SPECIFIC DESIGN PLAN SDP-1603-02 NATIONAL CAPITAL BUSINESS PARK	*	BEFORE THE
	*	DISTRICT COUNCIL
	*	FOR
AND	*	PRINCE GEORGE'S COUNTY
TCP2-026-2021-02		

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Exceptions and Request for Oral Argument

Introduction

NCBP Property, LLC ("Applicant") applied for the approval of a Specific Design Plan (SDP-1603-02) to develop a 3,428,985 square foot distribution facility with associated parking lots and a trailer and loading area. Ray Crawford, Kathy H. Crawford, Antawan Williams, Arlancia Williams, John Homick, Fredrick Tutman as president of the Patuxent Riverkeeper, Dan Smith, Vernice Miller-Travis, Charles Reilly, and UFCW, Local 400 (collectively "Citizen-Protestants") are Persons of Record and opposed SDP-1603-02. Along with SDP-1603-02 Applicant submitted TCP2-026-2021-02. Citizen-Protestants opposed TCP2-026-2021-02.

The Planning Board approved SDP-1603-02 and TCP2-026-2021-02 in Resolution 2022-76 dated June 30, 2022. Notice of the Planning Board's decision was mailed to all Persons of Record on July 7, 2022.

Citizen-Protestants appeal the Planning Board's decision to approve SDP-1603-02 and TCP2-026-2021-02, file these exceptions, and request oral argument.

I. The Planning Board's written decision is legally deficient because the Planning Board failed to conduct an independent evaluation of the evidence presented to it.

The Planning Board's written decision is legally deficient because the Planning Board failed to articulate independent findings of fact, conclusions of law, and explanation for its decision to approve SDP-1603-02 and TCP2-026-2021-02.

Maryland law requires administrative agencies to articulate the facts found, the law applied, and the relationship between the two when the agency makes a final decision. *Forman v. MVA*, 332 Md. 201, 221 (1993). According to the Court of Appeals, the rote repetition of a Technical Staff report in an agency's written decision is "not a practice to be encouraged." *Montgomery v. Bd. of County Comm'rs for Prince George's County*, 256 Md. 597, 603 (1970). The practice of adopting by reference the Technical Staff report is only permissible when the Staff Report itself is adequate and when the administrative agency has reached the same conclusions based on its own independent evaluation of the record. *See e.g.*, *Colao v. County Council of Prince George's County*, 109 Md. App. 431, 460-61 (1996).

Here, the Planning Board's written decision is deficient for several reasons. First, the Planning Board's written decision is essentially a verbatim copy of the Technical Staff Report (the only differences being changes like a substitution of "staff finds" with "the Planning Board finds") and the Planning Board failed to provide any independent analysis of the facts presented or law applied.

Second, even if the Planning Board is permitted to copy verbatim the Technical Staff Report without providing additional analysis, the Planning Board is only permitted to do so after the Planning Board conducts an independent evaluation of the record. Here, the Planning Board wrote its decision and provided it on the Board's agenda, as Agenda Item 8, more than a week before the Planning Board held its hearing. The Planning Board then adopted the written decision immediately after it voted to approve SDP-1603-02 on June 30, 2022, without any discussion of the substance presented at the hearing and without making any significant changes to the pre-written decision. Citizen-Protestants assert that this practice does not conform with the requirements of the law and, at the very least, the Planning Board's actions demonstrate clearly that the Planning Board did not conduct its own independent evaluation of the evidence. Therefore, the Planning Board's written decision is deficient because the Planning Board failed to provide a description of the facts found, law applied, and conclusions made based on the Planning Board's evaluation of the record before it.

This practice is particularly problematic here because Citizen-Protestants raised issues during the hearing that were not addressed in the written decision. For example, Citizen-Protestants presented arguments related to the validity of CB-22-2020, the scope of the Planning Board's authority, compliance with Landscape Manual Section 4.6, the necessity of the impacts to Primary Management Areas (PMAs), and the sufficiency of TCP2-026-2021-02. However, the Planning Board's written decision fails to articulate any finding, conclusion, or determination regarding these issues.

The District Council should vacate the Planning Board's decision to approve SDP-1603-02 and TCP2-026-2021-02 because the Planning Board failed to adequately articulate the facts found, law applied, and relationship between the two and failed to conduct an independent evaluation of the record.

II. The Planning Board erred when it approved SDP-1603-02 because the SDP's validity is based on an illegal special law.

The approval of SDP-1603-02 allows the Applicant to construct an approximately 3.5 million square foot distribution facility on the Subject Property. Even though the Subject Property was zoned Residential Suburban Development (R-S) and distribution facilities are not ordinarily allowed in the R-S Zone, Council Bill 22-2020 (CB-22-2020) expanded the permissible uses on the Subject Property to include employment and institutional uses. However, CB-22-2020 is an illegal special law and thus invalid. Therefore, the uses permitted by SDP-1603-02 are based on an illegal special law and SDP-1603-02 must be denied.

To determine whether a law is "special" and therefore prohibited by Article III, Section 33 of the Maryland Constitution, the District Council must conduct a six-element analysis as follows:

1. Whether the legislation was actually intended to benefit or burden a particular member or members of a class instead of an entire class;

2. Whether the legislation identifies particular individuals or entities;

3. Whether a particular individual or business sought and received special advantages from the Legislature, or if other similar individuals or businesses were discriminated against by the legislation;

4. Whether the legislation's substantive and practical effect, and not merely its form, shows that it singles out one individual or entity, from a general category, for special treatment;

5. Whether the legislatively drawn distinctions are arbitrary and without any reasonable basis;

6. The public interest underlying the enactment, and the inadequacy of the general law to serve that interest is also a pertinent consideration.

See Cities Serv. Co. v. Governor, 290 Md. 533, 569–70 (1981); *MDE v. Days Cove Reclamation Co., Inc.*, 200 Md. App. 255–56 (2011). No single element "is conclusive in all cases," *Cities Serv. Co.*, 290 Md. at 569, but rather they are applied jointly to determine to what extent an alleged special law benefits or burdens a singular person, entity, or narrow group of persons or entities. *See generally id.* "One of the most important reasons for the provision in the Maryland constitution against special legislation is 'to prevent one who has sufficient influence to secure legislation from getting an undue advantage over others[.]'" *Howard Cty. v. McClain*, 254 Md. App. 190, 197 (2022).

1. CB-22-2020 was clearly intended to benefit a particular entity.

The second element—whether an entity is specifically named in a bill—is analyzed concurrently with the first—whether the law is intended to implicitly benefit or detriment a certain entity. "Laws that confer a benefit, rather than a detriment, on a single party at the time of its enactment are looked upon more harshly." *McClain*, 254 Md. App. at 200. Courts only "accord limited weight to [the second] factor because it can be easily manipulated by using narrow descriptive criteria." *Id.*

As often occurs in an analysis of spot zoning, a particular parcel is typically targeted for rezoning at the behest of a particular entity or group of entities. In this case, the record clearly identifies the Applicant as the chief proponent of the bill, the owner of the lot that the bill would affect, and the meaningful recipient of any advantages conferred by the bill. *See* July 14, 2020, District Council Hearing (Arthur Horne testifying as a representative of the Applicant in support of CB-22-2020) (link provided at Additional Backup, p. 18). Similarly, during the June 2, 2020, District Council hearing, Council Members Davis and Turner explained that CB-22-2020 would benefit the Subject Property. *See* June 2, 2020, District Council Hearing (link provided at Additional Backup, p. 18)

Further, the Planning Board specifically identified the Subject Property as the sole beneficiary of CB-22-2020. The Planning Board stated it "believe[d] that only one property in the County would" be impacted by CB-22-2020. *See* Additional Backup, p. 16.

The Planning Board further explained that CB-22-2020 "was drafted for an approximately 639-acre property, located north of Leeland Road and east of a freight line owned by Consolidated Rail, and identified in tax records as Parcel 30, tax account 0670737. This property is also known as Willowbrook and has an extensive approval history under its existing R-S Zone. . . If the District Council would like this property to be rezoned, it would be more appropriate to do so during a sectional map amendment following approval of the ongoing master plan for Bowie and Vicinity (Planning Area 74A)." *See* Additional Backup, p. 16.

The Prince George's County, Maryland Office of Law similarly stated, "the proposed bill (specifically footnote 38 to Section 27-515(b)) appears to be drafted for a specific parcel contained within a R-S zone." Additional Backup, p. 10.

