

SAMS, LARKIN, HUFF & BALLI

A LIMITED LIABILITY PARTNERSHIP

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November 13, 2017

VIA EMAIL:

Mr. Ken Suddreth, Director
Community Development Department
City of Smyrna
3180 Atlanta Road
Smyrna, GA 30080

Re: Application of Neighborhood Commercial, LLC to Rezone a 1.188 Acre Tract from R-15 to RAD – Conditional - (No. Z-17-013)

Dear Ken:

You will recall that this firm represents Neighborhood Commercial, LLC (“Applicant”) concerning the above-captioned Application for Rezoning. The Application is scheduled to be heard and considered by the Mayor and City Council next week on Monday, November 20, 2017. However, as you and I have discussed, the Mayor and City Council are desirous that the Application be tabled until such time as the Ward 3 Council Seat is filled as a result of the run-off election which is scheduled for December 5, 2017. In that regard, the Applicant consents to and this letter will confirm that the Application is being tabled and that the City’s consideration of same will be held in abeyance until the meeting of the Mayor and City Council on December 18, 2017.

In addition to the foregoing, you have asked that I respond to the contents of a letter, dated October 9, 2017 which was presented to the Planning & Zoning Board (“P&Z”) contemporaneously with the P&Z Hearing regarding the Application. The letter was submitted on behalf of an individual resident who lives in Ward 3 and “. . . on behalf of all other persons similarly situated” (hereinafter “Residents”).

FACTS

The Subject Property is located in an area under the City’s Future Land Use Map which is denominated as Moderate Density Residential which allows maximum densities up to 4.5 units per acre. The Applicant’s proposed density for the above-captioned proposal, at 3.39 units per acre, is significantly lower, meaning that an amendment to the Future Land Use Map is not necessary concurrent with an approval of the Rezoning. However, to be clear, every RAD Conditional zoning which was previously approved by the Smyrna Mayor and City Council was

SAMS, LARKIN, HUFF & BALLI

A LIMITED LIABILITY PARTNERSHIP

VIA EMAIL:

Mr. Ken Suddreth, Director
Community Development Department
City of Smyrna
November 13, 2017
Page 2

done so based upon stipulations authored by the City's Professional Staff, sometimes in concert with an applicant, all of which form the basis of a conditional rezoning of those properties.

The Applicant's proposal is to rezone the subject property from R-15 to RAD Conditional to provide for the development of the subject property and for the construction of four (4) custom, quality-made, single-family detached homes at price points ranging from approximately Six-Hundred Thousand Dollars to Seven-Hundred Twenty-Thousand Dollars (\$600,000.00 - \$720,000.00) and greater. The size of the homes will range from a minimum of 3,000 sq. ft. The architectural style and composition of the homes are "four-sided" with the architecture of the home located on Lot 1 (contiguous to Spring Street) "presenting" and architecturally appearing to be oriented to Spring Street as shown on the previously submitted architectural renderings/elevations.

The Subject Property is bounded on the north by a three (3) lot subdivision fronting on Walker Street which was zoned RAD Conditional in 2015 (No. Z15-011); on the east by a four (4) lot subdivision zoned RAD Conditional in 2013 (No. Z13-008); on the south by Spring Street and a three (3) lot vertically-oriented subdivision which was zoned to RAD Conditional in 2005 (No. Z05-027); and, on the west by other vertically-oriented residential development situated at the intersection of Spring Street and Walker Court.

With respect to the RAD-Conditional rezoning on the south side of Spring Street, one of the Residents, most notably the author of the October 9, 2017 letter ("Letter") stated his support for that vertically-oriented RAD Conditional rezoning as a part of the public hearing before the Mayor and City Council as contained in the following quotation:

"Mayor Bacon recognized Mr. Lemuel Ward, residing at 1496 Spring Street and Mr. Ward stated that he would like the Applicant to stipulate to a requirement for four-sided architectural features so that a side façade of a house is not displayed along Spring Street. Mr. Ward stated that he would also like for the Applicant to agree to a stipulation for the curb cut on Spring Street to only serve three (3) of the proposed houses rather than connect all the way to Bernard Lane. Mr. Ward expressed the view that the density of the proposed development is acceptable."

The above paragraph is a verbatim quotation from the public hearing Minutes approving the vertically-oriented, private street, three (3) home subdivision by one of the very same Residents who have now submitted the Letter in opposition to a virtually identical set of developmental circumstances in the Applicant's instant Application for Rezoning.

