McMillan Metro, P.C.

ATTORNEYS AT LAW

March 31, 2020

**VIA E-MAIL AND**
**ELECTRONIC FILING**

Madam Chair and Members of the
Planning Board for Prince George's County,
Maryland-National Capital Park
and Planning Commission
C/O Jeremy Hurlbutt, Staff Reviewer
(*Jeremy.hurlbutt@ppd.mncppc.org*)

**Peter E. Ciferri**
Direct: 240-778-2307
pciferri@mcmillanmetro.com
Maryland Bar
District of Columbia Bar

Re: Objection to Detailed Site Plan Application
No. DSP-19050; Dewey Parcel (the "**Application**")
By Bald Eagle Partners (the "**Applicant**")
Concerning 3.87 acres of land owned by Dewey, L.C.

Dear Madam Chair and the Members of the Board:

This correspondence is submitted by Peter E. Ciferri, Esq., and McMillan Metro, P.C., attorneys on behalf of 6525 Belcrest Road, LLC (hereinafter "**Belcrest**"). For the reasons as set forth herein, and the facts, testimony, and evidence included in the record and to be included further into the record at this Board's April 16, 2020 public hearing, Belcrest hereby moves that the Planning Board deny the Applicant's Detailed Site Plan Application. In support of this request, Belcrest states as follows:

## I. Summary of Material Factual History of the Parking Parcel and the Metro III Parcel.

### A. Development History for Metro III Parcel and Reliance on the Parking Parcel.

The office building commonly known as "Metro Center III" is located on 2.78 +/- acres of real property bearing the street address 6525 Belcrest Road, Hyattsville, Maryland. The real property and improvements thereon are hereafter referred to as the "**Metro III Parcel**" in this memorandum. Historically, the Metro III building has been referred to sometimes as the "Federal III Building" or the "Presidential Building". Belcrest owns the Metro III Parcel.

Adjoining the Metro III Parcel, across Toledo Road, is an overall piece of property comprised of approximately 21.78 acres of land (the "**Subject Property**"). That parcel of land is the subject of the Applicant's two preliminary plan applications and Detailed Site Plan applications, one of which is pending before this Board. About 19.9639 +/- acres of the Subject

Property is improved with a parking lot and has been so improved since the early 1970s. The 19.9639+/- acres of land and improvements thereon are referred to as the "**Parking Parcel**" for this memorandum. The 3.87 acres of land subject of this Detailed Site Plan for redevelopment are part of the Parking Parcel.

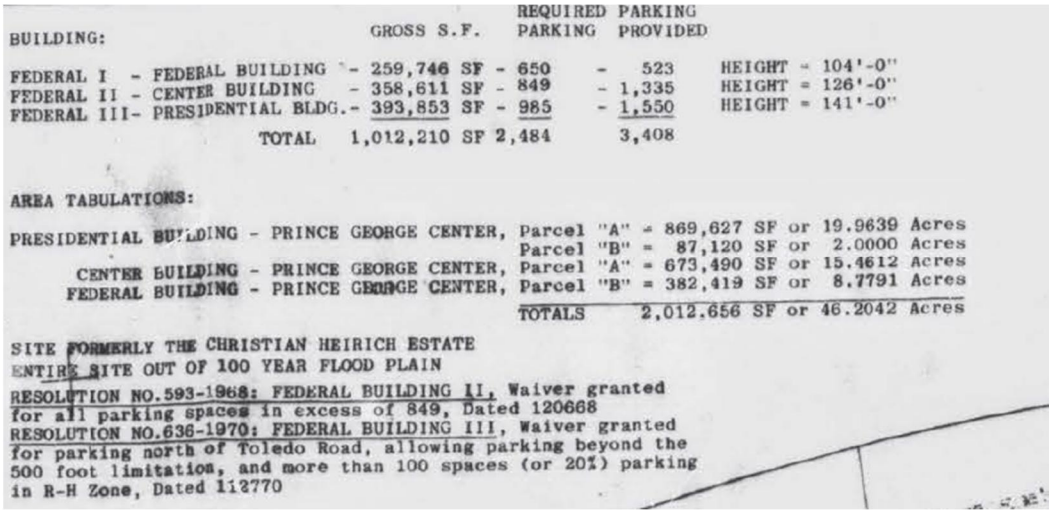
Prior to being developed, Dewey Development Corporation acquired the Parking Parcel from Byrd Development Corporation, Spruell Development Corporation, and Landy Development Corporation, by deed dated December 10, 1957, and recorded in the Land Record of Prince George's County in Book 2173 at page 178. **Exhibit 1**. Prior to being developed, Spruell Development Corporation purchased 2.0+/- acres of what is now the Metro III Parcel by Deed dated June 2, 1969, and recorded in Book 3728 at page 63. **Exhibit 2**. Spruell Development Corporation, together with Byrd Development, also owned adjoining lands in the Federal office center area that now make up the remainder of the Metro III Parcel. **Exhibit 3**. Herschel W. Blumberg was the President of Byrd Development Corporation, Spruell Development Corporation, Landy Development Corporation, and Dewey Development Corporation. **Exhs. 1, 2**; **Exhibit 4**; **Exhibit 5**. Marvin Blumberg was the Secretary for each of those entities.

The original development approvals for the Metro III Parcel and Parking Parcel were sought contemporaneously and jointly by Mr. Blumberg's development entities. Metro III Parcel was developed as an office building, and continues to be used as an office building to this day. The Parking Parcel was developed as a surface parking lot designed to support the Metro III Parcel, and continues to be used for that purpose to this day. The Metro III Parcel had insufficient land to accommodate the required on-site parking under the then-applicable Prince George's County Zoning Ordinance. To overcome this deficiency, Dewey Development Corporation and Spruell Development Corporation jointly requested that the Prince George's County Council, sitting as the District Council, grant a Waiver/Variation from the then-applicable County parking standards to allow them to use the Parking Parcel as a permanent off-site parking facility to accommodate the Metro III building. The District Council agreed and passed Resolution No. 636-1970, dated November 27, 1970 (hereinafter the "**Parking Waiver**"), which reads in full:

> It was Ordered that a WAIVER of the off-street parking requirements of the Zoning Ordinance requested by Nicholas Orem, Jr., Attorney for Spruell Development Corporation **and** Dewey Development Corporation, **owners of all property involved**, located on the north side of Toledo Road and limited by Belcrest and Adelphi Roads, Hyattsville, Maryland, be GRANTED."