2. NCBP Property, LLC (Applicant) sought out and received special advantages from the District Council.

The developer seeking to build on the Subject Property sent its attorney, Arthur Horne, on its behalf, to reiterate its goals before a friendly majority of the District Council, asking them to amend the Zoning Ordinance in such a fashion that it, and it alone, would be able to develop land in a manner otherwise expressly forbidden by the general use provisions of the R-S zone. It received these advantages with the passage of CB-22-2020.

3. CB-22-2020's substantive and practical effect shows that it singles out the Applicant for special treatment.

Like with factors 1 and 2, factors 4 and 5 are commingled and can be analyzed jointly. The June 2, 2020, District Council hearing demonstrates that the District Council was *aware* of the legal problems with CB-22-2020. *See e.g.*, Additional Backup, p. 10; June 2, 2020 District Council Hearing (OOL Testimony) (link provided at Additional Backup, p. 18).

Further, even though the language of CB-22-2020 might be generalized, the distinctions drawn within are arbitrary and designed for the application of CB-22-2020 to the Subject Property. *See* Additional Backup, p. 16. There is no particular rational provided for the restrictions placed within footnote 38 of CB-22-2020, except to limit the obvious ramifications of amending all R-S parcels within the County.

4. There is no public interest underlying the enactment of CB-22-2020.

The Court of Appeals has found that some laws, even if they in fact single out certain entities and would otherwise be considered "special," are not prohibited by the Constitution provided they address "special evils with which existing general laws are incompetent to cope." *Jones v. House of Reformation*, 176 Md. 43, 58 (1939). But broad suggestions that the community wants the development ring hollow without any actual factual evidence to suggest that it would benefit either the local community or the Prince George's County populace at large to allow a single developer the opportunity to side-step the duly enacted old Zoning Ordinance and undermine the newly enacted new Zoning Ordinance before it ever took effect.

When only a single entity is likely to benefit from an exception to a law, then it does not have a "justifiable public interest." *See McClain*, 254 Md. App. at 203. There was no "special evil" to correct in simply requiring the Applicant to develop under the rules of the zones applied to the Subject Property or to follow the procedures for a Sectional Map Amendment. Nothing identified in the record is unique about the property such that it would be penalized in a certain manner for legal compliance.

Therefore, as CB-22-2020 benefited a singular entity that sought out assistance from the District Council and had no underlying public interest, it is an illegal special law

Citizen-Protestants are permitted to raise this issue in the context of the SDP approval when the validity of CB-22-2020 would impact the validity of SDP-1603-02. *Maryland Reclamation Associates, Inc. v. Harford County*, 468 Md. 339, 398–99 (2020).

For all of these reasons, Citizen-Protestants request that the District Council declare CB-22-2020 invalid because it is an illegal special law and thus also deny SDP-1603-02.

III. The Planning Board erred when it approved SDP-1603-02 because the SDP's validity is based on an illegal text amendment in violation of Section 22-201(b)(2)(i) of the Maryland Land Use Article.

Citizen-Protestants address for the first time another legal violation created by CB-22-2020: violation of Section 22-201(b)(2)(i) of the Maryland Land Use Article, otherwise known as the "uniformity" requirement. The Court of Special Appeals recently issued a new reported opinion on June 29, 2022, *Matter of Concerned Citizens of PG Cnty. Dist. 4*, No. 0472, Sept. term, 2021, 2022 WL 2339411 (Md. Ct. Spec. App. June 29, 2022) [hereinafter *Concerned Citizens*].[1] In this opinion, the court explained why such a requirement hadn't been afforded much analysis until its ruling, stating: "As recognized in *Anderson House, LLC v. Mayor & City Council of Rockville*, Maryland courts have not fully elaborated on the meaning of the uniformity requirement." *Concerned Citizens* at *6. The precise legal parameters of the language in Md. Code, Land Use, § 22-201(b)(2)(i) thus remained unanalyzed until approximately two weeks ago, particularly since the legal underpinnings have distinct overlap in spot zoning and special law analyses, and former cases were determined on those alternative grounds.

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[1] As previously has occurred with Howard County v. McClain, this opinion has been recently filed as a reported opinion; consequently, while only a Westlaw citation is currently available until such time as a reporter index number is assigned, the case is still precedent.

Yet, with the new analysis presented by the Court of Special Appeals, it is clear that this case is yet another instance of a developer in Prince George's County pushing for a law that is not uniform. As in *Concerned Citizens*, Citizen-Protestants argue that CB-22-2020 is a special law, and by implication is not in furtherance of the public interest. The Court of Special Appeals in *Concerned Citizens* declined to review any other arguments and focused only on the uniformity requirement, summarizing the case before it as follows:

> Appellees assert that CB-17 does not violate the uniformity requirement because CB-17 is equally applicable to all R-A zoned properties that meet the requisite criteria. In essence, they allege that any R-A zoned property would qualify for townhome redevelopment if it is 100 to 150 acres or was formerly used as an airport, within one mile of a municipal boundary, entirely within 2,500 feet of an electric generating public utility, and bordering a right-of-way classified as freeway or higher. The parties dispute whether any properties—other than Freeway Airport—meet the CB-17 criteria. The Planning Board, in its letter report, noted that it could not determine whether other such properties existed. The District Council did not address this question, and it was unnecessary for it to do so. We need not consider whether other properties exist. *See Anderson House, LLC*, 402 Md. at 714, 939 A.2d 116 (noting that the uniformity requirement can be violated when "a zoning ordinance singles out a property or properties"). Rather, the pertinent issue is not whether some other properties might qualify under the criteria, but whether creation of special areas for increased density is reasonable and based upon the public policy to be served. *See Woodward & Lothrop, Inc.*, 280 Md. at 720, 376 A.2d 483.

As in *Concerned Citizens*, Citizen-Protestants argue that no other properties even meet the specific restrictions placed in CB-22-2020. Further, "the Planning Board believes that only one property in the County would qualify" for the restrictions placed in CB-22-2020. Additional Backup, p. 16. The Planning Board went on to explain that CB-22-2020

"was drafted for an approximately 639-acre property, located north of Leeland Road and east of a freight line owned by Consolidated Rail, and identified in tax records as Parcel 30, tax account 0670737. The Property is also known as Willowbrook and has an extensive approval history under its existing R-S Zone." Additional Backup, p. 16.

Similarly, the Office of Law stated that "we believe this proposed bill can be perceived to violate the uniformity requirement. . . The proposed bill (specifically footnote 38 to Section 27-515(b)) appears to be drafted for a specific parcel contained within a R-S zone." Additional Backup, p. 10.

Further, there appears to be no public purpose on the record for such particular restrictions in CB-22-2020, except to make them arbitrarily limited to the Subject Property.

In light of the Court of Special Appeals' recent ruling, it is clear that CB-22-2020 is another example of piecemeal zoning changes through a council bill in violation of the uniformity requirement instead of through "viable options" such as "the Sectional Map Amendment or Zoning Map Amendment process[es]." *Concerned Citizens* at *10.

Therefore, the District Council must deny SDP-1602-03 because the use proposed therein is based on an illegal law in violation of the uniformity clause.

IV. The Planning Board erred when it approved SDP-1603-02 because it lacks the authority to approve SDP applications contingent on future compliance with statutory requirements.

In Prince George's County the Planning Board is delegated a limited scope of authority to take action related to SDP applications. The Prince George's County Zoning Ordinance (ZO) Section 27-528(e) provides the Planning Board with the authority to take

four (4) actions with respect to an SDP application presented before it during a public hearing. After an SDP application has been presented to the Planning Board at a public hearing the Planning Board has the authority to (1) approve the SDP application as is, (2) delay issuing a decision to provide the Applicant additional time to make any necessary changes to the SDP application so that it conforms to the requirements of the code, (3) approve the SDP application "with modifications", or (4) disapprove the SDP application.

Here, the Planning Board acted in excess of its limited authority when it conditionally approved SDP-1603-02 because most of the conditions of approval do not qualify as "modifications" under ZO Section 27-528(e).

The Zoning Ordinance does not provide a definition of the term "modification." In Maryland, "[t]he Cardinal rule of statutory construction is to ascertain and carry out the intention of the Legislature." *See, e.g., Marriott Employees Federal Credit Union v. Motor Vehicle Admin.*, 346 Md. 437, 444 (1997). When "the term in a statute is a legal term, absent any legislative intent to the contrary, the term is presumed to be used in its legal sense." *See, e.g., Dean v. Pinder*, 312 Md. 154, 161 (1988). When a term does not carry a specific legal meaning, the legislative intent is ascertained by applying the plain meaning of the term. *See e.g., Lockshin v. Semsker*, 412 Md. 257, 275 (2010). In seeking to apply the plain meaning "it is proper to consult a dictionary or dictionaries for a term's ordinary and popular meaning." *See Minh-Vu Hoang v. Lowery*, 469 Md. 95, 120 (2020). After a term's ordinary meaning has been ascertained, "the plain language must be viewed within

the context of the statutory scheme to which it belongs." *See Lockshin v. Semsker*, 412 Md. 257, 276 (2010).

