

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 894

September Term, 2010

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SUZANNE SHAYT, ET AL.

v.

CITY OF GAITHERSBURG, ET AL.

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Eyler, Deborah S.,  
Kehoe,  
Thieme, Raymond G., Jr.  
(Retired, Specially Assigned),

JJ.

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Opinion by Kehoe, J.

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Filed: January 12, 2012

Suzanne Shayt and Scott W. Henry challenge a decision of the Gaithersburg City Council granting Robert J. Wilson's rezoning and site plan applications, which are a necessary step in his efforts to redevelop five adjacent parcels owned by him in that community. After Wilson prevailed before the City Council, appellants, and others,<sup>1</sup> filed a petition for judicial review with the Circuit Court for Montgomery County. Aligned against them in the judicial review proceeding were Wilson and the City itself, who are the appellees before us. The circuit court affirmed the City Council's decision.

Appellants present four questions for our consideration, which we have consolidated and reworded:

- I. Did the City Council act within its statutory authority when it approved the rezoning and site plan applications?
- II. Did the City provide the legally required public notice of amendments to Wilson's site plan?
- III. Did the applications fail as a matter of law because the City Council failed to act upon them within 90 days of its public hearing on the applications?

We conclude that the City Council did not have the authority to grant the rezoning application. Because the rezoning and site plan applications were inextricably linked, the Council also erred in granting the site plan application. Our decision as to the first issue raised by appellants makes it unnecessary to consider their alternative arguments. We will

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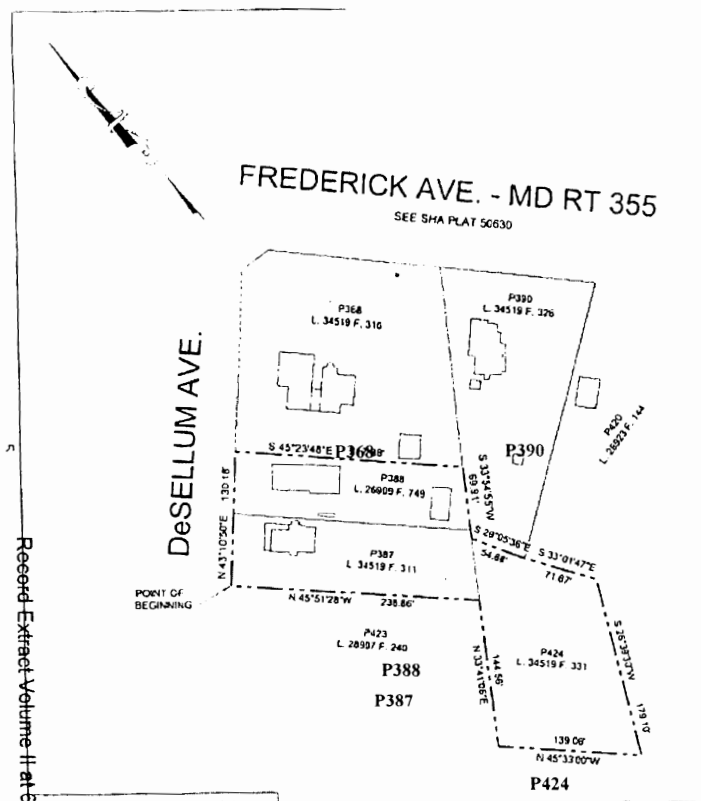
<sup>1</sup> In addition to Shayt and Henry, owners of other adjoining parcels, as well as Montgomery Preservation, Inc., opposed the Wilson application and participated in the judicial review proceedings. Only Shayt and Henry are parties to this appeal.

vacate the judgment of the circuit court and remand this case to it with instructions for it to reverse the decision of the City Council.

### BACKGROUND

Wilson owns five contiguous parcels at or near the intersection of Frederick Avenue (Maryland Route 355) and DeSellum Avenue in Gaithersburg. The parcels are depicted below, which is a portion of the Maryland Department of Assessments and Taxation Tax Map for the

area.



In the aggregate, the five parcels total about 2.71 acres. Parcel 368, at the intersection of Frederick and DeSillum Avenues, is improved by a historically significant house. Currently, Parcels 368 and 390 are zoned as CD (Corridor Development); Parcels 387, 388 and 424 are zoned as R-90 (Medium Density Residential). Wilson proposed to relocate the historically significant structure and build two office buildings on what are currently the Frederick Avenue lots. The parking areas, storm water management facility, and forest conservation area required for this development would be located on what are now the residentially-zoned properties. Therefore, Wilson requested that the three residential parcels be rezoned to the CD classification. The City's zoning regulations<sup>2</sup> provide that development on CD classified properties is permitted only after site plan review and approval by the City Council. Wilson's application requested both rezoning and site plan approval.