**Exhibit 6**. (Emphasis added). The District Council, through the Resolution, approved use of the Parking Parcel as a permanent subordinate use to benefit the Metro III building.

The scope of the Parking Waiver has been further described and memorialized in subsequent site plans for the Metro III Parcel and for the Parking Parcel:



| BUILDING: | GROSS S.F. | REQUIRED PARKING | PARKING PROVIDED | |
|---|---|---|---|---|
| FEDERAL I - FEDERAL BUILDING | - 259,746 SF | - 650 | - 523 | HEIGHT = 104'-0" |
| FEDERAL II - CENTER BUILDING | - 358,611 SF | - 849 | - 1,335 | HEIGHT = 126'-0" |
| FEDERAL III- PRESIDENTIAL BLDG. | - 393,853 SF | - 985 | - 1,550 | HEIGHT = 141'-0" |
| TOTAL | 1,012,210 SF | 2,484 | 3,408 | |

AREA TABULATIONS:

| | | | |
|---|---|---|---|
| PRESIDENTIAL BUILDING - PRINCE GEORGE CENTER, | Parcel "A" = | 869,627 SF or | 19.9639 Acres |
| | Parcel "B" = | 87,120 SF or | 2.0000 Acres |
| CENTER BUILDING - PRINCE GEORGE CENTER, | Parcel "A" = | 673,490 SF or | 15.4612 Acres |
| FEDERAL BUILDING - PRINCE GEORGE CENTER, | Parcel "B" = | 382,419 SF or | 8.7791 Acres |
| | TOTALS | 2,012,656 SF or | 46.2042 Acres |

SITE FORMERLY THE CHRISTIAN HEIRICH ESTATE
ENTIRE SITE OUT OF 100 YEAR FLOOD PLAIN
RESOLUTION NO.593-1968: FEDERAL BUILDING II, Waiver granted for all parking spaces in excess of 849, Dated 120668
RESOLUTION NO.636-1970: FEDERAL BUILDING III, Waiver granted for parking north of Toledo Road, allowing parking beyond the 500 foot limitation, and more than 100 spaces (or 20%) parking in R-H Zone, Dated 112770

*Excerpt from Original Site Plan drawing relied upon in subsequent Site Plan application for Greenwood School, No. SP-87076.*

The District Council's Parking Waiver set forth that "Federal III" (*i.e.,* the Metro III building) the waiver Resolution for "Federal Building III" was "granted for parking north of Toledo Road, allowing parking beyond the 500 foot limitations, and more than 100 spaces (or 20%) parking in R-H Zone…" and was granted to provide required parking for the Metro III (Federal III) building. 1,550 parking spaces in total were specifically allocated to Metro III (Federal III). *See e.g.* **Exhibit 7**. The Parking Waiver did not excuse the Zoning Ordinance requirement that an appropriate legal arrangement be entered to assure permanent availability of the Parking Parcel as accessory to Metro III. Exh. 6.

Notably, site plan calculations make plain that the developers for the Parking Parcel and Metro III Parcel sought and obtained approval to merge both parcels for zoning purposes in order to create a single developable parcel for the construction of the "Presidential Building", as evidenced by the applicable Zoning Ordinance and Parking Waiver Resolution, and the subsequent reliance on site plans for the 19.9639 acres of Parking Parcel land together with the 2.00 Metro III Parcel. E.g., Exh. 7**.** The owners and developers for both parcels specifically and intentionally obtained the Parking Waiver in order to beneficially use the Parking Parcel as the surface parking lot for the Metro III. The Metro III Parcel could not have been developed as a commercial office building under the then-applicable Code criteria without the Parking Waiver and the dedication of the Parking Parcel to service the parking needs of the Metro III Parcel. The owners of the Metro III building constructed the building and relied upon the availability of approximately 1,600 parking spaces specifically located on the Parking Parcel in order to use and occupy the Metro III building. **Exhibit 8**. Had the original owners intended for parking to exist elsewhere, they could have possibly sought a Parking Waiver for other pieces of land, as those

property owners owned nearly all of the adjoining lands at the time. Today, those other properties are not controlled in any sense by Belcrest.

During the 1970s, building permits were secured and Metro Center III was constructed on the Metro Center III Parcel in reliance on the earlier issued the Parking Waiver and in reliance upon governmental zoning and planning approvals, and other development approvals. Building permits for Metro III could not have been issued but for the owner's reliance on the Parking Waiver. Exhibit 9. Aerial imagery confirms that as of 1965 ground was not broken on the parking lot or Metro Center III. **Exhibit 10**. By 1977, both Metro Center III and the Parking Parcel were fully developed with the same uses that each piece of property holds today. Exh. 10. Throughout the 1970s and continuing through this day, the owner of the Metro Center III Parcel, as well as its tenants, condominium owners, and other users, have obtained certificates of use and occupancy for the use of Metro Center III as an office building, predicated on the availability and use of the Parking Parcel to service the parking requirements of the Metro III building. **Exhibit 11**. As further example, at various points during, at least, 1987, 1990, 1994, 2006, 2011, 2013, 2014, and 2015, and even as late as 2019, Metro III Parcel owners and occupants have relied upon the site plans that require use of the Parking Parcel, and permits have been issued to them in reliance on the continued validity of those plans. **Exhibit 12**.

**B. Summary of the Recent Ownership Histories.**

Over the years following the Waiver and the construction of the Metro III building, ownership of the Metro III Parcel has changed. In 1984, Spruell Development Corporation merged with and into Prince George Center, Inc., another entity controlled by Herschel Blumberg, and became the successor to Spruell Development Corporation's rights and obligations, including ownership of the Metro III Parcel. Prince George Center, Inc., later merged into Price George's Metro Center, Inc., and assumed the ownership rights. **Exhibit 13**. In 1998, Prince George's Metro Center, Inc. transferred for $10.00 the Metro III Parcel to PG Metro Center, III, Inc again controlled by Herschel Blumberg, expressly together with the rights to use the Parking Parcel for the benefit of Metro Center III. Exh. 13. In 2013, FUCMS 1999-C1 Belcrest Road, LLC, acquired the Metro III Parcel out of the foreclosure proceedings for PG Metro Center, III, Inc. Exh. 13. The foreclosure proceedings resulted in the property passing to FUCMS 1999-C1 Belcrest Road, LLC, by a Substitute Trustee's Deed of Foreclosure from Cindi E. Cohen and Martin J. Hutt, Substitute Trustees for the Purposes of Foreclosure. In 2015, FUCMS 1999-C1 Belcrest Road, LLC, sold the Metro III Parcel to 6525 Belcrest Road, LLC. Exh. 13.

