

**TOWN OF MOUNT AIRY
TOWN COUNCIL**

**FINDINGS AND DECISION REGARDING APPLICATION TO
REZONE O'BRIEN PROPERTY**

**HEARING DATE: MAY 8, 2023
ADOPTION OF WRITTEN FINDINGS: MAY 10, 2023**

Applicants: Michael J. O'Brien and Nanci J. O'Brien ("Applicants")

Property: 806 Park Avenue, Mount Airy, MD 21771; Tax Map 0601, Grid 000, Parcel 1291, Tax I.D. No. 13-015473; 35,177 square feet or 1.29 acres of land, more or less, located on the Southwest corner of Maryland Route 27 (Ridge Road) and Park Avenue ("the "O'Brien Property" or "the Property")

Current Zoning: Residential 3 (R-3)

Current Use: Residence and Veterinary Clinic Special Exception

Proposed Zoning: To rezone the property to Community Commercial (CC)

WHEREAS, Applicants are the owners in fee simple of the Property, which is currently zoned R-3; and

WHEREAS, Applicants currently utilize the Property for their personal residence and for the operation of a veterinary clinic; and

WHEREAS, the veterinary clinic is a conditional use being undertaken pursuant to a special exception granted to Applicant Dr. O'Brien on or about October 5, 1987 by the Mount Airy Board of Appeals (Case No. MA-A-87-13); and

WHEREAS, on December 22, 2022, Applicant submitted an application to the Town seeking to rezone the Property to CC on the basis of substantial change in the character of the neighborhood and/or mistake ("change/mistake") pursuant to the Land Use Article of the Maryland Code ("LU"), §4-204 and the Town Code, Section 112-69 (hereafter "the Application"); and

WHEREAS, the matter was initially referred to the Planning Commission pursuant to LU, §4-204 and the Town Code, §112-67; and

WHEREAS, on or about March 27, 2023, the Town Planning Commission made an unfavorable recommendation with respect to the application to the Town Council; and

WHEREAS, pursuant to LU, Section 4-203 and 4-204, and the Town Code, Section 112-66, a quasi-judicial, evidentiary public hearing on the Application was set for May 8, 2023 beginning at 5:30 p.m., and was advertised for two successive weeks, with the first publication of notice appearing at least 14 days before the hearing, in a newspaper of general circulation in the Town; and

WHEREAS, the hearing was likewise advertised by means of posting the Property; and

WHEREAS, the hearing was convened as scheduled on May 8, 2023, beginning at 5:30 p.m., last six and a half hours, ending at approximately midnight on May 8, 2023; and

WHEREAS, during the course of the proceedings, Applicants were represented by counsel, Clark Shaffer, and his partner and co-counsel, Matthew E. Hurff; and

WHEREAS, while not identified as such initially, the Town Council was at some point during the course of the proceedings advised that Peter Sabonis, an attorney licensed to practice before the Supreme Court of Maryland, was representing at least one of the interested parties who were present and signed up to provide testimony, Leslie Dickinson, who is also a Planning Commission Member; and

WHEREAS, all witnesses were sworn by the presiding officer, Pamela Reed, Secretary of the Town Council, who was presiding in the absence of Council President, Jason Poirier; and

WHEREAS, Councilpersons present were Council Member Stephen Domotor, Council Member Karl Munder, Council Member Lynne Galletti, and Council Member and Secretary Pamela Reed; and

WHEREAS, also present for the hearing, among others, were Town Attorney Thomas V. McCarron who advised the Presiding Officer Councilmember Reed and the rest of the Council as to the manner of proceedings including rulings on the admissibility of evidence, Town Clerk Holly McCleary who received and marked exhibits, and Director of Planning and Zoning Administrator, John Breeding; and

WHEREAS, Counsel for the Applicant made a brief opening statement asserting that the evidence would establish a change/mistake, and further that it would establish that the Property should be rezoned Community Commercial (CC); and

WHEREAS, all witnesses were duly sworn; and

WHEREAS, the following witnesses testified with opportunity given for cross-examination:

John Breeding, Town Director of Planning and Zoning Administrator

Michael J. O'Brien, Applicant

Peter Bowlus, Resident of the Wild Wood Park development, 804 Candy Apple Ave.

