

APPLICANT:
Lot 83 Newport Drive LLC

REQUEST: A request to rezone
1.217 acres from VR (Village Residential)
to CI (Commercial Industrial) District

HEARING DATE: August 15, 2012

BEFORE THE
ZONING HEARING EXAMINER
FOR HARFORD COUNTY
BOARD OF APPEALS

Case No. 179

ZONING HEARING EXAMINER'S DECISION

APPLICANT: Lot 83 Newport Drive LLC

LOCATION: 2A Newport Drive, Forest Hill
Tax Map: 33 / Grid: 4D / Parcel: 421
Third (3rd) Election District

ZONING: VR / Village Residential

REQUEST: A request, pursuant to Section 267-12A of the Harford County Code, to rezone 1.217 acres from VR/Village Residential to CI/Commercial Industrial District.

TESTIMONY AND EVIDENCE OF RECORD:

The Applicant, Lot 83 Newport Drive LLC, is seeking a request to rezone the 1.217 acres from VR/Village Residential to CI/Commercial Industrial.

For the Applicant first testified Torrence M. Pierce, professional engineer with Frederick Ward Associates, Inc. Mr. Pierce was proffered and accepted as an expert witness in the area of civil engineering, land planning and zoning. Mr. Pierce had previously been qualified as an expert witness before the Maryland Board of Zoning Appeals (see Applicant's Exhibit No. 5).

Mr. Pierce referenced Applicant's Exhibit No. 6, which is an aerial photograph of the subject Lot 83, which is located at the intersections of MD Route 24 and Newport Drive. Mr. Pierce described the area as containing commercial properties to the east and south, residential properties to the north, and a church and agricultural property to the west. The south area contained business use properties which include a ShopRite, Exxon, Kohl's, bowling alley, and office space. Mr. Pierce described the business park where the lot is located as containing a funeral home, Pizza Hut, and several other businesses. The subject property is 1.217 acres.

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Mr. Pierce also testified to Applicant's Exhibit No. 7, which was an aerial photograph of the subject property. The only difference with the current state of the property is that the property is now sufficiently blocking the residential area by the growth of vegetation. Mr. Pierce next reviewed Applicant's Exhibit No. 8, which is a neighborhood map of the area. Mr. Pierce specifically referenced the Department of Planning and Zoning's Staff Report (Applicant's Exhibit No. 4), dated August 8, 2012, which described the neighborhood. Mr. Pierce agrees with the Department of Planning and Zoning's description of the neighborhood, which is incorporated herein as follows:

"The Department of Planning and Zoning defines the neighborhood as all those properties fronting on the west side of MD Route 24, south of Jarrettsville Road and north of MD Route 23. The neighborhood then extends south to include those properties on the east and west side of MD Route 24, including the commercially zoned properties along Osborne Parkway and Colgate Drive. Enclosed with this report is a map of the neighborhood as defined by the Department of Planning and Zoning (Attachment 5)."

Mr. Pierce also testified that he is familiar with the Master Land Use Plan for Harford County. He referenced Applicant's Exhibit No. 10 and described the property as high intensity. He referenced Applicant's Exhibit No. 11 and described high intensity as follows:

"High Intensity – Areas within the Development Envelope that are intended for higher density residential development, exceeding 7.0 dwelling units per acre. These areas are also appropriate for a wide range of commercial uses including retail centers, home improvement centers, automotive businesses and professional offices."

Mr. Pierce testified that the current zoning for Lot 83, the subject property, is Village Residential. He provided his opinion that the zoning of Commercial Industrial would be consistent with the Harford County Master Land Use Plan. Mr. Pierce pointed out and referenced Applicant's Exhibit No. 9, which is a zoning map of the subject area. He explained that Lot 83 is the only lot in the Business Park that is not zoned Commercial Industrial. He has visited the subject property and noted that there are no residential uses in the Business Park. There is a buffer between Lot 83 and the residential community located to the north. There is an area of open space that is 50 feet wide north of Lot 83.

