

July 10, 2020

**VIA E-MAIL AND
ELECTRONIC FILING**

Madam Chair and Members of the
Planning Board for Prince George's County,
Maryland-National Capital Park
and Planning Commission
(c/o Staff Reviewer, Mr. Hurlbutt)
(PGCPB@mncppc.com)

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Maryland Bar
District of Columbia Bar

Re: DSP-19050 & DSP 19050-01; DDS-660 (the "Application")

Dear Madam Chair and Board Members:

This letter comes in response to those correspondences submitted by the Applicants, Bald Eagle Partners and FF Realty IV, LLC (the "Applicant" or "Bald Eagle") dated April 15, 2020 and June 8, 2020. The Metro III building owner, 6525 Belcrest Road, LLC ("Belcrest" or "Metro III"), stands by its earlier remarks concerning this Application and asks that its earlier letters dated March 31, 2020, April 8, 2020, and May 28, 2020, be incorporated fully herein and made a part of the Administrative Record for DSP-19050, DSP 19050-01, and DDS-660.

Bald Eagle continues to avoid the fundamental legal issue here: Metro III is not redeveloping its property and has never redeveloped its property in a meaningful way. Metro III has no application pending before the Planning Board, yet Bald Eagle's application has the effect of discontinuing Metro III's legally existing permanent right of use over the surface parking lot that exists on the Dewey parking parcel.

There is no provision in any zoning ordinance that allows one private property owner to take away valid entitlements belonging to its neighbor without its neighbor participation. Likewise, there is no provision in the Prince George's County Zoning Ordinance that would allow the Planning Board to approve a plan submitted by one private property owner that has the effect of taking away a different, unrelated property owner's prior approvals. Bald Eagle's request will undo Metro III's entitlement, plain and simple. Bald Eagle knew that Metro III enjoyed this right of parking when it agreed to purchase the Dewey Property and Bald Eagle knew the full scope of the development histories of both properties when it contracted to purchase the Dewey Property.

As argued previously, Metro III's consent and co-applicant status is required because Metro III enjoys a continued entitlement that exists on the Dewey Property. Metro III is definitionally an "Owner" under the Zoning Ordinance because it has a valid and continuing right

to use the Dewey Property for its parking. It is undisputed that when Metro III was constructed, its original approvals included a joint application brought forth by the Metro III building owner and the Dewey Parking Parcel owner to approve the surface parking lot on the Dewey Property for use by Metro III as its sole source of parking. Today, there are still two owners and Metro III still relies on the Dewey Parking Parcel as its sole source of parking, pursuant to these original joint development approvals. Metro III is not a part of this Application, but Metro III will lose its parking entitlements if the Applicant's Detailed Site Plan is approved. Even before any other merits are considered, the Planning Board must decide whether Metro III is required to be an Applicant. Approval of a plan to strip Metro III of the perpetual use right is contrary to property law and also contrary to the TDDP master plan policies of allowing each individual owner to rely on its valid and existing prior approvals until the time that it submits a Detailed Site Plan to redevelop its building. Metro III should have the same right as every other owner in the UTC neighborhood to redevelop its property at the time and manner that it sees fit.

In further support, Belcrest states as follows:

I. The Planning Board Should Reject Bald Eagle's misrepresentations and personal attacks.

Bald Eagle argues that Metro III "inexplicably omits several important facts and relevant documents in an attempt to mislead the Planning Board..." See Bald Eagle Memorandum, April 15, 2020 (hereinafter "April 15 Memo") at Page 1. Bald Eagle then specifically complains that Belcrest omitted a ground lease assignment: "**Belcrest elected not to provide a copy of the [Ground Lease Assignment] to the Planning Board...**"; "The Belcrest Assignment, **which Belcrest elected not to attach**, was recorded with the deed."; and "Their remaining arguments must be viewed in light of these **undisclosed facts.**" April 15 Memo at Page 5 (Emphases supplied).

Had Bald Eagle investigated the facts more closely, they would have known that the "undisclosed" Assignment of Ground Lease that Metro III "elect not to provide" was included as **Exhibit 18** to Metro III's first submission to this Planning Board, yet the Applicant has never corrected its accusation.

Bald Eagle's hollow reliance on easily disproven claims and its multiple baseless personal attacks on Metro III's owners and attorneys are an unneeded distraction from the facts of this case. Frankly, Metro III's owners would much rather focus on owning and operating an office building. However, Bald Eagle continues its unrelenting attack on Metro III's legally existing parking rights. Therefore, Metro III has been pressed into the position of continually protecting its property rights, which in turn requires an objection to these DSP Applications.

II. The Application should be denied, or in the alternative stayed indefinitely, because the Planning Board cannot make a determination of parking adequacy without first resolving a dispute between private parties.

There is a recorded Ground Lease, First Amendment to the Ground Lease, and Assignment and Assumption of the Ground Lease. *See, e.g.*, Metro III Memorandum, March 31, 2020 at p. 5-6. *Cf.* Applicant's April 15 Memo at 5, 8. The existence of these recorded documents is undeniable, their legal effect however is heavily contested.

Indeed, Bald Eagle omits from its arguments that Belcrest has filed in the Circuit Court for Prince George's County for Declaratory and Injunctive relief to resolve material legal questions concerning the interplay between the Ground Lease and the effect of Belcrest's continued rights under its prior development approvals to permanently use the existing surface parking lot. Likewise, the property owner (Dewey, L.C.) through which the Applicant is acting, has commenced an arbitration in an attempt to declare Belcrest in anticipatory breach of the Ground Lease.

The Applicant continually argues that the Ground Lease controls this dispute and seems to share Belcrest's view that the Planning Board has no role in construing and resolving disputes over private agreements. *See, e.g.*, Applicant's April 15 Memo at pp. 8-9; April 15 Memo at p. 18; April 15 Memo at p. 19; June 8 Memo at p. 3; June 8 Memo at p. 7. *See also*: "Petitioner's Opposition to Motion to Dismiss and Response to Objections" Filed in American Arbitration Association Case No. 01-20-0005-3966 (Arguing that the unresolved legal issues of the effects of the Ground Lease are issues to be resolved in private arbitration) **Metro III Exhibit 21** (Provided Sans Exhibits). Dewey, L.C., is quoted: "[T]hese are arbitrable disputes. These questions of use, ownership, and rights to substitution [of parking] are inextricably intertwined with the terms of the Ground Lease and subject to the parties' arbitration agreement. Respondent [6525 Belcrest Road, LLC] has publicly repudiated the parties' rights under the Ground Lease in multiple filings before the Planning Board, both of which challenged the validity of Petitioner's [Dewey, L.C.] contractual right under paragraph 6.f. of the Ground Lease to make the parking substitutions."

