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Chair Todd M. Turner and  
Members of the Prince George's  
County District Council  
County Administration Building  
14741 Governor Oden Bowie Drive  
2nd Floor  
Upper Marlboro, MD 20772



**Re:** Opposition to Mr. Bradley Heard's Petition for Appeal from the Planning Board's Final Decision District Council review of the Planning Board's approval of DSP-06001-03.

On behalf of our client 6301 Central Avenue, LLC ("**Applicant**"), Lerch, Early and Brewer, Chtd., is submitting this opposition to Mr. Bradley Heard's ("**Petitioner**") Petition for Appeal from the Planning Board's Final Decision District Council review of the Planning Board's approval of DSP-06001-03 ("**Petition for Appeal**").

**I. Background**

The Applicant applied for approval of Detailed Site Plan Amendment No. DSP-06001-03<sup>1</sup> ("**DSP Amendment**"), to allow for the development of certain property located in the southwest quadrant of the intersection of MD-214 (Central Avenue) and Addison Road, with frontage on Zelma Avenue ("**Property**") with a mixed-use project. The Property consists of three distinct areas: Parcel A, Parcel 87<sup>2</sup> and Lot 5, Block B. The Property is located within the R-55 (Lot 5) and C-S-C (Parcel A and Parcel 87) zones and is subject to the Addison Road Metro Town Center Development District Overlay Zone ("**D-D-O**"). The Property is subject to the following prior development approvals: 1) Detailed Site Plan ("**DSP**") No. 06001; 2) DSP-06001-01<sup>3</sup>; 3) Preliminary Plan of Subdivision ("**PPS**") No. 4-05068; and 4) PPS 4-08019.

The DSP Amendment proposed a mixed-use project consisting of 193 dwelling units and 11,000 square feet of commercial development and surface parking ("**Project**"). The proposed mixed-use building

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<sup>1</sup> The Property is subject to two prior DSP approvals DSP No. DSP-06001 and DSP Amendment No. DSP-06001-01.

<sup>2</sup> The Applicant does not own Parcel 87.

<sup>3</sup> DSP-06001-02 was withdrawn.

will be located on Lot A. The surface parking will be located on Parcel 87. No development is proposed on Lot 5. The Project will be an exciting high quality mixed-use pedestrian-oriented and transit-oriented development, which will provide much needed housing and retail directly across the street from the Addison Road Metro Station.

On April 9, 2020, the Prince George's County Planning Board ("**Planning Board**") considered the DSP Amendment at a public hearing. The Petitioner participated and presented his arguments in opposition to the DSP Amendment. After due consideration of these arguments, the Planning Board voted to approve the DSP Amendment. By resolution dated April 30, 2020, the Planning Board ("**Resolution**") approved the DSP Amendment subject to certain conditions. On June 2, 2020, Petitioner filed his Petition for Appeal, which is now before the District Council.

## **II. Legal Overview**

### **a. District Council Standard of Review**

When reviewing the Planning Board's action on the DSP Amendment, the District Council sits in an appellate capacity. This means the District Council mimics the standard of review a court would employ in reviewing the Planning Board's action, so as not to interfere with the jurisdiction of the Planning Board. *County Council of Prince George's County v. Zimmer Development Co.*, 444 Md. 490, 572 (2015). The District Council should not overturn Planning Board's findings and conclusions merely because District Council disagrees with Planning Board. Rather, the Planning Board's findings of fact and application of law to those findings of fact may only be overturned where not supported by substantial evidence in the record. *Id.* at 573. Substantial evidence means "sufficient evidence such that a reasoning mind reasonably could have reached the factual conclusion the agency reached." *Id.* (citation omitted) (internal quotations omitted).

Regarding the Planning Board's conclusions of law, the District Council owes less deference to the Planning Board and may reverse a legal conclusion of the Planning Board where "based on an erroneous interpretation or application of zoning statutes, regulations, and ordinances relevant and applicable to the property that is the subject of the dispute." *Maryland-Nat. Capital Park & Planning Comm'n v. Greater Baden-Aquasco Citizens Ass'n*, 412 Md. 73, 84 (2009). However, even when applying this less deferential standard, the District Council should accord a degree of deference to the Planning Board's interpretation of the ordinances it is tasked with interpreting and regulations promulgated by the Planning Board itself. *Id.*

A key caveat to the above is that, where a provision of the Land Use Article of the Maryland Code ("**Land Use Code**") or the Prince George's County Code ("**County Code**") empowers the District Council,

and not the Planning Board, to make a final decision on a matter, the District Council's authority is "original" rather than "appellate." *Zimmer Development Co.*, 444 Md. at 569. In this situation, the District Council may draw its own conclusions based on the evidence in the record. For example, pursuant to Section 27-548.26, the District Council, and not the Planning Board, provides the final decision on amendments to the D-D-O use table (see Petitioner's Contention #15 below).

**b. Weight of General, Master and Sector Plans**

The Property is subject to the *Addison Road Metro Town Center and Vicinity Sector Plan* ("**ARM Sector Plan**"), *2014 Approved General Plan (Plan Prince George's 2035)* ("**General Plan**"), and the *2010 Approved Subregion 4 Master Plan* ("**Subregion 4 Master Plan**"). A substantial number of the Petitioner's contentions appear to be based on Petitioner's opinion that the DSP Amendment does not conform to these three plans. In reviewing the Petitioner's contentions the District Council must bear in mind that, with respect to the DSP Amendment: 1) the General Plan and Subregion 4 Master Plan are merely advisory and not binding; and 2) Only the Development District Standards contained ARM Sector Plan are binding.

