

**TOWN OF INDIAN HEAD
BOARD OF ZONING APPEALS
Village Green Pavilion
PUBLIC HEARING #BZA05-01-22
June 2, 2022**

Chairman Dennis Scheessele called Public Hearing #BZA05-01-22 to order at 7:00 p.m. Sue Greer was present as legal representative on behalf of the applicant, Doug Meeker Vice President of Elm Street Development was also present on behalf of the applicant. They were present to request a variance for relief from the requirement to provide a minimum commercial footprint at 4210 Indian Head Highway, Villages of Potomac. Those in attendance were:

Chairman Dennis Scheessele
Michael Pellegrino
Thomas Blake
Anita Sampson
Ryan Hicks, Town Manager
Andrea Brady, Town Clerk
Fred Sussman, Town Attorney
Mark Harman, Town Zoning Administrator

The application and fee were received on March 18, 2022. Notice for the Public Hearing was published in the Maryland Independent on May 13, 2022. Certified letters were sent to adjoining property owners on May 16, 2022. The applicant was notified of the date time and place of the hearing on May 5, 2022. The sign for the public hearing was posted on the property at 4210 Indian Head Highway on May 20, 2022. Chairman Scheessele administered the Oath to Doug Meeker and Sue Greer.

Sue Greer presented the case on behalf of the applicant for the requested variance. Ms. Greer gave background information on the property. 16 years ago, the Villages of Potomac was developed. At the time of the project the commercial requirement was not outlined in the Zoning Ordinance. The Town asked the developer to include a commercial element to help spur development, and they acquiesced to the request. The parcel dedicated as commercial is a small property. Ms. Greer went over the location and size of the subject parcel. As Elm Street began to develop the residential portion of the property, they also began to market the commercial parcel. As of today, the property is still listed for sale under a national broker. Prior to that it was listed with two well known local brokers. Despite the efforts to market the property, to date there have been no offers received on the property.

Ms. Greer went over the unique qualities of the subject property, such as the limited parking availability, the lack of easy access to the property and it is surrounded by development. Ms. Greer feels this property is unlike other TCMX zoned properties, it is bounded by residential property, roads, and a school and the cumulative factors make this property unique.

While the developer was working with the Planning Commission on a residential plan, the Town adopted an updated Zoning Ordinance that included a specific commercial requirement for TCMX zones. The Planning Commission approved their plan, and it was contingent on Board of Zoning Appeals approval of the requested variance. Ms. Greer discussed how a residential use of the property would better fit the Town and noted that rooftops are needed in order to develop vacant commercial properties.

Doug Meeker, provided his current position with Elm Street development, job duties, and general job experience.

Mr. Meeker has been familiar with the property since Carborough LC put the property on the market in 2004. The parcel is located at the intersection of route 210 and Dr. Andrews Way and parcel 608 is within the Village of Potomac. Ms. Greer had Mr. Meeker circle the subject property on a map and submitted it as Exhibit A. Exhibit B is an aerial view of the property and Mr. Meeker also circled the subject property on the aerial view which was submitted into evidence. Ms. Greer asked to make the application in its entirety part of the official record.

Ms. Greer asked Mr. Meeker if he was familiar with the requirements of the TCMX zone and the recent updates to the TCMX zone. Mr. Meeker stated he was familiar, and he was also aware the most recent update occurred in September 2021.

Mr. Meeker provided a verbal list of his projects within the Town of Indian Head, and he stated he is familiar with the Town's Comprehensive Plan as well as the changes recently adopted in September 2021.

The subject property was zoned as TCMX when it was acquired in 2005 and the zoning remains TCMX.

Mr. Meeker gave background information on how parcel 608 came to be. At that time, while the commercial component wasn't required, during conversations with the Town Council they requested a commercial component to help spur growth. Unfortunately, a commercial component has not panned out. The property was marketed starting in 2006. The residential component of the project was complete in 2009. Mr. Meeker stated that the 2008 update to the Town Code did not include a commercial requirement for TCMX.

