SPECIFIC DESIGN PLAN SDP-1603-03 NATIONAL CAPITAL BUSINESS PARK	:	**BEFORE THE**
	:	**DISTRICT COUNCIL**
	:	**FOR**
AND	:	**PRINCE GEORGE'S COUNTY**
TCP2-026-2021-06	:	

NATIONAL CAPITAL BUSINESS PARK OPPOSITION TO EXCEPTIONS AND REQUEST FOR ORAL ARGUMENT

Comes now, NCBP Property LLC, the Applicant, in above referenced SDP-1603-01-03 and TCP2-026-2021-06 (hereinafter the "Applicant"), by and through its attorneys, Arthur J. Horne, Jr., Esq., Robert J. Antonetti, Jr., Esq. and Shipley & Horne, P.A., and hereby responds to the Exceptions and Request for Oral Argument from the decision of Prince George's County Planning Board (the "Planning Board") in the above-referenced applications, and further states as follows:

That on or about February 3, 2023, an appeal to the District Council was filed by Ray Crawford and Kathy H. Crawford[1] (collectively referred to as the "Appellants") regarding the above referenced applications. For reference, SDP-1603-03 (the "SDP") and TCP2-026-2021-06 (the "TCP2") directly relates to development of Parcel 11 within the employment park known as the National Capital Business Park (the "NCBP") in Upper Marlboro, Maryland. The SDP and TCP2 were approved unanimously by the Planning Board at a public hearing held on December 15, 2022. Further, a resolution (PGCPB No. 2022-133) was adopted unanimously by the Planning Board on or about January 5,

1 The Applicant reserves the right to challenge the standing of Appellants as part of all proceedings relative to this case.

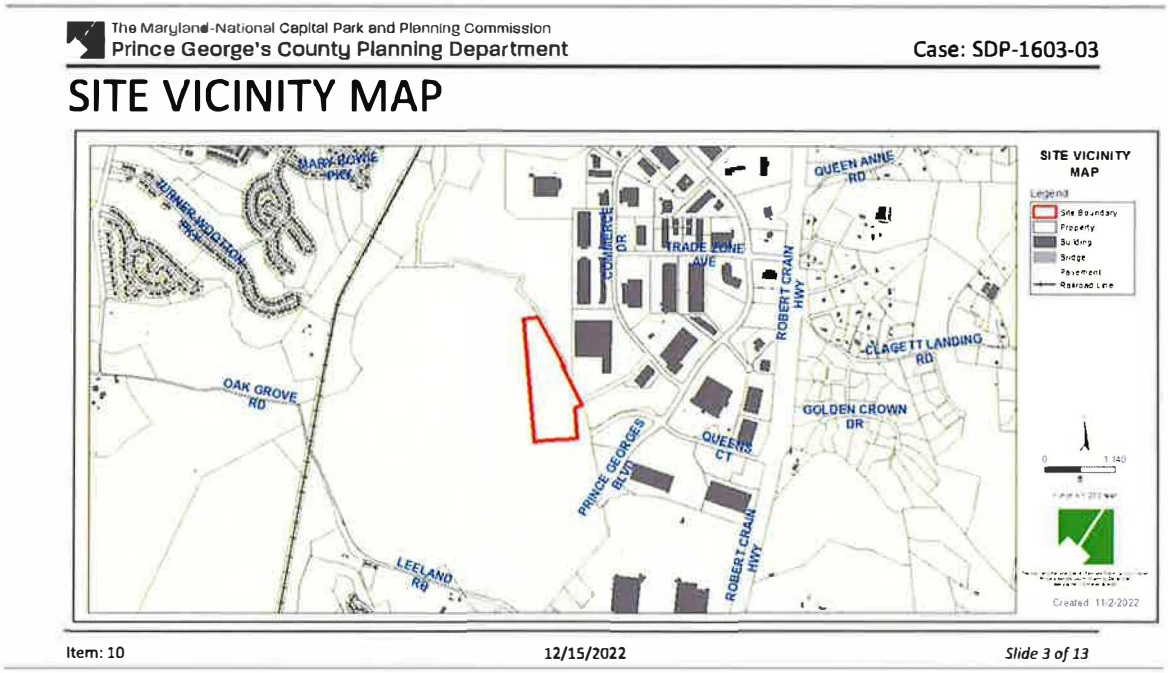
2023, approving both applications with conditions.

I. DESCRIPTION OF THE PROPERTY & SDP

The Applicant is the owner of the NCBP which is approximately a 442± acre site that is currently being developed as an employment park. The Applicant's property is located north of Leeland Road and west of US 301. The property is proximate to major transportation routes and is currently classified in the LCD (426.52 +/- acres), IE (15 +/- acres), and AR (0.78 +/- acres) Zones. The types of uses proposed for the NCBP will include warehouse/distribution, office, light industrial/manufacturing, and/or institutional uses as approved by the District Council in Basic Plan A-9968-03. The majority of uses within the NCBP are anticipated to be warehouse/distribution uses. The NCBP is currently under development with site infrastructure, grading, and clearing activities currently underway in accordance with previously granted entitlement approvals that are final and beyond appeal.

The SDP only applies to approximately 26.23 acres of the overall 426.52 acres in the LCD Zone portion of the NCBP. The primary purpose of the SDP is to obtain approval of a 301,392 square foot warehouse/distribution on future Parcel 11 within the NCBP. The proposed development also includes all required details relating to parking, lighting, landscaping, etc. It should be noted that warehouse and distribution uses are permitted by right in the LCD zone pursuant to sections 27-4205(c)(5) of the current Zoning Ordinance and Section 27-515(b) of the prior Zoning Ordinance (both sections authorizing eligible properties– such as the NCBP – to utilize the uses and standards of the former E-

I-A Zone). Specifically, the NCBP project is planned to be developed with warehouse/distribution, office, light industrial/manufacturing, and/or institutional type uses similar to those in the abutting Collington Center (also an employment center in the LCD Zone). The SDP plan sheets reflect that Parcel 11 is in the interior of the NCBP site and immediately adjacent to existing development in the Collington Center and other development parcels within the NCBP. The location of the property subject to this SDP is more specifically reflected below (outlined in red):



(*See* Planning Staff Slide Show, Slide 3 of 15, December 15, 2022)

Vehicular access to Parcel 11 will be provided via an extension of existing Queens Court within the Collington Center. It should be noted that Parcel 11 does not have any frontage on existing Leeland Road.

II. PREVIOUS ENTITLEMENT HISTORY

The NCBP has a significant entitlement/approval history which includes, but is not limited to, the following approvals:

- **Basic Plan Amendment A-9968-02**

A-9968-02 for the NCBP was approved for the subject property by the District Council on April 12, 2021 (Zoning Ordinance No. 2-2021), to delete all previously approved residential uses on the property and replace them with up to 3.5 million square feet of employment and institutional uses permitted on 442 +/- acres of the LCD Zone portion of the subject property.

- **Comprehensive Design Plan Amendment CDP-0505-01 & TCP1- 004-2021**

On April 15, 2021, the Planning Board approved CDP-0505-01 (PGCPB Resolution No. 2021-50), amending the previously approved CDP with five conditions. The amendment deleted previously approved residential uses and replaced them with 3.5 million square feet of employment and institutional space, in accordance with A- 9968-02.

- **Forest Harvest Operation & Erosion and Sediment Control Plan No. FH-145-21**

Plan approved by the Soil Conservation District on June 22, 2021.

- **Haul Road/Timber Transport Permit No. 21506-2021-00**

Permit issued by DPIE on July 2, 2021.

- **Preliminary Plan of Subdivision 4-20032 & TCP1-004-2021-01**

An overall PPS 4-20032 for the NCBP was approved by the Planning Board at a public hearing on September 9, 2021. Said application included 36 parcels to support the

development of up to 3.5 million square feet of warehouse/distribution, office, light industrial/manufacturing, and/or institutional space on the property.

- **Specific Design Plan SDP-1603-01(for infrastructure) & TCP2-026-2021-01**

An overall specific design plan for infrastructure is approved on January 27, 2022, by the Prince George's County Planning Board via Planning Board Resolution 2022-10.

- **TCP2-026-2021**

Signature approval of tree conservation plan 2 received February 18, 2022.

- **County Wide Sectional Map Amendment ('CMA")**

On April 1, 2022, the NCBP is officially rezoned to the LCD (426.52 +/- acres), IE (15 +/- acres), and AR (0.78 +/- acres) Zones.

- **Rough Grading Permit No. 29083-2021-G**

Permit issued by DPIE on April 26, 2022.

- **Basic Plan Amendment A-9968-03**

A-9968-03 for the NCBP was approved for the subject property by the District Council on May 16, 2022 (Zoning Ordinance No. 6-2022), approving 5.5 million square feet of employment and institutional uses permitted on 442 +/- acres of the LCD Zone portion of the subject property.

- **Comprehensive Design Plan Amendment CDP-0505-02 & TCP1-004-2021-02**

On May 19, 2022, the Planning Board approved CDP-0505-02 (PGCPB Resolution No. 2022-53), amending the previously approved CDP with seven conditions. The amendment approved 5.5 million square feet of gross floor area, in accordance with A-

9968-03. The remainder of the subject property, consisting of 15 acres in the IE Zone, and 0.78 acres in the AR Zone, was not included in this amendment.

- **Preliminary Plan of Subdivision 4-21056 & TCP1-004-2021-03**

An overall PPS 4-21056 for the NCBP was approved by the Planning Board via resolution PGCPB No. 2022-70 on June 9, 2022. Said application included 27 parcels to support the development of up to 5.5 million square feet of warehouse/distribution, office, light industrial/manufacturing, and/or institutional space on the property.

- **Specific Design Plan SDP-1603-02 & TCP2-026-2021-02**

On June 30, 2022, SDP-1603-02 was approved by the Planning Board for a 3,428,985 square foot warehouse/distribution facility on 90.11 acres of the NCBP. The resolution of approval, (PGCPB No. 2022-76) was adopted the same day. The case was affirmed by the District Council on October 9, 2022. The approved development reflected in SDP-1603-02 abuts Leeland Road and is immediately to the west of future Parcel 11.

III. STANDARD OF REVIEW

When reviewing a decision of the Planning Board to approve a specific design plan, the District Council exercises appellate jurisdiction. *Cnty. Council of Prince George's Cnty. V. Zimmer Dev. Co.*, 444, Md. 490, 583 (2015). As such, the District Council must apply the same standard of review a court applies to an agency decision on judicial review. Id. 444 Md. At 573-75. As such, the District Council's review of a decision by an administrative agency (in this matter, the Planning Board's decision in the SDP and TCP2) based upon issues of fact should consist of "determining if there is substantial evidence

in the record as a whole to support the agency's findings and conclusions," and the review upon findings of law are limited to whether, "the administrative decision is premised upon an erroneous conclusion of law." *Montgomery County v. Butler*, 417 Md. 271, 283(2010) (quoting *Marzullo v. Kahl*, 366 Md. 158, 172, (2001). A reviewing court may not disturb an agency's finding of fact so long as the evidence presented renders the finding "fairly debatable." *Armstrong v. Mayor & City Council of Baltimore*, 410 Md. 426, 443 (2009).

Furthermore, where discretionary decision making is involved, deference to the expertise of the agency is appropriate. *People's Counsel for Baltimore Cty. v. Surina*, 400 Md. 662, 681 (2007). Specifically, deference to an agency's interpretation of a statute which the agency was created to administer is to be given great deference due to its expertise in that field. *Kor-Ko Ltd. v. Maryland Dep't of the Env't*, 451 Md. 401, 412, (2017). When compared to the deference accorded an agency when interpreting its own a statute, an agency's interpretation of its own rules and regulations is given even greater weight, because they are promulgated by the agency and frequently used in its operations, and an agency is best suited to discern its own intent in designing its own rules and regulations. Id. at 412-413 (quoting *Md. Transp. Auth. v. King*, 369 Md. 274, 288, 799 A.2d 1246, 1254 (2002)).

IV. OPPOSITION TO EXCEPTIONS

The Appellants' appeal of the SDP and the TCP2 is limited to five areas of contention set forth in their memorandum filed with District Council on or about February 3, 2022. The Appellants' objections to the SDP and TCP2 (often recycled from other

appeals of development applications within the NCBP) are wholly without merit, untimely, lack any basis in the record of evidence, and/or otherwise rely on mischaracterized holdings from Maryland appellate court decisions. The Applicant responds to the Appellants' objections as follows:

i.) The Planning Board's approval of SDP-1603-03 is not legally deficient and satisfied all requirements for an approval of a specific design plan in the Zoning Ordinance.

The Appellants incorrectly contend (in two sub arguments) that the Planning Board's approval of the SDP is legally deficient because it's a "verbatim recitation" of the Technical Staff Report ("TSR").2 *See* Appellants' Memo, p. 4-7. The Appellants cite to the Maryland Supreme Court's holding in *Maryland-Nat. Capital Park and Planning Comm'n v. Greater Baden-Aquasco Citizens Ass'n*, 412 Md. 73, in attempt to establish that reliance on a TSR is only deemed permissible when the Planning Board has "added additional findings of fact and conclusions". *See* Appellants' Memo, p. 5. The Appellants' assertion in this regard is in complete contradiction to the actual holding in *Greater Baden* in which Justice Harrell, writing for the majority, stated:

> We affirm the Court of Special Appeals's judgment on the ground that the Planning Board should have considered the General Plan's numeric residential growth objective in the Rural Tier in determining whether the Preliminary Plan conformed to the Master Plan. Our holding in all other respects is more narrow than that expressed in the opinion of our brethren on the intermediate appellate court. **We do not**

2 The Planning Board's resolution in this case clearly is not a "verbatim recitation" of the TSR when reading the two documents side-by-side. Appellants' own Exhibit A attached to its appeal memorandum is an extremely lengthy side-by-side comparison of the two documents and contains numerous examples of how the text of the TSR and Planning Board's resolution are different and not "verbatim" recitations. *See* Appellants' Exhibit A, pgs. 1, 6, 7, 8, 13, 15, 16, 17, 19, 20, 21, 24, 25, 27, 28, 29, 30, 31, 34, and 35.

> **subscribe to the view that the Planning Board did not engage otherwise in meaningful fact-finding because its Resolution approving the Preliminary Plan was a "rote repetition" of the Technical Staff Report. It is not unreasonable for the Planning Board to rely on a Staff Report, as the Planning Board did in this case, if the Staff Report is thorough, well conceived, and contains adequate findings of fact**. *Id.* at 110.
>
> (Emphasis added).

As the Maryland Supreme Court established in *Greater Baden* (above), it is not unreasonable for the Planning Board's resolution to rely on a staff report, as the Planning Board did in this case, if the staff report is "thorough, well-conceived, and contains adequate findings of fact." *Id.* Further, it is entirely appropriate for the Planning Board to adopt by reference statements and reports of the technical staff as part of the basis for its final decision, if said evidence is referenced in its final resolution of approval.

The Planning Board's final written resolution provided a thorough description of the facts found, law applied, relationships between the two, and the conclusions made after the evidentiary hearing on the SDP. The record in this case includes, but is not limited to, a detailed 20-page resolution of approval, a 25-page TSR, 76 pages of backup materials, 70 pages of "additional" backup materials (including Applicant's revised conditions, staff revisions to findings, etc.), the plan sheets for the proposed SDP and TCP2, a transportation phasing memorandum from the Applicant's traffic engineer dated October 13, 2022, and a 13-slide PowerPoint presentation from the technical staff. After careful review of the Planning Board's resolution of approval, it should be clear that all necessary findings were made by the Planning Board pursuant to the requirements of the Zoning

Ordinance. Specifically, Finding 7 on pages 4 through 8 of the Planning Board's resolution addresses all appropriate requirements for approval of an SDP and TCP2 set forth in the Zoning Ordinance. This includes the findings set forth in Section 27-528 of the Zoning Ordinance specifically pertaining to the of approval of a specific design plan. These required findings are set forth on pages 6 through 8 of the Planning Board's resolution.

Further, the Planning Board's 20-page resolution also contains appropriate and adequate findings of fact based on evidence in the record. The factual findings made by the Planning Board, are contained in numerous sections of the resolution relating to a variety of topics including, but not limited to the following: conformance to prior conditions of approval from past entitlements (PGCPB No. 2022-133 at 8-11); findings regarding compliance to the County's Landscape Manual (PGCPB No. 2022-133 at 5,15); conformance to the Prince George's County Woodland and Wildlife Habitat Conservation Ordinance (PGCPB No. 2022-133 at 15-16, 17); and conformance to the Tree Canopy Coverage Ordinance (PGCPB No. 2022-133 at 15-16, 17). Contrary to the Appellants' assertions, one does not have to "scour the record" to determine why the Planning Board approved the SDP and TCP2, as such reasons and rationale are clearly set forth within the "4 corners" of the resolution.

The Appellants incorrectly assert in the instant appeal that the Planning Board did not "meaningfully consider evidence" presented to it during the public hearing, including the Appellants opposition raised at the hearing. *See* Appellants' Memo, p. 6. Here it is important to note that the opening recitals in the Planning Board's resolution of approval

contains the following:

> WHEREAS, **in consideration of evidence presented at a public hearing on December 15th 2022**, regarding specific design plan SDP-1603-03 for National Capital Business Park, Parcel 11, the planning board finds:
>
> (PGCPB No. 2022-133 at 1) (Emphasis added).

The Planning Board is under no obligation to specifically address (or give any weight) in its resolution to the point-by-point objections raised by Appellants at the December 15, 2022 public hearing. What is required, however, is that the Planning Board make appropriate findings of fact and conclusions of law based on the evidence presented at the public hearing. This clearly occurred as evidenced by the recital above and the detailed contents of the 20-page resolution itself.

Appellants assertion that statements in the resolution do not indicate the facts used to support certain aspects of the Planning Board's conclusion is also inaccurate and incorrect. Specifically, the Appellants complain that Section 27-528(a)(5) of the Zoning Ordinance requires that the SDP demonstrate "That the regulated environmental features are preserved and/or restored to the fullest extent possible." Appellants then proceed to incorrectly claim that the Planning Board provided only the following:

> This SDP has been reviewed by the Planning Board and determined that environmental features are preserved and or restored, to the fullest extent possible.

See Appellants' Memo, p. 8-9 (quoting PGCPB No. 2022-133 at 7).

The Planning Board resolution contains more findings on the regulated environmental features than what was selectively quoted by the Appellants. Upon

reading the entire resolution of approval, it is clear that the Planning Board made substantial factual findings related to the environmental features within Parcel 11 and the overall NCBP project. Such findings can be found specifically in Finding 13 which states as follows:

13. **Prince George's County Woodland and Wildlife Habitat Conservation Ordinance:** This property is subject to the provisions of the 2010 Woodland and Wildlife Habitat Conservation Ordinance (WCO) because the project is subject to a PPS (4-21056). This project is subject to the WCO and the Environmental Technical Manual (ETM). Type 2 Tree Conservation Plan TCP2-026-2021-06 has been submitted with the application and requires revisions, to be found in conformance with Type 1 Tree Conservation Plan TCP1-004-2021-03 and the WCO.

The District Council amended the woodland conservation/afforestation threshold on land with prior R-S zoning, with permitted uses in the prior E-I-A Zone. The subject property shall be developed in accordance with the threshold requirements of the prior E-I-A Zone. The woodland conservation threshold (WCT) for this 442.30-acre property is based on 15 percent for the E-I-A (R-S) and I-1 portions of the site, and 50 percent for the R-A Zone, for a weighted WCT requirement of 15.08 percent, or 52.40 acres. There is an approved TCP1 and TCP2 on the overall development related to the prior residential subdivision, which were grandfathered under the 1991 Woodland Conservation Ordinance, but the prior TCP approvals are not applicable to the new development proposal.

NCBP is subject to the WCO and the ETM. A rough grading permit was approved for the site, utilizing the limit of disturbance (LOD) of TCP2-026-2021, which is in process. An amended rough grading permit, with an enlargement of the LOD to include area approved under 4-21056 and TCP1-004-2021-03, was recently approved for this site as TCP2-026-2021-05. Revisions to TCP2-026-2021 were submitted with SDP-1603-01, SDP-1603-02, and SDP-1603-04. Proposed clearing with the park dedication area shall be reflected in a future application. Details of the recreation facilities, impacts to the primary management area (PMA), and the variance request for specimen tree removal will be analyzed with the application proposing the development of the park.

Section 25-122(c)(1) of the WCO prioritizes methods to meet the woodland conservation requirements. On November 18, 2022, the applicant submitted a statement of justification (SOJ) dated September 19, 2022, requesting approval of a combination of on-site and off-site woodland conservation, as reflected on the TCP2 worksheet. The site contains 186.15 acres of PMA, approximately 15,622 linear feet of regulated streams, and 94.77 acres of 100-year floodplain. The applicant states that, although they are only preserving 85.38 acres of the 117.85 woodland conservation requirement on-site, they are proposing to preserve the highest quality of woodlands on-site within the PMA and contiguous to these areas, which has a priority of preservation. The WCT for the development is 52.40 acres, or 15.08 percent, which is proposed to be met on-site in

preservation. The central portion of the site was the subject of a timber harvest, which was implemented. The applicant states that, clearing of the central portion of the property is supported due to the implemented timber harvest, and that providing on-site afforestation/reforestation, connected to the on-site preservation, is a higher priority over preserving the central areas of woodlands impacted by the timber harvest. The applicant proposes to protect the woodland preservation areas, including areas of reforestation. Ninety-nine of the specimen trees on-site are located in the proposed woodland conservation easement. The applicant states that the site is not suitable for natural regeneration and the next logical step is to provide the remaining requirement off-site, within an approved tree bank. In review of the conservation method priorities of Section 25-122(c)(1), staff agrees that on-site afforestation/reforestation, connected to the on-site preservation, is a higher priority over preserving the central areas of woodlands impacted by the timber harvest, that are not directly connected to environmental features. The Planning Board supports the applicant's request to meet the woodland preservation requirements, as stated in the SOJ, through a combination of on-site and off-site preservation.

The overall woodland conservation worksheet shows clearing of 254.35 acres (prior approvals 260.75 acres) of woodland on the net tract area, and clearing of 1.86 acres (prior 1.09 acres) of woodland in the floodplain. Based on calculations, this results in a woodland conservation requirement of 117.85 acres (prior 118.68 acres). The requirement is proposed to be met with 85.38 acres of on-site woodland preservation, 16.81 acres of on-site reforestation, and 15.66 acres of off-site woodland conservation credits. Although this development has been part of several reviews, as individual applicants submit SDPs for development, future applicants should continue to look for opportunities to provide additional areas of woodland preservation and reforestation.

As submitted, it appears this application proposes to reduce the overall amount of woodland clearing, increasing the woodland preservation. The plan is not clear where the reduction of the clearing is occurring. Prior to certification of TCP2-026-2021-06, the applicant shall demonstrate the areas where woodland clearing was reduced and revise the plan and worksheet, as necessary.

The plan was previously approved for clearing within the 100-year floodplain for an entrance to the site and proposed to reforest certain areas of the impacted floodplain. The worksheet must be revised to add the acreage of reforestation in floodplain.

Technical revisions to the revised TCP2 are required and included in the conditions of this technical staff report.

(PGCPB No. 2022-133 at 15-16).

Further, the Planning Board's resolution specifically incorporated by reference the Environmental Planning Section's memorandum dated November 17, 2022 "in which it was noted that the environmental features have been preserved, to the fullest extent possible." Id. at 17. This incorporated Environmental Planning Section memorandum is found on pages 49 through 68 of the Backup to SDP-1603-03 and contains an extensive

discussion regarding the previously approved environmental impacts within the NCBP as well as details regarding environmental features specific to the SDP and TCP2. The Environmental Planning Section memorandum concludes that there were no additional impacts to environmental features beyond those approved as part of prior entitlement applications for the NCBP. Specifically, the 19-page Environmental Planning Section memorandum states the following regarding preservation of environmental features onsite:

> **The development proposed with SDP-1603-03 has been determined in part by the environmental constraints of the site, including the regulated environmental features (REF) and the soils. For the overall National Capital Business Park development, minimal impacts to the environmental features are proposed. Impacts to the primary management area (PMA) were previously approved with 4-21056, SDP-1603-01, and SDP-1603-02, and are still valid. No additional impacts are requested with the subject case SDP-1603-03.**

(Backup, SDP-1603-03, p. 53).

Further, the Environmental Planning Section memorandum concludes with the following:

> **SUMMARY OF RECOMMENDED FINDINGS AND CONDITIONS**
> **The EPS has completed the review of SDP-1603-03 and TCP2-026-2021-06, and recommends approval subject to the following findings and conditions:**
>
> **Recommended Findings:**
>
> 1. **The regulated environmental features (REF) on the subject property have been preserved and/or restored to the fullest extent possible. No additional impacts are proposed with this application.**

(Backup, SDP-1603-03, p. 66).

Based on the above, it should be abundantly clear that that the Planning Board's

resolution adequately addressed the required finding in Section 27-528(a)(5) and that there were no additional impacts to regulated environmental features over and above those that had already been approved in previous applications for the NCBP.

Similarly, the Appellants incorrectly claim that the Planning Board's resolution of approval did not determine if the approved vehicle trip cap (approved in PPS 4-21056) for the NCBP was exceeded by the SDP. *See* Appellants' Memo, p. 9. This is factually incorrect as the Board makes a specific finding regarding the proposed development in the SDP's conformance with the trip cap. Specifically, Finding 10 in the SDP resolution of approval states the following regarding the trip cap established by Condition 2 of PPS 4-21056:

> 2. **Total development within the subject property shall be limited to uses which generate no more than 1,401 AM peak-hour trips and 1,735 PM peak-hour vehicle trips. Any development generating an impact greater than that identified herein above shall require a new preliminary plan of subdivision, with a new determination of the adequacy of transportation facilities.**
>
> A 301,392-square-foot gross floor area (GFA) warehouse/distribution building is proposed with this SDP. The Planning Board has reviewed and determined that the use is within the peak-hour trips.

(PGCPB No. 2022-133 at 11).

If the Appellants were to carefully review the entire Planning Board resolution of approval, they would recognize that specific findings were also made by the Planning Board related to the sufficiency of a phasing plan submitted by the Applicant as part of the SDP application showing, among other things, that the trip generation cap for the overall project is not exceeded by the proposed development. *See* attached Applicant's Exhibit

A, October 13, 2022 Phasing Plan. Said phasing plan is referenced throughout the Planning Board's resolution for the SDP as well as the Transportation Planning Memo (incorporated by reference in the Planning Board's resolution). (PGCPB No. 2022-133 at 7, 10, 13, 14, and 17; *see also* Backup, SDP-1603-01, p. 71-76).

Moreover, condition 2 set forth in the Planning Board's resolution of approval also directly references the phasing plan submitted by the Applicant with the SDP. Said condition states as follows:

> 2. **Prior to approval of a building permit, the applicant and the applicant's heirs, successors, and/or assignees shall pay a fee of $277,281 (1989 dollars), with a construction cost index determined by the Prince George's County Department of Public Works and Transportation, at the time of payment. In lieu of the payment listed above, prior to issuance of the building permit for Parcel 11, the applicant and the applicant's heirs, successors, and/or assignees shall (a) have full financial assurances, (b) have been permitted for construction through the operating agency's access permit process, and (c) have an agreed upon timetable for construction with the appropriate operating agency for all of the improvements along US 301 (Robert Crain Highway, as described in the phasing plan dated October 13, 2022, submitted as part of the specific design plan application.**

(PGCPB No. 2022-133 at 18) (Emphasis added).

The phasing plan filed with the SDP application by the Applicant (dated October 13, 2022) includes an "Exhibit 1" which calculates the trip generation for all specific design plans proposed and/or approved for the NCBP (including specific design plans for Parcels 1, 2, 10, 7, 8, 9, 11, 12 within the overall project). Specifically, the phasing plan submitted with the SDP application states the following regarding the approved trip cap in its included Exhibit 1:

Trip Generation Rates

Warehousing (0.3 FAR, Prince Georges County Rates)	Trip Distribution (In/Out)
Morning Trips = 0.40 x ksf	80/20
Evening Trips = 0.40 x ksf	20/80
High-Cube Fulfillment Center Warehouse - Sortable (ksf, ITE-155)	**Trip Distribution (In/Out)**
Morning Trips = 0.87 x ksf	81/19
Evening Trips = 1.2 x ksf	39/61

Square Footages and Resulting Trip Generation for Site

SDP-2206	Parcels 7, 8, 9	358,400	sq ft	
SDP-2201	Parcel 12	168,480	sq ft	
SDP-2202	Parcels 1, 2, 10	495,180	sq ft	(311,040 sf & 184,140 sf)
SDP-1603-03	Parcel 11	301,392	sq ft	
SDP-1603-02	Parcel 6	3,412,580	sq ft	(650,780 sq ft Ground Floor Area)
	Total:	**4,736,032**	**sq ft**	

		AM Peak			PM Peak		
		In	Out	Total	In	Out	Total
Warehousing (County Rates for Parcels 1, 2, 10, 7, 8, 9, 11, 12)	1,323,452 square feet	423	106	529	106	423	529
High-Cube Fulfillment Center Warehouse - Sortable (ksf, ITE-155) (Parcel 6)	650,780 permanent ground floor square footage[2]	458	108	566	305	476	781
	User Provided Data	505	45	550	447	453	900
	Higher of ITE or User Provided Data	458	108	566	447	453	900
	Total Trips for Proposed/Approved SDP's:	**881**	**214**	**1095**	**553**	**876**	**1429**
	Trip Cap for National Capital Business Park:	**1126**	**275**	**1401**	**614**	**1121**	**1735**

NOTES:

(*See* attached Applicant's Exhibit A, October 13, 2022 Phasing Plan – Exhibit 1) (Emphasis added).

As can be seen above, the submitted phasing plan clearly states that the total trip generation for all proposed/approved specific design plans for the NCBP (including SDP-1603-01 for Parcel 11) results in a peak hour trip generation of 1,095 AM peak trips, and 1,429 PM peak trips. This is less than the total trip cap of 1,401 AM and 1,735 PM trip established in Condition 2 of PPS 4-21056. As such, the Planning Board's findings in its resolution relying upon the Applicant's submitted phasing plan were entirely adequate to demonstrate that the required trip cap would not be exceeded by the approved development in the SDP for Parcel 11.

Based on the above, any reviewing person or entity, including the District Council,

can look to the findings of facts and conclusions of law in the Planning Board's resolution to determine the rationale used for approval of the SDP and TCP 2 and the evidence in the record relied upon to support said decision.

ii.) <u>The Planning Board's approval of SDP-1603-03 is not based on an illegal text amendment.</u>

The Appellants allege that industrial uses should not be allowed on the Subject Property because such uses are "based on an illegal text amendment, CB-022-2020" and therefore, the Planning Board should not have approved SDP-1603-03. *See* Appellants' Memo at 10. The Appellants allege that "CB-22-2020 is an illegal text amendment because it is a special law in violation of Article III, Section 33 of the Maryland Constitution and because CB-22-2020 violates the uniformity clause of Section 22-201(b)(2)(i) of the Maryland Land Use Article." *Id.*

a. The Appellants are barred by the law of the case doctrine and/or res judicata.

"In Maryland, the law of the case doctrine applies to both questions that were decided and questions that could have been raised and decided." *Holloway v. State*, 232 Md. App. 272, 282 (2017) (citing *Kline v. Kline*, 93 Md. App. 696, 700 (1992)).

"*Res judicata*, also known as claim preclusion or direct estoppel, means 'a thing adjudicated." *Anne Arundel County Bd. of Educ. v. Norville*, 390 Md. 93, 106 (2005).

Both the law of the case doctrine and *res judicata* "are similar defenses aimed at preventing parties from relitigating issues that have already been decided[.]" *Holloway*, 232 Md. App. at 282. The law of the case doctrine acts as a corollary to *res judicata* keyed

specially to appellate decisions. *Id.* The law of the case doctrine "lies somewhere between *stare decisis* and short of *res judicata*." *Stokes v. Am. Airlines, Inc.*, 142 Md. App. 440, 446 (2002).

Appellants Ray and Kathy Crawford already made the exact same arguments before the District Council regarding CB-22-2020 being an illegal text amendment when the Crawfords appealed the Planning Board's final decision to approve SDP-1603-02 and TCP2-026-2021-06 to the District Council on August 5, 2022. The Crawfords also participated at the oral argument before the District Council regarding these issues on September 12, 2022.

On October 19, 2022, the District Council issued its Notice of Final Decision and specifically decided the very same issues that are now being raised by the same Appellants in the instance action. *See* Applicant's Exhibit B, District Council Notice of Final Decision re: SDP-1603-02 at 8-12. The District Council already determined that the "Board's approval of SDP-1603-02 was not based on an illegal special law." *Id.* at 9. As to the argument that CB-22-2020 violated the uniformity requirement, the District Council determined that the issue was not preserved, and that CB-22-2020 was not challenged in a timely petition for judicial review to the Circuit Court. *Id.* at 12.

Because these issues have already been decided by the District Council relating to the same litigants, and the same project (i.e., the NCBP), the Appellants are precluded from re-raising this issue before this Council. The Applicant adopts and incorporates the District Council's findings on these issues in its Final Decision on October 17, 2022 in

SDP-1603-02.

b. The Appellants never timely challenged the validity of CB-22-2020 and are now barred.

None of the Appellants participated in the properly advertised public hearings related to the adoption of CB-22-2020 or took up any appeals therefrom, and therefore, the Appellants failed to exhaust administrative remedies for their now-contended constitutional claims.

For instance, after CB-22-2020 was adopted on July 14, 2020, the Appellants "should have presented all its evidence and legal arguments to the Board of Appeals," which then could have been appealed to the Circuit Court. *Maryland Reclamation Associates, Inc. v. Harford County*, 468 Md. 339, 413 (2020) (*MRA*); L.U. § 22-311(a)(3). Second, the Appellants failed to seek direct judicial review within 30 days of enactment of CB-22-2020 pursuant to L.U. § 22-407, which was the statutory vehicle in Prince George's County in place for making such a constitutional challenge to CB-22. L.U. § 22-407(e).

The Appellants mistakenly rely on *MRA* to assert that the "Planning Board could have, and should have, considered the validity of CB-22-2020 when it approved SDP-1603-03" and wrongly asserts that this is an instance in which such an administrative agency "must[] consider constitutional issues relevant to the land use application." *See* Appellants' Memo, p. 11. Nothing in *MRA* gives a protestant the right to wait nearly two years before first attempting to exhaust administrative remedies. Rather, the time for the administrative agencies to consider the constitutional issues relating to CB-22-2020 were at the time that CB-22 was being enacted, and the within the relevant statutory appeal

periods thereafter relating to the enactment of CB-22.

Notwithstanding that the Appellants completely failed to adhere to the procedure set forth by the Maryland-Washington Regional District Act (RDA), the Appellants are now attempting to file a collateral attack against said legislation as part of the instant SDP appeal before the District Council by incorrectly claiming that it is an illegal special law. Maryland appellate courts have routinely held that where procedures set forth by the RDA are not complied with, the Appellants cannot pursue collateral claims through other means. *See, e.g., Prince George's County v. Ray's Used Cars*, 398 Md. 632 (2007); *County Council of Prince George's County v. Chaney*, 454 Md. 514 (2017); *MRA*, 342 Md. at 493.

Not only are the Appellants barred by the RDA in making this belated attack, they are also barred by the equitable doctrine of laches. Laches applies when there is an unreasonable and prejudicial delay in the assertion of one's rights. *State Ctr., LLC v. Lexington Charles Ltd. P'ship*, 438 Md. 451, 584 (2014); see *Liddy v. Lamone*, 398 Md. 233, 244 (2007) ("[F]or the doctrine [of laches] to be applicable, there must be a showing that the delay [in the assertion of a right] worked a disadvantage to another.") (quoting *Simpers v. Clark*, 239 Md. 395, 403 (1965)).

Here, the Appellants waited approximately 674 days from the adoption of CB-22-2020 to their first appearance during the Planning Board hearing for CDP-0505-02 (via counsel) to allege that CB-22-2020 is somehow "illegal." This was an exceptional passage of time for the Appellants to remain silent on the validity of CB-22-2020 and represents an

unreasonable and prejudicial delay in the assertion of any claim related to the legislation. During said 674-day time period, the Applicant has spent millions of dollars in obtaining needed entitlements and permits for the development of the NCBP. Most of these approvals were obtained through properly advertised public hearing processes before the Planning Board and District Council that were never opposed (or even attended) by the Appellants. In reliance upon these approvals, development at the NCBP has already begun with the initiation of grading, clearing, installation of SWM facilities, and other site development activities (based on previous entitlements that are beyond appeal and which Appellants did not object to).

The Appellants' untimely attempt to undermine the validity of CB-22-2020 so long after its adoption could result in incredible financial damages for the Applicant. The Appellants chose not to directly challenge the validity of CB-22-2020 immediately after its adoption by the District Council and waited 674 days thereafter to attack its validity as part of an appeal of CDP-0505-02 for the overall NCBP project. The Appellants' failure to timely assert its challenge to the District Council's legislative adoption of CB-22-2020 has resulted in significant prejudice to the Applicant and such a claim should be barred by laches.

c. The Appellants' argument is moot.