Likewise, the ownership of the Parking Parcel has changed as well. In 1982, Dewey Development Corporation and its officers conveyed the Parking Parcel to the Trustees of the Herschel Blumberg Family Trusts and the Trustees of the Marvin Blumberg Family Trusts as described in the Deed recorded in Liber 5520 at folio 887. **Exhibit 14.** In 1993, the Trustees of the Marvin Blumberg Family Trusts conveyed a fifty percent interest in the Parking Parcel to

various Blumberg family members as described in the Deed recorded in the Land Record of Prince George's County in Liber 8759 at folio 978. In 1998, the family members owning the Parking Parcel conveyed it to Dewey, L.C., another entity controlled by the Blumberg family. Exh. 14. In or around 2012, as part of an overall bankruptcy and foreclosure process, Wells Fargo, N.A., acquired a 3.87 +/- acre portion of the Parking Parcel through a private settlement agreement. **Exhibit 15.** The out-sale of 3.87 acres in 2013 is helps explain why this pending Application came in two separate parts at the preliminary plan stage.

While ownership of the Metro III Parcel and the Parking Parcel have changed hands over the last 50 years, and despite various intervening private agreements between the ownerships, the Metro III building's use of, and reliance upon, the entire 19+ acre Parking Parcel remained unchanged. See Exhs. 10, 11, 12.

Between 1998 and 2013, Herschel Blumberg, various other Blumberg family members, and various entities controlled by the same, envisioned the expansion of the overall region to include additional condominiums, office buildings, student housing, retail, movie theatres, retail parking garages, and outdoor plaza space. Through a series of development approvals, Mr. Blumberg did develop portions of the overall "University Town Center" to varying degrees of success. It is acknowledged that the region has been the subject of several master plan amendments, sector plan amendments, zoning ordinance amendments, and zoning overlays throughout the years. Notably, however, the Metro Center III Parcel and the Metro Center III building have never been redeveloped in a manner that would disturb the validity or enforceability of the Parking Waiver. Exhs. 11, 12; **Exhibit 16**. As support, a copy of the most recent site plan approvals for the Metro Center III Parcel, demonstrates that the Metro Center III Parcel remains and continues to be reliant on the perpetual use of the entire Parking Parcel as granted in the Parking Waiver. **Exhibit 17**.

Separate and apart from being the beneficiary of the Parking Waiver, Belcrest is also the tenant for a portion of the Parking Parcel under a Ground Lease, which was first entered in 1998 between Dewey, L.C., as Landlord, and PG Metro Center III, Inc., as Tenant, and is recorded among the Land Records of Prince George's County in Liber 12085 at Folio 633, through which the landlord and tenant memorialized certain payment, maintenance obligations, and other obligations and agreements between the parties. **Exhibit 18**.[1] Owners and occupants of the Metro III building parked on the Parking Parcel for more than two decades without any ground lease in place, and in reliance on the original governmental approvals. Although the Ground Lease

[1] Dewey, L.C., and FUCMS 1999-C1 Belcrest Road, LLC, entered into a First Amendment to Ground Lease on July 16, 2014, recorded among the Land Records in Liber 37353 at folio 395. The First Amendment modified certain rights and obligations concerning temporary relocations of parking, among other topics. FUCMS 1999-C1 Belcrest Road, LLC, also entered into an unrecorded Sublease Agreement with MLCFC 2007-8 Belcrest Road, LLC, dated July 18, 2014. FUCMS 1999-C1 Belcrest Road, LLC, and 6525 Belcrest Road, LLC, entered into an Assignment and Assumption of Ground Lease and Sublease, dated November 9, 2015, and recorded among the Land Records in Liber 37718 at folio 027. Exhibit 18.

defined a 7.9 +/- acre area for parking, the entire Parking Parcel remains subject to the Parking Waiver and the entire Parking Parcel has been in continuous use by the Metro III building to service parking consistent with its original approvals.

**C. The Case and Decisions Pending before this Planning Board.**

Despite this lengthy history, at every stage of its redevelopment application process so far, the Applicant has failed to acknowledge Belcrest's property rights under the Parking Waiver, as well as Belcrest's rights to use the Parking Parcel, including failing to acknowledge those rights in either of Applicant's preliminary plans, numbered 4-18022 or 4-19033. At the preliminary plan hearings, the Planning Board determined that the Applicant's burden going forward into Detailed Site Plan was to both demonstrate that the Detailed Site Plan had adequate parking for the proposed project under existing regulations, and also was in compliance with the rights of the adjoining property owners' rights to parking on the Parking Parcel. *See* Resolution No. 19-82 for Case No. 4-18022, at p. 36-7 ("[A] determination of adequate parking for land uses that depend on this parking lot must be made prior to the approval of the detailed site plan for this property."); Resolution No. 19-129 for Case No. 4-19033 at p. 6 ("[A] determination of adequate parking for land uses that depend on this parking lot must be made prior to the approval of the DSP for this property." **Exhibit 19.**

The Applicant's attorney at the November 21, 2019, Planning Board hearing acknowledged that the Applicant's burden is to demonstrate that there is no parking problem caused by its development plans. The Applicant's attorney argued that there are only two separate before the Planning Board in considering the parking rights enjoyed by Belcrest: (i) the private ground lease agreement between the parties, and (ii) the Planning Board's legal determination as to whether the Detailed Site Plan supports a finding of adequate parking facilities. *See* Planning Board Hearing video, at 1:22:25 through 1:22:42 (Nov. 21, 2019).[2]

Nonetheless, the Applicant still fails to acknowledge the equitable and legal property interest enjoyed by Belcrest in the Parking Parcel in its Detailed Site Plan Application now pending before the Planning Board. Likewise, the Applicant did not include Belcrest as an applicant in preparing the application or submitting its plans. The Detailed Site Plan presented is in complete contravention to the earlier approved Parking Waiver, which remains a valid governmental approval that encumbers the subject property and acts as a benefit to the Metro III Parcel.

