RESOLUTION NO. 2020-129	*	IN THE COUNTY COUNCIL
	*	FOR PRINCE GEORGE'S COUNTY
BY THE PRINCE GEORGE'S	*	SITTING AS THE
COUNTY PLANNING BOARD	*	DISTRICT COUNCIL
14741 Governor Oden Bowie Drive	*	
Upper Marlboro, Maryland 20772	*	
	*	CASE NO. _____
IN THE CASE OF	*	
SPECIFIC DESIGN PLAN SDP-0007-03	*	
AMAZON.COM SERVICES LLC	*	
	*	

APPLICANTS' RESPONSE TO APPELLANTS' NOTICE OF APPEAL AND REQUEST FOR ORAL ARGUMENT

The Applicant, Amazon.com Services LLC (the "Applicant"), by its attorneys Wire Gill LLP, submits this Response to Appellants' Notice of Appeal and Request for Oral Argument. The Applicant submitted Specific Design Plan Amendment No. SDP-0007-003 (the "SDP Amendment") for property located at 1000 Prince George's Boulevard in Upper Marlboro, situated to the west of Robert Crain Highway (US 301), and immediately to the south of Branch Court and to the north of Queen's Court (the "Property") to the Maryland-National Capital Park and Planning Commission ("M-NCPPC") for review. The Property is zoned Employment and Institutional Area ("E-I-A") and is currently improved with a warehouse totaling approximately 290,225 square feet of gross floor area and ancillary surface parking spaces. The warehouse has been in existence and active use on the Property from the time of its construction in approximately 2001 until last summer when the previous owner departed.

The SDP Amendment is very simple – it proposes to construct additional pavement for surface parking, loading, and circulation areas in the northern area of the site, as well as an exterior canopy along the eastern portion of the existing warehouse building on the Property (the "Project"). No additional gross floor area is proposed as a part of the Project. It should be noted

that the original Specific Design Plan No. 0007, approved by Resolution PGCPB No. 00-136 on September 21, 2000 (the "Original SDP"), allowed for construction of this now-existing 290,225 square-foot warehouse building for storage and distribution, ancillary surface parking, loading, and a truck and trailer storage area at the Property, and also specifically noted that a future addition is proposed on the north side of the proposed building, and that a separate Specific Design Plan would be submitted at such future time for the addition. *Resolution PGCPB No. 00-136 at "Backup Materials", 45.* Again, no addition to the building is proposed at this time, but such an occurrence and more generally development into the northern end of the site was specifically contemplated at the time of the Original SDP.

Based upon substantial evidence in the record collected through the careful and thorough review and analysis by M-NCPPC Staff and a lengthy public hearing before the Prince George's County Planning Board (the "Planning Board") on July 23, 2020, all of which was conducted in full compliance with all statutory requirements, the Planning Board unanimously approved the SDP Amendment on July 23, 2020. On July 30, 2020, the Planning Board adopted Resolution PGCPB No. 2020-129, a 14-page Resolution that contains nine pages of factual findings. The Planning Board concluded that the Application satisfied all the legal requirements set forth in Subtitle 27 of the Prince George's County Code (the "Zoning Ordinance") for approval of the SDP Amendment.

The Applicant requests that the District Council affirm the decision of the Planning Board, which is legally correct and supported by the overwhelming weight of evidence in the record before the District Council.

STANDARD OF REVIEW

The District Council has appellate jurisdiction in this case. *Cty. Council of Prince George's Cty. V. Zimmer Dev. Co.*, 444 Md. 490, 569-70 (2015). "A Planning Board decision is vulnerable if it is not authorized by law, is not supported by substantial evidence of record, or is arbitrary or capricious." *Id*. at 573. However, such a review is narrow and is limited to determining whether the deciding body's action is unreasonable, arbitrary, or capricious, and not in accordance with the law. *See, e.g., Northampton Corp. v. Prince George's County*, 273 Md. 93, 100 (1974). The agency decision must be viewed in the light most favorable to the agency; it is deemed *prima facie* correct, and carries with it a presumption of validity. *Coscan Wash., Inc. v. Md.-Nat'l Capital Park & Planning Comm'n,* 87 Md. App. 602 (1991). Here, the Planning Board correctly applied the proper legal standard in unanimously approving the SDP Amendment, determining that it satisfies all of the findings that are required to be made by the Zoning Ordinance for its approval, and there is more than substantial evidence in the record evidencing this.

ARGUMENT

I. APPELLANT UFCW LOCAL 400 FAILS TO MEET ITS BURDEN TO DEMONSTRATE THAT IT IS A PARTY OF RECORD, AND EACH APPELLANT FAILS TO DEMONSTRATE THAT THEY ARE AGGRIEVED, AND THUS EACH APPELLANT LACKS LEGAL STANDING TO CHALLENGE THE PLANNING BOARD'S DECISION AT THE DISTRICT COUNCIL.

Under controlling Maryland law, it is well-settled that "in order to have standing to petition for judicial review, a party must meet two conditions precedent." *Greater Towson Council of Cmty. Ass'ns v. DMS Dev., LLC*, 234 Md. App. 388, 409 (2017) (internal citations omitted). The Court of Special Appeals has found that, "[f]irst, a petitioner must have been a party to the proceeding before the Board," and that "[i]f he or she participated in the case before the Board, the court's next inquiry is whether the party is aggrieved by the decision of the Board." *Id.* Here, member of

the Appellant group, UFCW Local 400, is not a person/party of record in the proceeding before the Planning Board. *See Party of Record list as provided by the Office of the Clerk of the Council on September 9, 2020, attached as Exhibit "A".*

Even were UFCW Local 400 a party of record in the proceeding, UFCW Local 400 is not aggrieved. With regard to administrative land use and zoning decisions, the Court of Special Appeals has defined "an aggrieved party as one whose personal or property rights are adversely affected by the [administrative] decision," and that the impact of the administrative land use decision "must affect the petitioner … in a way different from that suffered by the public generally." *Id.* To this end, the Court of Appeals has held that "an adjoining, confronting or nearby property owner is deemed, *prima facie*, to be specially damaged and, therefore, a person aggrieved." *Ray v. Mayor of Baltimore*, 430 Md. 74, 81 (2013). However, the Court of Appeals has found that where an individual is not *prima facie* aggrieved, such an individual must demonstrate that it is specially aggrieved to have standing to challenge an administrative land use decision. *Id.* at 86. In *Ray*, the Court of Appeals held that an individual is specially aggrieved "when they are farther away than adjoining, confronting, or nearby property owners but still close enough to the site of the rezoning to be considered almost *prima facie* aggrieved upon the offer of specific evidence to support an injury to the protestant." *Id.* Significantly, the Court found that "[a]lthough there is no bright-line rule for who qualifies as 'almost' *prima facie* aggrieved, we have found no cases, in which a person living over 2000 feet away, has been considered specially aggrieved," and that "protestants who lived more than 1000 feet from the rezoning site have repeatedly been denied standing." *Id.* at 91-92.

