



August 27, 2020

**VIA E-MAIL AND FIRST-CLASS MAIL**

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Maryland Bar  
District of Columbia Bar

Re: Appeal of 6525 Belcrest Road, LLC ("Appellant")  
Appealing the Decisions of the Planning Board in DSP-19050  
and DSP-19050/01 (collectively the "DSP Application") to Approve  
the DSP Application by Bald Eagle Partners, Inc. ("Applicant")  
Planning Board Resolution Numbers 2020-125 and 2020-127

Dear Chairman Turner and members of the County Council:

I write as counsel for the Appellant, 6525 Belcrest Road, LLC, who is a party of record in the above referenced matter. We appeared before the Planning Board on July 16, 2020, and provided written and oral testimony and evidence in this matter. Appellant, the owner of the Metro III property and office building ("Metro III Property"), appeals the decision to allow the Applicant to extinguish continuing, valid entitlement approvals that burden the subject property (the "Dewey Property") for the benefit of the adjacent Metro III Property. The Dewey Property is bound by previous District Council and/or Planning Board public approvals to serve as a surface parking lot benefiting the Metro III Property. The Applicant before the Planning Board did not present evidence to demonstrate that the approvals are no longer in effect, and no longer benefit the Metro III Property. The Planning Board committed legal error by relying on an irrelevant parking analysis and construing a private ground lease to conclude that the valid public approvals no longer restrict development of the burdened Dewey Property and to determine the scope of Metro III's rights. Although the Metro III Property is not the subject property before the Planning Board, and the Planning Board's decision that Appellant was not a necessary applicant: The Planning Board's decision to approve the Detailed Site Plan Application illegally, arbitrarily, and capriciously extinguishes Metro III's prior development approvals and results in Metro III Property losing all of its legally existing parking rights as granted in those prior approvals.

The Appellant requests oral argument on this matter.



**I. Issues Raised on Appeal.**

1. Whether the Planning Board committed legal error by relying on a parking analysis of the Metro III Property where the Appellant was not an applicant before the Board and the Metro III Property was not the property subject to a pending Detailed Site Plan application before the Board?
2. Whether the Planning Board committed legal error by concluding that the Appellant's valid and continuing public approvals for the benefit of the Metro III Property do not restrict the development of the burdened property, the Dewey Property?
3. Whether the Planning Board committed legal error by concluding that the Appellant has no equitable interest to use the Dewey Property?
4. Whether the Planning Board committed legal error by relying on a private agreement to define the scope of the Appellant's rights where private agreements are not relevant to the Board's analysis?

**II. Summary of Pertinent Facts and Procedural History**

The Dewey Property exists as a surface parking lot constructed to support the development of the 494,000 square foot office building improvements on the Metro III Property. The Dewey Property has served as the sole source of parking for the Metro III office building since the early 1970s when both properties were jointly developed for that purpose. The Metro III building was occupied in reliance on the availability of parking at the Dewey Property, and the Metro III owners, including Appellant, have relied upon the Dewey Property's parking lot as the sole source of parking ever since.

Final development approvals allowing the entirety of the Dewey Property to serve as the burdened property for the benefit of the Metro III Property were obtained from the District Council in 1970, by a joint application from Spruell Development (then owner of Metro III Property) and Dewey Development (then owner of the Dewey Property). Both entities were owned and controlled by developer Hershel Blumberg in order to utilize these two separate parcels for a single development project. The administrative record before the Planning Board shows that parking approvals were granted under the then-applicable 1970 Zoning Ordinance for Prince George's County (the "1970 Zoning Ordinance"), as modified by a parking waiver granted by the District Council in Resolution 636-1970 (the "Parking Waiver").

