

APPLICANT: MOB Prospect LLC

REQUEST: A request to rezone various parcels from AG Agricultural to R1 Urban Residential District

HEARING DATE: October 3, 2007

BEFORE THE

ZONING HEARING EXAMINER

FOR HARFORD COUNTY

BOARD OF APPEALS

Case Nos. 166, 167, 168

ZONING HEARING EXAMINER'S DECISION

APPLICANT: MOB Prospect LLC

LOCATION: Case No. 166 - 1.932 Acres
1413 North Fountain Green Road, Bel Air
Tax Map: 41 / Grid: 2C / Parcel: 333

Case No. 167 - 10.719 Acres
Prospect Mill Road, Bel Air
Tax Map: 41 / Grid: 2D / Parcel: 385

Case No. 168 - 3.393 Acres
Prospect Mill Road, Bel Air
Tax Map: 41 / Grid: 2D / Parcel: P/O 588

Third (3rd) Election District

ZONING: AG / Agricultural District

REQUEST: A request, pursuant to Section 267-12A of the Harford County Code, to rezone 1.932 acres, 10.719 acres, and 3.393 acres from AG/Agricultural District to R1/Urban Residential District.

TESTIMONY AND EVIDENCE OF RECORD:

These applications request a rezoning from AG/Agricultural to R1/Urban Residential of three parcels located at the intersection of Prospect Mill Road and MD Route 543. Two of the parcels are adjoining; the other parcel lies in close proximity to the first two. As identical relief was requested for all three parcels, the Applicant's request for a consolidated hearing was granted.

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For the Applicant first testified Thomas O’Laughlin who identified himself as a real estate investor, with land development and land planning experience. Mr. O’Laughlin has testified before as an expert in rezoning cases, variance cases, other land use applications, and has been accepted as an expert in land use in Harford County. Mr. O’Laughlin is a principal of the Applicant.

Mr. O’Laughlin was offered and accepted as an expert in real estate investment and site plan design. Mr. O’Laughlin described the three parcels under consideration. The subject of Case No. 166 is a 1.932 acre parcel with frontage on MD Route 543 (Fountain Green Road), which was improved by a private residence, now demolished. To the rear (east side) of the 1.932 acre parcel is located the subject of rezoning Case No. 167, which is a 10.719 acre parcel. Just to the northeast of the 10.719 acre parcel, and separated from it by approximately 300 feet is located the 3.393 acre parcel which is the subject matter of Case No. 168. This parcel, as well as the 10.719 acre parcel, is totally wooded and contain some wetlands.

All three parcels are zoned agricultural.

Mr. O’Laughlin stated that the 1.932 acre parcel was purchased from the Minnick family in the year 2000 by the Applicant. The other two parcels were purchased from the State Highway Administration (hereinafter “SHA”), by the Applicant in the years 2004 and 2005, subsequent to SHA declaring the two parcels as surplus.

Mr. O’Laughlin identified fairly extensive non-tidal wetlands on the 10.719 acre parcel which extend up from Dogwood Lane. Dogwood Lane is a part of the approximately 12 lot residential subdivision just to the south of and adjacent to the subject parcels.

The witness stated that after its purchase of the subject properties, the Applicant retained an engineering firm to determine if sufficient sewer capacity existed to service the subject parcels for residential purposes. Its findings were that sufficient sewer capacity exists. However, in 1997, according to Mr. O’Laughlin, this analysis had not been performed. Sewer capacity can now be seen to have existed in 1997 which would have allowed the subject properties to be utilized for residential purposes.

The 10.719 acre parcel was, prior to the purchase of the 1.932 acres by the Applicant, landlocked. It was not good agricultural property in 1997 and, in Mr. O’Laughlin’s opinion, it was a mistake to have maintained its agricultural zoning in 1997. Furthermore, the use of the property for either one or two residential lots, with private sewer, was not a practical use because of the wetlands on site.

In 2005 the Applicant’s petitioned for a change in agricultural zoning of the 10.719 acre parcel to R1. The Harford County Council approved the request, with the legislation being subsequently vetoed by the County Executive. Mr. O’Laughlin believes that R1 is a good transition from the R2 zoning of the Thomas Run townhome development, to the south and east of the property, to the agricultural uses which exist along Prospect Mill Road.