**i. Master Plans and the General Plan are not binding regulatory devices unless the applicable statute or ordinance so states**

Generally, plans like the ARM Sector Plan, General Plan, and Subregion 4 Master Plan, "which are the result of work done by planning commissions and adopted by ultimate zoning bodies, are advisory in nature and have no force of law absent statutes or local ordinances linking planning and zoning." *Friends of Frederick County v. Town of New Market*, 224 Md. App. 185, 199 (2015). "Whether a plan is a guide or a regulatory device is generally a matter of statutory interpretation." *Id.* With respect to development plans, like the DSP Amendment, "when the development regulations incorporate Master Plan compliance, the Master Plan itself becomes a regulatory device, rather than a mere guide and recommendation." *HNS Development, LLC v. People's Counsel for Baltimore County*, 425 Md. 436, 457 (2012). Where a development plan is required to, for example, "conform to" or "be in compliance" with a master plan or general plan, the relevant plan becomes a binding regulatory device that the deciding authority may not disregard. *Friends of Frederick County* 224 Md. App. at 201 (concluding that the Land Use Article's requirement that special exceptions further and not be contrary to comprehensive plans elevates comprehensive plans to the status of "true regulatory device" with respect to special exceptions); *see also Coffey v. Maryland-National Capital Park and Planning Commission*, 293 Md. 24 (1982) (concluding that, where the Prince George's County Code required a subdivision plan to be in compliance with the applicable master plan, the master plan was elevated to the status of a true regulatory device). Conversely, where no such requirement for compliance and the like exists, master plans and general plans are merely advisory.

- ii. The General Plan and Subregion 4 Master Plan are merely advisory and not binding with respect to the Planning Board's action on a DSP

The General Plan and Subregion 4 Master Plan are merely advisory with respect to the Planning Board's action on a DSP. With respect to approval of a DSP, neither the Land Use Code nor Zoning Ordinance elevates the General Plan or the Subregion 4 Master Plan to the status of a true regulatory device. Specifically, conformance to the applicable master plan or the General Plan is not a required finding of approval for a DSP. *See* Zoning Ordinance § 27-285(b).<sup>4</sup>

- iii. Only the Development District Standards contained in the ARM Sector Plan are binding and regulatory

The ARM Sector Plan contains both policy recommendations and the Development District Standards for the D-D-O. The recommendations of the ARM Sector Plan were superseded by the Subregion 4 Master Plan. Thus, these are irrelevant. However, the Development District Standards contained in the ARM Sector Plan are binding and regulatory. Pursuant to Section 27-548.25(b) of the Zoning Ordinance, a DSP (or amendment thereto) must conform to the Development District Standards.

### **III. Point-by-point Response to the Petitioner's Contentions**

- Petitioner's Contention 1: *The Planning Board erred as a matter of law and denied Petitioner due process of law to the extent it relied on the continuing validity of the District Council's previous ultra vires modifications of the Planning Board's final decisions concerning previous detailed site plan applications for the subject property.*

Response: Contrary to what the Petitioner suggests, the Planning Board's approval of the DSP Amendment did not rely on the previously approved DSP applications associated with the Property, DSP-06001 and DSP-06001-01.<sup>5</sup> Pursuant to Section 27-289(b) of the Zoning Ordinance, in approving an amendment to a DSP, the Planning Board makes the same findings as it would for an original DSP. As detailed in the Resolution, the Planning Board did so in this instance. As such, the Planning Board's approval of the DSP Amendment stands on its own and does not rely on the prior approvals.

To the extent it is relevant, the previous DSP approvals, DSP-06001 and DSP-06001-01, remain valid and the time to challenge them has expired. An approved DSP is only subject to review either via reconsideration by the District Council or appeal to the Prince George's County Circuit Court. Such appeal or petition for reconsideration must be filed within 30 days of the District Council's action on the DSP. Md.

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<sup>4</sup> Conversely, conformance with the applicable master plan and the General Plan is a required finding for approval of a PPS. County Code § 24-121. This indicates that, in drafting these provisions, the County Council determined that conformity to the General Plan and applicable master plan would be tested at the time of PPS, and not re-tested at the time of DSP.

<sup>5</sup> DSP-06001-02 was withdrawn.

Code Ann., Land Use, § 22-407; Zoning Ordinance § 27-228.02(b). DSP-06001 and DSP-06001-01 were approved on September 21, 2006 and October 4, 2010, respectively. Accordingly, the time to file an appeal or petition for reconsideration on either of these DSPs has long expired.<sup>6</sup>

- Petitioner's Contention 2: *The Planning Board erred as a matter of law and denied Petitioner due process of law to the extent it relied on prior preliminary subdivision and detailed site plan approvals involving the subject property between 2006 and 2010, when the previous property owner, Dr. Mirza H.A. Baig, was admittedly engaged in a criminal pay-to-play bribery scheme with various named and unnamed county officials between at least 2006-2010, in order to secure their official assistance with various matters, including matters specifically relating to the proposed Commons at Addison Road development.*

Response: The issues raised by the Petitioner regarding the prior PPS and DSP approvals are not relevant. Firstly, the Applicant had no involvement with the Property between 2006 and 2010. With regards to the prior DSP approvals (DSP-06001 and DSP-06001-01)<sup>7</sup>, as explained in detail above, the DSP Amendment stands on its own and does not rely on the previous DSP approvals referenced by the Petitioner. In approving the DSP Amendment, the Planning Board made the same findings that would be required for an original DSP, as is required pursuant to Section 27-289(b) of the Zoning Ordinance.