For the purposes of our analysis, it is not necessary for us to provide a detailed description of Wilson's application or its progress through the City's multi-layered review and public hearing process. On October 5, 2009, the City Council enacted Ordinance No. O-14-09, approving the rezoning application and an amended version of the site plan application. The record before the City Council included a report from the City's planning department concluding that the application complied with requirements of the City's zoning ordinance and its Master Plan. The ordinance contains findings to that effect. As we have

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<sup>2</sup> The City's zoning regulations are found in Chapter 24 of the City Code. We will refer to Chapter 24 as the "Zoning Ordinance."

mentioned, appellants filed a petition for judicial review with the circuit court. On May 3, 2010, the court affirmed the Council's decision.

In order to place the parties' contentions in context, further information regarding Frederick Avenue, and the City's land use plans and policies pertaining to it, is necessary. Frederick Avenue (also known as Maryland Route 355) is a busy highway that runs through the heart of Gaithersburg. The City's 1997 Master Plan<sup>3</sup> described the Frederick Avenue Corridor as a "Special Urban Design Corridor requiring additional study and a new guiding plan" to "improve the aesthetic quality. . . , to provide a safer pedestrian environment, to identify and preserve historic resources . . . , and to ensure continued economic revitalization." The Master Plan suggested that, in order to achieve these goals, the City should consider rezoning the commercial properties within the Frederick Avenue corridor to the City's existing MXD classification, which would permit mixed use development.

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<sup>3</sup> MD. ANN. CODE Art. 66B, § 3.05 (1957, 2003 Repl. Vol.), requires municipalities exercising planning and zoning authority to adopt, and thereafter to periodically review, a "plan" for the jurisdiction. The plan consists of "the policies, statements, goals, and interrelated plans for private and public land use, transportation, and community facilities documented in texts and maps which constitute the guide for the area's future development." Article 66B § 1.00(h) can be called a "general plan, master plan, comprehensive plan or community plan." *Id.* See also *Mayor & Council of Rockville v. Rylyns*, 372 Md. 514, 556 (2002).

The City commissioned the study recommended in the 1997 Master Plan and, in 2000, it adopted the “Frederick Avenue Corridor Land Use Plan” (the “Corridor Plan” or the “Plan”) as an element<sup>4</sup> of the Master Plan. The Corridor Plan noted that:

Currently, Frederick Avenue is struggling with many of the same issues being confronted by transportation corridors throughout America. Generally, these issues stem from uncontrolled and unplanned development as urban populations grow and spread beyond their metropolitan centers. As a result, Frederick Ave. exhibits a cluttered and unpredictable building pattern, comprised of a wide range of land uses, including residential, commercial, office, service, hotel, church, civic uses, parking lots and public open space. Irregular building setbacks create a disorderly street edge. Signage and lighting standards are inconsistent, as are streetscapes and roadway standards. Pedestrian and bicycle traffic are not integrated into the overall street design, creating numerous difficulties for those using the Corridor.

The Corridor Plan defined the Corridor in the text portion of the Plan as: a four-mile portion of state highway, Maryland Route 355, which extends the entire life of Frederick Avenue through the City from Shady Grove Road on the south, to Game Preserve Road on the north. **The Corridor, except in very specific locations, extends one parcel deep on either side of the Frederick Avenue right-of-way. . . .**

(Emphasis added.)

The Corridor Plan also contained maps depicting the boundaries of the Corridor. Consistent with the textual definition of the Corridor, the lots fronting on Frederick Avenue (Parcels 368 and 390) were included within the boundaries of the Corridor, as depicted on the map. Parcels 387, 388, and 424 were not.

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<sup>4</sup> See Article 66B § 3.05(a)(6)(i) (A plan “may include any additional elements which, in the judgment of the planning commission, will further advance the purposes of the plan.”)

