

required the hearing to be noticed or conducted in accordance with the APA. Further, the Planning Board had adopted its own Rules of Procedure, and Section 2C of the Rules (and not the APA) govern the process for notice of the Public Hearing. The Rules require that notice be sent to adjoining and confronting property owners and to civic associations registered with the Planning Board 10 days prior to the scheduled public hearing, giving the date of the hearing and the location of the subject property. Notice must include information regarding the time and date of the Public Hearing. The Board's legal counsel advised the Planning Board that the notice of Public Hearing sent by Staff complied with all applicable requirements of the Rules of Procedure and was legally sufficient in all respects. In response to further questioning, technical staff testified that the Union was on the staff's mailing list, and as such staff sent proper notice in accordance with the Board's Rules.

With regard to the timing of the issuance of the Staff Report on the Preliminary Plan, legal counsel advised the Board that the Rules of Procedure do not require a staff report, but that if a staff report is written, then pursuant to Section 2C, the staff report must be made available to any interested party and to the general public at the time the staff report is transmitted to the Planning Board. Legal counsel further advised the Board that the Staff Report on the Preliminary Plan had been made available to the general public and to interested parties at the same time that it was transmitted to the Planning Board in compliance with the requirements of the Rules of Procedure.

Finally, with regard to the right to cross-examine witnesses, legal counsel advised the Planning Board that Section 5 of the Rules of Procedure provides that the Chairman, upon request, may permit any party to ask questions of a witness at the conclusion of that witnesses' testimony, and further noted for the record that no speaker either prior to or during the public hearing made any such request for cross-examination.

The Board's legal counsel concluded her testimony by advising the Board that the Public Hearing had been properly noticed, and was being properly conducted, in accordance with all applicable requirements of the Planning Board's Rules of Procedure, the Subdivision Regulations and the Regional District Act.

B. Pedestrian Access and Circulation

In response to Commissioners' questions regarding the safety and efficiency of proposed pedestrian access to the store, both from adjoining roads and from within the Parking Garage, Staff advised the Board that the Project would enhance existing access to the store by improving and widening the sidewalks on Knowles Avenue and Armory Avenue, and by eliminating an existing steep grade along Armory Avenue that makes pedestrian circulation more difficult. Staff also explained to the Board that the Parking Garage would have clearly defined and striped pedestrian pathways leading customers to the store entrance. Accordingly, Staff concluded that the proposed pedestrian access would be safe and efficient and an improvement over existing

conditions. Staff testified that the new site would be at least as pedestrian-friendly as the existing site, if not more pedestrian friendly. The Applicant noted that currently there is no defined pedestrian access off Howard or Knowles Avenues.

C. Local Area Transportation Review

Commissioners Robinson and Bryant asked Staff to review the methodology and results of the Applicant's TIS and the requirements for LATR. Staff explained the Planning Board's LATR Guidelines dictate the number of intersections that the Applicant must study based on the number of trips generated by the Project. Based on the Guidelines, the Applicant was required to analyze the impact of the Project on eight intersections in the local area road network. Staff also noted that some of the speakers had asked that additional intersections be studied, however, under the LATR Guidelines those intersections were too far from the Property to require analysis. Staff testified that the Applicant's TIS, in accordance with the methodology set forth in the LATR Guidelines, added the trips generated by the Project to existing and background traffic (trips from approved but unbuilt development in the area) to estimate total future traffic and assigned the estimated traffic to the intersections in the study area.

Staff testified that all of the intersections analyzed were projected to operate within the 1,650 CLV congestion standard for the Kensington/Wheaton Policy Area except for the intersection of Connecticut Avenue and Plyers Mill Road, which currently exceeds the CLV congestion standards for the evening peak hours. However, Staff also explained to the Board that to mitigate the impact of traffic from the Project at this intersection, the Applicant proposed to reconstruct the westbound approach of Plyers Mill Road at Connecticut Avenue by relocating the median to the south to provide two left turn lanes, one through lane and one right turn lane within existing curbs and right-of-way. Staff further explained that this was a significant improvement that would reduce the CLV for the evening peak hour from 1,746 to 1,644, within the 1,650 CLV congestion standard and thereby satisfy the requirements for LATR for all intersections in the study area.

