

Resolution No.: 15-577Introduced: April 13, 2004Adopted: April 13, 2004

**COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL FOR THAT PORTION
OF THE MARYLAND-WASHINGTON REGIONAL DISTRICT
IN MONTGOMERY COUNTY**

By: County Council

SUBJECT: APPLICATION NOS. G-813 and G-814 FOR AMENDMENT TO THE ZONING ORDINANCE MAP, Michele Rosenfeld, Esquire, Attorney for Applicant Maryland-National Capital Park & Planning Commission, Barbara A. Sears, Esquire and Mark M. Viani, Esquire, Attorneys for Contract Purchaser Artery/Ryland LLC, OPINION AND RESOLUTION ON APPLICATION

G-813 Tax Account Nos.: P258-05-01751828; P340,05-02101492; P454,05-01751830, P202, 05-15022004; P125, 05-03209161; P181, 05-02309868; P303, 05-03229534; N700, 05-00270246; N300, 05-01705228; N581, 05-00270235; P440, 05-01705217; P75, 05-00262406; P700, 05-00274095
G-814 Tax Account No.: 05-01700636

OPINION

This Opinion addresses two zoning applications that have been considered in a single proceeding because they relate to a single proposed development. Two separate reclassification requests were filed because the combined property is bisected by property owned by PEPCO, which is neither part of the proposed development nor part of the zoning applications. Local Map Amendment Applications No. G-813 and G-814, filed on August 29, 2003 by Applicants Artery/Ryland, LLC ("Artery") and the Maryland-National Capital Park and Planning Commission ("MNCPPC"), request reclassification from the R-200 and RE-2 Zones (both residential, one-family) to the PD-2 Zone (Planned Development) of a total of 313.94 acres of land along the border between Montgomery County and Prince George's County, south of MD 198 and east and north of Greencastle Road in the 5th Election District. LMA G-813 requests rezoning from the R-200 and RE-2 Zones of 295.94 acres of land located southwest of the PEPCO property that bisects the subject property. LMA G-814 requests rezoning from the R-200 Zone of 18 acres of land located northeast of the PEPCO property. Individual

parcel numbers included in these applications are identified on the submitted Identification Plats, Exhibit 36(b) in LMA No. G-813 and Exhibit 4 in LMA No. G-814.

The Hearing Examiner recommended approval of the applications on the basis that (i) the submitted Development Plan (which covers both G-813 and G-814) satisfies all of the applicable requirements set forth in the Zoning Ordinance; and (ii) the proposed rezonings and development would satisfy the purposes and standards of the PD Zone, would be compatible with existing and planned land uses in the surrounding area and would serve the public interest. The Montgomery County Planning Board (the "Planning Board") and its Technical Staff provided similar recommendations. The District Council agrees with these conclusions, as discussed below.

A. Subject Property

The Hearing Examiner's Report and Recommendation contains a detailed description of the property that is the subject of these zoning requests, on pages 5 through 9, which is incorporated herein by reference. The combined property for which reclassification is requested (the "subject property") measures a total of approximately 314 acres. The subject property stretches along the county line from MD 198 in the north to Greencastle Road in the south, with an irregular shape and varying width. The property has approximately 1,370 feet of frontage on MD 198, widens to approximately 2,500 feet in width adjacent to the Saddle Creek neighborhood to the west, then narrows down to a single point less than an inch wide at its southern end, about 400 feet north of Greencastle Road. The property is bisected near its northern end by PEPCO transmission lines.

The portion of the subject property northeast of the PEPCO transmission lines, which is the subject of Case No. G-814, contains 18 acres of land. It is undeveloped, with woods on the majority of the tract and wetlands on much of the southern two-thirds of the parcel, and is classified under the R-200 Zone. Abutting to the east, in Prince George's County, is a restaurant known as Tubby's Diner, and beyond that are industrial uses and storage lots extending all the way to Old Gunpowder Road.

The portion of the subject property southwest of the PEPCO transmission lines is the subject of Case No. G-813 and contains the bulk of the property, 295.94 acres of land. A stream described as the McKnew Tributary to the Little Paint Branch runs through the G-813 property, parallel to the county line.