Here, UFCW Local 400 provides no factual basis to support a finding that the Planning Board's decision approving the SDP Amendment specially affects it in a way different from that

suffered by the general public, and, thus, fails to demonstrate that it is "aggrieved." It is not an adjoining, confronting, or nearby property owner, or any property owner at all. In fact, counsel for the Appellants seems to concede both that UFCW Local 400 is not a person/party of record and that it is not aggrieved in his Notice of Appeal and Request for Oral Argument. Counsel for the Appellants states that Ray A. Crawford and Kathy H. Crawford as well as Charles Reilly are persons of record and are aggrieved by the Planning Board's approval of the SDP Amendment. However, regarding UFCW Local 400, counsel for the Appellants simply states: "UFCW Local 400 is significantly affected by the Planning Board's decision to approve SDP-0007-03 because it has many members in Prince George's County." *Appellants' Notice of Appeal and Request for Oral Argument, 2.* For all these reasons, UFCW Local 400 should be dismissed from this case for lack of standing.

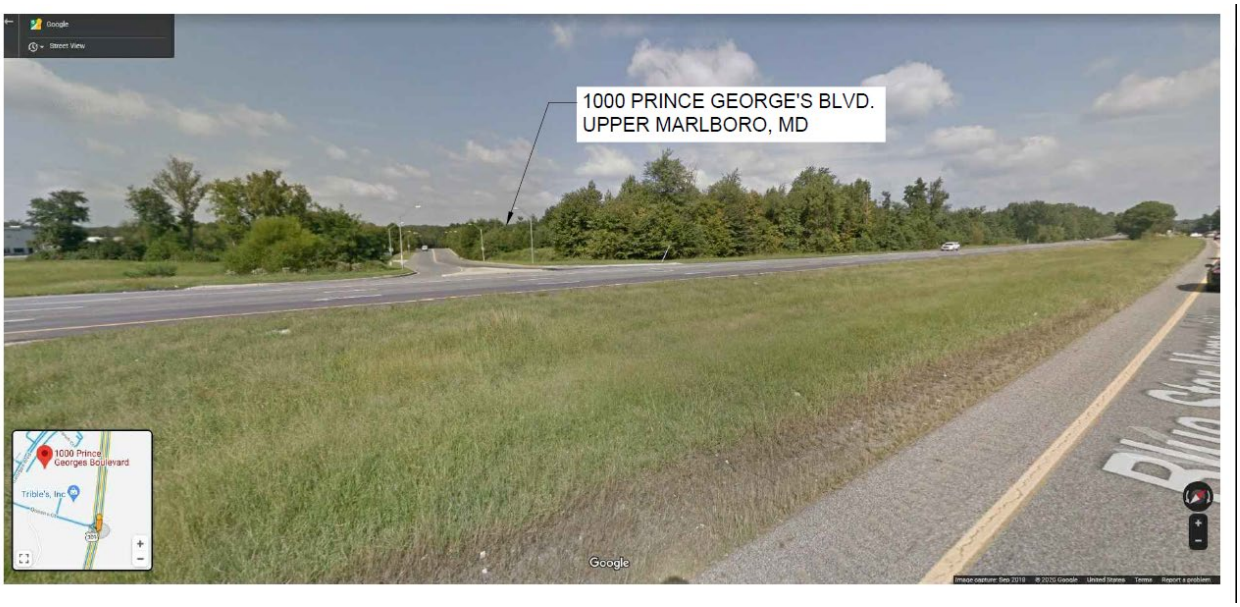
In addition to UFCW's lack of standing, Ray. A Crawford and Kathy H. Crawford, and Charles Reilly must demonstrate that they are specially aggrieved as they do not own adjoining or confronting properties to the Applicant's Property thereby entitling them to be *prima facie* aggrieved. To this end, Charles Reilly's property located at 16770 Clagett Landing Road is one-half mile from the Applicant's Property.

Charles Reilly's testimony before the Planning Board focused on the misconception that increased traffic would result from the SDP Amendment. In *Ray*, the Court of Appeals held that "we have uncovered no cases, and Ray has cited none, where a protestant who was 0.4 miles from the rezoned property was granted standing based on a claim of increased traffic," and that "[o]n the contrary, there is an overwhelming weight of authority that claims of increased traffic, by protestants who lack close proximity, are insufficient to prove special aggrievement." *Ray* at 96. As a result, Charles Reilly is not specially aggrieved and lacks standing to challenge the Planning Board's decision on the SDP Amendment.

While Ray A. Crawford and Kathy Crawford's property located at 1340 Crain Highway is less than 900 feet from the Applicant's Property, the administrative record does not contain evidence that the SDP Amendment specially affects them in a way different from the general public. At the Planning Board public hearing, Ray A. Crawford testified that the SDP Amendment would result in increased traffic, additional noise during the evening, pollution, and a decrease in property values. Significantly, Ray A. Crawford testified that "this particular site … has our concern

because of all of the traffic and the noise, the air pollution, the noise pollution …[and] that [e]ven when we had that, the other site we would always hear those trucks with the backing up and all hours of the night," [a]nd our concern is we will still [hear] all of those trucks coming at any and all hours of the night." (emphasis added in underline); *Planning Board Transcript Page 66, Lines 4-11*. Therefore, Ray A. Crawford's testimony reflects that his concerns exist at the Property irrespective of the SDP Amendment. Based upon Ray A. Crawford's own testimony, the factual record cannot legally support a finding that Ray A. Crawford and Kathy Crawford are specially aggrieved by the SDP Amendment.

