Appendix L: Adjacent property owner legal argument regarding easements

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MEMORANDUM

Via Email
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TO: Elza Hisel-McCoy, Assoc. AIA, LEED-AP
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FROM: David W. Brown

DATE: May 12, 2009

SUBJECT: Analysis of Easements on Studio Plaza, Project Plan 920070010

This Memorandum is addressed to the Project Plan 920070010 Application ("Application"), where the Applicant, Michael, LLC ("Applicant"), proposes to construct the Studio Plaza Project ("Project") on property in the block bounded by Silver Spring Avenue, Fenton Street, Thayer Avenue and Mayor Lane ("Subject Property"). It is submitted on behalf of three property owners in that block, as follows:

1. 911 Silver Spring Avenue Partnership
4641 Montgomery Avenue #200
Bethesda, MD 20814-3428

Owner of Part of Lot 5, Block E;
Liber 8041, Folio 671

2. 8204 Associates, LLC
8204 Fenton Street
Silver Spring MD 20910

Owner of Part of Lot 9, Part of Lot 10, Block E
Liber 14707, Folio 370

3. Athena C. and Dimitra Kalivas
12301 Overpond Way
Potomac, MD 20854-3040

Owners of Part of Lot 3, Part of Lot 4, Block F
Liber 26890, Folio 294

I will refer to these individuals and entities hereafter collectively as the "Property Owners."

The General Development Agreement and Abandoment Proceeding AB-719

Under the General Development Agreement ("GDA"), Michael, LLC ("Michael") is to acquire Parking Lot #3 from the County and associated alleys in fee simple absolute, "subject to covenants, conditions, restrictions, easements and rights-of-way of record as of the Effective Date," GDA ¶ 5.(a), which is October 24, 2008. GDA ¶ 34 & p. 29. Actual transfer of title is to take place on the Settlement Date, which is supposed to be within 3 years of October 24, 2008. GDA ¶ 2.(a)(i), ¶ 3.(a)(i).

The County has committed, in its capacity as a land owner, to join with Michael in a request for abandonment of the alleys. GDA ¶ 2.(a)(ii). The consummation of the deal is subject to a finding by the County Executive that Lot #3 and the alleys are "to no longer be necessary for public use..." GDA ¶ 10.(b)(i). Michael is the petitioner in Abandonment Proceeding AB-719, filed by Michael on October 30, 2008. It seeks abandonment of part, but not all of the public alleys located adjacent to Parking Lot #3. The request identifies five parcels, four of which are public alleys created by deed, and the fifth an alley created by plat. A copy of a Michael diagram filed in AB-719 depicting the five parcels, and identifying them as Parcels 1-5, is attached.

As detailed below, the issue of ROW abandonment for public use is a distinct matter from extinguishment of private easements in the Subject Property. To date, this distinction has been downplayed or ignored by the Applicant, resulting in the impression before the Board that the only property rights at issue in relation to the Subject Property are the public property rights implicated in AB-719. In some cases, there is no meaningful distinction because Michael is the fee owner of the land subject to an easement, and when ownership of an easement and the land burdened by an easement are in one and the same entity, the easement is extinguished by operation of law. That is, however, most certainly **not the case** with respect to my clients.

In order that the Board may understand the complete picture, I first describe the impact of the abandonment and the GDA in the case of the two ROW parcels where the Property Owners are **not** directly impacted, i.e., Parcels 1 and 4.

Parcel 1: This Parcel is the western (approximately 60%) part of the 20' public alley that extends into Lot #3 from Fenton Street. It was created by Plat 54 when this area of Silver Spring was first subdivided in 1904. An alley created by plat is a

dedication, and upon its abandonment, title to the property reverts to the owner of the abutting properties from whence the dedication arose. South Easton Neighborhood Ass'n, Inc. v. Town of Easton, Maryland, 387 Md. 468, 876 A.2d 58, 74 n.17 (2005). In this case, the abutting properties are owned by the County, so the County would be free to sell Parcel 1 upon abandonment, assuming compliance with statutory prerequisites for sale.

Parcel 4: This Parcel consists of approximately 2/3 of the westernmost part of the 16' public alley running along the north side of Parking Lot #3 into and through the entryway to Parking Lot #3 from Thayer Avenue, which entryway was acquired by deed by the County in 1948. [The eastern 1/3 of this alley was created separately, by a November 1948 deed, and is not part of the abandonment proceeding (Liber 1208, Folio 513).]