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Mr. O’Laughlin admitted, under cross-examination, that he has no personal knowledge of why the Council did not zone the property to R1 in 1997. The two parcels were owned by the SHA in 1997 and the County Council probably did not pay any attention to State Highway owned properties during that Comprehensive Zoning. Mr. O’Laughlin also stated that lots along Prospect Mill Road are agriculturally zoned but residentially used, and are each approximately one acre in size.

Next for the Applicant testified Sean Davis, who was offered and accepted as an expert land planner. Mr. Davis is familiar with the application, the neighborhood, and the history of the subject parcels.

Mr. Davis generally identified the neighborhood of the subject parcels as including those residential homes located just to the north side of and adjoining Prospect Mill Road, a portion of the Thomas Run townhouses to the east and south, all of the small subdivision along Dogwood Road to the south and southeast, and a small portion of property to the west of and fronting MD Route 543. Mr. Davis described this area as containing mixed residential uses and housing types. He described this neighborhood as similar to that defined by the Harford County Department of Planning and Zoning, although the Department includes the entire Thomas Run townhouse development.

Under the 2004 Master Plan the subject parcels are shown as low intensity. Low-intensity would allow a residential development of 1 to 3.5 residential dwelling units per acre.

The subject parcels lie in the development envelope with, again, agricultural zoning. Mr. Davis stated that agricultural zoning is not consistent with Harford County’s Land Use Plan designation of low-intensity.

In 1997, the SHA owned the 10.719 acre parcel and the 3.393 acre parcel. Mr. Davis agreed with Mr. O’Laughlin that the natural transition between the R2 zoning at Thomas Run townhomes to the agricultural properties along and to the north of Prospect Mill Road would be R1.

Addressing the 1.932 acre parcel fronting on MD Route 543, Mr. Davis explained that the property could not, in 1997, have been used for agricultural purposes.

Subsequent to 1997 SHA surplused the 10.719 acre and 3.393 acre parcels and sold them at auction to the Applicant.

Mr. Davis believes the County Council was probably not aware that adequate sewer service existed in 1997. However, because of percolation issues the properties would have been unsuitable for agricultural use or private septic systems.

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Mr. Davis believes a mistake occurred in 1997. The Council at that time could not have foreseen that SHA would surplus the parcels, or that the 10.719 acre parcel would be combined with the 1.932 acre parcel. The Council mistakenly assumed continuing ownership and use by the SHA. Furthermore, the R1 zoning is consistent with the 2004 Land Use Plan.

Under cross-examination, Mr. Davis admitted that the Council had no reason for foresee, in 1997, that the property would be declared surplus by the SHA. Under R1 zoning, Mr. Davis believes that 20 to 25 homes could be constructed on the 1.932 acre parcel and the 10.719 acre parcel combined. Without the requested zoning change the property can be used for residential purposes, although at an agricultural density.

The application filed by the Applicant concisely sets forth its argument for mistake for the following reasons:

“In 1997:

- 1. All 3 parcels were in different ownership and zoned AG, Agricultural.*
- 2. Parcel 385 was owned by the Maryland State Highway Administration (“SHA”).*
- 3. Parcel 333 was owned by Minnick.*
- 4. Parcel P/O 588 was also owned by the SHA.*
- 5. The parcels owned by the SHA (collectively the “SHA Parcels”) were not intended for development of any kind. The SHA Parcels were purchased in 1975 to accommodate road construction that did not occur.*
- 6. Parcel 385 and P/O 588 are landlocked. They have no access to Route 543.*
- 7. Parcel 333 by itself is not large enough by itself for residential development.*

Since the last Comprehensive Rezoning in 1997:

- 1. The SHA has abandoned the proposed road construction project and sold the SHA Parcels to the Petitioner.*
- 2. All 3 parcels are now owned by the Petitioner.*
- 3. Combining the subject parcel (Parcel 333) with Parcel 385 together makes one parcel that is appropriate for R-1 development (but still too small for development with permitted agricultural uses).*
- 4. Parcel 333 and Parcel 385 can now be developed together with road frontage on Route 543.*
- 5. It is now possible that Parcel P/O 588 can be developed in conjunction with the adjoining parcel Tax Map 41, Parcel 350.*

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The County Council could not have known that these changes would take place. If the County Council had know of these changes it would not have retained the AG zoning on the subject property. The County Council made a mistake in the legal sense when the property was zoned AG in the last Comp Rezoning.”