Michael Van Sant, VanMar Associates, Inc., registered surveyor, who was accepted as an expert in land surveying, land planning and development

David S. Thaler, registered surveyor, certified professional engineer and former law professor, who was accepted as an expert in land planning and development

Richard "Dick" Swanson, Town Resident

Leslie Dickinson, Town Planning Commission Member, Town Resident, 803 N. Main St.

Sheila Pyatt, Town Resident neighboring O'Brien Property at 705 Park Avenue

David Pyatt, Town Resident neighboring O'Brien Property at 705 Park Avenue

Sean Kelly, Town Resident

Christopher Boehm, Town Resident, Merrydale Gardens, 309 Violet Ct.

Amy Witter, Town Resident

Note: Other individuals may have spoken at various times during the proceedings, including witnesses who attested to the character of Applicant, and as may be reflected in the video and audio recordings, but whose comments were either not considered "testimony" offered at appropriate times during the proceedings, were more in the nature of objections, argument or prefaces to cross examination questions, and/or whose testimony was deemed not relevant (as in the nature of character testimony) or duplicative of testimony of the witnesses listed above and briefly summarized below.

WHEREAS, the following exhibits were introduced by the Town as to Exhibit 1, and the rest by Applicant as follows:

Exhibit 1 (by Planning Director) – Staff Report of John Breeding, Town Director of Planning and Zoning Administrator with attachments including at least portions of the Application and supporting documents.

Exhibit 2 (by Applicant) – Ordinance 2014-17 – comprehensive rezoning of properties pursuant to Town’s 2013 Comprehensive Plan

Exhibit 3 (by Applicant) – Ordinance 2021-17 – rezoning the Beck Property

Exhibit 4 (by Applicant) – Ordinance 2022-25 – Proposed amendments to MXD-related provisions of the Code dealing with open space, which was not enacted

Exhibit 5 (by Applicant) – Pre-concept sketch plan for Beck Property

Exhibit 6 (by Applicant) – Newspaper article regarding Harrison-Leishear Property

Exhibit 7 (by Applicant) – APFO Screening Assessment for the Beck Property prepared by Ronald Thompson of VanMar Associates January 26, 2023

Exhibit 8 (by Applicant) – Booklet of photographs and some narrative put together by Applicant in aid of his testimony

Exhibit 9 (Interested Party Mr. Pyatt) – Town Board of Appeals 1987 Findings and Decision granting special exception for veterinary clinic

Exhibit 10 (Interested Party Mr. Henderson) – Petition of Wild Wood Park residents against rezoning

Exhibit 11 (Applicant) – Neighborhood map submitted with Application, Applicant identifying thereon neighboring properties (also a part of Exhibit 1 above)

Exhibit 12 (Applicant) – CC Zoning Use Exhibit of the O’Brien Property prepared by Mr. Van Sant

Exhibit 13 (Applicant) – Resume/curriculum vitae of Mr. Thaler

Exhibit 14 (Applicant) – SDAT print out for the Post Office Property

Exhibit 15 (Applicant) – Summary of 2021 10-year plan of the U.S. Postal Service

Exhibit 16 (Interested Party, Mr. Pyatt) – Petition of residents against rezoning O’Brien Property

Exhibit 17 (Applicant) – May 7, 2023 email by Mr. and/or Mrs. Pyatt

Exhibit 18 (Applicant) – Packet of materials in part utilized by Applicant’s counsel in cross examination of Mr. Pyatt

WHEREAS, brief summaries of the extensive witness testimony over approximately six and a half hours is as follows, but with reference to the video and audio recordings, and any transcript derived therefrom, for the complete testimony including in response to cross examination:

Applicant's Case in Chief

Town's Director of Planning, John Breeding – Mr. Breeding testified as to his staff report (which was marked and entered as Exhibit 1, along with the attachments thereto consisting of the Application) briefly describing the Property, and the nature of the Application, and the Planning Commission's recommendation to the Town Council to deny the Application. Mr. Breeding was cross examined initially by Applicant's counsel, though whom Applicant's counsel introduced Exhibits 2 through 7 above, purporting to demonstrate the comprehensive rezoning of properties from the Town 2013 Master Plan including the Fire Company's Carnival Grounds property to Community Commercial (CC) zoning, the negotiations for Annexation of the Harrison-Leishear Property and that the owner of the property had withdrawn its petition for annexation, rezoning of the Beck Property to Mixed Use District (MXD), that the Post Office property is exempt from zoning, and the submissions for development of the Beck Property. Mr. Breeding was cross examined by Mr. Sabonis, Ms. Dickinson, Mr. Pyatt, Nicole Moon (Town Resident) that the newspaper reports about Harrison-Leishear were not reports of the Town and are not always accurate, that no concept plan had ever been submitted for Harrison-Leishear or for the Beck Property in 2014, and as to whether the Town had any say in the last Master Plan as to the use of the Post Office property. Mr. Breeding was also briefly questioned by Councilmembers in part as to the reason(s) that the Planning Commission gave a negative recommendation for the rezoning of the O'Brien Property. Mr. Breeding was later in the proceedings called as a witness by Mr. Sabonis.

Applicant Michael J. O'Brien – Applicant's counsel introduced Exhibit 8, from which Applicant extensively testified, and which according to his testimony evidenced a significant increase in traffic and motor vehicle accidents at the intersection of Maryland Route 27 and Park Avenue, and increase in activity since the end of the COVID 19 pandemic at the Carnival Grounds Property. He also testified to the increase in activity and traffic, including commercial vehicle activity, at the Post Office Property, which operates "24/7". He testified as to how this activity has affected Applicants' use of the Property. He also testified to the Board of Appeals proceedings in 1987 granting him the special exception to operate a veterinary clinic on the Property, and as to the uses of the Property including a personal wood working shop. Mr. O'Brien testified as to the development of the Twin Arch Shopping Center since 1987. Mr. O'Brien was extensively cross examined by Mr. Sabonis, Mr. Pyatt, Ms. Moon, Ms. Dickinson, and questioned by Councilmembers. Mr. O'Brien agreed that his activities or hobbies on his Property were not relevant to whether there has been a change or mistake. He was asked about whether he has been thinking of retirement and whether his attempts to rezone his

Property might be about maximizing the value of the Property to support an impending retirement. He was asked to agree whether the Board of Appeals made certain findings with respect to commercial property being East of Maryland Route 27, and not West thereof in Exhibit 9. He agreed that the carnival grounds activities decreased for a time due to the pandemic (*e.g.*, the cancellation of carnival(s)), and only increased recently after the pandemic ended. He was asked about what he considered to be a neighborhood, stating that that it is where people live as his personal definition. He agreed that he would consider the Pyatts neighbors. He testified that though he tried to obtain information from the Post Office about statistical information about increase in traffic, he could not obtain this information.

Peter Bowlus – Mr. Bowlus testified that he is a resident of Wild Wood Park and that he does not oppose the rezoning. Mr. Bowlus was primarily cross examined by Mr. Henderson (resident of Wild Wood Park), who introduced a petition of 111 residents there who oppose the rezoning, introduced as Exhibit 10.

Michael Van Sant – Mr. Van Sant was accepted as an expert after review of his qualifications and after *voir dire* by Mr. Sabonis, over Mr. Sabonis' objection. Mr. Van Sant reviewed the zoning and uses of the properties at and around the intersection of MD Route 27 and Park Avenue, including at the Post Office property, the Carnival Grounds Property, a nearby commercial site with a large TJ Max Retail Store and three commercial pad sites developed as a Jiffy Lube, High's Store, a bank and a supermarket. He testified that he is of the opinion that "neighborhood" is as reflected in Exhibit 11, and would be defined to include MD Rte. 27 as its "dominating feature". The "neighborhood" is at least defined, according to his testimony, as the four corners of Rte. 27 and Park Avenue. Exhibit 2, which Mr. Van Sant prepared, was introduced. As shown on Exhibit 12, according to Mr. Van Sant, the building envelope for any new development on the Property, assuming existing improvements were to be taken down and commercial improvements built in their place, would be restricted to approximately 13,000 square feet. This limited building envelope would preclude many of the more intensive uses of right in the CC zone. A fifty (50) foot buffer would be required between the Property and abutting residentially zoned property, which according to the witness would "protect" residential property from adverse impacts of a commercial operation on the Property. Mr. Van Sant testified, however, that the highest, best and most likely use of the Property if zoned Community Commercial (CC) would be as an adaptive reuse preserving the buildings and other improvements, which are in good condition, for a restaurant or coffee shop type of use. He also testified that commercial uses do exist in the Town West of MD Rte. 27 including Mount Airy Shopping Center, the Joy Property, commercially zoned property on butting Ridgeville Heights, Food Lion abutting Tall Oaks, commercial uses along Center Street. In his opinion, there has been a substantial change in the neighborhood and that rezoning the Property to Community Commercial would be appropriate. An objection was raised by Mr. Sabonis at the conclusion of Mr. Van Sant's direct examination asking that all the testimony be stricken as not relevant, which was overruled and denied. Mr. Van Sant was extensively cross examined by Mr.