The Parking Waiver was jointly obtained in response to 1970 Zoning Ordinance revisions. In order to use the Dewey Property as Metro III's parking, the developers sought and obtained waivers from two restrictive requirements that (i) all off-site parking be located within 500 feet from the building property; and (ii) that no more than 100 spaces can exist on a different parcel. Importantly, the 1970 Zoning Ordinance also required that off-site parking be secured by "an appropriate legal arrangement that assures permanent availability of the compound." See 1970

Zoning Ordinance Section 24.222 (Emphasis supplied). The 1970 Zoning Ordinance, Section 24.16, also required that all 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.” In other words, when Spruell Development and Dewey Development jointly obtained approvals for Metro III Property to use the Dewey Property as its sole source of parking, the Metro III Property gained the right to rely on that parking lot as a permanent accessory intended to benefit the use and occupancy of the building. Neither the “permanency” requirement, nor the creation of an “accessory” use relationship were waived.

The joint approvals to the Metro III Property and Dewey Property granted approval for 1,550 parking spaces across the 19+/- acre Dewey Property to serve the Metro III office building. The site plan in 1972 shows this calculation, as does the site plan from 1987, which was the operative site plan when the first TDDP master plan was adopted, and when the TDO overlay zone was implemented. The Dewey Property parking lot is constructed on the entirety of the developable portion of the land and continued to benefit Metro III during this time and today. When the TDDP was amended in 1998 and 2016, the parking lot was recognized as legally existing parking, which, as a matter of law, need not be reduced and is exempt from Transit District Standards until a Detailed Site Plan by Metro III Property is reviewed for redevelopment of the office building. The parking lot has existed on the ground for 50 years.

Beginning in 2001, the University Town Center region also became subject to CSP-00024, which imposed requirements for any DSP filed subsequently. Over the years, various DSPs have been filed and approved for the redevelopment of various UTC properties. There has never been a detailed site plan approved to alter or amend Metro III Property’s parking rights. As a result, the parking lot remains legally existing and need not be reduced. The Metro III Property continues to rely on its original valid, continuing public approvals which are inextricably connected the Dewey Property as a burdened property providing Metro III’s sole source of parking.

The Applicant seeks through the DSP Application to redevelop the entire 19+/- acre Dewey Property parking lot, without any consideration of this joint development history, without any participation from the Metro III building owners, and without regard to Metro III Property’s entitlements and approvals. Before the Planning Board on July 16, 2020, the Applicant did not present any evidence to demonstrate that Metro III’s parking approvals were legally ineffective. Rather, the Applicant argued that Metro III’s right to use the surface parking lot derived solely from a private ground lease executed 28 years after the approvals took effect and without any public process, and which only pertained to 8 acres of the overall 19+/- acre Dewey Property.

The Applicant argued, without evidence, that the private ground lease authorizes the Dewey Property owner to relocate the Metro III Property owner to other existing parking garages in UTC, and that the Applicant intends to rely on that clause to avoid its obligation to provide the Dewey Property as required parking. No agreement has been reached to relocate Metro III Property and the Applicant’s legal construction of the ground lease is the subject of litigation and an arbitration.<sup>1</sup>

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<sup>1</sup> By necessity of the District Council’s procedures, this appeal comes before the final administrative record has been prepared. The Appellant further objects to the administrative record that was presented to the Planning Board

Following testimony, the Planning Board's legal counsel gave an opinion that the District Council granted Metro III Property the right to use the Dewey Property as surface parking to satisfy its parking requirements at the time of its original approvals. Counsel opined that the approvals granted in 1970 are still effective today to allow Metro III to use and occupy the Dewey Property for parking. However, counsel also inconsistently opined that those joint development approvals for the benefit of the Metro III Property granted its owners no interest in using the Dewey Property. Counsel opined that Metro III Property's arguments were actually "a private party dispute" concerning construction of the ground lease conditions. Counsel opined that Metro III's only interest in the Dewey Property was as a ground lessee. Counsel opined that all authority to use the parking lot was granted to the Metro III Property, but that such use does not restrict development on the burdened Dewey Property, despite the Zoning Ordinance requirements and continued effectiveness of the approvals.

At the hearing, the Board reasoned that it was "irrelevant" whether Appellant should have been applicants before the Board on a request that affects Metro III Property's entitlement approvals, and thereafter determined that Appellant need not be an applicant. Nonetheless, the Planning Board also determined that because subsequent code revisions have removed minimum parking requirements applicable to Metro III Property's zoning, then there is no limit to the burdened property owner's right to eliminate the Metro III Property's prior approvals.