The prior PPS approvals are not relevant. The Petitioner is appealing the DSP Amendment and not the PPS. On the same day the Planning Board considered the DSP Amendment, the Planning Board also approved a reconsideration of PPS 4-05068 – the relevant PPS for the Property. To the extent that the Petitioner has an issue with the relevant PPS approvals for the Property, the Petitioner may file a petition for judicial review of the PPS in the Prince George's County Circuit Court. Md. Code Ann., Land Use § 23-401. A PPS cannot be appealed to the District Council.

To the extent that it is relevant, the prior DSP and PPS approvals remain valid and are no longer subject to judicial review. As described in detail in the response to Petitioner's Contention #1, DSP-06001 and DSP-6001-01 remain valid<sup>8</sup> and are no longer subject to judicial review. Regarding the prior PPS approvals, the Planning Board approved PPS 4-05068 (Parcel A) and PPS 4-08019 (Parcel 87) on February

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<sup>6</sup> Notably, the Petitioner did, in fact, appeal the District Court's action on DSP 06001-01 and lost both in the Circuit Court and the Court of Special Appeals. To the extent that, as the Petitioner suggests, there was some legal defect with DSP-06001-01 that Petitioner did not raise it at time he appealed it, the Circuit Court or Court of Special Appeals could have reversed the approval of DSP-06001-01 on that basis *sua sponte*. Apparently, given that the approval DSP-06001-01 was not reversed, neither court found such a defect.

<sup>7</sup> DSP-06001-02 was withdrawn.

<sup>8</sup> See CB-7-2009; CB-6-2010; CB-7-2011; CB-67-2012; CB-71-2013; CB-81-2015; CB-97-2017; CB-59-2018. Detailed site plans are generally valid for three years. From 2009 through 2018, the County and District Council enacted a series of legislation that temporarily suspended and/or extended the running of validity periods for approved detailed site plans in Sec. 27-287 of the Zoning Ordinance. Accordingly DSP-06001 and DSP-06001-01 remain valid until December 31, 2020.

9, 2006 and September 25, 2008, respectively. Pursuant to Sec. 24-119(d)(5) of the County Code, these approved preliminary plans of subdivision remain valid. Further, the sole means for challenging a PPS is a petition for judicial review. As noted above, a PPS cannot be appealed to the District Council. A petition for judicial review may only be filed within 30 days of the Planning Board's action on a PPS. Md. Code Ann., Land Use § 23-401.<sup>9</sup> This appeal period has long expired.

- Petitioner's Contention 3: *The Planning Board erred as a matter of law and denied Petitioner due process of law by disregarding or failing to consider the recommendations of the 2014 Approved General Plan (Plan Prince George's 2035) or the 2010 Approved Subregion 4 Master Plan, or viewing those comprehensive plan recommendations as merely advisory and not binding and regulatory in connection with the subject detailed site plan application.*

Response: The Planning Board did not err, as matter of law, in treating the recommendations of the General Plan and Subregion 4 Master Plan as advisory. As explained in detail above, these plans are merely advisory with respect to the DSP Amendment. Master plans are mere guidance and not binding regulatory devices unless applicable code so states. *See, e.g., Friends of Frederick County v. Town of New Market*, 224 Md. App. 185, 199 (2015). For example, in *Friends of Frederick County v. Town of New Market*, because the Land Use Article required that a special exception be "in compliance with" the applicable comprehensive plan, the comprehensive plan was elevated to the status of a true regulatory device. *Id.* at 201. Not so here. With respect to approval of a DSP, the Land Use Code and Zoning Ordinance do not elevate the General Plan or the Subregion 4 Master Plan to the status of a true regulatory device. Conformance to the applicable master plan or the General Plan is not a required finding of approval for a DSP. Zoning Ordinance § 27-285(b).<sup>10</sup> As such, the Planning Board did not err in treating the General Plan and Subregion 4 Master Plan as merely advisory with respect to the approval of the DSP Amendment.

- Petitioner's Contention 4: *The Planning Board erred as a matter of law and denied Petitioner due process of law to the extent it determined that it was not empowered or authorized to require, as a condition of approving a detailed site plan application, that Applicant dedicate land and/or pay for onsite, offsite, or site-adjacent improvements, including within the public right-of-way, in accordance with the requirements of applicable comprehensive plans, so long as there is a nexus and rough proportionality between the land dedication or monetary exaction and the proposed land use.*

Response: It is not abundantly clear to what dedications of land and monetary exactions the Petitioner is referring. To the extent that the Planning Board did not require an exaction or dedication with the approval

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<sup>9</sup> As previously noted, a PPS cannot be appealed to the District Council.

<sup>10</sup> Conversely, conformance with the applicable Master Plan and the General Plan is a required finding for approval of a PPS. County Code § 24-121. This indicates that, in drafting these provisions, the County Council determined that conformity to the General Plan and applicable Master Plan would be tested at the time of PPS, and not re-tested at the time of DSP

of the DSP Amendment, the Planning Board correctly determined that it is not empowered to require such dedications and exactions *at the time of DSP*. The Planning Board is empowered to make exactions, like the ones Petitioner lists, but only at the time of subdivision. Section 23-104(b) of the Land Use Article provides:

(c)(1) [. . .], the **subdivision regulations** may include provisions for:

...

(ii) the coordination of roads within the subdivision with:

1. existing planned or platted roads;
2. features of the regional district;
3. that county's general plan; or
4. a transportation plan adopted by the Commission as part of that county's general plan.