For the Harford County Department of Planning and Zoning testified Anthony McClune. Mr. McClune concurred with Mr. Davis that the Department’s definition of the neighborhood is slightly different from the Applicant. The properties have been zoned agricultural since 1957. A low-intensity use will allow 1 to 3.5 dwelling units per acre.

In 2005, during the Comprehensive Rezoning process (which was subsequently vetoed by County Executive Craig), the County Council did in fact vote to rezone the properties to R1.

Mr. McClune sees no change in the neighborhood, but agrees that a mistake did occur in 1997.

The Harford County Council in 1997 was not aware that the two parcels would be surplus by SHA. Mr. McClune believes R1 zoning is more appropriate, and is more consistent with the Land Use Plan in general. He also notes that the Planning Advisory Board, in its review of the cases under consideration, recommended R1 zoning be granted to the parcels.

Typically, the Council does not look at SHA held lands during Comprehensive Rezoning as SHA lands are not subject to local use restrictions.

R1 zoning will allow development which is consistent with the uses surrounding agriculturally zoned lands, which is residential use.

The Minnick property, being the 1.932 acre parcel on Route 543 is now under common ownership with the 10.719 acre parcel, and the Minnick property provides the only access to the landlocked property. Therefore the Department is considering this parcel along with the other ones in its recommended rezoning.

In opposition testified Trisha Palazzi, a resident of 1612 Dogwood Lane. By letter marked as Protestant’s Exhibit No. 1, Ms. Palazzi set forth her objections to the requested use. She notes a potential boundary encroachment; possible flooding exacerbated by the development of the subject property; concerns that the Dogwood Lane residents’ private well and septic systems will be affected by additional development; that the proposed density is inappropriate for the general neighborhood; and removal of the wooded buffer from the subject property side of the Dogwood Lane subdivision.

Various other residents also expressed their general opposition for reasons set forth by Ms. Palazzi in Protestant’s Exhibit No. 1.

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APPLICABLE LAW:

Section 267-12 A. Zoning Reclassifications states:

“A. *Application initiated by property owner.*

(1) *Any application for a zoning reclassification by a property owner shall be submitted to the Zoning Administrator and shall include:*

(a) *The location and size of the property.*

(b) *A title reference or a description by metes and bounds, courses and distance.*

(c) *The present zoning classification and the classification proposed by the applicant.*

(d) *The names and addresses of all persons, organizations, corporations or groups owning land, any part of which lies within five hundred (500) feet of the property proposed to be reclassified as shown on the current assessment records of the State Department of Assessments and Taxation.*

(e) *A statement of the grounds for the application, including:*

[1] *A statement as to whether there is an allegation of mistake as to the existing zoning and, if so, the nature of the mistake and facts relied upon to support this allegation.*

[2] *A statement as to whether there is an allegation of substantial change in the character of the neighborhood and, if so, a precise description of such alleged substantial change.*

(f) *A statement as to whether, in the applicant's opinion, the proposed classification is in conformance with the Master Plan and the reasons for the opinion.”*

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The Applicant requests a change in the zoning of the property. An initial presumption exists in the determination of whether any such request should be granted:

“It is presumed that the original zoning was well planned, and designed to be permanent; it must appear, therefore, that either there was a mistake in the original zoning or that the character of the neighborhood changed to an extent which justifies the amendatory action.” See Wakefield v. Kraft, 202 Md. 136 (1953).

It is a “rudimentary” principle of zoning review that there exists a:

“. . . strong presumption of correctness of the original zoning and a comprehensive rezoning.” See Stratakis v. Beauchamp, 268 Md. 643 (1973).