[2] Retreived on March 31, 2020, from: http://mncppc.iqm2.com/Citizens/SplitView.aspx?Mode=Video&MeetingID=1519&MinutesID=1363&Format=Minutes&MediaFileFormat=mpeg4.

## II. LEGAL ARGUMENT

### A. Belcrest's right to use the Parking Parcel vested in 1970 with the passage of the Parking Waiver. Belcrest continues to hold an equitable use interest through that grant.

#### i. The Parking Parcel and the Metro III Parcel were legally merged for the use and benefit of the Metro III Parcel owners.

"Merger, in the context of land use, is the joining of contiguous parcels under common ownership, so that they are viewed as a single parcel for purposes of zoning regulations." *Mueller v. People's Counsel for Balt. Cnty.,* 177 Md. App. 43, 94 (2007). Owners of land are empowered to combine or merge several parcels or lots of land to create a development project that complies with the applicable subdivision regulations and zoning ordinance. *Friends of the Ridge v. Balt. Gas & Elec. Co.,* 352 Md. 645, 658 (1999). "One way [to] do so is to integrate or utilize the contiguous lots in the service of a single structure or project". *Id.* Even if the lots or parcels remain separately platted and subdivided, by operation of law a single parcel emerges for zoning purposes when one parcel is used in service of advancing the building project on another parcel. *Id. Accord Remes v. Montgomery Cnty.,* 387 Md. 52, 77-8 (2005). Zoning merger consolidates lots to permit construction upon the affected lands that otherwise would be nonconforming in the absence of the merger, so that the applicants for both parcels may comply with applicable zoning requirements. *Remes,* 387 Md. at 66. The merger doctrine is applied to prevent the later creation of undersized, non-conforming parcels. *Friends of the Ridge,* 352 Md. at 653.

The co-applicants, Mr. Blumberg's Dewey Development (Parking Parcel owner) and Spruell Development (Building Parcel owner), owners of all of the property involved, sought and obtained the District Council's Parking Waiver approval to waive certain requirements of the off-site parking facilities under the then-applicable Zoning Ordinance. The governing Zoning Ordinance restriction reads:

> 24.222 Off-Site Facilities. **The required parking compound may be provided on a lot other than that lot on which the principal use is located as otherwise provided for in this Ordinance provided that** all of such parking compound is within five hundred (500) feet of the nearest boundary of the record lot on which the use is located and **an appropriate legal arrangement assures the permanent availability of the compound.** Such parking compound shall not exceed one hundred (100) spaces or twenty per cent (20%) of the parking required by Section 24.0, whichever is the lesser, if located within a residential zone.

**Exhibit 20.** (Emphasis supplied). The Parking Waiver granted relief from the Zoning Ordinance required (1) 500-foot boundary limitation; and (2) 100-space restriction for residential zones. Exh. 6. The Parking Waiver specifically restricts approved parking to the Parking Parcel. Exh. 6. However, the District Council expressly did not waive the requirement that "an appropriate legal arrangement assures the permanent availability" of the required off-site automobile parking compound.[3] Exh. 20.

In addition to this specific Zoning Ordinance requirement and specific District Council approval, the applicable Zoning Ordinance also sets forth that required automobile parking compounds be deemed permanent accessory uses that shall not be encroached upon in any manner:

> 24.16. Permanent Requirements. All required automobile parking compounds and loading areas together with the driveways giving access thereto **are deemed to be required space in connection with the uses to which they are accessory and shall not be encroached upon in any manner**. At any time that such a parking compound or loading area shall cease to be available for such purposes, the use and occupancy permit for the use to which it is appurtenant shall be revoked until such time as the requirements of this Section 24.0 are complied with.

Exh. 20. (Emphasis supplied). "Automobile parking compound" was a defined term for parcels used as surface parking lots: "parcel of land, lot or portion thereof required by and used in accordance with Section 24.0 of this ordinance to provide off-street automobile parking, and may include a private automobile garage." Exh. 20. "Permanent" is undefined by the 1970 Zoning Ordinance; the plain language definition is "continuing or enduring without fundamental or marked change."[4]

In *Remes v. Montgomery County, supra,* a common owner construed a home on one lot [Lot 12] and thereafter obtained permits to construct an accessory swimming pool on the adjacent lot [Lot 11], and expanded the footprint of the home into the setback area in further reliance on the adjacent lot area. 387 Md. at 57-8. The Court of Appeals held that the properties had merged for zoning purposes, and important in its reasoning was that the swimming pool use was accessory to the home constructed on the adjoining lot. *Id.* at 58. There, the property owner has no ability to implement a plan that would create non-conformity on either lot: "Without the use of Lot 11 as accessory to Lot 12, the uses of both lots would have both violated the zoning ordinance" at the time of the original approvals. *Id.* at 68. Thus, the owner's choices were limited: Either formally combine the parcels or cure the non-conformities as part of the

[4] https://www.merriam-webster.com/dictionary/permanent

resubdivisions of all affected parcels. *Id.* Once properties are "merged" for zoning purposes, the merger cannot be undone if it would result in one of the properties becoming nonconforming.[5]

The Parking Parcel and the Metro III Parcel were legally merged as contemplated by *Friends of the Ridge* and *Remes*. The Parking Waiver was granted under a joint application between the Metro III Parcel owner, Spruell Development, and the Parking Parcel owner, Dewey Development to legally merge the two properties for zoning purposes and to specifically encumber the Parking Parcel for the use and benefit of the Metro III Parcel. Spruell and Dewey were controlled by the same person, Herschel Blumberg, who made the application through single legal counsel for a joint and common development purpose. This plain evidence of common control by the same corporate officers and intentional acts to develop the properties consistent with a common scheme, resulted in a merger where the Parking Parcel served to advance the Metro III Parcel and its improvements.

The applicable Zoning Ordinance here mandated that an approved off-site automobile parking compound becomes an accessory use to the building that it serves, and cannot be encroached upon in any manner. 1970 Ordinance, Section 24.16. An "accessory use" automatically becomes permanently subordinate to principal use for so long as the principal use continues. *See Cnty. Comm'rs of Carroll Cnty. v. Zent,* 86 Md. App. 745, 770 (1991). Off-site automobile parking compound owners bind themselves to a permanent legal arrangement to assure the availability of the compound. 1970 Ordinance, Section 24.222. Extinguishing a permanent parking compound causes the revocation of use and occupancy permits for the building. 1970 Ordinance, Section 24.16. Permanently providing an automobile parking compound for the Metro III development created a perpetual right and interest in the Metro III Parcel Owner to use the Parking Parcel as its parking compound and would not have been disturbed by the District Council or Planning Board's other approvals. *See, e.g. Flores v. M-NCPPC,* 220 Md. App. 391 (2014).

