

Howard Research and  
Development Corporation,

Petitioner

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Before The Zoning Board

of Howard County

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Zoning Board Case 1031M

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### DECISION AND ORDER

On July 23 and 24, September 10, 11 and 24, October 15 and 20, and November 3 and 4, 2003, the Zoning Board of Howard County, Maryland considered the petition of the Howard Research and Development Corporation to amend the Preliminary Development Plan for the New Town District of Columbia to increase the overall maximum density from 2.35 to 2.5 dwelling units per gross acre.

The Zoning Board made a partial decision in this case on February 5, 2004 when it amended the Preliminary Development Plan of the Columbia New Town District so as to increase the overall residential density as provided in the PDP from 2.35 to 2.3571 dwelling units per gross acre on the condition that this density increase may be used only for the 96 age-restricted, moderate-income housing units proposed to be used on the old Exxon site in the Village of Oakland Mills. In this decision and order, the Zoning Board will decide the balance of the petition.

The notice of the hearing was advertised as required by law as evidenced by the certificate of advertising, which was 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, including the petition, the Technical Staff Report of the Department of Planning and Zoning and the Planning Board's Recommendation, were made part of the record of the case. Both

the Department of Planning and Zoning and the Planning Board recommended approval of the entire petition.

The Petitioner was represented by James D. Lano, Esquire. Several protestants appeared and testified in opposition to the entire petition. Several supporters also appeared and testified in support of the entire petition.

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

#### FINDINGS OF FACT

1. The entire petition in this case involves the Petitioner's proposed amendment to the Preliminary Development Plan ("PDP") for the New Town District of Columbia to increase the overall maximum density from 2.35 to 2.5 dwelling units per gross acre. Since the Zoning Board granted an amendment of the PDP in its February 5, 2004 decision to increase the overall maximum density from 2.35 to 2.3571 dwelling units per gross acre, this decision will address whether or not to grant an additional increase in overall residential density from 2.3571 to 2.5 dwelling units per gross acre or any lesser increase based on the applicable criteria.

2. The Petitioner's proposed amendment to the PDP involves only a proposed increase in the overall residential density in the Columbia New Town District. The petition does not involve any specific proposed changes to the land use designations on the PDP as was proposed in Zoning Board Case 918M. Nor does this petition involve any proposed rezoning of land to the NT District as was involved in Zoning Board Case 918M. The Petitioner indicated that the proposed increase in residential density to the maximum permitted 2.5 dwelling units per gross acre of the NT District would enable the development

of 1600 dwelling units in Town Center and 541 dwelling units in the Villages of Columbia. However, other than the proposed 96 unit Oakland Mills residential development, for which the Zoning Board increased the necessary residential density on February 5, 2004, the Board was not provided with any binding specifics as to the amount, location and design of the proposed development that would occur as a result of the proposed density increase. While the Petitioner assumed some combination of residential and commercial development for purposes of its desired scenario (Scenario 2) as part of its fiscal impact analysis, these assumptions were never proposed as required limits of development. In any case, none of the scenarios, including Scenario 2, dealt with the specifics of any proposed future development, including location of land uses or specifics as to design other than a non-binding statement that the residential development would be mid-rise, high-rise or multi-family development. The Board in this case is required, therefore, to make a decision on the Petitioner's proposed residential density increase based on non-binding assumptions as to square footage totals of proposed residential and commercial development with no specificity as to location, acreage or design of those land uses.

The Board also notes that while there were references in Petitioner's testimony to the fact that the bulk of the 1600 residential units in Town Center would likely be located somewhere on a total of about 75 acres of undeveloped land on the "crescent"-shaped property around the Merriweather Post Pavilion property, some Lakefront property, and some property around the Mall, Petitioner also acknowledged that residential density could be used in unspecified redevelopment areas as well. There were other references in Petitioner's testimony, particularly in its fiscal impact analysis, to 60 acres being the size of the area developed. This difference in acreage underscores the fact that the

Board has no specific plan for proposed land use before it for any particular property and must make the decision on whether to grant the increase in density based on proposed but non-binding development totals in terms of acreage and square feet.

The Board reiterates that the assumptions in the fiscal impact analysis are not binding in terms of amount of development to be provided. The Petitioner has indicated that the proposed density increase would allow the development of 1600 residential units in Downtown Columbia and 541 units in the Villages of Columbia. However, nowhere in the fiscal impact analysis or elsewhere in the petition or Petitioner's testimony before the Board is there any binding presentation or information as to where proposed residential or commercial uses would be located, or in what amounts or according to what general design (e.g., mid-rise versus high rise, retail versus office, vertical mixed use versus horizontal mixed-use) at those locations. The Petitioner did not present any proposed land use designation amendments to the PDP with its proposed density amendment that indicated the "location and nature of any commercial uses in relation to commercial uses" (Section 125B.2. of the HCZR), as was done in both previous Zoning Board cases that dealt with establishing the density of the New Town District on the PDP, either originally or by amendment. The Petitioner did not propose the acreage of the various land use designations that would use the proposed density increase nor propose the general location of these land use designations. The Petitioner did not provide the general location of recreational and public and community uses at least as would be affected by the development of the proposed 1600 residential units in Town Center enabled by the proposed density increase.