SAMS, LARKIN, HUFF & BALLI

A LIMITED LIABILITY PARTNERSHIP

VIA EMAIL:

Mr. Ken Suddreth, Director
Community Development Department
City of Smyrna
November 13, 2017
Page 3

On October 5, 2017 the City's Professional Staff, consisting of Community Development Director Ken Suddreth and Senior Planner Russell Martin, AICP authored and submitted the Staff's Community Development Department Memorandum ("Memo") wherein Staff recommended approval of the rezoning from R-15 to RAD Conditional for the four (4) single-family residences at a density of 3.39 units per acre with conditions. Staff concluded that:

"The rezoning proposal will permit a use that is suitable in view of the use and development of adjacent and nearby property. The proposed single-family residences will be located in the middle of an existing single-family neighborhood".

Of the eight (8) separate single-family residential RAD Conditional in-fill developments analyzed by Staff in the Memo, the Subject Property and proposed development had the lowest density and the largest sized lots of all but one RAD Conditional Subdivision analyzed by Staff. Again, each of the subdivisions analyzed by Staff all consisted of in-fill developments such as the one proposed by the Applicant.

CITATION OF LEGAL AUTHORITY IN SUPPORT OF APPLICANT AND IN OPPOSITION TO THE RESIDENTS' LETTER.

The Residents argue that approval of the Application will result in an illegal rezoning and an invalid site plan. As such, the Residents argue that they do not need to show special damages but simply an interest in preventing the Applicant from the illegal use or development of its property. In that regard, the Applicant concedes that the cited authority Rock v. Head, 254 Ga. App. 382 (2002), stands for the proposition that owners may seek to prevent neighbors from using their property in violation of existing zoning without showing special damages. However, this pre-supposes that a grant of the Application and that the resulting plan approval would be illegal. It is well settled, however, that although a challenge generally may be ripe prior to actual development (see Hitch v. Vaserhelyi, 285 Ga. 627 (2009), it is important to note that an appeal to an administrative decision provides an adequate and preemptive remedy to the extent that the City later approves a site plan "which does not comply with the Zoning Code".

If the Mayor and City Council are to approve the Application for Rezoning with numerous conditions proposed by the City Staff, it would be doing so by allowing said lots to be built on the proposed private drive with site-specific setbacks and other necessary concurrent variances and conditions (such as a waiver of public street requirements as to width) required in

SAMS, LARKIN, HUFF & BALLI

A LIMITED LIABILITY PARTNERSHIP

VIA EMAIL:

Mr. Ken Suddreth, Director
Community Development Department
City of Smyrna
November 13, 2017
Page 4

order to accommodate the approved plan. This is not an instance of ignoring the Ordinance but, rather, simply a conditional zoning which has been found by this State's Appellate Courts to be valid and well within the Mayor's and the City Council's discretion as the legislative body of the City. In fact, conditional zoning is not only permissible but, in the Georgia Supreme Court's words, "[g]enerally, Courts declare conditional zoning to be valid and in doing so are following precedent in this State as early as 1971. See Ervin Co. v. Brown, 228 Ga. 14 (1971).

The Residents argue for a result which eliminates the ability to develop property which is located off of a private street in any scenario while the authority to conditionally zone is specifically provided for in such situations such as this where a private street is appropriate to achieve the best use of the land. In the instant case, existing lots contain minimal street frontage but are relatively large due to their depth. As such, the proposed conditions may be imposed, pursuant to the City's police power, to ensure that traffic flow, access for private and public safety use and site development are effectuated for the protection and benefit of neighbors and in order to ameliorate the effects of the rezoning change. In that regard, the "concerns" raised by the Residents, albeit technical in nature with a faint hint of concern for potential negative impacts, will be eliminated by the imposed conditions.

Note that, while it may be argued that the Residents possess the requisite legal standing, to challenge the approval of the Application, they must show more than unproven mere inconvenience and speculative damages resulting from the City's "illegal" approval. At best, the damages of the Residents (if any) are common to all similarly situated owners and are simply the "condition incident to the urban living" type of complaints routinely held insufficient by the State's Appellate Courts.

