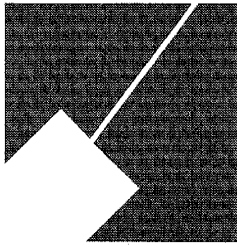


M-NCPPC



MONTGOMERY COUNTY DEPARTMENT OF PARK AND PLANNING

THE MARYLAND-NATIONAL CAPITAL
PARK AND PLANNING COMMISSION

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Agenda Item No. 1
Agenda Date: July 13, 2006
Reconsideration Request

**OFFICE OF
THE GENERAL COUNSEL**

(301) 495-4646
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July 7, 2006

REQUEST FOR RECONSIDERATION

MEMORANDUM

TO: Montgomery County Planning Board

FROM: Debra Yerg Daniel, Associate General Counsel *DYD*
301.495.4646

RE: Reconsideration Request for Burtonsville Shopping Center
Preliminary Plan No. 1-04109

I. BACKGROUND

Parties Seeking Reconsideration:

Stuart Rochester, Chairman, Fairland Master Plan Citizens Advisory Committee
A. Cleveland Brown, V.M.D., President, Patuxent Watershed Protective Assoc., Inc.

Action Sought To Be Reconsidered:

Preliminary Plan No. 1-04110

Date of Hearing: July 28, 2005

Action Taken: Approval of Preliminary Plan

Planning Board Vote:

Motion to approve Preliminary Plan made by Commissioner Bryant, seconded by Commissioner Perdue.

Chairman Berlage and Commissioners Perdue, Bryant, and Wellington voting in favor of the motion. Commissioner Robinson was absent.

Procedural Background

The Preliminary Plan involves a proposal from BMC Property Group ("Applicant") to create 1 lot on 27.55 acres of land located at the Northwest Quadrant of the intersection of Columbia Pike (US 29) (aka Burtonsville Boulevard) and Spencerville Road (MD 198), in the Fairland Master Plan area ("Subject Property"). The Subject Property is zoned C-2.

This Preliminary Plan was heard by the Planning Board on July 28, 2005. At that hearing, the Planning Board approved the Preliminary Plan with conditions. The Planning Board's opinion was issued on December 19, 2005. On December 29, 2005, the Applicant, through its attorneys, sent a letter to Richard Weaver of the Development Review Division, requesting certain changes to the Planning Board's opinion stating that if "any of our clarifications or confirmations do require Planning Board action, please consider this letter as our timely request for reconsideration."¹

After discussions between the Applicant's attorneys, Planning and Legal Staff, a Corrected Opinion—which made changes to Conditions Nos. 2 and 16²—was adopted by the Planning Board at its March 16, 2006 hearing and was mailed to all parties of record on March 21, 2006. In addition, Legal Staff sent a letter to the Applicant's attorney dated March 27, 2006.³ By letter dated March 24, 2006, Stuart Rochester, Chairman of the Fairland Master Plan Citizens Advisory Committee requested reconsideration of the Planning Board's decision.⁴ In addition, by letter dated March 30, 2006, A. Cleveland Brown, V.M.D., President of the Patuxent Watershed Protective Association, Inc., also requested a rehearing of this matter.⁵

Request For Reconsideration:

Mr. Rochester's Request

¹ See Attachment One, Letter to Mr. Richard Weaver from Timothy Dugan, Esquire, dated December 29, 2005, p. 1.

² See Attachment Two, Montgomery County Planning Board Corrected Opinion for Preliminary Plan 1-04109, Burtonsville Shopping Center, dated March 21, 2006, pp. 10 and 13.

³ Attachment Three, Letter to Timothy Dugan, Esquire, from Michele Rosenfeld, Associate General Counsel, dated March 27, 2006.

⁴ Attachment Four, Letter to Mr. Derick Berlage, Chairman, Montgomery County Planning Board, from Stuart Rochester, Chairman, Fairland Master Plan CAC dated March 24, 2006.

⁵ Attachment Five, Letter to Mr. Derrick Berlage, Chairman, Montgomery County Planning Board, from A. Cleveland Brown, V.M.D., President, Patuxent Watershed Protective Association, Inc. dated March 30, 2006.

Mr. Rochester's request for reconsideration is primarily based on two issues: 1) master plan conformance; and 2) the request for waiver of setbacks for parking facilities. With respect to master plan conformance, Mr. Rochester asserts that the Applicant, after showing an illustrative plan with structured parking to the Planning Board "immediately following the Board's issuance of its original opinion, felt free to repudiate the very basis for his density and semblance of master plan conformance in the plan shown the community and the Board"⁶ by sending a letter to the Department of Permitting Services ("DPS") dated February 7, 2006, stating that "[i]n the Burtonsville area, multi-story retail buildings and structured parking are not possible."⁷ Mr. Rochester goes on to take issue with certain conditions of approval on the basis that it may have "serious unintended consequences" unless language is added to Condition No. 12 to clarify that the Fairland Master Plan guidelines "call for a neighborhood retail center."⁸

With respect to the waiver requests, Mr. Rochester asserts that while the opinion requires the Applicant to obtain a waiver of the setbacks from DPS or comply with the setbacks (Condition No. 15⁹), DPS has indicated that a waiver may not be necessary in this case.

