're simply ephemeral depressions created in uplands.
>
> They're not stream channels. They are not regulated features. They are ephemeral drainage soils and ditches that just convey groundwaters off-site to the north.

(T. 66-67, 77-78, and 86)

(17) Ryan McAllister, accepted as an expert in the area of landscape architecture, testified on Applicants behalf and prepared a Cursory Stream Evaluation Report (with attached maps and photographs) for the site. (Exhibit 28). He has walked the subject property "the full site, not a straight direction, but kind of crisscrossing patterns in a grid to survey the site for all the many features of it." (T. 95) He agreed with Mr. McCarthy's assessment that there are no regulated environmental streams on site:

> So we walked the site…. We concur with Bay Engineering … [e]nvironmental report. Natural resource inventories under the county code can be prepared by a licensed landscape architect. As a licensed landscape architect in reviewing these based on the county code, I believe as well that the information that's been provided by Bay is consistent with county code regulations and the determination that these are not regulated environmental streams. These are drainage ditches, ephemeral ditches, if you will, which are also not [regulated] by the County Code.

(T. 100)

(18) Mr. McAllister expounded further in his Stream Evaluation Report:

> The scope of our analysis was to evaluate the property for stream resources that would be regulated by …[the] Maryland Department of the Environment's Nontidal Wetlands and Waterways Division (MDE) and the Regulatory Functions Branch of the Baltimore District

Army Corps of Engineers (USACOE). To be considered a stream, the channel must meet several criteria: convey surface water during the growing season or have a ground water connection; exhibit an ordinary high-water mark; have sediment and particulate sorting and scouring: and have a defined stream bed and banks.

Prince George's County utilizes the Environmental Technical Manual that was published in September 22, 2010 and updated in 2018 to define Regulated Environmental Features. Subtitle 24 … and Subtitle 27 … defines a "Regulated Stream" as …"streams that have water flowing year-round during a typical year and streams that have water flowing during certain times of the year when groundwater provides for stream flow. Water flow can be identified by a defined channel and movement of leaf litter and debris by the movement of water. During dry periods some regulated streams may not have flowing water. This definition includes "perennial" and "intermittent" streams. Streams that only have water flowing during, or for a short duration after, precipitation events in a typical year are "ephemeral" streams and are not regulated. The use of the term "stream" in this or other sections of County Code shall refer to a regulated stream unless the provisions of that section define a stream otherwise.…"

Existing Conditions

The undeveloped property consists of three parcels on the north side of Marlboro Pike, and south of Pennsylvania Avenue (MD-4). These are shown on the attached satellite imagery. The site was dominated with mixed upland hardwood forest ….

The US Fish & Wildlife Service's National Wetland Inventory map shows no wetlands mapped within the study area. Based on the Natural Resource Conservation Service's soil survey, there are no hydric soils mapped within the study area and all soil series are well drained….

Cursory Stream Evaluation

There were no regulated streams within the 60-acre study area that would fall under the jurisdiction of MDE or the USACOE, or be considered a Regulated Environmental Feature by Prince George's County. All of the swales and depressions shown on the attached PGAtlas Digital Elevation Model map are ephemeral ditches that are located in upland soils. There was no evidence of groundwater connections or defined bed/banks in any of the areas shown as potential streams. There are roadside ditches on the south side of MD-4 that are ephemeral in nature, underneath the roadway….

(Exhibit 28, pp. 1-2)

(19) Mr. Michael Lenhart, accepted as an expert in transportation planning, prepared a traffic impact analysis for the subject property and testified on Applicants' behalf. (Exhibit 11) That analysis provided, in pertinent part, as follows:

This Traffic Impact Analysis (TIA) was prepared for the rezoning application of the Carozza Property…. At this stage of the process, the applicant does not have specific uses or densities, however… the applicant has provided various assumptions on the potential development program so the rezoning request may be adequately evaluated. For the purpose of this application, it is research that the application, it is research that the property