There are three deeds relating to the creation of Parcel 4. The eastern 1/3 of parcel 4 was acquired by the County in two March 1948 deeds that themselves created no public or private easement rights (Liber 1140, Folios 206, 207). The rest of Parcel 4 was acquired by the County for $5000 in a November 1948 deed (Liber 1208, Folio 519).[1] This deed created a ROW over all of Parcel 4. This ROW was established on the land conveyed to the County in all three deeds, for the benefit of the grantor in the November 1948 deed and the public, in wording essentially identical to that employed in creating the public ROW of which Parcels 2 and 3 are part, as described below.

In contrast to the situation involving the Property Owners, as discussed below, in the case of Parcel 4 the successors to the grantors who hold easement rights in Parcel 4 are only two: the County and Michael, LLC. If the public ROW in Parcel 4 is abandoned, fee simple title to Parcel 4 will revert to the successor to the original grantor, which will be Michael, LLC, either directly (as owner of Lot 1, Block O and Lot 8, Block F) or indirectly (as contract purchaser of all other property held by the grantor in the November 1948 deed creating the easement, i.e., the County). The legal doctrine known as "merger" will extinguish the easement when the sale to Michael, LLC is consummated.

The Easement Held By 911 Silver Spring Avenue Partnership

Next to be considered are AB-719 Parcels 2 & 3. These Parcels comprise most but not all of an alley created by deed in 1948. The missing piece is a segment in the middle that is about one-eighth of the length of the entire alley. There is no indication from the GDA that there was to be any missing piece in the sale of this alley to Michael, and its exclusion from AB-719 is without any legally coherent explanation or justification. It appears to be based solely on the fact that the abutting property to the south, part of lot 4 in Block E, Plat 54, is not owned or controlled by Michael or the County, but rather by 911 Silver Spring Avenue Partnership ("911 SSA"), as detailed below. As will also be detailed, however, the property rights relative to Parcels 2 & 3 are

[1] The purchase price is evident from documentary stamps on the deed, as explained in greater detail below in connection with deeds creating the Property Owner's easements.

not limited such that owners of abutting property such as 911 SSA have rights to use of only the portions of Parcels 2 & 3 immediately abutting them. Hence, it is logical and proper to consider the public alley as a whole, i.e., Parcels 2 & 3 together with the part of the alley abutting the 911 SSA property.

The deeds creating the alley were all executed between November 6th and 16th, 1948. All were recorded within one minute of each other on November 26, 1948 in deed book 1208. All are essentially identically worded, except for the necessarily slightly different descriptions of the property conveyed. In each case, the rear portion of a lot fronting on Silver Spring Avenue was conveyed to the Board of County Commissioners for Montgomery County, with a 10-year option to repurchase at the sales price if the purchaser "shall cease to use the said land for a parking lot, or a parking building." In each case, the consideration paid can be determined from the documentary stamps, placed on the deeds at the rate of $1.10 per $1000 of consideration at that time (according to SDAT officials in the Montgomery County office). Consideration to Block E lot owners was as follows: lot 8 - $2500; lots 4-7 - $3500; lot 3 - $4500; and lot 2- $5000. [The stamps have "X's" through them because a sale to the County was exempt from payment of any transfer tax. The stamps nevertheless reveal the amount of consideration paid by the County.]

Most importantly, in each case, all conveyances were, in addition to money, "in consideration of . . . the agreement of the party of the second part herein [the County] to dedicate, pave and maintain a sixteen foot (16') public alleyway [across the back of all seven of the lots as depicted by Michael in the abandonment application Exhibit A] with a perpetual right in the sellers, their heirs and assigns, to use said alleyway at all times as a means of ingress and egress to and from that portion of [the lot associated with each deed] retained by the parties of the first part..." In each case, the land on which the alleyway is to be maintained is part of the land conveyed by the deed. The alleyway begins at the 20' alley created by plat 54 and ends at the west end of lot 2, block E.

The contemporaneous execution and simultaneous recording of these deeds, all in essentially identical form and language make clear that what was intended was for each of the sellers to have a perpetual easement along the rear of their retained properties, to and from the platted alleyway, the easement being on the property sold to the County. Collectively, these deeds created an easement by express reservation. Miller v. Kirkpatrick, 377 Md. 335, 833 A.2d 536, 544 (2003)("An express easement by reservation arises when a property owner conveys part of his property to another, but includes language in the conveyance reserving the right to use some part of the transferred land as a right-of-way.").