In considering an:

“. . . application for reclassification, there must first be a finding of substantial change to the character of the neighborhood or a mistake in the comprehensive plan.” See Hardesty v. Dunphy, 259 Md. 718 (1970).

Furthermore, case law dictates that legally sufficient evidence must exist to show “substantial change” in the character of the neighborhood, and not a “mere change” which may very well fail to rise to the level of being based upon legally sufficient evidence to justify a finding of change to the neighborhood. See, generally, Buckel v. Board of County Commissions of Frederick County, 80 Md. App. 05 (1989).

Furthermore, Section 267-9I of the Harford County Development Regulations, Limitations, Guides, and Standards, is applicable to this request and will be discussed in detail below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The Applicant is the owner of three parcels of property, located generally on the southeastern corner of the intersection at MD Route 543 and Prospect Mill Road. These parcels lie between the Hickory and Fountain Green areas of the County, in an area which has rapidly changed over the past years from traditional agricultural use to fairly intensive residential use.

The history of the three parcels is interesting. Parcel 333 is a 1.932 acre parcel, zoned agricultural, which fronts MD Route 543 and was improved for many years by a single family residence. The lot and the house on that lot are typical of many older units in the area which were built on one acre or smaller lots, and fronted on what in earlier times were roads which carried fairly limited volumes of traffic.

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Adjoining to the east of Parcel 333 is Parcel 385, which is an almost 11 acre parcel originally purchased by the State Highway Administration but surplus by it and purchased by the Applicant in the year 2004. The third parcel is not connected with either of the other two parcels. It is known as Parcel 588, and consists of about 4 acres. Parcel 588 has no road frontage, is landlocked, and is zoned agricultural, as are the other two parcels. This parcel is separated from Parcel 385 by approximately 300 feet. Parcel 588 was also surplus by the State Highway Administration and sold to the Applicant in the year 2005.

The 2004 Harford County Master Land Use designation for these parcels is low intensity. Low intensity is defined as follows:

“Areas within the development envelope where residential development is the primary land use. The density ranges from 1.0 to 3.5 dwelling units per acre. Neighborhood commercial uses such as convenience stores, doctors offices and banks are examples of some of the non-residential uses associated with this designation.”

While the Applicant suggests that it was a “mistake” to have agriculturally zoned land within a designed low intensity classification as shown on the Master Land Use Plan, the explanation by the Harford County Department of Planning and Zoning is, in fact, more accurate and is found to be controlling. The Department of Planning and Zoning indicates the Land Use Plan is accurate for the area in which the subject property is located:

“The zoning classifications in the area are generally consistent with the 2004 Master Plan as well as the existing land use. Residential zoning includes RR/Rural Residential District and R1 and R2/Urban Residential District. . . . There are also AG/Agricultural zoned parcels which are generally located on Prospect Mill Road.”

Land Use Plan designations are not site specific, but are generally a broader brush attempt to show policies, trends and a framework for development;

“The 2004 Land Use Element Plan provides the primary direction for achieving the Master Plan’s guiding principles. The Plan will set forth the framework for the County’s policies on land use and related issues. . .

The 2004 Land Use Element Plan provides a vision for land use in Harford County.” (See Harford County 2004 Master Plan and Land Use Element Plan, pages iii - d.)

Furthermore, failure to comply with the Land Use Plan is not a mistake nor it is necessarily evidence of mistake. See Howard County v. Dorsey, 292 Md. 351, 438 A.2d 1339 (1982).

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In order to secure its requested R1 zoning, the Applicant must show that the Harford County Council made a mistake in 1997 in allowing these three parcels to retain their agricultural classification. The Applicant makes no claim for change in neighborhood. After making a legally sufficient argument for mistake, the Applicant must then convince the Board of Appeals that the most appropriate zoning for the property is then R1. Often times a mistake argument can be made, but the most appropriate zone for the property remains that which was originally granted.