The Planning Board, in its approval Resolutions for each DSP case, found that Metro III's valid public approvals are "a factor of convenience" rather than a continuing permanent use right. The Planning Board relied upon an inapplicable parking analysis supplied by the Applicant to find that, within the UTC neighborhood, there would be a post-development "surplus of 1,008 spaces without the Dewey surface parking spaces". The Board concluded that the Application can proceed because "there is sufficient parking within University Town Center to serve the uses of that site [Metro III Property]" and "matters regarding private agreements for use of the parking on the Dewey [P]roperty are not relevant to the DSP requirements or analysis." On those findings and conclusions, the Planning Board ultimately concluded that Metro III Property's parking approvals to use the Dewey Property for permanent parking "did not restrict the future development of the Dewey Property and so had no relevance to this application."

### **III. Standard of Review**

The District Council exercises appellate jurisdiction to review the Planning Board's decisions respective to Detailed Site Plan applications. *County Council of Prince George's Cnty. v. FCW Justice, Inc.*, 238 Md. App. 641, 667 (2018). The District Council has the authority to reverse, modify, or remand the Planning Board's approval of a Detailed Site Plan, in accordance

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for the July 16, 2020 hearing. As of the commencement of the hearing, the Appellant's legal memoranda and exhibits were not fully included in the publicly published "case file", which is intended to be a record of all materials for board consideration on an application. Those materials which were submitted were entirely out of sequence and sometimes appeared as part of the Applicant's materials. This issue was raised at the Planning Board level and the transcript will show confusion by the Board in construing the incomplete record at times. Without the benefit of a live hearing, it would have been impossible to inspect the record actually before the individual Board members.

with specific grounds stated in the Order of Remand adopted by the Council. County Code Section 27-290(d). The District Council has the authority to reverse a Planning Board decision if the decision is not authorized by law, not supported by substantial evidence, or is arbitrary or capricious. *FCW Justice, Inc.* 238 Md. App. at 675. If the decision is based on an erroneous conclusion of law, no deference is owed to the legal conclusions of the lower agency. *County Council of Prince George's Cnty. v. Zimmer Dev. Co.*, 444 Md. 490, 553 (2015). Although agency decisions are sustainable if supported by substantial evidence, the Applicant in an administrative hearing bears the burden of proof and persuasion to demonstrate entitlement to the approvals it seeks based on its evidence in the record. *Grasslands Plantation, Inc. v. Frizz-King Enters., LLC*, 410 Md. 191, 214-5 (2009); *Attar v. DMS Tollgate, LLC*, 451 Md. 272, 286-7 (2017). Planning Board findings and conclusions that are not supported by any evidence are not fairly debatable and can be overturned without deference as arbitrary and capricious. *See, e.g., Ocean Hideaway Condo. Ass'n v. Boardwalk Plaza Venture*, 68 Md. App. 650, 665 (1986).

#### IV. Legal Argument

##### A. **The Planning Board committed legal error by relying on a shared parking analysis of the Metro III Property because 6525 Belcrest Road, LLC, is not an applicant before the Planning Board, has no proposed Detailed Site Plan under review, and the Metro III Property is not part of the Site Plan.**

The Planning Board's findings and conclusions relating to parking adequacy in this case are legally flawed because the Planning Board's decisions are based on its review of a property and an applicant that are not before the Board for review. The Planning Board's authority on site plan review includes rendering as to the relationship of structures and uses on the specific parcel of land under review. See Section 27-267; Section 27-281. The focus is on the Applicant before the Board and the specific piece of property under consideration, and the Applicant bears the burden in every respect to show that its Application is in compliance with law and that the Applicant is entitled to approval. The statutory authority delegated to the Planning Board requires it to act in this limited manner.