This situation is the obverse of the usual ROW abandonment situation. The typical context is where a platted street or alley is never finished and the abutting landowners petition for abandonment which, if granted, results in an unencumbered title vesting in the abutting landowners. South Easton, supra. More precisely, what happens is that once the public has abandoned the ROW, the owners of the abutting land have title to the land because they never surrendered their fee simple interest in the dedicated land

in the first place; they only granted the public an easement. M-NCPPC v. McCaw, 246 Md. 662, 675, 229 A.2d 584, 591 (1967). Here, instead of the County holding an easement and a private party holding a reversionary fee interest in the ROW, we have the County holding the reversionary fee interest and private parties holding an easement jointly with the public.

This fundamentally different situation produces a fundamentally different outcome upon abandonment of the public ROW. The County Council can perhaps determine, due to planned alternative means of ingress and egress, that the ROW is no longer needed for public use. But such a determination does not end matters, because it does not extinguish the easements held by the grantors of those 1948 deeds and their successors in interest. Such easements could be extinguished by the doctrine of merger if **all** of the benefitted property (in property law terms, the "dominant estate") were under common ownership with the **all** of the burdened property (the "servient estate"). Orfanos Contractors, Inc. v. Schaefer, 85 Md. App. 123, 132-33, 582 A.2d 547, 550 (1990); G. Korngold, Private Land Use Arrangements: Easements, Real Covenants and Equitable Servitudes § 6.11 (2d ed. 2004). But here, even after consummation of the GDA, there will be no merger, as the lot adjacent to the portion of the ROW excluded from the abandonment case, i.e., the 911 SSA lot, will not be under common ownership with the owner of the other lots with easement rights in the ROW, i.e., Michael.

In short, while the abandonment proceeding could result in termination of public access to the ROW, it cannot terminate the easement rights of the successor to the grantor who executed the 1948 deed as owner of Part of Lot 4 (Liber 1208, folios 517-18), i.e., 911 SSA. 911 SSA would still have the right to use of either the entire ROW, or at least that portion of it from the west end of its lot to its terminus at the 20' alley created by Plat 54. 911 SSA could relinquish that right upon sale or exchange for alternative access, but it is not required to enter into any such arrangement. Indeed, neither the County nor Michael has offered 911 SSA compensation for its easement or requested that 911 SSA deed over that interest to them, suggesting that a *sub rosa* taking of its easement with no compensation appears to be contemplated.

There are other ways in which an easement can be extinguished, but none of them have any immediate applicability to this situation. For example, upon a proper finding of public purpose, the County could seize the easement by the exercise of the power of eminent domain, under Art. 25A, § 5(B), Md. Code Ann. As noted above, no such effort has been initiated in 911 SSA's case. It is also far from obvious that the Studio Plaza Project would qualify as a public purpose to legitimize the taking of 911 SSA's easement even if it were attempted. First, the private nature of the enterprise suggests that it is certainly arguable that condemnation to facilitate such private development is not a public purpose. See Mayor and City Council of Baltimore v. Chertkof, 293 Md. 32, 441 A.2d. 1044, 1051 (1982)("Where the predominant purpose or effect of a particular condemnation action has been to benefit private interests, we have said that the taking is not for a public use."). Second, long ago, Maryland established that government could not condemn "a portion of a public alley for the purpose of selling it to . . . a private owner of land adjoining the alley." Prince George's County v. Collington Crossroads,

Inc., 275 Md. 171, 339 A.2d 278, 287 ((1975)(referring to VanWitsen v. Gutman, 79 Md. 405, 411-12, 29 A. 608, 610 (1894)). Third, although the controversial Supreme Court case of Kelo v. New London, 545 U.S. 469, 478 (2005) held that a public purpose could be found in a comprehensive urban redevelopment plan, that ruling is of little help to Studio Plaza, which is an isolated development, not part of a comprehensive plan. Since Kelo, the Maryland Court of Appeals has analyzed Kelo in depth and concluded that "while economic development may be a public purpose, it must be carried out pursuant to a comprehensive plan." Mayor and City Council of Baltimore City v. Valsamaki, 397 Md. 222, 916 A.2d 324, 356 (2007). Moreover, consistent with the Chertkof case, Kelo held that a taking would not be permitted "under the mere pretext of a public use, when its actual purpose was to bestow a private benefit." 545 U. S. at 477-78.

