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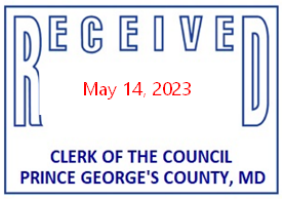
May 14, 2023

Ms. Donna Brown, Clerk
Clerk of the County Council
Wayne K. Curry Building
Largo, MD 20774



Re: ZMA-2022-001
Exceptions to Zoning Hearing Examiner Decision[1]

Dear Ms. Brown;

Applicant, Land Development Investors II, LLC ("Applicant") asserts errors in the Zoning Hearing Examiner's Decision ("ZHE Decision") in Zoning Map Amendment No.: ZMA-2022-001 ("ZMA"), in that the ZHE Decision's denial of the ZMA is incorrect and not based on the facts or evidence within the Record compiled for the hearings, and in support thereof, states the following:

1. In Conclusion of Law ("Conclusion") No. 4, the Zoning Hearing Examiner ("ZHE") states: "Applicants didn't point to any incorrect premises that the District Council relied on, other than its decision to retain the RR zoning despite the congruent zoning of the surrounding donut. If that failure is incorrect it falls into the category of bad judgment based on accurate information which cannot support a finding of mistake." (ZHE Decision, p. 20). In Maryland, the basis for piecemeal rezoning of conventional zones based on mistake is set forth in *Boyce v. Sembly*, 25 Md. App. 43 (1975). In *Boyce*, the Court summarizes the mistake rule as follows:

> [E]rror or mistake is established when there is probative evidence to show that the assumptions or premises relied upon by the Council at the time of the comprehensive rezoning were invalid. Error can be established by showing that at the time of the comprehensive zoning the Council failed to take into account then existing facts, or projects or trends which were reasonably foreseeable of fruition in the future, so that the Council's action was premised initially on a misapprehension.

[1]Notwithstanding submittal of these exceptions on May 14, 2023, the Applicant hereby reserves the right to submit revised exceptions prior to May 22, 2023, which is the "Appeal by Date," if deemed necessary.

Id. at 50-51. To prove that the Council's action was a mistake, "it is necessary not only to show the facts that existed at the time of the comprehensive zoning but also which, if any, of those facts were not actually considered by the Council." *Id*. at 52. Moreover, "a conclusion based on a factual predicate that is incomplete or inaccurate may be deemed, in zoning law, a mistake or error; an allegedly aberrant conclusion based on full and accurate information, by contrast, is simply a case of bad judgment, which is immunized from second-guessing." *People's Counsel for Balt. Cnty. v. Beachwood I Ltd. P'ship*, 107 Md. App. 627, 645 (1995).

2. The Applicant, through testimony provided by the Applicant's Land Planning Expert ("Applicant's Expert"), unequivocally demonstrated that the District Council relied upon invalid facts, projects or trends which were reasonably foreseeable of fruition when it chose to retain the RR Zone upon the Subject Property through adoption of the Approved 2010 Glenn Dale, Seabrook, Lanham and Vicinity Sector Plan and Sectional Map Amendment ("Sector Plan and SMA"). In the present case, the District Council incorrectly characterized the neighborhood in which the Subject Property is located. As stated by the Applicant's Expert:

> There is a vision statement at the very beginning of the plan, which I believe is the root of . . . the mistake and that vision is maintain the current density as residential neighborhoods. So to that to me, says, regardless of any facts, trends, projects, etcetera, we're not going there, we're just leaving that alone (February 8, 2023 Tr. at 53, Lines 15-22) . . . the mistake that's specific to this property in this area is that there is an assumption that the subject donut hole, if you will, is in fact a [rural] residential neighborhood.

(February 8, 2023 Tr. p. 54, Lines 17-20). To maintain current residential densities and retain the RR Zone through the Sector Plan and SMA, there must have been facts or evidence in existence at the time of the rezoning to justify a determination that the Subject Property was in a rural residential area appropriate to be zoned RR. In the present case, there was no rural residential density to retain since the Subject Property was, and is, not within a rural residential neighborhood. Justifying the retention of the RR zone for the Subject Property as being within a rural residential area when it very clearly was not, and proposing to retain the RR Zone for that reason, constitutes mistake.