In addition to the foregoing, the Court of Appeals has found that "when the affected properties are not sufficiently close to the site to qualify as almost prima facie aggrieved, claims of increasing traffic, change in the character of the neighborhood, lay opinion projecting a decrease in property values, and limited visibility have been held to show only general aggrievement." *Ray* at 84. Based upon Google earth, there is no visibility from Ray. A Crawford and Kathy Crawford's property to the Applicant's Property. Rather, any such "visibility" is blocked by five lanes of US 301 including its wide median, heavy woodlands, and an intervening warehouse building to the Applicant's Property (i.e., the Applicant's Property is not even directly adjacent to US 301).



Additionally, the Court of Appeals has found that "testimony about whether the value of a property will increase or decrease because of a future development 0.4 miles away requires expert testimony." *Id.* at 94. Therefore, Ray A. Crawford's lay testimony relative to a decrease in property value cannot support a finding that he is aggrieved as a matter of law. Given that Ray A. Crawford and Kathy Crawford are not *prima facie* aggrieved and have only identified potential impacts from the SDP Amendment that would be experienced by the public generally, both Ray A. Crawford and Kathy Crawford lack standing to appeal the SDP Amendment.

II. THE PLANNING BOARD ACTED IN ACCORDANCE WITH THE LAW WHEN IT UNAMIMOUSLY APPROVED THE SPECIFIC DESIGN PLAN AMENDMENT.

M-NCPPC Staff and the Planning Board followed all proper procedures and made all the findings that are required by the Zoning Ordinance for approval of this Application (also discussed in detail with regard to the existence of substantial evidence in the record to support these findings, in Section III below). M-NCPPC Staff's analyses, including the analyses of other reviewing agencies to whom the Application was referred for review, are thoroughly documented, with specific reference to the relevant governing legal provisions contained in the Zoning Ordinance, in the Staff Report, and in the Planning Board's Resolution. *Resolution PGCPB No. 2020-129, 3-11; Staff Report, 6-13.*

The Planning Board acted in accordance with the law in approving the SDP Amendment though its legal counsel had instructed M-NCPPC Staff not to speak with Appellants' counsel directly and to instead forward all inquiries to M-NCPPC legal counsel. It is standard legal and

attorney/client relationship procedure that, when clients are represented by counsel, opposing counsel may not speak directly with the opposing client without approval of the clients' counsel.[1]

The Planning Board acted in accordance with the law in approving the Application, despite that Appellants feel that they had not received the stormwater management information they were seeking. Under the Zoning Ordinance provisions, the Planning Board is charged with referring a case to reviewing agencies. Specifically, Part 8, Division 4, Subdivision 2 of the Zoning Ordinance contains the procedural requirements for review of a Specific Design Plan. Section 27-527.01 "Referral" provides:

> (a) Prior to taking action on the Specific Design Plan, the Planning Board shall refer the plan to the Historic Preservation Commission (Part 14) and to all agencies which the Planning Board deems appropriate for review and comment. The agencies shall include all of those whose action is likely to have a substantive effect on the plan under review. The Planning Board shall maintain a list of referral agencies. The plan shall also be referred to:
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> (1) the Prince George's County Police Department for review and comment. The Police Department may comment on issues relevant to their mission, including opportunities to implement crime-prevention measures, and to enhance the safety and security of residents, employees and other users of a project through implementation of the principles of Crime Prevention Through Environmental Design (CPTED); and
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> (2) the Prince George's County Health Department. The Health Department shall perform a health impact assessment review of the proposed development identifying the potential effects on the health of the population, and the distribution of those effects within the population, including recommendations for design components to increase positive health outcomes and minimize adverse health outcomes on the community.

Pursuant to these provisions, the Planning Board referred the SDP Amendment to the Department of Permitting, Inspections and Enforcement ("DPIE") for that agency's review, including its review as to whether the SDP Amendment was in conformance with the approved

[1] Although, it should be noted, Principal Counsel Warner indicated in the hearing that 12 different Staff members did in fact communicate with Appellants' counsel and/or his staff, calling into question the veracity of Appellant counsel's argument here. *Planning Board Transcript Page 110, Lines 8-11.*

stormwater management concept plan. DPIE approved Site Development Concept Plan No. 827-2020-0 (the stormwater management concept plan) on May 29, 2020, and issued its review comments on the SDP Amendment to M-NCPPC on June 8, 2020, specifically noting "[t]he proposed amendment to the specific Site Plan is consistent with the approved Site Development Concept Plan No. 827-2020-0. *June 8, 2020 DPIE Memorandum in "Backup Materials", 83.* The M-NCPPC Staff Report then notes, "DPIE finds the proposed amendment to the SDP is consistent with the approved Site Development Concept Plan No. 827-2020-0". *Staff Report, 13.* The Planning Board, in referring the SDP Amendment to DPIE for its "review and comment," and taking into account the June 8, 2020 DPIE Memorandum in its consideration of the SDP Amendment, adhered to all Zoning Ordinance requirements and proper procedures relative to the stormwater management concept plan and stormwater management at the Property.

If Appellants' counsel were truly concerned about obtaining stormwater management calculations in order to conduct his review, he could have simply contacted the Applicant and asked for a courtesy copy of what the Applicant had submitted to DPIE for its review. Appellants' counsel notes that on May 13, 2020, he submitted a Maryland Public Information Act ("MPIA") request seeking documents relative to the Applicant's stormwater plan. *Appellants' Notice of Appeal and Request for Oral Argument, 5.* Over two months later, rather than ever having contacted the Applicant, he submitted several hundred pages of exhibits to the Planning Board the day before its public hearing on the SDP Amendment, which the Applicant then received from M-NCPPC Staff, and at the outset of the hearing the next day requested a postponement of the hearing since he had not received the stormwater information he was seeking. If Appellants' counsel were truly concerned with transparency and conducting a fair and thorough review, he had well over two months during which he could have simply requested the Applicant's assistance in obtaining

a document in the public record. The Applicant would have offered its assistance, as a fair and open review is in everyone's interests. But that was clearly not Appellants' counsel's actual intent. Significantly, the Court of Special Appeals has found that the "the granting of a continuance is within the sound discretion of an administrative agency, as it is in the comparable discretion of a trial court." *Gnau v. Seidel*, 25 Md. App. 16, 20, (1975) (internal citations omitted). Based upon the factual record identified above, the Planning Board utilized sound discretion in proceeding with the public hearing on the SDP Amendment as there was no basis to continue the matter to a date in the future.

III. THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE PLANNING BOARD'S UNANIMOUS APPROVAL OF THE SPECIFIC DESIGN PLAN AMENDMENT.

Resolution PBCPB No. 2020-129, adopted by the Planning Board on July 30, 2020 and constituting the Planning Board's written opinion and unanimous approval of the SDP Amendment, contains nine pages of factual findings in support of the Planning Board's conclusion that the SDP Amendment satisfies the legal requirements of the Zoning Ordinance. *Resolution PGCPB No. 2020-129, 3-11.* The Planning Board made all requisite findings for approval of the SDP Amendment application, as enumerated in Section 27-528 of the Zoning Ordinance. These findings were overwhelmingly supported by the Applicant's SDP Amendment application materials, M-NCPPC Staff's written findings and recommendations, and other written and oral testimony of record. *See Staff Report, 1-15; Backup Materials, 1-85.*

In this case, the Planning Board's Resolution PBCPB No. 2020-129 approving the SDP Amendment clearly and methodically sets forth the evidentiary basis for its conclusion that the SDP Amendment satisfied each of the six requisite findings in Section 27-528 of the Zoning Ordinance. Those six findings are that:

(1) The plan conforms to the approved Comprehensive Design Plan, the applicable standards of the Landscape Manual, and except as provided in Section 27-528(a)(1.1), for Specific Design Plans for which an application is filed after December 30, 1996, with the exception of the V-L and V-M Zones, the applicable design guidelines for townhouses set forth in Section 27-274(a)(1)(B) and (a)(11), and the applicable regulations for townhouses set forth in Section 27-433(d) and, as it applies to property in the L-A-C Zone, if any portion lies within one-half (1/2) mile of an existing or Washington Metropolitan Area Transit Authority Metrorail station, the regulations set forth in Section 27-480(d) and (e);

(1.1) For a Regional Urban Community, the plan conforms to the requirements stated in the definition of the use and satisfies all requirements for the use in Section 27-508 of the Zoning Ordinance;

(2) The development will be adequately served within a reasonable period of time with existing or programmed public facilities either shown in the appropriate Capital Improvement Program, provided as part of the private development or, where authorized pursuant to Section 24-124(a)(8) of the County Subdivision Regulations, participation by the developer in a road club;

(3) Adequate provision has been made for draining surface water so that there are no adverse effects on either the subject property or adjacent properties;

(4) The plan is in conformance with an approved Type 2 Tree Conservation Plan; and

(5) 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).

As set forth below, the Planning Board made the necessary and proper findings based upon the substantial evidence of record.

A. There is substantial evidence in the record to support the Planning Board's finding that the SDP Amendment conforms to the approved Comprehensive Design Plan (Finding #1).

There is substantial evidence in the record to support the Planning Board's finding that the SDP Amendment "conforms to the approved Comprehensive Design Plan" and "the applicable standards of the Landscape Manual" (though there has been no assertion to date that the SDP Amendment is not in conformance with the Landscape Manual). *Resolution PGCPB No. 2020-*

129, 2-4, 6-8; Staff Report, 5-7, 9-12; Backup Materials, 4-11, 69-70. The Original SDP established the permissibility of a warehouse use on the Property, providing[2]:

> CDP-8712 designates the subject lots for manufacturing/warehouse uses. The proposed use is within the proposed building with no outside storage of materials. Warehouse and wholesaling establishments are also listed as permitted uses in the memorandum dated April 27, 1992, from John Rhoads, Chairman, to the Prince George's County Planning Board.

Resolution PGCPB No. 00-136 at "Backup Materials", 45.

M-NCPPC Staff for this SDP Amendment again analyzed the permissibility of the use on the Property, providing:

> The Basic Plans designate the subject lot for manufacturing/warehouse uses. Warehouse establishments are also listed as permitted uses in the memorandum dated April 27, 1992, from John Rhoads, Chairman, to the Prince George's County Planning Board based on CDZ Amendment 4, County Employment Park, from Prince George's County Council Resolution CR-108-1975.
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> 8. Prince George's County Zoning Ordinance: The subject application has been reviewed for compliance with the requirements of the Zoning Ordinance in the E-I-A Zone, as follows:
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> > a. This SDP is in general conformance with the requirements of Section 27-515 of the Zoning Ordinance, which governs uses in comprehensive design zones (CDZ). The existing warehouse and distribution facility, for which the proposed parking and circulation is in support of, is a permitted use in the E-I-A Zone, in accordance with Section 27-515(b).

Resolution PGCPB No. 2020-129, 4; Staff Report, 6.

Section 27-107.01(256) of the Zoning Ordinance defines "warehouse unit" as:

[2] Note that, despite that Appellants' counsel submitted the 1978 Comprehensive Design Plan into the record as part of his voluminous submission the day prior to the hearing, as noted by Principal Counsel Warner, the 1978 Plan allowed warehouse uses so it is unclear how this supports Appellants' argument. Moreover, subsequent to the 1978 Plan, "several different amendments were adopted by the County Council or the District Council to adopt new Basic Plans to approve on your behalf new CDP's … [s]o in other words, the original 1978 CDP has been replaced by subsequent CDP's". Therefore, when M-NCPPC Staff and the Planning Board make a determination as to conformance with the applicable Comprehensive Design Plan, it is with respect to the plans adopted since the late 1980s. *Planning Board Transcript Page 93, Lines 7-18.*

> **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." 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."