In fact, so much time has passed since the adoption of CB-22-2020 that several significant planning and zoning activities have occurred in the County including: i.) the adoption of a completely new County Zoning Ordinance; ii.) the approval of the CMA which

rezoned the majority of the NCBP to the new LCD Zone; and iii.) the adoption of the 2022 Bowie, Mitchellville, & Vicinity Master Plan (which designates the NCBP and the adjacent Collington Center as part of the new "Collington Local Employment Area"). As a result of these significant events, CB-22-2020 is part of a now superseded Zoning Ordinance, the NCBP is no longer in the R-S Zone and has been rezoned to the LCD Zone, and the project is now part of an entirely new master plan that strongly recommends employment/industrial uses for the site. Moreover, warehouse and distribution uses are permitted by right in the LCD Zone pursuant to sections 27-4205(c)(5) of the current Zoning Ordinance in a similar fashion to Section 27-515(b) of the prior Zoning Ordinance (both sections authorize eligible properties – such as the NCBP – to utilize the uses and standards of the former E-I-A Zone). As such, the Appellants' arguments are now moot.

d. The Appellants cannot meet their burden of overturning the presumption of validity of this legislation.

To successfully claim that legislation is an illegal special law, the Appellants have the burden of demonstrating the presence of numerous factors based on the legislative history of the case. The Appellants have only included select items from the administrative record related to CB-22-2020 as part of the record of this SDP. In this regard, the Appellants' claims are not supported by complete record nor conclusive evidence indicating that CB-22-2020 meets the criteria necessary for the finding of a "special law" or a violation of the uniformity statute.

Moreover, the Appellants did not set forth any arguments as to why CB-22-2020 is an illegal special law or violative of the uniformity statute, rather, the Appellants merely

inserted a memorandum from another case regarding the Subject Property in which the Appellants make the same arguments. *See* Appellants' Memo, pp. 10-11. Therefore, the response to this issue deserves as little attention as that given to it by the Appellants. The Applicant has duly included as exhibits herein, its memoranda in opposition that have already been filed pertaining to these issues. *See* Applicant's Exhibits C and D.

For all these reasons, the Applicant respectfully requests that the District Council dismiss any claims by the Appellants that CB-22-2020 is an illegal special law or a violation of the uniformity clause.

iii.) <u>The Planning Board's approval of SDP-1603-03 did not involve a use prohibited by the Zoning Ordinance.</u>

a. The Supreme Court of Maryland recently decided this issue contrary to the Appellants' position.

On February 23, 2023, the Supreme Court of Maryland unanimously decided *Crawford v. County Council of Prince George's County, Sitting as the District Council, et al.*, No. 4, Sept. Term, 2022. That opinion is dispositive of the third argument raised by the Appellants. Indeed, the Appellants acknowledged that "the arguments relevant here are substantially similar to those presented to the [Supreme Court of Maryland] in the case of ...*Crawford*[.]" *See* Appellants' Memo, p. 20.

The Petitioners in *Crawford* argued that Amazon's "last mile" warehouse facility was not a "warehouse" or "distribution facility" under the Zoning Ordinance. In the present case, the Appellants similarly incorrectly argue that the proposed single-story warehouse shown in the SDP, which the Appellants characterize as a "high-cube" warehouse facility,

is "not a 'warehouse unit' or 'distribution facility' contemplated under the Prior Zoning Ordinance." *See* Appellants' Memo, pp. 11-12.

Unfortunately for the Appellants here, the *Crawford* Court disagreed with the Petitioners and held that the District Council's finding that Amazon's proposed use of a "last mile" warehouse constituted a "warehouse" and "distribution facility" as defined in the Zoning Ordinance, was supported by substantial evidence in the record. *Crawford*, Slip Op., pp. 15, 17.

Therefore, this Council, like the *Crawford* Court, should affirm the Planning Board's approval of SDP-1603-03 in this case as there is substantial evidence in the record that the proposed warehouse facility is indeed a "warehouse" or "distribution facility."

b. Definitions from the Prior Zoning Ordinance

The Zoning Ordinance provides the following definitions pertinent to the Appellants' Exceptions:

> **Warehouse Unit**: A "Building" used for the *storage of goods and materials* in connection with the day-to-day operation of a *wholesale or distribution business*, or a business that is not located in the same "Building" or on the same property as the "Warehouse Unit."...*A "Warehouse Unit" is sometimes referred to as a "Warehouse."*

PGCC § 27-107.01(a)(256) (emphasis added). *See also Crawford*, Slip Op., pp. 12-13.

> **Distribution Facility:**
>
> (A) *A facility to or from which a* wholesaler or *retailer ships merchandise, materials, or supplies for storage or distribution* by that wholesaler or retailer *to* the sales outlets or *service operations it supports*; or
> (B) A business whose functions are similar to those of the United States Postal Service, that is exclusively devoted to the receiving, sorting, sending, and delivery of letters, parcels, and other postal express matter.

PGCC § 27-107.01(a)(66.4) (emphasis added).

c. Storage is storage no matter how brief the duration.

The Appellants argue that the proposed facility, which they describe as a "high-cube" facility differs from "traditional or standard warehouse uses" in which "the storage of goods and materials" lasts "typically for more than one month." *See* Appellants' Memo, p. 13. The Appellants argue that the "ITE manual identified the types of activities occurring on land with a high-cube facility as including a shorter storage duration[ ] of goods and materials[.]" *Id.* at 14.

In *Crawford*, the Petitioners similarly argued that "Amazon's proposed use does not constitute 'storage' because Amazon would hold packages at the facility only briefly before dispatching them for delivery. Indeed, packages would typically be held in the facility for under 12 hours." *Crawford*, Slip Op., p. 13. The Petitioners' "understating of typical storge duration" came from the definition of "Warehousing" in the "Institute of Transportation Engineers Trip Generation Manual (ITE)." *Id.*

In "[r]esolving this disagreement," the *Crawford* Opinion recognized that "[n]otably, the Zoning Ordinance neither defines 'storage' nor requires a minimum holding duration." *Id.* at 13-14. Thus, the Court turned to dictionary definitions which defined "storage" as "the act of storing." *Id.* at 14. Applying the definitions to the facts from the record before the Planning Board and the District Council, the Supreme Court of Maryland had "no difficulty concluding that the evidence was sufficient for a reasonable factfinder to conclude that" Amazon would hold packages in the facility prior to being loaded into

vehicles for delivery to the consumers and that packages would typically remain in the facility for less than 12 hours. *Id.* at 15. The *Crawford* Court found that Amazon's building "would, indeed, be used to 'hold' products, however brief that duration might be." *Id.*

Just as in *Crawford*, the Appellants "understating of typical storge duration" comes from the definition of "Warehousing" in the "Institute of Transportation Engineers Trip Generation Manual (ITE)." *Id.* at 13. Indeed, the Appellants attached Exhibit D to their Exceptions which is the High-Cube Warehouse Vehicle Trip Generation Analysis prepared by ITE. In relying on that analysis, which was part of the record before the Planning Board, the Appellants focus entirely on the fact that materials are held for "shorter" durations, and miss the bigger picture that even high-cube facilities involve "***storage durations of goods and materials***." *See* Appellants' Memo, p. 14 (emphasis added). Moreover, as pointed out by the Appellants, the record demonstrates that the Applicant's attorney testified that these "warehouse users [can] ***store their goods*** to higher heights." *Id.* (citing December, 15, 2022, Planning Board Hearing at 02:52:23) (emphasis added).

At the hearing before the Planning Board, the Applicant's counsel testified that this "employment area calls [f]or an expansion of employment uses to allow the area as a whole to develop as a ***regional transportation logistics and warehousing hub***. This Application is for a ***general warehouse*** structure." December 15, 2022 Tr. at 8 (emphasis added). The Applicant's counsel further testified that "this is a general warehouse. I'm not sure what evidence [Appellants] ha[ve] to show that it is not a general warehouse. This

high [cube] distribution warehouse is a type of warehouse which was shown on a separate application, not this Application. This is not that application. This is a ***one-story, standalone, general warehouse and distribution*** which is a, a permitted use[.]" *Id.* at 20-21 (emphasis added). Applicant's attorney explained that when Appellants "called this a high [cube] warehouse, it's a little confusing. The ITE Manual has a high [cube] fulfillment center and that was subject to another application. This is a high, has a high clear space in this building; but, again, that's the way modern warehouses are designed. So, there's a high clear height, but it's not a high [cube] fulfillment center. It's just a warehouse with a high, high clear height for racking and ***storage***." *Id.* at 31 (emphasis added). The height of this proposed building is 41 feet tall. *Id.* at 4.

Thus, as in *Crawford*, there is substantial evidence in the record to support the Planning Board's determination that the proposed facility is a "warehouse" which the Zoning Ordinance describes as a "'Building' used for the ***storage of goods and materials***." PGCC § 27-107.01(a)(256) (emphasis added).

d. The distribution business component of "warehouse."

The definition of "warehouse" also has a "distribution business" component.

In *Crawford*, the Petitioners argued that Amazon's proposed use of the Property as a last-mile hub would not be in service of the daily operation of a "distribution business." The Supreme Court disagreed. *Crawford*, Slip Op., p. 16. The Court accused Petitioners of "sidestep[ping] the plain meaning of the term 'distribution business'" which means, in relevant part, "to give out or deliver especially to members of a group." *Id.* The record in

Crawford evidenced that Amazon drivers would use vehicles to deliver parcels from the Property to individual customers, thus, from the consumer's perspective, Amazon was distributing the product from the retailer or wholesaler directly to the consumer's doorstep. *Id.* Therefore, the last-mile hub supported the distribution function of Amazon's operations. *Id.*

Crawford also argued that under the definition of "distribution facility" in PGCC § 27-107.01(a)(66.4), that Amazon did not meet this definition because Amazon shipped products to the end-user, rather than to sales outlets or service operations it supports. *Id.* at 17. The Court disagreed with Crawford's interpretation because the "facility" in question is the Property, and Amazon clearly qualifies as a "retailer." *Id.* Further, Amazon contemplates shipping "merchandise materials or supplies" both "to" and "from" the Property. *Id.* The Court found that there are "two alternatives to qualify as a distribution facility: (1) storage; or (2) distribution to the sales outlets or service operations that Amazon supports." *Id.* There was substantial evidence in the record to support both alternatives. *Id.* First, as noted above, "there is no minimum holding period to satisfy the 'storage' criteria, and the record evidence supports the conclusion that products would be stored in the Property." *Id.* Second, the Property would support Amazon's service operations, specifically its delivery services. *Id.* at 18.

In the present case, the record amply demonstrates that this warehouse facility would support delivery services, as in *Crawford*. There was testimony presented before the Planning Board that this is a "***general warehouse and distribution*** which is a, a

permitted use[.]" December 15, 2022 Tr. at 20-21 (emphasis added). *See also* Appellants' Memo, p. 14 (quoting testimony by representatives of the Applicant that this Property would act as "**a modern logistics center**") (emphasis added); Exhibit D, p. 4 to the Appellant's Memo (defining a high-cube facility as one whose purpose is a "distribution center[]" that "is used primarily for the **storage** and/or consolidation of manufactured goods...**prior to their distribution**[.]" (emphasis added). Similarly, Exhibit B to the Appellant's Memo explains that "This use is described in the manual as 'A building that...is used primarily for the **storage** and/or consolidation of manufactured goods (and to a lesser extent, raw materials) **prior to their distribution to retail locations or other warehouses**." *See* Appellants' Memo Exhibit B, p. 7 (emphasis added). Moreover, the Staff Report explains that the site will have "62 loading docks, and 133 loading spaces." *See* Staff Report, p. 6, ¶ 6. The Staff Report is laden with references to this Property being used as a "warehouse/distribution" building.

Thus, as in *Crawford*, there is substantial evidence in the record that use of this Property contemplates shipping merchandise both "to" and "from" the Property; the storage of merchandise; and the distribution of merchandise to service operations that the business supports, specifically its delivery operations. [3]

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3 The Planning Board correctly found that "pursuant to Section 27-528 of the Zoning Ordinance, the Planning Board does not approve uses with an SDP application but, instead, reviews and approves the physical development of a property, including items such as buildings, architecture, landscaping, circulation, and the relationships between them." (PGCPB No. 2022-133 at 3) (Emphasis added).

e. The legislative history does not support the Appellants' position.

In *Crawford*, Petitioners, "[c]iting *Marzullo v. Kahl*, 366 Md. 158, and *Lucas v. People's Counsel for Baltimore City*, 147 Md. App. 209 (2002)...claim[ed] support in the legislative history of the relevant Zoning Ordinance provisions. *Crawford*, Slip. Op., p. 18.

Just as in *Crawford*, the Appellants here made the exact same arguments, relying on the same cases as those in *Crawford*. *See* Appellants' Memo, p. 17-19.

The *Crawford* Court "decline[d] to attach significance" to these arguments. *Crawford*, Slip. Op., p. 20. Likewise, this Council should decline to attach significance to the Appellants' arguments.

iv.) The record contains ample evidence to support the Planning Board's determination that SDP-1603-03 satisfies all applicable requirements.

The Appellants incorrectly assert that there was a lack of substantial evidence in the record for which the Planning Board could base its decision approving the SDP. First, the Appellants allege that the record lacks any evidence to demonstrate whether the SDP conforms to the trip generation cap applicable to the entire NCBP property. As explained earlier in this opposition memorandum, the record contains substantial evidence regarding how the SDP conforms to the vehicle trip cap set forth in Condition 2 of PPS 4-21056. Again, the Appellants completely ignore the phasing plan (dated October 13, 2022) submitted into the record and included in both the Planning Board's resolution and the Transportation Section memorandum incorporated by reference therein. Specifically Exhibit 1 of the Applicant's transportation phasing memo clearly provides a trip generation estimate for the SDP and any other approved or proposed

development within the NCBP. *See* attached Applicant's Exhibit A, October 13, 2022 Phasing Plan – Exhibit 1. This phasing memo represents substantial evidence by which the Planning Board appropriately determined that the development proposed in the SDP does not exceed the trip cap established in Condition 2 of PPS 4-21056.

Similarly, the Appellants incorrectly allege that there is a lack of substantial evidence to support the Planning Board's finding that the SDP conforms to all requirements of the 2010 County Landscape Manual (the 'Landscape Manual"). Specifically, Finding 12 of the Planning Board's resolution of approval states the following:

> 12. **2010 Prince George's County Landscape Manual:** The application is subject to the requirements of the Landscape Manual, specifically Section 4.2, Requirements for Landscape Strips Along Streets; Section 4.3, Parking Lot Requirements; Section 4.4, Screening Requirements; Section 4.7, Buffering Incompatible Uses; and Section 4.9, Sustainable Landscaping Requirements. The Planning Board has reviewed this application and determined that it is in conformance with the Landscape Manual, and the required plantings and schedules are provided on the plan.

(PGCPB No. 2022-133 at 15). The Appellants allege that the Planning Board did not site to any document which identifies how Section 4.2 and 4.7 of the Landscape Manual (which requires landscape strips along street lines for all non-residential uses and parking lots) was met on Parcel 11. *See* Appellants' Memo, p. 24-28.

The Appellants fail to acknowledge what is included in an "application" for a specific design plan. Section 27-727(b) of the prior Zoning Ordinance sets forth the details required for the SDP plan sheets as follows:

Sec. 27-527. Contents of Plan.

(b) The Specific Design Plan shall include (at least) the following with all plans prepared at the same scale:

(1) A reproducible site plan showing buildings, functional use areas, circulation, and relationships between them; and in the V-M and V-L Zones, a three-dimensional model and a modified grid plan, which may include only the Village Proper, and any Hamlet, which incorporates plan concepts, spatial and visual relationships, streetscape, and other characteristics of traditional rural villages shall be provided prior to Planning Board and District Council review;

(2) Reproducible preliminary architectural plans, including floor plans and exterior elevations;

(3) **A reproducible landscape plan prepared in accordance with the provisions of the Landscape Manual;**

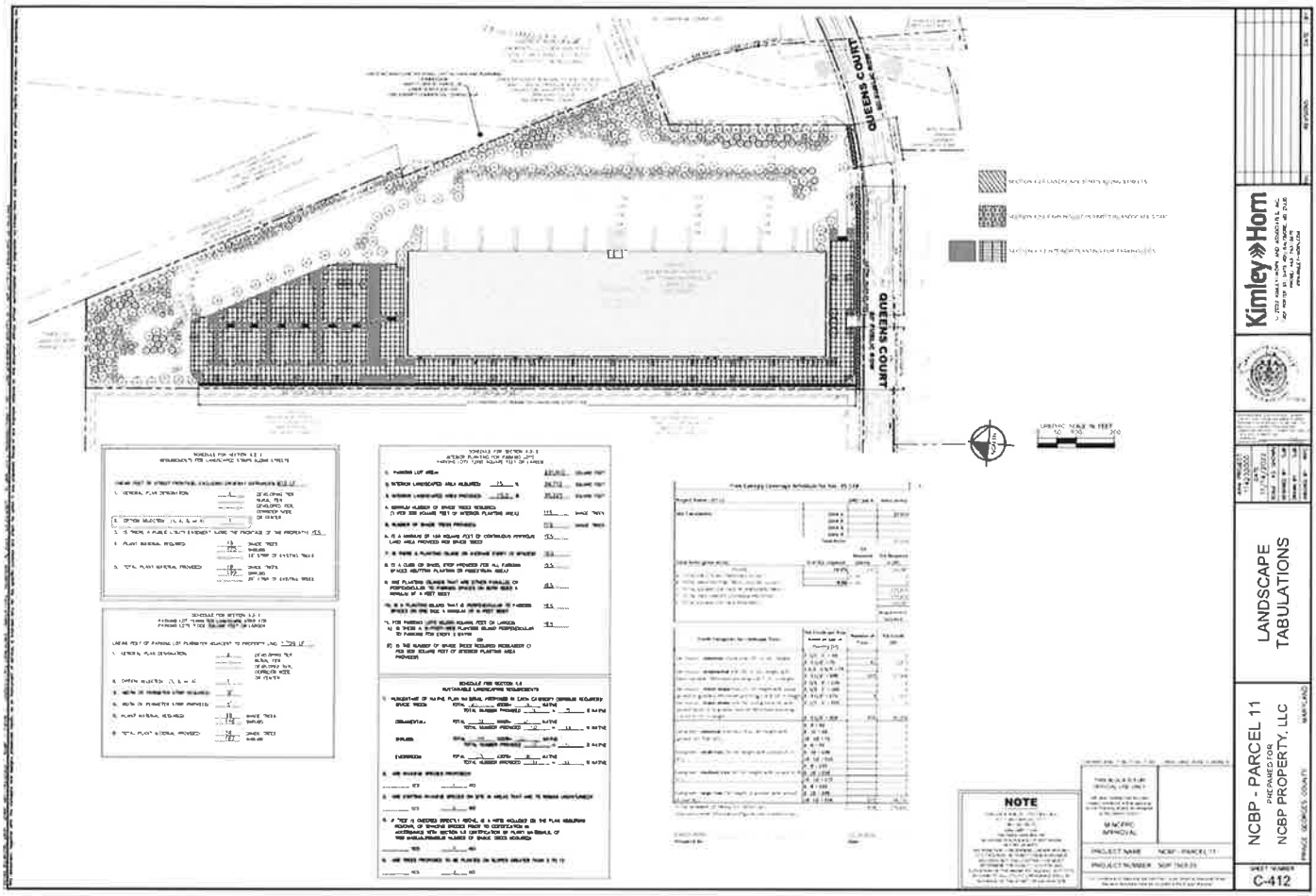
(4) A Type 2 Tree Conservation Plan prepared in conformance with Division 2 of Subtitle 25 and The Woodland and Wildlife Habitat Conservation Technical Manual or Standard Letter of Exemption;

(5) An approved Natural Resource Inventory; and

(6) A statement of justification describing how the proposed design preserves or restores the regulated environmental features to the fullest extent possible.

(Emphasis added).

Pursuant to Section 27-527(b)(3) above, the Applicant's SDP was required to have a plan sheet as part of its "application" showing how the proposed development meets the requirements of the Landscape Manual. Sheet C-412 of the Applicant's SDP plan set titled "Landscape Tabulations" shows how the proposal meets all required buffer yard requirements in the Landscape Manual. Said sheet C-412 of the SDP plan set is as follows:



Further, this plan sheet reflects all necessary Landscape Manual details including the locations of planting strips, dimensions of the required buffers, and plant material provided. Such details also include the required Section 4.2 buffer yard(s) per the Landscape Manual. Sheet C-412 is part of the SDP plan set (as required by 27-527(b)(3)), and the Planning Board's resolution in Finding 12 clearly states that "**the required plantings and schedules are provided <u>on the plan</u>**". (PGCPB No. 2022-133 at 15) (Emphasis added).

Finally, the Appellants assertion that the Applicants' SDP application does not

propose any buffering along the southern portion of the property subject to this SDP (i.e., Parcel 11) pursuant to Section 4.7 of the Landscape Manual is completely inappropriate and without merit. *See* Appellants' Memo, p. 25-29. Section 4.7 of the Landscape Manual requires a landscape buffer between incompatible uses. Since Parcel 11 in this SDP proposes development that is compatible with the industrial and employment uses either existing or proposed around it, there is no incompatible use that would trigger a Section 4.7 requirement.

As mentioned previously in this memorandum, the SDP only impacts approximately 26.23 acres (i.e., Parcel 11) of the entire 442± acre NCBP project. Parcel 11, subject of this SDP, is nearly surrounded by other property within the NCPB or land developed in the existing Collington Center. The Appellants confusingly state that the "residential uses along Leeland Road will have a clear view of across the entire National Capital Business Park site and thus will have a clear view of the proposed development in SDP-1603-03". *See* Appellants' Memo, p. 27. This statement indicates that the Appellants are not recognizing where Parcel 11 is in relation to the entire NCBP project, as Parcel 11 does not have any frontage along Leeland Road, nor is it adjacent to any single-family residential uses. Conversely, Parcel 11 abuts other phases of the NCBP which will be developed with similar industrial/employment uses consistent with approved the CDP and preliminary plan of subdivision. In fact, the District Council has already approved SDP-1603-02 reflecting a 3.4 ± million square foot warehouse and distribution use on separate parcels within the NCBP immediately abutting Parcel 11. As such there

is no requirement pursuant to the Landscape Manual for the provisions of a Section 4.7 landscape strip along the southern boundary of Parcel 11.

Based on the above, it should be abundantly clear that the Planning Board made the appropriate and required findings in its resolution of approval of the SDP pertaining to compliance with the approved vehicle trip cap and the Landscape Manual. As such, the Appellants' argument should be dismissed by the District Council.

v.) The Planning Board did not err when it approved TCP2-026-2021-06.

The Appellants incorrectly assert that the Planning Board erred by approving the TCP2 on two (2) grounds. First, the Appellants mistakenly claim that the Applicant was required to obtain an approval of an erosion and sediment control technical plan before the TCP2 could be approved. Here, the Appellants appear to be making their own requirements for approval of a TCP2, as the applicable sections of the 2018 Environmental Technical Manual makes no requirement that a final Erosion and Sediment Control Technical Plan be approved prior to approval of a TCP2.

To the contrary, the 2018 Environmental Technical Manual Section 7.2.2 simply requires that a TCP 2 match the limits of disturbance ("LOD") shown on an "erosion and sediment control plan". Section 7.2.2 states as follows:

7.2.2 Plan Preparation Process

7.2.2A STEP 1: ESTABLISHING THE LIMITS OF DISTURBANCE

Setting the LOD on the site is critical to the preparation of the TCP2. The LOD must reflect what will actually occur in the field during construction. Any change to the LOD that results in 5,000 square feet or more of additional clearing on an approved TCP2 requires the resubmission of a revised plan for review and approval. The LOD shown on the TCP2 must always match that of the erosion and sediment control plan. All proposed disturbances, whether temporary or permanent, must be within the LOD.

There are many aspects of the plan that may change as it moves through the review and development processes. The best way to reduce the amount of unanticipated revisions is to work with the most accurate information possible early in the process. If a TCP1 was approved for the site, the conceptual LOD shall be used as a guideline for the establishment of the LOD on the TCP2. At the time of TCP2 preparation, the topography and existing site features must be surveyed. Aerial photography or field run, ground-based mapping are required. After aerial photographs are obtained, field survey work may be required to establish and measure the map's basic control points and to identify objects that need visual verification.

See 2018 Environmental Technical Manual, A-16, Section 7.2.2. (Emphasis added).

The NCBP was subject to a TCP1 which was approved initially as part of the CDP and later the preliminary plan of subdivision (TCP1-004-2021-03). The approved TCP1 established a "conceptual LOD" which was used as a guideline for the establishment of the LOD on the TCP2 submitted SDP. This is completely consistent with Section 7.2.2 which expressly allows the LOD in the TCP2 to be guided by the conceptual LOD in an approved TCP1. In fact, Section 7.2.2 states that the conceptual LOD on a TCP1 "**shall**" be used as a guideline for the LOD on the TCP2.

Notwithstanding, the Planning Board's resolution of approval merely requests in Condition 4 that the final LOD, prior to certificate approval of the SDP, be verified with the Erosion and Sediment Control Technical Plan. This "technical plan" is the final step in the sediment erosion control approval process with the Prince George's County Soil Conservation District. The Planning Board's conditional approval requiring verification of

the conceptual LOD in the TCP2 with the LOD in the final Erosion and Sediment Control Technical Plan at time of certificate approval of the SDP is wholly appropriate and consistent with the applicable guideline requirements in the 2018 Environmental Technical Manual.

The Appellants also incorrectly allege that the record demonstrates that the Applicant failed to exhaust on-site preservation techniques in accordance with section 25-122(c) of the County Code. *See* Appellants' Memo, p. 31. The Appellants assert that the opportunities for on-site reforestation could be increased if the amount of parking for the development proposed for Parcel 11 were to be reduced. In this regard, the Appellants are merely expressing their own opinion on how Parcel 11 could develop, and the presence of such an opinion does not represent any reversible error on the part of the Planning Board. The Planning Board's resolution clearly makes finings that the SDP satisfies the off-street and loading requirements of the prior Zoning Ordinance. PGCPB No. 2022-133 at 5.

Section 27-568 (a) of the prior Zoning Ordinance sets forth "the **minimum** number of required off-street parking spaces for each type of use." (Emphasis added). The appropriate provisions of the zoning ordinance have never been interpreted to require the "minimum" number of parking spaces set forth in Section 27-568 to be treated as the maximum number of parking spaces allowed as part of a proposed development. The Applicant has the ability to request approval of all improvements within a site plan application it feels necessary to support development of its property for its intended

purposes (including the amount of parking that may be needed to support a future warehouse/distribution use). As such it is entirely inappropriate for the Appellants to allege that the optional parking configuration proffered in the SDP represents a failure to exhaust woodland conservation on site. *See* Appellants' Memo, p. 31. If such opinions of opposing parties could legitimately form the basis for objections to a development application, any person could request or demand that a property remain entirely undeveloped to maximize woodland conservation. This is simply not the law, and the Appellants' preference for how Parcel 11 should be developed does not reflect any reversible error in this case.

The record of this case also indicates that the Applicant submitted a statement of justification with its SDP application dated November 18, 2022. (Backup, SDP-1603-03, p. 33-34). Said statement of justification explains how the Applicant's proposal in the TCP2 prioritizes the methods of woodland conservation (considering the proposed development in the SDP and other development activities/approval in the overall NCBP) consistent with section 25-122(c)(1) of the County Code. The Planning Board's resolution of approval acknowledges the Applicant's statement of justification in this regard and makes findings regarding the Applicant's approach to woodland conservation (both on and off site). Specifically, the Planning Board's findings include the following:

Section 25-122(c)(1) of the WCO prioritizes methods to meet the woodland conservation requirements. On November 18, 2022, the applicant submitted a statement of justification (SOJ) dated September 19, 2022, requesting approval of a combination of on-site and off-site woodland conservation, as reflected on the TCP2 worksheet. The site contains 186.15 acres of PMA, approximately 15,622 linear feet of regulated streams, and 94.77 acres of 100-year floodplain. The applicant states that, although they are only preserving 85.38 acres of the 117.85 woodland conservation requirement on-site, they are proposing to preserve the highest quality of woodlands on-site within the PMA and contiguous to these areas, which has a priority of preservation. The WCT for the development is 52.40 acres, or 15.08 percent, which is proposed to be met on-site in

preservation. The central portion of the site was the subject of a timber harvest, which was implemented. The applicant states that, clearing of the central portion of the property is supported due to the implemented timber harvest, and that providing on-site afforestation/reforestation, connected to the on-site preservation, is a higher priority over preserving the central areas of woodlands impacted by the timber harvest. The applicant proposes to protect the woodland preservation areas, including areas of reforestation. Ninety-nine of the specimen trees on-site are located in the proposed woodland conservation easement. The applicant states that the site is not suitable for natural regeneration and the next logical step is to provide the remaining requirement off-site, within an approved tree bank. In review of the conservation method priorities of Section 25-122(c)(1), staff agrees that on-site afforestation/reforestation, connected to the on-site preservation, is a higher priority over preserving the central areas of woodlands impacted by the timber harvest, that are not directly connected to environmental features. The Planning Board supports the applicant's request to meet the woodland preservation requirements, as stated in the SOJ, through a combination of on-site and off-site preservation.

(PGCPB No. 2022-133 at 16)

Based on the above, the Planning Board made findings that that it supports the Applicant's stated approach to woodland conservation through a combination of on-site and off-site preservation. To the contrary, the Appellants fail to provide any evidence, other than their own opinion and preferences for development, that the methods for satisfying the project's woodland preservation requirements are inconsistent with the County Code.

It is not the function of the District Council to retry or second guess the Planning Board. *Ginn v. Farley*, 43 Md. App. 229, 235-36 (1979). It is also not the function of the

District Council to set aside a decision of an administrative agency because it might weigh the evidence differently. There's no substitution of judgment for that of the Planning Board in reviewing its finding of fact. *Lillian C. Blentlinger, LLC v Cleanwater Linganore*, Inc., 456 Md. 272, 293-94 (2017).

When the record is reviewed as a whole, and in the context of a multi-phase development such as the NCBP, there is substantial evidence in the record to support the Planning Board's findings that the SDP and related TCP 2 demonstrates that regulated environmental features are preserved and/or restored in a manner consistent with the requirements of the County Code. For these reasons, the Appellants' objections to the Planning Board's approval of the SDP and TCP2 should be dismissed by the District Council.

V. CONCLUSION

In conclusion, the SDP and TCP2 meets all legal criteria of approval in the Zoning Ordinance and the County Code, and said decisions are supported by substantial evidence in the record. Conversely, there is no evidence in the record that the Planning Board made any error in approving the SDP or the TCP2. For the reasons set forth herein, the Appellants' appeal in this matter should be dismissed by the District Council.

Respectfully Submitted,

Arthur J. Horne, Jr. (CPF 8706010199#)
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Attorneys for NCBP Property LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of March, 2023, a copy of the foregoing Opposition was mailed, postage prepaid to:

G. Macy Nelson, Esq.
Law Office of G. Macy Nelson, LLC
600 Washington Avenue, Suite 202
Towson, Maryland 21204

Alex Votaw, Esq.
Law Office of G. Macy Nelson, LLC
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Rajesh A. Kumar, Esq.
Prince George's County Council
1301 McCormick Drive, Suite 3-126
Largo, Maryland 20774

David Warner, Principal Counsel
Office of the General Counsel
The Maryland-National Capital Park and Planning Commission
14741 Governor Oden Bowie Drive
Suite 4120
Upper Marlboro, Maryland 20772

Persons of Record (List Attached)
(By U.S. Mail Only)

Robert J. Antonetti, Jr.

KELLY HADAYIA PIVOT ENERGY 1750 15TH STREET SUITE 4 DENVER CO 80202	HENRY WIXON GLENN DALE CITIZENS' ASSOCIATION, INC. P.O.BOX 235 GLENN DALE MD 20769
KIMLEY-HORN 215 WASHINGTON AVENUE SUITE 500 TOWSON MD 21204	ALEXANDRA VOTAW THE LAW OFFICE OF G. MACY NELSON 600 WASHINGTON AVENUE SUITE 202 TOWSON MD 21204
EMILY DEAN KIMLEY-HORN ENGINEERS 215 WASHINGTON AVENUE SUITE 500 TOWSON MD 21204	ALEXANDRA VOTAW THE LAW OFFICE OF G. MACY NELSON, LLC 600 WASHINGTON AVENUE SUITE 202 TOWSON MD 21204
JOE DIMARCO BOHLER ENGINEERING 16701 MELFORD BOULEVARD SUITE 310 BOWIE MD 20715	CHRIS RIZZI BOHLER ENGINEERING 16701 MELFORD BOULEVARD SUITE 310 BOWIE MD 20715
BOB KYTE BOHLER ENGINEERING 16701 MELFORD BOULEVARD STE 310 BOWIE MD 20715	MICHAEL LENHART LENHART TRAFFIC CONSULTING, INC. 645 B&A BOULEVARD SUITE 214 SEVERNA PARK MD 21146
RAY CRAWFORD 1340 CRAIN HIGHWAY UPPER MARLBORO MD 20774	KATHY CRAWFORD 1340 CRAIN HIGHWAY UPPER MARLBORO MD 20774
ARTHUR HORNE, JR. SHIPLEY & HORNE, P.A. 1101 MERCANTILE LANE SUITE 240 LARGO MD 20774	ROBERT ANTONETTI, JR. SHIPLEY & HORNE, P.A. 1101 MERCANTILE LANE SUITE 240 LARGO MD 20774
JOHN FERRANTE SHIPLEY & HORNE, P.A. 1101 MERCANTILE LANE SUITE 240 LARGO MD 20774	NCBP PROPERTY, LLC 5850 WATERLOO ROAD SUITE 210 COLUMBIA MD 21045
COLE SCHNORF MANEKIN, LLC 5850 WATERLOO ROAD SUITE 210 COLUMBIA MD 21045	HENRY WIXON 10701 MARIETTA STREET GLENN DALE MD 20769 -9406

MRS.CRYSTAL HABASH 11320 KETTERING PLACE UPPER MARLBORO MD 20774	RUTH GROVER 5727 RIDGE VIEW DRIVE ALEXANDRIA VA 22310
AUBREE FREELY ARCO DESIGN/BUILD INDUSTRIAL 44 SOUTH BROADWAY SUITE 1003 WHITE PLAINS NY 10601	KYLE THIBEAULT ARCO DESIGN/BUILD INDUSTRIAL 44 SOUTH BROADWAY SUITE 1003 WHITE PLAINS NY 10601
JOHN MCGOWAN KIMLEY-HORN ENGINEERS 1801 PORTER STREET SUITE 401 BALTIMORE MD 21230	

Lenhart Traffic Consulting, Inc.

Transportation Planning & Traffic Engineering

Memorandum: ***Date:*** **October 13, 2022**

TO: M-NCPPC
14741 Governor Oden Bowie Drive
Upper Marlboro, MD 20772

FROM: Mike Lenhart

RE: National Capital Business Park: SDP-1603-03 (Parcel 11)
SDP-2201 (Parcel 12)
SDP-2202 (Parcels 1, 2, 10)
SDP-2206 (Parcels 7, 8. 9)

The purpose of this memorandum is to provide a phasing plan for the referenced SDP's as required by Preliminary Plan 4-21056. Conditions 9 and 10 state are listed as follows and each of these require a phasing plan as detailed below. It should be noted that a phasing memo was submitted for SDP-1603-02 for Parcel 6, and this phasing memo is an update to the initial phasing memo to incorporate the referenced SDP's.

Conditions 9 & 10

9. The applicant shall submit a phasing plan (with adequate justification) as part of the first specific design plan for a building, to show the phasing of the following transportation improvements to the development of the site. A determination shall be made at that time as to when said improvements shall (a) have full financial assurances, (b) have been permitted for construction through the operating agency's access permit process, and (c) have an agreed upon timetable for construction with the appropriate operating agency.

   a. US 301 (Robert Crain Highway) at Leeland Road

      (1) Provide three left turn lanes on the eastbound approach.

   b. A signal warrant analysis and signalization of the intersection of Prince George's Boulevard and Queens Court-Site Access with the following lane configuration:

      (1) A shared through and left and a shared through and right lane on the eastbound approach.

      (2) A shared through and left and a shared through and right lane on the westbound approach.

      (3) A shared through and left on the northbound approach and a shared through and right lane on the southbound approach.

   When the signal is deemed warranted, the applicant shall construct the signal and associated improvements to the requirements and schedule directed by the operating agency.

10. Prior to approval of a building permit for each square foot of development, the applicant, and the applicant's heirs, successors, and/or assignees shall pay to the Prince George's County Department of Permitting, Inspections and Enforcement (DPIE), a fee of $0.92 (1989 dollars) multiplied by (Engineering News Record Highway Construction Cost index at time of payment) / (Engineering News Record Highway Construction Cost Index for second quarter 1989). The County may substitute a different cost index, if necessary.

In lieu of the fee payment listed in the preceding paragraph, prior to approval of a building permit for each phase of development, the applicant and the applicant's heirs, successors, and/or assignees shall provide improvements along US 301 (Robert Crain Highway), within the limits of US 301 that are covered by the Capital Improvement Program-funded improvements. The phasing of the of the US 301 improvements shall be submitted with each specific design plan application, prior to its acceptance, when this option is applied. Any improvements proposed as part of any lump sum payment shall have approval of the Maryland State Highway Administration and DPIE.

