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August 29, 2023

Via Electronic and Regular Mail

Ms. Donna Brown
Clerk of the District Council
Office of the Clerk of the District Council
Wayne K. Curry Administration Building, 2nd Floor
Largo, MD 20774



Re: 5801 Arbor Street Property—Appeal of Planning Board Recommendation of Disapproval
in Detailed Site Plan Case No.: DSP-21032

Dear Madame Clerk:

This firm represents Nabely Family Trust the Applicant for Detailed Site Plan No.: DSP-21032 (“DSP”), which seeks an amendment to the Table of Uses to the M-U-I/D-D-O Zone to permit “wholesaling or distribution of food or beverage materials used or produced on the premises” upon property located at 5801 Arbor Street, Hyattsville, shown as Lots 1-8, Block 6 of the Tuxedo Subdivision in Plat Book A, Plat No. 71 among the land records of Prince George’s County (“Subject Property” or “Property”). The Subject Property was rezoned from the C-M zone to the M-U-I/D-D-O zone through the *2005 Approved Tuxedo Road/Arbor Street/Cheverly Metro Sector Plan and Sectional Map Amendment* (“Tuxedo Road-Arbor Street Sector Plan/SMA”). The DSP was filed pursuant to § 27-548.26(b)(1)(B) of the Prince George’s County Zoning Ordinance (“Zoning Ordinance”), which allows a property owner within a Development District to petition the District Council to amend the Table of Uses for a D-D-O Zone.¹

¹ Sec. 27-548.26(b)(2)(3) requires the owner to submit either a detailed site plan or a conceptual site plan as part of the application. Although the amendment application is processed via the procedures in Part 3, Division 9 of Subtitle 27 of the Zoning Ordinance, only the District Council is authorized to render a final decision. See § 27-548.26(b)(3). The Planning Board is required to hold a public hearing and submit a recommendation to the District Council. *Id.*

Although the Subject Property was rezoned through the Tuxedo Road-Arbor Street Sector Plan/SMA, Prince George’s County approved a new Master Plan for the area in 2018 —the *Approved Greater Cheverly Sector Plan* (“Greater Cheverly Sector Plan”). However, no sectional map amendment was approved in conjunction with this plan, given that a new Zoning Ordinance was pending approval at that time, hence no properties were rezoned through the Greater Cheverly Sector Plan. For this reason, planning principles for this area are encompassed within both the Tuxedo Road-Arbor Street Sector Plan/SMA and the Greater Cheverly Sector Plan, albeit zoning is still controlled by the Tuxedo Road-Arbor Street Sector Plan/SMA.

On June 29, 2023, the Prince George’s County Planning Board (“Planning Board”) held a public hearing and voted to recommend to the Prince George’s District Council (“District Council”) disapproval of the subject DSP, which was memorialized in Prince George’s County Planning Board Resolution No.: 2023-79 (“Resolution”), and subsequently adopted by the Planning Board on July 29, 2023.

For the reasons discussed below, the Applicant respectfully disagrees with the Planning Board recommendation, files this appeal based on numerous errors contained within the Resolution, requests that there be oral argument on this appeal, and that the District Council approve the subject DSP.

I. REQUEST

1. The Planning Board erred when it determined that the subject DSP would not further the purposes of the applicable Development District.

Findings Nos.: 6 and 7 of the Resolution state that the purpose of the D-D-O Zone in the Tuxedo Road-Arbor Street Sector Plan/SMA was to transform Tuxedo Road into “a pedestrian-oriented, human-scale environment that will enliven the sector area, provide a community-oriented town center, and offer flexible, easy-to-accommodate opportunities for future economic growth and development.” The Resolution determined that the subject application was not consistent with this purpose, and, therefore, recommended disapproval. The Applicant submits that the

recommendation of disapproval relies on two erroneous conclusions, to wit: (1) that wholesaling or distribution of food or beverage materials is not a permitted use within the M-U-I/D-D-O Zones, and is therefore inconsistent with the purposes of the D-D-O Zone; and (2) that the achieving a walkable community via a mix of residential, retail, and office uses is more important than transforming Tuxedo Road/Arbor Street into a pedestrian-oriented main street. We submit that these conclusions are erroneous, and fail to justify a finding that the subject application does not further the purposes of the Development District. In support of the Applicant's position, the erroneous conclusions are discussed in greater detail below:

- i. It was an error to find that only uses permitted within a Development District are consistent with the purposes of the Development District when the Zoning Ordinance allows amendments to the D-D-O-Zone Table of Uses

In finding No. 7 of the Resolution, the Planning Board reviewed the permitted uses within the underlying M-U-I Zone, as modified by the D-D-O Zone, to determine if the requested use is allowed upon the Subject Property. For purposes of this application, the permitted uses within the M-U-I Zone are the same as those permitted in the C-S-C Zone, unless modified by the D-D-O Zone. Because wholesaling or distribution of food or beverage materials is not permitted in the C-S-C Zone, the Resolution concludes that “wholesaling and distribution warehouse . . . [are] . . . inconsistent with the permitted uses of the C-S-C Zone or the intent of the D-D-O Zone” (Page 5).

This conclusion is an egregious error that, whether purposefully or inadvertently, fails to acknowledge that the D-D-O Zone specifically allows modifications to the table of uses if the requested use furthers the purposes of the Development District, pursuant to § 27-548.26(b) of the Zoning Ordinance. The Planning Board's rationale for disapproval is devoid of legal sufficiency because, if true, it would render § 27-548.26(b)(1)(B) of the Zoning Ordinance superfluous—a result to be avoided according to Maryland Case Law. *See Mayor & Council of Rockville v. Rylyns Enters.* 372 Md. 514, 550 (2002) (“If reasonably possible, a statute is to be read so that no word, phrase, clause, or sentence is rendered surplusage or meaningless.”). If the Resolution's rationale were true, no amendment to a Development District's Table of Uses could be approved because for a use to be consistent with the purpose and intent of the Development District, it must already be permitted within the underlying zone or the D-D-O Zone—a circular argument leading to an

absurd result that is also to be avoided. *Rylyns Enters.*, 372 Md. at 550 (“wherever possible an interpretation should be given to statutory language which will not lead to absurd consequences.”).

- ii. The subject application is consistent with the Development District’s purpose, which is transforming Tuxedo Road/Arbor Street into a walkable, main-street area, and it was an error for the Planning Board to disapprove the DSP based on dogmatic adherence to a nonviable means of transforming Tuxedo Road/Arbor Street into a walkable, main-street area

Both the Tuxedo Road-Arbor Street Sector Plan/SMA and the Greater Cheverly Sector Plan (which basically relied upon the Tuxedo Road-Arbor Street Sector Plan for its stated objectives) envisioned transforming Tuxedo Road/Arbor Street into a main-street comprised solely of a mix of residential, retail and office uses. The Applicant respectfully submits, that the ultimate purpose of the Development District is to encourage pedestrians with activity on the streets, and it is an error to restrict this transformation exclusively to office, retail and residential uses—especially given the seismic shifts that have occurred in consumer habits and workplace culture since both plans were adopted. The enormous increase in online shopping over the past decade, along with the extreme increase in the number of people working from home resulting from the Covid-19 pandemic, have combined to drastically reduced the establishment of brick-and-mortar retail stores, as well as offices, which has dramatically altered the planning assumptions upon which the Tuxedo Road-Arbor Street Sector Plan/SMA were predicated.

