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October 9, 2020

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Re: Dewey Property; Detailed Site Plan DSP-19050

Dear Chairman Turner:

I represent the Applicant in the referenced Detailed Site Plan for the Dewey Property. Please accept this correspondence in response to letters dated August 27, 2020 and October 2, 2020 from Peter E. Ciferri appealing the Planning Board's approval of DSP-19050. That letter was submitted on behalf of 6525 Belcrest Road, LLC ("Belcrest"). In that letter, it is alleged that the Planning Board "illegally, arbitrarily, and capriciously extinguished Metro III's prior development approvals and results in Metro III Property losing all of its legally existing parking rights as granted in those prior approvals." Belcrest raises four arguments in its attempt to establish that the Planning Board committed legal error in approving DSP-19050. As will be demonstrated below, no legal error was committed, nor did the Planning Board extinguish any of Belcrest's prior approvals. For the following reasons, the District Council should reject Belcrest's arguments and affirm the approval of DSP-19050.

BACKGROUND

The Appellant, 6525 Belcrest Road, LLC ("Belcrest"), is the owner of the Metro III Parcel. The Applicant, Bald Eagle Partners, Inc ("Applicant"), is the owner of the Dewey Parcel. In 1970, the Metro III Parcel was owned by Spruell Corporation, while the Dewey Parcel was owned by Dewey Corporation. Those entities were under the common ownership of Mr. Herschel Blumberg. Mr. Blumberg aspired to develop an office building on the Metro III Parcel with parking located on the Dewey Parcel. To do so, a Parking Waiver was required. To obtain a Parking Waiver under the then applicable Zoning Ordinance, an applicant was required to show evidence of a legal arrangement guaranteeing "permanent" parking.

On November 20, 1970, Mr. Blumberg's attorney, Nicholas Orem, sent a letter to the Chairman of the Planning Board in support of the Parking Waiver. That letter made reference to the mortgage for the Metro III Parcel. That mortgage is recorded among the Land Records of Prince George's County at Liber 3754 Folio 590. This mortgage was the "legal arrangement" that was provided to, and accepted by, the District Council as satisfaction of the Zoning Ordinance requirements. It extended the lien to the Dewey Parcel in order to assure adequate parking for the Metro III Parcel. Significantly, the mortgage also provided that parking could be relocated to other adjacent land, subject to beneficiary approval (See Liber 3754, Folio 603-04, Paragraph 24). Clearly, it was the intent of Mr. Blumberg to preserve the right to relocate parking.

On November 25, 1970, the Chairman of the Planning Board sent a letter to the District Council recommending approval of the Parking Waiver. That letter stated:

> It is the Board and staff's understanding that this is a temporary use, realizing that, at this time, the term 'temporary' cannot be specifically defined in terms of the months or years; although the implication is that it will be for approximately five (5) years.

By 1998, ownership of the Metro III Parcel had transferred to an entity called PG Metro Center III Inc., whereas the Dewey Parcel was owned by Dewey L.C. That year, a ground lease was executed which provided that the owner of Metro III, and its successors and heirs, had the right to park on the Dewey Parcel. This was subject to the right of Dewey L.C., and its successors and heirs, to relocate the parking, provided that notice and an adequate alternative were given. That ground lease is recorded among the Land Records of Prince George's County at Liber 12085 Folio 633. It is important to note that Mr. Blumberg executed the ground lease on behalf of Dewey L.C. In 2015, when Belcrest bought the property, it accepted an assignment and assumption of the ground lease. That assignment and assumption agreement is recorded among the Land Records of Prince George's County at Liber 37718 Folio 27.

In 2019, the Applicant filed a Detailed Site Plan application (DSP-19050) seeking the approval to construct a mixed-use development on the Dewey Property. The Planning Board approved DSP-19050 without consideration of the ground lease.

Belcrest has opposed the Detailed Site Plan at every stage solely on the basis of their objection related to the parking issue addressed herein.. It has filed three lengthy opposition letters, each of which repeat ad nauseum the same unsupported arguments, with material facts misrepresented and oftentimes omitted. In essence, its opposition hinges on one word – "permanent." Although the District Council approved the Parking Waiver knowing full well that it could only be temporary, Belcrest urges a literal interpretation of the word "permanent" – that the Parking Waiver grants it perpetual parking rights because the 1970 Zoning Ordinance required a "legal arrangement assuring the permanent availability of the compound." By approving DSP-19050, Belcrest alleges the Planning Board committed legal error when it "arbitrarily" eliminated its "permanent" parking rights. As discussed below, this is simply not true.