Mr. Meeker explained that they have been through 3 brokers for parcel 608 and provided a verbal list of the brokers they have worked with to this point and a brief background on each broker. The listing was recently updated, and they have not received any interest in the property as of today.

Mr. Meeker discussed the issue of the size of the parcel and the limited types of uses that could go into that footprint. Mr. Meeker discussed the issue of vehicular access which is not ideal for commercial uses. There is also limited parking, with a maximum of 9 spaces that could be provided on the parcel itself. The final issue Mr. Meeker discussed was the number of vacant or underdeveloped commercial spaces within the Town that are more suited to commercial uses than the subject property.

Ms. Greer and Mr. Meeker reviewed the aerial view that was provided to the Board and went over all areas bounding the subject property. Mr. Meeker explained that if the property adjacent to it was undeveloped or underdeveloped it would provide the critical mass needed to make a commercial use viable and it is the cumulative effect of these factors that make it unique and unable to be developed commercially. Ms. Greer and Mr. Meeker further reviewed the differences between the subject property and other TCMX properties within the Town's limits.

Mr. Meeker had discussions back in spring of 2021 with the Town on if the idea of townhome units on the vacant parcel was something the Town would support. Mr. Meeker stated he received positive feedback and they moved forward with the preliminary plan with the understanding that there were no guarantees.

The preliminary plan was submitted in early September 2021, and it went before the Planning Commission in December 2021.

Page 2 of the revised preliminary plan was submitted as Exhibit C. The plan shows 5 townhouses in place of the commercial use. The Planning Commission felt it was appropriate to change from commercial to residential. They approved the plan with two conditions, reducing the number of townhomes from 5 to 4 and to address the contingent items in ARRO's review letter, one main point of the review letter being that the applicant obtain a variance from the Board of Zoning Appeals.

The minutes from the December 15, 2021, Planning Commission meeting were submitted as Exhibit D.

Mr. Meeker stated the commercial component of this project as it stands would not meet the 7% requirement currently outlined in the Town's Zoning Ordinance, it is actually around 2% of the overall project.

Ms. Greer and Mr. Meeker moved into discussion of the Town's Comprehensive Plan as it relates to the TCMX zone. Mr. Meeker thinks that mixed use zones need to be viewed in the larger context. Looking at the mixed uses of the entire area. Mr. Meeker listed some of the commercial properties adjacent to the subject property, including several vacant properties. With more rooftops it will generate the critical mass needed for new commercial, expanding existing commercial, and helping existing commercial remain viable.

Mr. Meeker explained a big takeaway he had from the ULI report was the statement that for the Town to realize the commercial amenities it desires there is a great need for more roof tops.

Ms. Greer and Mr. Meeker discussed if the proposed change is consistent with the Charles County Comprehensive Plan, and Mr. Meeker felt it is consistent. Mr. Meeker also does not see any compatibility issues with the existing residential development.

In Mr. Meeker's opinion the property would remain vacant and undeveloped if this variance is not approved.

Mr. Sussman asked if the applicant had a copy of the report from ARRO that was discussed during the December Planning Commission meeting. Mr. Meeker and Ms. Greer did not have a copy available, but the report is in the Town's record for the Board's review.

Mr. Blake expressed his support of growth within the Town and his understanding of the challenges they have faced from a business perspective, and he expressed his support of approving the requested variance.

Chairman Scheessele asked if Mr. Meeker feels a daycare on the parcel would be a viable option. Mr. Meeker did not feel that it is currently a viable option based on the surveys and demographics he has looked at it he does not feel it would receive the level of support needed to maintain a full-time daycare. Ms. Greer reiterated the uniqueness of the subject property and the lack of offers within the 16 years it has been on the market.

Mr. Blake agreed with Mr. Meeker that a daycare would not be an ideal use of that property. Ms. Sampsons also stated a lack of demand for daycares when so many people work from home.

Mr. Pellegrino stated when the property was originally approved or developed it was under the 2004 code. Mr. Pellegrino provided the outlined intent of the TCMX zone which was a mix of residential and commercial. Ms. Greer stated there was not a minimum requirement for commercial use within the TCMX zone at that time and the developer had the commercial parcel by the Town's request.