However, in the instant case, and addressing the second step of the Applicant's task first, it is found that the most appropriate zoning of the parcels is R1. Parcel 333 is a less than two acre lot located on MD Route 543 which historically was residentially used. It has no agricultural significance, or ability to be used for agricultural purposes. Adjoining is Parcel 385 which, by un rebutted evidence, contains significant wetlands, adjoins residential parcels on four sides, is relatively long and narrow, and, quite clearly, has no ability to be utilized for a viable agricultural use. Again, if one were to objectively look at this parcel and make a determination independent of any question of mistake or change in the neighborhood, one could not help but arrive at a conclusion that a residential use category is the most appropriate zone. The same reasoning would apply to the separated four acre parcel known as Parcel 588. Its most appropriate use is not agricultural, but low intensity residential, which would be consistent with a R1 zoning classification.

However, before addressing appropriate zoning, the Applicant must first meet the very high burden of showing that a mistake in zoning occurred in 1997.

The Applicant presents a case of mistake which appears to have three arguments. First is its argument that the SHA decision to surplus the property was both unforeseen and impossible to foresee in 1997. (See Page 8 of Applicant's Brief.)

Its second argument is that with the sale of the three parcels to the Applicant, the parcels are no longer landlocked and can now be developed;

“ . . . in a way that the County Council could not have foreseen at the time of the last comprehensive rezoning.” (See Page 9 of Applicant's Brief.)

Its last argument would appear to be the contention that;

“In 1997 the County Council did not know for certain that adequate water and sewer capacity exist to serve the parcels if developed with R1 uses.”
(See Page 9 of Applicant's Brief.)

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Maryland law gives relatively clear guidance on the manner in which requests for rezoning based on mistake are to be determined;

*“. . . the presumption of validity according to a comprehensive zoning is overcome an error 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 rezoning the Council failed to take into account any 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. **Error or mistake may also be established by showing that events occurring subsequent to the comprehensive zoning have proven the Council’s initial premises were incorrect.**”* (See Boyce v. Sembly, 25 Md. App. 43, 334 A.2d 137 (1975)
(emphasis added)

It is therefore essential to determine, in reviewing Applicant’s arguments, if there were facts, projects or trends which were reasonably foreseeable, and yet were not taken into account in 1997. However, by the Applicant’s own admission, the surplus of the property by the State Highway Administration was “completely unforeseen”. (See Page 8 of Applicant’s Brief.) Accordingly, it is not a question of whether the State Highway Administration action was “reasonably foreseeable” in 1997 as it was, admittedly, “impossible” for the Council to have foreseen this.

The second tenet of the Boyce v. Sembly analysis must next be examined, which is that error can be demonstrated “. . . by showing that events occurring subsequent to the comprehensive zoning have proven the Council’s initial premises were incorrect.”

Quite clearly, the Applicant has shown satisfactorily that the Council could not have foreseen the SHA decision to surplus Parcels 385 and 588, which are the two interior parcels. The decision was made by the SHA sometime prior to the years 2004/2005 to sell these parcels. The Applicant ended up with title to them. For many years prior thereto the parcels had been owned by the SHA and were, no doubt, part of the plans for the extensive intersection improvements which were at one time envisioned for MD Route 543, U.S. Route 1, and MD Route 23. The parcels had been zoned agricultural for all of those years. The Council must be charged with having knowledge of the ownership of the parcels during those years, and of their ownership by SHA during the comprehensive zoning of 1997.

While not unknown, it is somewhat unusual for the SHA to surplus parcels. It certainly could not have been reasonably anticipated in 1997 that these two parcels would not be utilized in the future by the SHA.

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As is also stated by Mayor and Council of Rockville v. Stone, 271 Md. 655, 319 A.2d 356 (1974):

“On the question of original mistake, this Court has held that when the assumption upon which a particular use is predicated proves, with the passage of time, to be erroneous, this is sufficient to authorize the rezoning.”

Boyce v. Sembly, cited above, also held:

“Because facts occurring subsequent to a comprehensive zoning were not in existence at the time, and, therefore could not have been considered, there is no necessity to present evidence that such facts were not taken into account by the Council at the time of the comprehensive zoning.”

