

Howard Research and Development Corporation     \*     Before The Zoning Board of  
Petitioner     \*     Howard County  
\*     ZB Case No. 979M - Rezoning

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### **DECISION AND ORDER**

On October 22 and 29, November 5, 12, and 19, December 10, 16, and 17, 1997, January 7, 14, 21, and 28, and February 4 and 18, 1998 the Zoning Board of Howard County considered the petition of the Howard Research and Development Corporation for an amendment to the Zoning Map of Howard County, so as to reclassify from the PEC (Planned Employment Center) and the R-SC (Residential: Single Cluster) Districts, 522.4 acres of land to the PEC-MXD-3 and R-SC-MXD-3 Districts (PEC and R-SC with Mixed Use Overlay). On the above dates, the Zoning Board also considered the petition for approval of a proposed Preliminary Development Plan (PDP) and Criteria for a Mixed Use Development (MXD-3) for that area proposed for rezoning. The subject property is located on the west side of I-95 generally north of MD 216 and south of Gorman Road, east of I-95 generally north of Whiskey Bottom Road, west of Stephens Road, and south of Gorman Road, and three areas on the south side of Whiskey Bottom Road, and identified as Tax Map 47, Grids 2, 7, 8, 9, 13, 14, 15, 20, and 21; parcel 462, part of parcel 3, part of parcel 837, part of parcel 133, in the Sixth Election District of Howard County.

At the beginning of the hearings on this petition, the Petitioner deleted a 5.5 acre PEC-zoned parcel from the petitions. This land is located at the intersection of Stephens Road and Whiskey Bottom Road. This amendment reduced the area of the subject property for which the

MXD-3 Overlay rezoning and PDP approval was being sought to approximately 516.5 acres. The hearing on the requested piecemeal rezoning concluded on February 4, 1998 with summation occurring on February 18, 1998. On February 23, 1998, the Board voted to approve the requested rezoning. On February 24, 1998, at a Board work session on the PDP portion of the case, the protestants presented a motion that the Board take judicial notice of the August 15, 1996 Decision and Order in Zoning Board Case No. 971M (Marlow) and the October 30, 1996 minutes of its work session in Zoning Board Case No. 973M (Cherrytree). The protestants did not ask the Board to reconsider its decision to rezone based on these documents. The Petitioner opposed the motion on the grounds that the protestants had ample opportunity to put these documents in the record while it was still open on the rezoning issue, and that the cases were discussed by Petitioner's witnesses in testimony. The Board denied the motion, the granting of which would have required re-provision of public notice, based on the reasons set forth in Petitioner's opposition. The Board reaffirms that decision by this decision and order because the original request for and denial of the motion occurred outside the public hearing process.

On May 27 and June 2, 1998, the Board considered modifications it proposed to the Preliminary Development Plan and Criteria for the Mixed Use Development. The Board's decision on the PDP is contained in ZB Case No. 979M - Preliminary Development Plan.

The notice of the hearing on the original petitions and the Board's proposed modifications to the PDP were advertised, the subject property was posted, and adjoining property owners were mailed notice of the hearing, as evidenced by the certificates of advertising, posting, and mailing to adjoining property owners, all of which were made part of the record. Pursuant to the Zoning Board's Rules of Procedure, all of the reports and official

documents pertaining to the petition and the Board's proposed modifications, including the petition, the Technical Staff Reports of the Department of Planning and Zoning, and the Planning Board's Recommendations, were made part of the record. Both the Department of Planning and Zoning and the Planning Board recommended approval of the petition for rezoning and the original PDP approval petition.

The Petitioner was represented by James Lano, Esquire. Several protestants appearing in opposition to the petition were represented by Thomas Dernoga, Esq. Mr. William Norton appeared in opposition, representing himself.

After careful evaluation of all the information presented, the Zoning Board of Howard County makes the following findings of fact and conclusions of law:

#### FINDINGS OF FACT

1. The Petitioner requests rezoning of approximately 510 acres of land in the PEC Zoning District so as to place an MXD-3 Overlay District on the underlying PEC District. The Petitioner also requests that approximately 6.5 acres of land in the R-SC District be rezoned so as to place an MXD-3 Overlay District on the underlying R-SC District. The Petitioner also requests approval of a Preliminary Development Plan and Criteria for a Mixed Use Development (MXD-3) for the area requested for rezoning of the MXD Overlay. The Board's decision on the proposed MXD PDP is made in ZB Case No. 979M -PDP.