> could… developed with 30,000 square feet of shopping center, a 220- room hotel, 180 townhomes, 60, 000 square feet of general office, and a 250-seat church…
>
> A scoping agreement are approved by M-NCPPC detailing the requirements for the traffic analysis (See Appendix A). M-NCPPC Guidelines require signalized intersections to be evaluated using the Critical Lane Volume (CLV) methodology- The site is located [in what was formerly known as] the developing tier and all signalized intersections must operate at a ' LOS"D" or better (<1450 CLV) to be considered adequate.
>
> Unsignalized intersections are subject to a three-tier of adequacy. An intersections meeting the requirements of any one of any one of the three-tiers in considered adequate. Tier one of the test considers an intersection adequate if HCM delay is less than 50 seconds for all movements. If an intersections fails tier one of the test, tier two of the test considers the intersection adequate if the minor street approach volumes are less than 100 vehicles during the peak hour. If an intersection also fails tier two of the test, tier three the test considers the intersection adequate if the CLV is less then 1,150…
>
> The subject property and constructions of [a] complementary mix of uses which will better responds to both positive and the impacts of the property's location. I location. I previously stated that, and it will better address the high volume of traffic and the negative impacts of the traffic both to – as well as the negative impacts of its proximity to Joint Base Andrews because of the noise. Its not practical or probably cost effective, if I may say that to continue—in history has proven this property has been RR zoned since 1961 and there is no activity. Its not a proper zone for that use for that property because of impact from the adjoining uses on the property as well as the cost to develop it. The Applicant is confident that the location of residential commercial retail, and office institutional uses provide opportunity for a sustainable community identity, and provides for a broad range of development opportunities. The rezoning of the subject property will facilitate opportunities for future development that will provide an effective transition between Pennsylvania Avenue. So the mixed-use development on the subject site provides a buffer to the neighboring residential uses on the south side of Old Marlborough Pike from the property. Essentially they will be building the sound barrier that Mr. Ryan discussed to his testimony. And the walls of the commercial buildings, institutional buildings, and townhouses, will be that sound barrier as well as the extensive landscaping that they are going to be required to put on the property as part of the CSP and the DSP review and development process…. (T, 155,151-163)

(20) Mr. Francis Silberholz, a land planner and paralegal employed by Applicants' Counsel, testified on Applicants' behalf and prepared a written response to the Technical Staff's analysis in its report. (Exhibits 26 and 27) Mr. Silberholz researched the zoning history of the subject property. A map of Areas of Annexation in Prince George's County indicates that the property was annexed into the Regional District in 1961 and placed in the R-R Zone. (Exhibit 36; T. 147) Mr. Silberholz believes that "the status quo was allowed to continue since the property was first [a]nnexed, and that no real focus or study of the subject property from a land planning perspective has been made." (Exhibit 27, p. 4) He explained why he believes the request satisfies the criteria of the Zoning Ordinances:

> [T]he application is in keeping …with the general purposes of the zoning ordinance at [Section 27-102]. The first is to protect and promote the health, safety, morals, comfort, convenience, and welfare of the present and future inhabitants of the county. Approval of this … application … will allow the planning and construction of a complementary mix of uses which will better respond to both positive and negative impacts of the subject property's location at the end of an interchange of a high-volume, high classification roadway and it benefits the efficient use of public …improvements to water and sewer…. And… as Mr. Ludwick explained, the use of a hotel and restaurant facility in close location to Andrews Air Force Base with its employees and contractors provide a vital service to them….
>
> [The staff does not believe the request meets the test of not substantially impairing the [G]eneral [P]lan or the [M]aster[P]lan]. The approval of the M-X-T [Z]one at this property … will allow for planning and construction of complementary mix of uses which will better respond to both positive and [negative] impacts of the property's location…. [I]t will better address the high volume of traffic and the… negative impacts of its proximity to Joint Base Andrews because of the noise.
>
> It's not practical or …cost effective … to continue [the R-R zoning of this property since] history has proven this property has been R-R zoned since 1961 and there is no activity. It's not a proper zone for that... property because of the impact from the adjoining uses on the property as well as the cost to develop it.
>
> The applicant is confident that the location of residential [,] commercial [,] retail, and office institutional uses provide opportunity for a sustainable community structure that strengthens the sense of community identity, and provides for a broad range of development opportunities. The rezoning of the subject property will facilitate opportunities for future development that will provide an effective transition between Pennsylvania Avenue…. [T]he mixed-use development on the subject site provides a buffer to the neighboring residential uses on the south side of Old Marlboro Pike from the property.
>
> Essentially they will be building the sound barrier that… [is required due to the site's proximity to Joint Base Andrews and location within the MIOZ]. And the walls of the commercial buildings, and townhouses, will be that sound barrier as well as the extensive landscaping that they are going to be required to put on the property as part of the CSP and the DSP review and development process….

