Joint Hearing - MCC & PC
CTAM-9739-2024
Ex 21

From: Frank Johnson
To: Rob Robinson
Cc: Gregory Mann
Subject: RE: Density rights via dedications
Date: Friday, March 15, 2024 1:22:53 PM
Attachments: image001.png
image002.png
image003.png

Rob: It seems to me there's a mixing of issues and arguments being made to come to a desired conclusion. They're taking one rule regarding the difference between dedication and fee simple ownership and simply adding the second rule that density rights are therefore transferable, whether part of the application or not. Now I would have to agree that if a dedicated land area (such as for a right of way) is part of an application, that land area should be included in the FAR calculations, and the County Attorney opinion does nicely lay out why that should be the case, which is consistent with applicable law anyway. But I can see no requirement that a dedicated area which isn't part of the application must be included. If they have fee simple rights (such as by dedicating it rather than transferring fee simple ownership), then they can include that land in the application; that's what the County Attorney opinion says. If not, then it doesn't count. The MXD difference may have been intended to encourage or offset such dedications, or simply allow more density overall, but I can see no requirement to include dedicated land area which isn't included in the application in determining the FAR.

It seems to me if this was so clearly a legally established principle that they would provide a case cite; they didn't and in checking I can also find nothing.

This conclusion doesn't mean the fee simple owner doesn't have density rights, indeed quite the contrary, but only that it is legitimate to only use land which is part of an application to calculate the FAR. Again, if a dedicated area is included in the application, then generally what Matt lays out below applies. If it's not part of the application, then I can see no requirement to include it. That's also not to say it can't be included, if we want or sense that not doing so would create new levels of opposition, but as a legal matter, I don't see that it has to be included (and can logically see why it wouldn't).

Thanks
Frank

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From: Rob Robinson <Rob.Robinson@gaithersburgmd.gov>
Sent: Friday, March 15, 2024 12:41 PM
To: Frank Johnson <Frank.Johnson@gaithersburgmd.gov>
Cc: Gregory Mann <Greg.Mann@gaithersburgmd.gov>
Subject: Density rights via dedications

Hi Frank, our current zoning ordinance says in the MXD zone that the land area of previous

dedications can be included in FAR calculations (or by extension, lot coverage). That is the only zone that says this. As part of Retool, we have proffered that previous dedications cannot be included in FAR calculations in the new CD zone, only dedications as part of an application and which do not receive financial compensation beyond nominal. Our local land use attorneys do not like this and are arguing with me that the County allows this and possibly legally we cannot do this restriction. Below is the latest discussion from Matt. I understand that interest remains in dedicated areas so if abandoned it my go to property owner, but I don't know if his argument is true highlighted in yellow below that the density is thereby transferred to the rest of the property. My argument back has been why should we allow these rights that, for example Lakeforest BLVD, were granted in the 1960's. Could you provide Greg and I guidance? If we have to allow based upon state law, we'll amend Retool to reflect, but can we also then require that dedicated land area must be included in forest conservation and SWM calculations? Just as an aside this position was not brought up with the recent BOA discussion on W Watkins road when Stuart Barr was arguing about lot coverage. I know you have WRS et al today; if we could get an answer next Wednesday if possible? Thanks as always,

Rob

From: Matthew Gordon <mgordon@sgrwlaw.com>
Sent: Friday, March 15, 2024 11:57 AM
To: Barr, Stuart R. <srbarr@lerchearly.com>; Rob Robinson <Rob.Robinson@gaithersburgmd.gov>; Gregory Mann <Greg.Mann@gaithersburgmd.gov>
Cc: Wallace, Scott C. <swallace@MilesStockbridge.com>; Nancy Regelin <NRegelin@shulmanrogers.com>; Hummel, Phillip A. <phummel@MilesStockbridge.com>
Subject: RE: Retool Comments

Rob and Greg,

On the discussion of whether a property owner retains the density rights associated with a dedication (for no more than nominal consideration), I wanted to send you a Montgomery County Attorney Opinion that is relevant: https://files.amlegal.com/pdffiles/MCMD/10-25-2004.pdf
This topic comes up a lot in the urban areas of the County, not relative to the density rights (it is well-established in the neighboring jurisdictions that property owners retain the density from dedicated right-of-way), but for purposes of when/if a development project can encroach into a public right-of-way (below graded and above-grade). As you will see in the memo, the key distinction is whether: (a) a property owner dedicates via plat solely (and it functions as an easement under Maryland law) versus (b) if the property owner grants the fee simple interest to the government (this is more typical with State Highway Administration and condemnations). In the latter where consideration is received, the property owner has relinquished the fee simple interest and associated density rights. No argument there.

In the former instance (i.e., dedication via plat), Maryland law is clear that the property owner retains the fee simple interest in the dedicated land, which means that they retain the density rights

from the property. I understand your distinction between dedicated rights-of-way that occurred 50 years ago versus dedications that occur in present day as part of redevelopment. However, I think the critical point is that Maryland law recognizes that this dedication amounts to the granting of the special and limited use of the public road, which equates to an easement. This is what financial institutions (equity investors and lenders) assume to be the rule of thumb in the Washington DC metro region. They are very sophisticated and make assumptions when underwriting their investments, so this issue does matter. Even if it's of limited impact as part of Retool (i.e., not may zones will be FAR based on Retool), it seems to me that it is in the public interest that the City follow the accepted standards of the rest of the region which will enhance the economic competitiveness of the City. In my simple mind, there is no need to reinvent the wheel and do something different than the rest of suburban Maryland.

