

**RE: CSP-20007 Clay Property
MRBCO, LLC, Applicant**

CITIZEN-RESPONDENTS' ANSWERING MEMORANDUM

Respondents, David Dukes, Rose B. Fletcher, Robert R. Fletcher, David R. Pitcher, Shirley A. Pitcher, Thomas L. Wright, Joseph R. Luebke, James H. Menasian, Alyson W. Reed, Sheila Reynolds Gupta, Rajeev Gupta, and Charles Dukes (collectively, “Citizen-Respondents”), by their counsel, G. Macy Nelson and Grant Amadeus Giel, submit this Answering Memorandum.

STATEMENT OF FACTS

MRCBO LLC (“Petitioner”) submitted a Conceptual Site Plan (“CSP”) No. 20007 for the Clay Property, located in the Neighborhood Edge of the Prince George’s Plaza Downtown, within the Transit District Overlay Zone (“TDOZ”). Development within the TDOZ is guided by the Transit District Development Plan. Within CSP-20007 was a rezoning application to change the underlying zone of the Clay Property from One-Family Detached Residential Zone (R-80) to One-family Triple-Attached Residential Zone (R-20) in order to accommodate Petitioner’s desire to build 137 townhouses.

The TDDP called for density below 3.55 du/ac in this area and intended for the Neighborhood Edge to be a transitional area, further clarified by desired land use categories with the Future Land Use Map on Page 74. The TDDP also created the Downtown Core of the area, to facilitate for denser residential and commercial development in juxtaposition to the Neighborhood Edge. The District Council previously denied rezoning applications for the Clay Property.

In concurrence with the District Council’s legislative aims and the language and guidance of the TDDP and the Prince George’s County Zoning Ordinance (“Zoning Ordinance” or “Ordinance”), Technical Staff prepared a Staff Report recommending disapproval of the CSP and its prerequisite zoning change. At the next step of the administrative process, the Planning Board reviewed CSP-20007 and also recommended disapproval. Consequently, Petitioner appealed the Planning Board’s recommendation to the District Council on August 16, 2021 (“Appeal”), and supplemented that appeal on August 26, 2021 (“Supplement”).

ARGUMENT

I. CSP-20007 does not satisfy the criteria for rezoning.

Citizen-Respondents note the posturing of this case and of Petitioner’s argument as follows: Petitioner seeks to argue that because it fulfills many of the TDDP’s goals, it therefore fulfills enough of the TDDP’s goals. This analysis is simply contrary to law. It is Petitioner’s expectation and obligation to fulfill the main thrust of the TDDP’s ambit as exemplified by legislative intent. Rezoning a Neighborhood Edge lot from R-80 to R-20 in order to develop townhouses would, for instance, conflict with Policy LU4 to “[c]oncentrate medium- to high-density development in the Downtown Core.” TDDP 76. It would conflict with Strategy LU7.2 to “[p]rohibit incompatible or inappropriate uses in the Neighborhood Edge” because of the size of the development. It would, as Petitioner admits, conflict with the very explicit legislative goals of future land use in accordance with the Future Land Use Map on Page 74 of the TDDP. That it also potentially conforms

to other policies like increasing residential capacity under LU2 does not mean it should be approved as a matter of course.

Likewise, and as recognized in the Resolution and the Staff Report, it would conflict with the Ordinance. Townhouse development as contemplated by Petitioner would violate Section 27-548.03(a)(10) by undermining existing residential development in the area and breaking a more appropriate transition toward the Core. It would violate Section 27-548.03(a)(11) because the development would not “possess a desirable urban design relationship with . . . adjoining areas.” These segments of the Ordinance and the TDDP carry weight as well, and suggesting that one’s CSP (or rather, in the context of the District Council’s original review, the rezoning application nested within the CSP) conforms to the law when it only, at best, conforms to *some* of the law is simply inappropriate.

