IN THE OFFICE OF ADMINISTRATIVE HEARINGS

CASE NUMBERS 2017-0149-R AND 2017-0150-R AND 2017-0151-R

HERRINGBONE DEVELOPMENT, LLC

THIRD ASSESSMENT DISTRICT

DATE HEARD: NOVEMBER 2, 2017

ORDERED BY:

DOUGLAS CLARK HOLLMANN
ADMINISTRATIVE HEARING OFFICER

PLANNER: SARA ANZELMO

DATE FILED: **NOVEMBER 30, 2017**

PLEADINGS

Herringbone Development, LLC, the applicant, seeks a zoning reclassification (2017-0149-R) from R2-Residential District to R10-Residential District on property comprising 1.01 acres located along the south side of Brightview Drive, east of Millrace Drive; a zoning reclassification (2017-0150-R) from R2-Residential District to R10-Residential District on property comprising 1.4468 acres located along the south side of Brightview Drive; and a zoning reclassification (2017-0151-R) from R2-Residential District to R10-Residential District on property comprising 2 acres located along the south side of Brightview Drive, east of Millrace Drive, Millersville.[1]

PUBLIC NOTIFICATION

The hearing notice was posted on the County's website in accordance with the County Code. The file contains the certification of mailing to community associations and interested persons. Each person designated in the application as owning land that is located within 175 feet of the property was notified by mail, sent to the address furnished with the application. Ronald Johnson or Ronald W. Johnson & Associates, Inc., the applicant's engineer, presented the affidavit of Steven R. Johnson indicating that the properties were posted on July 20, 2017 (Applicant's Exhibit 1). I find and conclude that the requirements of public notice have been satisfied.

[1] The three parcels total 4.457 acres. Each is improved by a single-family dwelling. The applicant seeks to rezone the three properties and develop them with townhouses.

FINDINGS

A hearing was held on November 2, 2107, in which witnesses were sworn and the following evidence was presented with regard to the proposed rezonings requested by the applicant.

The Property

The properties are identified as Parcel 358 (Tax Account No. 03-000-1689-4600), Parcel 341 (Tax Account No. 03-000-9003-4774), Parcel 310 (Tax Account No. 03-000-9007-5717), in Block 6 on Tax Map 22, (all three parcels hereinafter referred to as "the subject property" or "the property"), with street addresses of 661, 651, and 619 Brightview Drive, Millersville. The subject property is zoned R2-Residential District.

The Proposed Rezoning

The applicant seeks to rezone the subject property from R2-Residential to R10-Residential District, as shown on the site plan introduced into evidence at the hearing as County Exhibit 2.

The Evidence Submitted At The Hearing

Sara Anzelmo, a Planner with the Office of Planning and Zoning (OPZ), testified that OPZ takes no position on the requested rezoning. The subject property is irregular in shape and consists of three separate parcels totaling 4.457 acres of land.

At the time of the adoption of the 1952 Zoning Ordinance, the subject property was classified as A–Agricultural District. As a result of the First

Comprehensive Rezoning for the Northern Third Assessment District, effective December 3, 1972, the property was reclassified as R1–Residential District. With the Second Comprehensive Rezoning, effective September 11, 1989, the R1 zoning classification was retained. The property was reclassified as R2–Residential District with the Third Comprehensive Rezoning in accordance with the Severna Park Small Area Plan (SAP), effective June 24, 2002. Finally, during the most recent Comprehensive Rezoning for Councilmanic District 5, effective January 29, 2012, the R2 zoning classification was retained.

OPZ defines the neighborhood for this request as that area located within 1,500 feet of the north and south sides of Brightview Drive, Sunnyview Drive to the east, and Veterans Highway to west. This neighborhood generally conforms to the applicant's defined neighborhood in that it focuses for the most part on land use located along Brightview Drive.

The Department of Health commented that the project is to be served by public water and sewer facilities. The Department has no objection to the request, subject to the availability of public water and sewer.