The Corridor Plan departed from the recommendations in the 1997 Master Plan in one significant way. The Corridor Plan recommended that the City amend its zoning ordinance to add an additional floating zone classification, the CD (Corridor Development) Zone, for use in the Corridor in lieu of the MDX zone. The Plan also recommended certain properties within the Corridor for immediate reclassification to the new CD zoning district. These individual parcels were shaded on the maps contained in the Plan. Both Parcels 368 and 390 were shaded. Finally, the Corridor Plan contained text analyses of certain sub-areas within the Corridor. We will discuss this portion of the Corridor Plan later in this opinion.

In 2000, the City added specific Corridor District regulations to its zoning ordinance. These amendments provided that the CD District was a floating zone, to be established on a particular property only upon findings by the City Council that the CD classification and the specific development proposal was compatible with the existing and planned land uses on surrounding properties. Zoning Ordinance § 24-10A(2). The Zoning Ordinance provides that properties can be reclassified to the CD district by one of two methods; first, as part of a comprehensive rezoning, and, second, by local map amendment. *Id.* § 24-10A(4). Under either scenario, any development proposal is subject to Planning Commission and City Council review and approval after public notice and hearing. *See Id.* § 24-160G.6. Particularly relevant to this appeal is § 24-160G.3(a) which states:

**Sec. 24-160G.3. - Minimum location requirements.**

(a) No land shall be classified in the Corridor Development Zone unless the land is located within an area so designated on an approved and adopted land use master plan.

In 2003, as part of a comprehensive rezoning process, the City assigned the CD classification to Parcels 368 and 390. (At times in the opinion, we will refer to these properties as the “CD Parcels.”) The 2003 comprehensive rezoning did not change the classification of Parcels 387, 388 and 424 (the “R-90 Parcels”).

### STANDARD OF REVIEW

When an appellate court reviews a decision of an administrative agency, it “look[s] through” the circuit court’s decision and evaluates the decision of the agency itself. *People’s Counsel v. Loyola*, 406 Md. 54, 66 (2008) (quoting *People’s Council v. Surina*, 400 Md. 662, 681 (2007)).

An individual,<sup>5</sup> as opposed to comprehensive, rezoning is “a quasi-judicial process initiated by private interests leading to a legislative decision.” *Richmarr v. Holly Hills*, 117 Md. App. 607, 636 (1997). Judicial review is focused upon the quasi-judicial part of the process and our approach was summarized for this Court by Judge Kenney in *Stover v. Prince George’s County*, 132 Md. App. 373, 381 (2000) (internal quotation marks and citations omitted) (emphasis in original):

Judicial review of administrative agency action is narrow. The court’s task on review is *not* to substitute its judgment for the expertise of those persons who constitute the administrative agency.

Rather, to the extent the issues on appeal turn on the correctness of an agency’s findings of fact, such findings must be reviewed under the substantial

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<sup>5</sup> Traditionally, rezoning applications for individual lots were referred to as “spot” or “piecemeal” rezonings. The City uses the term “local map amendment” in its Zoning Ordinance. *See, e. g.*, § 24-10A.(4). Wilson’s application was for a local map amendment.

evidence test. The reviewing court's task is to determine whether there was substantial evidence before the administrative agency on the record as a whole to support its conclusions. The court cannot substitute its judgment for that of the agency, but instead must exercise a restrained and disciplined judicial judgment so as not to interfere with the agency's factual conclusions.

The reviewing court's analysis has three parts:

1. First, the reviewing court must determine whether the agency recognized and applied the correct principles of law governing the case. The reviewing court is not constrained to affirm the agency where its order is premised solely upon an erroneous conclusion of law.
2. Once it is determined that the agency did not err in its determination or interpretation of the applicable law, the reviewing court next examines the agency's factual findings to determine if they are supported by substantial evidence, i.e., by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. At this juncture, . . . it is the agency's province to resolve conflicting evidence, and, where inconsistent inferences can be drawn from the same evidence, it is for the agency to draw the inference.
3. Finally, the reviewing court must examine how the agency applied the law to the facts. This, of course, is a judgmental process involving a mixed question of law and fact, and great deference must be accorded to the agency. The test of appellate review of this function is a reasoning mind could reasonably have reached the conclusion reached by the [agency], consistent with a proper application of the [controlling legal principles].

Floating zones, such as the CD classification at issue in this case, "tend to be plan-implementation mechanisms that zoning decision-makers determine best carry out the function of a plan recommendation, and where placing the zone on the subject property is compatible with the surrounding area and the legislatively-declared prerequisites for imposition of the zone." *Richmarr v. Holly Hills*, 117 Md. App. 607, 637 (1997). Section 24-10A(2) requires the City Council to consider the issue of compatibility in floating zone

applications and provides that such an application can be granted only if the Council finds that the proposed development “will be compatible and harmonious with existing and planned uses in the surrounding area.”