2. The area which is the subject of both the rezoning petition and the petition for approval of the PDP originally consisted of 522.4 acres of land located on the east and west sides of I-95, in the northwestern and northeastern quadrants of the interchange of MD 216 and I-95. Throughout the hearings on these petitions, the subject property was referred to as consisting

of the "West tract", the 273.4 acre parcel west of I-95 (Area "A" in the petition) and the 9.1 acre parcel west of I-95 (Area "C" in the petition), and the "East tract", the combination of predominantly PEC-zoned parcels east of I-95, containing 228 acres of PEC and 6.5 acres of R-SC-zoned land (Areas "B", "D", "F", and "G" in the petition). The original petitions heard by the Zoning Board were amended so as to delete approximately 5.5 acres of PEC-zoned land from the petition along Whiskey Bottom Road (Area "E" in the petition). This amendment to the petition reduced the area requested for rezoning to approximately 516.5 acres.

3. Mr. Alton Scavo, Senior Vice-President of the Rouse Company, provided most of the testimony for the Petitioner as to the issues of alleged change in the character of the neighborhood and mistake in comprehensive zoning. Mr. Scavo's testimony is summarized as follows on the noted general areas relevant to the petitions:

#### Definition of the Neighborhood

Mr. Scavo testified that the Petitioner accepted the definition of the neighborhood of the subject property provided by the Department of Planning and Zoning in the March 6, 1997 Technical Staff Report - that area bounded by US 29 on the west, Middle Patuxent River on the north until I-95 and thence north to MD 32, US 1 on the east, and the Patuxent River/Howard County boundary on the south. The protestants did not challenge DPZ's defined neighborhood.

#### Change in the Character of the Neighborhood

Mr. Scavo testified that there had been extensive residential development in the neighborhood of the subject property in the last ten years. He enumerated the numerous residential subdivisions surrounding the subject property that had developed under the existing residential zoning in the neighborhood, and indicated that these developments constituted

changes in the character of the neighborhood. Mr. Scavo also cited the proposed new elementary school adjacent to Murray Hill Middle School, the opening of Murray Hill Middle School and Forest Ridge Elementary School, and the planned high school to be located on the Fulton MXD property west of US 29 as changes in conditions affecting the character of the neighborhood of the subject property. Mr. Scavo also indicated that the planned development of the Fulton MXD site on the west side of US 29 was a change in the character of the neighborhood of the subject property. No testimony was produced by Petitioner to show that any of these alleged changes were not contemplated according to the 1993 Comprehensive Zoning. Petitioner did not mention the criteria of change in the character of the neighborhood as a basis for justifying piecemeal rezoning in its closing argument or written summary. While the Board finds that Petitioner had not pursued change as basis for the granting of piecemeal rezoning by the end of the hearing on this matter, the Board formally finds that Petitioner has not presented any evidence of development or improvements occurring in the neighborhood of the subject property mentioned above that were not contemplated by the 1993 Comprehensive Zoning Plan.

#### Mistake in Comprehensive Zoning

Much of the testimony provided by Mr. Scavo relating to the issue of mistake in the zoning of the subject property at the 1993 Comprehensive Zoning was undisputed by the protestants and/or was corroborated by factual information contained in the Department of Planning and Zoning's Technical Staff Report or by testimony before the Board in this case. Those facts, which the Board finds to be established, include the following:

- a. Several general areas relating to specific parcels or groups of parcels of land were designated as Mixed-Use areas in the 1990 General Plan. Those areas included the subject

property (the "Key" property), the Fulton property, the Chase property, the Curtis Horse Farm property, and the Waverly Woods property. The Key and Fulton properties were designated as "Deferred New Mixed-Use" on the Policies Map 2000/2010, specified in the General Plan Map legend as areas where "Development Expected To Begin After 2000". The remaining areas were designated as "New Mixed Use", specified in the Map legend as area where "Development Expected To Begin Before 2000". This Policies Map contained a note under its heading which provided the following: "This map illustrates a possible phasing scenario based upon current information on the status of planning for roads and developments. Actual phasing will relate to the availability of services and infrastructure. The map also does not imply that all roadway improvements shown are necessary for any single land use modification. Roadway improvements noted (including interchanges, new alignments and realignments) are schematic requiring subsequent detailed engineering analysis."

b. In the 1993 Comprehensive Zoning, Mixed-Use Zoning was implemented as an Overlay Zone that was placed on several properties in addition to the underlying zoning of those properties. The MXD Overlay Zone allows the properties so zoned to develop according to the underlying zoning or to pursue approval of an MXD development plan as an option through the administrative process and approval criteria provided for in the Zoning Regulations.