Mr. Pierce referenced Applicant's Exhibit No. 12A and 12B. The photographs show the buffer between Lot 83 and the residential community and the thickness of the buffer preventing visibility. He showed how the buffer proceeds north, down Newport Drive, and separates the Business Park from the residential neighborhood. He also referenced Applicant's Exhibit 12B, which showed there is a 12 foot berm with vegetation separating Lot 83 and the Business Park from the residential area. He provided his opinion that the buffer is doing everything it is supposed to and serves as an open space to prevent visibility between the Industrial Park/Business Park use and the residential area.

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Mr. Pierce next testified to Applicant's Exhibit No. 13, which provided a zoning history with supporting maps from 1957 through 2009. Specifically, Exhibit No. 14 was an agreement between the prior owner of Lot 83 and the residential community concerning the buffer previously described. The community entered into the agreement not to oppose the commercial industrial zoning of the Business Park, subject to various restrictions.

In further support of his expert opinion, Mr. Pierce referenced and testified to Board of Appeals Rezoning Case No. 120, which was heard on December 6, 2006, before the Zoning Hearing Examiner for Harford County Board of Appeals. Mr. Pierce reviewed the testimony of the expert, Arthur Leonard, a land development consultant and registered professional engineer, who was accepted as an expert in planning and zoning matters. In particular, Mr. Leonard had reviewed the zoning history of the property. He referenced the 1981 agreement that was executed between the then owners of the subject property and the neighbors in the residential area (Applicant's Exhibit No. 14). That agreement established boundaries between the then proposed GI/General Industrial zoning of the subject property and the adjoining agricultural and residential used parcels.

In 1982, Lot 1 of Newport Drive, the subject of Board of Appeals Rezoning Case No. 120, was rezoned to a combination of CI/Commercial Industrial and VR/Village Residential. Lot 1 retained its split VR – CI zoning through the 1989 and 1997 Comprehensive Rezoning process.

During the hearing, Mr. Leonard testified that the line of demarcation between the CI and VR zoning was established by, and is intended to conform to, the September 18, 1981 agreement (see Applicant's Exhibit No. 14). Mr. Leonard determined, by reviewing the agreement and the County map, the zoning line was approximately 100 feet to the east of the line designated on the sketch attached to the September 18, 1981 agreement. According to Mr. Leonard's calculations, it was anticipated that the line would terminate roughly on the north side of Newport Drive and not impact what is now known as Lot 1 at all. According to Mr. Leonard, the zoning line as shown on the Comprehensive Zoning Maps is incorrect; it should be 100 feet west. If relocated 100 feet to the west, the subject property would not be bisected by the line of agreement and would not have been split-zoned. He explained that Lot 1 would be zoned CI in its entirety.

In support of his findings, Mr. Leonard referenced to language in the agreement of September 18, 1981, which discusses the reserve to the north of the entrance road, which is known as Newport Drive. Mr. Leonard went on to testify that, because of the small size of the existing VR zoned property on Lot 1, the Applicant is deprived of any use. Accordingly, to maintain a VR portion of Lot 1 is not sound planning, does not enhance the public welfare, and is not protective of the surrounding properties. He also felt that the continuation of the VR zone is not in conformance with the Harford County Master Land Use Plan.

Mr. Leonard's testimony was accepted by the Zoning Hearing Examiner.

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Anthony McClune, Deputy Director for the Department of Planning and Zoning, also testified at the 2006 hearing in Case No. 120. Mr. McClune agreed with the opinion of Mr. Leonard. The Hearing Examiner subsequently found that the entire Lot 1 of Newport Drive should be rezoned CI/Commercial Industrial, and that there was a mistake in zoning of .326 acre portion of Lot 1. The Hearing Examiner recommended that the proposed rezoning of the subject parcel from VR to CI be approved.