(T. 155, 161-163)

(21) Mr. Silberholz also provided a written counter-position to several statements within the Staff Report. In particular, Mr. Silberholz pointed out that the property is within the Established Communities discussed in the General Plan, and within the Developed Tier (designation in the former General Plan) in the 2013 Master Plan; the 2017 General Plan discusses the need for proper context-sensitive infill and low-to medium-density development and the 2013 Master Plan discusses the need to maintain low-to moderate-

density land development except as part of mixed-use and planned communities. (Exhibit 27, pp.7-8)

(22) Subsequent to the hearing, Applicants submitted additional information to address questions raised by this Examiner. (Exhibits 43 (a)-(b) and 44) In particular, Mr. McAlister provided additional support for Applicants' belief that the Green Infrastructure Plan and the County Resource Protection Plan do not always accurately reflect the regulated and evaluation area data on a particular site:

> 2017 Plan, page 29, specifically states the following:
>
> *"While some of the evaluation area site features are regulated by the County and/or state,* ***their exact position on the ground cannot be determined****, because many of these layers especially the layers generated by the state,* ***are conceptual in nature****. This results in the need to treat the network map as* ***a conceptual guide to decision making."***
>
> *2017 plan, page 30, Using the Network,*
>
> *" when using digital mapping . . . the boundaries of the Regulated and Evaluation Areas . . . to view the resulting outline* ***as a conceptual line for broad review purposes."*** *Meaning these lines are conceptual and are not considered the actual location or regulation.*
>
> *2017, page 30, paragraph 2, states that*
>
> *" During the land development process, the Regulated and Evaluation areas receive different levels of consideration.* ***The regulated areas are considered conceptual until their features and their buffers are mapped in greater detail on an approved Natural Resource Inventory (NRI)."***
>
> 2017, page 61, Appendix B: Green Infrastructure network mapping methodology,
>
> "Step 1: Establish the Regulated Areas, states that *"The Regulated Areas (RA's) establish the framework for the network map. Using the streams (Hydro) Layer as the frame work . . . "*
>
> *In summary, based on the testimony provided by myself and Jacob McCarthy from Bay Environmental, if a NRI plan was prepared today based on the data collected; the site would not contain existing county regulated streams or wetlands located on-site. The on-site information is field based and obtained in anticipation of preparation of a future NRI plan. The information depicted on the Green Infrastructure plan, 2017 Map 1, and depicted on PG Atlas is not as accurate as our field-based data collected. While the Green Infrastructure plan serves as a conceptual approach to review of the site, field collected data is a site-based approach that will be used in NRI preparation and should be used which more accurately represents the environmental regulated features of the site….*
>
> (Page 61, Resource Protection Plan, 2017)