The underlying premise of appellants’ position is that the office complex proposed by the Wilsons is not compatible with the surrounding residential neighborhood and that the City Council’s conclusions to the contrary were incorrect. However, the focus of their challenge to the City Council’s decision is legal rather than factual. They assert, in effect, that the Council’s decision was based on “an erroneous conclusion of law,” because the Council misinterpreted provisions of the Zoning Ordinance and the Corridor Plan. As a general rule, courts afford some degree of deference to an agency’s interpretations of ordinances and regulations that the agency itself has promulgated or administers. *Loyola*, 406 Md. at 67 (citing *Marzullo v. Kahl*, 366 Md. 158, 172 (2001)). However, the “interpretation of a statute is a judicial function,” *Manian v. County Council*, 171 Md. App. 38, 47 (2006), and a court will not defer to an agency’s statutory interpretation when it is clearly at variance with the plain meaning of the law itself. *See Christopher v. Dept. of Health*, 381 Md. 188, 198 (2004) (“Determining whether an agency’s ‘conclusions of law’ are correct is always, on judicial review, the court’s prerogative, although we ordinarily respect the agency’s expertise and give weight to its interpretation of a statute that it administers.”) (citations omitted); *see also Inlet Associates v. Assateague House*, 313 Md. 413, 432-433 (1988).

## ANALYSIS

### I.

In Maryland, master plans have traditionally been considered as guides for future land use decisions and their provisions are advisory, not mandatory. Under certain circumstances, local governments are free to make compliance with plan provisions mandatory and, when they do so, compliance is required. The variables are the specific language of the zoning ordinance and plan and the nature of the administrative land use decision. *Richmarr Holly Hills, Inc. v. American PCS*, 117 Md. App. 607, 635-41 (1997). Local governments can make compliance with master plans a prerequisite for subdivision approvals. *Pomeranc-Burke, LLC v. Wicomico Env'tl. Trust, Ltd.*, 197 Md. App. 714, 750 (2011) (citing, among other cases, *Board of County Comm'rs v. Gaster*, 285 Md. 233, 246-47 (1979)). Additionally, by a revision to Article 66B §1.02 effective July 1, 2009, a local government may make consistency with a master plan a condition for the grant of a special exception.

In contrast, in an individual rezoning application based upon the change/mistake rule, the recommendations of a plan as to the appropriate zoning classification of a particular property “standing alone, can never satisfy the change/mistake requirement . . . . [and it] serves merely as a guide or non-binding piece of evidence in the applicant’s case<sup>1</sup>.” *Richmarr*, 117 Md. App. at 637 (footnote omitted). Whether the provisions of a master plan are mandatory or advisory in a floating zone application, such as the one before us, depends

in large part upon the language of the zoning ordinance. As Judge Harrell explained for this Court in *Richmarr*,

Floating zones tend to be plan-implementation mechanisms that zoning decision-makers determine best carry-out the function of a plan recommendation, and where placing the zone on the subject property is compatible with the surrounding area and the legislatively-declared prerequisites for imposition of the zone. Thus, although a master plan recommendation may assume a weightier role in floating zone cases, it still does not assume the legal weight of being dispositive of an application, **unless the creating or enabling statute, ordinance, or regulation makes conformance to its recommendation mandatory.**

*Id.* (emphasis added).

We look to the language of the Zoning Ordinance to determine whether compliance with the Corridor Plan is mandatory in this case. In doing so, we apply the same rules of construction to zoning ordinances as we do to other statutes. Specifically,

The primary goal of statutory construction is to ascertain and effectuate the intent of the Legislature. In ascertaining legislative intent, the words of the statute are to be given their ordinary meaning. Furthermore, courts are to construe statutes as a whole, considering all provisions together and, to the extent possible, reconciling and harmonizing provisions.

*Manian*, 171 Md. App. at 48 (internal citations omitted).