Citizen-Protestants are not aware of any instance where a Maryland court has had the opportunity to consider the meaning of the term "modification" in the context of this section, so the term "modification" carries no specific legal meaning.

Merriam-Webster defines "modification" as "the making of a limited change in something." When one considers this definition specifically in the context of ZO Section 27-528, further meaning can be derived. ZO Section 27-528(a) requires the Planning Board to make a finding that the application satisfies the required criteria *prior* to approval of the application. As such, the most reasonable interpretation of the term "approve with modifications" would provide the Board with the authority to first determine that the SDP application satisfies all of the required criteria under ZO Section 27-528(a) and then request additional changes be made as the Board deems necessary.

For example, if the Planning Board was able to conclude that SDP-1603-02 satisfied all of the required criteria under ZO Section 27-528(a), then conditions of approval 2 and 3 could be considered permissible "modifications" within the scope of the Board's authority. Conditions of approval 2 and 3 have no bearing on the required criteria and thus could be considered "limited changes" to the application which create requirements *in addition to* the required criteria. "Modifications" cannot act *in lieu of* a finding by the Planning Board of compliance with required criteria.

Unlike conditions of approval 2 and 3, none of the sub-conditions provided in condition of approval 1 fall into the definition of "modifications" allowed under ZO Section 27-528(e) because they are not limited changes required *in addition to* the satisfaction of the required criteria. Instead, these sub-conditions act *in lieu* of a finding by the Planning Board that SDP-1603-02 complies with the required criteria.

The impermissible sub-conditions of condition of approval 1 consist of technical changes and contingencies.

Condition of approval 1(b), (d), (f), (g), (h), (i), (j), (k), (l), (p), (q), (r), and (s) are examples of technical changes the Planning Board determined were required for SDP-1603-02 and TCP2-026-2021-02 to be in conformance with the applicable statutes. Although the Planning Board likely has the authority to request these types of changes, the Planning Board does not have the authority to request these changes via approval with modifications. Instead, ZO Section 27-528(e) provides the appropriate procedure for requesting necessary technical changes – delay the issuance of its decision until the necessary technical changes are made.

Condition of approval 1(a), (c), (e), (m), (n), and (o) are examples of contingencies which are prohibited by ZO Section 27-528. ZO Section 27-528(a) requires the Planning Board to make findings that SDP-1603-02 satisfies the required criteria *prior to approval.* However, condition 1(a), (c), (e), (m), (n), and (o) imply that the Planning Board concluded that the Applicant failed to provide the required evidence to demonstrate that SDP-1603-02 satisfies ZO Section 27-528(a)(1)-(4) but the application will be approved anyway

because the Applicant might provide sufficient evidence at a later date. This practice is clearly outside the limited scope of the Planning Board's authority because ZO Section 27-528 does not allow the Planning Board to contingently approve an SDP application.

Further, in approving SDP-1603-02 contingent on future compliance with the required criteria, the Planning Board acted against the public interest and abandoned its duty to ensure that developments conform to the zoning code. For example, ZO Section 27-528(a)(1) requires the Board to evaluate whether SDP-1603-02 conforms to the approved comprehensive design plan. The only approved and certified comprehensive design plan applicable to this property permits a total gross floor area of 3.5 million square feet of employment and institutional uses while the proposed use in SDP-1603-02 is "based on a total gross floor area of 5.5 million square feet." Final Decision, p. 12. There is an updated CDP application (CDP-0505-02) that would allow designs based on a total gross floor area of 5.5 million square feet of employment and institutional uses, but it is pending review from the District Council and has not been certified. Accordingly, CDP-0505-02 may be denied, in which case SDP-1603-02 would definitively conflict with the applicable CDP (CDP-0505-01), or CDP-0505-02 may be approved with new conditions, in which case it would be uncertain whether SDP-1603-02 conforms with CDP-0505-02.

Contingent approval is against the public interest because it threatens to waste the County's resources and time. The approval of SDP-1603-02 allows the Applicant to pursue other applications and permits based thereon. If CDP-0505-02 is denied or significantly

changed, then the validity of all the applications and permits approved subsequent to SDP-1603-02 will be called into question.

This example of contingent approval is also a dereliction of the Planning Board's duty because the Planning Board effectively abandoned its obligation to meaningfully evaluate whether SDP-1603-02 will comply with the final version of CDP-0505-02, if it is even approved.

Therefore, the Planning Board acted outside the limited scope of its authority when it approved SDP-1603-02 based on requests for technical changes as well as contingencies that the Applicant demonstrate satisfaction of the required criteria at an undetermined date after approval. For all of these reasons, the District Council should vacate and remand the Planning Board's approval of SDP-1603-02.

V. The Planning Board erred when it approved SDP-1603-02 because the record lacks substantial evidence to support a finding that SDP-1603-02 satisfies ZO Section 27-528(a).

ZO Section 27-528(a) requires the Planning Board make a finding that SDP-1603-02 satisfies five (5) criteria "*prior to approving*" the SDP application. However, the record lacks substantial evidence to support a finding that SDP-1603-02 satisfied each of the five criteria when the Planning Board approved it.

1. SDP-1603-02 does not conform to the approved and certified Comprehensive Design Plan as required by ZO Section 27-528(a)(1).

ZO Section 27-528(a)(1) requires the Planning Board to make a finding that *prior to approval* the SDP application "conforms to the approved Comprehensive Design Plan."

Here, the Subject Property has a long development history with many approved Comprehensive Design Plans. The most recent Comprehensive Design Plan which has been approved and certified (CDP-0505-01) establishes the design guidelines for a total gross floor area of 3.5 million square feet of employment and institutional uses. Final Decision, p. 3.

Although SDP-1603-02 proposes the construction of 3.5 million square feet of warehouse and distribution uses, the design is "based on a total gross floor area of 5.5 million square feet." Staff Report, p. 14. Therefore, the only evidence on the record demonstrates that SDP-1603-02 does not conform to the applicable CDP (CDP-0505-01) and thus SDP-1603-02 does not satisfy ZO Section 27-528(a)(1).

Although Applicant has submitted a new Comprehensive Design Plan (CDP-0505-02) that would allow designs based on a total gross floor area of 5.5 million square feet of employment and institutional uses, CDP-0505-02 has not been approved and certified by the District Council. In fact, the District Council is hearing arguments about CDP-0505-02 on September 12, 2022. For the reasons stated *supra*, in Section IV, the Planning Board lacks the authority to approve SDP-1603-02 contingent on the future approval of a new Comprehensive Design Plan particularly when the evidence on the record clearly demonstrates that SDP-1603-02 conflicts with the applicable Comprehensive Design Plan.

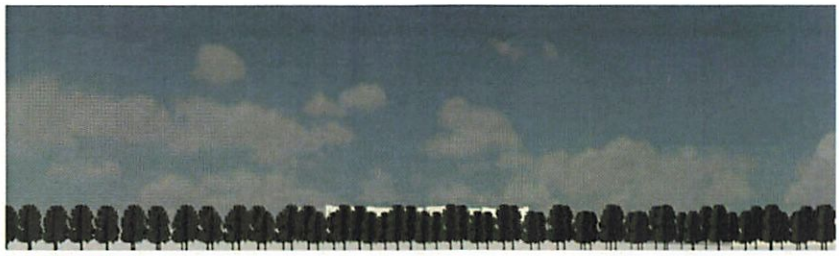
The District Council should reverse the Planning Board's approval of SDP-1603-02 because the evidence on the record demonstrates that SDP-1603-02 conflicts with the

applicable Comprehensive Design Plan and therefore did not satisfy ZO Section 27-528(a)(1) *prior* to its approval.