Here, the Board found that the Metro III Property was the beneficiary of parking approvals that limited the development of the adjoining property in 1970. However, the Board rendered an incorrect legal conclusion that changes in law allowing for no minimum parking requirement and the submission of a shared parking analysis construing Metro III Property under modern parking standards allows for the elimination of Metro III's prior approvals. Specifically, **"the parking requirements that limited development of the adjoining property in 1970 have changed and that sufficient parking exists to accommodate the current parking requirements ..."** (Emphasis supplied).

The Board's conclusion was largely premised on two pieces of information: First, its legal counsel's determination as stated during the hearing that although the 1970 parking approvals, as modified by the Parking Waiver, remained effective to allow Metro III's use and occupancy of the Dewey Property, those approvals could be eliminated as part of the Applicant's Detailed Site Plan for the burdened property "because the minimum parking requirements that previously applied to

[the Metro III Property] aren't even applicable anymore." Second, the Board's review of a shared parking analysis comparing the existing conditions of the Metro III office building and parking to the existing conditions throughout the UTC neighborhood. However, without a Detailed Site Plan pending for Metro III and without the Appellant requesting Planning Board action, the Board committed legal error to eliminate Metro III's legally existing right to use the Dewey Property by relying upon the Applicant's shared parking analysis and revised minimum parking requirements that came into law well-after Metro III Property and Dewey Property obtained joint approvals to use Dewey Property for parking.

Submitting a parking analysis is a Detailed Site Plan requirement for the redevelopment of properties within the UTC. To demonstrate compliance with TDDP standards and Conceptual Site Plan ("CSP") 00024, a shared parking analysis is required for properties within UTC at the time a Detailed Site Plan is submitted for the redevelopment of the building. Per the TDDP, "additions, expansions, or extensions of buildings, structures, and uses not subject to an exemption ... are subject to DSP review". Chapter 6, p. 198. CSP-00024, which also governs Metro III accords: "For each Detailed Site Plan, the applicant ... shall submit a parking demand analysis which reflects appropriate reduction for shared parking between the existing and proposed uses." However, under TDDP policies and CSP-00024 conditions, surface parking that exists under valid, prior approvals (like Metro III's parking right) is considered "exempt from DSP review" and need not be reduced until the building is being redeveloped. There is no requirement to demonstrate compliance with CSP-00024 conditions for a property that is not seeking DSP approval.

In other words, because the Appellant has not presented a Detailed Site Plan for review and the Metro III Property is not under review, its legally existing parking is exempt from Planning Board scrutiny. The Board has no authority to inquire into or eliminate valid entitlement approvals belonging to a property owner whose property is not brought before the Board on an application made by that property owner. Notwithstanding, the Planning Board's painstakingly specific findings in this case demonstrate that its conclusions regarding the Dewey Property DSP are based entirely on an analysis of Metro III Property. The Board analyzed the existing square footage of UTC office space, including the existing Metro III building, plus UTC retail space and residential units. The Board found that there are currently 4,845 parking spaces in UTC and the removal of 1,503 spaces from the Dewey Property would ultimately leave UTC "with a surplus of 1,008 spaces".

This analysis demonstrates the Board's legally flawed approach. Metro III's parking approvals remain effective and give it the right to use and occupy the Dewey Property *until the time that Metro III elects to redevelop its own property*. If, at some point in time, Metro III submits a Detailed Site Plan application, *then* the Planning Board could compare the then-existing UTC against the then-existing Metro III, as modified by Metro III's proposed development, and *only at that time*, would the Planning Board be legally correct to put the Appellant under scrutiny and render determinations based upon on a shared parking analysis submitted by Metro III.

The Planning Board has no express or implied authority to pull adjacent properties into a hearing for review and make determinations to modify or eliminate their prior approvals when there is no application pending by that adjacent property owner. In every prior instance where a

parking analysis was required for a detailed site plan submitted under the conditions of CSP-00024, it was the property owner of the building being redeveloped who was the applicant before the Board. Here, the legally-existing parking is being eliminated, but the building is not being redeveloped. There is no Code authority for review and modification of Metro III's existing rights, and there is no condition of CSP-00024 or TDDP policy advanced by undertaking that review. The offsite parking rights were made jointly by the prior owners of both the Dewey Property and the Metro III Property, and can only be modified by a similar joint application, and not an application by just Dewey Property. Metro III's parking approvals are more than a mere "factor of convenience" as the Board determined; they are legally existing entitlements. The parking approvals here act for the sole benefit of Metro III Property and burden the Dewey Property and the Planning Board acted outside of its authority to change the status quo of rights belonging to a property not before it.<sup>2</sup>