The Development Division of the OPZ defers to the Zoning Division with regard to the Zoning Reclassification request. However, the Division advises that approval of the rezoning does not constitute approval of the proposed subdivision or design as shown on the submitted plan, only the rezoning application as noted. Rezoning approval does not constitute approval of any modifications that may be requested, Adequacy of Public Facilities (Fire, Road, Schools, Utilities and Storm

Drains) requirements as stipulated by Article 17, Title 5 or approval of any Forest Conservation requirements found in Article 17-6-301. Adequacy of Facilities for Schools must be demonstrated. Schools are currently open at Old Mill Middle North and Old Mill High School but Southgate Elementary is closed as per the adopted APFO School Utilization Chart dated April 24, 2017. The applicant proceeds at their own risk with regards to school availability. Recreation Area location and Forest Conservation requirements must be addressed.

The Long Range Planning Division commented that the Severna Park SAP does not contain any specific recommendations for the site. The property was rezoned from R1 to R2 during the comprehensive planning process for the Severna Park SAP. The 2009 General Development Plan (GDP) does not contain any specific recommendations for the site. The Residential Low Density land use was retained for this site on the 2009 GDP Land Use Map. No application for rezoning was filed during the 2011 Comprehensive Zoning Process, and no change was made to the subject property's zoning.

Ms. Anzelmo testified that the site is within the Planned Sewer Service category in the Broadneck Sewer Service Area and the Existing Water Service category in the Glen Burnie High 295 Water Pressure Zone. The proposed change is consistent with the 2013 Water and Sewer Master Plan.

The applicant provided a previous statement of justification based largely on an argument for change, in response to which OPZ prepared a report with a recommendation for denial. The applicant has since provided a revised

justification with additional information to substantiate an argument for mistake, and this report reflects that revised justification. The applicant contends that the County Council erred in retaining the existing R2 zoning classification during the most recent Comprehensive Rezoning Process based on the following key factors.

First, the applicant notes that the site is located within a Priority Funding Area (PFA); yet, the current R2 zoning of the property, which only provides for a maximum of 2.17 units per acre (one dwelling unit per 20,000 square feet), does not meet the minimum 3.5 units per acre density requirement for a PFA designation. While the applicant realizes that the 3.5 units per acre mandated by the PFA does not require each individual property within a PFA cluster to achieve the minimum 3.5 unit density, the subject 4.457 acre property is isolated between contiguous R10 zoning to the west and an R2-zoned age-restricted subdivision to the east that is fully developed with its own internal amenities and is spatially separated from the subject property by platted open space and statutorily separated from the subject property by the Council not placing this subdivision in the PFA. Staff notes that the PFA is not adopted by Council; rather, it is approved by the Maryland Department of Planning.

Second, the applicant contends that the subject property, unlike any of the other undeveloped properties within the PFA in this area, has been singularly mistreated by application of an R2 classification making the property a buffer for the benefit of the two existing contiguous subdivisions. The applicant claims that while this may benefit the residents of the contiguous subdivisions, it

disadvantages the rights of the owners of the property, is improper pursuant to any planning doctrine, and constitutes zoning error that causes the property to have no value except to that which surrounds it.

Third, the applicant notes that the property is adjacent to an R10 subdivision, across the road from R15 zoning, and in the existing category for Public Water and Planned category for Sewer. All of the surrounding properties are subdivided and served by public water and sewer (except for 661 Brightview Drive). The applicant contends that by rezoning the adjacent properties to the west to R10 and having previously adopted the location of the PFA, the Council should have foreseen the impact of 108 townhouses on the property and should have implemented the Smart Growth policy of establishing PFAs based on existing and planned public facilities and zoned the property the appropriate density, R10, as it did to the adjacent site.

Fourth, the applicant argues that increased residential density should be encouraged because public utilities are adequate and adjacent zoning and uses are compatible. More specifically, the property meets these requirements, encompassed by the PFA designation, due to adequate public utilities and contiguity with the R10 subdivision, while the adjacent R2 subdivision does not meet these requirements because of its existing density and because it is not within the PFA. Given the existing facts at the time of the last Comprehensive Rezoning (i.e. the availability of public water and sewer, the PFA designation, and the high-

density development across Brightview Drive) the applicant opines that the Council erred in failing to rezone the property to R10.