The Waverly Woods property was not placed in an MXD Overlay Zone in the 1993 Comprehensive Zoning, because the previously granted piecemeal rezoning with documented site plan of the property in that area was retained by the 1993 Comprehensive Zoning Plan. All of the remaining areas designated as Mixed-Use in the 1990 General Plan were zoned with the MXD Overlay Zoning District except for the Key property which was designated with its

existing PEC zoning without the MXD Overlay. In addition, the Weisberg and Cherrytree properties were given MXD Overlay zoning in the 1993 Comprehensive Zoning. These two properties, both of which are less than 50 acres in size, were designated with the MXD-6 Overlay zone, the more dense and intensive of the two MXD zones established in the Zoning Regulations by the 1993 Comprehensive Zoning. The Chase, Curtis Horse Farm and Fulton properties, approximately 550 acres, 180 acres, and 800 acres in size respectively, were all given the MXD-3 Overlay zoning by the 1993 Comprehensive Zoning.

c. The process of gaining approval of the development plans for the MXD District to the point when the first construction could begin on the subject property would take 12-18 months from the time the Preliminary Development Plan was approved.

d. None of the parcels designated for an MXD Overlay zoning by the 1993 Comprehensive Zoning had been approved for MXD development as of the close of the record in this case, June 2, 1998 (the Board notes parenthetically that the hearing record for the rezoning portion of the case actually closed as of February 18, 1998 when the parties made closing arguments, however the record for the entire case, specifically the hearings on the Board-generated amendments to the PDP, did not close until June 2, 1998). No development plans have been submitted for the Weisberg property, the Curtis Horse Farm, or the Chase property to date. The Curtis Horse Farm has been partially developed under its underlying R-20 zoning, with the remaining portion of the property being considered for rezoning to remove the MXD Overlay designation in a case that was pending at the close of the record in this case.. The Chase property has been recently approved by the Howard County Board of Appeals for a quarry Special Exception. The Cherrytree property had amended its proposed MXD Preliminary Development

Plan, and the hearing on that proposed plan was scheduled for June 24, 1998 at the close of the record in this case. The proposed MXD PDP for the Fulton site was awaiting the scheduling of a hearing at the time of the close of the record in this case. In 1996, the Zoning Board had denied a proposed PDP for a portion of the Fulton property. The Fulton MXD properties are owned by several different property owners, while the Key property is owned by Howard Research and Development, Inc.

e. The MXD Overlay District is the only zoning category in the Howard County Zoning Regulations in which the provision of a required percentage of moderate income housing is required as part of an overall plan approval at a given residential density.

f. The provision of Mixed-Use Centers was one of the most important objectives contained in the 1990 Howard County General Plan, based on a variety of factors as outlined in the General Plan, particularly as summarized on page 84 of the Plan.

g. The provision of low and moderate income housing was another one of the most important objectives contained in the 1990 Howard County General Plan. The General Plan indicated that the projected employment in Howard County for the 1990-2010 period would generate the need for 5300 low/moderate income housing units at an average of 267 units per year. Zoning mechanisms that would require or permit the provision of low and moderate income housing were viewed in the General Plan as one of the principal means of providing such housing (page 108 of the General Plan). The Zoning Board must have assumed in the 1993 Comprehensive Zoning that the important role that MXD zoning would play in the meeting of goals for providing low and moderate income housing would be carried out without the subject property being available for MXD development because it did not zone the subject property



MXD in the 1993 Comprehensive Zoning Plan.

4. A great deal of the testimony presented by Mr. Scavo relating to the issue of mistake in Comprehensive Zoning was disputed by the Protestants. In these findings of fact and the accompanying conclusions of law relating to the issue of mistake, the Board will only make detailed findings as to the elements of alleged mistake that the Petitioner was pursuing by the conclusion of the hearings and that it addressed in its oral argument and written summation. It seems evident to the Board that the Petitioner abandoned its "Economic Trends" argument on mistake (Zimmerman summary outline, Rouse Claims, I.B.) by indicating that PEC zoning was feasible and marketable and would be pursued by Petitioner if the MXD Overlay were to be denied.

Similarly, Petitioner did not press its various arguments collected under the heading "Zoning Board Designated Wrong MXD Sites" (Zimmerman summary outline, Rouse Claims, II) and the heading "Inability to Meet General Plan Goals - PEC In Error. . ." (Zimmerman summary outline, Rouse claims, III.A.). Moreover, the Board notes that Petitioner did not present any evidence to overcome the presumption that the Board was aware of all of the factors under these arguments at the time of the 1993 Comprehensive Zoning, and did not present any evidence to show that these factors related to an incorrect, unknown or unconsidered fact upon which a conclusion was based as opposed to an allegedly bad conclusion or judgment based on presumably known facts.