Further, pursuant to Section 23-103(a) of the Land Use Article, land dedication for roads is relegated to the time of “subdivision plat,” meaning a PPS:

(a) [. . .] [I]n connection with the approval of a **subdivision plat**, the appropriate county planning board may require a dedication of land for:

- (1) an interior subdivision road;
- (2) a road that abuts the subdivision for the purpose of creating a new road as part of the plan of subdivision to provide for traffic access to another subdivision road; and
- (3) the widening of an existing or public road that abuts the subdivision for the purpose of providing additional right-of-way adequate to serve additional traffic that will be generated by the subdivision.

Additionally, the authority to regulate roadway and other off-site improvements are not included in the list of purposes enumerated under Maryland Land Use Article Section 22-104 – Authority to adopt and amend zoning law. Section 22-104(b) provides:

(b) *Purposes. The local law may regulate:*

(1)

- (i) *the location, height, bulk, and size of each building or other structure, and any unit in the building or structure;*
- (ii) *building lines;*
- (iii) *minimum frontage;*
- (iv) *the depth and area of each lot; and*
- (v) *the percentage of a lot that may be occupied;*
- (2) *the size of lots, yards, courts, and other open spaces;*
- (3) *the construction of temporary stands and structures;*
- (4) *the density and distribution of population;*
- (5) *the location and uses of buildings and structures and any units in those buildings and structures for:*
  - (i) *trade;*
  - (ii) *industry;*

- (iii) residential purposes;*
- (iv) recreation;*
- (v) agriculture;*
- (vi) public activities; and*
- (vii) other purposes; and*
- (6) the uses of land, including surface, subsurface, and air rights for the land, for building or for any of the purposes described in item (5) of this subsection.*

In sum, in terms of authority of the Planning Board, roadway issues and related off-site improvements are restricted to subdivision. Thus, the Planning Board did not err in not requiring “Applicant dedicate land and/or pay for onsite, offsite, or site-adjacent improvements, including within the public right-of-way,” as it is not empowered to do so at this juncture.

- *Petitioner’s Contention 5: The Planning Board erred as a matter of law and denied Petitioner due process of law by (a) relying principally on the technical staff report prepared by the Development Review Division, which by the Commission’s own admission considered only the arguments of the Applicant in support of the application and not the arguments of Petitioner in opposition to the application and (b) adopting substantially all of the staff report as the Board’s decision in a contested case.*

Response: The Planning Board did not err in adopting the findings and conclusions contained in technical staff report in the Resolution. Even in a contested case, the Planning Board may adopt the findings and conclusions in the staff report, so long as the staff report is “thorough, well-conceived, and contains adequate findings of fact.” *Maryland-Nat. Capital Park & Planning Comm’n v. Greater Baden-Aquasco Citizens Ass’n*, 412 Md. 73, 110 (2009). Even where the Planning Board’s resolution constitutes a rote recitation of the technical staff’s report, that does not indicate that the Planning Board “did not otherwise engage in meaningful fact finding.” *Id.* In this case, the staff report was thorough and well-conceived in that it addressed each of the findings the Planning Board was required to make in depth. Thus, the Planning Board did not err in adopting it.

To the extent that the Petitioner is alleging that the Planning Board somehow denied him due process by adopting the findings of the staff report, it did not. The Planning Board adequately considered the arguments set forth by the Petitioner at the April 9<sup>th</sup> hearing on the DSP. Based on the arguments presented by the Petitioner, the Planning Board asked questions of the Petitioner, the Applicant’s team, and Technical Staff. At the close of the hearing, after due consideration of all the Petitioner’s arguments throughout the hearing, the Planning Board voted to adopt the findings and conclusions contained in the staff report. To the extent that an issue raised by the Petitioner were not discussed at the hearing, the Petitioner has not made specific reference to it.



- Petitioner's Contention 6: *The Planning Board erred as a matter of law and denied Petitioner due process of law by (a) failing to resolve all contested issues of fact and explain the resolution thereof (rather than simply adopting the proposed findings contained in the technical staff report), and (b) failing to state a ruling on each proposed finding of fact offered by Petitioner.*

Response: The Planning Board properly resolved all contested issues of fact raised by the Petitioner by adopting the findings contained in the technical staff report after considering each issue raised by the Petitioner at the April 9<sup>th</sup> hearing. The Planning Board's adoption of the proposed findings in the technical staff report does not signify that the Planning Board "did not otherwise engage in meaningful fact finding." *Greater Baden-Aquasco Citizens Ass'n*, 412 Md. at 110. Even where the Planning Board's resolution constitutes a "rote-repetition" of the Staff Report, this does not indicate that the Planning Board did not otherwise engage in meaningful fact finding, so long as the Staff Report is "thorough, well-conceived, and contains adequate findings of fact." *Id.* As explained in detail above, the Planning Board adequately considered the arguments raised by Petitioner and the Petitioner's proposed findings at the April 9<sup>th</sup> hearing. To the extent that an issue raised by the Petitioner was not discussed at the hearing, the Petitioner has not made specific reference to it. At the close of the hearing, after due consideration of all the Petitioner's arguments throughout the hearing, the Planning Board voted to adopt the findings and conclusions contained in the staff report.