Phasing Plan for Condition 9a (US 301 & Leeland Rd)

The approved Traffic Impact Study for Preliminary Plan 4-21056 included discussion about the phasing of the construction of the third left turn lane along eastbound Leeland Road at US 301. The intersection passes the adequate public facilities test in the background traffic conditions with the CIP improvements. A supplemental analysis labelled Appendix E to the February 11th, 2022 Traffic Impact Study has been attached to this memorandum for the purposes of conducting a sensitivity analysis at US 301 & Leeland Road. It was determined that the high-cube fulfillment center warehouse (SDP-1603-02 on Parcel 6) can develop in its entirety (total of 3,412,580 sq ft with 650,780 sq ft of ground floor area) plus up to an additional 1,600,000 square feet of general warehouse on the remaining parcels. Prior to the issuance of a building permit which results in a floor area in excess of the high-cube fulfillment center (3,412,580 square feet) plus an additional 1,600,000 square feet of general warehouse, the applicant shall bond and permit an additional eastbound left-turn lane at US 301 and Leeland Road. Based on this information, the applicant shall bond and permit the third left-turn lane from Leeland Road to northbound US 301 prior to any building permit that results in a cumulative square footage in excess of 5,012,580 square feet. The attached trip generation exhibit includes a total summation of the SDP's currently proposed and the total square footage combined is 4,736,032 square feet. Since none of these SDP's results in the square footage exceeding 5,012,580 sq ft, the improvements at US 301 & Leeland Road are not warranted at this time.

Phasing Plan for Condition 9b (Prince George's Blvd & Queens Ct)

The applicant is in the process of designing and permitting the lane use as described in Conditions 9b (1), (2), and (3). A traffic signal warrant analysis has been submitted to DPIE and has been approved. The traffic signal design plans will proceed under a separate street construction permit with DPIE, and the signal will be installed at a time as directed by DPIE. The physical road improvements as identified will be completed prior to opening of any uses on this site, but the intersection will not meet signal warrants until at least one of the uses is operational and generating traffic. Based on discussions with DPIE, it is anticipated that the signal will be completed and operational prior to the opening of the high-cube fulfillment center, or as otherwise directed by DPIE, the operating agency.

Lenhart Traffic Consulting, Inc.
Transportation Planning & Traffic Engineering

Phasing Plan for Condition 10 (US 301 Improvements)

The applicant has submitted the initial concept plans to SHA and obtained approval of the concept improvements along US 301. Kimley Horn and Lenhart Traffic are coordinating the preparation of the design plans for the improvemenst along US 301 as follows:

1. Condition 10 requires a fee of $0.92 per square foot inflated from the 2nd quarter of 1989. For purposes of calculating the inflation, we have utilized the CPI Inflation Calculator that is required by M-NCPPC in calculating the inflation factor for the Bike and Ped Impact Fees. The inflation calculator specifies that $0.92 in June of 1989 has the same buying power as $2.20 in August of 2022 (the most recent available data). The cumulative square footage for all referenced SDP's is 4,736,032 square feet, therefore the CIP would be $4,357,032 in 1989 dollars and $10,419,270 in 2022 dollars.
2. As noted in Condition 10, in lieu of the fee payment, the applicant shall provide improvements along US 301 and the phasing of these improvements would be submitted with each SDP. NCBP Property LLC is the master developer and proposes the following improvements along US 301.
    a. US 301 Improvements Currently in Design and Permitting Process with SHA:
        i. Construct a third northbound lane along US 301 beginning approximately 1,800 feet north of Leeland Road where the current third lane transitions back to two through lanes. The third northbound through lane would continue along US 301 through Queens Court and Trade Zone Avenue, and would terminate in the vicinity of Queen Anne Bridge Road. The total distance of the new third northbound through lane is approximately 7,800 feet (1.5 miles).
        ii. Construct a new median break at US 301 and Queens Court. This includes the installation of a traffic signal and double left turn lanes from northbound US 301 onto Queens Court and from Queens Court onto northbound US 301. SHA has approved the traffic signal and concurs that a signal is warranted at full buildout, but they have indicated that the signal may not be installed until the intersection is built and an actual traffic count can verify when the warrants are met and when the signal may be implemented. There are many other users in Collington Center and we will continue to work with SHA in an effort to get the signal constructed and operational consistent with the opening of the US 301 & Queens Court intersection but ultimately SHA has regulatory authority on when the signal should be installed.
        iii. The current schedule for design and permitting of the US 301 improvements is estimated to have a permit issuance in the Spring of 2023. The construction of the new intersection at US 301 & Queens Court is expected to be a high priority and is estimated to be substantially completed in 2023 with the third through lane being completed shortly thereafter.
        iv. Detailed design plans are not yet completed; however, a preliminary estimate indicates that this set of improvements are approximately $10 million. This cost estimate is preliminary and will be refined as the design plans continue to develop.
    b. The scope of the US 301 improvements are consistent with the estimated US 301 CIP fee for these SDPs.

If you have any questions regarding this matter, please do not hesitate to contact me at the number below.

Thanks,
Mike

Lenhart Traffic Consulting, Inc.
645 B&A Blvd, Suite 214
Severna Park, MD 21146

Phone (410) 216-3333
Fax (443) 782-2288
email: mlenhart@lenharttraffic.com

Trip Generation Rates

Warehousing (0.3 FAR, Prince Georges County Rates) — **Trip Distribution (In/Out)**

Morning Trips = 0.40 x ksf — 80/20

Evening Trips = 0.40 x ksf — 20/80

High-Cube Fulfillment Center Warehouse - Sortable (ksf, ITE-155) — **Trip Distribution (In/Out)**

Morning Trips = 0.87 x ksf — 81/19

Evening Trips = 1.2 x ksf — 39/61

Square Footages and Resulting Trip Generation for Site

				CIP Fee	
				1989 Dollars	2022 Dollars[3]
SDP-2206	Parcels 7, 8, 9	358,400 sq ft		$329,728	$788,480
SDP-2201	Parcel 12	168,480 sq ft		$155,002	$370,656
SDP-2202	Parcels 1, 2, 10	495,180 sq ft	(311,040 sf & 184,140 sf)	$455,566	$1,089,396
SDP-1603-03	Parcel 11	301,392 sq ft		$277,281	$663,062
SDP-1603-02	Parcel 6	3,412,580 sq ft	(650,780 sq ft Ground Floor Area)	$3,139,574	$7,507,676
	Total:	**4,736,032 sq ft**		**$4,357,149**	**$10,419,270**

		AM Peak			PM Peak		
		In	Out	Total	In	Out	Total
Warehousing (County Rates for Parcels 1, 2, 10, 7, 8, 9, 11, 12)	1,323,452 square feet	423	106	529	106	423	529
High-Cube Fulfillment Center Warehouse - Sortable (ksf, ITE-155) (Parcel 6)	650,780 permanent ground floor square footage[2]	458	108	566	305	476	781
	User Provided Data	505	45	550	447	453	900
	Higher of ITE or User Provided Data	458	108	566	447	453	900
	Total Trips for Proposed/Approved SDP's:	**881**	**214**	**1095**	**553**	**876**	**1429**
	Trip Cap for National Capital Business Park:	**1126**	**275**	**1401**	**614**	**1121**	**1735**

NOTES:

1. Trip Generation rates obtained from Prince George's County Guidelines and the ITE Trip Generation Manual, 11th Edition.
2. Based on the description of High-Cube Fulfillment Center Warehouse (ITE-155) included in the ITE Trip Generation Manual, 11th Edition, "A high-cube warehouse may contain a mezzanine. In a High Cube Warehouse setting, a mezzanine is a free-standing, semi-permanent structure that is commonly supported by structural steel columns and that is lined with racks or shelves. The gross floor area (GFA) values for the study sites in the database for this land use do NOT include the floor area of the mezzanine. The GFA values represent only the permanent ground-floor square footage." The sortable warehouse proposed as part of this development will have a 650,780 square foot ground-floor with 4 floors of mezzanine / storage above. Therefore, based on the description provided by ITE, the 650,780 square foot ground-floor has been utilized to estimate the number of trips generated by the overall 3,412,580 SF sortable warehouse as shown in Table 1. This was also compared to user provided traffic estimates and the higher value was utilized in this study.
3. Inflation factor obtained from US Bureau of Labor Statistics indicated $0.92 per sq ft in June of 1989 is inflated to $2.20 per sq ft in August of 2022 (Most recent data). Final fee will be confirmed by DPW&T prior to issuance of building permits.

Traffic Impact Analysis

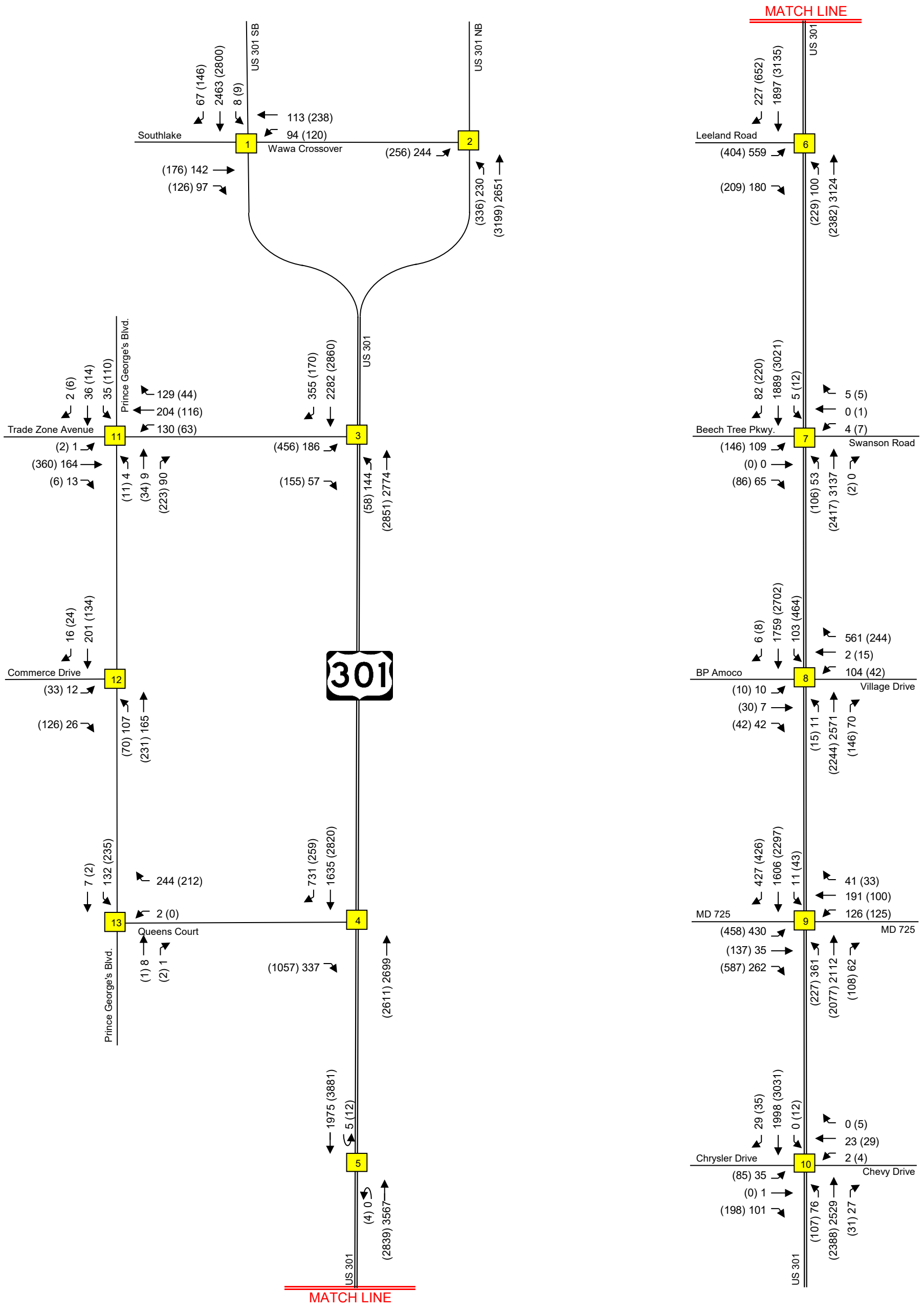
LENHART TRAFFIC CONSULTING, INC.
645 BALTIMORE ANNAPOLIS BLVD, SUITE 214
SEVERNA PARK, MD 21146
www.lenharttraffic.com

Trip Generation and CIP Estimates for SDP's

Exhibit 1

Appendix E

Sensitivity Analysis at
US 301 and Leeland Road



Traffic Impact Analysis

LENHART TRAFFIC CONSULTING, INC.
645 BALTIMORE ANNAPOLIS BLVD, SUITE 214
SEVERNA PARK, MD 21146
www.lenharttraffic.com

Background (2028) Peak Hour Volumes with Diversions

Key: xx = AM Peak Vol's (xx) = PM Peak Vol's

Appendix E1

Trip Generation Rates

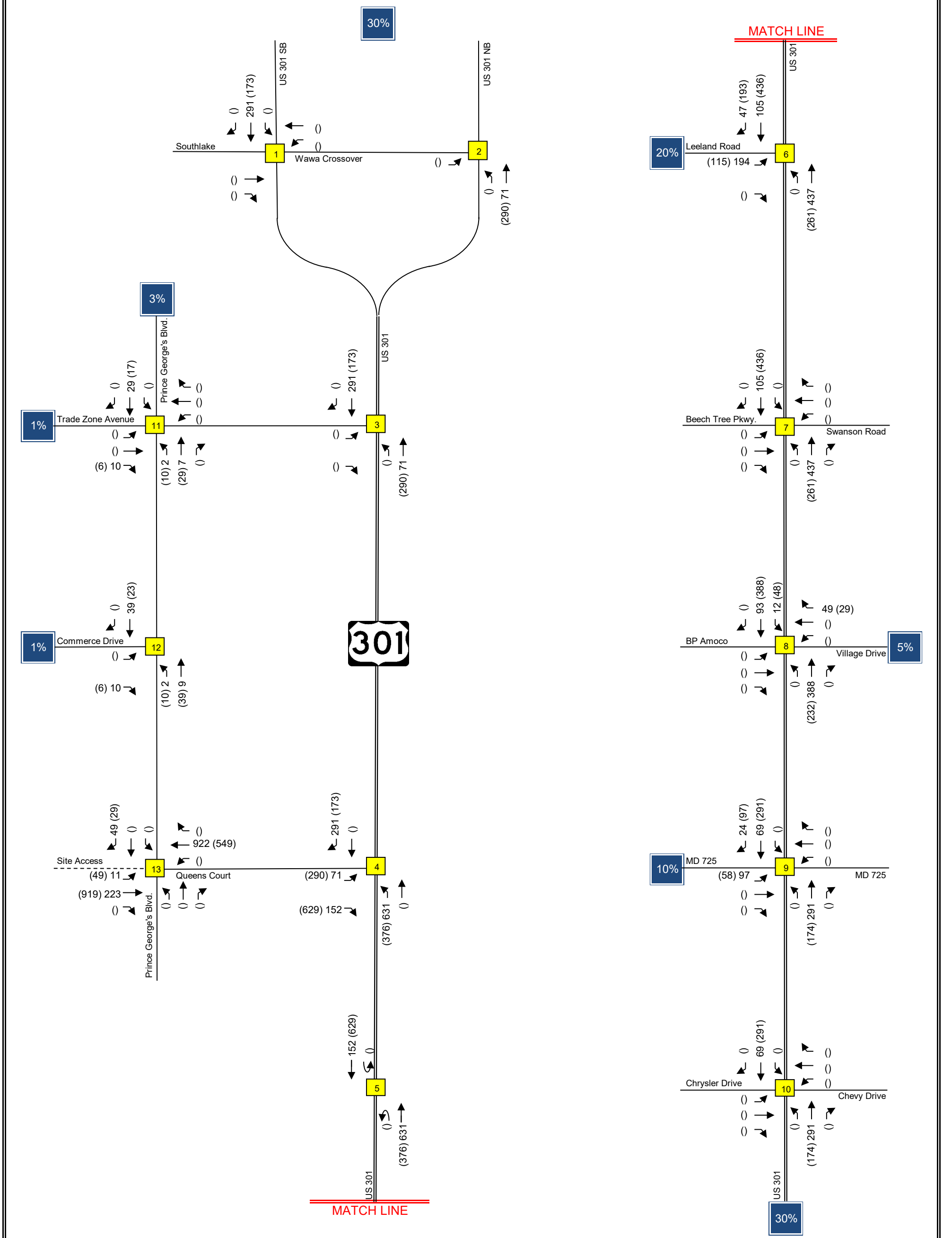
Warehousing (0.3 FAR, Prince Georges County Rates)	Trip Distribution (In/Out)
Morning Trips = 0.40 x ksf	80/20
Evening Trips = 0.40 x ksf	20/80
High-Cube Fulfillment Center Warehouse - Sortable (ksf, ITE-155)	**Trip Distribution (In/Out)**
Morning Trips = 0.87 x ksf	81/19
Evening Trips = 1.2 x ksf	39/61

Trip Generation for Site

		AM Peak			PM Peak			
		In	Out	Total	In	Out	Total	
Warehousing (0.3 FAR, Prince Georges County Rates)	1,600,000 square feet	512	128	640	128	512	640	
High-Cube Fulfillment Center Warehouse - Sortable (ksf, ITE-155)	650,780 permanent ground floor square footage	458	108	566	305	476	781	<<See Note 2
	User Provided Data	505	45	550	447	453	900	
	Higher of ITE or User Provided Data	458	108	566	447	453	900	
	Totals:	**970**	**236**	**1206**	**575**	**965**	**1540**	

NOTES:

1. **Trip Generation rates obtained from Prince George's County Guidelines and the ITE Trip Generation Manual, 11th Edition.**
2. **Based on the description of High-Cube Fulfillment Center Warehouse (ITE-155) included in the ITE Trip Generation Manual, 11th Edition, "A high-cube warehouse may contain a mezzanine. In a High Cube Warehouse setting, a mezzanine is a free-standing, semi-permanent structure that is commonly supported by structural steel columns and that is lined with racks or shelves. The gross floor area (GFA) values for the study sites in the database for this land use do NOT include the floor area of the mezzanine. The GFA values represent only the permanent ground-floor square footage." The sortable warehouse proposed as part of this development will have a 650,780 square foot ground-floor with 4 floors of mezzanine / storage above. Therefore, based on the description provided by ITE, the 650,780 square foot ground-floor has been utilized to estimate the number of trips generated by the overall 3,412,580 SF sortable warehouse as shown in Table 1. This was also compared to user provided traffic estimates and the higher value was utilized in this study.**



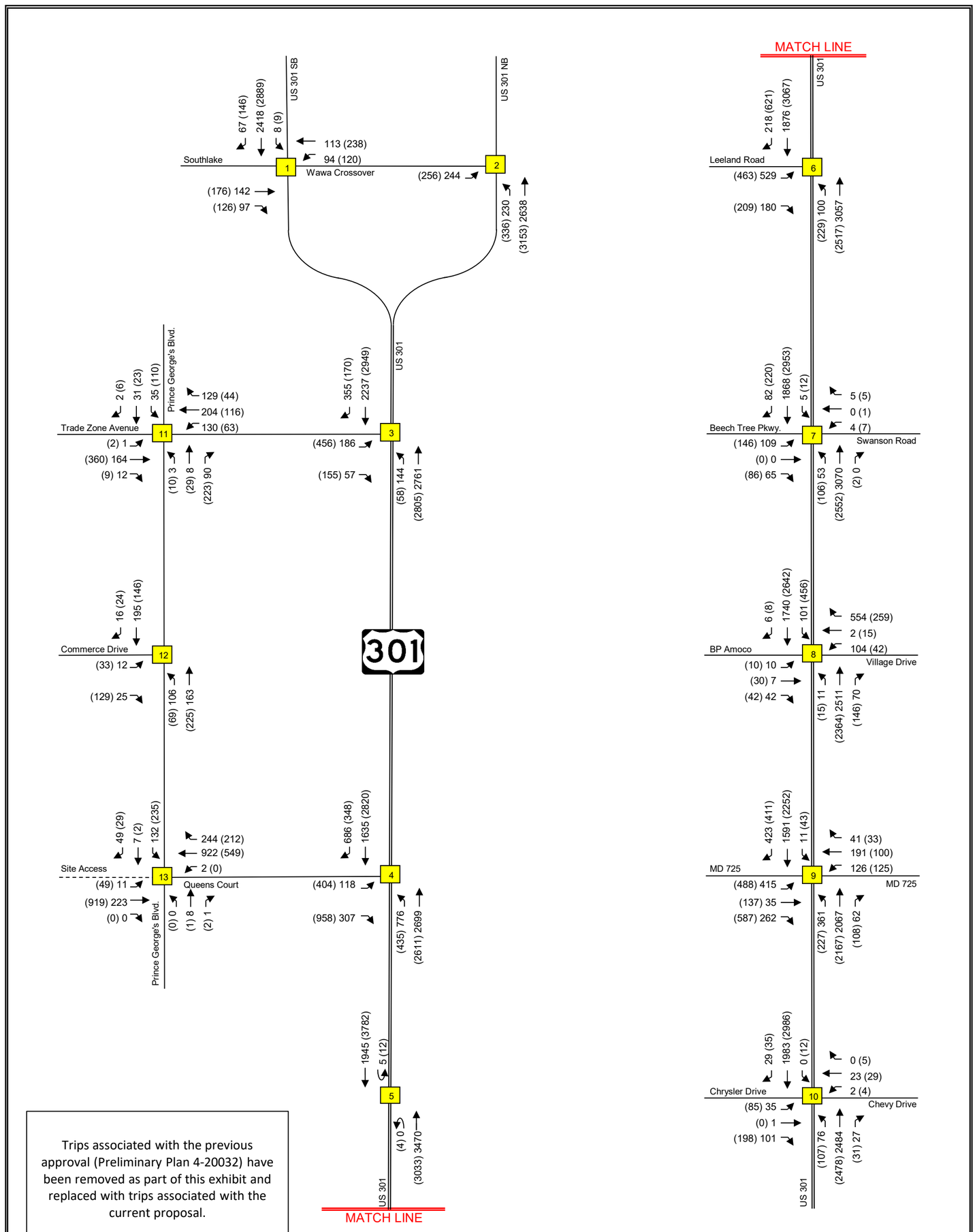
Traffic Impact Analysis

LENHART TRAFFIC CONSULTING, INC.
645 BALTIMORE ANNAPOLIS BLVD, SUITE 214
SEVERNA PARK, MD 21146
www.lenharttraffic.com

Trip Assignment for Site

Key: xx = AM Peak Vol's (xx) = PM Peak Vol's

Appendix E3



Trips associated with the previous approval (Preliminary Plan 4-20032) have been removed as part of this exhibit and replaced with trips associated with the current proposal.

Traffic Impact Analysis

LENHART TRAFFIC CONSULTING, INC.
645 BALTIMORE ANNAPOLIS BLVD, SUITE 214
SEVERNA PARK, MD 21146
www.lenharttraffic.com

Total Peak Hour Volumes

Key: xx = AM Peak Vol's (xx) = PM Peak Vol's

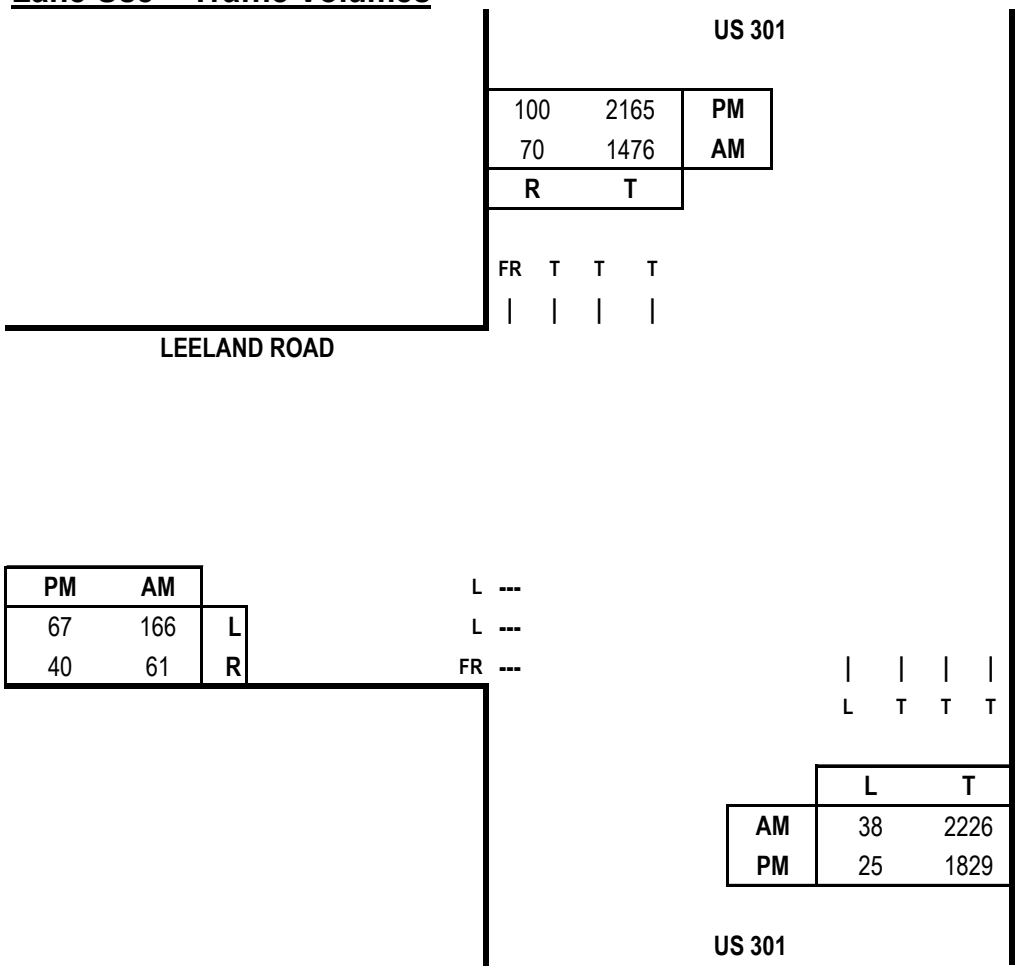
Appendix E4

CRITICAL LANE VOLUME (CLV) METHODOLOGY
for Prince Georges County

Intersection of: US 301
and: Leeland Road
Conditions: Existing Traffic

Analyst: Lenhart Traffic Consulting

Lane Use + Traffic Volumes



Capacity Analysis

Morning Peak Hour

Dir	Thru Volumes VOL	x LUF	= Total	+ Opposing Lefts VOL	x LUF	= Total	AM CLV
EB	166	0.60	100				100
NB	2226	0.37	824				824
SB	1476	0.37	546	38	1.00	38	

CLV TOTAL= **924**
Level of Service (LOS)= **A**

Evening Peak Hour

Dir	Thru Volumes VOL	x LUF	= Total	+ Opposing Lefts VOL	x LUF	= Total	PM CLV
EB	67	0.60	40				40
NB	1829	0.37	677				826
SB	2165	0.37	801	25	1.00	25	

CLV TOTAL= **866**
Level of Service (LOS)= **A**

Critical Lane Volume Analysis

LENHART TRAFFIC CONSULTING, INC.
645 BALTIMORE ANNAPOLIS BLVD, SUITE 214
SEVERNA PARK, MD 21146
www.lenharttraffic.com

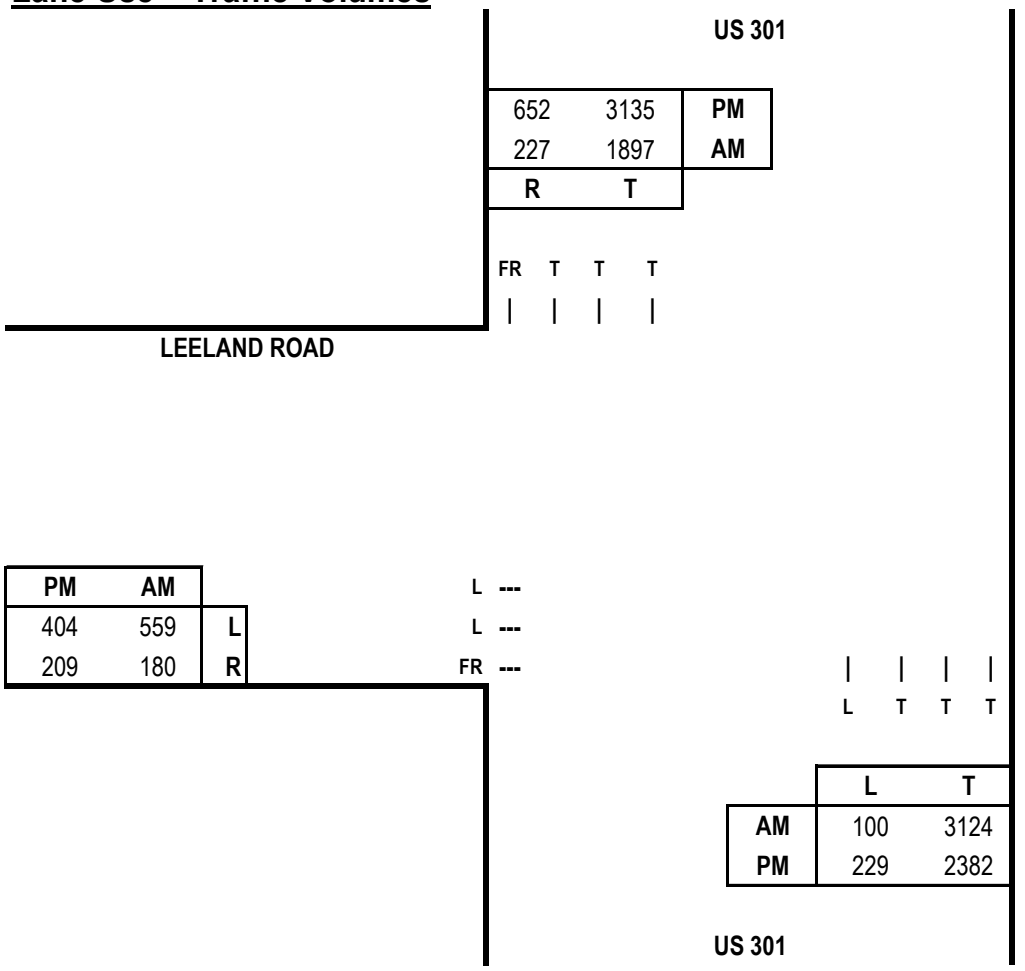
US 301 &
Leeland Road
(Existing Traffic)

Intersection
6

CRITICAL LANE VOLUME (CLV) METHODOLOGY
for Prince Georges County

Intersection of: US 301
and: Leeland Road
Conditions: Background Traffic
Analyst: Lenhart Traffic Consulting

Lane Use + Traffic Volumes



Capacity Analysis

Morning Peak Hour

Dir	Thru Volumes VOL	x LUF	= Total	+ Opposing Lefts VOL	x LUF	= Total	AM CLV
EB	559	0.60	335				335
NB	3124	0.37	1156				1156
SB	1897	0.37	702	100	1.00	100	

CLV TOTAL= **1491**
Level of Service (LOS)= **E**

Evening Peak Hour

Dir	Thru Volumes VOL	x LUF	= Total	+ Opposing Lefts VOL	x LUF	= Total	PM CLV
EB	404	0.60	242				242
NB	2382	0.37	881				1389
SB	3135	0.37	1160	229	1.00	229	

CLV TOTAL= **1631**
Level of Service (LOS)= **F**

Critical Lane Volume Analysis

LENHART TRAFFIC CONSULTING, INC.
645 BALTIMORE ANNAPOLIS BLVD, SUITE 214
SEVERNA PARK, MD 21146
www.lenharttraffic.com

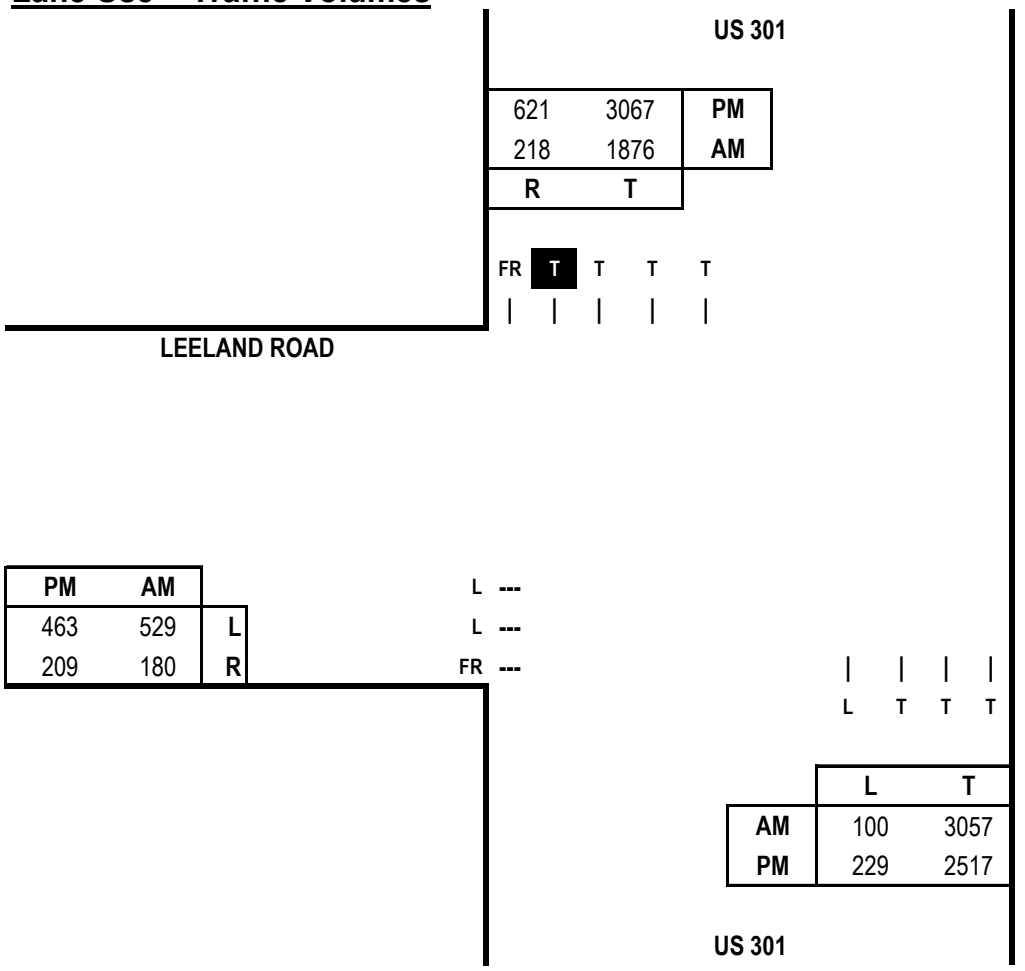
US 301 &
Leeland Road
(Background Traffic)

Intersection
6

CRITICAL LANE VOLUME (CLV) METHODOLOGY
for Prince Georges County

Intersection of: US 301
and: Leeland Road
Conditions: Total Traffic with 1,600,000 sq ft of warehouse and Fully Built Fulfillment Center AND CIP improvements

Lane Use + Traffic Volumes



As shown on this CLV, the Fulfillment Center AND up to 1,600,000 square feet of warehouse can be constructed prior to the construction of the additional eastbound left-turn lane.

Capacity Analysis

Morning Peak Hour

Dir	Thru Volumes VOL	x LUF	= Total	+ Opposing Lefts VOL	x LUF	= Total	AM CLV
EB	529	0.60	317				317
NB	3057	0.37	1131				1131
SB	1876	0.29	544	100	1.00	100	
						CLV TOTAL=	1448
						Level of Service (LOS)=	D

Evening Peak Hour

Dir	Thru Volumes VOL	x LUF	= Total	+ Opposing Lefts VOL	x LUF	= Total	PM CLV
EB	463	0.60	278				278
NB	2517	0.37	931				1118
SB	3067	0.29	889	229	1.00	229	
						CLV TOTAL=	1396
						Level of Service (LOS)=	D

Critical Lane Volume Analysis

LENHART TRAFFIC CONSULTING, INC.
645 BALTIMORE ANNAPOLIS BLVD, SUITE 214
SEVERNA PARK, MD 21146
www.lenharttraffic.com

US 301 &
Leeland Road

Intersection
6

THE PRINCE GEORGE'S COUNTY GOVERNMENT

Office of the Clerk of the Council
301-952-3600

October 19, 2022

RE: SDP-1603-02 National Capital Business Park
AMS 2022 BTS – Upper Marlboro MD, LLC, Applicant

NOTICE OF FINAL DECISION
OF THE DISTRICT COUNCIL

Pursuant to the provisions of Section 27-134 of the Zoning Ordinance of Prince George's County, Maryland requiring notice of decision of the District Council, you will find enclosed herewith a copy of the Council Order setting forth the action taken by the District Council in this case on October 17, 2022.