Petitioner pushes to undermine this weight. It suggests that the Future Land Use Map is “just one of numerous recommendations” and that it is “no longer responsible to market conditions.” Supplement 13. If such an argument is true, then the proper course of action is to amend the underlying planning documents, not to simply ignore them because they’re inconvenient.

Simply put, CSP-20007 does not conform with the TDDP, in accordance with Section 27-548.09.01(b)(5). The CSP conflicts with important visions and provisions of the TDDP and the Ordinance, and consequently the District Council should deny Petitioner’s rezoning application.

II. The Planning Board’s decision was not erroneous.

A. The Planning Board did not err as a matter of law in its disapproval.

As a fundamental matter, Petitioner misconstrues the ruling of *Archers Glen Partners, Inc. v. Garner*, 176 Md. App. 292, 314 (2007), *aff'd*, 405 Md. 43 (2008), in its suggestion that a Planning Board's language in its decision somehow applies a different standard of review if it interchanges "conformance" and "consistency". *Archers Glen* detailed the interplay between Master Plans, General Plans, and County Ordinances when applied to approval analysis of a preliminary subdivision plan. Broadly, the case explored situations where master plans were applied as generalized guides as opposed to binding and strict regulatory devices. *See id.* at 313–16. It held that in situations where the *Ordinance itself* (as stated but misapplied by Petitioner) dictated that development documents must conform to Master Plans/General Plans, they were therefore to be treated as regulatory devices, and further explored situations where Master Plans were or were not consistent with General Plans.

In short, the ruling in *Archers Glen* had nothing to do at all with whether there was a different standard of review to be applied in a Planning Board's review of a CSP vis-à-vis the Transit District Site Plan. That the Planning Board used "conformance" in a generalized sense in its Resolution has no import whatsoever; the word only rises to the level of a term of legal art when integrated into an Ordinance itself. In fact, if *Archers Glen* is applicable to this case at all, then it is applicable in the sense that it flatly undermines Petitioner's argument. *See Archers Glen*, 176 Md. App. at 305 n.7 ("The Planning Board used the terms 'consistent with' and 'conforms to' synonymously, when discussing whether the preliminary subdivision plan complied with the Master and General Plans."); *see generally Trail v. Terrapin Run, LLC*, 174 Md. App. 43 (2007) ("Whether we describe

the Board's analysis as examining whether the special exception use is in harmony with, consistent with, or in conformity with the plan, the terms differ only semantically.”)

Indeed, the Planning Board stated its own standard of review properly at the beginning of its resolution:

Regarding the approval of a Conceptual Site Plan in a Transit District Overlay Zone, “[i]n addition to the findings required by Section 27-276(b) for approval of a Conceptual Site Plan in the T-D-O Zone, the Planning Board shall find that the Transit District Site Plan is consistent with, and reflects the guidelines and criteria for development contained in, the Transit District Plan.” PGCC § 27-548.08(c)(1).

Resolution 1. And it is clear, in fact, that the Planning Board was using “conformance” as a mere synonym, as it has done for at least the 15 years following the decision in *Archers Glen*. For example, on Page 9 of the resolution, the Planning Board wrote: “The application will be reviewed for conformance with the applicable Landscape Manual requirements and the landscape requirements of the TDDP at the time of DSP.” Resolution 9. Clearly, if not self-evidently, the Planning Board was not looking at the County Landscape Manual as though it were a binding master plan. And on Page 11, the Planning Board wrote: “The Planning Board adopts a memorandum dated June 15, 2021 (Juba to Spradley), incorporated herein by reference, which provided a review of the CSP’s conformance with the approved Natural Resources Inventory Plan (NRI-044-2020), the woodland conservation threshold, the specimen, champion, or historic trees, soils, and SWM features” Petitioner’s argument would suggest that the Planning Board thought that stormwater features are binding regulatory documents, or perhaps woodland conservation thresholds.