The conclusions, as opposed to the information provided, in the Department of Planning and Zoning's Technical Staff Report, as to mistake in comprehensive zoning, with respect to the PEC portion of the subject property, were similarly not relied on by Petitioner in its mistake

argument. In any case, the Board finds that DPZ's PEC/mistake conclusions suffer from the same deficiencies as the Rouse claim arguments cited in the previous paragraph - the presumption that the Board was aware of all of these factors was not overcome, and the factors cited were disagreements over conclusions or policies perceived to be bad or incorrect, not conclusions based on incorrect or overlooked facts.

The testimony given on behalf of the Petitioner and the protestants, if any, on the issues before the Board are summarized below, together with the Board's findings on these matters:

a. Petitioner contended that the Zoning Board incorrectly assumed that HRD would wait until after the next Comprehensive Zoning applicable to the subject property to develop the subject property rather than move ahead with development under its existing zoning. Petitioner presented testimony that it was ready to move forward with PEC development on the subject property at the present time if rezoning were denied, and that the market for such development had improved in the last several years.

The protestants testified that if the Zoning Board had assumed that HRD would wait to develop the subject property as MXD, then that assumption had thus far proven to be correct. Some protestants expressed doubt that HRD would pursue PEC development if its rezoning request were denied, while other protestants expressed the preference for HRD moving ahead with PEC development under existing zoning.

The transcripts of the Comprehensive Zoning work sessions (Petitioner's Exhibits 32A and B) indicate that the Zoning Board was concerned about the development pressures on and splintered ownership of the Fulton site, and that those concerns prompted the Board to give the Fulton property owners the MXD Overlay option as a means of discouraging premature non-

MXD development despite the fact that the Fulton area was designated as a deferred site on the 1990 General Plan. The transcripts also show that the Board did not believe that the Key property had the same pressures, and that HRD, as an experienced developer of mixed-use in Howard County and elsewhere, would likely wait for the County's MXD zoning of the subject property. The DPZ Director expressed this view to the Board. However, there is a recognition expressed by the Board in those discussions that there was a chance that HRD might not wait for MXD Overlay zoning, and that it could proceed with PEC development instead.

b. Petitioner presented testimony that the Zoning Board did not take into account the residential character of the area surrounding the subject property when it retained the PEC zoning of the subject property in the 1993 Comprehensive Zoning. Petitioner contended that the record of the Comprehensive Zoning revealed that there had not been a comparative review conducted by any Howard County agency as to the PEC and MXD District Regulations in terms of scale, height of buildings, parking and paving requirements, grading, open space requirements, and development approval requirements. Petitioner indicated that any such review would have revealed that the PEC District was more intensive and therefore inappropriate for the predominantly residential area surrounding the subject property.

The protestants testified that no such comparative review was required to be conducted by the Zoning Board or any other Howard County zoning agency in the process of deciding the zoning of the subject property. In any case, the Board finds that it is presumed that the Zoning Board was aware of the fact that the subject property was surrounded predominantly by residential properties when it chose to retain PEC zoning on the subject property.

c. Petitioner presented two arguments as to events occurring subsequent to the 1993

Comprehensive Zoning, relating to the meeting of the General Plan's goals through MXD development. First, Petitioner presented testimony that Howard County's General Plan growth objectives (Petitioner's Exhibit 25) of 50,000 residential units at an average annual rate of 2,500 units depended on MXD development to meet those objectives. Petitioner cited two memos (Petitioner's Exhibits 26 and 27), one from DPZ Director Avin to Councilperson Pendergrass during the 1990 General Plan process, and another from Deputy DPZ Director McLaughlin to Councilman Gray during the 1993 Comprehensive Zoning process, in which the importance of MXD development to the achieving of the General Plan's residential growth objectives was confirmed by the DPZ officials. Petitioner also contended that the County's Development Monitoring System Report (Petitioner's Exhibit 24) showed that the 10,938 actual permits issued since monitoring began had not kept up with the 12,740 residential unit goal for that period. Petitioner concluded that the lack of any MXD development since the 1993 Comprehensive Zoning had contributed to that deficit.

Petitioner also presented evidence from the Development Monitoring System Report that the percentage of single-family detached units out of the total number of units developed during the September, 1993 to September, 1995 period, 58-66 %, exceeded the General Plan goal of 51 %, and that MXD development would help to correct that imbalance due to its emphasis on the provision of a greater mix of housing types.

