

Case No. SP-03098

Applicant: JPI

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 the decision of the Planning Board in PGCPB No. 04-193, to approve with conditions a detailed site plan, SP-03098, for retail, multifamily apartments, and townhouses on property described as approximately 4.56 acres of land in the M-U-I/R-T Zone, located on the southeast corner of US 1 and Cherokee Street, College Park, is hereby:

REVERSED, and Application SP-03098 is hereby DENIED, for the following reasons, which the District Council adopts as its findings of fact and conclusions of law:

Subject Property

1. The subject property includes about 4.56 acres of land in the M-U-I and R-T Zones. It fronts on US 1 and Cherokee Street in College Park, in the southeast corner of that intersection. The frontage on US 1 (0.97 acres in area) is zoned M-U-I, and the rest of the tract (3.6 acres) is R-T.
2. The property has two commercial uses in the M-U-I section, but the R-T is not developed. Terrain on the site slopes to the east and drains into unnamed tributaries of the Indian Creek watershed in the Anacostia River basin. Most of the undeveloped parts of the tract are wooded, or partially wooded.
3. The subject property is a single, undivided parcel, with no subdivided lots. It was not divided into separate lots in the preliminary plan of subdivision application, No. 4-03141, approved by the Planning Board in May 2004 in PGCPB No. 04-117.

4. The property is bounded on the west by US 1, on the south by the SHA ramp from MD 193 to US 1 (northbound) and Catawba Street, on the east by existing single-family residential development (separated by an unpaved alley), and on the north by Cherokee Street. Existing uses on the north side of Cherokee, across from the subject property, include a hotel (on US 1), an apartment building, and a church.

5. The property is in the Developed Tier, as designated in the 2002 General Plan. It lies within the part of College Park covered by the 2002 College Park – US 1 Corridor Sector Plan and Sectional Map Amendment (referred to below as the "Sector Plan" and the "SMA"). The property is also covered by the 1989 Langley Park-College Park-Greenbelt Master Plan.

Surrounding Uses and Neighborhood

6. With the exception of the hotel, church, and apartments across Cherokee Street, uses around the subject property are single-family residential. Off of US 1, with its commercial uses, the neighborhood – adjacent uses affecting and affected by the use of the subject tract – is largely single-family residential in character, for blocks to the north, and to the east.

7. The subject tract's neighborhood includes properties north of MD 193 and east of US 1. The neighborhood is bounded on the south by MD 193, on the west by US 1, on the north by Hollywood Road, and on the east by Rhode Island Avenue. Along US 1, on its eastern side – the properties within the 2002 Sector Plan and SMA – there are a number of nonresidential uses in this neighborhood, including commercial retail and office and public or quasi-public uses. Sector Plan, Existing Land Use Map – North. But east of these properties, *outside* the Sector Plan boundaries, the neighborhood is very much single-family in character. *Id.*; 1989 Langley Park-College Park-Greenbelt Master Plan, Existing Land Use Map. It is clear that development of the subject property as proposed in the applicant's site plan will affect many single-family residences to the east of US 1, as Cherokee Street runs toward Rhode Island Avenue. One of the problems with this case, as will be explained, is that applicant, staff, and Planning Board focused

entirely on Sector Plan properties and gave almost no attention to the properties east of Sector Plan boundaries.

Agency Recommendations

8. The technical staff, Planning Board, and City of College Park recommended approval of SP-03098, in the form first presented to the District Council, in the spring of 2005, and as revised after remand. When first approved by the Planning Board, the applicant's plan showed 237 rental apartments, 8 rental townhouses, and 3,405 square feet of commercial retail space. After remand by the District Council, the plan was revised to show 178 rental apartments, 18 rental townhouses, and 8,054 square feet of commercial retail. Both proposed developments were approved by staff and Planning Board, largely on the theory that the applicant showed a "high-quality" and "mixed-use" development project consistent with Sector Plan goals and recommendations. For its part, the City Council of College Park approved the originally-proposed project (on a split vote) because the applicant agreed to many highway improvements requested by City officials.

9. But staff, Planning Board, and City recommendations are flawed and unreliable.

(a) The City's recommendation carries little weight, as it includes no findings or determinations about the effects the project will have on single-family residences east of the subject property. The City was apparently satisfied that the project would improve an under-utilized property and provide several improvements to the US 1 – Cherokee intersection. But those facts do not show project compatibility with adjacent uses or compliance with Sector Plan recommendations.