This distinction is, of course, meaningless anyway, as Petitioner made no attempt to demonstrate how the Planning Board was applying a different standard of review than the one it itself stated it was implementing, or that “conformance with” even *could* be a different standard of review than “consistency with”. And even if Petitioner could have demonstrated this, it would have been a harmless legal error, as Petitioner would have therefore needed to meet the same threshold of compliance that it asserts the Planning Board erroneously held it to. After all, as is cited in the Resolution on Page 6, the Petitioner itself is obliged to demonstrate “conformance”. Section 27-518.09.01(b)(2)(A) requires an owner’s application include “A statement showing that the proposed development conforms with the purposes and recommendations for the Transit District, as stated in the Transit District Development Plan.” If it is the case that “conformance” is a higher standard of review than “consistency” in *all* matters instead of merely matters of binding or non-binding Master Plans, then Petitioner nevertheless was statutorily obliged to meet this threshold before ever reaching the Planning Board. Likewise, even if this *were* a legal error on the part of the Planning Board, the District Council itself would need to apply this speculatively higher standard of review under Section 27-518.09.01(b)(5): “In approving an application and site plan, the District Council shall find that the proposed development conforms with the purposes and recommendations for the Transit Development District, as stated in the Transit District Development Plan, and meets applicable site plan requirements.” Once again, it would be a harmless legal error, since this threshold would be one the Petitioner itself needed to demonstrate *and* one that the District Council would need to meet, regardless of how the Planning Board analyzed the CSP.

Petitioner suggests that the Staff Report apparently applied the correct standard (never mind that the Staff Report also regularly used the word “conform”) and that its quoted excerpts “conclude that the rezoning and Conceptual Site Plan are consistent with the TDDP and TDOZ.” See Supplement 16–19. While Citizen-Respondents’ initial response to this is that only the final decision is reviewable in instances of multiple administrative agencies working in tandem, see generally *Board of Cty. Comm'rs for St. Mary's Cty. v. Southern Resources Mgt.*, 154 Md. App. 10, 23 (2003), they respond *arguendo* to this analysis by noting that the Staff Report didn’t broadly agree that the CSP had fulfilled all requirements. Conspicuously absent from this citation are:

(10) To encourage uses which complement and enhance the character of the area;

The TDDP recommends a residential low future land use designation for the property. The property owner’s request to develop 137 townhouses does not complement and enhance the character of the Prince George’s Plaza Transit District. Providing a variety of housing options for the Neighborhood Edge character area could contribute to the vibrancy of the overall transit district by further activating the area and generating additional patrons for existing retail, amenities, and transit systems located in the Downtown Core, but this property was zoned to ensure a transition to the existing neighborhood. The development of townhouses on the property is not compatible with the existing residential development for the Neighborhood Edge character area and historic property to the north. Maintaining the R-80 Zone advances the TDDP’s vision for a transition in intensity that emanates from the Prince George’s Plaza Metro Station.

And:

(12) To provide flexibility in the design and layout of buildings and structures, and to promote a coordinated and integrated development scheme.

The TDDP recommends a residential low future land use designation for the property. Residential low areas are primarily single-family detached dwellings with up to 3.5 dwelling units per acre. Development within the Prince George's Plaza Transit District are typically developed in a manner that provides flexibility in the design and layout of the buildings and structures and promotes a coordinated and integrated development scheme through the inclusion of TOD design standards. The CSP has included the general layout of the requested townhouses with open space areas and pedestrian pathways; however, the design and layout of the buildings will be examined in more detail during the DSP stage of the development.

Furthermore, the Staff Report's review of Section 11 clearly states that "[t]he housing types allowed by right within the R-20 Zone and TDOZ on the property [does not facilitate] a desirable and compatible urban design relationship . . . with the surrounding residential communities that are immediately adjacent to the property." Staff Report 12.