CERTIFICATE OF SERVICE

This is to certify that on October 19, 2022, this notice and attached Council Order was mailed, postage prepaid, to all persons of record.

Donna J. Brown
Clerk of the Council

Wayne K. Curry Administration Building
11301 McCormick Drive Largo, MD 20774

RECEIVED 11/3/22

Case No.: SDP-1603-02
National Capital Business Park

Applicant: AMS 2022 BTS –
Upper Marlboro MD, LLC

COUNTY COUNCIL OF PRINCE GEORGE'S COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL

FINAL DECISION AFFIRMING PLANNING BOARD

On September 12, 2022, the District Council, using oral argument procedures, considered an appeal from Citizen-Protestants (Opposition) of the Planning Board's (Board) decision to approve Specific Design Plan (SDP)-1603-02 and Type 2 Tree Conservation Plan TCP2-026-2021-02. Having considered the written appeal from Opposition, Applicant's written response, oral arguments, and the administrative record, the District Council finds that the Board's decision to approve the plans was supported by substantial evidence of record, not arbitrary, capricious, or otherwise illegal, and is hereby AFFIRMED.[1,2]

[1] The District Council may take judicial notice of any evidence contained in the record of any earlier phase of the approval process relating to all or a portion of the same property, including a preliminary plan of subdivision. PGCC § 27-141. The District Council may also take administrative notice of facts of general knowledge, technical or scientific facts, laws, ordinances and regulations. It shall give effect to the rules of privileges recognized by law. The District Council may exclude incompetent, irrelevant, immaterial or unduly repetitious evidence. District Council Rules of Procedure Rule 6.5(f).

[2] The Board's decision to approve SDP-1603-**02** and TCP1-004-2021-**02** was adopted in Prince George's County Planning Board Resolution No. 2022-76 (PGCPB No. 2022-76) on June 30, 2022. "**02**" of each plan denotes the 2nd amendment to each plan. The Board approved the **1st** amendment or SDP-1603-**01** and TCP2-026-2021-**01** in PGCPB No. 2022-10 on January 27, 2022. Relevant here, as discussed *infra*, the **01** amendment, approved infrastructure for the site, including the proposed street network, sidewalks, utilities, grading, *stormwater management* (SWM), retaining walls, and directional signage that will serve the employment and institutional uses proposed for the portion of the property in the Residential Suburban Development (R-S) Zone. PGCC § 27-528(b) (Prior to approving a Specific Design Plan for Infrastructure, the Planning Board shall find that the plan conforms to the approved Comprehensive Design Plan, prevents offsite property damage, and prevents environmental degradation to safeguard the public's health, safety, welfare, and economic well-being for grading, reforestation, woodland conservation, drainage, erosion, and pollution discharge). SDP-1603-**01** and TCP2-026-2021-**01** became *final* because no one (including Opposition) timely appealed the Board's decision to the District Council. PGCC § 27-528.01(a). (The Planning Board's decision on a Specific Design Plan may be appealed to the District Council upon petition by any person of record… **within thirty (30) days after** the date of the notice of the Planning Board's decision).

A. Introduction

The applicant in this case is AMS 2022 BTS – Upper Marlboro MD, LLC (AMS). AMS requested, and the Board approved SDP-1603-02, for development of a 3,428,985-square-foot warehouse/distribution facility. The entire acreage of the property (±426.52 acres) is located north of Leeland Road and west of Robert Crain Highway (US 301) and is in Planning Area 74A, Council District 4. This application (SDP-1603-02) constitutes ±90.11 acres of the overall acreage on the north side of Leeland Road, approximately 3,178 feet west of its intersection with US 301 (Robert Crain Highway), which represents the first phase in a multi-phase development. PGCPB No. 2022-76 at 1-2, Opposition Appeal at 1, AMS Response at 1.

As detailed *infra*, uses permitted on the entire site along with gross floor area were previously set or approved in the Basic Plan (as amended) by the District Council. For instance, in April 2021, the Basic Plan was amended (A-9968-02) to replace previously approved residential land use patterns for the site with 3.5 million square feet of employment and institutional uses.[3] As a result, the Board approved an amendment to the Comprehensive Design Plan (CDP-0505-01) for the site in accordance with 3.5 million square feet of employment and institutional uses set forth in A-9968-02.[4] SDP-1603-02 is within the 3.5 million square feet limit established in CDP-0505-01.[5]

[3] PGCPB No. 2022-76 at 3. *See also* Zoning Ordinance No. 2-2021 approving Basic Plan Amendment A-9968-02, which became final because no one (including Opposition) timely petitioned for judicial review. Land Use Article § 22-407 sets a 30-day deadline to seek judicial review of *any* final decision of the District Council.

[4] PGCPB No. 2021-50, which approved Comprehensive Design Plan (CDP)-0505-01, became final. No one (including Opposition) timely appealed the Board's decision. *See* PGCC § 27-523(a) (The Planning Board's decision on a Comprehensive Design Plan may be appealed to the District Council upon petition by any person of record. The petition shall be filed with the Clerk of the Council within thirty (30) days after the date of the notice of the Planning Board's decision. The District Council may vote to review the Planning Board's decision on its own motion within thirty (30) days after the date of the notice).

[5] *See* Appeal at 4 (Opposition also agrees that "[t]he approval of SDP-1603-02 allows [AMS] to construct an approximately 3.5 million square foot distribution facility on the Subject Property").

For reasons set forth below, the appeal by Opposition lacks factual and legal merit because the Board's prior approvals of SDP-1603-01 and TCP2-026-2021-01, became final without any appeal to the District Council. As such, SDP-1603-**02** and TCP2-026-2021-**02**, are valid amendments under the Zoning Ordinance. Those amendments also conform with prior approvals of the District Council and the Board. *See* Zoning Ordinance No. 2-2021 (Basic Plan Amendment A-9968-02), PGCPB No. 2021-50 (CDP-0505-01), Zoning Ordinance No. 6-2021 (Basic Plan Amendment A-9968-03), PGCPB No. 2022-53 (CDP-0505-02).

B. The Appeal

Opposition alleges that the Board committed ten (10) errors when it approved SDP-1603-02 and TCP2-026-2021-02.[6] Appeal, 8/5/2022. When reviewing a decision of the Board to approve a Specific Design Plan, the District Council exercises *appellate* jurisdiction. *Cnty. Council of Prince George's Cnty. v. Zimmer Dev. Co.,* 444 Md. 490, 583, 120 A.3d 677, 733 (2015). Under *Zimmer*, the District Council must apply the same standard of review a court applies to an agency decision on judicial review, which is as follows:

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[6] This appeal includes Opposition from UFCW, Local 400. But that entity was not a person of record below. *See* Party of Record List, 6/30/2022. Senate Bill 564 of 2015 was enacted, in part, "[for] the purpose of . . . providing that, in Prince George's County, a person may make a request to the district council for the review of a certain decision of a zoning hearing examiner or the planning board only under certain circumstances." 2015 Md. Laws ch. 365. The Bill added Section 25-212 to the Land Use article, which provides:

> In Prince George's County, a person may make a request to the district council for the review of a decision of the zoning hearing examiner or the planning board only if:
>
> (1) the person is an aggrieved person that appeared at the hearing before the zoning hearing examiner or planning board in person, by an attorney, or in writing; and
>
> (2) the review is expressly authorized under this division.

2015 Md. Laws ch. 365, *Zimmer Dev. Co.*, 444 Md. 490, 583, 120 A.3d 677, 733 (2015). As such, UFCW, Local 400, as a matter of law, was not authorized to appeal the Board's decision. *Priester v. Balt. Cnty.*, 232 Md. App. 178, 157 A.3d 301, *cert. denied*, 454 Md. 670, 165 A.3d 469 (2017) (The rule of finality overlaps the rule of exhaustion. "[A] party must exhaust the administrative remedy and obtain a final administrative decision . . . before resorting to the courts.").

> Judicial review of administrative agency action based on factual findings, and the application of law to those factual findings, is limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is based on an erroneous conclusion of law. The reviewing court may not substitute its judgment for that of the administrative agency. Rather, the court must affirm the agency decision if there is sufficient evidence such that a reasoning mind reasonably could have reached the factual conclusion the agency reached. Agency decisions receive an even more deferential review regarding matters that are committed to the agency's discretion and expertise. In such situations, courts may only reverse an agency decision if it is arbitrary and capricious. Logically, the courts owe a higher level of deference to functions specifically committed to the agency's discretion than they do to an agency's legal conclusions or factual findings.

Id. 444 Md. at 573-75, 120 A.3d 726-28. This narrow and deferential standard of review will be applied to each error alleged by Opposition in the order presented.

I. The Planning Board's written decision is legally deficient because the Planning Board failed to conduct an independent evaluation of the evidence presented to it. Appeal at 2.

First, Opposition contends that the Board's written decision is deficient because it is essentially a verbatim copy of the Technical Staff Report. PGCC § 17-125.05(a) provides that "[w]here the [] Board is authorized to conduct a public hearing in a zoning or site plan case, the [] Board shall publish on its website a copy of the technical staff report no less than two (2) weeks prior to the scheduled public hearing on the application." Board Commissioner Geraldo made a motion to approve the application as follows:

> COMMISSIONER GERALDO: Mr. Chair, based upon Staff's evaluation and analysis, my Staff, **testimony of witnesses and the exhibits**, I move that the Board adopt the findings of the Technical Staff Report and approve SDP-1603-02, and Type 2 Tree Conservation Plan, TCP2-026-2021-02 for National Capital Park, Business Park, subject to the Staff's conditions as modified by Applicant's Exhibit No. 1, with the exception of 1(p), which shall be in the resolution as read into the record by Mr. Lynch and approved by Mr. Zhang. (6/30/2022, Tr., pp. 57-58) (Emphasis added).

The motion carried. In Maryland, it is well established that "[i]t is not unreasonable for the Planning Board to rely on a Staff Report, as the Planning Board did in this case, if the Staff Report

is thorough, well-conceived, and contains adequate findings of fact." *Greater Baden-Aquasco Citizens Ass'n*, 412 Md. 73, 110, 985 A.2d 1160 (2009). Upon review of the entire record, including a careful review of Staff's Report, the Board's reliance on the Staff Report (as its Resolution) was not in error because the Report is thorough, well-conceived, and contains adequate findings of fact. Opposition offers no evidence that the draft Resolution[7] posted on the Board's online agenda (prior to the evidentiary hearing) violated any law or rule or that it was unreasonable for the Board to adopt a revised version of the draft Resolution to reflect the actual evidence submitted by the parties. Nor does Opposition offer any evidence (or argument) that the motion made by Commissioner Geraldo was not sufficient to include an evaluation of their testimony and exhibits into the Board's final written Resolution.

Second, Opposition contends that if the Board is permitted to adopt Staff's Report as its Resolution, it is only permitted to do so after the Board conducts an independent evaluation of the record. According to Opposition, because the Board adopted the Resolution immediately after it voted to approve the application, it could not have conducted its own independent evaluation of their evidence on the validity of CB-22-2020, the scope of the Board's authority, compliance with Landscape Manual Section 4.6, impacts to Primary Management Areas, and the sufficiency of TCP2-026-2021-02.

A review of the entire record demonstrates otherwise. Opposition submitted **at least 128 pages** of extensive written testimony into the record *before* the date of the evidentiary hearing on all issues raised in their appeal for the Board's consideration. *See* Additional Backup at 6 of 134

[7] The draft Resolution may be viewed at: http://mncppc.iqm2.com/Citizens/Detail_LegiFile.aspx?Frame=&MeetingID=1713&MediaPosition=10027.429&ID=6969&CssClass= (last visited 10/13/2022).

(covering, among other things, extensive submissions on the validity of CB-22-2020, the scope of the Board's authority, compliance with Landscape Manual Section 4.6, impacts to Primary Management Areas, and the sufficiency of TCP2-026-2021-02).

Based on the motion made by Commissioner Geraldo, the Board's final written Resolution did not fail to provide a description of the facts found, law applied, relationship between the two, and conclusions made—*after* the evidentiary hearing. To the contrary, the Board's final written Resolution reflects the opposite. The draft Resolution posted on-line was based on the record at the time before the evidentiary hearing. But it did not (rightfully so) contain a *final* evaluation of the evidence. This practice is not problematic but instead transparent and based on good government because it informs the Board, the public, and the parties of Staff's evaluation of the record in advance of the hearing. When Commissioner Geraldo made the motion (which carried) to approve the application, it was *after* the evidentiary hearing, based on, among other things, testimony of witnesses and exhibits. As a result, the draft Resolution did not become the Board's final written decision because it was revised to adequately articulate the facts found, law applied, and relationship between the two before and after the evidentiary record closed as follows:

- During the public hearing for this SDP, on June 30, 2022, the applicant provided two exhibits: one exhibit of the proposed revisions to Conditions 1n. p., r., and t.; and the other exhibit of sight line analysis from Leeland Road to the subject site. After due discussion, the Planning Board decided that prior Condition 1.r., regarding the 10-foot-wide feeder trail, be deleted because this connection has been provided in SDP-1603-01; that the other three conditions be revised; and that prior Condition 1.t., be renumbered to Condition 1.s., in this resolution. PGCPB No. 2022-76 at 24.

- During the public hearing for this SDP, on June 30, 2022, members of the public submitted 11 exhibits and raised issues concerning the validity of certain laws; the Planning Board's jurisdiction to hear the case, the Planning Board's proposed conditioning of its approvals, such as compliance with stormwater requirements; landscaping; the applicant's proposed uses; PMA impacts; woodland conservation; public facility adequacy; and General Plan and master

> plan conformance. Counsel advised the Planning Board that no law applicable to its review of this application has been found invalid; the Board has jurisdiction to hear the case; conditioning the Board's approvals is both legal and appropriate; as well as longstanding practice of the Board; General Plan and master plan conformance is not a finding for approval of an SDP; and approval of an SDP does not constitute approval of the use. Applicant's counsel and the staff report also addressed the findings necessary for approval of PMA impacts; approval of the TCP2, including on-site preservation; the findings required for compliance with the Landscape Manual; public on-site preservation; the findings required for compliance with the Landscape Manual; public facility adequacy; and stormwater impacts. Planning Board counsel and staff also noted those issues raised, and properly addressed, in prior approved basic plans, CDPs, PPs, and infrastructure SDPs for the entire property. PGCPB No. 2022-76 at 24-25.

The Board's reliance on its Staff Report to formulate its final written Resolution was not erroneous because the Report is thorough, well-conceived, and contains adequate findings of fact. Moreover, when the Board's final written Resolution is compared to the record (as a whole) it reflects that the Board considered the factors and conditions required by the applicable provisions in the Zoning Ordinance to approve the application. The law does not require that the Board's final written Resolution restate *all* facts upon which it rests for it to be legally sufficient. *West Montgomery Cty. Citizens Ass'n v. Montgomery Cty. Planning Bd. of the Maryland-National Park & Planning Comm'n*, 248 Md. App. 314, 241 A.3d 76 (2020) (Emphasis added). *See* Appeal at 11 (Opposition concedes that Planning Board is delegated a limited scope of authority to take action related to SDP applications). *See also* Appeal at 16 (Opposition concedes that [PGCC §] 27-528(a) requires the Planning Board to make a finding that SDP-1603-02 satisfies five (5) criteria "*prior to approving*" the SDP application) (Emphasis in original).

II. The Planning Board erred when it approved SDP-1603-02 because the SDP's validity is based on an illegal special law. Appeal at 4.

According to Opposition, "the uses permitted by SDP-1603-02 are based on an illegal special law and SDP-1603-01 must be denied."[8] Because this property is in a Comprehensive Design Zone, development occurs in three phases: a Basic Plan, Comprehensive Design Plan, and a Specific Design Plan. A Basic Plan ***"[s]ets*** forth proposed ***land uses*** and general ***land use relationships***, including the approximate number of dwelling units and building intensity." A Comprehensive Design Plan or CDP "refines the approved Basic Plan, establishes the general location, distribution, and size of proposed structures and includes various standards and guidelines." A Specific Design Plan or SDP (as is the case here) "includes detailed landscaping plans, tree conservation plans, recreational facilities plans, and exterior building elevations."[9] (Emphasis added).

Because the Board approved SDP-1603-02, pursuant to criteria in PGCC § 27-528, it did not set forth *land uses* for the property.[10] Opposition does not dispute that SDP-1603-02 was required to be approved pursuant to PGCC § 27-528. *See* Appeal at 11, 16. Land uses and building intensity for the property were set forth in amendments to the Basic Plan, which were approved by the District Council—not the Board. The Basic Plan for this property was amended twice by District Council pursuant to criteria (and procedures) set forth in PGCC § 27-197. *See* Zoning Ordinance

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[8] The applicant in this case is AMS 2022 BTS – Upper Marlboro MD, LLC (AMS). But Opposition contends that CB-22-2020 was intended for NCBP Property, LLC. Appeal at 4-9.

[9] *See* Citizen's Handbook --- Planning, Zoning, and Development Review in Prince George's County at 23, which may be viewed at: https://mncppc.org/DocumentCenter/View/447/Citizens-Handbook-2014-PDF?bidId= (last visited 10/13/2022).

[10] The Board noted that "[t]his SDP is the first stage of the larger development and proposes a 3,428,985-square-foot warehouse/distribution facility and associated parking and loading spaces to serve the proposed uses on approximately 90.11 acres of the 442-acre larger property, within the prior R-S Zone. The Planning Board finds that the proposed improvements fall within the land uses approved by A-9968-03." PGCPB No. 2022-76 at 6.

No. 2-2021 (Basic Plan Amendment A-9968-02) and Zoning Ordinance No. 6-2021 (Basic Plan Amendment A-9968-03).[11]

As noted above, the first Basic Plan amendment (A-9968-02) (and not the SDP) set forth the land uses and gross floor area of 3.5 million square feet for the property. And the second Basic Plan amendment increased the gross floor area for the land uses from 3.5 million to 5.5 million square feet.

Under PGCC § 27-528(a)(1), and relevant here, the Board, prior to approving an SDP (as is the case here), must find that the plan conforms to the *approved CDP*—as opposed to the approved Basic Plan. After the District Council approved each amendment to the Basic Plan, the Board approved corresponding CDPs. In April 2021, the Board approved CDP-0505-01, in accordance with 3.5 million square feet of employment and institutional uses set forth in the first Basic Plan amendment (A-9968-02). In May 2022, the Board approved CDP-0502-02, in accordance with the additional 2 million square feet of gross floor area for employment and institutional uses set forth in the second Basic Plan amendment (A-9968-03). In June 2022, the Board approved a Preliminary Plan of Subdivision (PPS) application (4-21056). The PPS divided the entire property into 27 parcels for development up to 5.5 million square feet. PGCPB No. 2022-70. It is important to reiterate here, SDP-1603-02 (the application at issue here) is within the 3.5 million square feet limit established in CDP-0505-01—not CDP-0502-02. PGCPB No. 2022-76 at 3.

The Board's approval of SDP-1603-02 was not based on an illegal special law. The Board's approval of SDP-1603-02 was based on the criteria in PGCC § 27-528. *See* Appeal at 11

[11] The District Council takes judicial notice of the Basic Plan amendment proceedings, which reflects that Opposition did not participate in those proceedings, nor was there any opposition in those proceedings. Zoning Ordinance No. 2-2021, Zoning Ordinance No. 6-2021.

(Opposition concedes that Planning Board is delegated a limited scope of authority to take action related to SDP applications). *See also* Appeal at 16 (Opposition concedes that [PGCC §] 27-528(a) requires the Planning Board to make a finding that SDP-1603-02 satisfies five (5) criteria "*prior to approving*" the SDP application) (Emphasis in original).

Because the Board's approval of SDP-1603-02 implicated, among other things, "…detailed landscaping plans, tree conservation plans, recreational facilities plans, and exterior building elevations," but did *not* set forth land *uses* for the property, there is *no* need to address whether, CB-22-2020 (as alleged by Opposition) is an illegal special law because (as conceded by Opposition) the Board's scope of authority to approve SDP-1603-02 is *limited* to the criteria in PGCC § 27-528.

Moreover, the time for Opposition to file a petition for judicial review to challenge the District Council's authority to enact CB-22-2020, as an illegal special law, has long passed. The Court of Appeals has held that LU § 22-407 sets a 30-day deadline for filing a petition for judicial review when there is a direct attack upon the power or authority of the legislative body to adopt the legislation from which relief is sought. *Cty. Council of Prince George's Cty. v. Chaney Enters. L.P.*, 454 Md. 514, 538, 165 A.3d 379, 393 (2017). After the enactment of CB-22-2020, Opposition did not file a petition for judicial review in the circuit court to attack the District Council's power or authority to enact CB-22-2020, which is the relief they seek in this matter.

CB-22-2020 became final and the Zoning Ordinance was amended in accordance with CB-22-2020. After CB-22-2020 became a valid law, the District Council is only allowed to reconsider CB-22-2020 by introducing a new Zoning Bill, which did not occur here. PGCC § 27-219. Therefore, CB-22-2020 became a valid adoption of a legislative amendment to the local zoning laws of Prince George's County.

III. The Planning Board erred when it approved SDP-1603-02 because the SDP's validity is based on an illegal text amendment in violation of 22-201(b)(2)(i) of the Maryland Land Use Article. Appeal at 9.

Opposition concedes that this issue was never raised before the Board. Appeal at 9. As noted above, under *Zimmer*, the District Council must apply the same standard of review a court applies to an agency decision on judicial review. Ordinarily, a court reviewing the decision of an administrative agency "may not pass upon issues presented to it for the first time on judicial review. . . ." *Schwartz v. Maryland Dept. of Natural Resources*, 385 Md. 534, 556, 870 A.2d 168 (2005) (quoting *Brodie v. MVA*, 367 Md. 1, 4, 785 A.2d 747 (2001)). Accordingly, "[a] party who knows or should have known that an administrative agency has committed an error and who, despite an opportunity to do so, fails to object in any way or at any time during the course of the administrative proceedings, may not thereafter complain about the error at a judicial proceeding." *Cremins v. County Comm'rs of Washington County*, 164 Md. App. 426, 443, 883 A.2d 966 (2005) (quoting *Cicala v. Disability Review Bd. for Prince George's County*, 288 Md. 254, 261-62, 418 A.2d 205 (1980)). The failure to raise an issue before the administrative agency is a failure to exhaust administrative remedies and an improper request for "the courts to resolve matters ab initio that have been committed to the jurisdiction and expertise of the agency." *Chesley v. City of Annapolis*, 176 Md. App. 413, 427 n.7, 933 A.2d 475 (2007) (quoting *Delmarva Power & Light Co. v. Public Serv. Comm'n of Md.*, 370 Md. 1, 32, 803 A.2d 460, *motion for reconsideration granted on other grounds*, 371 Md. 356, 809 A.2d 640 (2002)), *cert. denied*, 403 Md. 305, 941 A.2d 1105 (2008). Because this question was not raised or presented (in the first instance) to the Board, the question is not preserved for appellate review. Opposition has failed to exhaust administrative remedies and it is therefore improper for the District Council to pass on this question for the first time.

Moreover, even if Opposition had raised the question before the Board, the time for Opposition to file a petition for judicial review to challenge the District Council's authority to enact CB-22-2020, as an illegal text amendment, has long passed. The Court of Appeals has held that LU § 22-407 sets a 30-day deadline for filing a petition for judicial review when there is a direct attack upon the power or authority of the legislative body to adopt the legislation from which relief is sought. *Chaney Enters. L.P.*, 454 Md. 514, 538, 165 A.3d 379, 393 (2017). After the enactment of CB-22-2020, Opposition did not file a petition for judicial review in the circuit court to attack the District Council's power or authority to enact CB-22-2020, which is the relief they seek in this matter.

CB-22-2020 became final and the Zoning Ordinance was amended in accordance with CB-22-2020. After CB-22-2020 became a valid law, the District Council is only allowed to reconsider CB-22-2020 by introducing a new Zoning Bill, which did not occur here. PGCC § 27-219. Therefore, CB-22-2020 became a valid adoption of a legislative amendment to the local zoning laws of Prince George's County.[12]

IV. The Planning Board erred when it approved SDP-1603-02 because it lacks the authority to approve SDP applications contingent on future compliance with statutory requirements. Appeal at 11.

In relevant part, PGCC § 27-528(e) provides that the Board "shall approve, approve with modifications, or disapprove the [SDP] within seventy (70) days of its submittal." Based on this

[12] The Zoning Ordinance is subject to review and amendment solely by the District Council, which may amend the text to create new zones or repeal zones. This process is called a text amendment. Similarly, it may add permitted uses to a zone, eliminate permitted uses from a zone, or require the grant of a special exception. Indeed, any of the regulations may be changed through the text amendment process. A text amendment may be requested by the County Executive, the Planning Board, or any interested individual or organization. In some instances, the council may initiate an amendment itself. Amending the Zoning Ordinance is a legislative process requiring a public hearing and approval by a majority of the council. *See* Citizen's Handbook --- Planning, Zoning, and Development Review in Prince George's County at 33.

language, Opposition contends that the Board exceeded its limited authority when it *conditionally* approved SDP-1603-02 because most of the *conditions* of approval do not qualify as "modifications" in PGCC § 27-528(e) (Emphasis added). Appeal at 12.

PGCC § 27-108 governs the applicability of interpretations and rules of construction for Subtitle 27 (also known as the Zoning Ordinance), and to the wording of any *conditions* placed on *any* final decision made in accordance with the Zoning Ordinance, such as *conditions* placed on the *approval* of zoning cases. PGCC § 27-108.01 governs interpretations and rules of construction and how words and phrases are to be interpreted. The word "approve" includes "approve with *conditions*, *modifications*, ***or*** *amendments*." PGCC § 27-108.01(a)(10) (Emphasis added). When a regulation (such as PGCC § 27-528(e)) involves two (2) or more items connected by the conjunction "***or***," it indicates that the connected items may apply ***singly*** or in ***any combination***. PGCC § 27-108.01(a)(13) (Emphasis added).

The Board approved SDP-1603-02 subject to three (3) conditions. PGCPB No. 2022-76 at 25-27. The Board's conditional approval of SDP-1603-02 falls squarely within its authority (limited or otherwise) under the Zoning Ordinance. The Board's conditional approval of SDP-1603-02 is an example of due diligence after a meaningful review of the application and the record as a whole. Such conditional approval is in the public interest, will protect and conserve the County's resources and time because AMS has the duty to ensure that those conditions are satisfied prior to formal certification, if not SDP-1603-02 will not be certified. Moreover, as noted by AMS, approvals from the Board generally contain *conditions* because the Board does not have the expertise on certain issues and must rely on other County agencies to ensure that the applicant complies with conditions of approval. AMS Response at 9.

V. The Planning Board erred when it approved SDP-1603-02 because the record lacks substantial evidence to support a finding that SDP-1603-02 satisfies [PGCC] § 27-528(a). Appeal at 16.

Opposition contends here (in six (6) sub-arguments), that the record lacks substantial evidence. Appeal at 16-30. On appeal, the Board's factual findings are reviewed to determine whether they are supported by substantial evidence in the record. *Md. Bd. of Pub. Works v. K. Hovnanian's Four Seasons at Kent Island*, 425 Md. 482, 514 n.15, 42 A.3d 40 (2012). Questions about findings from the evidence should be resolved in *favor* of the Board unless the record has *no* evidence – not even a "scintilla" to support them. *Turner v. Hammond*, 270 Md. 41, 310 A.2d 543 (1973), *County Comm'rs v. Oak Hill Farms*, 232 Md. 274, 192 A.2d 761 (1963). The substantial evidence test does *not* concern whether an *aggrieved party* provided substantial evidence to support its position before the administrative agency. On the contrary, the substantial evidence test requires a determination of whether the *agency's decision* is founded upon substantial evidence in the record. *Motor Vehicle Admin. v. Shea*, 415 Md. 1, 997 A.2d 768 (2010) (Emphasis added). There is no substitution of judgment for that of the Board in reviewing its findings of fact. *Lillian C. Blentlinger, LLC v. Cleanwater Linganore, Inc.*, 456 Md. 272, 293-94, 173 A.3d 549 (2017). The substantial evidence test is about *reasonableness, not rightness*." *Md. Dep't of the Env't v. Riverkeeper*, 447 Md. 88, 134 A.3d 892 (2016) (quoting *Annapolis v. Annapolis Waterfront Co.*, 284 Md. 383, 399, 396 A.2d 1080 (1979)) (Emphasis added). Each sub-argument will be addressed against this backdrop.

1. SDP-1603-02 does not conform to the approved and certified Comprehensive Design Plan as required by [PGCC] § 27-528(a)(1). Appeal at 16.

2. SDP-1603-02 does not conform to the applicable standards of the Landscape manual as required by [PGCC] § 27-528(a)(1). Appeal at 18.

Opposition is legally incorrect on both issues. First, the Board is *not* required to find that SDP-1603-02 must conform to a *certified* CDP. The word *certified* does not appear anywhere in PGCC § 27-528(a)(1). When construing a statute, it is *not* permitted to *insert* or omit words to make a statue express an intention not evidenced in its original form. *Taylor v. Baltimore*, 51 Md. App. 435, 443 A.2d 657 (1982). In relevant part, PGCC § 27-528(a)(1) provides that [p]rior to approving a Specific Design Plan, the Planning Board shall find that "[t]he plan *conforms* to the *approved* Comprehensive Design Plan, the *applicable standards* of the Landscape Manual..." The Board is only required to find that SDP-1603-02 *conforms* to the *approved* CDP and *applicable* standards of the Landscape Manual.

Specifically, with regards to PGCC § 27-528(a)(1), the Board made the following findings and conclusions:

> Finding 8. a. Through the adoption of Council Bill CB-22-2020, the District Council expanded the uses permitted in the R-S Zone, to allow nonresidential uses that are generally permitted in the E-I-A Zone on the subject property, under certain conditions. This SDP is for the middle 90.11 acres of the site for a warehouse/distribution facility, which is a use permitted by CB-22-2020 and otherwise complies with the findings in both A-9968-03 and CDP-0505-02, regarding the uses on the property. PGCPB No. 2022-76 at 8.
>
> Finding 8. b. Section 27-480 (General development regulations) of the Zoning Ordinance and those regulations in the R-S Zone, as stated in Sections 27-511 to 514 of the Zoning Ordinance, are mainly for residential uses. Since this SDP is for a warehouse/ distribution facility use that is generally permitted in the E-I A Zone, those regulations are not applicable to this SDP. PGCPB No. 2022-76 at 8.
>
> Finding 8. c. The site improvements proposed in this SDP will support the development described in *approved* CDP-0505-02 and each of the conditions of approval. The improvements also comply with the requirements of the Landscape Manual and the design guidelines *applicable* to this SDP, *as discussed in findings herein*. Therefore, the Planning Board finds that the SDP conforms with the approved CDP and the *applicable* standards of the Landscape Manual. PGCPB No. 2022-76 at 9 (Emphasis added).

> Finding 12. 2010 Prince George's County Landscape Manual: Per Section 27-528(a)(1) of the Zoning Ordinance, an SDP must conform to the applicable standards of the Landscape Manual. *The subject SDP is the first stage of the larger development and only Section 4.2*, Requirements for Landscape Strips Along Streets; Section 4.3, Requirements for Parking lot Interior Planting; and Section 4.9, Sustainable Landscape Requirements, apply to this site. *The landscape plans included with the SDP show the required landscape schedules that are in conformance with the applicable requirements*. PGCPB No. 2022-76 at 16 (Emphasis added).

Second, when the Board approved the first amendment to SDP-1603 or SDP-1603-**01**, it made the following findings concerning the Landscape Manual:

> Finding 8. c. The site improvements proposed in the infrastructure SDP will support the development described in approved CDP-0505-01, and each of the conditions of approval. The improvements also comply with those requirements of the 2010 *Prince George's County Landscape Manual* (Landscape Manual), and the design guidelines applicable to the infrastructure SDP, as discussed in findings herein. Therefore, the Planning Board finds the infrastructure SDP conforms with the approved CDP and applicable standards of the Landscape Manual. PGCPB No. 2022-10 at 7.
>
> Finding 11. 2010 Prince George's County Landscape Manual: Per Section 27-528(a)(1) of the Zoning Ordinance, an SDP must conform to the applicable standards of the Landscape Manual. However, when reviewing an infrastructure SDP, due to its limited scope, only certain regulations are applicable. For this infrastructure SDP, only Section 4.2, Requirements for Landscape Strips Along Streets; Section 4.6-2, Buffering Development from Special Roadways (Leeland Road), and Section 4.9, Sustainable Landscape Requirements, apply to this site. The landscape plans included with the SDP are in conformance with the applicable requirements. However, the applicant does not include the required landscape schedules for each respective section to demonstrate conformance on the landscape plans. A condition has been included herein to require the applicant to provide landscape schedules prior to certification of this infrastructure SDP. PGCPB No. 2022-10 at 15.
>
> ***

Accordingly, the Board approved SDP-1603-01 subject to Condition 1. e., which required the applicant to provide the following prior to certification: "Provide Sections 4.2, 4.6, and 4.9 landscape schedules and a tree canopy coverage schedule on the landscape plan." PGCPB No.

2022-10 at 26. Collectively, these findings by the Board are supported by substantial evidence in the record. Moreover, the Board's conditions of approval clearly demonstrate that SDP-1603-01 and SDP-1603-02 will conform to the approved CDP and applicable standards of the Landscape Manual, including buffering along Leeland Road for the proposed development. PGCPB No. 2022-76 at 4-9.

When the record is reviewed as a whole, and in context of a multi-phase development, there is substantial evidence in the record to support the Board's findings that SDP-1603-02 conforms to the approved CDP and applicable requirements of the Landscape Manual as required in PGCC § 27-528(a)(1).

> 3. The record lacks substantial evidence to support a finding that the development will be adequately served by public facilities as required by [PGCC] § 27-528(a)(2). Appeal at 22.

Opposition contends that AMS provided no evidence that existing or programmed public facilities will be adequate to serve the proposed development. Appeal at 23. The Board is only required to find, in relevant part, that "[t]he development will be adequately served *within a reasonable period of time* with existing or programmed public facilities..." (Emphasis added). And the Board made the determination as required by the statute as follows:

> Finding 8. c. *The subject property is governed by an approved and valid PPS, 4-21056*, which was approved by the Planning Board on June 2, 2022, *and determined that this development will be adequately served, within a reasonable period of time, with existing or programmed public facilities*. The site improvements described in this SDP are the first phase of the envisioned development occupying the middle of the larger site, that was approved with PPS 4-21056, which supersedes PPS 4-20032. *This SDP meets this requirement*. PGCPB No. 2022-76 at 9-11 (Emphasis added).

Moreover, the Board approved SDP-1603-02, subject to the following conditions:

> 1. m. Provide a phasing plan showing the US 301/Leeland Road and Prince's Boulevard/Queens Court intersection improvements phased

> with the development provided in the SDP. Any improvements generated by the SDP, as shown in the phasing plan, shall be provided at the time of building permit.
>
> n. Provide a fee schedule with the total cost of the applicant's contribution to the US 301 County Improvement Program improvements associated with the phased development of the SDP. In lieu of the fee payment, the applicant may provide physical improvements along US 301, within the limits of the US 301 CIP Project, consistent with the phasing plan that will be submitted by the applicant.
>
> o. Provide a truck turning plan, with design vehicle classification. If the truck turning plans show inadequate circulation for truck maneuvers on-site, the applicant shall modify the site to provide sufficient circulation for safe truck movements. Any modifications to the site that are needed, based on the review of the truck turning plans, shall be accepted by the Transportation Planning Section. PGCPB No. 2022-76 at 26-27.

When the record is reviewed as a whole, and in context of a multi-phase development, there is substantial evidence in the record to support the Board's finding that the development in SDP-1603-02 will be adequately served *within a reasonable period of time* with existing or programmed public facilities as required in PGCC § 27-528(a)(2).

> 4. The record lacks substantial evidence to support a finding that adequate provisions have been made for draining surface water as required by [PGCC] § 27-528(a)(3). Appeal at 24.

The Board approved SDP-1603-01 and TCP2-026-2021-01 on January 27, 2022. PGCPB No. 2022-10. Relevant here, that approval was for infrastructure for the site, including the proposed street network, sidewalks, utilities, grading, *stormwater management* (SWM). *See* PGCC § 27-528(b) (Prior to approving a Specific Design Plan for Infrastructure, the Planning Board shall find that the plan conforms to the approved Comprehensive Design Plan, prevents offsite property damage, and prevents environmental degradation to safeguard the public's health, safety, welfare, and economic well-being for grading, reforestation, woodland conservation, drainage, erosion, and

pollution discharge). Here, the Board made the following findings:

> Finding 10. 4. Development of this site shall be in conformance with the approved Stormwater Management Concept Plan (42013-2020-00) and any subsequent revisions. An approved SWM Concept Plan (42013-2020-00) was submitted and approved with SDP-1603-01 for the entire 442-acre site. As discussed previously, a revision to the approved SWM concept plan is in review, and this SDP is in conformance to the draft plan. The revised SWM concept plan approval is required, prior to certification of the SDP, as conditioned herein. PGCPB No. 2022-76 at 12.
>
> Finding 8. c. Adequate provision has been made for draining surface water so that there are no adverse effects on either the subject property or adjacent properties. As discussed above, the application included an approved and valid SWM concept plan for the entire larger site, and the site improvements proposed in the SDP support, or otherwise do not hinder, the plan. Therefore, the Planning Board finds that, to the extent the improvements proposed in this SDP are the first phase of the larger development, adequate provision has been made for draining surface water and ensuring that there are no adverse effects on the subject property or adjacent properties. In addition, a revision to the previously approved SWM concept plan is in the review process and this SDP is in conformance to the draft plan. A *condition* has been included herein requiring that the revised SWM concept plan be approved, prior to certification of the SDP. PGCPB No. 2022-76 at 9-10.