Today, the Applicant's Detailed Site Plan would encroach upon these permanent rights and the Applicant's plan cannot be implemented without creating non-conformity for Metro III Parcel. Belcrest is not an applicant here, nor does it consent to the Detailed Site Plan. Belcrest's rights held for the Metro III Parcel cannot be modified or terminated unless Belcrest submits a new application to redevelop its office building through the Planning Board's preliminary and site plan processes. The Applicant's Detailed Site Plan simply overrides Belcrest's approval prior approvals, which created a permanent accessory and primary use relationship between the Parking Parcel and Metro III Parcel. Indeed, the Court in *Remes* was not persuaded that a subsequent replatting of the properties could undo an earlier merger if the result is one property

[5] Indeed, in adopting the "merger" law of other jurisdictions, the Court of Appeals noted in *Friends of the Ridge*: "[I]n those jurisdictions that have expressly or impliedly recognized the doctrine of merger in zoning cases, … they generally reject both attempts to resubdivide into substandard parcels after a merger into a larger parcel has occurred and attempts to obtain variances from the nonconformity of the original parcels after a merger has created a larger conforming parcel." *Friends of the Ridge*, 352 Md. at 660.

becoming non-conforming, and there is no basis in law to file a development application that alters the rights of property which the Applicant does not own. "Articulating plan specifications, engineering details, and a plot diagram showing the details of the buildings to be erected does not remove the fact that the instant lot may be part of some larger zoning configuration – a configuration that arose through a common owner's use of the property, if not through schematics." *Remes,* 387 Md. at 67-8.

In attempting to divest Belcrest from its legal right to use the Parking Parcel for its parking requirements, the Applicant is rendering the Metro III Parcel nonconforming. Under the current Zoning Ordinance, much like the 1970 Zoning Ordinance, all parking is required to be maintained by the property owner when it develops its land. Belcrest is not submitting to the Planning Board for Detailed Site Plan approval, and so the Planning Board must reject any attempt by the Dewey property Applicants to warp and frustrate Belcrest's existing rights over the Parking Parcel. If it is stripped of its valid approvals, the Planning Board's decision would result in a nonconforming Metro III Parcel. The Applicant cannot produce any evidence to contravene these plain historic facts and the Planning Board should treat the encumbered Parking Parcel as legally merged with the Metro III Parcel and restricted in the type of use and construction that may occur thereon. If the Planning Board grants this Application, it effectively would be demerging the properties and creating an illegal nonconforming subdivision, contrary to controlling Maryland law.

**ii. Belcrest has vested rights in the Parking Parcel and continues to rely upon the enforceable Parking Waiver.**

Vested rights are established when a property owner obtains a lawful building permit and commences to build on the property in reliance on its valid permits and development approvals. *Town v. Sykesville v. West Shore Comm'ns, Inc.,* 100 Md. App. 300, 316 (1996) (quoting *Prince George's County v. Equitable Trust Co.,* 44 Md. App. 272, 278 (1979). A property owner is deemed to have vested rights as a matter of law where prior to the effective date of new regulatory orders or changes of law, the property owner has: (i) obtained a validly issued permit authorizing the construction; (ii) commenced significant construction; and (iii) acted in good faith. *West Shore Commn's,* 110 Md. App. 316-17.

Subsequent changes to the governing subdivision regulations, zoning ordinance, or master plan do not serve to alter or amend any prior approvals that remain in effect, even if those subsequent changes in law would otherwise serve to change the requirements facing a property owner under in a subsequent development application. *See West Shore Commn's,* 110 Md. App. 316 (quoting McMillan, *Municipal Corporations,* (3d Ed.) Vol. 8, p. 272). In this case, Belcrest is not bringing a new application and so there is no room for the Applicant to rely upon subsequent changes to the zoning ordinance or master plans, to frustrate or obstruct Belcrest's rights. *See West Shore Commn's, supra,* 110 Md. App. 316; *Farmer v. Jamieson,* 31 Md. App. 37 (1976); *See also Cnty. Comm'rs of Carroll County v. Zent,* 86 Md. App. at 770 (the County

cannot simply enact new zoning ordinance regulations to effectively terminate existing property rights, even in an attempt to reduce or limit non-conformities).

Belcrest has vested rights to use and rely upon Applicant's Parking Parcel. The Applicant's predecessor in title deliberately subjected itself to the Parking Waiver and those permanent conditions continue to encumber the property to this day. *Skipjack Cove Marina, Inc. v. Cnty. Comm'rs for Cecil Cnty.,* 252 Md. 440, 452 (1969). Owners are bound to the use restrictions acquiesced in by their predecessors in interest and the Parking Waiver constitutes a valid and effective use limitation on the Applicant's Parking Parcel. *Cnty. Council of Prince George's Cnty. v. Collington Corp. Ctr. I L.P.,* 358 Md. 296, 307 (2000). *Accord Skipjack Cove Marina, Inc., generally* (Holding that a property owner cannot accept and retain the advantages of development approvals while simultaneously attacking the validity or propriety of conditions or variations upon which such advances were expressly predicated).[6] That is what the Applicant is now attempting to do: They took the benefit and are now attacking the validity of the conditions as if the waiver was never asked for and granted. This approach is prohibited by the Court of Appeals.

The development approval history is confirmed further by aerial imagery and permitting records. Exhs. 10 and 11. The Parking Parcel and the Metro III Parcel were completely undeveloped prior to the jointly obtained development approvals. Neither property was developed in any fashion as of 1965. Exh. 10. In 1970, the developers obtained the Parking Waiver for the benefit of the Metro III Parcel and to the detriment of the Parking Parcel. Exh. 6. The Metro III Parcel approvals were granted in accordance with waivers from the then-applicable Zoning Ordinance requirements, which would have otherwise prevented the Metro III owner from obtaining building permits to commence construction. Exh. 20. And although the District Council waived the requirements that off-site parking be less than 100 spaces and within 500 feet of the property line, the District Council did not waive the requirement of Section 24.222 mandating that "an appropriate legal arrangement assures the permanent availability of the [off-site parking] compound". Exh. 6; Exh. 20. Therefore, that requirement continues to bind on the properties. *See Rochow,* 151 Md. App. at 583-84.