There remains only the question of the uses which the County/Michael can make of the property on which 911 SSA's easement lies. In Maryland, the rule is unequivocal: "The subservient tenement [the County/Michael] may not obstruct the use of the easement." Miller v. Kirkpatrick, supra, 833 A. 2d at 544. The current Project design is to construct a building in part directly on the 911 SSA easement land, thereby completely obstructing the ROW. Absent an act of condemnation, the County cannot force 911 SSA to accept a different ROW than the one defined in the deed executed by its predecessor in title in 1948. 911 SSA is entitled to the unobstructed use of that ROW, not some other one.

Equally clear is the fact that 911 SSA has not legally abandoned its right to the easement by non-use since the time of creation in 1948. The deeds executed at that time make clear that land was being sold to the County for construction of a surface parking lot or a "parking building." In the event of parking garage construction, the 16' wide paved easement prescribed in the deeds would be needed around the outside of the garage to maintain access to the platted alley. In the event of a surface parking lot, the easement would be superfluous, at least for the time the surface lot is in operation, as anyone parking in the lot could freely access buildings adjacent to the lot. Indeed, the very eventuality that would trigger the need to pave the easement is now under contemplation, apparently for the first time since the parking lot was created six decades ago: conversion of the parking lot into a below ground parking garage/above-ground building, an event necessitating **completion**, not **extinguishment** of the easement. There is no evidence of an intent to abandon the easement, and "non-use alone is insufficient to show an intent to abandon...." Chevy Chase Land Co. v. United States, 355 Md. 110, 733 A.2d 1055, 1081-82 (1999).

The Easement Held by Athena and Dimitra Kalivas

The ROW identified in AB-719 as Parcel 5 is a second 16' public alley with its terminus on the 20' alley created by Plat 54. This alley was created by deed simultaneously with the creation of the alley of which Parcels 2 & 3 are a part, in a two-minute recordation period on November 26, 1948 in book 1208—in this case, pages 511-12. The grantors, Preston T. and Louise E. White, owned the eastern half of Lot 3 and all of Lot 4 in Block F, and by this deed sold the County the rear 67' of their land. The

consideration paid to the Whites was $4500. The rest of the White property was at that time developed with a building operating as a restaurant. The property was sold to the Kalivas family and certain Kalivas partners who no longer are part owners (Liber 2303, Folio 545); the Kalivases (Mrs. Athena Kalivas and her daughter, Dimitra) are today the sole owners.

In essentially the same manner as was employed to create the public ROW for the other 16' public alley off the 20' platted alley, and with the same legal effect, the Parcel 5 alley was created by the Whites' November 1948 grantor deed, in favor of the public and the grantor. The ROW is, as in the other contemporaneously created alley, established in land that was part of the conveyance, making this a deed creating an easement by express reservation. Miller v. Kirkpatrick, supra. This is further confirmed by the location of the easement in relation to the development of the White property at the time. The easement runs from the platted alley all the way up the right-hand side of the property deeded to the County, to a point close to the rear wall of the Whites' restaurant. Plainly, it was intended that this easement would be for off-street loading/unloading for the Whites' business. Exactly like the deeds for the other alleyway off the platted alley, this deed requires the County "to dedicate, pave and maintain a sixteen foot (16') public alleyway..." Hence, not only the Whites, but also the public, would be free to use this alleyway, although in its configuration, it is clear that it would be of more utility to the Whites than any general member of the public that might be coming to use the parking lot that was contemplated. Also, using the same wording as in the other deeds, the Whites had a right of repurchase at the conveyance price during the following ten years if the County "shall cease to use the said land for a parking lot, or a parking building."

Given these facts, the same legal conclusions as are drawn above about the other 16' public alley off the 20' platted alley are applicable to Parcel 5. As explained, the Kalivases have an easement by express reservation, and this is a permanent property right. The Project would not just infringe upon it; it would effectively extinguish the easement, as the plan calls for construction of a building in part on the easement land. Further, the Kalivas' easement cannot be extinguished by an abandonment proceeding; all that can be extinguished is the public's right of access to Parcel 5. Nor can the Kalivases be required to sell their easement rights to the Applicant or exchange their easement rights for some assertedly equivalent access, whether devised by the Applicant or the County, because they have a right to non-interference with **this** easement. What the Applicant proposes is an exchange of one easement right for another, which, absent a condemnation proceeding, neither it nor the County can force the Kalivases to accept.