Mr. Brown's Request

Mr. Brown's request for rehearing is based on his assertion that he was "told there is uncertainty about the requirement" for a waiver of the setback requirement.¹⁰

Opposition to Request for Reconsideration

The Applicant, through its counsel, submitted a letter dated June 23, 2006, addressed to The Honorable Derick P. Berlage, Chairman, in opposition to Mr. Rochester's and Mr. Brown's requests for reconsideration.¹¹ The Applicant opposes the requests for reconsideration on, essentially, two grounds: 1) the requests are time-barred; and 2) all issues raised by Messrs. Rochester and Brown were fully discussed and decided at the Planning Board hearing. First, Applicant argues that, since there were only two minor modifications made in the Corrected Opinion, any reconsideration request of the Corrected Opinion must be limited to issues related to those minor modifications.

⁶ See Attachment Four, p. 1.

⁷ *Id.*, at Attachment A.

⁸ *Id.*, at p. 2.

⁹ See Attachment Two, pp. 12-13.

¹⁰ See Attachment Five.

¹¹ Attachment Six, Letter to The Honorable Derick P. Berlage, Chairman, Montgomery County Planning Board, from Timothy Dugan, Esquire, and Larry A. Gordon, Esquire, dated June 23, 2006.

Applicant argues that any issues related to other sections of the Opinion are time-barred since no timely request for reconsideration was submitted to the December 19th Opinion.¹²

Second, the Applicant argues that issues related to the illustrative plan and the setback waiver were fully discussed and decided at the Planning Board hearing. Specifically, the Applicant points out that the conceptual nature of the illustrative plan was expressly discussed at the hearing¹³ and that the waiver issue was also expressly discussed and decided to be a DPS issue at the hearing.¹⁴ The Applicant further argues that Mr. Rochester's request that additional language be added to Condition No. 12 to state that the Fairland Master Plan guidelines "call for a neighborhood retail center" essentially is a request to limit the Applicant's use of its property under the C-2 zone to only those uses allowed in the C-1 zone. Finally, the Applicant asserts that Messrs. Rochester and Brown have not raised any issues demonstrating "fraud, irregularity or mistake" that would justify a reconsideration by the Planning Board.¹⁵

Mr. Rochester's Response to the Applicant's Opposition

By letter dated June 27, 2006, Mr. Rochester responded to the Applicant's opposition to his reconsideration request.¹⁶ First, with respect to the Applicant's contention that his request is time-barred, Mr. Rochester asserts that the CAC submitted its request for reconsideration within 10 days of the issuance of the March 21st Opinion as it was advised by the General Counsel's Office to do.¹⁷

With respect to the waiver issue, the CAC's position is that the requirement for a waiver was based on a mistaken assumption and needs to be corrected.¹⁸ Mr. Rochester points out that the CAC's primary concern relates to master plan conformance and clarifies that the CAC does not want to "re-argue" issues but rather wants to "set the record straight with the introduction of new information indicating that the applicant had no intent and has no ability to do the plan that he showed the community and the Board in order to get approval . . ."¹⁹ Finally, Mr. Rochester argues that while the Applicant's

¹² *Id.*, at pp. 3-4.

¹³ *Id.*, at pp. 6-8.

¹⁴ *Id.*, at p. 8.

¹⁵ *Id.*, at p. 9.

¹⁶ Attachment Seven, Letter to Mr. Derick Berlage, Chairman, from Stuart Rochester, Chair, Fairland Master Plan CAC, dated June 27, 2006.

¹⁷ *Id.*, at p. 1.

¹⁸ *Id.*

¹⁹ *Id.*, at p. 2 (emphasis in original).

attorneys argue that mistake or fraud is necessary to reverse a decision, under Maryland law "a board may revise its judgment 'when there is justification and good cause."²⁰

II. RULES APPLICABLE TO RECONSIDERATION REQUEST

In accordance with the approved and adopted rules and procedures for the Montgomery County Planning Board, any party of record may, in writing, request the Planning Board to reconsider its determination on an action taken by the Board. The Planning Board must receive the request within ten days of the mailing date for the Opinion reflecting the action at issue. The ten day limitation may be waived by the Planning Board for just cause.