[6] Also analogous is the holding in *Rochow v. M-NCPPC,* 151 Md. App. 558 (2003) (Analyzing a Zoning Map Amendment by the Prince George's County Council sitting as the District Council), where the Court of Special Appeals correctly reasoned that when the District Council exercises its authority to pass a resolution granting a zoning map amendment change, the conditions and orders contained in that resolution remain in effect for so long as the property remains zoned in accordance with the resolution. In so holding, the Court of Special Appeals also recognized the District Council's statutory power to impose conditions on the approval of subdivision plans and to determine express conditions prior to final approval. 151 Md. App. at 574. The same reasoning should be applied here, where the District Council granted a Variation by express Resolution which granted rights to the Metro III Owner and subjected the Parking Parcel to an express use encumbrance with a statutory requirement that the parking use remain permanently accessory to the building use. So long as the Metro III Owner continues to rely upon that Variation, the Parking Parcel continues to be bound by its limitations and conditions.

Construction of Metro III and the Parking Parcel occurred contemporaneously as did use of the Parking Parcel to serve the Metro III building users. *See West Shore Commn's,* 110 Md. App. 321 (Completing extensive construction in reliance on building permits vests rights). As early as 1972, the Parking Parcel was identified as such. Exh. 9. Since 1977, numerous certificates of use and occupancy have been obtained by the Metro III Parcel owners, and also tenants and condominium regime members, all in reliance upon the original approvals for Metro Center III building, including the Parking Waiver. Exh. 11. Likewise, comprehensive development plans and site plans submitted by the owners of either (or sometimes both) the Parking Parcel and Metro III Parcel continually rely upon the record site plan and the availability of parking and reliance by Metro III on the original Parking Waiver approval. Exh. 12. Belcrest has no plans to undo the original Parking Waiver; Belcrest cannot use or occupy the Metro Center III building without relying on the Parking Waiver.

The Metro III Parcel owners, tenants, and other users, have used and enjoyed the Metro Center III building in reliance on the Parking Waiver since the original development of both properties. The Parking Parcel has always served the Metro III Parcel and continues to be encumbered and restricted by the rights vested in the Metro III Parcel owner. The Board has no discretion to disturb those rights on this Application.

**B. The Application must be rejected because the Applicant did not obtain the consent of all Owners whose equitable title interests are affected by the Detailed Site Plan.**

The Planning Board should immediately reject the Application because the Applicant failed to file a complete Application with the Planning Director. The Application is fundamentally flawed and should be rejected on its face and without a hearing.

"The detailed Site Plan shall be submitted to the Planning Board by the owner of the property or his authorized representative." Section 27-282(a) (Submittal requirements). *Accord* Section 27-546.19(b) (The owner shall file a Detailed Site Plan application that meets the requirements of Part 3, Division 9…). "Owner" is defined in the Zoning Ordinance as:

> **The "Person" in whom legal or equitable title rests**. "Owner" means any part owner, joint owner, owner of a community or partnership interest, life tenant, tenant in common, tenant by the entirety, or joint tenant. Where the signature of an "Owner" is required, the term "Owner" includes anyone having clear written authority to act on behalf of the actual "Owner."

(Emphasis supplied). The District Council, through the Parking Waiver, granted to Belcrest a dominant estate in the Parking Parcel, and subjected the Parking Parcel to a comprehensive use encumbrance. Now, as part of the Planning Board's preliminary plan Resolutions, the Board

imposed an affirmative obligation upon the Applicant to demonstrate whether parking was provided in accordance with law. Belcrest, as a person in whom equitable title rests, remains an "Owner" of the affected Subject Property under County law. Therefore, the Applicant has no written authority to act on behalf of Belcrest and the Planning Board has no authority to consider an Application that would alter Belcrest's property rights without its consent.[7] *See Calvert Cnty. Planning Com'n v. Howlin Realty Mgmt., Inc.,* 364 Md. 301, 325 (2001) (Planning board was within its power to reconsider a prior resubdivision approval once it was revealed that the Applicant never obtained consent from affected property owners).

The Applicant's failure to comply with the Application procedural requirements could easily lead to the Planning Board approving a Detailed Site Plan that will extinguish valid approvals and curtail Belcrest's rights. Belcrest does not have any pending application before the Planning Board. Belcrest is not seeking redevelopment. The Board would be without statutory power to pass a new Resolution that cuts off Belcrest's rights. The Planning Board cannot force it to redevelop its property simply because its neighbor proposes a redevelopment project. There is no place for a Planning Board decision that would effectively deprive an Owner of beneficial property rights without that Owner being a party to the Application. This Planning Board cannot establish a policy of allowing private property owners to dictate what they think is the best plan of redevelopment for their neighbors' properties. For these reasons, approval of the Application as submitted would be in violation of Belcrest's constitutional due process rights. U.S. Const. Amends. V and XIV; *Accord* Md. Const., Declaration of Rights, art. 24.

This Detailed Site Plan Application should be denied without any further consideration.

**C. The Applicant bears the burden to demonstrate that adequate parking exists for any land uses that depend on the Parking Parcel. Belcrest does not bear any burden of proof.**

The Applicant in an original administrative proceeding has the burden of proof and persuasion to demonstrate compliance with any applicable requirements of the County Code. *See Grasslands Plantation, Inc. v. Frizz-King Enters., LLC,* 410 Md. 191, 214 (2009). The applicant bears the burden to prove its entitlements. *Id.* Shifting the burden to an opponent ignores the basic principle that an applicant always bears the burden of proof and persuasion in an initial proceeding to demonstrate entitlement to the approvals it seeks. *Id.* at 215 (relying upon *Housing Auth. of Newark v. Norfolk Realty Co.,* 364 A.2d 1052 (N.J. 1976)). Likewise, the Prince George's County Code is clear that the Applicant bears the burden of proof and persuasion at all

[7] For the same reason, the Application should have been rejected because it does not include the "Exact location and size of all buildings, structures, sidewalks, paved areas, parking lots (including striping … and the use of all buildings, structures, and land" which are affected by the Detailed Site Plan. Section 27-282(e)(14). The Application affects the Metro III Parcel and its parking rights granted in valid prior approvals. The Applicant's DSP intends to eliminate those parking rights, but the Applicant has not demonstrated any agreement reached with Belcrest to extinguish its equitable and vested rights.

stages of the subdivision application process, including Detailed Site Plan. *See, e.g.,* Section 27-281(a); and 27-285(a) ("Prior to the issuance of any grading, building, or use and occupancy permit for the development or use of any land for which a Detailed Site Plan is required, the applicant shall obtain approval of a Detailed Site Plan from the Planning Board."). More specifically, the Applicant bears the burden: "(A) To show the specific location and delineation of buildings and structures, parking facilities, streets, green areas, and other physical features and land uses proposed for the site; … and (D) To describe any maintenance agreements, covenants, or construction contract documents that are necessary to assure that the Plan is implemented in accordance with the requirements of this Subtitle". Section 27-281(c)(1).