Greater creativity is needed to transform Tuxedo Road/Arbor Street into a walkable community, given the specific challenges facing the area—challenges acknowledged by the Tuxedo Road/Arbor Street Sector Plan and SMA and the Greater Cheverly Sector Plan. The first entry under both “Issues” and “Land Use and Zoning Recommendations” on Page 23 of the Tuxedo Road-Arbor Street Sector Plan/SMA acknowledges that redevelopment will require assembling and consolidating the small lots along Arbor Street to facilitate redevelopment. Thirteen (13) years later, within the Greater Cheverly Sector Plan, the assemblage of various properties along Arbor Street is not among the listed “Challenges” found on page 37, but parcel assembly to facilitate redevelopment along Arbor Street into a Local Transit Center is mentioned as part of Land Use Goal 2.2, which is found on Page 43 of the Greater Cheverly Sector Plan. The inclusion of land assembly as part of a land use goal in the 2018 is a clear indication that this impediment remains.

Until these challenges are addressed, substantial redevelopment of the area, as envisioned by the plans, is highly unlikely to occur. This does not, however, preclude other uses from serving as a catalyst, or a contributing resource in transforming Tuxedo Road-Arbor Street into a walkable, main-street area.

The Applicant respectfully submits that light industrial uses, in specific situations, can contribute to fostering a vibrant, walkable area, which, as mentioned previously, is one purpose of the Development District. The existing tenant, Sodibar Systems, provides an existing mixture of office and production workers to the area every day. Moreover, Sodibar Systems is a small business that has been serving the Washington D.C. metropolitan area since 1948, and will bolster the main street feel of Arbor Street. Additionally, its continued operation upon the Subject Property is greatly preferable to a vacant or boarded-up building that would clearly result in a negative impact—visually and functionally—upon the Tuxedo Road-Arbor Street neighborhood.

In sum, the goal of the Tuxedo Road-Arbor Street Sector Plan/SMA, as well as the Greater Cheverly Sector Plan, is to transform Tuxedo Road-Arbor Street into a walkable, main-street area. The continuation of the existing, thriving business upon the Subject Property, as requested through the subject application, and based on the facts in the record, is consistent with this goal. Based on the reasons set forth above, we respectfully submit that the subject application is consistent with the purposes of the Tuxedo Road-Arbor Street Sector Plan/ SMA Development District, and that the Planning Board's recommendation of disapproval was erroneous.

2. The Planning Board erred when it determined that this amendment would substantially impair implementation of the Tuxedo Road-Arbor Street Sector Plan/SMA by eliminating the opportunity to develop the subject property as recommended by the sector plan.

The term “substantially impair” is not defined by the Zoning Ordinance or relevant case law. Thus, under Section 27-108.1(a)(7) of the Zoning Ordinance, these terms should be given their common meaning. According to Black's Law Dictionary (11th ed. 2019), “impairment” is defined as: “[t]he fact or state of being damaged, weakened or diminished”, while the meaning of “substantial” is defined as: “[i]mportant, essential, and material; of real worth or importance:” or “[c]ontaining the essence of a thing.” Thus, when determining whether the subject application substantially impairs

the Tuxedo Road-Arbor Street Sector Plan/SMA, the applicable standard is whether the essence of these plans is being damaged or weakened by the subject application.

In Finding No. 7 of the Resolution, the Planning Board determined that the subject application substantially impairs implementation of the Tuxedo Road-Arbor Street Sector Plan/SMA because approval of the DSP would eliminate the opportunity to develop the Subject Property as recommended by the Tuxedo Road-Arbor Street Sector Plan. This conclusion is entirely incorrect, and unsupported by the evidence presented before the Planning Board at the June 23, 2023 hearing. The Applicant and the Town of Cheverly executed a covenant that ensures that the redevelopment potential of the Subject Property is not forfeited. The Town expressed a concern that the continuation of the existing use on the Subject Property could inhibit a redevelopment of the area, but this would be likely to occur only if the Subject Property were a part of a proposed assemblage (as discussed in the Tuxedo Road-Arbor Street Sector Plan/SMA and the Greater Cheverly Sector Plan), and would not agree to a conveyance as part of a proposed assemblage. To avoid this result, the Applicant has agreed to sell the Subject Property upon receiving a bona fide offer to purchase the Subject Property for its fair market value, with a process to determine that value set forth in the covenant. In effect, this covenant is a promise from the Applicant to the Town that the approval of this DSP would not result in an impediment to a proposed redevelopment of the area in the future, when economic conditions coalesce to make an assemblage, toward a redevelopment of this area, attractive. Moreover, even if the current tenant vacated the Subject Property, approval of this DSP would allow other future users such as a coffee roastery, bakery, distillery or microbrewery to occupy the premises - uses that would not otherwise be permitted at this location, but which are desired by the Town of Cheverly.