The written request alone shall be the basis upon which the Board will consider whether reconsideration is warranted, although a Boardmember may seek clarifications from staff or other persons present to aid in her/his consideration. No party of record (including the party seeking reconsideration) may present testimony regarding the reconsideration request, unless called upon by a Board member to respond to a question. A party seeking reconsideration is encouraged to be thorough in drafting a written request, because the Board's consideration of the issues will be limited to the contents of the written request and any staff consideration of those issues.

The Planning Board agenda reserves time to allow the Board to consider reconsideration requests that may have been transmitted to the Board. No notice need be sent of the Board's consideration of a reconsideration request. Staff does attempt to advise the party requesting reconsideration of the date the request is scheduled to go before the Board for consideration.

Staff will forward to the Board a reconsideration request for consideration at a regularly scheduled Planning Board hearing. When the item is called by the Chairman, staff presents the reconsideration request to the Board and any Board member may pose questions about points raised in the request. Thereafter, only a Board member that voted in favor of the motion (action) for which reconsideration is being requested may make a motion to reconsider. If a motion is made to reconsider, any Board member may second the motion. As always, to succeed, the motion carries if supported by a majority of Board members then present and voting.

If no motion is made or a motion fails either for lack of a second or insufficient votes, the prior action stands unaltered in all respects, including time for administrative appeals.

If a motion to reconsider carries, no further action or consideration will occur at that time. Rather, the prior action is extinguished and staff will schedule the matter for public hearing, upon due notice, at a later date. The Board, at that time, will conduct a

²⁰ *Id.*, at p. 3.

de novo hearing on the issue(s) that were the subject of the reconsideration request. This may be an entire project application, or may be narrowed in scope to specific issues.

Basis for Reconsideration

Grounds for reconsideration, as specified in the rules, are as follows:

1. The Board's action did not conform to relevant laws or procedures;
2. The Board was not timely provided pertinent and significant information relevant to the Board's ability to take the action at issue, and the request must include a statement explaining why the information was not provided at the time of the public hearing;
3. Other compelling reasons.

The Planning Board in its sole discretion is responsible for determining if the grounds stated in support of the reconsideration request are sufficient to merit reconsideration.

Any and all materials submitted as part of the reconsideration request are excluded from the public hearing administrative record, unless submitted in the record prior to its closing.

III. CONCLUSION

In Legal Staff's opinion, there is no legal deficiency in the Planning Board's decision that requires reconsideration of the Board's prior action. However, the Planning Board may decide to reconsider its prior action if it finds that the issues raised by Messrs. Rochester and Brown meet one of the grounds for reconsideration as specified in the Planning Board's Rules of Procedure.

ATTACHMENTS:

Attachment One: Letter to Mr. Richard Weaver from Timothy Dugan, Esquire, dated December 29, 2005.

Attachment Two: Montgomery County Planning Board Corrected Opinion for Preliminary Plan 1-04109, Burtonsville Shopping Center, dated March 21, 2006.

Attachment Three: Letter to Timothy Dugan, Esquire, from Michele Rosenfeld, Associate General Counsel, dated March 27, 2006.

Attachment Four: Letter to Mr. Derick Berlage, Chairman, Montgomery County Planning Board, from Stuart Rochester, Chairman, Fairland Master Plan CAC dated March 24, 2006.

Attachment Five: Letter to Mr. Derick Berlage, Chairman, Montgomery County Planning Board, from A. Cleveland Brown, V.M.D., President, Patuxent Watershed Protective Association, Inc. dated March 30, 2006.

Attachment Six: Letter to The Honorable Derick P. Berlage, Chairman, Montgomery County Planning Board, from Timothy Dugan, Esquire, and Larry A. Gordon, Esquire, dated June 23, 2006.

Attachment Seven: Letter to Mr. Derick Berlage, Chairman, from Stuart Rochester, Chair, Fairland Master Plan CAC, dated June 27, 2006.

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December 29, 2005

By Email and Messenger

Mr. Richard Weaver

Montgomery County Planning Board

The Maryland-National Capital Park and Planning Commission

8787 Georgia Avenue

Silver Spring, Maryland 20910

Re: Burtonsville Shopping Center
Northwest Corner of U.S. Rte. 29 and MD Rte. 198
Preliminary Plan Application No. 1-04109

Dear Rich:

Thank you for sending the Planning Board's Opinion mailed on December 19, 2005 (the "Opinion"). We would like to confirm our understanding of several matters addressed by the Opinion to be sure that we will be able to move ahead smoothly. Even if you agree, we do not believe that every matter warrants a revision to the Opinion. If, however, any of our clarifications or confirmations do require Planning Board action, please consider this letter as our timely request for reconsideration. Note that, in the interest of providing the M-NCPPC Staff adequate time to consider our letter, the Applicant waives its right to have any such request for reconsideration scheduled for the Board's next possible regular meeting, pursuant to Section 11B of the Planning Board's Rules of Procedure. We would prefer to discuss the matters with you thoroughly before scheduling a Planning Board hearing. To that end, please inform me when would be a convenient time to meet, at your earliest convenience.