During the preliminary plan application number 4-18022 hearing, the Planning Board impermissibly shifted the burden of proof onto Belcrest to demonstrate where it intended to move its parking if the Applicant's Preliminary Plan and Detailed Site Plan were approved, rather than requiring the Applicant to prove that it had the right to proceed with its plans despite Belcrest's plain equitable title interest. *See, e.g.,* Planning Board Hearing video (June 27, 2019), at 1:53:00 through 1:53:10 ("I would need to know the actual vacancy rates of your building [Metro III], the actual amount of people on there, how many places are around as parking garages…"); 1:53:58 through 1:54:50 ("There are parking lots in that area; one big one or sizable one that you missed, and part of redeveloping a TDDP plan is to get rid of these street parking lots … Part of the TDDP is actually to get rid of those things, and have the people who are existing in there look at a different way of doing business … and park in the nearby parking garages that were constructed. I haven't heard from you that you've actually gone out and investigated how many other vacant parking spaces are available in the vacant parking lots, and that's probably going to be part of what you'll need to dig into."); 1:47:48 through 1:48:40 (comments that Belcrest should "enter into negotiations with the owner" of other parking lots for parking elsewhere) (Comments by Commissioner Doerner).

Despite the inquisition into Belcrest's capacity to move elsewhere, the Planning Board in its written Resolution for both preliminary plan cases placed the burden of proof and persuasion on the Applicant to produce new evidence at the Detailed Site Plan stage. *See* Resolution No. 19-82 for Case No. 4-18022, at p. 36-7 ("[A] determination of adequate parking for land uses that depend on this parking lot must be made prior to the approval of the detailed site plan for this property."); Resolution No. 19-129 for Case No. 4-19033 at p. 6 ("[A] determination of adequate parking for land uses that depend on this parking lot must be made prior to the approval of the DSP for this property." Exh. 19. Belcrest does not have any burden of proof, nor does it have any obligation to explore other parking options to support the Applicant's plan application. The burden of proof and persuasion is legally required to remain on the Applicant at all stages of its Application and it would constitute reversible legal error if the Board were to require otherwise.

**D. The Parking Waiver is a valid governmental approval restricting the use of the Applicant's land. Such a development condition cannot be privately contracted away by the terms of the Ground Lease.**

The Planning Board's decision here cannot ignore the District Council's approved Parking Waiver. The Ground Lease does not resolve the questions before the Board. At the preliminary plan hearings, the Board disregarded the import of the Parking Waiver and instead relied upon the existence of a private Ground Lease as creating "an issue for private property owners" to resolve. Respectfully, the Planning Board cannot curtail Belcrest's property rights quite so easily.

As previously stated, properties, once merged, whether merged by affirmative application or by operation of law, cannot be demerged, where the result would be that one of the properties is nonconforming under the local zoning ordinance. It cannot be demerged by subdivision, or by the zoning board, not by private agreement between the property owners themselves.

"[W]here the Zoning Ordinance imposes a greater restriction upon the use and dimensions of buildings, structures, or land, or requires larger open spaces than are imposed or required by other ordinances, regulations, or permits, or by easements, covenants, or agreements, the provisions of the Zoning Ordinance shall govern, except where expressly qualified in it." Section 27-103(c). The Zoning Ordinance comports with a fundamental canon of Maryland law: Private parties cannot contract around governmental requirements. An agreement that violates the law is unenforceable in Maryland. *White v. Pines Cmty. Imp. Ass'n, Inc.,* 403 Md. 13, 44 (2008). This unenforceability precept of law applies where the record supports a finding that the parties' attempt to impose private land controls is in contradiction to prior zoning approvals. *Id. Accord Downing Dev't Corp. v. Brazelton,* 253 Md. 390, 399 (1969) ("Parties are ordinarily left free to contract, but they will not be permitted to do so in violation of statute regulations."); *Springlake Corp. v. Symmarron Ltd. P'ship,* 81 Md. App. 694 (1990) (motel lease and leaseback agreement in connection with construction loan was unenforceable to the extent it violated regulations promulgated by the governing loan commission). *See also M-NCPPC v. Washington Nat. Arena,* 282 Md. 588, 598 (1978) (questions to validity of a private agreement can be addressed by the administrative agency when it pertains to the rights of the Applicant before it).

In this case, the Ground Lease is not dispositive of this issue because the District Council's Parking Waiver governs the Applicant's use of the Parking Parcel and the Ground Lease is inconsistent. The District Council's Parking Waiver grants to the Metro III Parcel owner a permanent and dominant stake in the ability to use the entirety of the Parking Parcel land as its parking lot in perpetuity. Notwithstanding, even the Ground Lease prohibits any action by the Applicant with respect to the parking that results in the Metro III Parcel becoming a nonconforming use. Specifically, Ground Lease Section 6.1 ("Right of Landlord to Exchange Leased Premises"), provides at subsection (d) that any "Substituted Leased Premises … shall comply with all zoning and other applicable laws, rules and regulations." Exh. 18. As such, the Applicant bears the burden to demonstrate that it has provided Metro III with alternative parking that complies with all zoning laws. Here, the Applicant clearly has not complied and cannot comply with this provision, since there is no ability for it to provide permanently available offsite parking to meet the needs of the Metro III building.