Section 24-160G.3(a) states that: no parcel “shall be classified in the Corridor Development Zone unless the land is located within an area so designated on an approved and adopted corridor development master plan.” In the Zoning Ordinance, “the words ‘shall’ or ‘must’ are mandatory and not optional.” Section 24-1.1. Clearly, the Corridor Plan

constitutes “an approved and adopted corridor development master plan.” We hold that the language of this section of the Zoning Ordinance is mandatory and that compliance with § 24-160G.3(a) is prerequisite for rezoning a property to CD Zone. Because § 24-160G.3(a), in effect, incorporates provisions of the Corridor Plan by reference, we will examine its provisions according to the same standards that we use for statutes. We now turn to the specific contentions of the parties.

In their brief, appellants assert (emphasis in original; footnote omitted):

The City tried to rezone the Residential Parcels through the application of a “floating zone,” which provides a statutory mechanism for rezoning an isolated parcel or parcels. The CD Zone is statutorily identified as a floating zone.<sup>[1]</sup> However, the Gaithersburg City Code expressly prohibits property from even being considered for parcel-by-parcel rezoning to the CD Zone unless the applicable master plan specifically designates that property for rezoning to the CD Zone.

In support of the latter proposition, appellants point to § 24-160G.3(a) of the Zoning Ordinance, which states that no parcel “shall be classified in the Corridor Development Zone unless the land is located within an area so designated on an approved and adopted corridor development master plan.” They continue (emphasis in original):

Even a cursory review of the *Corridor Master Plan* shows it does not recommend the Residential Parcels for the CD Zone. First, the Residential Parcels are not designated within the Corridor Master Land maps for consideration. The *Corridor Master Plan* expressly states that “any properties that are not specifically addressed in the text, maps and charts herein will retain their 1997 land-use designations.” The Residential Parcels are neither designated in the maps nor specifically called out in the text.

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The maps contained in the *Corridor Master Plan* clearly delineate the boundaries of the corridor. The *Corridor Master Plan* expressly states that the corridor extends “one parcel deep on either side of the Frederick Avenue right-of-way,” except in very “specific locations.” . . . The Residential Parcels do not front along South Frederick Avenue, are not included within the map designations, and are not called out in the text for rezoning to the CD Zone.

In response, appellees argue that the Corridor Plan:

contemplated inclusion of additional adjacent properties in the corridor development zone. The Plan specifically provides that properties *along*, not just those in, the corridor, are eligible for rezoning to the CD zoning classification. Similarly, Section 24-160G.1 uses this same term, providing that it is the purpose of the CD zone to allow for redevelopment of underutilized properties *along* the corridor. As pointed out by [the circuit court in its] Memorandum Opinion and Order, it is significant to the interpretation of the language in the Corridor Plan that the word *along* is used in these provisions, which is defined by Blacks Law Dictionary (4th Ed.) as “by, on, up to, or over, according to the subject matter and context” and that it does not necessarily mean touching at all points.

In addition, the Frederick Avenue Corridor Plan, in addressing the Wilson properties, encourages parcel assemblage and redevelopment under the CD zone. This language demonstrates the intent of the Frederick Corridor Plan to include and expand the Corridor in order to accommodate the flexibility of redevelopment of parcels and to allow the assemblage of parcels in order to prevent redevelopment of underutilized parcels, like the Wilson properties.

(Emphasis in original.)

The City also points to its past practices to demonstrate that it has consistently interpreted and applied § 24-160G.3(a). Specifically, it refers us to its 2007 decision to grant the rezoning application of Fairfield Broadstone, LP to the CD classification. Wilson presents substantially the same arguments in his brief.

We conclude that the provisions of the Corridor Plan are intended to restrict the CD zoning classification to properties that are located within the Frederick Avenue Corridor as it was defined in the text of, and depicted on the maps of, the Plan itself. As a result, the R-90 Parcels are not eligible for reclassification to the CD zone under the current version of the Corridor Plan.

The primary basis for our conclusion is the pertinent map in the Corridor Plan, i.e., the one that depicts the boundary of the Corridor in the vicinity of the Wilson properties. This map shows the CD Parcels, which front on Frederick Avenue, as lying within the Corridor, and the R-90 Properties, which do not abut the highway, as being outside of it. This is consistent with the text of the Corridor Plan which states that “[t]he Corridor, except in very specific locations, extends one parcel deep on either side of the Frederick Avenue right-of-way ....”<sup>6</sup>

The arguments presented by appellees do not persuade us that our interpretation of the Corridor Plan is incorrect. Appellees assert that the Plan “specifically provides that properties *along*, not just those in, the corridor, are eligible for rezoning to the CD zoning classification.” This argument is based on the following introductory passage from the Corridor Plan:

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<sup>6</sup> An example of a “very specific location” in which the Corridor Plan extends the Corridor beyond the parcels immediately abutting Frederick Avenue is Sub-Area J, which includes two parcels that do not front on Frederick Avenue but abut Delmar Street. The text narrative for Sub-Area J states that “new retail liner buildings are proposed along Dalamar Street.”