Preliminarily, we organized this letter generally in the same order as the Opinion. We refer to the Opinion's page and paragraph and follow with our explanation.

Secondly, we address matters that warrant clarification even though they are not specifically addressed in the written Opinion. We look forward to your thoughts.

No.	Page	Para.	Discussion
1.	1	2	Introduction. The total acreage is 27.15 acres rather than 27.55 acres. Surely, correcting a typographical error does not require Planning Board action. Please confirm.
2.	8	3	<p>Mr. Charles Peters' testimony.</p> <p>Please confirm whether you agree that our proposed sentence is preferable and if a revised Opinion were required, for other more substantive reasons, it would replace the one referring to "Santini Road." Standing alone, however, the sentence does not warrant being replaced.</p> <p><u>Existing sentence.</u></p> <p>Staff confirmed that the proposed waiver allows the new Santini Road, and parking on that Road, within a 20-foot setback from the adjoining residentially-zoned property (which property is owned by the Applicant).</p> <p><u>Proposed sentence:</u></p> <p>Staff confirmed that the proposed waiver, if granted, would allow the new center's parking facilities to be within the applicable setback from the abutting RC-zoned property owned by the Applicant.</p> <p>Again, we do not believe that the sentence is substantive and does not alone warrant a revision. Please provide your thoughts.</p>
3.	10	IX.	<p>Condition of Approval #2.</p> <p><i>Consistent with the 1997 Approved and Adopted Fairland Master Plan, dedicate and show on the final record plat, right-of-way width at the subject property's frontage along:</i></p> <p>a) <i>US 29 (Burtonsville Boulevard) to provide a minimum of 100 feet from the roadway centerline or a minimum 200 feet from the</i></p>

No.	Page	Para.	Discussion
			<p><i>established opposite right-of-way line, as determined by M-NCPPC and SHA.</i></p> <p>b) <i>Spencerville Road to provide a minimum of 60 feet from the roadway centerline or a minimum 120 feet from the established opposite right-of-way line, as determined by M-NCPPC and SHA.</i></p> <p>c) <i>Burtonsville Access Road to provide up to 60 feet of right-of-way width as determined by DPWT.</i></p> <p>Condition #2 requires your attention, although we do not believe that our understanding is different from yours.</p> <p>Please see your revised conditions of approval attached as <u>Exhibit 1</u>, which we believe were presented to the Planning Board and, as moved by Commissioner Bryant, were the conditions of approval adopted.</p> <p>The revised conditions of approval reflected the existing varying right of way widths along Rte. 29. However, the final revised conditions of approval did not include such language. We believe that the correct condition of approval should read as follows, with the additions shown in bold:</p> <p>Consistent with the 1997 Approved and Adopted Fairland Master Plan, dedicate and show on the final record plat, right-of-way width at the subject property's frontage along:</p> <p>a) US 29 (Burtonsville Boulevard) to provide a minimum of 50-100 feet from the roadway centerline or a minimum 100-200 feet from the established opposite right-of-way line, as determined by M-NCPPC and SHA.</p> <p>b) Spencerville Road to provide a minimum of 60 feet from the roadway centerline or a minimum 120 feet from the established opposite right-of-way line, as determined by M-NCPPC and SHA.</p>

No.	Page	Para.	Discussion
			<p>c) Burtonsville Access Road to provide up to 60 feet of right-of-way width as determined by DPWT.</p> <p>We look forward to discussing the above and confirming our understanding.</p>
4.	11	IX.	<p>Condition of Approval #8.</p> <p><i>Construct a five-foot wide sidewalk and an eight-foot tree panel on MD 198 along the entire property frontage. The sidewalk shall be offset two feet from the property line.</i></p> <p>SHA has already installed the sidewalk. The Applicant, therefore, is not required to install it, even though the condition is listed in the Opinion. Nonetheless, no Opinion revision is necessary. Please confirm.</p>
5.	Page 8 and Page 12	1	<p>VII. Public Hearing. and IX. Conditions of Approval</p> <p>We would like to confirm that the site's illustrative plan for streets, streetscape and pedestrian pathways did not impose a rigid/perfect and homogeneous uniformity throughout the site. We believe that such is the understanding and that it does not require any revision to the Opinion.</p> <p>Condition No. 12 reads as follows:</p> <p><i>The development on the site shall have a pedestrian friendly internal street network, which will be in substantial conformance with the Fairland master plan guidelines, and shall meet the minimum requirements for the internal streetscape/sidewalks as required by the Building Officials and Code Administrators International Code used for Montgomery County.</i></p> <p>Condition No. 14 reads as follows:</p> <p><i>Applicant is bound to the elements of the Illustrative Circulation Plan dated June 2004, regarding general street cross sections, sidewalks locations, sidewalk widths, sidewalk amenities,</i></p>