Pyatt, Ms. Dickinson, and was questioned by Councilmembers as to the sensibility and credibility of his determinations as reflected in Exhibit 12, whether rezoning the Property would lead to a cascading of rezonings down Park Avenue, which the witness did not see happening, about why the potential for the Property being zoned commercial was not brought up during the 2013 Master Plan process, and that the uses of right in the CC zone permit some rather intensive uses.

David Thaler – Mr. Thaler was accepted as an expert as noted above. His qualifications were reviewed and are summarized in Exhibit 13, including teaching land use course(s) at the University of Baltimore School of Law. Mr. Sabonis conducted *voir dire*. Mr. Thaler made the point that change/mistake were very intertwined concepts. It is his opinion that a change/mistake has occurred justifying rezoning of the Property pursuant to Maryland law. Several factors, though which individually may not by themselves support a rezoning, combine to support it under the law in this case, according to his testimony. These factors include the operation at the Post Office, including retail-like services and product offered there. He testified that while he could not find statistics related to traffic at the Mt. Airy Post Office specifically, he cited a study that nationwide the delivery of packages through the postal service nationwide has significantly increase, by as much as 80%. Exhibits 14 and 15 were introduced during Mr. Thaler's testimony demonstrating ownership of the Post Office Property, and a 2021 10-year Postal Service Plan to increase services, including offering retail or commercial like services and products. A second factor is the Beck Property and its potential development as mixed use. Third, the increased activities at the Carnival Grounds property across MD 27 is evidenced by their calendar of events available on the website, showing an approximate 56% increase in indoor activities comparing 2017-18 to 6/1/22 – 2023 time frames. Fourth, there traffic in the MD 27 and Park Avenue intersection has increased in his opinion. Fifth, the Harrison-Leishear Property was planned as an office park type of development, but after the last Master Plan wherein the Harrison-Leishear Property was included in the outer growth boundary of the Town as a possible future annexation, but the Annexation Petition was reportedly unexpectedly withdrawn by the Industrial Development Authority. According Mr. Thaler, had the Town not been under the assumption that the Harrison-Leishear was available for annexation and development in the town, it may have been more receptive to a zoning of the O'Brien Property as Community Commercial. He also testified as to the unexpectedness of the COVID 19 pandemic as a basis for finding mistake, which is that certain determinations were made in the 2013 Master Plan that were based on assumptions that proved to be in error. Mr. Thaler testified that he is of the opinion that the zoning of the Property to CC zoning would be appropriate, and is supported by the Town's 2013 Master Plan which according to his testimony states that commercial growth was to be encouraged in connecting corridors. He agreed that given building envelope restrictions, fears of a highly intensive use on the Property are not justified. He agreed that the highest, best and most likely use of the Property if rezoned would be as an adaptive reuse, agreeing with Mr. Van Sant's opinions. He also testified that a rezoning would contribute to the walkability of the Town. Mr. Thaler was cross examined by Mr. Pyatt, Mr. Kelly, Ms. Dickinson, Mr.