D. Vehicular Access and Circulation

In response to the Commissioner's questions regarding the design of proposed access points for vehicles and the proposed parking for the Project, Staff first explained to the Planning Board that given the grading of the Property and other site constraints, the location of the Parking Garage access on Armory Avenue was the best option for the Project in terms of safety and efficiency of vehicular circulation. Staff also explained to the Planning Board that they had worked with the Applicant to improve the design and operation of the Parking Garage access at Armory Avenue, including requiring the Applicant to increase the radii of the driveway and to relocate a utility pole to better facilitate access by large trucks. Staff concluded that the proposed access for the Parking Garage would allow safe and adequate vehicular circulation by both passenger vehicles and delivery vehicles. The Applicant also testified, in response to questioning,

that it will look into providing signage that will alert customers to full parking garages, to minimize vehicles from entering the parking garage, finding it full, then exiting to find parking on the upper level.

E. Jurisdiction of the Historic Preservation Commission

In response to questions from the Commissioners and from opposition speakers regarding whether the HPC had any jurisdiction or other review authority over the Application, the Planning Board's legal staff advised the Board that the HPC had no jurisdiction over the Application because the Application did not include any historic resources, nor is it in an historic district. Legal staff further advised the Board neither the Subdivision Regulations nor any other applicable law authorize the Planning Board to make any findings regarding the impact of the Project on the Historic District, which confronts the Subject Property on Armory Avenue. Additionally, the record reflects that the HPC commented on the project through its participation on the Development Review Committee, and staff testified at the public hearing that HPC had not requested any subsequent review of this application.

F. Compliance with the Kensington Sector Plan

The Commissioners asked the Applicant and Staff to explain how the Project complied with the applicable recommendations of the Sector Plan in satisfaction of the Subdivision Regulations in this regard. The Applicant reiterated to the Planning Board that the Sector Plan provided little guidance regarding redevelopment of the Property, except to recommend retaining the commercial zoning of the Property and to require an 80-foot right-of-way on Knowles Avenue. The Applicant testified that the Application proposed dedication along Knowles Avenue to provide 80 feet from the opposite property line in compliance with the Sector Plan requirements. Further, in response to Commissioner Robinson's specific question regarding the applicability of the recommendation on Page 56 of the Sector Plan that additions to Kensington's business district should be low intensity in character, Staff explained that this recommendation did not apply to the Project because it was not an addition to the business district, but rather redevelopment of an existing use in the business district. Staff further testified that the Project would improve the visual appearance of the business district in compliance with the Sector Plan's general recommendations for development in the business district, also on page 56 of the Sector Plan.⁴ Staff also clarified that this use is not a transitional use as described in the master plan. Staff also testified that Community Based Planning Staff found that the project complies with the Sector Plan. For these reasons, Staff concluded that the Application complied with all applicable recommendations of the Sector Plan. Planning Staff had also advised the Board that the HPC had not expressed any interest in commenting on the Project.

⁴ Staff also advised the Board that the Applicant the design proffers regarding the building, including the façade treatments on Armory Avenue and the streetscaping, were not requirements of the Subdivision Regulations, but rather were negotiated with the Applicant as voluntary proffers.

G. "Harmonious Development" Requirement of 50-2(a) of the Subdivision Regulations

In response to Boardmember questioning, legal staff advised the Board that Section 50-2 of the Subdivision Regulations contain the purposes for which the Subdivision Regulations were promulgated, and the goals that the law intends to promote, but this section does not establish any standards that the Board can use to determine harmonious development. Legal staff opined that this section of the Subdivision Regulations do not provide any basis for substantive review of the instant application.

FINDINGS

After review and consideration of the evidence of record, including testimony given at the Public Hearing, the Planning Board adopts Staff's recommendations and finds that Preliminary Plan No. 1-03075 is in accordance with the Subdivision Regulations and the Regional District Act as follows:

A. Procedural Issues

The Board agrees with its legal counsel that the Public Hearing was noticed and conducted in accordance with all applicable requirements of the Board's Rules of Procedure. The Board finds the Rules set forth the requirements for notice and conduct of the Public Hearing on the Application, and that the Rules were followed in this case consistent with agency practice in prior subdivision proceedings. Consequently, the Board finds that the Public Notice complied with the Rules of Procedure and that the Public Hearing was otherwise conducted in accordance with the Rules of Procedure.