APPLICANT'S RESPONSE TO BELCREST'S LEGAL ARGUMENTS

Belcrest makes four arguments as to why the Planning Board committed legal error in approving DSP-19050. Those arguments, and the Applicant's responses, are as follows:

1) **Did the Planning Board commit legal error by relying on a shared parking analysis of the Metro III Property because 6525 Belcrest Road, LLC, is not an applicant before the Planning Board, has no proposed Detailed Site Plan under review, and the Metro III Property is not part of the Site Plan?**

By claiming that its parking rights are "eliminated," Belcrest mischaracterizes the impact of the Planning Board's action. The approval of DSP-19050 has had zero impact on those rights. In fact, the approval of DSP-19050 has been so unimpactful that even if the District Council approves DSP-19050, Belcrest will still be able to park on the Dewey Parcel. Whether parking can actually be relocated is subject to an ongoing arbitration action and litigation. Here, the Planning Board merely concluded that adequate parking would be available *if* parking is ever relocated.

Second, Belcrest argues that the Planning Board could not consider the parking analysis because Belcrest was not a party to the application. That argument ignores the fact that the Planning Board's consideration of the parking analysis was conducted at Belcrest's behest. At the public hearing for the Preliminary Plan of Subdivision, Belcrest raised concerns regarding its parking rights. On page 6 of Resolution No. 19-129 (which approved 4-19033), the Planning Board addressed those concerns:

> The site has been a part of a larger CSP, including the property to the south. Records indicate that the existing surface parking lot on this site that is to be removed, may require parking to support other uses on properties to the south. While this is an issue for the private property owners, 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. (Emphasis added).

Therefore, it is uncertain how the Planning Board can be accused of committing legal error for considering a parking analysis that it required solely to address Belcrest's own concerns.

The parking analysis utilized roughly the same methodology as other parking analyses submitted in previous development applications in the UTC area. While not technically required in this case, parking analyses were formerly required for the Dewey Parcel. Prior to 2016, the UTC area, including the Dewey Parcel and Metro III Parcel, were zoned M-X-T. Section 27-574 of the Zoning Ordinance requires a parking analysis when property in the M-X-T Zone is the subject of a Detailed Site Plan application. An additional parking analysis requirement stemmed from Condition 15 of CSP-00024. Both the Dewey Property and the Metro III Property were subject to CSP-00024. Condition 15 was intended to reflect the 1998 Prince George's Plaza Transit District Development Plan ("TDDP") which reduced minimum parking requirements within the TDDP and which also aspired to eliminate surface parking within the TDDP. To that end, Condition 15 required that a parking analysis be submitted as part of each subsequent Detailed Site Plan application in order to facilitate the "appropriate reduction for shared parking." There were in fact several subsequent Detailed Site Plans which impacted the Dewey and Metro III Parcels, including DSP-00052, and all four revisions thereto. Those plans involved the submission of parking analyses in compliance with Condition 15 and Section 27-574, to which Belcrest did not object.

In 2016, an updated Prince George's Plaza TDDP was adopted which rezoned the Dewey Parcel to the M-U-I Zone. This was significant for several reasons. First, the parking analysis requirement of Section 27-574 no longer applied to the Dewey Parcel. Second, the 2016 TDDP provided that Conceptual Site Plans approved prior to the adoption of the TDDP were no longer effective. The result was that the Dewey Parcel was no longer subject to the parking analysis requirement of Condition 15 in CSP-00024.

So, although the parking analysis was not statutorily required, it was required by the Planning Board in response to concerns raised by Belcrest. Even if it were not required at all,

Belcrest does not cite any evidence to establish that the Planning Board was prohibited from considering the analysis.

2) Did the Planning Board commit legal error by concluding that the Appellant's valid and continuing public approvals for the benefit of the Metro III Property do not restrict the development of the burdened property, the Dewey Property?

Belcrest argues the Planning Board erred by "relying on subsequent changes in law" to grant the "unrestricted" right to develop the Dewey Parcel "despite prior approvals." Belcrest Brief at 8. According to Belcrest, this was "legally unsupportable" and "a misapplication of the law."

The "subsequent changes in law" that Belcrest refers to are the parking standards in the Prince George's Plaza TDDP. The Planning Board never stated that those standards, in and of themselves, retroactively invalidated the Parking Waiver. Doing so would violate the TDDP, which exempts legally existing parking unless or until the filing of a Detailed Site Plan. The Metro III Parcel was the subject of a Detailed Site Plan (DSP-00052) in 2000. Therefore, the Planning Board did not rely solely on a subsequent change in law. Rather, it relied on the fact that the Metro III Parcel became subject to that subsequent change in law when it was included in DSP-00052. Belcrest has not, and cannot, show that it is not subject to the TDDP.