Nonetheless, the Applicant also make the contradictory argument that it has met the Planning Board's burden by demonstrating that adequate parking exists for Metro III per TDDP parking calculation standards. *See, e.g.*, Applicant's June 8 Memo at 2; April 15 Memo at 11. The Applicant's argument relies on a conclusory assumption that the Ground Lease allows for Bald Eagle to (a) relocate Metro III despite the existence of its prior approvals providing for permanent use of the existing surface parking; and (b) convert Metro III's rights from those of a ground lessee to those of a commercial sublessee in a nearby parking garage.

The Planning Board cannot make a finding that the Applicant has met its burden to demonstrate that adequate parking exists for land uses that depend on the existing surface parking lot because doing so would first require the Board to accept Bald Eagle's legal construction of the Ground Lease. (Exhibit 19). It would also require the Planning Board to determine that the Ground

Lease can override public approvals that were necessary at the time of development and which the Applicant has never been able to prove are inapplicable. Bald Eagle's so-called demonstration of adequate parking relies entirely on a pre-supposition that Metro III's parking can be relocated by Bald Eagle based on the Ground Lease, *without regard to Metro III's legal challenges and without regard to Dewey, L.C.'s arbitration action*. The Applicant's reliance on its own legal conclusions (a legal construction that is entirely disputed by Metro III) to effect the Ground Lease forces the Planning Board into legally construing and interpreting the effects of the private agreement, the Ground Lease, which is the subject of a private dispute.¹

This issue should be resolved in the Circuit Court (or, adopting Applicant's view for the sake of argument, resolved in private arbitration). The effect of Metro III's prior approvals and the effect and legal construction of the Ground Lease are legally disputed topics that are "inextricably intertwined" with pending private litigation. Pursuant to the Board's earlier decision, this is "an issue for private property owners" to resolve in the Courts. Therefore, the Planning Board should refuse to grant approval for this Application until the legal proceedings between these parties are resolved in the Courts.²

On the contrary, Belcrest is not asking the Planning Board to construe the Ground Lease. Belcrest is asking the Planning Board to recognize that it has and continues to rely on public approvals that give it the right to use the Dewey Parcel for its parking. Irrespective of the Ground Lease, Belcrest, in purchasing Metro III, also acquired and assumed the benefit of all public approvals that are applicable to Metro III's use and occupancy. Metro III acquired "any and all licenses, permits, authorizations, certificates of occupancy and other approvals issued by any governmental authority having jurisdiction over the Property or any portion thereof that are in effect for the current use and operation of the Property or any portion thereof..." **Metro III Exhibit 23** at Section 1(c) (Copy of Assignment and Assumption Agreement). Metro III was purchased by Belcrest "as is, where is, with all faults". *Id.* Metro III and its consultants at Ben Dyer Associates (see below) have searched the public record and have not located any approval that extinguishes Metro III's rights. Those rights were confirmed when it purchased the Metro III building. Apart from any private agreements, Belcrest enjoys a set of entitlements, which as earlier argued includes the 1970 parking approvals and the right to rely on a permanent legal arrangement between the

¹ Indeed, the Applicant secured a recommendation from the City of Hyattsville by persuading the City's staff and Council to also construe the private Ground Lease, to which Metro III has requested reconsideration. **Metro III Exhibit 22**. Although the City of Hyattsville passed forward a correspondence taking "no position" on the dispute, the reality is that the City Council's decision to take no position was fundamentally premised on its misunderstanding that enforcement of the Ground Lease on Bald Eagle's terms would resolve this dispute. *Id.* The Applicant is now setting the same trap for the Planning Board. Metro III's reconsideration request has not yet been considered at a public meeting.

² Metro III also disputes Bald Eagle's assertion that the parking waiver application followed by the development approvals granted cannot constitute a memorandum that complies with the Statute of Frauds. Even if it did not, the application is recognition of an agreement to use the parking parcel for the purposes of an easement, which would be upheld by the court as an enforceable easement based on performance. Nonetheless, that is likely an issue best left to the Courts as well.

Metro III property and the Dewey Property for the continued existence and use of the existing surface parking lot, which has never been modified. Belcrest's public approvals cannot be ignored by this Planning Board in favor of a later-entered private agreement.

Belcrest's Ground Lease with Dewey, L.C., must be viewed in the light of its pre-existing legal entitlements. The entry of this private agreement was not part of any public process, subdivision approval, site plan approval, and was never brought before any public body for consideration, approval, or consent. The Ground Lease was not a condition of approval for either property owner. The part of the Parking Parcel described in the Ground Lease was never subdivided. Conversely, Metro III gaining parking entitlements to use and rely on the Dewey Property for its permanent and accessory surface parking required for its original construction, *was a condition of public approvals*. Metro III has used roughly 1,550 parking spaces on the Dewey Parcel ever since. The Ground Lease and Metro III's prior development approvals are not mutually exclusive concepts and the Planning Board is able to construe the continued effect of prior approvals.

III. Belcrest still enjoys the permanent right to use the surface parking lot as its sole source of parking. Under Belcrest's approvals, the lot remains a legally existing parking lot that need not be reduced.

Metro III reincorporates its prior memoranda dated March 31, April 8 and May 28, and all exhibits, as evidence in the administrative record. Nonetheless, some of Bald Eagle's statements in its April 15 and June 8 memoranda cannot be ignored.