The Planning Board also agrees with its legal counsel that the HPC does not have jurisdiction over the Application and that the Board is not required to make a specific finding regarding compatibility of the Project with the Historic District. Chapter 24A of the Code governs Historic Resource Preservation and sets forth the powers and duties of the HPC. Specifically, ~~Section 24A-5(j) of the Code authorizes the HPC to advise the Planning Board in the event a subdivision is proposed that includes property containing an historic resource. However, the Property is not within the Kensington Historic District, which is located across Armory Avenue from the Property, and therefore, the HPC does not have jurisdiction over the Preliminary Plan Application.~~

B. Lot Size, Shape, Width and Depth

The Board finds that the record includes uncontested evidence, including without limitation, the testimony of Planning Board Staff and the Applicant that the size, width, shape, and depth of the lot as proposed in the Application is appropriate for the location of the Project. First, the proposed building and parking areas meet or exceed all

requirements in the C-2 Zone for lot area, set backs, height, density of development and green area. Further, the Board adopts the recommendations of Staff, supported by testimony from that Applicant, that the four vehicular access points proposed for the Project will provide safe, efficient and convenient access to both the Surface Lot and the Parking Garage for customers of the Project. The Board also finds, based on Staff's testimony, that the Applicant has located the Parking Garage access on Armory Avenue in the most desirable area of the Property for such access and that Staff has worked with the Applicant to design the access driveway to safely accommodate large truck deliveries. The Board further finds that the impact of large truck deliveries on the surrounding road network is further mitigated by the Applicant's proffer to limit such deliveries to between 3:00 p.m. and 8:00 a.m. The Board's findings also are based upon the condition of approval that requires the Applicant to reconstruct Knowles Avenue to provide two westbound lanes and one eastbound lane within an 80-foot Right-of-Way to improve vehicular circulation around the site.

With respect to pedestrian safety, the Board finds that the sidewalk improvements proposed as part of the Project, along the public streets adjacent to the Property, will enhance pedestrian circulation on the Property. Accordingly, the Board finds the proposed lot will safely accommodate the anticipated vehicular and pedestrian traffic that will be generated by the Project.

Finally, the Board notes that the Application proposes 259 parking spaces on-site, which exceeds the number of spaces required for the Project pursuant to the Zoning Ordinance.

C. Conformance with Development Standards of Zone

The record contains uncontested information and evidence, including the development standards table on the Preliminary Plan drawing, regarding the Applicant's conformance with the development standards for the C-2 Zone, and this information was uncontested. Therefore, the Planning Board finds that the Applicant meets the development standards of the C-2 Zone.

D. Adequate Public Facilities

As noted above, Section 50-35(k) of the Subdivision Regulations directs the Planning Board to approve preliminary plans of subdivision only after "determin[ing] that public facilities will be adequate to support and service the area of the proposed subdivision." The Montgomery County Council ("Council"), pursuant to authority granted under Section 33A-15 of the Code, has established an Annual Growth Policy for the County. The AGP, which tests the adequacy of four types of public facilities, supplies the information that enables the Planning Board to make its finding under the APFO.⁵

⁵ The four types of public facilities tested by the AGP are: water and sewerage facilities; police, fire and health services; transportation; and schools. The Project proposes a

As discussed below, the record includes evidence that the proposed development does satisfy the APFO based on the applicable standards set forth in the FY 03 AGP and, therefore, the Planning Board adopts Staff's findings and recommendations, finding that the Project is adequately served by public facilities, including transportation facilities, as follows:

(i) Water and Sewerage - The record includes uncontested evidence that the Property is located in Water Category 1 and Sewer Category 1, which designations demonstrate that existing and programmed water and sewerage facilities are adequate to support and service the Project under the County's Ten-Year Water Supply and Sewerage Systems Plan.

(ii) Police, Fire, and Health Services - The FY 03 AGP does not include specific standards for testing the adequacy of police, fire and health services. Additionally, there is no evidence in the record raising a concern regarding the adequacy of police, fire or health services resulting from this Application. Additionally, there were no comments from public safety or health agencies, and consequently as a matter of law the Board must consider the Application approved by those agencies. Therefore, the Board finds, based on the uncontested evidence of record, that existing and programmed police stations, firehouses, and health clinics are adequate to support and service the Project.

(iii) Transportation Facilities - As noted above, before the Planning Board can approve the Application, it must pass a Policy Area Transportation Review (previously defined as "PAR") and a Local Area Transportation Review (previously defined as "LATR").⁶

With regard to PAR, the AGP calculates the amount of development that can be supported by the existing and programmed transportation network within a policy area (known as "Staging Ceiling"). The Property is located within the Kensington/Wheaton Policy Area and as noted in the Transportation Memorandum and as testified to by Transportation Planning Staff at the Public Hearing, the Kensington/Wheaton Policy Area

commercial use, and there is no requirement that there be a finding of adequacy of public schools for this use.

