

PHED Committee #5
July 11, 2011

MEMORANDUM

July 7, 2011

TO: Planning, Housing, and Economic Development Committee
FROM: Jeff Zyontz, Legislative Attorney
SUBJECT: City of Rockville Annexation Petition (ANX2011-00139) Reed Brothers Property

Staff Recommendation:

Deny the request to rezone the property for residential use at increased density.

Recommend to the Mayor and Council of Rockville an annexation agreement with the petitioner that requires: 1) adequate right-of-way for the Corridor Cities Transitway on the property; 2) streetscaping on the property; and 3) achieving the goals of the Shady Grove Transportation Management District.

Background

The City of Rockville is proposing to annex approximately 4.37 acres of land located at the northeastern quadrant of Fredrick Road (MD355) and King Farm Boulevard/Metro Access Road. The site is currently classified in the TOMX-2 zone in Montgomery County. The zone requires conformance with the numeric limits in the applicable Sector Plan, including floor area ratio (FAR) and the number of dwelling units allowed per acre.

The Shady Grove Sector Plan is the applicable sector plan. The Sector Plan limits the FAR to .75 for non-residential uses and does not allow any dwelling units per acre. The Plan did not recommend residential development because of the site's proximity to the County's solid waste transfer station. Residential development on the property would also cause a limit on the total number of residential units proposed by the Shady Grove Sector Plan to be exceeded. The dwelling unit limit was due to a concern for adequate school capacity.

Under the annexation proposal, the Reed Brothers property would be reclassified to the City's MXTD (Mixed-Use Transit District) zone, which allows a mix of residential and commercial uses. Development on the site is proposed to consist of 417 residential dwelling units and 5,000 square feet of retail space. The property owner proposes structured parking to accommodate the uses. The proposed FAR would be 2.3, with a residential density of 95 dwelling units per acre; both numeric limits are substantially different than allowed by County zoning.

Article 23A, Section 9(c) of the Annotated Code of Maryland provides that no municipality annexing land may, for a period of five years following annexation, place that land in a zoning classification which permits a land use substantially different from the use for the land specified in the current and duly adopted master plan, without express approval of the County Council. The Council cannot prohibit the annexation.

The Rockville City Council will conduct a public hearing on August 1, 2011. The zoning of the Reed Brothers property will be a subject of the public hearing.

County Executive Recommendation

In a June 15, 2011 letter to the Planning Board Chair, the County Executive recommended against the approval of a zoning change to allow residential uses on the Reed Brothers property:

At times we must weigh competing worthy policy goals. While increasing housing near the Shady Grove Metro Station facility seems like the right thing to do, in this case it is not. Construction of housing a mere 200+ feet from the County's only municipal solid waste transfer station and material recycling facility would be a problem.

The County would not place this facility next to such a housing development [as proposed by the annexation petition] if it were locating the facility in the first instance, and it does not make sense to allow high density housing to locate in such close proximity to it after the fact.

Planning Board Recommendation

In its recommendation to the Council, the Planning Board recommended denying the request to rezone the site to the City's MXTD zone for the following reasons:

- 1) the requested zone is substantially different from the Shady Grove Sector Plan recommendation in that the Sector Plan recommended non-residential uses only;
- 2) the proposed density is substantially higher than the density recommended by the Shady Grove Sector plan; and
- 3) residential use of the site would be imprudent given its proximity to the County's Solid Waste Transfer Station; residential uses could jeopardize or limit the operations of a facility that cannot feasibly be relocated.¹

The Planning Board also recommended the annexation agreement include right-of-dedication for the Corridor Cities Transitway, streetscaping, and achieving transportation district management goals.

The Planning Board recommendations were based on testimony received and a Planning Staff memorandum dated June 9, 2011.² The memorandum documents that the Shady Grove Sector Plan's recommendation to prohibit residential uses on the Reed Brothers property and the property adjacent to the Reed Brothers property was thoroughly considered by the Council in 2006. Planning Staff noted the following:

Specifically, the Plan states that "odors emanating from the solid Waste Transfer Station are an additional air quality concern in the Shady Grove Plan Area" (p. 109). Future residential development adjacent to the Solid Waste facility will could [sic] lead to complaints from future residents to either move or reduce functioning aspects of the existing facility.

¹ June 30, 2011 letter from Planning Board Chairman Carrier to Council President Ervin.

² Staff found this memorandum to be particularly thorough.

Shady Grove Advisory Committee Recommendations

The Advisory Committee supports residential uses and increased density of the Reed Brothers property. In their opinion, achieving the 5,500 dwelling units in the plan is unlikely, yet the reason for the Council's decision to remove the possibility of residential uses from the Reed Brothers property was the potential to exceed 5,500 units. The density requested is about equal to the density designated across King Farm Boulevard.

Petitioner's Point of View

Based on conversations with the petitioner's representative and their testimony before the Planning Board, staff would summarize their reasons for changing their zoning as follows:

- 1) Putting housing, particularly housing with a significant affordable component (20%), next to a metro station is the very definition of smart growth.
- 2) The market rate units in the proposed project will be more affordable than in other metro station areas.
- 3) The Sector Plan's goal for housing units will not be achieved, given certain events that have occurred since the adoption of the Sector Plan (e.g., residentially designated sites developed with office, Casey 6 purchased by State and County for service facilities), without expanding the area in which housing is allowed.
- 4) The number of students to be generated is minimal and will not alter the requirements for one elementary school.
- 5) There is existing and planned housing closer to the transfer station.
- 6) The proposed housing across the Metro tract would be closer to the area currently used for yard waste than their proposed project.
- 7) Air quality tests found no detectable odor.
- 8) Noise tests indicated levels generally do not exceed residential noise limits, and the level from Rockville Pike was louder than that from the Transfer Facility.
- 9) There have been no formal complaints about noise or odor from Transfer Facility operations.
- 10) The rate of growth of the Transfer Facility use does not indicate the need for all night operation anytime in the foreseeable future.
- 11) The master plan recommendation to exclude residential uses on their property was a last-minute afterthought and, in any event, the recommendations are out of date and should not be respected.