The City of Smyrna is empowered by law to perform the planning and zoning functions of the City. Ga. Const. Art. IX, §§ 2, ¶ IV. The adoption of zoning plans and the exercise of zoning power is a legislative act belonging to the governing authority which can not be delegated. Berkelbaugh v. Green, 248 Ga./150 (1988). The governing authority under this provision strictly refers to such City or County Board as has the authority to exercise general and not limited powers. Button Gwinnett Landfill v. Gwinnett County, 256 Ga. 818 (1987).

Conditional zoning is permissible in the City of Smyrna and within the State of Georgia and such conditions will be upheld when they are imposed pursuant to the police power for the protection and benefit of the neighbors and to ameliorate the effects of the zoning change. Warshaw v. The City of Atlanta, 250 Ga. 535 (1983). Generally, Courts declare conditional zoning to be valid unless the circumstances and conditions constitute contract zoning which would be declared invalid. Therefore, when property is conditionally rezoned, the conditions

SAMS, LARKIN, HUFF & BALLI

A LIMITED LIABILITY PARTNERSHIP

VIA EMAIL:

Mr. Ken Suddreth, Director
Community Development Department
City of Smyrna
November 13, 2017
Page 5

include all of those stipulations entered into the official and public Minutes of the governing authority. Brian Realty Corp. v. DeKalb County, 229 Ga. App. 185 (1997). The determination of the validity of the conditions vary depending upon who challenges them. Cross v. Hall County, 238 Ga. 709, 712 (1977). However, where the conditional zoning is otherwise valid, the conditions imposed for the protection or benefit of neighbors can not be attacked successfully by those neighbors. (Id.). When the zoning change itself is valid as to neighbors, the conditions attached thereto do not invalidate either the zoning change or the conditions.

Mayor and City Council approval subject to the Ordinance also includes a power to conditionally zone and rezone; and, in so doing, grants conditions and concurrent variances which the Mayor and City Council see fit to address and lessen potential concerns. Simply put, if the proposed plan does not provide for the otherwise necessary public road frontage, as narrowly argued by the Residents, the proposed plan may be approved with site-specific conditions and variances and thereby constitute legal and appropriate action by and through the Mayor's and City Council's collective and inherent discretion.

Importantly, as noted in the City's Code of Ordinances, the Mayor and City Council are specifically granted the authority to conditionally zone specific plans and designs for a particular development and use. Article XII, § 1201 – Conditional Development. The Ordinance further directs to include with any variances “. . . any conditions, requirements or limitations” which are believed to be necessary and desirable to protect adjacent properties . . . Article IX, § 1401 – Conditions and Limitations. The powers of the Mayor and City Council, unless specifically granted or delegated to another body, are specifically reserved. Vollrath v. Collins, 272 Ga. 601, 602 (533 SE 2d 57) (2000) (“ . . . the failure of the local Act to make a specific grant of authority . . . is dispositive only if the statute also fails to provide . . . the general authority to make that determination”); see also, City of Brookhaven v. City Chamblee, 329 Ga. App. 346, 349 (2014). This discretion is not limited.

While expressly supporting rezonings to RAD-Conditional over the past ten plus (10+) years, those same Residents can not now with any degree of credibility turn on a dime because of their opposition to a rezoning which is fully recommended for approval by the City's Professional Staff and compliant with the City's FLUM. Moreover, to advance such a position is really quite curious.

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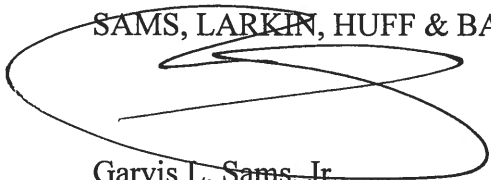
VIA EMAIL:

Mr. Ken Suddreth, Director
Community Development Department
City of Smyrna
November 13, 2017
Page 6

Please do not hesitate to contact me should you have any questions whatsoever regarding these matters. With kind regards, I am

Very truly yours,

SAMS, LARKIN, HUFF & BALLI, LLP



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GLS, Jr./dls

cc: Scott A. Cochran, Esq., City Attorney (via email)
Ms. Tammi Saddler Jones, City Administrator (via email)
Mr. Russell G. Martin, AICP, Sr. City Planner (via email)
Ms. Terri Graham, City Clerk (via email)
Mr. Thair Hanaway, Neighborhood Commercial, LLC (via email)
Ms. Jennifer Steele, Neighborhood Commercial, LLC (via email)