With regard to any claim that the Applicant might make that the easement has been lost due to non-use, two responsive points are in order. First, as with 911 SSA, there has been no abandonment from non-use because no parking building adjacent to the easement was erected; rather, the Kalivas building is readily accessible from the surface parking lot, just as is the 911 SSA building. Second, in a decision perhaps lost to history, decades ago when the County first began operating the parking lot, it chose not to fill it with parking spaces to the limit of the designated parking lot area. In particular, the area immediately adjacent to the Kalivas building is not devoted to parking; it is devoted to a

travel lane from surface streets to the actual parking area. Not only did this decision facilitate access to the Kalivas building generally, the travel lane is wide enough to permit commercial trucks to unload supplies into the Kalivas building while still providing ample room for other vehicles to move around the truck to or from parking spaces in the lot. This off-street loading situation, obviously conducive to the free flow of traffic on Thayer Avenue (on which the Kalivas building fronts and where trucks would otherwise be obliged to unload to the businesses there), has been in open and continuous operation for approximately 60 years, if not longer.

The Applicant has repeatedly proclaimed that unloading a commercial vehicle in a parking lot violates County law, but the cited prohibition, § 31-29(a)(10), by its express terms is subject to waiver by the County. Even if there has been no express written waiver, the County cannot seriously claim, after six decades of acquiescence in the open, transparent practice, that it has a legitimate concern over the off-street unloading of goods for the businesses in the Kalivas building, considering that the activity does not disrupt operation of the parking lot. In addition, the County Council has not even prescribed a fine for this activity. See COMCOR 31.33.01, Council Resolution 16-821 (eff. Jan. 25, 2009). Were the County to suddenly get agitated about off-street commercial vehicle unloading to the Kalivas building, it would raise the specter of a constitutional equal protection violation in the form of selective prosecution, even if there were a fine established for the "offense." A sudden shift in enforcement policy would suggest that the motivation for enforcement is not compliance with the law, but rather the improper use the power of government to achieve an ulterior motive—in this case disciplining a property owner seen to be in the way of advancement of the County's perceived entrepreneurial interest in the Silver Spring Parking Lot District. See United States v. Armstrong, 517 U.S. 456, 465 (1996); In re Laurence T., 285 Md. 621, 403 A.2d 1256 (1979).

Effect of Abandoment Approval on the 911 SSA and Kalivas Easements

The abandonment request is predicated on the claim that the public will no longer need the various ROW's at issue, given the plans for Studio Plaza to replace the existing surface County parking lot with an equal-sized underground County parking lot, complete with adequate means of ingress and egress. The County is not "frozen in time" when it comes to holding and maintaining ROWs, so it is well within the purview of the County Council to assess whether an existing ROW, even if in public use, is no longer needed for public use in light of either changed circumstances that alter or alleviate that need, or an expectation of changed circumstances that will have that effect. Montgomery County Code § 49-63 (c).

In this case, the abandonment applicant, Michael, has sought to justify ROW abandonment in the context of the decision to convert the existing surface parking lot into a sub-surface lot integrated with the Studio Plaza Project. However, the Studio Plaza Project cannot go forward, at least on the basis of current plans, which appear to simply assume that the easements held by 911 SSA and the Kalivas family will be extinguished. That assumption is unwarranted, and unless and until those property rights are protected

from the planned development or dealt with lawfully, there would appear to be no rationale for the Council to conclude that the ROW's are no longer necessary for public use due to changed circumstances. Whether the Council could approve the abandonment subject to satisfaction in the future of a condition, such as Planning Board approval of the Project, is open to serious question. Some of the rationales that underlie the prohibition on conditional zoning would seem equally applicable in this context. See Montgomery County v. National Capital Realty Corp., 267 Md. 364, 297 A.2d 675 (1972). .

The Easement Held By 8204 Associates LLC

Much of the analysis set forth above for ROW parcels has similar applicability to the 8204 Associates LLC Property ("8204 Property"). Mike Gerecht is the Publisher for CD Publications, with a nominal address of 8204 Fenton Street. His building's principal business entrance is from Lot #3, in the southeastern portion of the Lot. This entrance is connected to Lot #3 via a "pedestrian bridge," a concrete walkway that spans the irregular gap between Lot #3 and the 8204 Property. This "bridge" is believed to have been in place since the early 1960's, when the two separate buildings comprising the 8204 Property were built (one in 1959 and the other in 1962). Today, the two buildings function as one, a condition that has existed since not long after the Gerecht family acquired them in 1989.