Staff Comments

If Rockville can change the zoning in 5 years, why not allow a change of zoning now?

The Council lacks the power to disapprove an annexation. The Council can only make sure that the zoning does not change for 5 years if it believes that it is in the public interest to do so. Five years after the City annexes the property, the City can zone the property in any manner. There are 3 reasons for the Council to deny this rezoning:

- 1) The 5 year waiting period may dissuade petitioners from proceeding with the annexation.

- 2) Denial gives the strongest notice possible to the Mayor and Council of Rockville that more housing near the Transfer Facility than recommended in the Shady Grove Sector Plan is a bad idea. The City of Rockville may be persuaded to not change the zoning.
- 3) A lot can happen in 5 years that may result in non-residential development of the site.

Why not support more smart growth?

The County has a number of smart growth areas; it only has one Solid Waste Transfer Facility. There is no doubt that the Transfer Facility is a critical facility that cannot be easily relocated. There is also no doubt that the County has a history of closing or moving facilities based on complaints.³ The petitioners argue that there is no current basis for complaints based on noise or odors. Even if that is true, past performance is some evidence but not a guarantee of future performance.⁴ The fact that there have been no formal complaints concerning the facility does not mean that such complaints could not come in the future.

Was the Sector Plan recommendation to prohibit housing a last minute change that was not thoroughly considered by the Council?

The Planning Board Draft Sector Plan first submitted to the Council would have allowed housing on the Reed Brothers property. Included in the testimony reviewed by the Council when it was deliberating on the Shady Grove Sector Plan was a letter from the Solid Waste Advisory Committee. That testimony noted that housing close to the Transfer Facility was not in the long term interest of facility operations. The PHED Committee discussed this issue at length and after a thorough review, reversed the Planning Board's recommendation. (This review is well documented in the Planning Staff memorandum.) The Council agreed with the Committee. This was not a last minute ill-advised change.

Is the Sector Plan recommendation for the Reed Brothers Property site outdated?

The petitioner argues that other sites in the Sector Plan are closer to the Transfer Facility than their property. Staff does not view any comparison between sites to be relevant.⁵ The sole question for the Council is whether MORE housing near the Transfer Facility is a good idea or a bad idea. Staff, the Executive, and the Planning Board believe it to be a bad idea.

The petitioner argues that air quality tests, noise monitoring results, the lack of complaints, and reduced housing potential in the remainder of the Shady Grove Sector Plan area should warrant a change in the Council's Sector Plan decision regarding the Reed Brothers property.

The Sector Plan was adopted in 2006; the location of the Reed Brothers property relative to the Transfer Facility property has not changed. The Executive disputes the claim that the housing potential in the remainder of the Shady Grove Sector Plan was reduced by recent actions. In staff's opinion, the continued operation of the Transfer Facility makes the Plan's recommendation for no housing on the Reed Brothers property still sound.

³ A composting facility was closed in Fairland. The Rockville Detention Center was moved to Clarksburg. The model airplane park has been relocated twice.

⁴ In the financial world, the well-worn phrase is "past performance is not predictive of future results."

⁵ Given the critical function of the Transfer Facility, it is easier to conclude that the housing recommendations of other sites are wrong than to expand the number of potential residents around the Facility.

Why is the possibility of complaints concerning the Solid Waste Transfer Facility at all troublesome?

The odor and noise analyses by the petitioner go to the issue of justifiable complaints concerning the Solid Waste Transfer Facility. It has been staff's experience in persuading the Council to act that complaints based upon a **perception** of harm no different from complaints based upon actual harm.

Complaints come to the Council even if the offending use was there first.⁶ Residents may complain about anything. It is the Council's role at times to respond to complaints. When a unique and critical public facility is involved, complaint avoidance is a better strategy than complaint response.⁷

Why not support more affordable housing near a Metro station?

The Shady Grove Metro Station is different than other Metro Stations; no other Metro Station has a nearby Solid Waste Transfer Facility. If the question were, "Should the County allow affordable housing near a Solid Waste Transfer Station?", the ethical question would be more obvious.

The excellent operation of the Transfer Facility to date masks potential odor and noise hazards. As a matter of environmental justice, low income populations should not disproportionately bear the burden of environmental risks.⁸ A disproportionate amount of lower income housing next to a Solid Waste Transfer station may be an environmental justice problem to the advocates of that policy.

Should the Council raise any other issue to the attention of the Mayor and Council of Rockville?

The Shady Grove Sector Plan raised concerns about necessary rights-of way, streetscaping, and achieving transportation management district goals. These concerns should be highlighted for Rockville's consideration, as recommended by the Planning Board.

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⁶ East Montgomery Village was built and occupied after the Airpark was in operation.

⁷ Other residential units allowed by the Shady Grove Sector Plan are not issues before the Council. The only issue before the Council is whether MORE residents near the Transfer Facility are desirable.

⁸ Environmental justice is a matter of federal law and policy. An essential tenet of environmental justice is to avoid, minimize, or mitigate disproportionately high and adverse human health and environmental effects, including social and economic effects, on minority populations and low-income populations. Federal agencies use the Department of Health and Human Service's definition of poverty to define low income. The fact that the Federal Government uses the poverty standards to define low income is not a bar to considering a disproportionate impact to any disadvantaged population.