Notably, the definition of "warehouse unit" does not specify a minimum time period for storage of goods and materials at the warehouse. The Applicant's Statement of Justification describes the proposed use as handling:

> "[T]he 'last mile' delivery of customer orders. AMZL delivery stations receive packages from other Amazon facilities and deliver the packages to the customers. Packages arrive from line haul trucks, are sorted by delivery routes and then loaded into delivery vans operated by delivery service providers ("DSP") or personal vehicles operated by individuals ("Amazon FLEX"). Delivery stations operate 24/7, with the majority of the sortation activity done early in the morning when the line haul trucks arrive with customer packages. Packages are typically in the delivery station for under 12 hours prior to being loaded onto the DSP vans and Amazon FLEX cars for delivery.
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> …
>
> After DSP drivers complete their routes, they return to the delivery station with any packages that may have been non-deliverable. After proper checkout and release, the DSP drivers park the delivery van either onsite or at the offsite location and leave using a personal vehicle or public transport.

Applicant's Statement of Justification at "Backup Materials", 3.

Further, a representative of the Applicant, Samantha Mazo, provided extensive oral testimony at the Planning Board hearing, describing in detail the proposed use and its operations, and elaborating with detail on the description of the use included in the Statement of Justification. *Planning Board Hearing Transcript Page 20, Line 16-Page 23, Line 4.*

The Planning Board and its legal counsel very clearly concluded at the Planning Board public hearing on July 23, 2000 that the use proposed by the Applicant fits within the definition of warehouse and is permissible.[3]

> [W]ith a zoning code staff is always required to look at a static list of table of uses and determine if it's reasonable to conclude specific, a proposed use within the definition of a use that's listed on the table. And obviously that's never an exact science in a world where people do a wide range of activities on their property. But as Debra said it was certainly, in our opinion and the Boards opinion last week, that this same type of facility was reasonably categorized as a warehouse use in that particular zone. And that same use is permitted in this zone as well.
>
> And in order to make that determination, the Board just needs to have a reasonable basis for making that determination and you would look to your staff s recommendation. You would look at anything else in the record which interestingly enough includes materials submitted by Mr. Nelson that in fact provides that this is a warehouse use. The Land Use Code or the Land Use 155 section that he's recommending staff use to calculate trip generation is in fact a warehouse use. It's a high-cube warehouse, that's how it's defined, and in fact I looked up the ITE definitions for those high-cubes and they include within that definition, parcel hubs and fulfillment centers as warehouses. So you have evidence in the record from Mr. Nelson as well as from your staff that this is a warehouse use.
>
> And I thought that it would be kind of important just to also explain that in situations where you have to make a decision about whether something is a permitted use or not, you're an administrative agency that's given wide deference as to making that decision. The courts will tell you that they rely on an agency's expertise, not theirs to make determinations specifically about permitted uses. So that's what you have to consider on the use question as to whether this is a warehouse or not.

Planning Board Hearing Transcript Page 91, Line 13-Page 92, Line 22.

Further, the Planning Board Chair addressed the permissibility of the Applicant's proposed use on the Property (<u>underlining added for emphasis</u>):

> You mentioned that about the Amazon this last mile being a warehouse and that has already been determined by planning staff. But it was not just determined by planning staff, it was determined by this Planning Board, the decision makers. The planning staff

[3] It should also be noted that in the Washington Gateway Preliminary Plan of Subdivision case, that counsel for the Appellant repeatedly refers to, which the Planning Board considered the week prior to this SDP Amendment, there was also extensive discussion regarding whether the proposed use is a warehouse use and is permissible, and the Planning Board concluded that the use is a warehouse use and is permissible.

> did recommend it to us, it was also explained to us by legal. I know that Mr. Nelson does not agree with that interpretation, we discussed this at length last week during the Washington Gateway hearing, we discussed it again this week and what some may call arbitrary and capricious I will call fairly debatable. Our decision is that this is a warehouse. There's no precise definition for every conceivable use that can come up in this antiquated ordinance. And so you look at something that's very, very closely related, it was stated very clearly today by Counsel Warner and it was stated very clearly last week by Deputy General Counsel Debra Borden and the Planning Board agreed with that. So I just want to make sure that that's on the record as well.

Planning Board Hearing Transcript Page 109, Line 10-Page 110, Line 3.

Therefore, there is substantial evidence in the record, going all the way back to 2000 at the time of approval of the Original SDP, regarding the permissibility of a warehouse use on the Property. Further, there is substantial evidence in the record, in the form of both written evidence and oral testimony delivered as part of the Planning Board's public hearing, as detailed above regarding that the Applicant's proposed use is a "warehouse" use. Courts have held that "an administrative agency's interpretation and application of the statute which the agency administers," such as the Zoning Ordinance in this matter, "should ordinarily be given considerable weight by reviewing courts." *Singley v. County Com'rs of Frederick County*, 178 Md. App. 658, 675 (2008). Thus, "the expertise of an agency in its own field should be respected." *Singley*, 178 Md. App. at 676. Under this well-established legal principle, the Planning Board's interpretation of the Zoning Ordinance in reaching its conclusion that the SDP Amendment constitutes a warehouse use is afforded deference by a reviewing body. Finally, Appellants' argument that the Applicant was required to exhaust its administrative remedies by applying to add its proposed use to the list of permitted uses under the Comprehensive Design Plan has no applicability given that there was nothing for the Applicant to remedy. The use was and is clearly permitted, a fact supported by substantial evidence in the record.

B. There is substantial evidence in the record to support the Planning Board's finding that the development proposed by the SDP Amendment will be adequately served within a reasonable period of time with existing or programmed public facilities (Finding #2).