At the time of the Gerecht acquisition, the 8204 Property was (and remains) subject to a common driveway agreement between the owner of those parts of lots 8 & 9 in Block E that had not been sold to the County for the parking lot. Liber 2879, folio 218. The driveway is 12' wide, with 6' coming from each lot, for the length of the two lots, to/from Silver Spring Avenue. It appears that this easement would be unimpaired by the Project, which will include redevelopment of the rest of lot 8.

Subsequent to the Gerecht acquisition, two additional easements were entered into, both between the County and the Gerechts' business. One allowed the Gerechts to construct a "trash container alcove" on a 6' x 13' strip of land, part of the parking lot, adjacent to the common driveway for lots 8/9. Liber 9658, folio 93. Based on that easement, such an alcove was constructed around 1991, and it has remained functional ever since. This easement is apparently not at risk in the Project.[2]

It is the other easement that is of concern to the Gerecht family. Upon their acquisition of the 8204 Property, the Gerechts sought to permanently protect the principal access to the building on lot 9 from the parking lot via the long-standing pedestrian

[2] At least one variation on the Project shown to the Gerechts envisioned closing this easement on the parking lot, to be replaced with a similarly sized easement on lot 8, further south along the joint driveway. If that is not the current plan, then this easement is unimpaired by the Project. If the exchange is contemplated, however, it would be a matter of consent between the parties, absent a condemnation proceeding. The Gerechts do not intend to consent to such an exchange in the absence of a consensus resolution of the loss of the pedestrian bridge easement, discussed next

bridge. As a result, 8204 Associates LP [the predecessor entity to 8204 Associates LLC] entered into an "Easement and Maintenance Agreement" with the County, recorded on May 18, 1990, Liber 9322, folio 513. A copy of this Easement is in the record of this case. The Easement recounts that the pedestrian bridge "was designed and erected as an integral entrance to the 903 Silver Spring Building [the building on lot 9] and maintained without interruption, problem or challenge until the present." The Easement granted 8204 Associates LP "an easement and right-of-way for the pedestrian bridge . . . together with the rights and privileges pertinent to its proper use and benefit by 8204 Associates, its successors and assigns until such time as the building to which the pedestrian bridge is an integral entrance no longer exists." In exchange for 8204 Associates' agreement to maintain the bridge in proper condition, as well as $1 million in liability insurance in connection with any personal injury or property damage claim associated with the bridge, the County promised that it "will not interfere with the reasonable use and enjoyment of said easement and right of way without 8204 Associates' written consent."

At the time the easement was approved, a County official visited the property with Ash Gerecht, the owner of 8204 Associates LP. At that time, in addition to the pedestrian bridge, there were also glass double doors, at a right angle to the entry door and overlooking a two-foot drop off with no steps into the parking lot area. These doors had been located and installed for ramping materials directly to/from the building landing to Lot #3. The County employee who visited the site asked Mr. Gerecht about proof of insurance, but no questions about loading/unloading via either set of doors. At times in the 20 years since, 8204 Associates LP sought and received DOT permission to bag meters in front of the pedestrian bridge/double glass doors so that trucks could load/unload, and those double doors are still used for that purpose. In all that time, no County employee has raised any questions about the plainly visible and open loading/unloading activity in the parking lot adjacent to the 8204 Building.

In the same vein, for several years the Silver Spring farmers market was relocated in this section of the parking lot. Gary Stith, Silver Spring Redevelopment Office, sought out the approval of Mike Gerecht to ensure that this activity would not interfere with CD Publications' business. The farmers market operated without objection from Mr. Gerecht, as it was during weekend hours that did not impact his business. Of course, the market was a typical operation where commercial trucks would load/unload produce for sale from stalls or tables.

Not long after executing this easement, and in reliance on its continued existence, the Gerechts took steps to integrate their two adjacent buildings into one and made the upper-level entrance from the pedestrian bridge the principal entrance to the combined building. With the pedestrian bridge opening onto a public surface parking lot at the same level as the bridge, there was ample area for business visitors to enter or exit the premises to parked cars or vehicles in the lot, including commercial vehicles there for loading/unloading purposes. This operational situation began almost immediately upon the relocation of the Gerechts' business to 8204 Fenton in 1989, (after nearly 30 years elsewhere in Silver Spring and other locations), and has continued in the two decades since. This "reasonable use and enjoyment" has included visitor use of the parking lot on

a continuous basis, including commercial vehicle loading/unloading, utilizing the pedestrian bridge to make the building entrance there the principal entrance for the business for all purposes. The Gerechts sought legally enforceable protection of this precise outcome via the easement.