The protestants presented testimony that the actual use and occupancy permits issued by the County for another, broader "snapshot of time", April 1990 to September, 1996 indicated that the number of single-family detached units issued for that period of time was only 55 % of the total number of units issued. The protestants also questioned the inviolability of the

Monitoring System Report's statistics cited by the Petitioner, since it was acknowledged by the Petitioner that it was not known how many of the single-family detached homes on small lots were included in the category of single-family detached units in the Report, while the evidence indicated that single-family detached homes on small lots were not included in the General Plan definition of single-family detached units.

In addition, the protestants testified that the Development Monitoring System was intended only as a snapshot of the development that occurred over short periods of time, and that any deficit in development over several years could be evened out with increased development at a later time.

The Board finds that any short term fluctuation in the number of residential units or particular unit types developed, as measured by the County's Development Monitoring System Report, does not necessarily indicate the need for increased residential zoning or zoning for any particular residential housing type, particularly with respect to a specific parcel. However, the Board finds that the MXD Overlay Districts were planned to be a crucial component of the County's overall residential growth objectives as expressed in the Howard County General Plan, and that it was the intent of the Board that MXD zoning would produce a substantial portion of these needed residential units. The Board must have assumed in the 1993 Comprehensive Zoning that the important role that MXD zoning would play in the meeting of residential unit growth goals would be carried out without the subject property being available for MXD development because it did not zone the subject property MXD in the 1993 Comprehensive Zoning Plan.

d. Petitioner presented testimony that the PEC zoning given to the subject property in the

1993 Comprehensive Zoning was based on the Board's assumption that the subject property could not be developed for MXD until the improvements to MD Route 216 were completed. Petitioner contended that its traffic studies presented at the hearing on this case, in which it was concluded that approximately 30-35% of the trips generated by the development proposed on the MXD PDP could be accommodated under Howard County's APFO standards without improvements to the loop road or MD Route 216, showed that the Board's assumptions on this issue were incorrect.

While the Board does not disagree with the general conclusions in the Petitioner's traffic studies, a fair reading of the transcripts of the 1993 Comprehensive Zoning work sessions indicates that the Board was informed by DPZ that development of the subject property, whether under PEC or MXD zoning, would be dependent on the State's planned improvements of MD Route 216. There is no indication in the Comprehensive Zoning transcripts that the Board gave any consideration to the feasibility of partial development of the subject property under either MXD or PEC zoning without planned State road improvements, in determining the appropriate zoning of the subject property. Indeed, the DPZ Director expressed to the Board that any rational development of the property under either zoning category would be infeasible without those road improvements. As stated above, the Board's decision to not give the MXD Overlay development option to the subject property was based on a decision to encourage MXD development and achieve MXD development goals on other sites, and to defer MXD development on the subject property based on the calculated risk that HRD would wait for MXD zoning granted at a later date to develop the subject property as MXD. The work session transcripts do not reveal that the Board decision to not place the MXD Overlay on the subject property was based on traffic

concerns specific to the MXD District.

5. Petitioner presented testimony that the R-SC zoning of the small slivers of the subject property did not follow any logical boundary lines or topographical features, did not have a regular configuration, served no buffering strategy, and were inadvertently carried over from prior comprehensive zonings. DPZ echoed the illogicality and irregularity of the R-SC zoning of the 6.5 acre portion of the subject property in its Technical Staff Report. DPZ also indicated that these R-SC-zoned areas are not practically developable for R-SC purposes due to their size. DPZ also indicated that if the MXD Overlay were granted for the PEC portion of the subject property, that the R-SC parcels would only be further isolated and consigned to incompatible development.

The protestants did not offer any serious opposition or testimony as to the R-SC portion of the subject property for which the MXD Overlay was requested.

The Board finds that the R-SC zoning of the 6.5 acre portion of the subject property was an inadvertent continuation of prior comprehensive zoning plans, bearing no relation to any logical zoning criteria, such as zoning by property line, topographical features, or buffering function. These R-SC slivers of property are not feasibly developable in relation to the existing PEC zoning. If the Board is prepared to grant the MXD Overlay to the PEC portions of the subject property, it would exacerbate the mistake by not granting the MXD Overlay to the R-SC properties as well.