Finally, the applicant points out that the property is indistinguishable from the closest portion of the contiguous R10 property to the west, which was zoned R2 prior to being comprehensively rezoned to R10 in 2012. The applicant feels that this proves that the Council believed that all of the undeveloped property fronting Brightview Road, extending east from Veterans Highway to the eastern extremity of the PFA and including the subject property, should be zoned R10. The applicant contends that the property was not comprehensively rezoned as R10 by the Council only because it was not owned by the developer of the contiguous R10 property. Rather, the subject property was owned by three individual owners, who should not be treated differently from a developer of the larger contiguous property. The applicant concludes that zoning should be applied to property pursuant to sound planning principles, without distinction as to ownership. The Council failed to consider the likelihood of redevelopment.

The 2009 Land Use Plan (Figure 7-1) of the Anne Arundel County GDP designates the subject property as "Residential-Low Density". Table 7-1 of the GDP indicates the typical use within the Residential Low Density category is single-family detached homes and that the corresponding zoning is R1 and R2-Residential District. However, the subject property also lies within a designated PFA. The Maryland State Smart and Sustainable Growth Act of 2009 does not require properties within a designated PFA to be consistent with the "land use"

and “density” elements that are specified in the County’s GDP. The State excluded those terms in PFAs to provide a measure of flexibility and encourage local ordinances to allow for densities beyond those specified in a local comprehensive plan. This measure allows a local jurisdiction to further direct growth in PFAs where feasible. Therefore, the proposed R10 classification would conform to the GDP.

As to compatibility, Ms. Anzelmo testified that the property to the north of the subject site, across Brightview Drive, is zoned R15 and has been developed (c. 1984) as Millrace, a Planned Unit Development (PUD) of detached and townhouse dwellings. The property to the east is zoned R2 and has been developed (c. 2006) as an age-restricted PUD of single-family detached dwellings (Shipley’s Crossing South). The property to the south is zoned R2 and has been developed (c. 1998) as a single-family detached subdivision containing some cluster and some non-cluster lots (Shipley’s Retreat). Finally, the property to the west is zoned R10 and is currently being developed for townhouses (Watson’s Glen). Therefore, the proposed Zoning Reclassification and development of the subject property at a density of 10 dwelling units per acre allowed for under the requested R10 zoning would be compatible in the aforementioned land use context. There are sufficient buffers and/or barriers that are currently provided or can be provided to ensure compatibility among these differing residential land use intensities.

There is a strong presumption of correctness of the comprehensive rezoning, and the applicant must produce strong evidence of a mistake or change

in neighborhood in order to justify a Zoning Map Amendment. For the proposed Zoning Reclassification, OPZ finds that the evidence presented by the applicant and provided via County records supports the possibility of a mistake. In this particular case, the proposed rezoning would be compatible with the surrounding land uses, would conform to the goals of the GDP, and is not located within the critical area overlay.

Based upon the standards set forth in § 18-16-303 under which a zoning reclassification may be granted, Ms. Anzelmo testified that OPZ does not oppose the proposed zoning reclassification of 4.457 acres of land from R2–Residential District to R10–Residential District.

The applicant was represented at the hearing by Harry C. Blumenthal, Esquire, of Blumenthal, Delavan, Powers and Palmer, P.A, assisted by David Katz, Esquire. Evidence was presented through Shep Tullier of Land Visions, Inc., a land use consultant, that the request to rezone the property is justified. Mr. Tullier testified as to the history of the zoning of the area and that the Council made a mistake when it rezoned Parcel 291 and did not include the subject property. As a result, the subject property has been left as a buffer between the R10 zoning to the west and the R2 zoning to the east (Shipley's Crossing South). The PFA ends to the east of the subject property, which is unable to be developed with the 3.5 acre density allowed to a property in the PFA because of the restrictions of being zoned R2. Mr. Tullier was of the opinion that the subject property would have been included in the rezoning of Parcel 291 if the owners at

the time had been aware of the opportunity. Water and sewer are in the street in front of the subject property. There will be no domino effect since the surrounding properties have already been zoned and developed. Whether or not the applicant can meet the adequacy of public facilities requirements will be determined at the permit stage.