Roughly the southern half of the G-813 property, classified under the RE-2 Zone, is in public ownership as part of Fairland Recreational Park ("Fairland Park"). The northern portion of this publicly owned land houses the Gunpowder Golf Course, which was built by a private entity some 50 or 60 years ago on land previously used for sand and gravel mining. The course was purchased by the MNCPPC in 1991 but continues to be operated privately under a lease agreement. It has not been adequately maintained from an environmental standpoint, resulting in sedimentation of the McKnew Tributary. To the west, the golf course abuts a wooded, steeply sloped area of Fairland Park that contains a stream known as the Silverwood Tributary to the Little Paint Branch. The Silverwood and McKnew tributaries converge on the property of the existing golf course and flow south to join the Little Paint Branch main stem. To the east, Gunpowder Golf Course extends across the county line.

South of the existing golf course is an area of Fairland Park that is referred to in the record as the "southern spike" because it is roughly triangular and ends in a sharp point. The southern spike is a forested area with a stream running through it – the continuation of the combined Silverwood and McKnew tributaries that converge slightly to the north on the existing golf course. Much of this area contains high quality, hardwood forest. The southern spike is developed with a paved trail that bridges the stream, one natural-surface trail that has been formally approved and a number of informal trails that park users have created by persistent use. To the west, the southern spike abuts forested portions of Fairland Park, which in turn abut active park sports facilities along Greencastle Road. To the east, the southern spike abuts sports facilities of Fairland Regional Park in Prince George's County that are accessed from Old Gunpowder Road.

The G-813 property located north of Gunpowder Golf Course is classified under the R-200 Zone, and nearly all of it is privately owned. (The MNCPPC owns one small parcel.) An 18.6-acre

portion of this area, known as "Parcel X" or the "stump dump," was used as a landfill for many years and is severely degraded. The owner has entered into a consent decree with the Maryland Department of the Environment that requires him to seal the landfill and install a five-foot cap of clean fill.

Approximately 47 acres of private land, located mostly between the existing golf course and Parcel X, is comprised of un-reclaimed, abandoned sand and gravel mines. These areas are another significant source of sediment in the watershed, as exposed, highly erodible slopes carry sediment to the stream in many areas. To the west, Parcel X and the mined areas abut residential subdivisions in Montgomery County, McKnew Local Park and a forested area north of the local park. To the east, Parcel X and a small portion of the mined areas abut a cluster of industrial uses in Prince George's County that contribute to the degradation of the McKnew Tributary. The bulk of the mined areas abut undeveloped land to the east, in Prince George's County, that is planned for residential development as part of the larger golf course community of which these zoning applications are a part.

The northernmost part of the G-813 property consists primarily of open space, with a large area of high priority forest surrounding the McKnew Tributary as it enters the subject property. This area is connected with a larger forested area to the northwest, near McKnew Local Park.

B. Surrounding Area and Zoning History

The surrounding area for this application consists of the area referred to in the 1997 *Approved and Adopted Fairland Master Plan* as the "Oakfair/Saddle Creek" community, which extends from MD 198 on the north to and including Fairland Park to the south, and from the County line on the east to the Silverwood Tributary on the west. The subject property constitutes about half of the land area within the surrounding area as defined. The remainder of the surrounding area contains a mix of residential uses in the R-200 and R-200/TDR Zones, parkland and a church.

The subject property was classified under the R-A Zone (now RE-2, two-acre single-family) in the 1958 Countywide Comprehensive Zoning. In 1982, Sectional Map Amendment ("SMA") G-337 reclassified the majority of the subject property to the R-200 Zone, retaining the RE-2 designation for the easternmost portion adjacent to Prince George's County. In 1987, SMA G-563

reclassified a portion of the property to the R-200/TDR Zone. In 1997, following the adoption of the Master Plan, the R-200/TDR portion of the subject property was reclassified under the R-200 Zone, and the RE-2 portion of the privately owned land was reclassified under the R-200 Zone.