> *Appendix B: Green Infrastructure Mapping Methodology, Step 1: Establishing the Regulated Areas: "Bullet Point 6: "Slopes that are 15 percent or greater within 20 feet of any of the features described above."*
>
> Supplemental Response: This information is important because the mapping methodology of the 2017 Green Infrastructure Plan states that the mapping was done of steep slopes "within 20 feet of any of the features". This is conflicting with the current Environmental Technical [Manual] (ETM) which requires" 4. All areas having slopes of 15 percent or greater **adjacent** to the regulated stream or stream buffer, or the 100 year floodplain, or adjacent wetlands or wetland buffers" (ETM, Page C-2, 2018). Adjacent is the key because, what this means is that the Green Infrastructure Plan was mapped with a 20' wide brush of the environmental features; which is why the Green Infrastructure plan shows more regulated environmental features on the property of the subject application. During the preparation of the NRI, adjacent, means directly touching the environmental features. Therefore, when the NRI will be prepared at a later date, the work that was completed by Dewberry and Bay Environmental will show that since there are no regulated streams, steep slopes will not be a regulated feature and will be shown in the next phase of the Land Development Process with preparation of the NRI where site specific information will be provided….

(Exhibit 43(b))

Agency Comments

(23) The Department of Permitting, Inspections and Enforcement ("DPIE") noted it had no objection to the Application. (Exhibit 16, Backup p. 16)

(24) The Maryland State Highway Administration reviewed the Application and requested additional information on certain portions of the traffic study in a letter forwarded to Mr. Lenhart on August 23, 2019. (Exhibit 16, pp. 21-25) The SHA did not indicate an objection to the request, however, and Mr. Lenhart noted they revised the traffic study on August 27, 2019 "to address the state highway administration comments … and ultimately staff reviewed and agreed with our findings of that report." (T. 138-139)

(25) The Transportation Planning Section of the MNCPPC reviewed the Application and provided the following comment:

> The applicant has submitted a letter from a traffic consultant which summarizes the impact of the change in zoning….
>
> The comparison of estimated site trip generation indicates that the proposed rezoning would result in an increase of 371 AM and 437 PM trips during the respective peak hours. The applicant provided staff with a June 2019 traffic impact study (TIS) as part of the application documentation. The purpose of the TIS was to identify and evaluate the critical intersections, in order to determine the impact of the proposed zone changes on the performance of these intersections.
>
> It needs to be noted that the M-X-T Zone approval is not based upon a conceptual site plan. The only development yield is shown in the traffic impact study, and the traffic-

> related findings can be amended at the time of Preliminary Plan of Subdivision in accordance with Section 27-213 (a)(3)(B). While transportation staff has always interpreted this part of the law to allow the scope of transportation improvements to be amended as future traffic patterns changes, it appears to also allow more intensive uses to be proposed at later review stages. The M-X-T Zone allows a range of uses and no restriction on density. It is strongly advised the plans be reviewed to ensure that the zone is appropriate from a land use perspective at this location….

(Exhibit 16, Backup pp. 26-27,29)

(26) The Environmental Planning Section of the MNCPPC provided detailed comment on the Application:

> According to PGAtlas.com the site contains streams, steep slopes, and associated buffers. The predominant soils found to occur, according to the US Department of Agriculture …Natural Resource Conservation Service… Web Soil Survey … Marr-Doden complex (2 to 5 percent slopes), Marr-Doden complex (5 to 10 percent slopes), Marr-Doden complex (10 to 15 percent slopes), Sassafras sandy loam (2 to 5 percent slopes) and Udorthents. According to available mapping information, Marlboro clay or Christiana complexes do not occur on or in the vicinity of this property. A review of available mapping information indicates the subject area is not within a Sensitive Species Project Review Area (SSPRA) and does not contain potential forest interior dwelling species (FIDS) habitat. The site is located within the Western Branch, a stronghold subwatershed within the Patuxent River basin….
>
> According to the *Countywide Green Infrastructure Plan of the Approved Prince George's County Resource Conservation Plan* (May 2017) the majority of the site falls within Regulated Areas and Evaluation Areas. Based on available information the Regulated Areas include the headwaters of streams, associated stream buffers and adjacent steep slopes which comprise the Primary Management Area (PMA). The Evaluation Areas adjacent to REF provide opportunities for building larger riparian buffers and habitat corridors, and opportunities for building environmental features. Based on staff's analyses the developable area outside of the REF and Green Infrastructure Network would not support the density requested. Impacts to REF on the subject property are not supported….
>
> An NRI is not required as part of a zoning amendment application. All future applications will require an approved NRI covering the entire land area included in the application, approved under the current regulations. A full NRI is needed to determine the full extent of REF on the site. Based on available information, the proposal is not supported because the proposed rezoning would allow higher density that would substantially impair the *Green Infrastructure Plan*….
>
> According to information available on PGAtlas, there are REF on this site, however a final delineation of all regulated environmental features will be determined with the approval of a Natural Resources Inventory (NRI) under the current environmental regulations.
>
> Impacts to any REF should be limited to those that are necessary for the development of the property. Necessary impacts are those that are directly attributable to infrastructure required for the reasonable use and orderly and efficient development of the subject