(b) Staff and Planning Board ignored the large single-family part of the neighborhood east of the subject property. Both agencies decided that properties outside the Sector Plan boundaries did not matter. Indeed staff and Board did not even bother to define a neighborhood; they thought it sufficient to look only at the Sector Plan and SMA, and their stated goals and recommendations. For that reason,

neither staff nor Planning Board made meaningful findings on compatibility, the relation between use of the subject property and uses to the east, toward Rhode Island Avenue.

(c) Because the Planning Board omitted from its review the effects the proposed project will have on properties outside the Sector Plan, its recommendations, as well as those of staff, cannot be followed. The eastern property line of the subject tract is at the edge of the Sector Plan's coverage, the boundary of the College Park US 1 Development District. For compatibility review purposes, it simply does not make sense to confine the discussion to properties along US 1. The maps in the 2002 Sector Plan and the 1989 Master Plan show that the sizable apartment building proposed here will create potential adverse traffic safety effects at least as far as Rhode Island Avenue, but these and similar effects were not reviewed, in this M-U-I rezoning case. Neither applicant nor staff provided evidence in this record to show that the project will be compatible with single-family residential development to the east.

(d) Aside from the compatibility issue, the applicant, staff, and Planning Board did not provide the proofs required in the District Council's remand order of May 2005. There is insufficient proof that the applicant has followed Sector Plan recommendations or that the proposed massive increases in residential density are justified on the record.

(e) As to Sector Plan recommendations, it is not disputed that the land use map recommends *townhouse* development on that part of the subject property presently in the R-T Zone. Chang memo. (1 July 2004), at 2, 3; Williams memo. (9 Aug. 2005), at 5-6. (land use map recommends "single-family attached" residential development). But staff quotes the following at 31 of the Sector Plan:

The SMA has not rezoned private residential properties because no redevelopment proposal was pending at the time of SMA approval, except where land assembly had occurred in Subarea 5b. These properties could be rezoned under provisions of the DDOZ at such time as sufficient land assembly had occurred to support approval of a development proposal found to be in conformance with both the sector plan's land use and the DDOZ's development district standards.

Williams memo. (9 August 2005), at 5. Here staff misstates what the Sector Plan says: staff ignores the Plan *map* recommendation (townhouse) and then incorrectly cites what the Plan says about the *rezoning* of private residential properties. That is, the Plan says that the SMA "had not rezoned" certain private residential properties, because of the absence of redevelopment proposals and the need for land assembly, but staff interprets this passage as if it said that the *Plan* (not SMA) had not *recommended for rezoning* (instead of rezoned) private residential properties, if there were no pending redevelopment proposal or if land assembly were needed. In the first staff memorandum, of 1 July 2004, staff said it correctly: Though the Sector Plan text suggested "infill" and "mixed-use" and "multifamily" development, the Sector Plan itself had a "land use policy recommendation for single-family attached development" for the subject property. Chang memo. (1 July 2004), at 2. Staff's July 2004 submission accurately stated that the Sector Plan recommended R-T densities for the subject property, but the August 2005 staff memorandum, in an effort to demonstrate that rezoning the entire subject property to M-U-I was recommended by the Sector Plan, stated inaccurately that townhouse development was somehow not recommended on the subject tract.

An additional point to note is that the "land assembly" deferral rationale in the 2002 Sector Plan and SMA does not apply to the subject property. The R-T portion of the property was a single undeveloped parcel in 2002 and is the same today, in size and development characteristics. The Council's 2002 decision not to rezone the R-T portion to M-U-I had nothing to do with any future need for land assembly.

Staff and Planning Board were quite wrong, in the fall of 2005, to suggest that the Sector Plan did not recommend townhouse development on the subject property. It did, on all parts of the property other than the section on US 1 rezoned M-U-I in the 2002 SMA.

(f) As to both use ("single-family attached") and density (R-T, or six units per acre), the Sector Plan recommendations for the R-T portion of the subject property are for townhouse, not multifamily

or mixed-use. The mixed-use recommendations apply to the property on US 1, to a depth off the highway of about 130 feet. (The present M-U-I Zone depth from US 1 is approximately 130 feet.) But instead of about 21 units, the number allowed by R-T zoning, the applicant requests over 100 units.