6. As stated in finding of fact 3, it is undisputed that, at the time of the close of the record of this case, June 2, 1998, there had been no MXD-zoned land approved for development since the implementation of the MXD concept in the 1993 Comprehensive Zoning Plan. Except for

the Fulton MXD properties and the Cherrytree MXD property, all of the remaining properties given the MXD Overlay option in the 1993 Comprehensive Zoning, have either pursued development or zoning inconsistent with and/or precluding MXD development (Chase property and Curtis property), or have not pursued development at all (Weisberg property). An approximately thirty acre portion of the Fulton MXD properties was denied its proposed MXD Preliminary Development Plan in 1996 by the Zoning Board. A proposal for development of the entire Fulton MXD was awaiting the scheduling of a hearing before the Zoning Board at the close of the record in this case. Similarly, an amended proposal for approval of the Cherrytree MXD was scheduled for a June 24, 1998 hearing before the Board at the close of the record in this case. The amendment of the Cherrytree proposal was filed in response to the Board's refusal to approve the originally proposed MXD PDP for the Cherrytree property in 1996.

7. One of the key concepts of the 1990 General Plan was the idea of Mixed-Use development. Box 5-5 of the 1990 General Plan provides a succinct summary of the benefits of the development of Mixed-Use Centers to Howard County. The Board agrees that MXD Development can produce these benefits and finds that they can still be realized and are important to realize, and may be achieved only through the actual development of appropriate MXD-zoned properties.

The Zoning Board accepted and implemented the Mixed-Use concept of the General Plan by placing the MXD Overlay zone on several properties at the time of the 1993 Comprehensive Zoning. The continued importance of MXD development to the accomplishment of the goals of the General Plan related to the MXD concept has always been accepted by the Board and was not challenged by those protesting this particular rezoning. Many



of the protestants expressed the belief that MXD was a good planning concept, but that implementation on the Key property should await the next comprehensive zoning. The Board finds unpersuasive the testimony that a current surplus in \$100,000-\$160,000 homes makes planning for future moderate income housing unnecessary.

These protestants point out that the General Plan did not call for MXD development on the subject property to begin until after 2000. The Board notes that if the MXD Overlay is placed on the subject property at the present time, the normal 12-18 month development process for MXD development on a property such as the subject property would likely push the commencement of any ground-breaking associated with this proposal to beyond 2000.

8. The Board finds that its assumption at the time of the 1993 Comprehensive Zoning was that it was implementing the important concept of Mixed Use by zoning several properties with MXD Overlay zone, but without zoning the subject property MXD. This Board reasonably assumed that this action would provide for at least the beginning of at least one, if not more, actual developments of MXD within some reasonable period of time after the 1993 Comprehensive Zoning, in order to begin to achieve the important planning objectives of the Mixed-Use concept. The Board finds that this assumption has not been borne out due to events occurring subsequent to the 1993 Comprehensive Zoning. Some of the parcels counted on for MXD development have been used or are sought to be used by their owners for other types of development, or have not been proposed for any development. The remaining properties, or portions thereof, have not been able to gain formal approval of their MXD proposals. The result of these subsequent events is that, at the time of the close of the record in this case, there is no significant property in Howard County, aside from the subject property, that is reasonably

probable of MXD development in the next two to three years. Even if the Board assumes that the Cherrytree property would be formally approved within a reasonable period of time, the Board notes that the Cherrytree property is a relatively small parcel, at 30-40 acres, and cannot compare with the subject property in terms of achieving the planning policies and objectives envisioned in the 1990 General Plan and intended to be implemented in the 1993 Comprehensive Zoning Plan. While the Board recognizes that it expressed the desire to see a small MXD parcel develop first in the 1993 Comprehensive Zoning work sessions, it now finds that too much time has passed without the assurance of any MXD development for this policy preference to be continued.

9. If the Board does not provide the subject property with the MXD option at this time, the Board will ensure that there is no approval of any significant MXD proposal, especially a large MXD-3 proposal, some five years after the concept was implemented in the 1993 Comprehensive Zoning.

While the Board does not find that development of any one MXD property will ensure that the overall policy objectives and benefits of MXD zoning will be met, the Board would maintain the continued lack of even beginning to meet those important objectives and benefits if it fails to now correct the mistake of relying on the provision of MXD development in the County without the MXD development of the subject property.

10. It was generally acknowledged at the hearings of this proposal that HRD is the most experienced developer of mixed-use developments in the County, and that it is an entity with single ownership and the desire and wherewithal to do what is necessary to follow through with the MXD development of the subject property.