But the Board went further. The Board imposed the following condition to ensure *adequate provision* for draining surface water so that there are no adverse effects on either the subject property or adjacent properties:

> 1. Prior to certification of the specific design plan (SDP), the applicant shall provide the following information and/or revise the site plan to provide the following:
>
> c. Provide an approved revised stormwater management concept plan. PGCPB No. 2022-76 at 25.

When the record is reviewed as a whole, and in context of a multi-phase development, there is substantial evidence in the record to support the Board's finding that *adequate* provisions have been made for draining surface water as required by PGCC § 27-528(a)(3).[13]

[13] *See also* AMS Response at 13 (Approval of the revised stormwater management concept plan (SWM) is a condition of certification of SDP-1603-02 and will be overseen through continuing reviews by the Department

5. The record lacks substantial evidence to support a finding that SDP-1603-02 conforms with an approved Type 2 Tree Conservation Plan as required by [PGCC] § 27-528(a)(4). Appeal at 25.

As noted above, the Board approved SDP-1603-**01** and TCP2-026-2021-**01** on January 27, 2022. PGCPB No. 2022-10. Relevant here, the Board previously considered and approved TCP2-026-2021-**01.** The Board's approval of TCP2-026-2021-**01** in PGCPB No. 2022-10 was a *final* decision subject to judicial review, but Opposition did not file a petition for judicial review to challenge the Board's approval of TCP2-026-2021-**01** as embodied in PGCPB No. 2022-10. *Chesapeake Bay Found., Inc. v. Creg Westport I, LLC*, 2022 Md. LEXIS 337, 2022 WL 3695920 (filed August 26, 2022). As such, TCP2-026-2021-**01** as embodied in PGCPB No. 2022-10, is not subject to appellate review here except as *modified* in SDP-1603-**02**/TCP2-026-2021-**02**.[14]

Concerning the modifications to TCP2-026-2021-**02**, the Board made the following findings:

> Development of this subdivision shall be in conformance with approved Type 1 Tree Conservation Plan (TCP1-004-2021-03). The following note shall be placed on the final plat of subdivision:
>
> "This development is subject to restrictions shown on the approved Type 1 Tree Conservation Plan (TCP1-004-2021-03 or most recent revision), or as modified by the Type 2 Tree Conservation Plan and precludes any disturbance or installation of any structure within specific areas. Failure to comply will mean a violation of an approved Tree Conservation Plan and will make the owner subject to mitigation under the Woodland and Wildlife Habitat Conservation Ordinance (WCO). This property is subject to the notification provisions of CB-60-2005. Copies of all approved Tree Conservation Plans for the subject property are available in the offices of the Maryland-National Capital Park and Planning Commission, Prince George's County Planning Department."

(continued...)
of Permitting, Inspections, and Enforcement (DPIE) and Soil Conservation District. Grading of the site must be performed during the initial construction phase, and no grading permit will be issued by DPIE unless the revised SWM is approved).

[14] The National Capital Business Park project is subject to the [Woodland and Wildlife Habitat Conservation Ordinance (WCO) and the Environmental Technical Manual (ETM). A rough grading permit was recently approved for the site, utilizing the [Limits of Disturbance] LOD of TCP2-026-2021. TCP2-026-2021-01 was approved with SDP-1603-01 and TCP2-026-2021-02 was submitted with SDP-1603-02. PGCPB. No. 2022-76 at 16 (Emphasis added).

> The Planning Board finds that the revised Type 2 Tree Conservation Plan (TCP2-026-2021-02) is consistent with TCP1-004-2021-03 approved with PPS 4-21056, and with TCP2-026-2021-01 approved with SDP-1603-01. PGCPB No. 2022-76 at 15-16.

As a result, the Board concluded with the following additional finding:

> Finding 8. c. Type 2 Tree Conservation Plan TCP2-026-2021-02 was submitted to the Environmental Planning Section on April 26, 2022. The Planning Board finds that the subject SDP conforms to TCP2-026-2021-02, subject to conditions that have been included in this resolution. PGCPB No. 2022-76 at 10.

PGCPB No. 2022-76 at 10. The Board also imposed certain conditions on the TCP2-026-2021-02 that AMS must satisfy prior to certification of SDP-1603-02. Id. at 25-26.

When the record is reviewed as a whole, and in context of a multi-phase development, there is substantial evidence in the record to support the Board's finding that SDP-1603-02 is in conformance with an approved Type 2 Conservation Plan as required by PGCC § 27-528(a)(4).

> 6. SDP-1603-02 does not preserve and/or restore regulated environmental features to the fullest extent possible as required by [PGCC] § 27-528(a)(5). Appeal at 27.

The Board is required to find that SDP-1603-02 *demonstrates* that the regulated environmental features are preserved and/or restored to the fullest extent possible in accordance with the requirement of [PGCC] § 24-130(b)(5). PGCC § 27-528(a)(5). Opposition argues here that the Board should be reversed because the record lacks evidence to support a finding that the requested impacts to the Primary Management Area (PMA) are necessary and therefore the record lacks substantial evidence to support a finding that SDP-1603-02 satisfies the required criteria in PGCC § 27-528(a). Appeal at 30. But the record *demonstrates* otherwise.

The Board made the following findings and conclusions:

> The plan demonstrates that the regulated environmental features are preserved and/or restored to the fullest extent possible in accordance with the requirement of Subtitle 24-130(b)(5).

> The site improvements described in this SDP are only for a portion of the larger site and do not expand the approved land use quantities, included in A-9968-03, that preserve more than half of the entire site in a natural state. This condition was further evaluated at the time of approval of PPS 4-21056, and conformance was demonstrated. The Planning Board concluded, after review of the SDP and the proposed TCP2-026-2021-02, that the [Regulated Environmental Features] REF on the subject property will be preserved and/or restored, to the fullest extent possible, based on the level of detail provided with SDP-1603-02 for one proposed impact for a stormwater outfall.

PGCPB No. 2022-76 at 10. The Board's findings and conclusions, including PMA impacts, was based on the following evidence in the record:

> **Environmental Planning:** In a memorandum dated June 10, 2022 (Nickle to Zhang), incorporated herein by reference, a review of the site's environmental features and prior conditions of approval was presented. Findings related to the prior applicable conditions have been included above. Additional comments have been summarized, as follows:
>
> **Regulated Environmental Features:** There is PMA comprised of REF, which include streams and associated buffers, 100-year floodplain, steep slopes, and wetlands with their associated buffers. Under Section 27-521(a)(11) of the prior Zoning Ordinance, the plan shall demonstrate reservation and/or restoration of REF in a natural state, to the fullest extent possible. The development proposes impacts to the PMA. A letter of justification (LOJ), with exhibits, was submitted by the applicant on April 26, 2022, May 24, 2022, and June 7, 2022, for review with SDP-1603-02.
>
> Section 24-130(b)(5) of the prior Prince George's County Subdivision Regulations states, "Where a property is located outside the Chesapeake Bay Critical Areas Overlay Zones the preliminary plan and all plans associated with the subject application shall demonstrate the preservation and/or restoration of regulated environmental features in a natural state to the fullest extent possible consistent with the guidance provided by the Environmental Technical Manual established by Subtitle 25. Any lot with an impact shall demonstrate sufficient net lot area where a net lot area is required pursuant to Subtitle 27, for the reasonable development of the lot outside the regulated feature. All regulated environmental features shall be placed in a conservation easement and depicted on the final plat."
>
> Impacts to REF should be limited to those that are necessary for development of the property. Necessary impacts are those that are directly attributable to infrastructure required for the reasonable use and orderly and efficient development of the subject property, or are those that are required by Prince George's County Code for reasons of health, safety, or welfare. Necessary impacts include, but are

not limited to, adequate sanitary sewerage lines and water lines, road crossings for required street connections, and outfalls for SWM facilities. Road crossings of streams and/or wetlands may be appropriate if placed at the location of an existing crossing, or at the point of least impact to REF. SWM outfalls may also be considered necessary impacts, if the site has been designed to place the outfall at a point of least impact. The types of impacts that can be avoided include those for site grading, building placement, parking, SWM facilities (not including outfalls), and road crossings where reasonable alternatives exist. The cumulative impacts for development of a property should be the fewest necessary and sufficient to reasonably develop the site, in conformance with the County Code.

Two areas of PMA impact are proposed with SDP-1603-02. The first is a stormwater outfall from a stormwater facility, in the northwestern portion of the Parcel 6 development. The second area is the result of the final engineering of the road crossing for Queens Court, which is an expansion of a previously approved impact. This application does not propose revisions to the previously approved impacts, which will remain, as approved with PPS 4-21056 and SDP-1603-01.

Impact for Stormwater Outfall for Parcel 6: The first impact for the proposed stormdrain outfall is in the northwestern portion of the Parcel 6 development. The applicant proposes to convert a temporary sediment control facility, that was previously approved in that location, into a permanent stormwater facility, which requires an outfall to be located close to the stream channel, limiting erosion at the discharge point. Comments were provided regarding this proposed stormdrain outfall at an SDRC meeting on May 13, 2022, requesting an update to the LOJ and the exhibit, to provide the proposed totals for the impacts to the floodplain, stream buffer, and expanded PMA. A revised LOJ was received on May 24, 2022, for the newly proposed impact shown on the TCP2 and amended SDP. The current LOJ and associated exhibit reflect one proposed impact to REF associated with the proposed development, totaling approximately 0.10 acre. The following finding provides an evaluation of the proposed impact, as outlined in the applicant's justification.

This impact for a proposed SWM outfall is a revision to the overall stormwater design that was approved for the National Capital Business Park subdivision. Impacts to the PMA, that were approved by the Planning Board as part of the prior PPS 4-21056 and SDP-1603-01 cases, are to remain as approved. The new impact requested with SDP-1603-02 is for a stormdrain outfall estimated for 0.12 acre located on the north side of the development and includes 403 square feet of floodplain impact, 3,287 square feet of stream buffer impacts, and 1,343 square feet of expanded PMA impact. The stormdrain outfalls meet best management practices for discharging water back into the stream, while limiting erosion at the discharge points. The development shown on the SDP obtained preliminary approval from both DPIE and the Soil Conservation District (SCD).

The proposed PMA impact for a SWM outfall is considered necessary to the orderly development of the subject property. This impact cannot be avoided because it is required by other provisions of the County and state codes. The plan shows the preservation, restoration, and enhancement of the remaining areas of PMA.

Impacts for Queens Court Road Crossing: The second series of impacts is required by DPIE to support construction of the entrance road, Queens Court. This new area of impact is an expansion of an impact approved by the Planning Board with the PPS and SDP. The design of Queens Court crosses a stream and floodplain. Fill is needed to support the road, and a culvert was designed to not impede the flow of the stream. Because of the fill, clearing is needed downstream to provide compensatory storage for the floodplain, to prevent a rise to the floodplain. Compensatory storage of floodplain is a standard practice, which preserves the ability of the floodplain to store water. An LOJ and exhibits for the floodplain compensatory storage PMA impact were received on June 7, 2022. The current LOJ and associated exhibit is reflected in three parts, continuing the numbering system of the overall development impacts as Impacts 17, 18, and 19, totaling 1.20 acres of proposed impact to REF associated with the proposed site infrastructure. The following finding provides an evaluation of the proposed impact, as outlined in the applicant's justification.

This impact for the addition of floodplain compensatory storage is a revision to the overall road network design approved for the National Capital Business Park Subdivision. Impacts to the PMA that were approved by the Planning Board, as part of the prior PPS 4-21056 and SDP-1603-01 approvals, are to remain, as approved. The new impact requested with SDP-1603-02 is an expansion of Impact C, that the Planning Board approved with 4-21056. Impacts 17, 18, and 19 include 1.13 acres of floodplain, with an additional 0.07 acre of PMA, for an overall total of 1.20 acres. The use of compensatory storage of the floodplain in the three areas meets best management practices for providing an equal amount of floodplain storage, to support the grading and culverts required for the road infrastructure. The development shown on the PMA exhibits obtained preliminary approval from both DPIE and SCD. The majority of the graded floodplain will be reforested. The proposed floodplain clearing and reforestation shall be reflected in the worksheet and on the TCP2, prior to certification of SDP-1603-02.

The proposed PMA impact for compensatory storage is considered necessary to the orderly development of the subject property. This impact cannot be avoided because it is required by other provisions of the County and state codes. The plan shows preservation, restoration, and enhancement of the remaining areas of PMA. As a result of this analysis, it is recommended that the Planning Board approve the PMA impacts.

Specimen Trees: A timber harvest permit was previously approved for the site utilizing the approved LOD on the TCPII approved for the previous residential development, Willowbrook. Within the limits of the timber harvest area were 50 specimen trees. No variance was required for removal of these specimen trees because the TCPII was approved under the 1993 Woodland conservation Ordinance and was grandfathered from the variance requirements that were established in the WCO. The current development is subject to the WCO, which requires a variance for removal of specimen trees. A variance request was reviewed with 4-20032, and the Planning Board approved the removal of 69 specimen trees. A variance request was reviewed with SDP-1603-01 for infrastructure, and the Planning Board approved the removal of Specimen Trees 320 and 321. A variance request was resubmitted and reviewed with 4-21056, and the Planning Board approved the removal of 11 specimen trees. The trees were located generally in the area proposed for development, outside of the REF. No additional trees are requested for removal with SDP-1603-02.

Stormwater Management: SWM Concept Plan 42013-2020-00, approved on June 28, 2021, was submitted which shows the use of seven submerged gravel wetlands, four underground storage treatment facilities, and sand filters. The SWM concept approval letter indicates that additional micro-scaled environmental site design facilities will be evaluated when details of the development pads are proposed with later reviews. The proposed development, specific to SDP-1603-02, filed a revised Site Development Concept Plan (6108-2022-00) to amend the SWM facilities. The revised SWM concept plan approval is required, prior to certification of the SDP. The geographic area for this development proposes three submerged gravel wetlands and one wet pond. This development will be subject to a site development fine grading permit and continuing reviews by DPIE and SCD.

Soils: According to the *Prince George's County Soil Survey,* the principal soils on the site are in the Adelphia, Bibb, Collington, Colemantown Elkton, Howel, Marr, Monmouth, Sandy Land, Shrewsbury, and Westphalia series. Adelphi, Collington and Marr soils are in hydrologic class B, and are not highly erodible. Bibb and Shrewsbury soils are in hydrologic class D and pose various difficulties for development, due to high water table, impeded drainage, and flood hazard. Colemantown and Elkton soils are in hydrologic class D and have a K factor of 0.43, making them highly erodible. Howell and Westphalia soils are in hydrologic class B and are highly erodible. Monmouth soils are in hydrologic class C and have a K factor of 0.43, making them highly erodible. Sandy land soils are in hydrologic class A and pose few difficulties to development.

Marlboro clay is found to occur extensively in the vicinity of and on this property. The TCP2 shows the approximate location of the unmitigated and mitigated 1.5 safety factor line, in accordance with a geotechnical report dated August 6, 2021, and prepared by Geo-Technology Associates, Inc. The global stability analysis on Sections 2, 2R, 3, 4, 5, 5R, and 15 for the mitigated conditions was performed. The

geotechnical report recommends undercutting the Marlboro clay and replacing it with structural fill for the failed slope sections (Section 5 and Section 15). Section 5 is in the geographic area of SDP-1603-02. Prior to the SDRC meeting, staff requested the applicant to reanalyze Section 5. In the additional global slope stability analysis submitted May 24, 2022, Section 5R resulted in higher than minimum required factor of safety 1.5 for the mitigated conditions, considering the undercut, the problematic soil, and replacement with structural fill. Therefore, the revised location of the Marlboro clay undercut/replacement shall be shown on the TCP2.

Erosion and Sediment Control: The site is located within a sediment total maximum daily load (TMDL) related to Tier II waters, as established by the state. Watersheds within a TMDL for sediment will typically require erosion and sediment control measures, above and beyond the standard treatments. The site also contains REF species, including fish located in the Collington Branch. Redundant erosion and sediment control measures are also required for protection of the rare, threatened, and endangered species. Additional information, as determined by DPIE and SCD, in their respective reviews for SWM and erosion and sediment control, may be required.

The County requires approval of an erosion and sediment control plan, prior to issuance of a grading permit. The TCP must reflect the ultimate LOD, not only for installation of permanent site infrastructure, but also for installation of all temporary infrastructure, including erosion and sediment control measures. Prior to certification of SDP-1603-02, a copy of the erosion and sediment control technical plan must be submitted, so that the ultimate LOD for the project can be verified and shown on the TCP2.

The REF on the subject property have been preserved and/or restored, to the fullest extent possible, based on the level of detail provided with SDP-1603-02 for one proposed impact for a stormwater outfall. No specimen trees are proposed for removal with this application. The Environmental Planning Section recommends approval of this SDP and TCP2-026-2021-02, with three conditions that have been included in the Recommendation section of this report.

PGCPB No. 2022-76 at 19-23. Because under *Zimmer* the District Council must apply the same standard of review a court applies to an agency decision, it is not the function of the District Council to retry or second-guess the Board. *Ginn v. Farley*, 43 Md. App. 229, 235-36, 403 A.2d 858, 862-63 (1979). Nor is it the function of the District Council to set aside a decision of an administrative agency merely because [it] might weight the evidence differently. *Crowder*, 43 Md.

App. 276 (1979) (explaining that a "court may not set aside a decision of an administrative agency merely because the court might weight the evidence differently"). There is no substitution of judgment for that of the Board in reviewing its findings of fact. *Cleanwater Linganore, Inc.*, 456 Md. 272, 293-94, 173 A.3d 549 (2017). The substantial evidence test is about *reasonableness, not rightness*." *Riverkeeper*, 447 Md. 88, 134 A.3d 892 (2016). (Emphasis added).[15]

When the record is reviewed as a whole, and in context of a multi-phase development, there is substantial evidence in the record to support the Board's finding that SDP-1603-02 *demonstrates* that the regulated environmental features are preserved and/or restored to the fullest extent possible in accordance with the requirement of [PGCC] § 24-130(b)(5).

VI. The Planning Board erred when it approved SDP-1603-02 because the record lacks substantial evidence to support a finding that SDP-1603-02 satisfies all of the applicable conditions imposed by previous applications. Appeal at 31.

This argument has no merit. The Board is not required to find that SDP-1603-02 satisfies all conditions imposed by previous applications. The Board may only deny SDP-1603-02 if it does not meet the requirements in PGCC § 27-528(a) and (b). PGCC § 27-528(c), *Zimmer Dev. Co.*, 444 Md. 490, 535, 120 A.3d 677, 704 (2015). Required findings for the Board to approve SDP-1603-02 are set forth in PGCC § 27-528. The Board made those findings. *See* discussion above.

VII. The Planning Board erred when it approved SDP-1603-02 because the proposed use, "a High-Cube Fulfillment Center Warehouse – Sortable," is not permitted on the Subject Property under the Prior Zoning Ordinance. Appeal at 34.

Warehouse and distribution facility are permitted uses at the subject property. The Zoning Ordinance defines a *use* as:

[15] It is irrelevant that Opposition thinks other alternatives may exist concerning PMA impacts. Appeal at 30. The standard of review here is whether the Board's decision is reasonable and supported by substantial evidence.

> "either the purpose for which a building, structure, or land is designed, arranged, intended, maintained, or occupied; or any activity, occupation, business, or operation carried on in, or on, a building, structure, or parcel of land."

PGCC § 27- 107.01(a)(244). A *warehouse* or warehouse unit is a *use* defined as:

> A building used for the storage of goods and materials in connection with the day-to-day operation of a wholesale or distribution business, or a business that is not located in the same building or on the same property as the warehouse unit. The storage of goods and materials as an accessory use to a business located on the same property is not a warehouse unit. A warehouse unit is sometimes referred to as a warehouse.

PGCC § 27-107.01(a)(256). A *distribution* facility is a *use* defined as:

> A facility to or from which a wholesaler or retailer ships merchandise, materials, or supplies for storage or distribution by that wholesaler or retailer to the sales outlets or service operations it supports; or a business whose functions are similar to those of the United States Postal Service, that is exclusively devoted to the receiving, sorting, sending, and delivery of letters, parcels, and other postal express matter.

PGCC § 27-107.01(a)(64.4). When the Board approved SDP-1603-02, it found that "[t]he subject SDP is the first phase of the larger National Capital Business Park project for a 90.11-acre site for a 3,428,985-square-foot *warehouse/distribution facility* in one building. PGCPB No. 2022-76 at 1-4 (Emphasis added). Therefore, the Board did not err when it approved SDP-1603-02 for a warehouse and distribution facility.

Opposition argues that according to the Board's approval of the Preliminary Plan of Subdivision (PPS) 4-21056 application for the site, the proposed 3.5 million square foot facility will be utilized as a "High-Cube Fulfillment Center Warehouse – Sortable." That is a mischaracterization of the Board's decision in the PPS application. "High-Cube Fulfillment Center Warehouse" is a *type* of *warehouse use* the Board considered as part of its transportation analysis to determine trip generation and whether *adequate public facilities* exist to serve the proposed development. But these issues are *not* before the District Council. Nor could they be. As a matter

of law, the District Council has no authority and, therefore, no jurisdiction, for immediate review of the Board's action on such matters when it approves a PPS application. *County Council of Prince George's County v. Dutcher*, 365 Md. 399, 780 A.2d 1137 (2001).

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

In response to this argument, the District Council adopts and incorporates by reference, as if fully restated here, its response to argument V. 6 above.

IX. The Planning Board erred when it approved TCP2-026-2021-02 without requiring the Applicant to demonstrate that it had exhausted on-site preservation methods before being approved for off-site preservation. Appeal at 39.

This argument has no merit. The Board made the following findings and conclusions:

> **Prince George's County Tree Canopy Coverage Ordinance:** Subtitle 25, Division 3, the Tree Canopy Coverage Ordinance, requires a minimum percentage of the site to be covered by tree canopy for any development projects that propose more than 5,000 square feet of gross floor area or disturbance and require a grading permit. Properties in the R-S Zone, to be developed per Section 27-515(b), Footnote 38, are required to provide a minimum of 10 percent (398,226 square feet) of the gross tract area in tree canopy coverage (TCC). This SDP includes a TCC schedule that shows approximately 11 percent (450,595 square feet) tree coverage of the property, in a combination of the existing non-woodland conservation area and landscape trees, that exceeds the requirements. However, the total site area on the TCC schedule is not consistent with that on the SDP. The applicant should address the inconsistency in site area, prior to certification, as conditioned herein. PGCPB. No. 2022-76 at 17.
>
> ***
>
> Prior to *certification* of the specific design plan (SDP), the applicant shall provide the following information and/or revise the site plan to provide the following:
>
> 1. b. Address the inconsistency in site area between the Tree Canopy Coverage schedule and that labeled on the SDP.

PGCPB No. 2022-76 at 25. In addition, because this argument overlaps with V. 5 and V. 6 above, the District Council adopts and incorporates by reference, as if fully restated here, its responses to

argument V. 5 and V. 6 above. When the record is reviewed as a whole, and in context of a multi-phase development, there is substantial evidence in the record to support the Board's approval of TCP2-026-2021-02.

X. The Planning Board erred when it approved SDP-1603-02 because it conflicts with the General Plan and the applicable Area Master Plan. Appeal at 40.

The Board did not err when it approved SDP-1603-02 because PGCC § 27-528 does not require compliance with the General Plan and the applicable area Master Plan. Opposition concedes this point. Appeal at 40. Yet, Opposition advances an argument that such plans are still relevant. They are not. In relevant part, the Board made the following finding:

> **Community Planning:** The Planning Board reviewed and adopts a memorandum dated May 27, 2022 (Lester to Zhang), incorporated herein by reference, which noted that, pursuant to Part 8, Division 4, Subdivision 2, of the prior Zoning Ordinance, master plan conformance is not required for this application.

PGCPB No. 2022-76 at 18. When the record is reviewed as a whole, and in context of a multi-phase development, there is substantial evidence in the record to support the Board's approval of SDP-1603-02 and TCP2-026-2021-02.

C. Conclusion

The Board's decision, as adopted in PGCPB No. 2022-76, to approve SDP-1603-02 and TCP2-026-2021-02, is AFFIRMED, subject to the following conditions:

1. Prior to certification of the specific design plan (SDP), the applicant shall provide the following information and/or revise the site plan to provide the following:

    a. Obtain final certificate approval of Zoning Map Amendment (Basic Plan) A-9968-03, Comprehensive Design Plan CDP-0505-02, and Preliminary Plan of Subdivision 4-21056, and provide a note listing the prior applicable approvals.

b. Address the inconsistency in site area between the Tree Canopy Coverage schedule and that labeled on the SDP.

c. Provide an approved revised stormwater management concept plan.

d. Revise the Type 2 tree conservation plan (TCP2), as follows:

(1) Show the revised location of the Marlboro clay undercut/replacement 1.5 safety factor line.

(2) Show the regulated environmental features on the plan as black lines, not grey.

(3) In the legend, add "temporary" to the line type for the temporary tree protection fence.

(4) Revise the total plant units in the Reforestation Planting Schedule for reforestation Area M from *"565"* to "685," and correct the total for this table.

(5) Correct Note 1 of the Standard Type 2 Tree Conservation Plan Notes to list the specific case number of "SDP-1603-02," and remove the other case numbers.

(6) Revise Sheet C-303, in accordance with the proposed stormwater outfall, to remove the proposed reforestation from the easement area and update the totals for the label in the charts and worksheet, accordingly.

(7) Revise Sheet C-309 to adjust Preservation Area 15 to follow the limits of disturbance, and update the total areas for the label in the charts and worksheet, accordingly.

(8) On Sheet C-310, revise the note regarding the proposed park facilities and Collington Branch Trail to reflect the current case number, "SDP-1603-02."

(9) Revise Sheet C-318 to add a label for MC-600 and add the hatch pattern to the legend.

(10) Revise Sheet C-319 to add a label for MC-600 and add the hatch pattern to the legend.

(11) Revise the worksheet and plans to reflect the grading, limits of disturbance, and reforestation proposed with the floodplain compensatory storage areas, for construction of Queens Court.

(12) Have the revised plan signed and dated by the qualified professional preparing the plan.

e. Submit a copy of the erosion and sediment control technical plan, so that the ultimate limits of disturbance can be verified and shown on the final Type 2 tree conservation plan.

f. Revise the parking and loading table and notes on the SDP, to be consistent.

g. Provide a sign face area calculation table on the SDP.

h. Clearly show and label the 10-foot-wide public utility easement along both sides of public rights-of-way, in accordance with the approved preliminary plan of subdivision, on all applicable plan sheets.

i. Provide bearings and distances for all parcel boundary lines and provide the parcel labels and areas on all applicable plan sheets.

j. Remove the public right-of-way for Warehouse Way and depict the parcel and road layout, in accordance with Preliminary Plan of Subdivision 4-21056.

k. Revise General Notes 2 and 4 on the cover sheet to list the correct zoning designation for the property.

l. Revise General Notes 11 and 12 to correctly identify the number of parcels included with this SDP (Parcels 4-6, in accordance with Preliminary Plan of Subdivision 4-21056).

m. Provide a phasing plan showing the US 301/Leeland Road and Prince's Boulevard/Queens Court intersection improvements phased with the development provided in the SDP. Any improvements generated by the SDP, as shown in the phasing plan, shall be provided at the time of building permit.

n. Provide a fee schedule with the total cost of the applicant's contribution to the US 301 County Improvement Program (CIP) improvements associated with the phased development of the SDP. In lieu of the fee payment, the applicant may provide physical improvements along US 301, within the limits of the US 301 CIP Project, consistent with the phasing plan that will be submitted by the applicant.

o. Provide a truck turning plan, with design vehicle classification. If the truck turning plans show inadequate circulation for truck maneuvers on-site, the applicant shall modify the site to provide sufficient circulation for safe truck movements. Any modifications to the site that are needed, based on the review of the truck turning plans, shall be accepted by the Transportation Planning Section.

p. Provide bikeway guide signs (Dl 1-1/Bike Route; D1-1, D1-2, and D1-3/Destination Plates; and R4-I I/Bicycles May Use Full Lane), in association with bicycle facilities on the subject site.

q. Provide long-term bicycle parking and associated facilities at an appropriate location adjacent to the building.

r. Provide notes on the SDP, in accordance with Condition 7 of Preliminary Plan of Subdivision 4-21056.

s. Resolve all discrepancies between the SDP and the building elevations, so that all plans are consistent with each other related to building square footage and parking schedules.

2. Prior to issuance of a use and occupancy permit representing over 40 percent of the square footage approved in Comprehensive Design Plan CDP-0505-02, or three years from issuance of the first building permit, whichever comes last, the park and Collington Branch Stream Valley Trail shall be complete. Notwithstanding the above, the developer may request additional time from the Prince George's County Department of Parks and Recreation (DPR) to complete the portions of the master plan trail requiring

approval of a permit from the Maryland Department of the Environment and/or the US Army Corps of Engineers. Provided the developer is making good-faith efforts to complete said trail portions, in a timely manner, DPR shall not unreasonably withhold its approval of such request and such extension shall be documented by an amendment to the recreational facilities agreement.

3. Within 20 months after issuance of the first building permit for National Capital Business Park, the applicant shall obtain all applicable permits for construction of the 20-acre park. Should the permits for the 20-acre park not be obtained after 20 months, the Maryland-National Capital Park and Planning Commission (M-NCPPC) reserves the right to deny the applicant's request for any further permits within National Capital Business Park. Notwithstanding, M-NCPPC's approval of permits shall not be unreasonably withheld, provided that the applicant is making good-faith efforts to obtain all necessary permits for construction of the 20-acre park, in a timely manner.

Ordered this 17th day of October, 2022, by the following vote:

In Favor: Council Members Burroughs, Glaros, Franklin, Harrison, Hawkins, Ivey Medlock, Streeter, Turner and Taveras.

Opposed:

Abstained:

Absent: Council Member Dernoga.

Vote: 10-0.

COUNTY COUNCIL OF PRINCE GEORGE'S COUNTY, MARYLAND, SITTING AS THE DISTRICT COUNCIL FOR THAT PART OF THE MARYLAND-WASHINGTON REGIONAL DISTRICT IN PRINCE GEORGE'S COUNTY, MARYLAND

By: _____
Calvin S. Hawkins, II, Chair

ATTEST:

_____
Donna J. Brown
Clerk of the Council

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

PETITION OF: ANTAWAN WILLIAMS, ET AL., Petitioners, FOR JUDICIAL REVIEW OF THE DECISION OF THE: COUNTY COUNCIL OF PRINCE GEORGE'S COUNTY, MARYLAND SITTING AS THE DISTRICT COUNCIL IN THE CASE OF: A-9968-03 (AN AMENDMENT TO AN EXISTING BASIC PLAN FOR NATIONAL CAPITOL BUSINESS PARK)	**CAL22-18255**

NCBP PROPERTY LLC'S ANSWERING MEMORANDUM IN OPPOSITION TO PETITIONERS' MEMORANDUM IN SUPPORT OF JUDICIAL REVIEW AND REQUEST FOR A HEARING

NCBP Property LLC ("National Capitol Business Park" or "NCBP" or "Applicant"), by and through undersigned counsel, files this Memorandum in Opposition to the Petition for Judicial Review and as reasons in furtherance thereof states as follows[1]:

INTRODUCTION

In 2020, in response to the COVID-19 health crisis which brought the economy in Prince George's County, Maryland to a screeching halt, legislators enacted County Bill 22-2020 ("CB-22") in an effort to help restore economic resurgence by permitting "uses" traditionally designated for Employment and Institutional Area (E-I-A) Zones, to be utilized on properties within Prince George's County that are zoned Residential Suburban (R-S) Development, under specified circumstances.

Significantly, the allowance of E-I-A uses in R-S Zones, especially for the R-S Zone where the Subject Property is situated, was neither new, nor inconsistent with the County Council's

[1] NCBP adopts and incorporates by reference the memorandum of Respondent County Council of Prince George's County, Sitting as the District Council ("District Council").

overarching plan for this community. Rather, for decades, this particular district had been zoned E-I-A and had always been envisioned by community planners as a business district that included warehouse/distribution uses. For a brief period of time, around 2006, when the housing bubble had met its peak, this district was rezoned to R-S/R-A (Residential-Agriculture). However, once that bubble burst, not a single residential unit was ever constructed on the Subject Property from 2006 through the enactment of CB-22 in 2020.

More importantly, and fundamental to this appeal, is that once CB-22 was enacted and went into effect on August 28, 2020, *nobody*, not even Petitioners in this case, ever filed a Petition for Judicial Review of CB-22, timely or not.

Some two years later, and only after multiple subsequent entitlements were implemented and relied upon, Petitioners now seek to strike at the heart of CB-22. Recognizing that their window of opportunity has been long-closed to challenge CB-22, Petitioners are using present-day entitlements to retroactively attack the final agency decision surrounding the enactment of CB-22.

Although the current case is captioned by Petitioners as a Petition for Judicial Review of A-9968-03, an enactment on May 16, 2022, it really is just a challenge to CB-22 itself. *See* Petr's Mem. at 9 ("This Court should reverse the District Council's approval of A-9968-03 *because CB-22-2020 violates the uniformity clause*[.]"); *id*. at 15 ("This Court should reverse the District Council's approval of A09968-03 *because CB-22-2020 is a special law*[.]"). (Emphasis added).

Similarly, in *Antawan Williams, et. al v. Planning Board of Prince George's County*, CAL 22-19650, although Petitioners purported to seek review of a preliminary plan of subdivision that was approved on June 2, 2022, they in fact are seeking review of CB-22, again arguing that "*CB-*

22-2020 is an illegal special law[.]" Petr's Mem. at 20; and that "*CB-22-2020…violates the uniformity clause*[.]" *Id*. at 26.[2]

The pattern is clear. With every subsequent approval, Petitioners will use judicial review to launch a collateral attack on CB-22. In zoning matters, particularly ones as large as the development in this case, the progression of development is an orderly and lengthy process with each phase of construction requiring different applications for different approvals. To allow Petitioners to now go back two years to revisit dozens of steps, previously unchallenged, would set a precedent that no final agency decision is ever really final.

STATEMENT OF FACTS

The Subject Property is on land that sits to the West of the Collington Center. R. 21. Collington Center is zoned E-I-A. R. 21.[3] The Subject Property, at the time CB-22 was enacted, was primarily on land that was zoned R-S, with small portions that were on land that were zoned R-A and Light Industrial (I-1).

From 1991 to 2005, the Zone in which the Subject Property is located was an E-I-A Zone that was approved as part of the 1991 Bowie-Collington-Mitchellville and Vicinity Master Plan and Sectional Map Amendment. R. 22, 495. The 1991 master plan text referred to this land area as the "Willowbrook Business Center." R. 495-96. This center had an approved gross floor ratio of 3,900,000-5,500,000 square feet of "light manufacturing, warehouse/distribution, ancillary office, and retail commercial" uses. R. 496.

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[2] Likewise, in *Antawan Williams, et. al v. National Capitol Business Park*, C-16-CV-22-000311, a purported challenge to a comprehensive design plan that was approved on September 19, 2022, and in *Antawan Williams, et. al v. National Capitol Business Park*, C-16-CB-22-000572, a purported challenge to a specific design plan that was approved on October 17, 2022, Petitioners will seek to argue in each of those cases that CB-22 is an illegal special law and that CB-22 violates the uniformity clause.

[3] References made to zoning categories relate to the Zoning Ordinance in effect prior to April 1, 2022. Although a new Zoning Ordinance went into effect on April 1, 2022, the prior ordinance was utilized in enacting CB-22, as well as A-9968-03.

In 2006, the Subject Property was rezoned from the E-I-A Zone as part of the 2006 Approved Master Plan and Sectional Map Amendment for Bowie and Vicinity. R. 494. In 2007, a comprehensive design plan was approved allowing 818 residential dwelling units. R. 22. In 2017, a specific design plan was approved, specifying the types of residential dwelling units for the Subject Property. R. 22.

In 2019, A-9968-01, Amendment of Basic Plan and Conditions, was approved by the District Council to increase the number of dwelling units, and percentage of single-family dwelling units. R. 23, 69.