Portions of the subject property have been the subject of three unsuccessful zoning applications. In 1964, LMA F-932, seeking rezoning from RE-2 to the I-2 Zone, was withdrawn without prejudice. In 1989, LMA G-610, seeking rezoning from R-200/TDR and RE-2 to the I-1 Zone, was withdrawn without prejudice. In 1991, LMA G-657, seeking rezoning from R-200/TDR and RE-2 to the I-4 Zone, was denied by the District Council.

C. Proposed Development

The Hearing Examiner's Report and Recommendation contains a detailed description of the proposed development, on pages 12 through 14, which is incorporated herein by reference. The development proposed in these cases is part of a larger plan for a golf course community that would straddle the boundary between Montgomery County and Prince George's County, with residential neighborhoods and parts of the golf course in each County. In Montgomery County, the Applicants seek to develop the subject property with portions of an 18-hole golf course, 346 single-family detached dwellings and 50 single-family attached dwellings that would qualify as Moderately Price Dwelling Units ("MPDUs"). (The golf course entrance, the driving range and two holes would be located in Prince George's County.) Approximately 11 acres of land at the western edge of the subject property, adjacent to the existing Saddle Creek neighborhood, would be reserved for a new elementary school. The only through road on the site would be an extension of Cedar Tree Drive from its current terminus at the western edge of the subject property to Old Gunpowder Road in Prince George's County. On-site recreational facilities would include a community building, an outdoor playground, a pool, tennis courts and tot lots.

The residential development would be divided into five fairly distinct neighborhoods of varying sizes. The only development proposed for the G-814 property would be five single-family homes. The remaining 391 dwellings would be on the G-813 property. Two of the neighborhoods

would have only single-family detached dwellings and three would include MPDUs. Two of the neighborhoods with MPDUs would have eight duplex units each, for a total of 16 MPDUs. The duplexes would be built in the form of two attached units with the appearance of a large, single-family detached dwelling, indistinguishable from neighboring single-family detached homes. The third neighborhood with MPDUs would have approximately 81 dwelling units, including 34 town house MPDUs. The other 47 units would be "villas," narrow detached units that are deeper than they are wide, on small lots that create a more urban setting. This neighborhood would have the most urban environment, with an interconnected street pattern, houses close to the street and on-street parking. The on-site community recreation area would be located in close proximity, to give residents of this urbanized neighborhood, who would not have large yards, the benefit of nearby common open space.

The golf course would be spread out in the open areas between the five residential neighborhoods, and on abutting property in Prince George's County. The golf course plan was developed in association with a noted golf course architect and pioneer in creating environmentally sensitive golf courses. One of the chief design concerns at the subject property has been taking greatest possible advantage of the property's environmental features, which was done by locating the entrance drive where it would have a lovely view, locating golf holes with a view of the stream, and routing one golf hole (number 10, in Prince George's County) down into a sand and gravel mine area, which would put a unique stamp on the course and draw people to it. The golf course layout also endeavors to minimize grading by laying the golf holes into the topography as much as possible.

An area near the entrance and the driving range would be designated for use by "First Tee," a non-profit organization that provides access to golf for young people who would not otherwise have the opportunity, using golf as a means of teaching life skills.

D. Development Plan

The Development Plan in the present cases includes each of the elements required under Code § 59-D-1.3, including a land use plan showing site access, proposed buildings and structures, a preliminary classification of dwelling units by type and number of bedrooms, parking

areas, land to be dedicated to public use, and land intended for common or quasi-public use but not intended to be in public ownership. The present applications have complied with the requirements for a Development Plan through a single set of documents covering the entire subject property, including both the G-813 property and the G-814 property. The principal component of the Development Plan is the Land Use Plan, Exhibit 95(a). Additional components of the Development Plan include the NRI/FSD, vicinity maps (e.g. Exs. 12, 48 and 50) and a phasing plan (Ex. 95(b)).