The Board also notes that the density in the NT District has been decided on only two prior occasions by the Zoning Board or its zoning authority predecessor, the County

Commissioners – in 1965 when the original PDP was approved in ZB Case 412 at a density of 2.2 dwellings per gross acre and in ZB Case 918M when the PDP was proposed and approved to be amended to annex 135 acres of additional land to the NT District, to establish and amend various land use designations on the PDP, and to increase the density from 2.2 to 2.35 dwelling units per gross acre. In both of these prior cases, the proposed density and/or density increase was considered in conjunction with the proposed land use designations of the areas, or amendments thereto, to which the density increase were related.

A good example of the lack of detail presented in this case generally and the consequent difficulties posed for the Board, is that related to the information presented as to Merriweather Post Pavilion. The Petitioner indicated that Merriweather was located on a 9 acre open space parcel in the middle of Symphony Woods and that this area would remain as open space.

The Petitioner also presented testimony that its plan was to transform Merriweather from an outdoor facility into an indoor, year-round theater based on the economic infeasibility of continuing to operate it as an outdoor facility. There was a great deal of testimony presented by protestants challenging Petitioner's assertions in this regard.

The Board finds that whether or not Merriweather will continue to operate in the future as an outdoor or indoor facility, and the reasons for the decision to choose one option over the other are, by themselves, none of the Board's concern. The Petitioner is free today to operate Merriweather as it sees fit.

However, the Petitioner is asking that the Board grant it additional density. As part of the petition process, Petitioner has indicated that it may want to proceed with residential

development on the “Crescent” parcel adjacent to Merriweather, but it has refused to propose land uses at that location to show the Board its plan.

In Zoning Board Case 918M, the Petitioner specifically requested that the PDP be amended to change the land use designation for this area from Employment Center to Apartments. The Board rejected that request at that time based on its finding that the development of residential uses that close to Merriweather would be incompatible due to the noise levels associated with an outdoor music facility.

In this case, Petitioner has not presented any land use designation PDP amendments or additional binding information in lieu of those amendments, as to the property adjacent to Merriweather that shows how the density increase would be implemented on that property.

Without this information, the Board is unable to evaluate whether Petitioner’s plan constitutes a general land use plan that is designed to meet various objectives of the HCZR, including but not limited to how the various different uses may relate to each other in terms of issues such as parking, enhancement of existing landmarks or community gathering places, linking of open space with community facilities, and improvement of pedestrian connections.

3. The Petitioner was in essential accord with the Zoning Board as to the applicable criteria for the Board to apply in deciding this petition to amend the PDP – the same criteria contained in Section 125B.3. of the Howard County Zoning Regulations (“HCZR”) applicable to the approval of the original PDP in 1965. The protestants, particularly Mr. Adams, argued that the Zoning Board lacked the explicit authority under the HCZR to amend the PDP absent the annexation of additional land pursuant to Section 125B.6. of the HCZR, and that the Board lacked the implied authority to amend the PDP in a non-

annexation case. This case did not involve annexation of additional land to the NT District. The Board found that it did have the implied authority to amend a PDP in the NT District in the partial decision rendered on February 5, 2004 in this petition, and it makes the same finding in this case.

4. The criteria that both the Petitioner and the Zoning Board indicated were applicable in the Board's decision on this petition, therefore, were those contained in Section 125B.3. – after consideration of the guides and standards listed in Section 125B.3, (1) that the petition complies with the provisions of the Zoning Regulations ( Section 125B.3.a) and (2) that the PDP constitutes a general land use plan for the area covered thereby, designed to meet the objectives set forth in the Zoning Regulations (Section 125B.3.c.). The criterion contained in Section 125B.3.b, that a New Town District should be located at the proposed site, was conceded by all parties to be a criterion inapplicable to this case since no land was proposed to be rezoned to the NT District in the petition.

5. The Petitioner presented testimony and evidence that the proposed increase in density and the resulting 2141 dwelling units, particularly the 1600 units slated for Downtown Columbia, would be consistent with Policy 5.5 of the 2000 Howard County General Plan and Smart Growth principles. Policy 5.5 is "Encourage Downtown Columbia's continuing evolution and growth as the County's urban center."

Policy 5.5 is followed by 8 "actions" subheadings that describe more specifically how Policy 5.5 may be implemented in regard to specific topics. These "actions" are:

1. *More Downtown Residential Units.* Increase the number of housing units and people living Downtown to maintain activity and support restaurants, shops and

entertainment uses after normal office hours. Consider, in particular, the potential to address the growing market for active senior.

2. *Redevelopment of Older Properties.* Encourage the selective redevelopment of obsolete or underused properties for additional office, housing, retail, entertainment and cultural uses. Encourage property owners to seek vertical mixed uses, including residential, for Lakefront redevelopments as well as for currently undeveloped infill sites.