Sabonis, and was asked questions by Councilmember Domotor. Mr. Pyatt asked about the petition(s) against the development, to which the witness stated that he placed little stock in them. Mr. Thaler agreed that there is case law stating that increased traffic alone could not sustain a finding of change/mistake. Mr. Kelly asked about the affect on property values and what was the benefit to the Town if the Property is rezoned. Ms. Dickenson reviewed the uses in the CC zone, including some of the more intensive uses of right. Under cross examination by Mr. Sabonis, Mr. Thaler admitted that his national statistics about packages delivered by the Postal Service was not specific evidence as activities at the Mount Airy Post Office. On questioning by Councilmember Domotor, Mr. Thaler agreed that one or more of the factors he outlined may not by themselves justify a rezoning on change/mistake grounds, but in combination all of them would.

Case in Chief of Interested Parties

Leslie Dickinson – Ms. Dickinson was called to testify by Mr. Sabonis. She testified that she has served as a Planning Commission member for 13 years. She testified extensively against the rezoning. She made the point that a line of demarcation along MD 27 that would generally restrict commercial development to the East is supported among the Findings and Decision of the Board of Appeals permitting the special exception for Applicant to operate a veterinary clinic on the Property. She finds relevant that residentially zoned property is to the North and West of the O'Brien Property. In her opinion, the proof of a change/mistake is at best anecdotal and not supported by data. She is of the opinion that Harrison-Leishear is of no relevance to the proceedings. The CC zone permits a number of intensive uses of right that the Property has at least the potential for. Concern was expressed about a creeping of commercial zoning beyond the Property to the West. Data about the Carnival Grounds, which is on the East side of MD 27, is not supportive of a change of zoning on the West side MD 27. Ms. Dickinson was cross examined by counsel for Applicant, and Councilmembers.

Dick Swanson – Mr. Swanson testified as to an ordinance or rule within the Town adopted a number of years ago, that restricts the granting of special exceptions in the area.

Sheila Pyatt – Mrs. Pyatt read a prepared statement. She stated that there have been no mistakes in the zoning of the Property. There was an agreement in 1987 that upon the retirement of the veterinary use, the use of the Property would revert to residential, though the documents evidencing the contract are missing. Rte. 27 is the dividing line between residential and commercial. There has been no significant material change in the street since 1958. The Post Office is a government use, not commercial. If this rezoning is granted, it will lead to other commercial rezonings.

David Pyatt – Mr. Pyatt introduced Exhibit 16 (Petition against the rezoning). While the COVID 19 pandemic was unexpected, it was so for everyone because it was an Act of God, and does not establish a mistake. Mr. Pyatt was cross examined by counsel for

Applicant, who in doing so introduced Exhibits 17 and 18.

Sean Kelly – testified that while Mr. O’Brien is of high character, that is not relevant and that all the citizens of the Town want is consistent zoning.

Christopher Boehm – testified that he supported the rezoning and that Mr. O’Brien of high character.

Amy Witter – testified that the proceedings need to get back to the facts, rather than character evidence as to Mr. O’Brien. She testified that the Property should be zoned residential.

WHEREAS, brief closing arguments were made by Applicant’s counsel and Mr. Sabonis, and Applicant’s counsel delivered a brief rebuttal; and

WHEREAS, the proceedings were video and audio recorded and the exhibits were received into evidence.

NOW, THEREFORE, the Town Council, upon completion of the presentation of evidence, voted as follows on the following questions on successive roll call votes after opportunity for discussion on the record as to each question:

1. Do you find that the Applicant has met the burden of establishing that there has been a substantial change in the character of the neighborhood surrounding the Property?

Finding: 3 Yes, 1 No (Councilmember Munder), 1 absent (Councilmember Poirier)

2. Do you find that the Applicant has met the burden of establishing that there has been a mistake in zoning the Property?

Finding: 4 Yes, 0 No, 1 absent (Councilmember Poirier)

3. Do you find that the Property should legislatively be rezoned?

Finding: 4 Yes, 0 No, 1 absent (Councilmember Poirier)

4. To what zoning classification should the Property be rezoned?

On motion to rezone the Property to Community Commercial (CC), the Town Council voted 3 votes in favor of the motion (Councilmembers Domotor, Galletti and Reed), 1 vote against the motion (Councilman Munder, who supported rezoning the Property to Limited Commercial (LC), 1 absent (Councilmember Poirier).