The Land Use Plan and other components of the Development Plan are binding on the Applicants except where particular elements are identified as illustrative or conceptual. The Land Use Plan specifies that the extent and configuration of the golf course fairways and tees, the final limits of forest retention areas, the locations of proposed stormwater management facilities, the final number of single-family lots in each residential pod and the locations of trails and golf cart paths are illustrative. Visual elements of the Land Use Plan that can be considered binding include the general locations of residential pods, the general location of the extension of Cedar Tree Drive, the location of the school site and the general location of on-site recreational amenities. The Land Use Plan specifies additional binding elements in written form for both G-813 and G-814, which are set forth below.

Written Binding Elements for G-813

1. The number of dwelling units shall be limited to 391.
2. Commencement of construction shall be subject to execution of necessary agreements between the Applicants to provide for the construction of a golf course, conveyances of land areas by and between Applicants to implement the land use plan, and a lease with a third party operator to operate the golf course as a public course.
3. The trails shown on this plan are illustrative only. The trail system and location of golf cart paths will be established during site plan review.
4. The Elementary School site shall be dedicated to public use prior to recordation of final plats for residential lots in Phase II.
5. No building other than a single-family detached residence shall be constructed within 100 feet of any boundary of the Property comprising G-813 which adjoins land for which the area master plan recommends a one-family detached zone.

Written Binding Elements for G-814

1. The number of dwelling units shall be limited to 5.

2. Commencement of construction shall be subject to execution of necessary agreements between the Applicants to provide for the construction of a golf course, conveyances of land areas by and between Applicants to implement the land use plan, and a lease with a third party operator to operate the golf course as a public course.
3. The trails shown on this plan are illustrative only. The trail system will be established during site plan review.

E. Private/Public Land Exchanges

The Hearing Examiner's Report and Recommendation contains a detailed discussion of the private/public land exchanges proposed in connection with these applications, on pages 19 through 2, which is incorporated herein by reference. Development of the subject property as a whole requires a high degree of public/private cooperation because roughly half of the subject property is owned by Montgomery County and managed by the MNCPPC, while the remainder is in private ownership.¹ Carrying out the proposed development would require exchanging some of the public land for private. Assuming that the project moves forward to construction, the private developer (Artery) will bear the cost of developing and constructing the golf course, and any land underlying the course that is not currently owned by Montgomery County will be conveyed to the County. Any land underlying proposed residential lots that is not already under contract to Artery will be conveyed to Artery. Under the proposed Development Plan, 39.53 acres of publicly owned land would be converted to private ownership, and 86.68 acres of privately owned land would be converted to public ownership. Thus, Montgomery County would have a net gain of 47.15 acres of land. 11.31 acres of the land in public ownership after development would be used for an elementary school site and the rest would be parkland. This would result in a net gain in parkland of 36.2 acres.

In addition to the normal county approvals, some of the proposed land exchanges would require approval from state agencies because Montgomery County purchased the land to be

¹ Most of the privately owned land is owned by or under contract to Artery. Two private individuals own parcels that are part of or adjacent to Parcel X. Each of these individuals has submitted a letter into the record authorizing the MNCPPC to seek the subject rezoning as to their land. See Exs. 15 and 16. The record also contains a letter from the County's Chief Administrative Officer authorizing the MNCPPC to seek rezoning of County-owned portions of the subject property to the PD-2 Zone as part of a golf course community. See Ex. 14.

exchanged with Maryland Program Open Space funds. The evidence of record indicates that the proposed land exchanges would pass state scrutiny.

F. Master Plan

Pages 22 through 27 of the Hearing Examiner's Report and Recommendation contain a detailed discussion, which is incorporated herein by reference, of the *1997 Approved and Adopted Fairland Master Plan* (the "Master Plan"). The Master Plan divided the planning area into geographically defined communities and identified community building as its primary goal. A secondary goal was providing more housing options, and in particular increasing the number of new single-family detached homes where the existing housing mix favored attached or apartment units.