After the onset of the COVID-19 pandemic, in June, 2020, Council Chairman Todd Turner proposed CB-22, Draft 2, the legislation underlying the issues in Petitioners' Memorandum. CB-22 is an ordinance that permits certain employment and institutional uses permitted by right in the E-I-A Zone to be permitted in the R-S Zone of Prince George's County, under certain specified circumstances, and it provides procedures for the amendment of approved Basic Plans to guide the development of such uses. R. 205. CB-22 sets forth a Table of Uses pursuant to the Prince George's County Code of Ordinances ("Zoning Ordinance" or "Z.O.") Section 27-515, which is located in Footnote 38 of the bill. R. 211. This table permits any use allowed in the E-I-A Zone on any parcel, a portion of a parcel, or an assemblage of adjacent land that:

(i) was rezoned from the E-I-A and R-A Zones to the I-1 and R-S Zones by a Sectional Map Amendment approved after January 1, 2006;

(ii) contains at least 400 acres and adjoins a railroad right-of-way; and

(iii) is adjacent to an existing employment park developed pursuant to the E-I-A requirements (through which there is street connectivity).

R. 211.

In sponsoring this bill, Chairman Turner, informed the District Council that

> [T]his is one of those rare situations where…a property that had always been previously zoned for that use [E-I-A], had been rezoned by prior councils to do potentially residential development and now wants to go back to where it used to be, so that's why this legislation is before you and I think it does fall into the opportunity for us not [*sic*] to potentially create an impact.

Supplement June 2, 2020 Hearing at 7.

Councilmember Derrick Davis agreed that this is "a very great situation" particularly in light of the fact that when CB-22 was being considered in June, 2020, it was during the "COVID crisis, a health pandemic, that creates an economic insurgence that will be a problem for us to deal with for years to come." Supplement June 2, 2020 Hearing at 8. On July 14, 2020, a Joint Public Hearing was conducted on CB-22, Draft 2, during which speakers from the public addressed the District Council in favor of the passage of the bill. Supplement July 14, 2020 Hearing at 4-5. A complete summary of the proceedings that led to the adoption of CB-22 will be discussed in more detail in the Argument section, *infra*.

At no time prior to the July 14, 2020 enactment of CB-22 did any individual, organization, or entity, make themselves a party of record to challenge the legality, constitutionality, or enforceability of the provisions of CB-22 and the ensuing amendments. CB-22 became effective on August 28, 2020 and no appeal was ever taken from the final agency decision.

Subsequent to the passage of CB-22 and to expiration of any statutory appeal periods to challenge CB-22, NCBP filed its application for an amendment of the Basic Plan requesting permission to utilize CB-22 on the Subject Property for warehouse/distribution, office, light industrial/manufacturing, and/or institutional uses up to 3.5 million sq. ft. R. 82. Assigned the number A-9968-02, and consistent with all applicable procedures, A-9968-02 was considered by the Subdivision & Development Review Committee ("SRDC"), the Planning Board Staff, the

Zoning Hearing Examiner ("ZHE"), and the District Council. On April 12, 2021, the District Council approved A-9968-02. R. 82. At no time prior to the approval of A09968-02 did anyone seek to become a party of record, or challenge the legality of the provisions of the Amendment. No appeal was taken from the enactment of A-9968-02.

On April 29, 2021, the Planning Board approved the Application to Amend the Comprehensive Design Plan, CDP-0505-01, in accordance with 3.5 million sq. ft. of E-I-A land uses approved in A09968-02. R. 69. No exceptions, appeals, or petitions for judicial review were taken from this approval.

On September 9, 2021, the Planning Board approved Preliminary Plan of Subdivision 4-20032 and Tree Conservation Plan TCP1-004-2021-01 which contemplated the subdivision of the Site into 36 parcels. Further, the Planning Board approved development of up to 3.5 million sq. ft. of employment and industrial uses as said uses satisfied all applicable tests for adequacy of public facilities set forth in the County's Subdivision Regulations. R. 74. No exceptions, appeals, or petitions for judicial review were taken from this approval.

On October 26, 2021, Applicant applied for A-9968-03, Basic Plan Amendment for the Subject Property, seeking to amend the maximum developable space allowed on the Subject Property, from 3.5 million sq. ft. to 5.5 million sq. ft, for which the employment and institutional uses approved in A-9968-02 could be utilized. R. 137. Importantly, A-9968-03 did not amend the *uses* that were approved in A-9968-02.

The intent of A-0068-03 was "to utilize the flexibility of the comprehensive design zone to develop an employment park that provides uses in a manner which will retain the dominant employment and institutional character of the area, and to improve the overall quality of employment and institutional centers in Prince George's County, in accordance with the purposes

of the E-I-A Zone." R. 496. The project would provide a significant tax base and employment opportunities, including thousands of well-paying jobs. R. 496.

The Subject Property could be developed with uses permitted in the E-I-A Zone as authorized, pursuant to Z.O. § 27-515(b) and CB-22. R. 496.

Like the A-9968-02 Basic Plan Amendment, the A-9968-03 Basic Plan Amendment proceeded in the same sequence as the earlier Basic Plan approval with an SRDC, a Planning Board hearing, a hearing before the ZHE, and ultimately hearings before the District Council. R. 44-45. The District Council approved A-9968-03 on May 16, 2022.

On June 21, 2022 Petitioners filed a Petition for Judicial Review of A-9968-03 only. Petitioners did not seek review of any other final agency decision in their Petition, and specifically, did not ask for review of CB-22, nor attach that final agency decision to their petition. Yet, on September 26, 2022, in Petitioners' Memorandum in Support of Petition for Judicial Review (of A-9968-C-03), Petitioners challenged CB-22 for the first time, arguing that "CB-22-2020 violates the uniformity clause of Section 22-201(b)(2)(i) of the Maryland Land Use Article" and that "CB-22-2020 is a special law in violation of Article III, Section 33 of the Maryland Constitution." *See* Petr's Mem. at 9, 15. Petitioners also argued that even if CB-22 is a valid text amendment, the use contemplated in A-9968-03 is not a permitted use.

ARGUMENTS

I. THIS COURT CANNOT CONSIDER THE MERITS OF WHETHER CB-22 IS A VIOLATION OF THE LAND USE ARTICLE OR A VIOLATION OF THE STATE CONSTITUTION BECAUSE THE CLAIM IS BARRED.

Petitioners are ostensibly before this Court on their Petition for Judicial Review pursuant to the Code of Maryland, Land Use Article, Title 22 ("L.U.") § 22-407. *See* Petition for Judicial Review at 2. Petitioners only filed for judicial review in the case of A-9968-C-03. *See* Petition for

Judicial Review at 1-2 and Exhibit A to Petition. However, Petitioners' Supporting Memorandum is wholly unrelated to the approval of A-9968-03. The entire memorandum is directed at contended deficiencies of CB-22, and not the application for the approval of A-9968-03. *See* Petr's Mem. at 9-23.

A. Petitioners cannot be permitted to utilize a Petition for Judicial Review of A-9968-03 to challenge the final agency decision of CB-22 where Petitioners forfeited any right to challenge CB-22 by failing to Petition for Judicial Review of CB-22 within 30 days of that final agency decision.

L.U. § 22-407(a)(1) provides that any person aggrieved by the decision of the District Council may seek "[j]udicial review of any final decision of the district council[.]" However, the statute further states that a "petition for judicial under this subsection ***shall be filed*** in the Circuit Court for Prince George's County ***within 30 days*** after service of ***the final decision by the district council***." L.U. § 22-407(a)(2). (Emphasis added).

1. CB-22 was a "final decision of the district council" that required the institution of a challenge within 30 days after service of its enactment.

It is undisputed that CB-22 was a "final decision of the district council" pursuant to L.U. § 22-407(a)(1). Petitioners concede that "CB-22-2020 took effect forty-five calendar days" after it was adopted by the District Council, and that the "use changes authorized by CB-22-2020 were codified in the ZO Section 27-515(b), footnote 38." *See* Petr's Mem. at 4.

Recently, the Court of Appeals addressed whether petitioners could attack a zoning matter that had been previously passed, through a subsequent challenge made after the 30-day window for the filing of a petition for judicial review had closed. In *Town of Upper Marlboro v. Prince George's County Council*, 480 Md. 167 (2022), the Court of Appeals held that the prior zoning matter could be attacked through a petition for judicial review of a subsequent zoning matter only where the prior zoning matter was <u>not</u> a "final agency decision." The Court held that the prior

zoning matter was a "resolution" and therefore, not a "final agency decision" from which a petition for judicial review could be filed. *Id*. at 184.

Town of Upper Marlboro makes clear that when there is a final action of the District Council pursuant to its zoning authority, L.U. § 22-407(a) governs the procedure for judicial review. *Id*. at 181. Unlike the initiating resolution in *Town of Upper Marlboro*, in the instant case, CB-22 was an Ordinance, a County Bill, which indisputably was a final decision by the District Council. Because Petitioners failed to challenge CB-22 within 30 days of its enactment, Petitioners forfeited any right to contest the validity of CB-22.

Maryland Rule 7-203 similarly states that "a petition for judicial review shall be filed within 30 days after the later of: (1) the date of the order or action of which review is sought…" It has been said by the Court of Special Appeals that "the time for initiating an action for review is viewed as a statute of limitations[.]" *Colao v. County Council of Prince George's County*, 109 Md. App. 431, 444 (1996), *aff'd*, 346 Md. 342 (1997). Thus, "discretion has been removed from the circuit court with respect to untimely filed petitions for judicial review of agency decisions. Accordingly, the petition must be filed within the thirty-day filing period in order for the circuit court to have authority to hear the appeal." *Id*.

Colao provides a pertinent framework for analysis of the present case. In *Colao*, the petitioners sought to appeal the approval of two related zoning ordinances pertaining to two related parcels of land, but inadvertently left one of the two ordinances out of their appeal. 109 Md. App. at 440. The two ordinances in *Colao* were two administratively distinct *final* agency actions. *Id*. at 450-51. The Court determined that the circuit court had authority to review a timely filed petition for judicial review of A-9901, but that it lacked authority to review the Council's approval of A-9900 where petitioners failed to timely petition for judicial review of A-9901 and failed to ask for

review of the approval of A-9900 in their petition for judicial review of A-9901. *Id.* at 449, 452. In so doing, the Court determined that although the rezoning applications procedurally travelled together and were contemporaneously examined by the various public bodies, they were "unquestionably" two distinct administrative actions, with two distinct approvals. *Id*. at 450.

In the present case, Petitioners filed for Petition for Judicial Review of A-9968-03. They never sought to incorporate by reference the fact that they were attacking the final decision regarding CB-22. Rather, their petition merely stated that they "petition for judicial review of the District Council's Notice of Final Decision regarding A-9968-C-03 National Capitol Business Park." *See* Petition at p. 2. Similarly, the caption of the case was stated as a Petition for Judicial Review of the Decision of the County Council of Prince George's County, Maryland Sitting as the District Council "In the Case of: A-9968-0C-03 National Capitol Business Park." *See* Petition at p. 1. Petitioners did not include the agency case number for CB-22. A-9968-03 and CB-22 were "unquestionably" two distinct administrative actions, with two distinct approvals.

CB-22 was a "final agency decision" that should have been attacked pursuant to L.U. § 22-407(a) within thirty days of service of its enactment. "[W]here the legislature [or in the case of a rule, this Court] has not expressly provided for an exception in a statute of limitations, the court will not allow any implied or equitable exception to be engrafted upon it." *Colao*, 346 Md. at 362 (internal citation omitted). "A late filing, beyond the period of limitations, of a petition for judicial review cannot be sustained[.]" *Id*. at 363. Importantly, "neither can a petition for judicial review of one agency decision be amended after the running of limitations to seek review of an entirely separate decision." *Id*.

2. Petitioners' arguments about the invalidity of CB-22, are exactly the types of arguments that should have been raised in a timely petition for judicial review of CB-22.

If there was any doubt remaining as to whether the types of claims Petitioners now make would have been properly raised in a timely filed petition for judicial review, it is clear beyond debate that the Land Use Article vests with the Circuit Court, upon a petition for judicial review, the right to review the District Council's action that is: (i) unconstitutional; (ii) in excess of the statutory authority or jurisdiction of the district council; (iii) made on unlawful procedure; (iv) affected by other error of law; (v) unsupported by competent, material, and substantial evidence in view of the entire record as submitted; or (vi) arbitrary or capricious. L.U. § 22-407(e)(3).

Because Petitioners are clearly challenging CB-22's constitutionality as a whole, and not simply as applied, it was incumbent upon them to make timely arguments. A timely petition for judicial review of CB-22 would have permitted the court to consider the very arguments that Petitioners now allege, *i.e.*, that CB-22 was enacted "in excess of the statutory or jurisdiction of the district council," L.U. § 22-407(e)(3)(ii), because it violated the uniformity clause of L.U. § 22-201(b)(2)(i); and that CB-22 is "unconstitutional," L.U. § 22-407(e)(3)(i), because it violated the Maryland State Constitution.

Maryland appellate courts have routinely held that where procedures set forth by the Maryland-Washington Regional District Act (RDA) are not complied with, petitioners cannot pursue collateral claims through other means.[4]

[4] *See, e.g., Prince George's County v. Ray's Used Cars*, 398 Md. 632 (2007) (concluding that the petitioners had to exhaust "the adjudicatory administrative and judicial review procedures under the [RDA]" before seeking other relief for a claim against a final agency decision of the District Council); *County Council of Prince George's County v. Chaney*, 454 Md. 514 (2017) (reviewing the importance of following the protocols of L.U. § 22-407(a)(1) to timely challenge a final agency decision of the District Council as set forth by the RDA); *Maryland Reclamation Associates v. Harford County (MRA II)*, 342 Md. 476, 493 (1996) ("Where a legislature has provided an administrative remedy…, even without specifying that the administrative remedy is primary or exclusive, this Court has 'ordinarily construed the pertinent [legislative] enactments to require that the administrative remedy be first invoked and followed' before resort to the courts.").

L.U. § 22-407 expressly lists the procedures that must be followed to challenge an agency's final decision, especially where there is a contention that the enactment of a piece of legislation is a violation of the State Constitution, or the failure to follow the dictates of the Land Use Article. Petitioners failed to timely challenge CB-22. The appellate courts have strongly discouraged circuit courts from circumventing the procedure that must be invoked.

B. Petitioners failed to exhaust administrative remedies and failed to preserve arguments.

NCBP adopts and incorporates the arguments made by the District Council regarding Petitioners failure to exhaust administrative remedies and failure to preserve arguments.

C. Petitioners' claims are barred by the Doctrine of Laches.

NCBP adopts and incorporates the arguments made by the District Council regarding Petitioners' claims being barred by the Doctrine of Laches. There was an unreasonable delay in the assertion of the rights of Petitioners and that delay resulted in prejudice to NCBP. *Frederick Rd. Ltd. P'ship v. Brown & Sturm*, 360 Md. 76, 117 (2000). Petitioners had knowledge, or the means of knowledge, of the facts which created this cause of action. *Parker v. Board of Election Sup'rs*, 230 Md. 126, 131 (1962).

In this case, Petitioners never challenged any of the approvals before their Petition for Judicial Review of A-9968-03, nor did they participate in any of the administrative hearings which led up to the approval of A-9968-03. They could have participated at hearings before the ZHE and the District Council had Petitioners wanted to make the claim that said uses were not a permitted use under the Zoning Ordinance, or that a text amendment was unconstitutional, in violation of the uniformity provision, or otherwise. Instead, they sat idly, allowing the ZHE to make recommendations which then went unchallenged by any appeal to the District Council, an avenue Petitioners failed to avail themselves of. *See* L.U. § 25-212 ("In Prince George's County, a person

may make a request to the district council for the review of a decision of the zoning hearing examiner or the county planning board if: (1) the person is an aggrieved person that appeared at the hearing before the zoning hearing examiner or county planning board[.]").

In that process, NCBP made forward progress pursuant to entitlements which are cloaked with a presumption of validity. Maryland courts "afford a strong presumption of validity and correctness to comprehensive zoning and rezoning legislation." *Anderson House, LLC v. Mayor & City Council of Rockville*, 402 Md. 689, 723 (2008); *Bazzarre v. County Council of Prince George's County Maryland*, 2017 WL 2334472 (2017). The time, money, and effort that it took to clear and grade hundreds of acres of property was no small feat. Additionally, NCBP has entered contracts with tenants on the good faith reliance of the valid legislation.

II. THE DISTRICT COUNCIL DID NOT ERR IN APPROVING A-9968-03.

A. Standard of Review

Judicial review of a legislative text amendment is authorized by § 22-407 of the Land Use Article. Legislative enactments, like CB-22, are subject to "assessing whether the agency was acting within its legal boundaries," rather than considering "whether the agency's decision was arbitrary, capricious or unsupported by substantial evidence." *Town of Upper Marlboro v. Prince George's Cnty. Council*, 480 Md. 167, 180-81 (2022) (internal citations omitted); *Dep't of Natural Res. v. Linchester Sand & Gravel Corp.*, 274 Md. 211, 224 (1975) ("[T]he judiciary's scope of review of that particular action is limited to assessing whether the agency was acting within its legal boundaries"); *Talbot Cnty. V. Miles Point Prop., LLC*, 415 Md. 372, 393 (2010) (the standard of review of a legislative action is "extremely narrow"). *See also Md. Overpak Corp. v. Mayor of Baltimore*, 395 Md. 16, 33, 35 (2006) (stating that a "text amendment to a zoning ordinance or regulation" is a legislative action, which is "subject to very limited review by the courts").

In Maryland, it is well-established that text amendments are legislative actions which enjoy the presumption of correctness. A text amendment is "treated as legislative action; and it is the legislative nature of a zoning enactment that gives rise to the presumption that it is valid." *MBC Realty*, *LLC v. Mayor and City Council of Baltimore*, 192 Md. App. 218, 235 (2010). *See also Crown Cent. Petroleum Corp. v. Baltimore*, 258 Md. 82, 85 (1970) (there is a "heavy burden of overcoming the presumption of constitutionality of legislative action").

B. Presumption of Validity and Legality of CB-22.

The RDA gives the District Council broad authority and discretion to enact text amendments, among other land use controls. L.U. § 22-104. Specifically, § 22-104 gives the District Council the "[a]uthority to adopt and amend zoning law…in accordance with the requirements of this division as to the portion of the regional district located in the respective county…[b]y local law [to] adopt and amend the text of the zoning law for that county" for the purposes of utilizing "[t]he local law" to "regulate…the uses of land[.]"

A text amendment, like CB-22, is a legislative amendment to the Zoning Ordinance. As such, it carries the same presumption of validity as original zoning and comprehensive zoning. *See Md. Overpak Corp. v. Mayor of Baltimore*, 395 Md. 16 (2006).

C. CB-22 does not violate the uniformity clause of L.U. § 22-201(b)(2)(i).

Petitioners argue that CB-22 violates the rarely-used uniformity requirement of the Maryland Land Use Article. Petitioners rely almost entirely on the recent Court of Special Appeals opinion, *In the Matter of Concerned Citizens of PG County District 4, et al.*, 255 Md. App. 106 (2022), which was decided on June 29, 2022. The District Council and the owner of the property at issue in that matter both filed Petitions for Writ of Certiorari which were granted by the Court of Appeals on October 21, 2022 to reconsider the intermediate court's determination that the

uniformity clause was violated. Therefore, the analysis in *Concerned Citizens* by the Court of Special Appeals is of limited utility here.

The RDA contains uniformity provisions in § 22-201 of the Land Use Article that state in relevant part that "the district council may regulate…the uses of land" as long as zoning laws are "uniform for each class or kind of development throughout a district or zone" but that the "zoning laws in one district may differ from those in other districts or zones."

CB-22 is a direct result of the authority granted to the District Council by the RDA. Footnote 38 of CB-22 is a text amendment to the table of *uses* in the R-S/R-A Zones. Of critical import is the fact that the text amendment *did not rezone* any property in the County.

1. CB-22 does not have "invidious distinction" but rather "is reasonable and based upon the public policy to be served."[5]

Courts "have been somewhat reluctant to elaborate on or supply judicial gloss to the meaning of the uniformity requirement[.]" *Anderson House, LLC*, 402 Md. at 717. What is clear, however, is that the uniformity provision is only meant to prohibit "invidious distinctions and discriminations[.]" *Montgomery Cnty. V. Woodward & Lothrop, Inc.*, 280 Md. 686, 719 (1977). Significantly, Maryland Courts have recognized that the uniformity clause "does not prohibit classifications within a district, *so long as it is reasonable and based upon the public policy to be served*." *Id*. at 720 (emphasis added). The uniformity clause legally allows the District Council to determine the "optional method of development" because "the legislative purpose of encouraging land assembly to permit cohesive development…provides a reasonable basis for the classification." *Id*. at 721.

Applying the holdings and rationales from the foregoing cases, to the facts in the instant matter, there was a legitimate and reasonable public purpose in enacting CB-22, and its restrictions,

[5] *Montgomery Cnty. V. Woodward & Lothrop, Inc.*, 280 Md. 686, 720 (1977).

to encourage economic surgency in a district that had long-standing aspirations to be an industrial district. The "optional method of development" for this district had always been cohesive development consistent with uses in an E-I-A Zone, specifically permitting that of warehouse/distribution.

As discussed in the Statement of Facts, *supra*, from 1991 to 2005, the Subject Property was located in an E-I-A Zone that was approved as part of the Bowie-Collington-Mitchellville and Vicinity Master Plan and Sectional Map Amendment, which allowed 3,900,000 to 5,500,000 sq. ft. of "light manufacturing, warehouse/distribution" like the total allotted by the enactment of A-9968-03. R. 22, 496.

Although the district was rezoned in 2006 from E-I-A to R-S through the 2006 Bowie and Vicinity Master Plan and SMA, not a single dwelling unit, nor any building, was ever constructed on the Subject Property. The ebb and flow of demands for particular land uses in the County was reflected by the land that was developed, not by the land that remained undeveloped. The unimaginable events of 2020 and their impact on the economy resulted in the District Council's approval of CB-22, which in turn lead to the approval of A-9968-02, and ultimately the approval of A-9968-03. The public policy to be served by these amendments was indeed considered before the text amendments were effectuated.

a. The CB-22 Record

During the District Council Meeting on June 2, 2020, in which proposed CB-22 was considered, the sponsor of the bill, Chairperson Turner, informed the District Council that

> [T]his is one of those rare situations where…a property that had always been previously zoned for that use [E-I-A], had been rezoned by prior councils to do potentially residential development and now wants to go back to where it used to be, so that's why this legislation is before you and I think it does fall into the opportunity for us not [*sic*] to potentially create an impact.

Supplement June 2, 2020 Hearing at 7.

Chairperson Turner was aware that "several colleagues have raised this" to make "sure that we're able to diversify the economy in Prince George's County and this would be a situation, if enacted, that would give us that opportunity to do more commercial and office property in an area that already has that as part of its development character." Supplement June 2, 2020 Hearing at 7.

Councilmember Davis agreed that this is "a very great situation" particularly in light of the fact that when CB-22 was being considered in June, 2020, it was during the "COVID crisis, a health pandemic, that creates an economic insurgence that will be a problem for us to deal with for years to come." Supplement June 2, 2020 Hearing at 8. Allowing for E-I-A uses in this R-S Zone was contemplated "a couple of times" prior but it was the economic crisis of the pandemic that inspired the "legislative branch of government…to be flexible enough to try to give a chance to the County to increase its economic viability, its economic development, (indiscernible) develop jobs and do all of those things[.]" Supplement June 2, 2020 Hearing at 8. It was with those aspirations that the District Council has "been very responsible in contemplating this piece of legislation[.]" Supplement June 2, 2020 Hearing at 8.

The District Council was not unaware of concerns from the Park and Planning Commission and the Office of Law that a master plan amendment is the preferred method used to rezone a property. Supplement June 2, 2020 Hearing at 9-10. Indeed, Councilmember Davis said "[w]e contemplated it." Supplement June 2, 2020 Hearing at 10.

However, Chairperson Turner noted that actual rezoning through a master plan may not occur for a couple of years and that the County would not benefit from waiting a substantial period of time to accomplish what it could begin to accomplish at a time during which the County was reeling from economic distress. Supplement June 2, 2020 Hearing at 9-10. Thus, the motion carried

9-2 after the first reading, in favor of enacting CB-22, Draft 2. Supplement June 2, 2020 Hearing at 12.

On June 9, 2020, a second reading of CB-22, Draft 2 was conducted. Supplement June 9, 2020 Hearing at 4. During that hearing, Staff Attorney Karen Zavakos recapped that the bill sponsor, "informed the committee that this legislation is to facilitate the development of property in his district with employment, commercial and office uses as the original zoning in the area was intended in[.]" Supplement June 9, 2020 Hearing at 4. The legislation stood introduced and subject to public hearing. Supplement June 9, 2020 Hearing at 5.

On July 14, 2020, a Joint Public Hearing was conducted on CB-22, Draft 2. During that hearing, speakers from the public addressed the District Council in favor of the passage of the bill.

First, Thomas Graham, a 13-year resident of Oak Creek Community near Oak Grove Road and Leeland Road, spoke in support of the bill because: (i) there did not appear to be a negative impact on traffic flow; (ii) the project would bring over 3,500 jobs to the community, thereby providing business and contracting opportunities; and (iii) the project would generate an additional $21 million in tax revenue benefits for all Prince George's residents – noting that opportunities of this nature are few and far between. Supplement July 14, 2020 Hearing at 4-5.

Second, Arthur Horne, Esq., on behalf of the owners of Willowbrook, the Subject Property, testified that this property is one that could be impacted by the legislation. Supplement July 14, 2020 Hearing at 6. Mr. Horne recounted the history of zones and uses in this particular district. Prior to 2006, Willowbrook was zoned E-I-A by the County Council and received approvals for development of an employment and industrial park to be known as the Willowbrook Business Park. Supplement July 14, 2020 Hearing at 6. The Willowbrook Business Park was previously intended to be Phase II of the Collington Business Center, also zoned E-I-A. Supplement July 14,

2020 Hearing at 6. To date, the Collington Business Center is substantially developed and approximately 96% leased up. Supplement July 14, 2020 Hearing at 6. This parcel of land, where Willowbrook Business Park is located, has been continuously discussed as property intended to be part of the Collington Business Center, and no longer is the preferred use for residences. Supplement July 14, 2020 Hearing at 7.

Mr. Horne recounted information he received through public outreach to the communities surrounding this Site, including civic and homeowners' associations. Supplement July 14, 2020 Hearing at 7. These associations expressed concerns about overcrowding in public schools, a desire to increase job opportunities for residents, to increase the County's tax base by providing more commercial and industrial uses, and to alleviate traffic on neighborhood streets. Supplement July 14, 2020 Hearing at 7. Mr. Horne testified that by committing E-I-A uses in an R-S Zone on the Willowbrook property, these stated desires can be accomplished.

In addition to this testimony, Chairman Turner also accepted letters into the record, and concluded the public hearing. Supplement July 14, 2020 Hearing at 8-9. Those letters included letters from Southern Christian Leadership Conference and the NAACP for Prince George's County. *Id*. A copy of those letters are attached as Exhibits A and B, respectively.[6] Both organizations expressed their support of CB-22 on behalf of their constituents, primarily because the bill could create thousands of jobs to benefit the local county residents, including efforts to engage minorities in the construction and operations of the projected businesses. *See* Exhibits A and B.

[6] A motion to supplement the record to include Exhibits A and B will be filed.

b. The A-9968-03 Record

The history of the use of this district for E-I-A purposes was also fully considered during the proceedings leading up to the enactment of A-9968-03. For instance, before the ZHE there was a presentation of information about "the past planning and zoning history of the subject property for further context" including that the 1991 Master Plan and SMA zoned this district E-I-A and specifically allowed for 3,900,000 to 5,500,000 sq. ft. of "light manufacturing, warehouse/distribution and ancillary office and retail commercial." R. 27. "Thus, the effect of CB-22-2020 [and A-9968-02 and A-996803] can be seen as the District Council reinstating much of the planning intent of the 1991 Master Plan for the Willowbrook site, which in turn had been carrying forward planning ideas from the early 1970s." R. 27.

c. Petitioners' queries are answered by the record.

Petitioners averred that "the restrictions in CB-22-2020 are not reasonably related to any public policy" where it was enacted for "the purpose of permitting certain employment and institutional uses permitted by right in the E-I-A [ ] Zone to be permitted in the R-S [ ] Zone of Prince George's County, under certain specified circumstances." Petr's Mem. at 13 (citing R. 205). Petitioners' contentions are absolutely baseless as Petitioners patently overlooked the history of the enactments, as outlined in the record.

Petitioners asked "why must E-I-A uses be limited to R-S zoned properties that were 'rezoned from the E-I-A and R-A Zones to the I-1 and R-S Zones by a Sectional Map Amendment' specifically approved after January 1, 2006?" Petr's Mem. at 13-14. As the record clearly demonstrates, the answer is that permitting E-I-A uses in a zone that was previously zoned E-I-A comports with the overarching plan by the District Council over the course of decades for this area.

The record evidences that there is a public policy reason to "carry[ ] forward planning ideas from the early 1970s." R. 27.

Moreover, the reasons for allowing E-I-A uses to be utilized in 2020, comported with combatting the public health crisis that decimated Prince George's County and crippled its economic development. Those reasons were fully stated and supported by the record. *See* Supplement June 2, 2022 Hearing at p. 8 (CB-22 was contemplated during the "COVID crisis, a health pandemic, that creates an economic insurgence that will be a problem for us to deal with for years to come."); *Id*. (Allowing for EIA uses in this RS Zone was contemplated "a couple of times" prior but it was the economic crisis of the pandemic that inspired the "legislative branch of government…to be flexible enough to try to give a chance to the County to increase its economic viability, its economic development, (indiscernible) develop jobs and do all of those things[.]").

To answer Petitioners other questions, it is also entirely reasonable that the legislation would require the R-S zoned property to be adjacent to an existing E-I-A employment park because it provides for continuity of uses and types of businesses within close proximity to one another. Similarly, the requirement that "street connectivity [be] through an adjacent employment park" helps to ensure that E-I-A businesses and their accompanying traffic, will flow through other business and E-I-A developments.

Lastly, there is nothing unusual regarding the requirement in CB-22 that a particular use be conditioned upon proximity to rail facilities. The Prince George's County Zoning Ordinance alone identifies numerous zoning categories that permit certain uses in various zones, based, in part, on the property's proximity to rail facilities.[7]

[7] *See, e.g.* County Code § 27-441 (b), footnote 131; § 27-441 (b), footnote 138; § 27-441 (b), footnote 141; § 27-461 (b), footnote 25; § 27-461 (b), footnote 44; § 27-461 (b), footnote 50; § 27-461 (b), footnote 67; § 27-461 (b), footnote 70; § 27-461 (b), footnote 87; § 27-473 (b), footnote 34; § 27-473 (b), footnote 45; § 27-473 (b), footnote 50; § 27-473 (b), footnote 66; § 27-515 (b), footnote 29.

The District Council reviewed each of the recommendations made by the ZHE which set forth the criteria in Z.O. § 27-102(a) which must be satisfied prior to the approval of A-9968-03. R. 26-37. [8]

Therefore, it was both legal and reasonable for the District Council to enact legislation that provided "optional methods of development" that facilitated the development of a business park in this district. The District Council's action of approving CB-22 was reasonable and rooted in a sound public policy of protecting the citizens of Prince George's County during a health and economic crisis. Moreover, the District Council's adoption of CB-22 advances all of the reasons set forth in the general purposes section of Z.O. § 27-102(a), as found by the Zoning Hearing Examiner, and adopted by the District Council in the record. *See* R. 20-50. CB-22 promotes these same general purposes with a particular emphasis on job creation and protection of the County's commercial tax base by placing uses approved in A-9968-03 immediately adjacent to similar uses in an existing employment center. As such, approval of CB-22 is related to promotion of sound public policy.

The motives and wisdom of the legislative body in adopting zoning regulations enjoy a strong presumption of correctness and validity. *See MBC Realty*, 192 Md. App. at 235.

[8] This criteria establishes the broad public policy objectives of the ordinance and include, in part, (1) "to protect and promote the health, safety, morals, comfort, convenience, and welfare of the present and future inhabitants of the County;" (2) "To implement the General Plan, Area Master Plans, and Functional Master Plans;"…(4) "To guide the orderly growth and development of the County, while recognizing the needs of agriculture, housing, industry, and business;"…(6) "To promote the most beneficial relationship between the uses of land and building and protect landowners from adverse impacts of adjoining development"; (7) "To protect the County from fire, flood, panic, and other dangers;"…(9) "To encourage economic development activities that provide desirable employment and a broad, protected tax base;"… and (12) "To insure the social and economic stability of all parts of the County." Z.O. § 27-102(a).

2. The terminology of CB-22 demonstrates that it is applicable to any property similarly situated in the entire regional district.

CB-22 does not violate the "uniformity clause" set forth in L.U. § 22-201(b)(2)(i) of the RDA and is not otherwise illegal because it applies equally to all applicable properties in the R-S/R-A Zones. In determining the uniformity requirement, "[t]*he focus is upon the terminology of the ordinance, rather than upon its application*." *Woodward & Lothrop,* 280 Md. at 720 (emphasis added). *See also Anderson House, LLC*, 402 Md. 689; *Siena Corp. v. Mayor & Rockville Md.*, 873 F.3d 456 (4th Cir. 2017).[9]

The Court of Appeals recognized that "uniformly applicable regulations that produce disparate results in application do not violate the uniformity requirement." *Anderson House, LLC*, 402 Md. at 716-17. The question is whether "a zoning ordinance singles out a property or properties *for different treatment than others similarly situated*." *Id.* at 714.

Petitioners have not alleged anywhere in their memorandum that there is a "similarly situated" property that is being given "different treatment." *Id*. Rather, Petitioners allege that there are no other properties that are similarly situated that can benefit from this legislation. *See* Petr's Mem. at 10 ("[D]ue to the extensive limitations created by CB-22-2020, only one property in the entire county can take advantage of the benefits of CB-22-2020.") That is a completely different inquiry, and not the basis for finding of a uniformity clause violation.

Rather, if the classification uniformly applies to all qualifying properties using the exact same terminology, which CB-22 does, regardless of whether other qualifying properties currently exist, then there is no uniformity violation. *Woodward & Lothrop*, 280 Md. at 720.

[9] Just as in *Siena Corp.*, the instant judicial review "boils down to its disagreement with the Council's action. '[N]othing is more common in zoning disputes than selfish opposition to zoning changes.'" *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988).

Only if the legislation permits a similarly situated parcel to receive the benefits of the legislation, but does not permit another similarly situated parcel to receive those same benefits would there then be a uniformity violation. *See Anderson House*, 402 Md. at 716, n.21 (collecting cases finding that the uniformity requirement was violated by a zoning ordinance that singled out one property to permit a use that was forbidden for all other similarly classified parcels).

CB-22 does not violate the uniformity clause because the identifying terminology in CB-22 applies to all present *and future prospective properties* in the R-A/R-S Zone to utilize E-I-A uses, so long as those properties qualify under the criteria set forth in CB-22.

For example, there is property to the North of the Subject Property that prior to April 1, 2022, was classified in the E-I-A Zone and is adjacent to numerous parcels that were zoned R-A. The majority of this property is being developed as part of a mixed-use project known as South Lake. The E-I-A zoned portions of South Lake, coupled with adjacent R-A zoned parcels to the East would total more than 400 acres (the "South Lake Assemblage"). This potential South Lake Assemblage would be in conformance with the subcategories in CB-22 as it abuts a rail line (the same rail line abutting the Subject Property), totals more than 400 acres, and adjoins an existing employment center developed pursuant to the E-I-A Zone (the same employment center adjoining the Subject Property). At the time of approval of CB-22, it was certainly possible that the next Sectional Map Amendment could have rezoned the South Lake Assemblage from the E-I-A and R-A zones to the R-S, R-A, and I-1 zone, thus making the provisions of CB-22 fully applicable.

3. It is not a violation of the uniformity clause that a text amendment may be "site-specific."

CB-22 does not mention the Subject Property by name or address. However, even if CB-22 did mention Applicant's property by name or address, the United States Court of Appeals for the Fourth Circuit stated in *Siena Corp.*, determined that while "a single facility may provide the

impetus for a general zoning enactment, [ ] that does not mean the enactment is aimed solely at that facility." 873 F.3d at 464.

Jurisprudence over uniformity generally stems from the fact legislation is drafted with a specific property in mind. However, courts have upheld text amendments and legislative enactments that apply to specific property where it has been determined that the legislation is a permissible method that serves a public purpose, like the public purpose described *supra*.

D. CB-22 is not a special law that violated Article III, Section 33 of the Maryland Constitution.

Many of the arguments in this section overlap with the factors to be considered in the uniformity section, *supra*. Therefore, NCBP adopts and incorporates all of the previous arguments, and addresses some distinct points relevant to this Constitutional argument.

1. CB-22 is not a special law, it is a public local law.

As a threshold matter, CB-22 is a public local law, not a special law, therefore it is not subject to the provisions of Md. Const. art. III, § 33. *County Comm'rs of Dorchester v. Meekins*, 50 Md. 28 (1878). A public local law is a statute dealing with some matter of governmental administration *local in character*, in which persons outside of that locality have no direct interest. *Potomac Sand & Gravel Co. v. Governor of Md.*, 266 Md. 358 (1972), *cert. denied*, 409 U.S. 1040 (1972); LU § 22-104(a)(1) (The District Council may, *by local law, adopt and amend the text of the zoning law and by local law adopt and amend any map accompanying the text of the zoning law*); LU § 22-206(a)(1) (The District Council *may amend its zoning laws*, including any maps, *in accordance with procedures established in its zoning laws*) (Emphasis added). To the extent that CB-22 is subject to the provisions of MD. Const. art. III, § 33, it is not a special law.