For this matter, Mr. Pierce reviewed the same documents as Mr. Leonard from the 2006 hearing. He agreed with Mr. Leonard's testimony and noted that there was a mistake made in 1982. Mr. Pierce pointed out that all of Lot 83 was zoned VR. The incorrect zoning line was then extended into the future due to this error. Mr. Pierce pointed out that only .29 acres of Lot 83 is subject to the 1981 agreement. The error is shown on the current zoning maps for the subject property as VR zoned in its entirety. The correct zoning of the property should be split-zoned VR/CI, with the VR zone designated pursuant to the agreement, and the balance of the property should be zoned CI.

Mr. Pierce's opinion was that it was this mapping error that has caused subject Lot 83 to be continued to be zoned VR when it is, in fact, split-zoned. It is his opinion that the CI zoning should be granted as the VR use is not consistent with the uses in the Business Park. Further, he agreed with the opinions of Arthur Leonard that were proffered and accepted by the Zoning Hearing Examiner with respect to the property in Board of Appeals Case No. 120.

In further support of his opinion, Mr. Pierce testified to Section 267-9I, "Limitations, Guides and Standards", of the Harford County Code. In particular, he noted that if the subject rezoning was approved from Village Residential (VR) to Commercial Industrial (CI), there would be no impact on the number of persons living or working in the immediate area. There would be no impact from traffic conditions. The rezoning is consistent with the orderly growth of the neighborhood and community as previously testified to. There will be no effect of odors, dust, gas, smoke, fumes, etc. There will be no impact with respect to police, fire protection, sewerage, water, trash and garbage collection and disposal. The proposed rezoning is consistent with generally accepted engineering and planning principles as previously testified to. There would be no negative impact on structures in the vicinity such as schools, houses of worship, theaters, hospitals and other places of public use. The proposed rezoning is consistent with the Master Land Use Plan and related studies for land use, roads, parks, sewers, water, population, recreation and the like. There would be no negative environmental impact or any impact on the preservation of cultural or historic landmarks.

The Applicant then indicated on the record withdrawing their second argument noted in their application.

Next testified Shane Grimm from the Harford County Department of Planning and Zoning. Mr. Grimm is the Chief of Site Plans and Permits Review. Mr. Grimm testified primarily to the Staff Report. He explained that the lot in question, per the Master Land Use Plan, is located in a high intensity area. The proposed rezoning from VR to CI is consistent with the Master Plan.

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Mr. Grimm also testified to the zoning history and noted that the line was incorrectly moved 100 feet to the east, which encumbered the property with a VR designation. The mistake was carried forward in subsequent zoning maps. Mr. Grimm pointed out that the zoning line ran approximately through the middle of the subject property, although Lot 83 was still part of the overall tract at that time. He referenced the decision for Lot 1 Newport Drive in Board of Appeals Case No. 120, where the Board granted a rezoning from VR to CI based on the mistaken location of the zoning line. Mr. Grimm pointed out that at the time of the 1983 Comprehensive Zoning Review, the VR zoning line for Lot 83 was moved further to the east to include all of the land that eventually became Lot 83. The shift in the zoning line to include the entire lot appears to have been a drafting error.

Mr. Grimm pointed out that the Department of Planning and Zoning does not object to the rezoning of the subject Lot 83 to CI. The Department agrees with the Applicant that there was a mistake made in the existing zoning. Mr. Grimm pointed out that, pursuant to the private agreement executed in 1981 between the neighbors and the prior property owner, a VR zoning line was established for a small portion of subject Lot 83. In 1982, the Department of Planning and Zoning attempted to conform the VR zoning line to the line designated in the agreement; however, a drafting error caused the line to be incorrectly extended farther to the east. The VR zoning line was supposed to be farther to the west in order to conform with the residential/agricultural area delineated in the agreement. The drafting error was repeated when the incorrect VR line was further extended east to encompass the entire subject property. The drafting error was first recognized in Board of Appeals Case No. 120 (Lismore Limited Liability Company), wherein the Board of Appeals found that:

“According to Mr. Leonard, the original agreement between the then owners of the Forest Hill Business Center and certain of the neighbors, which was executed in 1981, was clearly an intent to segregate the more intensive commercial activities of the Forest Hill Business Center from existing agricultural and residential uses along Maryland Route 24. A line of division was set forth in the Agreement. Subsequent zoning of the parcel was based upon that line of division as testified to by Anthony McClune and as well documented by letters in the file. However, when comparing the line of agreement with the actual zoning maps, Mr. Leonard determined that the line is being inaccurately followed on the zoning maps. The line of division should be some 100 feet more to the west (emphasis supplied).”

Mr. Grimm went on to explain that on the current zoning maps, the subject property is shown as VR zoned in its entirety. The correct zoning of the property should be split-zoned VR/CI, with the VR zone designated pursuant to the agreement and the balance of the property should be CI.

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Mr. Grimm emphasized that the Department of Planning and Zoning agrees with the Applicant that a mistake occurred during the drafting of the previous zoning maps. Further, based on the testimony in Board of Appeals Case No. 120 from 2006, it was clear that the zoning maps since 1982 have not correctly reflected the zoning line delineated in the private agreement from 1981. Based upon the current Master Land Use Plan and the mistake in the zoning history and mapping of the subject parcel, the Department of Planning and Zoning does not object to the requested rezoning of Lot 83 from VR to CI.

Based upon the Applicant's withdrawal of their second argument as noted in the Staff Report, Mr. Grimm did not offer any testimony or opinion concerning the Applicant's second argument.

There was no testimony or evidence offered in opposition to the requested rezoning; however, the Hearing Examiner notes that People's Counsel was present throughout the hearing and a private agreement had been reached between the residents in the residential neighborhood and the Applicant to be separately prepared and filed and is not to be included in the Zoning Hearing Examiner's decision.

It is also noted that the Applicant's Exhibit Nos. 1 through 25 are admitted into the record as evidence in support of the application.

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.*

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(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."*

The Applicant requests a change in the zoning of the property. In determining 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 of comprehensive rezoning to sustain a piecemeal change. Strong evidence of mistake in the original zoning or comprehensive rezoning or evidence of substantial change in the character of the neighborhood must be produced."

See Stratakis v. Beauchamp, 268 Md. 643 (1973).

See also Hardesty v. Dumphy, 259 Md. 718 (1970).

Furthermore, 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 legally sufficient evidence to justify a finding of change in the neighborhood. See, generally, Buckel v. Board of County Commissions of Frederick County, 80 Md. App. 05 (1989).

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FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The Applicants presented an unusual set of circumstances which led to the current zoning of VR for the subject property. The Applicant's expert, Torrence Pierce, has made a compelling case that there was a mistake in the zoning dating back to at least 1981. Mr. Pierce's testimony is almost identical to the testimony presented by Mr. Arthur Leonard in the Case before this Board in 2006 concerning Lot 1 of the same subdivision.

The experts and the Department of Planning and Zoning all agreed that the agreement from 1981 between the owners of the Forest Hill Business Center and the residential neighbors was clearly an attempt to segregate the more intensive commercial activity of the Forest Hill Business Center from existing agricultural and residential uses along Maryland Route 24. Based on that agreement, a line of division was set forth in the agreement.

Subsequent zoning of the parcel was based upon that line of division and is documented in the Exhibits in this Case and the exhibits from Case No. 120 with respect to subject Lot 1. However, the experts and the Department of Planning and Zoning noted that when the line of agreement was compared with the actual zoning maps, Mr. Leonard and Mr. Pierce determined that the line was being inaccurately followed on the zoning maps. The line of division should have been some 100 feet farther to the west. Based upon this expert opinion, Lot 83 should have been zoned VR/CI, which would have made the property a split-zoned property.