Matt

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From: Barr, Stuart R. <srbarr@lerchearly.com>
Sent: Monday, March 4, 2024 1:08 PM
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Cc: Wallace, Scott C. <swallace@MilesStockbridge.com>; Nancy Regelin <NRegelin@shulmanrogers.com>; Hummel, Phillip A. <phummel@MilesStockbridge.com>; Matthew Gordon <mgordon@sgrwlaw.com>; Barr, Stuart R. <srbarr@lerchearly.com>
Subject: [EXT] RE: Retool Comments

Rob/Greg – thank you for your leadership on Retool, and thanks for taking comments from this group. I think Phil's, Scott's, and Matt's comments are excellent, and I support them. Additionally, for now, I would add:

- FAR -- Clarify that an applicant can use gross tract area for density purposes (allow use of dedications) – would be consistent with Montgomery County (Matt covered this in more depth in his email).

- Section 24-7.5 – surface parking. If it's not already clear somewhere, make clear when changes to a surface parking area have to comply with the new standards, particularly things like the 30% canopy coverage for parking areas. Ideally, applicants would be able to propose changes to existing surface parking areas under either the current or new standards (their choice) – this would allow maximum flexibility. If proposed changes to surface parking have to comply with new standards, then only the portion that is proposed to change should have to comply (i.e., the entire parking facility, including unchanged portions, shouldn't have to be brought up to current standards).

- Building lot coverage in the E-1/E-2 zones – consider increasing building lot coverage from 50% to either 70% or 75%. This would make the E-1/E-2 zones consistent with the other non-residential zones.

- Section 24-6.5 – Outdoor Storage – all existing outdoor storage that is consistent with an approved site plan should be grandfathered and shouldn't have to meet the new standard unless it's proposed to be changed.

- Drive-throughs and pick up/dropoff spaces should be as flexible as possible given retail trends.

- Waivers, exceptions, variances, alternative compliance, etc. are a good thing from the development community's perspective and should be allowed throughout the new ZO. We don't know everything and can't intelligently predict everything, so we shouldn't stymie a good idea in the future.

Thanks for the consideration --- Stuart

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From: Wallace, Scott C. <swallace@MilesStockbridge.com>
Sent: Monday, March 4, 2024 10:53 AM
To: Rob Robinson <Rob.Robinson@gaithersburgmd.gov>; Matthew Gordon (mgordon@sgrwlaw.com) <mgordon@sgrwlaw.com>; Nancy Regelin <NRegelin@shulmanrogers.com>; Barr, Stuart R. <srbarr@lerchearly.com>
Cc: Gregory Mann <Greg.Mann@gaithersburgmd.gov>
Subject: RE: Retool Comments

Rob – thanks again for your time on this. In addition to Phil's comments, I think the grandfathering provisions (Sec. 24-1.2(E)) need to include all of the required development approvals that flow from the initial approval. For example, with Metrogrove , we had sketch approved, now we should get SDP approved before the rewrite is effective, but then we'll have the FSP which is likely to come after the effective date. The FSP has to be reviewed under the current ZO. If this was your intent with Sec. 24-1.2(D), I suggest the language could be more clear. You may want to consider language along the lines of the language in bold the County put in their 2014 rewrite:

> **Sec. 7.7.1.B. Application Approved or Filed for Approval before October 30, 2014**
>
> **1. Application in Progress before October 30, 2014**
>
> Any development plan, schematic development plan, diagrammatic plan, concept plan, project plan, sketch plan, preliminary plan, record plat, site plan, special exception, variance, or building permit filed or approved before October 30, 2014 must be reviewed under the standards and procedures of the property's zoning on October 29, 2014, unless an applicant elects to be reviewed under the property's current zoning. Any complete Local Map Amendment application submitted to the Hearing Examiner by May 1, 2014 must be reviewed under the standards and procedures of the property's zoning on October 29, 2014. If the District Council approves such an application after October 30, 2014 for a zone that is not retained in Chapter 59, then the zoning will automatically convert to the equivalent zone as translated under DMA G-956 when the Local Map Amendment is approved. **The approval of any of these applications or amendments to these applications under Section 7.7.1.B.1 will allow the applicant to proceed through any other required application or step in the process within the time allowed by law or plan approval, under the standards and procedures of the Zoning Ordinance in effect on October 29, 2014.** The gross tract area of an application allowed under Section 7.7.1.B.1 may not be increased.

There are other grandfathering concepts in Sec. 7.7.1.B of the County ZO that you may want to consider (excerpt attached), such as allowing relatively small expansions to proceed under the old ZO at the applicant's discretion, but I understand your viewpoint that the changes you are proposing are generally not substantive and therefore more grandfathering is not necessary. That may be true in general, but there always seems to be unintended consequences from a ZO overhaul.

Let me know if you have questions. Thanks.

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From: Rob Robinson <Rob.Robinson@gaithersburgmd.gov>
Sent: Wednesday, February 28, 2024 12:31 PM
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Cc: Gregory Mann <Greg.Mann@gaithersburgmd.gov>
Subject: [EXTERNAL] Retool Comments

[EXTERNAL]

Hi All, I wanted to touch base to again thank you for the focus group and to let you know, if you have any specific personal technical comments for edits (not reflecting your firm's position), it would be great to receive those by noon next Monday so we can include as discussion items in our March 11th JWS packet. We have already received Phil's (attached). Thanks!

Rob

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