It is worth noting that the Staff Report, which findings Petitioner claims "all support a finding of consistency," Supplement 19, in fact *disapproved* the plan. See Staff Report 1, 18. Staff findings stating that certain elements of a plan meet statutory requirements must be reviewed in the aggregate to see which elements don't meet said requirements: As an exaggerated analogy to this principle, if a submitted CSP promoted public transit but also recommended burning down all trees on the site, it would clearly be in violation of forest conservation requirements even if it promoted the use of transit facilities. Likewise, a CSP providing for convenient pedestrian access (Purpose No. (a)(8)) doesn't much matter if it doesn't encourage uses that complement and enhance the character of the area (Purpose No. (a)(10)). Petitioner does not get to pick and choose which aspects of the law are most convenient to adhere to and ignore the rest. Petitioner even admits as much, stating that

“Pursuant to Sec. 27-548.09.01(b)(5), the District Council must find that an amendment to the T-D-O Zone meets *all* applicable site plan requirements.” Supplement 12.

Petitioner has not shown how the Planning Board has applied a different standard of review beyond a broad suggestion that using the word “conform” means as much based on a case reviewing an entirely separate aspect of land use law. Similarly, it is clear from the record that (1) the Planning Board’s Resolution obviously wasn’t using the word in such a manner; (2) even if it was, Petitioner would have had to meet that threshold anyway under 27-548.09.01; and (3) the Staff Report Petitioner suggests supports its plan recommended disapproval and stated where and why it did not meet appropriate requirements. Therefore, the District Council should uphold the Planning Board’s Resolution.

B. The Planning Board has not made any *ultra vires* determinations, nor has it usurped the District Council’s original jurisdiction.

Petitioner uses its suggestion that the word “conformance” indicates an improper standard of review to extrapolate the following *ultra vires* analysis: (1) The Planning Board was supposed to only review consistency with the TDDP; (2) The District Council reviews conformance with the TDDP; (3) The Planning Board instead reviewed conformance with the TDDP; and therefore (4) The Planning Board presumed the District Council’s yet-nonexistent determination in its disapproval.

There is nothing in the record to suggest that the Planning Board thought it was acting in the District Council’s capacity, nor that its actions constituted such an usurpation. Directly in its preamble it stated that its charge is “reviewing and *making a*

recommendation to the District Council regarding the request,” Resolution 1, demonstrating its acute awareness that its findings are neither binding nor abrogating. The closest section of the record suggesting, even slightly, that the Planning Board was preemptively basing its decision on thoughts of what the District Council might decide to do was when it stated “The Board weighted heavily the District Council’s decision to reject the prior request to rezone the Clay Property to R-20 during the TDOZMA process,” Resolution 15, a matter that should be uncontroversial given the District Council’s legislative intent is paramount in analyzing the TDDP’s recommendations.

It cannot be the case that a document which, by its own admission, only serves as a *recommendation* to the District Council could, in any way, be an indication that the Planning Board “ma[d]e the final decision on specific amendments to Transit District Development requirements.” Appeal 2.

Petitioner’s continuation of this line of reasoning suggests that, had the Planning Board merely not “improperly asserted the District Council’s authority” (in whatever manner it supposedly did), it, and the preceding Staff Report would have necessarily “mandated approval of CSP-20007.” Supplement 20. This argument may be summarily disregarded. After all, Petitioner has made no suggestion that the Staff Report “improperly asserted the District Council’s authority,” and yet the Staff Report recommended disapproval. It therefore cannot be the case that the only thing standing between approval and disapproval was improper assertion of the District Council’s authority via the usage of a semantic term.

For these reasons, the District Council should uphold the Planning Board's Resolution.

C. The Planning Board did not err as a matter of fact, nor did it rely on issues outside of the CSP criteria.

Petitioner asserts that the Planning Board "relied upon issues that are irrelevant to the applicable criteria for approval." The Future Land Use Map is part of the TDDP. The Planning Board weighed its value precisely on Page 8 of its Resolution, and its reliance on legislative intent in determining the value of that future land use map should be unsurprising, but for the fact that the legislative body originally determining the value of that map happens, by quirk of law, to sit in an appellate capacity in this case.