- Petitioner's Contention 7: *The Planning Board erred as a matter of law and denied Petitioner due process of law by considering and acting upon the subject detailed site plan application prior to the time that applicant had obtained all required preliminary plans of re-subdivision related to the subject property.*

Response: It is not wholly clear what error the Petitioner is alleging the Planning Board committed. There are validly approved PPSs associated with a majority of the land covered by the DSP Amendment – Parcel A and Parcel 87. Specifically, Planning Board approved PPS 4-05068 for the Property on February 9, 2006 and PPS 4-08019 for Parcel 87 on September 25, 2008. Pursuant to Sec. 24-119(d)(5) of the County Code, PPS 4-05068 and PPS 4-08019 were valid when the Planning Board approved the DSP Amendment and remain valid now.

No PPS is required for the remaining land, Lot 5, on which no development is proposed. Any replatting of Lot 5 necessary at this time can be accomplished via the minor final plat pursuant to Section 24-108 of the County Code. Further, per Condition 5.b of the Resolution, any final plat recorded for Lot 5 must bear a note stating: "Development on Lot 5 of Block B is limited to a cumulative 5,000 square feet of gross floor area pursuant to Section 24-111(c). At such time that development should exceed this maximum, then a preliminary plan of subdivision shall be required."

- Petitioner's Contention 8: *The Planning Board erred as a matter of law, abused its discretion, and acted arbitrarily and capriciously, in contravention of the substantial evidence adduced in the administrative record, and in contravention of the requirements of the applicable comprehensive plans, by approving the subject detailed site plan, which proposed a large surface parking lot covering the entire 0.9-acre land area of Parcel 87.*

Response: The Planning Board did not err or abuse its discretion by approving the DSP Amendment, including the surface parking on Parcel 87. While not abundantly clear from the Petitioner's contention, the Petitioner appears to be referring to Development District Standard S2, which provides: "Single, large surface parking lots are not permitted. Instead, parking lots shall be provided in smaller, defined areas separated by land planted medians." ARM Sector Plan at p.177. The District Council's review of this issue is limited to determining whether there is substantial evidence in the record to support the Planning Board's finding that the DSP Amendment complies with Development District Standard S2. *Lee vs. Maryland Nat'l Capital Park & Planning Commission*, 107 MD. App 486 (1995). As shown on the plans and demonstrated at the April 9<sup>th</sup> hearing, the proposed surface parking lot features several land planted medians, which effectively break up the parking lot into "smaller defined areas separated by land planted medians." Accordingly, there is substantial evidence in the record to support the Planning Board's finding that the subject DSP complies with Development District Standard S2.

- Petitioner's Contention 9: *The Planning Board erred as a matter of law, abused its discretion, and acted arbitrarily and capriciously, in contravention of the substantial evidence adduced in the administrative record, and in contravention of the requirements of the applicable comprehensive plans, by approving the subject detailed site plan, which proposed surface parking between the eastern building frontage and the right-of-way along Addison Road South.*

Response: The Planning Board did not err or abuse its discretion by approving the DSP Amendment, which includes surface parking between the Addison Road right-of-way ("ROW") and the eastern building frontage. The Petitioner has not identified a provision the Zoning Ordinance or Development District Standards<sup>11</sup> that would prohibit this parking. It appears that Petitioner may be referring to Development District Standard S2, which allows minimal parking between the roadway and building edge, so long as screening is provided in accordance with the *Landscape Manual*. ARM Sector Plan at p.176. The District Council's review of this issue is limited to determining whether there is substantial evidence in the record to support the Planning Board's finding that the DSP Amendment complies with Development District Standard S2. *Lee vs. Maryland Nat'l Capital Park & Planning Commission*, 107 MD. App 486 (1995). Substantial evidence in the record supports the Planning Board's finding that the DSP Amendment

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<sup>11</sup> To the extent that Petitioner's argument is derived from the recommendations of the General Plan or Subregion 4 Master Plan, as explained in detail above, these plans are merely advisory in this instance because compliance with the applicable Master Plan or the General Plan is not a required finding for approval of a DSP. *Zimmer Dev. Co.*, 444 Md. at 522.

complies. Specifically, as shown on the site plan and landscape plan, the minimal surface parking provided between the building frontage and right-of-way will be screened with generous landscaping and a pedestrian-scale street wall, in accordance with the *Landscape Manual*. Additionally, as explained by the Applicant's team at the April 9<sup>th</sup> hearing, the parking between the eastern building frontage and Addison Road is minimal "teaser" parking intended to contribute to the success of the commercial component of the Project. Accordingly, there is substantial evidence in the record to support the Planning Board's finding that the surface parking between the building and Addison Road complies with Development District Standard S2.

To the extent that the Petitioner is raising an issue regarding the 10-15 foot build-to-line required by Development District Standard S3, the Planning Board approved an alternative to that standard to allow a variable build-to-line of 15 to 65 feet from the right of way. As explained in the response to Petitioner's Contention 10 below, the Planning Board's approval of the alternative to Development District Standard S3 was supported by substantial evidence in the record.