There is substantial evidence in the record to support the Planning Board's finding that the SDP Amendment "will be adequately served within a reasonable period of time with existing or programmed public facilities". *Resolution PGCPB No. 2020-129, 5-6, 9-10; Staff Report, 7-8, 12; Backup Materials, 56-60 (5/21/20 Wells + Associates Memorandum to M-NCPPC), 65 (6/19/20 M-NCPPC Transportation Section Memorandum to Urban Design Section), 77-79.* Specifically, there is substantial evidence in the record to support the Planning Board's determination of the applicable trip cap for the site and its determination that the SDP Amendment remains within that trip cap, and that the Planning Board did not act arbitrarily and capriciously when it determined the applicable trip cap for the site. M-NCPPC Staff and the Planning Board utilized methodologies that have consistent precedent going back to the time of the Original SDP in September 2000 in analyzing the applicable trip cap. The Original SDP actually established that the maximum floor area ratio ("FAR") permissible on the Property was an 0.45 FAR. *Resolution PGCPB No. 00-136 at "Backup Materials", 45.* The Original SDP also analyzed the applicable trip cap and found that the development on the Property as proposed at that time, which was the exact 290,225 square-foot building that exists there today, was well within the trip cap.

> 9. The development will be adequately served within a reasonable period of time with existing or programmed facilities either shown in the appropriate Capital Improvement Program or provided as part of the private development.
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> Findings for adequate public facilities were made in conjunction with the Preliminary Plat. The Transportation Planning Section has confirmed (see Finding 15 below) that the proposal is consistent with the previous transportation adequacy findings.

Resolution PGCPB No. 00-136 at "Backup Materials", 50.

Finding 15 in turn provides (underlining added for emphasis):

15. The Transportation Planning Section (Masog to Srinivas, June 26, 2000) has stated that the proposal is in conformance with past approved plans and that the subject property will be adequately served within a reasonable period of time with transportation facilities which are existing, programmed, or which will be provided as a part of the development if the development is approved.

The memorandum from the Transportation Section states as follows:

> The Transportation Planning Section has reviewed the application referenced above. The application involves a portion of the Collington Center development. The property is located south and west of Trade Zone Avenue and Prince George's Center Boulevard. The applicant proposes to develop the property with 290,225 square feet of warehouse and office space. The site acreage is 28.02 acres.
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> The development of this site must be in accordance with CDP-9006 and A-6965 as amended. There should also be an underlying preliminary plat, and that plat, if approved since 1990, potentially has a square footage or trip cap. The transportation staff could not ascertain either the preliminary or final plats which created Lot 19C; a 1995 preliminary plat and its resulting record plat showed a far different lotting pattern. <u>However, all square footage caps have generally been based on a floor-to-area ratio of 0.40, with warehouse, office and light industrial uses all accommodated within the cap. Such a cap for this 28.02 acre site should have allowed for up to 488,170 square feet of development.</u>
>
> The access and circulation plan for the site is acceptable. The proposed warehouse and its associated drive aisles, loading bays and parking would occupy most of the site. The remainder of the plan makes a provision for an expansion of the planned building. The building envelope is approximately 122,500 square feet; this expansion would need to be the subject of a new review prior to its construction.
>
> The finding for a Specific Design Plan requires that the site be served adequately within a reasonable period of time by transportation facilities which are existing, programmed or which will be provided as a part of the development. <u>While the transportation adequacy findings for the subject property are quite old, nothing has occurred which would invalidate them.</u> Therefore, the transportation staff finds that the submitted plans are in conformance with past approved plans. The subject property was the subject of a finding of adequate public facilities made in 1995. Insofar as the basis for that finding is still valid, the transportation staff finds that the subject property will be adequately served within a reasonable period of time with transportation facilities which are existing, programmed, or which will be provided as a part of the development if the development is approved.

Resolution PGCPB No. 00-136 at "Backup Materials", 51-52.

As a result, there is nothing even remotely arbitrary and capricious regarding the methodology by which M-NCPPC Staff and the Planning Board determined the applicable trip cap for the site. The applicable trip cap, using an 0.4 FAR, was clearly established at the time of the Original SDP in 2000, as was the fact that up to 488,170 square feet of development could have been constructed on the Property pursuant to and within the bounds of this trip cap.

Given the very thorough determination of the applicable trip cap by M-NCPPC Staff and the Planning Board, utilizing a consistent methodology that dates back to the approval of the Original SDP in 2000, the only remaining task was for M-NCPPC Staff and the Planning Board to determine if the traffic generated by the SDP Amendment is within the trip cap. The Applicant, M-NCPPC Staff, and the Planning Board all clearly concluded it is, and there is substantial evidence in the record to support this. There was extensive discussion on this topic at the Planning Board's public hearing, providing substantial evidence in support of the Planning Board's finding that the SDP Amendment complies with the trip cap, excerpts of which are below.

Relevant excerpts from the hearing testimony, bolstering the already substantial evidence in the written record regarding the SDP Amendment's adherence to the trip cap, are as follows (underlining added for emphasis):

> [F]rom a traffic perspective, Amazon's production and Amazon's logistics on these delivery stations has really evolved over time and has been curated. Our intent and our effort is to take the trips off the peak hour time period, to make sure that both the trips for the delivery station associates, who are coming in to pick up the vans but most importantly for the vans when they are coming out are not going to be impacting the peak hours of the surrounding roads. And that is borne out in Mr. Kabatt's traffic report and the trip count.
>
> To that end, the station is designed for the vans to be loaded in a staged manner so that vans are loaded at approximately 40 vans at a time. They are then sent off onto the street in again a staged manner based on the operational nature of this particular site. And so through the operations of this particular building, there will not be a situation where hundreds of vans are thrown onto the streets during on particular time, rather this is a very, almost puzzle piece like logistics in order to both load the vans in a very quick manner and

then to have them on the streets for such a time period that they are not impacting the peak hours.

The vans would then leave in these waves, the waves leave approximately around 20, approximately 20 minutes after each one and then they would return about eight hours later, again outside the peak hour, empty, where at that point again we're outside the peak hour, the drivers would drop off the vans, pick up their own vehicles and then drive home.

You know, again, this is an incredibly well thought out process that is being pursued elsewhere around the country. It is a manner in which Amazon really believes it can be a win/win for everybody to the extent that our customers are satisfied with receiving their packages outside of the early morning or you know they're happy to receive packages during the day. And then more importantly, we're happy to keep our trips off the roads during the peak hour time periods. And so with that, I hope that gives you an overview of how this station would work in terms of an operational standpoint.