⁶ The record contains extensive testimony, and detailed inquiry from Planning Board members, regarding the layout of the parking garage, of the number and times of truck deliveries, and of the turning patterns and turning radii of trucks into and out of the site. The Planning Board has no jurisdiction over the design of the parking garage, and the subject matter of truck deliveries are beyond the scope of review under the Subdivision Regulations and the Adequate Public Facilities Ordinance. The Applicant proffered to limit truck deliveries, and the Board accepted that proffer, however there is no standard under the law that allows the Board to make findings on this issue.

has adequate Staging Ceiling capacity under the FY03 AGP for the Project. Therefore, the Board finds that PAR is satisfied.

With regard to LATR, Transportation Planning Staff, through testimony and the Transportation Memorandum, explained the methodology used in the LATR analysis. In particular, Staff testified that the TIS submitted by the Applicant complied in all respects, including CLV analysis and the scope of the intersections reviewed, with the requirements of the LATR Guidelines. Staff also reviewed the findings of the LATR analysis of the intersections studied in the TIS and testified, as stated in the Transportation Memorandum revised July 29, 2004, that taking into consideration the traffic projected to be generated by the Project, seven of the eight intersections required to be analyzed would operate within the 1650 CLV congestion standard for the Policy Area, as set forth in the FY03 AGP, in satisfaction of the requirements for LATR. With regard to the intersection of Connecticut Avenue and Plyers Mill Road, Staff explained that this intersection currently exceeds CLV congestion standards in the evening peak hour without taking into account the traffic generated by the Project. The FY 04 AGP provides that if a subdivision affects an intersection that already exceeds acceptable CLV standards, then the subdivision may only be approved if it does not make the situation worse. Accordingly, Staff explained that as a recommended condition of approval of the Application, in order to mitigate the impact of traffic generated by the Project at this intersection, the Applicant would be required to construct a significant improvement on Plyers Mill Road at Connecticut Avenue. Staff testified that this improvement will reduce the CLV at the intersection in the evening peak hour below the 1650 CLV congestion standard. In this regard, Staff noted that the proposed improvements would mitigate more trips at the intersection than is required by the FY03 AGP. Staff also testified that the public agencies that reviewed this proposed improvement approved the improvement, including the State Highway Administration.

The Board notes that the AGP permits applicants to satisfy LATR by ~~constructing improvements that add adequate capacity to the road network.~~ The Board finds persuasive the testimony of Staff, both at the Public Hearing and in the Transportation Memorandum as revised, that the Preliminary Plan, as conditioned to require the Applicant to construct the improvements to Connecticut Avenue detailed herein, satisfies the requirements for LATR.

The record contains testimony suggesting that the transportation analysis was flawed because congested intersections in the area were not included in the analysis. Staff testified, in response to Board questions, that those intersections were beyond the limits that that staff uses, based on staff's

application of its transportation guidelines, and consequently those intersections were not studied. In further response to Boardmember inquiries, staff confirmed that the transportation analysis was conducted in accordance with agency guidelines and consistent with staff's practice, just as it would on any other project. Based on this testimony, the Board finds that the TIS was prepared in accordance with the LATR Guidelines is consistent, in all aspects, with agency practice with regard to LATR, and that staff's findings with respect to the adequacy of public facilities with respect to transportation is valid and the Board adopts the conclusions of its staff in finding that transportation facilities are adequate to support this Application.

(iv) Schools. The Project proposes a commercial use, and there is no requirement under the AGP that there be a finding of adequacy of public schools for this use.

E. Relation to Master Plan

The Planning Board finds that the Application substantially conforms to the "Sector Plan" as follows:

(i) The Sector Plan confirms the C-2 zoning of the Property, which permits the development of "grocery stores" by right.

(ii) The Sector Plan designates Knowles Avenue as a two-lane closed-section arterial, with a minimum right-of-way width of 80 feet. The Applicant, as a condition of approval of the Application, will dedicate sufficient right-of-way across the Property frontage on Knowles Avenue to provide 80 feet from the opposite property line, the full width mandated by the Sector Plan.

(iii) The Project will enhance the appearance of the surrounding Central Business District by redeveloping an older grocery store with a modern store, improving streetscape and sidewalks, and incorporating façade treatments with high-quality building materials on the new building.