A number of surrounding property owners, including a new owner of one of the four townhouses that have been built on Parcel 291 since it was rezoned in 2011 (105 to go), testified in opposition to the requested rezoning. Many thought the Council had done them wrong when it rezoned Parcel 291. They all testified that they believed that the R2 zoning would be retained and that the rezoning was uncalled for, given the failure of the development of Parcel 291 and the influx of traffic the rezoning would cause. Some pointed out that the entire area, regardless of zoning, including the R15 neighborhood across Brightview Road (Millrace), are residential neighborhoods of single-family dwellings. Townhouses on the subject property, they argue, would be incompatible with the surrounding residential areas.

There was no other testimony taken or exhibits received in the matter. The Hearing Officer did not visit the property.

Findings

A rezoning requires affirmative findings that:

(1) There was a mistake in the zoning map or the character of the neighborhood has changed to such an extent that the zoning map should be changed;

(2) The new zoning classification conforms to the General Development Plan (GDP) in relation to land use, number of dwelling units or type and intensity of nonresidential buildings, and location;

(3) There is compatibility between the uses of the property as reclassified and the surrounding land uses, so as to promote the health, safety, and welfare of present and future residents of the County;

The applicant has the burden of proof on all questions of fact. The burden has been described as "onerous." *Agneslane v. Lucas,* 247 Md. 612, 233 A.2d 757 (1967).

Change or Mistake

The Court of Appeals has provided a succinct statement of the change-mistake rule applicable to piecemeal rezoning applications:

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

> is there a threshold evidentiary standard which when met compels rezoning. Even with very strong evidence of change or mistake, piecemeal rezoning may be granted, but is not required to be granted, except where a failure to do so would deprive the owner of all economically viable use of the property.

The Mayor and Council of Rockville et al v. Rylyns Enterprises, Inc., 372 Md. 514, 538-539 (2003).[2]

The applicant contends that the subject property should be rezoned R2 to R10 because the Council made a mistake in 2011 when it rezoned the adjacent property (Parcel 291) from R2 to R10 and failed to include the subject property. The applicant is correct that the Council made a mistake in 2011, but the mistake was in rezoning Parcel 291 from R2 to R10, not in failing to rezone the subject property to R10 at the same time. To carry the 2011 mistake over into the subject property would only make a bad situation worse.

Rezonings can only be granted if the Council made a mistake or if the character of the neighborhood has changed. The latter is more easily determined

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[2] See also, Case No. 2007-0420-R, *In Re: Regency Land Associates, LLC* (March 13, 2008) at 7:

> This office treads lightly into the considerable morass of conflicting evidence that piecemeal cases often engender. There are several reasons for caution: comprehensive zoning is the exclusive province of the Council; piecemeal cases effect an amendment to the zoning maps; the mistake-change rule is intended to promote the public health, welfare and safety while recognizing private property rights; the rule is easily recited but hard to apply; the rule is supposed to be disjunctive but the operative facts can support both the mistake and the change prongs of the rule; mistake cases require evidence of incorrect assumptions or premises by the Council - mere error of judgment by the Council is insufficient; change contemplated in the comprehensive zoning process is typically not evidence of substantial change in the character of the neighborhood under the rule; the applicant has a high burden of proof; even with proof of mistake or change, the rezoning is not compelled unless the owner is denied economically viable use; and other reasons.

And see, Case No. BA 75-06R/BA 76-06R, *In Re: Severna Park Market Place Center, et al* (June 25, 2008) at 18 (Dissent).

than the former because changes on the ground are visible. What goes on in the Council's mind, absent something spoken or written on the record, is usually opaque and, in many cases, impossible to discern.[3] The latter, therefore, is a heavier lift.