3. *Improve Pedestrian Connections.* Design new development and redevelopment to strengthen the connections between the Lakefront, the Mall and Downtown housing. Relieve traffic congestion without degrading pedestrian use or further dividing the Downtown into isolated pockets. Replace the asphalt walkway around the outer perimeter of the Mall; Little Patuxent Parkway and Governor Warfield Parkway with a concrete sidewalk to improve pedestrian convenience and safety and to enhance the urban Downtown “look.” Use a joint public-private effort to replace this walkway.

4. *Transit Integration.* Improve the bus transfer point at the Mall to complement the Mall’s design and to better serve transit patrons.

5. *Open Space.* Enhance Downtown open space, such as the edges of Lake Kittamaqundi and Symphony Woods, to promote enjoyment by the growing numbers of Downtown residents and visitors. Work with Howard Research and Development Corporation, Columbia Association and the Town Center Village Board to continue the lakeside path either as a full loop around the lake or through bridge connections at “Nomanisanisland.”



6. *Cultural Center*. Encourage efforts to develop Downtown Columbia as an art, cultural and civic center (including indoor facilities and outdoor/open space activities) in addition to its function as an employment and retail focal point.

7. *Infrastructure*. Foster high maintenance standards for streets, medians, pedestrian ways, landscaped areas and street furniture by the Columbia Association, Howard Research and Development Corporation, and other private property owners. Encourage them to develop a program of well-designed directional signage to aid orientation to Downtown sites, facilities, amenities and activities.

8. *Symphony Woods*. Encourage measures that enhance Symphony woods as an attractive, inviting open space resource for families and individuals to enjoy natural beauty within the urban setting.

Petitioner concentrated its focus on the first two actions of Policy 5.5. The Board finds that the six additional actions in Policy 5.5, and all other pertinent portions of the General Plan are guidelines/recommendations that must be considered by the Board in applying the Section 125B.3 criteria in deciding this case. The Board finds that much of Policy 5.1, Policy 5.2 and Policy 5.3 should also be taken into account in making its decision in this case.

Generally, the Board accepts Petitioner's evidence, and it finds, that Columbia is Howard County's major urban center, and that Smart Growth principles would call for the targeting of growth to areas, such as Downtown Columbia, where infrastructure is already in place.

The Board also accepts the testimony and evidence presented by Petitioner, and it finds that development of additional residential density and mixed-use in Downtown

Columbia would help to energize it and make it more vibrant, although there was convincing testimony presented by protestants that there is some existing residential capacity in NT that could be directed to Downtown Columbia.

The Board further finds further that increasing the residential density in Downtown Columbia, while it would help achieve the laudable “mixed-use” and “vibrancy” goals of the 2000 General Plan and the policies of Smart Growth, does not satisfy all of the criteria the Board is required to address pursuant to Section 125B.3. of the HCZR. The remaining issues encompassed within those criteria will be addressed below.

6. The Board asked that the Petitioner prepare a fiscal impact study comparing the fiscal impact on the County of three development scenarios 1) all commercial development in Downtown Columbia; 2) HRD’s request, which included mixed-use with 10% age-restricted units and 5% affordable units; and 3) the Zoning Board’s request, which included mixed use with 10% age-restricted units and 10% affordable units. The Board requested that this analysis be prepared because the proposed increase in density’s possible effect on the fiscal impact of the County should be considered by the Board under several of the “guides and standards” of Section 125B.3. (e.g., “the orderly growth of the County”, “the necessity of facilitating the provision of adequate community utilities and facilities such as public transportation, fire-fighting equipment, water, sewerage, schools, parks and other public requirements”, “traffic patterns and their relation to the health, safety and general welfare of the County”, “the needs of the County as a whole and the reasonable needs of the particular area considered”) and the preservation and promotion of the health, safety and welfare of the community criterion (“the objectives set forth in these Regulations”, Section 125B.3.c. and Section 100A. of the HCZR).

The Petitioner addressed only the fiscal impacts of an assumed 1600 dwelling units in Downtown Columbia in Scenarios 2 and 3. The Petitioner also addressed the fiscal impact of 1,200,000 square feet of commercial development in Downtown Columbia for Scenario 1 and 600,000 square feet of commercial development for Downtown Columbia for both Scenarios 2 and 3 in combination with the assumed residential development. The projected 541 dwelling units for the Villages were not factored into the fiscal impact analysis.

Much of the proceedings in this case concerned testimony and evidence presented by the Petitioner to support the assumptions in and the conclusions of the fiscal impact analysis, and testimony and evidence presented by the protestants attacking the assumptions in and conclusions of Petitioner's impact analysis. Before addressing its findings concerning these conflicting assumptions and conclusions, the Board must state that fiscal impact is only one factor that the Board must balance against other factors in addressing the criteria in Section 125B.3. of the HCZR, and it would not be the deciding factor unless extreme adverse fiscal impact was clearly established. A finding of a proposal's positive fiscal impact on the County does not equal a positive finding as to that proposal's preservation and promotion of the public health safety and welfare. However, fiscal impact is an important factor to weigh along with others and the Board's findings in that regard are addressed below.