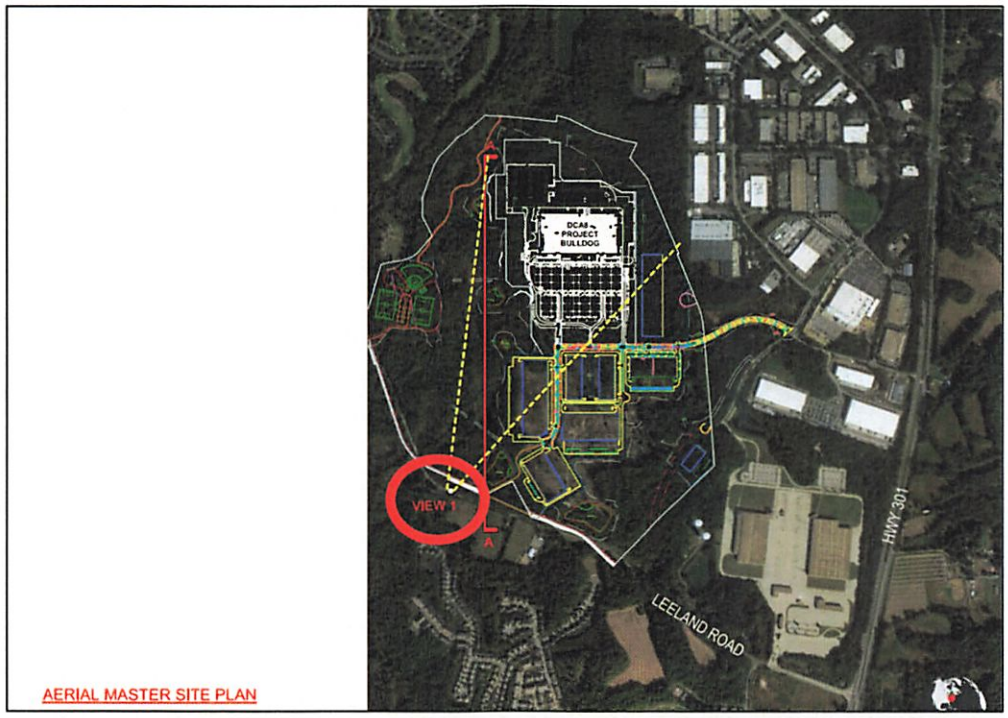
2. SDP-1603-02 does not conform to the applicable standards of the Landscape manual as required by ZO Section 27-528(a)(1).

ZO Section 27-528(a)(1) requires the Planning Board to make a finding that *prior to approval* the SDP application "conforms to . . . the applicable standards of the Landscape Manual." The Landscape Manual requires buffering along scenic roadways "when a property supporting any use has frontage on a special roadway." Landscape Manual Section 4.6(C)(2). The purpose of the Landscape Manual is to "preserve and enhance the scenic and/or historic landscape qualities within the viewshed adjacent to special roadways." Landscape Manual Section 4.6(a)(4).

Here, the Subject Property has frontage along Leeland Road which is a scenic roadway. As such, the Applicant is required to provide buffering along Leeland Road to "preserve [] the scenic [] landscape qualities within the viewshed adjacent [there]to." Applicant provided a computer-generated image to support the Applicant's assertion that the proposed five (5) story, 93 feet tall warehouse will have "little, if any visual impact on the surrounding properties" adjacent to Leeland Road. *See* Planning Board June 30, 2022, Hearing at minute 1:39:33. Applicant's computer-generated image and aerial image are included below. A red circle has been added to the aerial image to better emphasize the perspective provided in the computer-generated image.



CAMERA VIEW 1



AERIAL MASTER SITE PLAN

Additional Backup, p. 4.

However, Applicant's computer-generated image does not accurately depict the reality at the Subject Property. During the June 30, 2022, hearing, Citizen-Protestants pointed out that Applicant failed to show the potential view from a location on Leeland Road directly in front of the proposed building. *See* Planning Board June 30, 2022, Hearing at minute 2:05:40. Instead, the viewshed estimate was generated based on the potential

view from a location southwest of the proposed building, looking through an area of the Subject Property where tree coverage will be thickest.

Citizen-Protestants further testified that if one were on Leeland Road at a location directly south of the proposed building, one would likely have a clear view of the proposed development due to insufficient buffering along Leeland Road. 2:06:00. In fact, the record for PPS 4-21056 includes images which directly support this point as the images provide the view from a location on Leeland Road directly south of the proposed five (5) story building.[2] These images, provided below, clearly demonstrate that the existing buffering along Leeland Road is woefully insufficient and the proposed five (5) story facility will be clearly visible from the scenic road.

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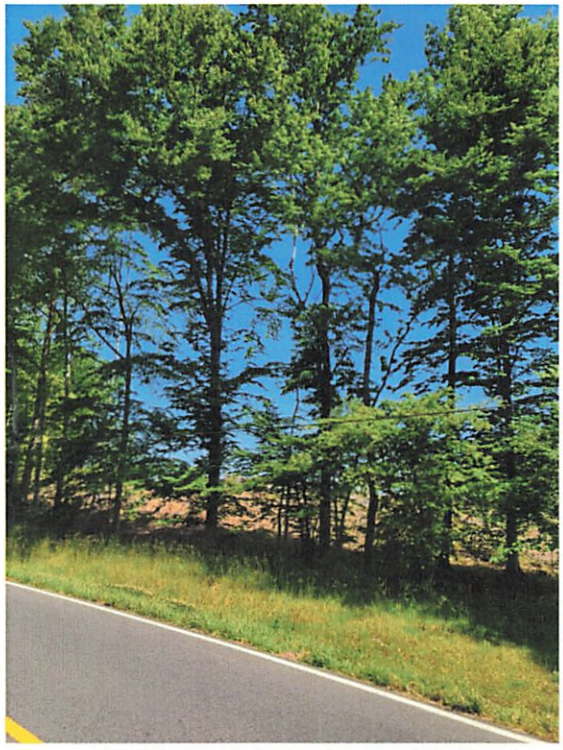
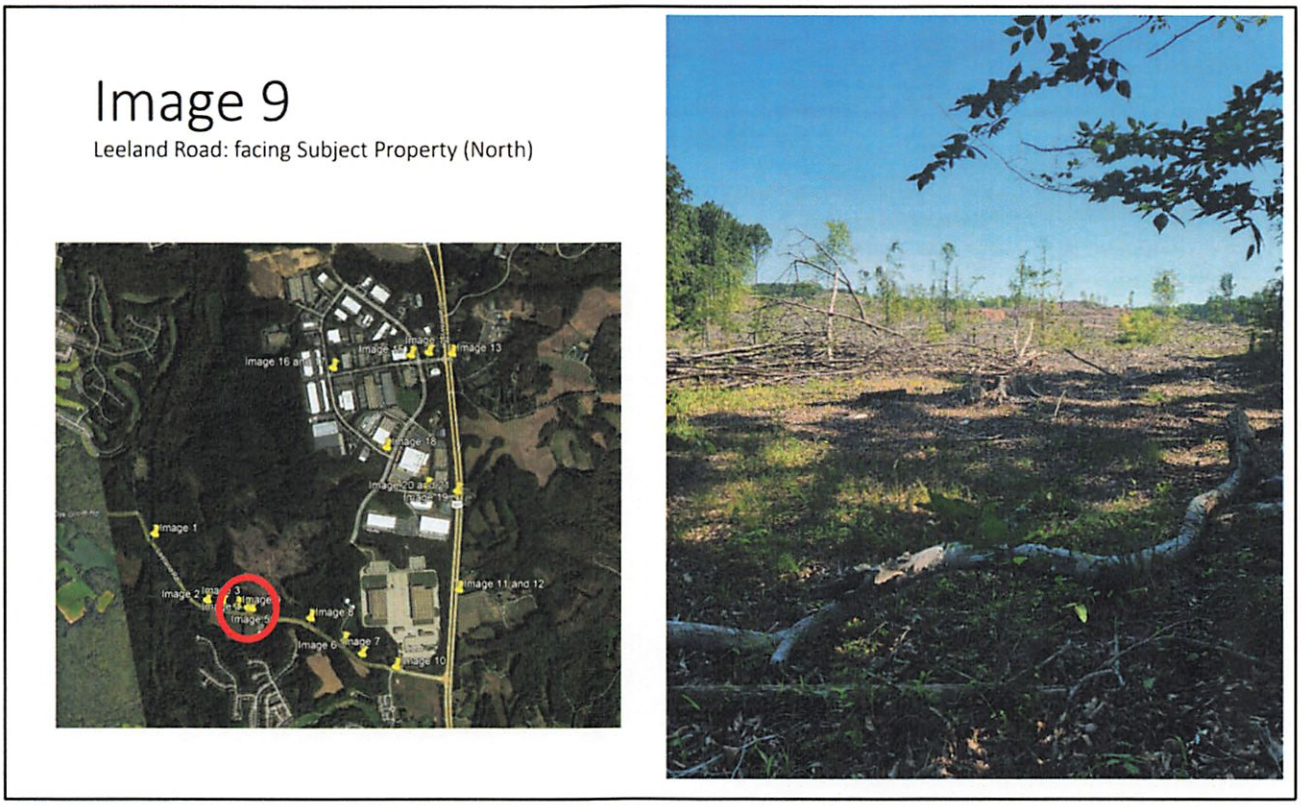
[2] ZO Section 27-523(c) authorizes the District Council to "take judicial notice of any evidence contained in the record of any earlier phase of the approval process relating to all or a portion of the same property, including the approval of a preliminary plat of subdivision." When the District Council considers an appeal of an SDP application, the District Council is required to conduct a hearing in accordance with ZO Section 27-523(c). *See* ZO Section 27-528.01(c).