No.	Page	Para.	Discussion
			<p style="text-align: center;"><i>street trees and crosswalk treatment.</i></p> <p>Our testimony (which was not included in the Opinion) addressed the intended flexibility. BMC agreed to be bound to provide on-site pedestrian-friendly streetscape as reflected in the illustrative plan. We testified that the streetscape will have <u>variations</u> for practical reasons. The variations will account for different tenant need and their patrons' needs. Further, variations surely will occur when different building configurations are taken into account for actual buildings rather than simply the conceptual boxes shown on the preliminary plan. The variations will make the site more interesting. As an example, some sidewalks will be wider than others. A restaurant might have a wider sidewalk for outdoor seating. Elsewhere, out of the activity areas, some sidewalks might be narrower than 10 feet. Loading and drop off areas will not have trees blocking the activity. Again, there will be general variations.</p> <p>Therefore, as we testified without objection at the hearing, and as was the consensus among us before the Planning Board hearing, we simply would like to confirm that the site's illustrative plan for streets, streetscape and pedestrian pathways was not intended to impose a rigid/perfect and homogeneous uniformity throughout the site.</p> <p>Please confirm that you agree that the above is the understanding and that no revision to the Opinion is required.</p>
6.	8	VII.	<p>Public Hearing</p> <p>The Opinion did not reflect that the Applicant's attorney said that the stormwater management facility was designed to accommodate both the Burtonsville Shopping Center's stormwater and a portion of the Burtonsville Elementary School stormwater. He also stated that it was the Applicant's expectation that MCPS will contribute their pro-rata share of the costs for the new facility and/or that they will explore funding from the County's stream restoration program.</p> <p>Accordingly, we request that you consider whether the Opinion ought to reflect such testimony. It is not the Applicant's intention to install a stormwater management facility that accommodates, for free, the stormwater management for the Burtonsville Elementary</p>

No.	Page	Para.	Discussion
			<p>School. Surely, if the school system refused to participate, the Applicant may be required to revisit the stormwater management plan and related matters; however, the Preliminary Plan conditions of approval do not include, nor do I believe it lawfully could include, a condition that the Applicant must build, for free, a stormwater management facility that would accommodate the Burtonsville Elementary School's stormwater, again, for free.</p>
7.	8	VII.	<p>Public Hearing.</p> <p>You clearly testified that the Preliminary Plan application was not a Site Plan application. You explained that the buildings shown on the Preliminary Plan were conceptual. The final size, location and configuration of the actual buildings were likely to be significantly different from what was shown on the Preliminary Plan. Your main point was that the C-2 zone does not require a Site Plan application and that the Applicant is not bound by the same degree of detail as the Site Plan.</p> <p>We would appreciate the Opinion including such language because it assists in differentiating the restrictions associated with certain conditions of approval appropriate for a Preliminary Plan from those with regard to a Site Plan.</p> <p>Including your explanation would be helpful also, because it supports the fact that by providing, for illustrative purposes, the "proposed" building setbacks for the conceptual "boxes," we did not intend to establish minimum building setback lines more stringent than those imposed by the C-2 Zone's development standards.</p> <p>Please see our more particular discussion immediately below.</p>
8.	N/A	N/A	<p>Preliminary Plan.</p> <p>The Preliminary Plan cover sheet (Sheet 1 of 2) includes a table that provides the C-2 Zone development standards and lists under "proposed" certain building setbacks and other information. We wish to confirm that the "proposed" building setbacks, measured from the conceptual boxes are not to be interpreted to establish more onerous building setback requirements than those imposed by the C-2 Zone. Again, the Preliminary Plan is not a Site Plan. As</p>

No.	Page	Para.	Discussion
			<p>testified by Chris Jones, the Applicant showed density on the plan that may prove to me more than what will actually be developed in order that the infrastructure would not be undersized. Similarly, it was not the Applicant's intention to establish minimum setbacks different from the C-2 Zone requirements, by drawing boxes on the plan.</p> <p>More specifically, the Applicant did not intend to establish, on the west side, a minimum rear building setback of 537 feet from the property line.</p> <p>As a practical matter, in some instances, the actual minimum building setbacks may be closer than those of the conceptual boxes shown on the Preliminary Plan.</p> <p>Please inform me whether we must modify the Preliminary Plan to correct any misunderstanding or whether you can confirm our above understanding, which we believe was clear from the very beginning, including the hearing testimony.</p>
9.	11	IX.	<p>IX. Conditions of Approval</p> <p>Condition # 7</p> <p><i>Construct an eight-foot-wide shared-use path and an eight-foot-wide tree panel on US 29 (Burtonsville Boulevard) along the entire property frontage. Extend this shared-use path and tree panel further north from the property line to the PEPCO power line right-of-way (or to the Patuxent Trail [PB-41]). The shared-use path shall be offset two feet from the property line.</i></p> <p>As for the sidewalks around the property's Rte. 29/Rte. 198 perimeter, as noted in Piera Weiss' July 20, 2005 memorandum, at page 2, "The Applicant will be installing sidewalks along MD 198 and US 29 along the property frontage with a grass panel separating pedestrians from the road, which will improve existing conditions greatly."</p> <p>We wish to discuss with you the condition pertaining to extending the shared-use path to the PEPCO right of way (or to the Patuxent</p>