Any properties which are not specifically addressed in the text, maps, and charts herein will retain their 1997 land use designations . . . . All parcels within the Frederick Avenue Corridor, regardless of whether or not there is a change in land use designation or zoning recommendation, must adhere to the *Frederick Avenue Corridor Plan* design code upon adoption of this special study. In addition, properties along the Corridor that are not undergoing a change in land use are eligible for subsequent comprehensive rezoning to the new CD Zone. Owners of properties not comprehensively rezoned are encouraged to apply for rezoning to the CD Zone in order to meet the goals and objectives of the Frederick Avenue Corridor Master Plan.

Assuming, for purposes of analysis, that the reference to “properties along the Corridor” means “properties adjacent to the Corridor as it was mapped in the Corridor Plan,” this passage does not assist appellee. The plain language of the Plan makes it clear that the “properties along the Corridor” are eligible for rezoning through the *comprehensive* zoning process. The case before us involves a local map amendment, not a comprehensive rezoning. *See Montgomery County v. Woodward & Lothrop*, 280 Md. 686, 702 (1977) (A “comprehensive zoning plan is one which applies to or covers a substantial or wide geographical area.”).

The final sentence in the passage, “[o]wners of properties not comprehensively rezoned are encouraged to apply for rezoning to the CD Zone . . . .” can refer only to the majority of the properties within the Corridor that were not identified for immediate reclassification in the Corridor Plan. To construe this passage otherwise would yield the absurd result that the Corridor Plan recommends rezoning to the CD classification any property, whether or not it is in the vicinity of the Frederick Avenue Corridor, if doing so

meets the goals and objectives of the Frederick Avenue Corridor Master Plan. Such an interpretation would render the restrictive provision in § 24-160G.3(a) meaningless.

Appellees also point to the portion of the Corridor Plan specifically addressing the CD parcels. The Corridor Plan refers to the vicinity of Wilson’s property as Sub-Area H. We set that discussion out in full:

**FAIRGROUNDS COMMERCIAL DISTRICT**

\* \* \* \*

**H** This small 38,000 square-foot parcel, owned by Robert Wilson, currently has a historic house on the site. There is, however, sufficient property along Frederick Avenue to intensify development on this parcel. A new structure could be developed into live-work units. . . . The current Residential Buffer zoning is restrictive as to how the parcel could redevelop. Any redevelopment will have to adhere to the Frederick Avenue Corridor Plan. Access to the property will be from DeSillum Avenue, and not Frederick Avenue. This corner is very visible and careful planning will need to take place in order to assure compatibility with the surrounding neighborhood and the historic resources. Development is recommended to be in keeping with the residential character of this portion of the Corridor. Offices, light retail or live-work units in low rise buildings are examples of what is envisioned. Any new development on this parcel should be sensitive to the existing historic house and its setting. A maximum of 5,000 square feet is recommended for the Wilson property on the corner of DeSillum Avenue and Frederick Avenue.... Parcel assemblage and redevelopment of the later lots should be considered. The corresponding zoning category would be the CD zone.

**Land-use and zoning recommendations[:]**

- Adopt commercial-office-residential land-use designation<sup>[7]</sup>
- Rezone to CD.

Appellees suggest that this language:

encourages parcel assemblage and redevelopment under the CD zone. This language demonstrates the intent of the Corridor Plan to include and expand the Corridor in order to accommodate the flexibility of redevelopment of parcels and to allow the assemblage of parcels in order to prevent redevelopment of underutilized parcels, like the Wilson properties.

The relevant language of the Corridor Plan, considered in context, does not support this interpretation.

At the time the Plan was prepared, Wilson owned only Parcel 368, the lot on the corner of DeSillum Avenue and Frederick Avenue. The Plan discussed the significance of this parcel and notes that its then-existing residential zoning inhibited redevelopment. After discussing the historic structure on the property, the Plan continues:

A maximum of 5000 square feet is recommended for the Wilson property on the corner of DeSillum Avenue and Frederick Avenue. Preservation and reuse of the Fulks house (P420) and former Salvation Army house, with potential redevelopment of the existing brick house, is also recommended. Parcel assemblage and redevelopment of the later lots should be considered. The corresponding zoning category would be the CD zone.