AND FURTHER, the Town Council does hereby make the following findings based upon the evidence adduced in the hearing:

- A. As to population – the evidence introduced by Applicant’s expert, Mr. Thaler, was that the population of the Town has not changed significantly, and was not a basis on which Applicant relied in support of the rezoning. The Town Council finds that the population has not changed significantly since the Town’s last comprehensive master plan (2013) and is not a factor supporting a rezoning of the Property.

- B. As to availability of public facilities – the evidence adduced by Applicant’s experts Mr. Thaler and Mr. Van Sant are that the most likely use of the Property if rezoned to Community Commercial (CC) is an adaptive reuse of the Property utilizing existing improvements on the Property, and that the size of the O’Brien Property and given building restrictions such as the requirement for a fifty (50) foot buffer where the Property abuts residentially zoned properties as well as set backs, many of the more intense uses permitted in the Community Commercial (CC) zone would be precluded. The Council accepts this testimony as credible, and finds that the future use of the Property if rezoned to Community Commercial (CC) would be supported by existing public facilities.

- C. As to present and future transportation patterns – the testimony and evidence presented at the hearing were to the effect that traffic has increased along the Maryland 27 corridor particularly since the end of the COVID-19 pandemic. The Council accepts that traffic has increased over the years in the Maryland 27 corridor, but does not find that a rezoning of the O’Brien Property to Community Commercial (CC) will materially adversely affect this traffic, in whole or in part for the reasons enumerated in A. above.

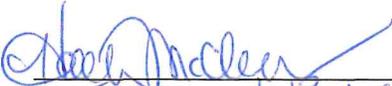
- D. As to compatibility with existing and proposed development for the area – the Town Council finds that there has been a substantial change in the character of the neighborhood surrounding the O’Brien Property to justify a rezoning of the Property to commercial zoning, and by a majority of the Council specifically to the Community Commercial (CC) zone, given other commercially zoned properties, a Post Office with government operations that are in terms of impacts at least similar to some commercial uses at the intersection where the Property is located, and given the at least proposed mixed use development of the nearby Beck Property and its Mixed Use District (MXD) zoning. For these reasons, the

Council finds that the current and likely future commercial uses of the O'Brien Property would be compatible with existing and proposed development for the area.

- E. As to the recommendation of the Planning Commission – while the Commission made a negative recommendation on rezoning the O'Brien Property, the Commission did not produce a memorandum or other document memorializing its recommendation and the reasons for it, and the testimony did not clearly set forth reasoning behind the recommendation. While extensive testimony was elicited from one Planning Commission member, Leslie Dickinson, as to at least her reasoning for voting to make an unfavorable recommendation, as Ms. Dickinson testified, she could only speak to her own reasons and could not speak for other Planning Commission members. In any event, the Council found based on the evidence adduced in the hearing that a change/mistake had occurred, and that a rezoning to commercial zoning was warranted.
- F. As to the relationship of the proposed amendment to the master plan zoning for the property – while the Town's 2013 Comprehensive ("Master") Plan called for the O'Brien Property to maintain its Residential zoning (R-3), the 2023 Master Plan is still in the process of being developed, and has not yet reached the Town Council for review and final vote. Moreover, the 2013 master plan rezoned the Carnival Grounds Fire Company Property to CC zoning at the same intersection, and approved commercial rezoning at other locations on the west side of Maryland 27. For these reasons, and the reasons enumerated in A. and D. above, the Council finds that rezoning the O'Brien Property to commercial zoning is not incompatible with the Town's master plan.
- G. The Town Council finds that the "neighborhood" from which to judge whether there was a substantial change in character is at least the four corners of the intersection of Maryland Route 27 and Park Avenue and that the neighborhood map submitted with the Petition shows the overall neighborhood.

These Findings and Decision are hereby APPROVED as an accurate statement of the proceedings, and the votes taken at the May 8, 2023 hearing and the findings made by the Council on the Application, this 10th day of May, 2023 by a vote of 4 in favor, 0 opposed and 1 absent (Councilmember Poirier).

ATTEST:



John Breeding, Holly McCleary
Town Clerk



Pamela Reed, Secretary and
Presiding Officer at the Hearing in
Absence of Council President Poirier

Approved as to legal form and sufficiency this 10th day of May, 2023.



Thomas V. McCarron, Town Attorney