First, however, it is useful to explore those facts on which the parties apparently agree. The Dewey Property is a surface parking lot that was constructed to support the development of the Metro III office building. April 15 Memo at 2. "It is undisputed that the office building [Metro 3] on the Belcrest Property has utilized parking spaces on the Dewey Property since it was constructed in the early 1970s." *Id.* Section 24 of the 1970 Zoning Ordinance was the applicable set of parking regulations applicable to both the Dewey and Metro III properties when they were jointly developed. *Id.* Specifically, Section 24.222 applied. *Id.* It is undisputed that the statute requires "an appropriate legal arrangement that assures permanent availability of the compound." *Id.* (emphasis supplied). The purpose of the "Parking Waiver" obtained by Herschel Blumberg (as the owner of both properties and on behalf of both properties) was to exceed the number of allowable parking spaces permitted off-site from the Metro III building, and to allow a location beyond 500 feet for that parking. *Id.* at p. 2, 4. It is undisputed that the waiver was obtained in response to a newly adopted law. *Id.* at 3. It is undisputed that the waiver application does not request waiver of the "appropriate legal arrangement" requirement.

Likewise, Zoning Ordinance Section 24.16 applied, which reads:

"All required automobile parking compounds and loading areas together with the driveways giving access thereto **are deemed to be required space in connection**

with the uses to which they are accessory and shall not be encroached upon in any manner.”

See Metro III Exhibit 20. No waiver was sought from the requirements of Section 24.16. It is undisputed that Mr. Blumberg had the opportunity to choose where to construct the parking lot and how to allocate parking to the various Metro buildings. April 15 Memo at 4. Mr. Blumberg chose to obtain parking approvals that applied to the entire 19.969 acres of land which then constituted a single lot of record. *Id.* at 6. Somewhere between 11.3 and 11.5 acres of land have always been actually developed and paved for parking as a result of Mr. Blumberg's conscious acts in obtaining these parking approvals. *Id.* at 6 and Applicant's Statement of Justification at Page 4.

SP-87076 was approved in 1987. That operative site plan included both the Dewey Property and the Metro III building and reflected that Metro III's parking is entirely located on the Dewey Property. *Id.* at 10. SP-87076 reflects the original approvals for 3,506 surface parking spaces specific to each Metro building's parking allocations:

- 674 Spaces for Metro I
- 1,282 Spaces for Metro II
- 1,550 Spaces for Metro III

See, e.g., Metro III Exhibit 7; *Accord* April 15 Memo at 10. The TDOZ overlay zone and the TDDP master plan were adopted and both properties are within the areas covered by the zone and plan. *Id.* at 10. In 2001, CSP-00024 included both properties and made the properties part of "Subareas 2 and 3" of UTC. *Id.* at 10.

As of the adoption of the master plan, 3,506 surface parking spaces still existed and became legally pre-existing parking spaces. Metro III Building remains a 394,000 square foot office building that is supported by the existing surface parking lot adjacent to it. CSP-00024 and the TDDP are both prospective, not retroactive. In Bald Eagle's words: "As properties have developed over the years, surface parking has been removed and structured parking has been built." April 15 Memo. at 10-11. The Dewey Property continues to be used by Metro III to satisfy its parking to this very day. See Bald Eagle June 8 Memo at p. 1. As set forth in the TDDP:

- **"Until a DSP is submitted**, all legally existing parking and loading spaces in the Transit District that were lawful on July 19, 2016 **need not be reduced**, are exempt from the Transit District Standards and DSP review, and are not nonconforming."
- **"Until a Detailed Site Plan (DSP) is submitted**, all buildings, structures, and uses, which were lawful or could have been certified as legal nonconforming uses pursuant to Section 27-244 of the Zoning Ordinance on July 19, 2016, are exempt from the Transit District Standards and are not nonconforming."

See TDDP Chapter 6, Page 198; **Metro III Exhibit 24** (Excerpts).

However, the parties' conclusions to be drawn from these material facts diverge because Metro III understands that the parking lot need not be reduced and is exempt from Transit District Standards and DSP review until a Detailed Site Plan is submitted *for the Metro III building*, since the surface parking lot was constructed under the requirements of the 1970 zoning ordinance, remained legally existing as of 1998, and remained legally existing as of July 19, 2016. Indeed, when Belcrest purchased Metro III it specifically confirmed by a zoning verification letter whether any prior approvals would bind or restrict its rights. In response, the Planning Department determined that CSP-00024, DSP-00052, and DSP-00052/04 were the only plans that have previously touched Metro III. **Metro III Exhibit 25**. The Planning Department's conclusion, also, is: "These records indicate the property was improved **in accordance with the zoning standards at the time of development.**" *Id.* Bald Eagle on the other hand claims that it can eliminate Metro III's surface parking without Metro III's agreement and irrespective of public approvals and Metro III's right to rely on the legally existing Lots.

The TDDP anticipates that a building owner will be the one submitting the Detailed Site Plan that would act to undo or materially change its prior, existing parking approvals. Metro III understands this also and has an expectation that it can rely on its valid existing development approvals for its building. Those rights emerged when the parking lot was constructed under common ownership and for the service of the singular development of Metro III. The Metro III owners have relied on the benefits of those approvals for five decades without interruption.

However, Bald Eagle argues that submitting a Detailed Site Plan for the redevelopment of the Parking Property – which serves the Building – will allow Bald Eagle to remove, reduce, and relocate its neighbor's lawfully existing parking. Bald Eagle's simplistic argument in the face of the property history ignores that the Dewey Property surface parking lot was constructed as part of a joint development project and the only reason it was ever constructed was to benefit the Metro III Building.

It is undisputed that when parking was approved for Metro III, both the entity that owned the Dewey Parcel and the entity that owned the Metro III building were brought before the Planning Board and District Council to obtain approvals and waivers. Now, Bald Eagle argues that the Dewey Parcel owner, alone and without agreement from the Metro III owners, can remove the legally existing surface parking lot even though the Dewey Parcel remains subject to the benefits that Metro III gained from those the original approvals and waivers.