Because of the validly imposed governmental approval resolution is more restrictive than the Ground Lease the subsequently-entered Ground Lease cannot invalidate or conflict with the prior Parking Waiver approval. Metro III building owners and occupants used the Parking Parcel with no ground lease in place for more than two decades. The Applicant cannot rest on a purported private agreement as the basis to ignore prior approvals that encumber its Parking Parcel, nor can it disregard the binding zoning laws, especially when the Parking Waiver is and has always been relied upon by Belcrest as fundamental to its ability to use and occupy the Metro III building as a conforming commercial use. *Accord, State Farm Mut. Auto. Ins. Co. v. Nationwide Mut. Ins. Co.,* 307 Md. 631, 643 (1986) ("A contractual provision that violates public policy is invalid, but only to the extent of the conflict between the stated public policy and the contractual provision."); *Post v. Bregman,* 349 Md. 142, 161 (1998) (Contractual provisions in violation of public policy are void and enforceable to the extent of the conflict). The Planning Board's parking requirements imposed in 1970 constitute a permanent arrangement for parking as required by the Zoning Ordinance. To the extent that the private ground lease encroached upon those approvals, it would be invalidly modifying rights granted to Metro III.

**E. The Applicant cannot turn to the planning process to unilaterally extinguish an easement under which its property is subject.**

The Parking Waiver created a perpetual legal agreement between the servient Parking Parcel for the benefit of the dominant Metro III parcel, thus resulting in the creation of a valid and enforceable easement. A use easement is a non-possessory interest in real property owned by another. An express easement can be created by any manner allowed by the recording statutes or by any memorandum that complies with the Statute of Frauds. *Emerald Hills Homeowners' Ass'n, Inc. v. Peters,* 446 Md. 155, 163 (2016). An easement, if sufficiently described, can be validly created by any agreement that is signed by the party to be charged or that party's authorized agent. *Kobrine, L.L.C. v. Metzger,* 380 Md. 620, 636-7 (2004).

The Parking Waiver Resolution, passed by the District Council upon the joint request of the benefitted and burdened property owners, constitutes an agreement creating an express easement. *See Peters, id.* and *Kobrine, LLC, id.* The District Council's grant vested benefitting rights in the Metro III Parcel and detrimental encumbrances in the Parking Parcel, all of which remain in place in perpetuity. Exh. 6; Exh. 20. Indeed, the applicable Zoning Ordinance required such an agreement between the owners. The Planning Board must acknowledge that Belcrest, and any of its successors in interest, hold the dominant right to an easement in the Parking Parcel. For this reason, as well, Belcrest should have been made a party to the Application, and the Applicant cannot disturb Belcrest's equitable title interest. However, Belcrest is not a party, does not plan to resubdivide, and objects to the Detailed Site Plan. This Application should be

denied because the Planning Board has no authority to allow the Applicant to unilaterally obstruct dominant easement rights.[8]

Even where an express easement is not created, one may be granted by implication based upon necessity, estoppel, or prescription. "Implied easements by necessity arise from a presumption that the party needing the easement should have access over the land." *Purnell v. Beard & Bone, LLC,* 203 Md. App. 495, 505 (2012) (quoting *Calvert Jt. Venture #140 v. Snider*, 373 Md. 18, 39 (2003)). To demonstrate establishment of an implied easement by necessity, it must first be established that the two parcels once "belonged to the same person". *Purnell,* 203 Md. App. at 506. An implied easement is based on the presumed intention of the parties at the time of the grant or reservation, as disclosed from the surrounding circumstances. *Id.* at 508.

An easement by necessity passes with each conveyance and continues to bind the properties for so long as the successor owners rely upon it. *Hancock v. Henderson,* 236 Md. 98, 105 (1964). Successor owners have equal rights to rely upon the continued grant. *Id.* Likewise, agreements between property owners to restrict the type of development on one parcel for the benefit of development on another parcel are equally enforceable as equitable restrictions the properties. *Metius v. Julio,* 27 Md. App. 491, 492 (1975). An owner who takes title with notice of such an equitable restriction is subject to it. *Id.* at fn. 1. Public policy favors the full utilization of the land and a presumption that parties do not intend to render land unfit for occupancy. *Purnell,* 203 Md. App. at 505. Extinguishing the necessary rights of the dominant owner to use the servient land not only carries a detrimental effect on the initial owner of the parcel, but every subsequent owner in the chain of title. *Id.* at 506.

Even in the absence of an express easement, an implied easement certainly exists by virtue of the binding Parking Waiver and the County Code requirements that off-site parking approvals are granted with permanent legal effect that cannot be encroached upon in any manner. Herschel Blumberg owned both pieces of property at the time the developers sought the Parking Waiver. Exhs. 1-6. Upon its grant, the Parking Parcel became a servient piece of land, the use of which was restricted by governmental order and the parties' agreement to submit an application to subject the Parking Parcel in perpetuity as parking for the Metro III Parcel. Likewise, the Metro III Parcel gained the dominant, beneficial use of the Parking Parcel in order to comply with its original development approvals. Metro III could not have been built without gaining this right to park on adjoining land and those rights and restrictions continue to benefit the Metro III Parcel at all times since the original approvals. Even if an express easement is not recognized here, an implied easement was created by this necessary reliance in obtaining building permits and occupancy permits, and the Metro III Parcel owners have never sought to disturb that grant. Subsequent owners, including Belcrest, have as much right to rely upon the Parking Waiver as

[8] The District Council's Parking Waiver resolution constituted an encumbrance passed for the benefit of the Metro III Parcel and encumbering the Parking Parcel. The Planning Board cannot validate the Applicant's request to subsequently disregard that approval and pass a new Resolution that would violate the District Council's earlier decision-making. *See, e.g., Rochow, supra,* 151 Md. App. at 587.

the original Metro III Parcel owners who built in reliance on governmental orders. To disturb the Parking Waiver now would be to allow a burdened property owner to use the planning process to materially interfere with dominant easement rights, an action in plain violation of Maryland law.

## III. Conclusion

For the above stated reasons, as supported by the facts, testimony, and evidence included in the record before this Board, including its public hearing, 6525 Belcrest Road, LLC, respectfully requests that this Board deny the Detailed Site Plan Application sought by the Applicant.

Respectfully submitted,

McMillan Metro, P.C.

Peter E. Ciferri, Esq.

PEC/mb

Enclosures (Exhs. 1-20 as noted)

CC: 6525 Belcrest Road, LLC
Thomas Haller, Esq. (Applicant's Counsel)