- Petitioner's Contention 10: *The Planning Board erred as a matter of law, abused its discretion, and acted arbitrarily and capriciously, in contravention of the substantial evidence adduced in the administrative record, and in contravention of the requirements of the applicable comprehensive plans, by approving an alternative Addison Road Town Center and Vicinity ("ARM") development district standard to Standard S3 that allowed for construction of a building with an inconsistent setback, inconsistent building edge, and obscured from the sidewalk in several places by fencing and surface parking, all of which violated basic principles of new urbanist or neotraditional building design and was not even remotely required by any potential site constraints imposed by the WMATA line of influence along the MD-214 frontage of the subject property.*

Response: The Planning Board did not err or abuse its discretion in approving the above referenced alternative to Development District Standard S3. Development District Standard S3 provides: "A front build to line between 10 and 15 feet from the right-of-way line shall be established for [. . .] commercial/retail [. . .] buildings which front on MD 214 and Addison Road." ARM Sector Plan at 180. The Applicant requested an alternative to Development District Standard S3 to allow for a variable build-to-line of 15 to 65 feet from the right-of-way. Pursuant to Sec. 27-548.25 of the Zoning Ordinance, the Planning Board may approve alternative Development District Standards upon a finding that "the alternate Development District Standards will benefit the development and the Development District and will not substantially impair implementation of the Master Plan, Master Plan Amendment, or Sector Plan." The Planning Board found that the Applicant's proposed alternative to Development District Standard S3 met this standard. The District Council's review of this issue is limited to determining whether there is substantial evidence in the record to support the Planning Board's approval of the alternative to Development District Standard S3. *Lee vs. Maryland Nat'l Capital Park & Planning Commission*, 107 MD.

App 486 (1995). Substantial evidence in the record supports the Planning Board's finding. Specifically, at the April 9<sup>th</sup> hearing, both staff and the Applicant presented evidence that a varied build-to-line of 15 to 65 feet from the right-of-way is necessary because of site constraints, including the WMATA zone of influence established by the adjacent Metro tunnel. Further, staff explained that the varied setback of 15 to 65 feet results in a stronger building design with greater architectural interest. Additionally, as shown on the plans, the larger setback along the MD-214 frontage allows for the creation of a park and plaza. Based on this substantial evidence, the Planning Board reasonably concluded the Applicant's proposed alternative to Development District Standard S3 benefited the development while not substantially impairing the applicable Sector Plan.

- Petitioner's Contention 11: *The Planning Board erred as a matter of law, abused its discretion, and acted arbitrarily and capriciously, in contravention of the substantial evidence adduced in the administrative record, and in contravention of the requirements of the applicable comprehensive plans, by approving the subject detailed site plan, which filed to: (a) connect the adjacent Zelma Avenue right-of-way directly to MD-214; (b) provide a safe crossing across MD-214 at its intersection with Zelma Avenue and MD-332; and (c) provide a safe crossing across Addison Road South at its intersection with the site access point.*

Response: The Planning Board did not err in approving the DSP Amendment without the above listed roadway improvements. The Planning Board is not empowered to exact such roadway improvements at the time of DSP. As staff explained at the April 9<sup>th</sup> hearing, the improvements that the Petitioner has identified are located offsite. The Land Use Article empowers the Planning Board to require off-site roadway improvements at the time of subdivision (PPS), not at the time of DSP. Section 23-104(b) of the Land Use Article provides:

(c)(1) [. . .], the **subdivision regulations** may include provisions for:

...

(ii) the coordination of roads within the subdivision with:

1. existing planned or platted roads;
2. features of the regional district;
3. that county's general plan; or
4. a transportation plan adopted by the Commission as part of that county's general plan.

Further, pursuant to Section 23-103(a) of the Land Use Article, land dedication for roads is relegated to the time of PPS:

(a) [. . .] [I]n connection with the approval of a **subdivision plat**, the appropriate county planning board may require a dedication of land for:

- (1) an interior subdivision road;

- (2) a road that abuts the subdivision for the purpose of creating a new road as part of the plan of subdivision to provide for traffic access to another subdivision road; and
- (3) the widening of an existing or public road that abuts the subdivision for the purpose of providing additional right-of-way adequate to serve additional traffic that will be generated by the subdivision.

Additionally, the authority to regulate roadway improvements is not included in the list of purposes enumerated under Maryland Land Use Article Section 22-104 – Authority to adopt and amend zoning law.

Section 22-104(b) provides:

*(b) Purposes. The local law may regulate:*

*(1)(i) the location, height, bulk, and size of each building or other structure, and any unit in the building or structure;*

*(ii) building lines;*

*(iii) minimum frontage;*

*(iv) the depth and area of each lot; and*

*(v) the percentage of a lot that may be occupied;*

*(2) the size of lots, yards, courts, and other open spaces;*

*(3) the construction of temporary stands and structures;*

*(4) the density and distribution of population;*

*(5) the location and uses of buildings and structures and any units in those buildings and structures for:*

*(i) trade;*

*(ii) industry;*

*(iii) residential purposes;*

*(iv) recreation;*

*(v) agriculture;*

*(vi) public activities; and*

*(vii) other purposes; and*

*(6) the uses of land, including surface, subsurface, and air rights for the land, for building or for any of the purposes described in item (5) of this subsection.*

In terms of authority of the Planning Board, roadway issues are restricted to subdivision. Thus, per the above provisions of the Land Use Article, the Planning Board could not require the Applicant to make the above listed off-site roadway improvements at the time of DSP.

To the extent that Petitioner is referencing Development District Design Standards P1 and P2, concerning relevant road network and crosswalk design, the proposed on-site improvements comply. In relevant part, Development District Standards P1 and P2 provide as follows:

- Development District Standard P1:
  - “intersections should employ ‘safe-crosses.’ This treatment enhances pedestrian safety by expanding the sidewalk area in the unused portion of the on-street parking lane adjacent to the intersection.”
  - “Zelma Avenue shall remain and connect into the road network.”
- Development District Standard P2:
  - “Sidewalks shall be set back from the curb on MD-214 and Addison Road to provide pedestrians a safe and comfortable walking environment. Sidewalks should be made of concrete paving or better, be a minimum of five feet in width”
  - “Crosswalks shall be provided at all intersections in the town center”

There is substantial evidence in the record to support the Planning Board’s finding that the subject DSP complies with Standards P1 and P2. Sidewalks, crosswalks, and pedestrian circulation are provided within the scope of the Project. Sidewalk is provided away from the curb line along Zelma Avenue, Addison Road, and MD-214, and crosswalks are provided at the intersection of Addison Road and MD-214. Pedestrian circulation is provided onsite and between Zelma Avenue and Addison Road. As discussed above, offsite improvements to the road network cannot be exacted at the time of DSP. Nonetheless, the Project does not prevent the eventual implementation of these improvements, including the connection of Zelma Avenue to the roadway network. Accordingly, there is substantial evidence in the record to support the Planning Board’s finding that the DSP conforms to Development District Standards P1 and P2, and the District Council cannot overturn the Planning Board on this basis.