Image 8

Leeland Road: facing Subject Property (North)



Additional Backup, June 2, 2022, Planning Board Hearing re 4-20156, p. 52.



Additional Backup, June 2, 2022, Planning Board Hearing re 4-20156, p. 53.

The District Council should reverse the Planning Board's approval of SDP-1603-02 because the record lacks substantial evidence to support a finding that SDP-1603-02 conforms with section 4.6 of the Landscape Manual and therefore the record lacks substantial evidence to support a finding that SDP16-03-02 satisfies ZO Section 27-528(a)(1).

3. The record lacks substantial evidence to support a finding that the development will be adequately served by public facilities as required by ZO Section 27-528(a)(2).

ZO Section 27-528(a)(2) requires the Planning Board to make a finding, *prior to approval*, that Applicant has demonstrated "the development will be adequately served

within a reasonable period of time with existing or programmed public facilities either shown in the appropriate Capital Improvement Program [or] provided as part of the private development the SDP application."

The Applicant provided no evidence that the existing or programmed public facilities will be adequate to serve the proposed 3.5 million square feet distribution warehouse and facility. The Applicant might have demonstrated that the facility will be adequately served by existing or programmed public facilities by providing a phasing plan for road improvements, a fee schedule to finance the road improvements, and the truck turning plan. However, conditions of approval 1(m), (n), and (o) demonstrate that the Applicant did not provide these materials.

To that end, Technical Staff explained that "given the industrial nature of the use, Transportation Planning Staff believes that the proposed development will generate large volumes of truck traffic. Staff requested that the applicant provide truck turning plans, to demonstrate adequate circulation for truck turning movements and safe integration with vehicular and pedestrian travel with limited conflicts on-site. The Applicant has not submitted truck turning and circulation plans as part of the latest SDP submission." Staff Report, p. 19.

Therefore, there was no evidence on the record to support the Planning Board's finding that *prior to approving* SDP-1603-02, the Applicant demonstrated that there would be adequate public facilities. The District Council should reverse the Planning Board's approval of SDP-1603-02 because the record lacks substantial evidence to support a

finding that the development will be adequately served within a reasonable period of time with existing or programmed public facilities and therefore the record lacks substantial evidence to support a finding that SDP16-03-02 satisfies ZO Section 27-528(a)(2).

4. The record lacks substantial evidence to support a finding that adequate provisions have been made for draining surface water as required by ZO Section 27-528(a)(3).

ZO Section 27-528(a)(3) requires the Planning Board to make a finding, *prior to approval*, that Applicant has demonstrated "adequate provisions have been made for draining surface water so that there are no adverse effects on either the subject property or adjacent properties."

Although there is an approved Stormwater Management Concept Plan for the entire 442-acre site (42013-2020-00), the approved plan was for the Applicant's original design plan that included a total gross floor area of 3.5 million square feet of employment and institutional uses. The Applicant has not yet obtained an approved stormwater management concept plan for the Applicant's new design plan that includes a total gross floor area of 5.5 million square feet of employment as is contemplated in SDP-1603-02. *See* Staff Report, p. 14, 23 (Stormwater Management Concept plan 42013-2020-00 was approved on June 8, 2021, before the Applicant requested the total gross floor area of employment and institutional uses be increased by 2 million square feet). The design depicted in SDP-1603-02 is based on the overall design plan for a total of 5.5 million square feet of employment and institutional uses on the Subject Property and therefore does not comply with the only approved Stormwater Management Concept Plan (42013-2020-00). The lack of sufficient

evidence with regard to this criterion is further demonstrated by condition of approval 1(c) which requires the Applicant to provide an approved revised stormwater management concept plan at some point in the future.

Therefore, the Applicant failed to provide any evidence on the record which would demonstrate that adequate provisions have been made for draining surface water as it relates to the overall development plan contemplated in SDP-1603-02 for 5.5 million square feet of development.

The District Council should reverse the Planning Board's approval of SDP-1603-02 because the record lacks evidence to support a finding that adequate provisions have been made for draining surface water so that there are no adverse effects on either the subject property or adjacent properties and therefore the record lacks substantial evidence to support a finding that SDP16-03-02 satisfies ZO Section 27-528(a)(3).

5. The record lacks substantial evidence to support a finding that SDP-1603-02 conforms with an approved Type 2 Tree Conservation Plan as required by ZO Section 27-528(a)(4).

ZO Section 27-528(a)(3) requires the Planning Board to make a finding, *prior to approval*, that Applicant has demonstrated that the SDP "is in conformance with an approved Type 2 Tree Conservation Plan."

Staff explained that the Subject Property is "within a sediment total maximum daily load (TMDL) related to Tier II waters, as established by the State." *See* Staff Report, p. 24. As a result, the Applicant is required to produce an erosion and sediment control technical plan to determine the ultimate limits of disturbance based on the impact of the proposed

3.5 million square foot facility and any temporary infrastructure on the Subject Property. *See* Staff Report p. 24. The ultimate limits of disturbance (LOD), as determined by the erosion and sediment control technical plan, must be shown on the Type 2 Tree Conservation Plans (TCP2s).

Although Applicant has submitted TCP2-026-2021-02, Applicant has not submitted an erosion and sediment control technical plan. As a result, there is no evidence on the record to demonstrate whether the ultimate limits of disturbance, required for the proposed facility as determined by the erosion and sediment control plan, are "in in conformance with" the limits of disturbance provided in TCP2-026-2021-02. The lack of this evidence is further demonstrated by condition of approval 1(e) which requires the Applicant to "submit a copy of the erosion and sediment control technical plan, so that the ultimate limits of disturbance can be verified and shown on the final Type 2 tree conservation plan."

The District Council should reverse the Planning Board's approval of SDP-1603-02 because the record lacks evidence to support a finding that the ultimate limits of disturbance required to address the impact of the proposed 3.5 million square foot structure development is in conformance with the limits of disturbance provided in TCP2-026-2021-02 and therefore the record lacks substantial evidence to support a finding that SDP-1603-02 satisfies ZO Section 27-528(a)(4).

6. SDP-1603-02 does not preserve and/or restore regulated environmental features to the fullest extent possible as required by ZO Section 27-528(a)(5).

ZO Section 27-528(a)(5) requires the Planning Board to make a finding, *prior to approval*, that SDP-1603-02 "demonstrates that the regulated environmental features are preserved and/or restored to the fullest extent possible in accordance with the requirement of Subtitle 24-130(b)(5)."

Subtitle 24-130(b)(5) requires "where a property is located outside the Chesapeake Bay Critical Areas Overlay Zones the preliminary plan and all plans associated with the subject application shall demonstrate the preservation and/or restoration of regulated environmental features in a natural state to the fullest extent possible consistent with the guidance provided by the Environmental Technical Manual established by Subtitle 25." ZO § 24-130(b)(5).

The Environmental Technical Manual Provides:

> Streams and nontidal wetlands and their associated buffers, and isolated nontidal wetlands and their associated buffers (collectively referred to as "regulated environmental features"), are required by the Zoning Ordinance and the Subdivision Ordinance to be preserved in, or restored to, a natural state to the fullest extent possible.
>
> The determination of "fullest extent possible" is a three-step process that starts with avoidance of impacts. Then, if the impacts are unavoidable and necessary to the overall development of the site (as defined below), the impacts must be minimized. In the third step, if the cumulative, minimized impacts are above the designated threshold, then mitigation is required for the impacts proposed.
>
> Necessary impacts are those that are directly attributable to infrastructure required for the reasonable use and orderly and efficient development of

> the subject property or are those that are required by County Code for reasons of health, safety, or welfare. Necessary impacts include, but are not limited to, adequate sanitary sewerage lines and water lines, road crossings for required street connections, and outfalls for stormwater management facilities. Road crossings of streams and/or wetlands may be appropriate if placed at the location of an existing crossing or at the point of least impact to the regulated environmental features.
>
> Stormwater management outfalls may also be considered necessary impacts if the site has been designed to place the outfall at a point of least impact.
>
> The types of impacts that can be avoided include those for site grading, building placement, parking, stormwater management facilities (not including outfalls), and road crossings where reasonable alternatives exist. The cumulative impacts for the development of a property should be the fewest necessary and sufficient to reasonably develop the site in conformance with County Code.
>
> Where properties are located in the Developed Tier or a designated center or corridor, impacts to regulated environmental features may be considered where needed to accommodate planned development on constrained sites. Such impacts may include allowing impervious surfaces to remain within the buffer or the placement of structures within a currently unvegetated buffer. Preservation of existing vegetated buffers will be a priority.