The Planning Board's flawed review not only eliminates the Appellant's rights, additionally the new shared parking analysis favored and relied upon by the Board here is now the baseline for future development if the Appellant ever does elect to come under the Planning Board's jurisdiction, meaning Appellant's rights have changed, again, without it being an applicant. For example, Appellant could choose to add commercial space, add residential units, retail, change the building size or height, or any other allowable change, all of which will now be reliant on the new shared parking analysis and the remaining parking allocations.

Granting the Planning Board the authority to review properties and property rights that are not before it on a pending application by that property owner would require an amendment of state law. Expanding the Board's authority in this manner would create an irrational and unworkable requirement whereby all adjacent and nearby properties are required to also come before the Board to protect and defend their valid approvals at the risk of losing them in every application before the Board. The Board's focus on Metro III Property, and its resultant findings and conclusions to eliminate its legally existing parking rights, exceeded the Planning Board's legal authority and constitutes reversible error.

**B. The Planning Board committed legal error by concluding that Metro III Property's valid and continuing public approvals do not restrict the development of the burdened Dewey Property.**

The Applicant failed to submit evidence to the Planning Board that the parking approvals jointly granted to Metro III and the Dewey Property are no longer effective. On the contrary, the administrative record demonstrates that the parking approvals have never been disturbed by subsequent public approvals. The rights originally granted to Metro III and burdening the Dewey Property remain valid. Therefore, the surface parking lot remains legally-existing for the sole

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<sup>2</sup> The Applicant's justification statement makes plain that the Applicant's position is that a parking analysis is not relevant to the Applicant but is provided to analyze the existing conditions of Metro III: "since the Subject [Dewey] Property is no longer subject to the condition requiring a parking analysis, one is not technically required. Nonetheless, the Applicant has commissioned a shared parking analysis to demonstrate that there is sufficient parking on the south side of Toledo Road within the University Town Center [to] satisfy the parking needs of the existing uses." SOJ for DSP-19050/01 at p. 8.

benefit of Metro III. The evidence also shows that the Dewey Property and Metro III Property predecessor owners came before the District Council in a joint application to obtain parking approvals that, as required by the laws then in effect, bound the Dewey Property as an accessory to the Metro III Property for the purpose of parking, and that the owners of both buildings subjected themselves to a "permanent" legal arrangement as a matter of law.

However, the Planning Board did not consider the evidence before it and instead misapplied the law to determine that subsequent changes in law have the effect of giving the Dewey Property the unrestricted right to redevelop the parking lot, despite prior approvals. The Board found: "[T]he parking requirements that limited the development of the adjoining property in 1970 have changed and that sufficient parking exists to accommodate the current parking requirements even if the surface parking on the Dewey Property is no longer available." The Board concluded that the parking approvals granted to Metro III Property and binding the Dewey Property as its surface parking, therefore, "did not restrict the future development of the Dewey Property so had no relevance to this application."

This legally unsupportable conclusion is apparently premised on Planning Board counsel's contradictory opinions, as stated during the hearing, that (1) The County granted parking approvals in 1970 so that Metro III could use the Dewey Property for its surface parking; but also (2) "The County has never given Metro III any legal rights over the Dewey Property or any other authority to limit the development of the Dewey Property." This analysis and the Planning Board's reliance upon it completely undermines the development review and approval process.