7. The Petitioner made a number of assumptions in conducting its fiscal impact analysis. It presented these assumptions to Mr. Paul Tischler of Tischler and Associates, who factored those assumptions into the fiscal impact analysis. The conclusion of the Petitioner's fiscal impact analysis was that (1) Scenario 1, the all commercial scenario of 1,200,000 square feet of commercial (800,000 sq.ft. of Office, 300,000 sq. ft. of Big Box retail, and 100,000 sq. ft. of non-Big Box retail) produced an annual net revenue to the

County of \$2,487,465, with a cumulative net revenue of \$20,807,104 through 2017; (2) Scenario 2, the Petitioner's Scenario of 1600 residential units in mid-rise and high-rise and other multi-family structures (10 % age-restricted and 5% affordable units) and 600,000 square feet of commercial (400,000 sq. ft. of Office, 100,000 sq. ft. of Big Box Retail and 100,000 sq. ft. of non-Big Box retail) produced an annual net revenue of \$6,560,901, with a cumulative net revenues of \$78,760,867 through 2017; and (3) Scenario 3, the Zoning Board's request, which is the same as the Petitioner's Scenario 2 except that 10% affordable units are provided instead of 5%, produced an annual net revenue of \$6,264,872, with a cumulative net revenue of \$75,460,547 through 2017.

The Board finds that a number of the Petitioner's assumptions imbedded within its fiscal impact analysis that led to its ultimate conclusions are not reliable. Those assumptions, the testimony concerning those assumptions, the Board's finding's regarding that testimony, and the effect of the findings on the Petitioner's conclusions in its fiscal impact analysis are provided as follows:

a. Pupil Generation Rate. The Petitioner assumed a pupil generation rate of .0826 pupils per unit for market rate units and .3469 pupils per unit for affordable units in Table 2 of its Fiscal Impact Analysis. These pupil generation rates, which Petitioner indicated are not the standard pupil generation rates used by the Howard County Public School System, were derived from a sample of properties deemed by Petitioner to be units comparable to the units that Petitioner would develop in Town Center if the petition were approved.

The Board recognizes that accurate projections of school enrollment, particularly those which are generated by new development, are problematic. This uncertainty is recognized in Box 4-9 of the 2000 Howard County General Plan (page 121).

The Board finds that Petitioner's determination of its assumed pupil generation rate based on such a relatively small sample of properties is initially of questionable validity. The smallness of the sample of properties is compounded by the fact that several of the projects have uncharacteristically low numbers of students that would seem to disproportionately skew the percentage of students per development/unit downward.

The protestants presented convincing testimony and evidence that the zero number of students for Governor's Grant is based on partial occupation status and/or may just be inaccurate, that over 50% of the Vantage Community's 425 units are senior units that would not permit school age children, that the Gramercy project's 210 units is unlikely to be typical in its generation of school age children because of the fact that it rents many of its units like a hotel to transients on a temporary basis, and that the high condo fees in the Watermark make the monthly housing costs of that project unlikely to be attractive to families with children. The Board finds the 2 students generated by the 108 condo units in the Whitney project to be uncharacteristically low and equally unreliable in terms of coming up with a realistic pupil generation rate in a small sample. All of these factors, which the Board accepts, would statistically skew the percentage of children downward, and would consequently lower the number of students and the costs associated with the \$6,437 FY04 average cost per student in Howard County.

The Board finds that Petitioner's calculation of 160 students to be generated under Scenario 3 and 140 students to be generated under Scenario 2 to be too low to be reliable for

use in the Fiscal Impact Analysis. This does not mean that the Board accepts the protestants' assumption that 957 students would be generated by the 1600 units in Downtown Columbia. That number of students would have to be based on a pupil generation rate of nearly .6 which is greater than the pupil generation rate often associated with single-family detached homes, and is greater than the .45 pupil/dwelling unit ratio for Howard County as a whole (41,766 student enrollment/ 91,000 total housing units) (See Figures 4-21 and 4-37 of the 2000 Howard County General Plan, pp. 120 and 155).

The mid-rise and high-rise and multi-family structures that Petitioner indicates would be developed pursuant to the proposed density increase would likely produce a pupil generation rate nearly double that assumed by the Petitioner for market rate units, when the skewing produced from the various atypical projects is removed from Table 2. If the Board adds 538 units from Town Center Apartments, 205 units from Vantage with its senior units removed, and 210 units from Banneker producing 49, 43 and 32 students respectively, a pupil generation rate of .13 is produced. Because Petitioner's original survey sample was so small, the Board's unskewed sample is even smaller, and the pupil generation rate for the affordable units is so much higher than that of the market rate units (.3469 vs. .0826), the Board finds that it is appropriate to round up the pupil generation rate to double that of Petitioner's suggested rate (.1652 rather than .0826) in order to use a more reliable pupil generation rate. While the Board would have preferred to have a larger sample upon which to base a pupil generation rate for market units, that option is not possible at this point.