The subject property corresponds very closely to Area 2 of the Oakfair/Saddle Creek Community as defined in the Master Plan. The Master Plan recommended development of a golf course community in Area 2, under the PD Zone, to achieve "an appropriate mix and size of [residential] units, an improved golf course design located outside the stream valley, and protection of other environmental features such as steep slopes and wooded areas." Master Plan at 47. The Master Plan recommended development of Area 2 under a private/public partnership, and noted that the PD Zone would permit a high level of scrutiny and promote compatibility between the golf course community and the existing neighborhood.

The Master Plan listed several elements to be evaluated at the time of a request to reclassify Area 2 under the PD Zone: a density cap of 396 units and an appropriate mix of housing types, MPDUs distributed throughout the development, extension of the existing road network, areas of no environmental impact, non-vehicular access to Fairland Park, common open space for residents and a site for a public elementary school. See Master Plan at 48. Additional recommendations included bikeways and sidewalks to connect the new community to existing residential neighborhoods, and protecting stream buffer areas and high quality forest stands. See *id.* at 119, 140.

The evidence of record demonstrates that the proposed development would be in substantial compliance with the objectives and recommendations of the Master Plan. The

Development Plan limits residential development to 396 units, as recommended in the Master Plan, and provides for a preponderance of single-family detached units, in keeping with the Master Plan objective of increasing the availability of such units in an area that is dominated by townhouses and apartments. MPDUs are distributed in three locations in the development and designed in a manner that would facilitate their integration into the community. Cedar Tree Drive, which currently terminates on the western border of the subject property; would be extended through the subject property to connect with Old Gunpowder Road in Prince George's County. This would create a second means of access to both the new golf course community and the existing Saddle Creek community, which currently has access only from MD 198. The Development Plan provides for a network of trails and sidewalks that would connect the new community with existing neighborhoods and provide pedestrian access to Fairland Park. It also includes an 11-acre site for a public elementary school, which would allow many children in the new and existing communities to walk to school, and would provide a focal point for community activities and involvement.

G. Environmental Impacts

The Hearing Examiner's Report and Recommendation contains a detailed discussion of the proposed development's environmental impacts, on pages 27 through 38, which is incorporated herein by reference. The proposed development would involve a substantial amount of forest clearing, but the project would satisfy forest retention requirements under county standards, and would involve very small reforestation requirements that likely would be satisfied on site. The proposed development would not fully avoid the extensive wetlands and streams on the subject property, although it would protect much of these resources. The Applicants have proposed offsetting environmental reclamation including creating wetlands on the property, restoring stream banks in certain locations, reforestation of degraded stream buffers where possible, preserving several tracts of high quality, upland forest outside the stream buffers, and installing a stormwater management facility to capture run-off from the adjacent industrial area in Prince George's County. See Ex. 33(n); Ex. 73; Tr. Nov. 19 at 216. The Development Plan would protect areas of the subject property where a plant has been identified that is

on the State of Maryland's list of threatened species. It would also involve expanding a pond located in the middle of the site to function both for golf course irrigation and for channel protection (water quantity control) and 10-year and 100-year storm flood control.

Although the proposed development would not comply fully with either the specific environmental recommendations of the Master Plan or the requirements of the Planning Board's Environmental Guidelines, Environmental Staff at the MNCPPC recommend approval of the present zoning applications, and the Development Plan, because on balance, the plan would "result in an environment on this unique site that is superior in many respects to a development plan that strictly complies [with] all current environmental standards and guidelines." Environmental Memo (attached to Technical Staff Report) at 2. Environmental Planning Staff further concluded that the requests for PD zoning and the Development Plan would "further the effort to minimize and avoid sensitive areas, accelerate the sustainable reclamation of severely degraded areas, provide acceptable rationale in support of flexibility in the strict implementation of the stream buffer, and provide in concept for remedial environmental improvements above and beyond existing regulations and laws as offsets to the buffer encroachments depicted on the development plan." Environmental Memo at 1. The District Council finds Environmental Staff's reasoning and conclusions on these points to be persuasive.

