

"Federation Corner" column
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New CR zoning makes master plans unreliable, too

by Jim Humphrey, Chair, MCCF Planning and Land Use Committee

Last week this column examined how the flexibility of the new mixed-use CR (Commercial-Residential) zoning undermines the ability of county government to predict the amount of added schools, roads and transit capacity needed to support new development.

In that column we looked at a hypothetical property where CR zoning allowed a building with 200,000 square feet of usable space (the equivalent of a five-story building on an acre of land), with no more than 50 percent for commercial use and no more than 75 percent for residential use. Under that zoning the new building might have 100,000 square feet each of residential and commercial space, or 150,000 square feet of residential with 50,000 square feet of retail and office use, or anything in between.

And with the residential limit expressed in square footage rather than in maximum allowed dwelling units per acre, the number of housing units created in any mixed-use CR zoned development will not be known until the project is approved by the Planning Board. There could be 100 large three-bedroom units, or 450 "micro-efficiencies" (350 to 400 square foot units). Until the project is approved, county officials will not know whether added classroom capacity will be needed to accommodate students from new three-bedroom units, or additional road and transit capacity will be needed to handle commuter trips of residents living in hundreds of new micro-efficiencies.

The new mixed-use zone category makes entire local community master plans unreliable, too, if they include properties to which CR zoning is applied. For an example of this unreliability, we can look to the master plan revision approved by the County Council earlier this year for the Gaithersburg West 'Science City' area, renamed the Great Seneca Science Corridor Master Plan.

The Great Seneca Science Corridor plan applied CR zoning to the current Public Safety Training Academy site, which is proposed to be sold by the county and developed as a town center with 2,200 new rental apartments or sale condos, most above retail in mixed-use buildings. Community master plans become more like master guesses, however, when one understands that under the flexible new CR zoning the PSTA site could yield the targeted 2,200 housing units, or only 1,000 luxury three-bedroom units, or maybe 3,000 micro-efficiencies and one-bedroom units.

When questioned about the difficulty of master planning with any reliable specificity when using the flexible new CR zoning, Former Planning Board Chair Royce Hanson replied that the amount of new housing allowed in a community could be limited by including a cap on the number of new units in the master plan for the area. The Great Seneca Science Corridor plan, for example, places a 5,700 unit cap on the amount of housing to be allowed in that area. The problem will come if and when the housing cap for the area is reached, but there are still properties with CR zoning allowing residential square footage which have not been redeveloped.

Let us imagine that our hypothetical one-acre property mentioned above is one that has not yet been developed. Remember that under the CR zoning our developer is allowed to construct a building with 200,000 square feet of space, but no more than 50 percent for commercial use (retail and office space). Could the Planning Board lawfully tell this developer that he can only construct a 100,000 square foot commercial building because the master plan cap on number of housing units has been reached? Would such a Board decision withstand judicial scrutiny or would it be deemed an "unlawful taking" in the eyes of the court--an unwarranted diminishing of the value and profitability of the property?

In his response to concerns about the unreliability of master plans using CR zoning, former Board Chair Hanson appeared to assert the enforceability of a master plan housing cap. But when civic advocates point to master plan language to support a position, we are customarily told these plans are just sets of recommendations or suggestions...only the zoning is legally enforceable. A new Maryland law, the Smart and Sustainable Growth Act of 2009, does state that local land use laws and regulations, even special exceptions, must be "consistent with" the following items in local comprehensive plans: the policies; timing of implementation of the plan; development patterns; land uses; and, densities or intensities.

It sounds like the new State law gives teeth to community master plans, providing a basis for their legal enforceability. The catch is that the law contains an exemption declaring that in Priority Funding Areas the requirement for "consistency" does not include "land uses", and "densities or intensities." The General Assembly excluded those terms in PFAs "to encourage, and not interfere with, ordinances and regulations that allow for mixed uses and bonus densities beyond those specified in a local master plan." And almost all of the developed land area in Montgomery County, nearly half of the county, is within the boundaries of a designated PFA.

The exclusion of Priority Funding Areas in the Maryland Smart and Sustainable Growth Act of 2009 was designed to direct so-called "smart growth" to areas served by public transit. But focus back on the 'Science City' area west of Gaithersburg. The County Council approved density levels appropriate for a transit center, and it is located within the county PFA boundaries. Yet it is likely the proposed transit system, the Corridor Cities Transitway, won't be built for at least 12 to 15 years. Meanwhile, the amount of housing and commercial space allowed by the master plan, or more, could be built before construction begins on the transit system used to justify all of the construction as "smart growth" transit-oriented development.

Master plans that aren't legally enforceable, that can't be relied on to predict the amount of development that will take place in an area, and which allow transit center levels of development with no transit (Clarksburg, Germantown and Gaithersburg West) are the ingredients in a recipe for fiscal disaster and ever-worsening traffic congestion.

The views expressed in this column do not necessarily reflect formal positions adopted by the Federation. To submit an 800-1000 word column for consideration, send as an email attachment to theelms518@earthlink.net