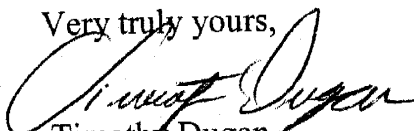
No.	Page	Para.	Discussion
			<p>Trail). The Applicant has studied the terrain running along the edge of the paved surface and has identified a precipitous fall away from the paved surface. Installing a shared-use pathway next to the existing paved surfaces would require retaining walls that could be as high as 8 feet or higher. Depending upon where the shared-use pathway were installed, it could be an unanticipated hardship costing millions of dollars.</p> <p>The condition would make economic sense, and would not be an unanticipated hardship, if the shared-use pathway were installed on the existing, flat, paved surface. If so, it would use some of the right of way no longer needed for vehicular capacity, as a result of the significantly reduced traffic volume along Rte. 29.</p> <p>Further, in the Rte. 198 area, installing bike paths at the roadway grade is being studied as part of the 198/28 corridor study. Such at grade bike paths do exist around the State. It would appear that a similar arrangement would be appropriate for a shared-use path along Rte. 29, especially considering the roadway's over-capacity.</p> <p>We solicit your sentiment about your expectations of what would be a proportional and reasonable off-site improvement in light of the existing circumstances.</p> <p>The Applicant is not required to purchase any land off-site for purposes of installing a shared-use path to the PEPCO right of way. The Applicant would be required to install such a shared use path only within the existing public right of way.</p> <p>If the Applicant were not permitted (by SHA) to install the pathway, then the Applicant would provide you with whatever SHA communication were provided. In such event, the Applicant would be unable to satisfy such condition of approval and would have to be relieved from the condition.</p> <p>We look forward to discussing the matter with you.</p>
10.	12	IX.	<p>IX. Conditions of Approval</p> <p>Condition #13</p> <p>We should be required to comply with the final forest conservation plan, which might have different numbers than the preliminary</p>

No.	Page	Para.	Discussion
			<p>forest conservation plan. Accordingly, Condition #13a. should read as follows:</p> <p>Condition #13a.:</p> <p style="padding-left: 40px;">The offsite reforestation or forest bank to be identified by Applicant and approved including the amount of acreage by M-NCPPC staff prior to approval of record plat.</p> <p>In other words, a deviation in the exact acreage in the final forest conservation plan should not trigger an inconsistency with the Opinion. I trust that you agree.</p>
11.	12	IX.	<p>IX. Conditions of Approval</p> <p>Condition #15.</p> <p style="padding-left: 40px;"><i>Obtain a waiver of the setbacks from MCDPS for parking facilities along the zoning line immediately to the west of the proposed shopping center prior to building permits. If a waiver cannot be secured, parking facilities must comply with setbacks as per Section 59-E-2.81 of the Zoning Ordinance.</i></p> <p>The notations on Sheet 1 of 2 of the Preliminary Plan, describe a necessary setback waiver of 43.8 feet from the RC-zoned land along Parcel P645, which is owned by the Applicant in the northeast corner of the Property.</p> <p>The condition does not refer to the waiver necessary for the northeast corner of the Property.</p> <p>The Planning Board did not have jurisdiction over the waiver request. The waiver for the west was brought to their attention for their comments.</p> <p>The Applicant must obtain a waiver for the northeast corner regardless of the Planning Board's comments, or the Applicant will be forced to comply with the applicable RC zone setback. It is not necessary to modify the Opinion to revise the condition of approval to refer to the northeast corner setback waiver in addition to the one for</p>

No.	Page	Para.	Discussion
			<p>the west.</p> <p>Please confirm that you agree that the matter does not warrant revising the Opinion.</p>
12.	13	IX.	<p>IX. Conditions of Approval</p> <p>Condition #16</p> <p>We have been unable to locate a stormwater management plan approval dated July 13, 2005. If one dated July 13, 2005 exists, please send it to my attention. If not, I believe that we should change the date referenced in the Opinion.</p> <p>We are enclosing a copy of the June 2, 2005 stormwater management plan approval, as <u>Exhibit 2</u>. We did not see language that indicated that the final plan might be modified and that the Applicant would be required to comply with the final stormwater management plan approved by MCDPS.</p> <p>The condition of approval ought to provide that the Applicant is required to comply with the final stormwater management plan, approved by MCDPS; therefore, we recommend the following changes:</p> <p style="padding-left: 40px;">Compliance with the conditions of the MCDPS stormwater management approval dated _____ . If the final stormwater management plan is modified, as may be required by MCDPS, the Applicant must comply with the final stormwater management plan.</p> <p>Please provide your thoughts.</p>
13.	N/A	N/A	<p>General. We were curious of the significance, if any, why some of the words in the conditions of approval were in italics.</p>

Thank you for considering our questions. We look forward to your thoughts.