From 1989 until very recently, there has never been any complaint or claim by the easement grantor, Montgomery County, that 8204 Associates has improperly been exercising its rights under the easement, or exceeded what constitutes its "reasonable use and enjoyment." On April 3, 2009, however, DOT Director Holmes sent Rose Krasnow, Chief of Development Review, a letter expressing the view that "the easement implies pedestrian access only and would not allow loading from Lot 3." In fact, however, all loading and unloading that has taken place has been in the form of "pedestrian access." Objects are carried into or removed from the premises by persons on foot, sometimes using and sometimes not using devices such as hand trucks. There is, in effect, no access other than pedestrian access, and a pedestrian navigating a hand truck to deliver supplies to the business is not something other than a pedestrian. Such activity is well within the contemplation of the natural and ordinary use of a "pedestrian bridge" over the gap between a parking lot and a business entrance.

The only possible issue of improper use of the pedestrian bridge is really a question of vehicular use of the parking lot as the entryway to the bridge by persons parking in the lot and then crossing the bridge on foot. Mr. Holmes' letter echoes the Applicant in noting that § 31-29(a)(10), Montgomery County Code, prohibits unloading/unloading of commercial vehicles on a County parking lot. That is a wholly separate question from whether someone crossing the pedestrian bridge to enter the 8204 Building with a delivery of goods is a pedestrian under the terms of the easement. In any case, as detailed above in connection with the Kalivas easement, a sudden County interest in enforcing this provision against the Gerechts is inconsistent with long-standing County acquiescence in its disregard. Indeed, Ash Gerecht, who signed the pedestrian bridge easement for 8204 Associates, LP, has had dealings with the County over the years leading to his reasonable belief that the County fully understood, both at the time of its execution of the easement and thereafter, that the pedestrian bridge was intended to serve as the "stepping stone" to the main entrance to his business, not just for business visitors, but also for loading/unloading of commercial vehicles in connection with his publishing business. Further, 8204 Associates, LP has invested substantial sums in the operation of CD Publications at this site in the expectation that it could continue to use the pedestrian bridge as it did when it first commenced use. The County must be viewed as equitably estopped from reversing course now on 8204 Associates, LP's loading/unloading activity. See Heartwood 88, Inc. v. Montgomery County, 156 Md. App. 333, 846 A.2d 1096, 1117 (2004) (equitable estoppel applies against the County when its actions or inactions "cause a prejudicial change in the conduct of the other" party.).