It is the prerogative and expectation of a factfinder to weigh all evidence before it and determine which evidence is more valuable or informative. And it is a simple matter to see that noncompliance with the Future Land Use Map was not the only reason the Planning Board recommended disapproval of the CSP.

- The Planning Board explained its reasoning for why the CSP did not conform with Plan 2035. Resolution 3–4.
- The Planning Board explained why the CSP did not adhere to TDDP policies, stating that it "fails to incorporate the mix of house types that the TDDP recommends for the Neighborhood Edge," that its increased density as R-20 would also run afoul of Neighborhood Edge policy of prohibiting dense residential development, and that it did not consider impacts to the nearby historic property at Hitching Post Hill. Resolution 5.

- The Planning Board expounded upon its Future Land Use Map analysis in stating that the CSP would not “ensure a transition to existing neighborhoods to the north and east.” Resolution 7.
- The Planning Board adopted a memorandum providing alternative analysis, beyond the Future Land Use map, for why the TDDP recommends low-density single-family development on the contested site. Resolution 10.

The Staff Report upon which the Planning Board relied also detailed various reasons recommending disapproval. Petitioner’s regular suggestion that the Staff Report recommended approval and/or that the CSP met all of the requirements discussed therein is simply inaccurate. First, the Staff Report noted obliquely that the rezoning would not comport with Purpose (a)(1)(C) of the R-20 zone, and then stated that it would not conform with Section 27-548.03(a)(10) or (11) (or that it would even necessarily conform with (12)). *See generally* Staff Report. As stated *supra* Section I, Citizen-Protestants do not contend that the CSP, as proposed, would not meet many criteria required. But “the ones that are convenient” is not the threshold. A CSP needs to meet the maximal amount of criteria, and to the extent that there is an irreconcilable conflict, it is up to factfinders to analyze legislative intent and clearly defined goals. Both the Staff Report and Planning Board found that CSP-20007 failed to do so. It is the Planning Board’s prerogative to weigh the evidence before it and act accordingly. It is therefore entirely permissible to weigh the Future Land Use Map heavily when that map was created to best demonstrate the long-term goals of the TDDP and clearly visualizes the exact desired parameters of future

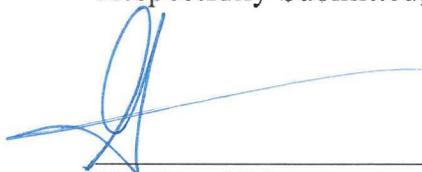
development, and a reasonable mind could have arrived at the same conclusion as the Planning Board.

Therefore, the Planning Board did not factually err in relying on the Future Land Use Map, and even if it did, other segments of the record show that that reliance was not the singular reason for disapproval. Thus, the District Council should uphold the recommendation of the Planning Board.

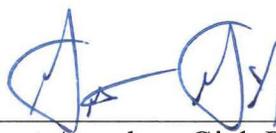
CONCLUSION

Petitioner's argument that its CSP conforms with the TDDP is incorrect. It may conform with *some* sections of the TDDP, but it clearly conflicts with other sections. The Planning Board Resolution and Staff Report both acknowledged these conflicts and stated them clearly. The Planning Board made no legal error in its layman usage of the word "conform"—as clearly demonstrated in context of the Resolution and the underlying Staff Report that used the same language—nor did the Planning Board err factually by weighing the combined recommendations of the TDDP in a manner different than that proposed by Petitioner. For all these reasons, the District Council should deny CSP-20007 and its nested rezoning application.

Respectfully Submitted,



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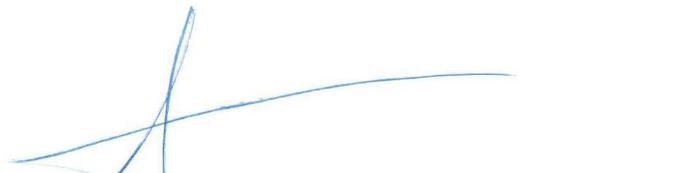
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of September, 2021, a copy of the foregoing
Citizen-Respondents' Answering Memorandum was served via email to:

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