Very truly yours,



Timothy Dugan

cc: Ms. Rose Krasnow
Ms. Cathy Conlon
Michele M. Rosenfeld, Esq.
Mr. Christopher T. Jones
Mr. Stephen P. Tawes
Mr. Andrew Der
Mr. Jagdish C. Mandavia
Mr. Edward Y. Papazian

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LIST OF EXHIBITS

Exhibit No.	Description
1.	July 28, 2005 Revised Conditions of Approval
2.	June 2, 2005 Stormwater Management Plan approval
3.	December 19, 2005 Planning Board Opinion

EXHIBIT 1

Revised Conditions of Approval
July 28, 2005

- 1) Limit redevelopment on the property as part of this preliminary plan to a shopping center consisting of 250,000 square feet of retail space and 10,000 square feet of commercial office space.
- 2) Consistent with the 1997 Approved and Adopted *Fairland Master Plan*, dedicate and show on the final record plat right-of-way along:
 - a. US 29 (Burtonsville Boulevard) to provide ~~either a minimum of 50-100 feet from the roadway centerline or a minimum of 100-200 feet from the established opposite roadway-right-of-way line, as determined by MNCPPC and SHA.~~
 - b. Spencerville Road to provide ~~either a minimum of 60 feet from the roadway centerline or a minimum of 120 feet from the established opposite roadway-right-of-way line, as determined by MNCPPC and SHA.~~
 - c. Burtonsville Access Road to provide ~~either a minimum of 30 feet from the roadway centerline or up to 60 feet right-of-way width, as determined by MNCPPC and DPWT. from the opposite roadway right-of-way line, as appropriate.~~

The final record plat shall also reflect dedication of necessary truncation at intersection corners.

- 3) The applicant shall resolve all outstanding issues and satisfy all conditions/comments pertaining to the Montgomery County Department of Public Works and Transportation (DPWT) approval letter dated July 21, 2005, (Attachment A) and shall provide written notification to both the Development Review Division and the Transportation Planning staff prior to the final record plat that all outstanding issues are resolved.
- 4) Satisfy all preliminary plan conditions included in the State Highway Administration (SHA) letter dated June 7, 2005. (Attachment B) All roadway/intersection improvements required by SHA shall be installed/constructed and in place prior to the release of any building permit associated with this preliminary plan.
- 5) Complete required traffic signal warrant studies. If approved by SHA, design/install a fully operational traffic signal at applicant's expense at:
 - a. the site access driveway intersection with the local lanes of US 29
 - b. the Burtonsville Access Road intersection with MD 198.

The timing for the installation for these signals shall be coordinated as required by SHA and DPWT.

- 6) All SHA and DPWT site frontage, site access and roadway/intersection improvement design concerns related to this development shall be addressed fully to the satisfaction of the respective agencies prior to the final record plat. Any physical improvement along the proposed alignment for Burtonsville Access Road shall conform to applicable DPWT design for the roadway.
- 7) Construct an eight-foot-wide shared-use path and an eight-foot-wide tree panel on US 29 (Burtonsville Boulevard) along the entire property frontage. Extend this shared-use path and tree panel further north from the property line to the PEPCO power line right-of-way (or to the Patuxent Trail [PB-41]). The shared-use path shall be offset two feet from the property line.
- 8) Construct a five-foot wide sidewalk and an eight-foot tree panel on MD 198 along the entire property frontage. The sidewalk shall be offset two feet from the property line.
- 9) Manage all shopping center related vehicular traffic, queues and parking within the property without spillover to US 29, MD 198, and Burtonsville Access Road.
- 10) All on- and off-site sidewalk/shared-use path ramps and crosswalks shall conform to Americans with Disabilities Act (ADA) standards.
- 11) The development on the site shall have adequate lead-in sidewalks from US 29, MD 198, and Burtonsville Access Road.
- ✓12) The development on the site shall have a pedestrian friendly internal street network, which will be in substantial conformance with the Fairland Master Plan guidelines, and shall meet the minimum requirements for the internal streetscape/sidewalks as required by the Building Officials and Code Administrators International Code used for Montgomery County.
- 13) 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, including:
 - a. 2.83 acres of offsite reforestation or forest bank to be identified by applicant and approved by M-NCPPC staff prior to approval of record plat.
 - b. Final forest conservation plan to include a reconfiguration of the proposed SWM pond to provide more forest retention near the northern part of the pond, if feasible. If additional forest retention is not feasible, provide documentation to demonstrate why the additional retention is not feasible.
 - c. Applicant to provide landscaping and fencing in consultation with MNCPPC staff and MCPS staff for perimeter of adjacent school site.