Development review functions for both property owners and government authorities because once a decision is rendered final by the responsible agency, the affected property owners are bound by the approvals that are granted to them. Subsequent changes in law, unless expressly enacted to be retrospective in application, are inapplicable to disturb the legally-existing rights previously granted to property owners, or which burden property owners. *See, e.g., County Council of Prince George's County v. Collington*, 358 Md. 256, 306-07 (2000). A property owner subject to valid public approvals has no right, thereafter, to challenge the validity and conditions of the public approvals granted to the owner. *Skipjack Cove Marina, Inc. v. Cecil Cnty.*, 252 Md. 440, 452 (1969). This rule applies to successor owners, as well, who are accepting the applicable conditions and encumbrances. *Id.*

In this case, those approvals burdened the Dewey Property for the benefit and use by the Metro III Property. The original owners of the Metro III Property and Dewey Property voluntarily came before the District Council, obtained parking approvals that were deliberately intended to burden the Dewey Property as necessary parking for Metro III Property, and accepted the conditions of those approvals, as modified by the waivers. A single developer acting through a common attorney came before the District Council on a joint application that bound the Dewey Property to the Metro III Property as its parking lot. The Board determined that the approval remains effective. It is, therefore, legally unsupportable to rely on subsequent changes in law to demonstrate that the conditions imposed on the properties are no longer effective to restrict development.



Under the 1970 Zoning Ordinance an accessory use restriction was created, legally encumbering the use of the Dewey Property parking parcel to the Metro III Property building parcel in a manner that could only be subsequently undone by both property owners' successors coming before the board through another joint application. Further, the use of the parking lot is in the sole service of Metro III. The benefit of those rights was assigned to 6525 Belcrest Road, LLC, which assumed those rights upon its purchase of the property. The Dewey Property owner assumed the burdens of those rights when it purchased its property.

The Planning Board's ruling is in contravention to county and state law, and ignores the administrative record which demonstrates only the continued effect of the prior applicable approvals. The Applicant is, indeed, restricted in the future development of its property, and the parking approvals granted in 1970 are relevant to the Application, because the Applicant's predecessor voluntarily sought and obtained approvals that rendered site development restrictions on its land by binding the Dewey Property as the sole source of parking for Metro III. The record demonstrates that the benefits and burdens of those approvals have continued validity today and so there is no basis for the Planning Board to reduce or eliminate those rights without *both properties* coming forward to modify the rights that were originally granted *for the benefit and burden of both properties*. That would require the Metro III Property to be part of the detailed site plan application.

The Board's determination that the properties are no longer bound by valid public approvals because of mere changes in law, without changes in development approvals applicable to both of two properties, is legal error.

**C. The Planning Board committed legal error concluding that 6525 Belcrest Road, LLC, has no equitable interest to use the Dewey Property.**

The Planning Board adopted its legal counsel's narrow definition of "equitable interest" in finding and concluding that 6525 Belcrest Road, LLC, has no equitable interest to use the Dewey Property. At the hearing, Board Counsel opined that "equitable interest", an undefined term used in the Zoning Ordinance, means "that you have a right to acquire formal legal title". That narrow definition is not supported by law and ignores that land use restrictions imposed by governmental approvals are validly enforced by the affected property owners.

The Planning Board and District Council hold the power to impose reasonable conditions on approvals, and once those conditions are imposed, the effectiveness of local government's power is derived from its ability to enforce those conditions. See, e.g., *Flores v. M-NCPPC*, 220 Md. App. 391, 400 n. 4 (2014). Indeed, the regulation of subdivision and the attachment of reasonable conditions related to the "restrictive use of the land" is a core function of the Planning Board. See, e.g., County Code, Section 24-110 (relating to plat approval). There is no strict definition of which encumbrances constitute an equitable interest in land under State law. However, it is settled law that subdivision approvals that include conditions reserving specific land for a specific purpose are restrictions on the subdivider's rights to use the reserved land in an inconsistent manner. See *City of Annapolis v. Waterman*, 357 Md. 484, 505-6 (2000). A subdivision condition that restricts the use of land "limits the method in which a property owner

may thereafter use the property.” *Id.* at 507. Reservations of land to use the land for only a restricted purpose will restrict the rights of the subdivider and others to the use the land for only that restricted purpose, regardless of whether there is a formal conveyance of land. *Id.* at 506.