property or those that are required by County Code for reasons of health, safety, or welfare. Necessary impacts include, but are not limited to, adequate sanitary sewerage lines and water lines, road crossings for required street connections, and outfalls for stormwater management (SWM) facilities. Road crossings of streams and/or wetlands may be appropriate if placed at the location of an existing crossing or at the point of least impact to the REF. Stormwater management outfalls may also be considered necessary impacts if the site has been designed to place the outfall at a point of least impact. The types of impacts that can be avoided include those for site grading, building placement, parking, SWM facilities (not including outfalls), and road crossings where reasonable alternatives exist. The cumulative impacts for the development of a property should be the fewest necessary and sufficient to reasonably develop the site in conformance with County Code.

Impacts to REF must first be avoided and then minimized. If impacts to the regulated environmental features are proposed, a statement of justification must be submitted in accordance with the Environmental Technical Manual. The justification must address how each impact has been avoided and/or minimized.

Future land development applications will require finding of preservation and/or restoration of the REF in a natural state to the fullest extent possible per Sections 24 and 27 of the County Code. Impacts to REF would not be supported in order to accommodate higher density….

(Exhibit 16, Backup pp. 17-20)

(27) The Technical Staff recommended that the request not be approved, reasoning, in part, as follows:

Plan 2035 established … policies and strategies that are relevant to this application….
Policy LU 1: Direct a majority of projected new residential and employment growth to the Regional Transit Districts, in accordance with the Growth Policy Map .. and the Growth Management Goals….
Strategy LU 1.1: To support areas best suited in the near term to become economic engines and models for future development, encourage projected new residential and employment growth to concentrate in the Regional Transit Districts that are designated as Downtowns….
Policy LU 7: Limit future mixed-use land uses outside of the Regional Transit Districts and Local Centers….
Policy LU 9: Limit the expansion of new commercial zoning outside of the Regional Transit Districts and Local Centers to encourage reinvestment and growth in designated centers and in existing commercial areas….
Policy HN 1: Concentrate medium-to high-density housing development in Regional Transit Districts and Local Centers with convenient access to jobs, schools, childcare, shopping, recreation, and other services to meet projected demand and changing consumer preferences.
Strategy HD 9.9: Implement urban design solutions to ensure appropriate transitions between higher intensity and density development and surrounding lower-density residential neighborhoods. Urban techniques include decreasing (stepping down) building heights, reducing development densities, and otherwise modifying architectural massing and form….

(Exhibit 16, p. 5-6)

(28) The Technical Staff also believed that the request did not jibe with the Subregion 6 Master Plan's recommendation that the area be developed with residential low land use (described as residential areas of up to 3.5 dwelling units per acre, and primarily single-family detached dwellings.) For similar reasons, Staff found that the request did not satisfy Master Plan policies related to economic development, nor those related to the environment. (Exhibit 16, pp. 6-9) As to the latter, the Technical Staff noted:

> According to the *Countywide Green Infrastructure Plan* of the *Approved Prince George's County Resource Conservation Plan* (May 2017), the majority of the site falls within regulated areas and evaluation areas. Based on available information, the regulated areas include the headwaters of streams, associated stream buffers, and adjacent steep slopes, which comprise the primary management area (PMA). The evaluation areas adjacent to regulated environmental features provide opportunities for building larger riparian buffers and habitat corridors, and opportunities to provide linkages between environmental features. Based on staff's analyses, the developable area outside of the regulated environmental features and Green Infrastructure network would not support the density requested. Any impacts to regulated environmental features on the subject property are not supported….
>
> The site is currently zoned R-R and has a required woodland conservation threshold of 20 percent of the net tract area. If approved, the proposed change to the M-X-T one will reduce the woodland conservation threshold to 15 percent. Based on the stream and Green Infrastructure network mapped on-site, the proposed zoning change is not supported….
>
> According to information available on PGAtlas, there are regulated environmental features, as defined in Section 25-118(b)[(63.1)] on this site. A final delineation of all regulated environmental features will be determined at a later stage of development, with the approval of a natural resources inventory, under the current environmental regulations.
>
> Impacts to any regulated environmental features should be limited to those that are necessary for the development of the property. Necessary impacts are those that are directly attributable to infrastructure required for the reasonable use and orderly and efficient development of the subject property or ate those that are required by County Code for reasons of health, safety, or welfare. Necessary impacts include, but are not limited to, adequate sanitary sewerage lines and water lines, road crossings for required street connections, and outfalls for stormwater management (SWM) facilities. Road crossings of streams and/or wetlands may be appropriate if placed at the location of an existing crossing or at the point of least impact to the regulated environmental features. SWM outfalls may also be considered necessary impacts if the site has been designed to place the outfall at a point of least impact. The types of impacts that can be avoided include those for site grading, building placement, parking, SWM facilities (not including outfalls), and road crossings where reasonable alternatives exist. The cumulative impacts for the development of a property should be the fewest necessary and sufficient to reasonably develop the site, in conformance with County Code.

> Impacts to regulated environmental features must first be avoided and then minimized. If impacts to the regulated environmental features are proposed, a statement of justification must be submitted, in accordance with the Environmental Technical Manual. The justification must address how each impact has been avoided and/or minimized.
>
> Future land development applications will require a finding of preservation and/or restoration of the regulated environmental features in a natural state to the fullest extent possible, per [Subtitles] 24 and 27 of the County Code. Impacts to a regulated environmental features would not be supported in order to accommodate higher density….

(Exhibit 16, pp. 8-9)

APPLICABLE LAW

(1) Applicants request for a rezoning to the M-X-T Zone must satisfy the provisions of Section 27-213 of the Zoning Ordinance. This Section provides, in pertinent part, as follows:

(a) **Criteria for approval of the M-X-T Zone**.

(1) The District Council shall only place land in the M-X-T Zone if at least one (1) of the following two (2) criteria is met:

(A) Criterion 1. The entire tract is located within the vicinity of either:

(i) A major intersection or major interchange (being an intersection or interchange in which at least two (2) of the streets forming the intersection or interchange are classified in the Master Plan as an arterial or higher classified street reasonably expected to be in place within the foreseeable future); or

(ii) A major transit stop or station (reasonably expected to be in place within the foreseeable future).

(B) Criterion 2. The applicable Master Plan recommends mixed land uses similar to those permitted in the M-X-T Zone.

(2) Prior to approval, the Council shall find that the proposed location will not substantially impair the integrity of an approved General Plan, Area Master Plan, or Functional Master Plan and is in keeping with the purposes of the M-X-T Zone. In approving the M-X-T Zone, the District Council may include guidelines to the Planning Board for its review of the Conceptual Site Plan.

(3) Adequate transportation facilities.

(A) Prior to approval, the Council shall find that transportation facilities that are existing, are under construction, or for which one hundred percent (100%) of construction funds are allocated within the adopted County Capital Improvement Program, within the current State Consolidated Transportation Program, or will be provided by the Applicants, will be adequate to carry anticipated traffic for the proposed development.

(B) The finding by the Council of adequate transportation facilities at this time shall not prevent the Planning Board from later amending this finding during its review of subdivision plats.