Mr. Pellegrino does not feel the property is unique due to its size and the parcel is 4.75 acres when you look at the full property. Ms. Greer said it is not one factor, it is the cumulative factors which include not only the size but being bounded on all sides. Mr. Pellegrino said the original intent for this parcel was for commercial at the existing size. Mr. Pellegrino said the Board's purpose is to review this request in conjunction with the existing Zoning Ordinance.

Zoning Administrator, Mark Harman, presented his Findings of Fact. Mr. Harman has no issues with any of the justifications provided by the applicant in support of the variance and he believes the applicant has satisfied the code requirements to obtain the variance. In Mr. Harman's perspective the premise for the variance is the inability to market the commercial space for over a 16-year period, utilizing 3 different brokers.

Chairman Scheessele requested for those present supporting the applicant's position to approach the podium and state their name and address for the record. There was no testimony supporting the applicant's position.

Chairman Scheessele asked for those present opposing the applicant's position to approach the podium and state their name and address for the record.

Kwasi Nkrumah, 314 Dr. Andrews Way Unit B, resident, and original owner in the Villages of Potomac. Mr. Nkrumah gave background on himself and his family and their time in the Village of Potomac. Mr. Nkrumah's expressed concern over building 4 to 5 townhomes on the property which he feels will seem very congested and it will take away from the view. Mr. Nkrumah stated that condo fees have raised which he is not sure if it has anything to do with the proposed development. Mr. Nkrumah feels that one thing that might hurt development in Town is the alarms that go off in the community because of the Volunteer Fire Department. Mr. Nkrumah asked how 4 or 5 townhomes on that corner really mixes up what is currently provided in the community, and he offered his own suggestions for other uses of the parcel.

Mr. Meeker understood Mr. Nkrumah's concerns. He feels a residential use on the property will have less of an impact than a commercial use. He also feels that having the additional units may help bring down the condo fees since they will be sharing the cost. Mr. Meeker stated a dog park or pool is not feasible for the development of the property and townhomes on the parcel would not be overwhelming and would be less intrusive.

Ms. Greer appreciates Mr. Nkrumah's concerns though they do not necessarily factor into the request for the variance. The Planning Commission has requested the number of units be lowered from 5 to 4 and without changing or allowing a variance from the commercial requirement this parcel will likely remain vacant and under-utilized.

Chairman Scheessele asked if the structures would be double stacked 2 floor units. Mr. Meeker said they will be 3 story units, 4 of them side by side. They will not be as tall as the buildings currently in the neighborhood.

Mr. Nkrumah said there is nothing that the Villages of Potomac has within their community specifically for community use.

Ms. Greer provided closing remarks on behalf of the applicant. You have a good steward here that has worked in good faith, they have tried for 16 years without one offer on the property and that is indicative that something is wrong. Ms. Greer reviewed the unique qualities of the property that have not made it marketable as a commercial use and asked the Board to look at the cumulative facts, and the consistency of the request as it relates to the Comprehensive Plan. It is not only the applicant that will suffer but the Town as well if the property remains undeveloped.

Chairman Scheessele closed the hearing at 8:22pm and opened the Board of Zoning Appeals meeting to move into disposition of the case.

Mr. Blake suggested approval of the requested variance. He feels the developer has always worked well with the Town and does not ask for things from the Town like many developers do. Mr. Blake does feel that a community amenity is lacking from this neighborhood, and he would love to see that included in future developments within the Town.

Ms. Sampson would also like to see a small playground for the residents, but she does feel they did their due diligence to attempt to market the property and she feels it is time for a change.

Chairman Scheessele said that Town Center Mixed use by definition includes more than one use and the intent was for that to be a mix of residential and commercial. While the previous Ordinance may not have outlined a specific percentage, the intent for a commercial use was outlined.

Mr. Blake recommended is that it should not remain a mixed use since they have not been able to successfully market the property for 16 years and stated the conditions of the Ordinance for this variance request have been satisfied.