If the Board's adopted pupil generation rate of .1652 is multiplied by the number of market rate, potentially pupil-producing units, 1280 (160 affordable units and 160

age-restricted units must be subtracted from the total), 211 pupils are produced. If the Petitioner's pupil generation rate of .3469 is multiplied by the number of affordable, potentially pupil-producing units, 160, 55 pupils are produced. The total number of pupils generated by the combination of 1440 market rate and affordable units is 266.

The annual costs attributable to 266 students ( $266 \times \$6,437$  per student) is \$1,712, 242 or roughly double that produced by 140 students (Scenario 2) and 1.7 times that produced by 160 students (Scenario 3) as indicated in the fiscal impact analysis. The resulting cumulative school-related operating expenditures using the costs produced under the Board's pupil generation rate would be 6 to 8 million greater than that expenditures shown for Scenarios 2 and 3 respectively, using Petitioner's pupil generation rate in Table 2 of the Fiscal Impact Analysis. And the corresponding cumulative General Fund Net Revenues for Scenarios 2 and 3 would be reduced by those same amounts.

b. Amount of commercial development assumed to develop under Scenario 1. In its Fiscal Impact Analysis, Petitioner assumed 1,200,000 sq. ft. of commercial uses would be developed on unspecified property if the residential density increase were not granted. This total was based on Petitioner's assumption that 60 acres would be developed at the average of 20,000 square feet per acre. Petitioner testified that this 20,000 square foot/acre average was derived from the Columbia average for commercial development, which is determined by dividing the 285 million square feet of commercial space developed in Columbia by HRD by the total acreage of Columbia, 14,272 acres.

While this calculation may produce the gross average of commercial space per acre over all of Columbia, the Board does not think this square foot/acre average is a realistic or likely assumption in terms of the amount of commercial space to be developed in the

remaining undeveloped or to be redeveloped commercial properties in Downtown Columbia. The protestants produced more credible testimony that it is more likely that the remaining undeveloped commercial areas in Downtown Columbia would develop at closer to 60-80,000 square feet/acre, at least for office uses.

The Board accepts Petitioner's testimony that retail uses require more parking than office uses and that retail parking is usually spread out horizontally more than office parking for market reasons. However, if one assumes that office uses would and could be developed at 80,000 sq. ft. per acre and retail uses at 20,000 sq. ft. per acre, Petitioner's Scenario 1 could be developed at double its proposed square footage on 60 acres according to the same square footage proportion of office and retail uses. This doubling of the development would double the projected revenues as well, increasing the cumulative net revenues for Scenario 1 to approximately 40 million in Table 4 of the Fiscal Impact Analysis.

The Petitioner testified that 3.1 million sq. ft of commercial development, 2 million of it office uses, would be needed to achieve the same level of positive fiscal impact as that provided under the mixed-use scenarios, but expressed doubt whether that amount of development could be accommodated on 60 acres at the average density of commercial development. The Board notes, however that use of shared parking and/or underground/multi-level parking could allow the accommodation of this amount of commercial development on 60 acres. Petitioner provided testimony that they had not analyzed whether a greater concentration of commercial development under Scenario 1 was economically feasible.

c. Income tax revenues attributable to commercial development. Petitioner assumed no positive fiscal impact in Scenario 1 for income taxes attributable to jobs produced by



commercial development. The Board understands that Maryland counties derive local income tax revenue from businesses only from the payment of that tax by business employees where they live, so that on a strict accounting basis Table 5 in Petitioner's Fiscal Impact Analysis could be considered accurate from Petitioner's point of view. However, in determining positive fiscal impact, the Board finds that the creation of jobs in Howard County would lead to some percentage of additional income-tax paying individuals moving to and paying local income taxes in Howard County. The 2000 Howard County General Plan indicated that in 1990, 42% of jobs in the County were filled by County residents (p.153). The protestants presented a very similar percentage on this issue. The indirect but very real positive income tax revenue benefit produced by additional jobs under Scenario 1, if reflected in Table 5 of the Fiscal Impact Analysis, would show substantially increased residence-related income tax revenues to the County. Moreover, this positive fiscal benefit would only increase based on greater amounts of commercial development than was assumed in Scenario 1. The Board finds that showing the income-tax benefit of job creation is a truer reflection of fiscal impact than not showing as was done in Petitioner's analysis.

d. Absorption rates of development. Petitioner's Fiscal Impact Study contains two assumptions regarding absorption rates that further skew its conclusions as to fiscal impact.

First, Petitioner assumed that the proposed office development in Scenario 1 would not be completed until 2016 while the office development in Scenarios 2 and 3 would be completed in 2013. This assumption, which the Board does not accept as justifiable, decreases the cumulative office/commercial development-related revenues of Scenario 1 compared to those in Scenarios 2 and 3.