Environmental Technical Manual C-3.

SDP-1603-02 and the associated TCP2-026-2021-02 required the approval of two additional impacts to Primary Management Areas (PMA). PMAs are regulated environmental features.

"The first is a stormwater outfall from a stormwater facility, in the northwestern portion of the Parcel 6 development. The second area is the result of the final engineering

of the road crossing for Queens Court, which is an expansion of a previously approved impact." *See* Staff Report, p. 21.

Pursuant to ZO Section 27-528(a)(5) and Subtitle 24-130(b)(5), the Applicant was required to provide evidence demonstrating why these two impacts are necessary. With regard to the first impact for a stormwater outfall, the Applicant merely provided that the impact "is considered necessary to the orderly development of the subject property. This impact cannot be avoided because it is required by other provisions of the County and state codes." *See* Staff Report p. 22.

Pursuant to the Environmental Technical Manual, a stormwater management facility, including a stormwater outfall, would not be considered necessary if it could be avoided by a change in building or parking placement. Environmental Technical Manual C-3. Here, the Applicant failed to provide any evidence to explain why the proposed stormwater outfall could not be avoided if the building size was reduced or placed elsewhere on the Subject Property. This site is 442 acres. Only 186 acres are defined as PMAs. Accordingly, the Applicant has available to it at least 256 acres of land to develop. The development regulations applicable to this site do not require the development footprint be this large. Thus, the Applicant could reduce the size of the development to avoid the proposed impact to the PMA for the stormwater outfall.

Since the Applicant has already received prior approval for impacts to the PMA when the total gross floor area for the project was 3.5 million square feet, the only evidence on the record indicates that this requested expansion of impacts on the PMA are the direct

result of the Applicant's increase in the size of the proposed development area from 3.5 million square feet to 5.5 million square feet.

With regard to the second PMA impact for the extension of Queens Court, the applicant merely provided that this impact is necessary and "cannot be avoided because it is required by other provisions of the County and state codes." *See* Staff Report, p. 22. However, the Environmental Technical Manual explicitly states that PMA impacts caused by road crossing are not necessary when "reasonable alternatives exist." Environmental Technical Manual C-3. Here, Citizen-Protestants argued that a reasonable alternative exists on the site. If the Applicant had chosen to extend Pope's Creek Drive instead of Queens Court Avenue, the Applicant could have avoided all impacts to the PMA caused by the road crossing. Applicant did not provide any evidence to rebut this point. As such, the only evidence on the record demonstrates that the proposed PMA impacts for the Queens Court Road Crossing are not necessary.

The District Council should reverse the Planning Board's approval of SDP-1603-02 because the record lacks evidence to support a finding that the requested impacts to the PMA are necessary and therefore the record lacks substantial evidence to support a finding that SDP16-03-02 satisfies ZO Section 27-528(a)(5).

For all of these reasons, the record lacks substantial evidence to support a finding that SDP-1603-02 satisfies the required criteria under ZO Section 27-528(a).

VI. The Planning Board erred when it approved SDP-1603-02 because the record lacks substantial evidence to support a finding that SDP-1603-02 satisfies all of the applicable conditions imposed by previous applications.

SDP-1603-02 is subject to all conditions imposed by previous development applications. Thus, the record must provide substantial evidence that SDP-1603-02 satisfies each applicable condition. Here, the record lacks substantial evidence to support a finding that SDP-1603-02 satisfies all of the applicable conditions.

Basic Plan A-9968-03, Condition 8 requires that "the list of recreational facilities shall be determined at the preliminary plan of subdivision and specific design plan stage." *See* Staff Report, p. 9. However, the only evidence on the record demonstrates that the Applicant has not provided a finalized list of recreational facilities on the Subject Property and instead is still "coordinating with DPR to determine the appropriate programming and design for the future community Park." *See* Staff Report, p. 9. Therefore, the record lacks substantial evidence to support a finding that SDP-1603-02 satisfies Condition 8 of A-9968-03.

Comprehensive Design Plan Consideration 1 requires "the natural aesthetic qualities of the site and all regulated environmental features shall be preserved to the fullest extent possible and shall seek to minimize any impacts to said features." *See* Staff Report, p. 10. SDP-1603-02 required the approval of two additional impacts to regulated environmental features. For the reasons stated in Section V(6), the record lacks substantial evidence to support a finding that SDP-1603-02 preserves regulated environmental features "to the fullest extent possible" because the required PMA impacts are not necessary.

Therefore, the record lacks substantial evidence to support a finding that SDP-1603-02 satisfies Comprehensive Design Consideration 1.

Comprehensive Design Plan Consideration 2 states that "*all* proposed internal streets" should support multimodal transportation. *See* Staff Report, p. 10 (emphasis added). However, the only evidence in the record demonstrates that the proposed internal streets for SDP-1603-02 will not facilitate multimodal transportation. *See* Staff Report, p. 10. Instead, only "other parts of the larger site" will "support multimodal transportation." *See* Staff Report, p. 10. Therefore, the record lacks substantial evidence to support a finding that SDP-1603-02 satisfies Comprehensive Design Consideration 2.

Comprehensive Design Plan (CDP-0505-02) Condition 3 and Preliminary Plan of Subdivision (PPS 4-21056) Condition 2 limit trip generation on the Subject Property. *See* Staff Report, p. 13, 14. The Applicant failed to present any evidence regarding the potential trip generation for the 3.5 million square feet distribution facility depicted in SDP-1603-02. Therefore, the record lacks substantial evidence to support a finding that SDP-1603-02 satisfies CDP-0505-02 Condition 3 and PPS 4-21056 Condition 2.

Comprehensive Design Plan (CDP-0505-02) Condition 4 states that road improvements "shall be phased at the time of future specific design plan applications, and a determination shall be made as to when said improvements shall (a) have full financial assurances, (b) have been permitted for construction through the operating agency's access permit process, and (c) have an agreed upon timetable for construction with the appropriate operating agency." *See* Staff Report, p. 13. Here, the Applicant has not provided any

information regarding road improvement phasing. Therefore, the record lacks any evidence to support a finding that SDP-1603-02 satisfies CDP-0505-02 Condition 4.

Comprehensive Design Plan (CDP-0505-02) Condition 6 requires that "at the time of specific design plan, the applicant shall show all proposed on-site transportation improvements on the plans." *See* Staff Report, p. 13. Here, "Staff requested that the applicant provide truck turning plans, to demonstrate adequate circulation for truck turning movements and safe integration with vehicular and pedestrian travel with limited conflicts on-site. The Applicant has not submitted truck turning and circulation plans as part of the latest SDP submission." *See* Staff Report p. 19. Accordingly, the record lacks the evidence necessary for the Planning Board to determine whether SDP-1603-02 "shows all proposed on-site transportation improvements." Therefore, the record lacks substantial evidence to support a finding that SDP-1603-02 satisfies CDP-0505-02 Condition 6.

Preliminary Plan of Subdivision (PPS 4-21056) Condition 4 requires the development of the Subject Property "be in conformance with the approved Stormwater Management Concept Plan (42013-2020-00) and any subsequent revisions." *See* Staff Report, p. 14. The only evidence on the record is that "a revision to the approved SWM concept plan is in review" and therefore subject to change. Accordingly, the record lacks the evidence necessary to determine whether SDP-1603-02 will conform to revised SWM concept plan because it has not been approved. Further, there is no evidence in the record as to whether SDP-1603-02 conforms to the previous version of the Stormwater

Management Concept Plan. Therefore, the record lacks substantial evidence to support a finding that SDP-1603-02 satisfies PPS 4-21056 Condition 4.

Finally, Preliminary Plan of Subdivision (PPS 4-21056) Condition 7 requires that fire safety requirements be "noted on the specific design plan." *See* Staff Report, p. 15. Here, the only evidence on the record indicate that these requirements have not been noted on the specific design plan. *See* Staff Report, p. 15. Therefore, the record lacks any evidence to support a finding that SDP-1603-02 satisfies PPS 4-21056 Condition 7.