- Petitioner’s Contention 12: *The Planning Board erred as a matter of law, abused its discretion, and acted arbitrarily and capriciously, in contravention of the substantial evidence adduced in the administrative record, and in contravention of the requirements of the applicable comprehensive plans, by approving the subject detailed site plan, which proposed to delay construction of required eight-foot-wide sidewalks and five-foot-wide planting strips along the adjacent MD-214 and Addison Road South rights-of-way.*

Response: The Planning Board did not err or abuse its discretion in allowing the Applicant to delay the construction of eight-foot-wide sidewalks and five-foot-wide planting strips along the adjacent Addison Road South rights-of-way and 12-foot wide hiker/biker trail along MD-214 (See Condition 1.O). Petitioner cites no provision of the County Code or Land Use Article that prevents the delayed implementation of the sidewalks. The Development District Standards require the implementation of the eight-foot-wide sidewalks and five-foot-wide planting strips and the hiker/biker trail, but do not specify a time for implementation. *ARM Sector Plan* at p. 195–98. The District Council’s review of this issue is limited to

determining whether there is substantial evidence in the record to support the Planning Board's decision to allow the delayed implementation of sidewalks. *Lee vs. Maryland Nat'l Capital Park & Planning Commission*, 107 MD. App 486 (1995). As explained at the April 9<sup>th</sup> hearing, the Applicant will implement the sidewalk improvements after another developer makes certain improvements at the intersection of MD-214 and Addison Road.<sup>12</sup> The nature and scope of the improvements to MD-214 and Addison Road are such that any sidewalk or planting strip implemented prior to these improvements would be impacted. To require the Applicant to construct the sidewalks prior to the MD-214 and Addison Road improvements would be inefficient and wasteful. Accordingly, substantial evidence exists to support the Planning Board's decision to allow the delayed implementation of sidewalks and the District Council may not overturn the Planning Board on this basis.

To the extent that the Petitioner is claiming that the sidewalk improvements must be provided without delay in order to meet adequacy of public facilities (“APF”) requirements, that is not a proper consideration at the time of DSP. APF findings are made at the time of PPS and are not required at the time of DSP. County Code § 24-122.01; Zoning Ordinance § 27-285(b).

- Petitioner's Contention 13: *The Planning Board erred as a matter of law, abused its discretion, and acted arbitrarily and capriciously, in contravention of the substantial evidence adduced in the administrative record, and in contravention of the requirements of the applicable comprehensive plans, by approving the subject detailed site plan, which failed to provide ornamental pole-mounted streetlights along the adjacent MD-214, Addison Road South, and Zelma Avenue rights-of-way.*

Response: The Planning Board did not err or abuse its discretion by approving the subject DSP without ornamental pole-mounted streetlights along the adjacent MD-214, Addison Road South, and Zelma Avenue rights-of-way. The District Council's review of this issue is limited to determining whether substantial evidence in the record supports the findings of the Planning Board. No applicable requirement of the Zoning Ordinance or the Development District Standards would require the Applicant to *implement* ornamental pole-mounted streetlights along the rights-of-way. Development District Standard P5, which concerns lighting in the subject area only requires that: “At the time of the first site plan in Metro West or Addison South, a consistent type of ornamental pole and luminaire shall be selected in consultation with DPW&T.” Additionally, Condition of Approval 1.d addresses any need for additional specification of the various types

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<sup>12</sup> See Prince George's County Planning Board Resolution of Approval No. 05-189. Planning Board approved PPS 4-05016 proposing 197 Dwellings on 197 lots and 19 parcels in the M-U-I Zone, roughly 0.35 miles south of the intersection of MD-214 and Addison Road. The Planning Board conditioned its approval on the Applicant's construction of an eastbound right-turn lane along MD-214 and the provision of separate northbound and southbound left-turn approach lanes along Addison Road.

of building-mounted and site lighting. Accordingly, there is substantial evidence in the record to support the Planning Board's finding of compliance with Standard P5.