- ✓ 14) Applicant is bound to the elements of the Illustrative Circulation Plan dated June 2004, regarding general street cross sections, sidewalks locations, sidewalk widths, sidewalk amenities, street trees and crosswalk treatment.
- 15) Obtain a waiver of the setbacks from MCDPS for parking facilities along the zoning line immediately to the west of the proposed shopping center prior to building permits. If a waiver cannot be secured, parking facilities must comply with setbacks as per Section 59-E-2.81 of the Zoning Ordinance.
- 16) Compliance with the conditions of the MCDPS stormwater management approval dated July 13, 2005.
- 17) The Adequate Public Facility (APF) review for the preliminary plan will remain valid for sixty-one (61) months from the date of mailing of the Planning Board opinion.
- 18) Other necessary easements.

19) Record/show Forest Conservation Easements on Record Plat

EXHIBIT 2



DEPARTMENT OF PERMITTING SERVICES

Douglas M. Duncan
County Executive

Robert C. Hubbard
Director

June 2, 2005

Mr. Saeyn Oh
Loiderman Soltesz Associates, Inc.
1390 Piccard Drive
Rockville, MD 20850

Re: Stormwater Management **CONCEPT** Request
for Burtonsville Shopping Center
Preliminary Plan #: N/A
SM File #: 219245
Tract Size/Zone: 27.6/C-2/RC
Total Concept Area: 27.6ac
Lots/Block: N/A
Parcel(s): 672
Watershed: Little Paint Branch

Dear Mr. Oh:

Based on a review by the Department of Permitting Services Review Staff, the stormwater management concept for the above mentioned site is **acceptable**. The stormwater management concept consists of on-site channel protection measures and on-site water quality control via the use of a wet pond. The utilization of a wet pond in this location will serve to minimize forest loss and repair a major erosion problem. Additional water quality will be provided by hydrodynamic structures to pre-treat parking lot runoff. Ground water recharge will be provided via drywells located throughout the site.

The following items will need to be addressed during/prior the detailed sediment control/stormwater management plan stage:

1. Prior to permanent vegetative stabilization, all disturbed areas must be topsoiled per the latest Montgomery County Standards and Specifications for Topsoiling.
2. A detailed review of the stormwater management computations will occur at the time of detailed plan review.
3. An engineered sediment control plan must be submitted for this development.
4. The proposed separate parallel storm drain and roof drain bypass systems are an integral part of the stormwater management system and will require "asbuilt" certification. Rooftop runoff must be drained directly to the proposed SWM pond and bypass the proposed hydrodynamic structures. Bypassing this runoff around these facilities will increase the treatment efficiency for the parking areas. Additional water quality storage within the SWM pond, as proposed, will provide adequate water quality treatment for the roof runoff.
5. While it is not required, DPS recommends that fencing be provided for the SWM pond. Any proposed fencing will be required to meet the MCDPS Pond Fencing Guidelines. Safety signage must be provided in either case.



6. Drywells must be spread across the site as much as practical. All runoff directed to the drywells must come from the rooftop of the buildings. All drywells must be located within a SWM easement.
7. A geotechnical report, including recommendations relevant to the construction of the SWM pond, must accompany the initial submission of the detailed review plans. If the plans are submitted without the report, the submission will be returned to the engineer without review.

This list may not be all-inclusive and may change based on available information at the time.

Payment of a stormwater management contribution in accordance with Section 2 of the Stormwater Management Regulation 4-90 is not required.

This letter must appear on the sediment control/stormwater management plan at its initial submittal. The concept approval is based on all stormwater management structures being located outside of the Public Utility Easement, the Public Improvement Easement, and the Public Right of Way unless specifically approved on the concept plan. Any divergence from the information provided to this office; or additional information received during the development process; or a change in an applicable Executive Regulation may constitute grounds to rescind or amend any approval actions taken, and to reevaluate the site for additional or amended stormwater management requirements. If there are subsequent additions or modifications to the development, a separate concept request shall be required.

If you have any questions regarding these actions, please feel free to contact Thomas Weadon at 240-777-6309.

Sincerely,



Richard R. Brush, Manager
Water Resources Section
Division of Land Development Services

RRB:dm CN213246

cc: R. Weaver
S. Federline
SM File # 213246

QN - On Site; Acres: 27.6ac
QL - On Site; Acres: 27.6ac
Recharge is provided