Second, the Petitioner assumed that the absorption rate for commercial development would be 100,000 square feet per year, which is based on the Petitioner's 37 year development period for Columbia. The Board notes that the protestants presented evidence that the average commercial absorption rate for Howard County was almost 3 million square feet per year between 1996 and 2002, and that the commercial absorption rate for Columbia development was even higher for that same period. While the Board recognizes that 1996-2002 may have been a particularly high growth period for commercial development so that use of the absorption rate for those years may be too high, it also recognizes that factoring in Petitioner's entire development period for Columbia is likely to produce an unreasonably low absorption rate since it took Columbia many years to achieve a development momentum. The Board finds that a reasonable and reliable commercial absorption rate to use in the fiscal impact analysis would be an average of Petitioner's and protestants' rates, or about 1- to 1.5 million sq. ft. per year. At this rate, the commercial development would be absorbed in 3-4 years and the cumulative net revenues would be increased in Scenario 1 relative to Scenarios 2 and 3.

8. The Board finds that there is a minimal fiscal difference between the three Scenarios in Petitioner's Fiscal Impact Analysis when the necessary adjustments are made to Petitioner's assumptions as indicated above. The Board finds that under either an all commercial or a mixed-use scenario, the fiscal impact on the County is likely to be positive. Therefore, the Board must weigh other factors related to the County's public health, safety and general welfare in deciding this petition according to the applicable criteria for PDP amendment decision-making.

9. Throughout the hearing process on this petition, protestants asserted that there was not enough information provided by the Petitioner to enable the Board to determine whether the proposed amendment to the PDP to increase the residential density to the maximum permitted met the criteria of Section 125B.3. of the HCZR. As stated above, the Petitioner would not commit to any specifics as to location, amount or design of any of the development tied to the density increase other than the limited proffers noted below.

10. The Petitioner did accept certain proffers or conditions that it indicated that it would agree to accept as part of any PDP amendment approval. Petitioner agreed that:

a. The density increase to 2.5 dwellings per gross acre in the NT District would enable the development of 1600 dwelling units in Downtown Columbia and 541 dwelling units in the Villages. Of the 541 Village units, 150 were allocated to the Village of Oakland Mills and 100 units allocated to the Village of King's Contrivance, with the remaining 291 units "available to a Village on a first come, first serve basis which at any time wishes to sponsor a residential project within its boundaries." (Page 1 of the petition).

b. 10% of the 1600 Columbia Town Center dwelling units provided would be age restricted dwelling units and 10% of the 1600 Columbia Town Center units would be Moderate Income Housing Units (MIHUs). Petitioner increased its proffer of MIHUs to be provided from 5% originally proposed in the petition to 10%;

c. No grocery store would be developed in Town Center with an area greater than 20,000 square feet;

d. It would abide by "Columbia Town Center Planning Principles/Development Guidelines" presented by Petitioner (Applicant's Exhibit 27); and

e. It would not object to a decision on the proposed density increase necessary for the Oakland Mill site being issued separately (see the Board's partial 2/5/04 decision in ZB Case 1031M).

11. In effort to "flesh out" how Petitioner's proposed density increase would relate to specific land uses at particular locations and how they would be designed, the Board inquired as to whether the Petitioner would agree to various additional "proffers", to facilitate the Board's application of the criteria to its decision-making authority on PDP amendment approvals. The following "proffers" were not agreed to by the Petitioner by the close of the hearing in this case:

a. The Petitioner's preparation of a "fully integrated pedestrian plan" to show how pedestrian access would be handled in the Town Center development areas;

b. The Petitioner's preparation of a detailed "Bubble Plan" showing the location of the proposed land uses at various locations with proposed totals for numbers of units and/or square footage to be developed at those locations;

c. Petitioner's elimination or restriction of any other retail/commercial uses other than provided in Finding 10c above;

d. Petitioner's removal of the covenants on the "Grandfather's Nursery" property;

e. Petitioner providing assurance that there would be adequate on-site parking provided for any future use of Merriweather Post Pavilion; or Petitioner providing assurance that it would provide a substantial amount of shared parking for any non-residential uses developed on the "crescent" parcel adjacent to Merriweather Post Pavilion; and

f. Petitioner's commitment to funding improvements necessary to develop a central park for Columbia in Symphony Woods.

#### CONCLUSIONS OF LAW

1. The Board concludes that it does have the implied legal authority to consider amendments to the PDP under Section 125B.3. of the HCZR for the reasons stated in Conclusion of Law 1 in the Oakland Mills density decision made on February 5, 2004, which is incorporated as Conclusion of Law 1 in this decision.

2. It is Petitioner's burden, pursuant to Rule 2.403D.3. of the Board's Rules of Procedure, to establish by a preponderance of the evidence that an amendment to the PDP to increase the overall density in the NT District to 2.5 dwelling units per gross acre meets the criteria for approval in Section 125B.3 of the HCZR. If the Board determines that Petitioner has not met that burden, the Board must deny the petition.