11. The Board finds that its decision to not give MXD zoning to the subject property in the 1993 Comprehensive Zoning was a policy decision based on a variety of factors, including the desire to encourage MXD developments on other properties, and the belief that HRD would probably wait for some time to develop the subject property as MXD. While the Board can find no evidence presented to convince it that this decision to withhold MXD zoning from the subject property at the time of the 1993 Comprehensive Zoning was a mistake at that time, the Board also finds that subsequent events, that is the lack of any MXD development since the 1993 Comprehensive zoning, has convinced the Board that it erroneously assumed that it was not necessary to zone the subject property with the MXD Overlay in order to meet the MXD objectives of the General Plan, and in order to meet the intent of the Zoning Board to implement the concept of MXD on specific properties within a reasonable period of time. These subsequent events have also shown that the Board's assumptions that it would have to defer MXD zoning on the subject property in order to prevent the simultaneous development of several separate MXD properties, and/or to produce a timely example of a small MXD development, have been proven incorrect due to the passage of time. No MXD development has occurred instead of simultaneous MXD development. No smaller MXD site has been produced to serve as a model for larger MXD developments as of yet. As stated above, due to the passage of time without any MXD development, this preference for a smaller "model" MXD development is no longer a viable policy preference for the Board.

12. The Board makes these findings cognizant of the fact that HRD cannot wait indefinitely for the MXD option to be placed on the subject property. While the Board recognizes that HRD has not proceeded with PEC development thus far, choosing instead to

pursue this piecemeal zoning request and PDP approval request, it also finds that until the last two years, the Petitioner had little choice but to wait since the market for development of PEC was not economically feasible. However, the record indicates that the market for a PEC-type development has improved in the last two years, and that the traffic improvement requirements for the developer under APFO would be less stringent under PEC development than under MXD development. Given the continuation of only PEC development as an option, and given HRD's statement that it could and would pursue PEC development if this proposal was denied, the Board finds that HRD might have no other choice but to pursue PEC development at some point in time while the County waits for an appropriate time as perceived by those in opposition to act to implement MXD on this property. The Board finds that the acknowledged superiority of PEC over MXD development in terms of fiscal impact on the County must be balanced against the different objectives and benefits accomplished by enabling MXD development on the Key property.

13. The protestants who acknowledged the long-term wisdom of MXD development of the subject property, maintained that the MXD zoning of the subject property should be dealt with at the next comprehensive zoning of the County. The Board finds that this argument would have some merit if the next comprehensive zoning in the County were imminent. However, the timing of the occurrence of the next comprehensive zoning applicable to the subject property is unknown at best, and distant at worst. The pattern for comprehensive zoning in Howard County over the last thirty years is that it occurs every 7 to 10 years - the last three countywide comprehensive zonings occurred in 1977, 1985, and 1992/93. However, the Board notes that in all three of these instances, as is consistent with general good planning principles, these

Comprehensive Zoning Plans followed and implemented the 1971, 1982, and 1990 General Plans, respectively. Therefore, if the next comprehensive zoning occurs after the next general plan, as it always has and likely would, there would probably be a gap of at least 2 to 3 years between the adoption of the next Howard County general plan and the subsequent next Howard County comprehensive zoning. The next general plan could be adopted at the earliest in 1999-2000 by the next County Council. It is much more probable that it would take 2-3 years to adopt the next general plan. If the past is any guide then, the next comprehensive zoning would likely not occur until 2001-03 at the earliest and most optimistic date, while it is more likely to occur in 2003-05.

The Board also notes that the past three general plans were adopted by Council resolution and the last three comprehensive zoning plans were adopted by the Zoning Board not by Council bill, without being subject to referendum. Section 202(g) of the Howard County Charter, effective December 8, 1994, requires that all future General Plans and Comprehensive Zoning Plans adopted in the County be done so by Council bill, subject to the referendum process provided for in the Charter. It is unknown what effect the referendum process, or the prospect of that process, will have on the timing of the adoption of the next general plan and the next comprehensive zoning. but the Board doubts that its likely effect would be a speeding up of the process.

### **CONCLUSIONS OF LAW**

1. The Petitioner, as one seeking a piecemeal zoning classification, has the burden of demonstrating substantial change in the character of the neighborhood since the last comprehensive zoning or mistake in the last comprehensive zoning, in order to justify the

granting of piecemeal zoning. Satisfaction of this burden by the Petitioner permits, but does not compel the Zoning Board to grant the requested rezoning.

2. The Board concludes that the evidence that Petitioner has presented to show change in the character of the neighborhood of the subject property since the 1993 Comprehensive Zoning is insufficient to overcome the presumption of correctness attached to the PEC and R-SC zoning of the subject property without an MXD Overlay zone. The evidence of contemplated development and improvements that have occurred in the neighborhood of the subject property presented by Petitioner are not sufficient evidence of change in conditions affecting the neighborhood or its character to permit rezoning.