Metro III hired a consultant to further analyze the history here. See **Metro III Exhibit 26** (and Exhibits thereto). The opinion of Paul B. Woodburn, P.E., of Ben Dyer Associates, Inc., is consistent with the history as understood by the Metro III owners. Each of the original three "Metro" office buildings were served by surface parking areas in close proximity to that building. Exh. 26 at p. 2. Metro III's parking was always, and is now, provided "by the large parking lot on

the north side of Toledo Road,” as shown on DSP-87076, which was constructed to meet the applicable parking requirements at the time of development. *Id.*

Although there have been a number of “zoning and subdivision changes and subsequent plan approvals for the area” now known as University Town Center, there is “no reference made to reducing the required parking for Metro III” in any of the parking tabulations. Exh. 26 at page 3. Mr. Woodburn’s opinion is that “the owners and users of Metro Center III (formerly Federal Building III) should be able to rely on the DSP-87076 approval designating this existing parking lot associated with the Metro Center III (formerly Federal Center III) office building as originally approved.” *Id.* at 3.

The fact remains: TDDP’s parking calculation requirements have never been triggered by Metro III. See **Exhibit 29**; See also Exh. 26 at Items 24-25. By DSP-00052, Metro I’s office building expansion caused a reduction of 21 surface spaces belonging to Metro I. Metro III’s parking was not modified at all by DSP-00052 or DSP-00052/04. DSP-01002, for Metro IV expansion and Garage A caused a reduction of surface parking spaces used by Metro IV. Street infrastructure DSP-03072/02 resulted in the elimination of surface parking on parcels other than the Dewey Parcel. The development of parking garage A through DSP-05084/02 resulted in the reduction of surface parking that had previously been located on that parcel. See Exh. 29. None of these changed the Dewey Parcel or Metro III’s right to rely on it. Indeed, Mr. Woodburn’s opinion and the history here are consistent. Metro III was constructed in reliance on parking being provided by the Dewey Parcel. Metro III’s owners have always relied on that parking and Metro III’s owners have never acted to reduce the surface parking to which they have a legal entitlement. Exh. 26. The reality that the Applicant refuses to accept is that the surface parking lot on Metro III was always intended to serve as the surface parking for Metro III and continues to provide for Metro III as the sole source of parking for that building. Exh. 26 at page 2-3.

The TDDP acts prospectively and makes clear that the surface parking for each building is reduced whenever that building’s owner comes forward with a DSP to redevelop the site in any meaningful way. See TDDP Chapter 6, Page 198. The starting point of 3,506 surface parking spaces was not a coincidence. Of those original spaces, 1,550 were originally dedicated to Metro III, as shown on SP-87076. The parking allocated to Metro III has always been the baseline for the parking calculations relied upon by all owners. See Exhibit 7, 16; See also Metro III Exhibit 26; *Accord* Applicant’s Parking Analysis Memorandum Dated Nov. 5, 2019. Unlike other property owners in the region, Metro III has never given up its right to rely on the surface parking lot approvals as the source of its parking. Metro III has been, is, and continues to be the sole beneficiary of all of the parking on the Dewey Property. Metro III has never disturbed or reduced that right. Metro III has never modified parking in the Dewey Parcel and continues to rely upon the original parking calculations for Subareas 2 and 3, as shown on SP-87076.

Bald Eagle has pointed to no instance in the past when a UTC property owner has been allowed to bring an application that would reduce or relocate another UTC property owner’s parking without both owners participating. Bald Eagle settles on the proposition that the prior

approval of CSP-00024 and the later approval of DSP-00052 touched Metro III and, therefore, Metro III's legally existing surface parking can be modified by any property owner in UTC. See June 8 Memo at 3-6.

Bald Eagle is actually making Metro III's point. As conditioned in CSP-00024:

"15. For each Detailed Site Plan, the applicant, his heirs, successors, and/or assigns shall submit a parking demand analysis which reflects appropriate reduction for shared parking between the existing and proposed uses."

Metro III Exhibit 27. Metro III is still governed by CSP-00024, and the process that Bald Eagle is choosing to ignore is explained clearly in CSP-00024 Resolution. This process is intended to allow individual development projects to come forward in a way that will not disturb the rights enjoyed by other existing users who are not developing on the same timeline. Bald Eagle is using this process to remove one owner's rights without its consent.

Further, DSP-00052 was for an addition to the *Metro I building*. It also included a new "chiller building" adjacent to Metro III and so Metro III was made a part of DSP-00052. Metro III's inclusion in the application there makes sense because the plans for a new chiller building affected Metro III's operations. Much like Metro III should be a part of DSP-19050 and DSP19050-01 because Bald Eagle's plans now have an impact on Metro III's rights and operations. Again, however, the Planning Board found specifically that Metro III continued to rely on its pre-existing parking (i.e., the Dewey Property) *and replacement of legally existing parking is exempt from the TDDP until a Detailed Site Plan for Metro III is submitted.*

"The total number of proposed parking spaces shown in the submitted Detailed Site Plan is exactly the same as the total number of parking spaces that were existing on the Subarea 2 and 3 prior to the approval of the TDDP. **Pursuant to the TDDP applicability, replacement or alternatives to legally pre-existing parking spaces are exempt from meeting the TDDP requirements. Therefore, the review of the Detailed Site Plan will be limited** to the adequacy determination of access points, vehicular and pedestrian circulations, and the level of compliance with the transportation related requirements of the approved Conceptual Site Plan."

(Metro III Exhibit 28 at Finding 17).

The findings in CSP-00024 and DSP-00052 are entirely consistent with the TDDP's prospective approach to modifying legally pre-existing surface parking. Today, Metro III is still not proposing to change any of its legally pre-existing surface parking, and therefore the Planning

Board cannot require it to have its dedicated parking removed in order to accommodate another wholly unrelated owner's plans. As has been previously argued, disturbing those rights flies in the face of basic property law. Metro III has every right to continue its parking use because it is based on Metro III's continued, uninterrupted reliance on prior public approvals. The subsequent enactment of new laws encouraging the reduction of Metro III's rights cannot be relied upon to outright require a reduction or relocation. Metro III has the right to continue to rely on its vested interests, which were an implementation of its development approvals, and that Metro III's right is constitutionally protected, regardless of subsequent changes in the law. Until Metro III brings a Detailed Site Plan for redevelopment of its own parcel, the Planning Board cannot modify its legally existing surface parking.

IV. Bald Eagle has failed to demonstrate any reliable evidence of the original owner's intent to avoid the original Zoning Ordinance requirements that the parking parcel be subject to zoning merger for use as an accessory to Metro III.