F. Forest Conservation

The Application satisfies all the applicable requirements of the Forest Conservation Law, Montgomery County Code, Chapter 22A. This finding is subject to the applicable condition(s) of approval regarding forest conservation.

G. Stormwater Management/Sediment and Erosion Control

The Application meets all applicable stormwater management requirements and will provide adequate control of stormwater runoff from the site. This finding is based on

the determination by the Montgomery County Department of Permitting Services ("MCDPS") by letter dated January 22, 2003, included in the record of the Application, that the Stormwater Management Concept Plan, also included in the record of the Application submitted to MCDPS by the Applicant, meets MCDPS' standards.

CONCLUSION

Based upon the testimony, evidence, and exhibits presented, as well as the contents of the Preliminary Plan file, the Planning Board finds Preliminary Plan No. 1-03075 to be in accordance with the Subdivision Regulations and the Regional District Act. Therefore, the Planning Board approves Preliminary Plan 1-03075, subject to the following conditions:

1. Limit the development to 42,000 square feet of gross leaseable area (patron area) of grocery store and 53,684 square feet of gross floor area excluding the parking garage to replace an existing 23,518 square feet of grocery store.
2. Dedicate sufficient right-of-way across the property frontage on Knowles Avenue between Connecticut Avenue and Armory Avenue to provide 80 feet from the opposite property line.
3. As a condition of site access, reconstruct Knowles Avenue between Armory Avenue and Connecticut Avenue as shown on the preliminary plan to provide a three-lane cross section (two lanes westbound and one lane eastbound) approaching Connecticut Avenue, tapering to two lanes at Armory Avenue.
4. To satisfy Local Area Transportation Review, reconstruct the westbound approach of Plyers Mill Road at Connecticut Avenue (MD 185) by relocating the median to the south to provide for two-left turn lanes, one through lane, and one right turn lane within the existing curbs and right of way.
5. Restrict large truck deliveries to the site to the hours between 3:00 p.m. and 8:00 a.m., daily.
6. Relocate the utility pole and increase the turning radius to 25 feet at the northwest corner of the intersection of Armory Avenue and Knowles Avenue to better accommodate vehicle-turning movements.
7. Compliance with the conditions of approval for the preliminary Forest Conservation Plan. The Applicant must satisfy all conditions prior to recording of plat(s) or MCDPS issuance of sediment and erosion control permits.

8. All road right-of-ways shown on the approved preliminary plan shall be dedicated, by the Applicant, to the full width shown in the Master Plan unless otherwise designated on the preliminary plan.
9. All road right-of-ways shown on the approved preliminary plan shall be constructed, by the Applicant, to the full width mandated by the Master Plan, and to the design standards imposed by all applicable road codes. Only those roads (or portions thereof) expressly designated on the preliminary plan, "To be Constructed by _____" are excluded from this condition.
10. Streetscaping treatment to comply with Department of Housing and Community Affairs letter dated, February 13, 2004, unless otherwise amended.
11. Review and approval of the final landscape/streetscape and lighting plan by MNCPPC staff in conjunction with Town of Kensington prior to recordation of plats.
12. Compliance with conditions of approval of the MCDPS stormwater management letter dated, January 22, 2003.
13. The Adequate Public Facilities (APF) review for the Preliminary Plan will remain valid for sixty-one (61) months from the date of mailing of the Planning Board Opinion.
14. Other necessary easements shall be shown on the record plats.

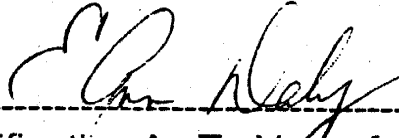
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[CERTIFICATION OF BOARD VOTE ADOPTING OPINION ON FOLLOWING PAGE]

MF 3/18/05
Approved for legal sufficiency
M-NCPPC Office of General Counsel

CERTIFICATION OF BOARD ADOPTION OF OPINION

At its regular meeting, held on **Thursday, March 31, 2005**, in Silver Spring, Maryland, the Montgomery County Planning Board of The Maryland-National Capital Park and Planning Commission, by unanimous consent **ADOPTED** the above Opinion which constitutes the final decision of the Planning Board and memorializes the Board's findings of fact and conclusions of law for **Preliminary Plan No. 1-03075, Kensington Sawayay**. Commissioner Perdue was absent. Commissioner Wellington recused herself.



Certification As To Vote of Adoption
E. Ann Daly, Technical Writer