With 182 acres in priority forest and 104 acres in stream buffer, 30 percent of the subject property has environmental constraints. The record suggests that it is not possible to implement the three land-intensive development activities recommended in the Master Plan – predominantly single family detached housing, an improved golf course and a school – totally outside of environmentally sensitive areas. In keeping with priorities established by Environmental Staff, the Development Plan preserves much of the unique and high quality resources of the Silverwood Tributary and undisturbed portions of the McKnew Tributary. These areas contain a large, contiguous forest (over 400 acres), as well as significant areas of diverse geologic and soil conditions and resulting unique vegetation. The priority placed on preserving resources of countywide significance resulted in concentrating development in areas of the subject property with existing uses that are unstabilized and

environmentally damaging. Under the Development Plan, residential lots and roadways would affect approximately 2.5 acres of stream buffer. The golf course would affect approximately 29.5 acres of stream buffer, but much of that area would have shrub/scrub vegetation rather than being totally cleared. Moreover, with the exception of unavoidable roads and utilities, stream buffer encroachments on the Development Plan are limited to the fringes of defined buffer areas that currently lack environmentally desirable resources such as streams, forest, wetlands, or rare, threatened or endangered species. The District Council agrees with Environmental Staff's conclusion that the stream buffer restoration and other environmental remediation provided for in the Development Plan would clearly offset the stream buffer encroachment.

H. Trails

The Hearing Examiner's Report and Recommendation contains a discussion of the proposed development's potential impact on the Fairland Park trail system, on pages 38 through 40, which is incorporated herein by reference. Fairland Park contains a network of paved and natural-surface trails, several of which run through the southern spike of the subject property. These trails are well-used and loved by hikers, bikers and equestrians. Fairland Park has only two trails that have been formally designated as such, which means they are signed, shown on an MNCPPC map and routinely maintained by park personnel. One of the designated trails is paved and the other is a natural surface trail called the Holly Trail. *Id.*

The paved trail is part of a loop that extends from the area of the Silverwood Tributary through the southern spike and into Fairland Regional Park in Prince George's County. A portion of this paved trail would have to be removed to accommodate the golf hole proposed for the southern spike. The private developers would be responsible for the cost of relocating this trail and removing any unused sections of the existing trail. The record indicated unequivocally that Trail Planning Staff for the MNCPPC would ensure that this relocation would continue to allow park users to travel from the Montgomery County side of the park to the neighboring Fairland Recreational Park in Prince George's

County in an attractive, park-like environment on a well-designed, hard surface trail, in keeping with the trail objectives stated in the Fairland Park Master Plan.

The Holly Trail, which connects to the paved trail, would not be directly affected by the proposed development. Other natural-surface trails that have not been formally approved by the Park and Planning Department may have to be removed to accommodate the golf hole proposed for the southern spike. However, the record makes clear that Trail Planning Staff intends to make every effort to develop an improved natural-surface trail system that will provide the loop trails and connectivity users currently enjoy.

I. Public Facilities and other Public Interest Issues

The Hearing Examiner's Report and Recommendation contains a detailed discussion of the proposed development's impact on public facilities, on pages 42 through 49, which is incorporated herein by reference. Under the County's current Annual Growth Policy, the proposed development is exempt from the requirements of Local Area Transportation Review ("LATR") and Policy Area Transportation Review ("PATR"), provided that the Applicants submit the information that would normally be required for LATR. The Applicants submitted an LATR study demonstrating that the proposed development would not cause any of the relevant intersections to experience critical lane volumes above the applicable congestion level. The Applicants have also agreed to comply, at the time of preliminary plan and site plan review, with several recommendations made by Transportation Planning Staff at the MNCPPC regarding roadway design and sidewalks. Several Opposition witnesses argued that the proposed development would worsen already difficult traffic conditions in the surrounding area. However, they presented no substantial, probative evidence to support their anecdotal impressions that traffic is congested and getting progressively worse. To allow the Applicants' substantial, probative evidence to be outweighed by contentions that amount to little more than generalized concerns and unsupported allegations would be counter to the dictates of Maryland law. See *Rockville Fuel & Feed Co. v. Board of Appeals*, 257 Md. 183, 192-93 (1970); *Moseman v. County Council of Prince George's County*, 99 Md. App. 258, 265 (Ct. Spec. App. 1994).