3. The Board, in order to grant the petition, is required to find that the PDP, with the amendment to increase the density as proposed, after consideration of all the "guides and standards" in Section 125B.3., will "constitute a general land use plan for the area covered thereby, designed to meet the objectives set forth in these Regulation." The prime objective of the Zoning Regulations in Section 100A is to preserve and promote the health, safety and welfare of the community and "to guide the future growth and development of the County in accordance with the General Plan which represents the most beneficial and convenient relationships among the residential, non-residential and public areas within the County considering the suitability of each area for such uses, as indicated by existing conditions, trends in population and modes of living, and future requirements; and considering such conditions, trends and requirements, both within the County and in relationship to areas

outside thereof.” Eight more specific objectives are listed under Section 100A of the HCZR, all of which the Board must consider in deciding whether the PDP, as it is proposed to be amended, constitutes a general land use plan for the area covered that meets these objectives. In addition, the Board must take into consideration the pertinent recommendations of the 2000 Howard County General Plan, particularly Policies and Actions 5.1, 5.2, 5.3 and 5.5 in deciding this petition. These recommendations must be considered as a whole and not in isolation in this regard.

4. The Petitioner, at the request of the Board, submitted a fiscal impact analysis in which various amounts of commercial uses versus mixed-use (commercial and residential) were assumed for purposes of analyzing the fiscal impact of those developments.

The Board concludes that the fiscal impact analysis is not a decisive basis or determinative factor for the Board’s ultimate decision in this matter one way or another for several reasons. The Petitioner made various assumptions regarding the way development would be carried out in the areas to be developed according to the three scenarios. However, the actual development that will take place may bear no resemblance to the assumptions underlying any of the scenarios because none of Petitioner’s assumptions are binding. Therefore, the fiscal impact analysis is not a helpful tool for the Board in determining whether the proposed density increase will be a fiscal benefit or detriment to the County per se or in comparison to not granting the proposed density increase.

The Board concludes that even if Petitioner’s proposed development in its fiscal impact analysis is viewed as what is likely to happen rather than what might happen if the density increase is granted versus denied, it cannot be accepted as valid based on the flawed assumptions contained in that analysis as outlined in the Board’s findings of fact. The

Petitioner has concluded that while all three development scenarios would yield positive net revenues to the County, the mixed-use scenarios would be almost four times as beneficial as the all-commercial scenario. After the Board has made the adjustments for what it has found to be the flawed or skewed assumptions in Petitioner's analysis as outlined above in the findings of fact, it concludes that at best the differences in the fiscal impact on the County of commercial versus mixed use development would be minimal, that both scenarios are likely to be equally fiscally beneficial, and that non-fiscal factors therefore must be examined to decide this petition.

5. The Board, in addressing the criteria of whether the proposed density increase, would allow it to find that the PDP, as amended, would constitute a general land use plan meeting the guides and standards of Section 125B.3. and the objectives of Section 100A of the HCZR, asked the Petitioner to provide the Board with some additional information on these various issues through its request for proffers as to the Bubble Plan, the central park improvements, the parking issues related to Merriweather Post Pavilion and the pedestrian access study. The Board asked for this information in lieu of the Petitioner providing the general location, acreage and design of the land use areas as shown on a PDP amendment as required by the HCZR. The Petitioner refused to make commitments with respect to any of these additional proffers by the close of the hearing.

6. The Board, therefore, is without sufficient information in the form of accompanying PDP amendments, or definitely binding information in lieu of those amendments, as to the location and acreage of the various land use designations on the PDP, the location of proposed sites for recreational uses and public community uses on the PDP, and the nature of commercial uses in relation to residential areas, to adequately decide the

density increase PDP amendment without that necessary information according to the applicable criteria for approval of PDP amendments. The Development Guidelines and grocery store size restriction that Petitioner agreed to as part of its proffers, while helpful, do not provide the extent, specificity, and locationality of information that the Board deems is necessary for Petitioner to meet its burden of proof according to the criteria.

When the original PDP was approved in ZB case 412, and when the Zoning Board granted the only other density increase by PDP amendment in ZB Case 918M, the Zoning Board or its predecessor, made decisions as to density on the PDP in relation to the proposed location and amounts of various land uses to be developed based on that density. In this case, the Board is being asked to make the decision on density essentially in a vacuum, devoid of any idea as to even the general location of the various land uses in relation to each other. On this basis, the Petitioner has not met its burden of convincing the Board that the density increase, unconnected to any general plan for land use for the area to be developed with that density, constitutes a general land use plan for the area covered by the PDP that meets the guides and standards of Section 125B.3 and the Section 100A objectives of the HCZR.