Mr. Pierce's findings, as well as the findings of Mr. Leonard from 2006 with respect to Lot 1, were supported by the Department of Planning and Zoning which, in its independent review, reached the same conclusion that a mistake was made in zoning Lot 83 VR as a result of the misapplication of the 1981 agreement.

Both Mr. Pierce and Mr. Grimm further agree that the appropriate zoning for the entire site is CI. It is also found that CI zoning is consistent with the Harford County Master Land Use Plan, whereas VR is not. The Applicant has made a compelling case of mistake in zoning to support its request to rezone Lot 83 from its present Village Residential zoning to Commercial Industrial. It is also noted that convincing testimony was also presented that the property itself, with Village Residential zoning, cannot be developed for any practical use by the Applicant. Village Residential uses are not in keeping with the surrounding Forest Hill Business Center uses and are not consistent with the Harford County Master Land Use Plan.

Accordingly, it is found that a mistake was made in zoning the subject property VR. The most appropriate zoning is CI.

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Nevertheless, the analysis of the request for rezoning based on mistake also requires a review of the Harford County Code and the standards of Section 267-9I, "Limitations, Guides and Standards". That Section is discussed as follows:

- (1) *The number of persons living or working in the immediate area.*

The rezoning of the subject property will have no impact on the number of persons living or working in the area. The proposed rezoning will be consistent with uses in the business park and the neighborhood and should not cause any significant impact on the number of persons living or working in the area.

- (2) *Traffic conditions, including facilities for pedestrians, such as sidewalks and parking facilities, the access of vehicles to roads; peak periods of traffic, and proposed roads, but only if construction of such roads will commence within the reasonably foreseeable future.*

There is no evidence that the rezoning of the property would adversely impact existing traffic conditions.

- (3) *The orderly growth of the neighborhood and community and the fiscal impact on the County.*

There is no evidence that the rezoning of the property would adversely impact the orderly growth of the neighborhood and community. Any fiscal impact should be positive given the commercial nature of the proposed use.

- (4) *The effect of odors, dust, gas, smoke, fumes, vibration, glare and noise upon the use of surrounding properties.*

There should be no adverse impact from any of these effects.

- (5) *Facilities for police, fire protection, sewerage, water, trash and garbage collection and disposal and the ability of the County or persons to supply such services.*

The property is served by public water and sewer and fire and police protection is more than adequate.

- (6) *The degree to which the development is consistent with generally accepted engineering and planning principles and practices.*

It is found that the rezoning is consistent with generally accepted engineering and planning principles and practices.

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- (7) *The structures in the vicinity, such as schools, houses or worship, theaters, hospitals, and similar places of public use.*

No such structures have been identified.

- (8) *The purposes set forth in this Part 1, the Master Plan and related studies for land use, roads, parks, schools, sewers, water, population, recreation and the like.*

The property is consistent with the Harford County Master Land Use Plan.

- (9) *The environmental impact, the effect on sensitive natural features and opportunities for recreation and open space.*

There will be no adverse environmental impact.

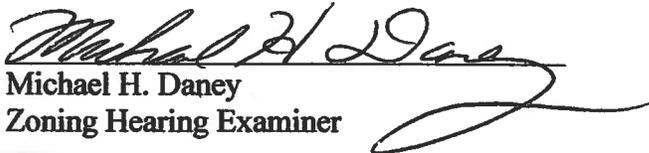
- (10) *The preservation of cultural and historic landmarks.*

No such landmarks have been identified.

CONCLUSION:

Accordingly, it is recommended that the proposed rezoning of the subject parcel from VR Village Residential to CI Commercial Industrial be approved.

Date: October 22, 2012


Michael H. Daney
Zoning Hearing Examiner

Any appeal of this decision must be received by 5:00 p.m. on November 20, 2012.