3. It was an error of law for the ZHE to retain the RR zone, not only because this conclusion contravenes evidence in the record (discussed *supra*), but because the ZHE *agreed* with Applicant's Expert that the Subject Property **was not in a rural residential neighborhood** (emphasis added). As stated by the ZHE in Conclusion No. 2 — "I agree that the subject property is akin to an undeveloped 'donut hole' in the middle of an eclectic neighborhood that would not be described as 'rural residential' given its mix of uses" (ZHE Decision p. 19, No.: 3). This conclusion was based upon a thorough discussion of the neighborhood, which was put before the ZHE. It is uncontroverted that the ZHE accepted the Applicant's Expert definition of the neighborhood (ZHE Decision p. 2, No.: 3), which encompasses an

approximately 270-acre area, notwithstanding uses along the north side of Greenbelt Road (MD 193) that certainly impacted and were a major factor in establishing the character of the neighborhood, but were deemed to be technically outside of the neighborhood (Exhibit 24, p. 5). Unrefuted in the ZHE Decision is that within the 270 acres of the neighborhood, over 80% of the land is either zoned for, or used as, higher-density residential uses and intense commercial uses. This 80% is comprised of Woodland Landing apartments in the RMF-20 Zone, the Arbor Terrace senior apartments in the CGO Zone, attached single-family dwellings in the RSF-A Zone, the Eastgate Shopping Center in the CGO Zone, and strip commercial uses that includes a cell tower, gas station, the Glenn Dale Post Office, a few auto-related uses, and places of worship in the CGO and CS Zones (ZHE Decision p. 2, No.: 3). The ZHE omits additional testimony from the Applicant's Expert in her decision wherein Applicant's Expert provides context for the part of the neighborhood that is zoned RR. Of the fifty (50) acres zoned RR, only four (4) are used residentially, and the ownership and past regulatory history of those four acres suggest that their residential use is interim only (Exhibit 24, p. 5). Not only was this point made within the Land Planning Analysis (Exhibit 24), but it was repeated when the Applicant's Expert was questioned by the ZHE during the hearing (February 8, 2023, Tr. at p. 87, Lines 17-22, p. 88, Lines 1-3). Furthermore, there was sufficient evidence in the record, not simply undermining the Council's decision to retain the RR Zone upon the Subject Property, but also supporting a finding that the proper zoning for the Subject Property was RMF-48. When the Applicant's Expert was questioned about residential development in the area, specifically multifamily dwelling units, the Applicant's Expert opined that there were at least three (3) multifamily properties comprising approximately 1,000 multifamily units in the neighborhood. (March 1, 2023 Tr. at 73, Lines 3-8). This testimony was unrefuted.

4. This error of law is buttressed by comments (or the lack thereof) from Maryland-National Capital Park and Planning Commission ("M-NCPPC") Staff cited by the ZHE in her decision (ZHE Decision, p. 11-15, at 18-22). Staff's analysis of the Sector Plan and SMA does not refute any of the facts set forth by Applicant's Expert. Rather, M-NCPPC Staff assert in their November 10, 2022 Technical Staff Report (Exhibit 20), and reiterate in their February 22, 2023 Technical Staff Report (Exhibit 32), that the District Council's retention of the RR Zone was not a mistake based on the Sector Plan and SMA's recommendation, which states: "Residential low land uses conformed to the plan's goal of maintaining current densities for residential neighborhoods (Exhibit 20 at 4; Exhibit 32 at p. 6). . . and the purpose of the RR Zone (encouraging variations of single-family detached residential lots and preservation of trees and open space) aligned with this category" (Exhibit 32 at p. 6 and 7-8). The Sector Plan and SMA presume the area to be rural residential rural in character, and M-NCPPC Staff take this assertion at face value, even after the ZHE provided M-NCPPC Staff additional time to analyze the unrefuted oral testimony provided by Applicant's Expert. After the February 8, 2023 hearing, the ZHE asked M-NCPPC Staff to review the additional testimony provided by Applicant's Expert. This additional analysis was memorialized in the February 23, 2023 Technical Staff Report (Exhibit 32). M-NCPPC Staff refuted ancillary assertions from Applicant's Expert, but not the fundamental mistake posited by Applicant's Expert—that the Subject Property was incorrectly determined to be in a rural residential area. (Exhibit 32 at p. 7-8). The insistence by M-NCPCC Staff to classify the Subject Property as being within a rural residential area

constituted nothing more than a parroting of the same mistake made by the District Council, unsupported by any independent evidence to support its classification.