Ms. Sampson does not want to see the property remain undeveloped.

Mr. Pellegrino discussed the lack of a commercial element in the Anchor Point subdivision, which is also zoned TCMX, and wonders what the point is of a TCMX zone when it won't be enforced. Mr. Pellegrino feels approval of the variance could set a precedence for future requests of this kind and he stressed that Town Center Mixed Use requires a mixed use and what will prevent this type of request from being approved again in the future.

Mr. Blake made a motion that a resolution be prepared to approve the request for variance. Ms. Sampson seconds the motion.

Roll vote, Ms. Sampson - Aye, Mr. Blake - Aye, Mr. Pellegrino - Nay, Chairman Scheessele - Nay. Fred Sussman stated the motion failed by roll vote, 2 to 2.

Mr. Blake requested further discussion.

Mr. Pellegrino reviewed the portion of the Zoning Ordinance that discusses granting a variance. He has discussed the lack of actual unique qualities of the property that prevent the commercial use and he does not feel the application meets the requirements for a variance outlined in the Ordinance.

The Board further discussed the subject property in comparison to other TCMX properties.

Mr. Sussman said Mr. Pellegrino has made his argument on why the application does not satisfy the request for a variance. He feels that at the same time a reasonable person could look at the application and see that it does apply. The Town Zoning Administrator has also concurred with the applicant. Based upon the evidence presented and the testimony made tonight a reasonable judgment could be made to either grant or deny the variance.

Mr. Sussman feels at this point the Board has taken a vote, and any member can ask for reconsideration of that vote and ask for another vote to be taken, or an alternative motion can be made. In the absence of that, the Board would need to conclude for tonight. If there would be an approval or denial Mr. Sussman would prepare a resolution but at this point no action has been taken. The failure of the Board to approve or deny by an even vote means the application is not approved.

Mr. Pellegrino suggested having residential units with the bottom floor dedicated for commercial use or require a community element on the subject property.

Chairman Scheessele's concern is that he does not see harm. He requested the Zoning Administrator reevaluate the parcel. Mr. Sussman feels that is going beyond what is appropriate.

Mr. Harman explained that different uses will have different requirements based on the Ordinance. To require a specific use would potentially require the applicant to come back before the Board for additional variances. The variance gives the ability to mold to the scenario. The variance says something is not working and because it is not working, we will grant relief.

Mr. Blake made a motion to reconsider the prior vote. Ms. Sampson seconds the motion. All in favor by roll vote, Ms. Sampson - Aye, Mr. Blake - Aye, Mr. Pellegrino - Aye, Chairman Scheessele - Aye.

The motion to grant the variance with the number of townhomes to be no more than 4 is back on the floor for discussion and vote.

Mr. Harman explained that if the Board approves a commercial use if the applicant cannot meet the requirements, it will be denied, and the property will be unused or have to come before the Board to make the same request the applicant is making this evening. Mr. Harman explained you cannot require something they are not able to meet the requirements for. The applicant is here for the variance because it does not work as commercial. You cannot take a unit that is intended for one residential unit and make a condition that they use it for commercial space.

Mr. Pellegrino made a motion to amend the original motion and to require a non-residential component on the parcel. Mr. Blake seconds the motion. Chairman Scheessele called for a vote on the amended motion and abstained from voting. The motion passed by roll vote, Ms. Sampson - Aye, Mr. Blake - Aye, Mr. Pellegrino - Aye. Mr. Sussman reviewed the motion to approve with conditions to include no more than 4 townhome units and a non-residential use on the parcel.

The Board took a vote to have Mr. Sussman move forward with a resolution for approval. All in favor by roll vote, Ms. Sampson - Aye, Mr. Blake - Aye, Mr. Pellegrino - Aye, Chairman Scheessele - Aye.

Mr. Sussman will prepare a draft Resolution subject to the conditions discussed for the Boards approval and a meeting will be called for the Board's discussion and approval or reconsideration of the prepared Resolution.

The meeting adjourned at 9:14pm.


Andrea Brady
Town Clerk