2. CB-22 is not an impermissible special law.

Second, even if CB-22 were subject to constitutional scrutiny as a "special law," Petitioners have failed to establish that ***all six*** elements, required to find a special law impermissible, exist.

A special law is one that relates to particular persons or things of a class, as distinguished from a general law which applies to all persons or things of a class." *Cnty. Comm'rs of Prince George's Cnty. V. Baltimore & O.R. Co.*, 113 Md. 179, 183 (1910). To determine whether CB-22 is an impermissible special law, this Court must not only consider, but make a finding that Petitioners have proven ***all six*** factors.[10] *Cities Service Co. v. Governor, Maryland*, 290 Md. 553 (1981).

In considering these factors, the Court is to "begin with the presumption that the legislative enactment is constitutional." *CCI Entm't, LLC v. State*, 215 Md. App. 359, 399 (2013). The party challenging the legislative enactment bears the burden of demonstrating that the validly enacted law is unconstitutional. *Id*.

a. CB-22 is intended to benefit an entire class of properties that satisfy certain criteria in the R-S Zone, not particular members of a class.

Petitioners have misread the substance and practical effect of CB-22 and allege that it singles out Applicant for special treatment. Petr's Mem. at 18. CB-22 does not identify particular individuals or entities. CB-22 does not identify a specific address. CB-22 applies with equal force to *all properties* in an R-S Zone meeting the criteria listed in CB-22. That includes current

[10] The factors include: (1) that the underlying purpose of the legislative enactment "was actually intended to benefit or burden a particular member or members of a class instead of an entire class;" (2) that "particular individuals or entities are identified in the statute;" (3) that "[t]he substance and 'practical effect' of an enactment" is to benefit a particular individual or entity; (4) that "a particular individual or business sought and received special advantages from the Legislature, or [ ] other similar individuals or businesses were discriminated against by the legislation;" (5) that there was no "public need and public interest underlying the enactment" and "the general law to serve the public need or public interest" was adequate to address the need; **and** (6) that the legislative enactment is "arbitrary and without any reasonable basis[.]"*Cities Service Co.*, 290 Md. 553.

properties, as well as future potential properties, such as the South Lake Assemblage described *supra*, Section II.C.2.

In *Reyes v. Prince George's Cnty.*, 281 Md. 279 (1977), the Court of Appeals ruled that even though the legislative enactment was alleged to have been enacted for the sole benefit of Washington National Arena in Prince George's County as it was the only sports stadium or arena in the county at the time of the legislative enactment, the enactment would provide future benefits as it would apply to the acquisition of financing of other sports facilities in Prince George's County in the future. *Id*. at 302-06.[11] Courts have held that certain enactments are not considered special laws even if they applied only to a single entity. *Green v. N.B.S., Inc.*, 409 Md. 528, 544-45 (2009) ("Such laws are permissible where unique circumstances render the entity a class unto itself, or where the enactment, although it affects only one entity, would apply to other similar entities in the future.").

b. NCBP did not receive special advantages from the District Council.

Petitioners allege that "Applicant sought out and received special advantages from the District Council." Petr's Mem. at 18. It is accurate that Applicant, through counsel, applied for CB-22. But it is a misrepresentation of the record that Applicant "sought out and received special advantages from the District Council" that would not have been available to others. Petitioners failed to identify a single "special advantage."

[11] *See also Potomac Sand & Gravel v. Governor*, 266 Md. 358 (1972) (upholding an act of the General Assembly making it a criminal offense to dredge for sand, gravel, or aggregate in the tidal waters or marshlands of Charles County, even though the Potomac Sand & Gravel was the only party at the time engaged in dredging in Charles County); *Md. Dep't of the Env't v. Days Cove Reclamation Co.*, 200 Md. App. 256, 272 (2011) (holding that the statute was not a special law because it applied in principle to other similarly situated entities, such as anyone who may seek in the future to establish or operate a rubble landfill in the areas prohibited by the statute and did not identify a particular entity); *State v. Burning Tree Club, Inc.*, 315 Md. 254, 275 (1989) (stating that even "laws affecting only a single entity have been upheld where they can apply, in principle, to other similarly situated entities").

Applicant went through the process that is delineated by the Prince George's County Code in making its application for CB-22. This was an extremely lengthy process where volumes of information was gathered, submitted, revised, discussed at public hearings, reviewed by the Zoning Hearing Examiner, and ultimately adopted by the District Council. There were no short-cuts made by Applicant.

Not only did Applicant request the passage of CB-22, but it was sponsored by the Chair of the District Council, Todd Turner, who explained the need for this legislation for the County as a whole. Moreover, nearby resident, Mr. Graham, and prominent organizations in Prince George's County, such as NAACP and the Southern Christian Leadership Conference, all supported the bill because of the thousands of jobs that it would bring to this community. Supplement July 14, 2020 Hearing at 4-9.

The record amply demonstrates that the only advantages received from CB-22 were the advantages to the residents of Prince George's County. Petitioners have completely failed to identify any similarly-situated property that was prevented from taking advantage of this legislation.

c. CB-22's distinctions are not arbitrary nor are they without any rational basis.

Clearly, CB-22's distinctions are not arbitrary nor without any rational basis. *See supra*, Section II.C.1.

d. CB-22's public interest underlies its enactment and the general law was inadequate to serve that interest.

Petitioners erroneously argue that "[t]here is no public interest underlying the enactment of CB-22-2020." Pet'r Mem. at 19. The record undeniably establishes the public interest underlying its enactment. *See supra*, Section II.C.1.

What is void from the record is any opposition from *the public* to CB-22.

Moreover, Petitioners incorrectly assert that the general law was adequate, such that the Applicant could have applied for a Sectional Map Amendment or Zoning Map Amendment. Petitioners also cited cases positing that the beneficiaries of other bills could seek a variance or conditional use under the general law. Petr's Mem. at 20.

However, the general law in the Zoning Ordinance does not permit a variance application for *uses* of land as a stand-alone application. *See* Z.O. § 27-229(b)(12). Further, if a use variance were to be coupled with a zoning application or a site plan, such a request would be inappropriate because it would focus on unique features of the property (i.e. topography, size, shape, etc.) as opposed to the appropriateness of the use for public policy. Similarly, there is no applicable conditional use that could have been applied for in this situation because the Zoning Ordinance does not recognize conditional uses as an application type. Thus, the general law was inadequate to serve the needs of the public policy.

According to Petitioners, NCBP had the opportunity for a Sectional Map Amendment or a Zoning Map Amendment. Again, they are mistaken. NCBP cannot initiate a Sectional Map Amendment. Rather, these actions come directly from the District Council itself. *See* Z.O. § 27-224(a). The last time a Sectional Map Amendment was conducted was in 2006. CB-22 was enacted in 2020 for an express purpose of addressing an imminent economic crisis. Although SMAs are required by the Zoning Ordinance to occur every 10 years, *see* Z.O. § 27-221(a), it is telling that the County still has not conducted an SMA since 2006, some 16 years later.

Although a Zoning Map Amendment can be initiated by a property owner, such processes typically take between 12 to 18 months to complete. Equally as important, is that the County initiated a Countywide Sectional Map Amendment ("CMA") on July 23, 2019 for the purpose of

rezoning all land within the County. *See* CR-27-2019. While the CMA represented an opportunity to rezone the Subject Property, the approval process was not completed until November 29, 2021. *See* CR-136-2021. All pending zoning requests within the County were postponed once the CMA was transmitted to the District Council by the Planning Board on October 28, 2021. *See* Z.O. § 27-1905(c). In sum, the length of time involved to approve an individual Zoning Map Amendment for the Subject Property coupled with the uncertainty and procedural impacts of the pending CMA process (occurring between July 23, 2019 through November 29, 2021) made the general law inadequate.

Thus, it was not reasonable to languish for an unforeseen number of years to address an imminent need in the County. Indeed, the increased use of text amendments as well as floating zones bridge the gap where "Euclidean zoning, standing alone, has been unable to respond adequately to changing community needs and development pressures." 7 Zoning and Land Use Controls § 39.01(3)(a)(2022).

Petitioners failed to establish that CB-22 is an unconstitutional special law.

III. A-9968-03 AUTHORIZES A USE THAT IS PERMITTED UNDER THE ZONING ORDINANCE BECAUSE A HIGH-CUBE FULFILLMENT CENTER WAREHOUSE IS A WAREHOUSE OR DISTRIBUTION CENTER.

The District Council approved A-9968-03 which listed "Proposed use: Warehouse/distribution, office, light industrial/manufacturing, and/or institutional uses up to 5.5 million square feet[.]" R.12.

A-9968-03 made no mention of a "high-cube fulfillment center warehouse."

Petitioners do not argue that a warehouse or distribution facility use would not be a permitted use under the Zoning Ordinance, only that a "high-cube fulfillment center warehouse" would not be a permitted use under the Zoning Ordinance. As is demonstrated by the record, a

"high-cube fulfillment center warehouse" is a term of art for traffic analyses; it is not a stand-alone "use" in the Zoning Ordinance distinct from a "warehouse" or "distribution facility."

A. A-9968-03 approved the same uses as those approved by A-9968-02.

On February 23, 2022, the ZHE conducted a hearing in A-9968-03 for purposes of reviewing the Technical Staff Report. R. 1126. At that hearing, Robert Antonetti, Esq., a representative of NCBP, informed the ZHE that the proposal for A-9968-03 "looks *for the same types of uses*, but looks for *more* of those uses, specifically the prior Basic Plan approved 3.5 million gross square feet, we are currently requesting 5.5[ ] million gross square feet of *warehouse distribution*, office, light industrial manufacturing and/or institutional use." R. 1130 (emphasis added). "*It's the same use types that were approved in the prior application* but we're requesting 2 million gross square feet more as a maximum in the approved land use quantities for the project." R. 1130 (emphasis added).

Mr. Christopher Rizzi of Bohler Engineering testified that the amendment, A-9968-03, "is that the maximum land use quantity has been increased from 3.5 million to 5.5 million gross square footage" but that "*the proposed uses remain consistent*." R. 1139 (emphasis added). Mr. Rizzi further testified that "*the proposed uses [are] for warehouse and distribution uses*, E-I-A uses on this property." R. 1142 (emphasis added).

The ZHE issued a decision finding that the A-9968-03 request to amend the Basic Plan was "to *increase* employment and industrial uses by 2 million square feet," not to amend any uses. R. 20, 24.

The District Council, in deciding whether to approve A-9968-03, recognized that both the Technical Staff and the Planning Board recommended approval of the application; that an evidentiary hearing was held before the ZHE on February 23, 2022 at which no one appeared in

opposition and there was no evidence presented in opposition to the application; and that the ZHE filed a written decision recommending that the application should be approved. R. 44-45.

In approving A-9968-03, the District Council approved the *same uses* that had been approved in A-9968-02: "*Warehouse/distribution*, office, light industrial/manufacturing, and/or institutional *uses*." The only difference in the two approvals was that the former A-9968-02 amendment permitted those uses for "up to 3.5 million square feet," whereas, the A-9968-03 amendment permitted those uses for "up to 5.5 million square feet."

Importantly, the approved *uses* in A-9968-03 make no reference to a "high-cube fulfillment center warehouse" – the term of art that Petitioners take issue with. The *uses* that remained consistent between A-9968-02 and A-9968-03 were "warehouse"[12] or "distribution"[13] facility. Thus, the District Council, in approving A-9968-03, approved uses that are defined in the Zoning Ordinance. Moreover, because warehouse and distribution facilities are uses that are contemplated in an E-I-A Zone, the District Court approved a land use application that contemplates a use that is permitted by CB-22.

B. A "high-cube fulfillment center warehouse" is a term of art for traffic analyses; it is not a standalone "use" in the Zoning Ordinance distinct from a "warehouse" or "distribution facility."

The phrase "high-cube fulfillment center warehouse" was first injected into the record of A-9968-03 from a reference in a traffic study for the Subject Property that was included in the Technical Staff Report and discussed before the ZHE.

Michael Lenhart, the transportation planning expert, testified about the Technical Staff Report and transportation improvements. R. 1145. Mr. Lenhart explained that the "previously

[12] Z.O. § 27-107.01(a)(256) defines a "warehouse unit."

[13] Z.O. § 27-107.01(a)(66.4) defines a "distribution facility.

approved application" (A-9968-02), considered "county warehouse rates." R. 1142. However, with the amendment and the development of "more specific land uses a[s] proposed," the "trip rates from the Institute of Transportation Engineer's Trip Generation Manual (ITE) may be substituted for rates which may not be available in the Department's Transportation Review Guidelines." R. 1145. *See also* Technical Staff Report pg. 5.[14]

For warehouses of certain sizes and types, the newest edition of the ITE Trip Generation Manual (the 11th Edition) provides "more empirical data" than the Prince George's County local rates, or the earlier editions of the ITE Trip Generation Manual; and therefore, uses "different trip generation rates." R. 1146-1151.

People's Zoning Counsel Stan D. Brown specifically asked Mr. Lenhart, "[w]hat are the *new uses* that are utilized in this latest [2021] edition?" R. 1148 (emphasis added). Mr. Lenhart testified that "*they're not necessarily new uses, they are uses that were also in the 10th Edition,* but there's much better direction and much more empirical data on those uses *and it's types of warehouses, high cube fulfillment center houses, different types of you know just different types of warehouses.*" R. 1148 (emphasis added).

Zoning Counsel Brown asked Mr. Lenhart whether it would be his "opinion that the multistory warehouses fits within one or more of the labels you just described concerning different types of warehouses" and Mr. Lenhart replied, "That's correct." R. 1150.

Architect and land planner, Mark Ferguson, testified that "the subject property qualif[ies] to develop with *uses* and standards pursuant to the E-I-A Zone under 27-515(b) footnote 38 of the Count Zoning Ordinance." R. 1154 (emphasis added). He explained that the revision is for

[14] Determining the correct trip generation based on subcategories of a use type (such as warehouse or distribution uses) does not constitute a change in use type but simply refines the trip generation rates to accurately reflect how the traffic impacts the use.

"industrial warehousing" and that it simply increases the quantity by two million sq. ft. R. 1154. Mr. Ferguson opined that instant application for A-9968-03 meets the criteria set forth in Z.O. § 27-195 for an amendment to an approved basic plan. R. 1156-57.

As a result of this testimony, which went unrefuted, and was adopted by the ZHE and the District Council, it is clear that a "high-cube fulfillment center warehouse" is just a descriptive term used in this case to establish more accurate vehicle trip generation rates for a traffic study. The experts confirmed that the terminology is reserved for the ITE manual, and that a multi-story warehouse facility, still fits within the category of "warehouse" under the Zoning Ordinance.

CONCLUSION

NCBP respectfully requests that the Court deny Petitioners' petition for judicial review and affirm the District Council's enactment of CB-22 and the approval of A-9968-03.

REQUEST FOR A HEARING

NCBP respectfully requests that a hearing be scheduled for the determination of the issues set forth in this memorandum.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of December, 2022, a copy of the foregoing was served by via MDEC and e-mail, to the following:

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Docket: 12/23/2022 9:29 PM; Submission: 12/23/2022 9:29 PM

TB

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

PETITION OF: ANTAWAN WILLIAMS, ET AL., Petitioners, FOR JUDICIAL REVIEW OF THE DECISION OF THE: PLANNING BOARD OF PRINCE GEORGE'S COUNTY, MARYLAND IN THE CASE OF: Preliminary Plan of Subdivision 4-21056 National Capital Business Park, TCP1-004-2021-03, and the associated variance to Section 25-122(b)(1)(G)	**CAL22-19650**

NCBP PROPERTY LLC'S ANSWERING MEMORANDUM IN OPPOSITION TO PETITIONERS' MEMORANDUM IN SUPPORT OF JUDICIAL REVIEW AND REQUEST FOR A HEARING

NCBP Property LLC ("NCBP" or "Applicant"), by and through undersigned counsel, files this Memorandum in Opposition to the Petition for Judicial Review stating as follows:

INTRODUCTION

Petitioners seek judicial review of the Planning Board's approval of Preliminary Plan of Subdivision ("PPS") 4-21056, TCP1-004-2021-03, and the associated variance to Section 25-122(b)(1)(G) of the Prince George's County Code. Although their petition is fashioned as a challenge to the Planning Board's approval of the PPS itself, what Petitioners attempt is an attack on Council Bill 22-2020 ("CB-22"), a 2020 legislative enactment by the Prince George's County Council, Sitting as the District Council ("District Council").

It should be noted that CB-22 went unchallenged by Petitioners at all pertinent times. Petitioners failed to participate in the proceedings leading up to its enactment; failed to file a petition for judicial review within 30 days after it was enacted; and failed to challenge subsequent entitlements premised upon CB-22, including A-9968-02, CDP-0505-01, PPS 4-20032, and SDP-

1603-01, all of which were approved between April 12, 2021 and Jan. 13, 2022. R. 162. Now, two years later, and multiple steps into the process, Petitioners attempt to use the approval of a revised PPS to retroactively, collaterally, and belatedly, attack CB-22. This is improper and wholly unsupported by any statute or case law.

As to Petitioners' issues that relate to the approval of the PPS itself, this Court will see that there is substantial evidence in the record that supports the approvals by the Planning Board.

STATEMENT OF FACTS

NCBP is the owner of a 442.30-acre parcel of land ("Subject Property") that is partially bounded on the west by the Popes Creek Branch CSX Railroad tracks, vacant M-NCPPC park land to the north, Collington Business Center to the northeast, Leeland Road to the south, and the former Safeway Distribution Center to the southeast. R. 130.

From 1991 until 2006, the Subject Property had been zoned for employment and institutional uses ("E-I-A"). R. 227. The 1991 master plan text referred to this land area as the "Willowbrook Business Center." R. 227. The basic plan for this center allowed for a total gross floor ratio of 3,900,000-5,500,000 square feet of "light manufacturing, warehouse/distribution, ancillary office, and retail commercial" uses. R. 227. This property was envisioned by community planners as a business district that included warehouse/distribution uses. R. 14.

In 2006, the District Council rezoned the Subject Property primarily for residential/suburban uses ("R-S"), with small portions of the Subject Property for residential/agricultural ("R-A") and light industrial ("I-1"). R. 15. However, nothing was ever constructed on the Subject Property.

In June, 2020, after the onset of the COVID-19 pandemic, the District Council proposed CB-22, the legislation underlying the second and third issues in Petitioners' Memorandum. CB-22

is an ordinance that permits certain E-I-A uses permitted by right in the E-I-A Zone to be utilized in a R-S Zone of Prince George's County, under certain specified circumstances. R. 194. CB-22 sets forth a Table of Uses, found in footnote 38, pursuant to Section 27-515 of the Zoning Ordinance of the Prince George's County Code ("Zoning Ordinance" or "Z.O."). Footnote 38 provides that any use in the E-I-A Zone may be used on any parcel, a portion of a parcel, or an assemblage of adjacent land that:

(i) was rezoned from the E-I-A and R-A Zones to the I-1 and R-S Zones by a Sectional Map Amendment approved after January 1, 2006;

(ii) contains at least 400 acres and adjoins a railroad right-of-way; and

(iii) is adjacent to an existing employment park developed pursuant to the E-I-A requirements (through which there is street connectivity).

R. 200.

On July 14, 2020, after a Joint Public Hearing, CB-22 was adopted. At no time prior to the July 14, 2020 enactment of CB-22 did Petitioners make themselves a party of record to challenge the legality, constitutionality, or enforceability of the provisions of CB-22. CB-22 became effective on August 28, 2020 and no petition for judicial review was filed thereafter.

NCBP filed its application for an amendment of the Basic Plan requesting permission to utilize CB-22 on the Subject Property for warehouse/distribution, office, light industrial/manufacturing, and/or institutional uses up to 3.5 million sq. ft. Assigned the number A-9968-02, and consistent with all applicable procedures, A-9968-02 was considered by the Subdivision & Development Review Committee ("SRDC"), the Planning Board Staff, the Zoning Hearing Examiner ("ZHE"), and the District Council.

On April 12, 2021, the District Council approved A-9968-02 which deleted all residential uses and replaced them with uses permitted in the E-I-A Zone for I-1, R-A, and R-S Zones of the

Subject Property, subject to 17 conditions and two comprehensive design plan (CDP) considerations. R. 17. At no time prior to the approval of A-9968-02 did Petitioners seek to become a party of record, or challenge the legality of the provisions of the Amendment. No appeal was taken from the enactment of A-9968-02.

On April 29, 2021, CDP-0505-01 was approved for 3.5 million sq. ft. of E-I-A land uses, pursuant to A-9968-02. R. 17. Petitioners failed to participate in this approval or take any appeals.

On September 9, 2021, the Planning Board approved Preliminary Plan of Subdivision 4-20032 and Tree Conservation Plan TCP1-004-2021-01 which contemplated the subdivision of the Site into 36 parcels. Further, the Planning Board approved development of up to 3.5 million sq. ft. of E-I-A uses on the Subject Property, consistent with development pursuant to A-9968-02 and CDP-0505-01 R. 18. Likewise, Petitioners failed to participate before the Planning Board and failed to take any appeals or petition for judicial review from this approval.

On January 13, 2022, SDP-1603-01 was approved for infrastructure in accordance with A09968-02, CDP-0505-01, and PPS 4-20032. R. 18. Petitioners failed to participate or take any appeals from this approval.

On October 26, 2021, Applicant applied for A-9968-03, a Basic Plan Amendment for the Subject Property, seeking to amend the maximum developable space allowed on the Subject Property, from 3.5 million sq. ft. to 5.5 million sq. ft, for which the employment and institutional uses approved in A-9968-02 could be utilized. R. 17.

Like the A-9968-02 Basic Plan Amendment, A-9968-03 proceeded in the same sequence with an SRDC, a Planning Board hearing, a ZHE hearing, and hearings before the District Council. The District Council approved A-9968-03 on May 16, 2022. R. 17.

On March 31, 2022, while the approval for A-9968-03 was pending, NCBP filed an application for PPS 4-21056, the PPS under review in this case. PPS 4-21056 contemplates 27 parcels for development of up to 5.5 million sq. ft. of E-I-A uses on the Subject Property, consistent with development pursuant to A-9968-03 and CDP-0505-02. R. 4. The application included proposed clearing of trees within the Subject Property, as well as a variance to Section 25-122(b)(1)(G) for the removal of 13 specimen trees.[1]

This application was reviewed under Subtitle 24 of the Code. R. 4. The Planning Board considered policies from the 2014 *Plan Prince George's 2035 Approved General Plan* (*Plan 2035*), the Master Plan, the Technical Staff Report, Backup Materials, relevant policies, the applicable statutory considerations, and the considerations set forth in the approval of A-9968-03. R. 18-40. The Planning Board determined that the proposed development is in accordance with the Zoning Ordinance as modified by CB-22. R. 13. As to the Specimen Treen Variance, the Planning Board considered numerous criteria. R. 42-48. On June 9, 2022, the Planning Board approved the PPS in this case.

On July 7, 2022 Petitioners filed a petition for judicial review. Petitioners subsequently filed a Memorandum in Support of Petition for Judicial Review, in which Petitioners challenged CB-22 arguing that "CB-22-2020 is a special law in violation of Article III, Section 33 of the Maryland Constitution," and "CB-22-2020 violates the uniformity clause of Section 22-201(b)(2)(i) of the Maryland Land Use Article." *See* Petr's Mem. at 20, 26. Petitioners also argued that the Planning Board's decision to approve a tree variance is legally and factually insufficient, and that the record lacks substantial evidence to support the Planning Board's decision that PPS 4-21056 satisfies the requirements for adequate public facilities and roads.

[1] Two of the thirteen trees in the application were approved to be removed under the prior PPS, and therefore, were not re-considered in this PPS by the Planning Board.

ARGUMENTS

I. THIS COURT IS PRECLUDED FROM CONSIDERING PETITIONERS' CHALLENGES TO CB-22 IN PETITIONERS' SECOND AND THIRD ISSUES.

On a petition for judicial review of the Planning Board's final action on an application for subdivision approval, the circuit court cannot conduct judicial review of a final decision of the District Council.

This petition for judicial review stems from the Planning Board's final action on June 9, 2022, approving an application for subdivision: PPS 4-21056. *See* Pet. for Jud. Rev. at 1-2. A petition for judicial review of a planning board's final action is governed by L.U. § 23-401. *See also* R. 3 (A petition for judicial review of the Planning Board's action must be filed pursuant to Section 23-401 of the Land Use Article of the Maryland Code ["L.U."]). L.U. § 23-401(a)(1) only permits a circuit court's review of the final action of the county planning board on an application for subdivision approval.

This Court may only consider a Petition for Judicial Review within the strict confines of both the statutory structure, here L.U. § 23-401, and the final agency decision being appealed, here the application for PPS 4-21056, Type I Tree Conservation Plan, TCP1-004-2021-03, and the associated variance to Z.O. § 25-122(b)(1)(G).

However, Petitioners' Supporting Memorandum is directed at contended deficiencies of CB-22, a final agency decision of the District Council enacted on July 14, 2020. A petition for judicial review of a final agency decision of the District Council is governed by L.U. § 22-407, not L.U. § 23-401. L.U. § 22-407 has relief and elements that are distinct from L.U. § 23-401. For example, upon judicial review of the final agency decision of the District Council, the circuit court is authorized to affirm the decision of the District Council, remand the case for further proceedings, or reverse or modify the decision "*if the substantial rights of the petition have been prejudiced*

because the district council's action is: (i) unconstitutional; [or] (ii) in excess of the statutory authority or jurisdiction of the district council…" L.U. § 22-407(e) (emphasis added). By contrast, L.U. § 23-401, the provision governing judicial review of a planning board final action, i.e., *this* petition for judicial review, only permits the circuit court to "(i) affirm or reverse the action [of the planning board]; or (ii) remand the action to the county planning board for further consideration." L.U. § 23-401(3). This statute does not give the circuit court the authority to remand the case to the District Council, nor to reverse the District Council decision itself. Moreover, L.U. § 23-401 does not provide factors for consideration of whether the underlying legislation is "unconstitutional" or "in excess of the statutory authority or jurisdiction of the district council," like L.U. § 22-407(e), and like the issues raised by Petitioners in their attack on CB-22.

Notwithstanding the above, Petitioners "request that this Court reverse the Planning Board's decision to approve PPS 4-21056 because that approval was predicated on an illegal special law," Petr's Mem. at 26; and "was predicated on an illegal text amendment[.]" Petr's Mem. at 32. However, neither the District Council, the Board of Appeals, the circuit court, nor any appellate court, have ever declared CB-22 an "illegal special law" or an "illegal text amendment."

CB-22 stands as valid legislation. CB-22 is a text amendment which is a a legislative amendment to the Zoning Ordinance. As such, it carries the same presumption of validity as original zoning and comprehensive zoning. *See Md. Overpak Corp. v. Mayor of Baltimore*, 395 Md. 16 (2006); *MBC Realty*, *LLC v. Mayor and City Council of Baltimore*, 192 Md. App. 218, 235 (2010); *Crown Cent. Petroleum Corp. v. Baltimore*, 258 Md. 82, 85 (1970) (there is a "heavy burden of overcoming the presumption of constitutionality of legislative action").

Thus, CB-22 is valid legislation, until it is *properly* challenged. A challenge to a Planning Board's approval of a subdivision application is not the proper way to challenge the underlying

legislation. Petitioners fail to cite a single case or statutory provision that authorizes judicial review of an underlying final agency of the District Council, when petitioning for judicial review of a Planning Board final action; or a statutory provision that says that the final agency decision of the District Council does not have to be appealed within 30 days. *Cf.* L.U. § 22-407(a)(2) (A "petition for judicial under this subsection ***shall be filed*** in the Circuit Court for Prince George's County ***within 30 days*** after service of ***the final decision by the district council***."). (Emphasis added).

It is noteworthy that during the public hearing before the Planning Board, counsel for Petitioners argued that "*MRA* [*Maryland Reclamation Associates, Inc.*] *v. Harford* [*County*], 468 Md. 339, 398-99 (2020) spells out explicitly that in a land use case we're allowed to challenge the underlying legality of the bill that enables the application." June 2, 2022 Hearing at 26.

Planning Board Chairman Peter A. Shapiro correctly articulated that "whether or not this is a permitted use based upon CB-22-2020, that's not before us. That's a decision that's made by the Council[.]" June 2, 2022 at 26. Attorney Coleman, on behalf of the Planning Board also weighed in that "there's been no court that has made any determination that there would be a special law that would not be allowed." *Id*. at 28.

Not surprisingly, Petitioners abandoned that argument and any reference to *MRA* in their memorandum. In fact, Petitioners provided no authority for their request to have this court, retroactively, collaterally, and belatedly, consider the validity of CB-22, a final decision by the District Council, in this petition for judicial review of a Planning Board action.

However, *MRA is* informative on this issue, just not in the manner that Petitioners were expecting. *MRA* explicitly "hold[s] that MRA failed to exhaust its administrative remedies by withholding its [constitutional] claim from consideration by the Board of Appeals" and [u]nder our exhaustion jurisprudence, all constitutional claims arising from the application of a zoning

regulation to a property must be presented as part of the administrative agency proceeding." *MRA*, 468 Md. at 417.

Like in *MRA*, Petitioners failed to exhaust administrative remedies for their constitutional claims that CB-22 violates the uniformity clause of the Land Use Article and that CB-22 is an illegal special law under Article III, Section 33 of the Maryland Constitution. The *MRA* opinion concisely sets forth the proper procedure for exhausting administrative remedies of a constitutional claim arising from the application of a zoning regulation. *Id*. at 413-16.

First, like in *MRA*, after the bill in question was adopted, here CB-22 on July 14, 2020, Petitioners "should have presented all its evidence and legal arguments to the Board of Appeals." *Id*. at 413. L.U. § 22-311(a)(3) permits any person aggrieved by any administrative decision based wholly or partly on a zoning law enacted by the District Council to be appealed to the Board of Appeals. Like in *MRA*, Petitioners could have raised all of their constitutional arguments before the Board of Appeals. 468 Md. at 414. By proceeding in this manner, the Board would be charged with making the initial factual determination of the constitutional questions arising from the zoning regulation. *Id*.; L.U. § 22-311(e)(2) ("The decision of the board shall be by resolution and include a statement of the findings of fact and conclusions that support the decision.").

Second, as outlined in *MRA*, if the Board denied Petitioners' claims and upheld the District Council's enactment of CB-22, Petitioners would have had the right to appeal this determination to the circuit court for the circuit court to "determine whether the factual determinations were supported by substantial evidence, and whether the Board applied the correct legal standards, with the benefit of a fully developed record of the evidentiary hearing." 468 Md. at 415. Here, however, Petitioners failed to appeal to the Board of Appeals, and therefore no factual determinations have ever been made, nor legal standards applied, by the Board, regarding the constitutionality of the

legislation. Also contrary to the roadmap set forth in *MRA*, is that Petitioners failed to seek direct judicial review of CB-22, pursuant to L.U. § 22-407, which was the statutory vehicle in place for driving home a constitutional challenge to CB-22. L.U. § 22-407(e) specifically authorizes the circuit court to review whether the District Council's final agency decision, i.e., enactment of CB-22, was "unconstitutional" or "in excess of the statutory authority or jurisdiction of the district council." By contrast, L.U. § 23-401 does not contain the same language regarding consideration of decisions for their constitutionality, let alone does it allow review of District Council decisions.

Third, as discussed in *MRA*, had the circuit court upon a judicial review pursuant to L.U. § 22-407(a) determined that the District Council's enactment of CB-22 was improper, the circuit court could have remanded, reversed, or modified the District Council's final agency decision. 468 Md. at 415-16; L.U. § 22-407(e)(2) and (3). By contrast, L.U. § 23-401 does not permit the circuit court to remand, reverse, or modify the District Council's final agency decision.

Maryland appellate courts have routinely held that where procedures set forth by the Maryland-Washington Regional District Act (RDA) are not complied with, petitioners cannot pursue collateral claims through other means.[2] Notwithstanding the clear guidance of *MRA*, as well as the unambiguous statutory language in the RDA, Petitioners failed at every step of the way to exhaust administrative remedies regarding their attack on the validity of CB-22. Even after the Planning Board approved PPS 4-21056, Petitioners failed to appeal to the District Council pursuant to L.U. § 25-212, to give the District Council the opportunity to receive arguments and make factual determinations regarding the validity of the very bill that it enacted. This Court must dismiss Petitioners' second and third claims regarding the underlying validity of CB-22.[3]

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[2] *See, e.g., Prince George's County v. Ray's Used Cars*, 398 Md. 632 (2007); *County Council of Prince George's County v. Chaney*, 454 Md. 514 (2017); *MRA*, 342 Md. at 493.

[3] Petitioners' claims are also barred by the Doctrine of Laches. There was an unreasonable delay in the assertion of the rights of Petitioners and that delay resulted in prejudice to NCBP. *Frederick Rd. Ltd. P'ship v. Brown & Sturm*,

II. ASSUMING *ARGUENDO* THIS COURT WERE TO CONSIDER PETITIONERS' SECOND AND THIRD CLAIMS, THIS COURT STILL MUST FIND THAT THE PLANNING BOARD DID NOT ERR IN APPROVING PPS 4-21056 BASED UPON CB-22.

A. CB-22 enjoys a presumption of validity.

As stated *supra*, CB-22 enjoys a presumption of validity. Judicial review of a legislative text amendment involves "assessing whether the agency was acting within its legal boundaries," rather than considering "whether the agency's decision was arbitrary, capricious or unsupported by substantial evidence." *Town of Upper Marlboro v. Prince George's Cnty. Council*, 480 Md. 167, 180-81 (2022).

B. CB-22 does not violate the uniformity clause of L.U. § 22-201(b)(2)(i).

1. CB-22 does not have "invidious distinction" but rather "is reasonable and based upon the public policy to be served."[4]

Courts "have been somewhat reluctant to elaborate on or supply judicial gloss to the meaning of the uniformity requirement[.]" *Anderson House, LLC v. Mayor and City Council of Rockville*, 402 Md. 689, 717 (2008). What is clear, however, is that the uniformity provision is only meant to prohibit "invidious distinctions and discriminations[.]" *Montgomery Cnty. V. Woodward & Lothrop, Inc.*, 280 Md. 686, 719 (1977). Significantly, Maryland Courts have recognized that the uniformity clause "does not prohibit classifications within a district, *so long as it is reasonable and based upon the public policy to be served*." *Id*. at 720 (emphasis added). The uniformity clause allows the District Council to determine the "optional method of development"

360 Md. 76, 117 (2000). Petitioners had knowledge, or the means of knowledge, of the facts which created this cause of action. *Parker v. Board of Election Sup'rs*, 230 Md. 126, 131 (1962). Petitioners never challenged any of the prior approvals, nor did they participate in any of the administrative hearings, as outlined above. NCBP made forward progress expending money, time, and resources, pursuant to entitlements which are cloaked with a presumption of validity. Additionally, NCBP has entered contracts with tenants on the good faith reliance of the valid legislation.

[4] *Montgomery Cnty. v. Woodward & Lothrop, Inc.*, 280 Md. 686, 720 (1977).

because "the legislative purpose of encouraging land assembly to permit cohesive development…provides a reasonable basis for the classification." *Id*. at 721.

It is clear that there was a legitimate and reasonable public purpose in enacting CB-22 to encourage economic surgency in a district that had long-standing aspirations to be an industrial district. During the District Council Meeting on June 2, 2020, the sponsor of the bill, Chairperson Turner, informed the District Council that

> [T]his is one of those rare situations where…a property that had always been previously zoned for that use [E-I-A], had been rezoned by prior councils to do potentially residential development and now wants to go back to where it used to be, so that's why this legislation is before you and I think it does fall into the opportunity for us not [*sic*] to potentially create an impact.
>
> Supplement June 2, 2020 Hearing at 7.[5]

Chairperson Turner was aware that "several colleagues have raised this" to make "sure that we're able to diversify the economy in Prince George's County and this would be a situation, if enacted, that would give us that opportunity to do more commercial and office property in an area that already has that as part of its development character." Supplement June 2, 2020 Hearing at 7.

Councilmember Davis agreed that this is "a very great situation" particularly in light of the fact that when CB-22 was being considered in June, 2020, it was during the "COVID crisis, a health pandemic, that creates an economic insurgence that will be a problem for us to deal with for years to come." Supplement June 2, 2020 Hearing at 8. Allowing for E-I-A uses in this R-S Zone was contemplated "a couple of times" prior but it was the economic crisis of the pandemic that inspired the "legislative branch of government…to be flexible enough to try to give a chance to the County to increase its economic viability, its economic development, (indiscernible) develop jobs and do all of those things[.]" Supplement June 2, 2020 Hearing at 8. It was with those

[5] Petitioners filed a Motion to Supplement the Record with these materials which was unopposed and is pending a ruling.

aspirations that the District Council has "been very responsible in contemplating this piece of legislation[.]" Supplement June 2, 2020 Hearing at 8.