Planning Board Hearing Transcript Page 21, Line 14-Page 23, Line 3.

Planning Board Chair Hewlett, following these comments, remarked that "and going through everything beforehand, I noticed that you have a well-oiled system for not impacting traffic during peak hour times." *Planning Board Hearing Transcript Page 23, Lines 7-9.*

Mr. Kabatt of Wells + Associates then provided an overall summary of the traffic analysis that his office conducted:

So and then on to the trip cap, just as Samantha had mentioned, Amazon's operation is specific for this delivery station and it is an off peak operation. And our comparison is for the trip cap is for the comparison of peak hour, commuter peak hour a.m. and p.m. trip generation and that's what's we compared to the warehouse. So while there are trips coming on and off the site, the majority of them have been at traditionally non-peak hours, midday and then into the late evening. And then as you see in the record and now our trip cap memorandum, with that operation, we are below the number of trips the peak hour trips that would be generated by the warehouse that is permitted.

Planning Board Hearing Transcript Page 30, Line 16-Page 31, Line 2.

Counsel for the Applicant summarized the transportation findings, and the flawed method of Appellants' analysis, at the hearing[4]:

[4] In her opening remarks, counsel for the Applicant had also stated: "[T]he increase in parking does not really bear a direct relation to any changes in traffic. I'm sure folks are generally familiar with Amazon,

> [O]verall I think there's a bit of a fundamental flaw in Mr. Nelson, his team's analysis of the Wells' memorandum. They are stating that we used the Land Use Code 150 to determine our site's trip generation, but that is not accurate. The Land Use Code 150 was used to determine the implied trip cap.
>
> So to the extent that the argument is that those numbers generate numbers that are too low, we were actually being very conservative there. To determine our actual trips that memorandum used our actual operations and so that is why it very specifically delineates the number of trucks in certain hours, the number of trucks out in certain hours, the number of employees in, the number of employees out. All of the phasing. So there's kind of a fundamental in how they're interpreting our memo and I think Chris Kabatt can much better elaborate on that.

Planning Board Hearing Transcript Page 80, Lines 10-25.

The Applicant's transportation engineer testified as to the following (underlining added for emphasis):

> [T]he Land Use Code 150 for warehouse that was used of the allowed use up to approximately 480,000 square feet of warehouse. That was used to calculate the trip cap number for that size warehouse. We compared that to the number of trips that would actually be generated by the Amazon delivery station.
>
> I do want to point out that Land Use Code 155 that they keep referring to and was used, you know, in their study and other studies, that is a land use in ITE but right there in the ITE Manual it says to use caution and that is because that trip rate was only based on two studies, two data points. And both of those data points, both of those buildings were very large compared to our use. One was approximately 800,000 square feet and the other one was approximately 1.5 million square feet and that just a flag for the traffic engineer as the Institute says, to use caution and to use more other available data and that's what we did.
>
> We used specific data for this Specific Design Plan Amendment. We have a specific use here and we essentially know what the driveway counts are going to be because of their operation. And again, as I stated earlier during the a.m. and p.m. peak hours we stay within that trip cap based on those conservative estimates for the warehouse use for the 480,000 square feet.

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you see the little sprinter vans running around your neighborhoods. So the drivers come onto the site, they park their car in a vehicle parking space. They go to the van storage space and pick up the van and head out. So I just wanted to put that out there, we can certainly get into it in more detail but to note that increases in paving for parking do not necessarily have a direct relationship on trips." *Planning Board Hearing Transcript Page 18, Lines 14-24.*

> The other point, the comparison between the Washington Gateway site, obviously I am not, I can't speak to you know the determination as to why those trips rates were used for that site. I just wanted to point out that again that Washington Gateway site, that is a Preliminary Plan application and you know perhaps they need some flexibility with who the user might be or what the type of operation might be for a Preliminary Plan determination, an adequacy determination. And just pointing out again that here we have a specific use for this Specific Design Plan Amendment and we went through with both DPIE and with your Planning Department staff on the appropriate trip rates to use for this determination, and that's the result of our study and we remain under the trip cap.

Planning Board Hearing Transcript Page 81, Line 4-Page 82, Line 17.

Near the conclusion of the extensive discussion regarding the trip cap at the Planning Board's hearing, Glen Burton of the M-NCPPC Transportation Planning Section, summarized M-NCPPC Staff's conclusions as follows (underlining added for emphasis):

> And so my conclusion therefore is that while I may have reached that conclusion using a different path, but I feel comfortable that based on this analysis the 488,000 square foot implied development cap would still generate a higher number than the 290 square foot which is before you today. So that's my take on the comparisons between 150 versus 155.
>
> As far as the other issues regarding traffic, and I think someone eluded to this earlier, this is not a Preliminary Plan of Subdivision.
>
> There is no test for adequacy and so from my perspective this is really a comparison between what is versus what could have been. What could have been was that someone would come in and develop this property with 488,000 square feet of warehouse. They could have, but they didn't. They used a smaller density. So this is really from a transportation standpoint nothing more than an exercise comparing one GFA versus another. And that's why I didn't think it was appropriate for us to reinvent the wheel, if you will, by reexamining the entire Collington area to see whether we're still under the original cap that was envisioned 30 years ago when the CDP was done.
>
> My own experience tells me that if you looked, and while this was not documented in my referral, I think it's safe to say that if you looked totally at what's been built in the larger Collington area to date versus what could have been built 30 years ago when the CDP was envisioned, I am fairly confident that what's on the ground now is far less dense than what could have been or what was envisioned when the CDP was done 28, 30 years ago. <u>So from whatever perspective one chooses to look, I am satisfied that the trip cap implied would not be exceeded with the application that's before you today.</u>

Planning Board Hearing Transcript Page 88, Line 8-Page 89, Line 16.