A. All evidence contained in the administrative record demonstrates an intent to merge these properties.

Bald Eagle argues that Mr. Blumberg never intended for these parcels to merge. As demonstrated below and in the Metro III's prior memoranda, there is no evidence in the record to advance that position. The intent of the owner that is a dispositive fact in a zoning merger analysis, and the evidence in this administrative record only supports an intent to merge.

As the Applicant suggests, Metro III relies on the Court of Appeals' holding in both *Friends of the Ridge* and in *Remes* "that merger may be derived from the common owner's intent, as evidenced by integrating or utilizing the contiguous lots in the service of a single structure or project." *See Remes v. Montgomery Cnty.*, 387 Md. 52, 66 (2005); *Accord Friends of the Ridge*, 352 Md. at 658. Bald Eagle conveniently ignores the Court of Appeals guidance in *Friends* that demonstrating the owner's intent to merge is not always a high burden: "[M]ost [courts] require that the intent of the owner to merge be expressed, **though little evidence of that intent is required.**" 352 Md. at 653. In *Friends* the Court agreed with Connecticut's highest court that "An intent on the part of the owner to do so may be inferred from his conduct with respect to the land and the use which he makes of it." *Id.* at 659-60 (quoting *Molic v. Zoning Board of Appeals*, 556 A.2d 1049, 1051 (1989); *see also Rouse-Fairwood Dev. Ltd. P'ship v. Supervisor of Assessments for Prince George's Cnty.*, 138 Md. App. 589, 630 (2001) (quoting *Friends of the Ridge*).

The parties here agree that one way to merge parcels is to integrate or utilize two parcels in the service of a single structure, and that doing so shows an intent to merge. *See* Bald Eagle April 15 Memo at 14. There is no dispute here that the Dewey Property has always been in service to the Metro III building as its sole source of parking. Bald Eagle agrees that the parking was originally approved for that purpose and has continued in that manner ever since, through this day. The evidence supports no other rationale for the approved 1,550 surface parking spaces that were originally constructed and continue today as legally existing parking on the Dewey Property.

Likewise, the inferences drawn from the historic record all point to Mr. Blumberg's intent to merge these properties. Foremost, Metro III could not have been constructed without use of the parking lot. The development team understood this need and understood the applicable law. Mr. Blumberg voluntarily subjected his development to the applicable Code requirements by using the Dewey Property as source of that parking. Indeed, other available parking existed around the neighborhood as shown on SP-87076. And as reflective in the ownership and plat history here, Mr. Blumberg no-doubt could have also re-subdivided if he wanted the parking to exist on the same parcel as Metro III, or some place else.

The material event that we know occurred is that Mr. Blumberg elected to place the required parking on the Dewey Property. After five years, Mr. Blumberg did not attempt to remove it. Since 1970 when the parking approvals and waivers were granted, Mr. Blumberg and his successors never obtained public approvals to modify those original grants. No affirmative steps were ever taken by Mr. Blumberg that would change or modify the parking approvals. Rather, those approvals were still relied upon in 1987. No public approval was sought to remove parking or modify the earlier approvals in 1998. No change was sought at the time CSP-00024 was being considered in 2001, nor was any change for Metro III sought when the first set of Detailed Site Plans under that CSP were going through the planning process. The parking was not removed in 2004, 2012, 2015 or 2016, when further Detailed Site Plans were submitted around the UTC neighborhood. The Applicant's so-called evidence of intent is nothing more than unsubstantiated conjecture and speculation that flies in the face of the actual facts on the ground and contained in the well-documented approval history.

The reality is that this parking lot has remained unchanged and in service of the Metro III building for around 50 years because valid public approvals require this parking lot to serve Metro III, and that relationship cannot change without Metro III changing it. Each of Bald Eagle's arguments that the Dewey Property and Metro III property owners never intended for this parking to remain permanent are completely undercut by the actual use and the current conditions. Our consultant reached the same opinion: "It is my opinion that based on the record Detailed Site Plan approvals we have been able to secure, that it was and still is the intent, that the surface parking lot located on Parcel A on the north side of Toledo Road was and is for the purpose of providing adequate and code required parking for the continued use of Metro Center III ... building and the tenants since originally approved." See Exhibit 26 at page 3. The actual steps taken by Mr. Blumberg and the actual use of the parking parcel glean intent – Not speculation about alternative theories that were never approved or implemented.³

³ Noted also is the plain fact that 6525 Belcrest Road, LLC, has paid property taxes on the entire Dewey Parcel since 2015, except for the 3.86 acres owned by BE UTC Dewey Parcel LLC. Prior owners of Metro III have also consistently paid property taxes for the parking parcel, which is further evidence of an intent to treat these properties as merged.

Around the time that CSP-00024 contemplated redevelopment of UTC including both of these properties, Mr. Blumberg could have demonstrated an intent to de-merge the parking by taking the additional step of implementing the Concept Plan for Metro III. Mr. Blumberg had control over virtually the entire process at that time, yet he never acted to obtain approvals for Metro III in a way that would have modified the original parking approvals. Certainly Mr. Blumberg could have obtained a new set of parking approvals for Metro III if he intended to file such an application. Instead, the Dewey Property continued in service to the Metro III property and Mr. Blumberg actually reaped a sizeable benefit through those public approvals by controlling the use of both the burdened and benefitting parcels, which is actually evidence of intent to treat the parcels as merged. Indeed, neither the Dewey Property nor the Metro III property were actually redeveloped, and so the CSP's dormant vision for Metro III has never actually been implemented.

What both *Friends of the Ridge* and *Remes* make clear is that the record here supports Mr. Blumberg's intent to merge these properties by always using the Dewey Property as Metro III's sole source of parking, the parking parcel having been originally constructed for that specific purpose. Indeed, those cases also make clear the burden of proof actually is on Bald Eagle to prove that Mr. Blumberg *did not* intend to merge the properties. *Remes*, 387 Md. at 67-68; *Friends of the Ridge*, 352 Md. at 658. Bald Eagle has not demonstrated that here.