5. Also, in Conclusion No. 4 the ZHE asserts that the Applicants did not submit sufficient justification to support rezoning from one of the least-dense residential zoning categories (RR) to the densest (RMF-48)—characterizing the justification as being that the RMF-48 Zone would be more economically feasible and failure to rezone the site to RMF-48 would result in no reasonable use of the property under its current zoning. This is a patently incorrect characterization of Applicant's request for the RMF-48 Zone. The record includes evidence that, based on the unique site characteristics, the actual development envelope will be more akin to the RMF-20 development standards than the development standards for the RMF-48 zone (February 8, 2023 Tr. p. 64-65; *See* also March 1, 2023 Tr. p. 181, at Lines 4-9). In this regard, as testified to by the Applicant's Expert, developing in accordance with regulations afforded by the RMF-48 Zone would result in context-sensitive infill that is compatible with the neighborhood accepted by the ZHE (March 1, 2023 Tr. at 180, Lines 10-15), and which would conform to the policies within the Plan 2035 Prince George's General Plan. A referral from the Community Planning Section of M-NCPPC refers to the General Plan designation of the Subject Property as being within the Established Communities Growth Policy Area, which is an area "most appropriate for context-sensitive infill and low to medium-density" (Exhibit 20, Backup p. 11-12; *See also* ZHE Decision, p. 11, at 18). Moreover, it is patently incorrect to assert that this development could obtain the maximum number of dwelling units permitted in the RMF-48 Zone. Based on the development restrictions, the actual unit yield would be approximately 250, not the 598 units permitted in the RMF-48 Zone upon the Subject Property (March 1, 2023 Tr. at 181, Lines 4-9) and touted repeatedly by the opposition.

6. It was legal error for the ZHE to conclude that the area is not rural residential in character, and to deny the Applicant's request to rezone the property to a zoning category more compatible with the neighborhood. While the Applicant submits that the RMF-48 zone is compatible with the neighborhood in which it is located, even though the ZHE believed otherwise, the ZHE can recommend, and the District Council is authorized to approve, a less intense zoning category than the category requested by the Applicant, pursuant to § 27-3601(d)(8)(B) of the Prince George's County Zoning Ordinance. It was, therefore, error for the ZHE to fail to recommend a less intense zoning category because there was clear evidence of mistake in retaining the RR Zone upon the Subject Property, and should the District Council agree that the evidence in the record, at the very least, supports a lesser intense zone, the Applicant respectfully submits that the RMF-20 zone would be an appropriate zone for the Subject Property.

In sum, there is sufficient testimony, facts and evidence in the record to show that the District Council erroneously maintained the RR Zone upon the Subject Property through adoption of the 2010 Glenn Dale, Seabrook, Lanham and Vicinity Sector Plan and Sectional Map Amendment under the misapprehension the Subject Property was in a rural residential neighborhood. Thus, it was legal error for the ZHE to deny the ZMA request, especially when the ZHE found, contrary to the unrefuted evidence in the record, that the Subject Property was not in a rural residential neighborhood in her decision. Moreover, it was legal error for the ZHE to fail to consider and

recommend a lesser intense zone, in particular, the RMF-20 zone, given her decision that the RMF-48 zone would be too dense for the Subject Property.

Respectfully submitted,

O'MALLEY, MILES, NYLEN & GILMORE, P.A.

By: _____
Lawrence N. Taub, Esquire

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301-575-3237

REQUEST FOR ORAL ARGUMENT

Pursuant to § 27-3414 of the Zoning Ordinance, the Applicant submits these exceptions to the Decision of the Zoning Hearing Examiner and requests Oral Argument be granted for this Zoning Map Amendment Case.

By: _____
Lawrence N. Taub, Esquire

_____
Nathaniel Forman, Esquire

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on the 15 day of May, 2023, a copy of the foregoing Exceptions to the Zoning Hearing Examiner Decision in ZMA-2022-001 was mailed first-class postage to Sean Suhar, Attorney for Wingate Homeowner's Association, People's Zoning Council and all persons of Record.

By: _____
Lawrence N. Taub, Esquire

_____
Nathaniel Forman, Esquire