Based on this discussion, therefore, there is no need to show facts which were not taken into account by the Council in 1997. It is quite clear that the SHA owned the two parcels in 1997; it is likely that the Council assumed this SHA ownership would continue, and that the parcels would be put to a public use. In fact, SHA ownership did not continue nor did the two parcels remain dedicated to public use. Accordingly, the Council’s assumptions in 1997 proved to be incorrect, and mistake is shown.

For reasons set forth earlier in this opinion, it is also found the most appropriate zoning for Parcels 385 and 588 are R1 as requested by the Applicant.

However, and despite the conundrum which this presents for the Applicant, a finding of mistake in 1997 with respect to Parcels 385 and 588 does not lead to the conclusion that a mistake occurred in 1997 with respect to Parcel 333, as Parcel 333 was not under SHA ownership in 1997. With respect to Parcel 333, the Applicant argues that the Harford County Council could not have foreseen the combination of parcels 333, 385 and 588 under common ownership, and that the Council did not know for certain that adequate water and sewer capacity existed in 1997. These arguments are not persuasive. Application of the principles enunciated in Boyce v. Sembly, supra, necessitate a finding that the Council could not have taken into account the fact of common ownership, as it was not, again, reasonably foreseeable of fruition in the future. SHA owned Parcel 385 and 588 in 1997. How could the Council have foreseen that some seven years later that these parcels would be under common ownership with Parcel 333? It is simply not a reasonably foreseeable event.

Furthermore, there is no evidence that the Council would have acted differently if it had known all parcels would be consolidated under common ownership. Many parcels throughout the County are consolidated, combined, divided, reunited, purchased, sold, etc. The Council’s inability to foresee an individual landowners’ decision to take such action with respect to his or her properties cannot be grounds, under the facts of this case, for a finding of mistake in zoning.

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The Applicant's third argument must similarly fail for perhaps more pedestrian reasons. The Applicant argues that in 1997 the County Council was not certain if water and sewer capacity existed to service the parcels (including Parcel 333). The Applicant now presents evidence of adequate water and sewer capacity. However, no mistake was made by the Council in 1997 in being uncertain about capacity. If the Council determined that capacity did exist and acted upon that determination, and it in fact did not exist, then a mistake would have been made. If the Council determined that capacity did not exist and acted upon that determination, and it did exist, then a mistake would have been made. However, it was not a mistake at that time to be simply uncertain about capacity. Indeed, apparently this issue was not even addressed until the Applicant performed at its own expense studies which determined capacity. These studies were only undertaken in 2005. Uncertainty about a set of facts, upon which no identifiable action was taken, cannot be grounds for a post-facto argument of mistake.

Therefore, while perhaps a less than symmetrical result, there can be but one finding. Landlocked Parcels 385 and 588 should be given the most appropriate zoning of R1 due to Council's inability in 1997 to foresee the SHA declaration that these parcels should be surplus and sold. However, there can be no finding of mistake in 1997 with respect to Parcel 333 which, at that time, was under private ownership and used residentially. It simply cannot be held that the Council's initial premises were incorrect simply because the parcel is now owned by the owner of the adjoining parcel.

It is further noted that the Harford County Department of Planning and Zoning Staff Report simply states in support of its recommendation that Parcel 333 be rezoned that:

“The County Council could not have known during the 1997 Comprehensive Review that the Applicant would subsequently acquire all three parcels.”

Of course the Council could not have known that. However, not knowing it in 1997 does not provide a reason for rezoning Parcel 333 in 2008.

Accordingly, despite this somewhat anomalous result, the Applicant has failed to overcome the “strong presumption” of correctness of the 1997 zoning of Parcel 333.

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CONCLUSION:

It is, accordingly, recommended that the requested rezoning of Parcel 385 (Case No. 167) and Parcel 588 (Case No. 168) from AG Agricultural to R1/Urban Residential zoning, be granted.

It is recommended that the rezoning request for Parcel 333 (Case No. 166) be denied.

Date: February 8, 2008

ROBERT F. KAHOE, JR.
Zoning Hearing Examiner

Any appeal of this decision must be received by 5:00 p.m. on MARCH 10, 2008.