Bald Eagle also argues that *Skipjack* and *Collington* are inapplicable to this case because, in Applicant's reading of the cases: "[I]n each of those cases, development approvals were granted subject to conditions that the owners accepted. Thereafter, subsequent purchasers brought action to remove the conditions. The Court of Appeals held that the subsequent purchaser could not seek to invalidate conditions of approval that were agreed to by the prior owner." April 15 Memo at 16. Even if Bald Eagle's interpretation of the case law is adopted, this is exactly what Bald Eagle is doing today: Metro III was granted approval for 1,550 parking spaces all situated on the Dewey Property. The Dewey Property, as part of the same development project, was constructed as accessory required space in connection with the office building use, and with assurances of permanent availability pursuant to the applicable Zoning Ordinance requirements. The Dewey Property has been used in that manner, and subject to those valid public approvals ever since.

Bald Eagle, as a subsequent contract purchaser, now for the first time seeks to disturb those prior approvals that were agreed upon by the predecessor owners. Indeed, Bald Eagle is attempting to invalidate that Metro III's approval was contingent and reliant on permanent, dedicated parking on the Dewey Parcel to this day, and both that the permanent availability of that parking lot and the Metro III owners' reliance on it continues to this day. What makes *Skipjack* and *Collington* different is that the Applicants in those cases at least acknowledged the existence of the prior approvals and in these cases around the properties being affected. Here, the Applicant is removing the rights of its neighbors without ever acknowledging whether those rights continue to exist.

B. Bald Eagle's reliance on private agreements and hearsay as evidence of a contrary intent is both incredible and unreliable, and should be given no weight by the Planning Board.

In an attempt to discredit Metro III's legitimate concerns that its property rights are being taken from it, Bald Eagle throws red herring after red herring at this Board rather than addressing a straightforward and serious legal issue. Bald Eagle's spurious evidence should be given no weight.

1. The Application for Parking Waiver

Bald Eagle relies heavily on the application for parking waiver to draw a number of unsubstantiated conclusions that Bald Eagle unsurprisingly claims each would support a conclusion that Metro III has no right to surface parking on the lot it has used for 50 years. The waiver request and Mr. Orem's original statement of justification actually cut squarely against Bald Eagle's arguments. Those documents are further evidence that Mr. Blumberg's original intent was to specifically pursue development approvals under the applicable law at the time, which bound the Dewey Property as the site of required parking for the benefit of Metro III.

1970 Zoning Ordinance, Section 24.222, imposed three requirements: (1) The parking compound must be within 500 feet of the building; (2) the use of the parking compound must not exceed 100 spaces or 20% of the required parking; (3) "an appropriate legal arrangement assures permanent availability of the compound". Metro III Exhibit 20. Section 24.16 further deemed that all required parking compounds "are deemed to be required space in connection with the uses to which they are accessory and shall not be encroached upon in any manner." *See* Metro III Exhibit 20.

In the face of these known legal requirements, Mr. Blumberg, through a well-known and accomplished legal counsel, sought application for waiver only of the two area restrictions. The waiver application reads:

"Nature of Requested Waiver(s): (1) Spaces Beyond 500 Feet & (2) More than 100 Spaces or 20% in R-H Zone."

See Exh. A to Bald Eagle April 15 Memo. Mr. Blumberg decidedly did not seek a waiver of the requirement for a legal arrangement assuring permanent availability, and he did not seek a waiver of Section 24.16. Indeed, Mr. Blumberg's attorney expressed that the new laws were a "surprise to the applicants", however they recognized the need to obtain final parking approvals for the use of the Metro III building. *See* Bald Eagle Exhibit A. This is evidence of a conscious decision to be bound by the applicable code requirements for a permanent parking facility. Mr. Blumberg and Mr. Orem surely both knew of the third requirement of Section 24.222 and surely knew that Section 24.16 was adopted by the same Zoning Text Amendments. Mr. Blumberg made a decision to acquiesce to the Code and not seek further waivers. He then proceeded with the development

and construction of the parking lot as the sole source of parking for Metro III; assuring the permanent availability of parking to Metro III.

2. Mr. Orem's Justification Statement

Bald Eagle grasps onto Mr. Orem's explanation of the private mortgage as more purported evidence of intent to not be bound by applicable law. This is a weak thread.

Mr. Orem differentiates in the letter that: "The area in red is the areas on which the applicants desire to construct immediately a parking compound to serve Federal Building III now under construction, the compound thus constructed to be in accord with the site plan submitted with this application ..." Separately, Mr. Orem goes on to explain that a portion of the surface parking lot is identified as an "area in green" which was included "for the purpose of guaranteeing a mortgage". See Bald Eagle Exhibit A. Mr. Orem explains:

"The fact that it is so included is 'an appropriate legal arrangement that assures the permanent availability of the compound' satisfying that requirement of Section 24.222, an assurance that is for the benefit of the public as well as the mortgagee."

See Applicant April 15 Memo Exh. A. Bald Eagle twists that mundane explanation into purported evidence of the developer's intended to remove the parking lot. Bald Eagle's reading makes no sense because, in the very same request, the developer is seeking approvals which would make the parking lot permanently available by law.

A far more logical reading is that Mr. Orem was explaining the physical placement of the parking lot to be developed. In fact, the "Composite Plan of Prince George's Center" date-stamped July 12, 1972, shows clearly that the "mortgage parcel" is something completely different and its description is wholly unrelated to the piece of property that was made subject to these development approvals. Metro III Exhibit 9. This Composite Plan was included as an Exhibit to Belcrest's first letter to this Planning Board before the Applicant rendered its conclusory analysis and told the Planning Board that the mortgage parcel location could not be determined. It is also readily available to the Applicant through MNCPPC public records. The reality is that there are two assurances being made by Mr. Orem: One is being made to the lender, demonstrating that the "green area" will exist for the purpose of guaranteeing a loan, and another assurance to the District Council, that the "red area" will exist for the benefit of Metro III's approved parking.