And finally, Planning Board Chair Hewlett summarized the Planning Board's findings relative to the trip cap, the SDP Amendment's traffic generation, and the SDP Amendment's conformance with the trip cap as follows:

> So basically there are a number of ways you could do an analysis and anyway, from your professional perspective, anyway you look at it, this particular application will generate less trips, less peak hour trips than what could have been under the previous CDP approval. It's a matter of 290 square feet of warehousing versus 488 square feet of warehousing. In addition to that, what I'm hearing from the applicant also, if you put that together with what the apartment's saying, even though this will generate fewer trips based on their operation, which typically involves nonpeak hour traffic. The two things coupled together means that this is likely generate far less peak hour traffic.

Planning Board Hearing Transcript Page 89, Line 20-Page 90, Line 7.

In conclusion, with respect to the finding that the SDP Amendment "will be adequately served within a reasonable period of time with existing or programmed public facilities", with respect to traffic, it is clear from the evidence of record, both written and in oral testimony at the Planning Board's public hearing, that:

- Amazon deliberately avoids producing traffic in the AM and PM peak hours, and it is the AM and PM peak hours only that M-NCPPC tests.
- Amazon's trip generation is based on actual operations at this specific site.
- Due to Amazon's mode of operations, an increase in paving and/or parking at a site has no direct relationship to trips.
- This case is an SDP Amendment; it is not a Preliminary Plan of Subdivision as was the "Washington Gateway" case heard by the Planning Board the week prior to this case. There are different findings that need to be made for each type of case. Moreover, here Amazon is the Applicant and their unique operations at this specific site are used to

analyze traffic and trips. In a Preliminary Plan of Subdivision, there could be any use permitted in the given zone and thus the analysis conducted is far more generic.

The Planning Board's conclusion that the SDP Amendment will be adequately served by transportation facilities is based upon its application of the Zoning Ordinance to the factual record identified above. As noted above, the expertise of the Planning Board in this area must be respected and a Court must provide considerable weight to the its conclusion that the SDP Amendment would be served by adequate transportation facilities. *See Singley v. County Com'rs of Frederick County*, 178 Md. App. 658 (2008). Moreover, a Court "may not substitute its judgment on the question whether the inference drawn is the right one or whether a different inference would be better supported." *Critical Area Comm'n for Chesapeake & Atl. Coastal Bays, et al. v. Moreland, LLC*, 418 Md. 111, 123 (2011) (internal quotations omitted). While the Appellants ask that the District Council substitute its judgment for that of the Planning Board and draw different inferences from the factual record, Maryland Courts have consistently held that they "will affirm an agency's ruling on a factual matter if … the ruling is supported by substantial evidence, such that a reasonable mind might accept as adequate to support a conclusion, even if there is substantial evidence to the contrary." *Singley*, 178 Md. App. at 675. As detailed above, the Planning Board's findings relative to the adequacy of transportation facilities is supported by substantial evidence such that a reasonable mind might accept as adequate. Therefore, the District Council should affirm the Planning Board's finding that the SDP Amendment will be adequately served within a reasonable period of time with existing or programmed public facilities.

While there is no assertion in this case that any of the other types of public facilities contemplated by this Finding #2 (e.g., water, sewer, police, fire) have not been found to be adequate, we note for completeness that there is substantial evidence in the record supporting a

finding that these will be adequate as well. *Resolution PGCPB No. 2020-129, 5-6; Staff Report, 7-8; Backup Materials, 66-68, 77-80, 82.*

C. There is substantial evidence in the record to support the Planning Board's finding that adequate provision has been made for draining surface water (Finding #3).

There is substantial evidence in the record to support the Planning Board's finding that "[a]dequate provision has been made for draining surface water so that there are no adverse effects on either the subject property or adjacent properties". *Resolution PGCPB No. 2020-129, 6; Staff Report, 8; Backup Materials, 61, 83-84.* As discussed in detail in Section II above, the Planning Board referred the SDP Amendment to DPIE for their review, including their review of the stormwater management concept plan. DPIE approved Site Development Concept Plan No. 827-2020-0 (the stormwater management concept plan) on May 29, 2020, and issued its review comments on the SDP Amendment on June 8, 2020, specifically noting "[t]he proposed amendment to the specific Site Plan is consistent with the approved Site Development Concept Plan No. 827-2020-0. *June 8, 2020 DPIE Memorandum in "Backup Materials", 83.* The M-NCPPC Staff Report then notes, "DPIE finds the proposed amendment to the SDP is consistent with the approved Site Development Concept Plan No. 827-2020-0". *Staff Report, 13.* Therefore, there is substantial evidence in the record in support of the Planning Board's finding that adequate provision has been made for draining surface water on the Property.

D. There is substantial evidence in the record to support the remainder of the findings that the Planning Board is required to make in approving this SDP Amendment (Findings #1.1, 4, and 5).

There is substantial evidence in the record to support the remainder of the findings that are required to be made by the Planning Board in approving the SDP Amendment, though these have not been brought into question at this time.[5]

There is substantial evidence in the record to support the Planning Board's finding that "[t]he plan is in conformance with an approved Type 2 Tree Conservation Plan". While there is no assertion by the Appellants that this finding was not correctly found to be satisfied, the Applicants note the substantial discussion in the record regarding this finding for purposes of completeness. *Resolution PGCPB No. 2020-129, 6; Staff Report, 8; Backup Materials, 71-76.*

There is substantial evidence in the record to support the Planning Board's finding that "[t]he 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)". While there is no assertion by the Appellants that this finding was not correctly found to be satisfied, the Applicants note the substantial discussion in the record regarding this finding for purposes of completeness. *Resolution PGCPB No. 2020-129, 6; Staff Report, 9; Backup Materials, 71-76.*

CONCLUSION

For all the reasons stated above, the Applicant respectfully requests the District Council affirm the unanimous decision of the Planning Board with respect to its approval of the Specific Design Plan Amendment via Resolution 2020-129 adopted on July 30, 2020. The Planning Board

[5] Note, what is shown in the Zoning Ordinance Section 27-528(a) as "1.1" is inapplicable as the SDP Amendment does not contain property designated as a regional urban community. *Resolution PGCPB No. 2020-129, 4; Staff Report, 7.*

acted in accordance with the law, there is no evidence that it acted arbitrarily or capriciously, and there is substantial evidence in the record to support the Planning Board's decision in this case.

Respectfully Submitted,

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