Without saying as much, Belcrest is actually making a vested rights argument. This is apparent given Belcrest's discussion of a statute's retroactive effect on development approvals. Belcrest Brief at 8. Moreover, Belcrest cites the same cases for the same propositions that it cited when casting its vested rights argument in its original Opposition Letter.

The doctrine of vested rights applies when construction has commenced pursuant to a validly issued permit, but before the completion of that construction, a subsequent change in zoning laws would cause the use to become nonconforming. *See, e.g., Prince George's County,*

Maryland v. Sunrise Development Ltd. Partnership, 330 Md. 297, 314 (1993). That is clearly not what has happened in this case. Therefore, the Applicant submits that the doctrine is inapplicable.

Equally inapplicable are the cases that Belcrest cites. As stated in the Applicant's April 15 Letter, neither *Collington* nor *Skipjack* support Belcrest's claims. In each of those cases, the Court of Appeals held that subsequent purchasers cannot invalidate conditions of approval that were agreed to by the prior owner. *See Skipjack Cove Marina, Inc. v. Cnty. Comm'ers for Cecil Cnty.*, 252 Md. 440, 455 (1969); *Cnty. Council of Prince George's Cnty. V. Collington Corp. Ctr. 1. L.P.*, 358 Md. 296, 307 (2000). In this case, the Applicant seeks approval of Detailed Site Plan, not to invalidate prior conditions of approval.

3) Did the Planning Board commit legal error by concluding that 6525 Belcrest Road, LLC, has no equitable interest to use the Dewey Property?

Planning Board's legal counsel defined "equitable interest" as when "you have a right to acquire formal legal title." Belcrest asserts "this definition is not supported by law," and that "the Planning Board relied on an extremely narrow interpretation of the term 'equitable interest' as only applying to a person who has the right to eventually take fee simple title to property through a purchase agreement." Belcrest Brief at 9. As usual, Beclrest has cited no authority for these claims, nor does it offer what it feels is the "correct" definition.

The doctrine of equitable title falls within the doctrine of equitable conversion. Belcrest would be hard-pressed to find a single equitable title case that *did not* comport with the definition provided by Planning Board's legal counsel. Perhaps that is why none were cited.

Countless Maryland cases have dealt with the doctrine. For example, the Court of Appeals in *Kingsley v. Makay* stated:

> It has long been established that a purchaser of land under a contract of sale acquires, not a legal title, but an equitable title. The legal title to land, of course,

> does not pass, other than by operation of law, until a deed is properly executed and recorded. *Kingsley v. Makay*, 253 Md. 24, 27 (1969) (internal citations omitted).

Likewise, in *Noor v. Centreville Bank*, the Court of Special Appeals stated:

> [W]hen the vendee contracts to buy and the vendor to sell, though legal title has not yet passed, in equity the vendee becomes the owner of the land, the vendor of the purchase money. In equity the vendee has a real interest and the vendor a personal interest. Equity treats the executory contract as a conversion, whereby an equitable interest in the land is secured to the purchaser for whom the vendor holds the legal title in trust. *Noor v. Centreville Bank*, 193 Md. App. 160, 167 (2010) (internal quotations and citations omitted).

The definition of "equitable title" provided by Maryland Courts is almost identical to the definition provided by Planning Board's legal counsel. The issue, then, is not that the definition was misconstrued. Rather, it is that Belcrest does not meet the definition of an equitable title holder. Therefore, the District Council should reject Belcrest's attempts to construe its leasehold interest as an equitable title interest. Because the Planning Board's legal counsel provided the proper definition, the Applicant submits that no legal error occurred.

Belcrest also appears to be arguing that the Parking Waiver is a condition of approval, and as such, the Planning Board is required to uphold it. Belcrest Brief at 9. In fact, the Parking Waiver is not a "condition of approval." Rather, it is an arrangement that Mr. Blumberg sought and voluntarily entered into, and the parking that it approved was always subject to the possibility of relocation. The cases that Belcrest cites do not support its argument. First, Belcrest cites to *Flores v. M-NCPPC.* In its Letter of April 15, 2020, the Applicant explained that *Flores* dealt with whether an easement – which is provided for in a dedication of a recorded final plat – is extinguished in a tax sale. *See Flores v. M-NCPPC*, 220 Md. App. 391, 405 (2014). Belcrest has not shown how the facts of *Flores* relate to a Detailed Site Plan case. Therefore, *Flores* is just as inapplicable now as it was when Belcrest first cited it. Belcrest also cites to the Subdivision Ordinance, as well *City of Annapolis v. Waterman*, which dealt with conditions attached to

subdivision approval. For brevity's sake, the instant case is not controlled by the Subdivision Ordinance.

4) Did the Planning Board commit legal error by relying on the private ground lease to define the Appellant's scope of right to use the Dewey Property in a case where private agreements are not relevant to the Board's analysis?