The District Council would have only been concerned with the permanent availability of the 1,550 surface parking spaces sought by the developer and so an "assurance that is for the benefit of the public" was made that the "area outlined in red is the area on which applicants desire to construct immediately a parking compound to serve the Federal Building III now under construction ..." Applicant April 15 Memo Exh. A. The Lender would have only been concerned with the availability of the bare minimum of parking, which as explained below, was required

security under a pre-existing loan; thus another assurance is made to the lender “for the purpose of guaranteeing to the mortgagee that adequate land for parking will be available for that building.” *Id.* That smaller area is reflected on contemporaneous plans and plainly does not support the Applicant’s interpretation of the record. By segregating this “green area”, the owner merely avoided unnecessarily encumbering the entire property with the private mortgage lien. The lender’s concern was ensuring that there was adequate security for the loan.

3. The Developer’s Private Mortgage

Bald Eagle’s argument is equally misplaced that the mortgage means “the parking could be moved to a different property”. April 15 Memo at page 4. Bald Eagle conveniently ignores the plain fact that the mortgage does not even secure the Metro III Building Parcel, nor does it secure the entire Dewey parking lot. The mortgage required as security a lien on two parcels:

- “Parcel I”: Described as a 2.5942 acre “Part of Parcel A” on Plat WWW44 at Page 70 (*I.e., a portion of the Metro III Building parcel, not including most of the land on which the building actually exists*); and
- “Parcel II”, which is 7.0 acre “Part of Parcel A” on Plat WWW59 at Page 11. (*I.e., only a fraction of the developable portions of the Dewey Parking Property*).

See Applicant’s April 15 Memo, Exh. B at Pages 3-4; *Accord* Metro III Exhibits 3 and 4. Revealing those facts exposes that there is nothing for Bald Eagle to rely upon here.

Likewise, the mortgage did not secure vast swaths of the other existing or planned parking lots around the neighborhood. This mortgage does not at all evidence an intention to relocate the 11.5 acres of parking planned for development on the Dewey Property, as is argued by Applicant.

The mortgage also has no bearing on how the Planning Board or District Council would have rendered public approvals. All that the mortgage demonstrates is the Lender’s decision to make certain there is adequate security for its loans. Here, the lender and borrower agreed:

“24. The Beneficiary agrees to authorize the release of all or any portion of the property described as Parcel II herein, which is presently designed for parking, in exchange for a first lien security given to the Beneficiary on adjacent land improved for parking or a parking garage affording comparable parking spaces and containing at least 850 parking spaces specifically allocated to the improvements constructed on the land described as Parcel I herein, provided that such parking facilities are satisfactory to the Beneficiary and are subjected to the lien of this Deed of Trust ...”

(Exhibit B at Page 14-15). The Applicant latches onto a single phrase from this paragraph in order to misleadingly conclude: "In other words, the parking could be moved to a different property." April 15 Memo at page 4. One phrase pulled from a 19-page private lending agreement does not constitute evidence that Mr. Blumberg intended for his successors to relocate Metro III's parking, or that the parking rights could be stripped from Metro III without Metro III's consent. All this statement shows is that the Lender is allowing its borrower to replace security with other comparably valued security.

The Lender's reference to 850 parking spaces is an acknowledgement that if it ever releases its security interest on the parking parcel, then it would expect the Metro III Building to be supported by, at least, the Code minimum for parking. Let's not make this agreement language more than it is.

Further undercutting Bald Eagle's reliance: This mortgage was executed and recorded a year in advance of the "surprising" adoption of the new Zoning Ordinance requirements that bound the Dewey Property to the Metro III building. Because it was entered before the restrictive Code requirements were even adopted, this mortgage language could not have possibly had any bearing on Mr. Blumberg's intent at the time he sought parking approvals under those laws. If anything, this mortgage demonstrates that the Lender required its Borrower to be bound by applicable law, which, as of October 30, 1970, required the permanent availability of parking. To argue otherwise defies the precepts of time.

4. Private Loan Coordination Agreement

Bald Eagle's reliance on the "Coordination Agreement" fails for similar reasons. April 15 Memo at p. 5. This agreement is a private loan modification and consolidation agreement. See Applicant's Exhibit C. Like the mortgage and the Ground Lease, there is no evidence that the lender and developer came before the Planning Board or District Council for input or approval of its terms. A private agreement has no bearing on the Planning Board's decision-making and no bearing on a zoning merger analysis.⁴

As importantly, the only discussion of parking in this agreement is the lender's permission, again, to allow the borrower to release the parking lot as a secured interest, provided that "substituted land and/or property" that is comparably used for parking is replaced as additional security for the lender. See Applicant's Exhibit C, ¶ 4. The lender's intent to maintain security on its borrower has absolutely nothing to do with the validity of the District Council's and Planning Board's public approvals.

⁴ Conclusions as to merger are not drawn from deed descriptions or recorded instruments. Merger is answered by analyzing the history of the parcels and zoning ordinance. *See, e.g., Remes*, 387 Md. at 66 n. 11 ("The doctrine of zoning merger deals with zoning limitations and uses, not with title.")

Bald Eagle knows full-well that private agreements cannot supplant public approvals, yet it keeps advancing the same tired arguments that its predecessors' private acts can undo the decisions of the Planning Board and District Council. If Bald Eagle's arguments are accepted, then it would follow in all future cases that once a developer pays off its loan, it is also released from adhering to the conditions of its Planning Board and District Council approvals.

5. Planning Board Recommendation Letter

Bald Eagle points to one phrase in the Planning Board's 1970 parking waiver recommendation letter, again as somehow being conclusive evidence of its position. The letter states that the developer's "implication" is that it might use the Dewey Property parking lot as parking for only five years. See Applicant's Exhibit A. Bald Eagle's reliance on 50-year-old, second-hand hearsay, which was not adopted in the application or the approval, demonstrates how weak its position is that this could constitute a "reservation of the right to relocate the parking" April 15 Memo at 4.

The Dewey Property has been the sole source of parking for the Metro III Building for 50 years. Bald Eagle April 15 Memo at 2. Those 50 years include around 40 years of ownership by Mr. Blumberg and his family. Now, Bald Eagle argues that Mr. Blumberg always intended to relocate the parking after just five years. Here we are in 2020 and the parking lot still remains permanently fixed to the Metro III Building. Bald Eagle's argument to the contrary is plainly only bubbling to the surface now because it wants to redevelop this parcel and Metro III's protection of its property rights is inconvenient to Bald Eagle's plans.