Here, the Dewey Property’s use was plainly restricted to that of the parking lot for Metro III Property. The condition burdened the Dewey Property’s use and gave any owner of the Metro III Property an interest in using the Dewey Property. Appellant is the beneficiary of those restrictive use conditions that burden the Dewey Property and, in that respect, the Appellant’s rights are equivalent to an easement because the District Council’s approval of the property owners’ joint application constitutes an agreement giving Appellant authority via a non-possessory property interest to access and use the Dewey Property as its permanent source of parking. The joint approval has never been superseded by subsequent administrative actions and so the Applicant, as the burdened owner, has no right to disturb the benefitted Appellant’s rights or reliance on that grant.

Here, however, the Planning Board relied on an extremely narrow interpretation of the term “equitable interest” as only applying to a person who has the right to eventually take fee simple title to property through a purchase agreement. The Planning Board apparently confused the effect of conditions imposed through private land development, which are subdivision restrictions, with the general law respective to allowable zoning uses. Certainly, joint development conditions requiring one parcel to be used specifically as the parking lot for an adjoining parcel in the same application constitutes a condition restricting the use of the burdened land and creates a protectable interest enjoyed by the benefitted property owner.

Restrictive approval conditions burden the use of the land and prevent the owner from any inconsistent use that would violate the rights enjoyed by the benefitting owner. In the face of Maryland law, the Planning Board’s opinion is legally unsupportable because it ignores the Appellant’s use right enjoyed over the Dewey Property. The Planning Board committed reversible error in concluding that the Appellant has no equitable interest in the Dewey Property despite being the beneficiary of a continued use right imposed as a condition of approval by public officials who were charged with reviewing both properties in a single subdivision application.

**D. The Planning Board committed legal error by relying on the private ground lease to define the Appellant’s scope of right to use the Dewey Property in a case where private agreements are not relevant to the Board’s analysis.**

The Planning Board found in each case: “Any matters regarding private agreements for use of the parking on the Dewey Property are not relevant to the DSP requirements or analysis.” However, the Board’s considerations at the hearing, and the Board’s findings and conclusions, were largely influenced by its legal counsel’s opinion that the Appellant’s rights are defined solely as those of a lessee under a private ground lease with the Applicant. The Applicant’s entire argument that its shared parking analysis is evidence to support the availability of adequate replacement parking is premised in Applicant’s presupposed argument that the ground lease allows it to relocate Appellant to a nearby parking garage. There is no record evidence that the public

approvals would allow for parking relocation, which is a concept entirely construed from the ground lease terms.

By its own words, the Planning Board's findings and conclusions are tainted by its consideration of irrelevant evidence that should have never been considered. A private ground lease does not supersede prior development approvals nor is it grounds to eliminate those approvals. In this case, this is made obvious by the fact that the parking approvals granted parking rights across the entire 19+/- acre Dewey Property, while the ground lease covered just under 8 acres, and that the ground lease was executed 28 years after the parking approvals were granted, is for a limited lease term, was never put before a public body, and was not approved as part of any subdivision or other redevelopment application. To the extent the ground lease has any applicability to the discussion, it would have no bearing on Appellant's approval rights which are far greater. The Board's decision to allow redevelopment of the entire 19+/- acres cannot be premised on the 8-acre ground lease. The Board ignored Appellant's valid public approvals and instead construed a private agreement to define the parties' rights.

The Planning Board committed reversible error by construing and relying on the private ground lease to define Appellant's rights.

#### **V. Conclusion**

For the reasons as set forth above, the evidence and arguments set forth in the administrative record, and as will be expanded upon at oral argument before the District Council, the Appellant respectfully requests that the District Council reverse the decision of the Planning Board and remand with instructions to Deny the Application because the Application is incompatible with valid public approvals that restrict the development of the land.

Respectfully submitted,

**McMillan Metro, P.C.**



Peter E. Ciferri, Esq.

*Counsel for the Appellant*

CERTIFICATE OF SERVICE

I hereby certify that on this 27<sup>th</sup> day of August, 2020, a copy of the foregoing Appeal was sent by first-class mail, postage prepaid, to the Clerk of the County Council, and to all parties of record on the Applications, *to wit*:

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