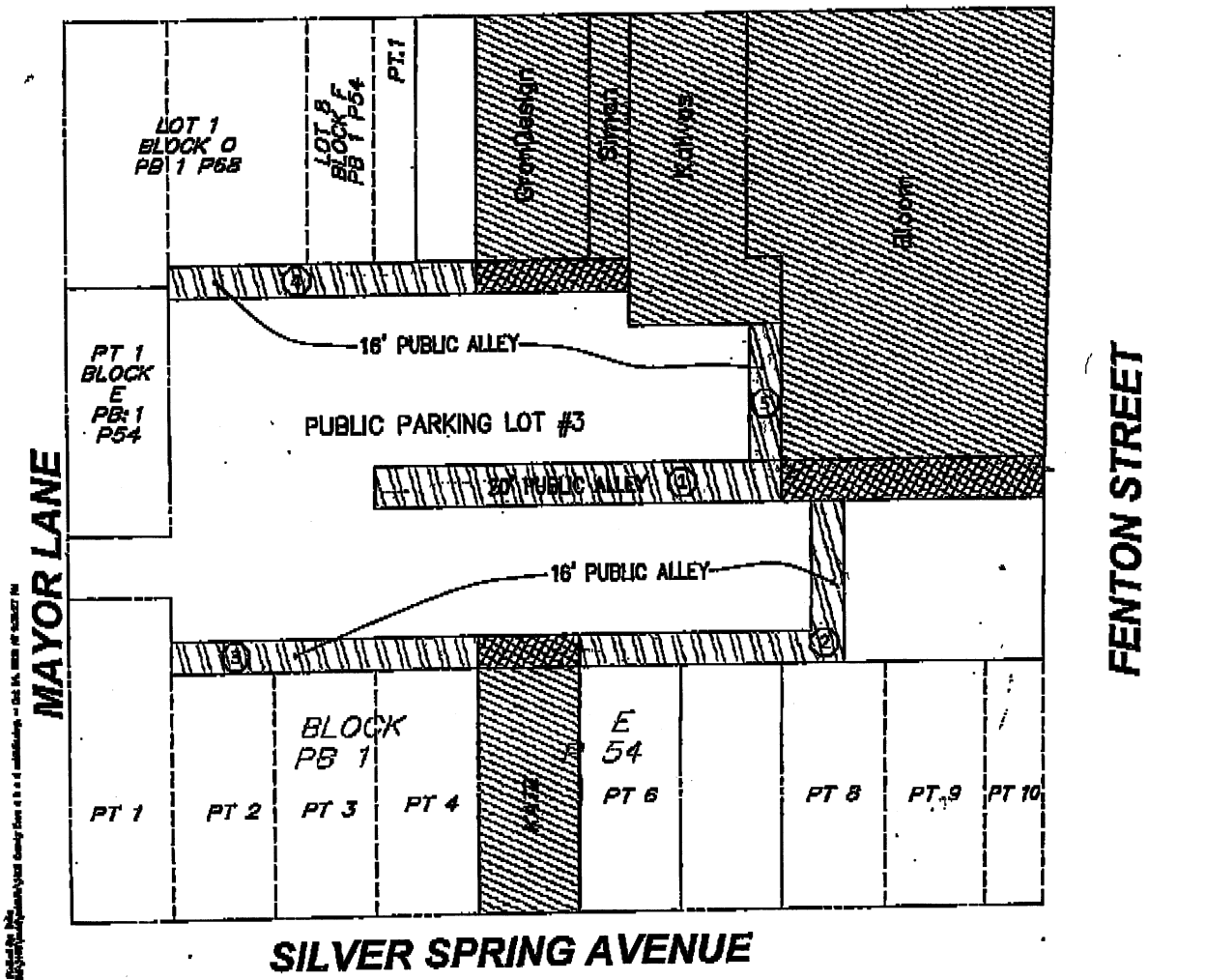
Reinforcing this conclusion is the reliance the Gerecht family placed on the ongoing use of the front entrance to the 8204 Associates building when they purchased it. The current configuration of the building did not originate with or after the Gerechts purchase of it. Well before that time, the building was built, with County approval,

fronting on the parking lot after the parking lot had already been constructed. The building's parking lot entrance, which was designed as a main entrance, is level with the parking lot and is on the common property line with the parking lot. The entry there is to the second floor of the building, and there is no entrance to the second floor on Silver Spring Avenue. The pedestrian bridge was built with County approval at the same time as the building. Absent the pedestrian bridge, there would have been no way to get out of the building on to the parking lot, due to the slope next to the building, and, hence, no utility of the entire second floor absent major internal renovations.

The Project contemplates effective extinguishment of the pedestrian bridge easement by converting the surface parking lot essential to the utility of the easement into a building, and actually physically occupying the easement space with the building. Considering the impact on its business that loss of the pedestrian bridge would cause, 8204 Associates has no intention of surrendering its easement rights to the Applicant, and is therefore opposed to the Project. As with the 911 SSA and Kalivas easements, 8204 Associates cannot be required to sell its pedestrian bridge easement rights to the Applicant or exchange their easement rights for some assertedly equivalent access, whether devised by the Applicant or the County, because they have a right to non-interference with **this** easement. What the Applicant has proposed is an exchange of one easement right for another, which, absent a condemnation proceeding, neither it nor the County can force 8204 Associates to accept.

Conclusion

All of my clients, 911 SSA, the Kalivases and 8204 Associates, have permanent easement rights in the Subject Property. The Project proposes not a mere infringement on those perpetual property rights, but rather effective eradication of them. This cannot be done without their consent, which, for the most part, has not even been sought, much less obtained. Abandoment proceeding AB-719 changes none of this; it only deals with the general public's right of access to the same areas.



① Part 1 of Legal Description (Typical)

Remaining Properties

Alley to be Abandoned

Alley to Remain

0 40' 80' 160'

Studio Plaza

'Exhibit C'

October, 2008

exh. 1