* * * * * *

(c) **Conditional approval**.

(1) When it approves a Zoning Map Amendment, the District Council may impose reasonable requirements and safeguards (in the form of conditions) which it finds are necessary to either:

(A) Protect surrounding properties from adverse effects which might accrue from the Zoning Map Amendment; or

(B) Further enhance the coordinated, harmonious, and systematic development of the Regional District.

(2) In no case shall the conditions waive or lessen the requirements of, or prohibit uses allowed in, the approved zone.

(3) All building plans shall list the conditions and shall show how the proposed development complies with them.

(4) Conditions imposed by the District Council shall become a permanent part of the Zoning Map Amendment, and shall be binding for as long as the Mixed Use Zone remains in effect on the property (unless amended by the Council).

(5) If conditions are imposed, the Applicants shall have ninety (90) days from the date of approval to accept or reject the rezoning as conditionally approved. He shall advise (in writing) the Council accordingly. If the Applicants accepts the conditions, the Council shall enter an order acknowledging the acceptance and approving the Map Amendment, at which time the Council's action shall be final. Failure to advise the Council shall be considered a rejection of the conditions. Rejection shall void the Map Amendment and revert the property to its prior zoning classification. The Council shall enter an order acknowledging the rejection, voiding its previous decision, and reverting the property to its prior zoning classification, at which time the Council's action shall be final.

(6) All Zoning Map Amendments which are approved subject to conditions shall be shown on the Zoning Map with the letter "C" after the application number.

* * * * * *

(2) The Application must also further the purposes of the M-X-T Zone, found in Section 27-542(a) of the Zoning Ordinance. This Section provides as follows:

(a) The purposes of the M-X-T Zone are:

(1) To promote the orderly development and redevelopment of land in the vicinity of major interchanges, major intersections, and major transit stops, so that these areas will enhance the economic status of the County and provide an expanding source of desirable employment and living opportunities for its citizens;

(2) To conserve the value of land and buildings by maximizing the public and private development potential inherent in the location of the zone, which might otherwise become scattered throughout and outside the County, to its detriment;

(3) To promote the effective and optimum use of transit and other major transportation systems;

(4) To facilitate and encourage a twenty-four (24) hour environment to ensure continuing functioning of the project after workday hours through a maximum of activity, and the interaction between the uses and those who live, work in, or visit the area;

(5) To encourage diverse land uses which blend together harmoniously;

(6) To create dynamic, functional relationships among individual uses within a distinctive visual character and identity;

(7) To promote optimum land planning with greater efficiency through the use of economies of scale and savings in energy beyond the scope of single-purpose projects;

(8) To permit a flexible response to the market; and

(9) To allow freedom of architectural design in order to provide an opportunity and incentive to the developer to achieve excellence in physical, social, and economic planning.

CONCLUSIONS OF LAW

(1) The Application must be found to comply with the requirements of Section 27-213 and the purposes of the M-X-T Zone found in Section 27-542. Compliance with each provision of law will be addressed seriatim.

(2) The subject property is located at the intersection of two streets classified as arterial or higher – Pennsylvania Avenue (MD 4) and Woodyard Road (MD 223). (Section 27-213 (a)(1)(A)(i)) Accordingly the 2013 Master Plan is not required to have recommended mixed land uses for the site similar to those permitted in the M-X-T Zone.(Section 27-213 (a)(1)(B))

(3) The Technical Staff and Applicants expert transportation planning witness both opined that transportation facilities are adequate to carry anticipated traffic for the proposed development. (Section 27-213(a)(3)) Moreover, transportation adequacy will be reviewed again at the time of subdivision approval.

(4) However, the Technical Staff and Applicants disagree as to whether the request can satisfy the provisions of Section 27-213 (a)(2). The Technical Staff believes the request substantially impairs the integrity of the 2014 General Plan, 2013 Master Plan and the Countywide Green Infrastructure and Resource Conservation Plans. It basically argues that the General Plan and Functional Master Plan urge limited mixed-use development outside of areas identified as Regional Transit Districts and Local Centers, and since the subject property lies to the south of the Westphalia town center approval of the Application would amount to impairment. The Technical Staff believes the request also substantially impairs the Functional Master Plans because there are regulated environmental features on the site that will be impacted if the density requested is approved.