The District Council was not unaware of concerns from the Park and Planning Commission and the Office of Law that a master plan amendment is the preferred method used to rezone a property. Supplement June 2, 2020 Hearing at 9-10 (Councilmember Davis: "We contemplated it."). However, Chairperson Turner noted that actual rezoning through a master plan may not occur for a couple of years and that the County would not benefit from waiting a substantial period of time to accomplish what it could begin to accomplish at a time during which the County was reeling from economic distress. Supplement June 2, 2020 Hearing at 9-10. Thus, the motion carried 9-2 after the first reading, in favor of enacting CB-22, Draft 2. Supplement June 2, 2020 Hearing at 12.

On June 9, 2020, a second reading of CB-22, Draft 2 was conducted. Supplement June 9, 2020 Hearing at 4. During that hearing, Staff Attorney Karen Zavakos recapped that the bill sponsor, "informed the committee that this legislation is to facilitate the development of property… with employment, commercial and office uses as the original zoning in the area was intended in[.]" Supplement June 9, 2020 Hearing at 4.

On July 14, 2020, a Joint Public Hearing was conducted on CB-22, Draft 2. During that hearing, Thomas Graham, a 13-year resident of Oak Creek Community near Oak Grove Road and Leeland Road, spoke in support of the bill because: (i) there did not appear to be a negative impact on traffic flow; (ii) the project would bring over 3,500 jobs to the community, thereby providing business and contracting opportunities; and (iii) the project would generate an additional $21 million in tax revenue benefits for all Prince George's residents – noting that opportunities of this nature are few and far between. Supplement July 14, 2020 Hearing at 4-5.

Arthur Horne, Esq., on behalf of the owners of the Subject Property, recounted the history of zones and uses in this particular district, particularly that it was previously zoned E-I-A for development of the Willowbrook Business Park which was intended to be Phase II of the Collington Business Center, also zoned E-I-A. Supplement July 14, 2020 Hearing at 6. Because the Collington Business Center is substantially developed and approximately 96% leased up, the Subject Property has been continuously discussed as property intended to be part of the Collington Business Center. Supplement July 14, 2020 Hearing at 6-7.

Chairman Turner also accepted letters into the record from Southern Christian Leadership Conference and the NAACP for Prince George's County endorsing CB-22 on behalf of their constituents, in support of CB-22 because it would create thousands of jobs to benefit the local county residents. Supplement July 14, 2020 Hearing at 8-9.

Despite the above, Petitioners here aver that "the restrictions in CB-22-2020 are not reasonably related to any public policy" where it was enacted for "the purpose of permitting certain employment and institutional uses permitted by right in the E-I-A [ ] Zone to be permitted in the R-S [ ] Zone of Prince George's County, under certain specified circumstances." Petr's Mem. at 30. Petitioners' contentions are absolutely baseless.

Petitioners asked "why must E-I-A uses be limited to R-S zoned properties that were 'rezoned from the E-I-A and R-A Zones to the I-1 and R-S Zones by a Sectional Map Amendment' specifically approved after January 1, 2006?" Petr's Mem. at 31. As the record clearly demonstrates, the answer is that permitting E-I-A uses in a zone that was previously zoned E-I-A comports with the overarching plan by the District Council over the course of decades for this area.

Moreover, the reasons for allowing E-I-A uses to be utilized in 2020, comported with combatting the public health crisis that decimated Prince George's County and crippled its

economic development. Those reasons were fully stated and supported by the record. *See* Supplement June 2, 2022 Hearing at p. 8.

To answer Petitioners other questions, it is also entirely reasonable that the legislation would require the R-S zoned property to be adjacent to an existing E-I-A employment park because it provides for continuity of uses and types of businesses within close proximity to one another. Similarly, the requirement that "street connectivity [be] through an adjacent employment park" helps to ensure that E-I-A businesses and their accompanying traffic, will flow through other business and E-I-A developments.

Lastly, there is nothing unusual regarding the requirement in CB-22 that a particular use be conditioned upon proximity to rail facilities. The Prince George's County Zoning Ordinance alone identifies numerous zoning categories that permit certain uses in various zones, based, in part, on the property's proximity to rail facilities.[6]

Therefore, it was both legal and reasonable for the District Council to enact legislation that provided "optional methods of development" that facilitated the development of a business park in this district during a health and economic crisis.

2. <u>The terminology of CB-22 demonstrates that it is applicable to any property similarly situated in the entire regional district.</u>

CB-22 does not violate the "uniformity clause" because it applies equally to all applicable properties in the R-S/R-A Zones. In determining the uniformity requirement, "[t]*he focus is upon the terminology of the ordinance, rather than upon its application*." *Woodward & Lothrop,* 280 Md. at 720 (emphasis added). The Supreme Court of Maryland recognized that "uniformly

[6] *See, e.g.* County Code § 27-441 (b), footnote 131; § 27-441 (b), footnote 138; § 27-441 (b), footnote 141; § 27-461 (b), footnote 25; § 27-461 (b), footnote 44; § 27-461 (b), footnote 50; § 27-461 (b), footnote 67; § 27-461 (b), footnote 70; § 27-461 (b), footnote 87; § 27-473 (b), footnote 34; § 27-473 (b), footnote 45; § 27-473 (b), footnote 50; § 27-473 (b), footnote 66; § 27-515 (b), footnote 29.

applicable regulations that produce disparate results in application do not violate the uniformity requirement." *Anderson House, LLC*, 402 Md. at 716-17. The question is whether "a zoning ordinance singles out a property or properties *for different treatment than others similarly situated*." *Id.* at 714.

Petitioners have not alleged that there is a "similarly situated" property that is being given "different treatment." *Id*. Rather, Petitioners allege that there are no other properties that are similarly situated that can benefit from this legislation. *See* Petr's Mem. at 27-28 ("[D]ue to the extensive limitations created by CB-22-2020, only one property in the entire county can take advantage of the benefits of CB-22-2020.") That is a completely different inquiry, and not the basis for finding of a uniformity clause violation. Rather, if the classification uniformly applies to all qualifying properties using the exact same terminology, which CB-22 does, regardless of whether other qualifying properties currently exist, then there is no uniformity violation. *Woodward & Lothrop*, 280 Md. at 720.

Only if the legislation permits a similarly situated parcel to receive the benefits of the legislation, but does not permit another similarly situated parcel to receive those same benefits would there then be a uniformity violation. *See Anderson House*, 402 Md. at 716, n.21 (collecting cases finding that the uniformity requirement was violated by a zoning ordinance that singled out one property to permit a use that was forbidden for all other similarly classified parcels).

CB-22 does not violate the uniformity clause because the identifying terminology in CB-22 applies to all present *and future prospective properties* in the R-A/R-S Zone to utilize E-I-A uses, so long as those properties qualify under the criteria set forth in CB-22. This would include, for example, a property to the North of the Subject Property, known as South Lake, that prior to April 1, 2022, was classified in the E-I-A Zone and is adjacent to numerous parcels that were zoned

R-A. The E-I-A zoned portions of South Lake, coupled with adjacent R-A zoned parcels to the East would total more than 400 acres (the "South Lake Assemblage"). This potential South Lake Assemblage would be in conformance with the subcategories in CB-22 as it abuts a rail line (the same rail line abutting the Subject Property), totals more than 400 acres, and adjoins an existing employment center developed pursuant to the E-I-A Zone (the same employment center adjoining the Subject Property).

3. <u>It is not a violation of the uniformity clause that a text amendment may be "site-specific."</u>

CB-22 does not mention the Subject Property by name or address. However, even if CB-22 did mention Applicant's property by name or address, the United States Court of Appeals for the Fourth Circuit determined that while "a single facility may provide the impetus for a general zoning enactment, [ ] that does not mean the enactment is aimed solely at that facility." *Siena Corp. v. Mayor & Rockville Md.*, 873 F.3d 456, 464 (4th Cir. 2017).

Jurisprudence over uniformity generally stems from the fact legislation is drafted with a specific property in mind. However, courts have upheld text amendments and legislative enactments that apply to specific property where it has been determined that the legislation is a permissible method that serves a public purpose, like the public purpose described *supra*.

C. CB-22 is not an illegal special law and does not violate article III, Section 33 of the Maryland Constitution.

Many of the arguments in this section overlap with the factors to be considered in the uniformity section, *supra*. Therefore, NCBP adopts and incorporates all of the previous arguments, and addresses some distinct points relevant to this constitutional argument.

1. CB-22 is not a special law, it is a public local law.

As a threshold matter, CB-22 is a public local law, not a special law, therefore it is not subject to the provisions of Md. Const. art. III, § 33. *County Comm'rs of Dorchester v. Meekins*, 50 Md. 28 (1878). A public local law is a statute dealing with some matter of governmental administration *local in character*, in which persons outside of that locality have no direct interest. *Potomac Sand & Gravel Co. v. Governor of Md.*, 266 Md. 358 (1972), *cert. denied*, 409 U.S. 1040 (1972); LU § 22-104(a)(1) (The District Council may, *by local law, adopt and amend the text of the zoning law and by local law adopt and amend any map accompanying the text of the zoning law*); LU § 22-206(a)(1) (The District Council *may amend its zoning laws*, including any maps, *in accordance with procedures established in its zoning laws*) (Emphasis added). To the extent that CB-22 is subject to the provisions of MD. Const. art. III, § 33, it is not a special law.

2. CB-22 is not an impermissible special law.

Second, even if CB-22 were subject to constitutional scrutiny as a "special law," Petitioners have failed to establish that ***all six*** elements, required to find a special law impermissible, exist. *Cities Service Co. v. Governor, Maryland*, 290 Md. 553 (1981). In considering these factors, the Court is to "begin with the presumption that the legislative enactment is constitutional." *CCI Entm't, LLC v. State*, 215 Md. App. 359, 399 (2013). The party challenging the legislative enactment bears the burden of demonstrating that the validly enacted law is unconstitutional. *Id*.

a. CB-22 is intended to benefit an entire class of properties that satisfy certain criteria in the R-S Zone, not particular members of a class.

Petitioners have misread the substance and practical effect of CB-22, alleging that it singles out Applicant for special treatment. Petr's Mem. at 21. CB-22 does not identify particular individuals, entities, or addresses. CB-22 applies with equal force to *all properties* in an R-S Zone

meeting the criteria listed in CB-22. That includes current properties, as well as future potential properties, such as the South Lake Assemblage described *supra*, Section II.B.2.

In *Reyes v. Prince George's Cnty.*, 281 Md. 279 (1977), the Supreme Court of Maryland ruled that even though the legislative enactment was alleged to have been enacted for the sole benefit of Washington National Arena in Prince George's County, as it was the only sports stadium or arena in the county at the time of the legislative enactment, the enactment would provide future benefits as it would apply to the acquisition of financing of other sports facilities in Prince George's County in the future. *Id*. at 302-06.[7] Courts have held that certain enactments are not considered special laws even if they applied only to a single entity. *Green v. N.B.S., Inc.*, 409 Md. 528, 544-45 (2009) ("Such laws are permissible where unique circumstances render the entity a class unto itself, or where the enactment, although it affects only one entity, would apply to other similar entities in the future.").

b. NCBP did not receive special advantages from the District Council.

Petitioners failed to identify a single "special advantage." Petr's Mem. at 23. Applicant went through the process that is delineated by the Prince George's County Code in making its application for CB-22. Petitioners failed to identify any similarly-situated property that was prevented from taking advantage of this legislation.

c. CB-22's distinctions are not arbitrary nor are they without any rational basis.

Clearly, CB-22's distinctions are not arbitrary nor without any rational basis. *See supra*, Section II.B.1.

[7] *See also Potomac Sand & Gravel v. Governor*, 266 Md. 358 (1972); *Md. Dep't of the Env't v. Days Cove Reclamation Co.*, 200 Md. App. 256, 272 (2011); *State v. Burning Tree Club, Inc.*, 315 Md. 254, 275 (1989).

d. CB-22's public interest underlies its enactment and the general law was inadequate to serve that interest.

Petitioners erroneously argue that "[t]here is no public interest underlying the enactment of CB-22-2020." Petr's Mem. at 24. The record undeniably establishes the public interest underlying its enactment. *See supra*, Section II.B.1. What is void from the CB-22 record is any opposition from *the public* to CB-22.

Moreover, Petitioners incorrectly assert that the general law was adequate, such that the Applicant could have applied for a Sectional Map Amendment or Zoning Map Amendment. Petitioners also cited cases positing that the beneficiaries of other bills could seek a variance or conditional use under the general law. Petr's Mem. at 20. However, the general law in the Zoning Ordinance does not permit a variance application for *uses* of land as a stand-alone application. *See* Z.O. § 27-229(b)(12). Further, if a use variance were to be coupled with a zoning application or a site plan, such a request would be inappropriate because it would focus on unique features of the property (i.e. topography, size, shape, etc.) as opposed to the appropriateness of the use for public policy. Similarly, there is no applicable conditional use that could have been applied for in this situation because the Zoning Ordinance does not recognize conditional uses as an application type.

Furthermore, NCBP cannot initiate a Sectional Map Amendment. Rather, these actions come directly from the District Council itself. *See* Z.O. § 27-224(a). The last time a Sectional Map Amendment was conducted was in 2006. CB-22 was enacted in 2020 for an express purpose of addressing an imminent economic crisis. Although SMAs are required by the Zoning Ordinance to occur every 10 years, *see* Z.O. § 27-221(a), it is telling that the County still has not approved an SMA since 2006, some 16 years later.

Lastly, although an individual Zoning Map Amendment can be initiated by a property owner, such processes typically take between 12 to 18 months to complete. Equally as important,

is that the County initiated a Countywide Sectional Map Amendment ("CMA") on July 23, 2019 for the purpose of rezoning all land within the County. *See* CR-27-2019. While the CMA represented an opportunity to rezone the Subject Property, the approval process was not completed until November 29, 2021. *See* CR-136-2021. All pending zoning requests within the County were postponed once the CMA was transmitted to the District Council by the Planning Board on October 28, 2021. *See* Z.O. § 27-1905(c). In sum, the length of time involved to approve an individual Zoning Map Amendment for the Subject Property coupled with the uncertainty and procedural impacts of the pending CMA process (occurring between July 23, 2019 through November 29, 2021) made the general law inadequate.

Thus, Petitioners failed to establish that CB-22 is an unconstitutional special law. The Planning Board's approval of PPS 4-21056 was predicated upon a text amendment that is both presumed valid and is valid.

III. THIS COURT SHOULD AFFIRM THE PLANNING BOARD'S APPROVAL OF A VARIANCE FROM THE REQUIREMENTS OF SECTION 25-122(b)(1)(G) TO REMOVE 11 SPECIMEN TREES.

A. Standard of Review

This court reviews the final decision of an administrative agency, such as the Planning Board, without substituting its judgment for the administrative agency's, so long as the agency's determination is based on "substantial evidence." *People's Counsel for Baltimore County v. Surina*, 400 Md. 662, 681-82 (2007) (internal citations omitted). The courts "frequently defer to an agency's interpretation of its *own* regulations." *Dan's Mountain Wind Force, LLC v. Allegany County Board of Zoning Appeals*, 236 Md. App. 483, 491 n.5 (2018) (citing *Surina*, 400 Md. at 682 ("When determining the validity of those legal conclusions reached by the zoning body…'a degree of deference should often be accorded the position of the administrative agency' whose

task it is to interpret the ordinances and regulations the agency itself promulgated.")). The test is "reasonableness, not rightness." *Surina*, 400 Md. at 681.

B. It was reasonable for the Planning Board to approve NCBP's tree variance application because substantial evidence in the record supported its interpretation of its own zoning ordinance.

Z.O. § 25-119(d) sets forth the factors for consideration of a tree variance under the Prince George's County Code. It is important to note that a tree variance under this provision of the county code is *not* considered a zoning variance under State definitions and case law. *See* Z.O. § 25-119(d)(4) ("Variances granted under this Subtitle are not considered zoning variances.").

Therefore, Petitioners' citation to cases interpreting the State Land Use Article on variances, or the Montgomery County Code on variances, do not have applicability to this court's review of the Prince George's County Code on tree variances. *See* Petr's Mem. at 9-10 (citing *Dan's Mountain Wind Force, LLC*, 236 Md. App. at 494, 496 (interpreting the term "conditions peculiar to the property" in Md. Code, Land Use, Section 4-206(b)(2)); *Montgomery Cnty. V. Rotwein*, 169 Md. App. 716, 727 (2006) (interpreting terms of the Montgomery County Code)).

Moreover, Petitioners fail to cite the one appellate opinion that actually evaluated a tree variance. *See W. Montgomery Cnty. Citizens Ass'n v. Montgomery Cnty. Plan. Bd. Of Maryland-Nat'l Capital Park & Planning Comm'n*, 248 Md. App. 314, 347 (2020), *cert. denied sub nom.*, 474 Md. 198 (2021) (determining that there was substantial evidence in the record for a tree variance to be granted under an applicant's approved forest conservation plan).

1. Z.O. § 25-119(d)(1)(A): Special features of the site warranted the request to remove 11 specimen trees.

Z.O. § 25-119(d)(1) sets forth that an applicant, such as NCBP, may request a tree variance "where owing to special features of the site or other circumstances, implementation of this subtitle would result in unwarranted hardship to an applicant." Z.O. § 25-119(d)(1)(A) requires the

Planning board to find that "Special conditions peculiar to the property have caused the unwarranted hardship."

The record substantially demonstrates that there were special features of the site that warranted the request to remove the 11 specimen trees, because without their removal, it would result in an unwarranted hardship to NCBP, by preventing the project from being developed in accordance with the land uses approved in basic plan A-9968-03.

The record contains a "Letter of Justification re: Variance to Remove Specimen Trees" which is found at R. 130-137. This letter was submitted for review with PPS 4-21056, as noted within the Resolution. *See* R. 43. This letter explains that the special features of this site include a "widely varying shape, undulating topography, and presence of Marlboro clay soils." R. 132. The Subject Property's width differential is 2,000 feet in some areas and it has an elevation that fluctuates between 48 feet and 165 feet. R. 132. Most importantly, over 40% of the site within the Primary Management Area (PMA) and therefore unable to be developed. R. 132.

Of the area that can be developed, that portion of the property sits on Marlboro clay soil and steep slopes. R. 132. The entitlement approvals permit development of employment/light industrial use, and therefore, must be developed on portions of the site that allow the foundations for such structures to be constructed safely. R. 133. "The combination of all the above referenced site conditions make it necessary to remove the noted specimen trees to allow the property to be developed for its intended/approved use(s)." R. 133.

"The removal of these specimen trees is necessary to facilitate the proposed final development approved for the main portion of the site[.]" R. 131. "The trees in question are spread over the Property and their removal is critical to the development of the NCBP." *Id.* These specimen trees noted "are either directly located within the proposed building footprints, parking

areas, public roadways, public park, or along areas impacted significantly by proposed grading for the site" or have "critical root zone disturbance…that…will not survive site construction." *Id*.

At the Planning Board hearing, Mridula Gupta of the Subdivision Section, addressed that the PPS proposes removal of an additional 11 specimen trees because they are located within the most developable arch of the site and are not located in the regulated environmental PMA areas. June 2, 2022 Hearing at 12.

Thus, the Planning Board correctly found, based upon this evidence in the record, that "[t]he specimen trees requested for removal are located within the most developable part of the site and are not located in the regulated environmental PMA areas." R. 43. The Resolution recounted that "[t]he site is characterized by extensive environmental resources associated with the Collington Branch stream valley system. The proposed subdivision concentrates development in the northeast portion of the property, in order to avoid impacts to the more environmentally sensitive areas of the site." R. 14.

Of the 442.30 acres of subject property, 186.15 acres is PMA, representing 42% of the overall site area. R. 43. The Planning Board correctly found that "Development cannot occur on the portions of the site containing PMA, which limits the site area available for development." R. 43. Thus, "the proposed project cannot be accomplished elsewhere on the site without the requested variance." R. 43. Those are the peculiarities of this site that would not be present on nearby properties that are not within a PMA that contains "streams, wetlands, 100-year floodplains, and associated areas of steep slopes with highly erodible soils on the property." R. 43.

This is not simply a case of go build on another part of the property as Petitioners imply. Petr's Mem. at 12 ("any hardship does not relate to the use of the *entire* parcel"). Petitioners completely ignore the record which establishes that NCBP cannot develop "the entire 442 acre

Subject Property," but rather, can only develop the Northeast corner of the property because of environmental constraints. Moreover, these 11 specimen trees stand in the way of that development, as clearly explained in the Letter of Justification, which was reviewed by the Planning Board. R. 43, 131-32.

The Planning Board rightly recognized that requiring these additional specimen trees to remain on site, would limit the area of the site available for development causing NCBP an "unwarranted hardship" that is not justified in light of the "significant and reasonable uses of the site" such as a "warehouse/distribution, office, light industrial/manufacturing and/or institutional uses, and a park" that are similarly used in nearby locations, such as the Collington Business Center. R. 43-44.

That is the correct analysis consistent with *W. Montgomery*, 248 Md. App. at 346-47 (an "unwarranted hardship" means that "without a variance, an applicant would be denied reasonable and significant use of the entire parcel or lot for which the variance is requested."). The appellate courts have made it clear that the applicant for a variance does not have to demonstrate a denial of *all* reasonable and significant use of the entire property, the standard urged by Petitioners, rather, the applicant mut merely show a denial of "*a* use of the property that is both significant and reasonable." *Id*. at 347 (citing *Assateague Coastal Trust, Inc. v. Schwalbach*, 448 Md. 112, 127, 139 (2016)).

Thus, the Planning Board did not fail to articulate how the Subject Property is unique based upon its size, extent, or location of the environmental resources, nor did the Planning Board fail to articulate a meaningful analysis of the facts to support its conclusion, nor does the record lack substantial evidence that NCBP satisfied Z.O. § 25-119(d)(1)(A). Petr's Mem. at 11.

2. Z.O. § 25-119(d)(1)(B): Absent a variance, NCBP would be deprived rights commonly enjoyed by others in similar areas.

Property owners in similar areas, such as the Collington Center which is an employment center to the East of the Subject Property, R. 14, were able to clear acres worth of trees in order to build an employment/industrial park on suitable land conditions. The Subject Property in this case was approved to develop uses on land, similar to the Collington Local Employment Area, "where the goal is to attract light industrial and office land uses." R. 19. However, as the Planning Board correctly determined in its Resolution, each site is unique depending upon how many specimen trees grow, how large they have grown, what the species is, how long and deeps the roots are, what their construction tolerance is, and where they are located on a site in relation to where the construction must occur. R. 44.

NCBP was granted the right to construct an approved structure, rights that were granted to them through the Zoning Ordinance, the approved Basic Plan, the CDP, a Preliminary Plan, and the SDP. R. 133. To prevent the removal of 11 specimen trees would deprive NCBP a right commonly enjoyed by others seeking to develop in the nearby employment/industrial park.

Petitioners argue that under prior approvals for 3.5 million sq. ft. of industrial uses on the Subject Property that the Applicant would be able to retain the 11 specimen trees, but now it requests permission to remove those trees with the approval of the 5.5 million sq. ft. of industrial uses on the Subject Property. Petr's Mem. at 14. On balance, a request to remove an additional 11 specimen trees for two million more square feet of approved uses is not unreasonable. What would be more unreasonable would be to deny NCBP the right to remove 11 specimen tree and suffer the loss of this additional two million square foot approval that is consistent with the master plan for this area.

3. Z.O. § 25-119(d)(1)(C): Granting the variance will not confer on NCBP a special privilege that would be denied to other applicants.

The Planning Board cogently explained that any other applicant seeking a similar variance because of similar environmental features preventing development would be provided the same considerations in review of their variance application. R. 44.

Petitioners submitted materials for consideration by the Planning Board, not one of which was a tree variance application that had been denied based upon similar environmental conditions. *See* R. 380-399. Similarly, Petitioners participated in the public hearing before the Planning Board and did not testify to one instance in which this supposed "special privilege" was denied to another applicant.

Thus, there is no evidence in the record that the Planning Board has denied similar tree variance applications. This is not a "meaningless" criterion, as expressed by Petitioners, Petr's Mem. at 15, but rather, a criterion designed to ensure that all similarly situated applicants will receive the same considerations, which the Planning Board said they would ensure.

4. Z.O. § 25-119(d)(1)(D): The request is not based on conditions or circumstances which are the result of actions by the applicant.

Petitioners misconstrue interpretation of this factor when they argue that "the Applicant's need for a variance arises only from its desire to increase the size of its development[.]"

A desire to build a larger structure is not the type of "condition[ ] or circumstance[ ] which are the result of actions by the applicant" that the Zoning Ordinance envisioned. Z.O. § 25-119(d)(1)(D). If that were the case, then *no* applicant could ever satisfy this condition since *every* request for a tree variance is based upon the applicant's desire to utilize the land in the interest of the applicant without the presence of the tree.

The "self-created hardship" was indeed discussed in the case cited by Petitioners, *Chesley v. City of Annapolis*, 176 Md. App. 413 (2007), although the variance in *Chelsey* was a zoning variance, not a tree variance. *See* Petr's Mem. at 16. However, *Chelsey* is favorable to NCBP's position because it explains that the desire to build a larger structure is not a "self-created hardship," as contended by Petitioners.

The *Chesley* Court relied upon the Supreme Court of Maryland's decision in *Richard Roeser Prof'l Builder, Inc. v. Anne Arundel County*, 368 Md. 294 (2002), in which Roeser, a developer, bought a lot with knowledge that a variance from the critical area buffer would be necessary *to build a house of the size that it planned,* akin to the arguments Petitioners make about NCBP's desire to increase the size of the development. *Chesley*, 176 Md. App. at 436 (citing *Roeser*, 368 Md. at 297). The local zoning board denied the variance on the ground that the conditions surrounding the request were "self-created." *Roeser*, 368 Md. at 297. However, the circuit court reversed, holding that "hardships of this type are normally those which are created by the owners of the property and not by the property itself." *Id*. at 298. Importantly, the circuit court "reasoned that Roeser had not created the topography and placement of the property, which were the reasons that the lot required a variance." *Chesley*, 176 Md. App. at 436 (citing *Roeser*, 368 Md. at 297). This is much like the topography, environmental concerns, and placement of the site for the Subject Property in the instant case. The Supreme Court of Maryland affirmed the circuit court's decision and rationale. *Roeser*, 368 Md. at 320.

The *Roeser* Court illustrated the principle by contrasting the mere purchase of a property in the hope of obtaining a variance, like occurred in *Roeser* and the instant case, with instances in which the property owner took some affirmative action that created the hardship for which the variance was sought, like in *Chelsey*. Self-created hardships include buildings being "constructed

in violation of established setbacks, height restrictions, and building permit requirements." *Chesley*, 176 Md. App. at 437 (citing *Roeser*, 368 Md. at 314-16) (collecting cases).

In the instant case, NCBP did not begin construction or cutting down trees *before* applying for a tree variance, and thus did not make a self-created hardship, in contrast to all of the cases cited by *Roeser*, and Chesley who "created the need for the variance by developing the property before obtaining the garage variance." *Chesley*, 176 Md. App. at 440.

Thus, the Planning Board did not err in its findings that "[t]he request to remove the trees is solely based on the trees' locations on the site" and that "[t]he applicant has taken no actions leading to the conditions or circumstances that are the subject of the variance request." R. 44.

5. Z.O. § 25-119(d)(1)(E): The request does not arise from a condition relating to land or building use, either permitted or nonconforming, on a neighboring property.

Petitioners do not contend that the Planning Board erred in their assessment of this factor. Thus, the Planning Board's findings are undisturbed. R. 44.

6. Z.O. § 25-119(d)(1)(F): Granting of the variance will not adversely affect water quality.

Z.O. § 25-119(d)(1)(F) permits approval of a variance when "[g]ranting of the variance will not adversely affect water quality." The tree specimen variance application clearly stated that "[t]here is no evidence that the removal of the specimen trees in any area approved for development will have any impact on water quality." R. 18. Petitioners, who submitted filings before the Planning Board and presented expert witnesses on other matters at the public hearing on June 2, 2022, never offered contrary evidence into the record that there was any evidence that removal of the 11 specimen trees would have any impact on water quality. This alone was substantial evidence in the record, unrefuted, to support the Planning Board's finding in the Resolution that "Granting

this variance request, for the removal of 11 trees, will not adversely affect water quality standards nor cause measurable degradation in water quality." R. 45.

But this was not the only evidence in the record that supported that finding. As the application further indicated, "many of the specimen trees requested for removal are located in areas that will be providing stormwater management for the proposed site program." R. 18. This is an additional assurance that granting the variance would not adversely affect water quality because the area where the trees will be removed will have to comply with a stormwater management plan.

The Planning Board was aware that a prior stormwater management concept plan, plan 42013-2020-00, had already been approved on the previous application to remove over 100 specimen trees on the Subject Property. *See* Petr's Mem. at 12 ("The Applicant has already been approved to remove over 100 specimen trees on the Subject Property." (citing Technical Staff Report 32-33)). Indeed, the Planning Board's Resolution made reference to that fact in approving this PPS, by permitting the "[d]evelopment of this site…in conformance with the approved stormwater management concept plan (42013-2020-00) and any subsequent revisions." R. 5. Where a stormwater management concept plan was already approved after determination that the removal of more than 100 specimen trees would not adversely affect water quality, it was reasonable for the Planning Board to conclude, upon unrebutted evidence, that the removal of the additional 11 specimen trees would not adversely affect water because the project must continue to be "subject to SWM regulations as implemented locally by DPIE" and "subject to environmental site design" and "State standards [that] are set to ensure that no degradation occurs." R. 45.

The fact that a subsequent stormwater management plan inclusive of these 11 specimen trees was "unapproved" is of no consequence, because compliance with stormwater management

regulations in this context, merely requires the filing of the plan with the appropriate agency. The Technical Staff Report clearly indicated that to comply with stormwater management, "[a]n application for a major subdivision must include an approved SWM concept plan, ***or an indication that an application for such approval has been filed with the appropriate agency*** or the municipality having approval authority." R. 64 (Emphasis added). Here, "[a]n unapproved SWM concept plan (42013-2020-01) was submitted with this application and is currently in review with the Prince George's County Department of Permitting, Inspections and Enforcement (DPIE)[.]" R. 64, 134. Thus, the Technical Staff was able to "find[ ] that development on the site in conformance with SWM concept approval and any subsequent revisions, ensuring that no on-site or downstream flooding occurs, satisfies the requirement of Section 24-130 of the Subdivision Regulations." R. 64.

Section 24-130(b)(3) expressly states that "the submission of a storm drainage and stormwater management concept plan, and approval thereof by the County, ***may*** be required prior to the preliminary plan approval." It does not state that it must be approved by the County prior the preliminary plan approval.

Similarly, the record contains a memorandum from the Environmental Planning Section (EPS) submitted a letter on May 2, 2022. R. 161. The EPS likewise reviewed PPS 4-21056, and similarly recommended approval. R. 161. The EPS made this approval based upon the development being "subject to the current stormwater management (SWM) regulations, which require that environmental site design be implemented to the maximum extent practicable." R. 168. The EPS report also found that "an unapproved SWM concept plan is in review with DPIE[.]" R. 175.

Z.O. § 25-119(d)(1)(F) does not state that the granting of the variance application requires more than what it says, more than what 24-130(b)(3) says, or more than what was found by the Planning Board, contrary to Petitioners' assertions. *See* Petr's Mem. at 18-19.

Here, the Applicant demonstrated not only that the removal of 11 trees would not adversely impact water quality, but that the area is going to be in compliance with standards more stringent than what is required under Z.O. § 25-119(d)(1)(F). Thus, the Planning Board did not err in granting the request for a variance to remove 11 specimen trees.

IV. THIS COURT SHOULD AFFIRM THE PLANNING BOARD'S APPROVAL OF PPS 4-21056 BECAUSE THE RECORD CONTAINS SUBSTANTIAL EVIDENCE THAT REQUIREMENTS HAVE BEEN MET FOR ADEQUATE PUBLIC FACILITIES AND ROADS.

A. Adequacy of Public Facilities for Fire and Rescue Services under Section 24-122.01.

Petitioners read the record out of context and out of sync with the requirements of Section 24-122.01. Section 24-122.01 does not require, as is suggested by Petitioners, that "the subject property [ ] pass the four-minute travel test from the closest Prince George's County Fire/EMS station, Pointer Ridge Volunteer Fire/EMS, Company 843, in Bowie." *See* Petr's Mem. at 33 (citing Technical Staff Report 20).

First, the four-minute or less travel time is the national performance *objective*, not the standard or requirement. *See* R. 74 (Technical Staff Report 20) ("Per the National Protection Association 1710, Chapter 4, 240 seconds (4 minutes) or less travel time is the national performance objective."). The controlling *law* is Section 24-122.01(d) of the Prince George's County Code, which sets forth the adequate public facilities requirements for fire and rescue facilities. Section 24-122.01(e)(1)(E) provides that "A statement by the Fire Chief that the response

time for the first due station in the vicinity of the property proposed for subdivision is a maximum of **seven (7) minutes** travel time." (Emphasis added).

Second, and even more important, is that the requirement of a statement regarding travel time of seven (7) minutes, as required by Section 24-122.01(e)(1)(E), is only required for residential facilities, not commercial sites like the Subject Property. Section 24-122.01(e)(3) states that "The provisions of Subsection (e)(1) *shall not apply to commercial or industrial applications for preliminary plans*." (Emphasis added).

Thus, for commercial or industrial properties like the Subject Property, Section 24-112.01(d)(1) only requires the Planning Board to find that "The population and/or employees generated by the proposed subdivision at each stage of the proposed subdivision will be within the adequate coverage area of the nearest fire and rescue station(s)" as determined by the Planning Board in the "Guidelines for the Mitigation of Adequate Public Facilities: Public Safety Infrastructure" as may be amended from time to time. However, those Guidelines likewise do not address commercial/industrial subdivisions, only residential properties. Because of the void in both the statute and the Guidelines, the Staff turned to the County Fire Chief to provide guidance for a commercial/industrial subdivision. For this PPS, it was recommended that the Applicant "contact the Prince George's County Fire/EMS Department to request a pre-incident Emergency Plan for the facility; install and maintain Automated External Defibrillators (AEDs) in accordance with the Code of Maryland Regulations (COMAR); and install and maintain hemorrhage kits next to fire extinguishers." R. 74, 157. Moreover, "the Special Projects Section" recommended not only that these conditions would be required "prior to issuance of a use and occupancy permit" but also that the Applicant must "[i]nstall and maintain a sprinkler system that complies with FNPA 13 Standards for the Installation of Sprinkler Systems." R. 158.

Petitioners cannot establish that the approval of this PPS violated any statutory standards because there are no travel time regulations for non-residential sites such as the Subject Property. Adequacy of fire and rescue services is to be determined by the Planning Board and deference must be given to "an agency's interpretation of its *own* regulations." *Dan's Mountain Wind Force, LLC*, 236 Md. App. at 491 n.5 (citing *Surina*, 400 Md. at 682). The Planning Board clearly made the required statutory finding of adequacy based upon the standards which have been consistently applied to non-residential subdivisions. Thus, the Planning Board did not err in finding that adequate public facilities requirements had been met.

B. Adequacy of Roads Requirement under Section 24-124.

Petitioners' sole contention about the sufficiency of roads stems from their belief that there will be inadequate access roads, namely, that the plan does not properly accommodate an uptick in traffic to Leeland Road. Petr's Mem. at 33-34.

First, Z.O. § 24-124(a)(1), the provision cited by Petitioners, applies to "access roads." Leeland Road, by contrast, is not an access road to the Subject Property. The record evidences that "[b]ecause of a zoning restriction, the project cannot use Leeland Road as its vehicular access, and is limited to providing connections from Queens Court and Prince George's Boulevard." R. 46. *See also* R. 6 ("The final plat of subdivision shall contain a note reflecting denial of vehicular access along the frontage of Leeland Road[.]").

Second, what Petitioners fail to address in their memorandum, is the same issue that they failed to address at the public hearing, which is that "Leeland Road will be completely reconstructed as a part of a Master Plan update." June 2, 2022 at 56. A preliminary plan of subdivision must conform to any applicable Master Plans, of which the Master Plan of Transportation ("MPOT") is one. The Staff recognized that the "subject site is along the 110-foot

master-planned right-of-way of Leeland Road (a major collector)" and thus "[d]edication of 4.48-acre right-of-way along Leeland Road is required to meet the right-of-way requirements and is adequately shown on this plan." R. 69. Moreover, Petitioners overlook the fact that the "transportation improvements conditioned by CDP-0505-02…have been modified and carried forward as conditions of approval of this PPS." R. 30. CDP-0505-02 includes improvements to Leeland Road. R. 68.

The Planning Board took Petitioners objections into account, but ultimately found that Petitioners "raised an issue with traffic impacts that were not relevant for approval of the PPS, utilizing daily trip count on Leeland Road, a road to which no access is proposed with this PPS." R. 50. Thus, the Planning Board did not err in approving PPS 4-21056.

CONCLUSION

NCBP asks this Court to affirm the Planning Board's decision to approve PPS-421056, TCP1-004-2021-03, and the associated variance to Z.O. § 25-122(b)(1)(G).

REQUEST FOR A HEARING

NCBP respectfully requests that a hearing be scheduled for the determination of the issues set forth in this memorandum.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of December, 2022, a copy of the foregoing was served by via MDEC and e-mail, to the following:

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