Moreover, the subject application in its present condition conforms with the Tuxedo Road-Arbor Street Sector Plan/SMA and as superseded by the 2018 Greater Cheverly Plan. The present state of existing industrial properties is a specific challenge to revitalization of the plan area, which is from page 37 of the *2018 Approved Greater Cheverly Sector Plan*: “vacant and underutilized industrial properties are unattractive and show signs of deferred maintenance”. Moreover, Policy EP 5.5 is to “coordinate economic revitalization and urban design strategies in the industrial area.” The retention of this use will prevent the proliferation of vacant industrial properties along Arbor Street

that diminish the economic viability of the entire area. Approving the subject application will also create economic incentives for the Applicant to maintain his property in a good condition. For this reason, the subject application conforms with the goals and principles of the Greater Cheverly Sector Plan as it relates to industrial property.

For all of the above-stated reasons, it was erroneous for the Planning Board to determine that approval of the subject application would substantially impair the Tuxedo Road-Arbor Street Sector Plan/SMA or the Greater Cheverly Sector Plan.

3. The lack of a permit for the operation of the business upon the Subject Property is irrelevant to the request to allow the use set forth in the subject application, which is based on standards set forth in the Zoning Ordinance.

The Resolution includes as a finding that the existing business upon the Subject Property does not now have a use and occupancy permit to operate upon the Subject Property. Maryland Case law is very clear that absent a specific ordinance or required finding related to prior violations, it is beyond the authority of the jurisdiction to consider such matters in a zoning case. *See Council v. Board of Cnty. Comm'rs*, 225 Md. 535 (1961); *Klein v. Colonial Pipeline Co.*, 55 Md. App. 324 (1982). The current permit status of the business upon the Subject Property has no bearing upon, and is irrelevant to, the required findings for the subject application to add the proposed use to be permitted within the existing zoning of the Subject Property. If approved, it is quite clear that the existing business upon the Subject Property – and any subsequent business upon this property – must obtain a use and occupancy permit, as set forth in the Ordinance, and this and any other future business upon this property will do so.


II. CONCLUSION

In conclusion, the Applicant respectfully submits that for all of the above-stated reasons: (1) the recommendation of the Planning Board in this case, including its findings and conclusions, are erroneous and unsupported by the evidence in the record; and (2) the record does support an approval of the requested addition of the proposed use of “Wholesaling or distribution of food or beverage materials used or produced on the premises” to the Table of Uses for the M-U-I/DDOZ in the Approved 2005 Tuxedo Road/Arbor Street/Cheverly Metro Sector Plan and Sectional Map


Amendment, and as such, the applicant respectfully requests that the District Council approve Detailed Site Plan No. DSP-21032.

Respectfully submitted,

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By: 

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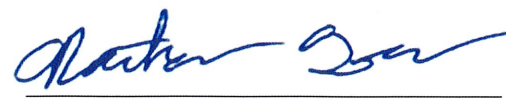
Attorneys for the Applicant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 29th day of August 2023, a copy of the foregoing Appeal of Planning Board Recommendation of Disapproval in Detailed Site Plan Case No.: DSP-21032, was mailed first-class postage to all persons of record.

By: 

Lawrence N. Taub, Esquire



Nathaniel Forman, Esquire