Belcrest claims that the Planning Board's "considerations . . . findings and conclusions were largely influenced by its legal counsel's opinion that the Appellant's rights are defined solely as those of a lessee under a private ground lease with the Applicant." Belcrest Brief at 10. As is thematic in Belcrest's filings, no evidence is offered to support this claim. Indeed, Belcrest acknowledges the Planning Board's statement that "*[a]ny matters regarding private agreements for use of the parking on the Dewey property are not relevant to the DSP requirements or analysis*." PGCPB Resolution No. 2020-125 at 19 (Emphasis added). Given such clear language, it is uncertain how the Planning Board is accused of impermissibly relying on the ground lease.

As a general statement of zoning law, it is correct that an administrative agency cannot interpret a private agreement unless the private agreement was already incorporated into the public record by the parties. *See Perry v. County Board of Appeals*, 211 Md. 294, 299-300 (1956) (enunciating the general rule that private agreements are irrelevant to zoning matters); *Blakehurst Life Care Cmty/Chestnut Real Estate P'Ship. v. Baltimore County*, 146 Md. App 509, 519-22 (2002) (recognizing an exception to the general rule in situations where parties have agreed to incorporate the private agreement into the public record); *Capital Commer. Props. (CCP). v. Montgomery County Planning Bd.*, 158 Md. App. 88, 102-03 (2004) (applying the rule to ground leases). In *Perry*, the Court of Appeals stated:

> [s]uch private restrictions controlled by contract and real estate law are entirely independent of zoning and have no proper place in proceedings of this character, notwithstanding if in a proper proceeding the restrictions contended for are shown to be binding upon the properties mentioned, zoning cannot nullify them.

Perry, 294 Md. at 299-300. By its own words, the Planning Board declined to consider the ground lease. (PGCPB Resolution No. 2020-125 at 19). Therefore, no legal error was committed.

Belcrest also claims "there is no record evidence that the public approvals would allow for parking relocation, which is a concept entirely construed from the ground lease terms." Belcrest Brief at 10-11. This claim is unfathomably false. The concept of parking relocation did not arise from the ground lease – it arose in 1969. This is easily established by several publicly available documents, including:

(1) Letter from Nicholas Orem in Support of Parking Waiver Application - November 20, 1970: this letter is publicly available in the M-NCPPC records of the Parking Waiver. It makes specific reference to a mortgage which was offered to, and accepted by, the District Council as satisfaction of the requirement of a "permanent legal arrangement."

(2) Mortgage Covering Federal III Building – August 22, 1969: the mortgage referenced in the abovementioned letter is publicly available as it is recorded among the Land Records of Prince George's County at Liber 3754, Folio 490. Paragraph 24 on pages 603-04 of the mortgage clearly indicates that parking may exist somewhere other than the Dewey Property.

(3) Letter from Chairman of the Planning Board to the County Commissioners – November 25, 1970: this letter is also publicly available in the M-NCPPC records of the Parking Waiver. Significantly, this letter states: "*it is the Board and staff's understanding that this is a temporary use, realizing that, at this time, the term 'temporary' cannot be specifically defined in terms of the months or years; although the implication is that it will be for approximately (5) years.*" (Emphasis added).

To claim that these documents are not publicly available is disingenuous. The letters from Mr. Orem and Mr. Dutton are in the record of the parking waiver which Belcrest has cited. The mortgage referenced in the parking waiver record is recorded in land records and it publicly available. The history of the intent to relocate the parking has been in the public realm since 1969. Belcrest's argument has no merit.

BELCREST'S LETTER OF OCTOBER 2, 2020

Belcrest's Letter of October 2, 2020, served as a motion to correct the administrative record, to postpone the District Council hearing duly scheduled for October 19, 2020, and to remand the case to the Planning Board. The basis for those motions was that the letters and accompanying exhibits filed by Belcrest in this case had not been included in the record transmitted from the Planning Board to the District Council. Despite that clerical error, and in response to Belcrest's motion, the Planning Board transmitted Belcrest's letters and exhibits to the District Council on October 6, 2020. The District Council will therefore have thirteen days to review the documents added to the record. Given that the record is now complete and corrected, the Applicant submits that there is no need to postpone the District Council hearing or remand the case to the Planning Board.

CONCLUSION

For the foregoing reasons, the Applicant asserts that Belcrest has failed to establish that the Planning Board committed legal error in approving DSP-19050. Therefore, the Applicant respectfully requests that the District Council affirm the Planning Board's approval of DSP-19050.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of October, 2020, a copy of the foregoing correspondence was sent by first-class mail, postage prepaid, to the Clerk of the County Council, and to all parties of record, *to wit*:

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