(g) Even if the subject property *were* recommended for mixed-use development in the Sector Plan, the applicant's proposal does not fit that definition. (Staff again misstates this point.) A project does not have a "mix" of uses, for purposes of this Sector Plan, if substantially all of it is multifamily and there are small townhouse and commercial retail components. This project has just 18 townhouses, only one-tenth the proposed multifamily component (178 units), and it has only 8,000 square feet of commercial retail, enough for perhaps two modest-sized shops or stores. Within the section of the property proposed for M-U-I rezoning, the applicant proposes no commercial at all. What this applicant shows in this detailed site plan is essentially a huge apartment building, with roughly 200 apartments, and small, unconnected retail and townhouse development components. This "mix" of applicant uses will not encourage living and working (or living and shopping) within the subject property, without getting into a car. The development will very clearly not discourage automobile use or encourage resident use of the on-site commercial, as the Plan intended.

(h) Residential density and compatibility with neighborhood development, the single-family homes east of the subject property, must be considered together. As the opposition indicates, the proposed apartment structure will produce many automobile trips in and through the single-family part of the subject property's neighborhood. It will also create traffic safety hazards for the neighboring residents, as they use the streets for activities (walking, jogging, child stroller pushing) not involving their own automobiles.

(i) For the reasons stated, neither staff nor applicant proved compatibility (as between the proposed use and nearby single-family development) or compliance with Sector Plan land use recommendations (townhouse development).

Planning Board Proceedings

10. Finally, the District Council must point out that the Planning Board, in this contested adjudication proceeding, denied the opposition parties a fair hearing, on the several points they tried to raise. The Planning Board's hearing procedures, in which staff presents almost the entire case for the applicant, no witnesses are sworn or cross-examined, and an insufficient transcript of proceedings is kept, does not make a fair record, especially as to opposition presentations.

(a) Staff presentation. It was clear by the Planning Board's first hearing date, in July 2004, that a number of residents were appearing in opposition to the applicant's proposed site plan. These residents opposed the M-U-I rezoning of the R-T section of the subject property. It was incumbent on the Board to allow the residents to challenge applicant evidence and submit their own. But that did not happen.

The first major problem for the opposition was that Planning Board *staff* presented the applicant's case. All the applicant had to do was sit there and listen, while staff did all the work, and then chime in at the end, when staff was finished. That procedure is fundamentally unfair to the opposition, in a contested case. It is the applicant's burden to satisfy Zoning Ordinance standards, § 27-142, and it is highly irregular – even if a common Planning Board practice – to have staff weigh in on one side and actively oppose the other.

If a case is contested, the Planning Board should require the applicant to present the case. Staff should say nothing, unless called to testify by applicant or opposition.

(b) Swearing of witnesses. No witness in this Planning Board proceeding was sworn. In adjudicative proceedings, an agency must require testimony under oath. Unsworn testimony by a witness is unfair to those opposing the witness, and it cannot be relied upon to make findings.

(c) Lack of cross-examination. Because staff, in a summarized oral report, did much of the testifying in Planning Board proceedings, and because the testimony from staff did not come in question-and-answer format, meaningful cross-examination was denied to the opposition. Moreover, the Board did not make it clear to the opposition that reasonable cross-examination was permitted. Testimony not subject to cross-examination cannot be relied on, for adjudicative findings.

(d) Contested case procedures. If this case is again before the District Council, for any reason, the Planning Board (or the Examiner, if appropriate) will be required to compile a record with proper testimony and evidence from both applicant and opposition. The record presently before the District Council is insufficient, for purposes of approving the rezoning of any part of the subject property.

11. Finally, as to the proposed rezoning, the District Council concludes that this applicant has not demonstrated an enforceable right to have the R-T section of its property rezoned to M-U-I. There is no evidence that R-T development on the 3.6-acre part of the property is not a reasonable use of the property or will deny the applicant a reasonable investment return.

Ordered this 13th day of February, 2006, by the following vote:

In Favor: Council Members Dernoga, Bland, Campos, Dean, Exum, Knotts and Peters

Opposed: Council Member Hendershot

Abstained:

Absent: Council Member Harrington

Vote: 7-1

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: _____
Thomas E. Dernoga
Chairman

ATTEST:

Redis C. Floyd
Clerk of the Council