The District Council should reverse the Planning Board's approval of SDP-1603-02 because the record lacks substantial evidence to support a finding that SDP-1603-02 complies with at least nine (9) applicable requirements of previous development applications.

VII. The Planning Board erred when it approved SDP-1603-02 because the proposed use, "a High-Cube Fulfillment Center Warehouse – Sortable", is not permitted on the Subject Property under the Prior Zoning Ordinance.

SDP-1603-02 was reviewed under the prior Zoning Ordinance. *See* Staff Report p. 1. Under the prior Zoning Ordinance, the Subject Property was zoned R-S and, pursuant to CB-22-2020, uses allowed in the E-I-A Zone are permitted on the Subject Property. ZO § 27-515. The E-I-A Zone, and therefore the R-S Zone as it applies to the Subject Property, permits "warehouses and distribution facility" uses. *See id.*

According to PPS 4-21056, the proposed 3.5 million square foot facility will be utilized as a "High-Cube Fulfillment Center Warehouse – Sortable." *See e.g.*, Additional Backup, p. 91. This use is not permitted under the Prior Zoning Ordinance. Therefore,

SDP-1603-02 should be denied because it proposes a use not authorized under the prior zoning code.

When determining whether a proposed use qualifies as a use already defined by the county zoning code, Rathkopf suggests that "it is not the name used by the owner that determines the character of the use. This is to be ascertained from what the use actually consists of and its method of operation." 1 Rathkopf's The Law of Zoning and Planning § 5:18 (4th ed.).

Two cases, *Marzullo v. Kahl*, 366 Md. 158 (2001), and *Lucas v. People's Counsel for Balt. Cty.*, 147 Md. App. 209 (2002), demonstrate how Maryland courts apply these principles of statutory interpretation specifically in the context at issue here-whether a proposed use qualifies as a use already defined by a county zoning code.

Marzullo analyzed whether a snake breeding operation qualified as "commercial agriculture" based on the definition provided in the county zoning ordinance. 366 Md. at 174. The Court's analysis turned on both whether the legislature contemplated snake breeding operations when it drafted the definition of "commercial agriculture" and whether substantial evidence supported the Board of Appeals' interpretation of the zoning ordinance. Based on previously proposed text amendments to the definitions of several agricultural uses, the Court concluded that the legislature did not contemplate snake breeding when it defined "commercial agriculture" because snakes are not "farm animals" and there was no indication that the legislature intended to "extend [] any of the relevant definitions to include any new animals involved in new types of commercial agriculture

that were not explicitly stated in the new definition." *Id.* at 190-91. Therefore, there was clear legislative intent that the definition of "commercial agriculture" did not include the proposed snake breeding use.

In *Lucas*, the intermediate appellate court considered whether a proposed facility consisting of a helicopter landing pad and a landing strip for fixed-wing aircraft qualified as an "airport" based on the definition in the Baltimore County zoning ordinance. 147 Md. App. 209. The court's analysis turned on whether the County Council created a narrower definition that more specifically described the proposed use. The court concluded that "in light of the legislative history, it is appropriate to view the specific designations of airstrip, helistop, and helipad as modifications of the general term 'airport,' and creating distinct and separate uses for different levels of aircraft operations. The combination of an airstrip with a helistop and helipad does not create an airport." *Id.* at 235. Therefore, subsequent text amendments that more specifically described the proposed use served as clear legislative intent that the broader "airport" use no longer included the proposed use.

Here, there is clear legislative intent that the District Council did not intend to include the High-Cube Fulfillment Center Warehouse – Sortable use in the "warehouses and distribution" use.

The prior zoning ordinance defines warehouse (or warehouse unit) as "a 'Building' used for the storage of goods and materials in connection with the day-to-day operation of a wholesale or distribution business, or a business that is not located in the same 'Building' or on the same property as the 'Warehouse Unit.' The storage of goods and materials as an

'Accessory Use' to a business located on the same property is not a 'Warehouse Unit.'" ZO § 27-101.01(a)(256).

The prior zoning ordinance defined distribution facility as "(A) a facility to or from which a wholesaler or retailer ships merchandise, materials, or supplies for storage or distribution by that wholesaler or retailer to the sales outlets or service operations it supports; or (B)A business whose functions are similar to those of the United States Postal Service, that is exclusively devoted to the receiving, sorting, sending, and delivery of letters, parcels, and other postal express matter." ZO § 27-101.01(a)(66.4).

A high-cube fulfillment center warehouse is defined, according to the ITE-Manual, as a facility "used primarily for the storage and/or consolidation of manufactured goods (and to a lesser extent, raw materials) prior to their distribution to retail locations or other warehouses. . . High-cube fulfillment center warehouses include warehouses characterized by a significant storage function and direct distribution of ecommerce product to end users. These facilities typically handle smaller packages and quantities than other types of HCWs and often contain multiple mezzanine levels." ITE Manual, 10th Ed., p. 129.

The definitions of "warehouse" and "distribution facility" do not contemplate a high-cube fulfillment center warehouse-sortable use. This conclusion is further supported by subsequent amendments to the zoning ordinance.

In the prior Zoning Ordinance, a Merchandise Logistics Center was defined as "a facility located within a Regional Urban Community, where goods or products are received and may be sorted, packed and stored for the purpose of distribution to parcel carriers or

delivery directly to a customer, and which may include ancillary, and related functions such as indoor or outdoor loading and unloading, light maintenance and refueling of fleet vehicles, employee break room(s), ancillary retail sales and customer service areas, pick and pack areas, printing, packaging, and assembling or making products on demand and ancillary and related uses." ZO § 27-101.01.150.1.[3]

As in *Lucas*, the prior Zoning Ordinance included a more specific definition which more closely describes the proposed high-cube fulfillment warehouse – sortable use than the general "warehouse" and "distribution facility" uses.

Further, in the new Zoning Ordinance, the District Council defined a new use– "distribution warehouse". This new use "includes the temporary storage of such products, supplies, and equipment pending distribution." New ZO § 27-2500. Under the new Zoning Ordinance, a distribution warehouse use requires approval of a special exception in the Industrial, Employment ("IE") zone. New ZO § 27-5101.[4] This definition would likely encompass a high-cube fulfillment center warehouse use.

Similar to *Marzullo*, the new zoning text amendment here demonstrates that the District Council did not intend to include a high-cube fulfillment center warehouse –

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[3] Although the bill that created this definition (CB—018-2019) was ultimately invalidated, this definition provides clear legislative intent that the "warehouse" and "distribution facility" uses do not include a high-cube fulfillment center warehouse – sortable

[4] Although SDP-1603-02 is being evaluated under the prior Zoning Ordinance, Citizen-Protestants offer the definition in the new Zoning Ordinance to demonstrate clear legislative intent that the "warehouse" and "distribution facility" uses of the prior Zoning Ordinance do not include a high-cube fulfillment center warehouse – sortable.

sortable use in either the "warehouse" or "distribution facility" uses of the prior Zoning Ordinance.

Therefore, there is clear legislative intent that the use proposed on the Subject Property, a high-cube fulfillment center warehouse – sortable, is not a use permitted in the R-S or E-I-A zone under the prior zoning ordinance.

The District Council must deny SDP-1603-02 because it would permit a use not allowed under the applicable zoning code.

VIII. The Planning Board erred when it approved SDP-1603-02 and TCP2-026-2021-02 because the proposed impacts to the Primary Management Area (PMA) are not necessary.

For the reasons stated in Section V(6), the Planning Board erred legally when it determined that the requested impacts to the PMA were necessary even though the impacts could have been avoided with alternative site design options.

IX. The Planning Board erred when it approved TCP2-026-2021-02 without requiring the Applicant to demonstrate that it had exhausted on-site preservation methods before being approved for off-site preservation.

Subtitle 25 of the County Code requires the Applicant to take "every effort [] to meet the woodland conservation requirements on-site." *See* ZO § 25-122(b)-(c); 2018 Environmental Technical Manual, A-16. Accordingly, before being allowed to satisfy its woodland conservation requirements off-site, the Applicant was required to demonstrate that it had "exhaust[ed] in turn" every on-site preservation method. *See* ZO § 25-122(c); 2018 Environmental Technical Manual, A-16.

Here, the Applicant proposes to satisfy its conservation requirements, in part, through off-site preservation. Staff Report, p. 19. However, the Applicant never explained whether it had exhausted on-site preservation requirements before requesting approval for off-site preservation.