While the Board has found that Downtown Columbia is probably a good place to have additional residential development based on the recommendations of the 2000 Howard County General Plan and Smart Growth principles, and has also found that increased residential development in Downtown Columbia would help to achieve more vibrancy in Downtown Columbia, these findings do not allow the Board to conclude that Petitioner has met its burden of meeting the Section 125B.3 criteria due to the deficiencies in binding information presented to the Board as detailed above. In particular, the Board cannot make



any intelligent findings and conclusions as to the vibrancy issue or the 2000 Howard County General Plan's "actions" 3, 5, 6 and 8 under Policy 5.5, "action" 1 of Policy 5.1, "action" 1 of Policy 5.2, and "action" 2 of Policy 5.3.

The Board, in making these conclusions, is cognizant of the fact that detailed land use decisions in NT are made by the Planning Board at the Final Development Plan stage of the NT development process under the HCZR. However, the Board is required by the HCZR to make density PDP amendment decisions based on the general location, acreage and design of land uses, in relation to each other, at the PDP stage of development. While the the Zoning Regulations intend that the Zoning Board make density decisions in relation to general land use proposals, those proposals must be specific enough for the Board to be able to evaluate, in its judgment, whether the proposed land use plan, implementing the density, is in the health, safety and welfare of the community. The Board is unable to make that evaluation based on the information presented in this case.

7. The Board also concludes that the petition does not comply with the provisions of the HCZR, pursuant to Section 125B.3.a., because the PDP amendment did not "indicate the location and nature of any commercial uses in relation to residential areas" on the PDP as specifically required by Section 125B.2. of the HCZR. Petitioner's non-binding mixed use development scenario contemplated the development of commercial uses in relation to residential areas, but those relationships have not been shown to the Board on the PDP as required by the HCZR.

8. The one density increase request exception contained in the petition that the Board concludes would not be subject to its above conclusions is the grant of the density necessary to support the possible development of 100 residential units on a "first-come, first serve

basis” in a Columbia Village according to the process as described in the petition and as referred to in Finding 10(a) above. The Board made this same conclusion with respect to the grant of the density increase necessary to support the development of the 96 unit residential unit development in the Village of Oakland Mills in its February 5, 2004 partial decision in this case.

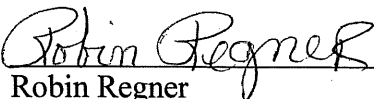
The Board concludes that the grant of this de minimus amendment to the PDP to increase the residential density from 2.3571 to 2.3643 dwelling units per gross acre of the NT District, for the sole purpose of supporting the above-described possible development of 100 residential units in some non-Downtown Columbia Village, according to the process outlined in the petition, complies with the provisions of the New Town Regulations. The Board also concludes that this the grant of this de minimus amendment to the PDP allows the Board to conclude that the PDP, as amended, would constitute a general land use plan for the Columbia New Town District designed to meet the objectives of the New Town Regulations. The Board can make this conclusion because the problems associated with the lack of information related to how the density increase would relate to the location, acreage and design of land uses in the Downtown Columbia area outlined above do not exist with respect to the potential development of 100 residential units in a non-Downtown Columbia Village under the Village-sponsored process outlined in the petition. Any development of property pursuant to this conditional density increase would have to go through the Planning Board/Comprehensive Sketch plan approval process as well as was indicated for the Oakland Mills development -related density increase granted on February 5, 2004.

9. The Zoning Board will fashion its order in this case based on the already granted density increase request in the partial “Oakland Mills” portion of this case, decided on


February 5, 2004. That case approved a PDP amendment to increase the overall residential density in the PDP from 2.35 to 2.3571 dwelling units per gross acre in the Columbia New Town District, for the limited purposes as specified in that decision. The Zoning Board's stated plan at its work session to fold the February 5, 2004 decision into this decision has become impossible due to the Petitioner's filing of a petition for judicial review of the February 5, 2004 decision prior to the issuance of this decision.

For the foregoing reasons, the Zoning Board of Howard County, Maryland on this 24<sup>th</sup> day of March, 2004, hereby DENIES Petitioner's request for an amendment to the PDP to increase the overall density in the PDP from 2.3571 to 2.5 dwelling units per gross acre in the Columbia New Town District, but it GRANTS a lesser amendment to the PDP to increase the overall density in the PDP from 2.3571 to 2.3643 dwelling units per gross acre in the Columbia New Town District, on the condition that this density increase may be used only for 100 residential units for use in a pool for projects in non-Downtown Columbia Village(s) to be submitted in accordance with the process as outlined in the petition.

ATTEST:


  
Robin Regner  
Administrative Assistant

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

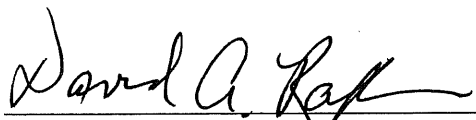
  
Paul T. Johnson  
Deputy County Solicitor

ZONING BOARD OF HOWARD COUNTY

  
Ken Ulman, Chairperson

  
Allan H. Kittleman, Vice Chairperson

  
Guy Guzzone

  
David A. Rakes\*\*

  
Christopher J. Merdon\*\*

\*\*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 HAS REVIEWED THE EVIDENCE OF RECORD.