The lift gets even heavier when the rule that the Council's determination as to zoning is presumed correct is combined with the reluctance on the part of this Office to play the role of the Council. (See footnote 1 above.) The lift becomes impossible when the evidence shows that the zoning of Parcel 291 was an anomaly when the overall residential single-family dwelling zoning from Brightview Road south in this part of Millersville is taken into account.[4]

The PFA designation was much discussed at the hearing. The land east of Veterans Highway is in the PFA. The eastern boundary of the PFA is the line that separates the subject property from the Shipley's Crossing South subdivision to the east. The impact of the PFA on the question at hand was answered succinctly by Ms. Anzelmo when she testified that "[t]he Maryland State Smart and

[3] From the evidence, it appears that the Council may not have debated at all whether Parcel 291 should be rezoned R10. Testimony was given that the change was a last-minute amendment by a Council member for the district involved and that the other six members of the Council approved the amendment as a courtesy. However, whether or not this sequence of events is true, the denial of the rezoning request in this case is based on what the existing situation is on the ground, not what went on, or didn't go on, in the minds of the Council members when the rezoning of Parcel 291 was granted in 2011.

[4] Fourteen witnesses in opposition to the application presented detailed evidence and exhibits. Many more people were in the hearing room but graciously gave up their opportunity to hammer the nail deeper into the wood and declined the offer to testify. They were identified by name and stood to show who they were. One of the fourteen who testified was Jason Marszalek, a new owner if what appears to be the failed townhouse development on Parcel 291. He didn't want the subject property to his east to be rezoned. Emails from scores of other nearby residents were also received and are in the record. Numbers do not decide rezoning requests, of course, although the extent of the opposition to the proposed rezoning confirmed what other evidence shows—that rezoning the three parcels involved in this case is a matter that the Council should take up when they are considering the effects of a change on the entire County.

Sustainable Growth Act of 2009 does not require properties within a designated PFA to be consistent with the 'land use' and 'density' elements that are specified in the County's General Development Plan." This dovetails into the conclusion that the owners of the subject property are not denied any legal development of their lots. The three parcels are zoned R2 and can be developed with single-family dwellings, like their neighbors to the north, east, and south have done. That they could build more homes if the requested zoning were granted is irrelevant.

Finally, I do not believe that rezoning the subject property to R10 would comply with the GDP. Table 1-7 shows the uses in various zoning districts:

Land Use Plan Categories	Typical Uses	Corresponding Zoning Categories
Rural	Agricultural uses and single family detached homes.	RA, RLD
Residential Low Density	Single family detached homes.	R1, R2
Residential Low-Medium Density	Single family detached homes. (Townhouse and duplex units may be allowed as Special Exception or Conditional uses.)	R2, R5
Residential Medium Density	Single family detached, duplex, townhouse, and multifamily dwellings.	R5, R10

Notice that the GDP envisions R2 areas with single-family detached homes while R10 districts allow dwellings of a much different nature, such as the townhouses planned for the subject property if the rezoning were granted. Placing the subject property in a PFA does not require that the requested rezoning be granted. As the Protestants so deeply felt, the GDP envisioned residentially-zoned single-family homes south of Brightview Road, and granting the requested rezoning would not

comply with the GDP, nor would it be an example of "smart growth," whatever that is.[5]

ORDER

PURSUANT to the application of Herringbone Development, LLC, petitioning for a zoning reclassification from R2-Residential District to R10-Residential District on property comprising 1.01 acres located along the south side of Brightview Drive, east of Millrace Drive; a zoning reclassification from R2-Residential District to R10-Residential District on property comprising 1.4468 acres located along the south side of Brightview Drive; and a zoning reclassification from R2-Residential District to R10-Residential District on property comprising 2 acres located along the south side of Brightview Drive, east of Millrace Drive, Millersville; and

PURSUANT to the notice, posting of the property, and public hearing and in accordance with the provisions of law, it is this **30th day of November, 2017**,

ORDERED, by the Administrative Hearing Officer of Anne Arundel County, that the applicant's request to rezone the subject property is hereby **denied**.

Douglas Clark Hollmann
Administrative Hearing Officer

[5] It should not be left unsaid that the state of development on Parcel 291 is irrelevant. In other words, if Parcel 291 were completely developed and landscaped, this decision would be no different.

NOTICE TO APPLICANT

Within thirty days from the date of this Decision, any person, firm, corporation, or governmental agency having an interest therein and aggrieved thereby may file a Notice of Appeal with the County Board of Appeals.

If this case is not appealed, exhibits must be claimed within 60 days of the date of this Order, otherwise they will be discarded.