Again, the actual history of this property demonstrates plain evidence that the developers intended to be bound by the applicable laws in place at the time which required that off-lot parking become permanently available to the property that relied upon it; and that parking compounds are required space, accessory to the building use, and cannot be encroached upon in any manner. That legally pre-existing surface parking lot has remained to this day, and Metro III is entitled to continue to rely upon it.

6. Intent having been clearly shown, the use of one property in sole service of an adjacent property supports merger.

Bald Eagle further argues that zoning merger could not occur in this case because the Dewey Property and Metro III Building are not "contiguous" due to Toledo Road.

Maryland formally adopted the doctrine of zoning merger in *Friends of the Ridge*, in 1998. As a result of this somewhat new application of law, there is little law on zoning merger in Maryland. Although the two primary merger cases in Maryland dealt with contiguous parcels, Maryland courts have never decided the issue of whether zoning merger would allow a property owner to merge *only contiguous* parcels that share a common boundary line.

Here, the local zoning ordinance in effect here at the time that these properties were merged would support a conclusion that Herschel Blumberg was capable of merging *adjacent or confronting* parcels to form a tract that conformed to the zoning regulations, without reliance on this off-parcel parking lot approval, Metro III could not have been constructed under the applicable code, and Prince George's law in effect at the time expressly provided that property owners could construct a surface parking lot on one adjacent property to serve an undersized building lot that could not support its own parking; See Metro III Exhibit 20 (Sections 24.16 and 24.222). Bald Eagle Exhibit A. The Metro III Building only gained the physical characteristics allowing it to be developed once it was viewed together with the parking parcel. Although separated by a road, a relationship where one property is utilized solely in service of the other property in order to allow development under applicable standards is the exact fundamental purpose and principle underlying zoning merger. See, e.g., *Friends of the Ridge*, 352 Md. at 654 (“[Zoning merger is] a doctrine that seeks to prevent the proliferation or use of nonconforming, undersized lots by holding that they have been combined or merged into a larger parcel.”).

V. The entitlement approval for parking necessarily was granted over the entire 19.9639-acre property as platted at the time of approval. The Applicant cannot seriously dispute this.

Bald Eagle attempts to undermine Metro III's protection of its property rights by recasting Metro III's argument as 'nothing can be done with the Dewey Property'. That is, of course, not the case. Metro III's position is that it holds valid parking entitlements, and so no development of the Dewey Property can be undertaken if it would be contrary to the continued effect of those valid entitlements.

At the time the parking approvals were obtained, it is undisputed that the Dewey Property was 19.9639 acres. In Bald Eagle's words: "As would currently be required, the entire property was identified as the subject of the Parking Waiver application, as noted on the application..." April 15 Memo at 6. This is likewise reflected in the approved parking count for Metro III:

“Area Tabulations:

**Presidential Building = Prince George's Center, Parcel "A" – 869,627 SF or 19.9639 Acres
Parcel "B" – 87,120 SF or 2.0000 Acres”**

Metro III Exhibit 7. Bald Eagle argues that because its private ground lease described only 7.9 acres, then the earlier entitlement approvals would only apply to 7.9 acres. See April 15 Memo at 6.

Bald Eagle knows better than this. It goes without saying that development approval acts to bind the entire property. The sheer fact that 11.5 acres of the Dewey Property are improved for parking is enough to discredit Bald Eagle's position. Reliance on a private agreement does not advance Bald Eagle's point, either. The 7.9 acres described in the ground lease was never the

product of subdivision. Bald Eagle is misconstruing Metro III's statement of plainly applicable law as being some kind of dramatic overreaching.

Metro III has approval for 1,550 parking spaces on the Dewey Property. Those spaces have always been constructed on 11.5 acres of developable land that exists among the 19.9639 acres tract that was originally approved. The public approval would still legally bind the entire 19.9639 acres. Defining this right of use is really only relevant in showing that Metro III, as a result of its approvals, is the dominant holder of the Dewey Property. The original 19.9639 acres of land could be used for any purpose that does not interfere with the continuing rights of Metro III. For example, the portion of land conveyed to MNCPPC has never been developed for parking and likely cannot be developed for parking due to its environmental constraints and topography.

On the contrary, the existing surface parking lot that has always been developed for parking and therefore is subject to Metro III's continued right. Bald Eagle cannot materially interfere with Metro III's rights because the property for which Bald Eagle seeks public approval is part of the 19.9639 acres of land that are subject to those approvals. The Applicant has had more than a year to demonstrate that Metro III's valid and continuing parking approvals were undone by some other public approval and the Applicant still has not demonstrated it.

VI. The Parking Lot Became Accessory to the Metro III Building by the Plain Language of the 1970 Zoning Ordinance.

Without rehashing Metro III's earlier arguments, Bald Eagle again misconstrues the fact that this parking lot is an accessory use benefitting the Metro III Building, as made plain by Section 24.16 of the original zoning ordinance. Bald Eagle April 15 Memo at Page 15. Accessory uses are controlled by the benefitting party. When an owner becomes the beneficiary of an accessory use, the accessory use does become bound to the primary use as long as the primary use continues to rely upon it. *See Cnty. Comm'rs of Carroll County v. Zent*, 86 Md. App. 745, 770 (1991). As such Metro III, as the beneficiary of the surface parking lot, is the party who determines when and how that accessory use can be reduced or relinquished. Not Bald Eagle, who bought the Dewey Property knowing that it was encumbered by this parking lot.

VII. Conclusion

For the reasons set forth above and in Belcrest's earlier memoranda, the Application should be denied, or in the alternative stayed indefinitely. Belcrest is the beneficiary of entitlement approvals that continue to bind the parking parcel to the Metro III building and cannot be disturbed by Bald Eagle without Belcrest's participation and consent. As importantly, Bald Eagle cannot meet its burden to show parking adequacy without forcing the Planning Board to make determinations construing private agreements and private disputes among Bald Eagle and Belcrest.

Madam Chair and Members of the
Planning Board for Prince George's County,
Maryland-National Capital Park
and Planning Commission
July 10, 2020
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Belcrest reserves the right to make further statements in opposition at the July 16 hearing.
Thank you for your consideration.

Respectfully submitted,
McMILLAN METRO, P.C.



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PEC/mb

Enclosures

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