(5) The Zoning Ordinance does not expressly define the term “substantially impair”; accordingly, we look to the generally recognized usage. *See*, Section 27-108.01(a)(7). “Substantial” is generally defined as “considerable; ample; large”. (Webster’s New World Dictionary, 2nd College Edition) “Impaired” generally means weakened or damaged. If the facts concerning the regulated environmental features on site were exactly as proffered by the Technical Staff I would recommend denial of the request since the County Green Infrastructure Plan clearly delineates most of the site within regulated areas and evaluation areas (and the General Plan and Subregion 6 Master Plan clearly include policies for the protection and preservation of the Green Infrastructure network), and approving the request would considerably weaken these areas. However, there is strong evidence presented by Applicants’ expert witnesses that suggests that the Green Infrastructure Plan does not necessarily reflect what is onsite, and their onsite visits indicate the presence of ephemeral depressions and not regulated environmental streams. A recommended condition, *infra*, would address these divergent positions and ensure that these Plans are not substantially impaired on environmental grounds.

(6) I cannot find that approval of mixed-use development on the subject property will substantially impair either the General Plan or the Subregion 6 Master Plan recommendations concerning mixed-use development. First, both Plans contain "recommendations" for land use and are not strictly binding on the District Council. Second, the goals/policies arguably impacted by the Application concerning location of mixed-use development urge that they be concentrated in Regional Transit Districts and Local Centers, not that they be restricted to those areas. Third, both Plans also support context-sensitive infill development (General Plan) and low-to moderate-density development unless it is part of a mixed-use development (Subregion 6 Master Plan), indicating that the District Council might still consider mixed-use that falls outside of these Districts and Centers. Fourth, Applicants' expert in commercial real estate development noted: a) the subject property has not developed since it was used for agricultural purposes or to build MD 4 many years ago, and its location adjacent to MD 4 and within the MIOZ height and noise impact areas limit its feasibility to ever develop within the R-R Zone; and, b) in his vast experience the type of neighborhood commercial use proposed would be compatible with that developing in the Westphalia power (local) center. Finally, the Zoning Rewrite will probably not change the zoning of the subject property since the R-R Zone will be carried over - so the District Council may not consider the "fit" of this zone during its upcoming Countywide Map Amendment. (Section 27-213(a)(2))

(7) The Application furthers the purposes of the M-X-T Zone since: it lies within the vicinity of a major interchange (MD 4 and MD 223); it can be developed in a manner to support the General Plan and Subregion 6 Master Plan goals of compact, mixed-use, and internally walkable design; it can encourage a robust (if not quite 24-hour) environment by providing a hotel, convenience store and restaurants as well as townhouse dwellings: and, the site plan approval process can ensure appropriate horizontal and vertical mix of uses and a functional relationship among the uses within a distinctive visual character and identity. (Sections 27-213(a)(2) and 27-542(a))

RECOMMENDATION

I recommend that the REMAND OF A-10051 subject to the following conditions:

1. The Application shall be remanded to the Office of the Zoning Hearing Examiner. Within 90 days, or other reasonable time determined by the District Council, Applicants must submit to the Office of the Zoning Hearing Examiner an approved NRI Plan, which covers the entirety of the subject property, that verifies that the Green Infrastructure and Resource Conservation Plans inaccurately depict regulated environmental features on the site. Applicants may not grade or develop the property before submittal of the NRI Plan.
2. If the NRI Plan verifies the absence of regulated environmental features the Planning Board/Technical Staff shall have 30 days to submit any additional recommendations to guide further review of any development on the subject property.

3. The Zoning Hearing Examiner shall send her revised Decision to the District Council within 14 days of the receipt of any comments from the Planning Board/Technical Staff.