Despite the clear deficiencies in the TCP2 in light of the requirements set out in Subtitle 25 and the 2018 Environmental Technical Manual, the Planning Board nevertheless approved TCP2-026-2021-02. The Planning Board failed to explain why it believed that the Applicant had exhausted all on-site preservation methods before requesting permission to meet its woodland conservation requirements off-site. Accordingly, the Planning Board's decision to approve TCP2-026-2021-02 violated both Subtitle 25 and the Environmental Technical Manual.

Therefore, Citizen-Protestants request the District Council disapprove TCP2-026-2021-02 because the Applicant failed to explain how it exhausted on-site preservation methods.

X. The Planning Board erred when it approved SDP-1603-02 because it conflicts with the General Plan and the applicable Area Master Plan.

Although ZO Section 27-528(a) does not specifically require compliance with the General Plan and the Area Master Plan, these are still relevant factors for the Planning Board to take into consideration.

During the June 30, 2022 Hearing, expert witness, Ruth Grover testified that SDP-1603-02 conflicts with Plan Prince George's 2035 ("Plan 2035) and the 2006 Approved Master Plan for Bowie and Vicinity ("2006 Bowie Area Master Plan").

With regards to Plan 2035, Ms. Grover explained that

> Plan Prince George's 2035 indicates that [the Subject Property] is located in the Established Communities, which are existing residential and commercial areas served by public sewer and water outside of the Regional Transit Districts and Local Centers, which are most appropriate for context sensitive infill and low to medium density development where existing public services and infrastructure should be enhanced to ensure that the needs of existing residents are met. In the subject case, the applicant is proposing approximately 3.5 million square feet of High Cube Fulfillment Center Warehousing, which is a high intensity land use and does not fit with this vision. Additionally, this new land use is undefined in the old zoning ordinance under which the applicant has chosen to proceed. As obvious in the PowerPoint offered by the staff for the project, there are many established [subdivisions] in close proximity to the subject site.

June 30, 2022 Planning Board Hearing at minute 2:16:37.

With regards to the 2006 Bowie Area Master Plan, Ms. Grover explained that

> I believe the 2006 plan should have been applied as it is more appropriate for use in tandem with the old zoning ordinance.

June 30, 2022, Planning Board Hearing at minute 2:19:20.

Under the 2006 Bowie Area Master Plan, the Subject Property was designated for residential uses. The 2006 Area Master Plan is more appropriate than the 2022 Master Plan because the 2006 Bowie Area Master Plan was created to effectuate the goals of the old zoning ordinance while the 2022 Master Plan was created to effectuate the goals of the new Zoning Ordinance. *See* Ruth Grover's Testimony, June 30, 2022, Planning Board Hearing

at minute 2:14:00. Here, Applicant chose to have its application evaluated under the old ordinance, thus the old master plan should apply.

To that end, Ms. Grover further testified that:

> comprehensive planning should be just that, overall, in approach and evenhandedly implemented, considering the county as a whole and the multiplicity of projects and types of land use that are envisioned for all areas of the County. *It is my opinion that in this case, the comprehensive planning process has been subverted to enable a certain use in a certain location, where it is not supported by the comprehensive planning documents in place, nor the ordinances meant to implement them.* Planning should come first and then effort to implement those plans, not the other way around. The development review process should consistently consider comprehensive planning goals and objectives and not bend or modify requirements to serve individual interests on a case-by-case basis.

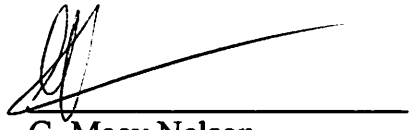
June 30, 2022, Planning Board Hearing at minute 2:15:34 (emphasis added).

Therefore, the Planning Board erred when it approved SDP-1603-02 because it conflicts with Plan 2035 and the 2006 Bowie Area Master Plan.

Conclusion

For all of these reasons, Citizen-Protestants request the District Council disapprove SDP-1603-02 and TCP2-026-2021-02.

Respectfully submitted,



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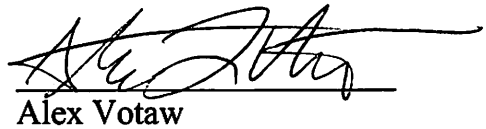

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of August 2022, a copy of the foregoing Exceptions and Request for Oral Argument was mailed electronically and by first-class, postage pre-paid, to:

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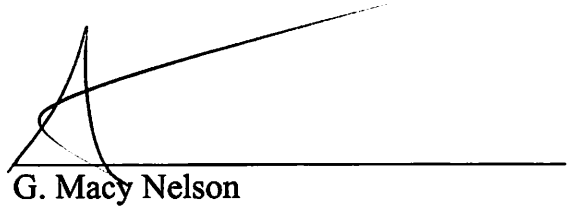
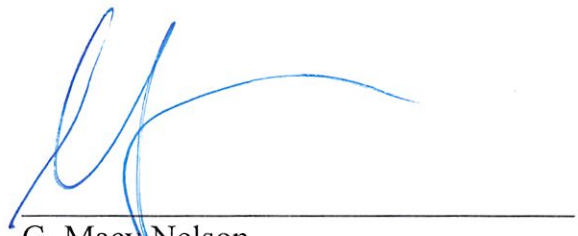


G. Macy Nelson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of August 2022, a copy of the foregoing Exceptions and Request for Oral Argument was mailed by U.S. Mail to:

Persons of Record (List Attached)



G. Macy Nelson

CASE NO: SDP-1603-02
CASE NAME: NATIONAL CAPITAL BUSINESS PARK
PARTY OF RECORD: 19
PB DATE: 6-30-2022

CODY GARRISON
8888 KEYSTONE CROSSING SUITE 1150
INDIANAPOLIS IN 46240
(CASE NUMBER: SDP-1603-02)

DANIEL TAMANKO
AMBROSE PROPERTY GROUP
8888 KEYSTONE CROSSING SUITE 1150
INDIANAPOLIS IN 46240
(CASE NUMBER: SDP-1603-02)

AMBROSE SERVICES
8888 KEYSTONE CROSSING CROSS
INDIANAPOLIS IN 46240
(CASE NUMBER: SDP-1603-02)

ALEXANDRA VOTAW
600 WASHINGTON AVENUE
TOWSON MD 21204
(CASE NUMBER: SDP-1603-02)

JOHN HOMICK
1600 TRADE ZONE AVENUE
UPPER MARLBORO MD 20774
(CASE NUMBER: SDP-1603-02)

MICHAEL LENHART
LENHART TRAFFIC CONSULTING, INC.
645 B&A BOULEVARD SUITE 214
SEVERNA PARK MD 21146
(CASE NUMBER: SDP-1603-02)

ANTAWAN WILLIAMS
1905 LAKE FOREST DRIVE
UPPER MARLBORO MD 20774
(CASE NUMBER: SDP-1603-02)

ARLANCIA WILLIAMS
1905 LAKE FOREST DRIVE
UPPER MARLBORO MD 20774
(CASE NUMBER: SDP-1603-02)

KATHY H CRAWFORD
1340 CRAIN HIGHWAY
UPPER MARLBORO MD 20774
(CASE NUMBER: SDP-1603-02)

RAY CRAWFORD
1340 CRAIN HIGHWAY
UPPER MARLBORO MD 20774
(CASE NUMBER: SDP-1603-02)

MCNAMEE HOSEA
6411 IVY LANE SUITE 220
GREENBELT MD 20770
(CASE NUMBER: SDP-1603-02)

DAN LYNCH
MCNAMEE HOSEA
6411 IVY LANE SUITE 200
GREENBELT MD 20770
(CASE NUMBER: SDP-1603-02)

ROBERT ANTONETTI
SHIPLEY & HORNE, P.A.
1101 MERCANTILE LANE SUITE 240
LARGO MD 20774
(CASE NUMBER: SDP-1603-02)

VERNICE MILLER-TRAVIS
104 JEWETT PLACE
BOWIE MD 20721
(CASE NUMBER: SDP-1603-02)

CHARLES REILLY
16770 CLAGETT LANDING ROAD
UPPER MARLBORO MD 20774
(CASE NUMBER: SDP-1603-02)

FRED TUTMAN
PATUXENT RIVERKEEPER
17412 NOTTINGHAM ROAD
UPPER MARLBORO MD 20774
(CASE NUMBER: SDP-1603-02)

DAN SMITH
6019 INWOOD STREET
CHEVERLY MD 20785
(CASE NUMBER: SDP-1603-02)

RUTH GROVER
5727 RIDGE VIEW DRIVE
ALEXANDRIA VA 22310
(CASE NUMBER: SDP-1603-02)

RUTH GROVER
5727 RIDGE VIEW DRIVE
ALEXANDRIA VA 22310
(CASE NUMBER: SDP-1603-02)