As far as we can discern from the record, all of the properties specifically identified in this passage abut Frederick Avenue and all are within the mapped Corridor. The Plan certainly supports assemblage of some or all of these properties and further recommends CD zoning for lots resulting from that process in order to foster the type of redevelopment the

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<sup>7</sup> A chart in the Corridor Plan indicates that the “commercial-office-residential” designation includes the CD zoning classification.

Plan seeks for the Frederick Avenue Corridor. However, the above-quoted language simply does not support the conclusion that the Plan was intended to recommend CD zoning for properties outside of the Corridor (as described and mapped in the Plan) especially in light of the Plan’s earlier admonition that the Corridor “except in very specific locations, extends one parcel deep on either side of the Frederick Avenue right-of-way ....” Even if the Corridor Plan could be interpreted as recognizing the possibility of CD rezonings at some future time outside of the Corridor (and such an interpretation would be generous), the Plan is quite specific as to the Corridor’s current boundaries and it is clear that the R-90 Parcels lie without the pale. Having concluded that the R-90 Parcels are not in the Corridor, we turn to the dispositive issue—whether Wilson’s application satisfied the requirements of the Zoning Ordinance.

Section 24-160G.3(a) requires that, to be eligible for CD zoning, a property “must be located **within** an area so **designated** on an approved and adopted land use master plan.” (Emphasis added.) Neither “within” nor “designate” is defined in BLACK’S LAW DICTIONARY (8th Ed.) When used as a preposition (as it is in § 24-160G.3(a)) “within” is defined as “a function word to indicate enclosure or containment.” [www.merriam-webster.com/dictionary/within](http://www.merriam-webster.com/dictionary/within). When used as a verb (as it is in the statute) “designate” means “to indicate and set apart for a specific purpose, office, or duty” or “to point out the location of.” *Id.* Even with deference to the City Council, we cannot conclude that its

interpretation of the Corridor Plan is correct, for to do so would render the restrictions imposed upon the Council by § 24-160G.3(a) virtually meaningless.<sup>8</sup>

In conclusion, appellees' contentions are unpersuasive in light of the language of the Zoning Ordinance and the text and maps of the Corridor Plan. In granting Wilson's rezoning application, the City Council disregarded the express mandatory language of § 24-160G.3(a) and the Corridor Plan, and erred as a matter of law.<sup>9</sup>

## II.

The Council's error in granting Wilson's rezoning application necessarily dictates that it erred also in granting the site plan application. Neither Wilson nor the City suggests to the contrary. Our decision as to the legality of the approval makes it unnecessary for us to

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<sup>8</sup> As their final argument, appellees cite the City Council's 2007 decision to grant the rezoning application of Fairfield Broadstone, LP to the CD classification as being consistent with the interpretation of § 24-160G.3(a) that they urge us to accept in this case. (Wilson's brief refers to a 2007 application for a project titled "Fairfield at West Deer Park." We assume both parties are referring to the same application.) This argument is unpersuasive. First, there is nothing in the record about the 2007 decision, and we are unable to tell whether the parcel subject to that application was located within, or outside of, the Corridor.

But even assuming that the Fairfield Broadstone parcel lay outside the Corridor, the City's decision to grant that application does not change the plain meaning and legal effect of the Zoning Ordinance. *See Inlet Associates*, 313 Md. at 432-433 ("[N]o custom, however venerable, can nullify the plain requirements of a statute or charter provision or otherwise confer power on a legislative body. In other words, the unvarying construction of a charter provision by those charged with its enforcement over a long period of time cannot override the plain meaning of an unambiguous provision or extend it beyond its clear import." (citations omitted)).

<sup>9</sup> At oral argument, counsel for the City advised this panel that the City was in the process of amending its current Master Plan to provide that properties adjacent to the Corridor are eligible for CD zoning. However, this amendment is not yet effective.

consider appellants' other arguments, which are directed at perceived procedural flaws in the City's processing of the application.

**THE JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY IS REVERSED AND THIS CASE IS REMANDED TO IT WITH INSTRUCTIONS TO REVERSE THE DECISION OF THE GAITHERSBURG CITY COUNCIL.**

**APPELLEES TO PAY COSTS.**