- Petitioner's Contention 14: *The Planning Board erred as a matter of law, abused its discretion, and acted arbitrarily and capriciously, in contravention of the substantial evidence adduced in the administrative record, and in contravention of the requirements of the applicable comprehensive plans, by approving the subject detailed site plan, which failed to show the placement underground of all existing and proposed utilities along the adjacent MD-214, Addison Road South, and Zelma Avenue rights-of-way.*

Response: Contrary to what the Petitioner suggests, as conditioned, Planning Board's approval of the DSP Amendment provides for the undergrounding of utilities along the adjacent rights-of-way. Development District Standard P6 requires "future development in the town center shall place all utilities underground." ARM Sector Plan at p. 204. The District Council's review of this issue is limited to determining whether substantial evidence in the record exists to support the Planning Board's finding that the DSP Amendment complies with this standard. Substantial evidence in the record supports the Planning Board's determination that the DSP Amendment, as conditioned, complies with Development District Standard P6. While the plans submitted prior to the April 9<sup>th</sup> hearing do not show the undergrounding of utilities, Condition 1.c of the Resolution requires, as follows:

Revise the site plan to show all on-site utility lines and facilities, for utilities that serve the subject property and the proposed project, as being placed underground. Utility lines and facilities off-site need not be underground, but the applicant shall participate in an underground utilities fund at MD 214 (Central Avenue) and Addison Road, if one is created, to study or implement the underground placement of utilities in this vicinity. Funding contributions by the applicant shall not exceed \$10,000.<sup>13</sup>

- Petitioner's Contention 15: *The Planning Board erred as a matter of law, abused its discretion, and acted arbitrarily and capriciously, in contravention of the substantial evidence adduced in the administrative record, in contravention of the requirements of the applicable comprehensive plans, and in contravention of the zoning ordinance by approving the subject detailed site plan, which contained residential uses on the first floor of a mixed-use building in the C-S-C/D-D-O Zone.*

Response: The Planning Board did not err or abuse its discretion by approving the DSP Amendment, which contained residential uses on the first floor of a mixed-use building in the C-S-C/D-D-O Zone. Within the C-S-C/D-D-O zone, a building with more than four stories containing commercial uses may only contain residential units on the 3<sup>rd</sup> floor or higher. *Addison Road Metro and Vicinity Sector Plan* ("ARM Sector

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<sup>13</sup> This condition has been carried through from the approval of DSP-06001. When the Planning Board approved DSP-06001, it imposed a condition requiring that: "the applicant shall consult with all the affected utility companies to develop cost estimates for the undergrounding of utilities for review by the District Council for a final determination." The District Council revised the condition to include the language contained in Condition 1.c. As noted in the response to Petitioner's Contention 1 above, DSP-06001 remains valid and the time in which it may be challenged has expired.



**Plan**”) at p.257. By way of background, the prior approvals (DSP-06001 and DSP-06001-01) included an amendment to the D-D-O use table allowing residential units above the first floor. At the April 9<sup>th</sup> hearing on the subject DSP, pursuant to Section 27-548.26(b)(1)(B) of the Zoning Ordinance, the Applicant requested an amendment to allow residential units on all floors of the proposed building.<sup>14</sup> The Planning Board did not pass a motion to recommend approval of the requested amendment. A subsequent motion to recommend approval of an amendment allowing residential units above the first floor passed. However, the District Council, and not the Planning Board, has the authority to approve the requested amendment. Accordingly, the Applicant respectfully requests the District Council approve the requested amendment to allow residential units on all floors of the building.

To approve the requested amendment, the District Council must find that “the proposed development conforms with the purposes and recommendations for the Development District, as stated in the Master Plan, Master Plan Amendment, or Sector Plan, meets applicable site plan requirements, and does not otherwise substantially impair the implementation of any comprehensive plan applicable to the subject development proposal.” Zoning Ordinance § 27-548.26(b)(2). The Applicant submits that substantial evidence in the record demonstrates that this finding is met.

The proposed development conforms to the purposes of the applicable Development District. The purposes of the Development District are to implement the goals of the ARM Sector Plan as follows: 1) “revitalize the Town Center with new upscale commercial and residential development;” 2) “promote transit oriented development near the metro station;” 3) “promote pedestrian oriented development;” and 4) “promote compact development in the form of a town center with town commons at MD 214 and Addison Road.” *ARM Sector Plan* p. 166. The Project will be the first project within a block of the Addison Road Metro Station, kicking off a transit and pedestrian-oriented mixed-use neighborhood around the metro station. The Project will set the stage for other development surrounding the Addison Road Metro Station transforming a majority auto-oriented community with properties dedicated to single uses into a mixed-use, transit and pedestrian-oriented community.

Placing residential units on the first floor will not “substantially impair the implementation of any comprehensive plan applicable to the subject development proposal.” The Applicant is proposing commercial uses on the first floor of the proposed building where feasible. However, because this is the first project of its kind in the Addison Road Metro vicinity, there is not yet adequate support for further commercial uses. To the extent that any street activation is decreased by the presence of residential units

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<sup>14</sup> The Applicant was only made aware of the need for such an amendment by staff on the eve of the hearing.

on the first floor rather than commercial uses, this is off-set by the proposed park and plaza space along the MD-214 frontage. Further, the proposed first floor residential units are actually elevated above the street level due to grade changes onsite and, therefore, are not truly first floor units. This is illustrated on the building elevations, which are part of the record.

To the extent that it is relevant, the proposed development, including the first floor residential units also will not impair the implementation of the applicable Subregion 4 Master Plan and the General Plan. The Subregion 4 Master Plan, in particular calls, for “high-density” housing, “transit-supporting, mixed-use, pedestrian-oriented neighborhoods”, and “appropriate infill housing.” *Subregion 4 Master Plan* at 280. The proposed high density, infill development brings new residential units and commercial uses within a block of the Addison Road Metro Station.

For the foregoing reasons, the Applicant respectfully requests that the District Council approve an amendment to the D-D-O use table allowing for residential units on all floors of the proposed building.

Respectfully submitted,  
LERCH, EARLY & BREWER, CHTD.



Christopher L. Hatcher

## CERTIFICATE OF SERVICE

This will certify that I have this day caused to be served copies of the within and foregoing document upon the following parties by first-class mail, postage prepaid, addressed as follows:

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