3. The Board concludes that the evidence that Petitioner has presented to show mistake in the PEC zoning of the subject property without an MXD Overlay zone in the 1993 Comprehensive Zoning, based on events occurring subsequent to the 1993 Comprehensive Zoning as provided in the findings of fact, is sufficient to overcome the presumption of correctness attached to that Comprehensive Zoning and justify the requested rezoning. The Board concludes that the Petitioner established mistake by showing that events occurring subsequent to comprehensive zoning have proven that the Zoning Board's initial premises were incorrect. In this case, the Board's assumptions were that MXD development, and the resulting accomplishment of some of the goals of the General Plan and Comprehensive Zoning related to that MXD development, would have been accomplished, or at least approved by this time in the County, without the zoning of the subject property for MXD. The Board concludes that those assumptions have been proven to be incorrect. The Board further concludes that the requested rezoning, so as to place an MXD Overlay zone on the subject property in addition to the

underlying PEC zoning is not only justified under the subsequent events standard of the mistake rule, but will also correct the mistake of not providing the MXD development option for the PEC portion of the subject property, given the subsequent events of no MXD development in the County, and is the appropriate zoning for the property in order to permit the option of MXD development on the subject property, a zoning district which offers the prospect of development much more compatible with the surrounding area than PEC development.

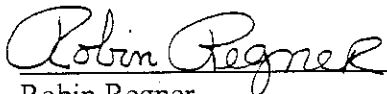
4. The Board concludes that the evidence that Petitioner has presented to show mistake in the R-SC zoning of the subject property without an MXD Overlay zone, especially given the Board's granting of the MXD Overlay zoning for the PEC portion of the subject property, is sufficient to overcome the strong presumption of correctness of attached to that Comprehensive Zoning and to justify the requested rezoning. The continuation of the R-SC zoning portion of the subject property was an inadvertent act at the time of the 1993 Comprehensive Zoning, given the adjoining PEC zoning, and the lack of consistency of zoning with property lines or topographical features. Continuation of R-SC zoning at this time without an MXD Overlay, especially given the Board's decision to grant the MXD Overlay to the PEC portion of the subject property, would compound the original mistake of zoning in 1993.

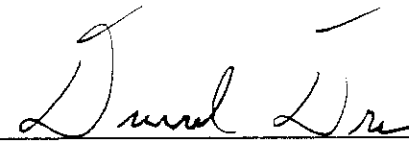
For the foregoing reasons, the Zoning Board of Howard County, Maryland, on this 27<sup>th</sup> day of August, 1998, having extended the decision for thirty days due to the summer schedule, hereby GRANTS the Petitioner's request for an amendment to the Howard County Zoning Map so as to reclassify the approximately 516.5 acre subject property from the PEC Zoning District (approximately 510 acres) and the R-SC Zoning District (approximately 6.5 acres) to the PEC-MXD-3 and R-SC-MXD-3 Zoning Districts (PEC and R-

SC with a MXD Overlay zone), respectively, as described in the petition and DPZ Technical Staff Report.

ATTEST:

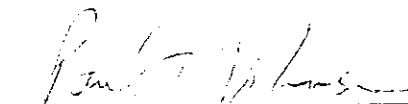
ZONING BOARD OF HOWARD COUNTY

  
Robin Regner  
Administrative Assistant

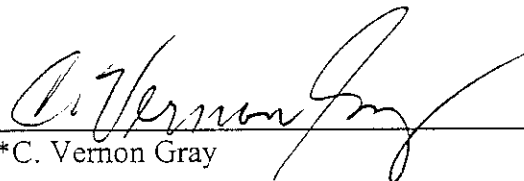
  
\*Darrel Drown, Chairperson

PREPARED BY HOWARD COUNTY  
OFFICE OF LAW  
BARBARA M. COOK  
COUNTY SOLICITOR

DISSENT  
\*Dennis R. Schrader, Vice Chairperson

  
Paul T. Johnson  
Deputy County Solicitor

  
\*Charles C. Feaga

  
\*C. Vernon Gray

DISSENT  
\*Mary C. Lorsung

\*THE ABOVE SIGNED BOARD MEMBERS  
HEREBY CERTIFY THAT THEY HAVE LISTENED TO  
A RECORDING OF THE PORTIONS OF THE HEARING  
FROM WHICH THEY WERE ABSENT AND HAVE  
REVIEWED THE EVIDENCE OF RECORD.